



## SCALING UP THE FISHERIES ACT:

Restoring lost protections and incorporating modern safeguards





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## INTRODUCTION

This brief makes preliminary recommendations for achieving the two categories of reform of the federal *Fisheries Act* that the Minister of Fisheries, Oceans and the Canadian Coast Guard (the Minister) was tasked with in his Mandate letter: restoring lost protections and incorporating modern safeguards.<sup>1</sup>

These recommendations will also assist the Minister to achieve other mandate letter commitments, such as on Indigenous rights, strengthened co-management and science-based decision-making.

The conservation community recommends:

1. Restoring habitat protection and prohibitions against the killing of fish as a first, urgent, short-term priority; and
2. Conducting thorough public consultation to modernize the Act to, among other things, reform fishing practices, benefit coastal communities, regulate aquaculture, and protect the marine environment from existing and new pollution sources, in line with scientific principles and international commitments, and in recognition of declining fisheries and diminished marine biodiversity.

We go into each of these recommendations in more detail below.

<sup>1</sup> Rt. Hon. Justin Trudeau, Letter to Mr. Tootoo re: "Minister of Fisheries, Oceans and the Canadian Coast Guard Mandate Letter" (November 2015), online: <http://pm.gc.ca/eng/minister-fisheries-oceans-and-canadian-coast-guard-mandate-letter#sthash.YwOW3COW.dpuf>.

## RECOMMENDATIONS

### 1. Restoring Lost Protections for Habitat and Fish

Fish habitat protection is an internationally agreed-to obligation and a national Canadian priority. The prohibition in the previous version of the federal *Fisheries Act* against the “harmful alteration, disruption or destruction of fish habitat” (HADD) was a much needed legal tool to preserve marine biodiversity and maintain sustainable fisheries. Recent amendments through two budget omnibus bills weakened this protection, “collectively appear[ing] to narrow the Act from protecting fish habitat to protecting fisheries” with the potential to “undermine an ecosystem-based approach to fisheries management,” according to the judicial Commission of Inquiry into the decline of sockeye salmon in the Fraser River.<sup>2</sup>

A recent empirical analysis of Fisheries and Oceans (DFO) authorizations makes the case that the *Fisheries Act* is “an area of law in need of serious reconsideration.”<sup>3</sup> The Royal Society of Canada Expert Panel report on marine biodiversity stated that the *Fisheries Act* is “an insufficient statutory tool to enable Canada to fulfill many obligations to sustain marine biodiversity and requires extensive revision or replacement.”<sup>4</sup>

The need for a modern *Fisheries Act* with comprehensive habitat protection is imperative in an era of declining freshwater and marine fisheries health. Loss of fish habitat has historically been a chief cause in fisheries decline: to take one startling example, in the lower Fraser River watershed, approximately 90% of the fish habitat was lost during the 20th century.<sup>5</sup>

Fisheries declines persist across Canada. “The scientific case for protecting aquatic habitats is as strong as ever, and the justifications for weakening protection do not bear up to reasonable scrutiny.”<sup>6</sup>

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<sup>2</sup> Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River (Canada), and Bruce I. Cohen. *The Uncertain Future of Fraser River Sockeye: The Sockeye Fishery*. 2012. Volume 3, Recommendations, Summary, Process. Chapter 3, at 78 and 81.

<sup>3</sup> Martin Z.P. Olszynski, “From ‘Badly Wrong’ to Worse: An Empirical Analysis of Canada’s New Approach to Fish Habitat Protection Laws” (2015) 28(1) *J. Envy. L & Pac.* (Forthcoming).

<sup>4</sup> VanderZwaag, David L., et al. “Canada’s international and national commitments to sustain marine biodiversity” *Environmental Reviews* 20.4 (2012): 312-352.

<sup>5</sup> C. D. Levings & D. J. H. Nishimura, “Created and restored sedge marshes in the lower Fraser River and estuary: an evaluation of their functioning as fish habitat” (1996) 2126 Canadian Technical Report of Fisheries and Aquatic Sciences.

<sup>6</sup> Favaro, Brett, John D. Reynolds, and Isabelle M. Côté. “Canada’s weakening aquatic protection.” *Science* 337.6091 (2012): 154. Also see Taylor, Eric B. “Changes to Canada’s *Fisheries Act* and what it means for freshwater biodiversity.” Other recent scientific syntheses emphasize the importance of habitat for fish: Lapointe, Nicolas WR, et al. “Principles for ensuring healthy and productive freshwater ecosystems that support sustainable fisheries.” *Environmental Reviews* 22.2 (2013): 110-134. Randall, Robert George, et al. “A science-based interpretation of ongoing productivity of commercial, recreational or Aboriginal fisheries.” *DFO Can. Sci. Advis. Sec. Res. Doc* 112 (2012).

We recommend amending the *Fisheries Act* to:

- a) Restore protection for all native fish and fish that sustain First Nations food, ceremonial and social needs, not just those that are part of or support a fishery.

Limiting the prohibition on habitat destruction to only “fisheries fish” and the fish that support those fish has been widely criticized as arbitrary, inconsistent with an ecosystem-based approach to management and ultimately potentially harmful to the fish the prohibition purports to protect. We recommend restoring habitat protection for all native fish, not just those that are part of or are deemed to support an established fishery.

- b) Return to HADD, but keep “activities”

Instead of HADD, the amended Act prohibits causing “serious harm to fish,” defined as “the death of fish and the permanent alteration or destruction of fish habitat,” which is a lower level of protection than the HADD provision provided. We recommend bringing the HADD prohibition back, but keeping the expansion of the prohibition that was introduced with the changes to include activities. Thus the provision should read: “No person shall carry on any work, undertaking or activity that results in the harmful alteration, disruption or destruction of fish habitat.”

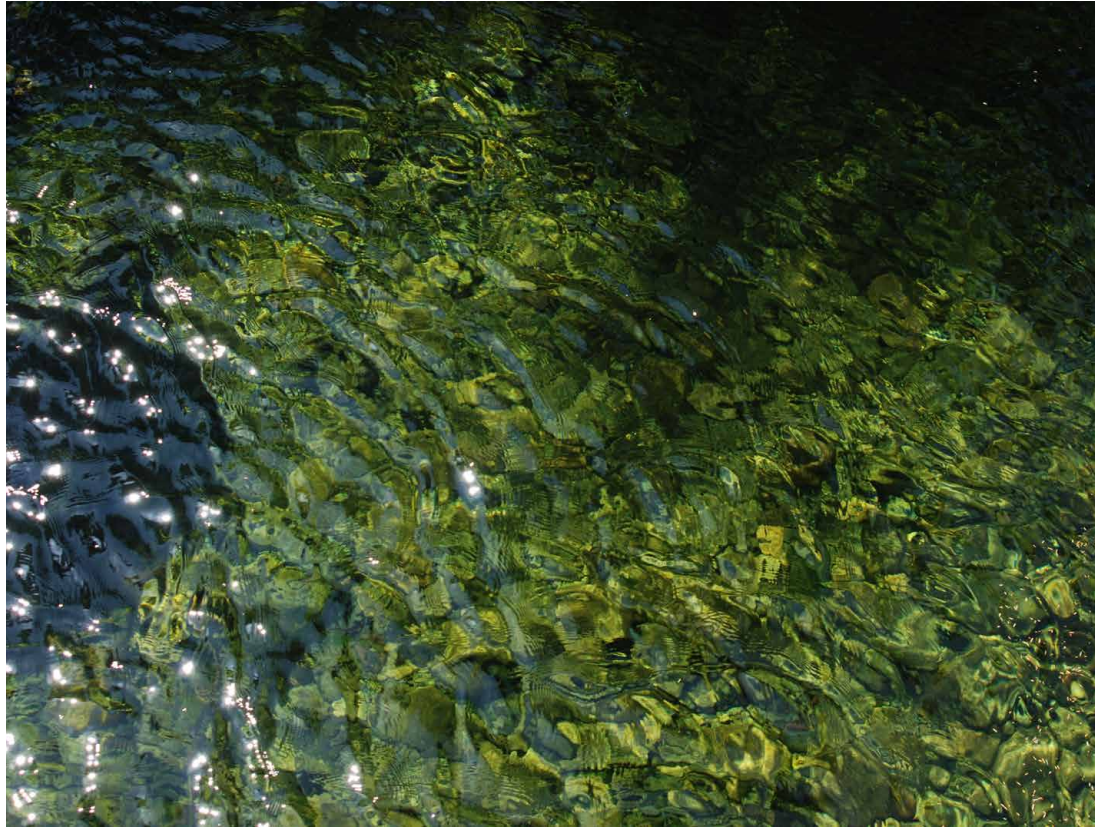
- c) Restore prohibition against destroying fish

The repeal of section 32, the prohibition against the destruction of fish by means other than fishing, has left a gap in the protection of fish. Along with the return to HADD, it is also necessary to restore section 32 as it appeared in the *Fisheries Act* before the passing of Bill C-38. Death of fish (e.g. from turbines in a hydroelectric dam complex) is directly observable and measurable and therefore more enforceable than proving what constitutes “serious harm”. Examples of lost protections when section 32 disappeared include numerous other activities (e.g., blasting near water, diversion of water for farmland irrigation, agriculture and industrial runoff and steam for exploitation in the oil sands).

The suggested improvements for modern safeguards should include prohibitions against activities, such as those listed above, that cause sub-lethal effects (e.g. injury, reduction of fitness) on fish.

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<sup>7</sup> Favaro, op cit. fn 6. And see Hutchings, Jeffrey A., and John R. Post. “Gutting Canada’s *Fisheries Act*: no fishery, no fish habitat protection.” *Fisheries* 38.11 (2013): 497-501; Dr Jeffrey A. Hutchings “Potential consequences of a perceived relaxation of the habitat-protection provisions of the *Fisheries Act*”, Petition 361 to Commissioner of Environment and Sustainable Development, 2014. A. Nikiforuk, “Don’t Gut *Fisheries Act*, Plead 625 Scientists”, 24 March 2011, The Tyee. CBC News, May 1, 2012. “*Fisheries Act* proposal draws fire from ex-Minister.” <http://www.cbc.ca/news/technology/fisheries-act-proposals-draw-fire-from-ex-minister-1.1276271>



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d) Limit the Ministers' regulatory powers

To ensure adequate oversight and the sustainability and health of fish, fish habitat and fisheries, we recommend constraints on Cabinet and the Ministers of Environment and Fisheries and Oceans' broad new powers to exempt works, undertakings, activities, deleterious substances and even water bodies from the section 35 and 36 protections. We recommend that any regulations making such exemptions be required to comply with listed factors that aim to ensure the health and sustainability of fish and fish habitat, such as the guiding principles and purposes noted in section 2(c) below.

e) Strengthen regulatory oversight of minor works and minor waters

Regulations for minor projects and bodies of water could set standards for works and activities that, if followed by proponents, would avoid a HADD finding. This approach would be clear and transparent, provide certainty for proponents, and allow DFO to better fulfill its duties by amassing project and watershed information from proponents.<sup>8</sup> While the power to do so exists, it has not yet been used.

<sup>8</sup> Olszynski, Op cit., fn 2.

- f) Re-establish sections 32, 35 and 36 authorizations as environmental assessment triggers

To ensure that the impacts and cumulative effects of works, undertakings and activities are understood, avoided, offset and/or mitigated, Canada’s environmental assessment legislation should include triggers for an EA when authorization is required under sections 32, 35 or 36 of the *Fisheries Act*.

- g) Restore policy goals of “Net Gain” and “No Net Loss” of habitat

The policy goal in the 1986 *Policy for the Management of Fish Habitat* (1986 Policy) was to ensure a net gain of habitat for Canadian fisheries resources, a goal that was widely lauded though difficult to achieve in practice. The Fisheries Protection Policy Statement, 2013, which replaced the 1986 Policy when the *Fisheries Act* was amended, omits this goal. The concept of no net loss should be restored through policy or amendment to the statute or regulations.



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## 2. Incorporating modern safeguards

Before the amendments to the *Act* in budget omnibus bills adopted in 2012 and 2013, on three occasions over the past decade the federal government attempted to reform the *Fisheries Act*: Bill C-62, “An Act Respecting Fisheries” (1996); Bill C-45, “An Act Respecting the Sustainable Development of Canada’s Seacoast and Inland Fisheries” (2006); and Bill C-32, “An Act Respecting the Sustainable Development of Canada’s Seacoast and Inland Fisheries” (2007). These calls for reform were broadly supported.

We recommend that the government commit to a complete modernization of the *Act*, building on these previous reform efforts.

We recommend amending the *Fisheries Act* as follows:

a) Acknowledge Indigenous rights and the need for reconciliation

A modern *Act* will recognize Indigenous rights. It will conform to the direction from the Prime Minister in all Ministerial mandate letters: “No relationship is more important to me and to Canada than the one with Indigenous peoples. It is time for a renewed, nation-to-nation relationship with Indigenous peoples, based on recognition of rights, respect, co-operation, and partnership.” Further, the Minister’s Cabinet colleagues in Indigenous and Northern Affairs and Justice are committed to review laws, policies, and operational practices to ensure that the Crown is fully executing its consultation and accommodation obligations, in accordance with its constitutional and international human rights obligations, including Aboriginal and Treaty rights.<sup>9</sup>

b) Strengthen provisions for co-management

A modern *Act* will give effect to the direction in the Minister’s mandate letter to: “Work with the provinces, territories, Indigenous Peoples, and other stakeholders to better co-manage our three oceans”.

c) Guide and limit discretion through sustainability guiding principles and purposes

The Minister enjoys an unparalleled degree of discretion under the *Fisheries Act*. Excessive discretion is a systemic weakness which limits the effectiveness of Canadian environmental law, as all too often officials exercise their discretion to the detriment of the environment.<sup>10</sup>

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<sup>9</sup> Rt. Hon. Justin Trudeau, Letter to Ms. Bennett re: “Minister of Indigenous and Northern Affairs Mandate Letter” (November 2015), online: <http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter#sthash.KNofCwH7.dpuf>

<sup>10</sup> Boyd, David Richard. *Unnatural law: rethinking Canadian environmental law and policy*. UBC Press, 2003, at 231- 33 and 293.

We recommend two ways to guide the exercise of discretion under the Act:

*i. Expand guiding principles to include sustainability principles*

Guiding principles should apply to decision makers exercising discretion under the Act. Bills C-38 and C-45 codified four factors that must be considered by the Minister only in certain cases when making a regulation or exercising a power such as an authorization to allow a HADD.<sup>11</sup> We submit this is too narrow, and recommend deleting three of these factors as overly focused on ‘fisheries fish’ and thereby contrary to the intent and spirit of the Act, keeping the public interest factor, and reviving the “application principles” contained in previous attempts at *Fisheries Act* reform, as listed and modified below.

For better decisions that are guided by modern environmental and fisheries management principles, we recommend that all persons engaged in the administration of the proposed Act or its regulations be required to:<sup>12</sup>

- a. take into account the principles of sustainable development , as set out in the Rio Declaration on Environment and Development;<sup>13</sup>
- b. apply an ecosystems approach , as adopted by the Conference of the Parties of the Convention on Biological Diversity,<sup>14</sup> in the management of fisheries and in the conservation and protection of fish and fish habitat;
- c. apply a precautionary approach;<sup>15</sup>
- d. employ a science-based approach to decision-making and take into account the best available science, research, and technical information available;<sup>16</sup>
- e. take into account climate change, when making decisions affecting fish stocks and ecosystem management;<sup>17</sup>
- f. manage fisheries and conserve and protect fish and fish habitat in a manner that is consistent with the constitutional protection provided for existing Aboriginal and treaty rights of the Indigenous peoples of Canada;

<sup>11</sup> S.6. *Fisheries Act*. The factors are: a) the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries; b) fisheries management objectives; c) 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 that support such a fishery; and d) the public interest.

<sup>12</sup> The Fisheries Protection Policy Statement, 2013 contains a set of guiding principles, under 7.4, similar to the binding principles recommended here.

<sup>13</sup> Canada is a signatory to the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, June 3-14, 1992. The principles of sustainable development were set out in the Rio Declaration. While the instrument is not formally binding, the declaration includes provisions which at the time of its adoption were either understood to already reflect customary international law or expected to shape future normative expectations. <http://legal.un.org/avl/ha/dunche/dunche.html>

<sup>14</sup> In 1992 Canada ratified the Convention on Biological Diversity (CBD). In November 1995, the Conference of the Parties adopted the ecosystem approach as the primary framework for action under the Convention. <https://www.cbd.int/ecosystem/about.shtml>

<sup>15</sup> Canada has ratified the United Nations Fish Stocks Agreement, under Articles 5 and 6 of which require the application of the precautionary principle and an ecosystem approach when considering the conservation and management of straddling fish stocks.

<sup>16</sup> Fisheries Protection Policy Statement, 2013

<sup>17</sup> The Minister’s mandate letter directs him to: “Use scientific evidence and the precautionary principle, and take into account climate change, when making decisions affecting fish stocks and ecosystem management.”



- g. consider traditional knowledge;
- h. consider cultural significance to indigenous peoples of Canada, as stipulated under the UN Declaration on the rights of indigenous peoples;<sup>18</sup>
- i. act in cooperation with other governments and bodies under land claims agreements;
- j. encourage the participation of Canadians in the making of decisions that affect the management of fisheries and the conservation or protection of fish or fish habitat; and
- k. consider the public interest.

Many of these principles, such as the precautionary principle and concept of ecosystem-based management, are already included in DFO policies such as the *Policy to Manage the Impacts of Fishing on Sensitive Benthic Areas*, and are required by international obligations.

ii. *Include purposes, such as rebuilding depleted fish stocks and preventing overfishing*

While the omnibus bills added some factors to guide some decision and regulation-making (section 6) and a purpose to those factors (section 6.1), they are limited: for example, section 6.1 only applies solely to section 6 rather than to the entire *Act*, and only to “fisheries fish,” an approach to protection that, as we have noted above, we recommend replacing with protection of all fish.



<sup>18</sup> United Nations Declaration on the rights of indigenous peoples, GA Res. 295, UN GAOR, 61st Sess., UN Doc. A/RES/61/295 (2007) online: <<http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx>> at Arts. 8, 11, 12, 19, 31, 38, and 40. The UNDRIP was adopted by the General Assembly in 2007, endorsed by Canada in 2010, was recently reaffirmed by the Prime Minister in his mandate letter to Minister Bennett. UNDRIP refers to the creation of mechanisms that require consultation with indigenous peoples where government action deprives them, inter alia, of their cultural values, or ability to practise and revitalize their cultural traditions and customs.



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We recommend additional purposes or preambles to assist with interpretation of the *Fisheries Act*. For example, the US *Magnuson Stevens Fishery Conservation and Management Act* has seven purposes, including to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and to promote the protection of essential fish habitat in the review of projects conducted under federal authority.<sup>19</sup> Other federal environmental laws contain useful precedents of purposes or preamble clauses, such as the *Oceans Act*, *Migratory Birds Act* and *Canadian Environmental Assessment Act, 2012*.

d) Make ecological integrity the top priority

Maintenance or restoration of the ecological function of aquatic ecosystems should be the first priority of the Minister when considering all aspects of the management of fisheries. Including such language in the *Act* will provide necessary direction to decision-makers.

e) Protect environmental flows

The *Act* should more explicitly directly protect environmental flows, widely recognized as the 'master variable' for aquatic ecosystem health.<sup>20</sup>

<sup>19</sup> ACT, AN. "Magnuson-Stevens Fishery Conservation and Management Act." *Public Law 94* (1996): 265.

<sup>20</sup> Nowlan, Linda. "CPR for Canadian Rivers - Law to Conserve, Protect, and Restore Environmental Flows in Canada." *Journal of Environmental Law and Practice* 23.3 (2012): 237.

f) Prohibit HADD from fishing practices

Fishing practices still have the greatest impact to marine habitat, according to marine cumulative impact studies.<sup>21</sup> So among the exceptions to the prohibition on harm to habitat, the most troubling is section 35(2) (d), which exempts harm to fish habitat caused by authorized activities, which can include fishing practices. Modifying this section would recognize that fishing practices can and do damage or destroy habitat and these activities should be subject to habitat protections in the Act.

g) Designate essential fish habitat that cannot be destroyed or compensated

Scientists acknowledge that “it is simply not possible to compensate for some habitats.”<sup>22</sup> Accordingly, some essential fish habitat (EFH) areas should not be destroyed or damaged under any circumstances. Two possible ways to address this issue are to enact a new provision to identify and protect EFH, similar to the US legal provision;<sup>23</sup> or use the ‘ecologically significant area’ sections of the Act to designate and protect specific areas as EFH by regulation.



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<sup>21</sup> Ban, Natalie C., Hussein M. Alidina, and Jeff A. Ardron. “Cumulative impact mapping: Advances, relevance and limitations to marine management and conservation, using Canada’s Pacific waters as a case study.” *Marine Policy* 34.5 (2010): 876-886. Murray, Cathryn Clarke, et al. “Advancing marine cumulative effects mapping: An update in Canada’s Pacific waters.” *Marine Policy* 58 (2015): 71-77. Agbayani, Selina, Candace M. Picco, and Hussein M. Alidina. “Cumulative impact of bottom fisheries on benthic habitats: A quantitative spatial assessment in British Columbia, Canada.” *Ocean & Coastal Management* 116 (2015): 423-434.

<sup>22</sup> Quigley, Jason T. and David J. Harper. “Effectiveness of fish habitat compensation in Canada in achieving no net loss.” *Environmental Management* 37.3 (2006): 351-366 at 366.

<sup>23</sup> Section 3 (10) Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1801 et seq.). EFH is defined as “those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity. The law requires Regional Fishery Management Councils (RFMC) to describe and identify EFH by life-stage, evaluate potential adverse impacts to habitat and develop measures to protect EFH, and identify major prey species, among other provisions.

DFO's current policies such as the *Wild Salmon Policy* and the *Policy to Manage the Impacts of Fishing on Sensitive Benthic Areas* can provide guidance for this designation. These policies do not have the force of law. Including a requirement to identify and describe EFH (particular areas that would not be eligible for offsets or habitat compensation) to the extent possible would augment the general duty to protect all fish habitat. The Act should include a requirement for processes for Indigenous groups, fishing organizations and coastal community residents to identify such areas for enhanced protection.



h) Require consideration of cumulative effects to fish and fish habitat

To better understand the cumulative effects of impacts on fish habitat, DFO should be required to consider the cumulative impacts of all works, undertakings and activities with the potential to harm fish habitat when issuing authorizations. To facilitate this, a legal/policy framework should be developed to avoid and mitigate cumulative effects relative to ecosystem-based habitat targets at different geographic scales (e.g., stream, watershed and seabed levels). The Act should require proponents of all projects to notify DFO with basic information such as location, potential effects, cumulative impacts and their significance and proposed mitigation measures, and this information should be included in a public registry.<sup>24</sup> Addressing cumulative effects was also a recommendation from the Cohen Commission.<sup>25</sup>

i) Require habitat monitoring

To assist with the understanding of cumulative impacts, and confirm the accuracy of predicted impacts and effectiveness of mitigation and compensation measures, the *Fisheries Act* should require follow-up monitoring of fish habitat for all section 35 authorizations.<sup>26</sup>

j) Allow for delegation of monitoring and enforcement powers to Indigenous and coastal community groups

Many indigenous communities see Guardian Watchmen and equivalent organizations as critical to their capacity for monitoring and habitat protection. Providing adequate resources for this work is essential.

k) Create a public registry of habitat authorizations, and other key Departmental decisions.

Authorizations, applications, and decisions should be public documents, and available in an easily searchable database. A DFO registry would facilitate public engagement and increase transparency, and accord with the federal government's emphasis on transparent and open government, as set out in all the Ministerial mandate letters: "Government and its information should be open by default."

### 3. Increase enforcement

Fish habitat monitoring and enforcement has been inadequate for a number of years. DFO should be given adequate capacity (bodies and budgets) to monitor and enforce works, undertakings and activities, and provision made for "citizen enforcement" provisions whereby actions may be commenced by ENGOs or concerned community members.

<sup>24</sup> Olszynski, Op cit., fn 2.

<sup>25</sup> The Minister's mandate letter directs him to: "Act on recommendations of the Cohen Commission on restoring sockeye salmon stocks in the Fraser River".

<sup>26</sup> Susanna D. Fuller, "Synthesis of ENGO – DFO Workshop Recommendations from 2006-2009 on the Delivery of Habitat Management Program by Fisheries and Oceans Canada," report for the National Fish Habitat Coordinating Committee (24 September 2010) at 22.

## PUBLIC PARTICIPATION AND THE CONSULTATION PROCESS

Restoring habitat protection should be straightforward. However, a thorough consultation process is needed for a full-scale reform of the *Fisheries Act*.

Inadequate consultation has been a consistent failing of recent efforts to reform the *Fisheries Act*, culminating in a complete lack of public consultation on Bill C-38 in 2012. We commend the government for committing to a higher bar for openness and transparency and a different style of leadership, including constructive dialogue with Canadians, civil society, and stakeholders, including business, organized labour, the broader public sector, and the not-for-profit and charitable sectors, as set out in the Ministerial mandate letters.

We believe that: “Effective collaborative public participation improves the quality and legitimacy of a decision and builds the capacity of all involved to engage in the policy process. It can lead to better results in terms of environmental quality and other social objectives. It also can enhance trust and understanding among parties.”<sup>27</sup>

## CONCLUSION

The *Fisheries Act* is the key federal law for fish habitat protection, one of the key laws for marine biodiversity, and an essential part of Canada’s environmental safety net. We recommend these amendments to improve fish and fish habitat protection throughout Canada. All improvements should be based on science, Indigenous and community knowledge and the precautionary principle, and only occur with the participation of Indigenous peoples, the public and stakeholder groups.

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<sup>27</sup> Thomas Dietz and Paul C. Stern, Eds., Panel on Public Participation in Environmental Assessment and Decision Making, Public Participation in Environmental Assessment and Decision Making, National Research Council, 2008.



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