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A Summary of NOAA's OOA Draft Bill

NOAA has been circulating an open ocean aquaculture bill within the government for several months. The recently retired director of aquaculture for NOAA, Linda Chavez has mentioned the bill at meetings from Alaska to Ireland. The Institute for Fisheries Resources has obtained a copy of that bill, studied it and written an extensive analysis of the bill. That analysis shows that the bill is heavily slanted towards the aquaculture industry in its lack of controls of aquaculture.

The heart of the bill requires that an open ocean aquaculture (OOA) farmer will need two permits, a site permit and then an operating permit. The bill authorizes the Secretary of Commerce to "establish a process" to make U.S. waters available for OOA. Other than a requirement to "coordinate the offshore aquaculture permitting process" with other federal agencies and states and some minor procedural requirements, the Secretary of Commerce is given total discretion regarding the issuance of the permits and the conditions that can be attached to those permits. The NOAA OOA bill is, therefore, very different from many other environmental statutes which impose some limitations and/or requirements on particular facilities, activities or industries. The Clean Water Act, for example, has either requirements for specific levels of technology and/or for specific goals, leaving the mechanism of implementation to the respective department head. The NOAA OOA bill does require that any permits comply with international law and all applicable statutory and regulatory requirements. Thus all other environmental statutes apply to OOA. The bill, however, specifically excludes Magnuson-Stevens.

The NOAA OOA bill does purport to protect the environment by compelling the Secretary issue permits so as to be "compatible with the use of the Exclusive Economic Zone for navigation, fishing, resource protection, recreation, national defense, mineral exploration and development and other activities", but only "to the extent practicable". Fishing and resource protection are thus mentioned, but accorded the same weight as navigation, recreation, national defense, mineral exploration and development, and "other activities". Fishing and resource protection, moreover, are

only protected "to the extent practical" with no guidance to what that means. As such, "to the extent practical" could mean anything and, depending on the administration, will probably mean nothing. The Secretary is also required to "consider risks to and impacts on natural fish stocks, the coastal environment, water quality and habitat, marine mammals and endangered species, and the environment". Once those risks and impacts are considered, the Secretary is free to ignore them. There is no requirement that those risks be minimized or balanced against other aspects of an OOA project. There is also no requirement that the process of that consideration be public.

The bill authorizes fee collection, but the fee subdivision has no requirement that fees cover cost of reviewing permit applications and enforcement duties. There is also no requirement for royalty payment for use of a common resource as in several other federal laws. The bond requirement is limited to insuring payment of unpaid fees, the cost of removing the OOA facility at the end of the permit period, "and other financial risks as identified by the Secretary". Lacking is a requirement for the bond to cover clean-up costs, damage done by escapes, and damage done by the spread of farm based disease.

The bill also contains provisions for research and development, to shift funds collected under the Capital Construction Fund under the Merchant Marine Act of 1936, to coordinate the permitting process with other federal agencies, and to use permit fees for monitoring and enforcement. The bill does not contain an independent source of funds.

The final sections of the bill are concerned with unlawful activities, civil and criminal penalties, and forfeitures. Of particular note, civil penalties may not exceed \$120,000 for each violation with no rationale for such a limit. The criminal penalty section omits a permit violation as a criminal offense unlike almost every other federal environmental statute.

The NOAA bill does not contain a provision for 'private attorney-general lawsuits. As a result, only the government would be left to enforce the Act. The bill, finally, contains no provision for who is liable for escaped fish or for disease spread from a fish farm. ♦