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Fisheries Act Review – Protection of Fish Habitat and Associated Provisions

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Introduction

Fish habitat is essential for healthy fish populations, and by extension, for healthy fisheries. Habitat protection provisions were added to the federal *Fisheries Act* in 1977, in response to the devastating loss of wild salmon stocks on Canada's Atlantic coast.[1] The provisions were organized around a central prohibition against the harmful alteration, disruption or destruction of fish habitat ("HADD") – which cast a wide net intended to catch the myriad ways in which fish habitat can be harmed by human activity. In 2012, that provision was amended to change the focus from "harm to fish habitat" to "serious harm to fish" - a move that did not eliminate but certainly diminished the protection of fish habitat in Canada. This change was part of a broader suite of changes to the *Fisheries Act* and other federal environmental legislation that were enacted in 2012 (the "2012 Amendments"), currently under review in various *fora*. The protection of fish habitat under Canadian law must be effectively restored to ensure functioning aquatic and marine ecosystems and healthy fish populations for future generations.

Habitat protection under the *Fisheries Act*: then and now

As the Committee is aware, section 35 of the *Fisheries Act* used to prohibit any "work or undertaking" that resulted in the "harmful alteration or disruption, or the destruction" (commonly referred to as "HADD") of fish habitat (the "HADD Provision"). The HADD Provision was amended in 2012 to prohibit any "work, undertaking, or activity" that results in "serious harm to fish that are part of a commercial, recreational or Aboriginal fishery" (the "Serious Harm to Fish Provision"). "Serious harm to fish" is defined in s. 2(2) of the Act as "the death of fish or any permanent alteration to, or destruction of, fish habitat" ("DPAD"). Commercial, recreational, and Aboriginal fisheries are also defined, and a new section 6 has been added to guide the Minister's decision-making with respect to all of the Fisheries Protection provisions.

Section 35 (2) of the HADD Provisions previously allowed the Minister to authorize HADD, both through individual authorizations and by regulation. The Serious Harm to Fish Provision maintains the Minister's broad discretion to authorize DPAD[2], including by enabling automatic authorizations for "works", "activities" and "waters" that are "prescribed" in regulation[3], as well as exemptions for activities authorized by "prescribed people".[4] Additionally, the Serious Harm to Fish Provision confirms that any activity that is authorized under the Act[5] – such as fishing – or done in accordance with the regulations[6] – such as operating a fish farm – is exempt from the prohibition.

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[1] House of Commons Debates, 30th Parl, 2nd Sess, Vol 6 (16 May 1977) at 5667, and 5668 (Hon Romeo LeBlanc). Available at: http://parl.canadiana.ca/view/oop.debates_HOC3002_06/278?r=0&s=1

[2] *Fisheries Act,* R.S.C., 1985, c F-14*,* s. 35(2)(b)

[3] *Fisheries Act, supra,* s. 35(2)(a)

[4] *Fisheries Act, supra,* s. 35(2)(c)

[5] *Fisheries Act, supra,* s. 35(2)(d)

[6] *Fisheries Act, supra,* s. 35(2)(e)

In our opinion, the 2012 Amendments enacted in two successive omnibus budget bills – Bill C-38 and Bill C-45[7] – significantly weakened habitat protection under the Act.[8] In our experience, the 2012 Amendments and associated budget cuts created confusion inside and outside the Department of Fisheries and Oceans (DFO) about whether and how the law operated to protect fish habitat. As but one example, we recently received a call in our office from a community member in the lower mainland concerned about silt pouring into a fish bearing creek from a construction operation. It was obviously HADD, but did it constitute "serious harm to fish"? The concern, of course, was that by the time the harm would be considered permanent, it might be too late to do anything about it. This is just one instance that is emblematic of a general problem.[9] Further, we fear that the 2012 Amendments have created a sense that protection of habitat – no matter its technical status under the law - is no longer of concern to the government of Canada. Finally, in our opinion, the pre-amendment provisions were far from perfect, and thus simply returning to them is not the best option.

Restoring lost protection and ensuring modern safeguards

This Standing Committee on Fisheries and Oceans is tasked with the important job of examining the effectiveness of habitat protection under the *Fisheries Act*, and this brief will focus primarily on the habitat protection provisions. However, it is Ecojustice's opinion that as Canada's oldest environmental law, the *Fisheries Act* is long overdue for a comprehensive review. Even prior to the 2012 Amendments, the Act was in need of substantial revision. For example, enacting a modern *Fisheries Act* was a key recommendation of the recent Royal Society of Canada's Expert Panel Report entitled "Sustaining Canadian marine biodiversity: responding to the challenges posed by climate change, fisheries, and aquaculture".[10] Many of the observations and recommendations in this brief could be applied to the entire Act. Thus, an overarching recommendation to the Committee is that amendments to the habitat protection provisions be just the first phase of a comprehensive review of the entire Act, and where possible in this brief we will flag recommendations that could apply to the Act as a whole.

The Committee has been specifically charged with modernizing habitat protection. In 2008, in response to a previous attempt to revise the *Fisheries Act,* Ecojustice published its "10 Principles of Modern Fisheries Legislation", which lists what, in our experience, are critical elements of a sound, modern *Fisheries Act.*[11] Many of the principles are relevant to the specific issue of habitat protection – such as the need to guide all decision-making with legislated criteria, and the need to protect fish habitat from the potentially harmful effects of fishing. They are based on established principles of environmental law

[7] The *Fisheries Act* was amended twice in 2012 through the passage of the *Jobs, Growth and Long-term Prosperity Act,* S.C. 2012, c. 19 and the *Jobs and Growth Act,* 2012, S.C. 2012, c. 31.

[8] Ecojustice. Fisheries Act Legal Backgrounder. Originally published May 2012. Updated February 2013. Available at: http://www.ecojustice.ca/reports_publications/fisheries-act-backgrounder/

[9] "Fish habitat damage goes unprosecuted since Conservative changes to Fisheries Act". March 24, 2016. Vancouver Sun. Available at: http://www.vancouversun.com/fish+habitat+damage+goes+unprosecuted+since+conservative+changes+fisheries/11805140/story.html

[10] Hutchings, J.A., Côté, I.M., Dodson, J.J., Fleming, I.A., Jennings, S., Mantua, N.J., Peterman, R.M., Riddell, B.E., Weaver, A.J., and D.L. VanderZwaag. 2012. Sustaining Canadian marine biodiversity: responding to the challenges posed by climate change, fisheries, and aquaculture. Expert panel report prepared for the Royal Society of Canada, Ottawa, p. 221.

[11] The updated 2016 version of the "10 Principles of A Modern Fisheries Act" can be found at: http://www.ecojustice.ca/wp-content/uploads/2016/11/Ecojustice-Ten-principles-of-a-Modern-Fisheries-Act.pdf.

including: ecosystem based management, sustainable development, and the principles of precaution, polluter pays, and intergenerational equity. They are also consistent with the modern notion that decisions affecting living systems should be scientifically based. In this brief, we apply some of the 10 principles in our recommendations to the Committee, and propose that any amendments considered at the end of the Committee's review be evaluated against all of these principles.

This brief considers some of these principles in the context of the real world challenges we experience in our work in relation to fish habitat protection.[12] Specifically, we provide recommendations to support the following five key changes we would like to see to habitat protection under the *Fisheries Act*:

(1) Habitat protection needs to be broad;
(2) Habitat protection needs to be precautionary;
(3) Discretion to authorize harm to habitat needs enforceable limits based on science;
(4) Habitat provisions must address cumulative harm to and loss of fish habitat; ; and
(5) Habitat provisions must be enforceable and enforced.

***Fisheries Act* review in context of broader review of federal environmental law**

We also note that the Committee's review is just one part of a broader effort to review and revise the matrix of federal environmental law. The protection of the environment and human health are two of the greatest challenges of our time. These cannot be accomplished by individual pieces of legislation nor by one level of government acting alone. Parliament is currently reviewing a broad range of legislation with the goal of restoring previous protection and modernizing environmental protection, including: the *Canadian Environmental Protection Act* (CEPA), the *Canadian Environmental Assessment Act, 2012* (CEAA), the *National Energy Board Act,* and the *Navigation Protection Act.* The *Fisheries Act* interacts with a number of these statutes, most significantly CEAA, and the *Navigation Protection Act.*

The *Navigation Protection Act* and the *Fisheries Act* together provide the federal government strong jurisdictional footing to ensure the sustainable development of Canada's waterways. And so they should be considered together, in particular from the perspective of protecting the function of aquatic ecosystems in the face of activities, works or undertakings which might be approved under one statute, which could affect the core purpose of the other. For example, there are many projects that affect navigation, which also affect fish and fish habitat. In the absence of a comprehensive environmental assessment act which compels the consideration of impacts on all interests, these statutes must be amended in a way to avoid unintentional impacts. Considering how the 2012 amendments to federal environmental legislation work together to create major gaps in Canada's environmental protection, legislation is a key aspect of restoring lost protections.

[12] We also draw the Committee's attention to the submissions and recommendations on important issues beyond the scope of this brief covered in briefs submitted by: West Coast Environmental Law Association regarding instream environmental flows; Oceana Canada regarding the duty to recover fish stocks; by the Ecology Action Centre regarding aligning the Act with international best practices in fisheries management and mandating timelines and targets for rebuilding stocks; and Professor Martin Olszynski regarding watershed level management of the cumulative effects of habitat degradation.

Recommendations

(1) Habitat protection needs to be broad

It is widely accepted and understood that without fish habitat there are no fish. This concept was expressed, for example, in DFO's 1997 publication of its first Sustainable Development Strategy entitled *"A Framework for Action"* which outlined the principles of sustainability for the management of Canada's fisheries and oceans. Thus, directly and expressly protecting fish habitat is an essential aspect of modern fisheries legislation. Protecting fish habitat indirectly by prohibiting "serious harm to fish" has created ambiguity that is standing in the way of effective compliance with and enforcement of the law. The HADD provision was a clearer statement of legislative intent and better signaled to the world the type of harm prohibited under fisheries law.

In 1977, when then Minister of Fisheries and the Environment Roméo LeBlanc introduced the new habitat protection provisions in Parliament, he spoke to the House of Commons about why broad protection of fish habitat was critical to ensuring the long-term sustainability of the fisheries resource:

> "…But Mr. Speaker, as the case of Atlantic salmon shows so well, the regulation of fishing itself is only part of what we need. Protecting fish means protection their habitats. Protecting the aquatic habitat involves controlling the use of wetlands… The chain of life extending to the whole open ocean depends on bogs, marshes, mudflats, and other "useless-looking" places that ruin your shoes. Biologists have likened these areas to the cornfields and wheat fields on the ocean. These rich shore areas support salmon, lobster, herring and other local populations; their influence extends for hundreds of miles, even to the most rocky shorelines. They are the irreplaceable nurseries of fisheries well-being…Habitat protection will always remain a difficult battle because it runs against the energies of good people following their natural bent…the work of constant monitoring and restraint where necessary is hard, but the alternative prospect of forever losing stocks or species of fish is not acceptable." [13]

Healthy fish and fish habitat are interdependent and depend upon a complex and layered ecosystem. Thus, targeting the prohibition against destruction of fish habitat on the habitat of, for example, commercially-fished species, ignores the scientific reality of viable ecosystems. All parts of an ecosystem need protection in order to function as a whole and support healthy fish populations, including those targeted in commercial, recreational and aboriginal fisheries.

Many activities can impact fish habitat. Even the HADD Provision did not capture the full range of activities that could affect fish habitat, and did not apply against "activities". Thus, expanding the prohibition against harm to prohibition of activities was wise, and this aspect of the 2012 Amendments should be retained. The HADD provision also failed to protect fish habitat from the harmful effects of fishing, as confirmed by the Federal Court in its 2004 decision in *Ecology Action Centre v. Canada.*[14] Thus, simply reverting to the HADD Provision will not ensure fulsome protection of fish habitat.

The habitat protection provision should reflect the biological reality that any activity can harm fish habitat, including those activities authorized under the *Fisheries Act* and regulations, such as fishing or

[13] House of Commons Debates, 30th Parl, 2nd Sess, Vol 6 (16 May 1977) at 5668 (Hon Romeo LeBlanc). Available at: http://parl.canadiana.ca/view/oop.debates_HOC3002_06/278?r=0&s=1

[14] *Ecology Action Centre v. Canada* 2004 FC 1087 at para 76

operating a fish farm. The Serious Harm to Fish Provision does not apply to harm to fish habitat that "is the result of doing anything that is authorized, otherwise permitted"[15] under the Act, and therefore does not apply to protect fish or fish habitat from the potentially harmful effects of certain fishing methods. While it is desirable to avoid internal conflict in legislation (i.e. one part of an Act says yes, another says no), automatically authorizing habitat destruction caused by fishing creates a huge gap in habitat protection under the Act. This is particularly relevant for marine habitat, where fishing practices can have a very significant impact.

Further, given the range of activities that can harm habitat and how context-dependent harm can be, it creates risks to the integrity of fish habitat to streamline approvals through lists of works, undertakings and activities that will automatically be authorized, which is currently enabled by the Serious Harm to Fish Provision. Such risks need to be expressly addressed in a modernized provision. The Serious Harm to Fish Provision creates gaps in protection of fish habitat through the automatic authorization of many activities, works and undertakings that can harm fish habitat. While the desire to streamline and avoid potential conflict by preauthorizing certain kinds of low risk activities is understandable, it creates a serious risk to fish habitat over the long-term because (a) there is no requirement to consider impacts to fish habitat in any other part of the Act, such as the licencing provisions; and (b) there is no requirement to consider cumulative effects of individual activities, works or undertakings on habitat.

If the habitat protection provisions were modernized as part of a comprehensive overhaul of the entire Act, then such automatic authorizations for fishing, as an example, could be balanced by requirements under other provisions to consider and protect fish habitat. For example, the current s. 7 licencing power could be amended to require consideration and minimization of impacts to fish habitat when issuing fishing licences. However, in the absence of any broader amendments, the habitat protection provisions need to compensate for the failure to consider and protect fish habitat when making decisions under other provisions in the Act.

Recommendations to ensure broad protection of fish habitat:

a) Revert to the previous prohibition against harmful alteration, disruption and destruction of fish habitat, but keep the 2012 amendment addition of "activities".
b) Guide with science-based criteria, the exceptions under s. 35(2) (a) and (c) which automatically authorizes harm to fish habitat from prescribed activities, works or undertakings, or harm authorized by prescribed persons.
c) Ensure that the potential harm to fish habitat caused by fishing is not ignored under the habitat protection provisions through the operation of the exception in s. 35(d) which automatically authorizes any harm to fish habitat that results from doing anything authorized under the Act.
d) As an alternative to recommendation (c), add mandatory consideration of the impact of fish habitat into fisheries authorizations by amending other provisions of the Act.

(2) Habitat protection needs to be precautionary

A preventative approach must be taken to protecting habitat. It is clear that habitat protection is critical to the protection and survival of fish themselves, however it is not always clear at what threshold harm

[15] *Fisheries Act, supra,* at s. 35(2)(d)

to habitat translates to harm to fish. Often, by the time scientific conclusions can be definitively made, it is too late to take the necessary precautions to protect the resource.

The precautionary principle states that "lack of full scientific certainty is not to be used as a reason for postponing preventative measures".[16] It is a strategy to cope with possible risks where scientific understanding is yet incomplete. By definition, the precautionary principle denotes a duty to prevent harm even when all the evidence is not known. As it concerns environmental decision-making, there are four key aspects to the precautionary principle: take preventive action in the face of uncertainty; shift the burden of proof to the proponents of an activity; explore a wide range of alternatives to possibly harmful actions; and increase public participation in decision making.[17] The precautionary principle is an established principle of international environmental law recognized by Canada. It is included in many modern environmental statutes in Canada[18], and relied on by the Courts in interpreting domestic legislation.[19] It should also be included expressly in the *Fisheries Act*.

The 2012 Amendments introduced a list of four factors in section 6 to guide decision-making under certain subsections in the Act, including the Serious Harm to Fish Provision.[20] The precautionary principle is not included in the list of 4 factors.

Recommendation to ensure that habitat protection is precautionary:

a) Include the Precautionary Principle as an express principle that guides decision-making throughout the *Fisheries Act*, and specifically for decisions regarding habitat protection.

(3) Discretion to authorize harm to habitat needs enforceable limits based on science

A broad prohibition against harming fish habitat will of necessity require provisions to authorize harm in some contexts. The power to authorize harm to fish habitat must be guided by clear principles based on science. Such an approach is consistent with the Minister's duty to manage and conserve the fishery and his paramount obligation under the *Fisheries Act* – the conservation of the fisheries resource.[21] The principles that guide the discretion to authorize harm to fish habitat should be clearly set out in the Act or in the regulations. Harm to fish habitat should require a permit from the Minister. Such an approach would result in more predictable and transparent decision-making.

Excessive discretion and Ministerial power is problematic throughout the *Fisheries Act,* including in the Serious Harm to Fish Provision. Excessive discretion was also a weakness of the HADD provision. Unchecked discretion leads to inconsistent and potentially politicized decision-making, which may have little to do with science or the long-term protection of functioning aquatic ecosystems necessary for the long-term survival of the resource.

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[16] *Canada National Marine Conservation Areas Act,* S.C. 2002, c. 18, *preamble*

[17] D. Kriebel et al. 2001. The precautionary principle in environmental science. Environ Health Perspect. 109(9): 871–876.

[18] *Canadian Environmental Protection Act, 1999,* SC 1999, c 33, preamble, s. 6 (1.1) and s. 76.1, ; *Canadian Environmental Assessment Act, 2012,* SC 2012, c 19, s 52.

[19] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town),* 2001 SCC 4; *Castonguay Blasting Ltd v Ontario (Environment)*, 2013 SCC 52.

[20] *Fisheries Act, supra,* s. 6

[21] *R. v Marshall* [1999] 3 SCR 533 at para 40

The unguided discretion to authorize harm to fish habitat has also created problems for DFO. It is why the Minister could not rely on the HADD provision as legal protection of habitat under other regulatory schemes. For example, the federal *Species at Risk Act* (SARA) requires the legal protection of identified critical habitat in lands and waters under federal jurisdiction.[22] Practically speaking, this means the Minister must ensure legal protection of the critical habitat for all aquatic species. A simple way to do this would be to rely on habitat protection provisions under existing legislation. However, in a case concerning the legal protection of critical habitat for killer whales, the Court of Appeal held that the HADD provision did not constitute legal protection because the Minister retained complete discretion to authorize its destruction.[23] If discretion was guided by principles and rules, one of those rules could be that the Minister could not authorize the destruction of habitat in an area designated as critical habitat of a threatened or endangered species. Such an approach could be an administratively efficient and substantively effective way to simultaneously achieve two regulatory objectives.

Guiding discretion through clearly regulated principles has multiple benefits including improving the consistency and transparency of decision-making – two issues with which DFO has chronically struggled. It aligns policy with science and makes clear to the public what the rules are before they engage in the approval process. As the Royal Society of Canada Expert Panel observed, there are models available to assist the Canadian government to effectively manage Ministerial discretion:

> Fisheries management in the U.S. represents a model to replicate in efforts to dilute the Minister's 'czar-like' powers over fisheries management in Canada. In the US, the *Magnuson-Stevens Fishery Conservation and Management Act* has facilitated a curtailment of discretionary decision-making authority, an increase in accountability, and a strengthening of links between policy and science in fisheries management.[24]

It is important that the criteria that guide the authorization of harm to fish habitat are based in science. Further, those criteria should require consideration of: (1) cumulative effects on fish habitat from individual authorizations; (2) long-term stability of the ecosystems upon which healthy fish stocks depend; (3) habitat needs for struggling or recovering fish stocks and aquatic species at risk; and (4) the predicted effects of climate change on the habitat in question. Authorization of harm to fish habitat should also be guided by the precautionary principle and the principle of intergenerational equity. The current "factors to be taken into account", set out in section 6 of the Act, are not about habitat and do not require consideration of cumulative effects, ecosystem health, or vulnerable fish populations.

As suggested by other fisheries experts appearing before the committee, it would enhance the effectiveness of the fish habitat protection provisions if authorizations of harm to fish habitat required some form of positive authorization or approval by DFO such as a permit. As it currently stands, and under the HADD provisions, authorization is not required to proceed with an activity, work or undertaking that could result in harm to fish habitat. The authorization is simply a protection against prosecution if you were to violate the prohibition. This structure creates several challenges to the

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[22] *Species at Risk Act,* S.C. 2002, c. 29, s 57 and 58

[23] *Canada (Fisheries and Oceans) v. David Suzuki Foundation et al.,* 2102 FCA 40 at paragraph 8 and 9. See also para 126-131.

[24] J.A. Hutchings et al. 2012. Sustaining Canada's Marine Biodiversity: Responding to the Challenges Posed by Climate Change, Fisheries and Aquaculture. Expert panel report prepared for the Royal Society of Canada. p. 219.

effective protection of fish habitat. First, it misses an excellent opportunity to gather information useful for evaluating cumulative impacts on fish habitat – especially at the larger watershed or ecosystem level. If it is clear a permit is needed, then more people will get permits, resulting in more information in DFO's hands about what is happening incrementally to watersheds that might over the long-term harm fish stocks. Second, in a climate of obvious reductions in enforcement budget, it encourages people to take the risk that they will not be caught rather than seek prior approval.

Recommendations for a principled approach to authorizing harm to fish habitat

a) Guide Ministerial discretion throughout the *Fisheries Act,* including the discretion to authorize harm to fish habitat.
b) Add in a purpose section for the entire Act, or with the habitat protection provisions that guide the Minister's decision-making.
c) Require science-based considerations and principles to guide any authorization of harm to fish habitat including: (1) cumulative effects on fish habitat from individual authorizations; (2) long-term stability of the ecosystems upon which healthy fish stocks depend; (3) habitat needs for struggling or recovering fish stocks and aquatic species at risk; and the predicted effects of climate change on the habitat in question. These considerations should be set out in the habitat provision or in regulation and not in policy documents.
d) Authorization of harm to fish habitat should be guided by the principles of precaution and intergenerational equity. These principles could either be included in a purpose section under the Act or added as specific considerations in the habitat protection provisions.
e) Permits should be required to harm fish habitat.

(4) Habitat provisions must address cumulative harm to and loss of fish habitat

The current habitat protection provisions do not allow for consideration of cumulative effects of multiple activities on fish habitat. Ecosystems have thresholds or tipping points, beyond which the system will restructure itself in response to stressors.[25] A series of individual activities can push a system beyond that boundary just as much as one major project. Up until 2012, cumulative effects of individual proposed works and undertakings were considered as part of the environmental assessment that preceded the issuance of a HADD authorization. Since the 2012 Amendments, authorizations of Serious Harm to Fish no longer trigger an environmental assessment. Thus, under the current system there is no requirement to consider the cumulative impact of individual decisions.

This situation is exacerbated by DFO's apparent failure to compile authorizations to harm fish habitat. This makes it essentially impossible for regulators to meaningfully consider and manage the cumulative effects of multiple authorizations to harm fish habitat on the health and function of watersheds and ecosystems. There needs to be a mechanism for assessing and managing cumulative impacts to fish and fish habitat.

[25] Jax, K. (2016): Thresholds, tipping points and limits. In: Potschin, M. and K. Jax (eds): OpenNESS Ecosystem Services Reference Book. EC FP7 Grant Agreement no. 308428. Available at: http://www.openness-project.eu/library/reference-book/sp-thresholds.

Further, to our knowledge, DFO does not set watershed-level objectives for fish habitat. Thus, proposed individual authorizations conflict with concerns over total and cumulative impact on a case-by-case basis. Publically available and clear watershed-level habitat goals, against which individual proposals for harm to fish habitat could be evaluated, would set reasonable expectations in a community about what will be permitted. Watershed-level goals could also help reverse the slow deterioration of habitat at the watershed level, which is the inevitable outcome of the existing approach of *ad hoc* approvals.

From a practical perspective, and in particular if the habitat protection provisions were to capture all works, undertakings and activities that could harm fish habitat (including fishing), DFO will need an effective way to review the multitude of requests for permits or authorizations to harm fish habitat. Watershed or ecosystem-level assessments provide a practical tool for efficient vetting of individual applications to harm habitat.

Previous attempts to manage the volume of requests to authorize harm to fish habitat have tended to favour ignoring certain "low risk" activities (e.g. the introduction in 2012 of automatic authorization for prescribed works, undertakings and activities considered low risk). While such an approach may be administratively appealing it makes it more difficult for the regulator to effectively assess long-term habitat health on a watershed level. Because entire categories of activities are no longer captured by the habitat provision, the regulator is deprived of relevant information. Another previous policy approach was the "letters of advice" policy in which DFO informally provided advice on how to avoid harming fish habitat without issuing a formal authorization. This was done to avoid the time and expense of an environmental assessment. However, it also deprived the regulator of the ability to add enforceable conditions to approvals. The only way to protect habitat under the letters of advice approach was through a full HADD prosecution.

Watershed-level objectives for fish habitat maintains DFO's access to relevant information and ensures they have the tools they need to ensure compliance with authorizations. They can also provide the foundation for more consistent and efficient approvals.

Recommendation to address cumulative loss of fish habitat:

a) Ensure that all activities, works and undertakings that may harm fish habitat require authorization.
b) Add "cumulative effects" as a mandatory factor to be considered as part of any authorization of harm to fish habitat.
c) Set science-based precautionary thresholds and objectives for fish habitat at the watershed and ecosystem levels before issuing individual authorizations in a watershed or ecosystem.
d) Maintain a comprehensive and publically accessible database of all authorizations to harm fish habitat that is ideally configured to allow for compilation, display and analysis of authorizations to harm fish habitat on a watershed or ecosystem level.

(5) Habitat provisions must be enforceable and enforced

An essential part of an effective regulatory regime is monitoring and enforcement. There is significant concern that the Serious Harm to Fish Provision is not enforced. This may be due to the fact that "serious harm to fish" is more difficult to prove than "harmful alteration, disruption or destruction". It may also be due to recent budget cuts to DFO's Habitat Protection branch. Effective protection of fish

habitat requires enforceable provisions that directly protect fish habitat. Effective enforcement of any provision in the *Fisheries Act,* including habitat protection provisions, requires people on the water, effectively equipped and supported, to monitor, inspect and enforce where necessary. In addition to properly funding the department, the Act should be amended to enhance and clarify provisions that enable the public to assist regulators in monitoring and enforcement.

The Serious Harm to Fish provision lowers the standard of protection for fish habitat under the Act by requiring proof of permanent alternation or destruction of fish habitat or death of fish. To enhance enforceability of habitat protection provisions, they should be expressly aimed at protecting fish habitat. Habitat protection provisions must be worded in a way that makes protecting fish habitat a reasonable possibility. Requiring permanent harm sets a very high bar for burden of proof that is difficult to meet.

In addition to scaling back the protection for fish habitat in law, the 2012 Amendments were followed by a shift in approach away from review by regulators towards self-assessment.[26] This shift towards self-assessment coincided with a significant reduction in staff, particularly in what had been until then known as the Habitat Branch, as DFO had its budget reduced by $80 million in 2012 and another $100 million in 2015.[27] The policy shift towards self-regulation combined with the significant reduction in staffing and resources has made diligence and scrutiny over authorizing harm to habitat, as well as monitoring and enforcement, very difficult for DFO. During the period from 2003/4 to 2014/15, the number of authorizations to harm habitat considered by DFO went from approximately 700 down to only 75.[28] This coincided with the amendments to the *Canadian Environmental Assessment Act* which removed s. 35 (2) authorizations as a trigger for federal environmental assessment, making authorization less rigorous, as there were no mandatory considerations of the environmental or cumulative effects of authorizations. Finally, in 2014-15 only 5 warnings were issued and no charges laid under the Serious Harm to Fish provision.[29]

It is important to note that DFO struggled with monitoring and enforcement before the 2012 Amendments. For example, in its 2009 audit of DFO's protection and management of fish habitat, the Commissioner for Environment and Sustainable Development (CESD) documented various examples of lack of enforcement. The audit concluded that DFO does not have a systemic approach to monitoring compliance with project approvals, nor does it evaluate whether its decisions are meeting the [then policy of] no net loss of fish habitat. Further, the CESD randomly selected 15 fish habitat "occurrences" – situations where a complaint was made that the *Fisheries Act* had been violated – and found a lack of documentation in the files reviewed and as a result a lack of enforcement.[30]

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[26] See http://www.dfo-mpo.gc.ca/pnw-ppe/index-eng.html

[27] "Conservative MPs argue DFO cuts won't hurt research". May 22, 2012. CBC News. Available at: http://www.cbc.ca/news/canada/new-brunswick/conservative-mps-argue-dfo-cuts-won-t-hurt-research-1.1162831 and "Federal budget cuts $100 million from fisheries and oceans over three years". March 21, 2013. Vancouver Sun. Available at: http://www.vancouversun.com/news/Federal+budget+cuts+million+from+fisheries+oceans+over+three+years/8133846/story.html

[28] Prof. Martin Olszynski's submission: *Fisheries Act* Review – "Serious Harm to Fish" and Associated Provisions. p. 3.

[29] DFO Annual Report to Parliament 2014-15, section 2.2 Conservation and Protection Program, Tables 7 and 8 available at http://www.dfo-mpo.gc.ca/pnw-ppe/reports-rapports/2014-2015/page02-eng.html

[30] Canada, Commissioner of the Environment and Sustainable Development, *Protecting Fish Habitat,* ch 1 (Ottawa: Office of the Auditor General, 2009) at paras 1.46-1.47.

For the habitat protection provisions to be effective, DFO needs to be enabled through both staffing and budget. However, given the inherent limits to resources for any government department, and the vast task of protecting fish habitat throughout Canada, DFO needs to better rely on and partner with citizen groups to assist with the monitoring and enforcement of the habitat protection provisions. The current fisheries scheme envisions citizen enforcement.[31] Efforts by citizens to enforce the Act have had mixed success. Private prosecutions frequently do not proceed due to intervention by the Attorney General, and in some jurisdictions they are always stayed. Further, there is no provision under the Act which allows a citizen to request an investigation of a potential offence. Such provisions do exist under other federal legislation such as the *Canadian Environmental Protection Act.*[32]

Citizen enforcement provisions allow individuals proceeding in good faith to take action to enforce the law. From experience in other jurisdictions, citizen monitoring and enforcement improves compliance with the law and leads to better environmental outcomes. For example, in the United States, clear citizen suit provisions are included in almost all major federal environmental laws, including the *Clean Water Act*, *33 U.S.C. § 1365*, the *Clean Air Act, 42 U.S.C. § 7604* and the *Resource Conservation and Recovery Act,* 42 U.S.C. § 6972. In Australia, citizen suit provisions are included in both the *Environmental Planning and Assessment Act* 1979 (New South Wales) s. 123 and *Protection of the Environment Operations Act 1997* (New South Wales) s. 219. Full text of these provisions is included as an appendix to this brief. Citizen suit provisions support government enforcement of federal law and enhance on-the-ground environmental protection. The US Senate describes environmental citizen suits as a "proven enforcement tool" that has deterred violators and achieved significant compliance gains.[33]

Recommendations to improve enforceability and enforcement of fish habitat protection provisions

a) Amend the serious harm to fish provision to expressly and clearly protect fish habitat, and ensure that the offence reflects the need to take a precautionary approach to habitat protection by not requiring proof of permanent harm or harm to the productivity of the fishery.
b) Ensure that there is an adequate risk-based approach to monitoring projects and providing assurance that proponents are complying with the *Fisheries Act* and all terms and conditions of DFO decisions. DFO should also determine whether the required mitigation measures and compensation are effective in meeting DFO policy with respect to fish habitat.
c) Add a clear provision that allows concerned citizens to request that DFO investigate an alleged fish habitat violation.
d) Add a provision that allows concerned citizens acting in good faith to take action in the courts to enforce the Act where DFO is unable or unwilling to do so.

[31] Fishery (General) Regulations, SOR/93-53, s 62(1)
[32] *Canadian Environmental Protection Act, 1999* S.C. 1999, c. 33, s. 19
[33] See Senate Rep. No. 99-50, at 28 (1985). See also 136 Cong. Rec. S3180 (1990): "Citizen resources are an important adjunct to governmental action to assure that these laws are adequately enforced. In a time of limited governmental resources, enforcement through court action prompted by citizen suits is a valuable dimension of environmental law."

About Ecojustice Canada Society

Incorporated in 1990, Ecojustice is Canada's largest not-for-profit environmental law organization. We have 20,000 individual donors from coast to coast to coast who support our mission to use the law to protect the environment. The federal Fisheries Act has been a cornerstone of our work, and we have over 20 years of experience working to enforce and apply the Act.

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Appendix

Ecojustice Submissions to the Fisheries and Oceans Standing Committee
Re: Fisheries Act Review

FOREIGN JURISDICTION CITIZEN SUIT PROVISIONS FOR FISHERIES ACT REFORM

United States

Clean Water Act **– citation:** ***33 U.S.C. § 1365***

(a) Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

Clean Air Act **– citation:** ***42 U.S.C. § 7604***

(a) Authority to bring civil action; jurisdiction - Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

Endangered Species Act **– citation: *16 U.S.C. § 1540***

(g) Citizen suits

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

Resource Conservation and Recovery Act **– citation: *42 U.S.C. § 6972***

(a) In general Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

(1)

(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment,

storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

Australia

***Environmental Planning and Assessment Act 1979 No 203* (NSW), s 123**

Section 123 Restraint etc of breaches of this Act

(1) Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.

(2) Proceedings under this section may be brought by a person on his or her own behalf or on behalf of himself or herself and on behalf of other persons (with their consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.

(3) Any person on whose behalf proceedings are brought is entitled to contribute to or provide for the payment of the legal costs and expenses incurred by the person bringing the proceedings.

***Protection of the Environment Operations Act 1997* (NSW), s 219**

Section 219 Other persons may institute proceedings with leave of Land and Environment Court

(1) Any person may institute proceedings in the Land and Environment Court for an offence against this Act or the regulations if the Court grants the person leave to bring the proceedings.

***Protection of the Environment Operations Act 1997* (NSW), s 252**

Section 252 Remedy or restraint of breaches of this Act or regulations

(1) Any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act or the regulations.

(2) Any such proceedings may be brought whether or not proceedings have been instituted for an offence against this Act or the regulations.

(3) Any such proceedings may be brought whether or not any right of the person has been or may be infringed by or as a consequence of the breach.

(4) Any such proceedings may be brought by a person on the person's own behalf or on behalf of another person (with their consent), or of a body corporate or unincorporate (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.

(5) Any person on whose behalf proceedings are brought is entitled to contribute to or provide for the payment of the legal costs and expenses incurred by the person bringing the proceedings.

(6) If the Court is satisfied that a breach has been committed or that a breach will, unless restrained by order of the Court, be committed, it may make such orders as it thinks fit to remedy or restrain the breach.

(7) Without limiting the powers of the Court under this section, an order under this section may suspend any environment protection licence.

(8) In this section:

"breach" includes a threatened or apprehended breach.