



HOUSE OF COMMONS
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CANADA

**REVIEW OF CHANGES MADE IN 2012 TO THE
FISHERIES ACT: ENHANCING THE PROTECTION
OF FISH AND FISH HABITAT AND THE
MANAGEMENT OF CANADIAN FISHERIES**

**Report of the Standing Committee on
Fisheries and Oceans**

**Scott Simms
Chair**

FEBRUARY 2017

42nd PARLIAMENT, 1st SESSION

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has the honour to present its

SIXTH REPORT

Pursuant to its mandate under Standing Order 108(2), the Committee has completed the Review of the Changes made in 2012 to the *Fisheries Act*: enhancing the protection of fish and fish habitat and the management of Canadian fisheries and has agreed to report the following:

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REVIEW OF CHANGES MADE IN 2012 TO THE *FISHERIES ACT*: ENHANCING THE PROTECTION OF FISH AND FISH HABITAT AND THE MANAGEMENT OF CANADIAN FISHERIES

INTRODUCTION

Canada's oceans and inland waters host a multitude of ecosystems containing some of the world's richest fishing grounds. Commercial and recreational fisheries are major contributors to the economy and the sustainability of many rural communities. Fish, however, is not simply a commodity; it is also culturally important and essential to numerous communities' food security. Many fish, such as salmon, are vital to Indigenous communities and have cultural and spiritual significance. Therefore, fish and fish habitat conservation and protection are matters of economic, social, cultural and environmental significance.

The [Fisheries Act](#) (the Act) is the main federal statute managing Canadian fisheries resources. The Act also includes provisions for the conservation and protection of fish and fish habitat.¹ In 2012, numerous changes to the Act were made. Those legislative amendments entered into force in November 2013. In light of concerns expressed by various segments of the population regarding those changes to the Government of Canada and the mandate letter requesting the Minister of Fisheries, Oceans and the Canadian Coast Guard to "review the previous government's changes" to the Act, on 19 September 2016, the House of Commons Standing Committee on Fisheries and Oceans ("the Committee") agreed to

review and study the scope of application of the *Fisheries Act*, and specifically the serious harm to fish prohibition; how the prohibition is implemented to protect fish and fish habitat; the capacity of Fisheries and Oceans Canada to deliver on fish and fish habitat protection through project review, monitoring, and enforcement; the definitions of serious harm to fish and commercial, recreational, and Aboriginal fisheries; the use of regulatory authorities under the *Fisheries Act*; and other related provisions of the Act, and provide its recommendations in a report to the House.²

The Committee convened 10 meetings in Ottawa from 31 October to 12 December 2016 to study the matter, examining submissions and hearing testimony in person and by videoconference from numerous participants including the Minister of Fisheries, Oceans and the Canadian Coast Guard, representatives of Fisheries and Oceans Canada (DFO), provincial governments, Indigenous organizations, fish harvester groups, scientists, non-governmental organizations, and various industry associations. The Committee members would like to express their thanks to the participants who shared their knowledge and recommendations with the Committee over the course of this study.

1 Fisheries and Oceans Canada [DFO], [A Practical Guide to the Fisheries Act and to the Coastal Fisheries Protection Act](#).

2 House of Commons, Standing Committee on Fisheries and Oceans, [Minutes](#), 19 September 2016.

The Committee notes that DFO conducted online public consultations regarding the Act and fish habitat protection in Fall 2016 and agreed to provide the Committee with the input received.³ However, the public input to DFO's online consultations were not all delivered to the Committee in time to allow its members to take them into consideration when making recommendations for this report.⁴ The Committee recognizes, however, that the departmental consultations are a separate and complementary process from this Committee's study.

The Committee is pleased to present its report, in which it makes recommendations to the federal government. These recommendations are based on the testimony and submissions of study participants.

BACKGROUND

A. Federal Jurisdiction

Under the *Constitution Act, 1867*, the federal Parliament was assigned legislative authority for seacoast and inland fisheries while provincial legislatures were assigned responsibility for matters of property and civil rights and the management of public lands. The *Fisheries Act* was enacted in 1868 in accordance with this responsibility. The Act primarily deals with the management of fisheries, the conservation and protection of fish, the protection of fish habitat and the prevention of aquatic pollution.

While the federal government has retained final authority over all fisheries and fish habitat management, a number of court references have confirmed provincial legislative responsibilities for inland fisheries. As a result, a system of delegation of federal administrative authorities over a number of fisheries was instituted. Management of fish habitat, however, remains under the responsibility of the federal government.⁵

The federal government's jurisdiction to regulate fisheries and the protection of fish and fish habitat is not only reflected in the legislative history of the *Fisheries Act* requiring it to set national legal standards, it is also pursuant to Canada's numerous international obligations under treaties such as the [United Nations Fish Stocks Agreement](#) and the [United Nations Convention on Biological Diversity](#).

B. Efforts to Modernize the *Fisheries Act* in 2007

Until 2012, the Act had not undergone substantial changes since habitat protection was added and pollution prevention provisions were strengthened in 1977. A legislative attempt to overhaul the Act occurred in 2007. That attempt was embodied by Bill C-32, an Act respecting the sustainable development of Canada's seacoast and inland fisheries,

3 House of Commons, Standing Committee on Fisheries and Oceans, [Minutes](#), 23 November 2016.

4 The Committee received the final report compiling data from DFO's online consultations on 5 January 2017. The original input and comments gathered during the consultations were not delivered to the Committee.

5 Office of the Auditor General of Canada, "[Protecting Fish Habitat](#)," Chapter 1 in *2009 Spring Report of the Commissioner of the Environment and Sustainable Development*.

which was introduced in the House of Commons on 29 November 2007.⁶ However, Bill C-32 died on the Order Paper when elections were called in September 2008.⁷

The proposed Bill C-32 reflected the growing emphasis of fisheries management strategies worldwide on ecosystem-based management, sustainable development and the use of the precautionary principle. It did so by including a preamble and principles to guide and to be applied to the management of fisheries as well as to the conservation and protection of fish and fish habitat. The preamble proposed by Bill C-32 also recognized that stable access to fisheries resources is important to the economic viability of fishing communities and industry.

C. Changes Made to the *Fisheries Act* in 2012

1. Protections Provided to Fish and Fish Habitat

One of the notable changes to the Act made in 2012 was that of focussing its protections on the productivity of fish that are part of a commercial, recreational or Aboriginal (CRA) fishery, or to fish that support such a fishery, rather than on all fish and fish habitat as was previously the case. In addition, prior to the 2012 legislative changes, the Act contained prohibitions against “killing fish by any means other than fishing” (section 32(1)) and against carrying on “any work or undertaking that results in harmful alteration, disruption or destruction [HADD] of fish habitat” (section 35(1)). Both prohibitions were subject to exceptions and regulations authorized by the Minister allowing the impacts to occur under certain conditions.

Those two provisions were replaced in 2012 with a single new prohibition in section 35(1) against carrying on “any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.” This prohibition is subject to five exceptions related to authorizations and regulations. The new term “serious harm” is defined in section 2(2) as “the death of fish or any permanent alteration to, or destruction of, fish habitat,” with fish habitat defined as “spawning grounds and any other areas, including nursery, rearing, food supply and migration areas, on which fish depend directly or indirectly in order to carry out their life processes.”

Amendments to the Act also provide the Minister with the ability to designate ecologically significant areas for fish (section 37(1.1)). The Minister may require higher levels of protection for such areas and proponents would be required to submit plans for review if any activities are proposed within these areas. To date, however, no regulations have been established defining ecologically significant areas. Some witnesses, such as West Coast Environmental Law, recommended that this useful provision be used.⁸

6 Bill C-32: [An Act respecting the sustainable development of Canada's seacoast and inland fisheries](#), 2nd Session, 39th Parliament.

7 Bill C-32 was similar to [Bill C-45](#), which died on the Order paper when the 1st Session of the 39th Parliament was prorogued in September 2007.

8 Linda Nowlan, Staff Counsel, West Coast Environmental Law, [Evidence](#), 23 November 2016.

2. Factors and Purpose to Guide the Minister in Issuing Authorizations and Making Regulations

The Minister of Fisheries, Oceans, and the Canadian Coast Guard has the authority to issue authorizations that would allow the works, activities or undertakings to occur that cause serious harm to fish, under certain conditions. Section 6 to the Act sets out the following factors, which the Minister is required to consider before making regulations or issuing authorizations:

- the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries;
- fisheries management objectives;
- whether there are measures and standards to avoid, mitigate or offset serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery; and
- the public interest.

The purpose of requiring the Minister to consider these factors is “to provide for the sustainability and ongoing productivity of commercial, recreational and Aboriginal fisheries” (section 6(1)). Definitions for the terms “commercial,” “recreational,” and “Aboriginal,” in relation to a fishery, were added to section 2(1).

3. Framework for Entering into Agreements with Federal Departments, Provinces and Others, and Ministerial Authority to Undertake Programs and Projects with Partners

Sections 4.1 to 4.3 were added to the Act in 2012 to provide a legal framework to guide future agreements with the provinces to further the purposes of the Act. They also allow the Governor in Council to declare that certain provisions of the Act or its regulations do not apply in a province if a federal-provincial agreement provides that a provision under provincial law is equivalent to a provision of the federal regulations.

Section 4.4 provides the power for the Minister to implement programs and projects with partners for the purpose of the Act, and to provide financial support for such programs and projects. The [Recreational Fisheries Conservation Partnerships Program](#) was established in 2013 pursuant to section 4.4.

With respect to delegation, the Minister of Fisheries, Oceans and the Canadian Coast Guard can, through regulations (paragraphs 35(2)(c) and 43(1)(i.3)), provide other persons or entities the authority to issue authorizations under the amended Act, as long as their regulatory processes are consistent with the objectives, purpose and factors outlined in the Act.⁹ An example of a delegation agreement is the [2013 DFO – National Energy](#)

⁹ DFO, [The Fisheries Protection Provisions of the Fisheries Act: Before and after the 2012/2013 Amendments](#).

[Board \(NEB\)'s Memorandum of Understanding \(MOU\)](#). Through this MOU, the NEB is responsible for assessing potential impacts to fish and fish habitat from proposed NEB-regulated pipeline and power line applications. If the NEB determines that an authorization or permit is required, DFO is notified and is responsible for issuing the authorization or permit.

4. New Regulatory Powers

Some of the significant regulatory powers added in 2012 to the Act include:

- [Regulations](#) that spell out for proponents the information and documentation that must be submitted in applications for authorization under paragraph 35(2)(b).
- Once an application for authorization is received, DFO is bound by set time limits for the processing of the application and a decision on the issuance of an authorization, if required.
- Recognition of externally-developed standards (i.e., not developed by DFO) as appropriate to guide activities in and near waters.
- Equivalency of regulatory regimes could be established if the provincial regime “meets or beats” provisions of the Act or of its regulations.¹⁰

Under the amended Act, ministers can make regulations authorizing the deposit of a certain class of deleterious substances into waters or places within a certain class or resulting from a work, undertaking or activity within a particular class (section 36(5.2)). Pursuant to sections 35(3) and 36(5.2), on 26 June 2015, the [Aquaculture Activities Regulations](#) were published establishing conditions authorizing the deposit of deleterious substances in the operation of an aquaculture facility.

New powers also allow for the establishment of regulations prescribing works, undertakings or activities, or fisheries waters that do not require approval to cause serious harm (sections 35(2) and 35(3)). As a result of these new provisions, a self-assessment tool called “[Projects near water](#)” was developed by DFO and lists types of waterbodies and project activities and criteria where a DFO review is not required. If the project is deemed not to require a DFO review, project proponents must nevertheless follow [Measures to avoid causing harm to fish and fish habitat including aquatic species at risk](#), as determined by DFO. If the project is deemed to require a DFO review by the self-assessment tool, project proponents must submit a request for review.

10 DFO, [The Fisheries Protection Provisions of the Fisheries Act: Before and after the 2012/2013 Amendments](#).

SECTION 35: SERIOUS HARM TO FISH PROHIBITION

A. Definition and Implementation of the Serious Harm to Fish Prohibition

In the view of Justyna Laurie-Lean, Mining Association of Canada, changes made to the Act in 2012 have, “in practice, broadened the circumstances in which the section 35 prohibitions apply and increased the circumstances in which an authorization and offsets are required.”¹¹ In Manitoba Hydro’s view, the “addition of the word “activities” in the prohibition against serious harm to fish arguably represents greater protection for fisheries, as do the addition of requirements for reporting all incidents of serious harm, the duty to intervene to address impacts, the extension in the time limitation for laying of charges from two to five years, and the establishment of contravening conditions of licence as an offence.”¹² Ron Bonnett¹³, Canadian Federation of Agriculture, and Fawn Jackson¹⁴, Canadian Cattlemen’s Association, explained to the Committee that enforcement of the HADD prohibition under previous versions of the Act to works and undertakings related to artificial infrastructures, such as drainage ditches and irrigation canals, resulted in “significant barriers and costs to farmers.” They argued that artificial waterbodies should not be treated as fish habitat. Ron Bonnett added that, under the previous Act, there were “many accounts of inconsistency in enforcement, monitoring, and compliance across Canada.”

The Committee suspects that enforcement of the HADD prohibition under previous versions of the Act to works and undertakings related to artificial infrastructures could be due to the fact these infrastructures may provide habitat for fish. A 2008 scientific study found that “agricultural drains (ditches) provide necessary drainage for cropland and may also provide habitat supporting native fish assemblages.”¹⁵ The same study recommended that “drains continue to be recognized as fish habitat under the Canadian *Fisheries Act* and that drain and fish habitat managers strive for logical, scientifically defensible drain maintenance practices that preserve fish biodiversity and habitat, while considering the needs of agriculture.” Similarly, the City of Winnipeg suggested that “an area that appears to hold little value at one time of the year may have a very important fisheries function at another time” and encouraged project proponents to, “[a]s a rule of thumb, assume that all ditches, creeks and sloughs provide fish habitat.”¹⁶ The Committee notes that section 30 of the Act providing the Minister with the power to require the installation and maintenance

11 Justyna Laurie-Lean, Vice-President, Environment and Regulatory Affairs, Mining Association of Canada, [Evidence](#), 14 November 2016.

12 Gary Swanson, Senior Environmental Specialist, Manitoba Hydro, [Evidence](#), 30 November 2016.

13 Ron Bonnett, President, Canadian Federation of Agriculture, [Evidence](#), 21 November 2016.

14 Fawn Jackson, Manager of Environmental Sustainability, Environment and Sustainability, Canadian Cattlemen’s Association, [Evidence](#), 30 November 2016.

15 Katie L. Stammer, Robert L. McLaughlin, and Nicholas E. Mandrak, “[Streams modified for drainage provide fish habitat in agricultural areas](#),” *Canadian Journal of Fisheries and Aquatic Sciences*, Vol. 65, 2008, pp. 509-522.

16 City of Winnipeg, [Best Management Practices Handbook for Activities In and Around the City’s Waterways and Watercourses](#), November 2005, p. 23.

of screens or guards to prevent the passage of fish into water intakes, ditches, canals and channels was repealed in 2012.

The Committee was informed by many other participants to the study that the definition of “serious harm”, as a replacement for the HADD provision, creates confusion in the implementation of the prohibition. David Browne, Canadian Wildlife Federation, indicated that there is a “lack of clarity around how the prohibition under section 35 applies to temporary alterations of fish habitat.”¹⁷ Brett Favaro questioned the implications of the word “permanent alteration” of fish habitat used in the definition of “serious harm.” He stated:

What does “permanent” mean? Does it mean a human lifespan? Could you destroy a river if you promised that you would repair it 50 years in the future, and have that be considered a temporary alteration? These questions were never satisfactorily answered, and the only reasonable conclusion was that this wording would make it easier to cause harm to fish habitat.¹⁸

The Committee learnt from West Coast Environmental Law¹⁹ that the sole court case, *Courtoreille v. Canada*, commenting on amendments made to section 35(1) of the Act, considered that those changes “increase the risk of harm to fish” and “removed the protection to fish habitat.”²⁰

[91] Hence the amendments to the *Fisheries Act* removed the protection to fish habitat from section 35(1) of that Act. The Applicant submitted that this amendment shifted the focus from fish habitat protection to fisheries protection which offers substantially less protection to fish habitat and the term “serious harm” permits the disruption and non-permanent alteration of habitat.

[101] ... In addition, for the reasons the Applicant expressed above, the amendment to section 35(1) of the *Fisheries Act's* clearly increases the risk of harm to fish.

According to Kristi Miller-Saunders the requirement for the death of fish to be deemed “serious harm” is also problematic and noted that

fish that are stressed in one environment may become physiologically compromised, but they may not immediately die within the habitat in which the initial stress occurred. Rather, this compromised state may manifest as an inability to adapt and thrive as these fish move to new habitats. In this case, the death of fish and the impact of the stressor are unobservable.²¹

17 David Browne, Director of Conservation, Canadian Wildlife Federation, [Evidence](#), 31 October 2016.

18 Brett Favaro, Research Scientist, Fisheries and Marine Institute, Memorial University of Newfoundland, As an Individual, [Evidence](#), 31 October 2016.

19 West Coast Environmental Law, [“Habitat 2.0: A new approach to Canada's Fisheries Act,”](#) Brief, 23 November 2016.

20 [Courtoreille v. Canada](#) (*Aboriginal Affairs and Northern Development*), 2014 FC 1244 (CanLII).

21 Kristi Miller-Saunders, Head of Molecular Genetics, Pacific Biological Station, DFO, [Evidence](#), 30 November 2016.

Zo Ann Morten, Pacific Streamkeepers Federation, agreed with the above statement and pointed out that, while not being considered “serious harm” in the current Act, a simple environmental change, such as water quality or temperature, could cause great harm to fish and prevent them from reaching the next life stage.²² Stephen Sutton, Atlantic Salmon Federation, added that the focus of “serious harm” on preventing permanent alteration or destruction of fish habitat is insufficient to address important human impacts on wild salmon productivity:

Atlantic salmon have specific habitat requirements at specific points in their life cycle and at specific times of the year. Temporary alterations to key habitats at times when they are needed can have substantial and long-lasting impacts. For example, temporary disruptions to water quality, flow, or temperature at key times during the fall of the year could render important spawning habitats useless when they are needed and have significant impacts on salmon productivity for years into the future.²³

Stephen Sutton also informed the Committee that the focus of “serious harm” on preventing the death of fish is similarly inadequate. He suggested that many human activities, such as open net-pen salmon aquaculture, affect the “long-term health and productivity of salmon populations without actually causing the death of the fish that are being impacted.”

Dan Gibson, Canadian Hydropower Association, told the Committee that the definition of “serious harm” is ambiguous and could be interpreted in different ways, not only by stakeholders, but by DFO staff as well. As “serious harm” is presently a key concept in the application of section 35, divergent approaches in enforcing it may lead to uncertainties for project proponents. He submitted that death of fish could be “interpreted to include the incidental loss of an individual fish with no material impact on the fishery at large.”²⁴ The Committee heard similar arguments from James Duncan, Manitoba Sustainable Development. In his opinion, the lack of clarity in the definition of “serious harm” makes it difficult to determine with certainty when this prohibition applies.²⁵ Deputy Minister Derek Sturko, British Columbia’s Ministry of Agriculture, also expressed his concerns that “federal Fisheries Officers are not proceeding with enforcement actions because of the difficulty to prove serious harm.”²⁶

Jay Walmsley, Canadian Electricity Association, recommended that this prohibition “focus on the sustainability of fisheries by protecting fish populations or stocks, and not individual fish”, with the exception of species at risk where harm to individual fish can

22 Zo Ann Morten, Executive Director, Pacific Streamkeepers Federation, [Evidence](#), 7 December 2016.

23 Stephen Sutton, Coordinator of Community Outreach and Engagement, Atlantic Salmon Federation, [Evidence](#), 28 November 2016.

24 Dan Gibson, Senior Environmental Specialist, Canadian Hydropower Association, [Evidence](#), 5 December 2016.

25 James Duncan, Director, Wildlife and Fisheries Branch, Manitoba Sustainable Development, [Evidence](#), 28 November 2016.

26 Derek Sturko, Deputy Minister, Ministry of Agriculture, Government of British Columbia, Brief, 30 November 2016.

threaten the population.²⁷ In addition to Jay Walmsley, the Nicola Tribal Association²⁸ and the A-Tlegay Fisheries Society²⁹, both in British Columbia, advised the Committee that the current Act does not define what constitutes the “sustainability” of a fishery.

According to Linda Nowlan, West Coast Environmental Law, and Margot Venton, Ecojustice, the HADD prohibition benefits from 40 years of judicial interpretation³⁰ and casts a “wide net intended to catch the myriad ways in which fish habitat can be harmed by human activities.”³¹ In their view, “judicial interpretation of the HADD provision was clear that the offence was harming fish habitat, even temporarily, and did not require proof of either permanent damage or harm to fish directly.” Margot Venton added that DFO should establish “science-based thresholds and objectives for fish habitat at the watershed and ecosystem level” before issuing authorizations for a particular watershed and ecosystem.

While recommending the reinstatement of the HADD prohibition, Ducks Unlimited Canada pointed out that, under the previous Act, many of its “conservation projects and activities that sought to restore, enhance or manage wetland habitat were deemed to be “fish habitat destruction” by DFO.”³² In its opinion, this interpretation of the Act limited the organization’s “ability to deliver new conservation programming designed to protect and conserve habitat that is essential for waterfowl and other wetland-dependent species, including fish.”

In its submission to the Committee, Metro Vancouver explained that the current regulatory approach considers potable tap water containing chlorine as a potential deleterious substance causing serious harm to fish.³³ For Metro Vancouver, such an approach can present challenges to the management and operation of public water utility systems. Therefore, it recommended a “relaxation of absolute prohibitions” in cases where actual risks to fish-bearing waters are unlikely giving chlorine dissipation rates but the risk to public utility system operations is high if the discharge is prohibited. The preceding paragraphs in this section indicate the differing testimony heard with no scientific or legal evidence provided to show whether the 2012 changes broadened or reduced the circumstances under which section 35 applies.

27 Jay Walmsley, Senior Environmental Scientist, Aquatic, Nova Scotia Power, Canadian Electricity Association, [Evidence](#), 5 December 2016.

28 Nicola Tribal Association, Brief, 31 October 2016.

29 A-Tlegay Fisheries Society, Brief, 30 November 2016.

30 Linda Nowlan, Staff Counsel, West Coast Environmental Law, [Evidence](#), 23 November 2016.

31 Margot Venton, Staff Lawyer and Director of Marine Program, Ecojustice, [Evidence](#), 28 November 2016.

32 Ducks Unlimited Canada, Brief, 12 December 2016.

33 Metro Vancouver, Brief, 30 November 2016.

B. Focus on Commercial, Recreational and Aboriginal Fisheries

1. Precautionary Approach to Fisheries Management

According to many study participants, the current Act's focus of protections on the productivity of fish that are part of a CRA fishery, or to fish that support such a fishery, does not conform to the precautionary approach to fisheries management. In the view of Brett Favaro, for example, such a focus has no basis in science as there is currently "no scientific ability to divide fish into categories of fish that support a fishery and fish that do not."³⁴ He added that the precautionary approach to fisheries management, especially in the context of climate change, implies avoiding the "highly risky assumption" that a fish or other aquatic organism is irrelevant to the ecosystem. Rather, he suggested a focus on protecting the integrity of the whole ecosystem since fish habitat is the best proxy for fish productivity.

2. Ecosystem Approach to Fisheries Management

The Committee heard from Elizabeth Hendriks, World Wildlife Fund-Canada, that an ecosystem approach to fisheries management requires consideration for biodiversity and protection for all fish rather than simply fish that are part of a CRA fishery or fish that support such a fishery.³⁵ Committee members also note that, according to the DFO *Fisheries Act* Review Consultation Final Report, the clear majority (90%) of participants would like all fish and fish habitat, whether the fish are harvested or not, to be the focus of protection by the Act.³⁶

Kristi Miller-Saunders pointed out that the current Act's focus does not protect fish stocks that were once abundant, but are currently at record lows and unable to support a fishery, such as many Pacific wild salmon populations.³⁷ In her view, under the current section 35, these "stocks may no longer be provided enough protection to rebound and become viable in the future." This would be in contradiction with DFO's *Wild Salmon Policy*,³⁸ which calls for the conservation of genetic diversity of wild stocks to ensure the long-term sustainability of fish resources.

The Committee also notes the concern expressed by the Nicola Tribal Association regarding the need to protect fish to ensure the sustainability of predators such as bears, eagles and killer whales.³⁹ In the view of the City of Maple Ridge, British Columbia, the

34 Brett Favaro, Research Scientist, Fisheries and Marine Institute, Memorial University of Newfoundland, As an Individual, [Evidence](#), 31 October 2016.

35 Elizabeth Hendriks, Vice-President, Freshwater, World Wildlife Fund-Canada, [Evidence](#), 14 November 2016.

36 Nielsen, Delaney + Associates and Publivate, *DFO Fisheries Act Review Consultation Final Report*, Prepared for Fisheries and Oceans Canada, 19 December 2016.

37 Kristi Miller-Saunders, Head of Molecular Genetics, Pacific Biological Station, DFO, [Evidence](#), 30 November 2016.

38 DFO, [Canada's Policy for Conservation of Wild Pacific Salmon](#), 2005, p. vi.

39 Nicola Tribal Association, Brief, 31 October 2016.

current Act's focus on CRA fisheries "diminishes the importance of ecological linkages between features of watersheds that support fish and associated fisheries."⁴⁰ The Newfoundland and Labrador Environment Network, therefore, proposed to "replace fish with aquatic animal in all parts of the Act and define aquatic life as appropriate with consideration for the whole food web."⁴¹

For project proponents, such as Manitoba Hydro, however, the focus on CRA fisheries and fish that support such a fishery was not deemed to reduce fish habitat protection.⁴² Nevertheless, the Mining Association of Canada testified that DFO's "explanatory guidance, such as how to identify commercial, aboriginal, or recreational fisheries and fish that support such fisheries, or how to assess fisheries productivity, still falls short of what is necessary for clear and consistent national application."⁴³

3. Indigenous Fishing Rights

In the view of Indigenous study participants, the inclusion and definition of "Aboriginal fishery" in the 2012 changes to the Act reduce the scope of protection to fish and fish habitat recognized by Indigenous perspectives and rights.⁴⁴ The Listuguj Mi'gmaq Government, Quebec, argued that Indigenous fishing rights include far more than fishing for food, social, and ceremonial purposes.⁴⁵ These rights also comprise commercial fishing with or without a licence as confirmed by the Marshall decision of the Supreme Court of Canada. Biigtigong Nishnaabeg, Ontario, stated that Indigenous fisheries should, at minimum, include:

fisheries with economic components, fisheries protected under historical treaties, traditional fisheries that are not currently active for conservation or other reasons, fisheries operating under First Nation granted licences, and unlicensed fisheries that are operating legally.⁴⁶

The Maliseet Nation of New Brunswick suggested that, by only offering protections to species currently being fished or to fish that support such fisheries, the current section 35 freezes Indigenous fishing rights at a certain point in time.⁴⁷ The Nicola Tribal Association⁴⁸ and the Lower Fraser Fisheries Alliance,⁴⁹ both in British Columbia, submitted that sale, trade and barter fall under the commercial fishery definition in the

40 City of Maple Ridge, Brief, 28 November 2016.

41 Newfoundland and Labrador Environment Network, Brief, 28 November 2016.

42 Gary Swanson, Senior Environmental Specialist, Manitoba Hydro, [Evidence](#), 30 November 2016.

43 Justyna Laurie-Lean, Vice-President, Environment and Regulatory Affairs, Mining Association of Canada, [Evidence](#), 14 November 2016.

44 First Nations Fisheries Council of British Columbia, Brief, 29 November 2016.

45 Listuguj Mi'gmaq Government, Brief, 30 November 2016.

46 Biigtigong Nishnaabeg, Brief, 30 November 2016.

47 Maliseet Nation of New Brunswick, Brief, 30 November 2016.

48 Nicola Tribal Association, Brief, 31 October 2016.

49 Lower Fraser Fisheries Alliance, Brief, 30 November 2016.

current Act, yet court cases have declared that Indigenous fishing rights also include the right to sale, trade or barter. In addition, the Assembly of Nova Scotia Mi'kmaq Chiefs pointed out that the present section 35 appears to rank fisheries in order of importance with Indigenous fisheries ranked third after commercial and recreational fisheries. In its view, this ranking denigrates the significance of Indigenous constitutionally protected fisheries.⁵⁰

The Committee recalls the Federal Court's *Courtoreille v. Canada* case and notes that most Indigenous study participants called for the repeal of both the "serious harm" prohibition and its associated definitions of CRA fisheries, and the restoration of the HADD provision to section 35. In their opinion, all fish should be protected under the Act, not just fish that are deemed to be part of or supportive of an active fishery. As put by the Assembly of Manitoba Chiefs:

The changes to the *Fisheries Act* represent a capricious and arbitrary redefinition of what is sacred and inalienable. The fact that fish that are not currently a part of a fishery are not offered federal protection is contrary to Indigenous worldviews and laws.⁵¹

C. Enhancing Fish and Fish Habitat Protection and the Management of Fisheries

The majority of the Committee recognizes that fish habitat has declined under the previous Act and the 1986 *Policy for the Management of Fish Habitat*, and continues to decline today as indicated by David Browne.⁵² The 2009 Spring Report of the Commissioner of the Environment and Sustainable Development stated that since the 1986 "Habitat Policy was adopted, many parts of the Policy have been implemented only partially by Fisheries and Oceans Canada or not at all."⁵³

As noted by David Schindler, the current lack of environmental data coupled with a reduced DFO monitoring and enforcement capacity in past years preclude a quantitative assessment of the 2012 changes to the Act on fish and fish habitat protection since its coming into force three years ago.⁵⁴ Linda Nowlan reminded the Committee, however, that the "Committee on the Status of Endangered Wildlife in Canada, or COSEWIC, ranks freshwater and marine fishes very high on the danger list. In fact, the chair of COSEWIC says that, as a group, they are the second most endangered group of species in Canada, and that the leading cause of risk for most of these freshwater fishes is habitat loss and degradation."⁵⁵ Kevin Stringer, DFO, expressed the hope that this review will provide an opportunity to modernize the Act giving DFO the regulatory authority and required

50 Assembly of Nova Scotia Mi'kmaq Chiefs, Brief, 30 November 2016.

51 Assembly of Manitoba Chiefs, Brief, 30 November 2016.

52 David Browne, Director of Conservation, Canadian Wildlife Federation, [Evidence](#), 31 October 2016.

53 Office of the Auditor General of Canada, "[Protecting Fish Habitat](#)," Chapter 1 of *2009 Spring Report of the Commissioner of the Environment and Sustainable Development*.

54 David Schindler, Killam Memorial Professor Emeritus, University of Alberta, As an Individual, [Evidence](#), 7 December 2016.

55 Linda Nowlan, Staff Counsel, West Coast Environmental Law, [Evidence](#), 23 November 2016.

resources to carry out quantitative impact assessments of legislative changes on the sustainability of fish and fish habitat.⁵⁶

1. Serious Harm and HADD Prohibitions

The majority of the Committee agrees with study participants regarding the definition of “serious harm” lacking clarity and concludes that the concept of “serious harm” in the current Act does not fully capture negative impacts to fish resulting from harmful alterations to fish habitat. Based on the testimony given, the “serious harm” prohibition also fails to conform to DFO’s [Fishery Decision-Making Framework Incorporating the Precautionary Approach](#) and Canada’s commitment to [Principles of Ecosystem-Based Fisheries Management](#).

Although sufficient time may not have passed to fully assess the impacts of the 2012 legislative changes to the Act, we believe in the importance of taking a precautionary approach in the protection of fish and fish habitat and the management of fisheries. Therefore, the Committee recommends:

Recommendation 1

That section 35(1) of the *Fisheries Act* return to its wording as of 29 June 2012 which reads: “No person shall carry on any work, undertaking or activity that results in the harmful alteration or disruption, or the destruction, of fish habitat.” Remove the concept of “serious harm” to fish from the Act.

Recommendation 2

That Fisheries and Oceans Canada take an ecosystem approach to protection and restoration of fish habitats so that the entire food web is preserved for fish by:

- 1. Adopting key sustainability principles;**
- 2. Protecting the ecological integrity of fish habitat; and**
- 3. Protecting key areas of fish habitat.**

Recommendation 3

Any revision of the *Fisheries Act* should review and refine the previous definition of HADD due to the previous definition’s vulnerability to being applied in an inconsistent manner and the limiting effect it had on government agencies in their management of fisheries and habitats in the interest of fish productivity.

56 Kevin Stringer, Associate Deputy Minister, DFO, [Evidence](#), 2 November 2016.

Recommendation 4

That Fisheries and Oceans Canada emphasize protection for priority habitats that contribute significantly to fish production within the context of section 6 of the Act.

Recommendation 5

That Fisheries and Oceans Canada fund more research dedicated to ecosystem science.

2. Extending Protection to All Habitats

The Committee also heard from Susanna Fuller, Ecology Action Centre, and Trevor Taylor, Oceans North Canada, on the importance of ensuring that impacts of fishing practices on fish habitat being regulated under the Act.⁵⁷ Fishing practices were also mentioned by David Browne, in addition to destruction and alteration of habitat from projects and land use, as known causes of habitat decline.⁵⁸ Although DFO has established a [Policy for managing the impact of fishing on sensitive benthic areas](#), the majority of the Committee believes that incorporating this policy in the Act will enhance enforcement and compliance and, therefore, recommends:

Recommendation 6

That protection from harmful alteration or disruption, or the destruction, of fish habitat be extended to all ocean and natural freshwater habitats to ensure healthy biodiversity.

Recommendation 7

To protect fish habitat from key activities that can damage habitat, such as destructive fishing practices and cumulative effects of multiple activities.

3. Exceptions to Section 35 Prohibition

The Committee notes the appreciation of the Groundfish Enterprise Allocation Council⁵⁹ for exceptions provided by the current section 35(2) and considers that the listed exceptions to the HADD prohibition take into account the concerns of the agriculture and other industries. Types of waterbodies where a DFO review is currently not required already include private ponds, irrigation ponds or channels, and agricultural drains and drainage ditches.⁶⁰ Project activities such as bridges, causeways and culverts mentioned

57 Trevor Taylor, Director of Fisheries Conservation, Oceans North Canada, [Evidence](#), 28 November 2016.

58 David Browne, Director of Conservation, Canadian Wildlife Federation, [Evidence](#), 31 October 2016.

59 Groundfish Enterprise Allocation Council, Brief, 30 November 2016.

60 DFO, [Projects near water](#). Artificial waterbodies where DFO reviews are not required must not be connected to a natural waterbody that contains fish at any time during any given year.

by Kate Lindsay, Forest Products Association of Canada,⁶¹ as regular activities engaged by the forestry sector are also exempt from DFO reviews as long as they meet prescribed criteria.

Committee members agree with the Canadian Federation of Agriculture on the need to establish clear and enforceable guidelines for artificial infrastructures and recommend:

Recommendation 8

That Fisheries and Oceans Canada put sufficient protection provisions into the *Fisheries Act* that act as safeguards for farmers and agriculturalists, and municipalities.

Recommendation 9

That Fisheries and Oceans Canada work with the farm community and rural municipalities to provide incentives and expert advice to conserve and enhance fish habitat and populations and utilize the enforcement approach as a last resort.

Recommendation 10

That permitting be expedited to allow for works that involve the restoration of damaged infrastructure and emergency works to protect people and communities.

Recommendation 11

That the *Fisheries Act* should include a clear definition of what constitutes fish habitat.

4. Engagement with Stakeholders

The Committee heard from Brian Parker, Manitoba Sustainable Development, that communication between local stakeholders and DFO management must be improved. He stated:

In some instances, the ability to communicate local issues and perspectives may have become more challenging due to the thematic focus within the federal fisheries protection program. For example, federal staff who are based in Manitoba may have the expertise to review a local oil and gas project, even though the project would typically be assigned to staff located in another province.⁶²

61 Kate Lindsay, Director, Environmental Regulations and Conservation Biology, Forest Products Association of Canada, [Evidence](#), 5 December 2016.

62 Brian Parker, Senior Fisheries Manager, Wildlife and Fisheries Branch, Manitoba Sustainable Development, [Evidence](#), 28 November 2016.

Ron Bonnett also stressed the importance of communication and information sharing between federal, provincial and conservation authorities.⁶³ For Elizabeth Hendriks, enhanced communications with Canadians regarding the health of watersheds are vital for transparency and for identifying target areas for fish habitat protection's improvements.⁶⁴ The Committee also heard from the Federation of Sovereign Indigenous Nations, Saskatchewan, on the need to increase Indigenous engagement at the strategic policy level.⁶⁵

The Committee recommends:

Recommendation 12

That Fisheries and Oceans Canada assess and improve communications between fisheries stakeholders and the Department's upper management and decision makers.

Recommendation 13

That communication within and between all levels of Fisheries and Oceans Canada be improved.

The majority of the Committee concurs with Susanna Fuller on the importance of DFO engaging in multi-stakeholder consultations to achieve optimal fish and fish habitat protection regulations while taking into account particularities of the agricultural sector and municipalities.⁶⁶ The Alberta Association of Municipal Districts and Counties and the Saskatchewan Association of Rural Municipalities reminded the Committee that municipalities take into account fish habitat protection when planning public works. For example, municipal "project plans include habitat protection and land use provisions when developing bridges and culverts."⁶⁷

5. Interpretation of the HADD Prohibition

To avoid conflicting interpretations and inconsistencies in enforcement of the HADD provision across Canada at the local level, the Committee recommends:

Recommendation 14

That Fisheries and Oceans Canada clearly define the parameters of what is considered a violation of the *Fisheries Act*.

63 Ron Bonnett, President, Canadian Federation of Agriculture, [Evidence](#), 21 November 2016.

64 Elizabeth Hendriks, Vice-President, Freshwater, World Wildlife Fund-Canada, [Evidence](#), 14 November 2016.

65 Federation of Sovereign Indigenous Nations, Brief, 28 November 2016.

66 Susanna Fuller, Senior Marine Conservation Coordinator, Ecology Action Centre, [Evidence](#), 21 November 2016.

67 Alberta Association of Municipal Districts and Counties and Saskatchewan Association of Rural Municipalities, Brief, 3 November 2016.

Recommendation 15

That Fisheries and Oceans Canada should create a widely representative advisory committee to provide ongoing recommendation regarding the administration and enforcement of the *Fisheries Act*. The advisory committee should include but not be limited to, industry groups, project proponents, agricultural groups, municipal government representatives and commercial, recreational and Indigenous fisheries representatives.

Recommendation 16

To broaden the Minister's mandate to consider long-term conservation and protection of fish and fish habitat when evaluating projects that contravene the *Fisheries Act*.

SECTION 35: AUTHORIZATIONS

A. Time Limit

The Committee heard from Ron Bonnett that farmers' experience with previous versions of the Act's authorization process was characterized by "lengthy bureaucratic applications for permitting and authorizations" and the 2012 changes "drastically improved the timeliness and cost of conducting regular maintenance and improvement activities to their farms."⁶⁸ Fawn Jackson concurred by indicating that many cattle producers found HADD authorizations to be long and administratively burdensome.⁶⁹

For Matthew Pickard, Prospectors and Developers Association of Canada, "regulatory processes should be scalable and be proportionate to the nature, scope and duration of the project activities."⁷⁰ In addition, Jay Walmsley proposed that the Act should contain provisions for long-term authorizations and for amending or extending authorizations as there are many long-term activities in the electricity sector.⁷¹

The Committee also heard from Chris Bloomer, Canadian Energy Pipeline Association, on the importance of a regulatory framework that would "outline clear accountabilities, contain transparent rules and processes, allow for meaningful participation and adhere to the need for timeliness."⁷² Committee members believe that regulations should ensure that decisions on section 35 authorizations are made within a reasonable and set period of time and with industry-specific considerations. Committee

68 Ron Bonnett, President, Canadian Federation of Agriculture, [Evidence](#), 21 November 2016.

69 Fawn Jackson, Manager of Environmental Sustainability, Environment and Sustainability, Canadian Cattlemen's Association, [Evidence](#), 30 November 2016.

70 Matthew Pickard, Member, Vice-President, Environmental and Sustainability, Sabrina Gold and Silver Corp., Prospectors and Developers Association of Canada, [Evidence](#), 7 December 2016.

71 Jay Walmsley, Senior Environmental Scientist, Aquatic, Nova Scotia Power, Canadian Electricity Association, [Evidence](#), 5 December 2016.

72 Chris Bloomer, President and Chief Executive Officer, Canadian Energy Pipeline Association, [Evidence](#), 5 December 2016.

members also note the [Applications for Authorization under Paragraph 35\(2\)\(b\) of the Fisheries Act Regulations](#) that entered into force in 2013 set time limits for the Minister to either issue an authorization or notify the applicant in writing of the refusal to do so.

Accordingly, the Committee recommends:

Recommendation 17

That Fisheries and Oceans Canada provide the Committee with a report within two years after the revision to the *Fisheries Act* detailing authorization requests and decisions timelines.

B. Project Reviews: Self-Assessment of Project Impacts

Francis Bradley, Canadian Electricity Association, noted that the 2012 changes to the Act have strengthened protections for fish and fish habitat.⁷³ The requirement for industry to self-report serious harm to fish was given as an example of strengthened protections and was characterized by Dan Gibson as a burden on industry.⁷⁴ The Committee also heard from Fawn Jackson on the need for the reporting burden to reflect the size of the project's risk.⁷⁵

Prescribed works, undertakings and activities as well as projects deemed as low-risk by proponents' self-assessments do not necessitate a DFO review. Currently, proponents are also not required to notify DFO of such projects taking place. The reliance by DFO on self-assessments completed by project proponents to streamline the authorization process and the lack of systematic monitoring was, however, criticized by many other study participants, such as the Ontario Federation of Anglers and Hunters⁷⁶ and northern Quebec's Indigenous Hunting, Fishing and Trapping Coordinating Committee.⁷⁷ The Mohawk Council of Kahnawake, Quebec, called for the establishment of an appeal process that will "allow an Indigenous Nation or other interested party to request that a project designated as "minor work" be required to obtain a permit."⁷⁸

In the opinion of Krystyn Tully, Lake Ontario Waterkeeper, self-regulation is not appropriate to ensure compliance with the Act.⁷⁹ Minor projects may each carry low risk for fish and fish habitat but, as explained by Otto Langer, when considered cumulatively, they may represent "death by a thousand cuts." He also stated:

73 Francis Bradley, Chief Operating Officer, Canadian Electricity Association, [Evidence](#), 5 December 2016.

74 Dan Gibson, Senior Environmental Specialist, Canadian Hydropower Association, [Evidence](#), 5 December 2016.

75 Fawn Jackson, Manager of Environmental Sustainability, Environment and Sustainability, Canadian Cattlemen's Association, [Evidence](#), 30 November 2016.

76 Ontario Federation of Anglers and Hunters, Brief, 30 November 2016.

77 Hunting, Fishing and Trapping Coordinating Committee, Brief, 9 November 2016.

78 Mohawk Council of Kahnawake, Brief, 30 November 2016.

79 Krystyn Tully, Vice-President, Lake Ontario Waterkeeper, [Evidence](#), 14 November 2016.

From experience in Australia and elsewhere in the 50 years I've been around, that simply does not work, so we were going off in the wrong direction, hoping it would work. It was wishful thinking. It hasn't worked.⁸⁰

Newfoundland and Labrador's Minister Steve Crocker also expressed doubts regarding the self-assessment tool. In his view, self-assessment "translates to an unrealistic expectation that proponents must understand the type of ecological and biological impacts their projects are likely to cause."⁸¹ He suggested that a "more rigorous systematic, regionally-based assessment conducted by DFO officials" would offer better protection to fish and fish habitat. Stephen Sutton agreed with Minister Steve Crocker and stated:

People undertaking potentially damaging activities are typically not qualified to understand the complexities of salmon habitat requirements or to judge when their activities may have caused serious harm. There are also disincentives for people to report harm that they may have caused, yet the self-assessment tool currently used by DFO places most of the responsibility for protecting fish habitat with the project proponents. This provides significant opportunities for projects to proceed without sufficient oversight from monitoring and enforcement. We believe that this situation results in ongoing and cumulative habitat loss that is undocumented and unmitigated, and it makes it nearly impossible to assess future project impacts in light of previous damage.⁸²

Zo Ann Morten also added:

With studies showing that over half the developers in North Vancouver did not know that their storm drains on the street were carrying the development waste directly to the local streams, I find it hard to imagine that the average person could self-determine if they might cause serious harm to fish or to a fishery, whether it be local or at sea.⁸³

In the view of the Federation of Canadian Municipalities, the Act should continue to allow for a streamlined review process for low-risk projects but the federal government should "examine the issue of projects that individually may have small environmental impacts, but cumulatively may cause serious harm to fish."⁸⁴ The Committee was informed by the Newfoundland and Labrador Environmental Industry Association that the "lack of regulator input (even on "low-risk" projects) presents challenge[s] for proponents when dealing with municipalities and other third-parties who would prefer an assurance that the regulator is aware of the project and has approved it."⁸⁵

The topic of self-assessment also figured in the brief sent to the Committee by Deputy Minister Derek Sturko. He indicated that the "criteria for what constitutes a low-risk

80 Otto Langer, Fisheries Biologist, As an Individual, [Evidence](#), 23 November 2016.

81 Steve Crocker, Minister, Department of Fisheries, Forestry and Agrifoods, Government of Newfoundland and Labrador, [Evidence](#), 28 November 2016.

82 Stephen Sutton, Coordinator of Community Outreach and Engagement, Atlantic Salmon Federation, [Evidence](#), 28 November 2016.

83 Zo Ann Morten, Executive Director, Pacific Streamkeepers Federation, [Evidence](#), 7 December 2016.

84 Federation of Canadian Municipalities, Brief, 30 November 2016.

85 Newfoundland and Labrador Environmental Industry Association, Brief, 29 September 2016.

project are not always appropriate in areas of sensitive habitat which included habitat that has already experienced significant impacts. DFO's reviewable project list and reliance on a proponent's interpretation of project impacts on fish increases the risk for screening out high risk impacts at the self-assessment stage."⁸⁶ The Yukon Fish and Wildlife Management Board and Yukon Salmon Sub-Committee submitted that "with declining Department capacity in terms of staff and resources, DFO's focus has been on major projects and the small projects have fallen between the cracks in terms of assessment, compliance monitoring and enforcement and shuffled off to the self-assessment process which is clearly not working in Yukon and elsewhere."⁸⁷

In addition, the City of Port Moody, British Columbia, recommended DFO abandon the self-assessment process and "develop policy to provide clear approval processes and to establish strong, independent and clear performance standards for protecting, mitigating and where unavoidable, compensating for fish and watershed impacts."⁸⁸

In light of the above testimonies, the Committee recommends:

Recommendation 18

That any changes to habitat protection in the *Fisheries Act* must be supported by a reduced reliance on project proponent self-assessment.

C. Enhancing Monitoring of Project Impacts

Brett Favaro told the Committee that, currently, there is neither a public registry nor auditing of self-assessed projects.⁸⁹ In order to monitor and understand project impacts on fish and fish habitat, especially on a cumulative basis, Martin Olszynski called for a public registry, similar to the [Alberta Energy Regulator](#) website, of self-assessed projects, which would contain information on all applications for section 35 authorizations, all authorizations and monitoring data following authorizations from proponents.⁹⁰

Jay Walmsley⁹¹ and Susanna Fuller⁹² added that such a public registry, with spatial and temporal mapping capabilities, would increase transparency and accountability in the authorization process. In the opinion of the Kitsumkalum Indian Band, British Columbia,

86 Derek Sturko, Deputy Minister, Ministry of Agriculture, Government of British Columbia, Brief, 30 November 2016.

87 Yukon Fish and Wildlife Management Board and Yukon Salmon Sub-Committee, Brief, 30 November 2016.

88 Margot Davis, Sustainability Manager, City of Port Moody, Brief, 30 November 2016.

89 Brett Favaro, Research Scientist, Fisheries and Marine Institute, Memorial University of Newfoundland, As an Individual, [Evidence](#), 31 October 2016.

90 Martin Olszynski, Assistant Professor, Faculty of Law and Affiliated Faculty, Canadian Institute of Resources Law, University of Calgary, As an Individual, [Evidence](#), 31 October 2016.

91 Jay Walmsley, Senior Environmental Scientist, Aquatic, Nova Scotia Power, Canadian Electricity Association, [Evidence](#), 5 December 2016.

92 Susanna Fuller, Senior Marine Conservation Coordinator, Ecology Action Centre, [Evidence](#), 21 November 2016.

fishing areas that are critically important for Indigenous peoples should be outlined on a map and the information be made available to projects proponents.⁹³

Committee members note from DFO's online consultations that keeping the public informed was of great interest to participants. The preferred mediums to receive information were through regular website updates, public registry of development and restoration projects, annual reports to Parliament and social media.⁹⁴

The Committee also recalls the following finding from the 2009 Spring Report of the Commissioner of the Environment and Sustainable Development regarding reviewed projects by DFO:

The Department has little documentation to show that it monitored the actual habitat loss that occurred, whether habitat was protected by mitigation measures required as a condition for project approval, or the extent to which project proponents compensated for any habitat loss.⁹⁵

The report goes on to say that, in the 23 years since the Habitat Policy was adopted, the Department "cannot demonstrate that fish habitat is being adequately protected as the *Fisheries Act* requires."

To ensure adequate monitoring of potential project effects and to enable the analysis of cumulative impacts, the Committee agrees with the suggestion from Brian Parker⁹⁶ on the need to establish clear standards and a rationale for monitoring requirements. The Committee, therefore, recommends:

Recommendation 19

That Fisheries and Oceans Canada put in place consistent monitoring requirements for proponents, with clear standards and rationale.

Recommendation 20

That Fisheries and Oceans Canada make investments into a public and accessible database system that will identify:

- 1. The location and status of projects that have been flagged by the Department of having a potential to cause harm to fish and fish habitat (authorizations, monitoring results and convictions) and their cumulative effects;**
- 2. The location of different aquatic species;**

93 Kitsumkalum Indian Band, Brief, 30 November 2016.

94 Nielsen, Delaney + Associates and Publivate, *DFO Fisheries Act Review Consultation Final Report*, Prepared for Fisheries and Oceans Canada, 19 December 2016.

95 Office of the Auditor General of Canada, "[Protecting Fish Habitat](#)," Chapter 1 in *2009 Spring Report of the Commissioner of the Environment and Sustainable Development*.

96 Brian Parker, Senior Fisheries Manager, Wildlife and Fisheries Branch, Manitoba Sustainable Development, [Evidence](#), 28 November 2016.

3. **Up-to-date monitoring of aquatic species at risk and their status; and**

4. **The status of authorizations.**

D. Projects Guidance and Enforcement

Patrick McDonald, Canadian Association of Petroleum Producers, recommended that any changes to the Act be “focused on enhanced compliance tools and further development of best practices for avoiding, mitigating, and offsetting harm to fish and fish habitat.”⁹⁷ In his opinion, DFO should “reinstate activity-specific operational statements⁹⁸ and/or develop new operational statements, or best practice guidelines, to guide proponents in how risks associated with routine activities can best be mitigated and managed by proponents.” In addition, Dan Gibson submitted that DFO-industry partnerships have been hindered by a reduction of staff at DFO regional offices:

Our members have found that the experts with whom they had once worked from Newfoundland all the way to B.C. have experienced some loss on the ground with these experts. They have either moved on or are simply no longer with the Department. This makes for less understanding and less strength in our relationships with our regulators. We believe the government should give serious consideration to restoring some of these lost resources with the objective of re-establishing the productive working arrangements that have existed.⁹⁹

Enhanced project guidance by DFO for project proponents was also called for by Kate Lindsay. She informed the Committee that:

Operational statements were an effective and efficient set of guidelines, as well as a notification and tracking system. They outlined science-based timing windows and appropriate mitigation measures for proponents to undertake low-risk activities, both providing outcome-based objectives for avoiding or mitigating any impacts to fish and fish habitat, but also allowing DFO staff to focus on more time-intensive reviews on activities that were deemed higher risk to fish and fish habitat.¹⁰⁰

In the view of Ducks Unlimited Canada, habitat enhancement or restoration projects should not be subject to the same regulatory requirements as the ones intended for non-habitat projects. Therefore, it proposed that the Act make a distinction between a

97 Patrick McDonald, Manager, Oil Sands, Canadian Association of Petroleum Producers, [Evidence](#), 30 November 2016.

98 Prior to the 2012 changes to the Act, a low-risk project did not require a DFO review under section 35 if “planning guidance” was followed. Such planning guidance was set out in [operational statements](#), which “outline[d] conditions and measures for avoiding harmful alteration, disruption and destruction (HADD) of fish habitat” to ensure that a “project complies with subsection 35(1) of the *Fisheries Act*.”

99 Dan Gibson, Senior Environmental Specialist, Canadian Hydropower Association, [Evidence](#), 5 December 2016.

100 Kate Lindsay, Director, Environmental Regulations and Conservation Biology, Forest Products Association of Canada, [Evidence](#), 5 December 2016.

project proponent and a project partner and that DFO develop operational requirements specific to conservation organizations seeking to restore fish habitat.¹⁰¹

The Committee heard from Martin Olszynski that, based on DFO's enforcement data, there has been a "massive decrease" in enforcement hours dedicated to fisheries and fish habitat protection provisions.¹⁰² Deputy Minister Derek Sturko noted that, with reduced enforcement staffing in British Columbia, "there has been almost no DFO field presence responding to occurrences or potential violations."¹⁰³ David Browne added that, in terms of enforcement, DFO staff and equipment were "severely cut, with no alternative arrangement in place with provinces, and few fines or warning[s] are being issued."¹⁰⁴ Minister Dominic LeBlanc acknowledged that DFO cut the number of fish habitat protection offices from 63 to 16 in recent years and added:

One of the concerns we have is that, over the last five years, the Department suffered a series of budget cuts, \$35 million, which led to almost 1,100 positions being eliminated. If you think about 1,100 positions over the last five years, many of them were front-line enforcement people, habitat protection people, and scientific people.¹⁰⁵

To improve compliance, enforcement and fish habitat protection, Margot Venton advocated for provisions that would allow concerned citizens to "request that DFO investigate an alleged fish habitat violation" and "take actions in the courts to enforce the Act where DFO is unable or unwilling to do so."¹⁰⁶ She added that citizen enforcement provisions have worked effectively in other jurisdictions and such a provision already exists in the [Canadian Environmental Protection Act, 1999](#).

The Committee also notes the suggestion from the Inuvialuit Settlement Region's Fisheries Joint Management Committee¹⁰⁷, Northwest Territories, and the A-Tlegay Fisheries Society, British Columbia, to create a "mechanism for First Nations Guardians, provincial and local governments to be involved to assist with evaluating, monitoring and enforcement of projects."¹⁰⁸

101 Ducks Unlimited Canada, Brief, 12 December 2016.

102 Martin Olszynski, Assistant Professor, Faculty of Law and Affiliated Faculty, Canadian Institute of Resources Law, University of Calgary, As an Individual, [Evidence](#), 31 October 2016.

103 Derek Sturko, Deputy Minister, Ministry of Agriculture, Government of British Columbia, Brief, 30 November 2016.

104 David Browne, Director of Conservation, Canadian Wildlife Federation, [Evidence](#), 31 October 2016.

105 Dominic LeBlanc, Minister of Fisheries, Oceans and the Canadian Coast Guard, Government of Canada, [Evidence](#), 2 November 2016.

106 Margot Venton, Staff Lawyer and Director of Marine Program, Ecojustice, [Evidence](#), 28 November 2016.

107 Fisheries Joint Management Committee, Brief, November 2016.

108 A-Tlegay Fisheries Society, Brief, 30 November 2016.

In light of the above testimonies, the Committee recommends:

Recommendation 21

That Fisheries and Oceans Canada ensure that significant investments are made in hiring more field personnel to improve fish habitat enforcement, to assist in fisheries enhancement projects and to establish positive consultative relationships with local communities.

Recommendation 22

That Fisheries and Oceans Canada meaningfully resource the monitoring, compliance and enforcement components of the Department.

Recommendation 23

That Fisheries and Oceans Canada increase enforcement staff on the ground by recruiting and retaining habitat monitors, including fishery officers who are dedicated to habitat protection.

Recommendation 24

That Fisheries and Oceans Canada ensure that habitat protection staff are adequately trained and resourced with long-term funding and empower field staff to do their job to protect fish and fish habitat.

The Committee also recommends:

Recommendation 25

That Fisheries and Oceans Canada re-establish the Habitat Protection Branch, adequately resourced to provide advice to proponents of projects that may impact marine and freshwater habitats and to enforce compliance.

E. Trigger Under the Canadian Environmental Assessment Act

As part of the 2012 legislative changes, authorizations under the *Fisheries Act* no longer trigger an environmental impact assessment under the new *Canadian Environmental Assessment Act, 2012* (CEAA). According to Graeme Gawn, Canadian Independent Fish Harvesters Federation, without the trigger:

Fishing communities, coastal fishermen, and the ocean floor no longer have full protection from increasing uses of the coastal marine environment by other industries. Activities such as dredging, pipelines and cables, aquaculture operations, and renewable energy operations all impact fish habitat and must be subjected to very careful environmental impact assessments before being approved.¹⁰⁹

109 Graeme Gawn, Member of the Board of Directors, Canadian Independent Fish Harvesters Federation, [Evidence](#), 14 November 2016.

In the opinion of Susanna Fuller, the loss of CEAA triggers partly explains the present difficulty in assessing impacts of the 2012 changes to the Act on fish and fish habitat.¹¹⁰ Therefore, environmental non-governmental organizations and First Nations representatives advocated restoring environmental assessment triggers for *Fisheries Act* authorizations.¹¹¹

Recommendation 26

Re-examine sections 32, 35 and 36 *Fisheries Act* authorizations as environmental assessment triggers.

SECTION 32: KILLING OF FISH BY ANY MEANS OTHER THAN FISHING

According to Elizabeth Hendriks, the 2012 repeal of section 32 created a gap in the protection of fish from industrial activities.¹¹² She recommended reinstating section 32 and adding prohibitions against sub-lethal harm (e.g., injury or reduction of fitness) to fish. The Committee notes that this position is also supported by many other study participants, such as the Mikisew Cree First Nation¹¹³ in Alberta, the Nuu-chah-nulth Tribal Council¹¹⁴ in British Columbia, and Michael d'Eça from the Nunavut Wildlife Management Board. Micheal d'Eça pointed out that while the HADD provision in section 35 protected fish habitat, section 32 provided safeguards for fish.¹¹⁵

AGREEMENTS, DELEGATIONS OF AUTHORITY, PROGRAMS AND PROJECTS

A. Legal Framework to Guide Agreements With the Provinces

In the opinion of Brian Parker, “provincial and territorial input is essential in determining impacts to long-term sustainability and productivity of fisheries, including the determination of cumulative impacts.”¹¹⁶ Minister Steve Crocker indicated that, “engagement and collaboration between DFO and provincial and territorial departments and agencies are essential for the development and implementation of clear and effective legislative policies.”¹¹⁷ In the view of the Alberta Association of Municipal Districts and Counties, the current Act provides a “better balance of federal oversight and local autonomy, both through the simplification of prohibitions related to fish habitat damage,

110 Susanna Fuller, Senior Marine Conservation Coordinator, Ecology Action Centre, [Evidence](#), 21 November 2016.

111 Brenda Gaertner, First Nations Fisheries Council of British Columbia, [Evidence](#), 7 December 2016.

112 Elizabeth Hendriks, Vice-President, Freshwater, World Wildlife Fund-Canada, [Evidence](#), 14 November 2016.

113 Mikisew Cree First Nation, Brief, 30 November 2016.

114 Nuu-chah-nulth Tribal Council, Brief, 30 November 2016.

115 Michael d'Eça, Legal Counsel, Nunavut Wildlife Management Board, [Evidence](#), 7 December 2016.

116 Brian Parker, Senior Fisheries Manager, Wildlife and Fisheries Branch, Manitoba Sustainable Development, [Evidence](#), 28 November 2016.

117 Steve Crocker, Minister, Department of Fisheries, Forestry and Agrifoods, Government of Newfoundland and Labrador, [Evidence](#), 28 November 2016.

and through the involvement of local authorities to self-identify potential impacts on fish habitats.”¹¹⁸

The Committee also heard from Fawn Jackson that the Canadian Cattlemen’s Association “encourages coordination with the provinces.”¹¹⁹ Kate Lindsay added that the equivalency of regulatory regimes and the recognition of externally-developed standards to guide activities are elements of the 2012 changes that should be maintained to reduce regulatory duplication.¹²⁰ In the opinion of Derek Sturko, agreements with provinces provide “opportunities to create regulatory efficiency”, a one-window approach to approvals as well as potential of delegation to First Nations.¹²¹

Zo Ann Morten also expressed her support for the continued ability to share the responsibility for fish and fish habitat protection where it could be established that a provincial regime “meets or beats” provisions of the Act or of its regulations.¹²² However, she cautioned the Committee that monitoring standards and on-the-ground outcomes are vital to ensuring that DFO protection goals are met. The ability to pull out of federal-provincial agreements when the provincial partner is no longer able to meet or beat the standards set out by the federal Act was, therefore, deemed necessary.

Chief Robert Chamberlin, Union of British Columbia Indian Chiefs,¹²³ and Brenda Gaertner, First Nations Fisheries Council of British Columbia,¹²⁴ were dismayed, however, that sections 4.1 to 4.3 enable a legal framework to guide agreements with the provinces but that First Nations were not included. Brenda Gaertner pointed out that:

Indigenous inherent rights and section 35 [of the *Constitution Act, 1982*] aboriginal and treaty rights, including aboriginal title, have and will always include the right and responsibility of First Nations to govern and manage the fish, fish habitat, both in the fresh and marine environments, and fisheries, and to be stewards of the rivers, lakes, and waters in their territories.

Therefore, she recommended:

That the Act enable the Department of Fisheries and Oceans and the Minister to enter into direct agreements with First Nations governments in a manner that would allow them to facilitate collaboration among First Nations, the province, and the federal government as it relates to the management of fish, fish habitat, and fisheries.

118 Alberta Association of Municipal Districts and Counties, Brief, 27 October 2016.

119 Fawn Jackson, Manager of Environmental Sustainability, Environment and Sustainability, Canadian Cattlemen’s Association, [Evidence](#), 30 November 2016.

120 Kate Lindsay, Director, Environmental Regulations and Conservation Biology, Forest Products Association of Canada, [Evidence](#), 5 December 2016.

121 Derek Sturko, Deputy Minister, Ministry of Agriculture, Government of British Columbia, Brief, 30 November 2016.

122 Zo Ann Morten, Executive Director, Pacific Streamkeepers Federation, [Evidence](#), 7 December 2016.

123 Chief Robert Chamberlin, Vice-President, Union of British Columbia Indian Chiefs, [Evidence](#), 21 November 2016.

124 Brenda Gaertner, First Nations Fisheries Council of British Columbia, [Evidence](#), 7 December 2016.

In the view of the Mikisew Cree First Nation, the delegation of federal powers to provinces can be problematic because provincial agencies have more “restrictive rules around Aboriginal participation in decision making.”¹²⁵ The Mikisew Cree First Nation indicated that such a delegation would “run contrary to the important role that DFO has played in the oil sands region, where DFO has been the sole regulatory voice to point out that provincial water licences for oil sands projects would reduce fish habitat if granted in the manner approved by Alberta.”

B. Delegation of Ministerial Authority

With respect to delegations of the ministerial authority to issue authorizations under the Act to other persons or entities, Chris Bloomer recommended to the Committee that the MOU between the NEB and DFO be maintained.¹²⁶ In his view, the delegation of authority to the NEB does not weaken the protection for fish and fish habitat. He stated that the NEB is the best-placed regulator as it has unique knowledge of the history of success of mitigation methods specific to pipelines projects.

The Committee notes that the Manitoba Metis Federation and Otto Langer did not share Chris Bloomer’s opinion on delegations of authority and the NEB-DFO MOU. Otto Langer called for the centralization of expertise in the “right agency.” He indicated:

When we're dealing with an energy issue, the National Energy Board should just be dealing with that energy issue. Do we have enough natural gas for future generations? Do we build a pipeline across provincial boundaries? Why would the National Energy Board then determine what's good for fish in every stream they put that pipeline across? That makes no sense at all. Get all the agencies to do their job properly and efficiently versus the fragmentation we now have.¹²⁷

In the view of the Manitoba Metis Federation, the protection for fish and aquatic habitat is not part of the NEB’s mandate and the NEB “lacks the key capacity, experience and expertise to be able to competently assess impacts” of energy projects on fish and fish habitat.¹²⁸

C. Power to Implement Programs and Projects with Partners

The [Recreational Fisheries Conservation Partnerships Program](#), established pursuant to the power for the Minister to implement programs and projects with partners, was noted as one of the positive aspects of the 2012 amendments to the Act mentioned by many study participants. Ron Bonnett emphasized to the Committee that “ecological goods and service programs offer an excellent vehicle that should be explored further to improve the quality of fish habitat on or near agricultural lands.”¹²⁹ Susanna Fuller added

125 Mikisew Cree First Nation, Brief, 30 November 2016.

126 Chris Bloomer, President and Chief Executive Officer, Canadian Energy Pipeline Association, [Evidence](#), 5 December 2016.

127 Otto Langer, Fisheries Biologist, As an Individual, [Evidence](#), 23 November 2016.

128 Manitoba Metis Federation, Brief, 30 November 2016.

129 Ron Bonnett, President, Canadian Federation of Agriculture, [Evidence](#), 21 November 2016.

that further work could be done under the regulations to incentivize fish habitat conservation.¹³⁰

In the view of David Browne, DFO should increase its “capacity to design, operate, and enforce a fish habitat protection program” and “continue building partnerships with NGOs and other sectors of society to deliver it, because DFO cannot do this alone. If it's going to succeed, this is going to have to be a co-operative and collaborative approach to protecting fish habitat.”¹³¹

The Committee also heard the call from Jay Walmsley for more focus to be placed on “supporting and encouraging partnerships and stewardship activities, including broad area planning initiatives to protect and restore fish habitat.”¹³² For the Fisheries Council of Canada, the power to implement programs and projects with partners, such as fishing companies and harvester groups, represents a “boon for co-management.”¹³³

Therefore, the Committee recommends:

Recommendation 27

That Fisheries and Oceans Canada continue to fund fisheries conservation and enhancement projects in co-operation with the Indigenous communities, the agricultural communities, and fisheries conservation organizations.

POWERS IN ISSUING AUTHORIZATIONS AND MAKING REGULATIONS

A. Guiding Factors and Transparency

Despite the factors and purpose introduced by the 2012 amendments to the Act to guide the ministerial discretion in issuing authorizations and making regulations, Martin Olszynski informed the Committee it is still impossible for anyone to know in any given instance whether and how the Minister considered those factors.¹³⁴ In Susanna Fuller's view, the high level of ministerial discretion makes it difficult for decisions to adhere to scientific advice or plans recommended by co-management boards.¹³⁵ Michael d'Eça also expressed concern regarding the expansion of regulation-

130 Susanna Fuller, Senior Marine Conservation Coordinator, Ecology Action Centre, [Evidence](#), 21 November 2016.

131 David Browne, Director of Conservation, Canadian Wildlife Federation, [Evidence](#), 31 October 2016.

132 Jay Walmsley, Senior Environmental Scientist, Aquatic, Nova Scotia Power, Canadian Electricity Association, [Evidence](#), 5 December 2016.

133 Fisheries Council of Canada, Brief, 30 November 2016.

134 Martin Olszynski, Assistant Professor, Faculty of Law and Affiliated Faculty, Canadian Institute of Resources Law, University of Calgary, As an Individual, [Evidence](#), 31 October 2016.

135 Susanna Fuller, Senior Marine Conservation Coordinator, Ecology Action Centre, [Evidence](#), 21 November 2016.

making powers under section 43 of the Act which allows the Governor in Council to “exclude fisheries from the definition *Aboriginal, commercial and recreational*.”¹³⁶

Margot Venton indicated to the Committee that factors guiding decision-making under the Act need to be clarified further to expressly reflect habitat concerns. She argued that inconsistencies in the implementation of the HADD prohibition under previous versions of the Act stemmed, in part, from the broad discretion under section 35(2) authorization power. In her opinion, the power to authorize harm to fish and fish habitat must be guided by clear principles, based on science. Therefore, Margot Venton recommended adding:

science-based considerations to guide any authorization of fish habitat, including consideration of cumulative effects on fish habitat of individual authorizations; consideration of the long-term stability of ecosystems; consideration of the habitat needs for struggling or recovering fish stocks and aquatic species at risk; and consideration of the predicted effect that climate change is expected to have on the habitat in question.¹³⁷

In addition to the factors listed above, the Committee heard from Brenda Gaertner that the Minister should be charged with “exercising his discretion in a manner that meets the requirements of the *Fisheries Act* and meets the requirements of subsection 35(1) of our Constitution as well as the *United Nations Declaration on the Rights of Indigenous Peoples*.”¹³⁸ The Mikisew Cree First Nation also suggested that traditional knowledge, treaty rights, culturally significant fish and fishing areas to Indigenous peoples, the principles of reconciliation and the precautionary principle should be included among the factors guiding the ministerial discretion.¹³⁹

Considering the testimony given, the Committee recommends:

Recommendation 28

That the exercise of ministerial discretion be subject to transparency principles and public disclosure.

B. Fisheries Management Objectives

Fisheries management objectives (FMO) are one of the four factors in section 6 which the Minister is required to consider before making regulations or issuing authorizations. Gary Swanson, Manitoba Hydro, submitted that the requirement to consider FMOs is necessary and logical to ensure the long-term sustainability and productivity of fisheries.¹⁴⁰ However, Dan Gibson told the Committee that FMOs are not clearly articulated at present. He indicated that properly defined FMOs could be very

136 Michael d'Eça, Legal Counsel, Nunavut Wildlife Management Board, [Evidence](#), 7 December 2016.

137 Margot Venton, Staff Lawyer and Director of Marine Program, Ecojustice, [Evidence](#), 28 November 2016.

138 Brenda Gaertner, First Nations Fisheries Council of British Columbia, [Evidence](#), 7 December 2016.

139 Mikisew Cree First Nation, Brief, 30 November 2016.

140 Gary Swanson, Senior Environmental Specialist, Manitoba Hydro, [Evidence](#), 30 November 2016.

useful for the hydropower industry when designing facilities and operations to avoid negative impacts to fish.¹⁴¹

In the view of the First Nations Fisheries Council of British Columbia, FMOs should also take into account existing First Nations management objectives informed by Indigenous laws, traditional knowledge and objectives developed through co-management agreements.¹⁴²

C. Aquaculture Activities Regulations

With respect to the [Aquaculture Activities Regulations](#) (AAR) introduced in 2015 pursuant to the Minister's new regulatory powers, Graeme Gawn indicated that those regulations weaken the protections for wild marine species from illegal pesticide use by open net-pen salmon farms.¹⁴³ He pointed out to the Committee that the use of pesticides threatens coastal lobster fisheries, the most valuable fishery in Eastern Canada. The Committee notes similar criticisms against the AAR expressed by Nova Scotia's Eastern Shore Fisherman's Protective Association¹⁴⁴, New Brunswick's Grand Manan Fishermen's Association¹⁴⁵ and by the Maritime Fishermen's Union.¹⁴⁶

Susanna Fuller concurred with Graeme Gawn and added that, as aquaculture activities are now permitted under class authorizations and are exempt from section 35(1) of the Act on an individual basis, there is a lack of tracking regarding the deposit of deleterious substances.¹⁴⁷ For his part, Chief Robert Chamberlin, citing findings from the Cohen Commission's final report, called for the removal the DFO's mandate to promote the salmon farming industry and its products.¹⁴⁸ This position was also supported by Nikki Skuce of Northern Confluence in British Columbia.¹⁴⁹

The Committee also heard contrasting opinions from Minister Steve Crocker. In his view, the AAR provided "improved clarity" with regard to aquaculture activities and any "review of the *Fisheries Act* should take the AAR into consideration and ensure that any proposed changes do not duplicate or conflict with the applications of the AAR."¹⁵⁰

141 Dan Gibson, Senior Environmental Specialist, Canadian Hydropower Association, [Evidence](#), 5 December 2016.

142 First Nations Fisheries Council of British Columbia, Brief, 29 November 2016.

143 Graeme Gawn, Member of the Board of Directors, Canadian Independent Fish Harvesters Federation, [Evidence](#), 14 November 2016.

144 Eastern Shore Fisherman's Protective Association, Brief, 28 November 2016.

145 Grand Manan Fishermen's Association, Brief, 25 November 2016.

146 The Maritime Fishermen's Union, Brief, 29 November 2016.

147 Susanna Fuller, Senior Marine Conservation Coordinator, Ecology Action Centre, [Evidence](#), 21 November 2016.

148 Chief Robert Chamberlin, Vice-President, Union of British Columbia Indian Chiefs, [Evidence](#), 21 November 2016.

149 Nikki Skuce, Director, Northern Confluence, Brief, 30 November 2016.

150 Steve Crocker, Minister, Department of Fisheries, Forestry and Agrifoods, Government of Newfoundland and Labrador, [Evidence](#), 28 November 2016.

Matt Sullivan, P.E.I. Aquaculture Alliance, also deemed the 2012 changes to the Act as having positive outcomes for the aquaculture industry.¹⁵¹ He commended the streamlined approach to authorizing low-risk projects, such as oyster aquaculture leases.

Kristi Miller-Saunders cautioned the Committee, however, that given the declining productivity of large numbers of Pacific wild salmon stocks, it is “imperative that the regulations put in place to assure minimal impacts of aquaculture on wild stocks are strongly evidence-based, and that the research to understand these risks be transparent, objective, and independent of influence from industry.”¹⁵²

MODERNIZING THE FISHERIES ACT

Witnesses testified that fish habitat conditions have been declining under previous versions of the Act and continue to deteriorate in Canada. Numerous study participants, therefore, proposed that a renewed Act should include “modern safeguards”. As put by Elizabeth Hendriks, in the context of climate change, incorporating such elements in the Act would:

ensure that the *Fisheries Act* is brought into the 21st century and is an effective cornerstone in Canada’s environmental legislation by including sustainable principles, and specifically an ecosystem approach; the precautionary principle; community-based management to guide fisheries management decision-making and cumulative effects; prescriptive guidance on fish management objectives, principles, and procedures; and better monitoring, open data, and transparency.¹⁵³

A. Preamble, Purposes and Guiding Principles

Marc Allain, Canadian Independent Fish Harvesters Federation, pointed out to the Committee that the Act presently does not have a purpose statement.¹⁵⁴ In his view, it is “critical that the “Purposes” section of the Act clearly establish the authority of the Minister to manage the fishery in pursuit of cultural, social, and economic objectives in addition to the conservation and protection of fish.” The Committee notes similar arguments made by the Cape Breton Fish Harvesters Association¹⁵⁵ and Capitaines-Propriétaires de la Gaspésie.¹⁵⁶ The BC Seafood Alliance¹⁵⁷, the Fisheries Council of Canada¹⁵⁸ and Jay Walmsley put the emphasis on the sustainability of fisheries by stating:

151 Matt Sullivan, Executive Director, P.E.I. Aquaculture Alliance, [Evidence](#), 5 December 2016.

152 Kristi Miller-Saunders, Head of Molecular Genetics, Pacific Biological Station, DFO, [Evidence](#), 30 November 2016.

153 Elizabeth Hendriks, Vice-President, Freshwater, World Wildlife Fund-Canada, [Evidence](#), 14 November 2016.

154 Marc Allain, Executive Secretary, Canadian Independent Fish Harvesters Federation, [Evidence](#), 14 November 2016.

155 Cape Breton Fish Harvesters Association, Brief, 29 November 2016.

156 Capitaines-Propriétaires de la Gaspésie, Brief, 28 November 2016.

157 BC Seafood Alliance, Brief, November 2016.

158 Fisheries Council of Canada, Brief, 30 November 2016.

the purpose of the *Fisheries Act* should be to provide for the sustainability of Canada's marine and inland fisheries by ensuring that environmental, economic, and social considerations, including the impact on other water resource uses, are systematically taken into account in the management of fisheries, and the conservation of fish and fish habitat. The underlying principles should be ecosystem-based management and sustainable development.¹⁵⁹

The Committee heard from Susanna Fuller that a purpose section would “ensure that current and future policy frameworks are enabled by the Act, including those on desired conservation, social, and economic outcomes.”¹⁶⁰ The Mikisew Cree First Nation and Trevor Taylor both emphasized the need for the Act to “acknowledge respect for Indigenous and treaty rights and provisions of modern land claim agreements, as well as the goal of reconciliation.”¹⁶¹ To take into account Indigenous fishing rights, the First Nations Fisheries Council of British Columbia proposed to the Committee that the Act's purpose section be drafted as follows:

The purpose of the Act is to ensure the protection of fish, fish habitat and fisheries for present and future generations through the protection, conservation, and restoration of fish, fish habitat, and biological diversity, the application of precaution, ecosystem-based management, and achieving reconciliation with Indigenous peoples.¹⁶²

For its part, Manitoba Hydro informed the Committee that the “key to providing meaningful protection for fisheries lies in the clear description of the purpose of the Act, which leads to a fuller integration of fisheries management objectives.”¹⁶³ Gary Swanson, therefore, suggested that the current section 6 merits “increased prominence within the *Fisheries Act*” and should guide all considerations in the determination of harm to fish. For the British Columbia Commercial Fishing Caucus, decision-making must be shared with local fishers, First Nations, and adjacent coastal communities.¹⁶⁴

Elizabeth Hendriks proposed to add a preamble to the Act that, in line with other Canadian statutes such as the *Canadian Environmental Protection Act*, would ensure that fundamental guiding principles are included, such as: evidence-based decision-making, an ecosystem approach, the precautionary principle, transparency and accountability, co-management, and incorporation of Indigenous traditional knowledge.¹⁶⁵ The Committee also heard similar arguments from Trevor Taylor on the importance of adding a preamble

159 Jay Walmsley, Senior Environmental Scientist, Aquatic, Nova Scotia Power, Canadian Electricity Association, [Evidence](#), 5 December 2016.

160 Susanna Fuller, Senior Marine Conservation Coordinator, Ecology Action Centre, [Evidence](#), 21 November 2016.

161 Trevor Taylor, Director of Fisheries Conservation, Oceans North Canada, [Evidence](#), 28 November 2016.

162 First Nations Fisheries Council of British Columbia, Brief, 29 November 2016.

163 Gary Swanson, Senior Environmental Specialist, Manitoba Hydro, [Evidence](#), 30 November 2016.

164 British Columbia Commercial Fishing Caucus, Brief, 30 November 2016.

165 Elizabeth Hendriks, Vice-President, Freshwater, World Wildlife Fund-Canada, [Evidence](#), 14 November 2016.

to the Act. He pointed out to that both the [Oceans Act](#) and the [Species at Risk Act](#) have preambles that offer a statement on the shared premises on which the act is based.¹⁶⁶

Recommendation 29

That the Minister, in the exercise of his or her discretionary power over licencing, may specify conditions of licence respecting and in support of social and economic objectives, in addition to the conservation objectives currently identified.

B. Rebuilding Depleted Fish Stocks

In Fall 2016, the Commissioner of the Environment and Sustainable Development found that for 12 of the 15 major fish stocks that were in the critical zone and required rebuilding plans, DFO had neither plans nor timelines for developing them. The Department accepted the Commissioner's recommendation for DFO to set out:

priorities, targets, and timelines for putting in place Integrated Fisheries Management Plans for all major fish stocks. These should include long-term, specific, measurable objectives, performance reviews, and rebuilding plans for stocks in the critical zone that are still being fished. These plans should also be made publicly accessible.¹⁶⁷

In the opinion of Stephen Sutton, a revised Act should include “purposes for restoring lost or depleted populations and re-establishing fisheries.”¹⁶⁸ Similarly, Oceana Canada recommended to the Committee that the Act be amended to “mandate the rebuilding of fish stocks when they have fallen below healthy levels.”¹⁶⁹ Elizabeth Hendriks argued that quantitative definitions for overfishing and recovery, mandating recovery plans, and rebuilding timelines and targets for overfished and depleted fish stocks are required in the Act to increase political accountability and transparency.¹⁷⁰ In addition, Susanna Fuller proposed that an annual report to Parliament on the progress of rebuilding depleted fish stocks should be mandated.¹⁷¹

Consequently, the Committee recommends:

166 Trevor Taylor, Director of Fisheries Conservation, Oceans North Canada, [Evidence](#), 28 November 2016.

167 Office of the Auditor General of Canada, “[Sustaining Canada’s Major Fish Stocks—Fisheries and Oceans Canada](#),” Report 2 in *2016 Fall Reports of the Commissioner of the Environment and Sustainable Development*.

168 Stephen Sutton, Coordinator of Community Outreach and Engagement, Atlantic Salmon Federation, [Evidence](#), 28 November 2016.

169 Oceana Canada, Brief, 30 November 2016.

170 Elizabeth Hendriks, Vice-President, Freshwater, World Wildlife Fund-Canada, [Evidence](#), 14 November 2016.

171 Susanna Fuller, Senior Marine Conservation Coordinator, Ecology Action Centre, [Evidence](#), 21 November 2016.

Recommendation 30

That any revision to the *Fisheries Act* should include direction for restoration and recovery of fish habitat and stocks.

C. Legal Entrenchment of the Fleet Separation and Owner-Operator Policies

Fleet separation and owner-operator policies for inshore fisheries are in place throughout eastern Canada. They are designed to “ensure that inshore fish harvesters remain independent, and that the benefits of fishing licences flow to the fisher and to Atlantic coastal communities.”¹⁷² The fleet separation policy keeps ownership of fish harvesting and processing sectors separate by preventing processing companies from acquiring the fishing licences of inshore vessels (those measuring less than 19.8 m or 65 ft). The owner-operator policy requires the holders of licences for inshore vessels to be present on the boat during fishing operations.

Graeme Gawn described inshore fishers as natural stewards of the marine environment upon which these fishers depend for their livelihoods.¹⁷³ Inshore fishers inherited their licences from “their great-great-grandfathers” and have developed intimate knowledge about their local environments. Graeme Gawn indicated to the Committee that the well-being and economic sustainability of eastern Canada’s fishing communities depend on the health of marine fish resources and their habitats.

In the view of Marc Allain, support for the economic sustainability of coastal communities and inshore fishers is linked to fish habitat and fisheries productivity protection.¹⁷⁴ Therefore, to ensure the protection of both marine fish habitat and resources and the viability of eastern Canada’s inshore fishing communities, the Canadian Independent Fish Harvesters Federation, Nova Scotia’s Eastern Shore Fisherman’s Protective Association,¹⁷⁵ Gulf Nova Scotia Fleet Planning Board¹⁷⁶, the Prince Edward Island Fishermen’s Association¹⁷⁷, and Quebec’s Regroupement des Pêcheurs Professionnels de la Haute et de la Moyenne Côte-Nord¹⁷⁸ called for the enshrinement of the fleet separation and owner-operator policies within the *Fisheries Act*.

Minister Steve Crocker also expressed his support for the legal entrenchment of the fleet separation and owner-operator policies as well as the DFO policy requiring that a harvester be certified as a level II professional fish harvester in order to receive the

172 DFO, [Policy for Preserving the Independence of the Inshore Fleet in Canada’s Atlantic Fisheries](#).

173 Graeme Gawn, Member of the Board of Directors, Canadian Independent Fish Harvesters Federation, [Evidence](#), 14 November 2016.

174 Marc Allain, Executive Secretary, Canadian Independent Fish Harvesters Federation, [Evidence](#), 14 November 2016.

175 Eastern Shore Fisherman’s Protective Association, Brief, 28 November 2016.

176 Gulf Nova Scotia Fleet Planning Board, Brief, 25 November 2016.

177 Prince Edward Island Fishermen’s Association, Brief, 25 November 2016.

178 Regroupement des Pêcheurs Professionnels de la Haute et de la Moyenne Côte-Nord, Brief, 29 November 2016.

transfer of a core enterprise.¹⁷⁹ Marc Allain added that, without regulations tying policy requirements to the conditions of licence, these policies are subject to workarounds and violations that are difficult to track and enforce.¹⁸⁰

D. Baseline Data Collection

The Committee heard from Nick Lapointe, Canadian Wildlife Federation, that ongoing baseline assessment of fish habitat conditions across Canada is required for evidence-based decision-making and tracking of outcomes of habitat rehabilitation projects.¹⁸¹ Brenda Gaertner insisted on the need for DFO's commitment to environmental monitoring and a robust collection of baseline data in order to assess impacts of the Act on the ground.¹⁸² The 2009 Spring Report of the Commissioner of the Environment and Sustainable Development also indicated that DFO "has limited information on the state of fish habitat across Canada – that is, on fish stocks, the amount and quality of fish habitat, contaminants in fish, and overall water quality," and recommended that DFO "develop habitat indicators to apply in ecosystems with significant human activity."¹⁸³

In the view of Elizabeth Hendriks, the monitoring and reporting requirements of the Act need to be updated to include provisions for citizen monitoring. She indicated that "adequate resourcing must support these provisions so that a range of communities, Indigenous groups, and coastal communities can actively participate in monitoring."¹⁸⁴

Consequently, the Committee recommends:

Recommendation 31

That the Government of Canada address known regulatory gaps to ensure that Fisheries and Oceans Canada, in collaboration with all fisheries stakeholders, is capable of responding to all activities that are harmful to fish or fish habitat and is able to actually determine effect (e.g. ongoing collection of baseline data that allows determination of changes due to activities).

179 Steve Crocker, Minister, Department of Fisheries, Forestry and Agrifoods, Government of Newfoundland and Labrador, [Evidence](#), 28 November 2016.

180 Marc Allain, Executive Secretary, Canadian Independent Fish Harvesters Federation, [Evidence](#), 14 November 2016.

181 Nick Lapointe, Senior Conservation Biologist, Freshwater Ecology, Canadian Wildlife Federation, [Evidence](#), 31 October 2016.

182 Brenda Gaertner, First Nations Fisheries Council of British Columbia, [Evidence](#), 7 December 2016.

183 Office of the Auditor General of Canada, "[Protecting Fish Habitat](#)," Chapter 1 in *2009 Spring Report of the Commissioner of the Environment and Sustainable Development*.

184 Elizabeth Hendriks, Vice-President, Freshwater, World Wildlife Fund-Canada, [Evidence](#), 14 November 2016.

E. Fish Passage and Environmental Flows¹⁸⁵

The Committee was informed by David Browne that, although fish passage provisions in the Act were updated in 2012, they are discretionary and generally not applied. He indicated that, of more than 2,500 dams in Ontario, fewer than 50 have a fishway.¹⁸⁶ The impacts of dams on fish passage were also mentioned in the brief from the City of Maple Ridge, British Columbia. It recommended to the Committee to examine “legislative requirements that can assist with restoration and compensation programs for impacts on historical fisheries from existing or proposed dams and other instream infrastructure.”¹⁸⁷

The Committee also heard from Lina Azeez, Watershed Watch Salmon Society, that flood control infrastructure operations are currently exempt from authorizations under the Act.¹⁸⁸ She indicated that these operations can have negative cumulative impacts on salmon habitat, but that current flood control standards do not consider fish passage or overall ecosystem health. Therefore, Randy Christensen proposed that fish-friendly flood control practices and the protection of environmental flows should become the norm through legislation and DFO authorizations should be required for flood control infrastructure operations.¹⁸⁹

Linda Nowlan told the Committee that environmental flows are a key element in the protection of fish habitat and a renewed Act should provide a “legally binding national flow standard to conserve the quantity, timing, and quality of water flows.”¹⁹⁰ In her view, the Act should define conditions of flow alteration that constitute HADD of fish habitat based on advice from DFO scientists.

F. Net Gain in Fish Habitat

David Browne advocated for a national goal of achieving a net gain in fish habitat allowing experimentation in authorizing, offsetting, and monitoring harm.¹⁹¹ He pointed to habitat banking as a tool for achieving this goal and recommended DFO focus on “achieving a net gain in fish habitat in already impacted watersheds”¹⁹² in order to not only prevent harm to fish habitat but also reverse past harm and restore ecosystems.

185 Environmental flows are defined as the “quantity, timing and quality, only as it is affected by changes in quantity, of water flows required to sustain freshwater and estuarine ecosystems and the human livelihoods and well-being that depend on these ecosystems.” See: Andrew Harwood et al., “[Environmental Flow Needs: Approaches, Successes and Challenges](#),” Summary report, Prepared for the Canadian Council of Ministers of the Environment, Ecofish Research Ltd., 25 July 2014.

186 David Browne, Director of Conservation, Canadian Wildlife Federation, [Evidence](#), 31 October 2016.

187 City of Maple Ridge, Brief, 28 November 2016.

188 Lina Azeez, Project Manager, Watershed Watch Salmon Society, [Evidence](#), 30 November 2016.

189 Randy Christensen, Legal Counsel, Watershed Watch Salmon Society, [Evidence](#), 30 November 2016.

190 Linda Nowlan, Staff Counsel, West Coast Environmental Law, [Evidence](#), 23 November 2016.

191 David Browne, Director of Conservation, Canadian Wildlife Federation, [Evidence](#), 31 October 2016.

192 Canadian Wildlife Federation, Brief, 30 November 2016.

Jay Walmsley also mentioned conservation agreements and third-party offset habitat banks as possible “innovative and modern approaches to offsetting residual project impacts.”¹⁹³ While mentioning that it is still reviewing DFO’s 2016 Interim Fisheries Protection Program’s Guide to Proponent-led Habitat Banking, the Port of Vancouver recommended “maintaining the capability to create and bank habitat and thus contribute to an increase in habitat productivity in advance of any confirmed need for habitat offsetting.”¹⁹⁴

Chief Robert Chamberlin, however, cautioned the Committee regarding habitat banking as follows:

There's this one company – I won't name the name – that was able to develop a marine bank, an area where they restored so many hundred thousand cubic metres of underwater environment. That was their bank, so they could destroy that same amount in our First Nations territory. It made no sense. It would be like tearing down the arena here in Kenora and rebuilding a new one in Toronto as some sort of way to compensate.¹⁹⁵

Chief Robert Chamberlin also stressed that fish habitat mitigation measures should be developed in partnership with impacted First Nations “who hold the title for the lands where the destruction is going to occur.”

Recommendation 32

That Fisheries and Oceans Canada renew its commitment to the “No Net Loss” and “Net Gain” policies with a renewed focus, effort and resources on restoration and enhancement of fish habitat and fish productivity and that the Department allow project proponents flexibility to fulfill this requirement.

G. Provisions Reflecting Land Claim Agreements and Indigenous Constitutional Rights

Trevor Taylor informed the Committee that, while the Act has been amended to reflect some land claim agreements in British Columbia, it was not yet modified to refer to many other modern agreements such as the *Nunavut Land Claims Agreement*.¹⁹⁶ This situation has “required the beneficiaries of this agreement and others to resort to litigation to establish that the minister’s broad discretionary powers are in fact limited by the terms of *Nunavut Agreement* and other land claim agreements.” Raymond Andrews, Nunavut Wildlife Management Board, pointed out that fishing in Nunavut waters is still

193 Jay Walmsley, Senior Environmental Scientist, Aquatic, Nova Scotia Power, Canadian Electricity Association, [Evidence](#), 5 December 2016.

194 Port of Vancouver, Brief, 30 November 2016.

195 Chief Robert Chamberlin, Vice-President, Union of British Columbia Indian Chiefs, [Evidence](#), 21 November 2016.

196 Trevor Taylor, Director of Fisheries Conservation, Oceans North Canada, [Evidence](#), 28 November 2016.

governed by the Northwest Territories' regulations due to the lack of Nunavut-specific regulations in the current Act.¹⁹⁷

In the view of Nunavut Tunngavik Incorporated, the lack of Nunavut Fishing Regulations “more than 23 years after the conclusion of the *Nunavut Agreement* is an ongoing blot on its implementation” and such regulations “could make a significant contribution to ongoing reconciliation and mutual benefit, as well as practical advantages in the form of a better regulated, more efficient, and more dynamic fishing industry in Nunavut.”¹⁹⁸

The Yukon Fish and Wildlife Management Board and Yukon Salmon Sub-Committee also reminded the Committee that the lack of explicit reference and acknowledgement in the Act of the *Yukon First Nation Final Agreement* should be addressed.¹⁹⁹

In addition, the Federation of Sovereign Indigenous Nations called for the establishment of an Indigenous Constitutional Rights Compliance Office to ensure that the Act's decision-making processes respect Indigenous constitutional rights and fully engage Indigenous interests.²⁰⁰

CONCLUSION

In the Committee's view, healthy fish habitat is critical for the vitality of fish populations, and by extension, for sustainable fisheries. To ensure the protection of Canadian fisheries for future generations, one of the most sensible places to start is to protect fish habitat since without healthy fish habitat there are no fisheries.

The Committee takes note of the testimony indicating that fish habitat was declining under previous versions of the Act and continues to decline today. Although the majority of the Committee believes that positive elements were introduced to the *Fisheries Act* in 2012, it stresses that, in light of the testimony received and in the context of environmental change, there is also room to enhance fish and fish habitat protections and fisheries management through the proposed amendments to the Act. In our view, decision-making regarding fish and its habitat and fisheries management must be transparent and guided by legislated principles based on science and Indigenous traditional knowledge.

Beyond assessing the 2012 legislative changes to the Act, the Committee considers that this review also represented a unique opportunity to modernize the Act. In our opinion, the proposed amendments included in this report reflect the values of ecosystem-based management, sustainable development, the precautionary principle and co-management in addressing fish habitat protection and fisheries management.

197 Raymond Andrews, Fisheries Advisor, Nunavut Wildlife Management Board, [Evidence](#), 7 December 2016.

198 Nunavut Tunngavik Incorporated, Brief, 10 November 2016.

199 Yukon Fish and Wildlife Management Board and Yukon Salmon Sub-Committee, Brief, 30 November 2016.

200 Federation of Sovereign Indigenous Nations, Brief, 28 November 2016.

We emphasize that this review was an open, non-partisan and not constricted by foregone conclusions process.

Regarding implementation of future amendments to the Act, the Committee calls on the federal government and DFO to develop appropriately resourced transition provisions, including having an implementation plan fully in place prior to the coming into force of any amendments.²⁰¹

201 Justyna Laurie-Lean, Vice-President, Environment and Regulatory Affairs, Mining Association of Canada, [Evidence](#), 14 November 2016.

LIST OF RECOMMENDATIONS

Recommendation 1

That section 35(1) of the *Fisheries Act* return to its wording as of 29 June 2012 which reads: “No person shall carry on any work, undertaking or activity that results in the harmful alteration or disruption, or the destruction, of fish habitat.” Remove the concept of “serious harm” to fish from the Act. 13

Recommendation 2

That Fisheries and Oceans Canada take an ecosystem approach to protection and restoration of fish habitats so that the entire food web is preserved for fish by:

1. Adopting key sustainability principles;
2. Protecting the ecological integrity of fish habitat; and
3. Protecting key areas of fish habitat. 13

Recommendation 3

Any revision of the *Fisheries Act* should review and refine the previous definition of HADD due to the previous definition’s vulnerability to being applied in an inconsistent manner and the limiting effect it had on government agencies in their management of fisheries and habitats in the interest of fish productivity. 13

Recommendation 4

That Fisheries and Oceans Canada emphasize protection for priority habitats that contribute significantly to fish production within the context of section 6 of the Act. 14

Recommendation 5

That Fisheries and Oceans Canada fund more research dedicated to ecosystem science. 14

Recommendation 6

That protection from harmful alteration or disruption, or the destruction, of fish habitat be extended to all ocean and natural freshwater habitats to ensure healthy biodiversity. 14

Recommendation 7

To protect fish habitat from key activities that can damage habitat, such as destructive fishing practices and cumulative effects of multiple activities. 14

Recommendation 8

That Fisheries and Oceans Canada put sufficient protection provisions into the *Fisheries Act* that act as safeguards for farmers and agriculturalists, and municipalities. 15

Recommendation 9

That Fisheries and Oceans Canada work with the farm community and rural municipalities to provide incentives and expert advice to conserve and enhance fish habitat and populations and utilize the enforcement approach as a last resort..... 15

Recommendation 10

That permitting be expedited to allow for works that involve the restoration of damaged infrastructure and emergency works to protect people and communities. 15

Recommendation 11

That the *Fisheries Act* should include a clear definition of what constitutes fish habitat. 15

Recommendation 12

That Fisheries and Oceans Canada assess and improve communications between fisheries stakeholders and the Department's upper management and decision makers. 16

Recommendation 13

That communication within and between all levels of Fisheries and Oceans Canada be improved. 16

Recommendation 14

That Fisheries and Oceans Canada clearly define the parameters of what is considered a violation of the *Fisheries Act*. 16

Recommendation 15

That Fisheries and Oceans Canada should create a widely representative advisory committee to provide ongoing recommendation regarding the administration and enforcement of the *Fisheries Act*. The advisory committee should include but not be limited to, industry groups, project proponents, agricultural groups, municipal government representatives and commercial, recreational and Indigenous fisheries representatives. 17

Recommendation 16

To broaden the Minister’s mandate to consider long-term conservation and protection of fish and fish habitat when evaluating projects that contravene the *Fisheries Act*. 17

Recommendation 17

That Fisheries and Oceans Canada provide the Committee with a report within two years after the revision to the *Fisheries Act* detailing authorization requests and decisions timelines. 18

Recommendation 18

That any changes to habitat protection in the *Fisheries Act* must be supported by a reduced reliance on project proponent self-assessment. 20

Recommendation 19

That Fisheries and Oceans Canada put in place consistent monitoring requirements for proponents, with clear standards and rationale. 21

Recommendation 20

That Fisheries and Oceans Canada make investments into a public and accessible database system that will identify:

- 1. The location and status of projects that have been flagged by the Department of having a potential to cause harm to fish and fish habitat (authorizations, monitoring results and convictions) and their cumulative effects;**
- 2. The location of different aquatic species;**
- 3. Up-to-date monitoring of aquatic species at risk and their status; and**

4. The status of authorizations	22
Recommendation 21	
That Fisheries and Oceans Canada ensure that significant investments are made in hiring more field personnel to improve fish habitat enforcement, to assist in fisheries enhancement projects and to establish positive consultative relationships with local communities.	24
Recommendation 22	
That Fisheries and Oceans Canada meaningfully resource the monitoring, compliance and enforcement components of the Department.....	24
Recommendation 23	
That Fisheries and Oceans Canada increase enforcement staff on the ground by recruiting and retaining habitat monitors, including fishery officers who are dedicated to habitat protection.	24
Recommendation 24	
That Fisheries and Oceans Canada ensure that habitat protection staff are adequately trained and resourced with long-term funding and empower field staff to do their job to protect fish and fish habitat.....	24
Recommendation 25	
That Fisheries and Oceans Canada re-establish the Habitat Protection Branch, adequately resourced to provide advice to proponents of projects that may impact marine and freshwater habitats and to enforce compliance.	24
Recommendation 26	
Re-examine sections 32, 35 and 36 <i>Fisheries Act</i> authorizations as environmental assessment triggers.	25
Recommendation 27	
That Fisheries and Oceans Canada continue to fund fisheries conservation and enhancement projects in co-operation with the Indigenous communities, the agricultural communities, and fisheries conservation organizations.....	28

Recommendation 28

That the exercise of ministerial discretion be subject to transparency principles and public disclosure..... 29

Recommendation 29

That the Minister, in the exercise of his or her discretionary power over licencing, may specify conditions of licence respecting and in support of social and economic objectives, in addition to the conservation objectives currently identified..... 33

Recommendation 30

That any revision to the *Fisheries Act* should include direction for restoration and recovery of fish habitat and stocks. 34

Recommendation 31

That the Government of Canada address known regulatory gaps to ensure that Fisheries and Oceans Canada, in collaboration with all fisheries stakeholders, is capable of responding to all activities that are harmful to fish or fish habitat and is able to actually determine effect (e.g. ongoing collection of baseline data that allows determination of changes due to activities)..... 35

Recommendation 32

That Fisheries and Oceans Canada renew its commitment to the “No Net Loss” and “Net Gain” policies with a renewed focus, effort and resources on restoration and enhancement of fish habitat and fish productivity and that the Department allow project proponents flexibility to fulfill this requirement. 37

APPENDIX A LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
<p>As individuals</p> <p>Brett Favaro, Research Scientist, Fisheries and Marine Institute Memorial University of Newfoundland</p> <p>Martin Olszynski, Assistant Professor Faculty of Law and Affiliated Faculty, Canadian Institute of Resources Law, University of Calgary</p>	2016/10/31	31
<p>Canadian Wildlife Federation</p> <p>David Browne, Director of Conservation</p> <p>Nick Lapointe, Senior Conservation Biologist Freshwater Ecology</p>		
<p>Department of Fisheries and Oceans</p> <p>Dominic LeBlanc, Minister of Fisheries, Oceans and the Canadian Coast Guard</p> <p>Serge Cormier, Parliamentary Secretary to the Minister of Fisheries, Oceans and the Canadian Coast Guard</p> <p>Catherine Blewett, Deputy Minister</p> <p>Philippe Morel, Assistant Deputy Minister Ecosystems and Fisheries Management</p> <p>Kevin Stringer, Associate Deputy Minister</p>	2016/11/02	32
<p>Canadian Independent Fish Harvester's Federation</p> <p>Marc Allain, Executive Secretary</p> <p>Graeme Gawn, Member of the Board of Directors</p>	2016/11/14	33
<p>Lake Ontario Waterkeeper</p> <p>Mark Mattson, President</p> <p>Krystyn Tully, Vice-President</p>		
<p>Mining Association of Canada</p> <p>Justyna Laurie-Lean, Vice-President Environment and Regulatory Affairs</p> <p>Mark Ruthven, Associate Biologist Amec Foster Wheeler</p>		
<p>World Wildlife Fund-Canada</p> <p>Elizabeth Hendriks, Vice-President Freshwater</p>		
<p>Canadian Federation of Agriculture</p> <p>Drew Black, Director of Environment and Science Policy</p> <p>Ron Bonnett, President</p>	2016/11/21	35

Organizations and Individuals	Date	Meeting
<p>Ecology Action Centre Susanna Fuller, Senior Marine Conservation Coordinator</p>	2016/11/21	35
<p>Union of British Columbia Indian Chiefs Chief Robert Chamberlin, Vice-President</p>		
<p>As an individual Otto Langer, Fisheries Biologist</p>	2016/11/23	36
<p>West Coast Environmental Law Linda Nowlan, Staff Counsel</p>		
<p>Atlantic Salmon Federation Charles Cusson, Quebec Program Director Stephen Sutton, Coordinator of Community Outreach and Engagement</p>	2016/11/28	37
<p>Ecojustice Canada Margot Venton, Staff Lawyer and Director of Marine Program</p>		
<p>Government of Newfoundland and Labrador Elizabeth Barlow, Director, Aquaculture Development Department of Fisheries, Forestry and Agrifoods Steve Crocker, Minister, Department of Fisheries, Forestry and Agrifoods</p>		
<p>Manitoba Sustainable Development James Duncan, Director, Wildlife and Fisheries Branch Brian Parker, Senior Fisheries Manager, Wildlife and Fisheries Branch</p>		
<p>Oceans North Canada Trevor Taylor, Director of Fisheries Conservation</p>		
<p>Canadian Association of Petroleum Producers Patrick McDonald, Manager, Oil Sands</p>	2016/11/30	38
<p>Canadian Cattlemen's Association Fawn Jackson, Manager, Environment and Sustainability</p>		
<p>Department of Fisheries and Oceans Kristi Miller-Saunders, Head of Molecular Genetics, Pacific Biological Station</p>		
<p>Manitoba Hydro Gary Swanson, Senior Environmental Specialist</p>		
<p>Watershed Watch Salmon Society Lina Azeez, Project Manager Randy Christensen, Legal counsel</p>		

Organizations and Individuals	Date	Meeting
<p>Canadian Electricity Association Francis Bradley, Chief Operating Officer Jay Walmsley, Senior Environmental Scientist, Aquatic, Nova Scotia Power</p>	2016/12/05	39
<p>Canadian Energy Pipeline Association ChrisJ. Bloomer, President and Chief Executive Officer</p>		
<p>Canadian Hydropower Association Dan Gibson, Senior Environmental Specialist Jacob Irving, President</p>		
<p>Forest Products Association of Canada Kate Lindsay, Director, Environmental Regulations and Conservation Biology</p>		
<p>P.E.I. Aquaculture Alliance Matt Sullivan, Executive Director</p>		
<p>As an individual DavidW. Schindler, Killam Memorial Professor Emeritus University of Alberta</p>	2016/12/07	40
<p>First Nations Fisheries Council Brenda Gaertner</p>		
<p>Nunavut Wildlife Management Board Raymond Andrews, Fisheries Advisor Michael d'Eça, Legal Counsel</p>		
<p>Pacific Streamkeepers Federation Zo Ann Morten, Executive Director</p>		
<p>Prospectors and Developers Association of Canada Matthew Pickard, Member, Vice President, Environmental and Sustainability, Sabina Gold and Silver Corp. Lesley Williams, Senior Manager Aboriginal and Regulatory Affairs</p>		

APPENDIX B LIST OF BRIEFS

Organizations and Individuals

ACAP Humber Arm

Agence Mamu Innu Kaikusseht

Ahousaht First Nation

Alberta Association of Municipal Districts and Counties

Altmann, Alexander

Amson, Victoria

Assembly of Manitoba Chiefs

Assembly of Nova Scotia Mi'kmaq Chiefs

Association des capitaines propriétaires de la Gaspésie

Association des pêcheurs propriétaires des Îles-de-la-Madeleine

Atlantic Salmon Federation

A-Tlegay Fisheries Society

Badger, Austin

Baker, Kelsey

Bassett, Theran

Bay St. George Bird Society

BC Commercial Fishing Caucus

BC Seafood Alliance

Beaton, Susan

Becker, Justin

Biigtigong Nishnaabeg

Boutilier, Dale

Boutilier, Jeffrey

Organizations and Individuals

British Columbia Ministry of Agriculture, Food and Fisheries

Brown, Ian

Brzeski, Veronika

Burke, Jonathan

Cameco Corporation

Campbell River Environmental Committee

Canadian Aquatic Resources Section of the American Fisheries Society

Canadian Association of Forest Owners

Canadian Electricity Association

Canadian Hydropower Association

Canadian Independent Fish Harvester's Federation

Canadian Nuclear Association

Canadian Parks and Wilderness Society - Newfoundland and Labrador Chapter

Canadian Wildlife Federation

Canim Lake Band

Cape Breton Fish Harvesters Association

Cariboo Chilcotin Conservation Society

Cavallin, Alivia

City of Maple Ridge

City of Port Moody

Coastal First Nations Great Bear Initiative

Cold Lake First Nations

Conklin Métis Local 193

Conte, Angelina

Cormier, Roland

Organizations and Individuals

Council of the Innu First Nation of Essipit
Council of the Innu First Nation of Nutashkuan
Council of Yukon First Nations
Cunningham, Arctica
Dalhousie Environmental Law Students' Society
David Suzuki Foundation
De Baie, Ernest
DeLorey, Rebecca
Devauld, Krystal
District of Maple Ridge
Donovan, Darrell
Ducks Unlimited Canada
Eastern Shore Fisherman's Protective Association
Ecojustice Canada
Ecology Action Centre
Ehattesaht First Nation
Environmental Policy Institute
Esk'etemc
Eveco Consultants Ltd.
Fairfax, Mark
Fan, Ming Sam
Federation of Canadian Municipalities
Federation of Ontario Cottagers' Associations
Federation of Sovereign Indigenous Nations
Ferguson, David

Organizations and Individuals

File Hills Qu'Appelle Tribal Council

Fillis, Shannon Marie

First Nation of Na-Cho Nyäk Dun

First Nations Fisheries Council of British Columbia

First Nations of Maa-Nulth Treaty Society

First Nations of Quebec and Labrador Sustainable Development Institute

Fish Food and Allied Workers - Unifor

Fisheries Council of Canada

Fisheries Joint Management Committee

Fishing for Success

Forest Products Association of Canada

Forhan, Tigan

Fort Chipewyan Métis Local No 125

Fort McKay First Nation

Fort McKay Métis Local No 63

Fort McMurray Métis Local No 1935

Forum for Leadership on Water

Fraser Riverkeeper

Fundy Baykeeper

Fundy North Fishermen's Association

Gaetz, Jamie

Georgian Bay Great Lakes Foundation

Girvan, Scott

Gitxaala Nation

Go Western Newfoundland

Organizations and Individuals

Government of Saskatchewan

Government of Yukon

Grand Conseil de la Nation Waban-Aki

Grand Council of the Crees (Eeyou Istchee)

Grand Council of Treaty No 3

Grand Manan Fishermen's Association

Grand Riverkeeper Labrador Inc.

Groundfish Enterprise Allocation Council

Gulf Nova Scotia Bonafide Fishermen's Association

Gulf of Nova Scotia Fleet Planning Board

Gutwillinger, Danielle

GW Solutions Inc.

Gwich'in Renewable Resources Board

Gwich'in Tribal Council

Haisla Nation

Harbour Authority of Ingomar

Harbour Authority of Lower Sandy Point

Heiltsuk Nation

Hesquiaht First Nation

Holman, Dawn

Hopkins, Caitlyn

Humber Natural History Society

Hunting, Fishing and Trapping Coordinating Committee

Imperial Oil Limited

Indian Bay Ecosystem Corporation

Organizations and Individuals

Indian Head Mikmaq Sharing Circle

Inuvialuit Game Council

Inuvialuit Regional Corporation

Island Marine Aquatic Working Group

James Bay Advisory Committee on the Environment

James, Alan C.

Kelligrews Ecological Enhancement Program Inc.

Kemper-Vanosch, Helena

Kitasoo/Xai'xais First Nation

Kitigan Zibi Anishinabeg First Nation

Kitsumkalum Indian Band

Klaue, Rudy

Kluane First Nation

Kozachenko, Chantel

Kwanlin Dün First Nation

LaGrandeur, Emilie

Lake Babine Nation

Lake Ontario Waterkeeper

Lake Winnipeg Indigenous Collective

Langer, Otto

Levy, Randy

Levy, Sue

Listuguj Mi'gmaq Government

Little Salmon Carmacks First Nation

Lower Fraser Fisheries Alliance

Organizations and Individuals

Lower Nicola Indian Band

Luutkudziiwus

MacGillivray, Leah

MacInnes, Lloyd S.

MacPhee, Richard

Makivik Corporation

Malahat First Nation

Maliseet Nation of New Brunswick

Malette, Alphonse

Mandell Pinder LLP Barristers and Solicitors

Manitoba Hydro

Manitoba Metis Federation Inc.

Manolis L Citizen's Response Committee

Maritime Fishermen's Union

May, Elizabeth

Mercy Centre for Ecology and Justice

Métis Nation British Columbia

Métis Nation of Ontario

Metro Vancouver

Mi'gmaq Maliseet Aboriginal Fisheries Management Association

Mikisew Cree First Nation

Mi'kmaq Confederacy of Prince Edward Island

Mining Watch Canada

Mississaugas of the New Credit First Nation

Mohawk Council of Kahnawake

Organizations and Individuals

Mowachaht/Muchalaht First Nations

Musgamagw Dzawada'enuxw Tribal Council

Mushkegowuk Council

Musqueam Indian Band

Naskapi Nation of Kawawachikamach

Nature Canada

Nature Conservancy of Canada

Nature Newfoundland and Labrador

Newfoundland and Labrador Environment Network

Newfoundland and Labrador Environmental Educators

Newfoundland and Labrador Environmental Industry Association

Nicola Tribal Association

Nisga'a Lisims Government

North Saskatchewan Riverkeeper

Northeast Avalon ACAP

Northern Confluence

Nova Scotia Power Inc.

NSLC Adopt A Stream

Nunavut Tunngavik Inc.

Nunavut Water Board

Nunavut Wildlife Management Board

Nuu-chah-nulth Tribal Council

Oceana Canada

Olszynski, Martin

Ontario Federation of Anglers and Hunters

Organizations and Individuals

Ontario Headwaters Institute

Ontario Power Generation Inc.

Ottawa Riverkeeper

Pawluk, Jordan

Port au Port Bay Fishery Committee

Prince Edward Island Fishermen's Association

Quebec Business Council on the Environment

Quidi Vidi/Rennies River Development Foundation

Q'ul-Lhanumutsun Aquatic Resources Society

Regroupement des pêcheurs professionnels de la Haute et Moyenne Côte-Nord

Regroupement des pêcheurs professionnels du sud de la Gaspésie

Reid, Travis

Reist, Addison

Rivershed Society of British Columbia

Rogers, Kasey

Ross River Dena Council

Rowson, Mackenzie

Sackville Rivers Association

Salmon Preservation Association for the Waters of Newfoundland

Salmonid Association of Eastern Newfoundland

Salmonid Council of Newfoundland and Labrador

Saskatchewan Association of Rural Municipalities

Saskatchewan Environmental Society

Saskatchewan Mining Association

Serpa, Justin

Organizations and Individuals

Sherwood, Raymond
Shuswap Nation Tribal Council
Sierra Club of Newfoundland and Labrador
Skeena Fisheries Commission
SkeenaWild Conservation Trust
Soda Creek Indian Band
Southern Chiefs' Organization Inc.
Squamish First Nation
Stewardship Association of Municipalities
Stswecem'c Xgat'tem First Nation
Stuart, Wayne
Sumas First Nation
Suncor Energy Inc.
Ta'an Kwach'an Council
Taykwa Tagamou Nation
Te'mexw Treaty Association
Teslin Tlingit Council
Thunder Bay District Stewardship Council
Tla-o-qui-aht First Nation
Tlicho Government
Tobiasz, Anna
Tr'ondëk Hwëch'in First Nation
Trout Unlimited Canada
Tsai, Anthony
Tsawwassen First Nation

Organizations and Individuals

Tsilhqot'in National Government

Tsleil-Waututh Nation

Turner, Chris

Union of British Columbia Indian Chiefs

Upper Fraser Fisheries Conservation Alliance

Vancouver Fraser Port Authority

Vuntut Gwitchin First Nation

Wabauskang First Nation

Waldie, Matthew

Watershed Watch Salmon Society

Wells, Lindsey

West Coast Environmental Law

Western Environment Centre

Wet'suwet'en

Wildlife Conservation Society of Canada

Williams Lake Indian Band

World Wildlife Fund-Canada

Yuan, Jiachen

Yukon Fish and Wildlife Management Board

Yukon Salmon Sub-Committee

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* ([Meetings N^{os} 31 to 33 and 35 to 41](#)) is tabled.

Respectfully submitted,

Scott Simms
Chair

CONSERVATIVE DISSENTING REPORT: REVIEW OF CHANGES MADE IN 2012 TO THE *FISHERIES ACT*: ENHANCING THE PROTECTION OF FISH AND FISH HABITAT AND THE MANAGEMENT OF CANADIAN FISHERIES

It was agreed on September 19th, 2016, that the Standing Committee on Fisheries and Oceans (the committee), as directed by and through correspondence (dated June 29, 2016) from the Minister of Fisheries, Oceans and the Canadian Coast Guard & the Minister of Transport, review and study the scope of the application of the *Fisheries Act*, and specifically the serious harm to fish prohibition: how the prohibition is implemented to protect fish and fish habitat; the capacity of Fisheries and Oceans Canada to deliver on fish and fish habitat protection through project review, monitoring, and enforcement; the definitions of serious harm to fish and commercial, recreational, and Aboriginal fisheries; the use of regulatory authorities under the Fisheries Act; and other related provisions of the act, and provide its recommendations in a report to the House, no later than Tuesday, February 28th, 2017.

The Conservative Party of Canada accepts the majority of the Standing Committee on Fisheries and Oceans recommendations on the review of changes made in 2012 to the *Fisheries Act*, but there is a significant concern that a direct return to the prior definition of harmful alteration or disruption, or the destruction, of fish habitat (HADD), may result in the same problems that precipitated the need for changes to the *Act* in 2012.

This concern is based largely on Recommendation 1, which states “That Section 35(1) of the *Fisheries Act* return to its wording as of 29 June 2012 which reads: ‘No person shall carry on any work, undertaking or activity that results in the harmful alteration or disruption, or the destruction of fish habitat (HADD).’ Remove the concept of “serious harm” to fish from the Act.”

In 2012, the Government of Canada undertook a rigorous regime of review and revisions to the *Fisheries Act*. This review was commenced for a number of reasons primarily; that the broad scope of the definition of fish habitat included entire watersheds, and extended the reach of the federal government into watershed and land-use planning in which the Department of Fisheries, Oceans and the Canadian Coast Guard (DFO) did not have expertise. Second, there was a lack of discretion for what is “important” fish habitat as it relates to fish productivity, and what is “less important”. This led to difficulties in assessing an appropriate level of regulatory effort that was proportional to the actual “importance”. Further, the lack of knowledge regarding fish populations allowed for all waterbodies to be considered as fish habitat until proven otherwise. Prior to the 2012 changes, the *Act* also duplicated existing provincial approval processes, adding unnecessary regulatory burden.

The pre-2012 definition of HADD, as set out in the *Act* was cumbersome, difficult to enforce, vague, and negatively impacted natural resource development. In addition to hindering economic development and delivering little in terms of fisheries enforcement, reverting back to the pre-2012 definition of HADD as outlined in Recommendation 1 would directly contradict Recommendation 3, which states that “Any revision of the

Fisheries Act should review and refine the previous definition of HADD due to the previous definition's vulnerability to being applied in an inconsistent manner and the limiting effect it had on government agencies in their management of fisheries and habitats in the interest of fish productivity.”

The Conservative Party is disappointed with the Committee's failure to reach a consensus on a clear recommendation for the definition, revision or reinstatement of HADD, in addition to the confusion created by including contradictory recommendations numbered 1 and 3 in the final report.

The *Act* is intended to allow for a framework to ensure sustainable development and expansion of fisheries production across the country. Prior to drafting any legislative changes, and given the contradictory nature of Recommendations 1 and 3, further consultations should take place to ensure that language in the *Act* is not made so vague as to allow it to be used as a means to prevent development that is unrelated to fisheries that do not sustain Canada's commercial, recreational and Indigenous fisheries.

Clearly Stated Purpose

Multiple witnesses testified that the *Act* would be improved by the addition of a clearly stated purpose. Although the testimony is reflected in the section titled “Modernizing the Fisheries Act” of the report, there is no correlating recommendation addressing this issue.

The World Wildlife Fund-Canada said that, “First, unlike other important environmental acts such as the Canadian Environmental Protection Act, the Fisheries Act has no preamble. By including a preamble, we can ensure fundamental guiding principles to the *Act* are included¹.”

This comment was reiterated by Oceans North Canada, who stated “The *Act* no longer has a general statement of objectives or purposes. Neither does it have a preamble to offer a statement of the shared premises on which the *Act* is based. We have already referred to the preamble to the Oceans Act. The Species at Risk Act contains both an extensive preamble and a short and succinct statement of purposes. While we acknowledge that it will be more difficult to draft a statement of purpose for the *Fisheries Act*, we think it is worth the effort, because a statement of purpose serves to highlight the important normative goals that [the] *Act* is aiming to achieve. If an objectives or purposes section seems beyond the remit of the committee, the committee, should at least consider adopting a preamble that sets out the shared premises on which the act is based².”

¹ Elizabeth Hendriks, Vice-President, Freshwater, World Wildlife Fund-Canada, Evidence, 14 November 2016.

² Trevor Taylor, Director of Fisheries Conservation, Oceans North Canada, Evidence, 28 November 2016.

As such, the Conservative Party would like a clearly defined purpose reflected in any future legislation dealing with the *Act*. Additionally, the Conservative Party would recommend that a widely representative advisory committee including, but not limited to, industry groups, project proponents, agricultural groups, municipal government representatives and commercial, recreational and Indigenous fisheries representatives be created in order to provide ongoing recommendations regarding the administration and enforcement of the *Fisheries Act*. An advisory committee of this nature would provide advice to the DFO on conservation mechanisms and protection of fish and fish habitat over the long-term.

Enforcement Impacts:

Under the previous *Act*, no distinction was drawn between the vital waterways, lakes and rivers that support Canada's fisheries and bodies of water that may not support fish populations. While Recommendation 8 does make mention of special conditions for farming operations and municipal infrastructure, the Conservative Party recognizes the importance of these measures, and would like to see them included in any future legislative changes. It is also pertinent to note that a return to the pre-2012 definition of HADD would unduly target and create hardships for agricultural and rural communities.

As indicated by Fawn Jackson of the Canadian Cattlemen's Association, many cattle producers found [pre-2012] HADD authorizations to be long and administratively burdensome. The Canadian Federation of Agriculture agreed, stating that "lengthy bureaucratic applications for permitting and authorizations [and the 2012 changes] drastically improved the timeliness and cost of conducting regular maintenance and improvement activities to their farms³."

Margot Venton, Staff Lawyer and Director of Marine Programs for Ecojustice Canada said the following, "...We were very clear that we don't propose reverting to the HADD prohibition...I would agree with you that there are huge problems with inconsistencies under the previous HADD regime, in part because of the very broad discretion under that section 35(2) authorization power. It wasn't guided by any regulatory provisions⁴."

The Conservative Party is also concerned that a return to the pre-2012 definition of HADD will shift focus away from ongoing productivity of Canada's commercial, recreational and Indigenous fisheries. This is in line with previous Department of Fisheries and Oceans policy, outlined in a 1986 policy documents on fish habitat stating "the policy applies to those habitats directly or indirectly supporting those fish stocks or populations that sustain commercial, recreation or [Indigenous] fishing activities of benefit to Canadians. In addition, Fisheries and Oceans recognizes its responsibility to protect and increase fish stocks and their habitats that have either a demonstrated potential themselves to sustain fishing activities, or a demonstrated ecological support function for the fisheries resources. In accordance with this philosophy, the policy will

³ Ron Bennet, President, Canadian Federation of Agriculture, Evidence, 21 November 2016.

⁴ Margot Venton, Staff Lawyer and Director of Marine Programs, Ecojustice Canada, Evidence, 28 November 2016.

not necessarily be applied to all places where fish are found in Canada, but it will be applied as required in support of fisheries resource conservation⁵.”

Any legislative changes should take into consideration this longstanding policy, and not shift away from the fact that policy must focus on fish stocks or populations that sustain or could sustain commercial, recreational or Indigenous fishing activities that are of benefit to Canadians.

Impact on Economic Growth:

In line with witness testimony, the Conservative Party is concerned that a return to the vague language of the pre-2012 definition of HADD will be utilized as a means for project opponents to prevent much needed development projects from moving forward, despite having already gone through the regulatory process. Under the previous definition, almost all areas of the country could be considered fish habitat, and it can therefore be argued that any project may result in the harmful alteration or disruption, or destruction, of fish habitat.

Zo Ann Morten of the Streamkeepers Federation had this to say when testifying before the committee, “It depends on what the function of the water was prior to man taking account. If it’s a dug-out, it’s not attached to anything, and it’s just full of water, of course that wouldn’t be anything to do with the *Fisheries Act*. But if you’ve actually channelled a functioning stream and turned it into an irrigation ditch or a drainage ditch, that would of course need to be covered under the *Fisheries Act*. Think of a man-made end of things as well. I’d have to say “person-made,” because I actually made a fish-bearing stream, and yes, I would like it to have the protection of the *Fisheries Act*. We changed a leachate ditch in the District of North Vancouver from a drainage ditch that took the leachate to Lynn Creek to a fish-bearing stream, and I would like to have that under protection. That was the intent of it. Moreover, Recommendation 20 in the report calls for a Public Registry of authorizations for projects and this could be used by project opponents to undertake acts in opposition to development projects. Any changes to the *Act* must ensure that such a registry does not pose a threat to the safety, security or privacy of project proponents, contractors, employees and / or work sites⁶.”

Chris Bloomer, President and CEO of the Canadian Energy Pipeline Association testified before the committee, stating “The concerns expressed by various groups regarding 2012 changes to the *Act* tend to focus on the fact that fewer authorizations are required under the revised legislation. While fewer authorizations are required, the effort that the pipeline companies must invest to determine whether to apply for an authorization under the *Fisheries Act* has not changed. This is because the *Act* still requires the protection of commercial, recreational, and [Indigenous] fisheries. The practical measures that pipeline companies used before the 2012 definition changes under the *Act* are the very same measures that have continued to be used after 2012 to avoid serious harm to fish. The changes in 2012 also allowed for project proponents to

⁵ Fish Habitat Management Branch, 1986.

⁶ Zo Ann Morten, Executive Director, The Pacific Streamkeepers Federation, Evidence, 07 December 2016.

engage a qualified environmental professional to prepare a self-assessment for a project and identify appropriate mitigation methods to address any potential impacts. This has been a positive change, because it has allowed professionals with knowledge and expertise of aquatic habitat, pipeline construction, and operations to apply best practices to meet regulatory requirements⁷.”

Contrary to the Minister of Fisheries, Oceans and the Canadian Coast Guard’s correspondence to the committee dated June 29th, 2016 whereby the Minister directed the committee to undertake a study investigating the 2012 changes to the Fisheries Act and any resulting loss of protections, witnesses who appeared before the committee were unable to provide any scientific or legal proof of harm resulting from asserted lost protections under the *Act* as a result of 2012 changes. This fact is noted in paragraph 33 of the committee report, which states “The preceding paragraphs in this section indicate the differing testimony heard with no scientific or legal evidence provided to show whether the 2012 changes broadened or reduced the circumstances under which section 35 applies.”

In some cases, witnesses like the Mining Association of Canada expressed that the 2012 changes to the *Act* actually increased habitat protections. They said, “... the 2012 changes have in practice broadened the circumstances in which the section 35 prohibitions apply and increased the circumstances in which an authorization and offsets are required.”

The CFA also added that, “...It is the CFA’s position that a complete revert to reinstate all provisions of the *Fisheries Act* as they were would be unproductive [and] re-establish the same problems for farmers, and... provide little improvement [in conservation]⁸.”

Dan Gibson of the Canadian Hydropower Association (CHA) provided testimony expressing that, “we have experienced more regulatory interaction with DFO around *Fisheries Act* authorizations. Requests for reviews are the big ones, so in this feel out process, in the first few years of the implementation, we’ve had 30 *Fisheries Act* requests for reviews. We are getting the same outcomes that we would have had over the four to six months previous to 2012, but we’re seeing those same outcomes in about four to six weeks now, the same levels of protection, the same levels of security⁹.”

Given the numerous witnesses and lengthy testimony affirming that there has been no proof of harm as a result of changes to the 2012 *Act*, the Conservative Party believes that a return to the pre-2012 definition of HADD would result in unnecessary delays for projects essential to Canada’s economic development.

⁷ Chris Bloomer, President and Chief Executive Officer, Canadian Pipeline Association, Evidence, 05 December 16.

⁸ Ron Bennet, President, Canadian Federation of Agriculture, Evidence, 21 November 2016.

⁹ Dan Gibson, Senior Environmental Specialist, Canadian Hydropower Association, Evidence, 05 December 2016.

Timelines

Undertaking a study of this nature requires flexible timelines so all participants have a chance to voice their opinions. The Conservative Party repeatedly sought extensions on the timeline mandated by the Minister of Fisheries, Oceans and the Canadian Coast Guard, citing the gravity and breadth of the work requested.

Unfortunately, these requests were voted down.

The First Nations Fisheries Council of BC wrote to the committee, expressing that the “timelines for this process are no longer realistic given the delay in administrative roll-out of funding agreements and the current lack of key information from government that First Nations require in order to meaningfully participate in this review¹⁰.”

Similar concerns were echoed by the Lower Fraser Fisheries Alliance in a letter dated November 3rd, 2016, stating that timelines were “...inadequate, unacceptable, and disrespectful to First Nations and demonstrates the lack of integrity in the federal review process¹¹.”

These are just a few examples of those who requested the committee take more time to study changes made to the *Act*, in addition to testimony heard by the committee. The Conservative Party is disappointed that the Liberal majority on the committee did not adhere to these requests.

Public Consultations

An October 18, 2016 news release from Minister LeBlanc's office made the commitment that public input collected in the Government's public consultation on the Fisheries Act would be provided to the Committee and that the “...Committee will consider all feedback as part of its recommendations for changes to the Fisheries Act.”

This commitment was not coordinated with the Committee nor was the Committee notified of the commitment and this was confirmed by Minister LeBlanc when he appeared at the Committee on November 2, 2016.

A similar commitment was made, unbeknownst to the Committee, by the Government online when it said “Fisheries and Oceans Canada and Transport Canada representatives will also be available to consult directly with Indigenous groups, to seek their views to inform the Committees' work.” No such views were delivered to the Committee by DFO personnel.

¹⁰ First Nations Fisheries Council, Brief, 17 October 2016.

¹¹ Lower Fraser Fisheries Alliance, Brief, 03 November 2016.

In the end, many consultation submissions were not delivered to Members of the Committee in time to be considered for the Committee's report and recommendations therein when consideration of the draft report started on February 2, 2017.

CONCLUSION

The Conservative Party believes that there will be significant implications across Canada should the Government choose to return to the pre-2012 definition of HADD. The contradictory nature of Recommendation 1 and Recommendation 3 will serve only to create confusion for DFO officials, and does not accurately reflect witness testimony heard by the committee. Any legislative 'fixes' should take into consideration the broader effects that changes to the *Act* will have on the Canadian economy, resource development, agricultural, farming and rural communities, in addition to commercial, recreational and Indigenous fisheries.

As referenced in this document, it is the hope of the Conservative Party that the Government will note the testimony of numerous witnesses who indicated that there has been no proof of harm resulting from asserted lost protections under the *Act*. The goal of the *Act* is, and should remain to protect and enhance Canada's fish stocks, while avoiding any unnecessary negative economic impacts on industries that rely on Canadian land and water for success

DISSENTING OPINION FROM THE NEW DEMOCRATIC PARTY

The New Democratic Party of Canada respectfully submits the following dissenting opinion to the Standing Committee on Fisheries and Oceans' Review of Changes made in 2012 to the Fisheries Act and the Management of Canadian Fisheries.

It is our opinion that the restoration of HADD (Harmful Alteration, Disruption & Destruction) should have been implemented immediately following the last Federal Election. Once habitat protections were restored to the Act, a thorough review and consultation to further improve and modernize the Fisheries Act could have been undertaken.

While we respect the hard work of the Committee, we believe that there was insufficient time allotted to complete a thorough study. This abbreviated timeline prevented some written evidence to be translated and received by Committee members in a timely matter. We think this is an unfortunate circumstance that could have been easily remedied by allotting the proper amount of time necessary for a thorough review.

The Committee heard from a number of witnesses in a variety of formats but many Canadians and First Nations were excluded from presenting testimony in person. The Committee did not travel to coastal and freshwater communities and as a result did not fully engage Canadians in this important process.

It was clear from the beginning of this study that the letter to the Committee from the Fisheries Minister combined with a public press release and website launch by the Department of Fisheries and Oceans announcing consultations on the review of the Fisheries Act caused confusion amongst Committee members and the public as to the perceived scope of the study. This confusion remained evident throughout the Review.

It is our opinion that the final version of the report should include a reference to the huge outcry by those opposed to the 2012 changes to the Fisheries Act that removed the harmful alteration, disruption or destruction of fish habitat (HADD). Specifically, four former Federal Fisheries Ministers wrote an open letter objecting to the 2012 changes and more than 700 scientists wrote a letter urging the government to keep habitat in the Act. Thousands of First Nations, environmental organizations and concerned citizens also spoke out against these changes. This is significant and should be mentioned in the report.

Finally, the report should reference the only court case that considered the 2012 Section 35 amendment. The Federal Court said this provision **removed the protection of fish habitat**. We believe this judicial interpretation from judges, the ultimate legal experts, on the meaning of the 2012 amendments and its reference to Aboriginal Rights are significant and should be included in the report. The New Democratic Party of Canada supports evidence provided to the committee by West Coast Environmental Law in their written brief entitled: Habitat 2.0.

It says: *It appears that the sole case commenting on this provision is Courtoreille v. Canada 36, the Mikisew Cree First Nation's successful judicial review action challenging the inadequate consultation with First Nations on Bill C-38 which amended the Fisheries Act, among other matters, and substantially affected Aboriginal rights. The Federal Court pronounced on the Act as follows: [91] Hence the amendments to the Fisheries Act removed the protection to fish habitat from section 35(1) of that Act. The Applicant submitted that this amendment shifted the focus from fish habitat protection to fisheries protection which offers substantially less protection to fish habitat and the term "serious harm" permits the disruption and non-permanent alteration of habitat. [101] ... In addition, for the reasons the Applicant expressed above, the amendment to s. 35(1) of the Fisheries Act clearly increases the risk of harm to fish. These are matters in respect of which notice should have been given to the Misikew together with a reasonable opportunity to make submissions.*

Based on evidence provided to the Committee, the New Democratic Party of Canada believes the following recommendations should be included in the Report, and ultimately incorporated into the Fisheries Act, in order to fully modernize the Act:

1. **Purpose Statement & Preamble** – Insert a General statement of objectives or purposes of the Fisheries Act and a preamble. Similar to the Oceans Act or The Species at Risk Act, both have an extensive preamble and short and succinct statement of purposes. This should include: ecosystem management, a precautionary approach, and science-based management.
2. **Amended s.35.** (1) that would prohibit any “work, undertaking or activity that results in harmful alteration or disruption, or the destruction of fish habitat.” Restore the former HADD and strengthen protection by including the word “activity.” Remove the concept of ‘serious harm to fish’ from the Act, and reinstate the prohibition on HADD.
3. **Restore Environmental Assessment triggers:**
Re-establish Section 32, 35 and 36 authorizations as EA triggers
4. **Prioritize the Protection of Fish and Fish Habitat**
 - Renew DFO’s commitment to “No Net Loss” and “Net Gain”, with a renewed focus, effort and resources on enhancement of fish habitat;
 - Meaningfully resource the monitoring, compliance and enforcement components of DFO, and expand such activities through agreements and collaboration with First Nations;
 - Address known regulatory gaps promptly to ensure that DFO, in collaboration with First Nations, are capable of responding to all activities that are harmful to fish or fish habitat and are able to actually determine effects (e.g. ongoing collection of baseline data that allows determination of changes due to activities);
 - DFO must take the lead on both the protection of habitat and the restoration of habitat;

- Remove the promotion of salmon farming as an industry and farmed salmon as a product from the DFO's mandate;
- Protect fish habitat from key *Activities* that can damage habitat, such as destructive fishing practices and cumulative effects of multiple activities;
- Mandate rebuilding fish stocks when they have fallen below healthy levels;
- Mandate a report annually to Parliament on the status of Canada's fish stocks and on management decisions made for stocks in the critical zone;

5. **Emphasize principles of sustainability**

- Adopt key sustainability principles;
- Protect ecological integrity of fish habitat;
- Respect Indigenous laws regarding sustainability;
- Take an ecosystem approach to protection and restoration of fish habitats so that the entire food web is preserved for fish;
- Protect fish habitat from key threats, such as a changing climate;
- Protect key areas of fish habitat activities.

6. **Advance the “Nation-to-Nation” Relationship with First Nations**

- Recognition of Indigenous rights in the *Act*;
- Move beyond “delegation” to work with First Nations as partners in fisheries management;
- Recognize First Nations right to all forms of commercial trade/barter opportunities;
- Include guiding principles of reconciliation that allow for and promote consent-based shared decision-making processes (e.g. co-management/co-governance) with First Nations and that have the flexibility to reconcile pre-existing sovereignty and First Nations' jurisdictional authority;
- Expand factors considered in decision-making to include principles of sustainability (including ecological integrity and cultural sustainability), Indigenous law, protection of inherent Aboriginal rights, and the principles found in the *United Nations Declaration of the Rights of Indigenous Peoples*;
- Ensure meaningful consultation, accommodation and a consent-seeking process with First Nations to build new regulations;

7. **Reduce discretionary power and expand scope of Ministerial Consideration**

- Reduce Ministerial discretion through establishment of shared decision-making;
- Broaden the Minister's mandate to consider long-term conservation and protection of fish and fish habitat when evaluating projects that contravene the Fisheries Act;
- Limit the discretionary nature of the Ministerial Authorization and ensure that the remaining discretion is not structured in a way that infringes Aboriginal rights.

8. Increase on the ground resources to enforce the Fisheries Act

- Get more boots on the ground by recruiting and retaining habitat monitors, including Fishery officers who are dedicated to habitat protection and who have the power to make orders or charge people with non-compliance on site (such as with the Inspectors Direction).
- Ensure habitat protection staff are adequately trained and resourced with long-term funding. Empower field staff to do their job to protect fish and fish habitat.

9. General Regulation Changes

- The Minister, in the exercise of their discretionary power over licencing, may specify conditions of licence respecting and in support of social and economic objectives, in addition to the conservation objectives currently identified.
- Regulatory provisions should be promulgated, either in the Fisheries General Regulations or a separate instrument, setting out the Owner-Operator and Fleet-Separation policies in regulatory form, and specifying criteria for application of these measures to particular fisheries.
- Regulatory change to state that the legal interest of the holder of a fishing licence and the related beneficial interest of the fishing licence are inseparable.