

# *Fisheries Act*

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Prior to the implementation of the 2012 federal budget via the *Jobs, Growth and Long-term Prosperity Act*<sup>1</sup>, or Bill C-38, provisions in the *Fisheries Act* triggered an environmental assessment. This is no longer the case. While changes made to this legislation are significant, even more extreme changes will occur to s.35 of the *Fisheries Act* when current amendments come into force, and possibly with the development of regulations which could explicitly allow the killing of fish and harm to fish habitat by specific projects or classes of projects, as well as in specific rivers, lakes and streams. Any protection offered to fish by s. 35 will be limited to fish that are part of a commercial, recreational or aboriginal fishery.<sup>2</sup>

## **Current Status**

Prior to Bill C-38, an authorization under s. 35 of the *Fisheries Act* triggered a federal environmental assessment. The former s. 35 read as follows:

**35.** (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

Since the royal assent of Bill C-38 on June 29, 2012,<sup>3</sup> s. 35 of the *Fisheries Act* now reads as follows:

**35.** (1) No person shall carry on any work, undertaking or activity that results in the harmful alteration or disruption, or the destruction, of fish habitat.

## **Exception**

(2) A person may carry on a work, undertaking or activity without contravening subsection (1) if

(a) the work, undertaking or activity is a prescribed work, undertaking or activity, or is carried on in or around prescribed Canadian fisheries waters, and the work, undertaking or activity is carried on in accordance with the prescribed conditions;

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<sup>1</sup> SC 2012, c 19, available for download from: <<http://laws-lois.justice.gc.ca/eng/acts/J-0.8/index.html>>.

<sup>2</sup> For more information, see Meinhard Doelle & Chris Tollefson, *Environmental Law – Cases and Materials*, 2d ed (Toronto: Carswell, 2013), at pp 316 – 326.

<sup>3</sup> See: LEGISinfo, House Government Bill C-38, 41<sup>st</sup> Parliament, 1<sup>st</sup> session: online: Parliament of Canada <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=5514128>>.

(b) the carrying on of the work, undertaking or activity is authorized by the Minister and the work, undertaking or activity is carried on in accordance with the conditions established by the Minister;

(c) the carrying on of the work, undertaking or activity is authorized by a prescribed person or entity and the work, undertaking or activity is carried on in accordance with the prescribed conditions;

(d) the harmful alteration or disruption, or the destruction, of fish habitat is produced as a result of doing anything that is authorized, otherwise permitted or required under this Act; or

(e) the work, undertaking or activity is carried on in accordance with the regulations.

Together with the removal of a s. 35 authorization triggering an environmental assessment, these changes to the *Fisheries Act* are likely to mean many activities and works previously reviewed under the *Fisheries Act*, and scrutinized for their impact on fish habitat will no longer be reviewed by the department of Fisheries and Oceans Canada (DFO).<sup>4</sup> Examples of activities that no longer require an environmental assessment include projects that result in the temporary removal of vegetation from spawning grounds and the disruption of gravel or sediment as a result of road construction.<sup>5</sup> This is likely to include any temporary alteration or disruption of fish habitat during the construction of hydroelectric projects.

Along with eliminating the environmental assessment of projects likely to harm fish and fish habitat, a process previously coordinated with DFO, this new version of s. 35 greatly expands the ways in which a harmful alteration, disruption and destruction (HADD) of habitat can be authorized.<sup>6</sup> One way that authorizations may be expanded is through the creation of new regulations,<sup>7</sup> which could exclude harm done to fish or fish habitat by certain projects (i.e. a specific mine, a type of mine, a specific hydroelectric project or all small hydroelectric projects) or harm done to fish or fish habitat in specific fisheries waters (i.e. the Stikine river, or tributaries of the Taku). The possibility for such wide exemptions stem from s. 35(2)(a), which allows for:

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<sup>4</sup> T. Leadem, "Supplementary Written Submissions on Behalf of the Conservation Coalition" *Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River* (14 May 2012) at p 9, online: Ecojustice <[http://www.ecojustice.ca/files/conservation-coalition-supplemental-written-submissions-to-cohen-commission-may-14-2012/at\\_download/file](http://www.ecojustice.ca/files/conservation-coalition-supplemental-written-submissions-to-cohen-commission-may-14-2012/at_download/file)> [Leadem, "Supplementary Written Submissions on Behalf of the Conservation Coalition" *Cohen*].

<sup>5</sup> Leadem, "Supplementary Written Submissions on Behalf of the Conservation Coalition" *Cohen*, at p 9.

<sup>6</sup> Prior to Bill C-38 HADDs were authorized by ministerial authorization. It was also possible for them to be authorized by Cabinet regulation, however no such regulations existed. See: Leadem, "Supplementary Written Submissions on Behalf of the Conservation Coalition" *Cohen*, at p 9.

<sup>7</sup> Pursuant to *Fisheries Act*, at s. 35(3).

- The automatic exemption, via regulation, from s. 35(1) of harm to fish habitat caused by prescribed works, undertakings and activities; and
- The automatic exemption, via regulation, from s. 35(1) of harm done to prescribed fisheries waters.

Another way changes to s. 35 expand the ways authorizations of harm to fish habitat may be granted is that authorizations may now be granted by any person or entity prescribed by regulation.<sup>8</sup> Previously only the Minister had this authority.<sup>9</sup> This means the power to grant authorizations may be delegated to industry, project proponents or the Province of BC.<sup>10</sup>

The full impact of these changes will not be known until new regulations are made under the *Fisheries Act* and the Ministers (including the Minister of the Environment) begin exercising the discretion granted by provisions dealing with impacts to fish and fish habitat. While it must be noted that even more drastic changes to the *Fisheries Act* likely lie ahead, it is also important to keep in mind that while Bill C-38 dramatically changes s. 35, it is uncertain what impact this will have on the ground. For example, these changes have created a void in terms of how federal agencies assess the impact of development on fish and fish habitat. It is highly likely a review will no longer be coordinated through the environmental assessment process.<sup>11</sup> Yet, it remains uncertain what, if anything will fill this gap. It is possible that projects that require a s. 35 authorization will be granted for all projects likely to have an impact on fish, and that no mitigation measures will be required of these project. However, it is also possible that DFO will continue to assess the impacts of projects on fish and attach conditions to s. 35 authorizations which mitigate the impacts of these projects and fish and fish habitat.

### Future Changes

As of September 2013, several additional changes to s. 35 and s. 32 of the *Fisheries Act* have been passed but have yet to come into force. The wording of s. 35 of the *Fisheries Act* will undergo further change when s. 142(2) of Bill C-38 comes into force by order of the Governor in Council (the date on which this will happen is unknown).<sup>12</sup> The change, reproduced below, “eliminates the protection of fish habitat entirely and sets out a test of serious harm to fish of commercial, recreational or Aboriginal fishery - terms that are elsewhere defined in the Bill.”<sup>13</sup> This new version of s. 35 will merge the existing prohibition against HADD with the s. 32 prohibition against killing fish (which will be repealed) to create the following provision:

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<sup>8</sup> *Fisheries Act*, s. 35(2)(c).

<sup>9</sup> Section 35(2), pre Bill C-38 allows for a HADD under conditions authorized by the Minister, or under regulations made by Governor in Council, however no such regulations existed.

<sup>10</sup> Leadem, “Supplementary Written Submissions on Behalf of the Conservation Coalition” *Cohen*, at p 10.

<sup>11</sup> The Minister of Environment does have the discretion to require an EA/Screening of projects that require an authorization under s. 35.

<sup>12</sup> Bill C-38, at s. 156.

<sup>13</sup> Leadem, “Supplementary Written Submissions on Behalf of the Conservation Coalition” *Cohen*, at p 8.

**35.** (1) No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery [emphasis added].

[ss. (2) (a)-(c);(e) remain unchanged from their current version]

(2) ... (d) the serious harm is produced as a result of doing anything that is authorized, otherwise permitted or required under this Act; or...

(3) The Minister may, for the purposes of paragraph 2(a), make regulations prescribing anything that is authorized to be prescribed.

(4) Regulations made under (3) are exempt from section 3 of the *Statutory Instruments Act*.

“Serious harm” will be defined as “death of fish or any permanent alteration to, or destruction of, fish habitat.”<sup>14</sup>

This iteration of s. 35 builds on the drastic changes described above in several ways. Most notably:

- 1) It limits any protection previously provided by s. 35 to “to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery”.<sup>15</sup>

Impact: This change means that only fish that are established to be of value to humans (via commercial, recreational, or Aboriginal fishery, or support of that fishery) will be protected by s. 35. Fish that play a vital role in ecosystems will not be protected, unless it can be established they support a protected fishery.

- 2) It limits protection to “serious harm” to these fish. Serious harm is defined as death, or permanent alteration or destruction of fish habitat.

Impact: Previous versions of s. 35 protected against the “harmful alteration, disruption and destruction of fish habitat”. By limiting the application of this provision to death or permanent alteration or destruction of fish habitat only the most dramatic impacts on fish will be caught by this provision. For example, the disruption of spawning beds in one year may not be caught by this provision, unless it is established that killing eggs constitutes the killing of fish and the disruption of spawning grounds for one season constitutes a permanent alteration of fish habitat. This would likely be difficult to establish.

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<sup>14</sup> Bill C-38, at s. 132(4).

<sup>15</sup> Bill C-38, at s. 132(4), see proposed change to 35(1) of the *Fisheries Act*.

- 3) It allows the Minister (in addition to Governor in Council) to prescribe works, undertakings or activities that are not subject to s. 35(1) via regulation and it “appears to exempt these ministerial regulations from the normal process of regulatory review and publication.”<sup>16</sup> However, DFO officials have committed that any draft regulations will be published in the *Canada Gazette*, and be developed in consultation with environmental and recreational fishing groups.<sup>17</sup>

Impact: By allowing the Minister to establish regulations under this provision, and removing them from the normal process of regulatory review and publication, the transparency and accountability of key decisions made with regards to the protection of fish, and fish habitat, will be dramatically reduced. The ability of the Minister to simply exempt a type of activity or fishery from s. 35 is a major decision, worthy of significant public scrutiny.

These changes are likely to have a dramatic impact on how governments ensure the impacts of development and human activity on fish and fish habitat are mitigated and where possible avoided.<sup>18</sup>

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<sup>16</sup> Proposed s. 35(4) provision. By exempting such regulations from s. 3 of the *Statutory Instruments Act*, it appears that regulations will not have to be reviewed by the clerk of the privy council for conformity with other legislation, including the *Canadian Charter of Rights and Freedoms*, as required by s. 3 of the *Statutory Instruments Act*. See: Leadem, “Supplementary Written Submissions on Behalf of the Conservation Coalition” *Cohen*, at p 10.

<sup>17</sup> Leadem, “Supplementary Written Submissions on Behalf of the Conservation Coalition” *Cohen*, at p 11.

<sup>18</sup> For more information, see Meinhard Doelle & Chris Tollefson, *Environmental Law – Cases and Materials*, 2d ed (Toronto: Carswell, 2013), at pp 316 – 326.