



December 18, 2023

Danielle Blacklock
Director, Office of Aquaculture
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
1315 East-West Highway
Silver Spring, MD 20910

RE: Identifying Aquaculture Opportunity Areas in Alaska; RTID 0648-XD381

Dear Ms. Blacklock:

Don't Cage Our Oceans is a nationwide coalition of fifty-three organizations and businesses working to stop industrial-scale offshore finfish farming while uplifting [values-based sea-food systems led by local communities](#). We represent nearly 4.5 million people nationwide, and several organizations and businesses in Alaska. Responsible forms of aquaculture are community-driven, thoughtfully-sited, and appropriately scaled, using low impact methods. We submit these comments in response to NOAA's efforts to identify aquaculture opportunity areas in Alaska - which, as we outline below, is a misnomer for this process.

In broad strokes, this request for comment asks stakeholders to provide suggestions over a number of parameters, as NOAA has begun with only considering state waters that are within 25 miles of a coastal community population center, and state waters that do not regularly experience significant sea ice cover. We begin with an analysis of NOAA's claimed authority to operate in this area, followed by the proposal itself.

Legality and Sources of Claimed Authority

In the request for comment, the agency claims that it "has directives to [...] facilitate domestic aquaculture in the U.S., including through the National Aquaculture Act of 1980, the NOAA

Marine Aquaculture Policy, and the Executive Order 13921, Promoting American Seafood Competitiveness and Economic Growth (May 7, 2020).¹ Yet it frequently blurs the line between facilitating and stepping into the realm of regulating and permitting, the latter of which the agency is not authorized to do by Congress, and forbidden to do by court order.² Moreover, all of the cited authorities do not necessarily give NOAA the “directives” that the agency believes it must uphold.

The “Aquaculture Opportunity Areas (AOAs)” in this scenario are indeed different from the highly controversial process that NOAA undertook to designate AOAs of primarily finfish aquaculture in federal waters off the coast of the Gulf of Mexico and southern California Bight. Here, NOAA is purportedly working with Alaska to designate AOAs in *state* waters. Recognizing the state’s *prohibition on finfish aquaculture*, the agency has no choice but to narrow it to identifying AOAs that would “advance invertebrate (*e.g.*, shellfish, sea cucumber) and seaweed (*e.g.*, macroalgae, kelp) aquaculture.”

These two elements alone - state waters and *not* finfish aquaculture - make this process distinct from the aforementioned AOAs, and questions the relevance of President Trump’s EO 13921 to this process at all. Indeed, EO 13921 states in part that NOAA is to help expedite permits “for aquaculture projects located outside of the waters of any State or Territory and within the exclusive economic zone of the United States.” In other words, the EO does not pertain to state waters at all.

Furthermore, while EO 13921 does nothing to bolster NOAA’s authority, the agency might argue otherwise. Executive orders cannot confer authority on agencies because the President’s powers are executive, not legislative, in nature.³ Rather, the President’s authority to act “must stem either from an act of Congress or from the Constitution itself.”⁴ As a result, EO 13921 cannot even allow NOAA to establish an *offshore* aquaculture industry in the absence of any statutory authority granted by Congress.

With the EO 13921 issue aside, the agency also claims that both its own Marine Aquaculture Policy and the National Aquaculture Act of 1980 direct it to facilitate aquaculture. The NOAA Marine Aquaculture Policy is a document that NOAA itself wrote. To claim that it has issued

¹ Federal Register. Identifying Aquaculture Opportunity Areas in Alaska. Available at: <https://www.federalregister.gov/documents/2023/10/19/2023-23084/identifying-aquaculture-opportunity-areas-in-alaska>

² See *Gulf Fishermens Ass’n v. Nat’l Marine Fisheries Serv.*, 968 F. 3d 454 (5th Cir. 2020).

³ *Doe #1 v. Trump*, 957 F.3d 1050, 1062 (9th Cir. 2020) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“[T]he President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”)).

⁴ *Id.* at 585.

itself a directive is nonsensical, yet the agency behaves as if the document *forces its hand* by directing it to then implement the very things that it hoped could get accomplished. It is the kind of peculiar logic that an agency might subscribe to when Congress has not given it the authority that certain agency officials desire.

Finally, NOAA has claimed authority to regulate aquaculture via its role in the interagency Subcommittee on Aquaculture,⁵ established by the National Aquaculture Act of 1980.⁶ This legislation identifies the U.S. Department of Agriculture as the lead agency on aquaculture, and barely assigns any responsibilities to the Department of Commerce (NOAA) at all, let alone authority to designate AOAs. The Act requires only consultation with NOAA for a biennial report on the status of aquaculture,⁷ and several studies due 35 years ago.⁸ None of these submissions required NOAA to determine locations suitable for industrial aquaculture in federal waters. **The three claimed directives can therefore be dismissed for their lack of applicability to this issue.**

If “AOAs” were not a term that already has an existing meaning and process, then this would have just simply been a plain English descriptor, and an appropriate term. Unfortunately, identifying AOAs *is already a pre-existing process* that has been undertaken by the agency in federal waters in other regions, again, according to how it interprets President Trump’s EO 13921. **Therefore, it is a misnomer to call this whole process “identifying AOAs in Alaska,” given what the term “AOA” means in other contexts, such as in EO 13921 and in failed legislation.**

Alaska and Our Coalition’s Recommendations

Alaska is an important part of our country’s beauty and heritage, and a shining example of how to proceed forward within the context of aquaculture. According to the Alaska Department of Fish and Game, “The farming of finfish in Alaska was banned in 1990 to protect wild stocks from the danger of disease and pollution as well as the possibility of escaped farmed fish displacing or breeding with wild fish.” Indeed, the state was an early adopter of restrictions on finfish aquaculture to protect its oceans and wild fish populations from the ecological and economic threats of offshore fish farming. It did so at a time when other countries were going the opposite direction by massively expanding their salmon farms. Those very same countries are now expressing regrets as their wild salmon populations have crashed, and are now

⁵ NSTC Subcommittee on Aquaculture, A Strategic Plan to Enhance Regulatory Efficiency in Aquaculture. (Feb. 2022) https://www.ars.usda.gov/sca/Documents/2022%20NSTC%20Subcommittee%20on%20Aquaculture%20Regulatory%20Efficiency%20Plan_Final%20508%20compliant.pdf.

⁶ 16 U.S.C. §§ 2801-2810.

⁷ *Id.* § 2804(d).

⁸ *Id.* § 2804(c)(1)(C), (D) (requiring the Department of Commerce to submit studies by December 31, 1987).

implementing policy measures to reverse the growth of the offshore finfish farming industry.⁹ There is a reason why Alaska is the dominant global leader when it comes to wild salmon.

In broad strokes, so long as there are a host of precautionary measures in place, the concept of growing mariculture in Alaskan state waters could potentially be beneficial to coastal communities. Issues like appropriate scale, community ownership and community support, Tribal leadership, and appropriate species and farming methods are critical for this to be able to land on the positive end of the equation. In other words, **Don't Cage Our Oceans and its members support bivalve and seaweed farming when such parameters are truly considered and there is real consultation among affected communities and stakeholders.** Indeed, our members include seaweed farmers who are doing things the right way.

As a resource, **we recommend that the agency consult the North American Marine Alliance's Aquaculture Values Report**¹⁰ from August 2023. It identified eight main aquaculture values, some of which dovetail with the very questions NOAA is asking in its RFI. Those values include how to understand food and stewardship, what "community-based" and "access" mean, equitable supply chains, place-based knowledge, what a "public resource" means, and accountability. Applied to Alaska, these values should entail strong respect for existing uses of nearshore environments, such as rural subsistence and commercial fishing livelihoods, and a commitment to community buy-in and community benefits for any proposed mariculture activities.

NOAA should also look to other departments within its own agency for advice on assessing impacts that various ropes and lines could have on **endangered and threatened species in Alaska**. The full list of endangered and threatened species that occur in Alaska includes ten species of whales, three pinnipeds, and four species of sea turtles.¹¹

As a process, Congressional efforts to legislate in this space are more inclusive and democratic process than any agency acting on its own volition - NOAA or otherwise. For example, the Coastal Seaweed Farm Act of 2023 is one such bill that explores how to address these very issues, and in a similar scenario, where there is a Federal government effort to support activities that occur in state waters.

⁹ Don't Cage Our Oceans. How the World is Responding to Industrial Aquaculture (Nov. 2023); available at <https://dontcageouroceans.org/wp-content/uploads/International-Response-Fact-Sheet-3.pdf>.

¹⁰ <https://namanet.org/reports/nama-aquaculture-values-report/>

¹¹ NOAA Fisheries. Endangered, Threatened, and Candidate Species in Alaska. Available at: <https://www.fisheries.noaa.gov/alaska/endangered-species-conservation/endangered-threatened-and-candidate-species-alaska>

Thank you for your consideration of these recommendations, and for the opportunity to comment.

Sincerely,

James Mitchell
Legislative Director
Don't Cage Our Oceans
