

September 16, 2024

Annette Gibbons  
Deputy Minister  
Fisheries and Oceans Canada  
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Dear Ms. Gibbons,

WaterPower Canada is the national trade association representing Canada's hydropower industry. We represent public and private power producers, equipment manufacturers, engineering and construction firms, and others associated with the hydropower sector.

As we prepare for the Parliamentary review of the *Fisheries Act*, we are writing to seek further information on how Fisheries and Oceans Canada (DFO) decision makers apply decision-making factors in exercising their powers under the *Fisheries Act* on matters relating to hydropower development. We are also writing to request information on the implementation of the Cabinet Directive on Regulatory and Permitting Efficiency for Clean Growth Projects within Fisheries and Oceans Canada.

These decision-making factors are outlined in subsection 34.1(1) of the *Fisheries Act*:

- (a) *the contribution to the productivity of relevant fisheries by the fish or fish habitat that is likely to be affected;*
- (b) *fisheries management objectives;*
- (c) *whether there are measures and standards*
  - (i) *to avoid the death of fish or to mitigate the extent of their death or offset their death, or*
  - (ii) *to avoid, mitigate or offset the harmful alteration, disruption or destruction of fish habitat;*
- (d) *the cumulative effects of the carrying on of the work, undertaking or activity referred to in a recommendation or an exercise of power, in combination with other works, undertakings or activities that have been or are being carried on, on fish and fish habitat;*
- (e) *any fish habitat banks, as defined in section 42.01, that may be affected;*
- (f) *whether any measures and standards to offset the harmful alteration, disruption or destruction of fish habitat give priority to the restoration of degraded fish habitat;*
- (g) *Indigenous knowledge of the Indigenous peoples of Canada that has been provided to the Minister;*  
*and*
- (h) *any other factor that the Minister considers relevant.*

These decision-making factors apply to the following sections of the *Act*.

Regulations relating to:

Section 34.4	Death of fish
Section 35	Harmful alteration, disruption, or destruction of fish habitat (HADD)
Section 35.1	Designated Projects
Subsection 35.2 (10)	Regulations relating to HADD
Section 36 (5) or (5.1)	Deleterious substances
Paragraph 43 (1) (b.2)	Restoration of fish habitat
Subsection 43 (5)	Exempting fisheries waters from prohibitions

Other than a procedural regulation addressing approval of *Fisheries Act* authorizations, Fisheries and Oceans Canada has not implemented regulations relating to these provisions of the *Fisheries Act*.

These same factors also apply to decisions taken by the Department relating to:

Subsection 34.3(2), (3), or (7)	Management of Obstructions
Paragraph 34.4(2) (b) or (c)	Authorizations for Death of Fish
Subsection 34.4 (4)	Regulations relating to Prescribed Works
Paragraph 35 (2) (b) or (c)	Authorizations relating to HADD
Subsection 35 (4)	Regulations relating to HADD
Subsection 35.1 (3)	Permitting for Designated Projects
Subsection 35.2 (7)	Ecologically Sensitive Areas
Subsection 36 (5.2)	Deleterious Substances

Our concerns relate to the application of factors (a) and (b) in the Department's decision making.

Factor (a) considers the **contribution to the productivity of relevant fisheries** by the fish or fish habitat that is likely to be affected, and factor (b) considers **fisheries management objectives**. (emphasis added). Given that the first stated purpose of the act is to provide a framework for the proper management and control of fisheries, a reasonable interpretation of the fish and fish habitat protection provisions of the act would suggest that factors a) and b) must be considered together.

We believe that to effectively consider these factors, the Department needs to have identified:

- (i) which fisheries are **relevant**, and
- (ii) what effects (positive or negative) to **the productivity of those fisheries** arises from the impact on fish or fish habitat, and
- (iii) how the effects on productivity will contribute to or detract from achieving **relevant fisheries management objectives**. (emphasis added)

We believe that to assess the effects of a facility or project on fisheries management objectives, the Department needs to have identified these objectives for those jurisdictions where it has the authority for the management of the fishery. Where management of the fishery is an area of provincial responsibility, DFO needs to recognize and adhere to provincial fisheries management objectives, or in the absence of established objectives, seek concurrence with the provincial fisheries manager on the acceptability of the likely impacts to the fishery. This would be consistent with the Department's Fish and Fish Habitat Protection Policy Statement noted below.

To date we are unaware of any generally available set of published management objectives for inland waters that could be impacted by our members' hydropower development and operations. This is a concern, as without clearly stated objectives, it is impossible to validate the extent to which a decision may impact on the achievement of those objectives.

This matter is a cause for concern for our members, as we are aware of decisions taken by Department personnel that do not appear to have properly considered the contribution to the productivity of relevant fisheries or the extent to which the achievement of fisheries management objectives will be affected.

Given the considerable resource commitments associated with fish passage, avoiding the death of individual fish, preventing impacts on any quantity of fish habitat, or providing offsets for the death of fish and impacts on habitat, it is critical that the Department have clear and transparent determinations of the above two factors. Regulatory certainty requires objectivity in the application of criteria such as these.

The latest *Fisheries Act* amendments came into force five years ago in 2019, and we are disappointed that thus far, no regulations that aid the interpretation of the *Act*, including these decision-making criteria, have yet been enacted. While these factors are discussed in the August 2019 Fish and Fish Habitat Protection Policy Statement, as discussed below, this document is often ambiguous and does not offer the legal certainty that a regulation would provide.

This has created regulatory uncertainty for Canadian hydropower producers.

The regulatory uncertainty applies to all aspects of the sector, including:

- a) Existing facilities, which currently provide 60% of Canada's electricity supply,
- b) Planned capacity expansions at existing hydropower facilities, which provide cost-effective additional firm capacity with minimal effect on the facility's environmental footprint.<sup>1</sup>
- c) Greenfield facilities, which will be required to provide reliable capacity and energy, to displace fossil fuel fired facilities.
- d) Maintenance and repair work, which must be carried out at all facilities.

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<sup>1</sup> A study commissioned by WPC and funded by NRCAN has identified over 5,000 MW of potential from existing facilities. [https://waterpowercanada.ca/wp-content/uploads/2023/09/H368493-0000-21A-066-0001\\_final\\_en-1.pdf](https://waterpowercanada.ca/wp-content/uploads/2023/09/H368493-0000-21A-066-0001_final_en-1.pdf)

Given hydropower’s ability to integrate variable renewable energy sources, provide long-term high-capacity energy storage, and reliable firm power generation for Canadian consumers and industry, this regulatory uncertainty undermines Canada’s overarching goal to reduce its greenhouse gas emissions.

The Department has published a series of policies and position statements on various topics, including the following as listed below:

- a) [Fish and fish habitat protection policy statement, August 2019](#)
- b) [The Management of Existing Facilities and Structures under the Fisheries Act and the Species at Risk Act, May 2023](#)
- c) [Policy for applying measures to offset adverse effects on fish and fish habitat under the Fisheries Act, December 2019](#)
- d) [The Management of Death of Fish \(other than fishing\), under the Fisheries Act and the Species at Risk Act, May 2023](#)

While these policy documents provide some assistance to industry, they provide little guidance on how the Department weighs the decision-making criteria required by the *Fisheries Act*.

A summary of our concerns with each of these policies is provided below:

#### Fish and fish habitat protection policy statement, August 2019

The policy statement does not offer any prioritization of departmental efforts on decisions related to projects with a high risk of impacting the productivity of relevant fisheries or fishery management objectives. In fact, it reaches into potential situations:

*The Department conserves and protects fish and fish habitat by applying the fish and fish habitat protection provisions of the Fisheries Act, in combination with the relevant provisions of the Species at Risk Act and the Aquatic Invasive Species Regulations to regulate works, undertakings or activities **that could result in harmful impacts** to fish and fish habitat. The Department can authorize harmful impacts to fish and fish habitat and has the authority to manage or control obstructions.<sup>2</sup>*

In our view, the application of the policy to any situation that ‘could’ harm fish or fish habitat is not consistent with focusing regulatory resources on high-risk situations of relevance to the sustainable management of the fishery.

The policy also states:

*“... the Department will employ a risk-based approach to determine the likelihood and severity of potential impacts to fish and fish habitat that could result from a given work, undertaking or activity.”*

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<sup>2</sup> [Fish and fish habitat protection policy statement, August 2019](#), pg. 7

As noted above, factor (a) requires the Department to consider the impact of the work on the contribution to the productivity of relevant fisheries by the fish or fish habitat that is likely to be affected. Our experience is that the ‘risk-based approach’ referred to in the policy statement is not always applied, and that activities that would reasonably be expected to have a minimal impact on fish populations and productivity (that is, with minimal risk) are needlessly held up.

### The Management of Existing Facilities and Structures under the Fisheries Act and the Species at Risk Act

This policy applies to hundreds of hydroelectric facilities and structures which predate the fish and fish habitat protection provisions of the *Fisheries Act*. Many of these facilities have enhanced and continue to support significant fish populations and Indigenous, commercial, and/or recreational fisheries. The policy has introduced considerable regulatory uncertainty as proponents are warned that if a facility causes the death of fish, then:

*“The person will be required to take corrective measures to prevent the occurrence or to counteract, mitigate or remedy any adverse effects that result from the occurrence or that might reasonably be expected to result from it [subsection 38(6) of the Fisheries Act].<sup>3</sup>*

This statement is unconditional and includes no consideration of factor (a) and b), as required under the *Fisheries Act*. In our view, the Department has taken this position without considering whether the incidental death of fish has an impact on a relevant fish population or the achievement of fisheries management objectives.

We believe this is an excessively strict interpretation of the *Act*.

### Policy for applying measures to offset adverse effects on fish and fish habitat under the Fisheries Act

This policy lacks any discussion on how relevant fisheries and potential effects on their productivity are determined (factor (a)), or how fisheries management objectives are considered (factor (b)). In our view, these are important inputs into determining an appropriate offset strategy. The offset policy also places considerable focus on uncertainty without recognizing that adaptive management is an available tool to implement additional measures should an initial plan as defined in a *Fisheries Act* authorization not meet desired objectives.

This is particularly true given the authority provided in Section 34.4 (5), where the Department has the authority to amend an authorization.

The practice of assigning expiry dates to *Fisheries Act* authorizations also leads to unnecessary regulatory uncertainty, as our members have identified that subsequent approvals often take years – leaving them for extended periods with no approved authorization.

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<sup>3</sup> [The Management of Existing Facilities and Structures under the Fisheries Act and the Species at Risk Act \(dfo-mpo.gc.ca\)](https://www.dfo-mpo.gc.ca), pg. 5

This could be addressed with no loss of oversight by amending authorizations as required using the Department's authority under section 34.4 (5) of the *Fisheries Act*, rather than applying fixed terms to them.

### The Management of Death of Fish (other than fishing), under the Fisheries Act and the Species at Risk Act

This policy is also unconditional, and further indicates:

*The Department reserves the right to not issue an authorization that, for example, conflicts with or compromises:*

- ...
- *The conservation and protection of fish, including aquatic species at risk.*

We believe this condition should be qualified to indicate how factors (a) and (b) are considered in making this determination.

While the policy is clear that causing the death of fish by means other than fishing is prohibited, it fails to explain how the Department determines whether an impact on individual fish warrants decision making by the Department to require corrective measures.

As we have noted with other DFO policies, this policy also does not explain how the contribution of potentially affected fish to the productivity of fisheries and fisheries management objectives are considered in its application.

We also note the following policy statement:

*Where fishery-specific objectives do not exist, overarching strategies and policy objectives established by the Department or other fisheries managers should be considered.<sup>4</sup>*

This represents a problem for our industry. In the absence of clear guidance from DFO headquarters, we are concerned that individual decision makers may apply personal or subjective criteria, rather than following mandated considerations.

The lack of a threshold for action in multiple policies represents a problem with the administration of the *Fisheries Act*, and this potential for straying into 'trivial' or 'insignificant' effects arose in the Supreme Court of Canada's decision on the *Impact Assessment Act*.

*The term "effects within federal jurisdiction", when properly interpreted, does not encompass de minimis, trivial, or insignificant effects.<sup>5</sup>*

In relation to clean energy development, the Canada Electricity Advisory Council has echoed our concerns that the federal government's approach to permitting is stalling the clean energy projects that are necessary to decarbonize the economy and mitigate the worst impacts of climate change.

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<sup>4</sup> <https://waves-vagues.dfo-mpo.gc.ca/library-bibliotheque/40971193.pdf>, page 20

<sup>5</sup> [Reference re Impact Assessment Act, 2023 SCC 23 \(CanLII\)](#), par 272.

It found that:

***An over-abundance of caution on federal permitting, reviews and approvals undermines the clean energy transition<sup>6</sup>***

The Council also recommended that the federal government should:

- a. *Formalize the definition of a net-zero-enabling electricity project (e.g. solar, wind, nuclear, hydro, transmission, storage) and, for those projects that meet the net-zero definition, identify:*
  - i. *Project-specific critical risks by known project type, on a region-specific basis where relevant;*
  - ii. *Minimum permitting, review and approval requirements for each identified project-specific critical risk; and*
  - iii. *Mitigation requirements consistent with best practices for non-critical project risks and well-understood impacts that are not subject to federal permitting, review, and approval.*
- b. *Limit the scope of permitting, review and approval processes required for net-zero electricity projects to critical project- or site-specific risks without known or widely accepted mitigation strategies*

Considering the recent Cabinet Directive relating to Clean Energy Projects<sup>7</sup> and the key role the hydropower industry must play to achieve Canada's net-zero aspirations, we are particularly interested in the guidance that will be provided to DFO staff in relation to this directive.

Given the significance of the hydropower sector, the Cabinet Directive is of considerable interest to our members. If the Department focuses on clearly defined, critical issues, it will improve the probability of successfully achieving Canada's GHG reduction goals.

We respectfully recommend the Department take the following steps:

- 1) Focus the attention of DFO staff on the overarching objective of maintaining sustainable fisheries and fish populations rather than seeking to require a permit for every activity that could possibly affect any fish or any area of fish habitat.
- 2) Where DFO has authority to manage the inland fisheries, confirm fisheries management objectives for waterways where hydropower facilities operate to establish a basis for decision-making. Establish policies which would ensure that where management of the fishery is an area of provincial responsibility, will adhere to provincial fisheries management objectives, or in the absence of established objectives, seek concurrence with the provincial fisheries manager on the acceptability of the likely impacts to the fishery.

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<sup>6</sup> [Powering Canada a Blueprint for Success-Canada Electricity Advisory Council \(waterpowercanada.ca\)](#), p99

<sup>7</sup> [Government of Canada Announces Cabinet Directive for Clean Growth Projects - Canada.ca](#)

- 3) Develop updated policy guidance that considers the importance of hydropower facilities to Canada's efforts to reduce GHG emissions and that focusses on critical issues rather than all possible effects.
- 4) End the practice of applying fixed terms to *Fisheries Act* authorizations as required, rather than applying fixed terms to them.
- 5) Provide standard guidance for a wide range of low-impact activities that do not have critical activity-specific risk without requiring permits and authorizations for every activity.
- 6) In the absence of regulation, confirm the Department's policy guidance is in accordance with the *Fisheries Act* so that they become a more meaningful guide to DFO staff and proponents alike.

We believe that these actions are within the discretion already available to the Department under the *Fisheries Act* and are consistent with the recommendations of the Canada Electricity Advisory Council. These steps will be essential for the Department to enable the Cabinet Directive for Clean Growth Projects.

We would appreciate a briefing by your staff as to how the Cabinet Directive will be integrated into DFO decision making, and how the Department plans to approach the important matter of assisting staff in balancing the decision-making factors in Section 34.1 (1) of the *Act* specifically in relation to clean energy projects and hydropower permitting requests.

Sincerely,



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**Lorena Patterson**  
President and CEO

cc. Hon. Diane LeBouthillier, Minister of Fisheries, Oceans, and the Canadian Coast Guard  
Hon. Jonathan Wilkinson, Minister of Energy and Natural Resources  
André Bernier, Director General, Electricity Resources Branch, NRCan