

House of Commons Standing Committee on Fisheries and Oceans

The Canadian Nuclear Association (CNA) is pleased to have this opportunity to make a submission to the House of Commons Standing Committee on Fisheries and Oceans with respect to its review of the Fisheries Act.

The CNA has approximately 100 members, representing over 60,000 Canadians, employed directly, or indirectly, in uranium mining and exploration, fuel processing, electricity generation, and the production and advancement of nuclear medicine. Included among our member facilities are nuclear facilities, uranium mines and mills, and nuclear waste management facilities that carry out projects and activities in and around Canadian fisheries waters.

Over the years, the over-inclusiveness, broad discretion and lack of clarity in the administration of the Fisheries Act, as well as its focus on prohibition rather than conservation outcomes in regulating *effects* on fish and fish habitat, have been the source of concern to those who carry out projects and activities that are subject to the provisions in the Act.

That is why the CNA, while supportive of the review, believes that it is important to note that a number of amendments stemming from the 2012 changes have been positive for fisheries, aquatic habitat and clarity for stakeholders. Some of those positive developments include:

- The Department of Fisheries and Oceans move to a single window approach to service, in an attempt to create greater consistency and more expedient timelines in decision making
- The broadening of Section 35 to apply to activities in addition to works and undertakings;
- Clear provisions outlining the Minister's considerations when deciding on Fisheries Act authorizations
- The creation of regulations for aquatic invasive species
- Specific commitments to partnerships with stakeholders
- Ensuring that conditions of authorizations became directly enforceable
- The duty to take corrective measures to prevent or remedy any adverse *effects* and to increased enforcement and penalties.

Notwithstanding those positive elements of the 2012 amendments (which only came into force in November 2013) the CNA believes there is merit in a parliamentary review. However, we would caution that three years is a very limited time to draw conclusions about the effectiveness and efficiency of the amended Act and we would encourage the Standing Committee to focus on recent practical experience in its review. We believe such an approach would point to some incremental changes in the Act or its administration which would improve its efficiency and effectiveness.

Significant and frequent changes to legislation and administration of regulatory Acts can prove challenging to both stakeholders and regulators often leading to confusion and inefficient application. Should the Standing Committee choose to recommend significant changes, we would strongly urge the committee to ensure that adequate implementation and transition plans be in place prior to the coming into force of any amendments.

In the case of the 2012 amendments, such steps were not sufficiently taken and it resulted in confusion and increased costs to proponents. There were significant challenges with implementation and transition largely due to the lack of sufficient guidance and training for both proponents and regulators. When coupled with a significant reduction in the number of regional departmental offices and staff, the end result was unnecessary delays to projects, increased costs and in our view, also a perception of reduced effectiveness.

One of the more controversial elements of the 2012 amendments was the changes to Section 35 of the Act concerning Fisheries and Habitat protection. The CNA is aware of the public perception that the 2012 amendments weakened the protections offered by the Fisheries Act but we would argue that those public concerns were largely driven by the way the 2012 amendments were introduced as mentioned above.

The CNA would argue that in a number of ways, the 2012 amendments strengthened Section 35.

- Section 35 (1) was expanded from regulating "works and undertakings" to include "activities" which substantially broadens the scope of the section
- The definition of serious harm is now being applied to require approval for works , undertakings and activities that impact fish habitat.
- More stringent application requirements for considering Section 35 approval including plans to offset impact of work and detailed baseline evaluations.
- Our members have experienced a significant increase in oversight and inspections from DFO to ensure compliance.

Nevertheless, CNA believes that the public perception issue needs to be addressed and could be done so through increased clarity and guidance on implementation and improved public consultation of which this process is an important start.

Recommendations

1. Guidance and Training

- As previously mentioned, one of the most significant recommendations from the CAN is the need for clearer guidance and consistency in the interpretation of key elements of the Fisheries Act. A lack of clear understanding of the technical requirements and the consultation process has extended the application time line to multiple years in some cases. CNA members strongly recommend greater training for both proponents and regulators.
- There is currently no guidance on how to include currently operating facilities that were brought into the requirement after 2012. A regulatory process that was based on the assumption that applications would be related to a new project is being used with little interpretation resulting in significant effort and inconsistency on requirements that are not appropriate. CNA members strongly recommend that specific guidance and policy direction be considered when operating facilities are to be incorporated retroactively.
- With improved guidance and greater training, the CNA would expect a more consistent and clear process which should lead to a more effective and efficient way to protect fisheries while enabling critical projects to move forward with an increased degree of certainty.

2. Clarify the Definition of "Serious Harm"

- CNA members make substantial investments in constructing and operating long-term facilities and need to be supported by timely and predictable rules and decisions regarding the definition of "serious harm".
- Currently, CNA members experience inconsistency in the interpretation and application of what constitutes "serious harm" to fish. This creates significant uncertainty around the planning of new facilities.
- The definition of "serious harm" as defined in the regulations under this Act is distinctly different than the determination for "significant adverse environmental effects" under CEAA. Both consider fish and fish habitat and impacts on the fishery but have very different criteria requiring significant duplication of effort as well as extended time lines. CNA members highly recommend that the requirements of these two pieces of legislation with similar goals be aligned.

- CNA recommends that DFO clearly define a position on what constitutes "serious harm" to fish. To that end, the CNA recommends that "serious harm" to fish should be interpreted as protection of fishery resources and not individual fish.
- CNA suggests the following definition:

Serious Harm to fish: "the death of fish or any permanent alteration to, or destruction of fish habitat **that negatively impacts the sustainability of a fishery or fish that support a fishery**"

3. Clarify the how the Fisheries Act is applied to Specific Waters and Species

- The Fisheries Act is designed to protect or preserve Canada's fisheries as a public resource with commercial, recreational or aboriginal value. There is considerable uncertainty and inconsistency over what bodies of water qualify as commercial, recreational or aboriginal fisheries.
- As a result of numerous provincial regulatory regimes there is inconsistent application across the country. The CNA would encourage the Standing Committee to consider how better guidance can be provided to ensure clarity and consistency.
- Similarly, the administration of the Act would benefit from clear guidance on what species of fish constitute a fishery and how fisheries productivity should be considered.

4. Habitat Banking and Offsets

- CNA members are strong supporters of the use of habitat banking and offsets but believe the process could be significantly improved with some clarification, guidance and consistency regarding implementation. Greater understanding of how offsets can be calculated, determined and used against projects would be beneficial.
- In some cases, like for like mitigation of habitats is not feasible and "out of kind" offsets should be considered.
- CNA members would encourage the Standing Committee to consider expanding the habitat banking and offset provisions to include aggregate proponent led and third party led opportunities. This would significantly increase the opportunities for more large scale offsets.
- This offers an example of the discussion under Point 1 above, regarding the inclusion in the 2012 amendments of already operating facilities. Facilities operating for many years who have been voluntarily funding offset programs have found that they needed

to cancel spending on these programs since the department would not allow any pre-existing programs to be considered as offsets. While this is an understandable rule for a new project, it is unreasonable to punish industry that had the foresight to undertake this work on under their own initiative, as well as to disrupt the good work in progress.

5. Interaction with the Canadian Environmental Assessment Act (CEAA)

- As noted in Point 2 above, the CNA recommends that the Standing Committee should consider how the significantly different assessment criteria and processes under these two Acts could be better aligned.
- The CNA would encourage the Standing Committee to consider amending the Fisheries Act or implementation to enable the timing of approvals under the Act to coincide with the timing of EA approval. Such co-ordination would provide proponents with a more certain process and should be able to be done without impacting the effectiveness of either process.

In closing the CNA would like to thank the Standing Committee for the opportunity to provide input into its review of the Fisheries Act. If you have any questions or concerns please feel free to contact Steve Coupland at 613-237-4262 ext 107 or couplands@cna.ca.

Sincerely,



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