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Asking the Right Questions about Amendments to the *Fisheries Act*

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Legislation Commented On: [Bill C-68, *An Act to Amend the Fisheries Act*](#)

On February 5, 2018, the federal government tabled Bill C-68, *An Act to Amend the Fisheries Act*. This Bill is the product of roughly two years of study and public consultation by both the [Standing Committee on Fisheries and Oceans \(FOPO\)](#) and [Fisheries and Oceans Canada \(DFO\)](#) – study and consultation that was promised by the then-opposition Liberals during the last federal election campaign. That promise was itself a response to the previous Conservative government’s changes to the *Fisheries Act*, [RSC 1985, c F-14](#), as part of its overhaul of the federal environmental regime back in 2012. With respect to the *Fisheries Act* specifically, the previous government took direct aim at the habitat protection provisions of that legislation (section 35). While some of the changes were positive, such as broadening protection to include not just “works and undertakings” but also “activities”, most of them were widely panned (see e.g. [here](#), [here](#), [here](#), [here](#), [here](#), and [here](#)). Whereas the original prohibition protected all fish and fish habitat, post-2012 only those fish (and their habitat) that were part of, or supported, a commercial, recreational or Aboriginal fishery are protected. The level of protection has also been reduced: whereas the previous version of section 35 protected against “harmful alterations, disruption, or destruction” of fish habitat, the 2012 version only protects against the “permanent alteration or destruction” of fish habitat.

Bill C-68 proposes to restore the previous habitat protection provisions, which will once again apply to all fish and fish habitat in Canada. This has some now-opposition members demanding proof that the 2012 changes resulted in harm to fish or fish habitat, or even actual fisheries themselves. [During our own appearances at FOPO back in the fall of 2016](#), for example, Conservative MP Robert Sopuck asked whether one of us could “quantify...any changes to a fish population or community in Canada that resulted from the changes that we made to the *Fisheries Act*?” More recently, [during second reading of Bill C-68](#), Conservative MP Ed Fast suggested that, in the course of its review, FOPO “could not show one instance of where fish and fish habitat had been harmed. The government had no evidence, no science, upon which this legislation before us was based.” As academics and practitioners who research in this area and who participated in this process over the past two years, we feel compelled to respond – once again – to these demands for proof of harm.

As a starting point, it is necessary to distinguish between proof of harm to fish populations or fisheries on the one hand, and proof of harm to fish and fish habitat on the other. As we explained to FOPO back in 2016, the former (evidence of harm to fish populations) is scientifically impossible to show for two simple reasons. The first is that such proof would require an assessment of all fish populations in Canada *before* the 2012 changes were brought into force – especially inland fish species, bearing in mind the nature of those legislative changes

(i.e. their primary effect was to de-regulate resource activity in and around fish habitat). Scientists call this a “baseline”. Unfortunately, such comprehensive data did not exist then – nor does it exist now. We pause to note that this reality is somewhat perplexing, bearing in mind that the previous government’s [stated rationale](#) for the 2012 changes was that “current fisheries policies go well beyond what is required to protect fish and fish habitat”. Such a conclusion would seem to require an assessment of the state of fish and fish habitat at the time.

The second reason that population-level effects are impossible to show is that even if such baselines existed, three years is, biologically speaking, an unrealistic time frame to not only detect all but the most catastrophic effects, but also to prove that those effects were attributable to a change in law. We suspect Mr. Sopuck knows this, as a former biologist himself. Indeed, in touting the previous government’s [Recreational Fisheries Conservation Partnerships Program](#)’s success, Mr. Sopuck did not point to increased fisheries productivity but rather to habitat metrics: “the estimation is that 2.4 million square metres and 2,000 linear kilometres of recreational fisheries habitat was restored, including restoring access.” If it is sufficient to quantify the success of restoration projects by the area or length of habitat restored, then it should be sufficient to quantify habitat loss by those metrics as well. Along those lines, our own [research](#) has showed that any such gains were mostly wiped out by six months of authorization activity by DFO back in 2012 alone, which contrary to its own policy authorized a net loss of [2,919,143 square meters](#) of habitat.

As for impacts to fish habitat, Mr. Fast is simply wrong. Our [own briefs to FOPO](#) (fall of 2016) referred to such harm, including a reference to a January 2015 story by the Vancouver Sun’s Larry Pynn, which [described several cases](#) where the 2012 changes had a negative effect on fish and fish habitat:

In one case, an Aldergrove nursery removed streamside vegetation and used an important creek as a dumping ground. In another, the headwaters of a river in Abbotsford were channelized as part of a land-clearing operation. In the third, a tributary of critical aquatic habitat in Agassiz was put through a culvert, covered over and converted to blueberries...

Critics say weak provincial laws fail to compel farmers to protect streams. That combined with lax enforcement, exacerbated by cuts to the federal Fisheries department [at least \$180 million], and revisions to the *Fisheries Act* are making prosecutions more difficult than ever before, they argue.

“It’s hard for me to go out for a day and not see something outrageous,” said consulting biologist Mike Pearson, a Fraser Valley fish specialist who assisted The Sun in its lengthy investigation...

“The level of disturbance has clearly increased in recent years,” said Detmar Schwichtenberg, chair of the Fraser Valley Watersheds Coalition and co-owner of a family dairy farm in Agassiz. “My sense having lived here many years is that 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.”

We concede that the foregoing are examples only. We therefore have some sympathy for those members, such as Mr. Fast, frustrated by DFO's refusal to conduct more systematic assessments of fish and fish habitat in Canada and the outcomes of the 2012 changes on the basis that, in Minister Leblanc's words, "the department has not been either resourced or mandated to conduct this type of comprehensive monitoring." Indeed, one of us [made essentially the same request](#) before FOPO even began its work.

Our sympathy is tempered, however, by the fact that such members do not seem bothered that the 2012 changes were themselves introduced without any proper evidentiary basis. If a [few examples](#) were sufficient then (a music festival in Saskatchewan and some farmers' fields in Quebec), then current demands for more robust evidence smack of partisanship. Our sympathy is further tempered by the fact that such members do not seem genuinely interested in ascertaining the effect of the 2012 changes for themselves. If they did, they would easily find the following additional information in a [March 2016 story](#), also by Larry Pynn:

Fisheries and Oceans Canada has not laid a single charge of damaging fish habitat, despite almost 1,900 complaints nation-wide, since controversial changes to the *Fisheries Act* came into effect two a half years ago.

Fisheries data provided at The Vancouver Sun's request shows that of 1,865 complaints, federal staff concluded 1,290 posed a low risk to fish and fish habitat, or were referred to another agency such as Environment Canada or a provincial ministry. Another 460 reports resulted in the federal fisheries department providing advice or education to the party involved to improve work practices or undertake mitigation...

The number of *Fisheries Act* charges for damaging fish habitat declined dramatically while Stephen Harper served as prime minister from 2006 to 2015. Just 11 charges (an average of less than three a year) were laid nation-wide during the four-year period ending March 2014, none of them were since the Conservative changes to the *Fisheries Act* took effect.

That compares with 80 charges (an average of 20 per year) in the four-year period ending March 2009. The most charges in the past decade totaled 46 in the 2004-2005 fiscal year.

Mike Pearson, an independent fish biologist, has complained that the District of Kent has caused damage to the habitat of salmon and endangered Salish suckers near Agassiz due to siltation from excavations to reduce flood risks for local farmers.

"A very interesting question is, whether or not even this constitutes a *Fisheries Act* violation. Is it permanent, serious harm?"

It is simply untenable to suggest that compliance and enforcement are unrelated – indeed it flies in the face of the [empirical research](#) on this question.

Committee members could have also reached out to fisheries biologists in the field, which is what we recently did. Mike Pearson (the professional biologist interviewed for the Vancouver Sun stories referred to above) readily provided us with photographs documenting harm to fish habitat since the 2012 changes came into force (see below), as well as his professional opinion that such harm has become more prevalent since those changes were introduced. We also reached out to David Mayhood, a freshwater ecologist who works in Southern Alberta, and he too provided us with photographs of harm.

We absolutely agree that policy should be evidenced-based. To that end, the [basic evidence that habitat matters](#) is essentially irrefutable: without intact habitat, there can be no fisheries. The evidence published to date also shows that Canada’s habitat protection regime has long been inadequate rather than overly protective (see e.g. [here](#), [here](#) and [here](#)). Thus, while there is still room for improvement (the topic of future posts and submissions to FOPO), we support the restoration of the prohibition against harmful alteration, disruption, or destruction of fish habitat, its application to all fish and fish habitat, as well as the introduction of a public registry, to name but a [few of the changes](#) included in Bill C-68.

A. Photographs provided by Mike Pearson ([Pearson Ecological](#), B.C., Canada)



Removal of riparian vegetation and dumping in Bertrand Creek, Aldergrove, B.C. (January 17, 2014). The responsible party, JRT Nurseries, “completed extensive remedial work” after [the Vancouver Sun series](#) exposed these alterations of fish habitat.



Photos of erosion at the District of Kent (McCallum Slough, Agassiz, BC, April 2016) following a dredging project affecting Salish sucker critical habitat. Sites are immediately upstream of the main spawning site for suckers and salmon in the watershed. Those spawning areas were covered in mud. Complaint was filed with DFO and the District when damage first observed in January 2016. As can be seen from the photos, no action was taken. The work itself was done in fall 2015.

B. Photographs by David Mayhood ([Freshwater Research](#), Alberta, Canada)



14 Aug 2015: Hidden Creek logging trail (above) fords the upper Oldman River, Alberta, a provincially important trout stream, moments after the start of a thunderstorm. Muddy runoff began less than 10 minutes after the start of rainfall. Unpaved road and trail surfaces are so highly compacted from traffic that there is virtually zero infiltration capacity on such surfaces, so runoff begins almost immediately after rainfall or snowmelt starts. The cumulative effect is to substantially increase – well above natural levels – fine sediment delivery to watercourses throughout the region.



25 May 2016: McLean Creek (above) downstream of McLean Reservoir drains 34 sq km dedicated to off-highway vehicle use, grazing and logging. Most of the suspended sediment in this creek comes from road and trail runoff, and has already settled out in the reservoir a few hundred metres upstream. Even low (10-20 mg/L) total suspended sediment concentrations can cause physiological and habitat problems to adults and juvenile trout, and mortality in trout and non-trout eggs and larvae, if those concentrations persist over days to weeks (Newcombe and Jensen 1996). This is the characteristic colour of McLean Creek in the open-water season in most years. Without road runoff, it would be clear like unaffected streams in the area.

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