

## Chapter 3 • Legislative amendments

On March 29, 2012, the Government of Canada tabled its budget in Parliament. Four weeks later, on April 26, 2012, the government introduced Bill C-38, entitled *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures* (short title: *Jobs, Growth and Long-Term Prosperity Act*). Bill C-38 received royal assent on June 29, 2012.

Bill C-38 includes at least two sets of provisions relevant to the work of this Commission:

- It repeals the *Canadian Environmental Assessment Act* (CEAA) that was in force at the time of this Commission's hearings and replaces it with the new *Canadian Environmental Assessment Act, 2012* (CEAA, 2012).
- It amends the *Fisheries Act*, most notably some of the habitat protection provisions, but also enforcement and fisheries management provisions.

Bill C-38 was introduced five months after completion of the evidentiary hearings and when

my Final Report was in the late stages of drafting. My review of the amendments satisfied me that many of them would have a significant impact on some of the policies and procedures of the Fraser River sockeye salmon fisheries examined by this Commission and on important habitat protection measures in place at the time of the evidentiary hearings.

In response to these recent developments, I decided to take the following actions:

- To invite all participants to make supplementary written submissions regarding how, if at all, their previous submissions would be affected by Bill C-38's changes to legislation.
- In this Report, to insert references to Bill C-38 when discussing issues that may be affected by these new amendments.
- In this chapter, to summarize the changes to Canada's environmental assessment process and to the federal *Fisheries Act*, insofar as they may have an impact on Fraser River sockeye salmon, their habitat, and the sockeye fishery.

I extend my appreciation to those participants who, on short notice, prepared detailed and thoughtful responses to these legislative changes. I make reference to them in the discussion that follows. The full text of all participants' supplementary submissions is included in the DVD accompanying this Report.

I note that the Government of Canada suspended several processes pending the results of this Inquiry in order to consider the advice and recommendations made in my Report. Such processes include Pacific Salmon Treaty negotiations with the United States, treaty negotiations with First Nations, the Coastwide Framework initiative of the Department of Fisheries and Oceans (DFO) (related to post-treaty allocations of fish), and decisions about new salmon aquaculture licences. It is regrettable that the legislative amendments discussed in this chapter, especially those related to the *Fisheries Act*, could not also have waited until the Government of Canada had the opportunity to consider this Report.

Because these amendments were introduced after the conclusion of the Inquiry's evidentiary hearings, neither Commission counsel nor counsel for participants had the opportunity to explore with witnesses the potential impact of these changes on DFO's fisheries management and habitat protection programs and activities. As a result, I decided to invite supplementary written submissions from participants. I received those submissions on May 14, 2012.

As I finished my drafting of this Final Report, the amendments presented challenges:

- Some of the amendments are enabling only, granting to cabinet or to a minister the authority to make regulations. It is only when these regulations are drafted and published that interested parties will be able to assess the true import of the amendments.
- The statutory language used in some amendments has not yet been interpreted by officials and may be tested in court.

For all these reasons, I approached the drafting of this chapter with caution. I am, however, able to summarize Bill C-38's provisions that relate most directly to the work of this Inquiry and, where appropriate, will include the positions taken by

the various participants who filed supplementary written submissions.

I have not considered any further legislative amendments beyond June 30, 2012, when the drafting of this Report was essentially complete.

## ■ Summary of legislative changes in Bill C-38 relevant to this Report

In this section, I briefly summarize Bill C-38's changes to the environmental assessment process and the *Fisheries Act* that are relevant to this Inquiry. In the next major section, I address the possible implications of these enactments in light of the evidence I heard and my findings and recommendations.

### Changes to the environmental assessment process: CEAA, 2012

Bill C-38 repeals the *Canadian Environmental Assessment Act* in force at the time of the Commission's hearings and enacts the *Canadian Environmental Assessment Act, 2012* (CEAA, 2012) – which establishes a new federal environmental assessment process.<sup>1</sup> Under the CEAA, 2012, assessments are conducted in relation to projects designated by regulations or by the minister of the environment – the “designated projects.” However, not all designated projects will require an environmental assessment. Proponents of designated projects must provide the Canadian Environmental Assessment Agency (CEA Agency) with a description of the designated project.<sup>2</sup> The CEA Agency then conducts a “screening,” which includes a consideration of the description of the designated project; the possibility that the carrying out of the designated project may cause adverse environmental effects; any comments received from the public within 20 days of posting the notice of the proposed project; and the results of any relevant study conducted by a committee established under sections 73 and 74 of the CEAA, 2012 (the minister may establish a committee to conduct a study of the effects of existing or future physical activities

in a region entirely on federal lands or may jointly establish such a committee if the region is partly on or entirely outside federal lands).<sup>3</sup> On completion of this screening, the CEA Agency must decide if an environmental assessment of the designated project is required.<sup>4</sup>

If an environmental assessment is required, the assessment determines whether a designated project is likely to cause significant adverse environmental effects that (1) fall within the legislative authority of Parliament or (2) are directly linked or necessarily incidental to a federal authority's exercise of a power or performance of a duty or function required to carry out the project.<sup>5</sup> The CEA Agency, the Canadian Nuclear Safety Commission, the National Energy Board, or a review panel established by the minister (at his or her discretion) conducts the assessments.<sup>6</sup> However, cabinet is the final decision maker with respect to project approval.

After an assessment, if the decision maker decides that the designated project is not likely to cause significant adverse environmental effects or if cabinet decides that these effects are justified in the circumstances, then a decision statement, with conditions, is issued to the project proponent.<sup>7</sup>

A designated project means one or more physical activities that are

- carried out in Canada or on federal lands;
- designated by regulations or in an order made by the minister; and
- linked to the same federal authority as specified in the regulations or order.

It also includes any physical activity that is incidental to those physical activities.<sup>8</sup> At the time of writing this Report, there are no proposed regulations under the CEAA, 2012, prescribing designated projects.

The CEAA, 2012, allows the federal government to delegate an environmental assessment, substitute the process of another jurisdiction for an environmental assessment under the Act, and exclude a project from application of the Act when there is an equivalent assessment by another jurisdiction.<sup>9</sup> The new Act provides opportunities for public participation during both the screening process and an environmental assessment.<sup>10</sup> It also requires participant funding programs,<sup>11</sup> establishment of a public registry,<sup>12</sup> and follow-up programs in relation to all environmental assessments.<sup>13</sup>

The CEAA, 2012, specifies that federal authorities (with exceptions for national security, national emergencies, and other matters) must determine that the projects are not likely to cause significant adverse environmental effects before they take steps to carry out projects or enable projects on federal lands (defined in the Act), or outside Canada. If, however, the authority determines that a project is likely to cause significant adverse environmental effects, it may refer the matter to cabinet – to decide whether the effects are justified in the circumstances.<sup>14</sup>

## Changes to management of Fraser River sockeye and sockeye habitat

Bill C-38 amends the *Fisheries Act* “to focus that Act on the protection of fish that support commercial, recreational or Aboriginal fisheries and to more effectively manage those activities that pose the greatest threats to these fisheries.”<sup>15</sup> In this section I focus on the amendments that, in my view, have the potential to significantly affect DFO's and Environment Canada's management of Fraser River sockeye and sockeye habitat.

### *Management of Fraser River sockeye*

Part 3, Division 5, of Bill C-38 contains a new section of the *Fisheries Act* (section 4.1) that allows the minister of fisheries and oceans to enter into agreements with the provinces to further the purposes of the Act. If an agreement provides that there are provincial laws which are “equivalent in effect” (not defined in the Act) to a provision in the regulations, then cabinet can declare, by order, that provisions of the Act or its regulations do not apply in that province (section 4.2). The amendments also allow the minister to enter into agreements, arrangements, or transactions with any person or body, or any federal or provincial minister, department, or agency, to implement programs and projects for the purposes of the Act (section 4.4).

Bill C-38 defines commercial, recreational, and Aboriginal fisheries for the purposes of the *Fisheries Act* (in subsection 2(1)). A “commercial fishery” is defined as fish harvested under the authority of a licence for the purpose of sale, trade, or barter. A “recreational fishery” is defined as fish harvested under the authority of a licence for personal use

of the fish or for sport. An “Aboriginal fishery” is defined as fish harvested by an Aboriginal organization or any of its members for the purpose of using the fish as food or for subsistence or for social or ceremonial purposes.

Part 3, Division 5, also creates a new section 43.2. It permits cabinet to designate another minister as the minister responsible for the administration and enforcement of subsections 36(3) through (6) of the *Fisheries Act* for the purposes of, and in relation to, subject matters set out by order. As discussed in Volume 1, Chapter 7, Enforcement, and Chapter 2, Recommendations, of this volume, section 43.2 means that Environment Canada could assume legislative as well as administrative responsibility for these subsections. At the time of the hearings and report writing, DFO is ultimately responsible for enforcement of section 36, although Environment Canada has administrative responsibility.

Part 4, Division 18, of Bill C-38 creates a new provision (section 10) that authorizes the minister of fisheries and oceans to allocate fish for the purpose of financing scientific and fisheries management activities in the context of joint project agreements. Section 10 appears to be a response to the *Larocque v. Canada* decision.<sup>16</sup> In *Larocque*, a case involving the snow crab fishery in the Gulf of St. Lawrence, the Federal Court of Appeal held that the minister of fisheries and oceans does not have the authority to finance DFO’s scientific research activities by selling fish, “a common property resource belonging to all the people of Canada” – a resource managed by DFO.<sup>17</sup> After *Larocque*, DFO ceased funding Fraser River sockeye test-fishing programs through the allocation of fish to test fishers.

### ***Management of Fraser River sockeye habitat***

The amendments to section 35 (at the time of the hearings, the harmful alteration, disruption, or destruction [HADD] provision) in Part 3, Division 5, of Bill C-38 are relevant to the evidence, findings, and recommendations in this Report regarding management of Fraser River sockeye habitat. At the time of the hearings, subsection 35(1) provided that “[n]o person shall carry on any work or undertaking that results in the harmful alteration,

disruption or destruction of fish habitat.” The new subsection 35(1) states that “no person shall carry on any work, undertaking or activity that results in serious harm\* to fish that are a part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.” The amendments also broaden the exceptions to the prohibition in subsection 35(1) under a revised subsection 35(2). In addition to the authorizations for HADDs at the time of the hearings (for any person following the conditions required by the minister or regulations made by cabinet), the following categories of exceptions are authorized:

- Paragraph 35(2)(a): If the work, undertaking, or activity is a prescribed work, undertaking, or activity and is carried on in accordance with prescribed conditions.
- Paragraph 35(2)(c): If the carrying on of the work, undertaking, or activity is authorized by a prescribed person or entity and the work, undertaking, or activity is carried on in accordance with the prescribed conditions.
- Paragraph 35(2)(d): If the serious harm is produced as a result of doing anything that is authorized, otherwise permitted, or required under the Act.

Bill C-38 also creates a new subsection 35(3). It allows the minister (instead of cabinet as required by the Act at time of report writing) to make regulations for the purposes of paragraph 35(2)(a). Changes to section 36 also allow the minister (instead of cabinet) to make regulations to except the application of subsection 36(3). (That subsection prohibits the deposit of deleterious substances into fish habitat.)

In addition, Bill C-38 creates a new section 6, which requires the minister of fisheries and oceans to consider certain factors before he or she recommends to cabinet that a regulation be made in relation to section 35 (and some other specific circumstances). The following factors must be considered:

- the contribution of the relevant fish to the ongoing productivity of commercial, recreational, or Aboriginal fisheries;
- fisheries management objectives;

\* “Serious harm” is defined as the death of fish or any permanent alteration to, or destruction of, fish habitat (ss. 2(2)).

- whether there are measures and standards to avoid, mitigate, or offset serious harm to fish that are part of a commercial, recreational, or Aboriginal fishery, or that support such a fishery; and
- the public interest.

The minister also has to consider these factors before exercising powers in certain circumstances, including those set out in paragraph 35(2)(b) (exception to the prohibition in subsection 35(1), where the minister authorizes a work, undertaking, or activity and the minister's conditions are followed); paragraph 35(2)(c) (exception to the prohibition in subsection 35(1) if a prescribed person or entity authorizes a work, undertaking, or activity and the prescribed conditions are followed), and subsection 35(3) (the minister may make regulations prescribing a work, undertaking, or activity that can be carried out without violating subsection 35(1)).

Also relevant to the management of Fraser River sockeye habitat is the amendment to section 32. Section 32 prohibits the killing of fish by means other than fishing. The revised provision expands exceptions to the prohibition. Paragraph 32(2)(d), in conjunction with paragraph 43(1)(i.3) (see below), enables government to allow other regulators, such as a province or a federal agency, to issue authorizations under the *Fisheries Act*. Bill C-38 also provides that cabinet can, by order, repeal section 32 at any time.

Prior to the amendments, section 37 of the *Fisheries Act* provided that

- the minister may request plans and specifications for works or undertakings that might affect fish or fish habitat; and
- the minister may, by regulations or with cabinet approval, make orders to restrict or close works or undertakings that may harmfully alter fish habitat or lead to the deposit of deleterious substances.

The amendments to section 37 require, but only on request of the minister or in accordance with any regulation requiring the provision of specific material, any person proposing to carry on a work, undertaking, or activity in “any ecologically significant area” (not defined in the Act or amendments),

to provide the minister with prescribed material and other information.

The Bill C-38 amendments also add new categories of regulations (in section 43) that cabinet may make to carry out the purposes and provisions of the *Fisheries Act*. These categories include regulations providing for the control and management of aquatic invasive species.

In addition, a new subsection 43(5) provides that cabinet may make regulations exempting any Canadian fisheries waters from the application of section 35.

As noted above, paragraph 43(1)(i.3), in conjunction with paragraphs 32(2)(d) or 35(2)(c), enables government to allow regulators other than the minister of fisheries and oceans, such as a province or a federal agency, to issue authorizations under the *Fisheries Act*.

## ■ Discussion of legislative changes

In this section I discuss the impact that the legislative amendments have on this Commission's findings and recommendations. I also summarize concerns identified by participants in this Inquiry.

### **New environmental assessment process: CEAA, 2012**

At the time of report writing, no regulations were yet proposed regarding what type of projects will be considered designated projects and potentially subject to environmental assessment. It is difficult to fully assess the impact of the CEAA, 2012, on the environmental assessment process without knowing the regulations. However, on the face of the enactment, the environmental assessment process as described in this Report will be fundamentally changed once the new Act comes into force and the CEAA is repealed. Below, I discuss several of the changes that I see as particularly relevant to this Commission's findings and recommendations on management of Fraser River sockeye and sockeye habitat.

First, under the CEAA, 2012, the trigger for environmental assessment is no longer

government action. Rather, it is the type of project. For Fraser River sockeye, this change means that projects requiring HADD authorizations will not necessarily be subject to an environmental assessment. Furthermore, even designated projects may not be subject to environmental assessments because the CEA Agency has complete discretion to decide if an environmental assessment is required. The participant Conservation Coalition submits that, given this new regulatory structure, the new Act is likely to result in fewer environmental assessments than under the CEAA. In this participant's view, the CEAA, 2012, is intended to eliminate federal government responsibility for environmental protection.<sup>18</sup> The participant Western Central Coast Salish First Nations (WCCSFN) told me that the CEAA, 2012, reduces federal oversight of environmental assessments, including projects that may have an impact on fish habitat, and that this change will have long-term effects on the sustainable management of Fraser River sockeye.<sup>19</sup>

Second, the CEAA, 2012, limits responsible authorities to three regulatory agencies. Therefore, DFO will no longer be a responsible authority for environmental assessment. Also, the CEA Agency is the sole decision maker of whether an environmental assessment will be required for designated projects. The combined effect of these changes to the CEAA regime means that it is likely DFO will be less involved in assessing the impact of projects on Fraser River sockeye and sockeye habitat.

Third, the CEAA, 2012, allows a provincial environmental assessment to proceed instead of the federal assessment process. The Conservation Coalition was concerned with this change because, in its view, federal environmental assessments are an important opportunity for "sober second thought."<sup>20</sup> In addition, British Columbia's environmental assessment process does not require a complete analysis of the significance of a project's environmental impact.

Fourth, the CEAA, 2012, increases cabinet's role as a decision maker in project approval. Cabinet may decide that significant environmental effects are justified in the circumstances and approve a project. The participant First Nations Coalition (FNC)\* was concerned about increased cabinet

(and ministerial) discretion. The FNC stated that this change to the CEAA ignores "well documented international experience and concerns raised repeatedly by First Nations."<sup>21</sup>

Participants also expressed the following concerns about the CEAA, 2012:

- restricted scope of environmental assessments compared with the CEAA;<sup>22</sup>
- short timelines for the initial screening decision and environmental assessments;<sup>23</sup>
- reduced public participation in environmental assessments;<sup>24</sup>
- reduced opportunities for First Nations participation in environmental assessments;<sup>25</sup>
- reduced generation and dissemination of Aboriginal traditional knowledge;<sup>26</sup>
- reduced generation and dissemination of science and diverse perspectives;<sup>27</sup>
- the possibility that proposed fish farms will not be subject to environmental assessments<sup>28</sup> (the participant Aquaculture Coalition also told me that, even if environmental assessments were required for fish farms, the risk of disease would not be evaluated);<sup>29</sup>
- a weakened environmental assessment process and "moving projects, major and important economic projects, rapidly through the approval process";<sup>30</sup>
- the inability of Canada to meet its duty to consult with First Nations;<sup>31</sup> and
- reduced transparency of decision making by cabinet with respect to project approval.<sup>32</sup>

## Revised *Fisheries Act*

### *Management of Fraser River sockeye*

As set out above, section 4.1 allows the minister of fisheries and oceans to enter into agreements with the provinces to further the purposes of the Act. If an agreement provides that there are provincial laws that are "equivalent in effect" to a provision in the regulations, then cabinet can declare, by order, that provisions of the Act or its regulations do not apply in that province (section 4.2). Section 4.4 also allows the minister to enter into agreements,

\* The participant Musgamagw Tsawataineuk Tribal Council supported the FNC's submission in its entirety.

arrangements, or transactions with any person or body, or any federal or provincial minister, department, or agency, to implement programs and projects for the purposes of the Act.

The FNC noted that Bill C-38 provides no guidance on when a provincial law will be considered “equivalent in effect”<sup>33</sup> and told me the following:

The lack of engagement and leadership by the Province on issues central to the sustainability of FRSS [Fraser River sockeye salmon] suggests that even if an agreement to cooperate is reached under the proposed s. 4.1 of the [*Fisheries Act*], it is unlikely that it will lead to greater protections for FRSS, unless it was nested within tripartite agreements with First Nations which included provisions for transparent decision making processes and accountability for the long term sustainability of FRSSI ...

This amendment may lead to further downgrading of oversight and protections with respect to fish habitat given the Province’s increasing reliance on industry and qualified environmental professionals to ensure that activities such as logging and developmental projects do not adversely affect FRSS and their habitat

...

The FNC submits that while increased collaborative governance amongst DFO, the Province and First Nations is required, it would be dangerous to FRSS and their long term sustainability for Canada to delegate certain DFO responsibilities regarding FRSS to the Province.<sup>34</sup>

The FNC and WCCSFN both expressed concern that sections 4.1 and 4.2 do not also make provision for equivalent agreements between First Nations and DFO.<sup>35</sup>

There is ambiguity in the scope of the agreements contemplated, and it is not clear to me how the government intends to use them. However, evidence from the Commission’s hearings reveals that, since the 2000s, the province has withdrawn from actively reviewing individual proposed projects and moved to a “results-based approach,” which provides standards and guidance documents (see Volume 1, Chapter 6, Habitat management).

I note also that, in 2009, the Commissioner of the Environment and Sustainable Development reported that accountability in agreements between DFO and the provinces is weak.<sup>36</sup> In my findings, I conclude that, although there are some broad, overarching federal-provincial agreements on the management of fish habitat, DFO’s regional headquarters has not provided guidance on how the department’s Habitat Management Program staff and the province are to coordinate their habitat work.

The Conservation Coalition told me that sections 4.1 and 4.2 allow devolution of fisheries management to the provinces and territories.<sup>37</sup> I also note that the amended paragraph 35(2)(c), in conjunction with paragraph 43(1)(i.3), would enable government to allow other regulators, such as a province or a federal agency, to issue section 35 authorizations under the Act. In Chapter 2, Recommendations, I set out my conclusions regarding the minister’s ultimate authority for decision making. At the time of report writing, it is too early to say what impact sections 4.1–4.4 may have on my recommendation in this regard, but the potential impact cannot be ignored. Indeed, at the hearings, Kaarina McGivney, former regional director, Treaty and Aboriginal Policy, DFO, was asked about the ultimate authority of the minister (in the context of barriers to co-management). Ms. McGivney said that the *Fisheries Act* provides the minister with ultimate authority and that proposals had been put forward to revisit the Act to address this barrier to co-management.<sup>38</sup> Some of the previous proposed amendments to the *Fisheries Act* included provisions allowing new “agreements.” Claire Dansereau, deputy minister, told me that “there is potential for modernizing the *Fisheries Act* in some parts to ensure that there is more room outside of the Minister constantly being the final decision point.”<sup>39</sup>

As noted above, Bill C-38 creates definitions for commercial, recreational, and Aboriginal fisheries. The WCCSFN told me that adding these definitions provides DFO with a way of “further separating Aboriginal fisheries from commercial fisheries,” suggests a misleading hierarchy of priority, and suggests that First Nations are “mere stakeholders as opposed to rights holders to Fraser River sockeye.”<sup>40</sup> The FNC, the Stó:lō Tribal Council, and the Cheam Indian Band also were concerned that the definitions separate Aboriginal and commercial fisheries.<sup>41</sup>

In addition, the FNC argued that the definitions could result in an adverse impact on the “ongoing protection and exercise of [constitutionally protected] fishing rights, including rights and responsibilities to [Fraser River sockeye].”<sup>42</sup> The FNC warned that the definition attempts to reduce an Aboriginal fishery to a right to harvest. In its view, the “choice to hold off harvest in order to meet conservation and stewardship objectives should not affect whether those fisheries are an ‘Aboriginal fishery,’” and it is “not for the legislature to predetermine what constitutes an Aboriginal fishery and freeze that right in time.”<sup>43</sup>

I cannot assess what effect these definitions will have on the long-term sustainability of the Fraser River sockeye fishery. I note, however, that DFO’s 1993 Policy for the Management of Aboriginal Fishing contains a definition of “Aboriginal fishing.” At the time of the hearings, this policy was still in effect. It is not clear if the amendment would change the definition, stated in the policy as follows:

- In this policy, Aboriginal fishing means fishing under the authority of a Communal Licence issued pursuant to the Aboriginal Communal Fishing Licences Regulations under the Fisheries Act.
- Aboriginal fishing under a Communal Licence includes fishing for food, social and ceremonial purposes. In a limited number of cases, it may also include fishing for sale under test sale projects negotiated as part of an Aboriginal Fishing Agreement. The terms of the Communal Licence will set out the extent of the authority of the Aboriginal group to fish.
- In the absence of an Aboriginal Fishing Agreement, all Aboriginal fishing under a Communal Licence will be limited to fishing for food, social and ceremonial purposes.<sup>44</sup>

### ***Management of Fraser River sockeye habitat***

The revisions to the *Fisheries Act*, in particular sections 2(1), 6, 32, 35, 36, and 43, appear to substantively change DFO’s habitat management framework. Habitat management was a significant topic explored during the Commission’s

hearings, and one on which I have made findings and recommendations (see Volume 1, Chapter 6, Habitat management; and Chapter 2, Recommendations, of this volume). The changes to the Act leave me with a number of concerns in relation to this Inquiry and my recommendations for the future sustainability of Fraser River sockeye salmon.

The amendments collectively appear to narrow the focus of the Act from protecting fish habitat to protecting fisheries. Based on the evidence I heard, this shift could harm the long-term sustainability of Fraser River sockeye. Although, as discussed in Volume 2 of this Report, the evidence does not allow me to conclude that one stressor in particular is the sole cause of the long-term decline in Fraser River sockeye productivity, there is a risk that some of these stressors have a negative impact on sockeye and may have contributed to the long-term decline. My reference to “stressors” is to conditions present in Fraser River sockeye habitat. The importance of habitat to healthy fish stocks was emphasized throughout the hearings. In Chapter 2, Recommendations, of this volume, I accepted the evidence of DFO and expert witnesses that habitat degradation and loss pose risks to Fraser River sockeye and that, if current trends persist, there will be a significant decline in the productive capacity of Fraser River sockeye habitat. This decline could have a negative impact on Fraser River sockeye productivity, affecting the long-term sustainability of the fishery.

For this reason, I highlight the following specific changes that flow from the amendments in Bill C-38 as potentially problematic:

- expanding the circumstances in which harm to fish habitat may be authorized;
- providing greater discretion to the minister to authorize exceptions to the prohibitions (by regulation) in sections 35 and 36;
- allowing damage to fish habitat where there is no permanent alteration or destruction of habitat or death of fish;
- enabling the government to allow other regulators, such as a province or federal agency, to issue section 35 authorizations under the Act;
- requiring a revised 1986 Habitat Policy, including a review of the No Net Loss principle “to ensure consistency with our focus on managing threats



to recreational, commercial or Aboriginal fisheries”;<sup>45</sup> and

- codifying the Environmental Process Modernization Plan (EPMP) streamlining processes, such as operational statements and best management practices.

Because habitat is so important to Fraser River sockeye productivity, expanding the circumstances in which harm to fish habitat may be authorized (including giving the minister more discretion to authorize these exceptions) concerns me. Also, allowing damage to Fraser River sockeye habitat, where there is no permanent negative impact on habitat or death of fish, appears to lower the threshold of protection for these stocks. It presupposes that one can assess whether damage is permanent – if one cannot, then the prohibition will not apply. It also presupposes that the only way fish can be negatively affected by stressors in their habitat is if these stressors have a direct, lethal effect. This assumption is contrary to the evidence I heard from many science witnesses, as well as to my finding that sublethal, delayed, and cumulative effects can all act to reduce Fraser River sockeye productivity. (For a summary of this evidence, see the discussion of cumulative effects in the section on science research in Chapter 2, Recommendations.)

I note that DFO has worked hard over the years to amass expertise on fish habitat which other agencies do not have. The amendments enabling the government to allow other regulators to issue section 35 authorizations introduce the possibility that DFO’s expertise on fish and fish habitat will not inform these decisions.

In Chapter 2, I made a number of recommendations about habitat management based on the regulatory framework in place at the time of the hearings. The amendments significantly change this framework. According to the federal government, the amendments to the *Fisheries Act* in Bill C-38 will require review of the 1986 Habitat Policy, including a review of the No Net Loss principle “to ensure consistency with our focus on managing threats to recreational, commercial or Aboriginal fisheries.” In Chapter 2, I stated that the policy is a valuable tool for the protection of productive Fraser River sockeye habitat. I also stated that DFO needs to complete implementation of the 1986 Habitat Policy and that, if the policy is revised, its goals and No Net Loss

principle should be retained. Given Bill C-38, I reiterate these findings. I also repeat my recommendation that DFO should complete implementation of the 1986 Habitat Policy.

Operationally, how the revised Act will change the management of Fraser River sockeye is unknown. For example, will the changes require a new Habitat Management Program project review process, and, if so, what resources will be required to overhaul the regulatory system described in this Report? If EPMP streamlining processes are codified, will oversight of projects (including the cumulative negative impact on habitat) by habitat staff be reduced? The revised Act appears to signal a move toward further reduction of DFO oversight of projects. On the evidence, I found that cumulative impact is one of the key things that negatively affect fish habitat. DFO needs to manage this cumulative incremental harm that, over time, could have a substantial effect on Fraser River sockeye habitat. Less oversight of development is not likely to aid DFO in this regard.

I heard no evidence that the regulatory framework and sections 35 and 36 were inadequate to protect Fraser River sockeye habitat. Rather, witnesses and exhibits pointed to the lack of resourcing, resulting in less oversight and more reliance on streamlining processes, as having a negative impact on DFO’s ability to protect Fraser River sockeye habitat. According to David Bevan, associate deputy minister, DFO, because not all proposed projects are reviewed, more monitoring is required to ensure compliance with the *Fisheries Act*. In my findings and recommendations, I agree with Mr. Bevan. The shift away from project-by-project review and toward a proponent or professional-reliance model demands a strong emphasis on monitoring. The evidence indicated that this emphasis was still lacking, and I recommended that DFO strengthen the monitoring component of DFO’s Habitat Management Program. Given the changes to the *Fisheries Act*, this recommendation is all the more critical to the long-term sustainability of Fraser River sockeye.

Another concern I have with the amendments, including the introduction of the CEAA, 2012, is that they limit the statutory habitat protection to those habitats that are linked to a specific type of fishery. Witnesses told me that fisheries management should no longer be focused on a single

species. The revised Act, however, narrows the approach to habitat management. This approach is contrary to the evidence I heard from senior DFO management and scientists about the importance of, and DFO's shift toward, ecosystem-based management. The evidence was that ecosystem health is important to support Fraser River sockeye. Moreover, the amendments appear contrary to legislative commitments to ecosystem-based management in the *Oceans Act*.

One key question arising from the amendments is whether habitat of Fraser River sockeye stocks or Conservation Units that are not part of a commercial, recreational, or Aboriginal fishery will be protected by the Act. On the face of the provisions, such habitat will not be protected if "fishery" is construed to mean a fishery at the Conservation Unit level rather than the Fraser River sockeye fishery as a whole. Not only is that interpretation contrary to ecosystem-based management generally, but it is contrary to the spirit and intent of the Wild Salmon Policy (WSP). WSP implementation requires ecosystem-based management. In addition, Bill C-38 reverses the explicit approach to fish protection set out in the WSP. The policy directs that, when a Conservation Unit is assessed to be in the red zone (and would presumably not be able to support a fishery), management action is required. With the amendments, when a Conservation Unit is in the red zone,\* it could then have less statutory protection. I note that the *Species at Risk Act* has protections analogous to those in the WSP for species deemed to be at risk.

Further, in signing on to the *Convention on Biological Diversity* (Convention), Canada has agreed, among other things, "as far as possible and appropriate" to do the following:

Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures. (Article 14.1(a))<sup>46</sup>

"Biological diversity" in the Convention is defined as "the variability among living organisms from

all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems."<sup>47</sup> This commitment to protect biological diversity is not limited to protection of organisms with economic value. Indeed, the Convention recognizes that biological diversity has intrinsic value in social, genetic, scientific, cultural, and aesthetic terms, in addition to economic value.

The Convention therefore suggests a focus on conservation of all fish, and not just those that support fisheries. In its preamble, it notes that "the fundamental requirement for the conservation of biological diversity is the *in-situ* conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings."<sup>48</sup>

The precautionary principle is an important feature of this Convention. (See Volume 1, Chapter 3, Legal framework, for a discussion of the precautionary principle.) Canada has also committed to applying the precautionary principle in domestic legislation, including the *Oceans Act* and the *Species at Risk Act*. As noted in Chapter 2, Recommendations, of this volume, the Wild Salmon Policy is Canada's expression of the precautionary principle applied to Pacific salmon. Through protecting biodiversity within salmon species, the Wild Salmon Policy ensures that a species as a whole has the genetic diversity to better survive future threats. In this way, the long-term future of the fishery is protected. However, if the focus of the legislative amendments is to protect only habitat linked to a current fishery, such limited protection could actually jeopardize future fisheries by undermining precautionary protections for biodiversity.

Additionally, I am concerned about the implications of the amendments for DFO's conservation mandate. In Volume 1, Chapter 3, Legal framework, I explain that the primary legislative exercise of the federal conservation mandate is subsection 43(b) of the *Fisheries Act*, which provides the power to DFO to make regulations "respecting the conservation and protection of fish." DFO has regulated extensively pursuant to subsection 43(b). Furthermore, in its 1990 decision in *R. v. Sparrow*, the Supreme

\* A Conservation Unit in the "red zone" has low spawning abundance and distribution and requires a high extent of management intervention (Exhibit 8, p. 17).

Court of Canada determined that conservation takes precedence over food, social, and ceremonial fisheries.<sup>49</sup> Subsequent to *Sparrow*, several DFO policies set out that conservation is DFO's primary mandate (see the discussion in Volume 1, Chapter 4, DFO overview).

The amendments focus on fisheries explicitly. Fisheries are also an important DFO mandate, and the goals of conservation and a sustainable fishery are complementary. Conservation measures are intended to promote abundant healthy wild stocks that may in turn permit harvesting, while fisheries management activities regulate the catch so that future productivity is ensured. However, if the Act protects only fish that are part of a fishery, then the careful balance between conservation and fisheries would tip toward fisheries at the expense of conservation. Ultimately, this imbalance would likely have a negative impact on fisheries as well. As I state in Chapter 2, Recommendations: "DFO's conservation mandate extends to all fish habitat. It also extends to all fish, not just fish that are important to a fishery. I accept that diversity in Fraser River sockeye stocks is essential for the conservation and future sustainability of the species." As the participant FNC put it, "If the goal is to ensure the long term sustainability of FRSS [Fraser River sockeye salmon], it is evident that protecting the habitat of FRSS cannot be limited to those fish currently harvested."<sup>50</sup>

In my review of the legislative amendments in Bill C-38, I have focused on the possibility that these amendments may collectively weaken the *Fisheries Act's* protection of fish habitat and may undermine an ecosystem-based approach to fisheries management. My focus on these themes is directed by what, in my view, is relevant to my mandate to make recommendations that ensure the future sustainability of the Fraser River sockeye salmon fishery. However, as noted, I asked participants to provide submissions on how, if at all, Bill C-38 might affect their final submissions. A number of participants raised the issues I canvass above, but participants also had other concerns, including the following:

- changing the environmental protection provisions of the *Fisheries Act* from being among the strongest legislative tools for environmental protection to among the weakest;<sup>51</sup>
- increasing the discretion of the minister and cabinet whereby important questions of biodiversity and the protection of ecosystems, fish, and fish habitat are affected by political interests and influences and result in decreased transparency in decision making;<sup>52</sup>
- allowing government to ultimately suspend application of laws designed to protect fish, fish habitat, and the environment;<sup>53</sup>
- raising a potential lack of constitutionality of protecting only stocks that are currently being harvested;<sup>54</sup>
- exempting ministerial regulations from the normal process of regulatory review and publication;<sup>55</sup>
- exempting harms caused by fishing practices from the scope of subsection 35(1);<sup>56</sup>
- making the application of subsection 35(1) to aquaculture more tenuous;<sup>57</sup>
- criminalizing Aboriginal peoples who exercise their Aboriginal rights to fish;<sup>58</sup>
- potentially infringing on rights to traditional Aboriginal fishing practices that use nets or other fishing apparatus;<sup>59</sup>
- increasing uncertainty around consultation with First Nations, including concern that the Crown may no longer be required to consult with First Nations on developments affecting waterways that will not attract protection under the revised Act;<sup>60</sup>
- exempting the National Energy Board from ensuring conditions are in place to protect critical habitat (designated under the *Species at Risk Act*) on projects it approves and extending indefinitely, at the discretion of the competent minister, permits under the *Species at Risk Act*;<sup>61</sup>
- repealing the *Kyoto Protocol Implementation Act* and thus reducing Canada's ability to address the impact of climate change;<sup>62</sup>
- providing greater discretionary powers to the Canadian Food Inspection Agency in the *Health of Animals Act* to control infected places – and concern that these powers may be exercised in the interests of trade rather than wild stocks;<sup>63</sup> and
- allowing multiple renewals of Disposal at Sea permits through changes to the *Canadian Environmental Protection Act*.<sup>64</sup>

## Conclusions

In this chapter, I have reviewed Bill C-38's amendments to the environmental assessment process and to the *Fisheries Act* that might affect DFO's and Environment Canada's management of Fraser River sockeye and sockeye habitat. I described my concerns about significant changes to the management of Fraser River sockeye that may occur as a result of the enactment of Bill C-38. My review satisfies me that many of the amendments will have a significant impact on policies and procedures examined by this Commission, and on important habitat protection measures.

The complexity of Fraser River sockeye salmon management illustrates the difficult policy questions arising from this fishery. Indeed, this complexity appears to be one of the reasons behind DFO's past significant efforts to obtain First Nations and stakeholder input into draft policies before introducing a change in its management regime. The development of the Wild Salmon Policy, described in Volume 1, Chapter 10, Wild Salmon Policy, is a good example of the measured approach DFO has taken to policy development. In light of this approach, the federal government's tabling of Bill C-38 is disappointing. The bill was introduced very late in this Commission's life – five months after completion of the evidentiary hearings, and when my Final Report was in the late stages of drafting. I learned nothing of impending amendments to the environmental assessment process or the *Fisheries Act* from any witness at the hearings and saw nothing in any of the exhibits.

Based on the evidence, as well as the supplementary written submissions of participants, there were no consultations with First Nations or stakeholders about Bill C-38. Moreover, the introduction of the amendments long after the conclusion of this Inquiry's evidentiary hearings means that neither Commission counsel nor counsel for participants had the opportunity to explore the potential impact of these changes on DFO's fisheries and habitat management.

I am not in a position to make recommendations regarding Bill C-38. I do not know what regulations may be enacted under the CEAA, 2012, or the *Fisheries Act*. I also do not know how officials and the courts may interpret the CEAA, 2012, or an amended *Fisheries Act*. However, as required by my Terms of Reference, I have set out my findings and recommendations in this Report for the future sustainability of the Fraser River sockeye fishery. Notwithstanding Bill C-38, I urge the federal government to heed my findings and to implement these recommendations.

Finally, I note that in Chapter 2, Recommendations, I recommend that an independent body, such as the office of the Commissioner of the Environment and Sustainable Development, report to the Standing Committee on Fisheries and Oceans and to the public on the extent to which, and the manner in which, this Commission's recommendations are implemented (Recommendation 75). I expect that, in the course of this review, the impact of Bill C-38 on the management of Fraser River sockeye will also be assessed.

## Notes

- 1 *Canadian Environmental Assessment Act, 2012*, being Part 3, Division 1, of Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures* (CEAA, 2012).
- 2 CEAA, 2012, s. 8.
- 3 CEAA, 2012, s. 10(a).
- 4 CEAA, 2012, s. 10(b).
- 5 CEAA, 2012, ss. 2(1), 6-7, 13-14, 27, 52, 84.
- 6 CEAA, 2012, ss. 15, 38.
- 7 CEAA, 2012, ss. 53-54.
- 8 CEAA, 2012, s. 2(1).
- 9 CEAA, 2012, ss. 26, 32-37.
- 10 CEAA, 2012, ss. 9-10, 17, 19, 24-25.
- 11 CEAA, 2012, ss. 57-58.
- 12 CEAA, 2012, s. 78.
- 13 CEAA, 2012, ss. 2(1), 19, 29-31, 43, 53.
- 14 CEAA, 2012, ss. 67-70.
- 15 Bill C-38, Summary. The amendments to the *Fisheries Act* are found in Part 3, Divisions 5 and 18, of Bill C-38.
- 16 *Larocque v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237, 270 DLR (4th) 552 (*Larocque*).
- 17 *Larocque*, para. 13, citing *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12, 142 DLR (4th) 193.
- 18 Conservation Coalition's supplementary submissions, p. 4, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 19 Western Central Coast Salish First Nation's supplementary submissions, pp. 5-6, 8, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 20 Conservation Coalition's supplementary submissions, p. 4, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 21 First Nations Coalition's supplementary submissions, p. 6, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 22 Aquaculture Coalition's supplementary submissions, p. 5, available at [www.cohencommission.ca](http://www.cohencommission.ca).

- 23 Conservation Coalition's supplementary submissions, p. 5; Western Central Coast Salish First Nation's supplementary submissions, pp. 8–9, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 24 Conservation Coalition's supplementary submissions, May 14, 2012, pp. 5–6; Western Central Coast Salish First Nation's supplementary submissions, p. 8, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 25 Western Central Coast Salish First Nation's supplementary submissions, p. 6, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 26 Western Central Coast Salish First Nation's supplementary submissions, pp. 6, 8, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 27 Western Central Coast Salish First Nation's supplementary submissions, p. 8, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 28 Conservation Coalition's supplementary submissions, May 14, 2012, p. 6; Aquaculture Coalition's supplementary submissions, p. 4, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 29 Aquaculture Coalition's supplementary submissions, p. 4, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 30 Supplementary submissions of Area D Salmon Gillnet Association and Area B Harvest Committee (Seine), May 14, 2012, p. 2, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 31 First Nations Coalition's supplementary submissions, p. 13; Western Central Coast Salish First Nation's supplementary submissions, pp. 6, 9–10, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 32 First Nations Coalition's supplementary submissions, pp. 6–7, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 33 First Nations Coalition's supplementary submissions, pp. 14–15, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 34 First Nations Coalition's supplementary submissions, pp. 15–17, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 35 First Nations Coalition's supplementary submissions, p. 18; Western Central Coast Salish First Nation's supplementary submissions, p. 3, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 36 Exhibit 35, p. 29.
- 37 Conservation Coalition's supplementary submissions, p. 13, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 38 Transcript, August 19, 2011, pp. 43–45.
- 39 Transcript, September 26, 2011, p. 5.
- 40 Western Central Coast Salish First Nation's supplementary submissions, pp. 2–3, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 41 First Nations Coalition's supplementary submissions, p. 10; supplementary submissions of the Stó:lō Tribal Council and Cheam Indian Band, p. 4, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 42 First Nations Coalition's supplementary submissions, p. 8, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 43 First Nations Coalition's supplementary submissions, pp. 9–10, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 44 Exhibit 261, p. 3.
- 45 DFO, Frequently Asked Questions – New Fisheries Protection Measures, April, 2012, online, DFO: [www.dfo-mpo.gc.ca/media/back-fiche/2012/hq-ac12b-eng.htm](http://www.dfo-mpo.gc.ca/media/back-fiche/2012/hq-ac12b-eng.htm).
- 46 Exhibit 13, p. 151.
- 47 Exhibit 13, p. 145.
- 48 Exhibit 13, p. 146.
- 49 *R. v. Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385.
- 50 First Nations Coalition's supplementary submissions, pp. 10–11, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 51 First Nations Coalition's supplementary submissions, p. 11, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 52 First Nations Coalition's supplementary submissions, pp. 4, 7; see also Conservation Coalition's supplementary submissions, p. 14, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 53 Conservation Coalition's supplementary submissions, pp. 10–12, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 54 First Nations Coalition's supplementary submissions, p. 9, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 55 Conservation Coalition's supplementary submissions, p. 10, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 56 Conservation Coalition's supplementary submissions, p. 10, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 57 Aquaculture Coalition's supplementary submissions, pp. 1–2, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 58 Supplementary submissions of the Stó:lō Tribal Council and Cheam Indian Band, p. 4, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 59 Western Central Coast Salish First Nation's supplementary submissions, p. 4, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 60 Western Central Coast Salish First Nation's supplementary submissions, pp. 4, 9, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 61 Conservation Coalition's supplementary submissions, pp. 15–16, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 62 Supplementary submissions of the Stó:lō Tribal Council and Cheam Indian Band, pp. 1–2; Conservation Coalition's supplementary submissions, p. 15, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 63 Supplementary submissions of the Stó:lō Tribal Council and Cheam Indian Band, p. 3; Conservation Coalition's supplementary submissions, p. 16, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 64 Conservation Coalition's supplementary submissions, p. 16, available at [www.cohencommission.ca](http://www.cohencommission.ca).