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West Coast Environmental Law Submission

Implementing the New Fisheries Protection Provisions under the *Fisheries Act*: April 2013 DFO Discussion Paper

West Coast Environmental Law has been an advocate for strong legal protection for fish and fish habitat in Canada for close to 40 years. We offer the following comments on the legal framework established through Bill C-38 and C-45 amendments to the *Fisheries Act* and the recently released discussion paper from the Department of Fisheries and Oceans (DFO) regarding implementation of these amendments.

First, we want to flag the critical importance of consultation with environmental and conservation organisations and meaningful government-to-government engagement with First Nations regarding any changes to the *Fisheries Act* and its regulations. Such consultation did not occur prior to very substantial amendments made in last year's omnibus bills. The limited outreach that is occurring now about *how* these amendments should be implemented is clearly insufficient. The fundamental question remains whether the highly controversial amendments to *Fisheries Act*, s. 35(1) and related provisions should be brought into force at all.

We unequivocally submit that the long-standing prohibition on harmful alteration, disruption or destruction (HADD) in section 35(1) of the *Fisheries Act* should be retained and that Bill C-38 and C-45 amendments to the *Fisheries Act* that weaken protection for fish habitat should never be brought into force (or repealed).[i]

We have had the privilege of reviewing the submissions of a number of organisations, representing thousands of Canadians, on the DFO discussion paper, and would highlight that every submission we have seen reiterates a fundamental concern with the legislative amendments themselves.

The *Fisheries Act* authorization procedure has always offered considerable flexibility and discretion that is more than adequate (given appropriate training and direction) to address any concerns that have offered as a rationale for the C-38 and C-45 amendments.

Our longstanding experience working with the *Fisheries Act* requires us to condemn the amendments made Bill C-38 that weaken protection for fish and their habitat. The Governor in Council should not bring the proposed legislation into force when there is no compelling case for changing one of Canada's longest-standing laws for fisheries management and environmental protection.

The April 2013 DFO Discussion Paper

The DFO discussion paper demonstrates awareness of some of the fundamental flaws in the new *Fisheries Act* framework, and attempts to identify policy direction that might potentially mitigate the damage from these amendments to fish, fish habitat and the communities who rely on them.

Without assurances, however, that DFO interpretations and direction would be made legally binding, these efforts offer little or no security that their intent will be achieved. Furthermore, the intent of many of the proposals made by DFO could better be achieved *without* bringing into force the C-38 amendments.

Against this backdrop of these overarching points we offer the following specific feedback regarding the discussion paper:

1. **A more robust, ecosystem-based and measurable definition of "sustainability" is required for the new section 6.1 purpose provision to be meaningful, and should be included in legislation**. A strong definition of sustainability should incorporate the notion of ecological limits to human use and development based on best available science and Indigenous Knowledge. This would include ensuring that decision-making about fish protection achieves the goal of maintaining and where necessary restoring ecosystems to conditions within their historic range of variability in order to support fish species associated with these ecosystems.

2. It follows that **maintaining ecological integrity and environmental protection should be added to the factors** that the Minister of Fisheries and Oceans Canada must consider prior to issuing an authorization or exercising other Ministerial powers **under new *Fisheries Act* s. 6**.

3. Furthermore, **an ecological approach that fully recognizes the support functions of ecosystems in sustaining fisheries needs to be reflected in amendments to the actual legal language** of definitions and requirements in the *Fisheries Act* and its regulations, and an ecologically-based legal definition of the language "fish that support such a fishery" in the new s. 35(1) should be added to the *Act*.

4. **It is essential that the legal framework established by the *Fisheries Act* and its regulations provide for a robust approach to cumulative impacts management.** We submit that, at a minimum, such an approach will require a proactive, watershed-based approach to identifying fish habitat needs based on best available science and Indigenous knowledge (including identification and spatial application of measurable, legally binding objectives and targets) coupled with regulatory requirements that require fisheries authorizations and other exercise of ministerial powers to be consistent with objectives/targets. **To ensure this, environmental impact assessment of specific proposals to alter or destroy fish habitat should also be required** (prepared by the proponent) and evaluated by the ministry prior to granting authorizations.

5. **Addressing cumulative impacts is particularly essential given concurrent amendments made to the *Canadian Environmental Assessment Act*** (now CEAA 2012) which will greatly reduce the circumstances in which federal environmental assessments (and their requirement for consideration of cumulative effects) are associated with fisheries authorizations. Taking a collaborative (i.e., with other ministries, the provincial government, First Nations and affected citizens), proactive, watershed/regional level approach to fish habitat protection may also have the benefit of reducing the administrative burden associated with individual approvals. Legal

amendments should incorporate consideration and management of cumulative impacts under the *Fisheries Act* and its regulations.

6. The various scientific advisory papers DFO has made available offer useful analysis related to the above recommendation.[1] **A revised discussion paper from DFO should be prepared that fully incorporates this science advice and further consultation should occur on the revised paper.** An updated discussion paper should also address **how *Species at Risk Act* listed species will be addressed and reflect scientific advice on this question**.

   Even if the above were to be implemented, we remain gravely concerned that the C-38 *Fisheries Act* amendments create a fundamental barrier to effective and efficient cumulative impacts management, without which goals of maintaining sustainability and productivity will remain elusive. This is because the amendments will have the effect of allowing alteration or disruption of fish habitat to occur without federal authorization at all in many circumstances (given the narrower application of s. 35(1)).

   Thus, we again reiterate our recommendation that the existing HADD prohibition be retained.

7. If this recommendation is ignored and C-38 amendments are brought into force, **the DFO proposed interpretation of the definition of "serious harm to fish" would need to be reflected in actual legal language in the Act or regulations** to offer any comfort that it will be given effect. In addition, the DFO interpretations proposed on page 4 (section 3.3.1) of the Discussion Paper[2] should also evolve to specify that best available scientific information and Indigenous Knowledge is to be used, and the precautionary principle applied in interpreting the various elements of serious harm to fish.

8. In general, **the current definition of "fishery" in the *Fisheries Act* presents a barrier to implementing scientific approaches to defining CAR fisheries**. If C-38 amendments are brought into force, with their shift in emphasis from protection of fish habitat to protection of CAR fisheries the definition of "fishery" presents a number of

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[1] Science Advisory Report 2012/063 – Science Advice to Support Development of a Fisheries Protection Policy for Canada (National Capital Region); Research Document 2012/110 – Identification of species and habitats that support commercial, recreational or aboriginal fisheries in Canada (National Capital Region); Research Document 2012/112 – A science-based interpretation of ongoing productivity of commercial, recreational or Aboriginal fisheries (National Capital Region); Research Document 2012/141 – A Science-based Interpretation and Framework for Considering the Contribution of the Relevant Fish to the Ongoing Productivity of Commercial, Recreational or Aboriginal Fisheries (National Capital Region).

[2] The proposed DFO interpretation is that the prohibition of serious harm to fish includes: the death of fish; alteration of fish habitat of such duration that [it] limits or diminishes the ability of a fish to carry out one or more of their life processes (i.e,. permanent alteration to fish habitat); elimination of habitat such that fish can no longer rely on this habitat to carry out one or more of their life processes (i.e, the destruction of fish habitat).

problems that need to be resolved. In particular the definition of fisheries is narrowly focused on locations where actual 'fisheries appliances' (e.g., nets) are actually being used; the area, tract or stretch of water from which fish may actually be taken using those appliances; as well as the appliance itself. **Put simply, the definition is not an ecological one that addresses the functioning of the ecosystem that sustains the fishery or fully accounts for legal or voluntary conservation measures that may require temporary suspension of fishing to rebuild stocks. This must change**. Furthermore, we note that in the context of Aboriginal fisheries, the definition's emphasis on current use is narrower than the constitutionally protected Aboriginal or treaty right to fish.

As noted above, an ecologically-based, legal definition of the new language "or fish that support such a fishery" would be an important mitigative step if the C-38 amendments are brought into force.

9. **The Discussion Paper is silent on the critical question of First Nations consultation/co-management and public involvement in fish protection** and decision-making with respect to authorization and other exercises of ministerial discretion. Particularly in light of changed requirements for environmental assessment under CEAA 2012, a revised discussion paper should address these matters. Furthermore, **an approach to First Nations participation in decision-making and public involvement should be co-designed with First Nations and civil society groups,** and not unilaterally imposed**.**

10. **The Discussion Paper is silent on the implications of new sections 4.1 and 4.2 of the *Fisheries Act*,** which could result in the inapplicability of s. 35(1) in circumstances where province's have laws that are "equivalent in effect." For example, it is not presently clear how the interpretations offered by DFO with respect to the prohibition on serious harm to fish would apply in this circumstance. This should be addressed in a revised discussion paper.

Conclusion

The C-38 and C-45 amendments to the *Fisheries Act* were made without any consultation with the Canadian public or First Nations. Accordingly, the amendments cannot represent Canadian consciousness on fisheries management, nor do they reflect sensible law making. West Coast Environmental Law strongly advises that the C-38 and C-45 amendments to the *Fisheries Act* that weaken fish habitat protection not be brought into force or repealed. Without meaningful legal acknowledgement of the interconnectedness of ecosystems and the cumulative effects that human activities have on fish and fish habitat (e.g., through the legal definitions and requirements of the *Fisheries Act*) we fear that approaches proposed by DFO in the April 2013 discussion paper will be of little effect.

Respectfully submitted:

Jessica Clogg, Executive Director & Senior Counsel, West Coast Environmental Law

[i] **Among our key concerns with the C-38 amendments to the *Fisheries Act* are the following:**

i) Changes to section 35(1)

The *Fisheries Act* amendments contained in Bill C-38 will narrow and reduce the protection of fish habitat to the point that we fear that many fish and watercourses will lose protection entirely. The only fish that will retain protection are "part of a commercial, recreational, or Aboriginal fishery, or to fish that support such a fishery" ("CAR fisheries"). If a fish manages to remain protected by the proposed section 35(1), it will then only be safeguarded from "serious harm". Serious harm is limited to the "death of fish or any permanent alteration to, or destruction of, fish habitat."

The new language in section 35(1) presents a real and substantial threat to fish and fish habitat. Only fish considered useful enough or which incidentally supports "useful" fish species get legal protection. Scientists from the Canadian Society for Ecology and Evolution have estimated that the proposed *Fisheries Act* amendments mean that the majority of freshwater fish and up to 80 percent of the 71 freshwater species at risk of extinction would lose protection. In addition to weakening protection for fish habitat, the ban on "serious harm to fish" would reduce clarity with several legal complexities, including more fieldwork, more evidence, and more argument by lawyers before anyone can be charged or convicted under the Act.

On their face, the amendments starkly ignore cumulative environmental effects. The "serious harm" test does not appear to recognize that fish and their habitat can suffer a "death by a thousand cuts." So while a series of small and temporary changes to fish habitat might not individually kill fish, taken together they might cause serious problems over time. Similarly, limiting section 35(1)'s application to a "commercial recreational or Aboriginal fishery, or to fish that support such a fishery" could easily fail to recognize the ways in which riparian ecosystems are interconnected in the absence of an ecologically-based legal definition of "fish that support such fishery".

ii) Expanding the authority of the Minister to exempt fish habitat protections

The *Fisheries Act* already provides extremely broad discretion to authorize harmful alteration, disruption, and destruction of fish habitat. Section 142(1) of Bill C-38 inappropriately goes further to automatically exempt prescribed works, undertakings and activity, and prescribed Canadian fisheries from section 35(1) habitat protections. The new section 6 of the *Fisheries Act* offers four vague factors that the Minister must take into account when deciding whether or not to authorize decisions regarding fish and fish habitat. These factors are missing a key component to what long-term, comprehensive fisheries management requires – environmental considerations. The Discussion Paper insists that these factors ensure transparency and accountability, but neither can be achieved without a basic focus on maintaining the ecosystems that sustain fish and fisheries.

In addition, further *Fisheries Act* amendments contained in Bill C-45 (see section 177(2)) would permit holders of existing authorizations to request cancellation or amendment of their authorizations under the *Fisheries Act* (and more importantly the conditions under them), which is of great concern to us.

With respect to amendments already in force we also have significant concerns about the manner in which C-38 amendments will permit offloading to the provinces with insufficient

safeguards. Bill C-38 added sections 4.1 and 4.2 to the *Fisheries Act*. Section 4.1 empowers the Minister to enter into agreements with a province to "further the purposes of this Act" including agreements to reduce overlap, facilitate cooperation, facilitate consultation etc. Section 4.2 provides that if an agreement is in place with a province under section 4.1 and the agreement provides that the province has laws that are "equivalent in effect to a provision of a [federal] regulation" then the Governor in Council may declare that the certain provisions of the *Fisheries Act* or one if its regulations are "do not apply in the province with respect to the subject matter of the provision under the laws of the province." "Equivalent in effect" is not defined, and presumably, any "equivalency" will be measured against the new, narrower and weaker fisheries protections, which is problematic.