

**Background Information for DFO Internal Use**

**DRAFT FSC Access Guiding Principles**

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## **Background for First Nations Consultation Sessions:**

In response to the Pearce/MacRae Report, the First Nation Panel on Fisheries was established, with representatives appointed by a steering committee made up of leaders of the First Nations Summit and the B.C. Aboriginal Fisheries Commission. The Panel was asked to articulate a vision for future fisheries management and allocation, and to identify what principles would help to achieve that vision. They were also asked to describe a workable management framework that would provide some certainty to users in terms of access and use of fisheries resources. In addressing these tasks the Panel engaged with First Nations across BC, and worked with the visions, ideas, and information to develop the report entitled *Our place at the table: First Nations in the B.C. Fishery* (also known as the *First Nations' Panel Report*). This report states that many people who appeared before the Panel reported having fisheries allocations for food, social and ceremonial (FSC) purposes that are inadequate and far below what were historically available. In addition to having small allocations, some First Nations indicated that they no longer have the boats or the resources to fish in FSC or commercial fisheries. Many First Nations felt that federal and provincial governments do not adequately recognize or respect aboriginal rights to fish.

Fisheries and Oceans Canada responded to this report in April 2005 with an Action Plan which contained the following commitment to First Nations regarding FSC access:

*Food, Social and Ceremonial Fisheries – DFO will work with First Nations to address concerns regarding fisheries access for food, social and ceremonial purposes. In addition, for the longer term, the Department will work with First Nations to develop a mutually agreeable framework for negotiating appropriate levels of fisheries resources for food, social and ceremonial purposes.*

General agreement with and among First Nations on guiding principles for FSC access decisions would be a fundamental step towards developing the “mutually agreeable framework” for negotiating FSC access, as committed to by DFO. It should be recognized, however, that Guiding Principles may continue to evolve in the longer term in response to changing circumstances, legal direction, etc.

Some First Nations representatives may want to challenge the Minister’s authority to make decisions on FSC access, etc., so presenters need to be clear that we are seeking input on Principles that would be applied within the current regulatory regime (i.e. the Minister does have the authority to make these decision and is responsible for the management of all fisheries...)

In the fall of 2005 consultation meetings DFO sought input from First Nations on FSC access issues, including principles that could guide FSC access decisions. Input received

in these discussions was reviewed to identify common issues and themes, and the draft principles above were subsequently developed.

DFO is now seeking further input on these general principles e.g. Are they appropriate? What is missing? What needs to be added, revised, or deleted?.

## Discussion Points of Draft FSC Access Principles

### ***Draft Principle #1:***

*Processes and decisions regarding FSC access (amount or allocation, fishing area, and fishing opportunity) should honour Canada's obligations to First Nations.*

#### **Interpretation:**

This really means that processes and decisions should be consistent with law, etc.

#### **Potential Discussion Issues:**

- 1) No First Nations expressed concern about the intent of a similarly worded principle last year.
- 2) The word "allocation" could provoke some discussion because some First Nations are strongly opposed to allocations. A key point to discuss is that allocations are a fundamental management tool – resources need to be managed such that all First Nations that use fish actually have fishing opportunities; this cannot happen without using numbers.
- 3) There may be some discussion about what is encompassed in "food, social and ceremonial" as many First Nations assert that "social" includes some amount of sale. DFO policy is very clear on this issue and intends for FSC fish to be used by the First Nations community, not sold.
- 4) Anticipate some discussion on obligation to consult on FSC access. Guiding principles should direct discussion in bilateral negotiations.

### ***Draft Principle #2:***

*Aboriginal fishing for FSC purposes should have first priority in management decisions, after conservation, over other user groups.*

#### **Interpretation:**

This is self-explanatory.

#### **Potential Discussion Issues**

- 1) Some participants may question use of the word "should" vs. "will; in this case we can probably live with "will".
- 2) First Nations will likely have strong views on what "priority" means. Courts have given conflicting advice on what "first priority" means – i.e. amount versus opportunity or some combination of the two so this is an area in which legal

direction and policy may continue to evolve. The wording comes from the *Sparrow* court decision and is therefore consistent with legal direction..

“Priority” does not mean that nobody else can fish until all First Nations have obtained their FSC fish. This would preclude many fisheries from occurring. However, DFO is obligated to manage fisheries such that First Nations have a reasonable opportunity to obtain their FSC.

- 3) In the First Nations Panel Report, the issue of Priority was linked with the idea that First Nations should have greater control over the management of fisheries (Pg. 46).

### ***Draft Principle #3:***

Processes and decisions regarding FSC access (amount, fishing area, and fishing opportunity) should incorporate some flexibility within a generally consistent approach.

#### **Interpretation:**

This Principle reflects input received from First Nations in the 2005 consultation sessions. It reflects competing concerns that on one hand in order to achieve some type of equity among First Nations there needs to be a consistently applied process or approach for making FSC access decisions, but conversely, there also needs to be some flexibility to accommodate unique circumstances of each First Nation.

#### **Potential Discussion Issues:**

- 1) Balance between flexibility and consistency – agreement on Guiding Principles would be a big step towards consistency and transparency. DFO has no intention of trying to develop a one-size-fits-all formula.
- 2) Anticipate questions around how such a balance would be achieved. Again, the Guiding Principles (with refinements) will be an important step forward.
- 3) Transparency: First Nations have expressed concerns around lack of transparency in decision-making re: FSC access. DFO is accountable for its decisions and they should reflect agreed-upon guiding principles. Note: the draft principles have not gone through any DFO approval process; this step would follow refinement of draft principles.

### ***Draft Principle #4:***

Decisions regarding FSC fishing areas should take into consideration information relating to First Nations’ claimed traditional territories.

#### **Interpretation:**

Last year First Nations provided a range of views on fishing area i.e. should be able to fish where they want vs. DFO had better not licence other First Nations to fish in “their” fishing area. Issues involving fishing area need to be considered within a broad context of the circumstances of a requesting First Nations, and other First Nations that may be affected by a decision. AFS policy is clear that Aboriginal fishing rights relate to historic resource use, including historic use of areas for fishing.

**Potential Discussion Issues:**

- 1) There may be some discussion on what is meant by “take into consideration” – this term is deliberately broad.
- 2) DFO does not automatically default to the claimed traditional territory to define the fishing area for a number of reasons e.g. one First Nations may not agree with the traditional territory claimed by another if it results in an overlap issue and this can cause conflict. While DFO does not want to become embroiled in overlap conflicts where they exist, we must take into account the overall manageability of the fishery.
- 3) Courts have stated that fishing rights are both species-specific and
- 4) There are mechanisms for providing flexibility on fishing area depending upon supporting circumstances e.g. temporary amendment of licenced fishing area.

***Draft Principle #5:***

Decisions regarding FSC amounts should take into account the diversity and abundance of fisheries resources available in the First Nations’ fishing area.

**Interpretation:** This attempts to get at several issues:

- 1) *What to do when there is not enough of a given species or stock to meet the requests of all First Nations.* Some First Nations have access to only a few species (e.g. upriver groups might only have access to sockeye and chinook while coastal First Nations would have access to a greater diversity of species). In taking into account what is available to each First Nation, Nations with access to only a small number of species or stocks would have stronger consideration for access to these species or stocks than groups with a broader diversity available.
- 2) *Considering the “fish basket”* - as most First Nations historically harvested a diversity of available species, FSC access should reflect the scope of what is available in the fishing area, and not be focused exclusively on one or two highly desirable species such as sockeye.

**Potential Discussion Issues:**

Some First Nations may object to this as they may wish to focus specifically on their preferred species rather than accept that allocations should take into consideration other available, but perhaps less desirable, species.

***Draft Principle #6:***

FSC access decisions should take into account community use and operational factors.

**Interpretation:**

Taking into account community use implies that DFO will need some knowledge regarding harvest levels of all species i.e. catch reporting.

Operational factors can encompass a diversity of issues. For example, not all FSC allocations are readily attainable each year e.g. herring are unpredictable, and pink salmon may only be available every second year. Such factors should be taken into consideration when looking at “total” allocations as they may be higher than can realistically be caught.

**Potential Discussion Issues:**

From a First Nations perspective, DFO will need to consider FSC access in the broader context of managing fishing activities for various species and/or stocks such that FNs will have a reasonable harvesting opportunity.

***Draft Principle #7:***

Decisions regarding FSC fishing should take into account the FSC/domestic access of other Aboriginal groups.

**Interpretation:**

This attempts to get directly at the issue of what to do when there is not enough of a given species or stock available to meet the aspirations of all First Nations for FSC access.

**Potential Discussion Issues:**

- 1) With respect to salmon there may be widely differing views between coastal First Nations, who have “first opportunity” to harvest because of their geographic location, and interior Aboriginal groups, that fish after everyone else due to their location, but have far greater reliance on salmon compared with coastal groups.

- 2) This may lead to discussion re: let First Nations sort out these issues among themselves. Although DFO is responsible for management of the fisheries, agreement from all First Nations on how FSC access should be shared among Aboriginal groups would be welcome.
- 3) First Nations may have questions regarding priority of Treaty fishing rights vs undefined aboriginal rights that are addressed via communal licences to fish for FSC purposes. DFO would address Aboriginal and Treaty rights with the same priority.

***Draft Principle #8:***

Decisions regarding FSC access should take into account differences among First Nations (e.g. community needs, preferences, social and cultural differences, community use, availability of resources, etc.).

**Interpretation:**

First Nations will have different preferences, community needs and interests. FSC access decisions should reflect these differences, hence there will be differences among allocations, even within the same geographic area. A “cookie cutter” approach or mathematical formula will not work

**Potential Discussion Issues:**

- 1) This may raise issues around DFO’s efforts at consultation with First Nations e.g. DFO does not listen when First Nations attempt to communicate their community needs.
- 2) This may also once again raise the issue of what is included in food, social and ceremonial use. DFO addresses FSC as a package and does not attempt to define a social use versus a ceremonial use etc. and will not provide separate allocations for these FSC components. Again, DFO’s clear policy is that FSC fish are not to be sold.

FSC Access Discussion Questions from Fall, 2005:

- 1) What factors should be considered in determining the area where a First Nation fishes for FSC?
- 2) Are there circumstances when access should be provided to areas outside of a First Nation's regular fishing area? What are these circumstances?
- 3) What process should be followed to address fishing area issues?
- 4) What factors should be considered in determining FSC amounts?

Examples:

- a) The number of the First Nation's members?
- b) Allocations/availability of other species?
- c) The First Nation's species preferences?
- d) Availability of requested species in fishing area?
- e) Historic use of the species?
- f) Recent use and harvest trends?

What else?

- 5) When there is a limited amount of a stock available for FSC purposes what factors should be considered in providing access?

Should First Nations with few or no alternative species/stocks available receive a more generous share of the limited species/stock than First Nations with diverse opportunities?

What other factors need consideration?