



Canadian  
Electricity  
Association

Association  
canadienne  
de l'électricité

**Federal Discussion Paper on Environmental and Regulatory Reviews:  
A Supplementary Submission on Enhancing Protection for Canada's Fish  
and Fish Habitat**

**Canadian Electricity Association (CEA)**

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**Final**

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## **Table of Contents**

1. Introduction	2
2. Planning and Integrated Management	3
Compensation Mechanisms, Banking and Offsets	5
3. Partnering and Collaboration	6
4. Monitoring and Transparency	7
5. Regulatory and Compliance Activities	8
Prohibitions	8
Compliance and Transition Time	9
Implementation of Section 89 and Self-Assessments	10
6. Summary of Recommendations	11

## 1. INTRODUCTION

The Canadian Electricity Association (CEA) respectfully submits this supplementary brief for consideration by the government as part of the review process for the *Fisheries Act*. CEA is supportive of the government's decision to review the *Fisheries Act*, as part of the environmental and regulatory review process, to incorporate modern safeguards and improve public and Indigenous engagement. While our sector is committed to protecting and conserving our natural resources, we're concerned about some of the proposed changes to the *Fisheries Act*. It is essential that the Government of Canada undertake further consultation with industry to reconsider some of the proposed prohibitions prior to implementation.

CEA represents the electricity generation, transmission, and distribution industry in Canada. Founded in 1891, CEA represents a broad range of companies that generate, transmit, distribute, market electric energy to industrial, commercial, and residential customers across Canada and provide value-added services to the electricity sector and other sectors. CEA utility member companies are committed to delivering reliable, affordable, and sustainable electricity to support the growth of a low carbon, clean energy economy and advance Canada's international climate change commitments.

In addition to CEA's feedback on the recent federal discussion paper on environmental and regulatory reviews, this supplementary submission provides further details on the following key subject areas relevant to the *Fisheries Act* that were part of the Government's response to the Standing Committee on Fisheries and Oceans:

1. Planning and integrated management
2. Partnering and collaboration
3. Monitoring and transparency
4. Regulatory and compliance activities

The regulatory and compliance activities are the most significant changes and potentially problematic for the electricity sector. CEA believes the focus should be on conservation outcomes, not broad-based prohibitions. Recognizing some impacts on fish and fish habitat are unavoidable, the government must seriously consider focusing the *Fisheries Act* on avoidance and mitigation of impacts rather than expanding prohibitions and enforcement. Furthermore, the focus should be on natural ecosystems rather than anthropogenic industrial environments such as industrial cooling and settling ponds.

## **2. PLANNING AND INTEGRATED MANAGEMENT**

CEA supports improved planning and integrated management done in consultation with stakeholders. The challenge is how complex concepts such as cumulative effects, the precautionary approach, and ecosystem-based management will be incorporated. Over the last five years there have been significant policy developments at the Department of Fisheries and Oceans (DFO) related to: Sustainable Fisheries Framework, Fisheries Productivity Investment Policy, and Fisheries Protection Policy Statement. These policies incorporate relevant concepts such as an ecosystem-based approach, science basis for management, risk management framework, pathway of effects, consideration of socio-economic elements, Fisheries Management Objectives (FMOs), that should be part of the policy development to create an integrated management approach. If fundamental changes are made to the *Fisheries Act*, these policies may have to be significantly amended.

If the *Fisheries Act* had a clear purpose in the preamble then that statement would guide implementation. Based on the Constitutional grant of federal power over the coastal and inland fisheries, and the historical articulations of the Act's purpose, CEA suggests that the purpose of the *Fisheries Act* should be to:

*“Provide for the sustainability of Canada’s marine and inland fisheries by ensuring that environmental, economic, and social considerations are systematically taken into account in the management of fisheries and the conservation of fish and fish habitat”.*

This purpose statement would make it clear that the conservation of fish and fish habitat is the means to achieve sustainable development of the fisheries, and not the objective of the Act itself. Canadian courts have confirmed, more than once, that the federal powers are limited to fisheries, as a resource, and do not mean the federal government has the power to regulate over all fish or fish habitat in Canada. In this respect, the purpose is a codification of the federal jurisdiction. Perhaps most importantly, it codifies that decisions taken in support of the fisheries must consider the environmental, social and economic impact on other valuable water resource uses. By extension, this statement also respects the role of the Provinces in managing property and civil rights (section 92(13) of the *Constitution Act*) thus the establishment of relevant FMO's. This logically includes their assessment of undertakings and activities relative to the fish population and the ongoing sustainability of the fishery. CEA continues to support the

delegation to provincial/territorial governments and recommends enhancing this functionality.

CEA proposes that the following principles be incorporated into the preamble of the Act:

*The Minister and every person engaged in the administration of the fisheries protection and pollution prevention sections of the Act or regulations made pursuant to it must:*

*(a) seek to apply a sustainable development approach in the conservation of commercial, recreational and Aboriginal fisheries and fish that support the fishery or those fisheries, whereby environmental, economic and social considerations are systematically taken into account in decision-making.*

*(b) seek to apply an ecosystem approach in the conservation of commercial, recreational and Aboriginal fisheries and fish that support the fishery.*

These principles would enable an ecosystem-based approach to fisheries management as per the Standing Committee's recommendation. The federal government's jurisdiction is related to coastal and inland fisheries, not the entire aquatic ecosystem. There are means of achieving better management of aquatic ecosystems such as better collaborative planning mechanisms (e.g. Integrated Resource Management Plans (IRMPs), encouraging stewardship by all Canadians, and innovative offsets combined with the identification and protection of priority habitats/ecosystems and species at risk.

In the online questionnaire, DFO asked several specific questions related to planning and integrated management. The section below is intended to address some of the key areas:

#### How to Help Rebuild Fish Stocks:

- Amend the Fisheries Act and/or its regulations to require that measures are taken aimed at rebuilding stocks that have reached low levels;
- Increase resources dedicated to rebuilding fish stocks. This should include the need for science based fish habitat valuation methods so that limiting habitat can be identified, quantified and replaced if impacted;
- Close commercial fisheries on stocks that have reached low levels until the stock has recovered to a predetermined level;
- Make public all stock rebuilding plans in a timely manner; and,

- Continue to implement the current policy including the requirement to put in place stock rebuilding plans.

#### Considering and Managing Cumulative Effects:

- Better use of local expertise / management agencies, standards, guidelines and codes of practice to manage small scale projects - this enables focusing of efforts on higher potential impacts;
- Increased involvement in area-based planning – there should be FMOs, IRMPs, prioritization of key habitats/ecosystems etc. leading to the development of allowable harm thresholds;
- Restoration of degraded habitats – enable more innovative offset programs including restoration of legacy impacts;
- Require proponents to collect and share standardized data and information – CEA continues to advocate for increased transparency; however, confidentiality concerns must be addressed; and,
- Confirm ecosystem conditions through pre-and post monitoring of projects – CEA members have already developed extensive aquatic monitoring programs. The challenge is bringing together the information that has been collected.

#### Compensation Mechanisms, Banking and Offsets

The way the habitat provisions of the 1986 version of the *Fisheries Act* were implemented was not effective. Of particular importance to CEA members, compensation mechanisms were limited (e.g. “like for like” and in the same geographic location) and did not allow innovative solutions to better sustain fisheries and conservation of aquatic ecosystems.

The concepts of compensating for harm, including via offset or habitat banking, as outlined in the 2013 Fisheries Productivity Investment Policy, have merit if properly implemented. Habitat banking may be implemented to preserve the long-term sustainability of fisheries by proactively designating important habitats for fish and other species to be conserved or restored through different market-based incentive tools, including the creation of new protected areas, to maintain the provision of ecosystem services and contribute more broadly towards meeting sustainability and biodiversity targets. However, the policy was written without mechanisms in place to implement it and has been fairly restrictive in its application.

CEA’s recommended changes to the compensation framework include:

- Conservation agreements - Conservation agreements could include an ecosystem approach and would allow added stewardship for fisheries species and species at risk. Furthermore, conservation agreements could be used more broadly to contribute to meeting sustainability and biodiversity targets;
- Correction of legacy issues - This would encourage proponents to undertake substantial offsetting projects that will have real impact (e.g. removing a 100-year old dam). The offset ratio could take into consideration the legacy nature of the offset; i.e., what the historic conditions were, and historic and current ownership; and,
- Third party banking - This would ensure that more ecologically significant projects are created and maintained. Adequate safeguards can be incorporated to effectiveness of banks by learning from wetland and species at risk banks throughout the Canada, US and Australia (e.g. Nova Scotia “wetland banks”).

### **3. PARTNERING AND COLLABORATION**

CEA supports the recommendations in the discussion paper on Environmental and Regulatory Reviews related to partnering and collaboration. Better cooperation, stewardship and communication will lead to better fisheries management. Meaningful and ongoing engagement and participation is necessary for effective planning and integrated management. Innovative approaches should be considered as part of fostering partners for conservation activities.

To improve implementation, CEA agrees that a multi-stakeholder advisory committee with a focus on policy guidance for the implementation of the *Fisheries Act* should be created sooner rather than later. As the electricity sector’s national organization, representing major stakeholders of the *Fisheries Act*, CEA should be part of the advisory committee.

Since 2002, CEA has been working with the DFO under a Memorandum of Understanding (MOU) trying to assure that the discretionary powers of the Act are applied in a clear, consistent and certain manner. To this end, CEA has engaged in regular consultations at the Ministerial, Deputy Minister and Assistant Deputy Minister level, held joint national workshops for operational level interaction, and has developed joint stewardship initiatives, education and training materials, and research programs with DFO. This effort is ongoing under a new tripartite MOU among DFO, CEA, and the Canadian Hydropower Association (CHA), and this effort should continue in the future.

In addition, to ensure the development and maintenance of scientific expertise, appropriate research, staffing levels and resources are needed within DFO. The two years following the 2012 changes to the *Fisheries Act* saw transformation of the organizational structure and staffing within the Fisheries Protection Program at DFO. In the regions, area offices were closed, and Fisheries Protection Program staff centralized. The result of these changes is that, in the regions, there are fewer competent and knowledgeable staff that are familiar with local conditions, stakeholders, and industry facilities. The culture of partnership and stewardship has been eroded, to the detriment of the fisheries resources. There is generally consensus amongst the stakeholders that DFO requires additional staff and resources and this should be prioritized.

The program also requires ongoing supportive science and research to ensure that fisheries sustainability is achieved in a measurable fashion.

#### **4. MONITORING AND TRANSPARENCY**

Accountability and transparency are key to restoring and maintaining public trust. To the public, the current regulatory process is neither transparent nor clear on who is accountable for what decisions. To address this gap, CEA agrees that there needs to be an easy-to-use, streamlined public registry for *Fisheries Act* authorizations and self-assessments. The details of the registry need to be determined in collaboration with all stakeholders, especially those with potential confidential information. At minimum, CEA supports the following information be incorporated:

- List proponent-led self-assessment notifications;
- List authorizations under the Act;
- Identify location and status of projects potentially causing harm to fisheries/habitat;
- Provide confirmation that monitoring, mitigation and compensation plans are in place to address impacts; and,
- DFO should provide up-to-date location and status of fisheries species, priority habitats and ecosystems including aquatic species at risk.

Companies can do better at incorporating of all sources of information (Indigenous Knowledge, community and scientific knowledge, FMO's) and have better designed follow-up and monitoring programs. Many regulatory processes result in a long list of terms and conditions, covering off all areas of review. Typically, regulators do an



excellent job providing compliance requirements for basic monitoring associated with the project. However, there continue to be challenges in the development of meaningful monitoring requirements that address real environmental change and cumulative effects. Furthermore, depending on the success of greater use of strategic and regional environmental assessments, it may be possible to link requirements to regional cumulative effects studies. CEA supports the recommendation that DFO put in place consistent monitoring requirements for proponents, with clear sector-specific standards and rationale.

## **5. REGULATORY AND COMPLIANCE ACTIVITIES**

### **Prohibitions**

CEA believes the *Fisheries Act* continues to provide the same level of protection as before 2012, with some amendments strengthening aspects of it. However, the implementation has been significantly constrained through the lack of adequate policy and definition, and due to a shortage of experienced science staff in the DFO regional offices to implement the *Fisheries Act* and related policies.

CEA understands that there are differing perspectives on the current state of fisheries protection as well as what the scope of the *Fisheries Act* should be. The pre-2012 *Fisheries Act* prohibitions were ambiguous and resulted in compliance challenges. CEA strongly supports the decision to clarify when *Fisheries Act* authorizations are or are not needed for projects and clarify the factors considered in decisions about approvals. Regulatory certainty is important for all projects, especially existing projects. There must be sufficient clarity such that authorization powers are not entirely arbitrary and discretionary with considerable ambiguity in DFO policies. This was the case prior to the 2012 amendment.

The re-introduction of section 35 (harmful alteration disruption or destruction - HADD) and consequently, section 32 may make any unauthorized incidental death of a fish or change in fish habitat a potential criminal offence – regardless of its effect on fish populations and the sustainability of a fishery. CEA is concerned that a reversion to these style of prohibitions is very restrictive on industry yet does not accomplish significant incremental environmental protection. CEA believes the purpose of the *Fisheries Act* and its prohibitions should be anchored on the principle of sustainability of commercial, recreational and Aboriginal fisheries at a fish population level (not individual fish level). Industry can manage impacts such that there is often no population level impact;

however, it is not possible to never have an incidental killing of fish or any change to fish habitat. It is necessary that long-term facilities have the certainty associated with authorizations that either are issued for the length of the project or have a process for renewal.

Furthermore, the focus should be on natural ecosystems rather than anthropogenic industrial environments such as industrial cooling and settling ponds. This focus on natural ecosystems was central to the Standing Committee's recommendation #6. There are many different means of ensuring that industrial environments are not captured as part of HADD prohibitions (e.g. in the definitions within the Act, in regulation or in policy). CEA looks forward to working with DFO to ensure the appropriate focus and clarity.

CEA supports a delegation to provincial Ministers to permit incidental killing of fish that does not impact fishery sustainability (similar to the existing process for provincial issuance of general fishing permits (or varying fishing limits and seasons). Similarly, CEA supports the ability of life-cycle regulators to issue authorizations that would provide a means of compliance with the prohibitions. This process would enable decisions to be made for existing facilities locally with the best available information including FMOs.

If the decision is made to revert to the prior prohibitions, then CEA recommends the incorporation of the following concepts into policy documents: priority habitats/ecosystems; science-based decisions and risk management; ecosystem-based approach; and consideration of socio-economic elements. The Risk Management Framework, Pathways of Effects, Fisheries Management Objectives (FMOs), section 6 factors, and Operational Statements are critical to successful protection of fisheries and the aquatic environment while maintaining an efficient, predictable regulatory regime. Given the importance of species at risk, a clearer link to the *Species at Risk Act* (SARA) would ensure a coherent implementation. The implications for activities impacting species at risk should be clear and consistent with the prohibitions under SARA.

### **Compliance and Transition Time**

It takes time to implement substantial changes and therefore an appropriate transition period will be necessary during which DFO should be consulting and training stakeholders. Certain activities will be prohibited, particularly under a reversion to section 32, that would require authorizations. Time must be provided for existing facilities to obtain authorizations and where appropriate this authorization should be

issued by a provincial fisheries manager. There should be a relatively administratively simple process for long-term facilities with no demonstrated impact on fisheries populations. Furthermore, the revised *Fisheries Act* should include the ability to amend authorizations either on the Minister's own initiative or in response to a proponent's request. The ability to amend authorizations is necessary to enable adaptive management and respond to changing circumstances.

### **Implementation of Section 89 and Self-Assessments**

Greater reliance on existing provincial and industry standards through the use of section 89 is encouraged. CEA also supports the development of standards and codes of practice for areas not currently covered by existing standards. There have been concerns raised about self-assessments by qualified professionals; however, adequate safeguards can be developed. For example, additional resources for audits and enforcement combined with the public registry enhance oversight. Eventually, REAs and Integrated Fish Management Plans (IFMPs) will manage cumulative effects of low-risk activities. Resources should be allocated proportionally such that higher risk activities require enhanced scrutiny by DFO with enhanced public and Indigenous engagement. The risk thresholds should be regularly reviewed with a transparent process to provide greater public confidence.

CEA supports DFO, either alone or working with others, developing standards, guidelines and, codes of practice that help proponents comply with the *Fisheries Act*. The purpose of those standards, guidelines, and codes of practice should include:

- Project categories / scaling that streamlines and simplifies project reviews;
- Providing certainty and clarifying the requirements to protect fish and fish habitat;
- Creating legally enforceable requirements for specific project and impact types;
- Enabling better project monitoring; and,
- Making best practices for fish and fish habitat protection more accessible to the public.

CEA believes these standards, guidelines, and codes of practice should be prioritized for development as follows:

- General guidance on how to avoid, mitigate and offset human impacts on fish and fish habitat;

- Codes of practice describing avoidance measures for types of industries (e.g. agricultural, transportation, oil and gas), that if followed could avoid residual impacts to fish and fish habitat;
- Guidelines describing when project proponents should submit their plans for review by provincial management agencies or Fisheries and Oceans Canada;
- Codes of practice describing avoidance measures for typical works, undertakings and activities (e.g. dock, bridge, dredging), that if followed could avoid residual impacts to fish and fish habitat;
- Standards setting out monitoring requirements; and,
- Guidelines for protecting a particular species or area.

Compliance promotion activities are important and should start with better communication and relationships with provincial fisheries management agencies and DFO regional staff. If there were more clarity in the legislation and accompanying regulations and policies, then compliance would be higher. The “rules” should be available through numerous outreach mechanisms including websites, public (and industry) awareness and education events and publication of standards/guidelines/etc. (e.g. old operational statements). Prior to publishing violations on a website, proponents should be given an opportunity to address the issues that caused the violation and ensure that confidential material is not released.

## **6. Summary of Recommendations**

**CEA supports the following key recommendations outlined in the government’s response to the Standing Committee on Fisheries and Oceans Report:**

- Establish a public registry with contents to be determined in consultation with stakeholders;
- Define the parameters of a violation of the *Fisheries Act*, particularly in relation to fish habitat;
- Use section 89 to incorporate by reference and where there is no existing documentation, develop standards, codes, and guidelines to develop standards;
- Prioritize the identification and protection of key habitat/ecosystems and develop Integrated Resource Management Plans and mechanisms for effective integration of Fisheries Management Objectives, and other planning tools/processes; and,
- Invest in additional staff, resources, and training as part of re-establishing consultative relationships in the regional offices. Partnering and stewardship efforts should be encouraged.

**The following recommendations are additional to the Standing Committee's recommendations:**

- The *Fisheries Act* requires clear articulation of its purpose and the principles that guide the application of the law and that structure the current discretionary provisions in the Act;
- The Act be amended or a regulation created that: 1) enables *Fisheries Act* authorizations to be issued for long-term operation of electricity generation facilities and 2) specifies procedures for amending and renewing *Fisheries Act* authorizations; and,
- A comprehensive framework for offsets and habitat banking that enables innovative solutions and addresses barriers to projects needs to be established.

**CEA is concerned about the implications of some recommendations including:**

- Reverting back to section 32/35 of the pre-2012 *Fisheries Act* and extending protection of fish habitats to all marine and freshwater habitats as a means of protecting biodiversity - while CEA supports identifying priority fish habitats, not all aquatic environments should be protected in the same manner. The old prohibitions were overly broad and ambiguous.
- Reducing reliance upon self-assessments - CEA supports multiple tools to reduce reliance on individual permits. The use of codes, standards, and self-assessments by qualified professionals should be maintained while enabling resources to be allocated to projects with a higher potential for impacts.