SUBMISSIONS OF THE AQUACULTURE COALITION
REGARDING BILL C-38 PROPOSED AMENDMENTS TO FISHERIES ACT AND CANADIAN ENVIRONMENTAL ASSESSMENT ACT
MAY 14, 2012

Introduction

In Bill C-38, the federal government introduces proposed changes to environmental legislation that will restrict environmental protection of the ocean ecosystem on which Fraser sockeye depend and further threaten the sustainability of this valuable resource. The Aquaculture Coalition here restricts our submissions to the implications of proposed changes to the habitat protection provisions of the *Fisheries Act*[1] and the proposed replacement of the *Canadian Environmental Assessment Act* as they relate to aquaculture and its impacts on Fraser sockeye.

In our main submissions, the Aquaculture Coalition emphasized the inadequacy of current environmental review and assessment practices in relation to aquaculture, and, in particular the failure of DFO to ensure that impacts from disease and pathogens were accounted for in placing and managing fish farms. Those practices took place in a legislative framework that, on its face, provided opportunity for, and required that, fulsome assessments occur of all impacts, including pathogens, before fish farms were permitted to operate. In other words, regulators were not using the tools they had available. We heard evidence during the inquiry, however, from DFO that going forward, they would apply an ecology-based, sustainable, precautionary approach to management of aquaculture. The proposed changes to the FA and CEAA do not provide a legislative framework in which that is likely to occur. Rather, the changes appear to facilitate DFO's mandate to significantly expand aquaculture on the British Columbia coast, at the expense of wild salmon, by restricting or potentially eliminating: assessments of environmental impacts prior to authorizing aquaculture operations, opportunities to impose considered conditions on the operation of farms, and related enforcement tools.

The changes cause real concern to the Aquaculture Coalition, and, we strongly urge that the Commissioner recommend that the federal government reconsider changes to the FA and CEAA that will weaken environmental protection of wild Fraser sockeye from the impacts of the aquaculture industry.

Fisheries Act- section 35

Harm to fish and fish habitat

Section 35 is an essential tool to protect the habitat of the Fraser sockeye. As noted in our original submissions, the current s. 35 has been under-utilized by DFO to evaluate and regulate the impacts of aquaculture operations on wild salmon. The proposed changes to section 35 make

[1] Bill C-38 contemplates two stages of amendments to the *Fisheries Act*. In these submissions, reference to the "Proposed *Fisheries Act*" or "Proposed FA" assumes both stages of the proposed amendments are eventually enacted.

the application of the provision to aquaculture more tenuous, with potentially grave consequences for Fraser sockeye and ocean habitat.

The Proposed FA includes amendment that restricts the scope of harm captured by s. 35:

- The current FA prohibits unauthorized activity resulting in "harmful alteration, disruption or destruction of fish habitat" (s. 35(1)).
- The Proposed FA prohibits unauthorized activity resulting in "serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery, with serious harm to fish defined as "death of fish or any permanent alteration to, or destruction of, fish habitat." (s. 35(1), s. 2(2))

The proposed amendment changes the prohibition from harm to serious harm. This overarching change allows (and presumably was intended to allow) for "lesser" harms to fish habitat. So while death to fish is prohibited, a lesser impact (for example, weakening stocks by disease) is not. Permanent alterations are prohibited, but temporary (even potentially very long-lasting) alterations of fish habitat are not. Disruption is no longer prohibited.

The result of the changes in relation to aquaculture and Fraser sockeye is that aquaculture operations may not even be considered as potentially coming within s. 35, and may avoid departmental review, regulation and enforcement. Fish farms operate by fixed-term licences and tenures, so their alteration to fish habitat is likely not "permanent" within the proposed amendment, even though farms operate for many years in the same location. Farms do not necessarily destroy fish habitat, though they negatively impact and alter its ability to sustain migrating wild salmon.

Recommendation: *The requirement that an alteration of fish habitat be "permanent" be deleted from the proposed amendment to s. 35 and 2(2) so that temporary alterations are captured; and, "disruption" of fish habitat be re-inserted into the provisions so that it too constitutes a harm or serious harm to fish. Both of these changes are necessary to ensure that the impacts of aquaculture operations on the habitat of Fraser sockeye are reviewed, regulated, and enforced by the Department.*

Disease and "death of fish"

Based on international experience and scientific literature (reviewed in our original submissions), aquaculture operations do cause death of wild salmon by the transmission and amplification of pathogens on migration routes. This potential to kill wild salmon *ought to* bring fish farms within the meaning of "serious harm" for s. 35 of the Proposed FA, making farms subject to enforcement of the prohibition in s. 35(1) and requiring an FA assessment of impacts to determine whether a s. 35(2) authorization is required.

In order for this application of s. 35 to occur, however, DFO must take seriously international experience and research on the impacts of disease and must conduct its own research to truly evaluate the prevalence of disease in aquaculture and wild salmon on our coast. As noted in our original submissions, the evidence before the Commission (documentary, DFO witnesses, authors of technical reports, and persons with experience in the aquaculture industry) was

remarkably consistent that DFO had not studied in any meaningful way and currently knows little about disease in wild salmon and aquaculture in British Columbia (see original Final Submissions, pp. 48-54, 68-70). This must change before the risk of disease will attract s. 35.

Most importantly, the department must transform its approach towards the potential impacts pathogen from farms pose for wild salmon from one of denial or ignorance to one of recognition and precaution. If the department does take seriously the risk of death to wild salmon from fish farms, we reiterate our submission that there is no tenable basis on which fish farms could be placed on the wild salmon migration route.

Recommendation: *If the proposed changes to s. 35 are enacted, DFO should interpret the "death of fish" provision to include the potential for disease transmission and amplification from fish farms on wild salmon migration routes to kill or weaken (contributing to death) of wild salmon.*

Authorization of Harm

The current FA exempts a person from contravening s. 35(1) if they are carrying out an activity authorized by the Minister or under regulations made by the Governor in Council under the Act. The Proposed FA broadens the means and powers by which a fish farm can potentially be exempted from s. 35(1). The new Act allows for the Minister (or another prescribed person (potentially the Province)) to prescribe activities, including by "regulations" (s. 35(2) and (3)),[2] by which power the Minister of Fisheries and Oceans could make regulations prescribing aquaculture as an exempt activity. The power of the Minister is concerning in light of DFO's stated intention to substantially expand aquaculture, and its history of reluctance to vigorously apply s. 35 to fish farms.

During the Commission, representatives of DFO assured the Commissioner that regulation of impacts of fish farms on ocean habitat and wild stocks would occur via the conditions imposed on an aquaculture licence. However, the evidence showed that the conditions of the template licence were insufficient for this task; and, that there was no condition that prohibited fish farms from spreading disease to wild salmon or causing death of wild salmon through pathogen transfer (see original Final Submissions, pp. 61-64). On the other hand, the s. 35 enforcement provisions, if applied (which has not been the case in the past), provide at least a responsive tool to encourage compliance, if not a means to ensure the precautionary protection of wild stocks.[3] The application of s. 35 to fish farms is therefore essential (as is an approach that seriously evaluates and regulates disease transmission as a harm to fish within that provision).

[2] Any such regulations made by the Minister are exempt from review under s. 3 of the Statutory Instruments act, meaning that they will not be subject to review by the Minister of Justice to ensure, amongst other things that they do not constitute an unusual or unexpected use of the conferred authority. This is concerning in it appears to allow a broad scope to the Minister to use his power to prescribe an activity as not violating s. 35(1) no matter the exemption is reasonable, justifiable or arbitrary. (see proposed s. 35(4)).

[3] As outlined in our original Final Submissions (see p. 58), DFO evidence was that it would use the enforcement provisions of HADD if it had not conducted an assessment of allowable operations under the provision.

***Recommendation**: Fish farms should not be exempted from s. 35 (by regulations or otherwise). Each fish farm must be subject to review and regulation pursuant to s. 35 as well as the related enforcement provisions.*

CEAA

Fulsome, science-based environmental assessments of the impacts of fish farms are essential if wild salmon stocks are to be protected. In our original Final Submissions, we highlighted the limited scope of the environmental assessments ("EA") conducted in the past, in particular the failure of the assessments to evaluate the risk of disease. Like s. 35 reviews, the assessments were conducted in the absence of data on disease specific to the province and in the context of departmental position that disease from aquaculture did not pose a risk to wild salmon. In our submissions, we advocated for a different approach to EA that would consider the individual and cumulative impacts of fish farms, including disease impacts, and, that would make risk of disease a primary consideration in siting farms. We further recommended that no farms be sited on the migration route until the risk of disease was properly evaluated (see Final Submissions, p. 47-53). On the current state of international knowledge and inference from limited data in British Columbia, no EA could find that there would not be significant adverse impacts from farms on the migration route. Proper EAs pursuant to the current CEAA should result in more strategic, sustainable placement of fish farms.

The proposed replacement CEAA raises the very real possibility that no EA of fish farms will occur in the future and no evaluation of the risk of disease will occur before a farm is approved.

Previously, a s. 35 FA authorization and a *Navigable Waters Protection Act* permit were the two federal authorizations that would potentially trigger an environmental assessment of a fish farm under CEAA. Both authorizations were identified in the Law List Regulations, SOR/94-636, enacted under s. 59 of CEAA thereby requiring an EA pursuant to s. 5(1)(d) of the Act.

The replacement CEAA only requires an EA for designated projects. Aquaculture operations in the marine waters of British Columbia (over sea floor belonging to the Province) will only be subject to an EA if the activity is designated by regulations made under s. 84 of the Act (see ss. 2(1) and 13 of proposed CEAA). At this point, we have no indication of whether aquaculture activities will be designated under s. 84. [The change in triggers makes it unlikely that the need for a s. 35 FA authorization or NWPA permit will require an EA of an aquaculture facility.] Their designation as reviewable projects is crucial.

Recommendations: *A licence to operate an aquaculture facility under the Pacific Aquaculture Regulations should be prescribed as a designated project under regulations pursuant to section 84 of the proposed Canadian Environmental Assessment Act. This is the most certain way to ensure that before any aquaculture licence is issued, an environmental assessment is conducted to evaluate the environmental impacts of the farm alone and in combination with existing farms (cumulative effects) on wild salmon and the marine environment.*

"Directly linked or necessarily incidental" effects

The proposed CEAA restricts the scope of an environmental assessment from that mandated under the current Act. The definition of environmental effect is narrowed from any change to the environment (s. 2(1)) to effects on specific elements of the environment within federal jurisdiction and effects that are "directly linked or necessarily incidental" to a federal authorization (s. 5(1) and (2)). The environmental effects to wild salmon from aquaculture should come within the definition of environmental effect, but the department's approach to considering disease risks and impacts in the past makes it questionable whether disease risk would be assessed. As stated in our original submissions, government representatives repeatedly emphasized that disease is endemic in the Pacific, so a risk of disease may not meet the standard of causation in the proposed Act. This is a serious concern in light of the increasing body of evidence of disease in farmed salmon in British Columbia and the real risk this poses to wild Fraser sockeye.

All of which is respectfully submitted, this 14th day of May, 2012

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