

Discussion Paper:
A Scoping of Aboriginal Implications
of Renewal of the *Fisheries Act* 1985

Prepared by:

Russ Jones
PO Box 98
Skidegate
Haida Gwaii V0T 1S0

Tel: 250 559-8945
rjones@island.net

Prepared for:

Assembly of First Nation
473, Rue Albert Street
8th Floor/ 8e Étage
Ottawa ON K1R 5B4

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The opinions expressed in this paper are those of the author and are not necessarily shared by the Assembly of First Nations.

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1. Introduction

Fisheries and Oceans Canada (DFO) is contemplating changes to the *Fisheries Act*. The *Fisheries Act* is one of the oldest pieces of legislation in Canada still in use today and several unsuccessful attempts have been made to rewrite it in recent years. This paper is aimed at scoping potential changes to the *Fisheries Act* and their effects on First Nations. It focuses on First Nations issues in areas on the Atlantic and Pacific coasts where there are few modern treaties. As well there is limited coverage of inland fisheries. Issues in Labrador or the Arctic were not investigated. It is not a legal analysis and it is understood that AFN intends to complete that at a later date. This report provides a First Nation perspective on proposed changes although it is preliminary and without the benefit of community dialogue. I have drawn heavily on fisheries policies developed over the past ten years and two reports that capture First Nations issues on the east and west coast: *Post Marshall Implementation: A report of progress and future expectations for the Atlantic Policy Congress* and *Our Place at the Table: First Nations in the B.C. Fishery*.

Policy and legislation often go hand in hand. In Canada, considerable efforts are underway on both Atlantic and Pacific coasts to develop comprehensive fisheries policies that foreshadow most of the legislative changes. The provinces manage Inland fisheries, although policies vary, and these may likewise be affected by *Fisheries Act* changes.

The *Fisheries Act* itself has not been a major impediment to addressing fishery issues in areas where treaties are under negotiation. In fact a renewed *Fisheries Act* may make it simpler to make some changes such as commercial allocation transfers. At the same time it may be more costly and politically difficult to achieve such changes. This emphasizes the need for First Nations to be vigilant about monitoring and responding to proposals for *Fisheries Act* changes as well as existing and future policy development processes.

This report is organized as follows:

Section 2 gives the background behind some of the proposed *Fisheries Act* changes;

Section 3 analyzes components of the Act under review and identifies priority issues for First Nation discussion with subsections devoted to the main aspects of the Act identified for renewal including – governance, access and allocation, licencing, co-management (including consultation, and First Nation representation on advisory bodies), habitat management, and administrative sanctions;

Section 4 is a summary of recommendations; and

Sections 5 and 6 are the glossary and a list of pertinent references.

In reading this report, keep in mind that it is a scoping of major issues and is unlikely to capture the wide diversity of views on issues likely to occur at local levels. A logical follow-up to this report would be regional policy workshops to identify local concerns and ensure that regional or national policy positions are consistent with local solutions.

2. Background

The Department of Fisheries and Oceans (DFO) has expressed its intent to revise the *Fisheries Act* (DFO 1995a). The *Fisheries Act* was put in place in 1857 and is one of the oldest pieces of legislation still in use today. Although many fisheries policy and program changes have been put in place in recent years, some additional changes that are intended may require legislative amendment. Directions for change are said to be consistent with recent policy reviews and initiatives. DFO engaged in preliminary public consultations on *Fisheries Act* changes in the Fall of 2005. No timelines were announced for the review and a broader public consultation was promised.

The present *Fisheries Act* deals primarily with the proper management and control of fisheries, the conservation and protection of fish, and the protection of fish habitat. The Minister of Fisheries and Oceans (referred to as the “Minister” throughout the document) is accountable to Parliament for the administration of the Act and its regulations. The Minister has additional responsibilities under the *Oceans Act* 1996. Although the federal government was assigned responsibility for sea coast and inland fisheries under the *Constitution Act, 1867*, as a result of court interpretations, administrative authority over a number of inland fisheries has been delegated to the provinces, as detailed later in this section. Delegation in Ontario and Quebec occurred under section 43 of the *Fisheries Act*, and in Alberta, Saskatchewan and Manitoba under *Natural Resource Transfer Agreements*, subsequently incorporated into the *Constitution Act* 1930 (DFO 1999: 17-18). The Minister retains national responsibility for habitat, but management is shared with the provinces due their responsibilities for land, natural resources and the environment.

Previous Attempts to Revise the Fisheries Act

There have been several recent attempts to revise the *Fisheries Act*. A major rewrite was attempted in 1996. It would have allowed for partnering agreements with industry, a new system of administrative sanctions to replace criminal proceedings, a reduction and streamlining of regulations, new powers to vary fishery regulations that would have applied to federal, provincial and territorial fisheries managers, and integration of fisheries management in coastal waters and outside the 200 mile limit. But Bill C-62, introduced in October 1996 died on the *Order Paper* when the 1997 general election was called.

Several additional bills have been proposed to prevent challenges to licensing and regulations as identified by the Parliamentary Standing Joint Committee on the Scrutiny of Regulations. The bill to clarify that Aboriginal organizations could designate individuals to fish under the *Aboriginal Communal Fishing Licences Regulations* was eventually passed. The other sought to prevent an “enforcement vacuum” in Ontario. It would have clarified inconsistencies between the *Fisheries Act* and *Ontario Fishery Regulations* but failed to pass.

The current initiative has some similarities with the 1996 rewrite but includes a variety of new provisions that reflect new policy initiatives that have been fleshed out in the

interim. The proposed *Fisheries Act* changes are aimed at facilitating some of these policy developments as well as modernizing the legislation.

Synopsis of Recent Fishery Policy Initiatives

DFO states that the need for reform has been highlighted in a variety of public engagement efforts. These include: the *Atlantic Fisheries Policy Review and Framework*; a new discussion document, *Pacific Fisheries Renewal* prepared in response to two independent reports on the future of post-treaty fisheries, one of which was prepared for First Nations; a variety of “New Directions” policy papers relating to the Pacific salmon fishery; and an “Environmental Process Modernization Plan” for coastwide changes in fisheries habitat management. These are reviewed in turn below.

Atlantic Coast

A comprehensive policy framework exists for the Atlantic coast fisheries. *A Policy Framework for Management of Fisheries on Canada's Atlantic Coast*, released in March 2004, was the culmination of a three year process. However many First Nations did not participate in public forums to discuss policy proposals (Cheryl Knockwood, Personal Communication, March 1, 2006). The framework outlines a vision, four objectives and nine principles for moving ahead (See Appendix C). The four objectives are: conservation and sustainable use, self-reliant fisheries, shared stewardship, and a stable and transparent access and allocation approach. The policy document lays out strategies for each of the four objectives. While most elements of the framework can be implemented without modifying current laws it was identified that legislative reform may be required to implement some aspects. Further public consultations are proposed about implementation. Key elements of the new framework (DFO 2004) are:

- Increasing the role of resource users in management of the fishery;
- Eventual change in DFO's role from day-to-day management of fisheries to policy development, setting overall direction and ensuring compliance with conservation standards;
- Affirming commitments to conservation and sustainable use including precautionary decision-making, an ecosystem approach and responsible harvesting;
- More self-reliant fisheries where resources users have more say about social and economic objectives while at the same time promoting well-being of coastal communities and independence of the inshore fleet through collaboration among governments and all users;
- Establishing a more fair, transparent and rules based process for determining resource access and allocation including processes and criteria for determining “best use” and stabilizing sharing arrangements in commercial fisheries; and

- Sharing of specific management functions with resource users that may include delegation. Effective involvement of fishery participants at appropriate levels of decision-making includes facilitating Aboriginal participation in policy planning and decision-making.

Pacific Coast

Similar policy changes are underway on the Pacific Coast but final outcomes are less certain at this point in time. Six “New Direction” policy documents were developed over the past eight years that focus primarily on the salmon fishery. These policies tried to address poor economic performance and reduction in fishing opportunities to address conservation issues. A major restructuring of the salmon fishing fleet that was labeled “Pacific Fisheries Renewal” occurred from 1998-2001. It involved a \$200 million buyback of about half of the salmon fleet in an attempt to make the remaining fleet economically viable. Following this effort new fishery challenges emerged that led to further curtailment of fishing. Other new fishing policies included: selective fishing policies aimed at reducing bycatch of depleted salmon populations, an allocation policy that sets commercial and recreational allocation priorities for the five salmon species, and efforts to reform existing fisheries advisory processes. In addition a Wild Salmon Policy was released in June 2005 that aims at protecting wild salmon populations in their natural habitats.

In September 2005 a Pacific Fisheries Reform discussion paper was issued that proposes sweeping changes (Anon. 2005b). The proposal was developed in response to two independent reports on options for allocation and management and the future of post-treaty fisheries. *Treaties and Transition: Towards a Sustainable Fishery on Canada's Pacific Coast*, was released in April 2004 by a Joint Task Group on Post Treaty Fisheries (JTG) jointly appointed by the Federal Minister of Fisheries and BC Minister of Agriculture, Fisheries and Food. A parallel report, *Our Place at the Table: First Nations in the BC Fishery* was completed by a First Nation Panel on Fisheries, a group of three First Nation experts including the author, appointed by leaders of the First Nations Summit and the BC Aboriginal Fisheries Commission.

The intent of changes proposed under Pacific Fisheries Reform (Anon 2005b) include:

- Full economic and social potential of the resource is achieved,
- First Nations fishing interests are defined and reconciled with the interests of all Canadians,
- There is public, market and participant confidence that the fishery is sustainable,
- Participants are self-reliant and able to self-adjust,
- Participants are treated fairly and equitably and are involved in decision-making and share accountability for the conduct of the fishery,

- Costs of management are shared by those who benefit from the harvest,
- All fishery participants enjoy certainty and stability necessary for business planning, and
- Equitable treaty-based fisheries are achieved.

Although proposed changes will initially focus on salmon they will ultimately apply to all fisheries. The Minister identified four themes for reform, one of which includes “increase First Nations access to economic fisheries.” A questionnaire distributed with the Pacific Fisheries Reform discussion document looked for feedback on allocation approaches (including individual quotas, fleet allocations or community quotas), licence restrictions (duration, licencing of persons rather than vessels, transferability) and co-management (at both broad integrated and operational levels).

Inland Fisheries

It is uncertain to what extent *Fisheries Act* policy changes would be implemented in Inland fisheries. Some provinces with a role in fisheries management have yet to develop specific policies. Over time, Canada has delegated many freshwater fisheries management responsibilities, in whole or in part, to provinces and territories (Anon. 1999a):

- Delegation in whole has taken place in Quebec, Ontario, Manitoba, Saskatchewan and Alberta;
- Delegation in part, for trout enhancement, has taken place in Nova Scotia, New Brunswick and Prince Edward Island;
- Delegation in British Columbia was for the management of trout hatcheries, but informally evolved into management of all non-Pacific salmon species;
- An order-in-council assigns sports fishing revenues and certain sport fishery management responsibilities to the Government of the Northwest Territories; and
- Delegation of freshwater fisheries management responsibilities to the Yukon Territory took place in 1989.

DFO maintains full management responsibility for freshwater fisheries in Newfoundland, Nunavut, Northwest Territories and the Yukon North Slope other than the recreational fisheries agreement as mentioned above. Through lands claims agreements, freshwater fishery decision-making responsibilities are shared with legislated co-management boards in Nunavut, Northwest Territories and Yukon.

Where there has been delegation, the resultant system generally involves the Governor-in-Council approving fishery regulations (e.g., quotas, closed seasons) that have been developed by provincial or territorial governments (Anon. 1999a: 18). The regulations usually designate the provincial or territorial “fisheries” Minister or another official as the

responsible authority for administering the regulations. Thus, while the legislative authority and responsibility resides with the federal government, the day-to-day administration rests with the provinces and territory. DFO's role has evolved to be primarily one of enacting provincial regulatory recommendations.

Roles of the federal and provincial governments with respect to freshwater issues involving Aboriginal groups remain a matter of debate (Anon. 1999a: 19). The federal position is stated as follows "... because of their responsibility for managing freshwater fisheries, delegated provinces have the resulting responsibility to ensure that fisheries management is conducted in a manner consistent with any aboriginal or treaty rights."

Habitat is in the federal government's jurisdiction but it has to work closely with the provinces due to their interest in lands. In the past few years, DFO has undertaken an Environmental Process Modernization Plan that is aimed at more effective delivery of its habitat responsibilities, improved predictability and timeliness in decision making, and better harmonization of federal processes with others.

Further, new federal legislation such as the *Species at Risk Act 2003* and *Oceans Act 1996* are driving changes in fisheries policy and affect (or can affect) how fisheries are conducted on both coasts.

Federal Policy Initiatives in Aboriginal Fisheries

Dramatic changes have occurred in Canada's Aboriginal fisheries policies over the past 14 years which primarily affect First Nations without modern treaties. These include the Aboriginal Fisheries Strategy (AFS) in 1992 and the Marshall Response Initiative in 1999. Two new programs with promise are the Aboriginal Aquatic Resource and Oceans Management Program (AAROM) and Aboriginal Inland Habitat Program (AIHP) in 2003.

Introduction of AFS was a pivotal point in Canadian fisheries policy. The policy was in response to the 1990 Supreme Court of Canada *Sparrow* decision. The *Sparrow* decision established a priority for Aboriginal rights to fish for food, social and ceremonial purposes over commercial and recreational fisheries and the need for the Crown to consult with Aboriginal peoples about potential infringements on Aboriginal rights. However AFS went beyond management of Aboriginal food, social and ceremonial fisheries by providing Aboriginal groups with an opportunity to negotiate interim agreements and participate in the management of fisheries in ways that could form a foundation for treaties.

In *Chippewas of Nawash First Nation v. R* (2002) the Chippewas unsuccessfully sued DFO over their exclusion from participation in the federal AFS. First Nations in inland fisheries within provincial boundaries are not offered the opportunity to participate in AFS. However the court ruled that there was no evidence that the delegation of inland fisheries to the provinces amounted to a breach of fiduciary duty. In this case the delegation of authority to the province made a First Nation ineligible to participate in a federal fisheries program even though there were no similar provincial programs.

Another major policy shift, the federal Marshall Response Initiative was initiated after the 1999 *Marshall* decision (*R. v. Marshall* 1999 3 S.C.R. 456) determined that Mi'kmaq and Maliseet on the Atlantic coast had treaty rights to fish commercially. This initiative is directed at increasing participation of Mi'kmaq and Maliseet in commercial fisheries.

AAROM and AIHP were mandated in 2003, following a national review of AFS. AAROM is directed at fostering structures for collaborative management involving Aboriginal organizations. AIHP is aimed at involving First Nations in Quebec, Ontario, Manitoba, Saskatchewan and Alberta in habitat management. In 2005 The Assembly of First Nations was involved in a round of community workshops to discuss the future direction for AIHP (AFN 2005).

Summary

In summary, a reformed *Fisheries Act* is expected to entrench a variety of new or existing policy initiatives and enable new directions in fisheries management. As such it may provide some opportunities for First Nations. But it could also impede treaty negotiations or implementation by entrenching management and allocation approaches in the fishery. It is important to note that the most of the recent policies were initiated under the old *Fisheries Act* which implies that the Act itself is not a critical barrier to change, although some policy changes may have stretched the limits of the existing legislation.

3. Components of *Fisheries Act* under Review

This section review each of the six components of the *Fisheries Act* identified for review in the following order: governance, access and allocation, licencing, co-management (including consultation, and First Nation representation on advisory bodies), habitat management, and administrative sanctions.

3.1. Governance

Governance is a key element in a renewed *Fisheries Act*. Changes are expected to provide direction on use of the regulatory powers, lay out a framework of values and guiding principles, and spell out accountability of the Minister and DFO to Parliament and Canadians. First Nations will have a range of expectations about their role in governance. But there are likely to be commonalities as in self-government, a core First Nations value, that could be supported in a reformed *Fisheries Act*.

The Atlantic Fisheries Policy Framework defines governance as “The various systems of authority and decision making in fisheries management combined”. It includes participation in consultation, planning and decision-making processes by resource users and other interested parties. DFO states that its intention is to provide “a framework of values and guiding principles that would bring *Fisheries Act* into line with modern governance practice” (Anon 2005a).

In recent years the term “good governance” has been coined to refer to more complementary forms of interaction between formal governance and civil society, and a sharing of responsibility and accountability among public and private actors (Kooiman 1993 as cited in Berkes 2005). Elements of “good governance” include participation, accountability, transparency and legitimacy (Jentoft 1999, as cited in Berkes 2005) where:

- *Participation* is the involvement of resource users in the decisions that affect them;
- *Accountability* is the ability of the parties affected by a decision to demand and receive an explanation;
- *Transparency* is openness of decision making; and
- *Legitimacy* is the acceptance by users of the authority of rule makers.

Governance under the Fisheries Act 1985

Under the *Fisheries Act 1985 s. 7 & 9*, the Minister of Fisheries and Oceans has absolute discretion to issue, suspend or cancel leases or licences for fisheries or fishing. As provided in s. 43 the Governor in Council may make regulations for carrying out the

purposes and provisions of the Act including for the proper management and control of the sea-coast and inland fisheries; respecting the conservation and protection of fish; and regarding the many and varied aspects of fishing operations. The legislation provides little in the way of guidelines for decision making. There is no preamble and the section 2.1 relating to purposes of the Act was repealed in 1985 and not replaced.

DFO's Governance Approach

DFO's approach to a renewed *Fisheries Act* is to lay out principles, policies and authorities of governance (Anon. 2005a). A new governance framework could include:

- A preamble to set the context;
- Purpose clause;
- Fisheries and habitat management principles; and
- Access and allocation principles.

In terms of Aboriginal issues, consideration is being given to (Anon. 2005a):

- Including a reference to Section 35 of the *Constitution Act*, 1982;
- Language concerning the government's relations with Aboriginal peoples;
- A reference to traditional knowledge; and
- A reference to Aboriginal groups' role in broader advisory processes.

In comparison, other new legislation provides some guidance on the type of changes that might be contemplated. The *Oceans Act 1996* commits to a national strategy based on principles of sustainable development, integrated management and the precautionary approach. Only a few provisions refer specifically to Aboriginal issues. For instance the main provision relating to First Nations in the *Oceans Act* is a non-derogation clause found in s.2.1. It provides:

For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from any existing aboriginal or treaty rights of the First Nations of Canada under Section 35 of the *Constitution Act*, 1982.

This wording has less strength than Section 35 of the *Constitution Act* that "recognizes and affirms" aboriginal and treaty rights. Both the *Oceans Strategy* (but not the *Oceans Act*) and the *National Marine Conservation Areas Act* acknowledge the value of First Nations' knowledge although traditional knowledge is not necessarily applied exclusively to First Nations in the latter. As well, the *Oceans Act* refers to the importance of coastal communities but does not refer specifically to First Nations.

First Nation self-government could be supported under governance provisions of the

Fisheries Act. This is a prominent First Nation issue that has yet to be realized despite political commitments. In a 1995 policy statement, the Government of Canada recognized the inherent right of aboriginal self-government as an existing right within the *Constitution Act*, 1982, s. 35. Canadian examples of modern self-government include recognition of the Nisga'a government in British Columbia and the establishment of Nunavut Territory. First Nation fisheries management responsibilities are spelled out in these modern treaties. But there is less clarity about First Nation roles where there are no treaties or historic treaties are not yet implemented and the scope of First Nations' rights has not been defined by the courts or through treaty negotiations.

First Nation Perspectives

First Nations' approaches to governance on the Atlantic and Pacific coasts are described in several recent First Nation policy documents. First Nation interests in governance are broader than encompassed in DFO descriptions. They include fisheries management and decision making, appropriate access and fish allocations in keeping with their status as owners of the resource, and incorporation of First Nations' values into decision making.

The report on post-Marshall implementation identified the need for Mi'kmaq, Maliseet and Passamaquoddy First Nations "to pursue a direct role with DFO in fisheries and habitat and policy making" (APC 2005). This role was identified as necessary to meet consultation and accommodation standards as well as to incorporate traditional knowledge and protect treaty rights within fisheries management. Also the authors recognized that there is a need for an effective management structure representing First Nation collective interests rather than individual First Nations.

In BC, the First Nation Panel on Fisheries focused on fisheries management and allocation based on the principles underlying Aboriginal rights and title. The scope of the Aboriginal right to manage fisheries has yet to be addressed at the Supreme Court of Canada level. However several lower courts have outlined First Nations roles in protection and management of fisheries as arising from the Aboriginal priority in fisheries (FNP 2004: 10; Gaertner 2004: 19). The panel outlined a broad role for First Nations in policy development and management and identified a need for First Nations to organize themselves to participate in regional and province-wide discussions.

A First Nations governance model is available in Washington and Oregon States, where tribal management rights are recognized (Cohen 1986). In Washington the US treaty tribes were allocated up to 50% of the fish by the courts in 1974. The courts and eventually the state accepted the tribes as co-managers of the fishery resource. The tribes created the Northwest Indian Fisheries Commission to deal effectively with state and federal, and international management processes including the Pacific Fishery Management Council and the Pacific Salmon Commission.

A revised *Fisheries Act* proposes to lay out a framework of values as well as guiding principles. On a national level, an effort could be made to express core First Nation values and differentiate them from broader Canadian values. Such values might include a holistic or ecosystem approach to fisheries, cultural and spiritual connections to fish and

the environment, utilization of First Nation traditional knowledge in decision making, and ethical concerns about practices such as catch and release.

Governance Policies and Trends

Governance trends and potential changes in Atlantic and Pacific policy are described in detail in recent DFO policy documents.

The vision for the Atlantic Fisheries Policy Framework “advocates a broad, inclusive approach to fisheries management while managing in a manner consistent with the constitutional protection provided to Aboriginal and treaty rights” (Anon. 2004: 7, 9, 21). It outlines a shift from top-down management to shared stewardship including delegation of some fisheries management responsibilities to resource users. One of nine principles is “The fishery is a common property resource to be managed for the benefit of all Canadians, consistent with conservation objectives, the constitutional protection afforded Aboriginal and treaty rights, and the relative contributions that various uses of the resource make to Canadian society.” Another is “Fisheries management decision-making will provide opportunities for increased Aboriginal participation and involvement.”

The Pacific Fisheries Reform discussion paper likewise identifies “shared management responsibility and accountability” as one of four key elements of policy change. Changes are said to be in the direction of modern governance and the demand of citizens for greater engagement in decisions that directly affect them and where those who benefit directly from an activity bear a greater responsibility for funding that activity than other Canadians (Anon. 2005b: 7). This is stated as a principle: “First Nations and stakeholders will assume a greater role in operational decision-making and program delivery through effective co-management processes.” (Anon. 2005b: 27). Several other principles regarding the legal framework are “Pacific fisheries resources are a common property resource managed by the Minister of Fisheries and Oceans”; “Commercial participants fish under the same priority of access and similar rules”; and under the title of Aboriginal and treaty rights, that “First Nations interests in increased economic access will be addressed in a manner consistent with Canada’s treaty process”.

DFO policies for Pacific salmon fisheries are described in six New Directions papers developed from 1998 to 2000. The first lays out principles for conservation, sustainability and shared decision-making (Appendix D). Later papers outline approaches to selective fisheries, an allocation policy for 2000-2005 and a framework for improved decision-making. In 2001 DFO commissioned an independent review of decision-making in the Pacific salmon fishery. Aboriginal and treaty rights were identified as a significant issue that required accommodation in fishery policy and planning processes. As a result of the independent review DFO established a coast-wide cross-sectoral advisory process in 2003; although DFO recognized that consultation processes with First Nations were still not developed.

Priority Governance Issues

Topics for First Nation discussion include:

1. Ensure meaningful references to Aboriginal and treaty rights with linkages to modern treaties, self government and the right to manage fisheries

New legislation needs to recognize the special relationship between Canada and First Nations. DFO suggests that language be added to recognize protection of Aboriginal rights and treaties (Anon. 2005a). The purpose of “acknowledging” aboriginal and treaty rights in other legislation seems largely to be to avoid laws being struck down rather than to address Aboriginal and treaty rights. DFO obligations to involve First Nations in fisheries management are more than just good governance practice. The legislation should provide guidance on how regulators and policy makers need to recognize and accommodate Aboriginal and treaty rights and title in management.

As well, self-government is a core First Nations’ value that could be supported in a reformed *Fisheries Act*. Self-government in fisheries may include involvement in decisions on management of First Nation, recreational and commercial fisheries, sharing of fish in a First Nations traditional territory and protection of habitat. First Nations may participate in advisory processes but should have a larger role in decision-making as discussed in the upcoming co-management subsection.

2. Ensure that *Fisheries Act* changes are consistent with modern treaty arrangements

Modern treaties define relationships between Aboriginal peoples and Canada including establishment of processes and structures. Language in a revised *Fisheries Act* needs to reflect these processes and structures. Similar changes were made in the *Canada National Marine Conservation Areas Act* to be consistent with modern treaties in Nunavut (Dunsmuir 2001). These included references to Aboriginal governments, in addition to Aboriginal organizations, and the need to consider traditional ecological knowledge in planning.

3. Carefully weigh the overall effects of delegating responsibilities to the Provinces or industry groups

The stated purpose of delegation of authority is so that DFO plays less of a role in day-to-day management of fisheries. This means that either management systems will be less complex or the provinces, industry groups, First Nations or others will have to carry out these functions. If Aboriginal issues have not been resolved before this transition then it is likely to be more difficult to deal with fundamental issues such as allocation, decision-making and First Nations management rights. Fishery negotiations would be simpler for First Nations if the fishery was kept in federal jurisdiction. There would be only one responsible party in the negotiations, and federal obligations would remain in focus.

In the past the provinces have generally not been proactive about protecting or promoting Aboriginal or treaty rights and title. In Manitoba First Nations access

to remote Manitoba lakes is gradually being lost to lodge developments and commercial pulse fishing permits. British Columbia effectively delayed negotiation of the Nisga'a treaty as most of the natural resources (other than fisheries) were under Provincial control. And today, commercial fish allocations are not included in the Nisga'a Final Agreement but part of a side agreement because the Province would not agree to include them.

4. Consider effects of elevating management responsibilities for industry groups and others.

Currently DFO (or the provinces for inland fisheries) has obligations to consult with First Nations about decisions that may affect Aboriginal rights or title. The consultation process becomes vague when fishery management decisions are made by third parties. In British Columbia a model has been proposed for industry to hold long term 'evergreen' fishing licences similar to agreements under treaties. This could be a mechanism for ignoring the priority of Aboriginal and treaty rights fisheries arising from the prior occupation and ownership of the land. For instance, if third parties are making fisheries management decisions, then how will the federal government deal with the analysis of impacts on Aboriginal rights? The *Haida* decision (*Haida v. British Columbia* 2004) makes clear that the Crown alone has the ultimate legal responsibility for consultation and accommodation regarding developments that may affect Aboriginal title and rights.

5. Challenge the concept of the fishery as a "common property resource".

Historically the *Fisheries Act*, and Canadian government policy, have ignored prior First Nation ownership of land and resources including fish. According to Harris (2005: 20) "The common law doctrine of the public right to fish was imposed establishing the fisheries in tidal waters as an open-access resource, providing the legal basis and justification for ignoring prior Native ownership." Both the Atlantic Fisheries Policy Framework and DFOs Allocation Policy for the Pacific Salmon state call the fishery a common property resource (Anon. 2004; Anon. 1998b). At the same time, measures such as licencing and individual quotas have led to access to these resources being limited to a select few.

6. First Nations should collaboratively define processes for participating in national and regional fishery management structures to meet conservation needs.

Migratory fish need comprehensive management to provide for conservation. Aboriginal rights on the other hand are often "place based" and exercised in fixed geographic areas. It is up to First Nations to decide how to organize themselves for participation in national and regional management processes. Without a coastwide First Nation voice, the alternative is for DFO to make coastwide conservation decisions. Functioning national or regional First Nations organizations are an important source of power for individual First Nations but, to

the degree possible, consultation and management decisions should be made at the local level.

7. Incorporate in principles respect for First Nation values and application of traditional knowledge to fisheries management

Statements of Canadian values should be complemented by references to First Nations' values that may include recognition of customary beliefs, laws and principles.

A reference to traditional knowledge has already been suggested by DFO (Anon. 2005a). References to Aboriginal traditional ecological knowledge appear in other statutes including the *Migratory Birds Convention Act 1994*, the *Oceans Act 1996*, the *Canada National Marine Conservation Areas Act 2002*, and the *Species at Risk Act 2002*. Similar acknowledgement is contained in policy documents such as the *Oceans Strategy*. It would be helpful for the legislation to support co-management processes that provide venues for exchange of information and which make it more likely that traditional knowledge will be used in decision-making. Traditional knowledge has been used in establishing management plans for wildlife in the Arctic (Berkes 2005) and Manitoba (Michael Anderson, Personal Communication, March 17, 2005).

8. Promote viable coastal communities as a management principle

Coastal communities and inshore fisheries are supported in the Atlantic Fisheries Policy Framework but are not mentioned in Pacific Fisheries Reform. This could be a serious oversight. Health of coastal communities is vital for self-sufficiency of First Nations' communities who often have limited opportunities for alternate economic development.

3.2. Access and Allocation

Regaining fisheries access is a priority issue for First Nations in Atlantic, Pacific and Inland areas. As First Nations rights are recognized, their allocations, or shares in the fishery, should increase substantially through new treaties or historic treaty implementation. Changes to legislation and policy relating to access and allocation need to be carefully examined as to their effects on Aboriginal and treaty rights and the ability of the federal government to make future allocation changes.

Access and Allocation under the Fisheries Act 1985

Under the current *Fisheries Act* the Minister has absolute discretion to issue or cancel leases and licences. Since almost all modern fisheries are managed through some form of licencing this also gives him or her absolute authority over allocation. However the current legislation provides little in the way of accountability or guidelines for the Minister's decision. There is considerable resistance to changes in status quo allocations.

In some cases First Nations have used s. 35 of the *Constitution Act* and favorable court rulings (e.g. *Sparrow*, *Gladstone*, and *Marshall*) to achieve changes in management and allocation.

DFO has a variety of mechanisms in place to make specific fishery allocations to First Nations. Modern treaties have dealt with fisheries access and allocations which is enacted through legislation, separate from the *Fisheries Act*. First Nations without treaties or historic treaties where fisheries provisions have not yet been fully implemented rely on the *Fisheries Act*. The *Aboriginal Communal Commercial Fishery Regulations* were enacted as a result of AFS. These regulations allow the Minister to issue a communal licence to an Aboriginal organization to carry on fishing and related activities with detailed species and quantities of fish to be taken. Communal Licences are usually issued pursuant to negotiated agreements between DFO and an Aboriginal organization including an Indian band council, tribal council or other organization. However DFO has been reluctant to issue Communal Licences for economic fisheries with terms and conditions that are significantly different from existing commercial licences.

DFO's Access and Allocation Approach

The Minister already establishes allocations for fleets or groups of fishers for a fixed period of time based on policies developed over time. A renewed *Fisheries Act* could lay out principles to govern future changes in allocations and the process for doing so. It is also suggested that the Minister could have less control over allocation although views are divided on this.

A renewed *Fisheries Act* could include the following (DFO 1995a):

- Allocation principles to guide future decisions in marine fisheries;
- A legal instrument to establish allocations to fleets or groups in commercial, recreational and Aboriginal fisheries for a specified number of years;
- Authority for the Minister to name an advisory body to hold public consultations and develop and provide public recommendations on those allocations; and
- Ability to rescind, alter, or replace allocation in given circumstances.

As to effects on First Nations, DFO proposes that Aboriginal representation could be included in advisory bodies.

First Nation Perspectives

Access and allocation are priority issues for First Nations and amendments could create new barriers to future transfers. In the past licencing has often been used as a tool to limit First Nations access to both existing and emerging fisheries. Currently the Minister has discretion in making allocation or changing allocations. New policies that delegate some of this authority to others may make it more difficult to address First Nation issues.

First Nations in the Atlantic are unhappy that commercial licences are being used as a surrogate for treaty rights. Since the *Marshall* decision, First Nation access has been increased through buyback of commercial fishing licences and vessels and transfers to First Nations. While this has improved First Nation access with little public social or economic disruption, it was noted that the transfer of commercial fishing assets within an existing regulatory framework does not result in full expression of the treaty right (APC 2005: 4). The *Marshall* decision referred to ability to earn a moderate livelihood which is different from access to commercial licences that due to licencing restrictions has to be limited to a few individuals.

As a result of the Marshall Response Initiative, the number of Atlantic licences held by Mi'kmaq and Maliseet increased from 594 in 2000 to 1,269 in 2004. By 2004 Mi'kmaq, Malisset and Passamaquody First Nations access was up to 5% of commercial licences in a few fisheries, specifically snow crab and bluefin tuna. The next stage in the Marshall Response Initiative is treaty implementation but there are no indications from DFO or First Nations about allocation targets for that stage.

The First Nation Panel on Fisheries (2004) emphasized the need for flexibility in addressing First Nations access to fish. First Nations may have preferred ways of exercising Aboriginal or treaty rights to a fishery and policies should be broad enough to allow varied means of access. Options identified to the panel included community quotas, exclusive First Nation fishing areas, continuation of usual and accustomed means of fishing, fixed quotas, or percentage shares (FNP 2004: 69-70). In addition the FNP proposed principles that allocations would not be irrevocably made to private parties, a responsibility to treat aquatic species and their habitat with respect, a need for independent, fair and transparent allocation processes, incentives and mechanisms for parties to develop sharing arrangements, and priority to First Nation fisheries over commercial and recreational interests (FNP 2004: 58).

A legal review commissioned for the panel emphasized three aspects of Aboriginal title particularly relevant to First Nations fishery rights: the right to choose what uses land can be put (the legal definition includes ocean spaces), the right to exclusive use, and occupation and an inescapable economic component of title (Gaertner 2004). The review emphasized the importance of the latter two to allocation.

“The right to exclusive use and occupation – reflected in the principle of aboriginal priority – means that the Crown must demonstrate that both the process by which a resource is allocated and its actual allocation reflect that priority. Consultation and accommodation is required to respect this priority.”

“The inescapable economic component: First Nations are entitled to share in the benefits from the fisheries regardless of whether First Nations or others are engaged in catching the resource. First Nations have a legal right to access and use of the land and resources within their territory. Compensation is required where there is infringement.”

The test to prove an Aboriginal right to fish for economic purposes was demonstrated in *Gladstone v. R 1996* but those rights have to be proven in each case.

Access and Allocation Policies and Trends

The Atlantic Fisheries Policy Framework identifies a stable and transparent access and allocation approach as one of four core objectives. Included in the nine principles (Anon. 2004: 9) are that:

“The fishery is a common property resource to be managed for the benefit of all Canadians, consistent with conservation objectives, the constitutional protection afforded Aboriginal and treaty rights, and the relative contributions that various users of the resource make to Canadian society”; and

“The Minister of Fisheries and Oceans, on behalf of all Canadians, retains authority for the sustainable use of fisheries resources and their habitat, and for the access and allocations thereof.

“Best use” is later defined as the particular use of a fisheries resource that will generate the greatest possible public good or best serve the interests of all Canadians. The rationale for the Minister retaining authority for Atlantic fisheries allocation is that disputes over allocation lead to instability and uncertainty that reduces the ability of resource users to focus on conservation. Three strategies are described relating to allocation:

- Clarifying the process and criteria for determining best use and acknowledging legitimate uses;
- Establishing decision-making guidelines for commercial access and allocation; and
- Stabilizing sharing arrangements in established commercial fisheries.

Best use decisions are said to be necessary in “exceptional circumstances, for example to implement court decisions or international agreements, or when it has become necessary to resolve conflicts between different uses” (Anon. 2004). Criteria for best use decisions are to be determined in phase 2 of the Atlantic Fisheries Policy review that is in progress.

A short section on Aboriginal and treaty rights refers to the constitutional protection of Aboriginal and treaty rights and the need to consult over access and allocation decisions that may affect their interests. As well, it states that the department’s Aboriginal fishing policies assists in meeting these obligations.

The policy encourages commercial harvesters to recommend mutually agreed sharing arrangements to the Minister and devise its own mechanisms for settling allocation disputes at the local level. However it is recognized that not all licence holders will have the capacity or willingness to take on such responsibility. Conflict resolution processes

such as mediation will be encouraged to resolve conflicts over commercial access and allocation but the Minister will make all final decisions on questions regarding access and allocation.

A slightly different strategy is laid out for new access in commercial fisheries. Here the intent is to put in place a decision-making framework to determine access when there are substantial changes in resource abundance or value. The Minister's decisions on new access are to be consistent with a hierarchy of principles and criteria that are laid out in *The New Access Framework*, a 2002 document. The first of two overarching principles are conservation and consistency with the constitutional protection provided to Aboriginal and treaty rights. Criteria for granting new or additional access after conservation include adjacency, historic dependence and economic viability.

On the Atlantic coast, the Marshall Response Initiative was put in place to provide First Nations affected by the *Marshall* decision with increased access to commercial fisheries on an immediate basis (DFO 2004b). The initiative provided about \$300M funding to buy and transfer licences and vessels and for training. By February 2004, a total of 410 fishing enterprises, some with licences to fish more than one species, were transferred to Mi'kmaq and Maliseet in the Maritimes and Gaspé region of Quebec under agreements with DFO. A survey by the Atlantic Fisheries Congress showed that the number of First Nation licences in a total of 25 fisheries increased from 594 to 1,269. Participation in a few fisheries was up to 5% of all Atlantic licences. One of the major concerns identified in the survey was that licences were an inappropriate surrogate for treaty rights.

On the Pacific coast DFO enunciated an allocation policy for Pacific salmon for the 1999-2005 period. Recreational and commercial allocations are made after allowance for priority Aboriginal food, social and ceremonial fisheries and treaty requirements. The policy gives priority to recreational fishery for chinook and coho salmon and assures the commercial sector access to a minimum of 95% of sockeye, chum and pink salmon. As well, salmon gear (gillnet, seine and troll) allocations were established. One outcome of this hierarchy is that First Nations economic fisheries could be lower in priority to recreational fisheries.

DFO also recently made an allocation of 12% of the Pacific halibut Total Allowable Catch to the recreational fishery (DFO 2003). This was based on historic catches and makes some allowance for future growth but was made at the same time that First Nations are attempting to negotiate fisheries access in the B.C. Treaty Process. Market mechanisms will be developed to accommodate for future allocation transfers to the recreational fishery. This could include acquisition of additional quota from the commercial sector through purchase or lease.

An Allocation and Licencing Advisory Board has been under consideration for Pacific salmon fisheries for several years. DFO announced its intention to create this board in 1998 and indicated that its purpose would be to hold public hearings on domestic allocation of Pacific salmon in both commercial and recreational fisheries as well as to provide advice on commercial licence eligibility and rules for re-issuing licences (Anon. 1998: 13-15). Licencing review was already in the purview of an existing Licence

Appeal Board (Anon. 2000: s.5). It was noted that the Board's mandate would not include First Nations' food, social and ceremonial fisheries and treaty obligations. An independent report recommended that an Allocation and Licencing Board consist of four persons and include both a negotiating process (for intersectoral and intrasectoral allocations) and a public hearing process (Institute for Dispute Resolution 2001: 30-35). It was also recommended that the mandate of the Allocation and Licencing Board should not be expanded to other fisheries unless there is consultation with representatives of those fisheries.

To date an Allocation and Licencing Board has not been established. A new Pacific Salmon Integrated Harvest Planning Committee was formed with ad hoc First Nation representation. Some dialogue has occurred on intersectoral allocations by subcommittees of that committee.

The Pacific Fisheries Reform discussion paper identified increased First Nations economic fisheries access to be a key to future fishery certainty and stability. Government intends to continue to address the impacts of transfers on existing commercial fishing interests through voluntary licence retirement and government allocation transfer programs (Anon. 2005b: 27). Alternatives for defining catch shares were identified as individual quotas (the main focus of the federal provincial Joint Task Group, p. 4), a new idea for distribution of quota entitlement to fleets or groups of fishers collectively, and broader community based allocations that would include non-First Nation communities. Reform of the salmon fisheries is identified as critical because of the poor financial performance, intense disputes over the resource and high public cost of fisheries management.

Species allocations between the various fleet sectors is seen as a key activity to be worked out concurrent with increasing First Nations economic access. The vision is that once commercial catch shares are defined and secured, and once First Nations fisheries access is increased and similarly defined and secured, fisheries management plans can be developed through co-management processes.

Canadian policies compensate third parties for allocation transfers to First Nations. But other jurisdictions have found other ways to make allocations to dispossessed constituencies. In Alaska, new pollock, halibut and blackcod allocations called Community Development Quotas (CDQs) were set aside for remote communities when Individual Quota programs were introduced (OSB 1999: 124-127). The programs accomplish community development in rural coastal communities in western Alaska at little cost to the taxpayer or harm to licence holders. This is because new licencing systems such as individual quotas generally increase quota or licence entry costs to the fishery so that recipients of initial allocations of quota shares have potential to reap windfall profits when they sell their shares (OSB 1999: 142). Creation of new allocations such as CDQs, when an individual quota system is introduced, is a way for the public to capture royalties or taxes on windfall gains and use these for public benefit.

On the Pacific coast, First Nations access is to be provided in the long term through treaty arrangements, and in the interim period by economic opportunity fisheries and

commercial licence transfers. The only modern treaty in BC, the Nisga'a Final Agreement, provides allocations for Nisga'a domestic (food, social and ceremonial purposes, not authorized for sale), communal sale (communally operated by Nisga'a fisheries) and individual sale (regulated by permit). As well, funds are available to purchase commercial fishing licences. Agreements-in-Principles with Lheidli T'enneh Nation and Yale First Nation provide for percentage allocations of returning Fraser River salmon (FNP 2004: 81; B.C. 2006). Three salmon pilot sales fisheries with defined fishery allocations for First Nations have operated since 1992. These were not expanded to other fisheries or areas because of industry resistance. Also since 1992 a commercial licence transfer program (now called the Allocation Transfer Program) has been underway with a budget of about \$4-6 Million per year in the Pacific Region. In 2005, a variety of small new First Nation economic opportunity fisheries were tested under Pacific Fisheries Reform but had mixed success due to poor salmon returns. They are expected to continue in 2006.

Access to fisheries resource for both food and commercial fisheries is a key issue for Inland fisheries (Anderson 2004). Some First Nations have reacquired access by purchasing licences and quotas. Aboriginal commercial fisheries are small in most areas except Manitoba. On the Great Lakes, there are about 100 First Nation fishers who are licensed to fish commercially (Liuson 1997). Targeted fish species include lake whitefish, trout, and walleye. Fishing operations tend to be small in scale, and the aboriginal harvest makes up less than two percent of the total commercial harvest of Ontario (Liuson 1997).

The Fresh Fish Marketing Corporation (FFMC) has been identified as a barrier to First Nations fisheries development (DFO 1999: 30-33). Manitoba has the largest commercial fishery within the jurisdiction of the FFMC, accounting for approximately two-thirds of the landings and three-quarters of the landed value. FFMC is a federal crown corporation established under the *Fresh Fish Marketing Act* in 1969. It serves approximately 3,500 fishermen. Approximately 50% are status Indian and 10-20 percent are non-status Indian. The Corporation hires agents to deal directly with fishermen fishing 300 to 500 lakes and landing their catch at one of 75 delivery points scattered throughout the FFMC's market and trade territory. The agents pack the fish in ice and ship 40 to 50 million pounds round weight annually to the Corporation's processing plant in Winnipeg. First Nations have concerns that the FFMC monopoly limits economic opportunities of First Nation communities to fish at remote lakes. In 1995 a pilot project was started in the Island Lake region of northern Manitoba by the Island Lake Opakitawak Co-operative Ltd. Results continue to be under review and their exemption from the FFMC has been extended (Anon. 2003).

Priority Access and Allocation Issues

1. Reflect in legislative principles the First Nations priority to fisheries resources

The proposed legislation will codify allocation principles that will be used not only by the Minister, but by fisheries managers in interpreting the Minister's

decisions. Federal policies do not distinguish between First Nation economic allocations and commercially licenced fisheries unless they are put in place through treaties. Treaty rights may already establish a clear Aboriginal priority. If treaties are not clear or do not exist there are a range of court decisions such as *R. v. Sparrow*, *R. v. Marshall*, *R. v. Gladstone* and *Delgamuukw v. B.C.* which establish legal principles for priority in First Nation fishery allocations that could be acknowledged in legislation. The *Sparrow* decision established “the priority of the Aboriginal fishery for food, social and ceremonial purposes” over commercial and recreational fisheries. The *Marshall* decision is based on the “right to a moderate livelihood”. The *Gladstone* decision recognized Aboriginal right fisheries for commercial purposes when trade can be proven as “an integral part of the culture” in pre-contact times. *Delgamuukw* identifies “an “inescapable economic component” to Aboriginal title. As well, federal government obligations such as the need to consult with First Nations and the fiduciary duty of the Crown could be referred to in policy and legislation principles and serve as a reminder to fisheries managers.

2. Deal with First Nation allocations up front before others’ property rights are further entrenched

A renewed *Fisheries Act* aims to entrench significant policy changes such as fixed allocations over a period of years that are likely to make future allocation transfers to First Nations more difficult in future. In BC First Nations allocation transfers are proposed as part of a packet of reforms although no target allocations have been negotiated. In the Atlantic there is talk about treaty implementation but no concrete commitments. Unless measures are taken to address First Nation access rights, a renewed *Fisheries Act* may limit options and make political solutions more difficult.

3. Support policies and processes for addressing new Aboriginal access and allocations

Legislation is aimed at providing more certainty and stability for commercial or recreational allocations. The only provisions proposed for First Nations is “protection of Aboriginal and treaty rights”. This implies status quo for Aboriginal fishery allocations until treaties are negotiated or courts provide explicit guidance on allocation. In B.C., DFO has been establishing allocations to recreational fishing groups. However political commitments to similarly address First Nations allocation are weak. Political solutions such as quantities of allocation transfers under Marshall implementation or economic access fisheries as proposed by Pacific Fisheries Reform are still uncertain. Principles reflecting Aboriginal and treaty rights could help First Nations without treaties or whose historic treaties are not yet implemented.

4. Exercise caution in defining “best use” criteria, particularly principles which may favour increases in recreational access to fisheries

Current Pacific coast policy is that recreational allocations for chinook and coho salmon have priority over commercial allocations. Recreational access to halibut was recently capped at 12% of the commercial and recreational TAC and market mechanisms are to be developed for future transfers. Atlantic salmon stocks are depressed but are still targeted in some recreational fisheries. Recreational demand is unlikely to wane so allocations will likely increase over time. In the future it will be more difficult and costly to transfer recreational allocations to First Nations than commercial. Recreational use often results in permanent developments such as fishing lodges and other recreational tourism. Developments may provide some economic benefits for First Nation communities but are also likely to have social costs. So, First Nations need input into policies that may promote such development.

5. Avoid delegation of decisions on First Nations allocations to an arms length board

Several models for allocation boards are proposed and legislation is likely to accommodate a range of approaches. Allocation boards are likely to act mainly in the interest of licence holders. Allocation principles by themselves may not infringe on Aboriginal rights and title. But application of principles by allocation boards may do this.

3.3. Licencing

In the past, licencing under the *Fisheries Act* has been a tool used to limit First Nation access to fisheries (Newell 1993; Harris 2004). The *Fisheries Act* 1985 provides little guidance on licencing policy and more explicit principles and rules would be included in a reformed Act. Canadian fisheries have moved progressively towards creating new private property rights in fisheries. Resource users on both coasts have lobbied for more secure access through long term licences and quotas. Limited entry licencing and individual quotas have been promoted as a tool to prevent excess capacity and overcapitalization. Licencing systems may solve some of these problems but create others such as armchair fishers (investors who buy licences but stay at home and rent them to the real fishermen while making a tidy profit), reduced local employment, and barriers to the next generation of fishers hoping to get a licence to the fishery.

Licencing under the Fisheries Act 1985

As mentioned in the previous subsection, the *Fisheries Act* authorizes the Minister to issue leases and licences for fisheries and fishing as well as to suspend or cancel such leases or licences. Licencing of Inland commercial fisheries and many freshwater recreational fisheries is done under provincial regulations.

Existing licencing has been subjected to several parliamentary and court challenges. The constitutionality of the Aboriginal Communal Fishery Regulations was challenged by *R. v. Kapp*, winning in a lower court but losing on appeal. As well, the Parliamentary Standing Committee on the Scrutiny of Regulations identified problems with Aboriginal organizations designating persons to fish under a Communal Licences under those regulations. The Standing Committee also called for revocation of a subsection of the Ontario Fishery Regulations because according to the Committee, this provision of the *Ontario Fishery Regulations* is not authorized by the *Fisheries Act*.

DFO Licencing Approach

DFO proposes to update the licencing provisions of the Act (Anon. 2005a), which could include:

- Minister sets licencing policy in those fisheries that are administered by DFO, and the Department administers the licencing program;
- Regulations are used to prescribe the overall licensing framework, administration rules and maximum number of licences;
- Organizations that are issued licences, such as First Nations, would be authorized to designate who can fish under the licence;
- DFO would have authority to attach licence conditions; and fishing contrary to conditions would be expressly prohibited;
- Fees would be set by ministerial order, similar to the *Oceans Act*; and
- DFO would have the ability to withhold licences under certain conditions.

DFO identified one Aboriginal consideration which was that Aboriginal groups could designate who will fish on their behalf under communal licences. This would clarify the issue identified above by the Standing Joint Committee on Scrutiny of Regulations.

First Nation Perspectives

Licencing systems provide a mechanism for distributing access to fisheries. First Nations in the Atlantic have noted that the transfer of commercial fishing assets within an existing regulatory framework does not result in full expression of the treaty right (APC 2005: 4). One problem identified was that licences may restrict fishing to certain areas that may exclude high value fishing areas or frustrate joint ventures. Another is that non-transferability of licences means that First Nations cannot exit a particular fishery or use assets as collateral. From DFO's perspective the purpose of non-transferability is that fishing assets provide access to First Nations over the long term instead of windfall profits to the current membership. First Nations shared this objective but identified problems with non-transferability such as exposure to financial risks due to inability to diversify or exit a fishery in a timely manner (APC 2005: 44).

Many First Nations in BC are forced to use commercial licences for economic access to fisheries similar to the Atlantic coast under conditions of the DFO Allocation Transfer Program. First Nations with modern treaties, such as the Nisga'a have fisheries allocations that are clearly defined. The First Nation Panel on Fisheries (FNP) did not provide recommendations on changes to commercial licence conditions other than individual quotas. The FNP recommended a moratorium on new Individual Fishing Quota programs unless First Nations interests including allocations in those fisheries are first addressed.

Licensing Policies and Trends

The Atlantic Fisheries Policy Framework (AFPF) focuses on licensing policies to preserve inshore fishing fleets while encouraging commercial licence holders to develop self-adjustment mechanisms for conservation or overcapacity. One of the important goals of the *Commercial Fisheries Licensing Policy for Eastern Canada* is to achieve a balance between harvesting capacity and resource availability. The framework mentions several possible self-adjustment mechanisms: transferable quotas, partnering of enterprises by pooling their quota share (or licences or gear) or the issuance of licences and quotas through a fleet planning board. According to the framework, some modifications to legislation/regulations may be necessary to implement these mechanisms (Anon. 2004: 20).

Atlantic owner-operator and fleet separation policies are aimed at preserving the inshore fishery by avoiding undue concentration of licences and preserving and fostering a diversified sector of viable independent inshore enterprises. "Trust agreements", that direct the use of the licence (the beneficial interest) to a party other than the licence holder, are a widespread concern of the inshore fleet. Adaptations that may be considered under AFPF include facilitation of intergenerational transfers; authorization for heads of enterprises to combine by pooling their quota shares (or licences or gear); or designation of qualified operators who have a long-term attachment to the industry.

The Pacific Fisheries Reform discussion paper is looking for feedback on new individual quota fisheries, licence duration (25 year "evergreen" terms proposed) and where the licence should reside (a person only, a person including corporations and other legal entities, a vessel) and transferability. This was in response to recommendations by the Joint Task Group (JTG). The JTG recommended that an individual quota approach be extended to all commercial fisheries. Also, that commercial licence privileges be issued for twenty five year terms with provision for renewal on an evergreen basis after fifteen year. These were suggested in order to parallel the terms of the Harvest Agreement negotiated in the Nisga'a Final Agreement and other similar agreements being negotiated with other First Nations. As well it recommended that all licences be issued to persons, corporations or associations instead of vessels.

Canada has moved toward individual quotas in many fisheries on the Atlantic, Pacific as well as Inland. The JTG proposed that Pacific salmon fisheries convert remaining BC fisheries to individual quotas to improve economic viability. Individual quotas have worked in many fisheries to improve economic efficiency. Ecotrust Canada (2004)

documented social impacts of individual fishing quotas on the B.C. west coast. Between 1994 and 2002 rural communities lost over 540 licences in groundfish, salmon and shellfish as a result of fleet downsizing and the sale of licences to urban areas. A Senate committee report heard concerns about socio-economic impacts of individual quotas and recommended an open and transparent B.C. wide consultation before any such quota program were introduced for Pacific salmon (Senate Standing Committee 2005).

A US study of individual quotas concluded that “IFQs (Individual Fishing Quotas) should be allowed as an option in fisheries management if appropriate measures are imposed to avoid potential adverse effects. The issues of initial allocation, transferability, and accumulation of shares should be given careful consideration when IFQ programs are considered ...” (Ocean Studies Board 1999). They recommended that the public capture some of the windfall gain from the initial allocation of quotas in new IFQ programs through collection of fees. They also recommended inclusion of fisheries communities in initial allocations.

A different approach is being followed with emerging fisheries where there is no historic data about fishery limitations. The approach to fisheries in northern Atlantic regions is one that balances conservation, management and shared stewardship with economic development (Anon. 2004: 26-27).

Inland fisheries are managed through licences issued by the provinces. Licencing policies in different provinces are variable and were not compared in this paper. Consequently it is not known whether *Fisheries Act* changes would affect them.

Priority Licencing Issues

1. Avoid creation of property rights or further enhancement of privileges in fisheries until First Nations access and allocations are addressed

Fisheries management systems have moved increasingly towards individual property rights through licences and quotas. Today commercial licences and quotas are valuable commodities and a significant part of investment in a fishing operation. *Fisheries Act* revisions could enhance this through more secure “evergreen” licences that could be issued for longer terms. At the same time First Nations access in most fisheries has not been addressed because Aboriginal or treaty rights may not yet be defined through negotiation or the courts. Licencing changes will increase the cost of allocation transfers which is likely to negatively affect First Nation access in the long term. As well Canada should consider allocations to First Nations in new and existing fisheries where licencing or quota changes may produce windfall profits.

2. Support opportunities to design First Nation fisheries that are differentiated from commercial fisheries

Economic access is an expression of Aboriginal or treaty rights in the fishery.

Since different First Nations may express their rights differently there is a need for flexibility in management approaches. DFO already has a mechanism for negotiating and supporting First Nation fisheries through AFS and the Aboriginal Communal Licence Regulations. It has mainly been policies and political resistance that have constrained the types of First Nations fisheries that are supported under AFS. First Nations should have more opportunity to manage allocations and access based on their own values and objectives.

3. Provide tools for design of economically viable First Nation fisheries

First Nation fisheries need to avoid the pitfalls of overcapacity and overcapitalization that plague other fisheries. Fisheries throughout the world have gone through phases of development, crisis and rationalization. Establishing independent First Nation fisheries need to provide the benefits that First Nations require such as self-sufficient fishers and stable fishing opportunities. Tools are likely to include both fishing effort and market controls (such as quotas).

3.4. Co-management

Co-management, the sharing of responsibilities between the government and local resource users, is an increasing trend in Canadian fisheries. Fisheries management responsibilities are increasingly being shared with First Nations as well as third parties in the fishery. One reason for these changes is to transfer management costs from the public to those who benefit. Another is to give resource users more of a say in decisions that affect them.

A co-management framework needs to distinguish between First Nations and third parties. The federal government is obligated to meaningfully consult with First Nations about decisions that may interfere with the exercise of Aboriginal or treaty rights. Modern treaties have often established co-management processes between the First Nations and the federal government for management of fish and wildlife. In the pre-treaty or treaty implementation context, programs and policies such as AFS and AAROM facilitate agreements on conduct and management of First Nation fisheries and processes for First Nations to work together with DFO and others.

Co-management of commercial fisheries by third parties is expanding for other reasons. DFO budgets for fisheries management have been shrinking at the same time as new fisheries are developing and conservation pressures increasing. A recent direction in commercial fisheries is for management costs to be paid by resource users rather than the public. Resource users fund data collection, monitoring and enforcement in a variety of fisheries. Legislative changes have often not kept up with changes in the way that government operates, and further co-management changes under the *Fisheries Act* are likely to require legislative change.

Co-management under the Fisheries Act 1985

The current *Fisheries Act* has little provision for co-management. One exception is where a province has been delegated authority over a fishery. But even in this case the Minister has authority over management and allocation, although it may rarely be exercised. There are no guidelines in the *Fisheries Act* for how the Minister will consult with those who are affected by management or allocation decisions.

DFO Co-management Approach

DFO's *Fisheries Act* presentation (Anon. 2005a) points out that resource users and others have consistently called for greater use of co-management arrangements in fisheries. Proposed changes could include:

- Co-management tools which would allow the sharing of authority and accountability between DFO and responsible groups of resource users.

A stated benefit for First Nations is that agreements would clearly identify the First Nations' role in the resource management and decision-making process. Some management agreements already exist with First Nations and third parties. AFS provides a policy framework to negotiate agreements. The types of agreements have been limited by DFO policies but allow for involvement in fisheries management before treaties are finalized.

First Nation Perspectives

The APC report on Post-Marshall Implementation says that while "First Nation's involvement in fish harvesting has exponentially increased over the past 5 years, progress on management participation has been disappointing". First Nations report that their input on management is primarily at the local advisory level. As well there has been little change in First Nations' management and habitat staffing since 2000. The APC survey showed a strong interest in increased employment in fisheries management. Mi'kmaq, Maliseet and Passamoquoddy First Nations identified the following objectives for fisheries management and harvesting participation:

- Implement a First Nation management regime to improve self-rule in the fishery with an emphasis on conservation and integration of traditional knowledge;
- Develop and enhance key First Nation human resource capacity on a tribal basis to meet the spectrum of management and harvesting requirements; and
- Seek out partnerships/collaborative approaches to generate improved employment and revenue opportunities in fisheries management, harvesting and other related commercial activities.

The APC report goes on to state that it is likely that First Nations will want their harvesters to be involved in area advisory committees in a consistent and orderly manner. Also that harvester participation cannot be considered a surrogate for a more integrated

role in fisheries management.

In addition the report identified a need for Maliseet, Mi'kmak and Passamaquoddy First Nations to pursue a direct role with DFO in fisheries and habitat management and policy-making. The rationale is to protect treaty rights and to provide both a mechanism to ensure that consultation and accommodation standards are met and a vehicle to incorporate traditional knowledge into fisheries management. As a start, interest was expressed in the establishment of a fisheries network to provide a broad range of technical support to First Nations. AAROM was identified as a potential source of funds for this endeavour.

The First Nation Panel on Fisheries took a broad view of co-management. It encompasses participation at all levels of management including development of policies and overall objectives for fisheries management, direct involvement in conservation and rehabilitation programs and detailed decisions on the regulatory controls and management programs for both First Nation and other fisheries. They proposed that co-management needs to occur in three phases: between individual First Nations (or tier 1); between First Nations and government (tier 2); and between First Nations, government and third parties (tier 3). This would provide a respectful process for consultation and discussion of First Nation issues. Furthermore it would allow for First Nations to formulate approaches that would assist in practical solutions to issues and a process to integrate these with government and third party approaches (Figure 1).

Co-management Policies and Trends

Canada has been moving in the direction of integrating co-management approaches into fisheries for a number of years. Approaches have differed for commercial, recreational and First Nations fisheries. Initiatives are at different stages of development for Atlantic, Pacific and Inland fisheries, so co-management is reviewed for each region.

The Atlantic Fisheries Policy Framework identifies shared stewardship as one of four main objectives (Anon. 2004: 29). Four broad strategies are to be implemented to engage participants in fisheries management decisions and policy development: adopt a more inclusive approach to policy planning; enable resource users to assume more of a role in operational decisions; facilitate Aboriginal participation in policy planning and decision making; and support building capacity for resource users to take on new responsibilities. Fish harvesters involvement in co-management is being supported by a movement towards professionalization. Professionalization is largely an industry-led initiative that may include certification and training standards for fishers. Some Aboriginal groups are said to be developing their own approaches (AFPR 2004: 33) and these should be supported. The importance of criteria to define legitimate fisheries organizations is emphasized. Fisheries organizations must meet certain minimum requirements to partner with DFO such as democratic procedures and a legal structure such as a registered or incorporated society. It was recognized that some resource users are ready to manage the fisheries they exploit while others still need to get organized. In AFPR Phase 2, DFO will help resource users to build capacity to participate in fisheries management decision-making processes.

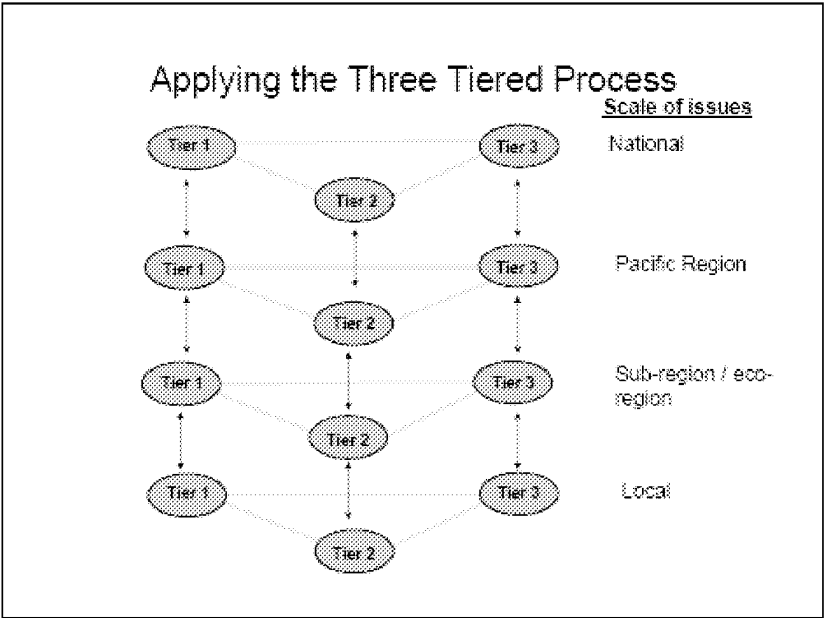
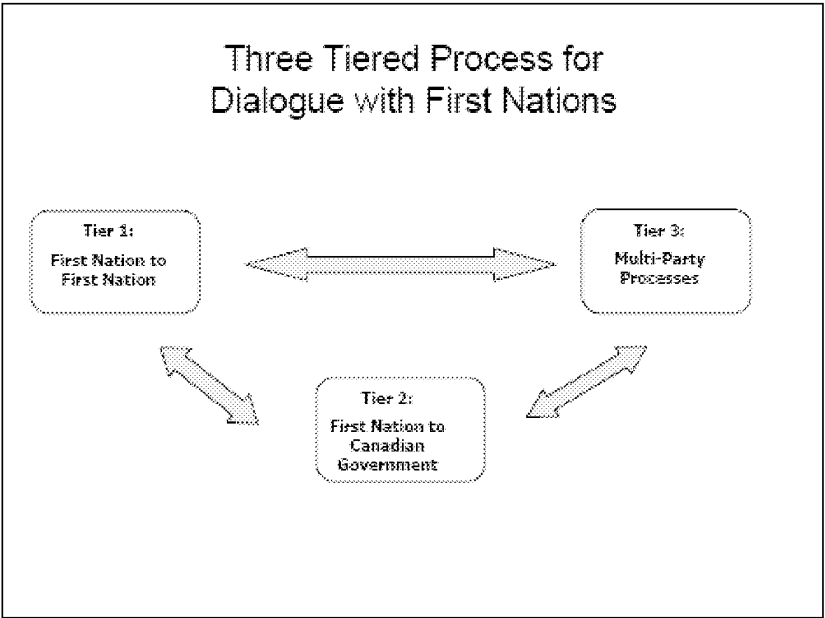
The Pacific Fisheries Reform discussion paper states that “effective co-management is a fundamental element of the DFO’s vision of a reformed fishery.” Current co-management initiatives with First Nations and other stakeholders are described. DFO has moved towards co-management of fisheries with First Nations through initiatives such as the AFS, AAROM, treaties like the Nisga’a Final Agreement, treaty related interim measures and non-treaty related initiatives. Co-management with other fisheries stakeholders has been promoted through formal advisory processes and formal Joint Project Agreements with a number of commercial fishing organizations. Joint Project Agreements involve cost-sharing and financial contributions towards research or management activities (Anon. 1999c).

The Joint Task Group recommended formation of Pacific fisheries associations to represent and act on behalf of licence or quota holders in each fishery. This is a direction that DFO has been moving for some time. Reid (1999) described DFO Pacific Region’s approach to co-management with industry as having three aspects: the advisory/decision-making framework, provision of fisheries management services, and funding of fisheries management services. Co-management arrangements are commonly expected under Joint Project Agreements, or collaborative agreements. Funding is obtained in a variety of ways. Special licencing arrangements may permit catching and selling the resource to fund special management services. Or industry associations may collect voluntary fees from members. DFO may create impetus for industry to organize to collect fees by requiring some services as a condition of licence such as dockside monitoring. In addition licence holders may pay third parties directly for services such as dockside landing where this is a condition of licence.

The First Nations Panel recommended a three tier structure for co-management as discussed above. AAROM is currently supporting First Nations to organize on regional levels to address fisheries management issues. To a certain extent these initiatives are exploring alternatives that could be included in treaties. The Nisga’a Final Agreement creates a Joint Fisheries Management Committee between DFO and the Nisga’a. The Nisga’a participate less formally in other management processes. Co-management has progressed further in the Arctic due in part to treaties. Berkes (2005) examined oceans and coastal management in the Canadian north and ways that academics, government managers, policy makers, Aboriginal groups and industry have connected to address issues of environmental stewardship.

In the Pacific Region, DFO has restructured coastwide salmon and herring advisory processes. Changes are aimed at bringing First Nations, commercial licence holders, recreational fishery participants and environmental interests together for fishery planning purposes. This process puts First Nations at the same level as other resource users. At the same time DFO acknowledges that processes for First Nation participation are lacking.

Figure 1 Potential process for First Nation consultation with government and resource users (DFO diagram adapted from FNP 2004)



Priority Co-management Issues

1. Respect the special relationship between the Crown and First Nations in co-management principles

Co-management with First Nations needs to provide for consultation and accommodation at the policy and decision-making levels. New co-management measures could provide for a greater First Nation role in management but are likely, also, to increase involvement by all resource users. The Crown's relationship with First Nations is different from other resource users and needs to be recognized and affirmed at all levels of policy and legislation.

A renewed *Fisheries Act* is likely to enable the Minister to make encompassing agreements with industry for management services. So it would be important to differentiate the type of arrangements that the Minister might make with First Nations as opposed to commercial or recreational users. Co-management agreements with First Nations must respect the fiduciary relationship between the Crown and First Nations and Aboriginal and treaty rights including title.

2. Ensure that policy tools support First Nation co-management processes that are separate from commercial and recreational fisheries

First Nations are likely to want to design fisheries that are separate from other resource users in order to meet their own social or economic objectives. As a result, licencing and management tools under the *Fisheries Act* need to be flexible in order to support these possibilities during both pre-treaty and post-treaty phases.

3. Participate in design of new policy development and advisory processes and ensure particularly that they meet the Crown's consultation obligations

DFO consultation with First Nations (and others) on policy changes often occurs after policy directions are already set. Yet some of these changes may have significant impacts on First Nations access to fish. Modern treaties provide some examples of models for consultation and co-management with First Nations. But Canada has been reluctant to apply these broadly. As a result, First Nations are asked to participate in multi-sector advisory processes which are unsatisfactory and may not meet legal requirements.

4. Install checks to avoid conflicts of interest that may occur if industry delivers operational management services

Some might see new operational management arrangements with industry as putting the fox in charge of the chicken coop. There is potential for manipulation and checks need to be in place to ensure that data and information collected by industry or third parties is accurate and that problems are detected at an early stage. Similar concerns arise with environmental assessment where proponents

are asked to do impact assessments and follow through with monitoring. Adequate resources must be available for review and auditing of third party operated programs.

5. Avoid undue resource rents on First Nation fisheries

Fisheries Act changes are aimed at covering management costs through cost recovery. Costs of managing First Nation fisheries may be higher as they are generally smaller and generate less revenue. Careful consideration needs to be given to the type of monitoring and management programs and associated costs in the planning stage.

6. Promote full First Nation representation and participation at all levels of fisheries policy development and planning, management decision making and operational planning

First Nations must be prepared to organize themselves to participate at all levels of decision making. Processes are needed for selection of representatives as well as mechanisms for reporting back to national, regional and local First Nation organizations and governing bodies. Separate planning tables should be promoted for First Nations (tier 1), for First Nations and Canada (tier 2) and First Nations, Canada and third parties (tier 3). As well, First Nations need to build capacity to fully engage Canada and stakeholders on technical and management issues.

3.5. Habitat Management

Protection of habitat is currently a federal government responsibility. However fulfillment of this mandate requires close cooperation with provincial and territorial governments due to their jurisdiction over lands. Using the same reasoning, First Nations are an essential partner due to the large reserve land base but also their proprietary interest in land by virtue of Aboriginal and treaty rights and title. Strong fish habitat protection measures are essential to ensure protection of Aboriginal and treaty rights to fish over the long term. Aboriginal and treaty rights to fish would no longer have meaning if the fish and the habitat they depend on no longer exist. Although Canada has strong legislation and policies for protecting habitat, implementation can be problematic. Canada has undertaken programs to update and modernize habitat referrals. Increasing attention and resources needs to go towards assessment of compliance and monitoring of habitat status and First Nations could play a prominent role.

Habitat Management under the Fisheries Act 1985

Provisions of the *Fisheries Act* deal with fish habitat protection and pollution prevention (s. 34-42) and construction of fishways (s. 20-22). The Act prohibits the deposit of deleterious substances in or nearby water frequented by fish; requires reports, plans and studies for works that are likely to affect fish habitat; authorizes inspectors to investigate offences; details maximum fines and possible imprisonment for offences; outlines

responsibility for clean-up; and provides for annual reporting by the Minister to Parliament on habitat protection and pollution protection.

DFO Habitat Management Approach

Possible changes to support habitat program improvements could:

- Clarify habitat protection provisions; and
- Provide for alternatives to proceeding with charges and for directing fines for use in habitat restoration.

No First Nations considerations were identified by DFO regarding proposed changes in habitat management.

First Nation Perspectives

Atlantic First Nations raised concerns about inadequate conservation and habitat protection by DFO (APC 2005). Mi'kmaq, Maliseet and Passamaquoddy First Nations actively participate in habitat enhancement and employment approximately doubled (152 to 301) during the Marshall Response Initiative. They want to see similar increases in coming years.

In BC, habitat is a major concern with First Nations and many are involved in programs to protect and restore habitat (FNP 2004: 52). The First Nation Panel on Fisheries proposed allocation principles and objectives (FNP 2004: 58). These included that aquatic species and their habitat are held in trust by governments, and that use carries with it responsibility to ensure their continued and unimpaired use and enjoyment for future generations.

AFN recently held workshops on Aboriginal Inland Habitat Program (AFN 2005). First Nations unanimously supported building capacity to actively participate in protection of fish habitat but recommended that the program be developed in collaboration with First Nations.

Habitat Management Policies and Trends

DFO maintains jurisdiction over habitat but must work with the provinces and territories to manage it. Since 1986, DFO's Habitat Management Program has been guided by the "no net loss" principle for the protection of these habitats (Anon. 1986). The first and preferred approach is prevention of habitat loss. DFO policy also stipulates that where a harmful alteration of habitat is authorized by the Minister, losses shall be compensated by habitat replacement. Habitat referral processes vary among the provinces and territories. The Environmental Process Modernization Program has five key elements: development of a science based risk management program so that science review efforts are focused on projects with the greatest degree of risk; regulatory streamlining for low risk activities such as development of detailed operational statements and guidelines; internal program improvements to coherence and predictability; a renewed emphasis on partnering with

provinces, industry, Aboriginal groups, non-governmental organizations and municipalities; implementing a new management model for “major projects”; and habitat compliance modernization with increased emphasis on monitoring and auditing regulatory decisions and adequate resourcing of compliance activities.

The Atlantic Fisheries Policy Framework clearly states that the Minister will continue to have authority over habitat. Protection of habitat is embodied in the principles of conservation and sustainable use and ecosystem management. There are several references to marine habitat. For instance, it is noted that the impacts of particular fishing methods and gear types on fish resources and habitat are of continuing concern. It is acknowledged that fishing can have impact on habitat and non-targeted species. Also harvesting methods in some marine areas, result in higher risks than others for marine mammals, birds, plants, corals and habitat integrity. It is identified that closing fisheries to protect biodiversity or to support recovery of a stock or fish habitat, could also be a best use in certain situations (AFPR p. 24). An action identified for AFPR Phase II is the use of oceans management measures, including Marine Protected Areas, to protect the most vulnerable habitats and areas of biological importance.

In the Pacific Region a Wild Salmon Policy was put in place in June 2004. Its goal is to restore and maintain healthy and diverse salmon populations and their habitats in perpetuity. “Objective 2” is to maintain habitat; “Strategy 2” is assessment of habitat status and “Strategy 3” is inclusion of ecosystem values and monitoring. A new focus on the salmon habitat that is most productive, limiting, or at risk in a Conservation Unit (a management area unit) will clarify decision-making and better link habitat management strategies to harvest and salmon assessment (“Strategy 4”). Low risk activities, where measures to avoid or mitigate impacts are well understood, will be dealt with through other mechanisms such as guidelines and standards. This approach will ensure that all habitats are addressed and resources are focused where most required. In order to effectively manage and protect aquatic systems where the productive capacity of habitat is at highest likelihood of loss, DFO must integrate its work with that of provincial governments and other federal agencies, First Nations governments, stewardship groups, industry, and stakeholders.

Some First Nations in the Atlantic and Pacific regions have been involved in habitat monitoring through AFS.

DFO created an Aboriginal Inland Habitat Program (AIHP) in 2003 aimed at capacity building for fish habitat management in Quebec, Ontario, Manitoba, Saskatchewan and Alberta (AFN 2005). Annual funding for the program was \$1.8 million or about \$400,000 per province. In 2004, DFO approached six communities regarding interest in pilot programs but soon realized the pilot project approach was too limited and froze the program. DFO then approached AFN to conduct workshops with First Nations to understand and review AIHP. These workshops were conducted from January to March 2005. First Nations were unanimously in favour of the program objective but asked for further engagement on design of the program including an allocation process for funding between the provincial areas. Participants in the AFN workshop identified insufficient

funding as a major gap.

Priority Habitat Management Issues

1. Be wary of transfer of further habitat responsibilities to the provinces and territories including the effects on habitat protection and federally funded First Nations habitat programs

DFO presentations mentioned the need to clarify habitat protection provisions. It is possible that this could include transfer of habitat responsibilities to provincial or territorial governments. This would be consistent with the Environmental Process Modernization Program that moves towards less DFO involvement in routine habitat referrals. Changes will presumably result in cost savings for DFO and more responsibility for the provinces who issues permits that may affect habitat. In some provinces responsibilities for assessment and monitoring are increasingly passed on to developers such as forest companies. At the same time Pacific Region's Wild Salmon Policy foresees increased monitoring of ecosystem indicators and habitat essential for wild salmon production although it is not identified who would do this monitoring.

It is important to ensure that there are adequate resources for habitat protection for the long term. At least one non-governmental organization, the Suzuki Foundation, expressed concerns that legislation could be weakened if habitat responsibilities were transferred to the provinces. Through the Aboriginal Inland Habitat Program, the federal government has been proactive about First Nation participation in habitat protection. If federal responsibilities for routine assessment and monitoring are reduced then resources for First Nation involvement might be seen as a new provincial responsibility and less of a federal priority for funding.

2. Demand regular reporting to the public on habitat condition and better habitat assessment and monitoring

First Nations should be concerned about fish habitat degradation since it may irreversibly affect fish production and First Nations access. A recent review of habitat compensation in Canada concluded that it was not possible to determine the effectiveness of no net loss policies due to inconsistent monitoring by proponents (Harper and Quigley 2005). Urban development and road corridor development accounted for the greatest loss of habitat in terms of area. This is consistent with Pacific Region's Wild Salmon Policy that identifies habitat as critical for long term sustainability of wild Pacific salmon populations and the need for new monitoring systems. Consistent monitoring requires adequate resources, proper training, and standardized approaches to data management and monitoring programs. While legislation typically does not address implementation, it may help to include a more explicit reference to habitat

protection and monitoring in *Fisheries Act* principles.

The Minister is required to report annually on incidents of pollution. Requirements to report annually on habitat status should be added.

3. Avoid weakening of sanctions for habitat infractions

Alternatives to charges for habitat offences have not been identified. If new legislation provides alternatives to charges it will be important that penalties are adequate to provide a deterrent. Otherwise developers may look at the risk of being caught for habitat infractions as merely “a cost of doing business”. Typically most agency monitoring of development occurs in the approval phase. Sanctions may also need to be provided in the post-project monitoring phase to ensure that habitat impacts and compensation are within acceptable guidelines.

4. Promote enhanced First Nation roles in habitat monitoring and enforcement

First Nations depend on fish resources and view their role as protecting the land and resources. First Nations also have habitat responsibilities by virtue of Aboriginal and treaty rights and many are already involved in habitat restoration and monitoring. Hence there are co-management opportunities for partnerships with federal agencies on habitat responsibilities by building on AFS and AIHS. This may not need to be addressed specifically in legislation at this time. It should not be overlooked that under other legislation Canada is already engaging in measures to protect marine species and habitat. First Nations need to seek opportunities to engage in processes to establish marine protected areas, marine conservation areas or wildlife refuges under the *Oceans Act*, the *Canada National Marine Conservation Areas Act* and the *Canada Wildlife Act*.

3.6. Administrative Sanctions as an Enforcement Alternative

Administrative sanctions are being considered as an alternative to traditional deterrents such as enforcement and processing of charges under the *Fisheries Act* through the legal system. Administrative sanctions are being proposed as a primary tool. They could substantially reduce the cost of enforcement. While this system could work with the commercial fishery it is unclear how acceptable it would be with the First Nation fishery.

Administrative Sanctions under the Fisheries Act 1985

The *Fisheries Act* is set up to deal with licence, habitat or other infractions through the court system. As well a system of penalties including fines up to \$1 million (for repeat habitat offences) and/or imprisonment is specified (s. 40). Tickets also may be issued by a fishery officer, fishery guardian or inspector for infractions of regulations that can result

in either a court appearance or payment of fines less than \$1000 (s. 79.7). Licence suspensions are another option.

DFO Administrative Sanctions Approach

Some resource users have called for establishment of an administrative sanctions system as the primary tool for handling licencing violations. Proposed options could include:

- An administrative tribunal operating at arm's length to DFO on the east and west coasts to impose licence sanctions and associated supplemental financial penalties on licensed fishers and to process tickets for minor infractions; or
- An internal sanctioning process.

Aboriginal considerations include:

- Discussion whether administrative sanctioning would be appropriate in the Aboriginal fishery

First Nation Perspectives

In British Columbia there continues to be large numbers of aboriginal cases in the courts for *Fisheries Act* offenses. In 2004 DFO proposed the use of tickets for fisheries offences in the Pacific Region. Issues raised by legal counsel for the BC Aboriginal Fisheries Commission (Braker 2004) concerning the proposal include whether:

- Charges against First Nations peoples would continue to follow the Aboriginal Charge Approval Guidelines which is different from the process for approving charges against other persons;
- DFO would differentiate between first time and repeat offenders;
- Fines for sports fishermen who are charged under different regulations such as the *British Columbia Sport Fishing Regulations, 1996* would continue to be less than charges commonly imposed on First Nation peoples under the *Pacific Fishery Regulations, 1993* or the *Fishery (General) Regulations*; and
- Consideration would be given for community service in lieu of fines for Aboriginal people in keeping with the direction to restorative justice.

No Atlantic or Inland perspective was available on administrative sanctions.

Enforcement Policies and Trends

The Atlantic Fisheries Policy Framework suggests that co-management will engage resource users in developing procedures, compliance methods and enforcement strategies to promote conservation and improve management. DFO's role would be to audit the effectiveness of methods chosen by resource users from a conservation standpoint. It was

noted that this may require legislative changes. In AFPR Phase II, DFO expects to further develop its statutory/regulatory framework. Specific actions may include a mix of monitoring, control and surveillance that may include electronic monitoring, fleet penalties for illegal fishing practices, and increasing industry self-regulation by developing compliance protocols that set out obligations and consequences for non-compliance and making them part of fisheries management plans.

The Pacific Fisheries Reform discussion paper mentions co-management arrangements with representative industry associations through negotiated Joint Project Agreements. Typically, Individual Quota fisheries contribute to enforcement costs as well as pay for the improved fishery monitoring and reporting systems and incremental scientific research.

Priority Enforcement Issues

1. **Consider new processes for charges or tickets for First Nations peoples on a case by case basis providing these are respectful of legitimate Aboriginal and treaty rights**

Processes for handling offences that may have Aboriginal or treaty rights implications are already different from others. So, administrative processes for deciding whether to charge First Nations persons likewise need to be different. The fact that the courts are full of Aboriginal and non-Aboriginal individuals charged with fisheries offences may be a symptom of more fundamental problems. If Aboriginal and treaty rights are at stake then these need to be dealt with directly rather than seeking a way to reduce the administrative burden.

2. **Support integration of administrative sanctions and other penalties into Aboriginal justice systems**

Canada is embarking on Aboriginal restorative justice programs in other areas. One problem is that restorative justice does not work if the community does not believe that what the individual did was wrong. So it is unlikely to be effective in the face of individuals who feel strongly that they are exercising Aboriginal or treaty rights. As well, there needs to be some parity between penalties for First Nations persons and commercial or sports fishers who commit similar offences.

3. **Provide processes for First Nations to have input to sanctions for offences by non-Aboriginals within their traditional territories**

First Nations access to resources may be negatively affected by *Fisheries Act* offences such as illegal fishing in their traditional territories. So First Nations should have an opportunity to determine sanctions such as community service or applying proceeds from fines to activities that benefit the local area such as habitat or resource restoration.

4. Summary

This paper has attempted to scope Aboriginal implications of a variety of legislative changes proposed to the *Fisheries Act*. Changes embrace new approaches to governance, access and allocation, licencing, co-management, habitat management, and administrative sanctions. Some of these changes are already underway in some parts of Canada and may have been discussed during various public processes. However, First Nations have had little opportunity to look comprehensively at these changes and assess the direction that they are going. Issues were identified based on experience with First Nations and some limited discussions with others.

Several follow-up steps are recommended. These include:

- The need for First Nation policy forums to review regional issues and how these might be supported or affected by new laws and regulations; and
- A legal analysis of issues, although this would be somewhat limited by the lack of specific proposals or language describing the changes.

A summary of recommendations that were made throughout the report is provided in Appendix A.

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Appendices

- A. Summary of Recommendations**
- B. Definitions**
- C. Atlantic Fisheries Policy Framework: Vision, objectives and principles**
- D. New Directions (Pacific Salmon Fisheries): Principles**
- E. Pacific Fisheries Reform Discussion Paper: Principles**

Summary of Recommendations

Governance

- ⇒ Ensure meaningful references to Aboriginal and treaty rights with linkages to modern treaties, self government and the right to manage fisheries
- ⇒ Ensure that *Fisheries Act* changes are consistent with modern treaty arrangements
- ⇒ Carefully weigh the overall effects of delegating responsibilities to the Provinces or industry groups
- ⇒ Consider effects of elevating management responsibilities for industry groups and others.
- ⇒ Challenge the concept of the fishery as a “common property resource”.
- ⇒ First Nations should collaboratively define processes for participating in national and regional fishery management structures to meet conservation needs.
- ⇒ Incorporate in principles respect for First Nation values and application of traditional knowledge to fisheries management
- ⇒ Promote viable coastal communities as a management principle

Access/Allocation

- ⇒ Reflect in legislative principles the First Nations priority to fisheries
- ⇒ Deal with First Nation allocations up front before others’ property rights are further entrenched
- ⇒ Support policies and processes for addressing new Aboriginal access and allocations
- ⇒ Exercise caution in defining “best use” criteria, particularly principles which may favour increases in recreational access to fisheriesExercise caution in defining “best use” criteria, particularly principles which may favour increases in recreational
- ⇒ Avoid delegation of decisions on First Nations allocations to an arms length board

Licencing

- ⇒ Avoid creation of property rights or further enhancement of privileges in fisheries until First Nations access and allocations are addressed
- ⇒ Support opportunities to design First Nation fisheries that are differentiated from commercial fisheries
- ⇒ Provide tools for design of economically viable First Nation fisheries

Co-management

Appendix A

- ⇒ Respect the special relationship between the Crown and First Nations
- ⇒ Ensure that policy tools support First Nation co-management processes that are separate from commercial and recreational fisheries
- ⇒ Participate in design of new policy development and advisory processes and ensure particularly that they meet the Crown's consultation obligations
- ⇒ Install checks to avoid conflicts of interest that may occur if industry delivers operational management services
- ⇒ Avoid undue resource rents on First Nation fisheries
- ⇒ Promote full First Nation representation and participation at all levels of fisheries policy development and planning, management decision making and operation

Habitat management

- ⇒ Be wary of transfer of further habitat responsibilities to the provinces and territories including the effects on habitat protection and federally funded First Nations habitat programs
- ⇒ Demand regular reporting to the public on habitat condition and better habitat assessment and monitoring
- ⇒ Avoid weakening of sanctions for habitat infractions
- ⇒ Promote enhanced First Nation roles in habitat monitoring and enforcement

Administrative sanctions/Enforcement

- ⇒ Consider new processes for charges or tickets for First Nations peoples on a case by case basis providing these are respectful of legitimate Aboriginal and treaty rights
- ⇒ Support integration of administrative sanctions and other penalties into Aboriginal justice systems
- ⇒ Provide processes for First Nations to have input to sanctions for offences by non-Aboriginals within their traditional territories

Definitions

Definitions are taken from Policy Framework for Atlantic Fisheries (Anon. 2004) unless otherwise noted.

Access. The opportunity to harvest or use fisheries resources, generally permitted by licences or leases issued by Fisheries and Oceans Canada under the authority of the Minister of Fisheries and Oceans. The department must take Aboriginal and treaty rights to fish into account when providing these opportunities.

Allocation. The amount or share of the fisheries resource and/or effort that is distributed or assigned by the Minister of Fisheries and Oceans to those permitted to harvest the resource (see also Enterprise allocation and Quota).

Best use decisions. These decisions concern the access and allocation of fisheries resources among different uses. They also involve the determination of the particular uses of a fisheries resource that will generate the greatest possible public good or best serve the interests of all Canadians.

Biodiversity. Biodiversity, also known as biological diversity, is the variability among living organisms from all sources, including terrestrial, marine and other aquatic ecosystems, and the ecological complexes of which they are part. It includes diversity within species, between species and of ecosystems.

Co-management. Two definitions cited in Berkes (2005: 6) are “The sharing of power and responsibilities between the government and resource users” (Berkes et al. 1991: 12) and “A system that enables a sharing of decision-making power, responsibilities between the government and stakeholders” (NRTEE 1998, 14).

Commercial fisher. Any person who participates in an authorized commercial fishery, including skippers and fishermen’s helpers.

Conservation. Sustainable use that safeguards ecological processes and genetic diversity for present and future generations.

Ecosystem. A dynamic complex of plants, animals and micro-organisms and their non-living environment interacting as a functional unit.

Ecosystem-based management. Taking account of species interactions and the interdependencies between species and their habitats when making resource management decisions.

Fishing licence. An instrument by which the Minister of Fisheries and Oceans, pursuant to discretionary authority under the *Fisheries Act*, grants permission to a person, including an Aboriginal organization, to harvest certain species of fish or marine plants subject to the conditions attached to the licence. This is a temporary grant;

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licences are issued for a fixed period, usually annually.

Fleet separation policy. (In the Atlantic region) the fleet separation policy applies to fishing vessels less than 65 feet in length and separates the harvesting and processing sectors. It does not recommend the issuance of new inshore licences to corporations, including processing companies.

Governance. The various systems of authority and decision making in fisheries management combined. It also includes participation in consultation, planning and decision-making processes by resource users and other interested parties.

Governor in Council. In Canada, the governor in council is the governor general acting on the advice of the federal cabinet. Orders in council and minutes of council are signed by the governor general giving legal force to cabinet decisions relating to a statutory authority or the royal prerogative. Online at:
<http://canadaonline.about.com/cs/gg/g/govincouncil.htm> .

Individual Fishing Quota. A (Federal) permit under a limited access system to harvest a quantity of fish, expressed by a unit or units representing a percentage of the total allowable catch of a fishery that may be received or held for exclusive use by a person (Ocean Studies Board 1999)

Individual Quota or Individual Transferable Quota. Under an Individual Quota (IQ) management system, the available catch (quota for a particular stock) or portion of the available catch is divided among individual fishers, fishing units or fishing enterprises before the fishing season. Each individual unit or enterprise is assigned a fixed share of the quota assigned to the fleet, either as a specific quantity or as a percentage of the quota. This is done for one year or for a longer period. An Individual Transferable Quota (ITQ) is transferable if the quota share can be temporarily or permanently leased or traded to another licence holder. (In Atlantic Canada) IQ management generally applies to vessels under 65 feet long.

Inland fishery. This is a fishery in non-tidal waters where there may be mixed federal and provincial jurisdiction and policies. The two largest inland fisheries in Canada are in the Great Lakes and Lake Manitoba. (author's definition)

Limited entry. The mechanism by which Fisheries and Oceans Canada controls the number of licence holders who participate in any given fishery.

Owner-operator policy. (An Atlantic region policy that) applies to licence holders using vessels less than 65 feet long. It requires licence holders to be present on their vessel and personally fish their licences.

Precautionary decision making. A special category within conservation-oriented decision making, to be applied when there is high scientific uncertainty and risk of serious or irreversible harm.

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Quota. The percentage share of the Total Allowable Catch that is allocated to a specific group or to an enterprise (i.e., a fleet or fleet sector, a defined set of resource users or an individual).

Recreational fisher. A fisher who participates in a fishery in which fish can be either released or used for personal consumption (i.e., not sold). "Recreational fisher" also applies to a person who participates in the non-Aboriginal subsistence or food fishery.

Species at Risk Act. The Species at Risk Act, which entered into force in June 2003, seeks to prevent wildlife species from becoming extirpated or extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened.

Sustainable development. Development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs. It implies a specific commitment to the management of coastal regions and resources in an environmentally responsible manner that defines and acknowledges risk.

Total Allowable Catch (TAC). The total amount of fish allowed to be caught from a particular stock by all resource users over a particular period of time.

Trust Agreements. (In the Atlantic region) trust agreements are legally binding private contracts sometimes used to transfer the beneficial interest associated to a licence from a licence holder to another party. Fisheries and Oceans Canada is not a party to such agreements and does not condone them.

Excerpt from A Policy Framework for the Management of Fisheries on Canada's Atlantic Coast (Anon. 2004: 15-17)

2 Vision for the Management of the Atlantic Fisheries

2.1 The Vision

Vision

The Atlantic fisheries will become a biologically sustainable resource supporting fisheries that:

- are robust, diverse and self-reliant;
- effectively involve all interests in appropriate fisheries management processes;
- are sustainable and economically viable, contributing to the economic base of coastal communities; and
- provide for the constitutional protection afforded Aboriginal and treaty rights and where Aboriginal and non-Aboriginal resource users work collaboratively.

This framework provides policy direction for the management of fisheries on the Atlantic coast over the long term. Although the focus of the document is on commercial harvesting, it recognizes that the fishery is a valuable and vital common property resource to be managed for the benefit of all Canadians and acknowledges the diversity of uses of fisheries resources. The document advocates a broad, inclusive approach to fisheries management while managing in a manner consistent with the constitutional protection provided to Aboriginal and treaty rights. The framework is based on a clear, achievable vision for the future of the Atlantic fisheries.

Conservation and sustainable use of resources and habitat must be the overarching, and indeed the fundamental, objective for fisheries management on Canada's Atlantic coast. Conservation is essential if fisheries are to be self-reliant, viable and capable of contributing to the economic and social base of coastal communities over the long term.

To achieve the vision of biologically sustainable resources supporting self-reliant and viable fisheries, there will be a continued shift away from strictly top-down management to shared stewardship. Participants will be given opportunities to communicate and work together, to contribute specialized knowledge and experience, and to be effectively involved in decision making. By sharing in and endorsing the decision-making process, participants will be responsible not only

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for the interests they represent, but also for the conservation and sustainable use of fisheries resources. They will also be expected to acknowledge the legitimacy of the process by which decisions are made and to abide by these decisions.

The shift from top-down management to shared stewardship also implies an evolution in the role of Fisheries and Oceans Canada, from one largely taken up with day-to-day management of fleets and fishing activities to one concerned primarily with developing policy, setting strategic direction and evaluating performance. To achieve this fully, certain fisheries management responsibilities will be delegated to resource users. The department will continue to provide sound scientific advice, establish required conservation measures, and ensure compliance.

2.2 Objectives

To make the vision for the Atlantic fisheries a reality, this framework identifies two core objectives and two supporting objectives. These four objectives describe the outcomes that Fisheries and Oceans Canada will strive to achieve in collaboration with resource users and others who have an interest in the Atlantic fisheries. The framework also sets out policy strategies, including specific actions calculated to achieve the four objectives. The principles that underpin these objectives and strategies are outlined in section 2.3 below.

The two core objectives are:

Conservation and Sustainable Use

Conservation of marine resources and habitat, and rebuilding of resources and restoration of habitat where necessary, will remain the highest priority for the management of all fisheries. Within the limits of available knowledge, all fishing activities will be conducted in a manner that leads to sustainable levels of resource use.

Self-reliance

Self-reliant fisheries and collaboration among all orders of government will contribute to the well-being of coastal communities. To be more self-reliant, resource users will have more flexibility to make decisions about their own economic and social objectives.

Achieving these two core objectives demands:

Shared Stewardship

Participants will be effectively involved in fisheries management decision-making processes at appropriate levels; they will contribute specialized knowledge and experience, and share in accountability for outcomes. Achieving shared stewardship requires:

A Stable and Transparent Access and Allocation Approach

The access and allocation of fisheries resources will be more stable and predictable, and decisions will be made and conflicts resolved through fair, transparent and rules-based processes.

2.3 Principles

The following principles are intended to guide decision making on management of the Atlantic fisheries. They will also serve as a tool for evaluating future fisheries management policies and decisions and ensuring their coherence with the framework's objectives. Together, the vision, the four objectives and the principles provide the foundation for the management of fisheries over the long term and set the stage for further development of operational plans in Phase II of the review. There are nine principles:

- Conservation of fisheries resources and habitat—defined as sustainable use that safeguards ecological processes and genetic diversity for present and future generations—is the first priority of fisheries management decision making.
- The fishery is a common property resource to be managed for the benefit of all Canadians, consistent with conservation objectives, the constitutional protection afforded Aboriginal and treaty rights, and the relative contributions that various uses of the resource make to Canadian society.
- The Minister of Fisheries and Oceans, on behalf of all Canadians, retains authority for the sustainable use of fisheries resources and their habitat, and for the access and allocation thereof.
- Fisheries and Oceans Canada recognizes the historic and continued importance of commercial fisheries on the Atlantic Coast as well as the legitimacy and importance of other users, such as recreational fishers and aquaculturists.
- Governments, resource users and others with an interest in the fisheries share responsibility for the sustainable use and economic viability of fisheries.
- Fisheries management decision-making processes will provide opportunities for increased Aboriginal participation and involvement.
- Fisheries management decision-making processes must be, and must be seen to be, fair, transparent and subject to clear and consistent rules and procedures.
- Fisheries management decision-making processes will be more inclusive so that resource users and others will have appropriate opportunities to

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participate.

- Operational decision making affecting specific fisheries will normally be made as close to those fisheries as possible and will primarily involve resource users.

**Excerpt from A New Direction for Canada's Pacific Salmon Fisheries
(Anon. 1998a)**

Principles

Conservation

1. Conservation of Pacific salmon stocks is the primary objective and will take precedence in managing the resource.
2. A precautionary approach to fisheries management will continue to be adopted.
3. Continue to work toward a net gain in productive capacity for salmon habitat in British Columbia.
4. An ecological approach will guide fisheries and oceans management in the future.

Sustainable Use

5. The long term productivity of the resource will not be compromised because of short term factors or considerations – tradeoffs between current harvest benefits and long term stock wellbeing will be resolved in favour of the long term.
6. All sectors – First Nations, recreational and commercial – will use selective methods to harvest salmon.
7. First Nations requirements for food, social and ceremonial purposes will continue to have first priority after conservation requirements.
8. Whenever possible, the recreational fishery will be provided with more reliable and stable fishing opportunities.
9. The commercial fishery will be a more diversified (less dependent on salmon) and economically viable sector, better able to withstand fluctuations in the cycles of the resource and the market.

Improved Decision Making

10. Clear, objective and relevant information on major issues requiring decisions will be provided to the public with sufficient time and opportunity for review, comment and feedback. Periodic review of progress and achievements will be initiated to facilitate accountability for the sound management of the salmon resource and its habitat.
11. Government and stakeholders will together be responsible and accountable for sustainable fisheries.
12. Enhanced community, regional and sector wide input to decision making will be pursued through a structured management and advisory board system.

**Excerpt from Pacific Fisheries Reform Discussion Document
(Anon. 2005: 27-28)**

Principles for Pacific Fisheries Reform

The introduction of changes to the management of Pacific fisheries will be consistent with the following principles:

- **Conservation is paramount** (e.g. consistency with the Wild Salmon Policy)
- **Consistent legal framework**
 - Pacific fisheries resources are a common property resource managed by the Minister of Fisheries and Oceans
 - Fisheries must be conducted under an integrated management plan authorized by the Minister, and
 - Commercial participants fish under the same priority of access and similar rules
- **Aboriginal and treaty rights of First Nations**
 - First Nations access to food, social and ceremonial fisheries will be respected, and
 - First Nations interests in increased economic access will be addressed in a manner consistent with Canada's treaty process
- **Fair transfer of fishing opportunity**
 - Transfer of economic fishing opportunity to First Nations will be accomplished through voluntary licence retirement from willing sellers, and within existing programs, to mitigate impacts on established fishers
- **Stable resource access and allocation**
 - Certainty will be provided for allocations between harvest sectors (First Nations, recreational and commercial)
 - Allocation policy as it pertains to Chinook and Coho salmon will be maintained
 - Certainty of harvest shares will be provided to commercial participants, and Commercial harvesters will enjoy a similar level of certainty regarding fisheries access
- **Responsibility and accountability**
 - First Nations and stakeholders will assume a greater role in operational decision-making and program delivery through effective co-management processes
- **Management regimes for commercial fisheries**
 - Fleets will be enabled to self-adjust
 - Resource management practices will be designed to optimize economic performance while meeting conservation objectives

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- Fleets will have the capacity to assume a larger share of the cost of management of their fishery
 - Catch monitoring and independent validation will be implemented, and
 - Measures will be adopted to provide confidence that adequate compliance is achieved
- **Transition and adjustment**
 - Existing government programs will be coordinated to best meet the needs of those impacted by change