



GUTTING CANADA'S FISHERIES LAW

WHAT THE CHANGES MEAN FOR FISH

WEST COAST ENVIRONMENTAL LAW, 2013

OVERVIEW

The *Fisheries Act* is the main federal law governing fisheries in Canada. It has protected fish and fish habitat and regulated seacoast and inland fisheries since 1868. Once heralded as the most important environmental law in the country, its core provisions protecting fish and fish habitat are now under threat.

In 2012, the government of Canada passed Bills C-38 and C-45, which made amendments to the *Fisheries Act* that significantly limit its fish and habitat protections. The bills were widely criticized as having passed with lack of proper parliamentary debate, dissemination of information or public consultation, and for not being informed by a full and appropriate consideration of the best available science.

What the *Fisheries Act* Does

The *Fisheries Act* provides for the management and control of fisheries, the conservation and protection of fish, the protection of fish habitat and pollution prevention.

For example, it prohibits killing fish other than by fishing, as well as harmfully altering, damaging or destroying fish habitat. It also requires obstructions across or in streams to



Photo courtesy of A. Wright

allow fish to pass freely and prohibits the deposit of harmful substances into waters frequented by fish.

The 2012 Amendments

While the Bills received Royal Assent, not all the amendments have been brought into force.

The first stage amendments came into effect when Bill C-38 received Royal Assent. They broaden the Minister of Fisheries and Oceans' power to authorize harm and destruction of fish and fish habitat. They also allow the Minister to delegate responsibility to private interests and enable Canada to offload its responsibility under the Act to provinces. The Minister may now also authorize pollution and Cabinet can immunize activities from prohibitions against harming fish or fish habitat, or exempt waters from the protection of the *Fisheries Act*.

The second stage amendments still require a Cabinet Order to be brought into force. If that happens, the health and abundance of Canada's fish would be seriously at risk. For example, fish that are not part of a fishery would lose their protection, it would no longer be an offense to harm habitat and Cabinet could exempt entire fish species from protection.



Photo courtesy of Brian Hutchings

PROTECTION = FISH

No habitat, no fish

Scientists agree that the most effective way to protect fish populations is to protect fish habitat.

No fish, no fisheries.

Protecting all fish species and habitats helps ensure the health and abundance of fish into the future. Fish rely on nutrients conveyed in upstream waters. Recognizing the complexity of ecosystems, all fish and waters must be protected or else the bottom quickly falls out from under fish species.

No fisheries, no fisheries economies

Fishing makes significant a contribution to local, regional and national economies. In 2010, recreational fishing contributed \$8.3 billion to local economies. Commercial fisheries were valued at over \$11 billion and generated 82,646 jobs.¹ No fisheries, no fishing economies.

Harm Fish, Harm Communities

Fish play central economic, cultural, spiritual and recreational roles across the country. From sockeye salmon, cultural cornerstone of British Columbia, to the iconic steelhead, fish are woven into the culture and wellbeing of many Canadians. In 2010, almost 3.3 million adult anglers fished recreationally in Canada, the majority of whom were Canadian residents fishing in their home province or territory. Over 400,000 British Columbians sport fished in their home province.²

Fish are important sources of food and a staple part of the diet of many Canadians. Certain species of fish also have cultural and spiritual

¹ Fisheries and Oceans Canada, Survey of Recreational Fishing in Canada 2010, s 1.1 at 1, online: http://www.dfo-mpo.gc.ca/stats/rec/can/2010/RECFISH2010_ENG.pdf; Fisheries and Oceans Canada, "National Overview", *Canada's Fisheries Fast Facts 2012*, online: <http://www.dfo-mpo.gc.ca/stats/facts-Info-12-eng.htm>; Fisheries and Oceans Canada, *Survey of Recreational Fishing in Canada 2010*, section 1.2, online: http://www.dfo-mpo.gc.ca/stats/rec/can/2010/RECFISH2010_ENG.pdf.

² Fisheries and Oceans Canada, Survey of Recreational Fishing in Canada 2010 at 4, online: http://www.dfo-mpo.gc.ca/stats/rec/can/2010/RECFISH2010_ENG.pdf.

significance for both Aboriginal and non-Aboriginal communities. The *Fisheries Act* amendments threaten not only the survival of fish and industries, but the very way of life of communities across the country.

AMENDMENTS

1. *Amendments In Force*

Extending Power to Exempt

The first set of amendments significantly expand the Minister and Cabinet's power to permit harm to habitat through authorizations and regulations.

For example, Cabinet can now make a regulation exempting metal mineral mines from the prohibitions against killing fish or destroying habitat, which would enable the operation of mines to kill fish – any species, and of any magnitude – with impunity. The Minister may authorize pollution and exempt activities from the *Fisheries Act* prohibitions. She may also delegate authority to permit an activity to harm fish or habitat to individuals and industry.

This means that, for example, she may allow a forester to authorize logging to would destroy spawning beds in Cameron Creek, which runs through the ecologically important Cathedral Canyon on Vancouver Island.

Offloading Responsibility

New *Fisheries Act* provisions would allow Cabinet to offload responsibility for fish onto the provinces. They authorize the substitution of provincial laws for any in the *Fisheries Act* and its regulations that are deemed “equivalent in effect”, regardless of the capacity of provincial governments to take on those responsibilities.

2. *Amendments Not Yet in Force*

“Serious Harm” to a Fishery

The second stage of amendments replaces the prohibitions against killing fish and against the

harmful alteration, damage or destruction of fish habitat with a single prohibition against “serious harm to fish that are part of a commercial, recreational or aboriginal fishery, or to fish that support such a fishery.”

“Serious harm” is defined as the “death of fish or any permanent alteration to, or destruction of, fish habitat”. This change reflects the shift in the focus of protection to only those species of fish deemed “useful” to humans.

Following are some impacts of this change.

a. **Lost protection for non-target species**

The Act would only apply to fish that are part of, or support, an existing commercial, recreational or Aboriginal fishery. Any fish that are not currently part of a fishery will not be protected. Fish that would lose their protection include those inhabiting Canada's thousands of pristine, unfished waters, as well as fish not currently being fished for conservation reasons.

Moreover, the new Act inadvertently favours some non-native fish species over some native fish. Because the new Act focuses on fisheries rather than fish, non-native species that are currently being fished would be protected, whereas native species that are not currently a part of a fishery would not. For example, Brook Trout, a species introduced to Western Canada, would be protected, whereas native species in pristine areas not fished by humans would not.



Photo courtesy of A. Wright

An example of fish that would not be protected under the new Act are the chum salmon that returned to Still Creek in Metro Vancouver in

2012 and 2013 for the first time in decades. Once the most polluted waterway in BC, salmon habitat in Still Creek was restored by the Rivers Institute at BCIT, with help from conservation groups. If the second set of amendments are brought into force, neither these chum nor Still Creek would be protected under the *Fisheries Act*, undermining the work of those groups to restore salmon habitat in Still Creek.

b. No longer unlawful to harm fish

It would no longer be unlawful to alter or disrupt fish habitat. Instead, only the death of fish or *permanent* alteration to or destruction of fish habitat would be prohibited. Habitat would not be protected from damage that is “temporary” or that could someday be repaired. Also, activities that would harm (but not destroy) fish or habitat would not be prohibited. In waterways where multiple projects impact fish habitat, the cumulative effects of those activities could be ignored, even if they result in the destruction of fish or habitat.

Carnation Creek on the south shore of Barkey Sound in Western Vancouver Island is an example of a waterway at risk from these amendments. Forestry and other human-related factors has had significant impacts on chum salmon in the creek.³ The new amendments would give additional industrial activities an automatic green light to further harm Carnation Creek despite their potential to cumulatively wipe out chum from that waterway.



³ BC Ministry of Forests, Lands and Natural Resource Operations, Carnation Creek Project, online: <http://www.for.gov.bc.ca/hre/ffip/CarnationCrk.htm>.

Photo of Lower Carnation Creek, 1981, from by Ministry of Forests, Lands and Natural Resource Operations

c. Lost protection for at-risk species

Scientists have estimated that removing protection of habitat for fishery-unrelated species means removing *Fisheries Act* protection of approximately 80% of the 71 species of freshwater fish at risk of extinction in Canada.⁴

An example of fish that would lose protection are the stickleback species pairs inhabiting Paxton Lake on Texada Island. Listed as endangered under the *Species at Risk Act*, the Paxton Lake Stickleback species pair are threatened by invasive species, water extraction and land use. However, projects or activities will no longer be automatically assessed to ensure they do not harm that species.

Cabinet May Exempt Fisheries

The second stage amendments would allow Cabinet to remove *Fisheries Act* protections from any fish or habitat it chooses by giving it the power to exempt fisheries from what would be considered “commercial”, “aboriginal” or “recreational” fisheries under the Act.

WHAT CAN BE DONE?

The Cabinet Order bringing the second stage amendments into force has been expected for over half a year, along with new regulations. At a minimum, an effective level of protection for Canada’s fish will require:

- Round 2 changes not coming into force.
- No regulations exempting waterways from *Fisheries Act* protections or authorizing activities that could harm fish.
- No regulations allowing pollution that would harm fish or fish habitat.
- No regulations offloading responsibility for protecting fish onto the provinces.

⁴ Jeffrey A. Hutchings and John R. Post, “Gutting Canada’s Fisheries Act: No Fishery, No Fish Habitat Protection”, *Fisheries* (2013) 38:11 at 498.