

**Pacific Region – Interim Assessment Framework and Procedures for
Addressing Changes to First Nation Food, Social and Ceremonial
Allocations and Fishing Locations**

Background:

In its 1990 decision in *R. v. Sparrow*, the Supreme Court of Canada had its first opportunity to consider the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*. The Court held that the Crown cannot infringe Aboriginal rights except where such infringement is justified in accordance with the principles set out in that decision. This court decision had broad implications for the management of fish and other natural resources in Canada.

In its decision in *R. v. Sparrow*, the Supreme Court of Canada emphasized that the Crown has a fiduciary relationship with the aboriginal peoples of Canada. More recently, the Court has held that the Crown has a duty to engage in meaningful good faith consultations with aboriginal groups and, in some circumstances, accommodate their interests when the Crown has knowledge of the potential existence of aboriginal title or other aboriginal rights and contemplates decisions or actions that might adversely affect the title or other rights. In the fisheries context, this means that DFO should engage in meaningful good faith consultations with aboriginal groups regarding FSC access and should, where appropriate, accommodate the groups' interests.

In 1993, the Department of Fisheries and Oceans developed and implemented its ***Policy for the Management of Aboriginal Fishing***, which provides general guidance with respect to management of Aboriginal fishing for food, social and ceremonial (FSC) purposes. A more recent policy document, "***A New Direction for Canada's Pacific Salmon Fisheries***" (1998), re-affirms the importance of Aboriginal FSC requirements in Principle #7, which states "First Nations requirements for food, social and ceremonial purposes will continue to have first priority after conservation requirements". Some recent court decisions provide further guidance Aboriginal fishing matters.

DFO receives many requests from Aboriginal groups for changes to their FSC allocations or fishing locations. Decisions on these matters involve complex issues. It has therefore become a regional priority to develop an evaluation framework to be consistently used in addressing all requests from Aboriginal groups for changes to FSC allocation or fishing location, and to ensure that relevant Branches are involved in the decision-making process.

This interim assessment framework and procedures document is intended to build on the 1993 Policy for the Management of Aboriginal Fishing. It provides interim guidance on how to evaluate requests from Aboriginal groups for changes in FSC allocation (Parts A & B below) and/or fishing location (Parts A & C below), and procedures for the review and approval of such changes.

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Requests from Aboriginal groups regarding FSC access can involve:

- 1) adjustments to existing numerical allocations;
- 2) new allocations (i.e. for species that were previously unallocated);
- 3) a new fishing location; or
- 4) a combination of 1 & 3 or 2& 3 above.

Where requested changes involve both the allocation (1 or 2 above) and the fishing location, staff should work through Parts A, B and C of this document below.

A. General Steps to follow for all FSC requests:

For each request for a change in FSC allocation or fishing location from an Aboriginal group it is very important to take the following steps:

1. Communication:

Inform all relevant DFO staff of the request as soon as possible. Relevant staff would include the appropriate RHQ Fish Management Species Coordinator, the Area Chief of Resource Management (and Area Salmon/Groundfish/Shellfish coordinators if applicable), the Area Director, the Manager of AFS, the Treaty and Aboriginal Policy (TAP) Senior Negotiator, and others, as you consider appropriate. This will avoid surprises later, and may also result in contribution of useful information to assist with the decision.

2. Consultation:

All requests for changes to FSC allocation and/or fishing location should begin with the FN providing as much information as possible in support of the request. This is appropriate, and in keeping with the 2004 *Haida* court decision. Further consultation between DFO and the requesting aboriginal group regarding the information provided should be contemplated.

Keep detailed records of:

- a) all information received from the requesting Aboriginal group, all information provided to the requesting Aboriginal group, or other Aboriginal groups that may be affected by the decision.
- b) all attempts to contact the requesting Aboriginal group, and other Aboriginal groups that may be affected by the decision;
- c) all discussions with these parties (i.e. dates, times, locations, participants, substance of discussions, commitments made, etc.).

3. Dispute resolution:

If DFO and an Aboriginal group cannot reach agreement with respect to an access request, follow the Issue Resolution Process outlined in the relevant AFS agreement. If there is no AFS agreement, confer with the Area Manager on how to proceed.

B. Evaluation and Approval Procedures for Changes to Existing FSC allocations and issuing of Communal Licences:

Note: If an Aboriginal group requests an increase in the amount of a species they can harvest in their Communal Licence, and the increased amount will still be *within the maximum level specified in their current AFS Mandate*, the in-depth review process and sign-off procedures outlined below are not necessary. Address the questions below and consult as appropriate. If the licence is revised, ensure that the AFS Manager receives a copy of the revised Communal Licence and file on the Regional drive at the following address: N:\Afsneg\$\Communal Licences\Area\Year.

When approached by an Aboriginal group requesting a new allocation, or an increase in their existing FSC allocation which will either

- a) exceed the amount specified in a Communal Licence when there is no AFS Agreement in place; or
- b) exceed the maximum amount specified for that species in an existing AFS Mandate,

the Resource Manager should prepare a summary of information to consider, addressing the following issues or questions:

Research Existing Allocation:

- 1) Determine the population base of the Aboriginal group, both on and off reserve. Summary data are provided with this interim document. When calculating the population of the Aboriginal group include only numbers for "Own band", including On reserve, Off Reserve, and On Crown Land. Do not include numbers for "Other band" or "No band". Contact the TAP Database Manager at 604-666-3974 for updated population information in subsequent years.
- 2) Summarize available information on all wild fish resources that the requesting Aboriginal group is licensed to harvest for food, social and ceremonial purposes.
- 3) Use information collected in Steps 1 and 2 above to answer the following questions
 - a) What is the existing per-capita allocation of the requested species?
 - b) What is the existing total per-capita allocation of all fish species combined?
 - c) Incorporating the requested increase in allocation, provide the per-capita allocation for the requested species, and for all species combined.
 - d) Has there been a significant increase in the Aboriginal group's population since earlier allocations were arrived at?
 - e) Has there been a change to grouping of First Nations (e.g. splitting of a Tribal Council), and if so, how do the sub-totals relate to the total fish allocation of the former group?

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- f) How was the existing allocation arrived at? Was it a product of negotiation, or was it imposed? If the existing allocation was negotiated, what was taken into account in that negotiation?
 - g) Compare the existing and requested allocation with those of neighbouring First Nations on a per-capita basis, and also compare on a regional basis, with groups in similar geographical settings in BC.
 - h) Does the requested increase in allocation seem reasonable for food, social, and ceremonial purposes, on a per-capita basis, taking into consideration all the available fish food sources and the geographic circumstances of the Aboriginal group?
- 4) Using personal background knowledge of the Aboriginal group concerned, note historically what they have done with FSC fish, i.e. – have they distributed to “off-reserve” members? to Elders? Have they traded or bartered the fish with other Aboriginal groups? Have they used the fish in ceremonies? Is it reasonable to assume that the requested fish will be consumed by the Aboriginal group, or is there concern that the additional fish may be sold?
 - 5) Check the group’s AFS Agreement “Final Reports” for information on FSC catch figures and any information regarding FSC issues. Determine how often, if ever, the group has attained their existing allocation, and the catch numbers being requested. Identify your level of confidence in the data, and any data quality constraints that you are aware of. If licensed numbers have not been attained, the Aboriginal group must provide a convincing rationale for increasing the allocation (e.g. increased fishing capacity, and evidence that existing allocations are unreasonable).

Context Information

- 6) Conservation concerns:
 - a) Will approval of the requested allocation result directly in a conservation issue for the requested stock, or any other co-migrating or co-existing species or stock? Provide relevant details.
 - b) Is the request a result of a conservation concern (i.e. increase harvest of a requested species or stock to offset decrease in the harvest of a species or stock due to conservation concerns)?
- 7) If the request is for access to a species for which the Aboriginal group hasn’t previously had an allocation, obtain as much information as possible about historic use of the species by the requesting Aboriginal group as part of a consultation process. Ensure that the AFS Manager and TAP Senior Negotiator are informed of the request and supporting information.

Identify the potential implications of

- a) approving the request;
- b) denying the request.

Consider issues such as implications for other Aboriginal groups (i.e. Could approval result in potential infringement concerns with respect to another Aboriginal group?).

- 8) Identify the implications for other Aboriginal groups that may be affected by the decision. When the request involves a migratory species that will pass through other fishing areas of other Aboriginal groups on its route, can the requested FSC increase be provided without affecting the ability of other Aboriginal groups to catch their FSC allocations of the stock or species?
- 9) If the Aboriginal group requesting an increase in the allocation of a species already has a generous total allocation (all species) on a per capita basis, consider negotiating a smaller allocation of another species or stock in exchange, if this is appropriate based on conservation and equity considerations.
- 10) Is the requested allocation increase intended to facilitate short-term access to unusually high stock abundance? If so, the request should be considered in the context of the existing allocation of the Aboriginal group, and anticipation of requests from other Aboriginal groups (especially those located in terminal areas for a migratory stock) who may request increased access, and commercial and recreational stakeholders.
- 11) Is the requesting Aboriginal group participating in the Treaty process? If so, discuss the request with the TAP Senior Negotiator for Pacific Region, and briefly summarize the potential implications of approving the allocation increase for the Treaty process.

Process for review and decision-making

- 12) Discuss the information collected above with the appropriate RHQ Fisheries Management Species Coordinator, the Area Chief of Resource Management (and Area Salmon/Groundfish/Shellfish coordinators if applicable), the Area Director, the AFS Manager, the TAP Senior Negotiator, and other staff as appropriate. Discuss possible impacts and implications of the allocation increase, conservation concerns, affects on other First Nations, as well as recreational and commercial interests. Also consider implications of denying the request.
- 13) Document all management (e.g. catch monitoring, data tracking, etc) and financial issues that DFO will need to address if the request is approved.
- 14) If there is consensus that a permanent allocation increase is appropriate, Area staff will draft a memorandum to ADM Fisheries Management from RDG Pacific Region, summarizing key information with respect to points 1-12 above, and

providing the rationale in support of the recommended decision. Before this memorandum is signed off by the RDG it must be reviewed and approved by the Regional Directors of Fish Management, and Treaty & Aboriginal Policy. ***If the requested allocation increase is a “one-off” or a temporary in-season change, the memorandum will be addressed to the RDG from the Area Director with copies to Directors of FM and TAPD.***

- 15) Upon receiving approval and sign-off by the ADM (or the RDG for a temporary change), the Area drafts a Communal Licence or amendment to an existing licence to reflect the increase in fish allocation. Do not issue the licence until you have been given the authority to do so. If a change in allocation is being provided to address unusual or extenuating circumstances, these circumstances should be clearly identified in a cover letter to the Aboriginal group which is sent with the revised Communal Licence.
- 16) The AFS Manager will be advised to make the appropriate amendment to the Aboriginal groups' AFS Fisheries Agreement and to the Regional AFS fish mandates. This will ensure consistency between the Regional Mandates, AFS Agreement and the Communal Licence. ***If the change is a “one-off” or temporary change, no amendment to the AFS agreement or Regional FSC Mandates will be necessary.***
- 17) A copy of the Communal Licence will be signed, faxed to the group and an electronic copy sent to Area C&P and Resource Management. All Communal Licences and amendments will be filed on the Regional drive at the following address: **N:\Afsneg\$Communal Licences\Area\Year.**

C. Steps required for evaluating and approving changes to FSC fishing location

When approached by an Aboriginal group requesting a change in their licensed FSC fishing location for one or more species, Resource Managers must have a clear understanding of the reasons for the request, given the potential long-term implications of the decision with respect to treaty negotiations, and relationships with other First Nations that may be affected by the decision.

The 1993 Policy for the Management of Aboriginal Fishing provides the following direction:

- B.1.a) Aboriginal fishing should occur within areas that were used historically by the aboriginal group or First Nation.
- B.1.b) Aboriginal fishing opportunities will be provided to the First Nation having historical use and occupancy of the area in question.

Determination of historical fishing areas is difficult and AFS has therefore focussed on current and local fishing areas.

DFO does not object to members of one Aboriginal group fishing under the Communal Licence of another Aboriginal group provided that the harvest is accounted for and credited to the allocation set out in the Communal Licence of the Aboriginal group in the area where the fishery takes place.

The following issues require consideration as part of the decision-making process, when a First Nation asks DFO to alter the fishing area defined in their Communal Licence:

General Background Information:

- 1) What species has the First Nation harvested outside their local area and why?
- 2) Is the requested fishing area located within the licensed fishing area of another First Nation? If the requested fishing area is within the fishing area of another Aboriginal group, the Resource Manager must exchange information with the other Aboriginal group to determine how they would be affected by the proposed fishing.

Note: Protocol agreements between or among Aboriginal groups are encouraged and supported by the Department, however, it is not DFO's role to negotiate these arrangements. Once in place, protocol agreements will be useful in documenting and assuring the Department that First Nations collectively support specified arrangements. Protocol arrangements can facilitate the consultation discussed above.

Context Information

- 3) Does the requesting Aboriginal group have an allocation of a stock that can be fished in the other proposed area without unduly impacting on co-migrating or co-existing stocks? Document any issues.

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- 4) If the request is for a species or stock for which the Aboriginal group does not currently have an allocation, and outside the existing fishing area of the Aboriginal group, DFO should work with the Aboriginal group to obtain all relevant supporting information (e.g. when did the Aboriginal group fish the requested species in the requested location, and why is it being requested now etc.). This information must be discussed with the Area Director, and the Treaties and Aboriginal Policy Director to determine how to proceed.
- 5) If the request results from the Aboriginal group being unable to harvest one or more fish species in the usual (licensed) location (e.g. a conservation issue, or change in migration route) for FSC purposes, document the circumstances. DFO should work with the requesting Aboriginal group to accommodate their access to the specific stock in question, or develop alternative options as appropriate. This would require dialogue with other Aboriginal groups who would be affected by the decision.
- 6) If the requesting Aboriginal group is participating in the Treaty process, discuss the request with the TAP Senior Negotiator and briefly summarize the potential implications of approving the change in fishing location for the Treaty process.
- 7) The Resource Manager shall determine if the request is a result of a cooperative initiative supported by DFO (e.g. AAROM-type arrangement, First Nations Marine Society, etc.)? If so, this will need to be taken into consideration when arriving at a decision.
- 8) The Resource Manager shall determine if the request is for a one-season change in location to address unique circumstances, or if the requested change is likely to become an ongoing issue.

Process for review and decision-making

- 9) If the Area considers that a permanent or temporary change in fishing location is warranted, the request and supporting information must be discussed with the RHQ Species Coordinator, Area Chief Resource Manager, the Area Director, the Senior Treaty and Aboriginal Policy negotiator, and the Manager of AFS.
- 10) If there is agreement that the temporary or permanent change in fishing location should be approved by DFO, the Area will draft a memorandum to the RDG describing the requested change in fishing location and seeking approval and sign-off by Director of Fisheries Management, Director of Treaties and Aboriginal Policy, Species Coordinators, and the Manager of AFS. The memorandum should contain a summary of key information addressed in Points 1-8 above.
- 11) Upon receiving approval from the RDG, the Area may incorporate the necessary changes to the relevant Communal Licence. The revised Communal Licence should then be filed on the Regional drive at the following address: **N:\AfsnegS\Communal Licences\Area\Year.**

The AFS Manager will be advised, and amendments will be made to the First Nation's AFS Fisheries Agreement should also be made to Schedule "A" and

Schedule “B” in the applicable AFS Comprehensive Fisheries Agreements as necessary.

Where a temporary change in fishing location is being accommodated to address an unusual situation, a cover letter providing a brief explanation of the circumstances must be sent to the Aboriginal group with the amended Communal Licence.

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