



August 1, 2021

Via email and mail

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

Dear Minister Jordan:

Re: Implementation of the Fish and Fish Habitat Protection Provisions of the *Fisheries Act*

We are writing to request a meeting with you to discuss our serious concerns regarding your department's activities to modernize and develop new policies and regulations to implement the fish and fish habitat protection provisions of the *Fisheries Act*. In particular, we are concerned about the approach the Department has proposed to address the new legal requirement to consider cumulative effects.

Currently, your department issues authorizations for about 200 projects per year. Some of these projects are authorized with mitigative measures, such as offsets. At the same time, thousands of other projects are reviewed by the Department or subject to self-assessment by project proponents and proceed without authorizations. Yet it is well-documented that the

residual harm associated with all of these projects adds up to significant environmental impacts to fish and fish habitat. In 2019 Parliament established a specific mandate to address cumulative effects associated with regulations and decision-making under the *Act*. Our concern is that your department is not on track to meet its legislated mandate.

1. The legal requirement regarding cumulative effects

Amendments to the Act

According to section 34.1(1)(d) of the *Fisheries Act*, as amended, cumulative effects must be considered when the Minister makes regulations related to habitat protection and pollution prevention.

This requirement was included in the 2019 amendments to the *Act* to address well documented evidence of cumulative harms to fish habitat associated with the application of existing *Fisheries Act* regulations, and the need to refine regulatory approaches. There are decades of empirical observation and analysis from government and external sources confirming significant net habitat loss resulting from the routine application of *Fisheries Act* regulations and related policies as well as decision-making frameworks.

Minister's responsibility

Under the amended *Act*, the Minister is now required to consider cumulative effects when making regulations (i.e. in the design stage). Mere acknowledgment of cumulative effects is not enough. 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 application 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?

2. Based on the Department's *Discussion Paper on Cumulative Effects* and related public presentations, DFO not on track to implement the legal requirement under section 34.1

Requirements under the Act

The materials and communications provided by the Department regarding its proposed approach to implement section 34.1 fall short of what is required by the legislation. The Department is proposing to consider cumulative effects only at the time of decision making (i.e. authorizations). The Discussion Paper describes this objective, but includes nothing about regulatory development:

Policy Objective 2: Guide FFHPP staff in decision-making

As part of the consideration of cumulative effects, the FFHPP will need to determine the various ways cumulative effects could be incorporated into its decisions related to fish and fish habitat. For instance, the Program could:

- *Determine whether changes to the proposed WUAs are necessary as a result of the consideration of cumulative effects; and/or,*
- *Identify and include additional conditions in the proposed authorization in order to reduce a proposed project's contribution to the cumulative effects within a given aquatic ecosystem.*

This approach ignores the legal requirement under the Act that the Minister will consider cumulative effects at the time of making regulations, and potentially exposes regulations made without due consideration of cumulative effects to legal challenge.

The Department's current and proposed regulatory practices in relation to certain small projects offer a practical example. Currently, such projects are allowed via *Letters of Advice* and *Codes of Practice*. The proposed prescribed works regulation would replace *Letters of Advice* for some of these projects. Empirical research has shown there is significant residual harm to fish habitat accumulating from the use of *Letters of Advice*, and it is clear that the proposed *Prescribed Works and Waters Regulation* is likely to allow similar harms. However, Department staff have not given any indication of how or if cumulative effects are being considered in the development of the *Prescribed Works and Waters Regulation* in the current consultation materials in keeping with the new *Fisheries Act* requirement. For example, how is the risk of residual harm calculated, managed, and accounted for on a systemic basis?

How can the cumulative effects requirement be implemented?

In our view, once the problem of cumulative effects is effectively brought forth through consideration in regulatory development, it can begin to be managed 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 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 thresholds or limits to habitat loss and alteration. There are also opportunities for the Department to cooperate with Indigenous authorities and regional entities.

Conclusion

Our organizations represent a broad cross-section of Canadians who care about these issues. The new *Fisheries Act* legally requires that your department consider cumulative effects when making regulations to implement the 2019 amendments, to secure the protection and conservation of fish and fish habitat. There is expertise available within the Department and

externally that can support the analysis needed to consider cumulative effects in the development of regulations.

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

Sincerely,

Rick Bates

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Executive Director and Senior Counsel
West Coast Environmental Law Association

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