

Presentation to Environmental Protection Act

Expert Panel

Sudbury, Ontario

November 3, 2016

Presenter: James Gomm

My name is Jim Gomm; I am making this presentation as a Private Individual and not as a member or representative of any of the numerous organizations that I belong to. I want to thank the Panel for the opportunity to present my information today.

## **Slide # 2 PURPOSE**

The purpose of my presentation today is to highlight the failure of the Environmental Assessment process and the failure of the responsible agencies to enforce the regulations of the Federal Fisheries Act, the MTO/DFO/OMNR Protocol for Protecting Fish and Fish Habitat on Provincial Transportation Undertakings, the Environmental Protection Act (EPA) and the Ontario Water Resources Act.

## **Slide # 3 BACKGROUND**

During the reconstruction of Highway 69 south of Sudbury there was a need to construct new bridges to span several major rivers. One of these rivers is the Murdock River. The Murdock River flows from Rock Lake into the French River (a Canadian Heritage River). The Murdock River supports a sport fishery, has fish habitat, Species at Risk, a Resource Stewardship Agreement, is a canoe route, and has many other attributes.

## Slide # 4 MURDOCK RIVE BRIDGE PROJECT

Some of the construction work required at the Murdock River Bridge site consisted of the following;

- Drilling and blasting of rock for the installation of Bridge abutments.
- Removal of two meters of river bed (fish habitat).
- Construction of two bridge piers in the middle of the river.
- In filling of the river to construct an access road to the piers and to build the piers.

## Slide #5 HABITAT ASSESSMENT PRIOR TO CONSTRUCTION

As required by the Canadian Environmental Assessment Act, the Ontario Ministry of Transportation conducted a Fish and Fisheries Habitat Impact Assessment Study (July 2011) that included the Murdock River. The MTO Fisheries Consultant's initial Assessment report stated the following;

**“It is anticipated that works at two of the proposed crossings that support fish habitat will result in harmful alteration, disruption or destruction of existing fish habitat (HADD). Twin bridges are proposed to span the Murdock River (F25), which will require the placement of a pair of in-water pier footing. This has been considered a permanent removal of bottom area and appropriate on-site compensation has been proposed.”**

## Slide #6 MTO INITIAL LETTER OF INTENT (LOI) JULY 20, 2011

In the initial Letter of Intent (LOI) dated July 20, 2011 the MTO agreed to the following:

**“The Ministry of Transportation (the MTO) agrees to undertake specified measures to compensate for and mitigate the loss of fish habitat arising from the work below.”**

1. Twin bridges will be required to cross the Murdock River (F25) which will require the placement of in-water pier footings and result in a loss of 700 m<sup>2</sup> of river bed (2 X 350 M<sup>2</sup>) The risk assessment has determined that this will be a HADD.

The initial Letter of Intent also contained the following statement **“The MTO will compensate for the fish habitat losses due to installation of the Murdock River pier footings.....”**

## Slide #7 FISHERIES ASSESSMENT IS EDITED

In September 2011 an edited version of the Fish and Fish Habitat Assessment Report was submitted. The Murdock River bridge site (F25) was dropped from the HADD list. To my knowledge no addition fisheries assessment work had been done so what criteria was used to remove the Murdock River Bridge site from HADD protection and compensation?

On October 11, 2011 the MTO issued a revised Letter of Intent that now excludes the Murdock River bridge location. How could the construction site with the most potential for fish and

fish habitat destruction be dropped from the list of areas requiring compensation, mitigation and monitoring measures for the harmful, alteration, disruption or destruction of fish habitat?

This revised version of the fish and fish habitat assessment report had to be vetted and approved by DFO. I have asked who at DFO approved the final version. This information has never been shared with me.

### **Slide #8 ROLE OF DFO IN MURDOCK RIVER BRIDGE**

During this time period the MTO Fisheries Consultant was dealing with a Department of Fisheries and Oceans Fisheries Biologist based in Parry Sound Ontario. In the documentation that I have reviewed the DFO Biologist was recommending a HADD and habitat compensation for the Murdock River Bridge site.

At this time the DFO was undergoing a downsizing exercise. The DFO Offices in Parry Sound and Sudbury were being closed and the staff given their notices. I was told by DFO staff that there was a backlog of files to be dealt with and direction was given by Senior DFO Managers to move these files along quickly.

## **Slide #9 DFO GUIDELINES FOR BRIDGE WORK**

The MTO was advised by DFO that only clean washed materials of a specific size were to be used during the in-water construction at the Murdock River bridge site.

MTO was required to installed a turbidity curtain to capture any sediment or deleterious materials that may escape from the bridge construction site.

## **Slide # 10 DURING BRIDGE CONSTRUCTION**

The turbidity curtain that was installed by MTO was not adequate to capture the sediment (deleterious materials) during high water periods with increased volume and rates of flow. The turbidity curtain failed on numerous occasions. The MTO was made aware of these failures by their onsite Environmental Specialist (Site Reports) and by me personally. In my opinion, each one of these sediment releases resulted in a release of deleterious materials into the Murdock River and as such was a serious violation of the Federal Fisheries Act, the Ontario Environmental Protection Act and the Ontario Water Resources Act.

The MTO/DFO/OMNR Protocol for Protecting Fish and Fish Habitat on Provincial Transportation Undertakings in Section 5.1.2 requires that in the case of emergencies that the work site shall be secured by MTO and that DFO be advised immediately. In Section 5.2 of the Protocol it states “When spills occur, MTO shall contact the Ministry of the Environment Spills Action Center and take reasonable corrective action.

## Slide #11 MTO CHANGE ORDER

The MTO submitted a Change Order to DFO requesting the use of gravel (a deleterious material) during the in-water construction of the Murdock bridge piers and access road. The MTO proceeded to dump hundreds of tons of gravel into the Murdock River that resulted in the release of deleterious materials into the watershed. The numerous releases of deleterious materials were witnessed and documented by the MTO Environmental Specialist and by myself. The MTO Environmental Specialist documented work (dumping of gravel) continuing at the site during the sediment releases which is in violation of the established Protocol and MTO's Best Management Practices.

Someone at DFO had to approve the Change Order that permitted the release of these deleterious materials into the Murdock River and negatively impacting fish and fish habitat.

**These were significant and repeated violations of the Federal Fisheries Act and other Acts which must be reported immediately. There does not appear to be any records of these violations being immediately reported to DFO as required by the Protocol or having been investigated by DFO.**

## Slide # 12 PHOTO OF BULLDOZER IN RIVER

## Slide #13 PHOTO OF TRUCK DUMPING GRAVEL INTO MURDOCK RIVER

## Slide #14 PHOTO OF TURBIDITY CURTAIN FAILURE

## Slide #15 PHOTO OF WORK CONTINUING DURING SEDIMENT RELEASE

## Slide # 16 REPORTING INFORMATION

I contacted the Ontario Ministry of the Environment and Climate Change (MOECC) and asked if these violations had been reported. I was advised that the local MOECC did not deal with these situations and that I should contact DFO.

The closest DFO Office to Sudbury is now in Burlington Ontario. I contacted the DFO Office in Burlington. I was passed from one DFO staff member to another. I asked DFO how they monitored the bridge construction work as DFO had oversight and compliance responsibilities under the Federal Fisheries Act. The DFO response was that they relied on the quarterly monitoring reports submitted by MTO? The DFO staff person spoke of a “Risk Management Framework Assessment” that DFO had instituted for these projects. There was also a mention of a self compliance model. My comment to DFO was that if the fox was in charge of the hen house, you should be prepared for some losses.

I asked who at DFO was responsible for monitored the quarterly reports and how were any concerns addressed. I have not receive an adequate response.



I asked DFO if any of their staff had attended the Murdock River site. I also asked DFO if any concerns had been forward to the DFO Compliance Section for possible consideration. The DFO response was that no DFO staff or DFO compliance staff had attended the site during the construction period.

### Slide # 17 ANNUAL COMPLIANCE REPORT

One of the most compelling statements in the reports that I reviewed is provided in one of the Annual Compliance Report. The Author (Environmental Specialist) states “**I expect that if a Contractor does not achieve specific compaction rates, or concrete density on structures there are very real and meaningful penalties. These tend not to be exercised on environmental infractions.**”

### Slide #18 ADDRESSING ENVIRONMENTAL CONCERNS

On September 4, 2014, I submitted a comprehensive report to;

- the Minister of Fisheries and Oceans
- the Ontario Minister of Transportation
- the Ontario Minister of Natural Resources and Forestry
- the Ontario Minister of the Environment and Climate Change
- Transport Canada
- the Environmental Commissioner of Ontario

This report documented many of the grievous environmental and health and safety concerns related to this project. I offered to meet with the Agencies to discuss possible remedies, to conduct a mutual site inspection and recommended that a multi Agency group be formed to deal with the myriad of unanswered concerns.

The Minister of DFO (Ms. Gail Shea) and the Ontario Minister of Transportation (Seven Del Duca) did not acknowledge or respond to my letter or the offer to meet to discuss our documented concerns.

### **Slide #19 REQUEST FOR INFORMATION**

I was instructed by DFO to file a Freedom of Information Request, which I did.

Further to my FIO request I did received some files from DFO. It was obvious that more files related to my request must be available. I contacted the Access to Information and Privacy Secretariat and after some discussion I was advised that no further responsive files existed. I disagreed and so I filed an Access to Information Act Complaint Form on March 15, 2016 that is still pending.

I have been in contact the two subsequent Ministers of Fisheries and Oceans (Hunter Tootoo and Dominic LeBlanc) and my local Federal MP (Marc Serre) requesting their assistance in this environmental disaster.

## Slide # 20 CONCLUSIONS

### Conclusions

It is my opinion that during this Construction Project, that the CEAA process failed to provide adequate environmental protection. The failure of the DFO to monitor, investigate and enforce the Regulations of the Federal Fisheries Act only exacerbated a terrible environmental situation.

1. In a letter from DFO Minister Dominic LeBlanc dated June 16, 2016 he states “DFO is satisfied with the actions taken by MTO to remedy the issues that occurred during the construction of the bridge.” This statement does not address the core environmental issues:
  - The failure of DFO to fulfill its stated mandate to protect fish and fish habitat.
  - The failure of DFO to properly monitor, investigate and if warranted to enforce the repeated violations of the Federal Fisheries Act.
2. The Department of Fisheries and Ocean’s top priority according to Minister Leblanc “is the protection of Canada’s commercial, recreational and aboriginal fisheries”. If this statement is indeed fact then why did the DFO approve actions, activities, operational changes, etc. that permitted the use and release of deleterious materials into a sport fisheries?

3. Why did the DFO Management Team not support the decision of the on site DFO Biologist with respect to the original HADD determination and the need for fish habitat compensation at the Murdock River Bridge site? A Senior MTO Manager told me that he was amazed that the Murdock River site had not received a Fisheries Authorization from DFO.
4. One of the guiding principles of the EA process and the Federal Fisheries Act is that there must be no net loss of fish or fish habitat as a result of a project. The DFO refusal to protect the fish and the fish habitat at the Murdock River Bridge site resulted in a net loss of fish habitat. Why did DFO fail to fulfill their mandate?
5. The MTO has a documented history of Federal Fisheries Act violations. During this time period MTO and one of their Contractors working on another Highway Project plead guilty to infractions under the Federal Fisheries Act and were fined half a million dollars. When advised of the potential violations of the Federal Fisheries Act and other compliance concerns why did the DFO not investigate these incidents and if warranted lay charges.
6. The Ontario Government (Premier Wynne) has issued a Mandate Letter to the Minister of MOECC that polluters will be held responsible for their decisions. In this case the polluters have been identified; their misdeeds have been well documented and still the DFO and Provincial Agencies have not held them responsible? Why not?

7. Why has the DFO not acted in an open, transparent and accountable manner in dealing with the serious environmental concerns related to this issue?

**Slide # 21 QUOTE FROM ALBERT EINSTEIN**

There is one more point that I would like to share with the Panel. It is a quote made by Albert Einstein;

**“NOTHING IS MORE DESTRUCTIVE OF RESPECT FOR THE GOVERNMENT AND THE LAW OF THE LAND THAN PASSING LAWS WHICH CANNOT BE ENFORCED”**

Thank you for the opportunity to present these observations and concerns.