Fisheries Act: A Brief from the Lower Fraser Fisheries Alliance (LFFA) Submitted to the House of Commons Standing Committee on Fisheries and Oceans

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1. Summary

This brief provides context on the habitat provisions of the *Fisheries Act* (*FA*) with a focus on changes in 2012/2013, made as part of Bill C-38. The impacts of these changes are discussed in relation to effects on Lower Fraser First Nations' interests and ability to give free, prior and informed consent to projects in their territories and activities that can inhibit their inherent rights manage fish, fish habitat and fisheries. Recommendations are provided that aim to restore fish and fish habitat protections and improve the Act moving forward.

Changes in 2012-2013 included a shift from the assessment of the Harmful Alteration, Disruption and Destruction (HADD) of fish habitat, and the guiding principle of "No Net Loss" to a single prohibition focused on the "serious harm of fish that are part of, or support, commercial, recreational or Aboriginal (CRA) fisheries". The prohibition of "serious harm" is ineffective in protecting Canada's fish, fish habitat, and fisheries, not to mention the wildlife and First Nations' that depend upon them. A self-assessment review process now identifies project types and criteria where DFO review is not required, putting the onus on the proponent to accurately assess the level of impact and appropriate mitigation measures. This changed the focus of the *FA* from proactive and preventive to reactive and permissive, shifting the responsibility of fish and fish habitat protection to First Nations and the public. No monitoring or compliance is in place to assess the effectiveness of this self-assessment process, and lack of regulatory oversight and enforcement further increases the risk of undocumented damage to fish and fish habitat.

Recommendations are outlined that include reinstating the HADD habitat provisions and protection to all fish species, not just those currently accessed in CRA fisheries; clearer commitments for regulatory oversights, including for small, 'low-risk' projects; retaining the assessment of "activity" in the habitat prohibitions; systematic changes and increased capacity for First Nations; re-instating the Aboriginal Guardianship Program in the Lower Fraser; empowering the Minister to enter collaborative management agreements with First Nations; and holding consultations and use Independent Expert Panels to incorporate feedback to strengthen the *Fisheries Act*.

The LFFA, as a Regional Organization, collaborated in and support the November 29, 2016 submissions put forward by the First Nations Fishery Council (FNFC). This submission supports and expands upon the FNFC submissions.

2. Background

The *Fisheries Act,* R.S.C. 1985, c. F-14 ("Act"), constitutes some of Canada's oldest federal environmental legislation used to protect fish and fish habitat for over 148 years. In 1977 the Act was amended to emphasize habitat protection as critical in ensuring the sustainability of Canada's fisheries by including two principle habitat protection provisions: (1) a prohibition against the destruction of fish by means other than fishing (s. 32); and (2) a prohibition against the harmful alteration, disruption or destruction of fish habitat (s. 35). Until the 2012 amendments, the focus of the Act has not changed much since its enactment and the fish habitat protection provisions of the *Fisheries Act* (*FA*) remained essentially unchanged from 1977[1]. The Act guided Fisheries and Oceans Canada's (DFO) regulatory policies and practices with the objective of achieving a net gain of the productivity capacity of fish habitats. In 2012, changes to the Act were introduced, resulting in a reduction in the Act's protection of fish and fish habitat, as well as DFO's objective of achieving a net gain of fish habitat. The Minister has been mandated to review the *FA* and these changes for the purpose of restoring lost protections and incorporating modern safeguards.[2]

3. Significance to Lower Fraser First Nations

Fish, fish habitat and fisheries are deeply important to Lower Fraser First Nations (LFFN). Since time immemorial, LFFN have relied on the once abundant fisheries and thriving habitats within their territories to support their way of life, including their spiritual, social, cultural and economic well-being. Indigenous inherent rights, and s. 35(1) Aboriginal and Treaty rights, including Aboriginal title, have and will always include the rights and responsibilities of

[1] DFO, 2016. Fisheries Act: Before and after the 2012/2013 Amendments. http://www.dfo-mpo.gc.ca/pnw-ppe/changes-changements/index-eng.html
[2] Rt. Hon. Justin Trudeau, Letter to Minister re: "Minister of Fisheries, Oceans and the Canadian Coast Guard Mandate Letter" (November 2015) [Trudeau Letter]

First Nations to govern and manage the fish, fish habitat, and fisheries, and be stewards of the rivers and coastal waters in their territories. LFFN hold and exercise sacred responsibilities, on behalf of past, present and future generations to govern and manage fish, fish habitat, and fisheries, which include the ecosystems and the natural balance on which they rely. First Nations are required to look after fish and fish habitats.

LFFN have consistently engaged at both the negotiating tables (inside and outside of the British Columbia Treaty Commission process) and in the Courts to better ensure the required nation-to-nation relationship regarding the governance, management and conservation of fish, fish habitat and fisheries, and the proper respect for s.35(1) Aboriginal and Treaty rights. The historic and present struggles between First Nations in British Columbia and DFO are well demonstrated by the body of case law that has emerged from the province and shaped the Canadian legal landscape on fisheries management.[3] As a result of s.35(1) of the *Constitution Act, 1982*, numerous cases since 1982 have confirmed Aboriginal title to the land and resources of the territory, Aboriginal and Treaty rights to fish, the continuing rights of self-government, and the constitutional imperative for reconciliation. This legal landscape must inform the current review of the *Fisheries Act*, where 2012/2013 changes have threatened the food security and cultural security of LFFN, present and future.

4. Fisheries Act 2012 Amendment

The 2012/2013 changes to the Act severely weakened the protective function of the Act, significantly reducing protections to fish and fish habitat. These changes were put in place without deep and meaningful consultation with LFFN, and in a manner that offended Crown-First Nation relations. Some of the main changes made that weakened the protective function of the Act, or had significant implications include, but are not limited to:

- Removal of the prohibition against the destruction of fish by means other than fishing (s.32);
- Removal of the prohibition against the "harmful alteration, disruption or destruction of fish habitat (s.35);
- "Serious harm to fish" was added but definition limited to death of fish or permanent alteration or destruction of fish habitat;
- A unilateral imposed definition of "Aboriginal fisheries" on First Nations. This incomplete and flawed definition excludes fish not currently harvested for conservation, other fisheries activities, fisheries management, etc.;
- "Commercial fisheries" was defined as "sale, trade or barter". This does not recognize Aboriginal fishing rights and their traditional trade or barter practices as part of their food, social and ceremonial rights. First Nations do not consider these necessary and incidental food exchanges as commercial in nature;
- Focus of *FA* shifted to protecting only fisheries and habitat supporting fisheries, leaving unprotected those fish (and their habitat) with no demonstrable economic value to fishers or direct ecological value to fisheries;
- Increased Minister's regulation-making powers, resulting in greater flexibility in fisheries management decision-making, including increased discretion in whether or not to protect fish and fish habitat and decreased transparency;
- Self-assessment review process that identifies project types and criteria where DFO review is not required. This puts the onus on First Nations and public to challenge projects using common law and proponent to assess impact and appropriate mitigations
- Supposed enhanced compliance and protection, but no outlined increase in monitoring requirements unless Authorization issued.

In the following sections, we provide an analysis on what these changes mean for the protection of fish and fish habitat, and how these changes impact LFFN and their requirement to give free, prior and informed consent.

[3] See for example: See for example: *Jack et al. v. The Queen*, [1980] 1 SCR 294; *R. v. Sparrow*, [1990] 1 SCR 1075; *R. v. Van der Peet*, [1996] 2 SCR 507 ["*Van der Peet*"]; *R. v. Gladstone*, [1996] 2 SCR 723 ["*Gladstone*"]; *R. v. Lewis*, [1996] 1 SCR 921; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 SCR 672; *R. v. Nikal*, [1996] 1 SCR 1013; *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56; *Saanichton Marina Ltd. v. Claxton (1987)*, 18 BCLR (2d) 217 (SC), aff'd (1989), 36 BCLR (2d) 79 (BCCA) ["Saanichton"]; *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*, 2005 BCSC 283; *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2013 BCCA 300; *Quipp v. Her Majesty the Queen*, 2011 BCCA 235; *Ahousaht First Nation v. Canada (Fisheries and Oceans)*, 2014 FC 197; *Haida Nation v. Canada (Fisheries and Oceans)*, 2015 FC 290.

4.1 Impacts of Changes Made in 2012

The 2012/2013 changes to the *FA*, coupled with the downsizing of DFO, severely weakened Canada's protection of fish and fish habitat in British Columbia, which increased their vulnerability. The new *FA* narrowed its protection to only fisheries and fish habitat of economic importance and imposed upon First Nations, a clearly misunderstood and incomplete definition of "Aboriginal fisheries". The Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River ("Cohen Commission") found that "[t]he amendments collectively appear to narrow the focus of the Act from protecting fish habitat to protecting fisheries."[4] The Federal Court of Appeal also concluded that the 2012/2013 changes "clearly increases the risk of harm to fish".[5] The loss of protections to fish and fish habitat undermines, diminishes and threatens the ability to meaningfully exercise Aboriginal and Treaty rights and obligations related to fish. We highlight below several of the significant impacts, but by no means is our list complete and comprehensive of the impacts felt by LFFN. We also provide recommendations as to how to restore lost protection for fish and fish habitat and modernizing the *FA.*

4.1.1 Serious Harm to Fish that are Part of or Support a CRA fishery

Canada has an obligation to protect fish habitat that First Nations rely on for the meaningful exercise of Aboriginal and Treaty rights to fish.[6] Canada is currently failing to fulfill this obligation due to the abdication of protections for fish habitat under the standard of "serious harm to fish" and the reliance on an incomplete understanding of Aboriginal fisheries. The removal of prohibitions against killing of fish by means other than fishing (s. 32) and harmful alteration, disruption or destruction of fish habitat (s. 35), and replacing them with "serious harm to fish", significantly reduced fish and fish habitat protection. DFO interprets "serious harm to fish" as "the death of fish or any permanent alteration to, or destruction of fish habitat".[7] This meant that the *FA* no longer protected fish against non-lethal but potentially harmful activities, works or undertakings or indirect mortality. Fish habitat was also no longer protected from disruption or non-permanent but potentially significant, damages or alterations.

LFFN has continuously voiced their concern regarding non-lethal but potentially harmful activities that can impact fish species. One example is the Lower Fraser white sturgeon and exposure to non-lethal activities that inhibit reproduction, spawning and fitness. Stress from non-lethal activities, such as recreational fishing, can raise cortisol and susceptibility to toxic effects, such that fish can be seriously harmed despite not directly killed by activities, works or undertakings.[8] Unfortunately, these effects are not considered as part of "serious harm to fish" since effects are non-lethal.

The removal of HADD detached habitat protection from the *FA.* Limiting habitat protection to only permanent alterations or destructions is short sighted and does not recognize the wide protection needed to ensure sustainable and long term fisheries. By taking out disruption, the provision also lost protection against activities like noise pollution. LFFN have significant concerns as the Lower Fraser River and Pacific Ocean are subject to high levels of boat traffic and developments. These traffic and development projects can cause noise pollution that can negatively affect species such as the Southern resident killer whales[9]. The changes to s.35 also fail to consider cumulative effects of non-permanent alterations that can effectively destroy critical habitats of fish species. "Serious harm to fish" is difficult (and open) to interpretation and provides too much discretion for the Minister and DFO to determine, leading to a risk of non-compliance, or slippage, which is a common challenge in modern environmental law.[10]

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[4] Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River (Canada), and Bruce I. Cohen. *The Uncertain Future of Fraser River Sockeye: The Sockeye Fishery,* 2012 ["Cohen Commission Report"] Volume 3 at Chapter 3, p. 78.

[5] *Courtoreille v. Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244 at para. 104.

[6] See for example: *Saanichton, supra Note 2*; UNDRIP Article 29(1)

[7] DFO, 2013. Fisheries Protection Policy Statement, October 2013, available online: http://www.dfo-mpo.gc.ca/pnw-ppe/pol/index-eng.html

[8] McLean, M. F., Hanson, K. C., Cooke, S. J., Hinch, S. G., Patterson, D. A., Nettles, T. L., Litvak, M. K., & Crossin, G. T. 2016. Physiological stress response, reflex impairment and delayed mortality of white sturgeon Acipenser transmontanus exposed to simulated fisheries stressor. Conservation Physiology. 4.

[9] Deng, Z. D., Southall, B. L., Carlson, T. J., Xu, J., Martinez, J. J., Weiland, M. A., & Ingraham, J. M. 2014. 200kHz Commercial Sonar Systems Generate Lower Frequency Side Lobes Audible to Some Marine Mammals. PLoS One. 9(4).

[10] Olszynski, M.Z.P. 2015. From 'Badly Wrong' to 'Worse': An Empirical Analysis of Canada's New Approach to Fish Habitat Protection Laws. J.Env. L & Prac. 28(1)

Section 35 (*FA 2012*) also limited protection to only fish that are part of or supporting a commercial, recreational or Aboriginal (CRA) fishery; however, the concept that fish and fish habitat is only valuable if it supports fisheries is flawed. LFFNs are stewards of the rivers and coastal waters and share a deep relationship with all fish and fish habitat that support their way of life. All fish and fish habitat are fundamentally important to LFFN and the Act must not be limited to only protecting fish of economic importance. The focus on fisheries ignores other functions that fish may provide within the ecosystem, as the inherent value of a fish species is not limited to its role as an exploitable resource by humans. Fish, many of which are not considered important CRA species, provide many bird, amphibian, reptile and mammalian species with important food resources, the value of which is not recognized or protected in the current Act. Non-CRA fish that are relied on by other fish and wildlife may receive no protection under the Act. The Act risks works, activities, disruptions, or alterations of habitat occurring without a proper understanding of ecosystems and ecosystem linkages. The determination of CRA fisheries is complicated and it would be more straightforward to protect, all fish equally, regardless of their status in fisheries – noting that provincial and territorial regulations are also aimed at fisheries management. Reinstating explicit consideration of fish habitat and associated baseline characteristics in the provisions of the *FA* would strengthen the Act, and provide clearer direction for proponents to follow. Identifying critical areas of fish habitat for additional protection within the Act, based on available science and First Nations traditional knowledge, should also be promoted.

The addition of "activity" strengthens the prohibition. For example, the Act prior to 2012 would have included provisions for building a dock on fish habitat, but not for the activity of driving a boat to get to the dock, which may have included passage through a sensitive spawning area. There has been no policy guidance or regulations issued on this yet, but the incorporation of the term is a positive change in the 2012 amendment to the Act.

Recommendation 1: Restore the "HADD" and "killing of fish by means other than fishing" provisions from the previous *FA* while retaining "activity" from the 2012/2013 changes, such that the amended Act should state: *"No person shall carry on any work, undertaking or activity that results or is likely to result*[11] *in the harmful alteration or disruption, or the destruction, of fish habitat."*

4.1.2 Imposed Flawed and Incomplete Definition of Aboriginal Fisheries

The 2012/2013 changes shifted the focus of the Act to managing threats to the sustainability and ongoing productivity of fisheries of CRA importance. As part of these changes, Canada unilaterally imposed an incomplete and flawed definition of Aboriginal fisheries on First Nations. Through the definition of Aboriginal fisheries, Canada relies on a flawed notion that Aboriginal and Treaty rights to fish are mere rights of harvest for limited purposes, and that such rights need only focus on species that are currently fished. The definition ignores existing case law and Aboriginal perspectives, and limits the protection of fish habitat. In reality, First Nations' inherent Aboriginal and Treaty rights and responsibilities to fish are not based simply on what they currently are harvesting. More than harvest, Aboriginal fisheries are a relationship that includes governance, ownership, management, and stewardship for a myriad of living purposes, including spiritual, cultural, social and economic purposes.

Furthermore, the use of "sale, trade or barter" in the definition of commercial fisheries is constitutionally inaccurate. Some First Nations have already established sale, trade or barter as part of their Aboriginal fishing right,[12] and others exercise and rely upon traditional trade or barter practices as part of their food, social and ceremonial (FSC) rights and do not consider these important food exchanges as commercial in nature. Deeming any Aboriginal fishery for sale, trade or barter purposes as a commercial fishery and not part of an Aboriginal fishery is inconsistent with pre-contact, post-contact, historical and modern fisheries conducted by LFFN.

The definition of Aboriginal fishery (and recreational and commercial fishery) restricts protection to fisheries where "fish is harvested" (*i.e.* current use). This restriction of protection under the Act, conflicts with inherent and Aboriginal fishing rights and responsibilities. It has the potential of significantly reducing protection of fish and fish habitat for fish that cannot be harvested for historical reasons (*e.g.* over-fished previously) or current conservation

[11] Underlined addition to include limitations inherent in scientific inquiry, incorporates precautionary principle into the standard for protection and better reflects the level of protection necessary to ensure sustainable fish, fish habitat and fisheries for future generations

[12] See for example: *Van der Peet, supra* Note 2; *Gladstone, supra* Note 2; *Ahousaht, supra* Note 2.

purposes (*e.g.* weak stock or conservation unit). It precludes habitat protection for fish which are rebuilding (e.g. spawning gravel of small stocks) and limits habitat protection to only currently abundant fish. Such a focus could allow managers to ignore the importance of biodiversity. Fish that is not part of a fishery or supporting a fishery requires the same protection as those fish presently harvested. For example, eulachon is a culturally important fish species that LFFN have historically harvested. Due to conservation concerns, LFFN temporarily halted harvesting of the fish. Under *FA 2012,* eulachon would not have protected once First Nations FSC harvesting stopped as it was no longer defined as part of any CRA fisheries. This approach to fisheries management is dangerous and short-sighted as it pertains only to short term economic benefits. It is inconsistent with Indigenous laws and responsibilities, international commitments to biodiversity, and Canada's Wild Salmon Policy.[13] The Act must be amended to ensure the tools are in place for long-term sustainable fisheries. To do so, it must protect biologically diverse fish and fish habitat, thereby increasing the ability for fish to adapt and evolve over time and to changing ecological conditions. The Cohen Commission recognized this in considering 2012/2013 changes, affirming that "if the focus of the legislative amendments is to protect only habitat linked to a current fishery, such limited protection could actually jeopardize future fisheries by undermining precautionary protections for biodiversity" and "if the Act protects only fish that are part of a fishery, then the careful balance between conservation and fisheries would tip towards fisheries at the expense of conservation."[14]

Recommendation 2: Repeal the definitions of commercial, recreational and Aboriginal fisheries. Once HADD is restored, all three definitions must be removed.

If "Aboriginal fishery" must be maintained in the Act, we suggest that any definition should go through a robust consultation process with First Nations to gain their informed consent. The First Nations coalition participating in the Cohen Commission expressed an understanding of the right to fish, which was summarized by Commissioner Cohen as, "a broad right", which in First Nation perspectives include the following: a responsibility to protect, conserve and sustain the fishery; a responsibility to other First Nations peoples dependent on salmon; a right to fish for all purposes; a right to use all traditional and modern fishing methods; and a right and responsibility to maintain proper relations to the salmon and their ecology[15]. First Nations regularly make management decisions based on their own Indigenous legal traditions to not exercise their rights to harvest fish stocks for FSC purposes when the specific fish stocks are scarce and vulnerable. In the Lower Fraser, a harvest moratorium on white sturgeon was enacted in early 1990s due to conservation concerns. The management decision to suspense harvest temporarily to meet conservation and stewardship objectives must not affect whether those fisheries are part of Aboriginal fishery, and whether the fisheries are protected under the Act.

4.1.3 Self-assessment Reviews, EA Triggers for Impacts on Fish and Fish Habitat

The 2012/2013 changes that weakened the Act also weakened environmental assessment (EA) processes which had provided oversight of fish habitat protections. The removal of environmental assessments for authorizations under the Act is inconsistent with Canada's international obligations under the *Law of the Sea Convention* (1982) which requires Canada to assess the potential effects of activities that may cause "substantial pollution of or significant and harmful changes" to the marine environment.[16] The 2012/2013 changes instead introduced self-assessment review process for low-risk projects to determine if the *FA* is applicable, which delegated much of the Federal Government's responsibility for the determination of impacts and protection of fish and fish habitat to project proponents and the private sector. A proponent-led system allows for bias where conflict of interest (e.g. proponents paying Qualified Environmental Professionals directly) may cause QEP to provide advice on avoidance and mitigation measures to ensure that the *FA* does not apply (e.g. therefore does not need to go to DFO for review). Analysis showed a significant decline in referrals from 2012 to 2014, suggesting that self-assessment resulted in more projects not reviewed or requiring an authorization.[17]

[13] *Convention on Biological Diversity* (1992); Canada. *Canada's Policy for Conservation of Wild Pacific Salmon. Fisheries and Oceans Canada* (2005) at pp. 9-12.
[14] Cohen Commission Report, *supra* Note 4, Volume 1, at Chapter 4, pp. 80-81.
[15] Cohen Commission Report, *supra* Note 4, Volume 1, at Chapter 2, p.22.
[16] *Law of the Sea Convention*, Article 206.
[17] Olszynski, M.Z.P. 2015. From 'Badly Wrong' to 'Worse': An Empirical Analysis of Canada's New Approach to Fish Habitat Protection Laws. J.Env. L & Prac. 28(1)

There are likely many cases where low risk projects may not be accurately self-assessed for impacts to fish and fish habitat under the Act. Only BC and AB have official QEP designations (RP Bio) and a college overseeing those qualifications. This raises further doubts on the efficacy of the assessments of potential impacts and guidance on mitigations, all of which occurs with no DFO oversight and no monitoring required. If proponents deem that they can mitigate all serious harm, there is no follow-up confirmation or monitoring of how effective these mitigation measures are. Instead of a proactive, protective system, 2012/2013 changes shifted to a reactive, permissive system that infringes on First Nations' requirement for free, prior, and informed consent on projects in their territory. First Nations must rely on common law whenever fish and fish habitat are impacted, an approach that is not preventative and generally requires damage to have occurred before activity can be challenged. It is a costly and long-term process to undergo and neither First Nation's capacity nor the judicial system is well-equipped to deal retroactively with project effects.

Recommendation 3: *Self-assessment of projects should be removed, there are too many risks and capacity for monitoring is not available. Self-assessment promotes reactive management for protection. If self-assessment is retained, capacity needs to be ensured such that regulatory bodies be empowered to have higher oversight on self-assessment of projects. Projects needs to be monitored to ensure compliance with mitigation measures and that mitigation measures are effective.*

4.1.3.1 Relevance to CEAA 2012

While a review of *CEAA 2012* is outside of the scope of this brief, it is important to recognize that the *FA* was not altered in a vacuum. The *CEAA* was changed in the same year, which altered requirements for federal EAs. Prior to the changes to *CEAA* in 2012, any impacts to fish and fish habitat triggered a screening level environmental assessment. In *CEAA 2012*, the *FA* was removed as a trigger to conduct a federal EA, instead utilizing a "designated project list", wherein the project type and scope of work determined the requirement for an EA. *CEAA 2012* also removed certain projects from requiring a federal EA, such as pipelines (other than offshore) and electrical transmission lines not regulated by the NEB; industrial facilities (*e.g.*, pulp and paper mills, chemical explosives, lead-acid batteries); heavy oil and oil sands processing facilities; groundwater extraction facilities. Thresholds regarding project sizes requiring an EA were also established for LNG storage, quarries, dam and dyke expansions, disposal and recycling of hazardous waste, and NEB-regulated pipelines. The focus to only larger projects, and to impacts at a fisheries level, poses a significant risk to fish and fish habitat from ineffective mitigation measures on many smaller projects, which cumulatively, may result in greater, and undocumented, losses. Overall, *CEAA 2012* eliminated thousands of screening-type EAs conducted each year under the former Act. Projects that are not on the designated list, and are self-assessed as not having an impact to fish, can proceed without a notice to the Minister, First Nations or the public. Examples of projects not on the designated list include: construction of clear span bridges if there is no new fill below the high water mark; construction of boat houses if the total combined footprint is less than 20m^2; and installation of underwater cables on lakebeds and in the marine environment.

Recommendation 4: EA triggers that previously existed for authorizations under s.32, 35, and 36 must be restored under the *CEAA* to ensure that the impacts and cumulative effects of works, undertakings and activities on fish and fish habitat are assessed, understood and avoided before projects are approved.

4.1.4 Systemic Changes and Capacity Building

The 2012/2013 changes shifted the focus of the *FA* to managing threats from larger projects to the sustainability and ongoing productivity of fisheries and removes regulatory oversight of works, undertakings or activities that pose a low risk to fish and fish habitat. Part of the justification of the changes was to modernize a regulatory system and to prevent permitting delays and uncertainty around how long permitting will take. This however was not the case as review times under *FA, 2012,* was similar to times prior to 2012/2013 changes.[18] While review times did not seem to change, the number of reviews and DFO's day to day operational capacity did. The streamlining of the assessment

[18] De Kerckhove, D.T., Minns, C.K., Shuter, B.J. 2013. The length of environmental review in Canada under the Fisheries Act. Canadian Journal of Fisheries and Aquatic Sciences 70(4):517-521.

of the more common activities and the loss of fish and fish habitat protection, coincided with a significant reduction in DFO's budget and staff capacity. The reduced capacity has directly and negatively impacted DFO's day to day application, monitoring and enforcement of the *FA*.

Recommendation 5: Increased funding should be provided to DFO and First Nations such that capacity can be developed to apply, monitor and enforce the *FA.*

4.1.4.1. Fines and Compliance

The penalties for contraventions have increased, with maximum fines set at $1M for individuals and a minimum fine of $500,000 and maximum fine of $6M for large corporations (doubling on second offences). We suggest that there should be no maximum fine values, and that fines should be established over a more refined scale system that will dissuade each type of company from violating the Act. A scaled approach, calculated based on the value of a company, is recommended. A multi-billion dollar company may feel little to no impact from a $6M fine and may violate the Act if complying is deemed to be more expensive in terms of time and money. Project license should also be revoked upon major offences.

Recommendation 6: No maximum fine with proportional penalty based on damage and value of company.

4.1.4.2. Increase First Nations Capacity for Monitoring and Enforcement

LFFN continue to raise serious concerns regarding DFO's institutional bias towards monitoring, compliance and enforcement of Aboriginal fisheries. There is up to 100% monitoring of Aboriginal fisheries in the Lower Fraser whereas recreational are not monitored (estimates rely on voluntary reporting) and monitoring of commercial fisheries ranges from 0-100%. These concerns were present under the previous legislative regime and persist and increase under the 2012/2013 changes[19], especially in light of decreased funding and capacity within DFO. Furthermore, the current *FA* leaves too much assessment and monitoring of project impacts on fish and fish habitat to industry's self-assessment and compliance.

Furthermore, Canada's commitment to monitoring and assessing (including collection of baseline data) of fish, fish habitat and fisheries needs to be standardized and undertaken in a robust manner on a consistent basis. DFO's declining capacity, commitments and responsibilities to baseline data and monitoring and compliance over the last several years have raised serious concerns throughout the marine and freshwater habitats in the Lower Fraser. Monitoring of project compliance, including low-risk projects, also needs to be standardized and undertaken more consistently and within scheduled timeframes. Compliance should be assessed on those projects that rely on mitigation measures to avoid impacts. Monitoring of all fisheries (commercial, recreational and First Nations' fisheries) needs to be determined fairly and capacity needs to increase to ensure compliance.

Monitoring, compliance and base line data collection are obvious areas for LFFN and DFO partnerships. LFFA advocates for the re-instatement and funding of the Aboriginal Guardian Programs in the Lower Fraser. More funding and human resources capacity must be built within DFO and First Nations as co-management partners to move away from proponent self-assessments and with LFFN in order to ensure robust monitoring and enforcement. Creating a more robust monitoring and enforcement regime will necessarily require the elimination of systemic data gaps – data collection and transparency is desperately needed to ensure baseline analysis is possible for use a point of comparison during monitoring to determine if a change has occurred. Through co-management agreements that enable the collaborative development of frameworks, benchmarks or thresholds, Federal responsibility and resources can be shared with LFFN who are best positioned to undertake monitoring and enforcement within their territories. LFFN can contribute to establishing baseline information about fisheries, such as: where fish resources are not yet commercially developed or designated as fisheries; where habitat enhancements, stock revitalization, or stocking programs are underway; and to identify historical fisheries that hold cultural importance, yet are no longer actively fished but should be revitalized and enhanced. Some examples include LFFA's test fishery program for eulachon in the Lower Fraser, as well as efforts to re-introduce the Kwikwetlem sockeye run in the Coquitlam River.

[19] Martin Olsynski, "From 'Badly Wrong' to Worse: An Empirical Analysis of Canada's New Approach to Fish Habitat Protection Laws" (2015) 28 J. Env. L. & Prac. 1.

Recommendation 7: First Nations and DFO capacity must be increased to monitor and enforce fisheries and activities that will impact fish and fish habitat. LFFN are best positioned to monitor, manage and enforce within their territories and can contribute to baseline information about fish and fish habitat.

4.1.5 Meaningful Collaborative Governance & Management Agreements

This Federal government has committed to a renewed, nation-to-nation relationship with Indigenous peoples, based on recognition of rights, respect, co-operation, and partnership and to implementing *UNDRIP*. In the spirit of reconciliation, a more collaborative, coordinated and efficient approach to the management of fisheries and oceans, including co-management and associated economic opportunities must be forged. The complexity of fish, fish habitat, fisheries and the ecosystems on which they rely, must advance forward in a manner that meets sacred, constitutional and international commitments. The Act must empower a change in how we together govern and manage fish, fish habitat and fisheries, including providing adequate space and flexibility in the legislative framework for different mechanisms for meaningful co-management. To foster this space and flexibility, amendments to the Act can be made which explicitly empower the Minister to reach collaborative governance and management agreements with LFFN governments. This type of legislative space would allow Canada and First Nations, together with the Province where appropriate, to create joint decision making bodies. The Minister and DFO require modern legislative tools to respect and uphold collaborative governance and management agreements with First Nation governments. Respecting First Nations' rights, responsibilities and authorities through collaborative governance and management regimes is a necessary part of reconciliation.

The amendments we are proposing would allow the Minister to enter into agreements which share aspects of Federal decision-making authority with jointly authorized boards. Providing clear statutory authority for DFO to create and rely upon jointly authorized management bodies is a necessary tool for nation to nation relationships, including decision-making. The Minister would significantly benefit from the statutory clarity that this amendment would bring as it would facilitate real options for First Nations and DFO to pursue collaborative governance and management solutions. The amendments would promote reconciliation and certainty in the management of fisheries. It would streamline management, help to reduce and avoid duplication of efforts and could significantly reduce conflicts. The Act must be amended so that the Minister is empowered to reach collaborative governance and management agreements with First Nation governments in order to facilitate cooperation and joint action on areas of common interest, such as conservation, stewardship, restoration and habitat protection, harvest planning and management, and monitoring and compliance. Regulations must be created to structure the exercise of the Minister's discretion as it relates to fish, fish habitat, fisheries and Aboriginal and treaty rights, including conditions which require the Minister to enter into agreements. This approach of providing specific guiding criteria on how Aboriginal and Treaty rights will be accommodated for in discretionary decision-making under the Act is consistent with the Supreme Court of Canada's direction over 20 years ago; with the failure to do so representing an infringement on those rights.[20]

Recommendation 8: The Act must empower a change in how we together govern and manage fish, fish habitat and fisheries, including providing adequate space and flexibility in the legislative framework for different mechanisms for meaningful co-management. Amendments to the Act can be made which explicitly empower the Minister to reach collaborative governance and management agreements with LFFN governments.

4.1.6 Reduce Discretion and Eliminate Certain Regulatory Authority

The 2012/2013 changes provided the Minister with new regulation-making powers which has resulted in increased flexibility in fisheries management decision-making overall, including increased discretion resting with the Minister and Cabinet as to whether or not to protect fish and fish habitat.[21] This contradicts the Royal Society of Canada Expert Panel on Sustaining Canada's Marine Biodiversity which found that, even prior to the 2012/2013 changes, "Canada's progress in meeting its obligations to sustain marine biodiversity has been impeded by the absolute

[20] *R. v. Adams,* [1996] 3 SCR 101 at para. 54.
[21] As a result of the 2013/2013 Changes, ss. 6, 6.1, 35, 36, 37 and 43 of the Act increase the Minister's discretion.

discretion afforded to the Minister of Fisheries and Oceans… [which] reflects a period of time in Canadian history when Ministers were afforded 'czar-like' powers."[22] Accordingly, the Expert Panel recommended that Canada "reduce the discretionary power in fisheries management decisions exercised by the Minister of Fisheries and Oceans."[23] Therefore, to better conserve and protect fish and fish habitat, the Act must be amended to eliminate Ministerial or Cabinet discretionary power. If protection of fish and fish habitat are left to political interpretations of public interest, history has shown that current economic interests quickly over-power ecological interests.

Recommendation 9: The Act be amended in a manner that eliminates Ministerial or Cabinet discretionary power to rely upon social or economic interests to avoid fish or fish habitat protections.

The Act must also be amended to ensure the Minister's discretion is structured such that it does not infringe Aboriginal and Treaty rights. To achieve this, the new regulatory authorities under the 2012/2013 changes to exclude certain fisheries from protection pursuant to s. 43(1)(i.01) of the Act and to exempt certain Canadian fisheries waters from protections pursuant to s. 43(5) of the Act must be repealed. Additionally, more prescriptive measures must be introduced to the Act that the Minister must adhere to when exercising discretion. The prescribed factors the Minister must consider when exercising regulation-making powers pursuant to s. 6 of the Act must be repealed and replaced to better guide and reduce the exercise of ministerial discretion overall. To help with transparency and confirm that public interest assessments are consistent with Aboriginal and Treaty rights, Ministerial discretion must be consistent and factor in the following:

Compliance with s.35(1) of the Constitution Act and UNDRIP	UNDRIP sets out "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."[24] Canada's support for UNDRIP means compliance with these minimum standards must be adopted in amending and implementing the Act. UNDRIP requires the free, prior and informed consent of Indigenous peoples before adopting and implementing legislative or administrative measures that may affect them.[25]
Consistency with International Standards and Commitments on Marine Governance	Canada must ensure that its decision-making under the Act is consistent with the many international standards on marine governance it has committed to meeting, in particular as they relate to sustainable development, ecosystem-based management, precautionary approach and protecting marine biodiversity. These standards are found in international instruments, including: *Law of the Sea Convention* (1982), *UN Agreement on Straddling and Highly Migratory Fish Stocks* (1999), *Convention on Biological Diversity* (1992) and *Rio Declaration of Environment and Development* (1992).
Precautionary Principle	The precautionary principle is a cornerstone principle for responsible resource management and must guide decision-making under *FA*, especially given the current systemic data gaps related to fish, fish habitat and fisheries.
Best Available Information	The Minister must be obligated to transparently consider and follow the best available scientific and technical information, including traditional knowledge, at all times when exercising discretion under the Act.
Cumulative Impacts and Effects	The Act and its policies must provide effective tools for assessing and addressing cumulative impacts and effects to fish and fish habitat. Commissioner Cohen recognized that "DFO needs to manage this incremental harm that, over time, could have a substantial effect on Fraser River sockeye habitat productivity."[26] The need for protection from cumulative impacts and effects extends to all fish and fish habitat. Many of our recommendations would provide for more effective tools to address cumulative impacts, such as restoring EA triggers, increasing capacity for monitoring and enforcement, and prescribing better standards and objectives for guiding decision-making.
Climate Change	Climate change is having far reaching and complex effects on fish, fish habitat and fisheries. Climate change will continue to be a key stressor on biodiversity and fisheries management must be responsive to this fact.[27]
First Nation Management Objectives	Pursuant to UNDRIP and consistent with Aboriginal and Treaty rights to fish, First Nations have the right to "determine and develop priorities and strategies for the development or use of their lands or territories and other resources."[28] The Minister is required to take account of existing First Nation management objectives informed by Indigenous laws, traditional knowledge and western science (e.g. water quality standards) and/or management objectives to be developed through co-management agreements. Providing clarity in the Act that this is a required factor in decision-making would strengthen fisheries management and bring increased collaboration and fishery transparency into management.
Offsetting with Avoidance Priority	To best fulfill the purpose of protecting and conserving fish and fish habitat, the Minister must continue to consider, when issuing authorizations, whether there are measures and standards to avoid, mitigate or offset. However, in establishing conditions for authorizations the Minister must be required to give priority to measures and standards that avoid harm to fisheries habitat. Avoidance is paramount as functional fisheries habitat is both precious and complex, especially when it also serves to support healthy, sustainable First Nation communities. In addition, avoidance measures should exceed "no net loss" and achieve "net gain" objectives such that proponents are sufficiently dissuaded from utilizing offset in lieu of avoidance, mitigate or compensation measures.

[22] Royal Society of Canada. *An Expert Panel Report on Sustaining Canadian Marine Biodiversity: Responding to the Challenges Posed by Climate Change, Fisheries, and Aquaculture*. February 2012 ["RSC Expert Panel Report"] at Chapter 13, p. 219.
[23] *Ibid.*
[24] UNDRIP, Article 43.
[25] UNDRIP, Article 19.
[26] Cohen Commission Report, *supra* Note 4, Volume 3 at Chapter 4, p. 97
[27] RSC Expert Panel Report, *supra* Note 14, Chapters 4 and 7; Cohen Commission Report, *supra* Note 4, Volume 2 at Chapter 5.
[28] UNDRIP, Article 32.

4.1.7 Hold Consultations and use Independent Expert Panels to Incorporate Feedback to Strengthen the *FA*

The *FA* is an important piece of legislation that should be carefully amended. This review process was underfunded and did not provide sufficient time for full discussions and consultations. As protection of fish and fish habitat affects First Nations nationwide, we recommend that public consultations and an independent expert panel (including mutually agreed upon First Nation representatives) should also be integrated into the full *FA* review. We also recommend that the government provide all interveners submitting written recommendations with a response to their concerns, detailing how each will be dealt with, or providing an explanation as to why not, prior to finalization of the Act.

Recommendation 10: Government to hold public consultations and provide response to interveners submitting written recommendations and implementing an independent expert panel (with First Nations representatives) to incorporate feedback to strengthen the *FA.*

5. Summary of Recommendations

1. Restore the "HADD" and "killing of fish by means other than fishing" provisions from the previous *FA* while retaining "activity" from the 2012/2013 changes
2. Repeal the definitions of commercial, recreational and Aboriginal fisheries. Once HADD is restored, all three definitions must be removed.
3. *Self-assessment of projects should be removed, there are too many risks and capacity for monitoring is not available. Self-assessment promotes reactive management for protection. If self-assessment is retained, capacity needs to be ensured such that regulatory bodies be empowered to have higher oversight on self-assessment of projects.*
4. EA triggers that previously existed for authorizations under s.32, 35, and 36 must be restored under the *CEAA, 2012,* S.C. 2012, c. 19, c. 52
5. Increased funding should be provided to DFO and First Nations such that capacity can be developed to apply, monitor and enforce the *FA.*
6. No maximum fine with proportional penalty based on damage and value of company.
7. First Nations and DFO capacity must be increased to monitor and enforce fisheries and activities that will impact fish and fish habitat. *Reduce Discretion and Eliminate Certain Regulatory Authority*
8. The Act must empower a change in how we together govern and manage fish, fish habitat and fisheries, including providing adequate space and flexibility in the legislative framework for different mechanisms for meaningful co-management. Amendments to the Act can be made which explicitly empower the Minister to reach collaborative governance and management agreements with LFFN governments.
9. The Act be amended in a manner that eliminates Ministerial or Cabinet discretionary power to rely upon social or economic interests to avoid fish or fish habitat protections.
10. Government to hold public consultations and provide response to interveners submitting written recommendations and implementing an independent expert panel (with First Nations representatives) to incorporate feedback to strengthen the *FA.*

6. Description of Organization Providing Brief

The Lower Fraser Fisheries Alliance (LFFA) consists of 30 member Nations from Tsawwassen to Yale, BC. The LFFA is a voice for First Nations of the Lower Fraser River on matters related to fish and aquatic resources. The LFFA works collaboratively and holistically to support the management and sustainability of First Nation fisheries and supports cultural and spiritual traditions for future generations. The mission of the LFFA is to promote and support the management of a robust and expanding fishery for the First Nations of the Lower Fraser River. LFFA is not a holder of Aboriginal rights as defined in s.35 of the *Constitution Act, 1982*, and therefore the comments submitted do not fulfill the Crown's duty to consult directly with rights and title holders. For more info: www.lffa.ca