

ATTACHMENT November 23, 2022

Federal Authority Advice Record: Designation Request under IAA

Response due by December 19, 2022

Clearwater Peat Harvesting Project

Department/Agency	Fisheries and Oceans Canada
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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 2017 Fisheries and Oceans Canada (DFO) reviewed the project (DFO File No. 17-HCAA-00453) and at the time determined that the project would not require regulatory review. The decision provided by DFO in 2017 does not represent a power, duty, or function under any Act of Parliament; the decision at the time was considered in relation to Serious Harm impacts to fish that are part of a commercial, recreational or Aboriginal fishery, as was required by the previous *Fisheries Act* (2013 - 2019). Given that the *Fisheries Act* was amended in 2019, DFO recommends that the Project be reviewed under the current provisions and policies of the amended *Fisheries Act* to ensure compliance.

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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 death of fish (DoF) or the harmful alteration, disruption or destruction (HADD) of fish habitat which are prohibited under subsections 34.4(1) and 35(1), respectively, of the *Fisheries Act*, unless authorized by the Minister. As outlined in section 6, and detailed in section 32 to 56 of the *Species at Risk Act*, DFO has the responsibility to provide for the recovery of wildlife species that are extirpated, endangered or threatened as the result of human activity.

Based on the information provided by the Agency, it is unclear at this time the scale and extent of HADD or DoF. Additional fish and fish habitat, and flow data for all watercourses impacted by the project would be required to fully assess impacts. DFO is concerned that Mud Creek, which is directly adjacent to the project footprint is ~8km upstream of mapped Critical Habitat for Bull Trout (Saskatchewan – Nelson populations; Clearwater River), which are listed as Threatened under Schedule 1 of the *Species at Risk Act*. It is unclear at this time if impacts to Bull Trout or their Critical habitat are likely.

If it is determined that an IA is not required, DFO recommends that the proponent submit a Request for Review form to DFO's Ontario and Prairie Region Triage Unit ([DFO.OPHabitat.MPO@dfo-mpo.gc.ca](mailto:DFO.OPHabitat.MPO@dfo-mpo.gc.ca)) for review under the *Fisheries Act* and *Species at Risk Act*. Guidance on requesting a review can be found at: <https://www.dfo-mpo.gc.ca/pnw-ppe/reviews-revues/request-review-demande-d-examen-001-eng.html>. The current legislative landscape has changed significantly since the project was initially reviewed in 2017. It is DFO's opinion that the project should be reviewed under the new provisions of the *Fisheries Act* which came into force in 2019. The Project should also be reviewed with respect to the uplisting of Bull trout (Saskatchewan - Nelson River populations) to 'Threatened' within Schedule 1 of the *Species at Risk Act* in 2019. This is imperative given the proximity of mapped Bull trout Critical Habitat which is downstream of the Project footprint in the Clearwater River.

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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.

If DFO determines that a *Fisheries Act* Authorization is required, the authorization process may trigger a duty to consult given the contemplated crown conduct may have a potential adverse impact on potential or established Indigenous or Treaty rights recognized and affirmed by section 35 of the *Constitution Act*, 1982.

The *Fisheries Act* now gives explicit consideration under section 2.4, where the Minister must consider any adverse effects that the decision (under paragraphs 34.4(2)(b) and 35(2)(b)) may have on the rights of Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act*, 1982. The precise nature of consultation activities is dictated by developing a shared understanding with each respective community, and determining a mutual path forward. Feedback from Indigenous groups, such as concerns raised by O'Chiese First Nation on impacts to fish and fish habitat, would be incorporated into DFO's assessment of impacts, and contribute to methods used to mitigate, offset, and monitor impacts within the bounds of DFO's mandate.

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 has specialist and expert information and knowledge on the assessment of impacts to fish and fish habitat, death of fish, aquatic species at risk, and aquatic invasive species as linked to legislative and regulatory responsibilities under the *Fisheries Act*, *Species at Risk Act* and *Aquatic Invasive Species Regulations*. As well, DFO may advise on measures to avoid, minimize and mitigate the negative impacts of the proposed works, undertakings or activities 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.

As previously stated, DFO reviewed a request for review for the Clearwater Bog Project in 2017 under the relevant provisions of the previous *Fisheries Act*. Based on the information provided and the provisions of the Act in force at the time, the 2017 proposal was identified as a project where regulatory review was not required. DFO advised the proponent to follow DFO guidance tools in order

to comply with the *Act*. Given that the *Act* was amended in 2019 and that DFO typically advises that if proponents plans change or if some information was omitted in the proposal such that the proposal meets the criteria for a site specific review, the proponent should submit the request for review form. A comparison of the two project area extents (i.e., those submitted to DFO in 2017, and those received with this request in 2022) indeed shows that the project plans have changed. The Proponent has not been in contact with DFO regarding these project changes.

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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.

- Yes, this project does have the potential to cause adverse effects within federal jurisdiction. Impacts to fish and fish habitat are likely limited to potential changes in flow caused by land surface alterations and/or water drawdown, in particular to Mud Creek (i.e., mapped Bull trout distribution), which is directly upstream of the Clearwater River, designated as Critical Habitat for Bull Trout. However, this assessment is greatly hampered by the limited description of baseline and impacts currently available, and as such DFO is taking the precautionary approach in this response.
  - If required and granted, Authorizations under the *Fisheries Act* include a list of conditions that dictate avoidance, mitigation, and offsetting requirements commensurate with project impacts. Monitoring to validate impacts and verify efficacy of mitigation measures are also part of Authorization conditions. If prohibited effects to aquatic species at risk are likely, Section 74 of the *Species at Risk Act* allows for a *Fisheries Act* authorization to have the same effect as a SARA permit provided SARA legislative requirements are met.
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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. The Project could result in potential:

- **adverse effects to areas within federal jurisdiction, including Indigenous peoples and lands;**

No additional authority exists separately from what is outlined above.

- **adverse impacts to soil, water, wetlands ,watersheds, medicines, vegetation and other component of the environment important to O'Chiese First Nation treaty rights;**
- **alteration of the land and hydrological and ecological functions of groundwater, surface water, and wetlands in O'Chiese First Nation's traditional territory;**

No additional authority exists separately from what is outlined above. The regulatory processes for a *Fisheries Act* authorization would consider impacts to fish and fish habitat associated with changes in water quantity (See guidance below). Specifically related to the assessment of flow alterations on fish and fish habitat adjacent to and within peat harvesting areas, and the ecological flows required to sustain fish and fish habitat.

- significant adverse impacts on the treaty and aboriginal rights of O'Chiese First Nation as well as significant adverse effects on health, social, and economic conditions;
- **adverse impacts to O'Chiese First Nation's Section 35 rights;**

If DFO determines that a *Fisheries Act* Authorization is required, the authorization process may trigger a duty to consult within the scope of DFO's mandate of fish and fish habitat given the contemplated crown conduct may have a potential adverse impact on potential or established Indigenous or Treaty rights recognized and affirmed by section 35 of the *Constitution Act*, 1982. It is unclear at this time based on the information provided if a *Fisheries Act* authorization will be required.

- impacts to highly used traditional hunting, trapping and gathering areas including areas of cultural importance (i.e. gravesite located approximately 6km from the Project area);
- contribution to climate change due to loss of peatland carbon storage and sequestration area; and

- **cumulative effects of existing peat harvesting operations in the area, which are likely irreversible or not restorable for well over 100 years.)**

No additional authority exists separately from what is outlined above; however in accordance with section 34.1(1)(d) of the *Fisheries Act*, DFO is required to consider ‘the cumulative effects of the carrying on of the work, undertaking or activity referred to in a recommendation or an exercise of power, in combination with other works, undertakings or activities that have been or are being carried on, on fish and fish habitat’.

If yes, please specify the program or authority.

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.

No, DFO does not have specific information about Indigenous groups interests in the vicinity of the project. DFO is not currently engaging with Indigenous communities on this project or nearby projects

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="https://www.dfo-mpo.gc.ca/projects-near-water">Projects near water (dfo-mpo.gc.ca)</a>
Selecting an appropriate study design with the ability to detect changes in fish and fish habitat throughout the duration of the Project (e.g., baseline data collection, monitoring).	<p><a href="https://www.dfo-mpo.gc.ca/science/functional-monitoring">A review of functional monitoring methods to assess mitigation, restoration, and offsetting activities in Canada (dfo-mpo.gc.ca)</a></p> <p><a href="https://www.dfo-mpo.gc.ca/science/operational-guidance">Science advice on operational guidance on functional monitoring: Surrogate metrics of fish productivity to assess the effectiveness of mitigation and offsetting measures (dfo-mpo.gc.ca)</a></p> <p><a href="https://www.dfo-mpo.gc.ca/science/assessment/monitoring-design">Assessing the Effectiveness of Fish Habitat Compensation Activities in Canada: Monitoring Design and Metrics (dfo-mpo.gc.ca)</a></p>
The regulatory processes for a <i>Fisheries Act</i> authorization would consider impacts to fish and fish habitat associated with changes in water quantity. Specifically related to the assessment of flow alterations on fish and fish habitat adjacent to and within peat harvesting areas, and the ecological flows required to sustain a fishery. We recommend liaising with DFO on requirements associated with this pathway of effect.	<a href="https://www.dfo-mpo.gc.ca/framework-ecological-flow">Framework for Assessing the Ecological Flow Requirements to Support Fisheries in Canada (dfo-mpo.gc.ca)</a>
Characterizing the fish-bearing status of a watercourse (e.g., occupancy), in particular in habitat suspected of being fishless (e.g., wetlands or bogs), using sufficient lines of evidence.	<p>Status of fish-bearing habitat should include convincing evidence that fish do or do not utilize the habitat for any life stages. If significant uncertainty still exists with regards to the status of fish-bearing waters following baseline data collection, DFO may choose to utilize the precautionary principle and assume fish may occupy the habitat. DFO suggests the following types of information would help determine the fish-bearing status of a watercourse:</p> <ul style="list-style-type: none"> <li>• More than one year of data utilizing multiple gear types in different seasons;</li> <li>• A detailed accounting of fish habitat and potentially limiting features for fish occupancy (e.g., substrate type, thermal regime, water quality and quantity, etc.);</li> <li>• Detailed documentation of potential fish barriers;</li> <li>• A review of previous studies from the area (e.g., raw</li> </ul>

	<p>data, literature, technical reports); and,</p> <ul style="list-style-type: none"> <li>• Rationale for the selected methods based on the species and life-history stage expected to be present, along with any uncertainties or limitations of the methods.</li> </ul>
Characterizing Palustrine Habitats	Detailed classification of palustrine habitat types and accounting of areas which are being disturbed or destroyed as the result of the peat harvesting operation are necessary to determine potential impacts to fish and fish habitat.

Terina Hancock  
Name of departmental / agency responder

Biologist – Mining, Oil and Gas South  
Title of responder

December XX, 2022  
Date