

ENVIRONMENTAL & ENERGY LAW

FEDERAL INITIATIVES STREAMLINE REGULATION OF INDUSTRY IMPACTS ON FISHERIES

Stanley D. Berger B.C.L.,L.L.B, Certified Specialist Environmental Law

Why this Initiative is Important Companies which negotiate in good faith with regulators on licence conditions should be entitled to conduct their affairs with reasonable reliance on the concluded conditions. However, the objectives of some regulators are not always consistent with each other and this has led to confusion and uncertainty. For example, historically, Environment Canada unlike some of the provincial authorities, did not accept mixing zones but determined a deleterious substance at the end of the pipe. See e.g. *R. v Suncor (1985) 4 F.P.R.409 (Alberta Provincial Court)*. More recently, we have seen the Ontario Ministry of the Environment aggressively pursue prosecution in areas which would normally come within the purview of another department, in that case the Ministry of Labour. See *Ontario v. Castonguay Blasting Ltd. 2013 SCC 52*. Assurances by Environment Canada through regulation that deleterious substances can be deposited if they are otherwise authorized by other regulatory authorities, the addition of a more expeditious process to deliver those assurances and increased coordination between the CNSC and the DFO should help to make a crowded regulatory field more manageable.

Draft Regulation under s.36 (5.1&2) Fisheries Act On February 15th 2014 the federal government announced draft regulations *Establishing Conditions For Ministerial Regulations Authorizing the Deposit of Deleterious Substances in Water Frequented By Fish* see Canada Gazette VOL.148, no.7, Feb.15, 2014 [www.gazette .gc.ca/rp-pr/p1/2014/2014-02-15/html/reg5-eng.php](http://www.gazette.gc.ca/rp-pr/p1/2014/2014-02-15/html/reg5-eng.php)

Since 1978, Environment Canada has been responsible for the regulation of deposits of deleterious substances in waters frequented by fish under s. 36 of the Act. The pollution prevention provisions in the *Fisheries Act* (the "Act") include a general prohibition in sub-section 36(3) on polluting water frequented by fish. Up until now, the federal cabinet could authorize certain types of pollution by way of regulation. The new *Fisheries Act*, introduced last year (see s. 36 (5.1 and 5.2), included a process whereby the deposit of deleterious substances, could, under specific conditions, be authorized by Ministerial regulation. The Regulatory Impact Analysis Statement accompanying the draft regulations explains the need for this added authority and rules for its exercise as follows:

"...activities already well managed in a way that is protective of water frequented by fish may not be in compliance with the pollution prevention provisions of the Act. As a result, there is some uncertainty within industries because their activities, though in compliance with other federal or provincial regulatory controls, are not authorized under the Act. For example, deposits from an industrial sector that are managed by a provincial permitting program may not be authorized under the Act, even if they comply with the provincial permit requirements. This uncertainty could pose a challenge to some industries in that it could discourage investment decisions or delay business development....ministerial regulations are an efficient means for authorizing lower-risk deposits that are already well controlled by recognized instruments and/or processes outside the Act or research that supports the objectives of the Act."

Continued on page 2...



Albert M. Engel, Partner
416.864.7602
aengel@foglers.com



Stanley Berger, Partner
416.864.7626
sberger@foglers.com



Yadira Flores, Associate
416.365.3744
yflores@foglers.com



Tom Brett, Partner
416.941.8861
tbrett@foglers.com

Fogler, Rubinoff LLP
Lawyers
77 King Street West
Suite 3000, PO Box 95
TD Centre North Tower
Toronto, ON M5K1G8

Tel: 416.864.9700
Fax: 416.941.8852
foglers.com

FEDERAL INITIATIVES STREAMLINE ...

Continued from page 1

Preconditions to Regulatory Approval The conditions which would apply to proposed Environment Canada regulations for deleterious substances already managed by federal and/or provincial regulating authorities are set out in section 4 of the new draft Regulation:

- (a) the deleterious substance to be deposited, its deposit or the work, undertaking or activity that results in the deposit is authorized under federal or provincial law or is subject to guidelines issued by a federal or provincial government and is subject to an enforcement or compliance regime;
- (b) the federal or provincial law or guidelines set out conditions that result in a deposit that is not acutely lethal and contains a quantity or concentration of deleterious substance that, when measured in that deposit or in the relevant water frequented by fish, satisfies
 - (i) the recommendations of the *Canadian Water Quality Guidelines for the Protection of Aquatic Life* that were published in 1999 by the Canadian Council of Ministers of the Environment, as amended from time to time, or the recommendations that were derived from those guidelines on their site-specific application, as amended from time to time, or
 - (ii) the recommendations of any peer-reviewed guidelines that are established for the purpose of protecting aquatic life and adopted by a federal or provincial body; and
- (c) the effects of such a deposit on fish, fish habitat and the use by man of fish have been evaluated in accordance with generally accepted standards of good scientific practice.

Memorandum of Understanding Between CNSC and DFO <http://www.nuclearsafety.gc.ca/eng/pdfs/MoU-Agreements/2014-02-27-mou-cnsc-fisheries-oceans-eng.pdf>. The DFO is responsible for the habitat protection provisions in the Act, most notably section 35 authorizations for work, undertakings or activities which results in serious harm to fish. In December 2013, the DFO and the CNSC signed a Memorandum of Understanding (MOU) outlining areas for cooperation and administration of the *Fisheries Act*. Under the MOU, DFO will rely on the CNSC to take on responsibilities for the assessment and monitoring of environmental impacts on fish, including species listed in the *Species at Risk Act (SARA)* S.C. 2002 c.29 and to make recommendations to the DFO related to authorizations under the *Fisheries Act*. The Guiding Principles of the MOU recognize that the DFO will continue to be responsible for decisions on authorizations until Regulations are passed under s.43(1) i (3) of the Act which would likely prescribe the CNSC as an entity which may make such these decisions pursuant to s. 35(2)c.

Recent joint panel reviews under the *Nuclear Safety and Control Act* S.C. 1997 and the *Canadian Environmental Assessment Act* S.C.2012 c.19 for nuclear new build and refurbishment at the Darlington facility and the proposed deep geologic repository in Kincardine Ontario have highlighted that in addition to the CNSC's jurisdiction over nuclear safety, design and operational issues could impact on fish and bring into play the *Species at Risk* and *Fisheries* legislation as well as the Honour of the Crown as it relates to the protection of Aboriginal and treaty rights. The Memorandum clarifies the developing practice whereby the DFO and the CNSC are seeking to harmonize their applicable standards, guides, policies and procedures and communicate with each other in a timely fashion in regards to non-compliances with licence conditions relating to fish and fish habitat. The CNSC specifically agrees to notify the DFO in a timely manner when it anticipates that fisheries authorizations will be required and to recommend appropriate conditions to avoid, mitigate or offset impacts to fish and fish habitat and the need for monitoring and reporting. The DFO, in return agrees to review and where appropriate, issue fisheries authorizations in a timely fashion.