



CITY OF NEW BEDFORD
JONATHAN F. MITCHELL, MAYOR

June 20, 2017

Samuel D. Rauch, III
Assistant Administrator for Fisheries
National Oceanic and Atmospheric Administration
1315 East-West Highway
Silver Spring, MD 20910

Re: United States v. Carlos Rafael

Dear Assistant Administrator Rauch:

I write to share the City of New Bedford's perspective on the NOAA-National Marine Fisheries Service's enforcement action against Carlos Rafael, who is subject to a related criminal prosecution now pending in the District of Massachusetts (*United States v. Carlos Rafael*, 16-CR-10124-WGY). As you are aware, Mr. Rafael is the owner of a major commercial fishing business in the Port of New Bedford, and he recently entered guilty pleas to various criminal charges that he defrauded the Fisheries Service by falsely reporting his fish landings over a period of years. In the criminal matter and the Service's parallel enforcement action, Rafael faces a possible punishment of incarceration, the forfeiture of fishing vessels and permits, and fines.

As a former Assistant U.S. Attorney who worked directly with the Fisheries Service on several successful prosecutions, I wish to commend the Service's contributions to the Rafael case. The scale, duration, and brazenness of Rafael's scheme directly undermined the integrity of the catch share system that governs the groundfish industry in the North Atlantic. NOAA relies on the accurate reporting of landings to promulgate fisheries regulations whose purpose is both to preserve fish stocks and to sustain yields for fishermen. Fraudulent reporting like that perpetrated by Rafael puts ecosystems and fishing families alike at risk, and is a direct affront to the vast majority of fishermen who accurately report their catch. It is inarguable, therefore, that Rafael's punishment should be sufficient to deter others from engaging in similar misconduct.

The sanction to be meted out in this case, however, involves more than a linear determination of the length of Rafael's jail sentence. The potential forfeiture of Rafael's groundfish permits and vessels threatens the existence of the groundfish component of his business, which is one of the largest enterprises of its kind in the United States. Although I believe that Rafael should not be allowed to profit

from permits he has abused, numerous others in Greater New Bedford, who played no part in his fraudulent scheme, also depend on the landings associated with those permits for their livelihoods.

The decisions concerning the forfeiture or revocation of Rafael's permits should take their interests into account. Rafael's business directly employed hundreds of individuals, including 285 fishermen, many of whom would lose their jobs if his groundfish permits were revoked or auctioned off to others outside New Bedford. His business also supports a sprawling supply chain in the port that includes gear menders and manufacturers, fuel companies, vessel outfitters, settlement houses, welders, lumpers, ice houses, truckers, and many others. Some of these businesses rely heavily on Rafael's boats. For example, approximately seventy percent of the fuel supplied to fishing vessels by Bay Fuels, a fueling company based on the New Bedford waterfront, is sold to Mr. Rafael; thirty percent of the fishing gear manufactured by New Bedford-based Reidar's Trawling is sold to Mr. Rafael; and seventy-five percent of the groundfish landed at the Whaling City Display Auction is landed by Rafael's boats. These and other businesses would suffer directly from the demise of his groundfish business.

There is also a longer term risk to the Port of New Bedford. While the port is widely known as the country's highest grossing commercial fishing port and is not wholly dependent on any single business, the revocation or redistribution of Rafael's groundfish assets would reduce the diversity of the port's landings and leave many of its businesses more vulnerable to economic shocks. Rafael is responsible for approximately three-quarters of the port's groundfish landings. Amid the contraction of the traditional groundfish industry along the East Coast, the loss of Rafael's groundfish permits and vessels would leave many businesses up and down the New Bedford waterfront almost exclusively reliant on scallop landings. Although scallops are relatively plentiful now and their wholesale prices stable, like any other fish stock, they are subject to changes in availability and market value for environmental, regulatory or other reasons. If there were a dramatic drop in the price or supply of scallops, those businesses would have less to fall back on.

In cases involving wrongdoing by the head of a large business, it is common for the government to tailor punishment so as to avoid harm to others who were not involved in the underlying criminal activity. Department of Justice policy in fact directs federal prosecutors to take into account the effect their decisions may have on innocent third parties. In particular, the Principles of Federal Prosecution (Section 9-28.1100) speak directly to the possible need for restraint in cases of corporate misfeasance, where punishment that results in the demise of the business itself would cause harm to employees, shareholders, suppliers and other constituents of the business.

DOJ policy of course does not directly govern administrative agency enforcement actions, but the same principle of restraint applies with equal force in such actions, and is commonly exercised. Although Rafael's conduct was, to put it mildly, highly unusual for a chief executive of a business as large as his, the government's case against him bears some similarity to parallel enforcement actions in government procurement and health care fraud cases, where administrative agencies often have the ability to close an offending business by "debaring" it from federal contracting. Federal agencies have long been vested with debarment authority, and the government often raises the threat of debarment

against offending companies. But in practice the government rarely exercises this authority because of the potential for harm to employees, suppliers and other third parties.

The revocation or auctioning off of Rafael's fishing permits should be seen through the same lense. In a general sense, like a government contractor subject to debarment, commercial fishing enterprises cannot do business without the permission of the federal government. Fishing permits effectively are a license to do business that supports not only the livelihood of the permit holder, but in large enterprises like Rafael's, many others as well.

This is not to suggest that the Fisheries Service should impose no penalty on Rafael in addition to his jail sentence. Rather, the Service should seek sanctions that, together with the punishment in the criminal case, achieve the federal government's two primary enforcement goals in this case, namely a clear general deterrence message and the removal of Rafael from the business of fishing. This can happen without harming the crew members, suppliers, and everyone else who depends on Rafael's groundfish landings.

Avoiding harm to these innocent stakeholders requires the government to fashion sanctions against Rafael in such a way as to ensure that his permits and vessels remain in the Port of New Bedford. If the flow of landings from those permits and vessels continues in New Bedford, the various companies and employees that depend on them can go on, more or less, largely without disruption. This can happen if he is allowed to satisfy that his forfeiture obligation by transferring his permits and vessels to others in New Bedford and paying cash to the government in equal value to the permits and vessels that are subject to forfeiture. As you know well, the government commonly agrees to accept such "substitute assets," particularly in cases where the assets originally identified for forfeiture are necessary to maintain the viability of the business.

I understand that, toward this end, Rafael has expressed interest in selling his entire business to other fishing companies in New Bedford, and disgorging the proceeds to the government to satisfy his forfeiture obligation. If the Service affords him a reasonable opportunity to fully divest himself in such fashion, the government can accomplish its enforcement goals and avoid harm to employees and other businesses. In fact, it may be the only way for the government to ensure that Rafael will leave the fishing industry for good. If, as it appears, the government does not have sufficient evidence or the legal authority to pursue the forfeiture all of Rafael's permits and vessels not named in the criminal indictment, Rafael will be able to use his remaining permits, largely to fish for scallops. This scenario would result in harm to the businesses that rely on his groundfish landings, while Rafael could continue to profit from scallop landings -- even from his jail cell.

There is little risk that affording Rafael an opportunity to explore divestiture will be interpreted by others in the fishing industry as an act of leniency. Rafael's punishment will be unambiguously severe. His likely prison sentence alone, especially in light of his age, will give pause to anyone who might be tempted to falsify landings records. That he would be forced to give up a business he has built over his entire adulthood is significant further punishment. A reasonable opportunity for him to

discharge his forfeiture obligations by divesting himself from business, however, presents the most promising means of avoiding harm to others in New Bedford who do not deserve to be punished at all.

If the City or the New Bedford Harbor Development Commission can provide any assistance in support of this approach, please do not hesitate to ask. Thank you for your consideration.

Sincerely,



Jon Mitchell

cc: Andrew Lelling, Assistant U.S. Attorney
John Bullard, Regional Administrator, National Marine Fisheries Service
John Quinn, Chair, New England Fisheries Management Council
Edward Anthes-Washburn, Port Director, Port of New Bedford
William Kettlewell