

May 4, 2021

Standing Committee on Environment and Sustainable Development  
Sixth Floor, 131 Queen Street  
House of Commons  
Ottawa ON K1A 0A6  
Canada  
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## **Re: The Federal Failing of Canada's Freshwater Resources**

### 1. Introductory Information

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*a) Which issues related to protecting and managing freshwater does your organization work on?*

MO: Although I am affiliated with various organizations, including the Smart Prosperity Institute in Ottawa, I am filing this brief in my personal capacity as an academic who researches freshwater law and policy in Canada. Presently, I am an associate professor at the University of Calgary Faculty of Law. My faculty profile can be found at <https://law.ucalgary.ca/profiles/olszynski>. Of particular relevance to this study, prior to joining the Faculty in 2013, I spent half a decade practicing environmental and natural resources law in the legal services unit at Fisheries and Oceans Canada (DFO). The result is almost fifteen years of experience practicing, researching, and writing about Canadian freshwater law and policy. My primary focus in this context over the past 15 years has been on the habitat protection and pollution prevention provisions (sections 35 and 36) of the federal *Fisheries Act* RSC 1985 c. F-14 and related regulations, including with respect to mining and wastewater systems effluent.

### 2. Interaction and Collaboration with Federal Departments and Agencies

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*a) Does your organization interact with federal departments and/or agencies on freshwater issues? If so, on which issues and with which departments and/or agencies?*

MO: My current interactions with DFO and Environment and Climate Change Canada (ECCC) are largely as a public stakeholder. I was actively involved in the public consultations and appeared as a witness in the Parliamentary hearings leading up to Bill C-68 (restoration of the *Fisheries Act*: <https://www.ourcommons.ca/DocumentViewer/en/42-1/FOPO/report-6/>) and continue to be engaged in the implementation of the new habitat protection regime. I recently authored several briefs for DFO as part of a collaboration with Oceans North, specifically with respect to the ongoing need for an effective public registry and DFO's reliance on "codes of practice": <https://www.fisheriesact.ca/>) (the matter of a public registry is further discussed below). I was also a consultant on the recent *Alberta Tailings Pond II Factual Record* completed by the Commission for Environmental Cooperation (<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/alberta-tailings-ponds-ii/>), which examined allegations of non-enforcement of the *Fisheries Act* subs. 36(3) prohibition against the deposit of deleterious substances in the oil sands and in that context interacted with ECCC officials.

*b) Do the specific freshwater issues targeted by your organization fit within the mandate of a given federal department and/or agency or do they relate to more than one department and/or agency? If more than one, have you been able to identify a lead department and/or agency with which to engage?*

MO: Yes. DFO (habitat issues) and ECCC (pollution prevention issues).

*c) Have you encountered notable successes in engaging with the federal government on freshwater issues? If so, please specify. If you have not had success in doing so, what in your opinion is the reason (e.g., no program available tailored to your needs, no identifiable service or unit within a department and/or agency with which to engage)?*

MO: I have encountered what I would describe as moderate success in engaging with DFO. Many of the recommendations proposed by myself and several colleagues in the consultations leading up to Bill C-68 were adopted for the purposes of that bill, which I suspect required departmental support and for which I am grateful. That being said, the department appears to insist on past practices that have been shown to be detrimental to fish and fish habitat, especially reliance on “codes of practice” (CoPs). DFO is relying on CoPs, which are intended for situations where proponents can *avoid* harm, to instead essentially *authorize* harms for what it deems low-risk projects, but without the scrutiny and rigour associated with the authorization route (see here for brief primer on codes of practice and the problems with their implementation: [https://www.fisheriesact.ca/s/Fisheries-Act-Brief\\_Codes-of-Practice.pdf](https://www.fisheriesact.ca/s/Fisheries-Act-Brief_Codes-of-Practice.pdf)).

*d) Do you foresee engaging with the new Canada Water Agency? If so, in what way? What are your organization’s expectations with respect to the Agency?*

MO: Yes, I look forward to engaging with the new Canada Water Agency. I have not yet been able to engage in the recent discussions surrounding its mandate, but this has been a difficult year (*i.e.* COVID).

### 3. Federal Water Legislation, Policies and Regulations

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*a) Does your organization interact with federal departments and/or agencies on policies, legislation, regulations, or funding programs related to freshwater? If so, please specify.*

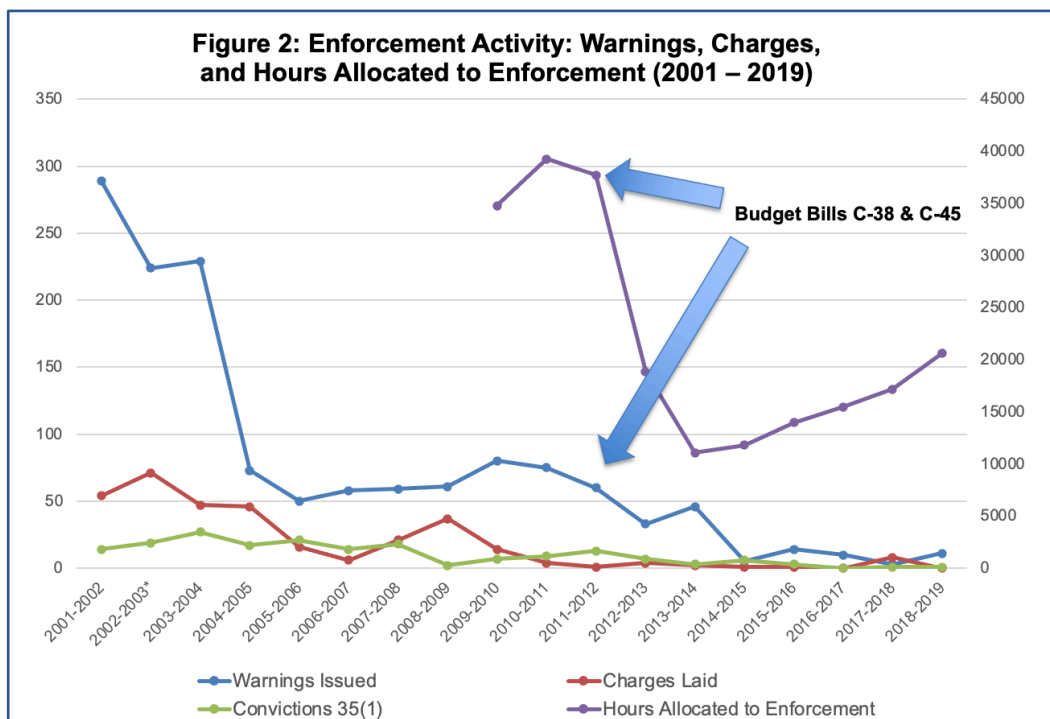
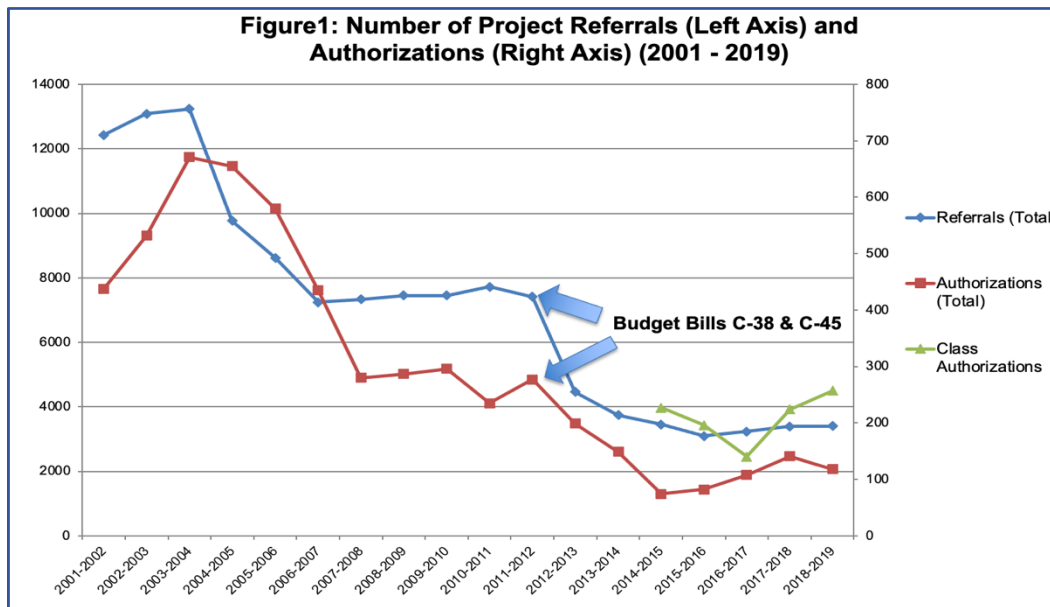
MO: As noted above, I have been actively involved in Canadian freshwater law and policy issues for almost fifteen years, first as a regulatory lawyer for DFO and now as an academic. In this latter capacity, I have interacted with both DFO and ECCC.

*b) Can you identify any current gaps in federal water legislation, policies, regulations, and/or initiatives, or in general across jurisdictions? If so, please specify.*

MO: **Fundamentally, successive governments over the past twenty years have abdicated the federal government’s clear constitutional role in maintaining freshwater quality in Canada.** While I would not preclude the value of additional legislation or policies, no legislation or policy will meet the freshwater challenges of the 21<sup>st</sup> century if it is not effectively implemented and enforced – and that is the primary threat to freshwater in Canada: the federal government’s refusal to implement the laws and policies that *already* exist. The following four examples are illustrative:

A. **DFO oversight of impacts to fish habitat** (*i.e.* the lakes, rivers, and streams that Canadians fish in) **plummeted in 2005 and then again in 2012** with the passage of the previous Conservative

government's budget Bills C-38 and C-45 and has yet to return to pre-2012 levels, notwithstanding a commitment by the current Liberal government to "restore lost protections" (see Figures 1 and 2, below; these are updates on those contained in a 2015 paper on this topic: see Martin Olszynski, "From 'Badly Wrong' to Worse: An Empirical Analysis of Canada's New Fish Habitat Protection Laws" (2015) 28(1) J. Env. L. Prac. 1 (SSRN)).



The above figures are current to 2019, the year that Bill C-68 (which restored various legislative provisions of the *Fisheries Act*) was brought into force. Unfortunately, more current numbers are not available because DFO and ECCC often take approximately two years to complete their annual

report on the implementation and enforcement of the habitat protection and pollution prevention provisions of the *Fisheries Act*, notwithstanding the clear requirement in the Act to do so “as soon as feasible after the end of each fiscal year” (*Fisheries Act* subs. 42.1(1)). To the best of my knowledge, the 2019/2020 annual report has not yet been made public – over a year after the end of that fiscal year.

- B. **DFO has routinely failed to meet its obligations under the *Species At Risk Act* (SARA).** It is my understanding that others will be submitting detailed briefs to the Committee on this front. For my part, I will simply underscore that DFO’s record, like the rest of the federal government on the SARA file, is one of unjustifiable delay and inaction, to the detriment of Canada’s freshwater resources.
- C. **ECCC has failed to enforce the subsection 36(3) prohibition** (prohibiting the deposit of deleterious substances into places where such deposits may enter waters frequented by fish) **against oil sands operators.** As noted above, a recent (2020) “[Factual Record](#)”<sup>1</sup> prepared by the [Commission for Environmental Cooperation](#) (CEC, established under *NAFTA* and continued under the *USMCA*) has concluded that there is “**scientifically valid evidence**” of **oil sands processed (OSPW) seepage into near-field groundwater** around tailings ponds that are hydrologically connected to the Lower Athabasca River. ECCC Minister Wilkinson has stated that these conclusions “are very troubling, and certainly they cannot be ignored,” and that “the oilsands tailing issue is a problem that we are going to have to address going forward” (see <https://www.cbc.ca/news/politics/oilsands-tailings-groundwater-contamination-1.5711471>). And yet, over six months later, I am not aware of any additional measures having been taken. This Committee should invite downstream First Nations to understand their perspective and concerns and require oil sands operators to appear and explain how they will address this problem.
- D. **ECCC has failed to develop coal effluent regulations in a timely manner.** These regulations were first announced several years ago. As noted by my UCalgary Law colleague Drew Yewchuck,<sup>2</sup> Environment and Climate Change Canada initially planned to have the regulations [published in 2018](#), but they have been significantly delayed; it is my understanding that even draft regulations have not yet been published in Canada Gazette I. The prospect of additional coal mining in the context of an ongoing climate crisis is contentious throughout Canada but especially so in my home province of Alberta, where proposed coal developments along the eastern slopes of the Rocky Mountains have downstream residents and First Nations concerned about both water quantity and quality, especially with respect to selenium.

If DFO were to commit to fully enforcing the *Fisheries Act* prohibition against impacts to fish habitat and to meeting its obligations under *SARA*, and if ECCC were to commit to fully enforcing the prohibition against the deposit of deleterious substances in the oil sands context and to developing robust coal effluent regulations that reflect the true value of water in the 21<sup>ST</sup> century, Canada’s freshwater resources would be in significantly better shape than they are presently.

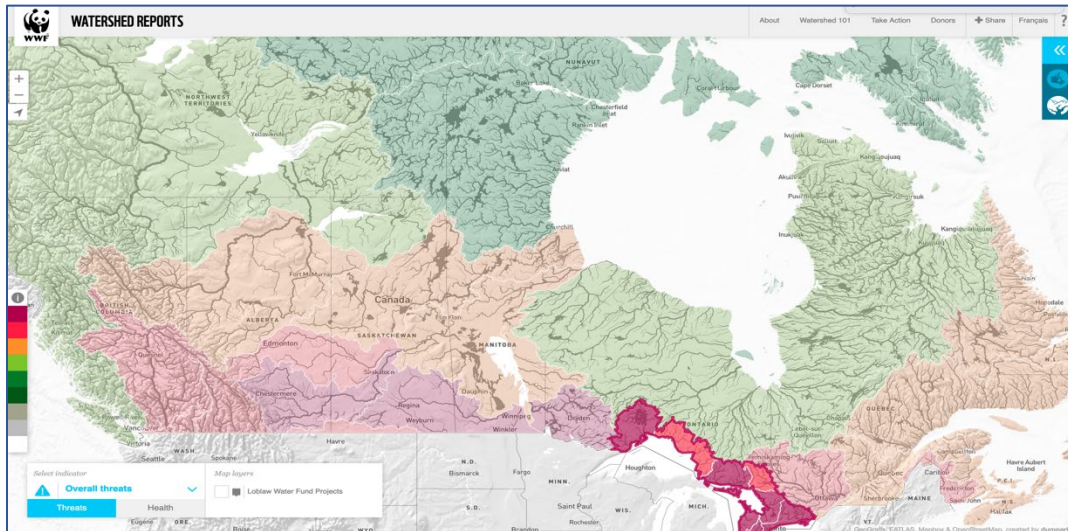
c) *Do you feel the federal government could play a more effective role in protecting watersheds in Canada? If so, which watersheds and how?*

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<sup>1</sup> See [http://www.cec.org/wp-content/uploads/wpallimport/files/17-1-ffr\\_en.pdf](http://www.cec.org/wp-content/uploads/wpallimport/files/17-1-ffr_en.pdf)

<sup>2</sup> See Drew Yewchuk, “Coal Law and Policy Part 5: What is the Role of the Federal Government in Relation to Alberta Coal Mines?” (March 24, 2021), online: ABLawg, [http://ablawg.ca/wp-content/uploads/2021/03/Blog\\_DY\\_Coal\\_Policy\\_Part5.pdf](http://ablawg.ca/wp-content/uploads/2021/03/Blog_DY_Coal_Policy_Part5.pdf).

MO: Unequivocally yes. As the following image from WWF's Watershed Reports makes clear (<https://watershedreports.wwf.ca/#intro>), **most major Canadian watersheds are interprovincial**. This is certainly true of the watersheds referred to above, including the Athabasca (oil sands) and South Saskatchewan (coal mining) watersheds. This further strengthens the federal government's already strong constitutional authority rooted in subsection 91(12) (seacoast and *inland* fisheries).



It is my understanding that WWF Canada, which developed the Watershed Reports website, will be submitting its own brief to the Committee; I generally support their efforts and recommendations on this front. For my part, I believe that DFO and ECCC (or perhaps the new Canada Water Agency) should become more active partners in tracking watershed health, and then integrating that knowledge into their respective regulatory regimes. For example, DFO should integrate watershed considerations when authorizing impacts to fish habitat pursuant to *Fisheries Act* subsection 35(2) as well as in managing in-stream flows pursuant to section 34.3.

*d) Are there areas of freshwater policy, legislation and/or regulation where you feel the federal government should play a greater role?*

MO: As above, and without precluding the merits of further laws and policies, **the federal government's first problem is that it has never fully embraced the clear roles and obligations that it already has** in protecting fish habitat and preventing freshwater pollution.

*e) Are there areas of freshwater policy, legislation and/or regulation that you feel the federal government should vacate and leave to another level of government or to the private sector?*

MO: There is increasing evidence that partnerships with Indigenous peoples lead to greater conservation outcomes. The federal government has already made steps in this direction by piloting several Indigenous Guardian programs (<https://www.canada.ca/en/environment-climate-change/services/environmental-funding/indigenous-guardians-pilot/map.html>); the Committee should explore these programs and their potential for increasing the effectiveness of freshwater stewardship. The provinces, for their part, have demonstrated time and again that they are not prepared to take water quality seriously; the problems of oil sands tailings seepage and coal mining effluent are but two of the most recent examples.



#### 4. Collection of information and data

a) *Do you believe that there is sufficient data collected and made available publicly about freshwater in Canada?*

MO: No. As noted above, while DFO and ECCC must file an annual report with Parliament on the implementation and enforcement of the fish habitat protection and pollution prevention provisions of the *Fisheries Act* (*Fisheries Act* subs. 42.1(1)), the release of these reports is often delayed for 1-2 years. Furthermore, while the information in these reports is useful, they omit the most useful information. For example – and notwithstanding it having been the guiding principle of the habitat program for over thirty years – DFO never collected or shared data that would show whether it was achieving “No Net Loss” of fish habitat. As Dr. Brett Favaro and I showed in a 2017 paper, it is a virtual certainty that it was not: “Authorized Net Losses of Fish Habitat Demonstrate Need for Improved Habitat Protection in Canada,” *Canadian Journal of Fisheries and Aquatic Science* (CJFAS) (2017). This paper was only possible through the filing of an access to information request pursuant to the *Access to Information Act*. Of particular relevance to the Committee’s question here, this paper was prompted by questions from members of the Standing Committee on Fisheries and Oceans (FOPO) when Dr. Favaro and I appeared before them in the context of their 2016 *Fisheries Act* review. Dr. Favaro and I were challenged to provide proof that the 2012 changes to the *Fisheries Act* had resulted in harm to fisheries. We were unable to provide such direct evidence because there was not then – nor is there now – a baseline against which to measure changes.

Admittedly, DFO has recently made strides towards the establishment of a public registry that will contain various kinds of information, include project authorizations in real-time, but it is not yet clear whether DFO will make this data sufficiently user-friendly, and whether it will include the kind of data that would be most useful to stakeholders (see answer to Question 4(c) below). See <https://open.canada.ca/data/en/dataset/2c09d2fd-9a8e-4d8c-b5af-95747e36eaac> for the current version of this registry, which has been imbedded in the federal government’s broader “Common Project Registry” (including navigable waters permits from Transport Canada and projects assessed under the *Impact Assessment Act*). ECCC also provides some freshwater monitoring information on its website: <https://www.canada.ca/en/environment-climate-change/services/freshwater-quality-monitoring.html>.

b) *Do you believe there should be improvement in freshwater-related data-sharing?*

MO: Yes, managing freshwater in the 21<sup>st</sup> century will be a data-driven exercise that will require leading data-sharing approaches.

c) *Is there any specific type of data or information you would like the federal government to provide to freshwater stakeholders?*

MO: Yes. The federal government should provide *aggregate* information on: (i) the amount of fish habitat authorised to be impacted by works, undertakings, or activities; (ii) the amount of offsetting habitat required, and (iii) the amount of offsetting habitat actually created (based on the results of monitoring over time). This information should be aggregated in several ways: by region and by watershed, but also over time to assess trends (e.g. improving or deteriorating). The federal government should also partner with other organizations to report on the health of watersheds.

d) *Has your organization experienced challenges obtaining well-organized data from the federal government on issues relating to freshwater?*

MO: Yes. As noted above, before the introduction of the public registry, information regarding impacts on fish and fish habitat could only be obtained through access to information requests. This then required combing through authorizations. This kind of analysis should be done by DFO and ECCC so that Canadians have readily accessible and understandable information regarding freshwater health.

*e) Is the lack of standardized data or information across government jurisdictions a problem or challenge for your organization in accomplishing its objectives with respect to protecting and managing freshwater?*

MO: Yes, absolutely.

## **5. International and business issues**

*a) Should Canada play a greater role internationally in helping find solutions, either through government and/or the private-sector involvement, to the challenge of global freshwater security?*

MO: Due to its relative freshwater wealth, Canada should certainly be actively involved in international discussions about the challenge of global freshwater security. At the same time, this Committee should be mindful of the potentially contentious nature of such discussions; Canadians have in the past exhibited a form of “aqua-nationalism” that can make such discussions wrought (see e.g. <https://archive.macleans.ca/article/2005/11/28/america-is-thirsty>).

*b) Do you feel Canadian private-sector companies, including financial institutions, can and should play a role internationally?*

MO: For the same reasons referred to in 5(a) above, i.e. that discussions about freshwater and water security can be wrought with concerns about privatization and restricted access, this Committee needs to tread carefully in this space. I suspect that the mere existence of these questions in this questionnaire will cause alarm for some that the government has a secret agenda to sell off Canada’s water. The Committee therefore needs to be very transparent about its ideas and intentions in this respect.