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The West Coast Environmental Law Association is a non-profit society which provides legal services to concerned members of the public aimed at protection of the environment and the promotion of public participation in environmental decision making.

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# **Recommendations for Improvement to Bill C-74, An Act to Amend the *Fisheries Act* and to Amend the *Criminal Code* in Consequence Thereof**

by

**West Coast Environmental Law Association**

**November 19, 1990**

## **Executive Summary**

This brief makes recommendations for improving Bill C-74, an Act to Amend the Fisheries Act and to Amend the Criminal Code in Consequence Thereof. The recommendations are summarized in the first part of the brief. The second part of the brief sets out discussion and recommendations on a section by section basis.

Some key points are:

1. section 36 of the Fisheries Act should be amended to allow fees to be charged, on a sliding scale, when authorizing a person to deposit a deleterious substance pursuant to regulations under the Act;
2. section 37 of the Fisheries Act should be amended to make it mandatory that information be requested from a person carrying on works that may result in damage to fish or fish habitat and to make it mandatory that an order be made when it is likely that an offence will be committed under section 40;
3. a new penalty provision should be added to the Fisheries Act allowing for more severe penalties where there has been intentional or reckless harm to fish habitat;
4. a new section should be added to the Fisheries Act allowing for an injunction to be granted to any person where an offence is likely to be committed under section 40;
5. a new section should be added to the Fisheries Act permitting a person to bring a civil action where the person has suffered loss or damage as a result of a violation of the fish habitat protection and pollution prevention provisions of the Act;
6. a new provision should be added to the Fisheries Act allowing for compensation for loss of property when there has been a violation of the fish habitat protection and pollution prevention provisions of the Act;
7. a "whistleblower" protection provision should be added to the Fisheries Act;
8. the new order powers in Bill C-74 which are available to a court on sentencing should be expanded further to allow for a wider range of options for a court;
9. a new provision should be added to the Fisheries Act allowing two citizens to apply to have the Minister initiate an investigation of an offence under the Act;
10. the Minister should be required to report annually to Parliament regarding the administration of the fish habitat protection and pollution prevention provisions of the Act; and
11. the draft Enforcement and Compliance Policy for the Fisheries Act should be released as soon as possible.

This short list does not include numerous other important points made in the brief.

## **PART I**

### **INTRODUCTION AND SUMMARY OF RECOMMENDATIONS**

The West Coast Environmental Law Association (WCELA) provides legal services to members of the public who are concerned about threats to the environment. Since its founding in 1974, WCELA lawyers have provided advice to and acted as counsel for citizens concerned about water pollution and its consequent impact on ocean and inland fisheries and fish habitat. For example, WCELA lawyers currently act on behalf of 54 organizations and individuals comprising over 250,000 members who are concerned about water pollution from pulp and paper mills and the effect of pulp mill pollution on the local fisheries and fish habitat.

For many years, WCELA has been concerned about non-compliance with the Fisheries Act (FA) and the lack of effective enforcement of the provisions of the Act, particularly with respect to fish habitat protection and pollution prevention. WCELA has vigorously supported the federal government taking a stronger role in the protection of fish and fish habitat by achieving compliance with the Act and by directing its officials to seek prosecutions in cases of non-compliance.

Therefore, we are pleased that Bill C-74, An Act to Amend the Fisheries Act and to Amend the Criminal Code in Consequence Thereof, improves the enforcement provisions of the FA. We strongly support those provisions in Bill C-74 allowing for increased fines for violations of subsection 35(1) and subsections 36(1) and(3) of the FA. We also support those provisions which expand the range of penalties available to the court upon sentencing of offenders.

However, we wish to make a number of recommendations aimed at further strengthening the enforcement and compliance provisions of the FA. The following is a summary of the key proposals in the brief:

- \* when authorizing the deposit of deleterious substances pursuant to regulations, the government should be able to make regulations under section 36 of the FA to charge fees, on a sliding scale, that increase according to the quantity, concentration and quality of the substance deposited;
- \* the ability of the government to require information and to make orders under section 37 of the FA in respect of parties who are carrying on works or undertakings that may have a harmful effect on fish or fish habitat should be improved;
- \* if a person is carrying on a work or undertaking that may cause harm to fish or fish habitat it should be mandatory for the government to require information under section 37 of the FA from that person;
- \* if the information received under section 37 of the FA from a person carrying on a work or undertaking indicates that an offence is likely to be committed under section 40, it should be mandatory that an order be made under section 37 of the FA to deal with the potential offence;

- \* a new section should be added to the FA, similar to section 115 of the Canadian Environmental Protection Act (CEPA), providing for a more serious penalty if a person is convicted of intentionally causing the destruction of fish habitat;
- \* a new section should be added to the FA, similar to section 135 of CEPA, allowing for an injunction to be granted when a person has or is likely to commit an offence under section 40 of the FA;
- \* a new section should be added to the FA, similar to section 136 of CEPA, permitting a person to bring a civil action where the person has suffered loss or damage as a result of a violation of the fish habitat protection and pollution prevention provisions of the FA;
- \* a new provision should be added to the FA, similar to section 131 of CEPA, allowing for compensation for loss of property when there has been a violation of section 40 of the FA;
- \* a "whistleblower" protection provision, similar to section 37 of CEPA, should be added to the FA;
- \* the new order powers available to a court under the proposed section 79.2 of the FA should be expanded further to include all of the options available under section 130 of CEPA;
- \* a new provision should be added to the FA, similar to section 108 of CEPA, allowing two citizens to apply to the Minister to initiate an investigation of an alleged offence under the FA;
- \* the Minister should be required to report annually to Parliament regarding the administration of the fish habitat protection and pollution prevention provisions of the FA; and
- \* the draft Enforcement and Compliance Policy for the pollution control provisions of the FA should be released at the earliest possible opportunity.

The second part of this brief is organized according to particular sections of Bill C-74. For each section of Bill C-74 that we address there is a short comment regarding the problems that we have identified with the section, followed by a recommendation proposing the specific wording for proposed amendments. We have also included suggestions for amending some of the existing provisions of the FA and for adding new provisions to the FA which are not presently included in Bill C-74. In those cases we have made recommendations proposing the specific wording for those proposed amendments and additions.

For ease of reference, when we have made recommendations in this brief for amendments to provisions of Bill C-74 or to existing provisions of the FA, we have reproduced the provision, underlined the proposed additions to the provision and placed a line through the suggested deletions to the provision.

## **PART II**

### **SECTION BY SECTION RECOMMENDATIONS**

#### **EXISTING SECTION 36 OF THE FA**

##### **DEPOSITS AUTHORIZED BY REGULATION**

Subsection 36(5) of the FA provides that the Governor in Council may make regulations authorizing the deposit of deleterious substances, the quantities authorized, and the conditions under which they may be deposited, among other things. We suggest that a paragraph be added providing that a fee may be charged when a person is authorized to deposit a deleterious substance, and that the fee may vary according to the quantity, concentration and quality of the substance deposited.

Subsection 36(6) of the FA allows the Minister to direct a person authorized to deposit a deleterious substance under regulations made pursuant to subsection 36(5) to conduct sampling or monitoring, install or operate equipment, and report information as required by the Minister. It would be useful if, in addition to the Minister, the Regional Director General or a person designated by the Minister were also authorized by subsection 36(6) to direct a person to take specific action and report such information.

It would also be useful if the material or information received under subsection 36(6) of the FA be used to determine the effect of depositing the deleterious substance on fish or fish habitat, in addition to whether the person is depositing the substance in the manner authorized.

Therefore, we have three recommendations for improving section 36.

First, subsection 36(5) of the FA should be amended to authorize the Governor in Council to make additional regulations prescribing that a person authorized to deposit a deleterious substance by or under regulations made pursuant to subsection 36(5) may be required to pay a fee, and that the prescribed fee may vary according to the quantity, concentration and quality of the substance deposited.

Second, subsection 36(6) of the FA requires the Minister to issue the direction to take action and report information. Since it is not always feasible for the Minister to deal with an individual situation, we suggest that the Regional Director General or any other person designated by the Minister be authorized to make a written direction under subsection 36(6).

Third, we recommend that subsection 36(6) of the FA be amended to add that the information reported by a person under subsection 36(6) be used to determine the effect of a deposit of a deleterious substance on fish or fish habitat, as well as to determine whether the person is depositing the substance in the manner authorized.

**Recommendation 1. We recommend that Bill C-74 be amended by adding a new paragraph 36(5)(g) to existing subsection 36(5) of the FA as follows:**

**"36(5)(f) that a person who is authorized to deposit a deleterious substance by or under regulations made pursuant to subsection 36(5) shall pay a fee for depositing such deleterious substance, which fee may vary according to the quantity, concentration and quality of the deleterious substance so deposited."**

**Recommendation 2. We recommend that Bill C-74 be amended by repealing subsection 36(6) of the FA and substituting the following therefor:**

**"36(6) A person authorized to deposit a deleterious substance by or under regulations made pursuant to subsection (5) shall, when directed in writing by the Minister, the Regional Director General or a person designated by the Minister, notwithstanding any regulations made pursuant to paragraph 5(e) or any conditions set out in an authorization made pursuant to paragraph 5(f), conduct such sampling, analyses, tests, measurements or monitoring, install or operate such equipment or comply with such procedures, and report such information, as may be required by the Minister, the Regional Director General or a person designated by the Minister in order to determine the effect of such deposit on fish or fish habitat or whether the person is depositing the deleterious substance in the manner authorized."**

### **EXISTING SECTION 37 OF THE FA**

#### **MINISTER MAY REQUIRE PLANS AND SPECIFICATIONS**

Subsection 37(1) of the FA provides that the Minister may require information in the form of plans, specifications, etc., from a person who proposes or is carrying on a work or undertaking that is likely to result in the destruction of fish habitat or in the deposit of a deleterious substance in water frequented by fish. The information is to be supplied in the manner set out in regulations made pursuant to paragraph 37(3)(a).

In our view it should be mandatory, rather than optional, for the Minister to require appropriate information in circumstances where fish or fish habitat may suffer harm. Further, it would be useful if, in addition to the Minister, the Regional Director General or a person designated by the Minister were also authorized by subsection 37(1) to require the information.

Also, it is unduly restrictive to require that the work or undertaking must be "likely to" result in harm before information is sought. It would encourage a preventative approach if the Minister were required to request information in circumstances where harm "may" occur as a result of a work or undertaking, not just where it is "likely to" occur. The information received could then be used in the determination of whether harm is likely to occur.

It would also be useful if the information to be supplied under subsection 37(1) of the FA could include information which might be required under other regulations made under the FA, not only regulations made pursuant to paragraph 37(3)(a). For example, the monitoring data to be submitted pursuant to the draft Pulp and Paper Effluent Regulations should be considered to be information provided under subsection 37(1) of the FA.

Subsection 37(2) of the FA provides that if the Minister is of the opinion that an offence under subsection 40(1) or (2) of the FA is likely to be committed or is being committed, the Minister may utilize a range of order powers to deal with the situation. The Minister or a person designated by the Minister may order modifications to plans submitted under the FA or may restrict the operation of a work, subject to regulations made pursuant to paragraph 37(3)(b) of the FA or, if there are no such regulations in force, with the approval of the Governor in Council. The Minister may also direct the closing of a work with the approval of the Governor in Council.

Subsection 37(2) of the FA refers only to material or information provided under subsection 37(1). However, the ability to make an order under subsection 37(2) should also extend to situations where information is reported under subsection 36(6) and, upon reviewing that information, it appears that an offence under subsection 40(1) or (2) of the FA is being or is likely to be committed. Therefore, we suggest such an amendment.

We suggest that an order under subsection 37(2) to modify or restrict a work should be able to be made without the approval of the Governor in Council, pursuant only to regulations that are then in force, if any.

We also suggest that, if an offence is being or is likely to be committed, it be mandatory that an order be made under subsection 37(2). The order would either be to modify or restrict the work or undertaking, or to close the work or undertaking. The latter would require the consent of the Governor in Council.

Under subsection 37(2) of the FA the Minister or a person designated by the Minister is able to make an order. It would allow for greater flexibility in circumstances where it is necessary that an order be made immediately if the Regional Director General were also able to make such an order, rather than requiring action by the Minister.

Subsection 37(3) provides that the Governor in Council may make regulations in two situations. First, it may make regulations prescribing the manner and circumstances in which any information or material is to be provided to the Minister under subsection 37(1). Second, the Governor in Council may make regulations governing the manner and circumstances in which the Minister may make orders under subsection 37(2) and the terms of those orders. As a practical matter, the lack of these regulations has seriously limited the federal government's ability to impose orders against illegally polluting operations.

We have eight recommendations for improving section 37.

First, we suggest strengthening subsection 37(1) by making it mandatory for the Minister to request this information if a work or undertaking may result in the destruction of fish habitat or in the deposit of a deleterious substance in water frequented by fish. Therefore, in the absence of regulations requiring a party to automatically provide this information, the Minister would be required to make the request. Furthermore, the test for when information is required shifts from when the works are likely to cause harm to when they may cause harm.

Second, the information which is to be provided without request under subsection 37(1) of the FA should not be restricted to information required under paragraph 37(3)(a) of the FA. It should also include other types of information which might be required by any regulation made under the FA.

Third, all monitoring data that is required to be submitted to the Minister pursuant to any existing regulation or a regulation to be passed under the FA, such as the draft Pulp and Paper Effluent Regulations, should be considered to be information provided under subsection 37(1) of the FA. That way, if monitoring data submitted revealed non-compliance, an order could be made under subsection 37(2) directing the person carrying out the work or undertaking to correct the situation. Therefore, "monitoring data" should be added to the list of possible information required under subsection 37(1).

Fourth, subsection 37(1) requires the Minister to make the request. It is not always practical for the Minister to consider each of these situations. To allow greater flexibility we suggest that the request could be made by the Minister, the Regional Director General, or any other person designated by the Minister.

Fifth, we recommend that subsection 37(2) of the FA be strengthened by making it mandatory that an order be made to modify, restrict or close an operation if an offence is being or is likely to be committed under section 40, in the opinion of the Minister, the Regional Director General or a person designated by the Minister.

Sixth, since information required under subsection 36(6) of the FA could disclose that an offence under subsection 40(1) or (2) of the FA is being or is likely to be committed, we recommend extending the order powers under subsection 37(2) to situations where material or information is reported under subsection 36(6), in addition to subsection 37(1), and where the other conditions of subsection 37(2) are met.

Seventh, we suggest that an order under subsection 37(2) of the FA should be able to be made without the approval of the Governor in Council, subject only to regulations, if any, made pursuant to the Act. The ability to order the closing of a work or undertaking would continue to require the approval of the Governor in Council.

Eighth, to be consistent with the foregoing recommendations, a number of consequential amendments follow. We suggest that subsection 37(3) of the FA be amended to reflect that the Regional Director General or a person designated by the Minister may receive information or materials under subsection 37(1). It should also be



amended to indicate that the Regional Director General may make orders under subsection 37(2). Subsection 37(4) of the FA should be amended to reflect that the Regional Director General may make orders pursuant to subsection 37(2). Finally, subsection 37(5) of the FA should be amended to indicate that the Regional Director General is authorized to make an interim order pursuant to subsection 37(2) in the same circumstances that the Minister or a person designated by the Minister considers it necessary to make interim orders.

**Recommendation 3. We recommend that Bill C-74 be amended by repealing section 37 of the FA and substituting the following therefor:**

**"37.(1) Where a person carries on or proposes to carry on any work or undertaking that results or may ~~is likely to~~ result in the alteration, disruption or destruction of fish habitat, or in the deposit of a deleterious substance in water frequented by fish or in any place under any conditions where that deleterious substance or any other deleterious substance that results from the deposit of that deleterious substance may enter any such waters, the person shall, on the request of the Minister, the Regional Director General or a person designated by the Minister, or without request in the manner and circumstances prescribed by regulations, ~~made under paragraph (3)(a)~~, provide the Minister, the Regional Director General or a person designated by the Minister with such plans, specifications, studies, procedures, schedules, analyses, samples, monitoring data or other information relating to the work or undertaking and with such analyses, samples, evaluations, studies, monitoring data or other information relating to the water, place or fish habitat that is or ~~may be likely to~~ be affected by the work or undertaking as will enable the Minister, the Regional Director General or a person designated by 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; or**

**(b) whether there is or is likely to be a deposit of a deleterious substance by reason of the work or undertaking that constitutes or would constitute an offence under subsection 40(2) and what measures, if any, would prevent that deposit or mitigate the effects thereof.**

**(1.1) The Minister, the Regional Director General or a person designated by the Minister shall make a request for material or information under subsection (1) where a person carries on or proposes to carry on any work or undertaking that results or may result in the alteration, disruption or destruction of fish habitat, or in the deposit of a deleterious substance in water frequented by fish or in any place under any conditions where that deleterious substance may enter any such waters, unless the material or**

**information provided by the person without request in the manner and circumstances prescribed by regulations under this Act is, in the opinion of the Minister, the Regional Director General or a person designated by the Minister, adequate to enable the Minister, the Regional Director General or a person designated by the Minister to make a determination under paragraph (1)(a) or (b).**

**(2) If, after reviewing any material or information provided under subsection (1) or subsection 36(6) and affording the persons who provided it a reasonable opportunity to make representations, the Minister, the Regional Director General or a person designated by the Minister is of the opinion that an offence under subsection 40(1) or (2) is being or is likely to be committed, the Minister, the Regional Director General or a person designated by the Minister ~~shall~~ **may**, by order, subject to regulations made pursuant to paragraph (3)(b), ~~if any, 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, the Regional Director General or a person designated by the Minister considers necessary in the circumstances, or**

**(b) restrict the operation of the work or undertaking,**

**~~or shall, 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, the Regional Director General or a person designated by the Minister considers necessary in the circumstances.**

**(3) The Governor in Council may make regulations**

**(a) prescribing the manner and circumstances in which any information or material shall be provided to the Minister, the Regional Director General or a person designated by the Minister without request under subsection (1); and**

**(b) prescribing the manner and circumstances in which the Minister, the Regional Director General or a person designated by the Minister may make orders under subsection (2) and the terms of the orders.**

**(4) Where the Minister, the Regional Director General or a person designated by the Minister proposes to make an order pursuant to subsection (2), he ~~or she~~ shall offer to consult with the governments of any provinces that he ~~or she~~ considers to be interested in the proposed order and with any departments or agencies of the Government of Canada that he ~~or she~~ considers appropriate.**

**(5) Nothing in subsection (4) prevents the Minister, the Regional Director General or a person designated by the Minister from making an interim order pursuant to subsection (2) without the offer of consultation referred to in subsection (4) where he or she considers that immediate action is necessary."**

#### **NEW SECTION 40.1 OF THE FA**

##### **INTENTIONAL DESTRUCTION OF FISH HABITAT**

We recommend that Bill C-74 be amended to add a provision to the FA, similar to section 115 of CEPA, providing for a more severe penalty if a person is convicted of intentionally causing a disaster that results in the destruction of fish habitat. This provision could be used in extraordinary situations where there has been deliberate or reckless harm.

**Recommendation 4. We recommend that Bill C-74 be amended by adding a new section to the FA as section 40.1:**

**"40.1 Every person who, in contravention of section 40,**

**(a) intentionally or recklessly causes a disaster that results in the harmful alteration, disruption or destruction of fish habitat, or**

**(b) shows wanton or reckless disregard for the protection of fish habitat and thereby causes the harmful alteration, disruption or destruction of fish habitat,**

**is guilty of an indictable offence and is liable to a fine or to imprisonment for a term not exceeding five years, or to both.**

#### **NEW SECTIONS 40.2, 40.3 and 40.4**

##### **OF THE FA -- OTHER REMEDIES**

We suggest that two additional remedies that are available under CEPA be included in the FA. First, we suggest including a provision allowing an injunction to be granted when a person has or is likely to commit an offence under section 40.

Second, we suggest including a provision that would allow a civil action by any person who has suffered loss or damage as a result of an offence under section 40 of the FA, in addition to section 42 of the FA, which provides for liability to the Crown and to fishers.

Therefore, we recommend adding sections to the FA similar to sections 135, 136 and 137 of CEPA, except we recommend that any person be permitted to make an application for an injunction, not only the Minister as is the case in section 135 of CEPA.

**Recommendation 5. We recommend that Bill C-74 be amended by adding new sections to the FA as sections 40.2, 40.3 and 40.4:**

**"40.2(1) Where, on the application of any person, it appears to a court of competent jurisdiction that a person has done or is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence under section 40, the court may issue an injunction ordering any person named in the application**

**(a) to refrain from doing any act or thing that it appears to the court may constitute or be directed toward the commission of the offence; or**

**(b) to do any act or thing that it appears to the court may prevent the commission of the offence.**

**(2) No injunction shall issue under subsection (1) unless forty-eight hours notice is given to the party or parties named in the application or the urgency of the situation is such that service of notice would not be in the public interest.**

**40.3(1) Any person who has suffered loss or damage as a result of conduct that is an offence under section 40 may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct an amount equal to the loss or damage proved to have been suffered by the person and an amount to compensate for the costs of any investigation in connection with the matter and of proceedings under this section.**

**(2) Any person who suffers or is about to suffer loss or damage as a result of an offence under section 40 may seek an injunction from a court of competent jurisdiction ordering the person engaged in the conduct**

**(a) to refrain from doing any act that it appears to the court causes or will cause the loss or damage; or**

**(b) to do any act or thing that it appears to the court prevents or will prevent the loss or damage.**

**(3) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under section 40 is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was an offence under section 40.**

**(4) In any action under subsection (1) against a person, a certificate setting out with reasonable particularity the conviction and sentence of the person for an offence under section 40 signed by**

**(a) the person who made the conviction, or**

**(b) the clerk of the court in which the conviction was made,**

**is, on proof that the person is the offender referred to in the certificate, evidence that the person was so convicted and sentenced without proof of the signature or the official character of the person appearing to have signed the certificate.**

**40.4 No civil remedy for an act or omission is suspended or affected by reason only that the act or omission is an offence under section 40 and nothing in this Act shall be construed so as to repeal, remove or reduce any remedy available to any person at common law, under any Act of Parliament or of a provincial legislature."**

#### **NEW SECTION 40.5 OF THE FA**

#### **COMPENSATION FOR LOSS OF PROPERTY**

We suggest that Bill C-74 be amended to add a provision to the FA making it possible for a court, at the time of sentencing, to order that compensation be paid to a person who has suffered loss or damage as the result of an offence committed under section 40 of the FA. We recommend including a provision similar to section 131 of CEPA. This would allow compensation to be granted immediately in appropriate cases, upon the application of a party who has suffered loss or damage, relieving that party of the expense of initiating a separate civil action for damages.

**Recommendation 6. We recommend that Bill C-74 be amended by adding a new section to the FA as section 40.5:**

**"40.5(1) Where a person has been convicted of an offence under section 40, the court may, at the time the sentence is imposed and on the application of the person aggrieved, order the person convicted to pay to the aggrieved person an amount by way of satisfaction or compensation for loss of or damage to property suffered by the aggrieved person as a result of the commission of the offence.**

**(2) Where an amount that is ordered to be paid under subsection (1) is not paid forthwith, the applicant may, by filing the order, enter as a judgment, in the superior court of the province in which the trial was held, the amount ordered to be paid, and that judgment is enforceable against the offender in the same manner as if it were a judgment rendered against the offender in that court in civil proceedings."**

#### **NEW SECTION 40.6 OF THE FA**

#### **"WHISTLEBLOWER" PROVISION**

To encourage reporting of possible offences under section 40 of the FA, we recommend that Bill C-74 be amended to add a "whistleblower" provision to the FA, similar to section 37 of CEPA. We have revised the wording of section 37 of CEPA to conform to the requirements of the FA.

**Recommendation 7. We recommend that Bill C-74 be amended by adding a new section to FA as section 40.6:**

**"40.6(1) Where a person has knowledge of the occurrence or reasonable likelihood that an offence under section 40 is being or is likely to be committed, the person may report any information relating to the offence or likely offence to a fishery officer or fishery guardian or to any person to whom a report may be made under this Act.**

**(2) A person making a report under subsection (1) may request that the person's identity and any information that could reasonably reveal the identity not be released.**

**(3) Where a person makes a request under subsection (2), no person shall release or cause to be released the identity of the person making the request or any information that could reasonably be expected to reveal the identity, unless the person making the request authorizes the release in writing.**

**(4) Notwithstanding any other Act of Parliament, no employee of a department, board, commission or agency of the Government of Canada, or of a corporation named in Schedule C to the Financial Administration Act or of a federal regulatory body shall be disciplined, dismissed or harassed for making a report under subsection (1)."**

#### **SECTION 18 OF BILL C-74:**

##### **NEW SUBSECTION 61(2) OF FA -- INFORMATION RETURNS**

Section 18 of Bill C-74 repeals section 61 of the FA and replaces it with a new section 61. New subsection 61(2) requires that the persons referred to in subsection 61(1) may be required to provide information or documents relating to the matters enumerated in paragraphs 61(2)(a) to (f).

Paragraph 61(2)(f) refers to "the proper management and control of fisheries or the conservation and protection of fish." This paragraph does not refer to fish habitat and, accordingly, we suggest paragraph 61(2)(f) be amended to include fish habitat.

**Recommendation 8. We recommend that section 18 of Bill C-74 be amended by adding the phrase "or fish habitat" to proposed paragraph 61(2)(f) of the FA as follows:**

**"61(2)(f) any other matter relating to the proper management and control of fisheries or fish habitat or the conservation and protection of fish or fish habitat.**

## **SECTION 24 OF BILL C-74:**

### **NEW SECTION 79.2 OF FA -- ORDERS OF COURT**

This proposed addition to the FA adds a number of important options to a court upon sentencing for an offence under the Act. This section is similar to section 130 of CEPA, but some of the specific order powers available under CEPA have not been included. These additional order powers would be useful to a court in some circumstances. Therefore, we recommend that new FA section 79.2, allowing a court to make orders containing prohibitions, directions or special requirements, be expanded to include all of the categories of orders permitted under section 130 of CEPA. In that regard, we have four recommendations.

First, we recommend that it may be useful to allow the court to order a person convicted under the FA to notify aggrieved parties regarding the facts relating to a conviction, with the cost of doing so being borne by the offender. This would ensure that a court is able to make an order requiring actual notice to particular persons who have suffered injury or damages as a result of a violation of the FA. The aggrieved party would then be in a position to decide whether to initiate a civil action for compensation. It would also allow an order designed to achieve actual notice to individuals who may wish to take steps to prevent consumption of contaminated fish.

Second, we recommend including a provision allowing the court to direct a convicted party to submit to the Minister relevant information regarding the activities of the offender following the conviction. This would give the Minister the right to monitor the activities of a known offender and could assist in preventing further offences.

Third, if a person is convicted of an offence involving the deposit of a deleterious substance or the destruction of fish habitat, it may be useful to order the offender to fund research into the ecological use and disposal of the deleterious substance or any other material that caused the destruction of fish habitat. Therefore, we recommend the addition of a provision which would permit the court to make such an order.

Fourth, paragraph 79.2(f) provides that an order may be made directing a person to pay money for the purpose of promoting the proper management and control of fisheries or the conservation and protection of fish. However, this paragraph does not refer to fish habitat and, accordingly, we recommend paragraph 79.2(f) be amended to include fish habitat.

**Recommendation 9. We recommend that section 24 of Bill C-74 be amended by adding new paragraphs 79.2(i), (j) and (k) to proposed section 79.2 of the FA as follows:**

**"79.2(i) directing the person to notify at his or her own cost and in the manner prescribed by regulation, if any, any person aggrieved or affected by the person's conduct of the facts relating to the conviction;**

**79.2(j) directing the person to submit to the Minister, the Regional Director General or a person designated by the Minister, on application by the Minister, the Regional Director General or a person designated by the Minister, made within three years after the date of conviction, such information with respect to the activities of the person as the court considers appropriate in the circumstances; and**

**79.2(k) directing the person to pay, in the manner prescribed by regulation, if any, an amount for the purposes of conducting research into the ecological use and disposal of the deleterious substance or any other material in respect of which the offence was committed."**

**Recommendation 10. We recommend that section 24 of Bill C-74 be amended by adding the phrase "or fish habitat" to proposed paragraph 79.2(f) of the FA as follows:**

**"79.2(f) directing the person to pay Her Majesty an amount of money the court considers appropriate for the purpose of promoting the proper management and control of fisheries or fish habitat or the conservation and protection of fish or fish habitat."**

## **NEW SECTIONS 79.8, 79.9 and 79.10 OF THE FA**

### **INVESTIGATION OF OFFENCES**

We suggest that Bill C-74 be amended to add provisions to the FA similar to sections 108, 109 and 110 of CEPA, which allows any two persons to require the Minister to investigate an alleged offence. Given the history of non-compliance under the FA and the lack of public confidence that the provisions of the Act will be enforced, this provision would be an important tool for members of the public. We are not aware of any complaint that these sections of CEPA have been abused or over-utilized.

Our recommendations below incorporate the language of sections 108, 109 and 110 of CEPA.

**Recommendation 11. We recommend that Bill C-74 be amended by adding new sections to the FA as sections 79.8, 79.9 and 79.10:**

### **INVESTIGATION OF OFFENCES**

**79.8(1) Any two persons resident in Canada who are not less than eighteen years of age and who are of the opinion that an offence has been committed**



**under this Act may apply to the Minister for an investigation of the alleged offence.**

**(2) An application for an investigation shall be accompanied by a solemn or statutory declaration**

**(a) stating the names and addresses of the applicants;**

**(b) stating the nature of the alleged offence and the name of each person alleged to be involved in its commission; and**

**(c) containing a concise statement of the evidence supporting the allegations of the applicants.**

**79.9(1) On receipt of an application under section 79.8, the Minister shall acknowledge receipt of the application and investigate all matters that the Minister considers necessary for a determination of the facts relating to the alleged offence.**

**(2) Within ninety days after receiving an application under section 79.8, the Minister shall report to the applicant on the progress of the investigation and the action, if any, that the Minister proposes to take.**

**(3) The Minister may discontinue an investigation where the Minister is of the opinion that the alleged offence does not require further investigation.**

**(4) Where an investigation is discontinued the Minister shall**

**(a) prepare a report in writing describing the information obtained during the investigation and stating the reasons for its discontinuation; and**

**(b) send a copy of the report to the applicants and to any person whose conduct was investigated.**

**79.10 At any stage of an investigation under section 79.9, the Minister may, in addition to or in lieu of continuing the investigation, send any records, returns or evidence to the Attorney General of Canada for consideration of whether an offence has been or is about to be committed against this Act and for such action as the Attorney General of Canada may wish to take."**

## **NEW SECTION 89 OF THE FA**

### **ANNUAL REPORT TO PARLIAMENT BY MINISTER**

It would be extremely useful to require the Minister of Fisheries and Oceans to report annually to Parliament regarding the administration of the habitat protection and pollution prevention provisions of the FA, including information on compliance, non-

compliance and prosecutions under the relevant sections of the FA. As well as bringing these matters to the attention of Parliament annually, the addition of such a provision would facilitate greater access to information for the public.

**Recommendation 12. We recommend that Bill C-74 be amended by adding a new section to the FA as section 89:**

**"89(1) The Minister shall report annually to Parliament, within four months after the end of the fiscal year being reported, on the administration of the provisions of this Act regarding fish habitat protection and pollution prevention during that year.**

**(2) The annual report to Parliament referred to in subsection (1) shall include a statistical summary of compliance and non-compliance under sections 34 to 42 and all prosecutions under section 40 during that year.**

#### **ENFORCEMENT AND COMPLIANCE POLICY OF THE FA**

A draft Enforcement and Compliance Policy (ECP) for the pollution control provisions of the FA has been under development for many years, beginning long before the development of the ECP under CEPA. Despite numerous assurances that the ECP for the FA would be released by various deadlines, it still has not been released. However, we understand that it is substantially similar to the ECP for CEPA. To improve enforcement and compliance under the FA, it is essential that the ECP for the FA be released as soon as possible.

**Recommendation 13. We recommend that the ECP for the FA be released at the earliest possible opportunity.**

Further, it is obvious that to improve existing enforcement of the FA, the federal government will have to devote substantially increased government resources for enforcement. It is equally clear that by far the most successful results are achieved when enforcement units are established separate from the units which deal on a day-to-day level with polluters. Therefore, prior to releasing the ECP for the FA, the federal government should increase the resources allocated for enforcement of the FA and establish separate enforcement units for environmental prosecutions.

**Recommendation 14. We recommend that the federal government substantially increase the resources allocated for enforcement of the FA and establish separate enforcement units for environmental prosecutions.**