



AFN NATIONAL FISHERIES STRATEGY

PROMOTING SUSTAINABLE FIRST NATIONS
FISHERIES AND AQUATIC RESOURCES

Technical Overview: *Fisheries Act* Amendments

November 21, 2012

The Assembly of First Nations (AFN) is the political representative body for over 630 First Nations across Canada. As part of its mandate, the AFN actively engages First Nation communities and government partners to promote broad engagement on initiatives with the potential to affect First Nations rights and title. The AFN actively monitors policies, regulations and legislation that may impact, alter or affect First Nations' constitutionally recognized treaty and Aboriginal rights. In this capacity, the AFN has an integral interest in the amendments to the *Fisheries Act* within Bill C-38 and Bill C-45.

Bill C-38 and Bill C-45 are omnibus budget implementation bills that include wide-sweeping and comprehensive changes to numerous pieces of legislation. Bill C-38, *Jobs, Growth and Prosperity Act*, received Royal Assent on June 29, 2012. Bill C-45, *Jobs and Growth Act, 2012*, was introduced on October 18, 2012. The AFN has expressed continued concern about the lack of First Nation engagement on both bills despite the fact that each has a clear potential for material impacts on First Nations rights.

The following document provides an overview of the changes to the *Fisheries Act* contained within both omnibus bills and summarizes the information that the AFN has received to date.

What are some of the changes to the *Fisheries Act* within Bill C-38 and Bill C-45?

Bill C-38 contained numerous changes to environmental components of the *Fisheries Act*. Some changes came into force when the bill received Royal Assent; the remainder will occur at a later date set by Cabinet. In all, the changes alter the purpose of the *Fisheries Act* from protecting "fish, fish life and fish habitat of all fish" to the protection of "fisheries".

Changes that have current legal standing include:

- The ability for the Minister to enter into agreements with provinces;
- The authority for the Governor in Council (i.e., Cabinet) to make regulations on agreements entered into by the Minister; and,
- A series of enabling amendments to facilitate the second stage of amendments.

Changes that will occur in the second stage of amendments include:

- Replacing the prohibition against any unauthorized “harmful alteration, disruption or destruction of fish habitat” with a prohibition against causing “serious harm,” with serious harm defined as “death of fish or any permanent alteration to or destruction of fish habitat”;
- Limiting protection against serious harm to commercial, recreational, and Aboriginal fisheries, with Aboriginal fisheries defined as: “fish [that] 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”;
- Allowing the establishment of regulations prescribing works or actions that do not require approval to cause serious harm;
- Setting conditions for the Minister to make regulations to authorize deleterious deposits;
- Creating proponent requirements for work in “ecologically significant areas,” with the Governor in Council able to regulate the definition of “ecologically significant areas;” and,
- Changes in the authority to carry out an inspection.

Bill C-45 puts forward further changes to the *Fisheries Act*. Specifically:

- The definition of an “Aboriginal fishery” will be changed to: “fish [that] is harvested by an Aboriginal organization or any of its members for the purpose of using the fish as food, for social or ceremonial purposes or for purposes set out in a land claims agreement entered into with the Aboriginal organization;”
- Weirs and seines extending past 2/3rd the width of a river or 1/3rd the width of a tidal stream at low tide are prohibited; and,
- Fines collected for *Fisheries Act* violations will be used to “further enhance the conservation and protection of Canada's fisheries resources”.

How will the *Fisheries Act* protect fish and fish habitat?

Fish and fish habitat will be protected under the amended section 35 of the *Fisheries Act*. Section 35(1) of the *Fisheries Act* will prohibit unauthorized actions that cause serious harm to Aboriginal, commercial and recreational fisheries or to fish that support those fisheries. “Serious harm” is defined as the death of a fish, permanent alterations to habitat, or destruction of habitat. Section 35(2) allows for the authorization of activities that result in serious harm by the Minister.

The amended section 35 combines two prohibitions in the old *Fisheries Act*. Section 32 of the old *Fisheries Act* prohibited destroying fish by means other than fishing. Section 25 of the old *Fisheries Act* prohibited activities that result in a harmful alteration, disruption or destruction of fish habitat. Activities in contravention of sections 32 and 35 of the old act could be authorized by the Minister.

The amended prohibition applies only to fisheries and habitat supporting fisheries, and therefore no longer extends to all fish and fish habitat. DFO has stated that it understands the section only applies to currently operating fisheries. Therefore, species of fish and habitat may not be protected if:

- the fish and the habitat on which it depends has no demonstrable economic value to aboriginal, commercial, or recreational fishers or no demonstrable direct ecological value to the fishery in which those fishers are engaged;
- the fish is not harvested under a licence or for food, social, ceremonial purposes, or for purposes consistent with a land claim;
- the fish is not currently being fished as part of a fishery (e.g., for conservation reasons);
- the damage or alteration to the habitat is not permanent; or if
- fish that are part of a fishery are not directly killed by activities, works or undertakings.

The definitions within the amendment raise several pertinent questions, including:

- how will “permanent” be determined with regards to alterations or destruction of fish habitat;
- how will “licences” be defined within the definition of “commercial” and “recreational;”
- how will the Minister consider First Nations rights and interests when granting authorizations under section 35(2);
- how will the Minister protect fish that are not being fished for reasons of conservation or stock recovery; and
- how will the Minister protect First Nations fisheries if a First Nations fishery does not meet the definition of “aboriginal,” “commercial” or “recreational” in respect to a fishery within the *Fisheries Act*?

What is the current definition of Aboriginal Fisheries?

At this point in time, there is no definition of “Aboriginal” fisheries with legal effect. In the second phase implementation of the *Fisheries Act* amendments, which will be determined at a later date by Order in Council, “Aboriginal” fisheries are defined as: “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...”

Bill C-45 amends Bill C-38’s definition to read: “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, for social or ceremonial purposes or for purposes set out in a land claims agreement entered into with the Aboriginal organization...” This will be the definition of an “Aboriginal” fishery after Bill C-45 receives Royal Assent.

The AFN has identified several issues with the definition of “Aboriginal fisheries”. Specifically:

- The definition does not include First Nations fisheries with economic components, such as those identified by the Supreme Court of Canada in the Marshall and Ahousaht et al. decisions;
- It is unclear if fisheries that are not exploited for conservation or other reasons fall within the definition and are therefore eligible for protection from further “serious harm”;
- The definitions within the Act are sufficiently vague that it is uncertain where or how fisheries practiced under First Nations granted licences are protected;
- It is unclear how the Act will extend protection to First Nations fisheries that may legally operate unlicensed commercial fisheries;
- Fisheries protected under historical treaties or traditional fisheries that are not currently being actively exercised are not recognized within the definition; and,
- Other fisheries based on First Nations rights and title are not expressly recognized.

It is important for all of these fisheries to be captured within the definitions in the Act in order to ensure “serious harm” to those fisheries is prohibited consistent with section 35 of the *Fisheries Act*.

The definition is further problematic since it may:

- Be refined in regulation or policy, thereby further limiting DFO’s interpretation of First Nations’ fisheries; and,
- Form the basis for decisions by DFO on fisheries of interest to First Nations.

How will the amendments impact First Nations that use seines or weirs as their preferred mean to exercise their fisheries rights?

Amendments to the *Fisheries Act* restructure an existing prohibition against placing obstructions in rivers. It is unclear how these amendments will affect DFO's ability to authorize or permit the use of some weirs and seines for fishing or for science and monitoring purposes once all amendments from Bill C-38 and Bill C-45 come to force.

As noted by DFO in its testimony to the Standing Committee on Fisheries and Oceans (FOPO), section 26 of the *Fisheries Act* prior to the new amendments prohibited seines and weirs greater in width than $2/3^{\text{rd}}$ of a river or stream unless the Minister deems the seine or weir to be necessary for fish breeding or for other purposes in the public interest. First Nations use seines and weirs for fishing purposes as well as for purposes to count and monitor fish stocks.

The discretionary power to approve weirs or seines does not exist in the Bill C-45 amendment to section 29 of the *Fisheries Act*, which states the Minister or a fishery officer may remove the seine or weir as an obstruction if, in the opinion of the Minister or fishery officer, the gear exceeds the specified width. Assuming all amendments to the *Fisheries Act* within Bill C-38 and Bill C-45 come in to force, the language authorizing the minister to allow a weir or seine will continue to exist in section 21 of the *Fisheries Act*; however, it is uncertain how DFO will reconcile the authorization in section 21 with the prohibitions and remedies set out in section 29 in scenarios where a net, seine, weir or fence exceeds the width allowed within section 29. The language in section 29 allows interpretation and discretion on behalf of the Minister or fishery officer; however, the existence of a general prohibition seems contradictory to the intent of section 21 and may be construed so as to prevent monitoring the health of fish stocks in certain cases. Furthermore, the previous prohibition was listed in reference to the obstruction of a main channel. The prohibition is now placed in reference to the obstruction of fish or waters, suggesting that the Government intends for the new prohibition to contemplate the act of fishing (and therefore, the act of harvesting a fish) instead of the act of impeding navigation.

In its testimony to FOPO, DFO stated that the approval process for section 35 of the *Fisheries Act*, which prohibits serious harm, will be used to authorize some obstructions outside of the context of fisheries management. However, the approval under section 35 authorizes serious harm and does not necessarily authorize violations elsewhere in the Act.

Over the last several years, court cases have elaborated on the rights for First Nations to practice fishing and hunting rights in their preferred means (see: *Ahousaht et al. v Canada* [2009 BCSC]; *R. v. Seward* [1999 BCCA]). Given this evolving understanding, the AFN suggests that the Government of Canada exempt First Nations from section 29 and, for

clarification purposes, to exempt fences, seines, weirs or other gear extending past the width of 2/3rds of a river used to assess the health of fish stocks.

The AFN suggests that DFO provide further briefings on this topic and discuss the application of section 29 directly with First Nations that may be impacted.

How does the Environmental Damages Fund work?

The Environmental Damages Fund is a specified purposes account that directs funds fines collected under the *Fisheries Act* to purposes related to conservation and protection of fish and fish habitat, the restoration of habitat, or the administration of the fund. Universities, NGOs, Aboriginal groups, and local governments can apply for funds from the EDF to undertake projects related to fish and fish habitat. Project proposals will be assessed by a group of technical experts. Currently, the fund is administered by Environment Canada. No agreement has been made yet as to DFOs involvement in decision making. It is unclear if the same funding preferences or decision making criteria will be used for administration of the fund consistent with the *Fisheries Act*.

First Nations are distinct resource users identified by the *Fisheries Act*. Under the 1986 *Habitat Policy*, DFO followed the “polluter pays” principle to compensate habitat damage under a ranking system in which like-for-like habitat restoration or compensation received preference. It is essential for First Nations that this preference continues. Many First Nations have unique fisheries that may be overlooked in favor of compensating larger commercial or recreational fisheries. As well, First Nations have specific insight and interests that should be taken into account when making funding decisions. The AFN recommends that First Nations technicians are included in the technical body that reviews proposals for the EDF and that the EDF adopts a preference system similar to that in the 1986 *Habitat Policy* to assess funding proposals.

Has the AFN received any briefings from Fisheries and Oceans Canada (DFO) on Bill C-38 or Bill C-45?

The AFN has had high-level discussions with senior DFO officials related to the contents of the amendments within Bill C-38 and subsequent policy and regulatory reform. Specifically, the AFN has participated in:

- A face-to-face one hour Technical Briefing on Responsible Resource Development / Fisheries Act with representatives from DFO, Aboriginal Affairs and Northern

Development Canada (AANDC), Transport Canada (TC), Environment Canada (EC), Natural Resources Canada (NRCan), the Canadian Environmental Assessment Agency (CEAA), and the Major Projects Management Office (MPMO);

- Two conference calls, one high level call to address process issues with the Assistant Deputy Minister (ADM) and senior officials from DFO and one technical call to outline the policies and regulations promulgated under the C-38 amendments that DFO will contemplate within the next two years; and,
- Two face-to-face meetings with senior DFO officials discussing the department's commitment to work with the AFN and address preliminary questions.

The AFN has not received any written materials from DFO at these meetings. DFO has released a brief document on its website outlining some of the changes to the *Fisheries Act* and the benefit of those amendments to certain resource users. The document can be found here: <http://www.dfo-mpo.gc.ca/habitat/changes-changements/index-eng.htm>

AFN has not engaged in dialogue with DFO on changes within Bill C-45 – nor was there any advance information that these changes were forthcoming. AFN will continue to advance the concerns expressed by First Nations on the new definition of “Aboriginal fisheries” and to seek clarity on DFO's interpretation of this definition.

Has the AFN received answers to the questions submitted to DFO on Bill C-38?

The questions submitted by the AFN to DFO on Bill C-38 were posted on the Order Paper by Mr. Philip Toone, NDP Member of Parliament for Gaspésie—Îles-de-la-Madeleine. An answer was tabled from the Honourable Keith Ashfield (Fredricton), Minister of Fisheries and Oceans. The questions and answers are below in their entirety:

Question No. 677—

Mr. Philip Toone:

With regard to proposed changes to the Fisheries Act outlined in Bill C-38: (a) what plans does the government have for consultation with First Nations on changes to the Fisheries Act, and what are the timelines for the proposed consultations; (b) how will the Department of Fisheries and Oceans (DFO) involve First Nations in consultations on any regulations or policies that will emerge from the proposed changes; (c) what resources will be made available to First Nations to enable them to participate in the consultation process; (d) what programs will be made available to facilitate the implementation of the amended Fisheries Act, and will any of these programs be specific to First Nations or other Aboriginal peoples; (e) will changes to the

Fisheries Act be retroactively applied to projects currently under environmental assessment, or currently undergoing DFO authorization processes; (f) will there be a transitional phase following the establishment of new legislation, regulations, or policies; (g) what new regulations are planned by the DFO under the framework of the proposed Fisheries Act amendments; (h) how does the DFO intend to define “third-party stakeholders” in section 4.1(1) of the proposed amended Fisheries Act; (i) how does the DFO intend to define “Aboriginal fisheries”; (j) how does the DFO intend to define “serious harm” in section 35(1); (k) how does the DFO intend to determine conditions with respect to the “quantity or concentration” of deleterious substances in s. 36; (l) how does the DFO intend to define the situations under which a Minister may require plans and specifications for activities that are likely to result in serious harm to fish; (m) how does the DFO intend to define ecologically significant areas; (n) does the DFO intend to define “food,” “social,” and “ceremonial” fisheries; (o) how will the DFO engage with the Assembly of First Nations in order to jointly communicate, interpret, and define the proposed amendments to the Fisheries Act; and, (p) how will the DFO engage with the Assembly of First Nations to facilitate joint dialogues with First Nations communities?

Hon. Keith Ashfield (Minister of Fisheries and Oceans and Minister for the Atlantic Gateway, CPC):

Mr. Speaker, with respect to questions (a) through (d), (g), (o) and (p), on June 29, Bill C-38, the Jobs, Growth and Long-Term Prosperity Act, received royal assent. Amendments to the Fisheries Act were included in Bill C-38. When Bill C-38 was initially tabled in April 2012, Fisheries and Oceans Canada provided information sessions on the proposed changes to the Fisheries Act to provinces, non-governmental organizations, and aboriginal groups. During summer and fall 2012, officials from Fisheries and Oceans Canada will engage with these key partners and stakeholders to develop the regulatory and policy framework to support the new and focused direction set out by the changes to the Fisheries Act.

With respect to questions (e), (f), (h), (i), (j), (l) (m) and (n), while some terms, such as “serious harm to fish” in section 2(2), and “Aboriginal” fisheries, in section 2(1), are already defined in the amended Fisheries Act, others, such as “ecologically significant areas”, will be defined by regulations or clarified through policies. As various sections of Bill C-38 will come into force at a later date to be fixed by order of the Governor in Council, as indicated in section 156, there will be a transitional phase that will provide an opportunity for further work and engagement with key partners and stakeholders.

With respect to question (k), no changes are planned in the way quantity or concentrations are determined.

Has the AFN coordinated with DFO on engagement initiatives following Bill C-38?

The AFN has had discussions with DFO officials on convening a National Policy Analysis Group (NPAG) to engage on policy and regulatory reforms resulting from Bill C-38. The NPAG is a joint national dialogue table that provides regional First Nations technical experts with a forum to directly engage with the DFO on various policies and programs as they are developed and implemented. First Nations regional technical experts are appointed by the AFN Regional Chiefs. The AFN has made it clear to DFO that the NPAG is not a consultation body and activities carried out in conjunction with the NPAG or AFN do not take the place of formal consultation with First Nations, as stated in the NPAG Terms of Reference.

We are currently awaiting further discussion with DFO to move forward on the NPAG and other engagement activities.

What new fisheries policies or regulations should First Nations expect in the coming months?

The AFN has been informed by DFO of the following potential policies and regulations:

- Regulations outlining reporting requirements for proponents seeking approvals under the *Fisheries Act*;
- Regulations setting timelines for the DFO to respond to proponents' requests;
- A policy on protecting fisheries consistent with the new prohibition against serious harm or permanent alterations to fisheries; and,
- Policies and/or regulations on aquatic invasive species.

AFN will make information on timelines for policy and regulation development available to First Nations as it is released by DFO.

Next Steps

There are no official statements from DFO as to how or when changes in the *Fisheries Act* will be implemented. However, officials have indicated that the Government wants to be in a

position to start implementing changes in spring 2013. AFN will continue to provide updates as information is made available.