



habitat enforcement bulletin



Fish Habitat Management

Conservation and Protection

CHARGES

Contractors and City of Barrie charged after sediment enters trout stream

January – Charges have been laid under the *Fisheries Act* against Fanshore Development Inc., EMC Group Ltd. and the City of Barrie, ON. The charges were laid after DFO investigated an alleged release of sediment from a subdivision construction site. The sediment entered a local brook trout stream. The charges allege that the work caused a harmful alteration to fish habitat. This is the third time in 10 years the City has been charged under the *Fisheries Act*.

More info: Gerald Fillatre (905) 639-8236

District of Tofino and contractor charged after sediment discharge to creek

May – The District of Tofino, BC, and Gibson Brothers Contracting Ltd. have been charged under the *Fisheries Act* in connection with the release of sediment into Lorry and Cemetary creeks in February 2000. The sediment is alleged to have come from road construction at a debris stump dump, known locally as the 6-mile dump.

The District and Gibson Brothers are alleged to have deposited a harmful substance, sediment, into fish-bearing waters. Both have entered pleas of not guilty. Trial is scheduled for January in 2002.

More info: Mike Crottey (250) 725-3468

Homeowner charged after shoreline work on bass pond

May – William Wakulich of St. Catherines, ON, has been charged under the *Fisheries Act* for alleged damage to fish habitat. The charge was laid after a section of Martindale pond was filled without authorization. The affected shoreline is on Wakulich's property, but the pond is owned by the City of St. Catherines. The pond supports bass and other sport fish species.

More info: Gerald Fillatre (905) 639-8236

Fuel spill on First Nations reserve leads to charges

June – The Hesquiaht First Nation, Homiss Enterprises Ltd. and Donald Sabbas face charges under the *Fisheries Act*. The charges allege the deposit of diesel fuel into fisheries waters. Charges were laid after DFO investigated a 1999 fuel spill into Hot Springs Cove at Clayoquot

Sound, BC. The fuel was being pumped into a generator tank at the Hesquiaht First Nations Reserve.

More info: Gordon Adams (250) 725-3468

CONVICTIONS

Royal Oak Mines pays \$100,000 for damaging fish habitat

January - Royal Oak Mines Inc. has pleaded guilty to polluting South Kemess Creek, 400 km northwest of Prince George, BC. The company was charged after releasing sediment into fish habitat while constructing a gold and copper mine. Charges were laid by DFO and the BC Ministry of Environment, Lands and Parks in April 1999 after an investigation that took 16 months. The company went bankrupt during the investigation, but criminal liability is not extinguished by bankruptcy.

The prosecution and defence lawyers had jointly recommended a \$75,000 penalty. However, Judge Brecknell imposed a heavier sentence. Brecknell said a higher penalty was needed to reflect community concern for the environment. This was especially true in an area where the lifestyle includes using wild lands for fishing, hunting and outdoor recreation. Brecknell imposed a \$5,000 fine, payment of \$75,000 to improve fish habitat around Prince George, and a further \$20,000 payment for remedial work by Royal Oak under DFO supervision.

More info: Jeff Johansen (604) 666-2057

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The Habitat Enforcement Bulletin is part of the Fisheries and Oceans Canada (DFO) program for effective enforcement against illegal damage and pollution of fish habitat. Unless explicitly stated, no material in the Bulletin represents opinion or legal advice from the federal Department of Justice. Back issues are available on request. Comments and submissions should be directed to:

C. Yong, (604) 666-3282; or C. Mishima, (604) 666-0392



Land developer fined \$15,000 for removing streamside vegetation

January – Niho Land and Cattle Co. Ltd. has pleaded guilty to damaging fish habitat. The company is in the business of buying, logging, and selling recreational property. Niho owned 40 acres bordering the North Thompson River near Avola, BC, and was preparing it for sale in 1997. Niho was charged after it cleared all the trees, shrubs and grass from 1000 metres of the riverbank.

Streamside trees and vegetation are vital for fish habitat. They prevent erosion, keep the water cool by providing shade, shelter juvenile fish, and contribute to the aquatic food chain. Under the *Fisheries Act*, Judge Rohrmoser sentenced Niho to pay a \$1,000 fine and \$14,000 for fish habitat restoration in the Kamloops area.

More info: Mike Flynn (250) 851-4852

Canfor fined \$15,000 for stream damage

February – Canadian Forest Products Ltd. (Canfor) pleaded guilty to a charge of harming fish habitat. Canfor was charged under the *Fisheries Act* after building a road network east of Prince George, BC, to access a logging site. One road crossed a tributary of the Torpy River. The company removed streamside vegetation and damaged the banks. The company was operating as Northwood Inc., before its purchase by Canfor in January 2000.

Canfor was ordered by the court to pay a \$1,000 fine, and \$14,000 to improve fish habitat in rivers near the city of Prince George.

More info: Richard Elson (250) 561-5510

Construction company convicted for pumping sediment into stream

March – Southern Construction (1981) Ltd. has pleaded guilty in Newfoundland Provincial Court to a pollution charge. The company was charged after DFO discovered sediment-laden water being pumped into a trout stream at Bay Roberts in September 2000. The stream had been blocked off with gravel, and sediment was being pumped from a construction site.

The work was stopped until measures were taken to prevent further silting of the stream. Under the *Fisheries Act*, Judge Kean ordered the company to restore the stream to its original condition, and pay a \$2,000 fine.

More info: David Lambert (709) 786-3960

Bird Construction fined \$97,000 for discharging concrete wastewater to creek

March – Bird Construction Company Ltd. pleaded guilty to polluting Quibble Creek, and failing to comply with the direction of a DFO inspector. The offences involved work at the Surrey Memorial Hospital in Surrey, BC.

DFO discovered concrete waste runoff from the construction site settling pond entering a nearby storm drain. Storm drains often lead directly to local streams. Untreated concrete wastewater is corrosive, and can kill fish in minutes by destroying their gills. The company ignored verbal and written directions from a DFO inspector to stop releasing wastewater outside the range of 6.5 to 9.0 pH units.

Judge Stewart sentenced Bird Construction to pay a \$2,000 fine, \$65,000 for polluting, and \$30,000 for failing to comply with the DFO inspector. The latter two sums will pay for fish management and habitat improvement projects in the City of Surrey.

*More info: Barb Wernick (604) 666-3363
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BC Ministry of Transportation fined \$35,000 for fish habitat damage

April – The government of BC has been convicted in Provincial Court for harmfully altering fish habitat near Smithers. The provincial Ministry of Transportation and Highways was found guilty under the *Fisheries Act*. The case began in 1998 when federal fishery officers received a complaint from the public. Ministry staff were using heavy machinery to install a fence, removing vegetation and damaging the stream.

Small streams provide spawning and rearing habitat for salmon and trout. The damaged stream is a tributary to the Bulkley and Skeena rivers. The decline of coho salmon in this area has resulted in significant fishery restrictions.

The Ministry was sentenced to pay \$35,000 for fish habitat improvement in the Smithers area. This is the fourth time since 1991 the Ministry has been convicted for polluting or damaging fish habitat. BC is appealing the conviction.

More info: Edward Green (250) 842-6327

Bayside Sawmills fined \$20,000 for wood waste leachate pollution

May – A sawmill company has pleaded guilty in BC Provincial Court to a pollution charge. Bayside Sawmills Ltd. had allowed wood waste leachate to drain to the ocean from its log sort operation near Port Mellon. Toxic resin acids, naturally present in wood, can leach out of wood waste exposed to water from rain or in rivers and lakes. The company was charged under the *Fisheries Act* after an investigation by DFO.

Bayside will pay a \$1,000 fine, and \$19,000 for fish habitat projects on Langdale Creek, Ouillet Creek and the Hillside area of Port Mellon. In 1998, after charges had been laid, the company installed a wastewater collection system at the site.

More info: Robert Kaatz (604) 883-2313

Review of cases involving damage to waterside vegetation

The *Fisheries Act* prohibits harmful alteration, disruption or destruction of fish habitat (s. 35). Fish habitat is defined in the *Act* as:

spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes (s. 34).

The meaning of harmful alteration of fish habitat has been refined by case law over the past 20 years. In general, courts have found fish habitat to include vegetation (trees, shrubs and grasses) next to the water but not normally wetted. The following is a brief chronological review of 11 selected cases that involved removing or damaging waterside vegetation.

R. v. Lawrence Forde **BC Provincial Court (1982)**

The accused cut down trees along a stream bank. The stream was originally built as a drainage ditch, and had become frequented by salmon. The accused was charged with harmfully altering fish habitat.

The accused was convicted and fined \$100. The court accepted opinion evidence that the felled trees had been an important part of the fish habitat. The court also found that the man-made ditch was fish habitat within the meaning of the *Fisheries Act*.

R. v. District of Chilliwack **BC Provincial Court (1988)**

For flood control, trees and vegetation were removed above a designated high-water level for a kilometre along the Little Chilliwack River. The District was charged with harmful alteration to fish habitat.

Counsel for the defence urged the court to accept the definition of fish habitat put forward in *R. v. Fraser River Harbour Commission* (1985). However, the trial judge distinguished that definition, and found instead that fish habitat does not “suddenly stop at the line ‘normally under normal conditions wetted or washed by water’. Trees and vegetation beyond that line and on top of the bank, as areas that shelter and shade streams, also affect fish which depend directly or indirectly [on them] in order to carry out their life processes.” The District was convicted. The fine was set at \$2,000 after an appeal in County Court.

R. v. John Maurice Tuck **BC Provincial Court (1991)**

The Tucks owned a 40-acre parcel of land near Bella Coola. Clearing the land for farming, the Tucks removed streamside trees, skidded logs across streams and filled several tributaries of the Bella Coola River with logging debris. The Tucks were charged with harmful alteration to fish habitat.

The defence argued that:

- a) the *Fisheries Act* unfairly prevents landowners from using their private property;
- b) the streams involved were intermittent, of poor water quality due to other human activities, and were therefore not fish habitat or marginal fish habitat; and
- c) scientific studies comparing the site before and after logging were required before an opinion could be formed on whether fish habitat was harmed.

The accused was convicted. The court disagreed with all defence arguments:

- a) Judge Barnett cited *Interprovincial Co-Ops v. The Queen* (1976): “Federal power in relation to fisheries... is concerned with the protection and preservation of... a public resource... even in suppression of an owner’s right of utilization.”
- b) The streams are not insignificant or marginal fish habitat, but of real value and required by coho salmon during the early part of their life cycle. The streamside trees provided cover, and insects that fish feed upon.
- c) The Crown expert witness needed to locate fish habitat and record damage, not perform comparative scientific studies. Otherwise, every brook and river in the province would have to be surveyed before any charge could be laid. That was not the intention of Parliament in passing the law.

R. v. Dennis Robin Harris **BC Provincial Court (1992)**

The accused removed about 30 trees along Voght Creek, south of Merritt. The trees were dragged across the creek with a skidder, a machine weighing about 22,000 lbs. on large tires, which completed a dozen crossings. Harris was charged with harmfully altering fish habitat.

Harris was convicted and fined \$1,000. The court heard conflicting evidence on whether there was harmful alteration caused by the log skidding, or by the tree removal. The court found that, at this location, crossing the stream with a skidder 12 times did not cause enough damage to found a conviction. However, clearing the 30 mature cottonwood trees from the water’s edge was a harmful alteration.

R. v. Kenneth Pickering **BC Provincial Court (1993)**

Heavy machinery was used to remove all vegetation from 34 metres along Horse Creek near Brackendale. The vegetation removed consisted of dense brush, one standing alder tree, and 5-10 fallen alders partially in the stream. The accused was charged with harmful alteration to fish habitat.

Pickering was convicted, fined \$500, ordered to restore the disturbed area, and ordered to pay \$3,000 for a local habitat improvement project. The court accepted

opinion evidence that the vegetation had provided insect food for fish, protection from predators, temperature moderation, and erosion control.

R. v. Dual Enterprises Ltd. and Keico Holdings Inc.
BC Provincial Court (1995)

The accused logging companies harvested timber from 700 metres along the west bank of the Nechako River without a leave strip. They were charged with harmfully altering fish habitat.

The Crown submitted that removing the riverbank trees harmed fish habitat by removing a source of large organic debris (LOD) from trees falling into the river. The defence argued there was insufficient evidence of harm: there was no proof the trees would have provided any LOD, and the opinion of the Crown witness was conjecture because the witness had no personal knowledge of the site before logging.

Dual Enterprises was convicted and fined \$5,000. The court noted that prospective harm to fish habitat by removing trees which can become LOD can found a conviction for this *Fisheries Act* offence. That is so even though prospective harm cannot found a *Criminal Code* conviction. Further, the Crown opinion, partly based on photographs, was real evidence and not conjecture.

R. v. West Pines Developments Ltd.
BC Provincial Court (1996)

A caterpillar tractor was used to remove deadfall and flood debris from a 950 metre strip parallel to the North Thompson River. Many small trees were permanently bent or broken. The affected strip was partly separated from the river by a vegetated berm, and the area is under water four to six weeks a year. The accused was charged with harmfully altering fish habitat.

The court held that the flood plain was fish habitat only during the time it was flooded. Works can be done on the property when it is not flooded, provided that they do not harmfully alter fish habitat values when the land is flooded. However, the Crown need not show that an alteration actually reduced the overall capacity of the river to support fish.

The Crown failed to prove harmful alteration beyond a reasonable doubt, and the charge was dismissed.

R. v. IPSCO Inc.
BC Provincial Court (1998)

Preparing for a residential development, trees and vegetation were removed from land surrounding Pigeon Creek, Port Moody. The creek originated as a drainage ditch of the city storm sewer system. The accused was charged with harmfully altering fish habitat.

IPSCO was convicted. The court found that the creek did originate from storm sewers, but was nevertheless productive fish habitat for trout and salmon.

That habitat was harmfully altered by the removal of several large trees and streamside shrubs.

BC Supreme Court (1998)

IPSCO appealed its conviction. IPSCO claimed it had reasonably and honestly held the mistaken belief that the creek was a storm sewer ditch and not fish habitat; and should be acquitted under s. 78.6 of the *Fisheries Act*.

The appeal court held that the trial judge found IPSCO honestly believed the ditch was not fish habitat. However, the trial judge did not say whether that belief was reasonable. The appeal court quashed the conviction.

R. v. Denney and Denney
BC Provincial Court (1998)

The accused removed vegetation from 40 metres of their property along Shuswap Lake to build a residence. The property was subject to a 7.5-metre restrictive covenant setback from the lake. The accused were charged with harmfully altering fish habitat.

The accused were acquitted. The court heard conflicting opinion evidence on whether removing the vegetation materially affected the lake's fish habitat. The Crown did not prove beyond a reasonable doubt that the alteration was harmful.

R. v. Barret Denault and Chase Riverside Estates Ltd.
BC Provincial Court (1998)

The accused individual and his company were building a trailer park on the Neskainlith Indian Reserve near Chase. Landfill was placed over 7,000 square metres of a flood plain off the South Thompson River. The accused were charged for harmfully altering fish habitat.

Mr. Denault, on his own behalf, argued that he had Aboriginal title to site, the laws of Canada did not apply, and the flood plain was not fish habitat.

The accused were convicted. Citing *Delgamuukw v. BC* (1997), the court noted that lands subject to Aboriginal title cannot be used in ways that would destroy the relationships giving rise to that title in the first place. Historic Aboriginal use of the land would be impossible once it was developed as a trailer park. Further, the court found that the flood plain is rare and valuable fish habitat. The court imposed \$30,000 in fines and ordered the accused to restore the damaged habitat.

R. v. Niho Land and Cattle Co. Ltd.
BC Provincial Court (2000)

The accused owned forty acres of land bordering the North Thompson River near Avola. To prepare it for sale, the company removed trees, shrubs and grass from 400 metres along the west bank, and 600 metres along the east. The accused pleaded guilty under the *Fisheries Act* to harmful alteration of fish habitat.

Niho was fined \$1,000 and ordered to pay \$14,000 for local fish habitat conservation work.