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Plenty of Fish in the Sea: An Analysis of the Fifth Circuit's Refusal to Bite on Aquaculture in the Gulf

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Plenty of Fish in the Sea: An Analysis of the Fifth Circuit’s Refusal to Bite on Aquaculture in the Gulf

Mary Eliza Baker*

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INTRODUCTION

There may be plenty of fish in the sea, but there are not plenty of *wild* fish in the sea anymore.¹ Wild fish supply plateaued in the mid-1980s, and

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the American seafood industry now relies on foreign imports to keep up with the continuous demand for seafood by American consumers.² By weight, approximately 90% of the seafood consumed in the United States (“U.S.”) is imported, and over half is farmed.³ At the same time, roughly one-third of fish caught in American waters are sold in other countries due to the high foreign demand for U.S. seafood, a phenomenon experts refer to as the “Great American Fish Swap.”⁴ These titanic levels of U.S. imports have resulted in a seafood trade deficit amounting to upwards of \$16.9 billion.⁵

In the U.S., most aquaculture—more commonly referred to as fish farming—takes place in coastal waters and is regulated by state law.⁶ Regulation of fish farming in federal waters, however, proves much more difficult.⁷ The U.S. government’s attempts to tap into the offshore fish farming industry in domestic waters have been largely unsuccessful.⁸ As of 2019, the U.S. ranks 17th in aquaculture production, and marine aquaculture accounts for a mere 1.5% of the U.S. seafood supply.⁹

1. See Gunnar Knapp & Michael C. Rubino, *The Political Economics of Marine Aquaculture in the United States*, 24 REVS. FISHERIES SCI. & AQUACULTURE 213, 214 (2016).

2. *Id.*

3. *Understanding Marine Aquaculture*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/insight/understanding-marine-aquaculture> [<https://perma.cc/J345-ZFT7>] (last visited Sept. 3, 2021).

4. David Bianculli, *‘The Great Fish Swap’: How America is Downgrading its Seafood Supply*, NPR (July 17, 2015, 3:13 PM), <https://www.npr.org/2015/07/17/423490558/the-great-fish-swap-how-america-is-downgrading-its-seafood-supply> [<https://perma.cc/DR5V-BFUT>].

5. *Understanding Marine Aquaculture*, *supra* note 3.

6. See *Marine Aquaculture in NOAA Fisheries’ Southeast Region*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/southeast/aquaculture/marine-aquaculture-noaa-fisheries-southeast-region> [<https://perma.cc/EZ4J-RZLNQ>] (last visited Sept. 3, 2021).

7. See *id.* (“In the U.S., federal waters begin where state jurisdiction ends and extends out to 200 nautical miles.”).

8. See, e.g., *Gulf Fishermens Ass’n v. Nat’l Marine Fisheries Serv.*, 968 F.3d 456, 456 (5th Cir. 2020).

9. *Increase Aquaculture Production*, U.S. DEP’T OF COM., <https://internal-commerce.data.socrata.com/stories/s/2-1-Increase-Aquaculture-Production/a8ee-udq3#> [<https://perma.cc/AN3R-ZQFG>] (last visited Sept. 3, 2021); see also *Understanding Marine Aquaculture*, *supra* note 3 (“[T]he United States ranks 17th in total aquaculture production behind China, Indonesia, India, Viet Nam, Philippines, the Republic of Korea, Egypt, Norway, Chile, Myanmar, Japan, Thailand, Democratic People’s Republic of Korea, Brazil, and Ecuador.”).

Marine aquaculture regulation at the federal level would increase domestic seafood supply, decrease the massive trade deficit, create jobs in rural and coastal communities, provide quality assurance to consumers, and allow wild fishing stock a chance to recover from the effects of overfishing.¹⁰ Marine aquaculture faces opposition from some commercial fishermen fearing competition and also from environmentalists fearing pollution, degradation, and harm to the wild fish population.¹¹ However, many of these concerns stem from the negative impact of antibiotics and pesticides that resulted from early, outdated attempts at creating marine aquaculture regimes.¹² Today, the rest of the world has shifted toward sustainable aquaculture practices to balance the need for this industry against the needs of the environment, but the U.S. lags behind.¹³

The laws governing federal regulation of offshore marine aquaculture have remained murky for decades.¹⁴ The patchwork legislation and regulatory gaps have created a massive roadblock preventing federal agencies from utilizing federal waters for seafood production.¹⁵ The lack of comprehensive federal regulatory measures, along with the potential environmental and economic impacts of marine aquaculture, slows the development of commercial marine aquaculture.¹⁶ Today, courts are entering into uncharted territory as administrative agencies seek to chip away at the seafood trade deficit¹⁷ through the regulation of marine aquaculture. Courts are left to determine the legality of agency attempts to

10. See Knapp & Rubino, *supra* note 1.

11. See *id.*

12. Elan Lowenstein, *Regulating the Blue Revolution: A Sea of Change for the United States' Offshore Aquaculture Industry or a Missed Opportunity for Increased Sustainability*, 26 U. MIAMI INT'L & COMP. L. REV. 473, 476–77 (2019).

13. See *Aquaculture*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS, <http://www.fao.org/aquaculture/en/> [<https://perma.cc/FA4A-CH7T>] (last visited Sept. 3, 2021) (“FAO recognizes the fast-growing contribution aquaculture is making to food security, providing technical assistance through the implementation of the Code of Conduct for Responsible Fisheries.”).

14. *Understanding Marine Aquaculture*, *supra* note 3.

15. See *id.*

16. HAROLD F. UPTON, CONG. RSCH. SERV., R43565, REAUTHORIZATION ISSUES FOR THE MAGNUSON STEVENS FISHERY CONSERVATION AND MANAGEMENT Act 24 (2014) [<https://perma.cc/RXP5-S9NE>].

17. *Understanding Marine Aquaculture*, *supra* note 3 (“Farmed seafood products already make up half of the world’s seafood supply, but U.S. production lags behind much of the world, leading to a \$16.9 billion seafood deficit in the United States in 2020.”).

strategically maneuver around imperfect legislation to gain the benefits of marine aquaculture in federal waters.

The United States Court of Appeals for the Fifth Circuit addressed this issue in *Gulf Fishermens Ass'n v. National Marine Fisheries Service*,¹⁸ the first instance in which a federal agency attempted to create an aquaculture regime in federal waters pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act” or “MSA”), a federal statutory scheme for regulation of wild fisheries enacted in 1976.¹⁹ In basing its decision solely on methods of statutory interpretation and ending its analysis before fully determining what deference should be afforded to an administrative agency’s interpretation of the MSA, the court invalidated a thorough scheme to begin marine aquaculture in the U.S. after ten years of planning.²⁰

The issue is not that the Fifth Circuit blatantly erred in interpreting the Magnuson-Stevens Act to preclude the National Marine Fisheries Service (NMFS), a federal agency within the National Oceanic and Atmospheric Administration (NOAA), from regulating aquaculture in the Gulf. Rather, the problem is that the majority prematurely cut off the statutory analysis. *Gulf Fishermens* was the federal appellate judiciary’s first attempt at interpreting the regulation of aquaculture in U.S. waters and essentially served as a test case for any future attempts to regulate aquaculture in U.S. waters. It was an opportunity for the Fifth Circuit to analyze all of the concerns related to the aquaculture industry, including the statutory framework, economic harm, environmental harm, and other implications that inevitably accompany a vital and longstanding industry in the U.S. Further, the court failed to address the reasonableness of a federal agency’s attempt to maneuver through a poorly enacted area of law to achieve the main goals of the Magnuson-Stevens Act. The result places the country in the same confusing position as it was in 1976 when the Magnuson-Stevens Act was first enacted. As foreign countries capitalize on a highly technical and lucrative industry, the U.S., or at the very least the territory within the Fifth Circuit’s jurisdictional reach, is stuck relying on outdated traditional methods of fishing and inland and coastal aquaculture regimes. While an executive order, other administrative agencies, and pending legislation are simply working around the Fifth Circuit decision, the states within the jurisdiction of the Fifth Circuit are all lost at sea.

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

19. *See* 16 U.S.C. §§ 1801–1891(d).

20. *See Gulf Fishermens*, 968 F.3d 454.

Part I of this Note will discuss the backdrop to federal regulation of marine aquaculture in general and the factual details of *Gulf Fishermens Association v. National Marine Fisheries Service*. Part II will analyze the Fifth Circuit's decision in *Gulf Fishermens* including the methods of statutory interpretation, issues raised within the parties' briefs, and the the arguments made in the dissent. Underlying issues within the opinion will be identified and alternative outcomes will be discussed in depth. Part III will explore the future, if any, of aquaculture in the Gulf after the Fifth Circuit's decision. Additionally, the effects of the decision will be considered in light of recent activity by the executive branch, proposals to Congress, and other relevant activity by the NMFS post-*Gulf Fishermens*.

I. BACKGROUND

A. Aquaculture in General

Congress enacted the Magnuson-Stevens Act²¹ in 1976 as a response to aggressive overfishing along the U.S. coast by large commercial fishing trawler boats.²² The two primary purposes of the MSA are to conserve and manage fisheries and fishery resources in U.S. waters as well as to implement a framework to regulate fisheries and encourage sustainable fishing practices.²³

Congress delegated the administration of the MSA to the Secretary of Commerce (the "Secretary"), and the Secretary conferred this authority of administration to the NMFS, a division of the NOAA.²⁴ The MSA established Regional Fishery Management Councils nationwide.²⁵ These councils are tasked with developing Fishery Management Plans ("FMPs") consistent with the national standards of promoting sustainable fisheries management.²⁶ The primary task of the councils is "to prepare fishery management plans for its area, which must 'assess and specify the present and probable future condition of, and the maximum sustainable yield' of

21. *Id.*

22. Robert J. McManus, *America's Saltwater Fisheries: So Few Fish, So Many Fishermen*, 9 NAT. RES. & ENV'T 13, 13 (1995).

23. *See* 16 U.S.C. § 1801(b).

24. *Id.* §§ 1854–1855; *see* *Campanale & Sons, Inc. v. Evans*, 311 F.3d 109, 111 (1st Cir. 2002).

25. 16 U.S.C. § 1852(a).

26. *Partners: Regional Fishery Management Councils*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/topic/partners> [<https://perma.cc/Z9RZ-839G>] (last visited Sept. 3, 2020).

a fishery.”²⁷ The most relevant council for the purposes of this Note is the Gulf Council, which has jurisdiction over federal waters “extend[ing] from three to 200 miles off the coasts of Louisiana, Mississippi, and Alabama, and nine to 200 miles off Texas and the west coast of Florida.”²⁸ The NMFS has the responsibility of authorizing and implementing the FMPs submitted by the Regional Fishery Management Councils, which are ultimately adopted or rejected by the Secretary and subsequently put into effect by regulation if adopted.²⁹

The MSA defines “fishery” as stock or stocks of fish that can be treated as an identifiable unit and also as the fishing for stocks.³⁰ It defines “fishing” as the actual, attempted, or actions reasonably expected to result in the “catching, taking, or harvesting of fish.”³¹ The definition of fishing also includes “any operations at sea in support of, or in preparation for, any activity described in [16 U.S.C. § 1802(16)].”³² Neither the definition of fishery nor fishing under the MSA expressly includes aquaculture or fish farming.³³ In fact, the language of the original MSA did not clearly specify whether it was drafted with an intent to protect and control fish farming at all.³⁴ Instead, its language reflects Congress’s initial desire to maintain control over U.S. waters and the fishery resources within its territory.³⁵ However, the entire MSA contains broad, inclusive language that suggests it may reasonably encompass regulation of aquaculture within its scope. Subsequent revisions to the MSA added references to aquaculture or fish farming, but those references have not clarified whether Congress intended for aquaculture to be governed under the MSA.³⁶

In 2009, the Gulf of Mexico Fishery Management Council proposed an FMP to the NMFS entitled “Plan for Regulating Marine Aquaculture in

27. *Kramer v. Mosbacher*, 878 F.2d 134 (4th Cir. 1989) (quoting 16 U.S.C. §§ 1852–1853).

28. *About Us*, GULF MEX. FISHERY MGMT. COUNCIL, <https://gulfcouncil.org/about/> [<https://perma.cc/FD53-PLT9>] (last visited Sept. 3, 2021); *see also* 16 U.S.C. § 1852.

29. 16 U.S.C. §§ 1854–1855; *see also Campanale & Sons*, 311 F.3d at 111.

30. 16 U.S.C. § 1802(13).

31. *Id.* § 1802(16).

32. *Id.*

33. *See id.* § 1802(13), (16).

34. *See id.* §§ 1801–1891(d); *see also* Colby Stewart, *A Current Affair: Ensuring Sustainable Aquaculture in the U.S. Exclusive Economic Zone*, 20 VT. J. ENVTL. L. 70, 84 (2019) (“Congress drafted and passed the MSA specifically with harvesting fish from wild fisheries in mind.”).

35. *See* 16 U.S.C. §§ 1801–1891(d).

36. *See id.*

the Gulf of Mexico” (“the Plan”).³⁷ The Plan was the first of its kind—a novel attempt by the NMFS, or any council for that matter, to regulate offshore aquaculture in the U.S.³⁸ It proposed a more efficient, less burdensome permitting process for the issuance of offshore aquaculture permits.³⁹ The Plan estimated that between five and twenty offshore fish farms would take root in the Gulf within the next decade, and this aquaculture scheme would produce approximately 64 million pounds of seafood each year.⁴⁰ In 2014, the NMFS published the proposed rule (“the Rule”) to implement the Plan.⁴¹ The NOAA finalized the Rule two years later.⁴² A coalition of fishing and conservation organizations, concerned over the NMFS’s statutory authority as well as environmental and economic consequences of the regulatory scheme for offshore aquaculture set forth in the Rule, brought suit in the United States District Court for the Eastern District of Louisiana in 2018.⁴³

B. Gulf Fishermens Association v. National Marine Fisheries Service Overview

In *Gulf Fishermens*, the Eastern District of Louisiana addressed the question of whether the NMFS exceeded its statutory authority in implementing the Rule to regulate aquaculture in the Gulf of Mexico.⁴⁴ Whether the NMFS, an administrative agency, correctly interpreted the MSA required the court to address the issue under a seminal administrative

37. Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Aquaculture, 74 Fed. Reg. 26,829 (proposed June 4, 2009) (to be codified at 50 C.F.R. pt. 622).

38. NOAA FISHERIES, MARINE AQUACULTURE IN THE U.S. 2 (2019), <https://media.fisheries.noaa.gov/2021-01/fact-sheet-marine-aquaculture-in-the-us.pdf?VersionId=null>.

39. *Id.*

40. Fisheries of the Caribbean, Gulf of Mexico, South Atlantic; Aquaculture, 79 Fed. Reg. 51,424, 51,427 (proposed Aug. 28, 2014) (to be codified at 50 C.F.R. pts. 600, 622) (“This maximum level of harvest represents the average landings of all marine species in the Gulf, except menhaden and shrimp, between 2000–2006.”).

41. *Id.*

42. Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Aquaculture, 81 Fed. Reg. 1762, 1764 (Jan. 13, 2016) (to be codified at 50 C.F.R. pts. 600, 622).

43. *Gulf Fishermens Ass’n v. Nat’l Marine Fisheries Serv.*, 341 F. Supp. 3d 632, 637 (E.D. La. 2018).

44. *Id.*

law standard: *Chevron* deference.⁴⁵ The court focused on the plain text, congressional intent, statutory scheme, and legislative history of the MSA to determine whether the NMFS had the authority to regulate offshore aquaculture.⁴⁶ The court heavily emphasized the MSA's plain language such as "harvesting"⁴⁷ and "found"⁴⁸ as clear indicators that Congress was referencing "traditional fishing activities" in the MSA rather than fish farming.⁴⁹ The references to aquaculture within the MSA are few and far between, and the court asserted that regulation of aquaculture within the MSA would render the statute nonsensical.⁵⁰ The plain language and statutory scheme, combined with an ambiguous legislative intent regarding whether the MSA meant to include aquaculture, led the Eastern District to end its analysis after only the first step of *Chevron*.⁵¹ That is, under the *Chevron* analysis,⁵² the court abruptly ended the two-part determination as to the extent of judicial deference afforded to an agency interpretation before addressing step two of the analysis.⁵³

Ultimately, the district court held that the MSA did not give the NMFS authority to implement an aquaculture regulatory scheme in federal waters.⁵⁴ The court did not address the environmental and socioeconomic arguments presented by the plaintiffs because "the NMFS was without authority under the MSA to promulgate the Regulations, [so] it need not address Plaintiffs' other arguments."⁵⁵ The NMFS appealed the district court's grant of the plaintiff's motion for summary judgment.⁵⁶

In January 2019, the Fifth Circuit heard oral arguments on the same issue: whether the NMFS, as an administrative agency, had the authority to implement an aquaculture regulatory scheme under the MSA.⁵⁷ Before the Fifth Circuit released its decision, President Donald Trump signed an executive order entitled "Executive Order on Promoting American

45. *Id.*; see also discussion *infra* Part III ("[*Chevron*], the landmark administrative law case, established the test to determine whether a court must defer to agency action.").

46. *Gulf Fishermens*, 341 F. Supp. 3d at 637–41.

47. 16 U.S.C. § 1802(16).

48. *Id.* § 1801(b)(1).

49. *Gulf Fishermens*, 341 F. Supp. 3d at 638–39.

50. See *id.* at 639.

51. *Id.* at 641–42.

52. See discussion *infra* Part III.

53. See *Gulf Fishermens*, 341 F. Supp. 3d at 641–42.

54. *Id.* at 642.

55. *Id.* at 637.

56. *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 459 (5th Cir. 2020).

57. *Id.* at 454.

Seafood Competitiveness and Economic Growth,” which essentially restated the goals and regulatory scheme set forth in the Gulf Council FMP into an executive order so as to circumvent an anti-aquaculture decision by the Fifth Circuit.⁵⁸

Months after the Executive Order was signed, the Fifth Circuit affirmed the ruling by the Eastern District.⁵⁹ The Fifth Circuit made it clear that it would not create an entire aquaculture industry by reading something into the MSA that did not expressly exist in its text with the following powerful statement: “We will not bite.”⁶⁰ The Fifth Circuit approached its analysis by starting with *Chevron* Step One.⁶¹ The court held that the plain text of the MSA did not indicate congressional authorization to create and regulate marine aquaculture, referring to it as a “textual dead zone” as far as aquaculture was concerned.⁶² The court then determined whether the text of the MSA was at the very least ambiguous and open-ended enough to permit the NMFS to regulate aquaculture pursuant to the statute.⁶³ The Fifth Circuit examined the definition of “fishing”⁶⁴ and concluded that although “harvesting of fish” is included in the definition, it did not encompass aquaculture based on the other language within the definition, other provisions of the MSA, and overall lack of references to aquaculture and/or fish farming within the MSA.⁶⁵ The court supported this interpretation by explaining the flaws in including aquaculture within the scope of the MSA’s language, such as rendering certain provisions “nonsensical” or not generally applicable.⁶⁶ The Fifth Circuit ended its analysis of the MSA at this point without moving on to *Chevron* Step Two.⁶⁷

The opinion in *Gulf Fishermens* was a two-thirds majority.⁶⁸ Judge Higginson dissented, arguing the NMFS was permitted to regulate marine aquaculture in the Gulf under the MSA.⁶⁹ The dissent focused on the broad and inclusive language of the MSA’s definition of “fishing” as well as the overall aims of the statute and the responsibilities assigned to the NMFS

58. Exec. Order No. 13,921, 85 Fed. Reg. 28,471 (May 12, 2020).

59. *Gulf Fishermens*, 968 F.3d at 459.

60. *Id.* at 460.

61. *Id.*

62. *Id.* at 462.

63. *Id.*

64. *Id.* at 462–66.

65. *Id.*

66. *Id.* at 468.

67. *See id.*

68. *Id.*

69. *Id.* at 469.

such as the regulation of lobster traps, mussel lines, towed mesh cages, and other non-traditional methods of fishing.⁷⁰ Judge Higginson criticized the majority's decision to stop the analysis at *Chevron* Step One, arguing that "even if the Magnuson Act's capacious regulatory grant does not unequivocally comprehend aquaculture, I would say it is at least ambiguous."⁷¹ While the MSA does not unambiguously allow for aquaculture regulation, the majority focused too heavily on the more restrictive words in the statute while simultaneously ignoring the expansive language.⁷² The dissent further reasoned that the provisions rendered ineffective or incompatible when including aquaculture in the definition of "fishing" did not necessarily resolve the ambiguity issue.⁷³ After moving to *Chevron* Step Two, Judge Higginson concluded that the NMFS interpreted the MSA reasonably when fitting aquaculture in the meaning of "fishing" and when considering the broad language incorporated throughout the MSA.⁷⁴ In fact, Judge Higginson asserted, "[M]odern aquaculture methods of fishing fit vitally in, not out of, the Magnuson Act regime."⁷⁵ However, if that is not sufficiently clear to confer authority to the NMFS, the ambiguity of the MSA "oblig[es] [the court] to defer to the NMFS's reasonable interpretation before invalidating over a decade of state and federal officials' efforts. . . to draft [the Plan] that reconciles myriad commercial, environmental, and recreational interests."⁷⁶

II. ANALYSIS

A. *Chevron Step Zero*

Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., a landmark administrative law case, established the test to determine whether and to what extent a court must defer to agency action.⁷⁷ The *Chevron* analysis is a two-step formula used to determine the appropriateness of judicial deference to agency interpretations of statutory

70. *Id.* at 469–70.

71. *Id.* at 470.

72. *Id.*

73. *Id.*

74. *Id.* at 470–71.

75. *Id.* at 471.

76. *Id.*

77. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

ambiguities or legislative silence.⁷⁸ The Fifth Circuit in *Gulf Fishermens* immediately started its review with a *Chevron* analysis. In doing so, the court may have improperly skipped *Chevron* Step Zero.

In *Gulf Fishermens*, the Fifth Circuit began the *Chevron* analysis immediately without any reference to *United States v. Mead Corporation*, commonly referred to as “*Chevron* Step Zero.”⁷⁹ Step Zero is the preliminary step used to determine whether the court should apply *Chevron* deference to an agency interpretation at all.⁸⁰ The Supreme Court in *Mead* clarified *Chevron* by explaining that *Chevron* deference, the highest level of judicial deference, is only applicable when Congress intended for an agency to speak with the force of law.⁸¹ If Congress intended for the agency to have such authority, it falls within the “safe harbor” and is entitled to *Chevron* deference.⁸² Otherwise, the interpretation fails Step Zero and should instead receive a different, lower level of agency deference, such as *Skidmore* deference,⁸³ instead.⁸⁴

Courts commonly ignore Step Zero when interpreting FMPs⁸⁵ and instead generally assume the FMPs are entitled to *Chevron* deference.⁸⁶

78. *See id.* at 842–43.

79. *U.S. v. Mead Corp.*, 533 U.S. 218, 229 (2001).

80. *Id.*

81. *Id.*

82. *Id.*

83. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (“The weight of [an agency interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”).

84. *Chevron*, 467 U.S. 837. (1984).

85. *See, e.g., Oregon Trolles Ass’n v. Gutierrez*, 452 F.3d 1104, 1119 (9th Cir. 2006) (“Our obligation to give *Chevron* deference to the NMFS’s [National Marine Fishery Service] interpretation of the Act that it is charged to administer [resolves the question in this case] . . .”). Many courts cite *Chevron* when discussing the standard for judicial review in a challenge to an FMP or other regulation under the MSA. *See State of New York v. Locke*, No. 08-CV-2503, 2009 WL 1194085, at *11 (E.D.N.Y. Apr. 30, 2009) (citing *Chevron*, 467 U.S. at 842–43 (1984)); *Fisherman’s Finest, Inc. v. Gutierrez*, No. C07-1574MJP, 2008 WL 4889958, at *3 (W.D. Wash. Nov. 12, 2008) (citing *Chevron*, 467 U.S. at 842–43).

86. Kate Stanford, *The Need for Chevron Step Zero in Judicial Review of Interpretations Developed by Fishery Management Councils*, 19 N.Y.U. ENV’T L.J. 380, 402 (2012) (“[C]ourts neglect to perform anything resembling a *Mead*/Step Zero analysis, most likely assuming that these plans fall into the *Mead* safe harbor, which assumes that interpretations promulgated through notice-and-comment rulemaking carry the ‘force of law.’”).

However, unlike the cases where courts have afforded *Chevron* deference to FMPs, FMPs developed by a regional council, like the Plan at issue, are not subject to the Federal Advisory Committee Act.⁸⁷ Under the MSA, regional councils make fishery management decisions and perform much of the statute's regulatory action.⁸⁸ The NMFS made clear that it only made editorial, non-substantive changes to the FMP submitted by the Gulf Coast Regional Council.⁸⁹

Since the interpretation at issue started from a council-developed FMP, a *Chevron* analysis may be inappropriate because the Secretary of Commerce, as the statutory designee acting through the NMFS, did not make the interpretation at issue in *Gulf Fishermens*.⁹⁰ The court would not defer to a decision by the Secretary or NMFS but rather to the interpretation of the Gulf Council.⁹¹ In fact, after the FMP was submitted for public comment pursuant to the MSA,⁹² the Secretary took no affirmative action, neither approving nor disapproving the Plan.⁹³ Thus, the FMP took effect by operation of law rather than by the statutory design.⁹⁴ The Gulf Council is characterized by decreased political accountability, high levels of technical expertise, potential biases, and other characteristics not found with official statutory designees.⁹⁵ Thus, the court may have been able to skip a *Chevron* analysis altogether in *Gulf Fishermens*.

87. See 16 U.S.C. § 1852(i)(1).

88. Charles T. Jordan, *How Chevron Deference is Inappropriate in U.S. Fishery Management and Conservation*, 9 SEATTLE J. ENVTL. L. 177, 181 (2019).

89. See Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Aquaculture, 81 Fed. Reg. 1762, 1769 (Jan. 13, 2016) (to be codified at 50 C.F.R. pts. 600, 622).

90. Stanford, *supra* note 86.

91. Jordan, *supra* note 88.

92. 16 U.S.C. § 1854(a)(1).

93. See Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Aquaculture, 81 Fed. Reg. at 1762.

94. 16 U.S.C. § 1854(a)(3).

95. Stanford, *supra* note 86, at 411. (“Councils have several characteristics—decreased political accountability, susceptibility to capture, and regionalization—that cast doubt on the effectiveness of Council-developed policies and suggest that Council-developed interpretations should not survive Chevron Step Zero.”); see also Jordan, *supra* note 88, at 219 (“The procedures for creating and amending the FMPs and regulations under the MSFCMA do not conform to those of traditional agency actions.”).

According to *Mead*, the court may have been justified in applying *Skidmore* deference to the interpretations in the council-developed FMP.⁹⁶ If the *Gulf Fishermens* court had taken the *Mead* approach rather than the *Chevron* approach, it is uncertain whether it would have reached a different conclusion since *Chevron* offers a higher level of deference to administrative agencies. While *Skidmore* deference is not binding, it requires the court to consider the persuasive weight of an agency's interpretation, including consistency with overall congressional purpose, agency expertise, and other persuading factors.⁹⁷ However, consideration of this issue pursuant to *Skidmore* may have led to the permissance of an aquaculture regime or may have given the Fifth Circuit more support from refusing to permit the NMFS from regulating marine aquaculture in the Gulf. While the intricacies of the type of deference courts should apply are not the focus of this Note, recognizing the applicability of *Chevron* to FMPs as questionable is important and should be acknowledged before courts jump into *Chevron* in future litigation.

B. *Chevron* Step One

1. *Silence*

The Fifth Circuit opinion began with the two-step *Chevron* framework to determine whether the NMFS interpretation of the MSA was sufficient for judicial deference.⁹⁸ The first prong of *Chevron* necessitates an inquiry into “whether Congress has directly spoken on the precise question at issue” by “exhausting all traditional tools of construction including text, structure, history, and purpose.”⁹⁹ If Congress has spoken to the issue in

96. *U.S. v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evidenced in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”)).

97. *Baylor Cnty. Hosp. Dist. v. Price*, 850 F.3d 257, 261 (5th Cir. 2017) (“The degree of deference depends on ‘the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.’”).

98. *See Gulf Fishermens Ass’n v. Nat’l Marine Fisheries Serv.*, 968 F.3d 454, 460 (5th Cir. 2020).

99. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Gulf Fishermens*, 968 F.3d at 460.

question, the *Chevron* analysis ends at Step One.¹⁰⁰ If Congress has not spoken, the court must then examine the second prong of *Chevron* to determine whether the administrative agency interpreted the statutory ambiguity or silence reasonably.¹⁰¹ If the agency's interpretation is deemed reasonable, the court must defer to it.¹⁰²

As is typical in most statutory interpretations, the court explained it would begin its analysis with the text of the MSA to determine if Congress was silent as to whether the MSA includes regulation of marine aquaculture.¹⁰³ The Fifth Circuit referred to the MSA as a "textual dead zone" regarding aquaculture or the creation of an entire aquaculture regime.¹⁰⁴ The three instances where aquaculture and/or fish farming are referenced in the MSA were considered insignificant and disregarded by the court in their plain text analysis.¹⁰⁵

In support, the court relied on two cases: *Texas v. United States*¹⁰⁶ and *Ethyl Corp. v. Environmental Protection Agency*.¹⁰⁷ However, these cases are distinguishable from *Gulf Fishermens* because both involve extremely clear, restrictive statutes that give no room to interpret silence into their text. In *Texas v. United States*, the Fifth Circuit held that the Immigration and Nationality Act was too intricate and specific to provide any leeway to defer to agency interpretation because the level of specificity in the statute filled any potential gap the agency sought to provide.¹⁰⁸ Further, the Fifth Circuit stated that *Chevron* Step One was not determinative because the agency action would have failed Step Two as "manifestly contrary" to the statute—an issue the Fifth Circuit never addressed in *Gulf Fishermens*.¹⁰⁹

Similarly, in *Ethyl* the D.C. Circuit held that a statute permitting the Environmental Protection Agency (EPA) to waive a probation for fuel additives upon a factual finding that the additive was not problematic did not permit the EPA to waive the prohibition for other reasons, specifically public health, because public health was not mentioned in the statute.¹¹⁰

100. *Chevron*, 467 U.S. 837.

101. *See id.* at 843.

102. *See id.*

103. *Gulf Fishermens*, 968 F.3d at 460.

104. *Id.*

105. *See id.* at 460 n.11.

106. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

107. *Ethyl Corp. v. EPA*, 51 F.3d 1053 (D.C. Cir. 1995).

108. *Texas*, 809 F.3d at 186.

109. *See id.*

110. *Ethyl*, 51 F.3d at 1055.

The statute at issue in *Gulf Fishermens* is much broader than those at issue in *Texas* and *Ethyl*. The MSA provides leeway to permit aquaculture regulation without expanding the scope of the statute by an alternative interpretation of “fishing.”¹¹¹

The Fifth Circuit’s plain text analysis focused less on the text of the MSA and more on the text of the Appellants’ Opening Brief taken out of context.¹¹² The Fifth Circuit repeatedly pointed out that the NMFS applied the first step of *Chevron* backwards by claiming the MSA grants the NMFS authority to regulate aquaculture because it “fail[ed] to express[] Congress’s unambiguous intent to *foreclose* the regulation of aquaculture.”¹¹³ However, the NMFS did not assert authority to regulate based upon a lack of express preclusion of regulation of aquaculture. Instead, the NMFS made this point to reject the Eastern District’s conclusion that the plaintiffs prevailed under *Chevron* Step One.¹¹⁴ The NMFS was not arguing that “nothing-equals-something,” as the Fifth Circuit claimed.¹¹⁵ If anything, the NMFS made a nothing-equals-nothing argument in that the MSA’s failure to expressly mention aquaculture was insufficient evidence that Congress intended to preclude the NMFS from regulating aquaculture altogether. In short, the MSA neither expressly conferred nor foreclosed authority to regulate aquaculture on the NMFS.

The court concluded the simple, plain text analysis with a classic metaphor claiming the NMFS’s argument is “all elephant and no mousehole.”¹¹⁶ The majority implied that the text of the MSA leaves absolutely no room, or “mouseholes,” to read aquaculture into the MSA.¹¹⁷ The MSA provisions declare the purposes of the MSA to include, *inter alia*, managing all fish in federal waters, promoting domestic commercial fishing, and encouraging the development of the U.S. fishing industry.¹¹⁸ The MSA defines “fishing” to include “activity which can reasonably be

111. See 16 U.S.C. § 1802(16).

112. *Gulf Fishermens Ass’n v. Nat’l Marine Fisheries Serv.*, 968 F.3d 454, 460–62 (5th Cir. 2020).

113. *Id.* at 461.

114. Appellants’ Opening Brief at 26, *Gulf Fishermens Ass’n v. Nat’l Marine Fisheries Service*, 968 F.3d 454 (5th Cir. 2020) (No. 19-30006); see *Petit v. U.S. Dep’t of Education*, 675 F.3d 769, 781 (D.C. Cir. 2012) (stating that in order to “prevail under *Chevron* Step One” a plaintiff “must show that the statute unambiguously forecloses the [agency’s] interpretation” (quoting *Village of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 661 (D.C. Cir. 2011))).

115. *Gulf Fishermens*, 968 F.3d at 460.

116. *Id.* at 462.

117. *Id.*

118. 16 U.S.C. § 1801(b).

expected to result in the catching, taking, or harvesting of fish” and “any operation in support” thereof.¹¹⁹ These exemplary provisions suggest there are indeed mouseholes within the MSA that the Fifth Circuit deliberately chose to overlook.

2. Ambiguity

After determining that the NMFS failed to prove the MSA was silent on the issue, the Fifth Circuit proceeded to reject the Agency’s argument that the MSA is, at a minimum, ambiguous as to the regulation of aquaculture.¹²⁰ The primary argument the Fifth Circuit raised was that the word “harvesting” within the MSA definition of “fishing”¹²¹ cannot be interpreted to include aquaculture.¹²² The NMFS argued that the dictionary definition for “harvesting”¹²³ suggests that the MSA intended to include aquaculture within the definition of “fishing.”¹²⁴ However, the court stated it was “far better to read ‘harvesting’ as synonymous with the adjacent terms ‘catching’ and ‘taking.’”¹²⁵

By claiming the three words catching, taking, and fishing are similar in meaning simply because they are strung together under a *noscitur a sociis* method of interpretation, the court ignores and contradicts the surrounding language of the MSA.¹²⁶ The court’s *noscitur a sociis*¹²⁷ approach to statutory interpretation severely restricted the scope of the MSA. The definition of fishing not only includes actual or attempted catching, taking, or harvesting of fish, but it also includes “any other activity which can be reasonably expected to result in the catching, taking, or harvesting of fish; or any operation at sea in support [thereof].”¹²⁸ The expansive language within the definition suggests Congress intended “fishing” to encompass a broad range of activities, not limited in the

119. *Id.* § 1802(16).

120. *Gulf Fishermens*, 968 F.3d at 462.

121. 16 U.S.C. § 1802(16).

122. *Gulf Fishermens*, 968 F.3d at 462–66.

123. *Id.* at 462 (using the dictionary definition of “harvest” as “[t]o reap and gather in” a “ripe crop”).

124. *Id.* at 463.

125. *Id.* at 462–63.

126. *See id.* at 454.

127. *United States v. Buluc*, 930 F.3d 383, 390 (5th Cir. 2019) (“*Noscitur a sociis* (‘it is known by its associates’) applies ‘when a string of statutory terms raises the implication that the words grouped in a list should be given related meaning.’”) (quoting *United States v. Lauderdale Cnty, Miss.*, 914 F.3d 960, 967 (5th Cir. 2019)).

128. 16 U.S.C. § 1802(16).

manner the court suggests. At the very least, the word “harvesting” within the MSA offers two legitimate interpretations: one including aquaculture and the other precluding it.

The court supported this argument by suggesting that Congress considered aquaculture when implementing the MSA in 1976 and deliberately decided to leave it out of the statute.¹²⁹ Nothing in the legislative history suggests this. To the contrary, subsequent amendments to the MSA include references to aquaculture.¹³⁰ If Congress intended the statute to preclude aquaculture in its entirety, including any specific references to aquaculture within the MSA’s amendments would not make sense unless a reference was included to expressly prevent aquaculture regulation under the MSA. It is not “unfathomable,” as the court suggested,¹³¹ to consider Congress may have intended “harvesting” to be interpreted by its common sense, broader meaning to include aquaculture rather than limit it through a *nosctur a sociis* interpretation.

The Fifth Circuit moved to the broader statutory scheme of the MSA, claiming that if aquaculture was included within “fishing,” other MSA provisions would be rendered “nonsensical.”¹³² The main argument in support of this nonsensical theory was that an aquaculture system was incapable of being overfished, and thus the authorization to the NMFS to regulate aquaculture in the Gulf contradicted the main purpose of the MSA: the prevention of overfishing.¹³³ The majority rejected the plaintiff’s argument that aquaculture would help to mitigate overfishing in the Gulf and instead restricted the language of the MSA to require FMPs to prevent overfishing within the actual fishery itself, the fish farms, rather than to the Gulf as a whole.¹³⁴

The court was again cherry-picking certain provisions and language within the MSA while simultaneously ignoring others. The primary purpose of the MSA is not to exclusively prevent overfishing within fisheries but rather to conserve and manage all fish in federal waters.¹³⁵ Other purposes of the MSA include promoting commercial fishing and encouraging the development of the U.S. fishing industries.¹³⁶ Specifically related to FMPs, the plans must “prevent overfishing” while simultaneously considering efficiency, minimizing costs, and “rebuilding

129. See *Gulf Fishermens*, 968 F.3d at 465–66.

130. See *id.* at 466 n.26.

131. *Id.* at 462.

132. *Id.* at 466.

133. *Id.* at 467.

134. 16 U.S.C. § 1802(b).

135. See discussion *supra* Part I.

136. 16 U.S.C. § 1802(b).

overfished stocks.”¹³⁷ The court ignored these purposes and relied too heavily on the more restrictive provisions of the MSA.

The court concluded the incompatibility that occurs when aquaculture is included within the definition of fishing is a “clear indication that Congress did not intend for the MSA to grant the NMFS authority to regulate aquaculture.”¹³⁸ However, no such indication exists here, as the regulation of aquaculture under the MSA has been unclear since the statute’s enactment in 1976. Thus, the court simply chose to read clarity into an ambiguous statute.

C. Chevron Step Two

At a minimum, the Fifth Circuit should have moved to *Chevron* Step Two to determine whether the NMFS or the Gulf Council interpreted the MSA reasonably because the Act was ambiguous. In Step Two, the question is “whether the agency’s answer is based on a *permissible* construction of the statute.”¹³⁹ The Fifth Circuit would not impose its own interpretation of the MSA but rather would defer to the NMFS’s interpretation “if it [was] a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by the courts.”¹⁴⁰ Presumably, the court chose not to move on to *Chevron* Step Two because the NMFS had acted reasonably.

The MSA was enacted for various purposes, many of which the Fifth Circuit failed to acknowledge. For example, the MSA explicitly states that FMPs “will achieve and maintain, on a continuing basis, the optimum yield” from fisheries.¹⁴¹ It also states that the Regional Councils will “exercise sound judgment . . . [and] take into account the social and economic needs of the States.”¹⁴² The language is not restrictive but rather forward-looking and indicative of Congress’s intent for the MSA to evolve with the needs of fisheries as well as the needs of the nation. The policies set forth in the MSA have similar language such as “to assure that the national fishery conservation and management program utilizes . . . the best scientific information available; involves, and is responsive to the needs of, interested and affected States and citizens; considers efficiency.

137. *Id.* § 1851(a).

138. *Gulf Fishermens*, 968 F.3d at 468.

139. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

140. *Sw. Elec. Power Co. v. U.S. Env’t. Prot. Agency*, 920 F.3d 999, 1028 (5th Cir. 2019).

141. 16 U.S.C. § 1801(b)(4).

142. *Id.* § 1801(b)(5).

. . . and is workable and effective.”¹⁴³ The need for aquaculture has evolved in the past few decades as technology has advanced and access to fishable seafood has declined. Perhaps Congress deliberately designed the MSA to adapt with society, as the language of the MSA suggests, and marine aquaculture would be an effective tool to fulfill the MSA’s goals despite its absence from the text of the MSA. If Congress knew in 1976 the present state of our fishing industries and the current need for a marine aquaculture regulatory regime, Congress would encourage the NMFS’s action in the Rule. As Judge Higginson stated, “modern aquaculture methods of fishing fit vitally in, not out of, the Magnuson Act regime.”¹⁴⁴

As already noted, the Gulf Council consists of members with high levels of experience and expertise in fishing and aquaculture, as is true for all the Regional Councils. The Gulf Council’s FMP was first proposed in 2009 and had undergone numerous reviews and changes prior to this litigation. The NMFS worked for years to find a pathway to regulate aquaculture under a flawed statute, and the NMFS took into consideration environmental, economic, and any other reasonable concerns that related to aquaculture. The Rule was required to comply with the MSA in full, and while some provisions fit awkwardly, such as the overfishing or optimum yield requirements, the Rule addressed each instance of incongruence with the MSA and offered compatible alternatives.¹⁴⁵ The Rule did not contravene the requirements of the MSA. In fact, it addressed and resolved each misfitting provision to align with the overall goals of the MSA. Each of these facts suggest that the Gulf Council FMP and the NMFS reasonably interpreted the MSA despite seeming to fit a “square peg in a round hole.” Again, the agency’s interpretation need not be perfect; it simply needs to be permissible.

The Fifth Circuit repeatedly relied on the single most significant purpose of the MSA—to conserve and manage wild fish.¹⁴⁶ To achieve this goal, the MSA needs to control regulation of marine aquaculture to

143. *Id.* § 1801(c)(3).

144. *Gulf Fishermens Ass’n v. Nat’l Marine Fisheries Serv.*, 968 F.3d 454, 471 (5th Cir. 2020) (Higginson, S. dissenting).

145. *See* Read Porter & Rebecca Kihslinger, *Federal Environmental Permitting of Offshore Aquaculture: Coverage and Challenges*, 45 ENV’T L. REP. NEWS & ANALYSIS 10875, 10881 (2015) (“FMPs must contain mandatory provisions, including overfishing thresholds, annual catch targets, optimum yield assessments, and EFH conservation measures . . . Although the concepts of yield and catch are relevant to aquaculture, determination of these provisions . . . cannot be directly applied to aquaculture. As a result, FMPs for aquaculture must incorporate alternative means of satisfying these requirements.”).

146. *See* discussion *supra* Part I.

some extent because it “is an important link in protecting the environment from the impacts of offshore aquaculture.”¹⁴⁷ The NMFS is authorized to deploy management measures and permits that adhere to the provisions within the MSA, and allowing the NMFS to regulate aquaculture with strict adherence to the MSA, such as in the Rule, would result in marine aquaculture development while minimizing negative impacts to the environment, wild fish, and the fishing economy.¹⁴⁸ The best route for the NMFS to regulate marine aquaculture is pursuant to the MSA because the MSA functions to protect wild fish, whereas alternative mechanisms, such as those seen in the aftermath of *Gulf Fishermens Association*, may not.

III. IMPLICATIONS

A. Executive Attempts to Regulate Aquaculture

The Executive Branch has taken interest in aquaculture since the Gulf Council initially released its Plan. In 2009, President George W. Bush pushed the National Aquaculture Act of 2007 to encourage the Plan, but the bill never became law.¹⁴⁹ President Barack Obama also attempted to improve the U.S. marine aquaculture regime, or lack thereof, with initiatives to encourage domestic aquaculture and increase federal aquaculture research.¹⁵⁰ Most recently, the Trump Administration issued an Executive Order—*Promoting American Seafood Competitiveness and Economic Growth*—before the Fifth Circuit released its decision in *Gulf Fishermens*.¹⁵¹

Unlike the MSA, the Executive Order specifically defines aquaculture as the “harvesting of aquatic species,” implying the Order was specifically drafted to address the concerns set forth in *Gulf Fishermens*.¹⁵² The Fifth Circuit decision calls into question the legal authority relied upon by the Executive Order, as the Order expressly states its consistency with the

147. Porter & Kihlslinger, *supra* note 145, at 10882.

148. *Id.*

149. Steven Hedlund, *U.S. Approves Open-Ocean Aquaculture in Gulf*, SEAFOODSOURCE (Sept. 3, 2009), <https://www.seafoodsource.com/news/aquaculture/u-s-approves-open-ocean-aquaculture-in-gulf> [<https://perma.cc/2PML-PS8G>].

150. April Forristall, *Obama Aims to Protect Oceans, End Illegal Fishing*, SEAFOODSOURCE (June 17, 2014), <https://www.seafoodsource.com/news/supply-trade/obama-aims-to-protect-oceans-end-illegal-fishing> [<https://perma.cc/4F53-9BDQ>].

151. Exec. Order No. 13,921, 85 Fed. Reg. 28,471 (May 12, 2020).

152. *See id.*

MSA.¹⁵³ The Executive Order explicitly acknowledges that any action taken thereunder is subject to the provisions of the MSA.¹⁵⁴ It also designates NOAA as the lead agency for aquaculture regulation in federal waters.¹⁵⁵ The Executive Order also requires the Secretary of Commerce to consult with other agencies, including the EPA and the Department of Agriculture, as well as “appropriate Regional Fishery Management Councils” and to subsequently identify “at least two geographic areas containing locations suitable for commercial aquaculture.”¹⁵⁶ These “Aquaculture Opportunity Areas,” once assessed, are intended to be the starting points for federal regulation of marine aquaculture.¹⁵⁷

The question of whether, in the absence of a clear delegation of congressional authority, the President may legally grant NOAA the power to regulate offshore aquaculture is dependent upon if Congress delegated its power to regulate marine aquaculture to the executive branch.¹⁵⁸ If so, the Executive Order may represent a valid exercise of authority. However, the *Gulf Fishermens* decision implies that President Trump lacked authority because the Executive Order must comply with the MSA.¹⁵⁹ NOAA announced its intent to move forward with aquaculture regulation and has already identified its two Aquaculture Opportunity Areas—the coast of southern California and the southwest coast of Florida—pursuant to the Executive Order.¹⁶⁰ Florida is in the Eleventh Circuit, so NOAA’s actions are an attempt to regulate aquaculture in the Gulf by avoiding the Fifth Circuit’s jurisdiction.¹⁶¹ Until a case similar to *Gulf Fishermens* is brought and decided in the Eleventh Circuit, the Fifth Circuit decision can be disregarded as NOAA continues its plan to regulate marine aquaculture.

153. *See id.*

154. *Id.* at 28,472.

155. *Id.* at 28,473.

156. *Id.* at 28,474.

157. *See id.*

158. Charles Witek, *Executive Order Could Impact Coastal Fisheries, Habitats: Part II*, MARINE FISH CONSERVATION NETWORK (June 11, 2020), <https://conservefish.org/2020/06/11/executive-order-could-impact-coastal-fisheries-habitats-part-ii/> [https://perma.cc/7KEE-UFD2].

159. Exec. Order No. 13,921, 85 Fed. Reg. at 28,472.

160. *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> [https://perma.cc/Z7FT-ZQB6].

161. Cathy Carter, *Despite Federal Ruling, Fish Farm Company Says Gulf Project Moving Forward*, WUSF PUB. MEDIA (Aug. 7, 2020, 8:00 AM), <https://wusfnews.wusf.usf.edu/environment/2020-08-07/despite-federal-ruling-fish-farm-company-says-gulf-project-moving-forward> [https://perma.cc/6LAS-RCYT].

The Executive Order seeks to do exactly what the Gulf Council sought with its FMP but on a federal level. However, its primary goals are “remov[ing] unnecessary regulatory barriers” and “facilitat[ing] aquaculture projects” rather than conservation and management of marine ecosystems as in the MSA.¹⁶² Whether or not this Order renders the Fifth Circuit decision meaningless is unclear, but it does minimize its impact. By limiting its interpretation of the MSA to *Chevron* Step One, the Fifth Circuit forfeited the opportunity to address legitimate concerns that may have provided more clarity on the impact of President Trump’s Executive Order moving forward.

Currently, the Executive Order and the decision in *Gulf Fishermens* leave the industry in a fishy position. Advocates of offshore aquaculture remain optimistic that the Biden Administration will not interfere with the future of aquaculture because of the nation’s need for food security and economic stability post-Covid-19.¹⁶³ Opponents of marine aquaculture, in contrast, request that President Joe Biden replace the previous Order with a new Order supporting sustainable wild capture fishing communities and cease U.S. marine aquaculture development entirely.¹⁶⁴ The uncertainty surrounding the *Gulf Fishermens* decision regarding the future of aquaculture, or lack thereof, places everyone in an unsettling position.

B. Legislative Attempts to Regulate Aquaculture

Legislation regarding aquaculture has been proposed before Congress numerous times over the years. In 2018, companion bills were introduced in the House and Senate to provide NOAA the authority to regulate aquaculture in federal waters under the name Advancing the Quality and Understanding of American Aquaculture (“AQUAA Act”).¹⁶⁵ The AQUAA Act was designed to streamline the permitting process for putting aquaculture farms in federal waters while also providing funds for

162. See Exec. Order No. 13,921, 85 Fed. Reg. at 28,471; see also 16 U.S.C. § 1801(b).

163. See Liza Mayer, *U.S. Aquaculture Industry to Present Wish List to President-elect Biden*, AQUACULTURE N. AM. (Nov. 13, 2020), <https://www.aquaculturenorthamerica.com/u-s-aquaculture-industry-to-present-wish-list-to-president-elect-biden/> [<https://perma.cc/373T-6CXX>].

164. *Letter to President-Elect Biden on Industrial Fish Farming Executive Order*, FRIENDS OF THE EARTH (Dec. 15, 2020), <https://1bps6437gg8c169i0y1drtgz-wpengine.netdna-ssl.com/wp-content/uploads/2020/12/2020-12-15-FINAL-Biden-seafood-EO-sign-on-from-52-orgs.pdf> [<https://perma.cc/978P-26C8>].

165. AQUAA Act, H.R. 6966, 115th Cong. (2018); AQUAA Act, S. 3138, 115th Cong. (2018).

aquaculture research.¹⁶⁶ The AQUAA Act set forth national standards for sustainable offshore aquaculture and designated NOAA as the lead federal agency for marine aquaculture.¹⁶⁷ The bill, introduced in 2018, died when Congress's term ended in early 2019.¹⁶⁸

The bipartisan AQUAA Act was reintroduced in the House in March 2020,¹⁶⁹ and the companion bill was introduced in the Senate in September 2020.¹⁷⁰ The two bills do not seek to do anything the NMFS was not already attempting to do in the Rule. Similar to the Executive Order, the notable difference between the AQUAA Act and the MSA is the purpose, and the former, first and foremost, prioritizes the promotion of the American seafood industry.¹⁷¹ Whether Congress will act is unknown, but the two bills sandwiched around the Executive Order and the *Gulf Fishermens* decision may finally push Congress to take action on the issue of marine aquaculture.

C. The Future of Marine Aquaculture

The *Gulf Fishermens* decision only *directly* affects the authority of the NMFS to regulate aquaculture in the Gulf of Mexico. The NMFS website and the Gulf Council website have expressly stated that the FMP has been “voided” after the Fifth Circuit’s decision.¹⁷² However, that does not mean that the NMFS has lost hope for regulation of marine aquaculture in federal waters. The NMFS simply needs to move outside the Fifth Circuit’s jurisdiction, which it already intends to do off the coasts of Florida and California pursuant to the Executive Order.¹⁷³

Since *Gulf Fishermens* was the NMFS Council’s first attempt to regulate marine aquaculture with an FMP under the MSA, any future attempts by the NMFS or other regional councils will face similar backlash as the Gulf Council. Because the NMFS has already announced its intent

166. Sam Hill, *Bill Pushing for US Offshore Aquaculture Development Reintroduced in House*, SEAFOODSOURCE (Mar. 12, 2020), <https://www.seafoodsource.com/news/aquaculture/bill-pushing-for-us-offshore-aquaculture-development-reintroduced-in-house> [<https://perma.cc/2TKX-S85U>].

167. *Id.*

168. *Id.*

169. AQUAA Act, H.R. 6191, 116th Cong. (2020); Hill, *supra* note 166.

170. AQUAA Act, S. 4723, 116th Cong. (2020).

171. *See* Hill, *supra* note 166.

172. *See Southeast*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/region/southeast> [<https://perma.cc/K686-73A5>] (last visited Sept. 3, 2021).

173. *See NOAA Announces Regions for First Two Aquaculture Opportunity Areas Under Executive Order on Seafood*, *supra* note 160.

to pursue marine aquaculture, it is likely that litigation will ensue with every attempt and burden the courts in the same manner as *Gulf Fishermens* unless and until Congress decides to act.

Multiple other federal agencies have *some* authority to regulate aquaculture, including the Army Corps of Engineers, EPA, U.S. Fish and Wildlife Service, and the Department of Agriculture.¹⁷⁴ However, no agency has as much authority as the NMFS in the regulation of marine aquaculture. Other laws, such as the National Aquaculture Act of 1980 and the Fish and Wildlife Coordination Act of 1980, might provide the NOAA and NMFS authority to regulate marine aquaculture, but the MSA remains the primary law governing fisheries.¹⁷⁵ However, the NMFS remains the sole authority for issuance of permits applicable for offshore aquaculture—no other agency has primary permitting authority. The MSA also provides the only regulatory scheme that addresses both environmental protection and controlled regulation of sustainable fishing practices.¹⁷⁶

Presently, the Fifth Circuit and the Executive Order are in direct conflict with each other. While the Fifth Circuit suggested the issue in *Gulf Fishermens* is a matter best resolved by Congress, the aquaculture industry is not waiting idly for congressional action. The Fifth Circuit's decision may finally be the push Congress needs to take action on aquaculture. If Congress does not act, however, aquaculture will continue to move forward outside of the Fifth Circuit's jurisdiction under less stringent conservation and management requirements as would have been implemented under the Gulf Council's Plan. The MSA prioritizes conservation whereas both the Executive Order and the AQUAA Act prioritize the commercial value of aquaculture. In the absence of congressional action, the aquaculture industry may proceed in a manner more harmful and less controlled than it would have had the Fifth Circuit afforded *Chevron* deference to the NMFS interpretation of the MSA.

CONCLUSION

In *Gulf Fishermens*, the Fifth Circuit read clarity into an unclear statute by determining that the MSA in no way permits the NMFS to

174. *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 471 (5th Cir. 2020).

175. Tristan Baurick, *Trump Administration Moves Forward with Gulf Fish Farming Plan Despite Court Decision*, NOLA.COM (Sept. 8, 2020, 5:45 PM), https://www.nola.com/news/environment/article_a17ff10c-f202-11ea-a4cb-f352b9ed1d03.html [<https://perma.cc/XC5T-QYEQ>].

176. *Gulf Fishermens*, 968 F.3d at 471 n.43.

regulate marine aquaculture in the Gulf. By cutting the analysis to merely a *Chevron* Step One interpretation, the Fifth Circuit failed to address questions that have existed in the fishing industry since the enactment of the MSA in 1976. Environmental and economic concerns are the primary arguments against marine aquaculture, and the best routes to combat those concerns are either through congressional action or under the MSA, an act intended to conserve and manage wild fish. However, the Fifth Circuit's decision did not pause the development of a marine aquaculture industry in the U.S. after *Gulf Fishermens*. Instead, the NMFS plans to create an aquaculture regime in the Gulf, and uncertainty exists as to whether these new initiatives will afford the same levels of protection to federal waters and wild fish populations as they would pursuant to the MSA. However, based on the goals set forth in the Executive Order and the AQUAA Act, it appears the initiatives will not.

Along with flawed methods of interpretation limiting the Fifth Circuit to an erroneously brief *Chevron* analysis, the implications of this decision will affect not only the fishing industry in the Gulf of Mexico but also future attempts similar to the Gulf Council's attempts with its FMP. Moving forward, the Executive Order, the AQUAA Act, and the Fifth Circuit decision place the future of the aquaculture industry in troubled waters. Ideally, *Gulf Fishermens* is the final push Congress needs to make a choice regarding marine aquaculture. If not, the consequences are increased litigation, commercial and economic harm, and less controlled development of marine aquaculture in federal waters.

The Fifth Circuit stated that including aquaculture within the meaning of "harvesting" was impermissible because it would be "a slippery basis for empowering an agency to create an entire industry the statute did not even mention,"¹⁷⁷ but the future of aquaculture alongside continued congressional inaction will be even more slippery by placing the economic incentives of fish farming ahead of environmental protections afforded by the MSA. Marine aquaculture in the U.S. is inevitable, but the Fifth Circuit blocked the safest route to developing the industry by refusing to bite on the NMFS's authority to regulate aquaculture under the MSA based on a restrictive interpretation of one word—harvesting.

177. *Id.* at 456.