

BILL C38 AND AMENDMENTS TO THE FISHERIES ACT AND THE NAVIGABLE WATERS PROTECTION ACT

By: Michael S. Hebert, Beament Green

Bill C38, an omnibus Bill of the Harper Government was enacted to much protest from the Environmental Bar and Scientific Environmental Advocates. The Act affected a number of statutes but this paper discusses only changes to the *Fisheries Act* and the *Navigable Waters Protection Act*.

Navigable Waters Protection Act

When the new Act comes into force the Act will be known as the *Navigation Protection Act*. It is uncertain at present when this Act will come into force and for the time being the provisions of the present Act will prevail. The common law provides a right to pass on Navigable Waters which is interfered with only by virtue of a statute.

While the old Act had a generic description of what constituted a Navigable Water, the new legislation will have a schedule with a specific listing of what is and what is not Navigable Waters.

The issue will still remain: does the activity risk interference with navigation?

Whereas the old Act referred to activities taking place in, on, under or across a Navigable Water the new definition will be simpler and simply deals with the risk of interference with navigation. The new Act will also have administrative penalties which are in the works as at the writing of this paper.

The Fisheries Act

Bill C38 amendments to the *Fisheries Act* were much more broad and enacted fundamental changes to the way in which fisheries are regulated.

The most fundamental change that the Act deals with is the concept of the protection of commercial, recreational or aboriginal fisheries, unlike the previous Act which concentrated primarily on the concept of HADD. The new Act concentrates instead on the fishery. There is a shift in emphasis from protection of fish habitat to protection of fisheries. No longer are our fish protected per se if they are not part of a fishery. Difficulty will arise in determining what is or is

not a recreational or aboriginal “fishery”. The concept to replace HADD is “serious harm to fish” which is a new method of following the old section 32 of the *Fisheries Act* and a restatement of the HADD concept. Note however that it is only a permanent alteration of the fish that is caught by the new Act. It is going to be extremely difficult to discriminate between a permanent alteration and a temporary alteration in practice.

The new Act contains a policy statement which will apply in assessing a review of the protection provisions of the new Act.

All applications for permits will be reviewed to determine if the project will result in serious harm to fish and applications for authorization under section 35(2)(b) of the Act will not apply where permits have been issued. The bulk of the Act will be deemed in force on November 25, 2013 and transitional provisions provide that existing authorization under HADD criteria deem to be issued under the new criteria set out in section 34(2) of the new Act. Anyone holding a present permit also has the right to re-apply for revision of that permit under the new criteria.

The new Act provides, as does CEAA for the offence of failure to comply with the conditions in a permit but this provision will be suspended if an application is underway to review an existing permit.

The Act and regulations under it have provisions for dealing with minor works that might have smaller effects on fisheries and two types of applications, “normal” and “emergency” are now prescribed.

The regulatory tools used in the review process in an application under the Act for a permit are much streamlined and deal with prescribed works being undertakings or activities carried out pursuant to prescribed conditions. Works are described as undertakings or activities carried out in prescribed fisheries waters pursuant to prescribed conditions and exemptions exist which may exclude fisheries from sections 20, 21 and 35 of the Act.

Curiously, section 6 of the new Act provides factors that must be considered before authorizing a permit. Among the factors are the contribution of the relevant fish to the ongoing productivity of commercial, recreation or aboriginal fisheries, fisheries and management objectives and whether there are measures and standards in place to avoid, mitigate or off-set serious harm to fish that are part of or that support a commercial, recreation or aboriginal fishery. The concept of the deposit of the deleterious substance is now contained in section 36 and is largely unchanged from the prohibition in the previous *Fisheries Act*.

The new Act also increases Directors power to issue directions. Previously inspectors had power to issue directions to make correcting measures now both inspectors and fisheries officers have the power to issue directions and situations where directions may be issued are expanded to include where a HADD has occurred or where there is a serious danger of an occurrence.

A new reporting obligation, section 38 inserts a reporting obligation that is a duty to report an occurrence that may result in serious harm to fish. This is of course in addition to the existing duty to report the deposit of a deleterious substance. Fines have increased under the new Act. Maximum and minimum penalties are now in place and penalties will vary according to whether the accused are individuals, small revenue corporations or other corporations, which can have fines to \$12 Million for a second offence.

The future will be interesting as we oversee the implementation of the serious harm regime and the development of regulations and the review policies and guidelines set out under the Act.