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Protecting Fish in British Columbia

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## 12. Protecting Fish in British Columbia

BY DEBORAH CURRAN AND MEGAN SEILING

The federal *Fisheries Act* – first enacted in 1868 – has been one of Canada’s strongest environmental protection laws. The Act has been effective because it’s done more than simply protect individual fish – it was one of the first laws to recognize larger ecological processes and protect the *habitat* that species depend upon. However, Ottawa recently weakened *Fisheries Act* habitat protection. It is critically important that the province now step in to attempt to fill the regulatory gap – and protect fish habitat.

For years, section 35 of the *Fisheries Act* was important because it prohibited harmful alteration, disruption or destruction of fish habitat (HADD). Where a proposed activity could create a HADD, habitat officers had to approve the project before the work commenced, and those approvals often involved environmental assessment and measures to compensate for habitat loss.

Although officers had discretion to allow fish habitat to be harmed or destroyed, the section 35 requirement preserved much habitat – and created much compensatory habitat. This beloved federal law prevented hundreds of

kilometres of riparian habitat from being paved, rip rapped, seeded for lawn, or otherwise degraded.

However, the era of comprehensive habitat protection abruptly ended in June 2012 when the federal government enacted Bill C-38. The new law amended the *Fisheries Act*:

- The HADD provision and the prohibition against killing fish are merged into one prohibition against “serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery;” and
- “Serious harm to fish” is a new concept defined as “*death* of fish or any *permanent* alteration to, or destruction of, fish habitat.”

These *Fisheries Act* amendments mean that federal authorization is only required for impacts on *commercial, recreational, or Aboriginal fisheries*, or to fish that support such a fishery. And the level of harm that triggers an authorization requirement is now much higher. Now many activities that have an impact on fish and fish habitat – including non-lethal impacts on fish and non-permanent habitat destruction – will not be scrutinized.

But perhaps most damaging, Ottawa recently chopped budgets for habitat field offices and staff positions in Fisheries and Oceans Canada (DFO). DFO’s budget was reduced by \$79 million just months after the introduction of Bill C-38. This will mean losing half of the habitat staff in BC that assess the impact of land development on fish and fish habitat. Half as many human resources will be deployable in favour of fish during environmental assessment processes.

This gutting of fish protection laws and staff has left many asking how the provincial government might fill the regulatory gap and protect fish habitat. This question is timely because the province has spent a number of years working on modernizing one of its oldest laws, the *Water Act* – and the provincial review of best practices in water and riparian habitat management is pointing to progressive, community-involved, watershed-scale approaches that work elsewhere.

A number of BC laws could be amended to limit the disturbance of fish habitat. At the same time, well-focused amendments could foster community-based ecological planning and create a new generation of habitat stewards. Although no replacement for federal oversight, shoring up these provincial legal tools may help fill the hole in habitat protection that Bill C-38 created.

The province of British Columbia should consider the following reforms:

### **1. Implement Water Management Plans (WMPs) across the province.**

Part 4 of the *Water Act* gives the minister the authority to designate areas for the development of a Water Management Plan if a WMP will address conflicts between water users, conflicts between water users and in-stream flow requirements, and risks to water quality. The minister may also consider concerns about fish, fish habitat and other environmental matters. If adopted

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by regulation, WMPs can require statutory decision makers such as local and provincial governments to consider the WMP when making decisions.

Applying WMPs across the province could be a comprehensive approach to ecosystem-based planning that addresses the protection of broader ecological processes, including fish life processes. Amending section 65 of the *Water Act* to require *all* statutory decision makers to ensure that their decisions conform to a WMP – and extending WMPs to include forestry-related decisions – could effectively replace the federal HADD provisions.

## **2. Reform the Riparian Areas Regulation and expand its application to all regional districts in BC.**

The *Fish Protection Act's Riparian Areas Regulation* (RAR) requires that proposals to local governments for new developments within 30 metres of water bodies containing fish must be assessed by a qualified professional to determine the impact of the development on fish. The professional determines a streamside protection and enhancement area for that location – which is an area that must be protected.

While the application of RAR has been widely criticized, its premise is sound: protect the riparian habitat that fish depend upon, and health outcomes for fish will improve. However, at present the RAR only applies to the geographic area of 14 regional districts and their member municipalities. The province should expand the application of the RAR to all regional districts and municipalities in the province, to ecosystem health in general, and make RAR protections more effective.

## **3. Apply section 9 of the Water Act as a replacement for HADD assessments.**

Section 9 of the *Water Act* empowers provincial water management staff to approve proposals to make changes in and about a stream. The *Water Act Regulation* goes on to require persons making changes in and about streams to protect habitat by complying with terms and conditions imposed by the habitat officer for the timing of the change, minimum instream flows, removal and addition of material, the salvage or protection of fish, and restoration.

The *Water Act Regulation* defines “habitat” as the areas in and about a stream and includes spawning grounds, nursery, rearing, food supply and migration areas, and the quantity and quality of water on which fish or wildlife depend directly or indirectly in order to carry out their life processes.

Section 9 approvals could be applied in a way that would replace HADD assessments and also take into account other ecosystem values.

Finally, it should be noted that a number of the reform recommendations found elsewhere in this book will also improve general environmental protection and protect fish habitat.

In a province where salmon are an icon of our way of life, and where respect for ecological integrity is a common value, action should be taken to restore comprehensive protection for fish habitat.

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**For more information, see:**

Oliver Brandes, Keith Ferguson, Michael M’Gonigle and Calvin Sandborn. *At A Watershed: Ecological Governance and Sustainable Water Management in Canada*. The POLIS Project on Ecological Governance. (2005) <http://www.polisproject.org/PDFs/AtaWatershed.pdf>

*Bill C-38 and Offloading Fisheries onto the Provinces*. West Coast Environmental Law. (2012) <http://wcel.org/sites/default/files/publications/OffloadingFisheriesFinal.pdf>

The chapter “[Privatizing Salmon Protection: The Failure of the Riparian Areas Regulation](#)” in this publication.

The POLIS Project on Ecological Governance website: <http://www.polisproject.org/>.