Federal Control over Land-based Pollution

Jessie Irving
Associate, McInnes Cooper, Halifax, N.S.
Vice Chair, East Coast Environmental Law

- There are many land-based sources of marine pollution, including:
  - Pesticides;
  - Nutrients; and
  - Sediment.
- The main sources are:
  - Agriculture;
  - Forestry;
  - Aquaculture; and
  - Coastal Developments.

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Key Federal Legislation

- Canadian Environmental Assessment Act
- Canadian Environmental Protection Act
- Fisheries Act
- International Boundary Waters Treaty Act
- Canada Marine Act
- Canada Water Act

Canadian Environmental Assessment Act

- Need a project and a federal decision to trigger the Act. Triggering process is complex.
- Potential Application to:
  - Agriculture (funding or land)
  - Aquaculture (FA trigger)
  - Forestry (funding or land)
  - Coastal Development (funding or land)

Canadian Environmental Protection Act

- The Basics
  - Purpose: the Act is intended to protect the environment and human health from the risks posed by harmful pollutants and to prevent new ones from entering the Canadian environment.
  - Subject Areas: eight in total, including new and existing substances
    - Substances – lists, lists and more lists

Canadian Environmental Protection Act

- The Basics
  - Regulation of toxic substances: Declare a substance toxic (Sch. 1 of CEPA), then regulate and/or require pollution prevention plans
  - Public consultation and the "Environmental Registry"

    (see http://www.ec.gc.ca/lcpe-cepa/)

Canadian Environmental Protection Act

- Application to:
  - Sediments (could be covered)
  - Nutrients (could be covered, see phosphorus regs)
  - Pesticides (separate federal legislation, but only on which pesticides are approved for use in Canada)

Canadian Environmental Protection Act

- Key Provisions
  - Power to make regs to reduce growth of aquatic vegetation caused by nutrients not adequately regulated in another federal Act (s. 118)
  - After consulting with other affected ministers, the Minister may issue environmental objectives, release guidelines and codes of practice to prevent and reduce marine pollution from land-based sources (s. 121)

Canadian Environmental Protection Act

- Key Provisions
  - Duty to report release or likely release of toxic substance; take all reasonable measures to prevent it; remedy any dangerous condition or reduce danger to the environment or human health or life (s. 95)
  - Voluntary report of release (s. 96)

Canadian Environmental Protection Act

- Enforcement
  - Enforcement Officers
  - Voluntary report of an offence to an enforcement officer (s. 16)
  - Apply to the Minister for an investigation (s. 17-18)
  - Bring an environmental protection action (s. 22)
  - Bring a private action for an injunction or to recover damages (ss. 39-40)

Fisheries Act

- "HADD" – prohibited without authorization (s. 35)
  - Harmful alteration, disruption or destruction of fish habitat without an approval is prohibited.
  - Sediment can harmfully alter, disrupt & destroy fish habitat

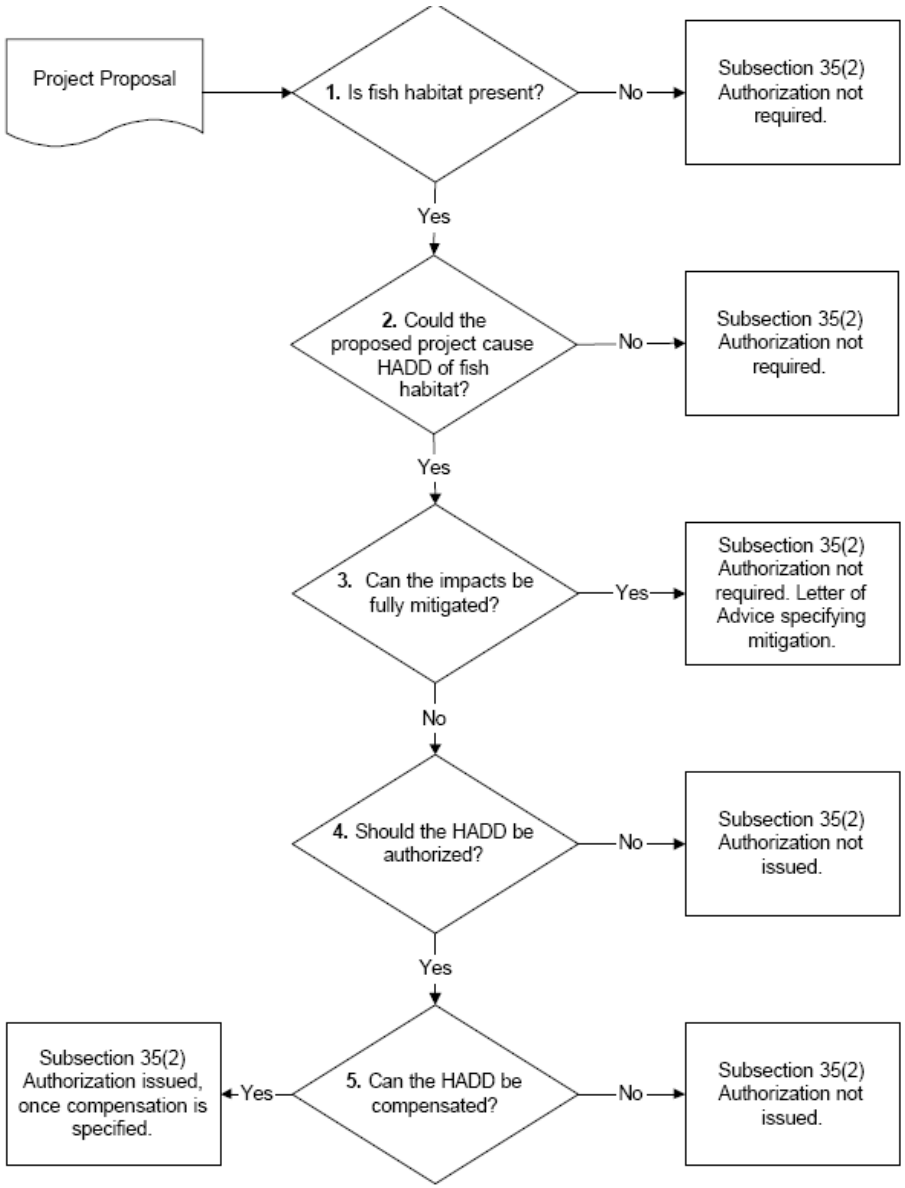

Figure 1: A decision framework for the determination and authorization of harmful alteration, disruption or destruction of fish habitat.

Fisheries Act

- Deposit of a deleterious substance – prohibited unless authorized by regs [s. 36(3) & 36(4)]

  – 36(3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

Fisheries Act

"deleterious substance" means

(*a*) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or

(*b*) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water,

Fisheries Act

- Regulations
  - Potato Processing Plant Liquid Effluent Regulations

Column I	Column II	Column III	Column IV
Class of Plant	Deleterious Substance	Authorized actual daily deposit	Authorized average daily deposit
Potato Chip Plant	Biochemical Oxygen Demanding Matter	1.5 kg/tonne of raw potatoes processed	0.5 kg/tonne of raw potatoes processed
	Total Suspended Matter	2.1 kg/tonne of raw potatoes processed	0.7 kg/tonne of raw potatoes processed
Other Potato Products Plants*	Biochemical Oxygen Demanding Matter	2.7 kg/tonne of raw potatoes processed	0.9 kg/tonne of raw potatoes processed
	Total Suspended Matter	2.4 kg/tonne of raw potatoes processed	0.8 kg/tonne of raw potatoes processed

Fisheries Act

- Regulations
  - Meat and Poultry Products Plant Liquid Effluent Regulations
  - Pulp and Paper Effluent Regulations
  - Metal Mining Effluent Regulations

R. v. Abitibi (2000) (NLProvCt)

- Case involved the deposit of silt into a watercourse
- Accused was responsible for the deposit of silt
- Court held that the crown had to prove that the silt was deleterious at the concentrations at which it entered the waters.
- Court seems to be influenced by the fact that the silt was a naturally occurring substance.
- The court talks about the silt not being deleterious until it reaches a concentration of 200mg/l, and concluded that the crown had failed to prove that the silt entered the water at above those concentrations.

Fletcher v. Kingston (2004) (OnCA)

- Private prosecution
- Based on release of ammonia in landfill leachate into watercourse
- Issue: Do you have to prove ammonia was deleterious at concentrations in the receiving waters?
- Court says no, applies R. v. MacMillan, enough for leachate “if added to any water” to be deleterious
- Rejects Abitibi approach

International Boundary Waters Treaty Act

- Article IV states that Canada and the US will not pollute boundary waters or waters flowing across the boundary “to the injury of health or property of the other”.

- The term ‘pollute’ is not defined for the purposes of this Act.

Canada Marine Act

- Focus is on Canadian ports
- Port authorities:
  - must develop land-use plans (s. 48)
  - may establish rules to be followed by ships for navigation or enviro protection [s.56]
- Regulations can be made on use and environmental protection of a port & seaway (ss. 62, 74, 98)
- Regulations dealing with sedimentation and water quality, but concern is shipping

Canada-NS Offshore Petroleum Resources Accord Implementation Act

- Mirror Federal and Provincial Legislation creating the Board
- Main objective is the joint regulation of offshore oil & gas activities
- Acts allows regs for protection of environment from impacts of offshore petroleum activities

Canada Water Act

- s.2 defines “waste” as (a) any substance that, if added to any water, would degrade or alter the quality of water to an extent that is detrimental to their use by man or by any animal, fish or plant
- s.9 restricts waste disposal in water quality management areas
- s.11 & s.13 establish mechanisms for creating water quality management areas (no areas have been established)

Conclusions

- Federal govt has important role to play
- Patchwork of legislative power to address land-based pollution
- Either a clear change in policy, or new legislation needed to address issue consistently and effectively