



*The*  
**University of Mississippi**

Oxford • Jackson • Tupelo • Southaven

National Sea Grant Law Center  
Kinard Hall, Wing E - Room 262  
Post Office Box 1848  
University, MS 38677-1848  
Office Phone: (662) 915-7775  
Fax: (662) 915-5267  
E-mail: sealaw@olemiss.edu

---

January 8, 2010

Dr. Michael Rubino  
Program Manager  
NOAA Aquaculture Program  
1315 East West Hwy  
Silver Spring, MD 20910

RE: Defining Offshore Aquaculture as Agriculture (MASGP 10-008-02)

*This product was prepared by the National Sea Grant Law Center under award number NA06OAR4170078 from the National Oceanic and Atmospheric Administration, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the authors and do not necessarily reflect the views of NOAA or the U.S. Department of Commerce.*

Dear Michael,

Below is the summary of research regarding NOAA Aquaculture's questions on the legal implications of defining offshore aquaculture as agriculture. This information is intended as advisory research only and does not constitute legal representation of NOAA Aquaculture by the Law Center. It represents our interpretation of the relevant laws and cases and does not necessarily reflect the views of the National Sea Grant Office, NOAA, or any other agency or entity.

*Exclusion of Aquaculture from Regulation under the MSA*

NOAA asked what the legal ramifications would be if aquaculture were excluded from existing fisheries laws. NOAA currently interprets "fishing" as defined in the Magnuson Stevens Act (MSA) to include aquaculture activities. That interpretation provides the Councils with the necessary authority to develop Fishery Management Plans (FMPs) for aquaculture and NOAA with the authority to issue permits pursuant to such FMPs. If aquaculture were excluded from the definition of "fishing" under the MSA, the Councils would not be able to develop FMPs nor would NOAA be able to issue permits authorizing aquaculture operations.

Exclusion from the MSA, however, would not create a complete regulatory void. Aquaculture operators would, at a minimum, still need permits from the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA). Under the Rivers and Harbors Act, the Corps issues permits for structures located in navigable waters.<sup>1</sup> The EPA asserts authority over discharges from aquaculture facilities under the Clean Water Act.<sup>2</sup>

*Impacts on Eligibility for Disaster Relief and other Economic Incentives/Aid*

Defining aquaculture as fishing enables operators to take advantage of several benefits available under the MSA. For example, if there is a commercial fishery failure due to a fishery resource disaster, NOAA may provide funds for the affected state or fishing community.<sup>3</sup> And, when there is a catastrophic regional fishery disaster, the Regional Coastal Disaster Assistance, Transition, and Recovery Program provides immediate disaster relief assistance to the fishermen, fish processors, and owners of related fishery infrastructure affected by the disaster.<sup>4</sup> For purposes of the program, the term "catastrophic regional fishery disaster" is defined as

*a natural disaster, including a hurricane or tsunami, or a regulatory closure (including regulatory closures resulting from judicial action) to protect human health or the marine environment, that--(1) results in economic losses to coastal or fishing communities; (2) affects more than 1 State or a major fishery managed by a Council or interstate fishery commission; and (3) is determined by the Secretary to be a commercial fishery failure under section 312(a) of this Act [16 USCS § 1861a(a)] or a fishery resource disaster or section 308(d) of the Interjurisdictional Fisheries Act of 1986 (16 U.S.C. 4107(d)).*

If offshore aquaculture were not defined as a fishery under the Magnuson Act, it could lose its eligibility for such programs.

The Interjurisdictional Fisheries Act authorizes the Secretary of Commerce to provide grants or cooperative agreements to states affected by a commercial fishery failure or serious disruption affecting future production due to a fishery resource disaster arising from natural or undetermined causes.<sup>5</sup> The IFA also enables the Secretary of Commerce to help commercial fishery operations that have incurred a fishery resource disaster arising from a hurricane or other natural disaster.<sup>6</sup> Commercial fisheries are not defined in the Act, but the term "interjurisdictional fishery resource" means

*(A) a fishery resource for which a fishery occurs in waters under the jurisdiction of one or more States and the exclusive economic zone established by Proclamation Numbered 5030, dated March 10, 1983;*

*(B) a fishery resource for which there exists an interstate fishery management plan; or*

<sup>1</sup> 33 U.S.C. § 403.

<sup>2</sup> *Id.* §§ 1251-1387.

<sup>3</sup> 16 U.S.C. § 1861a.

<sup>4</sup> *Id.* § 1864.

<sup>5</sup> *Id.* § 4101.

<sup>6</sup> *Id.* § 4107.

(C) a fishery resource which migrates between the waters under the jurisdiction of two or more States bordering on the Great Lakes.

“Fishery resource” means “finfish, mollusks, crustaceans, and any other form of marine animal or plant life, other than marine mammals and birds.” If fish in aquaculture operations would not meet these definitions, it seems that aquaculture would not qualify for these programs.

NOAA also asked whether the treatment of aquaculture as a “non-fishing” activity under fisheries law would make aquaculture ineligible for National Marine Aquaculture Initiative (NMAI) grants or other competitive grant programs instituted by NOAA. NMAI is administered by the NOAA Aquaculture Program and NOAA’s Office of Oceanic and Atmospheric Research and supports projects and research on sustainable marine aquaculture in the U.S.<sup>7</sup> The program is not tied to the MSA, so aquaculture’s exclusion from the Act likely would not affect the authority to fund aquaculture programs.

The Saltonstall-Kennedy Act established a fund to finance projects and cooperative agreements for fishery research and development.<sup>8</sup> Although the Act does not specifically address aquaculture, NOAA has funded aquaculture projects under the Act. NOAA is charged with disbursing funds under the Act; however, Congress has oversight, and if aquaculture is no longer considered a “fishery” it could raise questions about whether aquaculture should be funded through the program.

NOAA also asked whether the classification of aquaculture as agriculture, as opposed to a fishery, would make it ineligible for loans under NOAA’s Fisheries Finance Program. The Fisheries Finance Program is a national financial assistance program in the form of direct loans, a tax-deferred capital construction fund, and a fund for vessel and gear loss and damage. It is authorized by the Merchant Marine Act.<sup>9</sup> Aquaculture businesses are eligible for loans for capital construction and other investment costs. In its definition of “fishery facility” the Act includes “equipment that is for use with the structure or appurtenance and that is necessary for [unloading processing, holding, or distributing fish] ... for aquaculture, including operations on land or elsewhere – a structure or appurtenance thereto designed for aquaculture ... and a vessel built ... for aquaculture.”<sup>10</sup> Even if aquaculture were excluded from fisheries laws, it seems that it would still be eligible for the FFP, since the Act specifically defines aquaculture operations as eligible fishery facilities.

#### *Defining Aquaculture as Agriculture*

If offshore aquaculture were defined as agriculture, as onshore aquaculture operations like catfish farms are, it could be eligible for additional benefits. For example, Farm Credit Banks are authorized to make loans “to farmers, ranchers, and producers or harvesters of aquatic products for any agricultural or aquatic purposes.”<sup>11</sup> The Farmers Home Administration, which offers financial assistance to farmers, includes “fish farming” in its definition of “farming” and states

<sup>7</sup> Program Authority is 33 U.S.C. 1121, *et seq.*

<sup>8</sup> 15 U.S.C. § 713c-3.

<sup>9</sup> 46 U.S.C. § 53701.

<sup>10</sup> *Id.*

<sup>11</sup> 12 U.S.C. § 2129.

that “farmer” includes a person who is engaged in, or who ... intends to engage in, fish farming.”<sup>12</sup> Aquaculture operations are also eligible for crop insurance under the Federal Crop Insurance Act, which includes “aquacultural species” in its definition of “agricultural commodity.”<sup>13</sup> Furthermore, states may provide aquaculture operations with additional benefits by including aquaculture as a form of agriculture.<sup>14</sup>

I hope you find the above information useful. Thank you for bringing your questions to the Law Center and we look forward to working with you in the future.

Sincerely,

Terra Bowling  
Research Counsel

---

<sup>12</sup> 7 U.S.C. § 1991.

<sup>13</sup> *Id.* § 1518.

<sup>14</sup> E.g. MISS. CODE ANN. § 69-7-501 (2009).