



Focus on Mining

NOVEMBER 2012

- 1 The New *Fisheries Act*: What Miners Need to Know
- 2 Contact Us

The New *Fisheries Act*: What Miners Need to Know

By [David Hunter](#), [Nalin Sahni](#) and George McKibbon (McKibbon Wakefield Inc.)

The repeal and enactment of the Canadian Environmental Assessment Act ("CEAA") and amendments to other federal legislation is the most significant change in federal environmental assessment (EA) since the legislation was enacted. The amendments are aimed at increasing investment in extractive industries by encouraging certainty, reducing regulatory duplication and reducing delays. The implications of these changes are vast and it is too early to determine their impacts on the mining industry.

This is the fourth article in our series on changes to the federal environmental assessment regime and what that means for mining in Ontario. Our [first article](#) provided a general overview while our [second article](#) addressed changes in CEAA related to Aboriginal consultation. Our [third article](#) discussed what the new Aboriginal consultation regime meant for mining in Ontario. In this article we discuss the *Fisheries Act* amendments, their implications for Aboriginal consultation and other matters relevant to miners taking into account further *Fisheries Act* revisions proposed in [Bill C-45](#).

Prior to the recent amendments, the *Fisheries Act* was a powerful environmental and resource management tool of general application. It was applied with force to protected fish habitat across the country. The changes to the *Fisheries Act* enacted last year and the proposed revisions in Bill C-45 limit the focus from the protection of almost all fish habitat to only the protection of "fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support that fishery". The *Fisheries Act* will apply less often and

in more narrow circumstances. It is no longer a statute of general application across Canada but one that will apply only to a limited number of lakes and rivers in limited parts of Canada.

The transition to the new *Fisheries Act* will occur in two phases. The first amendments to the *Fisheries Act* were made this past summer. Some of these amendments are placeholders enabling Federal-Provincial negotiations on agreements and protocols and the drafting of new regulations and definitions critical to implementation.

For example, Bill C-38 included two amendments each to Sections 35 and 37 of the *Fisheries Act*. The first set of amendments that came into force this past summer, maintain the emphasis on protecting almost all fish habitat by expanding the prohibition from only “works and undertakings” that damage fish habitat to include all activities that damage fish habitat as well. The second set of revisions limits the application of the *Fisheries Act* to only commercial, recreational and aboriginal fisheries or fish that support these fisheries. The second set of revisions will come in to force on a date ordered by federal cabinet, presumably when Federal-Provincial negotiations for new agreements and protocols are complete.

While waiting for the changes from federal cabinet, does nothing change in the interim? No, the placeholder amendments diminish the current administrative restrictions and override existing protocols on habitat protection by providing for greater administrative discretion. Staffing and administrative resource cuts underscore the effects of these changes. Even though federal cabinet has not approved the second set of amendments, Fisheries and Oceans Canada is processing applications as if the legislative changes were in force.

While many of the changes to the *Fisheries Act* were intended to facilitate mining development, they may not have their intended purpose, at least in the short term. Uncertainty as to the *Fisheries Act's* application to mining projects may prevail for some time. *Fisheries Act*

implementation has historically involved the participation of provincial ministries and agencies to shape implementation agreements and develop an accepted scientific body of practice that defined the measures taken to ensure compliance with the habitat protection provisions.

The refocused *Fisheries Act* requires development of a new scientific body of practice to implement the more limited habitat protection focus. This will take time and much judgment and consultation will be required, particularly where Aboriginal fisheries are concerned. With staffing and budget reductions, especially among scientists, the resources needed to implement the changes effectively may not be there.

For mining projects, there may be three major impacts. Over larger areas, approvals may become quicker and less expensive to obtain. Projects with existing *Fisheries Act* approvals will be able to apply to have their permit requirements reduced in accordance with the new Act. However, for projects caught by the new approvals requirements, there may be additional uncertainty as the new science and body of practice are developed.

It may take years to implement the new *Fisheries Act* and re-establish the science and administrative practices needed for competent implementation. The withdrawal of federal protection for most fisheries could in theory be replaced by additional provincial oversight but this is unlikely to happen in Ontario given the budgetary problems and expected staffing reductions at the Ministry of Natural Resources. But the messaging is clear. The *Fisheries Act* won't be the powerful decision-making tool it was in the past.

Contact Us

For further information, please contact a member of our [National Mining Group](#).