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ASSEMBLY OF FIRST NATIONS

First Nations Perspectives: Review of National Aquatic Animal Health Program

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Agency, Aquatic Animal Health Division**

Introduction:

The Assembly of First Nations has compiled the following review of the National Aquatic Animal Health regulations. The prepared document highlights potential areas of concern for First Nation fisheries rights holders and draws attention to potential infringements of Aboriginal rights as a result of a loss of access to marine resources. The document submitted does not qualify as consultation with First Nations and in no way seeks to set or define the limit and/or scope of First Nations rights; however, this document puts forth a non-exclusive list of areas where the Canadian Food Inspection Agency (CFIA) should consult with First Nations treaty and aboriginal rights holders. Recommendations and proposed steps forward are offered to the CFIA.

Potential Impact to First Nations Rights to Fish

It is acknowledged that the establishment of a national framework to identify and respond to aquatic animal disease is of critical importance and First Nations are supportive of these efforts. The National Aquatic Animal Health Program's (NAAHP) mandate to "prevent aquatic animal diseases from being introduced to, and from spreading in, Canada," can contribute to the protection of First Nations rights by maintaining healthy fish stocks which are the corner-stone of First Nations fisheries rights. In principle, the aims of NAAHP are well aligned with the interests of First Nations.

First Nations have inalienable constitutionally protected and recognized rights to fisheries access, fish harvesting, and fish use. In the *R. v. Sparrow* (1990) case, the Supreme Court of Canada recognized the rights of First Nations to fish for Food, Social, and Ceremonial (FSC) purposes. The court recognized First Nation priority access to fisheries and acknowledged that First Nations rights to fish and access fish are not "frozen" in time, but rather exist in modern forms. The scope of FSC fisheries has not been defined; however, as suggested by the "Integral to a Distinctive Culture" test established in the *Van der Peet* (1996) case, FSC fisheries exist to the extent defined by First Nations who practice fishing. The Department of Fisheries and Oceans (DFO) has acknowledged that "today, FSC fisheries have priority over all other fisheries."¹ Other cases have proven a clear aboriginal right to fish for commercial purposes, including *R. v. Gladstone* (1996) and *R. v. Marshall* (1999).

NAAHP should prepare compensation strategies for situations where First Nations access to fish is lost. Currently, NAAHP guidelines only provide compensation where destruction of fish is required. In the context of First Nations rights, which are tied to the ability to physically possess fish, *loss of access to fish is equivalent to the destruction of fish stock*. Since First Nations have a clear access and priority access right to fish, the government must strive to: prevent loss of access; compensate with new access when access is limited; and/or financially compensate First Nations whose traditional cultures, societies, and/or livelihood are negatively affected by access limitations. If disease regulations require the closure of a fishery, NAAHP should compensate First Nations for infringement on the right to access fish.

¹ <http://www.pac.dfo-mpo.gc.ca/fm-gp/species-especes/salmon-saumon/fisheries-peches/index-eng.htm>

Compensation for loss of wild stocks due to disease

There is some variance in CFIA statement regarding compensation. According to the First Nation Focus Group Information Session Report (2009), CFIA acknowledged that “if an eradication initiative takes place under the [National Aquatic Animal Health] act – First Nation harvesters should be compensated if their population is affected (food social ceremonial). It may require legal analysis and more discussion with First Nations.” The CFIA should recognize that *First Nation food, social, ceremonial, and commercial rights may be abrogated or derogated by loss of wild stocks due to disease.*

Current NAAHP guidelines do not recognize that First Nation rights are intertwined with the existence of healthy wild fish stocks and do not conform to legal standards for compensation. The “Regulatory Impact Analysis Statement for the Regulations *Amending the Reportable Diseases Regulations*” states that “...the legislation does not allow for payment of compensation caused by disease for anything other than animals or things destroyed or traded in accordance with the Act.” This legislation, which *prima facie* does not allow for compensation to be paid due to a loss of income or access to marine resources as a result of disease, may infringe upon First Nations rights and the right to compensation as acknowledged in *R. v. Delgamuukw* (1997).

In *Delgamuukw*, the Supreme Court of Canada stipulated that “fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated.”

In defining Aboriginal title, the Supreme Court of Canada in *Delgamuukw* enunciated the principle that Aboriginal title gives rise to the right to use and occupy the land for a variety of activities. The implications of the principle of exclusive use and occupation include:

Aboriginal title land traditionally used for fishing could not be used by Aboriginal people in a manner which destroyed that fishery. Based on the same principle, the Crown cannot manage the land and resources in a manner which destroys the Aboriginal attachment to the land that is the basis for Aboriginal title. For example, the Crown does not have the authority to knowingly destroy a fish stock or the necessary habitat required to support a fishery that is the source of a longstanding First Nation fishery².

While it is clear that Government of Canada has put these Regulations under review into effect to prevent the destruction of fish stock; it should be noted that

² Gaertner, Brenda (2004) The Scope of Section 35 Fishery Rights: A Legal Overview and Analysis, prepared for: The First Nation Panel on Fisheries

where there is destruction of fish stocks due to disease resulting in infringement of aboriginal rights, appropriate compensation may be considered.

Consultation prior to Regulations becoming Law

As holders of inalienable rights, First Nations are separate from stakeholders and entitled to meaningful consultation and engagement. The current “Regulatory Impact Analysis Statement for the Regulations Amending the *Reportable Diseases Regulations*” does not identify Aboriginal people as rights holders and separate from other stakeholders. The AFN recognizes that CFIA has made significant efforts in properly engaging with First Nations rights-holders separate from non-indigenous stakeholders. However, formal mechanisms should be recognized to ensure First Nations maintain paramount importance in the implementation of NAAHP.

It is critically important to acknowledge First Nations as rights holders and to ensure they have forums separate from stakeholder forums to address their concerns. Among stakeholders there is often a lack of understanding and resentment about First Nations rights and special relationship with the Crown. Therefore a separate forum is necessary to ensure meaningful engagement. The AFN acknowledges that the Focus Group Information Session held at the end of 2009 was a good approach to engaging First Nations. However, more sessions will have to be held across the country in order for the Focus Group strategy to provide effective engagement.

Although consultation began in 2007, First Nations have not received meaningful consultation on NAAHP. CFIA has made efforts to engage with First Nations in the 2009 forum; however, *consultation requires the Government of Canada to meaningfully engage with First Nations rights holders, on the terms set by those rights holders, on all proposed programs which may impact or affect First Nations rights.* As a general principle, it is best practice to involve First Nations groups early in the process. The Assembly of First Nations suggests CFIA follows the below terms for consultation:

- The Government of Canada should approach and engage First Nations at the initial phases of program drafting, planning, and implementation
- The Government of Canada must negotiate in good faith, “with the intention of substantially addressing the aspects of title and rights... which First Nation's want accommodated”³
- Both the Government of Canada and First Nations should have parallel and symmetrical information in consultation, except where disclosure of information may result in infringements on First Nations rights or protocols (e.g., Aboriginal Traditional Knowledge)
- First Nations should be given adequate time to assess and analyze all information given by the Government
- All information must be exchanged in a timely manner

³ Gaertner, Brenda (2004) *The Scope of Section 35 Fishery Rights: A Legal Overview and Analysis*, prepared for: The First Nation Panel on Fisheries

- Neither the Government of Canada nor First Nations may stall the consultation process by refusing to meet, participate, or share information. Furthermore, neither party may demand unreasonable conditions.
- Stakeholders should not be brought in to consultation.

Other First Nations' Concerns Related to the Aquatic Animal Disease Regulations

The following section contains a number of areas of concern that CFIA may wish to address with First Nations. Suggestions are provided to address concerns where possible.

Consultation: First Nations are concerned that CFIA has not designated enough resources to fully and meaningfully engage with First Nations on the NAAHP program. Lack of front-end engagement and joint-implementation may result in the infringement of First Nations rights. Furthermore, improper engagement and/or lack of First Nation participation may prevent the successful implementation of NAAHP in First Nations fisheries.

Suggestions:

- More government resources should be allocated to First Nation engagement in the NAAHP program.
- Information sessions should be held frequently to update on status to First Nations and explain program in depth.
- CFIA should develop consultation guidelines with First Nations communities that are engaged in fisheries or fishing activities. Consultation should be held before implementation of the NAAHP program.

Materials: First Nations are concerned that adequate materials that explain the structure, purpose, and extent of the NAAHP program are not easily available.

Suggestions:

- CFIA should continue to develop easy-to-understand materials to explain the structure and functions of NAAHP.
- CFIA should provide a list of all certified labs in the country for circulation to all First Nations' communities engaged in fishing activities.
- CFIA should consider working with the AFN to develop more in-depth materials for First Nations audiences.
- CFIA should continue to work with the AFN to distribute materials to First Nations.

Coordination: First Nations have expressed concern about the effectiveness of the NAAHP program without proper coordination between government agencies and departments. Specific examples of coordination include: with Transport Canada to prevent disease spread from bilge and other vessel-based transfer mechanisms; and Department of Fisheries and Oceans to indicate fisheries closures and properly change licences and advise of closures. First Nations have stated that connections and responsibilities between departments must be clear and transparent to avoid abrogation/derogation/infringement of First Nations rights, as may be caused by unclear chains of command and uncertain procedures.

Suggestions:

- Make MOUs on NAAHP between departments and agencies easily available to First Nations.
- Create and distribute materials that show the responsibilities of all departments involved in NAAHP.

Scientific Capacity: In 2009, the CFIA noted that DFO and CFIA labs have limited capacity and may be put under heavy stress by the NAAHP program. Such stress may cause delays and errors in the analysis of aquatic resource samples, which may cause unnecessary or unnecessarily prolonged closures, or inadequate response to disease.

Suggestions:

- CFIA should build lab capacity in First Nations communities that would be able to perform testing on samples.

Enforcement Capacity: CFIA and First Nations have both acknowledged that there is a limited ability to enforce NAAHP regulations in Canadian waters.

Suggestions:

- First Nations should be trained and given financial capacity to enforce NAAHP regulations in their territory.

Aboriginal Traditional Knowledge: Concerns regarding the place of ATK have been raised by numerous First Nations. These concerns include: proper use of ATK vis-à-vis science, compensation for use of ATK, and protection of ATK as intellectual property.

Suggestions:

- ATK should be valued and respected equivalent to knowledge formed using the scientific method.
- ATK holders that provide ATK should be financially compensated the same as scientists.

- Protocols must be in place to protect and respect ATK use.

Response Planning: First Nations have expressed concern regarding the level of their involvement in planning emergency responses when disease outbreaks are identified.

Suggestions:

- CFIA should integrate response planning discussions into First Nations community engagement and consultation before full implementation of NAAHP.
- CFIA should prepare to designate funds to build capacity for First Nations to respond to emergency disease situations.

Legal Sanctions: First Nations have expressed concern about uncertainties regarding the criminality of non-reporting. Furthermore, First Nations are unaware of the extent of their liability in non-reporting of diseases, especially those with few visible symptoms.

Suggestions:

- CFIA should provide materials detailing the legal requirements for First Nations in the NAAHP program and consult First Nations communities on these requirements.

Compensation: Along with compensation issues already raised, First Nations are concerned about the accounting methods used to calculate compensation.

Consumer Perceptions: First Nations have expressed concern about the long-term commercial impacts of disease reporting. Specifically, First Nations are concerned that disease outbreaks may be reported or released to the public in a way that “diseased” fisheries will face long-term consumer loss and product devaluation.

Recommendations

These recommendations reflect strategies that may be employed by CFIA to ensure that First Nations fishers, both FSC and commercial, will have access to information and capacity to implement the Regulations.

- Hold regional info-sessions on program. When planning information sessions for First Nations, go as close to the community level that funding will allow.
- Create online clearing house and reference guide for disease information and requirements.
- Provide forum for First Nations to showcase their best practices to prevent disease.
- Provide information on overlapping provincial jurisdictions and discussions/MOUs with provinces for program.

- Pay ATK holders equally as scientists in monitoring and identifying disease.
- Develop guide to show all department/agency/government linkages within program.
- Create guidelines for marketing boards.
- Create guidelines and kits for incorporating NAAHP into eco-label certification. Note that First Nations groups are actively exporting and developing an eco-label which will require full traceability standards. Aquatic Animal disease regulations will need to be built in.
- Reconsider the establishment of an on-going working group with 2 yearly meetings.

Next Steps

This year the AFN distributed a survey which, following analysis will provide some guidance on the way forward. CFIA is encouraged to increase its effort to involve First Nations in all aspects of the National Aquatic Animal Health Program (NAAHP). Now that the Regulations are law, a concerted effort will be required to ensure First Nations have the information and tools required to play their role in the implementation of the NAAHP.

Document Referenced

Gaertner, Brenda (2004) The Scope of Section 35 Fishery Rights: A Legal Overview and Analysis, prepared for: The First Nation Panel on Fisheries