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PRACTITIONERS GUIDE to Writing an Authorization for the Habitat Protection Provisions of the *Fisheries Act*

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Fisheries and Oceans Canada



Canada

The intent of this guide is to provide guidance to Fisheries and Oceans Canada (DFO) Habitat Management Program staff (Practitioners) in the preparation, writing and issuance of Authorizations for the application of the habitat protection provisions (sections 20 to 42) of the Fisheries Act. For the purposes of this guide, the application of section 36 (pollution prevention provisions) will be limited to the specified responsibilities of the HMP and respect the administrative role of Environment Canada (EC). This Guide is part of a series of Standard Operating Policies (SOP) that support the Habitat Management Program in making transparent and consistent decisions during the regulatory review of proposed developments that affect fish and fish habitat across Canada. These SOP are intended for internal use by Practitioners. If you have any concerns or comments on this Guide or any Practitioner Guide, please refer them to your Regional Manager, Habitat Protection (HP). This guide may be subject to periodic updates so please check DFO's intranet web site to ensure you are using the most current version.

Cette publication est également disponible en français.

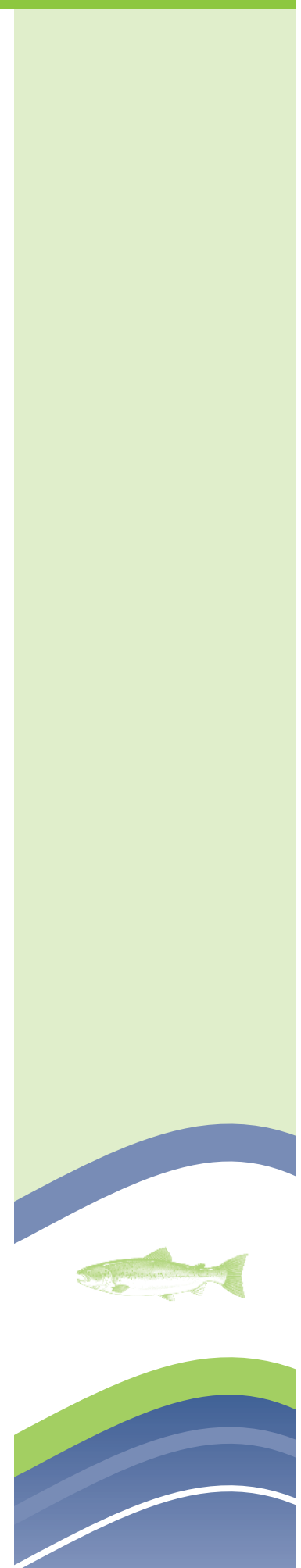
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1.0 Introduction

Fisheries and Oceans Canada (DFO) is responsible for delivering the Government of Canada's constitutional authority for sea coast and inland fisheries including its responsibility for the conservation and protection of fish and fish habitat under the *Fisheries Act*.

DFO is also responsible for the administration of the *Species at Risk Act* (SARA) as it applies to aquatic species other than those on federal lands administered by Parks Canada Agency.

Impacts to fish and fish habitat are prohibited under subsection 35(1) and section 32 of the *Fisheries Act* unless an Authorization has been granted. An authorization under the *Fisheries Act* ("Authorization") is the main regulatory approval issued on behalf of the Minister of Fisheries and Oceans ("the Minister") to administer the legislative authority pursuant to subsection 35(2) and section 32 of the *Fisheries Act*.

DFO exercises its authorities primarily through reviewing proposed developments and monitoring data relative to existing and new developments and providing advice on appropriate mitigation measures to avoid impacts on fish and fish habitat. DFO's Habitat Management Program (HMP) administers its responsibilities for the application of the habitat protection provisions of the *Fisheries Act* through the preparation and issuance of Authorizations. The decision to issue an Authorization may require DFO to conduct an environmental assessment (EA) under the *Canadian Environmental Assessment Act* (CEAA) and/or other relevant EA legislation.

Previous versions of the Authorization Guide focused on the authority to regulate impacts to fish habitat from works and undertakings under subsection 35(2) yet many of the means and conditions described in Authorizations also consider other decision making authorities in the *Fisheries Act*. In practice, the authority of section 32 is almost always applied either directly or indirectly to manage for the impacts on fish but has not been explicitly integrated into the operational policies and practices of DFO.

2.0 Purpose of this Guide

This guide assists Practitioners (DFO Habitat Management Program staff) in the preparation, writing, and issuance of Authorizations under the *Fisheries Act* subsection 35(2) and section 32, and under the *Species at Risk Act*.



3.0 Legal and Policy Context

The decision to issue Authorizations is based on a legal and policy framework for the habitat protection provisions of the *Fisheries Act* that includes consideration of the authorities and requirements of other legislative, regulatory and policy directives. This guide will focus on the legislative authorities provided by the habitat protection provisions of the *Fisheries Act* administered by DFO and where appropriate, provide advice for including SARA conditions as described in SARA (section 74).

The policies and processes for review and assessment of proposed developments (referrals) for impacts to fish and fish habitat are guided by a suite of Practitioners guides collectively known as the HMP's *Standard Operating Policies (SOP) Manual*. This Manual and the collection of policies, positions, guides and frameworks within it help form the basis of Practitioners' decisions to recommend the means and conditions under which impacts are acceptable to authorize. The SOP Manual includes decision points and processes associated with fulfilling DFO's responsibilities under the *Fisheries Act*, CEAA and SARA, achieving *DFO's Policy for the Management of Fish Habitat (the Habitat Policy)* objectives and contributing toward DFO's strategic outcomes. This Authorization Guide is part of the SOP Manual.

Practitioners are responsible for ensuring that applicable federal environmental assessment (EA) responsibilities are addressed prior to the issuance of an Authorization. These obligations may be imposed by the *Canadian Environmental Assessment Act* (CEAA), other federal EA legislation such as the *Yukon Environmental and Socio-economic Assessment Act* or the *Mackenzie Valley Resource Management Act*, or other federal EA regimes such as that identified under a modern lands claims agreement. In cases that may affect species at risk, there are also additional obligations under SARA (section 79).

3.1 FISHERIES ACT

The *Fisheries Act* provides the legal framework for regulating impacts on fish and fish habitat associated with works, undertakings, operations and activities occurring in or around Canadian fisheries waters (e.g., freshwater, estuaries and marine). The *Fisheries Act* assigns the Minister a wide range of powers, authorities and duties to regulate impacts to fish and fish habitat in relation to:

- fish passage (section 20);
- in-stream flow needs of fish (section 22);
- destruction of fish by any means other than fishing (section 32);
- harmful, alteration disruption or destruction of fish habitat (section 35); and
- pollution of fish-frequented waters (section 36).



Authorizations are the legislative approval issued by the Minister which allow otherwise prohibited impacts to fish and fish habitat as stated in subsection 35(1)¹ and section 32² of the *Fisheries Act*. The means and conditions in every Authorization, as required by subsection 58(1) of the Fishery (General) Regulations, are the mechanism by which DFO considers the other habitat protection provisions listed above.

An Authorization gives a Proponent protection from prosecution pursuant to subsection 35(1) and section 32 provided they comply with the conditions of the Authorization. As indicated by the wording of subsection 35(2)³ and section 32, the Minister may authorize the alteration, disruption or destruction (HADD) of fish habitat and also the destruction of fish by any means other than fishing. Therefore, when the *means and conditions* of an Authorization under these provisions are followed, the Proponent has not contravened subsection 35(1) or section 32 and is not liable for prosecution under either of these two sections of the *Fisheries Act*.

The only mechanism to permit the deposit of a deleterious substance under section 36 of the *Fisheries Act* is by regulation made by Governor in Council for which many have been developed (e.g., *Metal Mining Effluent Regulations, Pulp and Paper Effluent Regulations, etc.*). The development of regulations under section 36 is led by Environment Canada.

3.2 SPECIES AT RISK ACT

The purposes of SARA are to prevent wildlife species from becoming extirpated or extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity, and to manage species of special concern to prevent them from becoming endangered or threatened. Under SARA, the Minister of Fisheries and Oceans is the competent minister for listed aquatic species except individuals found on lands administered by Parks Canada Agency. "Aquatic species" means fish (as defined in section 2 of the *Fisheries Act*) and marine plants (as defined in section 47 of the *Fisheries Act*).

Where it is assessed that impacts on fish and fish habitat may also affect a SARA-listed aquatic species, its residence or critical habitat, Practitioners are to ensure that the regulatory requirements of both the *Fisheries Act* and SARA are satisfied before issuing an Authorization.



¹ Subsection 35(1) of the *Fisheries Act* states that: "No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat."

² Section 32 of the *Fisheries Act* states that: "No person shall destroy fish by any means other than fishing except as authorized by the Minister or under regulations made by the Governor in Council under this Act."

³ The Minister may authorize an alteration, disruption, or destruction (HADD) of fish habitat pursuant to subsection 35(2) of the *Fisheries Act* which states: "No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister."

Whether considering issuing a separate SARA permit (SARA Section 73⁴) or a *Fisheries Act* Authorization with SARA conditions (SARA Section 74⁵), the requirements outlined in SARA Section 73(2) to (6) and (9) must be met. Section 73(3) requires that:

- All reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted;
- All feasible measures will be taken to minimize the impact of the activity on the species or its critical habitat or the residences of its individuals; and
- The activity will not jeopardize the survival or recovery of the species.

Consistent with the legal requirement in SARA Section 73(3.1), explanations for all SARA permits and *Fisheries Act* Authorizations with SARA conditions must be published on the SARA Public Registry.

Subsections 73(4) and (5) require that consultations be undertaken with relevant wildlife management boards authorized by a land claim agreement or with bands when a listed species at risk is found on a reserve or other lands under the *Indian Act*.

Subsection 73(6) of SARA specifically requires a permit to “contain any terms and conditions governing the activity that the competent minister considers necessary for protecting the species, minimizing the impact of the authorized activity on the species or providing for its recovery.” SARA recovery strategies, management plans, and action plans are important sources of information to consult when determining the conditions that should be included in the Authorization.

Subsection 73(9) imposes a three year time limit on the duration of SARA permits or *Fisheries Act* Authorizations issued with SARA conditions. This requirement should be considered when deciding whether to issue a separate SARA permit or a *Fisheries Act* Authorization with SARA conditions.

The designated regional HMP SARA representative is generally the first point of contact for Practitioners when making the decision to issue a separate SARA permit or a *Fisheries Act* Authorization containing SARA-related conditions. Practitioners are encouraged to contact the designated regional HMP SARA representative and regional SARA Manager who can provide advice and clarify the requirements and preconditions of SARA compliant *Fisheries Act* Authorization.

If a decision is made to issue a SARA permit separately from a *Fisheries Act* Authorization, Practitioners should be directed to the regional SARA Manager for advice, as this Authorization Guide does not apply to SARA permits.

If a decision is made to issue a SARA compliant *Fisheries Act* Authorization, Practitioners should receive SARA Manager confirmation that SARA requirements are met as a final check before an Authorization is issued.

4 Subsection 73(1) of the *Species at Risk Act* states: “(1) The competent minister may enter into an agreement with a person, or issue a permit to a person, authorizing the person to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals.”

5 Section 74 allows for other permits or authorizations made under other federal Acts of Parliament to essentially act as SARA permits as long as they satisfy the requirements of section 73.



3.3 HABITAT MANAGEMENT POLICY

The Policy for the Management of Fish Habitat, tabled in Parliament in 1986, provides guidance for the administration of the habitat provisions of the *Fisheries Act* and a comprehensive framework for the management of Canada's fish habitat resource base in the context of sustainable development. It includes the overall objective of net gain for habitat for Canada's fisheries resources and outlines the three goals to reach this objective: fish habitat conservation, fish habitat restoration, and fish habitat development.

The HMP contributes to the Department's strategic outcomes by conducting its regulatory role of reviewing proposed developments, negotiating mitigation conditions and when necessary issuing Authorizations for sections 35(1) and 32 prohibitions. In combination with its regulatory functions, the HMP coordinates other strategic activities according to the *Habitat Policy* to increase the social and economic benefits derived by Canadians from productive fish habitats and the fisheries resources they support.

The guiding principle of No Net Loss (NNL) is fundamental to achieving the fish habitat conservation goal in the *Habitat Policy*. Under this principle, the Department strives to offset unavoidable habitat losses with fish habitat replacement (i.e., habitat compensation) on a project-by-project basis so that further reductions to Canada's fisheries resources due to habitat loss or damage may be prevented. The *Habitat Policy* also describes that measures aimed at offsetting the destruction of fish by means other than fishing should be considered in order to achieve conservation and protection goals in consideration of the fisheries management objectives. The NNL guiding principle is intended to guide Practitioners and others when considering the acceptable *means and conditions* to be included in an Authorization that will likely achieve the conservation and protection goal of the *Habitat Policy* and contribute overall to DFO's strategic outcomes.

3.4 AQUATIC SPECIES AT RISK POLICY

The SARA Policy Suite provides the overarching policy framework to enable the effective implementation of SARA. The latest version of the Policy Suite can be found on the SARA Public Registry.



4.0 Assessing whether an Authorization is appropriate

There are several steps to determine whether an Authorization will be required and is appropriate:

1. An initial assessment of the impacts of a proposed development (See: Practitioners Guide to Risk Management Framework for DFO Habitat Staff)
2. Work with the proponent to relocate or redesign to avoid residual impacts where possible and determine and decide if unavoidable impacts to fish and fish habitat will likely require authorization.
3. If the impacts to fish and fish habitat are considered acceptable (i.e., no net loss and/or SARA conditions likely can be met) then the Proponent is sent the *High Risk*⁶ template letter requesting more detailed information to be provided by the Proponent including:
 - a) An Application for *Fisheries Act* Authorization to be signed and returned;
 - b) A summary of options considered for relocation and redesign for reducing impacts to fish and fish habitat;
 - c) A fish habitat compensation plan;
 - d) A monitoring and reporting plan or program; and
 - e) An explanation of how SARA Section 73 preconditions will be met, if applicable.
4. The Proponent initiates the Authorization Process by submitting a signed Application for *Fisheries Act* Authorization. The Proponent should also be informed that by submitting an application may trigger an environmental assessment process and require DFO to consult with the public and Aboriginals.
5. When all the required additional information identified above is provided, Practitioners will be able to make their final determination whether an Authorization is appropriate and consistent with DFO's policies and legislation. An Authorization would typically not be considered if:
 - a) the *Habitat Policy* conservation goal of No Net Loss in productive capacity of fish habitat is unlikely to be achieved;
 - b) the destruction of fish and/or fish habitat would compromise conservation and protection goals and fisheries management objectives;
 - c) a HADD of fish habitat has already occurred. Authorizations for impacts resulting in a HADD can not be issued retroactively;
 - d) the works, undertakings, operations or activities violate section 36 of the *Fisheries Act*;
 - e) impacts may jeopardize the survival or recovery of an aquatic species listed under SARA; or
 - f) all feasible measures or reasonable alternatives to minimize the impact of the activity on a listed aquatic species or its critical habitat or the residences of its individuals will not be taken.

⁶ Please refer to the *Practitioners Guide to Writing Letters Used in Fisheries Act and Species At Risk Act Reviews for Habitat Management Staff* for more information on applying a High Risk letter template.



5.0 Preparing and Writing an Authorization

Up-to-date, standardized national templates for Authorization Cover Letters and Amendment Letters are available on the Habitat Management Program intranet web site and the Program Activity Tracking for Habitat (PATH).

Practitioners must clearly identify the impacts that are being authorized. Complete documentation records of the impacts to fish and fish habitat that are to be authorized will form the foundation for measuring effectiveness and determining compliance with the prescribed Authorization conditions and undertaking enforcement action in situations of non-compliance.

The Proponent must have submitted an “Application for *Fisheries Act* Authorization” confirming that they accept responsibility for the requirements to implement mitigation measures, prepare and implement a fish habitat compensation plan, monitor to ensure compliance with all the conditions and provide financial security. Furthermore the Proponent should also know that an Authorization can not be issued until completion of the EA process and/or SARA pre-conditions are met, when applicable.

It is possible that all or part of the information that Proponents provide to DFO may be made available to the public in relation to any of the following:

- the registry file under the *Canadian Environmental Assessment Act*;
- the Internet-based SARA Registry; or
- a response to a request under the *Access to Information Act*.

Proponents should be made aware of this possibility. With respect to the content of authorizations, Practitioners should avoid specifying or making direct reference to any proprietary, confidential or private information in an Authorization. In situations when a Practitioner believes that this type of information must be included in an Authorization, the practitioner should indicate on the file why this information was necessary to be included.

Before an Authorization can be issued, DFO must also ensure that:

- When an EA is required, the appropriate course of action decision (under CEAA) or equivalent decision (under other EA regimes) is taken and recorded;
- If applicable, compliance with SARA conditions will be met; and
- If established or potential Aboriginal or treaty rights are affected, appropriate consultation, and when necessary, accommodation, should also have been completed.

Specific advice and guidance is provided below (sections 5.1-5.9) to assist Practitioners in writing each of the main components of an Authorization.

Practitioners should refer to the Authorization and Letter templates provided by PATH and the HMP intranet web site for the most up to date versions with standard text and minimum conditions to be included.



5.1 AUTHORIZATION TITLE

The title of every Authorization will be:

"Fisheries Act Authorization"

5.2 RECIPIENT OF AUTHORIZATION

The Authorization is issued to the principal party, referred to as the "Proponent", responsible for the works, undertakings, activities or operations as written on the Application for Authorization. The Proponent is generally a person (land owner), corporation, or government department (legal entity). Practitioners must verify that the recipient of the Authorization is the same as on the Application for Authorization. Contractor(s) may be provided with a copy of the Authorization, however, it is ultimately the Proponent's responsibility to ensure that the Authorization and its conditions are distributed to, and understood by contractors or any other persons carrying out the work on their behalf.

When appropriate, a contact person or delegate with appropriate authority to represent the Proponent may be included on the Authorization as "c/o" or "attention". Current contact information for the Proponent (name, address, contact telephone number(s), e-mail etc.) must be included in the appropriate documentation.

When working with organizations, corporations or government departments for the first time, Practitioners should verify that the contact person has the appropriate authority to accept and be bound by the terms and conditions of the Authorization.

To verify the proper name of a corporation and confirm that it is a legal entity, a corporate name search can be done with the relevant provincial or federal registrar of corporations (e.g., Industry Canada is the federal registrar and can be searched at <http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/home>). If the entity is not a corporation, its individual owner should be the recipient of the Authorization.

5.3 LOCATION OF PROPOSED DEVELOPMENT

The Authorization should provide a sufficiently detailed description of the location to be able to find the proposed development and locate or identify the described impacts to fish and fish habitat and related conditions. This is important to assist DFO staff in conducting compliance monitoring and inspections. As described in the *Proponent's Guide to Information Requirements for Review Under the Fish Habitat Protection Provisions of the Fisheries Act*, an Authorization should include the following information:

- Nearest community (City, Town, Village)
- Municipality, District, Township, County, Province
- Name of the watercourse(s) or water body(ies) likely to be impacted by the proposed development
- Coordinates of the proposed development (e.g., longitude and latitude or Universal Transverse Mercator Grid [UTM] coordinates)



Additional location information to include:

- A map or directions appendix (showing access routes, e.g., via road, water, air) to access the proposed development site and indicate if permission is needed to gain access
- In a marine setting, the approximate location of the proposed development on a nautical chart or in relation to sea marks or other navigational aids (as an appendix to the Authorization).

The location of the habitat compensation works described in the Habitat Compensation Plan should be referenced in the conditions related to compensation (see 5.6.4 of this Guide), regardless of whether or not it is at the same location of the development.

5.4 VALID AUTHORIZATION PERIOD FOR IMPACTS TO FISH AND FISH HABITAT

The Authorization is valid for a defined time period over which all the impacts to fish and fish habitat can occur. Impacts occurring outside of this period would constitute a breach of the terms and conditions of the Authorization. A proposed development can have many development phases over different periods during which the various works, undertakings, activities or operations will result in impacts to fish and fish habitat that would likely require an Authorization. At a minimum, an Authorization should describe the valid time period for the proposed HADD of fish habitat and the period of time over which destruction of fish will occur.

Authorizations should specify various schedules and timing related to the conditions for avoiding or mitigating impacts, monitoring of their implementation, reporting on their effectiveness and any corrective actions taken, and habitat compensation requirements. These schedules may extend several years after the construction phase is complete and a proposed development is operating. Schedules and timing of additional requirements beyond the valid impact period should be specified under the appropriate "Condition of Authorization". The standard phrase: "*The valid authorization periods for other conditions of this Authorization are set out below as Conditions of Authorization.*" is automatically provided in this section of the Authorization template to indicate other schedules are included.

Practitioners are reminded that SARA Subsection 73(9) imposes a three year time limit on the duration of SARA permits or *Fisheries Act* Authorizations issued with SARA conditions.



5.4.1 Authorization for Defined Period of Impacts

For most Authorizations, the impacts to fish and fish habitat from a development proposal occur over a well defined or short period (<1 year). Within this defined period there may be several conditions that specify periods for different activities causing impacts as determined from the aquatic effects assessment. For example, a proposed development may include multiple stream crossings, channel diversions or construction of water impoundment structures, site preparation and abandonment impacts. It is necessary to provide sufficient description of timing of these works, undertakings, operations or activities individually so that it is absolutely clear to anyone undertaking compliance monitoring which impacts have been authorized over what time period. A table or matrix of residual impacts (e.g., from the aquatic effects assessment) may be useful to establish a schedule of impacts to occur within the valid authorization period.

5.4.2 Authorization for Ongoing Period of Impacts

For proposed developments where an activity or operation results in an ongoing HADD or destruction of fish over an extended period of time the valid authorization period will need to reflect the acceptable period of impacts. Examples include the ongoing alteration of fish habitat as a result of a regulated water management regime or the ongoing destruction of fish through turbines or water intakes. In such situations it is essential that there is ongoing monitoring of impacts to ensure impacts to fish stocks, communities, assemblages, and/or changes in fish habitat are within the range initially predicted by the proponent and authorized by DFO.

Given the limitations of predicting impacts into the distant future the valid period for long term impacts should be consistent with the valid time period of associated provincial/territorial permits or approvals (typically < 10 years) or with regular maintenance/modification schedule of an existing facility. Information derived from monitoring may be used to determine new limits, and/or conditions required for future authorizations.



5.5 DESCRIPTION OF IMPACTS RELATED TO PROPOSED DEVELOPMENT

5.5.1 Description of Proposed Development

A concise description of the larger proposed development is important to include for those conducting compliance monitoring activities. This simply establishes the context for the authorized impacts within the broader proposed development.

5.5.2 Description of Authorized Impacts to Fish and Fish Habitat

A detailed understanding of the anticipated impacts on fish and fish habitat from a proposed development is required to effectively develop conditions for mitigation, monitoring and compensation. Key elements that must be incorporated in the Authorization, including but not limited to:

- expected quantity, type and sensitivity of fish habitat to be harmfully altered, disrupted or destroyed;
- expected sources and estimate of fish mortality;
- expected impacts from flow changes;
- expected passage or migration impacts.

A recommended method for preparing an Authorization is to use the information resulting from aquatic effects and risk assessments (as outlined in *Risk Management Framework*) to ensure all elements of the proposed development are clearly understood, appropriate mitigation measures are applied and the residual impacts to fish and fish habitat to be authorized are clearly identified. The aquatic effects assessment provides a quick and efficient means to describe and document the residual impacts to fish and fish habitat in relation to the proposed works, undertakings, activities or operations.

A detailed diagram of the location(s) at which the impacts are likely to occur, including site specific details, may be included in an Annex or referenced in this section.



5.6 CONDITIONS OF AUTHORIZATION

Conditions of Authorization should address all requirements and limitations that DFO intends to impose on the Proponent, the breach of which could result in enforcement action under the *Fisheries Act*. Conditions should be simple, concise, specific and result in a measurable habitat protection outcome; however overly prescriptive measures should be avoided to provide flexibility to the Proponent to decide how they will comply with the conditions.

Conditions in an Authorization are related to various plans and information provided by the Proponent and are organized according to:

- 1.0 The Proponent's proposed development plan;
- 2.0 Specific fish and fish habitat impact mitigation measures;
- 3.0 Reporting of mitigation monitoring results;
- 4.0 The habitat compensation plan;
- 5.0 Reporting of habitat compensation monitoring results; and
- 6.0 Estimates for financial security;

The conditions of the Authorization should be numbered sequentially so that each point and each section is clearly outlined and easily referenced to assist compliance monitoring or when making amendments.

When considering SARA related conditions Practitioners should note that subsection 73(6) of SARA specifically requires a permit to "contain any terms and conditions governing the activity that the competent minister considers necessary for protecting the species, minimizing the impact of the authorized activity on the species or providing for its recovery."

5.6.1 Conditions that relate to the Proponent Plan

The Proponent Plan is the development proposal submitted by the Proponent which outlines all their proposed plans. Reference should be made to the version of the Proponent Plan(s) reviewed including relevant reports, mitigation plans, environmental management plan, habitat compensation plan, engineering plans, etc. For more detailed proposed developments, a schedule of activities and impacts authorized may be appended. As a final check, Practitioners are to confirm that any changes to the Proponent Plan are reflected in the authorized impacts and conditions sections of the Authorization.

All Authorizations contain a condition that allows DFO to suspend works, undertakings, activities or operations where impacts are greater than those previously assessed. The full range of options in responding to compliance issues is detailed in the *Habitat Compliance Decision Framework*. DFO should also provide the Proponent with a written description of the nature and the extent of the additional unauthorized impacts that are greater than the parties previously contemplated and explain what they need to do to become compliant with the *Fisheries Act*.



5.6.2 Conditions that relate to Mitigation of Potential Impacts to Fish and Fish Habitat

It is important to identify mitigation measures necessary to prevent any impacts to fish and fish habitat that are greater than those authorized. A consistent method to assess and document the required mitigation measures related to a proposed development are derived from the aquatic effects assessment using Pathways of Effects (PoE) as described in the *Practitioners Guide to Risk Management Framework for DFO Habitat Staff*.

Additional conditions should be added where appropriate. The following are common types of mitigation conditions:

- Timing windows
- Construction site control measures for erosion and sediment
- Description of fish salvage operations
- Intake screens to be designed according to guidelines
- Outline turbine operating conditions and flow ramping rates
- Description of specific mitigation features or operational regime required to maintain fish passage

5.6.3 Conditions that relate to Monitoring and Reporting

Monitoring and reporting of Authorization Conditions are the responsibility of the Proponent and are necessary to satisfy DFO that the Proponent is in compliance with the conditions of the Authorization. Practitioners should verify that the required monitoring and reporting relate to the specific mitigation conditions that, if not followed, would likely result in impacts greater than those authorized.

For proposed developments with more detailed conditions and monitoring requirements, a monitoring plan or program may be included as part of the Authorization. The key measures or standards to be used to verify compliance must be written directly in the Authorization so that DFO staff or other personnel responsible for compliance and enforcement activities can quickly and easily evaluate compliance and determine if further action may be necessary.

The following are examples of common monitoring and reporting conditions:

- Provide dated photographs of works undertakings, activities or operations related to mitigation conditions;
- Undertake a monitoring program according to the Monitoring and Reporting Plan/Program;
- Provide monitoring and inspection records;
- Provide details of any mitigation changes, corrective actions or contingency measures that were followed in the event that mitigation measures did not function as described.

Additional conditions should be added where appropriate.



5.6.4 Conditions that relate to Compensation for the Authorized Impacts to Fish and Fish Habitat

The key compensation measures are to be written as conditions of the Authorization. The details of how compensation conditions will be implemented and the methods used to demonstrate that no net loss of fish habitat is met can be provided in a Habitat Compensation Plan.

In unique cases where no compensation is required, it is recommended that an explanation be provided in the project file and PATH of how the conservation of fish and fish habitat is achieved. Practitioners should refer to the Practitioners Guide to Habitat Compensation when working with Proponents to develop the Habitat Compensation Plan.

When writing the **habitat compensation** requirements the following type of **conditions** should be entered as a minimum:

- The area in square metres and the location (latitude and longitude, UTM coordinates) of compensatory fish habitat;
- The timeline or schedule for completion of compensatory fish habitat with evaluation criteria; and
- A clause indicating the Proponent's responsibilities to adapt the Habitat Compensation Plan, as part of the Proponent Plan, should the compensation project fail to meet the evaluation criteria.

Additional conditions should be added where appropriate.

5.6.5 Conditions that relate to monitoring and reporting of Habitat Compensation

The key compensation monitoring criteria and reporting deliverables are to be written as conditions of the Authorization. Habitat compensation projects often take years to become established and therefore the conditions for monitoring and reporting must be written directly in the Authorization so that DFO staff or other personnel responsible for compliance and enforcement activities can quickly and easily evaluate compliance and determine if further action may be necessary.

Additional conditions should be added where appropriate. The following are common types of compensation monitoring and reporting conditions;

- The methodology and criteria that will be used to evaluate the success of the fish habitat compensation project to offset the Authorized impacts to fish habitat (e.g., physical and biological criteria used to evaluate effectiveness)
- Photographs of completed compensation habitat;
- Contingency measures and changes made to adapt Habitat Compensation Plan to meet evaluation criteria; and
- Timelines for monitoring and reporting.



5.6.6 Conditions that relate to Financial Security

Financial security in the form of a Letter of Credit is an agreement by a financial institution promising to pay the Receiver General on behalf of DFO an agreed-upon sum of money if the conditions of the Authorization are not fulfilled by the Proponent. Practitioners must determine on a case-by-case basis if financial security is required using the criteria provided in the *Practitioners Guide to Letters of Credit* as well as the compliance risk assessment criteria in the *Habitat Compliance Decision Framework*.

The following is an example of financial security conditions that are frequently included in an Authorization:

- *The Proponent will deliver a letter of credit from a Canadian Bank in the sum of (XX amount), that renews annually, and which shall be in a form acceptable to DFO.*

5.7 AUTHORIZATION LIMITATIONS AND APPLICATION CONDITIONS

Every Authorization will state the authority under which the Authorization is being granted. These may be one or both of:

- *Fisheries Act* subsection 35(2); and/or
- *Fisheries Act* section 32.

The default for the Authorization Template will state the authority of both sections 35(2) and 32 of the *Fisheries Act* since the authority of both sections is almost always applied either directly or indirectly to manage for the impacts on fish and fish habitat.

The content for this section of every Authorization will depend on the applicable sections of the *Fisheries Act*. If a *Fisheries Act* Authorization is to also act as a SARA permit, subsections 73(2) to (6) and (9) of SARA must be met, and SARA-specific conditions will need to be included in the Authorization. Existing SARA documents, such as recovery potential assessments, recovery strategies, management plans, and action plans, will provide additional information regarding species-specific measures that must be undertaken.

The deposit of a deleterious substance is prohibited under section 36 of the *Fisheries Act* and can only be authorized by regulations made by Governor in Council. Therefore advice and thresholds related to allowable deposits or discharges for deleterious substances, wastewater, stormwater, suspended sediment, etc. must not be included in an Authorization for subsection 35(2) and section 32 of the *Fisheries Act*.



The Authorization template generated in PATH will insert the appropriate SARA text automatically when impacts to SARA-listed species is indicated by Practitioners on the appropriate PATH data entry tab.

If aquatic species at risk are *not* identified at the time the proposed development is authorized, a statement will be included automatically in the Authorization template as an additional Authorization Limitation and Application Condition.

5.8 DECISION AUTHORITY AND AUTHORIZATION SIGNATURES

Given the high level of accountability and sign-off authority given to Authorizations, it is important that Practitioners communicate the content and conditions to the responsible DFO manager, especially when there are known uncertainties or new approaches. An ongoing dialogue with the Proponent regarding the development of Authorization content and conditions must be maintained to ensure they fully understand what is required and are able to confirm that they are capable of meeting the conditions that will be included in the Authorization. Effective communication of the content, expectations and responsibilities between Practitioners and the Proponent will improve compliance, better protect fish and fish habitat and minimize delays in sign-off process for the issuance of an Authorization.

Practitioners should refer to the decision signing authority to determine who approves and signs an Authorization. The most recent documents are posted on the HMP Intranet web site.

- Key Decisions and Signing Authorities for Habitat Management Decisions Under the *Fisheries Act*

When completed and signed the Authorization represents a final decision made by the Minister according the legislative authority provided by the relevant sections of the *Fisheries Act*.

If the Authorization has SARA conditions (and therefore acts as a SARA permit according to section 74 of SARA), then it must also be published on the SARA public registry website as required under section 73(3.1) of SARA.



5.9 ISSUING AN AUTHORIZATION

There are a number of important steps that need to be confirmed before issuing an Authorization. Below is a basic checklist for Practitioners to verify that all requirements have been met and the Authorization can be issued. More detailed checklists may be available for your specific regional sign-off protocol.

- Latest version of Proponent Plan(s) and location of proposed development are accurately referenced in the Authorization.
- Conditions of Authorization are reflective of Proponent Plan and Authorized Impacts to fish and fish habitat (mitigation, compensation, monitoring, etc.)
- Monitoring and reporting conditions for compliance and effectiveness verification are identified and scheduled.
- Habitat Compensation Plan is completed.
- Condition for submitting a Letter of Credit, if required, is identified in the Authorization
- SARA pre-conditions have been met, when appropriate.
- The Proponent has reviewed the Authorization and confirmed that they will apply the conditions.
- Environmental Assessment is complete, signed and the record of decision posted on CEAR Registry or appropriate process for other EA regimes is complete
- When appropriate, Aboriginal consultation, and if necessary accommodation has been completed.
- The Authorization is verified and signed by the designated DFO decision authority.

After the Authorization is signed by the designated DFO decision authority a copy of the signed document must be retained by DFO while the original is issued to the Proponent. Depending on the circumstances, Proponents or their agents can be sent an Authorization by various means (e.g., fax, email attachment, etc.) as long as the original signed copy is mailed directly to the Proponent. Registered mail is recommended to ensure receipt of the Authorization. Upon issuance, Practitioners must ensure that the copy of the signed Authorization is uploaded to PATH as soon as possible.

5.9.1 Authorization Cover Letters

An Authorization Covering Letter is to be sent with every Authorization. This letter conveys important information that is not explicitly covered in the Authorization (e.g., Environmental Assessment requirements, notification of commencement of work, etc.). The cover letter template is based on the standard letter format and follows the guidance provided by the *Practitioners Guide to Writing Letters Used in Fisheries Act and Species at Risk Act Reviews*. The most recent version of the template is available through PATH and the HMP intranet web site.



6.0 Post Authorization Considerations

After the Authorization has been issued, Practitioners must update the PATH file for the project and link the appropriate documents.

Practitioners should consult with the Proponent according to the schedule of conditions to verify compliance with the Authorization and in particular that the requirement for providing monitoring reports to DFO are on track. Calendar reminders set in PATH are very important for ensuring monitoring and reporting requirements are met and should be established as soon as the conditions are set. PATH calendar reminders are transferred to the new assessor when the PATH file is re-assigned.

For Authorizations that include SARA-related conditions, the Proponent must be informed of the monitoring requirements in subsection 79(2)⁷ which requires monitoring of adverse effects of the proposed development on the listed species and its critical habitat. The details for monitoring of SARA-related conditions should be detailed in the Proponent's Monitoring and Reporting Plan. Practitioners must consult with their regional HMP SARA representative to coordinate monitoring and reporting of SARA-related conditions. Consistent with the legal requirement in SARA (S 73 (3.1)), explanations for all SARA permits and *Fisheries Act* Authorizations with SARA conditions must be published on the SARA Public Registry.

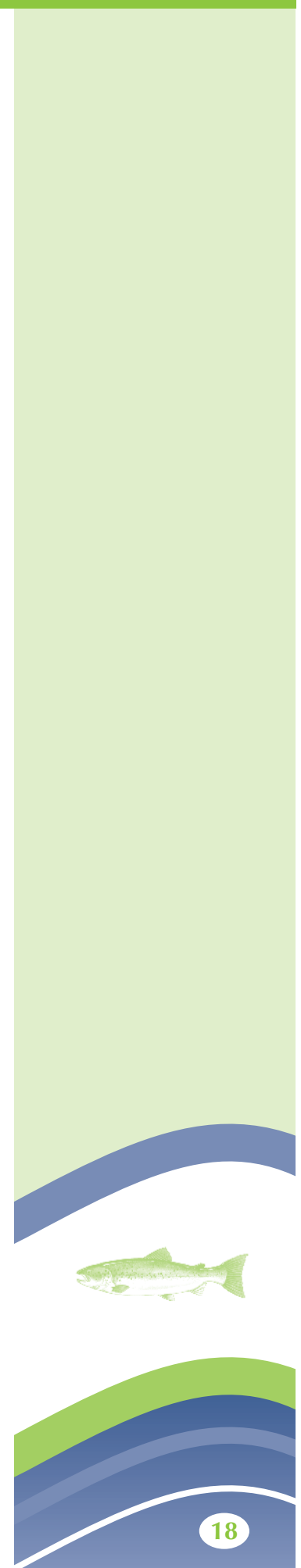
DFO must verify that the mitigation measures and any requirement relevant to fish and fish habitat considered during any relevant EAs are satisfied.

6.1 AUTHORIZATION AMENDMENTS

Amendments to the Authorization should only be considered under limited circumstances. For example, a Proponent may be unable to undertake the works or the compensation program or provide a monitoring report in the time specified in the initial Authorization and may request an amendment to the dates. To request an amendment, the Proponent should make the requested changes to the original Authorization and fax, email or mail to DFO for consideration. In most instances the Proponent will be required to provide supporting documentation such as plan change approval from the project authority, permission from the fishery management authority for timing window date changes, or other information that Practitioners need to conduct their assessment. Practitioners should review and assess the impact of the proposed changes and, if there are less or no new impacts, mail the modified Authorization to the Proponent with the covering Letter of Amendment. The most recent version of the amendment letter template is available through PATH and the HMP intranet web site.

If the impacts to fish and fish habitat will be greater than originally assessed then a new assessment is required to determine if a new Authorization may be issued.

⁷ SARA subsection 79(2) *The person must identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, must ensure that measures are taken to avoid or lessen those effects and to monitor them. The measures must be taken in a way that is consistent with any applicable recovery strategy and action plans.*



Note that the issuance of an amendment or a new Authorization may trigger additional EA and SARA requirements, unless it can be demonstrated that EA conditions or SARA requirements have not changed.

In cases where a change of recipient of the Authorization is requested advice should be sought from regional managers.

6.2 MONITORING REPORTS

All file information, documentation, photographic records, and a description of how the conditions of the Authorization have been conducted are to be collected according to the standards and criteria established by the conditions of Authorization as guided Habitat Compliance Monitoring Procedures and entered accordingly into PATH.

When an evaluation of a monitoring report indicates that performance criteria are not being met, Practitioners are to communicate with the Proponent and confirm any further actions required to meet the conditions of the Authorization. In situations of potential non-compliance with monitoring or other conditions of the Authorization refer to the *Habitat Compliance Decision Framework* and associated protocols.



7.0 List of References

DFO Policy for the Management of Fish Habitat (1986)

Fisheries Act

Habitat Compliance Decision Framework

Key Decisions and Signing Authorities for Habitat Management Decisions Under the Fisheries Act

Practitioners Guide to Habitat Compensation

Practitioners Guide to Letters of Credit

Practitioners Guide to Risk Management Framework for DFO Habitat Staff

Practitioners Guide to the Species at Risk Act

Practitioners Guide to Writing Letters Used in Fisheries Act and Species at Risk Act Reviews

Registrar of corporations (Industry Canada)

Species At Risk Act



