

May 19, 2017

The Hon. Jane Philpott,
Minister of Health
and
The Hon. Catherine McKenna,
Minister of Environment and Climate Change
House of Commons
Ottawa, ON K1A 0A6

Dear Ministers McKenna and Philpott,

Re: Commercial Production of Genetically Modified Salmon in Canada

We write to bring to your attention the urgent issue of a proposal by Aquabounty Canada Inc. for the commercial production of genetically modified salmon, known as AquAdvantage Salmon (“AAS”), at a new facility in Rollo Bay West, Kings County, PEI. As explained further below, this proposal would contravene subsection 106(10) of the *Canadian Environmental Protection Act, 1999* (“CEPA”) as applied by the Federal Court of Canada.

I. Commercial production of AquAdvantage Salmon

Aquabounty developed and owns the rights to AAS. AAS is an organism that contains genes transferred from two other species – an ocean pout and Chinook salmon – and allegedly grows to adult size more quickly than conventional Atlantic salmon.

On April 30, 2013 Aquabounty filed a New Substances Notification under CEPA¹ stating its intent to manufacture AAS eggs at its existing research facility near Souris, PEI and to export up to 100,000 of these eggs annually to be grown out in Panama.

Aquabounty requested and was granted a waiver of information requirements pursuant to section 106(8)(b) of CEPA. Specifically, then-Minister of Environment Leona Aglukkaq granted a waiver of the requirement to provide data from a test conducted to determine the pathogenicity, toxicity, or invasiveness of AAS.² Pursuant to section 106(8)(b), this waiver was

¹ CEPA s106(1); *New Substances Notification Regulations (Organisms)* SOR/2005-248 at s4.

² NSN Regulations Schedule 5, para 5.

granted on the basis that the organism would be manufactured at a location where, in the opinion of the Ministers, Aquabounty was able to contain AAS so as to satisfactorily protect the environment. As set out in its waiver request, the location that Aquabounty was to contain AAS was its Souris, PEI facility.

Fisheries and Oceans Canada conducted an expert CEPA toxicity assessment and made recommendations to Ministers Aglukkaq and Ambrose for the purposes of section 108 of CEPA. That toxicity assessment recommended that any activity other than the manufacture of AAS eggs at the Souris, PEI facility be subject to a CEPA toxicity assessment based on all data mandated by the Act and the Regulations.³

The Ministers published a Significant New Activity (“SNAC”) Notice pursuant to section 110(1) of CEPA on November 23, 2013. The SNAC Notice sets out the uses of AAS that are permitted in Canada. In addition to authorizing the manufacture of AAS eggs as recommended by DFO, the SNAC Notice permits commercial “grow-out”, or production, of AAS in Canada.

As recognized by the Federal Court of Canada,⁴ the uses set out in the SNAC Notice are subject to two major limitations: (1) any person other than Aquabounty who wishes to manufacture AAS must still notify the Ministers pursuant to section 106(1) because AAS is not listed on the Domestic Substances List, and (2) Aquabounty can use and manufacture AAS consistent with the SNAC Notice but it can do so only at its Souris, PEI facility. Otherwise, it too would need to notify the Ministers under the Act. This important limitation is explained further below.

II. AquaBounty can only lawfully use AquAdvantage Salmon at its Souris, PEI Facility

When the Minister of Environment and Climate Change grants a waiver of information requirements on the basis that an organism will be contained at a specific location, section 106(10) restricts the locations at which that organism can be used:

(10) Where the Minister waives any of the requirements for information under paragraph (8)(b), the person to whom the waiver is granted shall not use, manufacture or import the living organism unless it is ... at the location specified in the request for the waiver...

As confirmed by the Federal Court, this means that AquaBounty is restricted “to using AAS at its [Souris] PEI Facility.”⁵ The Court elaborated as follows:

AquaBounty requested and was granted a waiver from providing “the data from a test conducted to determine [AAS’s] pathogenicity, toxicity or invasiveness.” The waiver was granted because the Ministers were of the opinion that AquaBounty was “able to

³ Summary of the Environmental and Indirect Human Health Risk Assessment of AquAdvantage Salmon (August 13, 2013) at p21.

⁴ *Ecology Action Centre et al v Canada*, 2015 FC 1412.

⁵ *Ecology Action Centre v Canada* paras 67-69, 77.

contain the living organism so as to satisfactorily protect the environment and human health:" [CEPA, paragraph 106\(8\)](#)(b). That decision was made with specific reference to the PEI Facility identified and described in the application. **Accordingly, AquaBounty, having received the waiver, "shall not use, manufacture or import living organism unless it is ... at the location specified in the request for the waiver:"** [CEPA, subsection 106\(10\)](#).

...

To summarize, the impact of Part 6 of [CEPA](#) on AquaBounty is the following. Having filed a Notification and been provided with the requested waiver, and the assessment period having passed, **it can "manufacture" and "use" AAS (provided it is not a use that is a significant new activity) only at the PEI Facility**. If it wishes to manufacture AAS at a different location, or import AAS, then it must file a new Notification under [subsection 106\(1\)](#). If it wishes to use AAS for a significant new activity, then it must file a Notification under [subsection 106\(4\)](#).⁶ [emphasis added]

Unless AquaBounty has filed a new Notification under subsection 106(1) or provided the information for which it was previously granted a waiver, these legal restrictions continue to be in force. Legal counsel representing the Ministers before the Federal Court of Appeal in the above-noted legal challenge consistently adopted the position that, as set out by the Federal Court, "Aquabounty...is limited by ss106(10) to using and manufacturing AAS at its [Souris] PEI facility... If Aquabounty wishes to manufacture AAS at a different location, or import AAS, then it must file a new notification under ss 106(1)."⁷

On June 10, 2016 the PEI government approved Aquabounty's redevelopment of the Rollo Bay aquaculture facility to rear Atlantic Salmon broodstock. These broodstock were not to include AAS and are therefore not biotechnology organisms subject to CEPA. On April 12, 2017 Aquabounty submitted a proposal for commercial production of AAS at this new Rollo Bay facility. The company's Environmental Impact Statement does not appear to reference the Minister's waiver of information requirements and the resulting restrictions on location of manufacture and use under section 106(10).

III. Enforcement of CEPA

We ask that you act to ensure AquaBounty's compliance with sections 106(1) and (10) of CEPA. This requires that if the company intends to manufacture or use AAS at a facility other than its Souris, PEI facility, Aquabounty must provide notification to the Ministers under section 106(1) of CEPA for the purposes of a risk assessment under section 108 of the Act.

⁶ *Ecology Action Centre v Canada* paras 70, 78. Note that the applicants appealed the Federal Court's decision on other grounds but the Federal Court of Appeal upheld the decision of the Federal Court in its entirety.

⁷ Respondent Ministers' Memorandum of Fact and Law dated July 8, 2016 at para 69.

Please confirm that you will take action to ensure compliance with the Act as described above by June 20, 2017. After that date, we will be considering our own legal options to ensure compliance with CEPA and the Federal Court of Canada's 2015 decision.

Sincerely,



Mark Butler
Policy Director
Ecology Action Centre



Karen Wristen
Executive Director
Living Oceans Society

CC: Hon. Dominic LeBlanc – Minister of Fisheries, Oceans, and the Canadian Coast Guard
Ms. Linda Duncan, M.P. – NDP Environment and Climate Change Critic
Mr. Ed Fast, M.P. – Conservative Environment and Climate Change Critic
Ms. Elizabeth May, M.P. – Leader of the Green Party of Canada
Hon. Robert Mitchell – PEI Minister of Communities, Land and Environment
Premier Wade MacLauchlan
Kaitlyn Mitchell – Staff Lawyer, Ecojustice