An Abdication of Responsibility: Assessing Canada’s Habitat/Fisheries Protection Regime

JELP 5: “Après…le Deluge”
University of Calgary, June 5 – 7, 2015

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1. Introduction: Big Valley Jamboree, SK.

2. Comparing the Habitat and Fisheries Protection Regimes

3. Methodology and Results
   1. National, Regional and Sectoral Trends
   2. Habitat v. Fisheries Protection:
      1. Activities
      2. HADD v. DPAD
      3. The Fisheries Requirement
      4. Size of Impact
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Ottawa defends proposed Fisheries Act changes

MARK HUME
VANCOUVER – The Globe and Mail

“Mr. Speaker, current fisheries policies go well beyond what is required to protect fish and fish habitat. I can give some examples of that,” he said. “Last year in Saskatchewan, a long-running country jamboree was nearly cancelled after newly flooded fields were deemed fish habitat by fisheries officials. In Richelieu, the application of rules blocked a farmer from draining his flooded field.”

The incident in Saskatchewan took place last June, when DFO officials used the Fisheries Act to stop the Craven Country Jamboree from pumping water off flooded flats along Last Mountain Creek and the Qu’Appelle River.

A similar situation occurred in southwest Quebec, where farmers were warned they could be fined if they killed fish while pumping out fields flooded when the Richelieu River spilled its banks.
<table>
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<tr>
<th><strong>Habitat Protection Regime</strong></th>
<th><strong>Fisheries Protection Regime</strong></th>
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<tr>
<td>Applied to works and undertakings</td>
<td>Applies to works, undertakings and activities</td>
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<td>Prohibited the harmful alteration, disruption or destruction of fish habitat (HADD)</td>
<td>Prohibits the death of fish and the permanent alteration or destruction of fish habitat (DPAD)</td>
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<td>Applied to all fish habitat as defined in the Act</td>
<td>Applies to fish – and their habitat – that are part of, or support, commercial, recreational or Aboriginal fisheries</td>
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<td>Minister had broad discretion to issue authorizations</td>
<td>Minister must consider certain factors (section 6) and provide for the sustainability and ongoing productivity of fisheries</td>
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Mountie says more enforcement needed of ATVs in Alberta backcountry

By Staff  The Canadian Press
Bill C-38
The Fisheries Act says you can’t do this to fish habitat...

What is a HADD?

Serious Harm

Harmful alteration:
• Change it so that it can’t support as many fish as it used to.

Disruption:
• You can’t change it for the worse for even just a little while

Destruction: or alter
• Permanently remove it...somehow

...unless the Minister specifically Authorizes you to do so...and then You have to replace it, with something just like it or better and usually nearby.
Fisheries req. per Hutchinson and Post (2014):
No humans, no fishery, no protection?
Analyzed 183 *Fisheries Act* subsection 35(2) authorizations issued between May 1 and October 1 for the years 2012, 2013, 2014

— Bill C-38 passed in June 2012 but Fisheries Protection Regime not brought into force until *November 25, 2013*

Also analyzed 12 Annual Reports (2001/02 – 2013/14) on the Administration and Enforcement of Habitat/Fisheries Protection Provisions (as required by s. 42.1)

— Referrals are reported in the year received;
— Authorizations are reported in years issued;
Figure 3: Number of Section 35 Referrals and Authorizations (2001/02 - 2013/14)
Regional Trends

Figure 7: Referrals by Region (2001/02 -- 2013/14)

- Newfoundland and Labrador
- Maritimes
- Gulf
- Quebec
- Central and Arctic
- Pacific
Figure 8a: Referrals by Work Type (2004/05 - 2013/14)

- **Instream Works**
- **Mineral, Aggregate and Oil & Gas Exploration, Extraction, Production**
- **Shoreline Works (Foreshore and Streambank Work)**
- **Structures in Water**
- **Water Management**
- **Watercourse Crossings**
- **Other**
Figure 8b: Referrals by Work Type (2004/05 - 2013/14)
Almost **60% reduction** (from 87 in 2012 to 36 in 2014) in authorizations from 2012 – 2014:

- Large number of 2014 vintage (~15) related to 2013 Alberta Floods (further discussed below) – 2014 numbers could be even lower?
- 87/6 months (Pacific and C&A combined) = 174/year (prorated)
  - Consistent with 164 authorizations in the 2011/12

Possible explanations:

a) DFO has found a basis for ~ 60% reduction in regime’s scope.

b) A reflection of reduction in referrals, which have declined by roughly 50% in these two regions (see Slide 11).

c) Combination of (a) and (b)
Figure 9a: Authorizations by Work Type (2012 – 2014)

- Structures in Water
- Watercourse Crossings
- Mining, Oil & Gas
- Contaminated Site Remediation
- Habitat Improvement
- Control of nuisance species
- Water Management
- Instream Works
- Dredging
- Shoreline Works
- Log Handling

Year 2012, 2013, 2014, and 2014 (adjusted) are represented in the pie charts.
Figure 9b: Authorizations by Activity (2012 – 2014)

- Transportation
- Industrial/Commercial
- Mining
- Forestry
- Hydro
- Rural/Urban Development
- Recreational
- Oil/Gas

Activities cont’d
Results show that harmful alteration & disruption were never major part of authorization scheme;

Thus, change from HADD to DPAD cannot explain reduction in # of authorizations.

Fisheries requirement?
Fisheries requirement?

Figure 11a: Authorizations Issued Between May 1 – October 1, 2012
Figure 11b: Authorizations Issued Between May 1 – October 1, 2013
Mapping suggests authorization regime has long been concentrated on urban areas;

Fewer authorizations in 2014, but no obvious change in pattern

What else might account for reduction?
Figure 12a: Proportion of Authorizations by Impact Size (2012 – 2014)
Figure 12b: Proportion of Authorizations by Impact Size (2012 – 2014)

- Clear trend (increasing) in size of impacts authorized;
- Legislative basis?
6. Before exercising any power under subsection...35(2)... the Minister shall consider the following factors:
(a) the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries;
(b) fisheries management objectives;
(c) whether there are measures and standards to avoid, mitigate or offset serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or that support such a fishery; and
(d) the public interest.
Implications for Fish Habitat in Canada?
“There is many a slip ’twixt the cup and the lip.”¹ Nowhere is this more true than in environmental law. In all areas of law, there are gaps between the “law on the books” and the “law in action,” but in environmental law the gap is sometimes a chasm.²
Figure 5: Total Habitat Activity (2001/02 - 2013/14)
Martin Olszynski retweeted

Dr. Solomon David @SolomonRDavids · Apr 17

Crazy that so many #GreatLakes fishes migrate through these narrow ditches to reach spawning habitat! #GBfish15

Patrıcik S. Forsythe, Center for Limnology, Ashley Moerke and 2 others