

DEC 05 2018

File # 2.1129.0045
Reg. #1975

James Gunvaldsen Klaassen
Sarah McDonald
Ecojustice
520-1801 Hollis Street
Halifax, NS B3J 3N4

Dear Mr. Gunvaldsen Klaassen and Ms. McDonald:

Re: Indian Head Hatchery Expansion Project Section 107 *Environmental Protection Act* Appeal

Thank you for your Notice of Appeal dated and received on November 5, 2018.

Background

On July 17, 2018, Northern Harvest Smolt Ltd (NHS) registered an undertaking for the expansion and upgrading of the Indian Head Hatchery owned by NHS at Stephenville, NL. According to the registration document, the improvements will provide more smolt at a higher quality in order to fully utilize the existing licensed NHS salt-water farms.

On September 4, 2018 the Indian Head Hatchery Expansion Project was released from environmental assessment subject to conditions, the details of which can be found at: www.mae.gov.nl.ca/env_assessment/projects/Y2018/1975/index.html.

Appeal

Section 107 of the *Environmental Protection Act* (the *Act*) provides that a person who is aggrieved by a decision made under the *Act* may appeal that decision in writing to the Minister within 60 days of receipt of that decision.

On November 5, 2018, the Department of Municipal Affairs and Environment (this Department) received your appeal pursuant to section 107, which stated, in part:

"Please accept this letter as an appeal under section 107 of the Environmental Protection Act, SNL 2002, c E-14.2 [EPA] of your decision to release the Indian Head Hatchery Expansion Project (Registration 1975) from further environmental

assessment." You also wrote:

"Your decision to release the Hatchery Expansion Project from further environmental assessment under the EPA is unlawful and must be set aside. The Hatchery Expansion was improperly registered under s 49(1) of the EPA, as you did not require the Proponent to register the entire undertaking. To be properly scoped and registered, the undertaking must include not only the Hatchery Expansion itself, but also the associated increase in salmon smolt transferred to open net pens and farmed in the Province's coastal waters."

"We respectfully request that you revoke this decision and require the Proponent to submit a properly scoped Environmental Registration document which includes all of the essential project components."

In support of your appeal, you provide nine appendices. Your appeal document outlines the following three main areas of concern:

- 1. Overview of the Environmental Protection Act environmental assessment scheme:**
 - a. The purpose of Part X of the EPA; and**
 - b. The registration and assessment process.**
- 2. The entire undertaking must be registered:**
 - a. "Connected actions";**
 - b. Section 29 of the EA Regs; and**
 - c. The common law (same proponent; timing; and avoiding environmental scrutiny).**
- 3. Risk of the Minister's failure to conduct a proper environmental assessment.**

In response to your appeal of the former Minister's decision to release the undertaking from further environmental assessment, I offer the following:

- 1. Overview of the Environmental Protection Act environmental assessment scheme**
 - a. The purpose of Part X of the EPA**
 - b. The registration and assessment process**

Environmental assessment is defined in section 45 of the Act, as "a process by which the environmental effect of an undertaking is predicted and evaluated before the undertaking

has begun or occurred". Environment, as stated in section 2 of the *Act*, includes air, land, water, plant, animal, and human life, social, economic, recreational, cultural, and aesthetic conditions, and factors that influence quality of life. During this process, all relevant facts are considered, including those presented in the registration document, public comments, and scientific and technical review comments, to come to a reasonable decision on the acceptability and overall environmental impact of a proposed undertaking.

As per this routine process, and as required by the *Act*, the registration document for this undertaking was circulated to all provincial and federal government departments/agencies on the environmental assessment screening committee for their review, and posted on the this Department's web page for a 35-day public review. All review comments were considered.

The undertaking was examined as per section 50(1) of the *Act* and a determination was made under section 51(1) to release the undertaking. In releasing the undertaking, this Department considered the ability for environmental effects of the undertaking to be mitigated under an act of the province or Canada, section 23(1) (c)-(h) and section 23(2) (a)-(e) of the *Environmental Assessment Regulations* (the *Regulations*). This Department considered specific issues of concern relating to the environmental effects of the undertaking, including: the management of hatchery waste, management and disposal of solid waste, potential contamination of groundwater and soil by hydrocarbons and metals, as well as the need for water quality monitoring, hydrogeologic assessment and real time water quality monitoring, treating and transferring diseases, and use of feed with chemicals.

This Department also considered, as required, whether or not licences, certificates, permits, approvals, or other required documents of authorization will mitigate these environmental effects. In doing so, it was identified that:

- A waste management plan, which includes solid waste disposal, will require approval by the Pollution Prevention Division. Waste management must also meet the requirements of an aquaculture licence application.
- Effluent leaving the hatchery must conform to the *Environmental Control Water and Sewage Regulations*, 2003 and any analyses completed for the purposes of compliance determination will be subject to the provincial *Accredited Laboratory Policy*.
- Pursuant to the *Water Resources Act*, 2002, permits will be required for drilled wells and work in any body of water. A Water Use Licence will also be necessary and water quality monitoring will inform any mitigations for contamination remediation.
- The undertaking is required to adhere to the federal *Aquaculture Activities Regulations*.

Although the proponent provided water quality and quantity monitoring information, additional details were required for hydrogeological assessment and real-time water quality monitoring. Provision of this information requires the continued involvement of and consultation with the Water Resources Management Division of this Department. As such, additional information will be obtained through the conditions of release as per the Minister's discretion under section 56(c) of the *Act*.

Section 24 of the *Regulations* sets the criteria that must be considered for the requirement of further assessment through an Environmental Preview Report (EPR), including the sufficiency of detail provided, whether or not the proponent has adequately demonstrated their ability to conduct the undertaking in an environmentally sound manner, and the use of unknown or experimental technology. Section 25 of the *Regulations* sets the criteria that must be considered for the requirement of further assessment through an Environmental Impact Statement (EIS), including where there "*may be significant negative environmental effects*" or there is "*significant public concern*".

As described above, there was no significant negative environmental effects of the hatchery operation identified. No department/agency thought that further assessment through an environmental preview report or an environmental impact statement was necessary. The environmental effects that were identified will be addressed through existing regulations and conditions of release, as described above. Furthermore, there was no significant public concern raised during the environmental assessment of the hatchery.

Twenty-three public comments on the undertaking were received during the registration phase of the environmental assessment. Approximately 75% of the 23 comments submitted were in support of the undertaking and these included comments from the general public, industry, and local town councils. Points raised in each submission with respect to the expansion and operation of the hatchery were acknowledged, investigated, and contributed to the identification of environmental effects and the development of appropriate terms and conditions.

After having fully examined the information provided by NHS, the former Minister determined, pursuant to section 51(1)(c), that the undertaking could be released and I agree with that determination. This determination was made in accordance with section 23(1) of the *Regulations*. All relevant facts were considered and a reasonable decision reached based on those facts. As a result of this review, on September 4, 2018 the Indian Head Hatchery Expansion Project was released from further environmental assessment subject to conditions, the details of which can be found at:

www.mae.gov.nl.ca/env_assessment/projects/Y2018/1975/index.html

2. The entire undertaking must be registered

a. "Connected actions"

The undertaking as registered proposes to expand and upgrade the existing Indian Head Hatchery. While this expansion and upgrading will provide more smolt to fully utilize the 33 existing licensed NHS marine sea farms, the focus of the undertaking is the existing physical structure of the hatchery. The sea farms were developed, licensed, and operated prior to the existence of the Indian Head Hatchery and they do not require this Hatchery in order to function. Any increase in production could be supplied through smolts obtained from other hatcheries as the proponent described as an alternative in the registration document. As the sea farms have separate utility from and can proceed without the hatchery expansion, they cannot be considered connected actions.

You reference in the appeal the decision of the Newfoundland and Labrador Supreme Court - Trial Division in its July 20, 2017 decision in *Atlantic Salmon Federation (Canada) v Newfoundland (Environment and Climate Change)*. That decision arose out of an application which challenged the Minister's decision to register the Placentia Bay Atlantic Salmon Aquaculture Project [Grieg] and the decision to release that project from further environmental assessment with conditions. It must be considered however, that in that case the court was dealing with a project distinguishable from this undertaking. The Grieg project required new cage sites in order to support the hatchery production and this involved the use of the Aqualine Midgard cage system and European-strain triploid Atlantic salmon; both being new to the Newfoundland and Labrador salmon aquaculture industry. In addition, the Grieg project proposes to locate the cages within Placentia Bay, the first time that any salmon aquaculture facilities will be constructed in Placentia Bay. Unlike the Grieg project, the Indian Head Hatchery is an expansion, and not a new development and the sea farms identified in the registration are licensed to receive the strain of fish and the approximate number of fish the hatchery expansion will be able to supply.

The project described was properly scoped and the relevant aspects of the project were registered fully and appropriately under section 49(1) of the *Act*. The decision to release this project from further environmental assessment was lawful and correct.

b. Section 29 of the EA Regs

As per section 29 of the *Regulations*, an undertaking involving marine sea farms is required to be registered only where there is the construction of shore-based facilities, other than wharves and storage buildings. In this Province, marine sea farms and hatcheries have developed both independently and with each other. This provides further evidence that the sea farms have separate utility from and can proceed without any one specific hatchery and therefore do not fully meet the criteria for connected actions. For example, at Hopeall Fish

Farm Hatchery, the hatchery serves as a supplier to other companies' marine sea farm and therefore there is no marine sea farm connected to that undertaking. Similarly, at the hatchery facility which is the subject of this undertaking in Stephenville and at the St. Alban's Salmon Hatchery, marine sea farms utilizing the smolt grown at these hatcheries were operating prior to the hatchery construction using smolt from existing hatcheries in the province or in another Atlantic province.

The NHS Indian Head Hatchery was registered as an undertaking for environmental assessment with this Department in November 2010 and released from review with conditions in January 2011. The facility was constructed in 2011 and began producing smolt in 2012 exclusively for the NHS marine sea farms. The facility operates under an aquaculture license AQ1087 issued by the Department of Fisheries and Land Resources.

The 33 NHS marine sea farm sites, intended to be stocked with fish coming from the hatchery expansion, are existing aquaculture licensed sites that completed the licensing process. NHS advises that while they do intend to increase production, that increase will occur on fully licensed sites that have not been stocked to their full licensed capacity and that NHS has not submitted any plans to expand site perimeters or capacity of any of its sites. The marine sea farm sites associated with this undertaking have been evaluated in accordance with the established licensing process and existed prior to the proposed expansion of the hatchery. No modifications to the existing licensed marine sea farms are required. In response to this appeal, NHS stated on November 22, 2018: *"All of the NHSF Sea Farms are fully licenced to operate under valid Aquaculture Licences and have been so since at least 2016."*

The Department of Fisheries and Land Resources advise that it is standard for hatcheries to produce less than the maximum production capacity in response to annual demand. A review by the Department of Fisheries and Land Resources determined that without the expansion, NHS will be required to continue sourcing smolt from out-of-province hatcheries for all year classes, which is not ideal from a biosecurity, economic, and performance perspective.

As existing undertakings, the sea farms do not require environmental assessment. The *Act* obliges a proponent to notify the Department before the final design of a proposed undertaking. Once that information is received, an examination of it commences. The *Act* does not authorize the assessment of an existing undertaking unless the proposal is to modify, extend, or otherwise deal with one. The prediction and evaluation of environmental effects as they relate to this undertaking only involve the expansion and upgrade of the Indian Head Hatchery.

c. The common law

Same Proponent

The proponent of this undertaking, as stated in the registration document is Northern Harvest Smolt Ltd (NHS). The registration document also states that "*Northern Harvest Smolt (NHS) is a wholly owned subsidiary of Northern Harvest Sea Farms (NHSF).*" and "*Both NHS and NHSF are now owned by Marine Harvest (MH) and will continue to operate as distinct corporate entities, with Marine Harvest as the owner of the corporations.*". The scoping of this undertaking was not influenced in any way by the corporate structure of the hatchery or the marine sea farms to be stocked by the hatchery.

Timing

In your appeal, you reference marine sea cage sites in Facheux Bay that Marine Harvest recently applied for and express concern that the smolt raised in this hatchery will be used to stock those marine sea farms. The registration document states "*NHS is the provider of smolt for the 33 saltwater farms owned by the company. The Project will create greater security and greater numbers of smolt for these sites.*" The registration document does not state that any other marine sea cage sites, either existing or new, will be stocked from fish at this hatchery. In response to this issue NHS stated on November 22, 2018:

"Gray Aqua was a company which also owned and operated licenced sea farms in the Coast of Bay area (GA Sea Farms). Two of the existing licenced GA Sea Farms were in Facheux Bay. In 2017 Gray Aqua also had a number of outstanding applications for Aquaculture Licences for additional sea farm sites, two of which were in Facheux Bay. Gray Aqua also owned and operated a land-based hatchery in New Brunswick (NB Hatchery) which supplied it's GA Sea Farms.

In early February 2017, Marine Harvest purchased the GA Sea Farms and the NB Hatchery. The process for transferring Aquaculture Licences requires the new owners to apply to have the Licences reissued in its name. When there are applications for new Aquaculture Licences in progress, a new owner must recommence the application process. In March 2018, Marine Harvest submitted applications to transfer the two licenced GA Sea Farms in Facheux Bay to its name. In April and May 2018 Marine Harvest applied to recommence the applications for the two additional sea farms in Facheux Bay which Gray Aqua had already submitted.

Ecojustice states that Marine Harvest recently submitted four applications for additional Aquaculture Licenses in Facheux Bay at the same time as it is developing the Indian Head Hatchery expansion, and that the information available to it suggests that smolt from the expanded Indian Head Hatchery may be transferred to these new open net pens.

The four applications for Aquaculture Licences submitted by Marine Harvest which are identified by Ecojustice, are the applications to transfer the two existing

GA Sea Farms in Facheux Bay to Marine Harvest's name, and the recommencement of the applications previous submitted by Gray Aqua for two additional sea farms in Facheux Bay. As noted above, the GA Sea Farms are supplied with smolts from the NB Hatchery. All of the applications for the Facheux Bay Sea Farms submitted by Marine Harvest identify the NB Hatchery as their source for smolt.

The operation the Facheux Bay Sea farms are unrelated to the sea farms or the Indian Head Hatchery operations of NHSF or NHS."

In addition, you provided in Appendix E of your appeal copies of leases for aquaculture, dated June 21, 2017, and state concern that "A number of Marine Harvest's open net pen sites received their leases and/or licenses for operation within the last 18 months." The documents provided as Appendix E are leases issued to Northern Harvest Sea Farms Newfoundland Ltd., not Marine Harvest, and are not new aquaculture site licenses. Besides the leases themselves the other documents attached are the forms filed with the provincial Crown Lands Division requesting the leases. Northern Harvest Sea Farms Newfoundland Ltd. advised that before the leases were issued they were operating the same sites with Permissions to Occupy issued by the Crown Lands Division.

Avoiding Environmental Scrutiny

The scoping of this undertaking was not completed to avoid environmental scrutiny. The NHS Indian Head Hatchery was registered as an undertaking for environmental assessment with this Department in November of 2010 and released from review with conditions in January 2011. The facility was constructed in 2011 and began producing smolt in 2012 exclusively for the NHS marine sea farms. As described above, the 33 NHS marine sea farm sites, intended to be stocked with fish coming from the hatchery expansion, are existing aquaculture licensed sites that completed the licensing process. No modifications to the existing license marine sea farms are required, and therefore there is nothing new to review.

Although the existing sea farms to be stocked by the hatchery expansion did not require environmental assessment, they are still subject to the licensing process and provincial and federal regulatory regime. The aquaculture industry is subject to provincial legislation under the mandates of the Department of Fisheries and Land Resources and the Department of Municipal Affairs and Environment. It is also subject to federal regulation under the mandates of Fisheries and Oceans Canada, Transport Canada, Environment and Climate Change Canada, Health Canada, and the Canadian Food Inspection Agency. The federal *Aquaculture Activities Regulations* provide conditions under which aquaculture operators can install, operate, maintain, and remove an aquaculture facility, as well as how they take measures to treat their fish for disease and parasites, and deposit organic matter.

3. Risk of the Minister's failure to conduct a proper environmental assessment

As described above, the registration document does not state that any other marine sea cage sites, either existing or new, will be stocked from fish at this hatchery, nor that any existing marine sea cage license will be altered to increase capacity or expand site perimeters. The marine sea farm sites associated with this undertaking have been evaluated in accordance with the established licensing process and existed prior to the proposed expansion of the Hatchery. Therefore, the Indian Head Hatchery expansion does not create any increase in the marine environmental footprint that has not already been evaluated and approved through the required provincial and federal regulatory regime.

Decision

For all of these reasons, and after fully considering your arguments and the comments, pursuant to section 107 of the *Act*, I am dismissing your appeal.

If you have any questions concerning this matter, please contact Dr. Susan Squires, Director, Environmental Assessment Division, at (709) 729-0673 or susansquires@gov.nl.ca.

Sincerely,

A handwritten signature in blue ink, appearing to read "Graham Letto", with a blue oval and arrow pointing to the right.

GRAHAM LETTO, MHA
District of Labrador West
Minister of Municipal Affairs and Environment