Credit: Jeff Wallace

FISHERIES ACT BRIEF

CODES OF PRACTICE

By Martin Olszynski, Associate Professor, University of Calgary Faculty of Law | January 2021

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 reforms to the *Fisheries Act*. One such reform was to explicitly enable the Minister to rely on "**codes of practice**" as tools for *avoiding* harm to fish and fish habitat. As further set out below, these codes of practice are essentially analogous to Fisheries and Oceans Canada's (DFO) previous practice (pre-2012's Bill C-38 version of the *Fisheries Act*) of publishing "Operational Statements" and, to a lesser extent, issuing "Letters of Advice" to proponents instead of requiring and issuing section 35 authorizations for the harmful alteration, disruption, or destruction (HADD) of fish habitat. While an improvement on the Bill C-38 regime, it appears that **DFO is not applying the lessons learned from past experience and research** with respect to Operational Statements and Letters of Advice.

The next Part (II) describes DFO's past practice with respect to Operational Statements and Letters of Advice and the problems that were identified with that practice. Part III sets out the current *Fisheries Act*'s provisions in relation to codes of practice and the steps that DFO has taken towards implementing them as part of its habitat protection program to date. Part IV makes the care for correcting the course on codes of practice in order to make them a more effective tool for fish habitat management and protection.

II. DFO'S PAST RELIANCE ON OPERATIONAL STATEMENTS AND LETTERS OF ADVICE

Since its introduction in the late 1970s, the *Fisheries Act* prohibition against HADD has always been subject to exemptions by either Ministerial authorization or by regulations. In practice, however, there have been very few regulations promulgated for this purpose, such that Ministerial authorizations, the application for which triggered an environmental assessment under the original *Canadian Environmental Assessment Act* (CEAA), were the rule.

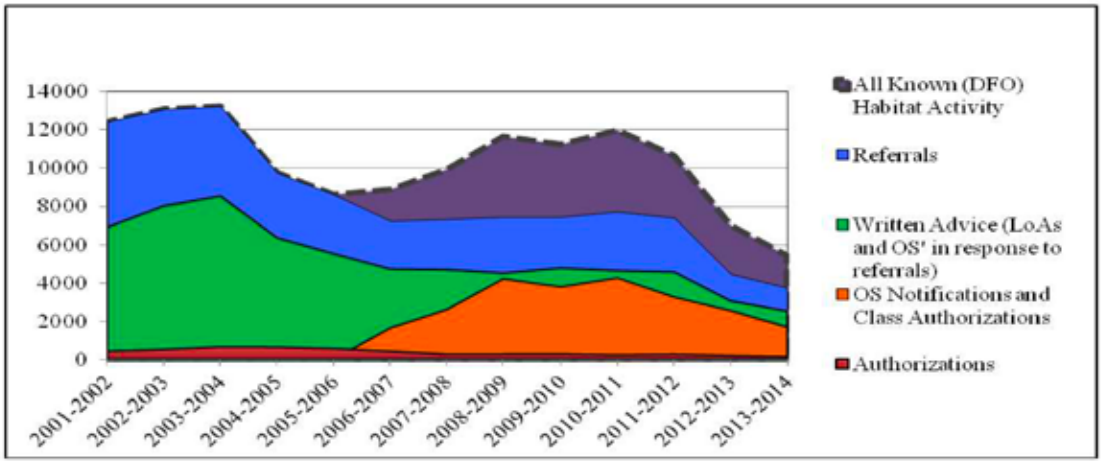
During this period (between 1995 and 2012), DFO relied on two *extra*-regulatory instruments, Letters of Advice (LoAs) and Operational Statements (OS), to divert what it deemed to be "low risk" projects from the authorization (and *CEAA*) regime. An LoA was essentially a letter that contained advice from a DFO official to a proponent on steps that could be taken to *theoretically avoid* causing a HADD and, consequently, avoid the need for an authorization and a federal environmental assessment. An OS was essentially a generic LoA made available through DFO's various regional websites for various kinds of projects (e.g. culvert repair, stream crossings, beaver dam removal) but that also provided for *voluntary* notification of use to DFO. In the five years preceding Bill C-38 (2012), DFO received an average of 7,000 project referrals/year, wrote 5,000 LoAs/year, received 4,000 OS notifications/year, and issued approximately 275 authorizations/year.[1] In other words, LoAs and OSs appeared to do much of the heavy lifting in terms of habitat management and protection throughout Canada (see also Figure 1, below, for all activity between 2001—2014 based on DFO's annual reports for that period).

Albeit to varying degrees, most stakeholders tended to view this regime as unsatisfactory. Environmental groups and academics expressed concern that the DFO was relying on LoAs and OSs to circumvent its environmental assessment duties pursuant to *CEAA*.[2] Fisheries biologists observed that

1. See Martin Olszynski, "From 'Badly Wrong' to Worse: An Empirical Analysis of Canada's New Fish Habitat Protection Laws" (2015) 28(1) J. Env. L. Prac. 1 (SSRN).
2. See Arlene Kwasniak, "Slow on the Trigger: The Department of Fisheries and Ocean, the Fisheries Act and the Canadian Environmental Assessment Act" (2004) 27:2 Dal. L. J. 349.

monitoring and enforcement were generally inadequate.[3] With respect to Operational Statements, a 2011 study of trenchless watercourse crossings in Alberta identified several compliance issues.[4]

Figure 1: Habitat Protection Program Activity (2001 – 2014)



Probably the three most common criticisms of the LoA and OS regime were that:

(i) There was **no clear statutory basis** for LoAs and OSs;

(ii) While they purported to set out steps that should be taken by proponents to *avoid* HADD, they were in fact ***enabling*** **HADDs** that DFO deemed "low risk", resulting in cumulative loss and degradation of fish habitat;

(iii) Because of the fiction that compliance with OSs meant that a HADD was avoided, **notification of their use was not mandatory**.

As further discussed below, the reformed *Fisheries Act* does address the first of these issues. Before proceeding, however, it is worth noting that, with the repeal of the original *CEAA* and its regulatory trigger (e.g. that issuance of a s. 35 authorization triggered a federal impact assessment), which was *not* re-introduced in the new *Impact Assessment Act*, much – if not all – of the logic supporting the use of extra-regulatory tools like LoAs, OSs or codes of practice appears to have dissipated. In other words, it is not clear why the department is reluctant to exercise its regulatory authority to regulate the kinds of works, activities and undertakings that have previously been subject to these instruments, bearing in mind that such regulations can be designed to impose essentially the same minimal regulatory burden, but with added benefits in terms of certainty, compliance, and the future ability to include mechanisms to offset residual harm.

III. *FISHERIES ACT* CODES OF PRACTICE PROVISIONS AND PRACTICE

Standards and codes of practice are found at section 34.2 of the *Fisheries Act*:

> 34.2(1) The Minister may establish standards and codes of practice for
>
> (a) the *avoidance* of death to fish and harmful alteration, disruption or destruction of fish habitat;
>
> (b) the conservation and protection of fish or fish habitat; and
>
> (c) the prevention of pollution.

3. J. T. Quigley, D. J. Harper, "Effectiveness of Fish Habitat Compensation in Canada in Achieving No Net Loss" (2006) Environ. Manage. 37.
4. Nugent, S. 2011. "A review of trenchless watercourse crossings in Alberta with respect to species at risk. Can. Manuscr. Rep. Fish. Aquat. Sci. 2947: vi+ 69 p.

(2) The standards and codes of practice may specify procedures, practices or standards in relation to works, undertakings and activities during any phase of their construction, operation, modification, decommissioning or abandonment.

(3) *Before establishing any standards and codes of practice, the Minister may consult* with any provincial government, any Indigenous governing body, any government department or agency or any persons interested in the protection of fish or fish habitat and the prevention of pollution.

(4) The Minister shall publish any standards and codes of practice established under this section, or give notice of them, in the *Canada Gazette* and he or she may also do so in any other manner that he or she considers appropriate.

The new *Fisheries Act* does address the first issue identified above regarding the use of OSs (now codes of practice): the absence of any clear statutory basis for them. This basis has now been provided.

Unfortunately, based on DFO's approach to date, the other two problems of enabling harm and lack of notification have not been addressed. To date, the department has published six "interim" codes of practice (CoPs)[5] for:

- Beaver dam removal
- Culvert maintenance
- End-of-pipe fish protection screens for small water intakes in freshwater
- Routine maintenance dredging
- Temporary cofferdams and diversion channels
- Temporary stream crossings

It is not clear what is intended by the term "interim" – there is no mention of interim CoPs in the Act. Presumably, this qualifier is intended to explain why DFO may not have consulted the public with respect to these CoPs (as it is permitted but admittedly not required to do pursuant to subsection 34.2(3)). In any event, a review of these CoPs makes plain that in many cases, proponents are being advised to *take steps not to avoid but rather to mitigate impacts* on fish and/or fish habitat, contrary to the plain wording of section 34.2:

- Many steps outlined in these CoPs, such as allowing riparian zone vegetation to be pruned then later replanted, represent mitigation rather than avoidance. Riparian zone pruning and the construction of access points (both recommended in several CoPs) cause harm, and any replanting or restoration only partially restores the functionality of that riparian zone, leaving residual harm. The interim CoP for end-of-pipe fish protection screens calls for timing water withdrawals, appropriately sized screens, and cleaning fish screens to diminish the likelihood of (but not fully avoid) entraining eggs and larval fish, implying residual death of fish.6
- The interim CoP on routine maintenance dredging egregiously violates the intent to avoid harm. This CoP instructs proponents to reinstate habitat structure, restore stream geomorphology, restore disturbed habitat features, and remediate impacted areas. Aquatic restoration is a complex and emerging field that remains largely experimental and frequently unsuccessful. Non-profit and government partners are typically required to seek reviews by DFO when carrying out such projects. It is unclear why proponents are being permitted through this CoP to undertake restoration actions without oversight through this CoP.[7]

5. See https://www.dfo-mpo.gc.ca/pnw-ppe/practice-practique-eng.html
6. Correspondence with Dr. Nicolas Lapointe, Canadian Wildlife Federation.
7. Ibid.

At the risk of stating the obvious, these CoPs appear to be in contravention of the text, context, and purpose of the Act. The harmful alteration, disruption, or destruction of fish habitat may only be authorized by the Minister by regulations.

Finally, proponents are merely requested to notify DFO when they are relying on a CoP, rather than being required to do so. Although past experience with OSs does suggest that even voluntary notification does generate some useful data, it will invariably be second best to mandatory notification.

IV. THE PATH AHEAD FOR CODES OF PRACTICE

As Figure 1 (above) demonstrates, the vast majority of historical habitat activity could be considered relatively minor when viewed in isolation. However, the continued degradation of Canada's watersheds suggests that cumulatively these represent a significant threat to fish and fish habitat. Viewed this way, it is not clear why DFO refuses to make use of the myriad regulatory tools at its disposal (*e.g.* the various regulatory powers in subsection 35(2)) to better manage these threats. Most – if not all – of the interim CoPs could be converted into a form of "minor work" regulation, with the important difference being that notification (also sometimes referred to as "registration") would not be voluntary; proponents could be required to send DFO basic information about their project.

For the near future, such "minor work" regulations' primary function would be to gather information, enabling DFO to better ascertain the state of various fisheries and the watersheds that support them, and to assist in targeting enforcement and compliance activity. Over time, this and other information could be used to determine which proposed projects require greater scrutiny not because of their individual size but rather because of their location in a watershed and the extent of previous developments' impacts on the state of that watershed – precisely as required by the new subsection 34.1(1), which sets out a series of factors that the Minister must consider when issuing authorizations – including cumulative effects. It would also leave open the option of requiring additional measures, such as minor offsets or fees, where the circumstances support the application of such a tool. CoPs could also be revised to truly apply to instances where the avoidance of harm is in fact contemplated and feasible.