

In this episode, we talk about local opposition to shellfish aquaculture, with a focus on zoning conflicts in particular. With the commercial aquaculture industry rapidly growing in size and popularity in the United States, shellfish farmers often encounter barriers outside of the federal and state permitting and leasing process. Local laws regulating shellfish aquaculture vary from state-to-state and town-to-town, and can pose real challenges for shellfish farmers.

What is Zoning?

Private property owners are not necessarily free to do anything they want with their property. Local governments are responsible for ensuring the health, safety, and welfare of their citizens. One way they do this is through zoning. If someone starts an aquaculture operation on property that isn't zoned for that type of agricultural activity, neighbors may be able to shut it down.

"Zoning" is the legislative process through which a local government determines what types of activities can take place on the various parcels of land within their town. "Zoning ordinances" regulate what land can be used for, as well as the structures that can be built upon it, and "zoning codes" are made up of those ordinances.

Zoning and Shellfish Aquaculture

Zoning can have far reaching impacts on shellfish aquaculture. The first of these has to do with what types of zoning districts a city or town chooses to allow as well as where those districts are located. This decision can either pave the way for shellfish aquaculture or cut off the possibility that a farm can be located in a certain area. Typically, municipalities create districts based on what uses they think certain areas of land should be used for. These districts are fixed by law with reference to a map, and each district is assigned a different land use category, such as commercial, residential, industrial, or agricultural use.

After cities establish what districts they'll have, they have to decide what uses will be permitted in those districts. If a proposed use conforms with the district type as well as any applicable zoning ordinances, the city will permit the use. Cities can also choose to allow special or different uses in certain circumstances, and some districts are mixed use - for instance, allowing both residential and commercial uses.

These zoning decisions can greatly impact shellfish farmers. For instance, in Virginia, one property owner fought several court battles arguing that he should be allowed to operate his small commercial aquaculture business from his residential property. His property was zoned "rural/residential," and crop/livestock farming was a permitted use in this zone. The property owner believed oyster aquaculture would be allowed. The county zoning administrator disagreed, and asserted that the property owner needed a special use permit to continue aquaculture operations. The Supreme Court of Virginia ultimately agreed with the county zoning administrator, determining that the shellfish farmer's aquaculture activities weren't a permitted agricultural use within the zone.

Shellfish farmers who violate zoning ordinances can face serious legal consequences. Cities can impose civil penalties and require that farmers remove illegal structures or additions. Offenders can also be charged criminally, risking additional fines or even imprisonment. Furthermore, violations can cause a city to refuse to issue permits to the offender in the future.

Shellfish farmers do have some recourse, however. Property owners subjected to unfavorable zoning decisions can appeal or seek some form of waiver that would make a violating use allowable. In many circumstances, subjects of such zoning decisions can also file lawsuits if they are unsatisfied by the administrative appeal and waiver process.

Other Complications

Neighboring landowners may also challenge shellfish farming activities if disputes can't be resolved informally. This type of retaliation is called a "not in my back yard" or "NIMBY" dispute. Zoning-related NIMBY disputes often challenge zoning decisions based on the argument that an offending use negatively impacts the objecting party's property. NIMBY participants are most often residential property owners who object to uses they believe will negatively impact their homes. In considering these protests, cities try to balance what is best for the public as a whole with the desires of residential property owners.

Local conflicts involving species listed under the Endangered Species Act, known as the ESA, can leave interested parties similarly dissatisfied, as we have seen on the coast of NJ. The listing of the red knot as a threatened species in the area resulted in a Biological Opinion, or BiOp, that was triggered by federal permits to aquaculture operations in the state. The BiOp requires certain actions that the aquaculture farmers must take, known as Conservation Measures (CMs), to reduce the potential harm of oyster farming on the red knot population. Among other things, the CMs limit gear placement, farm work hours, and access to all farms, and have resulted in the closure of at least one farm site.

Listen to the full episode for more details on the who, what, where, why, and how of shellfish aquaculture!

Keywords: zoning, ordinance, variance, special use permit, NIMBY, Endangered Species Act

Resources:

- National Sea Grant Law Center, Zoning 101: A Stakeholder's Guide to Understanding the Zoning Decisions Impacting Shellfish Aquaculture Permitting: <http://nsglc.olemiss.edu/projects/ag-food-law/files/zoning101.pdf>
- National Sea Grant Law Center, Comparison of State Right-to-Farm Laws that Include Aquaculture: <http://nsglc.olemiss.edu/projects/ag-food-law/files/rtf-comparison.pdf>