



Government of Canada
Fisheries and Oceans

Gouvernement du Canada
Pêches et Océans

Q8

MECTS # 2010-006-00618

EKME # 2308919

ABR-4050-1/E001

To: Claire Dansereau
Pou

Date: DEC 23 2010

Object: **ADMINISTRATION AND ENFORCEMENT OF THE POLLUTION
PREVENTION PROVISIONS OF THE FISHERIES ACT (SECTION 36)**

From / De: Mitch Bloom, ADM Strategic Policy

Your Signature
Votre signature

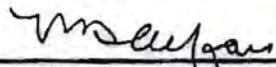
Information

For Comments
Observations

Material for the Minister
Documents pour le Ministre

Approved by:


Kevin Stringer, Assistant Deputy Minister, Program Policy


David Balfour, Assistant Deputy Minister, Ecosystems and Fisheries Management

Drafting Officer/ Rédacteur: T. Kerluke (998-9132) / T. Caron / G. Belzile / st

To provide to client



Fisheries and Oceans
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Strategic Policy

Politiques stratégiques

Assistant
Deputy Minister

Sous-ministre
adjoint

DEC 23 2010

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MEMORANDUM FOR THE DEPUTY MINISTER

**ADMINISTRATION AND ENFORCEMENT OF THE POLLUTION
PREVENTION PROVISIONS OF THE FISHERIES ACT (SECTION 36)**

(Decision Sought)

SUMMARY

- The pollution prevention provisions of the *Fisheries Act* (s. 36) have historically been administered and enforced by Environment Canada (EC). However, the Minister of Fisheries and Oceans Canada (DFO) has remained ultimately accountable to Parliament for these provisions. This has resulted in lack of clarity around responsibilities and priorities.
- A number of emerging s. 36 issues have highlighted the need to address this situation, including a report from the Commissioner of Environment and Sustainable Development (CESD) and regulatory initiatives being pursued within the Department.
- Options have been examined and it is recommended that the Department pursue a position of having EC fully administering and accountable for s. 36 of the *Fisheries Act* including new regulations related to aquaculture, aquatic invasive species (AIS) or other emerging issues.
- If you agree, we will initiate discussions immediately with EC with a view to have a new arrangement in place by 2012 in line with the commitment made in response to the CESD report.
- Given the prospect that EC may not be fully supportive of this position, it is expected that intervention from the Privy Council Office, Machinery of Government group will be required.

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Background

- Subsection 36(3) of the *Fisheries Act* prohibits deposits of deleterious substances into waters frequented by fish unless authorized by regulations.
- The Prime Minister transferred responsibility for s. 36 from the Minister of DFO to the Minister of EC in 1978. The initial intent was to repeal these provisions from the *Fisheries Act* and replace them in new environmental protection legislation but this has yet to occur. In the meantime, ultimate accountability to Parliament for s.36 remains with the Minister of DFO.
- EC leads on enforcement of the s. 36 prohibition as well as the administration and enforcement of most regulations created under s.36 (i.e. *Metal Mining Effluent, Pulp and Paper Effluent, proposed Wastewater Systems Effluent Regulations*).

Analysis / DFO Comment

- Lack of clarity around responsibilities and priorities on s. 36 have emerged due to one Minister being responsible for the administration and another accountable to Parliament.
- A 1985 Memorandum of Understanding (MOU) confirmed EC would administer s. 36, but stated that DFO could take action when EC was unwilling/unable to do so. This leaves DFO legally accountable in areas where EC does not intervene.
- A commitment has been made by DFO and EC in response to a 2009 CESD report to review the administration of s. 36 by March 31, 2011 and renew the MOU by March 31, 2012 to better establish expectations and responsibilities for EC.
- Of a more immediate nature, decisions will be required in the coming months on responsibility for proposed *Fish Pest and Pathogen Treatment Regulations (FPPTRs)*, as well as proposed regulations allowing for AIS control and eradication activities.
- Two options have been considered during our recent meetings on this file:

Option 1: DFO/EC Split Responsibility for s. 36:

- EC would continue to administer the s. 36 prohibition and existing regulations (i.e. waste water, pulp and paper and metal mining effluent). DFO would administer regulations in areas including aquaculture and AIS. The MOU could be used to achieve this split or amendments to the *Fisheries Act* could align accountability and responsibility.
- The main advantage of this scenario is that either department could pursue s. 36 regulations in respective areas of priority and expertise.

- However, issues around clarity, accountability, and responsibility may persist and this type of split may lead to inconsistent application of pollution prevention standards across industry sectors. Operational inefficiencies and a public perception of duplication may also result from pollution related expertise being maintained in two departments. As well, key pollution prevention legislation would continue to exist outside of EC's mandate. At the same time, DFO could be accused of having conflicting mandates where it finds itself promoting sector such as aquaculture while also ensuring its compliance with the regulatory requirements of s. 36.
- There would also be potential significant risks for DFO assuming s. 36 responsibilities. Although DFO takes some enforcement action on s. 36 issues currently, these are integrated with habitat protection activities. There is uncertainty related to the resource and operational implications for increased enforcement and administration activities. DFO also lacks the technical expertise and experience required for enforcement activities. There is also the risk for an expected increased DFO role in other fish-related pollution issues (i.e. fish processing plant effluent, Canadian Shellfish Sanitation Program) or other emerging issues.

Option 2: EC fully administers s. 36:

- EC would fully administer s. 36 through an MOU and/or Order in Council and amendments to the *Fisheries Act* and departmental acts making the Minister of EC both accountable and responsible for s. 36.
- This scenario is consistent with the Prime Minister's vision (1978 and the "Roadmap" initiative's principle of best placed provision of service). It would facilitate operational efficiencies and provide for more consistent application of pollution prevention standards and thus aligning it within broader government environmental protection objectives and rules.
- DFO could still maintain some enforcement activities (i.e. by fisheries officers investigating habitat destruction) but full responsibility of s. 36 with EC would mitigate the risk of future costs to DFO if demands for s.36 enforcement grow.
- The main disadvantage associated with this scenario is that DFO would not have full control over s. 36 issues related to aquaculture or AIS. EC may pursue these issues on a different priority basis or take a different approach, potentially resulting in delays.
- EC may not be supportive of this scenario or may seek further resources to pursue new regulations under s.36.

Recommendations / Next Steps

- Responsibility of s. 36 fully resting with EC would seem be the best approach from a departmental and public policy perspective. It would result in a single Minister acting as a decision point on pollution prevention issues and would facilitate greater consistency in application of aquatic pollution prevention standards across industry sectors. It would also align responsibility for aquatic pollution prevention provisions with broader environmental protection government responsibilities. In addition, EC existing expertise, infrastructure and staff makes them "best placed" to assume full responsibility for s. 36.
- It is recommended that you agree to the pursuit of EC becoming fully accountable and responsible for s. 36 of the *Fisheries Act*, including the administration and enforcement of proposed new aquaculture pest control regulations, s. 36 provisions in any future regulation on aquatic invasive species, aquaculture waste, and other emerging issues. This option will best serve to limit DFO's immediate and future liability.
- If you agree, given the likelihood that EC may not support this position and the fact that it is a Machinery of Government issue, we will engage with Privy Council Office and EC immediately.



Mitch Bloom
Assistant Deputy Minister
Strategic Policy



I concur,
Claire Dansereau
Deputy Minister

T. Kerfuké / T. Caron / G. Belzile / st

DEC 29 2010

I agree but we need to discuss with Minister before we proceed in any way. We need to call for discussion. Please use NB's questionnaire as an example.

2010/12/29
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ACTION REQUEST / FICHE DE SERVICE

From/De: Kerluke, Tracy

Docket No. \ N° Dossier: 2010-006-00618

File Code\Indicatif:

LIA / Legislative and Regulatory Affairs

Subject/ ADMINISTRATION AND ENFORCEMENT OF THE POLLUTION PREVENTION

Objet: PROVISIONS OF THE FISHERIES ACT (SECTION 36)

Topics:

Action Sec. resp. : Policy

Info. Sec(s) Informée(s) :

Dated/En date du
2010/12/09

Input/Entrée
2010/12/09

Deadline/Échéance
2010/12/23

ACTION REQUIRED/ SUITE A DONNER

Reply/Réponse

Other/Autre

) for DM's signature/
pour la signature du SM

() For info or necessary action/
Pour information ou suite à donner

ChargeTo/Délégué à: Ecosystem Management / Gestion des écosystèmes APP 2010/12/22 2010/12/23 2010/12/22
Assignee/Assigné à: Ecosystem Management / Gestion des écosystèmes

Assigned/Assigné à: [Redacted]
Action Date/Date d'assign.: 2010-December-22
Comments/Commentaires: [Redacted]

Assigned/Assigné à:
Action Date/Date d'assign.: 2010-December-22
Comments/Commentaires: approved. will HD to ADMO shortly. ar

ChargeTo/Délégué à: Deputy Minister / Sous-ministre - RCN DEC 2010/12/24 2010/12/23 2010/12/29
Assignee/Assigné à: DM Office

Assigned/Assigné à: [Redacted]
Action Date/Date d'assign.: 2010-December-24
Comments/Commentaires: [Redacted]

Assigned/Assigné à:
Action Date/Date d'assign.: 2010-December-29
Comments/Commentaires: Signed by Claire Dansereau. SP: Please see DM's comments on page with sticky note. Original in your inbox in DMG: JE

ChargeTo/Délégué à: Strategic Policy / Politiques stratégiques CCMTS 2010/12/29 2010/12/23
Assignee/Assigné à: Strategic Policy / Politiques stratégiques

Strategic Policy / Politiques stratégiques

Please see DM's comment for a check for a Min. Please prepare material in collaboration w partners. thx &