

Fisheries Act Review Should Be Evidence-Based

By: Martin Olszynski

Matter Commented On: Standing Committee on Fisheries and Oceans Review of the Fisheries Protection Provisions (section 35) of the *Fisheries Act* [R.S.C. 1985 c. F-14](#).

Consistent with the Prime Minister's [mandate letter](#) to the Minister of Fisheries and Oceans and the Liberal government's announcement this past summer of a [broad review of the federal environmental and regulatory regime](#), the [Standing Committee on Fisheries and Oceans](#) (FOPO) is about to begin its review of the changes to the habitat protection provisions of the *Fisheries Act* introduced by the previous Conservative government back in 2012. I have previously blogged about those changes [here](#) and [here](#), and eventually wrote an [article](#) about them. What follows is a letter that I recently sent to FOPO with respect to the scope of its review, urging it to ensure that it has the evidentiary foundation necessary to make its review meaningful.

Re: *Fisheries Act* Review – “Serious Harm to Fish” and Associated Provisions

I am writing you today with a view towards your review of the *Fisheries Act* and specifically the changes to section 35 (protection of fish and fish habitat) introduced in 2012. I write to urge you to request that Fisheries and Oceans Canada (DFO) gather the relevant data and information necessary to ensure that the Committee has the proper evidentiary foundation to conduct a meaningful review. More specifically, I am referring to data and information with respect to compliance with section 35 of the *Fisheries Act*, including compliance with section 35 authorizations, as well as information with respect to the overall status of fish habitat in Canada.

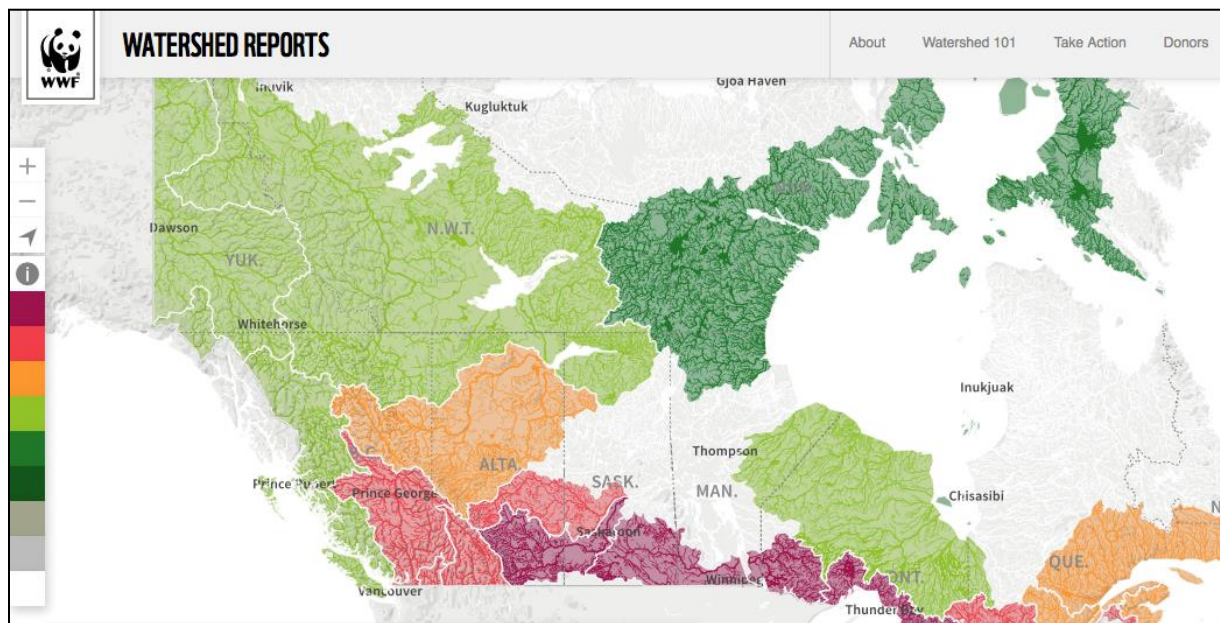
Such studies have previously been carried out by DFO employees in the past. Perhaps one of the best known is J. T. Quigley, D. J. Harper, “[Effectiveness of Fish Habitat Compensation in Canada in Achieving No Net Loss](#)” (2006) *Environ. Manage.* 37 at 351. In this paper, the authors assessed the effectiveness of habitat compensation requirements in section 35 authorizations for a number of projects in Western Canada. In the course of my research, I have also come across the following piece from Alberta assessing the effectiveness of trenchless watercourse crossings: Nugent, S. 2011. “[A review of trenchless watercourse crossings in Alberta with respect to species at risk](#)” *Can. Manusc. Rep. Fish. Aquat. Sci.* 2947: vi + 69 p. These are but two examples of the kind of research I propose further below.

During the limited (by design) Parliamentary debates surrounding Bill C-38 and C-45, critics of the then-existing fish habitat protection provisions argued that such laws [were too onerous and/or unnecessary](#). My own research shows that, by the time of the 2012 amendments, DFO had already gone to great lengths to reduce the regulatory burden on proponents. What is missing, however, is an objective and rigorous assessment of what this regulatory regime has - and has not - accomplished over the years (referring now to both the current and previous regime) in terms of the protection and management of fish habitat.

In my view, this requires an assessment of

- (i) a random selection of individual projects that entered the authorization regime in the past decade or so (25 – 30 projects could suffice, drawn proportionally from DFO’s various regions);
- (ii) a random assessment of the status of fish habitat in various watersheds or sub-watersheds across Canada. As part of this second assessment, DFO officials would no doubt come across various works in or near water that did not enter the section 35 authorization regime, or perhaps were subject to DFO’s “Operational Statements” or “Letters of Advice”. The state of these works and their impacts (or not) on fish habitat should also be assessed as a part of this exercise.

Here in Alberta there are several individuals and organizations that have conducted such assessments at the watershed and sub-watershed scale who I suspect would be inclined to share their expertise if requested to do so. The Committee may also be aware of the innovative [watershed reports](#) recently completed by WWF Canada. These reports rely on various databases to provide an assessment of the health of, and threats to, Canada’s watersheds. Although the authors admit to struggling with data gaps in some instances, their assessment suggests that effective fish habitat protection laws are in fact necessary to stem the tide of continued watershed degradation, especially in urban areas and areas of significant resource development (e.g. the Peace-Athabasca Region). Below is a screenshot to give you some sense of this potentially transformative tool:



Of course, none of this would predetermine the outcome of the Committee’s work. Nor would negative results (e.g. that fish habitat is in fact deteriorating in some regions) necessarily require reverting to the previous regime. There is a wealth of innovation in environmental regulatory theory that should be considered in crafting an effective and efficient regime suited for the challenges of the 21st century. But it seems clear to me that the Committee, and Canadians more

generally, would benefit greatly from having some common understanding of the extent of the problem. I am confident that if you request such information and analysis now, it could be completed within 2 months – well within the time frame set out for the Committee to do its work.

Thank you for your time in considering this matter. I will conclude by urging you to request that DFO collaborate on this project with one or more outside institutions, *e.g.* an academic or research institution of some kind. There are many outstanding fisheries biologists in Canada whose involvement would bolster the credibility, objectivity, and transparency of the exercise, bearing in mind always that restoring trust in Canada's regulatory processes is one of the primary motivators for this review.

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