September 1, 2015

5 Things I learned about ~~Mike Duffy~~ Canada's New Fish Habitat Protection Laws

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Case 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

This is a follow-up post to an earlier blog from May in which Alex Grigg and I described a research project looking into the new "fisheries protection" regime under the amended *Fisheries Act*. Interested readers are referred to that post for background. Briefly, in order to gain insight into the difference between the previous habitat protection regime and the new fisheries protection regime, we analyzed the primary permitting vehicle in this context, the *Fisheries Act* section 35 authorization (previously authorizing harmful alteration, disruption or destruction of fish habitat, now authorizing the death of fish and the permanent alteration or destruction of fish habitat). One hundred and eighty four authorizations (just over 1600 pages worth) issued by the Department of Fisheries and Oceans' two largest regions (Pacific and Central & Arctic) over a six-month period for the years 2012, 2013, and 2014 were analyzed, with 2014 being the first year under the new regime. In order to help frame the analysis and provide additional baseline information, twelve statutorily required annual reports to Parliament on the administration and enforcement of the habitat/fisheries protection provisions were also analyzed (2001/02 – 2013/14). In this post, I discuss five of the most significant findings from this analysis. The full paper (from which this post borrows liberally) is available here.

Overall Results

My earlier post focused on DFO's annual reports to Parliament, beginning with annual referral and authorizations rates. The results indicated that the federal government's abandonment of the habitat protection field has been a decade's long process, beginning with the implementation of a risk-based approach to section 35 authorizations roughly ten years ago (see Figure 1 of that post). This post focuses on Bill C-38's effects on that process by examining the differences between the previous habitat protection regime and Bill C-38's fisheries protection regime.

While DFO's *Fisheries Protection Policy Statement* appears to adopt a generous interpretation of the new subsection 35(1) prohibition, departmental budget cuts and the strong signal sent to the regulated community by virtue of the mere fact of the 2012 amendments have resulted in a **58% reduction** in the authorization regime's scope. In concrete terms, DFO's two largest regions went from issuing 86 authorizations in 2012 (over a six month period) to 36 in 2014. As will be seen, only a small percentage of this reduction appears attributable to the actual legislative changes to section 35. Approximately 40% of it can be attributed to DFO's apparent adoption of an extra-legislative size threshold for impacts requiring authorization. The rest of it appears to be attributable to proponents' views on the likelihood – or not – of being prosecuted.

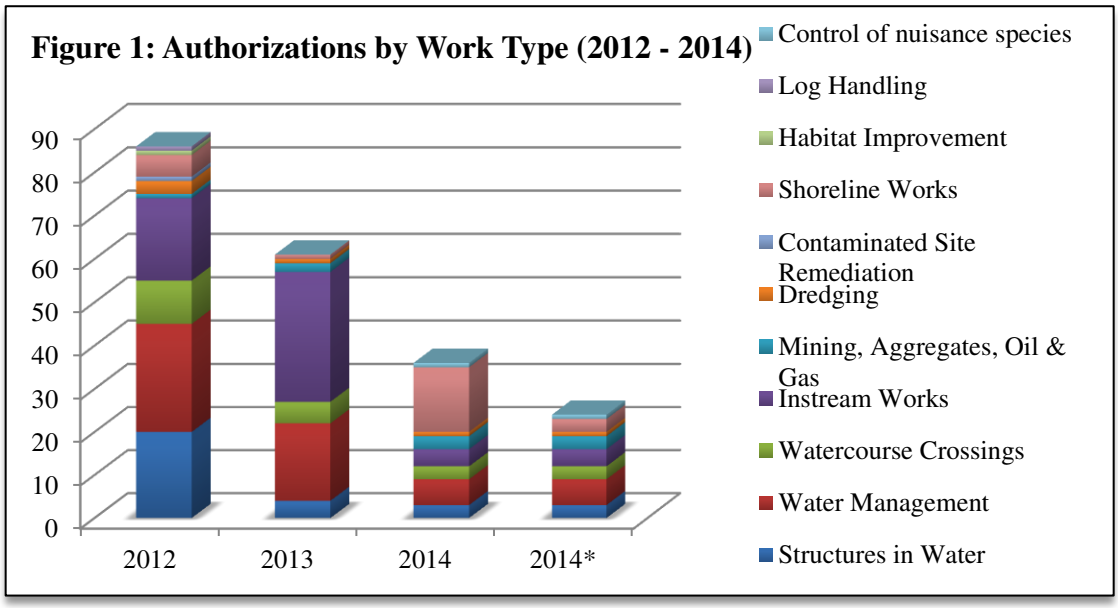
Habitat v. Fisheries Protection

The primary differences between the previous habitat protection regime and the current fisheries protection regime can be summarized as follows:

- The new prohibition applies to works, undertakings *and activities*;
- The previous prohibition prohibited the harmful alteration, disruption or destruction of fish habitat (HADD), whereas the current one prohibits "serious harm to fish" (s 2(1)), which the Act now defines as the death of fish and the permanent alteration or destruction of fish habitat (DPAD);
- The previous prohibition essentially applied to all fish habitat in Canada, whereas the current one only applies to fish and their habitat that are part of, or support, commercial, recreational or Aboriginal fisheries (the fisheries requirement);
- Previously, the Minister had broad discretion to issue authorizations, whereas under the amended Act the Minister must consider certain factors, including measures to avoid, mitigate or offset impacts (s 6), the purpose of which is to ensure the sustainability and ongoing productivity of fisheries (s 6.1).

1. Works, Undertakings *and Activities*

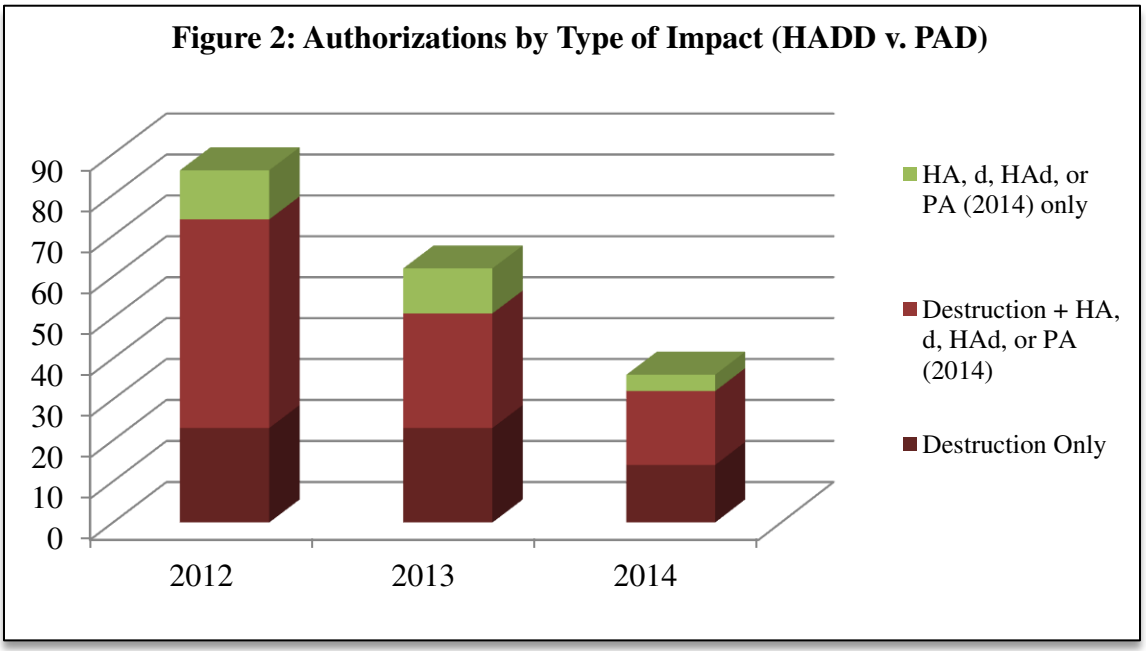
To determine whether the prohibition is capturing new activities, authorizations were categorized on the basis of the primary work-type for which an authorization was granted (using categories from DFO's annual reports). The results (Figure 1 below) indicate that the fisheries protection regime has not, as of yet, captured previously unregulated activities. This is not surprising as the primary messaging surrounding the amendments was less – not more – regulation. Figure 1 also illustrates the disproportionate number of authorizations issued for shoreline work in 2014, which are related to the Alberta floods of 2013. When shoreline work is adjusted to reflect the average of the two preceding years, the number of authorizations in 2014 decreases even further (see column 2014*).



2. HADD v. DPAD

Assuming perfect implementation of both the prior and new regime, one would expect there to be fewer authorizations in the 2014 vintage simply on the basis that one kind of impact, temporary disruptions, is no longer prohibited or regulated. This scenario is complicated, however, by the fact that DFO risk-managed low-risk projects away from the authorization stream. Consequently, we coded all of the authorizations on the basis of the type of impact that was being authorized. The results (Figure 2) suggest that harmful alterations (HA) and disruptions (d) alone or in combination constituted only a small portion of DFO's authorization activity under the previous HADD regime. With respect to disruptions alone, there were only three authorizations issued in 2012 (3.5%) and two in 2013 (3.2%).

Figure 2: Authorizations by Type of Impact (HADD v. PAD)



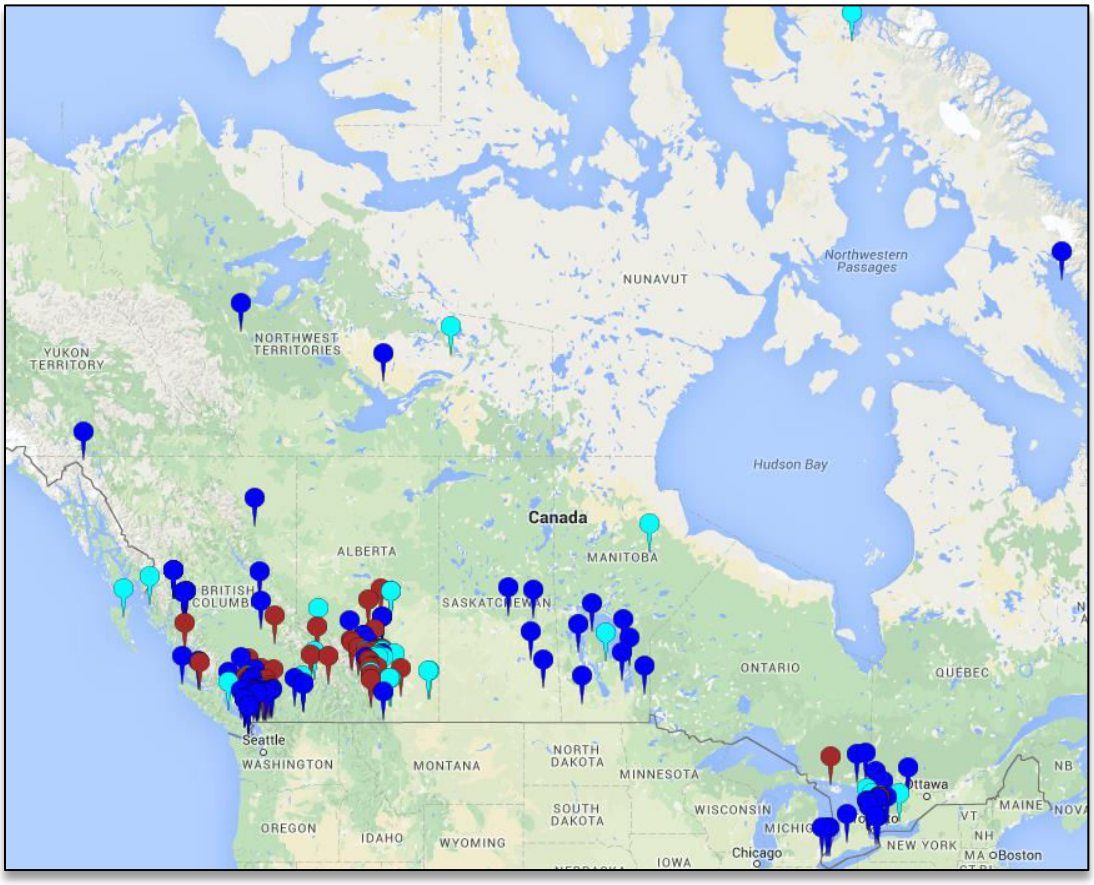
On the one hand, this suggests that the change from HADD to DPAD was not as drastic as some industry lawyers and environmental groups suggested, or at least may have been understood as suggesting. Practically speaking, few projects that did not involve at least some destruction of fish habitat would have been caught by the regulatory process under the previous HADD regime. This is not to say that disruptions and other harmful alterations were not prohibited (they were) but proponents were actively dissuaded from seeking an authorization and more or less assured compliance if they followed the mitigation measures set out in a non-binding Letter of Advice or applicable Operational Statement (see my previous post for an explanation of these).

Most importantly, Figure 2 makes clear that the change from HADD to DPAD cannot account for the 58% reduction in authorization activity under the new regime. At most, this change could account for a 16% reduction (86 minus 14 authorizations for harmful alteration and/or disruption only). Therefore, there must be some other basis for the observed reduction in the number of authorizations.

3. The Fisheries Requirement

The foregoing suggests that if the reduction in the number of authorizations is coming from DFO, it must be through the fisheries requirement. To determine whether this requirement was

having the drastic effect predicted by some (see *e.g.* this paper by fisheries biologists Jeffery Hutchings and John Post, who suggested that Canada's sparsely inhabited northern lakes and rivers would not receive protection), the coordinates of all authorizations issued in 2012, 2013 and 2014 were plotted on a map using Google Maps. The results are available here, where users can view authorizations from each year or all at once. Below is a screen shot of the latter view (blue = 2012, red = 2013, light blue = 2014):



My first observation is that, apart from the fact that there are fewer authorizations in 2014, their distribution more or less resembles the distribution from 2012 (in fact, 2013 exhibits the strongest urban concentration; such authorizations accounted for 44% of the total). Although the data is obviously limited, the absence of any obvious change in pattern is consistent with the government's talking points and DFO's approach that the fisheries requirement does not represent a radical change to the scope of the regime.

The more striking realization, however, is that the vast majority of Canada's freshwater lakes and rivers appear to not have had the benefit of habitat protection *before* the implementation of the new fisheries protection regime. It is simply untenable to suggest that there were only *two instances* of habitat destruction (to say nothing of harmful alteration or disruption) requiring authorization in all of northern British Columbia, Alberta, Saskatchewan, Manitoba and Ontario in 2012 and 2013 (*i.e.*, draw a horizontal line from the Pacific coast all the way to Ontario at roughly the latitude of Smithers, B.C., and count how many authorizations you see above that line). In addition to a long-established forestry industry, this area includes the Montney and Horn River shale gas plays of northeastern British Columbia and northwestern Alberta, which have seen significant development in the past decade. It also includes Alberta's Lower Athabasca Region, home to Alberta's oil sands. Most of this development falls within Canada's Peace-

Athabasca watershed, the threats to which have most recently been assessed by World Wildlife Fund Canada (WWF Canada) as follows:

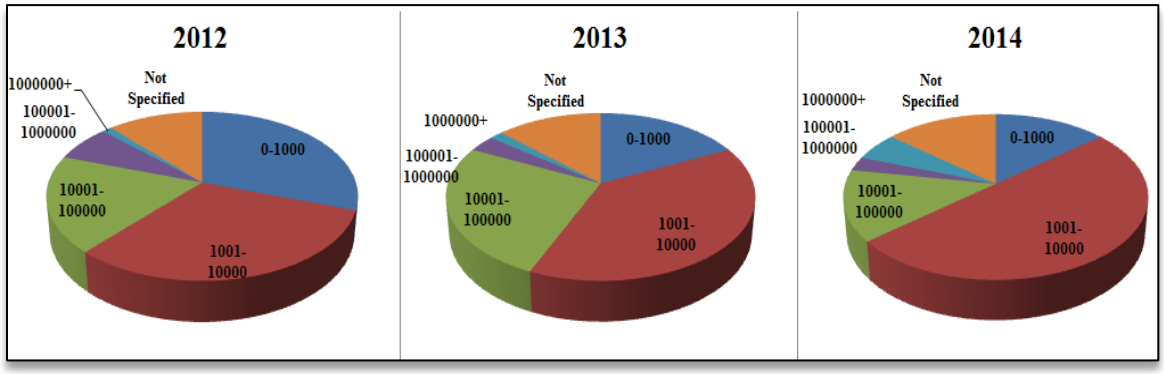
> High levels of pollution are a concern, with all sub-watersheds except the Williston Lake sub-watershed scoring moderate or above. Transportation incidents are very high in the Central Peace–Upper, as are pipeline incidents in the Upper Peace and Upper Athabasca. Habitat loss also scores *high*, due primarily to forest loss and, to a lesser extent, farming and urban and industrial development. Habitat loss is greatest in the Lower Athabasca sub-watershed (*very high*) and the Lower Peace and Central Athabasca–Lower sub-watersheds (*high*)… The level of habitat fragmentation is *moderate* overall but *high* in the Central Athabasca–Upper, Williston Lake and Upper Peace sub-watersheds.

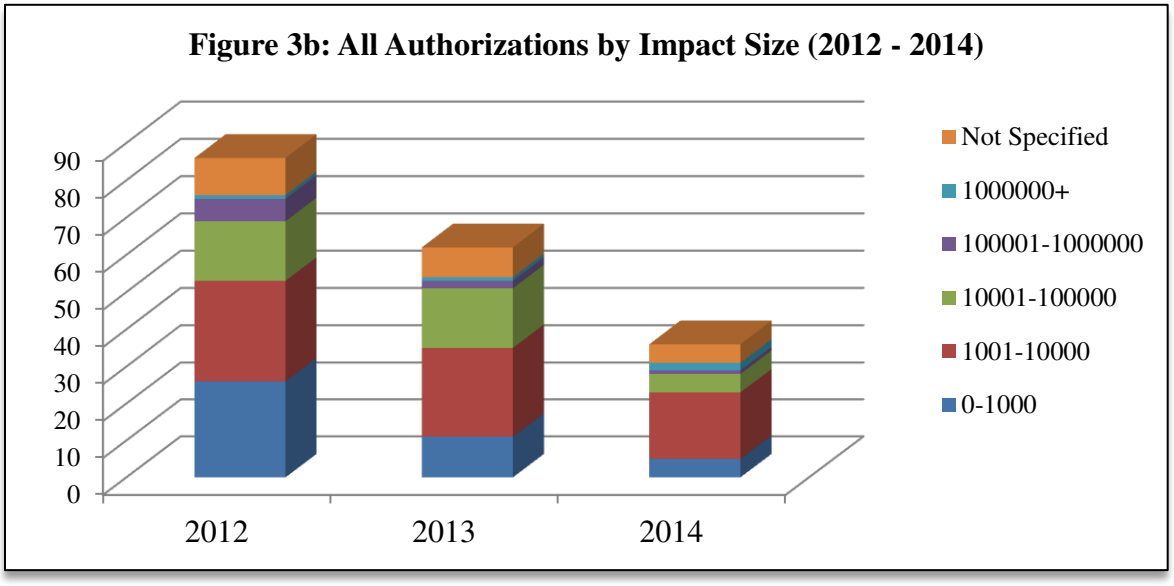
(WWF-Canada recently launched an innovative online tool, Watershed Reports (http://watershedreports.wwf.ca/), which allows users to access the assessed health of, and threats to, their watersheds and sub-watersheds. For the Peace-Athabasca watershed, see http://watershedreports.wwf.ca/#ws-6/by/threat-overall/threat).

4. Size of Impact

In light of the above, an attempt was made to determine if there was any other variable that might explain the reduction in authorizations. Although the size of impact is not explicitly reflected in the new regime, it is often – if incorrectly – equated with significance; indeed, some have suggested that the term "serious harm to fish," although defined in the Act to mean simply "the death of fish and the permanent alteration, or destruction of, fish habitat," implies that such impacts need to reach a certain threshold. The results suggest that DFO has indeed adopted such an approach. Figures 3a and 3b (below) demonstrate that the number of authorizations for impacts less than 1000 m^2 have declined from 2012 to 2014, while the proportion of impacts between 1000 m^2 and 10,000 m^2 has increased. This change can account for roughly 40% (20 out of 51) fewer authorizations from 2012 to 2014.

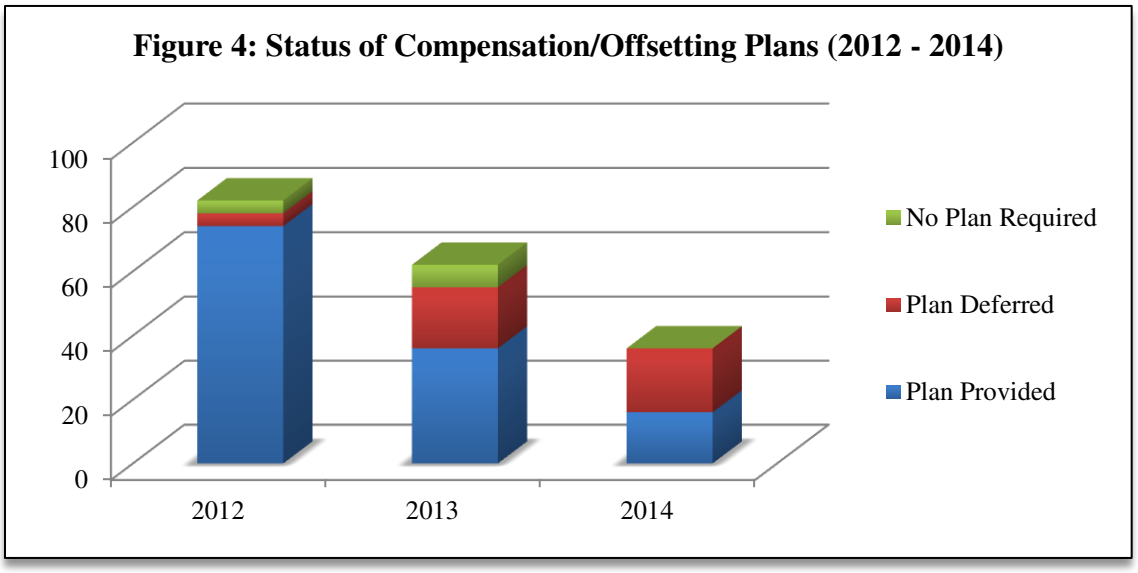
Figure 3a: Proportion of Authorizations by Impact Size (2012 – 2014)





5. The Section 6 Factors

Finally, we wanted to determine whether the addition of the section 6 factors had any appreciable effect on the content of authorizations. Generally, we observed authorizations from 2014 to be shorter and less detailed than in 2012 or 2013. With respect to offsetting plans in particular, and bearing in mind that this was a matter of policy before but now is a legally required consideration, we were somewhat surprised to find that these were being increasingly deferred to a later time (Figure 4). This is likely a reflection of the three month time limit imposed by the new section 35 regulations, coupled with resource constraints following the significant reductions to DFO's budgets. But such an approach is also pretty clearly unlawful; section 6 is unambiguous that the Minister must consider the relevant factors *prior* to exercising his or her authority pursuant to section 35.



Arguably, such an outcome is made possible because sections 6 and 6.1 are half measures only; in addition to listing a series of mandatory factors, establishing a clear structure for the regulatory review process also requires transparency (*e.g.* by making decisions public). Notwithstanding the fact that the Supreme Court of Canada has long held that Canada's fisheries are a public resource (see *e.g. Interprovincial Co-Operatives Limited et al. v. The Queen* [1976] 1 SCR 477 at 495), DFO has never maintained a public registry of section 35 authorizations. At least under the previous *Canadian Environmental Assessment Act*, SC 1992 c 37, this reality was offset by the fact that the need for a section 35 authorization triggered a federal environmental assessment, information about which would be posted on the Canadian Environmental Assessment Registry (CEAR). But Bill C-38 also repealed the previous *CEAA* regime and replaced it with the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, whose dominant feature is abandonment of the trigger approach in lieu of a (major) project list, such that the CEAR no longer reflects DFO's authorization activity. Consequently, the only way for the Canadian public to become aware of an authorization now is through an access to information request.

Conclusion

The above is just a snapshot of the findings of this research project (these and others are discussed in more detail in the full paper), but overall it is hard to escape the conclusion that the federal government has in fact all but abdicated its responsibility for fish habitat protection in Canada. The results also cast further doubt on the purported rationale for the *Fisheries Act* changes in Bill C-38. As is clear from my previous post, DFO had already gone to great lengths to reduce the regulatory burden on proponents (*e.g.* with the implementation of its risk-based framework and lax approach to enforcement). Bearing in mind also the evidence of continuing degradation of Canada's aquatic ecosystems, one can't help but wonder upon what basis then Minister of Fisheries and Oceans Keith Ashfield declared that "current fisheries policies go well beyond what is required to protect fish and fish habitat."