Slow on the Trigger: The Department of Fisheries and Oceans, the Fisheries Act and the Canadian Environmental Assessment Act

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The federal Department of Fisheries and Oceans plays an important role in protecting fish and fish habitat in Canada, primarily under the Fisheries Act. Section 5 of the Canadian Environmental Assessment Act requires an environmental assessment when the Department takes certain actions under the Fisheries Act. In the past few years environmental interests have taken the Department to task claiming that it has circumvented assessment. The alleged circumvention occurs when proponents of projects that will harm fish habitat, in consultation with the Department, revamp the project to avoid harm, and the Department issues a letter of advice to the proponent. The Department contends that in these circumstances no assessment is triggered. The author argues that, notwithstanding the Department’s position, this course of action triggers an environmental assessment. The article concludes with suggestions on how to facilitate the Department’s compliance.

Le ministère fédéral des Pêches et des Océans joue un rôle important dans la protection des poissons et de leur habitat au Canada, principalement sous le régime de la Loi sur la pêche. L’article 5 de la Loi canadienne sur l’évaluation environnementale exige la réalisation d’une évaluation environnementale chaque fois que le ministère pose certains gestes en vertu de la Loi sur la pêche. Au cours des dernières années, des personnes et des groupes qui s’intéressent à l’environnement ont adressé des reproches au ministère, alléguant qu’il contourne les dispositions de la loi relatives à l’évaluation environnementale. Le contournement reproché se produirait lorsque le promoteur d’un projet nuisible pour l’habitat du poisson, en consultation avec le ministère lui délivre ensuite une lettre de recommandation. Le ministère prétend que dans de telles circonstances, il n’y aucune obligation de réaliser une évaluation environnementale. L’auteure allègue que contrairement aux prétentions du ministère, cette façon de faire déclenche une évaluation environnementale. En conclusion, elle suggère des façons pour le ministère de se conformation aux dispositions de la loi.

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Appendix I
Introduction

The federal Department of Fisheries and Oceans (DFO) plays a critical role in protecting fish and fish habitat in Canada. The DFO carries out this role primarily under the *Fisheries Act*. By performing certain duties and functions pursuant to the *Fisheries Act* the DFO triggers the requirements for a federal environmental assessment under the *Canadian Environmental Assessment Act* (CEAA). In the last few years environmental interests have taken the DFO to task for allegedly, as a matter of policy, attempting to circumvent the provisions of the *Fisheries Act* that trigger an environmental assessment under the CEAA. The main such provision is section 35. Subsection 35(1) makes it an offence to carry on any work or undertaking that results in a harmful alteration, disruption, or destruction of fish habitat, commonly known as a “HADD” of fish habitat. Subsection 35(2) states that no one commits an offence under subsection 35(1) if the Minister of Fisheries and Oceans (the Minister) has authorized the HADD of fish habitat. Engaging subsection 35(2) “triggers” a requirement for an environmental assessment under the CEAA.

The Friends of the West Country Association, an Alberta environmental organization, has taken the Minister to the federal court challenging the Minister’s interpretation of the relationship between subsection 35(2) of the *Fisheries Act* and the CEAA. They claimed that the Minister’s not engaging subsection 35(2) and triggering the CEAA when presented with a project that clearly would result in a HADD of fish habitat was *ultra vires*. The action was subsequently discontinued because an environmental assessment was triggered under another Act.

The Friends of the Oldman, another Alberta environmental organization, made a submission known as the “Oldman II Submission,” under the

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1. R.S.C. 1985 c. F-14 [*Fisheries Act*].
2. S.C. 1992, c. 37 [CEAA].
3. The CEAA is triggered because ss. 35(2) of the *Fisheries Act* is included in the *Law List Regulations*, S.O.R./1994-636, Schedule I, s. 2, s. 6(11) [*Law List Regulations*]. Part I of this article explains the triggering process.
5. See also discussion in Part III. On June 27, 2004, Dr. Martha Kostuch, a principal of the applicant, advised by email that the reason why the applicant discontinued the application was that in this situation, an environmental assessment was triggered under section 5 of the *Navigable Waters Protection Act* and therefore, this was not a good test case to determine the *vires* of issuing a Letter of Advice under the *Fisheries Act*. 
North American Agreement on Environmental Cooperation in which they alleged that the Government of Canada was "failing to apply, comply with and enforce the habitat protection provisions of the Fisheries Act and the CEAA." The North American Agreement on Environmental Cooperation ("NAAEC") is the environmental side agreement established under the North American Free Trade Agreement (NAFTA). Articles 14 and 15 of the NAAEC provide for a process that allows residents of NAFTA member countries to file submissions to the Secretariat of the Commission for Environmental Cooperation, alleging that a NAFTA state party is not effectively enforcing its environmental laws.

The Oldman II Submission successfully proceeded through the NAAEC review process. In 1999 the Secretariat of the Commission for Environmental Cooperation notified the Council, the governing body of the Commission, comprised of highest level environmental authorities of the governments that are party to the NAFTA, that the Oldman II Submission warranted the production of a Factual Record under Article 15 of the NAAEC. A Factual Record summarizes the submission, the response of the allegedly non-compliant government, any other relevant factual information, and the Secretariat's understanding of the facts. The purpose of a Factual Record is to "provide information regarding asserted failures to effectively enforce environmental law in North America that may assist submitters, NAAEC Parties and other interested members of the public in taking any action they deem appropriate..." The Council agreed to the production of a Factual Record, which was released late in 2003. Although the Factual Record addressed facts relating to the application of the Fisheries Act and the CEAA to the given fact situation, it did not take a particular point of view on the contentious legal issues.

6 North American Agreement on Environmental Cooperation, with annexes, 32 I.L.M. 1480 (entered into force 1 January 1994), Art. 8 [NAAEC]
7 Friends of the Oldman River, Oldman River II Submission, Doc. No. A14/SEM 96-006/01/ SUB (submission filed with the Secretariat under Art. 14 of the NAFTA), online: Commission for Environmental Cooperation [http: wwwcec.org files pdf sem 97-6-SUB-E.pdf] [Friends of the Oldman River]
9 Established under the NAAEC
10 Friends of the Oldman River, Oldman River II - Factual Record, Doc. No. A14/SEM/97-006/ F/R-OP (released 8 November 2003 to the Secretariat of the CEC) [Factual Record]
11 ibid
12 See Factual Record, ibid. at 8, 9. The fact situation concerns a number of stream crossings proposed by Sunpine Forest Products Ltd. in connection with timber operations under a forest management agreement with the Province of Alberta signed in July 1992.
Throughout both of these proceedings the DFO has contended that it did not commit any error. It has vigorously argued that where a HADD of fish habitat may be prevented through project redesign or mitigation, there is no need for a subsection 35(2) authorization and hence no requirement for an environmental assessment. Where a HADD of fish habitat can be avoided with DFO help, the DFO will issue a “letter of advice” (Letter of Advice) to the proponent advising the proponent that if the project is carried on in accordance with the Letter there should be no subsection 35(1) offence. In the DFO’s view, it follows that no subsection 35(2) authorization is required, and no CEAA environmental assessment is triggered. This article calls this position of the DFO the “No Triggering” position.

This article analyzes and critiques the No Triggering position. It concludes that the position is incorrect in law and that the Fisheries Act/CEAA legislative scheme or relationship requires that the CEAA be triggered, even where through project redesign or re-development, a HADD of fish habitat is avoided.

Part I of this article describes the pertinent legislation in relation to the problem. Part II demonstrates how the DFO embraces the No Triggering position. Part III critically examines the position and concludes that it is not correct in law. Part IV describes other approaches that strengthen the argument against the No Triggering position. Part V makes suggestions on facilitating the DFO’s compliance with the CEAA.

I. Legislative Background in relation to the Problem

1. Constitutional Jurisdiction over Fisheries

The Federal Government has exclusive legislative jurisdiction over inland and coastal fisheries. For that reason it is important that the Federal Government appropriately exercise its legislative duties and discretions under the Fisheries Act. While provincial environmental controls over water quality and quantity, species protection, and riparian land uses can provide considerable protection to fish habitat, the provinces may not directly legislate in areas under exclusive federal legislative jurisdiction.13 Accord-

13. Peter W. Hogg, Constitutional Law of Canada, 3rd ed. (Toronto: Carswell, 1992) at 15-6, 15-5(a). Hogg states “What the courts do in cases of this kind is to make a judgment as to which is the most important feature of the law and to characterize the law by that feature; that dominant feature is the ‘pith and substance’ or ‘matter’ of the law; the other feature is merely incidental, irrelevant for constitutional purposes.”
ingly, if the Federal Government does not implement and enforce its fish habitat protection legislation, no other level of government can directly fill the gap.

2. *The CEAA*

The CEAA environmental assessment process is largely administered by the Canadian Environmental Assessment Agency. The Agency's *Responsible Authority's Guide* states that the fundamental purpose of the CEAA "is to ensure that federal decision-makers are aware of and carry out their obligation to assess the environmental impacts of a project." Echoing subsection 11(1) of the CEAA, the *Guide* requires that the environmental assessment "be conducted early on in the project's development stage and before any irrevocable decisions are made."

CEAA applies when a "federal authority" who is a "responsible authority" exercises certain powers or duties or performs certain functions in respect of a "project" or proposed "project." A "federal authority" means a Minister of the Crown, and certain government agencies, departments or bodies. A "responsible authority" is the federal authority that oversees or carries out an environmental assessment under the CEAA. "Project" means, in relation to a physical work, any "proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work." Section 5 of the CEAA sets out the main circumstances that will trigger the Act.

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the

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14. *CEAA, supra* note 2 at ss. 60 and 61.
17. *Ibid., supra* note 2, s. 2. The Act excludes some bodies from the definition. These are not relevant to this article.
18. *Ibid., s. 2.
19. *Ibid.,* s. 2: "Project" also means any physical activities set out in the *Inclusion List Regulations*, SOR/1994-637. These regulations set out undertakings that do not necessarily relate to a physical work yet but are subject to the Act. Examples include dumping specified substances, certain aviation activities and killing of migratory birds.
20. *Ibid.,* s. 5. The *CEAA* may also apply in circumstances in which there is no s. 5 trigger. For example, the federal Environment Minister may order an environmental assessment in certain circumstances where a project may have significant adverse effects on another province, or where the project is carried out on federal lands or elsewhere in Canada and may have significant adverse environmental effects outside of federal lands or outside of Canada (s. 48) or where public concerns warrants an environmental assessment requirement (s. 28).
following duties or functions in respect of a project, namely, where a federal authority

(a) is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part;

(b) makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried out in whole or in part, except where the financial assistance is in the form of any reduction, avoidance, deferral, removal, refund, remission or other form of relief from the payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried out;

(c) has the administration of federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands, or transfers the administration and control of those lands or interests to Her Majesty in right of a province, for the purpose of enabling the project to be carried out in whole or in part; or

(d) under a provision prescribed pursuant to paragraph 59(f), issues a permit or license, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part [under the Law List Regulations made pursuant to subsections 59(f) & (g) of the CEAA] [emphasis added].

The Law List Regulations in paragraph (d) of section 5 set out provisions of federal acts or regulations that confer powers, duties or functions on federal authorities, the exercise or performance of which will require a prior environmental assessment. Both subsections 35(2) and 37(2) of the Fisheries Act are Law List triggers.

22. There are four types of federal environmental assessment: screenings, comprehensive studies, mediations and panel reviews. Depending on type, an environmental assessment will vary in intensity in respect of such matters as public participation, depth of study of effects, and whether there will be a formal hearing. Projects requiring a comprehensive study assessment are listed in the Comprehensive Study Regulation S.O.R./1994-638. These projects are likely to result in significant environmental effects. The Canadian Environmental Assessment Agency's examples are large oil and natural gas developments, some projects in national parks, and larger projects that can cause harm in migratory bird sanctuaries. Of the nearly 25,000 assessments conducted annually under the CEAA more than 99% are screenings. See Review of the Canadian Environmental Assessment Act, Cat. No. EN 194-211-1999E, (Ottawa: 1999) at 25. The CEAA enables a responsible authority to apply to the agency to allow class screening reports for a given type of project. If approved, the responsible authority may use the report in whole or in part for all projects of that type.
23. Law List Regulations, ibid. at Schedule I, (Section 2), s. 6(11).

This article focuses on section 35 of the *Fisheries Act* and its relationship to the CEAA. Subsection 37(2) also is critical to the article. Section 35 reads:

35. (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.
(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

Subsection 35(2) provides an exemption to the subsection 35(1) offence. Under subsection 35(2) no offence occurs where the Minister has approved a HADD of fish habitat or where regulations authorize a HADD of fish habitat. There are no regulations under subsection 35(2) that authorize a HADD without ministerial approval. Accordingly, the only way a HADD of fish habitat can lawfully occur under section 35 is where the Minister has authorized it.

24. *Fisheries Act*, supra note 1. Section 32 of the *Fisheries Act* defines “fish habitat” as “spawning grounds and nurseries, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes.” Section 40(1) of the *Fisheries Act* makes it an offence to contravene subsection 35(1).

25. There are regulations, however, relevant to section 35 of the Act. In 1993, the Fishery (General) Regulations, S.O.R. / 1993-53 were promulgated. Section 58 reads:

58(1) Any person who proposes to carry on any work or undertaking that is likely to result in the harmful alteration, disruption or destruction of fish habitat and who wishes to have the means or conditions of that work or undertaking authorized by the Minister under subsection 35(2) of the Act shall apply to the Minister in the form set out in Schedule VI.
(2) An authorization given under subsection 35(2) of the Act shall be in the form set out in Schedule VII. [emphasis added]

Although it is not pursued in this article, this regulation lends some support to the view that the relationship between the *CEAA* and section 35 of the *Fisheries Act* is that proposals presented to the DFO that reasonably will result in a HADD of fish habitat must be assessed under the *CEAA*. This is because the use of the word “shall” in section 58(1) indicates a mandatory process. The words “likely to” indicate that the prescribed process must be followed even where it is not certain that the proposed activity or undertaking will result in a HADD of fish habitat but that it likely will. The mandatory form attached to the regulation states all applications pursuant to section 35 of the *Fisheries Act* shall be assessed in accordance with federal environmental assessment requirements. Under section 78 of the *Fisheries Act* anyone who contravenes this provision of the regulation would be guilty of an offence. Therefore, technically anyone who proposes to carry on an activity or undertaking that is likely to result in a HADD of fish habitat and wishes to have the work or undertaking authorized is required by regulation to follow this process and to use the form that states that the application will be assessed under the *CEAA*. Of course, from the viewpoint of the DFO, it is open to argument whether the regulation and form go beyond the requirements of the *Fisheries Act*. 
Section 37 of the *Fisheries Act* reads:

37. (1) Where a person carries on or proposes to carry on any work or undertaking that results or is likely to result in the alteration, disruption or destruction of fish habitat ... the person shall, on the request of the Minister or without request in the manner and circumstances prescribed by regulations made under paragraph (3)(a), provide the Minister with such plans, specifications, studies, procedures, schedules, analyses, samples or other information relating to the work or undertaking and with such analyses, samples, evaluations, studies or other information relating to the water, place or fish habitat that is or is likely to be affected by the work or undertaking as will enable the Minister to determine

(a) whether the work or undertaking results or is likely to result in any alteration, disruption or destruction of fish habitat that constitutes or would constitute an offence under subsection 40(1) and what measures, if any, would prevent that result or mitigate the effects thereof ... 

(2) If, after reviewing any material or information provided under subsection (1) ... the Minister ... is of the opinion that an offence under subsection 40(1) ... is being or is likely to be committed, the Minister ... may, by order, subject to regulations made pursuant to paragraph (3)(b), or, if there are no such regulations in force, with the approval of the Governor in Council,

(a) require such modifications or additions to the work or undertaking or such modifications to any plans, specifications, procedures or schedules relating thereto as the Minister ... considers necessary in the circumstances, or

(b) restrict the operation of the work or undertaking.

and, with the approval of the Governor in Council in any case, direct the closing of the work or undertaking for such period as the Minister considers necessary in the circumstances.

The key difference between section 37 and section 35 of the *Fisheries Act* is that section 35 applies in respect of HADDs of fish habitat that will happen and section 37 applies in respect of HADDs of fish habitat that are happening or are likely to happen.
II. DFO Policies

This section reviews a number of DFO policies that underlie the No Triggering position. Recall that the No Triggering position concerns a situation where the DFO is approached by a proponent of a work or undertaking that is likely to result in a HADD of fish habitat. The No Triggering position is that the Fisheries Act CEAA legislative scheme or relationship is such that the DFO has discretion in such a situation, to redesign or develop the project with the proponent, so that a HADD of fish habitat is avoided, without triggering an environmental assessment under the CEAA. The DFO may then issue a Letter of Advice outlining procedures for carrying out the project to avoid a HADD of fish habitat.

The first policy is embodied in the Directive on the Issuance of Subsection 35(2) Authorizations (the Directive). The Directive is intended to provide "specific guidance on the administration of section 35 to ensure national consistency in its application...." The Directive's purpose is to "clarify the circumstances when authorizations pursuant to Subsection 35(2) may be issued." The Directive asserts that subsection 35(2) authorizations are not mandatory. However "proponents are strongly advised to consult with the appropriate authorities prior to undertaking projects to ensure that fish habitat concerns and any associated regulatory requirements are taken into account as part of project planning." The Directive states that "subsection 35(2) authorizations should only be issued ... when it is impossible or impractical to maintain the same level of habitat productive capacity by altering the design of the project or using mitigation measures." It explains that "authorizations should only be issued for works or undertakings which could result in damage to fish habitat which cannot be avoided through relocating or redesigning the project or through mitigation."

The Directive also describes the role of Letters of Advice. The Directive states that where it has been determined that a HADD of fish habitat "can be avoided though project relocation, redesign or mitigation, letters of advice may be issued to proponents which set out measures aimed at
ensuring that harmful effects do not occur.” The Directive takes the view that such letters do not “constitute an authorization” though they will give proponents “some protection against enforcement action where due diligence has been applied in implementing” the written advice.32 Obviously, if Letters of Advice were authorizations, then the DFO’s issuance of them would trigger the CEAA.33

The second DFO policy that is relevant is found in the Decision Framework for the Determination and Authorization of Harmful Alteration, Disruption or Destruction (HADD) of Fish Habitat34 (the Decision Framework). The Decision Framework was in preparation at the time of the Directive’s publication and provides a framework for DFO fish habitat managers to decide if a HADD of fish habitat is likely to result from a project and whether to issue a subsection 35(2) authorization.35 Under it the “first priority is to avoid or reduce the project’s potential for a HADD through appropriate mitigation measures.”36 Just like the Directive, the Decision Framework requires that the implementation of mitigation be considered before finalizing a decision about whether a HADD of fish habitat will result. It instructs the habitat manager to issue a Letter of Advice instead of a subsection 35(2) authorization if mitigation will avoid a HADD of fish habitat.37 The Decision Framework addresses mitigation in a section titled “Can the Impacts to Fish Habitat be Fully Mitigated” as follows:

... mitigation is defined as “action taken during the planning, design, construction and operation of works and undertakings to alleviate potential adverse effects on the productive capacity of fish habitats.” Under the Subsection 35(2) Directive the term mitigation is also meant to include measures which are undertaken to maintain habitat or to prevent residual damage to habitat at the project site or that occurs as a direct result of the project. Mitigation could thus include a wide variety of activities (e.g.,

32. Ibid. at 4
33. One might argue that Letters of Advice are authorizations and that the CEAA requires an environmental assessment before the issuance of a Letter of Advice. This argument is considered in Part III.
34 Canada, Department of Fisheries and Oceans, Decision Framework for the Determination and Authorization of Harmful Alteration, Disruption or Destruction of Fish Habitat, DFO Doc. No. 5531, (Ottawa, Communications Directorate, Fisheries and Oceans Canada, 1998) DFO 5531, [Decision Framework].
35. See Directive, supra note 26 at 2, Art. 4. The Decision Framework is referred to as a document that is being developed.
36. Decision Framework, supra note 34 at iii (Executive Summary).
37. Ibid. at 3, 4.
redesign or relocation of project components, timing of works, methods of construction or operation) which avoid or minimise changes to habitat attributes and thus minimise impacts to the habitat’s capacity to produce fish.\(^\text{38}\)

It is noteworthy that operations of works, undertakings, and timing of works and any other measures to maintain habitat as a result of the project all relate to undertakings, processes or activities that occur after the commencement of a project. Hence, under the Decision Framework a Letter of Advice may recommend two kinds of mitigation measures. First, it may recommend mitigation measures that can be completed before project commencement and will avoid both present and future HADDs of fish habitat. Examples could include some cases of project re-design or relocation. Second, a Letter of Advice may recommend mitigation measures where future HADDs of fish habitat are avoided through ongoing mitigation that follows project commencement. Examples include undertakings, operations, and timing of works. This article calls the former kind of mitigation “pre-project mitigation” and the latter kind “post-project mitigation”. Part V of this article further develops these concepts.

A third example of the DFO’s policy concerning destruction of fish habitat is revealed in a five page publication called *What the Law Requires: Fish Habitat and the Fisheries Act*\(^\text{39}\) (the Brochure). The Brochure emphasizes that proponents of projects should not apply for an authorization under subsection 35(2) unless it is certain, after considering mitigation measures, that the proposed project will result in a HADD of fish habitat. The Brochure is directed at proponents who are planning a project that is likely to “alter or damage fish habitat.” It states that subsection 35(2) authorizations are “the instrument of last resort” and should be issued “only when there is no other way to go.” It advises proponents to visit the local government office that deals with fisheries habitat management to inquire whether the proposed project is likely to result in a HADD of fish habitat, and if so, whether it can be “avoided or lessened by changes in project design or implementation.” The Brochure states that if the DFO believes that the impact on the fish habitats might be reduced by certain measures, it will issue the proponent a Letter of Advice, “on ways to avoid

\(^{38}\) *Ibid.* at 14

\(^{39}\) Canada, Department of Fisheries and Oceans, *Fish Habitat Conservation and Protection, What the Law Requires* DFO Doc. No. 5077 (Ottawa: Communications Directorate, Fisheries and Oceans Canada, 1995) [Brochure].
or minimize damage.” These measures might include “relocating or redesigning [the] project — or steps to mitigate the harmful impacts on habitat.” The Brochure also states that the Letter of Advice is not the same as an authorization but if the proponent complies with it and conducts the project as prescribed, the proponent “will be in compliance with the Fisheries Act.” However, if the proponent does not comply and a HADD of fish habitat results, the proponent is “liable to prosecution.”

The Brochure continues that it “may be impossible to protect fish habitat by changes in project design or by other measures to lessen harmful impacts.” In such cases, the proponent should “request an Authorization under Subsection 35(2) of the Act.” It notes that the proponent is within its “legal rights to go ahead with [the] project without getting this Authorization” but if a HADD of fish habitat results the proponent is liable to prosecution. It states “[W]hat this means is that if you are planning a project that might affect fish habitat, applying for an Authorization should not be your first step — in fact it should be your last.”

III. Critical Analysis of the No Triggering Position

A study of the relevant provisions in the Fisheries Act and the CEAA indicates that the DFO’s No Triggering position is incorrect. To iterate, paragraph 5(1)(d) of the CEAA provides:

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority

... (d) under a provision prescribed pursuant to paragraph 59(f), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.

Breaking down paragraph 5(1)(d) reveals the nature of the conditions that must be met to trigger a CEAA environmental assessment.

First, to trigger the CEAA there must be a “project”. As can be seen from the definition of “project,” set out in Part I, for something to be a project there need not be any kind of government involvement. A project

40. Ibid.
41. Ibid.
is merely the undertaking itself, whether it be in relation to a physical work (such as a dam) or an activity on the Inclusion List Regulation (such as a drilling of a well).

Second, there must be a “federal authority” that “exercises ... powers or performs duties or functions in respect of a project.” Also as set out in Part I, a “federal authority” simply means one of a number of government ministries or agencies.

In determining whether section 5 applies to the activities of the DFO before an authorization is granted under subsection 35(2), consideration must be given to whether section 5 requires the federal authority be a decision-making authority. It is noteworthy that the present CEAA process is different from the process under the Environmental Assessment and Review Process Guidelines Order (“EARPGO” or “Guidelines Order”). The EARPGO set out the federal environmental assessment requirements prior to the enactment of the CEAA. The CEAA replaced and repealed the EARPGO for any project proposed after the commencement of the CEAA. The process under the EARPGO applied to all federal departments and agencies with a decision-making authority for any “proposal” meaning any initiative, undertaking or activity that could have an environmental effect on an area of federal responsibility. It required the departments or agencies to screen a proposal to determine whether the proposal had any potentially adverse environmental effects.

In contrast, subsection 5(1) of the CEAA provides that the federal authority must exercise powers or perform duties or functions in respect of a project. The notion of “duties” suggests positive regulatory duties. Here the CEAA process is similar to the EARPGO process. Justice La Forest for the majority in *Friends of the Oldman River Society v. Canada (Minister of Transport)* (the “1992 Oldman Dam Decision”) stated that an environmental assessment was not triggered under the EARPGO unless the initiating department had a positive regulatory duty to make a decision.

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43 CEAA, supra note 2, s. 74.

44 Guidelines Order, supra note 42, s. 2.

45 Although initially thought to be non-binding, the Federal Court of Appeal in *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, [1989] F.C.J. No. 357, aff’d (1989), 99 N.R. 72 (F.C.A.) ruled that the Guidelines Order was a law of general application.


47 Ibid at paras. 52-59.
The provision of the *Fisheries Act* under consideration in that case, subsection 37(2), was not found to contain such a positive regulatory duty. However, La Forest did find that subsection 37(2) authorized the exercise of a *function*. In his words:

> In my view a discretionary power to request or not to request information to assist a Minister in the exercise of a *legislative function* does not constitute a decision-making responsibility within the meaning of the Guidelines Order.\(^\text{47}\) [emphasis added].

The presence of the word “function” in section 5 of the CEAA makes the CEAA triggering process different from the triggering process under the former *Guidelines Order*. Even if subsection 35(2) of the *Fisheries Act* does not impose a *duty* to engage in the authorization process when the Minister is confronted with a potential HADD of fish habitat, there is good argument that it describes a *function* of the Minister. By determining whether to authorize any means or conditions under which a HADD of fish habitat may be carried out, the Minister is engaging in a legislative function. Entering into the determination process may be discretionary, but nevertheless, it is the exercise of a legislative function.

The nature of the Minister's *function* under subsection 35(2) of the *Fisheries Act* is worth examining. Once engaged, section 5 of the CEAA requires compliance with the CEAA environmental assessment provisions. When does this occur? Making only the necessary substitutions to section 5 of the CEAA to incorporate the pertinent words of the subsection 35(2) *Law List* trigger, section 5 of the CEAA requires an environmental assessment *before* the DFO exercises a power or performs a duty or *function* in respect of a project, namely where it issues a permit or licence, grants an approval or takes any other *action* for the purpose of enabling a project to be carried out in whole or in part. What fits under this description?

The words in section 5 of the CEAA, “for the purpose of enabling a project to be carried out” can only mean for the purpose of enabling a project to be *legally* carried out, that is, without committing an offence under the *Fisheries Act*. The *Fisheries Act* does not require that projects that will likely result in a HADD of fish habitat be authorized. DFO publications iterate this point.\(^\text{48}\) Mr. Justice La Forest articulates this point in

\(^{47}\) 1992 Oldman Dam Decision, supra note 46 at paras. 57-59.

\(^{48}\) See e.g. discussion of the Directive on the Issuance of Subsection 35(2) Authorizations and of *What the Law Requires: Fish Habitat and the Fisheries Act*, in Part II of this article.
the 1992 Oldman Dam Decision. La Forest distinguished a *Fisheries Act* authorization from an authorization under section 5 of the *Navigable Waters Protection Act*.50 Section 5 of the *Navigable Waters Protection Act*, like many other CEAA Law List triggers, requires an authorization for a project to be carried out at all. Hence, under the CEAA, section 5 of the *Navigable Waters Protection Act* and similar Law List triggers, an environmental assessment is mandated before the responsible authority exercises the regulatory duty of issuing a project approval. The purpose of paragraph 5(1)(a) of the *Navigable Waters Protection Act* — a Law List trigger — is to enable a project to proceed by the issuance of an approval. By contrast, subsection 35(2) of the *Fisheries Act* does not require an authorization for a project to be carried out and the Minister has no regulatory duty to issue an authorization for a project to proceed. The purpose of an authorization is for the proponent to avoid committing an offence by carrying out a project that results in a HADD of fish habitat. Therefore, the regulatory function that the Minister fulfills under subsection 35(2) is enabling a project to legally proceed, that is without the proponent committing an offence.

What follows from the regulatory function of the Minister, through the DFO, working with the proponent to redesign, relocate or mitigate a project where the project, as presented by the proponent, would likely result in a HADD of fish habitat? It follows that the CEAA, by its language, is triggered *before* the DFO carries out this regulatory function. In other words, the CEAA is triggered before the DFO determines or advises on how the project should be properly carried out so that the fishery is best protected. If the DFO concludes as a result of exercising this regulatory function that a HADD of fish habitat cannot be avoided, then the proponent must obtain a subsection 35(2) authorization to legally carry out the project. If through the exercise of this legislative function a HADD of fish habitat is avoided through the adoption of acceptable project design, location, or mitigation conditions, then it is the determination of these matters that enables the project to be carried out legally. The Letter of Advice sets out these determinations and serves to better ensure that no offence will result from the project. In either case the legislative function

50 See the *Navigable Waters Protection Act*, R.S. 1985 c. N-22, s.5(1)(a) [*Navigable Waters Protection Act*]. Section 5 reads:

5. (1) No work shall be built or placed in, on, over, under, through or across any navigable water unless

(a) the work and the site and plans thereof have been approved by the Minister, on such terms and conditions as the Minister deems fit, prior to commencement of construction; ....
must not be carried out until an environmental assessment under the CEAA has been completed. That is, the processes leading to a determination of appropriate project redesign, relocation, or mitigation are to be carried out in the context of a CEAA environmental assessment. It is a contingent matter whether or not as the result of these processes the proponent requires an authorization. Accordingly, the CEAA is triggered not as a "last step" as advised by the DFO, but rather as the step directly following the proponent's bringing to the DFO's attention a project, as proposed by the proponent, that would likely result in a HADD of fish habitat.

Before proceeding, the soundness of the argument that the Minister of Fisheries and Oceans exercises a function under subsection 35(2) can be tested. Two arguments in support of the DFO No Triggering position could be advanced. First, it could be argued that when the DFO is determining means or conditions under which a project may be carried out to avoid a HADD of fish habitat (resulting in a Letter of Advice) or minimize a HADD of fish habitat (resulting in an authorization if the proponent requests one), the DFO is not exercising a function, as per section 5 of the CEA, and therefore does not trigger an environmental assessment. This first approach seems unlikely to succeed. There is no relevant legislated definition of "function", but the Canadian Oxford Dictionary defines "function" to mean "an activity proper to a person or an institution." 51 Making such determination clearly is a key activity proper to the DFO.

Second, it could be argued that the DFO is exercising a function, just not a function emanating from the provisions of subsection 35(2). This argument was made in Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans) 52 referred to in the introduction to this article. In the course of the proceedings, the Friends of the West Country Association made an application to compel the DFO to produce certain documents. The DFO refused, relying on Federal Court Rule 1612. The rule pertains to obtaining information from a federal board, commission or tribunal. The DFO argued that in issuing Letters of Advice it was not acting pursuant to any statutory authority and consequently, was not acting in the capacity of a federal board, commission or tribunal. Accordingly, it argued that it did not have to comply with the request for

52. Supra note 4.
documents. The DFO stated:

Now, the Act doesn't expressly provide for this policy nor Letters of Advice, but it doesn't prohibit it either. And in our submission this is a pure administrative fact-finding process which the department in its day-to-day exercise of its authority is able to devise in order to assist it with its workload. And where the process that is involved in accordance with this departmental policy does not meet the test of exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament, or by or under an order made pursuant to the prerogative of the Crown, then whoever is doing this fact-finding, it isn’t the federal board, commission or other tribunal.  

Justice Muldoon granted the application without specifically rejecting the DFO’s argument. He noted that if he agreed with the DFO he would be resolving the main issue, whether Letters of Advice are ultra vires the Fisheries Act, before the hearing of that issue. In his words:

Perhaps, if so inclined, the respondents will want to make out their argument once again at the main, substantive judicial review hearing as to the legal merits and effects of their internal policies. It is clear that one legal effect the DFO’s internal policy cannot have is to bind this Court with respect to a rule 1612 application, so that this Court must deny the applicant disclosure of the documents it seeks because the issue it wants to contend at the main hearing would have already been resolved as a matter of policy by the DFO.

Of course, if the DFO in exercising the function is not acting under subsection 35(2) of the — Fisheries Act, there must be some other valid source of authority. The Supreme Court of Canada has made it clear that statutory authorities have no inherent powers. Unless a statute explicitly, or by necessary implication, confers a power to carry out some action, the statutory authority generally cannot carry out the activity and a court would find the action to be ultra vires and of no legal effect.

It is hard to imagine how the DFO could not be acting under the authority of the Fisheries Act when it carries out these determinations. There does not seem to be any other relevant source of authority. Even the

54  Friends of the West Country, supra note 4 at para. 15
55  Ibid. at para. 17.
Minister has stated that the DFO is functioning pursuant to the *Fisheries Act* when it makes fish habitat related determinations. However, even if the Minister is fulfilling a function under the *Fisheries Act*, it still may be asked if the Minister is exercising this function under subsection 35(2). A method to answer this question is to consider each other habitat protection provision of the *Fisheries Act* to see if the function reasonably could be exercised under it.

The Minister enumerates the *Fisheries Act* habitat protection provisions in the DFO Annual Report 2002-2003 as sections 35, 20, 21, 22, 26, 28, 30, 32, 37, 37.3, 38.1, 40 and 42. A review of the *Fisheries Act* indicates that this is an accurate summary of the list. Regarding these:

- section 20 deals with the construction of fishways;
- section 21 authorizes the Minister of Fisheries and Oceans to pay part of the expenses relating to fishways or canals;
- section 22, a CEAA Law List trigger, authorizes the Minister to require the removal or modification of obstructions to allow fish passage;
- section 26 prohibits certain obstructions of streams, rivers and canals by nets, fishing apparatus, logs or other materials, and contains some prohibitions regarding catching eels;
- section 28 prohibits the use of explosives to hunt or kill fish or marine animals;
- section 30 gives the Minister the authority to require fish guards in certain waterworks or projects;
- section 32, a CEAA Law List trigger, prohibits anyone from destroying fish other than by fishing without an authorization under the Act;
- section 37, a CEAA Law List trigger, authorizes the Minister to order plans and specifications regarding a potential HADD and to

57. In the 2002-2003 Annual Report on the Administration and Enforcement of the Fish Habitat Protection and Pollution Prevention Provisions of the *Fisheries Act* the Minister states at para. 1.0 “The federal government fulfills its constitutional responsibilities for seacoast and inland fisheries through the administration and enforcement of the *Fisheries Act*...” See Minister of Fisheries and Oceans, Canada, Department of Fisheries and Oceans, *Annual Report to Parliament 2002-2003* (Ottawa: Communications Branch, Fisheries and Oceans Canada, 2004), online: <http://www.dfo-mpo.gc.ca/ canwaters-eauxcan/infocentre publications/index_e.asp> [DFO Annual Report].
60. *Law List Regulations*, supra note 3, Schedule I, (Section 2), s. 61(11).
require modifications or restrictions of the project:

- section 37.3 deals with inspectors' powers;
- section 38.1 enables the Minister to appoint inspectors;
- section 40 describes offences and punishments; and
- section 42 deals with liability in relation to the deposit of deleterious substances.

None of the above provisions authorize the determination function under discussion, other than sections 37 or 32, which themselves trigger the CEAA. Accordingly, it is reasonable to conclude that when the Minister, through the DFO, is determining means or conditions under which a HADD of fish habitat may be carried out (whether this results in a Letter of Advice or an authorization if requested by the proponent), it is exercising a function under a *Fisheries Act* provision that is a *Law List* trigger, usually under subsection 35(2).

Although, the argument involving a close reading of the relevant legislative provisions described above concludes that the No Triggering position is wrong, there are a number of other approaches to reach, or support this conclusion. Some approaches support a finding that Letters of Advice are *ultra vires*, others that the process culminating in a Letter of Advice triggers an environmental assessment. One considers whether Letters of Advice are subsection 35(2) authorizations.

**IV. Other Possible Approaches**

1. *The Minister Lacks Jurisdiction to Issue Letters of Advice*

   The argument in Part III against the No Triggering position did not dispute the *vires* of Letters of Advice. Instead it argued that the process leading to Letters of Advice triggered a CEAA environmental assessment and so the No Triggering position was wrong. However the No Triggering position also may be challenged by disputing the *vires* of Letters of Advice. One approach relies on the administrative law principle made clear by the Supreme Court of Canada that statutory authorities have no inherent powers. 63 Unless a statute explicitly or by necessary implication confers a power to carry out some act, the statutory authority normally cannot validly carry out the act and a court could find the action to be *ultra vires*. The approach recognizes that the *Fisheries Act* incorporates processes to

63 *Canadian Pacific*, supra note 56. See also discussion in Part III.
Deal with situations which will (section 35) or could (section 37) result in HADDs of fish habitat. Even if Letters of Advice are claimed to be policy-based only, there is sufficient jurisprudence that while authorities may issue policy statements and guidelines without specific statutory authorization, there are jurisdictional limits. For example, policy cannot be inconsistent or inharmonious with a statute or prevent a statutory delegate from exercising a discretion in a particular case. Arguably Letters of Advice policies are inconsistent or inharmonious with the Fisheries Act since the Act deals with all alternatives: actual HADDs of fish habitat (subsection 35(2)) and potential HADDs of fish habitat (subsection 37(2)). By implication, the Act does not permit Letters of Advice policies. Similarly, arguably the Letters of Advice policies prevent the DFO from exercising discretion under subsection 35(2) or subsection 37(2).

Support for this line of argument is found in the Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans) where Justice Muldoon said, regarding the issue by the DFO of Letters of Advice:

Apparently, it is the respondent's submission that a policy which the DFO has developed internally without any explicit statutory foundation to do so will in some way relieve the Minister of statutory obligations or limit the obligations of the Minister vis-à-vis subsections 35(2) and 37(2) of the Fisheries Act and, in turn, paragraph 5(1)(d) of the CEAA. It also appears that a further "benefit" which derives from this informal approach to the statutory mandate and obligations placed upon the DFO by the Fisheries Act and the CEAA is that the DFO does not need to disclose materials in relation to a judicial review application related to the letters of advice since, in accordance with the policy, the letters of advice (although they do inform a party that subsection 5(1) of the Fisheries Act will apply to

67. Supra note 4.
68. Ibid. The main issue in the case was whether DFO's issuing Letters of Advice was ultra vires the Fisheries Act. The applicant argued that the DFO erred in law or acted without jurisdiction in issuing Letters of Advice in relation to logging activities of Sunpine Forests Products Ltd. It claimed that the DFO and Sunpine should have followed statutory procedures in section 35 or 37 of the Fisheries Act which would have triggered environmental assessment under the CEAA. Justice Muldoon commented on this issue in the course of the applicant's application to compel DFO to produce certain documents. See discussion in Part III.
them or not) do not constitute a decision within the meaning of rule 1612. This is a transparent bureaucratic attempt at sheer evasion of binding statutory imperatives. It is neither cute nor smart, and this Court is not duped by it. By making "policy" not contemplated by the statutes, the DFO types simply cannot immunize the Minister and DFO from judicial review, nor circumvent the environment laws which they decline to obey.\textsuperscript{69}

The applicant discontinued their application so there was no final decision in the case regarding the jurisdictional validity of Letters of Advice.\textsuperscript{70}

2. \textit{In Pari Materia} Rule of Interpretation

This approach supports the view that the process leading to a Letter of Advice triggers an environmental assessment. When statutes enacted by a legislature deal with the same subject matter they are assumed to be drafted with each other in mind. As Sullivan and Driedger point out in \textit{Construction of Statutes}, all statutes of a level of government are presumed to be drafted to produce a consistent and coherent whole.\textsuperscript{71} As noted in \textit{R. v. Loxdale}:

\begin{quote}
Where there are different statutes \textit{in pari materia} though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other.\textsuperscript{72}
\end{quote}

The presumption follows therefore, that Parliament intends the CEAA and the regulatory triggers under clause 5(1)(d) to work as a coherent, logical scheme so that project planning and design occur within the context of a CEAA environmental assessment.

The No Triggering position must interpret the relation between the statutes in a manner that does not assume such an \textit{in pari materia} relationship. The position presupposes that planning and project design may be

\begin{footnotes}
\item[69] \textit{Ibid.} at para. 16, 17.
\item[70] \textit{Supra} note 5.
\item[71] Ruth Sullivan & Elmer A. Driedger, \textit{Construction of Statutes}. 4\textsuperscript{th} ed., (Toronto: Butterworth, 2002) at 323.
\end{footnotes}
conducted outside of the CEAA process.' This contradicts several of the CEAA’s purpose statements and statutory mandates that provide for the conduct of environmental assessments in the planning stages of a project before any government action is taken. An *in pari materia* approach supports the view that any assessment of a proposed project that could reasonably result in a HADD of fish habitat must be conducted under the CEAA and not informally, outside of the CEAA process. A successful *in pari materia* argument would support a claim that the CEAA/Fisheries Act legislative scheme is such that the process leading to Letters of Advice must be conducted under a CEAA environmental assessment, and in not carrying out this process under the CEAA the Minister’s actions are *ultra vires*. It is possible, of course, for the Minister to argue that the two Acts not be considered together, for example on the basis that the *Fisheries Act* was enacted before the CEAA. As Sullivan points out, however, the “correct view is that subsequently enacted legislation may be considered and relied on in the same manner and to the same degree as previously enacted legislation — and vice versa.”

3. *Exhaustive Code*

This approach also supports the view that the Letters of Advice practice is *ultra vires*. The rule of statutory interpretation *expression unius est exclusio alterius* — to express one thing is to exclude another — supports the argument that sections 35 and 37 of the *Fisheries Act* speak exhaustively to situations in which the Minister of Fisheries and Oceans can deal with a proponent regarding a potential HADD of fish habitat. Subsection

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71. As a side comment, for a number of years, the writer has been a member of the Regulatory Advisory Committee, a multi-stakeholder committee created in connection with the Canadian Environmental Assessment Agency to advise the federal Environment Minister on matters concerning environmental assessment. On more than one occasion at Committee meetings, industry advocates or consultants have expressed dismay over having to carry out what they see as two environmental assessments: one when determining whether a HADD of fish habitat can be avoided resulting with a Letter of Advice, and another one if a HADD of fish habitat cannot be avoided, and a CEAA environmental assessment is required upon the engagement of the subsection 35(2) authorization process. By this time the project has already been planned and mitigation set, yet proponents must begin again. This article argues that the legal scheme of the statutes is that proponents should not have to carry out two assessments in such cases. The *Fisheries Act/CEAA* interface requires only one environmental assessment, and it is under the CEAA.

74. Sullivan & Drieger, *supra* note 71 at 324. Sullivan refers to *Hayes v Mayhew* (1959), 18 D.L.R. (2d) (4th) 520 (S.C.C.). In that case, Mr Justice Martland, for the majority states at p. 528, that where there is an ambiguity in an earlier statute which is *in pari materia* with another statute “it is proper to look at the subsequent legislation to see what is the proper construction to put upon the earlier statute.”
37(1) applies in respect of any undertaking or activity that is likely to result in a HADD of fish habitat. Section 35 deals with situations that, as presented, will result in a HADD. Between the two sections, the ground is covered. The Letters of Advice process is not authorized and is therefore, ultra vires. Statutory authorities have no inherent powers. Unless a statute explicitly or by necessary implication confers a power to carry out some act, the statutory authority normally cannot validly carry out the act and a court could find the action to be ultra vires and of no legal effect.

4. Letters of Advice as Authorizations

A potential approach to challenge the No Triggering position is to argue that Letters of Advice are, in effect, subsection 35(2) authorizations. Hence, the argument would conclude, since a Letter of Advice is a project authorization, a CEAA environmental assessment must be conducted prior to issue, under section 5 of the CEAA.

This argument could succeed, but in limited circumstances. If a Letter of Advice acknowledges or contemplates that the project will result in a HADD of fish habitat and it outlines measures to mitigate or minimize the HADD, then the Letter likely amounts to a subsection 35(2) authorization. However, if a Letter of Advice outlines measures to completely avoid a HADD of fish habitat, and if the Letter is complied with, the HADD of fish habitat will be avoided, then the Letter of Advice cannot be a subsection 35(2) authorization. Subsection 35(2) authorizations only apply to HADDs of fish habitat that will occur.

Take note, however, that even if a Letter of Advice is not a subsection 35(2) authorization, this does not mean that the CEAA is not triggered prior to its issuance. The main conclusion of this article is that a CEAA environmental assessment is triggered prior to when the Minister performs a function under subsection 35(2). It is during this prior period that an environmental assessment is to be conducted the period during which measures are determined such as to redesign, relocate and mitigate to avoid a HADD of fish habitat, where a Letter of Advice is issued, or to authorize a HADD of fish habitat under subsection 35(2).

V. Addressing Ramifications

There are several ramifications of the main conclusion of this article. One is that the CEAA may be triggered even where, through project rede-
sign and mitigation, no HADD of fish habitat results. This conclusion is consistent with the CEAA and supported by the CEAA mandate described in Part I.

The CEAA provides that an environmental assessment must be conducted before the Minister exercises a function under subsection 35(2) of the Fisheries Act. This function is setting out means or conditions to enable a project to legally proceed. The CEAA does not require that means or conditions actually be set out in any statutory authorization. Indeed the CEAA does not even require the responsible authority to exercise the legislative function described in a Law List trigger following conducting an environmental assessment. The CEAA states that after an environmental assessment is conducted by virtue of a Law List trigger and there is a finding of no significant environmental effects "the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part" [emphasis added].

One might also object that it follows from the main conclusion that environmental assessments would be triggered in the most trivial or informal circumstances. This objection focuses on the article's conclusion that the CEAA is triggered before the DFO exercises a function under subsection 35(2). The objection is that this before period could cover far too many events, thus constituting a form of reductio ad absurdum. For example, one might argue that the conclusion requires that an environmental assessment be triggered when a person calls the DFO and makes casual inquiries about the Fisheries Act, even where the caller has only a mere idea about a potential project.

A closer look at the relationship between the Fisheries Act and the CEAA reveals that for an environmental assessment to be triggered, several conditions must be met. First the DFO must be satisfied that what is being presented to it is a "work" or "undertaking" for the purposes of the Fisheries Act. A mere idea of a possible development would not do. Second, the DFO must be satisfied that what is being described is a "project" for the purposes of the CEAA, namely an undertaking in respect of a physical work, or something that constitutes a project by virtue of being on the Inclusion List Regulation. Third, it also must be fairly apparent to the DFO that the person making inquiries actually intends to carry out the work or undertaking and that the proposal is not

76. CEAA, supra note 2, s. 37 (1)(a).
77. Fisheries Act, supra note 1, s. 35(1).
78. CEAA, supra note 2, s. 2.
idle speculation. Fourth, the proponent must provide a description of the project that is relatively complete. When this occurs depends on circumstances, but a casual verbal inquiry over the phone and nothing else would not meet this condition, a complete verbal presentation in the DFO office might meet this condition, and a presentation to the DFO of the details of a fully designed project will meet this condition. Fifth, the DFO must be satisfied that the project, as described by the proponent will likely result in a HADD of fish habitat. Unless these conditions are met, the CEAA is not triggered by subsection 35(2) of the Fisheries Act. Accordingly, the main conclusion does not mean that environmental assessments will be triggered in trivial or informal circumstances.

Given the main conclusion of this article the DFO often will be in non-compliance with section 5 of the CEAA. The question remains: where does this leave the Department in the management of inland and coastal fisheries under the Fisheries Act? If the DFO is in a state of non-compliance with the legislation, this non-compliance should be rectified. Thus, to close, the writer suggests ways to facilitate compliance.

One way of facilitating compliance is explained through using the notions of "pre-project mitigation" and "post-project mitigation." The distinction between "pre-project mitigation" and "post-project mitigation" is relevant to a situation where it is determined that a HADD of fish habitat can be avoided through mitigation. In pre-project mitigation all mitigation measures are completed prior to the operation of the project, for example, by moving the location of a project or changing its design to completely avoid a HADD of fish habitat. This kind of mitigation eliminates the HADD of fish habitat.

Pre-project mitigation may be contrasted with post-project mitigation which describes mitigation measures following the commencement of operation of a project. Post-project mitigation is designed to prevent future adverse impacts on fish habitat, for example, control measures to be carried out by the project proponent to prevent future HADDS of fish habitat, and monitoring and follow-up programs.

Where a HADD of fish habitat is avoided through post-project mitigation, it is desirable that the DFO retain regulatory control to enforce and monitor mitigation measures.

One approach would be to invoke subsection 37(2) of the Fisheries Act to address post-project mitigation. Under this subsection the Minister may impose enforceable conditions and limitations on a project to avoid a

79. See also discussion in Part II.
future HADD of fish habitat, precisely what post-project mitigation measures are meant to do. One problem with using subsection 37(2) is that in the absence of regulations the imposition of enforceable modification measures or restrictions of operations is possible only through a Cabinet order. This time consuming and politically charged task could be alleviated through the promulgation of appropriate regulations. Until that time, however, there are other avenues available for retaining government control where a HADD of fish habitat is avoided through post-project mitigation.

One possibility for extending DFO control over post-project mitigation situations is for the department to reconsider its interpretations of what counts as a HADD of fish habitat. What counts as a "harmful alteration, disturbance or destruction of fish habitat," could include a broad spectrum of projects. Indeed prior to the passing of regulations to the CEAA in 1995 that made subsection 35(2) of the Fisheries Act a CEAA trigger, the DFO issued considerably more subsection 35(2) authorizations. On the basis of the number of CEAA environmental assessments conducted in the 1995-96 fiscal year, the Oldman II Submission estimates that the DFO issued no more than 339 subsection 35(2) authorizations across Canada in 1995-96, compared to over 12,000 subsection 35(2) authorizations in 1990-91. In its 2002-2003 Annual Report to Parliament, the DFO reported 532 authorizations and 8,034 Letters of Advice issued. Assuming there has not been a remarkable decrease in projects that impact fish habitat (12,000 in 1990-1991 compared to 339 in 1995-1996 and 532 in 2002-2003) it follows that the DFO has radically altered its interpretation of what counts as a HADD of fish habitat. Unless the DFO was patently unreasonable in its determination as to what counted as a HADD of fish habitat in 1990-91, the DFO could reasonably determine that many projects that it currently finds do not result in HADDs of fish habitat actually do result in them.

Increasing the number of authorizations to pre-CEAA trigger levels would have significant resource implications. Another avenue might be for the federal Government to enact regulations under subsection 35(2) of the Fisheries Act which would apply to routine and minor HADD situations. Through these regulations the Minister could bypass determinations of means and conditions for specific projects and a CEAA assessment.

80. *Fisheries Act*, supra note 1, s. 37(2).
81. *Friends of the Oldman River*, supra note 7 at 3; *The Factual Record*, supra note 10 at 13 refers to this claim.
82. *DFO Annual Report*, supra note 57 at 7, Table 2.
The CEA also offers a number of mechanisms that could reduce or streamline assessments. Among possible measures are additions to the *Exclusion List Regulations* and the use of model and replacement class screenings.

The *Exclusion List Regulations* were promulgated under subsection 59(c) of the CEA which enables the Governor in Council to make regulations:

... prescribing any project or class of projects for which an environmental assessment is not required where the Governor in Council is satisfied that

(ii) in the case of projects in relation to physical works, in the opinion of the Governor in Council, have insignificant environmental effects.

For a project to be placed on the Exclusion List it must be clear from its description without further information and without mitigation, that the project will have no, or only insignificant, environmental effects. Under government interpretive policy, industry standards are not classified as mitigation when they are universally applied throughout Canada and they form part of the project design. An "industry standard" is a practice recognized by and used consistently throughout an industry, often a specification, code or guideline. Accordingly, if a project otherwise qualifies for exemption from environmental assessment under the *Exclusion List Regulations*, the presence of such standards would not prevent a project type from being placed on the Exclusion List.

Model and replacement class screenings may also be used to streamline environmental assessment requirements for certain types of projects. These screenings apply to classes of projects that are not likely to cause significant adverse environmental effects, provided that certain design standards and other limitations have been met. A model class screening is based on a generic assessment of a class of projects. The responsible authority adjusts the generic assessment for the location and other specific

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84. The policy is found in a document called "Principles and Criteria for consideration for inclusion on the Exclusion List". It was circulated to members of the Regulatory Advisory Committee (see, *supra* note 73) in 2002-2003 in connection with a process leading to additions to the Exclusion List.
85. Model class screenings, see CEA.1, *supra* note 2, s. 19(2)(b); replacement class screenings, see CEA.1, *ibid.*, s. 19(2)(a).
project details. The resulting assessment is a project specific assessment report.

A replacement class screening is a category of class screenings introduced with 2003 CEAA amendments, that requires no adjustments to make the assessment project specific. A generic class assessment is used without modification. Accordingly, a project that can be assessed by a replacement class screening is similar to its being on the Exclusion List in that no individual assessment is required. However, replacement class screening project categories are more flexible than Exclusion List categories. The former, but not the latter, may be conditional on mitigation or other adjustments that do not constitute industry standards.

**Conclusion**

The DFO’s full compliance with *Fisheries Act* and CEAA requirements would be challenging given current DFO resources. Nevertheless, the solution is not non-compliance with legal requirements. Also, the solution is not removing subsection 35(2) from the *Law List Regulations*, as has been suggested to the author on occasion. Countless projects must be assessed to avoid environmental degradation and better protect our fisheries. The Table in Appendix I describes the advantages and protective measures associated with a CEAA assessment.

The solutions are that the DFO comply with legal requirements and use its economic resources and legal tools, including CEAA tools, to reduce or streamline environmental assessment, to facilitate compliance. Those solutions however, should not detract from the basic role of the DFO which is to protect our fisheries resources in Canada. Accordingly, ultimately, the DFO must be awarded the resources for it to do its job.\(^\text{87}\)

**Appendix I**

The following chart shows the difference between a project proceeding with a CEAA environmental assessment as compared with a project proceeding without a CEAA environmental assessment. The chart demonstrates the safeguards that CEAA offers in respect of broader input into development of project design, enforceable mitigation conditions, opportunities for public involvement, regulated monitoring and other matters.

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\(^{87}\) The author thanks the Alberta Ingenuity Centre for Water Research, being one source of water research funding that facilitated research for this article. The views in this article, however, are those of the author.
<table>
<thead>
<tr>
<th>Project will or likely will result in a HADD of fish habitat</th>
<th>No CEAA Environmental Assessment</th>
<th>CEAA Environmental Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consideration of cumulative effects</td>
<td>No requirement</td>
<td>Yes, s. 16(1)(a)</td>
</tr>
<tr>
<td>Public notice relating to EA</td>
<td>No requirement</td>
<td>Yes, s. 55.1(2) (a) requires publication for screenings (except class screenings), comprehensive study or panel review. Act requires other publication including, scoping of project, various documents relating to the EA, and EA reports (s. 55)</td>
</tr>
<tr>
<td>Public participation</td>
<td>No requirement</td>
<td>The Public has right to participate in any level of the assessment. CEAA requires that the public be given opportunity to participate in comprehensive studies (s. 21.2), mediations and panel review (ss. 34 and 36), there is discretionary public participation planning for screenings (s. 18(3) (c)).</td>
</tr>
<tr>
<td>Mitigation measures</td>
<td>May be recommended but no enforcement powers over mitigation</td>
<td>Mandatory consideration in EA process in determining whether a project likely to have significant environmental effects (ss. 16(1) (d), 20 and 37).</td>
</tr>
<tr>
<td>Follow up program* and monitoring compliance</td>
<td>Responsible authority follow up possible but not required No enforcement of follow up requirements. There is a potential of a prosecution under the Fisheries Act. No regulatory basis for responsible authority monitoring. Proponent monitoring not enforceable</td>
<td>Designing and implementing a follow up program mandatory for comprehensive studies, mediation or panel review and consideration of a follow up program mandatory for screenings (s. 38). Monitoring has a regulatory basis where it is a condition of authorization. Proponent monitoring enforceable through authorization conditions. Any mitigation measures imposed must be in the power of responsible authority to enforce or that the responsible authority is satisfied will be implemented by some other body (s. 20(1.1). Mitigation measures normally would be imposed as condition of s.37(2) or 35(2) or authorization.</td>
</tr>
</tbody>
</table>
### Project will or likely will result in a HADD of fish habitat

<table>
<thead>
<tr>
<th>No CEAA Environmental Assessment</th>
<th>CEAA Environmental Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enforcement capability</td>
<td>None, except by prosecuting a HADD of fish habitat under s. 35(1). However, if a Letter of Advice is issued and complied with and HADD of fish habitat still results, the defendant may raise statutory due diligence defence or mistake of fact (Fisheries Act s. 78.6).</td>
</tr>
<tr>
<td></td>
<td>An authorization is enforceable under the Fisheries Act.</td>
</tr>
</tbody>
</table>

* Explanation of terms:

- "EA" means "environmental assessment."
- "Cumulative effects" are effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out. 89
- "Follow up program" is a program under the CEAA designed to verify the accuracy of the environmental assessment of a project and determine the effectiveness of a mitigation measures. 90

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88. *Fisheries Act*, supra note 1. Section 78.6 provides two statutory defences to all *Fisheries Act* offences. Section 78.6(a) states that no person may be convicted of an offence if she establishes that she exercised all due diligence to prevent the commission of the offence. If a person receives a Letter of Advice, follows its recommendations and a HADD of fish habitat nevertheless results, section 78.6(a) would likely provide a defence to a charge under section 35(1). DFO’s Directive, discussed in Part II of this article, acknowledges this. As set out in that Part, the Directive states that a Letter of Advice gives proponents “some protection against enforcement action where due diligence has been applied in implementing” the written advice. Section 78.6(b) codifies the common law defence of mistake of fact. It provides that no person may be convicted of an offence if that person reasonably and honestly believed in the existence of facts that, if true, would render the person’s conduct innocent. A defendant who acts on a Letter of Advice could argue this defence if he or she believed that the Letter of Advice sanctioned the conduct that resulted in a HADD of fish habitat. If the court characterizes the defence as a mistake of fact the defence could succeed. Also relevant is the common law defence of officially induced error. If a HADD of fish habitat results after compliance with a Letter of Advice a defendant could have a complete defence if the defendant can prove that the government approved the defendant’s course of action, even if it was not in compliance with the law.

89. *CEAA*, supra note 2, s. 16(1)(a).

90. *Ibid.*, s. 2, definition of “follow up program.”