

Decapitating the Fisheries Act by removing the HADD: A Critique of the Rationale

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Decision Considered:

Federal government proposal to remove habitat protection from the *Fisheries Act*.

The federal government of Canada proposes to remove the habitat protection provisions of the *Fisheries Act*, RSC 2000, c F-14, s 35. Countless Canadians have vigorously spoken out against this proposal because removing these provisions would be a critical and fundamental change not only to federal legislative approach, but also to the management, protection, and well-being of fisheries in Canada.

The federal government's proposed change is questionable for three reasons. One, as the federal government has exclusive constitutional authority over inland and coastal fisheries it would be unconscionable to remove the habitat protection provisions from the *Fisheries Act*. Two, the evidence shows that the habitat provisions of the *Fisheries Act* have not posed significant economic barriers to development. Three, we already have the legal tools to assure an appropriate level of regulatory requirements with respect to project applications that will impact Canada's fisheries.

Section 35(1) of the *Fisheries Act* prohibits activities that result in a harmful alteration, disruption or destruction (HADD) of fish habitat. The HADD provisions came into law in 1977 with the Federal Government legislatively acknowledging its exclusive constitutional authority over inland and coastal fishers (section 91(12) of the Constitution of Canada) and that habitat is critical to any fishery. In other words, fish cannot survive without protection of their habitat and if the federal government does not protect fish habitat no other level of government may legally fill the gap.

The Department of Fisheries and Oceans (DFO) recently has affirmed the critical importance of habitat to fisheries in its 2011 Policy and Practice Report on *Habitat Management Policies and Practices*, stating "The Department acknowledges that fish habitat is not only essential to the production of fish, but also provides essential ecosystem services" (para 9).

Yet despite the federal government's exclusive jurisdiction over fisheries and acknowledgement of the critical relationship between habitat and fish, the Government of Canada is apparently planning to remove the habitat protection provisions as part of the upcoming budget bill. Not only will there be no opportunity for meaningful Parliamentary debate of this core and substantive change, but there also will be no opportunity to consult Canadians who rely on federal protection of their fisheries.

Federal Fisheries Minister Keith Ashfield's justification for these changes is that protection of fish habitat inhibits the "everyday way of life of Canadians," and that "federal fisheries policies designed to protect fish are out dated and unfocused in terms of balancing environmental and economic realities" (See Peter O'Neil, "Ottawa ready to gut laws protecting fish to balance environmental, economic 'realities'" edmontonjournal.com, published: Tuesday, March 13, 2012, and "[Feds out to gut Fisheries Act: Opposition MPs](#)," Postmedia News Published: Wednesday, March 14, 2012).

We assume that Minister Ashfield's concern is because DFO must authorize a HADD under section 35(2) of the *Fisheries Act* in order for one to occur legally, which normally triggers a review under the *Canadian Environmental Assessment Act* (CEAA).

In fact, there is little evidence that protection of fish habitat has provided any significant barrier to economic development in Canada. Between 1995 and 2000, more than 99.9% of approximately 25,000 federal environmental assessments of proposed projects were subjected to regulatory screenings under CEAA, the lowest level of environmental review. Projects are almost never stopped by this sort of review, with approximately 5% involving any follow-up at all. During this period, only 46 projects advanced to more detailed impacts assessments and, of these, only 10 advanced to reviews by joint provincial-federal panels with public hearings. (Canadian Environmental Assessment Agency. 2000, "Review of the Canadian Environmental Assessment Act: A Discussion Paper for Public Consultation. Ottawa: Minister of Public Works and Government Services Canada," and S. Hazell, 1999. *Canada v. The Environment: Federal Environmental Assessment 1984-1998*. Toronto: Canadian Environmental Defence Fund (at 157), both as cited in D. R. Boyd. 2003. *Unnatural law: rethinking Canadian environmental law and policy*. Vancouver: UBC Press (at 152-153); and Ecocompliance, "[Feds to review Cdn Environmental Assessment Act](#)", January 2000).

With respect to environmental reviews by DFO, official regulatory assessments of projects dropped dramatically in the mid-1990s. Rather than authorizing damage to fish habitat, "letters of advice" and "referrals" were issued by DFO to permit HADDs and avoid both the threat of prosecution and the triggering of environmental assessments under CEAA. This shift in approach reduced screening-level environmental assessments triggered by DFO from more than 12,000 in 1991-92 to 233 in 1995-96. Since then, many thousands of referrals and letters of advice are issued in response to applications, and less than 400 advance to environmental assessments annually. (See DFO, *Annual Report to Parliament on the Administration and Enforcement of the Fish Habitat Protection and Pollution Prevention Provisions of the Fisheries Act for the Period of April 1, 1997-March 31, 1998* (Ottawa: Minister of Public Works and Government Services Canada, 1999), and Julliet, L. and G. Toner, "From Great Leaps to Baby Steps: Environment and Sustainable Development Policy under the Liberals," in G. Swimmer, ed., *How Ottawa Spends, 1997-98: Seeing Red - A Liberal Report Card* (Toronto: Oxford University Press, 1997), pp 179-209 (at 185), both as cited in D. R. Boyd).

There are existing legislative tools to reduce or remove the regulatory processes concerning HADDs without removing protection of fish habitat. Section 35(2) of the *Fisheries Act* allows the federal government to create regulations that authorize classes of projects that result in HADDs without the need for a project-specific authorization and consequent CEAA environmental assessment. And even where an authorization is required (no regulation applies and the HADD cannot be avoided), the CEAA allows for the exclusion of types or classes of projects via the *Exclusion List Regulation* SOR/94-639, the replacement of a "ready-made" assessment for a new assessment, and for a simplified assessment process through a model class

screening (CEAA s 19). Simply put, there is no justification to remove habitat protection from the *Fisheries Act* on the basis that it sometimes can result in lengthy regulatory reviews. Obviously, careful and legitimate regulatory oversight is sometimes warranted to protect fish habitat. But if close review of a particular kind of project and its potential impact on habitat is not warranted, then we already have the legal tools to assure the appropriate level of review processes.

Media reports suggest that the federal government wants these changes to speed up approval of major industrial projects by reducing the regulatory checks and balances seen by some as impediments to rapid development in the oil sands, mining, and pipeline sectors, among others. However, this headlong rush to support speedy development approvals likely can only weaken environmental and resource protection, and limit available regulatory and enforcement actions in response to actual harm to fish habitat that are properly the authority and responsibility of the federal government.

The Auditor General of Canada, the federal Commissioner of the Environment, the Royal Society of Canada, and the federal Oilsands Advisory Panel all have recently highlighted that the regulatory capacity of the federal and provincial governments has fallen far behind the pace of industrial development in Canada. Removing protection of fish habitat from our environmental and resource laws, will just further diminish our capacity to deal with impacts on our fisheries and will reduce the potential for environmental review through the triggering of environmental hearings in the application and approval process. It also will impact the ability of Environment Canada and the DFO to properly carry out their roles in environmental and resource management in Canada, including exercising exclusive federal constitutional authority to manage and regulate inland and coastal fisheries in Canada.

The *Fisheries Act* is the single piece of legislation that provides the most protection to Canada's aquatic systems in the face of growing development pressures. If the federal government is intent on "updating" environmental and natural resources law in Canada to reduce regulatory requirements while still maintaining high levels of environmental protection, we recommend that it consult with legal and scientific experts in public and private practice and academia in Canada, as well as with Aboriginal peoples and the public. The rationale government gives for its current proposal does not hold water and no studies or indications have been offered as to the proposal's direct and indirect implications for environmental and natural resource management and protection. We are left with the obvious observations that implementing the proposal will restrict and lessen environmental and resource management and protection across Canada, diminish the ecological and economic services of aquatic habitats on we all rely upon, and open the door to legal challenges.