



May 28, 2013

Cynthia Mitton-Wilkie
Co-ordinator Client Liaison & Partnerships
Fisheries & Oceans Canada / Central and Arctic Region
P.O. Box 5050, 867 Lakeshore Rd
Burlington, ON L7R 4A6

Re: Conservation Ontario's Comments on the discussion paper "Implementing the New Fisheries Protection Provisions under the *Fisheries Act*"

Dear Ms. Mitton-Wilkie,

Thank you for the opportunity to provide comments regarding the discussion paper produced by Fisheries and Oceans Canada (DFO) entitled "Implementing the New Fisheries Protection Provisions under the *Fisheries Act*." This discussion paper is intended to explain recent changes to the *Fisheries Act* related to fisheries protection and to outline how the Department plans to interpret these new provisions. The paper indicates that the intended audience is DFO staff and project proponents. It should also be recognized that partner agencies are a third audience for the paper. Conservation Ontario (CO) is the network of Ontario's 36 Conservation Authorities (CAs) who are partners with 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*.

Due to the limited time provided, a comprehensive review of the discussion paper and associated science advisory documents was not possible. For this reason CO respectfully requests that DFO consider extending the deadline for comments on the discussion paper and science advisory documents so that implementation of the Fisheries Protection Policy can be adequately supported. Based on a preliminary review of this discussion paper it appears that there is a large volume of work still to be done to develop clear implementation guidance. There are several terms that are still unclear and there are many tools that proponents will need in order to identify their responsibilities under the amended *Fisheries Act*. Therefore it is highly unlikely that proponents or federal and provincial agencies will be fully prepared to move forward with implementation of the amended *Fisheries Act* by the proposed July 1st deadline. This could result in significant delays during implementation. CO strongly encourages DFO to consider extending this deadline to the Fall. This would allow CO, CAs and other partners to work with DFO on implementation guidance that would clarify for proponents their responsibilities and streamline implementation.

General Comments

The discussion paper states that in general, DFO will shift emphasis from site-specific project reviews,

P.O. Box 11, 120 Bayview Parkway Newmarket Ontario L3Y 4W3
Tel: (905) 895-0716 Fax: (905) 895-0751 Email: info@conservationontario.ca

particularly for those works, undertakings, or activities that pose a low risk to fish and fish habitat, to a focus on managing threats to the sustainability and ongoing productivity of fisheries. The discussion paper does not make it clear how this will be accomplished. CO encourages DFO to consider providing further clarification by suggesting that low risk projects should be reviewed and implemented so that the outcomes are consistent with local fisheries management objectives. CO is concerned that this shift in emphasis may result in disregard for the cumulative impacts of the numerous low risk projects that occur. The document “Science Advice to Support the Development of a Fisheries Protection Policy for Canada” (DFO, 2013) (hereafter the SAR) indicates that it was developed to support the discussion paper. Throughout the SAR the scientists repeatedly identify areas where science advice will need to be produced to guide the development of future implementation tools for proponents and regulators. Adequate guidance needs to be produced prior to the *Fisheries Act* amendments coming into force and this does not seem feasible by the July 1st deadline.

In particular the SAR acknowledges the need to identify methods and metrics for cumulative impact assessment in order to avoid impacts to ongoing productivity. The SAR also indicates that the scale at which the impact on productivity is assessed needs to be the functional ecosystem scale in order to take into account cumulative impacts. This is an important point not addressed in the discussion paper. More detailed operational guidance will be necessary to identify practical methods to support cumulative impact assessment, such as the development of registry databases to track the number of low risk projects and their locations (e.g. the levels of these activities allowed in different classes of ecosystems).

While the discussion paper states that the 2012 changes to the *Fisheries Act* are intended to provide enhanced compliance and protection tools; this paper does not make it clear how this is to be accomplished. It appears from organizational charts that there may be a couple of DFO compliance officers for the entire province of Ontario. Additional pragmatic details on plans to enhance compliance are needed given DFO’s new organizational structure and resulting limited staff capacity.

Finally, the discussion paper states that the 2012 changes to the *Fisheries Act* are intended to reemphasize proponents’ responsibilities to avoid harm to fish and fish habitat through the appropriate design of projects and the application of mitigation measures. A strategy for effectively communicating this message to proponents is not addressed in the discussion paper. The delay in release of policy guidance following the changes to the *Fisheries Act* in 2012 has resulted in widespread misinformation and confusion with respect to the *Fisheries Act* and the extent of proponents’ continuing responsibilities under the Act. Therefore it will be important to clearly communicate their responsibilities and the tools provided to assist them in implementation.

3.2 Purpose of the New Provisions

The paper states that DFO interprets “*productivity*” to mean “the sustained yield of all component populations and species and habitats that support and contribute to a fishery in a specified area.” The SAR recognizes that in order to implement this definition in practice, additional operational tools will be needed, based on additional scientific information. While this is not directly acknowledged in the discussion paper, it is necessary to develop these operational tools as soon as possible to facilitate a smooth transition to implementation.

3.3 Prohibition against Serious Harm to Fish

Figure 1 provides a general diagram illustrating the project planning, review and decision-making process; however the discussion paper as a whole focuses only on outlining the authorization process for cases where serious harm to fish cannot be avoided. The discussion paper does not mention review

outcomes where authorization would not be required (i.e. Letters of advice, Operational Statements). As discussed in general comments above, this paper lacks a communication strategy and guidance materials for project proponents informing them in detail of what actions are allowed and when under the new *Fisheries Act*. Letters of advice have been useful tools used in Ontario to inform proponents of the kinds of mitigation actions that would allow them to proceed with a project without requiring an authorization. In addition detailed Operational Statements have been a useful tool to inform proponents about which actions they can take and how to carry out projects in order to avoid serious harm. Conservation Ontario provided preliminary comments on a set of proposed new national operational statements in April 2012. Operational Statements and other similar tools to inform proponents about their responsibilities when proceeding with project planning to avoid serious harm will need to continue to be a part of the review process under the revised *Fisheries Act* in some form. It will be important that these tools also include some sort of registration or tracking system to allow DFO to assess cumulative impacts of low risk activities. As watershed managers, Conservation Authorities should be able to provide input into the development of Operational Statements and they should also be informed or have access to this tracking system to support watershed planning and management.

3.3.3 Scope of Application of the Prohibition

Further clarification is required as to the interpretation of the definitions of commercial and recreational fisheries. Recreational fishery is defined as a location where “fish are harvested under the authority of a licence for personal use or sport”. Commercial fishery is defined as a location where “fish are harvested under the authority of a licence for sale, trade, or barter.” Section 3.3.3 of the discussion paper further clarifies the scope of the application of these definitions by stating that the prohibition would apply to Canadian fisheries waters that contain fish or fish habitats that are part of commercial or recreational fisheries, as identified under either federal or provincial fishing regulations. It is not clear what is meant by fish that are “identified” in federal or provincial fishing regulations. In Ontario, the Ministry of Natural Resources issues fishing licenses and thus they may play a large role in the future in identifying which areas are considered recreational or commercial fisheries. However, there are a variety of ways to interpret the scope of fishing regulations therefore it is important to ensure that each province will be able to give a clear definition of which regulations will specify a commercial or recreational fishery for the purposes of the *Fisheries Act*. In order to provide clarity on this issue DFO should work with provincial partners to develop a list of provincial regulations that will be used to make this determination and where they apply. In addition, project proponents and DFO partners (including provincial partners) should be consulted on any new regulations that propose to exempt Canadian fisheries waters from the prohibition or that exclude certain fisheries from the definition of commercial, recreational, or Aboriginal (CRA) fisheries.

The discussion paper states that “the prohibition would not apply in waters that have been surveyed, using recognized, appropriate scientific methods, to demonstrate that they do not contain fish or their habitats that are part of or support, commercial, recreational or Aboriginal fisheries. An example would be disconnected or isolated waters.” Given that some habitats are used seasonally, a project specific survey may not be sufficient to “demonstrate” the objective. Further guidance should be provided to specify the “recognized, appropriate scientific methods” that will be required to demonstrate that waters do not contain fish or fish habitat. In this guidance, DFO is urged to include a statement of support for the use of local monitoring data and fisheries management objectives as identified in Fisheries Management Plans.

Several other points require further clarification with respect to defining Canadian Fisheries waters where the prohibition would apply. The definition of Canadian Fisheries Waters includes all internal

P.O. Box 11, 120 Bayview Parkway Newmarket Ontario L3Y 4W3
Tel: (905) 895-0716 Fax: (905) 895-0751 Email: info@conservationontario.ca

waters of Canada. In the past Canadian Fisheries Waters needed to be connected to a public use (i.e. a private (offline) pond would not be considered fisheries waters), this is an important distinction and it is not clear from this discussion paper whether this distinction will continue. In addition, it is unclear whether stocked water bodies will be addressed as part of the prohibition. Future guidance should address these issues.

3.4.1 Contribution of Relevant Fish

It is agreed that the precision required in estimating the contribution of the relevant fish to the sustainability and ongoing productivity of the fishery will depend on the scale of impact of the project to the productivity of the fishery. The SAR correctly states that the science to support defining the role of relevant fish and overall productivity does not exist in many areas. Future policy guidance will need to be more explicit. Details will need to be provided to specify exactly how the contribution of the relevant fish to the sustainability and ongoing productivity will be determined in various situations.

3.4.2 Fisheries Management Objectives

Conservation Ontario supports the use of integrated fisheries management plans as an important tool to identify Fisheries Management Objectives. Fisheries Management Objectives will be a critical decision making tool under the *Fisheries Act*. In the past Conservation Authorities have partnered with DFO and received some funding to create Fisheries Management Plans, however not all areas currently have Fisheries Management Plans and those that do will need updating. Conservation Ontario encourages DFO to consider offering financial support to partners to create and update these Fisheries Management Plans to support future decision making.

In addition, the paper states that, where Fisheries Management Objectives do not exist, consultation with fishery management authorities may be required. Future guidance should define a list of organizations that would be considered fishery management authorities for consultation purposes. This list should include Conservation Authorities.

Conservation Authorities currently rely on Fisheries Management Objectives identified in Fisheries Management Plans to provide input into Planning Act applications. As DFO partners involved early on in the planning process, CAs educate proponents about the Fisheries Management considerations and objectives. This process streamlines the review process by making it much more likely that proponents will design projects that include mitigation measures and will not require a *Fisheries Act* authorization. The 2012 changes to the *Fisheries Act* and associated regulation are intended to bring them into alignment with the federal government's responsible resource development plan which aims to result in streamlined timely reviews to enable resource development. Conservation Ontario is concerned that the policy paper makes no mention of DFO's continued involvement in educating proponents about fish management objectives and proponent responsibilities under the *Fisheries Act early in the planning process*, as this is an essential element in delivering streamlined timely reviews. DFO should strongly consider continued partnership agreements with Conservation Authorities in order to fulfill this function.

3.4.3 Measures and Standards to Avoid, Mitigate and Offset

Conservation Ontario is supportive of the discussion paper's proposed use of habitat banks for offsets. In order for this to be implemented DFO will need to provide more guidance with respect to when it would be acceptable to establish a habitat bank and what form of bank would be appropriate for a given project. The discussion paper makes reference to offsetting measures being "in the area of the affected fishery". Conservation Ontario finds this statement to be vague as 'area' could be considered an entire

watershed or a few square meters. Future guidance should make it clear that offsetting should be outcome based and provide for equivalent productivity anywhere that contributes to the same species or ecosystem type. Tools that can be used to demonstrate how the productivity is maintained or improved, through offset projects will also need to be developed.

Conservation Ontario agrees that mitigation measures should be “practically” and “economically” feasible however practical and/or economic feasibility are subjective terms. DFO should provide further guidance to proponents to assist them in determining the types of mitigation measures that would be considered feasible.

3.4.4 Public Interest

While it is recognized that it is up to the discretion of the minister for the determination of ‘other factors’ that should be considered as part of the public interest, it would be useful to have a more specific understanding of what this might entail. This could be provided as a part of future policy guidance.

Once again, thank you for the opportunity to provide comments on the discussion paper. Insufficient time was provided for Conservation Ontario (CO) to conduct a comprehensive review of the discussion paper and associated science advisory documents. Based on this preliminary review, CO has strong reservations about the feasibility of developing all the implementation guidance tools and clarification necessary for transition to implementation of New Fisheries Protection Provisions under the *Fisheries Act* by the proposed July 1st deadline for enactment of the amendments. CO strongly encourages DFO to finalize clear operational guidance prior to the implementation of these amendments and, to that end, to consider extending this deadline to the Fall. As significant partners, CO looks forward to being engaged in the process of developing further implementation guidance. 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