

**SUBMISSION TO THE
NUNAVUT WILDLIFE MANAGEMENT BOARD**

Issue: Basic Needs Level for Arctic Char in Kingnait Fjord, Nunavut

Background:

A public hearing on Kingnait Fjord Arctic char was held June 3, 2009 in Pangnirtung to consider establishing a Total Allowable Harvest (TAH). As a submission to be considered as part of the public hearing, the NWMB provided a legal opinion from Lang Michener LLP on the definition of a Basic Needs Level (BNL). It was agreed before the hearing that the discussion on the BNL would be postponed to allow all parties to review the legal opinion.

Assessment:

References are to provisions in the Nunavut Land Claims Agreement (NLCA).

In DFO's view it is relevant that the BNL uses the term "basic needs" to inform the scope of the right. This term reflects harvesting for the purposes set out in 5.6.26 (a) to (c) and does not include harvesting for commercial purposes other than for intersettlement trade or marketing for consumption or use in the Nunavut Settlement Area (NSA). For example, in DFO's view the BNL would include sale within the community for local consumption through the local Hunters and Trappers Organization (HTO) or the local store. However, it would not include harvesting fish to supply the local fish plant for export.

While the elements of what is included in the BNL are not explicitly defined in the NLCA, in DFO's view the elements set out in 5.6.26 reflect the intended purposes for harvests that comprise, and are used in calculating, the BNL. Under 5.6.26, the NWMB is required to periodically review the BNL for each stock or population and determine whether an additional allocation is required to meet any or all of:

- a) increased consumption or use by Inuit;
- b) intersettlement trade; and
- c) marketing for consumption or use in the NSA.

In DFO's view, the Adjusted BNL, which is the BNL as may be adjusted upon periodic review, and the BNL would both be comprised of the same elements. The factors in 5.6.27 considered by the NWMB in making a decision related to 5.6.26 are consistent with this view.

The purpose of the Nunavut Wildlife Harvest Study (the Harvest Study) as set out in 5.4.5 is "to furnish data, to establish current harvesting levels, to assist the NWMB in establishing levels of total allowable harvest and, in general, to

contribute to the sound management and rational utilization of wildlife resources in the NSA. To this end, the Study shall: (a) document the levels and patterns of Inuit use of wildlife resources for the purpose of determining the basic needs level ...” While 5.4.5(a) is a key part of the Harvest Study, there is nothing in the wording of 5.4.5 that suggests that the BNL includes harvesting for purposes other than the elements set out in 5.6.26(a) to (c). In looking at the levels and patterns of Inuit harvests during the period covered by the Harvest Study, in addition to harvesting for purposes set out in 5.6.26, Inuit may also have harvested for other purposes. This does not mean that harvesting for all purposes is included in the BNL. Harvest amounts taken into account in calculating the BNL are those that reflect the purposes of the harvests that comprise the BNL. The approach taken during the design and execution of the Harvest Study is consistent with this view.

Several committees were established by the NWMB to advise and administer the Harvest Study. This included the establishment of a Steering Committee in 1994, chaired by the NWMB and comprised of representatives appointed by the three Regional Wildlife Organizations (RWOs), DFO, Environment Canada, and the GNWT Department of Renewable Resources. The Steering Committee reasoned that the primary application of the Harvest Study was for calculating basic needs level, and concluded that although the definition of BNL was not explicitly defined in the NLCA:

“the context of the Agreement does indicate that the basic needs level is that amount of harvest which is currently taken for domestic and cultural purposes. Harvesting or gathering for the purpose of obtaining skins, feathers, dog food, craft materials etc. would all be acknowledged “basic needs” components as long as the end use occurred in the hunter’s community or entered into inter-settlement trade. Apparently not eligible for consideration as an item of “basic need” would be material harvested or gathered for commercial sale as food outside the Nunavut Settlement Area.” (NWMB, 1995b: 2).

The Steering Committee established guidelines and methods to manage commercial harvest reporting, which included removing records whose comments indicated that the harvest had been sold to a fish or meat plant or indicated that the harvest had been ‘sold’ or was ‘commercial’, while records whose comments indicated that the harvest had been sold for local consumption, for example to the local HTO or one of the local stores were retained (NWHS, pg. 23).

In DFO’s view, the use of the term “personal consumption” in relation to “other residents” in 5.6.27(e) and 5.6.31 but not in the context of 5.6.26(a) or 5.6.27(b) does not indicate that “use by Inuit” in 5.6.26(a) is intended to be “use for any purpose” (including harvesting for commercial purposes). “Personal consumption by other residents” is defined in 5.6.33 as “consumption in the NSA by other residents and their dependents”. Adding “personal” before “consumption by other residents” indicates the narrower scope of that wording; it is more limited in scope than 5.6.26(a) and would not include the purposes in 5.6.26 (b) and (c).

Given the specificity of 5.6.26(b) and 5.6.26(c), both of which reflect economic activity, in DFO's view "consumption or use by Inuit" in 5.6.26(a) is not intended to include harvesting for commercial purposes.

Similarly, the use of the term "domestic consumption" in the context of the Inuit harvesting right in 16.1.2 indicates the intended scope of that right.

In DFO's view, not having the term "subsistence" appear in 5.6.26 or in the provisions related to the Harvest Study or for calculating the BNL does not imply that the intention of the parties was to include harvesting for commercial purposes other than intersettlement trade or marketing for consumption or use in the NSA. Different land claims agreements use different terms to provide for similar rights and concepts. For example, 5.6.1 and 5.6.26 also do not use the term "food", but no one would suggest that harvesting by Inuit for food is not included in these provisions.

Determination of the BNL and the right to dispose of any wildlife lawfully harvested set out in 5.7.30 are two different matters. Further, the right in 5.7.30 is specifically subject to 5.6.26 to 5.6.30, related to the Adjusted BNL. In DFO's view, the intention is to limit the disposition of wildlife harvested under the BNL, as may be adjusted upon periodic review, to disposition consistent with the purposes of the harvests identified in 5.6.26 (a) to (c). Other harvests by Inuit, for example in the context of commercial fisheries under the surplus, are not subject to this limitation. In DFO's view the reference to 5.6.26 to 5.6.30 supports the position that the BNL and Adjusted BNL do not include harvesting for commercial purposes other than for intersettlement trade or marketing for consumption or use in the NSA.

If the BNL included commercial harvests for purposes other than intersettlement trade or marketing for consumption or use in the NSA, such as for example harvesting fish for the local fish plant for export, there would be much less likelihood of there being a surplus to provide for the harvesting opportunities identified in section 5.6.31. These opportunities include harvesting by Inuit and non-Inuit and by Designated Inuit Organizations (DIOs) in the order and priority set out in that section. The detail and specificity of provisions related to allocating the surplus supports DFO's view that where a TAH is established, commercial harvesting opportunities other than for intersettlement trade or marketing for consumption or use in the NSA are provided through allocating the surplus.

In negotiating land claims agreements, the Government also takes third party interests and the public interest into account. As noted above, the NLCA, in addition to setting out harvesting rights in 5.6.1 and 5.6.3 (related to the BNL and Adjusted BNL), also provides for economic opportunities in the NSA for Inuit and DIOs. The objectives set out in 5.1.3(a) noted below reflect Inuit harvesting in the NSA and also reflect third party interests.

5.1.3 This Article seeks to achieve the following objectives:

- (a) the creation of a system of harvesting rights, priorities and privileges that
- (i) reflects the traditional and current levels, patterns and character of Inuit harvesting,
 - (ii) subject to availability, as determined by the application of the principles of conservation, and taking into account the likely and actual increase in the population of Inuit, confers on Inuit rights to harvest wildlife sufficient to meet their basic needs, as adjusted as circumstances warrant,
 - (iii) gives DIOs priority in establishing and operating economic ventures with respect to harvesting, including sports and other commercial ventures,
 - (iv) provides for harvesting privileges and allows for continued access by persons other than Inuit, particularly long-term residents, and
 - (v) avoids unnecessary interference in the exercise of the rights, priorities and privileges to harvest; ...

Subsection (i) indicates that the system is to reflect traditional and current harvesting by Inuit, but does not suggest that all current harvesting needs to be rights based or that current harvesting may not include traditional and other harvesting. Subsection (ii) refers to Inuit harvesting rights sufficient to meet basic needs, as adjusted as circumstances warrant. The use of the terms “basic” and “needs” reflects the scope of the right and the wording in subsection (ii) supports the view that the Adjusted BNL is an adjustment to the elements that comprise the BNL. Subsection (iii) reflects a priority to be given to DIOs for specific economic opportunities with respect to harvesting. Subsection (iv), refers to harvesting privileges, without reference to “Inuit” or “non-Inuit”, thus indicating that it includes harvesting privileges of both.

Harvesting provisions in Article 5 reflect this system of harvesting rights, priorities and privileges. As discussed above, the provisions provide for Inuit rights to harvest sufficient to meet their basic needs, as adjusted as circumstances warrant upon periodic review. Where a TAH is established, the system provides for the BNL, as adjusted, to be the first demand against the TAH. The provisions on the allocation of the surplus (5.6.31 to 5.6.40) reflect 5.1.3 (iii) and (iv). There is nothing in the wording of 5.6.31(b) to suggest an intention to limit that provision to non-Inuit – the existing sport and commercial operations being referenced would include both Inuit and non-Inuit operations. Specific opportunities for ventures sponsored by HTOs and RWOs are provided for in 5.6.31(c). The other uses under 5.6.31(d) include commercial harvesting under a limited entry system and 5.6.46 provides that Inuit shall have “at least the same right to apply (for access to commercial opportunities) as all other persons who qualify and to have their applications considered on their merits”.

As noted above, in DFO's view, where a TAH is established, the NLCA intended to provide for Inuit harvesting in the NSA for commercial purposes other than intersettlement trade or marketing for consumption or use in the NSA through the allocation of the surplus. Where a TAH is established, this approach provides priority for the BNL (as may be adjusted) and promotes the long-term economic, social and cultural interests of Inuit harvesters while providing opportunities to fish for non-Inuit where there is a surplus.

Kingnait Fjord Arctic Char:

In the event that the NWMB decides to establish a TAH for the Kingnait Fjord Arctic char, then the BNL will need to be set. The recommendation that DFO provided at the Public Hearing in Pangnirtung was to set a TAH taking into account the following levels of risk:

| Total Harvest | Risk |
|---------------|----------|
| >4800 kg | High |
| 2700-4800 kg | Moderate |
| <2700 | Low |

Upon reviewing the transcript of the hearing, DFO would like to clarify one point. The total harvest levels reflected above are for all fishing, not just commercial fishing. (0083 lines 8 to 18 of the transcript)

Conclusion:

In DFO's view the BNL (as adjusted as circumstances warrant) consists of harvesting for: (a) consumption and use by Inuit, (b) intersettlement trade, and (c) marketing for consumption or use in the NSA. The BNL does not include harvesting for other commercial purposes such as, for example, harvesting fish to supply the local fish plant with fish for export. DFO is of the view that these other commercial opportunities should be conducted and are provided for in the NLCA, but that they are not part of the BNL (as may be adjusted upon periodic review).

Prepared by: DFO Central and Arctic Region

Date: July 14, 2009