CANADA’S FEDERAL FISHERIES ACT:

CHANGING THE RULES ON HABITAT PROTECTION WILL AFFECT BC’S RIVERS

Introduction

The *Fisheries Act* is Canada’s strongest environmental law, mainly because it prohibits what’s known as HADD – “the harmful alteration, disruption, or destruction of fish habitat.”¹ A habitat is a fish’s home, or as the Act puts it: the “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.”² Fish depend on their habitat. The *Fisheries Act* can stop a mining company turning a sacred lake into a tailings pond. The Act can keep a new dam from harming fish. The Act can be used to lay charges against a developer filling in a stream. Under this law, one can’t destroy fish habitat unless one gets a permit. But with the changes being made to this cornerstone law, fish could soon be at risk – fish like those in the Skeena, home of wild rivers, salmon strongholds, and world-class sport fishing; fish like those in the Fraser, British Columbia’s most productive salmon river.

Changes to the Federal *Fisheries Act*: A Sledge Hammer to Swat a Fly

For the past thirty years the Act’s blanket prohibition on HADD has been a powerful environmental protection tool especially when combined with the Department of Fisheries and Oceans’ policy of “no net loss” of fish habitat. (The Act does allow harm to habitat through authorization from the Minister or through regulations, but the default position is that all harm to habitat is outlawed.)

The changes to the Act, buried in the May 2012 budget bill, will seriously weaken fish habitat protection.

The government argues that the law needs to change because it protects too much. Scientists disagree. Three experts from Simon Fraser University disproved this rationale by examining thousands of development proposals filed from 2006-11 and finding that only one was turned down by the federal environmental assessment process – and then only partly due to potential destruction of fish habitat.
habitat. They also surveyed 1,283 convictions by the federal government for violations of the *Fisheries Act* in the same time period and found that only 21 related to destruction of fish habitat. Their conclusion? “These low numbers could reflect compliance with the habitat provision of the law, in which case there is no reason to alter it, or a poor enforcement capacity, which cannot be blamed on the law.”³

All fish and fish habitat anywhere in Canada is currently protected by the HADD prohibition, but the changes to the Act may soon limit protection to those fish that are “part of a commercial, recreational or Aboriginal fishery.”⁴ All fish and fish habitat anywhere in Canada is currently protected by the HADD prohibition, but the changes to the Act may soon limit protection to those fish that are “part of a commercial, recreational or Aboriginal fishery.”⁴ In other words, if it’s not being caught, then it’s not protected. And even if it is being caught, it may fall through the cracks, as the Act is not clearly worded.

Moreover, the government plans to replace the prohibition against HADD with a prohibition against “serious harm to fish,”⁵ defined as “the death of fish or any permanent alteration to, or destruction of, fish habitat.”⁶ It’s extremely difficult to prove permanent habitat destruction. As the Sea to Sky Fisheries Roundtable has pointed out, temporarily removing gravel and impeding an entire year of salmon could be allowed because the gravel removal isn’t “permanent.”⁷ This section of the Act is not yet in force, and there is still time to prevent this change from happening. WWF calls on the Government of British Columbia to ask the federal government to address the fundamental question of whether *Fisheries Act* amendments limiting legal protection for fish habitat to “serious harm to fish” should be brought into force at all. British Columbians expect their government to speak up for fish habitat protection.

And the new weaker law also comes with more exceptions: the government can: exempt works or activities from the Act even if they cause serious harm to fish habitat; make regulations that give power to authorize harmful projects to anybody it chooses – including developers that cause that harm!;⁸ and exempt any Canadian fishing waters from the application of the law.⁹
Potentially even more troubling is the fact that the federal government plans to hand over more power to the provinces to regulate their own fisheries and habitats, seemingly contrary to its constitutional responsibility to protect fish.

British Columbia will be seriously affected by the changes, yet no consultation has taken place.

**The Skeena and the Fraser: No Habitat, No Fish**

*The Skeena River and the Northern Gateway Project*

The Skeena River is approximately 620km long, stretching from the Coast Mountains in BC’s Great Bear region until it drains into the Pacific. A world-renowned sport fishing destination, it is the second-largest producer of sockeye salmon in BC, thanks in part to limited development in the lower watershed. Other fish species in the Great Bear area include all five species of Pacific salmon, steelhead salmon, Pacific herring, Pacific halibut, sablefish and numerous rockfish.

The Skeena, however, is threatened by the Northern Gateway Project, currently under regulatory review by a Joint Review Panel. The project would see two pipelines built, reaching across northern BC to load and unload oil tankers for export. This pipeline would cross 996 streams and rivers, in both Alberta and BC, 279 of which are in the Skeena watershed. Of the total almost one thousand streams, DFO classifies 669 as fish-bearing and 131 as significant due to the presence of salmonids or species of conservation concern. It is possible that many of these waters in remote areas could soon be exempt from scrutiny. Or regulations may be passed so these waters are formally exempt from the Act, as Minister Ashfield appears to suggest.

Many First Nations have concerns that the numerous fish within the pipeline area will be at risk from oil spills. The eulachon, a culturally significant species, is designated as endangered by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). The Gitga’at First Nation notes in its written submission to the Northern Gateway Joint Review Panel that the presence of larval and juvenile eulachon in the surface waters of the area from April to July each year make this species particularly vulnerable to an accidental spill.

DFO’s fisheries biologists gave two examples of proposed pipeline stream crossings that they classified as medium or high risk to fish and fish habitat, requiring different construction techniques for pipeline crossings, contrary to the project proponent’s advice to the regulators that both were low risk. The Globe and Mail reported the Department of Fisheries and Oceans’ confession to the Joint Review Panel that they had not done a complete review of all proposed crossings, and so were “unable to submit a comprehensive list as requested.”

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“The [Northern Gateway] pipeline goes over an estimated 1,000 waterways and [Fisheries Minister] Ashfield acknowledged that some of them won't fit the definition of a stream that is part of either of the three fisheries.”

Peter O’Neil, “Fisheries Act changes introduced amid debate over new law’s intent”, *The Vancouver Sun* (26 April 2012).
environmental risks was already falling behind when the pipeline review project started. Changes to the *Fisheries Act* mean that the pipeline’s impact on key sensitive stream crossings may not be considered at all.

*The Fraser River and the Cohen Commission*

The Fraser River is approximately 1,375km long with a drainage basin of 220,000km². It is the greatest salmon-producing river on Earth: more than two billion juvenile salmon spend weeks or months in the estuary before setting off on their ocean migration.

But of the eighteen sockeye salmon stocks classified by the International Union for the Conservation of Nature, seven are considered endangered. COSEWIC lists two populations of sockeye as endangered, with the Cultus population having a “high probability of extinction.” After two decades of decline, low sockeye salmon stocks in the Fraser led to fishery closures from 2007 to 2009, leading the federal government to appoint Justice Bruce Cohen to investigate this decline in what is now known as the Cohen Commission.

Changes to the *Fisheries Act* threaten vulnerable sockeye salmon, and also threaten the findings of this two-year, $26.4-million commission. Tasked with making recommendations for the Fraser’s depleted salmon stocks, the Commission now faces the prospect of its recommendations falling on deaf ears and its mandate being thwarted by the very government that commissioned it. In April 2012, Mr. Justice Cohen asked all parties to tell him how the budget bill that contained the *Fisheries Act* changes would affect their previous positions on the state of B.C.’s top fishery. The Conservation Coalition told the Commission “that the total effect of the [legal changes] is to render much of the evidence heard by the Commission particularly with regard to habitat and habitat protection potentially irrelevant.” The Western Central Coast Salish First Nations pointed out the ‘alarming consequence’ of the habitat changes: in their view a “likely result” of the application of this new piecemeal habitat protection would be “an overall decline in the abundance and health of fish including Fraser River sockeye.”

At a time when the status of Fraser River salmon stocks is still unclear and when experts suggest that the government “reduce the discretionary power in fisheries management decisions
exercised by the Minister of Fisheries and Oceans,”17 the government is expanding those discretionary powers without regard for the Commission’s findings.

Conclusion

Canadians rely on their governments to protect fish and their homes all across the country. WWF Canada is concerned about the impact of changes to the federal *Fisheries Act* on BC and believes that BC’s fish and rivers will be placed further at risk from the diminished *Fisheries Act*.

Fisheries and Oceans Canada intends to bring the “serious harm” provisions into force roughly six months after the budget implementation bill become law (June 29, 2012). This provides a small window of opportunity for the government of BC to ask the federal government for full and meaningful consultation on whether this important change to fish and fish habitat management should be brought into force, and to identify risks to the lives and livelihoods that may result if they are brought into force. WWF supports uniform rules to protect fish habitat that apply to all fish habitat and to all fish across Canada.

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1 *Fisheries Act*, RSC 1985, c F-14, s 35(1).
2 Ibid at s 34(1).
3 *Canada’s Weakening Aquatic Protection*, Brett Favaro, John D. Reynolds, and Isabelle M. CôteScience 13 July 2012: 154. Published online 21 June 2012
5 Ibid.
6 Ibid at cl 133(4).
7 Letter from Sea to Sky Fisheries Roundtable Group to John Weston, MP (11 May 2012).
8 Supra note 6 at cl 142(1).
9 Ibid at cl 149(5).
10 Submission of Fisheries and Oceans Canada and Canadian Coast Guard to the Enbridge Northern Gateway Project Joint Review Panel, Hearing Order OH-4-2011, December 22, 2011, pg. 9-10.
12 Mark Hume, “DFO risk assessment of Northern Gateway is, at best, a work in progress”, *The Globe and Mail* (10 June 2012)
15 Supplementary submission of the Conservation Coalition to the Cohen Commission (14 May 2012).
16 Supplementary submission of the Western Central Coast Salish First Nations to the Cohen Commission (14 May 2012).