

# FISHERIES ACT BRIEF

# A PUBLIC REGISTRY

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## I. THE ISSUE

Aside from restoring the core habitat prohibition against its harmful alteration, disruption, and destruction (HADD) of fish habitat, Bill C-68 included several needed innovations to the *Fisheries Act*. Perhaps the most important innovation was **the promise of a public registry** for the various authorizations issued by Fisheries and Oceans Canada (DFO), including but not limited to section 35 HADD authorizations.

As further set out below, an accessible and properly functioning public registry is foundational to several of the *Fisheries Act's* objectives, including not only the conservation and protection of fish and fish habitat generally<sup>1</sup> but also the management of cumulative effects specifically.<sup>2</sup> An accessible and properly functioning public registry can also be expected to discipline departmental practice in the issuance of authorizations and other permits – the need for which has been identified in peer-reviewed literature.<sup>3</sup>

The next Part (II) sets out the *Fisheries Act's* requirements in relation to a public registry. While these requirements **have not yet been brought into force**, DFO has apparently taken some interim steps towards the development of a registry. Part III sets out this progress in more detail and, with the assistance of screenshots (for convenience), compares it to other federal environmental registries and databases. As will be seen, there is currently a significant gap between DFO's efforts and ambition relative to those of other departments insofar as public registries are concerned. Closing this gap should be a top priority for DFO, as further set out in Part IV.

## II. FISHERIES ACT PUBLIC REGISTRY PROVISIONS<sup>4</sup>

The most relevant provisions are sections 42.2 and 42.3(1) of the new *Fisheries Act*. When brought into force, section 42.2 will oblige the Minister to establish a registry “for the purpose of facilitating access to records relating to [the habitat protection and pollution prevention provisions of the Act]” (sections 34 to 42.1).

Subsection 42.3(1) sets out the obligatory elements of this registry:

- (a) any agreements referred to in section 4.1 that are entered into by him or her and that establish the circumstances and manner referred to in paragraph 4.1(2)(h) [equivalence agreements, essentially].
- (b) any standards and codes of practice established by him or her under section 34.2;
- (c) any orders made by him or her under sections 34.3 and 37;
- (d) any authorizations given under paragraphs 34.4(2)(b) and (c) and 35(2)(b) and (c) and subsection 35.2(7);
- (e) any permits issued by him or her under section 35.1; and
- (f) any fish habitat restoration plan prepared under subsection 35.2(9).

1. Fisheries Act s. 2 (purpose of the Act)

2. Fisheries Act s.

3. “Authorized Net Losses of Fish Habitat Demonstrate Need for Improved Habitat Protection in Canada” (2017) [74 Can. J. Fish. Aquat. Sci. 285-291](#) (with Dr. Brett Favaro); “From ‘Badly Wrong’ to Worse: An Empirical Analysis of Canada’s New Fish Habitat Protection Laws” (2015) [28\(1\) J. Env. L. Prac. 1](#).

4. The full text of the public registry provisions can be found at Appendix A to this brief.

Earlier this year, and in recognition of its new duties, DFO announced that it was “releasing information on authorizations that have been issued since the coming into force on August 28, 2019 of the amended *Fisheries Act*, on the Open Data Portal. Updates to the dataset will be published monthly... DFO is working towards establishing a full *Fisheries Act* Registry later in the coming months.”<sup>5</sup>

### III. COMPARING REGISTRIES

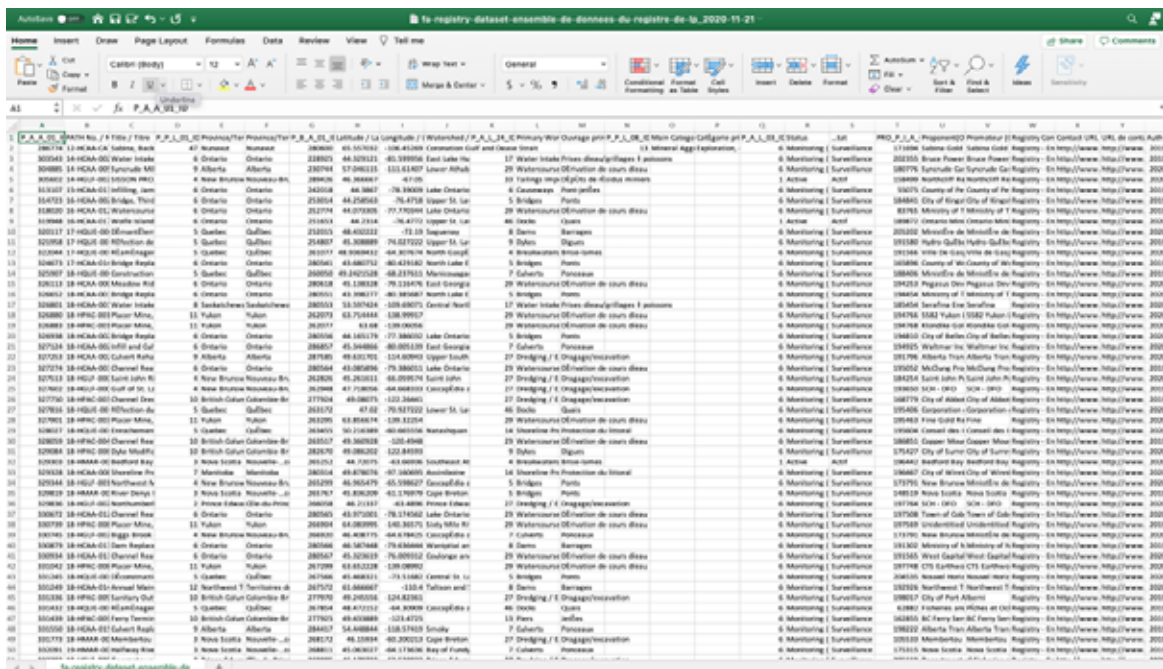
The interim DFO public registry is essentially an excel sheet. Upon entering the Open Data Portal, users are met with the following:

Resources

Show 25 entries

Resource Name	Resource Type	Format	Language	Links
Data Dictionary and Field Guide	Guide	CSV	English French	<a href="#">Access</a>
Description of Registry	Guide	TXT	English French	<a href="#">Access</a>
FA Registry Dataset	Dataset	CSV	English French	<a href="#">Access</a>

When a user selects “access” to the FA Registry Dataset, they are met with an (impenetrable) excel sheet:



5. See <https://www.dfo-mpo.gc.ca/pnw-ppe/registry-registre-eng.html>

While recognizing that DFO’s current efforts are interim in nature, it is worth noting that these efforts stand in marked contrast to other existing registries at the federal level. Two well-known registries are the Canadian Impact Assessment Registry<sup>6</sup> and the Species at Risk Registry.<sup>7</sup> The former is an online registry of major project assessments in Canada, both completed and ongoing. Projects are searchable from the main page by keyword or reference number, while results can be filtered by status, date, and province from the “search registry” page (see screen shot below). The registry also features a map showing the approximate location of all projects in Canada.

## Search Registry

The screenshot displays the 'Search Registry' interface. At the top, there is a search bar with the placeholder text 'Search by keyword(s) or reference number' and a 'SEARCH' button. Below the search bar, the interface is divided into two main sections: 'Refine Search' on the left and 'Results' on the right.

**Refine Search:**

- Active Assessments:** A green checkmark icon and the text 'Active Assessments' are visible.
- Last Updated:** A dropdown menu is set to 'Best Match'. Other options include 'Most Recent' and 'Reference Number'.
- Start Date:** A text input field with the placeholder 'yyyy - mm - dd'.
- End Date:** A text input field with the placeholder 'yyyy - mm - dd'.
- Apply Filter:** A button to apply the selected filters.
- Result Type:** A dropdown menu set to 'Assessments' with a count of 550.
- Province:** A list of provinces and territories with corresponding counts:
  - British Columbia: 128
  - Ontario: 112
  - Quebec: 78
  - Alberta: 69
  - Nova Scotia: 37
  - Saskatchewan: 34
  - Newfoundland and Labrador: 31
  - Manitoba: 23
  - New Brunswick: 21
  - Prince Edward Island: 10
  - Outside Canada: 6

**Results:**

The results section shows 550 results. The first three results are visible:

- Dene Tha' First Nation Meander River Wastewater Treatment Plant Upgrade** (Dene Tha' First Nation, Alberta)
  - Assessment Type:** Project on federal lands
  - Status:** In progress
  - Reference Number:** 81130
  - Last Modified:** 2020-12-09
  - Description:** The Dene Tha' First Nation's Meander River wastewater treatment plant (WWTP) has difficulty meeting Wastewater System Effluent Regulations and has reached the end of its service life. Meander River requires a new WWTP with an average treatment capacity of 185 m3/day with ability to manage peak hourly flow of 738m3/day (20-year design horizon). The design for the new WWTP is a Membrane Bioreactor (MBR) consisting of: a stainless steel influent screen, a compactor, two anoxic basins, two ...
- Enoch Cree Nation Wastewater System Upgrades** (Enoch Cree Nation, Alberta)
  - Assessment Type:** Project on federal lands
  - Status:** In progress
  - Reference Number:** 81221
  - Last Modified:** 2020-12-09
  - Description:** Enoch Cree Nation is located on the western limit of the City of Edmonton, situated within Treaty No. 6 Territory lands. The Nation is comprised of one main reserve (Stony Plain 135) with approximately 5,306 hectares. The project includes upgrades to the existing wastewater systems to provide wastewater collection and treatment in the community, for the next 10 years. The wastewater system upgrades for the Village area consist of gravity sewers upgrades, construction of a sewage pumping station ...
- Awasis Solar - 10 MW Project** (Cowessess IR #73, Saskatchewan)
  - Assessment Type:** Project on federal lands
  - Status:** In progress
  - Reference Number:** 80915
  - Last Modified:** 2020-12-09
  - Description:** Awasis Solar (the "Project") is a 10MW solar plant being developed by CFN and Elemental Energy Inc. on Cowessess First Nation ("CFN") reserve land. The chosen location is SE 7-17-18 W2, which is cultivated

The Species at Risk Registry is broader in scope in that, like the future *Fisheries Act* registry, it contains a broader set of records, including regulations, orders, permits and agreements (analogous to section 35 authorizations), policies and guidelines. Some of these features, including an e-permit application page,<sup>8</sup> already exist to some extent on DFO’s website (e.g., a section 35 authorization application page<sup>9</sup>). Like the Canadian Impact Assessment Registry, permits and agreements are searchable by keyword (purpose, description, species), while results can be filtered by status (active or inactive), issuing authority, year and month of activity, and location (province).

6. See <https://iaac-aeic.gc.ca/050/evaluations>

7. See <https://www.canada.ca/en/environment-climate-change/services/species-risk-public-registry.html>

8. See <https://wildlife-species.canada.ca/SPLP-SARAPS/index.cfm?fuseaction=home.main&lang=En>

9. See <https://www.dfo-mpo.gc.ca/pnw-ppe/reviews-revues/request-review-demande-d-examen-005-eng.html>

Finally, for the purposes of this brief, there is a lesser-known registry, called the Common Project Search registry,<sup>10</sup> that combines the projects on the Canadian Impact Assessment Registry with permits issued under the renamed *Canadian Navigable Waters Act*, in a remarkable map that contains 7,359 entries:

What even this brief survey of federal environmental registries makes clear is their considerable sophistication, accessibility, and utility. The Common Project Search registry, in particular, has the potential to facilitate cumulative effects management, which as alluded to at the outset of this brief is now a relevant factor in the issuance of section 35 authorizations. Combining data from DFO and the Species at Risk registry, the Common Project Search registry would be a powerful tool for understanding the extent of federally regulated resource development.

#### IV. THE PATH FORWARD

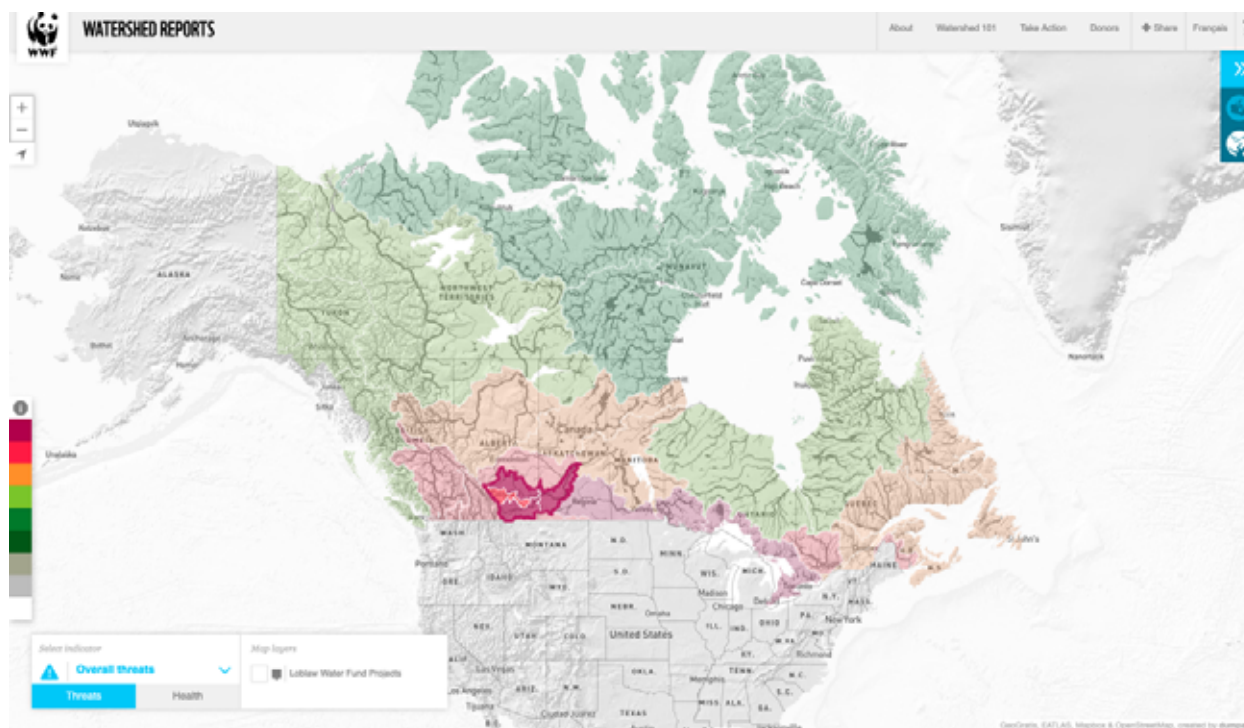
Almost 50 years ago, in *Interprovincial Co-operatives Ltd. et al. v. R.*,<sup>11</sup> the Supreme Court of Canada recognized that “**Federal power** in relation to fisheries...is concerned with the protection and preservation of **fisheries as a public resource**, concerned **to monitor or regulate undue or injurious exploitation**” (at p 495; bolding mine). And yet, for the vast majority of that time (indeed, until this year), Canadians have been deprived of the ability to monitor the health of this vital public resource. With the exception of information requests under the *Access to Information Act*, they have had no readily available way of knowing where and when authorizations were being issued, let alone the terms and conditions pursuant to which harm to fish and fish habitat was being authorized.

10. See <https://common-project-search.canada.ca/search-recherche?sortType=2&showMap=true>

11. [1975 CanLII 212 \(SCC\)](#).

Without purporting to establish cause and effect, recent research into these terms and conditions does indicate that projects have often been authorized to impact more habitat than proponents were required to compensate for,<sup>12</sup> while earlier research has confirmed that many projects resulted in HADDs greater than were initially authorized.<sup>13</sup> Simply put, it is reasonable to suggest that DFO's habitat protection program would benefit from the transparency and accountability that a *properly* functioning public registry can be expected to bring. It is also worth noting that under the new Act, the Minister is obligated to consider a series of factors, including cumulative effects, before issuing an authorization,<sup>14</sup> and yet the absence of a functioning registry makes it exceedingly difficult – if not impossible – for Canadians to assess whether and how he or she has done so.

Beyond this, a properly calibrated registry could be an enormously powerful tool in safeguarding Canada's fishery resources, bearing in mind especially advances in information technology (IT) and geographic information systems (GIS). WWF Canada's Watershed Reports (screenshot below) provide another powerful example of how these advancements can be put to use for the purposes of watershed protection, including raising awareness about the value of functioning and intact habitat.<sup>15</sup>



DFO should seize the current opportunity to build a public registry that is accessible and useful, both in its own right and in combination with other federal environmental registries.

12. Above, note 3.

13. J. T. Quigley, D. J. Harper, "Effectiveness of Fish Habitat Compensation in Canada in Achieving No Net Loss" (2006) *Environ. Manage.* 37.

14. See *Fisheries Act* subsection 34.1(1).

15. See <https://watershedreports.wwf.ca/#intro>

## **APPENDIX: FISHERIES ACT PUBLIC REGISTRY PROVISIONS**

### Public registry

42.2 The Minister shall establish a public registry for the purpose of facilitating access to records relating to matters under any of sections 34 to 42.1.

### Contents of registry — obligatory

42.3 (1) The Minister shall publish the following records in the registry:

- (a) any agreements referred to in section 4.1 that are entered into by him or her and that establish the circumstances and manner referred to in paragraph 4.1(2)(h);
- (b) any standards and codes of practice established by the Minister under section 34.2;
- (c) any orders made by the Minister under sections 34.3 and 37;
- (d) any authorizations given under paragraphs 34.4(2)(b) and (c) and 35(2)(b) and (c) and subsection 35.2(7);
- (e) any permits issued by him or her under section 35.1; and
- (f) any fish habitat restoration plan prepared under subsection 35.2(9).

### Contents of registry — optional

(2) The Minister may publish in the registry, other records that he or she considers appropriate for the purpose set out in section 42.2, including

- (a) any agreements referred to in section 4.1 and subsection 4.4(3);
- (b) any arrangements referred to in subsection 4.4(3) and section 42.02;
- (c) any proposed regulations;
- (d) any reports submitted under any regulations made under this Act;
- (e) any guidelines; and
- (f) any policy.

### Request of designated minister

(3) The Minister may, on the request of any other minister designated under section 43.2, publish any records in the registry that the designated minister considers appropriate for the purpose set out in section 42.2.

### Types of records in registry

- (4) Despite subsections (1) to (3), the registry shall contain only records or any part of those records
  - (a) that are publicly available; or
  - (b) that the Minister determines would be disclosed to the public in accordance with the [Access to Information Act](#) if a request were made in respect of that record under that Act, including any record that would be disclosed in the public interest under subsection 20(6) of that Act.

### Form, manner and access — registry

42.4 The Minister may determine the form of the registry, how it is to be kept and how access to it is to be provided.

### Protection from civil proceeding or prosecution

42.5 Despite any other Act of Parliament, civil or criminal proceedings shall not be brought against Her Majesty in right of Canada, the Minister and any person acting on behalf of or under the direction of the Minister for the full or partial disclosure of any record through the registry made in good faith or for any consequences of its disclosure.