

Major Changes to Federal Fisheries Act Take Effect



On April 26, 2012, the federal government proposed changes to several environmental laws, including the *Fisheries Act*, in Bill C-38, the *Jobs, Growth and Long-term Prosperity Act*. In July 2012, some of those changes took effect. But many of those that apply to the *Fisheries Act* just took effect on Nov. 25, 2013. Fisheries and Oceans Canada (DFO) posted a new *Fisheries Protection Policy (Policy)* to help stakeholders understand these changes. Here's an overview of the key changes.

THE KEY CHANGES

The amended act has changes in three key areas:

Prohibitions. The new law combines the prior Sec. 32 (killing of fish by means other than fishing) and Sec. 35 (harmful alteration, disruption or destruction of fish habitat'sometimes referred to as HADD). It now prohibits 'serious harm to fish' and fish habitats that are part of or support commercial, recreational or Aboriginal fisheries, which include:

- All three of Canada's oceans;
- Areas of fishing for food, social or ceremonial purposes or under land claims agreements by Aboriginal peoples; and
- Areas covered by federal or provincial fisheries regulations.

'Serious harm to fish' is defined as the death of fish or any permanent alteration to, or destruction of, fish habitat. The Policy adds that any permanent alteration to or destruction of fish habitat must be of a spatial scale, duration or intensity that limits or diminishes the ability of fish to use such habitats as:

- Spawning grounds;
- Nursery, rearing or food supply areas;
- A migration corridor; or
- Any other area in order to carry out one or more of their life processes.

Authorizations. If an activity or project has the potential to cause serious harm to fish that are part of or support a fishery, the project proponent or

operator may need authorization from the DFO. The Policy includes a hierarchy of goals for undertaking activities that may cause serious harm to fish 'avoid, mitigate or offset' and discusses what the DFO considers these terms to mean. But only offsetting requires authorization under the revised *Fisheries Act*.

The new *Applications for Authorization Regulations* also took effect Nov. 25, 2013. The regulations describe the information that must be submitted by a proponent seeking an authorization. They also require a Canadian financial institution to provide an irrevocable letter of credit to cover the costs of implementing any required 'offsetting plan.' The DFO has 60 days to determine an application's completeness and another 90 days to either issue or reject the authorization. In an emergency, an abridged application and approval process applies.

Insider Says: Under the amendments, existing Sec. 32 and 35 authorizations issued before Nov. 25, 2013 will be valid under the new prohibitions in Sec. 35. But if you want to amend or cancel such authorizations, you may apply to the DFO by Feb. 24, 2014.

Enforcement. The amendments also include expanded enforcement powers, some of which took effect in July 2012 and the rest on Nov. 25, 2013. These changes include:

- Higher maximum fines and new minimum fines for violations of Secs. 35 and 36 'for a first conviction, a minimum fine of \$15,000 for an individual and \$500,000 for a company. Subsequent violations will result in higher penalties;
- A new duty to report 'without delay' unauthorized serious harm to fish and to take corrective measures;
- Modernized inspector powers to assist them in ensuring compliance with Sec. 35; and
- The ability of the Minister to designate ecologically significant areas for fish, which may require higher levels of protection.

ANALYSIS

The goal of these changes, according to the DFO, is to ensure the productivity and ongoing sustainability of Canadian fisheries. It'll be some time before we know whether the amendments achieve that goal. Narrowing the scope of protection to fish and fish habitats that are part of or support commercial, recreational and Aboriginal fisheries may mean less DFO involvement in reviewing projects and a focus on projects with the greatest impacts on such fisheries. Although this approach may be more convenient for businesses, it may also fail to adequately protect fish and their habits.