

**COMMISSION OF INQUIRY INTO THE DECLINE OF SOCKEYE SALMON IN
THE FRASER RIVER**

In the matter of His Excellency the Governor General in Council, on the recommendation of the Prime Minister, directing that a Commission do issue under Part 1 of the *Inquiries Act* and under the Great Seal of Canada appointing the Honourable Bruce Cohen as Commissioner to conduct an inquiry into the decline of sockeye salmon in the Fraser River

**SUBMISSIONS OF THE PARTICIPANT GOVERNMENT OF CANADA
IN RESPONSE TO APRIL 27, 2012 LETTER FROM COMMISSION COUNSEL
REGARDING BILL C-38**

May 14, 2012

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I. INTRODUCTION

1. These are the participant Government of Canada's submissions in response to the April 27, 2012 letter from Commission counsel regarding Bill C-38.
2. In that letter, Commission counsel invite supplementary submissions from participants regarding how, if at all, submissions already made by the participant would be impacted by the proposed changes to legislation relevant to the work of the Commission set out in Bill C-38 – in particular, those proposed changes in:
 - a) Division 1 of Part 3 (*Canadian Environmental Assessment Act, 2012*), Division 5 (*Fisheries Act*), Division 6 (*Canadian Environmental Protection Act*), and Division 7 (*Species at Risk Act*) all of Part 3 of Bill C-38; and
 - b) Division 18 (*Fisheries Act*) of Part 4 of Bill C-38.
3. Bill C-38 includes some proposed changes to legislation that would be interim to various permanent amendments set out in the Bill. Unless otherwise specified, these submissions address the permanent amendments set out in Bill C-38.
4. To put these supplementary submissions in context, namely, how Canada's previous submissions would be impacted by the proposed changes to legislation in Bill C-38, we will first provide an overview of the proposed changes to the *Fisheries Act*, the *Canadian Environmental Protection Act*, and the *Species at Risk Act*, and an overview of the new *Canadian Environmental Assessment Act, 2012* ("CEAA, 2012").
5. Bill C-38 received first reading on April 26, 2012 and is now in second reading.

II. OVERVIEW OF PROPOSED CHANGES TO RELEVANT LEGISLATION IN BILL C-38

6. The proposed changes to the *Fisheries Act*, the *Canadian Environmental Protection Act*, and the *Species at Risk Act* - and the new *CEAA, 2012* - are summarized in Bill C-38 as follows:

Division 1 of Part 3 (CEAA, 2012)

Division 1 of Part 3 enacts the *Canadian Environmental Assessment Act, 2012*, which establishes a new federal environmental assessment regime. Assessments are conducted in relation to projects, designated by regulations or by the Minister of the Environment, to determine whether they are likely to cause significant adverse environmental effects that fall within the legislative authority of Parliament, or that are directly linked or necessarily incidental to a federal authority's exercise of a power or performance of a duty or function that is required for the carrying out of the project.

The Canadian Environmental Assessment Agency, the Canadian Nuclear Safety Commission, the National Energy Board or a review panel established by the Minister are to conduct assessments within applicable time limits. At the end of an assessment, a decision statement is to be issued to the project proponent who is required to comply with the conditions set out in it.

The enactment provides for cooperation between the federal government and other jurisdictions by enabling the delegation of an environmental assessment, the substitution of the process of another jurisdiction for an environmental assessment under the Act and the exclusion of a project from the application of the Act when there is an equivalent assessment by another jurisdiction. The enactment requires that there be opportunities for public participation during an environmental assessment, that participant funding programs and a public registry be established, and that there be follow-up programs in relation to all environmental assessments. It also provides for powers of inspection and fines.

Finally, the enactment specifies that federal authorities are not to take certain measures regarding the carrying out of projects on federal lands or outside Canada unless they determine that those projects are not likely to cause significant adverse environmental effects.

This Division also makes related amendments to the *Environmental Violations Administrative Monetary Penalties Act* and consequential

amendments to other Acts, and repeals the *Canadian Environmental Assessment Act*.¹

Division 5 of Part 3 (Fisheries Act)

Division 5 of Part 3 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. The amendments provide additional clarity for the authorization of serious harm to fish and of deposits of deleterious substances. The amendments allow the Minister to enter into agreements with provinces and with other bodies, provide for the control and management of aquatic invasive species, clarify and expand the powers of inspectors, and permit the Governor in Council to designate another Minister as the Minister responsible for the administration and enforcement of subsections 36(3) to (6) of the *Fisheries Act* for the purposes of, and in relation to, subject matters set out by order.²

Division 6 of Part 3 (Canadian Environmental Protection Act)

Division 6 of Part 3 amends the *Canadian Environmental Protection Act, 1999* to provide the Minister of the Environment with the authority to renew disposal at sea permits in prescribed circumstances. It is also amended to change the publication requirements for disposal at sea permits and to provide authority to make regulations respecting time limits for their issuance and renewal.³

Division 7 of Part 3 (Species at Risk Act)

Division 7 of Part 3 amends the *Species at Risk Act* to allow for the issuance of authorizations with a longer term, to clarify the authority to renew the authorizations and to make compliance with conditions of permits enforceable.

The Act is also amended to provide authority to make regulations respecting time limits for the issuance and renewal of permits under the Act. Furthermore, section 77 is amended to ensure that the National Energy Board will be able to issue a certificate when required to do so by the Governor in Council under subsection 54(1) of the *National Energy Board Act*.⁴

¹ Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 1st Sess, 41st Parl, 2012, Summary (first reading 26, April 2012)

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

Division 18 of Part 4 (Fisheries Act)

Division 18 of Part 4 amends the *Fisheries Act* to authorize 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.⁵

III. CANADA'S PREVIOUS SUBMISSIONS THAT WOULD BE IMPACTED BY PROPOSED CHANGES IN BILL C-38

7. Certain statements made in Canada's previous submissions to the Commission would be impacted by some of the proposed changes to the *Fisheries Act*, and the new *CEAA, 2012*, included in Bill C-38. The references to the *Canadian Environmental Protection Act*, and to the *Species at Risk Act*, in Canada's previous submissions would not be impacted by the proposed changes to those statutes set out in Bill C-38.

8. The proposed changes included in Bill C-38 that would impact Canada's previous submissions can be categorized as follows:

- a) Proposed changes to the regulation-making authorities under the *Fisheries Act*;
- b) Proposed new section 6 of the *Fisheries Act*;
- c) Proposed new section 10 of the *Fisheries Act*;
- d) Proposed changes to the provisions of the *Fisheries Act* relating to the protection of fisheries and pollution prevention; and
- e) Proposed new *CEAA, 2012*.

9. Bill C-38 also includes proposed changes to the *Fisheries Act* beyond those referred to above. For example, Bill C-38 includes changes to increase the fines and penalties in the Act to be in line with those in the *Environmental Enforcement Act*.⁶ As another example, Bill C-38 includes proposed changes to section 36 the *Fisheries Act*, such as an amendment to paragraph

⁵ *Ibid.*

⁶ *Ibid* at cl 147.

36(4)(b) to remove the requirement that regulations which authorize deposits must set out the quantity or concentration of the deleterious substance to be deposited.⁷

A. Proposed Changes to the Regulation-Making Authorities under the *Fisheries Act*

10. Canada's previous submissions refer to the authority of the Governor in Council to make regulations under the *Fisheries Act*. For example, paragraph 151 of the Final Submissions of the Government of Canada, dated October 17, 2011 ("Canada's Final Submissions") states:

151. Canadian fisheries are managed in accordance with regulations which operationalize the *Fisheries Act* and other relevant federal legislation. Pursuant to s. 43 of the *Fisheries Act*, the Governor in Council may make a wide range of regulations for carrying out the purposes and provisions of the Act, including for the proper management and control of fisheries, the conservation and protection of fish and spawning grounds, and the use of fishing gear and equipment.

11. Bill C-38 includes proposed changes to the *Fisheries Act* to provide the Governor in Council with new authority to make regulations, such as regulations to define "ecologically significant area" for the purposes of the new subsection 37(1.1) of the Act.⁸ The proposed subsection 37(1.1) would make it a duty for anyone proposing to carry on a work, undertaking or activity in an "ecologically significant area" to provide information, on request or as prescribed by regulations, on the proposed work, undertaking or activity to the Minister who could, *inter alia*, require modifications or additions to, restrict the carrying on of, or direct the closing of, the work, undertaking or activity.⁹

12. Further, Bill C-38 would amend the *Fisheries Act* to provide that the Minister - not just the Governor in Council - will have authority to make regulations under the Act, such as certain regulations under sections 35 and 36 of the Act (proposed new subsections 35(3) and 36(5.2)).¹⁰

⁷ *Ibid* at cl 143.

⁸ *Ibid* at cl 144.

⁹ *Ibid*.

¹⁰ *Ibid* at cls 142 and 143.

B. Proposed New Section 6 of the *Fisheries Act*

13. Canada's previous submissions refer to the authority under the *Fisheries Act* to regulate impacts on fish and fish habitat. For example, paragraph 124 of Canada's Final Submissions states:

124. The *Fisheries Act* establishes the legal authority for regulating impacts on fish and fish habitat, with explicit provisions to protect fish habitat, provide upstream and downstream migration, guard against the destruction of fish by means other than fishing, and prohibit the deposit of a deleterious substance in water frequented by fish, unless authorized under regulations.

14. The proposed changes in Bill C-38 would change what is set out in paragraph 124. Bill C-38 would add a new section to the *Fisheries Act* to provide that the authority for regulating impacts on fish and fish habitat, other than the deposit of deleterious substances, will be subject to consideration of certain factors:

FACTORS TO BE TAKEN INTO ACCOUNT

6. Before recommending to the Governor in Council that a regulation be made in respect of section 35 or under paragraph 37(3)(c) or 43(1)(i.01) or subsection 43(5), and before exercising any power under subsection 20(2) or (3) or 21(1), paragraph 35(2)(b) or (c) or subsection 35(3), or under subsection 37(2) with regard to an offence under subsection 40(1) or with regard to harm to fish, the Minister shall consider the following factors:

- (a) the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries;
- (b) fisheries management objectives;
- (c) 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
- (d) the public interest.

6.1 The purpose of section 6, and of the provisions set out in that section, is to provide for the sustainability and ongoing productivity of commercial, recreational and Aboriginal fisheries.¹¹

¹¹*Ibid* at cl 135.

C. Proposed New Section 10 of the *Fisheries Act*

15. In Canada's previous submissions, Canada referred to the impact of the 2006 decision of the Federal Court of Appeal in *Larocque et al. v. Minister of Fisheries*¹² on, *inter alia*, funding for test fishing.¹³

16. One of the proposed changes in Bill C-38 is to amend the *Fisheries Act* to add the following new section to the Act:

FISH ALLOCATION FOR FINANCING PURPOSES

10. (1) For the proper management and control of fisheries and the conservation and protection of fish, the Minister may determine a quantity of fish or of fishing gear and equipment that may be allocated for the purpose of financing scientific and fisheries management activities that are described in a joint project agreement entered into with any person or body, or any federal or provincial minister, department or agency.

(2) The Minister may specify, in a licence issued under this Act, a quantity of fish or of fishing gear and equipment allocated for the purpose of financing those activities.

D. Proposed Changes to the Provisions of the *Fisheries Act* Relating to Protection of Fish and Fish Habitat and Pollution Prevention

17. Canada's previous submissions refer to the provisions of the *Fisheries Act* relating to the protection of fish and fish habitat and pollution prevention. For example, paragraph 128 of Canada's Final Submissions states:

128. Other important provisions of the *Fisheries Act* include ss. 35 and 36, which provide for the protection of fish habitat by prohibiting the harmful alteration, disruption, or destruction of fish habitat without authorization (s. 35), and prohibiting the deposition of deleterious substances in waters frequented by fish, or in a place that may enter waters frequented by fish, unless allowed under regulation (s. 36). "Fish habitat" is defined in the Act as the "spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes".

¹² *Larocque et al. v. Minister of Fisheries*, 2006 FCA 237.

¹³ For example, para 127 of Canada's Reply Submissions, dated November 3, 2011.

18. One of the proposed changes in Bill C-38 is to amend section 35(1) of the *Fisheries Act* to, *inter alia*, add reference to “activity” - and to incorporate “serious harm to fish” as a threshold:

35.(1) No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.¹⁴

19. Bill C-38 would amend the *Fisheries Act* to add a definition for “serious harm to fish” – *i.e.* “the death of fish or any permanent alteration to, or destruction of, fish habitat”.¹⁵ Also in relation to the amendments to subsection 35(1), Bill C-38 includes proposed amendments to the *Fisheries Act* to add definitions for “commercial”, “recreational” and “Aboriginal” fisheries.¹⁶

20. Further, Bill C-38 proposes that the definition of “fish habitat” in the *Fisheries Act* be amended to, *inter alia*, include reference to “any other areas”:

“fish habitat” means spawning grounds and any other areas, including nursery, rearing, food supply and migration areas, on which fish depend directly or indirectly in order to carry out their life processes.¹⁷

21. Canada’s previous submissions also refer to DFO policies related to fish habitat – most notably the 1986 *Policy for the Management of Fish Habitat*.¹⁸ DFO has publicly stated on its website that it plans to update that policy to reflect the focus - set out in Bill C-38 - on managing threats to recreational, commercial or Aboriginal fisheries.

22. Canada’s previous submissions refer to the pollution prevention provisions in section 36 of the *Fisheries Act* and arrangements regarding the administration and enforcement of those provisions.¹⁹ One of the proposed changes in Bill C-38 is to amend the *Fisheries Act* to provide authority to the Governor in Council to formally designate a federal minister, other than the

¹⁴ *Supra* note 1 at cl 142.

¹⁵ *Ibid* at cl 133.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ For example, para 212 of Canada’s Final Submissions.

¹⁹ For example, para 129 of Canada’s Final Submissions.

Minister of Fisheries and Oceans, as the minister responsible for the administration and enforcement of subsections 36(3) to (6) of the Act.²⁰

E. Proposed New CEAA, 2012

23. Canada's previous submissions refer to the existing *Canadian Environmental Assessment Act*.²¹ Bill C-38 would establish a new federal environmental assessment regime and provide for the enactment of a new federal environmental assessment act – *CEAA, 2012*.

24. *CEAA, 2012* is part of the Responsible Resource Development initiative which is aimed at improving and modernizing the current federal review process for major resource development projects – including the conduct of environmental assessment and regulatory permitting. The goal of the initiative is to support responsible resource development – encouraging greater development and economic growth, while still ensuring environmental protection - and to achieve “one project, one review” within a certain and predictable time period. Specific measures are aimed at four objectives: making project reviews more predictable and timely; reducing unnecessary duplication in project reviews; strengthening environmental protection; and enhancing consultations with Aboriginal peoples.

25. The key features of *CEAA, 2012* are described as follows:

- a) Environment assessments are conducted in relation to projects, designated by regulations or by the Minister of the Environment, to determine whether they are likely to cause significant adverse environmental effects that fall within the legislative authority of Parliament, or that are directly linked or necessarily incidental to a federal authority's exercise of a power or performance of a duty or function that is required for the carrying out of the project;

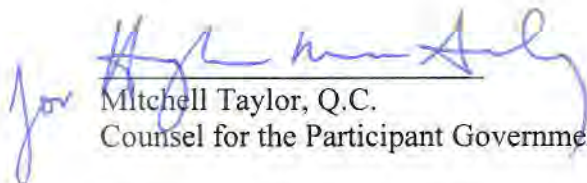
²⁰ *Supra* note 1 at cl 150.

²¹ For example, paras 139, 140 and 141 of Canada's Final Submissions, para 32 of Canada's Submissions in Response to Commission's “Legislative Framework Overview” Policy and Practice Report (dated October 26, 2010) [Appendix A to Canada's Final Submissions], and para 67 of Canada's Reply Submissions (dated November 3, 2011).

- b) The Canadian Environmental Assessment Agency, the Canadian Nuclear Safety Commission, the National Energy Board or a review panel established by the Minister are to conduct assessments within applicable time limits. At the end of an assessment, a decision statement is to be issued to the project proponent who is required to comply with the conditions set out in it;
- c) The enactment provides for cooperation between the federal government and other jurisdictions by enabling the delegation of an environmental assessment, the substitution of the process of another jurisdiction for an environmental assessment under the Act and the exclusion of a project from the application of the Act when there is an equivalent assessment by another jurisdiction;
- d) The enactment requires that there be opportunities for public participation during an environmental assessment, that participant funding programs and a public registry be established, and that there be follow-up programs in relation to all environmental assessments. It also provides for powers of inspection and fines; and
- e) Finally, the enactment specifies that federal authorities are not to take certain measures regarding the carrying out of projects on federal lands or outside Canada unless they determine that those projects are not likely to cause significant adverse environmental effects.²²

All of which is respectfully submitted.

Dated at Vancouver, B.C. this 14th day of May, 2012.



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²² *Supra* note 1.