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RE: Aquaculture Facilities in Federal Waters (MASGP 08-007-12)

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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 questions 2, 3, and 4. Our research findings with respect to your first question were summarized in a separate memo (MASGP 08-007-11). 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.

### Is there any federal permit needed to transport and place the fish in federal waters?

There are no federal permit requirements in place regarding the transport of striped bass from aquaculture facilities. However, the Lacey Act, 16 U.S.C. § 3372, provides:

It is unlawful for any person –

- (1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation

of the United States or in violation of any Indian tribal law;

(2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce--

(A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law;

(B) any plant taken, possessed, transported, or sold in violation of any law or regulation of any State; or

(C) any prohibited wildlife species (subject to subsection (e) of this section);

(3) within the special maritime and territorial jurisdiction of the United States (as defined in section 7 of Title 18)--

(A) to possess any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law or Indian tribal law, or

(B) to possess any plant taken, possessed, transported, or sold in violation of any law or regulation of any State; or

(4) to attempt to commit any act described in paragraphs (1) through (3).

In essence, the Lacey Act federalizes state wildlife laws. So, although no federal permit is required to place striped bass in an aquaculture facility, state laws governing the transport, importation, and sale of live aquaculture facilities do apply. If an aquaculture facility operator fails to comply with those laws, he could be charged with violating the Lacey Act – a federal offense.

In the event of disease or escapes, who would have responsibility to act if the facility were registered in California? Would the Corps of Engineers have duplicate authority?

To engage in marine finfish aquaculture in state waters, operators must obtain a lease from the California Fish and Game Commission.<sup>1</sup> California law imposes a number of lease conditions, including the requirement that “all facilities and operations shall be designed to prevent the escape of farmed fish into the marine environment and to withstand severe weather conditions and marine accidents.”<sup>2</sup> Escapes must be reported to the Commission and the “lessee shall be responsible for damages to the marine environment caused by those escaped fish, as determined by the Commission.”<sup>3</sup>

When an operator files an application to register an aquaculture facility, he must certify that he has “read, understands and agrees to be bound by the regulations of the Commission and the Fish and Game Code sections governing aquaculture and its products.”<sup>4</sup> Could a registered aquaculture facility in federal waters be required to make a similar certification thereby extending all California aquaculture laws, including the escape provisions, to federal waters? Probably not.

As I understand it, registration is required primarily to regulate the transport and sale of live aquaculture products. Because an aquaculture facility will be transporting products through state waters, California clearly has authority to require compliance with those laws and

<sup>1</sup> CAL. FISH AND GAME CODE § 15440(b).

<sup>2</sup> *Id.* § 15440(b)(9).

<sup>3</sup> *Id.*

<sup>4</sup> CAL. ADMIN. CODE tit. 14, § 235(b).

regulations. An aquaculture facility operator would have to comply with those laws regardless of registration.

The escape prevention requirements, however, are a bit different. Those provisions arise as conditions to a lease of state submerged land for aquaculture operations. A lease is a binding contract between a landlord (the state of California) and a tenant (aquaculture facility operator) that provides for the rental of property (parcel of submerged land). "The parties to an agreement can make almost anything that is not illegal or unconscionable a condition to performance."<sup>5</sup> As a condition to receiving the lease, the operator agrees to report escapes and be responsible for any damages that result.

California does not have similar authority to contract with operators in federal waters. California does not own the submerged lands beyond three miles from shore and therefore has no property to lease. If there is no property to lease, there can be no contract and no escape prevention conditions.

This is not to say that California is without recourse. The issuance of federal permits will trigger federal consistency review under the Coastal Zone Management Act (CZMA). The CZMA states that federal agency activities, including the issuance of permits, "within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs."<sup>6</sup> The enforceable policies of the California coastal management program can be found in Chapter 3 of the California Coastal Act of 1976.<sup>7</sup>

Since an aquaculture facility four miles offshore could affect state waters or natural resources, the operator would have to provide the California Coastal Commission, the state agency responsible for federal consistency review and enforcement, with a consistency certification stating that the proposed activity complies with California's approved coastal management program and will be conducted in a manner consistent with that program. The CCC has six months to object or concur with the certification. If the CCC objects to the applicant's consistency certification, the federal agency may not issue the permit.

Federal agencies and applicants are encouraged to "cooperate with State agencies to develop conditions that, if agreed to during the State agency's consistency review period and included in a Federal agency's [permit approval], would allow the State agency to concur with the federal action."<sup>8</sup> If the state is not satisfied with these efforts, it does have the authority to issue a conditional concurrence. The conditions must be based on the enforceable policies of a state's coastal management program.

A number of enforceable policies are potentially relevant to a permit for an aquaculture facility. For instance, § 30230 of the California Public Resources Code states that "uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes." Section

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<sup>5</sup> Howard O. Hunter, *The Modern Law of Contract* § 10:2.

<sup>6</sup> 16 U.S.C. § 1456(c)(1)(A).

<sup>7</sup> CAL. PUB. RES. CODE §§ 30200 – 30265.5.

<sup>8</sup> 15 C.F.R. § 930.4(a).

30231 states that "the biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained . . ."

The Clean Water Act (CWA) also contains a provision providing states significant authority over federal permits. Under § 401, states can review and approve, condition, or deny all federal permits or licenses that might result in a discharge of pollutants to state waters.<sup>9</sup> Rivers and Harbors Act § 10 permits issued by the Corps of Engineers (Corps) for obstructions to navigation are subject to § 401 review. In general, states decide whether to deny, certify, or condition permits based on the activity's compliance with state water quality standards. EPA cannot issue the permit if the state has denied certification. The HSWRI facility could result in the discharge of pollutants, such as excess fish, fish wastes, and escaped fish, into state waters. The California State Water Resources Control Board issues § 401 certifications. If the Board determined that the HSWRI facility would result in the discharge of pollutants in violation of California water quality standards, it could deny or condition the project's § 401 certification.

Less formal options are also available. The California Department of Game could work with the Corps and other federal permitting agencies during public comment periods to add escape prevention conditions to federal permits. Federal agencies often have discretion to add conditions to permits to ensure protection of the environment. If the Corps inserted an escape provision into a navigational permit, for example, the Corps would have primary authority to enforce that condition.

What conflicts with other states could arise, e.g. a farm in federal waters near the Oregon border, who would have jurisdiction?

The federal government would have primary jurisdiction regardless of where the aquaculture facility was placed in federal waters. Oregon would have no more authority to apply its law to the facility than California does. Oregon law does provide for the leasing of state waters for aquaculture facilities, but it does not require registration or impose detailed environmental requirements. Extraterritorial application of existing Oregon law seems unlikely. If Oregon did seek to apply a future law extraterritorially, Oregon and California law could potentially conflict. Such conflict could burden interstate commerce and prevent application of either state's laws.

The more likely scenario is one that involves consistency review. Applicants for federal permits must submit consistency certifications to all affected states. A facility near the Oregon border could potentially affect Oregon waters and natural resources, as well as California waters. Oregon, therefore, has a right to review the project for consistency with its coastal management program. Oregon might also have the right to review under § 401 of the CWA.

We hope you find this information helpful. Please let us know if you have follow-up questions.

Sincerely,



Stephanie Showalter  
Director



Terra Bowling  
Staff Attorney

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<sup>9</sup> 33 U.S.C. § 1341(a)(1).