

Fisheries Inter-Jurisdictional Issues

The Department of Fisheries and Oceans (DFO) continues to expand its jurisdiction through the application of the fish habitat protection provisions of the Fisheries Act. This goes beyond Federal jurisdiction, as provided in the Constitution, established case law, DFO policy, and generally through the definitions of “fish habitat” and “waters frequented by fish” as applied under Sections 35(2) and 36(3) of the Fisheries Act.

Fisheries are a vitally important resource in Canada and are under the jurisdiction of the Federal Government. However, for inland fisheries, the Provinces own the water and fish that comprise any given fishery. Many industrial projects in Canada are located in areas that may have some impact on fish habitat or waters that may contain fish. In many circumstances industry participants have noticed an increased role taken by the Federal Department of Fisheries and Oceans (DFO) in areas where provincial governments have historically taken administrative control. In some circumstances, DFO has actively ignored existing provincial approvals for facilities.

Recent proposals to amend the Fisheries Act contained in Bill C-32, do not significantly alter the habitat protection provisions of the Fisheries Act, but do set out certain principles that may assist in the application of the fish habitat protection provisions, including cooperation with provincial governments, and sustainable development. Bill C-32 does provide for potential provincial equivalency on fisheries management and for agreements with provinces to further the purposes of the Act, but DFO suggests that administration of fish habitat protection will not be delegated. Bill C-32 may be submitted to the House of Commons Standing Committee on Fisheries and Oceans and further consultations are contemplated.

From recent DFO administrative decisions in various provinces, it is clear that DFO has expanded application of the Fisheries Act by extensions of the definition of habitat through case law over time, and even beyond established case law. DFO no longer confines its jurisdiction to “fisheries”, but takes jurisdiction over any water that may have fish in it, whether such waters may support or be connected to a viable fishery or not, and over adjacent lands as ‘habitat’.

This expanded jurisdiction is often based on the definition of “fish habitat” and its application under Section 35, and based on the definition of “waters frequented by fish” and its application under Section 36(3) of the Fisheries Act. These definitions are broadly framed and when read literally and outside the context of the Federal fisheries power under Section 91(12) of the Constitution Act, 1867, likely intrude on Provincial jurisdiction over property and civil rights contained in Section 92(13). In current applications of the Fisheries Act, no assessment of the quality of the fishery is made by DFO. DFO appears to take the position that a fish is a fish regardless of its contribution to fisheries as a natural resource. This expanded application of fisheries jurisdiction by DFO is not apparently supported by the Constitution, case law or existing fisheries policy.

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This has recently led to obvious distortions, such as the conclusion that a facility approved as a mine tailings system is “fish habitat” simply because a fish was found there, or the classification of some storm sewers as habitat. Timelines for receiving decisions from DFO on issues such as fisheries compensation are also unacceptable. These problems are unlikely to be changed by Bill C-32, an Act respecting the sustainable development of Canada’s seacoast and inland fisheries.

A related issue requiring attention is the provision for changes of the rules, which affect parties after they have operated in good faith under the preceding rules. Rule changes can be expected to be needed to enable better management of the resource as new information is obtained, circumstances change and

development continues. It is key that, when such changes are made, existing users with investment and dependency based on past rules be provided time and compensation for the change. The expansion of the definition of 'fish habitat' is a recent example of this. New legislation should allow changes to be forced, but also require the provision of time and compensation for the transition.

DFO lacks a policy framework as it no longer follows the Fisheries Policy or habitat management policies set with significant stakeholder input. As a result, the approach DFO will take to many fishery related issues, including habitat protection and compensation issues, is unpredictable.

The approach DFO takes to fisheries issues is ad hoc and often takes a significant period of time, needlessly delaying projects and stalling economic activity. In the current economic climate, DFO has the potential to significantly chill investment.

Recommendations

That the federal government:

1. Amend the Fisheries Act to restrict fisheries jurisdiction to that intended by the Constitution including limiting fisheries jurisdiction to the protection of commercial, recreational, and subsistence fisheries. This should be accomplished through amendments to the fish habitat protection provisions of the Fisheries Act. The definition of "fish habitat" should exclude provincially licensed industrial facilities and other anthropogenic structures or facilities. The definition of "fish habitat" should also include a qualifier with respect to quality. The definition of "waters frequented by fish" should be similarly limited. New legislation should allow changes to be forced, but also require the provision of time and compensation for the transition.
2. Develop the needed habitat definition changes with stakeholders and include these definitions in the legislation and/or regulation(s), and not set them through changing Department policy and expansion through case law.
3. Require DFO to increase the use of operational statements to more clearly articulate regulatory requirements.
4. Require DFO to more clearly set out binding timeframes in policy for determining whether and how the Fisheries Act applies to a particular project.