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Assessing Canada's Habitat/Fisheries Protection Regime: A Near Total Abdication of Responsibility?

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Legislation Commented On: Section 35 of the *Fisheries Act*, RSC 1985 c F-14, as amended by the *Jobs, Growth and Long-term Prosperity Act* SC 2012, c 19

Roughly three years ago (on June 29, 2012), Bill C-38, the omnibus budget bill also known as the *Jobs, Growth and Long-term Prosperity Act*, received royal assent. As most ABlawg readers will surely know, Bill C-38 fundamentally changed some of Canada's most important environmental laws. Among these were changes to the *Fisheries Act* and a new regime for the protection of fish habitat in particular. Section 35 of the *Act,* which used to prohibit any work or undertaking that resulted in the "harmful alteration or disruption, or the destruction" (HADD) of fish habitat, was amended to prohibit works, undertakings and activities that result in "serious harm to fish that are part of a commercial, recreational or Aboriginal fishery," serious harm being defined as "the death of fish or any permanent alteration to, or destruction of, fish habitat" (DPAD). At the time of Bill C-38's passage, this wording was widely panned as vague, confusing and bound to reduce the scope of protection for fish habitat (see here, here, here, here and our own professor emeritus Arlene Kwasniak here). This summer – and with a view towards a *Fisheries Act* panel at the Journal of Environmental Law and Practice's 5th conference in Kananaskis in June – we are conducting research to assess the merits of this new regime. This blog sets out our approach and some preliminary findings. Long story short, it appears that the federal government has all but abdicated its role in protecting fish habitat in Canada.

Background

Section 35 has always been more of a regulatory regime than a prohibition. Impacts to fish habitat prohibited by subsection 35(1) could be – and still can be post-Bill C-38 –authorized by the Minister, through the Department of Fisheries and Oceans (DFO), pursuant to subsection 35(2). Prior to Bill C-38, this regulatory regime generally worked as follows. DFO would receive inquiries or authorization requests from proponents (referred to as "referrals"), which it would then review to determine if a HADD was likely to occur. DFO would then do one of two things. For low risk projects, it would provide advice to proponents on how to avoid a HADD and, consequently, the need for an authorization. Such advice could be found in a letter specific to the proponent (referred to as a Letter of Advice) or in an Operational Statement (essentially a generic Letter of Advice available on DFO's various regional websites for certain, usually routine, kinds of projects, *e.g.* culvert cleaning and beaver dam removal). In the case of the latter, DFO simply requested that proponents voluntarily notify DFO of their project. If avoidance of a

HADD was not possible, DFO would require proponents to obtain an authorization, which until 2012 also triggered the need for an environmental assessment (EA) pursuant to the previous federal EA regime.

As noted above, Bill C-38 received royal assent in June 2012, but the changes to the *Fisheries Act* were not brought into force until November 25, 2013. Around that time, changes were also made to the manner in which DFO conducts its business. Operational Statements have been replaced with a "self-review" feature on DFO's primary fisheries protection website. Here, project proponents are provided information and advice about the kinds of waters and works that DFO has determined do not require an authorization, with the important difference that there is no longer any way for proponents to notify DFO of their projects. Proponents are also encouraged to seek advice from a Qualified Environmental Professional (QEP), which suggests that Letters of Advice will also be less frequent; no doubt a reflection of the fact that the department had its budget reduced by $80 million in 2012 and another $100 million in 2015.

The Minister of Fisheries and Oceans also released the Fisheries Protection Policy Statement (October 2013), which set out her interpretation of the new "fisheries protection" regime and which replaced the Policy for the Management of Fish Habitat that had been in place since 1986. The stated goal of the 1986 policy was to ensure "No Net Loss" (NNL) of the productive capacity of fish habitats, which would be achieved by requiring compensatory (offsetting) fish habitat when authorizing any HADDs. DFO had a hard time achieving this objective, in large part due to inadequate monitoring and enforcement activity (see here and here). Under the new fisheries protection regime, the goal is "to provide for the sustainability and ongoing productivity of commercial, recreational and Aboriginal fisheries" directly (*Fisheries Act*, s 6.1).

Approach

To gain some insight into how DFO is actually implementing the new fisheries protection regime and the implications for fish habitat in Canada, we are currently analyzing over 150 subsection 35(2) authorizations issued by DFO's two largest regions (the Pacific and Central & Arctic Regions) over a six month period (May 1 – October 1) for the years 2012, 2013, and 2014 (2014 being the first year under the new regime). Because DFO does not maintain a public registry, these authorizations were obtained through the federal *Access to Information Act,* RSC 1985 c A-1. By analyzing and comparing these authorizations, we hope to get a better sense of how the new regime is different from the previous one, especially with respect to the relevant level of harm (HADD *v.* DPAD) and the new requirement that fish be part of, or support, a fishery in order for their habitat to receive protection.

In order to help frame the analysis and provide additional baseline information, however, we are also analyzing and compiling data from twelve annual reports to Parliament by DFO (2001/02 – 2013/14). These reports are statutorily required by section 42.1 of the *Fisheries Act* and must include information on "the administration and enforcement of the provisions of the Act relating to fisheries [previously habitat] protection and pollution prevention for that year," as well as a statistical summary of convictions under the *Act*. They contain information regarding the number of referrals that DFO received in a given year, the number of authorizations issued, as well as DFO's enforcement activities (*e.g.* the number of warnings issued, charges laid, as well as convictions reported) – all broken down by project type and region. The preliminary findings discussed below come from our initial analysis of these twelve annual reports.

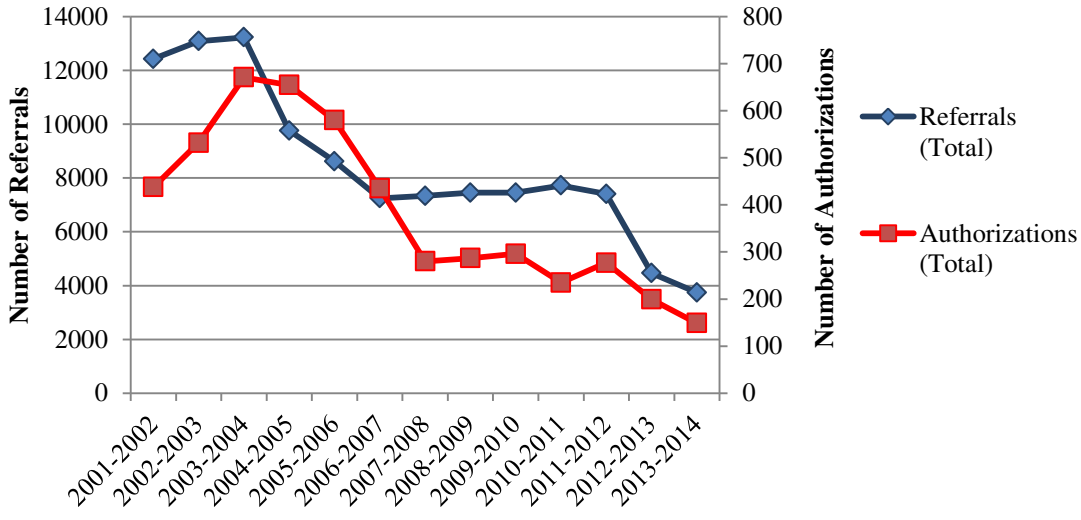
As a quick aside, readers can access the 2012/13 report here, and previous reports here and here.

To access the 2013/14 report, readers must click here. This is because it is not yet available on DFO's website (or anywhere else on the internet for that matter), notwithstanding the fact that it is May 2015 and that these reports are supposed to be tabled in Parliament "as soon as feasible after the end of each fiscal year" (section 42.1). Indeed, it took considerable (student) sleuthing to discover that Minister Shea had in fact deposited the 2013/14 report with the Clerk of the House of Commons less than a month ago (April 21, 2015), at which time it was apparently sent to the Standing Committee on Fisheries and Oceans (though you won't find the report on its website either). We obtained our copy by contacting the Library of Parliament directly.

Preliminary Findings

Figure 1 (below) demonstrates that the total number of authorizations issued by DFO (nationally) (right axis) has declined from a high point of almost 700 in the 2003/04 fiscal year to roughly 150 for 2013/14. The most dramatic drops occurred between 2006 – 2008 and then again in 2012 – 2014. Similarly, the number of referrals that DFO reviewed has also declined. The most dramatic decline in referrals occurred between 2004 and 2006. The slight lag in the drop in the number of authorizations issued around that time makes sense when one considers that referrals would take on average two years to process (thus the decline in authorizations in 2006 is likely a reflection of the decline in referrals in the preceding two years). That is not the case, however, with respect to the declines in *both* authorizations and referrals *immediately* following the passage of Bill C-38 in 2012, bearing in mind that the changes to the *Fisheries Act* were not brought into force until November 25, 2013 (in other words, the data below includes only four months of activity under the new regime). These declines appear consistent with a Vancouver Sun story from June 2014, wherein the chair of the Fraser Valley Watersheds Coalition suggested that "[t]he level of disturbance has clearly increased in recent years… people got the memo that now is the time, no one is watching, the rules are vague, your chances of being prosecuted are virtually none." As for those four months under the new regime (November 25, 2013 – March 31, 2014), DFO only issued 17 authorizations in that time. Pro-rated to a yearly average, that would be 51 – or an 83% decline from an average of 300 authorizations/year in the years prior to the passage of Bill C-38.

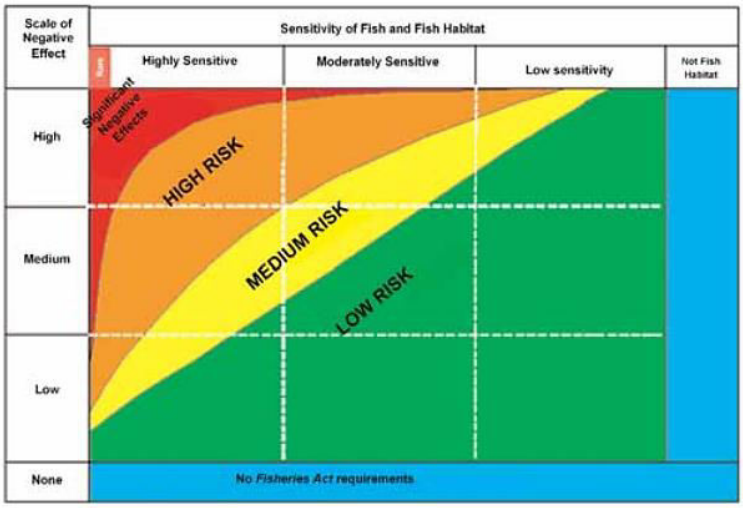
Figure 1: Number of Section 35 Referrals and Authorizations (2001/02 - 2013/14)



Overall, this information can only mean one of two things. Either project proponents have

become exceedingly good at understanding and avoiding impacts to fish habitat, or they have had increasingly less reason to worry about the consequences of those impacts. We are going to suggest the latter for two reasons.

First, the decline in referrals between 2004 and 2006 coincides with DFO's launching of its "Environmental Process Modernization Program" (EPMP), which is referred to widely in its annual reports for those years. The goal of the EPMP was to "contribute to more efficient and effective delivery of its regulatory responsibilities and to support the federal smart regulation agenda" (Fisheries and Oceans Canada, 2005. *Annual Report to Parliament on the Administration and Enforcement of the Fish Habitat Protection and Pollution Prevention Provisions of the Fisheries Act*, April 1, 2003 to March 31, 2004 at 7). Probably the most tangible result of that program was the development of DFO's "risk management framework" (below – as found in DFO's "Practitioners Guide to the Risk Management Framework for DFO Habitat Management Staff" at 18), pursuant to which risks to fish habitat were classified as high, medium and low, with high-risk projects receiving site-specific review and authorization, medium risk projects being subjected to streamlined authorization processes, and low risk projects being subject to advice and Operational Statements.

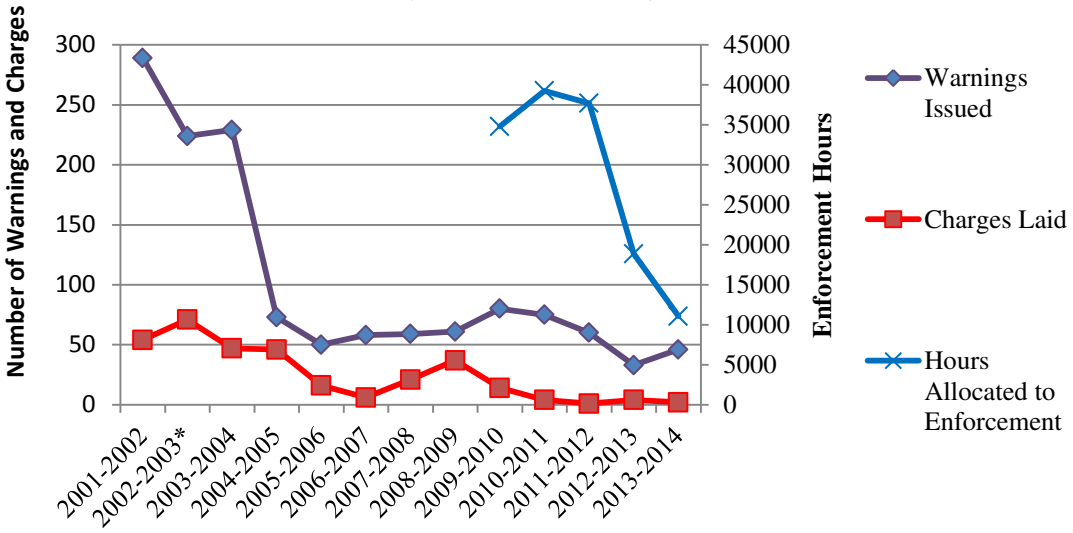


What is striking about this figure is the upward and seemingly arbitrary placement of the low-risk threshold, which results in this category taking up roughly 60% of the available matrix space. This is remarkably consistent with an approximately 60% reduction in authorizations following the implementation of the EPMP starting around 2004/05 (see Figure 1).

Our other reason for suggesting that fish habitat is likely being degraded may seem simplistic but here it is nevertheless: if project proponents had become pros at avoiding impacts to fish habitat, it seems unlikely that they would bother to lobby for changes to the Act. The only other alternative is that they were pros, but compliance was deemed too costly (see preceding link). In either case, the future for fish habitat – and Canadian fisheries – appears bleak.

There is, of course, a simple way to test our theory: compliance and enforcement. With all of the time and resources saved by the reductions in project review, one might reasonably expect a shift towards increased compliance and enforcement activity. Here too, however, we see a dramatic decline, as set out in Figure 2:

Figure 2: Habitat/Fisheries Protection Enforcement Activities (2001/02 - 2013/14)



It would be one thing if, all other things being equal, the number of charges laid decreased over time. But that is not the case. There has also been a dramatic decrease in the number of warnings issued since 2001/02, again most notably following the implementation of the EPMP in 2004 but also from 2010 onwards. The most telling trend, however, is in the number of hours actually allocated to enforcement. These numbers only began to be reported in the 2009/10 fiscal year, but saw a significant decline (~ 75%) since 2012/13.

A near-total abdication of the federal government's role in protecting fish habitat in Canada? Looks like it. Stay tuned for more in June.

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