



VISION 2016 – 2020

Conservation Ontario will be the leader in engaging Conservation Authorities in matters of common interest and in shaping effective policy related to Conservation Authorities

## Conservation Ontario Council Report

From: Leslie Rich, Policy and Planning Liaison & Nicholas Fischer, Policy and Planning Officer

Date: September 12, 2018

Subject: Conservation Ontario's Comments on "Approach to a key regulation under the proposed fish and fish habitat provisions of the Fisheries Act" Consultation Paper

### Summary

On February 6, 2018, Fisheries and Oceans Canada (DFO) introduced Bill C-68, which proposes amendments to the *Fisheries Act* with the aim to better protect fish and fish habitat. While Bill C-68 awaits Senate review and possibly approval, DFO has released the "Approach to a key regulation under the proposed fish and fish habitat provisions of the Fisheries Act" discussion paper to begin early engagement with stakeholders and the public on the regulations, policies, and other program instruments needed to implement a modern *Fisheries Act*. Conservation Ontario has submitted a consolidated CA response to DFO on the discussion paper which reinforces earlier CO comments regarding letters of credit required for offsetting projects as part of a project authorization. The response also recommends that DFO establish clear guidance regarding timelines for the review of requests for amendment, suspension or cancellation of authorizations.

### Recommendation

**THAT** Conservation Ontario's comments on the "Approach to a key regulation under the proposed fish and fish habitat provisions of the Fisheries Act" Consultation Paper submitted on September 21, 2018 to Fisheries and Oceans Canada be endorsed.

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### Background

On February 6, 2018, Fisheries and Oceans Canada (DFO) introduced Bill C-68 which proposes amendments to the *Fisheries Act* to restore lost protections and incorporate modern safeguards to better protect fish and fish habitat. The review process involved two phases which Conservation Ontario actively participated in. In phase one of the review, the Standing Committee on Fisheries and Oceans was charged with consulting with experts and the public. Public feedback was received through a workbook from October 18, 2016 until November 25, 2016. At the December 2016 meeting, Council endorsed a submission to the province to be shared as part of the phase one review of the *Fisheries Act*.

In phase two of the review, the public provided feedback on the “Environmental and Regulatory Reviews Discussion Paper” from July 26 until September 11, 2017. Conservation Ontario Council endorsed comments at their September, 2017 meeting. The comments recommended early engagement in the planning process whenever possible.

Following the two phases of the review, CO asked CAs to identify any significant concerns related to the current implementation of the *Fisheries Act*. These issues were then incorporated into comments submitted by CO on Bill C-68 to the Standing Committee on Fisheries and Oceans on May 10, 2018. Conservation Ontario Council endorsed these comments at the June 26, 2018 council meeting.

### **Current Status**

Bill C-68 has now passed third reading and will undergo Senate review. During this period, DFO has begun early engagement with stakeholders and the public on the regulations, policies, and other program instruments needed to implement a modern *Fisheries Act*. On July 6, 2018, DFO released their first consultation paper entitled “Approach to a key regulation under the proposed fish and fish habitat provisions of the Fisheries Act”. This paper proposes amendments to the existing Applications for Authorization under Paragraph 35(2)(b) of the Fisheries Act Regulations.

Conservation Ontario submitted the attached response to the discussion paper on September 12, 2018. Feedback on the discussion paper was received from Central Lake Ontario, Credit Valley, Kettle Creek, Halton Region, Nottawasaga Valley, South Nation, Toronto and Region, and Upper Thames River Conservation Authorities. Conservation Ontario’s comments focused on DFO’s consultation question regarding approaches to financial securities required for offsetting plans. CO’s response reiterated concerns with the letters of credit for offsetting projects required as part of an authorization, and proposed alternative measures to ensure that the offsetting work is completed as required. The letter also emphasized the need for pre-consultation and early engagement with the proponent and other permitting agencies.

L. Rich participated on behalf of CO in the provincial and federal briefings on the consultation paper on September 6, 2018 hosted by Ministry of Natural Resources and Forestry (MNRF) and DFO respectively.

### **Conclusion**

The “Approach to a key regulation under the proposed fish and fish habitat provisions of the Fisheries Act” represents the first of multiple discussion papers which DFO intends to release to seek further feedback on policy and regulatory instruments and concepts related to the administration of the amended *Fisheries Act*. Conservation Ontario will continue to be involved in the review of upcoming papers as appropriate and will seek opportunities to influence the development of regulatory and policy frameworks to implement the updated *Fisheries Act* when such material become available.



September 12, 2018

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**Re: Conservation Ontario's Comments on the "Consultation Paper: Approach to a key regulation under the proposed fish and fish habitat provisions of the Fisheries Act"**

Government of Canada:

Thank you for the opportunity to provide comments on the "Consultation Paper: Approach to a key regulation under the proposed fish and fish habitat provisions of the Fisheries Act". Conservation Ontario (CO) is the network of Ontario's 36 Conservation Authorities (CAs), which are community-based watershed management agencies dedicated to conserving, restoring and managing Ontario's natural resources on a watershed basis. CAs have extensive knowledge of the *Fisheries Act* as prior to the amendments to the Act in 2013 all 36 CAs had partnership agreements with Fisheries and Oceans Canada (DFO) to review proposed projects in their watershed under Section 35 on their behalf. Since the amendments to the *Fisheries Act* many CAs continue to have at their disposal extensive fish habitat information and may have prepared fisheries/fish habitat management plans, which continue to benefit fish and fish habitat in their watersheds.

CO and DFO continue to have a MOU which recognizes our respective responsibilities for regulatory reviews and approvals and aquatic resource protection, and we continue to develop a collaborative approach to fisheries and aquatic resource protection in Ontario. Conservation Ontario is highly supportive of effective partnerships which streamline approvals and contribute to better environmental outcomes.

This letter has been structured to respond to the questions in the consultation paper.

**1. Do you have any suggestions on the amendments related to the proposed changes to the *Fisheries Act* contained in Bill C-68?**

Conservation Ontario is supportive of the proposed changes found within Bill C-68 which aim to better protect fish and fish habitat. It has been our experience that DFO *policy* and human/financial *resources* equally directs how DFO manages fish habitat, as evidenced by the changing thresholds for authorizations under the previous version of the Act and the current reliance on the self-assessment process. Given our strong history as aquatic managers, our previous partnership agreements with DFO and our current MOU, it is Conservation Ontario's expectation that CAs will continue to be engaged in regulatory and policy development discussions directly and through the Canada Gazette process moving forward.

When developing the accompanying policy framework, it is recommended that DFO include a mandatory pre-consultation with the proponent and other affected agencies to help streamline the authorization application process. The policy framework should also be adequately flexible to allow experimental approaches to habitat improvement, restoration, and creation using an adaptive management approach. Finally, the policy framework should seek to assess and address cumulative impacts of a proposed project.

## **2. Do you have any suggestions on amendment, suspension or cancellation of any authorization by the Minister, including timelines?**

Conservation Ontario is supportive of the development of transparent criteria that the Minister would use for amendment, suspensions or cancellation of an existing authorization. It is understood that these powers would apply to new authorizations, rather than existing ones. As part of the criteria development, it is recommended that case studies or scenarios be developed to demonstrate the process in full. This would help to provide more clarity on what might trigger a suspension versus an amendment versus a cancellation.

Requests for an amendment to an authorization, in the event of unforeseen circumstances such as weather conditions delaying a project, should be allowed to proceed through a streamlined process and/or be given priority over a new application. To further streamline the process, it is recommended that the Minister **or delegate** be permitted to review and issue a decision on a request to amend, suspend or cancel an authorization. Finite timelines should be established so that project suspensions do not result in a project being put on hold indefinitely.

It is further suggested that policies be developed that will allow offsetting projects to be amended, suspended or cancelled provided that the modification does not result in a less effective project.

## **3. Do you have any views about the use of certified habitat credits?**

It is understood through participation in the stakeholder engagement sessions on this consultation paper that: the legislative framework does not allow for third party businesses to create habitat credits to be drawn upon at a later date; prior to the introduction of Bill C-68 habitat banking has been used, but was never enshrined in the legislation; and that habitat credits would be “certified” through a formal agreement with DFO and the proponent. Therefore the proposed proponent-led habitat banks may be established by proponents, which could include a government agency, corporation, non-profit organization, and individual or other entity under an arrangement with DFO. Given that third parties cannot create habitat banks, it is recommended that a policy framework be developed and consulted upon to assist proponents with creating habitat credits on a case-by-case basis.

CAs have expertise in ecological off-setting and are prepared to assist with the policy development. CA-specific feedback on the use of certified habitat credits includes:

- The off-setting should be based on fisheries management objectives and include local fisheries management plans, watershed managements plans and local/regional knowledge/experience to ensure appropriate habitat projects are selected;
- Partnering with a CA who has a fisheries management plan or watershed management plan in place will assist with identifying the highest priority areas for restoration. CA local relationships could be used to connect willing property owners with proponents and CA expertise could be used for restoration purposes;

- To increase transparency, consideration should be given to having an ENGO or CA (where they exist) monitor habitat credits at a more local level; and
- Wherever possible, the habitat credit should be developed in the same watershed as where the authorization is issued.

#### **4. Do you have any suggestions or comments on various approaches to financial securities required for an offsetting plan?**

Throughout the review of the *Fisheries Act* Conservation Ontario has repeatedly identified that the requirement for letters of credit have had a significant implication on the work conducted by Conservation Authorities, municipalities and ENGOs and may impede opportunities for fisheries habitat restoration in Ontario. In the case of Conservation Authorities (who cannot hold a letter of credit on their own, and must partner with municipalities to receive one), the banking and administrative fees associated with the letter of credit are significant and represent a permanent loss of taxpayer money. In some cases, such as the proposed restoration work in Port Perry by Kawartha Conservation, the Conservation Authority and municipality simply cannot afford the proposed security.

Conservation Ontario is appreciative of DFO's exploration of whether additional forms of financial security would meet their policy objectives. Performance bonds could be one tool which may assist proponents by providing increasing flexibility. It is agreed that there is a need for securities in some cases where there is a risk that the work may not be undertaken. For conservation projects undertaken by Conservation Authorities; there is no anticipation of insolvency and thus there is an extremely low risk that the projects will not be completed as proposed. Further, where projects are designed to enhance fish habitat then a letter of credit is redundant.

Conservation Ontario strongly recommends that, for conservation projects undertaken by Conservation Authorities, there is **no** financial security requirement. Legislative safeguards are already in place to ensure that proponents comply with the conditions of an authorization. The current *Fisheries Act* enables the court to order a person to remedy any harm to any fish, fishery or fish habitat and the proposed amendments allow for the use of an alternative measures agreement to do the same. Further, it is noted that currently federal and provincial governments are exempt from the requirement to provide financial security. The current exemption list could be expanded to include Conservation Authorities, as they implement provincial regulations under both the *Conservation Authorities Act* and *Clean Water Act* as well as coordinate with provincial and federal agencies on enforcement issues. This coordination is further to the recognition of our respective responsibilities for regulatory reviews and approvals and aquatic resource protection.

Further exemptions should also be developed for activity types. For example, projects that are designed to enhance fish habitat should be exempt and could be defined using specific criteria.

For situations where the projects do not fit into the CO proposed exclusion categories (conservation projects completed by public agencies and/or projects designed to enhance fish habitat), it is recommended that DFO consider providing securities in the form of habitat, rather than money. Many projects that require authorizations are years in the making. With DFO pre-consulting (see

question 1 above) with the proponent, such as a CA, DFO staff could identify early in the process that securities would be required as part of an authorization. This would allow the CA as a proponent to develop a habitat bank, in the form of stewardship/restoration projects, prior to the commencement of the authorized work. These projects could provide the security through pre-emptive habitat enhancement, rather than through financial means, resulting in better use of tax payer dollars and improved environmental outcomes.

**5. Do you support the proposal to require geographical coordinates in the description of offsetting measures?**

CAs are supportive of the proposal to require geographical coordinates in the description of offsetting measures. As described in our response to question 3, it is recommended that CAs/ENGOS be consulted to identify the best areas for restoration. It is unclear whether or not this is intended to be an open database. It is recommended that one of the uses for these coordinates should be to generally ensure that new authorizations are issued in areas where offsetting has not previously taken place.

**6. Do you have any suggestions regarding this proposed requirement for communication with Indigenous communities about an application for authorization?**

Conservation Ontario is supportive of a proposed requirement for DFO to communicate with Indigenous communities about an application for authorization and suggests that direction could be taken from initiatives including the National Aquatic Habitat Partnership. It is noted however that this document does not describe what may be the effect of this notification. Further, Figure 4 is overly simplistic and does not assist with proponent understanding of the process. A revision to include the Crown's Duty to Consult may be appropriate.

It is recommended generally that DFO seek opportunities to enhance communication with all partners, including Indigenous communities throughout the authorization process. For authorizations in CA watersheds, a permit under Section 28 of the *Conservation Authorities Act* will be required. Therefore, as a best practice, DFO and CAs should work together to ensure that proponents receive complementary feedback and timely approvals.

**7. Are there any other changes to the applications for authorization regulations that you would suggest?**

As described in the MOU between CO and DFO both agencies have respective responsibilities for regulatory reviews and approvals and aquatic resource protection, and we should continue to develop a collaborative approach to fisheries and aquatic resource protection in Ontario. Conservation Ontario is highly supportive of effective partnerships which streamline approvals and contribute to better environmental outcomes. Therefore it is recommended that wherever possible for proposed authorizations in a CA watershed that DFO staff seek feedback from the affected CA to provide local context and expertise.

Once again, thank you for the opportunity to provide comments on the "Consultation Paper: Approach to a key regulation under the proposed fish and fish habitat provisions of the Fisheries Act". Should you have any questions about this letter, or require any additional details, please do not hesitate to contact me at extension 226.

Sincerely,

A handwritten signature in black ink that reads "Leslie Rich". The signature is written in a cursive, flowing style.

Leslie Rich  
Policy and Planning Liaison

c.c. all CA GMs/CAOs  
Audie Skinner, Ministry of Natural Resources and Forestry