

**Implementing the New Fisheries Protection Provisions
under the *Fisheries Act***

Discussion Paper

Fisheries and Oceans Canada

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1. Introduction

This discussion paper has been prepared by Fisheries and Oceans Canada (the Department) to explain recent changes to the *Fisheries Act* related to fisheries protection and to outline how the Department plans to interpret these new provisions, especially as they relate to proponents' responsibilities to avoid impacts to fish and fish habitat. The paper focuses on the factors that will provide direction in Ministerial decision making (the new section 6 of the *Fisheries Act*) and the new prohibition against causing *serious harm to fish* (the new section 35).

The paper will be of interest to a wide range of parties involved in fisheries and fish habitat management in Canada, including but not limited to provincial and territorial governments, Aboriginal groups, commercial and recreational fishing groups, major resource industries, landowners and municipalities, and community and conservation organizations.

The paper provides background information in support of the Department's planned discussions with other governments and interested parties on implementation of the new fisheries protection provisions. The information presented here will be used to develop operational guidance and a new Fisheries Protection Policy, incorporating comments received.

2. Managing Threats to Canada's Fisheries

Fisheries and the fish¹ and fish habitats² that support them have long had economic, environmental and cultural value to Canadians. Commercial and recreational fisheries alone generate several billions of dollars per year in the Canadian economy. Fish and fish habitat are also important food, spiritual and cultural resources for many Aboriginal peoples and coastal communities. As a component of aquatic ecosystems, fish and fish habitat provide ecological goods and services that contribute to the well-being of Canadians, such as the provision of food, purification of water, and recreational services like swimming and boating.

The legal framework for regulating impacts to fish and fish habitat is founded on Canada's *Constitution Act, 1982*, which assigns responsibilities to:

- the federal government for "Sea-coast and Inland Fisheries"
- the provinces for public lands (including overlying waters) and the management of natural resources within their jurisdiction.

¹ Fish are defined in the *Fisheries Act* as including: (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;

² Fish habitat will be defined in the *Fisheries Act* as: 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.

As a result, the provinces deliver a range of activities that serve to complement those of the federal government for regulating impacts to fish and fish habitat.

Threats to fish and fish habitat have continued to emerge in recent years, triggered in part by economic development and population growth across Canada. Today the sustainability and productivity of fisheries are threatened by multiple, interacting, and cumulative stressors, including:

- *habitat degradation or loss*, which can result from direct impacts in the aquatic environment. This includes fragmentation of habitat, infilling of lakes or streams, conversion of wetlands or from activities in the watershed such as logging, urbanization, clearing of riparian or aquatic vegetation;
- *flow alteration*, which may be caused by a variety of sources, including dams or other impoundments, water diversion, and water extraction, such as municipal, industrial, agricultural, thermal/nuclear generating station uses;
- *invasive species*, which can threaten fish through competition, predation or habitat impacts;
- *overharvesting*, which can lead to depleted populations that are not able to sustain themselves;
- *pollution* of many kinds, which can affect water quality and lead to health effects on fish.

All of these direct threats take place in the context of a changing environment. Changes in seasonal temperatures, ice cover, precipitation and evaporation patterns can all lead to changes in both water quantity and quality, ultimately affecting fish and fish habitat.

3. The New Fisheries Protection Provisions of the *Fisheries Act*

3.1 Overview

Changes were introduced to the *Fisheries Act* in 2012, when all of these changes enter into force, the amended *Fisheries Act* will:

- focus the Department's regulatory regime on managing a range of threats to provide for the sustainability and ongoing productivity of Canada's commercial, recreational and Aboriginal fisheries³;
- provide enhanced compliance and protection tools;
- provide greater clarity, certainty and consistency of regulatory requirements through the expanded use of standards, regulations and time limits; and,

³ In the *Fisheries Act* a "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;

- enable partnerships with agencies and organizations that are best-placed to provide fisheries protection services to Canadians.

While these changes will reduce the regulatory burden on proponents, they also re-emphasize proponents' responsibilities to avoid harm to fish and fish habitat through the appropriate design of projects and the application of mitigation measures. The Department's emphasis will shift from site-specific project reviews, particularly for those works, undertakings, or activities that pose a low risk to fish and fish habitat, to a focus on managing threats to the *sustainability and ongoing productivity* of fisheries. There will be reduced duplication between federal and provincial/territorial review processes through greater use of best-placed delivery and partnerships.

Two new fisheries protection provisions are of particular importance under the amended *Fisheries Act*:

- sections 6 and 6.1, which provide a new framework and purpose for decision making related to the fisheries protection provisions,
- section 35, the prohibition against causing *serious harm to fish* that are part of or that support a commercial, recreational or Aboriginal fishery.

The amended *Fisheries Act* is coming into force in two phases. Some new sections of the Act, including those related to compliance, regulations-making authorities and partnerships, came into force on June 29, 2012. Additional changes, including those providing direction in Ministerial decision making and the new prohibition against causing *serious harm to fish*, will come into effect on a date to be determined by the Governor in Council. The Department is planning to be ready for summer 2013.

3.2 Purpose of the New Fisheries Protection Provisions

The new section 6.1 of the *Fisheries Act* sets out the purpose for decision-making under the fisheries protection provisions: "*to provide for the sustainability and ongoing productivity of commercial, recreational and Aboriginal fisheries*".

In this context, the Department interprets:

- *sustainability* as the use of the environment and resources to meet the needs of the present without compromising the ability of future generations to meet their needs; and,
- *productivity* as the sustained yield of all component populations and species and habitats that support and contribute to a fishery in a specified area.

3.3 The Prohibition against *Serious Harm to Fish*

The existing regulatory regime under the *Fisheries Act* (until the more substantial changes come into effect) includes two prohibitions for the management of impacts to fish and fish habitat: the killing of fish by means other than fishing (section 32); and the harmful alteration or disruption, or the destruction of fish habitat (subsection 35(1)). The amended fisheries protection provisions will effectively combine these into a single new prohibition:

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.

It is important to note that section 35 is not a permitting scheme but rather a prohibition against serious harm to fish. It is the proponent's responsibility to avoid serious harm through appropriate design and mitigation measures. However, in cases where the proponent determines that serious harm to fish cannot be avoided, the proponent must apply for a section 35(2) authorization which may be issued after taking into consideration the factors set out in section 6 (see section 3.5 of this paper).

There are two key components to this prohibition:

- the definition of *serious harm to fish*; and,
- protected fish that are part of or support commercial, recreational and Aboriginal fisheries, and their associated habitats.

3.3.1 Definition of *Serious Harm to Fish*

Serious harm to fish is defined in the *Fisheries Act* as “the death of fish or any permanent alteration to, or destruction of, fish habitat” (section 2). In terms of implementing the provision, the Department interprets the prohibition as:

- the death of fish;
- the permanent alteration to fish habitat as an alteration of such duration that limits or diminishes the ability of fish to carry out one or more of their life processes; and,
- the destruction of fish habitat as an elimination of habitat such that fish can no longer rely on this habitat to carry out one or more of their life processes.

3.3.2 Protected fish and their habitats under the prohibition

Section 2 of the *Fisheries Act* provides definitions of commercial, recreational and Aboriginal, in relation to a fishery.

Commercial Fishery

Under the *Fisheries Act*, *commercial*, in relation to a fishery, means that fish are harvested under the authority of a licence for sale, trade, or barter. (Section 2)

Recreational Fishery

Under the *Fisheries Act*, *recreational*, in relation to a fishery, means that fish are harvested under the authority of a licence for personal use or sport. (Section 2)

Aboriginal Fishery

Under the *Fisheries Act*, *Aboriginal*, in relation to a fishery, means that fish are 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. (Section 2)

Fish that are part of, or support, these fisheries and their associated habitats

The prohibition also applies to fish that are part of or support a commercial, recreational or Aboriginal fishery. The fish habitats of these fisheries are those that provide functions for sustaining the production of commercial, recreational or Aboriginal fishery species. These areas may occur in other water bodies outside the location of the fishery and be connected through food webs and migrations.

3.3.3 Scope of Application of the Prohibition

Most water bodies in Canada contain fish or the habitat of fish that are part of or support a commercial, recreational, or Aboriginal fishery. The determination of whether a particular area contains fish or the habitat of fish that are part of, or support, a commercial, recreational or Aboriginal fishery is not simple and may be further complicated by incomplete data about fishing practices and fish distribution, and by the complexity of food web structures and ecological processes. Water bodies that do not provide habitat to fish that are part of or support these fisheries are the exception in Canada.

In light of this, Fisheries and Oceans Canada proposes to apply the prohibition against serious harm to fish that are part of or support commercial, recreational, or Aboriginal fisheries as follows:

- The prohibition **would apply to** Canadian fisheries waters⁴ that contain:
 - i. fish that are part of commercial or recreational fisheries, as identified under either federal or provincial fishing regulations; or
 - ii. fish habitats of commercial or recreational fisheries, as identified under either federal or provincial fishing regulations.

⁴ Canadian fisheries waters are defined in the *Fisheries Act* as: all waters in the fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada;

- The prohibition **would apply to** Canadian fisheries waters that contain:
 - i. fish that are part of Aboriginal fisheries; or
 - ii. fish habitats of Aboriginal fisheries.

- The prohibition **would apply to** Canadian fisheries waters that contain:
 - i. fish that support commercial, recreational or Aboriginal fisheries; or
 - ii. fish habitats of those fish that support commercial, recreational or Aboriginal fisheries (i.e., by providing essential functions for sustaining the production of these fisheries).

- The prohibition **would not apply to** any Canadian fisheries waters that have been exempted, by regulations, from the prohibition.

- The prohibition **would not apply to** any fisheries that have been excluded, by regulations, from the definition of commercial, recreational, or Aboriginal fisheries

- The prohibition **would not apply** in waters that have been surveyed, using recognized, appropriate scientific methods, to demonstrate that they do not contain fish or their habitats that are part of or support commercial, recreational or Aboriginal fisheries. An example would be disconnected or isolated waters.

3.4 Factors to be Considered

In addition to the new prohibition, the fisheries protection provisions also provide powers to the Minister to issue authorizations, to make regulations, or to recommend to the Governor in Council the making of regulations to allow serious harm to fish.

The new section 6 of the *Fisheries Act* identifies four factors that the Minister of Fisheries and Oceans Canada must consider prior to deciding whether to issue an authorization or exercising other ministerial powers, as they relate to the protection of commercial, recreational and Aboriginal fisheries. The four factors 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 or that support a commercial, recreational or Aboriginal fishery; and,
- d) the public interest.

These factors represent a new accountability mechanism requiring a consistent, well-documented and transparent approach to decision making under the fisheries protection provisions.

3.4.1 Contribution of Relevant Fish

In this context, the Department interprets:

- *relevant fish* as meaning all fish and their habitat 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 work, undertaking or activity; and,
- *contribution* as meaning 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 work, undertaking or activity.

In other words, the contribution of relevant fish is the role of the affected fish in the productivity of the commercial, recreational or Aboriginal fishery.

The precision required in estimating the contribution of the relevant fish to the sustainability and ongoing productivity of the fishery will depend on the scale of impact of the project to the productivity of the fishery. For example, a major project that will cause large scale ecosystem changes that affect the productivity of fisheries might require detailed estimates of the contribution of the relevant fish, using direct metrics of productivity. A smaller scale project with known adverse effects to fish and fish habitat, by contrast, might require less precise estimates of productivity using surrogates of habitat quantity or quality⁵.

3.4.2 Fisheries Management Objectives

The Minister must consider the anticipated impact of the project in relation to the stated *fisheries management objectives* for the commercial, recreational or Aboriginal fisheries in question. Fisheries management objectives are generally understood to mean the stated socioeconomic, biological and ecological goals for a fishery. The objectives typically are established by federal or provincial/territorial fishery managers. However, there are cases where other authorities may be the fishery managers, including co-management boards established under Aboriginal land claims agreements.

Fisheries management objectives can range from high-level objectives, applying widely to fisheries or stocks (e.g., the Department's Sustainable Fisheries Framework and provincial fisheries strategies), to those that are more limited in scope to a fishery, stock, or region (e.g., a watershed fisheries management plan). As a result, fisheries management objectives can be found in a variety of documents, including fisheries regulations, policy documents, conservation and harvesting plans, integrated fisheries management plans, and species at risk strategies and plans. Where objectives do not exist, consultation with fishery management authorities may be required and will be guided by the purpose statement of section 6.1 of the *Fisheries Act*.

⁵ Guidance on metrics of productivity will be provided in an upcoming Canadian Science Advisory Secretariat report.

3.4.3 Measures and Standards to Avoid, Mitigate and Offset

The Minister must consider whether measures and standards to avoid, mitigate or offset serious harm to fish that are part of or that support a commercial, recreational or Aboriginal fishery have been applied. In this context, the Department interprets:

- *avoidance* as measures to completely prevent adverse effects to fish and fish habitat;
- *mitigation* as measures to reduce the duration, intensity or extent of adverse effects to fish and fish habitat that cannot be completely avoided; the best-available measures or standards should be implemented as much as is practically, technically and economically feasible; and,
- *offsetting* as measures to offset serious harm to fish by maintaining or improving the productivity in the area of the affected fishery.

These factors build upon a mitigation hierarchy which is internationally recognized by the *Convention on Biological Diversity* (1992) as best practice in reducing risks to biodiversity. According to the mitigation hierarchy, efforts should be made to prevent (avoid) impacts first, then, when avoidance is not possible minimise (mitigate) impacts, and then repair or restore adverse effects. After these steps, any significant residual impacts should then be addressed via offsetting.

Offsetting fisheries productivity means maintaining the fisheries productivity that existed prior to the initiation of the development project. Options for offsets may include habitat modification (restoration, removal of obstructions, etc.), enhancement of fish production, and use of habitat banks. The Department is moving towards new and innovative approaches that result in improved outcomes for fisheries. Offsetting activities must maintain or improve the productivity of commercial, recreational or Aboriginal fisheries that would be affected by the project.

The choice of appropriate offsetting options will depend on the key threats to fisheries productivity. In some instances, the most desirable offset may indeed be a replacement of the same type of habitat that is affected by the project. In other situations fish passage may be the primary threat limiting productivity; thus, removal of barriers may be an acceptable offsetting option. Habitat banks may be used for offsets provided that several conditions are met. For example, the habitat bank must be functioning to sustain fish species prior to the start of the project and the bank must be managed by a legitimate organization capable of managing and maintaining the habitat bank. Where such banks are created by a third party, the Minister may enter into an agreement with such organizations to recognize the habitat bank as suitable for offsetting purposes.

A proponent will be required to demonstrate that measures and standards have been fully applied to first avoid, then mitigate and finally, offset any residual serious harm to fish that are part of or that support commercial, recreational or Aboriginal fisheries. Where offsetting is necessary, then the proponent will be required to provide an offsetting plan that demonstrates that the actions proposed will maintain or improve the rate of fish production that existed prior to the project being developed.

3.4.4 Public Interest

Finally, the Minister must take into account “the public interest”. It is important to note that the public interest is a consideration that is integral to the entire *Fisheries Act*. In most instances where Section 6 applies, the public interest will be served through consideration of factors (a) through (c) which consider the public’s interest in the fishery. However, factor (d) allows the Minister to consider other factors deemed relevant to the well-being of society at a given place and time. Discretion on how to apply this factor rests with the Minister who is, at every given decision moment, responsible to the interests and welfare of Canadians.

4. Summary of the Decision Process and Next Steps

This discussion paper outlined the Department’s proposed policy interpretations of the key concepts of *serious harm to fish* and *fish that are part of or support commercial, recreational or Aboriginal fisheries*, as well as the factors to be considered in decision-making.

Figure 1 summarizes the overall project planning, review and decision-making process related to serious harm to fish under the new fisheries protection provisions of the *Fisheries Act*.

Feedback generated from this discussion paper will be used to develop more detailed operational guidance for departmental staff and project proponents. This guidance will address such issues as information requirements for proponents, the identification of fisheries management objectives, the use of standards, and exclusions.

Please provide any comments on the concepts in this document to:

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Figure 1. The generalized project planning, review and decision-making process. Considerations of the proponent and the Department are highlighted in green and blue, respectively.

