



One Industry, One Voice

September 20, 2002

Via U.S. Mail and Facsimile (206-842-8364)

Mr. Colin Nash
NMFS/WASC
P.O. Box 130
Manchester, WA 98353

Re: Comments of the National Aquaculture Association with Respect to the "Draft Code of Conduct for Responsible Aquaculture in the U.S. Exclusive Economic Zone" (67 FR 54644 (August 23, 2002))

Dear Mr. Nash:

The National Aquaculture Association (NAA) submits the following comments regarding the above-referenced draft Code of Conduct for Responsible Aquaculture in the U.S. Exclusive Economic Zone ("Code"). The NAA appreciates the opportunity to submit these comments and looks forward to working with the National Marine Fisheries Service (NMFS) to develop the Code and other program elements to foster the development of sustainable aquaculture in the Exclusive Economic Zone (EEZ).

1. General Comments

The NMFS must more specifically detail the intended nature and purpose of the Code. Doing so will not only better facilitate appropriate use of the Code, but will also help to ensure that the proper procedural requirements are observed commensurate with the intended use. The Code cannot be both "voluntary" and a framework for agency decision-making in the authorization of offshore facilities. Text that identifies the Code as a regulatory tool should be deleted. In addition, the development of future regulations that use the Code as a "starting point" must comply with notice and comment rulemaking procedures for legislative rules under the Administrative Procedures Act,¹ and other required standards of review and oversight², without being constrained to comply with provisions of a previously employed voluntary code.

A proposed Code of Conduct should be limited in scope to the conduct of aquaculture operations in the EEZ. The Code should not make recommendations for federal funding or modification or expansion of federal agency authority. Such recommendations are inappropriate for a "Code of

¹ 5 U.S.C. 552 et seq.

² E.g. Executive Order 12866 [58 FR 51735, October 4, 1993]; 5 U.S.C. 601 et seq.; 2 U.S.C. 1532.

Conduct.” The Code also should not interpret existing state or federal law or the appropriate application of international standards, voluntary or otherwise, within U.S. waters.

The majority of the factual statements, interpretations and conclusions set forth in Sections 1 (Rationale) through 5 (Relationship with Other Legal Instruments) are made without benefit of citation to legal authority or sufficient explanation or documentation to foster a substantive comment by a reviewer. It should be made clear in any amended document that these sections, and the Appendix II and Appendix III are not part of the Code.³

2. Specific Comments

The following comments are organized to address specific provisions of the draft Code and public notice materials.

- a. Section 1. The Rationale for Aquaculture Development in the United States Exclusive Economic Zone (EEZ)

Page 6, Paragraph 1: The list of cultivated aquatic animals and plants should include “ornamental species for aquaria and species produced to be used as biological control agents.”

Page 6, New Paragraph 4: If the existing format of the introductory sections of the Code document are kept in the document, then insert the following before the “5-year Fisheries Strategic Plan” paragraph:

The National Aquaculture Act of 1980 provides for the development of aquaculture in the United States through the declaration of a national policy, creation and implementation of a national aquaculture development plan, establishment the U.S. Department of Agriculture as a lead agency with respect to the coordination and dissemination of information as a permanent chair of the Joint Subcommittee on Aquaculture, and encourages aquaculture activities and programs in both the public and private sectors. Congress, through this Act, declared that aquaculture has the potential to: reduce the trade deficit in fisheries products, augment existing commercial and recreational fisheries, produce other renewable resources, assist the United States in meeting its future food needs and contribute to the solution of world resource problems. In addition, Congress declared it is in the national interest and a part of national policy to encourage the development of aquaculture in the United States.⁴

³ Much of the information provided without attribution in the document may be based on information that has been available, in some instances, for quite a few years (e.g., *Marine Aquaculture: Opportunities for Growth*, 1992, National Research Council), may be of questionable value given the level of ecological, biological and production information and analysis currently available in published reference sources (e.g., *Responsible Marine Aquaculture*, 2002, Stickney and McVey or *Aquaculture and the Environment in the United States*, 2002, Tomasso, et. al.) or is superfluous given the complex array of state and federal regulations that has stalled several attempts to place sea cages in the Exclusive Economic Zone (See, *Development of a Policy Framework for Offshore Marine Aquaculture in the 3-200 Mile U.S. Ocean Zone*, 2001, Cicin-Sain, et. al.).

⁴ 16 U.S.C. 2801 et seq.; 16 U.S.C. 2801(c).

Page 7, Paragraph 2: The declaration that there are “serious constraints” to expansion of marine aquaculture is overly broad and not correct in many respects. This paragraph should be rewritten to recognize the: 1) explosive growth in shellfish aquaculture in the coastal zone over the last decade and 2) constraints to marine aquaculture have been, as stated, related to development of the coastal zone but are also attributable to the lack of economically viable and environmentally friendly technology. Recognition should also be given to the fact that shellfish production can clean coastal waters by removing nutrients, and that a number of recent advances in production and changes in consumer behavior have provided the opportunity to succeed in marine aquaculture. For example, technical advances have yielded the techniques to produce large numbers of fingerlings and shellfish seed for grow-out in high-density systems, and recent changes in seafood values and demand have created a business climate to support marine aquaculture as an economically viable enterprise.

It should be noted that investment in marine aquaculture in the EEZ will be driven to a large extent by the comparative cost of regulations and the costs of operations in this country versus the costs of operating in other countries. Many other countries (Canada, Norway, Chile, China, etc.) offer potential investors substantial state subsidies, lower labor costs and facilitated permitting processes. These factors will tend to drive investment in aquaculture to other countries unless the U.S. can rectify these imbalances.

Any references to “externalities” should be more specific and written in plain language.

References to “traditional” uses of coastal areas are inaccurate and should be deleted. It should also be noted that several types of aquaculture have been in practice for more than 100 years, and are more “traditional” than the uses referenced in this section of the Code document. Traditional aquaculture occurred long before the majority of seasonal coastal cottages were converted to year-round occupancy and septic system use, large recreational facilities developed, intensive tourism fostered and high-technology capture fishing methods employed.

Page 7, Paragraph 3: This paragraph and the one preceding it would lead us to believe that the U.S. aquaculture industry has all but given up on nearshore marine aquaculture due to the complexities of user conflicts. To the contrary, this is where proven aquaculture technologies have been developed and the bulk of the expansion is likely to occur if we are to achieve the Department of Commerce’s projected five-fold increase in aquaculture production by 2025.

Statements to the effect that the Code will encourage “timely investment in aquaculture opportunities” should be deleted unless the underlying basis for such statements is fully explained and verified.

Other sections of the Code imply additional direct or indirect costs may be leveled on offshore aquaculturists. Any analysis of the economic benefits afforded by the Code should include an analysis of the attendant costs of the Code to aquaculturists. The presumed benefits should be weighed against the specific direct and indirect costs to be paid by aquaculturists.

b. Section 2. Background to the Development of the Code.

Page 8, Paragraph 1, Sentence 1: This sentence should be deleted and replaced with a statement that the Code is intended to be interpreted in a manner that makes it consistent with the National

Aquaculture Act. Naturally, the Code cannot modify the findings, policy or directives of the National Aquaculture Act, and it should specifically say so.

Page 8, Paragraphs 3 and 4: This interpretation of legal authority and responsibility seems unnecessary. However, if NOAA retains this section as part of the Code, then the shared responsibility with the U.S. Department of Agriculture for research, development and outreach should be acknowledged here. If the Code's conclusion as to NOAA's responsibility for the "culture" of marine species is intended to extend beyond the provision of fish brood stock and technology transfer, and include responsibility for regulation of marine aquaculture by private parties, then the basis for that conclusion should be specifically identified.

Page 8, Paragraph 5: In the interest of full disclosure, this first reference to the FAO Code of Conduct for Responsible Fisheries should note that by its own terms, the FAO Code is voluntary, and it is not a provision of U.S. law.⁵

c. Section 3. The Nature and Scope of the Code.

Page 10, Paragraph 2: The term "soft law" is not included in the list of definitions and should be deleted. There is an inference of legal effect that is misleading and inappropriate in the context of a "guidance" document composed of voluntary activities.

Page 10, Paragraph 3: The draft Code states that: "the Code provides principles and standards applicable to all systems and practices for the culture of aquatic animals and plants for whatever purpose." It should be made clear that this Code is proposed to apply only to offshore marine aquaculture activities in federal jurisdiction waters of the U.S. Exclusive Economic Zone.

Page 10, Paragraph 4: The first sentence, "The Code is to be interpreted and applied in a manner consistent with existing federal regulations and international agreements" should be changed to "The Code does not supersede, modify or amend existing federal law, including international agreements." In addition, we assume that the Code would not be "applied" by an agency in the sense that it would apply enforceable laws. For example, a permit, lease or other instrument or right could not be refused to an aquaculture operation for not engaging or "complying" with a provision of the Code. An offshore facility also should not be subjected to enforcement action for not complying with the Code or modifying its operation without agency approval or confirmation of continued compliance with the Code.

Page 10, Paragraph 5: The meaning of this paragraph ("The Code is Generic . . .") is unclear and the statement confusing. Two statements in this paragraph directly contradict each other and the first statement really calls into question whether this is a code of 'conduct' or (based on the first statement) a broad "policy" statement.

Statement 1: "It [the code] is elaborated on the basis of desired outcomes for development, rather than a set of procedures to attain those outcomes."

⁵ FAO, Code of Conduct for Responsible Fisheries, Section 1.1 (1995). To our knowledge, the FAO Code has not been codified, adopted by Executive Order or ratified as a treaty by the United States.

Statement 2: “Therefore it is the responsibility of Government to ensure development compatible with responsible stewardship by means of clear and achievable development policies based on financial, social and environmental sustainability.” [Emphasis added].

It is inappropriate to attempt to define governmental responsibility in a federal Code of Conduct intended to guide aquaculture activities. This may simply be a vestige of the policies recommendations discussed in the FAO code of conduct. But such recommendations should be addressed in other materials.

Page 10, Paragraph 6: This paragraph should be deleted. All references to the precautionary principle or precautionary approach should be deleted throughout the Code. The American Farm Bureau Federation opposes the use, application or reference to the Precautionary Principle. The National Aquaculture Association advocates and endorses the use of unbiased, science-based evaluation that meets the standards required by applicable laws. The precautionary principle is vague and not clearly defined or applied by its various proponents. The precautionary principle is not even defined in Appendix I of the Code. The level or nature of the risk avoided, significant or not, is not defined. It is unclear whether all potential risks must be avoided to a level only bounded by the impossible, or requiring an unreasonable level of risk avoidance.

It is unclear in this paragraph how “potentially unacceptable outcomes” are defined or derived. It is equally unclear from what perspective those outcomes are being considered (economic, ecological or social).

Page 10, Paragraph 7: The NAA respectfully requests that the statement that the United States is a “strong supporter” of the FAO Code of Conduct for Responsible Fisheries be deleted or that it be amended to presumably state that NOAA is a strong supporter of the FAO Code.⁶

Page 10, Paragraph 8: Since the Code is described as a “living document,” the point of contact and planned procedure for revising the Code should be explained and included in supporting information to the Code.

d. Section 4. The Objectives of the Code.

Page 11, “Provide guidance” paragraph: The term “guidance” should be avoided as it is a term of art that has significance that may not be applicable to the use of the Code. Perhaps the elements of the Code should be described as suggestions or recommendations. In addition, the use of the Code for purposes of formal agency action (“guidance to those in government that must act on petitions to use the EEZ for aquaculture”) amounts to an acknowledgement that the Code would be used as a regulatory standard. General application of the Code for purposes of agency action on permit application decisions or other agreements or approvals makes the Code a rule.

Page 11, “Serve as an instrument of reference” paragraph: “Soft law” reference should be deleted.

e. Section 5. The Relationship of the Code with Other Legal Instruments

⁶ See, Footnote 3 and accompanying text.

The Code is not a legal instrument.

Page 12, Paragraph 2: This preliminary discussion section leading to presentation of the Code should not include conclusory statements regarding the application of state law to the EEZ. This issue goes beyond the scope of the Code, and must be thoroughly reviewed. While the states would certainly be participants in the permitting process for offshore facilities, the application of state law to aquaculture in areas of the EEZ beyond 3 nm. or 9nm. has yet to be determined. This issue of state law arises in several provisions of the Code, and our comment applies to those sections as well.

Page 12, Paragraph 3: There would be no “permits, licenses or the like” issued pursuant to the Code as the Code provides no legal authority for such action, and is itself not an enforceable standard. The Congress holds the authority to determine how property interests may be conveyed in the EEZ, and one such interest in property that is being considered is a lease for offshore aquaculture sites.

f. Section 6. The Code

Section 6.1: The Legal Framework

The NAA strongly agrees with the following statements in this section:

“The legal framework, to the fullest extent possible, should use existing institutional infrastructure to facilitate the administration and management of the national aquaculture industry. It should clearly define the jurisdiction of the many federal agencies involved in the regulation of EEZ-based aquaculture at the present time, and provide a mechanism for their continual close coordination.”

“Inter-agency coordination is essential to: (a) ensure the uniformity of policies for operating in the EEZ; (b) promote standardization and streamlining of regulations and procedures; (c) monitor and evaluate development; (d) simplify the permitting process; (e) increase efficiency and prevent delays in the elaboration of standards and regulations; (f) resolve or avoid conflicts, and (g) minimize costs.”

Section 6.2: The Administrative Framework

The Code is not the appropriate place to recommend that one agency be designated with “overall authority” for aquaculture development in the EEZ. Various agencies hold Congressionally-determined authorities with respect to activities in the EEZ. The delegation of authority in one agency for coordination, support, regulation, and promotion of all aquaculture activities would require legislation that takes authority for several statutory programs from various agencies and gives it to a single agency.

The NAA does not agree that the lack of a single designated authority has delayed development of regulatory guidelines. The lack of specific elements of such a program, whether vested in one or more agencies, has been a contributing factor.

Section 6.3.2: Permitting

The NAA disagrees with the recommendation that there be a single, consolidated permit for offshore aquaculture facilities but does agree that the permitting process should be coordinated. Offshore aquaculture facilities are anticipated to require several types of approvals commonly required in the nearshore marine environment. These include discharge permits issued by the U.S. Environmental Protection Agency or delegated states under the Clean Water Act,⁷ and “Section 10” structures permits issued by the U.S. Army Corps of Engineers.⁸ These agencies have expert staffs who have administered these programs in thousands of cases. Transfer of these authorities to a single agency would be inappropriate, ill-advised and would require Congressional action to amend those provisions of the Clean Water Act that address permits for structures and the discharge of wastes. A single permit for all programs would be unwieldy, present timing problems, and complicate agency performance evaluation processes.

Page 15, Paragraph 6: This provision of the Code states: “Guidelines for remedial compensation for damages caused or suffered by aquaculture producers should be elaborated and made part of permit conditions.” This statement may be suggesting that NOAA provide some form of crop insurance for offshore aquaculture as part of the permit process. The NAA does not support the linkage of crop insurance procedures with permit application procedures. In addition, the U.S. Department of Agriculture already provides a crop insurance program for aquaculture facilities and another such program would be redundant. A plan to establish financial assurance instruments to address facility impacts would be an appropriate issue for further consideration if this is the purpose of the statement.

Section 6.3.4 Zoning

The NAA supports an analysis of the possible application of a zoning approach to identify appropriate locations for offshore aquaculture. However, it is critically important to the creation of a viable offshore aquaculture industry and defensible regulatory program that such efforts not be duplicative. We should not create a new permit requirement. Offshore aquaculture facilities can be properly evaluated by the programs available for the issuance of Clean Water Act discharge permits and Corps of Engineers structures permits. The zoning of aquaculture locations could supplement such permit procedures by providing a source of environmental and resource information that could be used to address many review requirements for these other permits. However, we should not create yet another permit requirement in addition to discharge permits, structures permits and whatever zoning process would be developed to identify appropriate aquaculture locations. Moreover, the consideration and possible development of a zoning approach should not bar the development of offshore aquaculture in the meantime. Aquaculture zoning should be used to identify and facilitate evaluation of appropriate sites but not preclude the proposal of specific sites by individual project applicants. The zoning of offshore aquaculture sites is anticipated to take several years of investigation, federal rulemaking and potential appeals. Furthermore, since aquaculture is essentially a new use of the EEZ, the agency that performs the zoning must develop protocols to decide which of many valid uses for a given body of water deserve precedence. It is not adequate to design aquaculture zones based primarily on the absence of an existing use.

Section 6.4 The Fiscal Environment

⁷ 33 U.S.C. §402

⁸ Rivers and Harbors Act, Section 10, 33 U.S.C. § 403

Page 17, 6.4 Fiscal Environment, Paragraph 3: The sentences, “The federal government might also consider bearing the main burden of monitoring as a financial incentive until industry is established and can assume full responsibility. In such cases the federal government would use concerned farms as indicators and fit them for more comprehensive data collection,” should be fully explained.

Section 6.5 Managing Risk and Uncertainty

This recommendation for adoption of the “precautionary approach” should be deleted for the reasons noted elsewhere in these comments. Nevertheless, the following specific comments are also provided.

Section 6.5.1 Adaptive Management

The “periodic amendment” that is enabled by adaptive management must be specified. What is being amended? Offshore aquaculture is not “new to the world,” and monitoring, record-keeping and reporting procedures are followed by thousands of U.S. industry facilities on a daily basis under a variety of federal programs.

Section 6.5.2 Conserving Biodiversity

Page 18, Paragraph 5: The text, “international accepted codes of practice,” must be deleted unless those codes of practice are formally adopted by legislative rulemaking, Executive Order or ratification.

Section 6.5.3 Introductions and Genetically Altered Species

This is another example of confusion regarding the intended conduct to be regulated by the Code. This section is directed to the conduct of the “competent authority” rather than the conduct of offshore production facilities.

Section 6.6 Responsible Aquaculture at the Production Level

Section 6.6.1 Best Management Practices

The nature of the Code is again confusing when this voluntary code calls for establishment of enforceable management practice requirements.

Best Management Practices: Confusing and contradictory statements regarding BMPs have been made in this section. In the first paragraph, BMPs are described as “enforceable elements of permits...which can be used in lieu of government regulations” that will serve as a ‘seal of quality’ for products. In the second paragraph BMPs are described as “voluntary instruments” that agencies should develop “appropriate procedures” to monitor for compliance.

No matter what role BMPs will serve in the EEZ, it is unlikely that a governmental agency will support or condone the use of regulations as a “seal of quality.” NOAA should also provide clarification as to whether BMPs become a tool for self-regulation by the farming community or an enforceable regulatory tool by an agency. Some industry organizations are promoting and

state agencies supporting the use of Best Management Practices and a means of providing accountability, as the preferred method for assuring compliance with applicable environmental standards.

Also, “best management . . . attitudes” cannot be made enforceable standards. If BMPs are voluntary then there is no need to monitor compliance.

Section 6.6.2 Information and Record Keeping

The NAA opposes requirements of the Code that would direct producers to publicly report production data. Production data submitted in conformance with legal requirements should be confidential business information exempt from disclosure under the Freedom of Information Act, and subject to special confidentiality rules under the Clean Water Act, as applicable. The reporting of production data strikes at the heart of proprietary financial data

Section 6.7 Research and Development

This is another section of the Code that appears to concern recommendations for government activity and funding rather than the conduct of production facilities in the EEZ. Aside from our previous comments on this issue, we wish to note our concern that federal funding of aquaculture efforts in the EEZ should not come at the expense of the nearshore aquaculture research programs that are so important to the continuing advances of that industry.

Again, we wish to thank you for the opportunity to comment on the draft Code and thank you for the agency’s efforts in advancing the discussion of offshore aquaculture development issues. Please contact the undersigned if you have any questions regarding these comments. We would be pleased to make ourselves available to participate in any workshops or other discussions of these issues.

Sincerely,

John R. MacMillan, Ph.D.
President