

**Discussion Paper**

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

**An Overview of Strategic Issues and Recommendations**

**Draft #2**

**Background**

Fisheries and Oceans Canada (DFO manages First Nations' access to fish for food, social, and ceremonial (FSC) purposes through the Aboriginal Fisheries Strategy (AFS) program, which was established in 1992. Under the AFS program, fish Mandates for each Aboriginal group that has a Communal Licence to fish for food, social, and ceremonial (FSC) purposes. Mandates define the upper harvest limits that can be specified in communal licences for certain species:

- Sockeye, chinook, chum, coho, and pink salmon;
- Halibut, Sablefish, and Other Ground fish
- Herring, and Herring Spawn-on-Kelp
- Eulachon.

Area staff negotiate communal licence harvest limits on an annual basis. Communal licences also specify fishing areas, and may provide for the harvesting of non-Mandate species using gear restrictions, timing windows, bag limits, and other approaches to achieve resource management objectives.

Each year DFO receives requests from Aboriginal Groups for new species allocations, increases to current allocations, changes to fishing areas, and commercial and/or recreational closures. Within the region there has not been clear guidance with respect to the process for addressing such requests, and how to evaluate these requests. As well, there has not been a full review of Fish Mandates since the AFS program began.

In January 2006 a regional working group was formed to develop of a consistent process for managing and evaluating First Nation's requests for changes to their FSC access (issues pertaining to fish quantities, fishing area, and the actual opportunity to harvest fish). To date, two main products have been developed for implementation on a trial basis in 2006:

- a) An Operational Framework, which identifies the administrative tools available (e.g. Mandates, Communal Licences), how they should be used in managing FSC access, the roles and responsibilities of the Area, TAPD, Fisheries and Aquaculture Management (FAM) and Department of Justice, in evaluating FSC access requests, and sign-off procedures;

## PROTECTED FOR NEGOTIATIONS

- b) Evaluation frameworks for addressing FSC access requests that will improve consistency in decision-making, and document the supporting rationale for decisions.

In the course of addressing these initiatives, the working group identified several significant issues that were beyond its' scope, and which should be considered by senior management. These issues are outlined below.

These issues should be considered individually, and then collectively, in advance of deciding upon a course of action. As there has not been a comprehensive review of FSC allocations since they were first implemented in 1993, and because there are a number of substantive issues that may need to be addressed, DFO may want consider a full review of all AFS mandates, and development of a more strategic approach for managing FSC access into the future. Such a review would need to involve Treaty and Aboriginal Policy Directorate (TAPD), Fisheries and Aquaculture Management representatives from Regional Headquarters, and the Areas.

### Overview of Issues

#### *Issue 1. Low "Outlier" Allocations*

Some First Nations have allocations of fish that are very low in comparison with neighbouring First Nations that have a similar diversity and abundance of fisheries resources available in their fishing areas, and taking population into consideration as an indicator of community needs. In some cases the low allocations are for certain species, and in other cases the allocations of many or all species appear to be disproportionately low for a First Nation. DFO should anticipate that many of these First Nations will approach the Department for increases to their allocations.

#### *Options and Analysis*

- A) DFO can continue with the current approach of responding to requests for allocation changes. While some consideration is given to allocations of the requesting First Nations relative to other Aboriginal Groups in the same geographic area, a broader regional context is lacking.
- B) TAPD could work with Area staff to identify low allocation "outliers" (e.g. approximately the bottom third for total allocations in each Area has been proposed). An evaluation would then be completed for each of the "outlier" First Nations, using the FSC Access Evaluation Framework for guidance, to identify more defensible allocations, taking into consideration community size, the species that are "low", the total fish allocations and the available "fish basket". When some approximate total numbers for Mandate revisions have been identified (for Areas and for the Region), an evaluation of the management implications to other resource users should be completed, and a plan developed for addressing the issues. As part of this plan, DFO would need

to decide whether to pro-actively increase some of the Mandates for these First Nations, or to address as a priority upon receipt of requests.

This type of approach could enable DFO to be more strategic in addressing FSC allocation issues and risk management in the future, and facilitate longer-term planning with respect to both First Nations overall allocations and other sectors.

***Recommendation:***

Option B is recommended.

***Issue 2. Status of Communal Licence Harvest Limits Relative to AFS Mandates***

Currently, the harvest limits specified in Communal Licences are equal to the AFS Mandate limits for most First Nations. Consequently, DFO usually has no negotiating room with respect to allocations of fish for FSC purposes. This makes it difficult for DFO to respond in a timely manner to requests for increased harvest amounts, as current Mandates cannot be exceeded and Temporary Mandate Changes require regional review via a comprehensive evaluation process, with RDG approval. As well, this places area staff in a very difficult position, as the expectations of First Nations with respect to consultation and accommodation are very high, while DFO's capacity to address requests is constrained. This results in frustrating situations for staff, and has a large impact on relationships between DFO and First Nations.

***Options and Analysis***

- A) *Retain the current approach of evaluating and responding to First Nations requests for changes to FSC allocations (except possibly for the low outliers as discussed above).*

As most Communal Licence harvest limits are already equal to Mandate amounts, almost all allocation increases will need to go through the regional evaluation and sign-off processes. This approach provides limited flexibility to respond to special circumstance or events (e.g. such as those leading to in-season requests), and will likely perpetuate conflict with First Nations with respect to FSC issues. As well, it constrains the potential of moving to abundance-based allocations under AFS.

- B) *Explore the concept of create interim Area allocation pools (i.e. quantities of fish), which would provide some flexibility within each of the Areas for negotiating temporary increases in AFS allocations. "Pools" in the range of 5-10% of current FSC allocations for each Mandated species, for each Area, have been suggested.*

Areas would use the "pools" to manage their priorities for addressing requests for increased FSC access, in accordance with the Operational and Evaluation frameworks. These pools would provide area staff with the ability to negotiate "top-ups" of current Mandate amounts on an annual basis.

## PROTECTED FOR NEGOTIATIONS

This would provide greater flexibility to address short-term circumstances or special events, and would provide for improved resource management planning as the allocation pools would be accounted for in IFMPs (currently, in-season requests can result in more fish being allocated to Aboriginal Groups than is planned for in IFMPs).

Further work would need to be done to determine how such an approach could be implemented. Decisions on allocation increases would still require information exchange between the Area, and TAPD for First Nations that are engaged in the treaty process at Stage 4 or later. As well, exceeding Mandate limits would presumably still require a Temporary Mandate Change before harvest limits could be increased in Communal Licences, unless changes are made to the current process.

### ***Recommendation:***

Option B is recommended; TAPD and FAM should work collaboratively to explore if and how such an approach could work, and to develop an approach for trial implementation in 2007 if it is determined that the concept is feasible.

### ***Issue 3. First Nations Priority of Access to Fish for FSC Purposes:***

In the *R. v. Sparrow* decision, the Court held that after conservation and other “valid legislative objectives”, Aboriginal rights to fish for FSC purposes have priority over all other uses of the fishery. The court also held that infringements of Aboriginal rights must be justified and that part of the justification analysis involves an assessment of whether adequate consultation has occurred.

There are some species (or groups of species) which appear to have low allocations among most First Nations in a given geographic area, relative to local abundance and harvests by other sectors. Such cases may put DFO at legal risk, if First Nations requests for larger allocations are not met, and if there is not adequate consultation with respect to these allocations.

As an example, South Coast bands in the Strait of Georgia have an average groundfish allocation of about 3 lbs per person per year. The total First Nations’ allocation amounts to about 3% of the average total commercial and recreational catch in Georgia Strait (based on 1995 -2004).

Chinook allocations for Georgia Strait bands are also very low, with an average of 0.44 pieces per person per year if Qualicum is excluded (Qualicum is a “high” outlier with 10 pieces per person per year). The total Chinook FSC allocation for First Nations in the Strait is 6,450 pieces (including Qualicum’s allocation of 1,000 pieces) while the average sport catch is 37,460 in the same area (based on data from 1995 – 2004). Chinook are a species preferred by First Nations, and DFO may be in a difficult position if challenged with respect to providing FSC priority access, especially if a request for an increase in a Chinook allocation has been turned down, and if there is not adequate consultation with respect to allocations.

In both of these cases, increasing the allocations of low “outliers” as proposed above is unlikely to address the issue of Priority access for FSC purposes, as almost all First Nations have very low allocations of these species. These are just two examples for one portion of the coast, where some preliminary analysis has been done.

***Options and Analysis:***

*A) Continue with the current approach of addressing these situations on a case-by-case basis, upon the request of the Aboriginal Group.*

This option could minimize disruption to other harvesters in the short-term, and does not create a new workload for DFO. It presents some risks, however, depending upon how First Nations communicate their requests, and what consultation takes place.

*B) Conduct a Regional review of allocations to identify situations where there are widespread low allocations of some species in some geographic areas relative to abundance and/or harvests by other sectors, and use findings to guide development of an action plan.*

TAPD could complete a Regional review of Mandate allocations and analyse in comparison with measures of abundance and/or catch of species in the same area by other Sectors, to identify where the Department is at greatest risk with respect to providing Priority access to First Nations for FSC purposes. TAPD would then work with Areas and FAM to draft a plan for responding to the risks identified, and managing implications for other Sectors.

This approach would facilitate more pro-active management of both overall FSC access, and implications for other stakeholders, compared with Option A. This approach could also assist with reducing the pressure to increase allocations of “designer” species, and to diversify the FSC “fish baskets”.

***Recommendation***

Option B is recommended.

***Issue 4. Implications of Current Reforms to Pacific Fisheries, for Unallocated Species***

There are species of significant commercial value for which DFO has not usually defined AFS Allocations, such as crab and prawn. As part of Current Reforms to Pacific Fisheries (CRPF), DFO has an objective of accelerating involvement of First Nations in commercial fisheries. Understandably, many First Nations are interested in becoming involved with these lucrative fisheries. The challenge for DFO is that an increasing number of First Nations will be acquiring commercial capacity (boats, gear, etc), which they can also use to harvest for FSC purposes. Potentially significant implications are discussed below:

## PROTECTED FOR NEGOTIATIONS

- As First Nations harvesting capacity increases, the capacity to harvest for FSC purposes will also increase; in the longer term this may result in resource management implications in the absence of allocations. Implications for both commercially targeted species, and for species often caught as by-catch, should be considered.
- When DFO provides a commercial opportunity to a First Nation, and there is no corresponding FSC allocation for the species for which the opportunity is provided, there may be an increased risk of unauthorized sales, as First Nations will have the gear and the markets for their product, and no limit on the amount they can harvest.

### ***Options and Analysis:***

- A) Maintain the current approach of not necessarily implementing a FSC allocation, when an economic opportunity is provided to a First Nations.

While this approach would minimize up-front negotiating efforts it could result in time-consuming resource management issues in the longer term.

- B) Adopt the approach of negotiating a FSC allocation for relevant species (target and associated desirable by-catch species) when an economic opportunity is provided to a First Nation. This would be consistent with the approach taken in Treaty, where a Harvest Agreement opportunity would not be provided for species unless a Domestic allocation has been agreed to.

With both options, when commercial-style gear is used to harvest for FSC purposes, there should be rigorous catch monitoring and reporting requirements.

### ***Recommendation:***

Option B is recommended.

### ***Issue 5. Long-term Strategic Approach for Lower Fraser Fish Allocations***

While Mandates are currently being developed for 2006-2007, the current approach should be reviewed with consideration to developing a longer term strategy for managing FSC and First Nations economic fisheries in the Lower Fraser.

Currently, many Lower Fraser First Nations have combined allocations for FSC/Sales opportunities. They have a base amount for FSC, and the balance of the allocation is split between the FSC and sales opportunities, with the split negotiated annually. Consequently, the FSC allocation can vary widely from year to year. This raises questions with respect to the purpose of FSC, as with other First Nations DFO takes the approach of assuming that FSC needs do not vary widely from year to year. As well, this approach may undermine DFO's commitment to implementing a consistent approach, and result in conflict between DFO and other First Nations.

## PROTECTED FOR NEGOTIATIONS

This approach also raises conflicts with respect to Treaty approaches; because the Lower Fraser First Nations are only permitted to harvest salmon for sale if there is an opening of the regular commercial fishery, there is a strong incentive for First Nations to have as much of their overall allocation as possible as FSC in years where there is a poor outlook for the commercial fishery. Hence, when abundance is low, the FSC access of these First Nations can increase substantially. This is inconsistent with the negotiation of abundance-based approaches in Treaty, where FSC access decreases as abundance declines. This may become an increasingly challenging issue, with Tsawwassen in final negotiations, Fish Chapter discussions now beginning with Katzie, and Musqueam almost ready to begin AIP negotiations.

While the current approach to managing fisheries access in the Lower Fraser presents some significant issues and challenges, it is the result of many years of difficult negotiations with First Nations, and trying to change the current approach will also present significant challenges.

### ***Options and Analysis***

Two options have been identified that should have further analysis by TAPD, FAM, and Lower Fraser:

- A) Continue with the current approach of a combined FSC/Sales envelope, with the split negotiated each year (similar to the Lheidli T'enneh arrangement negotiated for making adjustments between FSC allocations and Harvest Agreement);

This approach has several substantial inconsistencies with all the management of FSC access in almost all other parts of the Region, and creates complications for Treaty negotiations. The Treaty implications will likely increase in the future as more First Nations advance in the treaty process.

- B) Completely separate the FSC and Economic Opportunities allocation envelopes;

This approach could generate strong resistance among First Nations as it would decrease their flexibility. However, it would narrow the range of FSC allocations available and reduce inconsistencies among First Nations.

Ultimately, the risks and challenges of remaining with the current approach need to be evaluated against risks and challenges of trying to negotiate and implement changes. If DFO wants to move from the current approach, developing a strategy and reasonable timeframe for achieving change will be key to a positive outcome.

### ***Recommendation:***

TAPD, FAM, and Lower Fraser should work on a collaborative evaluation of the two options in accordance with:

- a) how the options would support DFO in reaching resource management and relationship objectives;

## PROTECTED FOR NEGOTIATIONS

- b) the stated objective of a transparent and consistently applied process, and also with respect to preventing large disparities among neighbouring First Nations;
- c) the purpose of FSC access
- d) relationships with other first Nations
- e) implications for Treaty negotiations.

The risks and challenges of the current approach need to be evaluated against risks and challenges of trying to negotiate and implement changes

### ***Issue 6. West Coast Vancouver Island Somass FSC/Economic Sockeye Allocations***

There are two First Nations on the west coast of Vancouver Island (Hupacasath and Tseshahat First Nations) that have a combined FSC/Sales allocation, with no negotiated split - the First Nations decide themselves what to retain for community use and what to sell. They are supposed to report their FSC and Sales catches to DFO. This approach raises many of the same issues as identified in section 5 above for Lower Fraser (inconsistent with the regional process, leads to disparities among First Nations). As well, this approach results in First Nations fishing for commercial purposes along with FSC, when the rest of the commercial fishery is not open (i.e. the Priority access is provided to both FSC and commercial access for these First Nations).

#### ***Options and Analysis:***

As identified under Issue 5 above.

#### ***Recommendation:***

A identified for Issue 5 above.

#### ***Next Steps:***

DFO needs to consider the issues identified above, and determine which are the highest priorities for addressing pro-actively. A work plan for addressing the highest priorities, as recommended by the Strategic Directions Committee and/or the Regional Management Committee, should then be developed and implemented. As an alternative approach DFO should consider conducting a full review of FSC allocations with respect to the issues identified above, as there are some linkages between the issues, and therefore possibly some efficiencies to be gained by doing one comprehensive review. Whether a prioritized approach or comprehensive review is selected, the associated analyses and evaluations should be completed, and Action Plans developed for presentation to the Strategic Directions Committee and/or Regional Management Committee.