Bill C-38 Part Three
Questions and Answers on Changes to Environmental Laws

Introduction

The Assembly of First Nations (AFN) is the representative body for over 630 First Nations across Canada. As part of its mandate, the AFN actively engages First Nations 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 effect First Nations constitutionally recognized treaty and Aboriginal rights. In this capacity, the AFN has an integral interest in the amendments proposed within Bill C-38, the *Jobs, Growth and Long-term Prosperity Act*.

Bill C-38 is a sweeping omnibus bill that proposes significant changes to approximately 70 pieces of federal legislation. Part 3 of Bill C-38, entitled "Responsible Resource Development," amends numerous pieces of environmental legislation and will fundamentally alter the environmental regulatory regime in Canada. Notably, Part 3 proposes to amend: the *Fisheries Act*, the *National Energy Board* (NEB) *Act*, and the *Species at Risk Act* (SARA). Part 3 also repeals the *Canadian Environmental Assessment Act* (CEAA) and introduces a new act referenced in this document as *CEAA 2012*.

Since the release of Bill C-38, the AFN has called upon the Government of Canada to undertake engagement and consultation with First Nations rights holders. This call for action has been put forward by National Chief Shawn A-in-chut Atleo to the Subcommittee on Bill C-38 (Part 3) of the Standing Committee on Finance and by Regional Chief Morley Watson to the Senate Standing Committee on Energy, the Environment and Natural Resources. The AFN recommends that the Government withdraw Part 3 of Bill C-38 and engage in robust consultation with First Nations before altering Canada's environmental legislation.

The following questions and answers are based on the AFN's analysis of Bill C-38 and communicate concerns and expected impacts on First Nations related to Part 3.

Questions and Answers

Q: Does the AFN believe that Bill C-38 will support economic growth?

A: First Nations are supportive of responsible, sustainable development that protects the long term integrity of the environment. The AFN is supportive of legislative changes that bring jobs and prosperity to First Nations communities; however, Bill C-38 is not a pro-growth piece of legislation and it will likely have unintended consequences that will hinder economic development.

The Government has not taken the time to consult with First Nations on Bill C-38. Hastily moving forward on significant and broad changes will have long reaching and expensive consequences. Bill C-38 impacts our collective ability to ensure the protection and sustainability of our previous natural resources. Inhibiting engagement processes and weakening environmental protection standards is a recipe for conflict and uncertainty.

In order to foster economic growth, the AFN encourages the Government of Canada to adopt legislation that seeks to protect our resources for the future in a manner consistent with the *United Nation Declaration on the Rights of Indigenous Peoples*. First Nations seek willing partners in development. Legislation should reflect the value of true partnerships by establishing frameworks for stronger engagement; better dialogue; accountable and transparent decision making; and development based on the standard of free, prior and informed consent.

Q: Have First Nations been adequately engaged on the changes proposed within Bill C-38?

A: First Nations have not received adequate engagement or briefings on Bill C-38.

The National Chief briefly met with the Minister of the Environment to discuss a range of issues, including the government's responsible resource development plan. The meeting did not qualify as consultation. Insufficient information was given as to the scope, scale and implications of changes within Bill C-38.

The AFN attended a technical briefing on the Bill C-38, which was hosted by Aboriginal Affairs and Northern Development Canada (AANDC) and attended by departments with various environmental mandates. This meeting did not qualify as consultation.

The AFN has submitted 16 questions to the Department of Fisheries and Oceans (DFO) regarding changes to the *Fisheries Act*. These questions were replicated on the notice paper on May 11, 2012. To date, the AFN has not received a response.

The AFN has been briefed that specific funding has not been allocated to consult First Nations on changes to the *Fisheries Act* and the regulations and policies that may follow those amendments. The DFO has advised the AFN that funding for consultation will come from existing allocations for Aboriginal programs, which are funds that are supposed to be used for commercial operations, training, and other important front-line community initiatives. This leads to concerns that there will continue to be inadequate engagement and consultation as changes to the environmental regime are implemented, and that these processes will undercut funding for other necessary programs. The AFN emphasizes that separate funding envelope should be identified for technical briefings, engagement and consultation directly with First Nation rights holders. This approach would be consistent with

statements made by the Deputy Minister of the DFO in September 2011, in which she stated that the DFO consults with First Nations on all matters and that modernizing the *Fisheries Act* or making any changes in Ministerial discretion would require significant consultations.

On behalf of First Nations, the AFN has routinely registered concern about the need for proper consultation throughout legislative, regulatory and policy processes. The AFN reminds the government that the honour of the Crown is at stake and that so far, the Crown has failed to uphold its fiduciary obligations with regards to Bill C-38. It is absolutely essential that funding is allocated to the DFO and all other departments with responsibilities under Bill C-38 in order to undertake meaningful, robust consultations with First Nations.

Q: Bill C-38 calls for greater provincial involvement in decision-making. Does this concern First Nations?

A: First Nations believe that resource decisions are best made by those who will shoulder the impacts of development. At the same time, First Nations are committed to work with other governments on resource development.

However, the AFN is gravely concerned by the way in which Bill C-38 accomplishes this goal. The AFN is not certain that the federal Crown can legally devolve its constitutional responsibilities to other levels of government. These changes raise complex issues of federalism and will bring conflict, confusion and delay to resource development.

For example, in order for substitution and equivalency under the *CEAA 2012*, provincial Environmental Assessment (EA) regimes must be deemed substantially equivalent to the federal regime with respect to a number of factors. None of those factors are related to consultation and accommodation of First Nations Treaty rights. Some provincial EA processes are lacking compared to the federal process, especially when it comes to respecting Treaty rights. One example of this is the Prosperity Mine in British Columbia where a provincial EA approved the mine, only to have a federal EA reject the mine.

Q: Has Bill C-38 done an adequate job of respecting and protecting traditional knowledge?

A: Section 19(3) of the *CEAA 2012* states that an EA *may* take into account traditional knowledge.

This is a lukewarm acknowledgement of traditional knowledge and it is well divorced from the decision-making processes under the Act. This is a stark change from the

SARA, where traditional knowledge is incorporated in the technical and decision-making provisions of the Act.

There are provisions within the *CEAA 2012* that allow review panels to compel information from witnesses. These provisions could be used to compel the disclosure of traditional knowledge. Furthermore, the confidentiality provisions of the *CEAA 2012* would require such disclosures to be made public. This is a stark difference from the *SARA*, which requires the approval of traditional knowledge holders before traditional knowledge is shared. The *CEAA 2012* would do a better job of respecting and protecting traditional knowledge if it required approval from knowledge holders before disclosure of knowledge and if traditional knowledge was incorporated in the decision making processes.

Q: What do First Nations think about changes to other portions of Part III of C-38, specifically the changes to *Species At Risk Act* (SARA) and the *National Energy Board* (NEB) Act?

A: First Nations have always experienced challenges engaging with the NEB. Similar to concerns about decision making under the *CEAA 2012*, the AFN is concerned about the politicization of pipeline approvals, through increased use of Cabinet decisions.

First Nations are alarmed by the new provision of the *NEB Act* that would greatly limit judicial reviews. If this provision passes, First Nations will have a mere 15 days from the time a decision is published in the Canada Gazette to file an application for review. No timeline and no notice will be provided to First Nations and by default, the Act directs the Federal Court of Appeal to decide the case without personal appearances.

First Nations view this provision as a serious and fundamental breach of the principles of natural justice and a derogation of treaty and Aboriginal rights because it is designed to deny First Nations a fair hearing on these rights.

We are also concerned that the *NEB Act* will exempt international pipelines from the operation of the Navigable Waters Protection Act and will allow the NEB to permit destruction of critical habitat under the *SARA* without consulting the Environment Minister.

Under the new *SARA*, Bill C-38 will do away with time limits on *SARA* permits. This is disturbing because without the need to apply for new permits at regular intervals, there will be no possibility for modification. Permit modification is important to either loosen restrictions if a species recovers or tighten restrictions if a species declines.

Q: Do First Nations have any concerns about how decisions are to be made under *the CEAA 2012* or the *Fisheries Act*?

A: First Nations are concerned about the increased use of Ministerial discretion under the *Fisheries Act*, as well as increasing the use of Cabinet decisions under the *CEAA 2012*. The AFN believes these two changes will increase political interference, while limiting transparency and accountability in decision making.

The discussions leading up to Cabinet decisions occur behind closed doors. The secrecy around these decision making processes is carefully maintained by the government. Discretionary decisions made by the Minister are generally not subject to question or review. Therefore, under such a system, First Nations cannot know if the Crown has accommodated their rights and interests, even in instances where there is a clear requirement to do so. First Nations will be forced to resort to lengthy and uncertain litigation to learn if and how their rights were considered.

Q: Do the changes to the *CEAA 2012* or the *Fisheries Act* support better consultation with First Nations, if that consultation occurs?

A: There is little in the text of the *CEAA 2012* to suggest the government is serious about consulting and accommodating First Nations rights. For example, under the *CEAA 2012*, there are 'public participation' provisions that impose very tight timelines on First Nations to provide comments alongside members of the public. Under the *Fisheries Act*, sections 4.1(1)(c) and 4.1(2)(g) provide guidance to provincial consultations with the public. It is important to recognize that First Nations are rights-holders and governments with jurisdiction, and require separate consultation from stakeholders.

There is no duty to provide notice to First Nations, even though courts have held that the duty to consult requires this *at a minimum*. We understand, from a technical briefing with officials, that the government has no intention of providing notice directly to First Nations, either through regulation or through policy. There is no mention in C-38 about free, prior and informed consent, which is customary international law articulated in the UNDRIP, and binding on Canada pursuant to its adoption of the declaration.

However, there are provisions in the *CEAA 2012*, which allow the suspension of the timelines in order to conduct certain studies. The AFN believes that these studies include studies to support consultation and accommodation with First Nations.

Q: Has the Government allocated enough money to undertake consultation?

A: The Government of Canada has allocated $13.6 million to undertake consultation related to environmental assessments. As a threshold matter, only about $7.4

million, just over half of the funds, is allocated to First Nations communities for consultation. The remainder goes to supporting the bureaucracy. Even worse, this funding goes entirely to the Canadian Environmental Assessment Agency, bypassing the DFO, the NEB and the Canadian Nuclear Safety Commission (CNSC).

$13.6 million is an increase from previous years' allocations, but it is not enough. Consultation and engagement needs to occur both at the project level and at the policy level. Historically, the Government of Canada has a very poor track record in engaging and consulting First Nations on policy issues.

First Nations want to reduce capacity burden and 'consultation fatigue' while ensuring the Crown meets its honourable obligations. Many First Nations want to be engaged and to partner with government and industry on development. One would think that the government would be interested in hearing from First Nations on how to develop a regulatory or policy framework which supports our mutually shared goals.

The AFN knows that any money to support policy consultation would probably be taken from that $7.4 million dollars earmarked for First Nations. This is unacceptable. The Government should allocate specific resources for engagement on regulatory and policy issues which do not threaten the adequacy of resources available for First Nations, many of whom are severely in need of such resources.

At this time, the DFO has not yet identified consultation resources for policies and regulations that are created under the amendments to the *Fisheries Act*. The AFN recommends that the DFO create a new funding envelope to undertake consultation, and that funds for consultation are not taken from existing Aboriginal programs.

Q: Does the AFN support the definition of "Aboriginal Fisheries" in the proposed *Fisheries Act* amendments?

A: No, the AFN does not support the definition of Aboriginal Fisheries. The Supreme Court of Canada has routinely recognized First Nations rights to food, social, ceremonial and commercial fisheries. In addition, the Court has also recognized the right for certain First Nations to engage in fisheries for a "moderate livelihood". For conservation and other reasons, First Nations do not always fish in the fisheries to which we have a constitutionally recognized right. The definition in Bill C-38 does not capture the full scope of First Nations fisheries and can be interpreted in such a way so as to limit, prejudice, derogate or abrogate from First Nations' fishing rights.

The definition for "Aboriginal Fisheries" must recognize that First Nations fisheries extend beyond a limited definition and include all First Nations fishing, harvesting, and fish management activities. As stated by the Supreme Court in *R. v. Sparrow,* a case that examined the nature of First Nations fisheries rights, "the phrase "existing

Aboriginal rights" must be interpreted flexibly so as to permit their evolution over time."

During a technical briefing session, the AFN learned that the DFO may attempt to define the scope and scale of "food, social, ceremonial and sustenance" fisheries through regulations**.** The AFN believes that it is improper for the Minister to create regulations that in any way restrict, limit, or constrain First Nations fishing rights by establishing a limited definition of those rights or by failing to acknowledge inherent rights that have always existed but may not yet have been acknowledged by the courts.

Any attempt to define the scope or scale of Aboriginal fisheries requires extensive and robust consultation with each and every First Nation in Canada. The DFO has allocated a total amount of $57.1 million dollars for Aboriginal fisheries this year – an amount that is 47.5% less than the amount allocated last year. These funds are meant to be used for front line First Nations fisheries activities and it would be unfortunate for these funds to be diverted. The DFO is not properly resourced to handle the issue of defining Aboriginal Fisheries and an attempt to fully define Aboriginal Fisheries will impact First Nations rights and title.

Q: Do First Nations support amendments to the *Fisheries Act* concerning fish habitat?

A: First Nations have established rights to food, social, ceremonial and commercial fisheries. The *Fisheries Act* is the sole piece of federal legislation that provides the protection for fish and fish habitat that is crucial to the exercise of these rights. Harmful alterations, disruptions and destruction of fish habitat have the potential to permanently damage First Nations fishing rights and harm fishing in Canada.

The Minister of Fisheries and Oceans has always had discretionary powers to approve any work or undertaking that may harm fish and fish habitat. The new amendments greatly increase the scope of these discretionary powers but detrimentally limit the scope of decisions that the Minister may make to those activities that result in "serious harm". The AFN does not believe that the Government should limit the Minister's legal power to prevent harm from mining, hydro-development, water-front development and other projects that can potentially cause long term, temporary or semi-permanent damage to fish, fish habitat and subsequently, First Nations rights and title.

The ban against harmful alterations, disruptions or destruction of habitat will no longer exist under the new amendment. The new ban against "Serious Harm" covers permanent changes to habitat; however, the AFN is uncertain as to what constitutes permanent. The previous ban against harmful alterations, disruptions and destruction of fish habitat created the framework for Canada's "No Net Loss" policy, which seeks to protect the productive capacity for all of Canada's aquatic

habitats. The DFO implemented this policy through authorization conditions for works and undertakings. This kind of protection cannot exist under the definition of "Serious Harm". Fewer authorizations will be necessary, meaning fewer conditions of authorization will be granted and the DFO will be unable to prevent a net loss of habitat to the same degree as previously possible.

The issue with "No Net Loss" has been that habitat cannot be rebuilt to be as productive as the creator made it. When rebuilt, or when left to "fix itself," habitat is often degraded and less capable of supporting fish life. By virtue of removing the mechanisms that trigger the "No Net Loss" policy, the proposed *Fisheries Act* amendments will allow for the net loss of habitat, provided that the loss isn't "permanent". However, even if habitat loss is not permanent, the habitat may be seriously degraded and unable to continue to support the species we fish or the organisms that support those species.

Q What specific amendments to the habitat protection provisions in the *Fisheries Act* concern the First Nations?

A: Although at first glance the amendments appear to offer continued protection for fish habitat, the protection granted is considerably less than that in the current form of the Act. The specific amendments that cause concern are:

- **The shift in focus from fish to "fisheries":** Not all fish are part of fisheries and not all aquatic organisms directly support a fish that has economic use. Ecosystems are highly complex and organisms interact with one another in ways we don't yet fully understand. Furthermore, some fish are only part of fisheries when the fish stock is robust enough to support fishing. It is contrary to the spirit of the *Fisheries Act* to selectively choose which resources to protect based on current economic use. All fish and aquatic organisms must be protected in order to ensure long term productive fisheries and to preserve the integrity of our aquatic resources.

- **The move from prohibiting "harmful alteration, disruption and destruction of fish habitat" to solely prohibiting "serious harm":** this change seriously limits the ability of the DFO and co-managers from protecting fish and aquatic resources. The AFN does not yet understand what qualifies as "permanent harm" and any degradation of fish habitat threatens the well-being and integrity of our fisheries. First Nations have proven rights to fish and to have priority access to fisheries. Allowing for harm that falls short of the threshold of "serious" will infringe upon these rights. Allowing fish to be maimed, damaged, poisoned, or to become inedible effectively limits the protection of First Nations rights to fish for food, social, ceremonial, sustenance or commercial purposes.

- **Additional discretionary powers for the Minister to authorize deleterious substances or to identify prescribed waters:** decisions that impact the health

of fish stocks and therefore, First Nations rights to fish must be open, transparent, and accountable, and these decisions should trigger the duty to consult and accommodate. By allowing closed-door, discretionary decision making, the Government will allow Ministers to set rules that result in automatic authorizations outside the scrutiny of impacted First Nations and will result in decisions without proper engagement, consultation or accommodation.

Q: The Fisheries Act amendments protect Aboriginal fisheries from serious harm. Does the AFN believe that Aboriginal fisheries need further protection?

A: All fisheries in Canada, including First Nations fisheries, must be protected and used sustainably. First Nations have undeniable rights to fish. These rights are protected by Section 35 of the Canadian Constitution. The Supreme Court of Canada has given Canada a clear directive to protect First Nations fisheries access when it stated in *R. v. Sparrow* that "Any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing".

The amendments to the *Fisheries Act* are not conservation-oriented. Merely protecting Aboriginal fisheries from "serious harm" is inadequate to ensure continued access to sustainable, healthy fish stocks. The Court has made it clear that First Nations fisheries are a priority. Continued enjoyment of fisheries resources necessitates healthy, robust fish stocks.