

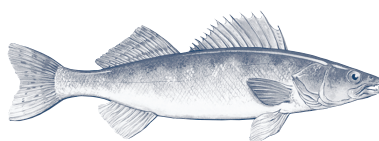


Fisheries and Oceans
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APPLICATION OF the Habitat Protection Provisions of *the Fisheries Act* to *Existing Facilities and Structures*

Fisheries and Oceans Canada



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Departmental Position Statement

The habitat protection provisions of the Fisheries Act apply to the ongoing operation, modification, maintenance or other works and undertakings associated with an existing facility /structure in or near fish-bearing waters, even if the facility or structure was constructed prior to the enactment of those provisions.

PURPOSE

The purpose of this *Position Statement* is to outline Fisheries and Oceans Canada's (DFO's) position and approach for the application of the habitat protection provisions of the *Fisheries Act* to existing facilities and structures in or near fish-bearing waters that were constructed prior to the enactment of the provisions.

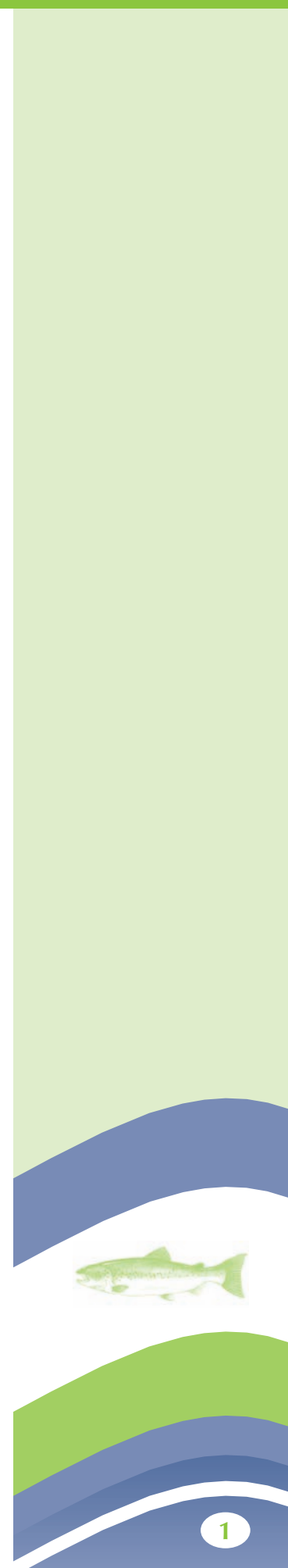
The *Position Statement* is consistent with and supportive of the legislative responsibility of DFO to conserve and protect fish and fish habitat and its risk management and compliance policies that support administration of the habitat protection requirements of the *Fisheries Act* [Risk Management Framework (DFO, 2005) ⁽¹⁾ and Habitat Compliance Decision Framework (DFO, 2007)].

BACKGROUND

Canada's Parliament, through its Constitutional authority for "Sea coast and Inland Fisheries", first enacted the *Fisheries Act* in 1868 as one of the country's first laws, reflecting the economic, social and cultural importance of fisheries that continue to present day. Following a series of amendments over the years, most recently in 1976, the Act includes provisions allowing the federal government to regulate impacts to fish and fish habitat related to fish passage, instream flow needs for fish, harm to fish habitat and killing of fish; in a manner that supports the conservation and protection of fish habitat essential to sustaining Canada's freshwater and marine fisheries resources. (See Table 1 for details on the evolution of the provisions).

Across Canada, there are several thousand facilities and structures in or near fish-bearing waters that were constructed and put into operation prior to the enactment of the various habitat protection provisions of the *Fisheries Act*. These facilities and structures vary greatly in scale and complexity, from small stream crossings to major hydroelectric dams. The risks to fish and fish habitat that these facilities and structures pose individually and cumulatively are increasingly being understood, as a result of new knowledge gained through research and monitoring. Of particular concern are structures and facilities that impede water flow or fish passage and hence make it difficult to meet established fisheries resource objectives for the watershed or ecosystem in question.

¹ http://www.dfo-mpo.gc.ca/oceans-habitat/habitat/policies-politique/operating-operation/risk-risques/index_e.asp



Owners/operators are responsible for ensuring that their existing facilities and structures operate in compliance with the *Fisheries Act*, regardless of when these facilities and structures were constructed or whether they have provincial permits, licenses or other government approval. The fact that a facility or structure existed prior to the enactment of the habitat protection provisions of the *Fisheries Act* should not, on its own, prevent DFO from fulfilling its legislated responsibilities to regulate impacts to fish and fish habitat, in relation to the ongoing operation, modification or maintenance of an existing facility/structure. The footprint of the existing facility / structure however, is not subject to the habitat protection provisions of the *Fisheries Act* if its construction precedes the enactment of those provisions.

SCOPE OF THE POSITION STATEMENT

The *Position Statement* applies to:

- the habitat protection provisions of the *Fisheries Act*, and specifically:
 - *Section 20*, which deals with fish passage around obstructions;
 - *Section 22*, which addresses the provision of minimum water flows over spillways or obstructions and below obstructions;
 - *Section 30*, which addresses the need for fish guards or screens over water intakes and certain waterways constructed for irrigation, manufacturing or power generation;
 - *Section 32*, which prohibits the killing of fish by means other than fishing, unless authorized by the Minister of Fisheries and Oceans Canada; and
 - *Section 35*, the key habitat protection provision, which prohibits any work or undertaking that would cause the harmful alteration, disruption or destruction (HADD) of fish habitat, unless authorized by the Minister of Fisheries and Oceans Canada;
- effects on fish and fish habitat arising from the ongoing operation, modification, maintenance or other works and undertaking associated with existing facilities/structures in or near fish-bearing waters; and
- current owners and/or operators of the existing facilities/structures, including individuals, private companies, departments and corporations of the federal, provincial and territorial governments, and Aboriginal organizations.

(Section 36 of the *Fisheries Act*, known as the pollution prevention provision, prohibits the deposit of any substances in water that makes the water deleterious to fish and fish habitat. Section 36 is administered by Environment Canada and thus is not included under this *Position Statement*.)



APPROACH TO APPLICATION OF THE POSITION STATEMENT

Owners/operators of existing facilities/structures are encouraged to work proactively and cooperatively with DFO and stakeholders to:

- Identify effects on fish and fish habitat from the operation, maintenance, modification or other works and undertakings associated with an existing facility/structure;
- Evaluate the impact of any effects on fish and fish habitat using DFO's Risk Management Framework;
- Establish priorities for action based on risk to fish and fish habitat, fisheries resource objectives, other resource objectives and public concern;
- Develop action plans to reduce or eliminate risk to fish and fish habitat and achieve compliance;

DFO's application of the position will be guided by the following principles:

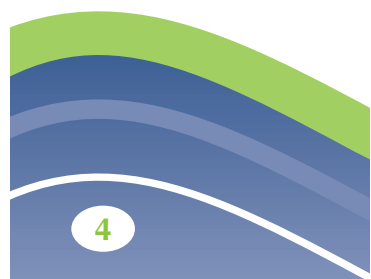
- Compliance with the habitat protection provisions of the *Fisheries Act* is mandatory;
- Compliance will be encouraged through communication with owners/operators of existing facilities/structures to clarify the requirements of habitat protection provisions;
- Enforcement actions will be undertaken in a manner that is fair, predictable, and consistent. Rules, sanctions and processes securely founded in law will be used;
- Priority for enforcement action will be guided by:
 - the degree of harm to fish and fish habitat caused by the existing facility/structure, or the risk of that harm; and
 - situational factors to be considered to achieve compliance.

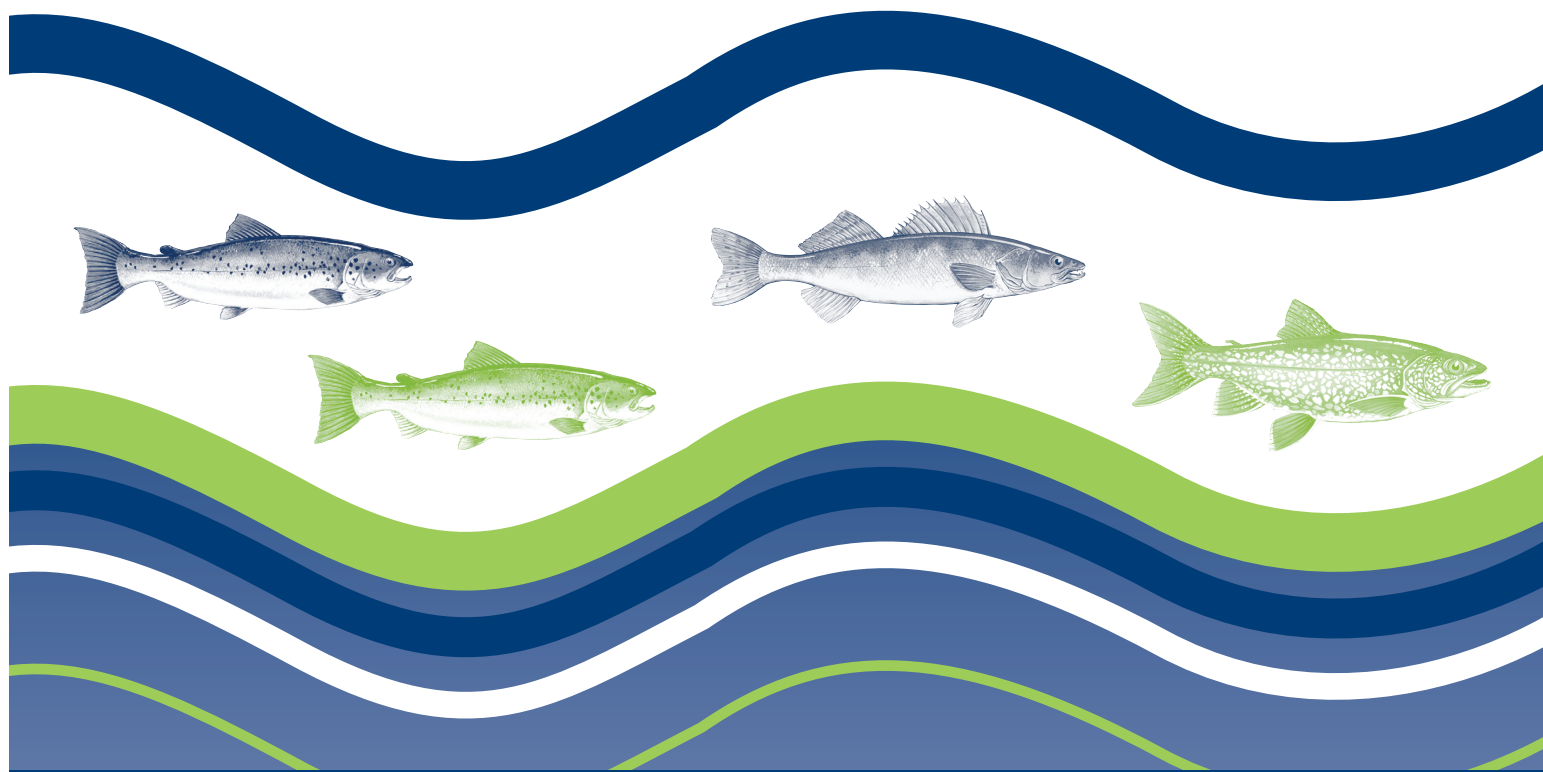


Table 1: Habitat Protection Provisions of the *Fisheries Act*

The following table summarizes the legislative history of the habitat protection provisions of the *Fisheries Act*:

Section of <i>Fisheries Act</i>	Year Introduced	Subject	Legislative History
20	In 1868 , was s. 12. Became s. 20 in 1932.	Enables DFO to require a fishway , when it determines it to be necessary for the public interest, in such form and capacity as will in its opinion permit the free passage of fish. The remaining subsections address pre-approval of fishway plans, any necessary modifications upon commencement of operation, and situations where a fishway is not feasible.	1884, 1906, 1914, 1932, 1985. Except that current versions of sections 20 –22 were all under section 12 (subsections 1 – 10), this section is substantively unchanged since introduction.
22	Was introduced as part of s. 20 in 1932 . Became s. 22 in 1985.	Enables DFO to require sufficient flow of water for the safety of fish and flooding of spawning grounds as well as free passage of fish during construction.	See section 20, above.
30	In 1894 , is introduced by amendment as subs. 14(17). Becomes s. 30 in 1985.	Water diversions or intakes may require a fish guard or screen to prevent the passage of fish into these diversions or intakes. These must be approved by DFO, maintained in good working order, and not removed except for repair, during which sluices and gates must be closed.	1906, 1910, 1914, 1927, 1932, 1970, 1977, and 1985. Not substantively amended since introduction; prior to 1927, fish guards were mandatory.
32	In 1976/1977 , replaces old s. 30. Becomes s. 32 in 1985.	Prohibits the destruction of fish by means other than fishing without prior approval.	1985. Not substantively amended since its introduction.
35	Introduced in 1976/1977 as subs 33.1—33.4. Became s. 35 in 1985.	Most frequently applied habitat protection provision of the Act. Prohibits works or undertakings that may result in the harmful alteration, disruption or destruction of fish habitat (HADD), unless the HADD is authorized by the Minister or under regulations made by the Governor in Council.	1985. Initially this section included most of what is now section 37. Not substantively changed since 1985.





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