



May 13, 2013

Ray O'Flaherty  
Legislation and Regulatory Affairs  
Fisheries and Oceans Canada  
200 Kent Street,  
Ottawa, Ontario K1A 0E6

Dear Mr. O'Flaherty,

**Re: Conservation Ontario's Comments on the proposed Application for Authorization under Paragraph 35(2)(b) of the Fisheries Act Regulations Published in the Canada Gazette, Part I, April 13, 2013**

Thank you for the opportunity to provide comments regarding the proposed Application for Authorization under Paragraph 35(2)(b) of the Fisheries Act Regulations (hereafter referred to as the proposed regulations) published in the Canada Gazette, Part I, on April 13, 2013. Conservation Ontario (CO) is the network of Ontario's 36 Conservation Authorities (CAs) who are partners with Fisheries and Oceans Canada (DFO) through Fish Habitat Management Agreements. These agreements describe work sharing arrangements for initial review determinations, mitigation requirements and compensation planning for the purposes of Section 35 of the Fisheries Act.

The proposed regulations are intended to result in more predictable and timely reviews to enable resource development as envisioned in the government's responsible resource development plan. As significant partners in reviews under Section 35 of the Fisheries Act, CAs want to facilitate timely and predictable implementation of these new regulations. While CO, in principle, is supportive of the proposed regulations, it has been identified that several key elements lack clarity. Unless this lack of clarity is addressed, there is a high likelihood that these regulations will not achieve their intended purpose of streamlining the review and authorization process. Most notably, there is a lack of guidance available to assist with the interpretation of the definitions of several terms used in the proposed regulations; this is discussed in further detail below. Policy guidance with respect to these terms has only recently been released. This is important because a thorough review of this guidance may suggest the need for further revisions to the sections on information requirements in the proposed regulations. Accordingly, CO requests that the Canada Gazette 30-day comment period for potential revisions to the proposed regulations be extended to coincide with the comment period for the discussion paper "Implementing the New Fisheries Protection Provisions under the *Fisheries Act*" (April 2013) and accompanying science advice. In the interim, a few minor changes to the regulatory text are suggested to allow for a clear and seamless transition to implementation.

***Definition of Terms in Proposed Regulations***

The proposed regulations require proponents to provide "a description of the likely effects of the proposed work, undertaking or activity on fish that are part of a commercial, recreational or Aboriginal fishery or to fish

that support such a fishery.” However, there is a lack of biological and ecological understanding of many fish species that are not generally targeted species for angling. There are numerous approaches that could be used to assess whether a species is a “support species” and the likely risk associated with impacts to those species. The lack of biological information available to support such a determination and the lack of guidance in the regulations as to the approach to be used to make such a determination may result in added expenses for the proponents and delays in obtaining authorizations.

In addition, the proposed regulations require project proponents to provide a “quantitative description of the serious harm to fish that is likely to remain after the measures and standards referred to in section 9 have been implemented.” Serious harm to fish has been defined under the Fisheries Act as “the death of fish or any permanent alteration to, or destruction of, fish habitat.” This definition does not provide enough detail for its efficient use in implementation. At a minimum a full description of the type of information required in the referenced “quantitative description” is needed. The term “serious harm” suggests that enforcement of the prohibition will rely on some science-based means for determining when harm becomes serious, however this has yet to be made clear.

### **Regulatory Impact Statement**

The regulatory impact statement indicates that there will be no costs to small business as a result of the proposed regulations. However, as described in comments above, it has not been made clear how habitats supporting fish species used in small commercial bait fisheries will be protected. If this is not clarified it has the potential to affect small commercial bait fisheries, this should be acknowledged and addressed.

The impact statement also indicates that Fisheries and Oceans Canada reports to Parliament annually on authorizations issued under subsection 35(2) of the Act and that future reports may include information on compliance with time limits proposed under the proposed regulations. It is suggested that future reports should also include a report on the effectiveness of legislative and regulatory changes in terms of the ecological integrity of the fisheries being managed, and the long-term performance of “off-setting” projects. Without monitoring for effectiveness, sustainability of this natural resource (fish and fish habitat) is at risk.

### **Comments on Proposed Regulatory Text**

#### ***Application for Authorization 3(b)***

In general, Conservation Ontario is supportive of the use of a letter of credit as a tool to ensure compliance with the proposed regulation. It may be unnecessarily punitive in all situations as a large letter of credit can take several years to be cancelled and this can impact budgeting. Therefore it is suggested that softening this tool to an optional one would allow regulators to use this tool more effectively as required on a case by case basis.

#### ***Timelines (5 (1), 6***

It is our understanding that the timelines do not start until DFO has received a complete application for an authorization. To minimize the potential for later delays, pre-consultation should be encouraged for confirmation of complete application requirements.

It is suggested that the proposed regulations have regard to harmonization with other permitting processes. For example, it is likely that permits issued under Ontario’s Provincial Endangered Species Act, will take longer than 90 days to issue and the final plan approved by Ontario’s Ministry of Natural Resources may be quite different than the original plan. This may render the Fisheries Act Authorization inaccurate and unenforceable or may necessitate proponents initiating a second application process. Again, a pre-consultation meeting could minimize resubmissions.

**Schedule (Section 1 and subsection 3(1))**

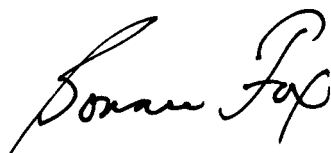
Overall, insufficient details are available in the schedule to allow applicants or regulators to determine what would constitute a complete application. For example, the schedule does not specify which monitoring and assessment methodologies would be considered sufficient to provide estimates of the number of fish likely to be affected. Nor does it provide direction on what would be considered an “adverse effect” or methodologies that would be considered appropriate mitigation for such an effect. It is suggested that at a minimum the proposed regulations include an additional requirement for applicants to provide information on the qualification of persons undertaking the studies and completing the assessments. The regulations should also specify required qualifications. This revision would start to address this issue by ensuring that any information submitted as part of an application is accurate. Qualified persons would still need additional policy guidance to ensure that the methodologies used in assessments are considered appropriate.

**Description of Effects on Fish and Fish Habitat (8)**

There is concern that limiting the description of effects on Fish and Fish Habitat to “likely” effects may not adequately address all risk to fish and fish habitat as it is challenging to determine what is “likely” without a clearly described risk assessment process. It is suggested that additional information requirements be added to the proposed regulations so that applicants would list all potential effects and provide a description of the mitigation measures that would be applied to reduce the list of potential effects, to those that are likely. The likely effects could then be evaluated to determine if they constitute serious harm.

Once again, thank you for the opportunity to provide comments regarding the proposed Application for Authorization under Paragraph 35(2)(b) of the Fisheries Act Regulations . Overall, Conservation Ontario is supportive of the proposed regulations. However, in order to ensure that these regulations achieve their intended purpose of streamlining the review and authorization process, it is suggested that the Canada Gazette 30-day comment period for potential revisions to the proposed regulations be extended. The extension date could coincide with the comment period for the discussion paper “Implementing the New Fisheries Protection Provisions under the *Fisheries Act*” (April 2013) and accompanying science advice. In the interim, Conservation Ontario suggests several revisions to the regulatory text for your consideration. These changes are suggested to allow for a clear and seamless transition to implementation. As significant partners, CAs look forward to being engaged in the process of developing further implementation guidance to facilitate the timely and predictable implementation of these new regulations. Should you have any questions about this letter, please contact myself at extension 223 or Samantha Dupre at extension 228.

Sincerely,



Bonnie Fox  
Manager, Policy and Planning

c.c.: K. Gavine, General Manager, Conservation Ontario  
CAOs, All Conservation Authorities