

March 2, 2005

By Hand

Minister, Fisheries and Oceans Canada
House of Commons
Parliament Buildings, Wellington Street
Ottawa, Ontario
K1A 0E6

Attention: The Honourable Geoff Regan

Dear Honourable Minister:

Re: December 2004 Draft Wild Salmon Policy

As you are aware, the British Columbia Aboriginal Fisheries Commission (“BCAFC”) and DFO have recently completed a series of jointly arranged regional information meetings with First Nations to discuss the draft Wild Salmon Policy (“WSP”). The recommendations received by BCAFC at those meetings have been summarized for formal presentation to you on March 2, 2005.

The purpose of this letter is to provide you and your ministry with formal notice of BCAFC’s concerns in respect of the legal issues arising from the WSP. BCAFC seeks to ensure that First Nations’ interests are properly acknowledged, protected and accommodated within the WSP, as required by the *Constitution Act, 1982* and the case law. This can be achieved by reference to and incorporation of, the new legal framework set out by the Supreme Court of Canada in the November 18, 2004 Haida and Taku River Tlingit decisions. The lack of such an approach is in our opinion, the over-arching deficit in the WSP.

BCAFC’s concerns and recommendations are as follows:

I. Conformity with Current State of the Law

In the draft WSP, DFO states its intention to manage the fisheries in a manner consistent with Sparrow and subsequent Supreme Court of Canada decisions. At page 11 of the WSP, the Department also states that Aboriginal and treaty will be respected and accorded priority, consistent with the protection provided by section 35 of the *Constitution Act, 1982* and the case law.

Despite the Department's stated intention for the policy to reflect the protection provided by section 35 and the case law, the draft WSP in our opinion, falls short. In Haida, the Supreme Court of Canada made significant pronouncements regarding the nature and scope of the federal and provincial Crowns' duties to consult with and accommodate the interests of Aboriginal people where legislation or government action has the potential to infringe Aboriginal rights.

A key clarification offered in Haida relates to the relationship between the seriousness of the potential infringement and the scope of consultation that may be required. In particular, the Supreme Court of Canada held that the scope of the Crown's duty is proportional to the strength of the claim and to the seriousness of the potential infringement.

At paragraph 37, the Court pointed out the distinction between knowledge sufficient to trigger the duty to consult and the content or scope of that duty. The content may vary from a mere duty of notice in response to a "dubious or peripheral claim" to a more stringent series of duties where there is a strong *prima facie* claim. The Court stated that difficulties associated with defining the claim can be addressed by varying the content of the duty, rather than denying the existence of the claim.

Further, in Haida, the Court referred to a spectrum of consultation and while noting that specific requirements would vary according to the circumstances, stated consultation would range from providing notice, disclosing information and discussions to "deep consultation aimed at finding a satisfactory interim solution" (para. 44). This "deep" consultation requirement is said to arise where there is a strong *prima facie* case, the risk of potential infringement and the risk of non-compensable damage are high. It may require the Crown to make changes to its plans.

It is BCAFC's position that the depth and breadth of the relationship between British Columbia First Nations and salmon is well documented and more than sufficient to trigger the duty to consult; furthermore, many B.C. First Nations are engaged in treaty negotiations, which as the Court recognized in Taku, establishes a *prima facie* case and triggers the Crown's duty to consult in a substantive fashion.

Another key clarification offered by the Supreme Court of Canada in Haida relates to the scope of the Crown's duty to accommodate the interests of First Nations where government action or decision results in an infringement of Aboriginal rights. At paragraph 49 of Haida, the Court directed that accommodation must be aimed toward seeking compromise and reconciliation of competing interests,

through “good faith efforts to understand each other’s concerns and move to address them”. The duty to accommodate also requires that Aboriginal representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.

The draft WSP contains no provisions setting out how DFO will identify, through the five-stage planning process, or otherwise, potential adverse impacts on Aboriginal fishing rights and determine the degree of consultation and accommodation required to protect those rights in a manner consistent with the protection afforded by section 35.

II. The WSP

The WSP states that its overall goal “...is to restore and maintain healthy and diverse salmon populations and their habitat for the benefit and enjoyment of the people of Canada in perpetuity”. The WSP states that conservation of wild salmon and their habitat is the first priority, however the content of the WSP does not support that principle.

- **Conservation Units**

The WSP proposes managing groups of salmon sharing certain genetic and geographical characteristics as “Conservation Units” (“CUs”). Principle 9 of the WSP “Snapshot” affirms the discretion of the Minister to limit the range of conservation measures to be taken, if scientific assessments show the “... measures will be ineffective or that the social or economic costs to maintain or rebuild a CU are extreme”.

In our opinion, such a management scheme, which does not explicitly include consideration of Aboriginal interests in respect of the stocks contained within CU’s, has great potential to lead to infringement without adequate consultation.

- **The Status of Pacific Salmon**

The WSP notes that the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) recommended listing three sub-species of salmon as endangered under the *Species at Risk Act* (“SARA”). The WSP does not mention that on October 22, 2004, the Minister of the Environment, in consultation with yourself, recommended that two of these sub-species, the Cultus Lake and Sakinaw Lake salmon *not* be added to SARA, citing the potential costs to the commercial salmon industry as the primary reason. On January 21, 2005 that recommendation was confirmed and in its press release, Fisheries and Oceans

would only commit to a “comprehensive recovery plan...to protect and rebuild the Cultus and Sakinaw Lake sockeye populations”.

At page 35, the WSP sets out the implications for species at risk in advance of listing as endangered. It sets out “proactive responses” to help manage and reduce adverse social and economic impacts. What is lacking is explicit consideration of First Nations’ interests in addressing species at risk, within the context of the Crown’s duty to consult.

In BCAFC’s opinion, this proposed response to urgent conservation concerns raises the validity of the purported conservation priority set out in WSP; to the contrary, the Cultus and Sakinaw Lake salmon decisions suggest that in reality, the highest priority is actually given to commercial interests.

- **Aquaculture**

There is no specific reference to First Nations’ interests in this section of the WSP. Aquaculture is a subject area which has been the subject of much debate amongst First Nations and DFO. It has also been the subject of litigation, most recently the Homalco case. In Homalco, the First Nation was successful in obtaining an interim injunction to prevent Marine Harvest Canada from delivering further Atlantic salmon to its facilities, pending the resolution of the substantive court proceedings challenging the amendment to the operating permit.

At the heart of many First Nations’ aquaculture concerns are lack of consultation and potential infringement; we are of the opinion that this section of the WSP must expressly address and incorporate the Haida/Taku principles.

- **Legal Context**

As noted above, the WSP makes reference to Aboriginal and treaty rights and the emerging case law. While the seminal case of Sparrow is specifically referred to, Haida and Taku are not. In our opinion, the requirements on government to engage in meaningful consultation with First Nations, established in Haida and Taku, should be expressly articulated in the WSP. These new legal principles must guide the WSP and its implementation at every level. Many of the WSP’s subject areas have the potential to lead to infringement of First Nations’ fisheries interests and in our opinion, on-going reference to Haida/Taku principles should be a key component of the WSP throughout.

Many fisheries cases since the 1990 decision of Sparrow have helped to define the duties upon the Crown, in this case Fisheries and Oceans. In 1996, the B.C. Court of Appeal in R. v. Sampson, affirmed that,

“...it is the responsibility of the DFO to implement a system which will conform to the priorities set forth in Sparrow.”

There is a clear duty on Fisheries and Oceans to develop and implement a fisheries management scheme that upholds the Sparrow principles of conservation to be given first priority, followed by First Nations food, social and ceremonial requirements. The WSP must be strengthened to clearly articulate this requirement.

- **WSP and First Nations’ Interests**

The WSP makes reference to First Nations’ participation in various sections, including the Pacific Scientific Advice Review Committee (PSARC), the Integrated Salmon Harvest Planning Committee, Watershed-based Fish Sustainability Planning Initiatives and Integrated Fisheries Management Plans. The WSP describes the Integrated Salmon Harvest Planning Committee as made up of elected representatives from First Nations, the sports fishing community, B.C. and non-governmental environmental organizations. The WSP states that this committee “...will help provide inclusive and balanced information for the development of commercial and recreational fishing plans in B.C.” It goes on to note that this is a useful starting point, but that more needs to be done to link this committee with local First Nations and other processes and interests. In our opinion, this is an understatement and such a committee is doomed to fail unless it includes in a substantive manner, representatives of the affected First Nations. It is also of concern that Aboriginal fishing interests are not expressly mentioned in the “commercial and recreational fishing plans”. In our opinion, it is time for Fisheries and Oceans to change its management approach to clearly place First Nations’ interests in substantive priority. There must be a shift in the status quo as is made clear in Haida/ Taku.

Page 33 lists WSP implications for First Nations Fisheries. What is lacking in this section is the same principle that is missing from the WSP as a whole: the legal duty to consult with and where appropriate accommodate, First Nations.

- **Accommodation of Aboriginal Rights through a Consensus-Based Approach**

DFO is proposing to manage and conserve wild salmon resources through a consensus based approach that will involve all Canadians with an interest in the resource.

At page 30 of the WSP, DFO states that the goal of the five-stage planning process is to “use constructive dialogue and draw on all the help available from

other local and region-wide planning processes to develop consensus recommendations.” At page 28, DFO similarly states that all parties should “work towards consensus.”

While the draft WSP provides for First Nations’ participation in the five-stage planning process proposed in the policy, it contains no consultation guidelines or any other provisions that set out how the Crown intends to fulfill its legal obligation to consult with Aboriginal peoples and accommodate their interests where government decisions regarding the conservation of wild salmon may potentially infringe Aboriginal fishing rights. This is a key gap in the draft WSP.

The legal duty to consult with and where required, accommodate, affected Aboriginal groups will arguably not be satisfied by obtaining advice and input from First Nation representatives appointed to the various planning bodies involved in the five-stage planning process provided for in the WSP.

Furthermore, in Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) the Federal Court Trial Division established that First Nations are entitled to a distinct consultation process apart from public forums or general public or stakeholder consultations.

If the Department of Fisheries and Oceans is proposing to consult with First Nations in British Columbia through First Nation representatives appointed to the various planning bodies provided for or proposed under the draft WSP, such an approach will not be consistent with the current state of the law and the direction provided by the courts.

In the complete absence of provisions regarding the accommodation of Aboriginal fishing rights by DFO through the WSP, it is not clear how the Aboriginal fishing rights of First Nations in British Columbia can be protected, accommodated and reconciled through the consensus-based planning process proposed by the Department.

IV. Interim Measures

Another key gap in the draft WSP is the lack of reference to the interests of First Nations in BC currently engaged in the BC treaty process. In Haida, the Supreme Court of Canada offered clear guidance regarding the obligation of the Crown to consult with and accommodate the interests of those First Nations in the treaty process. In particular, the Supreme Court of Canada noted at paragraph 27 that:

“The Crown, acting honourably cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances...the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

Instead, DFO is proposing an interim process for implementing the WSP as part of the transition from current planning to the five-stage planning process proposed by the WSP. At page 30 under Action Step 4.2, the WSP states that the “interim approach will use existing planning processes with First Nations, harvesters and stewardship groups and collate their advice to protect CUs and to manage fisheries, watershed and marine areas.” The interim process proposed arguably falls short of satisfying the direction provided by the Supreme Court of Canada in Haida.

V. A Proposed Consultation Policy

With the decisions of Haida and Taku, in BCAFC’s opinion, there is now sufficient direction from the Supreme Court of Canada for the Crown and in particular Fisheries and Oceans, to develop fisheries consultation guidelines. With such guidelines, all parties would be clear of the requirements of consultation from the Crown’s perspective and the process would not be driven by unpredictable forces such as the goodwill, discretion or initiative of departmental officials.

A consultation policy would articulate the parameters for consultation and help all parties understand what the dual expectations are. The Supreme Court of Canada in Haida, referred with approval to New Zealand’s “Guide for Consultation with Maori” and this could form a good starting point for discussion with Fisheries and Oceans in the development of a First Nations fisheries consultation policy.

The Supreme Court of Canada in Haida at para. 51 referred to its decision in Adams where the Court held,

“...the government may not simply adopt an unstructured discretionary administrative regime which risks infringing Aboriginal rights in a

substantial number of applications in the absence of some explicit guidance”.

In our opinion, that is a precise description of the WSP as currently drafted and illustrates why changes must be made to ensure the Crown upholds the principles articulated in Haida/Taku.

BCAFC suggests that the development of consultation guidelines, parallel to and in conjunction with the WSP would be of great assistance in mapping out clearly for the first time, the new relationship between the Crown and First Nations in the context of fisheries.

The Court in Haida went on to make reference to B.C.’s Policy for Consultation with First Nations, noting that it “may guard against unstructured discretion and provide a guide for decision makers.” We agree that a fisheries consultation policy would provide a legal framework for many of the subject areas contemplated by the WSP, to ensure a consistent approach to dealing with First Nations’ fisheries interests and in particular, their infringement and accommodation.

BCAFC strongly urges the Minister to take steps as soon as possible, to strike a team to develop First Nations fisheries consultation guidelines, with the caveat that First Nations representatives be included in that process.

In conclusion, BCAFC welcomes the opportunity to continue to be involved in the development of a WSP final draft that captures our common goals of protecting and enhancing wild salmon stocks, within the context of the Crown’s legal obligations to First Nations.

Yours truly,

British Columbia Aboriginal Fisheries Commission

Per:

Arnie Narcisse, Chairperson