



**WEST COAST**  
Environmental Law

Questions and Answers about the 2018  
Proposed Amendments to the Federal Fisheries Act



Photo: Bernard Spragg

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## Questions

What is the Fisheries Act?	3
Which level of government is assigned responsibility for fisheries in the Constitution?	3
Why is the Fisheries Act being amended?	3
What did the 2012 version of the Act change?	4
Is there evidence of lost protections of fish habitat since 2012?	4
How has the government consulted the public on the Act?	5
What is the purpose of the Act?	5
Are the lost protections restored in the proposed amendments to the Act?	5
What modernizations are in the Bill's proposed amendments?	6
What new provisions relate to Indigenous peoples and fisheries?	6
What are the Bill's new considerations for decision-making?	7
What does the Bill say about advisory groups and fees?	7
How does the Bill propose to regulate projects, or "works, undertakings and activities" that may cause negative impacts on fish and fish habitat?	7
Have protections changed for fish passage and fishways?	8
Will the amendments to the Act affect ongoing projects?	8
Does the Act address past habitat loss or set a goal to prevent habitat loss?	8
Does the Bill impose any requirements regarding habitat restoration?	9
How does the Bill propose to protect ecologically significant areas (ESAs)?	9
Does the Bill create any new opportunities to regulate non-point source pollution from urban run-off?	10
How does the Bill propose to change the regulatory framework for project approval? What new tools are added?	10
What factors must the Minister consider before recommending new Governor-in-Council regulations, or before exercising powers related to authorizations, permits, orders, or Ministerial regulations?	11
What does the Bill say about fish habitat banks?	11
What is the proposed new public registry?	12
What does the Bill say about rebuilding fish stocks?	12
What legal tools does the Bill add to protect marine biodiversity?	13
What changes does the Bill propose for 'prompt' fisheries management action?	13
What new provisions does the Bill propose for protection of cetaceans?	14
How will the Bill change enforcement measures?	14
What alternative enforcement measures does the Bill propose?	14
What new provisions does the Bill propose for control of aquatic invasive species?	15
What new reporting requirements does the Bill introduce?	15
What does the Bill propose for protection of commercial inshore fisheries?	15
What changes does the Bill propose for management of aquaculture?	16
Does the Bill address environmental flows?	16
Does the Bill address climate change?	16

## What is the *Fisheries Act*?

The federal *Fisheries Act* is one of Canada's oldest laws, passed one year after Confederation. It sets the rules for catching fish and restricts pollution in fish-bearing waters. In 1977, the Hon. Romeo LeBlanc, the father of the current Fisheries and Oceans Minister, the Hon. Dominic LeBlanc, amended the Act to better protect fish habitat. He said:

"The chain of life extending to the whole open ocean depends on bogs, marshes, mudflats, and other 'useless-looking' places that ruin your shoes. Biologists have likened these areas to the cornfields and wheatfields in the ocean."

He urged Parliament to protect "the irreplaceable nurseries of fisheries well-being."

## Which level of government is assigned responsibility for fisheries in the Constitution?

Indigenous laws regarding fisheries predate the arrival of settlers to Canada, and remain relevant, applicable and in force. Implementation of the UN Declaration on the Rights of Indigenous Peoples and renewed commitments from the federal government to enter into nation-to-nation relationships are likely to result in greater recognition of these Indigenous laws from the Canadian state. Currently under Canadian law, Aboriginal rights to fish are constitutionally guaranteed by s. 35 (1) of the Constitution.

Parliament saw fit to give exclusive legislative authority to the federal government over 'Sea Coast and Inland Fisheries' as one of the "great questions which affect the general interests of the Confederacy as a whole," as John A. Macdonald stated during the Debates on Confederation of the Canadian Parliament in 1865.

Over the years there has been interplay between this federal and the provincial power over property and civil rights. While the Supreme Court of Canada (SCC) has held that there is no 'bright jurisdictional line' between these two powers, the Court has confirmed the wide scope of federal jurisdiction to include environmental protection provisions such as habitat protection in the *Fisheries Act*.

## Why is the *Fisheries Act* being amended?

As part of a broader suite of environmental law reforms, (including the *Canadian Environmental Assessment Act, 2012*, *National Energy Board Act*, *Navigation Protection Act*) the *Fisheries Act* has been under review since 2016. The reviews relate to a series of changes by the previous government in 2012 that weakened those environmental laws. The mandate



letter issued to the Fisheries Minister by the Prime Minister in 2016 called on him to “restore lost protections and introduce modern safeguards” to the *Fisheries Act*.

Amendments to the Act have been proposed in [Bill C-68](#), introduced February 6<sup>th</sup>, 2018, that will now be read twice in Parliament, reviewed by the Standing Committee on Fisheries and Oceans, be read a third time in Parliament, and then passed on to the Senate for final approval before it receives Royal Assent, and becomes binding law.

For more background on the amendments, see our reports [here](#) and [here](#), as well as [this webpage](#). (Some of the material in this Q&A is adapted from these reports, and some is adapted from Department of Fisheries and Oceans briefings.)

## What did the 2012 version of the Act change?

The 2012 amendments to the Act reduced the scope of habitat protection – the “lost protections” – by removing a rule against causing “Harmful alteration, disruption or destruction” (or HADD) of fish habitat and replacing it with another standard (“serious harm to fish”) which we called “scientifically suspect and legally toothless” in [Habitat 2.0](#).

The Act’s scope was also limited to ‘fisheries fish’: those fish that were part of, or supported a commercial, Aboriginal or recreational fishery. This meant that the habitat of fish that weren’t fished did not fall under the protection of the *Fisheries Act*. A 2013 [study](#) estimated that 80% or more of the 71 freshwater fish at risk of extinction in Canada would not be considered “fish that are part of a commercial, recreational or aboriginal fishery, or ... fish that support such a fishery.”

## Is there evidence of lost protections of fish habitat since 2012?

Yes. [A study](#) published last year estimates the extent of fish habitat loss authorized by the Department of Fisheries and Oceans (DFO) over the six-month period in 2012 after amendments to the *Fisheries Act* were introduced. Finding that DFO required two-thirds of projects to create or restore *smaller* areas of habitat than they were allowed to impact, the researchers estimate that a net loss of nearly 3,000,000m<sup>2</sup> of fish habitat was authorized.

As detailed in [Habitat 2.0](#), it appears there were zero prosecutions in the entire country for fish habitat damage between 2013 and 2018. This evidence is from the DFO annual report to Parliament. A complete lack of prosecutions for fish habitat damage for the entire country strongly suggests that the definitions introduced into the Act were completely unworkable.

## How has the government consulted the public on the Act?

In September 2016, the House of Commons Standing Committee on Fisheries and Oceans commenced a review and study of the 2012 version of the Act, including a call for written briefs and numerous witnesses. In February 2017, the Committee published its 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". Over these years, there has been a related in-depth public consultation process. For details of the process see this [DFO webpage](#).

## What is the purpose of the Act?

The Bill will add a new purpose clause for the *Fisheries Act*: the "proper management and control of fisheries" and "the conservation and management of fisheries, protection of fish and fish habitat including from pollution." (s. 2.1.)

## Are the lost protections restored in the proposed amendments to the Act?

Yes. There are at least three ways the Bill restores legal protections that were in place before the 2012 amendments.

The Bill reinstates a key protection by prohibiting any work, undertaking or activity that results in the "harmful alteration, disruption or destruction (HADD) of fish habitat" without authorization. The Bill does not attempt to restrict the definition of HADD that has been developed by the courts, and contains no thresholds, criteria or factors to determine when a HADD is caused.

The Bill also restores protection for all fish in Canada by introducing a new definition for fish and fisheries that reverses the limitation of protection to only "fisheries fish" and the fish that support those fish. This limitation introduced in 2012 was widely criticized as arbitrary, inconsistent with an ecosystem-based approach to management and ultimately potentially harmful to the fish the prohibition purported to protect.

Another restored protection is the reintroduction of the prohibition on causing death of fish by means other than by fishing. This is an important protection; the death of a 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." When this prohibition disappeared in the 2012 amendments, protections were lost against 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).

Fish habitat is now defined in the Bill as “water frequented by fish and any other areas on which fish depend directly or indirectly to carry out their life processes, including spawning grounds and nursery, rearing, food supply and migration areas.” The underlined phrase has been added to the definition.

## What modernizations are in the Bill’s proposed amendments?

The Bill contains a number of proposed modernizations, set out [in this list on the first page](#) of the Bill, and highlighted and described in more detail below.

## What new provisions relate to Indigenous peoples and fisheries?

As set out in the Bill’s summary, when the Bill becomes law, it will:

- require that, when making a decision under that Act, the Minister shall consider any adverse effects that the decision may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*, a codification of existing duties imposed by the Constitution and case law,
- include provisions respecting the consideration and protection of traditional knowledge of the Indigenous peoples of Canada through a new section,
- authorize the making of agreements with “Indigenous governing bodies”, a defined term, to further the purpose of the *Fisheries Act*,
- allow for the declaration of equivalent provisions of Indigenous law, so that certain provisions of the *Fisheries Act* or regulations would not apply in the territory governed by the Indigenous governing body. (This provision also applies to provincial laws).

For further commentary on these provisions see [these tweets](#) from lawyer Kris Statnyk at the law firm of Mandell Pinder who summarizes the Bill as: “Overall, a bit of a mixed bag. Some positives for fish and fish habitat protection but still light years to go to ensure proper recognition and respect for Indigenous rights.”

## What are the Bill's new considerations for decision-making?

The Bill adds nine new considerations for all decision-making under the Act:

- (a) the application of a precautionary approach and an ecosystem approach;
- (b) the sustainability of fisheries;
- (c) scientific information;
- (d) traditional knowledge of the Indigenous peoples of Canada that has been provided to the Minister;
- (e) community knowledge;
- (f) cooperation with any government of a province, any Indigenous governing body and any body — including a co-management body — established under a land claims agreement;
- (g) social, economic and cultural factors in the management of fisheries;
- (h) the preservation or promotion of the independence of licence holders in commercial inshore fisheries; and
- (i) the intersection of sex and gender with other identity factors.

This list of factors aligns with those proposed in our briefs and advocated by many others. However, these are factors that the Minister *may* consider. There is no mandatory duty to consider the factors.

Another section of the Bill requires mandatory consideration of certain factors. See the question on page 11 below: What factors must the Minister consider before recommending new Governor-in-Council regulations, or before exercising powers related to authorizations, permits, orders, or Ministerial regulations?

## What does the Bill say about advisory groups and fees?

The Bill will empower the Minister to establish advisory panels and to set fees, including to recover costs for services provided.

## How does the Bill propose to regulate projects, or “works, undertakings and activities” that may cause negative impacts on fish and fish habitat?

The summary states that the Bill provides measures for the protection of fish and fish habitat with respect to works, undertakings or activities that may result in the death of fish or the harmful alteration, disruption or destruction of fish habitat, including in ecologically significant areas. It also includes measures relating to the modernization of the regulatory framework such as authorization of projects, establishment of standards and codes of practice, creation of fish habitat banks by a proponent of a project and establishment of a public registry.

This involves a number of proposed changes, broken down below. Many of these provisions will require new regulations, and no details of the various proposed regulatory provisions have yet been publicly released.

## Have protections changed for fish passage and fishways?

Bill C-68 moves provisions on the free passage of fish and fishways from section 20 to section 34, under Fish and Fish Habitat Protection and Pollution Prevention (specifically s. 34.3).

A slight improvement to the language in this section has been added by the inclusion of characteristics of the water and water flow, including temperature, physical and chemical characteristics of water within the list of specifications the Minister may make to ensure the free passage of fish or the protection of fish or fish habitat.

## Will the amendments to the Act affect ongoing projects?

After the Bill receives Royal Assent it becomes binding law, and projects in the construction phase will be bound to follow the new legal requirements from that date forward. The new law will not change or otherwise affect project approvals that were granted before the amended Act comes into force.

## Does the Act address past habitat loss or set a goal to prevent habitat loss?

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 last amended in 2012, omits this goal. Proposed amendments in the Bill contain no reference to either net gain of habitat or no net loss of habitat.

The *Fisheries Act* does not define a habitat baseline from which decisions and monitoring of fish habitat loss and restoration can be evaluated.



## Does the Bill impose any requirements regarding habitat restoration?

Fish habitat loss in Canada is substantial. The Bill does not impose broad requirements around restoration of degraded habitat, though there is a new power to make general regulations for this purpose, and it is a factor to consider in designating 'ecologically significant areas.'

There are four proposed new provisions related to fish habitat restoration:

First, s. 6.1 concerns decision-making about depleted fish stocks. For fisheries management decisions respecting such stocks, the Minister "shall take into account" whether measures are in place to restore degraded fish habitat where the minister is of the opinion that the loss or degradation of fish habitat has contributed to a stock's decline.

Second, before making decisions about permits, authorizations, or regulations, there is a mandatory list of factors for the Minister to consider, including whether any measures to offset a HADD give priority to the restoration of degraded fish habitat (s. 34.1 (f)).

Third, there is a new power requiring a fish habitat restoration plan to be prepared for an ecologically significant area where restoration is required to meet prescribed objectives for conservation and protection of fish and fish habitat (s. 35.2 (9)).

There is also a new specific authority for making regulations for the restoration of fish habitat to support the conservation and protection of fish (s. 43 (1) (b.2)).

## How does the Bill propose to protect ecologically significant areas (ESAs)?

The 2012 version of the Act contained a new power to regulate ecologically significant areas (ESAs). The provision has not been used to designate any ESAs.

DFO's 2013 [Fisheries Protection Policy Statement](#) envisions that when ESAs are designated, proponents may be required to provide additional project information to the Minister, who may then require modifications or restrict or stop the project for as long as necessary if s/he determines that the project is likely to result in harm to fish.

The Bill's proposed amendments to the ESA provisions, s. 35.2, would align the power to designate ESAs with the proposed new prohibitions on causing death of fish and HADD provisions. The Governor in Council may make regulations defining ecologically significant

areas: the Bill contains no definition of the term. DFO states that ESAs are “intended to be established through regulations to protect sensitive, highly productive, rare or unique areas.”

Carrying on works, undertakings or activities specified in regulations in ESAs will be prohibited, unless authorized. Before such an authorization is granted, the Minister must be satisfied of the existence of avoidance and mitigation conditions required to achieve the conservation and protection objectives of the ESA, and those conditions will be included in any authorization, and so be legally enforceable. This section provides powers to require proponents who propose work in ESAs to provide information on activities and to prepare fish habitat restoration plans.

## Does the Bill create any new opportunities to regulate non-point source pollution from urban run-off?

The potential toxicity of urban run-off for fish and other aquatic species has been acknowledged for decades. However, while there have been indirect attempts to get at the problem ([encouraging less impervious surfaces](#), for example), it has not been regulated, either federally or provincially (at least in the province of BC). In practice this means that some long-term freshwater and marine contamination issues are simply not addressed.

The Bill (s. 34.1(1)) allows the Minister to establish standards and codes of practice for the prevention of pollution, a mechanism that could be used to regulate run-off.

## How does the Bill propose to change the regulatory framework for project approval? What new tools are added?

The procedure for project authorizations to impact fish habitat appears to be unchanged from the current *Act*, but there are a number of proposed changes in the Bill for project reviews, many of which will depend on the development and implementation of new regulations.

Two new mechanisms are proposed in Bill C-68 for major and minor projects: permitting for designated projects and standards or Codes of Practice.

Permitting for a 'designated project' is a new provision, s. 35.1, in the Bill. The term 'designated project' is not defined in the Bill. A list of designated projects will be defined through regulations passed by the Governor-in-Council. The DFO website says this is for projects that will always need a permit, presumably major projects. For these projects, failure to have a permit would be prohibited. DFO states: “This new permitting scheme will complement, not replace, the current practice of issuing Letters of Advice and authorizations.”

A new section 34.2 on Standards and Codes of Practice may specify procedures, practices or standards as "formal guidance documents for small, routine projects" according to the DFO website. DFO says these standards and codes of practice are for the purposes of avoiding the death of fish and HADD, the conservation of fish and fish habitat, and the prevention of pollution. They will be formal documents that may be published on the Canada Gazette. They may be applied to works, undertakings or activities at various phases including construction, operation, and maintenance or decommissioning.

## What factors must the Minister consider before recommending new Governor-in-Council regulations, or before exercising powers related to authorizations, permits, orders, or Ministerial regulations?

A new proposed section, 34.1, of the Bill contains this list of mandatory factors for the decisions or recommendations noted in the question above:

- (a) the contribution to the productivity of relevant fisheries by the fish or fish habitat that is likely to be affected;
- (b) fisheries management objectives;
- (c) whether there are measures and standards
- (d) to avoid the death of fish or to mitigate the extent of their death or offset their death, or
  - i. to avoid, mitigate or offset the harmful alteration, disruption or destruction of fish habitat;
- (e) the cumulative effects of the carrying on of the work, undertaking or activity referred to in a recommendation or an exercise of power, in combination with other works, undertakings or activities that have been or are being carried on, on fish and fish habitat;
- (f) any fish habitat banks, as defined in section 42.01, that may be affected;
- (g) whether any measures and standards to offset the harmful alteration, disruption or destruction of fish habitat give priority to the restoration of degraded fish habitat;
- (h) traditional knowledge of the Indigenous peoples of Canada that has been provided to the Minister; and
- (i) any other factor that the Minister considers relevant.

## What does the Bill say about fish habitat banks?

Habitat banks are a new concept in federal fisheries law. The banks are meant to offset harm to fish and fish habitat caused by authorized projects through restoration, creation or enhancement of habitat in advance of any impacts, to be used as compensation.

The Bill creates a new legal foundation for establishing habitat banking agreements by providing definitions for habitat banks, habitat credits, and conservation projects for the

restoration or enhancement of fish habitat. A new proposed section (42.02) allows the Minister to establish systems “for the creation, allocation and management of a proponent’s habitat credits in relation to a conservation project.” The details of how these proponent-led systems will work will be determined in regulation.

## What is the proposed new public registry?

Like many groups, we urged the government to introduce more transparency and provide more public access to information through the creation of a public registry. The Bill requires the Minister to establish a public registry of project authorizations and the details of these authorizations, as well as a number of other documents related to government decisions made under the Act.

The Bill specifies both required and optional contents for the registry.

It appears that smaller projects, or those which are covered by Letters of Advice, or Codes of Practice, will not have to be posted on this registry. It is not apparent at this time if DFO intends to create a map-based registry.

## What does the Bill say about rebuilding fish stocks?

DFO’s fishery management decision-making frameworks define reference points for assessing the status of fish stocks. Stocks are considered to be within ‘Healthy’, ‘Cautious’, and ‘Critical’ Zones depending on their status relative to scientifically recommended levels; the Limit Reference Point and an Upper Reference Point. Currently, 26 commercial fish stocks are classified by the federal government as being in the “Critical zone” or below their determined Limit Reference Point, and therefore require a plan to be produced for rebuilding the stock under Fisheries and Oceans Canada's policy. However, despite policy commitments, rebuilding plans are in place for [only three of these stocks](#). The Department plans to complete 19 additional plans within the next 3 years, according to briefings.

A new section, 6.1, requires the Minister to consider the state of fish stocks in fisheries management decisions, including whether the stock has declined to its limit reference point and whether there are measures in place aimed at rebuilding the stock.

The Bill proposes a new regulation-making power ‘respecting the rebuilding of fish stocks,’ s. 43 (b.1). DFO advises that these regulations could specify the circumstances when a rebuilding plan is required, as well as timelines and required components for rebuilding plans.

## What legal tools does the Bill add to protect marine biodiversity?

The health of fish populations and habitat is inextricably linked to the state of the marine ecosystems and biodiversity within which they occur. Fisheries Closures are a management measure that can be used to protect a fish species and/or important habitat area through fishery time, gear, or area closures.

Though Fisheries Closures often have objectives relating to a single species, population or stock for a fishery, many such closures may provide broader protections for marine biodiversity beyond these objectives. DFO is reviewing these closures for classifications as [marine refuges](#).

The proposed new provisions in section 43.3 of the Bill are intended to give closures implemented for areas like Marine Refuges longer-term protection as biodiversity conservation areas, rather than their current standing as Fisheries Closures through Variation Orders. Areas currently identified by DFO as Marine Refuges would also be converted to these permanent closures, and would allow for establishment of closures with broader conservation objectives.

The Bill proposes a quicker procedure for these s. 43.3 regulations respecting marine biodiversity: the Minister, rather than the Governor-in-Council, will have the power to make them.

## What changes does the Bill propose for 'prompt' fisheries management action?

Quick response to threats arising during fisheries season, such as those faced by the North Atlantic Right Whale this past summer, alerted the Department to the need for powers that could be exercised more swiftly than other regulatory options such as amending fishing licence conditions or issuing Variation Orders.

Bill C-68 proposes new powers for the Minister in section 9.1 to issue fisheries management orders for a period not to exceed 45 days where prompt measures are required to address a "threat to the proper management and control of fisheries and the conservation and protection of fish".

The use of shorter-term Fisheries Closures for managing time, area and gear restrictions is a critical component of fisheries management and for broader conservation tools (e.g. the [emergency closure](#) of the Snow Crab fishery in the Gulf of St. Lawrence this summer to protect North Atlantic Right Whales).



## What new provisions does the Bill propose for protection of cetaceans?

In addition to the proposed new fisheries management order powers noted above, s. 23.1 proposes to prohibit the fishing of a whale or other cetacean with the intent to take it into captivity, unless authorized by the Minister, including when the cetacean is injured, in distress or in need of care.

## How will the Bill change enforcement measures?

The Bill updates and strengthens enforcement powers by including a power to stop and detain vessels and vehicles, s.49 (4); the authority to inspect and exercise enforcement powers on Canadian vessels in foreign ports and foreign waters, s. 87.1, and a duty to keep records for catch certification purposes, s. 61 (3.1).

There are a number of provisions to enhance fishing gear compliance, and new provisions related to forfeiture of fish or illegal fishing gear, and extend the detention of anything seized by DFO. There are also alternative measures, discussed in the next question.

## What alternative enforcement measures does the Bill propose?

The Bill establishes authority for a more modern type of regulatory enforcement, “alternative measures agreements” (AMAs), in a new section set out in s. 86.1-86.96. AMAs are designed for people charged with offences under the Act to agree to avoid the court system. When an AMA is filed with the court, the charges against an accused may be stayed or adjourned for a period of not longer than a year.

AMAs may only be used if consistent with the purposes of the Act, and if a number of conditions are met, including:

- if there is enough information to proceed with the charge and the court proceeding has begun, and
- if the Attorney General and Fisheries Minister are satisfied that the measures would be appropriate, based on a review of the offence, and the following factors:
  - (i) the importance of the protection of fisheries, fish or fish habitat or the prevention of pollution,
  - (ii) the alleged offender’s history of compliance with this Act,
  - (iii) whether the offence is a repeated occurrence,
  - (iv) any allegation that information is being or was concealed or other attempts to subvert the purpose and requirements of this Act are being or have been made, and
  - (v) whether any remedial or preventive action has been taken by or on behalf of the alleged offender in relation to the offence;

- (vi) the alleged offender has been advised of the right to be represented by counsel;
- (vii) the alleged offender accepts responsibility for the act or omission that forms the basis of the offence;

There are a number of other procedural and substantive requirements for AMAs. A plan must be developed to remedy the offence, and the charges will be stayed if the AMA and its conditions are implemented.

## What new provisions does the Bill propose for control of aquatic invasive species?

The Bill slightly alters the regulation-making power with respect to the management and control of aquatic invasive species, including allowing regulations to be made regarding the prevention of the introduction and spread of those species.

## What new reporting requirements does the Bill introduce?

The Bill introduces a new requirement that the Act be reviewed every five years by either or both of the Fisheries Committees of the Senate and House of Commons. Reports from the reviews will be public. A five year review of the *Canadian Environmental Protection Act* was completed last year under a similar provision in that law, and the proposed new Impact Assessment Act contains a ten year review provision.

There are no reporting requirements related to a systematic assessment of fish habitat status.

## What does the Bill propose for protection of commercial inshore fisheries?

One of the new considerations for all decision-making under the Act is "the preservation or promotion of the independence of licence holders in commercial inshore fisheries."

A number of new powers are proposed to achieve this purpose through regulations related to:

- the proper management and control of the seacoast and inland fisheries, including for social, economic or cultural purposes;
- the circumstances when the holder of a licence or the operator named in the licence is required to personally carry on the activity authorized by the licence and the exceptions to that requirement;

- the issuance, suspension and cancellation of licences and leases to licence holders that are a party to an agreement in respect of the lease or licence that contravenes any provision of this Act or of the regulations
- the use and control of the rights and privileges under a lease or licence issued under this Act, including the prohibition on the transfer of the use and control of those rights and privileges except under prescribed conditions; in the case of a licence issued to an organization, respecting the designation of persons who may fish and the fishing vessels that may be used under the licence and any other matter relating to designations, including the method of designation and who may designate those persons and vessels.

## What changes does the Bill propose for management of aquaculture?

None.

## Does the Bill address environmental flows?

No. Environmental flows describe the quantity, timing, and quality of water flows required to sustain freshwater and estuarine ecosystems, and the human livelihoods and well-being that depend on these ecosystems. For more information on environmental flows and the *Fisheries Act* see pgs. 18-20 of [Habitat 2.0](#).

## Does the Bill address climate change?

No. Climate change, and its impacts to fish and fish habitat are not mentioned in the proposed amendments to the *Fisheries Act*.

Global climate change impacts both marine and freshwater fish through factors including warming water temperatures, acidification of marine water, and [altered productivity](#) of aquatic ecosystems. Climate change will in some cases [cause fish populations to move](#) from current habitats towards cooler waters. Coastal habitats in developed areas are imperiled by sea level rise. These changes will also have important [social, cultural and economic](#) impacts to fisheries in Canada.

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