

BILL C-55: STRONGER LEGAL PROTECTION FOR MARINE SPACE IN CANADA



Submitted on behalf of SeaBlue Canada to the Standing Senate Committee on Fisheries and Oceans

The Honourable Fabian Manning, Chair
The Honourable Marc Gold, Deputy Chair

INTRODUCTION

We face a shocking crisis of biodiversity loss, in the ocean as well as on land. The global ocean suffers from increasing threats, such as a rapidly accelerating climate, pollution, declining fisheries resources, overexploitation, and accumulating plastic pollution. The UN Secretariat of the Convention on Biological Diversity has estimated that the world loses up to 150 species every day due to increasing pressure from climate change and human activities. Marine fish populations have fallen by 55% since 1970.¹ In Atlantic Canada, species such as cod, mackerel and tuna, as well as sharks, skates and rays, all declined by 38 per cent from 1970 to 2014. Only a third of Canadian commercial fish stocks are classified as healthy, while 13% are in critical condition and data is missing to assess the status of over one-third of stocks.² More than 40 fish populations in Atlantic Canada, and over 20 populations in the Pacific are considered at-risk by the Committee on the Status of Endangered Wildlife in Canada.³ Populations of both Atlantic and Pacific salmon, ecological and cultural keystones on Canada's east and west coasts, are fractions of their historical abundances.^{4,5}

At the same time, international consensus is growing on the need to address threats to the ocean. In particular, Aichi Target 11 adopted in 2010 by Parties to the Convention on Biological Diversity committed states to protect 10% of our coastal and marine areas by 2020. In 2015, the UN adopted the Sustainable Development Goals, Goal 14: Life Below Water.

Canada's laws to protect fish and fish habitat, including the Oceans Act, could serve to prevent and mitigate human impacts if used effectively. Yet despite the fact that Canada has had an Oceans Act since 1997, effective implementation of this Act has been lacking.⁶ As of 2015, the government had protected less than 1% of Canada's coastal and marine areas. Among other critiques, the Commissioner on the Environment and Sustainable Development and the Royal Society of Canada Expert Panel on Sustaining Marine Biodiversity criticized the government for delays in creating MPAs.⁷ Fortunately, to reverse this trend, Canada has promised to take ambitious steps to protect both species and habitats, including a commitment to meet Aichi Target 11.

Bill C-55 is a very welcome step in the quest to improve protection of marine biodiversity, and to ensure the government meets its target. Over the past two years in particular, this government has taken many

steps to put spatial protection in place by creating marine protected areas (MPAs). Once passed, Bill C-55 will fulfill the government's commitment to "Establish Marine Protected Areas Faster" by updating the Oceans Act "to facilitate the designation process for Marine Protected Areas, without sacrificing science, or the public's opportunity to provide input."⁸

The amendments proposed in Bill C-55 will provide a stronger legal foundation for improved ocean protection:

1. The Bill will make action on marine conservation faster without sacrificing science or public input.
2. The Bill will make the law more effective by incorporating lessons learned from the past two decades of ocean law and ocean science development.
3. The Bill is a win-win, providing more certainty for industry.

FASTER: Bill C-55 will accelerate action on marine protected areas

Once passed into law, the Bill's amendments will make it easier for Canada to reach its marine conservation targets to protect 10 per cent of its coastal and marine areas by 2020.⁹

One of the main reasons for lack of progress on MPAs was a slow process with no fixed deadlines for action. Bill C-55's amendments will accelerate MPA designation so that it does not take 7,¹⁰ 10,¹¹ or even 20¹² years to create an MPA.

The new Ministerial order procedure for MPAs is faster than the current process as it does not require all the procedural steps of the Governor in Council regulatory process. The Bill sets a five-year deadline to turn a Ministerial Ordered MPA into a fully-fledged permanent MPA under the regulations, and if that deadline is not met, the Order must be repealed.

When a Ministerial Order is issued, new activities that may harm marine ecosystems in proposed MPAs, such as fisheries, seismic testing, undersea mining and offshore oil and gas extraction, may be immediately restricted. Existing fisheries activities in these areas may also be restricted. This results in immediate protection for highly sensitive and significant marine ecosystems.

MORE EFFECTIVE: Bill C-55's new provisions reflect two decades of progress in ocean law and ocean science.

The Bill embodies an evidence-based, scientifically and legally well-founded approach to MPAs with updated legislative language that:

I. ENSHRINES THE CONCEPT OF A NETWORK OF MPAS INTO LAW.

Bill C-55 substitutes a national “network” for a national “system” of MPAs, and charges the Minister with the task of leading and coordinating the “development and implementation of a national network of marine protected areas.” [Emphasis added.] Network is the scientifically preferred term. Connectivity between sites is a key concern. An evaluation of DFO summarized the need for networks in this way: “A connected series of MPAs is meant to enhance the benefits of each individual MPA, and is intended to fulfil ecological goals more effectively and more comprehensively.”¹³

II. DEFINES ECOLOGICAL INTEGRITY FOR THE FIRST TIME IN THE ACT AND ALLOWS MPAS TO BE CREATED TO MAINTAIN ECOLOGICAL INTEGRITY.

MPAs are often described as national parks in the ocean. But while the first priority for park management under the Canada National Parks Act is “the maintenance or restoration of ecological integrity,” the Oceans Act contains no similar requirement for managing MPAs.¹⁴ The Standing Committee on Environment and Sustainable Development considered this topic in its federal protected areas study and recommended that the Government of Canada amend and strengthen the National Marine Conservation Areas Act and the Oceans Act in order to “[e]nshrine the restoration and maintenance of ecological integrity as the overriding priority for Canada’s marine conservation areas in parallel with the Canada National Parks Act.”¹⁵

III. AUTHORIZES THE DELINEATION OF ZONES BY REGULATION.

This change will remove one of the Act’s ambiguities that has previously caused delay. In the case of SGAan Kinghlas-Bowie Seamount, where the Council of the Haida Nation, the governing body for the Haida Nation, and stakeholder conservation and fisheries groups, agreed to a system of zoning within the MPA which allowed the designation to proceed. Unfortunately the agreed zones were not included in the regulations, causing uncertainty about their legal status for a number of years.

IV. EMBEDS A PRECAUTIONARY APPROACH.

The precautionary principle is a core tenet of modern environmental law and a “full-fledged and general principle of international law”,¹⁶ first adopted at the 1992 Rio Earth Summit,¹⁷ and recognized in numerous Canadian environmental statutes.¹⁸ Historical examples of a lack of precaution abound.¹⁹ Precaution may have prevented the Atlantic cod collapse. Precaution can stave off further declines in fish and whales. Precaution can safeguard our vital foreshores where forage fish spawn and natural processes provide resilience in the face of sea level rise. The application of the precautionary principle in the proposed section 35.2 will ensure that Canada errs on the side of protecting marine species and habitat from harm in the face of scientific uncertainty

WIN-WIN: Bill C-55 provides more certainty for ocean users will provide enhanced protection for marine life

The amendments will create more certainty for ocean users in two significant ways.

First, under the proposed new Ministerial Order MPA process the government “freezes the footprint” and restricts new human activities that may disturb, damage, destroy or remove from the designated area any unique geological or archeological features or any living organism or any part of its habitat. In other words, this proposed new section immediately prohibits a wide class of activities that may harm the ecosystem of an MPA such as seismic testing, undersea mining and oil and gas exploration and extraction during the five-year period when the Ministerial Order is in effect. “Ongoing interests” defined by the Bill are still allowed, however, the Minister may restrict ongoing fisheries activities in areas created by Order.²⁰ This new designation procedure must be done “in a manner that is not inconsistent with a land claims agreement that has been given effect and has been ratified or approved by an Act of Parliament.”

Second, amendments to the Canadian Petroleum Resources Act will create a legislated process that can be used to negotiate the surrender or cancellation of oil and gas interests in MPAs in specified circumstances, with compensation payable to the holders of those interests. We commend this approach and recommend similar amendments to the Atlantic Accord Acts²¹ to create a consistent legal regime on this issue across Canada

Many in the fishing industry are the first to act to protect their resources from other ocean activities – aquaculture, tidal power, pulp and paper emissions, oil and gas – as examples. The proposed changes in C-55 will protect areas the fishing industry has set aside from other industrial activities. This may also give coastal communities, with low impact fisheries and where MPAs have been proposed, some reprieve from worrying about other activities as the MPA process unfolds.

Environmental protection and ocean industries need to go hand in hand. The blue economy is only achieved when the “blue” is functioning as well as possible.

What still needs to happen?

Additional legal changes could improve the Oceans Act even further, and we recommend further legislative renewal on the following key issues.

1. A UNIFORM SYSTEM FOR PROHIBITING OIL AND GAS ACTIVITIES IN ALL MPAS IN CANADA

Oil and gas activities are not compatible with marine protection. In 2017 regulations for the proposed Laurentian Channel MPA were tabled that would have left over 80% of the MPA open to direct oil and gas production activities, with the remainder open to directional drilling. However, these activities threaten the very species that the government intended to protect including Northern wolffish, porbeagle sharks and leatherback sea turtles, in addition to sensitive benthic habitats with high concentrations of sea pens. As noted above, further work is needed to create a Canada-wide approach to restricting oil and gas activities from Oceans Act MPAs.²²

Further, marine refuges established under the Fisheries Act currently count for more than half of Canada’s marine conservation targets and yet are still potentially open to oil and gas exploration and production. The government needs to move swiftly to prohibit oil and gas in these areas as well.

2. PROTECTION STANDARDS FOR MPAS

As the examples above demonstrate, often regulations allow activities with potentially harmful impacts to continue within MPAs.²³ In addition to oil and gas exploration and exploitation, other potentially harmful industrial activities such as undersea mining, open net-pen aquaculture and bottom trawling should not occur in areas of the a ocean slated for protection.

The Minister-appointed National Advisory Panel on MPA Protection Standards recommended prohibiting industrial and extractive activities in all MPAs, following IUCN's guidance, in two recommendations on Protection Standards (PS):

PS 1. That the government adopt International Union for the Conservation of Nature standards and guidelines for all marine protected areas, therefore prohibiting industrial activities, such as oil and gas exploration and exploitation, mining, dumping, and bottom trawling.

PS 2. When industrial activities are allowed to occur in areas counted as other effective area-based conservation measures, the Minister of Fisheries, Oceans and the Canadian Coast Guard must be satisfied through effective legislation or regulation that risks to intended biodiversity outcomes are avoided or mitigated.²⁴

Scientific evidence and legal practice support the creation of these standards.²⁵ The public strongly supports standards as well. Polling released by WWF-Canada in 2016 shows that 98 per cent of Canadians support designating parts of Canada's waters as MPAs, 80 per cent rejected oil and gas exploration in MPAs, and 63 per cent favoured limits on commercial fishing within MPAs.²⁶

3. INDIGENOUS CO-GOVERNANCE AND INDIGENOUS PROTECTED AREAS

The government has pledged to fully implement the Calls to Action from the Truth and Reconciliation Commission and review Canada's laws to ensure compliance with the UN Declaration of the Rights of Indigenous Peoples. In the oceans context, giving life to these promises means recognizing the inherent jurisdiction and laws of Indigenous peoples within our multilayered legal system.

The Oceans Act can provide for true joint management of Indigenous marine territories on a nation-to-nation basis where desired by Indigenous peoples. At present, the Oceans Act provides wide latitude for the Minister to enter into agreements with multiple governments and groups to achieve the Act's purposes but does not direct him or her to proactively pursue the development of co-governance bodies, and contains no regulatory framework for an orderly approach to co-governance. The Minister's mandate directs him to "work with the provinces, territories, Indigenous Peoples, and other stakeholders to better co-manage our three oceans." Yet progress on this commitment has stalled.

There are many ways the Oceans Act (and Canada's other MPA legislation) could better interact with and recognize Indigenous Protected and Conserved Areas in federal law as recommended by the Final Report on the Shared Arctic Leadership Model by the Prime Minister's Special Representative, Mary Simon;²⁷ the House of Commons Standing Committee on Environment and Sustainable Development;²⁸ and the Indigenous Circle of Experts (ICE) Committee.²⁹

4. ADMINISTRATION AND ENFORCEMENT, FINES AND PUNISHMENT

We adopt the recommendations of the written brief of the Canadian Environmental Law Association on these topics.

We commend the government for updating these sections to conform with those in other federal environmental laws. In particular we applaud the proposed increased fines, the proposal for all fines received for the commission of an offence under the Oceans Act to be credited to the Environmental Damages Fund for the specific purpose of conservation, protection or restoration of MPAs, and the proposed creative sentencing provisions which would allow the court to order payment for environmental effects monitoring, promotion of MPA conservation and restoration, conservation research and other related activities.

We recommend the government undertake further legislative changes on all these essential topics.

CONCLUSION: Life support from the oceans

The vast oceans are essential to life on Earth. Law is one of the most effective ways to secure marine conservation. We look forward to the swift passage of Bill C-55 and to celebrating the government's success in strengthening our ocean protection laws.

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Endnotes

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- 7 Commissioner of the Environment and Sustainable Development (CESD). 2012. Chapter 3—Marine Protected Areas. In 2012 Fall Report of the Commissioner of the Environment and Sustainable Development. Office of the Auditor General of Canada, Ottawa. Available from http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201212_03_e_37712.html.
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- 8 *Oceans Act*, RSC 1996, c 31; Government of Canada, "News Release: Government of Canada Celebrates Oceans Day and Announces Plan for Marine Conservation Targets", (8 June 2016), online: <https://www.canada.ca/en/fisheries-oceans/news/2016/06/government-of-canada-celebrates-oceans-day-and-announces-plan-for-marine-conservation-targets.html>.
- 9 The mandate letter commits the Minister of Fisheries and Oceans to Work with the Minister of Environment and Climate Change to increase the proportion of Canada's marine and coastal areas that are protected – to five percent by 2017, and ten percent by 2020 – supported by new investments in community consultation and science. DFO. Meeting Canada's marine conservation targets. Online at <<http://www.dfo-mpo.gc.ca/oceans/conservation/plan-eng.html>>
- 10 "...given the current pace of establishing *Oceans Act* MPAs – which was noted as taking on average between five and seven years – the Government of Canada announced a five-point plan to help meet its marine conservation targets." House of Commons Standing Committee on Fisheries and Oceans Report 14: Healthy Oceans, Vibrant Coastal Communities: Strengthening the Oceans Act's Marine Protected Areas Establishment Process 2018. Online at <<http://www.ourcommons.ca/DocumentViewer/en/42-1/FOPO/report-14/page-66>>
- 11 Both the Council of the Haida Nation (CHN) and DFO designated the SGaan Kinghlas-Bowie Seamount and surrounding area as a protected area. In 1997, the CHN designated SGaan Kinghlas or Supernatural Being Looking Outwards as a Haida marine protected area. In 1998, DFO identified Bowie Seamount as an Area of Interest and the area was designated as a MPA under Canada's *Oceans Act* in 2008.
- 12 "...when Parks Canada established the Gwaii Haanas National Marine Conservation Area Reserve and Haida Heritage Site, the process took more than 20 years" 2012 Fall Report of the Commissioner of the Environment and Sustainable Development. para 3.28. Online at http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201212_03_e_37712.html#hd4a. This designation occurred under a different Act, the *National Marine Conservation Areas Act*. Another MPA, BC's Hecate Strait and Queen Charlotte Sound Glass Sponge Reefs, provide an *Oceans Act* example. The ancient globally unique reefs were discovered in 1987, and due to concern from the fishing sector and conservationists, voluntary fishing closures were put in place in 2001, followed by mandatory closures in 2002 which prohibited bottom trawling over the reefs. DFO designated the area by regulation in 2017, fifteen years later. CPAWS, Sea of Glass. Online at <<http://glasssspongereefs.com/>>
- 13 Evaluation Directorate, Fisheries and Oceans Canada 2017. Evaluation of the Oceans Management Program
- 14 Canada National Parks Act, SC 2000, c 32, s 8(2): "Maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Minister when considering all aspects of the management of parks."
- 15 Parliament, House of Commons, Standing Committee on Environment and Sustainable Development, Taking Action

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- 16 Commission of the European Communities. 2000. Communication from the Commission on the Precautionary Principle. /* COM/2000/0001 final */. Online at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52000D-C0001&from=EN>>
- 17 "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." (Principle 15) Agenda 21: Programme of Action for Sustainable Development; Rio Declaration On Environment and Development ; Statement of Forest Principles: The Final Text of Agreements Negotiated By Governments At the United Nations Conference On Environment and Development (UNCED), 3-14 June 1992, Rio De Janeiro, Brazil. New York, NY: United Nations Dept. of Public Information, 1993.
- 18 Federal Sustainable Development Act S.C. 2008, c. 33; Canada National Marine Conservation Areas Act SC 2002, c 18 Pest Control Products Act, SC 2002, c 28 Canadian Environmental Protection Act, 1999S.C. 1999, c. 33.
- 19 The many instances where early warnings existed but no preventive actions were taken include overfishing, asbestos, lead in gasoline, pesticides such as DDT, ozone depleting substances, and methyl mercury in wastewater. See reports from the European Environment Agency for examples:
Gee, David, et al. 2001 Late lessons from early warnings: the precautionary principle 1896-2000. Ed. Poul Harremoës. Luxembourg: Office for Official Publications of the European Communities, 200.
Hansen, Steffen Foss. Late lessons from early warnings: science, precaution, innovation. European Environment Agency, 2013.
- 20 CPAWS News Release, June 20, 2017. "Changes to Canada's Oceans Act a good start say conservationists, but more is needed" <http://cpaws.org/news/changes-to-canadas-oceans-act-a-good-start-say-conservationists-but-more-is>
- 21 In Atlantic Canada, the federal and provincial governments jointly manage petroleum resources in the offshore areas adjacent to Newfoundland and Labrador and Nova Scotia. These areas are subject to separate agreements between Canada and each of those provinces, known together as the Offshore Accords, and legislated by mirror federal and provincial statutes, known collectively as the Accord Acts. Canada-Newfoundland and Labrador Atlantic Accord Implementation Act, SC 1987, c 3; Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, SC 1988, c 28.
- 22 See Appendix 3: Oil and Gas Activities in West Coast Environmental Law Association Submission to the Standing Committee on Fisheries and Oceans Regarding Bill-C55. November 2017 for a description of the problem and recommended solutions. <https://www.wcel.org/sites/default/files/publications/2017-11-wcela-brief-fopo-c-55-final.pdf>
- 23 CPAWS. "Oceans Report 2015. Dare to be Deep: Are Canada's Marine Protected Areas Really 'Protected'?" 6 Ottawa: Canadian Parks and Wilderness Society (2015), 49pp. CPAWS, "How deep did Canada dare? Assessing national progress toward marine protection to December 2012," Ottawa: Canadian Parks and Wilderness Society (2013): 33pp.
- 24 Final Report of the National Advisory Panel on Marine Protected Area Standard September 26, 2018. Online at <http://dfo-mpo.gc.ca/oceans/publications/advisorypanel-comiteconseil/2018/finalreport-rapportfinal/index-eng.html>. Note that PS2 does not meet the CBD guidance on OECMs.
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- 26 WWF-Canada, "Support near unanimous for marine protection, new survey finds" (25 October 2016), online: <http://www.wwf.ca/?22721/Support-near-unanimous-for-marine-protection-new-survey-finds>.
- 27 Indigenous Affairs and Northern Development, *A New Shared Arctic Leadership Model* by Mary Simon, (Ottawa, March 2017), online: <https://www.aadnc-aandc.gc.ca/eng/1492708558500/1492709024236>.
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- 29 ICE. We Rise Together. 2018. Available online: https://static1.squarespace.com/static/57e007452e69cf9a7af0a033/t/5ab94aca6d2a7338ecb1d05e/1522092766605/PA234-ICE_Report_2018_Mar_22_web.pdf