



CANADIAN
ENVIRONMENTAL
DEFENCE
FUND

Article 14 Submission

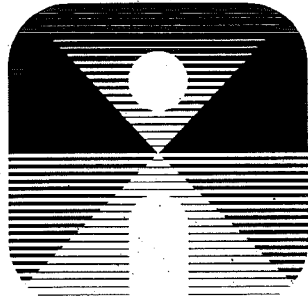
Made pursuant to the

North American Agreement on Environmental Cooperation

by the

Canadian Environmental Defence Fund

MAY 26, 1997



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Making a case for the environment.

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Written by:
BRUCE M.R. BEST, B.A., LL.B.

About the CEDF:

The Canadian Environmental Defence Fund (CEDF) is a national, non-profit organization founded in 1985 to help citizens gain access to environmental justice.

CEDF provides funding, fund raising assistance, legal and expert referrals and organizational support to groups pursuing precedent-setting or nationally significant environmental law cases. CEDF has provided over \$1.5 million in assistance to over 35 citizens' groups across Canada.

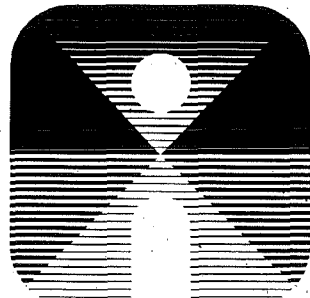
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ENVIRONMENTAL
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1. Introduction

The Canadian Environmental Defence Fund (CEDF) submits that the Canadian government has failed to enforce its law requiring environmental assessment of federal initiatives, policies and programs. In particular, the Canadian government failed to conduct an environmental assessment of The Atlantic Groundfish Strategy (*TAGS*)¹, as required under Canadian law. By its failure to do so, the Canadian government has jeopardized the future of Canada's east coast fisheries.

The federal government imposed a moratorium on the Atlantic cod fishery in 1992. What caused the collapse of the Atlantic groundfish industry is the subject of debate, with foreign fishing, seals, changing water temperature and illegal fishing all being blamed for the decline. It is clear, however, that the basic problem was that too many fish were being caught by licensed fishers. For the fishery to be sustainable, there must be a reduction in the catch.

The Canadian government's solution was *TAGS*, announced on May 16, 1994 by the Canadian *Ministry of Fisheries and Oceans* in co-operation with the *Ministry of Human Resources and Development*. *TAGS* is a \$1.9 billion commitment of federal money; its approach is to provide income supplements to those individuals who were left with no livelihood as a result of the moratorium. In addition, *TAGS* set the goal of reducing the number of people employed in the fishery by 50%.

However, a 50% reduction in employment has no effect on the amount of fish which may be caught. This solution ignores the most significant issue in catch levels: technology. The decline of the fish stocks since the early 60's has occurred in direct parallel with a substantial shift in the technology used in the fishery. Since 1977, the dragger fleet has become the dominant element in terms of catch levels in the groundfish industry. There is concern that this method of fishing has far greater ecological impacts than the traditional methods of fishing. An environmental assessment of fisheries management policies would have examined the environmental effects of different gear technologies.

On the other hand, those most in need of the income supplement, and therefore the most likely to subscribe to the *TAGS* program, are the small-scale, independent fishers using traditional, sustainable fishing technology such as long-lining and cod traps. When the fishery returns, *TAGS* will have removed many of those fishers from the industry, leaving the commercial draggers as the "core fishery".

Thus, *TAGS* will have a profound effect. It will concentrate the fishery into intensive technologies with virtually unlimited capacity, with corresponding environmental implications. It will also radically alter the social fabric of Newfoundland and the Maritime provinces, since the fishery will be concentrated in a few large players with no local or community element. None of these significant consequences of *TAGS* received any



identifiable study. In particular, no environmental assessment was done, though required by law.

The applicable law for an environmental assessment was the federal *Environmental Assessment and Review Process Guidelines Order (EARPGO)*. *EARPGO* required an initial assessment of *TAGS*. No such assessment was carried out. The government of Canada therefore failed to follow its environmental laws. This failure to "fully assess" the fisheries management of Canada's east coast fisheries is likely to cause significant adverse environmental and social effects. The destructive and uncontrolled practices that are directly responsible for the current crisis in the Canadian fisheries will invariably continue.

Under Article 14 of the North American Agreement on Environmental Cooperation, citizens may request a review of a country's failure to comply with their domestic environmental laws. The CEDF is seeking a declaration by the Commission on Environmental Cooperation (CEC) that Canada did not apply *EARPGO* to the *TAGS* cabinet decision. A finding by the CEC consistent with this request should compel Canada to carry out the appropriate assessment of Canada's east coast fisheries, before any future decisions are made.

2. EARPGO: Environmental Assessment and Review Process Guidelines Order ²

At the time of *TAGS*, federal law for environmental assessment was set out in *EARPGO*. Therefore, *TAGS* was subject to *EARPGO*'s requirements. There was no discretion to legally avoid an environmental assessment.

The federal environmental assessment process dates back to a Cabinet policy, *EARP*, in 1974. In 1984, the *EARP* Guidelines were approved as an Order to implement the policy. (thereafter referred to as *EARPGO*). Their exact legal status was uncertain prior to the 1989 decisions of the Federal Court (Trial and Appeal Divisions) in *Canadian Wildlife Federation v. Canada*³. This and subsequent cases established that *EARPGO* was legally binding.

EARP and *EARPGO* applied broadly to policy and program decisions by the federal government. For example, the following three panel reviews focused on broad policy issues rather than on specific projects or undertakings:

- **Panel Report 25:** *Beaufort Sea Hydrocarbon Production and Transportation*⁴ dealt with the environmental implications of arctic development north of 60 degrees latitude.
- **Panel Report 31:** *Fraser-Thompson Corridor Review*⁵ dealt with the environmental implications of establishing a transportation corridor for railway, highway, electricity transmission and pipeline works.
- **Panel Report 35:** *Northern Diseased Bison*⁶ dealt with the environmental implications of disease in bison for their long-term sustainability.

EARPGO also made specific provision for technology assessments. More than ten panel reviews, for example, considered the environmental implications of technologies, including northern pipelines, offshore drilling and arctic shipping. This type of review would be entirely appropriate for *TAGS* in assessing its environmental effects. Panel Report 25 (above), in particular, considered the different effects technologies would have in determining its recommendations.

Assessment of policies and programs, in addition to projects, is not an unusual legal requirement. For instance, similar provisions for environmental assessment of policies and programs exist in the United States. Under the *National Environmental Policy Act* (NEPA), any major federal action which may significantly affect the human environment requires an environmental impact assessment. Regulations of the Council on Environmental Quality (CEQ)⁷ require an EIS for adoption of policies, plans, programs and projects. (s.1508.18) by any federal agency (s.1508.12).

On January 19, 1995 the Canadian federal government reduced its environmental assessment obligations by proclaiming a new law with narrower application than *EARPGO*. This replacement law, the *Canadian Environmental Assessment Act (CEAA)*, applies to projects only, not policies or programs. However, as *TAGS* was introduced prior to the proclamation of *CEAA*, it was still subject to *EARPGO*.

Instead of following binding law, the federal government claims it assessed *TAGS* according to a vague, non-binding cabinet policy⁸ [*Federal Environmental Assessment Process for Proposals (EAPP)*, enclosed at Tab "E", is the publicly available summary of that policy]. This policy sets out a different environmental assessment process than the *EARPGO*, making no provision, for example, for independent public review of policies or programs. The government purports to have complied with this policy through carrying out a cursory evaluation of *TAGS* and its potential environmental effects⁹ [enclosed as Tab "F" of this submission is a copy of this evaluation]. However, at the time of this assessment and the introduction of *TAGS*, *EARPGO* was in force. Therefore, its mandatory provisions override the discretionary provisions of the cabinet policy.

The following sections outline the process required for environmental review under *EARPGO*:

Environmental Assessment and Review Process Guidelines Order,
June 11 1984 [under the *Government Organization Act, 1979*]

• • •

Application

2. In these Guidelines,



"initiating department" means any department that is, on behalf of the Government of Canada, the decision making authority for a proposal;

• • •

"proposal" includes any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility.

6. These Guidelines shall apply to any proposal
 - (a) that is to be undertaken directly by an initiating department;
 - (b) that may have an environmental effect on an area of federal responsibility;
 - (c) for which the Government of Canada makes a financial commitment; or
 - (d) that is located on lands, including the offshore, that are administered by the Government of Canada.

Administration

3. The Process shall be a self assessment process under which the initiating department shall, as early in the planning stage as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for which it is the decision making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel.

- 4.(1) An initiating department shall include in its consideration of a proposal pursuant to section 3
 - (a) the potential environmental effects of the proposal and the social effects directly related to those environmental effects, including any effects that are external to Canadian territory; and
 - (b) the concerns of the public regarding the proposal and its potential environmental effects.

• • •

10. (1) Every initiating department shall ensure that each proposal for which it is the decision making authority shall be subject to an environmental screening or initial assessment to determine whether, and the extent to which, there may be any potentially adverse environmental effects from the proposal.

• • •

12. Every initiating department shall screen or assess each proposal for which it is the decision making authority to determine if

- (a) the proposal is of a type identified by the list described under paragraph 11(a), in which case the proposal may automatically proceed;
- (b) the proposal is of a type identified by the list described under paragraph 11(b), in which case the proposal shall be referred to the Minister for public review by Panel;
- (c) the potential adverse environmental effects that may be caused by the proposal are insignificant or mitigable with know technology, in which case the proposal may proceed or proceed with the mitigation, as the case may be
- (d) the potentially adverse environmental effects that may be caused by the proposal are unknown, in which case the proposal shall either require further study and subsequent prescreening or reassessment or be referred to the Minister for public review by Panel;
- (e) the potentially adverse environmental effects that may be caused by the proposal are significant, as determined in accordance with criteria developed by the Office in cooperation with the initiating department, in which case the proposal shall be referred to the Minister for public review by Panel;
- (f) the potentially adverse environmental effects that may be caused by the proposal are unacceptable, in which case the proposal shall either be modified and subsequently rescreened or reassessed or be abandoned.

13. Notwithstanding the determination concerning a proposal made pursuant to section 12, if public concern about the proposal is such that a public review is desirable, the initiating department shall refer the proposal to the Minister for public review by a Panel.

• • •

15. The initiating department shall ensure

- (a) after a determination concerning a proposal has been made pursuant to section 12 or a referral concerning the proposal has been made pursuant to section 13, and
- (b) before any mitigation or compensation measures are implemented pursuant to section 13,

that the public have access to the information on and the opportunity to respond to the proposal in accordance with the spirit and principles of the *Access to Information Act*.



TAGS was a proposal. *EARPGO* defined "proposal" broadly to include "any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility." *TAGS* clearly falls within this definition, and therefore it was subject to *EARPGO*.

As both the *Department of Fisheries and Oceans* and the *Department of Human Resources and Development* were within the definition of "initiating department", they had an obligation to conduct an *EARPGO* review of *TAGS*.

To comply with *EARPGO*, courts have determined that an initial environmental assessment must consider all potentially adverse environmental effects of a proposal. See *Friends of the Island v. Minister of Public Works* (Federal Court, Trial Division, Reed J.)¹⁰ [excerpts enclosed at Tab "G" of this submission]. The cursory review of *TAGS* under the *EAPP* failed to identify or consider any environmental effects whatsoever.

Courts have also determined that an initial environmental assessment must also assess the significance of all potentially adverse environmental effects using the specific language in s.12 [see above] of the *EARPGO* to determine environmental effects; namely: "Insignificant", "Unknown", "Significant" or "Unacceptable": see *Tetzlaff v. Canada (Minister of the Environment)*¹¹ [enclosed at Tab "H" of this submission]. The *EAPP* assessment carried out does not comply with this requirement for two reasons: first, "neutral" effects is not an acceptable determination under *EARPGO*. Second, a conclusion of "neutral effects" can only be the result of balancing positive against negative effects. Initial review does not permit this balancing: the existence of any significant adverse effect must result in referral to the Minister [*Tetzlaff v. Canada*, note above]. Balancing is permitted under *EARPGO* only at the stage of independent public review. No such review was carried out.

Third, courts have supported the *EARPGO* requirements for public involvement: see *Friends of the Island v. Canada (Minister of Public Works)* (F.C.T.D., Cullen, J.)¹² at 308-10. The approach taken by the federal government did not involve the public in the decision-making process as required by *EARPGO* [s.15]. There was no public consultation prior to the decision of the Ministers, and furthermore no public access to the information on which that decision was based.¹³

At the time of the announcement of *TAGS*, several interested groups, including the applicant, wrote the Minister of Fisheries and Oceans, the Honourable Brian Tobin (now Premier of Newfoundland and Labrador) and the Minister of Human Resources and Development, Lloyd Axworthy, requesting that an environmental assessment of *TAGS* be conducted under *EARPGO*. The Ministers' responses reiterated the original *Fisheries and Oceans* position that no environmental assessment was necessary. Attached to this submission at Tab I₁¹⁴ is the response from *Human Resources Development Canada*, and at Tabs I₂¹⁵ and I₃¹⁶ are copies of the *Department of Fisheries and Oceans* responses.

3. Environmental Significance of *TAGS*

There are two very significant failures of *TAGS* from an environmental point of view:

1. it fails to fully consider its effects on conservation;
2. it fails to fully consider its relationship to fisheries technology.

The collapse of the Atlantic groundfish fishery was and is a major environmental issue. To rejuvenate the cod stocks, very careful regard must be paid to environmental implications. *EARPGO* made provision for a needs assessment of each proposal as well as an assessment of effects. In this way, it could consider the full "implications" of any proposal. *TAGS* was a response to the problem of overfishing, yet it sets no quotas or limits on fishing. A review under *EARPGO* would have identified this weakness and made provision to consider alternatives.

In 1977, the majority of the fishing fleet was made up of small-scale fishers, using the traditional methods such as hook-and-line and cod traps. After the establishment of the 200-mile limit in 1977 (ostensibly to save the fish stocks from foreign overfishing) up until 1982, there was a huge expansion of the dragger fleet. In addition, the efficiency of the dragger fleet also increased significantly. The total landings for the groundfish industry in 1977 was 550,000 tonnes; in only five years this increased by 67% to 820,000 tonnes. Over the same period, the dragger fleet average catch per-boat increased from 8.5 tonnes per day to 14 tonnes per day, a 60% increase in efficiency.¹⁷ By 1981, the Canadian fleet was larger than the foreign fleet of 1976. Thus, the establishment of the 200 mile limit, followed by the huge expansion of the Canadian-based dragger fleet, produced within five years an even greater strain on the resource.

By the early 1980's, the inshore fishers had serious concerns about the effect of this technological shift on the cod stocks. After unsuccessfully lobbying the government to consider the impact of technology on the cod stocks, the Newfoundland Inshore Fisheries Association went to court in 1989 in an attempt to halt the devastating resource management policies of the Department of Fisheries and Oceans. Unfortunately, the court did not accept their prediction that the fisheries would disappear within 5 years if current practices were maintained. The court dismissed their request for an injunction until an environmental assessment was conducted. Within two years, the Atlantic groundfish stocks had collapsed.

Following the 1992 moratorium, *TAGS* was introduced in May 1994. Through *TAGS*, qualified fishers over 55 who have lost their livelihood as a result of the moratorium were able to receive extended income benefits if they were willing to permanently leave the fishery. Other fishers also received *TAGS* benefits. The stated objective of *TAGS* was a 50% capacity reduction of the industry. However, it was clear from the beginning that *TAGS* would only reduce the number of individual fishers in the industry. There is nothing in *TAGS* which would ensure that there is a corresponding reduction in the capacity of those remaining in the fishery.



This approach to down-sizing the fishery fails to address the real cause of overfishing: better fishing technology utilized by large trawlers. *EARPGO* powers to assess technology were never applied despite evidence that large-scale, commercial drag fishing has a significant environmental effect, compared to the relatively non-intrusive fishing methods used by the independent fishers.

Environmental assessment is essentially a tool of precaution. EA attempts to predict effects so as to prevent significant or unacceptable events from occurring. In 1995, the Canadian government stated its commitment to the precautionary principle. Precaution is a guiding principle of Canadian environmental law according to the federal Department of the Environment in the December 1995 *Response to the Standing Committee on Environment and Sustainable Development*. This confirms commitments expressed in several international treaties to which Canada is a signatory, including the 1992 Rio Declaration and the 1990 Bergen Declaration.

The collapse of the fisheries demonstrates a complete failure to apply the precautionary principle. Given the unreliability of the biological information on which catch levels have been based in the past, a precautionary factor must be built into the relationship between catch and health of the marine environment. Considering the depth of the current crisis, this precautionary approach would also suggest a technological preference for inshore fishing methods than dragnet operations.

Thus, there is no reasonable basis for the conclusion by the *Ministry of Fisheries and Oceans* that the effect of *TAGS* on the environment would be "neutral". Fishing technology is relevant to fisheries' conservation. An environmental assessment is needed to determine which fishing methods are compatible with sustainable fishing.

4. Social Significance of *TAGS*

TAGS has very significant social impacts:

1. It is intended to encourage individual fishers to retire and also encourage the active portion of the fisheries to be concentrated in the larger commercial fisheries. Thus, *TAGS* downsizing efforts deal almost exclusively with the small-scale inshore fishers that sustain dozens of coastal communities.
2. *TAGS* promotes social inequity. It targets individual fishers who are part of centuries-old fishing communities to stop fishing, leaving in place the off-shore sector which engages in destructive forms of fishing. *TAGS* has no effect on the practice of enterprise allocations—the privatized portion of the Total Allowable Catch (*TAC*) allotments owned by the large companies. This means that if the fish return, fishing will be carried out predominately by large companies. Many who have their roots in coastal communities will have left the fishery. By these objectives, when the Atlantic fish stocks have returned to a commercially viable level, the only significant fishers remaining will be the large scale, environmentally destructive commercial operations.

3. *TAGS* facilitates irrevocable destruction to coastal communities. It will result in a fishery that exists and operates independently of the community in which it takes place. Under panel reviews carried out under *EARP* and *EARPGO*, social impact assessment has been a critical component of EA. For example, **Panel Report 13: Eldorado Uranium Refinery R.M. of Corman Park, Saskatchewan**, rejected a proposal solely for its social impacts.¹⁸

The January 1995 operational review of *TAGS* conducted by Price Waterhouse¹⁹ on behalf of Human Resources and Development Canada describes the closure of the fishery as "the largest single layoff in Canadian history. . . . [As of January 1995], approximately 49,000 workers have applied for *TAGS* and over 40,000 have received payments under the initiative." [Price Waterhouse report, page 4].

The program was initially designed for an estimated 30,000 participants. The greater-than-expected response has resulted in the program being wound up in 1998, shortening the program to 4 years from the original 5.

An initial assessment under *EARPGO* would have required an assessment of all environmental effects of *TAGS*, including direct social effects.

Today, on the west coast, DFO is implementing a similar program, the *Mifflin Plan*, to regulate the depleted salmon stocks. Like *TAGS*, the *Mifflin Plan* has been subjected to no proper environmental assessment. Thus, it too fails to fully consider its environmental and social implications. However, unlike *TAGS*, the *Mifflin Plan* was proposed after *EARPGO* was repealed. The narrower scope of federal Environmental Assessment law through the *CEAA* means that there is no legal requirement to assess this plan.

5. Conclusion

Canadian law, prior to January 1, 1995, required environmental review of any government proposal. In the case of The Atlantic Groundfish Strategy (*TAGS*), this law was not followed and no review was undertaken, despite the clear environmental and social effects of the policy. As a result, the Federal government has continued managing the fisheries without a comprehensive study of environmental or social issues to guide policy decisions. For the effective, environmentally and socially sound management of Canada's fisheries, and to guarantee that the fishery will become a sustainable long-term resource, the Canadian government must conduct a comprehensive environmental assessment of fisheries policy.

6. Requirements for Submission

This submission meets the requirements under Article 14 of the North American Agreement on Environmental Cooperation. In particular;



Article 14(1) —

- This submission is written in English.
- The applicant, the *Canadian Environmental Defence Fund*, is clearly identified.
- The submission contains sufficient information to allow the Secretariat to review the submission, including background information on the law as it relates to this particular incident.
- The purpose of this document is to compel the Federal government to meet their own environmental review laws, and not to harass industry.
- This issue has been addressed to the Ministers of Human Resources Development and of Fisheries and Oceans, and their responses are included at Tabs I₁, I₂ and I₃ of this submission.
- The *Canadian Environmental Defence Fund* is a non-profit organization incorporated and carrying on business in Canada.

Article 14(2) —

- The *Canadian Environmental Defence Fund* is a non-profit organization in Canada dedicated to the protection of the natural environment. The future of the fisheries is of vital importance to the well-being of a large portion of the population of the east coast of Canada.
- One of the stated objectives of the *NAAEC* is to promote sustainable development. A proper environmental review of *TAGS* will ensure that the fisheries in Atlantic Canada are reformulated in the most environmentally sustainable method.
- The *Canadian Environmental Defence Fund* has pursued the private remedies available to bring about the application of the environmental laws in this issue. A request for an environmental assessment of *TAGS* was made by Dr. Irene Novaczek of the Environmental Coalition of Prince Edward Island in the fall of 1994.
- The *Canadian Environmental Defence Fund* has a long-standing relationship with various fishers' groups in Atlantic Canada. The basis of this submission includes information and data from a variety of sources, including academic opinions on sustainability and statements from fishers' groups in Atlantic Canada.

7. Background to the *CEDF*

The *Canadian Environmental Defence Fund* has been providing Canadians with access to environmental justice since 1985. In the summer of 1995 following a review of its mandate, the *CEDF* made fisheries a focus of concern, to bring a national approach to fisheries issues. Presently, the *CEDF* is working with groups across Canada and on both coasts to promote fisheries management that is based on sustainable fisheries targets and community-based decision-making authority.

About the Author

Bruce Best is a staff lawyer at *Sudbury Community Legal Clinic* in Sudbury, Ontario.

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Notes

¹ *The Atlantic Groundfish Strategy (TAGS)*, despite being a \$1.9 billion dollar program, has minimal publicly available documentation. A formal request was made under the *Canadian Access to Information Act* for information regarding *TAGS*. The response was limited to a 1 page information bulletin, a 3 page media release, and a 3 page Department and Fisheries and Oceans Backgrounder. Despite being specifically requested in the Access to Information request, there was no information provided on the *EAPP* environmental review of the *TAGS* policy. The Access to Information package received by the applicant is attached at Tab A.

² Tab B: *Environmental Assessment and Review Process Guidelines Order (EARPGO)*

³ Tab C: *Canadian Wildlife Federation v. Canada* (1989) 3 C.E.L.R. (NS) 287 (F.C.T.D.) (excerpts)

⁴ Tab D₁: **FEARO Panel Report 25: Beaufort Sea Hydrocarbon Production and Transportation** (excerpts)

⁵ Tab D₂: **FEARO Panel Report 31: Fraser-Thompson Corridor Review** (excerpts)

⁶ Tab D₃: **FEARO Panel Report 35: Northern Diseased Bison** (excerpts)

⁷ CEQ Regulations Implementing § 102(2) of *NEPA*, 40 C.F.R. pts 1500-1508

⁸ Tab E: *Federal Environmental Assessment Process for Proposals (EAPP)*

⁹ Tab F: *EAPP* Decision re *TAGS*.

¹⁰ Tab G: *Friends of the Island v. Minister of Public Works* (1993), 10 C.E.L.R. (NS) 204 (F.C.T.D.), Reed J. (excerpts)

¹¹ Tab H: *Tetzlaff v. Canada (Minister of the Environment)* [1991] 1 F.C. 641 (A.D.) (excerpts)

¹² *Friends of the Island v. Canada (Minister of Public Works)* (F.C.T.D., Cullen, J.) (excerpts)

¹³ See Note 1, above.

¹⁴ Tab I₁: Letter from Human Resources Development Canada to Dr. Irene Novaczek, dated December 6, 1994

¹⁵ Tab I₂: Letter from Department of Fisheries and Oceans to Dr. Irene Novaczek, dated January 4, 1995

¹⁶ Tab I₃: Letter from Department of Fisheries and Oceans to David Donnelly, dated April 12, 1995

¹⁷ L.S. Parsons, *Management of Marine Fisheries in Canada* (2 vols.) Ottawa, 1993 (National Research Council 1993) pp.184-5

¹⁸ Tab J: **FEARO Panel Report 13: Eldorado Uranium Refinery R.M. of Corman Park, Saskatchewan**. (excerpts) "The Panel cannot endorse the proposed Warman site due to its concern regarding the potential social impacts on the local community" (p.52).

¹⁹ Tab K: Human Resources Development Canada: Operational Review of The Atlantic Groundfish Strategy, January 6, 1995, conducted by Price Waterhouse.

