

Memorandum of Understanding

BETWEEN:

Fisheries and Oceans Canada (“DFO”)

AND

Canada Energy Regulator (“CER”)

For the Cooperation and Administration of the *Fisheries Act* and the *Species at Risk Act* Related to Regulating Energy Infrastructure

March 2023

1.0 Introduction

Whereas:

- (a) the *Constitution Act, 1867* assigns to the federal government exclusive jurisdiction for sea coast and inland fisheries, and the *Fisheries Act* sets out the powers and duties of the Minister of Fisheries, Oceans, and the Canadian Coast Guard with respect to the conservation and protection of fish and fish habitat, including by preventing pollution. The administration and enforcement of the pollution prevention provisions of the *Fisheries Act* are a shared responsibility between the Minister of Fisheries, Oceans, and the Canadian Coast Guard and the Minister of Environment and Climate Change;
- (b) Fisheries and Oceans Canada (“DFO”) is responsible for the administration and enforcement of the *Fisheries Act*, including the fish and fish habitat protection provisions (sections 34 to 42.1) and pollution prevention provisions (subsections 36(3) to 36(6)), as they pertain to the conservation and protection of fish and fish habitat from the impact of human activities. With respect to the pollution prevention provisions, DFO is responsible for the administration and enforcement of subsections 36(3) to 36(6) pertaining to aquaculture facilities and the control or eradication of any aquatic invasive species or aquatic species that constitute a pest to the fisheries;
- (c) the *Species at Risk Act* (“SARA”) identifies the Minister of Fisheries, Oceans, and the Canadian Coast Guard as the competent minister with respect to aquatic species, other than those individuals in or on federal lands administered by the Parks Canada Agency. As such, DFO is responsible for the administration and enforcement of the SARA, with respect to such species and has powers and duties with respect to protecting them and to provide for their recovery;
- (d) Pursuant to the *Canadian Energy Regulator Act* (CER Act), the Canada Energy Regulator (CER) regulates certain energy projects in Canada, including the construction, operation and abandonment of interprovincial and international pipelines and powerlines; pipeline traffic, tolls and tariffs; energy exports; and offshore renewable energy projects;
- (e) The CER is responsible for assessing and approving proposed energy infrastructure projects, ensuring they are constructed, operated, decommissioned, and abandoned in a safe and secure manner that protects people, property and the environment and that is in the public interest;
- (f) The CER is responsible for assessing potential environmental impacts that a proposed energy infrastructure project may cause, including potential impacts to fish and fish habitat and may impose any order or condition deemed appropriate under the CER Act to avoid or mitigate those impacts;

- (g) DFO is responsible for conducting regulatory reviews for *Fisheries Act* authorization requests, as defined in the *Authorizations Concerning Fish and Fish Habitat Protection Regulations*, for proposed works, undertakings, and/or activities that may impact fish and fish habitat; and
- (h) The CER and DFO are committed to fostering and developing a collaborative approach to support each other in their respective mandates for the conservation and protection of fish and fish habitat that is consistent across Canada.

Therefore, DFO and the CER (the “Participants”) concur with the following Memorandum of Understanding (“MOU”):

2.0 Definition

The following definitions apply to this MOU:

Aquatic invasive species means a species set out in Part 2 or 3 of the Aquatic Invasive Species (AIS) Regulations.

Aquatic species at risk means an aquatic species listed in Schedule 1 of the SARA.

Energy infrastructure project or **Project** means CER-regulated facilities such as pipelines, power lines, offshore renewable energy projects, abandoned pipelines and facilities as defined in the CER Act.

Fish means fish, shellfish, crustaceans, marine animals in all life stages (i.e., eggs, sperm, spawn, larvae, spat, juvenile, adult) and their parts, as defined in the *Fisheries Act*, and includes aquatic species at risk as defined in SARA.

Fish habitat means water frequented by fish and any other areas on which fish depend directly or indirectly to carry out their life processes, including spawning grounds and nursery, rearing, food supply and migration areas, as defined in the *Fisheries Act* and includes critical habitat and the residence of individuals as defined in SARA.

Harmful alteration, disruption, or destruction of fish habitat is any temporary or permanent change to fish habitat that directly or indirectly impairs the habitat’s capacity to support one or more life processes of fish.

Non-indigenous species refers to an aquatic species that did not originate naturally in a particular region or body of water.

Proponent and Applicant are used interchangeably throughout this MOU and mean a company that has applied for an approval or authorization from the CER or DFO.

Work, undertaking, activity (WUA) means a physical activity or human actions resulting from the proposed energy infrastructure project that may impact fish and fish habitat.

3.0 Purpose and Guiding Principles

- (a) The purpose of this MOU is to facilitate a coordinated approach and to share information between the Participants during the assessment of energy infrastructure projects under the CER Act to increase regulatory certainty, coherency, efficiency, and effectiveness with respect to the conservation and protection of fish and fish habitat.
- (b) Through the implementation of this MOU, the Participants will:

- (i) Cooperate through ongoing information exchanges on their respective regulatory requirements, guidelines, best practices, and lessons learned regarding oversight and processes, and will seek joint initiatives where beneficial;
- (ii) Conduct effective and efficient reviews and assessments of proposed WUAs that may impact fish or fish habitat as a result of CER Act-regulated activities under the *Fisheries Act* and the SARA;
- (iii) Facilitate effective and efficient use of government resources to ensure regulatory decisions be made in a timely manner and in accordance with legislated timelines;
- (iv) Promote clarity and consistency of the regulatory decision-making process;
- (v) Fulfill their respective responsibilities regarding avoidance, mitigation, monitoring, inspecting and reporting, compliance and enforcement, follow-up monitoring and inspection activities, and consultation with Indigenous peoples;
- (vi) Maintain collaboration between the Participants during any respective reviews and assessments of mutual interest; and,
- (vii) Clarify and facilitate the implementation of DFO's fish and fish habitat protection policies and operational approaches by the CER for WUAs.

4.0 Scope

(a) This MOU applies to:

- (i) CER's assessments of proposed WUAs that may impact fish and fish habitat; and,
- (ii) Decisions with respect to the issuance or refusal of authorizations under the *Fisheries Act* and permits under the SARA, which remain DFO's responsibility.

(b) This MOU does not apply to:

- (i) Proposed WUAs that relate to the deposit of deleterious substances into fish bearing waters outlined in subsections 36(3) to 36(6) of the *Fisheries Act* and administered by the Minister of Environment and Climate Change;
- (ii) Proposed WUAs that relate to the control or eradication of any AIS or aquatic species that constitute a pest to the fisheries, as outlined in subsections 36(3) to 36(6) of the *Fisheries Act* and administered by the Minister of Fisheries, Oceans, and the Canadian Coast Guard;
- (iii) Proposed WUAs that may occur in marine ecosystems, such as marine terminals, marine shipping and marine cables;
- (iv) Proposed WUAs that are subject to other federal environmental and impact assessment regimes; and
- (v) Proposed WUAs occurring in the critical habitat of aquatic species at risk.

(c) Section 4(b) above does not prevent the CER from meeting their own obligations under the CER Act or the SARA or limit DFO from participating in the CER assessment and hearing processes.

5.0 Roles and Activities

5.1 General

All Participants will:

- (a) Share organizational knowledge and establish, whenever possible, clear, comprehensive, and harmonized policies, standards, guidelines, procedures, and/or protocols to guide and examine regulatory implementation related to:
 - (i) Reviewing and assessing proposed WUAs for potential impacts to fish and fish habitat, including the introduction or spread of non-indigenous species and AIS;
 - (ii) Assessing impacts to fish and fish habitat, including the development of protocols and engagement with practitioners from DFO's Fish and Fish Habitat Protection and Species at Risk programs; and,
 - (iii) New methods, measures, and/or best practices for the conservation and protection of fish and fish habitat related to energy infrastructure activities such as planning, construction, operation, decommissioning, and abandonment.
- (b) Facilitate the routine exchange of organizational knowledge for the staff of both Participants whenever a change in policy or process direction occurs, or at the request of either Participant;
- (c) Notify the other Participant in writing if they become aware of any WUA that is potentially non-compliant with the CER Act, *Fisheries Act*, the *Aquatic Invasive Species Regulations* and/or the SARA as they relate to the protection of fish and fish habitat; and,
- (d) Establish a Working Group consisting of working-level staff at DFO and the CER to review the MOU, as set out in Section 7.0, and to develop and implement a Terms of Reference, to include the terms set out in **Annex 1**, with oversight from the principal contacts set out in Section 10.0, as needed.

5.2 Referral Responsibilities

(a) The CER will:

- (i) Assess proposed energy infrastructure projects for impacts to fish and fish habitat and require proponents to consider measures to avoid and mitigate impacts;
- (ii) Contact DFO for review and advice, as needed, if potential impacts to fish and fish habitat are identified for any proposed WUA; and,
- (iii) Refer to DFO formally in writing any proposed WUA that may result in the harmful alteration, disruption or destruction of fish habitat or death of fish to determine if an authorization or permit will be required under the *Fisheries Act* or SARA.

(b) DFO will:

- (i) Provide timely advice to the CER, as needed;
- (ii) Review, in a timely manner, all proposed WUAs, referred to DFO by the CER, for which the CER has identified a potential for the death of fish and/or the harmful alteration, disruption, and destruction of fish habitat, including for aquatic species at risk (where the WUA is not located in critical habitat) and/or where impacts may

result from the introduction or spread of non-indigenous or AIS, per the AIS Regulations;

- (iii) Where appropriate, issue a *Fisheries Act* authorization and/or SARA permit in accordance with legislated timelines;
- (iv) Respond to the CER and proponents indicating if a *Fisheries Act* authorization and/or SARA permit will be required, or if a Letter of Advice has been issued; and,
- (v) Apply to participate in a CER application and assessment process, as needed, particularly for WUAs that fall within the critical habitat of aquatic species at risk.

(c) The Participants will:

- (i) Inform Proponents about the existence of this MOU and the processes outlined herein and advise Proponents of their obligation to apply for referrals directly to the appropriate DFO regional triage offices for all WUAs proposed to occur in the critical habitat of aquatic species at risk.

5.3 Compliance Monitoring and Inspection Responsibilities

(a) All Participants will:

- (i) Conduct joint and coordinated compliance monitoring or inspections and site visits, where and when possible, for WUAs at CER-regulated facilities; and,
- (ii) Verify conformity with measures to protect fish and fish habitat, including sharing monitoring, inspection and/or auditing information obtained from actions taken pursuant to this MOU, when appropriate.

(b) The CER will:

- (i) Conduct inspection, where possible, for WUAs at CER-regulated facilities that have not been referred to DFO for potential authorization under the *Fisheries Act* and/or permitting under the SARA, but may impact fish and fish habitat; and,
- (ii) Inform DFO in writing, where appropriate, of any potential non-compliance with the CER Act, the *Fisheries Act* (including the AIS Regulations), and/or the SARA, as they relate to the protection of fish and fish habitat, at CER-regulated facilities.

(c) DFO will:

- (i) Remain responsible for receiving all reporting required as set out in *Fisheries Act* Authorizations and/or SARA permits;
- (ii) Monitor *Fisheries Act* Authorizations, including Authorizations also acting as a permit under SARA and stand-alone SARA permits; and
- (iii) Inform the CER, where appropriate, of any potential non-compliance with the *Fisheries Act* (including the AIS Regulations) and/or the SARA at CER-regulated facilities.

6.0 Annual Report

- (a) The Working Group will develop a template for a joint annual report that will allow both Parties to report on the actions taken, decisions made, and results achieved under this MOU. This information will be shared in the Participants' Annual Reports, including DFO's Annual Report to Parliament.
- (b) CER will prepare the initial draft of the joint annual report (Draft Report), DFO will review, in a timely manner the Draft Report against DFO's own information and provide any supplemental information, as appropriate.
- (c) Via the MOU Working Group, the Participants will finalize the Draft Report.

- (d) The Participants will submit the final Draft Report to the Deputy Minister of Fisheries and Oceans Canada and the Chief Executive Officer of the CER for final approval.

7.0 Assessment, Review, and Amendment

The Participants will meet annually to review the effectiveness of activities under this MOU. This review will include discussion, via the Working Group, of opportunities for improvements to the procedures for referring, reviewing, and assessing WUA's that have the potential to cause death of fish and/or the harmful alteration, disruption, and/or destruction of fish habitat.

Participants will conduct a periodic review of this MOU to evaluate its effectiveness and identify opportunities for continuous improvement in its implementation (e.g., a review within five (5) years of the MOU coming into effect, and every five (5) years subsequently).

Proposals for changes to this MOU can be made at any time, and appropriate amendments may be made, if both Participants concur.

8.0 Financial Arrangements

This MOU will not impose any financial responsibilities on the Participants, except that each will be responsible for their respective costs incurred related to the implementation of the MOU.

9.0 Legal Disclaimer

This MOU is an expression of the mutual intentions of the Participants and is not legally binding on them or enforceable against them. This MOU is not intended to override the Participants' respective authorities as set out in their enabling legislation. The MOU has been reviewed independently by legal counsel for both DFO and the CER.

It is agreed and acknowledged that any enforcement action under the *Fisheries Act* and the SARA is at the sole discretion of DFO and may be referred to the Attorney General of Canada for consideration for prosecution.

If there is any conflict or inconsistency between this MOU and any obligations under any Act of Parliament, including but not limited to the CER Act, the *Fisheries Act*, and the SARA, the obligations under the Act of Parliament shall prevail.

10.0 Principal Contacts

Correspondence relating to this MOU is to be sent to the respective points of contact (the Principals) designated below. Either Participant may unilaterally change its Principal by written notice to the other Participant at any time.

- (a) For DFO:
 - Director General
 - Ecosystems Management
 - Fisheries and Oceans Canada

- (b) For the CER:
 - Vice President
 - Energy Adjudication
 - Canada Energy Regulator

11.0 Duration, Withdrawal and Termination of the MOU

- (a) This MOU comes into effect when signed by both Participants.
- (b) Amendments to the MOU can be made at any time with concurrence from both Participants, as described in Section 7.0.
- (c) This MOU will remain in effect until terminated by either Participant by providing to the other Participant six (6) months written notice of the intention to cancel or by mutual concurrence with any agreed period of notice.
- (d) This MOU replaces the:
 - (i) *2013 Memorandum of Understanding between the National Energy Board and Fisheries and Oceans Canada for Cooperation and Administration of the Fisheries Act and the Species at Risk Act Related to Regulating Energy Infrastructure*; and,
 - (ii) *2021 Addendum to the Memorandum of Understanding between Fisheries and Oceans Canada and the National Energy Board for Cooperation and Administration of the Fisheries Act and the Species at Risk Act Related to Regulating Energy Infrastructure*.

12.0 Signatories

The Participants hereto have signed this MOU in counterpart, on the dates indicated below.

Approved by:

<i>Signed original</i>	March 30, 2023	<i>Signed original</i>	March 30, 2023
Annette Gibbons Deputy Minister Fisheries and Oceans Canada	Date	Gitane De Silva Chief Executive Officer Canada Energy Regulator	Date

List of Annexes

Annex 1 – Terms of Reference

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1. Purpose: The Working Group is responsible for managing implementation of the MOU.
2. Membership: The Working Group consists of DFO and CER staff, appointed by their respective principals.
3. Working Group roles and activities will include:
 - a. Managing and Implementation of the MOU
 - b. Convene on a regular basis to discuss the approach to manage and implement the MOU in a manner that has been agreed-upon by the members of the Working Group and approved by the principal contacts;
 - c. Establish additional sub-Working Groups, as required, that include regional and headquarters staff of the CER and DFO and relevant partners and stakeholders, to apply the approved approach to manage and implement this MOU outlined in paragraph 1;
 - d. Convene meetings, as required, between regional and headquarters staff of the CER and DFO to discuss and address, as they arise, any specific concerns and/or emerging priorities that may not be adequately addressed by the approved approach to manage and implement the MOU outlined in paragraph 1;
 - e. Review and Reporting
 - Review the content and effectiveness of activities conducted under this MOU; and,
 - Prepare and deliver their respective parts of a joint annual report on results achieved under the MOU for approval by the Deputy Minister of DFO and the CEO of the CER. The results will also be identified in the Participants' Annual Reports, including DFO's Annual Report to Parliament.