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

In the matter of Her Excellency the Governor General in Council, on the recommendation of the Prime Minister, directing that a commission do issue under Part I 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.

SUPPLEMENTARY WRITTEN SUBMISSIONS ON BEHALF OF THE CONSERVATION COALITION:

COASTAL ALLIANCE FOR AQUACULTURE REFORM,
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FRASER RIVERKEEPER SOCIETY, GEORGIA STRAIT ALLIANCE,
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1. On April 26, 2012, Canada introduced into Parliament Bill C-38 entitled the Jobs, Growth and Long-Term Prosperity Act, (the "Bill") which over the span of its 421 pages proposed significant legislative changes to environmental laws in Canada.

2. Senior Commission Counsel by letter dated April 27, 2012, invited participants to file supplementary submissions if the proposed changes in the Bill impacted previous submissions that participants had made to this Commission.

3. This Coalition files these submissions in direct response to that letter. In these submissions there is an assumption that the proposed changes contained in the Bill would be enacted in the same format as they were introduced at first reading.

General Comments on the Bill and its effect upon this Commission

4. This Commission has heard evidence over a two year period of time. During those submissions several times senior officials and scientists with the Department of Fisheries and Oceans gave evidence that Canada was looking forward to receiving the final Report from this Commission and was avoiding making significant changes to policies and direction until such time as they received the advice from this Commission in a final report.[1]

5. This Coalition submits that the tendering of the sweeping changes to the Fisheries Act and other significant pieces of core environmental legislation in Canada as contained in the Bill fly fully in the face of the work that this Commission has undertaken. We further submit that Canada in proposing these changes has not shown the proper respect for the work of this Commission and has departed significantly from the evidence that has been proffered through many of its witnesses. As a consequence the evidence of DFO witnesses, particularly when they are addressing the topic of consultations around change to law or policy must be accorded little weight.

6. The invitation from senior Commission Counsel references several pieces of legislation that are changed in material ways, The Canadian Environmental Assessment Act, The Fisheries Act, The Canadian Environmental Protection Act and the Species at Risk Act.

7. For the reasons fully developed within, it is the position of this Coalition that the proposed Bill presents such a wide change to several critical pieces of legislation that were not only the subject of submissions by this Commission but also occupied many days of testimony, that the total effect of the Bill is to render much of the evidence heard by the Commission particularly with regard to habitat and habitat protection potentially irrelevant. The final submissions that this Coalition

[1] See for example Transcripts of September 26, 2012, per Deputy Minister Dansereau, at page 97, lines 1-16

made to the Commission on the topics of the Wild Salmon Policy, on habitat loss and protection must be reviewed in light of the changes proposed in the Bill.

8. In these submissions this Coalition will address the changes to specific pieces of federal legislation and how the changes have both impacted our original submissions as well as what these changes may mean for the Commission's work and recommendations.

The repeal and replacement of the Environmental Assessment Act

9. The Bill repeals the *Canadian Environmental Assessment Act,* S.C. 1992, c. 37 ("CEAA") in its entirety and replace it with a new piece of legislation - the *Canadian Environmental Assessment Act, 2012* ("CEAA 2012"). If the Bill is passed into law, CEAA as we currently know it will no longer exist. Instead, Canadians will be left with a federal assessment law that is significantly weaker than its predecessor.

Key provisions of concern in CEAA 2012

- <u>Federal environmental assessments would no longer be conducted where a province provides an "appropriate substitute"</u>

  Federal environmental assessments have long provided an important backstop or "sober second thought" to less rigorous provincial reviews. Many provincial assessments don't require a complete analysis of the significance of a project's environmental impacts. The Taseko Prosperity Mine environmental assessment, that is within the watershed of the Fraser River system provides a clear example about what would happen in the absence of a federal government assessment. In this case, the federal assessment process under CEAA provided a superior level of scrutiny and overruled a provincial approval that likely would have created a legacy of environmental degradation that would have impacted the Fraser River Sockeye including the Taseko CU's.

  Duplication of environmental assessment between the provincial and federal governments was already eliminated more than a decade ago. As far back as 1997, the House of Commons Standing Committee on Environment and Sustainable Development, in studying the necessity of additional federal-provincial cooperation, indicated "…that there is insufficient evidence of overlap and duplication of environmental regulations or activities of the federal and provincial/territorial governments" and concluded that there were not likely any further

efficiencies or costs savings to be achieved[2]. Documenting this success was the finding in 2001 by the Minister of the Environment that of the 7,000 federal assessments conducted annually; only 80-100 are subjected to any level of assessment provincially.[3] The Supreme Court of Canada also confirmed that the existing law has addressed duplication and promotes cooperation with the provinces.[4] The new law is therefore not intended to reduce cooperation but will allow the federal government to shirk its responsibilities to plan for environmental protection.

- <u>Significantly fewer assessments will be conducted</u>

  CEAA 2012 shifts from a "trigger" approach, where an assessment is required when certain pre-conditions are met, to a "project list" approach, where an assessment is only required for projects included in the list of "designated projects". The type of projects that will be included is currently unknown, as that decision is left to Cabinet (through the enactment of future regulations) and the Minister of Environment (through an order of the Minister). Such an approach provides complete discretion to Cabinet and the Minister to determine which projects should be deemed to be subject to an assessment.

  Even for projects that Cabinet or the Minister decides to include in the list of "designated projects", there is no requirement that those projects be subject to anything more than a "screening" to determine whether an actual "environmental assessment" is required. The CEAA Agency has complete discretion to determine, based on the screening assessment, whether an actual "environmental assessment" would be required.

  As a result of this high level of discretion, it is expected that there will be a dramatic drop in the number of environmental assessments conducted.

  The trigger for an environmental assessment arising from the application of s. 35 of the Fisheries Act will disappear.

[2] Report of the House of Commons Standing Committee on Environment and Sustainable Development, Harmonization and Environmental Protection: An analysis of the harmonization initiative of the Canadian Council of Ministers of the Environment, 1997, at page 7

[3] Canadian Environmental Assessment Agency, *Strengthening Environmental Assessment for Canadians: Report of the Minister of the Environment to the Parliament of Canada on the Review of the Canadian Environmental Assessment Act*, (Ottawa: Public Works and Government Services Canada, 2001).

[4] *Miningwatch Canada v. Canada*, 2010 SCC 2, at para 25

- Reducing the number of factors that are required to be considered in assessments, thereby compromising the value of any analysis

  For the projects that are subject to an "environmental assessment", assessing the impacts of a project on renewable resources will no longer be required, even though it is an important indicator of whether we are overtaxing ecosystems.

  Overall, the removal of this important factor from environmental assessment under *CEAA* 2012 could severely constrain the ability to evaluate a project from a sustainable development perspective.

- Establishing binding timelines

  Very short timelines are given under *CEAA* 2012 for the initial screening decision to be completed (45 days after posting to the Internet site), and for a decision to be made as to whether an environmental assessment is required. In many cases, there would be insufficient time for information to be gathered about the potential effects of the project and for the CEAA Agency to determine whether the project may cause adverse environmental effects, such that an environmental assessment is required.

  As for the timelines imposed for environmental assessments, there is a requirement to complete the actual assessment within 365 days or 24 months if referred to a review panel, though these times can be extended by the Minister by 3 months or longer by order of Cabinet. The construction of a major project or activity is subject to many factors. Imposing a rigid deadline onto a complex environmental assessment process could result in incomplete or sloppy assessments. For example, more than 12 months of scientific data may be required to understand baseline environmental conditions. This Commission has heard much evidence about how data collection over several life cycles of sockeye is necessary before one can be in a position to draw conclusions about the sockeye that are so tied to cycles. In some cases, a project proponent also needs extra time to consult with affected groups and communities in order to prepare robust analyses of potential environmental impacts. Finally, those responsible for evaluating a proposed project and its impacts may require expert consultants to study particularly complex aspects of the projects.

- Public Participation Reduced

  Under *CEAA* 2012, participation in assessments undertaken by the National Energy Board (NEB) or review panels would be limited to any

"interested party". This includes those that are determined by the relevant authority to be "directly affected" by the project or to have relevant information or expertise.

The present *CEAA* ensures that the public be given the opportunity to participate in review panel hearings. Under *CEAA* 2012, the number of people permitted to participate in hearings could be severely limited.

10. The ramifications of this legislative change for this Commission are these:

- By moving from a trigger approach to a designated approach, projects that are likely to affect critical habitat of sockeye salmon would be left to the discretion of the Minister who is charged with making the regulations that govern projects.

- Coupled with the sweeping changes to the Fisheries Act that are discussed more fully below, the lack of proper environmental assessment particularly in the context of habitat for sockeye will have negative consequences upon sockeye CU's.

- One of the areas where it is unclear whether environmental assessments would be conducted under the Bill is the location, licensing and approval for aquaculture projects and fish farms. Without guidance from regulators that environmental assessment should occur for these farms, then it is very likely that farms would be licensed without knowing all of the risks associated with any particular farm. This Coalition repeats its submissions on the need for environmental assessment to be conducted on proposed aquaculture facilities particularly where those facilities are located along the migration pathways of Fraser sockeye.

Major Changes to the Fisheries Act

11. The Bill proposes significant and far reaching changes to the Fisheries Act. As a consequence this Coalition makes the following supplemental submissions in addition to the ones as contained in its original final submissions and reply submissions.

12. The *Fisheries Act ,* R.S.C. 1985, c. F-14*,* is a long-standing building block of Confederation. It was first enacted in 1868, following the enactment of the *British North America Act,* and has been strengthened in recent decades. While the *Act* has some shortcomings, it is one of the few pieces of legislation in Canada that empowers the government to protect oceans,clean water and fish habitat.

13. Since 1976, the *Fisheries Act* has empowered the Department of Fisheries and Oceans("DFO") to conserve and protect fish and fish habitat across Canada. These

necessary improvements to the Act were first proposed as legislation almost 40 years ago. They arose from widespread understanding and acknowledgement that healthy fisheries —and the people and ecosystems that depend on healthy fisheries — cannot exist without healthy, intact, unpolluted fish habitat. In this respect, in 1976 fish habitat was defined in the Act as "*spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly to carry out their life processes".* At the same time, key provisions were added to help protect the ecosystems that fish inhabit.

14. This Commission heard much evidence about the application and effects of s. 35 and s. 36 of the Fisheries Act on Fraser sockeye. Subsection 35(1) makes it an offense to carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat ("HADD"). If a person or developer harmfully alters, disrupts or destroys fish habitat without authorization, they may be guilty of an offence and may be penalized with fines of up to $1,000,000, up to six months imprisonment, or a combination of both. However, this broad prohibition against destroying fish habitat is weakened by the complete discretion given to the Minister of Fisheries and Oceans under subsection 35(2). Under s.35(2), the Minister or DFO bureaucrats are given the discretion to allow fish habitat to be harmed or destroyed "by any means or under any conditions". These.35 (2) authorizations allow industry or proponents to lawfully destroy fish habitat.

15. Section 36 makes it an offence to deposit deleterious substances into fish-bearing waters. Unlike s.35, s.36 never allows a Minister or his bureaucrats to authorize pollution. Instead, any pollution authorized under s.36 can only be done pursuant to regulations enacted by Cabinet, which themselves must confirm with a number of conditions. Examples of such regulations include the *Metal Mining Effluent Regulations,* SOR/2002-222 and the *Pulp and Paper Effluent Regulations*, SOR/92,-269.

16. Section 35 and 36 of the Fisheries Act provide a regulatory backstop to prevent the destruction and pollution of Canada's bodies of water. Most provinces do not have similar laws making it an offence for industry or developers to harm fish habitat. While a few provinces, like B.C., have relatively weak fish habitat protection laws such as the *Riparian Areas Regulation,* courts have confirmed that those laws nonetheless permit municipalities and developers to destroy fish habitat.[5]

17. With the introduction of the Bill, there are significant and important changes that would be made to both s. 35 and 36 of the Fisheries Act.

18. The Bill proposes that there will be a change in the wording of s. 35 of the Fisheries Act in several provisions:

[5] *Yanke v. Salmon Arm (City),* 2011 BCCA 309

142. (1) Section 35 of the Act is replaced by the following:

Alteration, disruption or destruction of fish habitat

35. (1) No person shall carry on any work, undertaking or activity that results in the harmful alteration or disruption, or the destruction, of fish habitat.

(2) Subsection 35(1) of the Act is replaced by the following:

Serious harm to Fish

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.

19. By virtue of s. 156 of the Bill the first version of s. 35 (1) as contained in s. 142 (1) of the Bill would take place upon passage of the Bill; then s. 142 (2) would take effect when proclaimed by the Governor General in Council. This latter provision eliminates the protection of fish habitat entirely and sets out a test of serious harm to fish of a commercial, recreational or Aboriginal fishery –terms that are elsewhere defined in the Bill.

20. Such an approach in our respectful submission is completely at odds with the bulk of the evidence that this Commission has heard with regard to habitat and the protection of fish habitat.

21. Our submission is a simple but logical one on this point. Without the protection of fish habitat, all fish including Fraser River sockeye are not protected. It is insufficient to pigeonhole fish into discrete categories as the proposed legislation does here and hope that the fish would not be harmed. As this Commission heard time and time again in the discussion on the Wild Salmon Policy, it is important to protect the ecosystem upon which Fraser River sockeye depend. That ecosystem may include fish and prey that would not in themselves fit easily within the definition of the categorized fish in s. 142 (2) of the Bill.

22. The existing prohibition against HADD, and the prohibition against killing of fish (s. 32 of the present Fisheries Act) will be merged into one prohibition against "serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery". Serious harm to fish is a new statutory concept defined as "death of fish or any permanent alteration to, or

destruction of, fish habitat" (s. 132(4) of the Bill). Once cabinet so orders, it will no longer be against the law to harmfully alter or disrupt fish habitat.

23. This change alone could mean that many activities that under the current *Fisheries Act* were scrutinized for their potential impact on fish habitat and Fraser river sockeye will now be ignored. This is a concern because, from a biological perspective, many alterations and disruptions of fish habitat, that might be temporary in nature, can have a lasting harm to fish. Temporarily removing vegetation from a spawning stream, or disrupting the gravel or adding sediment through road works could wipe out a year class of sockeye salmon – but it does not permanently alter the habitat.

24. Currently, and as discussed above, the authorization provision in s. 35(2) makes lawful events that are otherwise prohibited under s. 35(1). There are currently two means by which harmful alteration, disruption and destruction of habitat can be lawfully authorized: either by ministerial authorization, or by Cabinet regulation.[6]

25. The proposed legislative amendments to the authorization provision in s. 35(2) would immediately expand the Government's ability to authorize harm to fish habitat,[7] in several ways, as proposed at s.142(1) of the Bill.

26. First, s. 142(1) of the Bill proposes that harm to fish habitat caused by certain prescribed works, undertakings and activities could be automatically exempted from the s. 35(1) prohibition and thus automatically allowed (s. 35(2)(a)). Likewise, it proposes that harm done to certain prescribed Canadian fisheries waters will be automatically exempted from the s. 35(1) prohibition and thus automatically allowed (s. 35(2)(a)). These automatically exempted works, undertakings, activities and waters would be prescribed in regulations (s. 35(3)).

27. In effect, DFO would no longer review, be notified of or consult on any of these works, undertakings and activities before they may automatically proceed, and those carrying out such works or activities would no longer be liable for prosecution for any damage they cause to fish or fish habitat provided they follow any conditions prescribed in the regulation. Likewise, the fisheries waters prescribed in the regulation – whether oceans, rivers, lakes or streams –would no longer receive any protection from harm, such that it would no longer be unlawful to kill fish or destroy habitat in these waters. Theoretically, the Government could remove any projects – from pipelines to oil sands projects – from the requirement to protect fish habitat, and could deprive any Canadian lake, river or streams of

[6] However, there are currently no such regulations enacted under s. 35(2).

[7] Unlike the proposed long-term changes to the s.35 (1) prohibition and related provisions, which would only come into force if there was a subsequent Cabinet order, these proposed changes to the s.35 (2) authorization provision would generally take effect immediately upon the Bill receiving royal assent.

protection. These are actions that would have severe impacts upon Fraser sockeye-particularly those CU's that are exhibiting declining population trends.

28. While s.142(1) of the Bill proposes that ministerial authorizations of harm to habitat would be maintained (s. 35(2)(b)), such authorizations would expanded to allow not just the Minister or his officials but any person or entity prescribed by the regulation to authorize harm to fish and fish habitat (s. 35(2)(c)). Thus this particular amendment would permit the Government to delegate to industry, developers or provinces the right to authorize adverse effects on fish and fish habitat. Such an amendment is not only environmentally unwise in that it would let the "fox guard the chicken coop," but moreover it could raise constitutional concerns.

29. Finally, s. 142(1) of the Bill would also expressly exempt harm caused by anything authorized, permitted, or required under the *Fisheries Act* (s. 35(2) (d)). Unfortunately, this means that the harms caused by destructive fishing practices would continue to be exempt from the s. 35(1) prohibition against harming fish habitat.

30. These proposed legislative amendments to s. 35(2) expressly set out a troubling framework through which the Government could ultimately suspend the application of the laws designed to protect fish and fish habitat. While the potential impact of these new exemptions in s. 35(2) is vast, it will be difficult to assess their real impact until any regulations are passed. Regulations would ultimately be necessary to exclude particular water bodies and particular works/activities from compliance with habitat protection.

31. Any such regulations would be made under s. 35(3). Subsection 35(3) would allow the Government to prescribe any works, undertakings or activities, or any fisheries waters, to which the prohibition against serious harm to fish would not apply. Regulations made under this subsection are made by the Minister. This provision enabling ministerial regulations would not come into force automatically, but rather will come into force by an order of Cabinet, at some time in the future.

32. Troublingly, the proposed s. 35(4) appears to exempt these ministerial regulations from the normal process of regulatory review and publication.[8] It is unusual to exempt regulations from this otherwise mandatory and automatic review – similar exemptions are found in only few places in federal law, and specifically for emergency situations.[9] However, despite s. 35(4), DFO senior officials have

[8] Section 35(2)(4) would exempt regulations prescribing anything under s. 35(2) from s. 3 of the *Statutory Instruments Act* – a provision that requires regulations to be reviewed by the clerk of the privy council for conformity with among other things, the enabling legislation and the *Canadian Charter of Rights and Freedoms*.

[9] For example emergency listing under s. 29(3) and emergency orders under s. 80(5) of the *Species at Risk Act* are exempted from regulatory review.

unambiguously committed to environmental and recreational fishing groups that DFO will ensure consultation on any draft regulations under s. 35(2) including by publishing any such regulations in Part 1 of the *Canada Gazette* for public comment.

33. Furthermore, section 149 of the Bill amends the general regulation-making provision of the *Fisheries Act* (s. 43). These regulations are made by Cabinet as opposed to by the Minister. The existing s. 43 of the *Fisheries Act* is a broad regulation-making power which already allows Cabinet to make wide-ranging regulations for implementing the Act.

34. As with the amendments to s. 35, the amendments to the regulation-making powers take place in two stages as well. The regulation-making powers that immediately come into force are set out in Bill s. 149(1). These will be replaced by the regulations envisioned in s. 149(2).

35. The initial regulation-making powers under s. 149(1) envision, among other things, regulations:

    a. prescribing works, undertakings or activities, and prescribing water bodies, that are exempt from the prohibitions against harming fish or fish habitat (*i.1*);

    b. prescribing conditions by which a work, undertaking or activity is exempt from these prohibitions against harm, and the people who may authorize such harm (*i.2* and *i.3);* and

    c. prescribing time limits for issuing authorizations to harm fish or fish habitat (*i.4).*

36. The second, long-term set of regulation-making powers under s. 149(2) are similar in structure to initial regulation-making powers under s. 149(1),but they refer only to the proposed long-term prohibition against serious harm to fish that is ultimately envisioned in the Bill*.* This second set of proposed regulation-making powers goes even further towards narrowing the protection for fish and fish habitat under the Act*.* Most notably, the proposed second section 43 (*i.01)* envisions regulations excluding fisheries from the definitions of "Aboriginal", "commercial" and "recreational". Given that overall thrust of these legislative changes is intended to limit DFO's focus only to Aboriginal, commercial and recreational fisheries and to exclude fish generally, this regulation-making power could potentially greatly restrict the coverage of the *Fisheries Act*.

37. Finally, at s. 149(5) of the Bill, the proposed amendments include a new regulation-making power under s. 43(5). Problematically, this new provision would

allow Cabinet to make regulations exempting any Canadian fisheries waters from the application of sections 20, 21, 35 and 38.[10]

38. Overall, these regulation-enabling provisions would further the ability of the Government to narrow or suspend the application of law designed to protect the environment.

39. Section 135 of the Bill introduces a new set of considerations that potentially reinforce the narrowing of fish and fish habitat protection under the Act. Section 6 introduces four factors to be taken into account before the Minister of Fisheries and Oceans may make statutory decisions or regulatory recommendations in relation to fish and fish habitat:

    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.

40. The Minister must apply these vague factors before recommending or making any regulations under s. 35 prescribing waters or works/activities to which the habitat protection provisions should not apply; any regulations under s. 43(.01) excluding certain fisheries from the protection of the *Fisheries Act*, or any regulations under s. 43(5) prescribing fisheries waters to which the Act does not apply. The Minister must also apply these factors when authorizing serious harm to fish; taking action to ensure free passage of fish or prevent harm to fish; and investigating and taking enforcement action in relation to the protection of fish and fish habitat. These factors or concepts are intended to guide the Minister's exercise of discretion when it comes to protecting fish and fish habitat.

41. Notably absent from these factors are fundamental guiding principles for environmental protection, such the precautionary principle and the ecosystem approach. The Bill is a significant departure from the principles contained in the Wild Salmon Policy and weakens critical legislative support for these principles while removing key regulatory tools that currently support the WSP.

[10] Sections 20 and 21 establish requirements for the free passage of fish including the maintenance of in-stream flows and open channels. Subsection 38(4) requires the owner or manager of a work, undertaking or activity that causes or threatens harm to fish and fish habitat, or the person causing or contributing to the harm, to report the problem to an authority.

42. The central provision governing pollution prevention in the *Fisheries Act* is section 36. Section 36 has remained largely unchanged in the Bil*l.* Importantly, the narrowed focus on protecting only particular waters, types of works/activities or fisheries, anticipated in the proposed amendments to ss. 32 and 35, has not been replicated in any amendments to s. 36. Subsections 36(1)-(3) are unchanged, and the prohibition against the deposit of deleterious substances into all fisheries waters remains intact.

43. The most notable amendment to s. 36, as found within s. 143 of the Bill, is a proposed change to the regulation making provisions. Currently, the *Fisheries Act* prohibits the deposit of deleterious substances unless they have been authorized under regulations made by the Cabinet under s. 36(5) of the Act. However the new provisions would allow such regulations authorizing pollution to also be made by the Minister [ss. 36(4) (c), (5.1) and (5.2)]. This new regulation-making power would presumably make it easier to promulgate regulations that authorize pollution of fisheries waters.

44. Section 134 of the proposed Bill adds two new key provisions to the *Fisheries Act* – sections 4.1 and 4.2 – under the heading "Agreements, Programs and Projects". According to DFO, this provision was added as one of many tools aimed at enhancing regulatory efficiency and encouraging partnerships.

45. Section 4.1 allows the Minister to enter into an agreement with a province or territory to further the purposes of the Act, including agreements respecting harmonization and reducing overlap, communications and public consultation. Agreements are envisioned to cover the wide variety of issues set out in s. 4.1(2) that address everything from role of the parties to such agreements to policy development. [11]

46. Further, section 4.2 provides that *if* one of these agreements identifies an existing provincial provision which is "equivalent in effect" to a provision of the regulations under the *Fisheries Act*, the Cabinet may order that certain provisions of the *Fisheries Act* or the regulations there under do not apply in the province. Federal fisheries law is therefore suspended and the provincial law applies in its place.

47. These two new provisions allowing devolution of fisheries management to provinces and territories seem consistent with the overall trend in these Bill amendments to limit or suspend the operation of the Act, whether by excluding its application to prescribed water bodies or works/activities, or by suspending its operation entirely within a province or territory.

[11] There is an interesting notice provision included in 4.1(4) that says that the Minister shall publish the agreement "in the manner that he or she consider appropriate."

How the changes to the Fisheries Act affect previous submissions of this Coalition

48. As indicated above elimination of the habitat protection for fish including the Fraser River sockeye is the wrong move for Canada to make at a time when it is unknown exactly what the long term status of our Fraser sockeye stocks are.

49. Moreover vesting more discretion in the Minister of DFO and in the federal cabinet is also wrongly placed at this crucial time. The Royal Society of Canada Expert Panel Experts in a recently released report made the following recommendation:

> Recommendation 3: The Panel recommends that the Government of Canada reduce the discretionary power in fisheries management decisions exercised by the Minister of Fisheries and Oceans.[12]

50. **This Coalition strongly submits that the Commission recommend that before Canada proceeds with the changes to the Fisheries Act and in particular the drastic changes to s. 35 as discussed above, that the government consult with all stake holders: Aboriginal, Commercial, Recreational and Conservation Groups.**

51. In making this recommendation this Coalition is mindful of the terms of reference of this Commission and submits that such a recommendation would fit squarely within the Commission's terms of reference: "to conduct the Inquiry without seeking to find fault on the part of any individual, community or organization, and with the overall aim of respecting conservation of the sockeye salmon stock and encouraging broad cooperation among stakeholders".

52. **This Coalition likewise submits that this Commission recommend that before any regulations are passed pursuant to the enabling provisions of the Bill that proper consultation be conducted with stakeholders.**

53. The Deputy Minister of DFO was aware that before significant changes should be made to the Fisheries Act, consultations are necessary:

> MS. DANSEREAU: I think 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. **And obviously that would require significant consultation** and I couldn't prejudge where -- what type of tools we would develop through consultation around that. But I think that there is some room for improvement there.[13]

[12] Sustaining Canada's Marine Biodiversity: Responding to the Challenges Posed by Climate Change Fisheries, and Aquaculture, Royal Society of Canada Expert panel, February 2012, at page 219
[13] Transcripts, September 26, 2012 page 5, lines 21-29, with emphasis added

> For as I think you may know, a ***Fisheries Act*** was introduced twice in the past five years and didn't make it through the process of the House, so we need to analyze why that was and should we be going back to the drawing board to look at some of the provisions **within that to determine if there should be more consultation.** So those are the steps that we would be looking at this year, to determine when would be the right time and what would that ***Fisheries Act*** look like.[14]

Other Changes contained in the Bill that impact this Commission and the Submissions of this Coalition

54. The Bill repeals the *Kyoto Protocol Implementation Act* S.C. 2007, c. 30.[15] This Commission heard much scientific evidence concerning the potential linkage to the disappearance of Fraser sockeye and global climate change. By signalling a move away from commitments made through the Kyoto Accord, Canada is making the wrong move with regard to the Fraser River sockeye.

55. Canada is no longer obligated to produce a climate change plan, and accountability mechanisms that other countries have put into place in keeping with their Kyoto commitments are not matched by Canada.

56. The Bill also makes changes to the *Species at Risk Act,* S.C. 2002, c. 29 (``*SARA*`). *SARA* is being amended to exempt the National Energy Board from ensuring that conditions are in place to protect critical habitat on projects it approves. One such project is the proposal by Enbridge to construct a pipeline, the Northern Gateway Pipeline, from Alberta to Kitimat. The present route of that pipeline would intersect with many tributaries of the Fraser system and has the potential to affect the CUs that are located in the North Fraser system (Stuart, Takla, and Trembleur CUs).

57. Another potential NEB proposal that may be exempted from the *SARA* issues discussed in paragraph 55 is the construction of a pipeline by Kinder Morgan from Valemount to Vancouver-this proposal would see the construction of a twin pipeline near an existing one. This plan would mean the expansion of oil tanker traffic through the port of Vancouver. The route of tanker traffic would intersect with the mouth of the Fraser and may cause potential harm (in the event of a spill) to Fraser sockeye including the endangered Cultus Lake CU.

58. In general, changes to *SARA* brought pursuant to the Bill would mean that companies won't have to renew permits on projects threatening critical habitat.

[14] Transcripts, *ibid.* Pages 24, lines 43-48, and page 25, lines 1-5, with emphasis added
[15] Section 699 of the Bill

Permits under *SARA* may be extended indefinitely at the discretion of the competent Minister.[16]

59. The *Canadian Environmental Protection Act*, S.C. 1999, c. 33 will be amended so the present one-year limit to permits for disposing waste at sea can now be renewed four times.[17]

60. The *Health of Animals Act*, S.C. 1990, c. 21 has also been changed. The provisions dealing with infected animals (which would include fish in aquaculture facilities) have been modified to allow for more discretion in the handling and publication of infections and infected animals.[18]

Conclusions

61. The legislative changes contained in the Bill represent a significant change in how Canada is setting laws and policy with respect to Fraser sockeye. Fundamentally, federal protection of sockeye salmon and the ecosystems they depend on will be reduced significantly. All of the evidence that this Commission has heard about how DFO consults with all stakeholders and convenes meetings to discuss topics of concern must now be viewed with a healthy dose of skepticism. This legislation is a game changer, and undermines all of the assertions that DFO officials will consult with First Nations, Commercial and recreational fishers and conservationists before making substantive long lasting changes that will affect the Fraser sockeye fishery and the conservation of the species. The importance of clear, prescriptive recommendations on how to improve federal protection and management of Fraser River sockeye salmon are now much more urgent and necessary.

62. The scope and breadth of the legislative change to the protection and conservation of Fraser sockeye casts a significant cloud of doubt over implementation of the Wild Salmon Policy – a document that was heavily relied upon by Canada and was the subject of much evidence and discussion during the hearings. Effective Wild Salmon Policy implementation is supported by prescriptive, protective laws that ensure the basic needs required to maintain and recover Fraser sockeye are met. Reduced legislative protection will require increased monitoring, reporting, and integrated governance.

63. Generally the Bill would vest large amounts of discretion within Ministers and Cabinet through regulation making powers. Some of these regulations would be

[16] Sections 163-167 of the Bill
[17] Section 157 of the Bill
[18] Section 508-509 of the Bill

exempted from publication and the application of the *Statutory Instruments Act*, R.S.C. 1985, c. S-22. In our original submissions we called for less discretion to be vested in the Minister of DFO.

64. One remedy to this state of affairs brought about by these sweeping changes contained in the Bill is for Canada to recognize that it has obligations to consult with Canadians who will be most affected by their legislative program. To do less is not acceptable to the participants in this Commission or to the Fraser sockeye.

65. This Commission has heard from many scientists and witnesses. It has commissioned reports from eminent scientists and those reports and scientists were the subject of examination. Throughout the course of the Inquiry Canada seemed willing to await the recommendations coming from the Commission before taking precipitous steps. With the introduction of this Bill, the process that we all embarked upon to determine the best course of action for the Fraser sockeye has been impaired. This Commission should respond to the changes contained in the Bill in a manner that would elicit the cooperation that it was empowered to foster. More consultation on these changes is a key to moving forward.

All of which is respectfully submitted.

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

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