



Tsilhqot'in National Government: Submission to the House of Commons Standing Committee on Fisheries and Oceans

Changes to the *Fisheries Act* and its Regulations

Submitted via Committee's Website
Standing Committee on Fisheries & Oceans
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Introduction

Tsilhqot'in Nation

The Tsilhqot'in Nation, or People of the River, have occupied our ancestral *nen* (land) since time immemorial. We have never ceded or surrendered our rights or title to our Territory. We depend on clean lakes and rivers that carry wild and stocked fish, and we have a sacred responsibility to protect our lands and waters for future generations. Our future is as firmly tied to the *nen* as our past. We will continue to sustain our communities from our *nen* and resources and in doing so ensure the survival of our culture and the Tsilhqot'in language.

The Tsilhqot'in have a deep ancestral connection to fisheries resources, including both anadromous and non-anadromous species. Salmon and trout in particular are important food resources that members continue to rely upon.

The Tsilhqot'in Nation is made up of six Tsilhqot'in communities: Xenigwet'in First Nations Government (Nemiah), Yunesit'in (Stone), Tl'esqox (Toosey Band), Tl'etinqox (Anaham), Tsi Del Del (Alexis Creek), and ?Esdilagh (Alexandria). Our ancestral *nen* (land) includes the *dzelh* (Coast mountains) and the ?Elhdaqox (Fraser River), in what is recognized now as the central interior of British Columbia (see Figure 1).



Figure 1: Approximate Tsilhqot'in Territory Map in Context of British Columbia

To this day, the Tsilhqot'in people have a strong traditional culture, including language. Many of our Elders do not speak English, and we continue our traditional practices of hunting and trapping, fishing for salmon, trout and other species, and gathering traditional foods, teas and medicines. Closely tied to these activities are a cultural education for our youth, spiritual

ceremonies, and sharing with others on the land, including our First Nation neighbours and non-First Nations. Special intact areas are vital to transmit our culture to future generations.

In the Chilcotin War of 1864, our War Chiefs stopped the construction of a road from Bute Inlet into our territory to facilitate the gold rush. They did so because of threats of small pox against our people and to protect our lands from incursion. Our Chiefs were arrested by the colonial government under false pretenses and subsequently tried and hanged. To this day, we carry this sacrifice close to our hearts, honouring the Chiefs that gave their lives to protect our lands and our Tsilhqot'in way of life. October 26, the day five of our Chiefs were wrongfully executed, marks Lhats'as'in Memorial Day, an important reminder for us to continue to be unwavering in our commitment to uphold our responsibility to our ancestors and to our future generations of Tsilhqot'in people.

Importance of Fisheries to Tsilhqot'in Rights and Values

Fishing is central to the Tsilhqot'in way of life and an inherent Aboriginal right protected by Section 35 of the *Constitution Act*. As a result, the Tsilhqot'in National Government ("**TNG**") has dedicated significant effort to obtain recognition from other levels of government, including the Department of Fisheries and Oceans ("**DFO**"), that the Tsilhqot'in must be part of the protection and management of fisheries and fish habitat in Tsilhqot'in Territory.

Tsilhqot'in traditional fishing practices continue to this day. Dip-netting and gaffing for salmon migrating up the Fraser and Chilcotin River systems, and fish traps and gill nets for lake fish, form the most common fishing practices. Anadromous species include: Sockeye, Chinook, Coho, and Pink salmon, and Steelhead. Non-anadromous species include: Lake trout, Rainbow trout, Suckers, Dolly Varden, Small Mouth Pike, Sturgeon and Bull trout, among others.

The 2014 Mount Polley tailings disaster negatively affected Tsilhqot'in fishing rights, with many families refusing to fish for salmon originating from the Fraser River system, due to the uncertainties related to the tissue safety after potential exposure to the tailings effluent. This had a direct impact on the food security and mental and social well-being of Tsilhqot'in members and affirmed the central importance of salmon fishing for our Nation's existence.

The Tsilhqot'in continue to seek resources and capacity to fully understand and address the ongoing impacts of the Mount Polley breach. It is very alarming and disappointing that until today, DFO has yet to meaningfully respond to this disaster in terms of downstream effects (physical and social), or issue any charges or fines against the actors involved in the breach. We address in more detail below our concerns related to the lack of resources dedicated to monitoring, compliance and enforcement.

Relationship with the Department of Fisheries and Oceans

Since 1989/90, the TNG has had an Aboriginal Fisheries Strategy ("**AFS**") agreement in place with DFO in a co-management setting. Under this agreement, a work plan is followed that both DFO and the TNG Chiefs have negotiated. All work plans within the agreement are under the direction of the Tsilhqot'in Chiefs.

The Fishery Program runs throughout the year, with most field projects running in conjunction with the annual salmon run. There are, on average, seven projects throughout the year, employing approximately thirty individuals. The objective of the Tsilhqot'in Fisheries Department is to work alongside DFO regarding harvesting, monitoring, conserving and protecting the salmon stocks passing through the Tsilhqot'in Territory. The Fisheries Department also helps

monitor the main Tsilhqot'in fishing sites (e.g. Farwell Canyon) during the salmon harvesting season to ensure safety and to assist in enumeration of fish harvests.

Despite many ongoing challenges, some of which we address below, we are also proud of our role in ensuring that the Chilko sockeye salmon run is the strongest sockeye system in the Fraser watershed. The Chilko returns often represent more than 50% of the entire Fraser River sockeye.

One of the biggest challenges is moving towards a true co-governance model using consent-based decision-making. This is particularly important given that the Tsilhqot'in Nation now has court declared title lands to a portion of our traditional territory, following the historic Supreme Court of Canada declaration of June 26, 2014, as shown in Figure 2. Portions of the title lands encompass important salmon fishing sites, and rearing habitat.

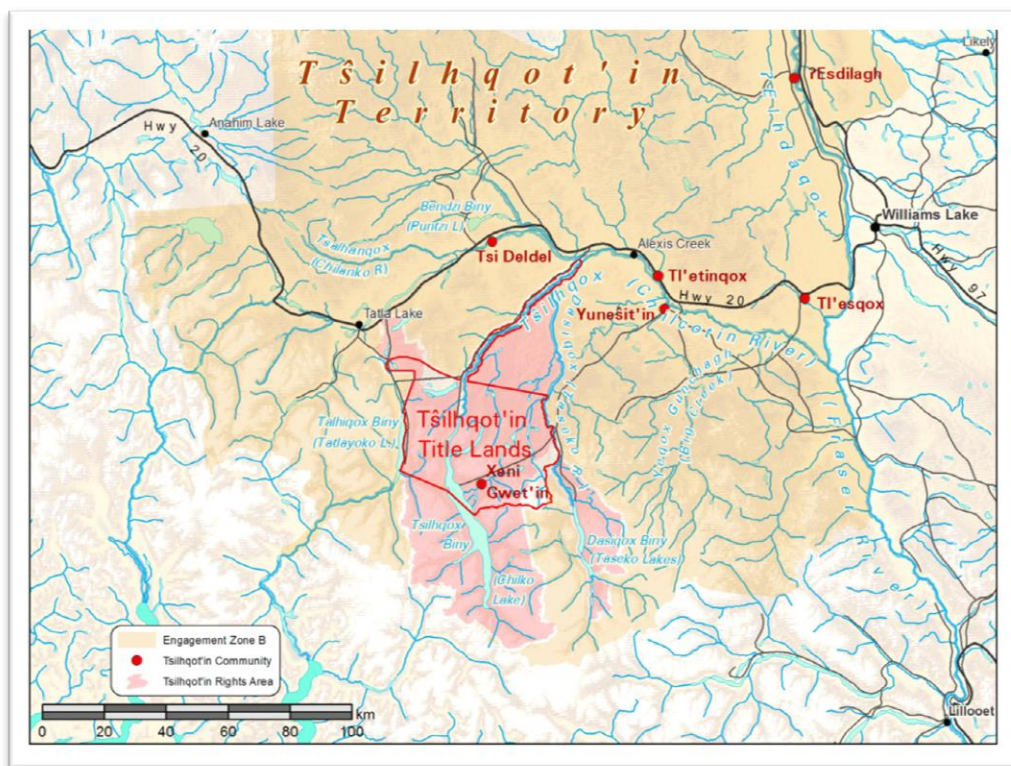


Figure 2: Tsilhqot'in Communities and Declared Title Lands

Tsilhqot'in Title Lands and Fisheries

There are a number of issues and concerns that have arisen since the Supreme Court title declaration, including the fact that DFO operates a salmon enumeration camp on title lands without an agreement with the Tsilhqot'in Nation. The title declaration is therefore a wake-up call for a new approach throughout Tsilhqot'in Territory, one based on co-governance models that recognize the Tsilhqot'in Nation as a third order of government with inherent and proven rights and interests, and that adopts free, prior and informed consent as the new standard for decision-making. The forthcoming changes to the *Fisheries Act* therefore represent an opportunity to ensure legislative flexibility that permit and encourage innovative co-governance and shared decision-making arrangements related to fisheries management and the protection of fish habitat.

Impacts of 2012 Changes to the *Fisheries Act*

Besides an active role in fisheries management in our Territory, the Tsilhqot'in Nation has also been subject to two recent environmental assessments ("EA") for a major mine proposal, the "Prosperity" and revised "New Prosperity" gold-copper mine. Both reviews led to federal rejection of the projects. In the first review (2009-10), the original *Canadian Environmental Assessment Act* ("CEAA") and *Fisheries Act* applied. In the second review, the EA began under the original CEAA, but was subject to a mid-review switch to *CEAA 2012*, and the revised *Fisheries Act*. The Tsilhqot'in Nation is therefore in a unique position to comment on the changes and deterioration in protections caused by the 2012/13 legislation.

Most importantly, the 2012/13 "watering down" of the *Fisheries Act* caused much alarm in Tsilhqot'in Territory. We viewed those changes as a direct threat to our Aboriginal rights and a barrier to our ability to raise concerns and object to major projects proposed in our Territory. Only through much hardship and work on the part of the Tsilhqot'in Nation was it made clear that the revised New Prosperity Mine posed the same unacceptable risks and impacts as the original proposal. During these processes, we observed a significant deterioration in the levels of attention and funding available for environmental assessment, and in general, fisheries management. This needs to change.

We also observed a troubling trend that the responsibility now lay with the First Nation to prove that we have a "fishery" according to the revised *Fisheries Act*, in order to be afforded the minimal and unacceptably weak protections available. The removal of prohibitions for "harmful alteration, disruption or destruction of fish habitat" ("HADD") directly affected us, and those fundamentally important protections need to be reinstated. We discuss more on that below.

Advancing the Nation-to-Nation Relationship

The Liberal Party of Canada has committed to renewing the Nation-to-Nation relationship with Canada's Indigenous peoples based on "recognition of rights, respect, co-operation, and partnership."¹ However, the current legislative and regulatory framework that excludes Indigenous laws, knowledge, and governance is not equipped to advance these commitments.

Instead, evolving governance frameworks must consider both the interests and resources of First Nations to define both their range of participation (e.g. from observer to partner) and their assumption of responsibilities (e.g. from delegation of non-critical responsibilities to co-governance) in managing fish and fish habitat. These arrangements, formalized in partnership with Indigenous peoples, must allow for and promote the flexibility to meet the unique needs and interests of Canada's Indigenous peoples.

Transitioning towards consent-based and shared decision-making processes are necessary not only to reconcile pre-existing sovereignty and First Nations jurisdictional authority over lands and resources but also for building more equitable and effective means for protecting the long-term sustainability of fish, fish habitat and fisheries. There is a reason the Chilko sockeye stock remains the strongest on the Fraser: because the Tsilhqot'in promote conservation through our

¹ Rt. Hon. Justin Trudeau, Letter to Ms. Bennett re: "Minister of Indigenous and Northern Affairs Mandate Letter" (November 2015),

traditional practice of selective dip-net fishing and we have gone so far and sacrificed so much to protect this vital habitat.

Advancing new models of co-management will require adequate resources for First Nations to participate in all stages from negotiation and engagement to implementation. First Nations are in a unique position to accept greater management responsibilities that reflect our values and perspectives. However, DFO must also be ready for this change, as it requires leadership in Ottawa and across all levels of operations. The capacity limitations of DFO must also be addressed to include adequate budgets for the important work needed to restore and enhance our already depleted fisheries and fish habitat.

We therefore call on a change in priority-setting at DFO, one that elevates relationships with First Nations, and that re-establishes fish and their habitat as the shared value that binds us all. This could begin with setting out a purpose in the revised *Fisheries Act* that includes the principles outlined here, and that requires all decisions, discretionary or otherwise, to provide for the sustainability and ongoing productivity of fish and fish habitat.

Comments on Legislative and Regulatory Framework

Restore and Build on HADD Standard

The wide sweeping changes introduced by the Omnibus Bill C-38 significantly weakened the protection for fish and fish habitat. Sections 32 and 35(1)² of the *Fisheries Act* (1985) prohibited destroying fish and damaging habitat, but were replaced, in Bill C-38, with a prohibition against “serious harm to fish.”³

The definition of “serious harm,” restricts the scope of impacts to consider only “permanent” alteration or destruction of habitat. This clause creates uncertainty in both defining and evaluating “permanent alteration or destruction of fish habitat”. Restoring Sections 32 and 35 from the previous *Fisheries Act* is therefore a starting place for everyone.

Inadequate Definition of “Fisheries”

The 2012/13 changes limited the Act to only protect fish and fish habitat that contribute to commercial, recreation or Aboriginal fisheries. This is far too narrow of an application. Protection cannot apply to this narrowly defined range of human “use” but instead must be expanded to protect fish and fish habitat that contribute to healthy, productive and functioning ecosystems.

More specifically, Indigenous peoples have identified a broader scope of rights and responsibilities than defined by the Act, including⁴:

- A responsibility to protect, conserve, and sustain the fishery;
- a responsibility to other Aboriginal 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.

² Section 32 of the *Fisheries Act* pre-2012 states “No person shall kill fish by any means other than fishing.” And Section 35(1) states that “No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat. (HADD).”

³ Section 2 defines “serious harm” as “death of fish or any permanent alteration to, or destruction of, fish habitat.”

⁴ Cohen Commission Report, *supra* Note 4, Volume 1, at Chapter 2, p. 22.

Unless deep and further consultations with and consent from the Tsilhqot'in Nation to address the inadequate definitions of "aboriginal fisheries" in the revised 2012/13 *Fisheries Act*, we object to there being any definition in the *Act*.

Restore Environmental Assessment Triggers

One of the most critical negative effects of the revisions in 2012/13 was the loss of environmental assessment triggers. These triggers which worked in unison with the *Canadian Environmental Assessment Act* must urgently be restored.

Review and Update MMER

The Tsilhqot'in Nation also has direct experience dealing with the *Metal Mining Effluent Regulations* ("MMER"), including discharge of mine effluent from the Gibraltar Mine into the Fraser River 4km from the main Indian Reserve of the ?Esdilagh First Nation, as well as the proposed use of "Schedule 2" to re-classify Teztan Biny (Fish Lake) to be turned into a tailings impoundment.

In both cases, DFO did not have a meaningful framework to consult and engage the Tsilhqot'in Nation. In the case of Gibraltar Mine, that dereliction of the honour of the Crown continues. DFO is absent when it comes to monitoring, enforcement and addressing impacts of the discharge on Aboriginal fishing rights of ?Esdilagh and other Tsilhqot'in communities. A review of the MMER and their application is therefore needed to accompany the review of the *Fisheries Act* itself.

Expanding Scope Considered through Ministerial Authorizations

Under Section 35(2), a Ministerial Authorization may be issued for a specific project that contravenes the provisions prohibiting serious harm to fish. The discretionary power inherent in Ministerial Authorizations is far too broad, and the considerations required to be taken into account far too narrow.⁵ Besides limiting the scope of discretion afforded to the Minister through a consent-based co-governance framework, we submit that Fisheries Act Authorizations (FAA) should be carried out within a:

- Rights-based evaluation framework that includes First Nations in the decision
- Cumulative effects and eco-system based approach that considers contribution of the fish to the health and productivity of the ecosystem more broadly (and vice-versa)

In order to establish how such evaluations occur, we submit that the following steps are still required with the Tsilhqot'in Nation:

- Develop a framework to include Tsilhqot'in law related to fish and fish habitat protection;
- Jointly define fisheries management objectives for distinct spawning grounds and other fish habitat in Tsilhqot'in territory; and,
- Support the identification of culturally appropriate measures and standards to avoid, mitigate or offset serious harm to fish.

Without due consideration to broader principles of Indigenous rights and ecological sustainability, discretionary authority can undermine the long-term goals of conservation and protection of the fish and fish habitat. If the Minister evaluates a decision to consider "only fish that are part of a fishery, then the careful balance between conservation and fisheries would tip toward fisheries at the expense of conservation."⁶ This is not an acceptable outcome.

⁵ Section 6 outlines four factors that must be considered by the Minister before making a decision.

⁶ Cohen Commission Report, *supra* Note 4, Volume 1, at Chapter 4, pp. 80-81.

Regulatory Framework to Include Indigenous Nations

The Tsilhqot'in National Government must be recognized as a third order of government with both inherent rights and interests and jurisdictional authority over title lands and resources. As such, the TNG expects to participate in a range of regulatory areas identified in Section 43. Most notably, government-to-government agreements – related to the management of fisheries resources – must specify inclusion of agreements with Provinces, Territories, *and* First Nations.

In addition, greater respect and accommodation should be given to shared decision-making with TNG. With both local and specialized knowledge of fish and fish habitat, Tsilhqot'in peoples contribute valuable insight into the Section 35(2) decision-making process. A formalized process with TNG is essential to facilitate the integration of our Indigenous legal orders and inclusion of our Indigenous knowledge into the FAA. Without this, uncertainty will continue.

Finally, regulatory decisions are anticipated to be executed in a “timely manner.” For decisions that have the potential to adversely impact TNG's rights and interests, it is critical that TNG be engaged well in advance of a decision, co-develop and agree on the engagement process, and be adequately resourced to engage and/or participate in the decision-making process.

Emphasize Principles of Sustainability in the *Fisheries Act*

The goal of the Fisheries Protection Policy is to “provide for the sustainability and ongoing productivity of commercial, recreational and Aboriginal fisheries.” This scope is again far too narrow and needs to be expanded to provide for the sustainability and ecological integrity of the aquatic ecosystem in general. As a starting place, the Policies of “No Net Loss” and “Net Gain” must be restored. In addition, a modern set of safeguards are needed that can be viewed as “Principles of Sustainability”. They should emphasize:

- Conservation and protection of fish and fish habitat
- Restoration and/or enhancement of degraded fish habitat
- Restoration and/or rebuilding depleted fish stocks
- Ecosystem-based management approach
- Adopting the precautionary principle particularly when managing risk and uncertainty
- Application of evidence-based decision-making that includes best available information from science and traditional knowledge, with equal weight afforded to both
- Respect Aboriginal rights and interests related to fish and fish management

Building on these principles of sustainability, however, will further require:

- 1) Solid baseline knowledge and information of local and historic conditions;
- 2) Ongoing monitoring;
- 3) Continued engagement with First Nations;
- 4) Adequate enforcement capabilities with commensurate authority; and
- 5) Sufficient resources for First Nations and DFO to carry out these activities.

Comments on Administration and Process

Cultivate Responsive Administration

The changes to the *Fisheries Act* have not only impacted the state of fish and fish habitat. The changes have also impacted attitudes and culture at DFO. In advancing a new legislative and regulatory framework in partnership with First Nations, the Federal Government must cultivate an environment at the Department that:

- Respects Indigenous rights and promotes partnership with First Nations

- Encourages evidence-based decisions
- Resource the capacity to actually monitor, enforce and manage fisheries and fish habitat
- Prioritizes habitat, including funding for restoration and enhancement programs

Constrained Process Limits Participation

For TNG to meaningfully engage in the systematic review of the *Fisheries Act*, the administrative delays experienced to-date must not limit the time made available for First Nations to respond. TNG has an interest and a responsibility to ensure that the interests and concerns of the Tsilhqot'in peoples are considered and addressed. Representing these interests demands a systematic and comprehensive approach to capture the values, interests and concerns of TNG's communities.

Further, building an enduring relationship with Indigenous peoples is more than sending a notice to participate and receiving a response. Consultation and engagement present an immediate opportunity to advance shared interests in reconciliation. The two-week notice of funding and the deadline to submit these comments have placed significant pressures on us, and have negatively impact this consultation process.

Recommendations

1. Advance the “Nation-to-Nation” Relationship with First Nations

- Broad recognition of Indigenous rights in the *Act*
- Move beyond “delegation” to work with First Nations as partners in fisheries management
- Recognize First Nations right to all forms of commercial trade/barter opportunities
- Include guiding principles of reconciliation that allow for and promote consent-based shared decision-making processes (e.g. co-management/co-governance) with First Nations (e.g. not just Provinces) and that have the flexibility to reconcile pre-existing sovereignty and First Nations' jurisdictional authority
- Expand factors considered in decision-making to include principles of sustainability (including ecological integrity and cultural sustainability), Indigenous law, protection of inherent Aboriginal rights, and the principles found in the *United Nations Declaration of the Rights of Indigenous Peoples*
- Ensure meaningful consultation, accommodation and a consent-seeking process with First Nations to build new regulations, such as the seriously deficient *Metal Mining Effluent Regulations* and the associated *Schedule 2*

2. Restore and build on HADD standard

- Restore protection for all native fish that are part of First Nations food, social, ceremonial, and commercial needs, not just those that are part of a “fishery”
- Restore former Section 32 prohibiting destruction of fish
- Restore the HADD prohibition to the *Act* (Section 35), but retain inclusion of “activity” from the 2012/13 changes
- Remove phrase “that are part of a commercial, recreational or Aboriginal fisheries” introduced in the 2012/13 changes
- Repeal definition of “Aboriginal fishery” along with “commercial” and “recreational”
- Introduce measures to protect the health and fitness of fish in addition to prohibiting destroying fish

3. Restore Environmental Assessment triggers

- Re-establish Section 32, 35 and 36 authorizations as EA triggers

4. Reduce discretionary power and expand scope of Ministerial Consideration

- Reduce Ministerial discretion through establishment of shared decision-making
- Broaden the Minister's mandate to consider long-term conservation and protection of fish and fish habitat when evaluating projects that contravene the Fisheries Act
- Limit the discretionary nature of the Ministerial Authorization and ensure that the remaining discretion is not structured in a way that infringes Aboriginal rights

5. Emphasize principles of sustainability

- Adopt key sustainability principles
- Protect ecological integrity of fish habitat
- Respect Indigenous laws regarding sustainability

6. Prioritize the Protection of Fish and Fish Habitat

- Renew DFO's commitment to "No Net Loss" *and* "Net Gain", with a renewed focus, effort and resources on enhancement of fish habitat
- Meaningfully resource the monitoring, compliance and enforcement components of DFO, and expand such activities through agreements and collaboration with First Nations
- Address known regulatory gaps promptly to ensure that DFO, in collaboration with First Nations, are capable of responding to all activities that are harmful to fish or fish habitat and are able to actually determine effects (e.g. ongoing collection of baseline data that allows determination of changes due to activities)

7. Additional time to allow for in-depth review

- Ensure sufficient time and resources are made available to enable timely and meaningful engagement and participation of TNG

Concluding Remarks

The Tsilhqot'in National Government shares the federal government's objectives of improving the legislative and regulatory framework to protect fish and fish habitat. These objectives can only be realized with the full involvement of our Nations and communities.

Given that 2016 was the lowest Fraser sockeye return in 100 years, we have reason to be concerned. Unfortunately this sad state of affairs has happened under DFO's watch. Despite the gloomy picture, an approach that makes First Nations partners in decision-making *is* the means to alter the trend.

Thank you for your attention to these issues, and we remain open to further questions or engagement with the Committee should you wish to clarify any our recommendations.