Electricity Canada and WaterPower Canada's Joint Submission on the Proposed Amendments to the *Authorizations Concerning Fish and Fish Habitat Protection Regulations*

January 12, 2025

Fisheries and Oceans Canada (DFO) have asked for input from Electricity Canada, Waterpower Canada and member companies on potential amendments to the *Authorizations Concerning Fish and Fish Habitat Protection Regulations* (the regulation). We appreciate the opportunity to provide comment on the questions posed in the presentation *Amending the Authorization Regulations to right-size regulatory requirements* that was given to Electricity Canada and WaterPower Canada on November 13, 2025.

We believe amendments to the regulation have the potential to improve the efficiency of the authorization process and better align information requirements with the likely impact of the work, undertaking or activity that is to be authorized. If implemented appropriately, the specific amendments we propose below will be a positive step in reducing red tape and right-sizing the resources required for DFO to administer permitting. However, we remain of the opinion that targeted amendments to the *Fisheries Act,* supported by a sector-specific regulation is the most appropriate path forward to improve regulatory certainty and efficiency for the sector. We would be pleased to collaborate with DFO on these initiatives and any efforts to improve the implementation of the *Fisheries Act* for our sector.

Proposed Tiered Approach to *Fisheries Act* Authorizations for the Electricity Sector

At our November 13 workshop DFO suggested a tiered system for application requirements based on project risk. Collectively we have given the suggestion a great deal of thought. However, all electricity generating facilities are unique and cannot be easily classified into tiers that are widely applicable across sectors and regions. The risk to fish and fish habitat posed by a work, undertaking or activity is not simply a factor of the project type and size. Scheduling, the local geography, geology, ecology and provincial or territorial jurisdiction, the current state of fisheries resources, the fishery and fisheries management objectives, and the ability of rights holder to utilize those resources in the exercise of their rights must all be considered.

We are therefore of the view that the level of scrutiny in decision making and mitigation should be commensurate with the extent to which a project or activity affects the factors outlined in Section 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.

If these factors are properly considered, especially with fish populations as a priority, the appropriate level of scrutiny and decision making can be fit-for-purpose with low residual impact activities and projects getting simple requirements and higher potential residual impacts getting more scrutiny. The level of scrutiny and effort required ought to be dependent on outcomes, not on project size.

We propose targeted amendments to the regulation to clarify the Minister's discretion, and accompanying policy guidance specific to our sector to support the appropriate application of the regulation based on these factors. Our proposed approach would make it possible to tailor the information requirements of a work, undertaking or activity on a case-by-case basis.

- Recommendations 1 through 9 will deliver immediate benefits to our industry and to DFO through regulatory amendments to the *Authorizations Concerning Fish and Fish Habitat Protection Regulations*.
- Recommendations 10 and 11 describe a policy framework to guide the implementation of the amended regulation by using a conceptual tiered approach specific to our sector. This framework should form the basis for a sector-specific regulation to ensure even greater efficiency, certainty, consistency and transparency in decision making for the sector and across regions.

Aligning application requirements to project risk

Recommendation 1: amend the regulation such that Schedule 1 criteria may be waived or modified based on the factors set out in paragraph 34.1(1) of the *Fisheries Act*.

By modifying or waiving the requirements of Schedule 1, DFO assessors can tailor the information requirements to the impact, or potential impact, of the work, activity or undertaking. By incorporating the factors in paragraph 34.1(1) of the Act, consideration of the relevance of the fish and fish habitat being affected is assured and this relevance becomes the basis for establishing

more or less stringent requirements under Schedule 1. For example, where the operation of an existing facility does not impact the productivity of relevant fisheries or fisheries management objectives, the requirement for offsetting could be waived.

Waiving the requirement for an offsetting plan would preclude the need to submit a letter of credit under Subsection 2(1)(b). Moving the existing text of Subsection 2(1)(b) and the exception under Subsection 2(2) to Schedule 1 ties the requirements together and applies the necessary discretion to letters of credit. This would also allow for the offsetting requirements and the requirement for letters of credit to be waived for habitat enhancement projects or projects being advanced by not-for-profit or Indigenous organizations in partnership with a Crown corporation.

This would allow for the submission of an otherwise complete application that triggers established time limits and keeps the process moving forward as the proponent collects additional information. If needed, DFO can still stop the clock when the financial assurance is requested, but after the regulatory review and any required consultations are largely completed and measures to offset have been agreed to. This would also provide an opportunity for cost estimates and work plans to be created by the proponent after the offset plan is scoped but before the authorization is granted.

The proponent can be advised of any waiver or modification of the requirements of Schedule 1, including offsetting and letters of credit, by DFO in their response to a request for review or following the submission of a partially completed application for authorization. This process already exists and would remain subject to the existing process timelines that apply to both the proponent and the assessor.

Suggested regulatory language:

> **Required information and documents**
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> **2 (1)** The Minister may, on application, issue the authorization referred to in paragraph 34.4(2)(b) or 35(2)(b) of the Act. The application must be made to the Minister in writing and may include
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> ~~**(a)** the information and documents set out in Schedule 1.; and~~
>
> ~~**(b)** an irrevocable letter of credit issued by a recognized Canadian financial institution, or another equivalent financial guarantee, including a performance bond, to cover the costs of implementing the plan referred to in section 16 of Schedule 1.~~ **[Move text of 2(1)(b) to Schedule 1]**
>
> **Exception**
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> **(2)** After considering the factors outlined in paragraph 34.1(1) of the Act, the Minister may waive or otherwise modify the required information and documents set out in Schedule 1. ~~**(2)** Paragraph (1)(b) does not apply if the applicant is Her Majesty in right of Canada, Her Majesty in right of a province or the government of a territory.~~ **[Move original text to Schedule 1]**

Recommendation 2: introduce "description", as used in Schedule 1 (referred to as "detailed description"), as a defined term in the regulation.

While the language of Schedule 1 is general in nature, it does create concerns as there is no specific guidance available on how detailed a "description" must be. By introducing "description" as a defined term, the requirements of Schedule 1 can be interpreted by proponents and DFO in a more focused way. Additional sector-specific guidance on sufficiency can then be developed through policy to address the unique needs of various sectors as they will all impact on the factors outlined in paragraph 34.1(1) in unique ways.

Suggested regulatory language:

> **Interpretation**
>
> **[NEW] 1.1** In Schedule 1 of these Regulations, **description** means a description sufficient to allow the Minister to reasonably consider the factors listed in paragraph 34.1(1) of the *Act*.

Recommendation 3: make minor amendments to clarify and re-organize the requirements outlined in Schedule 1 to align with the *Fisheries Act* and policy and to better allow requirements to be tailored to the level of risk.

Remove "quantitative" from sections 13 and 14 and add "residual" to the death of fish and HADD discussed in sections 13, 14, 15 and 16.

This would allow for more qualitative, but still appropriately detailed, descriptions of the residual death of fish and HADD where the impact from the project is low and does not warrant onerous quantification. This does not preclude a more quantitative assessment where it is warranted (i.e., higher risk or greater impact). The decision to accept qualitative vs. quantitative assessments, and the extent to which an existing facility may benefit fish and fish habitat (thereby mitigating offsetting requirements) should be guided by policy.

Explicitly stating that the requirement is for the quantification of the *residual* death of fish and *residual* HADD is needed. This will align the regulation with DFO's offsetting policy.

Suggested regulatory language:

> **Information and Documents To Be Provided**
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> **13** A ~~quantitative and detailed~~ description of the residual death of fish referred to in subsection 9(2) after the measures and standards referred to in paragraph 10(a) are implemented.
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> **14** A ~~quantitative and detailed~~ description of the residual harmful alteration, disruption or destruction of fish habitat referred to in subsection 9(2) after the measures and standards referred to in paragraph 10(b) are implemented.
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> **Habitat Credit**
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> **15** Where required by the Minister after considering the factors outlined in paragraph 34.1(1) of the *Act*, the number of habitat credits that the applicant plans to use to offset the residual death of fish referred to in section 13 and the residual harmful alteration,

disruption or destruction of fish habitat referred to in section 14, as well as the number of any certificate referred to in paragraph 42.02(1)(b) of the Act.

Offsetting Plan Requirements

To improve the regulatory efficiency of the authorization process it is imperative that offsetting plans are not necessarily required to complete an application with the possibility of receiving an authorization without offsetting.

Suggested regulatory language:

Offsetting Plan

16 Where required by the Minister after considering the factors outlined in paragraph 34.1(1) of the *Act*, a ~~detailed~~ description of a plan to offset the residual death of fish referred to in section 13 and the residual harmful alteration, disruption or destruction of fish habitat referred to in section 14 that were not offset by the habitat credits referred to in section 15, including

(a) …

[NEW] (k) an irrevocable letter of credit issued by a recognized Canadian financial institution, or another equivalent financial guarantee, including a performance bond, to cover the costs of implementing the plan referred to in section 16 of Schedule 1. This information is not required if the applicant is His Majesty in right of Canada, His Majesty in right of a province or the government of a territory. **[Moved/modified from the original text of Subsections 2(1)(b) and 2(2)]**

Tailoring information requirements to project type

We also support the ability to tailor information requirements to project type and believe that can be achieved through the amendments proposed above. By introducing the ability to waive or modify the requirements of Schedule 1, assessors can appropriately tailor information requirements to project type guided by policy. We are of the opinion that it is not necessary to prescribe information requirements based on project type within the regulation.

We understand that DFO has identified issues with the authorization of rehabilitation projects and agree with the objective of resolving this situation. We believe that works, undertakings or activities that are predicted to be net neutral or net positive for fish and/or fish habitat should not require offsetting. Amending the regulation such that all Schedule 1 criteria can be waived or modified could practically resolve many hurdles associated with obtaining a *Fisheries Act* Authorization for any project type, including those that are net neutral or positive.

We further believe that such works should not require a *Fisheries Act* Authorization. We are supportive of additional legislative and a sector specific regulation (that could for example include class authorizations) that would allow for triaging these and other projects out of the application process all-together to achieve even greater efficiency.

Financial guarantee

We agree that where offsetting is required, there is benefit in requiring financial guarantees later in the authorization process. The requirement can be applied once measures to offset have been finalized through the regulatory review and any required Crown consultations.

Recommendation 4: when offsetting is required, financial assurance can be provided at any time prior to the issuance of authorization without rendering the application incomplete.

This can be achieved by combining the current requirement under Subsection 2(1)(b) and the exception under Subsection 2(2) as a single subsection under the requirement for a plan to offset (Subsection 16(K) in the example text provided above).

Recommendation 5: the exception to the requirement for a letter of credit should be extended to Indigenous groups working in partnership with a Crown Corporation.

Partnership agreements between electricity companies, many of which are Crown Corporations, and Indigenous partners are becoming increasingly prevalent. Indigenous partners are not privy to the exception granted to Crowns and must maintain a letter of credit. To maintain a letter of credit, annual fees are charged by the carrying financial institution which reduces the financial benefit for all partners. Ensuring letters of credit are maintained also creates an administrative burden for the department.

We believe financial guarantees are unnecessary under partnership structures that would maintain the Crown's liabilities under the *Fisheries Act*. Allowing the Minister to waive the financial guarantee in circumstance like this is enabled by our proposed amendments above and would be positive for advancing reconciliation.

Expanded grounds for amendment

We are not aware of a situation where the Minister would need to amend, suspend or cancel an authorization but does not already have the authority to do so. Any expansion of this authority without a clear need to do so risks significantly increasing the compliance risk for proponents that have gone through the onerous process of securing authorizations for their facilities. If authorizations can be amended, suspended or cancelled without sufficient cause they cease to provide legal certainty.

The Minister does not require any additional grounds for amendment, suspension or cancellation to allow for adaptive management. Adaptive management needs to be implemented through the application of conditions developed by DFO in collaboration with the proponent and applied to the

authorization at the time of issuance. These conditions can allow for future amendments based on monitoring, metrics and contingencies already agreed to by both parties.

Recommendation 6: do not amend the regulation to expand the Minister's powers to amend, suspend or cancel a *Fisheries Act* Authorization.

Engagement with Indigenous Peoples

Early engagement with Indigenous peoples for high impact projects is well understood by our sector to be a best practice. We also recognize the benefits of early engagement in advancing regulatory applications in a timely manner.

The existing language in paragraph 7 of Schedule 1 is sufficient to gather information on Indigenous interests resulting from the proponent's engagement activities. The extent of proactive engagement by the proponent is, and should remain, discretionary. We do not believe it is appropriate to impose mandatory engagement prior to a Crown duty to consult being triggered, and prior to DFO delegating any procedural aspects of that Crown consultation to the proponent.

We recommend that DFO instead engage with the Impact Assessment Agency of Canada and the Major Projects Office to ensure proactive engagement by proponents and with provincial environmental assessment departments and agencies where appropriate to coordinate Crown consultation with Indigenous peoples takes place during the environmental assessment of high impact projects.

Recommendation 7: do not introduce a mandatory requirement for proponents of high-impact projects to engage early with Indigenous peoples as part of the authorization process.

Additional amendments to the regulation for consideration

Recommendation 8: amend the regulation to explicitly allow for authorization up to and including the intended lifespan of the work, undertaking or activity.

Electricity sector facilities have design lives of 50 to 100 years, often with minimal physical or operational changes over that time. The current practice of issuing *Fisheries Act* authorizations with unnecessarily short terms of 10 to 15 years creates a regulatory burden for industry and additional administrative work for the DFO.

With the Minister's existing powers to apply conditions and adaptive management criteria at the time of authorization, and the powers to amend, suspend, or cancel an authorization should conditions warrant it, the regulations should explicitly enable longer term approvals for enduring infrastructure.

Recommendation 9: amend the regulations such that review timelines do not restart each time additional information is requested by DFO.

On receipt of a completed application the regulations provide DFO 120 days to complete a review and render a decision. The time limits that apply to DFO's process should not start over each time additional information is requested. The 60- and 90-day periods of time prescribed should not be restarted simply because outstanding information is received as the prescribed time limits were established with the expectation that they were sufficient to allow for the review of that material.

The ability to stop the clock under Subsection 4(6) will remain and DFO can use this additional time to advance other aspects of its review while the proponent responds to the information request.

This will incentivize DFO assessors to meaningfully engage with proponents at the request for review stage; to ensure their tailored information requirements are appropriate and communicated in a timely manner; and to continue reviewing the already submitted materials while the proponent gathers the outstanding items.

Suggested regulatory language:

> **Subsection (3) applies ~~again~~**
>
> **(4)** The Minister must, on receipt of any information or documents set out in the notification, send to the applicant a confirmation of receipt that indicates the date of receipt. Subsection (3) continues to apply to the application~~, except that the period begins on~~ from the date indicated in the original confirmation of receipt.
>
> **Time limit resumes ~~starts over~~**
>
> **(8)** The time limit referred to in subsection (3) or (5) resumes ~~starts over~~ as soon as all of the following conditions have been met:
>
> **(a)** all information or …
>
> **Notice**
>
> **(9)** The Minister must notify the applicant in writing of the day on which the time limit referred to in subsection (3) or (5) resumes ~~starts over~~.

We recommend the same amendments be made to Subsections 8(3), (7) and (8) to address the time limits that apply to proponent's requests to cancel, amend or suspend an authorization.

Recommendations for policy guidance that supports amendments to the regulation

Recommendation 10: policy is required to guide the implementation of the amendments suggested above.

The electricity sector is committed to working with DFO to develop sector specific policy to aid assessors in tailoring information requirements to our works, undertakings and activities. A core objective of the policy guidance must be to ensure consistent interpretation of the regulation for assessors across the regions to driver greater consistency in decision-making.

The level of scrutiny in decision making and mitigation should be commensurate with the extent to which a work, undertaking or activity is likely to affect the factors outlined in Paragraph 34.1 (1) of the *Fisheries Act*. When properly considered, these factors will guide assessors in determining which requirements from Schedule 1 are appropriate and how much detail is necessary to make an informed decision.

This policy will also inform determinations of the sufficiency and reasonableness of the required "descriptions" and provide mechanisms to ensure the transparency and fairness of such determinations, for example by using independent Qualified Environmental Professionals and the establishment of a dispute resolution mechanism.

Table 1 proposes tiers specific to our sector based on the extent to which a project or activity affects the factors outlined in Section 34.1 (1) of the *Fisheries Act*. "Tier 0" attempts to encompass the works, undertakings and activities that are not currently subject to FAAs. While outside of the scope of the regulation, it is included as context for the broader discussion, as is "Tier 3".

Table 1 - Conceptual approach to tiering for the electricity sector

Tier	Description	Requirements	Regulatory Treatment
0	No or negligible residual impacts to Fish and Fish Habitat after avoidance and mitigation measures. For clarity, this covers activities that may have an impact on Fish and Fish Habitat but for which mitigation measures will reduce impact such that it is insignificant.	Adherence to appropriate Letters of Advice, Codes of Practice and BMPs.	No further review is necessary
1	Residual impacts to relevant Fish and Fish Habitat are low or result in a net-gain or no-net loss.	Project Review with simplified information requirements.	FAA granted, with the focus of the authorization being to ensure that mitigations are applied where reasonably possible. No offsets would be required. Monitoring and follow-up reporting would be limited in scope and extent.
2	Residual impacts to relevant Fish and Fish Habitat are likely to be moderate or significant.	Project Review with fit-for-purpose information.	FAA granted with offset plan focused on relevant species and habitat.

3	Projects designated as a Project of National Interest subject to the coordinated assessment processes to be developed by the Major Projects Office and the *Building Canada Act*.	Project Review in accordance with requirements of the *One Canadian Economy Act (Bill C-5)*	

Please note that characterization of "Tier 1" and "Tier 2" are based on existing legislative and policy frameworks. We remain of the opinion that legislative amendments and a sector specific regulation are needed to appropriately triage some of these projects and activities out of the application processes altogether. However, we are focusing on comments on the existing legislative and policy context for the purposes of this submission. We would welcome the opportunity to provide further comment on those necessary changes.

Recommendation 11: DFO, with support from our sector, should develop policy to return financial guarantees at an appropriate time.

Maintaining a letter of credit adds financial and administrative costs to a project. DFO should develop a policy to return, or reduce over time, financial guarantees. This would recognize the burden of maintaining the letter of credit for many years while still maintaining the department's ability to ensure a proponent's obligations are fulfilled.

Next Steps

1. Implement the proposed amendments to the regulation (recommendation 1 through 9).
2. Develop policy guidance specific to the electricity sector to accompany the regulatory amendments (recommendations 10 and 11).
3. Work with the sector to develop a sector-specific regulation to introduce a tiered approach to *Fisheries Act* authorizations for the electricity sector. The regulation would clarify that projects that fall under "Tier 0" and certain projects that fall under "Tier 1" can move forward without requiring a *Fisheries Act* Authorization.

Thank you for the opportunity to provide feedback and we look forward to continued engagement with the Department on this important consultation.

Sincerely,

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