

The Value and Benefits of a Lease to Secure Farms and Advance Offshore Aquaculture In the U.S. Exclusive Economic Zone

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The lack of a comprehensive federal management framework for the long-term authorization of offshore aquaculture operations, including the right to physically occupy ocean space, is a significant barrier to the expansion of commercial aquaculture offshore into federal waters of the U.S. Exclusive Economic Zone (EEZ). Marine aquaculture in the EEZ may involve a range of production systems from anchored submersible or floating sea cages to raise finfish, to suspended “ropes” or floating racks to culture algae or shellfish (oysters, mussels or scallops).

The most crucial unaddressed aspect of any legal framework affecting offshore marine aquaculture is security of tenure; i.e., whether the legal rights to farm in a specified area an aquaculturist receives from the government provides sufficient property interest to support development of a viable business model, including the ability to secure insurance and adequate financing. Permits available from the U.S. Environmental Protection Agency, U.S. Army Corps of Engineers and U.S. Coast Guard and the marine aquaculture operational permit available from the National Oceanic and Atmospheric Administration for the Gulf of Mexico do not provide a property interest.

Given the innovative and capital-intensive nature of offshore aquaculture operations, it may take 10 or more years for an aquaculture operation to generate a return on investment. Potential offshore farm infrastructure installation and operational costs to produce cod, salmon or flounder, were modeled in 2012 to be \$83.7 million, \$99.6 million and \$14.4 million, respectively. Costs can be highly variable and influenced by farm site selection, cage technology, fish species and scale of operation. The reality today is offshore farms will be expensive and exposed to a high degree of physical and business risk.

The legal right to locate an aquaculture operation in the EEZ might be granted through a variety of legal mechanisms, including permits, licenses, easements, rights-of-way, or leases. However, there are key legal differences between these options that can impact exactly what rights an aquaculturist acquires. A license or permit does not transfer property rights, but provides an individual or entity permission to use real property for a specific purpose. A lease does create property rights and typically includes the elements of remuneration, duration, transferability, renewability, insurability, exclusivity, restitution and revocability (only for failure to meet certain performance standards). Leases are legal constructs common to our nation’s business laws and practices, and the security of tenure they afford results in bankable and marketable assets; attributes that are essential for private investment.

In developing a management framework for offshore aquaculture, Congress must legislate what type of property interest an aquaculture operator should have in an offshore aquaculture farm. Of

¹ The National Aquaculture Association is a U.S. producer-based non-profit association founded in 1991 that supports the establishment of governmental programs that further the common interest of our membership, both as individual producers and as members of the aquaculture community (<http://thenaa.net/>). For over 27 years NAA has been the united voice of the domestic aquaculture sector committed to the continued growth of our industry, working with state and federal governments to create a business climate conducive to our success, and fostering cost-effective environmental stewardship and sustainability. Prepared May 20, 2019.

the possible legal mechanisms, the U.S. aquaculture community has advocated for a renewable lease with a minimum term of 25-years. This view of the essential need for a lease as a means of site deposition for multi-million dollar offshore investment is shared by ocean energy companies that lease sites for the long-term extraction of oil and gas or to produce electricity using wind driven turbines.

Twenty-two of 23 coastal states convey a property right in the form of a lease for shellfish farming. Florida, Hawaii, Maine, Puerto Rico, and Washington also provide a leasing opportunity for finfish aquaculture. The states and territory offer a lease as an interest in sovereign marine waters and land which creates a contract defining a landlord-tenant relationship between the state or territory as landlord and the applicant as tenant. The state or territory grant and transfer to the farmer the exclusive use, possession, and control of certain specified sovereign lands or waters for a determinate number of years, with conditions attached, at a defined rental payment. The rental fee compensates the state and the public for the loss of use of a public resource; nearshore state marine waters. Lease conditions may include an obligation to comply with state and federal laws and permits and retention of a public easement for fishing and navigation as long as the public does not imperil worker safety, farm operation and production system, and the growing crop.

Significant scholarship exists regarding governance frameworks and the importance of leasing for offshore marine aquaculture. For copies of these references, please contact the NAA Office at 850-216-2400 or naa@thenaa.net.

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