



Canadian
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Fisheries Act Review

Sustainable Fisheries: Applying Modern Safeguards to the *Fisheries Act*

Brief submitted to:

House of Commons Standing Committee on Fisheries and Oceans

By

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1 INTRODUCTION

The Government of Canada is undertaking a review of environmental and regulatory processes, including the *Fisheries Act*. The *Fisheries Act* review will be undertaken by the Parliamentary Standing Committee on Fisheries and Oceans (FOPO) with the following mandate:

"[T]he Committee, in light of the letter provided by the Minister of Fisheries, Oceans and the Canadian Coast Guard and the Minister of Transport, review and study the scope of application of the Fisheries Act, and specifically the serious harm to fish prohibition; how the prohibition is implemented to protect fish and fish habitat; the capacity of Fisheries and Oceans Canada to deliver on fish and fish habitat protection through project review, monitoring, and enforcement; the definitions of serious harm to fish and commercial, recreational, and Aboriginal fisheries; the use of regulatory authorities under the Fisheries Act; and other related provisions of the act, and provide its recommendations in a report to the House, no later than Tuesday, February 28, 2017." (Approved: September 19, 2016.)

The Canadian Electricity Association (CEA) respectfully submits this brief for consideration by FOPO in fulfillment of this mandate. The Canadian Electricity Association (CEA) represents the electricity generation, transmission and distribution industry in Canada. Founded in 1891, the CEA represents a broad range of companies that generate, transmit, distribute, market electric energy to industrial, commercial and residential customers across Canada every day 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 Canada's economic growth and advance the federal government's international climate change commitments and commitments to promote a growing low carbon, clean energy economy.

2 SUMMARY STATEMENT

The CEA is supportive of the government's desire to review the Act and incorporate modern safeguards into its implementation. The industry as a whole is committed to protecting and conserving our natural resources and heritage for the use of future generations.

Changes to the *Fisheries Act* were introduced as part of the Budget Bill, *Bill C-38, Growth, Jobs and Long-term Prosperity Act* on June 29, 2012. Without substantial prior public, Aboriginal or stakeholder engagement, the introduction of the changes to the Act and the concomitant restructuring of Fisheries and Oceans Canada (DFO) have created uncertainty in the Act and its implementation, and have allowed a perception of lost protections to pervade. The CEA is of the opinion that the Act continues to provide the same level of protection as before 2012, with some amendments strengthening aspects of it. Examples of this include: the industry's duty to self-report serious harm to fish; the duty to take corrective measures to prevent or remedy any adverse effects, and increased penalties and enforcement. However, the implementation of the Act has been significantly constrained through the lack of adequate policy and definition, and due to a shortage of experienced people in the DFO Regions to implement the Act and related policies.

The CEA offers the following recommendations, discussed further in the brief that follows:

Changes to the Act

- 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. A proposed purpose and principles are provided.



- The definition of “sustainability of a fishery” should be included in Section 2(1) of the Act. A suggested definition has been provided.
- The definition of “serious harm” in Section 2(2) of the Act should be changed to reflect the proposed Purpose of the Act, and focus on the sustainability of fisheries by protecting fish populations or stocks, not individual fish. This will ensure that the definition caters for both harvest fish and species at risk. The suggested change to Section 2(2) is provided.
- The Act should be amended or a regulation created that: 1) enables *Fisheries Act* authorizations to be issued for long term operation of facilities and 2) specifies procedures for amending and renewing *Fisheries Act* authorizations.

Modern Safeguards

- The Federal Government should provide increased staffing and financial resources to ensure that the DFO Fisheries Protection Program (previously Habitat Management Program) staff are capable and active in the field, and understand the activities and operations that they are required to provide authorization for.
- There should be greater effort from the Federal Government to support and encourage partnerships and stewardship activities, including broad area planning initiatives that describe fisheries management objectives and the “public interest”.
- Fisheries management objectives need to be documented as part of the initial project/activity review process to determine whether there is a commercial, recreational or Aboriginal (CRA) fishery that requires protection, what the nature of that fishery is and what is required to ensure its ongoing sustainability. This may be delegated to the proponent or province, but DFO would have the regulatory responsibility to define fisheries management objectives.
- More innovative and modern approaches need to be applied to offsetting of harm. It is recommended that the following be considered: conservation agreements, including but not limited to species at risk conservation agreements, correction of legacy issues and third-party offset banks.
- A public registry of *Fisheries Act* authorizations should be developed to promote transparency and accountability in the authorization process.
- A risk management approach could be developed and take into consideration established fisheries management objectives, mitigation of adverse impacts, significance of effects and the ongoing sustainability of the fishery or fisheries. Any new risk-management framework should include consultation with stakeholders. For the evaluation of existing facilities, the use a risk-based approach could take into consideration whether an ecosystem equilibrium has developed over time.
- Section 89, Incorporation by Reference, could be used to implement modern approaches. Examples could include:
 - Class authorizations for routine operation and maintenance activities;
 - Management practices or standards for activities that when properly executed would not likely seriously harm a fishery (e.g., sediment and erosion control; culvert specifications);
 - Guidance on what constitutes serious harm related to the ongoing productivity and sustainability of a fishery.

3 PURPOSE AND PRINCIPLES OF THE FISHERIES ACT

Modern acts of Parliament often include a purpose or principles as a preamble to the Act. Good examples of this are provided by the *Oceans Act*, 1996 and the *Species at Risk Act*, 2002. This is currently missing from the *Fisheries Act* and, as a result, the intent of the Act is not clear. **The CEA is advocating for a clear articulation of the Purpose of the Act, and the Principles that will guide the application of the law.**



3.1 Purpose

On June 10, 1857, the Fifth Parliament of Canada assented to the *Fisheries Act* as a statute intended “to make better provision for the preservation and regulation of the fisheries”. This was followed with Canada’s First Parliament enacting the *Fisheries Act* on May 27, 1968, for “the regulation of fishing and protection of fisheries.” The last purpose statement, introduced in 1985 revisions but subject to a sunset clause, indicated that the purpose of the Act was the management of the fishery in all its dimensions (including socio-economic). *Bill C-32*, which saw first reading on November 29, 2007, declared that the purpose of the Act “is to provide for the sustainable development of Canada’s seacoast and inland fisheries, through the conservation and protection of fish and fish habitat and the proper management and control of the fisheries.” Based on the Constitutional grant of federal power over the fisheries, and these historical articulations of the Act’s purpose, the 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.

The strength of this purpose statement is that it makes it clear that the conservation of fish and fish habitat is the means to achieve sustainable development of the fisheries, and not the purpose of the Act itself. It creates the legislative space for DFO to authorize activities that incidentally kill fish or harm fish habitat, without being subjected to the criticism that such authorizations contradict the purpose of the Act. It reconnects the *Fisheries Protection Provisions* with the overall legislative scheme, and ensures that decisions taken under these provisions of the Act are justified by concern for the fisheries. 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.

3.2 Principles

The CEA proposes that the following principles be incorporated into 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 approach¹ 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.*

The proposed principles support the purpose clause by iterating that a commitment to sustainable development means that decisions made under the Act to protect the fisheries must also consider the social and economic impact on other water resource uses. The CEA suggests that these purpose and principles are reflected in the Section 6.1 of the Act. Thus, the risk to the “sustainability of a fishery” is the harm that justifies federal involvement, and decisions must be made on reasonable grounds and in the public interest. Thus, federal reviews should be targeted at the federal jurisdictional interest in the continued productivity of the fishery, not in the conservation of fish and fish habitat in and of itself.

In addition, we recommend the inclusion of the definition of “sustainability of a fishery” in Section 2(1) of the Act, as derived from the *Federal Sustainable Development Act 2008*:

¹ See DFO’s Sustainable Fisheries Framework: <http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/fish-ren-peche/sff-cpd/overview-cadre-eng.htm>



"sustainability of a fishery" means the capacity of a commercial, recreational, or Aboriginal fishery to be maintained indefinitely.

4 FISHERIES PROTECTION PROVISIONS

Many of the habitat provisions of the Act were developed in the 1970s, reflecting a level of understanding of environmental sustainability of aquatic ecosystems that is far less developed than it is today. Legislators did not develop a carefully structured scheme for protecting Canada's fish bearing waters; instead they delegated this responsibility to DFO through prohibitions against killing fish or altering fish habitat without Ministerial authorization.

4.1 No Loss of Protection for Fisheries Resources

The CEA is of the opinion that the 2012 revisions to the *Fisheries Act* have not decreased the level of protection to fish and fish habitat. However, without substantial public, stakeholder and Aboriginal engagement prior to the revisions being made, the introduction of the changes to the Act and the concomitant restructuring of DFO eroded public trust in the Act and its implementation, and created the perception of lost protections.

There are three main reasons why the CEA holds to this opinion:

1. **Fisheries Protection Provisions incorporate protections in the previous Act or expand protection** - Section 35 (1) of the Act states: "*No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery*", where serious harm is defined in the Act as "*the death of fish or any permanent alteration to, or destruction of, fish habitat*". This provision combines the former Section 32 (killing of fish by means other than fishing) and Section 35 (harmful alteration or disruption, or the destruction, of fish habitat - HADD). Having said that, the definition of "serious harm" and "commercial, recreational and Aboriginal fisheries, or fish that support such a fishery" have been broadly defined in policy, but have not yet been tested through the courts and warrant further discussion (see Section 4.2.2 below).
2. **The Act incorporates expanded order and enforcement powers** - There were several new offences listed under the 2012 *Fisheries Act*, including the failure to: report serious harm or deposit of a deleterious substance; take measures to address serious harm or deposit; comply with any conditions of authorizations; supply information required by the Minister, or to comply with directions from inspectors or fisheries officers. Another change is the extension of the limitation of laying charges under the Act from two to five years. Under the previous Act, the conditions of authorizations were not, in and of themselves, enforceable. This meant that, if conditions in authorizations were not complied with, so long as a HADD did not result, there was no way for the government to enforce the authorization. The current focus is on ensuring protection through compliance and enforcement, rather than on partnerships and stewardship, which is discussed further in Section 5.2 of this brief.
3. **The Act has expanded the duty to report** – Section 38(4) requires that "*[e]very person shall without delay notify an inspector, a fishery officer or an authority prescribed by the regulations of an occurrence that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery, that is not authorized under this Act, or of a serious and imminent danger of such an occurrence*". This duty to report has been expanded from the previous Act, where only a HADD needed to be reported. The CEA is not against the notion of reporting unforeseen occurrences; however, this provision has had significant impact on existing industry facilities that do not have *Fisheries Act* authorizations. In many cases fish mortality is a daily occurrence, but does not occur at a level that would influence the sustainability of a fishery under the Act. It is unclear to industry what is expected under Section 38(4) of the Act.



4.2 Definitions Lead to Broad Interpretation of the Law

The concern that the CEA has with the Fisheries Protection Provisions of the Act is that there are indications that serious harm may be interpreted as “all harm to all fish”. This is implicit in the definitions of commercial, recreational and Aboriginal (CRA) fisheries, and in the definition and interpretation of what constitutes serious harm. It is compounded by the fact that the definitions in the Act have not come under scrutiny by the courts due to the short time that they have been in effect.

4.2.1 Commercial, Recreational and Aboriginal Fisheries

Currently the protection provisions of the *Fisheries Act* are applicable to “commercial, recreational and Aboriginal fisheries and fish that support these”. Given the ecosystem approach to fisheries management, this includes all fish, and regional implementation has confirmed this. The CEA has two main concerns related to the interpretation of what constitutes a CRA fishery:

1. **Fisheries Management Objectives** - Without clearly defined fisheries management objectives up front in the evaluation/determination process, there are still numerous instances where the Act is being over inclusive. For example, in Ontario on Crown land, brook stickleback (a small minnow) in a small, disconnected pond can be considered a CRA fish as they support a fishery under the Ontario Ministry of Natural Resources definition.

Section 6 of the Act currently requires the Minister to consider several factors prior to issuing a *Fisheries Act* authorization under Section 35 of the Act. This is currently applied at the end of the review process. However, the CEA recommends that fisheries management objectives be documented as part of the initial project/activity review process to determine whether there is a CRA fishery that requires protection, what the nature of that fishery is and what is required to ensure its ongoing sustainability. This may be delegated to the proponent or province, but DFO would have the regulatory responsibility to define fisheries management objectives.

2. **Species at Risk** - Historically, the *Fisheries Act* was the only piece of legislation providing for the protection and conservation of aquatic species, so it made sense for it to cover all species. However, now the *Oceans Act* 1996 and the *Species at Risk Act (SARA)* 2002, both more modern acts of Parliament, also provide for the conservation of aquatic species. There needs to be recognition of this during the review of the *Fisheries Act*. Inclusion of species at risk scheduled under *SARA* within the definition of CRA fisheries has led to uncertainty in the implementation of the *Fisheries Act*. It could be argued that species at risk, by definition, require additional protection and should not be harvested no matter what their historical status might have been. The inclusion of species at risk in the interpretation of CRA fisheries has led to confusion between the requirements of *SARA* and those of the *Fisheries Act*. For instance, under Section 74 of *SARA* a *Fisheries Act* authorization is recognised as the permit to engage in an activity that may affect a species at risk, and the DFO Fisheries Protection Program has been requested to manage *SARA* permitting through *Fisheries Act* authorizations. This is leading to inefficiency in the *Fisheries Act* authorization process, with wait times greater than three years in some instances, and may lead to decreased protection for species at risk. The CEA suggests that the definition of “serious harm” makes provision for species at risk (see Section 4.2.2. below).

4.2.2 Serious Harm

In Section 35 of the Act, the prohibitions are clear, and stated in absolute terms. The authorization clauses, however, are wide grants of power based on the definition of “serious harm”, with little internal guidance as to when or if fish mortality or habitat disruption should be authorized. Section 2(2) of the Act defines serious harm as: “the death of fish or any



permanent alteration to, or destruction of, fish habitat". This is further elucidated in the *Fisheries Protection Policy Statement* (DFO 2013²) as:

- the death of fish;
- a permanent alteration to fish habitat of a spatial scale, duration or intensity that limits or diminishes the ability of fish to use such habitats as spawning grounds, or as nursery, rearing, or food supply areas, or as a migration corridor, or any other area in order to carry out one or more of their life processes;
- the destruction of fish habitat of a spatial scale, duration, or intensity that fish can no longer rely upon such habitats for use as spawning grounds, or as nursery, rearing, or food supply areas, or as a migration corridor, or any other area in order to carry out one or more of their life processes.

The concern that the CEA has around these definitions of serious harm is that their interpretation tends to be discretionary, and often over inclusive, prohibiting more than is necessary to carry-out the Act's purpose. An interpretation of these provisions is that any unauthorized incidental death of a fish, or of many fish, or change in fish habitat, regardless of its effect on the sustainability of a fishery, is an offence under the *Fisheries Act*. **The CEA recommends changing the definition of "serious harm" in Section 2(2) of the Act to reflect the proposed purpose of the Act, and to focus on the sustainability of fisheries by protecting fish populations or stocks, and not individual fish, with the exception of species at risk where harm to individuals can threaten the population.** The proposed definition is:

For the purposes of this Act, serious harm to fish is the death of fish, or any permanent alteration to or destruction of fish habitat, to the extent that it negatively impacts the viability of a fishery population or stock that is part of a commercial, recreational or Aboriginal fishery.

This definition can equally be applied to species at risk where the loss of an individual fish may impact the viability of the designated unit, or to a thriving fisheries species where the loss of several thousand may have no noticeable impact to the population or the fishery.

The CEA also recommends that the concept of "significance of effect" be incorporated into the **Factors to be Taken Into Account in Section 6 of the *Fisheries Act***. The concept of "significance of effect" has been introduced into legislation in Canada through Section 19 of the *Canadian Environmental Assessment Act (CEAA)*, and has been the cornerstone of environmental impact assessment for many years. Determination of significance of effect decides whether the residual effect after mitigation will be negative, whether it will be likely, and whether it will be significant, based on the following key criteria: magnitude; geographic extent; timing; frequency; duration; and reversibility. Thresholds can be readily attached to all these criteria in the determination of serious harm, particularly through the well-established Pathway of Effects tools available to departmental staff.

4.3 Amendment and Renewal of Fisheries Act Authorizations

The *Fisheries Act* does not specify a time limit or expiry of *Fisheries Act* Authorizations and, as such leaves this to the discretion of the Minister. In addition, there is currently no process in the Act, through regulation or in policy, to formally amend or extend *Fisheries Act* Authorizations. This creates uncertainty in the electricity industry where many activities and ongoing operations are long term. **The CEA recommends that 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.

² Fisheries and Oceans Canada. 2013. Fisheries Protection Policy Statement. <http://www.dfo-mpo.gc.ca/pnw-ppe/pol/PolicyStatement-EnoncePolitique-eng.pdf>



5 MODERN SAFEGUARDS

The above discussion has focused on the changes that could be made to the Act itself, as well as to supporting regulations and policies. However, some of the modern safeguards called for as part of the *Fisheries Act* review process fall outside the ambit of the Act itself. Many of the modern safeguards recommended below focus on the restoration of public trust in the public service, specifically DFO, by developing transparency and accountability.

The CEA and its member companies recognize the benefit of our freshwater and marine resources to the good of the country. We are in support of protecting and conserving our natural resources and heritage for the use of future generations. We believe that this is achievable through good governance, but also through a culture of stewardship within industry and the public sector. As such, we would propose that the following are modern safeguards that will contribute to the conservation of the ecosystems that support Canada's fishery resources.

5.1 Provision of Adequate Fisheries Protection Program Staffing

The two years following the changes to the *Fisheries Act* saw transformation of the organizational structure and staffing within the Fisheries Protection Program at DFO. Under the auspices of "workforce adjustment" numerous staff were laid off or moved to other positions within the federal public service. In the regions, area offices were closed, and Fisheries Protection Program staff centralized. It seems that it has also become more common for staff to take on acting positions for very short periods on a rotational basis.

The result of this change is that, in the regions, there are fewer competent and knowledgeable staff that are familiar with local conditions, stakeholders, and industry facilities (generating stations, and transmission and distribution infrastructure). In addition, some staff are located far from their jurisdictional areas (e.g., staff based in Manitoba and Ontario dealing with files in Saskatchewan). Additionally, with the focus on enforcement, it is now more likely that a Fisheries Officer will appear at a site to inspect it than a biologist. The culture of partnership and stewardship has been eroded, to the detriment of the fisheries resources in these areas.

The CEA calls for the Government to provide increased staffing and financial resources to ensure that Fisheries Protection Program staff are active in the field, and understand the activities and operations that they are required to provide authorization for. The CEA recognizes the steps that have already been taken to increase the science base that was eroded during the previous government; the same needs to be applied to the Fisheries Protection Program. This will allow for the development of stewardship programs and ensure more active partnerships for the protection of fisheries.

5.2 Promoting Partnerships and Stewardship

The Fisheries Protection Policy Statement asserts that protection of fisheries is a joint responsibility, in the statement "[m]any partners and stakeholders, including federal departments, provincial and territorial governments, Aboriginal peoples, recreational fishing and angling groups, conservation organizations and industry groups, share a common interest in the conservation and protection of fisheries. Sustainability and ongoing productivity of fisheries may best be achieved when these partners and stakeholders work together to conserve and protect fish and fish habitat."

The CEA supports this statement and would like to see greater effort from the Federal Government to support and encourage partnerships and stewardship activities, including broad area planning initiatives that describe fisheries management objectives and the "public interest", particularly at a regional level where the Act is implemented.



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.

5.3 Offsetting Harm and Use of Conservation Agreements

The way the Habitat Provisions of the 1986 Act were implemented by DFO did little to ensure that productivity of an ecosystem was maintained or restored. Compensation mechanisms were limited, and did not allow innovative solutions have not been allowed to offset harm. The concepts of offsetting harm in a variety of ways, and offset or habitat banking, as outlined in the 2013 *Fisheries Productivity Investment Policy*³, have merit if properly implemented. Habitat banking may also 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. The concept of offsetting serious harm to fish is introduced in Section 6 of the Act, Factors To Be Taken into Account. Under the *Fisheries Productivity Investment Policy*, DFO recognises the requirement for other compensatory mechanisms, thus allowing more innovative and modern approaches. The policy was written without mechanisms in place to implement it and has been fairly restrictive in its application. Pilot studies undertaken with proponents have proved that the policy needs some fine-tuning, based on practical considerations. Some recommended solutions include:

- **Conservation agreements should be included as an offsetting option.** Conservation agreements are a concept that is currently applied only in the case of the *Species at Risk Act*. Conservation agreements could include an ecosystem approach and would allow added stewardship for harvest species and species at risk. Furthermore, conservation agreements could be used more broadly to contribute to meeting sustainability and biodiversity targets by promoting innovative conservation programs, projects for restoring important fish habitat, or the designation of new protected areas.
- **Correction of legacy issues should be allowed as an offsetting option.** 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.
- **Third party offset banking should be allowed as an offsetting option.** This would ensure that more ecologically significant offset banks are created and maintained. An example of successful third-party habitat banking is the “wetland banks” in Nova Scotia, which are established and maintained by non-profit conservation organizations with resources provided by industry as part of compensation agreements.

5.4 Transparency in the Authorization Process

Accountability and transparency are key to restoring and maintaining public trust. To the public eye, the current authorization process is not transparent and they have no way of determining the accountability of various parties. **The CEA recommends that a public registry of *Fisheries Act* Authorizations be put in place.** The level of detail of the Registry and what is essential to disclose should be established in collaboration with industry.

³ Fisheries and Oceans Canada, 2013. Fisheries Productivity Investment Policy. <http://www.dfo-mpo.gc.ca/pnw-ppe/offsetting-guide-compensation/index-eng.html>



5.5 Implementing a Risk-Management Approach

Under the previous Act, the Department developed the *Risk Management Framework*⁴ for fish and fish habitat. This was a decision-making model that categorized risks to fish and fish habitat associated with water resource uses, communicated these risks to proponents, and identified appropriate management options to reduce risks to acceptable levels. Although DFO has revealed that a similar approach will be used as part of their “serious harm determination process”, the development of this approach has not been transparent – although the testing of the thresholds has been undertaken on real projects, with real cost implications to industry.

The CEA calls for a risk management approach that takes into consideration established fisheries management objectives, mitigation of adverse impacts, significance of effects and the ongoing sustainability of the fishery or fisheries. Any new risk-management framework should include consultation with provinces and industry.

5.6 Dealing with Existing Facilities

There are many industrial facilities in Canada that were constructed and commissioned prior to the 1976-77 *Fisheries Act* amendments that introduced the original Habitat Provisions. These operations were designed in accordance with approvals issued under federal and provincial laws in effect at the time of construction, which contemplated and accepted an alteration of affected bodies of water, fisheries and fish habitat. It is on the basis of regulatory decisions taken at the time of construction that proponents made the decision to invest, and the operating range of existing facilities is largely dictated by their design and storage capability.

Most of the Fisheries Protection Provisions are written with a forward-looking stance, suggesting that modification and authorizations will be assessed at the project proposal stage. This correctly places the onus on the proponent to demonstrate that their new proposal presents no unacceptable risks to fisheries. While this burden is acceptable for new projects, it presents serious problems when applied to existing facilities where modification costs can easily be in the hundreds of millions of dollars. Under the current legislative system, where what is “acceptable” in terms of risk is discretionary, operators and owners of existing facilities find it hard to determine what is acceptable.

Until 2007 there was little suggestion from the Department that facilities without authorizations were out of compliance with the *Act*. It was assumed by facility owners and operators that the *Act* did not apply retroactively. This assumption was clarified by the Department's release of its *Position Statement on the Application of the Habitat Protection Provisions to Existing Facilities* in 2007⁵.

An approach that has been taken in some provinces is for utilities is to review their existing operations with DFO and provincial fisheries management staff, to assess the risk to fish and fish habitat at existing facilities. A list of issues and related risk to fish/habitat and mitigation measures can then be developed, where feasible. This process can help provide certainty in operations for facilities in an open and transparent process.

The use of a risk-based approach for the evaluation of existing facilities could also take into consideration whether an ecosystem equilibrium has developed over time. Where the government is able to demonstrate that the operation of an existing facility is causing harm to the sustainability of a fishery, its discretion to order changes must be based on sound science and take into account economic considerations.

⁴ Fisheries and Oceans Canada (DFO). Undated. *Practitioners Guide to the Risk Management Framework for DFO Habitat Management Staff* (Version 1.0). <http://www.dfo-mpo.gc.ca/Library/343443.pdf>.

⁵ Fisheries and Oceans Canada . 2007. *Application of the Habitat Protection Provisions of the Fisheries Act to Existing Facilities and Structures*.



5.7 Use of Section 89 to Incorporate by Reference

Section 89 of the Act allows the Minister to “*incorporate by reference material produced by a person or body other than the Minister, including by a government, a government agency or an international body*”. In particular, the Minister may “*incorporate by reference technical or explanatory material produced by the Minister, such as specifications, test methods, procedures, construction standards, operational standards, safety standards and performance standards of a technical nature*”. Section 89 of the Act could be used to incorporate by reference:

- Class authorisations for routine operation and maintenance activities;
- Management practices or standards for activities that are not likely to seriously harm a fishery if properly executed (e.g., sediment and erosion control; culvert specifications);
- Guidance on what constitutes serious harm related to the ongoing productivity and sustainability of a fishery.

6 DESCRIPTION OF THE CANADIAN ELECTRICITY ASSOCIATION (CEA)

The Canadian Electricity Association (CEA), founded in 1891, represents the electricity generation, transmission and distribution industry in Canada. CEA is the national voice for sustainable, safe, and secure electricity for all Canadians, and provides its members with value-added products and services to advance the strategic interests of Canada's electricity industry. CEA members generate, transmit, distribute and market electric energy to industrial, commercial and residential customers across Canada every day. Its membership includes provincially-owned and investor-owned utilities, many of which are vertically-integrated; independent power producers; independent system operators; wholesale power marketers; and municipally-owned local distribution companies. Electricity is critical to Canada's economic sustainability and development. Today, over 80% of Canada's electricity is generated from sources emitting comparatively low greenhouse gases (GHG) and the sector leads all other industrials sectors in the projected reduction of GHGs.



7 ANNEX I: CEA MEMBERS

CORPORATE UTILITY MEMBERS

1. Algonquin Power and Utility Corp.
2. AltaLink
3. ATCO Electric
4. ATCO Power
5. BC Hydro and Power Authority
6. Brookfield Renewable
7. Capital Power
8. City of Medicine Hat Electric Utility
9. Columbia Power Corporation
10. Emera Inc.
11. ENMAX Corporation
12. EnWin Utilities Ltd.
13. EPCOR Utilities Inc.
14. FortisAlberta Inc.
15. FortisBC Inc.
16. Horizon Utilities Corporation
17. Hydro One Brampton Networks Inc.
18. Hydro One Inc.
19. Hydro Ottawa
20. Hydro Quebec
21. Kingston Utilities
22. Manitoba Hydro
23. Maritime Electric Company, Limited
24. Nalcor Energy
25. New Brunswick Power Corporation
26. Newfoundland Power Inc.
27. Northwest Territories Power Corporation
28. Nova Scotia Power Inc.
29. Oakville Enterprises Corporation
30. Ontario Power Generation
31. PowerStream Inc.
32. Saint John Energy
33. Saskatoon Light & Power
34. SaskPower
35. Toronto Hydro Corporation
36. TransAlta Corporation
37. TransCanada
38. Yukon Energy Corporation



CORPORATE PARTNER MEMBERS

1. ABB Inc.
2. Accenture
3. Ackland Grainger Inc.
4. Alberta Electric System Operator
5. Allteck Line Contractors Inc.
6. Alstom Grid Canada ULC
7. Altus Group Limited
8. Amec Foster Wheeler
9. Andritz Hydro Canada Inc.
10. Armtec LP
11. Awz Ventures Inc.
12. Babcock & Wilcox PGG Canada
13. Bennett Jones LLP
14. Black & Veatch Canada Company
15. Burns & McDonnell
16. Cam Tran Co. Ltd.
17. CEATI International Inc.
18. CLEAResult
19. Cogent Power Inc.
20. Davies Consulting LLC
21. Deloitte
22. Digital Boundary Group
23. Elster Solutions
24. EnerNOC
25. EY
26. Esri Canada
27. G&W Canada
28. GE Canada
29. Golder Associates Ltd.
30. Hatch Ltd.
31. Hubbell Power Systems Inc.
32. IBM Canada Ltd.
33. iFactor
34. Independent Electricity System Operator (IESO)
35. Itron, Inc.
36. KPMG LLP
37. Landis+Gyr
38. Lawson Lundell LLP
39. MNP LLP
40. Navigant
41. Nexans Canada Inc.
42. OMICRON electronics Canada Corp.
43. Optima Communications International Inc
44. Oracle Corporation
45. Partner Technologies Incorporated



46. Plastiq
47. PowerAdvocate
48. PowerPlan, Inc.
49. Renewable Energy Systems Canada Inc.
50. SAP
51. SAS Institute (Canada) Inc.
52. S&C Electric Canada Ltd.
53. Schneider Electric Canada Inc.
54. Sensus Metering Systems Inc.
55. Shell Energy North America
56. Shermco Industries Canada Inc.
57. Siemens Canada.
58. SNC-Lavalin Inc.
59. Southwire Canada
60. STARK International
61. Star Telecom / NuVoxx Communications
62. Stella-Jones Inc.
63. Stratejm Ltd.
64. Tantalus Systems, Inc.
65. TELUS
66. Thomas & Betts Limited

ASSOCIATE MEMBERS

1. Bermuda Electric Light Company Limited
2. Caribbean Electric Utility Services Corporation (CARILEC)
3. Caribbean Utilities Company, Ltd.
4. City of Lethbridge
5. City of New Westminster
6. City of Penticton
7. City of Red Deer Electric Light and Power
8. City of Swift Current Light & Power
9. CSA Group
10. EQUUS REA Ltd.
11. Hammond Power Solutions
12. Orillia Power Corporation
13. St. Thomas Energy Inc.
14. Stantec Consulting