Habitat Protection? Go Fish

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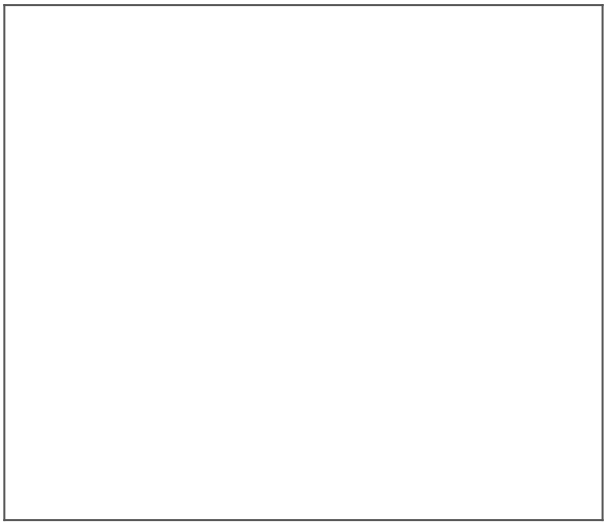
New Rules under the Fisheries Act



The federal Fisheries Act is one of the oldest pieces of legislation in Canada, pre-dating Confederation itself. With its prohibitions against the deposition of a "deleterious substance" into "water frequented by fish" and against the "harmful alteration or disruption, or the destruction" ("HADD", for short) of fish habitat, it is also, at least in its current form, the most powerful piece of environmental protection legislation in the federal enforcement arsenal.

The Fisheries Act is of special interest to the mining and forestry sectors. The activities of those industries frequently come into contact with the waters and surrounds that support Canada's fisheries, especially its inland fisheries. They are given special attention and partial exemptions from the Act's otherwise strict pollution prohibitions, via the Metal Mining Effluent Regulations and the Pulp and Paper Effluent Regulations.

The application of the Act to the protection of fish habitat has not been without some friction between industry and the Department of Fisheries and Oceans ("DFO"). Developers were sometimes surprised to find that seemingly innocuous stream crossings or other works would trigger the need for permits and their concomitant environmental assessments. Over time, however, policies and processes developed that would provide all parties some level of relative predictability, if not complete certainty. "No net loss" became a generally accepted, or at least expected, principle applicable to habitat preservation. The vast, vast majority of environmental assessments became screening assessments. (Besides, those assessments were requirements of the Canadian Environmental Assessment Act and not the Fisheries Act.)

Now, due to the pending legislative amendments contained in, of all things, the federal government's budget implementation bill, Bill C-38, the HADD provisions of the Act are subject to a fundamental shift in approach and focus. Under the mantra of clarity, the amendments are geared toward:

- focusing habitat protection efforts on activities that will have a "significant impact" on the productivity or sustainability of "recreational, commercial and Aboriginal fisheries";
- making distinctions between "vital waterways" and other water bodies such as ditches and

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agricultural channels that may serve as habitat for fish;
- identifying and managing "real threats" to fisheries, such as "direct" impacts to fish, habitat destruction, and invasive species,
- all as defined in the amendments and in yet-to-be-released regulations.

Under the amendments, the Minister will be empowered to establish guidelines for projects in or near water and to identify ecologically sensitive areas that require enhanced protection.

The federal government has announced that the existing pollution protection provisions of the Act will continue, subject to further legislative proposals that may limit their application.

The changes to the Act, as proposed, are intended to enable the Minister to identify and protect "ecologically significant areas" and enter into agreements with conservation groups and others to undertake measures to enhance fisheries protection in those areas. The announced changes are also expressed to permit the enhancement of compliance and enforcement tools. Those tools would include the ability of DFO to impose conditions on permits and the imposition of a duty on proponents to notify DFO in the event of serious harm to fisheries. Penalties and other enforcement tools are intended to be consistent with those available to the federal government under other federal environmental legislation as enhanced by the Environmental Enforcement Act.

Finally, the announced changes are intended to result in further opportunities for delegation of the authority over fisheries and habitat protection to the provinces, by way of equivalency and agreement.

While many of the specifics of these changes remain to be determined, the basic tenets seem clear. Look for a significant reduction in the involvement of DFO in regulating and enforcing the preservation of fish habitat outside of fisheries that are classified as recreational, commercial and Aboriginal fisheries. Also look for a resultant increase in the exercise of provincial governmental jurisdiction in the protection of habitat, insofar as delegation allows or offloading necessitates and provincial treasuries permit. It is not clear that all of the provinces favour this new regulatory opportunity. Neither is it clear as to whether it will further the cause of certainty or give rise to a patchwork between provinces and spawn litigation as to the scope of provincial legislative authority and the meaning of the changes to the Act.

As an aside, the federal budget has had other impacts in the area of fish habitat protection, notably the cancellation of federal funding for the Experimental Lakes Area (ELA) program. The program, begun in 1967, saw the Province of Ontario and the Government of Canada agree to set aside 58 small, isolated lakes in Northwest Ontario for the purpose of research. This giant, natural laboratory, unique in the world, has permitted research activity of considerable interest to the mining, forestry and energy sectors to be conducted, including studying the effects of acid rain, mercury pollution and estrogen disruptors on the health of lake organisms and that of the lakes themselves. Now Manitoba and Ontario are scrambling

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to see if a consortium can be formed to make up for the cancelled funding and allow the research to continue for decades to come.

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