



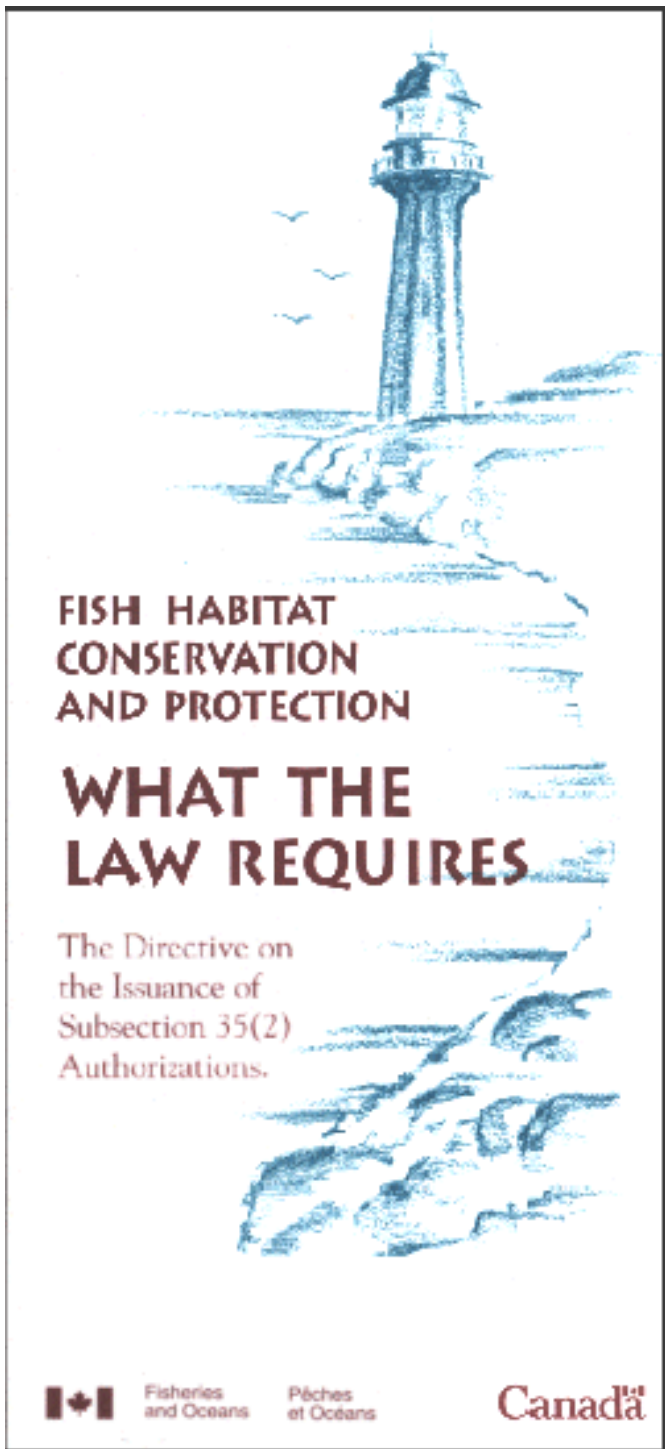
WHAT THE LAW REQUIRES



Fish Habitat, Conservation and Protection

The Directive on the Issuance of Subsection 35(2) Authorizations.

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What the Law Requires

If you are planning a project that is likely to alter or damage fish habitat you are subject to certain legal obligations under the *Fisheries Act*. These obligations have been clarified in the Directive on the Issuance of Subsection 35(2) Authorizations.

The purpose of this brochure is to summarize these obligations in non-technical language and to suggest how to fulfill them. For a more detailed discussion, see our brochure entitled *Fish Habitat Conservation and Protection – Guidelines for Attaining No Net Loss*.

Fish Habitat and the *Fisheries Act*

The main part of the *Fisheries Act* dealing with the protection of fish habitat is Section 35.

Subsection 35(1) is a straightforward prohibition. It says that "*no person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction fish habitat.*"

Subsection 35(2) qualifies that prohibition by explaining that the federal Minister of Fisheries and Oceans may authorize exceptions. It says that "*no person contravenes Subsection 35(1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions **authorized by the Minister or under regulations made by the Governor in Council under this Act.***"

In short: once you have received a legal Authorization to "alter, disrupt or destroy" a fish habitat subject to the conditions prescribed in that document, your action in doing so is not illegal –it is not an offence under the *Fisheries Act*.

Steps in the Process

Authorizations to harmfully alter, disrupt or destroy fish habitat are, in a sense, the instrument of last resort. They are issued only when there is no other way to go.

What this means is that if you are planning a project that might affect fish habitat, applying for an Authorization should not be your first step – in fact it should be your last.

Your first step should be to get in touch with the government agency responsible for fish habitat protection. In some provinces this will be the Department of Fisheries and Oceans (DFO) – in others it will be the provincial government department responsible for fisheries and fish habitat management.

In some cases, the agency responsible for fish habitat protection may already be aware of your project. If you have had to apply for permits to conduct your work, a description of your project may have been referred to the agency responsible for fish habitat, for review.

Your purpose in contacting this agency is to find out whether your project is likely to harm fish habitat. If there is indeed such a danger, the agency will be able to tell you whether the damage to the habitat could be avoided or lessened by changes in project design or implementation.

Seek Advice

Let us assume that your point of contact is DFO. The Department will request information from you concerning the nature of your proposed project, its possible impact on fish habitat and the measures you propose to minimize those impacts. If the Department believes that the impact of your project on fish habitats might be reduced by certain measures, it will advise you in writing, on ways to avoid or minimize damage. These measures might include relocating or redesigning your project – or steps to mitigate the harmful impacts on habitat.

The advice you receive is not the same as an Authorization – which we will describe in the next section. But, if you comply with the advice provided, and conduct your project as described, you will be in compliance with the *Fisheries Act*. Conversely, if you don't comply with the advice provided, or if you change your project and damage to fish habitat occurs, you are liable to prosecution.

More About Authorizations

In some situations it may be impossible to protect fish habitat by changes in project design or by other measures to lessen harmful impacts. In such cases, you should request an Authorization under Subsection 35(2) of the Act, to (in the words of the Act) "harmfully alter, disrupt or destroy fish habitat."

You are within your legal rights to go ahead with your project without getting this Authorization. But if you do, and if you harm fish habitat you are liable to prosecution under the *Fisheries Act*.

What Authorizations Authorize

It is important to understand what an Authorization does and does not cover.

An Authorization deals **only** with the impact of your project on fish habitat. It does **not** deal with other aspects of your project – nor does it give you an overall green light to proceed.

Authorizations Come With Conditions Attached

Authorizations are not unconditional – they permit harmful alteration and damage to fish habitat only under carefully prescribed conditions. One particularly important condition is that losses to habitat caused by your project must be balanced by gains elsewhere.

This requirement grows out of DFO's Policy for the Management of Fish Habitat, which states that there shall be "no net loss" of fisheries habitat. Simply put, this means that a habitat loss on one side of the ledger must be balanced by a habitat gain on the other. DFO will be able to provide you with technical assistance on measures that are appropriate and feasible for achieving "no net loss".

How would losses be balanced? This will depend on the project and the habitat.

Fish, Fisheries and Fish Habitat:

An Important Distinction

Section 35 of the *Fisheries Act* under which this process operates, is not about protection of fish but of *fisheries*. The difference is an important one.

It means that you are required to protect fish habitat that directly or indirectly supports – or has the potential to support – subsistence, commercial or recreational fisheries.

To determine whether the habitat in question is in that category, contact your nearest Department of Fisheries and Oceans Office, the Department's regional headquarters, or the responsible provincial agency.

If you propose to build a bridge across a river, for example, and loss of spawning habitat would result, you might be asked to create or improve spawning habitat nearby. This could entail moving and placing gravel on the river bed appropriate to the spawning requirements of the fish species involved.

Another example might be a marina development that involves dredging of lake or river shorelines with resulting destruction of rearing habitat. In that case, you might be asked to improve existing habitat within the same section of the river, or to create new habitat; this could involve stabilizing banks, construction of side channels and the planting of appropriate aquatic and terrestrial vegetation.

In either case you may also be asked to monitor the results of these compensating measures.

Requests for Authorization may be Denied

An Authorization will not normally be issued unless the person or company proposing the project is able to "compensate" for lost habitat – i.e., replace it. And this option will be allowed only as a last resort.

There will also be cases in which a habitat is so critical or sensitive that habitat compensation is not an option. In these cases too, Authorizations will not be granted.

The objective of this approach is not to block all development activities but to protect fish habitat, effectively and reasonably. The procedure described above is intended to reconcile, wherever possible, project goals with habitat protection and to do so cooperatively, rather than in courtroom confrontation.

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