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May 4, 2011

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Re: Implications of Alabama Department of Health's ISSC Designation (MASGC 11-008-01)

This product was prepared by the Mississippi-Alabama Sea Grant Legal Program under award number NA10OAR4170078 from the National Oceanic and Atmospheric Administration, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the author and do not necessarily reflect the views of NOAA or the U.S. Department of Commerce.

Dear Bill,

As requested during our meeting on March 17, 2011, the Mississippi-Alabama Sea Grant Legal Program has been conducting research on some of the legal issues raised by your novel proposal to establish an oyster aquaculture "farming park" in Alabama. This memo, which is the first in a series, discusses the Alabama Department of Health's role as the designated state aquaculture lead or "Shellfish Authority." The following research is provided for informational purposes only and does not constitute legal representation of the Auburn University Shellfish Laboratory or its constituents.

The Alabama Department of Public Health (DPH) is the designated State Shellfish Control Agency (SSCA) to the International Shellfish Sanitation Conference (ISSC). The ISSC "was formed in 1982 to foster and promote shellfish sanitation through the cooperation of state and federal control agencies, the shellfish industry, and the academic community."¹ The ISSC is not a regulatory body, but rather a mechanism by which control agencies and the industry can work together to address shellfish sanitation concerns. Shellfish producing states are represented in the Conference by their respective State Shellfish Control Agency, defined in the ISSC bylaws as "the state agency or agencies having the legal authority to classify shellfish growing waters, to issue certificates for the interstate shipment of shellfish and to regulate harvesting, processing and shipping in accordance with the NSSP Model Ordinance [effective January 1, 1998]."

¹ International Shellfish Sanitation Conference, Welcome to ISSC.org, <http://www.issc.org/>.

The ISSC designation, however, does not grant DPH any authority with respect to oyster aquaculture permitting. Only the Alabama Department of Conservation and Natural Resources (DCNR) has the authority to “regulate the time, manner, means or place or places for planting oysters or oyster shells.”² Further, the Alabama Legislature has granted DCNR the authority to lease “for the purpose of oyster culture, any bottom of the waters of the state in a natural oyster bed or reef in such areas and at such prices and under such conditions as he may determine.”³ This language covers both the on- and off-bottom culture of oysters.

While the DPH does not have any authority with respect to leasing the geographic area for oyster aquaculture, the DPH does have significant responsibilities with respect to shellfish safety which can impact the oyster aquaculture permitting process. First, the State Board of Health is authorized to inspect waters of the state where oysters are grown and harvested.⁴ If the waters surrounding a particular oyster bed (public or private) are determined to be unsafe for the harvesting of oysters, the DPH may order the closure of those waters. After the issuance of such a closure order, no person may harvest oysters from those waters during the closure period.⁵ Pursuant to this authority, DPH has divided Mobile Bay into various growing zones (conditionally approved, conditionally restricted, unclassified, restricted, and prohibited).⁶ Oysters harvested from closed waters are considered “adulterated shellfish.”⁷

In addition, the DPH’s shellfish sanitation rules incorporate by reference the National Shellfish Sanitation Program Guide for the Control of Molluscan Shellfish, 2001 Revision.⁸ The National Shellfish Sanitation Program Guide (NSSP Model Ordinance) is a guidance document developed by the Food and Drug Administration and it “represents the Agency’s current thinking on the safe and sanitary control of the growing, processing, and shipping of molluscan shellfish for human consumption.”⁹ According to the FDA, ISSC members agree “to enforce the NSSP Model Ordinance as the requirements which are minimally necessary for the sanitary control of molluscan shellfish.”¹⁰

Chapter VII of the NSSP Model Ordinance outlines the responsibilities of the “Shellfish Authority” with respect to the control of shellfish harvest. Although the DPH is the designated

² ALA. CODE ANN. § 9-12-22.

³ *Id.* at § 9-12-24.

⁴ *Id.* at § 9-12-126(a).

⁵ *Id.*

⁶ Alabama Department of Public Health, *Alabama Shellfish Harvest Area Designations Map*, <http://adph.org/foodsafety/assets/AreaDesignationsShellfish.pdf>. The oyster operations currently under consideration would be taking place in Area II, which is conditionally approved for shellfish harvest. The criteria for opening and closing of shellfish growing areas are listed in Ala. Admin. Code r. 420-3-18-10.

⁷ ALA. ADMIN. CODE r. 420-3-18.03(1).

⁸ *See, id.* r. 420-3-18-09(1). The 2001 NSSP Model Ordinance has been superseded by the National Shellfish Sanitation Program Guide for the Control of Molluscan Shellfish, 2009 Revision. The DPH rules, however, have not been updated to incorporate the most recent version.

⁹ Food and Drug Administration, National Shellfish Sanitation Program Guide for the Control of Molluscan Shellfish, 2009 Revision,

<http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/Seafood/FederalStatePrograms/NationalShellfishSanitationProgram/ucm046353.htm> .

¹⁰ *Id.*

"Shellfish Authority"¹¹ in Alabama, the Marine Resources Division (MRD) of the DCNR acts as the enforcement arm of DPH with respect to many of the oyster harvesting requirements.¹² For example, MRD is responsible for patrolling growing areas and licensing harvesters. In fact, many of the provisions of the NSSP Model Ordinance are actually incorporated into the DCNR's rules for commercial oyster catcher licensing. For instance, anyone taking oysters for commercial purposes must have a DCNR-issued commercial oyster catcher's license.¹³ In accordance with the NSSP Model Ordinance, and by reference the DPH rules, individuals holding an oyster catcher's license may only sell to a licensed Alabama Seafood Dealer.¹⁴

Other provisions of the NSSP Model Ordinance, however, can be confusing. For instance, the 2009 NSSP Model Ordinance requires a person operating an aquaculture facility to obtain "a permit from the Authority for the activity or for construction and functioning of his facility."¹⁵ While the DPH does have the licensing authority for seafood and shellfish processing facilities, the Alabama Legislature has not given the DPH the authority to issue submerged land leases for aquaculture. Therefore, because the DPH cannot assert authority it does not have nor can it supersede the statutory authority of the DCNR through a rulemaking, the DCNR continues to be responsible for leasing the submerged lands. DCNR, however, could not issue a submerged lands lease for oyster aquaculture in waters closed by the DPH.

Summary:

Oyster aquaculture in Alabama is regulated by two agencies: the DPH and DCNR. DCNR is responsible for the leasing of the state lands upon which the project will occur and DPH is responsible for ensuring that the seafood produced upon that lease is safe. Given that there is bound to be some overlapping authority with respect to where and how the aquaculture facility operates, a Memorandum of Understanding (MOU) could potentially improve the working relationship of the agencies. A MOU is simply a written agreement between one or more agencies outlining how the agencies will work together on a particular issue or project. The negotiation of an MOU could be an opportunity for the DPH and DNCR to outline their respective authorities and provide greater clarification for those seeking to engage in the oyster aquaculture business.

Sincerely,



Stephanie Showalter Otts

Director, Mississippi-Alabama Sea Grant Legal Program

¹¹ Authority, for the purposes of the NSSP Ordinance, is defined as "the State or local shellfish control authority or authorities or its designated agents, which are responsible for the enforcement of this Code." *Id.*, Definitions (2)(7).

¹² Telephone Interview with Capt. Chris Blakenship, Director, Marine Resources Division, Alabama Department of Conservation and Natural Resources (May 4, 2011).

¹³ Ala. Admin. Code r. 220-3-.02(9). *See also*, Alabama Department of Conservation and Natural Resources, Alabama Commercial/Recreational Oyster Harvest Information (Jan. 2010), <http://www.outdooralabama.com/fishing/saltwater/regulations/oyster.pdf>.

¹⁴ *See* 2009 NSSP Model Ordinance, Chapter VIII, @01C(2)(b) (requiring the Authority "to assure that a license is required to commercially harvest shellstock, including shellstock harvested from aquaculture" and that the license, among other things, "Require the harvester to sell only to dealers listed on the Interstate Certified Shellfish Shippers List.")

¹⁵ 2009 NSSP Model Ordinance, Chapter VI, @.02(B)(1).