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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FINAL SUBMISSIONS OF THE FIRST NATIONS COALITION ON BILL C-38

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I. OVERVIEW

1. These are the written submissions of the First Nations Coalition ("FNC") in response to the Commission's letter of April 27, 2012 inviting submissions on the impact of Bill C-38 (including the proposed amendments to the *Fisheries Act* ("FA"), the *Canadian Environmental Assessment Act* ("CEAA"), the *Canadian Environmental Protection Act* ("CEPA") and the *Species at Risk Act* ("SARA")) to the submissions we have already made.

2. These submissions should be read in conjunction with the final written submissions of the FNC provided to the Commission on October 17, 2011 (the "original submissions"), the reply submissions of the FNC provided to the Commission on November 3, 2011 (the "reply submissions"), the oral submissions made on November 10, 2011, and the ISA submissions of the FNC provided to the Commission on December 22, 2011.

3. The FNC submits that the proposed amendments to the FA, CEAA, CEPA and SARA found in Bill C-38 significantly undermine the work of this Inquiry. The Commissioner was mandated under the Terms of Reference ("TOR") to, *inter alia*, conduct the Inquiry with the overall aim of **respecting the conservation** of Fraser River Sockeye Salmon ("FRSS"), and to consider the policies and practices of the Department of Fisheries and Oceans ("DFO") with respect to FRSS including its **fisheries policies and programs, risk management strategies, and fisheries management practices and procedures**. The Commissioner was also asked to develop **recommendations for improving the future sustainability** of the FRSS fishery. Now with the introduction of Bill C-38 and its substantive changes to fisheries and environmental protection laws, Canada proposes to change, without consultation, the statutory foundation on which the protection of FRSS and its habitat is based.

4. After spending over $28 million on the Inquiry, holding more than 125 days of hearings on over 25 topics ranging from habitat management to cumulative impacts, hearing from over 175 witnesses, and with only a few months remaining before the release of the Commissioner's report and recommendations, both the timing and content of the proposed amendments contained in Bill C-38 are a surprise. On numerous occasions Canada and in particular DFO advised that activities were on hold pending the Commissioner's report and recommendations. No mention of these proposed

amendments (or the potential for such amendments) was made during the Inquiry. Given that the Commissioner was specifically mandated by Governor in Council, on the recommendation of the Prime Minister, to consider DFO's policies and procedures (which themselves are based on the FA, CEAA, CEPA and SARA) and to make recommendations aimed at improving the sustainability of the FRSS fishery, including any required changes to policies, practices and produces of DFO, the Inquiry had to and did proceed on the basic assumptions as to the legislative foundation (FA, CEPA, CEAA and SARA) would not change until **after** the release of the Commissioner's Report and Canada's consideration of the recommendations therein. The timing of BILL C-38 is even more disturbing in light of Deputy Minister Claire Dansereau's testimony in this Inquiry in September 2011 stating that DFO consults with First Nations on all matters[1] and that steps such as modernizing the FA and changes in Ministerial discretion would require significant consultation.[2]

5. The FNC submit that the Commissioner must consider the potential impacts to DFO's policies, practices and procedures and the future sustainability of FRSS arising from Bill C-38 in order to best ensure that the Report and Recommendations are comprehensive, current and relevant. Otherwise, the Commissioner's Recommendations run the risk of being moot.

6. At paragraph 42 of the original submissions, the FNC argued that in developing recommendations to improve the future sustainability of the FRSS and the fishery, the Commissioner must consider how such recommendations can assist DFO in meeting its constitutional obligations to First Nations and in promoting reconciliation. The FNC submits that in order to meet constitutional obligations and promote reconciliation, the honour of the Crown requires the Crown to engage First Nations about these proposed amendments and any proposed regulations before they are finalized and put into effect.

7. The FNC further submits that both the timing and content of the proposed amendments in Bill C-38, developed without adequate consultation, harm the potential of developing "broad cooperation"[3] among the various governments, rights holders and stakeholders with interests in ensuring a sustainable FRSS fishery. Therefore, the FNC urges the Commissioner to recommend on an urgent basis that Canada commit to consult with

[1] Transcript September 28, 2011 p. 3 (Claire Dansereau)
[2] Transcript September 26, 2011 p. 5 (Claire Dansereau)

and engage First Nations prior to enacting these proposed amendments and any subsequent regulations that have the potential to affect FRSS along their entire migratory route, and the ecosystems on which they depend.

8. Many of the substantive amendments to the FA will not come into force upon the Royal Assent of Bill C-38, but rather upon a later date to be set by Governor in Council. [4] In addition, the details about many of the proposed amendments in Bill C-38 will only be revealed through regulations which are still under development.[5] The FNC submits that this phased approach provides a space for the Crown to consult with First Nations regarding the Commissioner's Report and Recommendations prior to enacting the more substantive amendments to the FA and the passing of regulations. This will better ensure a regulatory regime that is constitutional and provide meaningful opportunity for the Commissioner's recommendations in aid of promoting the long term sustainability of FRSS are properly considered. The FNC submits that the Commissioner must recommend in a timely manner that the Governor in Council and any relevant Ministers not set a date for the new amendments to come into force or pass new regulations under the FA, CEAA, CEPA and SARA as it relates to FRSS and their entire migratory route until:

   a. The Commissioner's Report and recommendations are publicly released (anticipated to be Fall 2012); and

   b. Canada has meaningfully consulted with First Nations about the proposed amendments including any associated regulations and has accommodated concerns regarding potential adverse impacts to their s. 35 Rights. While this consultation may benefit from collaborative efforts with interested stakeholders, the Crown's unique constitutional obligations to First Nations must be met.

9. The rest of our submissions address five main issues: Ministerial discretion; Aboriginal fisheries; Habitat management; Provincial involvement; and Enforcement.

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[3] See Commission's TOR, a(1) (A)
[4] See s. 156 of Division 5 of Bill C-38.
[5] The new regulations anticipated under the new FA or CEAA were not tabled with Bill C-38.

II. MINISTERIAL DISCRETION

Fisheries Act

10. Many sections of the proposed amendments to the FA in Bill C-38 give increased discretion to the Minister, the Governor in Council, or other prescribed persons with regard to the creation and issuance of regulations and authorizations. For example:

    a. the proposed amendments in s.139(1) of Division 5 of Bill C-38 to s.32 of the FA allow the Minister to set the conditions for authorizations under which persons who kill fish will be deemed not to have contravened the FA;

    b. the proposed amendments in s.142 of Division 5 of Bill C-38 to s.35 of the FA allow the Minister to authorize the conditions for works, undertakings and activities such that they will be deemed not to have contravened s.35 of the FA;

    c. the proposed amendments in s.143 of Division 5 of Bill C-38 to s.36 of the FA allow the Minister to make regulations authorizing the types, quantities and concentrations of deleterious substances that can be deposited in Canadian waters; and

    d. the proposed amendments in s.149(5) of Division 5 of Bill C-38 to s.43 of the FA allow the Governor in Council to make regulations exempting any Canadian fisheries waters from the application of certain sections of the FA, including s.35.

11. While the FA, in its present form, leaves significant discretion with the Minister, the FNC submits that the additional discretion given to the Minister and Governor in Council under the proposed amendments creates a situation whereby important questions of biodiversity and the protection of ecosystems, fish, and fish habitat are left open to the dictates of passing political interests and influences.

12. Throughout its original submissions the FNC has advocated for more transparent efficient governance and management of FRSS, and specifically increased co-management with First Nations.[6] The shift from a top-down, centralized management of the fisheries resource by the Minister to the shared stewardship approach, it was argued, would provide for more sustainable management in a manner consistent with s. 35 of the *Constitution Act, 1982.* Co-management must be built on a foundation of

respect for and recognition of strong *prima facie* s. 35 rights and established Treaty rights in the fishery which include the right to habitat, and established fishing rights that include both livelihood and food, social and ceremonial rights.[7] The FNC presented evidence to support its submissions that the benefits of co-management include: higher acceptability and legitimacy of government, improved effectiveness of fisheries management, and the protection and enhancement of the resource, among many other benefits.[8] The evidence at the Inquiry was that negotiated co-management agreements appeared to be the preferred approach of DFO Regional Directors, managers and policy analysts charged with the day-to-day responsibility of engaging with First Nations and advancing co-management.[9] Increasing the discretionary authority of the Minister and Cabinet is the antithesis to such an approach.

CEAA

13. While Bill C-38 is a budget implementation bill it completely replaces the Canadian Environmental Assessment Act and many other environmental laws. Combined with changes to the National Energy Board Act, the proposed *Canadian Environmental Assessment Act, 2012*, ('*CEAA 2012*") would put in place changes to what projects and activities are subject to an environmental assessment ("EA"), how EAs are conducted, the scope of federal EAs, and how and by whom decisions are made following an assessment.

14. The triggers under the existing *Canadian Environmental Assessment Act* will be replaced with regulations that specify what projects or physical activities are "designated projects". Designated projects will generally require an EA. Government press releases state that the intent is for EAs to only be required for "major projects".

15. Decision making within an EA under CEAA 2012 is also significantly different than under the existing CEAA, in that decision making is split into two stages: 1) whether the project is likely to cause significant environmental effects; and 2) whether any such effects are justified in the circumstances. Cabinet makes the decision on justification. The responsible authority or, in the case of an EA that is referred to a review panel it is the Minister, who will decide whether the project is likely to cause significant adverse

[6] See paras. 628-643 of FNC's original submissions.
[7] See para. 57 of FNC's original submissions. See also Saanitchton Marina Case.
[8] See para. 635 of FNC's original submissions.

environmental effects. The legislation is silent on the process Canada will use to consult with Aboriginal peoples on the issue of justification.

16. It is also uncertain whether there will there be any transparency or disclosure in relation to Cabinet's decision, particularly since *CEAA 2012* provides that where a Minister or Clerk of the Privy Council objects to disclosure on the basis that the information constitutes a confidence of the Queen's Privy Council, the information will not be disclosed or made available to any person. Information that is captured by this would include information relevant to Cabinet's decisions on justification. [10]

17. The implications of having excessive Ministerial control in the management of ecosystems and fisheries was highlighted in the comprehensive report of the Royal Society of Canada Expert Panel[11] entitled *Sustaining Canada's Marine Biodiversity: Responding to the Challenges Posed by Climate Change, Fisheries, and Aquaculture*, which was released in February 2012.[12] The Expert Panel notes at page 13:

> Canada has consistently failed to meet targets and obligations to conserve biodiversity and promote sustainability. The government has the knowledge, expertise and even the policy and legislation it needs to correct that; but multiple factors have combined to slow the pace of statutory and policy implementation almost to a standstill. Those factors, we believe, include the inherent conflict at Fisheries and Oceans Canada, which has mandates both to promote industrial and economic activity and to conserve marine life and ocean health. **The minister of Fisheries and Oceans has excessive discretionary power to dictate activities that should be directed by science and shaped by transparent social and political values.** (added emphasis)

The Expert Panel went on to recommend, at page 16, that Canada should reduce the discretionary power in fisheries management decisions exercised by the Minister of DFO. The proposed amendments to the FA and CEAA, which give more discretion to the Minister and Cabinet, ignore well documented international experience and concerns raised repeatedly by First Nations. Given the increased political discretion contained in

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[9] *Ibid.*
[10] See s. 35 of Division 1, Part 3 of Bill C-38
[11] Dr. Randall Peterman, who testified in the Inquiry, is a member of this Royal Society of Canada Expert Panel.

the amendments in Bill C-38, the Commissioner's recommendations must tackle how to ensure that Traditional Ecological Knowledge and sound scientific advice will be fully and properly considered if Canada is going to take seriously its obligations to ensure the long term sustainability of FRSS.

18. In addition, the FNC submits that increasing Ministerial and Cabinet discretion, as proposed in Bill C-38, does nothing to improve transparency within DFO, which was identified as a major concern at various times throughout the Inquiry. For example, during the Inquiry testimony was provided as to the lack of transparency within DFO in relation to the 2004 decision to not list Cultus and Sakinaw populations of FRSS as endangered under SARA,[13] as well as the lack of transparency with respect to the research of Dr. Kristi Miller[14] and testing for infectious salmon anaemia ("ISA") virus.[15] Increased statutory decision making roles for the Minister and Cabinet, together with the confidentiality provided in s. 35 of Bill C-38, decreases the transparency and accountability of many decisions that could adversely affect FRSS and will further undermine the confidence of First Nations in DFO and its ability to ensure the long term sustainability of FRSS.

19. While the proposed addition of s.6 to the FA[16] will require the Minister to consider certain factors prior to making recommendations to Cabinet about certain kinds of regulations, the Minister is not explicitly required to consider scientific guidelines, environmental frameworks, or fisheries best practices. This is a concern. The FNC submits that the Minister must be required to consider a number of factors, including, most importantly, the potential impacts and infringements to s. 35 rights and how to mitigate and/or accommodate these impacts prior to issuing or recommending any types of regulations, permits or authorizations that would allow harm to or killing of fish, harm to fish habitat, or the by-passing of the FA. In addition, the Minister must consult with affected First Nations prior to authorizing any activities that have the potential to impact First Nation's long term sustainable exercise of their constitutionally protected Aboriginal rights.

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[12] The FNC brought this public report to the attention of the Commissioner by way of a letter dated March 19, 2012.
[13] See paras. 593-607 of FNC's original submissions.
[14] See paras. 58-63 of FNC's Final Submissions on the ISA Virus.
[15] See paras. 32-52 of FNC's Final Submissions on the ISA Virus.
[16] See s.135 of Division 5 of Bill C-38.

20. Much of the detail about the types of works, undertakings and activities that may be authorized, and under what conditions, will be revealed in regulations, which are not yet available for review. The Commissioner's recommendations must help to ensure that the regulations passed pursuant to the FA and CEAA will ensure stronger, not weaker protection for FRSS and the ecosystems on which they rely, and meet Canada's constitutional obligations to First Nations, including consultation regarding potential impacts, accommodations and justification. If Bill C-38 had come into force prior to the conclusion of the Inquiry's evidentiary hearing, the FNC would have endeavoured to explore through key witnesses the implications of these amendments and whether there were options available to implement any of the FNC proposed recommendations through the regulatory regime now contemplated for the FA and CEAA. In addition, because a reasonable expected outcome of these amendments is to allow Governor in Council approval of large scale oil and gas projects that endanger the marine and fresh water habitats of FRSS, the implications of foreseeable projects ought to have been considered by this Commission. The potential effect on FRSS, particularly impacts on fish habitat and risk of oil spills or leaks that could potentially affect a large portion of the migratory route of FRSS, was not adequately considered during this Inquiry. [17] The FNC is very concerned that increased Ministerial and/or Cabinet discretion will override precautionary or preventive recommendations that may be made.[18] Short of re-opening this Inquiry, the Commissioner must, in the FNC's submission, strive to find solutions within this potential new statutory regime that protect the long term sustainability of FRSS, and make strong recommendations that support those solutions.

III. NEW DEFINITIONS OF ABORIGINAL AND COMMERCIAL FISHERIES

21. The proposed amendments add to the FA, for the first time, definitions of what constitutes Aboriginal, commercial and recreational fisheries. While this legislation cannot limit or define the scope of s. 35 rights, the FNC submits that Canada is introducing definitions that could result in adverse impacts to the ongoing protection and exercise of s. 35 fishing rights, including rights and responsibilities to FRSS. The amendments in Bill C-38 use these definitions to define what fisheries trigger DFO's statutory obligations for fish and habitat protection measures. It is also foreseeable that

[17] Only one day during the Inquiry was spent on potential oil spills or leaks.

these definitions may be used in the new regulations, under the FA and the new CEAA, and in licencing and other statutory decisions made pursuant to these Acts.

22. The proposed definition of Aboriginal fishery restricts the fishery that will be protected to those where "fish is harvested", i.e. current use authorized by DFO, which could significantly reduce protection of stocks that are not being harvested for historical (e.g. overfished at previous times) or current conservation purposes (e.g. weak stock struggling to adapt to cumulative impacts, including climate change). It is possible this definition will preclude habitat protection for stocks that are rebuilding (e.g. spawning gravel of small stocks), limit habitat protection to large stocks and preclude ecosystem considerations within habitat protection and management. Simply put, the revised language fails to address the historical and current realities of FRSS thoroughly canvassed throughout the Inquiry.

23. The FNC's original submissions focused on the importance of FRSS to First Nations, and First Nations' perspectives on their Aboriginal rights and responsibilities, including how such rights and responsibilities would better ensure the long term sustainability of FRSS.[19] The FNC noted, at para. 32 of our original submissions that "Aboriginal rights to fish would be rendered meaningless by reducing an Aboriginal right to being simply a right to access or a right to harvest."

24. The proposed definition of Aboriginal fisheries does exactly what para. 32 of the FNC original submissions warned against – it attempts to reduce an Aboriginal fishery to a right to harvest. First Nations fishing rights and responsibilities are not based simply on a harvest model. In some years, when returns of FRSS or other fish are low, First Nations have chosen not to exercise their rights to harvest fish for food, social and ceremonial purposes. The choice to hold off harvest in order to meet conservation and stewardship objectives should not affect whether those fisheries are an "Aboriginal fishery." These proposed definitions, when read together with other proposed amendments, are being introduced to inform what protection Aboriginal fisheries will be provided under the FA. It is not for the legislature to predetermine what constitutes an Aboriginal fishery and freeze that right in time. It is constitutionally inadequate to only protect stocks that are presently being harvested.

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[18] See Bill C-38 Part 3, Division 1, sections 31, and 52(1) –(4)
[19] See, for example, paras. 4-13, 17, 22-34, 628-643 and recommendation 1 of the original submissions.

25. Given the increased variability among FRSS Conservation Units ("CUs") it would not be precautionary or scientifically sound to approach the protection of fish and fish habitat based on current harvesting practices. This could be devastating for the long term sustainability of FRSS. This was acknowledged in the Wild Salmon Policy ("WSP") which is founded on the protection of wild salmon and their ecosystems.

26. Adding a definition of Aboriginal fisheries to the FA is also directly in contrast to the evidence in the Inquiry that established DFO does not have the expertise to define Aboriginal fisheries or rights. The determination of what constitutes an Aboriginal fishery that is entitled to constitutional protection is made by applying the common law tests which in turn requires consideration of First Nations' laws, practices, customs, traditions and ways of life.

27. Any Aboriginal fishery for sale, trade or barter purposes (elements that First Nations assert are part of s. 35 rights to fish) would, under the proposed definitions, be deemed a commercial fishery and not part of an Aboriginal fishery. The FNC submits that the use of "trade or barter" only in the definition of Commercial is inconsistent with pre-contact, post-contact, and modern fisheries conducted by many First Nations. Some First Nations have already established sale, trade or barter as part of their Aboriginal fishing rights.[20] Many First Nations rely upon traditional trade or barter as part of their food social and ceremonial rights and would not consider necessary and incidental food exchanges as part of commercial fisheries.

28. In sum, the FNC submits that in the context of Aboriginal law, the proposed definitions of "Aboriginal" and "Commercial" that are to be added to the FA,[21] are de minimus and risk unlawfully restricting the considerations of statutory decision makers. [22] In addition, the evidence in the Inquiry clearly established the historic variability amongst FRSS CUs and the increasing variability in response to environmental and ecosystem changes, including climate change. The WSP rests on this important acknowledgement. If the

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[20] R.v.Gladstone, [1996] 2 SCR 723; Ahousaht Indian Band and nation v. Canada (AG) 2011 BCCA 237; R. V. Van Der Peet, [1996] 2 SCR 507

[21] See s.133(3) of Division 5 of Bill C-38 which states: ""Aboriginal", in relation to a fishery, means that fish is harvested by an Aboriginal organization or any of its members for the purpose of using the fish as food or for subsistence or for social or ceremonial purposes"; and "commercial", in relation to a fishery, means that "fish is harvested under the authority of a licence for the purposes of sale, trade or barter."

[22] For example, Tsawout Indian Band v. Saanichton Marina (1989) 36 BCLR (2D) 79, leave to appeal to SCC denied, R. v. Nikal [1996] 1 SCR 1013;

goal is to ensure the long term sustainability of FRSS, it is evident that protecting the habitat of FRSS cannot be limited to those fish currently harvested.

IV. HABITAT MANAGEMENT

29. Paragraphs 608 to 627 of the FNC's original submissions address habitat management, restoration and enforcement. In particular, para. 608 notes the legislative tools guiding DFO's habitat management and protection work, including: sections 35 and 36 of the FA, as well as SARA, and CEAA, and refers to Practice and Policy Report ("PPR") 8. PPR 8 states that the FA contains a number of habitat protection provisions that many, including DFO, believe make the FA one of the **strongest legislative tools in Canada in terms of environmental protection**. PPR 8 also notes that section 35 of the FA, which prohibits the unauthorized carrying on of any work or undertaking that results in the "harmful alteration, disruption or destruction of fish habitat" (a "HADD"), is "the primary habitat protection provision."

30. The proposed amendments, and in particular those found in ss.142(2), 144(2) and 145(3) of Division 5 of Bill C-38, remove the HADD language from the FA and replace it with a focus on "any work, undertaking or activity that results or is likely to result in a serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery." The FNC submits that **these proposed amendments, fundamentally change the environmental protection provisions of the FA, taking them from being among the strongest legislative tools for environmental protection to among the weakest.** This becomes even more problematic when read with the significant amendments to CEAA. These proposed amendments fundamentally change the statutory landscape for the protection of FRSS habitat on which the FNC's original submissions were based.

31. In particular, the FNC submits that these proposed amendments alter the **threshold** and the **focus** of the harm that DFO is mandated to protect fish from. In order to be deemed a "serious harm", an activity, work or undertaking must result in or be likely to result in the death of a fish (not simply harm or injury to a fish) or any permanent alteration to or destruction of fish habitat (not simply temporary alteration or harm to fish habitat). Given the difficulties of tracking and determining the death of FRSS, and challenges for fish habitat to recover from what may be considered temporary alterations, this new

threshold will impair fisheries managers from having the necessary tools to protect FRSS into the future.

32. There was overwhelming evidence that ecosystem health, including fish that are not harvested by humans, are essential to support the myriad of populations of FRSS. It is unclear whether a population or sub-population of fish that was once harvested by First Nations, but are now returning in such low numbers that First Nations are not harvesting them, would be deemed to be part of or supporting an Aboriginal fishery. In addition populations or sub-populations of fish (referred to in the WSP as CU) that serve important biological or ecosystem purposes, but may not be part of commercial, recreation or Aboriginal fisheries may, under the proposed amendments, become of lesser or no importance. The weakening of the habitat protection provisions weakens the WSP and could, we submit, result in the loss of wild salmon populations, including many CUs of FRSS.

33. Furthermore, the evidence from the Inquiry relating to SARA indicates that DFO's decision makers in Ottawa have, in the past, shown a tendency of overvaluing the economic importance of fish while undervaluing their biological importance.[23] The FNC is concerned that the legislative importance put on fish that form a part of commercial, recreational and Aboriginal fisheries, and the increased use of Cabinet as the statutory decision maker under CEAA,[24] can only perpetuate the problem of undervaluing the importance of biodiversity, the maintenance of healthy ecosystems and sustainable fisheries.[25]

34. The FNC's original submissions noted both the tremendous importance of DFO's habitat management and habitat protection functions, as well as the fact that DFO was struggling to meet its responsibilities in this regard.[26] The FNC submits that there is significant evidence, submissions and proposed recommendations to support the conclusion that the answer to addressing these struggles is not to reduce or gut the habitat protection provisions, as Bill C-38 does, but rather to strengthen the legislative and policy tools in a manner that supports the protection of biodiversity, weak stocks and

[23] See paras. 594-607 of FNC's original submissions.
[24] Insert cite to CEAA amendments and/or add paras. describing the amendments.
[25] For more information on the importance of biodiversity see paras. 46 to 51 of FNC's original submissions.
[26] See, for example, paras. 611-615 and 618-627 FNC's original submissions.

ecosystems, including the implementation of WSP and SARA. The FNC also submits that the application of these amendments to FRSS could cancel the current provisional MSC certification of FRSS thus resulting in the loss of valuable export markets.

35. The evidence in the Inquiry already indicates that the effect of the Environmental Process Modernization Plan ("EPMP") in 2004 was to create a situation where DFO lacks "regulatory awareness" of more and more activities that have the potential to harm fish and fish habitat, raising the concern that DFO is not able to act in a way that will achieve the best results for the sustainability of the fishery resource.[27] The FNC submits that the impact of the proposed amendments will further aggravate this situation. The proposed amendments will mean that DFO will, by legislation, lack "regulatory awareness" of an increasing number of small, medium and large scale projects which individually, and cumulatively, have an adverse impact on the sustainability of FRSS.

36. By reducing the types and number of projects that will be reviewed under the FA and CEAA referral processes, these proposed amendments will also mean that First Nations will have less notice of proposed projects or activities and less opportunity to be consulted on projects or activities that have the potential to significantly impact the exercise of their constitutionally protected fishing rights and responsibilities.[28]

37. Throughout the habitat management and enforcement hearings, participants and Commission Counsel focused primarily on the renewal of the 1986 Habitat Policy and the problem of "slow net loss." The FNC submits that had it known that the HADD provisions, one of the fundamental underpinnings of the 1986 Habitat Policy, was to be removed from the FA, it would have sought to elicit evidence from witnesses as to the implications of such a change. The Commissioner is now left without the evidentiary basis or the opportunity to hear from First Nations, biologists, ecologists, and habitat practitioners about the on-the-ground implications of these proposed amendments.

38. It is difficult to assess and summarize the full impact of the large scale amendments introduced by *CEAA 2012* because without the anticipated regulations, it is not possible to get a clear picture of what the new EA regime will look like, or of what projects will be subject to an EA. We will not know what projects or activities may require an environmental assessment under *CEAA 2012* until regulations are made. In addition,

[27] See para. 618 of FNC's original submissions.

the Minister can by order designate a physical activity not prescribed by the regulations if in the Minister's opinion the activity may cause adverse environmental effects or public concerns regarding environmental effects warrant designation.

39. The FNC submits that the proposed amendments to the FA and to CEAA are likely to put the future sustainability of FRSS further at risk and seeks recommendations from the Commissioner that prevent the operation of these amendments as it relates to FRSS and recommend that good faith negotiations with First Nations about these proposed amendments take place. The FNC submits there is ample evidence in this Inquiry that FRSS and the ecosystems upon which they depend are already vulnerable within a strong habitat protection legislative scheme. Lowering the bar for habitat protection of FRSS is not an option if Canada wants to ensure long term sustainability of this precious resource.

V. PROVINCIAL INVOLVEMENT

40. The proposed addition of s.4.1 of the FA[29] empowers the Minister to enter into an agreement with a province to facilitate cooperation, communication, consultation and action on areas of common interest, to reduce overlap and to harmonize their respective programs. As noted in the FNC's final and reply submissions and proposed recommendations, improved governance, cooperation and co-management amongst First Nations, Canada, the Province, and with stakeholders, is vital to better ensuring the long term sustainability of FRSS and their ecosystems.

41. Crown governments do not typically use or require specific statutory authority to enter into agreements to improve inter-jurisdictional governance matters. Section 4.2 provides that if Canada has an agreement with a province under section 4.1, and a province has laws that are "equivalent in effect to a provision of a [federal] regulation" then the Governor in Council may declare provisions of the FA or regulation "not applicable in that province". No guidance is provided in Bill C-38 as to when a law will be considered "equivalent in effect" to another.

42. The impact of this amendment is difficult to predict without a better understanding of Canada's intention regarding these provisions. There is significant ambiguity as to the

[28] See para. 621 of FNC's original submissions for further details.
[29] See s. 134 of Division 5 of Bill C-38.

scope of such agreements with a province, including what is to be considered a common interest and what Canada is anticipating regarding "arrangements with third party stakeholders."

43. During the Inquiry, witnesses testified that the abdication of responsibility by the Province of British Columbia (the "Province") and its failure to exercise its jurisdiction for certain aspects of freshwater habitat protection was affecting the sustainability of FRSS. For example, DFO witness Mr. Crowe testified that the Province's decision to deem retaining walls below the highwater mark as not falling within its regulatory jurisdiction, thereby requiring DFO to manage these issues through a best management practice ("BMP"), was a real problem.[30] He went on to testify:

> So we believe, based on a series of Environmental Appeal decisions, that actually the province does have the jurisdiction, and we need to engage with the province at senior levels to get them to revisit their directions and opinion on where their authorities lie in this matter, so that they can manage this type of development activity under the *Water Act*.[31]

44. Mr. Salomi also testified that the Province decided in 2002 it would not review all the notifications for work in and around streams, or provide a review role at the Environmental Review Committee ("ERC"), often leaving just DFO and the local government to meet,[32] and creating a vacuum.[33] This was despite a recognition that cooperative work between the Province, DFO and local governments through the ERC was "essential to delivering fish habitat protection in the Lower Fraser"[34] and for mapping and codifying water courses for annual maintenance works.[35] The lack of engagement and leadership by the Province on issues central to the sustainability of FRSS suggests that even if an agreement to cooperate is reached under the proposed s.4.1 of the FA, it is unlikely that it will lead to greater protections for FRSS, unless it was nested within tripartite agreements with First Nations which included provisions for transparent decision making processes and accountability for the long term sustainability of FRSS.

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[30] Transcript, June 8, 2011, p. 8 (Michael Crowe)
[31] Transcript, June 8, 2011, p. 8 (Michael Crowe)
[32] Transcript, June 8, 2011, p. 21 (Corino Salomi)
[33] Transcript, June 7, 2011, p. 99 (Corino Salomi)
[34] Transcript, June 7, 2011, p. 98 (Corino Salomi)
[35] Transcript, June 7, 2011, p. 99 (Corino Salomi)

45. This amendment may lead to further downgrading of oversight and protections with respect to fish habitat, given the Province's increasing reliance on industry and qualified professionals to ensure that activities such as logging and development projects do not adversely affect FRSS and their habitat.[36] For example, Mr. Delaney testified that the provincial *Forest Range and Practices Act* ("FRPA") was a results based, professional reliance model, where much more reliance was placed upon industry to protect fish habitat during operations. He testified that not as much information was coming to DFO to review referrals as there was in the past and that the changes under the FRPA had significantly changed the extent to which DFO receives referrals.[37] Another witness noted the non-compliance of developers, local governments and Qualified Environmental Professionals ("QEPs") under the provincial *Riparian Area Regulations* ("RAR"), which is another results based, professional reliance model.[38]

46. The FNC in our reply submissions highlighted the dysfunctional relationship currently existing between DFO and the Province on habitat protection issues.[39] For example, Mr. Salomi and Mr. Crowe agreed with the views of Mr. Hwang as expressed in Exhibit 662, which included the statement:

> [The] **relationship between the Province and DFO is in a state of dysfunction**. We don't coordinate on referrals in any consistent way, and there is no guidance or leadership from Vancouver-Victoria on this.[40]

47. Federal-Provincial agreements can adversely impact First Nations. Presumably the purpose of such delegation would be DFO playing less a role in fisheries habitat protection, and possibly management. First Nations' rights and responsibilties to fisheries, and in particular FRSS, must be properly respected and recognized in any such agreements. [41]

48. The FNC submits that while increased collaborative governance amongst DFO, the Province and First Nations is required, it would be dangerous to FRSS and their long

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[36] Transcript, June 17, 2011, p. 19 (Peter Delaney)
[37] FNC's original submissions, para. 149-150
[38] FNC's reply submissions para. 52.
[39] FNC's reply submissions paras. 49 and 51
[40] FNC's reply submissions para. 51; Transcript, June 8, 2011, p. 21 (Corino Salomi; Michael Crowe); Exhibit 662 (Jason Hwang, OHEB Key Issues, Draft Memo, July 26, 2007)
[41] See further Exhibit 681, 2006 Paper by Russ Jones "A scoping of Aboriginal Implications of Renewal of the Fisheries Act, 1986

term sustainability for Canada to delegate certain DFO responsibilities regarding FRSS to the Province. This is particularly true given the current lack of initiative, capacity, commitment to collaborate, and resources needed to work together in an effective way to ensure that FRSS and their habitat is adequately protected.

49. The Province's submissions told the Commissioner that areas within its jurisdiction, including freshwater habitat, logging, water management, urbanization and aquaculture, were not contributing to the causes of poor returns of FRSS in 2009 or longer term declines. The Province made this assertion despite clear scientific evidence as to the cumulative impacts from a variety of sources on the longer term declines.

50. Mr. Marmorek testified that, because of lack of data, it was not possible to draw conclusions about the role that factors such as disease and endocrine disrupting contaminants or emerging chemicals of concern played in the long term decline of FRSS.[42] The FNC also noted the testimony of Mr. Marmorek, as well as other scientists throughout its original submissions, regarding the many gaps in data and the need for further research in order to understand the causes of decline of FRSS.[43]

51. Mr. Marmorek said:

> ... all of these results are only as good as the data that you put into them, and for the freshwater life history stage, there really weren't many datasets available within the time we had and may not be available, period. So, for example, we had to use air temperatures instead of lake or stream temperatures as a proxy variable for freshwater conditions. So ideally, you would have a lot more data on freshwater conditions.[44]

52. Many data limitations, including the interaction between farmed salmon and wild salmon, were attributable to the Province's choices regarding priorities for research and limited knowledge, expertise, and scientific capacity to research and investigate the harms to fish, including FRSS. Simply put, the Province of B.C. does not have the knowledge, experience, capacity, initiative or scientific foundation to be reliable stewards of FRSS.

53. There are numerous examples in this Inquiry where the Province's participation in existing processes related to FRSS is declining, where its focus was turned to

[42] Transcript, September 19, 2011, p. 35 (David Marmorek)
[43] See paras. 9-12, 88-95, 116-123, and 468-476 of FNC's original submissions
[44] Transcript, September 19, 2011, p. 35 (David Marmorek)

aquaculture rather then wild stocks, and the Province's commitment to habitat protection of FRSS was simply non existent.

54. In summary, the Commission must consider these proposed amendments in light of the evidence heard in the Inquiry to the effect that the decline of FRSS is being influenced by a number of factors including ones falling within provincial jurisdiction, and that the Province has limited capacity or expertise to improve the conditions affecting FRSS survival. In particular: DFO is the only Crown agency (Federal or Provincial) with a history of some technical and managerial expertise related to FRSS, and DFO is relied upon by other Federal and Provincial Crown agencies for such expertise. There is little to no Provincial expertise related to FRSS, and for those habitat matters which fall within Provincial jurisdiction, for e.g. freshwater, including ground water, there is very limited capacity or political will at the Provincial level to understand or protect impacts to FRSS against competing interests.

55. Ironically, the amendments are silent on the much needed government to government agreements with First Nations whose section 35 rights and responsibilities demand increased participation in the management and governance of fisheries. The long standing and historic conflict between DFO and First Nation governing authorities which continues to result in protracted litigation and conflict has been a significant challenge for over a century and yet there are no provisions in the proposed amendments confirming the Minster's power to enter into co-management agreements with First Nations to facilitate cooperation and joint action on areas of common interest.

56. While Canada may enter into agreements with First Nations, it is glaring that the proposed amendments include express provisions relating to agreements with provinces and third party stakeholders while being completely silent as to agreements with First Nations, who have relentlessly called for respect and reconciliation agreements with the Crown on areas of common interest (such as stewardship and habitat protection measures) and are seeking respect for their own laws and processes.

57. The FNC submits that, at this time, any delegation of DFO's obligations to FRSS pursuant to s. 4.2 of the proposed Amendments to the FA would put FRSS and their habitats at significant risk. The Commissioner must be clear in his recommendations that the evidence does not support such delegation at this time. Rather, the evidence

calls for tripartite engagement to determine how all levels of government - Canada, First Nations and the Province - can best bring their respective authorities and expertise together to more efficiently, transparently and lawfully protect and ensure the long term sustainability of FRSS.

58. The FNC seeks recommendations from the Commissioner that Canada must take steps to include First Nations in any discussions with the Province regarding potential agreements which would delegate any responsibilities associated with FRSS including habitat. Only through transparent tripartite agreements will the existing dysfunctions be improved in a manner that better ensures the long term sustainability of FRSS.

VI. ENFORCEMENT

59. Section 147 of Division 5 of Bill C-38 deal with offences and punishment and impose significantly higher financial penalties for the contravention of ss. 35 and 36 of the FA. These proposed amendments also create a tiered regime whereby individuals, small revenue corporations, and other corporations are subject to different ranges of penalties.

60. The FNC submits that although these proposed amendments may serve a desirable deterrent purpose, their effectiveness will be limited without the necessary commitment to education and the development of policies and practices that better promote sustainability and the commitment and resources to investigate these violations of the FA and to pursue prosecution of such. As noted in the FNC's original submissions at para. 625, DFO's Conservation and Protection Branch ("C&P") has noted that cases involving the violation of sections 35 and 36 of the FA are complicated, involve particular expertise, and are often more time consuming than other fisheries violations. C&P has already experienced reductions in the time and resources it has been able to commit to enforcing sections 35 and 36.

CONCLUSION

61. The timing, scope and depth of the legislative changes to the protection and conservation of FRSS resulting from Bill C-38 significantly and adversely effect the future sustainability of FRSS. Canada has failed to adequately consult First Nations with respect to these amendments. Canada has failed to await the Commissioner's Report and Recommendation regarding FRSS, DFO's policies, practices and procedures and the measures needed to improve the further sustainability of the FRSS fishery. The timing and content of the proposed amendments in Bill C-38 harm fish and harm the potential of developing broad cooperation.

62. In the manner set out in these supplementary submissions, the Commissioner must make recommendations that help Canada act in a manner that meets its constitutional obligations to First Nations, promotes transparent and accountable governance and management of FRSS, and helps to ensure the long term sustainability FRSS. The Commissioner must take urgent steps to recommend that Canada consult with and engage First Nations prior to enacting these proposed amendments and any subsequent regulations that have the potential to affect FRSS and the ecosystems on which they depend, including their entire migratory route.

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

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Leah Pence

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