

A Review of First Nation Comments

Concerning the

***Federal-BC Aquaculture Regulation
& NASAPI as presented at
Nanaimo, BC
December 2009***

Prepared by

The Aboriginal Aquaculture Association

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1.0 INTRODUCTION

On December 14, 2009, Fisheries and Oceans Canada invited all interested coastal First Nation people to provide input into the Federal Government's plans for drafting a new Federal regulatory regime for aquaculture in British Columbia and for development of the National Aquaculture Strategic Action Plan Initiative (NASAPI). The Aboriginal Aquaculture Association (AAA) was contracted to coordinate and facilitate meetings and to assist First Nations in responding to the information that was presented.

First Nations recognize that this is a timely opportunity for the Federal government to implement the new regulations in a manner that satisfies its legal duty to consult and accommodate First Nations in the aquaculture resources. The new regulations must be implemented in a manner that is based upon the guiding principles provided by First Nations. The First Nations are more than mere stake holders in the marine and aquaculture industries. The First Nations assert aboriginal title throughout their territories including all tidal waters.

It is the aboriginal title that vests the First Nations with legal interests in all marine resources. The law is clear that the Crown (both Federal and Provincial governments) have a legal obligation to consult with First Nations when making decisions that may affect the aboriginal title of First Nations. As well the law will require the Crown to accommodate First Nations where the aboriginal title is interfered with. It is with this legal foundation that each First Nation requires the Crown to consult and where warranted accommodate directly with each First Nation on any aquaculture development within its territory.

The Federal government must recognize that the duty to consult and accommodate is a continuous duty to First Nations. Since the initial meeting on December 14, 2009 in Nanaimo, recommendations and comments from participants have now been assembled into this document for further review by First Nations and presentation to DFO on March 30, 2010 which has happened. It is important that all voices are heard, understood and respected. It is equally important for all coastal First Nation communities to understand the proposed governance model and regulation, and the implications of the five year strategic plan.

This document was prepared with two purposes in mind:

1. The first is to ensure that DFO understands and acknowledges the existence of First Nations' aboriginal rights including title and treaty rights as they pertain to the marine resources when implementing these new aquaculture regulations.
2. The second purpose is to advance the interests of the coastal First Nations related to developing:

- (a) Existing and alternative species (e.g. geoduck) for aquaculture and enhancement;
- (b) salmonid enhancement;
- (c) the potential for ocean ranching;
- (d) First Nations roles in regulation and enforcement, and
- (e) certification through the AAA Sustainability Principles and Audit Standard for Aquaculture Operations.

2.0 GUIDING PRINCIPLES

The basic principles by which First Nations are guided throughout this review process are summarized as follows:

1. Respect for each First Nation's autonomy.
2. Enhance economic development opportunities for each First Nation.
3. Implement shared decision-making and co-operative management of resources between each First Nation and government.
4. Ensure that First Nations realize the benefits from a sustainable aquaculture industry.
5. Promote both socioeconomic and environmental sustainability.

The First Nations expect Canada to be inclusive of First Nations and these guiding principles when developing and implementing the new regulations and governance structure.

3.0 AQUACULTURE GOVERNANCE

With the appearance of modern day treaties and recent decisions handed down by the Courts, the aboriginal rights including title and treaty rights of coastal First Nations are clearer and more defined. The implementation of a treaty making process in British Columbia is tacit acknowledgement that there are aboriginal rights in British Columbia. The aboriginal rights include the right for a First Nation to be self governing over its territories. It is in the best interests of the Canadian public to be inclusive of First Nations when making decisions over the aquaculture resources. Discussions and decisions on aquaculture are therefore not complete without Canada first acknowledging the aboriginal right of First Nations to self governance and to include First Nations in the decisions over these resources.

We agree that the recent British Columbia Supreme Court (BCSC) decision concerning the regulation of aquaculture is an opportunity to review historic practices for aquaculture management; but it is also an opportunity to develop a

regulatory regime that meets the needs and interests of First Nations and their constitutionally protected rights.

The opportunity that presents itself for Canada is to be proactive in implementing these aquaculture regulations in a manner that will minimize infringement of the aboriginal rights including title and treaty rights. A fundamental step in this regard is for Canada to implement these regulations on the fundamental basis that aboriginal rights including title exists and is recognized. The recognition of aboriginal rights including title and treaty rights can form the basis for cooperative aquaculture management and revenue sharing between the Federal, and First Nations' governments. Furthermore, many First Nations have an undeniable interest in aquaculture management in their traditional territories, including the administration and enforcement of licenses and in determining under what conditions facilities may be operated.

3.1 Application

The possibility of excluding from these regulations land-based and government-owned facilities, and culturing for purposes other than sale of product will result in a fractured system for managing aquaculture: It would perpetuate the double standard that currently exists for private and public aquaculture operations, and create a two-tiered system of regulation. This would not be sufficient to ensure that the necessary safeguards for protecting the environment and wild stocks are universal. All aquaculture operations should be subject to the same regulations, environmental and policy guidelines that regulate the aquaculture industry as well as existing First Nation enhancement projects that hold provincial aquaculture licences.

There is great concern over a regulation that could limit access to licensed aquaculture areas by other licensed fishers. On the face of it, First Nations see it as a conflict with the provincial authority over land use decisions. Neither the current provincial licence nor tenures give the owner exclusive use of the land. Limiting access by any level of government to specific areas in First Nations' territories requires accommodation to the First Nation from the Department of Fisheries and Oceans. Part of the accommodation can be having the First Nation consent to the siting of the aquaculture facilities. To provide exclusive access to third parties should result in accommodation and/or compensation to First Nations who claim title to that territory. Existing policies were designed to ensure that First Nations' access and use of the resources is protected and that aquaculture is carried out in a manner that minimizes the infringement on aboriginal title.

3.2 Licence and Licence Conditions

a) First Nations agree that license conditions be set for:

- conservation and protection of existing resources
- proper management of fisheries, and
- pollution prevention.

The development of these regulations must be done on the foundation that First Nations' aboriginal title and rights and treaty rights are recognized and protected when managing aquaculture activities. This can be achieved with Conditions of the License requiring operators to;

- Obtain First Nation support for the approval of the license
- notify First Nations of escape events and recapture efforts;
- notify First Nations in advance of any treatments with therapeutants;
- notify First Nations of discharge or spillage of deleterious substances; and,
- ensure they do not damage or disturb archeological sites or areas of cultural and spiritual importance.

b) The federal government needs to play a role to level the playing field so that First Nations can participate in the industry's opportunities. First Nations have been alienated from many aspects of the licensing systems in the marine resources for too long. Licensing pre-requisites favor the current corporate structure that controls most of the aquaculture businesses in BC. Some of these are too burdensome for First Nations wishing to engage in profitable aquaculture ventures, but are lacking the means to satisfy these standards.

c) The financial playing field must be leveled for First Nations if First Nations are going to be able to develop aquaculture opportunities for their communities. Consideration and incentives for First Nations should be built into the management regime so that First Nations are not excluded from participating in aquaculture simply by the lack of funds or financial security.

If the Minister establishes a list of species that may not be cultured it is important that First Nations be party to this. Many First Nations are interested in culturing alternative species such as cockles and butter clams that are not part of the mainstream of aquaculture products but which hold significant cultural value, especially to our Elders. In addition, many other species that are currently not cultured are nonetheless part of our indigenous, pre-contact commerce and trade. Decisions on what species may or may not be cultured need to take these factors into account.

Access to wild stocks for culture is important to First Nations. While the Federal Policy on Access to Wild Resources for Aquaculture Purposes may provide for this, First Nations are concerned that provisions to “minimize the need for such access” could be imposed on a license, which appears to be contradictory to the intent of this policy.

3.3 Pollution Prevention Measures

First Nations must have knowledge of any potential pollutants (deleterious substance) being deposited into their traditional territorial waters. Others are concerned about the safety of their traditional sea foods when farms use drugs to treat their fish. These concerns can be addressed as a condition of license (Sec 3.2) above.

3.4 Notification and Reporting

As previously discussed (3.2) and (3.3), First Nations need to be aware of all events that pose environmental risks to their territorial waters and what measures will be taken to mitigate any harmful effects.

The reporting process should be simplified with First Nations being notified at the same time as the government regulators; a pre-designated contact to the First Nation(s) in proximity to an aquaculture facility should be established and equipped to receive reports in real time. It is essential that reports be in a form that is understandable to First Nations people, who may not have the technical or scientific expertise of the government regulators.

3.5 Enforcement

A new regulation and management regime must come equipped with sufficient human and monetary resources to provide immediate and comprehensive enforcement.

First Nations that wish to have enforcement capability for aquaculture projects within their territories should be offered the training and funding for meaningful participation in local enforcement activities in cooperation with Fisheries and Oceans.

The current First Nation Fisheries Guardian Program is not sufficient to meet the legitimate needs of communities and requires increased capacity for aquaculture and fisheries monitoring and enforcement duties.

3.6 Inspection and Audits

First Nations have an undeniable interest in what goes on in their traditional territories and a legitimate need to be fully involved in aquaculture and

ecosystem management. The development of a new regulatory and management regime for aquaculture offers an opportunity for First Nations to fully participate and utilize their unique local and traditional ecological knowledge for the benefit of their communities. Meaningful participation will mean First Nations:

- Must have the capacity, training and infrastructure to monitor biological and ecosystem indicators associated with aquaculture in their territories;
- contribute to monitoring and evaluating the performance of aquaculture operators;
- can apply their own environmental, social and cultural values as they relate to aquaculture practices and environmental sustainability;
- provide their own monitoring and audit reports of industry performance and determine if aquaculture companies are operating in accordance with First Nations criteria for environmental sustainability; and,
- Can quantify the socioeconomic effects that aquaculture has on their communities to inform decisions for the future.

The DFO should seriously consider adoption of the ACES program in a new aquaculture management regime that will be unique to the BC aquaculture industry.

3.7 Attestations of Regulatory Compliance and Monitoring Results

In March 2006, the AAA began development of the Aboriginal Certification of Environmental Sustainability in Aquaculture (ACES) Program. This program is evolving as it develops and is now known as the AAA Sustainability Principles and Audit Standard for Aquaculture Operations. The program is based on a hierarchical management system that includes farm-specific Codes of Practice and environmental compliance protocols, territory-specific operational standards, and a coastal management framework for assessing performance, assigning certification levels (branding, labeling and other incentives), and ensuring that the program is adopted as a common initiative. A proposed operational framework that provides more detail of this initiative is included in the attachments to this document.

3.8 Fees

We are advised by DFO that license fees will change under a new management regime. No numbers have been provided; but a standardized Canada wide regulation is likely to include increased fees, especially if fees are intended for administrative cost recovery for the aquaculture program. Increased fees will potentially inhibit new First Nations wishing to participate in aquaculture opportunities while increasing the operating costs for those already in the business. We would welcome more discussion on licence fees.

Each First Nation should benefit from revenues generated in their territories by the aquaculture industry.

3.9 Policy and Guidelines

First Nations need a voice in drafting policy in order to ensure their rights and title are recognized and accounted for. Discretionary policies for licence issuance need to include this recognition, as well as providing accommodation for First Nations' interests by both federal and provincial Governments. These include such things as:

- Aquaculture farms require local First Nations approval for site selection;
- exemption of licence fees and other waivers for First Nations;
- incentives for First Nations to engage in aquaculture;
- incentives for licensees to hire and train First Nations personnel;
- conditions that protect environmental and social values;
- accommodation from federal and provincial Governments through revenue sharing.
- First Nations must be exempt from limitations imposed by local Government (Regional District) bylaws which are undermining the rights of First Nations to realize aquaculture opportunities in their traditional territories, and.
- First Nation ownership of licences.

Similarly, First Nations should have input to guidelines and performance objectives to make sure their resources are protected and aquaculture is practiced sustainably in their territories. We recommend adopting the guidelines and performance criteria of the AAA Sustainability Principles and Audit Standard for Aquaculture Operations.

4.0 THE NATIONAL AQUACULTURE STRATEGIC PLAN INITIATIVE

The First Nations vision for aquaculture opportunities range from wild stock enhancement and ocean ranching to private, intensive culture activities. Although there are common practices to rearing fish and other aquatic animals, the opportunities and benefits obtained can be enhanced when these practices are put to various uses. In this regard, First Nations find the NASAPI discussion too narrow in its approach. It concentrates almost exclusively on private, intensive finfish culture and misses other opportunities that can add to the objectives of sustainable growth and economic prosperity in the seafood sector.

Fundamental to First Nation culture is the belief that everything in nature is connected. This forms the basis for everything they do, and how they manage

their resources. Nothing happens or is done in isolation. This is a perspective that First Nations can bring to the discussion of sustainable growth for aquaculture in all of its forms. First Nations agree that a collective and collaborative approach will help us accomplish complex tasks through the sharing of ideas, knowledge and wisdom.

4.1 Governance and Other Management Measures

Once again the greatest concern is about timelines, especially those for implementation. First Nations need to be able to assess the scope of opportunities available to them before a NASAPI advances the sector and encourages more investment and development from non-First Nations ventures who may be better positioned to take advantage of expanding development opportunities. First Nations do not want to be left behind.

As previously stated, First Nations' rights and title to the resource are becoming more defined, and this fact cannot continue to be ignored by government and industry in resource management and allocation. As more treaties and agreements are signed, First Nations will have more to say in how resources are allocated and managed. This should be anticipated and acknowledged in the NASAPI, particularly as it relates to a five-year plan and what the future may hold. With this future in mind, the resource base needs to be positioned to the advantage of First Nations as the rightful owners of the resource.

4.2 Introductions and Transfers of Aquatic Organisms

First Nations support the current regulatory approach through the Introduction and transfer (I&T) program under the *Fisheries Act* that will look for maximum economic and social benefits that are associated with introductions and transfers while ensuring conservation and protection of aquatic resources and effective management of ecological and disease risks.

4.3 Access to Wild Aquatic Resources as it Applies to Aquaculture

First Nations are interested in the culture of species offering sound economic returns, but they also have a strong interest in their native species for uses other than strict commercial production. Aquaculture for salmon enhancement on the coast has been practised for decades. First Nations look to advances in this technology to help rebuild and enhance many depressed salmon stocks. First Nations therefore require assured access to wild stocks for salmon enhancement and ocean ranching. Since many of their reserve lands are located on salmon rivers that once held an abundance of salmon, they need to continue to restore these rivers and the salmon so that they will once again contribute to the wealth of the communities.

First Nations also need access to geoduck in order to develop culture opportunities. In their view, the current Geoduck Policy papers were written for the underwater harvesters. As it stands, First Nations will be denied access to wild Geoduck stocks that are proposed to be harvested as a “purge fishery” prior to re-planting culture stocks in their tenures, when these resources could be used to help finance start up operations. First Nations require fair and equitable access to the geoduck resource if their goals are to be realized. To them this means policies that provide equal access to everyone, not those intended to protect the interests of commercial, non-First Nation fishers.

We note that an aquaculture allocation of black cod (sablefish) is given in the integrated fisheries management plan for this species. First Nations suggest that an important step in developing aquaculture for other wild resources is to include allocations for aquaculture in all fisheries management plans. A stock access policy that prioritizes only the existing fishers is not a level playing field.

4.4 Canadian Shellfish Sanitation Program (CSSP)

First Nations understand and agree with the responsibility of the CSSP to ensure the safety of shellfish for human consumption. First Nations also understand its importance to trade with the United States and the EU. Fundamentally, however, the program does not meet the needs of those First Nations whose beaches are under sanitary closure. This is a challenge for First Nations who are reliant on those beaches for food. Under the current program, it is far easier to close a beach than to open one. Remediation of contaminated areas is therefore a critical component that is missing from the program.

To be effective, the CSSP needs to be re-examined with a view to aiming resources at beach restoration and protecting open areas from encroachment of activities that lead to shellfish contamination. This is especially important now that closures around waste water treatment plants are to be expanded as a result of stricter standards for sanitation coming from the United States program.

Many of their contaminated beaches are prime growing areas and offer opportunities to expand their shellfish culture land base. If these beaches cannot be remediated the only option is to conduct fisheries under the Management of Contaminated Fisheries Regulations. This we can do, but to do so, we will need to deplete the product with its additional costs. At the present time there are only five deputation facilities in BC. If the shellfish industry is to continue to expand in the face of increasing closures, First Nations and non-First Nations alike are going to need more deputation plants to continue to guarantee product safety.

4.5 Sustainability, Competitiveness, Investment and Innovation

Many of the principles embodied in the AAA Sustainability Principles and Audit Standard for Aquaculture Operations speak to these objectives, in particular sustainability. This developing program is built on the pillars of environmental, economic and social responsibility, under the umbrella of inclusivity for First Nations.

4.6 Fish and Shellfish Health Management

The emphasis here appears to be on protecting the health and well-being of aquaculture stocks for economic and trade reasons. Of more importance to many First Nations is the potential impact of aquaculture on the health and survival of wild stocks, particularly salmon. Health management for aquaculture is not complete without including protection for wild stocks.

4.7 Aquatic Invasive Species

Again, the emphasis appears to be on the impact that invasive species pose to aquaculture production. Of greater importance is the threat invasive species pose to native wild stocks through displacement, predation and disease. The introduction of non-native species by various vectors, including aquaculture, carries considerable risk to native species if there are not sufficient safeguards to monitor and control invasive introductions.

4.8 Emerging Production Technologies and Systems

As previously mentioned, many First Nations look to advances in culture technologies to help rebuild and enhance many salmon stocks. There are also many other native species that would benefit from technological advances both for use aquaculture and in wild stock management.

4.9 Industry Diversification / Alternative Species

Many First Nations are more interested in culturing native species and species that are of cultural significance to us. Geoduck and sablefish appear to show promise and these projects should be continued and expanded. However, many First Nations want access to a number of other species such as sea urchins, cockles, and rock fish. They view a focused strategy limiting species development over a five year period as too restrictive, especially if it locks out First Nations from pursuing their own interests in diversification of aquaculture. We believe more discussion is needed to explore an expanded list of potential species based on First Nations priorities and interests.

4.10 Risk Management and Access to Financing

The AAA Sustainability and Audit Standard could be included in the framework of current operational Codes of Practice, Best Management Practices, and Environmental and Quality Management Systems to improve First Nations' confidence in sustainable aquaculture.

Access to financing and capacity are the fundamental constraints to many First Nations wishing to engage in aquaculture in their territories. An aquaculture strategy needs to include opportunities for First Nations to derive more benefit from aquaculture operations in their territories through revenue and equity sharing.

4.11 Infrastructure

Infrastructure is another major constraint to First Nations who wish to engage in aquaculture, or develop salmonid enhancement projects. Aquaculture infrastructure in their territories could be used for a variety of purposes, including ocean ranching.

4.12 Market Access and Certification

First Nations agree that a major determinant of success will be continued and expanded acceptance in the international market. Much of this will depend on how Canadian products are able to meet international standards, for example cadmium levels and *Vibrio* in oysters. Conversely, Canada must enforce its own standards more rigorously and equitably. In some cases, Canadian product is excluded from our domestic markets to be replaced by contaminated imports because the importation rules are not effective or enforced.

Market certification and branding are major elements of the AAA Sustainability and Audit Standard for Aquaculture Operations.. First Nations recommend this program be added to Canada's plans for increasing product assurance through traceability and certification. We were pleased to hear the announcement that the federal government will allocate \$7.2 M of its 2010/2011 budget to increased product traceability and certification of sustainable fisheries products. This is an opportune time for the Federal government to move forward and support further development of the ACES program to its implementation.

4.13 Social Licence and Reporting

The responsibility of aquaculture companies to address the social concerns of First Nations is an issue for First Nations that do not yet derive benefits from aquaculture operations in their territories. Trust and respect, employment

opportunities, access to training, and capacity building are some of the principles contained in the AAA Sustainability and Audit Standard for Aquaculture Operations.

5.0 Criteria for Growth

First Nations realize that the focus of this discussion is on the future of aquaculture. However, many First Nations perceive this attention as abandoning the wild fishery, especially wild salmon. As noted earlier, they view aquaculture as all inclusive, including wild stock restoration and enhancement in addition to intensive farm culture.

First Nations therefore believe that a fully comprehensive aquaculture program can be truly sustainable and will contribute important socio-economic benefits to coastal First Nation communities in the following way:

- *Increased employment, in isolated communities*
- *New training opportunities,*
- *Joint venture business opportunities,*
- *Project management opportunities*
- *License ownership,*
- *Accommodation,*
- *Research and development partnerships*

First Nations no longer wish to be on the outside looking in but are interested in direct participation in the development of sustainable aquaculture to alleviate poverty and to help achieve new wealth and future prosperity for their communities.

6.0 CONCLUSION AND NEXT STEPS

We thank you for the initial meeting on December 14, 2009, which was informative and designed to layout the review process for the development of the new federal regulation for B.C. and NASAPI. Also, we thank you for the meeting on March 30, 2010 where we heard comments from First Nation representatives on the new aquaculture regulations. First Nations view this as the beginning of a process that can provide meaningful input to the Federal government regulations, and that they are implemented in a positive manner that respects First Nations aboriginal rights including title and treaty rights. First Nations look forward to our next step which will be to fully discuss the suggestions put forward in this paper and to garner more information through more community meetings.

Thank you for this opportunity to comment on the discussion document. First Nations hope their comments have helped inform you more fully of First Nations people, their reliance on the resource now and in the future, and their aspirations for future generations.