

DFO Guidelines For Responding to Requests by Aboriginal Organizations to Fish for Food, Social and Ceremonial (FSC) Purposes in Areas not Previously Authorized Under Communal Licences Issued by DFO to the Aboriginal Organization for FSC Purposes

Effective Date:

Objective

- The objective of these Guidelines is to assist Fisheries and Oceans Canada (DFO) in responding to requests by Aboriginal organizations to fish for food, social and ceremonial (FSC) purposes in areas not previously authorized under a communal licence issued by DFO to the Aboriginal organization for FSC purposes.

Application

- These Guidelines apply where the Minister of Fisheries and Oceans (the Minister) issues licences under the *Aboriginal Communal Fishing Licences Regulations* to Aboriginal organizations to fish for FSC purposes. They are to be read in conjunction with the “Policy for the Management of Aboriginal Fishing, 1993” and other policies and guidelines of DFO respecting the management of fisheries.
- These Guidelines apply to requests by Aboriginal organizations to fish for FSC purposes in areas not previously authorized under communal licences issued by DFO to the Aboriginal organization for FSC purposes and in particular to requests to:
 - expand the geographic scope of fishing areas where fishing is currently authorized; or
 - provide opportunities to fish in new fishing areas where fishing has not previously been authorized.

Context

- Existing Aboriginal and treaty rights are recognized and affirmed in Section 35 (1) of the *Constitution Act, 1982*.
- The Supreme Court of Canada (SCC), in a number of decisions, has provided some guidance on issues involving Aboriginal and treaty rights related to fishing. In general, the SCC has stated that Aboriginal fishing rights are communal in nature; Aboriginal fishing rights are fact and site specific; the Crown has a fiduciary relationship with Aboriginal peoples; and government action that infringes on Aboriginal or treaty rights must be justified.
- When contemplating conduct that might adversely affect potential Aboriginal title or other Aboriginal rights, Government has a legal duty to consult and, in some circumstances, accommodate.

- The Aboriginal Fisheries Strategy (AFS) is in part a response to the 1990 decision of the SCC in *R. v. Sparrow*. Under the AFS, which applies where DFO manages the fishery and land claims agreements are not in effect, DFO seeks to negotiate fishing agreements with eligible Aboriginal groups to, among other things, describe the mutually agreeable arrangements for Aboriginal fishing for FSC purposes.
- Opportunities to fish for FSC purposes are provided to Aboriginal organizations through communal licences issued under the *Aboriginal Communal Fishing Licences Regulations*.

Policy Guidance

- Under the AFS and DFO's policies for managing Aboriginal fishing:
 - Aboriginal fishing for FSC purposes has priority, after conservation, over other uses.
 - Fishing by Aboriginal groups for FSC purposes should occur within the areas used historically by the Aboriginal groups near or adjacent to their communities. DFO may require that the Aboriginal group provide evidence of historic use.
 - In general, under the AFS, DFO seeks to negotiate agreements for Aboriginal fishing for FSC purposes in waters that are near or adjacent to the Aboriginal communities.
 - Where an Aboriginal individual wishes to fish for FSC purposes in an area outside their community's historical area, and in the historic area of another Aboriginal group, the individual may be designated by the other Aboriginal group to fish under their communal licence for FSC purposes for the area in question. The other Aboriginal group must count the harvest against the allocation provided under the communal licence issued to it.

With respect to the above points, see in particular fisheries agreements negotiated under the AFS and the following paragraphs from the "Policy for the Management of Aboriginal Fishing, 1993": paragraphs 1.a; 1.c; 2.b, 5.a and 11.d.

Considerations

Where an Aboriginal organization makes a request for fisheries access for FSC purposes in areas not previously authorized under a communal licence, DFO will ask for any of the following information that has not been provided with the request:

- identification of the new or expanded area(s) that the Aboriginal organization requests be included in the communal licence;
- the species of fish to which the request relates;
- the reasons for the request and any supporting details/documentation;
- the status of any Treaty/Land Claims Agreement negotiations with the Aboriginal organization or of the DIAND-led processes in the Maritime Provinces and Gaspé Region of Quebec; and
- if there are other Aboriginal groups which fish for the species in question for FSC purposes in the area, whether the Aboriginal organization has discussed the request with those groups, and if so, their views regarding the request.

Keeping in mind DFO's general policy position that fishing by Aboriginal groups for FSC purposes should occur within the areas that were used historically by the Aboriginal groups near or adjacent to their communities, in addition to the information provided by the Aboriginal organization, DFO will take the following factors into account in reviewing a request from an Aboriginal organization:

1. conservation;
2. fisheries management, including enforcement and monitoring;
3. potential impact on other Aboriginal groups or other users of the resource;
4. historical information relevant to the request;
5. access currently provided and where;
6. consultations with Aboriginal groups and others that may be affected;
7. implications for Treaty/Land Claims Agreements (negotiations or implementation) for the requesting Aboriginal organization or for others or for the DIAND-led processes in the Maritime Provinces and Gaspé Region of Quebec;
8. court challenges (decisions already rendered or cases in process) that should be considered; and
9. other relevant considerations.

Process

Where in response to a request a Region recommends providing access to the Aboriginal organization to fish for FSC purposes in an area not previously authorized under a communal licence issued to the Aboriginal organization for FSC purposes, the Regional Director General will provide a recommendation to the Director General, Aboriginal Policy and Governance (APG) for decision. The recommendation will include a summary of the request and of the supporting documentation along with the analysis of this information and the factors considered in making the recommendation. Depending upon the nature of the request, the Director General, APG may decide to provide the recommendation to the Associate Assistant Deputy Minister, Fisheries Renewal for information or decision or, in consultation with the Regional Director General, to a more senior level in DFO for information or decision. The decision will be made by the National Capital Region (NCR). The Director General, APG will inform the Regional Director General of the NCR decision. If there is a difference of opinion between the Director General and Regional Director General, they are to resolve the issue together with the Associate Assistant Deputy Minister.

The Director General, APG will share the material and decision with other DFO Regions in order to maintain a national awareness of the issue.

The Regional Director General or his/her delegate is responsible for informing the Aboriginal organization of DFO's decision, both where a decision is made by the Region not to agree to a request and where a decision is made by the NCR with respect to the Regional Director General's recommendation to provide FSC access in an area not previously authorized.

Contact:

Rose Marie Karnes
Rose-Marie.Karnes@dfo-mpo.gc.ca