Gulf Fishermens Association v. National Marine Fisheries Service: The Fifth Circuit Halts Offshore Aquaculture in the Gulf of Mexico by Determining that the National Marine Fisheries Service Has No Authority to Regulate It

I. OVERVIEW

In 2016, the Fishery Management Council for the Gulf of Mexico (the Gulf Council or Council) became the first regional council to promulgate a Fishery Management Plan (FMP) to regulate offshore aquaculture.[1] The Gulf Council has authority over the fisheries in the Gulf of Mexico seaward of the states of Texas, Louisiana, Mississippi, Alabama, and Florida.[2] Aquaculture, or mass-scale marine farming, creates harvests of cultured fish in massive stocks.[3] The Gulf Council's 2016 FMP contemplated approval of five to twenty aquaculture permits in the Gulf over a ten-year period.[4] After the Council submitted the plan and proposed implementing regulations for approval, the National Marine Fisheries Service (NMFS)—a division of the National Oceanic and Atmospheric Administration that oversees fishery conservation matters—neither approved nor disapproved the plan.[5] The plan therefore went into effect by operation of law, pursuant to 16 U.S.C. § 1854(a)(3).[6] NMFS

1. Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv., 968 F.3d 454, 458-59 (5th Cir. 2020).
2. *Id.* at 458; 16 U.S.C §§ 1801(b)(5), 1852(a)(1)(E).
3. *Gulf Fishermens Ass'n*, 968 F.3d at 458.
4. *Id.*
5. *Id.*
6. *Id.* at 457-58.

followed up by proposing and then finalizing a rule to implement the plan.[7] A coalition of environmental and fishing groups joined together to challenge the rule based on concerns over its environmental and commercial impacts.[8] The district court granted summary judgment to these plaintiffs on the basis that the Magnuson-Stevens Act (MSA or Act), the main piece of fishing conservation legislation, foreclosed NMFS's authority to create and regulate aquaculture, denying the NMFS deference under the *Chevron* doctrine.[9] On appeal, the U.S. Court of Appeals for the Fifth Circuit reviewed the lower court's summary judgment for Plaintiffs de novo.[10] The court *held* that the NMFS does not have authority to regulate aquaculture under the MSA because such regulation falls outside of the Act's scope, and Congress did not intend to delegate that authority to the agency. *Gulf Fishermens Ass'n v. National Marine Fisheries Service*, 968 F.3d 454 (5th Cir. 2020).

II. BACKGROUND

A. Application of the Magnuson-Stevens Act

In the 1970s, Congress found that aggressive fishing practices had destructive effects on coastal fisheries and economies.[11] In 1976, Congress sought to remedy this conservation crisis by passing the MSA to "manage the fishery resources found off the coasts of the United States."[12] The main goal of the Act is to prevent overfishing of crucial aquatic resources.[13] To combat the threats of overfishing, the MSA created Fishery Management Councils in major regions around the United States.[14] The councils are charged with embedding the national standards set forth in MSA, which include ensuring optimum yields, utilizing the best scientific information available and cost-benefit analyses, promoting efficiency, focusing on community needs, minimizing bycatch, and prioritizing safety.[15] Once

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7. *Id.*

8. *Id.* at 459 & n.10 ("Plaintiffs worry that the Rule's expansion of seafood production will harm traditional fishing grounds, reduce prices of wild fish, subject wild fish to disease, and pollute open waters with chemicals and artificial nutrients.").

9. *Id.* at 459; *see* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

10. *Gulf Fishermens Ass'n*, 968 F.3d at 459.

11. 16 U.S.C. § 1801(a).

12. *Id.* § 1801(b)(1).

13. Delta Com. Fisheries Ass'n v. Gulf of Mex. Fishery Mgmt. Council, 364 F.3d 269, 271 (5th Cir. 2004).

14. 16 U.S.C. § 1801(b)(5).

15. *Id.*; *see also* 16 U.S.C. § 1851 (establishing ten "national standards for fishery conservation and management.")

NMFS approves an FMP—or fails to disapprove an FMP within thirty days of the end of the comment period set by the federal register notice announcing availability of the plan under 16 U.S.C. § 1854(a)(1)(B)—it goes into the Federal Register and holds force of law.[16] While the national standards under MSA are important, a court's role is "not to review *de novo* whether the amendment complies with [standards set forth in the Act] but to determine whether the Secretary's conclusion that the standards have been satisfied is rational and supported by the record."[17]

In 1996, Congress amended the MSA, requiring managers of regions to begin rebuilding overfished stocks.[18] The change shifted the focus toward repopulating and growing sustainable fisheries.[19] Since then, forty-three stocks have been rebuilt.[20] However, systemic problems remain, including bycatch, destructive fishing practices, and loopholes that leave "ecologically important fish species poorly managed or unmanaged under a federal plan."[21] From this general overview, it is unclear whether offshore aquaculture fits within the scope of the activities regulable under the MSA.

B. Aquaculture in the United States

The term "aquaculture," as used in the present context, refers to the large-scale breeding and harvesting of fish in a water environment, and it has contributed to increased food security and protein production across the globe.[22] Aquaculture operations use a system of fish pens, cages, and other technologies to control the farming and production of fish and other

16. James Auslander & Kate Tipple, *Fifth Circuit Finds National Marine Fisheries Service Has No Authority to Regulate Aquaculture*, NAT'L L. REV. (Aug. 12, 2020), https://www.natlawreview.com/article/fifth-circuit-finds-national-marine-fisheries-service-has-no-authority-to-regulate [https://perma.cc/UF5L-PRHV?type=image].

17. Coastal Conservation Association v. United States Department of Commerce, 846 F.3d 99, 107 (5th Cir. 2017) (quoting C & W Fish Co. v. Fox, 931 F.2d 1556, 1562 (D.C. Cir. 1991)) (alteration in original). The Magnuson Act sets ten standards, which are (briefly): (1) preventing overfishing while achieving optimum yield, (2) using best scientific information, (3) managing individual stocks of fish, (4) nondiscrimination between residents of different States, (5) efficiency, (6) allowance for variation among fishery resources, (7) cost minimization where practicable, (8) use of economic and social data and participation of communities, (9) limit bycatch, and (10) promoting safety of human life at sea. 16 U.S.C. § 1851.

18. Molly Masterton & Alexandra Adams, *Fact Sheet: How the Magnuson-Stevens Act is Helping Rebuild U.S. Fisheries*, NRDC, 1 (Jan. 2018), https://www.nrdc.org/sites/default/files/magnuson-stevens-act-rebuild-us-fisheries-fs.pdf [https://perma.cc/8PBA-NVS8?type=image].

19. *See id.*

20. *Id.*

21. *Id.* at 2. Bycatch is the unintended catching of fish.

22. *Aquaculture Overview*, NOAA FISHERIES, https://www.fisheries.noaa.gov/topic/aquaculture [https://perma.cc/BK3M-Y295?type=image].

seafood products.[23] Commercial aquaculture began in the United States in 1955 in the Mississippi Delta.[24] In 1980, Congress passed the National Aquaculture Act to prioritize national policy in seafood production and created an interagency group to coordinate activities.[25] Both the federal government and states regulate it through a somewhat complicated process [26] The federal government, often through state environmental agencies, regulates aquaculture in navigable waters within the United States differently than offshore aquaculture,[27] in that aquaculture in navigable waters of the United States is regulated under the Clean Water Act rather than the MSA.[28]

Despite the organizational and economic benefits that an aquaculture regime can bring, environmentalists tend to take an anti-aquaculture stance because these farms can spread disease, deposit fish waste that can cause algal bloom, and increase nutrient pollution.[29] An aquaculture regime is essentially a system of "floating factory farms" that can devastate ecosystems and damage the wild-capture fishing industry.[30] The Gulf of Mexico habitat, for example, is already vulnerable due to a massive dead zone in the Gulf from nutrient pollution, and aquaculture can further threaten the area.[31] Large aquaculture operations in other countries have ended in disastrous aquaculture-related incidents, including

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23. Ariella Simke, *The Pros and Cons of Expanding United States Offshore Aquaculture in 2020*, FORBES (July 19, 2020), https://www.forbes.com/sites/ariellasimke/2020/07/19/the-pros-and-cons-of-expanding-united-states-offshore-aquaculture-in-2020/?sh=6534a170755f [https://perma.cc/Y76G-WTJB?type=image].

24. *Aquaculture: An Overview*, THE NAT'L AGRIC. L. CTR. https://nationalaglawcenter.org/overview/aquaculture/ (last visited Feb. 15, 2021) [https://perma.cc/C6PH-FYMU?type=image].

25. *Id.*

26. *Id.* This is done through permits, zoning, water use, and species certification.

27. See U.S. Pub. Int. Rsch. Grp. v. Atlantic Salmon of Maine, 339 F.3d 23, 32 (1st Cir. 2003). The First Circuit affirmed the district court's judgment which struck down a loosely regulated aquaculture regime when it granted an injunction against companies polluting through their aquaculture regimes. *See* 33 U.S.C. § 1365(a) (2000) (any citizen can bring a suit against any person "who is alleged to be in violation of an effluent standard or limitation").

28. *See generally* 33 U.S.C. §1251 *et seq*.

29. *Id.*

30. Hallie Templeton, *It's Not Déjà Vu. Congress Really is Trying to Pass Another Failing Industrial Ocean Fish Farm Bill*, FRIENDS OF THE EARTH, https://foe.org/blog/not-deja-vu-congress-really-trying-pass-another-failing-industrial-ocean-fish-farm-bill/ [https://perma.cc/5XJU-BCQT?type=image].

31. Northern Gulf of Mexico Hypoxic Zone, *Mississippi River/Gulf of Mexico Hypoxia Task Force*, EPA (last visited Feb. 20, 2021) https://www.epa.gov/ms-htf/northern-gulf-mexico-hypoxic-zone [https://perma.cc/VC5L-P4ME?type=image].

"catastrophic fish escapes, depleted wild fish stocks and wildlife fatalities."[32]

C. Agency Review

Courts may review agency action to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[33] In 1984, the Supreme Court promulgated a two-part test applicable to agency interpretations of the statutes that those agencies implement in *Chevron, U.S.A., Inc. v. Natural Resource Defense Council*.[34] A court first asks if Congress directly spoke on the issue at hand.[35] If not, the Court asks if the agency's interpretation is permissible.[36] In 2001, the U.S. Supreme Court clarified that an agency interpretation merits *Chevron* deference only 1) when "Congress delegated authority to the agency generally to make rules carrying the force of law," and 2) the agency promulgated the interpretation at issue "in the exercise of that authority."[37] Otherwise, the agency's interpretation is "eligible to claim respect according to its persuasiveness."[38]

U.S. courts rarely decide issues regarding the regulation of offshore aquaculture in federal waters. A decade prior to the noted case, environmental groups brought a similar suit against the general proposal of the Gulf Fishery Management Council Plan that would allow for offshore aquaculture permitting and operations in the Gulf of Mexico under NMFS authority.[39] Plaintiffs argued that it was beyond NMFS's authority for the agency to allow the disputed FMP to take effect.[40] They further alleged that the FMP did not comply with the national standards set forth in the MSA and would cause considerable harm to the Gulf of Mexico ecosystem.[41] The court dismissed the case, holding that the plaintiff groups lacked standing because several further steps—including the promulgation of regulations—would have to occur for them to suffer

32. Templeton, *supra* note 30.
33. 5 U.S.C. § 706(2)(A).
34. Chevron, 467 U.S. at 842-43.
35. *Id.*
36. *Id.*
37. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).
38. *Id.* at 221 (citing Skidmore v. Swift & Co., 323 U.S. 134 (1994)).
39. Gulf Restoration Network, Inc. v. Nat'l Marine Fisheries Serv., 730 F. Supp. 2d 157, 160 (D.D.C. 2010).
40. *Id.* at 163.
41. *Id.* at 170.

an injury, and thus the FMP alone was not a final agency action and the issue was not ripe for review.[42]

Later, a district court in Hawaii addressed the specific issue of offshore aquaculture.[43] In *Kahea v. National Marine Fisheries Service*, the U.S. District Court for the District of Hawaii held that the NMFS's characterization of an aquaculture project as "fishing" was not "otherwise contrary to law."[44] NMFS granted a one-year permit to a water farm group authorizing it to "stock, culture and harvest" almaco jack fish using specified equipment off the coast of the island.[45] The plaintiffs argued that aquaculture fell categorically outside of fishing in the Act, but the court disagreed.[46] In *Kahea*, the court criticized plaintiffs' argument that the definition of "fishing" in the MSA, when read alongside "harvesting" and "catching," "must be read as repeating the very same words."[47] The court held that the agency's decision to permit the stocking and harvesting of almaco jack fish was reasonable in light of the statutory language in the MSA.[48]

The *Kahea* court gave deference to NMFS's characterization of an aquaculture project as "fishing."[49] While the plaintiffs claimed that "harvesting," as it relates to aquaculture, does not fit within the MSA, the court stated that "[t]he definition of 'harvest' [that plaintiffs relied on] completely destroys any purpose for inclusion of the word 'harvesting' in the MSA."[50] The court reasoned that while reading redundancy into a statute is not problematic, the plaintiffs insistence on reading "harvesting" and "fishing" as identical when listed back-to-back in the statute was problematic.[51] The Ninth Circuit affirmed this holding in a non-precedential memorandum opinion.[52] Such a broad grant of authority to NMFS would not stand in the Fifth Circuit, however, as evidenced in the noted case.

In the noted case, a wide variety of environmental interest groups and sport fishing groups challenged the agency's regulatory rule to implement

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42. *Id.* at 166, 174.
43. *See* Kahea v. Nat'l Marine Fisheries Serv., No. 11-00474, 2012 WL 1537442, at *11 (D. Haw. 2012).
44. *Id.* at *11.
45. *Id.* at *1.
46. *Id.* at *8.
47. *Id.* at *10.
48. *Id.*
49. *Id.* at *11.
50. *Id.* at *10.
51. *See id.* at *10.
52. Kahea v. Nat'l Marine Fisheries Serv., 544 F. App'x 675, 675-76 (9th Cir. 2013).

the FMP, including the Gulf Restoration Network and food safety advocates.[53] Plaintiffs filed the case in the U.S. District Court for the Eastern District of Louisiana, relying heavily on environmental violations as well as agency authority.[54] They claimed violation of the MSA, the National Environmental Policy Act, and the Endangered Species Act.[55] Environmentalists complained that the regulations would allow permit holders to farm fish in the Gulf with "little oversight and [would] defer consideration of the environmental and socioeconomic impacts of aquaculture on a discretionary and individual applicant basis."[56] The district court held that NMFS did not have authority to regulate aquaculture in the first place, and thus did not address the environmental claims.[57]

III. COURT'S DECISION

In the noted case, the Fifth Circuit relied on a *Chevron* analysis to justify denying NMFS's authority over offshore aquaculture.[58] The court restricted its analysis to the first step, finding that the MSA "unambiguously preclude[ed]" NMFS from implementing aquaculture regulations.[59] While the Act is a "textual dead zone" in regards to aquaculture, the court stressed that the agency cannot use a "nothing equal[s] something" argument;[60] i.e., a court should not fill an ambiguous gap in a statute to allow an agency to create a new regime.[61] The lack of statutory text concerning aquaculture, the court concluded, did not automatically confer authority upon the agency to approve and oversee aquaculture operations.[62] This would open the door to unrestricted agency authority over marine operations.[63] The agency argued that the MSA does not express any intent to prohibit aquaculture regulation, but the Fifth Circuit concluded that there must be evidence of an intent to delegate, and

53. Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv., 341 F. Supp. 3d 632, 635 (E.D. La. 2018).
54. *See id.* at 637.
55. *Id.* at 635.
56. *Id.* at 637.
57. *Id.* at 635.
58. See *Chevron* 467 U.S. at 842-43.
59. Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv., 968 F.3d 454, 460 (5th Cir. 2020).
60. *See* Texas v. U.S., 809 F.3d 134, 186 (5th Cir. 2015) (holding that Congressional silence does not confer authority to act).
61. *Gulf Fishermens Ass'n*, 968 F.3d at 462.
62. *Id.* at 466.
63. *See id.* at 462.

"[i]nstead of identifying any intent to delegate authority here, the agency can claim only that Congress did not withhold the power the agency now wishes to wield."[64] Therefore, the court found that NMFS's conclusion did not fit rationally with the legislative history and intent of the Act, as Congress intended the MSA for the "conservation and management of natural resources,"[65] and aquaculture farmed fish are not "found" off the coasts of the United States and are not natural resources.[66] Thus, the court determined that NMFS's approval of the Plan's regulations was arbitrary and capricious.[67]

Next, the court devoted a lengthy portion of its opinion to differing canons of statutory construction.[68] NMFS sought to give itself expansive power based on one single word in the Act: harvesting.[69] The agency determined that "harvesting" in the definition of "fishing" under the MSA leaves sufficient room to include regulation of aquaculture.[70] Yet it placed more weight on this single word than the court found appropriate.[71] According to the court, the agency acted outside of its statutory authority by hinging an entire regulatory scheme on the creation of new meaning in an unambiguous word.[72] Instead, the court stated that "harvesting" should be read in alignment with adjacent terms listed in the Act's definitions, such as "catching" and "taking."[73] The agency opposed constructing meaning through associated words, arguing that the variety of words used in the definition was not intended to repeat the exact same meanings.[74] However, the agency offered no concrete evidence to support this claim.[75] Notably, other provisions in the Act associate "harvest" with "catch," assigning a more traditional meaning to the language, thus the court found that the statute should be read to use a traditional meaning of "fishing."[76]

The agency then leaned on the "anti-surplusage canon," which relies on context in other parts of the act to construe meaning of potentially

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64. *Id.* at 460-61, 466.
65. *Gulf Fishermens Ass'n*, 341 F. Supp. 3d at 642.
66. *Id.*
67. *Gulf Fishermens Ass'n*, 968 F.3d at 460.
68. *See id.* at 462-63.
69. *Id.* at 466.
70. *Id.* at 462.
71. *Id.* (explaining that the agency wrongly interprets harvest in the traditional sense to an "elaborate regime of farming fish for 'harvest'").
72. Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv., 341 F. Supp. 3d 632, 642 (E.D. La. 2018).
73. *Gulf Fishermens Ass'n*, 968 F.3d at 462.
74. *Id.* at 463.
75. *Id.*
76. *Id.* at 464.

ambiguous words and avoid redundancy, but the court concluded that "harvesting" (as it relates to the definition of fishing) is "no more superfluous" than "catching" and "taking" are to each other.[77] Additionally, the court noted that some legislative texts are intentionally redundant for a variety of reasons.[78] Therefore, the court noted, the agency should not try to invent new meanings in the redundancy without substantiation.[79] This philosophy, the court noted, properly fits within the context of the larger structure of the MSA.[80] The MSA states that a major long-term threat to commercial and recreational fisheries is continuing loss of marine and estuary habitat.[81] The court then noted that "when aquaculture is viewed as a 'fishery,' some of the Act's core requirements stop making sense."[82]

Further, the court looked to the legislative history of the MSA and its relation to NMFS. When Congress passed the law in 1976, it knew of aquaculture but chose not to include it.[83] Four years earlier, Congress gave the EPA, rather than NMFS, the authority to regulate aquaculture operations.[84] Further, Congress twice amended the MSA in 1992 and 2007 with references to fish farming and aquaculture and still did not grant NMFS authority.[85] The majority reasoned that aquaculture is a major economic and industrial activity that would not be overlooked by experts in the legislative process unless it was meant to fall outside the scope of the legislative framework.

Finally, the Court engaged in a brief discussion of environmental impact. The MSA requires each fishery to have a plan to "prevent overfishing and rebuild overfished stocks,"[86] and aquaculture's emphasis on mass harvesting seems inconsistent with this essential statutory language.[87] In an attempt to conform, NMFS relied on an ambiguity that this sort of regulation may help mitigate overfishing, but the court

77. *Id.* at 464-65.

78. *Id.*; *see also* Latiolais v. Huntington Ingalls, Inc., 951 F.3d 286, 294 (5th Cir. 2020) ("If the meaning of a text is discernibly redundant, courts should not invent new meaning to avoid superfluity at all costs.").

79. *Gulf Fishermens Ass'n*, 968 F.3d at 454.

80. *Id.* at 466; *see also* Sw. Elec. Power Co. v. EPA, 920 F.3d 999, 1024 (5th Cir. 2019) (reasoning that these definitions should be read reasonably with consistency in the larger statutory scheme).

81. 16 U.S.C. §1801(a)(9).

82. *Gulf Fishermens Ass'n*, 968 F.3d at 466.

83. *Id.* at 465-66.

84. *Id.* at 466.

85. *Id.* at 466 & n.26.

86. *Id.* at 457.

87. *See id.* at 467.

responded firmly that it was a mistaken reliance.[88] The nature of the MSA, simply put, fits poorly with aquaculture.[89] Even the environmental impact statement for the implementing rule acknowledges that Congress did not write the MSA for oversight of large sea fish farming or an aquaculture regime.[90]

Judge Higginson, however, filed a dissenting opinion, which relied heavily upon the "expansive authority" under the Commerce Clause to regulate all fish and other resources within the exclusive economic zone.[91] Judge Higginson maintained that, even though the MSA may be ambiguous toward an aquaculture regime, Congress's expansive definition of fishing would reach anything that can be expected as a result from the catching, taking, or harvesting of fish.[92] According to Judge Higginson, ambiguity ought not preclude NMFS's actual authority over aquaculture[93] because an expansive definition of fishing should reach the "taking or harvesting fish from offshore nets, pens, or other enclosures are 'operations at sea.'"[94] The dissent further stressed the long amount of time the Fishery Management Council spent carefully planning.[95] As such, the dissent advocated deference to the agency's interpretation, relying on the federal officials' expertise.[96]

IV. ANALYSIS AND CRITICISM

Aquaculture has recently come under scrutiny across the country.[97] The Fifth Circuit reached the correct conclusion under *Chevron* but missed a potentially valuable opportunity to consider environmental impacts relating to consistency within the MSA. The Fifth Circuit's analysis of canons of statutory construction differed substantially from the Ninth Circuit's approach in *Kahea*. In the noted case, much of the argument

88. *Id.*

89. *Id.* at 468.

90. *Id.* ("The [Act] was . . . not explicitly written for managing at sea fish farming or aquaculture operations," and, accordingly, "[m]any of the principles and concepts that guide wild stock management under the [Act] are *either of little utility or not generally applicable* to the management of aquaculture operations.").

91. *Id.* at 469 (Higginson, J. dissenting).

92. *Id.* at 470.

93. *Id.* ("In fact, ambiguity enters only when one considers the majority's points that other provisions of the Act, separate and distinct from NMFS's authorizing text, may be inapt when applied to modern methods of rearing and harvesting fish in and from enclosed offshore waters.").

94. *Id.*

95. *Id.* at 469.

96. *Id.* at 471.

97. Auslander, *supra* note 16.

hinged on the definition of harvest under the MSA.[98] The court in *Kahea* went further in its analysis with the *Chevron* test, showing that a deeper look at legislative intent and permitting consequences changes the landscape.[99]

First, the court's decision in the noted case goes against recently developed public policy, raising questions about the future of aquaculture. Just months before the Fifth Circuit decided this case, the Trump administration issued an executive order regarding aquaculture.[100] The order lamented the fact that the country imports more than eighty-five percent of seafood consumed within its borders despite available domestic resources.[101] It called for more permitting of offshore aquaculture with the goal of revolutionizing domestic seafood production and enhancing "rural prosperity."[102] It determined that the domestic policy priorities call for removing existing "burdensome" regulations.[103] A section in the order focused on removing these barriers through "request[ing] each Regional Fishery Management Council to submit, within 180 days of the date of this order, a prioritized list of recommended actions to reduce burdens on domestic fishing and to increase production within sustainable fisheries."[104] While the order appointed NOAA as the leading regulatory agency, it did not indicate restrictions, further contributing to the significance of the Fifth Circuit's ruling.[105] The Fifth Circuit's decision in the noted case slows progression of the policies promoted in the order. The Executive Order identified areas in the Gulf and Southern California as the first regions to host "aquaculture opportunity areas.[106] Experts consider these areas to be the most environmentally sustainable locations to produce seafood if done responsibly.[107] The key word here is responsibly. At the federal level, there is not an effective or clear manner to ensure responsible aquaculture operations.[108]

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98. *Id.* at *9.
99. *Id.* at *10.
100. EXEC. ORDER NO. 13921, 85 FED. REG. 28471 (May 7, 2020).
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 28472.
105. *Id.*
106. *Id.* at 28474; *see also NOAA Announces Regions for First Two Aquaculture Opportunity Areas under Executive Order on Seafood*, NOAA FISHERIES (Aug. 20, 2020) https://www.fisheries.noaa.gov/feature-story/noaa-announces-regions-first-two-aquaculture-opportunity-areas-under-executive-order.
107. *Id.*
108. Kristen L. Johns, *Farm Fishing Holes: Gaps in Federal Regulation of Offshore Aquaculture*, 86 S. CAL. L. REV. 681, 685 (2013).

Second, the court's decision poses regulatory inconsistencies and highlights uncertainties over how aquaculture will be regulated.[109] Currently, the EPA has authority over Concentrated Aquatic Animal Production (CAAP) facilities that directly discharge wastewater into U.S. territorial waters to comply with effluent guidelines, but an aquaculture farm is considered a CAAP facility subject to CWA regulations only if it is a "significant contributor of pollution to waters of the United States."[110] In the Gulf region, the Fishery Management Council cannot gain approval under NMFS, which leaves the authority over aquaculture with other agencies.[111] To further complicate matters, several agencies have control over different aspects of federal waters.[112] Divided control over aquaculture regimes prevents a streamlined process.[113] The only realistic solution is to create a uniform federal regulation of offshore aquaculture.[114] As the current regulatory regime exists, most environmental risks are overlooked,[115] including eutrophication and the use of drugs and pesticides that endanger the marine environment.[116] NOAA could use its authority to ensure environmental health and safety in aquaculture plans.[117]

Third, the court's decision provides temporary relief to environmental concerns in the Gulf. Unfortunately, the court refrained from weighing regional environmental impacts in its decision, leaving the door open for future aquaculture farming attempts. In a region with such rich natural water resources, this halting of agency action sends a message that operations cannot be undertaken, there remains great uncertainty.

While aquaculture poses threats to the Gulf, there are legitimate interests in implementing these regimes across the country. Economists have concerns over the country's reliance on imported seafood to meet domestic demand.[118] Further, companies may move operations abroad if the United States does not implement a uniform regulatory system.[119] The dissent focused on the broad authority the Commerce Clause grants

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109. Auslander, *supra* note 16.

110. 40 C.F.R. § 122.24(c)(1); *see* Johns, *supra* note 108, at 703. Territorial waters extend twelve miles offshore. *Id.*

111. Johns, *supra* note 108, at 701.

112. Auslander, *supra* note 16.

113. *Id.*

114. Johns, *supra* note 108, at 685.

115. *Id.*

116. *Id.* at 684-85, 696.

117. *Id.* at 713.

118. *See* Johns, *supra* note 108, at 693.

119. *Id.*

NMFS in relation with the MSA.[120] The federal government, over the past few years, clearly sought to prioritize this economic activity and increase seafood exports in the United States, so development of the industry is likely inevitable,[121] but the ambiguity under the current system will not ensure the promotion of healthy and sustainable marine environments.

V. CONCLUSION

The Fifth Circuit's decision in *Gulf Fishermens* brings a sliver of hope for environmental and fishing interest groups in the Gulf region. Amidst a national push for the increase of aquaculture, the court halted federal economic interests by refusing to grant authority to NMFS to implement widespread operation of aquaculture farms. The MSA simply did not create room for this sort of operation, and instead focuses on the prevention of overfishing. However, the *Gulf Fishermens* decision highlights regulatory inconsistency in oversight of aquaculture into the future. Many questions remain in the wake of the Fifth Circuit's decision, such as the effects of offshore aquaculture on small fishing operations and ultimate authority over regulation. The noted case highlights the pressing need to resolve these questions while keeping environmental concerns at the forefront in an age of pressing climate uncertainty.

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120. *See Gulf Fishermens Ass'n*, 968 F.3d at 469 (J. Higginson, dissenting).

121. *See*, Simke, *supra* note 23. It is unclear how this will change with the new administration.

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