

Annette Gibbons
Deputy Minister Fisheries and Oceans Canada
200 Kent Street
Ottawa, ON K1A 0E6

Subject: Electricity Sector's Challenges with the *Fisheries Act* and Proposed Solutions

Dear Ms. Gibbons,

As national representatives of the electricity industry we are writing to express our concerns with Fisheries and Oceans Canada's (DFO) administration of the *Fisheries Act*, (the Act) and its associated regulations and policies.

Electricity Canada is the national voice of the electricity sector. Our members generate, transmit and distribute electrical energy to residential, commercial, industrial and institutional customers in every province and territory.

WaterPower Canada (WPC) is the national voice of Canada's waterpower industry. As a not-for-profit trade association, WPC represents members across the sector, including hydropower producers, manufacturers, and developers, who collectively account for over 95% of Canada's waterpower capacity, advocating for the sustainable development and use of waterpower to meet Canada's current and future energy needs.

The electricity industry, and particularly the hydroelectric sector, faces serious challenges with the administration of the Act. **Since the Act was amended in 2019, our industry has experienced a high degree of regulatory uncertainty which is negatively impacting our members' ability to efficiently operate existing electricity generating facilities and to put forward new projects.** This regulatory uncertainty has added unnecessary costs through overly prescriptive requirements, excessive information requests, process delays and administrative burden for operators. These increased costs are ultimately paid by Canadians through higher electricity bills and, in our view, have not resulted in improvements in the sustainability of fish and fish habitat.

The 2019 amendments to the Act replaced the prohibition against projects that would result in serious harm to fisheries, with a prohibition against any works, undertaking or activities that may result in the harmful alteration, disruption or destruction of any amount of fish habitat (HADD) or the death of any fish. Taken together, the 2019 amendments to the Act and DFO's position statement on *The Management of Existing Facilities and Structures under the Fisheries Act and the Species at Risk Act* render hundreds of existing electricity generating facilities non-compliant. Many of these facilities, which were built in accordance with the rules of the day, have been operating for decades within healthy ecosystems that support sustainable fish populations and have been managed by operators with strong track records of fish and fish habitat protection.

These facilities were made non-compliant without due consideration of the productivity of relevant fisheries or fisheries management objectives, key factors to be considered under section 34.1(1) of the Act. Further, DFO has not developed an appropriate pathway to compliance for existing facilities that

now require *Fisheries Act* Authorizations (FAAs) even where they do not result in serious harm to relevant fisheries.

As a result of the overly cautious interpretation of the Act, and without due consideration of the decision-making factors in section 34.1(1) at each step of the regulatory process, many of DFO's management decisions have been viewed by our members as unreasonable when applied to existing facilities. A list of some of the challenging situations they have encountered is provided as Appendix 1 to this letter to illustrate the significant issues our members frequently face.

Applying the most stringent interpretation of the Act and its associated policies is reducing the ability for DFO staff to make risk-based and project specific decisions. This has resulted in regulatory uncertainty for our industry as the application of regulatory processes is not proportionate to the actual impacts of our facilities. Specifically,

- DFO has not developed policy to guide how staff shall consider the factors listed in section 34.1(1) or how those factors should be applied to existing electricity generating facilities. DFO staff have not communicated to industry how they have, or will, consider the section 34.1(1) factors in the review of specific regulatory applications. In most cases, DFO has not developed fisheries management objectives, or where a province is responsible for fisheries management, adopted those fisheries management objectives. As a result, it is our members' view that the goal posts are constantly moving and that requirements being applied are not commensurate with the actual net impact of their works, undertaking or activities on relevant fisheries and fish habitat.
- The slow rollout of guidance materials has contributed to a culture of subjective decision making amongst DFO staff. This has resulted in significant regional inconsistencies in the application of the principles of the Act and associated policies. While some DFO staff are making appropriate risk-based decisions, others are applying overly stringent requirements that are not warranted by the impacts to fish and fish habitat. This contributes to a further sense of regulatory uncertainty for the industry.
- The absence of compliance tools for routine and well understood activities that may result in a minor HADD or death of fish, but do not result in serious harm to fish and fish habitat (e.g., Prescribed Works and Waters Regulations), and the lack of acceptance of time-tested regional Best Management Practices, has created undue administrative burden for the industry and has negatively impacted the efficient operation of existing electricity generating facilities.
- The approach of requiring a proponent to obtain a FAA, even for low-risk, routine and well understood maintenance work, is costly, administratively burdensome and slow, adding unnecessary time and costs to what should be routine activities.
- The conditions routinely included in FAAs purely as a matter of policy, including multi-year monitoring, reporting and offsetting, are onerous, particularly for facilities that have been in operation for decades. Our members have raised examples where DFO staff have

acknowledged certain requirements may seem unreasonable but were still required to ensure consistency in program delivery.

- When FAAs are issued, they have short lifespans that are not commensurate with the lifespan of the facility, or the likelihood of ecosystem change during the term of the authorization. This need to undertake costly and time-consuming renewals confirms proponents' impressions that the regulatory requirements are too complex to allow for further development, hindering potential expansions and new investments.
- The *Authorizations Concerning Fish and Fish Habitat Protection Regulations* and the new *Policy for Applying Measures to Offset Harmful Impacts to Fish and Fish Habitat* have been interpreted by DFO to mean an offset plan, including physical offsetting works, is mandatory whenever a FAA is required, even where management objectives are being met and there is no residual adverse effects to be offset. DFO has gone so far as to suggest that offsetting measures are a mandatory requirement even where the net impact of a work, activity or undertaking is positive for fish and fish habitat.

Departmental decisions must shift from a focus on preventing the death of individual fish to a more outcomes-oriented approach in support of fisheries management objectives. Such an approach balances prevention of the death of individual fish against the actual impact of regulated activities on the productivity of relevant fisheries. If the activity will not affect the productivity of the relevant fish habitat or the sustainability of fish populations, there should be no need for authorization or offsetting. Addressing this core concern is of importance to both government and industry.

This balance can be achieved through the following three mechanisms:

1. **Make strategic amendments to the *Fisheries Act* and supporting regulations** to explicitly require decision making on a population (fishery) basis and to ensure public-interest considerations are addressed. Explicit consideration of the public interest as a factor in Section 34.1 (1) of the Act would place greater focus on more significant issues and less on minor ones. Legislative amendments will provide the greatest level of certainty for our industry over the long-term.
2. **Develop regulations specific to the electricity sector** that provides the necessary guidance to both government and industry and allows for the reasonable development of future projects and efficient operation of existing facilities. The regulation should document DFO's management objectives for relevant fisheries, set thresholds on fish mortality and habitat impacts, outline rules for existing facilities, and articulate how decision-making factors are applied for FAAs. This would provide needed clarity for DFO staff and more predictability for project proponents.
3. **Provide immediate guidance through updated policy and administrative directives** to DFO staff that mandates a balanced approach to decision making in consideration of the factors listed in section 34.1(1) and in alignment with national interests and priorities (i.e., regulatory efficiency in pursuit of nation-building projects). Directives should also accelerate the development of tools to maintain compliance for low-risk, routine

activities. Staff should be further directed to only require FAAs for activities where there is potential for significant adverse impacts on relevant fisheries and their habitat.

In implementing this approach, DFO should specifically address the following:

- Explicitly require FAAs only for activities where there is a potential for significant adverse impacts on relevant fisheries and their habitat as identified by applicable fisheries management objectives. Although Section 34.1(1) of the Act identifies these factors, these mandatory criteria are not consistently applied or given due consideration through regulations and DFO policies.
- End the practice of including expiry dates on FAAs for enduring infrastructure and instead embrace adaptive management practices based on actual observations. The Act gives authority to DFO to require additional actions if needed, there is no need for a FAA to expire.
- Ensure that FAAs consistently include all contemplated activities, such as maintenance and dewatering, so that additional authorizations are not required for planned operations. This could be achieved through the inclusion of a maintenance annex in an FAA, or through codes of practice that include maintenance actions.
- Avoid the delay associated with extensive and unnecessary baseline studies at existing facilities and instead rely on existing or initial estimates whenever feasible to inform authorization and offset requirements. These estimates can then be refined through monitoring and adaptive management measures should the risks to relevant fisheries or fisheries management objectives warrant.
- Develop a code of practice for routine maintenance and minor works at existing facilities like Transport Canada's accepted practices, so that FAAs are no longer required for routine maintenance work.
- In consultation with the industry, develop an annex to the *Policy for Applying Measures to Offset Harmful Impacts to Fish and Fish Habitat* that guides how the policy will be applied to existing electricity generating facilities.

Since the changes to the Act, our sector has engaged frequently with DFO to work collaboratively towards practical solutions to resolve the regulatory uncertainty for our industry. While we appreciate the continued engagement and the positive working relationships we have with DFO officials at all levels, meaningful progress to address our core concerns has not been achieved.

We are, however, pleased that DFO has expressed openness to work on an equivalency audit pilot project and Offset Policy Annex specific to the electricity sector at our most recent joint workshop held on May 29. We welcome this progress and look forward to establishing a mechanism for collaboration in making these items actionable and practical for industry.

With a new government and a new mandate, now is the time to take meaningful action to improve the regulatory environment for the electricity industry. The government has a clear mandate to build electricity infrastructure to secure Canada's position as an energy superpower in both clean and conventional energy. Hydroelectricity supplies 60% of the electricity used to power Canadian homes and businesses. This power is emissions-free, renewable, and completely dispatchable. It must continue to play a significant role in Canada's energy future.

The provinces and territories are forecasting electricity demand to double by 2050. Meeting this demand will require an aggressive buildout of electricity infrastructure, including maximizing the capacity of existing facilities, at a scale and pace we have not seen for generations. Improving the operating environment for existing electricity generating facilities will enable our industry to deliver clean, affordable and reliable power more efficiently. This can be done while maintaining robust environmental protections and advancing reconciliation with Indigenous peoples.

A more certain and predictable regulatory environment will help electricity companies maximize the capacity of existing facilities and enable companies to allocate greater resources towards the buildout of our electricity grids. These improvements will also allow DFO to deploy limited resources and regulatory attention towards mitigating the most significant issues impacting fish and fish habitat.

Thank you for considering the position of the electricity industry on the pressing need for *Fisheries Act* reform. We would be pleased to meet with you to discuss charting a path forward at a time of your convenience.

Should you have any questions please do not hesitate to reach out.

Sincerely,



Francis Bradley
President and CEO
Electricity Canada



Lorena Patterson
President and CEO
WaterPower Canada

CC:

Kaili Levesque, Associate Deputy Minister for Fisheries and Oceans Canada

Arran McPherson, Assistant Deputy Minister, Ecosystems and Oceans Science for Fisheries and Oceans Canada

Kate Ladell, Director General, Ecosystems Management for Fisheries and Oceans Canada

Mollie Johnson, Deputy Secretary to the Cabinet, Plans and Consultations for Privy Council Office

Debbie Scharf, Assistant Secretary to the Cabinet, Clean Growth, Privy Council Office

André Bernier, Director General, Electricity Resources Branch, Natural Resources Canada

APPENDIX 1 - Examples of DFO's unreasonable interpretation and administration of the Fisheries Act

The following examples have been collected from members in all regions:

1. DFO staff turnover resulting in 7 lead biologists since 2017 when discussion on renewing the existing FAA first began.
2. One file had three different assessors in two years and the proponent has had to bring the individuals up to speed each time on the authorizations that DFO issued. No progress has been made on the file during this time to address issues and deliverables.
3. One FAA took 4 ½ years to obtain for a 9-month refurbishment project.
4. In one case, DFO indicated that the extended delays coming from their end may mean having to do even more offsetting, despite their role in those delays.
5. "We have been pursuing an amendment to a project FAA, a simple request to extend it for the life of the project after it was issued for the project's construction and early operations. Despite regular follow up and being passed around different assessors for a couple of years, DFO responded days before the FAA expired to say they will require new monitoring terms and conditions for an initial 20-year period. This of course mean additional costs. The long-term monitoring conducted to date has not shown any negative impacts [to fish population]. We are considering withdrawing the request and operating without an FAA because of the challenges we're experiencing."
6. For storage weirs that aren't used anymore and need to be dismantled for the area to be returned to its natural state, DFO requires an FAA and related offsets for the habitat that is lost as a result of undoing the flooding.
7. Some members have been asked to offset fluctuating reservoir levels in reservoirs that have been in operation and fluctuating for 100 years.
8. In an area where minnow fish get stranded in low water years, a member has to fish 50-100 minnows out the area and move them to a better area to avoid fish deaths. The cost of this procedure is \$30,000 once or twice a year.
9. In one facility, three years of data collection have cost ~\$375,000 and another year is planned.
10. In another, total costs for offsetting and pre- and post-project monitoring were \$400,000 for an initial project cost estimate of \$5,000.
11. Some members have seen their application delayed because DFO weighed in on archeology discovered on the project site, a provincial jurisdiction.

12. Some applications were made with nearly a decade of monitoring data from an advanced qualified environmental professional (QEP). DFO mandated additional data collection despite the years of data showing that fish population, productivity, and biomass have improved since projects began operating. The member proceeded with the additional monitoring at significant time and cost, which supported the conclusions of the original monitoring. DFO has still not confirmed that the extensive data provided is sufficient to make a decision.

13. DFO has been pushing for expensive invertebrate monitoring despite the limited scientific value for the projects or the requested IFR amendments. DFO's own scientific branch states that it is more beneficial to monitor the fish themselves as per a 2016 memo. DFO maintains that they will not proceed with the applications unless invertebrate monitoring is added.

14. DFO has proposed a proponent conduct a costly Instream Flow Study (IFS) despite one already being in their baseline and Long-Term Monitoring Plan (LTMP) data. IFS studies are normally performed when an entirely new project is being constructed, and the member is only seeking to change a minor flow value in one area of a creek.

15. For reservoirs designed to have fluctuating levels from day one and where the local ecosystem has adapted to such fluctuating conditions, DFO has asked to offset reservoir fluctuation in order to issue an FAA.