Over the past few months, the Mississippi River has been flooding at levels that have not been seen for 90 years, causing wide-ranging impacts. For farmers, the river flooding has delayed or prevented crop planting. In addition to these land-based impacts, freshwater diversions into the Mississippi Sound to relieve river levels have negatively affected the Sound’s natural resources. While not getting extensive media attention, oyster aquaculture producers are facing negative impacts to their crop yields similar to their land-based farming counterparts, leaving many to wonder what relief is available to these aquaculture producers.

Mississippi River Flooding
Pounding spring rains have caused the Mississippi River to flood along the mighty river’s banks. According to the National Weather Service, this year’s flooding is the longest-lasting since the Great Flood of 1927, which serves as the benchmark for Mississippi River flooding events. The 1927 flood led to the management of the Mississippi River as we know it today, spurring the federal government to enact a program for flood control led by the U.S. Army Corps of Engineers (Corps). In May 1928, Congress passed the Flood Control Act of 1928, which authorized the Corps to build and operate flood control structures along the Mississippi River.
Importantly, the Act also granted immunity to the government for its actions under the law, and courts have found that this immunity applies when the government releases floodwaters by operating one of its flood control projects.4

Today, there are numerous flood control structures along the Mississippi’s banks, including levees, floodways, and spillways. With the 2019 floods, the Bonnet Carré Spillway, which is located about 30 miles above New Orleans, has come into the spotlight. The spillway is designed to divert some of the floodwaters from the Mississippi River into Lake Pontchartrain to protect New Orleans and other downstream communities in Louisiana, but the freshwater eventually flows into Mississippi Sound and the Gulf of Mexico. In February, the Corps opened the spillway for the 13th time in the spillway’s history and kept the spillway open for 37 days until closing it in April.5 Due to continuing floodwaters, the spillway was opened again in May.6 Both of these openings were historic—it was the first time the spillway had been open in consecutive years and the first time it was opened twice in the same year.

**Gulf Resources Affected**

Along the banks of the Mississippi River, farmland has been flooded for months. In Mississippi alone, approximately 500,000 acres in the Delta are underwater, 225,000 of which is agricultural farmland.7 While much attention has been on land-based farms, the flooding has also negatively impacted the region’s shellfish aquaculture operations.

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In the Mississippi Sound, where the Bonnet Carré Spillway ultimately sends freshwater, sea life, aquaculture operations, and fisheries have been negatively impacted by increased freshwater levels. The Institute of Marine Mammal Studies (IMMS) in Gulfport, MS has tracked 129 dolphin carcasses that have washed up on Mississippi’s shores during this summer, many of which had freshwater lesions. The IMMS has also documented 154 sea turtle deaths. On top of these losses, the freshwater releases from the Bonnet Carré Spillway could be connected to losses sustained by the region’s aquaculture operations and fisheries. The Mississippi Department of Marine Resources (MDMR) has reported an oyster mortality rate of 80% this year, with the landings of blue crabs down 40% from an average of the last five years.8

**USDA Aquaculture Programs**

With the Corps likely immune from damage caused by the release of floodwaters from the Bonnet Carré Spillway, aquaculture producers may look for relief from the U.S. Department of Agriculture (USDA). Crop insurance is generally available to growers of large commodity crops and varies by location. While there are some crop insurance plans available to certain shellfish growers, such as clam growers in Massachusetts or oyster growers in Louisiana, crop insurance is not available for many aquaculture operators.9 However, additional USDA programs apply to aquaculture operations. Growers of crops not covered by crop insurance may be able to attain disaster assistance through the Noninsured Crop Disaster Assistance Program (NAP). NAP is administered by the USDA’s Farm Service Agency (FSA) and protects against natural disasters, including flooding, that result in lower yields or crop losses, or prevented crop plantings. Crops that are eligible for NAP include commercial crops that are grown for food for which crop insurance coverage is not available, making some aquaculture operations eligible for the program.10

However, there are some additional requirements that limit the availability of NAP coverage for aquaculture operations. For instance, the operation needs to be operated on private property that the producer leases or owns and has clearly identifiable boundaries. Moreover, the aquaculture species has to be “[k]ept in a controlled environment.” Thus, if an aquaculture producer is growing oysters offshore and leasing state-owned waterbottoms, he or she will need to check with his or her local FSA office to see if the operation is eligible for NAP coverage.

For those aquaculture operations that meet the eligibility requirements, the producer must enroll in the program by an established deadline. Notably, NAP coverage is prospective. For aquaculture, the coverage period runs from October 1-September 30 each year, and the deadline to sign up for the next year’s coverage is September 1.11 Thus, an oyster grower who had not previously enrolled in NAP for this year and who has already sustained damage to his or her oysters would not be eligible for a NAP payout and would need to talk to their local FSA agent to see what other aid may be available.12

Finally, the Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish Program (ELAP) is also administered by the FSA and is meant to cover losses not covered by other USDA disaster assistance programs and caused by adverse weather or other conditions. For farm-raised fish, ELAP covers two specific types of losses.13 First, ELAP provides compensation for the loss of feed that has been purchased or harvested for the producer’s farm-raised fish. Second, ELAP provides compensation...
for the death of farm-raised bait fish and game fish. All other losses are considered to be covered by NAP, and thus, not eligible for ELAP. Thus, this year’s losses by oyster farmers in the Gulf do not appear to be covered by ELAP.

Looking Forward

Oyster growers and fishermen in the Gulf could see additional relief from disaster declarations from either the USDA, the Department of Commerce, or the President, which could result in emergency loans or Congressionally appropriated funds. Mississippi Governor Phil Bryant has already asked the Secretary of Commerce to declare a fisheries disaster for the state in connection to the openings of the Bonnet Carré Spillway. The Governor of Louisiana has made a similar request based on the impact of the Mississippi River’s floodwaters on the fisheries of his state. Fisheries in the Gulf of Mexico could be in for a long summer, however, as forecasters have predicted this year’s Gulf dead zone to be “very large,” about the size of the state of Massachusetts, due to the heavy spring rains.

Endnotes

1 Senior Research Counsel, National Sea Grant Law Center. This material is based upon work supported by the National Agricultural Library, Agricultural Research Service, U.S. Department of Agriculture under Subaward no. UA AES 05687-03 from the National Agricultural Law Center, University of Arkansas.
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3 See 33 U.S.C. §§ 702c-702m.
7 Phil McCausland & Alex Rozier, Mississippi Residents Flooded Out for Four Months Say the EPA Could Save Them But Won’t, MISSISSIPPI TODAY (June 13, 2019).
8 Anita Lee, The Power to Open Bonnet Carré Spillway Rests 200 Miles From ‘Struggling’ Gulf Coast, SUN HERALD, June 20, 2019.
10 7 C.F.R. § 1437.303.
12 33 C.F.R. § 1437.6(d).
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17 Ray Price & Renee Johnson, Mississippi Governor Asks for Federal Fisheries Disaster Declaration, FOX8LIVE, June 7, 2019.
18 Gov Asks Feds to Declare Fisheries Disaster, APNews, June 17, 2019.
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