

# Fish and Fish Habitat Protection Policy Statement

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Fish and Fish Habitat Protection Policy Statement

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et de son habitat

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## 1.0 Ministerial Statement

As a proud maritime nation, Canada is home to the world's longest coastline and our three oceans are some of the most productive marine environments on the planet. In addition to this, our countless lakes, rivers, streams and wetlands hold one-fifth of the world's freshwater. The *Fisheries Act*, which is one of Canada's oldest pieces of environmental legislation, is vital to the health of our environment and our country's economic prosperity.

Soon after taking office in 2015, the Government of Canada set about updating and modernizing the *Fisheries Act*. To help make it even stronger, we looked at ways we could:

- restore lost protections and incorporate modern safeguards;
- provide increased certainty for industry;
- ensure the long-term sustainability of our marine resources; and
- provide strong and meaningful protection for our fish and waters.

To help inform this work we asked Canadians to share their ideas about how we could update and modernize the Act. We heard from thousands of people from all walks of life who asked for strong, fair and clear legislation that protects Canada's incredible wealth of water and the delicate web of marine life within it.

On June 21, 2019, Bill C-68 received Royal Assent and became law. On August 28<sup>th</sup>, 2019, the fish and fish habitat protection provisions came into effect. As Minister, I believe the *Fisheries Act* is now a forward-looking piece of environmental legislation that addresses modern opportunities and challenges.

For example, changes to the Act will help:

- restore protections for fish and fish habitat;
- enhance marine protection and habitat restoration;
- provide clarity around project development and help reduce the regulatory burden on industry; and,
- strengthen the role of Indigenous peoples in project reviews, monitoring, and policy development while also promoting the recognition of rights, respect, co-operation and partnership.

As Canadians, it's our collective responsibility to steward our environment with care and in ways that are practical, reasonable and sustainable. I believe that a modernized and strengthened *Fisheries Act* strikes this important balance by safeguarding

environmental protections for fish and fish habitat while also ensuring mechanisms are in place for sustainable economic growth, job creation and resource development.

Sincerely,

The Honourable Jonathan Wilkinson, P.C., M.P.  
Minister of Fisheries, Oceans and the Canadian Coast Guard

## **2.0 Disclaimer**

The Fish and Fish Habitat 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.

## **3.0 Approval Authority, Effective Date and Review Date**

The Fish and Fish Habitat Protection Policy Statement was approved by the Minister of Fisheries, Oceans and the Canadian Coast Guard and it is effective as of August 28 2019. The statement will be reviewed at least every 5 years.

## **4.0 Application**

The Fish and Fish Habitat Protection Policy Statement was developed by the Department of Fisheries and Oceans (the Department) to explain the fish and fish habitat protection provisions of the *Fisheries Act* and to outline how the Department will implement these provisions. In particular, the statement sets out how the Department interprets and will apply the regulatory and non-regulatory tools available to support the effective and efficient conservation and protection of fish and fish habitat.

The Fish and Fish Habitat Protection Policy Statement will be used by officials of the Department and the Department's regulatory partners when administering the fish and fish habitat protection provisions of the *Fisheries Act* and other applicable laws and regulations (such as the *Aquatic Invasive Species Regulations*, regulations respecting

aquaculture, and the relevant provisions of the *Species at Risk Act* and the *Oceans Act*).

The Policy Statement applies to proponents of existing or proposed works, undertakings or activities that may result in harmful impacts on fish or fish habitat, specifically the death of fish by means other than by fishing or the harmful alteration, disruption or destruction of fish habitat.

## 5.0 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 focus on the protection of fish and fish habitats that were a part of, or supported commercial, recreational or Indigenous fisheries, and to streamline the regulatory process. In 2019, changes were made to the *Fisheries Act* to provide a framework for the conservation and protection of fish and fish habitat by:

- ensuring protection for fish and fish habitat and incorporating tools to accomplish this;
- providing certainty for industry, stakeholders, and Indigenous groups; and,
- promoting the long-term sustainability of aquatic resources.

### 5.1 Importance of Fish and Fish Habitat

Fish have long had economic, environmental, cultural and spiritual value to Canadians. Indigenous peoples have been fishing for many generations in Canada's oceans, along the coasts, in lakes, and in rivers. Commercial and recreational fisheries generate billions of dollars every year for the Canadian economy. Importantly, the productivity of a fishery is inextricably linked to the health of the habitat in which fish reside. Fish need suitable places to live, feed, and reproduce. They also need unobstructed corridors to migrate between these places. Without productive habitat, it is recognized that species run the risk of becoming extirpated or extinct. Canada's water bodies, including coastal and marine areas, lakes, ponds, rivers, streams, and wetlands, and riparian areas provide important habitat for fish.

## 5.2 Threats to Fish and Fish Habitat

Fish and fish habitat in Canada are threatened by multiple and interrelated factors, including:

- **habitat degradation**, which may occur as a result of the removal or change of important habitat components, blocking fish passage, infilling of lakes, streams or wetlands to create dry land, or other activities in freshwater or marine environments that impair their ecological functions;
- **habitat modification**, which may alter habitat characteristics (such as flow), negatively affect spawning or rearing, or cause the death of fish, and which may be caused by dams or other impoundments, water diversion, stream crossings or water extraction for municipal, industrial or other uses;
- **aquatic invasive species**, which may threaten fish through competition, predation or habitat impacts;
- **overexploitation of fish**, which may lead to depleted or unsustainable populations;
- **pollution** of many kinds, which may adversely affect water quality and fish health; and,
- **climate change**, which is causing water temperatures to increase and is bringing changes to the geographical distribution of some species, rainfall patterns, water levels, flows, water chemistry, and temperature, that are important to support the characteristics and proper ecological function of fish habitat.

These threats can accumulate and have unforeseen or unpredictable consequences for fish and fish habitat. While many of these threats are beyond the control of any single regulatory body or individual, their harmful impacts should be managed collectively to conserve and protect fish and fish habitat.

The Department conserves and protects fish and fish habitat by applying the fish and fish habitat protection provisions of the *Fisheries Act*, in combination with the relevant provisions of the *Species at Risk Act* and the *Aquatic Invasive Species Regulations* to regulate works, undertakings or activities that could result in harmful impacts to fish and fish habitat. The Department can authorize harmful impacts to fish and fish habitat and has the authority to manage or control obstructions.



### 5.3 Conservation and Protection of Fish and Fish Habitat

The *Fisheries Act* and the *Species at Risk Act* provide a legal basis for conserving and protecting fish and fish habitat. The fish and fish habitat protection provisions of the *Fisheries Act* provide a holistic approach to conserving and protecting fish and fish habitat, supported by policies and programs that provide for the long-term sustainability of freshwater and marine resources.

The fish and fish habitat protection provisions of the *Fisheries Act* include:

- a prohibition against causing the death of fish, by means other than fishing (section 34.4);
- a prohibition against causing the harmful alteration, disruption or destruction of fish habitat (section 35);
- a framework of considerations to guide the Minister's decision-making functions (section 34.1); and,
- ministerial powers to ensure the free passage of fish or the protection of fish or fish habitat with respect to existing obstructions (section 34.3).

When applying these provisions, the Department will employ a risk-based approach to determine the likelihood and severity of potential impacts to fish and fish habitat that could result from a given work, undertaking or activity.

## **6.0 Roles and Responsibilities: Protecting Fish and Fish Habitat is a Shared Responsibility**

Canada's fish and fish habitat are a shared resource that provides social, economic and ecological benefits - but they are also finite and vulnerable. They must therefore be conserved and protected to maintain these benefits for present and future generations. Many partners and stakeholders, including federal departments, provincial and territorial governments, Indigenous peoples, recreational fishing groups, conservation organizations and industry groups share a common interest in the conservation and protection of fish and fish habitat. The conservation and protection of fish and fish habitat may best be achieved when these partners and stakeholders work together to conserve and protect fish and fish habitat.

## 6.1 Proponents

Works, undertakings, or activities taking place in or near water may harmfully impact fish or fish habitat. Proponents of these activities should:

- understand the types of harmful impacts their works, undertakings, or activities are likely to cause;
- take measures to avoid harmful impacts, including following relevant standards, codes of practice, or regulations; and,
- request an exception to the section 34.4 and 35 prohibitions from the Minister when it is not possible to avoid harmful impacts to fish and fish habitat, and abide by the conditions of any such exception. In most cases, this exception would be in the form of Ministerial authorizations granted to proponents under the [\*Authorizations Concerning Fish and Fish Habitat Protection Regulations\*](#).

Furthermore, proponents are required to ensure that their actions conform to all other statutory requirements, such as federal, provincial, territorial or Indigenous legislation.

## 6.2 Federal Government

As articulated in section 2.1 of the *Fisheries Act*, the purpose of the Act is to provide a framework for the proper management and control of fisheries and the conservation and protection of fish and fish habitat, including by preventing pollution.

The Department has obligations, among other matters, related to:

- the fish and fish habitat protection provisions of the *Fisheries Act*;
- the *Species at Risk Act* with respect to listed aquatic species (except for those located in or on federal lands administered by the Parks Canada Agency);
- the *Aquatic Invasive Species Regulations*;
- regulations respecting aquaculture;
- the *Oceans Act*; and,

- impact or environmental assessment processes specified under federal impact assessment legislation.<sup>1</sup>

The pollution prevention provisions of the *Fisheries Act* are a shared responsibility with the Minister of Environment and Climate Change. Through a 2014 [Designation Order](#), the Minister of Environment and Climate Change was designated as responsible for the administration and enforcement of the pollution prevention provisions of the Act except in relation to aquaculture facilities, the control and eradication of aquatic invasive species, and aquatic species that constitute a pest to the fisheries.

### 6.3 Provinces and Territories

While management of inland fisheries has largely been delegated to the provinces and the Yukon Territory, the administration of the fish and fish habitat protection provisions remains with the federal government across Canada. However, provincial and territorial authorities share a range of natural resource conservation responsibilities and 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, quantity and function of fish habitat in a given watershed.

[Arrangements](#) between the Department and other federal, provincial and territorial authorities offer effective mechanisms to collaborate on the conservation and protection of fish and fish habitat.

### 6.4 Indigenous Peoples

The Government of Canada is committed to a renewed, nation-to-nation, Inuit-Crown and government-to-government relationship based upon the recognition of rights, respect, cooperation and partnership. To support this commitment, the *Fisheries Act* includes the:

- Requirement for the Minister to consider the adverse effects that decisions made under the Act may have on the rights of the Indigenous peoples of

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<sup>1</sup> See *Canadian Environmental Assessment Act, 2012, Impact Assessment Act, Yukon Environmental and Socio-economic Assessment Act, Mackenzie Valley Resource Management Act, Nunavut Planning and Project Assessment Act*, as well as some land claims agreements that may be in place.

Canada recognized and affirmed by section 35 of the *Constitution Act, 1982* (Section 2.4 of the *Fisheries Act*);

- Requirement for the Minister to consider, when making certain decisions related to the fish and fish habitat protection (and pollution prevention) provisions of the Act, the Indigenous knowledge of the Indigenous peoples of Canada that has been provided to the Minister (34.1(1) (g) of the *Fisheries Act*); and,
- Requirement to protect the confidentiality of Indigenous knowledge that is provided to the Minister in confidence, except under limited circumstances (subsection 61.2 (1) of the *Fisheries Act*).

Furthermore, the *Fisheries Act* includes provisions for the Minister to delegate his or her authority to an Indigenous governing body and to enter into agreements with Indigenous governing bodies to further the purposes of the *Fisheries Act* (section 4.1).

## 7.0 Statement

### 7.1 Purpose

The purpose of the Fish and Fish Habitat Protection Policy Statement is to:

1. set out how the Department and its regulatory partners will interpret and administer the fish and fish habitat protection provisions of the *Fisheries Act* and guide the development of regulations, standards, and codes of practice; and,
2. provide guidance to proponents on the application of the fish and fish habitat protection provisions of the *Fisheries Act*.

### 7.2 Goal

The goal of the department in applying this Fish and Fish Habitat Protection Policy Statement is to provide a framework for the conservation and protection of fish and fish habitat.

### 7.3 Objectives

Through the Fish and Fish Habitat Protection Policy Statement, the Department's objective is to provide consistent national guidance through regulations, standards and codes of practice, and to make regulatory decisions in a timely manner. In this way, proponents will have the necessary information to comply with the fish and fish habitat protection provisions of the *Fisheries Act*.

### 7.4 Principles

In the application of the fish and fish habitat protection provisions of the *Fisheries Act*, the Department will be guided by the following principles:

- **Avoid Harm to Fish and Fish Habitat:** Whenever possible, the Department's preference is to conserve and protect fish and fish habitat by avoiding harmful impacts to fish and fish habitat. Proponents are responsible for avoiding the harmful impacts resulting from their works, undertakings, or activities.
- **Promote sound decision-making:** The Department will be informed by the best available science, technical information and Indigenous knowledge when making decisions. The Department will also be guided by the application of a precautionary approach<sup>2</sup> and a risk-based approach to decision-making.
- **Enable Best-Placed Delivery:** Proponents are responsible for addressing the harmful impacts of their works, undertakings, or activities on fish and fish habitat. Nevertheless, the Department will be collaborative in the application of the *Fisheries Act* (and other Acts as required) when making decisions. Other regulatory partners, Indigenous peoples, environmental organizations, and industry have the capacity, knowledge and interest in the conservation and protection of fish and fish habitat to support the Department's mandate, priorities and objectives.
- **Consistency:** The Department will apply the fish and fish habitat protection provisions of the *Fisheries Act*, and the relevant provisions of other Acts and

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<sup>2</sup> See the [Sustainable Fisheries Framework](#) for the Department's perspective on the precautionary approach.

regulations, in a manner that is transparent and coherent across Canada and recognizes the diversity of Canada's aquatic bio-regions.

- **Consider the ecosystem context:** The consideration of the state, resiliency, and natural biodiversity of the ecosystem will guide the Department in achieving the objectives of the Fish and Fish Habitat Protection Policy Statement.

## **8.0 Fish and Fish Habitat Protection Provisions of the *Fisheries Act***

The fish and fish habitat protection provisions of the *Fisheries Act* are the authorities for the regulation of works, undertakings or activities that risk harming fish and fish habitat. Specifically, they include the two core prohibitions against persons carrying on works, undertakings or activities that result in the “death of fish by means other than fishing” (hereafter referred to as the death of fish) (subsection 34.4(1)), and the “harmful alteration, disruption or destruction of fish habitat” (subsection 35(1)).

The fish and fish habitat protection provisions are applied in conjunction with other applicable federal laws and regulations related to aquatic ecosystems, including the *Species at Risk Act*, the *Oceans Act*, regulations respecting aquaculture, and the *Aquatic Invasive Species Regulations*.

### **8.1 Scope of Application of the Fish and Fish Habitat Protection Provisions**

The fish and fish habitat protection provisions apply to all fish and fish habitat throughout Canada.

Fish habitat is defined in subsection 2(1) of the *Fisheries Act* to include all waters frequented by fish and any other areas upon which fish depend directly or indirectly to carry out their life processes. The types of areas that can directly or indirectly support life processes include, but are not limited to: spawning grounds and nursery, rearing, food supply and migration areas. The Department will adopt a risk-based approach to the application of the fish and fish habitat protection provisions subject to the sensitivity of the fish and fish habitat in question.

## 8.2 *Death of Fish* (section 34.4) - Interpretation

The prohibition in subsection 34.4(1) states that:

*34.4 (1) No person shall carry on any work, undertaking or activity, other than fishing, that results in the death of fish.*

Under subsection 34.4(2) a person may carry on such works, undertakings or activities without contravening this prohibition, provided that they are carried on under the authority of one of the exceptions listed in subsection 34.4(2), and in accordance with the requirements of the applicable exception. In most cases, this exception would be Ministerial authorizations granted to proponents in accordance with the *Authorizations Concerning Fish and Fish Habitat Protection Regulations*. This exception is provided for under paragraph 34.4(2)(b), which is described further in Section 8.4 below. The *Fisheries Act* includes a number of other exceptions, some of which have not yet been brought into force, which are described in Section 9 below.

The Department will apply a risk-based approach when evaluating the impacts of works, undertakings or activities on fish. Where death of fish is likely as a result of a work, undertaking or activity, the Department shall consider the relative contribution of the potentially affected fish and their habitat to the productivity of the relevant fisheries before considering issuing a s.34.4(2)(b) Authorization. In doing so the Department may consider issues such as which species are likely to be affected, at what stage of their life the impacts may occur, and which life-cycle functions may be affected.

## 8.3 *Harmful alteration, disruption or destruction of Fish Habitat* (section 35) - Interpretation

The prohibition in subsection 35(1) states that:

*35. (1) No person shall carry on any work, undertaking or activity that results in harmful alteration, disruption or destruction of fish habitat.*

Under subsection 35(1) a person may carry on such works, undertakings or activities without contravening this prohibition, provided that they are carried on under the authority of one of the exceptions listed in subsection 35(2), and in accordance with the requirements of the appropriate exception. In most cases, this exception would be

Ministerial authorizations granted to proponents in accordance with the *Authorizations Concerning Fish and Fish Habitat Protection Regulations*. This exception is provided for under paragraph 35(2)(b), which is described further in Section 8.4 below. The *Fisheries Act* includes a number of other exceptions, some of which have not yet been brought into force, which are described in Section 9, below.

The Department will apply a risk-based approach when evaluating the impacts of works, undertakings or activities on fish habitat. Following from the definition of fish habitat noted above, the Department interprets “harmful alteration, disruption or destruction” as any temporary or permanent change to fish habitat that directly or indirectly impairs the habitat’s capacity to support one or more life processes of fish.

#### 8.4 Carrying on of Proposed Works, Undertakings and Activities in Accordance with the *Fisheries Act*

Proponents are responsible for planning and implementing works, undertakings or activities in a manner that avoids harmful impacts, specifically the death of fish and the harmful alteration, disruption or destruction of fish habitat.

If proponents believe that their work, undertaking or activity will result in harmful impacts to fish and fish habitat, the Department will work with proponents to assess the risk of their proposed work, undertaking or activity resulting in the death of fish or the harmful alteration, disruption or destruction of fish habitat and provide advice and guidance on how to comply with the *Fisheries Act*.

For instance, proponents can easily access the [Department’s Measures to Protect Fish and Fish Habitat](#) at the [Projects Near Water](#) website to determine how best to plan their work, undertaking or activity in a manner that avoids harmful impacts to fish and fish habitat.

##### **8.4.1 Standards and codes of practice (paragraph 34.2 (1))**

Section 34.2 of the *Fisheries Act* provides authority for the Minister to establish standards and codes of practice for avoiding the death of fish or the harmful alteration, disruption or destruction of fish habitat.

Standards and codes of practice are non-regulatory tools that specify procedures, minimum requirements, the potential harmful impacts to be managed, and the



measures to implement to ensure the protection of fish and fish habitat. If the measures set out in codes of practice or standards are implemented as described, the proponent is not likely to contravene the prohibitions against the death of fish or the harmful alteration, disruption or destruction of fish habitat.

Standards and codes of practice represent best management practices that have been determined to be the most effective and practical means of preventing harmful impacts to fish and fish habitat where there is a good understanding of the impacts to fish and fish habitat resulting from the works, undertakings, or activities being proposed. They may be developed in collaboration with interested provinces and territories, Indigenous peoples, stakeholders, or proponents. They are used by the Department to guide proponents when designing works, undertakings or activities that take place in or near water.

Standards and codes of practice can be found on the [Department's website](#) in published formal guidance, or advertised in the *Canada Gazette*.

#### **8.4.2 Ministerial Authorizations (paragraphs 34.4(2)(b) and 35(2)(b))**

When proponents are unable to avoid the death of fish or the harmful alteration, disruption or destruction of fish habitat, these harmful impacts should be mitigated to the extent possible. If, after the application of avoidance and mitigation measures, the proponent's works, undertakings, or activities will still result in residual harm to fish or fish habitat, they will need to seek an exception under one of the authorities listed, respectively, in subsections 34.4(2) or 35(2) of the *Fisheries Act* in order for the proposed work, undertaking, or activity to proceed without contravening the Act.

In most cases, the Minister will issue authorizations under paragraphs 34.4(2)(b) and/or 35(2)(b) following a site-specific review for works, undertakings, or activities that pose, respectively, a risk of death of fish or the harmful alteration, disruption or destruction of fish habitat. Proponents should consult the [Department's website](#) for details on information requirements and process.

A Ministerial Authorization can act as a [permit](#) issued under the *Species at Risk Act* provided that certain conditions are met. If the work, undertaking or activity is likely to result in an impact prohibited under the *Species at Risk Act*, the Department's regulatory review will consider whether the permitting conditions under the *Species at Risk Act* can be met. If they can be met, the authorization issued will also act as a

permit issued under the *Species at Risk Act*. If the conditions cannot be met, the authorization will be refused.

#### 8.5 The Authority to Amend, Suspend or Cancel a Ministerial Authorization

For authorizations issued under either of paragraphs 34.4(2)(b) or 35(2)(b), the *Fisheries Act* includes provisions for the Minister to amend, suspend or cancel an authorization. These authorities recognize the fact that, on occasion, a work, undertaking, or activity can evolve in unexpected ways, thereby requiring a change in the conditions of an authorization.

Based on this authority, the [Authorizations Concerning Fish and Fish Habitat Protection Regulations](#) allow the Minister to amend, suspend in whole or in part, or cancel the authorization, including those issued in emergency situations. In the instance of an amendment to, or suspension or cancellation of an authorization, the Minister is required to notify the holder in writing and provide the holder with the opportunity to make written representations. Notably, if such a notification were in response to an emergency situation, including preventing the imminent death of fish or harmful alteration, disruption or destruction of fish habitat, the Minister may suspend the authorization without providing the authorization holder an opportunity to make representations.

The circumstances under which the Minister may amend or suspend, in whole or in part, or cancel any authorization include:

- Reasonable grounds to believe that the conditions established by the Minister in the authorization have not been or will not be met;
- Reasonable grounds to believe that the authorization was obtained by fraudulent means, or improper means or through the misrepresentation of material;
- New information has emerged that demonstrates that the death of fish or the harmful alteration, disruption or destruction of fish habitat is or will be significantly greater than anticipated by the Minister at the time of issuance of the authorization; or,
- The authorization holder has not paid a fine imposed on them under the Act.

In addition, a holder of an authorization may request that the authorization be amended or suspended in whole or in part, or be cancelled. The [Authorizations Concerning Fish and Fish Habitat Protection Regulations](#) set out the process, including time limits, for the

Minister to review and issue a decision on a request to amend, suspend or cancel the authorization. The time limits are the same as those for the initial application for authorization. Amendment, suspension or cancellation of an authorization will be assessed with respect to the assessment of the potential impacts on fish and fish habitat, and with respect to potential Crown consultation obligations. An authorization will not be amended, suspended or cancelled by the Minister if the modifications are contrary to applicable laws and policies.

In approving an amended authorization, the Minister would set out the new conditions in the notification to the proponent. For a suspended authorization, the Minister's approval could include the date that the work, undertaking or activity is to resume, or state that the authorization is suspended until the proponent submits a request to reinstate the authorization. In the case of an authorization cancellation, the authorization cannot be re-instated.

#### 8.6 Factors to be Considered (subsection 34.1(1))

Subsection 34.1(1) of the *Fisheries Act* sets out factors that the Minister must consider when exercising his or her authority under the fish and fish habitat protection provisions of the *Fisheries Act*. These authorities include:

- recommending the making of a regulation to the Governor in Council; and
- making decisions related to the fish and fish habitat protection provisions of the *Fisheries Act*, such as:
  - the issuance of authorizations or permits related to the death of fish or the harmful alteration, disruption or destruction of fish habitat;
  - the making of orders respecting obstructions and the passage of fish and flow of water; or,
  - the modification, restriction or closure of works, undertakings, or activities that are resulting in, or are likely to result in an offence under subsection 40(1).

Proponents should keep these factors in mind when designing their works, undertakings or activities and in preparing materials or applications for Departmental review.

The Department interprets the factors as follows:

**(a) the contribution to the productivity of relevant fisheries by the fish or fish habitat that is likely to be affected.**

This factor is concerned with the contribution of the fish and fish habitat affected by the work, undertaking, or activity to the productivity of relevant fisheries. This factor identifies the relevant fisheries and helps focus efforts to conserve and protect the fish and fish habitat. Productivity is the potential sustained yield of all fish populations and their habitats that are part of or support relevant 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.

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 to fish and fish habitat 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 to the productivity of a relevant fishery by the fish or fish habitat affected by the work, undertaking or activity may be undertaken. This analysis will help inform how the project may affect the relevant fisheries management objectives (factor 34.1(1)(b)) and the amount and type of avoidance, mitigation and offsetting measures required (factor 34.1(1)(c)).

**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 that apply to multiple fisheries or fish stocks, or 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 fish and fish habitat 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 should 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 34.1(1)(c)).

**c) whether there are measures and standards**

**(i) to avoid the death of fish or to mitigate the extent of their death or offset their death, or**

**(ii) to avoid, mitigate or offset the harmful alteration, disruption or destruction of fish habitat;**

The concepts of “avoid, mitigate and offset” build a hierarchy that is internationally recognized as a best practice in reducing risks to biodiversity. This hierarchy of measures emphasizes that efforts should be made to first prevent (avoid) the occurrence of harmful impacts. When avoidance is not possible, then efforts should be made to minimize (mitigate) the extent of the death of fish and harmful impacts on fish habitat caused by the proposed work, undertaking, or activity in question. Any residual

harmful impacts should then be addressed by offsetting; offsetting measures typically counterbalance this loss through positive contributions to the aquatic ecosystem.

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

Proponents are required to demonstrate that measures and standards have been fully applied to first avoid, then mitigate, and then finally, offset any residual harmful impacts to fish and fish habitat. Measures to avoid, mitigate and offset, as well as requirements for monitoring and reporting, may be included as conditions of authorization. The Department interprets these measures as follows:

### ***Avoid***

Avoidance is the undertaking of measures to prevent the harmful impacts to fish and fish habitat. Avoidance measures may include the choice of appropriate location and design of a work, undertaking or activity. In some cases, works, undertakings or activities may need to be redesigned to avoid harmful impacts. Careful timing of certain activities may also avoid impacts to fish and fish habitat. For some works, undertakings, or activities, harm may be fully avoided while for others, it may only be partially avoided. When impacts to fish and fish habitat cannot be fully avoided, mitigation measures must be undertaken.

### ***Mitigate***

Mitigation measures reduce the spatial scale, duration, or intensity of harmful impacts to fish and fish habitat when such impacts cannot be avoided. The best available mitigation measures or standards should be implemented by proponents. Mitigation measures include the implementation of best management practices during planning, construction, operation, maintenance, temporary or permanent closures, and decommissioning of a work, undertaking or activity.

### ***Offset***

After efforts have been made to avoid and mitigate harmful impacts to fish and fish habitat, any residual impact must be addressed by offsetting. An offsetting measure is one that counterbalances unavoidable death of fish and harmful alteration, disruption or

destruction of fish habitat resulting from a work, undertaking or activity with the goal of protecting and conserving fish and fish habitat. Offsetting measures should support available fisheries management objectives and local restoration priorities and be conducted in a manner consistent with the department's offsetting policy.

Offsetting measures may 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 should be guided by the restoration priority for degraded fish habitat (outlined in paragraph 34.1(1)(f) and described below), fisheries management objectives and the expected death of fish and harmful impacts to fish habitat. In some instances, the most desirable offsetting measures may be a replacement of the same type of habitat that is affected by the work, undertaking, or activity. 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 work, undertaking or activity being considered for authorization.

**(d) the cumulative effects of the carrying on of the work, undertaking or activity in combination with other works, undertakings or activities that have been or are being carried on, on fish and fish habitat;**

The Department defines cumulative effects as:

- any cumulative harmful impacts on fish and fish habitat that are likely to result from the work, undertaking or activity in combination with other works, undertakings, or activities that have been or are being carried out.

The consideration of cumulative effects provides a better understanding of the challenges to the aquatic ecosystem outside of the context of the reviews of specific works, undertakings, or activities. The Department is responsible for collecting the information needed to consider the cumulative effects of a proposed work, undertaking or activity.

**(e) any fish habitat banks, as defined in section 42.01, that may be affected;**

The Department considers whether the harmful impacts of a work, undertaking or activity being proposed will affect any existing fish habitat banks, as defined in section 42.01 of the *Fisheries Act*. The objective of considering fish habitat banks is to ensure that proponents of existing habitat banks are protected from harmful impacts of new works, undertakings or activities and proponents of existing habitat banks are able to discharge their certified credits accordingly. The Department is responsible for

communicating to the proponents of proposed works, undertakings or activities, information concerning existing habitat banks that may be affected by their proposals.

**(f) whether any measures and standards to offset the harmful alteration, disruption or destruction of fish habitat give priority to the restoration of degraded fish habitat;**

The Department prefers to enhance previously degraded habitat over undertaking restoration projects in pristine habitat. Accordingly, in considering this factor, the Minister intends to give priority to measures that restore degraded habitat when considering offsetting measures proposed in the proponent's offsetting plan. The Department will use the offsetting plan provided by the proponent when considering this factor.

**(g) Indigenous knowledge of the Indigenous peoples of Canada that has been provided to the Minister;**

The Minister must consider the Indigenous knowledge of the Indigenous peoples of Canada that has been provided to the Department prior to making recommendations or exercising any decision making powers for those provisions of the *Fisheries Act* identified in subsection 34.1(1).

For example, during the review of applications for Ministerial authorizations, the Department will consider Indigenous knowledge that has been provided by Indigenous groups and communities to inform the decision-making process. When available, the Department will abide by community protocols on Indigenous knowledge throughout the process, including receiving Indigenous knowledge and communicating how it was considered in decision making. The Department will consider relevant Indigenous knowledge, alongside all other factors enumerated under the Act. The Department will work closely with the knowledge provider (and/or appointed representative) to develop protocols and procedures for handling Indigenous knowledge that are acceptable to them and their community.

**(h) any other factor that the Minister considers relevant.**

This factor allows the Minister to consider other elements that the Minister considers relevant.



## 8.7 Review and Decision-making Process

Proponents are encouraged to use standard guidance on the Department's website, or seek expert advice from a qualified environmental professional to determine whether their proposed work, undertaking, or activity has the potential to cause impacts to fish and fish habitat. Where impacts are likely, a request for review form should be submitted to determine whether a *Fisheries Act* authorization is required. A Ministerial authorization under paragraphs 34.4(2)(b) or 35 (2)(b) of the *Fisheries Act* may be required if, respectively, the death of fish or the harmful alteration, disruption or destruction of fish habitat cannot be avoided or mitigated. In the case of project reviews completed under relevant environmental legislation, including the *Impact Assessment Act*, Ministerial authorizations under the *Fisheries Act* will not be issued until processes are complete. When assessing a work, undertaking or activity likely to result in harmful impacts to fish and fish habitat, the Department will employ a nationally consistent, risk-based decision making process with respect to the review of proposals.

Clear guidance on work, undertaking or activity notification, considerations for project design, information requirements and application processes can be found on the [Projects Near Water](#) website. When considering an application for authorization, the Department will require information such as:

- A detailed description of the proposed work, undertaking or activity, including its purpose, construction methods and associated infrastructure;
- Geographic location and presence of important ecosystem features;
- A description and the results of any consultations regarding the proposed work, undertaking or activity, with Indigenous communities or groups, and the public;
- A detailed description of the fish and fish habitat found at the location and within the area of the proposed work, undertaking or activity;
- A detailed description of the likely effects of the work, undertaking or activity on fish and fish habitat;
- A detailed description of the measures and standards, monitoring measures, and contingency measures to be implemented;
- A quantitative and detailed description of the death of fish and the harmful alteration, disruption, or destruction of fish habitat after measures and standards are implemented;

- The number of habitat credits plans to use to offset the death of fish and the harmful alteration, disruption or destruction of fish habitat;
- A detailed description of a plan of offset the death of fish and the harmful alteration, disruption or destruction of fish habitat.
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The *Applicant's Guide Supporting the Authorizations Concerning Fish and Fish Habitat Protection Regulations* contains the complete list of information requirements and the conditions under which they are required.

## **9.0 Additional Exceptions under Subsections 34.4(2) and 35(2) of the *Fisheries Act***

In addition to the issuance of Ministerial authorizations under paragraph 34.4(2)(b) or 35(2)(b) of the *Fisheries Act*, subsections 34.4(2) and 35(2) of the *Act* include other exceptions that provide authorities for a person to carry on a work, undertaking, or activity without contravention of the prohibitions against the death of fish or the harmful alteration, disruption or destruction of fish habitat.

These additional exceptions include:<sup>3</sup>

### **9.1 Prescribed Works and Waters Regulations (paragraphs 34.4(2)(a) and 35(2)(a))**

Under the *Fisheries Act*, the Minister or the Governor in Council has the authority to make regulations under paragraph 34.4(2)(a) or 35(2)(a), respectively, in relation to the prohibitions against the death of fish and the harmful alteration, disruption or destruction of fish habitat.

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<sup>3</sup> Other paragraphs of subsections 34.4(2) or 35(2) provide authority for the carrying on of works, undertakings or activities such that they do not contravene the prohibitions, respectively, against the death of fish by means other than fishing, or the harmful alteration, disruption or destruction of fish habitat. Paragraph (c) provides for the authority to authorize to be given to other prescribed persons or entities; paragraph (d) provides for those circumstances where the death of fish or the harmful alteration, disruption or destruction of fish habitat is otherwise authorized, permitted or required under the *Fisheries Act*, and paragraph (g) provides for authorization by way of other *Fisheries Act* regulations.

These regulations could prescribe, or identify, works, undertakings, activities or classes thereof, that would not be subject to the prohibitions or prescribe Canadian waters where the prohibitions would not apply.

Proponents who were to carry on these prescribed works, undertakings or activities, or carry them on in prescribed waters, and who were to do so in a manner that is in accordance with the conditions set out in regulation, could do so without contravening the subsection 34.4(1) or subsection 35(1) prohibitions. Works, undertakings or activities to which such regulations would apply, would not require a 'site-specific review' by the Department. Further details are available in the Department's [Forward Regulatory Plan](#). If such regulations are made, the proponents of works, undertakings or activities that are prescribed in the regulations would benefit from clear guidance from the Department and would avoid the process associated with a site-specific review.

#### 9.2 Designated Projects Regulations and Permits (paragraphs 34.4(2)(f) and 35(2)(f))

Section 35.1 is an enabling provision that provides for establishing a special class of works, undertakings or activities that are likely to result in the death of fish or the harmful alteration, disruption or destruction of fish habitat. The Department's intention is to support proponents of large scale projects by providing clarity as to the role of the Department in relation to the prohibitions. Proponents whose proposed works, undertakings or activities belong to this class would require a permit under subsection 35.1(3). Failure to have a permit would be an offence under the Act.

Paragraphs 34.4(2)(f) and 35(2)(f) provide that persons who have such a permit and carry on their work, undertaking or activity in accordance with the conditions of the permit may do so without contravening the prohibitions against the death of fish or the harmful alteration, disruption or destruction of fish habitat. These permits would be issued in lieu of Ministerial authorizations under either paragraph 34.4(2)(b) or paragraph 35(2)(b).

For the purposes of defining a designated project in subsection 34(1) of the *Fisheries Act*, the Governor-in-Council may make regulations designating projects or classes of projects that will be captured under this regime. This may include those types of projects that are subject to a federal impact assessment (see subsection 43(4)). Under subsection 35.1(2) the Minister will make the final determinations about which works, undertakings or activities of the designated project are likely to result in the death of fish

or the harmful alteration, disruption or destruction of fish habitat, and it is these for which the Minister may issue a permit. If the designated projects regime regulations are established, proponents of those projects subject to the designated projects provisions would benefit from greater certainty and timeliness with respect to the Department's requirements for the review and permitting of the works, undertakings or activities of such projects.

### 9.3 Ecologically Significant Areas (paragraphs 34.4(2)(g) and 35(2)(g))

Section 35.2 is an enabling provision that sets out the statutory authority to establish an ecologically significant area and to administer various classes of works, undertakings or activities proposed to be carried on within that area in respect of the death of fish and the harmful alteration, disruption or destruction of fish habitat prohibitions. These areas would be established to manage fish and fish habitat that is sensitive, highly productive, rare or unique in accordance with management objectives established for their conservation and protection.

Subsection 35.2(2) of the *Fisheries Act* provides the Governor in Council authority to make regulations to: designate areas of fish and fish habitat as ecologically significant areas; set out management objectives for the conservation and protection of fish and fish habitat within these areas; and, prescribe the classes or types of works, undertakings and activities that will always require a review by the Minister. These works, undertakings and activities will be assessed against the conservation and protection objectives for the area. If the Minister is satisfied that proposed avoidance and mitigation measures can be implemented so as to achieve the objectives, the Minister may authorize the work, undertaking or activity. There is also authority to establish in regulations, classes of works, undertakings or activities that the Minister shall not authorize within an area under paragraphs 34.4(2)(b) and 35(2)(b).

Works, undertakings or activities that are proposed to be carried out within an ecologically significant area and which are not prescribed, or prohibited, would remain subject to the standard prohibitions against the death of fish and the harmful alteration, disruption or destruction of fish habitat. In order to proceed, a Ministerial authorization would be required.

## 10.0 Interpretation of Other Fish and Fish Habitat Protection Provisions

### 10.1 Obstructions - fish passage and water flows (section 34.3)

Management or control of existing obstructions that are detrimental to fish or fish habitat is described in section 34.3 of the *Fisheries Act*.

In summary, if the Minister deems it necessary to ensure the free passage of fish or the protection of fish or fish habitat, this provision:

- provides the Minister with authority to require the owner or person who has the charge, of the obstruction to carry out studies and evaluations related to obstructions or other things that may be detrimental to fish or fish habitat (subsection 34.3(1));
- provides the Minister with authority to order the owner or operator of an obstruction to: remove obstructions to fish passage; construct a fishway; implementing a system of catching fish before an obstruction and transporting and releasing them beyond it; install fish stops or diverters, guards or screens; maintain water flow necessary to permit the free passage of fish, or provide water flows downstream of an obstruction sufficient for the conservation and protection of fish and fish habitat, and to maintain such things as required (subsections 34.3(2) and (3)); and,
- provides for the Minister to make regulations respecting the flow of water necessary to be maintained to ensure the free passage of fish or the protection of fish and fish habitat (subsection 34.3(7)).

In addition, with respect to ensuring the free passage of fish, provisions in subsection 34.3(4) prohibit a person from damaging or obstructing fishways,<sup>4</sup> stops or diverters, or stopping or otherwise hindering fish from entering a fishway, or damaging or removing any fish guard, screen or netting installed on the Minister's order, or fishing near the lower entrance to a fishway, obstruction or leap.

Before issuing orders under subsections 34.3(2) or (3), or making regulations under subsection 34.3(7), the Minister is required to take into consideration the factors set out in section 34.1.

Existing or proposed works, undertakings or activities that have the potential to obstruct fish passage, modify flow or result in the entrainment of fish may result in harmful impacts to fish or fish habitat. In these situations, the Department's approach is to regulate these impacts to fish and fish habitat, respectively, under sections 34.4 and 35, and if appropriate, to provide for the carrying on of these works, undertakings or activities under the exceptions identified in subsections 34.4(2) or 35(2).

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<sup>4</sup> A fishway means any device, work or other things that provides for the free passage of fish.

For example, when a Ministerial authorization is issued (i.e., under paragraphs 34.4(2)(b) or 35(2)(b)) the conditions of the authorization could include measures to provide for fish passage around the obstruction, to identify the water flow requirements necessary to permit the free passage of fish downstream of the obstruction, or to require fish-guards or screens over water intakes.

#### 10.2 Additional powers of the Minister (section 37)

Section 37 of the *Fisheries Act* provides the Minister with the authority to require that proponents of active or proposed works, undertakings or activities that are likely to result in the death of fish or the harmful alteration, disruption or destruction of fish habitat, provide the Minister with any documents or information that will allow the Minister to determine whether there is likely to be an offence under subsection 40(1). This information would identify what measures, if any, would prevent the death of fish or mitigate the extent of their death, or prevent or mitigate the effects of harmful alteration, disruption or destruction of fish habitat. The Minister may make orders to modify or restrict the carrying on of the work, undertaking or activity, or direct the closing of the work or undertaking or the ending of the activity that the Minister considers necessary.

Before issuing orders under subsection 37(2) the Minister is required to take into consideration the factors set out in section 34.1.

Section 37 also applies to the deposit of deleterious substances under the pollution prevention provisions of the *Fisheries Act*.

#### 10.3 Duty to Notify (section 38)

Section 38 of the *Fisheries Act* sets out a series of obligations for persons responsible for works, undertakings, or activities that lead to occurrences which result in the death of fish or the harmful alteration, disruption or destruction of fish habitat. There is a duty to notify an inspector, a fishery officer, a fishery guardian or other person prescribed by regulations when the death of fish or the harmful alteration, disruption or destruction of fish habitat occurs that is not authorized under the Act, or when there is a serious and imminent danger of such an occurrence.

Moreover, section 38 imposes duties upon persons responsible for such works, undertakings or activities to take corrective measures and to provide written reports when there are such occurrences. 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 conserve and protect fish and fish habitat when the death of fish or the harmful alteration, disruption or destruction of fish habitat has resulted, or there is an imminent danger of such a result, which has not been authorized.

Section 38 also applies to the deposit of deleterious substances under the pollution prevention provisions of the *Fisheries Act*.

## **11.0 Consequences of Non-Compliance with the Fish and Fish Habitat Protection Provisions**

There are consequences for non-compliance with the prohibitions against carrying on any work, undertaking or activity that results in the death of fish or the harmful alteration, disruption or destruction of fish habitat. Subsection 40(1) of the *Fisheries Act* outlines minimum and maximum penalties with respect to persons who are convicted of carrying on a work, undertaking or activity that results in the death of fish or the harmful alteration, disruption or destruction of fish habitat. Penalties imposed will depend on the class of offender, the type of offence, and whether the offence is a first or subsequent offence. Imprisonment is a possibility for repeat offences.

Subsection 40(3) sets out the penalties for persons convicted of other offences under the fish and fish habitat protection provisions. Examples of other offences include, non-compliance with the conditions of an authorization, permit or conditions of regulations under sections 34.4 or 35; failure to obtain a permit for works, undertakings or activities of a designated project under section 35.1; failure to provide information as requested under sections 34.3, 35.2, or 37; and, failure to comply with the condition of a Ministerial order under sections 34.3 or 37, or in relation to requirements under section 38.

Fines collected for convictions under the fish and fish habitat protection provisions are directed into the Environmental Damages Fund to use for purposes related to the conservation and protection of fish and fish habitat or for the restoration of fish habitat.

Additional consequences may be imposed if other Acts of Parliament have been contravened. For example, destruction of critical habitat of an aquatic species at risk



may mean charges being laid under the *Fisheries Act* for destruction of fish habitat as well as under the *Species at Risk Act* for destruction of critical habitat.

## 12.0 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. Further details can be found in the Monitoring Strategy.

## 13.0 For More Information

For more information, please consult the [Projects Near Water](#) website.

## 14.0 Appendix: Overview of Several Regulations-making Authorities Related to the Fish and Fish Habitat Protection Provisions of the *Fisheries Act*.

Applicable Provision and Subject Matter	Regulations Making Authority	Description of Authority
Section 34.3: Obstructions and flows	Ministerial authority is provided in subsection 34.3(7).	The Minister may make regulations respecting the flow of water that is to be maintained to ensure the free passage of fish or the protection of fish or fish habitat.
Section 34.4: Death of fish by means other than fishing; and, Section 35: Harmful Alteration, Disruption or Destruction of Fish Habitat:		
➤ Paragraphs 34.4(2)(a) and 35(2)(a):  Prescribed works, undertakings or activities, or Canadian fisheries waters	Ministerial authority provided in subsections 34.4(4) and 35(4).  Governor in Council authority is provided in paragraph 43(1)(i.1).	The Minister or the Governor in Council may make regulations to prescribe works, undertakings or activities and the conditions according to which they are to be carried on or the waters in which they may be carried on. Works, undertakings or activities carried on in accordance with the regulations would



Applicable Provision and Subject Matter	Regulations Making Authority	Description of Authority
		not contravene the prohibitions under subsection 34.4(1) or 35(1).
<p>➤ Paragraphs 34.4(2)(b) and 35(2)(b):</p> <p>Issuance of Ministerial authorizations</p>	<p>Governor in Council authority is provided in paragraphs 43(1(i.11), (i.2), and (i.4).</p>	<p>The Governor in Council may make regulations respecting the process for the issuance of paragraph 34.4(2)(b) or 35(2)(b) <i>Fisheries Act</i> authorizations. These authorities were used in the development of the <i>Authorizations Concerning Fish and Fish Habitat Protection Regulations</i>, which sets out the information that an applicant must include in an application for authorization, as well as the process and time limits the Minister must follow for processing the application.</p>
<p>➤ Paragraphs 34.4(2)(b) and 35(2)(b):</p> <p>Amending, suspending or cancelling Ministerial authorizations.</p>	<p>Governor in Council authority is provided in paragraphs 43(1(i.6) and (i.8).</p>	<p>Based on the Minister's authority to amend, suspend or cancel an authorization established in subsection 34.4(5) and 35(5), the Governor in Council may make regulations respecting the time, manner and circumstances in which the Minister may amend, suspend or cancel an authorization and the process by which a person may apply to amend, suspend or cancel its authorization. These authorities were used in the development of the <i>Authorizations Concerning Fish and Fish Habitat Protection Regulations (2019)</i>.</p>
<p>➤ Paragraphs 34.4(2)(c) and 35(2)(c):</p> <p>Issuance of authorizations by prescribed person or entities</p>	<p>Governor in Council authority is provided in paragraphs 43(1(i.21), (i.3) and (i.31).</p>	<p>The Governor in Council may make regulations prescribing other persons or entities with the authority to issue <i>Fisheries Act</i> authorizations under paragraphs 34.4(2)(c) and 35(2)(c), and to set out the conditions and requirements respecting the granting of an authorization. As with Ministerial authorizations under paragraphs 34.4(2)(b) or 35(2)(b) the</p>

Applicable Provision and Subject Matter	Regulations Making Authority	Description of Authority
		Governor in Council may make regulations respecting the application for and issuance of an authorization as well as with respect to amending, suspending or cancelling such authorizations.
Section 35.1: Designated Projects	Governor in Council authority is provided in paragraph 43(1)(i.5) and in subsection 43(4).	<p>The Governor in Council may make regulations designating certain projects or classes of projects that may affect fish or fish habitat, and may include as a criterion for designation the fact that the project may be subject to a federal impact assessment.</p> <p>Any work, undertaking or activity that is likely to result in the death of fish or the harmful alteration, disruption or destruction of fish habitat requires a permit from the Minister in order to be carried on without contravention of the prohibition in subsection 35.1(4), and if carried on in accordance with the permit's conditions will, as provided for under paragraphs 34.4(2)(f) and 35(2)(f), not contravene the prohibitions in subsections 34.4(1) and 35(1).</p> <p>As with Ministerial authorizations under paragraphs 34.4(2)(b) or 35(2)(b) the Governor in Council has authority to make regulations respecting the application for and issuance of a permit as well as with respect to amending, suspending or cancelling such permits.</p>
Section 35.2: Ecologically Significant Areas	Governor in Council authority to Designate Ecologically Significant areas is provided in subsection 35.2(2).	Governor in Council may, by regulations designate ecologically significant areas and prescribe works, undertakings or activities within these areas, that require Ministerial authorization under subsection 35.2(7) prior to their carrying on. If carried on in accordance with the authorization's

Applicable Provision and Subject Matter	Regulations Making Authority	Description of Authority
	<p>Governor in Council authority to regulate activities within ecologically significant areas is provided in paragraphs 35.2(10)(a) to (g).</p>	<p>conditions the person will, as provided for under paragraphs 34.4(2)(g) and 35(2)(g), not contravene the prohibitions in subsections 34.4(1) and 35(1).                      The Governor in Council may under subsection 35.2(10) make regulations respecting the application for and issuance of an authorization for prescribed works, undertakings or activities, as well as with respect to amending, suspending or cancelling such authorizations.</p>
<p>Section 37:                      Minister may require plans and specifications, and modify, restrict or close works, undertakings or activities.</p>	<p>Governor in Council authority is provided in paragraphs 37(3)(a) and (b).</p>	<p>The Governor in Council may make regulations prescribing the manner and circumstances in which any information or material shall be provided to the Minister under subsection 37(1) without the Minister having to make a formal request. Regulations may also be made prescribing the manner and circumstances in which the Minister may make an order under subsection 37(2) and its terms.</p>
<p>Section 38:                      Duty to Notify and Take Corrective Measures</p>	<p>Governor in Council authority is provided in paragraphs 38(9)(a) to (e).</p>	<p>The Governor in Council may make regulations necessary for, or incidental to, carrying out the purposes and provisions of Section 38.</p>
<p>Sections 42.01 to 42.03:                      Fish Habitat Banking</p>	<p>Governor in Council authority is provided in paragraphs 42.04(a) to (c).</p>	<p>The Governor in Council may make regulations respecting the establishment of a system for the creation, allocation, and management of habitat credits; the issuance of a certificate of validity of any habitat credit; and arrangements with any proponent.</p>

Applicable Provision and Subject Matter	Regulations Making Authority	Description of Authority
Sections 34.3, 34.4, 35, and subsections 38(4) and (4.1):  Exemption of Waters	Governor in Council authority is provided in subsection 43(5).	The Governor in Council may make regulations exempting any Canadian fisheries waters from the application of sections 34.3, 34.4 and 35 and subsections 38(4) and (4.1).

