



Fisheries and Oceans Canada
Pêches et Océans Canada

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Our file *Notre référence*
20-HMAR-00391

August 15, 2024

Nova Scotia Department of Public Works

ATTENTION: Justin Tanner
Director, Highway Engineering and Capital Programs
P.O. Box 186
1672 Granville Street
Halifax, NS
B3J 2N2

Subject: Highway 101 – Avon River Aboiteau and Causeway - Phase 2 – Application for a Fisheries Act Authorization and Prohibited Effects on Listed Aquatic Species at Risk are Likely – Incomplete or Inadequate

Dear Mr. Tanner:

The Fish and Fish Habitat Protection Program (the Program) of Fisheries and Oceans Canada (DFO) received your application for authorization under paragraphs 34.4(2)(b) and 35(2)(b) of the *Fisheries Act* on November 5, 2020.

DFO understands the Nova Scotia Department of Public Works (NSPW) and Nova Scotia Department of Agriculture (NSDA) are in the process of twinning and upgrading the existing Highway (HWY) 101 from Trunk 14 (Exit 5) at Three Mile Plains to an area 2.5 kilometres (km) west of Falmouth Connector (Exit 7) in Hants County, Nova Scotia. As part of this extension, a new proposed aboiteau (tidal gate) is to be constructed downstream of the existing aboiteau, which is at the end of its design life. Phase 2 of this project, hereby known as the 'Project' will include the:

- Construction of the new aboiteau at the outlet of the Avon River and upgrade to the Elderkin Marsh Body dyke system;
- Realignment of the Avon River through the new aboiteau system;
- Completion of the causeway dyke system;
- Construction of two new highway bridges over the Avon River; and
- On-going operations of the new aboiteau structure.



With regard to your application for authorization under paragraphs 34.4(2)(b) and 35(2)(b) of the *Fisheries Act* and under the *Species at Risk Act* for the Project, the Program has completed an extensive review of the information provided to date.

Based on correspondence received from NSPW on January 17, 2024, indicating that the Province is now only proposing a freshwater lake operating scenario for the new aboiteau structure, the Program has determined that some of the information provided in your previous submissions is likely no longer applicable to your application. In addition, information and documentation set out in the *Authorizations Concerning Fish and Fish Habitat Protection Regulations* (the Regulations) has not been provided and as such the application continues to be incomplete or inadequate.

As the scope of the Project has changed considerably, DFO is requesting NSPW to submit a revised *Fisheries Act* application with complete information on the proposed work, undertaking or activity that does not include information on works, undertakings or activities that are no longer being proposed for the Project.

In addition to the information and documents identified below, please ensure the application includes detailed information on the proposed operation(s) of the aboiteau structure and rationale for proposing those operations, a detailed description of the likely effects of those operations on fish habitat and fish species that are likely to be in the project area and migrating on the Avon River (including species at risk), a detailed plan(s) to monitor and offset those impacts, details for any contingency plans associated with fish passage and operation of the new aboiteau, and details on removal of the existing aboiteau. Relevant information identified in the Department's previous Incomplete or Inadequate letters, and consideration of the Department's independent consultant review of the proposed aboiteau and operating scenarios that was shared with you on April 11, 2024 should also be addressed in your application.

- a completed Application for Authorization under paragraphs 34.4(2)(b) and 35(2)(b) of the *Fisheries Act* Form (<http://www.dfo-mpo.gc.ca/pnw-ppe/reviews-revues/request-review-demande-d-examen-005-eng.html>);
- the required information and documentation set out in the *Authorizations Concerning Fish and Fish Habitat Protection Regulations* (the Regulations) (<https://laws-lois.justice.gc.ca/eng/regulations/SOR-2019-286/FullText.html>); and
- the information identified in the document "Information required for the consideration of the approval of activities that are otherwise prohibited under the *Species at Risk Act*" (<http://www.dfo-mpo.gc.ca/pnw-ppe/reviews-revues/information-required-renseignements-necessaires-eng.html#2>). This information will be used by the Program to ensure that the requirements under section 73 of the *Species at Risk Act* are met before an authorization can be issued.

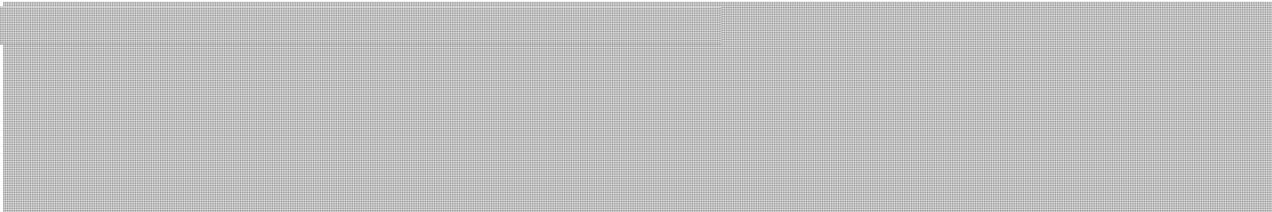
s.14



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s.21(1)(b)



The Department has previously communicated to NSPW on several occasions that the proposed freshwater lake operating scenario will not provide for the free passage of fish (e.g., March 5, 2021 Incomplete or Inadequate Letter, DFO's independent consultant assessment shared with NSPW on April 11, 2024). The Department has also repeatedly requested formal correspondence from NSPW on the proposed operation(s) of the new aboiteau structure since DFO staff were notified that only the freshwater lake operating scenario was being proposed.

As you are aware, DFO is required to consider any Indigenous Knowledge provided to the Department in decision-making while also undertaking meaningful consultation. The Department is anticipating information from Sipekne'katik First Nation as part of an Indigenous Knowledge study in the coming weeks, which will be considered as part of the regulatory review of the Project. As requested above, the Department also requires formal clarity on which operational scenario(s) is being proposed for the new aboiteau and a detailed rationale for that determination in order to continue with consultation and assess the full impacts to Indigenous rights. DFO continues to remain ready and committed to work diligently with your team to advance this application through a timely technical assessment and through meeting our shared constitutional obligations of Crown consultation with the Mi'kmaq.

If you have any questions with the content of this letter, please contact me at (902) 499-4372 or by email at Donald.Humphrey@dfo-mpo.gc.ca. Please refer to the file number referenced above when corresponding with the Program.

Yours sincerely,

Donald Humphrey
A/Director, Ecosystem Management
Maritimes Region