VENTURA PORT DISTRICT

BOARD OF PORT COMMISSIONERS
MINUTES OF NOVEMBER 18, 2020

CLOSED SESSION

CALL TO ORDER:
The Ventura Board of Port Commissioners Regular Closed Session Meeting was called to order by Chairman Chris Stephens at 5:00PM at the Ventura Port District Administration Office, 1603 Anchors Way Drive, Ventura, CA 93001 and via Zoom meeting.

ROLL CALL:

Commissioners Present:
Chris Stephens, Chairman
Brian Brennan, Vice Chairman arrived at 5:02PM
Jackie Gardina, Secretary via teleconference
Everard Ashworth via teleconference
Michael Blumenberg via teleconference

Commissioners Absent:
None.

Port District Staff:
Brian Pendleton, General Manager
Todd Mitchell, Business Operations Manager
Jessica Rauch, Clerk of the Board

Legal Counsel:
Andy Turner via teleconference
Elsa Sham via teleconference

PUBLIC COMMUNICATIONS: Michael Wagner, owner of Andria's Seafood, Sam Sadove and Jean Getchell spoke on item 3a. Jean Getchell asked her written comment be attached to the minutes (Attachment 1).

CONVENED TO CLOSED SESSION AT 5:10PM.

ADJOURNMENT: Closed Session was adjourned at 6:58PM.

OPEN SESSION

ADMINISTRATIVE AGENDA:

CALL TO ORDER:
The Ventura Board of Port Commissioners Regular Open Session Meeting was called to order by Chairman Chris Stephens at 7:04PM at the Ventura Port District Administration Office, 1603 Anchors Way Drive, Ventura, CA 93001 and via Zoom Meeting.

PLEDGE OF ALLEGIANCE: By Chairman Chris Stephens.

ROLL CALL:

Commissioners Present:
Chris Stephens, Chairman
Brian Brennan, Vice Chairman
Jackie Gardina, Secretary via teleconference
Everard Ashworth via teleconference
Michael Blumenberg via teleconference

Commissioners Absent:
None.

Port District Staff:
Brian Pendleton, General Manager
Todd Mitchell, Business Operations Manager
Jessica Rauch, Clerk of the Board
John Higgins, Harbormaster via teleconference
Dave Werneburg, Marina Manager via teleconference
Joe Gonzalez, Capital Improvements Manager via teleconference
Sergio Gonzalez, Maintenance Supervisor via teleconference
Robin Baer, Property Manager via teleconference
Jennifer Talt-Lundin, Marketing Manager via teleconference
Gloria Adkins, Accounting Manager via teleconference

Legal Counsel:
Andy Turner via teleconference
Elsa Sham via teleconference

ADOPTION OF AGENDA

ACTION: **Commissioner Brennan moved to adopt the November 18, 2020 agenda.**

Commissioner Blumenberg seconded. The vote was as follows:

AYES: Commissioner Stephens, Brennan, Gardina, Ashworth, Blumenberg
NOES: None.

Motion carried 5-0.

APPROVAL OF MINUTES
The Minutes of the October 21, 2020, 2020 Regular Meeting were considered as follows:

ACTION: **Commissioner Brennan moved to approve the October 21, 2020 Regular Meeting.**

Commissioner Gardina seconded. The vote was as follows:

AYES: Commissioner Stephens, Brennan, Gardina, Blumenberg
NOES: None.
ABSTAINED: Commissioner Ashworth

Motion carried 4-0-1.

PUBLIC COMMUNICATIONS: Derek Turner spoke about the Harbor's water quality. Councilmember Lorrie Brown also commented on water quality and stated she spoke with the City Parks and Rec Director who is willing to give a presentation to the Commission.

CLOSED SESSION REPORT: Mr. Turner stated that the Board met in closed session; discussed and reviewed items 1a-d, 2 and 3b on the closed session agenda. The Board gave direction to staff as how to proceed. No action was taken that is reportable under The Brown Act. The Board will reconvene for Items 3a, 3c-d after open session.

BOARD COMMUNICATIONS: Commissioner Gardina praised staff and Harbor businesses for how well they are handling the COVID restrictions.

STAFF AND GENERAL MANAGER REPORTS: Mr. Pendleton gave an update on the City's Styrofoam Ordinance.

LEGAL COUNSEL REPORT: None.

CONSENT AGENDA

a) Approval of 2021 Port Commission Meeting Schedule
Recommended Action: Roll Call Vote.
That the Board of Port Commissioners approve the 2021 Port Commission meeting schedule.

Commissioner Blumenberg pulled this item from the Consent Agenda. Commissioner Blumenberg requested staff include a public outreach meeting for the 2021 calendar year. Commissioner Ashworth requested staff consider scheduling a joint meeting with City Council.

Public Comment: None.

ACTION: **Commissioner Brennan moved to approve the 2021 Port Commission meeting schedule. Commissioner Blumenberg seconded. The vote was as follows:**

AYES: Commissioners Stephens, Brennan, Gardina, Ashworth, Blumenberg
NOES: None.

Motion carried 5-0.

b) Approval of Out of Town Travel Requests
Recommended Action: Roll Call Vote.
That the Board of Port Commissioners approve the out of town travel requests for:

a) Tucker Zimmerman, Harbor Patrol I, to attend the California Division of Boating and Waterways marine firefighting course in Marina Del Rey, CA; and
b) Casey Graham, Marine Safety Officer, to attend the California Division of Boating and Waterways rescue boat handling course in Marina Del Rey, CA.

Public Comment: None.

ACTION: **Commissioner Brennan moved to approve the out of town travel requests for:**

a) **Tucker Zimmerman, Harbor Patrol I, to attend the California Division of Boating and Waterways marine firefighting course in Marina Del Rey, CA; and**
b) **Casey Graham, Marine Safety Officer, to attend the California Division of Boating and Waterways rescue boat handling course in Marina Del Rey, CA.**

Commissioner Blumenberg seconded. The vote was as follows:

AYES: Commissioner Stephens, Brennan, Gardina, Ashworth, Blumenberg
NOES: None.

Motion carried 5-0.

STANDARD AGENDA:

1) Consideration of Operations Plan and Economic and Fiscal Impacts of the Proposed Ventura Shellfish Enterprise Project

Recommended Action: Roll Call Vote.
That the Board of Port Commissioners:

a) Authorize the submission of the Ventura Shellfish Enterprise Operations Plan to the U.S. Army Corps of Engineers, California Coastal Commission, and other regulatory agencies as appropriate; and,
b) Receive the Economic and Fiscal Impacts of the proposed Ventura Shellfish Enterprise.

Report by Brian D. Pendleton, General Manager, Laurie Monarres, Dudek, Toby Dewhurst, Kelson Marine Co., Scott Lindell, Woods Hole Oceanographic Institution, and Faith Backus, Illuminas Consulting.

Public Comment: Sam Sadove, Linda Krop, Environmental Defense Center and Jean Getchell spoke. Please see their attached written comments (Attachment 2). Councilmember Lorrie Brown asked questions of the District consultants about water quality.

ACTION: **Commissioner Brennan moved to:**

a) **Authorize the submission of the Ventura Shellfish Enterprise Operations Plan to the U.S. Army Corps of Engineers, California Coastal Commission, and other regulatory agencies as appropriate;**
b) **Receive the Economic and Fiscal Impacts of the proposed Ventura Shellfish Enterprise; and,**
c) **Continue to explore siting the VSE project in State waters.**

Commissioner Gardina seconded. The vote was as follows:

AYES: Commissioner Stephens, Brennan, Gardina, Ashworth, Blumenberg
NOES: None.

Motion carried 5-0.

2) Approval of Notice of Completion for the Ventura Harbor Village Painting Project
Recommended Action: Roll Call Vote.
That the Board of Port Commissioners adopt Resolution No. 3401:
a) Accepting the work of Garland/DBS, Inc. for the Ventura Harbor Village Painting Project; and,
b) Authorize staff to prepare and record a Notice of Completion with the Ventura County Recorder.

Report by Brian D. Pendleton, General Manager.

Public Comment: None.

ACTION: **Commissioner Brennan moved to:**

a) Adopt Resolution No. 3401 accepting the work of Garland/DBS, Inc. for the Ventura Harbor Village Painting Project; and,
b) Authorize staff to prepare and record a Notice of Completion with the Ventura County Recorder.

Commissioner Ashworth seconded. The vote was as follows:

AYES: Commissioners Stephens, Brennan, Gardina, Ashworth, Blumenberg
NOES: None.

Motion carried 5-0

3) Rejection of Bids for the Ventura Harbor Village Restroom ADA Remodel
Recommended Action: Roll Call Vote.
That the Board of Port Commissioners reject all bids received for the Ventura Harbor Village ADA Restroom Remodel for 1559 Spinnaker Drive.

Report by Brian D. Pendleton, General Manager.

Public Comment: None.

ACTION: **Commissioner Brennan moved to reject all bids received for the Ventura Harbor Village ADA Restroom Remodel for 1559 Spinnaker Drive.**

Commissioner Blumenberg seconded. The vote was as follows:

AYES: Commissioners Stephens, Brennan, Gardina, Ashworth, Blumenberg
NOES: None.

Motion carried 5-0.

4) Ventura Port District Operations Update as it Relates to COVID-19
Recommended Action: Informational.
That the Board of Port Commissioners receive an update on:
a) The COVID-19 Ventura Harbor Rental Abatement and Deferment Program; and
b) Status of Ventura Port District operations.

Report by Brian D. Pendleton, General Manager.

Public Comment: Sam Sadove mentioned that for outdoor dining only one side of a structure can be blocked. Michael Wagner, owner of Andria's Seafood confirmed Sam Sadove's comment. Shana Elson, owner of Top This Chocolate is concerned about December sales and would like to see a social distance Santa opportunity in the Village throughout December. Councilmember Lorrie Brown commented on the requirements for outdoor dining structures.

ACTION: The Board of Port Commissioners received an update on COVID-19 related items.

RECONVENED TO CLOSED SESSION AT 8:55PM.

RECONVENED TO OPEN SESSION AT 9:53PM.

CLOSED SESSION REPORT: Mr. Turner stated that the Board met in closed session; discussed and reviewed items 3a, 3c and 3d on the closed session agenda. The Board gave direction to staff as how to proceed. No action was taken that is reportable under The Brown Act.

ADJOURNMENT: The meeting was adjourned at 9:55PM.

The next meeting is Wednesday, December 16, 2020.

Jackie Gardina, Secretary

ATTACHMENT 1

Closed Session Meeting: November 18, 2020

Agenda Item 3 (a): Parcel 8
(Adjacent to National Park Service Headquarters Visitor Center
1901 Spinnaker Drive)

Commissioners:

I would like to bring two issues to your attention before you meet in Closed Session concerning this real property issue:

I. Compliance with The Brown Act

I trust that your Board has become familiar with various requirements of The Brown Act. Government Code Section 54956.8 is the section the District has invoked to discuss / decide this item in Closed Session. It provides a very useful but narrowly construed exception to the general requirement that the discussions and decisions of governmental agencies be made in public and allow for public comment.

Factual Background of This Proposed Real Property Transaction
Since the District lost the opportunity for a hotel at the end of Spinnaker Drive almost two and a half years ago, there has been no Open Session Agenda item concerning any other proposed development of Parcel 8.

With the former Blackbeard's Restaurant also having become a lost opportunity, the northern section of Harbor Village has been lacking a major business and a major commercial opportunity. The adjacent and other harbor tenants have lost the benefits of synergy and an increased number of visitors that the now-empty restaurant and empty parcel otherwise might have generated.

A decision regarding Parcel 8 would have significant impacts on harbor business activity, as well as the amounts collected in Sales Tax, Possessory Interest Tax, and Transient Occupancy Tax. If Parcel 8 is assigned to a governmental agency, particularly a federal agency, Transient Occupancy and Possessory Interest Taxes would never be generated.

Unless the National Park Service was to develop a visitor-serving facility on Parcel 8, the California Coastal Commission would likely deny the project.

These issues should have been presented in Open Session to allow adequate discussion and the best decision in the interest of the harbor.

Whether a real property proposal should be considered, based on public policy, economic costs and other factors, is something that should have preceded any Closed Session direction to the District's negotiators regarding price and terms of

payment for the real property interest. Direction given to District real property negotiators concerning price and payment terms is the only action that enjoys the exception and the only one that should be done in Closed Session.

When was a decision made to negotiate for Parcel 8?

II. Common Courtesy and Comity

When the Parker Hotel Project fell through in 2018, several City Council Members became upset because the District had not discussed and explained the situation to the Council. This short-coming was raised with District staff and they were asked to avoid it in the future. Unfortunately, it has happened again.
The harbor businesses, which are touted as the District's "partners" were in the dark about this proposal until the agenda was released last Friday.

I earnestly urge your Commission to change this pattern and practice of withholding information that is neither privileged nor benefits from being known to only a select few, and to take advantage of the expertise and experience of elected officials and the harbor business community.

Thank you.

ATTACHMENT 1

Closed Session Meeting: November 18, 2020

Agenda Item 3 (a): Parcel 8
(Adjacent to National Park Service Headquarters Visitor Center
1901 Spinnaker Drive)

Terms of Option
to
Acquire / Lease Property

Addendum to Previously Sent Letter

Commissioners:

The *Board of Port Commissioners Protocols and Policies Manual*, which each of you received upon appointment to the Commission, includes two Policies that govern consideration of this Closed Session item concerning the sale or lease of Parcel 8:

Section 5.2, Lease Negotiation and Administrative Policy; and
Section 5.7, Master Lease / Option Negotiation Administration Policy.

Section 5.2 is governed by Resolution No. 2595.
It provides that:

1. The Board finds and determines that it is in the best interests of the District to establish a policy regarding the procedure for negotiating leases and other entitlements with respect to real property within Ventura Harbor, so as to ensure fairness in the process of considering lease applicants, to ensure that District lessees provide adequate assurances of their financial strength, and to avoid any actual or perceived financial conflicts in the leasing process.

2. The General Manager shall advise the Board of Port Commissioners regarding the availability for leasing or licensing o[r]f real property within Ventura Harbor, or the. renewal of existing leases and licenses of real property within the Harbor.

3. The Board of Port Commissioners shall instruct the General Manager to receive proposals for leasing, licensing, or developing such a property. In the case of renegotiation of existing leases, consideration shall be given to the possible extension of such leases.

There are eight additional sections (Nos. 4-11) that are not relevant to Closed Session Item 3 (a) that is before your Commission on November 18.

What I would like to bring to your attention, I have underlined. This includes the stated policy of ensuring fairness to potential applicants and that your Commission is to instruct the General Manager to receive proposals (more than one proposal), which would not authorize sole-sourcing to one applicant.

In addition, there is nothing in Resolution 2595 that indicates that this policy is not cumulative; that its requirements must be met in addition to any other applicable policy adopted by the Commission.

Section 5.7 is governed by Resolution No. 2988.
It provides that:

Introduction
...This policy only applies to Master Leases in Ventura Harbor and is not applicable to the short-term office, retail and restaurant leases in Ventura Harbor Village administered by District personnel.
... This document establishes the general policies and practices for the optioning and leasing of real properties owned and administered by the District.
...Though described as a "leasing" policy, the procedures and concepts stated herein apply to the option to lease process as well, which the District will require in connection with a lease of currently undeveloped property or redeveloped property in Ventura Harbor.

I. Lease Negotiation Procedures

The lease negotiation process should begin with preliminary discussion between the General Manager, or his representative, and the prospective tenant in an effort to identify issues and objectives in the proposed lease transaction. The General Manager should then bring the results of these discussions to the Board for consideration and possible determination of the District's position in and strategy for the lease negotiation...

The General Manager and District counsel shall then prepare a draft "term sheet" identifying the business deal points including proposed rent, permitted uses and improvements. The term sheet should be reviewed by the committee or the Board, as the case may be, prior to presentation to the tenant. The business deal points are to be agreed upon by the District and tenant negotiators and reported to the Board before counsel will be authorized to prepare any lease document. The Board will not, however, formally approve business terms prior to approving the final lease document.

> Once the terms of the lease have been successfully negotiated between the General Manager and the tenant and the draft master lease has been prepared, the lease shall be submitted to the Department of Boating and Waterways, and possibly the Attorney General and the State Lands Commission if required by the Harbors and Navigation Code. After approval by the required agencies, notices inviting competitive bids and giving notice of the District's intention to authorize the entering into the lease by the adoption of an ordinance shall be given.

There is nothing in Resolution 2988 or Section 5.7 which specifies that its requirements supplant those of Resolution 2595 and the provisions of Section 5.2. As a result, the requirements are cumulative.

What is essential here is that like Section 5.2's requirement that proposals be solicited, Section 5.7 requires the invitation of competitive bids.

What Section 5.7 does not address is the situation where a prospective tenant (here, the National Park Service) identified an objective of a lease for which no other entity would have an interest or opportunity to compete.

> For example, the National Park Service might want to lease Parcel 8 to house laboratory work, office space or additional storage capacity for its equipment. None of these uses would be of interest to another entity, none would put the waterfront property to its highest and best use, and none would likely be approved by the Coastal Commission. To begin such a process would be a waste of time and eliminate the last waterfront property in the harbor.
>
> More importantly, unless an open-ended process were initiated that attracted the most diverse, commercially viable and complementary use of that section of the harbor, the best interests of the harbor would not be served.

Potential Sale or Gift of Parcel 8

"Acquire / Lease Property" is specified in the Closed Session Agenda description of Item 3 (a). Is the Commission considering a sale or gift of Parcel 8 to the National Park Service? This would convert Parcel 8 into a Federal Reservation over which the Port District would no longer have any jurisdiction. Possessory Interest Tax could never be charged if it became federal property. Sales tax would be minimal. Transient Occupancy Tax, very unlikely.
More importantly, there is no permitted use of Parcel 8 that the Park Service could not acquire on other District property. Has the District done everything possible to provide meeting rooms, office space and storage in the most efficient manner possible? Has the District worked with the General Services Administration to ensure that NPS requirements are achieved in the most productive manner?
Loss of Parcel 8 as a visitor-serving, revenue-generating asset should be avoided at all costs.

ATTACHMENT 2

Samuel S. Sadove
1074 Deseo Ave
Camarillo, CA 93010

November 12, 2020

Board of Port Commissioners
Ventura Port District
1603 Anchors Way Drive
Ventura, CA 93001

Sent Electronically
to All Recipients

SUBJECT: NOVEMBER 18, 2020 REQUEST TO SUBMIT SHELLFISH OPERATIONS PLAN TO REGULATORY AGENCIES

On October 7, 2020, the Staff Report for Standard Agenda Item No. 2 specified that on November 18, District staff would "…seek authorization to submit the Operations Plan to the Corps, Coastal Commission, and other regulatory agencies as appropriate."

Submittal of *Operations Plan* to the U. S. Army Corps of Engineers (USACE)
In January and February of this year, Dr. Aaron Allen, Chief of the Regulatory Branch of the Los Angeles District of the USACE, sent letters to the District's General Manager (attached), which specified that until a Navigational Risk Assessment was submitted and resolution was achieved of the outstanding issue with the Ventura County Local Agency Formation Commission (LAFCO), the USACE would not allocate staff time to review shellfish project documents. The February letter notified the District that the USACE was deactivating the District's permit application until the two aforementioned requirements were met. In the ensuing nine months, the LAFCO issue has not been resolved because the special legislation required to allow it to approve the project has not been enacted. Without resolution, the USACE specified that it would not allocate resources to the project. This would include review of the *Operations Plan* that District staff is requesting to send.

- Has the USACE notified the District that the terms of its February 18, 2020 letter have been revised?
- If not, why would the General Manager be requesting authorization to submit a document to the USACE that the Corps would not review until the special legislation is enacted?
- Does the District dispute that no special legislation has been enacted?
- Can anyone explain why the District has invested so much time and resources to produce an *Operations Plan* before the legislation is enacted?

Submittal of *Operations Plan* to National Oceanic and Atmospheric Administration (NOAA)
Over a year ago, on October 10, 2019, the Congressional Research Service published *U. S. Offshore Aquaculture Regulation and Development* (available at https://crsreports.congress.gov R45952) This report was a cautionary tale about development of aquaculture in Federal Waters because of the questionable legal authority to do so. On page fourteen, the report described the statutory authority to regulate aquaculture:

> ***Fishing (Aquaculture) Permit)***
> *NMFS [National Marine Fisheries Service] is the only federal agency that claims explicit management authority over offshore aquaculture. Currently, NMFS manages federal fisheries under authority of the MSA [Magnuson-Stevens Fishery Conservation and Management Act of 1976]. The MSA regulates fishing in the EEZ[Exclusive Economic Zone] through development and implementation of federal fishery management plans (FMPs).The MSA does not expressly address whether aquaculture falls within the purview of the act.(Memorandum from Constance Sathre, Office of General Counsel, to Lois Schiffer, NOAA General Counsel, June 9, 2011.)*
>
> *... The Magnuson Stevens Act does not expressly address whether aquaculture falls within the purview of the Act.* [See page 14 of the report.]

After the uncertainty expressed in the Congressional Research Service's 2019 report, HR 6191 was introduced in the 116th Congress on March 11, 2020. This *Advancing the Quality and Understanding of American Aquaculture Act of 2020* is to establish national standards to guide development of offshore aquaculture. On March 21 the bill was referred to the House Subcommittee on Water, Oceans and Water. No further action has been reported. Until the bill is enacted, NOAA cannot begin to develop regulations in accord with the Administrative Procedure Act. While one would have to speculate to determine when these national standards might be implemented, it would not be unusual for the process to take two to five years. Until the regulations are established in accord with legal requirements, they would not be enforceable.

Earlier this year, the Fifth Circuit Court of Appeals in *Gulf Coast Fishermen's Association v. National Marine Fisheries Service,* 968 F3d 454 (5th Cir. 2020) as revised August 4, 2020, stated that a federal agency could not create an aquaculture or fish farming regime in the Gulf of Mexico pursuant to the MSA. Accordingly, NOAA – National Marine Fisheries Service was deemed to have no statutory authority over aquaculture, which would justify regulatory activity. That being the case, NOAA – National Marine Fisheries Service has no regulatory authority over aquaculture in the Fifth Circuit. Though the decision is only persuasive in the Ninth Circuit, it is nonetheless persuasive. As a result, NOAA should exercise no regulatory authority over the District's shellfish project because it has no statutory or regulatory authority to do so; at least not until regulations are developed after enactment of *Advancing the Quality and Understanding of American Aquaculture Act of 2020*. Until then, the District should take cognizance that the MSA is a federal statute with national reach. The opinion suggests that NOAA's participation in the District's project has been *ultra vires*, which means that it has been acting beyond its actual

authority. With this reading, any permit that NOAA would issue before enactment of *Advancing the Quality and Understanding of American Aquaculture Act of 2020* and its implementing regulations would be *void ab initio*. This means that the permit would be void from the beginning and have no regulatory significance.

- ♦ Has the District been following these developments?

The District has invested significant time and resources in the shellfish project. Staff and counsel might have advised the Commission a year ago about the questionable authority of NOAA's participation. Ten months ago the USACE notified the District of two pre-requisites to its further involvement in the project. Special legislation has yet to be enacted. Why is District staff proceeding with work until these uncertainties are clarified?

Your General Manager and legal counsel might have advised your Commission a year ago, and again ten months ago, that a California special district's aquaculture project in Federal Waters faced not only significant hurdles due to State law, but that it faced a stone wall due to Federal law. Whether your Commission was so advised, I do not know. Given the facts today, I earnestly suggest that you consider returning to State Waters where an established environmental regime could analyze and oversee the project.

I appreciate the opportunity to comment.

Sincerely,

Samuel S. Sadove

cc: Dr. Aaron Allen, USACE
Kai Luoma, Ventura County LAFCO
Assembly Member Monique Limon
Assembly Member-Elect Steve Bennett
Linda Krop, Environmental Defense Center
Ventura Harbor Tenants Working Group
Brian Pendleton

Attachments: January 15, 2020 Letter from USACE to District.
February 18, 2020 Letter from USACE to District.
Gulf Fishermen's Assn v. Nat'l Marine Fisheries Service (5th Circuit Opinion).
U. S. Offshore Aquaculture Regulation and Development
(available at https://crsreports.congress.gov).

ATTACHMENT 2

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, LOS ANGELES DISTRICT
60 SOUTH CALIFORNIA STREET, SUITE 201
VENTURA, CALIFORNIA 93001-2598

January 15, 2020

SUBJECT: Request for Resolution to Continue Processing Permit Application

Brian Pendleton
Ventura Port District
Ventura, California 93001

Dear Mr. Pendleton:

This letter concerns your Department of the Army Permit application (Corps File No. SPL-2017-00093-BLR) which proposes to construct a 2,000 acre aquaculture facility in navigable waters outside state boundaries (in Federal waters) in association with the Ventura Shellfish Enterprise Project. The project would be located offshore from the Ventura Harbor, near the city and county of Ventura, CA (latitude: 34.241891, longitude: -119.292983).

In response to our 30 day public notice (dated August 27, 2019) the Corps received a letter from the Ventura County Local Agency Formation Commission (LAFCO) dated September 16, 2019. You provided a response to all the substantive public notice comment letters on November 15, 2019. Within the combined response you included a general response (response B2-1) as well as a separate letter addressing LAFCO's concerns from your special counsel (DeeAnne Gillick, letter dated November 15, 2019). The Corps Regulatory Division Chief (David Castanon), the Ventura team lead (Antal Szijj) and the senior project manager (Theresa Stevens) also met with you, your special counsel (Robert Smith), and your consultant (Laurie Monarres) on November 19, 2019 to discuss the proposed project, remaining issues, and a potential path forward. Prior to this meeting, Dr. Stevens had discussed concerns about issues raised by LAFCO with Ms. Monarres, and stated that review of the matter by Corps Office of Counsel would be requested. Also prior to this meeting, Mr. Smith conducted a phone conference with Corps Staff Counsel (Tiffany Troxel) on October 28, 2019. During this phone conference it was acknowledged that resolution of this matter via the state legislature or state Attorney General may be required.

In response to our public notice, the Corps also received a letter from the U.S. Coast Guard (USCG) dated November 1, 2019, which requested that a navigational risk assessment be completed prior to the Corps final action on the project. Due to the Corps statutory authority under section 10 of the Rivers and Harbors Act (33 U.S.C. 403) to evaluate impacts on navigation associated with structures and work in navigable waters and the recognized expertise of the USCG on navigation issues, the Corps needs at least a draft navigational risk assessment to be completed and submitted to the U.S. Coast Guard. Without this important information documenting the potential impacts to navigation, we cannot complete our required public interest evaluation. Because navigation is central to our review of your application, it would not be a

good use of our limited staff resources to continue processing your application without at least a draft of the navigational risk assessment.

Although you have provided to us the letters, legal opinions and legal citations regarding the claims made by LAFCO, it remains unclear whether the Ventura Port District has the authority under state law to construct permanent structures in navigable waters outside state boundaries as would be required for the proposed Ventura Shellfish Enterprise project.

Therefore, I have made a preliminary determination that in order to continue processing your permit application, the above draft navigational risk assessment and documented resolution of your dispute with LAFCO must be provided. Documentation from LAFCO, the LAFCO Board or a higher level state entity that the dispute has been resolved would be sufficient for the Corps to continue processing your application.

The Corps respectfully requests resolution of these matters in the next 30 days. If the requested information cannot be submitted within 30 days, the Corps will withdraw your permit application. When you do provide the requested information, the Corps will resume review of your previously submitted permit application.

If you have any questions, you may contact me at (805) 585-2148 or aaron.o.allen@usace.army.mil or Theresa Stevens, Ph.D. at (805) 585-2146 or via e-mail at theresa.stevens@usace.army.mil.

Sincerely,

ALLEN.AARON.O.1232270795 Digitally signed by ALLEN.AARON.O.1232270795 Date: 2020.01.15 07:44:28 -08'00'

Aaron O. Allen, Ph.D.
Chief, North Coast Branch
Regulatory Division

Cc: Kai Luoma, Executive Director, Ventura County Local Agency Formation Commission
Lieutenant Commander Isaac Mahar, U.S. Coast Guard District 11 Waterways Management, Los Angeles-Long Beach

ATTACHMENT 2

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, LOS ANGELES DISTRICT
60 SOUTH CALIFORNIA STREET, SUITE 201
VENTURA, CALIFORNIA 93001-2598

February 18, 2020

SUBJECT: Withdrawal of Permit Application

Brian Pendleton
Ventura Port District
Ventura, California 93001

Dear Mr. Pendleton:

I am responding to your application (File No. SPL-2017-00093) for a Department of the Army permit to install structures or conduct work in, over, under or affecting navigable waters of the U.S., in association with the Ventura Shellfish Enterprise project in the Pacific Ocean near the city of Ventura, Ventura County, California.

Our files indicate you have not provided the additional information we requested in our letter dated January 15, 2020 to continue processing your application. Therefore, your application is considered withdrawn. If you wish to re-establish evaluation of your project, please submit the items described in our January 15, 2020 letter.

Thank you for participating in our Regulatory Program. If you have any questions, please contact Theresa Stevens, Ph.D. at (805) 585-2146 or via e-mail at theresa.stevens@usace.army.mil. Please help me to evaluate and improve the regulatory experience for others by completing the customer survey form at http://corpsmapu.usace.army.mil/cm_apex/f?p=regulatory_survey.

Sincerely,

ALLEN.AARON.O.1232270795 Digitally signed by ALLEN.AARON.O.1232270795 Date: 2020.02.13 11:33:19 -08'00'

Aaron O. Allen, Ph.D.
Chief, North Coast Branch
Regulatory Division

ATTACHMENT 2

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 3, 2020
Lyle W. Cayce
Clerk

No. 19-30006

GULF FISHERMENS ASSOCIATION; GULF RESTORATION NETWORK; DESTIN CHARTER BOAT ASSOCIATION; ALABAMA CHARTER FISHING ASSOCIATION; FISH FOR AMERICA USA, INCORPORATED; FLORIDA WILDLIFE FEDERATION; RECIRCULATING FARMS COALITION; FOOD & WATER WATCH, INCORPORATED; CENTER FOR FOOD SAFETY,

Plaintiffs — Appellees,

versus

NATIONAL MARINE FISHERIES SERVICE; EILEEN SOBECK, IN HER OFFICIAL CAPACITY AS ASSISTANT ADMINISTRATOR FOR FISHERIES; DOCTOR ROY CRABTREE, IN HIS OFFICIAL CAPACITY AS REGIONAL ADMINISTRATOR, SOUTHEAST REGION; NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION; DOCTOR KATHRYN SULLIVAN, IN HER OFFICIAL CAPACITY AS UNDER SECRETARY OF COMMERCE FOR OCEANS AND ATMOSPHERE AND ADMINISTRATOR FOR NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; PENNY PRITZKER, IN HER OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF COMMERCE,

Defendants — Appellants.

ATTACHMENT 2

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:16-CV-1271

Before HIGGINBOTHAM, HIGGINSON, and DUNCAN, *Circuit Judges*.

STUART KYLE DUNCAN, *Circuit Judge*:

We consider whether a federal agency may create an "aquaculture," or fish farming, regime in the Gulf of Mexico pursuant to the Magnuson-Stevens Fishery Conservation and Management Act of 1976 ("Magnuson-Stevens Act" or "Act"), 16 U.S.C. §§ 1801–83. The answer is no. The Act neither says nor suggests that the agency may regulate aquaculture. The agency interprets this silence as an invitation, but our precedent says the opposite: Congress does not delegate authority merely by not withholding it. *See Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015), *aff'd by equally divided Court*, 136 S. Ct. 2271 (2016). Undaunted, the agency seeks authority in the Act's definition of "fishing"—the "catching, taking, or *harvesting* of fish." 16 U.S.C. § 1802(16) (emphasis added). "Harvesting," we are told, implies gathering crops, and in aquaculture the fish are the crop. That is a slippery basis for empowering an agency to create an entire industry the statute does not even mention. We will not bite. If anyone is to expand the forty-year-old Magnuson-Stevens Act to reach aquaculture for the first time, it must be Congress.

We therefore AFFIRM the district court's ruling that the challenged aquaculture rule exceeds the agency's statutory authority. *See* 81 Fed. Reg. 1762 (Jan. 13, 2016), *codified at* 50 C.F.R. pts. 600 and 622.

ATTACHMENT 2

I.

A.

The Magnuson-Stevens Act seeks to "conserve and manage the fishery resources found off the coasts of the United States." *Id.* § 1801(b)(1); *see also Delta Commercial Fisheries Ass'n v. Gulf of Mexico Fishery Mgmt. Council*, 364 F.3d 269, 271 (5th Cir. 2004) (the Act "aims to preserve fishery resources by preventing overfishing"). Congress passed the Act in 1976 after finding that aggressive fishing practices, especially by foreign trawlers, had imperiled important fish stocks and the coastal economies dependent on them.[1] *See* 16 U.S.C. § 1801(a)(2) (finding the economies of "[m]any coastal areas . . . have been badly damaged by the overfishing of fishery resources," particularly by "[t]he activities of massive foreign fishing fleets"). Accordingly, the Act provides a framework for protecting and managing fishing and fishery resources in federal waters. *See id.* §§ 1801(b), (c) (stating Act's purposes and policies).

As relevant here, the Act creates eight Regional Fishery Management Councils and tasks them with drafting Fishery Management Plans ("FMPs"). 16 U.S.C. §§ 1801(b)(5), 1852–53. Each FMP must identify and describe the fishery to which it applies, *id.* § 1853(a)(2), and contain "conservation and management measures" that are "necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery," *id.* § 1853(a)(1)(A). In addition, each FMP must "be consistent with" ten "national standards." *Id.* § 1851(a). Among these standards are requirements

[1] *See* Robert J. McManus, *America's Saltwater Fisheries: So Few Fish, So Many Fisherman*, 9 Nat. Resources & Env't 13, 13 (Spring 1995).

to "prevent overfishing while achieving . . . the optimum yield from each fishery." *Id.* § 1851(a)(1).[2]

Today, the Act is administered by the National Marine Fisheries Service ("NMFS" or the "agency"), a division of the National Oceanic and Atmospheric Administration, by delegation from the Secretary of

[2] These are the ten standards:

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

(2) Conservation and management measures shall be based upon the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different States. . . .

(5) Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

(8) Conservation and management measures shall . . . take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet [certain] requirements . . . .

(9) Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

(10) Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.

16 U.S.C. § 1851(a).

Commerce. *See id.* §§ 1854, 1855. NMFS reviews each FMP for consistency with the Act and other applicable laws. If NMFS fails to act within a specified period of time after the council submits an FMP, the plan is approved. *Id.* § 1854(a)(3). Each plan is then implemented through separate regulations, which NMFS reviews, *id.* § 1853(c), and, upon approval, implements through final rules, *id.* § 1854(b).[3]

The concept of a "fishery" is central to the Act and to the issues we consider in this case. The Act defines "fishery" as follows:

> (A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and
>
> (B) any fishing for such stocks.

Id. § 1802(13). "Fishing," in turn, is defined as:

> (A) the catching, taking, or harvesting of fish;
>
> (B) the attempted catching, taking, or harvesting of fish;
>
> (C) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or
>
> (D) operations at sea in support of, or in preparation for any activity described in subparagraphs (A) through (C).

[3] See generally Anglers Conserv. Network v. Pritzker, 809 F.3d 664, 667–68 (D.C. Cir. 2016) (discussing administration of the Act); Lovgren v. Locke, 701 F.3d 5, 13 (1st Cir. 2012) (same); General Category Scallop Fishermen v. Sec'y, U.S. Dep't of Commerce, 635 F.3d 106, 108–09 (3rd Cir. 2011) (same); Oregon Trollers Ass'n v. Gutierrez, 452 F.3d 1104, 1108 (9th Cir. 2006) (same).

Id. § 1802(16). When passed, the Act made no reference to aquaculture or fish farming.[4]

B.

The Gulf of Mexico Fishery Management Council (the "Council") comprises Texas, Louisiana, Mississippi, Alabama, and Florida. *Id.* § 1852(a)(1)(E). The Council has "authority over the fisheries in the Gulf of Mexico seaward of" those five states. *Id.* In 2009, it became the first regional council to put forward a plan to regulate and permit aquaculture. In common terms, aquaculture means fish farming: it is "the cultivation of aquatic organisms (such as fish or shellfish) especially for food."[5] The practice typically entails planting "broodstock," or wild-caught fish, to spawn the rest of the aquaculture stock, which are then harvested. *Id.*[6] As NMFS explains, aquaculture "is essentially a farming operation, [in which] all animals cultured are intended for harvest." 81 Fed. Reg. 1762, 1770 (Jan. 13, 2016).

The Council developed a "Plan for Regulating Offshore Marine Aquaculture in the Gulf of Mexico" (the "Plan"). Under the Plan, the Council would approve five to twenty permits for aquaculture operations over a ten-year period. Permits would be conditioned on compliance with biological, environmental, recordkeeping, and reporting conditions. The Council submitted the Plan and a proposed implementing regulation to

[4] As the district court noted, later amendments contain "discrete and immaterial" references to aquaculture. These post-enactment references, as we explain below, lend further support to our decision.

[5] MERRIAM-WEBSTER DICTIONARY, *Aquaculture* (last visited June 23, 2020), https://www.merriam-webster.com/dictionary/aquaculture.

[6] NMFS defines "aquaculture," somewhat circularly, as "all activities, including the operation of an aquaculture facility, involved in the propagation or rearing, or attempted propagation or rearing, of allowable aquaculture species in the Gulf [Exclusive Economic Zone]." 50 C.F.R. § 622.2.

NMFS. After NMFS took no position on the Plan, it went into effect. In 2014, NMFS published a proposed Rule to implement the Plan, which became final in 2016.[7]

In its own words, the Rule "establishes a comprehensive regulatory program for managing the development of an environmentally sound and economically sustainable aquaculture fishery in Federal waters of the Gulf." 81 Fed. Reg. at 1762. Its purpose is "to increase the yield of Federal fisheries in the Gulf by supplementing the harvest of wild caught species with cultured product." *Id.* To that end, the Rule requires aquaculture facilities to obtain aquaculture permits. *See id.* at 1763 (describing requirements for permit applications). Applications are submitted to NMFS's Southeast Regional Administrator (the "RA") who may grant or deny the permit. The Rule provides for a 45-day notice-and-comment period upon an application's completion. *Id.* A permit is valid for ten years initially and must be renewed every five years thereafter. *Id.* at 1762. The Rule contains a number of "operational requirements, monitoring requirements, and restrictions" for permittees. *Id.* at 1763–64. Permittees must allow NMFS personnel and NMFS-designated third parties access to their facilities to "conduct inspections and determine compliance with applicable regulations." *Id.* at 1765. Finally, the Rule contains a plethora of reporting and recordkeeping requirements, *id.* at 1766, and requires permittees to comply with various regulations promulgated by other federal agencies, including the Environmental Protection Agency ("EPA"), *id.* at 1763, and the Department of Agriculture, *id.* at 1764.

[7] *See* Fisheries of the Caribbean, Gulf, and South Atlantic; Aquaculture, 79 Fed. Reg. 51,424 (Aug. 28, 2014); Fisheries of the Caribbean, Gulf, and South Atlantic; Aquaculture, 81 Fed. Reg. 1762 (Jan. 13, 2016), *codified at* 50 C.F.R. pts. 600 and 622.

The Rule is the first attempt by NMFS or any council to regulate aquaculture under the Act. It is no small attempt. The Rule allows for a maximum annual production of 64 million pounds of seafood in the Gulf. *Id.* That figure would equal the previous average annual yield "of all marine species in the Gulf[] except menhaden[8] and shrimp." *Id.*

C.

A coalition of fishing and conservation organizations ("Plaintiffs"),[9] concerned about the commercial and environmental impacts of the Rule's proposed regime,[10] challenged the Rule in district court. They claimed the Rule was invalid because it fell outside the Council's authority to regulate "fisheries" under the Act. The parties cross-moved for summary judgment. Relying on the Act's text, structure, and history, the district court held the Act unambiguously forecloses NMFS's authority to regulate aquaculture. The court thus denied *Chevron* deference to the agency's construction of the Act and granted Plaintiffs summary judgment. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (courts will not defer to agency interpretation of an "unambiguous[]" statute). The agency

[8] Menhaden are prolific fish used for bait and fish oil. MERRIAM-WEBSTER DICTIONARY, *Menhaden*, https://www.merriam-webster.com/dictionary/menhaden (last visited June 23, 2020).

[9] The organizations (Appellees here) are Gulf Fishermens Association, Gulf Restoration Network, Destin Charter Boat Association, Alabama Charter Fishing Association, Fish for America USA, Inc., Florida Wildlife Federation, Recirculating Farms Coalition, Food & Water Watch, Inc., and Center for Food Safety. Defendants (Appellants here) are NMFS, the National Oceanic and Atmospheric Administration, and three officers charged with administering the Act. Where appropriate, "agency" and "NMFS" refer to all Defendants.

[10] Specifically, Plaintiffs worry that the Rule's expansion of seafood production will harm traditional fishing grounds, reduce prices of wild fish, subject wild fish to disease, and pollute open waters with chemicals and artificial nutrients.

appealed. Before us, it argues the Act is ambiguous as to whether it encompasses aquaculture. Because the Rule reasonably resolves this putative ambiguity, the agency claims it earns *Chevron* deference. *See id.* at 844 (when statute is ambiguous, "a court may not substitute its own construction . . . for a reasonable interpretation made by the administrator of an agency").

II.

"We review a summary judgment *de novo*." *Salinas v. R.A. Rogers, Inc.*, 952 F.3d 680, 682 (5th Cir. 2020) (citation omitted). Summary judgment is required when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

The Administrative Procedure Act requires setting aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). We review an agency's statutory interpretation—including one concerning the agency's own jurisdiction—under the two-step *Chevron* framework. *See generally Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1014 (5th Cir. 2019) (discussing *Chevron*); *see also City of Arlington, Tex. v. FCC*, 569 U.S. 290, 306–07 (2013). At step one, we ask "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. We answer that question by "exhaust[ing] all the 'traditional tools' of construction," including "text, structure, history, and purpose." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quoting *Chevron*, 467 U.S. at 843 n.9; *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting)). Our interpretation "must account for both the specific context in which language is used and the broader context of the statute as a whole." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014) (citation omitted) (cleaned up). We will not defer to "an agency interpretation that is inconsistent with the design and structure

of the statute as a whole." *Id.* (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013)) (cleaned up). If that holistic reading of the statute settles the matter, *Chevron* ends: we "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. On the other hand, if the statute is "truly ambiguous" on the question, *Kisor*, 139 S. Ct. at 2415, we proceed to step two, "asking whether the agency's construction is 'permissible.'" *Sw. Elec. Power Co.*, 920 F.3d at 1014 (quoting *Chevron*, 467 U.S. at 843). A permissible construction is one that "reasonabl[y] accommodat[es] . . . conflicting policies that were committed to the agency's care by the statute." *Chevron*, 467 U.S. at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961)).

III.

We first ask whether the Magnuson-Stevens Act unambiguously precludes the agency from creating an aquaculture regime. The answer is yes. *Chevron* step one is thus the only step we need take to resolve this appeal.

A.

We usually start with the text, but more telling here is the Act's lack of text. As far as aquaculture, the Magnuson-Stevens Act is a textual dead zone: the original Act does not mention aquaculture or fish farming at all.[11] More to the point, the Act's provisions defining the agency's regulatory power say nothing about creating or administering an aquaculture or fish farming regime. *Cf., e.g.*, 16 U.S.C. §§ 1802, 1854, 1855. The agency concedes this but asks us to treat the chasm as a mere "gap" for it to fill. That is, the agency argues it has power to regulate aquaculture because the Act

[11] Later amendments contain a few references to aquaculture. We explain below why those references actually support our holding.

"do[es] not unambiguously express Congress's intent to prohibit the regulation of aquaculture."

This nothing-equals-something argument is barred by our precedent. In *Texas v. United States*, we held the Immigration and Naturalization Act ("INA") unambiguously foreclosed the Department of Homeland Security's ("DHS") Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"). 809 F.3d 134, 186 (5th Cir. 2015), *aff'd by equally divided Court*, 136 S. Ct. 2271 (2016). Acknowledging that many of DAPA's provisions were not expressly foreclosed by the INA, we still rejected the argument that "congressional silence has conferred on DHS the power to act." *Id.* *Chevron* step two is not implicated, we said, merely because "a statute does not expressly negate the existence of a claimed administrative power." *Id.* at 186 (quoting *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995)) (emphasis in original). "Were courts to presume a delegation of power absent an express *withholding* of such power," we explained, "agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Id.* (quoting *Ethyl*, 51 F.3d at 1060).[12]

Similarly, in *Ethyl*, on which we relied in *Texas*, the D.C. Circuit rejected EPA's construction of a provision of the Clean Air Act ("CAA"). 51 F.3d at 1054. The CAA prohibits fuel additives but directs EPA to waive the prohibition for additives that do not interfere with a vehicle's emissions-control systems. *Id.* (citing 42 U.S.C. § 7545(f)(4)). EPA determined the

[12] *See also Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 269 (5th Cir. 2015) ("[A]n administrative agency does not receive deference under *Chevron* merely by demonstrating that 'a statute does not expressly negate the existence of a claimed administrative power . . . .'" (quoting *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (emphasis in the original)).

petitioner had satisfied that criterion but denied waiver, imagining it could "consider other factors" in its waiver decision, including public health. *Id.* (citation omitted). The agency argued that because the emissions provision did not mention public health, "Congress ha[d] not directly spoken on the issue of whether [EPA] may consider the public health implications of fuel additives before granting or denying a . . . waiver." *Id.* The D.C. Circuit set aside the decision, rejecting "the notion that if Congress has not mentioned public health in [the additive provision], then Congress is 'silent or ambiguous' as to that issue" for *Chevron* purposes. *Id.* at 1070 (quoting *Chevron*, 467 U.S. at 843). The provision was not "ambiguously worded" and did not "direct the Agency to adopt implementing regulations" to determine its meaning. *Id.* "Rather, the statutory waiver provision unambiguously expresse[d] Congress's intent that the [EPA] consider a fuel additive's effects on vehicles meeting emission standards." *Id.*[13]

Here, NMFS's argument parallels DHS's in *Texas* and EPA's in *Ethyl*. The agency claims, not that Act affirmatively empowers it to regulate aquaculture, but that the Act fails to "express[] Congress's unambiguous intent to *foreclose* the regulation of aquaculture." As *Texas* and *Ethyl* teach, this argument gets *Chevron* backwards. "It is only legislative *intent to delegate* such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of *Chevron*." *Ethyl*, 51 F.3d at 1060 (quoting *Nat. Res. Defense Council v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993)) (cleaned up); *see also Am. Bus Ass'n v. Slater*, 231 F.3d 1, 9 (D.C. Cir. 2000) (Sentelle, J., concurring) ("In order for there to be

[13] *Accord Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002) (rejecting as "entirely untenable" agency position that adopting certain rules "is permissible because Congress did not expressly foreclose the possibility" (citing *Ry. Labor Executives' Ass'n*, 29 F.3d at 671)).

an ambiguous grant of power, there must be a grant of power in the first instance."). Instead of identifying any intent to delegate authority here, the agency can claim only that Congress did not withhold the power the agency now wishes to wield. Once again, this is the argument that presumes power given if not excluded. We have resisted that siren song before, *see Texas*, 809 F.3d at 186, and we again decline to be seduced.

Fond of animal metaphors, courts like to say "Congress does not 'hide elephants in mouseholes.'" *Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360, 376 (5th Cir. 2018) (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)). The agency's argument here is all elephant and no mousehole. It asks us to believe Congress authorized it to create and regulate an elaborate industry the statute does not even mention. Because we cannot suspend our disbelief that high, we reject the agency's position.

B.

Unable to land support for its interpretation in the words of the Act, the agency goes angling for ambiguity. It argues the Act's text is sufficiently open-ended to give it leeway to create an aquaculture regime. *See, e.g., Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016) (explaining, "where a statute leaves a 'gap' or is 'ambiguous,' we typically interpret it as granting the agency leeway" to regulate (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (cleaned up)). The agency fixes on the word "harvesting" in the definition of "fishing." *See* 16 U.S.C. § 1802(16) ("fishing" means "the catching, taking, or harvesting of fish"). Recall that the Act empowers councils to regulate "fisheries," *id.* § 1852(a)(1)(E), whose definition includes "fishing" for stocks of fish, *id.* § 1802(13)(B). The agency contends the word "harvesting" is roomy enough to include

The agency also objects that the district court wrongly injected the concept of "traditional fishing of wild fish" into the Act. That is a puzzling objection, given one of the Act's goals is to remedy the "overfishing of fishery resources" caused by "[c]ommercial and recreational fishing," as well as "the activities of massive foreign fishing fleets." 16 U.S.C. § 1801(3). [22] To us, this sounds like concern over "traditional fishing of wild fish." In any event, the agency misunderstands the district court's rationale. The court used the phrase "traditional fishing of wild fish" merely to contrast with "farming of fish." Specifically, it reasoned that "catching" and "taking" are terms that "describe traditional fishing activities and would be awkward in reference to the farming of fish." Just so, the term "harvesting should be read similarly to refer only to the traditional fishing of wild fish." This is a straightforward—and correct—use of the associated-words canon to pin down the most likely meaning of "harvesting." [23]

the total allowable *catch*, guideline *harvest* level, or other annual *catch* limit" (emphases added)); *id.* § 1881a(e)(2)(B) (Secretary may structure private fishery surveys "by permitting the contractor to *harvest* on a subsequent voyage and retain for sale a portion of the allowable *catch* of the surveyed fishery" (emphases added)); id. § 1881(a)(e)(2)(C) (same).

[22] The Act contains numerous provisions that unmistakably refer to matters associated with the "traditional fishing of wild fish." *See, e.g.,* § 1853(a)(1) (requiring FMP to be "applicable to foreign fishing and fishing by vessels of the United States"); *id.* § 1853(a)(2) (requiring FMP to "contain a description of the fishery, including . . . the number of vessels involved, the type and quantity of fishing gear used, . . . any recreational interests in the fishery, and the nature and extent of foreign fishing and Indian treaty fishing rights"); § 1853(a)(13) (requiring FMP to "include a description of the commercial, recreational, and charter fishing sectors which participate in the fishery").

[23] For similar reasons, we also disagree with the agency that the district court incorrectly limited the Act's scope to "wild fish." Again, the court used "wild fish" merely to contrast with "farmed fish," not to address the specific kinds of fish covered by the Act. No one contests that the Act defines "fish" broadly to embrace "all other forms of marine

The agency further argues that the district court's interpretation slights the term "harvesting," making it redundant with "catching" and "taking." This invokes the anti-surplusage canon, which encourages courts to give effect to "all of [a statute's] provisions, so that no part will be inoperative or superfluous, void or insignificant." *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 294 (5th Cir. 2020) (en banc) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)). But that canon "yields to context," *id.* (citation omitted), and we have explained that, in context, the three terms are synonymous. Sometimes Congress writes statutes this way, either due to a "not uncommon sort of lawyerly iteration," *id.* (quoting *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012)), or "out of an abundance of caution," *Fort Stewart Sch. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 646 (1990). And, even on the agency's reading, the term "harvesting" is no more superfluous than "catching" and "taking" are to each other. The bottom line: "If the meaning of a text is discernibly redundant, courts should not invent new meaning to avoid superfluity at all costs." *Latiolais*, 951 F.3d at 294. We decline the agency's invitation to do so here.[24]

animal and plant life other than marine mammals and birds." § 1802(12). That definition, however, says nothing about whether the Act opens the door to aquaculture.

[24] The agency relies on *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, which applied the anti-surplusage canon to "take" in the Endangered Species Act ("ESA"). 515 U.S. 687, 690 (1995). The ESA penalizes "taking" an endangered species, defining "take" as "harass, harm, pursue, wound, or kill." *Id.* (cleaned up). The Secretary of the Interior defined "harm" to include modifying a habitat. *Id.* The Court upheld that reading, in part because it prevented "harm" from duplicating the other words in the definition of "take". *Id.* at 698. Similarly, it held the D.C. Circuit erred by using *noscitur a sociis* to deny "harm" any "independent meaning." *Id.* at 702. *Sweet Home* does not support the agency's position. As relevant here, *Sweet Home* rejected *noscitur a sociis* largely because "[t]he statutory context of 'harm' suggest[ed] that Congress meant that term to serve a particular function in the ESA, consistent with, but distinct from, the functions of the other verbs used to define 'take.'" *Id.* at 702. But here nothing suggests "harvesting" in 16 U.S.C. § 1802(16) was meant to carry any more water than "catching" or "taking."

The agency also relies on the breadth of some of the Act's terms to show an expansive meaning of "harvesting." For example, it cites § 1855(d), giving the agency "general responsibility to carry out any fishery management plan" and empowering it to "promulgate such regulations . . . as may be necessary to discharge such responsibility or to carry out any other provision of this chapter." It also cites language defining "fishery resources" to include "*any* fishery" and "*any* stock of fish." 16 U.S.C. § 1802(15) (emphases added). We are unpersuaded. These provisions are like "the broad grants of authority" DHS vainly relied on in *Texas*.[25] We refused to read such provisions to expand the agency's power beyond the statute's terms. So too here. The grant of authority to promulgate "necessary" regulations cannot expand the scope of the provisions the agency is tasked with "carry[ing] out." *Id.* § 1855(d). And the grant of authority over "any fishery" and "any stock of fish," *id.* § 1802(15), still depends on whether the relevant stock is a "fishery," which, in turn, turns on the definition of "fishing." As explained, nothing in the definition plausibly suggests the agency has been given authority to regulate aquaculture.

Finally, we point out a more fundamental problem with the agency's position. In 1976, when Magnuson-Stevens was passed, Congress knew what aquaculture was and how to confer authority to regulate it. Only four years earlier, Congress had amended the Federal Water Pollution Control Act of 1948 to give EPA authority to regulate "aquaculture project[s]." *An Act to Amend the Federal Water Pollution Control Act*, Pub. L. 92-500, § 318(a), 86 Stat. 816, 877 (1972), *codified at* 33 U.S.C. § 1328(a). Subsequently, in 1992

[25] *See* 809 F.3d at 183 (citing 6 U.S.C. § 202(5) (providing DHS "shall be responsible for . . . [e]stablishing national immigration enforcement policies and priorities"), and 8 U.S.C. § 1103(a)(3) (providing Secretary "shall establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter")).

and 2007, Congress even added three specific references in parts of Magnuson-Stevens to "aquaculture" and "fish farms."[26] As the district court concluded, while these "discrete and immaterial provisions" do not purport to empower NFMS to regulate aquaculture, they do show that Congress knows how to legislate on the subject when it wishes. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another, it is presumed that Congress acts intentionally and purposely." (cleaned up)).[27] In light of that, the agency's position appears all the more unfathomable. From one word—"harvesting"—the agency would conjure up authority over aquaculture that Congress knew how to give, but never gave. That does not hold water.

2.

So far, we have seen that the definition of "fishing" in § 1802(16), on its own terms, forecloses the agency's interpretation. That result is reinforced when we read the definition "in context and with reference to the

[26] In 1992, Congress provided resources "to restore overfished New England groundfish stocks through aquaculture or hatchery programs." Pub. L. No. 102-567, § 902(a), 106 Stat. 4270, 4318 (1992), *codified at* 16 U.S.C. § 1863(a)(E). In 2007, Congress established programs "to educate and inform consumers about the quality and sustainability of wild fish or fish products farmed through responsible aquaculture." Pub. L. No. 109-479, § 109, 120 Stat. 3575, 3595 (2007), *codified at* 16 U.S.C. §§ 1855(j)(1)–(2). The same amendment delineated the status of "an individual who owns or operates a fish farm outside of the United States." *Id.* § 103(j), 120 Stat. at 3583, *codified at* 16 U.S.C. § 1852(d)(2)(D)(iii).

[27] The agency's rejoinder is unpersuasive. It claims there is no evidence "that Congress actually considered the question of NMFS's regulating aquaculture" and rejected that possibility. *See Coastal Conservation Ass'n v. U.S. Dep't of Commerce*, 846 F.3d 99, 106 (5th Cir. 2017) (negative-implication canon does not apply "unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it"). But the 1972 Federal Water Pollution Control Act amendment is precisely such evidence.

larger statutory scheme." *Sw. Elec. Power Co.*, 920 F.3d at 1024 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)).[28] As the district court pointed out, there are "various ways in which [the Act] is nonsensical when applied to aquaculture." That is correct. When aquaculture is viewed as a "fishery," some of the Act's core requirements stop making sense. We will not defer to an agency interpretation that is "inconsistent with the design and structure of the statute as a whole." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014) (citation omitted).

The Rule's innovation is to equate an "aquaculture facility" with a "fishery" under the Act.[29] But the Act makes demands on a fishery that cannot apply to an aquaculture facility. Importantly, each fishery must have a plan (the "FMP") with measures designed "for the conservation and management of the fishery, [and] to *prevent overfishing* and rebuild *overfished stocks*." 16 U.S.C. § 1853(a)(1)(A) (emphases added). Easy to see how this applies to a typical fishery: the FMP must have measures, like annual catch limits, that will prevent taking too many fish out of the relevant fishery.[30] But try applying this idea to aquaculture, and your line will become hopelessly snarled. "Since aquaculture is essentially a farming operation," the Rule tells us, "all animals cultured are intended for harvest *and cannot undergo*

[28] *See also, e.g., United States v. Transocean Deepwater Drilling, Inc.*, 767 F.3d 485, 496 (5th Cir. 2014) (we interpret statutes by "looking at the full text of the statute, rather than one isolated clause, along with the statute's structure and its public safety purpose").

[29] *See, e.g.,* 81 Fed. Reg. at 1762 (Rule establishes a program for managing an "aquaculture facility" in the Gulf of Mexico); *id.* ("The aquaculture facility is managed under the FMP."); *id.* (Rule authorizes a "Gulf aquaculture permit" that "authorizes operation of an offshore aquaculture facility in the Gulf EEZ").

[30] *See, e.g.,* International Fisheries; Pacific Tuna Fisheries; 2019 and 2020 Commercial Fishing Restrictions for Pacific Bluefin Tuna in the Eastern Pacific Ocean, 84 Fed. Reg. 18,409 (May 1, 2019) (establishing annual catch limits on Pacific bluefin tuna), *codified* at 50 C.F.R. pt. 300.

overfishing or become overfished." 81 Fed. Reg. at 1771 (emphasis added).[31] Other provisions of the Act are also geared to prevent "overfishing" a fishery,[32] including one of the national standards every FMP must honor.[33] Equating a "fishery" with an aquaculture facility effectively erases these provisions from the Act.[34]

The agency responds that aquaculture may help mitigate overfishing with respect to "other stocks of fish"—that is, other fisheries. That is mistaken. The Act specifies when an FMP must address the specific fishery that is the subject of the plan. *See generally* 16 U.S.C. §§ 1853(a)(1)(A), (a)(2), (3), (5)–(7), (10), (11), (13)–(15) (applying FMP requirements to "the fishery" in question). As to overfishing, an FMP must "specify objective and measurable criteria for identifying when *the fishery to which the plan applies* is overfished," and must "establish a mechanism for specifying annual catch

[31] *See also* 81 Fed. Reg. at 1784 (stating "it is not possible to overharvest cultured animals").

[32] *See, e.g.,* 16 U.S.C. § 1853(a)(10) (plan must specify criteria "for identifying when the fishery to which the plan applies is *overfished*," and, "in the case of a fishery which the Council or the Secretary has determined is approaching an overfished condition or is overfished, contain *conservation* and management measures to prevent *overfishing* or end *overfishing* and rebuild the fishery"); id. § 1853(a)(15) (plan must have a "mechanism for specifying annual catch limits . . . at a level such that *overfishing* does not occur in the fishery" (emphases added)).

[33] *See id.* § 1851(a)(1) (requiring any FMP, "and any regulation promulgated to implement such plan," to be consistent with national standards including "[c]onservation and management measures [that] *shall prevent overfishing*" (emphasis added)).

[34] Same for the Act's requiring an FMP to assess a fishery's "maximum sustainable yield and optimum yield." *See* 16 U.S.C. §§ 1853(a)(3), 1851(a)(1). An aquaculture facility's "yield" is by definition 100% because—again, as the Rule itself states—"*all* animals cultured are intended for harvest." 81 Fed. Reg. at 1770 (emphasis added). So, it makes no sense to talk about the "maximum sustainable yield" or "optimum yield" from an aquaculture facility. *Cf.* 16 U.S.C. § 1802(33) (defining "optimum," in part, as referring to "an overfished industry").

limits . . . at a level such that overfishing does not occur *in the fishery*." *Id.* § 1853(a)(10), (15) (emphases added).[35] Here, the regulated fishery includes only aquaculture facilities, *see* 81 Fed. Reg. at 1762, and the overfishing requirements apply to *those* "fisheries," not others.[36]

The agency also invokes its general authority under the Act to "prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery." 16 U.S.C. § 1853(b)(14). It claims regulating aquaculture is "necessary and appropriate" to conserve fishing resources, perhaps by diminishing demand on wild fisheries. But, as discussed already, the Act's pertinent conservation provisions apply *to each FMP* and *per fishery*. In other words, the Act requires each management plan to employ conservation techniques for the given fishery, not for all fisheries or the ecosystem as a whole. Accordingly, the Act defines "fishery" as "one or more stocks of fish *which can be treated as a unit for purposes of conservation and management*." *Id.* § 1802(13) (emphasis added). Here, the Rule conceives all Gulf aquaculture as one "fishery," 81 Fed. Reg. at 1762, such that the Act's

[35] When the Act requires an FMP to consider impacts on *other* fisheries, it says so. *See id.* § 1853(a)(9)(B) (plan must include an impact statement analyzing likely effects on, *inter alia*, "participants in the fisheries conducted in adjacent areas under the authority of another Council"). Such references to *other* fisheries do not appear in the Act's overfishing measures discussed above.

[36] The agency cites no textual basis showing that one fishery can be regulated to prevent overfishing in another fishery. It quotes only the definition of "conservation and management," which refers to measures for "rebuilding, restoring, or maintaining[] *any* fishery resource and the marine environment." *Id.* § 1802(5)(A) (emphasis added). But the word "any" merely confirms that conservation measures include all of the "fishery resources" in § 1802(15). In any event, the agency does not explain how one word in the definition of "conservation and management" overrides the Act's express requirements that overfishing measures apply to the specific regulated fishery. *See, e.g., id.* § 1802(a)(10) (referring to overfishing criteria applicable to "the fishery to which the plan applies").

required conservation techniques apply only to *that* "fishery," not all Gulf fishing or all fishing under the Act's ambit.

Finally, we note the agency itself has conceded the Act fits poorly with aquaculture. In the Rule's environmental impact statement, NMFS candidly stated that "[t]he [Act] was . . . not explicitly written for managing at sea fish farming or aquaculture operations." Accordingly, "[m]any of the principles and concepts that guide wild stock management under the [Act] are *either of little utility or not generally applicable* to the management of aquaculture operations" (emphasis added).[37] The agency thus admitted that "[m]any" of the Act's "legal requirements do not fit well or are difficult to satisfy with respect to aquaculture, thereby making them seem less useful or even unnecessary." "Despite this lack of conceptual similarity," the agency nonetheless insisted that "offshore aquaculture falls within the realm of activities subject to regulatory control under the [Act] and therefore must be accommodated within the existing legal framework." This was the district court's reaction, which we find apt:

> Contrary to the NMFS's position, this Court does not view the incompatibility of the requirements of the [Magnuson-Stevens Act] with aquaculture operations as an unfortunate happenstance, but rather, as a clear indication that Congress did not intend for the [Act] to grant NMFS the authority to regulate aquaculture.[38]

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[37] *Accord* 81 Fed. Reg. at 1762 ("[M]any of the principles and concepts that guide wild stock management are not generally applicable to the management of an aquaculture fishery.").

[38] Given our conclusion that the Act's text and structure foreclose the agency's interpretation, we need not reach the district court's conclusion that the Act's legislative history also fails to support the agency's position.

The judgment of the district court is AFFIRMED.

ATTACHMENT 2

STEPHEN A. HIGGINSON, *Circuit Judge*, dissenting:

Through the Magnuson-Stevens Fishery Conservation and Management Act of 1976 (Magnuson Act) and its national standards, 16 U.S.C. §§ 1801–1882, Congress delegated to the Commerce Department expansive authority to regulate, manage, and conserve fish in the exclusive economic zone. Specifically, the Commerce Department's National Marine Fisheries Service (NMFS), in conjunction with eight independent regional fishery management councils, "will exercise . . . exclusive fishery management authority over *all fish*, and *all Continental Shelf fishery resources*, within the exclusive economic zone." § 1811(a) (emphasis added); *see also* §§ 1851, 1854–55; *see generally Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1008 (9th Cir. 2006); *Kramer v. Mosbacher*, 878 F.2d 134, 135 (4th Cir. 1989). Congress provided that this expansive authority should be used to "conserve and manage the fishery resources found off the coasts of the United States . . . by . . . exploring, exploiting, conserving, and managing *all fish*," "promote domestic commercial and recreational fishing under sound conservation and management principles," and "encourage the development by the United States fishing industry of fisheries which are currently underutilized or not utilized by United States fishermen." § 1801(b)(1), (3), (6) (emphasis added).

In turn, the Gulf of Mexico Fishery Management Council, comprised of members from the five Gulf states, eleven of whom are nominated by those states' governors, spent six years discussing offshore aquaculture before adopting the Plan for Regulating Offshore Marine Aquaculture in the Gulf of Mexico. That plan, which went into effect in 2009, regulates and permits greatly enhanced takes of fish through the operation of offshore structures

and nets wherein fish are bred and from which fish are harvested.[39] Thereafter, in 2014, NMFS published its Proposed Rule to implement the plan; and, in January 2016, its Final Rule. *See generally* 81 Fed Reg. 1762 (Jan. 13, 2016).

I would uphold NMFS's decision that it may regulate how fish are reared and harvested in the exclusive economic zone because this authority follows from Congress's expansive grant of authority to conserve and manage offshore "fishery resources," without distinguishing between methods of fishing or types of fish. *See* § 1802(15) (defining "fishery resource" as "*any* fishery, *any* stock of fish, *any* species of fish, and *any* habitat of fish" (emphasis added)).

As the majority notes, Congress's statutory delegation to NMFS does not delimit "aquaculture" as an industry distinct from other types of fishing. I would say that is because fishing, from time immemorial, has involved ingenious varieties of lines, pots, cages, nets and enclosures. The Magnuson Act responsibility given to NMFS—to conserve, maintain, and manage offshore fisheries—comprehends not just familiar mariculture methods like mussel lines and lobster traps, *see, e.g.*, *Duckworth v. United States ex rel. Locke*, 705 F. Supp. 2d 30, 45–46 (D.D.C. 2010), fish hatcheries, *see, e.g.*, *Gutierrez*, 452 F.3d at 1109, 1117–19, and towed mesh cages capable of growing up to 2,000 fish, *see Kahea v. NMFS*, 2012 WL 1537442, at *8–*10 (D. Haw. 2012), *affirmed in relevant part*, 544 F. App'x 675 (9th Cir. 2013), but also the more modern and enlarged methods contemplated by the Final Rule.

[39] The timing of the plan was not coincidental. The United States had become deeply reliant on imported seafood to meet demand. Kristen L. Johns, Note, *Farm Fishing Holes: Gaps in Federal Regulation of Offshore Aquaculture*, 86 S. CAL. L. REV. 681, 683 (2013) (observing that, in 2011, the United States imported 91% of its seafood supply).

Regardless, even if the Magnuson Act's capacious regulatory grant does not unequivocally comprehend aquaculture, I would say it is at least ambiguous.[40] Indeed, to read out ambiguity, I would have to say either, as appellees do, that fish farming is not "fishing," or, as the district court did, that "fishing" only means what it meant "traditionally" when the Magnuson Act was passed in 1976, assertedly the capture of "wild" fish. *But cf. Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1745 (2020) ("[C]ontentions about what . . . the law was meant to do, or should do, [do not] allow us to ignore the law as it is.").

Each of these understandings is plausible but neither is an unambiguously correct interpretation of the statutory language. That is because Congress provided an expansive definition of "fishing," explicitly including "*any operations at sea* in support of" "*any other activity* which can reasonably be expected to result in the *catching, taking, or harvesting of fish*." § 1802(16) (emphasis added).[41] Spawning, raising, and then taking or

[40] The majority classifies NMFS's position as "nothing-equals-something." But I understand NMFS to be relying on the broad language in the statute and the broad purposes of the statute to argue—I think convincingly—that it is at least ambiguous whether the plain language of the statute encompasses aquaculture. *See Envtl. Integrity Project v. EPA*, 960 F.3d 236, 246–47 (5th Cir. 2020) ("Under *Chevron*, we defer to an agency's interpretation when it reasonably resolves a genuine statutory ambiguity."). NMFS argues separately against what *it* perceives to be "nothing-equals-something" analysis where courts insert limiters like "wild" or "traditional" onto Congress's "any/all" statutory grant.

[41] The majority applies the noscitur a sociis canon of statutory interpretation to conclude that "harvesting" is "synonymous with" "catching" and "taking." In applying the noscitur a sociis canon, courts should focus on the "most general quality—the least common denominator, so to speak—relevant to the context." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 196 (2012). As I read the statute, the least common denominator is extraction of "any fish" from the water. Both "harvest" and "take" could be used to describe aquaculture, where fish are raised in offshore enclosures

harvesting fish from offshore nets, pens, or other enclosures are "operations at sea" supporting "any . . . activity" that results in the taking or harvesting of fish. *See id.*

In fact, ambiguity enters only when one considers the majority's points that other provisions of the Act, separate and distinct from NMFS's authorizing text, may be inapt when applied to modern methods of rearing and harvesting fish in and from enclosed offshore waters. These points are well taken,[42] but do not unambiguously resolve the issue. *See City of Dallas v. F.C.C.*, 118 F.3d 393, 395 (5th Cir. 1997) (holding that a court must "defer to the agency's reasonable construction" of a statute if there is ambiguity after applying all of the traditional tools of interpretation, including analysis of the "design of the statute as a whole").

Therefore, applying *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), I would defer to the agency's reasonable interpretation. *Envtl. Integrity Project v. EPA*, 960 F.3d 236, 246–47 (5th Cir. 2020). Interpreting the Magnuson Act to permit regulation of aquaculture is reasonable. Aquaculture fits within the Act's broad definitions of "fishery resources" and "fishing," and regulating aquaculture fits within the Act's mandate to manage and conserve "all fish, and . . . fishery resources, within the exclusive economic zone." §§ 1802(15)–(16), 1811(a).

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and then "harvested" or "taken" from those enclosures, so the noscitur a sociis canon—in my view—does not limit the appropriate interpretation of "harvest" to wild fish.

[42] *See* Read Porter & Rebecca Kihslinger, *Federal Environmental Permitting of Offshore Aquaculture: Coverage and Challenges*, 45 ENVTL. L. REP. NEWS & ANALYSIS 10875, 10881 (2015).

Congress's clear purpose to conserve and maintain our nation's offshore fisheries, coupled with its explicit and capacious grant of authority over "all fish," lead me to conclude that modern aquaculture methods of fishing fit vitally in, not out of, the Magnuson Act regime.[43] Alternatively, I would find that the statutory grant of authority is at least open on that point, obliging us to defer to the NMFS's reasonable interpretation before invalidating over a decade of state and federal officials' efforts, along with private experts, to draft a "fishery management" plan that reconciles myriad commercial, environmental, and recreational interests.[44]

[43] Multiple other federal agencies regulate aquaculture, including the Army Corps of Engineers, the Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the Department of Agriculture. Scholars have noted, however, that "the [Magnuson Act] is an important link in protecting the environment from the impacts of offshore aquaculture because it authorizes NMFS to deploy management measure and permit conditions . . . that are not adequately addressed by other regulatory programs." Porter & Kihslinger, *supra* note 4, at 10882.

[44] Notably, these interests include conservation and management of wild fish, which no one disputes as a fundamental purpose of the Magnuson Act. *See* Porter & Kihslinger, *supra* note 4, at 10882, 10892–93. It would be puzzling if the broad authority to manage and conserve wild fish under the Magnuson Act in no way permitted regulation of fish reared in, harvested from, and impacting the same waters.

ATTACHMENT 2

November 16, 2020

Ventura Port District Board of Commissioners
1603 Anchors Way Drive
Ventura, CA 93001
Sent to jrauch@venturaharbor.com

Re: <u>Preliminary Operations Plan for the Proposed Ventura Shellfish Enterprise Project</u>

Dear Commissioners:

Thank you for the opportunity to comment on the Preliminary Operations Plan for the proposed Ventura Shellfish Enterprise Project. As explained in our July 13, 2020, and October 1, 2020 letters, the undersigned groups are concerned about the proposed siting of this Project in federal waters. Collectively, our organizations have extensive knowledge of marine resources off the California coast and experience navigating the various laws and policies associated with coastal and marine development. We remain convinced that state environmental, safety, and health regulations and public processes are more robust and protective than their federal counterparts. Additionally, LAFCo rules prohibit the District from pursuing a project in federal waters. For these reasons, we urge you to refrain from submitting the Preliminary Operations Plan to the Army Corps of Engineers and California Coastal Commission.

Instead, we urge the District to work with the relevant state agencies to explore a proposal in state waters. The California Coastal Commission is working on a Guidance for

aquaculture projects in state waters that will be completed by the end of the year.[1] The California Department of Fish and Wildlife is tasked with preparing a programmatic Environmental Impact Report for aquaculture in state waters,[2] and is completing an Aquaculture Information Report. The California Ocean Protection Council identified promoting sustainable aquaculture as a primary objective in its 2020-2025 Strategic Plan, with a goal of developing a statewide aquaculture action plan focused on marine algae and shellfish by 2023.[3] These efforts involve coordination with various state agencies to produce a comprehensive process for reviewing proposed projects and ensure adequate attention to environmental, health, and safety concerns.

In contrast, the federal review process is mired in controversy and potential legal obstacles.[4] Several federal laws and regulations are weaker than state requirements, e.g., the National Environmental Policy Act lacks the substantive mandate to avoid or minimize environmental effects that the California Environmental Quality Act requires. In addition, the Coastal Commissions consistency review under the federal Coastal Zone Management Act lacks the permitting authority, environmental review, oversight, and enforcement that apply to issuance of coastal development permits.

Finally, state LAFCo requirements do not allow the District to operate in federal waters.[5] Accordingly, we urge the Commission to refrain from submitting the Preliminary Operations Plan to the Army Corps of Engineers and Coastal Commission, and to instead direct your staff to consider a proposal in state waters.

Thank you for consideration of our comments.

Sincerely,

Linda Krop, Chief Counsel
Environmental Defense Center

Hallie Templeton, Senior Oceans Campaigner
Friends of the Earth

Michael Stocker
Director, Ocean Conservation Research
President, Seven Circles Foundation

Susan Jordan, Executive Director
California Coastal Protection Network

Mati Waiya, Executive Director
Wishtoyo Chumash Foundation

Morgan Patton, Executive Director
Environmental Action Committee of West Marin

[1] See California Coastal Commission CDP Application Guidance: Aquaculture and Marine Restoration, Draft, July 2020; available at *https://documents.coastal.ca.gov/assets/cdp/Draft-CDP-Application-Guidance-Aquaculture-and-Marine-Restoration.pdf.*
[2] Fish & Game Code section 15008 (SB 201, 2006).
[3] California Ocean Protection Council, *Strategic Plan to Protect California's Coast and Ocean 2020-2025*, p. 27.
[4] See, for example, *Gulf Fishermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454 (5th Cir. 2020), *as revised* (Aug. 4, 2020).
[5] Staff report by Kai Luoma, Ventura County LAFCo, to LAFCo Commissioners (October 16, 2019).

ATTACHMENT 2

Ben Pitterle, Science and Policy Director
Santa Barbara Channelkeeper

Julie Teel Simmonds, Senior Attorney
Center for Biological Diversity

Rosanna Marie Neil, Policy Counsel
Northwest Atlantic Marine Alliance

Courtney S. Vail, Director of Strategic Campaigns
Oceanic Preservation Society

cc: Assemblymember Monique Limon
Cassidy Teufel, California Coastal Commission
Charlton Bonham, California Department of Fish and Wildlife
Mark Gold, Ocean Protection Council
Kai Luoma, Ventura County LAFCo

ATTACHMENT 2

Open Session Meeting: November 18, 2020

Standard Agenda Item 1,
Consideration of Operations Plan
and
Economic and Fiscal Impacts
of the
Proposed Ventura Shellfish Enterprise Project

Commissioners:

The Magnuson-Stevens Fishery Conservation and Management Act of 1976 (16 U.S.C. 1801 et seq.) does not specify anything concerning aquaculture.

As a result, the Fifth Circuit Court of Appeals has determined that NOAA - National Marine Fisheries Service has no authority to regulate aquaculture pursuant to the *Magnuson-Steven Act* (see *Gulf Coast Fishermen's Association v. National Marine Fisheries Service,* 968 F3d 454 (5th Cir. 2020).

Because the *Magnuson-Stevens Act* is the authorizing statute for NOAA - National Marine Fisheries Service (the only entity within NOAA that concerns fisheries), if the Act does not authorize NOAA's work in aquaculture, NOAA has no statutory authority to be involved in aquaculture.

U. S. Senators Wicker, Rubio and Schatz introduced S 4723, *Advancing the Quality and Understanding of American Aquaculture Act* on September 24, 2020. Once this bill is enacted, regulations adopted, and Regional Management Plans approved by the Secretary of Commerce, NOAA – National Marine Fisheries Service could exercise the regulatory authority granted, thereby. This could take up to five years. Until then, there is no statutory scheme that authorizes development of aquaculture in offshore (Federal) waters.

The lack of legal authority to proceed with the District's shellfish project should not be construed as an opinion regarding the potential economic benefit of such a project. Instead, it should be understood to mean that until Senate Bill 4723 is enacted and all administrative requirements are met, the District cannot consider any project in Federal Waters.