Brief on Bill 25 - *1997 Fish Protection Act*

"Habitat protection is a prerequisite for conservation of biological diversity. Habitat protection is essential not only to protect those relatively few species whose endangerment is established, it is also in essence a pre-emptive approach to species conservation..."[1]

BACKGROUND

How well are we protecting fish and their habitat in BC? The numbers are not encouraging. The combined salmon catch for 1995 and 1996 is the lowest of any two year period in the last 35 years.[2] Destruction of crucial fish habitat and reduced genetic diversity of fish stocks are contributing to the decline in fisheries. A recent survey of the status of anadromous salmon stocks from streams in BC and the Yukon found that 140 salmon runs were extinct and another 624 were at high risk of extinction. The BC/Washington Marine Science Panel's 1994 report on marine waters rated destruction, alteration or degradation of habitat as the highest environmental priority for the region because the impacts are irreversible, the potential harm to the environmental is great, and habitat losses are highly preventable.[3]

As the population of BC expands, and as development and pollution increase, fish habitat in urban areas decline. In 1997, urban streams were awarded the top spot on the list of the province's ten most endangered rivers. And a recent report from the Department of Fisheries and Oceans documents the continued deterioration of streams in the Lower Fraser Valley: of the 671 significant streams that existed in the area in 1860, 120 no longer exist and most of the remaining streams are under significant stress.[4]

In response to concerns about the decline in fisheries, BC and Canada have been negotiating over the past year to clarify some issues surrounding fish and fish habitat management. First, a *Memorandum of Understanding on Fisheries Issues* signed by Canada and British Columbia on July 15, 1996, recognizes that the Government of Canada and the Government of British Columbia share a mutual interest in conserving and enhancing the salmon resource and both governments agree that changes are necessary in the structure and management of the fisheries sector in order to achieve this goal.

More recently, the *Canada-British Columbia Agreement on the Management of Pacific Salmon Fishery Issues* was signed on April 16, 1997. A new federal/provincial Habitat Protection and Fisheries Enforcement Agreement will also be developed. A joint Canada/BC Council of Fisheries Ministers is established. One of the most important parts of the *Agreement* commits both governments to

strengthen habitat protection legislation.

The purpose of this brief is to discuss issues raised by Bill 25, the *Fish Protection Act 1997*, and in particular, to discuss how well the Bill improves legal protection for fish habitat.

INTRODUCTION TO BILL 25

Bill 25 establishes new legal mechanisms for the provincial government to use to protect fish and their habitat, and codifies some existing practices of water managers into law. It also provides consequential amendments to the BC *Waste Management, Water* and *Wildlife Acts*.

Positive features of the Bill include important innovations such as: a prohibition on dams on a list of named rivers; "stream flow protection licences" which community groups can obtain to protect their interest in fish and fish bearing streams; and some new planning procedures, such as water management plans and recovery plans for selected sensitive streams.

The Bill also contains mechanisms which may prove to be valuable such as:

- a policy directive on riparian protection to be developed in consultation with the Union of BC Municipalities which may eventually provide binding riparian setback standards applicable throughout the province's settled areas;
- a new prohibition against introducing debris into a stream under the *Water Act*; and
- expansion of the endangered species provisions of the *Wildlife Act* to include fish and other elements of fish habitat.

However, with all these mechanisms, the government's commitment to ensure that there are adequate personnel and financial resources available for implementation and enforcement will be the real test of the new Bill's effectiveness in protecting habitat.

Other parts of the Bill require amendment if it is to improve habitat protection. The Bill is overly discretionary, may intrude on federal areas of jurisdiction, may duplicate some provisions of other existing federal and provincial laws, fails to harmonize appeal rights with other environmental laws and fails to provide strict uniform standards for fish habitat protection in those areas which are clearly under provincial jurisdiction.

COMMENTARY ON SPECIFIC SECTIONS OF THE ACT

Relationship with Aboriginal and Treaty Rights - Section 2

Treaty and Aboriginal rights are not affected by this Bill, according to section 2 which specifically provides that the Act is intended to respect these rights in a manner consistent with section 35 of the *Constitution Act*.

No New Dams on Protected Rivers - Section 4

One of the most substantial changes that this Bill will make, if passed, is to prohibit new dams on named protected rivers. A list of fifteen rivers is included in section 4. It is possible for the Lieutenant Governor in Council (Cabinet) to list a stream as a protected river for the purposes of prohibiting no new dams (section 13(2)(a)). This is an important power, and if significant fish bearing streams are listed by regulation under this section, could help to prevent future situations such as construction of a dam on the Black Creek on Vancouver Island which had a major negative impact on local fish populations.

Section 4 is mandatory - "a person **must not** construct a bank to bank dam anywhere on a protected river" (emphasis added). Further, "the Comptroller or Regional Water Manager **must not** issue or amend a licence or approval or permit authorizing construction of a bank to bank dam anywhere on a protection river" (emphasis added). If this section is not followed, any licence, approval or permit that is issued contrary to this section is of no effect (s.4(5)). The new prohibition does not apply to any existing dams, including those under construction at the time the Act comes into force, but excludes proposed dams for which applications have been made, but not issued.

Commentary

This is an improvement to the status quo, and increases legal protection for fish that are found in a protected river. The list of rivers include key rivers for fish such as the Fraser, Nass and Skeena, as well as noted wilderness areas such as the Tatshenshini, the Alsek and the Stikine. But not all key fish bearing rivers are included in the list of protected rivers. Notably, the Nechako River, the location of the Kemano Completion Project, is not on this list.

More important, the definition of a protected river excludes all their tributaries, which will not adequately protect fish habitat since tributaries can often be the most productive fish bearing portions of a river.

Suggested Amendments

Section 4(1) should be amended to read: *"The main stem of the following, **including** their tributaries are protected rivers under this section."*[5]

Fish and Fish Habitat, Consideration in Licensing Decisions - Section 5

This section codifies the existing policy in which water managers consider fish and fish habitat needs when making decisions about licences or approvals under the *Water Act*.

Commentary

But this section does not go beyond the existing discretionary policy, and is contrary to the government's earlier indications that such considerations would be mandatory. Section 5 of the Bill says only that the Comptroller or Regional Water Manager *may* consider the impact on fish habitat and include conditions about those impacts in any licence, approval or amendment. Without requiring managers to expressly account for fish and fish habitat needs in their decisions, the public is left with the status quo in which these issues may be considered, and there are no grounds for recourse if they are not. The public's limited rights of appeal under the *Water Act* restrict even further the potential for improved fish habitat decisions that this Bill should provide. (See discussion of appeal rights, page 17 of this Brief).

It is important to have a statutory power to require applicants to monitor the impact of their water use or diversion on fish and fish habitat and to include conditions in the licences or approvals that stream flow measuring devices must be installed. This section of the Bill contains these powers.

Suggested Amendments

Section 5 should be amended to read: *"(1)...in making a decision on an application for a licence, an approval or an amendment to a licence or an approval, the Comptroller or Regional Water Manager **must** (a) consider impact on fish and fish habitat."*

Designation of Sensitive Streams for Fish Sustainability - Section 6

This section of the Bill allows the government, by regulation, to list certain streams as sensitive streams. The decision about which streams will be designated is entirely discretionary. To be listed as a sensitive stream, the Lieutenant Governor in Council must "consider that the designation will contribute to the protection of a population if fish use sustainability is at risk because of inadequate flow of water within the stream or degradation of fish habitat" (s.6(2)).

To obtain an authorization (such as a licence) pursuant to the *Water Act* for a listed

sensitive stream, a reverse onus applies. The applicant must satisfy the decision-maker that the authorization that is sought will have only an "insignificant" adverse impact on the sustainability of the protected fish population (s.6(6)). The applicant must provide decision-makers with information allowing them to make this determination. If a significant adverse impact on fish or their habitat cannot be mitigated, then a licence, approval or an amendment may only be issued if compensation either in place of or in addition to mitigation will "enhance or enable the enhancement of fish or fish habitat elsewhere to fully compensate for the significant adverse impact of the proposal" (s.6(8)).

Decision-makers with the authority to make decisions on licences, approvals or amendments for sensitive streams may refuse to issue these documents if there is an alternative source of water reasonably available to the applicant (s.6(9)).

Commentary

On its face, the creation of a category of sensitive stream, where special precautions must be taken to ensure fish sustainability, is a valuable addition to the arsenal of legal tools to protect fish habitat. The success of this provision will depend on how many streams are designated by regulation and how quickly this occurs.

There are problems with this section, which should be remedied through amendments before the bill is passed. Too much discretion is placed in the hands of Cabinet, rather than biologists or regional fish and wildlife managers. Requiring the Cabinet to make decisions on listing of sensitive streams means that the process will be slow, and subject to lobbying from competing interests. No criteria are included in the Bill to describe how a stream will be assessed for its sensitivity. No sensitive streams are named directly in the Bill, unlike the protected rivers referred to above which are listed in the Bill.

And major problems exist with allowing the provincial government to accept mitigation and/or compensation when proposals for diversions or uses of waters on sensitive streams may negatively impact fish populations.

First, this power intrudes on and is in direct conflict with the prohibition in the federal *Fisheries Act* against harmful alteration, damage or destruction of fish habitat. All losses of fish habitat must be authorized by the Department of Fisheries and Oceans (DFO), and any compensation or mitigation measures must follow DFO's national policy for the management of fish habitat, including its hierarchy of mitigation/compensation options. The BC provincial government must ensure that Bill 25 does not deviate from federal law and policy. The province likely does not have the constitutional authority to give its water managers the power to make decision about acceptable "insignificant" losses of fish habitat, and acceptable methods for compensating other habitat losses. There is no need for more jurisdictional wrangling and/or litigation on the issue of federal and provincial powers to regulate fish. If this section is enacted as it now stands, it will reopen

these old battles.

Second, the experience with mitigation and compensation programs under other legislation, such as the federal *Fisheries Act* and its "no net loss of fish habitat" policy have not been completely successful. Experience from the United States shows that mitigation and compensation are inadequate substitutes for preventative habitat protection. Often, no monitoring is required and there is no way to judge whether rehabilitation of degraded fish habitat areas has been successful or whether new habitat has been created.

A preferable approach would be to avoid creating separate classes of fish habitat areas which are subject to different degrees of legal protection. If fish sustainability is to be the overriding concern in making water use decisions, Bill 25 should expressly make this statement. No new licence, approval or amendment should be issued pursuant to the *Water Act* or *Fish Protection Act* unless the applicant can prove that there will be **no** adverse impact on fish or their habitat.

It is also a concern that the Lieutenant Governor in Council can decide to remove the designation of "sensitive stream" where "removal of the designation is in the public interest" (s.6(3)(c)). The phrase "public interest" sounds laudable, but actually gives the government free reign to make whatever decision the political climate of the day dictates.

Suggested Amendments

Section 6 of the Bill should be amended to provide that *"the Ministry of Environment, Lands and Parks shall prepare a list of designated sensitive streams which shall be designated to protect the population of fish whose sustainability is at risk because of inadequate flow of water within the stream or degradation of fish habitat."*

Section 6(6) should be amended to state that *"the Comptroller or Regional Water Manager may issue the licence, approval or amendment only if satisfied that there will be no adverse impact of the proposal on the sustainability of the protected fish population*."

Section 6(7) - 6(9) should be deleted.

Recovery Plans for Sensitive Streams - Section 7

This section allows the government to make recovery plans to restore fish populations for designated sensitive streams. These plans must include a process for public participation. The plans may include measures to provide a sufficient flow of water in the stream, either to be undertaken by government or other persons. Each recovery plan must be approved by the Lieutenant Governor in Council (Cabinet). In order to assist in implementation of an approved recovery plan, the

government, by regulation, may restrict the issuance of further authorizations or restrict how existing powers under authorizations are carried out. However these regulations may not be made in relation to the *Forest Practices Code of BC Act*. The effect of this provision is that recovery plans may limit new uses of water under the *Water Act*, but will not limit logging operations authorized by the *Forest Practices Code*, even if it is the logging operations that are having a negative impact on the fish population in a designated sensitive stream.

The government may order either Fisheries Renewal BC or Forest Renewal BC to "provide assistance to the development of a recovery plan or the implementation of an improved recovery plan." This presumably means that financial resources will be available from either of these two agencies for recovery plans for sensitive streams.

Commentary

Recovery plans should be required for any degraded fish habitat area, not just those "sensitive streams" listed by regulation at the discretion of Cabinet.

The limitation contained in section 7(5) that it is the Lieutenant Governor in Council who approves a recovery plan, if satisfied that the plan is "in the public interest" restricts the value of these plans. These decisions should be made by technical experts, not elected officials. The same concerns about decisions made in the public interest apply to this section. Too much discretion is retained by Cabinet when this phrase is included.

The Bill uses a cumbersome procedure to implement a recovery plan. Regulations are required for implementation (s. 7(6)(a)). If the recovery plan has been developed, the plan should be implemented, and should not be subject to further delays and red tape caused by a requirement for another round of regulation.

Suggested Amendments

Section 7 should be amended to read *"recovery plan means a plan to provide for the recovery of a protected fish population in a degraded fish habitat area."*

Section 7(5) requiring the Lieutenant Governor in Council to approve a recovery plan, if it considers that the plan is in the public interest, should be deleted.

Section 7(6) should be amended to state *"for the purposes of implementing an approved recovery plan, the Lieutenant Governor in Council may restrict the issuance of amendments, licences, approvals, permits or other authorizations."*

Section 7(7) should be deleted. As the *Forest Practices Code of British Columbia,* the *Forest Act* and the *Range Act* cover approximately 85% of BC's land area, there is no reason to exempt restriction on these Acts from recovery plans, if applicable. Each recovery plan should individually consider the impact of forestry practices on

fish habitat, and possible restrictions on those practices..

Streamflow Protection Licences - Section 8

This section allows the government to issue a water licence for the express purpose of protecting the amount of water in the stream for fish habitat. This is an important new development. Environmentalists, fish and wildlife groups, and naturalists and conservationists have been advocating for the creation of these instream flow licences for years.

A licence for a streamflow protection purpose must be approved by the Lieutenant Governor in Council (Cabinet) (s.8(1)(a)). It may only be issued to an organization that has a "community based interest in the stream for which the licence will be issued" (s.8(1)(b)). A licence may be issued to an organization even if it would not otherwise be eligible as a licensee under the *Water Act*.

The licence must specify the point or points on the stream in relation to which the stream flow rights are applied and must include the condition that the organization holding the licence "undertake works in relation to fish and fish habitat in the stream to which the licence applies." These works and activities include enhancing fish habitat, providing educational programs about fish and habitat and promoting the more efficient use of water for the purposes of protecting fish and fish habitat.

Cabinet has the sole authority to direct that these licences be issued, and once Cabinet makes a direction to the Comptroller or Regional Water Manager, and a decision is made, no further appeals under the *Water Act* may be taken. These licences may not be amended, transferred or apportioned without the approval of the minister. Finally, the minister may cancel a stream flow protection licence without compensation to the licensee if either the organization holding the licence contravenes a term or a condition contained in the licence or the minister considers the cancellation to be in the public interest.

Commentary

The process for approving streamflow protection licences is cumbersome, extremely discretionary and unnecessarily complicated, requiring an application to the Minister, preparation of a report by the Comptroller of Water Rights for the Lieutenant Governor in Council and approval or refusal of the application by the Lieutenant Governor in Council.

The hurdles that apply to NGOs who are interested in protecting the health of fish and their habitat in the province by acquiring a streamflow protection licence are very high, and unjustified:

- Restricting the ability to hold these streamflow protection licences to NGOs that have a "community based interest" in a stream is unclear, as there is no definition of what this phrase means. Presumably, this is to discourage urban environmentalists

from taking out water licences all over the province in remote areas. A better criteria would be an organization which "has an interest in the health of the stream" or some other environmental criteria.
- Only this type of licence must be approved by the Lieutenant Governor in Council rather than the Comptroller of Water Rights or Regional Water Manager who approve other *Water Act* applications for licences.
- Only this type of licence decision may not be appealed, unlike any other licence decision made under the *Water Act*.
- Only this type of licence requires the licensee to undertake works in relation to fish and fish habitat in the stream to which the licence applies.
- Only this type of licence may be cancelled without compensation if the Minister considers cancellation to be in the public interest. Cancellation of a licence, once issued, should only be done for breaches of the licence or some other failure on the part of the licensee. The term "public interest" confers very wide discretion upon the government, and gives it complete freedom to decide what constitutes the public interest.[6]

NGOs have as legitimate an interest in protecting water quality and fish health as other water users. By creating this series of steep hurdles, the government is indicating distrust of these groups who are assisting the government with its mandate to protect the environment.

Suggested Amendments

Section 8 should be amended as follows. Section 8(1) should state *"a licence for a streamflow protection purpose (a) may be issued by a Regional Water Manager or the Comptroller of Water Rights, (b) may be issued to an organization that the Regional Water Manager or Comptroller of Water Rights considers has an interest in conservation of the stream for which the licence would be issued."*

Sections 8(4) - (5) setting out extra steps in the application procedure which apply only to streamflow protection licences should be deleted.

Section 8(9) stating that licence decisions made by the Comptroller or Regional Water Manager may not be appealed should be deleted. There is no reason to exclude streamflow protection licences from the general class of licences which may be appealed under the *Water Act*.

Section 8(11)(b) allowing the Minister to cancel a licence in the public interest should be deleted, as this provision does not apply to other licences under the *Water Act*.

Temporary Reduction May be Ordered in Cases of Drought - Section 9

This section allows the minister to make a temporary order reducing the use of water in a stream by licence or approval-holders in cases of drought that threaten the survival of a population of fish in a stream. Consideration must be given to

agricultural users' needs before such a temporary order is made.

Commentary

Although this appears to be a useful new provision, drought has not often been the prime cause of threats to fish health. Over-allocation of water rights on a particular stream or river is a much more serious problem, one that this Bill does not address.

This section also explicitly favours agricultural users over fish needs which may be appropriate in some, but not all, cases.

Suggested Amendments

Section 9(3) giving priority to the needs of agricultural users in times of drought should be deleted. The Minister of the Environment should be required to give priority to environmental reasons when making decisions pursuant to the *Fish Protection Act*.

Fish and Fish Habitat Considerations in Water Management Plans - Section 10 (New Sections 22.1 - 22.4 *Water Act*)

Bill 25 substantially amends the *Water Act* by adding a new section, section 22.1, which would allow the minister to designate an area as a water management area. These areas may be created to address conflicts between water users or between water users and instream flow requirements or risks to water quality, including but not limited to concerns relating to fish or fish habitat. Plans will only be required for areas designated by the Minister.

Commentary

This section says a water management plan must include its purpose, the issues it will address, a process for public consultation and a time limit for completion of the plan. These are all worthy issues to be included in the plan. In addition, a water management plan should address *all* water sources and *all* water quality and quantity issues, whereas section 22.2(2)(b) now says a plan "may" include considerations related to surface water run off and groundwater.

This section of the Bill says mandatory consideration must be given to land use planning processes which has the potential to restrict the limitations that a water management plan may place on water use in a particular area.

To implement a water management plan, regulations may be made restricting the issuance of licences or approvals under an enactment. But this does not apply to the *Forest Practices Code of BC Act,* the *Forest Act*, the *Range Act* which together account for about 85% of the province's land area. Therefore, most of the province

will be excluded from the application of these water management plans.

Suggested Amendments

Section 22.2(2) of the proposed amendment to the *Water Act* should be amended to read that a water management plan *"must include ...(v) all water sources and sinks, (vi) minimum instream flow requirements for fish health."*

Section 22.2(3) - this section which states that consideration must be given to the results of land use planning processes within the water management area, should be amended to state that *"in the event of a conflict between land use designations and a water management plan, the latter has priority for the purpose of protection of fish."*

Section 22.4(2) excludes the *Forest Practices Code of British Columbia,* the *Forest Act* or the *Range Act* from any restrictions that the Lieutenant Governor in Council may apply to implement a water management plan. This section should be deleted. There is no reason why a water management plan should not include restrictions on forest practices, if necessary for a particular area.

Reduction in Water Rights in Accordance with Plan - Section 11

Section 11 of the *Fish Protection Act* relates to water rights for use, diversion or storage of water within a water management area. If Cabinet has authorized the Comptroller or Regional Water Manager to make a reduction of water rights under a water management plan, when a licence is disposed of, transferred or apportioned, the water management officials may reduce the quantity of water under the licence affected by the transfer. The maximum amount of the reduction is 5% of the quantity of water authorized by the applicable licence before the reduction. If a decision to reduce the amount of water is made in these circumstances, there can be no appeal, no law suit brought, and no compensation will be paid.

Commentary

Although this is a welcome improvement, setting the maximum amount that a water licence can be reduced at 5% of the quantity of water covered by the licence is too low an amount to address serious water quantity problems affecting fish.

Suggested Amendments

Section 11(3) should be amended by deleting the ceiling of 5% as the maximum quantity of water that can be reduced from a water licence.

Provincial Directives on Streamside Protection - Section 12

This section allows the government, by regulation, to establish "policy directives" for protecting and enhancing riparian areas the government considers are subject to residential, commercial or industrial development. These directives may only be established after consultation by the Minister of the Environment with representatives of the Union of BC Municipalities.

The directives may be different for different parts of BC. If a directive is established, a local government must include in its zoning and rural land use by-laws riparian area protection provisions in accordance with the directive or ensure that its by-laws and provide a level of protection that is comparable to or exceeds that established by the directive. The directive may set a time limit for a local government to complete a review and, if necessary, amendment of its by-laws to conform with the directive. And a local government may request an extension of the time period for compliance with the directive from the Minister of the Environment.

Commentary

This section is a major concern with this new Bill. It is unclear what form a "policy directive" will take. The government is not obligated to establish the directive by any deadline. There is no assurance that a directive will contain minimum standards for riparian area protection.

Using municipal by-laws to protect riparian areas continues the current problem of inconsistent application of protection measures from municipality to municipality, thereby weakening the overall protection of a particular stream or river. It is also troubling that the directive is to be established only after consultation with the BC Union of Municipalities, rather than the range of other affected public groups, including streamkeepers, conservation and community groups, and federal agencies such as the Department of Fisheries and Oceans.

Other problems with this section include too much discretion conferred upon the government. The government **may** establish a policy directive in an area that the government considers **may** be subject to development (s.12(1)) (emphasis added). Riparian protection should be required in all fish habitat areas, not just those subject to development.

This section also allows local governments to enact differing degrees of protection for riparian areas, not necessarily dependent on differing environmental conditions, but on different opinions about the value of development. Since section 12(3) says that policy directives "may be different for different parts of BC and in relation to different local government powers and different circumstances," it appears that almost any form of consideration that a local government gives to riparian protection will be found to meet the test of the *Fish Protection Act*.

The only enforceability that a local government must bring to riparian protection is

to ensure that their bylaws and permits "provide a level of protection that, **in the opinion of the local government**, is comparable to or exceeds that established by the directive" (s.12(4)(6)) (emphasis added). This is an unusual provision, and contrary to the usual equivalency agreement where the senior government decides if the junior government's law is equivalent enough to allow it to opt out of compliance with the senior law. This part of Bill 25 reverses this procedure and if passed, would mean that the only body that must determine whether the local government has complied is that government itself. On this issue of provincial importance, government is abdicating responsibility to local governments, who have shown to date that they are unable to effectively regulate developers and others who threaten the health of riparian areas.[7]

Suggested Amendments

Section 12 should be amended to require minimum riparian protection standards applicable to all the province's settled areas. The standards should be based on the *Land Development Guidelines for the Protection of Aquatic Areas* prepared by the Department of Fisheries and Oceans and the Ministry of Environment, Lands and Parks.

Regulation-making Authority - Section 13

This section allows the government to make regulations on a variety of subject required to implement specific provisions of the Bill.

The *Fish Protection Act* also amends several other Acts, including the *Waste Management Act*, by adding several provisions on creative sentencing, allowing those convicted of *Waste Management Act* offences to be directed to pay compensation, perform community service, pay Fisheries Renewal BC or the Habitat Conservation Fund, post a bond, or a number of other potential sentences that go beyond the traditional fine or imprisonment options.

Prohibition Against Introduction of Debris - New section 40.1 of *Water Act*

The *Water Act* is also amended by adding a prohibition against introducing debris into a stream. Debris is defined as "clay, silt, sand, rock or similar material" or "any material, natural or otherwise, from construction or demolition." Section 40.1 says that a person must not introduce debris into a stream, channel or area adjacent to a stream, if as a result harm or damage is caused to the stream or stream channel; use, diversion, storage or works authorized under the *Water Act*; property of riparian owners; or fish or fish habitat. However, this prohibition against the introduction of debris does not apply to forest practices under the *Forest Practices Code of BC.*

The government may make a remediation order in relation to the deposit of debris into a stream. If the government is compelled to perform the remediation, the cost

to the government is a debt due to the government by a responsible person, i.e., the person who introduced the debris or caused or allowed it to be introduced into the stream.

Commentary

This section is another welcome addition to the range of offences and tools for legal protection available in BC. Construction debris, and siltification remain major problems for fish, especially in urban and rapidly developing areas. But the deliberate exclusion of logging practices from this section means that the major source of debris to fish-bearing streams has been omitted from the ambit of this Bill. Presumably, the government anticipates that proper application of the *Forest Practices Code* will eliminate logging debris as a source of harm to fish-bearing streams.

This prohibition duplicates the prohibition in the federal *Fisheries Act* against harmful alteration, destruction or damage to fish habitat. And the provincial *Waste Management Act* prohibits the introduction of waste (defined to include a number of substances) into the environment. The *Waste Management Act* also allows the government to designate any substance as waste. Therefore, this prohibition on introducing debris into streams was already available to the government before the introduction of this new Bill. The difference that this provision in the *Fish Protection Act* makes to fish health will depend on the degree to which it is enforced. If a concerted effort is made to implement and enforce this new prohibition and inform the public about the consequences of failing to abide by the prohibition, then the new section will be useful.

Consequential Amendments to Wildlife Act

This Bill will change the definitions of endangered and threatened species to include fish, aquatic invertebrates and aquatic plants. The changes to the *Wildlife Act* would remove the current qualification that the threat of extinction to a species must result from human activities. Other changes would also increase the offences that are available under the *Wildlife Act* for harm to endangered or threatened species.

Commentary

No fish species, aquatic invertebrates, or aquatic plants are actually designated as threatened or endangered under this Act or regulations pursuant to the Act. The *Wildlife Act* may be used to designate these species as threatened or endangered in the future, but given the past record of the government in legally designating species, it is unlikely whether this legal change will result in any change on the ground. Only four species have ever been listed as endangered pursuant to the *Wildlife Act*, and none have ever been listed as threatened.

Suggested Amendments

A list of endangered and threatened fish species, aquatic plants and aquatic invertebrates should be included in the Bill. A timetable should be included in the legislation for the identification and protection of the critical habitat of these species.

Appeal Rights under the Water Act

The right to appeal a decision made under the *Water Act* has been unclear in recent years. Citizens' groups have received both favourable and unfavourable decisions on the question of whether they have "standing" or the legal right to bring an appeal of a decision under the *Water Act*. In one recent case, the same environmental group on one occasion was granted standing by the Environmental Appeal Board to appeal a decision related to filling of a wetland, and in another decision related to the same dispute over filling the same wetland, was denied standing.[8] It is possible to have two inconsistent decisions on the same issue from the Environmental Appeal Board, because that Board does not have to follow its own decisions.

West Coast Environmental Law has advocated legislative amendments to clarify who has a right to appeal decisions made under the *Water Act*. West Coast has asked the government to standardize appeal rights under all environmental statutes. It make no sense, for example, that citizens have the right to appeal a water quality decision under the *Waste Management Act*, but cannot appeal a water quantity decision under the *Water Act* unless they fall within a narrow class of persons (licensees, riparian owners, and applicants for licences).

The NDP government made a commitment to harmonize the issue of who has standing to launch an appeal of any decision under any Ministry of Environment, Lands and Parks statutes in its 1992 discussion paper on the BC *Environmental Protection Act*.[9] As part of advocacy efforts directed to the *Fish Protection Act,* West Coast made submissions to the Minister of the Environment and presented briefs arguing that the right of appeal under the *Water Act* be broadened so that any person with an interest in the decision have a right of appeal. Unfortunately, Bill 25 does not address appeal rights under the *Water Act*.

But another Bill recently introduced to the legislature for first reading, Bill 14, the *Environment, Lands and Parks Statutes Amendment Act of 1997* does include a change to the appeal rights under the *Water Act*. Rather than harmonizing the right of appeal with other environmental laws in the province, this proposed change to appeal rights under the *Water Act* would change the existing muddled situation by statutorily codifying a limited right of appeal.[10]

Not only does this proposed amendment to the *Water Act* contradict the government's stated priorities for harmonizing appeal rights under environmental statutes, it also flies in the face of recent trends toward increased public participation, and represents both a major setback for concerned citizens and

environmental groups as well as a marked policy change by the government.

The trend toward increased public participation in land use and environmental decision-making is discussed in a 1995 publication of the BC Government's Commission on Resource and Environment (CORE):

"In recent years the public has sought a greater say in decisions regarding land use and resource management, and government has responded to the demand by providing more opportunities for public participation. (p.15) ...Representative democracies recognize the general right of citizens to participate meaningfully in government decisions in which they have a significant interest (p.18) **Administrative officials have an additional responsibility, however, in that they are also directly accountable to the public whose interests they represent as public servants. This accountability is met by ensuring that to the degree they exercise discretionary authority, their decisions are informed by an understanding of the wants and needs of those who are affected by them. This is most effectively ensured by guaranteeing to the public the right to be heard by the discretionary decision-maker.** (p.19) The trend in land use and resource management decision-making hasbeen toward more public participation (p.35)."[11] (emphasis added)

In a related report, the government addressed the subject of dispute resolution. On the question of who should have standing to appear before dispute resolution tribunals, the report said:

"Standing to appeal an administrative decision to a tribunal should reflect the principle that in matters of public policy significant public rights may be at stake and, consequently, citizens should have the benefit of broad standing provisions. For example, just because someone does not have legal rights in an affected property does not mean they are unaffected by an administrative decision. Aquaculture development on the foreshore, logging on Crown land and the siting of a waste treatment facility are situations where a person without economic or property rights may have strong but indirect interests in the decision. **To meet the standards of administrative fairness, land use and related resource and environmental legislation should ensure that standing provisions for review and appeal are broad enough to include those who are significantly affected by an administrative decision. Within this context, "significantly affected" should include those who have a demonstrable public interest as well as those with either a direct or an indirect interest in the decision."**[12] (emphasis added)

Suggested Amendments

Bill 25 contains many contemplated amendments to the *Water Act*. It does not make sense to have just one other key change to the *Water Act* in a completely separate bill, Bill 14, especially when many advocates have argued that broadened

appeal rights are a key feature of protecting water quantity for fish habitat.

If Bill 25 is to comprehensively protect fish habitat, it should both harmonize rights of appeal under the *Water Act* with other modern environmental laws, and clarify that all those with a direct interest in conservation of fish and their habitat have the right to appeal decisions made by water managers. The *Water Act* should be amended to state that "any person" (which would include environmental groups and concerned citizens), can appeal a licence, approval or amendment decision.

To make the public right of appeal more meaningful, notice of all decisions made under the *Water Act* should be readily available to the public. A public registry for water licence and permit applications and decisions should be developed, available in print and electronic form similar to the registry that exists for the BC *Environmental Assessment Act*.

Conclusion

The *1997 Fish Protection Act* is a good step forward in filling some gaps in the current array of tools available for fish habitat protection. However, this Bill could be considerably strengthened by removing the discretionary language which is found in so many sections in the Bill, broadening the appeal rights under the *Water Act*, removing conflict with federal powers to protect fish habitat and strengthening the riparian protection provisions of the Bill, an area of fish habitat clearly under provincial jurisdiction, which has been left unregulated too long.

ENDNOTES

1. National Research Council, Committee on Scientific Issues in the Endangered Species Act, *Science and the Endangered Species Act*, National Academy Press, 1995, at 72.
2. ARA Consulting Group Ltd., *Fishing for Answers - Coastal Communities and the B.C. Salmon Fishery,* B.C. Job Protection Commission, September 30, 1996, s-1.
3. *The Shared Marine Waters of British Columbia and Washington*: A Scientific Assessment of Current Status and Future Trends in Resource Abundance and Environmental Quality in the Strait of Juan de Fuca, Strait of Georgia and Puget Sound, Report to the British Columbia and Washington Environmental Cooperation Council by the British Columbia and Washington Marine Science Panel, August 1994.
4. DFO, *Wild, Threatened, Endangered and Lost Streams of the Lower Fraser Valley*, Draft Summary Report, June 1997.
5. All suggested amendments are in italic letters.
6. For example, a statutory provision allowing Cabinet to change a decision by the Environmental Appeal Board "in the public interest," was recently used to weaken restrictions placed on Canfor's air emissions permit for its medium density fibreboard plant.
7. For example, see the recent report from DFO on lost and threatened streams in the

Lower Fraser Valley, op. cit. at footnote 4.

8. East Kootenay Environmental Society v. Deputy Comptroller of Water Rights et al., EAB decision 94/03; Columbia River & Property Protection Society, East Kootenay Environmental Society and Deputy Comptroller of Water Rights (Windermere Resorts Ltd., Third Party) EAB decision 95/42. To reconcile these conflicting decisions and confirm that the one that granted standing to EKES was the correct interpretation of the law, an appeal was taken to the Lieutenant Governor in Council who may vary or rescind any order or decision of the EAB if it feels that it is in the public interest to do so, but the appeal was not granted.
9. Ministry of Environment, Lands and Parks, *New Approaches to Environmental Protection in British Columbia - A Legislation Discussion Paper,* 1992 at p.33 "the issue of who has standing to launch appeal of any decision under the Ministry's statutes should be harmonized."
10. Bill 14 would amend section 40 of the *Water Act* by stating that any order of the Comptroller Regional Water Manager or an engineer may be appealed to the Environmental Appeal Board by "(a) the person who is subject to the order, (b) an owner whose land is or is likely to be physically affected by the order, or (c) a licensee, riparian owner of applicant for a licence who considers that their rights are or will be prejudiced by the order."
11. Commission on Resources and Environment, The Provincial Land Use Strategy, Volume 3, *Public Participation,* February 1995.
12. Commission on Resources and Environment, The Provincial Land Use Strategy, Volume 4, *Dispute Resolution*, February 1995 at p. 40.
