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## **Standing Committee on Fisheries and Oceans**

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**EVIDENCE**

**Monday, October 31, 2016**

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**Chair**

**Mr. Scott Simms**



## Standing Committee on Fisheries and Oceans

Monday, October 31, 2016

• (1530)

[English]

**The Chair (Mr. Scott Simms (Coast of Bays—Central—Notre Dame, Lib.)):** Welcome everybody.

Before we get to any interventions, I want to welcome to our guests, but before we get to our guests, I have just a couple of things. Let me get to the reason why we're here.

Pursuant to Standing Order 108(2) and the motion adopted by the Committee on Monday, September 19, 2016, the Committee commenced its study of review of changes to the Fisheries Act.

The motion of September 19 is as follows:

That the Committee, in light of the letter provided by the Minister of Fisheries, Oceans and the Canadian Coast Guard & the Minister of Transport, review and study the scope of application of the Fisheries Act, and specifically the serious harm to fish prohibition; how the prohibition is implemented to protect fish and fish habitat; the capacity of Fisheries and Oceans Canada to deliver on fish and fish habitat protection through project review, monitoring, and enforcement; the definitions of serious harm to fish and commercial, recreational, and Aboriginal fisheries; the use of regulatory authorities under the Fisheries Act; and other related provisions of the act, and provide its recommendations in a report to the House, no later than Tuesday, February 28, 2017.

This is our first meeting, and I want to welcome our guests. Before we get to that, however, I have just a bit of housekeeping. It was suggested that we televise the hearings. As you can see, we are not in a place where we are televising for a reason. We found out that when we used Centre Block we could televise, but we could not video conference at the same time. It doesn't have the technological capacity to provide that.

That being said, we are here today at 151 Sparks Street because we could not get a room in 1 Wellington Street, which is the only place where we can do both. It was booked up. On Wednesday, we won't need video conferencing. The minister will be here, and it will be televised.

Following the constituency week, we will return to 1 Wellington Street, where we're able to do both. So we are able to accommodate that, and I want to thank our clerk for arranging that, as was directed by our committee.

Before we go to the witnesses, did I see Mr. Donnelly put his hand up?

Mr. Donnelly.

**Mr. Fin Donnelly (Port Moody—Coquitlam, NDP):** Thank you, Mr. Chair. I'm very excited to hear from our witnesses on the

Fisheries Act review, but I just want to move my motion that I gave notice of:

That the committee may only meet in camera for the following purposes:

- (a) to consider wages, salaries and other employee benefits;
- (b) to consider contracts and contract negotiations;
- (c) to consider labour relations and personnel matters;
- (d) to consider a draft report or agenda;
- (e) for briefings concerning national or parliamentary security;
- (f) to consider matters where privacy or the protection of personal information is required;
- (g) to receive legal, administrative or procedural advice from the House of Commons' Administration; and
- (h) for any other reason, with the unanimous of the committee;

That the Chair may schedule all or portions of a meeting to be in camera for the reasons listed above;

That any motion to sit in camera shall be subject to a debate where the mover, and one member from each of the other recognized parties, be given up to three minutes each to speak to the motion; and that the mover shall then be given up to one minute to respond.

**The Chair:** Because you did this in advance, Mr. Donnelly, I don't think we need time for people to read and consider. I'm sure that everyone, like myself, has read the motion.

Is there any discussion? No.

(Motion agreed to)

**The Chair:** Thank you very much, Mr. Donnelly.

Normally what we do in a day of witnesses is take the first hour for testimonies and questions to witnesses, and then we do the same with a different set of witnesses for the second hour of the meeting. However, we decided, because of the gravity of the issue and the people we are discussing this with, that we're going to provide a full two-hour block for this. You will have your 10 minutes to open with, and then we'll proceed with the questions until 5:30 p.m. eastern time.

That being said, I will introduce our guests. From the Canadian Wildlife Federation, we have Dr. David Browne, director of conservation; as well as Dr. Nick Lapointe, senior conservation biologist, freshwater ecology. You will have 10 minutes for your group.

We also have, as an individual, Dr. Brett Favaro, research scientist at the Fisheries and Marine Institute of Memorial University of Newfoundland. He, of course, is no stranger. He was here just recently, and he joins us by video conference.

Finally, we have Dr. Martin Olszynski, assistant professor, faculty of law, an affiliated faculty at the Canadian Institute of Resources Law at the University of Calgary. Thank you for joining us, sir.

We'll go now to the Canadian Wildlife Federation for 10 minutes.

**Mr. David Browne (Director of Conservation, Canadian Wildlife Federation):** Thank you for the opportunity to speak with you today.

The Canadian Wildlife Federation is a national charity. It has about 250,000 supporters. We work through education, science-based policy, and outreach to conserve and inspire the conservation of Canada's wildlife and habitats for the use and enjoyment of all.

I want to provide some context, and then jump right into loss protections and modern safeguards.

I want to start by emphasizing the importance of fish habitat in Canada. It is important from a fisheries point of view. Aboriginal fisheries have critical cultural and subsistence value. Commercial fisheries have a direct value of \$6 billion or more per year. Recreational fisheries have a value of \$8 billion per year and engage millions of Canadians. Fish habitat is also important in terms of ecosystem services, such as flood control, water quality, and water quantity, and simply because of the intrinsic value of our aquatic biodiversity to Canadians. The task at hand is large, and it is important to all Canadians that we protect our freshwater environments and our fish.

Another aspect of that context is the current status of fish habitat in Canada. On the left are some photos of some fish habitats in various states of alteration. On the right is perhaps one of the closest things we have to a national status map of fish habitat, which it actually is not; it's a stress index developed by Dr. Cindy Chu, and the darker blue areas are the higher-stress areas for fish habitat.

In a nutshell, we could say that habitat quality was declining under the 1986 policy of no net loss, and that it continues to decline today despite prohibition on serious harm. Having said that, I would say that there are many very good examples of improvements to fish habitat, of good restoration projects, and of excellent offsets, but overall our evaluation would be one of continued decline. The known causes of this fall into three categories: direct destruction and alteration from projects; indirect destruction and alteration through land use; and destruction and alteration of habitat by fishing practices.

I also want to provide the context for why we are talking about the fish habitat provisions and the goals from the perspective of the Canadian Wildlife Federation.

In our view, it is really to set the overarching federal regulatory policy and program framework to protect existing fish habitat, restore the legacy of past harms to fish habitat, and compensate effectively for future harms to fish and fish habitat. Doing this will require a balanced effort and investment in both freshwater and marine habitats.

Our testimony will focus on loss protections and modern safeguards. I just want to preface this by saying that while we'll focus on loss protections, we do think there were a number of

changes to the act that came from earlier consultations that were beneficial and that can be built on as we move forward.

The first aspect of loss protections is confusion over where this prohibition now applies. We believe that derives directly from the requirement to link the prohibition either directly or indirectly to a fishery, so there's a bit of confusion over where in the landscape section 35 actually applies.

We have two recommendations. One is to amend section 35's language to apply the prohibition to all fish and all fish habitats. However, we would like to see the maintenance and the acknowledgement of the importance of all three types of fisheries in the interpretation and implementation of this act. The second aspect of loss protection involves what is protected by section 35. It is largely similar. However, there's one area of change, which is that there's a lack of clarity around how the prohibition under section 35 applies to temporary alterations of fish habitat. There is also confusion stemming from the use of the term "serious harm to fish", although it is defined in the act. Finally, there is the loss of 25 years of jurisprudence to provide clarity on what the prohibition actually means.

Again, our recommendation is clear: amend the language of section 35 to prohibit the death of fish and the harmful alteration, disruption, and destruction of fish habitat.

Finally, there are the loss protections in how we deliver fish habitat protection. These stem from massive changes—I would describe them as massive, and they've been going on for many years—to policy, program, and capacity. We'll focus on some aspects of this.

First would be project review. We have greatly reduced staff capacity in both numbers and years of experience. There is self-assessment of projects with no registry or auditing. Service standards are met largely by triage out of lower-risk projects, and there is no capacity internally to develop a more efficient framework for delivering on the responsibility to protect fish habitat.

● (1535)

Next, in terms of enforcement, staff and equipment were severely cut, with no alternative arrangement in place with provinces, and few fines or warnings are being issued.

Finally, on monitoring, there was no capacity before 2012 and no capacity after 2012, and this needs to change.

Our recommendation is to strategically invest in DFO capacity to design, operate, and enforce a fish habitat protection program and to continue building partnerships with NGOs and other sectors of society to deliver it, because DFO cannot do this alone. If it's going to succeed, this is going to have to be a co-operative and collaborative approach to protecting fish habitat.

I'd now like to move on to modern safeguards, where we have six points to make.

The first—and our overarching point—is that any changes made to the program or the law should really focus on better outcomes for fish and fish habitat. That means achieving better outcomes, not just building process. Build the process to achieve the outcomes we want. Adopt a national goal of achieving a net gain in fish habitat and already-impacted watersheds and allow and support experimentation and “learning by doing” in authorizing, offsetting, and monitoring harm. This may have been one of the key shortfalls of the previous program, in that it wasn't allowed to experiment and push flexibility in ways of doing things for authorizing and offsetting.

The second point is to address cumulative effects. Mechanisms to offset incremental impacts are essential, and this does not mean issuing authorizations for every single small activity that a Canadian citizen undertakes on the landscape. There are other tools available, such as, for example: regulated standards that create ticketable offences; a public registry of self-assessed projects to track and audit what's going on in the landscape; dedicated fees in lieu of offsets; and other program and policy tools that address moderate and low-risk activities.

The third point is to require fish passage. Fish passage provisions were clarified and updated in 2012. There is little improvement in implementation, and it is 100% discretionary and generally not applied. In fact, last year, the environmental commissioner of Ontario pointed out that this discretionary power has rarely been used in Ontario. Of more than 2,500 dams in the province, fewer than 50 have a fishway.

The fourth point is watershed or management zone planning. We see section 6 factors added to the act as requiring an outcomes-based regulation program. If you want to focus on outcomes, you need to have some kind of plan or goal at a watershed or management level. This includes fisheries management objectives, some sense of the current status of the habitat, and some sense of—or, even better, objectives or goals for—the desired future state. This would provide a context for review and authorization, mechanisms to protect watersheds from damaging land use practices, and strategic habitat restoration and offsetting.

Our fifth point under modern safeguards is habitat banking. Canada needs a habitat banking program for fish habitat. This requires legal enablement of third party banking. It requires the establishment of regulations and guidelines that make sure this program leads to real benefits for fish and fish habitat. We are open to experimentation with other market-based tools.

Finally, our sixth point is on partnership approaches to achieving modern safeguards. Governments around the world are turning to partnerships to deliver on regulatory responsibilities. At a federal-provincial level, we believe there's a need for a new national accord

for the protection of fish habitat, as well as renewed agreements with the provinces for enforcement that is tied to funding.

In the public sector, we believe that NGOs, universities, and industry need to find ways to collaborate with government. The Canadian Wildlife Federation has taken the first steps in building a national partnership for aquatic habitat. We believe this partnership can lead to enhanced science tools, better translation of science into policy, and concrete on-the-ground restoration that benefits fish habitat. One form this could take is an increased commitment to the RFCP program that is more strategic and partnership-focused, as well as agreements that allow for program delivery by non-government partners.

I will leave it there. Thank you for your time. I look forward to your questions.

• (1540)

**The Chair:** Thank you very much for your presentation.

Now we're going to go to Dr. Favaro in St. John's.

**Dr. Brett Favaro (Research Scientist, Fisheries and Marine Institute, Memorial University of Newfoundland, As an Individual):** I'm ready when I'm told to start.

**The Chair:** I hear that a lot myself.

Thank you, Dr. Favaro. It's nice to see you again.

We are going to ask you to do your 10 minutes, please. Thank you very much.

**Dr. Brett Favaro:** Thank you, Mr. Chairman.

I'd like to start by wishing you all a very happy Halloween and by thanking you all for the invitation to come speak today and also for accommodating my need to appear by video conference.

I am going to focus most of my attention today on the 2012 changes made to section 35 of the Fisheries Act.

Before the law was revised, the Fisheries Act contained the following text: “No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.” Before we get into details about what was changed and what we should do about it, I want to revisit why this law protected fish habitat so explicitly.

As most of you are aware, I am a scientist who works mostly with fisheries. I had the privilege of speaking to you a couple of weeks ago about my work on sustainable Atlantic cod fishing, but my work on catching fish is completely irrelevant if the ecosystems aren't there to produce fish in the first place. This is true of all fisheries. They depend on intact fish stocks, and those stocks depend on intact habitat.

When you protect fish habitat, you are making a smart investment in our country's environmental and economic future. Fish are like fertilizer to Canadian ecosystems. Salmon, in particular, act as giant conveyor belts for nutrients, sucking up energy from the ocean and injecting it into our coastal rainforests. Intact fish habitat is critical to keeping this conveyor belt moving. The best part is, all this happens free of charge.

Protecting fish habitat gives tremendous bang for your buck. By ensuring the integrity of this one type of environment, you are supporting hundreds of species. This ultimately saves us money, because as species become endangered, it costs us a lot to bring them back from the brink. In fact, this is already a huge problem. There are 91 freshwater fish species in Canada that the Committee on the Status of Endangered Wildlife in Canada has assessed as being endangered, threatened, or of special concern, and the vast majority of these were impacted by habitat loss.

Another reason to protect fish habitat has to do with the very nature of water itself. When you alter habitat on land, the damage is generally localized. By contrast, if you pollute a river, you will cause impacts all the way up and down that river system, and you will even affect the land that the river touches. This means that any damage you do to an aquatic system will not be restricted to the space that you harmed; rather, it will propagate through a giant ecosystem and affect everybody and everything that lives there.

Let's fast-forward to 2012 and Bill C-38, which included changes to the Fisheries Act. Whereas before no person could cause "harmful alteration, disruption or destruction of fish habitat", the new wording read as follows: "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."

This was widely panned by the scientific community: 625 scientists co-wrote a letter to the Prime Minister opposing these changes. Four former fisheries ministers co-authored an open letter opposing the changes as well. So what was the problem?

Scientifically speaking, there were three major issues with the new wording. First was this concept of "serious harm". Serious harm is defined as "the death of fish or any permanent alteration to, or destruction of, fish habitat." To an ecologist, the word "permanent" raises many red flags. What does "permanent" mean? Does it mean a human lifespan? Could you destroy a river if you promised that you would repair it 50 years in the future, and have that be considered a temporary alteration? These questions were never satisfactorily answered, and the only reasonable conclusion was that this wording would make it easier to cause harm to fish habitat.

The second problem was this new focus on fish that were targeted by fishing. This implied that the Fisheries Act wouldn't concern itself

with a large proportion of fish in Canada. If you took the passage literally, it suggested that you would be able to cause serious harm to a river if you could prove that nobody ever put a hook in those remote areas.

Now what if, despite the fact that we don't fish a river now, we want to fish it in the future? I remind everyone that sport fishing is incredibly important to our nation's economy, and a lot of that happens in very remote places and rivers that are sparsely populated. Not only that, but climate change is changing where one might find fish, so it's not crazy to think that as the world warms, people will want to fish in different places. What a shame it would be if we destroyed them all before we got to do that.

The third problem was the reference to this section applying to fish that support a fishery. Now, this statement has no basis in science. We don't have the scientific ability to divide fish into categories of fish that support a fishery and fish that do not. If you, as a committee, were to ask me whether any given fish species was essential to supporting a fishery, with very few exceptions, I would say, "I don't know."

Ecosystems are incredibly complicated. Aquatic ecosystems have hundreds of species interacting in all sorts of ways that science has only begun to describe. When you take parts of that ecosystem out, it may not collapse right away, but what this does is destabilize the system and make it more likely to fall apart. I would also add a reminder that it's not just fish that support fisheries. For example, when I am gutting cod that we harvest at sea, I am likely to find that these fish have been eating shrimp, sea stars, and a multitude of other critters. Again, this is why we protect habitat and not just the things that we fish. It provides an insurance policy against our own lack of scientific understanding.

● (1545)

There's no conservation value to these changes; was there some other motivation for doing so? One of the reasons that the minister at the time, Keith Ashfield, stated was that the existing Fisheries Act was overly burdensome. As a scientist I treated that statement as a hypothesis. Was there evidence that it was overly burdensome? One way you might detect this is if DFO were convicting lots of people under the Fisheries Act for frivolous offences. In other words, if you're handing out convictions like parking tickets then sure, maybe you've got a strong argument that the Fisheries Act was too broad.

At the time DFO published convictions on their websites spanning several years. You could go online and see every person who was convicted and what they were convicted for over a several-year period. In 2012 I went through every press release issued by DFO between 2007 and 2011. Across 285 press releases they described 1,283 convictions under the Fisheries Act. A total of 21, or about four per year, were due to destroying fish habitat. Four per year in the second biggest country on earth by land area. Four per year in a country covered from coast to coast by rivers, lakes, and streams, most of which contain at least some fish.

If four convictions a year are too many then that seems to me we set the bar very low. My colleagues and I published this finding as a letter in the journal *Science*. You wouldn't be able to go back and verify what we found. That's because about a year after we published the article the DFO website was restructured so you could only see six months' worth of convictions. It got less transparent and that much harder to assess the real-world impacts these laws were having.

This brings me to the closing part of my remarks where we talk about moving forward. The scientific case for habitat protection is simple, straightforward, and unambiguous. Perhaps the best articulated case was made on May 17, 1977, by the fisheries minister at the time, Roméo LeBlanc. To quote a few passages from his speech in the House of Commons:

...the regulation of fishing itself is only part of what we need. Protecting fish means protection [of ] their habitats. Protecting the aquatic habitat involves controlling the use of wetlands. The banks of streams, the foreshores of estuaries, provide nutrients to the larger eco-system of lakes and oceans in amounts far out of proportion to their size. The chain of life extending to the whole open ocean depends on bogs, marshes, mudflats, and other "useless-looking" places that ruin your shoes.

As a scientist I can find no argument in favour of making it easy to destroy or damage fish habitat. In fact the need for strong protection is only going to increase as we face a world increasingly stressed by climate change. All the fish in our country are at risk. Increased temperatures mean that rivers and streams will warm up potentially beyond the safe limits that many species can tolerate. Melting snowpack means that water levels will sharply drop, which will make life much more precarious for aquatic species, and while fish are tough they can only take so much. They may be able to survive polluted water, but polluted heated water could spell disaster. Let's give them a helping hand by at least making sure they have intact habitat to feed, grow, and spawn in.

I understand there are trade-offs in any decision so I close my remarks with three key recommendations. First, I think the original wording of section 35 should be restored. It needs to be clear to Canadians that it's just not okay to harmfully alter, disrupt, or destroy fish habitat without compensation. Not temporarily, not permanently, not at all. There's no advantage to allowing it without the legal obligation to build a compensatory habitat. This prohibition was a rule between 1977 and 2012, a time period over which our GDP grew by a factor of about 2.5. Over that time period the science only became clear that fish habitat is critical to the maintenance of fisheries and the ecosystems that support them.

Second, this review should be seen as an opportunity to go beyond what was there before, and strive to secure fish habitat for generations to come. It is noteworthy that despite the strength and

clarity of the original wording we were still losing fish habitat. A peer review 2006 study demonstrated this clearly. So simply restoring the old act is not enough, particularly in a world where on top of everything else climate change now threatens our waterways and the fish that live in them.

Third and finally, whatever recommendations the committee makes should be done with transparency and a view to open data. One of my biggest scientific problems with the 2012 changes was that they were made based on an untested premise, that the previous law was being applied inappropriately and was overly burdensome. To this day I have still not seen clear evidence to support that, and indeed every piece of evidence seems to counter it. I understand that as a scientist I may not always agree with decisions made on conservation, but I think it is uncontroversial that these decisions should be made transparently.

Thank you very much.

● (1550)

**The Chair:** Thank you, Dr. Favaro, for your input.

Dr. Olszynski from the University of Calgary, you have ten minutes.

**Professor Martin Olszynski (Assistant Professor, Faculty of Law and Affiliated Faculty, Canadian Institute of Resources Law, University of Calgary, As an Individual):** Thank you, Mr. Chair, and members of the committee for giving me this opportunity to speak to you in the context of your review of the Fisheries Act.

As the Chair mentioned, I am currently an assistant professor of law at the University of Calgary. I want to point out that before that, however, I was actually a federal public servant here in Ottawa where I spent several years as counsel, practising environmental and natural resources law under the Department of Fisheries and Oceans, as well as sometimes a policy officer at Environment Canada. I mention that only to say that although most of my presentation today is based on my work as an academic, my perspective on some of these issues is informed by my former experience as both an environmental law practitioner and a public servant.

In my presentation today, I hope to accomplish three things. We're going to talk about the changes to the act in 2012 and highlight some of the specific wording that's changed, and spend a bit of time—although I think both my colleagues here and Dr. Favaro have done a good job of it—talking about the lack of understanding in terms of the rationale for those changes. Then I'm going to dive deeply into the implementation of the section 35 regime over the past 15 years. If I have one major goal here, it's to demonstrate to you that any suggestion that this act was overly onerous or unduly protective of fish habitat simply doesn't hold up. Then if I have time left, I'll get to some of my specific recommendations. Of course, everything else that I'm presenting today is in a formal brief that I had submitted to committee last week. I understand it's in translation right now, but I do encourage you to refer to it when it's ready.

With respect to section 35, although it's written as a prohibition, it's important for the committee to understand that this has always been more of a regulatory regime. This is in the sense that, although prohibited, impacts to fish habitat, whether under the former or current wording, could always be authorized by the minister under section 35(2). Before 2012, this regulatory regime operated as follows: DFO would receive inquiries or requests for authorization from proponents, individuals, or corporations, and these were referred to as referrals. It would then review them to see if a harmful alteration, disruption, or destruction, or HADD—you'll all be versed in the terminology of the Department of Fisheries and Oceans by the time this is done—was likely to occur. When it deemed projects low-risk, it would provide advice to proponents in the form of a specific letter, what they called a letter of advice. It would do this or it would direct the proponents to its website or various regional websites where it had what were called operational statements. These were generic letters of advice, essentially, that allowed proponents to understand what the best practices are and how to mitigate impacts. The sum effect of those two policy-based tools was that those proponents were not subjected to the regulatory regime. They were taken out of the authorization stream and told essentially to do their best and go off and go forth and don't both us anymore.

If the department could conclude that a HADD was unavoidable, those projects were then brought into the authorization scheme and a section 35 authorization would be issued. At the time and until 2012, that requirement for an authorization triggered an environmental assessment under the previous Canadian Environmental Assessment Act.

Bill C-38 received royal assent in 2012, as noted by my colleagues and on page 3 of my deck, which you have a copy of as well. The idea at the time was that in fact this regime was too onerous and unduly protective. At the time, a couple of examples were given including a music jamboree in my home province of Saskatchewan where the flood plain was flooded with walleye, which are important recreational fish.

In terms of the main changes, on this deck, you see essentially a side-by-side comparison. Before, the section 35—and Dr. Favaro did a good job here, but just to reiterate—applied to works and undertakings, now it applies to works, undertakings, and activities. This was a broadening of the act. Before it prohibited HADD, now it prohibits the permanent alteration or destruction of fish habitat, and

the prohibition was merged with the previous stand-alone prohibition against destruction of fish.

Finally, whereas it used to apply to all fish and fish habitat, it now only applies to fish and their habitat that are part of, or support, commercial, recreational, and aboriginal fisheries.

In addition to these legislative changes, there have been changes to the manner in which DFO does its business. Operational statements that I referred to before have been eliminated, so DFO no longer has any way of tracking those low-risk projects. DFO has had its budget reduced by \$80 million in 2012 and another \$100 million in 2015.

• (1555)

The next six slides are really intended to give you an overview of what this regime has looked like over the past 15 years. In my view, they fundamentally undermine any suggestion that this regime has ever been too onerous on proponents or excessively protective of fish. On the contrary, the picture that emerges is one of near abdication of the federal responsibility with respect to Canada's fishery resources.

In this figure, what we see in the blue is the number of referrals that DFO would receive in any given year. Red is the number of authorizations issued. Importantly, the red is on the right axis, so it's a scale of order less than the number of referrals on the left. At a high point, in around 2003-04, DFO was receiving roughly 14,000 referrals, of which fewer than 700, or 5%, were deemed to require an authorization. Presently DFO receives just 3,500 referrals, and of those, only 75 were issued authorizations in 2014-15.

I also want to bring your attention to two periods that are statistically significant on this figure.

The first is post-2012. We see that decline in the number of referrals and number of authorizations. Note that this happened notwithstanding the fact that the changes were not actually brought into force until the end of 2013. The strong signal from the changes with the introduction of Bills C-38 and C-45 essentially sent a signal to proponents that they were not to be as preoccupied with this legislation as they had been.

The other period that I want to spend some time on is when there was the first significant drop in authorization and referral activity, and that's between 2004 and 2006. Around this time, DFO implemented what was called the environmental process modernization program. This was part of the Smart regulatory agenda that was very popular at the beginning of the 2000s.

The cornerstone of this was DFO's risk management framework. This is the way DFO was triaging projects and deciding which ones would receive authorizations and which ones would not.



The main feature of this matrix is, of course, the green shaded area. This is the low-risk area. Pursuant to this assessment, which is based on the sensitivity of fish habitat and the scale of negative effects, DFO would decide that, in this case, roughly 60% of projects would fall in the low-risk category.

Importantly, that's not no risk, and that's not no impact. It simply means that in taking a risk-based approach DFO decided, in this case, that the department would not subject these projects to authorization, and would rather deal with them with those policy-based documents that I referred to before, letters of advice and operational statements. Importantly also, of course, when it did this, no EA pursuant to the Canadian Environmental Assessment Act was triggered.

Figure 2 is another example of figure 1. The blue space is the number of referrals, and you see that declining, as does the number of letters of advice—that's the green space. But what you see popping up in around 2006-07 is that orange space. That is the operational statements and class authorizations.

I've combined all of those into that purple space. What you see, essentially, is that while the number of referrals declined, the overall activity on the watershed actually probably remained pretty consistent. You have to keep in mind that the numbers are a bit lower, but notification was voluntary only, so they probably didn't catch all of the use of and reliance on these operational statements. Long story short, there was the same amount of activity on the watershed but much less involvement, proportionately, by DFO in supervising those impacts.

At the same time that DFO was significantly reducing the regulatory burden both on itself and also on proponents, unfortunately compliance and enforcement fell off a cliff. Here you have a map of warnings in the orange and enforcement charges in the red, and what you see clearly in 2005-06 is that DFO goes from issuing roughly 200 warnings and laying close to 50 charges to last year issuing five warnings with zero charges.

I don't have data going all the way back, but beginning at around 2008-09 the department started to track enforcement hours. Here we see, again, that following 2012 there is a massive decrease in enforcement hours dedicated to the fish habitat protection provisions, or now the fisheries protection provisions.

In terms of the next couple of slides—I don't know if I have time to get into this now, and we can spend some time, maybe, in the question period—essentially what we wanted to do was figure out how is it that DFO, in terms of those 2012 changes, went to roughly a 60% further reduction in authorization activity. Was it this issue of the harm? Was it the question of harm? Or was it the imposition of this fisheries requirement?

Again, without getting into details, my research showed that the bulk of it was actually just that strong signal sent to proponents that this act doesn't matter any more, which resulted in a massive reduction in the number of referrals DFO was getting.

• (1600)

It certainly couldn't be explained by the change in harm, and this goes back again to the implementation of this risk-based approach. There might have been the suggestion that the act was overly

protective and all these harmful and temporary disruptions were being caught. When we looked at 2012 authorizations, only a fraction of those were for harmful alteration destruction. So those things were already being risk-managed out of the regime. What we see over time, then, by the time we get to 2014, as the graph here shows, is a reduction in the amount of authorization activity.

What we then tried to do is plot all of these authorizations, 2012, 2013, 2014, on a map to see if there was a change in the pattern. Before, the act applied to all fish and fish habitat. Is it possible that now that there's a fisheries requirement it would somehow change the distribution? Some biologists had suggested that all of northern Canada would essentially be left unprotected. We didn't find any change in pattern, other than the fact that there were fewer authorizations—that's the light blue—and the pattern resembled the previous pattern. Of course, what was most startling was that what this suggested was that even in 2012, most of Canada's northern wilderness, freshwater lakes, streams and such, were not receiving protection.

I just want to highlight that spot on that map that you see. That's covering northern B.C., Alberta, Saskatchewan, Manitoba and parts of Ontario. So according to this map, and according to DFO's authorization activity over a period of 18 months, May to October, 2012, 2013, 2014, there were roughly six instances of impacts to fish habitat. Of course, that doesn't square with the evidence that my colleagues have provided, and it doesn't square with industrial activity on the watershed according to various kinds of facts and figures. Again, that's all provided.

I see that my time is up, so I'm going to wrap it up by simply saying I agree with my fellow witnesses that we need to return, probably, to the previous HADD provision, but we can do a lot more to regulate and address cumulative impacts on the watershed, more transparency, a public registry for authorizations, for applications, for monitoring data. Again, I can spend more time during question period on that.

• (1605)

**The Chair:** Thank you, Dr. Olszynski.

For a point of clarification, can you go back about 3 slides? I don't know if you have the ability there. Stop right there. As a point of reference, did you run out of room or were there no indications for three provinces on the east coast?

**Mr. Martin Olszynski:** I used the access to information legislation and I specifically targeted the Pacific and central and Arctic regions.

My apologies.

**The Chair:** Okay, got it. I was simply trying to make sure.

**Mr. Martin Olszynski:** No, absolutely it's a fair point.

**The Chair:** Thanks for the clarification.

Perhaps I could get Dr. Favaro back on the screen again.

Thank you for the presentations.

To the witnesses, and to Dr. Favaro in particular, if you want to weigh in on a certain topic with the questions, you may want to put up your hand or signify that way that you'd like to weigh in on the subject, since I can't do it for my colleagues. Their seven minutes is their seven minutes. Please be aware that some of our colleagues would like to weigh in, and I encourage all, if they wish to do so, to signify to our colleagues so they can get the time. Time is of the essence here. I'll follow my own advice and be quiet.

That being said, Mr. McDonald, I believe you're going to start, the mover of the motion. Seven minutes, please.

**Mr. Ken McDonald (Avalon, Lib.):** Yes, thank you, Mr. Chair.

Thank you to all four individuals for taking their time to present to us here today. It's really appreciated, I'm sure, by all participants here from all sides of the House.

My first couple of questions will be to Mr. Olszynski. You mentioned environmental law. How did your background in environmental law bring you to concern yourself with habitat protections within the Fisheries Act?

**Mr. Martin Olszynski:** You learn almost immediately. In any environmental law course in Canada, you learn very quickly that the Fisheries Act, in section 35 in particular, has always been regarded as one of the most powerful environmental laws that we have in Canada at the federal level. Part of that is because it's a bit of a fluke of history, in the sense that shortly before that, the U.S., in what was called its environmental decade, passed five federal laws, the Clean Water Act, the Clean Air Act, the National Environmental Policy Act...

When it came to Canada, we already had the Fisheries Act and we already had a prohibition on the deposit of deleterious substances, so that became our de facto federal water pollution law. I think the thinking was to sort of buttress it with a prohibition against physical impacts to fish and fish habitat, so it has always been a mainstay of environmental law at the federal level here in Canada.

**Mr. Ken McDonald:** You mentioned the drop in the warnings and the number of charges from around 2,000 to 3,000 or 4,000 up to when the new law came in, and even for 2014-15. Would you please elaborate on how these changes to the Fisheries Act in 2012 have affected enforcement and offences in the habitat's protection?

• (1610)

**Mr. Martin Olszynski:** I don't know if that's possible. What I can do is refer you, if you have paper copies of my deck, to page 8, figure 3. This is for habitat enforcement and compliance. Essentially what we see is that in...again, there are matters of scale here with this figure, but of course if the figure started at 2012, what you would see is a reduction from roughly 75 warnings being issued per year and enforcement activity in the sense of charges in the single digits, to 50 to five warnings and zero charges.

What I can say about what that means is that when governments want people to follow laws, then they enforce them. When there is no enforcement, then there is no compliance with the law. I'll give you the example of speeding. We have speeding signs all over every city, and yet individuals speed all the time. We have police officers there to remind individuals financially that there are consequences to going too fast. It is untenable to suggest that, at this level of enforcement, this prohibition against the impacts of fish habitat is being taken seriously.

**Mr. Ken McDonald:** To Dr. Favaro and possibly Mr. Olszynski, I have one question, and it rings loud and clear for what each of you has said in your presentation. How exactly can anyone, whether it be DFO or local groups, protect fish and fish habitat when the regulations and the enforcement are not there to do it, and it's just left to its own demise?

**Mr. Martin Olszynski:** Currently it would be very difficult. There is a potential to what's called a private prosecution in Canada, but that potential is easily overstated. What happens in that context is that the Attorney General always reserves the ability to step into that prosecution and to stay the prosecution, and there's a long tradition of that happening.

This comes back to the points that were made by my colleagues about the wording of this prohibition right now. It is essentially nonsensical. It is incredibly difficult to prepare a coherent argument about what was intended in the scope of this act. Even if you weren't worried about the Attorney General stepping in, there are those legal challenges.

There is, of course, the incredible disparity in resources. For private individuals to bring private prosecution is very expensive. It's very difficult. They don't have the same access to sites and such that fisheries officers, fisheries inspectors, or guardians designated in various ways have to collect evidence.

**Mr. Ken McDonald:** Any comment, Dr. Favaro?

**Dr. Brett Favaro:** Yes, just to expand on this concept, you can hope that people will voluntarily comply and voluntarily work on the fish habitat, but I don't think that's working. The alternative hypothesis to all of this is that the reason there are no convictions is that everybody is complying with the law. That's not true, because we know there are 91 at-risk species in Canada that are freshwater fish that are mostly at risk because of the habitat disruption.

We know that we continue to lose habitat. We know that it's not because everybody is complying. I note an ironic observation that if everybody was complying, then we could have just left it the way it was before, and it shouldn't have mattered, right?

A point that's important to make is that it's really important to empower everyone to be conservationists. While we have to have this stick, I think the other thing to talk about is the carrot. How do we get people mobilized and teach them how to be good stewards of the environment, when it becomes a national value to protect your local fish habitat, where it is in some communities.

When I grew up in British Columbia, the excitement when salmon would come back to a stream in the middle of town that it had not been in for 100 years was amazing. People would flock out to see it. If we can get that value shared, then I think we're going to go a long way to that as well. I think another thing not to lose sight of is the importance of education and outreach on this.

Thank you.

**The Chair:** Thank you, Mr. McDonald.

Mr. Sopuck for seven minutes please.

**Mr. Robert Sopuck (Dauphin—Swan River—Neepawa, CPC):** I want to be really clear here. This notion that's being bandied about that there are no habitat protections in the new Fisheries Act is complete nonsense. The new act says it's prohibited to:

...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.

Serious harm to fish is defined as:

the death of fish or any permanent alteration to, or destruction of, fish habitat.

Fish habitat is defined as:

spawning grounds and any other areas, including nursery, rearing, food supply and migration areas, on which fish depend directly or indirectly in order to carry out their life processes.

This idea that all habitat protections are gone under the new Fisheries Act is completely false.

I should also note that in a legal opinion, Blakes, which is a prominent law firm that did an analysis of the new Fisheries Act, noted that:

It is important to note the federal government's constitutional authority to regulate impacts to fish and fish habitat flow from its powers under the Constitution Act, 1867 over "coastal and inland fisheries". Canadian courts have confirmed, more than once, that these powers are limited to fisheries, as a resource, and do not mean the federal government has the power to regulate over all fish or fish habitat in Canada. In this respect, the new prohibitions are, to some extent, a codification of that which already exists at law.

I am a member of Parliament for a rural area, and the Fisheries and Oceans law enforcement officers would descend on my community and cause great economic harm through their interpretation and enforcement of the old Fisheries Act, which, it's quite clear, they simply couldn't enforce or define. That is one of the reasons why we had to change the act.

I agree with much of what our colleagues from the Canadian Wildlife Federation said. I think they were implying that many of the changes to the act were good. They would like to see some changes to the old act. I think that's certainly legitimate.

I have a question for Doctor Favaro.

Given that you're a scientist, can you quantify for me any changes to a fish population or community in Canada that resulted from the

changes that we made to the Fisheries Act? I use the term "quantitative" deliberately. I don't want opinions or emotion; I want numbers and facts.

• (1615)

**Dr. Brett Favaro:** This is a great example of where we need to have better data sharing. Some of the comments that have been made today were only made possible by filings under the Access to Information Act. I'd love to answer your question. If we could have a better database of fish populations across Canada. I think that would be very helpful.

**Mr. Robert Sopuck:** So as a scientist who condemned our government for the changes to the act, you're telling me that you cannot find one example of a fish population or community that was harmed because of the changes we made to the act? I find that absolutely astonishing.

I should point out that in 2014 the sockeye salmon run in the Fraser River was over 20 million fish—the record in history. While I'm certainly not bold enough to take credit for that, that fish population surge occurred under the new Fisheries Act. To opine as you did—and I am referring to Mr. Olszynski as well—in very non-quantitative testimony in terms of fish.... You simply can't prove that there was any significant harm to fish production.

I should make the point as well that our new act focuses on fish production. I know it sounds very strange, but we're actually having an act based on fish. In prairie Canada for example—and I'll ask Mr. Olszynski this, because he comes from prairie Canada—we have a number of dams and reservoirs that made very significant alterations to fish habitat, such as Lake of the Prairies in Manitoba and Tobin Reservoir in Saskatchewan. Those particular major habitat alterations caused fish populations to explode and to do extremely well creating significant recreational fisheries.

Was the construction of those dams beneficial to fish or not, Mr. Olszynski?

**Mr. Martin Olszynski:** Obviously I would need to have some more information about whether there were any impacts in terms of methylmercury from those hydro dams and other downstream effects.

**Mr. Robert Sopuck:** They weren't hydro dams.

**Mr. Martin Olszynski:** But methylmercury—

**Mr. Robert Sopuck:** I understand that.

These were flood-control dams in prairie Canada, not in the boreal forest.

**Mr. Martin Olszynski:** Okay. Any time there is organic material where there's a flood caused by a dam, there is a potential for methylmercury to occur, and methylmercury pollution to occur downstream.

I don't really know what to say except that I would very much support a public registry with all applications for section 35 authorizations, all authorizations, and all monitoring data following those authorizations from proponents. We could have a conversation about what effect those projects are having on impacts to fish and fish habitat.

**Mr. Robert Sopuck:** Well, I represent communities that live around those projects, and I know very well, as a fisheries biologist myself, that there's something called the reservoir effect. When you create a reservoir, especially in areas of high soil fertility, the productivity expands exponentially. We've ended up with walleye fisheries that are second to none in spite of this major alteration to habitat.

Mr. Favaro, I have a question for you. We're in Ottawa right now. There have been massive changes to the watershed in the Ottawa Valley—the Rideau Canal, industrialization, urbanization—and yet the water quality in the Ottawa River is extremely good. The fish community is very diverse, fish populations are very large, and the fish community here is as healthy as it's ever been. How can you explain that?

• (1620)

**Dr. Brett Favaro:** The weakening of a law at the higher level doesn't necessarily override the benefits of local stewardship. I don't know a lot about the specific example you're giving me, but its existence doesn't preclude the fact that arguments were correct about the way that the wording was done in terms of serious harm and in terms of looking at fish that support a fishery. That would be my response to that.

**Mr. Robert Sopuck:** I have the very unfortunate tendency to actually worry about fish and think about fish.

Mr. Olszynski, we have in your community the Bow River, a world-class trout fishery, one of the best in North America if not the world. Again, that watershed has been changed dramatically because of the city of Calgary, agriculture, and so on, yet that fishery thrives. According to you, the way we implemented the Fisheries Act, Calgary basically wouldn't exist. How do you explain the productivity of the Bow River fishery?

**Mr. Martin Olszynski:** I'm sorry, I don't understand how, based on what I'm suggesting, the city of Calgary wouldn't exist.

**Mr. Robert Sopuck:** Well, you talked about watersheds and how important it is to protect watersheds. I certainly agree with that, but the implication is that there can never be any human activity in any watershed that may affect fish.

**Mr. Martin Olszynski:** That's not at all anything I've suggested, in any of my materials.

**Mr. Robert Sopuck:** It's pretty close.

**Mr. Martin Olszynski:** Not at all.

**Mr. Robert Sopuck:** Pretty close.

**Mr. Martin Olszynski:** Not at all. I will point out that while the Bow is indeed a healthy trout river, there are other streams and other watersheds, like the Ghost watershed and other ones in the Castle region, where we have endangered cutthroat trout.

**Mr. Robert Sopuck:** Cutthroat trout, yes. Some—

**Mr. Martin Olszynski:** They are being listed now. Those are the results of habitat fragmentation as a result of various activities, including recreational off-road activity, forestry, and mining in the Ghost watershed.

**Mr. Robert Sopuck:** Am I done, Mr. Chair?

**The Chair:** Yes, I'm afraid you are.

**Mr. Robert Sopuck:** Thank you. I look forward to the next round.

**The Chair:** I'm sure we all do. Nevertheless, we have to move on.

We'll go to Mr. Donnelly now for seven minutes.

**Mr. Fin Donnelly:** Thank you, Mr. Chair.

I'd like to thank all three of our witnesses for their excellent submissions. I found them very specific and pertinent to the task at hand—the motion, the question. I think all three answered my first question.

I'd just like to hear you confirm whether or not you would like to see the Fisheries Act, specifically section 35, the fish habitat section, restored or improved.

Maybe I'll start with the Canadian Wildlife Federation. A yes or no is fine.

**Mr. David Browne:** Yes, we would like to see improvements to it.

Neither of us is a lawyer, so we didn't comment specifically on exactly what that improvement would be in terms of language in the act. The one shortcoming primarily is the lack of clarity around it being temporary, preventing temporary harms. As well, there is some confusion in the language around where it applies.

I think those can be fixed, so it's a yes.

**Mr. Fin Donnelly:** Great. Thank you.

Dr. Favaro?

**Dr. Brett Favaro:** The original wording was scientifically coherent. The new wording has a lot of scientific problems. As a scientist, I like scientific coherence. The people with experience in law would be better suited to talk about the specific wording on how we can actually make it even better than it was before.

**Mr. Fin Donnelly:** Okay.

Dr. Olszynski?

**Mr. Martin Olszynski:** I should clarify that I'm not a doctor. I am a professor with a master's degree, but I don't have a doctorate.

I agree that part of the problem is that we do have this very condensed... You know, this review as laudable as it is and that it's actually occurring, is condensed. In my brief, I suggest what I think are not radical changes at all that build off the previous successes and the previous institutions and so on. A return to the HADD regime I think is right, but I think that there needs to be additional clarity sending out a power for regulating and streamlining those lower risk projects. Again, it's not at all about even subjecting each of those to review. There can be streamlined regulations that authorize those different projects. Of course, the key thing there would be to give DFO information that it doesn't currently have. Right now, it's looking at around 1.5% of projects on the watershed, based on some of the numbers that I presented earlier. How can they manage fish and fish habitat on a national level if we don't know what's going on in the landscape? Creating reduced, streamlined regulations that allow DFO to give the information that it needs to manage impacts to fish habitat, especially on a cumulative basis, while at the same time reducing any burden on proponents...

I also think that some time should be spent on the section 6 factors. I think that they could be simplified. For all the talk about fisheries productivity, at the end of the day even when you look at some of DFO's science documents, the fundamental issue there is fish habitat. Fish habitat is the best proxy for fish productivity. One of the clear factors should be the state of the watershed in terms of habitat at the time. For any watershed plans, going back to provincial jurisdiction, I think it's absolutely true that DFO needs to be mindful of provincial and regional plans, and watershed plans, and they should be taking those into account and making its decisions. Aside from that, the other big step, which would give us the information that we need, is a public registry. There should be provisions specifically requiring a public registry for all section 35 applications, their authorizations, and the monitoring data that will follow those authorizations.

Usually one year is not enough to know whether or not there's been a change, but in 10 or 15 years from now, we could assess that information, assess that data and come to some conclusions about whether or not the act is working.

• (1625)

**Mr. Fin Donnelly:** Thank you.

It's fair to say that all three witnesses want to see the Fisheries Act at least restored, if not improved. Mr. Olszynski, if I could just pick up on private prosecution since 2012, since the definition of serious harm came into effect. Do you know of any private prosecutions? In other words, has this definition been tested in court?

**Mr. Martin Olszynski:** No, but I want to clarify there. The changes were introduced in 2012, but of course, they were not brought into force until late November 2013 and since that time, no, I'm not aware of a single charge being laid under the act.

**Mr. Fin Donnelly:** With the remaining two minutes, I just want to draw to the committee's attention a letter that we all received from Otto Langer on October 30. I just want to read it into the record. He says, "I reviewed many pages of your committee and DFO websites on the subject matter and cannot find how one becomes a witness to appear before you on necessary changes to the habitat protections provisions of the Fisheries Act. I have written two comprehensive briefs on this matter—

**The Chair:** Sorry, Mr. Donnelly, could I just get you to hold that thought for just a moment?

Mr. Doherty, you have a point of order.

**Mr. Todd Doherty (Cariboo—Prince George, CPC):** I don't believe any of us on the committee have seen that and I'm not quite sure that is allowed to be read in to this committee.

**The Chair:** With his time, Mr. Doherty, with all due respect, I think he can read in pretty much any input that he has upon this matter. With certainty, we can say that some members did receive it, but some did not. That's all I can say right now.

Mr. Donnelly, you do have the floor, please proceed. You have one minute 40 seconds left.

**Mr. Fin Donnelly:** Thank you, Mr. Chair.

He goes on to say:

I have written two comprehensive briefs on this matter to the new Trudeau government and have not received any response from any minister and nor any invitation to appear before your committee.

I was an environment and habitat protection biologist and manager for DFO and E[nvironment] C[anada] from 1969 to 2001. I was indeed one of the Pacific Region staff that in the 1975-1976 era promoted the need for a habitat provisions in the Fisheries Act which was put in place and proclaimed in 1977. I also [am] the Canadian that found out about the Harper government planned cuts to the Fisheries Act in 2012 and made MPs, media and the public aware of that great setback.

During my 32 1/2 years in government I did promote enforcement of the pollution and then the habitat provisions of the Fisheries Act. I have been an expert witness for the DOJ, DFO, EC, Provincial and territorial governments in over 100 criminal trials from the Yukon to White Rock BC and from Tofino, BC to Mary[s]town, Newfoundland. This is more than any other fisheries expert in Canada.

I organized and ran an expert...witness course for national DFO staff and sessions for Ontario, Yukon and Alberta conservation and habitat staff on the legislation we have in the Fisheries Act, how to use it, how to collect evidence in a violation and how to properly prosecute a case. This course was cancelled during the Harper government period.

I feel I should be invited to be a witness on government plans to review and update the habitat provisions of the Fisheries Act. Please advise how that can be arranged. Should I submit a brief I will ask for assistance in translation into French. I strongly recommend that this parliamentary committee visit the West Coast to take evidence on this matter.

It's signed "Otto Langer, BSc—

• (1630)

**The Chair:** Okay. Thank you, Mr. Donnelly. I have to cut you off there. Your time is up.

Regarding the letter you just read in for the record, that was translated.

If Mr. Langer would like to submit something, I'd just like to point out to the committee that written submissions are taken on our website.

Let me give you the website address. It's [www.parl.gc.ca/committees](http://www.parl.gc.ca/committees); you follow the links to FOPO, Fisheries and Oceans. We have a deadline. November 30 is the deadline. We say this because we have to translate them and we have to provide our analysts here with enough time to include them in the report.

Thank you for that.

We now go, for seven minutes, to Ms. Jordan.

**Mrs. Bernadette Jordan (South Shore—St. Margarets, Lib.):** Thanks to all of you for appearing today and for your testimony.

I have questions for all of you, and I hope that in my seven minutes I can get to most of them.

I'm going to start with you, Mr. Olszynski. I've done a bit of research. I read an article in which you were quoted as saying that changes to environmental law in 2012 weren't intended to cut red tape, as the government suggested, but to lower the environmental bar. Do you think you could comment on that for me, please?

**Mr. Martin Olszynski:** It's based on the empirical evidence. If we look at what was happening—I'll refer the committee to slide 5, figure 1—by the time we're into 2010-11 we've seen a reduction in referrals to DFO from almost 14,000 to fewer than 8,000, and the number of authorizations at that time declined from about 700 to roughly under 300 a year, so that's roughly 300 in all of Canada per year. It's hard to understand in that context what all the red tape was about. That's essentially where that came from.

Also, of course, in looking at the letters of advice and the operational statements, all of that was designed by DFO in those 10 years to really reduce the burden, to say, "Look, don't come to us, don't bother us, you can deal with this yourselves." They just asked that you notify them, for instance, that you were going to be doing an activity on the landscape. I never heard, frankly, in a sense...it was never substantiated that there was in fact this immense burden.

**Mrs. Bernadette Jordan:** To all three of you, then, my question would be, do you feel that the decision was made based on scientific evidence or just on a desire to change the Fisheries Act?

**Mr. David Browne:** That's a complicated question. I don't think that you write laws based solely on scientific evidence but I do feel, and I pointed out, that there were a couple of shortcomings in the language that was used. I think Dr. Favaro did a good job of pointing out some of the inconsistencies that it's created, more on the policy side.

Why was it changed? I'd like to step back—maybe there's a bit of partisanship here—and say that from a non-partisan point of view, we're trying to build the best program for fish and fish habitat protection possible. The old program was not working. This program may not be working. It doesn't seem to be; it's only been around for a short period of time and there's some confusion in the legal language. The solution is bigger than what we write in a law. That would be our point, that this is not just about what you write in a law, it's about the other part—which we put under "modern safeguards"—which is how you actually go about doing this. I like Dr.

Favaro's point about how that really involves engaging across Canadian society, including with other governments. What's written in law is what it is; I think we can always do better, but it's not just about what's in the law.

• (1635)

**Mrs. Bernadette Jordan:** Thank you.

Dr. Favaro, do you want to comment on that?

**Dr. Brett Favaro:** It's important to me to not try to read anybody's mind because I can't do that, I'm a scientist. So in terms of what happened and as to what the thought process was as to why these changes were made, all I can do is comment on what the evidence has said about the reasons that were given to us as members of Canada. We have not found evidence that supports the propositions that were put forward as to why it needed to be changed.

**Mrs. Bernadette Jordan:** Thank you.

Back to you Mr. Olszynski. You said there have been five warnings and zero charges. Does this have to do with a lack of enforcement at DFO or does it have to do with changes to the act, or is it a combination of both do you think?

**Mr. Martin Olszynski:** A combination of both.

**Mrs. Bernadette Jordan:** Thank you.

**Mr. Martin Olszynski:** Again, that's just my opinion, and I should say, a lot of these figures come from annual reports that DFO issues every year, pursuant to section 42 of the Fisheries Act. They have all of the information stats on referrals, on authorizations, referrals by region, referrals by work type, and as well they have stats on enforcement activity. All of this is available on the website.

**Mrs. Bernadette Jordan:** Dr. Favaro, you had mentioned that there are 91 species, and I think it was COSEWIC that you referred to. My question is—and I'm not sure if maybe I misunderstood when Mr. Sopuck was asking or if I didn't hear the question properly—has that increased since then or are you not able to determine if that increased because you can't access data or there are no data available?

**Dr. Brett Favaro:** It's tough to ask about the number of increases of species that have been assessed as being at risk because the number of species assessed goes up over time. What you have to do is look at species that have been assessed more than once and look at whether they've gone up or down or stayed the same, in terms of their status, and where these things only came into effect a couple of years ago, the number of reassessments—I don't know what the number is off the top of my head—I would be willing to bet, is not a very large number that have been reassessed. Even if they have been, they're probably being reassessed based on data that would have been before these changes came into effect anyway.

**Mrs. Bernadette Jordan:** Dr. Favaro, to that point, do you think that if access to information was a little bit more readily available to you it would help with making sure that we have these determinations?

**Dr. Brett Favaro:** Absolutely.

**Mrs. Bernadette Jordan:** Are you still struggling with getting data? Is there data still not available to you that you would like to have?

**Dr. Brett Favaro:** We can always get better with that and I think the announcement, recently, that money was going to be put into explicitly data sharing from Fisheries and Oceans Canada, is excellent news. It could well be that this or that needs to be done to the law, but it should be easy for people to verify that the things that are being said are factually correct. This is where data sharing comes in. I was asked earlier about whether fish are declining after this came into effect. I was being asked to recall stock assessments, essentially, from across the country. The reality is, we know that stock assessments are also spotty in Canada. The data are problematic and incomplete. This is where taking what we do have and making it available is one step. Getting more information and getting more monitoring so that we actually understand the impact these decisions are having on the environment is another aspect to that.

**Mrs. Bernadette Jordan:** Great, thanks.

Dr. Lapointe, you wanted to comment?

**Mr. Nick Lapointe (Senior Conservation Biologist, Freshwater Ecology, Canadian Wildlife Federation):** I simply wanted to add that it's not just a question of sharing data, but it is the lack of monitoring data that makes weighing in on whether these changes are beneficial or harmful very challenging. Ongoing baseline assessment of habitat condition across Canada would really help to inform evidence-based decision-making and to track the outcomes of these types of projects.

**Mrs. Bernadette Jordan:** Thank you.

**The Chair:** Thank you, Ms. Jordan. Your seven minutes are up.

We'll go to the second round of five minutes.

Mr. Arnold, would you begin please?

**Mr. Mel Arnold (North Okanagan—Shuswap, CPC):** Thank you all for making yourselves available or for being here.

First off, Mr. Browne, you had referred to the inability to experiment with offsetting. Was that prior to the changes or after? Can you elaborate a little more on offsetting, whether there was impact to habitat?

**Mr. David Browne:** I think it's both before and after. Some amendments were made in 2012 that might facilitate some new ways of looking at offsetting. There is still some legal language, as I understand it, that is a barrier to working on things such as creating a habitat banking program in Canada.

Prior to 2012, there were also challenges within the law to other novel approaches to offsetting. By that I don't mean crazy, risky approaches to offsetting important harms, but finding ways to get the best bang for our buck. I think the expression we were using in the office was that isn't always counting pebbles. It's not always about the 10 square metres of sand being offset by an equivalent 10 square metres of sand. So it's about finding other ways.

● (1640)

**Mr. Mel Arnold:** Would it be fair to say that the new act may enable experimentation to take place on an easier basis because of the temporary alterations that might be allowed under the new act that wouldn't have been allowed under the old act, which simply didn't allow any alterations?

**Mr. David Browne:** The restriction wasn't so much around the fact that there was a prohibition on a temporary harm. The restriction was really around liability and what was allowed from a regulatory point of view.

The way this law gets applied both pre- and post-2012 is that there's a prohibition, and then there's a policy that interprets that and there's a program that rolls out. I think in both cases, as was just demonstrated, there's discretion used in how the law is applied, including a prohibition on temporary harms. I don't think it would prohibit something such as habitat banking. It's really the liability issue and the transfer of liability that's the problem.

**Mr. Mel Arnold:** I'd ask each of you to provide some input on this next question. I'd like to hear your thoughts on whether you think it's reasonable to expect consistent application on all waterways across this country, from coast to coast to coast and inland, under one act, with the multiple jurisdictions that we deal with. Do you think it's possible or reasonable to expect consistent application?

First, Mr. Olszynski.

**Mr. Martin Olszynski:** Personally I think it's reasonable to expect reasonably consistent application of the act. At the end of the day, what that comes down to, of course, is that we are a confederation, and in its wisdom or otherwise, Parliament decided that fisheries would be subject to national parliamentary oversight. So the key is to make sure that in fact we're not allowing different regions to essentially pit their habitat protections or water quality protections against each other to varying extents to leverage maybe some kind of advantage or otherwise. Actually having a consistent national law ensures that basic national standard and that all Canadians then are entitled to that same protection and quality of act.

**Mr. Mel Arnold:** Dr. Lapointe.

**Mr. Nick Lapointe:** Yes, I think consistent outcome should be expected in terms of consistent protection for streams and lakes in all jurisdictions. However, ecosystems vary quite a bit, and what it takes to offset works in the Arctic versus in southern Ontario are different types of projects. The regulatory regime has to be flexible to allow the right types of ecological processes to be protected and addressed.

**Mr. Mel Arnold:** Mr. Favaro.

**Dr. Brett Favaro:** My answer is somewhat similar about the outcomes. I grew up in British Columbia, and now I live in Newfoundland and Labrador. If I broke that federal law in British Columbia, I'd be punished the same way as if I broke that federal law here in Newfoundland and Labrador.

Certainly there's a certain amount of consistency that should be expected, although I agree that the way you get there is going to depend a lot on the ecosystem you're working with.

**Mr. Mel Arnold:** Thank you very much for being here.

**The Chair:** We'll go back to the government side.

Mr. Finnigan, you have five minutes, please.

**Mr. Pat Finnigan (Miramichi—Grand Lake, Lib.):** Thank you to our panel for being here today on our first day of the review of the Canada Fisheries Act.

Mr. Favaro, you co-authored a research paper in 2015 stating that there were alterations to habitat protection, historically afforded under the Canada Fisheries Act, and there was a lack of federal leadership on marine species at risk. Could you explain how the changes to the Fisheries Act in 2012 required the splitting of fish into valued, fishery-related, and non-valued categories as indicated in your 2015 paper?

**Dr. Brett Favaro:** Yes, this is referring to this idea that there are fish that support a fishery or that you fish, and then there are fish that are essentially not part of that. There are fish that are considered to be irrelevant.

This is what I was mentioning earlier about the concern around this. If you go to an ecologist and say, "I want you to prove to me that this fish doesn't matter", you would find that's a really hard thing to do. At the same time, it's also hard to prove that this particular fish matters, because if you were to remove a fish from an ecosystem, the fish isn't just going to keel over, it's going to try to eat something else.

This is what we see right now with Atlantic cod—a good example. There is some concern that we're finding some localized groups of cod that don't have bellies full of fish. They have bellies full of sea stars and other species that might be suboptimal for them to eat. So, it's not that you flip a switch and everything falls apart overnight. It's that you're taking out the Jenga pieces and making the whole tower a little flimsier and increasing the probability that you're going to get it to fall over at some point.

•(1645)

**Mr. Pat Finnigan:** Could you follow up by explaining how the changes to the fisheries act would reverse the burden of proof and how it would be reversed from what the precautionary approach would support?

**Dr. Brett Favaro:** The precautionary principle means that if there's something that is likely to cause a problem—I'm paraphrasing this, essentially—or that you can't be sure it's not going to cause a problem, you do the thing that's less likely to cause an irreversible harm. Precautionary would generally mean that you wouldn't assume that a fish or other aquatic organism is irrelevant to the ecosystem. That would be a highly risky assumption to make.

The precautionary approach would say that you assume that things matter that are in the environment and you manage around that. This is why managing for fish habitat is a very nice and precautionary thing to do, because if you're saying we can't degrade, we want no net loss of fish habitat, what you're really saying is we actually don't need to know whether this fish eats that fish or whether this thing eats that thing, because we're going to put that aside so that the fish

that we're interested.... Ultimately, this serves us, because the thing we want to fish is supported by that ecosystem. The precautionary decision is something that most likely keeps the integrity of that ecosystem intact, despite our activities.

**Mr. Pat Finnigan:** Thank you.

Somebody said, and I think it was Mr. Olszynski, that project proponents were saying that this act didn't matter anymore, after 2012. Do you think, first of all, that if enforcement had not been cut, that it would have had an effect on the drop in numbers that we're seeing?

**Mr. Martin Olszynski:** I'll back up just to say that, specifically, with that kind of quote there was a story in the *Vancouver Sun*, published around 2014, by Larry Pynn. He had interviewed some people and the chair of the Fraser Valley Watersheds who suggested that was what he was seeing on the landscape. People had gotten the signal, now is the time, and no one is going to prosecute you. You can go ahead and do what you want to do.

I would suggest that the data figures support that sort of finding, especially, again, the fact that right in 2012, the minute the changes were announced, notwithstanding the fact that it was another year and a half before they were actually implemented, brought into force, the referral numbers declined right away. That, to me, suggests very strongly that individuals simply understood that—notwithstanding that the law still hadn't changed—the changes that were going to be coming, and as well, the changes to DFO's budget, meant that they didn't have to worry about it as much.

**Mr. Pat Finnigan:** How does the minister interpret public interest, one of the factors he is required to consider? I guess that's the new part of it. I would like to hear from anyone who would care to answer.

**Mr. Martin Olszynski:** I go back a bit to what Dr. Favaro has said. It's hard to know how the minister interprets that. Certainly, the public interest of the concept is very common in Canadian law generally; and at both the federal and provincial levels it's a concept in national security, in environmental law, and pipeline regulation. For the most part, I think the conventional wisdom in terms of practitioners is that the public interest is basically what the minister says it is.

**Mr. Pat Finnigan:** When this new act was brought in, do you know how much consultation took place? In other words, was it brought in front of a committee? How did that take place, in your recollection? I wasn't around. I'll ask anybody who wants to take a stab at the question.

**Mr. David Browne:** I was around. There was no consultation during the drafting of the change. We were unaware, a lot of people I talked to were unaware. There had been, though, about five years of consultation on the Fisheries Act, and my understanding is that a bunch of that consultation was input. But when it was drafted, I think it was news to everyone when it came out.



•(1650)

**The Chair:** Thank you, Dr. Browne.

Mr. Finnigan, I apologize. I took my eye off the ball for a minute and I gave you an extra minute, so I will apportion accordingly to the other parties. I'm being honest.

That being said, there's also one other thing I'd like to address and I'd like to do this on the record. Earlier, Mr. Donnelly, you brought up about Mr. Langer. We asked Mr. Langer to be a witness on October 27, in an email addressed to him from our clerk. We didn't get a response. He was also sent an email about five hours ago, before this meeting, giving him five different dates. I don't know if he's listening to this or not, but he has been invited and those five dates... If he's not getting these emails, he should probably contact us immediately by phone or other means, because we are trying to reach out to him.

**Mr. Fin Donnelly:** That's great. I appreciate that, Chair.

**The Chair:** Thank you for that.

We now we go to the Conservatives, and I believe you're splitting your time. Let me put it this way; in two and a half minutes—

**Mr. Todd Doherty:** Three. We get an extra minute.

**The Chair:** Right you are. It's nice to know you're listening.

**Mr. Todd Doherty:** And math isn't my strong suit.

**The Chair:** Mr. Doherty, for three minutes, please.

**Mr. Todd Doherty:** Sure. Mr. Olszynski, do *actus reus* and *mens rea* have to be proven in environmental law?

**Mr. Martin Olszynski:** No, only *actus reus*.

**Mr. Todd Doherty:** Could it be argued that the changes to section 35 made it easier to prove *actus reus*?

**Mr. Martin Olszynski:** I don't see how.

**Mr. Todd Doherty:** Fair enough. Clarifying the law, making it a little bit easier to interpret the legal standpoint at the court area, might be easier to then be able to prosecute any of the offenders of that. Is that not correct?

**Mr. Martin Olszynski:** I agree that as a general principle, clarifying the law usually means it's easier to prove *actus reus*, all things being equal, but I guess there are a couple of points that I think need to be made on that point. The first, of course, referring back to Mr. Sopuck's invocation of Supreme Court jurisprudence, is that the same Supreme Court jurisprudence that says that Parliament's jurisdiction is over the fishery, defines the fishery as a resource and as a system, and that the jurisdiction over the resource includes jurisdiction over all parts of the system. I think that's an important point to make.

And then, in terms of this subsequent issue, the wording of this legislation, I think it is arguable that there is some confusion about what exactly those words mean in the prohibition, as my colleagues' remarks have demonstrated, and I think the court would be similarly justified in wondering what it means. When we say "fish that are part of a commercial recreational or aboriginal fishery", for instance, what is permanent...? These are not exactly clarifying terms.

**Mr. Todd Doherty:** Have you practised environmental law, or do you just teach it?

**Mr. Martin Olszynski:** I used to practice, for six years.

**Mr. Todd Doherty:** Did you pursue any major cases that this act would have been—

**Mr. Martin Olszynski:** Yes. Before 2013, I did work alongside other legal services members in prosecuting a metal mining effluent regulation charge.

**Mr. Todd Doherty:** One final question. Your slide that you showed with data on it goes back to 2012 with respect to the authorizations. Was there no other information that you could provide prior to the changes, to show what the level of authorizations were?

Then I have just one other point. Did you include all of Canada, or just the nine provinces that we saw in the snapshot?

**Mr. Martin Olszynski:** In terms of all the slides, figures 1, 2, and 3 are based on annual reports issued by DFO, so they apply across the board and they go back to 2001, 2002. For the information on slide 9, what I had to do—because again, there is no registry right now for Fisheries Act authorizations—was file an access to information request in 2015. For time management purposes, I had to somehow condense it, so I focused on the Pacific, central and Arctic regions, and then those six-month periods in each of those years.

That was just a resource issue. I didn't have the capacity.

**Mr. Robert Sopuck:** Mr. Olszynski, you used the phrase that "our government lowered the environmental bar". Can you give me a quantifiable environmental indicator that declined under our watch, and I don't mean enforcement actions, I mean a quantifiable environment indicator like the air quality, water quality, fish communities, and such.

•(1655)

**Mr. Martin Olszynski:** In a letter I sent to the committee on September 22 of this year, I encouraged the committee, before it starts its review, to task DFO with an audit of all current section 35 authorizations or a random selection of them, and to also go out into the watershed and do the exact assessment you're referring to, Mr. Sopuck. I would be the first person to read that report with great interest.

**Mr. Robert Sopuck:** I'm quite shocked that you and Dr. Favaro who are so critical of the changes to the act cannot find a single quantifiable environmental indicator to back that up, so much for evidence-based.

I'd like to talk to Mr. Browne with the Canadian Wildlife Federation. You used the letters RFCPP, recreational fisheries conservation partnerships program, which was enabled under our new act. Was that a program that your group liked and used?

**Mr. David Browne:** We accessed funds through it, and it was a government funding program of about \$10 million a year that continues to this day. I think it has two more years in it. So it's been a good investment. I think a bunch of good projects were put on the ground. There's an evaluation of it, and we'll see how good it's been, so we'd like to see more of that.

**Mr. Robert Sopuck:** Great, me too.

I'd like to refer to evidence regarding the recreational fisheries conservation partnerships program, and I will provide some numbers produced by Kevin Stringer who was senior assistant deputy minister of the department from October 2013 to July 2016. He talked about \$3.1 million spent at that time; 74 different organizations undertook 94 habitat restoration projects. In addition, we leveraged an additional \$7 million that was brought to those same projects from partners. That's the 1:1.25 leverage ratio. There were 380 partners involved in those 94 projects, 1,700 volunteers, and the estimation is that 2.4 million square metres and 2,000 linear kilometres of recreational fisheries habitat were restored, including restoring access. That is a quantifiable indicator of the effect of our new Fisheries Act, which enabled this kind of program to proceed.

I think it's truly remarkable that the recreational fisheries community, which the Canadian Wildlife Federation represents in many different ways, was able to mobilize its resources and expertise to create meaningful, on-the-ground fisheries conservation projects that benefited local communities. This was the intent of our new act, and I'm so proud of that particular program because it generated real and meaningful conservation results.

**The Chair:** Thank you.

As I said, if anybody has a response to the questions, you can work that in whichever way you want to during questioning. I know there have been a lot of questions and some concerns, but nevertheless, you all know the rules, your seven minutes is your seven minutes, or your five minutes, in this case.

Just as a reminder, if we get to a third round, which it looks as if we may, I'm going to call for three questions, seven minutes in the first round. If the time is less, I'll reduce the time accordingly to how much time we have left because we have no provisions for a third round. So we'll divide among the three on a seven-minute basis. Is that okay with everybody? Okay.

Mr. Hardie, you have five minutes.

**Mr. Ken Hardie (Fleetwood—Port Kells, Lib.):** Thanks to everybody for being here.

I have a bit of an advantage; I'm also on the transport, infrastructure and communities committee, and we're looking at the Navigation Protection Act. I don't know if the same conditions apply to this act as they did to the Navigation Protection Act, but one of the things we heard very clearly early on was people liked the changes this brought about, and they represented by and large people responsible for municipal works. Their concern prior to the changes was that the process was onerous. It added a lot of time and expense

to Public Works. The attitude we're taking in that committee, and I don't think it's much different in this one, is to step back, look at the changes, keep what works, and fix what needs fixing.

In that regard, what would you recommend to us in the provisions that would allow for the streamlining of Public Works so we weren't unduly burdening them with a lot of regulation that was just very long-tailed, very difficult to do, especially in light of the lack of DFO resources. Are there some things you would recommend to preserve that streamlining so we could get things built without undue delays and undue costs?

Yes, David.

● (1700)

**Mr. David Browne:** Prescribed works is a portion of the law as it stands, and it can incorporate prescribed set standards for doing certain works that can be regulated through the law. That would be one way to do that.

I'm not a lawyer, but I would assume it would make it quite a bit clearer when you violated, because you were violating a specific regulation that laid out exactly how you should do something and what's prescribed therein. That would be one way to move forward with that.

There were also operational statements used under the former habitat protection program that could be repurposed and continue to be used. I know industry has been quite concerned that those were lost. That's not an issue about law the way it's written, it's just a program decision by DFO to move away from those operational statements. Yes, that's important to move, and that's why I was saying it's not just the law, but it's how you build the program to protect fish and fish habitat in this country.

**Mr. Ken Hardie:** Thank you, Mr. Browne.

I'll move on to Dr. Favaro, with your thoughts on that.

**Dr. Brett Favaro:** I don't work at that level with the municipalities and whatnot. As a scientist, I mostly work with fisheries to make fishing more sustainable, but I do look at this in a broader sense. I want to paint a picture of the status of conservation in Canada really quickly.

**Mr. Ken Hardie:** Briefly, so that Mr. Olszynski has a chance to respond, as well.

**Dr. Brett Favaro:** In 2014, we did a review of all the species that had been looked at more than once by COSEWIC between 1977 and 2013, which I believe was the cut-off. We found in the freshwater fish that only six species had improved in status over that time period. This has been a long-standing problem. When we're prioritizing getting things built, I definitely agree that streamlining is important, but we can't lose sight of the fact that our systems for helping fish recover and for keeping the habitat intact need to improve, as well.

**Mr. Ken Hardie:** Thank you.

Martin.

**Mr. Martin Olszynski:** I would just echo that I think that's exactly right. This is part of my brief, with class authorizations and regulated standards for those projects that have been pre-assessed and identified as posing a low risk. You know, the "carry on" type of thing. Notify DFO so that DFO knows that it's happening, knows when it's happening, and is able to start building a concept and a map of the impacts that are going on for fish habitat in Canada and running from there.

**Mr. Ken Hardie:** It was also noted that we wanted to modernize, which means that it wasn't necessarily true that we were just going to roll the clock back to before. What does "modernization" look like? Anybody, please chime in.

**Mr. Martin Olszynski:** I'll jump in with one quick one, and I'm proud to bring this example back from Alberta.

If you go to the Alberta Energy Regulator website right now, it is a very high-tech website where you can access information on applications, you can access information decisions from the Alberta Energy Regulator, and all those kinds of things. At the very least, there is this idea of a public registry, where authorization requests, decisions, and the authorizations themselves are posted, and the monitoring data is available, so that individuals can assess that data and make the decisions. I don't mean to be pugnacious about this, but I'll make the point. Unless my more scientific colleagues can correct me, it would be impossible to show a cause and effect in less than three years from when the regulatory change occurred and anything that's happening in the environment. We would need at least 10 to 15 years.

I apologize, I haven't done that work. I will try to do that work maybe in the future, but it would be impossible right now to suggest that a cause and effect could be identified in that context.

**The Chair:** Okay, thank you.

Mr. Donnelly, you have three minutes, but it's four minutes afforded to you.

**Mr. Fin Donnelly:** Thanks, Mr. Chair.

Mr. Olszynski, I think you just commented on the question. I was going to say, did you need a little more time to respond to Mr. Sopuck's question? You're okay there with your last comment.

Mr. Browne, if I can go back, you mentioned the law and that it's not the only thing, which I completely agree with. It's important to look at that when protecting the fishery, but isn't the law a critical tool with which decision-makers have to work, whether at the local, regional, provincial, or federal level? I will reiterate that I completely

agree that other elements like a fully resourced department with the ability to properly review development applications is critical, but if that basis, i.e., the law and the jurisdiction that they have, is unable to help them do their job, isn't that also a critical element?

• (1705)

**Mr. David Browne:** Absolutely. I hope I didn't say anything otherwise, or imply otherwise.

The provisions in the Fisheries Act, both around deleterious substances and habitat, are the provisions for Canada to protect our aquatic environment. We have to get them right. They have to work, and they have to protect habitat—no question. The law is the basis for doing that.

What I'm suggesting is that this committee and the review of the Fisheries Act go beyond what it says in the law to include how the department enforces that law.

**Mr. Fin Donnelly:** If I can summarize, you're still in agreement that we need to restore to the pre-2012 definitions and level, and then improve with some other elements, and you've already provided the committee with specific suggestions. Is that a fair—

**Mr. David Browne:** That's not the language I used. I'm not a lawyer, so I don't understand what "restore" or "return to" means.

In our view, let's move forward. We do want to return to the language of "had"—those words. How that actually gets put into law, I don't know. I'm not sure that it's "return to", or what.

**Mr. Fin Donnelly:** On section 35, "the harmful alteration, disruption, and destruction of fish habitat"

**Mr. David Browne:** We like those words—

**Mr. Fin Donnelly:**—were specifically removed.

**Mr. David Browne:** Yes.

**Mr. Fin Donnelly:** That's what I mean by pre-2012, because in 2012 that wording was removed.

Certainly I think you join a number of other national organizations that are calling for the restoration of that wording, and then to move beyond in terms of modernizing and improving and building on how we improve our fishery in the country.

**Mr. David Browne:** Yes, but we don't just want the old act back. That's all I want to say.

**Mr. Fin Donnelly:** Right. That's why I was just confirming—

**Mr. David Browne:** Don't just nullify and move on.

**Mr. Fin Donnelly:** It's not to just go back there, but restore.

**Mr. David Browne:** That's what I heard from Mr. Hardie here.

**Mr. Fin Donnelly:** The reason I'm saying that is there are at least two parties here—and you did reference that there is a bit of partisanship at the table, which there definitely is—who were calling for the restoration in the last election of the Fisheries Act, to at least get back to what it was before we move on.

I think it's fair, and even the Conservatives would recognize, that when you open up something for consultation, you never know which way it can go. That's the risk at opening it up for consultation. Also, it takes a long time. Ideally, you have to go—

**Mr. Ken Hardie:** It should take a while.

**Mr. Fin Donnelly:** It should take a while. The committee should travel to all corners of the country, listen—certainly on the coast—to what people have to say, and then hear that feedback and make those suggestions, which definitely can take a while.

**Mr. David Browne:** I would just respond that it's always good to take time to make important decisions the right way. However, I think the issue is urgent. Any clarification that's needed in the law as it stands should be done as quickly possible.

If you can arrive at a consensus on what the clarification is—and we put forth our ideas on what clarification needs to be—and they're consistent with others, we'd like to see that move pretty quickly. What we need is a federal and provincial program to protect fish habitat. If we spend two years thinking about what the law is going to say, that's not going to help us.

**The Chair:** Thank you very much, sir. I appreciate that.

We do have time for a third round, as you can see. We have time for three seven-minute questions from each of the parties. If you want to split your time, I would ask the committee members to use your diligence, refer to me if you want to know how much time, and you can throw it to one of your colleagues, if you so desire.

Mr. Morrissey, you're up for seven minutes, please.

**Mr. Robert Morrissey (Egmont, Lib.):** Thank you, Mr. Chair.

We heard comments about a number of habitats that had significant alterations, where the fish resource increased. Can you identify any watershed or rivers that have been negatively impacted by the Fisheries Act changes since 2012?

**Mr. Martin Olszynski:** Again, what's sauce for the goose is sauce for the gander. It's not possible to show in the span of three years, population level impacts on any fishery resource in Canada. Again, I defer to my scientific colleagues to correct me on that.

This is the point that I think the Wildlife Federation was making. If you take the history, the last 20 years of habitat protection in Canada, the introduction of the habitat protection provisions in 1977 was a recognition that habitat had been degraded. In 1986, there was a recognition that habitat was being degraded and therefore the policy was introduced. Now recently, there have been changes, and here we are again today, in 2016.

In the course of all of that, when you look at the data, when you look at the stress indicators, when you look at the watershed reports by the WWF, you see clearly degradation over time. That's the long trend. What are the individual trends in any given year? Again, I

defer to Dr. Favaro or to the Wildlife Federation to give more specifics.

• (1710)

**Mr. Robert Morrissey:** Nick.

**Mr. Nick Lapointe:** I would like to speak about the Ottawa River. I fish in the Ottawa River regularly and I really do love that river. It has excellent elements to it, but there are severely stressed elements to it as well.

Atlantic salmon have been extirpated from that river for hundreds of years. American eel are at less than 1% of their historic abundance, and they were a vital aboriginal fishery. The biomass of the Ottawa River is about 80% channel catfish, the vast majority of which are contaminated with mercury where I can't eat them or feed them to my wife.

There are some serious problems that are habitat-associated in the Ottawa River, and we haven't made progress on resolving those.

**Mr. Robert Morrissey:** Can anybody give an example of a negative development that occurred post-2012?

**Mr. David Browne:** We don't actually have a picture of the status of fish habitat in Canada. It has been a problem for years, and it's a problem when we sit before you and try to answer these questions. I would really love to be able to quantifiably answer the question here.

We haven't done the study, but I think you probably could look at some impacts to habitat that have happened since 2012. Those impacts probably would have happened under the old regime and are probably happening under the new regime. That is the reality of the way the department has been going lately, over the last 10 years.

The thing I would add to that is the importance of investing in the monitoring of both offsets and fish habitat. That might seem to be a plea for massive buckets of money, but I'm not talking about monitoring and assessing every single square inch of habitat in Canada. I'm talking about strategically investing dollars in specific projects and specific locations so that at least we have some understanding of where things are headed over time. Frankly, I don't believe we have that. I don't know if Dr. Favaro has information otherwise.

**Mr. Robert Morrissey:** Go ahead, Dr. Favaro.

**Dr. Brett Favaro:** I guess what I would say is, if you go to the doctor and you have a fever, the doctor is going to treat that fever in a certain way. You're going to have your fluids, you're going to go home, and you're going to rest. That's going to be true regardless of what the cause is for that malady.

Where we're in this data-poor situation in Canada for a lot of these fisheries, the thing you do to treat highly variable fish stocks—for example, the Fraser River sockeye, which is all over the place, and one year it's great and the next year it's a disaster—is make sure the habitat is intact. Almost regardless of whether climate change is exacerbating things, which we know is part of the problem with some of these, having that intact habitat and really valuing that is going to be good for stabilizing those systems.

**Mr. Robert Morrissey:** Since we're reviewing the sections to the act that are under review, what would you recommend be put in place so that in four years' time, if the same question is posed, you will actually have specific answers?

**Mr. Martin Olszynski:** I would suggest a public registry where every authorization that DFO issues comes with a monitoring requirement, maybe not all of them, but many of them, and have that data coming.

In addition to that, DFO should partner with agencies that are actually doing some of this work, whether it's a study that was cited by the Canadian Wildlife Federation or the work being done by the World Wildlife Fund where they have mapped the threats and the health of watersheds in Canada right now. Go out there and do that baseline work, establish that baseline, and then, yes, sure, we can try to have that conversation.

I don't think four years is going to be enough. Changes in the environment usually take decades to detect. However, certainly we would have some kind of baseline, and we could be reasonably confident that we'll have that data when the time comes to make those reviews.

• (1715)

**Mr. David Browne:** In any act, there's a requirement to report to Parliament. That report usually takes the form of here's how many authorizations we issued, and here's how many prosecutions, and here's how many staff dollars. That's great, but how about a report to Parliament that actually reports on the status of fish habitat and the effectiveness of the program? The list of standard things in the report to Parliament doesn't tell you whether that taxpayer money is being spent effectively. I would like to see written in the act something a little broader than just the standard programmatic reporting to Parliament. I think that would be helpful.

Our overarching comment was really to drive this program to outcomes. Focus the program, the law, and what the department does on achieving outcomes; and have them report back to you in Parliament on what those outcomes are, not just the number of prosecutions last year.

**The Chair:** You have enough time to thank everybody.

**Mr. Robert Morrissey:** Thank you.

**The Chair:** Not that I want to put suggestions in your questions. My apologies, but thank you.

We'll go to the Conservatives. Mr. Sopuck, I think we're starting with you. Feel free to share your time, if you wish.

**Mr. Robert Sopuck:** Mr. Lapointe, I appreciate your point about the Ottawa. I didn't imply that there were no issues. It's just the fish biomass is still fairly high.

Mr. Browne, you talked about fisheries habitat offsets. I'm a big fan of that. I think that our recreational fisheries conservation partnership program is a good first step and I think could be expanded dramatically.

Mr. Browne, you talked about outcomes-based policy. The new Fisheries Act, as we wrote it...and I was there and there were hearings, by the way, with outside groups. I was on the fisheries committee at the time. We based the new Fisheries Act on fish production and productivity. Nothing is easy in fisheries, but it's something you can measure to a certain extent. Isn't a good outcome fish production, healthy fish communities and lots of them? Is that a reasonable outcome?

**Mr. David Browne:** Yes. I think understanding the predictions, the factors that lead to fisheries production is exactly where fisheries science is at, understanding the dynamics, the environmental and community ecological impacts, effects that lead to fisheries production. That's where we are with fisheries science. We're trying to figure that out.

**Mr. Robert Sopuck:** Right.

**Mr. David Browne:** As an outcome, yes, we want fish production. I think what Dr. Favaro was saying is exactly down the right line. One of the ways that you ensure optimal fish production is to protect habitat.

**Mr. Robert Sopuck:** Again, I refer to testimony by Mr. Kevin Stringer back on November 6, 2012, when he talked about our new Fisheries Act proposals, and he said:

Habitat is a crucial element of that, but is not the only element of that. We now have new tools to address other threats to fisheries, such as aquatic invasive species, and to take other approaches around productivity. But productivity, as you point out,

—

And he's referring to me.

—is the focus of the fisheries protection provisions.

At the time, the senior officials in the department, I think, were quite supportive of the changes we were making to the Fisheries Act, because it was so broad before. I very much appreciate Mr. Hardie's and Mr. Morrissey's questioning. It was so broad that everything in the world became fisheries habitat and it was almost impossible to deal with.

I'd like to maybe ask Mr. Olszynski one last question. There was an issue, and I hate to tread on Mr. Morrissey's turf, about 20 years ago, I think, when there was some potato field runoff in Prince Edward Island and it was through no fault of the producers. They put down their chemicals in their fields to grow almost the best potatoes in the world—Manitoba grows a lot too, but anyway, P.E.I. potatoes are wonderful—doing their due diligence, working very hard, and I think Mr. Morrissey would remember. There were very massive and significant rainfalls and there was a massive fish kill because of that. Should those farmers have been charged?

**Mr. Martin Olszynski:** Again, if the facts are such that there was due diligence, usually that's the work that fishery inspectors or officers will look at on the ground. I think when they make a recommendation on whether or not to charge, certainly if they think a defence of due diligence exists, then together with the prosecution they will make a decision that a prosecution is not in the public interest.

Is that the Wilmot River incident you're referring to?

**Mr. Robert Sopuck:** I think it was the Morell River.

• (1720)

**Mr. Martin Olszynski:** I don't have the specifics of that case, but certainly going back to the question earlier, *actus reus*, *mens rea*, there is no *mens rea* requirement. But once the *actus reus* is proven, then the defence has the right to establish due diligence. That happens all the time.

**Mr. Robert Sopuck:** One really last quick point. The implications from some of the witnesses is that the Fisheries Act is the only act that's available. What's conveniently forgotten is that all provinces have environmental licensing regulations and project reviews, and multiple reviews by different levels of governments really hurt economic development, especially rural economic development, the communities that I represent.

Thank you.

**The Chair:** You have three minutes left, Mr. Arnold.

**Mr. Mel Arnold:** Thank you, Mr. Chair.

Over the last little while we've been hearing differing testimony but with the same theme, that there seems to be a lack of goals and measurables. Would you say that part of the problem you see with the current act is that we could use better-defined targets, better-defined measurables, so that we can evaluate, at a point down the road, whether the changes were positive or not? I guess I'll ask each of you to reply to that.

Mr. Lapointe.

**Mr. Nick Lapointe:** I'll say yes.

**Mr. David Browne:** I would say having purposes to the act. I guess section 6 isn't that, but it is a roundabout way of setting some purposes. Maybe that could be strengthened. So, in setting goals and objectives and reporting on them, there's a part that's in law, and there's a part that's in policy. I absolutely agree that, yes, we have to know where we're going, or we're not going to get there.

**Mr. Mel Arnold:** Has that really changed from the old act, or is this a systemic problem that's been there for...?

**Mr. Martin Olszynski:** If you read some of the policy statements that came out at the time, I think that, with the addition of section 6, the idea was that this would create some kind of certainty and would guide proponents and everyone to understanding what's going on. Unfortunately, again, because there's no public registry, it's actually impossible for anyone—unless they're filing ATIPs on a regular basis—to know in any given instance whether the minister has issued an authorization, whether the minister considered those issues, and how the minister considered them. I think another improvement would be to have those factors. Again, we're not talking about every project, whether you want to call it low impact or low harm, or whatever. But, at least in certain instances—certainly for the medium- to high-risk projects—it would be an improvement to have the minister set out a set of reasons, in addition to the authorization. The reasons would explain how the minister considered those factors, and how he or she reached that position.

**Mr. Todd Doherty:** I'll just add that it's not easy appearing before this committee. I just want to go on record as saying that we appreciate all of the witnesses for coming to stand before us and for taking the line of questioning from us. Again, just want to say thank you from all of us. Regardless of whether it was partisan or non-partisan, we're all here with the same intention: to figure out whether the act, as it sits today, needs beefing up. I do appreciate all of the witnesses coming forward.

**Mr. Martin Olszynski:** With regard to that comment, as a former DFOer, I think it's also really hard being a DFO employee. It has been very hard being a DFO employee for the past 15 years. That's one of the things, I think, that the committee has to think about, as well, in its report. I certainly don't have a doubt because, within the department, I met outstanding fisheries biologists and professionals, but they have traditionally always been the pinch point for development and for a lot of other things. They need a bit of space, I think, to be able to do their job, basically.

**The Chair:** Thank you, gentlemen.

On that note, Mr. Donnelly, you have seven minutes, please.

**Mr. Fin Donnelly:** Thank you, Mr. Chair.

I just want to make a note before I ask my question. I think Mr. Morrissey asked a great question regarding DFO officials and provincial, regional, local, government, and first nations officials. I think they also should weigh in on the impacts the changes have made. It's a very good question.

Prior to becoming a member of Parliament, I was in local government, and development was certainly the big issue around fisheries habitat. Obviously, housing, commercial projects, roads, bridges, and that sort of thing were huge concerns, especially in the lower Fraser, where I am. Back then, I was a city councillor in Coquitlam.

Speaking of the Fraser, I think Dr. Favaro and others referenced the Fraser River sockeye earlier. I came in 2009, and there was a return of just over a million Fraser River sockeye. At that time, it was probably the lowest return in recorded history. In 2010, there were over 20 million that returned, so it was a big year in terms of modern history. This year it is looking like there will be less than a million. Essentially, the overall trend has been down. Certainly, that's post-contact. With regard to pre-contact, we understand that there were over 100 million Fraser River sockeye coming back to that river system, which is still one of the greatest systems in the world. However, there has been a downward trajectory. If you look at other species, like salmon, in that river system, it's still in trouble.

However, I want to go back to 2012 because of one of the main issues at that time and, again...it's always a question about what drives changes politically. I don't think it's any secret that there were some major energy projects being proposed, specifically, major pipeline projects in northern Alberta, B.C., southern B.C., and across the country. I think it's fair to say that the government at the time was anticipating problems with environmental protections like the Fisheries Act, the Navigable Waters Protection Act, and the Canadian Environmental Assessment Act. It was also anticipating significant change to the National Energy Board's powers in reviewing environmental projects.

With these concerns under the Fisheries Act—and these major projects being reviewed—could our witnesses provide comments if they have any concerns? I don't know if it's fair to say that we don't have the Northern Gateway project on the books, but it seems likely that it's not. However, we still have other major energy projects for which this Fisheries Act still has the same definition. Does that provide any concerns to the witnesses here?

I'll start with the Canadian Wildlife Federation.

• (1725)

**Mr. David Browne:** Pipelines, dams, mines, urban expansion, changes in agriculture intensification...aside from the NEB, those acts are cornerstones of how we make sure that development goes ahead with as minimal an impact on the environment as possible, and in some cases, that it doesn't go ahead because the costs to the environment are too high. I don't know what I'd say other than that. Do we have concerns? Absolutely. We have concerns across all of those acts because from our point of view, we can always do better. The main thing we have a concern about is that those are four pieces of legislation—the NEB is not a piece of legislation, but it's an oversight body—and there is also the Species At Risk Act, and there's also the Canadian Environmental Protection Act. These are all, to some degree or another, in various types of review and coming back to Parliament and in committee.

What we don't see is the coordination of all of that action into something that is a coherent picture of where Canada is headed on

the environment and on the conservation of wildlife. That is what we would really like to see.

**Mr. Fin Donnelly:** I'll maybe ask Mr. Olszynski and then go to Dr Favaro to finish.

**Mr. Martin Olszynski:** The problems with the current act have been sort of discussed. There is some uncertainty around some wording. Two big parts of the story today are that these problems are not all new. A lot of these difficulties are going way back, at least 15 years, and that's really important. Clearly, after 2012 we had further reduction of DFO's oversight, but this is a long slide; this isn't anything that's new.

I think a year ago, someone had taken a picture of a giant excavator, it looked like, in the water of the Oldman River in Alberta. The question was whether or not there was going to be an enforcement action. To my knowledge, because we know that in 2014-15 there were no charges, it appears that the giant excavator being in the middle of the Oldman River Dam wasn't sufficient, permanent alteration or destruction to fish habitat. If, on the other hand, tomorrow the department decided that it was going to take compliance and enforcement very seriously and publish that, making it very clear to all Canadians that in the meantime, while Parliament ponders its changes, it was going to rigorously enforce that prohibition, I think you could get a lot of the way, even with its current wording.

A big part of the story is also that there is the law in the books, as my colleagues said, and then there's the law, in terms of how it's implemented and enforced. I do believe, and I do think the figures support this notion that in addition to whatever changes there will be to the wording, the signal has been sent that this law is not being implemented and is not going to be enforced. If you change that, you might get halfway.

• (1730)

**Dr. Brett Favaro:** I'd just add that I want to talk about trust and the question of whether people have trust in these systems that are put in place to ensure conservation. As scientists, we're just the messengers. The context is that there have been widespread declines in fish habitat and there have been widespread declines in freshwater fish, at least for species at risk, anyway, on which we have data. We've seen these species decline.

It's concerning to people when they see wording that could allow for more things to happen. It's pretty unambiguous that whereas one thing said you can't do it, this other one adds a lot of caveats. I think this is where people were coming from when they opposed a lot of these changes. It could be that there's a network of things that come into effect here and there that might patch some of this up, but we're not going to trust that, because over the past number of years there have been declines, declines, and more declines. This is why people resisted this, and this is why scientists were so skeptical when we saw this wording change. Most of us aren't legal experts but we know science and we can certainly read these words and imagine all these scenarios in which you could have further declines.

In this environment, I think it's fair to say that we have conservation values; a lot of people do. They want to see long-term sustainability, so that's where this messaging about concern came from. We all want to be prosperous and we want to see things proceed in an environmentally sustainable way, and this is where

we're coming from with a lot of this testimony today. It's not about shutting things down; it's about having people do things in the right way so that we can ensure that we get all these benefits for generations to come.

**The Chair:** Thank you, Dr. Favaro.

Thank you to everybody.

Just before I move on, I'd like a point of clarification. We tend to throw out abbreviations every now and then. The only abbreviation we really don't mind is DFO, for obvious reasons. You did say, a couple of times, NEB. You are talking about the National Energy Board—is that correct? Okay, I just wanted to put that on the record.

Thank you, everybody. That concludes this meeting. We'll see you in 46 hours.

The meeting is adjourned.

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