Assembly of First Nations

Submission on Bill C-55

An Act to amend the Oceans Act

and the Canada Petroleum Resources Act

to the

Senate Standing Committee on Fisheries and Oceans
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Background
The Assembly of First Nations (AFN) is the national, political organization of First Nations governments and their citizens, including those living on and off reserve. Every Chief in Canada is entitled to be a member of the AFN, and the National Chief is elected by the Chiefs in Canada, who in turn are elected by their citizens. The AFN has 634 member nations within its assembly. The role and function of the AFN is to serve as a nationally delegated forum for determining and harmonizing effective, collective and co-operative measures on any subject matter that the First Nations delegate for review, study, response or action, and to advance the aspirations of First Nations.

The AFN acts as a key institution in supporting First Nations by coordinating, facilitating, and advocating for policy change, while the leaders of this change are the First Nations themselves. Chiefs, and the First Nations they represent, must be an integral part of meeting the challenge of sustainable, transformative policy change.

The AFN is mandated by Resolution 34/2017, First Nations Engagement and Consultation on Bill C-55 Oceans Act and Marine Protected Areas, Resolution 74/2017, Fisheries Legislative Amendments and the Ten Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples, and Resolution 5/2018, First Nations Oceans Working Group and the Oceans Act and Marine Protected Areas. These mandates direct the AFN to advocate where the rights of First Nations may be impacted or infringed upon; in particular, Canada’s legislation must recognize First Nations’ inherent and everlasting responsibilities to their traditional territories.

Context
This submission will consider what the legislation actually says and requires, not what the current government describes as the "spirit" of the Act which it will implement through policy. In its current form, the Act relies on a broad number of discretionary powers. For First Nations, laws must be written in anticipation of future governments that may misunderstand our rights, jurisdiction, and authority. In this context, legislation must constrain and/or require those governments to respect what has been written in the legislation.

The AFN acknowledges the importance of work in the legislative amendments phase of the Oceans Act; however, the implication of getting it right to create the space necessary to properly address First Nations rights in accompanying regulations and policies to the Act is of the utmost importance.
Jurisdiction
First Nations are rights holders, who hold inherent and constitutionally-protected rights set out in their own governance and legal systems, as well as under Section 35 of the Constitution. In practice, this means that First Nations rights cannot be undermined by colonial interpretation of their rights (i.e. s.35). Instead, First Nations must first interpret and describe their inherent rights, grounded in Indigenous law, Indigenous legal traditions, and customary law. These legal orders, which lay the foundation for First Nations’ concepts of self-determination and sovereignty, are essential to starting true “Nation-to-Nation” dialogues and expressing the respect for our rights and title.

Incorporation of or reference to the United Nations Declaration on the Rights of Indigenous Peoples means that the principles and obligations within should be woven throughout the fabric of the Acts (Bill C-55) and accompanying regulations and policy: from recognizing Indigenous peoples as another order of government, to including Indigenous peoples in decision-making in accordance with their own laws and customs, to imposing a requirement that Indigenous peoples’ consent must be sought before a designation of an marine protected area that could impact s.35 rights.

An affirmation of the recognition and affirmation of inherent Indigenous jurisdiction over Indigenous marine spaces opens up the opportunity to consider additional processes such as Indigenous led or co-governed Indigenous Protected and Conserved Marine Areas.

Indigenous Protected and Conserved Marine Areas
The inclusion of an Indigenous-led process for marine protected areas or Indigenous Protected and Conserved Marine Area (IPCMA) is an opportunity to designate marine areas in a manner that addresses conservation, protection while encouraging sustainable use of marine areas that respects the Indigenous governance and use of the marine area. IPCMA shall include a process similar to that demonstrated in existing terrestrial IPCA. These may include Indigenous-led IPCMA and a process where First Nations can suggest priority areas for protection and consideration. A key flaw in the Marine Protected Areas (MPA) process, as presented in the Bill, is the lack of recognition for Indigenous governments to develop, establish, and manage marine areas. Indigenous-led or joint processes that include Indigenous governments and representatives may mitigate flawed consultation processes and allow for opportunities of co-governance of MPAs while respecting investment in the capacity development of Indigenous People.
Interim Protection Marine Protected Areas
The “freeze the footprint” approach, proposed as part of Interim Protection Marine Areas (Interim Protection MPA) as outlined in Bill C-55, would allow for ongoing activities to continue while prohibiting new activities and added restrictions for ongoing activities. The implication of this approach may significantly or adversely impact First Nations fishing activities. The approach would freeze the First Nations fishing activity at the level documented at the Interim Protected MPA designation stage.

Bill C-55 can impact First Nations inherent rights and their ability to expand on fishing activities in coastal waters. For those reasons, the AFN recommends the approach to Interim Protection MPAs, including the obligation to protect rights of the Indigenous peoples of Canada recognized and affirmed by Section 35 of the Constitution Act, 1982.

Designation
While there is value in Ministerial flexibility for the designation of MPAs, First Nations are concerned that the extremely broad discretion of the Minister, may enable the avoidance of the protection of inherent and constitutionally protected rights.

In order to ensure protection for First Nations, laws must be written with a view towards potential future governments that may misunderstand to our rights, jurisdiction, and authority. In this context, legislation must constrain and/or require those governments to respect what has been written in the legislation.

The draft Bill does not provide for any requirement to consider Indigenous Knowledge and s.35 rights. In addition to the concerns about the lack of protection for s.35 rights, generally in Bill C-55, the proposed Bill does not require to consider Indigenous Knowledge, or the protection of s.35 rights when making designations. This is very problematic, especially given the breadth of some of the proposed regulation and order-making provisions. The AFN proposes the inclusion of Indigenous Knowledge in the:

Proposed Amendment

Designation of Marine Protected Area – Minister’s order
(2) The Minister shall give consideration of designated Indigenous Protected and Conserved Marine Areas.
(3) The Minister shall give consideration to areas of protection and conservation as identified by Indigenous governments or representatives.
Monitoring and Surveillance
The monitoring and surveillance of MPA/IPCMAs ought to include Indigenous peoples or Indigenous guardians programs, however, the inclusion of explicit language identifying a role for Indigenous people in the co-governance of an MPA was rejected at the Standing Committee of Fisheries and Oceans.

Proposed Amendment

Administration and Enforcement

39 (1) (a) Enforcement shall include Indigenous people (or Indigenous Guardians programs) in Indigenous territorial marine areas.