



March 21, 2023

Via email and mail

The Honourable Joyce Murray
Minister of Fisheries, Oceans and the Canadian Coast Guard
200 Kent Street
Station 15N100
Ottawa, ON K1A 0A6

Dear Minister Murray:

Re: Implementation of the *Fisheries Act* - Cumulative Effects

We are writing to express our serious concerns with your department's approach to implementing the amended *Fisheries Act* and addressing cumulative effects. Many of our organizations have previously written to you about these concerns and we therefore request a meeting with you to discuss this issue.

In 2019 Parliament established a specific mandate to address cumulative effects associated with regulations and decision-making under the *Act*. Unfortunately, DFO is failing to follow the new legal requirement to consider cumulative effects when making policies and regulations, resulting in the ongoing degradation of fish habitat in Canada.

We are aware of the long-standing challenges in undertaking cumulative effects assessments in an environmental assessment framework, but that is not what this correspondence is about. Instead, we are referring to the specific accumulating effects of projects that are directly mismanaged by DFO. Currently, your department only uses the authorizations process for under 200 projects per year (for which offsets are required to address harm). Meanwhile, your department allows thousands of other projects that result in the death of fish or HADD to proceed unchecked despite being explicitly prohibited by the Act. No offsets are provided, and these “death by a thousand cuts” losses continue to accumulate.

There are decades of empirical observation and analysis confirming significant habitat loss resulting from the routine application of *Fisheries Act* regulations and related policies as well as decision-making frameworks. But despite substantial amendments to the Act in 2019, no meaningful improvements are being made to address these issues.

1. The legal requirement regarding cumulative effects

Pursuant to section 34.1(1)(d) of the amended *Fisheries Act*, cumulative effects must be considered before the Minister recommends that regulations be made in regards to fish habitat protection, and before exercising decision-making powers in those sections of the Act. This requirement was included in the amended legislation to address well-documented evidence of cumulative harms to fish habitat associated with the application of existing *Fisheries Act* regulations.

The language of s. 34.1(1)(d) is clear. It requires the Minister to “consider” cumulative effects, but read together with the purpose of the Act, which includes the “protection and conservation of fish and fish habitat”, the objective is to exercise the Minister’s responsibilities in a way that prevents and reduces cumulative harm to habitat. If the Minister does not consider cumulative effects in making regulations, those regulations may be subject to review by the courts.

2. Based on the Department’s recently finalized Codes of Practice, proposed Prescribed Works regulations, and Draft Position Statement on the Consideration of Cumulative Effects on Fish and Fish Habitat, DFO is not meeting its legal requirements under section 34.1

Despite ongoing engagement with rightsholders and stakeholders since 2019, the Department has offered no solutions to address the accumulating harm caused by small projects that cause HADD or death of fish. The Department continues to allow such projects via Letters of Advice, despite this not being among the seven mechanisms by which DFO can exempt proponents from *Fisheries Act* prohibitions under s. 34.4(2) and 35(2).

The Department has also finalized several Codes of Practice, all of which allow proponents to cause HADD or death of fish despite prohibitions in the Act. Section 34.2(1) explicitly limits the Minister to establishing Codes of Practice *only* for projects that avoid death of fish and HADD. Projects that cause HADD or DoF should be managed via Prescribed Works, but doing so requires consultation with Indigenous peoples and consideration of cumulative effects. By

misapplying Codes of Practice to manage small projects, the department is avoiding its duty to consult as well as the legal requirement to consider cumulative effects.

Prescribed Works are a new tool under the amended *Act* that could effectively replace Letters of Advice to manage small projects, if cumulative effects are properly considered and avoided or addressed. These would be advantageous to proponents, given that permits can be registered automatically without the need for lengthy regulatory review. This would also reduce the burden on Departmental staff for reviewing small, routine works. Unfortunately, the first proposed Prescribed Works regulation, for shoreline stabilization, allows proponents to infill shorelines with riprap, 100 meters at a time, with no consideration of how harm from this practice might accumulate or mechanism to prevent it from doing so. The intent of the Prescribed Works tool is clearly to manage small projects efficiently in a manner that does not result in cumulative harm to fish habitat. The proposed regulation does not address the cumulative effects of shoreline stabilization projects -- a major source of harm to fish habitat across Canada.

To date, the Department has ignored or refused to incorporate all recommendations for how to do so. Department staff have not given any indication of how or if cumulative effects are being considered in the development of *Prescribed Works and Waters Regulations*. For example, how is the risk of residual harm calculated, managed, and accounted for on a systemic basis?

The Department's draft Position Statement on the consideration of cumulative effects is unduly narrow in scope, and focuses only on how cumulative effects will be considered when issuing authorizations for large projects. Earlier recommendations from many of us, to expand the Position Statement to include consideration of cumulative effects of small projects not managed by authorizations, have been completely ignored.

It is deeply troubling that more than three years after the *Act* was amended, and after multiple extensive representations by rightsholders and stakeholder, the Position Statement is still so narrow in scope that it excludes most of the situations for which cumulative effects must be considered under s. 34.1(1)(d).

3. Minister's responsibility

Under the amended *Act*, the Minister is required to consider cumulative effects when making regulations (i.e. in the design stage). Mere acknowledgment of cumulative effects is not sufficient. Cumulative effects must be considered in both regulatory development and decision-making so that the regulations function to limit or prevent cumulative effects.

To undertake that consideration you, as Minister, will need analysis from the Department about the cumulative effects associated with the operation of any proposed regulation. For example, is there any residual harm (including risk of residual harm) associated with the application of the regulation, whether through regulatory authorizations, through non-regulatory pathways associated with the regulation (e.g. self-assessment) or options for offsetting? How is this residual harm and risk of residual harm addressed in a way that aligns with the purpose of the

Act and your role as Minister to administer the responsibilities for the protection and conservation of fish habitat?

4. Managing the cumulative effects of small projects

There are many opportunities to manage the cumulative effects of small projects in accordance with the Department's mandate to protect and conserve fish habitat. For example, the cumulative effects of small projects can be managed by establishing quantitative limits to harm in watersheds or other appropriate scales, beyond which Prescribed Works processes are no longer applicable, or by establishing mechanisms to address the residual harm of Prescribed Works such as fees in-lieu and third-party offsetting models. Additionally, the Department's FFHPP staff and their colleagues in Integrated Planning will need to collaborate to understand the current status of a watershed, and identify habitat loss thresholds and alteration beyond which Prescribed Works processes are no longer applicable. There are also opportunities for the Department to cooperate with Indigenous authorities and regional entities.

DFO has prior experience investigating and implementing management approaches to cumulative effects. Recent analysis by DFO scientists discusses different types of assessment frameworks as a foundation and how they have been applied. DFO has also applied Ecological and Biological Significant Area Guidelines to develop management plans for human activities based on conservation objectives and relevant thresholds. Risk assessment and risk management have also been used to manage the cumulative effects of placer mining at a watershed scale in cooperation with the Yukon Government and the Yukon Council of First Nations.

It is not clear why any of this experience does not appear to be informing the Department's implementation of the new *Act*.

5. DFO is not fulfilling its duty to consult Indigenous Peoples

It appears that the Department is continuing to avoid the legal responsibility to consult with Indigenous peoples when managing and regulating small projects. DFO must consult with Indigenous peoples prior to issuing an authorization or making Prescribed Works regulations. The Department routinely avoids this responsibility by allowing small projects that cause HADD or death of fish to proceed via Letters of Advice. This responsibility has also been avoided by finalizing Codes of Practice for projects that should be managed under Prescribed Works because they cause HADD or death of fish. Department staff explicitly advised us that Codes of Practice were used for these classes of projects in order to avoid time-consuming consultation that would be required to develop Prescribed Works regulations for these projects.

DFO should not continue to allow proponents to harm fish habitat or kill fish without consulting with Indigenous peoples on whose traditional territories these projects are occurring.

6. Conclusion

Our organizations represent a broad cross-section of Canadians who recognize the cumulative harm caused by DFO's long-standing failure to properly manage small projects. Your department is not following legal requirements under the amended *Fisheries Act* to consider cumulative effects when making regulations. There is expertise available within the Department and externally to develop approaches to address the cumulative effects of small projects.

We would appreciate the opportunity to meet with you to explore how to make progress on meeting this responsibility.

Sincerely,

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