

# DÉJÀ VU ALL OVER AGAIN: THE NEW (OLD) FISHERIES ACT

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Though many laws regulate water and water use, the Fisheries Act remains the only legislation that directly addresses the protection and conservation of fish and fish habitat. Enacted in 1868, the Act is one of Canada's oldest pieces of environmental legislation. The Fisheries Act has a significant scope of application to a wide variety of undertakings that directly or indirectly involve water, ranging from hydroelectric projects to wetland improvement and conservation works.

Significant amendments to the Act are underway through Bill C-68, now before the Senate. Some of the most important amendments will restore the broad habitat and fish protections that were removed in 2012. This article reviews what changed in 2012, why those changes occurred, and what protections Bill C-68 proposes to restore to the Act.

## The 2012 Amendments to the Act

Other than the addition of pollution prevention provisions in 1970's, the Fisheries Act remained surprisingly similar to the original 1868 statute for most of its history. However, in 2012, the Act was significantly amended. The most controversial of these amendments involved a move from protecting fish generally to focus only on prohibiting serious harm to fish that were "part of a commercial, recreational or aboriginal fishery."

This more limited protection replaced two provisions from the pre-2012 Act: s. 32(1), which prohibited the killing of fish except by fishing and s. 35(1), which prohibited works or undertakings causing the **Harmful Alteration Disruption or Destruction** of fish habitat (the so-called "HADD" provision).

The changes were controversial and were accompanied by a sharp reduction in the

budget of the Department of Fisheries and Oceans.

In an unprecedented open letter to the Government, four former ministers of Fisheries and Oceans wrote that "we find it troubling that the government is proposing to amend the Fisheries Act via omnibus budget legislation in a manner that we believe will inevitably reduce and weaken the habitat-protection provisions". Ecojustice, a well-known environmental advocacy organization, summed up the new state of affairs by stating that the amendments "weaken fish habitat protection and result in government largely abdicating its role in habitat management".

## Problems pre-2012

The response to the 2012 amendments tends to obscure the reality that the pre-2012 Act was, like many laws, imperfect. One of the most significant problems was that the broad application of the HADD provision was not accompanied by clear guidance to help people and organizations with compliance. A range of parties from a variety of sectors have expressed this concern. For example:

- Ducks Unlimited Canada, in written submissions to the Standing Committee on Fisheries and Oceans, observed that "many of our conservation projects and activities that sought to restore, enhance or management wetland habitat were deemed to be 'fish habitat destruction' by DFO or their enforcement partners [...] [T]his strict interpretation of the Act severely limited our ability to deliver new conservation programming designed to protect and conserve habitat that is essential for waterfowl and other wetland dependant species, including fish."
- The Canadian Federation of Agriculture testified before the Standing Committee on Fisheries and Oceans that "the experience that many farmers had with the Fisheries Act, unfortunately, was not a positive one. It was characterized by lengthy bureaucratic applications for permitting and authorizations, and a focus on enforcement and compliance measures taken by officials coupled with a lack of guidance or outreach on the purpose of these measures or information on how to navigate through the process."
- Duane Post, a municipal councillor from British Columbia testified that the HADD provisions "were restrictive in nature because you always had to compensate for ditch work or flood mitigation work that you've done, whereas the actual work was often an improvement for fish habitat. We always felt it was really quite restrictive."

## Bill C-68

The above-noted concerns about the pre-2012 Act are important, because Bill C-68 will i) reinstate the HADD provision and ii) reinstate the prohibition on killing fish other than through fishing. This effectively undoes the most significant 2012 amendments regarding fish habitat.

This proposed change to the Act's protective scope is accompanied by an expanded definition of "habitat" that, for the first time, explicitly includes the concept of water flow:

**fish habitat** means water frequented by fish and any other areas on which fish depend directly or indirectly to carry out their life processes, including spawning grounds and nursery, rearing, food supply and migration areas;

[...]

(2) For the purposes of this Act, the quantity, timing and quality of the water flow that are necessary to sustain the freshwater or estuarine ecosystems of a fish habitat are deemed to be a fish habitat.

The definition of fish habitat is broad. The inclusion of water flow suggests that habitat may be harmfully altered, for the purposes of the Act, even by temporary alteration or impairment of water flow in any water body where fish are known to exist. This is true whether or not that water body is natural or artificial.

How, then, will the Act address concerns about breadth and lack of guidance? New provisions of the Act, as well as the Government response to the Standing Committee's report on the 2012 amendments, are instructive. In its response to the Standing Committee's recommendations about the HADD provision's "vulnerability to being applied in inconsistent manner", the Government noted that "policy and program amendments, to ensure that the prohibition is easily understood and applied will be considered. This may include the development of policies, standards and guidelines that establish how impacts can be effectively avoided and adequately mitigated."

The Government appears to envision 5 primary means of assisting with compliance:

1. **Standards and Codes of Practice.** Proposed s. 34.2(1) provides that the Minister may establish standards and codes of practice about how to avoid fish death and harm to fish habitat, fish and fish habitat conservation/protection, and pollution prevention. These are intended to assist project proponents with compliance. Though not clear at this time, it is possible that these standards and codes of practice will be industry-specific or activity-specific.

2. **Prescribed Exemptions.** Proposed s. 34.4(2) provides for an exception to the prohibition on killing fish and destruction of fish habitat and provides for regulatory authorization of projects that may affect same. The Legislative Summary for Bill C-68 states that "small and routine projects prescribed by regulations may proceed without prior authorization, provided they comply with standards and codes of practice that are established under the Act. The scope of what constitutes small and routine projects will only be known once regulations are published."
3. **Designated Projects.** Proposed s. 23 establishes that certain designated projects will always require ministerial permits before they begin. These would likely be large-scale projects that, by their nature, would be presumed to have an impact on fish and fish habitat.
4. **Self-Assessment.** Self-assessment was a feature of the 2012 changes to the Act. Project proponents were provided with a self-assessment framework to determine if further DFO intervention was required in a given project. However, it is not clear to what extent the new regime will maintain this approach. The Standing Committee on Fisheries and Oceans recommended reduced reliance on self-assessment. While the Government accepted that recommendation, its response was vague and non-committal, suggesting that some degree of self-assessment may remain in the new Act.
5. **Expedited Permitting.** The government's response to the Standing Committee's report suggests that it is open to establishing, by regulation, an expedited permitting process for restoration of infrastructure and emergency work.

Given that the above approaches will need to be established by regulation or policy-making, proponents will remain somewhat in the dark with respect to compliance until Bill C-68 comes into force. Given that other legal regimes, such as the Ontario Water Resources Act, overlap to some extent with the Fisheries Act, one might hope that those regulations will also determine to what extent compliance with other water-related laws will suffice for the purposes of the Fisheries Act. Until clarity is provided through regulation, project proponents and their advisors should assume that the new Act will have at least the same breadth of application as the pre-2012 Act (likely broader), and can assume that pre-2012 case-law regarding HADD will be applicable.

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