Mississaugas of
The New Credit First Nation

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Federal Review of the *Fisheries Act*: Mississaugas of the New Credit First Nation

Submission to the Standing Committee

To: The Standing Committee on the Review of the *Fisheries Act* - Fisheries Protection Provisions:

Introduction

The Mississaugas of the New Credit First Nation ("MNCFN") are the descendants of the "River Credit" Mississaugas and part of the Mississauga Nation. MNCFN Territory is described as, "commencing at Long Point on Lake Erie, eastward along the shore of the Lake to the Niagara River. Then down the River to Lake Ontario, northward along the shore of the Lake to the River Rouge east of Toronto then up that river to the dividing ridge between Lakes Ontario and Simcoe, then along the dividing ridges to the head waters of the River Thames, then southward to Long Point – the place of the beginning" (Attachment A). Our Territory covers 3.9 million square acres in what has and continues to be one of the most heavily developed and therefore environmentally impacted regions in the province, if not the country.

The Standing Committee should also be made aware that MNCFN recently submitted our "Aboriginal Title Claim to the Waters within the Traditional Lands of the Mississaugas of the New Credit" which outlines our unextinguished Aboriginal right and title to the waters (Lake Erie, Lake Ontario and their tributaries, floodplains and the groundwater within our Territory) and the land beneath the water. This claim emphasizes both our right and responsibility to protect the waters (and all inhabitants of the water) in our Territory, which necessarily means we must be involved in regulatory processes that have the potential to impact the waters, fish and fish habitat.

In 2012 through 2013 the federal government made significant changes to the *Fisheries Act* ("the Act") without any involvement, engagement or consultation with First Nations. Prior to the 2012/2013 changes, the Act was arguably the most powerful environmental legislation in this country that not only protected fish, but their habitats from projects that would cause harmful alteration, disruption or destruction. This type of protection required substantial government/regulatory oversight and involvement in projects near water, and even more-so for those projects that required an application to breech the habitat protection provisions of the Act (harmful

alteration, disruption or destruction). In making the changes to the Act, the former federal government made an implicit statement that the importance of water, of life, of Aboriginal and Treaty Rights, was of lesser importance then removing red-tape and regulatory oversight/approval related delays and complications for proponents of development and industry - these changes were referred to as a "modernizing" of the Act.

In reviewing the Act, and other pertinent documents (see: Bibliography), MNCFN has identified and explored several key issues that require the Standing Committee's attention and action.

Key issues identified by MNCFN includes:

- 2012/2013 Changes to the Fisheries Act
- Proponent Self-Assessment
- Implications to Aboriginal and Treaty Rights
- Compliance and Enforcement
- Transparency

This document is intended to provide the Standing Committee and the Department of Fisheries and Oceans ("DFO") with an overview of MNCFN's issues, concerns, questions and recommendations with respect to the review of and future direction for the Act. This document is also intended to initiate further dialogue regarding the Act, and the role of MNCFN (and other First Nations) in decision making processes, and in determining the future for our waters.

2012/2013 Changes to the Fisheries Act

The changes to the Act in 2012/2013 represented a significant shift in the federal government's standpoint on the importance of environmental protection, oversight and regulation. The changes to the Act were made without proper First Nation or public consultation, clearly signaling that the government recognized the amount of disapproval they would receive from environmental groups, First Nations communities/organizations and the general public.

DFO has recognized in public documents related to the 2012/2013 changes in the Act that "Indigenous and environmental groups in particular have argued that the changes weakened fish habitat protection. Industry, provinces and territories on the other hand, have expressed the view that most of the changes made to the Fisheries Act were positive" (DFO, October 2016). This statement summarizes the key issue with the changes to the Act: the changes were made regardless of the perspectives of First Nations and environmental organizations in order to decrease the regulatory processes and red-tape required for development.

The two most notable changes were in two of the strongest sections of the Act: Section 32 and Section 35. Section 32 (prohibition against the destruction of fish by any means other than fishing) was removed entirely and Section 35 was completely rephrased, with aspects of section 32 amalgamated into Section 35. The rephrasing of Section 35 from prohibition of "harmful alteration,

disruption and destruction (commonly known as a "HADD") of fish habitat" to prohibition of "serious harm to fish that are part of a commercial, recreational or Aboriginal fishery", seems like an insignificant change, however, the careful revision of wording alters the ability of the Act to actually protect all fish and their habitats from impacts by narrowing the scope of prohibition. Some of the specific, key issues related to the revised Section 35, and related revisions to the application of Section 35 include, but are not limited to:

- The word fish habitat is completely void in the new Section 35; implying a devaluation of habitat (water, water beds (sediment), aquatic vegetation).
- "Serious harm" is defined as: "the death of fish or any permanent alteration to, or destruction of, fish habitat."
  - This change significantly narrows protection to those projects that will cause mortality to fish or would destroy habitat permanently rather than those that would cause any alteration or disruption to fish habitat (and fish, by extension).
  - It is the primary responsibility of the proponent/applicant to determine if they will cause "serious harm" (death) to fish, and if their mitigation strategies are sufficient to diminish the threat of "serious harm".
  - It is then implied that projects that do not cause permanent destruction to fish habitat or direct/immediate death to fish, are acceptable, without any government oversight required (even though they may cause residual or unforeseen impacts based on the proponent's assessment of their own project).
  - Eliminating protection from alteration and disruption of fish and fish habitat also enhances the potential for fish species to become "threatened" or "endangered" as their habitats are degraded.
- Protection of fish is now limited to those fish that are part of (or support) a commercial, recreational or Aboriginal fishery ("CRA").
  - The definitions of both "commercial" and "Aboriginal" fishery exclude Aboriginal fisheries that are part of a commercial (not for sustenance) operation.
  - Knowing if the fish community in a given waterbody are part of a CRA depends on the availability of up to date and accurate information/data on both the fish species that use a waterbody (either continuously, or during part of their life history), and the physical use of a waterbody by humans as CRA fishery.
  - It is the primary responsibility of the proponent/applicant (not DFO) to determine if a waterbody is used for a CRA.
  - Placing protections only on fish that are part of a CRA emphasizes that if we(humans) are not actively using a waterbody for fishing, then protection is not important. Conversely, it may be even more important to protect those areas that are not being impacted by CRA fishing and/or to recognize that use

of some waterbodies may be limited as an intentional conservation effort (through a smaller, community based understanding).

Further to the already short list of projects that would require regulatory oversight and intervention, is the elimination of an environmental assessment trigger. Prior to the changes to the Act, an authorization under Section 32 or 35 (Fisheries Act Authorization ("FAA")) of the Act would trigger an environmental assessment under the *Canadian Environmental Assessment Act* ("CEAA"), and the requirements under CEAA would need to be completed prior to the issuance of an FAA; ensuring a fulsome review of the project/potential impacts. This is no longer required, which undercuts the importance of regulatory oversight (from multiple agencies/perspectives), the proper incorporation of Western science, expertise, consultation (Indigenous science/ways of knowing, land use and occupancy) and on-the-ground insights.

Proponent Self-Assessments

The 2012/2013 changes to the Act, not only changed the way that the Act protects fish from a legislative standpoint, but substantially changed DFO's role in reviewing and assessing projects near water that have the potential to impact fish and fish habitat. The scope of projects that require an application to DFO, and/or for an authorization to contravene the Act, is short and the responsibility to assess whether a project will cause serious harm to fish that are part of a CRA fishery is primarily, if not solely, that of the proponent/applicant.

From an environmental standpoint, the DFO's self-assessment process for projects near water has the potential to be problematic and potentially damaging to fish and fish habitat. We understand that perhaps the modernization of approvals process that both the provincial and federal governments have undergone was in response to the lack of capacity to complete project reviews in a timely manner. However, this removal of capacity can also be seen as a purposeful contribution to the lack of regulatory oversight. Instead of signaling a change in regulatory oversight that protects fish and fish habitat, the current lack of capacity calls for a government investment to increase staffing for the DFO.

DFO's website provides proponents an online guide for assessing their project, including a list of waterbodies and project types that do not require a review from DFO and encourages the proponent to read further materials, including in-water work timing windows. Again, whether the proponent actually reads any of these additional documents is entirely up to them, and the necessity of reading and adhering to the guidelines is merely suggested throughout. The language used to describe the proponent self-assessment, as well as the wording in the Act and the Fisheries Protection Policy Statement (DFO, 2013) is extremely soft and insubstantial (should, may, expected to), and does not prompt the reader to interpret the guidance as something that is important, obligatory, and absolutely essential to protecting fish and fish habitat.

Self-assessment puts a great level of trust in the proponent to value fish and fish habitat protection and complete their due diligence (and perhaps beyond due diligence). Not only that, but self-assessment puts the primary responsibility on the proponent to determine:

- The presence of fish that are part of a CRA fishery,
- The presence of a CRA fishery,
- Pathways for the project to cause serious harm to fish that are part of a CRA fishery (pathways that may be complex due to variance across species and life stages),
- Appropriate mitigations that will actually mitigate potential impacts (with the implication that implementing mitigations necessarily means that serious harm to fish and fish habitat will not occur),
- Appropriate monitoring to ensure that their mitigations are effective.

Self-assessment implies that DFO is of the opinion that proponents will choose to take a more arduous route and undertake a high-level of detail in their own assessment(s) not only in determination how their project could cause serious harm to CRA fish species, but one that accurately captures the presence of fish that are part of a CRA fishery. Through their own assessment, a proponent may find that their project will not have any impacts on fish or fish habitat that is part of a CRA fishery. When, in reality, a location could be incredibly important for a rather inconspicuous life stage such as nursery habitat (very small larval fish), or the use as a CRA could also be inconspicuous, and the proponent of the activity is completely unaware of that *or* the evidence to support either scenario has not been documented or readily available to the public.

The broader concern around proponent self-assessment relates to compliance and enforcement and the lack of fishery officers presence on the ground, monitoring these types of "under the radar" projects, which will be discussed in greater detail later in this document.

The implementation of an extended proponent self-assessment process is not only ineffective for ensuring protection of waters and fish, but has the potential to enhance adverse impacts and increase the gap in knowledge towards understanding and predicting cumulative impacts. Moreover, the lack of regulatory oversight and proponent self-assessment has the potential to seriously undermine Aboriginal and Treaty Rights of First Nations People.

Self-Assessment: Implications for Cumulative Impacts

All of the concerns above taken together, bring us to the legitimate concern around how the lack of DFO or other regulatory oversight of projects near water diminishes our ability to understand cumulative impacts to fish and fish habitat. Cumulative impact is already an incredibly complex topic, with no easy calculation or model for accurately assessing or quantifying the potential for cumulative impact and thus leaving substantial gaps in our understanding. Without consistent oversight, monitoring or record keeping of projects near water (from DFO or otherwise) it is nearly impossible to understand the stressors on fish and fish habitat in a given aquatic ecosystem, and in-

turn how each new project contributes to cumulative impacts. It is essential to have an understanding of all of the stressors impacting a system in order to assess how a future project (perhaps one that would otherwise be of minimal impact) could be the tipping point to an already highly impacted aquatic ecosystem or species. Without proper monitoring and oversight it is nearly impossible to predict and prevent these types of scenarios.

Implications for Aboriginal and Treaty Rights

The changes to the Act and the enhanced reliance on proponent self-assessment, taken together, have significant negative implications to Aboriginal and Treaty Rights and fulfillment of the duty to consult.

The overarching issue with respect to the changes to the Act, Aboriginal and Treaty Rights and the duty to consult, is that First Nations were not engaged or consulted, in any way, with regard to the substantive changes made to the Act. The void of consultation related to the Act in particular is a major impact to Aboriginal and Treaty rights because of the special importance that First Nations people associate with water, fish and fish habitat. This importance is related to subsistence and sustenance fishing, but in the bigger picture also represents a relationship, a way of life and a culture spanning tens of thousands of years. Water is an essential part of First Nations culture and teachings, just as fish as a clan animal and as food are an essential part of First Nations culture and teachings. The Federal Government is aware of the importance of water, fish and fish habitat to First Nations, making the lack of consideration for the role of First Nations in the process of changing the Act negligent.

Aside from the changes to the Act itself, the enhanced reliance on proponent self-assessment has several implications for Aboriginal and Treaty rights. From a legal standpoint, the duty to consult is that of the Crown (and the Crown relies on the responsible Federal or Provincial government authority to fulfill consultation) and the Crown can delegate procedural aspects of the duty to consult to a third-party (a proponent). In a proponent driven assessment process there is little to no onus on the proponent to engage in any type of consultation with First Nations regarding their project. Only in the case that a proponent actually applied through DFO for a FAA, would DFO then be required to consult with potentially impacted First Nations. The lack of regulatory oversight is problematic and leaves ample space for impacts to Aboriginal and Treaty Rights, as well as un-authorized, un-mitigated, un-monitored impacts to fish and fish habitat that are important to First Nations for any number or reasons.

The self-assessment guidance is void of any guidance that would prompt a proponent to engage with a First Nation, specifically regarding an Aboriginal fishery, or other information about a waterbody that may not be captured in the available scientific literature. In fact, the words First Nation, consultation, and duty to consult do not appear once within the self-assessment guidance, or the Fisheries Protection Policy Statement (2013). A proponent without any direction on how to determine if a waterbody or fish species is part of an Aboriginal fishery will seldom be able to

conclude this with accuracy. In areas where there is little scientific data regarding fish community/habitat use/health, how is a proponent supposed to accurately determine the potential impact? Again, these gaps and "under-the-radar" projects leave room for significant impacts to Aboriginal and Treaty Rights. These gaps amplify the common misconception prevalent in government, industry and the general public, that if waters (or land) are not being visibly, currently, intensively used by First Nations people than the land/water is not important to First Nations people, not under their stewardship, and degradation of that land/water doesn't impact Aboriginal and Treaty rights.

Compliance and Enforcement

Compliance to and enforcement of the Act is a major component hindering fish habitat protection, especially given the decrease in DFO oversight in projects that may adversely impact fish and their habitats coupled with the increase in proponent driven assessments, projects and implementation of mitigations.

Enforcement of the Act is carried out by Fishery Officers who work out of the "Conservation and Protection offices" of the DFO. There is only one (1) Conservation and Protection office in Ontario (and none in Manitoba or Saskatchewan). It seems implausible that with only one office operating out of Southern Ontario that enforcement of the Act in Ontario is effective. Continuous on the ground monitoring is essential to ensure that, not only authorized projects are being undertaken properly, but that self-assessed projects near water are being undertaken with proper precautions and during the proper timing windows. The reliance on proponent self-assessments calls for an increase in on-the ground enforcement to ensure that fish and fish habitat and being protected.

Given the lack of capacity within DFO, one very feasible and practical option would be to develop and implement a program that would enable (interested) First Nations to monitor projects within their Territories with the potential to have impacts on fish and fish habitat. This type of initiative would contribute to capacity within First Nations giving us more oversight and input into the projects occurring in their Territories and ensuring that Aboriginal and Treaty Rights are respected and upheld. This endeavor would require capacity funding/support from the Federal Government to recruit people in First Nations to carry out this important function. From our perspective, this type of program would be very beneficial. This program could be similar to the existing program administered under DFO, the "Aboriginal Guardian Program", where *certain* First Nations are able to submit to the Minister to designate band members as guardians. However, unlike the existing initiative, the scope must be much broader, with an opportunity for all First Nations to participate and build this type of capacity towards increasing their stewardship abilities in their communities.

Transparency

From the onset of the changes to the Act, a key issue has been the lack of transparency in the current process. First Nations, and the general public, need to be able to access the applications that are

submitted for Ministerial approval (FAA), and of those submitted which/how many are approved/declined and under what conditions. The following specific types of submissions related to the Act, must be available publically for review:

- All project proposals submitted to DFO for review (not just applications for authorization)
- All applications for authorization (FAA) submitted to DFO for review/approval
- All authorizations by the Minister under subsection 36 (deposit of deleterious substances)

Conclusion & Recommendations

MNCFN's review of the Act brings to light the concerning and potentially damaging impacts that the changes to the Act have had and will continue have on our waters, fish and fish habitat, our Aboriginal and Treaty Rights and our ability to fulfill our responsibility as stewards in our Territory.

Based on our review, MNCFN has following specific recommendations for the Standing Committee:

1. **Recommendation:** Lost habitat protections must be restored for all fish and their habitats, not just those associated with a commercial, recreational or Aboriginal fishery.

2. **Recommendation:** The Act must provide a definition of Aboriginal fisheries that includes those that are part of a subsistence (commercial) operation as part of the CRA definition (though reverted back to the HADD provision would be preferred).

3. **Recommendation:** The environmental assessment trigger associated with applications for authorization under section 35 and 36 of the Act must be restored.

4. **Recommendation:** Capacity within DFO must be restored in order to enhance regulatory oversight, and involvement projects near water (and by extension decrease reliance on proponent self-assessment).

5. **Recommendation:** A comprehensive database of projects near water must be developed and implemented in order to enhance DFO's ability to understand, assess and incorporate the potential for cumulative impacts into project reviews, advice and approvals.

6. **Recommendation:** A program that enables First Nations to provide monitoring, oversight and enforcement for projects near water in their Territories must be developed and implemented through DFO (this would also contribute to developing a comprehensive database of projects near water, especially those that are not vetted through DFO).

7. **Recommendation:** DFO must provide a clear statement regarding what DFO considers an impact to Aboriginal and Treaty Rights, relative to the Act and fish habitat protection provisions.

8. **Recommendation:** DFO must provide proponents (those engaged in "self-assessment") more information about Aboriginal and Treaty Rights and the importance of engaging with First Nations regarding their project.

9. **Recommendation:** DFO must create an (online) publically accessible library or registry for all projects submitted for review, applications for authorization under both section 35 and section 36 of the Act.

10. **Recommendation:** DFO must commit to engage and consult with First Nation in an in-depth and meaningful process regarding any future changes to the Act.

MNCFN appreciates the opportunity to provide our perspective, issues and concerns to the Standing Committee and the Department of Fisheries and Oceans. We hope that our contribution is incorporated in a meaningful way and will assist the Standing Committee in its report and recommendations to Parliament. We hope that our submission clearly signals our interest in on-going involvement in this process as it unfolds.

Respectfully,

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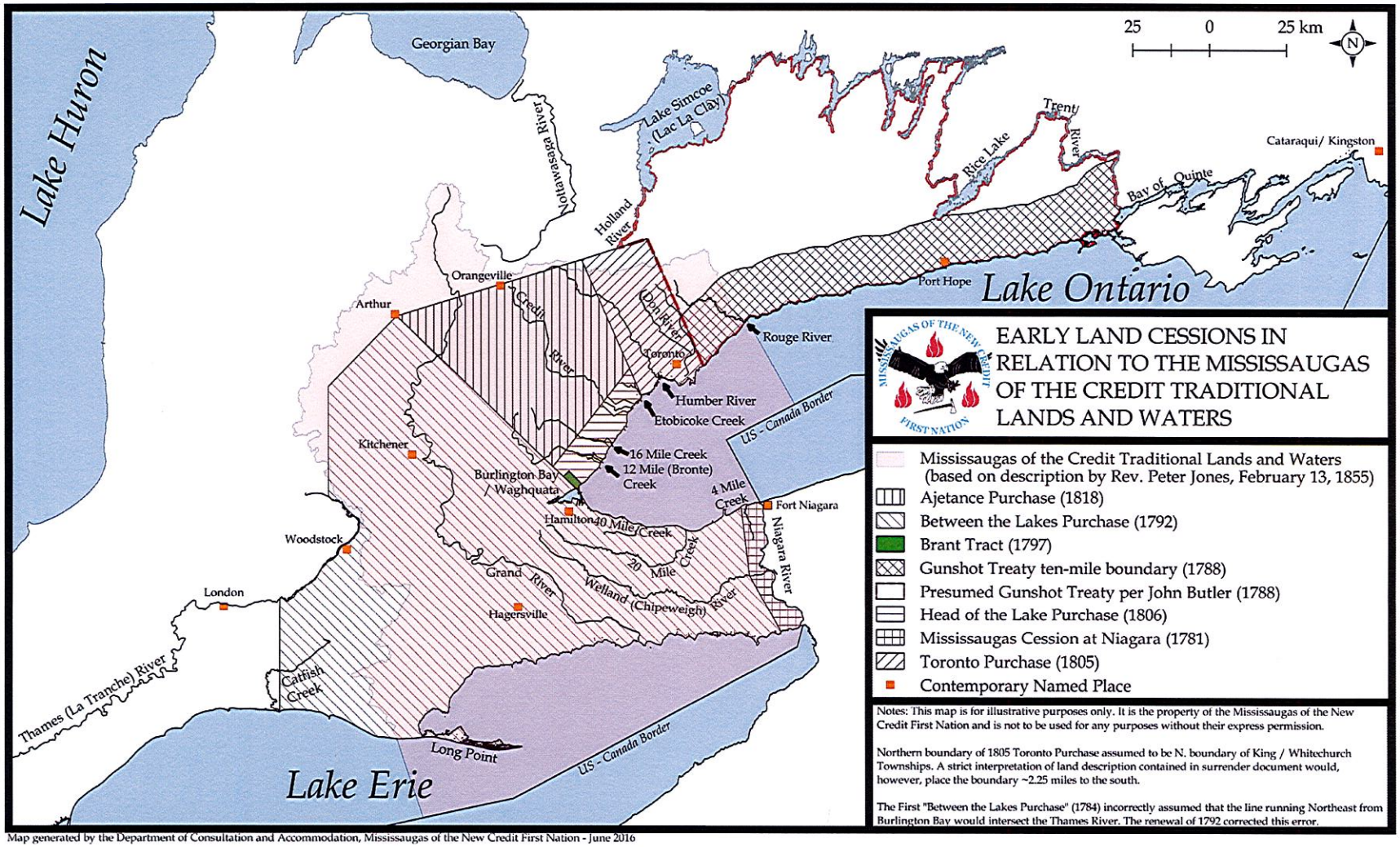
ATTACHMENT A: Map depicting the Mississuagas of the New Credit Territory Lands and Waters



Map generated by the Department of Consultation and Accommodation, Mississaugas of the New Credit First Nation - June 2016