

First Nations Access to Fish for Food, Social and Ceremonial Purposes

Part 1: Pacific Region Operational Framework

(Working Draft)

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1) INTRODUCTION:

With the introduction of the Aboriginal Fisheries Strategy (AFS) in 1992, First Nation's allocations of fish for food, social and ceremonial (FSC) purposes, and the associated fishing areas, were defined in Fisheries Agreements and Communal Licences. Since then there has been no strategic review of allocation numbers. Fisheries Managers are frequently asked to consider requests to increase First Nations FSC allocations, or to alter fishing areas. As FSC access decisions can have very significant legal implications for the Department, for negotiation of Treaties, and for neighbouring First Nations, it is very important that FSC access requests be evaluated using a consistent approach, and with a common set of criteria. As well, it is important that there is a common understanding of the administrative tools and processes for managing FSC access in the Region, that all of the relevant Branches are involved in evaluating FSC access decisions, and that all decisions go through a clearly defined regional approval process.

This Operational FSC Access Framework describes the following three key components:

- 1) administrative tools for managing FSC fisheries and describes how they are to be used;
- 2) roles and responsibilities of relevant Branches in evaluating different types of FSC access requests;
- 3) approval processes for different types of FSC access requests.

Requests for a change in allocation or fishing area, or a commercial or recreational closure to facilitate FSC access should be **evaluated** in accordance with guidance from senior managers.

2) The Toolbox for Managing FSC Fisheries

The basic "toolbox" for managing and coordinating FSC fisheries has several fundamental components:

- A) AFS Mandates;
- B) Comprehensive Fisheries Agreements (CFAs);
- C) Communal Licences (CLs);
- D) Communal Licence – Temporary Amendments (CL-TAs); and
- E) Fishing Plans.

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These components are described below:

A) AFS Mandates:

These are **confidential** internal DFO documents, exempt from Access to Information requests. They define DFO's negotiating envelope with respect to AFS agreements, including maximum allocations for some fish species, and funding levels for each Agreement. AFS Mandates are signed by the Assistant-Deputy Minister of Fisheries and Aquaculture Management (FAM) in National Headquarters, and regional staff cannot negotiate agreements that exceed the parameters defined in the AFS Mandates, including the maximum fish allocations. Both temporary and permanent increases in FSC allocations above an existing FSC Mandate must go through a formal review and approval process, for either a temporary or permanent Mandate change, with senior-level sign-off.

AFS Fish Mandates describe the long-term upper limit for allocations as bounding parameters for negotiations. Mandate amounts are incorporated into Integrated Fisheries Management Plans (IFMPs), as DFO must manage fisheries such that First Nations have a reasonable opportunity to catch their allocations.

The following general guidance applies with respect to AFS Fish Mandates:

- a) "Mandate" species include Sockeye, Chinook, Chum, Coho, and Pink salmon, halibut, sablefish, other groundfish, herring, herring spawn-on-kelp, and eulachon. Quantities of these species identified in Communal Licences must be in accordance with AFS Mandate amounts.
- b) AFS Fish Mandates have been developed for all First Nations who have a Communal Licence. Some of these First Nations are also signatories to a Comprehensive Fisheries Agreement (CFA), or are in the process of negotiating a CFA.
- c) A review of Fish Mandates and CLs confirmed that for the majority of First Nations, CL amounts are already at the Mandate levels. Therefore, in the majority of circumstances increasing an allocation in a CL will require at least a temporary Mandate change; this is a time-consuming process requiring sign-off by numerous Branches in the Department.
- d) Fish Mandate amounts should reflect some balance between the diversity of resources that are locally available, community needs, and preferences.
- e) Mandates may need to be adjusted when affiliations change. For example, a First Nation leaving a tribal council with a shared FSC Fish Mandate may take a proportional part of that allocation with them. As well, Mandates may need to be reviewed periodically for First Nations with respect to changing community needs.
- f) Ideally, each First Nation should be covered only by a single AFS Mandate. Managing multiple CLs under multiple Mandates can become very complex.

B) Comprehensive Fisheries Agreements (CFAs):

CFAs are legal agreements negotiated bilaterally with individual First Nations or with an aboriginal organization representing several First Nations (e.g. tribal council), and must be consistent with the terms of the corresponding AFS Mandate. CFAs specify all fisheries-related provisions (e.g. allocations, enforcement protocols, enhancement initiatives, etc.) through a number of schedules and appendices, and

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generally include provisions for DFO to fund stock assessment work, catch monitoring, capacity building, and access to commercial fisheries. In situations where a CFA does not specify an allocation of fish, it will nonetheless describe that a CL will be issued.

CFAs usually include a map of FN-defined fishing area, similar to the Statement of Intent areas for the treaty process. DFO needs to ensure that the descriptions of the fishing areas are consistent between the various documents issued for a First Nation e.g. the fishing area identified in the CL should be within the fishing area described in the CFA. As fishing area issues can be very contentious between First Nations, and often become substantive treaty issues, DFO needs to keep a central record of any permanent or temporary changes to fishing area to serve as an information base for addressing future requests and Treaty fishing area issues.

Under the AFS, DFO also enters into Project Funding Agreements (PFAs) with some Aboriginal groups as a bridge to negotiating a CFA. Under a PFA, DFO contributes funding to an Aboriginal group to support fisheries-related projects. PFAs do not include the fisheries-related provisions, such as allocations, that are included in CFAs.

C) Communal Licences (CLs):

CLs are issued under the *Aboriginal Communal Fishing Licences Regulations*, are legally enforceable, and must be consistent with the fisheries-related provisions of the applicable AFS Mandate and CFA. In general, CLs are issued annually (April 1st) or more frequently by DFO to a First Nation and describe, among other details, the **upper limit on harvest, fishing locations, gear restrictions, and other operational conditions**. CLs may be issued to either a single First Nation, or to an aboriginal organization representing several First Nations (e.g. tribal council). First Nations will expect to build on the allocations in CLs as a starting point for the fisheries component of future or ongoing treaty negotiations.

Some general guidance with respect to CLs is provided below:

- 1) Quantities of fish specified in CLs should remain relatively stable from year to year, given that community fish needs for FSC purposes are unlikely to vary widely from year to year.
- 2) Multiple CLs may be issued under one AFS Mandate where the Mandate covers more than one First Nation (e.g. provide access to a specific stock for one First Nation in a tribal council). In these cases, area staff must ensure that the sum of all fish amounts specified in these multiple CLs issued under a single Mandate do not exceed the provisions of the corresponding AFS Mandate.
- 3) Multiple CLs may be issued under one AFS Fish Mandate when it is appropriate to issue sequential CLs in intensively managed fisheries. The total licenced harvest amount must not exceed the AFS Mandate level for that species.
- 4) CLs are sometimes issued in the absence of a CFA for the First Nation. This occurs when a First Nation does not want to sign an agreement with DFO, but DFO needs to meet its legal obligations of providing an opportunity to fish for FSC purposes. Again, CL amounts must be within fish allocations specified in corresponding AFS Mandates, and reflect consultations with these First Nations.
- 5) CLs may define access opportunities by harvesting conditions (e.g. possession limits for clams) rather than a specific FSC allocation for non-Mandate species. CLs may contain detailed fishing plans with specific openings, locations and gear restrictions designed to provide FSC fishing

opportunities which provide reasonable catch-per-effort and facilitate compliance monitoring and data collection.

- 6) In most areas, CLs are issued annually. However, in some areas where fisheries are intensively managed (e.g. Lower Fraser), successive short-term CLs are issued throughout the season to set fishery openings in response to in-season information.
- 7) Fish caught under communal FSC licences may not be sold. In some areas DFO has authorized Aboriginal fishing for economic opportunity. In these cases, separate CLs are issued for FSC fishing and for commercial fishing.
- 8) In many cases the CLs include the exact allocations in AFS Mandates, while in others the CL is negotiated below the AFS Mandate to allow for abundance-based adjustments or negotiating room.
- 9) If there is a conservation issue with respect to one species, the CL limit may need to be decreased from recent levels, but in accordance with the principle of FSC access having priority over commercial and recreational fisheries. It is challenging to negotiate a decrease in harvest limits in CLs, however, conservation has priority over FSC access. In this scenario, the Fish Mandate level for the species of concern would remain unchanged.
- 10) CLs can specify harvest limits for Non-Mandate species. Proposals to establish new harvest limits for non-Mandate species should still go through the regional evaluation and sign-off process due to the potential implications to Treaties.

D) Communal Licence – Temporary Amendment (CL-TA):

Where it is intended that a change to a CL *NOT* be permanent, a “Communal Licence – Temporary Amendment” (CL-TA) should be issued to address the change. CL-TAs should be used to address **temporary** changes to fishing area, or to the licensed harvest amount of a species. To date, several different variations of CLs have been used in different areas (e.g. “Supplemental Licences”) to provide some flexibility and address special circumstances. CL-TAs will replace these other approaches and make it clear to the First Nation that the change is not intended to be permanent. If a CL-TA is being used to temporarily increase harvest limits on a species or stock, the total licensed harvest amount of that species or stock for the First Nation must be within the Fish Mandate limits for that First Nation, otherwise a temporary Fish Mandate change would need to be approved in advance of issuing a CL-TA.

E) Fishing Plans:

Stand-alone fishing plans are not legal instruments, and are usually developed for intensively managed FSC fisheries. Fishing Plans describe how the FSC fishery will be conducted under expected conditions (i.e. what, when, where, how), and must be consistent with conditions identified in Communal Licence(s) and the AFS Fish Mandate for that First Nation.

Management Tool	Specifies*	Proposed Use
AFS Mandate	<ul style="list-style-type: none"> Long-term upper limit on FSC allocations 	<ul style="list-style-type: none"> Confidential DFO-internal document describing the negotiating parameters for Comprehensive Fisheries Agreements, Communal Licences, and Supplemental Licences. Should reflect community needs and local availability of fisheries resources. Should reflect the population and geographic circumstances of the First Nation. As many Communal Licences are already at the AFS Fish Mandate limit, there will be ongoing requests for temporary and permanent Fish Mandate changes.
Communal Licence	<ul style="list-style-type: none"> Current upper limit on FSC harvest Management conditions (when, where, how) 	<ul style="list-style-type: none"> Legal instrument for setting the upper limit for FSC harvests and the operational details of FSC fisheries under <i>typical conditions</i>. Should <i>not</i> vary much from year-to-year as FSC needs don't vary widely from one year to the next. Opportunities to benefit from a very high abundance of any one stock or species in a given year can be addressed with a CL-TA.
Communal Licence – Temporary Amendment	<ul style="list-style-type: none"> Upper limit on harvest or change to fishing areas as a variance from the “normal” the provisions of a Communal Licence 	<ul style="list-style-type: none"> Legal instruments to implement non-permanent changes to the regular FSC e.g. short-term need, or dynamic or uncertain environment. Should be used to address unique circumstances such as (1) very high abundance of a species or stock, (2) very low abundance of species or stock, (3) temporary change in fishing areas for communal harvests, and (4) unusual circumstances for the First Nation.

Table 1. Key Administrative Tools for Managing Communal FSC allocations

Each of these documents contains many more provisions, but this table highlights only the components directly relevant to allocations and fishing areas.

3). Roles and Responsibilities in Managing FSC Access***A) General Issues***

This section describes the process for addressing requests for an increase in allocation or a change in fishing location, including approaches for information sharing and sign-off procedures. In each case, the process is the same whether the allocations are renegotiated pre-season or in-season, and whether there is a CFA in place or not. As well, the processes apply to requests for permanent or temporary changes.

The processes need to accommodate six different types of requests:

- i. Change to an allocation (permanent or temporary) for a Mandate species within Mandate limits;
- ii. Allocation increase (permanent or temporary) for a Mandate species to an amount exceeding current Mandate limits;
- iii. Change to management parameters (permanent or temporary) for a non-Mandate species
- iv. Change to a fishing area (permanent or temporary)
- v. Change to individual First Nation affiliation with a Tribal Council or other Aboriginal organization (may require changes as outlined for **i** to **iv** above).
- vi. Commercial and/or recreational closures to facilitate FSC access.

If a request involves both a change in fishing area and an increase in an allocation then both aspects of the request must be evaluated in accordance with the relevant Evaluation Frameworks and addressed in the same Information or Decision Note to the RDG.

Participants in the evaluation and sign-off process will normally include:

1. Area Review:

- Area Director, Area Chief of Resource Management (RM), and Aboriginal Affairs Advisor;

2. Regional Review

- RHQ-FAM: Species Coordinator
- RHQ-AFS: Manager of AFS
- RHQ-TAP: Senior Negotiator

3. National

- NHQ: ADM-FM (for Mandate changes only)

4. Department of Justice (DOJ)

- DOJ provides advice upon request.

The general steps that are followed, from receipt of an access request through to approval, are outlined in Figure 1.

Records

Due to the potential legal implications of all decisions pertaining to FSC requests, all DFO staff involved with addressing a FSC Access requests are responsible for keeping detailed records of:

- All information received from the requesting First Nation, as well as all information provided to the requesting First Nation or other First Nations that may be affected by the decision.
- Consultation records including:
 - All attempts to contact the requesting First Nation or other First Nations that may be affected by the decision.
 - Meeting records of all discussions with the requesting First Nation or other First Nations that may be affected by the decision. The template provided by the Consultation Secretariat can be used. Further guidance can be obtained from the DF consultation website:
<http://info.pac.dfo.ca/policy/consultation.htm>

B) Process for Addressing Changes to FSC Access

- Change to an allocation (permanent or temporary) for a Mandate species within Mandate limits:**

A temporary or permanent change to the harvest limits for a Mandate species is managed by Area staff as long as the current Mandate limits will not be exceeded, and provided that the FN involved is not engaged in the British Columbia Treaty Commission (BCTC) process, at Stage 4 (Negotiation of an Agreement in Principle) or later.

If DFO is negotiating FSC amounts with a FN engaged in the BCTC process at Stage 4 or later, the process outlined in ii) below should be followed. This is to ensure that the DFO Treaty Negotiator has the opportunity to provide input and additional context to the FSC allocation decision.

The Area does the following:

- 1) Issues a Communal Licence with a revised limit for the species of interest, if the change is intended to be permanent: or
- 2) Issues a CL-TA with a revised limit for the species of interest, if the change is NOT intended to be permanent.
- 3) Provides the RHQ-AFS Manager with a copy of the CL or CL-TA, and files the CL or CL-TA on the Regional drive at the following location
N:\Afsneg\$\Communal Licences\Area\Year

ii. Allocation increase (permanent or temporary) for a Mandate species to an amount exceeding current Mandate limits:

The steps outlined here apply to requests for permanent or temporary allocation increases, and for requests received pre-season or in-season. They should also be followed if a FN is requesting that a Mandate species be added to their CL.

- 1) Upon receiving a request from a First Nation, the Area representative engages other Area staff as appropriate and obtains as much information as possible from the First Nation, including supporting rationale, and documentation of current harvest levels. The Area representative provides the RHQ- AFS Manager with a copy of the request and supporting information.
- 2) The RHQ-AFS Manager contacts the Treaties and Aboriginal Policy (TAP) Senior Negotiator, who then engages the appropriate Regional Negotiator(s).
- 3) The RHQ-AFS Manager provides the Area representative with summary data on current FSC allocations for the requesting First Nation, and neighboring First Nations, for comparison.
- 4) The Area representative takes the lead in completing the evaluation, and involves the Regional Negotiator, the RHQ Fisheries and Aquaculture Management (RHQ-FAM) representative (e.g. Species Coordinator),

Department of Justice (DOJ), and others as appropriate, in developing the evaluation.

- 5) When a Draft evaluation has been prepared, the Area representative seeks input from:
 - RHQ-AFS Manager
 - the appropriate Regional Negotiator;
 - the appropriate RHQ FM representative
 - DOJ if appropriate.
- 6) All the parties identified in 5) above will contribute to a detailed evaluation of the request using the FSC Access Evaluation Framework and develop a final evaluation and recommendation.
- 7) Once the evaluation and recommendation are supported by all the parties involved, the Area Director will lead development of a decision note to the RDG, with an “I concur” line for the ADM. The RD-FAM, and the Director of TAPD will sign the Decision Note to the RDG/ADM. The completed FSC Access Evaluation table is appended to the Decision Note as supporting information.
- 8) When approval for a temporary or permanent Mandate change is received via the RDG’s office, the Area can issue a CL or CL-TA to the First Nation.
- 9) Once the CL-TA or revised CL has been issued and signed, Area staff then distribute the documentation as follows:
 - (a) Fax the CL-TA or CL to the First Nation, with a cover letter outlining the decision rationale. For CL-TAs, this cover letter should contain a clear description of the unusual or extenuating circumstances.
 - (b) Send an electronic copy of the new or amended licence to Area C&P and Resource Management.
 - (c) File a copy of the new CL or CL-TA on the Regional drive at the following address: **N:\Afsneg\$\Communal Licences\Area\Year.**
- 10) If the decision is for no allocation increase, Area staff send a letter to the First Nation, outlining the decision rationale, with a copy to TAPD. If the decision will be very controversial then senior managers should be involved in the communication as appropriate.

iii. Change to management provisions (permanent or temporary) for a non-Mandate species

All steps outlined in ii) above should be followed for addressing requests for changes to management provisions for non-Mandate species, whether received pre-season or in-season.

iv. Changes to a fishing area (permanent or temporary)

The process steps outlined below are for requests to harvest an existing allocation in a different location, or to access an additional allocation in a different location. For requests that include additional allocation as well as fishing area issues, the allocation issue would need to be evaluated in accordance with guidance from senior managers.

Upon receiving a request from a First Nation to fish outside of their current fishing area, the Area representative should obtain as much information as possible from the First Nation, e.g. supporting rationale.

- 1) Upon receiving a request from a First Nation, the Area representative engages other Area staff as appropriate, and obtains as much information as possible from the First Nation, include supporting rationale, and documentation of current harvest levels. The Area representative provides the RHQ- AFS Manager with a copy of the request and supporting information.
- 2) The RHQ-AFS Manager contacts the TAPD Senior Negotiator, who then engages the appropriate DFO Treaty Negotiator(s). As well, advice may be sought from DOJ as appropriate.
- 3) The Area representative takes the lead in completing the evaluation, and involves the DFO Treaty Negotiator, the RHQ-FAM representative (e.g. Species Coordinator), DOJ, and others as appropriate, in developing the evaluation.
- 4) When a Draft evaluation has been prepared, the Area representative seeks input from
 - RHQ-AFS Manager
 - the appropriate Regional Negotiator;
 - the appropriate RHQ FAM representative
 - DOJ if appropriate.
- 5) All the parties identified in 3) above will contribute to a detailed evaluation of the request and develop a final evaluation and recommendation.
- 6) Once the evaluation and recommendation are supported by all the parties, the Area Director prepares a Decision Note to the RDG and seeks sign-off from the RD-FAM, and the Director of TAP. The completed FSC Access Evaluation Framework table is appended to the Decision Note as supporting information.
- 7) When the Area receives approval from the RDG's office, the Area representative issues a CL-TA or revised CL to the First Nation.

- 8) Once the CL-TA or revised Communal Licence has been issued and signed, Area staff:
 - (a) Fax the revised CL or CL-TA to the First Nation, with a cover letter outlining the decision rationale. For CL-TAs, this cover letter should contain a clear description of the unusual or extenuating circumstances.
 - (b) Send an electronic copy of the new or amended licence to Area C&P and Resource Management.
 - (c) File a copy of the new CL or CL-TA on the Regional drive at the following address: **N:\Afsneg\$\Communal Licences\Area\Year.**
- 9) If the change is permanent, the AFS Manager ensures that the corresponding amendments are made in the First Nation's CFA (Schedule "A" and Schedule "B").
- 10) If the decision does not support a change to the Fishing Area, Area staff send a letter to the First Nation outlining the decision rationale, with a copy to TAPD. If the decision will be very controversial then senior managers should be involved in the communication as appropriate.

Accounting for Catch outside the Normal Fishing Area:

When a First Nations' harvest in the fishing area of another First Nation it is important that the harvest is counted against the appropriate allocation:

- If a First Nation is fishing in the area of another First Nation, under a CL-TA, with or without a protocol arrangement with the host First Nation, then any harvest is counted towards the allocation specified in the CL-TA.
- If members of one First Nation are fishing in the fishing area of another First Nation, without a CL-TA, they must be designated by "host" First Nation, and conform to the conditions set out in the CL of the "host" First Nation. Their catch is counted against their own First Nation's allocation if they have an allocation for the species or stock being harvested. If the "guest" First Nation does not have an allocation for the species or stock they are catching, the catch is counted against the allocation of the host First Nation.

v. Addressing Changes in a First Nation's affiliation

In a number of cases, DFO has Mandates for groups of First Nations, such as Tribal Councils. In such cases, the member First Nations often do not have specific allocations, but the combined harvests of the member First Nations should be within the limits established for the group. This creates challenges for DFO when these groups break apart. In such situations DFO needs to work

towards a manageable outcome, which could include individual CLs for each First Nation from the former group, or CLs for other new groupings. Mandates may need to be adjusted to reflect the new circumstances.

Negotiating new arrangements with the former members of a group will take time, and DFO must carefully consider the pros and cons of imposing licence amounts on FNs if a negotiated outcome cannot be reached in time for the next fishing season. When changes in affiliation involve First Nations that are engaged in treaty negotiations at Stage 4 or later, the Area, RHQ-FM, and TAPD need to work collaboratively to develop an interim management approach and/or new allocations.

vi. Addressing Requests to Close Commercial and/or Recreational Harvest to Facilitate FSC Access.

DFO receives numerous requests from First Nations each year to restrict commercial and/or recreational harvesting in order to facilitate FSC access. With respect to shellfish, such decisions are normally made by the Area, with guidance from: *Pacific Region Guidelines on Changes to Shellfish Management Plans to Address Requests by First Nations Regarding Harvesting for FSC Purposes (2003)*. Due to the potential implications of such decisions for Treaty negotiations, however, all requests for commercial and/or recreational closures should be referred to the RHQ-FAM and the TAPD Senior Negotiator for input. The process steps are summarized below:

- 1) Upon receiving a request from a First Nation, the Area representative engages other Area staff as appropriate and obtains as much information as possible from the First Nation, include supporting rationale and documentation of current catch-per-unit-effort and preferred fishing locations. The Area representative provides the RHQ-AFS manager with a copy of the request and supporting information.
- 2) The RHQ-AFS Manager contacts the TAPD Senior Negotiator, who then engages the appropriate DFO Treaty Negotiator(s). As well, advice may be sought from DOJ as appropriate.
- 3) The Area representative takes the lead in completing the evaluation, and involves the Regional Negotiator, the RHQ-FAM representative (e.g. Species Coordinator), DOJ, and others as appropriate, in developing the evaluation.
- 4) When a Draft evaluation has been prepared, the Area representative seeks input from:
 - RHQ-AFS Manager
 - the DFO Treaty Negotiator;
 - the RHQ FAM representative
 - DOJ if appropriate.
- 5) All the parties identified in 3) above will contribute to a detailed evaluation of the request and develop a final evaluation and recommendation.

- 6) Once the evaluation and recommendation are supported by all the parties, the Area Director prepares an Information Note to the RDG and seeks sign-off from the RD-FAM and the Director of TAPD. The completed FSC Access Evaluation table is appended to the Information Note as supporting information. If the three Directors do not agree on a recommendation, a Decision Note outlining the issues and options is prepared by the Area Director, signed by the RD-FAM and the Director of TAPD, and sent to the RDG.
- 7) When the Area receives approval from the Directors (or the RDG), they proceed with steps to implement the closure, and work with the FN on monitoring to determine whether or not objectives of the closure are met.
- 8) RHQ-AFS adds the closure information to the FSC access database.

C) Moving Forward

Comments and concerns about the processes outlined in this document should be brought to the attention of the RHQ-AFS Manager in the Treaty and Aboriginal Policy Directorate. As FSC access issues continue to evolve over time, DFO will need to re-evaluate its approaches to addressing FSC access issues and adjust to a changing environment.

Fig. 1. General Review and Approval Process for Addressing FSC Access Requests

