

THE
NATIONAL LAW REVIEW

Massachusetts Appeals Court Upholds Applicability of Wetlands Protection Act to Commercial Fishing Techniques Using Hydraulic Dredging Methods

Thursday, June 29, 2017

The Massachusetts Appeals Court [upheld](#) the applicability of the state's Wetlands Protection Act (WPA) to commercial fishing activities using hydraulic dredging methods on land under ocean and nearshore areas, clarifying municipal authority to impose additional requirements on activities in wetlands in relation to shell fishing. However, in the same opinion, the Court concluded that a town bylaw prohibiting hydraulic dredging in nearshore areas without a permit is preempted by state law as applied to sea clam and quahog harvesting.

In Aqua King Fishery, the Conservation Commission of Provincetown alleged that Aqua King Fishery, LLC violated both Provincetown's Wetlands Bylaw and the WPA when it failed to obtain the Commission's approval for the use of hydraulic dredge fishing gear for commercial sea clam fishing near Provincetown's shore. The town's Wetlands Bylaw prohibits hydraulic dredging within waters under the Commission's jurisdiction without a permit. Similarly, the WPA prohibits the dredging of land under the ocean and areas near the shoreline without obtaining an Order of Conditions from the local conservation commission or the Department of Environmental Protection. M.G.L. c. 131, § 40. The Commission concluded that Aqua King's use of hydraulic clamming gear qualified as dredging within the scope of both the Wetlands Bylaw and the WPA and issued an enforcement order requiring Aqua King to discontinue its dredging activities and file a restoration plan with the Commission. Aqua King [challenged the enforcement order](#) in the Superior Court, arguing that the Commission had exceeded its authority. The trial court affirmed the Commission's authority to enforce under the WPA but not the Wetlands Bylaw, and both parties appealed.

Town Wetlands Bylaw

On appeal, Aqua King argued that the hydraulic dredging prohibition in Provincetown's Wetlands Bylaw is preempted by M.G.L. c. 130, § 52 as applied to the hydraulic dredging of sea clams. While M.G.L. c. 130, § 52 authorizes local towns to regulate shellfish fishing, the law specifically excludes "sea clams and ocean quahogs" from the definition of "shellfish." Aqua King therefore argued that the commercial harvesting of sea clams falls within the authority of the Massachusetts Division of Marine Fisheries, and not local regulation. The Court agreed with Aqua King and concluded that the Commission's application of the hydraulic dredging prohibition to Aqua King's activities was an attempt to regulate the commercial management of sea clams. The Court reasoned that although M.G.L. 130, § 52 does not explicitly prohibit local regulation of sea clam and quahog harvesting, the exclusion of these two species from the definition of "shellfish" clearly demonstrated the Legislature's intent to withhold authority from towns to regulate the harvesting of these species. While Marine Fisheries may authorize regional management of sea clam and quahog fishing under M.G.L. c. 130, § 52, it may only do so if a regional plan is developed by the applicable cities and towns and the plan is approved by Marine Fisheries. The Court noted that Provincetown's Wetlands Bylaw did not meet these criteria.

Wetlands Protection Act



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The Court held that the Commission's application of the WPA to Aqua King's fishing activities was not arbitrary or capricious. Aqua King first argued that because commercial fishing is regulated and controlled by the Marine Fisheries, it cannot also be subject to the WPA, even where hydraulic dredging methods are used. The Court rejected Aqua King's reasoning, concluding that the Marine Fisheries' regulations do not prohibit further regulation by other agencies, including the MassDEP and conservation commissions. In addition, substantial evidence existed in the record that showed Aqua King's dredging technique had caused trenches from one to two feet deep and six to eight feet in the ocean floor. The Court therefore concluded that Aqua King's use of hydraulic fishing gear qualified as "dredging" within the meaning of the WPA, which term the Court explained is broadly defined as including "even a slight temporary deepening of the ocean floor."

Thus, while the use of hydraulic fishing gear for commercial sea clam fishing may not be regulated under a town bylaw, the use of such hydraulic fishing gear may nevertheless be subject to regulation under the WPA as dredging.

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