SUBMISSION FROM
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IN THE MATTER OF:
Review of Changes to the Fisheries Act

SUBMITTED TO:
Standing Committee on Fisheries and Oceans
% Thomas Bigelow, Clerk of the Committee
Via email: Thomas.Bigelow@parl.gc.ca

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Introduction

People in Canada are more likely than any other nation to say that they value water and nature.[1] And yet, Canada has been ranked lower than most developed nations when it comes to key environmental protection.[2]

It was not always this way. Canada's environmental descent is a relatively new phenomenon.[3] It can be attributed to a decade of deregulation and failure by government to commit to goals that reflect peoples' need and desire for swimmable, drinkable, fishable water.

The Government of Canada's review of the *Fisheries Act* (the "*Act*"), *Navigation Protection Act, Canadian Environmental Assessment Act, 2012,* and the National Energy Board is a chance to put Canada on the right side of history. This is the time to realign federal law and policy with values shared by people all across this country, so that communities can prosper.

The information in this brief comes from individuals and organizations with experience working with communities protecting Canadian waters. They have assisted sport, aboriginal, and small-scale commercial fishers. They have worked to protect fish habitat. They have worked to restore fish habitat. And they have worked to prevent or eliminate surface water pollution. The organizations have investigated offences under the *Act,* supplied information to government investigators and prosecutors, launched successful private prosecutions, and participated in federal environmental assessments triggered by authorizations under the *Act*. The organizations have provided comment during every major change to the *Act* in the last decade, including the omnibus hearings (brief as they were) in 2012.

Every time the law was changed, proponents of the changes argued there would be no impact on fish or fish habitat. They were wrong. As this brief shows, what was once illegal is now legal; what was once prohibited is now permitted.

Harm to fish and fish habitat has occurred since the *Act* was changed dramatically in 2012. But this harm pales in comparison to the harm that will occur as the web of rules that protect fish, habitat, and govern decision-making become increasingly unpredictable and inconsistent across the country.

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[1] David Boyd, *Unnatural Law* (Vancouver: UBC Press, 2003), 4.
[2] Waldie, P. "Canada dead last in ranking for environmental protection." *Globe and Mail*, November 18, 2013, World.
[3] N. Nevitte and M. Kanji, "Explaining Environmental Concern and Action in Canada," *Applied Behavioural Science Review*, Vol.3, No. 1 (1995): 85.

The *Act* and subsequent regulations are so deeply flawed that there is no true federal protection for fish, habitat, or water in Canada.

The organizations offer the following recommendations for addressing problems with the *Act*, so that Canadian communities can thrive. In addition to the recommendations set out below, these submitters recognize and support the submissions of other environmental non-government organizations, including the Great Lakes-St. Lawrence River focused submission authored by Forum for Leadership on Water.

9 Things the New Fisheries Act Must Do To Make Canada Healthy and Prosperous

1) Protect fish habitat

Some of the most devastating changes to the *Act* were the cuts to habitat protection provisions previously found in section 35.

The changes were not rooted in science, traditional knowledge, or even common sense. They fail to recognize that all living things are connected in an ecosystem. They fail to recognize that fish cannot be protected if their habitat, broadly defined, is not protected.

The changes also created problems for implementation and enforcement. Traditionally, the *Act* placed the burden of proof where it belongs: on the proponent. Proponents, who have access to the most information about their own projects, once had to prove their project would *not* harm fish or fish habitat. Today, third parties, such as government or residents, must prove projects *will* cause harm.

The shifting of the burden is a result of two specific changes to section 35(1). First, the new phrase “serious harm to fish” creates a new test for which activities require authorization. “Serious harm to fish” is now defined in section 2(1) as “the death of fish or any permanent alteration to, or destruction of, fish habitat”. It is problematic because “permanent” alteration could be very difficult to prove. Proponents, government, other resource users, and the general public may not agree on what constitutes “permanent” alteration. The burden shifts to people concerned about an activity to prove that any alteration to or destruction of fish habitat is “permanent”. Because they usually do not have access to the proponent’s information and

resources, this is often an impossible task. Furthermore, knowing with scientific certainty what activities will result in “permanent” alteration may never be possible, because unpredictable harm may result from cumulative effects of other projects or environmental changes.

Second, in order for the *Act* to protect fish, third parties must now prove that harm will result to “fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.” This test fails to reflect the way fish actually interact with their environment over time. It assumes that there is scientific certainty about which fish support which fisheries. It assumes that the relationship between fish and fisheries never changes. It assumes that fisheries themselves never change. None of these things is true.

Furthermore, this language discriminates against communities where habitat is degraded or where fish are threatened. For example, people are working hard to bring fish back to Lake Ontario, where overfishing, pollution, and habitat destruction destroyed a once-thriving fishery. With time, the lake could support a fishery again, but because of current problems, proponents around the lake are not compelled to protect habitat. This creates a vicious cycle: where there are no fisheries of value, no fish will ever be protected; those fisheries will never return.

Fish-bearing waters in pristine, remote parts of the country may also not be adequately protected. Without an active present-day fishery, the *Act* may not apply.

Ultimately, the changes made to the fish habitat provisions in 2012 will ensure that the *Act* fails to protect any fish in Canada.

→ Recommendation: Restore the broad protection for “fish habitat” to the *Fisheries Act*.

→ Recommendation: Maintain support for the Experimental Lakes Area.

2) Simplify the rules against pollution

The pollution prevention provisions in the *Act* once made it Canada’s most important environmental protection law.

Amendments made in 2012 were supposed to bring “clarity” to the *Act*, but the opposite has occurred. Confusion around if and how the pollution prevention prohibitions have changed is one example of how the 2012 changes weakened the

Act's protections for fish and water.

Section 36(3) once clearly protected water from pollution by prohibiting the deposit of deleterious substances into water. Case law on this topic was well-established and its meaning well-understood. Repealing the definition of "fish habitat" in Section 34(1) in 2012 may have altered the definition of "deleterious substance", which contains the same - now undefined - phrase. It is not yet clear what impact this may - or should - have on the interpretation of the *Act* or the established case law.

A second change to the pollution prevention provisions was the addition of sections 36(5.1) and (5.2). Section 36(5.2) allows the Minister (no longer the Governor in Council) to make further regulations authorizing the deposit of deleterious substances. A subsequent regulation transfers responsibility for this section of the *Act* to the Minister of the Environment. A second regulation then transfers responsibility for deleterious substances related to aquaculture, pests, and invasive species *back* to the Minister of Fisheries and Oceans. These regulation-making powers give the Ministers wide berth to permit the deposit of deleterious substances in ways, places, and amounts never possible before.

They are subtle changes, but the potential damage is significant. The *Act* was designed to protect water quality without requiring an itemized list of what substances in what amounts under what conditions could be considered "deleterious". This is the only efficient way to ensure the *Act* remains relevant over time and protects all communities equally. Microplastics, triclosan, certain pesticides, and fire retardants are all examples of substances we know to be deleterious but were invented after the *Act* was written. That was the beauty of the previous *Act*.

Today, there is an ever-growing set of different rules for different industries. Regulations redefine "deleterious" for some sectors, substances, or locations. This means there is no longer a uniform standard that applies equally across Canada. With time, the rules will become even more confusing; the clarity offered by the original deleterious substance test will be lost.

The *Aquaculture Activities Regulations* of 2015, made possible due to the 2012 changes to the *Act*, are one example of a new exemption to the deleterious substance standard. These regulations explicitly authorize the deposit of substances deleterious to wild fish into waters occupied by farmed fish. They do not protect all fish equally. They do not protect wild fish habitat.

Another example of confusing and inconsistent rules results from the equivalency provisions, which allow provinces to exempt themselves from this section of the *Act*. Enormous confusion surrounded Montreal's decision to dump raw sewage into the St. Lawrence River in October 2015. While the regulation governing wastewater effluent precedes the 2012 amendments to the *Act*, the new equivalency provisions made it unclear what, if any, approval was required from the federal government in this case. Montreal was just the first of many potential situations where the rules against depositing deleterious substances - or the process by which such substances may be deposited legally - are unclear, even to regulators.

→ Recommendation: Restore the definition of "fish habitat" to the *Act* to preserve the power of the deleterious substance test.

→ Recommendation: Remove Ministers' powers to exempt sectors or activities from the deleterious substance test.

3) Embrace the precautionary principle

The *Act* should embrace the precautionary principle. When there is uncertainty, decisions should favour the protection of fish and fish habitat.

Fish are part of interconnected ecosystems that we can only partially hope to understand. The consequences of one change or project cannot always be predicted. Emerging issues such as the invention of new contaminants, cumulative effects of multiple projects in one area, climate change, shifting land and water uses, and population growth, make it virtually impossible to predict impacts with any certainty.

For this reason, the principle of precautionary decision-making should be part of the *Act*.

→ Recommendation: Include a provision respecting the precautionary principle in the *Act's* purpose.

4) Ensure Fisheries and Oceans Canada and the federal government remain responsible, accountable

As a result of the changes made in 2012, two aspects of the *Act* create jurisdiction and accountability issues that will ultimately be harmful to fish and Canadian

waters.

Section 4.1 allows provinces to substitute their own approvals in lieu of federal oversight. It represents an abdication of the federal government's constitutional responsibilities. It creates confusion over who is ultimately responsible for ensuring the protection of fish, as was seen in the Montreal sewage dumping example cited above. It allows for a patchwork of rules to be created across Canada, with no guarantee of consistency across the country. This will encourage provinces to compete in a "race to the bottom". It could undermine the federal government's authority to protect the environment because of trade agreements. And it will create inconsistent rules for waters that flow across multiple jurisdictions, such as the Saskatchewan River, Ottawa River, and the Columbia River. Further, this decentralized system of fish protections makes it virtually impossible for the federal government to develop a robust, meaningful body of knowledge regarding the state of Canada's fisheries, fish populations, and regulatory best practices.

The other aspect of the *Act* that undermines consistency and accountability is the provision in section 35(2)(c) that gives new agencies and officials the authority to authorize the destruction of fish or fish habitat independently of the Department of Fisheries and Oceans (DFO). This can shift much of the responsibility for protecting fish to agencies such as the Canadian Nuclear Safety Commission, which lack DFO's expertise or holistic understanding of fish and habitat issues. Please see Appendix A to this submission for a detailed case study of how the 2012 changes to the *Act* enabled authorizations that harm fish and fish habitat at the Darlington Nuclear Generating Station.

The *Act* must affirm the federal government's authority for protecting fish and fish habitat equally, across Canada. Within the federal government, DFO should also not cede responsibility to other departments and agencies.

→ Recommendation: Remove section 35(2)(c) and ensure DFO remains the sole department with the authority to issue authorizations under the *Act*.

5) Give the *Act* the Purpose of protection all fish and fish habitat

In case law, the *Act* was understood to have one fundamental purpose: protect fish and fish habitat in Canada.

Changes have been made to the legislation that shift its purpose, away from protecting fish and fish habitat and towards permitting pollution and habitat

destruction by favoured industries. Rather than one consistent set of rules that create a level playing field for all industries and activities, the *Act* has been changed and regulations made that create different sets of rules for different industries. This gives an unfair advantage to certain sectors and sacrifices environmental protection for some regions of Canada for the benefit of others.

Proponents of the 2012 changes to the *Act* stated numerous times that the law was still intended to protect fish and fish habitat, but that the new system would offer more clarity.

The best way to ensure the *Act* fulfils its promise is to add a Purpose explicitly stating it is intended to protect fish and fish habitat in Canada. This will also offer guidance to courts and enforcement officials interpreting the legislation in the future.

→ Recommendation: Add a Purpose to the *Act* that explicitly protects fish and fish habitat.

6) Eliminate self-regulation

Self-regulation is not an appropriate way to ensure compliance with a quasi-criminal statute.

Self-regulation cannot protect fish and fish habitat:

- It cannot prevent cumulative impacts, or “death by a thousand cuts”
- It does not allow for public participation or take advantage of local knowledge
- It will not catch the truly bad actors causing the greatest harm

The *Act* serves a different purpose from provincial environmental regulation. It is a national statute, enforced in the criminal courts. Penalties include jail time for violations of the law. Furthermore, violations of the law may result in harm to fish that are not observable by the general public. The likelihood is high that bad actors exploiting the self-regulation approach might never be caught. DFO must remain responsible and vigilant when it comes to enforcing the *Act* in order to ensure violators are deterred.

→ Recommendation: Amend the Fisheries Protection Policy Statement and related administrative processes to eliminate the self-regulation processes.

7) Support a strong environmental assessment process

We recognize that there is a federal panel reviewing the Environmental Assessment process and we support efforts to improve that legislation. The *Act* should be part of a federal government culture of environmentally-responsible decision-making, transparency, and public participation.

If authorizations under the *Act* are no longer subject to environmental assessments, then the government must develop a new notice and comment process for making decisions under the *Act*. Without the provisions of the *CEAA*, each decision currently being made violates the principles of fair decision-making in environmental law and possibly represents a failure of the federal government to fulfil its duties under the Canadian Constitution.

8) Empower the civil service to enforce protections

There must be sufficient funding and staffing for enforcement activities. Enforcement officers should report to an independent supervisor, such as the Attorney General, to avoid the influences of regulatory capture.

9) Promote the development of scientific and traditional knowledge

The way forward is not just to patch the *Act* and hope for the best. The goal of the Government of Canada should not be to prevent the deaths of a few more fish or to restore a tiny fraction of the tiny fraction of habitat we have left. The goal should be to become a world leader in the protection of fish and fish habitat.

The way forward is to develop a knowledge base that can inform not only Canadian decisions but decision-making around the world. We should be investing in scientific study, commercial research, and traditional knowledge to become a world leader. Knowledge - not oil, trees, rocks, and water - is the greatest gift we can offer the world.

Committing to sustainability and informed decision-making will drive innovation. That is the foundation for Canada's prosperity.

About the Submitters

Fraser Riverkeeper (FRK) is a non-profit registered charity in Canada, and a licensed member of the international Waterkeeper Alliance. Based in Vancouver, British Columbia, FRK was first incorporated in 2004. FRK's programs bring together law, science, digital media, and culture to empower residents of the Fraser River

watershed and coastal B.C. They provide tools for water literacy and leadership, enabling local citizens to restore polluted places, protect human health, and promote swimmable, fishable, drinkable water.
Contact: Lauren Hornor, Executive Director Lauren@fraserriverkeeper.ca

Fundy Baykeeper, founded in 2003, is a program of the Conservation Council of New Brunswick a registered charity formed in 1969. Fundy Baykeeper serves as the public's eyes and ears on the Bay of Fundy and addresses wide-ranging environmental threats to the Bay and advocates responsible decision making. Working closely with Indigenous Nations, the traditional fishery, tourism operators and coastal residents, Baykeeper strives for a Bay of Fundy that remains ecologically productive and provides for coastal communities for generations to come.
Contact: Matt Abbott, Baykeeper matt.abbott@conservationcouncil.ca

Lake Ontario Waterkeeper/ Swim Drink Fish Canada is a registered charity working for swimmable, drinkable, fishable water. The organization represents 1-million people who care about clean water. It has participated and commented on changes to the *Fisheries Act* and its regulations over the course of the last fifteen years. An estimated $2-billion is being spent on restoration following the organization's work on fish and fish habitat cases. Its president, Mark Mattson, also investigated and/or prosecuted pollution offences under the *Fisheries Act* privately and with governments in Kingston, Hamilton, Deloro, Montreal, Port Granby, Moncton, Toronto, Happy Valley Goose Bay, Sarnia, and Vancouver.
Contact: Mark Mattson, President admin@waterkeeper.ca

North Saskatchewan Riverkeeper is a local waterbody preservation group that aims to be a united voice for the North Saskatchewan River watershed and its community. Through outreach, pollution reporting programs, and the Swim Guide, the Riverkeeper educates the larger community about issues facing the North Saskatchewan River watershed and unites them in restoring its habitat.
Contact: Krystyn Tully, Director krystyn@waterkeeper.ca

Ottawa Riverkeeper is a registered charity, founded in 2001 to protect, promote, and improve the health and future of the Ottawa River and its tributaries. We work collaboratively to inspire action, encourage responsible decision-making, hold polluters accountable, and recommend alternative practices and policies to safeguard our local waterways. ORK is a licensed member of Waterkeeper Alliance, an international grassroots organization founded by Robert F. Kennedy Jr.
Contact: Meredith Brown, Riverkeeper keeper@ottawariverkeeper.ca

APPENDIX A

CASE STUDY

Prepared by: Pippa Feinstein for Lake Ontario Waterkeeper/ Swim Drink Fish Canada
Date: November 18, 2016

In 2012, the federal government passed omnibus budget bills C-38 and C-45 which made an unprecedented series of far-reaching amendments to Canadian environmental legislation. The amendments significantly eroded the scope and effectiveness of the *Canadian Environmental Assessment Act* (CEAA), *Navigable Waters Act*, *Species at Risk Act*, and the *Fisheries Act*. These bills also threatened to reverse decades of hard-won environmental common law precedent, and effectively cancelled 3,000 planned environmental assessments.[1]

In this memorandum I briefly discuss how the 2012 changes to the *Fisheries Act* had a very real and adverse impact on the swimmability, drinkability, and fishability of Lake Ontario. A particularly stark example of this is the recent Darlington Nuclear Generating Station (DNGS) authorization to kill thousands of fish on an annual basis.

Impacts of the DNGS on Lake Ontario's fish and fish habitat

Throughout its operational history, the DNGS has adversely impacted the swimmability, drinkability, and fishability of Lake Ontario. This is primarily due to its once-through cooling water system which sucks lake water into a series of pipes passed around its nuclear generator to cool it down and prevent any accidents due to overheating.

This cooling water system uses a massive amount of lake water: the DNGS' intake pipe would drain an olympic-size swimming pool in 17 seconds. The force of this suction also results in the deaths of thousands of fish, eggs, and larvae and other aquatic biota which are crushed ("impinged") against its intake screens, or else sucked into the pipes ("entrained") if they are small enough to pass through the screens.

According to an expert report commissioned by Waterkeeper in 2012 that reviewed the DNGS' environmental assessment (EA), the rates at which fish were being impinged by the cooling water intake structure appeared to be steadily growing over the years.[2] While impingement rates were at 893 kg in 2006-7, they had leaped to 2300 kg by 2010-11, representing approximately 274,931 individual fish.[3] It

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[1] Mike De Souza, "Harper government scraps 3,000 environmental reviews on pipelines and other projects", The Canadian Press, June 12, 2012. Available at: http://o.canada.com/news/harper-government-kills-3000-environmental-reviews-on-pipelines-and-other-projects.
[2] P.A. Henderson, "Comments on Environmental Studies Relating to the Darlington Nuclear GEnerating Station Refurbishment and COntinued Operation Project", Pisces Conservation Ltd, July 2012, at 8. Available at: https://static1.squarespace.com/static/5266049fe4b08e763cc00c4b/t/533777ffe4b07691c190c018/1396144127695/Appendix1-BiologicalReportHenderson.pdf.
[3] These values come directly from OPG's submission to the DFO for authorization to destroy fish under the *Fisheries Act*.

was unclear whether this was due to an increase in the population of certain species of fish, or whether it was due to the installation of new intake screens that may have allowed more accurate impingement monitoring. If the latter, impingement rates may always have been this high. Entrainment rates also appeared to be increasing (by an astounding 875%) over the years, though available data on these effects was more limited.[4] Waterkeeper also found data to show that the number of species being impinged by the DNGS had increased over a similar time span. While at least eight species were identified in impingement samples in 2007-8, at least 15 were identified in 2010-11.[5]

In addition to the adverse impacts of the cooling water intake system, the DNGS' cooling water emissions also impair local water quality. The DNGS does this by emitting cooling water that has been passed around the reactors directly back into the lake without any treatment. This discharged water contains chemical contaminants such as chlorine, which is used to prevent the buildup of aquatic life in the intake pipes. The discharged water is also released at a significantly higher temperature, having absorbed heat from the nuclear reactor as it passed through the cooling system. Both these chemical and thermal emissions pose dangers to local fish and fish habitat.

The DNGS and the *Fisheries Act*

The *Fisheries Act* has been in effect throughout the time the DNGS has been active. However, the DNGS only received a permit to operate its cooling water system in 2015. Due to the explicitness and clarity of the pre-2012 *Fisheries Act*, it is doubtful whether the DNGS would ever have been authorized to operate its once-through cooling water system as it did. However, given the weaknesses and ambiguities present in the post-2012 Act, an authorization was provided in 2015. The following provides examples of how the authorization was easier to obtain in 2015 than it would have been before 2012.

When Unit 2 of the DNGS was brought online, the Act specified the following:

> ***32.*** *No person shall destroy fish by any means other than fishing except as authorized by the Minister or under regulations made by the Governor in Council under this Act.*

and:

> ***35.*** *(1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.*
>
> *(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.*

On November 25, 2013, changes to the Act replaced sections 32 and 35 of the old Act with the following provision:

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[4] It should be noted that entrainment poses a significant impact on Lake Ontario's health as it picks up not only eggs and larvae which can have as low as a 16% survival rate after being passed through the cooling water system, it also pulls in planktonic plants and invertebrates that form the basis of local food webs and stable ecosystems.

[5] SENES Consultants Limited, "Aquatic Environment Technical Support Document Darlington Nuclear Generating Station Refurbishment and Continued Operation Environmental Assessment", December 2011, at 3-18.

> ***35 (1)*** *No person shall carry 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.*
> *Exception*
> ***(2)*** *A person may carry on a work, undertaking or activity without contravening subsection (1) if*
> ***(a)*** *the work, undertaking or activity is a prescribed work, undertaking or activity, or is carried on in or around prescribed Canadian fisheries waters, and the work, undertaking or activity is carried on in accordance with the prescribed conditions;*
> ***(b)*** *the carrying on of the work, undertaking or activity is authorized by the Minister and the work, undertaking or activity is carried on in accordance with the conditions established by the Minister;*
> ***(c)*** *the carrying on of the work, undertaking or activity is authorized by a prescribed person or entity and the work, undertaking or activity is carried on in accordance with the prescribed conditions;*
> ***(d)*** *the serious harm is produced as a result of doing anything that is authorized, otherwise permitted or required under this Act; or*
> ***(e)*** *the work, undertaking or activity is carried on in accordance with the regulations.*

First, these changes were meant to pave the way for a series of regulations to establish broad exemptions to the application of the Act, allowing certain types of activities, or activities in certain areas, to proceed without examination and authorization from the Department of Fisheries and Oceans. Furthermore, the ability for "prescribed persons" to authorize activities that would harm fish and fish habitat raised concerns that government could delegate this authority to developers or industry.[6]

Second, introducing the word "serious" as a qualifier for allowable harm to fish and fish habitat introduced an unprecedented amount of uncertainty and discretion into this provision of the Act. "Serious" was defined as the "death of fish or any permanent alteration to, or destruction of, fish habitat". (section 2(2) *Fisheries Act*) The Fisheries Protection Policy Statement elaborated on the "serious harm" test, defining it as follows:

1. The death of fish
2. A permanent alteration to fish habitat of a spatial scale, duration or intensity that *limits or diminishes the ability of fish to use* such habitats as spawning grounds, or as nursery, rearing, or food supply areas, or as a migration corridor, or any other area in order to carry out one or more of their life processes
3. The destruction of fish habitat of a spatial scale, duration, or intensity that *fish can no longer rely upon* such habitats for use as spawning grounds, or as nursery, rearing, or food supply areas, or as a migration corridor, or any other area in order to carry out one or more of their life processes.[7]

This test is certainly more demanding that the previous prohibition against destroying fish or "altering, disrupting, or destroying" habitat. The new legal test places the threshold for establishing harm very high: requiring permanent alteration of fish habitat that diminishes species' actual use of their habitat. Such a

[6] Ecojustice, "Legal Backgrounder: *Fisheries Act*", February 2013, at 8. Available at: https://www.ecojustice.ca/wp-content/uploads/2015/03/Ecojustice-Fisheries-Act-Feb-2013.pdf.
[7] Fisheries and Oceans Canada, "Fisheries Protection Policy Statement". Available at: http://www.dfo-mpo.gc.ca/pnw-ppe/pol/index-eng.html.

high and elusive threshold could effectively permit activities that would not have been permissible under the pre-2012 version of the Act.

The Fisheries Protection Policy Statement also states that it is up to the proponent of a project to determine whether a *Fisheries Act* authorization may be necessary for its project. Understandably, a proponent may not want to undergo a self-assessment to determine its potential impacts on fish and fish habitat. If impacts are identified, a proponent also has a vested interest in arguing that the impacts do not meet the "serious harm" threshold, thus keeping costs and complications of its project to a minimum. This then places the onus on interested members of the public to remain vigilant and try to determine independently whether the threshold for a permit has been met - something that is beyond the resources of many members of the public and public interest organizations.

Third, the changes in the Act extended protection to only those species that are part of a "commercial, recreational, or Aboriginal fishery". This limits the protection of species on scientific or ecological grounds. It also introduces another level of uncertainty and discretion into the authorization process, where a particular fish population's relationship to local already-existing fisheries must be established in order for it to warrant protection. The Fisheries Protection Policy Statement confirms that ecological or ecosystem importance is not to be considered in this determination. (s 8.4)

This change is significant in the context of the DNGS. While the facility received a permit to kill 2,200 kg of fish per year, it was found to actually kill 21,537 kg per year: over ten times the permitted amount.[8] In light of this discrepancy, OPG sought to exclude 90% of its fish kills from its *Fisheries Act* permit on the grounds that most of these fish would be round goby and carp, i.e. less economically valuable fish. Permitting this to occur is likely a violation of the current Act, though with the current changes, this may be more difficult to establish. Such an exclusion would not have been permitted under the pre-2012 Act, and would have constituted a significant violation of the legislation, meriting quasi-criminal sanctions.

Finally, it is important to note that simultaneous changes in 2012 to the *CEAA* also prevented there from being a legal requirement to conduct EAs prior to the issuance of *Fisheries Act* authorizations. While certain authorizations for projects under the *Fisheries Act* would have triggered EAs before 2012, the new *CEAA* drastically reduced the number and types of EA trigger. The result has been a noticeable decline in EAs, and a more specific reduction in thorough environmental studies and public participation that had previously been used to determine whether to issue *Fisheries Act* permits.

All of these changes mark a sharp departure from the "no net loss" principle for fish protection under the previous version of the *Fisheries Act*. They are also inconsistent with the precautionary and ecosystem approaches to environmental protection affirmed in Canadian common law.

[8] *Supra* note 3 at 48-55.