



FIRST NATIONS
FISHERIES COUNCIL

Aquaculture Community Sessions Information Package:

Updated February 2010

SUPPORTING STEWARDSHIP OF FISHERIES RESOURCES FOR CURRENT AND FUTURE GENERATIONS



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Executive Summary/Overarching Themes:

The First Nations Fisheries Council has prepared this and other more detailed background information as a part of an effort to facilitate meaningful engagement between Fisheries and Oceans Canada and B.C. First Nations with respect to the development of a new Regulatory Framework for Aquaculture Management in British Columbia. The Council does not represent the proper First Nations rights-holders in British Columbia, and it serves a role of working with First Nations and rights-holders in order to help carry out the three key components of its mandate: 1) support efforts to have First Nations rights and title related to fisheries recognized properly; 2) to build First Nations' capacity in various aspects of fisheries and fisheries management; and 3) to work with communities to develop meaningful co-management of fisheries. This document provides a summary of work related to the development of a new aquaculture framework which was commissioned by the Council, including both policy and legal elements. This work has brought forward four key messages that the Council recommends First Nations bring up in engagement with Fisheries and Oceans Canada.

1. Process

The work carried out by the Fisheries Council indicates that the current process for development of the new regulatory framework raised significant concerns on a number of fronts. These concerns are significant and warranted issues about the process of consultation and the timelines which are associated with the regulatory redrafting. These limitations need to be acknowledged and discussed. As well, the artificial division between discussions on the regulatory framework and on the development of aquaculture management policy is confusing and hinders the meaningful engagement of First Nations. For a more detailed discussion of the concerns associated with the timelines and consultation processes please refer to pages 6 and 7 of this discussion document.

2. Ability to request bilateral consultation sessions

Related to the concerns raised about the timelines and consultation process associated with the regulatory redrafting, the Council wishes to highlight that any First Nation can and should request individual direct bilateral sessions with DFO if they feel that the management of aquaculture poses a real danger of infringement to rights and title. These community engagement sessions should not be the only opportunity First Nations have to offer input into this process. The Council strongly recommends that First Nations wanting more engagement/information on this process to contact DFO as soon as possible to arrange a community meeting(s).

3. Long term engagement/assessment of the process

Given the breath of the new proposed regulatory framework for British Columbia, a long term process must be established to ensure that First Nations are involved in all aspects of new regulations and policies which result from this jurisdictional changeover. First Nations will likely want to press DFO to ensure that mechanisms be established both now and in the future which guarantee a role at the decision-making table for First Nations in all aspects of aquaculture (siting, management, science, and monitoring/compliance), both at various scales (local, Area or Region, and B.C.-wide). It is recommended that the regulations contain a stipulation that they will be revisited in a set period of time (for example 5 years) so that First Nations will be given an opportunity to meaningfully critique the regulations and subsequent policies in the future.

4. Assertion of Aboriginal Tenure/Authority over Territories

DFO has initiated a dialogue with the First Nations Fisheries Council to assist in developing a meaningful engagement process for B.C. First Nations in the development of the new aquaculture regulatory framework. This is a broad and general process. If First Nations assert rights and jurisdiction within their local territories that may be impacted by the development or implementation of the new regulatory framework, then First Nations should begin now to articulate to DFO how they wish to be engaged when farming operations are occurring in their territories or may affect their rights (potential impact on passing stocks upon which interior First Nations depend for food purposes). One of the recommendations that the Council is making is that in the future communities may wish to implement a local/ area management regime which would give First Nations a degree of decision-making authority over aquaculture operations. These changes will only happen through the assertion of rights, and through the development of consultation protocols or engagement strategies for First Nations' communities. Through these actions First Nations will be positioning themselves to be better engaged in subsequent processes.

Background:

The B.C. Supreme Court Case (“Morton”) in February 2009 ruled that the current management system for aquaculture, where the federal government delegated management authorities for the aquaculture sector to the province through an MOU, was not legal. The courts determined that aquaculture was actually a fishery and fell under federal jurisdiction. In November 2009 DFO received a mandate from Cabinet to commence the jurisdictional changeover for the aquaculture industry. The mandate received was to negotiate the changeover for finfish aquaculture from provincial to federal jurisdiction. In February it became clear that shellfish jurisdiction would also be included. The development of the new regulatory framework for B.C. is expected to play an important and formative role in the more broad transfer of jurisdiction across Canada back to the federal government.

In November 2009 DFO released a document to focus discussion on the drafting of new regulations in B.C. which need to occur to support the jurisdictional changeover. The Discussion Document, *DFO’s Federal BC Aquaculture Regulation & Strategic Action Plan Initiative: Discussion Document*, contains 27 strategic questions to guide the consultations in B.C. and assist in the gathering feedback. DFO approached the Courts to seek an extension of the Province’s jurisdiction over the industry. The extension was granted on January 26th, 2010 moving the end date of the Province’s jurisdiction to December 18, 2010.

Anticipating the consultation process associated with a jurisdictional changeover, and the importance that First Nations in B.C. play a key role in these negotiations, the First Nations Fisheries Council entered into discussions (under the umbrella *Commitment to Action*) with DFO with respect to aquaculture. To gather input and guidance from B.C. First Nations, on September 15, 2009 the Council and AWG co-hosted a meeting open to all First Nations in B.C. to discuss aquaculture and how First Nations would like to be involved in upcoming regulatory reform process. The result was the drafting of two resolutions, which were subsequently endorsed by the B.C. Assembly of First Nations, the First Nations Summit and the Union of B.C. Indian Chiefs. These resolutions, *B.C. First Nations Statement of Jurisdiction on Aquaculture* and the *B.C. First Nation’s Statement of Solidarity on Aquaculture*, provide direction to the Council and the AWG on the expectations of B.C. First Nations in terms of involvement in the current regulatory regime shift for aquaculture in B.C. The *Statement of Solidarity on Aquaculture* outlines four main areas in which First Nations want to be involved: the siting of farms, involvement in the day-to-day management of farms; informing the science which is used to guide the industry and regulations; and involvement in the monitoring and compliance of farming operations. The *Statement of Jurisdiction on Aquaculture* empowers the Council and the AWG to engage senior decision makers and ensure the interests of First Nations are meaningfully considered in the regulatory reform process, and to facilitate one aspect of an effective consultation process with B.C. First Nations.

Methodology:

The Council and DFO engaged in a series of discussions which resulted in the drafting of an Aquaculture workplan in December of 2009. The workplan commits the Council to gathering some of the necessary information B.C. First Nations require in order to meaningfully engage in the upcoming consultation processes with DFO, and to present this information to First Nations through a series of community meetings. These meetings are also designed to allow First Nations around B.C. to obtain information and clarification from DFO. The Council has acted in good faith and sought out three policy analysis pieces and a legal opinion on the current processes underway.

The **legal opinion** discusses DFO's proposed regulatory framework from the perspective of possible implications/considerations to the rights and title of B.C. First Nations and highlights issues associated with the current timeframe and proposed consultation process. The legal opinion also details the legal foundation which exists if First Nations want to adopt a firmer stance on any aspect of the proposed regulations.

The three **policy analysis** pieces have been completed. These include:

1. A primer (or introductory guide) to the aquaculture industry. This piece explains the fundamentals and background of the aquaculture industry.
2. A review of the existing policies governing the aquaculture industry and the independent reviews which have examined the aquaculture industries in B.C. which examines previous and current inquires/policies from the lens of implications to the rights and title of B.C. First Nations. The piece also includes a set of best practices which could be used to inform the drafting of new regulations.
3. A review of the 27 strategic questions present in DFO's Discussion Document. Implications of the questions are discussed background information is provided necessary to meaningfully consider the questions.

A summary of each of these pieces is outlined in this overarching discussion document. As well, the complete pieces are included in the information kit. It is the hope of the Council that this foundational work will assist B.C. First Nations to engage with DFO in a meaningful manner, providing constructive advice and recommendations into the process of drafting new regulations.

The Council will also support 9 regional consultation sessions be hosted around B.C. to gather feedback and direction on the regulatory framework. These regional sessions will serve to ground truth the work of the Council and ensure that the discussion pieces adequately highlight the concerns, thoughts and perspectives of B.C. First Nations. These sessions are open to all First Nations and the Council wishes to highlight that **any First Nation can request individual direct bilateral sessions with DFO. The Council strongly recommends that First Nations wanting more engagement/information on this process to contact DFO as soon as possible to arrange a community meeting.**

Following the information sessions in February and March 2010 the Council plans to develop a summary of the recommendations received which will be distributed both to DFO and to First Nations communities. It is expected that further developmental work will take place from March to December of 2010 with respect to the development of the guidelines and policies related to the aquaculture industry transfer to federal jurisdiction.

The Council is committed to making this process as meaningful as possible for B.C. First Nations communities. Should you have any comment/questions/considerations, please contact us or make suggestions to improve this process as soon as possible.

Legal Opinion Executive Summary:

The central objectives of this legal opinion are to:

- Summarize the key procedural and substantive issues raised by the Federal Initiative that may impact First Nations and the legal bases for the Crown's corresponding duties of consultation and accommodation;
- Provide legal precedents relating to consultation and accommodation on which First Nations and the Council can rely; and
- Outline next steps for the Council and First Nations regarding consultation and accommodation in respect of the Federal Initiative.

SHORT SUMMARY

The Federal Initiative will have a significant impact on the asserted and proven aboriginal rights of First Nations in British Columbia and Canada has a duty to deeply consult with First Nations in respect of these impacts and to demonstrably integrate the feedback of First Nations into the regulations, policies and strategic plans that will govern aquaculture. As is set out in more detail below, the duty to consult requires the crown to meaningfully address the concerns of First Nations.

Our key conclusions in respect of the Federal Initiative are:

1. Given the scope of changes that the Federal Initiative plans to implement, the potential and established impacts of aquaculture on First Nations' rights, and the number of First Nations whose rights will be affected and who therefore are entitled to participate in consultations, it is not possible, in our opinion, for Canada to meet its duty to consult in respect of the Federal Initiative within the timelines currently proposed, i.e. to March 2010.
2. The process of consultation must be revisited and redeveloped in conjunction with First Nations, including with respect to:
 - (a) consulting comprehensively with respect to the regulations, policies, and strategic plans that make up the Federal Initiative;
 - (b) How to appropriately engage First Nations as rights-holders; and
 - (c) A workable timeline for consultation.
3. First Nations' interests and First Nation participation must be demonstrably integrated into the Federal Initiative, particularly with respect to ongoing decision-making at the site-specific, regional planning, strategic planning levels, including with respect to:
 - (a) granting and monitoring of individual licenses; (b) area, regional and coast-wide planning; and (c) opportunities for and benefits to First Nations.

This integration of First Nations' interests and participation should be direct and explicit on the face of regulations, policies and strategic planning documents and guidelines developed by Canada.

FRAMEWORK FOR CONSULTATION

As is evident, the Federal Initiative is an extremely complex endeavor that is likely to significantly affect the rights and interests of First Nations throughout B.C. Below we briefly summarize the central aspects of our opinion regarding the Crown's duty to consult with First Nations in respect of the Federal Initiative. We then identify key next steps and some of the many issues for further consideration and analysis.

A. PROCESS: CONSULTATION ON FEDERAL INITIATIVE

Canada has a legal duty to consult with First Nations whose asserted or proven rights may be impacted by

the Federal Initiative. Our opinion is that there is a duty to engage in deep consultations regarding all aspects of the Federal Initiative (regulations, policies and strategic plans) and that the consultations must begin with more significant exchanges of information and discussions regarding the appropriate process of consultation.

Canada must be responsive to the concerns and interests of First Nations (both with respect to the process of consultation and with respect to substantive issues) and must demonstrably integrate the concerns and suggestions of First Nations into the Federal Initiative. Our opinion is that demonstrably integrating the input of First Nations will mean that the regulations, policies and strategic plans will, on their face, explicitly include reference to First Nations rights, interests and participation and that First Nations will be included in the decision-making structures and processes at all levels including the site-specific, area or regional management, and industry- wide and province-wide planning.

Our primary concerns regarding the current process of consultation proposed by Canada are:

1. The timeline is inadequate for Canada to discharge its duty of consultation. Canada has not been ordered to enact regulations by a certain time, has indicated that it can implement interim measures, and thus must, in our view, significantly extend the timeframe of consultation. In most cases, simply responding to the strategic questions in the Discussion Document will not be sufficient consultation.
2. Canada's approach to consulting with the significant number of First Nations who may be impacted by the Federal Initiative needs to be reviewed. Further thought must be directed to how to best structure consultation with so many rights-holders. Discussions between First Nations and with Canada should take place in this regard.
3. Canada's guiding vision and principles for the Federal Initiative do not address or incorporate First Nations' rights and interests. Aside from holding separate meetings with First Nations, Canada appears to be treating First Nations as one of many stakeholder groups, not as rights-holders.
4. Consultation on the Federal Initiative in stages seems inappropriate and in our opinion is harmful to the interests of First Nations. Canada's proposed regulation, policies and strategic plans regarding the Federal Initiative work in conjunction and are interdependent. Meaningful consultation cannot take place on these pieces in isolation of each other and must be integrated.

We recommend that First Nations bring these issues of concern to Canada's attention. We note that along with Canada's legal duty to consult, many of Canada's assertions and agreements, as well as the business interests of aquaculture, also support meaningful consultation with First Nations in which the consent of First Nations to Canada's plans is the desired outcome.

B. SUBSTANCE: ISSUES ARISING IN FEDERAL INITIATIVE REQUIRING CONSULTATION

A large number of issues are raised by the Federal Initiative which require consultation with First Nations. At its most basic level, a standard fin-fish aquaculture facility require tenure to a large amounts of ocean space and a licence allows a facility to use the space to the exclusion of others- including for fishing, introduce hundreds of thousands of non-native fish, and deposit significant amounts of feed, drugs, and other substances into the water on a daily basis. Shell-fish aquaculture operations have similar implications (although with less depositing of chemicals, etc). Aquaculture facilities impact aboriginal title, the ability of First Nations to exercise control over territory, and aboriginal rights (particularly fishing rights). The form and content of the federal regulation, policies and strategic plans that govern aquaculture are of significant importance to First Nations in BC, particularly coastal First Nations. We organized our analysis of specific issues that arise in keeping with the issues identified as priority concerns by the COUNCIL membership: we highlight some of these key issues again below.

1. DFO's vision for aquaculture

DFO appears to intend to take a stream-lined approach to aquaculture regulation and licensing. First Nations need more information regarding Canada's plans and need to ensure that there is adequate opportunity for First Nations' input and participation regardless of stream-lining.

Canada is taking a growth-oriented approach to the aquaculture industry as a whole. First Nations must ensure that this growth does not come at the expense of their rights and interests (including with respect to preserving and restoring healthy and productive ecosystems), and that First Nations benefit from and are partners in growth where they wish to be and in ways that are in keeping with their goals, rights, and perspectives.

2. Siting and Licensing

First Nations must be consulted with respect to the siting and licensing of individual aquaculture operations, as well as with respect to regional and coast-wide planning (including expansion into new areas). Siting decisions may be based on policies and strategic plans, but will also be carried out on a site-by-site basis, requiring ongoing First Nations' involvement at all levels.

A significant issue is Canada's duty to consult and accommodate with respect to all = the aquaculture operations that currently operate pursuant to a provincial licence and will soon require federal approval. First Nations should press Canada for their plans in this regard.

3. Science and Environment

First Nations should have the opportunity to retain the assistance of scientists and contribute to the science that Canada relies upon. Areas of scientific uncertainty, such as the specific impacts of aquaculture on wild fish stocks, have been recognized by the courts to require consultation.

Canada must be pressed to clarify its plans in respect of environmental review of aquaculture operations – both current and prospective. It is not evident at this stage, for example, whether the review process under the *Canadian Environmental Assessment Act* will apply.

An issue not addressed by this opinion that deserves further consideration and analysis is the contribution that aboriginal traditional knowledge can make to management and decision-making for aquaculture.

4. Monitoring and Compliance

Monitoring and compliance of aquaculture operations to ensure against unforeseen infringements is important to First Nations. Monitoring and compliance must include information-exchange and ongoing consultations which allow First Nations to assess and avoid or reduce the impacts of aquaculture on their rights and interests.

Strategic planning and policies must be established which ensure opportunities for First Nations to participate in monitoring and compliance. This may be carried out in a number of ways including as on the ground personnel, and representation on standard-setting and decision-making bodies.

5. Management

Management of aquaculture takes place at all levels, from the site-specific to province-wide and involvement of First Nations in management must be secured through consultations. Of particular emphasis should be the interest of First Nations in area-based management that records and assesses cumulative effects of aquaculture. The management of the aquaculture industry as a whole, especially with regard to its interaction with broader interests and industries including FSC and commercial fishing is also of direct concern to First Nations.

6. Opportunities for First Nation Participation, Innovation and Investment

DFO asserts that the Federal Initiative will present opportunities for First Nations, but these opportunities

require elaboration. The opportunities must also be balanced against the impacts of aquaculture. First Nations should press for more information and for firm commitments regarding opportunities, including with respect to: resource and revenue sharing, employment and training, expansion of aquaculture into new species, the development of new technologies, opportunities for First Nations' businesses, and direct benefits to First Nations communities such as by license allocation and revenue-sharing.

Policy Piece 1: Aquaculture Policy and Past Inquiry Recommendations on BC First Nations Title and Rights

In order to support BC First Nations in these consultations, the First Nations Council (the Council) has commissioned this evaluation of relevant policies, legislation and reviews of the aquaculture industry. The goal of this policy review is to provide specific advice to First Nations, federal and provincial governments on which areas of current policies require consideration for potential reform.

The objectives are to identify themes of interest to First Nations emerging from the documents, including areas of existing policies which may result in infringement of First Nations jurisdiction, title and rights. A second objective is to compile recurring recommendations to create a toolkit of best practices which can be used to enlighten the drafting of new regulations.

The policies and legislation reviewed included the DFO *Aquaculture Policy Framework* (2003), the *Wild Salmon Policy* (2005), BC Aquaculture Regulation (2002), BC Aquaculture Waste Control Regulation (2002), and the DFO *Federal BC Aquaculture Regulation and Strategic Action Plan Initiative* Discussion Document (November 2009). Inquiry reports included the *Pacific Salmon Forum Final Report* (2009); Special Legislative Committee on Sustainable Aquaculture Final Report (2007); Assembly of First Nations report, *Aquaculture Discussion Paper: An Overview of Concepts and Terms Associated with Aquaculture, Sustainable Aquaculture in Canada, and Impacts Aquaculture has on First Nation Peoples* (2006); First Nation Panel on Fisheries report, *Our Place at the Table* (2004); and Standing Committee of Fisheries and Oceans report (2003). Most of the documents reviewed were concerned with finfish aquaculture, however, much of what is said concerning decision making, management, research, and monitoring of finfish aquaculture, could also apply to shellfish aquaculture. For additional guidance, various documents written by First Nations organizations were obtained through the First Nations Council and reviewed. Comments from representatives from BC First Nations and the Aboriginal Aquaculture Association were sought through the COUNCIL.

The common themes that emerged from the reports and policies were: 1) over-hauling the regulatory environment of the industry; 2) prioritizing wild salmon and the environment; 3) applying an ecosystem approach to managing the industry; 4) creating an inclusive process (including a co-management role for First Nations) in management and decision-making; 5) revising or creating policies and regulations that include best practices for dealing with environmental issues such as disease and parasite transfer, waste discharge and contaminants, escapes, etc.; 6) using science to guide decision-making and taking an adaptive management approach to day-to-day management; and 7) developing a commercially viable technology for closed containment finfish aquaculture. There was a high degree of convergence in the recommendations that came out of the reports. This made it possible to organize them into areas for the development of best practices.

The review identified thirty-seven areas where best practices could be developed. Identifying these best practices is only a first step. Further work needs to be done to prioritize these and to expand their content. The list of best practices offers a starting point for consultations with DFO and the province on aquaculture regulation reform and strategic direction of the industry in BC.

As participants in the drafting of a new federal regulatory regime, First Nations have an opportunity to significantly change the way aquaculture is managed. Based on two premises, that First Nations have rights and title that must be considered and accommodated, and that the wild species and their aquatic environments are a defining characteristic of BC, First Nations can articulate their vision of a future for aquaculture in BC.

Policy Piece 2: Analysis of Strategic Questions

The DFO discussion document offers 27 Strategic questions to guide the discussions about the regulatory reform process, 13 of which are specifically related to the B.C. regulatory drafting process. The questions cover a myriad of topics and range in complexity from broad, higher-level governance themes to specifics about the content of the regulations. Below are the 13 questions of direct relevance to the B.C. process underway, along with a few discussion questions to stimulate thought, and a series of recommendations based on the findings of the FNFC. The full piece, which provides context on each recommendation and on the policy area, is available.

DFO Question 1: Does the proposed Vision appropriately address the principal challenges within the industry? (p.6)

- **Recommendation:** A recommended alternative vision would be: As a world leader, Canada is committed to protecting aquatic environments, upholding obligations to Aboriginal people, increasing public confidence, and facilitating aquaculture sector prosperity by continuing to advance innovative and sustainable technologies and promoting regulatory compliance for environmentally sound, socially responsible, and economically competitive industry performance. (p.8)
- **Discussion point:** Is the time frame provided reasonable to effectively engage First Nations in consultation on the aquaculture regulatory shift? (p.8)
- **Recommendation:** The regulation should stipulate a time frame to facilitate regulatory transition and evaluate its efficacy.

DFO Question 2: Principles of a Federal Aquaculture Regulation for B.C. - Is there anything that you would add to or delete from these principles?

- **Discussion point:** Since all federal agencies have the same high degree of legal obligation to First Nations, will there be separate consultation processes specific to their agency mandate regarding aquaculture regulation and addressing Aboriginal title and rights?
- **Discussion point:** How will the federal government coordinate multi-department and agency requirements within the stated objective of developing a “designed regime with more consistent regulation & policies while still managing significant risks?”
- **Recommendation:** The Government of Canada recognizes that First Nations assert rights and title to the marine environment, waterways, and fisheries resources within B.C., and nothing in these principles or the associated regulatory framework is intended to diminish or infringe upon those rights.
- **Recommendation:** The policies and management system associated with aquaculture operate in an environment where Aboriginal rights and title can or may exist, and these rights have the potential to be infringed upon by the activities associated with aquaculture. Therefore, due to the high potential of this infringement of rights, and the need to develop meaningful processes for consultation and accommodation with affected Aboriginal peoples and First Nations, the aquaculture management regime needs to recognize and engage First Nations within all aspects of decision-making associated with the operation of the industry.
- **Recommendation:** The Government of Canada recognizes the need to facilitate development of collaborative institutional capacity for First Nations to effectively participate in the management of aquaculture in B.C.

- **Recommendation:** Canada will only sanction the operation of the aquaculture industry if it is committed to providing adequate funding to DFO and other federal or provincial departments or ministries tasked with associated responsibilities.
- **Recommendation:** Canada's aquaculture regulatory regime will incorporate a precautionary approach to identifying, assessing and managing risk and regularly evaluate risk management metrics and their results for minimizing or eliminating risk.

Strategic Question 3: Is there anything that you would add to or delete from the scope of the activities that would be managed under the proposed regulation?

- **Recommendation:** The regulations need to include a scoping statement which recognizes a governmental role for First Nations in the management of aquaculture which is different in nature than those of industry, non-governmental organizations, etc., which is related to their proven and asserted rights which are Constitutionally protected.

Strategic Questions 4 and 5: Conditions of Licence:

4. Are there items that should be added or deleted from this proposed list of licence conditions?

5. What type of activities should be ticketable offences instead of, or in addition to being subject to prosecution?

- **Recommendation:** Aquaculture licenses should only be issued where an aboriginal tenure permit has been issued or where there is proof of engagement and approval of all First Nations in whose territory the application lies.
- **Recommendation:** Work should be completed to look at the most effective mechanisms for engaging First Nations in discussions with aquaculture companies about how they would like to structure agreements and working relationships. These agreements may well benefit from some level of standardization across the industry on the Pacific Coast. These agreements should be explicit as helping to structure accommodation/compensation which relates to First Nations rights which will be infringed by aquaculture-related activities.
- **Recommendation:** Should be amended to include more direct reference to the process for license renewal, roll over and/or license time duration.
- **Recommendation:** The license conditions need to be designed to maximize transparency and the flexibility to make amendments in accordance with the development of an adaptive management approach.
- **Recommendation:** DFO needs to clarify the enforcement element of the licence conditions. A \$1000 fine is not adequate for a breach of licence conditions. Contravention of most of the licence conditions should be subject to prosecution.

Strategic Question 6: Are there other categories of substances that should be managed under section 36 of the Fisheries Act?

- **Discussion point:** Can DFO release additional information related to the CSAS Pathways of Effects and how they might relate to aquaculture, so that this information can be available to First Nations to consider as a part of their review?
- **Recommendation:** DFO, along with First Nations, industry, and other stakeholders, should review the current state of science with respect to pollution associated with aquaculture, in order to develop regulations that reflect the most complete science information available today.
- **Recommendation:** Canada should recommend that for the purposes of aquaculture management, DFO and its partners (First Nations) have the jurisdiction to monitor, enforce, and charge under Sections 35 – 43 of the Fisheries Act relating to pollution.

- **Recommendation:** A full investigative program is needed to conduct research on items such as those summarized above, and develop thresholds for monitoring the environment as well as reporting on environmental indicator performance.
- **Discussion point:** Clarity is needed to determine whether aquaculture feeds and feed waste products contain toxic elements that pose pollution risk, and if so, to assess in a complete way what constitutes acceptable levels of risk.

Strategic Questions 7 and 8: Notification & Reporting

7. What information/documentation should be kept by companies and to what level of detail?

8. What information should the Department make reportable to the public, recognizing that such requirements must be in accordance with the *Privacy Act*?

- **Discussion Point:** The data that are often difficult to obtain are those data sets that provide information on impacts to the environment. Developing the appropriate level of monitoring tools to facilitate effective environmental monitoring requires adequate data sets for researchers.
- **Recommendation:** Notification requirements should also extend to instances of non-target and unauthorized by-catch.

Strategic Question 9: Are the powers of enforcement, as identified above, appropriate to the objectives of the aquaculture regulation?

- **Discussion question:** What role does Conservation & Protection have with other environmental monitoring compliance agencies?
- **Recommendation:** The structure and funding for enforcement need to include adequate base resources for outlined activities and also need to include an Aboriginal Enforcement Officer component.
- **Recommendation:** DFO needs to work with First Nations to develop various classes of persons to be involved in inspection and audit function of aquaculture.
- **Recommendation:** DFO should require aquaculture-related businesses to implement whistle-blower protection practices into their management. Canada should also consider a system where information leading to the prosecution of a company would result in cash rewards being paid.

Strategic Question 10: Attestations of Regulatory Compliance & Monitoring Results

Should verification of regulatory compliance and monitoring history be made available to others upon request by the license holder?

- **Recommendation:** In the spirit of enhanced transparency and accountability DFO should also consider making information on the performance of various operators available on a regular basis as a part of a regular audit of the industry.

Strategic Question 11: What would be an appropriate fee structure for aquaculture licences?

- **Recommendation:** Considerations for a new fee schedule should relate to elements of risk and risk mitigation, with higher risk aquaculture paying proportionally higher fees.
- **Recommendation:** Spatial fees for aquaculture should include a component which relates to the infringement of First Nations' rights and title and which incorporates a tenure payment directly to local First Nations.
- **Discussion Point:** First Nations should consider their input relating to fee schedules for aquaculture including considerations relating to the restrictions to holding capital assets through the Indian Act, and the need to develop capacity and capability at various scales (local, area/region, and B.C. wide).

Strategic Questions 12: Is there anything that you would add to, or delete from, the proposed list of policies and guidelines that would support the implementation of the regulation?

- **Recommendation:** DFO and First Nations should engage in discussions related to the higher-level vision for ‘architecture’ and ‘operational management’ of aquaculture, looking at how the proposed issues related to policy fit into the approach.
- **Recommendation:** The Regulatory Framework and/or the policies need to more clearly address the adoption of an Area-Based Management framework for aquaculture in B.C. which includes an outline for bi-lateral co-management at a variety of spatial scales (local, area/ regional, B.C.-wide, and possibly national) in both architecture and operational management decision-making.
- **Recommendation:** Amend the policies and guidelines to include a focused area for science capacity and policies which specifically relate to risk mitigation.

Strategic Question 13: Is there anything that you would add to the regulation beyond the regulatory provisions outlined above?

- **Recommendation:** The federal Aquaculture regulation for B.C. should have a built in 5 year review which would allow for an audit and evaluation, including proposed amendments or clarifications.
- **Recommendation:** The aquaculture regulatory framework needs to directly address the issues of co-management and Area-Based Management with First Nations, both with respect to program architecture and operational management.
- **Recommendation:** Reference to the role of CCFAM and CCME, including mention of how First Nations fit into these structures.

Policy Piece 3: Aquaculture Primer

Created by the FNFC, informed by information provided from Watershed Watch and the B.C. Salmon Farmers Association, the aquaculture primer provides a foundation of knowledge on the current state of the aquaculture industry. The piece was created to not only provide information to persons unfamiliar with the aquaculture industry in B.C., but also to help and dispel some of the myths associated with farming practices. Included in the primer are discussions, facts and statistics on the following topics:

- Introduction to the FNFC and their Mandate to engage within the field of aquaculture
- History of the Aquaculture generally
- Defining - what is Aquaculture?
- Shellfish Aquaculture
- Freshwater Aquaculture
- Salmon Aquaculture
- History of Salmon Farming Outside of B.C.
- History of Salmon Farming in B.C.
- What's the difference between a farm and a tenure?
- Governance of the Industry
- General Ecological Concerns related to Salmon Farming
- Role of Traditional Ecological Knowledge in Identifying Concerns
- Management and Transparency of Information
- Disease and Disease Control
- Escapes
- Marine Mammals & Birds
- Sea Lice
 - What is a sea louse?
 - Why the concerns about lice?
 - Why is there a debate about lice?
 - How do farms control lice?
- Closed Containment or Alternatives to Open Net Pen Farming
- Economic Impacts of Aquaculture
- Conclusions

Overall Findings/Recommendations:

The KEY NEXT STEPS from the legal opinion are as follows:

This opinion outlines many steps that can be taken by individual First Nations and/or groups representing First Nations in respect of consultation for the Federal Initiative. Essential steps, that in our view should be taken immediately, are:

1. Advising Canada (DFO) of the aboriginal rights and interests that First Nations assert will be impacted by the Federal Initiative (likely including aboriginal rights, fishing rights, and aboriginal title);
2. Advising Canada of the concerns of First Nations with respect to some of the broad and specific ways that it appears that the Federal Initiative will impact and infringe these asserted and proven aboriginal rights;
3. Advising Canada of the desire of First Nations to be consulted with respect to all aspects of the Federal Initiative, including the development of regulations, policies, and strategic plans;
4. Advising Canada of any concerns that First Nations have with regard to the currently proposed consultation process, including: the timeline of the process, the engagement of First Nations as rights-holders, the fracturing of the consultation process into separate pieces, and expanding consultations beyond the strategic questions in the Discussion Document. As part of this it is important to remind Canada that the first step in consultation is to discuss with First Nations the process of consultation;
5. Advising Canada that their participation in the current consultation process must not be taken as support for the current process which was developed without their input. First Nations must emphasize to DFO that their participation is without prejudice to their right to challenge Canada's consultation process as inadequate;
6. Identifying for Canada broad and specific areas where more information is needed from Canada in respect of the Federal Initiative in order that First Nations can engage meaningfully in consultation;
7. Raising with Canada the issue of funding for First Nations that will be necessary in order to ensure meaningful participation; and
8. Carrying out preliminary discussions within and between First Nations regarding needs and goals in respect of the process and general substantive outcomes of consultation on the Federal Initiative.

The BEST PRACTICES from the review of the previous policies/inquires are as follows:

Siting Best Practices

1. Resource and Land-Use Decision-Making
 - a. Bilateral co-management structure with First Nations, federal, provincial and local governments
 - Capacity for First Nations and First Nations organizations
 - b. Environmental Assessment of Aquaculture on an Area and Ecosystem Scale
 - Involve all First Nations with territories in the defined area, in marine or land use planning
 - c. Process for siting decisions
 - Review, identify gaps and update siting criteria
 - Integrating data from other user groups, agencies and sources, and continuous information sharing
 - Characterizing an ecosystem: defining the baseline data necessary for an environmental review

- Identification of local indicators and thresholds;
 - Risk-management tools
 - d. Independent regulatory oversight authority to audit land-use decisions
 - e. Restrictions. Province-wide planning to determine if, when or where restrictions are needed (e.g., species restrictions or regional restrictions)
2. Sustainability of Aquaculture
- a. Research, design and test commercial-scale, marine-based closed containment systems
 - b. Definition of sustainability within an area, based on area management and ecosystems-based research and management of aquaculture operations
 - c. Monitoring area-based sustainability indicators and thresholds over time (including estuaries, watersheds, wild fish habitat and status, and stock assessments)
 - d. Models and risk management tools

Day-to-Day Management of the Aquaculture Industry Best Practices

1. First Nations Governance

- a. Bilateral governance structure and process between First Nations, federal, provincial and local governments that includes decision-making authority within a First Nations' traditional territory
- b. Development of a First Nations common vision and principles on the management of aquaculture that would protect habitat and water resources
- c. First Nation to First Nation structure and process 4. Incorporating Aboriginal traditional knowledge into plans and practices by developing standards

2. Interference with Fisheries

- a. Identify marine resources other than salmon that should be evaluated within an ecosystem- based research or management program
- b. Wild fish capture in net pens – research and best management practices to mitigate the inadvertent capture of wild fish or herring spawning on nets

3. Economic Benefits

- a. Support for First Nations Businesses
 - Planning an aquaculture business or an aquaculture-related business
 - Getting through the permitting and regulatory process
 - Aquaculture management and operations
 - Coast-wide assessment and map reserve
- b. Developing Aboriginal Certification for aquaculture products or wild fishery products
- c. Third party monitoring or watchman programs
- d. Opportunities for revenue-sharing with aquaculture companies

Science Best Practices

1. Developing a coordinated and collaborative research program to support ecosystem-based research

- a. Science Secretariat for ecosystem-based research on marine and watershed systems
 - Funding for research on wild salmon and other fish at the ecosystem level (e.g., federal funding equivalent or greater towards than the federal 5 year, \$70 million aquaculture research program)
- b. Baseline information on the environment and resources
- c. Environmental monitoring and data collection
- d. Funding ecosystem-based research
- e. Structure for First Nations involvement in ecosystem based science
 - i. Collaborative research process

- ii. Setting research priorities
 - iii. Integrating Aboriginal traditional knowledge (issues, indicators, thresholds, methods)
 - iv. First Nations access to data collected through regulatory programs, for purposes of conducting research
 - v. First Nations access to research funding
 - vi. Communicating scientific research to First Nations
2. Routing the results of new knowledge back to aquaculture management and operations
3. Fish Farm Effluent (Waste Control)
- a. Control aquaculture output
 - b. Research on waste and contaminants in the marine ecosystem and traditional First Nations resources
4. Disease and Parasites
- a. Sea lice research and monitoring on an area and ecosystem scale (Broughton Archipelago and other areas as needed)
 - b. Adaptive management of sea lice (fallowing, sea lice levels on farm and wild fish, limiting age classes on a site, production limits, etc.)
 - c. Determining research issues with input from First Nations
5. Escaped Farmed Fish
- a. A federal aquaculture regulation with provisions, prohibitions and standards on preventing escapes from finfish farms
 - b. Prevention and mitigation of escaped farmed fish
 - c. First Nations monitoring of Atlantic salmon
6. Species Attraction to Farm sites
- a. By-catch and other species attraction issues
 - b. Independent monitoring to determine scope of issue with species attraction
 - c. Characterize wild fish habitat and routes in the ecosystem and avoid these areas in siting to minimize impacts of species attraction
7. Wild Fish Use in Farm Fish Feed
- a. Develop new formulas for reducing wild fish content in feed
 - b. Thresholds for wild fish content

Monitoring and Compliance Best Practices

1. Monitoring health of the ecosystem
2. Federal program for ensuring compliance with regulations along with enforcement measures
3. First Nations as independent monitors or a watchman program