Aquaculture Regulation for the Gulf Coast Yields Salty Responses from Courts

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This past August, the Fifth Circuit Court of Appeals upheld a lower court ruling that found the National Oceanic and Atmospheric Administration (NOAA) lacked jurisdiction to implement an FMP developed by the Gulf of Mexico Fishery Management Council for aquaculture. The case forced the court to navigate the murky waters of the Magnuson-Stevens Fishery Conservation and Management Act, the purpose and powers of Fishery Management Councils, the implicit meaning of statutes, the definition of "harvesting," and the ever-blurry distinctions between "aquaculture" and "fisheries." With such an array of complex issues, it is essential to start with the basics and understand the roots of where this situation started.

Congress, Conservation, and Councils

Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act or MSA) in 1976 as a means of ensuring the conservation and efficient management of the United States' coastal fishery resources.[1] The Magnuson-Stevens Act tasks eight regional Fishery Management Councils with creating and implementing Fishery Management Plans (FMP) for their respective regions. Each FMP has to list and describe the fishery it applies to, as well as detail the conservation and management measures the Council will take to ensure the long term health and stability of the fishery, according to 16 U.S.C. § 1853(a). It is important to note that when the MSA was passed, it did not mention aquaculture (raising fish/shellfish under physical controls) or fish farming.[2] This means, arguably, that the Magnuson-Stevens Act gave the Councils authority to create plans only for wild-capture fisheries in their respective regions.

Gulf Aquaculture Plan

The Gulf of Mexico Fishery Management Council (the Council) manages the fisheries in the federal waters of the Gulf of Mexico. In 2009, the Council created an FMP entitled "Plan for Regulating Offshore Marine Aquaculture in the Gulf of Mexico" (the Plan) that attempted to regulate aquaculture in that region.[3] Under the Plan, the Council sought to approve 5 to 20 permits for aquaculture operations in the Gulf of Mexico over a 10-year period. The permits would be conditioned on compliance with biological, environmental, recordkeeping, and reporting conditions.

The National Marine Fisheries Service (NMFS), which is part of NOAA, published a rule (the Rule) in 2016 to implement the Plan, which, "establishes a comprehensive regulatory program for managing the development of an environmentally sound and economically sustainable aquaculture fishery in Federal waters of the Gulf."[4] The Rule stated that its purpose is to, "increase the yield of Federal fisheries in the Gulf by supplementing the harvest of wild caught species with cultured product."[5] In order to achieve this goal, and implement the Plan, the Rule requires aquaculture facilities to obtain permits from NMFS. Each aquaculture facility would be required to adhere to relevant regulatory standards enacted by NMFS and other federal agencies. This rule was the first attempt by NMFS or any regional council to regulate aquaculture under the Magnuson-Stevens Act, according to the court.[6]

The regulation of all aquaculture in the Gulf of Mexico is no small feat. The Rule allowed for a maximum annual production of 64 million pounds of seafood in the Gulf of Mexico. To put that number into perspective, the previous average annual yield for all marine species in the Gulf between 2000 and 2006, except menhaden and shrimp, was roughly 64 million pounds.[7] These numbers sound staggering, but on a global stage, 64 million pounds is nothing. China's aquaculture facilities produced 49 million tons (98 billion pounds) of seafood in 2016.[8]

It should also be noted that the United States currently imports more than 80 percent of its seafood.[9] Opening the door for aquaculture in the Gulf could mean more jobs and

potentially decrease the country's annual seafood imports. However, some believe that aquaculture could adversely affect existing fisheries. Thus, a coalition of fishing and conservation organizations (Plaintiffs) sued NMFS in federal court.

The Lawsuit

The Plaintiffs alleged that NMFS's rule was invalid since the Magnuson-Stevens Act gave NMFS the authority to regulate only fisheries, not aquaculture. When reviewing an agency's interpretation of a statute, a court will first examine whether Congress's intent is clear from the language of the statute, and if not, the court will defer to the judgment of the agency.[10] The trial court, in this case, decided that the MSA plainly stated that the Council's power was limited solely to fisheries, and ruled in favor of the Plaintiffs. NMFS appealed.

In reviewing the case, the appellate court considered the differences between "fishery" and "aquaculture." The court applied the MSA's definitions of "fishery" and "fishing," which state that "fishery" refers to the management and fishing of stocks of fish, with "fishing" defined as the act or attempted act of "catching, taking, or harvesting of fish." The court found "aquaculture," however, to be synonymous to "fish farming," which is, "the cultivation of aquatic organisms (such as fish or shellfish), especially for food." From there, the concern shifted to whether or not NMFS should have been granted deference to its interpretation of the statute to include "aquaculture."

NMFS argued that the MSA did not "unambiguously express Congress's intent to prohibit the regulation of Aquaculture." The court, however, shot down the agency's argument, noting that if agencies were able to claim any power that was not expressly prohibited in legislation, they would enjoy nearly limitless power. The court interpreted the powers of agencies to be limited solely to what the statutes expressly delegate to them, stating: "In order for there to be an ambiguous grant of power, there has to be a grant of power in the first place."[11]

NMFS also argued that the Magnuson-Stevens Act allowed the agency leeway to regulate aquaculture instead of only fisheries. It argued that the word "harvesting" is a loose enough term to include aquaculture, since harvesting sometimes means the gathering or reaping of a crop. Since aquaculture is a type of farming, where the "crop" harvested is fish, NMFS argued the definition of fishing could be interpreted to include aquaculture. The court, however, disagreed, and pointed out that harvesting, under the MSA, is best read to mean the catching and taking of fish, rather than the agrarian meaning relating to the gathering of crops. Considering the overall meaning of the Magnuson-Stevens Act and what it was created to do, the court stated that NMFS's argument that the word harvesting in the definition of fishing meant that NMFS has authority to regulate aquaculture operations, "does not hold water."[12] The court ruled that NMFS's attempt to regulate aquaculture in the Gulf of Mexico exceeded the agency's statutory authority, rendering the Plan null.

Where does this leave us?

So, who governs offshore aquaculture in the Gulf now that the 2016 Rule has been struck down by the Fifth Circuit? Two federal agencies have authority to issue permits for aquaculture operations in federal waters. Under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403), the Corps may issue permits for obstructions to "the navigable capacity of any of the waters of the United States." If the aquaculture operation will grow finfish, permits are required under the Clean Waters Act from the EPA for the discharge of pollutants.[13]

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Endnotes

1. 16 U.S.C. § 1801(b)(1).
2. Gulf Fishermens Association v. National Marine Fisheries Service, Case No. 19-30006, *6 (5th Cir. 2020).
3. *Gulf Fishermens Association*, *6 (5th Cir. 2020).
4. 81 Fed. Reg. 1761, at 1762 (Jan. 13, 2016).
5. 81 Fed. Reg. at 1763.
6. *Gulf Fishermens Association*, *8 (5th Cir. 2020).
7. 81 Fed. Reg. at 1764.
8. Cody Szuwalski, et al., *Marine seafood production via intense exploitation and cultivation in China: Costs, benefits, and risks* (Jan. 17, 2020).
9. Jennie Lyons, *American seafood industry steadily increases its footprint*, National Oceanic and Atmospheric Association (Dec. 2018).
10. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
11. *Gulf Fishermens Association*, *12-13 (5th Cir. 2020).
12. *Gulf Fishermens Association*, *20 (5th Cir. 2020).
13. Kelly B. Boden and Karen A. Mignone, *The aquaculture permitting process in federal waters*, American Bar Association (May 2014).