

OLTHUIS, KLEER, TOWNSHEND LLP

MEMORANDUM

DATE: May 9, 2012
TO: OKT Blog
FROM: Stephanie Kearns
RE: Amendments to the *Fisheries Act*
FILE NO: -----

1. SUMMARY OF KEY AMENDMENTS TO THE *FISHERIES ACT*

(a) Protection against “serious harm to fish”

Under the current act, it is an offence to cause harmful alteration, disruption or destruction (HADD) of fish habitat. Under the proposed amendments, it will be an offence to cause serious harm to fish that are part of a commercial, recreational, or Aboriginal fishery, or to fish that support such a fishery.

“Serious harm to fish” is defined as killing fish or permanent alteration or destruction of fish habitat. Disruption is no longer included and the alteration must be permanent.¹

Therefore, it will only be an offence to kill fish or permanently alter or destroy fish habitat for fish that are harvested as part of a fishery or support the fish that are harvested.

There is no protection for the habitats of small fish that are not harvested. This will likely mean that habitats in small streams and wetlands will not be covered by s. 35(1) of the amended *Fisheries Act*.

Also, there is a hole in the coverage of the amended s. 35(1) for Aboriginal commercial fisheries. Aboriginal fishery is defined in the amendments as a fish that is harvested by an Aboriginal organization or its members for food, social, and ceremonial (“FSC”) purposes. “Commercial” is defined in the amendments to be fish harvested under the authority of a commercial fishing licence. Therefore, fish harvested for Aboriginal commercial fisheries that are conducted without a licence will not be protected (unless those fish are also harvested for FSC purposes).

Further, the amended provision appears to only protect fish that are currently being harvested. This would not protect habitats that cannot support an active fishery because of previous damage; habitats that would benefit from protection in order to be rehabilitated. It also would not protect fish habitats in remote locations where harvesting may not currently be occurring.

DFO may leave it to First Nations to advocate for protection on the basis of their current fisheries and not actively determine which habitats ought to be protected under s. 35(1). This will place another burden on First Nations to engage with DFO. This will be a particularly high burden where the fish habitat a First Nation wants to protect supports a species that is not itself

¹ Note that the case law on the current s. 35(1) provides that the alteration must be “somewhat permanent” to breach s. 35(1) so the change to “permanent alteration” from “harmful alteration” is not a substantial amendment. See *R v. Zuber* (2004), 122 CRR (2d) 82 (ONSC).

harvested. First Nations may be forced to hire experts to assist them in satisfying DFO that the habitat falls under s. 35(1).

(b) Broad Regulatory Powers

Under the proposed changes, the Minister now has broad powers to regulate exemptions to s. 35(1). The minister can regulate classes of works, undertakings or activities and classes of waters that are exempt from s. 35(1). For example, the Minister could regulate that the construction of docks for personal use in a certain area are exempt from application of s. 35(1). A person could then construct a dock without an authorization and the person would not be liable under the *Fisheries Act* even if the construction of the dock altered or destroyed fish habitat.

This will also reduce the number of authorizations that are required under s. 35(2) of the *Fisheries Act* and, thereby, further reduce DFO’s oversight of projects that may cause “serious harm to fish”.

In making such regulations, the Minister must consider certain factors such as the contribution of the relevant fish to the ongoing productivity of a fishery (s. 6). Therefore, it may be in a First Nation’s interest to engage with DFO soon after the amendments are enacted to ensure that important fish habitat is protected and protection is not regulated away.

(c) Downloading onto the Provinces

Another key amendment is that the federal government can now more easily download responsibility onto the provinces. For example, where a province has a law that is equivalent in effect to a provision of the *Fisheries Act*, and there is an agreement between DFO and the province, the federal government can declare that certain provisions of the *Fisheries Act* do not apply in the province.

(d) Higher Penalties

On the positive side, the proposed amendments do create larger penalties for proponents who cause serious harm to fish or deposit a deleterious substance in water frequented by fish. The amendments also establish three categories of penalties, for individuals, corporations, and small revenue corporations, with corporations attracting the largest monetary penalty for an offence.

2. CHART OF AMENDMENTS AND IMPACT ON FIRST NATIONS

Section	Amendment	Impact on First Nations
2(1)	Adds a new definition, “Aboriginal” in relation to a fishery, means a fish that is harvested by an Aboriginal organization or any of its members for the purpose of food, subsistence, social or ceremonial purposes	This definition does not include commercial Aboriginal fishing. This definition only includes current fisheries.
2(1)	Commercial is defined as fish harvested under authority of a licence for sale, trade or barter	This definition does not include Aboriginal commercial fisheries, where such a fishery is done

		without a commercial licence.
2(2)	“Serious harm to fish” is defined as the death of fish or any <i>permanent</i> alteration to or destruction of fish habitat	This removes “disruption of fish habitat” from the previous offence and requires that the alteration or destruction be permanent in order to be a violation of the <i>Fisheries Act</i> .
4.1	The feds can now enter into agreements with a province to facilitate cooperation and joint public consultation	DFO can more easily download its functions onto the provinces
4.2	Where there is a provincial law equivalent in effect to a provision of the <i>Fisheries Act</i> and there is an agreement between the feds and a province, the Governor in Council can declare, by order, that certain <i>Fisheries Act</i> provisions do not apply in that province. The provisions of the <i>Fisheries Act</i> and regulations listed in such an order will then not apply in the province	This provision allows DFO to offload responsibility onto the provinces, which will mean that provinces will have more power with respect to fisheries and fish habitat.
6	Minister must consider certain factors before recommending to the Governor in Council that a regulation be made, including: (a) the contribution of a relevant fish to the ongoing productivity of a commercial, recreational or aboriginal fishery; (b) fisheries management objectives; (c) whether there are mitigation measures; and (d) the public interest	First Nations may want to work early on with DFO to advise on the significance on certain areas of fish habitat to ensure that they are protected when the Minister makes regulations. First Nations will also want to advise DFO about the impact of types of projects on that habitat and advocate that activities not be given a prescribed exemption.
35(1)	No person is allowed to carry on a 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 (Serious harm to fish is defined as “death of fish or any permanent alteration to or destruction of	This is significant change from the current <i>Fisheries Act</i> . Now only acts that cause serious harm to fish that are part of or support a fishery are protected. Serious harm only includes permanent alteration and destruction to fish habitat. A temporary alteration

	fish habitat”)	<p>will not be a violation of s. 35(1).² Also, a disruption of fish habitat is no longer an offence.</p> <p>Also, only those fish that are harvested or support a commercial, recreational or Aboriginal fishery are protected. Habitat for other fish species are not protected under this provision.</p> <p>This will mean that water bodies without fish species that are harvested, or support fish that are harvested, will <u>not</u> be protected by DFO. For example, small streams or wetlands will likely not be protected.</p> <p>Also, habitat required to support a First Nation’s commercial fishery may not be protected under this provision (unless it is done under a licence).</p> <p>DFO may leave it to First Nations to advocate for protection of habitat on the basis of their current fisheries and may not actively determine which habitats ought to be protected under s. 35(1).</p> <p>This provision may also only protect areas with an active fishery. Areas without active fisheries because of past environmental damage will not be protected to allow fisheries to return. Also, remote areas where there is no current fishery may not be protected.</p>
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² Note that the case law on the current s. 35(1) already required the alteration to be somewhat permanent. See for example, *R v. Zuber* (2004), 122 CRR (2d) 82 (ONSC).

<p>35(2)</p>	<p>There will be more exemptions to s. 35(1). A proponent is exempt from s. 35(1) if:</p> <ul style="list-style-type: none"> • The action is a prescribed work, undertaking, or activity in a prescribed fisheries waters, and carried out in accordance with prescribed conditions; • The action is authorized by the Minister or an authorized person; • The serious harm to fish is produced as a result of doing an authorized act; or • The action is carried out in accordance with the regulations <p>Therefore, the Minister can now make regulations prescribing types of actions that are permitted and locations where they are permitted, even if they would cause serious harm to fish (s. 35(3)).</p> <p>These regulations are exempt from s. 3 of the <i>Statutory Instruments Act</i>, and therefore do not have to be sent to the Clerk of the Privy Council for review (s. 35(4)) prior to enactment.</p>	<p>This section further allows DFO to regulate away its powers. The Minister will have broad powers to create regulations to exempt classes of works, undertakings and activities from application of s. 35(1).</p> <p>DFO can now go even further than its current Operational Statements, and can regulate classes of works, undertakings and activities that are exempt and locations where they are exempt. For example, the Minister could regulate that the construction of docks for personal use are permitted in certain areas. There would then be no sanction under the <i>Fisheries Act</i> if the construction of a dock caused serious harm to fish.</p> <p>This will reduce the number of authorizations that are required under s. 35(2) and thereby further reduce DFO's oversight of projects that may cause "serious harm to fish".</p>
<p>36</p>	<p>The substance of the deleterious substance related provisions remain the same.</p> <p>However, under the current legislation the Governor in Council has the power to make the regulations. Under the amendments, the Minister will now have the power to make all regulations related to deleterious substances. Although, the GIC can make a regulation establishing conditions for the exercise of the Minister's regulation making power.</p>	<p>This will likely have minimal impact on First Nations.</p>
<p>37</p>	<p>A proponent must submit its plans to DFO for review if it contemplates an action that:</p> <p>(i) results or is likely to result in serious harm to fish that are part of a commercial, recreational, or Aboriginal fishery or in the deposit of a</p>	<p>First Nations may want to engage with DFO to advocate that certain areas be classified as "ecologically significant" to attract further protection.</p>

	<p>deleterious substance; or</p> <p>(ii) proposes an action in an ecologically significant area</p> <p>Like in the current legislation, the Minister can then decide whether an offence is likely and require modifications to the plan or restrict the carrying on of the work, undertaking or activity.</p> <p>But this provision does add a new layer to what is protected, and DFO can act where the proposed action is in an ecologically significant area. The GIC has the power to regulate the definition of “ecologically significant area”.</p>	
38 and 39	<p>The search provisions will be amended. An inspector can enter onto a premises (other than a dwelling) without a warrant. A warrant is required for a search of a premises (which under the amendments cannot be a dwelling).</p>	<p>Minimal impact on First Nations. However, members may be impacted by these inspection provisions.</p>
40	<p>The penalties for breaching s. 35 and 36 have been amended. There are now three categories of penalties, for (i) individuals, (ii) corporations, and (iii) small revenue corporations. There are different monetary penalties for each category. For a s. 35(1) offence, they range from \$5,000 for an individual’s first offence on summary conviction to \$12,000,000 for a corporation’s second offence on indictment. These are higher than the old penalties.</p>	<p>Minimal impact on First Nations</p>