

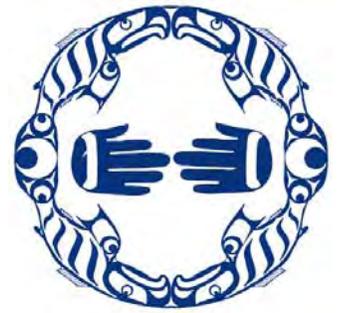
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FIRST NATIONS
FISHERIES COUNCIL

August 27, 2010

Trevor Swerdfager
Director General, Aquaculture Management
Fisheries and Oceans Canada
200 Kent Street, Ottawa, ON, K1A 0E6

***Re: Draft Pacific Aquaculture Regulations and B.C. First Nations engagement
in the development of an Aquaculture Management Framework for the Pacific***

Dear Mr. Swerdfager;

The B.C. First Nations Fisheries Council (FNFC) is writing to you today to outline concerns which B.C. First Nations have brought forward to the Council with respect to the development of the Pacific Aquaculture Regulations, and the associated Aquaculture Management Framework for the Pacific.

Since December 2009 the FNFC has been working with Fisheries and Oceans Canada in good faith to provide advice related to: (1) improvements in consultation and engagement of B.C. First Nations in the Pacific aquaculture regulatory development process; and (2) substantive recommendations with respect to the development of the Pacific Aquaculture Regulations. The FNFC has been driven by the overarching goal of promoting a process of meaningful engagement to develop regulations which will be respectful of the constitutional rights of First Nations who view that the aquaculture industry may constitute a potential infringement of their asserted rights and Title.

As part of this process, the FNFC developed policy analysis related to aquaculture regulations, and then co-hosted a series of nine community sessions with DFO around B.C. to disseminate information to First Nations communities and to facilitate discussions between DFO and communities to support the drafting of the new B.C. regulations.

Following the release of the draft Regulations in Canada Gazette 1 on July 10, 2010, the FNFC hosted a teleconference open to all First Nations in which you participated. The FNFC has also been engaged with DFO through the joint DFO/FNFC Aquaculture Working Group (AWG) and tabled a draft Workplan on July 29, 2010, which proposed funding to support the capacity to review both the current draft of the Pacific Aquaculture Regulations, to support community capacity to provide feedback on the Regulations and the

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associated Management Framework, to identify an engagement strategy on the development of the Management Framework, and to structure a capacity for dedicated support to the Aquaculture Working Group. Almost a month later, and nearing the deadline for responses with respect to the substance of the Regulations, the Working Group is still awaiting a response from DFO on the Workplan which was jointly prepared with B.C. Region DFO staff.

Implementation of the Pacific Aquaculture Regulations in B.C. have the potential to infringe on the rights and Title of B.C. First Nations. We have already sent a letter to the Minister outlining our concerns with the consultation process and the lack of adequate collaborative working relations with B.C. First Nations since the release of the regulations in Canada Gazette 1 on July 10, 2010 (see *Letter to Minister Shea, August 10, 2010*). In addition, the Fisheries Council sent an e-mail to Andrew Thompson on August 10/10, and provided copies of correspondence relating to concerns raised by the Leadership Council to the Minister on August 10/10, to which there has been no response.

The Fisheries Council has not been able to negotiate any dedicated funding to support aquaculture work within the 2010/2011 fiscal year, and has a limited capacity at present to conduct a thorough analysis of the draft Pacific Aquaculture Regulations or to make recommendations with respect to the associated management framework. In addition, without the ability to conduct meetings and community engagement, it is difficult for the Fisheries Council to advise DFO on the key interests and issues which would be expressed by First Nations communities.

We also feel compelled to point out that the review period for the Regulations has overlapped with summer fishing season, during which many coastal First Nations are engaged in fishing and related science, research, and management activities. The timing of the Gazette I review period has not been conducive to the engagement of many First Nations with direct interests and concerns in the marine environment, as they are out practicing those activities which are the basis of their rights and Title assertions.

Due to the impending deadlines, however, the Fisheries Council is taking the unusual step of developing this open letter to you, and will be inviting B.C. First Nations to provide commentary with respect to this letter or to use this letter to highlight their own specific issues and concerns with respect to the draft Pacific Aquaculture Regulations or the new Aquaculture Management Framework.

1. Concerns with Consultation

This issue has been outlined in a number of letters from various organizations, but in summary First Nations do not feel that they have been sufficiently engaged by DFO in the creation of the draft Pacific Aquaculture Regulations. The timeline for engagement was too short and many First Nations do not feel that they have adequate capacity at the Nation scale to provide the type of detailed feedback which they is warranted due to the potential of a significant rights infringement through the activity of aquaculture within their territories.

First Nations expect deep, robust, and meaningful consultation and accommodation with respect all licensed aquaculture activity in their territories and expect involvement in all decisions which have the potential to affect their resources, territories, rights and Title. DFO has stated they will be consulting on the development of the Management Framework (including: license conditions, operational policies and guidelines, process and substance of Integrated Aquaculture Management Plans (IAMP), science and

research, and enforcement), but at this point appear unwilling to engage with the Council in any sort of planning or preparation for that consultation. First Nations want to see a measure of good faith that DFO will follow through on this commitment, including discussions immediately about the timelines and process for this work.

2. First Nations Need a Key Role in Decision Making in Area Based-Management

DFO has made statements that relate to a comparison of the management of aquaculture with the management of other fisheries, which includes the intent to develop Integrated Aquaculture Management Plans. Presumably this also means that DFO intends to develop Areas to which these plans are associated, and a process which supports the annual review and development of these plans (like the current Integrated Harvest Planning Committees (IHPC) for other fisheries).

DFO needs to clearly understand that most B.C. First Nations view the current IHPC processes as dysfunctional, and the Fisheries Council as well as other First Nations organizations in B.C. have urged DFO to make numerous changes to these processes. Some of these changes include: increasing the number of seats available on IHPC processes for First Nations; developing a bilateral table at which DFO and First Nation sit down together to specifically address any issues relating to rights and Title; the need for Canada to provide adequate funding (travel, fees, and technical support) for B.C. First Nations participation (which cannot be expected to be absorbed through the already fully allocated AAROM program); and that First Nations expect to be engaged in science, research, and enforcement, especially with respect to areas where they identify their traditional knowledge should play an important role in management or where there is a high potential of rights infringement. DFO, aware of these concerns, should not be duplicating fundamental structural problems and systemic discrimination which are inherent in other fisheries management processes within the new management regime for aquaculture.

First Nations assert priority rights related to economic aspects of fisheries (rights proven in the Courts in through cases such as *Ahousaht* and *Gladstone*). These asserted priority rights will certainly extend to aquaculture (we have already seen issues arising due to a lack of proper consultation and accommodation relating to geoduck and other shellfish farming). As you are likely aware, clam gardens and other locally tended marine resources date back over 10,000 years on the B.C. coast and are well documented. There need to be mechanisms to deal with the issue of economic access for First Nations built into the management framework for aquaculture.

DFO and First Nations clearly do not want to repeat the same systemic shortcomings in the management of current fisheries in the development of Integrated Aquaculture Management Plans. First Nations want strong representation in all aspects of decision-making under this new area based system, which is warranted due to the acknowledged high potential for rights and Title infringement within the activity of aquaculture. For this to be possible, First Nations must be engaged **at the onset** of the process (in terms of establishing areas/regions, and incorporating First Nation interests). DFO must work with First Nations to develop a new bilateral process that recognizes the unique status of First Nations, and which ensures that First Nations will have the resources and capacity to participate in the processes in a meaningful way.

3. No Mention of First Nation Title and Rights in Regulations

B.C. First Nations find it unacceptable that the Draft Regulations do not mention asserted First Nations' rights and Title. There is mention of industry in the Regulatory Impact Statement, but no mention of the

potential for impact on First Nations rights and Title. This is unacceptable to B.C. First Nations and does not appear to show a willingness on behalf of DFO to follow the federal policy on this issue (*Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult*: INAC 2008). First Nations in B.C. assert that there needs to be a clear recognition in the regulations that First Nations rights and Title, as established by case law and protected by Section 35.1 of the Canadian Constitution, will be recognized, affirmed, and upheld in the Pacific Aquaculture regulations and subsequent policies.

4. There Needs to be Meaningful Follow up in 60-day Window

First Nations requested a series of face-to-face meetings with DFO within the 60-day comment window to share their perspectives and recommendations on how the draft regulations may affect their rights and Title. This request was made to you on the conference call July 14, 2010 and at that time you appeared to confirm that you would be available for one such meeting in August. Subsequent discussions with DFO Pacific Region were met with a response that your intent was only to meet with the members of the Fisheries Council. The Fisheries Council deemed this approach unacceptable.

Given that the 60-day comment window ends on September 8, 2010 and there has been no effort on the part of DFO to accommodate a broad meeting to this point, it seems unlikely that DFO is intending to convene such a meeting. The FNFC would like to therefore impress upon DFO that it is of critical importance that DFO engage directly in face to face meetings with those B.C. First Nations who have requested consultation on the issue of the Regulations within the 60 day response window. As DFO is aware, meaningful consultation is intended to constitute a dialogue between First Nations and government, and it is not adequate for DFO to offer only one meeting to a Nation in the last days of the comment period.

5. Comment on the Specific Content of the Regulations

At this point, lacking funding to complete a review of the draft Regulations, and any details relating to the development of a Management Framework for Pacific Aquaculture, the Fisheries Council finds it difficult to provide comment or critique on the draft regulations. Many of the details which are of key concern to First Nations are not clearly addressed in the Regulations, however it is possible that they will be addressed in the Management Framework. A complete overview of issues raised by First Nations with respect to the development of the regulations was previously submitted to DFO by the First Nations Fisheries Council.

We are however, prepared to provide some specific responses to the Regulations:

- First Nations are generally supportive of improvements to the current management framework which result in increased transparency and which improve the ecosystem-based management approach.
- The introduction of an Area-Based management approach sounds positive, but further work clearly needs to be done to establish what is intended by an Area and what will be included in the new approach.
- References to Aboriginal Guardians are positive, however without a commitment that Guardians and/or Aboriginal Observers will be integrated into the management structure it is not clear that there will actually be funding available to support the training or salaries for these positions.

- As was previously outlined, First Nations in B.C. feel that it is important to have a fee structure which charges higher fees for activities deemed to pose higher risk. The current scenario which proposes to license the activity of aquaculture with no fee structure does not make sense.
- The Regulations do not deal directly with the issue of fines and charges to be laid for non-compliance. First Nations have stated that these fines should increase in severity the number of infractions. As in the fishing industry, companies who repeatedly are not able to operate within the rules should have their licenses revoked. Revenues from fines should be re-invested in science, research, and stewardship in the local area, preferably linked to a local management process which actively engages First Nations in a decision-making capacity.
- The statement intimates that site observers will only be used where there are issues with non-compliance. First Nations have stated that an observer program should be introduced in general for aquaculture, as it is in other fisheries. Participation should be mandatory and funded through industry, as it is for other fisheries. Non-compliance problems should be dealt with through fines and charges.
- It is offensive to First Nations that in the opening statement only positive statements are made with respect to First Nations engagement in aquaculture. There is a total lack of recognition of rights and Title, of issues and concerns which have been raised repeatedly by First Nations with respect to many aspects of the current aquaculture management system. The repeated emphasis in the opening statement about First Nations receiving benefits from aquaculture companies totally misses the point of the significant issues and concerns which have been repeatedly raised by B.C. First Nations with respect to the Aquaculture industry.
- The opening statement references many First Nations receiving funding or program support from Aquaculture companies. This statement, put into a positive light, totally missed the point that First Nations have asserted rights and Title upon which aquaculture activities infringe. First Nations should not have to strike deals after the fact with companies, they should be dealing up front in a decision-making capacity which protects and accommodates their asserted rights and title and allows them a jurisdictional role, not one in which they are fighting for scraps from the industry profits.
- There is no mention of an objective of Canadian ownership as opposed to Foreign ownership of the industry. Canada may want to have an objective of balanced ownership over the coming years in order to support its own food security requirements.
- The opening statement repeatedly references streamlining for aquaculture management. Issues relating to ensuring that adequate Environmental Assessment is carried out both at the federal and provincial jurisdiction is largely missing. Clarity needs to be provided about how and where these responsibilities lay prior to the transfer of jurisdiction, how they are being dealt with in the new management regime, and clarification should be provided as to whether existing tenures will be subject to an environmental assessment under the new management system.
- Enforcement and penalties – it is our understanding that despite many numerous transgressions by the industry, many resulting in the destruction of fish, fish habitat, and in some cases endangered species like abalone, no finfish aquaculture operation has ever been successfully prosecuted under the Fisheries Act. The Regulations need to clearly identify how and where charges will take place, with what mechanism and authority.
- The regulations need to specifically reference the integration of local and traditional knowledge into area-based management and the science of ecosystem health.
- The opening statement and the regulations do not clearly address some of the activities which have not traditionally been thought of as aquaculture, but which are now covered under the new

Regulatory regime, including ocean ranching, land-based fish rearing, and enhancement. It is not clear if these activities will be subject to management overviews and if they will be included in the integrated aquaculture management plans. If so, many of these activities take place in watersheds and in the interior of B.C., and there would then need to be allowance for the integrated aquaculture management plans and planning process to engage the inland areas of the province. B.C. First Nations in the interior need to be engaged in planning related to ocean ranching, land-based aquaculture, and enhancement activities.

In addition, some specific comments on the Draft Regulations include:

Sec. Opening – require a “whereas” clause at the beginning that references that nothing in these regulations will be interpreted to interfere with aboriginal rights and Title or Treaty rights.

Sec 1. Definitions should include a definition of an aquaculture facility to include any facility which deals with fish reared in the activity of aquaculture during any life stage or the processing of those fish or parts of those fish.

Sec 5. Incidental Catch – should note that if fish cannot be returned to the same area to which they were caught in healthy condition the operator will be subject to charges related to a HADD under the Fisheries Act.

Sec 10. Prohibitions should be amended to include “any part of a fish” and blood water.

6. Intergovernmental Decision Making and the Development of an Intergovernmental Memorandum of Understanding

The Regulatory Impact Statement associated with the draft Regulations details that a decision-making table and Memorandum of Understanding (MOU) will be established between the Province of B.C. and DFO in order to clarify roles and responsibilities. It also mentions that strategic decisions will be made at this table, such as those related to new areas for aquaculture, new species, etc. These decisions, which affect First Nation rights and Title, cannot be made without First Nations engagement. The Fisheries Council therefore strongly urges Canada to ensure that there is a bilateral mechanism for First Nations to be engaged in all or a part of these government-to-government discussions, to have a seat at all high level and strategic decision-making processes, and to include First Nations within the intergovernmental strategic decision-making framework for aquaculture.

To be clear, B.C. First Nations demand to be involved in all aspects of the creation and implementation of the Regulations and the associated Management Framework, as these will have a significant impact on, and potentially infringe on, asserted rights and Title. This includes a wide range of components, and to remove any confusion, the following tables provide a listing of the areas in which First Nations must be engaged.

A. Governance Aspects

Theme	Aspects
<i>Development and Design of IAMP Framework</i>	• Determination of number, sectors and location for areas
	• Management objectives for each sector
	• Specific operational directives
	• Operational guidelines and industry standards
	• Ongoing engagement process to receive feedback on IAMPs
	• Setting of regional and national departmental priorities
	• Accounting/Assessing Cumulative impacts
<i>Policy Making</i>	• Compatibility with existing policies/programs
	• Consequential amendments to other policies/regulations
	• Drafting new policies
<i>Tenures</i>	• Authorizing tenures for farming
	• Determining areas for future tenures
	• Conditions and terms for tenures
<i>Promotion of Economic Development Opportunities</i>	• Programs to increase access
	• International certification
	• International marketing
	• NASAPI – linkages to initiative, national linkages
<i>Relationship Frameworks</i>	• MoU with Province
	• Relationship with First Nations
	• Industry
	• International markets
	• Consultations with Resource Users
<i>Reporting Mechanisms</i>	• Public outreach/education
	• Transparency of documentation
<i>Accountability Functions</i>	• Regulatory Review/assessment • IAMP review of process and plans
<i>Product Safety</i>	• Setting allowable toxicity levels, contamination levels, international trading standards

B. Management Aspects

Theme	Aspects
<i>Licensing Conditions</i>	• Introductions and transfers
	• Fee structures
	• Marine mammal considerations (nuisance seal permits)
	• Fish for cultivation – number, species, cultivation origin
	• Age, sex, development of cultivation
	• Waters where farming can occur (depth, flow, etc)
	• Composition of fish feed
	• Type of equipment used
<i>Waste Management</i>	• H.A.D.D.s
	• “Authorizations” for the deposition on substances into the marine environment <ul style="list-style-type: none"> ○ Fish feed, feces, offal, blood water, disinfectants, anti-foulants, wastewater from farming operation
<i>Incidental Catch</i>	• By-catch monitoring, reporting and tracking
<i>Enforcement</i>	• Monitoring for compliance
	• Penalties for non-compliance
	• Site inspections
	• Observers at on/off loading
<i>Ecosystem Stewardship/ habitat restoration</i>	• Monitoring for environmental factors
	• Escapement monitoring and re-catchment
<i>Area Management</i>	• Marine Use Planning
	• Watershed planning (bay management plans)
<i>Disease and Parasite control</i>	• Setting targets
	• Innovation for treatment
	• Control measures to reduce transmission
<i>Managing and authorizing farms</i>	• Animal welfare consideration
	• Operational guidelines on farms
<i>Industry innovation</i>	• Support for closed containment
	• Incentives to participate
<i>Coordinating/ managing conflict</i>	• Between resource users
	• Space competition
<i>Personnel management</i>	• New staff hires
	• Developing training programs

C. Operational/Technical Aspects

Theme	Aspects
<i>Administration</i>	• Collecting fees
	• Issuing of licenses
	• Reporting on financing
<i>Operational Guidelines/ standards</i>	• Facility integrity
	• Escape management
	• Workplace safety
<i>Reporting</i>	• Processes for effective reporting
	• Record-keeping methods (what to report on)
	• Incidental by-catch reporting
Project management	• As necessary as regulations are implemented and subsequent policies developed
<i>Science and Research</i>	• Data gathering
	• Record keeping
	• Assessment
	• Mapping
<i>Monitoring and Assessment</i>	• Guardian Program
	• Environmental Assessments
	• Watchman Program

As is evident from this listing, the scope of engagement that First Nations demand is comprehensive, and critical in order to ensure that rights and Title are protected.

As you are aware, on May 26, 2010 the FNFC signed a *Commitment to Action* with DFO Pacific Region. This document affirms the commitment of DFO and the FNFC to work collaboratively together to advance issues of mutual interest to B.C. First Nations and DFO. One of the priority areas under the *Commitment to Action* is Aquaculture. As a result, the FNFC and DFO have established a joint **Aquaculture Working Group**. The FNFC recommends that DFO follow through on their commitments and work with the FNFC through the Aquaculture Working Group to address the concerns raised above. The AWG has drafted a Workplan which outlines a process to seek First Nations engagement in the areas above. The FNFC urges DFO to work through the joint DFO/FNFC AWG to timely and adequately incorporate First Nations in all decisions which will affect, and potentially infringe upon, inherent rights and Title. Effective engagement must be accompanied with sufficient resources, as many First Nation communities do not have adequate resources and capacity to effectively participate.

Conclusions

In summary, as affirmed in *Huu-ay-aht*, input from First Nations is the required first step of meaningful consultation. The FNFC is committed to working collaboratively with DFO, and to develop engagement that leads to a world class approach to aquaculture management within British Columbia that respects and protects First Nations rights and Title. In order to accomplish the development of a management framework that meets these tests, B.C. First Nations need to be engaged from the outset in a manner that allows proper contributions to the drafting and implementation of the regulations and the subsequent management framework.

The FNFC urges DFO to work with B.C. First Nations and develop a process that is meaningful and adequate to achieve the outcomes necessary to ensure the protection of B.C. First Nations rights and Title. Gathering meaningful input from B.C. First Nations, and meeting the Crown's duty to meaningfully engage and consult with B.C. First Nations, will require a robust engagement strategy and the commitment to a long-term meaningful relationship between DFO and B.C. First Nations on the topic of aquaculture governance.

The Fisheries Council therefore is requesting further clarification on how DFO plans to meaningfully engage and consult with B.C. First Nations in the development and implementation of the Pacific Aquaculture Regulations.

We look forward to discussing this matter with you in the near future.

Thank you,



Chief Allan Claxton
Chair, First Nations Fisheries Council

Cc: Susan Farlinger, Director General, DFO Pacific Region
Andrew Thomson, DFO Director of Aquaculture Management, Pacific Region
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