



**UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration**

NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway
Silver Spring, Maryland 20910

THE DIRECTOR

SEP 3 2009

Dr. Robert Shipp, Chairman
Gulf of Mexico Fishery Management Council
2203 N. Lois Avenue, Suite 1100
Tampa, FL 33607

I write to report on the status of the Fishery Management Plan for Regulating Offshore Marine Aquaculture in the Gulf of Mexico (FMP), which the Gulf of Mexico Fishery Management Council (Council) approved on January 27, 2009, and subsequently transmitted to NOAA's National Marine Fisheries Service (NMFS) for Secretarial review, as required under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

On June 4, 2009, NMFS published in the *Federal Register* a Notice of Availability of the Council's proposed FMP. The public comment period on the FMP ended on August 3, 2009. Pursuant to the Magnuson-Stevens Act, the Secretary may approve, disapprove, or partially approve the FMP within 30 days of the end of the comment period (in this case by September 2, 2009). If the Secretary does not notify the Council within 30 days that he has taken one of the specified actions, the statute provides that the FMP shall take effect as if approved. Because the statutory period has passed without Secretarial action, the FMP has entered into effect by operation of law.

This unprecedented approach to Secretarial review of an FMP was influenced by several considerations:

NOAA's longstanding position has been that "fishing" encompasses aquaculture under the Magnuson-Stevens Act. This position is based on a 1993 legal opinion issued by NOAA's Office of General Counsel, which concluded in part

... The Act contains an exceptionally broad definition of the term "fishing" encompassing not only the catching or taking of fish, but also "harvesting" of fish and "any other activity" expected to result in, or "other operations at sea" in support of, "the catching, taking, or harvesting of fish." Use of the term "harvesting" is particularly significant since it adds an additional concept beyond "catching" or "taking"—harvesting connotes the gathering of a crop—which brings within the purview of the Act any aquaculture facility located in the EEZ.

Consistent with this interpretation, NOAA previously has approved aquaculture measures, including a live rock aquaculture program under the Gulf and South Atlantic Councils' Coral FMPs, an area closure under a Scallop FMP for aquaculture in New England, and issuance of exempted fishing permits for aquaculture research activities.

Although the FMP falls within our longstanding interpretation of the Magnuson-Stevens Act definition of "fishing," the scope of this FMP goes far beyond any aquaculture measures



previously submitted for Secretarial review under the Magnuson-Stevens Act. Our review of the Council's FMP has brought to the fore important issues of national policy regarding the manner in which offshore aquaculture is regulated in the EEZ.

As you know, the U.S. Commission on Ocean Policy, the Government Accountability Office, and task forces sponsored by the Pew Charitable Trusts and the American Fisheries Society all recommended that NOAA be the lead federal agency for regulating aquaculture in federal waters. NOAA concurs that such a comprehensive, ecosystem-based, National aquaculture program is warranted, that NOAA is the logical lead federal agency, and that the regulations should:

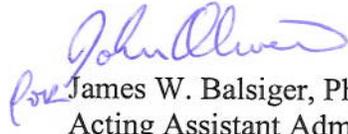
1. Include terms and conditions to conserve and protect our living marine resources and marine ecosystems and to address the fisheries management issues posed by aquaculture activities, including the placement of aquaculture facilities, species selection, genetic and ecological risks of escapes, risk of disease transfer, and other potential adverse impacts to wild fish stocks, fish habitat, ecosystem functioning and other living marine resources.
2. Ensure a coordinated federal regulatory process for permitting aquaculture facilities in federal waters and provide regulatory certainty for potential investors.
3. Allow NOAA to work with other federal agencies to clarify various regulatory responsibilities and to provide the scientific information needed for permitting decisions.

We agree that offshore aquaculture activities should be governed by a comprehensive national policy rather than by regional regulatory frameworks. We will develop such a policy in the coming months.

In the absence of a consistent national policy we do not believe it is prudent to take action on the FMP at this time. The only potentially viable basis for disapproval of the FMP that we have identified at this time is a determination that NOAA does not have the authority to regulate aquaculture under the Magnuson-Stevens Act. However, were we to disapprove this FMP on the basis that aquaculture is not "fishing" under the Magnuson-Stevens Act there would be no overarching authority to address environmental and fishery concerns for aquaculture operations in the EEZ. Although the U.S. Army Corps of Engineers and the Environmental Protection Agency have some regulatory authority over siting and water quality issues, other marine resource conservation concerns (such as fisheries management and fish habitat with respect to aquaculture in the EEZ) could not be adequately addressed without NOAA's Magnuson-Stevens Act authority. In the absence of other comprehensive legislative authority regarding offshore aquaculture, this is not an acceptable outcome. Accordingly, we are not taking action on the Plan at this time, allowing the statutory timeframe to lapse and the FMP to take effect by operation of law. As we develop a national policy, we will also examine the Plan in the context of that policy. If we determine the Plan is inconsistent with that policy, we will consider appropriate action, which could include seeking amendment or withdrawal of the plan through the Magnuson-Stevens Act process.

I want to thank the Council for the time and effort it has invested in addressing significant public concerns about the potential environmental impacts of offshore aquaculture. The FMP has served to clarify issues surrounding the development of a comprehensive national policy that will facilitate development of economically viable offshore aquaculture operations while ensuring they are environmentally sound. We will work closely with the Council and Congress to ensure a smooth transition to a national approach for regulating offshore aquaculture activities.

Sincerely,


James W. Balsiger, Ph.D.
Acting Assistant Administrator
for Fisheries