



**Business Council
of British Columbia**



**THE MINING ASSOCIATION
OF
BRITISH COLUMBIA**

"The voice of mining in BC since 1901"



FISHERIES ACT RENEWAL, 2006

Joint BC Industry Position Paper

August 2006

***Background
and Highlights***

FISHERIES ACT RENEWAL, 2006
JOINT BC INDUSTRY POSITION PAPER

Background and Highlights
August 2006

The British Columbia-based business associations listed below are pleased to release this position paper in connection with the *Fisheries Act* renewal process launched last fall by Fisheries and Oceans Canada (hereafter, the “DFO”).

Our understanding is that the Conservative government elected in January 2006 has not made a final decision on how to move ahead with the renewal process. We believe it is vital that the process of modernizing the *Fisheries Act* continue. The federal government should also be taking steps to improve and streamline the administrative practices and operations of the DFO, in accordance with the principles of “smart regulation” as enunciated by both Canadian and international advisory bodies.

The following business organizations have collectively authored the Joint BC Industry Position Paper on *Fisheries Act* Renewal:

- The Business Council of British Columbia
- The British Columbia Chamber of Commerce
- The Council of Forest Industries of BC
- The Mining Association of British Columbia
- The Association for Mineral Exploration BC
- The BC Agriculture Council

This submission is based, in part, on a review of the DFO’s 2005 proposal to amend the *Fisheries Act*¹ as well as our assessment of the Department’s ongoing Environmental Process Modernization Program.² It also reflects valuable input received from a number of British Columbia businesses which have had experience with the *Act* and with the DFO’s Pacific Region.

Reform of the *Fisheries Act* has taken on particular significance given British Columbia’s strong economy and the impact that the *Act* and the DFO continue to have on economic development across the province.

Underlying the Joint BC Industry Position Paper is the business community’s conviction that many of the issues that have arisen concerning the *Fisheries Act* and the operations of the DFO in British Columbia cannot be properly addressed without changing the legislation itself. The *Fisheries Act* is an old and in many respects outdated statute (parts of it date back to 1868), and it

¹ Fisheries and Oceans Canada, 2005-2010 Strategic Plan: Our Waters, Our Future, www.dfo-mpo.gc.ca/dfo-mpo/plan_e.htm (accessed June 13, 2006).

² Ibid.

lacks the kinds of administrative mechanisms found in more modern environmental protection statutes.

Key Issues

The main purpose of the *Fisheries Act* is to protect Canada's fisheries by safeguarding fish and fish habitat. This, in turn, defines the core mandate of the Department of Fisheries and Oceans. Under the *Act*, it is an offence to undertake work or activity that harms fish habitat or that leads to the depositing of "deleterious substances" into water frequented by fish, without first obtaining an authorization from the DFO or complying with a regulation. A wide range of projects and activities that may affect fish habitat, including many that are minor and low-risk in nature, cannot proceed without prior approval of the DFO. This gives the DFO important powers as a regulatory agency and means that its decisions and processes have a significant impact on local communities and businesses all across British Columbia.

Based on the experiences of BC companies in a variety of industry sectors, it is evident that difficulties often arise due to the manner in which the DFO carries out its responsibilities. Most of these are related to the language of the *Fisheries Act* itself. Among the problem areas identified in this position paper, the following stand out:

- Long delays and increased uncertainty for project proponents and business operators caused by the lack of statutory procedures and timelines to govern regulatory decision-making by the DFO.
- Extensive delays and high costs flowing from DFO Pacific Region's tendency to require all project proponents to seek prior evaluation and/or authorization of all activities or projects that may affect fish habitat, even though the legislation itself does not actually require this. In practice, many of the activities and developments that get caught up in the DFO's review processes are minor in nature and pose little or no risk to the environment or to fish habitat.
- The fact that the complete provisions of the *Canadian Environmental Assessment Act* are too easily and too frequently triggered, even for small projects, because of the linkages that exist between that legislation and the *Fisheries Act*.
- The DFO's excessively broad interpretation of the pollution prevention provisions of the *Fisheries Act*. This often leads to situations where harmless substances are classified as "deleterious."
- The lack of a regulation under the *Act* setting forth a process for obtaining site-specific individual authorizations to deposit substances. Modern environmental protection statutes typically feature such a regulation, which provides for more efficient and less cumbersome decision-making and approval processes.
- The absence within the *Fisheries Act* and from the DFO's policies of mechanisms that allow for appeals and for internal review of the decisions made by often junior front-line officers.
- The DFO's inconsistent, overly expansive interpretation and application of the *Act's* provisions concerning the harmful alteration, disruption and destruction of fish habitat ("HADD").

- Inadequate coordination and cooperation between federal and provincial government authorities on fish habitat and related matters.

Recommendations for Change

To address the problem areas noted above, the Joint BC Industry Position Paper makes 16 specific recommendations touching on both the *Fisheries Act* and certain of the regulations, policies and administrative practices of the DFO: The recommendations:

- 1) Revise the *Fisheries Act* to clarify that habitat disruption must be “harmful” in order for the prohibitions in section 35(1) to apply.
- 2) Incorporate a *deminimus* component to the concept of harmful alteration and disruption (HADD) of fish habitat to make clear that small-scale activities which do not significantly affect fish habitat will not be captured by the prohibitions in section 35(1) of the *Act*.
- 3) The DFO should move forward with measures already under consideration to streamline or eliminate the need to obtain individual authorizations for small-scale and lower-risk projects and activities that may affect fish habitat, by completing and implementing an up-to-date risk management framework. This should include the adoption of tools such as class authorizations, National Operational Statements, and new regulations setting out conditions in which lower-risk activities/projects may proceed without the detailed involvement of the DFO.
- 4) Create a habitat regulation under the *Act* that establishes a procedure for conducting low- and medium-risk works within and adjacent to fish habitat, and under which such relatively low-risk activity can take place without the need for an individual authorization.
- 5) Amend section 35 of the *Act* in order to reduce the application of the *Canadian Environmental Assessment Act* (CEAA) trigger, which is now a major source of delays and uncertainty for project proponents.
- 6) Amend the *Law List Regulations* to remove section 35(2) of the *Fisheries Act*.
- 7) Develop a transparent mechanism for evaluating significant, higher-risk projects and the associated compensation requirements that are intended to meet the DFO’s “no net loss” policy concerning fish habitat. This would help proponents ensure that their applications to the DFO address the relevant issues in a manner that satisfies the Department’s guidelines and that is likely to speed up, rather than further delay, the evaluation process.
- 8) Redefine “deleterious substance” in section 36 of the *Fisheries Act* so that harmless substances – those that do not have the potential to harm the environment or fish habitat at the time they are deposited – are not included.
- 9) Develop a regulation setting out a process for obtaining site-specific individual authorizations to deposit deleterious substances.
- 10) Create an appeal mechanism in the *Fisheries Act*.

- 11) Develop statutory rules governing the process and timelines for regulatory decision-making under the *Act* to reduce delays and provide greater certainty for all parties.
- 12) Amend the *Fisheries Act* to include equivalency provisions in order to facilitate and allow for more effective coordination with the provinces on fisheries-related matters. We note that such equivalency provisions currently exist in the *Canadian Environmental Protection Act* and the *Species at Risk Act*.
- 13) Develop mechanisms which permit the delegation of decision-making under the *Fisheries Act* to the provinces.
- 14) Add alternative enforcement measures to the *Fisheries Act*.
- 15) Do not amend the *Fisheries Act* to include an offence for failure to comply with an authorization.
- 16) Do not amend the *Act* to broaden the DFO's inspection powers under s. 35.

Conclusion

The BC industry associations that developed this joint position paper have recommended a number of amendments to the *Fisheries Act* and to existing DFO policy, in the hope that the ongoing process of modernizing the legislation will lead to positive changes in the way the *Act* is interpreted and administered. We believe that acting on our recommendations would result in more efficient and timely DFO decision-making and approval processes, increased certainty for all parties, and a greater concentration of public resources on activities and projects that pose significant risks to fish habitat.

While we understand that major legislative change requires time for careful review by stakeholders, we urge the federal government to give this matter top priority. British Columbia has recently experienced a strong upturn in its economy, including in the amount of resource exploration and development, major project construction, and other economic activity in the province. In the context of today's growing economy, the problems identified in this position paper are becoming increasingly serious, in part because of the protracted and costly delays being experienced by an increasing number of projects in a range of industry sectors.