

**BILL C-38 AMENDMENTS TO THE  
*FISHERIES ACT*:  
A NEW ENVIRONMENTAL ERA IN CANADA?**

**FOR THE SPECIAL SESSION OF THE  
ENVIRONMENTAL MANAGERS ASSOCIATION  
OF BRITISH COLUMBIA**

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**SEPTEMBER 13, 2012**

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## Bill C-38 Amendments to the *Fisheries Act*: A New Environmental Era in Canada?<sup>1</sup>

### The *Fisheries Act*

Arguably the federal *Fisheries Act*<sup>2</sup> is the most powerful and regularly applied environmental legislation in the country. It is Canada's oldest conservation law. It was first passed in 1866 in order to deal with sawdust which was polluting the Ottawa River.<sup>3</sup> Since then it has played a critical role in the management, protection and well-being of fisheries in Canada.

The *Fisheries Act* respecting unauthorized habitat deterioration disruption and destruction ("HADD") came into force in 1977. The HADD provision has been routinely applied since that time in order to protect fish and fish habitat. A failure to comply with this prohibition may give rise to criminal liability.<sup>4</sup>

### Bill C-38 - the *Jobs, Growth and Long-term Prosperity Act*

Bill C-38, the *Jobs, Growth and Long-term Prosperity Act* (omnibus budget implementation legislation) contains several amendments to the *Fisheries Act*.<sup>5</sup> They appear to reflect the federal government's position that federal fish protection policies were: "... outdated and unfocused in terms of balancing environmental and economic realities."<sup>6</sup> Some are controversial. Canadian scientists have suggested that some of the amendments will weaken the *Fisheries Act*.<sup>7</sup> Undoubtedly, if all the Bill C-38 amendments come into force they will significantly change compliance obligations. Some of the key changes that are important from a compliance perspective are set out below.

### Staged Introduction of Amendments

Bill C-38 contemplates the staged introduction of the amendments. The first set of amendments came into force on June 29, 2012.<sup>8</sup> A second set of amendments will

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<sup>2</sup> *Fisheries Act*, RSC 1985, c. F-14 [*Fisheries Act*].

<sup>3</sup> Ecojustice, "Fisheries Act Proposed changes at a glance" (Ecojustice, May 2012).

<sup>4</sup> See section 35.

<sup>5</sup> Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 1<sup>st</sup> Sess, 41<sup>st</sup> Parl, 2012 [*Bill C-38*] (Assented to on June 29, 2012).

<sup>6</sup> William Donahue and Arlene Kwasniak, *The University of Calgary Faculty of Law Blog on Developments in Alberta Law*, *ABlawg.ca*, "Decapitating the Fisheries Act by removing the HADD: A Critique of the Rationale" (March 27, 2012).

<sup>7</sup> Peter O'Neil and Larry Pynn, *Vancouver Sun*, "Canadian scientists slam weakening of federal Fisheries Act" (May 28, 2012) online: [http://www.vancouversun.com/story\\_print.html?id+6691159&sponsor+escapes.ca](http://www.vancouversun.com/story_print.html?id+6691159&sponsor+escapes.ca)

<sup>8</sup> See chart titled "Fisheries Act: Amendments in Bill C-38". Examples of the provisions brought into force include section 2 (definitions), section 32 (prohibition respecting the killing of fish except by fishing), section 35 (amendment to the HADD provision), section 36 (amendments to provisions regarding deposits authorized by regulation and directions by the Minister), section 37 (amendments to provisions respecting plans and specifications), section 38



come into force on a date to be fixed by order of the Governor in Council (Federal Cabinet).<sup>9</sup> A chart titled “*Fisheries Act: Amendments in Bill C-38*” sets out the former provisions, the current provisions and the future provisions of the *Fisheries Act*.

### HADD Provision

Former *Fisheries Act* subsection 35 stated as follows:

#### Harmful alternation, etc., of fish habitat

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

Authority indicates that harm to fish was not material to this prohibition. The prohibition relates to the harmful alteration, disruption or destruction of fish habitat. In *Her Majesty The Queen In Right Of The Province Of British Columbia v. Klaus Werner Posselt and Klaus Posselt Logging Ltd.*, the court outlined the elements of subsection 35(1):

In my view, the *actus reus* of the offence is established if the Crown proves beyond a reasonable doubt that the accused interfered with the fish habitat in a way that has impaired the value or the usefulness of the habitat for one or more of the purposes described in the definition of “fish habitat” in a way that impaired the value or usefulness of the habitat for one or more of the purposes described in the definition of “fish habitat” in s. 34(1). Thus, neither proof of actual harm to fish nor the assumption of such harm is necessary, as that fact is not material.

The first set of amendments to the *Fisheries Act* includes an amendment to subsection 35(1) in order to add the word “activity”. Amended *Fisheries Act* subsection 35(1) now states as follows:

#### Alteration, disruption or destruction of fish habitat

**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.

The second set of amendments include a further amendment of subsection 35(1). When it comes into force, the further amended subsection 35(1) will state as follows:

#### Serious harm to fish

**35.** 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.<sup>10</sup>

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(amendments to provisions respecting inspectors and analysts), section 39 (adding search provisions), paragraph 40(3)(a), and (c) to (f) (re specified failures to comply), section 43 (power to make regulations), subsection 63(1) (false and misleading statements), section 82 (time limits), and section 88 (regulation incorporating reference material).

<sup>9</sup> See section 156 which provides that: “Section 132, subsections 133(1), (3) and (4), sections 135 to 138, subsection 139(2), sections 140 and 141, subsections 142(2) to (4), 144(2) to (6) and 147(1) to (5), (7), (9) and (10), section 148, subsections 149(2) and (5) and sections 152 and 153 come into force on a day to be fixed by order of the Governor in Council.”

<sup>10</sup> *Fisheries Act*, *supra* note 1 at s. 35(1).

The second set of amendments will provide definitions of the words including “Aboriginal”<sup>11</sup>, “commercial”,<sup>12</sup> “fish habitat”<sup>13</sup> as well as a definition of the term “serious harm to fish”:

(2) For the purposes of this Act, serious harm to fish is the death of fish or any permanent alteration to, or destruction of, fish habitat.

One can make the following observations respecting the second set of amendments:

1. Section 35 will prohibit works, undertakings or activities that result in “serious harm to fish”.
2. The fish that are the subject of section 35 prohibition must be part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.<sup>14</sup>
3. The term “serious harm to fish” will include the death of fish or the permanent alteration to, or destruction of, fish habitat.
4. The term “serious harm to fish” does not prohibit the “disruption” (ie, temporary alteration) of fish habitat which is set out in the current version of subsection 35(1).
5. As a result, it appears possible that many situations prohibited under the current legislation will no longer be covered by the definition of “serious harm”.

A review of one of the leading authorities respecting the application of the HADD provision is illustrative. In *R. v. High*<sup>15</sup>, the accused operated dredges in a creek providing fish habitat. Dredges affected the creek as a result of their intake and discharge of water. The creek bed was also disrupted as a result of activities necessary in order to prepare for the operation of the dredges. Expert testimony established that the fish could frequent the creek but that the dredges negatively impacted fish habitat. The accused was found guilty of a *Fisheries Act* offence, namely, the disruption of fish habitat. This decision was upheld on appeal.

It is quite likely that the federal Department of Public Prosecutions would not have approved charges against the accused respecting the circumstances described in *R. v. High* if the second set of amendments were in force at the material time. This is because the record disclosed no evidence of “serious harm” (that is, the death of fish or permanent alteration or destruction to fish habitat). Section 35 of the *Fisheries Act*, as set out in the second set of amendments, does not prohibit the temporary alteration of

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<sup>11</sup> Bill C-38, *supra* note 5 at cl. 142; amended section 2 states: “Aboriginal, in relation to a fishery, means that fish is harvested by an Aboriginal organization or any of its members for the purpose of using the fish as food or for subsistence or for social or ceremonial purposes;”

<sup>12</sup> Amended section 2 states: “commercial, in relation to a fishery, means that fish is harvested under the authority of a licence for the purpose of sale, trade or barter;”

<sup>13</sup> Amended section 2 states: “fish habitat means spawning grounds and any other areas, including nursery, rearing, food supply and migration areas, on which fish depend directly or indirectly in order to carry out their life processes.”

<sup>14</sup> Some have characterized the section 35 prohibition as having a focus on certain “iconic fish”, that is, fish that represent significant value.

<sup>15</sup> 2003 BCSC 1723.



fish habitat. Criminal court judges will likely clarify the scope of this new provision if and when it comes into force.

### **Deleterious Substances**

Subsection 36(3) of the *Fisheries Act* prohibits the deposit of deleterious substances. Environment Canada is responsible for administering this subsection. Unlike Subsection 35(2), there is no provision to authorize the deposit of deleterious substances except by regulation or an Order in Council.<sup>16</sup> The amendments clarify the situations where the deposit may be authorized by regulation.<sup>17</sup>

The second set of amendments include an amendment of subsection 36(6) as follows:

#### Regulations — Governor in Council

(5.1) The Governor in Council may make regulations establishing conditions for the exercise of the Minister's regulation-making power under subsection (5.2).

#### Marginal note: Regulations — Minister

(5.2) If regulations have been made under subsection (5.1), the Minister may make regulations

(a) authorizing the deposit of deleterious substances specified in the regulations, or substances falling within a class of deleterious substances specified in the regulations;

(b) authorizing the deposit of deleterious substances into waters or places falling within a class of waters or places;

(c) authorizing the deposit of deleterious substances resulting from a work, undertaking or activity falling within a class of works, undertakings or activities;

(d) establishing conditions, which may include conditions with respect to quantity or concentration, for the deposit of deleterious substances referred to in paragraphs (a) to (c); and

(e) establishing, for the purposes of paragraphs (a) to (c), classes of

(i) deleterious substances,

(ii) waters and places, and

(iii) works, undertakings and activities.

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<sup>16</sup> Fisheries and Oceans Canada, "Fisheries and Oceans Canada – Fisheries Act", (2010 08 12) online: < <http://www.dfo-mpo.gc.ca/habitat/role/141/1415/14151-eng.htm> >

<sup>17</sup> *Bill C-38*, *supra* note 5 at cl. 143(2); *Fisheries Act*, *supra* note 1 at s. 36(5.1), 36(5.2), and 36(6).



Marginal note: Directions by the Minister

(6) A person authorized to deposit a deleterious substance by or under regulations made under subsection (5) or (5.2) shall, when directed by the Minister, despite any regulations made under paragraph (5)(e) or (5.2)(d) or any conditions set out in an authorization made under paragraph (5)(f), conduct any sampling, analyses, tests, measurements or monitoring, install or operate any equipment or comply with any procedures, and report any information, that is required by the Minister in order to determine whether the person is depositing the deleterious substance in the manner authorized.

These regulations would allow the Minister to authorize the deposit of deleterious substances of a certain class going to waters or places within a certain class or resulting from a work, undertaking or activity within a particular class. The advantage of having such regulations is that it provides more flexibility to the government of Canada to issue an authorization. Persons engaged in industries such as agriculture, boat building, mining or pipelines. However, concern about these changes is that allowing the Minister or cabinet to grant such broad exemptions will mean significantly less transparency and accountability for fish protection.<sup>18</sup>

### Reporting

The amendments impose a new duty to report an occurrence that results in serious harm to fish.<sup>19</sup>

### Administration and Enforcement

The amendments outline significant changes to the administration and enforcement provisions of the *Fisheries Act*. Like other federal environmental laws, the amendments will provide for minimum and maximum penalties, and for the increase of maximum penalties. The statutory scheme distinguishes between individuals, small revenue corporations and other corporations for purposes of penalties and fines.<sup>20</sup> For corporations, the minimum fine for a first offence is \$500,000 (by way of indictment) and the maximum fine is \$6 million. For a corporation's second offence, the maximum fine is \$12 million.<sup>21</sup>

The amendments provide increased power to inspectors for the purpose of issuing directions. Inspectors have previously been empowered to issue directions requiring corrective measures be taken in the event of a deposit of a deleterious substance or when there was imminent danger of a deposit occurring. The amendments provide both inspectors and fishery officers with the power to issue directions.<sup>22</sup> Additionally, the situations in which inspectors and officers may issue directions have been expanded beyond deposits. They include situations in which a HADD has occurred, or where there is serious danger of such an occurrence.<sup>23</sup>

### Delegation

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<sup>18</sup> Ecojustice, *Fisheries Act proposed changes at a Glance*, *supra* note 3, page 3.

<sup>19</sup> *Bill C-38*, *supra* note 5 at cl. 145(1); *Fisheries Act*, *supra* note 1 at s. 38(1) – (10).

<sup>20</sup> *Bill C-38*, *supra* note 5 at cl. 147(2).

<sup>21</sup> *Ibid.*

<sup>22</sup> *Bill C-38*, *supra* note 5 at cl. 145(1); *Fisheries Act*, *supra* note 1 at s. 38(1) – (10).

<sup>23</sup> *Ibid.*



The amendments provide that the federal and provincial governments may enter into cooperation and delegation agreements.<sup>24</sup>

## Summary

Bill C-38, the *Jobs, Growth and Long-term Prosperity Act*, contains several amendments to the *Fisheries Act*. Bill C-38 contemplates the staged introduction of the amendments. The first set of amendments came into force on June 29, 2012. A second set of amendments will come into force on a date to be fixed by order of the Governor in Council.

The first set of amendments to the *Fisheries Act* includes an amendment to subsection 35(1) in order to add the word “activity”. It broadens the HADD prohibition.

The second set of amendments will significantly alter subsection 35(1). The provision will prohibit works, undertakings or activities that result in “serious harm to fish”. The fish that are the subject of section 35 prohibition must be part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery. The term “serious harm to fish” will include the death of fish or the permanent alteration to, or destruction of, fish habitat. The term “serious harm to fish” does not prohibit the “disruption” (that is, temporary alteration) of fish habitat which is set out in the current version of subsection 35(1). As a result, some situations prohibited under the current legislation will no longer be covered by the definition of “serious harm”.

Other amendments clarify situations where the deposit may be authorized by regulation. They also set out a duty to report an occurrence that results in serious harm to fish. They make significant changes to the administration and enforcement provisions of the *Fisheries Act*. They provide that the federal and provincial governments may enter into cooperation and delegation agreement.

In summary, the *Fisheries Act* compliance requirements will change dramatically when the second set of amendments are brought into force. Over the next few months the Department of Fisheries and Oceans will likely issue administrative guidance statements respecting the interpretation of the Bill C-38 amendments. For persons who may be the subject of federal *Fisheries Act* compliance and enforcement activities, it is more important than ever before to keep informed of updates to the legislation.

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<sup>24</sup> *Bill C-38, supra* note 5 at cl.134.