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NOVA SCOTIA AQUACULTURE REVIEW BOARD

IN THE MATTER OF: *Fisheries and Coastal Resources Act*, SNS 1996, c 25

- and -

IN THE MATTER OF: An Application by KELLY COVE SALMON LTD for a boundary amendment and expansion for the cultivation of Atlantic salmon (*Salmo salar*) - AQ#1205x, in Liverpool Bay, Queens County (the "Application")

BETWEEN:

Kelly Cove Salmon Ltd. (KCS)

APPLICANT

and

Minister of Nova Scotia Department of Fisheries and Aquaculture (DFA)

PARTY

and

Kwilmu'kw Maw-klusuaqn Negotiation Office (KMKNO)

22 Fishermen of Liverpool Bay

Region of Queens Municipality (RQM)

Protect Liverpool Bay Association (PLBA)

INTERVENORS

CLOSING SUBMISSION ON BEHALF OF
KWILMU'KW MAW-KLUSUAQN

November 28, 2025

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KMK submits the following in respect of Kelly Cove Salmon's (KCS) proposed lease boundary amendment and expansion at its Coffin Island site in Liverpool Bay (the Application). In doing so, we make reference to several of the factors set out in section 3 of the *Aquaculture Licence and Lease Regulations*, which the Aquaculture Review Board (ARB) must take into consideration when rendering its decision.

Factor at s. 3(a): “the optimum use of marine resources”

When addressing this factor in its closing submissions dated November 14, 2025, counsel for KCS measured “optimum” according to the kilograms of food that could be derived from that area of water.

From our perspective, “optimum” should be measured against a different standard altogether. An optimum use of marine resources is one that promotes reconciliation with First Nations and upholds the Honour of the Crown.

As noted by the Supreme Court of Canada in *Clyde River*:

[T]he duty to consult, being a constitutional imperative, gives rise to a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest (para. 70). A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest (ibid.).¹

The same sentiment was expressed by the Supreme Court in *Carrier Sekani*:

Beyond its general power to consider questions of law, the factors the Commission is required to consider under s. 71 of the Utilities Commission Act, while focused mainly on economic issues, are broad enough to include the issue of Crown consultation with Aboriginal groups. At the time, s. 71(2)(e) required the Commission to consider “any other factor that the commission considers relevant to the public interest”. The constitutional dimension of the duty to consult gives rise to a special public interest, surpassing the dominantly economic focus of the consultation under the Utilities Commission Act. As Donald J.A. asked, “How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest?” (para. 42).²

When addressing the factor in s. 3(a), one may ask, *for whom* is the use of marine resources meant to be optimized? We submit that the term “optimum” should be interpreted as optimal *vis a vis* the public interest.

¹ *Clyde River (Hamlet) v. Petroleum Geo Services Inc.*, [2017] 1 S.C.R. 1069 at 40.

² *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650 at 70.

Thus, evaluating “optimum” should not be done without first and foremost considering the adverse impacts of any potential decision on established and asserted Aboriginal and treaty rights, including through a piecemeal erosion of the resources and geography on which they depend. In this case, as discussed in our submissions dated November 21, 2025, the rights at issue include an Aboriginal right to fish for food, social and ceremonial purposes and a treaty right to harvest fish for the purpose of trade to obtain a moderate livelihood. As directed by the Supreme Court, the duty to consult is a constitutional imperative that surpasses the dominantly economic focus of many tribunals. Using these guideposts, for the reasons set out below and in our earlier submissions, the proposed Application is not the optimum use of marine resources.

Factor at s. 3(b): “the contribution of the proposed operation to community and Provincial economic development”

With respect to several of the factors set out in section 3, we note that in its closing submissions KCS erroneously focused its analysis on the qualities or contributions of the *existing* facility as opposed to the *proposed* Application. For example, in its discussion of the factor set out in s. 3(b), counsel for KCS only alluded to economic contributions of the existing operation. There was no reference made to any evidence of economic contributions in connection with the proposed Application. Moreover, the majority of this section highlighted economic contributions that were not even related to the existing site, such as generalized investments throughout Atlantic Canada by KCS’ parent company, Cooke Aquaculture Inc. Their concluding sentence on this factor stated that “[t]he evidence demonstrates that the Coffin Island Farm positively impacts the economic development of RQM and the Province, including the tourism industry.”³ This is not the relevant test. The factor in s. 3(b) specifically inquires into the economic contribution of the “proposed operation.”

Factor at s. 3(c): “fishery activities in the public waters surrounding the proposed aquacultural operation”

Similarly, with respect to the factor set out in s. 3(c), counsel for KCS claimed that “[t]he Coffin Island Farm has successfully operated in Liverpool Bay in tandem with other fisheries including, but

³ Closing Submissions on behalf of Kelly Cove Salmon Ltd. dated November 14, 2025 at para. 35.

not limited to, herring, mackerel, lobster and First Nation fisheries."⁴ Again, there is a disconnect between the regulatory factor which focuses on the impact of the *proposed* operation on fishery activities, and KCS' argument which focused on the existing fishery.

The impact of the existing farm on First Nations' fisheries was neither explored at the hearing nor through the Indigenous consultation exercise. This type of analysis would have required a comparison of the First Nations' exercise of fishing rights today versus prior to the development of the current farm. Such evidence is not available. It was not within scope of the consultation exercise to investigate the impacts of the existing farm. The Supreme Court of Canada has held that the duty to consult is only with respect to potential impacts of the decision *currently* under contemplation, and not those of related developments that occurred in the past.⁵ Therefore, the Indigenous consultation exercise was required to remain focused on the potential impacts of the proposed Application and not of the existing farm.

Accordingly, the fact that First Nations continue to fish in Liverpool Bay does not suggest that their fishing rights have not been adversely impacted by the existing operation. Nor does it suggest their fishing rights will not be adversely impacted by the *proposed* expansion, which is the relevant regulatory factor. To the contrary, there is evidence to suggest that the proposed Application *does* have the potential to adversely impact the Mi'kmaq's fishing, including through its displacement. Furthermore, there is a potential for the proposed operation to have a different or greater impact than the existing farm, through its cumulative effects and by occupying larger areas of inshore fishing along Coffin Island.

Counsel for KCS spoke about the coexistence of the existing farm with other fisheries in Liverpool Bay. However, there is evidence to support the proposition that Indigenous (and other) fisheries will be displaced by the *proposed* Application:

- In its Science Report, DFO noted: "[t]he continued presence and expansion of site 1205 will displace fisheries that might have otherwise occurred in the current lease or do occur within the expanded lease area."⁶

⁴ *Ibid.* at para. 36.

⁵ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650 at 49.

⁶ Report on Outcomes of Consultation, Exhibit 4 at pg. 257.

- At the consultation meetings between the Mi'kmaq and the Department of Fisheries and Aquaculture (DFA), the First Nation representatives raised this issue on numerous occasions:
 - “Acadia underscored their perspective that the proposed expansion will impede the community’s FSC [Food, Social and Ceremonial] and moderate livelihood fisheries ‘without question’.”⁷
 - “KMKNO expressed concern that the company is taking up such important real estate that could be used to fish.”⁸
 - “Acadia repeated serious concern for the displacement of fishers given the large project area which almost takes up the whole coastline of Coffin Island.”⁹
 - “Acadia noted there is a food fishery in the area around Coffin Island and that commercial fisheries are located there as well.”¹⁰

In their closing submission, counsel for KCS added: “*DFO concluded that the lease area was relatively small to the fishing grounds of the other species in Liverpool Bay.*”¹¹ It is worth noting that the concept of “fishing grounds” pertains not only to the presence of the species being fished, but access to / availability of areas in which to harvest that species. For the Mi'kmaq, the available areas are greatly constrained by safety considerations and the need to remain close to shore. At the consultation meetings, the issue of safety and small boat sizes was discussed:

- “Acadia noted that the project as proposed would be taking away some areas where fishing could occur safely.”¹²
- “Acadia further explained that food fishery boats are small vessels with only 1 or 2 people on board.”¹³
- “Acadia further explained that many band members engage in lobster fishing in area - for food fishing (3 tags each) plus moderate livelihood which is growing as it becomes sanctioned by

⁷ Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 154, pdf pg. 159.

⁸ *Ibid.* at pg. 195, pdf pg. 200.

⁹ *Ibid.* at pg. 196, pdf pg. 201.

¹⁰ *Ibid.*

¹¹ Closing Submissions on behalf of Kelly Cove Salmon Ltd. dated November 14, 2025 at para. 9.

¹² Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 154, pdf pg. 159.

¹³ *Ibid.*

DFO. Acadia noted that the area is very accessible and close to the shore for the small food fishery vessels.”¹⁴

This point was also touched upon by Ms. Charmaine Stevens in her affidavit:

As I stated in the meetings, our members fishing for food are in small outboard boats and stay close to shore. They have three traps each and it would make no sense for them to go further from shore. The further away they fish from shore, the higher the fuel costs and increased risk for safety...Many of our women and younger fishermen are often alone in their boats and stay close to shore with someone watching from the shore for safety reasons. For example, non-Indigenous spouses/partners/parents are not permitted to assist and therefore for some it is necessary for them to go out in the boats alone. The proposed sites are significant and take up significant space at the mouth of the harbour and the area between the shore and Coffin Island. Based on my experience and knowledge of Acadia First Nation's fishing practices through my time as Councillor, and specifically as Councillor holding the fishing portfolio, it is my opinion that the new areas proposed in the applications along with the location of the existing operation are prime areas for those involved in food fishing.¹⁵

As noted in KMK's submissions dated November 21, 2025, DFA chose not to seek Fisheries and Oceans Canada's (DFO) feedback regarding these access and safety concerns being raised by the Mi'kmaq in the course of consultation. Had DFA done so, DFO may have reached a different conclusion regarding the size of the lease area relative to the relevant fishing grounds.

This concern also relates to the factor at s. 3(f): the public right of navigation (discussed further below).

In their closing submission, counsel for KCS added the claim that: “[t]here is no evidence that the Farm has displaced or negatively affected the lobster population or industry in Liverpool Bay, or the elver population or industry in the Mersey River.”¹⁶ Again, this claim pertains to the existing farm, not the proposed Application. As to the elver population, there is reason to suspect the existing farm *has* led to displacements of, or negative effects on, eel and elver due to the fact that it overlaps with glass eel fishing and nursery areas. As noted by DFO:

There are Food, Social, and Ceremonial (FSC) fisheries for Lobster and Eel in Liverpool Bay (DFO Resource Management). All three proposed sites were noted to overlap with identified glass eel (pre-elver) fishing and nursery areas through DFO's Coastal Fisheries Mapping

¹⁴ *Ibid.* at pg. 196, pdf pg. 201.

¹⁵ Affidavit of Charmaine Stevens, Exhibit 35 at pg. 3.

¹⁶ Closing Submissions on behalf of Kelly Cove Salmon Ltd. dated November 14, 2025 at para. 16(c).

Project (DFO Oceans and Coastal Management Division). Additional information on the size of the area or how specifically juveniles use the coastal habitat around the sites is lacking.¹⁷

DFA expressed the same concern regarding potential impacts to eel and the deficiency of information. As conveyed by DFA to the Mi'kmaq at the consultation meeting on December 9, 2020:

NSDFA shares concern related to impact of increased sizes of leases on the likelihood of migrating wild fish encountering cages. Limited literature on the subject is available, specifically as it applies to glass eels. It is thought that wild fish would avoid the obstacle presented by cages but if they did go inside it would likely lead to trauma or consumption.¹⁸

Factor at s. 3(e): “the other users of the public waters surrounding the proposed aquacultural operation”

Noise concerns

In their closing submission, counsel for KCS referenced the report by Mr. David Richards as finding that the “measurements from receptors were below certain thresholds”¹⁹ set out in the sound guidelines from Nova Scotia Environment and Climate Change. Despite the critique upon cross-examination of Mr. Richards’ qualifications and reliance on these guidelines, it is worth noting that when questioned about what constituted a noise “receptor,” Mr. Richards agreed that the offshore “emitter” locations also could be considered “receptors” for individuals working at those locations. Where these offshore locations actually *exceeded* the noise levels set out in the provincial guidelines, he confirmed that those working in the vicinity, *including fishers*, should be utilizing hearing protection. He also confirmed that these sound guidelines did not address impacts on birds, aquatic species, or other nearby wildlife.

Birds on Coffin Island

The Canadian Wildlife Service (CWS) has indicated that a buffer of at least 300m should be required between the AQ#1205 lease boundary and Coffin Island to protect nesting colonial

¹⁷ Report on Outcomes of Consultation, Exhibit 4 at pg. 285.

¹⁸ Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 49, pdf pg. 54.

¹⁹ Closing Submissions on behalf of Kelly Cove Salmon Ltd. dated November 14, 2025 at para. 97.

waterbirds.²⁰ At paragraph 113 of their closing submission, counsel for KCS cited *Town Point*, NSARB 2022-001-002-003 as a relevant authority in justifying a lesser buffer distance. That case is not comparable for a number of reasons.

In *Town Point*, the species in question was piping plovers. In response to concerns over the protection of piping plovers, the proponent in that case, Town Point Consulting Inc (TPC), made additional scientific inquiries when preparing its application, including contacting Birds Canada and retaining a consultant to prepare an assessment report of the potential impacts to nesting piping plovers.²¹ The assessment report endorsed a smaller recommended buffer as part of its assessment, and part of the rationale was that the “plovers use the ocean facing beach and are unlikely to use the harbour side of the beach.... Some portions of Dunn’s Beach are wooded with a boulder harbour shore – not plover habitat.”²² The author of the assessment report was qualified as an expert on piping plovers. Additionally, Dunn’s Beach was a provincial park with recreational use by pedestrians, kayakers, ATVs and a commercial wharf. In light of the differences of view between the proponent’s assessment report and the CWS recommendation regarding the buffer distance, DFA proceeded to request its own report from the Centre for Marine Applied Research.²³ The ARB referenced and relied upon all of this work to justify deviating from the recommendation of the CWS. The ARB opted for a compromise buffer distance and a requirement that active operations cease if plover activities were observed.²⁴

None of these factors apply in this case. At issue here are colonial waterbirds, including the Endangered Roseate Tern, and thus the specific findings in *Town Point* with respect to the habitat of piping plovers are not determinative. There is no evidence of extensive recreational uses of the relevant bird habitats on Coffin Island, as was the case in *Town Point*. There is no evidence that the colonial waterbirds use only the ocean-facing side of Coffin Island, furthest from the aquaculture operation, as was the case in *Town Point*. No additional scientific assessments were commissioned by either KCS or DFA, thus the only authority on the issue of an appropriate buffer is the CWS. Further, although the Mi’kmaq had awareness of Coffin Island as a nesting ground and

²⁰ Supplementary Affidavit of Nathaniel Feindel, Exhibit 72 at pg. 36.

²¹ *Town Point*, NSARB 2022-001-002-003 at para. 73.

²² *Ibid.* at para. 77.

²³ *Ibid.* at para. 91.

²⁴ *Ibid.* at para. 93.

migratory habitat for birds, DFA never flagged any potential impacts to these bird populations in the course of consultations. Thus, it is unknown how this may impact their Aboriginal or treaty rights. Until this additional work has been done, we respectfully submit that it is premature for the ARB to render a decision on the appropriate buffer distance from Coffin Island.

The most recent communication from CWS is an email dated January 24, 2024.²⁵ In it, CWS reiterated its concern that “the proposed boundary amendment for this lease is in part within 300 m of Coffin Island” and recommended partly relocating AQ#1205 “such that it would be entirely >300m from Coffin Island.”²⁶ It is clear that CWS was referring to the lease boundary in their comments, and not the cage boundary. Their reasons included that “[c]olonial birds are particularly vulnerable to the effects of human disturbance,” “[d]isturbance prior to egg-laying may cause birds to abandon historical colony locations,” and “disturbance during the breeding season can cause these birds to abandon their nests or young, or to use valuable energy reserves for defence, instead of incubating eggs and feeding their young.”²⁷ Further, “[w]hen parent birds are flushed, many of the young chicks wander from their nest site and be taken by predators, or be pecked to death by neighbouring birds.”²⁸

There appears to be conflicting information regarding the distance from the proposed lease boundary to Coffin Island. In the Affidavit of Adam Turner, KCS engineer, that distance was shown to be +-230m at the low water mark.²⁹ In the Supplemental Affidavit of Mr. Feindel, the distance was shown as either 238.5m (Property ID) or 248.2m (Satellite Image).³⁰ It is the largest of these distances that counsel for KCS has relied upon. There is also conflicting information regarding the new proposed lease boundaries relative to the existing lease boundaries. In their closing submission, counsel for KCS stated that “[t]he proposed expansion does not put the Farm closer to Coffin Island.”³¹ However, Volume 1 of the Application Package clearly showed the proposed lease

²⁵ Supplementary Affidavit of Nathaniel Feindel, Exhibit 72 at pg. 36.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Affidavit of Adam Turner, Exhibit 38 at pdf pg. 29, Figure 3.

³⁰ Supplementary Affidavit of Nathaniel Feindel, Exhibit 72 at pg. 34.

³¹ Closing Submissions on behalf of Kelly Cove Salmon Ltd. dated November 14, 2025 at para. 114.

boundaries as being located significantly closer to Coffin Island than the current lease boundaries.³²

Within the lease boundary are cages with moorings and anchors that extend out towards the edge of the lease boundary. This mooring and anchor system will require installation, inspections and periodic maintenance. The farm also relies on equipment in its operations which is located outside of the cage area. In other words, the infrastructure and operations of the farm are not constrained to the cages themselves. KCS has adopted the position that the relevant buffer distance should be measured to the cage boundary as opposed to CWS' recommended buffer distance to the lease boundary,³³ but there is no scientific assessment to support this approach. KCS also submitted that mitigations such as the sound attenuation will "sufficiently" protect the nesting colonial waterbirds,³⁴ but again, there is no scientific assessment to support this claim.

In the Report on Outcomes of Consultation, it stated: "If the application(s) are approved by the NSARB, DFA will work with the applicant to ensure that the advice, mitigations, and recommendations provided by CWS are appropriately incorporated into the applicant's FMP for each licence/lease."³⁵ This proposed approach is not consistent with the regulatory framework. The principal concern of CWS involves the location of the lease boundary relative to Coffin Island, and this boundary is to be decided by ARB, not DFA. Therefore, DFA will not have the authority or flexibility to "ensure" that the recommendations by CWS are appropriately incorporated following the ARB's decision.

Factor at s. 3(f): "the public right of navigation"

Above we discussed the particular Mi'kmaq navigational and safety concerns, which place them in a different position than other fishermen who may utilize larger vessels or have the option of fishing with a larger team. As noted, Ms. Stevens explained in her affidavit how oftentimes women must fish alone if their spouses do not hold Indian status or youth must fish alone if a parent does not hold Indian status, since non-Indigenous family members cannot exercise Aboriginal or treaty

³² Application Package Volume 1, Exhibit 5 at pg. 76, Figure 2.

³³ Closing Submissions on behalf of Kelly Cove Salmon Ltd. dated November 14, 2025 at para. 114.

³⁴ *Ibid.* at para. 115

³⁵ Report on Outcomes of Consultation, Exhibit 4 at pg. 12.

rights. Thus, the proposed expansion along the length of Coffin Island presents unique navigational issues for the Mi'kmaq, and the evidence to this effect remains uncontested.

Factor at s. 3(g): “the sustainability of wild salmon”

As noted by KCS, “[t]he extirpation of the [wild Atlantic salmon in the] Mersey River is a result of several factors including the introduction of dams and flow barriers, acidification and invasive species.”³⁶ A series of development decisions and approvals by the provincial and federal governments have completely eliminated the Mi'kmaq's ability to exercise their fishing rights with respect to this species in Liverpool Bay. An approval by the ARB of the proposed Application would introduce one more threat to the already-vulnerable salmon spawning rivers that remain, such as those at the Medway and Lehave rivers. As noted by DFO in its Science Report,

The existing and proposed sites are both within the migration pathways and range of the Nova Scotia Southern Upland (SU) wild Atlantic Salmon population. The nearby Mersey and Medway rivers are known Atlantic Salmon rivers. The SU Salmon run in the Medway River in Port Medway Harbour, which is approximately 10–12 km from Liverpool Bay, while the Mersey River is thought to be extirpated. Aquaculture escapees have been found in rivers at distances of up to 200–300 km from the nearest aquaculture site (Morris et al. 2008) and, although the Mersey and Medway rivers are closest in proximity, the majority of salmon rivers in the SU region are within that range. The SU Salmon have been assessed as Endangered by COSEWIC since 2010 and are under consideration for SARA-listing.³⁷

[...]

Escapes have been identified as an ongoing threat to the genetic integrity and persistence of wild Atlantic Salmon populations (Forseth et al. 2017, Bradbury et al. 2020b, Glover et al. 2020). Escapes of Atlantic Salmon from finfish aquaculture sites occur regularly, including in Atlantic Canada (Glover et al. 2017, Keyser et al. 2018, Diserud et al. 2019), and the true number of escapees are estimated to significantly exceed the number reported (Skilbrei et al. 2015, Mahlum et al. 2021, Føre and Thorvaldsen 2021). Escaped Atlantic Salmon have been found in rivers at distances of up to 200–300 km from the nearest aquaculture site (Morris et al. 2008), and escapees may continue to pose a threat to wild salmon for several years after escape (Aronsen et al. 2020).³⁸

³⁶ Closing Submissions on behalf of Kelly Cove Salmon Ltd. dated November 14, 2025 at para.136.

³⁷ Report on Outcomes of Consultation, Exhibit 4 at pg. 285.

³⁸ Report on Outcomes of Consultation, Exhibit 4 at pg. 297.

DFO may feel comfortable accepting this level of risk, but we strongly disagree. If this stepwise introduction of new threats continues, there may be no wild Atlantic salmon left in this part of the province for the exercise of Mi'kmaq rights by future generations.

Counsel for KCS minimized the risk of escapees by pointing to KCS' "custom-designed mooring and containment system which is approved by a professional engineer."³⁹ Presumably, all Cooke Aquaculture farms utilize engineer-approved mooring and containment systems, including in Maine where "more than 50,000 salmon escaped from two Cooke sites"⁴⁰ in August, 2023.

On the topics of sea lice, antibiotic use and impacts on local fisheries, KMK directs the ARB to our submissions dated November 21, 2025. For the sake of efficiency, we will not repeat our remarks here.

In conclusion, in response to KCS' unsubstantiated assertion that "[t]he proposed expansion will not negatively impact other users of Liverpool Bay,"⁴¹ for all of the reasons outlined above and in our earlier submissions, we vigorously dispute this claim.

All of which is respectfully submitted,

A solid black rectangular box used to redact the signature of Jessica Ginsburg.

Jessica Ginsburg

³⁹ Closing Submissions on behalf of Kelly Cove Salmon Ltd. dated November 14, 2025 at para. 141.

⁴⁰ Article: Salmon Farms Under Fire on U.S. East Coast After Being Shuttered on West Coast, Exhibit 80 at pg. 2.

⁴¹ Closing Submissions on behalf of Kelly Cove Salmon Ltd. dated November 14, 2025 at para. 16(e).