

Back to what we once HADD (plus more)

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Back to what we once HADD: *Fisheries Act* Amendments are Introduced

Since the 1970s, section 35 of the *Fisheries Act* operated to protect fish and fish habitat throughout Canada by prohibiting the harmful alteration, disruption or destruction of fish habitat (the HADD provision). Up to 2012, the HADD provision served as the primary focus of federal regulation for habitat under the *Fisheries Act*.

However, in 2012, the previous government (in addition to other changes) removed the HADD provision from the *Fisheries Act* via omnibus budget bills (see [here](#) and [here](#)). The HADD provision was replaced with a prohibition against works, undertakings or activities that result in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery. The definition of “serious harm to fish” is “the death of fish or any permanent alteration to, or destruction of, fish habitat”.

Removal of the HADD provision significantly narrowed the scope and nature of activities covered by the prohibition. This is because the “serious harm” prohibition (as opposed to the HADD provision):

- Focused on protecting only commercial, recreational or Aboriginal fisheries (also part of the 2012 amendments).
- The degree of harm permitted is much higher (fish deaths or permanent alteration or destruction of habitat, as opposed to, harmful alteration, disruption or destruction of fish habitat).
- A requirement to demonstrate that habitat is permanently altered or destroyed. A proponent may be able to argue that the habitat alteration or destruction is not permanent if there is a possibility – however remote – of future restoration.

Amendments to the *Fisheries Act* were introduced in the House of Commons on February 6. Significantly, these amendments include restoration of the HADD provision.

In addition to restoration of the HADD provision, several other amendments are aimed at providing better protection of all fish and fish habitat:

- Expanding the definition of fish habitat is amended to mean “water frequented by fish and any other areas on which fish depend directly or indirectly to carry out their life processes, including spawning grounds and nursery, rearing, food supply and migration areas” (i.e. protection is no longer limited to only commercial, recreational or Aboriginal fisheries).
- The purposes of the Act amended to provide a framework for the proper management and

control of fisheries and the conservation and protection of fish and fish habitat, including by preventing pollution.

- Powers enabling the Minister to take action to address declining fish stocks (and to protect the habitat of stocks in decline).
- Powers enabling the Minister to make emergency Fisheries Management Orders directing the cessation or limitation of fishing activities.
- Prohibition of fishing for cetaceans for captivity purposes (unless injured, in distress or in need of care).
- Expansion of the fishery protection and pollution prevention provisions of the Act (i.e. amendments to s.34 which deals with deposition of deleterious depositions and addition of ss. 34.1 to 34.4). This includes provisions allowing the development of standards and codes of practice for (a) the avoidance of death to fish and harmful alteration, disruption or destruction of fish habitat; (b) the conservation and protection of fish or fish habitat; and (c) the prevention of pollution.
- The creation of a public registry will increase transparency which should improve monitoring and enforcement, and tracking cumulative impacts. (Although, under s. 42.3 obligatory posting to the public registry is limited to Ministerial permits, orders or authorizations; certain delegate authorizations; standards and codes of practice; agreement; and fish habitat restoration plans which might, in practical terms, limit the transparency created.)
- The creation of a fish habitat bank which will allow areas of fish habitat that have been created, restored or enhanced by conservation projects to be used as credit to offset adverse effects on fish or fish habitat caused by a project (ss. 42.02 and 42.03).

As well as enhancing fish and fish habitat protections, there are several amendments which are meant to “strengthen the role of Indigenous peoples in project reviews, monitoring and policy development” (see [press release](#)).

It is noteworthy that the amendments include a list of matters that may be considered by the Minister when making decisions under the *Fisheries Act* (s. 2.5). These include, among other things:

- application of a precautionary approach and an ecosystem approach;
- the sustainability of fisheries;
- scientific information;
- traditional knowledge of the Indigenous peoples of Canada;
- community knowledge; and
- social, economic and cultural factors in the management of fisheries.

In our view, these are important factors that should guide all decision-making under the Act and should be required to be considered (as opposed to factors that the Minister *may* consider).

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