

Submission on Bill No. 24 – Fisheries and Coastal Resources Act (amended)

Law Amendments, 25 October 2021

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Good Evening Honorable Members, it is my pleasure to present to you on Bill No.24, which if passed will amend section 48 of the Fisheries and Coastal Resources Act.

My name is Lisa Mitchell, I am the Executive Director and Senior Lawyer with the East Coast Environmental Law Association. East Coast Environmental Law is a public interest environmental law charity that advocates for the fair application of innovative and effective environmental laws in Atlantic Canada through education, collaboration and legal action.

Although our office is located in the Schulich School of Law, our 3 lawyers are based in locations across the province, one here in Halifax, one in Cape Breton, and one in the Annapolis Valley. Given the distribution of our staff across the province we appreciate the recent decision to continue with opportunities for virtual presentation to this committee. Not only does it enhance public engagement, it enables us to reduce greenhouse gas emissions by avoiding unnecessary travel.

Very briefly on my personal qualifications, I am practicing member of the Nova Scotia Barrister's Society. I have a Masters of Environmental Studies from Dalhousie's School for Resource and Environmental Studies. I have been practising exclusively environmental law for more than 25 years, including drafting legislation for federal and provincial governments.

Turning to the topic at hand, East Coast Environmental Law was actively engaged in the development of the current regulatory framework for aquaculture in Nova Scotia. In 2013 we published [Aquaculture Regulation in Nova Scotia: Overview of the Regulatory Framework and Considerations for Regulatory Reform](#). In 2014 we completed three comprehensive regulatory reviews of aquaculture regulation in Canada and the United States at the request of the Independent Aquaculture Regulatory Review Panel (aka the Doelle-Lahey Panel) and in 2015 we published [Aquaculture Regulation in the Post Doelle-Lahey Era: An Analysis of Nova Scotia's New Regulatory Framework](#).

In addition we provide ongoing legal information and advice to individuals, organizations and coastal community groups who have concerns about commercial aquaculture activities or seek to participate in the aquaculture review process. Most recently we represented the Ecology Action Centre in their failed application for intervenor status before the Aquaculture Review Board in the upcoming ARB hearing on the lease expansion proposal at Rattling Beach in the Annapolis Basin.

In this context, I will speak to the simple and yet significant amendments proposed to the Fisheries and Coastal Resources Act through Bill 24.

As you know, the proposed changes will amend section 48 of the Act and add a new section, section 49A, to the Act. The amendment to subsection 48(1) will increase the size of the Aquaculture Review Board from 3 members to a maximum of 10 members and enable the Minister to set terms for Board members. The amendment to subsection 48(2) will create a position of Vice-chair of the Board.

We have no specific concerns with those proposed amendments although we would like to see criteria in place to guide the Minister in selecting Review Board members.

We do, however, have concerns with the repeal of subsection 48(4) and the proposal to replace that provision with

48(4) The Chair of the Review Board shall assign one or more of its members to constitute a panel to hear an application before the Review Board.

48(4A) The Chair of the Review Board shall determine a quorum of the Review Board or of a hearing panel.

We understand that the goal of these amendments is to facilitate a more timely and efficient process for upcoming applications. We understand that concern and we are not opposed to the creation of hearing panels per se, but rather to the creation of a 1-person hearing panel.

We recommend the proposed subsection 48(4) require the Chair of the Review Board to assign 3 of its members to constitute a panel.

(4) The Chair of the Review Board shall assign ~~one or more~~ **three** of its members to constitute a panel to hear an application before the Review Board.

Further we recommend that the proposed subsection 48(4A) require a majority of the members of the Review Board or a hearing panel constitute quorum.

(4A) **A majority of the members** ~~The Chair of the Review Board or a panel of the Review Board constitutes~~ shall determine a quorum of the Review Board or of a hearing panel.

In somewhat broad strokes, the adjudicative process under the FCRA is already quite limited and only applies to a new marine license or lease, an expansion to an existing marine license or lease or the addition of finfish species to an existing marine license or lease. All other applications under the Act including amendments and renewals are addressed via the administrative process, where the decisions are made by a single administrator.

To be perfectly honest, given the Bill passed second reading on Friday afternoon and I am here presenting to you on Monday evening, I have not had the opportunity to look at every conceivable application that might come before the Board to determine if certain applications are so straightforward and uncontroversial that a decision by a single board member would be appropriate. However, I would argue that if such is the case it should be considered in the context of the upcoming comprehensive regulatory review rather than through this amendment.

For the most part, the aquaculture applications that are subject to the adjudicative process are interdisciplinary and complex. The adjudicative process before the 3 member ARB was created to ensure that there is a robust evaluation of the application, with full opportunities to bring differing perspectives and expertise to the decision-makers and to have among those decision-makers differing perspectives and expertise. I am not suggesting that a hearing panel made up of one person is not due process, but there is value in recognizing that justice must not only be done but be seen to be done.

I specifically recommend that the all hearing panels be made up of 3 board members for the following reasons:

- (1) This should assist in addressing the need for more timely processing of applications while at the same time minimizes the change to the current regulatory process.
- (2) There has been no indication from the Minister that having 3 panel members is a problem.
- (3) A 1-person panel will have to completely re-start if the panel member, for any reason, leaves the board or can no longer conduct their duties.
- (4) Accommodation could be made to allow a panel to continue with 2 persons if one of the 3 panel members leaves the board or can no longer conduct their duties.
- (5) Apprehension of bias is more likely with a 1-person panel, than a 3 person panel.

The long-term success of the aquaculture industry in Nova Scotia requires social license from those in the communities most directly affected and from Nova Scotians generally. The road to the current aquaculture regulatory framework was long and challenging. The process is imperfect and certainly will benefit from the comprehensive regulatory review that was recommended by the Doelle-Lahey Panel and I understand has been committed to by the Minister.

We look forward to participating in that process, as I am sure many other Nova Scotians do and some of the issues raised by Bill No.24 may be considered in that process. Recognizing that the Minister has identified challenges with the timeliness of the current ARB process and seeks to address them by way of Bill No. 24, we ask only that any changes made before the regulatory review be kept to a minimum. There is a need for reasonable timelines and there is a equally a need for reasonable process.

In closing, I will mention that the Minister has indicated that expanding the Review Board membership will enable multiple hearing panels to take place simultaneously. At this point, it is unclear what that might mean. In making a decision to have multiple hearings running at the same time, I ask that the Minister and the Board consider how this will impact the ability for community members, coastal community groups and other interested members of the public to effectively participate in hearings. Public participation and engagement brings valuable information, expertise and local experience to the hearing process for consideration by the Review Board and robust public engagement will help the Board make better decisions. In an effort to accelerate applications, we ask members to not lose sight of the important role of the public interest in the decision-making process.