Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

March 17, 2014 **BY EMAIL TO**: ER-RH@dfo-mpo.gc.ca

Peter Ferguson
Manager, Legislation and Regulatory Affairs
Fisheries and Oceans Canada
Mail Station 14S020
200 Kent Street
Ottawa, Ontario
K1A 0E6

Dear Mr. Ferguson:

Re: *Canada Gazette*, Part I, Vol. 148, No. 7 — February 15, 2014
Regulations Establishing Conditions for Making Regulations under Subsection 36(5.2) of the *Fisheries Act*

These are the comments of the Canadian Environmental Law Association (CELA) regarding the regulatory approach recently proposed under the *Fisheries Act*, as described in the above-noted *Canada Gazette* notice.

For the reasons outlined below, CELA concludes that the regulatory proposal is unjustified, unacceptable, and contrary to the public interest. Accordingly, CELA strongly requests that Fisheries and Oceans Canada (FOC) immediately withdraw and discontinue this ill-conceived proposal.

In addition, CELA requests that FOC refrain from proposing or making any further regulatory changes pursuant to subsections 36(5.1) or 36(5.2) of the *Fisheries Act* unless there is meaningful stakeholder consultation and proper public participation throughout the regulation-making and standard-setting process.

PART I – BACKGROUND

Founded in 1970, CELA is a public interest law group that seeks to use and improve environmental laws in order to protect the environment and safeguard public health. Funded as a specialty clinic by Legal Aid Ontario, CELA represents low-income persons and disadvantaged communities and groups in the courts and before tribunals on a wide variety of environmental issues.

Over the past four decades, CELA has been actively involved in casework and law reform activities aimed at conserving, protecting and restoring water quality, particularly in the Great Lakes context. This work has included administrative proceedings, environmental assessments,

and litigation under the habitat protection and deleterious substance provisions of the *Fisheries Act*. For example, CELA staff have been involved in private prosecutions[1] under section 36(3) of the *Fisheries Act*, and have intervened in appellate court proceedings where the correct statutory interpretation of section 36(3) was at issue.[2]

Accordingly, it is through this public interest prism that CELA has carefully scrutinized FOC's current regulatory proposal, and has found it highly objectionable for various legal and policy reasons, as described below.

PART II – CELA COMMENTS ON THE CURRENT REGULATORY PROPOSAL

(a) Overview of FOC's Regulatory Proposal

In essence, the FOC's current regulatory proposal attempts to create the general framework for the passage of future (and as yet unknown) federal regulations to exempt various activities from the broad prohibition contained within subsection 36(3) of the *Fisheries Act*.

This prohibition currently provides that subject to regulations, "no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water."

There is an extensive body of Canadian jurisprudence that has helped define or clarify the meaning of the key words and phrases used within section 36(3) (e.g. "deposit", "deleterious substance", "water frequented by fish", etc.). Persons convicted under this prohibition potentially face large fines, imprisonment, restoration orders, and other court-imposed penalties pursuant to subsections 40(2) and 79.2 of the *Fisheries Act*.

For these reasons, subsection 36(3) of the *Fisheries Act* has long been regarded by CELA and other stakeholders as one of the most important anti-pollution prohibitions in federal law. If enforced in a timely and effective manner, the deleterious substance prohibition can not only be used to catch, convict and punish polluters, but it can also serve general deterrence purposes in relation to other persons, corporations and industrial sectors that handle or store deleterious substances in close proximity to Canada's water bodies.

Moreover, the significant liabilities (and public stigma) associated with convictions under subsection 36(3) of the *Fisheries Act* have undoubtedly motivated some proactive companies to prepare and implement pollution prevention plans which seek to <u>avoid</u> deposits of deleterious substances into water frequented by fish.

However, despite the public interest importance of subsection 36(3) for protecting fisheries and water quality, the *Fisheries Act* was controversially amended in 2012 to empower the federal

---

[1] See, for example, *R. v. Cyanamid Canada Inc.* (1981), 11 C.E.L.R. 1 (Ont Prov Ct).
[2] See, for example, *R. v. Kingston (City)* (2004) 7 C.E.L.R. 198 (Ont CA); leave to appeal refused by SCC (2005), 337 N.R. 189.

Cabinet to promulgate regulations “establishing conditions”[3] for Ministerial regulations which allow the deposit of deleterious substances into water frequented by fish. FOC’s current regulatory proposal is intended to fulfill this statutory condition precedent for passing exempting regulations under the *Fisheries Act*.

In particular, the regulatory proposal purports to establish the foundation for exempting regulations for three general types of activities: (a) managing aquaculture, aquatic pests or aquatic invasive species; (b) conducting aquatic research; and (c) managing activities, waters and deleterious substances that are already managed by other federal and/or provincial territories.

Thus, if the current regulatory proposal is implemented, then the Minister will be enabled to pass regulations allowing persons in the three above-noted categories to deliberately (and lawfully) deposit deleterious substances into water frequented by fish, notwithstanding subsection 36(3) of the *Fisheries Act*. In short, the exempting regulations will permit deposits of deleterious substances which have otherwise been specifically prohibited by the *Fisheries Act* for decades.

(b) From Repeals to Rollbacks: Federal De-Regulation is Continuing Unabated

To fully appreciate the nature and significance of FOC’s regulatory proposal, CELA submits that the proposal must be viewed in the context of the ongoing, unprecedented and unconscionable attack by the Government of Canada on its own federal environmental laws.

In particular, since 2010, there has been a systematic dismantling of the environmental safety net through controversial repeals (e.g. *Canadian Environmental Assessment Act, 1992*, *Kyoto Protocol Implementation Act*) or rollbacks of key legislation (e.g. *Navigable Waters Protection Act*, *Fisheries Act*, etc.). These and other regressive measures are being undertaken by the federal government despite widespread opposition from concerned citizens, scientists, non-governmental organizations, and First Nations communities across Canada.

Thus, CELA maintains that FOC’s current regulatory proposal should not be seen as an isolated initiative or an inconsequential matter. Instead, the FOC’s regulatory proposal represents another tangible and integral step in the overall de-regulation agenda that is still being implemented at the federal level.

CELA presumes that such de-regulation (including the FOC proposal) is being pursued in order to expedite certain types of projects (e.g. oilsands developments, pipelines, mines, fish farms, etc.), or to otherwise benefit certain industrial sectors which wrongly perceive environmental legislation as “red tape” that impairs or constrains the economy. On this point, a close perusal of the FOC’s *Regulatory Impact Analysis Statement* (RIAS) confirms that the underlying motivation for the regulatory proposal is not to enhance fisheries or protect water quality, but to provide “assurances to regulatees” (proponents), encourage investment decisions, and facilitate business development. In our view, these financial objectives fall far outside Parliament’s legislative intention and mandate in enacting and enforcing the *Fisheries Act* in order to protect fisheries.

---

[3] See subsections 36(5.1) and (5.2) of the *Fisheries Act*, R.S.C.1985, c.F-14, as amended.

<u>*(c) The Need for Further and Better Public Consultation on FOC's Regulatory Proposal*</u>

The above-noted legislative repeals and rollbacks were buried within massive budget bills, and were therefore not subject to careful Parliamentary consideration or meaningful public consultation.

In CELA's view, this questionable (and undemocratic) approach has again manifested itself in the secretive and hurried manner in which FOC has purported to solicit public comment on the current regulatory proposal.

For example, despite the sweeping nature and negative implications of the regulatory proposal, the public at large only received constructive notice through Part I of the *Canada Gazette*, and was only given 30 days in which to file comments on this complex and significant proposal. CELA submits that this compressed "consultation" exercise is wholly inappropriate and fundamentally inadequate.

More alarmingly, the RIAS contends that "limited consultation" via the *Canada Gazette* is being undertaken because FOC's regulatory proposal will have "no effect on stakeholders or the public at large", and "will not result in any impact on water frequented by fish." In CELA's view, this self-serving claim in the RIAS is completely devoid of merit and totally unsubstantiated by any credible evidence or analysis.

In addition, CELA submits that the RIAS claim about "no effects" overlooks or ignores three incontrovertible facts: (a) the forthcoming exempting regulations will allow deposits of deleterious substances which have long been prohibited by law for sound ecological reasons; (b) the deposit of deleterious substances under the exempting regulations will be occurring in <u>public</u> water bodies across Canada; and (c) since the exempting regulations under subsection 36(5.2) have not been crafted or released at the present time, it is both premature and speculative for FOC to suggest that there will ultimately be no adverse effects to water quality or fish (or consumers thereof). In our view, the determination of regulatory effectiveness can only be made once the actual standards and requirements of the exempting regulations themselves are made available for public scrutiny.

Moreover, it is disingenuous for the RIAS to argue that the current regulatory proposal is environmentally benign or insignificant when, in fact, passage of the regulation is the major stepping stone towards the implementation of exempting regulations which allow or facilitate additional loadings of pollutants into water frequented by fish.

CELA further notes that the RIAS mentions that certain "key" stakeholders were "pre-consulted" by FOC about the regulatory proposal, and that no "major" issues were identified as a result of these "pre-consultations." The RIAS is unclear on which stakeholders were "pre-consulted", but CELA was definitely not "pre-consulted" by FOC despite our lengthy history of interest and involvement in *Fisheries Act* matters. Similarly, to our knowledge, none of CELA's clients (or other notable environmental groups) were pre-consulted by FOC about the regulatory proposal. Accordingly, little or no weight should be given to the FOC assertion that no stakeholders raised issues or objections during the "pre-consultation" exercise.

In light of these procedural concerns, CELA strongly recommends that FOC should withdraw the current regulatory proposal, and that FOC should not proceed with any similar regulatory proposals under subsection 36(5.1) or 36(5.2) of the *Fisheries Act* unless there are further and better opportunities provided for public engagement in the regulation-making and standard-setting process.

At a minimum, and as matter of fairness, FOC must take all necessary steps (and various consultation techniques) to ensure that all persons (not just proponents) interested in, or potentially affected by, the regulatory proposal (or its successors) will have a meaningful say in whether this proposal proceeds at all, or whether fundamental changes or new approaches are warranted.

Accordingly, CELA objects to the minimalist "consultation" requirements set out in section 5 of the FOC's regulatory proposal, which merely requires 30 days' posting of proposed exempting regulations in the *Canada Gazette.* In our view, exempting regulations under the *Fisheries Act* raise important legal and policy issues and profoundly affect the public interest, and should therefore involve comprehensive public participation opportunities.

(d) Flaws, Gaps and Deficiencies in FOC's Regulatory Proposal

Aside from the above-noted procedural concerns, CELA remains highly critical of the "merits" of FOC's current regulatory proposal, despite the grandiose claims made within the RIAS.

After carefully considering the proposed regulatory text, CELA finds that there are a number of substantive shortcomings, interpretive difficulties, and operational uncertainties associated with the regulatory proposal, as currently drafted.

First, section 1 of the proposed regulation defines certain words and phrases contained within sections 2, 3 and 4 of the regulation. However, CELA finds that the proposed definitions are exceedingly sparse, unduly open-ended or, in some instances, wholly absent. For example, while "research activities" are vaguely defined as including monitoring, the term "research" is not defined and there is insufficient regulatory detail on the nature, purpose, or duration of the types of "research" that can be exempted by regulation from subsection 36(3). Similarly, other key terms used in the regulation (e.g. "pest to a fishery", "aquatic invasive species", "enforcement or compliance regime", etc.) are not defined in the regulation or the *Fisheries Act* itself. Therefore, for the purposes of greater certainty and governmental accountability, CELA submits that the definition section must be significantly expanded and enhanced (assuming, of course, that FOC intends to proceed with the regulatory proposal despite objections from CELA and other stakeholders).

Second, the regulatory powers conferred upon the Minister under sections 2, 3 and 4 are marred by the excessive Ministerial discretion in promulgating exempting regulations. For example, subsection 2(a) merely requires the Minister to be "satisfied" that the exempting regulation is necessary for fisheries purposes, but the subsection otherwise provides no specific criteria, benchmarks or indicia to help structure the exercise of such discretion. Similarly, subsection

3(a) allows the Minister to pass exempting regulations if he/she finds that there are certain "processes" in place in relation to "research" undertakings. Subsections 4(a) and (b) enable the Minister to pass exempting regulations if he/she finds that the deposit of a deleterious substance is authorized under federal or provincial law, or subject to federal or provincial guidelines, and "is subject to an enforcement or compliance regime." Taken together, CELA submits that these broadly worded and highly ambiguous "conditions" provide little legal reassurance that the exempting regulations will be restricted to appropriate circumstances, or will contain effective and enforceable standards to safeguard fish and their aquatic environments. It also seems highly dubious that the exempting regulations can contain sufficient site-specific prescriptions to fully protect fisheries from the potentially harmful effects of deleterious substances deposited into waters frequented by fish.

Third, CELA submits that the Ministerial power in section 2 to exempt applications of aquatic pesticides or drugs into water frequented by fish is premised, in part, on the questionable basis that these substances are stringently reviewed and regulated under other federal legislation. Suffice it to say that CELA and other stakeholders have long been concerned about the efficacy of the *Pest Control Products Act* (PCPA) for the purposes of evaluating and registering pesticides (including herbicides, insecticides, biocides, etc.) for sale and use across Canada. In our view, the mere fact that a product has been registered under the PCPA does not provide a sufficient rationale for passing generic Canada-wide regulations that exempt aquatic applications of such products from subsection 36(3) of the *Fisheries Act*. Put another way, section 2 of the regulation represents an ill-advised delegation of FOC's responsibilities under subsection 36(3) of the *Fisheries Act* to other federal agencies or regulators who possess far less expertise and experience in fisheries protection. It should be further noted that by definition, pesticides are specifically designed to kill living organisms, or to interfere with their reproduction, and may also adversely affect non-target species. As a result, aquatic ecosystem impacts will be inevitable at the local scale (if not regional level) if such substances are deliberately deposited into water frequented by fish.

Fourth, while section 3 allows the Minister to exempt undefined "research activities" if certain "processes" are in place, the Minister is not obliged to inquire whether these "processes" are adequate (or even complied with) by academic or private sector researchers. In CELA's view, at a minimum, the Minister must be under a positive legal duty to inquire – and make an express finding – on whether the governance or oversight procedures for exempted research activities are adequate for the purposes of preventing adverse effects upon fish, fish habitat, or water quality.

Fifth, CELA's strongest objection is to FOC's proposal in section 4 to create virtually unlimited Ministerial power to exempt deleterious substance deposits which are ostensibly managed or regulated by other federal or provincial authorities. As a matter of constitutional law, only the federal government has exclusive jurisdiction over sea coast and inland fisheries, and this federal legislative authority has served as the basis for the *Fisheries Act* since it was first enacted in 1868. This means that while industrial activities involving deleterious substance deposits may be subject to provincial licences, permits or approvals, the provincial authorities do not and cannot pass or enforce legislation aimed at protecting fisheries. Any attempt to do so by the provinces would, in CELA's view, be *ultra vires* due to the division of powers under the *Constitution Act, 1982*.

In Ontario, for example, activities that may discharge wastewater or other substances into surface water may be subject to instruments issued under the *Ontario Water Resources Act* or the *Environmental Protection Act*. However, it must be noted that these instruments can only address matters that are properly within provincial jurisdiction.

Assuming, for the sake of argument, that the provinces are legislatively competent to indirectly regulate or protect fisheries through provincial instruments, there still remains the equally daunting question of inspection, enforcement and compliance activities. As noted above, section 4 of the proposed regulation stipulates that there must be an undefined "enforcement and compliance program" in order for an exempting regulation to be passed by the Minister. However, section 4 ignores the critically important question of whether provincial enforcement/compliance programs are adequate, properly resourced, fully staffed or sufficiently rigorous for fisheries protection purposes.

In Ontario, for example, the Environmental Commissioner has repeatedly filed reports with the Legislature to express well-founded concerns about the dwindling institutional capacity of the Ministry of the Environment and the Ministry of Natural Resources to ensure compliance with provincial environmental laws, regulations and instruments. In addition, since the nature and extent of environmental enforcement/compliance programs vary considerably from province to province, it is unclear to CELA how the Minister can credibly compare, contrast or approve provincial regimes as acceptable substitutes or proxies for *Fisheries Act* purposes. This is particularly true if one province prefers the use of conditional approvals, while others prefer to use mandatory orders or prosecutions, in order to ensure environmental protection. The regulatory result may be a patchwork of exempting regulations under the *Fisheries Act* that apply to activities in certain provinces, but not others, or that exempt some persons, but not others, from subsection 36(3). It is unclear how this fragmented approach would provide more certainty or predictability to industry than the national prohibition in section 36(3) that applies consistently from coast to coast to coast in Canada.

In summary, CELA submits that section 4 of FOC's regulatory proposal represents a fundamental and unacceptable change in the long-standing legislative framework for protecting fish and their aquatic environments in Canada. By purporting to defer to provincial authorizations, CELA submits that section 4 amounts to a clear abdication, or improper delegation, of Canada's constitutional responsibilities in relation to fisheries. CELA makes the same submission in relation to section 4's attempt to off-load FOC's responsibilities under subsection 36(3) of the *Fisheries Act* to other federal agencies, boards or commissions that lack FOC's experience and expertise in protecting fisheries from the deposit of deleterious substances. Therefore, even if FOC proceeds with the regulatory proposal despite CELA's recommendations, section 4 must be deleted from the regulation.

PART III – CONCLUSIONS AND RECOMMENDATIONS

For the foregoing reasons, CELA concludes that FOC has not presented any persuasive evidence, nor any compelling policy reasons, nor any public interest justification for the current regulatory proposal. To the contrary, CELA remains highly alarmed that if the regulatory proposal is

actually implemented by FOC, then the forthcoming exempting regulations will likely authorize problematic deposits of pollutants into water frequented by fish across Canada.

While the RIAS claims that the exempting regulations will only authorize so-called “lower-risk” deposits of deleterious substances (particularly those which are allegedly “well-managed” by other authorities), CELA sees no safeguards in the regulatory proposal that will guarantee that this will indeed be the case. More fundamentally, “low-risk” is not the same as “no-risk”, and CELA is unaware of any risk assessment, analysis or criteria used by FOC to determine which activities are – or are not – “low risk” from a fisheries protection perspective.

Indeed, the RIAS presents no statistical information on how many persons, projects or activities would be allowed to deposit deleterious substances under the forthcoming exempting regulations. Nevertheless, in the absence of this kind of quantitative data or critical analysis, the RIAS simply predicts that the “risk to water frequented by fish is expected to be negligible.” In our view, this kind of unsupported conjecture (or wishful thinking) in the RIAS provides an insufficient basis for making an informed policy decision on whether the FOC’s regulatory proposal should be approved by Cabinet.

Moreover, CELA concludes that there have been inadequate opportunities for meaningful public review of, and comment upon, FOC’s regulatory proposal despite its perfunctory publication in the *Canada Gazette*.

Accordingly, CELA calls upon FOC to withdraw and discontinue the regulatory proposal forthwith. In addition, CELA requests that FOC not resurrect this or similar regulatory proposals under subsection 36(5.1) or 36(5.2) of the *Fisheries Act* unless proper public review/comment opportunities are provided in an open, timely and accessible manner.

We trust that CELA’s comments will be duly considered and acted upon by the FOC (and the Government of Canada) as it determines its next steps regarding the current regulatory proposal under the *Fisheries Act*. Please contact the undersigned if you have any questions or comments about CELA’s conclusions and recommendations.

Yours truly,
CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Theresa A. McClenaghan
Executive Director

Richard D. Lindgren
Counsel

cc. Prime Minister Stephen Harper
The Hon. Gail Shea, Minister of Fisheries and Oceans