



CONSULTATION FRAMEWORK

>> For Fisheries and Oceans Canada



Canada

Consultation Framework

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Executive Summary

Fisheries and Oceans Canada (DFO) has a broad mandate, with the authority to regulate and enforce activities, develop policy, provide services and manage programs. To help ensure that the department's policies and programs are aligned with its vision and effectively address the interests and preferences of Canadians, DFO supports consultations that are transparent, accessible and accountable. This *Consultation Framework* creates the foundation for DFO officials to build a **common understanding and coordinated approach** to consultations in support of departmental decision-making processes.

The *Consultation Framework* comprises a policy statement and, organized under three broad themes, nine principles and 37 guidelines. The three themes and their respective principles are:

<i>Theme</i>	<i>Principles</i>
Planning and Evaluating	Commitment, Evaluation, and Timing
Building Mutual Respect	Inclusiveness, Accessibility, and Clarity
Improving Consultation Culture	Accountability, Transparency and Coordination

Given the federal government's fiduciary relationship with Aboriginal groups and their significance in DFO's activities, particular attention is devoted to outlining some special considerations for consulting them. A separate *Toolbox* completes the *Framework* by providing practical tools and advice for planning, implementing and evaluating consultations.

Policy Statement

Fisheries and Oceans Canada (DFO) will undertake consultations in order to improve departmental decision-making processes, promote understanding of fisheries, oceans and marine transport issues, and strengthen relationships.

Principles and Guidelines

Theme 1 Planning and Evaluating

Principle 1: Commitment

Effective consultations require leadership and a shared commitment so that the results from consultations will be considered in the decision-making process.

- Guideline 1.1 Consultation plans are approved before consultations are undertaken.
- Guideline 1.2 Consultation planning documents include key decisions subject to consultation input, staff contacts, consultation methods, budget resources, identified participants, plans for identifying non-traditional stakeholders, proposed schedule for consultations, and the methods to evaluate the consultations.
- Guideline 1.3 Existing mechanisms for consultation, including those of DFO, the Government of Canada, or others, such as advisory boards and committees, are surveyed to determine whether and how they could be used.

Principle 2: Evaluation

Consultations will be evaluated periodically throughout the process and at their conclusion based on objectives set out in an established consultation plan.

- Guideline 2.1 Consultation participants are provided with the opportunity to contribute to the evaluation of decision-making processes, including the consultations.
- Guideline 2.2 Evaluation methods and processes are identified and developed during the planning process to departmental staff and consultation participants.
- Guideline 2.3 The evaluation process is flexible and ongoing throughout the consultations to ensure that goals and targets are being met or revised as input is received.
- Guideline 2.4 Once a consultations process is completed, it is assessed as to whether the participants were correctly identified and appropriately consulted, and if the policy, principles and guidelines were followed.

Principle 3: Timing

Consultations will be organized with appropriate timeframes and deadlines so that participants are provided reasonable time to prepare and provide their input.

- Guideline 3.1 Objectives for the consultation are developed early in the planning stage in the approved consultation plan so that they can be achieved within a reasonable time, given the differing levels of capacity for participants to respond.
- Guideline 3.2 Consultation participants are involved as early as possible in the consultations and consideration is given to providing them with the opportunity to participate in the design of the consultations.
- Guideline 3.3 Consideration is given to the time of day and time of year for holding consultations (e.g., consider that the general public is more available after normal working hours and that certain industries might be busier during particular seasons).
- Guideline 3.4 If further information or views are provided following allotted time frames for consultation, then reasonable steps are taken to consider the additional information.

Theme 2 Building Mutual Respect

Principle 4: Inclusiveness

Consultations will involve the appropriate range of groups or individuals that may have an interest in, be affected by or can make a meaningful contribution to a government decision.

- Guideline 4.1 As part of a context scan, research is undertaken to assess the positions and interests of the partners, clients and stakeholders on the subject being consulted.
- Guideline 4.2 Reasonable steps are taken to identify potentially affected groups early in the consultations and to include them.
- Guideline 4.3 For some consultations, participants are specially selected. In such cases, consideration is given to their knowledge of policies/operations; ability to communicate with DFO officials and other consultation participants; interest in providing and exchanging information; and interest in seeking recommendations.
- Guideline 4.4 Where civil society organizations, Aboriginal fisheries commissions or other associations represent multiple groups, consideration is given to contacting the individual member associations to ensure that feedback is provided at the appropriate level of detail/knowledge.
- Guideline 4.5 Participants might also be invited to consultations if they are interested in the issue, even though they may not have developed the capacity or expertise to provide input in order to build knowledge of DFO issues and decision-making processes.

Principle 5: Accessibility

Reasonable steps will be taken to determine how clients, stakeholders, and others wish to be consulted and to provide them with relevant, understandable information.

- Guideline 5.1 As part of consultation planning, activities are undertaken to determine the level of understanding of the partners, clients and stakeholders on the subject being consulted.
- Guideline 5.2 As part of developing a consultations plan, consideration is given to asking participants how they prefer to be consulted and involved in the consultations, if this is not already known.
- Guideline 5.3 Consultation plans can outline different consultations methods for various clients, stakeholders and partners, depending on their preferences for consultation methods, the suitability of that method to the circumstance, and might include a combination of multi-lateral and bi-lateral consultation activities.
- Guideline 5.4 Consideration is given as to how information/documentation is provided to consultations participants and how their input/feedback can be provided to DFO officials, depending on the capacity/ability of participants to access the information (including hard-copy documents by mail-out, e-mail attachments, or on-line documentation and feedback forms).
- Guideline 5.5 Documentation and background materials are provided to clients and stakeholders, and to the general public if applicable, at the earliest possible time (e.g., consider providing material one month in advance of consultations, or longer if the issue is complex or expected to be controversial).
- Guideline 5.6 Access to consultation information, documentation and activities can be provided, based on the participants' physical capabilities, linguistic, regional, ethno-cultural or socio-economic backgrounds.

- Guideline 5.7 On-line documentation is provided according to Government of Canada policy on accessibility, and respecting Government of Canada and DFO policy regarding official languages.
- Guideline 5.8 Notification for public involvement activities includes agency contact information (address, hours of operation, contact person, etc.) for relevant documentation and other information.

Principle 6: Clarity

Participants need to know the objective of consultations and be able to understand the information and documentation they receive.

- Guideline 6.1 The scope of the decision, how input will be gathered and how it will be incorporated into the decision-making process should be shared or might be developed with participants.
- Guideline 6.2 Efforts will be made to use “plain language”. Lengthy or highly technical documents can be summarized with bibliographical references to the original research studies and data.
- Guideline 6.3 The obligations for translations into second official languages and any need, if determined to be relevant, to translate into third languages are determined as part of the consultations planning process. There might be requirements to consult with linguistic minority communities and Aboriginal groups.

Theme 3 ***Improving Consultation Culture***

Principle 7: Accountability

Roles and responsibilities in consultations will be clearly communicated.

- Guideline 7.1 The roles and responsibilities of all those involved in consultations are defined, especially regarding who is required to provide information and who will be making decisions throughout the process.
- Guideline 7.2 The roles and responsibilities under legislation, regulations, agreements and other policy documents are shared with consultation participants.

Principle 8: Transparency

Consultations will be documented and results disseminated in a timely manner.

- Guideline 8.1 Input that is given at key decision points is considered and documented, including: statements of the decisions taken; the type of public involvement activity conducted; a list of participants; the issues on which the public was consulted; a summary of views, important comments, criticisms and suggestions; the effect the comments had on the action taken; and specific responses to significant issues, or explanations why proposals made by the participants were not incorporated.
- Guideline 8.2 The consultation process is documented, including: the participants, how they were consulted, the results of the consultation, and the decisions taken. This documentation might include policy decisions, research studies, regulatory changes, operational activities, evaluations, summaries of feedback received, consideration of input, etc. to all consultation parties. Participants can be identified generally (e.g., by categories) or specifically (e.g., using names) depending on the consultation.

- Guideline 8.3 Where consultations are required for localized policy development, including minor regulatory changes, or on minor operational changes, consideration can be given to meeting consultation requirements through letters, e-mails or other communication soliciting input from targeted participants. Where consultations are required for broader policy development or program changes, consideration can be given to planning more comprehensive and “open” public consultations.

Principle 9: Coordination

- Viewpoints, perspectives and comments on consultations, including the process and the product will be shared within the department and take into account impacts on and feedback from other initiatives.
- Guideline 9.1 Communications staff are involved early in the planning of consultations so that appropriate communication materials (i.e., communication plans or press lines) can be developed in accordance with the type and impact of the decision-making process, as required to support the consultation plan.
- Guideline 9.2 Other sectors/regions, and other departments as required, are involved early by notifying them in the preparation phase of consultation planning.
- Guideline 9.3 Press releases and other communication products that are of interest to other federal departments or other governments are shared with them in advance of public release in order to allow them to prepare any responses required.
- Guideline 9.4 A point of contact is indicated on all consultation documentation.
- Guideline 9.5 Research findings, reports and other final documents are shared with consultation parties prior to public release.

Introduction

“Consultation”, recognized as central to democracy, is complex. The term is often used to refer at once to a single activity as well as a process. There are situations where there may be a statutory or other requirement to consult. In addition, consultations can be undertaken as part of good business practice and to build positive relationships. Special considerations might apply regarding consultations with Aboriginal groups, which are dealt with in this *Consultation Framework* as well.

Fisheries and Oceans Canada (DFO) has a broad mandate. The department has the authority to regulate and enforce activities, develop policy, provide services, and manage programs. As part of the department’s business, consultations can be applied to the design, development and evaluation of public policies, programs and operational services. In their decision-making, Ministers rely on departmental staff to lay the groundwork through consultations, leading to:

DFO Vision

Safe, healthy, productive waters and aquatic ecosystems, for the benefit of the present and future generations.

- better and more informed policy and operational decisions;
- greater public acceptance of those decisions;
- more responsive services and programs; and
- more public willingness to comply with rules set by a regulatory authority.

To help ensure that DFO’s policies and programs are aligned with its vision and effectively address the interests and preferences of Canadians, DFO supports consultations that are transparent, accessible, and accountable. The *Consultation Framework* creates the foundation for DFO officials to build a **common understanding and coordinated approach** to consultations in support of departmental decision-making processes.

The *Consultation Framework* builds on the department’s existing culture, capacity and experience with public involvement and consists of:

- a sense of the **strategic purposes** and directions for consultation;
- **definitions**, to enhance the common terminology across the department;
- a **policy statement**, for consultations within and outside the department;
- **principles**, which departmental consultations should respect; and
- **guidelines**, to steer planning for consultations.

This *Consultation Framework* outlines a departmental consultation policy, principles and guidelines for encouraging and facilitating involvement in the decision-making processes that may affect people's socio-economic and environmental interests. To implement the *Consultation Framework*, a separate **Toolbox** has been developed, which provides practical guidance and tools for planning and evaluating consultations. By applying the *Consultation Framework* and the *Toolbox*, DFO officials can improve consultations with the department's external partners, clients and stakeholders, and promote internal coordination, learning, and communication.

Strategic Context

The Government of Canada has demonstrated its commitment to working with others to improve decision-making processes. The *Social Union Framework Agreement* is but one example of the Canadian government's recognition of the importance of public participation. This intergovernmental accord highlights the need to "ensure appropriate opportunities for Canadians to have meaningful input into social policies and programs." It is indeed a path-breaking approach to an interjurisdictional agreement relying on shared values and reporting to public, and as such sets a standard for cooperation and consultations.

Through various initiatives, DFO has involved others in its own decision-making processes. Examples of DFO consultations, clients and stakeholders can be found in Appendix A on page 25. The following list provides a few examples of these commitments:

- Through its *Strategic Plan*, March 2000, the "department has committed to work on a consultation framework, which will guide its interactions with the public, provinces and territories, and other organizations." DFO officials communicate with these various groups on a daily basis, through informal discussions and formally organized activities. There is greater public awareness of and involvement in government activities, resulting in an increased desire by citizens to become involved in DFO decision-making processes.
- The 1999 *Agreement of Interjurisdictional Cooperation with Respect to Fisheries and Aquaculture* commits governments to work in a true spirit of cooperation and partnership. The *Agreement* established the Canadian Council of Fisheries and Aquaculture Ministers (CCFAM) and intergovernmental task groups to focus on issues of strategic importance. Key principles contained in the *Agreement* include: timely consultation with affected jurisdictions as part of the decision-making process; information-sharing in advance of announcements that may affect another jurisdiction; and transparency to make explicit and known the objectives, principles and means underlying the decision-making process.
- Pacific Region analyzed decision-making practices through a review of its consultations under the *New Directions* Policy initiative called "Improved Consultation and Decision-Making in Pacific Fisheries". Out of this initiative came the establishment of a Consultation Secretariat to provide advice, develop tools and promote training for consultations in the Pacific Region.
- The Voluntary Sector Initiative (VSI) was officially launched as a government-wide priority in June 2000, to coincide with the United Nations proclamation of 2001 as the International Year of Volunteers. It also marked the federal government's commitment to find new ways to work with and engage the

voluntary sector in policy and program development along with other existing clients and partners. DFO contributes to the VSI in order to strengthen the federal government's and DFO's working relationship with voluntary sector organizations. DFO has developed a strategy to implement the *Accord Between the Government of Canada and the Voluntary Sector* and related *Codes of Good Practice*.

- In 2000, the government adopted a new management framework, *Results for Canadians*, following reports and pilot projects on implementing modern comptrollership. This framework positions modern comptrollership as a catalyst for change and one of the key priorities on the Government's modern management agenda. In the following year, the Treasury Board Ministers decided to implement the Modern Comptrollership Initiative government-wide. One of the key elements of this initiative is strategic leadership, which encompasses client relationships management. The *Consultation Framework* supports the department's development of a strategic approach to client relations as part of the modern comptrollership initiative.

Statutory and Legal Contexts

Consultations should be a matter of good business practice. However, there are instances when the nature and the scope of consultations should reflect legal obligations. In these cases, the Consultation Policy included in this *Consultation Framework* can be applied in a manner that is consistent with legal and other policy requirements.

Cabinet

A number of Cabinet directives require federal departments to undertake consultations as part of their decision-making processes. As well, departments are expected to report on the result of these consultations. Three relevant Cabinet directives are:

- the Strategic Environmental Assessment¹;
- the Government of Canada Regulatory Policy²; and
- the Cabinet Directive on Law-Making³.

Cabinet must have the correct information in order to decide whether a law or a regulation is justified or whether other alternatives would be more effective. Proper planning and documentation from the beginning of the decision-making process makes the later stages more manageable. In preparing submissions to Cabinet, drafters are directed to consider a set of questions grouped under six titles: policy basics; public interest; government themes; question of accountability; urging partnerships; and, efficiency and affordability. Efforts should be made not only to present information to interested parties, but also to provide opportunities for feedback in order to meet the requirements of these Cabinet directives.

Fisheries and Oceans Canada

DFO is responsible for administering or following several pieces of legislation, and some of these contain requirements to consult, collaborate or, at a minimum, publicly report on activities. This includes the *Oceans Act*, the *Fisheries Act* and the *Canada Shipping Act*. These and other examples are listed in Appendix B on page 27.

Another example of the opportunity for consultations in government processes is the *Canadian Environmental Assessment Act (CEAA)*. DFO typically consults with other federal departments during the conduct of an environmental assessment to seek their expertise or specialist knowledge to assist in assessing the environmental effects of

¹ http://www.ceaa-acee.gc.ca/0011/0002/dir_e.htm

² <http://www.pco-bcp.gc.ca> (click on “Publications” for a list of documents)

³ <http://www.pco-bcp.gc.ca> (click on “Publications” for a list of documents)

projects. In addition, there are federal-provincial environmental assessment cooperation agreements in place⁴ to ensure that both orders of government work together, where applicable. *CEAA* indicates that different levels of public participation⁵ are required depending on the type of environmental assessment.⁶

DFO does not have a mandate to determine whether an Aboriginal group has Aboriginal or treaty rights, or the nature and scope of such rights. However, the Government of Canada has a fiduciary relationship with Aboriginal peoples and DFO has an obligation not to unjustifiably infringe Aboriginal or treaty rights. Consultations are an important factor that courts consider in determining whether or not infringements of Aboriginal or treaty rights can be justified. Courts continue to provide guidance respecting consultations with Aboriginal groups. A discussion of special considerations for consulting Aboriginal groups is contained in Appendix C on page 31.

Canada is also a signatory to many international agreements spanning a diversity of issues, including those on oceans, fisheries, trade, environmental protection, species conservation, transport and security. As such, DFO is involved in negotiations in international fora that necessitate consultations to scope issues and prepare Canadian positions. In some cases, as a federation, Canada cannot bind sub-national units (provinces, territories) without their agreement. At the negotiation table, this is a special challenge when dealing with unitary states that do not face this difficulty.

⁴ The provinces are Alberta, Manitoba and Saskatchewan. The federal-provincial agreements are meant to foster some coordination of effort to avoid duplication, but are not necessarily in place for the purposes of consultation.

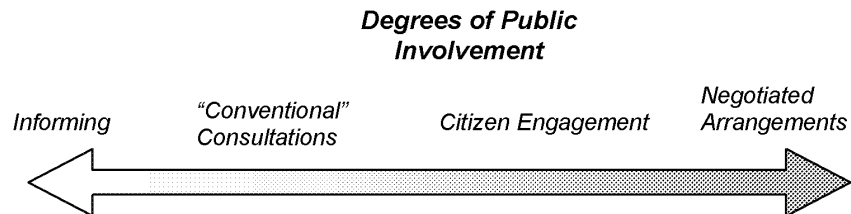
⁵ *CEAA* refers to “public participation” rather than “consultations”.

⁶ Most environmental assessments that DFO – or any federal department – undertakes fall under the screening level and it is at the discretion of departments, as responsible authorities, to determine if public participation is appropriate in the circumstances, as per sub-section 18(3). There are mandatory public processes for comprehensive studies, and panel reviews are open to public input. It should be noted, however, that comments received from the public that are relevant to the environmental assessment must be considered by the responsible authority under *CEAA* and the public registry must include comments from the public in relation to the assessment. DFO practice is to assess and address all relevant comments with a summary in the environmental assessment report to indicate how these comments were addressed.

Scope

Consultations, while often integral to many decision-making processes, can have various meanings for different practitioners and participants. In some cases, consultations are defined in legislation or agreements. Consultations can be *ad hoc* or regularized. Sometimes they are undertaken extensively, on broad issues with a wide-range of participants; other times, consultations are more intensive, with a narrower focus and specifically-targeted participants.

For the purposes of describing the scope of the *Consultation Framework*, there are four different levels of public involvement, depending on the degree of interaction between the department and other parties involved. This forms a continuum from the lowest degree of interaction to the highest, as illustrated below. As the degree of interaction increases, the degree of influence also grows, along with the amount of time and resources required. In this regard, it is critical to select the appropriate level of interaction for the desired outcome of the decision-making process.



A basis for any government-citizen relationship is a recognition that the government needs to provide timely, relevant and accessible information as the foundation for decision-making processes. This *Consultation Framework* focuses on the two often-overlapping processes of "conventional" consultations and citizen engagement. This *Framework* does not apply to the activities undertaken with respect to the negotiations and implementation of arrangements. This document provides general guidance on consultations, but does not preclude the development and implementation of frameworks or strategies for specific programs.

Informing	Government distributes or makes accessible information on policies, decisions, services, and legislation.
“Conventional” Consultations	Government requests feedback in a decision-making process after having determined the problem or issue and having identified the participants in the process, and makes the final decision.
Citizen Engagement	Government and citizens/groups undertake a process of “deliberative dialogue” by which participants commit to a process that seeks a public interest solution, including the possibility of debating current government assumptions/policies and the advocacy interests of others.
Negotiated arrangements	Government delegates authority for decision-making to other groups, or shares decision-making powers, or manages cooperatively.

“Conventional” consultations solicit information, input and feedback from others on a policy or program proposal; they can range in intensity from sending letters and background documents for soliciting input from targeted participants through to a series of national workshops and public meetings. “Conventional” consultations can be organized as either *ad hoc* or on-going processes. However, these processes rarely force clients and stakeholders to reconcile their positions with other clients or stakeholders, as they tend to focus the dialogue on and through the department. Through citizen engagement processes, clients, partners and stakeholders begin to develop relationships with other consultation participants. Resulting dialogues can include debating current systems and assumptions and traditionally-advocated viewpoints and roles.

When determining how to involve others in DFO’s activities, definitions are not as important as ensuring that the method of involvement is consistent with the outcomes that are being sought. There is a large amount of overlap between the two processes of “conventional” consultations and citizen engagement. Distinguishing between these two terms becomes more relevant when consultations are initiated because of a statutory or other legal requirement.⁷

It is generally understood that consultations are a two-way exchange. They include listening to others’ ideas, seeking suggestions to solve problems, and outlining proposals, while ensuring there are opportunities for change. Relationship-building facilitates meaningful consultations.

If DFO and others have an ongoing relationship and have established mechanisms for communication, then consultations on policies and operational decisions can become regularized and a part of doing business. Along with the consultation participants who

⁷ It is important to recognize that consultations with Aboriginal groups may involve a range of activities, which may or may not overlap with the definitions here.

are outside the department, participants can include DFO staff in sectors and regions. Indeed, the *Framework* could and should apply to internal consultations. For further elaboration of definitions of participants to consultations, please refer to Appendix D on page 37.

Government determines how to lead the development of a policy or program and whom to involve. Based on the department's legal requirements, its and others' knowledge of an issue, and the level of complexity, the department provides opportunities for others to become involved. In this regard, the overarching spirit of the policy and principles should be applied to all types of involvement the department has with the public. Ultimately, the Minister has final authority on decisions, including those that have entailed consultations as part of the decision-making process.

Consultations are undertaken when there is a reasonable chance that the results of the consultations can affect the decision.

Consultations should not be undertaken to convince others that a particular course of action is the only correct option, or to communicate changes that are already in effect. In these cases, other responses should be developed, such as a communications strategy, market research, education, outreach, and so on.

As noted above, consulting with Aboriginal groups involves special considerations. Courts have said that a part of a test as to whether or not an infringement of an Aboriginal or treaty right is justified is whether adequate "consultations" have taken place. Further, courts have indicated that consultations with Aboriginal groups may involve a number of activities depending on the extent of potential infringement. Some of these activities may be described as informing, "conventional" consultations, citizen engagement and negotiated arrangements. Accordingly, the word "consultation" as used in this *Consultation Framework*, in the Aboriginal context, may incorporate a wider range of activities. The courts have set out some guidance respecting consultations with Aboriginal groups, but the law is evolving, and consequently DFO's consultation mechanisms and criteria must be flexible.

A more detailed presentation of issues and some guidance respecting consultations with Aboriginal groups are contained in Appendix C on page 31. The principles of the *Consultation Framework* apply to consulting with Aboriginal groups generally. The guidelines in this document may or may not apply to consultations with Aboriginal groups, depending on the particular Aboriginal group and the situation. Appendix C provides some initial considerations, but before planning and undertaking consultations with Aboriginal groups, DFO officials are advised to contact colleagues within the department who have experience in this area.

Framework Objectives

DFO's public involvement activities may differ between the regions, which tend to be more operational, and National Headquarters, which are more policy-oriented. These differences simply reflect the breadth of the department's mandate. The goal of the *Consultation Framework* is to provide DFO officials with mechanisms and direction in support of a **common understanding and coordinated approach** to ensure enhanced consultation. These mechanisms can include tools, resources and infrastructure for consultations.

The objectives of the *Framework* are to:

- **respond to a changing culture** that increasingly values greater involvement in government decision-making and **recognize an expanding client base** in Canada that expects input into decision-making;
- **foster a common sense of purpose and cooperation** among DFO staff, partners, clients and stakeholders for consultations;
- **improve knowledge and understanding** of fisheries and oceans issues throughout the department and by its partners, clients and stakeholders;
- **improve the communication of messages** gathered through consultations throughout the department; and
- **promote better selection of appropriate consultation techniques** according to the goal to be achieved.

Benefits of a “Common Understanding and a Coordinated Approach”

Restoring confidence and credibility, the overarching objective of the departmental *Strategic Plan*, requires that a common sense of purpose and cooperation be promoted among DFO employees, clients and stakeholders with a view to achieving mutual respect and understanding of respective roles and responsibilities in decision-making processes. The *Consultation Framework* addresses this need through:

1. a policy statement and principles to:
 - **increase awareness** of how consultations are conducted within DFO and with its clients and stakeholders;
 - apply **a common set of principles and approaches** to consultations in order to promote transparency, accessibility and accountability, while recognizing necessary flexibility given the wide-range of DFO responsibilities;
2. guidelines to:
 - make the principles more operational;
 - provide **direction** on determining **why** consultations should be undertaken, **who** should be consulted, and **when** the consultations should occur;

3. a *Toolbox* to

- **guide the implementation of the *Framework*** through the promotion of proper planning;
- provide direction on determining **how** to select the appropriate consultation methods, participants, and evaluation processes.

This *Consultation Framework* and the *Toolbox* can be used to integrate consultations as part of ongoing good business practice and to assist with planning consultations to meet statutory or other requirements for consultations. The principles contained within the *Consultation Framework* can be applied to many of the consultations DFO undertakes. The guidelines and the *Toolbox* provide more specific guidance on consultations methodologies and can be adapted to suite various circumstances. The guidelines provide a link between the *Toolbox* and the principles and consideration of the guidelines can ensure that principles are followed. Those responsible for the coordination of existing consultation mechanisms, such as advisory groups, may wish to consider how their operations might benefit from the *Consultation Framework*.

As with any activity undertaken by government, a balanced approach is required. Not every client, stakeholder or member of the public will or should be consulted on every subject. There are time and resource constraints on the consultation participants themselves, as well as on the department. Contributing to “consultation fatigue” can become a real barrier to developing effective relationships with clients, stakeholders and the general public. While not every consultation exercise can be coordinated with other consultations, commitment to the *Consultation Framework* and the *Toolbox* can enable DFO officials to better assess the degree and type of consultations required, seek opportunities for coordination, determine the associated costs in time and money, and identify the expected results.

DFO Consultation Policy

The policy statement indicates DFO's commitment to improved consultations. The principles outline common approaches to consultations within DFO and with stakeholders. With a foundation in mutual respect and learning, DFO officials should also seek to follow these principles when they are participating in consultations led by others. It should be noted, however, consulting with Aboriginal groups involves special considerations and those considerations are described in Appendix C.

Policy Statement

Fisheries and Oceans Canada (DFO) will undertake consultations in order to improve departmental decision-making processes, promote understanding of fisheries, oceans and marine transport issues, and strengthen relationships.

Framework Principles and Guidelines

The department is accountable to the Canadian public for its decisions and the way in which decisions are made. DFO undertakes consultations for:

- policy, program or service development and evaluation, including regulatory changes; and
- developing plans to implement and deliver departmental policies, programs and services.

The principles and guidelines of the *Consultation Framework* are organized into three themes:

- Planning and Evaluating;
- Building Mutual Respect; and
- Improving Consultation Culture.

Planning consultations is critical. The data required and the criteria for evaluation should be considered during the planning process, before the consultations are undertaken. As well, this is the stage when the level of participation is determined, methods of consultation selected, and the resources for the consultations are determined.

Mutual respect is necessary for effective consultations. Regardless of the scope and size of the consultation, all aspects of planning, implementation and evaluation can affect the relationship with and among participants.

Consultation culture within the department is also improved as people gain experience planning, evaluating and building mutual respect.

The department has an important responsibility to consider the effects of its decisions on the staff and citizens in communities across Canada. The following list provides some examples of individuals and groups that may potentially be affected by DFO decisions to illustrate this diversity, but it is by no means exhaustive. Additional examples of DFO consultations mechanisms, clients and stakeholders can be found in Appendix A.

- | | |
|---|--|
| <ul style="list-style-type: none"> ▪ DFO staff ▪ fishing and aquaculture industries ▪ processors ▪ fishers and their communities ▪ Aboriginal fishers and communities ▪ youth in coastal communities ▪ other federal departments ▪ provincial and territorial governments ▪ residents in coastal communities ▪ recreational fishers ▪ fishing tourism operators ▪ shipping operators ▪ the oil and gas industry ▪ voluntary organizations ▪ the agricultural community ▪ other natural resource extraction sectors (forestry, mining, hydro-electric) | <ul style="list-style-type: none"> ▪ conservation authorities ▪ recreational boaters ▪ mariners ▪ manufacturing organizations ▪ safety organizations ▪ international organizations (environmental, economic, maritime, etc.) ▪ non-governmental organizations ▪ Canadians in general who are concerned about the management and protection of natural and ecological resources, marine safety issues, and scientific integrity |
|---|--|

There are many types of groups or individuals that can become involved or are invited to participate in consultations. For consultations where the general public could be invited to participate, representation cannot be controlled. When consultations are targeted, it is important to develop criteria in order to guide the selection of participants. If consultations are going to be targeted, DFO officials need to be aware that the participants in fact represent legitimate interests and organizations. This also raises the issue of funding, if some potential participants cite financial or other barriers to participation.

Government decision-making processes involve both political and administrative processes, where the roles and responsibilities of politicians and bureaucrats are distinctly different. Challenges fundamental to the basic premises of government policy⁸ are best situated in the political realm of parliamentary institutions where there is discretion to respond to the challenges. In other words, DFO officials have to be clear with consultation participants on the nature and objective of the consultations, including the limits on the scope of the consultations.

⁸ Stairs, Denis. "Foreign Policy Consultations in a Globalizing World in *Policy Matters*. vol. 1, no. 8. December 2000. pp. 1-44.

Theme 1

Planning and Evaluating

Principle 1: Commitment

Effective consultations require leadership and a shared commitment so that the results from consultations will be considered in the decision-making process.

Guideline 1.1

Consultation plans are approved before consultations are undertaken.

Guideline 1.2

Consultation planning documents include key decisions subject to consultation input, staff contacts, consultation methods, budget resources, identified participants, plans for identifying non-traditional stakeholders, proposed schedule for consultations, and the methods to evaluate the consultations.

Guideline 1.3

Existing mechanisms for consultation, including those of DFO, the Government of Canada, or others, such as advisory boards and committees, are surveyed to determine whether and how they could be used.

Leadership and strong **commitment** to the process of consultation is important for success in this area. Adequate financial, human and technical **resources** are needed for these processes, and the provision of such resources, can demonstrate the commitment to meaningful consultations. Building relationships over time goes towards building trust.

Continuity is also another indication of commitment. It is important to recognize the important role that can be played by existing or new mechanisms for consultations, such as Advisory Boards and Committees, and other groups that provide guidance and advice based on an in-depth knowledge of the issues. The convenience of using consultations mechanisms has to be balanced with the need to consult with the general public and other clients and stakeholders who are not part of an organized group.

Principle 2: Evaluation

Consultations will be evaluated periodically throughout the process and at their conclusion based on objectives set out in an established consultation plan.

Guideline 2.1

Provide consultation participants with the opportunity to contribute to the evaluation of decision-making processes, including the consultations.

Guideline 2.2

Communicate evaluation methods and processes identified and developed during the planning process to departmental staff and consultation participants.

Guideline 2.3

The evaluation process is flexible and ongoing throughout the consultations to ensure that goals and targets are being met or revised as input is received.

Guideline 2.4

Once a consultations process is completed, it is assessed as to whether the participants were correctly identified and appropriately consulted, and if the policy, principles and guidelines were followed.

In order to determine how **successful** consultations have been, objectives for the process should be set in advance during the consultation planning stage and measured and reported upon throughout the consultations and at the conclusion of the decision-making process. Reporting should occur internally and, when relevant, externally.

Evaluating the consultations will also support the department's efforts to implement several elements of modern comptrollership, including "strategic leadership" and "integrated performance information". Key activities under strategic leadership focus on developing the relationships with clients and stakeholders. Under clear accountability, responsibilities should be clearly defined to support more thorough evaluation and reporting. Applying the element called "integrated performance information" involves a consideration of both financial and non-financial data and advice in decision-making processes. Through this process, it will become increasingly important to link outcomes to resources and to focus on fewer, but more relevant measures.

Principle 3: Timing

Consultations will be organized with appropriate timeframes and deadlines so that participants are provided reasonable time to prepare and provide their input.

Guideline 3.1

Objectives for the consultation are developed early in the planning stage in the approved consultation plan so that they can be achieved within a reasonable time, given the differing levels of capacity for participants to respond.

Guideline 3.2

Consultation participants are involved as early as possible in the consultations and consideration is given to providing them with the opportunity to participate in the design of the consultations.

Guideline 3.3

Consideration is given to the time of day and time of year for holding consultations (e.g., consider that the general public is more available after normal working hours and that certain industries might be busier during particular seasons).

Guideline 3.4

If further information or views are provided following allotted time frames for consultation, then reasonable steps are taken to consider the additional information.

Developing a plan for consultation is an important step to being able to **anticipate** problems early and plan for their management. Determining the capacity of participants to respond and the potential level of controversy are prerequisites to ensuring that participants can effectively contribute during consultations. Participants require adequate time to become informed and develop input for consultations. As well, approaching participants at times that are appropriate and convenient for them will improve the effectiveness of the consultations.

Theme 2 **Building Mutual Respect**

Principle 4: Inclusiveness

Consultations will involve the appropriate range of groups or individuals that may have an interest in, be affected by or can make a meaningful contribution to a government decision.

Guideline 4.1

As part of a context scan, research is undertaken to assess the positions and interests of the partners, clients and stakeholders on the subject being consulted.

Guideline 4.2

Reasonable steps are taken to identify potentially affected groups early in the consultations and to include them.

Guideline 4.3

For some consultations, participants are specially selected. In such cases, consideration is given to their knowledge of policies/operations; ability to communicate with DFO officials and other consultation participants; interest in providing and exchanging information; and interest in seeking recommendations.

Guideline 4.4

Where civil society organizations, Aboriginal fisheries commissions or other associations represent multiple groups, consideration is given to contacting the individual member associations to ensure that feedback is provided at the appropriate level of detail/knowledge.

Guideline 4.5

Participants might also be invited to consultations if they are interested in the issue, even though they may not have developed the capacity or expertise to provide input in order to build knowledge of DFO issues and decision-making processes.

Broad consultation is needed most in the case of developmental or policy renewal decisions, and possibly to a lesser extent with respect to localized, operational decisions. In other words, consultations should match the **level of impact and interest**, recognizing any precedents that might be set and that there may be spillovers to other consultation processes. A balance has to be struck to recognize that the more comprehensive the consultations, the more costly and slower the process. In some cases, ensuring broad consultations is of greater importance; in other situations, time constraints may be of greater concern.

When targeted consultations are being undertaken, it is important to determine early in the process who speaks for whom and under what authority. Planning consultations may necessitate the development of criteria for participation, such as that in guideline 4.1. Where consultations are broad-based, it will be more difficult to assess and control representation.

Principle 5: Accessibility

Reasonable steps will be taken to determine how clients, stakeholders, and others wish to be consulted and to provide them with relevant, understandable information.

Guideline 5.1

As part of consultation planning, activities are undertaken to determine the level of understanding of the partners, clients and stakeholders on the subject being consulted.

Guideline 5.2

As part of developing a consultations plan, consideration is given to asking participants how they would prefer to be consulted and involved in the consultations, if this is not already known.

Guideline 5.3

Consultation plans can outline different consultations methods for various clients, stakeholders and partners, depending on their preferences for consultation methods, the suitability of that method to the circumstance, and might include a combination of multi-lateral and bi-lateral consultation activities.

Guideline 5.4

Consideration is given as to how information/documentation is provided to consultations participants and how their input/feedback can be provided to DFO officials, depending on the capacity/ability of participants to access the information (including hard-copy documents by mail-out, e-mail attachments, or on-line documentation and feedback forms).

Guideline 5.5

Documentation and background materials are provided to clients and stakeholders, and to the general public if applicable, at the earliest possible time (e.g., consider providing material one month in advance of consultations, or longer if the issue is complex or expected to be controversial).

Guideline 5.6

Access to consultation information, documentation and activities can be provided, based on the participants' physical capabilities, linguistic, regional, ethno-cultural or socio-economic backgrounds.

Guideline 5.7

On-line documentation is provided according to Government of Canada policy on accessibility, and respecting Government of Canada policy regarding official languages.

Guideline 5.8

Notification for public involvement activities includes agency contact information (address, hours of operation, contact person, etc.) for relevant documentation and other information.

Consideration should be given to arrangements and processes both for traditional and non-traditional consultation participants in order to reflect the increasing number of users demanding access to fisheries and oceans resources, requesting technical or scientific data, and requiring marine safety provisions. In this regard, consultations should reflect the **diversity** of Canadians' values and needs. With this diversity, some potential participants may encounter financial barriers to participation in consultations. In the event that DFO officials determine that resources might be made available for participation, Treasury Board policy would be in effect.

Principle 6: Clarity

Participants need to know the objective of consultations and be able to understand the information and documentation they receive.

Guideline 6.1

The scope of the consultations, how input will be gathered and how it will be incorporated into the decision-making process should be shared or might be developed with participants.

Guideline 6.3

Efforts will be made to use “plain language”. Lengthy or highly technical documents can be summarized with bibliographical references to the original research studies and data.

Guideline 6.2

The obligations for translations into second official languages and any need, if determined to be relevant, to translate into third languages are determined as part of the consultations planning process. There might be requirements to consult with linguistic minority communities and Aboriginal groups.

It is important for DFO staff to **communicate clearly** the objective of a consultations process. That is to say, “gathering input” or “soliciting feedback” are not objectives in and of themselves. It is important to indicate *why* the input is being sought as part of the DFO decision-making process, and what outcome is expected to be served through consultations (e.g., seeking feedback to develop federal options to discuss with provinces).

In addition, the documentation provided to consultation participants should be at a level that is understandable to them. This indicates the need to use “plain language” and summary documents. The *Official Languages Act* must also be respected in DFO’s consultations, including requirements to consult with linguistic minority communities. Translations into third languages can also be considered, where applicable.

Theme 3 **Improving Consultation Culture**

Principle 7: Accountability

Roles and responsibilities in consultations will be clearly communicated.

Guideline 7.1

The roles and responsibilities of all those involved in consultations are defined, especially regarding who is required to provide information and who will be making decisions throughout the process.

Guideline 7.2

The roles and responsibilities under legislation, regulations, agreements and other policy documents are shared with consultation participants.

DFO has a number of **obligations** under legislation, regulations and various types of agreements. Some are specific to the department, while others are applicable to the federal government as a whole. Understanding the various requirements is important for clarifying the level of influence that consultations processes and participants will have in the decision-making process.

There are also **roles and responsibilities** for all parties involved in consultations, including both the department and the consultation participants. Clear accountability is also one element of modern comptrollership, in which responsibilities should be defined to support more thorough evaluation and reporting.

Greater responsibility for decisions and decision-making processes can be achieved, where relevant, through stable advisory processes that DFO creates and, in some cases, may lead. With such permanent, predictable advisory processes, there is a continuity of membership, a mandate, and a sense of collectivity that *ad hoc* consultations do not provide. Examples of such advisory committees include, but are not limited to, the Fisheries Resource Conservation Council (FRCC), Ministerial Advisory Committee on Oceans (MACO), and the Canadian Council of Fisheries and Aquaculture Ministers (CCFAM). Such standing bodies are important tools for consultations, but there are also instances where broader consultations with the public and others are more appropriate.

Principle 8: Transparency

Consultations will be documented and results disseminated in a timely manner.

Guideline 8.1

Input that is given at key decision points is considered and documented, including: statements of the decisions taken; the type of public involvement activity conducted; a list of participants; the issues on which the public was consulted; a summary of views, important comments, criticisms and suggestions; the effect the comments had on the action taken; and specific responses to significant issues, or explanations why proposals made by the participants were not incorporated.

Guideline 8.2

The consultation process is documented, including: the participants (types of groups), how they were consulted, the results of the consultation, and the decisions taken. This documentation might include policy decisions, research studies, regulatory changes, operational activities, evaluations, and consideration of input, etc. to all consultation parties.

Guideline 8.3

Where consultations are required for localized policy development, including minor regulatory changes, or on minor operational changes, consideration can be given to meeting consultation requirements through letters, e-mails or other communication soliciting input from targeted participants. Where consultations are required for broader policy development or program changes, consideration can be given to planning more comprehensive and "open" public consultations.

The department's decision-making processes should be transparent, recognizing, however, that in many cases Ministers have discretionary powers. Consultations assist the department in assessing the implications associated with a final decision.

Some consultations will be open to the general public, while other consultations may require the advice of specifically targeted individuals or advisory groups because of their technical/scientific, traditional or local knowledge. For reasons of safety or efficiency, some consultations will be held bilaterally. In many cases, the processes and the results of the consultations might be communicated to the consultation participants, and other interested parties, if applicable, even though the feedback is not being sought through a forum "open" to the general public. If the planning and development stages have been comprehensive and well-documented, then comments can be anticipated and documents provided to senior decision-makers and Ministers will be comprehensive.

Some government processes already recognize the important role of consultations to strengthen the quality and credibility of a policy, program or service and the need to **document consultations**. For example, the regulatory process, culminating in the development of a Regulatory Impact Analysis Statement (RIAS), requires documentation of the consultations undertaken. Through consultations, the first step in the regulatory process is to determine if a regulation is even required, or if other alternatives could address the problem. If a regulation is required, consultations are undertaken for its

development, and these must be documented. The RIAS contains a section on consultations that requires the documentation of the types of participants, how they were consulted, the issues raised, both positive and negative, and how they were addressed in the decision-making process. These components are publicly reported through publication in the *Canada Gazette*.

Principle 9: Coordination

Viewpoints, perspectives and comments on consultations, including the process and the product will be shared within the department and take into account impacts on and feedback from other initiatives.

Guideline 9.1

Communications staff are involved early in the planning of consultations so that appropriate communication materials (i.e., communication plans or press lines) can be developed in accordance with the type and impact of the decision-making process, as required to support the consultation plan.

Guideline 9.2

Other sectors/regions, and other departments as required, are involved early by notifying them in the preparation phase of consultation planning.

Guideline 9.3

Press releases and other communication products that are of interest to other federal departments or other governments are shared with them in advance of public release to allow them to prepare any responses required.

Guideline 9.4

A point of contact is indicated on all consultation documentation.

Guideline 9.5

Research findings, reports and other final documents are shared with consultation parties prior to public release.

DFO engages in consultations to improve knowledge and understanding of fisheries, oceans and marine transport issues through dialogue. Continuous learning is promoted and encouraged through the **dissemination of messages** gathered during consultations and the consideration of feedback from other initiatives. At the same time, DFO officials have to respect individual and commercial privacy rights and to treat sensitive information with discretion as required.

Appendix A

DFO Consultation Mechanisms, Clients and Stakeholders

These lists, although lengthy, are not exhaustive but they reflect the breadth of consultations undertaken by Fisheries and Oceans Canada (DFO).

DFO Consultation Mechanisms

Aboriginal Fisheries Strategy
 Arctic Marine Advisory Board
 Atlantic Council of Fisheries and Aquaculture Ministers
 British Columbia Council of Fisheries Ministers
 Canadian Council of Fisheries and Aquaculture Ministers
 Canadian Marine Advisory Council
 Federal/Provincial/Territorial Freshwater Fisheries Liaison Committee
 Fisheries Resource Conservation Council
 Great Lakes Fishery Commission and Marine Advisory Board
 Integrated Fisheries Management Plans
 Marine Protected Areas
 Ministerial Advisory Council on Oceans
 Oceans Research Network
 Pacific Fisheries Resource Conservation Council
 Peer Review Meetings on Stock Assessments
 Recreational Boating Advisory Councils
 Regional Advisory Process
 Species/Zonal Advisory Committees (groundfish, pelagic, invertebrates, etc.)
 Sustainable Development Strategy

Some Types of Clients, Stakeholders and Partners

Aboriginal groups, associations, federations – national and regional
 Aquaculture industry groups
 Canadians, in general
 Conservation and environmental protection groups – provincial, regional, national and international
 Conservation authorities
 Co-operatives and rural groups
 Emergency response organizations
 Ethnic communities
 Agriculture industry groups
 Federal departments and agencies
 Fish and sea product marketing groups
 Fish processing organizations
 Fishermen's and fish workers unions
 Professionalization groups
 Fishing industry groups, associations and federations, organized by region or by species
 Management boards (e.g., wildlife and watershed management)
 Marine advisory boards
 Minority linguistic communities
 Municipalities and associations of municipalities

Energy industry, including the oil and gas industry
Utilities industry
Policing and enforcement organizations – federal, provincial, territorial and others
Provincial and territorial governments
Provincial energy and utility boards
Recreational fishing groups
Recreational boating groups
Resource co-management bodies and advisory groups
Safe boating organizations
Shipping groups and ferryboat operators groups
Small Craft Harbours Authorities
Tourism and eco-tourism industry groups
University and academic research networks – regional and national
Voluntary organizations and community groups
Youth groups, school groups and student groups

Appendix B

Relevant Legislation and Agreements

This *Consultation Framework* must be read and applied in accordance with the laws of Canada, in particular those where Fisheries and Oceans Canada (DFO) has responsibilities under the legislation. The following list includes principal pieces of legislation for the department that illustrate the consultations requirements in the statutes.

As well, some examples of agreements are listed to demonstrate the range of definitions and processes that are outlined with respect to consultations. The nature of the agreements varies. Some are legally binding, while others, such as the *Agreement on Interjurisdictional Cooperation with respect to Fisheries and Aquaculture*, are not legally-binding, but provide a framework for decision-making processes. Others, such as comprehensive land claims agreements, are constitutionally-protected. These examples are provided to illustrate the trend towards institutionalizing consultations into decision-making processes.

Whether legislation, agreement or framework, it should be noted that various documents use different terminology to describe consultations, such as “public involvement”, “public participation” or “seeking views and advice”. Particular attention should be paid to definitions of consultation processes in these documents. It is recommended that the provisions of such documents be discussed with experienced colleagues.

PRINCIPAL LEGISLATION FOR THE DEPARTMENT OF FISHERIES AND OCEANS

Atlantic Fisheries Restructuring Act 1 R.S.C. 1985, c. A-14

8. (1) The Minister shall cause to be laid before each House of Parliament, not later than the fifth sitting day of that House after the first day of June next following the end of each fiscal year, a report with respect to the administration of this Act in that fiscal year.

(2) In preparing the annual report required by this section, the Minister shall take into account any recommendations made by any committee of the House of Commons established or designated to consider matters related to fisheries.

Canada Shipping Act 2 R.S.C. 1985, c. S-9

8. (1) For the purpose of achieving the objectives set out in section 5, the Minister of Transport or the Minister of Fisheries and Oceans may, with respect to that Minister's responsibilities under this Act,
(a) establish consultative bodies.

Department of Fisheries and Oceans Act R.S.C. 1985, c. F-15

6. The Minister shall, on or before the 31st day of January next following the end of each fiscal year or, if Parliament is not then sitting, on any of the first five days next thereafter that either House of Parliament is sitting, submit to Parliament a report showing the operations of the Department for that fiscal year.

Fisheries Act R.S.C. 1985, c. F-14

37. (4) Where the Minister or a person designated by the Minister proposes to make an order pursuant to subsection (2), he shall offer to consult with the governments of any provinces that he considers to be interested in the proposed order and with any departments or agencies of the Government of Canada that he considers appropriate.

(5) Nothing in subsection (4) prevents the Minister or a person designated by the Minister from making an interim order pursuant to subsection (2) without the offer of consultation referred to in subsection (4) where he considers that immediate action is necessary.

Fisheries Development Act R.S.C. 1985, c. F-21

7. (1) The Minister may, in order to carry out the purposes and provisions of this Act, establish such advisory committees as he deems necessary and appoint the members thereof.

(2) Each member of a committee established under subsection (1) is entitled to be paid such amount for each day he attends any meeting of the committee as may be fixed by the Governor in Council and is entitled to be paid reasonable travel and living expenses while absent from his ordinary place of residence in the course of his duties under this Act.

10. The Minister shall, as soon as possible after the termination of each fiscal year, submit a report to Parliament respecting the operations for that year under this Act and under agreements made under this Act.

Oceans Act S.C. 1996, c. 31

29. The Minister, in collaboration with other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements, shall lead and facilitate the development and implementation of a national strategy for the management of estuarine, coastal and marine ecosystems in waters that form part of Canada or in which Canada has sovereign rights under international law.

31. The Minister, in collaboration with other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements, shall lead and facilitate the development and implementation of plans for the integrated management of all activities or measures in or affecting estuaries, coastal waters and marine waters that form part of Canada or in which Canada has sovereign rights under international law.

32. For the purpose of the implementation of integrated management plans, the Minister (d) may, in consultation with other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements, establish marine environmental quality guidelines, objectives and criteria respecting estuaries, coastal waters and marine waters.

33. (2) In exercising the powers and performing the duties and functions mentioned in this Part, the Minister may consult with other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements.

40. (2) For the purpose of subsection (1), the Minister shall encourage activities necessary to foster understanding, management and sustainable development of oceans and marine resources and the provision of coast guard and hydrographic services to ensure the facilitation of marine trade, commerce and safety in collaboration with other ministers of the Government of Canada.

42. In exercising the powers and performing the duties and functions assigned by paragraph 4(1)(c) of the *Department of Fisheries and Oceans Act*, the Minister may (h) prepare in collaboration with the Minister of Foreign Affairs, publish and authorize the distribution or sale of charts delineating, consistently with the nature and scale of the charts, all or part of the territorial sea of Canada, the contiguous zone of Canada, the exclusive economic zone of Canada and the fishing zones of Canada and adjacent waters.

50. (1) Before fixing a fee under this Act, the Minister shall consult with such persons or bodies as the Minister considers to be interested in the matter.

OTHER LEGISLATION

Canadian Environmental Assessment Act, 1992, c. 37

There are a number of references to public participation in CEAA, but the following provides some examples of relevance for responsible authorities, of which DFO is often one.

16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(c) comments from the public that are received in accordance with this Act and the regulations;...

18. (1) Where a project is not described in the comprehensive study list or the exclusion list, the responsible authority shall ensure that

(3) Where the responsible authority is of the opinion that public participation in the screening of a project is appropriate in the circumstances, or where required by regulation, the responsible authority shall give the public notice and an opportunity to examine and comment on the screening report and on any record that has been filed in the public registry established in respect of the project pursuant to section 55 before taking a course of action under section 20.

22. (1) After receiving a comprehensive study report in respect of a project, the Agency shall, in any manner it considers appropriate to facilitate public access to the report, publish a notice setting out the following information:

- (a) the date on which the comprehensive study report will be available to the public;
- (b) the place at which copies of the report may be obtained; and
- (c) the deadline and address for filing comments on the conclusions and recommendations of the report.

(2) Prior to the deadline set out in the notice published by the Agency, any person may file comments with the Agency relating to the conclusions and recommendations and any other aspect of the comprehensive study report.

34. A review panel shall, in accordance with any regulations made for that purpose and with its term of reference,

- (a) ensure that the information required for an assessment by a review panel is obtained and made available to the public;
- (b) hold hearings in a manner that offers the public an opportunity to participate in the assessment.

55. (1) For the purpose of facilitating public access to records relating to environmental assessments, a public registry shall be established and operated in a manner to ensure convenient public access to the registry and in accordance with this Act and the regulations in respect of every project for which an environmental assessment is conducted.

(3) Subject to subsection (4), a public registry shall contain all records produced, collected, or submitted with respect to the environmental assessment of the project, including

- (b) any comments filed by the public in relation to the assessment.

Species at Risk Act 2002, c.29

27. (2) Before making a recommendation in respect of a wildlife species at risk, the Minister must
(c) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of a wildlife species, consult the wildlife management board.

34. (4) Before recommending that the Governor in Council make an order under subsection (2), the Minister must consult

- (a) the appropriate provincial minister; and
- (b) if the species is found in an area in respect of which a wildlife management board is authorized in respect of wildlife species, the management board

39. (3) To the extent possible, the recovery strategy must be prepared in consultation with any landowners and other persons whom the competent minister considers to be directly affected by the strategy, including the government of any other country in which the species is found.

48. (3) To the extent possible, an action plan must be prepared in consultation with any landowners, lessees and other persons whom the competent minister considers to be directly affected by, or interested in, the action plan, including the government of any other country in which the species is found.

53 (2) if the competent minister is of the opinion that a regulation would affect a reserve or any other land that are set apart for the use and benefit of a band under the *Indian Act*, he or she must consult the Minister of Indian Affairs and Northern Development and the band before making the regulation.

DFO AGREEMENTS

The *Agreement on Interjurisdictional Cooperation with respect to Fisheries and Aquaculture* provides a framework for decision-making processes.

Principles of Cooperation

2. Timely Consultation

Governments agree to timely consultation with affected jurisdictions as part of their respective decision making processes.

By way of example, the federal government will consult on the preparation of legislation and regulations, and fisheries management plans and allocations, while the provinces and territories will consult on legislation and regulations related to fish habitat, programs and initiatives concerning the processing sector, provincial-territorial licensing and fisheries development initiatives.

THE PARTIES HERETO further agree to formalize the Council as follows:

1. Objectives
- 1.3 improve consultations and information-sharing on interjurisdictional matters in government decision-making processes;
- 1.5 provide a forum for discussion of and consultation on Canadian positions in international negotiations and subjects of national and regional interest.

COMPREHENSIVE LAND CLAIMS AGREEMENTS

Nunavut Land Claims Agreement

ARTICLE 10: LAND AND RESOURCE MANAGEMENT INSTITUTIONS

PART 8: CONSULTATION

10.8.1

Government shall consult closely with the DIO [Designated Inuit Organization] and the relevant institution referred to in Section 10.1.1 prior to taking any initiative under Sections 10.6.1, 10.7.1 or 10.7.2. The appropriate DIO or institution shall, upon request, be given an audience with the appropriate Minister as part of such consultation.

Nisga'a Final Agreement

<http://www.gov.bc.ca/tno/negotiation/nisgaa/default.htm>

Chapter 1 – Definitions:

"consult" and "consultation" mean provision to a party of:

- a. notice of a matter to be decided, in sufficient detail to permit the party to prepare its views on the matter,
- b. in consultations between the Parties to this Agreement, if requested by a Party, sufficient information in respect of the matter to permit the Party to prepare its views on the matter,
- c. a reasonable period of time to permit the party to prepare its views on the matter,
- d. an opportunity for the party to present its views on the matter, and
- e. a full and fair consideration of any views on the matter so presented by the party.

Yukon Umbrella Final Agreement

The *Yukon Umbrella Final Agreement* is a framework document for specific comprehensive land claims agreements with individual Yukon First Nations. The definitions and provisions in this framework are generally used in the specific agreements. Provisions from the *Umbrella Agreement* are outlined here, but reference must be made to the specific land claims agreements before undertaking consultations.

Chapter 1: Definitions

"Consult" or "Consultation" means to provide:

- to the party to be consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its view on the matter;
- a reasonable period of time in which the party to be consulted may prepare its view on the matter, and an opportunity to present such views to the party obliged to consult; and
- full and fair consideration by the party obliged to consult of any views presented.

Appendix C

Consulting with Aboriginal Groups

This Appendix provides guidance to Fisheries and Oceans Canada (DFO) officials when undertaking consultations with Aboriginal groups. This guidance is consistent with the principles of the *Consultation Framework*, but outlines special considerations that apply with respect to consulting with Aboriginal groups.

DFO does not have a mandate to determine whether an Aboriginal group has Aboriginal or treaty rights, or the nature and scope of such rights. However, the Government of Canada has a fiduciary relationship with Aboriginal peoples and DFO has an obligation not to unjustifiably infringe Aboriginal or treaty rights. Consultations are an important factor that courts consider in determining whether or not infringements of Aboriginal or treaty rights can be justified.

Courts have provided, and will continue to provide, guidance respecting consultations with Aboriginal groups. Accordingly, DFO's approach to consulting with Aboriginal groups must be flexible and responsive to new guidance provided by courts.

It is important to recognize that, in addition to addressing legal obligations and potential legal obligations, DFO might have other strong reasons to consult with Aboriginal groups. For example, the department might have policy commitments or might simply wish to improve its relationships with Aboriginal groups to promote more effective management of fisheries and oceans resources and marine safety.

Introduction

As is the case for consultations with non-Aboriginal groups and communities affected by decisions of DFO, consultations with Aboriginal groups are undertaken to attempt to understand and take into account the interests and preferences of those who are affected by the decisions. Aboriginal groups, which are often consulted on localized, operational issues, might also welcome the opportunity to discuss broad regional policy or national policy issues, and their participation should be considered early in the planning process.

In the context of consulting with Aboriginal groups, the term “consultations” is often understood to be the sum of a series of interactions, both formal and informal, or an ongoing process built around a relationship, rather than one specific consultation “event”. The ongoing process requires sound and effective relationships as a foundation. Before planning and undertaking consultations with Aboriginal groups DFO officials are advised to contact colleagues within the department who have experience in this area, and to review government documents such as the *Fiduciary Relationship of the Crown with Aboriginal Peoples: Implementation and Management Issues (A Guide for Managers)*, or other documents that may provide further guidance on effective consultation practices with Aboriginal groups.

Special considerations apply with respect to consulting with Aboriginal groups. Existing Aboriginal and treaty rights are “recognized and affirmed” in section 35(1) of the *Constitution Act, 1982*⁹. In its 1990 decision in *R. v. Sparrow*, the Supreme Court of Canada stated that the recognition and affirmation of existing Aboriginal and treaty rights in the *Constitution Act, 1982* “requires sensitivity to and respect for the rights of Aboriginal peoples on behalf of the government, courts and indeed all Canadians.”¹⁰

A **fiduciary relationship** exists between the Government of Canada and Aboriginal peoples arising out of the historic relationship between these two groups. As a consequence of that relationship, DFO has an obligation not to **unjustifiably infringe** Aboriginal or treaty rights. Consultations are an important factor that courts consider in determining whether or not infringements of Aboriginal or treaty rights can be justified. It is important to note that DFO does not have a mandate to determine whether an Aboriginal group has Aboriginal or treaty rights, or the nature and scope of such rights.

The following sections may assist managers in consulting with Aboriginal groups. The following sections should be considered in addition to the consultations principles contained in the main body of the *Consultation Framework*. It is important to recognize that consultations with Aboriginal groups may involve a number of activities, which can include informing, “conventional” consultations, citizen engagement and negotiated arrangements. Accordingly, the word “consultations”, as used in this Appendix, may incorporate a wider range of activities than identified in the *Framework*, or elements of these activities.

Cultural Considerations

Some challenges that DFO officials may face when consulting with Aboriginal groups are rooted in cultural differences that are not always well-understood. Aboriginal people are not one homogenous group, as there are considerable differences among, and even within, tribal and linguistic groups. For example, it is important to be aware of how to get in contact with an Aboriginal group and how they prefer to be consulted, any particular meeting protocol that might need to be followed, and who makes decisions for and on behalf of an Aboriginal group.

In instances where consultation plans are developed, recognition can be given to the fact that different participants may need to be consulted in varying ways, and take into account potential differences in culture as noted above. These differences can potentially affect how Aboriginal groups are consulted, how and when documentation is provided, when feedback is expected and how records are kept, and so on. Managers and officials undertaking consultations with Aboriginal groups can consider taking cultural training

⁹ http://laws.justice.gc.ca/en/const/annex_e.html#II

¹⁰ *R v Sparrow* (1990) 1 S.C.R. 1075

courses, speaking with others with experience working with Aboriginal groups, or participating in other opportunities to understand the cultural differences. Again, this learning is important for establishing and building relationships.

What are Aboriginal and treaty rights?

Section 35(1) of the *Constitution Act, 1982* recognizes and affirms existing Aboriginal and treaty rights:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Since 1982, the courts in Canada have provided clarification to the nature of these rights. In *Delgamuukw*, the Supreme Court of Canada described a “spectrum” of types of Aboriginal rights that arise out of historic use and occupation of land and resources.

...the aboriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the “occupation of the land” where the activity is taking place is not “sufficient to support a claim of title to the land”.... Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity....

At the other end of the spectrum there is aboriginal title itself. ...aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. What aboriginal title confers is the right to land itself.

Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by s. 35(1), including site-specific rights to engage in particular activities.¹¹

Treaty rights are rights that are described in **treaties** between Aboriginal groups and the Crown, and include historic treaties as well as modern comprehensive land claims

¹¹ *Delgamuukw v. British Columbia* [1997] vol. 3 SCR page 1010 paragraphs 138-139.

agreements. These treaties take many different forms and the rights protected by the treaties vary by treaty. Further, courts have recently emphasized that “extrinsic evidence” other than the text of a treaty should be considered when interpreting an historic treaty. It should be noted that in modern treaties, consultation processes are often defined¹², with timelines that must be adhered to, and provisions for recourse in the event that problems arise in consultations.

Whom to consult

Section 35 of the *Constitution Act, 1982* defines “aboriginal peoples of Canada” as Indian, Inuit and Métis. Consultations may involve various types, sizes and combinations of Aboriginal groups. In identifying whom to consult, it is necessary to recognize that the mandates and limitations of Aboriginal organizations may require that consultations take place at several different levels (e.g., association, tribal council, or band).

Most consultations with Aboriginal groups will be undertaken bilaterally, whereas other consultations might be conducted multi-laterally. The approach depends on the issue and the particular Aboriginal groups involved. Consultations planning should take into consideration the possibility that member groups of associations, such as Aboriginal fisheries commissions, may seek the opportunity to be consulted on a bilateral basis.

How to consult

The overriding principle is that consultations required will vary from case to case. In *Delgamuukw*, the Court discussed three levels of consultation in government decision-making processes: “consultation”, where an infringement of an Aboriginal right is relatively minor; “something significantly deeper than mere consultation”, which will be required in most cases; and “consent”, which may be required in some cases.

The Courts have described consultations in terms of:

- providing notice of the matter in sufficient detail for the Aboriginal group to provide its views;
- a reasonable period of time for the Aboriginal group to contemplate and prepare its views;
- an opportunity for the Aboriginal group to present its views; and
- consideration of those views.

¹² DFO officials should refer to the comprehensive agreements relevant to the area in question. In agreements, consultations may or may not be defined, but will generally include process elements that have to be respected, including provisions for notice, period and time, opportunity, and full and fair consideration.

Courts have also stated that Aboriginal groups in consultations have an obligation to act reasonably. Consultations are a two-way street. However, even if an Aboriginal group fails to participate in consultations, DFO should still make all reasonable efforts to inform and consult.

When conducting any consultations, it is important to carefully document the consultation process. The following should be kept as part of this documentation:

- the decision or measures being consulted on and the Aboriginal groups and associations of Aboriginal groups consulted;
- notes of verbal exchange including meetings and telephone conversations indicating the date, parties involved, location and outcome of the exchanges; and
- copies of all information and documents provided and all correspondence exchanged.

In keeping with the principles of the *Framework*, documentation and follow-up are important factors in making consultations meaningful.

When to consult

Consistent with the principles in this *Consultation Framework*, DFO officials should inform an Aboriginal group of a proposed action or measure that may affect its interests at the earliest possible opportunity. Consultations should be undertaken at a point in time that would allow interested Aboriginal groups the opportunity to express their interests and concerns and allow for serious consideration and, where possible, integration of those views in proposed activities.

As with the question of how to consult, the decision on when to consult depends on the circumstances of the situation including the nature of the decision or measures being considered.

The “duty” to consult and the “Sparrow test”

Section 35 of the *Constitution Act, 1982* provides constitutional protection to the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada. Although all existing Aboriginal and treaty rights are recognized and affirmed, few Aboriginal rights have been established, and few treaty rights have been considered, in litigation. Some examples are:

- the Musqueam First Nation in British Columbia, that was found to have an Aboriginal right to fish for food, social and ceremonial purposes (*Sparrow* case);
- the Heiltsuk First Nation in central British Columbia, that was found to have a commercial right to fish for herring roe on kelp (*Gladstone* case); and
- a Mi'kmaq treaty right to hunt, fish and gather in pursuit of a moderate livelihood (*Marshall* case).

Courts have held that infringement of Aboriginal and treaty rights must be justified. Whether or not adequate consultations have occurred is an important factor that courts will consider when determining whether or not an infringement of an Aboriginal or treaty right may be justified.

Statutory obligations to consult

In some circumstances, legislation outlines the obligations for the Crown to consult with Aboriginal groups. The content and the timing of a statutory obligation to consult can vary from statute to statute.

Appendix D

Defining the Participants

Aboriginal Peoples	The Canadian Constitution defines “aboriginal peoples of Canada” as Indian, Inuit and Métis people. The unique heritages, languages, cultural practices, and spiritual beliefs of Aboriginal groups may require special considerations when planning and implementing consultations.
Community	A group of people living in a particular area.
Community of interest	A group of people with common interests who may or may not reside in the same area, especially with regard to people on-line who share similar interests.
Civil Society Organizations	Citizens’ organizations, such as labour, business, professional organizations or other interest groups, that formally or informally represent views on behalf of citizens on specific issues.
Client	A citizen or group who is <i>directly</i> affected by the department’s programs and activities (e.g., fishers, oceans industry), and could be affected by Fisheries and Oceans Canada’s (DFO) decisions socio-economically or on other matters.
Other Federal Department	A federal department or agency. Some federal departments are more directly affected by DFO decisions than others and these include, <i>inter alia</i> , Environment Canada, Natural Resources Canada, the Department of Foreign Affairs and International Trade, Transport Canada, Industry Canada, and Human Resources and Development Canada, Public Works and Government Services Canada.
Partner	A group with which the department collaborates on the development of policies and programs, which, for the purposes of this <i>Consultation Framework</i> , generally includes other federal departments and other provincial or territorial governments.
Public	Canadian citizens or residents who are interested in DFO’s programs and policies, including but not limited to: representatives of consumer, environmental and other advocacy groups; environmental justice groups; Aboriginal groups; minority and ethnic groups; business and industrial interests, including small businesses; elected and appointed public officials; the media; unions and labour organizations; public health, scientific and professional representatives; civic and community associations; faith-based organizations; and research, academic, and educational associations and organizations.
Staff	An employee at any level within DFO who might have input into a decision-making process.
Stakeholder	A person, group or agency that has a direct <i>interest</i> in an issue for which the department has a mandate or legal responsibility, and may or may not be directly affected by the department’s programs and activities (e.g., fishers and oceans industry (see <i>clients</i> above), and also non-governmental organizations, civil society organizations).

