



November 30, 2016

By E-mail: Fopo@parl.gc.ca

Standing Committee on Fisheries and Oceans
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6

Re: Review of Changes to the *Fisheries Act* and the Great Lakes ecosystem

Dear committee members:

The Forum for Leadership on Water (FLOW), a project of Tides Canada, commissioned Dr. Anastasia Lintner of Lintner Law to prepare the attached submission to provide perspective on the Standing Committee's review of changes to the *Fisheries Act* in the context of the Great Lakes ecosystem. The submission is endorsed by 11 Great Lakes non-government organizations, including four US-based groups who share an interest in a strong Canadian *Fisheries Act*.

The submission begins with a brief discussion of Great Lakes fisheries and fish habitat, followed by an explanation for each of nine recommendations that we believe will strengthen the *Fisheries Act* to support sustainable fisheries in the Great Lakes-St. Lawrence River ecosystem.

In summary, the recommendations included in the submission are:

1. Restore habitat and fish protections
2. Strengthen protections for fish and fish habitat
3. Ensure healthy aquatic ecosystems
4. Ensure safe passage for fish
5. Engage local and indigenous communities in fisheries management
6. Provide for transparency and accountability through public monitoring and reporting
7. Maintain payment of fines to Environmental Damages Fund
8. Increase capacity to ensure monitoring, compliance, and enforcement
9. Improve relationship with indigenous peoples

We thank you for this opportunity to provide input into the Review of Changes to the *Fisheries Act* and look forward to the Committee's report in early 2017.

Sincerely,

Tony Maas

Project Director, Forum for Leadership on Water

tony@flowcanada.org

519-572-9972

flowcanada.org



Endorsing organizations:

Theresa McClenaghan, Executive Director, Canadian Environmental Law Association

Linda Heron, Chair, Ontario Rivers Alliance

Jill Ryan, Executive Director, Freshwater Future Canada

Mike Nagy, Chair, Wellington Water Watchers

Stan Gibson, CEO of Ecologos Environmental Organization and the Water Docs Programs; Co-leader of the Great Lakes Water Walk & Celebration

Tim Gray, Executive Director, Environmental Defence Canada

Raj Gill, Great Lakes Organizer, Canadian Freshwater Alliance

Molly Flanagan, Vice President, Policy, Alliance for the Great Lakes (USA)

Kristy Meyer, Managing Director, Natural Resources, Ohio Environmental Council (USA)

Marc Smith, Policy Director, National Wildlife Federation (USA)

Lee Willbanks, Upper St. Lawrence Riverkeeper and Executive Director, Save the River (USA)

GREAT LAKES NEED GREAT LAWS

Submission to the House of Commons Standing Committee on
Fisheries and Oceans on its Review of Changes to the Fisheries Act

BACKGROUND

The Forum on Leadership in Water (FLOW), a project of Tides Canada, commissioned Dr. Anastasia Lintner of Lintner Law to prepare this submission to ensure that issues and voices related to Great Lakes fisheries are included in the review of changes to the *Fisheries Act* being undertaken by the Standing Committee on Fisheries and Oceans.

According to the binational Great Lakes Fisheries Commission, “The [Great Lakes] fishery is worth more than \$7 billion annually to the people of the region, supports more than 75,000 jobs, sustains native fishers, and is the essence of the basin’s rich cultural heritage.”¹ In Ontario alone, the commercial fishery contributes \$350 million to Province’s GDP and Canadians spend \$443 million per year on the recreational fishery in the Great Lakes.²

Fisheries in the Great Lakes - St. Lawrence River have changed dramatically since Canada was formed almost 150 years ago. In Lake Ontario, Atlantic salmon were extirpated over 100 years ago.³ According to the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), “The Lake Ontario Atlantic salmon was extinguished through habitat destruction and through overexploitation by a food and commercial fishery.”⁴ Invasive species, including alewife and sea lamprey, have altered the aquatic ecosystem.⁵ Increased pollution from nutrients, primarily phosphorus, causes impacts such as harmful blue-green algal blooms and reductions in dissolved oxygen. These impacts were (and are again) most pronounced in Lake Erie and were an important catalyst to the negotiation and signing of the Great Lakes Water Quality Agreement between Canada and the United States in 1972.⁶

Efforts have been made to restore key native species, including Atlantic salmon, lake trout, walleye, and lake sturgeon, and to reduce the impact of non-native species. Despite some successes, fisheries management in the Great Lakes - St Lawrence River remains a challenge with ongoing pollution problems and introduction of additional invasive species including zebra and quagga mussels and the red goby.⁷

THE NEED TO RESTORE LOST PROTECTIONS AND INTRODUCE MODERN SAFEGUARDS

Modern safeguards for Great Lakes - St. Lawrence River fisheries have been needed for some time. Prior efforts to review and amend the *Fisheries Act* have not resulted in effective modernization, and new threats are emerging. For example, the Committee of Advisors of the Great Lakes Fisheries Commission has called on both Canadian and US governments to “thoroughly investigate the impacts of net pen aquaculture—through a comprehensive regulatory, social (including public meetings with stakeholders, citizens, and tribes and First Nations), economic, and scientific assessment—and prior to any approval of said operations, institute appropriate legislation and regulations to protect the Great Lakes from the consequences of unregulated net pen aquaculture.”⁸

The *Fisheries Act* has protected fish since was first enacted in 1868. In 1977, important amendments were made to the *Fisheries Act* to protect fish habitat. Maintaining healthy aquatic ecosystems required for sustainable fisheries requires protection and restoration of the habitats that supports all fish species. Protection of fish habitat is particularly concerning for Great Lakes - St. Lawrence River fisheries, and the people that enjoy and whose livelihoods depend on them, because years of alterations to the waters and landscape has degraded and reduced fish habitat both within lakes and in the many tributary rivers that feed them.

Changes to the *Fisheries Act* made in 2012 replaced the prohibition on “harmful alteration, disruption or destruction” (often referred to as “HADD”) of fish habitat and the prohibition on killing fish (repealed s 32) with a new prohibition on “serious harm to fish”, which is defined as “death of fish or any permanent alteration to, or destruction of, fish habitat” (s 2(2)). This new provision is problematic in particular due to the uncertainty about what time frame is necessary to be considered “permanent”. Ecojustice’s *Fisheries Act* Backgrounder includes a detailed analysis of how changes to the *Fisheries Act* in 2012 and 2013 weakened the protection of fish and fish habitat.⁹

RECOMMENDATIONS TO THE STANDING COMMITTEE

A strong *Fisheries Act* can play an important role in advancing efforts to ensure sustainable fisheries in the Great Lakes - St. Lawrence River ecosystem. The following nine recommendations are proposed for restoring lost protections and introducing modern safeguards to the legislation.

1. Restore habitat and fish protections

As noted in their brief entitled “Scaling up the Fisheries Act”, Nowlan and Johnston note that “Restoring habitat protection and prohibitions against the killing of fish as a first, urgent, short-term priority.”¹⁰ Indeed, these changes should be central to the Government of Canada’s efforts to restore lost protections and introduce modern safeguards to the *Fisheries Act*. The 2012 amendments also introduced the term “activity” along with “work” and “undertaking” to the prohibition. Keeping “activity” within the prohibition, so that the provision reads: “No person shall carry on any work, undertaking or activity that results in the harmful alteration, disruption or destruction of fish habitat”¹¹, will strengthen habitat protections. The prohibition against killing fish except by fishing should also be restored to the *Act*.

2. Strengthen protections for fish and fish habitat

Prohibitions need to be strengthened beyond the provisions that existed prior to the 2012 amendments. Under those prior provisions, Fisheries and Ocean Canada’s discretion under s 35(2) to allow destruction of fish habitat meant that the *Fisheries Act* regime was not capable of legally protecting critical habitat of endangered and threatened aquatic species under the federal *Species At Risk Act*.¹² Fisheries and Oceans Canada had cited the pre-2012 habitat protection provisions in a protection statement involving critical habitat for the Northeast Pacific Northern and Southern populations of killer whale. The intent was to rely on the *Fisheries Act* regime to satisfy the non-discretionary requirement that critical habitat of the killer whale be protected pursuant to the *Species At Risk Act*. In assessing whether the *Fisheries Act* regime could lawfully be found to protect critical habitat, the Court found that “There is no dispute that the protection offered fish habitat under subsection 35(1) may be waived at the discretion of the Minister acting under subsection 35(2).”¹³ As such, the Court determined that the *Fisheries Act* habitat management scheme to be distinct from a habitat protection scheme. In order to ensure that the *Fisheries Act* does protect habitat and provide for sustainable fisheries, ministerial discretion needs to be addressed through legislative amendments.

Further, habitat monitoring was only required through authorizations granted under s 35(2) and not as a standalone legal obligation of the *Fisheries Act*. This shortcoming also needs to be addressed as the Standing Committee undertakes its Review of Changes to the *Fisheries Act*.

3. Ensure healthy aquatic ecosystems

Ensuring healthy aquatic ecosystems that are able to support sustainable fisheries should be the focus of a modernized *Fisheries Act*. It would be helpful for the legislation to include a preamble and purpose statement that articulates a goal for sustainable Canadian fisheries. An overall goal of sustainable fisheries must be grounded in a comprehensive, ecosystem-based approach that ensures healthy aquatic ecosystems. Taking an ecosystem approach will require integrated planning that includes coastal protected areas for addressing existing and emerging threats. As well, important environmental law principles including the precautionary principle and the principle of intergenerational equity need to apply to fisheries management decisions made under the Act.

4. Ensure safe passage for fish

Strengthening the *Fisheries Act* to ensure that fishways are installed for native species is important to sustainable fisheries. For example, the American eel (an endangered species) continues to be harmed by lack of safe passage around waterpower operations. According to the Environmental Commissioner of Ontario:¹⁴

... safe passage for the endangered American eel on the Ottawa River has been blocked for decades by more than ten Ontario and Quebec hydro-electric dams, none of which have an eel ladder to allow upstream passage. And although two large hydro dams on the St. Lawrence River (the Moses-Saunders Power Dam and the Beauharnois Generating Station) are equipped with fish ladders and navigation locks, together these two waterpower facilities reportedly kill about 40 per cent of the eels that pass through their turbines.

...

Under the *Fisheries Act*, the federal Minister of Fisheries and Oceans may put conditions on dams and make orders to prevent harm to fish or to ensure fish passage, including ordering a dam owner to construct a fishway. **However, this discretionary power has rarely, if ever, been used to require the installation of a fishway in Ontario;** of the more than 2,500 dams in Ontario, less than 50 (2 per cent) have been identified as having a fishway. Likewise, of the more than 200 waterpower dams in the province, only a couple have a permanent fishway. [emphasis added]

Modern safeguards would include ensuring that there are means for fish to avoid being killed through such operations. At the same time, fishways should not be used to enable non-native species to enter into waterways where they will threaten native species.

5. Engage local and indigenous communities in fisheries management

Meaningful public engagement is an integral part of fisheries management. Local and indigenous communities hold important knowledge that can assist with decision-making. Such knowledge, in addition to advice and guidance from the fishing and scientific communities, ought to be a necessary component of modern safeguards. As such, provision for how such engagement will be carried out and how traditional ecological knowledge will be incorporated (if offered by indigenous communities) needs to be addressed in any legislative changes.

6. Provide for transparency and accountability through public monitoring and reporting

Although there is regular reporting to Parliament on the administration of the *Fisheries Act* (s 42.1), there is no requirement that such reporting be made easily accessible to the public. To enhance transparency and accountability, there needs to be a public registry that enables easy access to all information that is relevant to fisheries management, including authorizations and the associated reasons, monitoring and enforcement activities, and annual reports. Technical reports should include plain language summaries to ensure that the information is accessible to the interested public.

7. Maintain payment of fines to Environmental Damages Fund

The addition of the requirement that fines under the *Fisheries Act* be paid directly to the Environmental Damages Fund in order to be “used for purposes related to the conservation and protection of fish or fish habitat or the restoration of fish habitat” (s 40(6)) is a welcome improvement to the Act introduced in the 2012 revisions that ought to be maintained in any future legislative reform.

8. Increase capacity to ensure monitoring, compliance, and enforcement

Laws and policies are only effective if there is sufficient capacity applied to monitoring, compliance, and enforcement. There was a lack of enforcement activity under the pre-2012 provisions (warnings issued and charges laid declined since 2001-2002) and there was a dramatic drop in the hours allocated to enforcement from 2011-2012, even before the new provisions came into force in late 2013.¹⁵ In addition to considering the changes to the *Fisheries Act* and what types of legislative reform may be required to ensure modern safeguards for fisheries management, consideration needs to be given to ensuring federal ministries responsible for compliance and enforcement of both habitat protection and pollution prevention provisions have the necessary capacity. This includes resources to educate the regulated community and the public, as well as for enhanced monitoring and inspecting for compliance.

9. Improve relationship with indigenous peoples

Throughout the process of the Review of Changes to the *Fisheries Act*, it is expected that the federal government will honour its commitments under the United Nations Declaration on the Rights of Indigenous Peoples and to implement the recommendations of the Truth and Reconciliation Commission. First Nation and Métis communities within the Great Lakes - St. Lawrence River ecosystem will need to be consulted in a manner that meets the federal government's constitutional responsibilities.

CONCLUDING REMARKS

The review of the *Fisheries Act* being undertaken by the Standing Committee on Fisheries and Oceans, and the broader public consultation being undertaken by the Government of Canada on restoring lost protections and introducing modern safeguards to Act, present an important opportunity for the future of the Great Lakes - St. Lawrence River ecosystem. Including the recommendations proposed in this brief in the Committee's report to Parliament will send a strong signal to the Minister of Fisheries, Oceans and the Canadian Coast Guard that a modern *Fisheries Act* can play a key role in sustaining Great Lakes fisheries.

ENDNOTES

- 1 Great Lakes Fisheries Commission, Fact Sheet 6 – A Joint Strategic Plan for Management of Great Lakes Fisheries: Facilitating cooperation for more than 30 years—and counting!, http://www.glfc.org/factsheets/FACT%206_14-0913.pdf, accessed Nov 14, 2016.
- 2 Environment and Climate Change Canada, Great Lakes Quickfacts, <https://www.ec.gc.ca/grandslacs-greatlakes/default.asp?lang=En&n=B4E65F6F-1>, accessed Nov 14, 2016.
- 3 COSEWIC, Assessment and Status Report on the Atlantic Salmon (*Salmo salar*) Lake Ontario population in Canada (2006), http://www.registrelep-sararegistry.gc.ca/virtual_sara/files/cosewic/sr_atlantic_salmon_lake_ont_e.pdf, accessed Nov 14, 2016.
- 4 *Ibid.*, at p iii.
- 5 David B. Bunnell, et al., “Changing Ecosystem Dynamics in the Laurentian Great Lakes: Bottom-Up and Top-Down Regulation”, *BioScience* Vol. 64 No. 1, January 2014, at pp 27-29.
- 6 *Ibid.*, at p 29.
- 7 The Department of Fisheries and Oceans, Policy for the Management of Fish Habitat, Ministry of Supply & Services Canada, 1986.
- 8 Committee of Advisors to the Great Lakes Fishery Commission, A Resolution Calling For Multi-Jurisdictional Consideration And Regulation Of Net Pen Aquaculture In The Great Lakes, June 10, 2015, http://www.glfc.org/staff/resol2015_2.pdf, accessed Nov 14, 2016.
- 9 Ecojustice Canada, Fisheries Act Background, May 2012, Updated February 2013, <https://www.ecojustice.ca/wp-content/uploads/2015/03/Ecojustice-Fisheries-Act-Feb-2013.pdf>, accessed Nov 14, 2016.
- 10 Linda Nowlan and Anna Johnston, Scaling Up The Fisheries Act: Restoring lost protections and incorporating modern safeguards, *West Coast Environment Law* (March 2016) at p 2. Available at <http://wcel.org/resources/publication/scaling-fisheries-act-restoring-lost-protections-and-incorporating-modern-safe>, accessed Nov 14, 2016.
- 11 *Ibid.*, at p 4.
- 12 *Canada (Fisheries and Oceans) v David Suzuki Foundation*, 2012 FCA 40 (CanLII), <http://canlii.ca/t/fq4v4>, accessed Nov 22, 2016.
- 13 *Ibid.*, at para 130.
- 14 Environmental Commissioner of Ontario. 2015. “The Ecological Impacts of Waterpower Projects on Fish Passage.” *Small Things Matter, ECO Annual Report, 2014/15*. Toronto, ON: Environmental Commissioner of Ontario. 129-134. http://www.ecoissues.ca/The_Ecological_Impacts_of_Waterpower_Projects_on_Fish_Passage, accessed Nov 14, 2016.
- 15 Olszynski, Martin, From ‘Badly Wrong’ to Worse: An Empirical Analysis of Canada’s New Approach to Fish Habitat Protection Laws (August 27, 2015). (2015) 28(1) *J. Env. L & Prac.* (Forthcoming). at pp 23-24. Available at SSRN: <https://ssrn.com/abstract=2652539> or <http://dx.doi.org/10.2139/ssrn.2652539>, accessed Nov 22, 2016.



Bringing together past political leaders, former officials with federal and provincial governments, and senior staff of respected research institutes and non-governmental organizations, the Forum for Leadership on Water (FLOW) has been working for over a decade to secure the health of Canada's fresh water. FLOW convenes leading thinkers, provides independent analysis and commentary, and engages with governments to advance progressive public policies and influence important decisions for the protection and sustainable management freshwater resources and ecosystems. Learn more at www.flowcanada.org.



FLOW is a project on Tides Canada's shared platform, which supports on-the-ground efforts to create uncommon solutions for the common good. Tides Canada is a national Canadian charity dedicated to a healthy environment, social equity, and economic prosperity. Tides Canada's shared platform provides governance, human resources, financial, and grant management for leading environmental and social projects across Canada, allowing projects to more effectively achieve their missions. Tides Canada has full fiduciary and governance responsibility for FLOW.