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New Fisheries Act permit rules take effect November 25th, 2013

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Introduction

Last week, the federal government took a big step toward bringing the *Fisheries Act* (Canada) and its application into line with the federal government's responsible resource development plan. On November 6th, 2013, the Government of Canada announced that November 25th is the date of coming into force of provisions in the 2012 budget implementation legislation that will sharpen the focus of the *Fisheries Act* habitat protection provisions in order to reduce regulatory overlap with the provinces. The changes are significant. Proponents of new projects and holders of existing s. 35(2) authorizations should take note.

This article summarizes the principal changes that will result from these measures and identifies key questions Fisheries and Oceans Canada intends to address in guidance that is currently under development.

New Focus

Henceforward, the act will concentrate on maintaining the productive capacity of commercial, recreational, and Aboriginal fisheries, including fish and fish habitat that sustain those fisheries.

Section 35(1) of the *Fisheries Act* will now read:

> 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.

New *Fisheries Act* provisions define the different kinds of fisheries as follows:

> "Aboriginal", in relation to a fishery, means that fish is harvested by an Aboriginal organization or any of its members for the purpose of using the fish as food or for subsistence or for social or ceremonial purposes;
> "commercial", in relation to a fishery, means that fish is harvested under the authority of a licence for the purpose of sale, trade or barter; and
> "recreational", in relation to a fishery, means that fish is harvested under the authority of a licence for personal use of the fish or for sport.

"Serious harm to fish" is defined in the new act as the death of fish or any permanent alteration to, or destruction of, fish habitat. For its part, Fisheries and Oceans Canada defines serious harm to fish as follows:

> the **death of fish**;
> 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;

> 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.

It remains to be seen what the courts will say when asked to examine the application of these new rules to a given set of facts.

Policy Framework

In 2013, the federal government issued a Fisheries Protection Policy Statement. Then, to prepare for the coming into force of the above provisions, Fisheries and Oceans Canada put into effect a Fisheries Protection Program Operational Approach. Under this approach, the department is, among other things, working on developing guidance for project proponents regarding:

> *Marginal Water Body Types*, where project authorizations will never be required. These include non fish bearing-waters; watercourses not providing migratory corridors or in-stream habitat; and artificial irrigation, water supply, water management, or industrial water bodies not connected to aquatic systems that support fish;
> *Sensitive Species and Habitats* whose value to fisheries is so great that applications for authorization will be required even if anticipated impacts are considered minor; and
> *Minor Impacts*, for which project review by the Department will not be required, provided proponents follow best practices. These include watercourse alterations, such as channel realignment or vegetation removal, that are temporary or can be done in the dry; temporary obstructions that take place outside critical migratory, spawning and nursery periods for local fish species; and spatial impacts, such as infilling, dredging or excavation activities, that occur within the existing footprint of previous works or that are of a footprint small enough that local effects on fisheries productivity would not likely occur.

Existing Authorizations

The changes described above may reduce the number of projects requiring *Fisheries Act* authorizations. Beginning November 25th and **only until February 24th, 2014**, holders of existing authorizations may apply to Fisheries and Oceans Canada for a review of their files. Before doing so, they should be aware that any changes to terms and conditions under their authorizations may trigger First Nations consultation requirements and consideration of the environmental assessment process which gave rise to those terms and conditions, as the case may be.

Applications for New Authorizations

To coincide with changes to the *Fisheries Act* habitat protection provisions, the federal government published new regulations governing the issuance of authorizations for projects that cause serious harm to fish that directly or indirectly sustain fisheries. The regulations will take effect on November 25th. According to the government, the regulations do not change the regulatory burden on project proponents. What follows is a description of the new rules. Note that there are special rules for emergency situations and matters involving national security. In addition, at any time during project planning, a proponent may apply to Fisheries and Oceans Canada for a review of the adequacy of mitigation measures or to request an authorization under s. 35(2), if recommended by a qualified professional or by department staff, after reviewing the file.

Timelines

The regulations are categorical about Fisheries and Oceans Canada acknowledging receipt of applications and any subsequent supporting documents as and when they are received. That is because the date of receipt starts the clock on sixty (60) and ninety (90) day timelines for government review of applications. The department has sixty days from receipt of an application to inform the proponent that the application is complete and is being sent for processing or that it is incomplete and identifying missing information. From the time an application is deemed complete, the proponent is notified and the department has ninety days to either issue an authorization or notify the proponent in writing of its refusal to issue an authorization.

As with all good things, there are caveats in respect of the timelines. So, for example, the clock is reset when the proponent makes a significant change to the proposed project. What constitutes a significant change will be explained in guidance to be issued by Fisheries and Oceans Canada. Another caveat concerns projects that require another authorization or consultation before Fisheries and Oceans Canada can get involved. This includes projects requiring an environmental assessment under the *Canadian Environmental Assessment Act* or First Nations consultation under s. 35(1) of the *Constitution Act*, *1982*. For those projects, the new timelines will only start to run once the other processes have run their course. The government plans to issue guidance regarding situations that will stop the clock and how it intends to handle them.

Information Requirements

The regulations spell out in detail the information a proponent must submit regarding its work, undertaking or activity (for ease of reference, I will refer to all three as the "project"), the fisheries situation in the area where the project will be carried out, the effects of the project on the fishery, the manner in which the proponent intends to mitigate or offset project harm to fish, how the proponent proposes to obtain the necessary rights to access lands required to implement an offsetting plan, and what the proponent will do to ensure the success of mitigation measures and offset measures. (The Department of Fisheries and Oceans is currently considering how to incorporate habitat banking schemes into the authorization process).
Letter of Credit The implementation of any required offset measures must be guaranteed by a letter of credit.

Appeal from a refusal to deliver an authorization

The 1986 Policy for the Management of Fish Habitat spells out the right of project proponents to appeal a refusal by Fisheries and Oceans Canada to issue a *Fisheries Act* s. 35(2) authorization. That policy is currently under review. The government is well aware that proponents are concerned to ensure that a right of appeal remains part of the process.

Conclusion

Canada is a big country. Even counting Aboriginal fisheries in the North, there is an expectation that narrowing the scope of fish habitat protection to fish and habitat that sustain fisheries means that Fisheries and Oceans Canada will be less involved in project review in the future. Whether that is what happens remains to be seen.

Fisheries and Oceans Canada has indicated that it intends to focus on projects with the greatest impacts on fisheries. The department has already adopted measures intended to make project review more consistent across the country and it has designated teams that will focus on projects by industry sector, such as mining, oil and gas, linear development, marine and coastal, and hydro and flows. For smaller scale projects, the department will continue to issue guidance such as the now familiar operational statements, telling proponents of smaller, routine projects what they must do in order to minimize disruption and avoid needing an authorization.

Please reach out to any of the members in our environmental law team if you are wondering how these changes may affect your existing s. 35(2) project authorizations or a project you are planning. We are at your service.