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Position Statement on the Consideration of Cumulative Effects in Support of Decision Making on *Fisheries Act* Authorizations Concerning Fish and Fish Habitat Protection

March 2025

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Authorizations Concerning Fish and Fish Habitat Protection

Published by:

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200 Kent St
Ottawa, ON K1A 0E6

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Protection

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Cat. No. Fs23-766/2025E-PDF ISBN 978-0-660-76096-4

Fisheries and Oceans Canada. 2025. Position Statement on the Consideration of
Cumulative Effects in Support of Decision Making on *Fisheries Act* Authorizations
Concerning Fish and Fish Habitat Protection. 12 p.

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Executive summary

Fisheries and Oceans Canada's (DFO) Fish and Fish Habitat Protection Program (FFHPP) 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 projects¹ in or near water that could result in harmful impacts to fish and fish habitat. FFHPP administers the prohibitions in the *Fisheries Act* against the carrying on of a project that results in the death of fish by means other than fishing, and the harmful alteration, disruption or destruction of fish habitat.

FFHPP determines how to manage the impacts of the proposed project on fish and fish habitat, and may recommend the issuance of a *Fisheries Act* authorization² that would allow the project to proceed in compliance with the Act, where appropriate.

To inform decision making, [subsection 34.1\(1\)](#) of the *Fisheries Act* sets out a series of factors which the Minister of Fisheries and Oceans (the Minister) must consider when exercising their authority under some of the fish and fish habitat protection provisions of the *Fisheries Act*.

One factor set out in [paragraph 34.1\(1\)\(d\)](#) is the requirement to consider cumulative effects on fish and fish habitat. More specifically, the Minister is required to consider the cumulative effects of a proposed project, in combination with past or ongoing projects, prior to making a decision under the fish and fish habitat protection provisions of the Act (for example, prior to a *Fisheries Act* authorization decision). As well, cumulative effects of the proposed project on fish and fish habitat are likely to also translate into cumulative effects on Indigenous rights thus informing the scope of the Crown's duty to consult with Indigenous Peoples. [Section 2.4](#) of the *Fisheries Act* also requires that, when making any decision under the Act, the Minister must consider any adverse effects on the rights of Indigenous Peoples.

This Position Statement on the Consideration of Cumulative Effects in Support of Decision Making on *Fisheries Act* Authorizations Concerning Fish and Fish Habitat Protection (Position Statement) explains how FFHPP considers cumulative effects on fish and fish habitat prior to making a decision to issue or refuse a *Fisheries Act* authorization related to the death of fish and the harmful alteration, disruption or destruction of fish habitat. This position statement outlines an approach that will be taken by FFHPP to ensure that cumulative effects on fish and fish habitat are considered consistently and transparently.

1 The *Fisheries Act* refers to 'works, undertakings or activities'. For the purpose of this document 'projects' will be used.

2 Pursuant to paragraphs 34.4(2)(b) and/or 35(2)(b) of the *Fisheries Act*. Hereinafter 'Fisheries Act authorization' will be used.

Context

FFHPP is responsible for fulfilling the legal obligation to consider cumulative effects on fish and fish habitat, including when making decisions on whether or not to issue *Fisheries Act* authorizations for works, undertakings or activities in or near water. In accordance with the [Fish and Fish Habitat Protection Policy Statement](#), the consideration of cumulative effects will employ a risk-based approach to determine the severity of potential impacts to fish and fish habitat that could result from a given project.

This Position Statement also complements FFHPP's hierarchy of measures for the conservation of fish and fish habitat, as described in the [Policy for Applying Measures to Offset Adverse Effects on Fish and Fish Habitat](#). This means the Position Statement describes FFHPP's approach to considering residual adverse cumulative effects on fish and fish habitat after proposed avoidance, mitigation and offsetting measures are established and prior to a decision being made on whether or not to issue a *Fisheries Act* authorization.

While [subsection 34.1 \(1\)](#) of the *Fisheries Act* is a legislated decision-making framework, there are other tools available to FFHPP related to mitigating cumulative effects on fish and fish habitat. For example, there are non-regulatory approaches such as the use of integrated planning and adaptive management, priority setting for restoration, and funding of restoration activities through transfer payment programs.

FFHPP recognizes that considering cumulative effects on fish and fish habitat can support reconciliation with Indigenous Peoples because it can incorporate Indigenous Knowledge into decision making in a more comprehensive way, provide additional context and further insight into the overall impact on Indigenous Peoples' ability to exercise their rights, support processes to collaborate with Indigenous Peoples on proactive planning for fish and fish habitat, and inform the scope of the Crown's duty to consult.

FFHPP will continue to be responsible for identifying and evaluating information needed to consider the cumulative effects of projects and is committed to consultation with Indigenous Peoples, proactive integrated planning, and engagement with other interested parties. Information on cumulative effects will be used to inform decision making, and will be based on available science and Indigenous Knowledge.

Introduction

Under [paragraph 34.1\(1\)\(d\)](#) of the *Fisheries Act*, the Minister shall consider "the cumulative effects of the carrying on of the work, undertaking or activity referred to in a recommendation or an exercise of power, in combination with other works, undertakings or activities that have been or are being carried on, on fish and fish habitat". Within DFO, FFHPP is responsible for administering the fish and fish habitat protection provisions of the *Fisheries Act*.

FFHPP recognizes the importance of managing cumulative effects, as articulated in the [Fish and Fish Habitat Protection Policy Statement](#), which:

- 1) establishes a clear definition of cumulative effects;

- 2) affirms DFO's responsibility for identifying and considering the necessary information to effectively consider these impacts; and,
- 3) emphasizes that a thorough understanding of cumulative effects offers valuable insights into the broader challenges facing aquatic ecosystems, extending beyond the scope of individual reviews of specific projects.

FFHPP will continue to collect cumulative effects data related to fish and fish habitat, including information on restoration planning areas and the current state of fish populations and habitats. These data are important for informing decision making pertaining to cumulative effects and establishing a solid foundation for project-specific considerations.

FFHPP acknowledges the complexity of identifying, quantifying and managing cumulative effects, which extends beyond the provisions in this Position Statement. As such, FFHPP actively participates in and contributes to whole-of-government efforts to analyze and address cumulative effects comprehensively. More information on these efforts can be found in the [Government of Canada Interim Message on Cumulative Effects](#).

Disclaimer

This Position Statement is intended solely for informational purposes and does not replace the *Fisheries Act* or its associated regulations. In the event of inconsistencies between this Position Statement and the *Fisheries Act* or related regulations, the legislation and regulations shall take precedence. For a summary of key legislative provisions from the *Fisheries Act*, please refer to [Appendix 1](#).

Effective date and review date

This Position Statement came into effect upon final publication. It is intended to evolve over time and will be reviewed periodically as required.

Cumulative effects under the *Fisheries Act*

FFHPP considers how anticipated impacts associated with components of a proposed project might interact with other existing impacts on fish and fish habitat in or near water.

Examples of sources of impacts to fish and fish habitat that may lead to cumulative effects in combination with the effects of a new proposed project include:

- projects requiring authorization under the *Fisheries Act*
- projects in or near water that do not require authorization but are managed by DFO
- projects in or near water regulated under other authorities or by other jurisdictions³

3 In many instances contributing factors to cumulative effects on fish and fish habitat may be activities that occur under the remit of other federal, provincial or municipal authorities. Considering the impacts of these activities may inform an understanding of the state of fish and fish habitat and the sensitivity of habitat in which the Minister is considering making a decision. Where relevant, DFO may consider these activities to better inform an understanding of the cumulative effects on fish and fish habitat within a given ecosystem. DFO may also work with other regulators to help reduce cumulative stressors on fish and fish habitat.

FFHPP may also consider any additional threats to fish and fish habitat⁴ that may be relevant to the consideration of cumulative effects. These threats may be identified through Indigenous Knowledge, local knowledge and scientific information.

Threats to fish and fish habitat may include, but are not limited to: habitat degradation, habitat modification, aquatic invasive species, overexploitation of fish, and pollution. When considering the cumulative effects of a proposed project, FFHPP will also continue to take into account the impacts of climate change, including considering the sensitivity and resilience of fish and fish habitat to a changing climate.

Defining cumulative effects for fish and fish habitat protection

The [Fish and Fish Habitat Protection Policy Statement](#) 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.

Cumulative effects occur where multiple impacts overlap spatially and/or temporally, and when an ecosystem does not have adequate time to recover from past or ongoing impacts. FFHPP recognizes that the following types of cumulative effects can occur, depending on the manner in which effects interact:

- additive effect (total effect of multiple impacts equals the sum of their individual effects)
- synergistic effect (the effect combined is larger than the sum of their individual effects)

Scope of cumulative effects on fish and fish habitat

Along with the other factors listed in [subsection 34.1\(1\)](#) of the *Fisheries Act*, considering cumulative effects is an important component of FFHPP's decision-making process for authorizations under the *Fisheries Act*. FFHPP has a responsibility to ensure that the overall impacts on fish and fish habitat are understood by considering how a proposed project interacts with other projects and threats. This understanding informs the determination of potential cumulative effects and also plays a vital role in promoting sustainable development.

Scoping activities to consider cumulative effects involve:

- identifying the relevant projects
- determining spatial boundaries (the geographic area impacted by the proposed project and other projects or threats affecting fish and fish habitat)
- determining temporal boundaries (the timing, duration and persistence of potential effects on fish and fish habitat from the proposed project, and other projects and threats)
- examining their combined effects

4 The Fish and Fish Habitat Protection Policy Statement, August 2019. Section 5.2: Threats to fish and fish habitat <https://www.dfo-mpo.gc.ca/pnw-ppe/policy-politique-eng.html>

When considering cumulative effects in accordance with FFHPP's [Risk Management Framework Overview](#), FFHPP staff will also take into account habitat sensitivity. Habitat (and fish species) sensitivity is a critical element to consider when assessing whether the risk that the temporary or permanent change to fish habitat resulting from the proposed project is likely to directly or indirectly impair the habitat's capacity to support one or more life processes of fish.

Considering cumulative effects of relevant future projects

According to the *Fisheries Act*, FFHPP's consideration of a proposed project's cumulative effects on fish and fish habitat must account for other past and ongoing projects. In accordance with the Minister's authority under the *Fisheries Act* to consider other relevant factors⁵, FFHPP also typically considers cumulative effects of relevant future projects that are certain or reasonably foreseeable, as outlined below:

Certain: The project will proceed or has a high likelihood of proceeding, such as when the proponent has already obtained the necessary approvals but has not started the project.

Reasonably foreseeable: The project is expected to proceed, for example, when the proponent has submitted complete applications that meet the regulatory requirements for approvals.

Considering the cumulative effects of future projects is similar to the approach taken by the Impact Assessment Agency of Canada as described in the [Policy Framework for Assessing Cumulative Effects under the Impact Assessment Act](#).

New proponents are not responsible for addressing the impacts of other projects, but FFHPP must take into account the cumulative effects of the proposed project and other projects on fish and fish habitat when making decisions on whether or not to issue a *Fisheries Act* authorization. This approach aligns with FFHPP's legislated responsibility under the *Fisheries Act* as well as the risk-based approach described in the [Fish and Fish Habitat Protection Policy Statement](#).

Approach for considering cumulative effects on fish and fish habitat

FFHPP's approach to the consideration of cumulative effects is as follows:

- 1) Identify the temporal and spatial boundaries of fish and fish habitat components that may be affected by the proposed project in relation to other projects and threats.
- 2) Describe the fish and fish habitat found at the location of the proposed project, including any management objectives and threats.
- 3) Consider the combined effects of the proposed project in relation to other projects and threats over the geographical and temporal scale determined in step 1 and determine their impacts on fish and fish habitat.

FFHPP considers the following questions when making conclusions related to the cumulative

⁵ According to paragraph 34.1(1)(h) of the *Fisheries Act*, the Minister shall consider any other factor they consider relevant during the *Fisheries Act* authorization decision making process.

effects of a proposed project:

- Are the fish and fish habitat impacted by the proposed project also impacted by other past, present or relevant future projects? Are there other threats (e.g., habitat degradation, habitat modification, aquatic invasive species, overexploitation of fish, pollution, and/or climate change) likely to impact the fish and fish habitat associated with the proposed project?
- After taking into account the proposed project's contribution towards cumulative effects on fish and fish habitat in the area, do avoidance, mitigation and offsetting measures proposed by the proponent address the project's impacts?
- Will the project's contribution towards cumulative effects on fish and fish habitat be affected by a changing climate? If yes, has this been taken into account in the proposed avoidance, mitigation and offsetting measures?
- Are fisheries management objectives compromised as a result of a proposed project's contribution towards cumulative effects in the area?

FFHPP works to ensure that monitoring activities, where applicable, support the continued consideration of cumulative effects after issuance of a *Fisheries Act* authorization. It is the proponent's responsibility to understand their legal obligations and to comply with all relevant laws and regulations. When death of fish by means other than fishing, and the harmful alteration, disruption or destruction of fish habitat cannot be avoided, a proponent may be required to request a *Fisheries Act* authorization. In all cases, it is the project proponent's responsibility to implement measures to avoid, mitigate or offset impacts to fish and fish habitat. In cases where residual impacts to fish and fish habitat are likely, the proponent is required, through a *Fisheries Act* authorization, to provide monitoring information that will demonstrate whether the management measures that they have undertaken are functioning as planned.

Consideration of Indigenous rights and Indigenous Knowledge in the context of cumulative effects

The Government of Canada is committed to achieving reconciliation with Indigenous Peoples through a renewed nation-to-nation, government-to-government, and Inuit-Crown relationship based on recognition of rights, respect, co-operation and partnership as the foundation for transformative change. To support this commitment, the *Fisheries Act* includes the following requirements:

- 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 ([section 2.4 of the *Fisheries Act*](#)).
- The requirement for the Minister to consider, when making certain decisions related to the fish and fish habitat protection provisions of the Act, the Indigenous Knowledge of Indigenous Peoples that has been provided to the Minister ([paragraph 34.1\(1\)\(g\) of the *Fisheries Act*](#)).

- The 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](#)).

Indigenous Knowledge

FFHPP acknowledges that Indigenous Peoples possess a deep understanding of the land and waters that they have inhabited for generations. They may offer valuable insights into how cumulative effects can impact not only the environment, but also the cultural and spiritual connections that Indigenous Peoples have with aquatic ecosystems.

To effectively consider cumulative effects, FFHPP will continue to engage in collaborative efforts with Indigenous Peoples, including the meaningful consideration of Indigenous Knowledge and adverse impacts on the rights of Indigenous Peoples. This collaboration occurs as part of existing project-specific consultations on *Fisheries Act* authorizations, and as part of FFHPP's proactive engagement and relationship building which may include broader discussions related to cumulative effects, as applicable. FFHPP's efforts will continue to help ensure that decision-making processes are inclusive and reflective of the insights and experiences of Indigenous Peoples.

Consultations on cumulative impacts to the rights of Indigenous Peoples

[Section 35](#) of the *Constitution Act, 1982*, explicitly recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal Peoples of Canada. Cumulative effects on fish and fish habitat can have implications for these rights and the broader interests of Indigenous Peoples.

Cumulative effects on fish and fish habitat can also diminish access to traditional fishing areas, reduce the quality and quantity of culturally important species, and disrupt the intergenerational transmission of knowledge and cultural practices.

The Crown has a legal obligation to consult Indigenous Peoples when contemplating actions that may adversely affect their established or asserted [section 35](#) rights of the Canadian *Constitution Act, 1982*. Increasingly, Indigenous Peoples are raising concerns about the cumulative effects of government decisions and activities, emphasizing the need for rigorous consultation and accommodation to address these impacts.

The common law duty to consult is triggered when the Crown is aware of existing Aboriginal or treaty rights and contemplates actions that may negatively impact those rights. This duty hinges on three interconnected elements:

- anticipated Crown conduct
- the potential or established Aboriginal or treaty right
- the likelihood of adverse effects on that right

Cumulative effects from past decisions do not create a new duty to consult. There must be a

present conduct that has the potential to cause adverse impacts on Aboriginal or treaty rights, unless there is a direct causal link between current conduct and potential adverse impacts. However, the Supreme Court of Canada has acknowledged that cumulative effects may be relevant in understanding the broader context of the proposed conduct and the scope of the duty to consult. Specifically, Supreme Court of Canada rulings confirm cumulative effects should be considered contextually without attempting to redress historical grievances.

The Government of Canada, including the FFHPP, recognizes the important role of cumulative effects identification and management in supporting the continued meaningful exercise of Aboriginal and treaty rights.

Outcomes of the consideration of cumulative effects

FFHPP plays a critical role in supporting the Minister to fulfill their legal obligation to consider cumulative effects of a proposed project on fish and fish habitat prior to making a decision on whether or not to issue a *Fisheries Act* authorization. When considering cumulative effects on fish and fish habitat, various potential outcomes can arise from this process. These outcomes typically depend on the nature of the proposed project, the relevant environmental and biological conditions, and the cumulative impacts from past and all other applicable factors⁶ that must be considered.

The consideration of cumulative effects of a project may ultimately lead to a decision to proceed with the exercising of a power under the fish and fish habitat protection provisions of the Act, or a decision not to proceed. Equally important, the consideration of cumulative effects of a project will identify ways of managing cumulative effects while supporting sustainable development and respecting Indigenous rights. For example, it is hoped that this analysis will:

- recommend how to relocate or redesign projects to reduce negative effects
- identify additional avoidance, mitigation and offsetting measures that can be incorporated into decisions
- direct future study or research on particular effects and how to manage them
- inform integrated planning processes as well as the establishment of planning and conservation objectives
- identify priorities for directing efforts for fish habitat restoration

Conclusion

This Position Statement outlines FFHPP's approach to considering cumulative effects when making a decision on whether or not to issue a *Fisheries Act* authorization. While project-specific decisions play an important role, it is acknowledged that cumulative effects can only be fully managed with broader approaches. FFHPP will continue to meet its responsibilities under the *Fisheries Act* for considering cumulative effects on fish and fish habitat, while working with Indigenous Peoples, government officials, other interested parties and the public on

⁶ For further information on the factors the Minister of Fisheries and Oceans (the Minister) must consider, see [Appendix 1](#).

complementary measures and strategies for conserving, protecting and restoring fish and fish habitat for future generations.

Appendix 1: *Fisheries Act* provisions relevant to this document

- Section 2.4.
 - o When making a decision under this Act, the Minister shall consider any adverse effects that the decision may have on the rights of the Indigenous Peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*.
- Subsection 34.1(1)
 - o Framework of Considerations
 - 1) Before recommending to the Governor in Council that a regulation be made... the Minister, prescribed person or prescribed entity, as the case may be, shall consider the following factors:
 - (a) the contribution to the productivity of relevant fisheries by the fish or fish habitat that is likely to be affected;
 - (b) fisheries management objectives;
 - (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;
 - (d) the cumulative effects of the carrying on of the work, undertaking or activity referred to in a recommendation or an exercise of power, in combination with other works, undertakings or activities that have been or are being carried on, on fish and fish habitat;
 - (e) any fish habitat banks, as defined in section 42.01, that may be affected;
 - (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;
 - (g) Indigenous knowledge of the Indigenous Peoples of Canada that has been provided to the Minister; and,
 - (h) any other factor that the Minister considers relevant.
- Subsection 34.4(1)
 - o Prohibition Against Causing the Death of Fish
 - 1) No person shall carry on any work, undertaking or activity, other than fishing, that results in the death of fish.
- Paragraph 34.4(2)(b)
 - o Exception
 - 2) A person may carry on a work, undertaking or activity without contravening

subsection 34.4(1) if:

(b) the carrying on of the work, undertaking or activity is authorized by the Minister and the work, undertaking or activity is carried on in accordance with the conditions established by the Minister;

- Subsection 35 (1)
 - o Harmful alteration, disruption or destruction of fish habitat
 - No person shall carry on any work, undertaking or activity that results in the harmful alteration, disruption or destruction of fish habitat.
- Paragraph 35(2)(b)
 - o Exception
 - 2) A person may carry on a work, undertaking or activity without contravening subsection 35.(1) if:
 - (b) the carrying on of the work, undertaking or activity is authorized by the Minister and the work, undertaking or activity is carried on in accordance with the conditions established by the Minister;
- Subsection 61.2 (1)
 - o Any Indigenous knowledge of the Indigenous peoples of Canada that is provided to the Minister under this Act in confidence is confidential and shall not knowingly be, or be permitted to be, disclosed without written consent.