

# Blakes Bulletin

## Environmental Law

### Federal Government Increases Oversight of Activities Impacting Fisheries

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Bill C-38, the *Jobs, Growth and Long-term Prosperity Act*, (the Bill) was passed on June 29, 2012. While the Bill was publicized as streamlining natural resource development approvals, which it does, it also contains substantial amendments to the *Fisheries Act* (the Act) that have led to allegations that the federal government is reducing protection of the aquatic environment. What has been lost in this public discourse is that changes made by Bill C-38 to the Act actually increase the oversight by the federal government of activities impacting fish-bearing waters and fish habitat. This includes extending the power to order works to mitigate harm, allowing government officials to shut down operations permanently and increasing responsibilities on individuals and corporations to report potentially harmful activities.

#### FISHERIES ACT PROHIBITIONS

There are two key prohibitions in the "Fisheries Protection and Pollution Prevention" sections of the Act: (1) the deposit of a deleterious substance into waters frequented by fish (section 36); and (2) the harmful alteration, disruption or destruction of fish habitat (HADD) (section 35). The deposit prohibition is unchanged by Bill C-38, but the HADD prohibition been changed in two stages. The first stage came into force when the Bill was passed, but the second stage is not yet in force.

#### AMENDMENTS NOW IN FORCE

##### Expanded Reporting and the Duty to Take Corrective Measures

Before Bill C-38, the Act required reporting a deposit or the imminent danger of a deposit if the deposit could reasonably be expected to harm fish or fish habitat. This duty was limited by requiring the reports to be made in accordance with any regulations. Until recently, only specific operations such as pulp and paper mills were subject to reporting requirements in regulations.

In 2011, new regulations were made that effectively meant that all deposits must be reported. The bottom line, however, is that the only reportable activity was a deposit that had the potential to cause harm to fish or habitat. Other activities impacting the aquatic environment were not reportable.

As of June 29, the duty to report incidents has been expanded, and the Act now requires reporting the occurrence of a HADD or a serious or imminent danger thereof. The requirement to notify of a deposit remains in place, although it has been altered to require such a report if a detriment to fish or fish habitat may reasonably be expected to occur. "Detriment" is undefined, and it is unclear whether it is intended to be more or less stringent than "damage." The amendments also impose a new requirement to provide written reports after both of these notifications are made to fisheries officers (officers with Fisheries and Oceans Canada, i.e., the Department of Fisheries and Oceans (DFO)), inspectors (officers with Environment Canada) or others prescribed by regulations. There is also a concurrent duty to take measures to prevent the occurrence of a HADD or deposit, or to counteract, mitigate or remedy the adverse effects of a HADD or deposit once they occur. This reporting duty will be expanded further when the second stage of amendments comes into force, which we discuss further below.

The notification requirements and the duty to take measures apply broadly to anyone who owns or has charge, management or control of the activity that causes the HADD or deposit; causes or contributes to the HADD or deposit; or, in the case of a deposit, owns or has charge, management or control of the substance.

While most deposits of substances into waters frequented by fish are self-evident, a HADD is not necessarily so. This is because not all activity taking place in or near fish habitat causes a HADD, which is dependant on a number of factors, including the nature of the activity and the particular habitat. Indeed, the occurrence of a HADD can be difficult to ascertain without the assistance of a qualified fish habitat

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biologist and reference to the DFO's Fish Habitat Policy. It may be challenging to meet a legal requirement to report a HADD without such assistance, which raises the potential for disputes over how, or even if, a person is expected to know when a HADD had occurred or there is an imminent danger of it occurring.

### Expanded Order Powers

Prior to June 29, inspectors had the power to order corrective measures be taken in the event a deposit occurred, or there was a serious and imminent danger thereof. These orders are referred to as Inspector's Directions. Under Bill C-38, the power to issue directions has been expanded to include directions to take measures with respect to a HADD and to give fisheries officers the authority to issue them.

### New Offences and Limitation Period

As of June 29, there are a number of new offences under the Act, including the failure to:

- report a HADD or deposit;
- take measures to address a HADD or deposit;
- comply with any conditions of authorizations;
- supply information required by the Minister; or
- comply with directions from inspectors or fisheries officers.

The duty to comply with the conditions of authorizations creates a significant addition to the enforcement toolbox under the Act. Prior to this amendment, authorizations under these provisions were not, in and of themselves, enforceable. This meant that if conditions in authorizations were not complied with, so long as a HADD did not result from the non-compliance, there was no way for the government to enforce the authorization. A simple example would be a requirement for a regular report, a common condition in an authorization, but not one that would result in a HADD if not complied with. Even if conditions in an authorization directing how works were to be constructed were not adhered to, so long as the works did not result in a HADD, the conditions were not enforceable.

It has been our experience that even absent a compliance requirement in the Act, operators working under HADD authorizations do treat them as legal obligations. Nonetheless, the addition of enforceable requirements to comply with all the conditions of an

authorization and the concurrent ability of the courts to penalize an entity for failure to do so arguably removes some of the flexibility that existed to adapt projects to on-the-ground circumstances without the need to seek amendments to authorizations, provided such adaptations did not result in a HADD. Under these changes, HADD authorizations more closely resemble the type of construction or operating permits typically issued by provincial authorities and require regulatory approval before the conditions in them can be deviated from.

Another immediate change is the extension of the limitation period for laying of charges under the Act from two to five years. Lengthy limitation periods emphasize the need for thorough internal investigations and record-keeping at the time incidents occur, as preservation of evidence will be key to future defences of any charges that could conceivably not get to court until up to six or seven years after an incident has occurred.

### Other Changes Now in Force

Other key amendments to the Act now in force include the following:

- provisions allowing for agreements with the provinces for equivalency and delegation;
- amendment to the prohibition of "destroying" fish, to a prohibition on "killing" fish;
- clarifying that section 32 and 35 prohibitions apply to all activities, not just works and undertakings; and
- clarification of the regulatory-making power for authorization of activities under sections 32, 35 and 36, including power granted to the Minister to create regulations for such authorizations.

### AMENDMENTS NOT YET IN FORCE

#### Revised Prohibitions

As discussed in our May 2012 *Blakes Bulletin* on Bill C-38, some of the changes to the Act are to come into force at a future date by orders of the federal cabinet. This includes the provisions that are causing the most controversy; that is, the combination of section 32 and 35 prohibitions into a requirement not to cause serious harm to fish, which includes killing fish and permanent alteration and destruction of fish habitat that are part of aboriginal, commercial and recreational

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fisheries. We understand these amendments will not be brought into force until the DFO has revised its habitat policies to guide how the prohibition is to be interpreted and how activities impacting habitat can be appropriately mitigated. However, there are also provisions that will be brought into force by cabinet order that will further increase the powers of the regulators and the courts with respect to serious harm to fish and deposits.

### **Expanded Duty to Report**

The duty to report a HADD and take measures to correct it will be amended to remain consistent with the changes to section 35 to prohibit "serious harm to fish." As the amended prohibition also incorporates the current section 32 prohibition against killing fish, the result will be an expanded requirement to report and take corrective measures when there is unauthorized killing of fish or permanent alteration or destruction of fish habitat (or an imminent danger thereof) and to allow fisheries officers to issue directions regarding the works or activities that cause the occurrence.

### **Ministerial Power to Shut Operations No Longer Subject to Cabinet Approval**

Section 37 of the Act, both before and after the passage of Bill C-38, provides the power to the Minister (or his designate) to request information about activities that result in or are likely to result in a HADD or a deposit. After reviewing the requested information, the Minister currently has the power to order modifications or additions to the activities or to restrict the carrying on of the activity. However, this power is subject to conditions in regulations or, in the absence of regulations, to approval by the federal cabinet. The Minister can also direct the closing of a work or the ending of the activity for any period considered necessary. This power may also only be exercised if approved by the federal cabinet. Under the changes to come into force, the requirement for cabinet approval of ministerial orders requiring modification to or restriction of works or activities, or ending them altogether, is removed. Therefore, once the second stage of amendments is in place, the Minister or his designate will have broad powers to stop work and ultimately order works and activities to be shut down permanently.

### **Other Changes Not Yet in Force**

Also still to come into force are the provisions that impose higher fines, including substantial minimums, for violations of sections 35 and 36, as well as the following:

- the factors to be taken into account by the Minister in making decisions;
- the changes regarding obstructions in rivers; and
- the powers granted to the Minister to designate ecologically significant areas and make regulations regarding their management.

### **THE EXPANDED ORDER AND ENFORCEMENT POWERS**

The expanded order powers and requirements to comply with conditions in authorizations under the Act are similar to other environmental legislation in Canada, which typically has approval mechanisms that are fully enforceable if not complied with, and extensive powers to order works causing harm to the environment to modify or even shut down. In this respect, it is arguable that while these amendments expand the regulator's powers under the Act, the federal government has modernized the Act to make it consistent with other federal and provincial environmental laws and to provide enforcement tools to the DFO and Environment Canada, which their provincial counterparts already have. Nonetheless, in so doing, the Act will become more enforceable and more stringent, a fact that appears to have been entirely ignored in the political furor over Bill C-38.

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