



BY FACSIMILE

February 19, 2016

Jason Akearok,
Executive Director
Nunavut Wildlife Management Board
Box 1379
Iqaluit, NU X0A 0H0

RECEIVED
FEB 19 2016

Dear Mr. Akearok:

Re: Written Hearing of the NWMB concerning the proposed approval of the Qammartalik Cove Emerging Char Fishery Plan

Thank you for your February 9 2016 letter inviting DFO, the GN, and QWB to respond to NTI's letter dated September 17, 2015.

Your letter does not respond to NTI's January 28 2016 request for clarification of the decision the Board is considering making in this proceeding. As a result, NTI remains uncertain of the nature of the decision under consideration. In light of the confusion about DFO's proposal for decision that NTI's previous letters have brought to the Board's attention, NTI submits that all affected parties are entitled, as a matter of procedural fairness, to a clear explanation from the Board of the decision at issue. NTI asks that the Board provide this explanation before taking any further steps in this proceeding, allowing all affected parties a reasonable opportunity to respond.

Alternatively, NTI proposes that the Board decline to make the decision requested.

In support of this request and alternative proposal, NTI offers the following comments for the Board's consideration.

The decision in this proceeding

DFO's August 22 2015 proposal identified the issue for the Board's decision as a "Fishery Application" (page 1). Quoting DFO's proposal, NTI's September 17, 2015 letter provided the Board with detailed reasons why NTI understood this proposal to be for approval, by the Board, of an application for a fishing licence to be issued by DFO to the Nattivak HTO. Understanding the proposal to be for Board approval of a fishing licence application, or for some other Board



decision that Qikiqtarjuaq Inuit would purportedly require in order to legally harvest and sell 1000kg of char, NTI urged the Board not to make such a decision, citing the rights of Inuit to fish for sale without a licence and without limitations as to quantity outside a Total Allowable Harvest (TAH) under the *Nunavut Agreement* (NLCA). NTI also asked the Board, if it decided to proceed with such a decision notwithstanding NTI's objection, to identify the Board's authority under the *Nunavut Agreement* for making such a decision and to provide all parties an opportunity to comment on the Board's reasoning.

In the communications since, confusion surrounding the decision the Board is being asked to make has persisted. The Board's October 8, 2015 letter asking the HTO and DFO to confirm their intentions was captioned "Request for ... Board approval of ... fishery", while the body of the Board's letter treated the proposal as a decision "for approval of [a] ... fishery plan". In response, DFO's October 20, 2015 letter made no mention of a plan, confirming that DFO supports "seeking approval from the ... Board for an exploratory ... fishery". In contrast, HTO's October 28, 2015 response, captioned "... Fishery Application" stated simply that "we would like the ... Fishing to proceed" and that "The Monitoring & Management Plan" will continue to be worked on. The HTO did not indicate that the HTO considers a Board decision on the Plan necessary.

The Board's December 18, 2015 letter did not clarify matters by referring to NTI's position as a "jurisdictional challenge ... to the NWMB's authority" yet, at the same time, explaining the Proposal as "voluntary" and the Board decision at issue as "only ... approval by the Board of a mutually agreed upon plan for the management and protection of ... char". NTI had not challenged a voluntary arrangement, or any Board approval not purporting to be necessary in order for Inuit to fish.

It was in order to clarify this situation that NTI offered, in its January 28 letter, not to seek any delay of a Board decision approving a management plan for this fishery if the Board confirms that its decision will not engage NTI's concerns regarding establishment of quantitative limitations other than TAHs, any other mandatory limitations on Inuit fishing, and fishing licences. The Board's February 9 letter did not give this assurance, stating only that no TAH or BNL would be entailed in the decision and that Inuit should look, not to the Board, but to the Minister in order to learn "whatever implementation step(s) he considers necessary in the circumstances, as permitted by law".

Past proceedings

As the Board is aware, DFO for many years has been using Board approval of exploratory fishing licence applications, re-labelled "plans" by DFO, as an excuse to deny Inuit their NLCA rights to fish under s. 5.6.1 of the NLCA without licences and to impose on Inuit quantitative limits on their fishing outside any TAH, contrary to the *Nunavut Agreement*. The Board's 2012 approval of the Confederation Fiord Area Emerging Char Fishery Plan, cited in the Board's December 18 2015 letter in this proceeding, is only one example of this practice. So far as NTI is aware, DFO issued an exploratory fishing licence to the Nattivak HTO in reliance on that Board decision, and included in the licence quantitative fishing limitations outside any TAH and without the Board having purported to establish any quantitative limitation. As the Board is aware, the current Fishery Regulations in Nunavut purport to make it an offence for any person to fish for sale without a licence (ss. 5(1) and s. 22, *Northwest Territories Fishery Regulations*) or to sell fish not caught under a licence (s. 35(2) *Fishery (General) Regulations*). DFO's licencing therefore gives HTOs and their members the unequivocal message that Inuit fishing



outside the terms of such licences will make them liable to prosecution. The Crown owes Inuit a constitutional duty to act honourably in the implementation of modern treaties: see *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 1031, at paragraph 62. This colourable DFO practice is a violation of the Crown's duty.

If the Board does not end its role in this colourable practice, it risks being seen as a party to it. Attached are copies of two 2012 letters from NTI to the NWMB objecting to this practice. NTI does not have a record of any substantive response from the Board.

Conclusion

NTI is of the view that the Board lacks any authority:

- to approve limitations on Inuit fishing without meeting the requirements of procedural fairness and satisfying the decision constraints of ss. 5.3.3, 5.6.50 and other applicable provisions of the Nunavut Agreement,
- to approve a non-quantitative limit on Inuit fishing outside a TAH, or
- to approve any measure that would make it "necessary" within the meaning of s. 5.3.23 of the NLCA to require Inuit to have a fishing licence when fishing under s. 5.6.1 of the NLCA.

The Board may disagree with this view. If so, and if the Board proposes to rely on any disputed authority in this proceeding, it is incumbent on the Board to state its position and provide its reasoning.

Accordingly, before taking any further steps in this proceeding, please assure NTI and all affected parties that any Board approval of a Qammartalik Cove Emerging Char Fishery Plan will not:

- establish any limitation on the quantity of Inuit fishing;
- establish any non-quota limitation on Inuit fishing, including any requirement of a fishing licence, or;
- approve any measure that would be necessary to implement by means of a fishing licence.

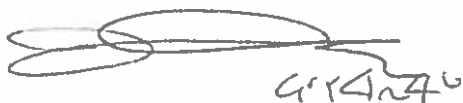
If the Board cannot give all of these assurances, NTI asks that the Board state its position and reasons in full and provide all affected parties a reasonable opportunity to respond.

Considering that the Board has characterized the decision at issue as "only" the approval of a voluntary, mutually agreed management plan, NTI also invites the Board, alternatively, to inform DFO and the HTO that the Board chooses not to exercise its discretionary jurisdiction under s. 5.2.34(d)(i) of the NLCA in this case, and so will not make any plan approval decision. This would leave DFO and the HTO free to follow their voluntary arrangement of their own accord, without involving the Board in any colourable decision.

Finally, NTI acknowledges and shares the Board's sincere desire that future Nunavut Fishery Regulations will remove any cause that has led DFO to deny Inuit their rights under the *Nunavut Agreement*. Clearly that is the long-term solution. In the meantime NTI relies on the Board, in this and all its proceedings, to make principled, fair and transparent decisions that respect the rights of Inuit.



Sincerely,



Handwritten signature of James T. Arreak, consisting of a stylized scribble above the name 'Arreak' written in cursive.

James T. Arreak
Chief Executive Officer

Attachments: Copy of March 12, 2012 Letter from NTI to NWMB
Copy of May 15, 2012 Letter from NTI to NWMB

CC. David Burden, DFO-RDG Central and Arctic Region
Manager, Nattivak Hunters and Trappers Organization
James Qillaq, Chairperson, Qikiqtaaluk Wildlife Board
Gabriel Nirlungayuk, Deputy Minister, Department of Environment, GN





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March 12, 2012

**Mikidjuk Akavak,
 Chairperson,
 Nunavut Wildlife Management Board
 Box 1379
 Iqaluit NU
 X0A 0H0**

Dear Mr Akavak:

Re: NWMB approval of the Coral Harbour exploratory char fishery plan

In reply to the NWMB's December 21, 2011 letter to Minister Ashfield approving the Coral Harbour exploratory char fishery plan, please be informed that NTI does not support the Board's decision.

Under the *NLCA*, it is not necessary for Inuit to have the Board's or Minister's approval in order to fish these char stocks. Inuit may do so without any form of licence, and may sell the catch for export. Accordingly, NTI recommends that the Aiviit HTO develop a fishing plan with DFO that

- i) identifies the water bodies to be fished and the amount of fish to be sold for processing/export, and
- ii) ensures that information and data from the fishery is collected and shared with DFO fisheries management.

The HTO approved fishing plan would be presented to the Board and the Minister for their information.

The Board's letter does not refer to any *NLCA* authority for the Board's decision except the Board's mandate to approve plans for the management and protection of wildlife (s.5.2.34(d)(i)). NTI therefore cannot be certain what authority is being relied on in the Board's decision for the limitations on Inuit harvesting that are described in the plan. For the Board's information, NTI would summarize its reading of the *NLCA* constraints that govern the Board and Minister in such an exercise as follows:

This fishery plan describes quotas and non-quota limitations that would apply to Inuit char fishing. The NWMB and Minister have the authority to limit Inuit fishing, but any quantitative limitation that does not continue pre-*NLCA* restrictions without modification must be in the form of a total allowable harvest (TAH), and must be justified under the *NLCA*'s standards for limiting Inuit harvesting (5.6.1-5.6.2; 5.3.3). Any TAH must be accompanied by the striking of a basic needs level (BNL) (5.6.19). Similarly, any pre-*NLCA* non-quota limitations on Inuit fishing modified after the Agreement was signed in 1993, and any non-quota limitations established after 1993, must meet the *NLCA*'s justification standards (5.3.3; 5.6.50). The inclusion of Inuit harvest limitations in a fishery plan does not alter these constraints on the Board's and Minister's authorities. In other words, neither the NWMB nor the Minister can avoid the *NLCA*'s constraints on decisions that limit Inuit harvesting by approving such a plan.

If the NWMB wishes to consider whether or not a quantitative limitation on this Inuit fishery is advisable, it may consider setting a TAH at the appropriate time, and may examine the justification for such a limitation accordingly. In the meantime, NTI wishes to point out that the historical harvest levels of char by Coral Harbour in the area in question are sufficiently high that it is very unlikely that a surplus would remain in the TAH after a BNL is struck. Therefore, whether or not a TAH is established in future, Inuit will be entitled to fish char in this area without a licence under the *NLCA* and to sell the catch for export. HTO powers respecting the regulation of members' fishing will be relied upon in either case, and any BNL will be allocated and enforced by the HTO.

In closing, NTI wishes to make a procedural recommendation to the Board, in the interest of informing Inuit of the significance of this type of Board decision. In future, when approving plans under s.5.2.34(d)(i) of the *NLCA*, NTI recommends that the Board

- 1) confirm in its decision whether or not it intends, by approving the plan, to establish, or modify, or remove any harvest limitations applicable to Inuit; and
- 2) where it intends to deal with Inuit harvest limitations, identify each harvest limitation applicable to Inuit that is contained in the plan, and the *NLCA* standard under which the Board has decided that the limitation is justified.

NTI recognizes that it is already Board practice to provide reasons for determining that a limitation on Inuit harvesting is justified.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. N.' followed by a stylized flourish.

Gabriel Nirlungayuk
Director of Wildlife
Nunavut Tunngavik Incorporated

CC Aiviit HTO
GN Fisheries and Sealing

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May 15, 2012

Mr. Peter Kusugak,
Acting Chairperson,
Nunavut Wildlife Management Board
Box 1379
Iqaluit NU
X0A 0H0

Dear Mr.Kusugak:

Re: NWMB approval of the Coral Harbour exploratory char fishery plan

In reply to the proposed “way forward” presented on behalf of the Board in its April 19 2012 conference call and described in the minutes attached to the Board’s May 4 follow-up e-mail, please be informed that NTI’s position remains as stated in NTI’s March 12 2012 letter. NTI does not support the NWMB’s decision to approve the Coral Harbour exploratory char fishery plan.

The Board’s December 2011 initial decision left much doubt for potentially affected parties as to what the Board intended to do by renaming the half-page document entitled “Coral Harbour Emerging Fishery” a “fishery plan,” and approving said “plan” on the basis of the Board’s mandate to approve plans for the management and protection of wildlife under s. 5.2.34(d) (i) of the NLCA.

In its March 12 letter, NTI outlined NTI’s understanding of what has been done and how the Board’s decision appears to depart from the NLCA. NTI also recommended that the Board clarify its procedure. NTI pointed out that

1. The HTO may adopt its own fishery management measures regarding locations of fishing char for sale, amounts for sale to the plant, and collection and sharing of data with DFO (s. 5.7.3, NLCA). Such measures do not require any form of approval by the Board or Minister under the NLCA. If the HTO chooses to develop such management measures in collaboration with DFO, it is appropriate that the HTO present the measures to the Board and Minister for their information but not for their approval;
2. Approval by the Board of plans for the management of wildlife under s. 5.2.34(d) (i) of the NLCA does not necessarily establish or modify any harvest limitations applicable to Inuit, and cannot relax the decision standards laid down by the NLCA for any such limitations;
3. In engaging the parties about related Board decisions, the Board should make clear which it is intending to do – approve a wildlife management plan, or establish or modify Inuit harvesting restrictions? If the Board intends to do both at the same time, NTI

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recommended a procedure to make clear the implications and the NLCA decision standards that must be followed;

4. Nothing the Board does can alter the right under the NLCA of an Inuk with proper identification to fish char for sale without "any form of licence or permit" (s. 5.7.26).

NTI disagrees with the Board's "plan" approval decision not only because Board approval of these HTO measures in fact would have no practical effect (point #1 above). NTI also disagrees because the effect that DFO appears to be asking the Board to give to its decision would contravene the NLCA. The document that DFO has submitted for approval refers to the HTO as "licence applicant" or "licence holder," and describes the fishery in question in terms of the "exploratory" type of licence to fish for sale under the NWT Fishery Regulations that DFO proposes to issue. In this context, it seems very clear that DFO intends to rely on the Board's plan approval decision to enable DFO i) to require the HTO's members to fish under DFO's proposed licence and ii) to enforce the HTO's measures in the form of licence conditions. In effect, the Board is being asked to impose a licence requirement on Inuit fishing and convert HTO voluntary measures into mandatory limitations by approving a management plan that contains the HTO's voluntary measures. This the Board may not do under the NLCA (points #2-4 above).

NTI appreciates that the Board is trying to promote a responsibly managed Coral Harbour char fishery for export, based on "voluntary harvesting limits" (Board minutes to the April 19 conference call, p. 2). In the light of points #2-4 above, the Board's role in this endeavour must be modest, pending any proper consideration of the need for mandatory harvesting limitations. As you know, I am seeking to meet with GN Deputy Minister David Akeegok in order to resolve the fish plant purchasing dimension of this issue. All parties recognize that GN purchasing policy is vital to proper implementation of the NLCA fisheries management system where fishing for export is concerned. As well, DFO's appropriate role in the system is already on the agenda for the next meeting of the Canada - Nunavut Fisheries and Marine Mammal Cooperation Committee (CNFMMCC), scheduled to be held on July 11-12, 2012. Pending the outcome of those initiatives, NTI recommends that the Board limit its next steps in this proceeding to either of the following:

1. Considering that the condition of NTI approval placed on the Board's initial decision was not met, rescind the initial decision; or
2. Rescind the initial decision and pass a Board resolution to the following effect:

RESOLVED:

1. The Board has reviewed the voluntary harvesting limits that the Coral Harbour Hunters and Trappers Organization proposes to adopt under s. 5.7.3 of the NLCA, described in the document titled "Coral Harbour Emerging Char Fishery";

2. The Board recommends that Fisheries and Oceans Canada (DFO) recognize and respect the HTO's voluntary harvest limits in exercising DFO's mandate to oversee the management of fish for export, and

3. The Board recommends that the Government of Nunavut (GN) recognize and respect the HTO's voluntary harvest limits in exercising the GN's mandate to regulate the purchase of fish for export.

In closing, I note that NTI's long-held position that s. 5.7.26 of the Agreement provides Inuit with the right to fish under s. 5.6.1 without a licence is well known to the Board, DFO, and the Government of Nunavut. To NTI's knowledge, neither the Board nor any party has taken a position to the contrary in this proceeding or any other NWMB proceeding.

I also would like to thank the Board for the well-intended suggestions made in points 1 and 2 of the minutes attached to the NWMB's May 4 email. We will be revisiting such matters at the next meeting of the CNFMMCC.

Sincerely,



Gabriel Nirlungayuk
Director, Wildlife and Environment
Nunavut Tunngavik Incorporated

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