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RE: State Registration of Aquaculture Facilities in Federal Waters (MASGP 08-007-11)

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Dear Paul,

Below is the summary of research regarding the questions you posed to the National Sea Grant Law Center regarding Hubbs-SeaWorld's Research Institute's (HSWRI) plans to farm striped bass in net-pens moored in federal waters. You raised four questions in your July 31, 2008 email: (1) Can California register the HSWRI facility?; (2) Is there any federal permit needed to transport and place the fish in federal waters?; (3) In the event of a disease or escape, who would have responsibility to act if the facility were registered in California?; and (4) What conflicts with other states could arise? This memo addresses only your first question. Our research findings with respect to the other questions will be summarized in a separate memo. The following information is intended as advisory research only and does not constitute legal representation of California Sea Grant or the California Department of Fish and Game or their constituents. It represents our interpretations of the relevant laws and cases.

Can California Register the Offshore HSWRI Facility?

HSWRI is a registered aquaculture facility in California approved to grow striped bass, white seabass, yellowtail, California halibut, and a few other species in state waters. Under § 15101 of the California Fish and Game Code, the owner of an aquaculture facility in must register with the Department of Fish and Game (DFG) and provide the owner's name, the species grown, and the location of each operation. An aquaculture facility is defined in regulations as any facility "devoted to the propagation, cultivation, maintenance and harvesting of aquatic plants and

animals in marine, brackish or fresh water."[1] It is illegal to conduct aquaculture operations in California state waters unless the facility is registered under § 15101.[2]

While registration is necessary to begin operations, registration is also essential to the continuing operations of an aquaculture facility. "All aquaculture products sold or transported [in California] must have been legally reared or imported by" a registered aquaculturist.[3] A registered aquaculture facility is permitted to sell and transport live aquaculture products authorized by its registration to anyone who has a license to possess those plants or animals for commercial purposes.

If HSWRI establishes an aquaculture facility in federal waters, can California require HSWRI to register the facility? Generally, state statutes "have no force beyond its boundaries."[4] HSWRI is contemplating growing striped bass about four miles offshore of San Diego. California's territory includes those ocean waters "three geographical miles distant from the coastline."[5]

Extraterritorial Application of State Law

In some situations, states may apply their laws extraterritorially. California courts have held that Congress, in delineating California's boundaries under the Submerged Lands Act, did not "suggest that California lacked power to regulate conduct outside those boundaries and within broader state law boundaries."[6] "In matters affecting its interests a state may exercise extraterritorial jurisdiction where there is no conflict with federal or international law."[7]

The rules regarding extraterritorial application of state law are based on well-settled principles of international law. In general, a nation has jurisdiction to regulate the activities, interests, status, or relations of its nationals wherever they may be as long as the exercise of jurisdiction does not infringe on the rights of another nation or its citizens.[8] Nations may also regulate conduct that takes place within its territory and conduct that takes place outside its territory "that has or is intended to have substantial effect within its territory."[9]

Citizenship

In 1941 in *Skiriotes v. Florida*, the U.S. Supreme Court upheld the extraterritorial application of a Florida law regulating the sponge fishery. Lambiris Skiriotes was convicted in state court for using prohibited diving equipment while fishing for sponges two marine leagues (six miles) from shore in the Gulf of Mexico. Florida law prohibited "the use of diving suits, helmets or other apparatus used by deep sea divers, for the purpose of taking commercial sponges from the Gulf of Mexico, or the Straits of Florida, or other waters within the territorial limits of that State."[10]

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[1] CAL. ADMIN. CODE, tit 14, § 235(a).
[2] CAL. FISH AND GAME CODE § 15101(b).
[3] CAL. ADMIN. CODE tit. 14, § 238(a).
[4] *North Alaska Salmon Co. v. Pillsbury*, 162 P. 93, 94 (Cal. 1916).
[5] 42 U.S.C. § 1301(b).
[6] *Tidewater Marine Western, Inc. v. Bradshaw*, 927 P.2d 296, 300 (Cal. 1996).
[7] John Briscoe, *The Effect of President Reagan's 12-mile Territorial Sea Proclamation on the Boundaries and Extraterritorial Powers of the Coastal States*, 2 TERRITORIAL SEA J. 225 (1982)
[8] Restatement (Third) of Foreign Relations Law of the United States § 402
[9] *Id.*
[10] *Skiriotes v. Florida*, 313 U.S. 924, 926 (1941).

Skiriotes appealed his conviction arguing that Florida did not have jurisdiction to enforce its laws on the high seas.

In 1941, Florida claimed jurisdiction out to nine nautical miles (or three marine leagues) pursuant to Spanish grants.[11] At the time, however, international law only granted coastal nations sovereignty over a three-mile territorial sea. Any waters beyond that were the high seas. To the international community, Skiriotes was fishing in the high seas and he argued that Florida could not extend its jurisdiction beyond the international boundaries of the United States.

The Supreme Court disagreed.

> If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with Acts of Congress.[12]

The Court concluded that Florida had a legitimate interest in "the proper maintenance of the sponge fishery."[13] Although Congress had passed a law prohibiting U.S. citizens from taking, possessing, and selling commercial sponges in the Gulf of Mexico below a minimum size, the Court found no conflict because the state law dealt only with the divers' apparatus, not the size of the sponges. Because Skiriotes was a citizen of the state of Florida, Florida had jurisdiction to regulate his conduct on the high seas.

Assuming HSWRI is incorporated in the State of California, that incorporation (which is akin to a person's citizenship) might be basis enough for asserting jurisdiction over its aquaculture facility provided there is no conflict with federal law. Currently there is no federal law regulating aquaculture or requiring registration of facilities. As long as California is not attempting to regulate the siting of offshore structures, which does fall within the jurisdiction of several federal agencies, the exercise of jurisdiction should be accepted.

"Effects"

"The effects doctrine recognizes that a state may exercise extraterritorial jurisdiction over conduct outside the state that has or is intended to have a substantial effect within the state so long as the exercise of jurisdiction does not conflict with federal law and is otherwise reasonable."[14] The Alaska Supreme Court recently applied the effects doctrine to find that Alaska had jurisdiction to prosecute a man accused of committing a sexual assault while on an Alaska state ferry in Canadian waters.[15] The court determined that the exercise of jurisdiction was proper even though there was no specific state jurisdictional statute authorizing the prosecution. If no statute is present, however, the state must have a substantial interest "so that the exercise of jurisdiction . . . is reasonable."[16] The court concluded that Alaska had a substantial interest in

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[11] Florida's jurisdictional claims were later affirmed by the Supreme Court in *U.S. v. Florida*, 425 U.S. 791 (1976).
[12] *Skiriotes*, at 929.
[13] *Id.* at 928.
[14] *State v. Jack*, 125 P.3d 311, 319 (Alaska 2005).
[15] *Id.* at 318.
[16] *Id.* at 322.

prosecuting the assault to ensure passengers and cargo transported on state ferries are safe. The court also believed the exercise of jurisdiction was reasonable given the importance of the ferry system to the state and its citizens. Furthermore, since the federal government had not attempted to prosecute the defendant for the crime, there was no federal conflict.

Aquaculture operations four miles offshore could clearly have an effect within the state. Striped bass could escape from the pen and spread disease or breed with wild populations that frequent California state waters. Pollution from the net pens could spread to California waters. In 2006, California passed the Sustainable Oceans Act which enacted stringent environmental standards for marine finfish aquaculture. California has a substantial interest in ensuring that aquaculture operations in state waters, abiding by state environmental standards, are not harmed by offshore facilities. The exercise of jurisdiction, therefore, would be reasonable as long as there is no conflict with federal law.

Constitutional Limits

Preemption

The Supremacy Clause of Article VI of the U.S. Constitution provides that the Constitution, including laws and treaties made pursuant to it, are the supreme law of the land. It is within the police power of states to regulate areas affecting the health and safety of its citizens; however, pursuant to the Supremacy Clause, state laws that conflict with federal laws are generally preempted by federal law. Even if state laws do not actually conflict with federal law, states may be barred from regulating areas in which the federal government has regulated.

Federal law can preempt state action in a number of ways. First, Congress can expressly preempt state law through federal statutes. Second, federal law will preempt state law when it is impossible to comply with both the state and federal directives. State law is also preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[17] Finally, state law is preempted when Congress intends federal law to occupy an entire area (field) leaving no room for state regulation.

For example, prior to the passage of the Magnuson Act, states could regulate fisheries beyond their waters as long as they had a legitimate conservation or management interest in the fishery; could assert jurisdiction over the fisherman through landing laws, state citizenship, or other sufficient contacts; and the exercise of jurisdiction did not unduly burden interstate commerce, impermissibly discriminate among fishermen, or violate the Supremacy Clause.[18]

The passage of the Fishery Conservation and Management Act in 1976 (now known as the Magnuson-Stevens Act (MSA) severely restricted, although it did not eliminate, state authority with respect to fishery resources outside state waters. Under the MSA, a state may regulate a fishing vessels outside the boundaries of the state if the fishing vessel is registered under the law of the state and there is no fishery management plan (FMP) or other applicable federal fishing

[17] *County of San Diego v. San Diego NORML*, 2008 WL 2930117 at *7 (Cal. App. Ct. July 31, 2008).
[18] Eldon V.C. Greensberg and Michael Shapiro, *Federalism in the Fishery Conservation Zone: A New Role for the States in an Era of Federal Regulatory Reform*, 55 S. CAL. LAW REV. 641, 657 (1982).

regulations or the state laws and regulations are consistent with the FMP and federal regulations.[19]

California courts have upheld the extraterritorial exercise of state criminal jurisdiction following the passage of the MSA. In *People v. Weeren*, the California Supreme Court held that § 1856(a) of the MSA permits a state "to regulate and control the fishing of its citizens in adjacent waters, when not in conflict with federal law, when there exists a legitimate and demonstrable state interest served by the regulation, and when the fishing is from vessels which are regulated by it and operated from ports under its authority."[20] The defendants, both of whom were citizens and residents of California, had been convicted of using spotter aircraft to take broadbill swordfish contrary to the DFG regulations. Their fishing vessel was registered in the state of California. The court had "no difficulty in discerning in the preservation of its valuable fish population the requisite state interest for extraterritorial jurisdiction."[21] The court found there was no federal conflict because federal swordfish rules had yet to be promulgated.

Congress has not preempted state action with respect to aquaculture because there is no federal law regulating the activity. Congress, however, has preempted state authority with respect to most aspects of fisheries regulations. HSWRI is intending to grow a species not covered by a federal FMP, so state authority should be preserved. Even if HSWRI were growing a species managed under a FMP, California should still be able to require HSWRI to register its facility. Registration would not stand as an obstacle to the implementation of federal fishery policies and it would be possible to comply with both the federal and state laws.

Commerce Clause

Even if state law is not preempted by federal law, state laws must still comply with the requirements of the commerce clause of the U.S. Constitution, which provides that Congress has the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[22] The negative implication of the commerce clause, sometimes called the "dormant commerce clause," is that the power of state and local governments to regulate interstate commerce is limited. State laws that affect interstate commerce will be invalid if they discriminate against non-residents or unduly burden interstate commerce. In determining whether a state's law unduly burdens interstate commerce, a court will balance the burden that the law places on interstate commerce with the benefits that the law provides the state.

Fish, of course, are an article of commerce. California would not be able to require registration of offshore facilities if such registration placed an undue burden on interstate commerce. Since California's registration of HSWRI's facility would actually promote commerce by facilitating the transport of aquaculture products from the facility to shore, it is unlikely to be seen as an impermissible burden on interstate commerce.

Furthermore, "states are not precluded from regulating the in-state components of an interstate transaction so long as the regulation furthers a legitimate state interest."[23] California clearly has

[19] 18 U.S.C. § 1856(a)(3)(A).
[20] 607 P.2d 1279, 1287 (Cal. 1985).
[21] *Id.* at 1286.
[22] U.S. Const., Art. I, sec. 8, cl. 3.
[23] *Bronco Wine Co. v. Jolly*, 29 Cal.Rptr.3d 462, 484 (Cal. App. Ct. 2005).

authority to regulate the transport of live aquaculture products through state waters and onshore. The registration requirements could be viewed as an exercise of that authority.

Conclusion

Until Congress enacts aquaculture legislation and evidences an intent to preempt state authority with respect to registration, California should be able to apply its registration law extraterritorially. I hope this information helps. Please let me know if you have any follow-up questions or would like additional information.

Sincerely,

Stephanie Showalter

Stephanie Showalter
Director