

# PROTECTING FISH HABITAT UNDER THE FISHERIES ACT

## Introduction

The 2012 Omnibus Budget Bill fundamentally altered the fish habitat protection provisions of the federal *Fisheries Act*. In his recently published article<sup>1</sup>, Prof. Martin Olszynski of the University of Calgary presents an empirical analysis of authorizations issued by Fisheries and Oceans Canada (DFO) pursuant to these 2012 amendments. Olszynski concludes that “With an almost sixty percent reduction in authorization activity from 2012 to 2014, the results suggest the further erosion of an already deeply flawed regulatory regime and the near-total abdication of responsibility for the protection of fish habitat by the federal government over the past decade.”

## Legislative Overview

Prior to 2012, the fish habitat protection provisions of the *Fisheries Act* applied to all fish habitat in Canada and offered a broad level of protection against most types of impacts. The 2012 amendments limit protection to “habitat of fish that are part of, or support, commercial, recreational or Aboriginal fisheries”. The 2012 amendments also reduce the level of protection of habitat prohibiting only “serious harm to fish” a new, narrower concept defined as “death of fish or any permanent alteration to, or destruction of, fish habitat”. Harmful alteration or disruption of fish habitat is no longer unlawful if ordered by Cabinet.

## Proposed Policy and Regulatory Changes

1. *Bring back Prohibition against HADD (Harmful Alternation or Disruption or Destruction)* - Olszynski recommends that the version of section 35 that was in force from June 29, 2012 to November 24, 2013 be reenacted to replace the current provision. Thus s.35.(1) would prohibit any “work, undertaking or activity that results in harmful alteration or disruption or destruction of fish habitat.” This subsection would actually be broader than the pre-2012 version in that the word “activity” would be added after the words “work, undertaking”.

2. *Expand regulatory authority for minor works and minor waters* – Olszynski also recommends that s. 35 be amended to expand authority to regulate with respect to “minor works” and “minor waters”. In his view, such regulatory authority is both necessary and appropriate: “(T)he vast majority of habitat-related activity can be considered relatively minor when viewed in isolation but, as the continued degradation of Canada’s watersheds makes clear, represents the greatest threat to fish habitat cumulatively. Such authorities could provide an explicit regulatory basis for DFO’s

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<sup>1</sup> (2015) 28(1) J. Env. L & Prac. From ‘Badly Wrong’ to Worse: An Empirical Analysis of Canada’s New Approach to Fish Habitat Protection Laws Martin Z.P. Olszynski

previously policy-based Operational Statements, with the important difference that notification would not be voluntary; proponents would be required to send DFO some basic information about their project (e.g. location, planned mitigation measures).”

3. *Develop fish habitat legislation appropriate for the 21<sup>st</sup> century* - According to Olszynski, DFO needs much better information on the “state of various fisheries and the watersheds that support them, and to assist in targeting enforcement and compliance activity to these regulations”. The expanded regulatory authority for minor works and minor waters would assist in gathering this information as well as “determine which proposed projects require greater scrutiny not because of their individual size but rather because of their location in a watershed and the extent of previous developments’ impacts on the state of that watershed”. The drafting of a new federal statute to protect federal fish would be a longer-term project based on a diagnosis reliant on this emerging information.