



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
MARINE FISHERIES ADVISORY COMMITTEE
Silver Spring, MD 20910

OCT 27 2014

MEMORANDUM FOR: Eileen Sobeck
Assistant Administrator for NOAA Fisheries

FROM: Keith Rizzardi *KWRizzard*
Chair, Marine Fisheries Advisory Committee

SUBJECT: Recommendation on Proposed Rule for the Aquaculture Plan for
Federal Waters in the Gulf of Mexico

This memo transmits the recommendation by the Marine Fisheries Advisory Committee (MAFAC) on the Proposed Rule for the Aquaculture Plan for federal waters of the Gulf of Mexico. MAFAC finalized and approved these recommendations unanimously at a public meeting on October 23, 2014.

These recommendations are based on the work of MAFAC's Commerce Subcommittee and were discussed and debated by the full Committee during the September 2014 meeting and the teleconference meeting on October 23, 2014. The Subcommittee identified 14 individual issues to address. During their work on these issues over the past month, members of the Subcommittee also reached out to former MAFAC members and other industry leaders with extensive experience in aquaculture operations.

The Committee respectfully requests that you forward the attached list of recommendations on behalf of the Committee to the Secretary of Commerce, other appropriate senior federal officials, and the Gulf of Mexico Fishery Management Council.

For the recommendations that require action on the part of the Gulf of Mexico Fishery Management Council, MAFAC requests that the Council consider making the changes requested *after* the Final Rule has been issued. Furthermore, the Council should choose the most expeditious process that they are afforded to make the specific changes, be that the framework procedures or amendment process.

If you or senior staff would like to receive a briefing on the recommendations from MAFAC Leadership, please contact Heidi Lovett or Paul Doremus, the Committee's Designated Federal Officer (Acting) at your earliest convenience.

Cc: Dr. Kathryn Sullivan, Under Secretary for Oceans and Atmosphere
Dr. Holly Bamford, Acting Assistant Secretary for Conservation and Management
Dr. Michael Rubino, Director of the NOAA Fisheries Office of Aquaculture





**MAFAC Recommendations on the Proposed Rule for the
Gulf of Mexico Fishery Management Council's
Fishery Management Plan for
Regulating Offshore Marine Aquaculture in the Gulf of
Mexico (Aquaculture Plan)
October 23, 2014**

MAFAC finalized and approved these recommendations unanimously at a public meeting on October 23, 2014. These recommendations are based on the work of MAFAC's Commerce Subcommittee and were discussed and debated in full during the meeting.

For the recommendations that require action on the part of the Gulf of Mexico Fishery Management Council, MAFAC requests that the Council should consider making the changes requested *after* the final rule has been issued. Furthermore, the Council should choose the most expeditious process that they are afforded to make the specific changes, be that the framework procedures or amendment process.

1. Issue: Permit time frame and renewal language.

MAFAC understands the Council considered a number of lengths of time for the initial term of the permit and the renewal. Further the Council was concerned that aquaculture in federal waters is a new activity for the Gulf.

Regardless, MAFAC is concerned that the terms chosen (10 years and 5 year renewal) are too short and will significantly affect the level of private sector interest in investing and the ability of a project to secure financing. Authorized terms should reflect leasing experiences in state waters (e.g. Maine and Hawaii) which is not new and represents decades of experience with finfish and more than a century of experiences with shellfish, e.g., 20 year initial term and 15 years for a renewal.

Recommendation: MAFAC suggests that the initial term for a permit should be 20 years and the renewal period 15 years to encourage private investment. At a minimum the terms should be raised to 15 years and 10 years, respectively. These terms are consistent with lease terms for commercial aquaculture leases in state waters. In addition, the rule should allow automatic (simple administrative) renewal if the project is in compliance.

MAFAC understands that significant changes to the rule at this time can only be made by sending it back to the Council for action and no one (the industry) wants any more delays (five years is long enough). While extremely inefficient, once the final rule is issued these changes should be made as soon as possible.

2. Issue: Permit fee.

MAFAC understands that administrative costs of the permit program were considered in developing the fee schedule.

Comment: MAFAC supports this approach to cost recovery.

3. Issue: The Rule specifies that brood stock sourcing should come from a population or sub population of fish where the facility is located.

MAFAC understands that NOAA will take steps to determine the available genetics information for populations of federally managed species that may be cultured in the Gulf under this rule. Currently, the completeness (usefulness) of the information is not known. This causes a number of concerns. We further understand the Council's intent to prohibit sourcing of brood stock from outside the Gulf.

MAFAC understands the concern over species from outside the Gulf, but is concerned that there is not sufficient species distribution information to allow the industry to site and source brood stock with the geographic limitation in the rule.

Recommendation: MAFAC requests NOAA clarify the available distribution information for potential target species and what is being done to build the data base for the Gulf. MAFAC suggests that NOAA develop a certification of origin process for brood stock and fingerlings to satisfy the requirement.

4. Issue: Allowable aquaculture species

MAFAC understands that the intention of the GMO and transgenic language is to prevent culture of these animals. Further, only federally managed species should be cultured under this program. Concerns that the rule included prohibitions on using commonly applied breeding technologies were discussed.

Recommendation: MAFAC agrees with the prohibition of GMO and transgenic species and the requirement for culture of federally managed native species, however the language is confusing and needs clarification. MAFAC requests additional language that clearly indicates that the rule does not prohibit a farmer from using commonly applied breeding techniques such as: selective breeding, polyploidy, and micro satellite genetic markers, as well as assisted reproductive technologies, e.g., hormones for spawning.

MAFAC also supports removing the term "genetically modified organism" from the rule and using "genetically engineered animal" to be consistent with FDA terminology.

5. Issue: Production caps (MSY, OSY)

MAFAC understands the Council carried out much deliberation to come up with acceptable the maximum production allowed for the Region of 62 million lbs and the single farm maximum value of 12.8 million lbs. Further we were assured there is a process in the Plan, but not specified in the rule, where these values can be changed by the Council after some experience is gained.

Recommendation: MAFAC finds the caps on production are too low and counter to the national policy of increasing domestic production. MAFAC believes production targets should be dictated by site characteristics and calculations of carrying capacity. The individual cap will be a disincentive to a farmer and finding financing.

6. Issue: Time frame to get gear and fish in the water.

MAFAC believes the currently proposed times of 2 years to install site infrastructure and 3 years to put fish in cages is too short and does not allow for any delays, e.g., getting a hatchery started and debugging it, purchasing cages from overseas, etc. We understand this is an issue that requires an amendment to the Plan, hence should not be changed now.

Recommendation: MAFAC suggests the time frames be changed to 3 years for infrastructure and 4 years for fish in the water. Further these changes should be made as soon as possible using the process in the Plan.

7. Issue: Minimum distance between operations (sites) is proposed to be 1.6 nautical miles.

MAFAC understands the primary concern for this requirement is disease transfer and they considered a range of distances.

Industry does not agree that the importance of disease transfer warrants a specific distance between farms. Oceanographic conditions, e.g., current patterns, could justify a closer distance.

Recommendation: MAFAC suggests the proposed minimum distance be dropped and a case by case evaluation of carrying capacity of a location and species being grown be considered as well as the concerns of the farmers.

8. Issue: Exclusive use of the site and permitted uses.

MAFAC understand the Council has created a mechanism to establish “restricted access zones” around a permitted facility. The prohibited activities are recreational and commercial fishing only.

Industry believes there could be advantages to giving each farm the opportunity to allow a variety of uses such as: recreational fishing and diving, other ocean recreation and eco-tourism. Alternatively, since the restricted zone does not prohibit ocean recreation (e.g., Jet Skis) and eco-tourism, these activities could be problematic if done independent of the farm operation.

Recommendation: MAFAC suggests it needs to be clarified if NOAA or the Council has the authority to regulate ocean recreation and eco-tourism at a farm site. Further provisions should be made to allow farmers to offer recreational fishing opportunities, ocean recreation, and eco-tourism opportunities at the Company’s discretion.

9. Issue: Brood stock fishing

MAFAC believes there needs to be a window of time for brood stock collection and a specific date or location can’t be accurately forecast 30 days in advance as required by the rule (p. 44 of the fishery management plan states notification “each time” the permittee will harvest brood stock).

Experience of industry with state agencies in state waters illustrates more workable approaches. In Hawaii, the farmer gets a permit to collect, good for a year and has to report what is collected. In California, the farmer gets an annual collection permit and calls the authority the day they are going out to collect.

Recommendation: Providing the specific day and location of collection, 30 days prior to going out is unrealistic, e.g., weather and fish move. This should be changed to a more practical and farmer friendly process, as in Hawaii or California (see above). This change should be made as soon as possible.

10. Issue: Operational landing of the harvest.

The rule specifies a 72 hour notice to officials before landing (offloading) and a 6 am to 6 pm window to off load fish “to dealers”, so federal authorities can be there to inspect during daylight hours. Aquaculture products have an advantage in shorter time to market and this restriction could compromise that. Product should get to market as soon as possible to meet customer needs.

Recommendation: MAFAC suggests that landing and offloading procedures be made more farmer friendly and market friendly by allowing offloading at any time with notification of the proper officials for inspection purposes. Further, the farm should be able to offload to a farm warehouse in addition to a dealer. This change should be made as soon as possible.

11. Issue: Size of the site to be twice as large as the combined area of the aquaculture system.

MAFAC understands this requirement is to provide a farmer with space for fallowing. Fallowing is a well known technique to manage excessive nutrient build up in the substrate under the cage.

MAFAC supports the selective application of fallowing as an effective management tool. We understand fallowing often involves two or more separate sites and not one contiguous site. Further, if a farmer opted for two sites the Company would have to go through a second permit process.

Recommendation: MAFAC suggests that the option for a contiguous site for fallowing be sized by the oceanographic conditions of the location and the option for one or two sites or more sites be the choice of the farmer. The Council and NOAA should not dictate the fallowing approach as it is part of the farmer’s business planning. This change should be made as soon as possible.

12. Issue: During discussions MAFAC members asked, does the Army Corps of Engineers require a lease to issue a Section 10 permit under the Rivers and Harbors Act.? Further, this relates to a previous MAFAC question to the General Council’s Office, Is a permit under MSA legally the same as a lease?

Members discussed a legal analysis by the National Sea Grant Law Center dealing with a proposed mussel farm in federal waters in New England that concluded the Section 10 permit regulations require applications to be signed as an affirmation the applicant possesses or will possess the requisite property interest to undertake the activity. Further the analysis notes there is no current mechanism to grant a property interest in federal waters.

(Note: After a court case, the Corps was able to issue the permit because the Corps did not have the authority to validate the applicant had the requisite property interest and could take the persons word.)

Related to this issue is the fundamental question, Is a permit under MSA legally equivalent to a lease? A cursory consideration concludes a permit gives a permission to do something, while a lease grants exclusive use and property rights and protections. Members thought a lease would be necessary to obtain financing and insurance.

Recommendation: MAFAC suggests NOAA should provide detailed answers to these two questions to clarify the process to obtain a NOAA permit and the other required permits under the rule and the ultimate utility of the permit, i.e., for conveying sufficient rights and protections and exclusive use.

MAFAC believes these critical questions need to be clarified so that potential farmers understand their risks and rights. NOAA should clarify the legal foundation to build a multi-million dollar aquaculture industry in federal waters.

13. Issue: Facilitation of aquaculture permits.

MAFAC understands that NOAA's aquaculture staff includes a Coordinator position for the Gulf Coast Region and the position will be the "point person" to implement aquaculture in the federal waters of the Gulf. Entrepreneurs interested in exploring getting a permit for federal waters would contact this position for information and an application.

MAFAC believes it would be extremely valuable if the Gulf Aquaculture Coordinator were required by the rule to organize a pre-application meeting or consultation to bring the potential applicant together with the regulatory agencies to informally discuss the proposed project. This would begin a dialogue where agencies could get an initial project briefing and comment on the applicants preliminary plans, i.e., sites, species, technologies, etc. and share information and issues that should be addressed in the application and permit process. This meeting could be very valuable in eliminating problematic (non-starter) sites. Ultimately this initiative could save all parties time and money.

Recommendation: MAFAC suggests the Council amend the plan to require NOAA to organize a pre-application meeting of the potential applicant and the regulatory agencies to discuss the project and receive comments. Alternatively, this could be made a NOAA policy to facilitate the permit process.

14. Issue: MAFAC is concerned the process to carry out enforcement sanctions against a farm are inadequate to govern commercial aquaculture projects.

MAFAC is aware of the regulations cited in the rule that govern enforcement sanctions for aquaculture projects (15 CFR part 904). Aquaculture projects will involve millions of dollars of investment for permitting and infrastructure and need to have secure and predictable property rights and protections that cannot be arbitrarily taken away.

MAFAC notes there does not appear to be an opportunity provided or a time set for a sanctioned project to remedy a problem, prior to a hearing before the Regional Administrator. Also, there is no appeal process indicated and the process seems to begin and end with the hearing. This seems one sided and does not describe the permit holders rights.

Recommendation: MAFAC suggests NOAA clarify the sanction process for an aquaculture project that has been subject to an enforcement action. This should be done with a view towards describing permit holder rights for the benefit of the farmer.