FIFTH CIRCUIT REELS IN NMFS' AQUACULTURE PERMITTING PROGRAM IN GULF OF MEXICO

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U.S. Environment, Land, and Natural Resources Alert

The United States Court of Appeals for the Fifth Circuit recently held the National Marine Fisheries Service (NMFS) does not have the authority to regulate aquaculture under the Magnuson-Stevens Fishery Conservation and Management Act (the "MSA" or the "Act"). The decision could affect recent efforts by the federal government to permit and facilitate the expansion of aquaculture facilities in federal coastal waters. While the decision's immediate impact is limited to federal waters in the Gulf of Mexico, it has potentially significant ramifications for aquaculture in other federal coastal areas across the United States.

KEY FINDINGS

In 2016, NMFS proposed establishing an aquaculture permitting program in federal waters in the Gulf of Mexico, whereby it would permit a significant expansion of aquaculture estimated to produce annually up to 64 million pounds of seafood. In the proposed rulemaking, NMFS claimed the authority to permit aquaculture under the MSA. A diverse coalition of plaintiffs challenged the rule, including the Gulf Fishermens Association, Gulf Restoration Network, Recirculating Farms Coalition, and Center for Food Safety, which claimed that the MSA did not authorize NMFS to create a permitting program for aquaculture. The district court agreed with the plaintiffs, and NMFS appealed.

The court declined to bite on NMFS' argument. The Fifth Circuit agreed with the plaintiffs that the MSA does not authorize NMFS to permit or regulate aquaculture in federal waters. By strictly construing the text of the MSA, the Fifth Circuit refused to expand the authority of the 40-year-old Act to include governance over aquaculture projects, holding that the Act's references to "harvesting" and "fishery" did not encompass fish farming.[1]

When interpreting the MSA, the Court found its language to be unambiguous, noting that the MSA does not mention aquaculture anywhere within the statute. "As far as aquaculture, the [MSA] is a textual dead zone: the original Act does not mention aquaculture or fish farming at all. More to the point, the Act's provisions defining the agency's regulatory power say nothing about creating or administering an aquaculture or fish farming regime."[2] Lacking specific authority to permit aquaculture under the Act, the Court held that NMFS was not authorized to fill in any statutory gaps without delegated authority from Congress. However, the Court noted that nothing prohibits Congress from delegating such authority to NMFS through revisions to the MSA or other statutory authorization.

AQUACULTURE IMPLICATIONS

The decision in Gulf Fishermens Association only directly affects NMFS's regulatory authority in the Gulf of Mexico. Unless overturned by the Supreme Court, the decision effectively ends NMFS' decade-long plan to create

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an aquaculture permitting regime under its purview in the Gulf. The decision does not directly affect NMFS's regulatory in other regions of the country outside the jurisdiction of the Fifth Circuit. Nevertheless, it may have significant indirect impacts on the national aquaculture industry by serving as precedent to challenge similar efforts by NMFS in the future to establish permitting or regulatory regimes for aquaculture in other regions.

The decision may call into question the legal authority for certain portions of Executive Order 13921 on Promoting American Seafood Competitiveness and Economic Growth issued by the White House in May 2020 ("EO 132921" or the "Executive Order").[3] One of the primary objectives of EO 13921 is to grant the National Oceanic and Atmospheric Administration (NOAA) significantly more authority to regulate and permit aquaculture, including authorizing NOAA to act as the primary lead agency on certain aquaculture projects and prepare certain environmental impact statements under the National Environmental Policy Act, as well as designating NOAA to create Aquaculture Opportunity Areas to facilitate the expansion of marine aquaculture. Additional details concerning the Executive Order can be found in our previous client alert here. Notably, NMFS is a division within NOAA. While the Executive Order did not explicitly reference the statutory or other legal authorization supporting it, the order may be subject to similar legal challenges that NOAA does not have the statutory authority to carry out some of the Executive Order's mandates. These challenges may arise as NOAA seeks to carry out the actions described in the Executive Order over the next few years.

While finding that NMFS currently does not have the authority to permit or regulate aquaculture, the Fifth Circuit indicated that its concerns could be resolved through additional Congressional action. In 2018, companion bills reached the floor of both the U.S. House and Senate to provide NOAA regulatory authority over aquaculture through the Advancing the Quality and Understanding of American Aquaculture Act (AQUAA Act).[4] Recently, the AQUAA Act was reintroduced to the House in March 2020 by Representatives Collin Peterson (D-MN) and Steve Palazzo (R-MS).[5] The bill seeks to establish a regulatory system for sustainable offshore aquaculture in the United States Exclusive Economic Zone. While the AQUAA Act has bipartisan sponsorship and support, it has had difficulty gaining traction in the current legislative environment. The decision in *Gulf Fishermens Association*, in highlighting the need for additional Congressional action, could prompt Congress to advance legislation.

Finally, *Gulf Fishermens Association* is an example of the increased rate of litigation surrounding aquaculture in the United States. While the authority of this decision does not extend beyond the Gulf of Mexico, this is the second decision within the last 12 months, where a diverse coalition of plaintiffs has successfully invalidated an aquaculture permitting regime.[6] While there is a strong push to expand aquaculture by both NOAA and the White House, these cases create an uncertain future for such efforts absent additional Congressional and regulatory action.

FOOTNOTES

[1] Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv., N. 19-30006, 2020 WL 4433100, at *1 (5th Cir. 3 August 2020).

[2] *Id.* at *4.

[3] Exec. Order 13921, 85 Fed. Reg. 28,471 (12 May 2020).

[4] AQUAA Act, H.R. 6966, 115th Cong. (2018); AQUAA Act, S. 3138, 115th Cong. (2018).

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[5] AQUAA Act, H.R. 6191, 116th Cong. (2020); Senators Roger Wicker (R-MS) and Brian Schatz (D-HI) are currently working on an AQUAA Act Senate bill, a draft of which has been circulated to stakeholders for review and comment.

[6] *See Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Eng'rs*, No. 17-1209RSL, 2020 WL 3100829 (W.D. Wash. June 11, 2020) (invalidating Nationwide Permit 48 authorizing commercial shellfish aquaculture activities in the State of Washington). This case is on appeal in the U.S. Court of Appeals, Ninth Circuit.

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