



EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

MEMORANDUM

To: PCC Working Group

From: Elisabeth Blaug/OGC

Subject: American Norwegian Fish Farm--Application of the
National Environmental Policy Act

Date: February 9, 1993

This past summer, the interagency Policy Coordination Committee for Oceans, Environment and Science (PCC) met to discuss a proposed 47-square nautical mile aquaculture project to be sited off the coast of Massachusetts in the United States Exclusive Economic Zone (EEZ). As the State Department noted, the proposed fish farm is not only the first of its kind for the United States, but, based on its type and magnitude, is unprecedented in the EEZ. Consequently, the PCC asked the Army Corps of Engineers (Corps) to refrain from any permitting actions until jurisdictional issues regarding the EEZ are resolved. Agencies with potential jurisdiction over the proposed fish farm were asked to consider which federal laws might apply to the action.

Upon review of the facts and law, the Council on Environmental Quality (CEQ) concludes that the National Environmental Policy Act¹ (NEPA) applies to federal actions in the EEZ, and, consequently, to the proposed construction of the fish farm. Although the language of the 1983 Presidential Proclamation creating the EEZ appears to confer to the United States sufficient jurisdictional and sovereign rights to apply relevant federal law in the EEZ, there is additional factual and legal support to confirm CEQ's conclusions.

SUMMARY OF FACTS

The American Norwegian Fish Farm, Inc. (ANFFI), a private corporation, has proposed to build a commercial aquaculture facility to be located approximately 52 miles off the coast of Massachusetts, within the EEZ of the United States. The facility will consist of 90 floating salmon pens, configured as nine strings of ten pens. Each string of pens will be attached to a barge (for a total of 9 barges): each barge will in turn be anchored to the outer Continental shelf. The project will occupy an area approximately 47 square nautical miles, and would effectively preclude all other types of ocean use in the proposed area. The facility will produce nearly 50 million pounds of fish annually,

¹ 42 U.S.C. §4321.

and will involve the discharge of antibiotics, fish foods, and fish wastes into the ocean.²

On December 14, 1990, the Army Corps of Engineers (Corps) issued ANFFI a permit pursuant to §10 of the River and Harbor Act of 1899 and the Outer Continental Shelf and Land Act ("OCSLA").³ The Corps also prepared an environmental assessment (EA) pursuant to NEPA, and concluded there would be no significant impact on the environment, thus precluding the need for an environmental impact statement (EIS). Upon issuance of the permit, the Corps was informed by the Department of the Navy that the location of the original site would interfere with Navy submarines. Accordingly, the applicants revised the site of the proposed fish farm. In February 1991, the Conservation Law Foundation of New England, Inc., filed a lawsuit against the Corps, alleging that an EIS was required for the proposed fish farm. The §10 permit was withdrawn by the Corps, which asked for additional information from the applicants. Consequently, the litigation was stayed.

Since the issuance of the original EA, the Corps has stated that NEPA does not apply beyond the boundary of the territorial seas of the United States, and that any new environmental analysis will be prepared pursuant to Executive Order 12114, which requires federal agencies to evaluate the environmental impacts of their actions taken outside the territorial United States.⁴

If the Corps, as it believes, has extended §10 permitting authority over the proposed fish farm, NEPA will be triggered, as the Corps' extended statutory authority specifically provides for the application of all relevant federal laws. In addition, other federal agencies have statutory authority over activities related to the proposed fish farm which may also trigger NEPA application. Finally, a number of federal agencies apply NEPA to their actions in the EEZ.

U.S. Proclamation Establishing the EEZ

The concept of an Exclusive Economic Zone was established by Article 56 of the U.N. Convention on the Law of the Sea (UNCLOS).⁵ In 1982, the United States announced its decision not to sign the Convention; eight months later, the U.S. proclaimed sovereign rights and jurisdiction within an EEZ extending 200 nautical miles from the coastal state, giving the United States sovereign rights over living and non-living resources. While the U.S. had already asserted exclusive jurisdiction over all living resources (except tuna) in this area via the 1976 Magnuson Fisheries Conservation and Management Act ("Magnuson Act"), the Proclamation significantly increased U.S. authority over potential sources of energy and minerals, stating that within the EEZ, the United States has:

² Letter from Elizabeth Higgins Congram, Office of Environmental Review, EPA, to William F. Lawless (February 12, 1992).

³ 33 U.S.C. §403; 43 U.S.C. §1333(e).

⁴ Letter from Nancy P. Dorn, Assistant Secretary of the Army (Civil Works), to Roger E. McManus, President, Center for Marine Conservation (August 14, 1992).

⁵ 21 I.L.M. 1261.

to the extent permitted by international law, (a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and nonliving, of the seabed and subsoil and the superadjacent waters and with regard to other activities for the economic exploration of the zone, such as the production of energy from the water, currents and winds; and (b) jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having economic purposes, and the protection and preservation of the marine environment."

President Reagan reiterated the same U.S. jurisdictional and sovereign rights in the EEZ in a statement on U.S. Oceans Policy, also issued March 10, 1983.

NEPA APPLIES TO §10 RIVER AND HARBOR ACT PERMIT

Section 10 of the River and Harbor Act of 1899 gives the Corps permitting authority over the "creation of any obstruction...to the navigable capacity of any of the waters of the United States."⁷ The Outer Continental Shelf and Land Act (OCSLA) extends much of the Corps' §10 permitting authority to the outer Continental shelf.⁸ Assuming, *arguendo*, that the OCSLA extends the Corps' permitting authority to the proposed fish farm, then NEPA would clearly apply.⁹

The purpose of the National Environmental Policy Act is to declare a national policy which will encourage productive and enjoyable harmony between man and his environment..." 42 U.S.C. §4121. NEPA provides that all federal agencies shall prepare detailed environmental documents for major federal actions that may significantly affect the quality of the human environment. 42 U.S.C. §4332. Section 102 further states that agencies comply with NEPA "to the fullest extent possible"; the U.S. Supreme Court has interpreted this to mean that NEPA applies unless there is a "clear and unavoidable conflict in statutory authority."¹⁰

⁶ 22 I.L.M. 465 (March 10, 1983).

⁷ 33 U.S.C. §403.

⁸ The Continental shelf encompasses the EEZ, as the former consists of the seabed and subsoil extending beyond the territorial sea of the coastal state.

⁹ A strong argument can be made that the 1978 amendments to the OCSLA limit the Corps §10 permitting authority to installations/fixed structures/devices that are erected only for the purpose of exploiting the resources of the subsoil or seabed, thus precluding §10 permitting authority over the proposed fish farm. See 43 U.S.C. §§1333(a)(1); 1333(e). Although the House Conference Report (H.R. 1474, 2d Session 82, 1978 U.S. Code Cong. Admin. News 1681) concerning the OCSLA amendments suggests just the opposite, the Report directly contradicts the plain and unambiguous language of the statute, and the plain language of a statute prevails over "the statements of individual legislators or committees during the course of the enactment process *West Virginia University Hospitals, Inc. v. Casey*, 111 S.Ct. 1138, 1147 (1991).

¹⁰ *Flint Ridge Development Co. v. Scenic Rivers Association*, 6 ELR 20528, 2053 (1976).

Section §1333(a)(1) of OCSLA states that the "Constitution and the laws and...jurisdiction of the United States" are extended along with the artificial islands, installations and other devices which are located in the extended area pursuant to OCSLA.¹¹ Thus, if the Corps' has extended §10 permitting authority for the proposed fish farm pursuant to OCSLA, it must also must apply NEPA to this action.¹² The proposed fish farm falls squarely under NEPA's purview, and there is no statutory conflict. To date, the Corps has not provided a legal basis as to why it believes otherwise, other than its conclusory assertion that E.O. 12114 is the proper authority under which an environmental analysis should be prepared.

ANALYSIS OF ADDITIONAL POTENTIAL REGULATORY AUTHORITY OVER PROPOSED FISH FARM THAT MAY TRIGGER NEPA

Magnuson Act

If the Corps' §10 permitting authority is interpreted to extend to the proposed fish farm, NEPA will clearly apply. Even if the Corps does not have §10 permitting authority in this case, NEPA could nevertheless be triggered based on other potential federal agency involvement in the proposed fish farm. One such possible trigger is the Magnuson Act, under which the federal government has exclusive fishery management authority over all fish within the fishery conservation zone.¹³ The Act is broadly interpreted to include not only the taking of fish, but also the "harvesting" of fish and "any other activity" expected to result in the "catching, taking, or harvesting of fish."¹⁴ Although neither the Magnuson Act or the implementing regulations define "harvesting," the Commerce Department broadly interprets the term to encompass actions pursuant to the proposed fish farm.¹⁵

Section 1852 of the Magnuson Act established Regional Fishery Management Councils to prepare fishery management plans (FMP) for each fishery that requires conservation and management. The Act's implementing regulations at 50 C.F.R. §604.2 and 604.4(c) require a NEPA analysis for every FMP or FMP amendment. The regulations add that FMPs be amended "on a timely basis, as new information indicates the necessity for change in objectives or management measures." 50 C.F.R. §602.12(d).

In 1988 the New England Fishery Management Council issued an FMP, and National Marine Fisheries Service (NMFS) implemented corresponding regulations for,

¹¹ See also *Chevron Oil Co. v. Hudson*, 404 U.S. 97, which held that §1333 makes the outer continental shelf, including fixed structures thereon, an area of exclusive federal jurisdiction, thus extending the laws of the United States to that area.

¹² The Corps' regulation at 33 C.F.R. §230.7 states that all permits normally require at least an environmental assessment pursuant to NEPA.

¹³ 16 U.S.C. §1812.

¹⁴ 16 U.S.C. §1802(10).

¹⁵ Telephone conversation with Jay Johnson, Deputy General Counsel for NOAA (December 9, 1992). See also draft memorandum from Jay Johnson to Thomas Campbell, General Counsel for NOAA.

the conservation and management of Atlantic salmon.¹⁶ The FMP's implementing regulations at 50 C.F.R. §657.4(a) prohibit, *inter alia*, the use of any U.S. vessel for harvesting, fishing or landing any Atlantic salmon taken from the EEZ. Although §657.20(b) of the Atlantic Salmon implementing regulations exempts as a violation the possession of salmon harvested from aquaculture enterprises, it is unclear whether this exemption refers to aquaculture enterprises actually located in the EEZ. It is difficult to imagine that the drafters of the Atlantic FMP contemplated the existence of a 47-square nautical mile aquaculture facility within the EEZ. What is clear is that, pursuant to 50 C.F.R. §§602.12(d), 604.2, and 604.4(c), the current FMP should be amended to address this new information, an action which in turn would trigger NEPA.

ANALYSIS OF CORPS' "EXTRATERRITORIAL" CLAIM

The Corps argues that preparing an EIS pursuant to NEPA for the proposed fish farm would be an extraterritorial application of NEPA, and argues that E.O. 12114 applies instead (presumably, although it is not stated, the rationale is that the fish farm would be located in the "global commons"). This argument fails for several compelling reasons.

As explained above, the United States has sovereign rights for, among other things, the purposes of managing natural resources in the EEZ, and it has jurisdiction with regard to the establishment and use of artificial structures having economic purposes. In fact, most federal agencies which take action in the EEZ have for many years complied with NEPA for those actions taken. The Minerals Management Service complies with NEPA for oil and gas exploration, development and production in the 1EEZ under the OCSLA;¹⁷ the National Oceanic and Atmospheric Administration (NOAA) complies with NEPA for incidental take permits in the EEZ pursuant to the Marine Mammal Protection Act, and for projects related to the Ocean Thermal Energy Conservation Act which are located in the EEZ.¹⁸ Finally, both the U.S. Navy¹⁹ and the Coast Guard²⁰ have prepared NEPA documents for activities in the EEZ.

The jurisdictional and sovereign rights held by the U.S. in the EEZ are, of course, limited by the "high seas freedoms of navigation, overflight, laying of submarine cables and pipeline, and other intentionally lawful uses of the seas." Nonetheless, it is clear that the U.S. has rights of primacy which significantly distinguish the EEZ from situations presented when the U.S. acts in foreign countries or in the global commons. Applying NEPA to the proposed fish farm would not conflict with any international laws of the seas, nor would it implicate any foreign countries' sovereignty or authority or control over actions within a foreign countries' border. Finally, the environmental impacts of a 47-square nautical mile aquaculture facility in the EEZ could have

¹⁶ 50 C.F.R. Part 657.

¹⁷ 51 Federal Register 1855 (1986).

¹⁸ NOAA Directives Manual 2-10, Environmental Review Procedures, July 23, 1984.

¹⁹ 32 C.F.R. §775 (1992).

²⁰ Coast Guard, Commandant Instruction M 164575.1B, July 12, 1985.

significant impacts in the "territorial" U.S., thus requiring the preparation of an EIS.²¹ These impacts include potential genetic modification and disease in wild stocks of fish, attracting new species that may disrupt the habitat, and polluting the ocean with waste, food and antibiotics.

CONCLUSION

It is clear that several federal statutes apply to actions in the EEZ in general, and to this situation specifically. Further, NEPA applies to actions in the EEZ in general, and to the proposed fish farm in particular. Given the extensive substantive environmental concerns which have been raised in regards to the proposed fish farm.²² CEQ urges the Corps of Engineers to commence compliance with NEPA immediately.

²¹ See *NORML v. U.S. Department of State*, 452 F.Supp. 1226, 1232 (D.D.C. 1978) (an environmental impact statement is "mandated by NEPA" for actions abroad where those actions have direct environmental impacts within the United States).

²² See, e.g., *Letter from Dinah Bear, General Counsel, CEQ, to General Henry Hatch, Corps of Engineers*, outlining some of the major concerns raised to date about the proposal (May 6, 1992); *Letter from Congressman Gerry E. Studds to General Henry Hatch*, urging the preparation of EIS (March 18, 1992); *Letter from Thomas A. Bigford, Division Chief, National Marine Fisheries Service, to William A. Lawless, Chief, Regulatory Division, Corps of Engineers*, urging the Corps to prepare an EIS based on recent studies suggesting cultured fish can spread to, and cause, genetic modification, in wild stocks of Atlantic salmon (March 26, 1992); *Letter from Barry Gibson, Chairman, New England Fishery Management Council, to William F. Lawless*, urging Corps to prepare an EIS, particularly to address the impacts of escaped farm-reared fish and the transfer of disease to native populations (July 24, 1992); *Letter from John Twiss, Executive Director, Marine Mammal Commission, to Karen Kirk Adams, Chief, Permits Branch, Corps of Engineers*, outlining major environmental concerns about the proposed fish farm (May 20, 1992); *Letter from Gordon E. Beckett, Fish and Wildlife Service, to William A. Lawless*, urging Corps to prepare EIS due to uncertain impacts (February 25, 1992); *Letter from Elizabeth Higgins Congram, Office of Environmental Review, EPA, to William A. Lawless*, urging compliance with NEPA (November 24, 1992).