

# Fisheries Protection Policy Statement

October 2013



Fisheries and Oceans  
Canada

Pêches et Océans  
Canada

Canada 

Published by:  
Ecosystem Programs Policy  
Fisheries and Oceans Canada  
Ottawa, Ontario  
K1A 0E6

*Fisheries Protection Policy Statement*

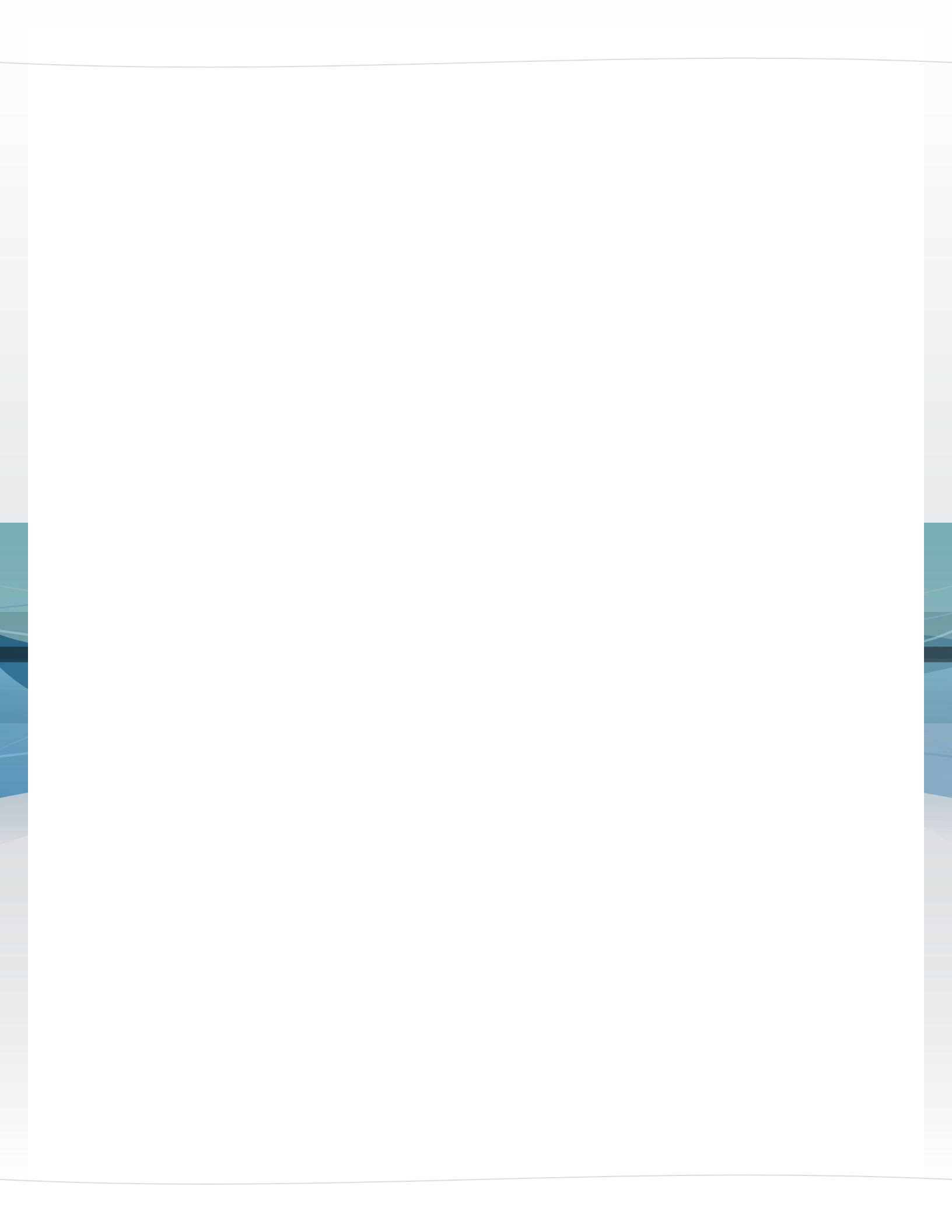
Également disponible en français : *Énoncé de politique sur la protection des pêches*

Catalogue Number: Fs23-595/2013E-PDF  
ISBN: 978-1-100-22885-3  
DFO/13-1904

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## 1. Ministerial Statement

Fisheries have long been valued by Canadians for economic, environmental, cultural and ceremonial purposes.

The Fisheries Protection Policy Statement, 2013 supports changes made to the *Fisheries Act* in 2012. These changes: focus our efforts on protecting the productivity of commercial, recreational and Aboriginal fisheries; institute enhanced compliance and protection tools that are more easily enforceable; provide clarity, certainty and consistency of regulatory requirements; and enable enhanced partnerships with stakeholders such as other agencies of government and local groups to ensure a comprehensive approach to fisheries protection.

The intent of this policy is to provide guidance to Canadians to ensure they are complying with the *Fisheries Act*. It will strengthen the Government's ability to address key threats to the productivity and sustainability of our fisheries, through standards and guidelines to avoid, mitigate and offset impacts to fisheries and to ensure compliance with these requirements.

Our approach to fisheries protection will ensure these valuable commercial, recreational and Aboriginal fisheries thrive, while encouraging the responsible development of Canada's natural resources.

I am confident that responsible resource development and sustainable fisheries can both be achieved. I look forward to our continued collaboration on fisheries protection so that our grandchildren, and their children, will also enjoy the benefits of Canada's rich fisheries resources.

The Honourable Gail Shea  
Minister of Fisheries and Oceans

## 2. Disclaimer

The Fisheries Protection Policy Statement is for information purposes only. It is not a substitute for the *Fisheries Act* or its Regulations. In the event of an inconsistency between the policy statement and the *Fisheries Act* or its Regulations, the legislation will prevail.

## 3. Approval Authority, Effective Date and Review Date

The Fisheries Protection Policy Statement was approved by the Minister of Fisheries and Oceans and it is effective as of November 25, 2013. The policy statement will be reviewed at least every 10 years.

## 4. Application

The Fisheries Protection Policy Statement will be used by officials of Fisheries and Oceans Canada (the Department) and the Department's regulatory partners<sup>1</sup> when administering the fisheries protection provisions<sup>2</sup> of the *Fisheries Act*.

The Fisheries Protection Policy Statement applies to proponents of existing or proposed works, undertakings or activities (hereafter referred to as projects) that are likely to result in impacts to fish or fish habitat that are part of or support commercial, recreational or Aboriginal fisheries, including projects that have the potential to affect the passage of fish or modify the flow of watercourses.

## 5. Context

### 5.1 Background

The *Fisheries Act* became one of Canada's first laws in 1868. In recognition that healthy and productive fisheries require healthy fish habitat, the habitat protection and pollution prevention provisions were incorporated into the Act in the 1970s. In 2012, changes were made to the *Fisheries Act* to enhance the ability of the Department to manage threats to the sustainability and productivity of Canada's commercial, recreational and Aboriginal fisheries. Changes were also made to enable:

- enhanced compliance and protection tools;
- expanded use of standards and other tools that make regulatory requirements clear and consistent; and
- partnerships with agencies and organizations best placed to provide fisheries protection services.

The changes to the *Fisheries Act* include a prohibition against causing *serious harm to fish* that are part of or support a commercial, recreational or Aboriginal fishery (Section 35), provisions for flow and passage (Sections 20 and 21), and a framework for regulatory decision-making (Sections 6 and 6.1). These provisions guide the Minister's decision-making process in order to provide for sustainable and productive fisheries.

The Fisheries Protection Policy Statement was prepared by the Department to explain the fisheries protection provisions of the *Fisheries Act* and to outline how the Department will implement these provisions. In particular, the policy statement focuses on the regulatory aspects of the Department's Fisheries Protection Program.

### 5.2 Importance of Fish and Fish Habitat

Fish have long had economic, environmental, cultural, and spiritual value to Canadians. Aboriginal peoples have been fishing for many generations in Canada's seas, along the coasts, in lakes, and in rivers. Commercial and recreational fisheries also generate billions of dollars every year within the Canadian economy.

Fish need healthy places to live, feed, and reproduce. They also need healthy corridors to migrate between these places. Canada's myriad water bodies, including coastal and marine areas, lakes, ponds, rivers, streams, and wetlands, and riparian areas provide important habitat for fish.

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1 Regulatory partners are those with whom the Department has established partnership arrangements for the administration of the fisheries protection provisions.

2 As set out in Appendix 1.

### 5.3 Threats to Fisheries

The sustainability and productivity of fisheries today are threatened by multiple and interacting stressors, including:

- **habitat degradation or loss**, which may occur as a result of the fragmentation of habitat, infilling of lakes or streams, conversion of wetlands or other activities in a watershed such as logging, urbanization, or the clearing of riparian or aquatic vegetation;
- **flow alteration**, which may alter habitat characteristics or cause the death of fish, and may be caused by dams or other impoundments, water diversion, stream crossings or water extraction for uses such as municipal, industrial, or agricultural uses;<sup>3</sup>
- **aquatic invasive species**, which may threaten fish through competition, predation or habitat impacts;
- **overexploitation of fish**, which may lead to depleted or unsustainable populations; and
- **pollution** of many kinds, which may adversely affect water quality and fish health.

Fisheries productivity is often subject to impacts from multiple, different stressors at a given time or from repeated stressors over time that pose significant threats. All of these stressors take place in the context of a changing environment. Changes in seasonal temperatures, ice cover, precipitation, and evaporation patterns can lead to changes in water quantity and quality, ultimately affecting fish and fish habitat. In turn, each of these stressors may have associated effects on the ability of fish to carry out their life processes and on their habitat. While many of these stressors are beyond the control of any single regulatory body or individual, their impacts can be managed collectively to provide for sustainable and productive fisheries.

Although overexploitation, aquatic invasive species and pollution are all threats to the sustainability of fisheries, the Fisheries Protection Policy Statement focuses on the management of impacts to fish resulting from habitat degradation or loss and alterations to fish passage and flow. Other components of the *Fisheries Act* and various pieces of federal, provincial, and territorial legislation address these other threats.

## 6. Roles and Responsibilities: *Protecting Fisheries is a Shared Responsibility*

Many partners and stakeholders, including federal departments, provincial and territorial governments, Aboriginal peoples, recreational fishing and angling groups, conservation organizations and industry groups, share a common interest in the conservation and protection of fisheries. Sustainability and ongoing productivity of fisheries may best be achieved when these partners and stakeholders work together to conserve and protect fish and fish habitat.

### **Proponents**

Canada's fish and fish habitat are a shared resource that provide great social, economic and environmental benefits but they are also finite and vulnerable. They must therefore be protected and managed to maintain these benefits for present and future generations.

Development activities taking place in or near water may affect fisheries by adversely affecting fish or fish habitat. Proponents of these activities should:

- understand the types of impacts their projects are likely to cause;
- take measures to avoid and mitigate impacts to the extent possible; and,

<sup>3</sup> Fisheries and Oceans Canada, Canadian Science Advisory Secretariat, Science Advisory Report: *A Framework for Assessing Ecological Flow Requirements to Support Fisheries in Canada*, 2013/017. [www.dfo-mpo.gc.ca/csas-sccs/Publications/SAR-AS/2013/2013\\_017-eng.pdf](http://www.dfo-mpo.gc.ca/csas-sccs/Publications/SAR-AS/2013/2013_017-eng.pdf)

- request authorization from the Minister and abide by the conditions of any such authorization, when it is not possible to avoid and mitigate impacts of projects that are likely to cause *serious harm to fish*.

Furthermore, proponents are required to ensure that their projects conform to all other statutory requirements.

### **Federal Government**

The *Fisheries Act* and, more specifically, its fisheries protection provisions, establish authorities for the protection of commercial, recreational and Aboriginal fisheries. These authorities include the prohibition against carrying out projects that result in *serious harm to fish* and the powers related to fish passage and flow.

Other federal legislation such as the *Oceans Act*, the *Species at Risk Act* and the *Canadian Environmental Assessment Act, 2012* consider fish and fish habitat. These other statutes may complement the fisheries protection provisions of the *Fisheries Act*.

### **Provinces and Territories**

While management of inland fisheries has largely been delegated to the provinces and the Yukon Territory, the administration of the fisheries protection provisions remains with the federal government across Canada. However, provincial and territorial authorities deliver a range of natural resource conservation initiatives under various provincial and territorial laws that complement those of the federal government. For example, land-use decisions made by these authorities may have a significant bearing on the quality and function of fish habitat in a given watershed.

Arrangements between the Department and other federal, provincial and territorial authorities provide effective mechanisms to collaborate on managing threats to fisheries.

## **7. Statement**

### **7.1 Purpose**

The purpose of the Fisheries Protection Policy Statement is two-fold:

- 1) to set out how the Department and its regulatory partners will apply the fisheries protection provisions of the *Fisheries Act* and guide the development of regulations, standards and directives; and
- 2) to provide guidance to proponents of projects on the application of the fisheries protection provisions of the *Fisheries Act*.

### **7.2 Goal**

The goal of the Department in applying this Fisheries Protection Policy is to provide for the sustainability and ongoing productivity of commercial, recreational and Aboriginal fisheries.

### **7.3 Objectives**

Through the Fisheries Protection Policy Statement, the Department's objectives are to provide consistent guidance through regulations, standards and directives, and to make regulatory decisions in a timely manner. In this way, proponents will have the necessary information and direction to avoid, mitigate and offset harmful impacts to fish and fish habitat so that they will meet the goal of this policy, and thereby comply with the fisheries protection provisions of the *Fisheries Act*.



## 7.4 Principles

To meet the goal and the objectives of the Fisheries Protection Policy Statement, the Department will be guided by the following principles:

- **Avoid harm:** Whenever possible, the Department’s preference is to maintain the productivity of Canada’s fisheries by avoiding impacts to fish and fish habitat. Proponents are responsible for managing and mitigating impacts resulting from their projects.
- **Promote sound decision-making:** In making regulatory decisions, the Department will be informed by the best available science, technical information and traditional knowledge. The Department will also be guided by the application of precaution<sup>4</sup> and a risk-based approach to decision-making.
- **Enable best-placed delivery:** Other entities across Canada may be well-placed to achieve and deliver the objectives of the fisheries protection provisions. The Department will thus seek to collaborate with partners who have the knowledge, capacity and interest in fisheries conservation and protection when these align with the Department’s mandate, priorities and objectives.
- **Employ a standards-based approach:** The Department will develop and support the use of standards that provide clarity and certainty to proponents while maintaining the sustainability and ongoing productivity of Canada’s fisheries.
- **Consider the ecosystem context:** The consideration of cumulative effects on the state, resiliency, and natural biodiversity of the ecosystem will guide the Department in achieving the objectives of the Fisheries Protection Policy Statement.

## 8. Fisheries Protection Provisions of the *Fisheries Act*

### 8.1 Scope of Application of the Prohibition (Section 35)

The prohibition against *serious harm to fish* applies to fish and fish habitat that are part of or support commercial, recreational or Aboriginal fisheries. Definitions of “fish”, “fish habitat”, “fishery”, and “commercial”, “recreational”, and “Aboriginal”, in relation to a fishery, are found in the *Fisheries Act* and in the glossary of this document.

**Fish that are part of** commercial, recreational or Aboriginal fisheries are interpreted to be those fish that fall within the scope of applicable federal or provincial fisheries regulations<sup>5</sup> as well as those that can be fished by Aboriginal organizations or their members for food, social or ceremonial purposes or for purposes set out in a land claims agreement.

**Fish that support** these fisheries are those fish that contribute to the productivity of a fishery (often, but not exclusively, as prey species). The “fish that support” may reside in water bodies that contain the commercial, recreational or Aboriginal fisheries or in water bodies that are connected by a watercourse to such water bodies.<sup>6</sup>

4 Government of Canada: *A framework for the application of precaution in science-based decision-making about risk*, 2003. [www.pco-bcp.gc.ca/docs/information/publications/precaution/Precaution-eng.pdf](http://www.pco-bcp.gc.ca/docs/information/publications/precaution/Precaution-eng.pdf)

5 Applicable federal and provincial statutes and regulations include, for example: fishing regulations made under the *Fisheries Act* (Canada), National Parks of Canada Fishing Regulations, and relevant provincial Acts and regulations.

6 Fisheries and Oceans Canada, Canadian Science Advisory Secretariat, Science Advisory Report: *Science Advice to Support Development of a Fisheries Protection Policy for Canada*, 2012/063. [www.dfo-mpo.gc.ca/csas-sccs/Publications/SAR-AS/2012/2012\\_063-eng.pdf](http://www.dfo-mpo.gc.ca/csas-sccs/Publications/SAR-AS/2012/2012_063-eng.pdf)

In Canada, most water bodies contain fish, or their habitat, that are part of or support commercial, recreational or Aboriginal fisheries and are therefore subject to the prohibition against *serious harm to fish*. These areas include: i) all three of Canada's oceans; ii) areas of fishing for food, social or ceremonial purposes or under land claims agreements by Aboriginal peoples; and iii) areas covered by federal or provincial fisheries regulations. Notwithstanding the above, some water bodies may be specifically excluded from the application of federal or provincial regulations.<sup>7</sup>

In addition, some water bodies may not contain fish or provide fish habitat that are part of or support commercial, recreational or Aboriginal fisheries. Such water bodies may not be subject to the prohibition. These would need to be determined on a case-by-case basis. In these circumstances, proponents are advised to use appropriate and recognized scientific methods to consider whether any such water bodies would be affected by their projects.

## 8.2 *Serious Harm to Fish (Section 35)*

35. (1) *No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.*

Section 35 of the *Fisheries Act* prohibits *serious harm to fish* which is defined in the Act as “the death of fish or any permanent alteration to, or destruction of, fish habitat.”

Proponents are responsible for avoiding and mitigating *serious harm to fish* that are part of or support commercial, recreational or Aboriginal fisheries. When proponents are unable to completely avoid or mitigate *serious harm to fish*, their projects will normally require authorization under Subsection 35(2) of the *Fisheries Act* in order for the project to proceed without contravening the Act.

The Subsection 35(1) prohibition will be applied to those projects that have the potential to cause *serious harm to fish*. These projects are likely to reduce the ability of the fish habitat to directly or indirectly support the life processes of fish or result in the death of fish. Relationships between typical project impacts (e.g., temperature change, sedimentation, infilling, reduction of nutrients and food supply, etc.) and the consequences to fish or fish habitat are described in various Pathways of Effects diagrams.<sup>8</sup>

Projects requiring authorization are those likely to result in a localized effect to fish populations or fish habitat in the vicinity of the project. Localized effects may also lead to more widespread impacts on fish and fish habitat and, in turn, affect the ability of the area to produce fish. Box 1 provides considerations for understanding when *serious harm to fish* is likely to occur.

The Department interprets *serious harm to fish* as:

- the **death of fish**;
- a **permanent alteration** to fish habitat of a spatial scale, duration or intensity that limits or diminishes the ability of fish to use such habitats as spawning grounds, or as nursery, rearing or food supply areas, or as a migration corridor, or any other area in order to carry out one or more of their life processes;
- the **destruction of fish habitat** of a spatial scale, duration, or intensity that fish can no longer rely upon such habitats for use as spawning grounds, or as nursery, rearing or food supply areas, or as a migration corridor, or any other area in order to carry out one or more of their life processes.

<sup>7</sup> See applicable federal and provincial statutes and regulations.

<sup>8</sup> Pathways of Effects diagrams are further described on the DFO website and in the glossary.

### 8.3 Provisions for Flow and Fish Passage (Sections 20 and 21)

The *Fisheries Act* includes sections that may require the provision of sufficient water and unimpeded passage for fish (Sections 20 and 21). In summary, these provisions:

- allow the Minister to request studies and evaluations related to obstructions or other things that may be hindering fish passage or harming fish;
- allow the Minister to request: the removal of or modifications to obstructions or things that are harmful to fish or impede flow or fish passage; the installation of fish-ways, screens and guards; or that sufficient water flow be provided for fish passage; or
- prohibit the damage or removal of fish-guards, fish-ways, and screens.

Projects that have the potential to obstruct fish passage, modify flow or result in the entrainment of fish may also cause *serious harm to fish*. In these situations, an authorization under Subsection 35(2) is required. The conditions of authorizations include avoidance, mitigation and offsetting measures to provide for fish passage around the obstructions. The conditions may also require water flows necessary to permit the free passage of fish and the need for fish-guards or screens over water intakes. The Minister must also consider the factors set out in Section 6 of the *Fisheries Act* prior to deciding whether to issue such an authorization or when the Minister makes a request under Sections 20 or 21.

### 8.4 Factors to be Considered (Section 6)

Section 6.1 of the *Fisheries Act* sets out the purpose of the fisheries protection provisions “to provide for the sustainability and ongoing productivity of commercial, recreational and Aboriginal fisheries.”

Once it has been determined that a regulation will be made or a Ministerial power will be exercised, such as the issuance of a Subsection 35(2) authorization or a request to provide for fish passage or sufficient flow, the four factors in Section 6 of the *Fisheries Act* must be considered by the Minister. These factors establish a clear structure for the regulatory review process. The four factors in Section 6 are:

- a) *the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries;*
- b) *fisheries management objectives;*
- c) *whether there are measures and standards to avoid, mitigate or offset serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or that support such a fishery;*
- d) *the public interest.*

Further guidance on how these factors should be considered is provided below.

#### *a) Contribution of Relevant Fish to the Ongoing Productivity of Commercial, Recreational or Aboriginal Fisheries*

The contribution of relevant fish relates to the role of the fish and fish habitat affected by the project in the overall productivity of the commercial, recreational or Aboriginal fishery.<sup>9</sup> Ongoing productivity is the potential sustained yield of all fish populations and their habitat that are part of or support commercial, recreational and Aboriginal fisheries. Effects on productivity may be assessed using a variety of tools. In general, the metrics and level of detail used to provide estimates of impacts to productivity will depend on both the type and scale of the impact.

<sup>9</sup> Fisheries and Oceans Canada, Canadian Science Advisory Secretariat, Science Advisory Report: *Science Advice to Support Development of a Fisheries Protection Policy for Canada*, 2012/063. [www.dfo-mpo.gc.ca/csas-sccs/Publications/SAR-AS/2012/2012\\_063-eng.pdf](http://www.dfo-mpo.gc.ca/csas-sccs/Publications/SAR-AS/2012/2012_063-eng.pdf)

For projects with a low likelihood of causing impacts to productivity, or in which the impacts are relatively small, proponents only need to qualitatively document the key impacts and their associated links to components of productivity (e.g., growth, performance, survival, migration, and reproduction).

For projects likely to cause large-scale impacts on the quantity or quality of fish habitat, metrics of productivity should be chosen based on the type of impact. These include metrics of productivity related to habitat area or metrics related to components of productivity that are linked to the life cycle of the fish.

Very large-scale impacts that are likely to result in ecosystem transformation will require the most detailed estimates of impacts to productivity, likely involving quantitative fish population models.

Proponents are responsible for documenting and providing information such that an analysis describing the contribution of relevant fish may be undertaken. This analysis will help inform how the project may affect the relevant fisheries management objectives (factor 6b) and the amount and type of avoidance, mitigation and offsetting measures required (factor 6c).

#### *b) Fisheries Management Objectives*

Fisheries management objectives are the stated socio-economic, biological, and ecological goals for a fishery that are typically established by federal, provincial or territorial fishery managers. Other entities, including wildlife co-management boards established under land claims agreements may also set fisheries management objectives.

Fisheries management objectives may range from high-level objectives applying widely to multiple fisheries or fish stocks to objectives that are limited in scope to a specific fishery, stock or region. Where they exist, fishery-specific objectives found in federal, provincial, territorial or co-management board fishing plans will be considered foremost when making regulatory decisions related to the fisheries protection provisions.

Where fishery-specific objectives do not exist, overarching strategies and policy objectives established by the Department or other fisheries managers should be considered. In areas where other entities manage the fishery, discussions with relevant authorities may also occur.

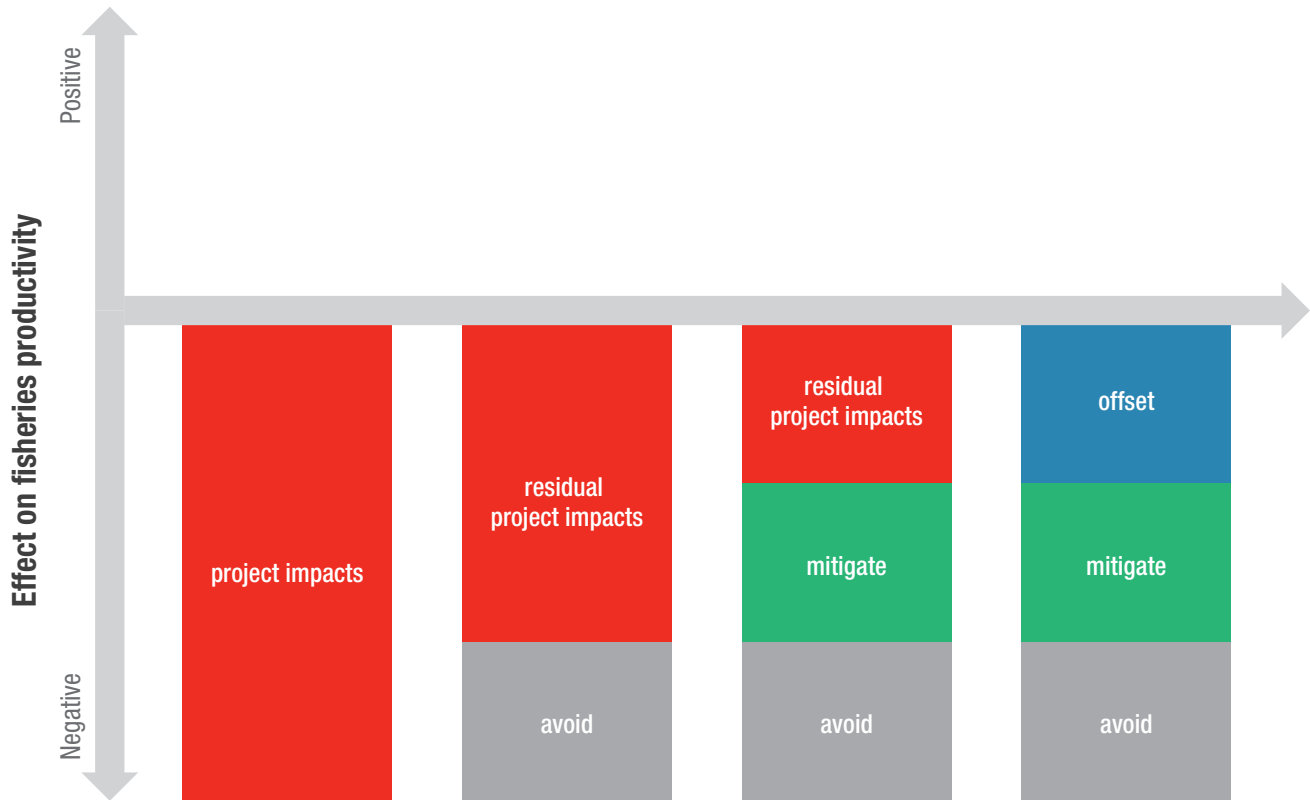
Where fisheries management objectives are available, proponents should consider and document how the impacts from their projects may affect fisheries management objectives. Proponents should also describe any effects their projects may have on the achievement of these objectives. Fisheries management objectives may guide proponents in the selection of any required avoidance, mitigation and offsetting measures (factor 6c).

#### *c) Measures or Standards to Avoid, Mitigate, or Offset Serious Harm To Fish*

The Minister must consider whether measures and standards have been applied by proponents to avoid, mitigate or offset *serious harm to fish* that results from their projects. The fundamentals of “avoid, mitigate and offset” build on a hierarchy that is internationally recognized as a best practice in reducing risks to biodiversity<sup>10</sup> (Figure 1). This hierarchy emphasizes that efforts should be made to prevent (avoid) impacts first. When avoidance is not possible, then efforts should be made to minimize (mitigate) impacts caused by the project in question. After these actions, any residual impacts would normally require authorization and should then be addressed by offsetting. A conceptual diagram of the hierarchy is provided in Figure 1.

10 References for the hierarchy of measures include: *Business and Biodiversity Offsets Programme*: [http://bbop.forest-trends.org/pages/mitigation\\_hierarchy](http://bbop.forest-trends.org/pages/mitigation_hierarchy) and the *IUCN/ICMM Independent report on biodiversity offsets*: [www.icmm.com/document/4934](http://www.icmm.com/document/4934).

Figure 1. Conceptual diagram of the hierarchy.



Projects can negatively affect fish and fish habitat (red boxes). Efforts should be made to avoid impacts first (grey boxes). When avoidance is not possible, then efforts should be made to mitigate impacts caused by the project in question (green boxes). After these actions, any residual impacts should then be addressed by offsetting (blue boxes). **Note:** the size of these boxes is for illustrative purposes only.

Fisheries dynamics and fish habitat functions are complex. It is much more difficult and expensive to repair or restore damaged ecosystems to maintain fisheries productivity than it is to avoid adverse impacts. For this reason, the Department emphasizes avoidance and mitigation as the main steps in the hierarchy, followed by offsetting as a means of last resort.

Proponents will be required to demonstrate that measures and standards have been fully applied to first avoid, then mitigate, and then finally, offset any residual *serious harm to fish* that are part of or support commercial, recreational or Aboriginal fisheries. Measures to avoid, mitigate and offset, as well as requirements for monitoring and reporting, may be included as conditions of authorizations.<sup>11</sup> The policy interpretation of these measures is as follows:

### **Avoidance**

Avoidance is the undertaking of measures to completely prevent *serious harm to fish*. Avoidance measures may include locating infrastructure or designing a project or one or more of its components to avoid *serious harm to fish*. Careful timing of certain activities may also avoid harm to fish and fish habitat.

For some projects, *serious harm to fish* may be fully avoided while for others, *serious harm to fish* may only be partially avoided. When *serious harm to fish* cannot be fully avoided, mitigation measures should be undertaken.

<sup>11</sup> As set out in the *Applications for Authorization under Paragraph 35(2)(b) of the Fisheries Act Regulations*.

### **Mitigation**

Mitigation is a measure to reduce the spatial scale, duration, or intensity of *serious harm to fish* that cannot be completely avoided. The best available mitigation measures or standards should be implemented by proponents as much as is practically feasible.

Mitigation measures include the implementation of best management practices during the construction, maintenance, operation and decommissioning of a project.

### **Offsetting**

After efforts have been made to avoid and mitigate impacts, any residual *serious harm to fish* should be addressed by offsetting. An offset measure is one that counterbalances unavoidable *serious harm to fish* resulting from a project with the goal of maintaining or improving the productivity of the commercial, recreational or Aboriginal fishery. Offset measures should support available fisheries management objectives and local restoration priorities.

Offset measures are actions taken after the application of avoidance and mitigation measures. They are intended to provide tangible conservation outcomes for fish and fish habitat that may reasonably be expected to counterbalance the loss of fish habitat and fisheries productivity as a result of the negative impacts of projects.

Offsetting measures could take a variety of forms ranging from localized improvements to fish habitat to more complex measures that address limiting factors to fish production. The choice of appropriate offsetting measures will be guided by threats to fisheries productivity and fisheries management objectives. In some instances, the most desirable offsetting measures may be a replacement of the same type of habitat that is affected by the project. In other situations, better outcomes for fisheries may be achieved by undertaking offsetting in water bodies or for fish species other than those affected by the project. For example, improving access to off-channel habitats or the removal of anthropogenic barriers might be acceptable offsetting measures.

Proponents will be required to submit an offsetting plan to demonstrate that the measures and standards will be fully applied to first avoid, then mitigate, and finally offset any residual *serious harm to fish* that are part of or support commercial, recreational or Aboriginal fisheries. Proponents will also be required to demonstrate that the offsetting measures will maintain or improve the productivity of fisheries.<sup>12</sup>

#### **d) The Public Interest**

Finally, the Minister must take into account the public interest. In most cases, the public interest will be served through the consideration of the first three factors: a) the contribution of relevant fish; b) fisheries management objectives; and c) measures and standards to avoid, mitigate or offset *serious harm to fish*.

However, factor 6(d) *the public interest* allows the Minister to consider a range of issues deemed relevant to the well-being of society at a given place and time. These may range from issues related to economic development to long-term sustainable development to impacts on ecosystem goods and services. Discretion on how to apply this factor rests with the Minister.

Proponents may wish to document any information relevant to the public interest considerations.

<sup>12</sup> As set out in the *Applications for Authorization under Paragraph 35(2)(b) of the Fisheries Act Regulations*.

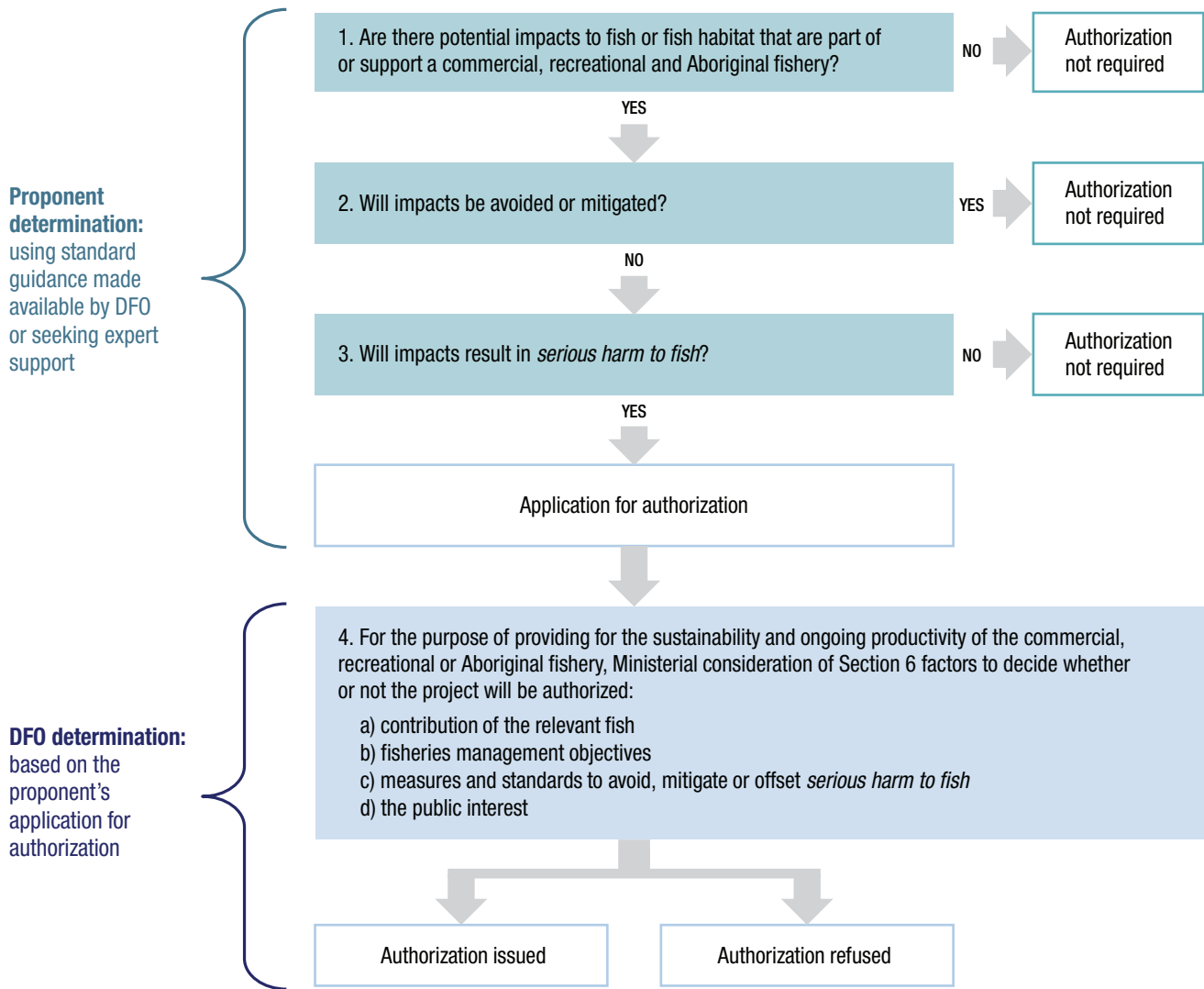
## 8.5 Review and Decision-making Process

An overview of the review and decision-making process is provided in Figure 2. General advice on understanding when a regulatory review or *Fisheries Act* authorization is required is provided in Box 1 and in steps 1 to 3 of Figure 2. When a regulatory review is required, proponents should be prepared to gather detailed information about their project and its impacts, as outlined in Box 1. The information used to answer these questions will also help to satisfy some of the information requirements outlined in the *Applications for Authorization under Paragraph 35(2)(b) of the Fisheries Act Regulations*.

**Box 1. When considering whether a project is likely to cause *serious harm to fish* and requires an authorization, proponents should identify:**

1. *Impacts to fish and fish habitat caused by the project:* For example, have all potential impacts been considered? Pathways of Effects diagrams, available on the Department's website, may help proponents determine what kinds of impacts can be expected from typical developments.
2. *The expected duration of impacts:* For example, is the duration short enough that it does not diminish the ability of fish to carry out one or more of its life processes? It is important to note that, for many projects, the duration of impact will be longer than the duration of the work taking place in or near the water.
3. *The geographic scale of impacts:* For example, is the scale small enough that the disturbance will not displace fish that would otherwise be occupying the habitat?
4. *The availability and condition of nearby fish habitat:* Is the habitat that is being altered or destroyed the only habitat of its type and quality in the area of the project?
5. *The impact on the relevant fish:* For example, are the fish that are affected by the proposed project likely to experience increased mortality rates, increased stress and reduced fitness as a result of direct injury or reduced habitat function such that a localized effect on a fish population or stock is possible?
6. *Proposed avoidance and mitigation measures:* Will measures to avoid and mitigate *serious harm to fish* be applied such that all *serious harm to fish* is avoided? If so, an authorization is not required. If *serious harm to fish* remains after all avoidance and mitigation measures have been applied, an authorization may be required. Proponents should apply for an authorization following the *Applications for Authorization under Paragraph 35(2)(b) of the Fisheries Act Regulations*.

Figure 2. Summary of the development proposal review and decision-making process.



Using standard guidance made available by DFO, or by seeking expert advice as required, proponents are responsible for determining whether their projects are likely to require authorization and, if so, to apply for authorizations. DFO is responsible for reviewing applications for authorizations and determining whether or not to authorize the project, based on the consideration of Section 6 factors. The answers to the questions in steps 1 to 4 should be informed by the advice in the Fisheries Protection Policy Statement. More specifically, step 1 is informed by 8.1 of this document “Scope of the application of the prohibition”; steps 2 and 3 are informed by 8.2 “Serious harm to fish” and 8.3 “Provisions for flow and fish passage”, and the material in Box 1 and step 4 is informed by the 8.4 “Factors to be considered”.



## 9. Requirements

### 9.1 General Compliance

The Fisheries Protection Policy Statement is a guidance tool to help proponents comply with the fisheries protection provisions in the *Fisheries Act* and related regulations. This includes compliance with Section 35 of the *Fisheries Act*, all supporting regulations, all relevant operational directives, the terms and conditions of all Subsection 35(2) authorizations, and the various duties specified in Section 38 (e.g., the duty to notify and to take corrective measures, etc.).

### 9.2 Additional Powers of the Minister (Section 37)

Section 37 of the *Fisheries Act* sets out the provisions that allow the Minister to request plans and specifications for projects that may result in *serious harm to fish*, and that allow the Minister to make orders to modify, restrict or close these projects.<sup>13</sup>

In addition, under Section 37, anyone proposing to carry out a project in an ecologically significant area, as defined in regulations, is required, upon request of the Minister or in circumstances set out in regulations, to provide information on their project to the Minister. If the project is likely to result in harm to fish in that area, the Minister may require modifications or restrict or stop the carrying on of that project for as long as necessary.

Before making decisions under Section 37 with regard to an offence under Subsection 40(1) or with regard to harm to fish, the Minister must consider the factors in Section 6 of the *Fisheries Act*.

### 9.3 Duty to Notify (Section 38)

The *Fisheries Act* imposes a series of obligations upon persons responsible for projects that lead to occurrences that result in *serious harm to fish* that are part of or support a commercial, recreational or Aboriginal fishery. There is a duty to notify an inspector<sup>14</sup> when this *serious harm to fish* is not authorized under the Act, or when there is a serious and imminent danger of such an occurrence.

Moreover, the *Fisheries Act* imposes duties to take corrective measures and to provide written reports when there are occurrences that may result in *serious harm to fish*. Failure to notify, take corrective measures or report in such situations may result in penalties.

An inspector or fishery officer has the authority to order the immediate action necessary to correct the situation and these actions may be at the expense of the person(s) identified as responsible. Those powers are designed to be used to maintain the productivity of commercial, recreational or Aboriginal fisheries when *serious harm to fish* has resulted from unplanned or unexpected situations for which the responsible person has not received an authorization prior to causing this harm or for which the *serious harm to fish* was greater than authorized.

<sup>13</sup> Section 37 also sets out other powers; however, the description in this policy statement is focused on those related to the fisheries protection provisions.

<sup>14</sup> Notifications must be provided to: an inspector; a fishery officer; or a prescribed authority.

## **10. Consequences of Non-Compliance with the Fisheries Protection Provisions**

There are consequences for non-compliance with the prohibition against carrying on any project that results in *serious harm to fish* or non-compliance with the conditions of an authorization. The *Fisheries Act* outlines minimum and maximum penalties, depending on different classes of offenders, type of offence, and whether it is a first or subsequent offence.

Imprisonment is also a possibility for repeat offences. Fines collected for convictions under the fisheries protection provisions are directed into the Environmental Damages Fund to use for proactive measures to enhance the conservation and protection of Canada's fisheries resources.

## **11. Monitoring and Reporting**

The Department will monitor and report on progress toward meeting the objective of this policy statement through its performance measurement strategy and related reporting initiatives, as appropriate.

## **12. For More Information**

For more information, please consult DFO's website ([www.dfo-mpo.gc.ca](http://www.dfo-mpo.gc.ca)).

## 13. Glossary

**Aboriginal, in relation to a fishery:** means that fish is harvested by an Aboriginal organization or any of its members for the purpose of using the fish as food, for social or ceremonial purposes or for purposes set out in a land claims agreement entered into with the Aboriginal organization. (Subsection 2(1))

**avoidance:** measures to completely prevent adverse impacts to fish and fish habitat.

**Canadian fisheries waters:** all waters in the fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada. (Subsection 2(1))

**commercial, in relation to a fishery:** means that the fish is harvested under the authority of a licence for the purpose of sale, trade or barter. (Subsection 2(1))

**contribution (of relevant fish):** the role of the relevant fish or fish habitat in the overall productivity of a commercial, recreational or Aboriginal fishery that could be affected by a given project.

**destruction of fish habitat:** an elimination of habitat of a spatial scale, duration, and intensity that fish can no longer rely upon such habitats for use as spawning grounds, or as nursery, rearing or food supply areas, or as a migration corridor, or any other area in order to carry out one or more of their life processes.

**Environmental Damages Fund:** a specified purpose account, administered by Environment Canada, to provide a mechanism for directing funds received as a result of fines, court orders and voluntary payments to priorities that will benefit the natural environment.

**fish:** includes (a) parts of fish, (b) shellfish, crustaceans, marine animals and any parts of shellfish, crustaceans or marine animals, and (c) the eggs, sperm, spawn, larvae, spat and juvenile stages of fish, shellfish, crustaceans and marine animals. (Subsection 2(1))

**fish habitat:** means spawning grounds and any other areas, including nursery, rearing, food supply and migration areas, on which fish depend directly or indirectly in order to carry out their life processes. (Subsection 2(1))

**fish that are part of:** fish that may be fished as part of a commercial, recreational or Aboriginal fishery.

**fish that support:** fish that contribute to the productivity of a commercial, recreational or Aboriginal fishery.

**fishery:** includes the area, locality, place or station in or on which a pound, seine, net, weir or other fishing appliance is used, set, placed or located, and the area, tract or stretch of water in or from which fish may be taken by the said pound, seine, net, weir or other fishing appliance, and also the pound, seine, net, weir or other fishing appliance used in connection therewith. (Subsection 2(1))

**fish-way:** means any device, work or other thing that provides for the free passage of fish, including a canal, a fish pump, a fish ladder, a fish elevator and a fish lock. (Subsection 2(1))

**mitigation:** measures to reduce the spatial scale, duration, or intensity of adverse effects to fish and fish habitat that cannot be completely avoided.

**obstruction:** means any slide, dam or other thing impeding wholly or partially the free passage of fish. (Subsection 2(1))

**offsetting:** measures to counterbalance *serious harm to fish* by maintaining or improving fisheries productivity after all feasible measures to avoid and mitigate impacts have been undertaken.

**ongoing productivity:** the potential sustained yield of all fish populations and their habitat that are part of or support commercial, recreational and Aboriginal fisheries.<sup>15</sup>

**Pathways of Effects:** diagrams developed by Fisheries and Oceans Canada as a tool to communicate potential effects of projects on fish and fish habitat. These diagrams describe, for a range of activities, the type of cause-effect relationships that are known to exist and the mechanisms by which stressors ultimately lead to effects in the aquatic environment. Each cause-and-effect relationship is represented as a line, known as a pathway, connecting the activity to a potential stressor, and a stressor to some ultimate effect on fish and fish habitat. Each pathway represents an area where avoidance and mitigation measures can be applied to reduce or eliminate a potential effect.<sup>16</sup>

**permanent alteration to fish habitat:** an alteration of fish habitat of a spatial scale, duration and intensity that limits or diminishes the ability of fish to use such habitats as spawning grounds, or as nursery, rearing, or food supply areas, or as a migration corridor, or any other area in order to carry out one or more of their life processes.

**prescribed authority:** a person designated by regulation for a specific role in the administration of a provision of the *Fisheries Act*.

**project:** one or more existing or proposed works, undertakings or activities.

**recreational, in relation to a fishery:** means that fish is harvested under the authority of a licence for personal use of the fish or for sport. (Subsection 2(1))

**regulatory partners:** those with whom the Department has established partnership arrangements for the administration of the fisheries protection provisions.

**relevant fish:** all fish that are involved (either as part of the fishery or in a supporting role) in a commercial, recreational or Aboriginal fishery, and that could be affected by a given project.

**riparian area:** the areas bordering on streams, lakes, and wetlands that link water to land. The blend of streambed, water, trees, shrubs and grasses directly influences and provides fish habitat.

**serious harm to fish:** the death of fish or any permanent alteration to, or destruction of, fish habitat. (Subsection 2(2))

**sustainability:** achieving a balance between the carrying out of current day activities while allowing for future generations of people to meet their needs related to fisheries.<sup>17</sup>

**watercourse:** a flowing water body, such as a river, stream, or creek, as well as watercourses that may be ephemeral, intermittent, temporary or seasonal in nature.

15 This definition builds on advice provided in: Fisheries and Oceans Canada, Canadian Science Advisory Secretariat, Science Advisory Report: *Science Advice to Support Development of a Fisheries Protection Policy for Canada*, 2012/063 [www.dfo-mpo.gc.ca/csas-sccs/Publications/SAR-AS/2012/2012\\_063-eng.pdf](http://www.dfo-mpo.gc.ca/csas-sccs/Publications/SAR-AS/2012/2012_063-eng.pdf) and Fisheries and Oceans Canada, Canadian Science Advisory Secretariat, Research Document: *A science-based interpretation of ongoing productivity of commercial, recreational or Aboriginal fisheries*, 2012/112. [www.dfo-mpo.gc.ca/Csas-sccs/publications/resdocs-docrech/2012/2012\\_112-eng.pdf](http://www.dfo-mpo.gc.ca/Csas-sccs/publications/resdocs-docrech/2012/2012_112-eng.pdf)

16 More detail can be found on the DFO website and in Fisheries and Oceans Canada, Canadian Science Advisory Secretariat, Research Document: *A science-based interpretation and framework for considering the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries*, 2012/141. [www.dfo-mpo.gc.ca/Csas-sccs/publications/resdocs-docrech/2012/2012\\_141-eng.pdf](http://www.dfo-mpo.gc.ca/Csas-sccs/publications/resdocs-docrech/2012/2012_141-eng.pdf)

17 Fisheries and Oceans Canada, Canadian Science Advisory Secretariat, Science Advisory Report: *Science Advice to Support Development of a Fisheries Protection Policy for Canada*, 2012/063. [www.dfo-mpo.gc.ca/csas-sccs/Publications/SAR-AS/2012/2012\\_063-eng.pdf](http://www.dfo-mpo.gc.ca/csas-sccs/Publications/SAR-AS/2012/2012_063-eng.pdf)

## 14. Appendices

### Appendix 1. Overview of the Fisheries Protection Provisions of the *Fisheries Act*

Provision	Intent
<b>Section 6</b>	<p><b>Factors</b></p> <p>Once it has been determined that a Ministerial power will be exercised, the following four factors must be considered by the Minister:</p> <ul style="list-style-type: none"> <li>• the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries;</li> <li>• fisheries management objectives;</li> <li>• whether there are measures and standards to avoid, mitigate or offset <i>serious harm to fish</i> that are part of a commercial, recreational or Aboriginal fishery, or that support such a fishery; and</li> <li>• the public interest.</li> </ul> <p>Section 6 applies in these circumstances:</p> <ul style="list-style-type: none"> <li>• before exercising any power under Subsection 20(2) or (3) or 21(1), Paragraph 35(2)(b) or (c) or Subsection 35(3), or under Subsection 37(2) with regard to an offence under Subsection 40(1) or with regard to harm to fish; or</li> <li>• a regulation made in respect of Section 35 or under Paragraph 37(3)(c) or 43(1)(i.01) or Subsection 43(5).</li> </ul>
<b>Section 6.1</b>	<p><b>Purpose</b></p> <p>This provision establishes the purpose of Section 6 and of the provisions set out in that section. The purpose is to provide for the sustainability and ongoing productivity of commercial, recreational and Aboriginal fisheries.</p>
<b>Sections 20 and 21</b>	<p><b>Fish-ways</b></p> <p>The Minister may take various steps to ensure the free passage of fish and to prevent harm to fish. For example, the Minister may request that obstructions be removed, that fish-guards be installed, that fish-ways be constructed and that minimal flows of water be maintained for the purposes of enabling the safe passage of fish around obstructions, barriers and dams.</p>
<b>Subsection 35(1)</b>	<p><b>Prohibition Against Causing Serious Harm</b></p> <p>“No person shall carry on any work, undertaking or activity that results in <i>serious harm to fish</i> that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.” (<i>Fisheries Act</i>, Subsection 2(1))</p>
<b>Paragraph 35(2)(b)</b>	<p><b>Authorization</b></p> <p>This provision allows the Minister to authorize, with conditions, a work, undertaking or activity that results in <i>serious harm to fish</i>.</p>
<b>Section 37</b>	<p><b>Additional Powers of the Minister</b></p> <p>Section 37 of the <i>Fisheries Act</i> is the provision that allows the Minister to request plans and specifications for projects that may cause <i>serious harm to fish</i> and to make orders to modify, restrict or close these projects.</p> <p>In addition, under Section 37, anyone proposing to carry on a work, undertaking or activity in an ecologically significant area (as defined in regulations) is required, on request of the Minister or in circumstances set out in regulations, to provide information on their project to the Minister.</p>

Provision	Intent
<b>Section 38</b>	<b>Duty to Notify</b> The <i>Fisheries Act</i> imposes a series of obligations upon persons who have the responsibility for projects that lead to occurrences that result in <i>serious harm to fish</i> or who cause or contribute to such occurrences. There is a duty to notify an inspector, a fishery officer or a prescribed authority of any unauthorized <i>serious harm to fish</i> that are part of, or support, a commercial, recreational or Aboriginal fishery. Moreover, the <i>Fisheries Act</i> imposes duties to take corrective measures and to provide written reports when there are occurrences that may result in <i>serious harm to fish</i> .

## Appendix 2. Overview of Several Regulation-Making Authorities Related to the Fisheries Protection Provisions of the *Fisheries Act*

Provision	Intent
<p><b>Subsection 35(3) (Ministerial) and Paragraph 43(1)(i.1) (Governor in Council) for the purpose of 35(2)(a)</b></p>	<p><b>Authority to Make Regulations Prescribing Certain Works, Undertakings or Activities and/or Waters</b></p> <p>These provisions allow the Minister or the Governor in Council to prescribe works, undertakings or activities and the conditions according to which they may be carried out or the waters in which they may be carried out. Works, undertakings or activities carried out in accordance with these regulations will not be in violation of the prohibition under Subsection 35(1).</p>
<p><b>Subsections 37(1) and (2) and Paragraphs 37(3)(a) and 37(3)(b)</b></p>	<p><b>The Authority to Modify, Restrict or Prohibit Works, Undertakings or Activities</b></p> <p>Subsection 37(1) ensures that a person who carries on, or proposes to carry on, a work, undertaking or activity that results, or is likely to result, in <i>serious harm to fish</i> that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery can be required to take specified actions or provide specified information.</p> <p>Subsection 37(2) allows the Minister to order modifications or restrict the carrying on of the work, undertaking or activity or, if necessary, to direct the closing of the work or undertaking or the ending of the activity for any period that the Minister considers necessary.</p> <p>Regulations can be made under Paragraph 37(3)(a) for prescribing the manner and circumstances in which any information or material shall be provided to the Minister without request under Subsection (1). Regulations can also be made under Paragraph 37(3)(b) for prescribing the manner and circumstances in which the Minister or a person designated by the Minister may make orders under Subsection (2) and the terms of the orders.</p>
<p><b>Paragraph 43(1)(i.01)</b></p>	<p><b>Exclusion of Certain Fisheries from Definitions of Commercial, Recreational or Aboriginal Fisheries</b></p> <p>Governor in Council regulations can be developed to exclude certain fisheries from the definition of commercial, recreational or Aboriginal fisheries. Fisheries which have been excluded would no longer be subject to the prohibition set out in 35(1), or any other provisions that refer directly to a commercial, recreational or Aboriginal fishery.</p>
<p><b>Subsection 43(5)</b></p>	<p><b>Exemption of Certain Waters from the Application of Certain Provisions</b></p> <p>Regulations can be developed which would exempt particular Canadian fisheries waters from the application of Sections 20, 21, 35, and Subsections 38(4).</p>
<p><b>Paragraphs 43(1) (i.2) and (i.4)</b></p>	<p><b>Applications for Authorization under Paragraph 35(2)(b) of the Fisheries Act Regulations</b></p> <p>These regulations set out the information the applicant must include in an application for authorization to the Minister of Fisheries and Oceans as well as the process and time limits that apply to the Minister for the review of the application and either to issue or to refuse to issue authorization.</p>
<p><b>Paragraphs 43(1)(n) and (o) and Subsections 43(2) to (4)</b></p>	<p><b>Control of Aquatic Invasive Species</b></p> <p>The <i>Fisheries Act</i> provides for the development of a list of aquatic invasive species and of regulations to control aquatic invasive species.</p>
<p><b>Subsections 37(1.1) and 37(2) and Paragraphs 37(3)(a) and (c)</b></p>	<p><b>Ecologically Significant Areas</b></p> <p>Governor in Council regulations may be used to designate ecologically significant areas. Subsequently, the Minister could require higher levels of protection in such areas, and project proponents would be required to submit for review plans of any work, undertaking or activity that are proposed within those areas.</p>

Provision	Intent
<b>Subsection 38(9)</b>	<p><b>Duty to Notify and Take Corrective Measures</b></p> <p>Governor in Council may make regulations necessary for or incidental to carrying out the purposes and provisions of Section 38.</p>
<b>Administrative Agreements, Equivalency and Delegation with Provinces</b>	
<b>Section 4.1</b>	<p><b>Administrative Agreements with Provinces</b></p> <p>This allows for the Minister to enter into various types of agreements with provinces to further the purposes of the <i>Fisheries Act</i>.</p> <p>The Governor in Council may make regulations establishing the conditions under which the Minister may enter into such agreements (under 4.1(3)).</p>
<b>Section 4.2</b> <b>(Requires an agreement first (under 4.1))</b>	<p><b>Equivalency with Provinces</b></p> <p>Provincial regulatory regimes can be recognized as equivalent to those established under the <i>Fisheries Act</i> where they meet or exceed federal regulatory or legislative requirements.</p>
<b>Paragraph 43(1)(i.3)</b> <b>for the purpose of 35(2)(c)</b>	<p><b>Prescribing to Others the Authority to Authorize</b></p> <p>The <i>Fisheries Act</i> provides for Governor in Council regulations prescribing other decision-making authorities for the issuance of authorizations under Paragraph 35(2)(c).</p>