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

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WRITTEN SUBMISSIONS REGARDING BILL C-38 – JOBS, GROWTH AND LONG-TERM PROSPERITY ACT BY THE

WESTERN CENTRAL COAST SALISH FIRST NATIONS

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A. Overview and Introduction

1. These are the submissions of Hwlitsum First Nation, Penelakut Tribe, Cowichan Tribes and Chemainus First Nation.

2. Bill C-38 the *Jobs, Growth and Long-term Prosperity Act* (hereafter "Bill C-38"), sets out proposed changes to numerous pieces of existing Canadian Federal legislation, including the *Fisheries Act,* R.S.C. 1985, F-14 ("FA"), and the *Canadian Environmental Assessment Act,* R.S.C. 1992, ch. 37 ("CEAA").

3. Many of the proposed changes to the FA and the repeal and replacement of the CEAA contemplated within Bill C-38 fail to take into consideration much of the evidence presented by First Nation participants at the Cohen Commission hearings. Much of this evidence addressed, *inter alia,* the desire of First Nations' to actively participate in the commercial Fraser River sockeye salmon fishery, to be involved in strategic management decisions, to maintain traditional fishing practices, to have adequate access to Fraser River sockeye for food, social, and ceremonial purposes, and to fulfill an environmental stewardship role with respect to maintaining salmon habitat.

4. The following submissions address how the nature and scope of Bill C-38's proposed legislative changes to the FA and CEAA serve to further circumvent meaningful participation by First Nations in the Fraser River sockeye fishery.

B. Fisheries Act

5. Overall, the legislative changes to the FA demonstrate a further diminishing of provisions accommodating First Nations' Aboriginal and Treaty rights, an overall lack of consultation, and a general failure for the proposed legislative changes to address a First Nations viewpoint. Of particular concern are (a) the segregated

C. Definitions – Expanding Section 2 of the FA

5. The proposed changes contemplate expanding the definitions section of the FA to include the separate definitions for "Aboriginal", "commercial" and "recreational". Specifically, "Aboriginal" is defined in relation to the act of harvesting fish by Aboriginal organizations or members for the purposes of pursuing fish for food, social, and ceremonial purposes. In turn, the definition of "commercial" includes having a licence to fish for the purposes of sale, trade, or barter, and "recreational" is defined as harvesting fish under the authority of a licence for personal use of the fish or for sport.

6. As set out in WCCSFN's previously delivered final submissions, the aboriginal perspective looks at harvesting Fraser River sockeye as a cultural matter. However, in western terms, the ability to harvest salmon is manifested in the special legal protection extended to Aboriginal and Treaty rights.

7. Section 35(1) of the *Constitution Act,* 1982 provides:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

8. Aboriginal rights arise out of pre-contact cultures of the specific nation and protect the customs, practices and traditions that constitute an integral part of the distinct culture of that nation. Whereas, Treaty rights are rooted in solemn commitments and the Crown is honour bound to respect these rights.

9. An economic right to trade in fish can arise out of either Aboriginal or Treaty rights. An Aboriginal right to fish exists when there was an equivalent or analogous form of pre-contact trade.[1] Whereas, a Treaty right to engage in an economic fishery occurs when there was an established commercial fishery at the time of treaty and protection for those fisheries was achieved in the treaty.

10. Much of the evidence during the hearings dealt with the interplay between access to Sockeye for food, social and ceremonial purposes and participation by First Nations to the commercial salmon fishery. Adding the specific definitions of "Aboriginal", "commercial", and "recreational" at this time provides Fisheries and Oceans Canada ("DFO") with a legislative tool for further separating Aboriginal fisheries from commercial fisheries. In addition, the timing of these specific additions to the definitions section also sends a very strong message as to Parliament's ongoing expectations regarding the continued separation of these fisheries.

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[1] See for example: *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2011 BCCA 237

11. In addition, the text of the legislation repeatedly uses these definitions together as "commercial, recreational, or Aboriginal fisheries". Arguably, this suggests to the reader a misleading hierarchy of priority, and also suggests that First Nations are mere stakeholders as opposed to rights holders to Fraser River sockeye.

D. Bi-lateral Agreements with the Province

12. Co-management was also a significant topic during the hearings. WCCSFN's position is that effective management of the Fraser River sockeye is dependent on a paradigm shift within DFO. Further, moving to a true co-management model is required in order to uphold DFO's legal duty to consult and to ensure effective management of the Fraser River salmon stocks.

13. The proposed Bill C-38 amendments to the FA contemplate the Minister entering into agreements with the Province for the purposes of facilitating joint activities in areas of common interest. This includes facilitating enhanced communications between these levels of government, exchanging scientific information, and facilitating public consultations or arrangements with third-party stakeholders.

14. Essentially, these proposed amendments copy many of the government-to-government consultation models proposed by First Nation participants at the earlier hearings. However, the scope of these proposed changes to the FA fail to include the Minister entering into agreements in areas of common interest with First Nations.

15. WCCSFN submits that the failure to include First Nations within the scope of these proposed changes effectively pre-empts any recommendations this Commission may have with respect to strategic level consultation. In addition, the proposed changes potentially impose a further layer of bureaucratic decision-making without imposing a corresponding process for consulting with the First Nations.

16. WCCSFN generally supports involving British Columbia in a co-management model for the Fraser River sockeye, however, the ongoing exclusion of First Nations ultimately misses the mark for a comprehensive co-management process.

E. Fishways

17. Pursuant to the proposed legislative changes the Minister is provided with the authority to make decisions regarding whether or not to remove obstructions or alternatively, require construction of fishways in order to ensure the free passage of fish and to prevent harm to fish. The proposed changes suggest that it is unacceptable to obstruct more than two-thirds of the width of a river, stream, or one-third of a main channel.[2] Of concern to WCCSFN is the subsequent clause which then goes on to prevent the placing of nets or any fishing apparatus in the remaining unobstructed part of a river, stream, or channel.

18. While these proposed changes speak to the Minister ensuring the free passageway of fish, there is the potential infringement of traditional Aboriginal fishing practices that engage the use of nets or other fishing apparatus to be precluded from fishing in areas where obstructions occur.

19. Section 35 rights also include rights incidental to a core harvesting right. Importantly, these incidental rights confirm that the existence of the rights is about preserving a way of life. However, these rights are rendered meaningless if they cannot be exercised due to inaccessibility, extinction of the resource, or destruction or compromise of the habitat upon which the resource relies. [3]

F. Fisheries Protection and Pollution Prevention

20. The proposed changes take a narrow approach to fish habitat protection, such that fish habitat will only be protected in designated waterways where commercial, Aboriginal, or recreational fisheries are present.

21. The proposed changes make it unclear how those water values that were once protected will be managed going forward. Bill C-38 appears to create a legislative gap in the FA contemplating the absence of "Crown conduct" when a proposed project seeks to impact a non-protected water value. The alarming consequence of this legislative gap is that the Crown may no longer be required to consult with First Nation's whose Aboriginal rights may be impacted related to developments affecting waterways that will not attract protection under the proposed FA.

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[2] Clause 20(4)(a)

[3] See for example: *Claxton v. Saanichton Marina,* [1989] 5 W.W.R. 82 (B.C.C.A.) and *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)* 2011 BCCA 247 (leave to appeal to SCC denied) at para. 118.

22. One of the significant evidentiary points made at the Cohen Commission is that DFO has very little data regarding critical Fraser River sockeye salmon habitat and that there is little co-ordination with the Provincial government with respect to taking steps to preserve fish habitat. In addition, witnesses repeatedly referenced the need to shift to ecosystem-based management of the fishery. WCCSFN specifically argued for infusing DFO's management of the fishery with conservation principles inherent to First Nations' historic management of the fishery. In addition the Wild Salmon Policy contemplates completing assessment of habitat status and establishing linkages to develop an integrated system for watershed management. However, as set out in our hearing submissions, one habitat status report (as required by Strategy 2 of the Wild Salmon Policy) has been completed to date on the Fraser Watershed.[4] DFO could not commit to a timeline for the completion of the habitat status reports.[5]

23. Given the breadth and depth of submissions made at the hearings regarding the importance of fish habitat, the resulting narrowing approach to fish habitat protection is extremely concerning. A likely result of the application of this piecemeal habitat protection and continued improper management of the remaining fish habitat, is an overall decline in the abundance and health of fish, including Fraser River sockeye. The proposed changes to the FA serve as further evidence that the federal fisheries regime will not allow for access to commercial fisheries based on an Aboriginal or Treaty right. The amendments also do not provide a co-management regime that includes participation by First Nations in strategic decision-making and again do not adequately consider the government's duty to consult with First Nations.

G. The CEAA

24. Bill C-38 repeals the CEAA and replaces it with a completely new statute, the *Canadian Environmental Assessment Act 2012* ("CEAA 2012"). The proposed changes will lead to an entirely new approach to federal environmental assessment ostensibly aimed at the "timely review" of projects.

25. The CEAA 2012 would alter the landscape from which WCCSFN based a number of recommendations in its final submissions. WCCSFN's position is that reducing federal oversight of environmental assessments and project reviews will have long-term effects on the sustainable management of Fraser River

[4] Farlinger, September 27, 2011 p. 25, ll. 16-34; p. 27 ll. 1-6
[5] Farlinger, September 28, 2011, p. 107, ll. 32-36

sockeye. Further, the effects of the proposed changes will introduce new challenges for the Crown in fulfilling its duty to consult with First Nations with respect to "de-regulated" fish habitat that will no longer initiate a federal environmental assessment.

26. WCCSFN emphasized the following elements in final submissions, among others, that are critical for the successful management of Fraser River sockeye: the need for better science incorporating the Aboriginal world view and traditional knowledge in sockeye-related research to inform DFO decision-making;[6] science must be performed without a policy bias; [7] and the fishery must be managed in a conservation-oriented manner,[8] inclusive of First Nations in a way that reflects true co-management of the fishery.[9]

27. WCCSFN's position is that the CEAA 2012 contains numerous provisions that collectively will have the negative effect of further diminishing DFO's ability to adequately manage Fraser River sockeye, and will hinder Canada's capability to meaningfully involve First Nations in the future direction of Fraser River sockeye. It is questionable whether, working pursuant to the proposed regime, Canada will have the ability to implement any of the principles put forward by the WCCSFN.

28. If the CEAA 2012 is passed into law, there will be less federal oversight of projects that may impact fish habitat; less meaningful opportunities for participation and a reduction in the generation and dissemination of knowledge and alternative perspectives; and increased uncertainty in the Crown's fulfillment of its duty to consult. First Nations, the public and government will lose valuable tools with which an improved fisheries management regime could be built.

H. Fewer Assessments of Potential Impacts to Fish Habitat

29. The operation of CEAA 2012 will result in fewer environmental assessments of those projects that may impact fish habitat. The level of protection provided under the current FA will only be afforded to designated fisheries: commercial, Aboriginal and recreational fisheries. As noted in our submissions regarding the proposed changes to the FA, it stands to reason that healthy ecosystems are required to support healthy populations of Fraser River sockeye.

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[6] WCCSFN Final Submissions at paras 50 and 104.
[7] WCCSFN Final Submissions at para 50.
[8] WCCSFN Final Submissions at para 89.
[9] WCCSFN Final Submissions at paras 92-94, 172.

30. Under the CEAA, certain actions by federal authorities "trigger" an environmental assessment, which is required to take place before the federal action, such as DFO issuing a permit or licence under s. 35(2) of the FA to harmfully alter, disturb or destroy fish habitat.

31. The CEAA 2012 replaces this trigger-based approach with a "designated project" list approach. Regulations will "designate" a physical activity or class of physical activities that require an environmental assessment, meaning environmental assessments will be initiated by the type of activity proposed, rather than by a government action.[10] This means that the government has broad discretion to decide which classes of activities or projects will require an environmental assessment. In conjunction with the proposed changes to the FA, it is likely that environmental assessments will only be completed when a s.35(2) authorization may affect an economically viable fish species, as fish habitat in general will no longer be protected.

I. Lost Opportunities for Participation and the Sharing of Knowledge

32. While not perfect, the CEAA provides opportunities to generate data to inform DFO policy and contribute to information-sharing as a component of consultation. Relative to the proposed regime, the CEAA has a more inclusive scope that leads to the creation of a comprehensive record to inform the decision-maker for the assessment. On the ground, the creation of an inclusive, comprehensive record has the analogous benefit of serving as a valuable source of information to infuse both DFO policy and consultation efforts.

33. Pursuant to the CEAA, in order to determine whether a proposed development may lead to significant adverse environmental effects, baseline data must be compiled to determine those environmental values that may stand to be impacted. DFO, as a responsible authority for assessments requiring the authorization for the harmful alteration, disruption and destruction of fish habitat, must satisfy itself of those impacts. [11]

34. The CEAA also provides the opportunity for public participation[12] and expert input coordinated by the relevant ministries involved in the environmental

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[10] CEAA 2012, s. 84(a) and s. 2(1) "designated project". A project may also be designated on a case-by-case basis by way of an order by the Minister

[11] CEAA s.37

[12] CEAA, s. 4(1)(d)

assessment and from participants pursuant to participant funding programs.[13] The CEAA further requires the consideration of alternatives to a proposed project. [14]

35. The collective result is a record that reflects a broad range of perspectives, including a scientific assessment of the water value in question. The absence of a legislated time limit on environmental assessments further allows for a more flexible process under which a more comprehensive record may be generated.

36. WCCSFN's position is that the CEAA 2012 will significantly curb the generation and dissemination of valuable science and diverse perspectives. As noted above, less environmental assessments will be required under the proposed regime, including less environmental assessments of fish habitat that the government deems as unworthy of oversight. This will lead to less science generated on the ground.

37. The proposed legislation further limits participation in assessments undertaken by the National Energy Board to "interested parties",[15] which is defined as persons "directly affected by the carrying out of the designated project" or with "relevant information or expertise",[16] and determined by the responsible authority.[17] This change would limit the number and type of interveners in National Energy Board hearings and review panel assessments. The responsible authority or review panel would have broad discretion to choose who may participate in hearings.

38. In addition to the restrictions on who may participate and in what capacity, the CEAA 2012 imposes strict fixed time limits on all environmental assessments. Standard assessments must be completed within 365 days,[18] or 14 months for an assessment by a review panel.[19] A likely consequence of the abbreviated timelines for assessment is that there will be insufficient windows to generate baseline data on Fraser River sockeye that require observation of one year or more.

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[13] Canadian Environmental Assessment Agency. Participant Funding Program, online at: http://www.ceaa.gc.ca/default.asp?lang=En&n=E33AE9FB-1
[14] CEAA, s. 16(1)(e)
[15] CEAA 2012, s. 15(b).
[16] CEAA 2012, s. 2(2).
[17] CEAA 2012, s. 2(2).
[18] CEAA 2012, s. 27(2).
[19] CEAA 2012, s. 38(3); Timelines may be extended by the Minister and/or Governor in Council: CEAA 2012, ss. 27(3) and (4).

an assessment by a review panel.[19] A likely consequence of the abbreviated timelines for assessment is that there will be insufficient windows to generate baseline data on Fraser River sockeye that require observation of one year or more.

40. WCCSFN's position is that setting a one-size fits all timeline for both standard and review panel assessments fails to account for unexpected complexities and will have the effect of discouraging comprehensive reviews.

41. The integrity of environmental assessment processes will be diminished in the face of assessments that are rushed, and that restrict the generation and sharing of knowledge, data and diverse perspectives.

J. Increased uncertainty concerning consultation

42. Reducing environmental assessments where unprotected fish habitat may be harmfully altered, disrupted or destroyed will greatly disadvantage First Nations. The CEAA 2012 arbitrarily designates certain environmental values as insignificant, namely, streams and wetlands that are not identified as a commercial, Aboriginal or recreational fishery. This uninformed designation of value will not necessarily align itself with the value placed on an unprotected water value by a First Nation whose rights may be impacted by adverse effects on that water value. Further, as noted above, Bill C-38 appears to include a legislative gap concerning how these unregulated water values will be managed, and whether there will be any "crown conduct" surrounding these water values that will trigger a duty to consult.

43. The inclusion of a legislated timeline for environmental assessments will further add to uncertainty on the ground for all parties, including government and project proponents. Where a legislated timeline for an environmental assessment runs out, the duty to consult with First Nations will not necessarily correspond with that timeline, which has the potential of leading to delays and frustration.

44. In addition, the reforms shift the authority for determining whether adverse environmental effects are justifiable from the CEAA to the Governor in Council. In essence, this means that the government has the power to approve a project, even if the assessment indicates significant adverse environmental effects.

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[19] CEAA 2012, s. 38(3); Timelines may be extended by the Minister and/or Governor in Council: CEAA 2012, ss. 27(3) and (4).

45. The Crown cannot legislate out of its duty to consult[20]. Increased litigation will follow any move on the Crown's part to curb consultation efforts to coincide with their goal of "timely review" of projects. Rather than further the goal of reconciliation, the CEAA 2012 has the potential to lead to confrontation and litigation.

K. Conclusion

46. The proposed legislative changes to the FA and the CEAA serve to pre-empt any recommendations this Commission may make with respect to building a fisheries regime that is both sustainable and inclusive of First Nation's interests and needs. The proposed changes serve to provide further evidence that the federal fisheries regime is not (and will not be) structured to allow for sustainable management that respects and Aboriginal and Treaty right to fish.

[20] *Klahoose First Nation* v. *Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642 at para. 131