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Trump Administration Takes Actions to Assist U.S. Aquaculture and Fishing Industry

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The Trump administration recently announced two major actions to assist the U.S. commercial aquaculture and fishing industries. President Trump's Executive Order on Promoting American Seafood Competitiveness and Economic Growth¹ (Order) aims to increase seafood production by streamlining aquaculture regulatory permitting processes and reducing burdens on the fishing industry. The Order has major implications for offshore aquaculture in particular.

In a separate action, the Secretary of Commerce detailed how \$300M in CARES Act² funding intended to address impacts to the seafood industry caused by COVID-19 will be distributed.

This alert outlines the impacts of the Order on aquaculture and fisheries, as well as describes the initial details for distribution of CARES Act funds to aquaculture and fishing businesses.

Aquaculture Impacts

The Order mandates sweeping changes to the regulatory scheme for commercial aquaculture with ambitious goals for the expansion of domestic seafood production through aquaculture. The Order provides several tools, including the development of nationwide permits for finfish, seaweed, and multi-species aquaculture activities, and identification of Aquaculture Opportunity Areas, that have the potential to streamline development of aquaculture projects. However, the Order does not exempt aquaculture projects from any of the numerous state and federal permits required, and development of the tools identified in the Order will likely be contentious and may take years to develop. Additionally, it is unclear if any of the agency actions compelled by the Order have been funded. At a minimum, the Order shows a commitment from the President and the National Oceanic and Atmospheric Administration (NOAA) that expansion of sustainable domestic aquaculture is a high priority, particularly given the impact to the industry from the COVID-19 pandemic.

The Order mirrors many of the objectives of the Advancing the Quality and Understanding of American Aquaculture Act (AQUAA Act),³ a bill recently sponsored by Representative Collin Peterson (D-MN) and Representative Steve Palazzo (R-MS) in the U.S. House, and previously introduced in 2018 by Senator Roger Wicker (R-MS) in the Senate,⁴ that seeks to

¹ Exec. Order 13921, 85 Fed. Reg. 28,471 (May 12, 2020), <https://www.federalregister.gov/documents/2020/05/12/2020-10315/promoting-american-seafood-competitiveness-and-economic-growth>.

² Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 12005, 134 Stat. 281 (2020).

³ AQUAA Act, H.R. 6191, 116th Cong. (2019–2020).

⁴ Senators Roger Wicker (R-MS) and Brian Schatz (D-HI) are currently working on an AQUAA Act bill, a draft of which has been circulated to stakeholders for review and comment.

Trump Administration Takes Actions to Assist U.S. Aquaculture and Fishing Industry

establish a regulatory system for sustainable offshore aquaculture in the United States Exclusive Economic Zone (EEZ⁵).

To begin with, the Order clarifies that NOAA will be the lead agency for any aquaculture project that requires authorization by two or more agencies to proceed, requires preparation of an environmental impact statement (EIS) under NEPA, and is located outside of the waters of any state or territory and within the EEZ. The Order also instructs agencies to complete all environmental review and authorization decisions for applicable projects within two years of publication of the notice of intent to prepare an EIS. The Order does not exempt projects from any existing federal and state permitting requirements, which may include permits from state or local agencies under the Coastal Zone Management Act and federal permits from the U.S. Army Corps of Engineers (Corps), U.S. Coast Guard, U.S. Environmental Protection Agency, and/or U.S. Food and Drug Administration.

Through tasking NOAA as the lead agency to shepherd projects through federal permitting, the administration is taking a different approach to promoting aquaculture than previous efforts to establish a regulatory scheme for offshore aquaculture in the Gulf of Mexico EEZ, where it had delegated regulatory authority to the National Marine Fisheries Service (NMFS). Those regulations were recently invalidated by a federal court in Louisiana, which found that NOAA lacked statutory authority to regulate aquaculture.⁶ While NOAA is appealing this decision to the Fifth Circuit Court of Appeals, the potential exists that this portion of the Order may be susceptible to challenge on similar grounds.

Second, the Order instructs the Corps to develop three new nationwide permits authorizing finfish, seaweed, and multi-species aquaculture activities, respectively, in state waters and the EEZ. The Corps must develop and propose these new nationwide permits within 90 days of the date of the Order, or by early August 2020. These nationwide permits could significantly streamline federal permitting associated with such activities, similar to the nationwide permit previously approved by the Corps for shellfish aquaculture activities.

Third, the Order mandates that the Secretary of Commerce identify “Aquaculture Opportunity Areas.” Within one year of the Order, the Secretary must identify at least two geographic areas containing locations suitable for commercial aquaculture and, within two years of identifying each area, complete a programmatic EIS for each. For the following four years, the Secretary of commerce must identify two additional aquaculture opportunity areas each year and complete a programmatic EIS for each within two years of identification. The programmatic EIS for each aquaculture opportunity area may include identification of suitable species, gear, and reporting requirements for owners and operators of aquaculture facilities in those locations. Identification of suitable site locations for aquaculture and coordinated programmatic environmental review has the potential to remove significant obstacles to the expansion of domestic aquaculture, which are currently required to go through extensive environmental review and site selection analysis prior to permit approval, which has proven to be cost prohibitive for many potential applicants.

⁵ The EEZ consists of marine federal waters extending from state boundaries out to 200 nautical miles from shore. For most states except two, state jurisdiction extends from the shoreline out to three nautical miles. State jurisdiction in Texas and off the west coast of Florida extends out to nine nautical miles from shore.

⁶ See Order Granting Plaintiffs’ Motion for Summary Judgment, *Gulf Fishermen’s Association v. National Marine Fisheries Service*, No. 2:16-cv-01271, Dkt. 94 (E.D. La. Sept. 25, 2018).

Trump Administration Takes Actions to Assist U.S. Aquaculture and Fishing Industry

Fourth, by early January 2021, the Secretary of Commerce must publish on NOAA's website a single guidance document that (1) describes the federal regulatory requirements and relevant federal and state agencies involved in aquaculture permitting and operations and (2) identifies federal grant programs available for aquaculture activities. This guidance must then be updated at least every 18 months.

Fifth, the Order instructs the Secretaries of the Interior, Agriculture, and Commerce, in consultation with the Joint Subcommittee on Aquaculture, to assess whether to revise the National Aquaculture Development Plan to improve the efficiency and predictability of aquaculture permitting, including whether revisions are required to identify restrictions to operate in a specific area for a specific period of time (such as a lease). If revised, the Secretaries shall include in the National Aquaculture Development Plan programs to resolve legal or regulatory constraints that may affect aquaculture and also consider whether to include a permitting framework consistent with the other provisions in the Order. The Secretaries must continue to assess, at least every three years, whether to revise the National Aquaculture Development Plan.

Finally, the Order requires the Secretary of Agriculture to consider whether to terminate and replace the 2008 National Aquatic Animal Health Plan (NAAHP). The primary goal of the NAAHP is to develop policies and regulations to address aquatic animal diseases. The Order further instructs that any new Plan must be completed within 180 days of the Order and must include additional information about aquaculture projects. If adopted, the new Plan must be updated at least every two years.

Fisheries Impacts

While the Order focuses mainly on aquaculture, it also contains several provisions aimed at assisting the U.S. fishing industry. As with the actions for aquaculture, important details remain to be worked out, and it is unclear how quickly the fishing industry will see benefits.

The Order requires the Secretary of Commerce to request that each Regional Fishery Management Council submit a prioritized list of recommended actions to reduce burdens on domestic fishing and increase production within sustainable fisheries. These recommendations must be submitted within 180 days of the Order or by early October 2020. After evaluating those recommendations, the Secretary of Commerce will determine whether to urge the prioritization of those actions in the Trump administration's regulatory agenda. The Order also directs the Secretary of Commerce to "provide administrative and technical support" to the Regional Councils to carry out this provision.

Next, the Secretary of Commerce must propose regulations to further implement the United Nations Food and Agriculture Organization Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated (IUU) Fishing (the Port State Measures Agreement). The goal of the Port State Measures Agreement is to close the world's ports to IUU vessels and prevent illegal catch from entering international commerce. While the United States already has measures in place that comport with many requirements of the Port State Measures Agreement, the Order requires formal adoption of additional regulatory measures.

The Order also includes policy directives that instruct the Departments of State, Commerce, and Homeland Security, as well as other appropriate agencies, to cooperatively work with the public, private, and international sectors to improve the effectiveness of fisheries law

Trump Administration Takes Actions to Assist U.S. Aquaculture and Fishing Industry

enforcement. The Departments of Commerce, Health and Human Services, and Homeland Security are further instructed to prioritize training and technical assistance in key geographic areas to promote sustainable fisheries management; strengthen existing enforcement capabilities to combat illegal, unreported, and unregulated fishing; and to implement the Port State Measures Agreement.

Finally, the Order mandates the establishment of an Interagency Seafood Trade Task Force. The Task Force must provide recommendations to the Office of the United States Trade Representative for a comprehensive interagency seafood trade strategy that identifies opportunities to improve access to foreign markets, resolves technical barriers to U.S. seafood exports, and otherwise supports fair market access for U.S. seafood products.

CARES Act Allocation of \$300M to Seafood Sector

Detailed guidance on the distribution of \$300M allocation of CARES Act funds for fishery participants is still forthcoming; however, the Secretary of Commerce has provided an initial outline of the process. NOAA has determined the available amount of funds for each of some 30 coastal states, territories, and tribes, which range from \$1M each for Mariana Islands and Delaware to \$50M each for Alaska and Washington.

The funds will be distributed by the Atlantic States Marine Fisheries Commission, Pacific States Marine Fisheries Commission, and Gulf States Marine Fisheries Commission, in consultation with relevant state agencies, tribes, and territories. Each applicable state agency, tribe, or territory will be charged with developing a spending plan for their jurisdiction to be reviewed by the Commissions.

Fishery participants eligible for funding include commercial fishing businesses, processors, qualified aquaculture operations, tribes, charter/for-hire fishing businesses, fishing communities, and fishery-related businesses (other than those farther down the supply chain such as vessel repair businesses, restaurants, or seafood retailers) that can demonstrate a 35 percent reduction in revenues attributable to the COVID-19 pandemic as compared to the prior five-year average revenues, or any negative impacts to subsistence, cultural, or ceremonial fisheries. The Commissions are required to provide further details concerning the application and review process to award funds.

The Health and Economic Recovery Omnibus Emergency Solutions Act introduced in the U.S. House on May 12, 2020⁷ would provide an additional \$100M of funding to this program. Negotiations between the House and Senate on this legislation are ongoing. Industry groups have urged Congress to provide substantial additional COVID-19-related relief to the seafood sector of between \$1–1.5B.

Please contact the authors of this alert with any questions.

⁷ HEROES Act, H.R. 6800, 116th Cong. (2019–2020).

Trump Administration Takes Actions to Assist U.S. Aquaculture and Fishing Industry

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