

**ATTACHMENT** August 18, 2022  
**Federal Authority Advice Record: Designation Request under IAA**  
**Response due by September 8, 2022**  
Summit Mine 14 Project

Department/Agency	Fisheries and Oceans Canada
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Alternate Departmental Contact	

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1. Has your department or agency considered whether it has an interest in the Project; exercised a power or performed a duty or function under any Act of Parliament in relation to the Project; or taken any course of action (including provision of financial assistance) that would allow the Project to proceed in whole or in part?

Specify as appropriate.

Yes, in 2009 Fisheries and Oceans Canada (DFO) issued a Letter of Advice (LOA) to the Proponent, indicating that no fish or direct fish habitat were expected to be impacted by the Project (DFO File #07-HCAA-CA1-00689, see attached). An LOA is a non-regulatory tool used to provide advice to the proponent in instances where prohibited impacts to fish and fish habitat are unlikely with appropriate avoidance and mitigation measures. The LOA issued for this Project included additional mitigations to reduce potential impacts to fish and fish habitat downstream of the project area (e.g. erosion sediment control measures).

This letter does not represent a power, duty, or function under any Act of Parliament. DFO reserves the right to require further review of project impacts should new or additional information become relevant.

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2. Is it probable that your department or agency may be required to exercise a power or perform a duty or function related to the Project to enable it to proceed?

If yes, specify that power, duty or function and its legislative source.

DFO has legislative and regulatory responsibilities under the *Fisheries Act* and the *Species at Risk Act*. The project may include works, undertakings, or activities that could cause the harmful alteration, disruption or destruction of fish habitat, which are prohibited under subsections 34.4(1) and 35(1) of the *Fisheries Act*, respectively, unless authorized by the Minister. As outlined in section 6 and detailed in section 65 through 72 of the *Species at Risk Act*, DFO has the responsibility to manage species of Special Concern to prevent them from becoming endangered or threatened.

It is DFO's view that the current legislative landscape has changed substantially since the project was initially reviewed in 2009. It is DFO's opinion that the project requires another review under the new provisions and prohibitions of the *Fisheries Act* which came into force in 2019. The Project also needs to be reviewed with respect to the uplisting of Bull trout (Western Arctic populations) to 'Special Concern' within Schedule 1 of the *Species at Risk Act* in 2019. Bull trout (Western Arctic populations) are found in the receiving watersheds impacted by the Project (i.e., Upper Smoky and Muskeg HUC 8).

Due to the **lack of assessment of effects to fish habitat downstream of the project caused by changes in groundwater or surface water quantity**, we cannot comment on the likelihood that this power would be needed to be exercised in order to enable the project to proceed.

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3. If your department or agency will exercise a power or perform a duty or function under any Act of Parliament in relation to the Project, will it involve public and Indigenous consultation?

Specify as appropriate.

The Crown has a Constitutional duty to consult, and where appropriate, accommodate Indigenous peoples when Ministerial decisions are being considered that may adversely impact potential or established Indigenous or Treaty rights. Considering the issuance of a *Fisheries Act* Authorization is a Ministerial decision and would trigger this duty. Without a more detailed description of the project and impacts, DFO cannot determine whether an Authorization would be required for the project.

Regarding public consultation, DFO does not engage the public on a project-by-project basis when considering a decision under paragraphs 34.4(2)(b) and 35(2)(b) of the *Fisheries Act*.

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4. Is your department or agency in possession of specialist or expert information or knowledge that may be relevant to any potential adverse effects within federal jurisdiction caused by the Project or adverse direct or incidental effects stemming from the Project?

Specify as appropriate.

DFO's specialist, expert information and knowledge is linked to its legislative and regulatory responsibilities under the *Fisheries Act* and the *Species at Risk Act*. DFO possesses expert knowledge of fish and fish habitat, including species at risk, and expert knowledge on the assessment of impacts to fish and fish habitat, including impacts of flow changes on fish and fish habitat. This includes but is not limited to assessing the adequacy of sampling that has been conducted to describe the baseline environment and make comparisons to post-impact outcomes, and whether the avoidance, mitigation, and offsetting measures proposed by the Proponent are appropriate and adequate.

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5. Has your department or agency had previous contact or involvement with the proponent or other parties in relation to the Project?

Provide an overview of the information or advice exchanged.

The Mine 14 Project was submitted for review to DFO in 2007; a Letter of Advice was issued by DFO to the Proponent (Summit Coal Inc.) in 2009.

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6. From the perspective of the mandate and area(s) of expertise of your department or agency, does the Project have the potential to cause adverse effects within federal jurisdiction or adverse direct or incidental effects as described in section 2 of IAA? Could any of those effects be managed through legislative or regulatory mechanisms administered by your department or agency? If a licence, permit, authorization or approval may be issued, could it include conditions in relation to those effects?

Specify as appropriate.

This project does have the potential to cause adverse effects within federal jurisdiction: Assuming the description of the project that DFO previously reviewed is still accurate, impacts to fish habitat are likely limited to potential changes in flow caused by land surface alterations and/or groundwater drawdown.

These effects could be managed through a regulatory mechanism administered by DFO: “[Authorizations Concerning Fish and Fish Habitat Protection Regulations](#)” dictate the requirements that a proponent must meet if they choose to request an exception to the above cited prohibitions of the *Fisheries Act*. These regulations also lay out factors that DFO must consider, and dictate timelines by which DFO must review an application for authorization. If granted, a *Fisheries Act* Authorization would include legally-binding conditions for avoidance, mitigation, and offsetting requirements commensurate with project impacts. Monitoring to validate impacts, and verify efficacy of mitigation measures and offsetting are also part of Authorization conditions.

7. Does your department or agency have a program or additional authority that may be relevant and could be considered as a potential solution to concerns expressed about the Project? In particular, the following issues have been raised by the requestor:
- adverse effects on fish and fish habitat;
  - adverse effects on migratory birds and species at risk and their critical habitats. Concerns were raised about the yellow-bellied flycatcher, common yellowthroat, black-throated green warbler, harlequin duck, Cassin’s vireo, barred owl, and western toad; the requester asserts that these species are known to be near the Project’s vicinity;
  - changes to the environment that occur on federal lands, including Jasper National Park;
  - changes to the environment that occur in a province or territory other than the one where the Project is taking place, including British Columbia;
  - adverse effects to multiple waterways due to selenium contamination;
  - adverse cumulative effects due to historical and present coal development in the area;
  - adverse effects to critical wildlife habitat, including Bighorn sheep, Woodland caribou, grizzly bear and wolverines;
  - changes to the environment that could affect the Indigenous peoples of Canada and their ability to practice section 35 rights; and,
  - changes occurring to the health, social, or economic conditions of the Indigenous peoples of Canada.

If yes, please specify the program or authority.

DFOs authority, as described above, is relevant to the topics of:

- adverse effects on fish and fish habitat;
- adverse cumulative effects – relevant to DFO due to section 34.1 of the *Fisheries Act*, which provides a framework of considerations to guide the Minister’s decision-making, including consideration of cumulative effects. In the case of this project, consideration of cumulative effects within our mandate are likely limited to impacts on fish and fish habitat as a result of changes to flow.

8. Does your department or agency have information about the interests of Indigenous groups in the vicinity of the Project; the exercise of their rights protected by section 35 of the *Constitution Act, 1982*; and/or any consultation and accommodation undertaken, underway, or anticipated to address adverse impacts to the section 35 rights of the Indigenous groups?

If yes, please specify.

DFO does not have information about the Indigenous groups in the vicinity of the project, the exercise of their rights, and has not undertaken consultation or accommodation related to this project.

9. If your department has guidance material that would be helpful to the proponent or the Agency, please include these as attachments or hyperlinks in your response.

Common Topic	DFO Guidance
Assessing potential impacts to fish and fish habitat	<a href="#">Projects near water (dfo-mpo.gc.ca)</a>
Assessing impacts of changes to flows on fish and fish habitat	<a href="#">DFO. 2013. Framework for Assessing the Ecological Flow Requirements to Support Fisheries in Canada. DFO Can. Sci. Advis. Sec. Sci. Advis. Rep. 2013/017</a>

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Amelia Corrigan

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Name of departmental / agency responder

Fisheries Biologist

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Title of responder

September 8<sup>th</sup>, 2022

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Date