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Using the Public Trust Doctrine to Ensure the National Forests Protect the Public from Climate Change

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Will California Law Apply to Hubbs-SeaWorld Research Institute's Offshore Aquaculture Demonstration Project? An Analysis of the Extraterritorial Application of State Aquaculture Laws

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I. Introduction

According to the National Oceanic and Atmospheric Administration (“NOAA”), “offshore aquaculture is one of the new frontiers for marine aquaculture production” that could help supply America’s growing demand for seafood.¹ U.S. aquaculture production totals about \$1 billion annually, of which approximately twenty percent is marine species.² Aquaculture of marine species, primarily molluscan shellfish (oyster, clams, mussels) and salmon, occurs around the country in near-shore coastal waters managed by

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1. NOAA, OFFSHORE AQUACULTURE IN THE UNITED STATES: ECONOMIC CONSIDERATIONS, IMPLICATIONS & OPPORTUNITIES 4 (July 2008).

2. NOAA Aquaculture Program, *Aquaculture in the United States*, <http://aquaculture.noaa.gov/us/welcome.html> (last visited July 9, 2009).

the states.³

In May 2006, California enacted stringent environmental standards for marine finfish aquaculture in state waters. The California Sustainable Oceans Act authorizes the California Fish and Game Commission (“Commission”) to lease state water bottoms or the water column for marine finfish aquaculture.⁴ Leases may only be issued if the site is appropriate for marine finfish aquaculture; the lease will not unreasonably interfere with fishing or public trust values or unreasonably disrupt wildlife or harm the environment; the operation minimizes the use of fish meal, fish oil, drugs, chemicals, and antibiotics; the operation follows best management practices approved by the Commission; the facilities are designed to prevent escape; and, all finfish are tagged or marked to assist with identification.⁵

Finfish aquaculture is not prohibited in federal waters and permits can, in theory, be secured for commercial operations. That process is currently incredibly daunting, however, as multiple federal agencies have authority to regulate various aspects of an aquaculture operation. For example, under the Rivers and Harbors Act, the Corps of Engineers issues permits for obstructions to navigation and under the Clean Water Act, the U.S. Environmental Protection Agency regulates the discharge of pollutants into navigable waters.

Five miles west of Mission Beach in San Diego, Hubbs-SeaWorld Research Institute (“HSWRI”) is planning an offshore aquaculture operation for striped bass and other fish species.⁶ HSWRI ultimately hopes to install 24, 25-meter cages in water approximately 300 feet deep.⁷ The proposed project would phase production by stocking enough juveniles to yield a maximum of 3,000 metric tons (3,307 short tons) annually by year five and beyond.⁸ HSWRI also plans to develop other aquaculture activities around the striped

3. *Id.* States exercise jurisdiction zero to three nautical miles (nm) offshore pursuant to authority granted by the Submerged Lands Act. 43 U.S.C. § 1312. For Texas and the Gulf Coast of Florida, state jurisdiction extends to three marine leagues (9 nm). *Id.*

4. CAL. FISH & GAME CODE § 15400(a).

5. *Id.* § 15400(b).

6. Hubbs-Sea World Research Institute, *Offshore Aquaculture Demonstration Project*, <http://www.hswri.org/offshore/about.html> (last visited July 14, 2009). *See also*, Mike Lee, *Institute Proposing Fish Farm in Federal Waters*, SAN DIEGO UNION TRIBUNE, Feb. 2, 2009.

7. Velo Mitrovich, *New Striped Bass Farm Tests U.S. Offshore Aquaculture Process*, *IntraFish*, Feb. 23, 2009, *available at* <http://www.hswri.org/files/pressrelease/2009-02-19%20Intrafish.pdf>.

8. HUBBS-SEA WORLD RESEARCH INSTITUTE, *OFFSHORE AQUACULTURE DEMONSTRATION PROJECT 2* (Mar. 2009), *available at* <http://www.signonsandiego.com/news/metro/images/090127aquaculture.pdf>.

bass farm, such as mussel and seaweed culture.⁹

If fully developed, HSWRI's aquaculture operation would undoubtedly enhance California's economy through additional jobs and revenues and provide a sustainable source of seafood. The project, however, could negatively impact California's environment. For example, organic wastes (excess feed and fish excrement) discharged from the cages could locally degrade water quality and adversely impact seafloor sediments.¹⁰ While the negative impacts can often be mitigated through the implementation of best management practices, such as orienting cages perpendicular to the current to assist with dispersion and limiting population densities,¹¹ they should be carefully considered during the planning and permitting process.

While the complexity and shortcomings of the federal permitting regime have been detailed in great length,¹² what role states may play in the regulation of offshore aquaculture is rarely discussed. Part II of this article discusses the states' indirect authority over offshore projects in federal waters pursuant to the Coastal Zone Management Act ("CZMA"). Part III evaluates whether states could apply their laws extraterritorially to regulate projects in federal waters. Finally, Part IV examines the preemptive effect of the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act" or "MSA") on the exercise of state authority.

II. Indirect Regulatory Authority of States over Aquaculture in Federal Waters

A. CZMA

Congress has encouraged states to plan for marine aquaculture through the CZMA. The Secretary of Commerce is authorized to provide funding to coastal states that want to amend their coastal management programs to address particular problems, such as wetlands loss, coastal hazards, or public access.¹³ When it amended the CZMA in 1996, Congress added the "adoption of procedures and policies to evaluate and facilitate the siting of public and private aquaculture facilities in the coastal zone" as a coastal zone enhancement objective eligible for grant funding.¹⁴

9. MARINE RESEARCH SPECIALISTS, HUBBS-SEA WORLD RESEARCH INSTITUTE: OFFSHORE AQUACULTURE DEMONSTRATION FINAL REPORT 6 (Oct. 2008).

10. *Id.* at 45-49.

11. *Id.* at 57.

12. Hope M. Babcock, *Grotius, Ocean Fish Ranching, and the Public Trust Doctrine: Ride 'Em Charlie Tuna*, 26 STAN. ENVTL. L. J. 3 (2007); Jeremy Firestone, et al., *Regulating Offshore Wind Power and Aquaculture: Messages from Land and Sea*, 14 CORNELL J. L. & PUB. POL'Y 71 (2004).

13. 16 U.S.C. § 1456b.

14. *Id.* § 1456b(a).

Once a state has a coastal management plan approved by NOAA, all federal agency activities, which include the issuance of permits and leases, “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.”¹⁵ The CZMA is an example of “cooperative federalism,” whereby Congress has induced states to participate in a coordinated federal program.¹⁶

The CZMA, therefore, provides a mechanism for states to influence federal decisions with respect to aquaculture in federal waters. Aquaculture operations in federal waters, especially those occurring close to the federal-state border of three nautical miles (nm), have the potential to affect land or water uses or the natural resources of a state’s coastal zone. For example, in addition to the water quality impacts mentioned previously, fish could escape from the aquaculture cages and potentially affect wild populations that frequent state waters.

Section 307 of the CZMA requires applications for federal permits “to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state [to] provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state’s approved program and that such activity will be conducted in a manner consistent with the program.”¹⁷ After receipt of its copy of the applicant’s certification, states have six months to review the consistency certification and notify the responsible agency as to whether it concurs with or objects to the applicant’s consistency certification.¹⁸ States may also issue a “conditional concurrence.”¹⁹ In its concurrence letter to the federal agency, the state must explain “why the conditions are necessary to ensure consistency with specific enforceable policies of the management program.”²⁰ If the federal agency and the applicant are unwilling to modify the application and project proposal pursuant to the state’s conditions, the state’s conditional concurrence is treated as an objection.²¹

States, therefore, effectively have a veto over federal permits. If the state objects, the federal agency may not issue the permit. Applicants may appeal a negative consistency determination to the Secretary of Commerce

15. *Id.* § 1456(c)(1)(A).

16. Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 184 and 203-204 (2005).

17. 16 U.S.C. § 1456(c)(1)(C)(3)(A).

18. *Id.*

19. *Id.*

20. 15 C.F.R. § 930.4(a)(1).

21. *Id.* § 930.4(b).

who may override the state's objection if he finds "that the activity is consistent with the objectives of [the CZMA] or is otherwise necessary in the interest of national security."²² Because a state's objection to a consistency certification could prevent the project from moving forward completely, federal regulations direct federal agencies and applicants "to develop conditions that, if agreed to [by the State] during the State agency's consistency review period and included in a Federal agency's final decision . . . would allow the State agency to concur with the federal action."²³

The consistency requirements provide California with a significant opportunity to influence the design, placement, and, ultimately, approval of offshore aquaculture operation. For example, because aquaculture cages could potentially pose a hazard to navigation, the operator must obtain a permit from the U.S. Army Corps of Engineers ("Corps") pursuant to § 10 of the Rivers and Harbors Act ("RHA").²⁴ In its § 10 application, the aquaculture operator would have to include a consistency certification explaining how the operation complies with the California's federally approved coastal management plan.

For instance, § 30231 of the California Coastal Act 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 . . . through, among other means, minimizing adverse effects of waste water discharges"²⁵ Consistency certifications, therefore, have to address the impact of projects on the biological productivity and the quality of the coastal waters and how any adverse effects would be minimized.

The Federal Consistency Unit of the California Coastal Commission ("CCC"), which handles consistency reviews in California,²⁶ could find that the offshore aquaculture project, as proposed, is not consistent with California's coastal management plan.²⁷ At that point, the agency has three options: (1) object to the consistency certification, and thereby prevent the is-

22. *Id.*

23. 15 C.F.R. § 930.4(a).

24. 33 U.S.C. § 403. ("The creation of any obstruction . . . to the navigable capacity of any of the waters of the United States is prohibited; . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army.")

25. CAL. PUB. RES. CODE § 30231.

26. California Coastal Commission, *Federal Consistency Program*, <http://www.coastal.ca.gov/fedcd/fedcndx.html> (last visited July 9, 2009).

27. It should be noted that in October 2008 consultants hired by Hubbs-Seaworld Research Institute to analyze the potential environmental impacts of its proposed aquaculture project concluded that the project should be considered consistent with the relevant provisions of the California Coastal Act. Marine Resource Specialists, *supra* note 10, at 101-104.

suance of the § 10 permit; (2) issue a conditional concurrence; or (3) negotiate with operator and the Corps during the consistency review period for the imposition of conditions to bring the aquaculture operation into compliance with California's coastal plan. The CCC, for example, might seek to incorporate environmental standards similar to those imposed on projects in state waters under the Sustainable Oceans Act. Regardless of the option a state chooses, the federal consistency provisions of the CZMA enable states to influence permitting decisions for activities in federal waters when those activities affect a land or water use or natural resource of the state's coastal zone.

B. Other Indirect Authority

States may also indirectly exert influence over offshore aquaculture by regulating aspects of offshore aquaculture operations that take place within the state's borders, such as transportation or landing of aquaculture products. For example, in Alaska "a person may not transport, possess, export from the state, or release into the waters of the state, any live fish unless the person holds a fish transport permit issued by the [Alaska Department of Fish and Game]."²⁸ The denial of a state permit to transport live fish to and from an aquaculture operation in federal waters could effectively shut down the project.

In California, "all aquaculture products sold or transported . . . must have been legally reared or imported by" a registered aquaculturist.²⁹ 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.³⁰ Section 15101 of the California Fish and Game Code requires the owner of an aquaculture facility in California to 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."³¹

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; however, its proposed facility in federal waters would not be registered. As a result, HSWRI would not be able to transport or sell the striped bass it grows in California. To eliminate this roadblock to the project, the California Department of Fish and Game is considering re-

28. ALASKA ADMIN. CODE tit. 5, § 41.005.

29. CAL. CODE REGS. tit. 14, § 238(a).

30. *Id.* at § 238(c).

31. *Id.* at § 235(a).

quiring aquaculture facilities in federal waters to register with the DFG.³²

III. Extraterritorial Application of State Law

The registration requirement, unlike the CZMA consistency provision, would result in the direct state regulation of an offshore aquaculture operation. It raises the question whether states have the authority to apply their laws beyond three nm from shore.

In some situations, states may apply their laws extraterritorially. "In matters affecting its interests a state may exercise extraterritorial jurisdiction where there is no conflict with federal or international law."³³ 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.³⁴ 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."³⁵

A. 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, a Florida citizen, 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."³⁶ Skiriotes appealed his conviction arguing that Florida did not have jurisdiction to enforce its laws on the high seas.

At the time, Florida claimed jurisdiction out to nine nm (or three marine leagues) pursuant to Spanish grants.³⁷ International law, however, only

32. Email from Devin Bartley, State Aquaculture Coordinator, California Department of Fish and Game, to Stephanie Showalter, Director, National Sea Grant Law Center (Aug. 4, 2008, 1:16:46 CDT) (on file with author).

33. 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).

34. Restatement (Third) of Foreign Relations Law of the United States § 402

35. *Id.*

36. *Skiriotes v. Florida*, 313 U.S. 69, 70 (1941).

37. Florida's jurisdictional claims were later affirmed by the Supreme Court in *United States v. Florida*, 425 U.S. 791 (1976).

granted coastal nations sovereignty over a three nm 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.³⁸

The Court concluded that Florida had a legitimate interest in “the proper maintenance of the sponge fishery.”³⁹ 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.

In 1976, the Supreme Court of Alaska went a step further. In *Alaska v. Bundrant*, the court relied on *Skiriotes* to justify the extraterritorial application of a state king crab regulation to a resident of Washington State fishing in the Bering Sea.⁴⁰ In reaching this conclusion, the court suggested the *Skiriotes* definition of “citizen” encompassed “all Americans.”⁴¹ The exercise of extraterritorial jurisdiction over both residents and non-residents is proper, according to the court, as long as “such an exercise is based on the conservation principles inherent in their migratory characteristics and not based on artificial boundaries or political circumstances.”⁴²

B. 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.”⁴³ The Alaska Supreme Court recently applied the effects doctrine to find that Alaska had jurisdiction to prosecute a man accused of committing a sexual

38. *Skiriotes*, 313 U.S. at 77.

39. *Id.* at 76.

40. 546 P.2d 530, 556 (Alaska 1976).

41. *Id.*

42. *Id.* at 554.

43. *State v. Jack*, 125 P.3d 311, 319 (Alaska 2005).

assault while on an Alaska state ferry in Canadian waters.⁴⁴ 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.”⁴⁵ The court concluded that Alaska had a substantial interest in 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.

IV. Preemptive Effect of the Magnuson-Stevens Act

Since there are no federal aquaculture rules, there would appear to be no federal conflict and no preemption of state regulation of aquaculture in federal waters. However, the NOAA Office of General Counsel (“OGC”) has taken the position that “aquaculture facilities are subject to the [Magnuson Act] because they engage in the ‘harvest’ of fish from the [exclusive economic zone] (‘EEZ’).”⁴⁶ The Magnuson Act defines fishing as “the catching, taking, or harvesting of fish”⁴⁷ and the OGC interpreted “harvesting” to connote the gathering of a crop (i.e., farmed fish).⁴⁸

Federal law is the “supreme Law of the Land”⁴⁹ and thus can preempt an otherwise valid exercise of state authority. Federal preemption of state law may be expressed or implied. The Supreme Court recognizes two types of implied preemption: field preemption, which results when federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it” and conflict preemption, which occurs when it is impossible to comply with both the federal and state regulations.⁵⁰

With the passage of the MSA, the U.S. claimed “sovereign rights and exclusive fishery management authority over all fish” located within the EEZ, the area of the ocean extending from 3 – 200 nm offshore.⁵¹ The MSA did not expressly preempt state regulation of fishing outside of state waters, al-

44. *Id.* at 318.

45. *Id.* at 322.

46. Jay S. Johnson and Margaret F. Hayes, NOAA Office of General Counsel, Memorandum for James W. Brennan, Acting General Counsel, RE: Regulation of Aquaculture in the EEZ 1 (1993) (Johnson Memo).

47. 16 U.S.C. § 1802(16)(A).

48. Johnson Memo, *supra* note 47, at 2.

49. U.S. CONST. ART. VI, cl. 2.

50. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

51. 16 U.S.C. § 1811(a).

though it did severely restrict that authority.

Under the MSA, a state may regulate a fishing vessel 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 regulations or the state laws and regulations are consistent with the FMP and federal regulations.⁵² The term fishing vessel "means any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for fishing; or aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing."⁵³

Because states retain limited concurrent authority over fishing activities in adjacent federal waters, Congress did not manifest through the MSA "an intent to occupy a given field to the exclusion of state law."⁵⁴ Rather, as the Alaska Supreme Court has stated, the MSA "alter[ed] prior law in regards to the legitimate exercise of extraterritorial state jurisdiction by replacing citizenship and close contact tests with a registration requirement."⁵⁵

In *People v. Weeren*, the California Supreme Court held that § 1856(a) of the MSA permits a state

[T]o 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.⁵⁶

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 California Department of Fish and Game 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."⁵⁷

Because NOAA views aquaculture as "fishing" for the purposes of the MSA, state regulation of aquaculture activities would be subject to the same registration limitation as state regulation of traditional fishing activities. States could regulate vessels involved in the harvesting of fish from aquacul-

52. 18 U.S.C. § 1856(a)(3)(A).

53. *Id.* § 1802(18).

54. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988).

55. *State v. F/V Baranof*, 677 Pac. 2d 1245, 1250 (Alaska 1984).

56. *People v. Weeren* 607 P.2d 1279, 1287 (Cal. 1980).

57. *Id.* at 1286. The court upheld California's regulation of swordfish because federal swordfish rules had yet to be promulgated and thus there was no conflict between federal and state law.

ture cages if the vessel is registered in the state and there is no FMP or the state laws are consistent with the federal rules. Returning to the HSWRI project, California should be able to regulate the activities of vessels engaged in aquaculture of striped bass, because striped bass is not subject to a fishery management plan developed by the Pacific Fishery Management Council.

A. Species Subject to FMP

Even when the vessel is registered in the state, state regulation of fishing may be preempted if there is a conflict with federal law. Upon receiving an FMP from a council, NOAA undertakes a review of the FMP to determine if it is consistent with the MSA and initiates a public comment period.⁵⁸ Once a FMP is approved, NMFS promulgates regulations to implement it. Federal regulations, as well as federal statutes, can preempt state law.⁵⁹

For example, in 1957, the state of Florida prohibited shrimp trolling in the “Tortugas Shrimp Bed.”⁶⁰ A large portion of this shrimp bed was beyond Florida’s territorial waters. Following the passage of the MSA, the Gulf of Mexico Fishery Management Council developed a FMP for the shrimp fishery and the Secretary of Commerce issued regulations to implement the Shrimp FMP in 1981. The FMP prohibited shrimp fishing in the “Tortugas Shrimp Sanctuary.” Although the boundaries of the Tortugas Shrimp Sanctuary substantially overlapped with the state-designated Tortugas Shrimp Bed, a portion of the shrimp bed located in federal waters fell outside the federal Sanctuary.⁶¹ That portion was therefore open to shrimp fishermen under federal law, but off-limits to shrimp fishermen who were citizens of Florida.

The U.S. District Court for the Southern District of Florida held that the Shrimp FMP preempted the Florida law prohibiting shrimp fishing in a portion of the EEZ.⁶² The court determined that the state law both conflicted with the federal law, because it prohibited fishing in an area where the FMP allowed it, and stood as an obstacle to a primary purpose of the Magnuson Act – the promotion of domestic commercial fishing.⁶³ The court enjoined the state from enforcing the state statute in a manner that conflicts with

58. 16 U.S.C.A. § 1854(a).

59. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

60. *Bateman v. Gardner*, 716 F. Supp. 595, 597 (S.D. Fla. 1989).

61. *Id.*

62. *Id.* at 598.

63. While the promotion of domestic commercial and recreational fishing remains a key purpose of the MSA, Congress now requires that such promotion occur “under sound conservation and management principles” and that fishery management plans be developed “which will achieve and maintain, on a continuing basis, the optimum yield from each fishery” 16 U.S.C. §§ 1801(b)(3) and (4).

federal regulations.⁶⁴

FMPs can also preempt indirect state regulation of a fishery. In *Se. Fisheries Ass'n v. Mosbacher*, the U.S. District Court for the District of Columbia held that the Secretary of Commerce's failure to supercede state landing and possession laws when implementing the Gulf of Mexico Red Drum FMP was arbitrary and capricious.⁶⁵ Fishing for red drum occurs in state and federal waters in the Gulf of Mexico. Concern over the increasing harvest of red drum in the EEZ in the mid-1980s led the Gulf Council to develop a Red Drum FMP in 1986. The FMP and a subsequent amendment established a 100,000-pound quota for the indirect (bycatch) fishery and provided for the application of state landing and possession laws to red drum harvested in the indirect fishery.⁶⁶

Because at least four out of the five Gulf States prohibited or restricted the possession, landing, and sale of bycatch, the court concluded that the state laws effectively prevented fisherman from landing fish harvested legally in federal waters. This prohibition, according to the court, prevented the state laws from coexisting with the federal scheme.⁶⁷ As a result, the Secretary should have expressly preempted those laws in his regulations implementing the Red Drum FMP. When the Secretary issued the final rule in 1992 to implement the Red Drum FMP following the *Mosbacher* decision, the "language specifying that, at such time as a catch of red drum is allowed, a person landing red drum, other than from a directed commercial fishery, must comply with the landing and possession laws of the state where landed" was removed.⁶⁸

B. Species Not Subject to FMP

States have more flexibility to regulate fishing activities when the species in question is not managed under a FMP. In *People v. Weeren*, as mentioned above, a California law prohibiting the use of aircraft in the taking of swordfish was upheld because, at the time of the defendant's conviction, the federal government had not yet promulgated rules for the swordfish fishery.⁶⁹ As a result, there was no federal law with which the state law might conflict. The court found it significant that "because the federal government has developed no swordfish regulations, the exclusion of any such state regulation would create the danger of wholly unregulated exploitation of that species in coastal waters and on the high seas."⁷⁰

64. *Bateman v. Gardner*, 716 F. Supp. at 598.

65. 773 F. Supp. 435,440 (D.D.C. 1991).

66. *Id.* at 439.

67. *Id.* at 441.

68. 57 Fed. Reg. 40134 (Sept. 2, 1992).

69. 607 P.2d 1279,1286 (Cal. 1980).

70. *Id.*

In *State v. F/V Baranof*, the Alaska Supreme Court upheld the seizure of an Alaska-registered vessel for violating state laws governing the harvest of king crab.⁷¹ The alleged violations occurred in federal waters. The court held that the MSA did not preempt state action in this situation, because there were no federal king crab regulations.⁷² That court reasoned that “holding that the [Magnuson Act] preempted all state regulation in the [EEZ] even in the absence of the promulgation of federal regulations would frustrate the primary purpose of the [Act], which is to provide proper management to ensure that fisheries are not depleted.”⁷³

C. State Regulation of Aquaculture in the EEZ

In the absence of federal legislation creating a regulatory framework for offshore aquaculture, which either preempts state authority or delineates the states’ proper roles, state regulation of aquaculture would depend on the preemptive effect of the MSA. HSWRI is considering stocking its cages with striped bass. The Pacific Council has not developed an FMP for striped bass and there are no federal regulations for the fishery. California may, therefore, have the authority to regulate state-registered vessels engaged in striped bass aquaculture.

The analysis changes, however, if there is an FMP, such as the aquaculture FMP under development for the Gulf of Mexico. In January 2009, the Gulf of Mexico Fishery Management Council finalized its Fishery Management Plan for Regulating Offshore Marine Aquaculture in the Gulf of Mexico.⁷⁴ The Aquaculture FMP would authorize NOAA Fisheries to issue aquaculture permits to deploy and operate aquaculture systems in the Gulf of Mexico EEZ, operate hatcheries in the EEZ for spawning and rearing of allowable species, harvest wild broodstock for aquaculture purposes, and possess, transport, land, and sell allowable aquaculture species.⁷⁵ Allowable species would include all species native to the Gulf of Mexico, such as snapper, grouper, and red drum, which are managed by the Gulf Council, excluding shrimp and corals.⁷⁶

Approval of the Aquaculture FMP could preempt any state regulation of offshore aquaculture in the Gulf of Mexico, at least with respect to species

71. 677 P.2d 1245 (Alaska 1984).

72. The Pacific Fishery Management Council had prepared an FMP for king crab and proposed regulations, but the Secretary had not yet promulgated final regulations. *Id.* at 1251.

73. *Id.*

74. Final Gulf of Mexico Fishery Management Council, *Fishery Management Plan for Management for Regulating Offshore Marine Aquaculture in the Gulf of Mexico*, available at: <http://www.gulfcouncil.org/beta/GMFMCweb/Aquaculture/Aquaculture%20FMP%20PEIS%20Final%202-24-09.pdf>.

75. *Id.*

76. *Id.* at 4.

managed by the Council. However, the Council does not manage all fish species in the Gulf of Mexico. Councils only prepare fishery management plans for fisheries that require conservation and management.⁷⁷ States might be able to regulate the aquaculture of species not managed under a FMP. However, state regulation of aquaculture in the Gulf following the approval of the FMP could conflict with the federal regulations. For example, a state regulation allowing the culture of a species prohibited by the Gulf Council's FMP would frustrate the purpose of the federal regulations.

The approval of the Gulf Council's FMP would not, however, affect state authority over aquaculture in other regions. For example, say someone wanted to culture Fish X, a species managed a Gulf Council FMP, in federal waters off the coast of Washington and the Pacific Council does not currently manage Fish X. The Gulf FMP would not preempt Washington's exercise of authority over the aquaculture operations, because there are no federal aquaculture rules that apply in that region.

77. 16 U.S.C. § 1852(h)(1).

V. Conclusion

Considerable attention has been paid to the federal government's authority to regulate aquaculture operations located outside of state waters (generally, more than three nm from shore).⁷⁸ Less attention has been paid to state government authority. Contrary to popular belief, states have significant authority under the CZMA and the Magnuson Act to influence the development of the U.S. offshore aquaculture industry. Proponents of new legislative and regulatory frameworks to govern offshore aquaculture should keep this traditional authority in mind and strive to include states in the process. After all, states will both share in the economic benefit of new aquaculture operations and the environmental risk they pose.

78. The Aquaculture FMP entered into effect on September 3, 2009 by operation of law when NOAA failed to respond to the Gulf Council's submission within the required timeframe. Press Release, National Oceanic and Atmospheric Administration, NOAA to Pursue National Policy for Sustainable Marine Aquaculture (Sept. 2, 2009), available at <http://aquaculture.noaa.gov/pdf/aqnatlpol09.pdf>. Although the FMP has taken effect, aquaculture operations are unlikely to be permitted anytime soon. Before permits may be issued, NOAA must promulgate implementing regulations and the agency has indicated that it wants to develop a comprehensive national policy for sustainable marine aquaculture before doing so. *Id.* In addition, Food & Water Watch and several other organizations filed a lawsuit on October 2, 2009 challenging the validity of NOAA's action on the Aquaculture FMP and the agency's authority to permit offshore aquaculture. Press Release, Food & Water Watch, Food & Water Watch and Other Organizations Sue Secretary of Commerce and Agencies on Offshore Aquaculture Plan (Oct. 2, 2009), available at <http://www.foodandwaterwatch.org/press/releases/food-water-watch-and-other-organizations-sue-secretary-of-commerce-and-agencies-on-offshore-aquaculture-plan20091002>.

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