



## *Legal Backgrounder* **Fisheries Act**

### **1. Overview**

The fishing industry in Canada is a significant source of jobs and a major contributor to the economy and well-being of Canadians. But for Canadians, fish are more than just a product. Fish provide our families with food and valued recreational opportunities. Tourism sectors across Canada are dependent on our fish-bearing waters. Many fish are integral to First Nation communities; some fish, such as iconic species like the salmon and oolichan, have a cultural and spiritual significance. Fish protection is serious business and it goes well beyond issues of environmental protection.

The *Fisheries Act*<sup>1</sup> is the principal federal statute that manages Canadian fisheries resources. Much of the Act is aimed at regulating fishing. However, the Act does not only protect fish, but also protects the habitat they need to reproduce, grow and survive. As any biologist can tell you, to try to protect fish without protecting their habitats does not make scientific sense.

This backgrounder considers how the *Fisheries Act* has been changed by provisions enacted in two successive omnibus budget bills — Bill C-38 and Bill C-45.<sup>2</sup> The changes enacted through the passage of these two bills will unfold over time, and may not all be realized.<sup>3</sup> This backgrounder will focus primarily on changes to the Fish Habitat Protection and Pollution Prevention provisions of the *Fisheries Act*.<sup>4</sup>

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<sup>1</sup> *Fisheries Act*, R.S.C., 1985, c. F-14

<sup>2</sup> This legal backgrounder was first created to address amendments to the *Fisheries Act* proposed when the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19 (“Bill C-38” or the “First Omnibus Budget Bill”) was introduced in Parliament on April 26, 2012. Since then Bill C-38 has been enacted. Only certain portions of Bill C-38 came into force at that time. A second budget omnibus bill — the *Jobs and Growth Act, 2012*, S.C. 2012, c.31 (“Bill C-45” or the “Second Omnibus Budget Bill”) was introduced in Parliament on October 18, 2012. Bill C-45 received Royal Assent on December 14, 2012.

<sup>3</sup> Changes to the *Fisheries Act* are being implemented by the Government of Canada in two phases. Some changes came into effect when Bill C-38 received Royal Assent; such changes are reflected in this backgrounder as “phase one” or “currently”. Some of the changes resulting from Bills C-38 and C-45 will not come into effect unless there is a Cabinet order; such changes are reflected in this backgrounder by terms such as “if Cabinet so orders”, “upon Cabinet order” or as being “not yet in force” or “phase two”. The situation prior to Bills C-38 and C-45 is referred to as “pre-omnibus bills”.

<sup>4</sup> There are a number of other changes to the *Fisheries Act* as a result of Bill C-38, which can be found in Bill C-38, sections 132-156.

Under consecutive headings, this backgrounder:

- (a) Outlines the key fish habitat protection and pollution prevention provisions of the Act as they existed pre-omnibus bills, and identifies how those original provisions could and should have been improved rather than weakened;
- (b) Discusses amendments by the Government of Canada (“the Government”), including those not yet brought into legal force, which weaken fish habitat protection as a result of the enactment of the First Omnibus Budget Bill (Bill C-38);
- (c) Discusses amendments by the Government’s Second Omnibus Budget Bill (Bill C-45).

## **2. How did the pre-omnibus Fish Habitat Protection and Pollution Prevention provisions work?**

The *Fisheries Act* is a long-standing building block of Confederation. It was first enacted in 1868, following the enactment of the *British North America Act*, and was strengthened in recent decades. While the Act has some shortcomings, it is one of the few pieces of legislation in Canada that empowers the Government to protect oceans, clean water and fish habitat.<sup>5</sup>

The *Fisheries Act* empowers Fisheries and Oceans Canada (“DFO”) to conserve and protect fish and fish habitat across Canada.<sup>6</sup> The Act has always included provisions that directly protected fish. In 1977, habitat protection was added to the Act and pollution prevention provisions were strengthened, to empower the Government to better protect the health of the ecosystem on which a healthy fishery depends. As then Fisheries Minister Romeo LeBlanc stated when he introduced the habitat protection and pollution prevention provisions in Parliament, “as the case of Atlantic salmon shows so well, the regulation of fishing itself is only part of what we need. Protecting fish means protecting their habitat. Protecting the aquatic habitat involves controlling the use of wetlands”<sup>7</sup>.

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<sup>5</sup> While Parliament enacted the *Oceans Act* in 1996, it remains largely unimplemented. Efforts to implement integrated ocean management planning on the Pacific coast, through the Pacific North Coast Integrated Management Area (PNCIMA), were recently impaired by the Government’s withdrawal of support.

<sup>6</sup> The provisions of the *Fisheries Act* governing Fish Habitat Protection and Pollution Prevention are at sections 34-43.

<sup>7</sup> House of Commons Debates, 30th Parl, 1st Sess, No 64 (17 May 1977) at 5668 (Hon Romeo LeBlanc).

Fish habitat is defined in the Act as "spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly to carry out their life processes".

Under subsection 35(1), it is an offense to carry on any work or undertaking that results in harmful alteration, disruption or destruction of fish habitat (often referred to as "HADD").<sup>8</sup> However, section 35 never was a blanket prohibition against destroying fish habitat. The prohibition in subsection 35(1) is significantly weakened by the complete discretion given to the Minister of Fisheries and Oceans under subsection 35(2). In particular, the Minister and DFO bureaucrats could authorize harming, disrupting or destruction of fish habitat "by any means or under any conditions".<sup>9</sup> These subsection 35(2) authorizations — or "HADD authorizations" — allowed destruction of fish habitat that would otherwise have been illegal.

Section 35 has at least empowered DFO to monitor, mitigate, and maintain some regulatory oversight of harmful activities such as:

- (a) Gravel mining in British Columbia's Fraser River, which poses grave threats to pink salmon and at-risk sturgeon populations;
- (b) Oil sands mining and pipeline development in Alberta, which destroys fish-bearing creeks, renders fish inedible, and creates significant risks to water resources generally;
- (c) Forestry and mining operations in Ontario and elsewhere, particularly where bridges, culverts, dams and road construction impinge on and degrade riparian areas;
- (d) Harmful habitat impacts on local fish and benthic species caused by industrial finfish aquaculture in B.C. and Atlantic Canada; and
- (e) Large-scale hydroelectric development.

In addition to the habitat protections just discussed, it is an offence to deposit any "deleterious substance" into fish-bearing waters,<sup>10</sup> and pollution cannot be authorized

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<sup>8</sup> As will be discussed, this provision has not yet been substantially changed, as a result of the fact that not all of the Bill C-38 amendments to section 35 have yet been brought into force as of the date of this background. In addition to the prohibition against any "work or undertaking" causing a HADD, a prohibition against any "activity" causing a HADD was also added to section 35 as a result of Bill C-38.

<sup>9</sup> In addition, subsection 35(2) provides that HADD may also be authorized under regulations enacted by Cabinet.

<sup>10</sup> Specifically, this prohibition is created by subsection 36(3), which provides that: "Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented

under section 36 of the Act, except under regulations enacted by Cabinet.<sup>11</sup> Examples of such regulations currently in force include the Metal Mining Effluent Regulations,<sup>12</sup> the Pulp and Paper Effluent Regulations and the Wastewater Systems Effluent Regulations.

Together, sections 35 and 36 provide a regulatory backstop to prevent destruction and pollution of Canada's bodies of water. Most provinces do not have laws making it an offence for industry or developers to harm fish habitat; for those that do, these laws are typically weak and discretionary.<sup>13</sup>

While an important provision in Canadian law, section 35 is overly discretionary and should have been strengthened, not weakened. The courts have held that the broad discretion afforded DFO under subsection 35(2) to allow destruction of fish habitat means that this provision cannot legally protect critical habitat of endangered and threatened aquatic species under the *Species at Risk Act* ("SARA").<sup>14</sup> By the same logic, section 35 does not afford mandatory habitat protection for other fish species and populations scientifically known to be at-risk, such as Atlantic cod or Pacific salmon populations. Mandatory habitat protection could help to restore these populations and assist commercial, recreational and First Nations fisheries. Moreover, section 35 does not prevent habitat destruction caused by destructive fishing practices like bottom trawling.<sup>15</sup>

In addition, there is a serious lack of enforcement for both sections 35 and 36. The Minister of Fisheries and Oceans submits Annual Reports to Parliament which show decreasing enforcement activity under these provisions.<sup>16</sup> One necessary, if not sufficient, part of the solution to this enforcement problem is to strengthen section 35, by giving DFO stronger powers to ensure compliance with permit conditions and by imposing legal obligations on DFO to monitor and mitigate activities that threaten to harm or pollute fish habitat. Currently, habitat monitoring is only required through the terms of subsection 35(2) authorizations granted by DFO to industry, and not as a legal obligation in the *Fisheries Act* itself.

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by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water."

<sup>11</sup> As discussed further below, the power to authorize pollution by regulation has now been granted to the Minister as well.

<sup>12</sup> The MMER are controversial insofar as amendments by Cabinet to Schedule 2 of these Regulations can allow lakes and streams to be converted into tailings ponds.

<sup>13</sup> *Yanke v. Salmon Arm (City)*, 2011 BCCA 309; See also West Coast Environmental Law summary at <http://wcel.org/resources/environmental-law-alert/bc-law-fails-protect-fish-habitat>.

<sup>14</sup> *Canada (Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40

<sup>15</sup> *Ecology Action Centre Society v. Canada (Attorney General)*, 2004 FC 1087

<sup>16</sup> Section 42.1 of the *Fisheries Act* requires the Minister of Fisheries and Oceans to submit an annual Report to Parliament addressing the administration and enforcement of these provisions. These reports indicate low and declining numbers of prosecutions of environmental crimes in Canada over the last decade; see the Reports to Parliament at DFO's website at: <http://www.dfo-mpo.gc.ca/habitat/role/141/reports-rapports/index-eng.htm>.

Currently, the *Fisheries Act* has no legislated purposes to inform fish habitat protection efforts. The Act should be amended to require that industrial developments are economically and environmentally sustainable, are designed to be less harmful than other alternatives, take a precautionary approach, and repair unanticipated harms. Strengthening section 35 would ensure appropriate constraints on bureaucrats' and politicians' ability to allow oil sands, metal mines, pipelines and other extractive industries to destroy habitat needed by fish, ecosystems and humans that depend on them.

Several efforts have been made in recent years to modernize the *Fisheries Act*; there are legitimate reasons to thoughtfully review the Act and to do exactly that. However, even earlier attempts fell short of capturing modern principles of fisheries management.<sup>17</sup> By contrast, changes to the Act that are described below are regressive. Instead of embracing ecosystem-based management, they expressly narrow provisions protecting fish and fish habitat to focus only on identified fisheries. Instead of limiting discretion or guiding decision-making under the Act, they create a framework for suspending the application of conservation provisions altogether.

### **3. The Government has enabled the weakening of fish and fish habitat protections**

The Government's amendments to the *Fisheries Act* as a result of enacting Bill C-38 will weaken fish habitat protection and result in the Government largely abdicating its role in habitat management. The Government has enabled provisions that will significantly weaken section 35 of the *Fisheries Act* and allow delegation of fish habitat protection, pollution prevention and fisheries management to the provinces and territories. As explained in further detail below, many of these provisions will not be in effect unless a future Cabinet order is issued.

The Government did not consult Canadians on the changes to the *Fisheries Act* made as a result of Bill C-38. Further, the Government did not consult Canadians on the additional changes proposed in Bill C-45. Contrary to its previous assurances such as those made by senior DFO officials testifying to the Cohen Commission,<sup>18</sup> DFO has also failed to conduct any public consultations on any changes to DFO's Policy for the

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<sup>17</sup> For a snapshot of efforts to educate stakeholders and decision-makers on previous proposed amendments to the *Fisheries Act* on Bills C-45 (introduced for first reading in the House of Commons on December 13, 2006) and C-32 (introduced for first reading in the House of Commons on November 29, 2007), refer to Canadian ENGO Position On Bill C-45: A Proposal To Amend Canada's *Fisheries Act* (<http://www.georgiastrait.org/?q=node/242>) and Ecojustice's Critical Aspects of a Modern *Fisheries Act*: [http://www.ecojustice.ca/files/critical-aspects-of-a-modern-fisheries-act-2007/at\\_download/file](http://www.ecojustice.ca/files/critical-aspects-of-a-modern-fisheries-act-2007/at_download/file).

<sup>18</sup> Cohen Commission of Inquiry, Testimony of Patrice Leblanc, April 4, 2011, p.8, l.8 — p.9, l.21 and Testimony of Claire Dansereau, September 22, 2011, p. 29, l.41 — p.30, l.3. See also Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River (Canada) / Bruce I. Cohen, Commissioner. *The Uncertain Future of Fraser River Sockeye*. Vol. 1 — The Sockeye Fishery. Final Report. October 2012.

Management of Fish Habitat. Thus, the Government does not have an informed view of Canadians' priorities or concerns.

Furthermore, the Government is being challenged in Federal Court for breaching its duty to consult First Nations regarding changes in environmental policies, including DFO's policies, as reflected in and being implemented by Bills C-38 and C-45.<sup>19</sup>

The justifications offered by the Government for weakening fish habitat conservation appear to focus on agricultural activities.<sup>20</sup> However, compared to aquaculture, mining activities, streamside development and other activities, agricultural activities are brought under section 35 of the *Fisheries Act* relatively rarely.

Removing DFO's legal power to protect fish habitat may justify job cuts and impose bureaucratic restructuring in DFO's Habitat Management Program. DFO's habitat staff are charged with key responsibilities like reviewing and mitigating habitat impacts of projects, monitoring habitat and supporting habitat restoration. These responsibilities would be diminished under the Government's legislative changes, should those changes ultimately be brought into effect in the ways discussed below.

#### **4. Changes introduced to the Fisheries Act through Bill C-38**

##### **4.1. Fish habitat protection will be significantly weakened**

Bill C-38 enacted amendments to three separate habitat provisions (sections 32, 35 and 37). These amendments are either currently in place or require a Cabinet order to be legally in force. These amendments will narrow and reduce the protection of fish habitat afforded under the *Fisheries Act*. Upon a future Cabinet order, these amendments will change the focus (and the title) of this part of the *Fisheries Act*, from "Fish Habitat Protection and Pollution Prevention" to "Fisheries Protection and Pollution Prevention".<sup>21</sup>

If brought fully into force by Cabinet order(s), Bill C-38 would repeal and replace section 35, the habitat protection provision of the *Fisheries Act*. As explained above, the pre-omnibus bill provision had two key parts: the prohibition in subsection 35(1) against the harmful alteration, disruption or destruction of fish habitat ("HADD"), and the

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<sup>19</sup> Two Applications for Judicial Review (Aboriginal Law) were filed on January 8, 2013 (referenced in the media as Mikisew Cree and Frog Lake First Nation litigation): Chief Steve Courtoreille et al v. The Governor General in Council et al, Federal Court Docket Number T-43-13 and Chief Clifford Stanley et al v. The Governor General in Council et al, Federal Court Docket Number T-44-13.

<sup>20</sup> Speaking Notes for the Honourable Keith Ashfield, P.C., M.P., Minister of Fisheries and Oceans at the Protection and Conservation Announcement (Ottawa, ON, April 24, 2012), at <http://www.dfo-mpo.gc.ca/media/speeches-discours/2012/2012-04-24-eng.htm>; Eric McCarthy, "Common-sense will prevail in managing threats to fisheries: Ritz," *The Guardian*, April 24, 2012 at <http://www.theguardian.pe.ca/News/Local/2012-04-24/article-2963082/Common-sense-will-prevail-in-managing-threats-to-fisheries:-Ritz/1>.

<sup>21</sup> Section 140 of Bill C-38 changes the title of this section of the *Fisheries Act*, and section 141 of Bill C-38 removes the definition of "fish habitat" from the section on definitions relevant to this part of the Act.



authorization provision in subsection 35(2) that legalizes HADD authorized by the Minister or under regulation. This basic structure is retained with the amendments already made by Bill C-38. And, if Cabinet so orders, the future changes to section 35 would still maintain the basic structure of the provision and would also significantly weaken the protection it offers to fish habitat.

#### **4.1.1. Narrowing the prohibition against harm: the long-term changes to section 35**

Currently, the prohibition remains largely as it did pre-omnibus bills. In fact, it is a slightly broader prohibition because it prohibits not just works and undertakings, but also activities that result in HADD.

However, at some point in the future, if Cabinet should so order, the prohibition may be significantly narrowed.<sup>22</sup> Specifically, the existing prohibition against HADD, and the prohibition against killing of fish (section 32) will be merged into one prohibition against “serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery”. Serious harm to fish is a new, narrower concept defined as “death of fish or any permanent alteration to, or destruction of, fish habitat”.<sup>23</sup> If Cabinet so orders, it will no longer be against the law to harmfully alter or disrupt fish habitat.

This change alone would mean that many activities that previously fell under the *Fisheries Act* and were scrutinized for their potential impact on fish habitat and our fisheries will now be ignored. This is a concern because, from a biological perspective, many alterations and disruptions of fish habitat, that might be temporary in nature, can have a lasting harm to fish. Temporarily removing vegetation from a spawning stream, or disrupting the gravel or adding sediment through road works could wipe out a year class of salmon — but it does not permanently alter the habitat.

#### **4.1.2. Expanding the authorization of harm: the interim changes to subsection 35(2)**

As discussed above, the pre-omnibus bill’s authorization provision in subsection 35(2) enabled lawful harms to fish habitat that would otherwise be prohibited under section 35(1). There were two means by which harmful alteration, disruption and destruction of habitat could be lawfully authorized: either by ministerial authorization, or by Cabinet regulation.<sup>24</sup>

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<sup>22</sup> Bill C-38, section 156.

<sup>23</sup> Bill C-38, subsection 132(4).

<sup>24</sup> However, there are currently no such regulations enacted under subsection 35(2).

Currently, the authorization provision in section 35(2) has expanded the Government's ability to authorize harm to fish habitat,<sup>25</sup> in several ways, depending on what future regulations may be enacted.

First, the current paragraph 35(2)(a) now permits harm to fish habitat caused by any prescribed works, undertakings and activities to be automatically exempted from the section 35(1) prohibition and thus automatically allowed. To date, no regulations have been enacted allowing certain works, undertakings or activities to be exempted from the law, but the Government has repeatedly suggested that such regulations are imminent, including statements before the introduction of Bill C-45 that the regulations would be enacted as early as January 1, 2013.

Likewise, the current subsection 35(2)(a) automatically exempts harm to certain prescribed Canadian fisheries waters from the subsection 35(1) prohibition. Again, to date, no regulations have been enacted automatically exempting certain Canadian fisheries waters from the law.

In effect, DFO would no longer review, be notified of or consult on any of these works, undertakings and activities before they may automatically proceed, and those carrying out such projects would no longer be liable for prosecution for any damage they cause to fish or fish habitat provided they follow any conditions prescribed in the regulation. Likewise, the fisheries waters prescribed in the regulation — whether oceans, rivers, lakes or streams — would no longer receive any protection from harm, such that it would no longer be unlawful to kill fish or destroy habitat in these waters. Theoretically, the Government could remove any projects — from pipelines to oil sands projects — from the requirement to protect fish habitat, and could deprive any Canadian lake, river or streams — from the Fraser River to Lake Ontario — of protection.

Second, the current paragraph 35(2)(c) extends the existing power to authorize harm to fish habitat beyond the Minister of Fisheries and Oceans and his officials. If regulations were enacted, paragraph 35(2)(c) could allow any person or entity prescribed by the regulation to authorize harm to fish and fish habitat. Thus this particular change could permit the Government to delegate to industry, developers or provinces the right to authorize adverse effects on fish and fish habitat. This change is not only environmentally unwise in that it would let the “fox guard the chicken coop,” but moreover it could raise constitutional concerns. To date, no such regulations have been enacted.

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<sup>25</sup> Unlike the proposed long-term changes to the subsection 35(1) prohibition and related provisions, which would only come into force if there were a future Cabinet order, these proposed changes to the subsection 35(2) authorization provision took effect immediately upon Bill C-38 receiving Royal Assent. Royal assent was granted on June 29, 2012.



Finally, the current paragraph 35(2)(d) also expressly exempts harm caused by anything authorized, permitted, or required under the *Fisheries Act*. Unfortunately, this change continues to exempt harms caused by destructive fishing practices from the subsection 35(1) prohibition against harming fish habitat.

#### **4.1.3. New regulation-making powers to suspend or limit fish habitat protection**

Bill C-38 enacted additional provisions enabling further changes to subsection 35, if Cabinet so orders. These future changes to subsection 35(2) set out a troubling framework through which the Government could ultimately suspend the application of the laws designed to protect fish and fish habitat. While the potential impact of these future exemptions in subsection 35(2) is vast, their real impact cannot be assessed unless and until new regulations, if any, are passed. Regulations would ultimately be necessary to exclude particular water bodies and particular works/activities from compliance with habitat protection.

Any such regulations would be made under the future subsection 35(3).<sup>26</sup> Subsection 35(3) would allow the Minister to prescribe any works, undertakings or activities, or any fisheries waters, to which the prohibition, be it the current HADD or the future serious harm to fish prohibitions, would not apply. Regulations made under this subsection would be made by the Minister.

Troublingly, the future subsection 35(4), if it ever comes into force through a Cabinet order, would appear to exempt these ministerial regulations from the normal process of regulatory review and publication.<sup>27</sup> It is unusual to exempt regulations from this otherwise mandatory and automatic review — similar exemptions are found in only a few places in federal law, and specifically for emergency situations.<sup>28</sup> However, despite the future subsection 35(4), DFO senior officials have unambiguously and repeatedly committed to environmental and recreational fishing groups that DFO will consult on any draft regulations under subsection 35(2), including by publishing any such regulations in Part 1 of the *Canada Gazette* for public comment.

Furthermore, Bill C-38 amended the general regulation-making provision of the *Fisheries Act* found at section 43. Section 43 of the *Fisheries Act* is a broad regulation-making power that already allows Cabinet to make wide-ranging regulations for implementing the Act.

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<sup>26</sup> Bill C-38, subsection 142(4) will not be of legal force unless Cabinet so orders.

<sup>27</sup> Section 35(2)(4) would exempt regulations prescribing anything under subsection 35(2) from section 3 of the *Statutory Instruments Act* — a provision that requires regulations to be reviewed by the Clerk of the Privy Council for conformity with among other things, the enabling legislation and the *Canadian Charter of Rights and Freedoms*. See Bill C-38, subsection 142(4), which will not be of legal force until Cabinet so orders.

<sup>28</sup> For example, emergency listing under subsection 29(3) and emergency orders under subsection 80(5) of the *Species at Risk Act* are exempted from regulatory review.

As with the amendments to section 35, the changes to the regulation-making powers under section 43 take place in two phases as well. The second phase is intended to overtake and replace the first phase.

First, the current regulation-making powers envision, among other things, regulations:

- (a) prescribing works, undertakings or activities, and prescribing water bodies, that are exempt from the prohibitions against harming fish or fish habitat (paragraph 43(1)(i.1));
- (b) prescribing conditions by which a work, undertaking or activity is exempt from these prohibitions against harm, and the people who may authorize such harm (paragraphs 43(1) (i.2) and (i.3)); and
- (c) prescribing time limits for issuing authorizations to harm fish or fish habitat (paragraph 43(1) (i.4)).

Second, the future regulation-making powers, if Cabinet so order, are similar to those powers described above, but would replace them. This set of regulation-making powers would enable regulations that relate only to the future prohibition against “serious harm to fish”. This future set of regulation-making powers goes even further towards narrowing the protection for fish and fish habitat under the Act. Most notably, the future paragraph 43(1) (i.01) envisions regulations excluding fisheries from the definitions of “Aboriginal”, “commercial” and “recreational”. Given that the overall thrust of these legislative changes is intended to limit DFO’s focus only to Aboriginal, commercial and recreational fisheries and to exclude fish generally, this regulation-making power could potentially greatly restrict the coverage of the *Fisheries Act* to very few species of fish in Canada.

Finally, Bill C-38 introduced a future regulation-making power (subsection 43(5) of the *Fisheries Act*). If Cabinet so orders, this new provision would allow Cabinet to make regulations exempting any Canadian fisheries waters from the application of sections 20, 21, 35 and subsection 38(4).<sup>29</sup>

Overall, these current and future regulation-enabling provisions further the ability of the Government, if it enacts regulations in the future, to narrow or suspend the application of law designed to protect the environment.

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<sup>29</sup> Sections 20 and 21 establish requirements for the free passage of fish including the maintenance of in-stream flows and open channels. Subsection 38(4) requires the owner or manager of a work, undertaking or activity that causes or threatens harm to fish and fish habitat, or the person causing or contributing to the harm, to report the problem to an authority.

#### 4.1.4. “Factors to be taken into account” in allowing harm to fish and fish habitat

Bill C-38 introduced a new set of considerations that potentially reinforce the narrowing of fish and fish habitat protection under the Act. Specifically, upon any future Cabinet order, section 6 of the *Fisheries Act* would require that four factors be taken into account before the Minister of Fisheries and Oceans may make statutory decisions or regulatory recommendations in relation to fish and fish habitat:

- (a) the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries;
- (b) fisheries management objectives;
- (c) whether there are measures and standards to avoid, mitigate or offset serious harm to fish that are part of a commercial recreational or Aboriginal fishery, or that support such a fishery; and
- (d) the public interest.

The Minister would be required to apply these vague factors before recommending or making any regulations under subsection 35 prescribing works, undertakings, activities and/or waters to which the habitat protection prohibition should not apply; any regulations under paragraph 43(1)(i.01) excluding certain fisheries from the protection of the *Fisheries Act*; or any regulations under subsection 43(5) prescribing fisheries waters to which the Act does not apply. The Minister must also apply these factors when authorizing serious harm to fish; taking action to ensure free passage of fish or prevent harm to fish; and investigating and taking enforcement action in relation to the protection of fish and fish habitat. These factors or concepts are intended to guide the Minister’s exercise of discretion when protecting fish and fish habitat.

Notably absent from these factors are fundamental guiding principles for environmental protection, such the precautionary principle and the ecosystem approach. Fundamental environmental principles were included in previous proposals, made between 2006-2008, by former Governments to modernize the *Fisheries Act*.<sup>30</sup> However, these progressive principles are not part of recent *Fisheries Act* amendments.

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<sup>30</sup> Bill C-45, which received first reading on December 13, 2006, required the Minister and every other person engaged in the administration of the *Fisheries Act* or its regulations to: (a) take into account the principles of sustainable development and seek to apply an ecosystems approach in the management of fisheries and in the conservation and protection of fish and fish habitat; (b) seek to apply a precautionary approach; (c) take into account scientific information; (d) seek to manage fisheries and conserve and protect fish and fish habitat in a manner that is consistent with the constitutional protection provided for existing Aboriginal and treaty rights of the Aboriginal peoples of Canada; (e) consider traditional knowledge; (f) endeavour to act in cooperation with other governments and bodies under land claims agreements and (g) encourage the participation of Canadians in the making of decisions that affect the

#### **4.2. Pollution prevention under section 36 remains largely intact**

The central provision governing pollution prevention in the *Fisheries Act* is section 36. Section 36 remained largely unchanged by Bill C-38. Importantly, the narrowed focus on protecting only particular waters, types of works, undertakings, activities, or particular fisheries, anticipated by the changes to sections 32 and 35, has not been replicated in any amendments to section 36. Subsections 36(1)-(3) are unchanged, and the prohibition against the deposit of deleterious substances into all fisheries waters remains intact.

The most notable amendment to section 36 is a change to the regulation-making provisions. Previously, the *Fisheries Act* prohibited the deposit of deleterious substances unless they have been authorized under regulations made by the Cabinet under subsection 36(5) of the Act. However, current provisions within section 36 now allow such regulations authorizing pollution to also be made by the Minister.<sup>31</sup> This new regulation-making power would presumably make it easier to promulgate regulations that authorize pollution of fisheries waters.

#### **4.3. Devolution of fisheries management and regulation to the provinces**

In addition to the Bill C-38 changes specific to fish habitat, two key amendments have been made to the *Fisheries Act* in sections 4.1 and 4.2.

Sections 4.1 and 4.2 are legislated under the heading “Agreements, Programs and Projects”. According to DFO, these provisions were added to enhance regulatory efficiency and encourage partnerships.

Section 4.1 allows the Minister of Fisheries and Oceans to enter into an agreement with a province or territory to further the purposes of the Act, including agreements respecting harmonization and reducing overlap, communications and public consultation. Agreements are envisioned to cover the wide variety of issues set out in subsection 4.1(2), which address everything from the role of the parties to such agreements to policy development.

Further, section 4.2 provides that *if* one of these agreements identifies an existing provincial provision which is “equivalent in effect” to a provision of the regulations under the *Fisheries Act*, the Cabinet may order that certain provisions of the *Fisheries Act* or the regulations there under, do not apply in the province. Supposedly, federal fisheries law would therefore be suspended and the provincial law would apply in its place.

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management of fisheries and the conservation or protection of fish or fish habitat. The same set of guiding principles was included in Bill C-32, which received first reading on November 29, 2007. However, all of these principles are missing from Bill C-38.

<sup>31</sup> Specifically, paragraph 36(4)(c) and subsections 36(5.1) and 36(5.2) enable Cabinet to make regulations as to how the Minister exercises future regulation-making powers. No such regulations have yet been enacted.

These two current provisions effectively allow devolution of fisheries management to provinces and territories. This devolution seems consistent with the overall trend in Bill C-38 to limit or suspend the operation of the *Fisheries Act*, whether by excluding its application to prescribed works, undertakings, activities or waters, or by suspending its operation entirely within a province or territory.

## **5. Further changes to the Fisheries Act through Bill C-45**

Bill C-45 further amends the *Fisheries Act*.<sup>32</sup> In contrast with Bill C-38, there are relatively few additional amendments in Bill C-45. All Bill C-45 amendments to the Act will only come into force upon a future Cabinet order and are directly or indirectly tied to the not yet in force amendments in Bill C-38.

Two changes of significance to fish habitat protection are discussed here.<sup>33</sup> While one of these changes has some positive implications, the other will weaken environmental protection by further removing protections against industrial development likely to harm fish habitat.

### **5.1. DFO will be able to cancel industry authorizations that currently harm to fish habitat**

Bill C-45 introduces ‘transitional provisions’.<sup>34</sup> The first provision deems that specific authorizations<sup>35</sup> that were made pre-omnibus bill, or current authorizations made since June 29, 2012, will also be authorizations under the future changes to the *Fisheries Act*. It isn’t surprising that authorizations are deemed to continue under a future, amended Act; what is troubling, however, is that the provisions will also enable a period of “suspension” and “review” of these past and current authorizations.

Subsection 177(2) of Bill C-45 enables a 90-day suspension of the past and current authorizations described above. During that period of suspension, any proponent with such an authorization can request that it be reviewed. The Minister will be empowered to alter or cancel the authorization. It is possible that mitigation measures intended to be

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<sup>32</sup> The *Jobs and Growth Act, 2012*, S.C. c.31 (“Bill C-45”) was given Royal Assent on December 14, 2012. The amendments to the *Fisheries Act* are contained in Part 4, Division 4, sections 173-178.

<sup>33</sup> In addition to the specific amendments discussed, Bill C-45 amended the not in force definition of “Aboriginal” as it relates to fisheries. If interested in contrasting the two definitions, see Bill C-38, subsection 133(3) and Bill C-45, section 175.

<sup>34</sup> Bill C-45, section 177.

<sup>35</sup> Specifically, those authorizations made under section 32 or subsection 35(2) of the *Fisheries Act* as it existed prior to June 29, 2012 OR those authorizations made under paragraph 32(2)(c) or paragraph 35(2)(b) prior to any Cabinet order bringing section 142(2) of Bill C-38 into force. See Bill C-45, subsection 177(1).

protective of fish and fish habitat and to “compensate” for habitat losses under DFO’s no net loss of habitat policy may never happen.<sup>36</sup>

Finally, the offence provisions of the *Fisheries Act* will not apply to the past and current authorizations described above until the 90-day period in which a review can be requested has expired or, if a review is requested, not until the earlier of the Minister’s decision or the end of the 210-day decision period.<sup>37</sup> This will mean that non-compliance with an authorization cannot be enforced during these periods.

## **5.2. Fines for *Fisheries Act* violations unlikely to be paid into general revenue**

Upon any future Cabinet order to bring subsection 147(1) of Bill C-38 into force, the future subsection 40(6) would require that fines collected as a result of *Fisheries Act* enforcement in the courts would be paid to the Environmental Damages Fund.<sup>38</sup> As well, the future subsection 40(7), if brought into force by any future Cabinet order, would create an exception to this requirement, by allowing the court to direct the payment elsewhere.<sup>39</sup>

The payment of fines to a dedicated environmental fund would be an improvement over the existing regime. Under the existing regime, fines are paid into the Government’s general revenue account and thus are not necessarily allocated to fish habitat restoration or conservation.

However, the effect of the proposed changes on private prosecutions to protect fish habitat are unclear. Under the Fishery (General) Regulations,<sup>40</sup> an informant in a private prosecution must be paid half of any fine arising from a conviction under the Act.<sup>41</sup> This regulatory provision is intended to promote and encourage private prosecutions under the *Fisheries Act*. It is unclear whether, if Cabinet so orders, this future payment of fines to private prosecutors will continue to be legally mandatory, or if judges will interpret subsections 40(6) and (7) as now providing them with the discretion to deprive private prosecutors of these fine payments.

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<sup>36</sup> DFO’s Policy for the Management of Fish Habitat, 1986.

<sup>37</sup> Bill C-45, subsection 177(3).

<sup>38</sup> Bill C-45, section 174.

<sup>39</sup> Bill C-45, section 174.

<sup>40</sup> SOR/93-53

<sup>41</sup> Section 62