

An Applicant's Guide to Submitting an Application for Authorization under Paragraph 35(2)(b) of the *Fisheries Act*

November 2013



Fisheries and Oceans
Canada

Pêches et Océans
Canada

Canada 

Disclaimer

This guide is for information purposes only. It is not a substitute for the *Fisheries Act*, or its regulations. In the event of an inconsistency between this guide and the *Fisheries Act* or its regulations, the *Fisheries Act* or its regulations, as the case may be, would prevail.

Published by:
Ecosystem Programs Policy
Fisheries and Oceans Canada
Ottawa, Ontario
K1A 0E6

An Applicant's Guide to Submitting an Application for Authorization under Paragraph 35(2)(b) of the Fisheries Act

Également disponible en français : Guide pour soumettre une demande d'autorisation visée à l'alinéa 35(2)b) de la Loi sur les pêches

Catalogue Number: Fs23-597/2013E-PDF
ISBN: 978-1-100-22941-6
DFO/13-1906

© Her Majesty the Queen in Right of Canada, 2013.

Table of Contents

1.0 Introduction	3
1.1 Purpose.....	3
2.0 Submitting an Application for Authorization	3
2.1 Application Forms	4
3.0 Application Requirements in Normal Circumstances	4
3.1 Prescribed Information Requirements in Normal Circumstances	4
3.2 Other Available Information	14
3.3 Letter of Credit	14
4.0 Process and Time Limits.....	15
4.1 Time Limits: 60 and 90 day	15
4.2 Ceasing Time Limits.....	15
5.0 Application Requirements in Emergency Circumstances	16
5.1 Information to be Provided in Emergency Circumstances	17
6.0 Decisions.....	18
Annex A: Determining the Amount of the Letter of Credit.....	20
Annex B: Letter of Credit Template	21

1.0 Introduction

The 2012 legislative amendments to the *Fisheries Act* were part of the Government of Canada's initiative for *Responsible Resource Development* under Canada's *Economic Action Plan*. The amendments established new Fisheries Protection Provisions which focus on the management of threats to the sustainability and productivity of commercial, recreational and Aboriginal fisheries, or to fish that support such a fishery. The ***Applications for Authorization under Paragraph 35(2)(b) of the Fisheries Act Regulations*** (the *Fisheries Act Applications Regulations*) support these provisions.

Subsection 35(1) of the *Fisheries Act* prohibits the carrying on of a work, undertaking or activity that results in serious harm to fish¹ that are part of a commercial, recreational or Aboriginal fishery or to fish that support such a fishery. However, under Paragraph 35(2)(b) of the *Fisheries Act*, the Minister of Fisheries and Oceans (the Minister) may issue an authorization with terms and conditions in relation to a proposed work, undertaking or activity that may result in serious harm to fish.

The *Fisheries Act Applications Regulations* set out the information requirements and documentation that must be submitted by an applicant requesting such an authorization in two circumstances:

- Applications to carry on a proposed work, undertaking or activity causing serious harm to fish in normal circumstances (Section 3 and Schedule 1); and
- Applications to carry on a proposed work, undertaking or activity causing serious harm to fish to be carried out without delay in response to an emergency² circumstance (Section 4 and Schedule 2).

The *Fisheries Act Applications Regulations* also establish the procedures and time limits for the Minister to process applications in normal circumstances (Sections 5 through 8).

1.1 Purpose

This guide is intended to provide an applicant seeking a Paragraph 35(2)(b) *Fisheries Act* authorization with guidance to develop and submit an application in accordance with the *Fisheries Act Applications Regulations*.

2.0 Submitting an Application for Authorization

All applicants are encouraged to engage Fisheries and Oceans Canada (DFO) early in the planning process to confirm whether an authorization is required to carry on their work, undertaking or activity and to discuss the requirements set out in the *Fisheries Act Applications Regulations* before submitting such an application.

All applications must be made in writing to the Minister and sent to one of the [DFO Regional Offices](#).

1 "Serious harm to fish" is defined in Subsection 2(2) of the *Fisheries Act* as "the death of fish, or any permanent alteration to, or destruction of, fish habitat".

2 Emergency circumstances in relation to works, undertakings or activities are those which are to be carried out without delay in response to a matter of national security, a national emergency for which special temporary measures are being taken under the *Emergencies Act*, or an emergency that poses a risk to public health or safety or to the environment or property.

2.1 Application Forms

To facilitate the submission of applications, the following two forms are available:

- [*Application Form for Paragraph 35\(2\)\(b\) Fisheries Act Authorization \(Normal Circumstances\)*](#); and
- [*Application Form for Paragraph 35\(2\)\(b\) Fisheries Act Authorization \(Emergency Circumstances\)*](#).

An applicant must attach all supporting information and relevant documentation, as required, to the appropriate application form. If this information was provided to DFO during preliminary discussions and the applicant chooses not to re-submit the information, the applicant must appropriately reference the information or titles of documents previously submitted, as well as identify the submission date and any appropriate reference number in their application.

3.0 Application Requirements in Normal Circumstances

Applicants seeking authorizations under normal circumstances should use the [*Application Form for Paragraph 35\(2\)\(b\) Fisheries Act Authorization \(Normal Circumstances\)*](#).

The application for this authorization must include the following:

- Prescribed information set out in Schedule 1 of the *Fisheries Act* Applications Regulations; and
- An irrevocable letter of credit to guarantee the implementation of the offsetting plan. See section 3.2 of this guide.

3.1 Prescribed Information Requirements in Normal Circumstances

The *Fisheries Act* Applications Regulations set out the information requirements and documentation³ which must accompany an application for authorization under normal (non-emergency) circumstances in Subsection 3(1) and Schedule 1.

Contact Information

"1. The applicant's name, address, telephone number and, if applicable, the name, and address and telephone number of their duly authorized representative."

[Schedule 1, Section 1]

The applicant must provide their full legal name and primary mailing address. The applicant must sign the application.

When the applicant is a company, the full legal registered name of the company and the company's representative must be identified. This representative must sign the application.

If relevant, the applicant must also provide a duly authorized representative and the role of this representative in relation to the application.

³ Applicable sections of the *Fisheries Act* Applications Regulations are featured in text boxes throughout this guide. The information that follows is intended to explain the requirements of the regulations to potential applicants and to help them meet these requirements.

Description of Proposed Work, Undertaking or Activity

“2. A description of the proposed work, undertaking or activity and, if applicable, of the project of which the proposed work, undertaking or activity is a part, including the purpose of the proposed work, undertaking or activity and, if applicable, of the project, the associated infrastructure, any permanent or temporary structure involved and the construction methodologies, building materials, explosives, machinery and other equipment that will be used.”

[Schedule 1, Section 2]

This information is required to provide background about the applicant's proposed work, undertaking or activity in or around water that is likely to result in serious harm to fish. The “purpose” of the proposed work, undertaking or activity must also be identified to explain the reason or goal to be achieved by carrying on the initiative and to add context as to why it is required. When a proposed work, undertaking or activity is part of a larger project, the applicant must also include a description of the overall project, including its overall “purpose”.

To complete this requirement, the applicant must provide information about all of the phases (e.g., construction, operation, maintenance and closure) for each proposed work, undertaking or activity, including details about the construction methods, associated infrastructure, permanent and temporary structures, building materials, machinery and equipment. For example, the construction of permanent structures may require the construction of temporary structures such as dikes, in conjunction with activities such as the withdrawal of water, land clearing, excavation, grading, infilling, blasting, dredging, installing structures, draining or removing debris from water. At the same time, the equipment and materials to be used might include hand tools, backhoes, gravel, blocks or armour stone, for which the applicant would be required to provide the average diameter. The applicant would also be required to indicate if the concrete to be used would be pre-cast or poured in-water.

“3. If physical works are proposed, the project engineering specifications, scale drawings and dimensional drawings.”

[Schedule 1, Section 3]

When physical structures in or around water are proposed, the applicant must provide the technical drawings and specifications of those works for which an authorization is being sought. Engineering specifications should be stamped and approved by an accredited engineer.

Note: Technical drawings and specifications may be referenced in the resulting authorization.

Timeline

“4. A description of the anticipated phases, including the sequencing of the phases, of the proposed work, undertaking or activity and, if applicable, of the project of which the proposed work, undertaking or activity is a part and the schedule for carrying on the proposed work, undertaking or activity and, if applicable, the project.”

[Schedule 1, Section 4]

An applicant must describe the schedule for carrying on the proposed work, undertaking or activity, and if applicable, of the project. At a minimum, the schedule should identify the proposed start and end dates for carrying out each proposed work, undertaking or activity and, when applicable, the respective phase (e.g., construction, operation, maintenance and closure phase).

In some cases, the applicant may also need to identify other information such as the expected life span of permanent and temporary structures, availability of specialized machinery, and sequence of actions specific to the proposed work, undertaking or activity.

Note: An authorization may provide specific period(s) for the carrying on of the proposed work, undertaking or activity.

Location

"5. A description of the location of the proposed work, undertaking or activity and, if applicable, of the location of the project of which the proposed work, undertaking or activity is a part, including

(a) geographic coordinates;

(b) a small-scale plan identifying the overall location and boundaries;

(c) a large-scale site plan indicating the size and spatial relationship of the planned facilities, infrastructure and other components and of any existing structures, landmarks, water sources or water bodies and other geographic features; and

(d) the name of any watersheds, water sources and water bodies that are likely to be affected and the geographic coordinates of the water sources and water bodies."

[Schedule 1, Section 5]

This information is required to describe and illustrate the location of an applicant's proposed work, undertaking or activity, and to provide geographical and spatial context about the project. The information also provides an understanding of how existing and proposed structures, as well as proposed activities and undertakings, will be situated.

The applicant must provide a description of the location of each proposed work, undertaking or activity to be authorized and, if applicable, of the project, including:

- Geographic co-ordinates of the proposed work, undertaking or activity (e.g., Latitude and Longitude or Universal Transverse Mercator Grid co-ordinates with zone);
- A small-scale site plan showing the overall location of the project, project boundaries, access routes (e.g., via road, water, air) to the site and, if applicable, the nearest communities;
- A large-scale site plan or diagrams indicating the high water mark and the location, size, and nature of proposed and existing structures (e.g., floating or fixed), landmarks, and proposed activities. In a marine setting, the applicant may find it helpful to depict the approximate location of the site on a nautical chart or to show the relation of the site to sea marks or other navigational aids. These plans, maps or diagrams should be at an appropriate scale to help demonstrate the relative size of the proposed structures and activities, the proximity to the watercourse or water body, and the distance from existing structures;
- Aerial photographs or satellite imagery of the water source(s) and water body(ies), if available; and
- Names of the watershed(s), water source(s) and/or water body(ies) likely to be affected and their geographic co-ordinates.

“6. The name of the community nearest to the location and the name of the county, district or region and the province in which the proposed work, undertaking or activity will be carried on.”

[Schedule 1, Section 6]

The applicant must reference the community nearest to the location of the proposed work, undertaking or activity as means to provide a general reference point. When possible, the applicant should use geographical names recognized by the [Geographical Names Board of Canada](#).

Description of Fish and Fish Habitat (Aquatic Environment)

“7. A description of the fish and fish habitat found at the location of the proposed work, undertaking or activity and within the area likely to be affected by the proposed work, undertaking or activity, including

(a) the type of water source or water body;

(b) the characteristics of the water source or water body and how those characteristics directly or indirectly support fish in carrying out their life processes;

(c) the fish species that are present and an estimate of the abundance of those species; and

(d) a description of how the information provided under paragraphs (a) to (c) was derived, including the sources, methodologies and sampling techniques used.”

[Schedule 1, Section 7]

The *Fisheries Act* includes the following definitions:

- “fish habitat” means “spawning grounds and any other areas, including nursery, rearing, food supply and migration areas, on which fish depend directly or indirectly in order to carry out their life processes”; and
- “fish” includes (a) parts of fish, (b) shellfish, crustaceans, marine animals and any parts of shellfish, crustaceans or marine animals, and (c) the eggs, sperm, spawn, larvae, spat and juvenile stages of fish, shellfish, crustaceans and marine animals”.

The applicant must describe the aquatic environment present at the site of the proposed work, undertaking or activity, as well as other areas that may be affected. They must also identify the current state of the fish and fish habitat.

In describing the aquatic environment, it is important for applicants to include information about the fish species present, fish characteristics, fish life-cycle functions, fish habitat (e.g., biological, chemical and physical features), and the various functional relationships within the aquatic environment. When possible, these descriptions should be supported with observed chemical, biological and physical data.

Note: The spatial scope for assessing fish and fish habitat should encompass all areas potentially affected by the proposed work, undertaking or activity, not just the direct physical footprint of the work, undertaking or activity.

The following is a non-exhaustive and non-prescriptive list of some common attributes which an applicant may use to characterize the aquatic environment identified in Schedule 1, Subsection 7(a)-(c) of the *Fisheries Act* Applications Regulations:

- Type of water source or watercourse (e.g., groundwater, river, lake, marine, estuary, etc.);
- The flood plain as well as its potential to provide for spring spawning for fish;
- The conditions and requirements for migration and local movements of the fish species present;
- Characteristics of the water source or water body:
 - Substrate characterization – types of substrate (e.g., bedrock, boulder, cobble, gravel, etc.), predominant substrate type (e.g., 80% cobble, 20% gravel, etc.) and maps of the substrate;
 - Aquatic and riparian vegetation characterization – prevalent types of vegetation (e.g., rooted, submerged, emergent, etc.), relative abundance of vegetation (e.g., 10% cattails, 80% grass, 10% sedge), predominant vegetation (e.g., by species or types), and vegetation densities (e.g., type of vegetation/area);
 - Flow characterization – if the flow is controlled or natural and permanent or intermittent, including current and tide (e.g., marine environment, etc.);
 - Physical water body – average depth of water for water bodies, bathymetry of water bodies, bathymetric maps where available, channel width (i.e., from the high water mark), shore and bank slope angle, etc.;
 - Bank and shore characterization – slope of shore bank; and
 - Other information about water quality and the biological community that would assist in understanding the fish habitat.
- Fish species characterization – fish species known or suspected to be in the area, including any aquatic species at risk listed under the *Species at Risk Act*; and
- Estimate of fish abundance – number of fish present, year class for each species, etc.

There are many different methods and attributes available for an applicant to use in order to characterize fish and fish habitat. The following information should, therefore, be included in the application for an authorization:

- All sources of information used;
- All fish and aquatic environment sampling techniques used;
- All modelling techniques used; and
- All other approaches used to identify/describe the fish and fish habitat.

Applicants are also encouraged to use recognized fisheries inventory methods such as those recognized by DFO or provinces and territories, and/or other scientifically defensible methodologies and techniques, whenever possible. It is also recommended that applicants support their descriptions of the aquatic environment with the use of detailed drawings, such as plans or maps, sonar imaging and photographs of the fish habitat features, whenever possible.

Description of Effects on Fish and Fish Habitat

“8(1) A description of the likely effects of the proposed work, undertaking or activity on fish that are part of a commercial, recreational or Aboriginal fishery, or on fish that support such a fishery, and the likely effect on the habitat of those fish. The description must include the following information:

- (a) the fish species that are likely to be affected and the life stages of the individuals of those species;*
- (b) the extent and type of fish habitat that is likely to be affected;*
- (c) the probability, magnitude, geographic extent and duration of the likely effects on fish and fish habitat; and*
- (d) a description of how the information provided under paragraphs (a) to (c) was derived, including the methodologies used.”*

[Schedule 1, Subsection 8(1)]

The objective of this information is to identify anticipated effects on fish and fish habitat that are likely to be caused by the proposed work, undertaking or activity, including whether they are a direct or indirect result of the proposed work, undertaking or activity.

Prior to the application of any mitigation or avoidance techniques, the applicant must consider how each proposed work, undertaking or activity would affect fish and fish habitat. The description must include quantitative and/or qualitative information about the fish species and fish habitat likely to be affected. Some examples of likely effects may include direct mortality to fish and injury to fish, avoidance behaviour, reduced reproductive success, habitat loss, change to flow, changes to habitat function, reduction in prey availability, or change to fish passage.

Note: The spatial scope for assessing fish and fish habitat should encompass all areas potentially affected by the proposed work, undertaking or activity, not just the direct physical footprint of the work, undertaking or activity.

The assessment must also include the following:

- Identification of fish species potentially affected by the proposed work, undertaking or activity (e.g., walleye, rock bass, Arctic char, Atlantic salmon, grey seal, American lobster, etc.);
- Of the affected fish, identification of the life stages potentially affected (e.g. juvenile, yearling, adult, etc.);
- Identification of the type of fish habitat potentially affected (e.g., spawning habitat – gravel and cobble, feeding and pupping/rearing areas, side channel slough, small tributaries, ice floes, etc.), and an estimate of the affected area (e.g., number of square metres or hectares);
- Description of the potential effect(s) (e.g., mortality of fish from entrapment, delayed migration of spawning adults, reduction in prey availability, reduced feeding availability, effects of obstructions or encroachment into water bodies, etc.);
- Probability or likelihood of the potential effect occurring (e.g., probability of fish strike from turbines for specific fish sizes, probability of disturbance of nursing marine mammals, probability of sediment plume within a distance from source, etc.);
- Description of the magnitude of the potential effect (i.e., the intensity or severity of the effect including estimated number of fish potentially affected or qualitative effects, e.g., low, medium, high);
- Geographic extent (spatial range) of the potential effect (e.g., localized to 100 metres from the work, channel reach or lake region, entire watershed, etc.); and
- Duration of the potential effect (e.g., duration of delay to fish migration in hours, days, months or years).

The information to be provided by the applicant must also describe the methods and techniques used to conduct the assessment. All methods and techniques used should be scientifically defensible.

“8(2) A description of how the effects referred to in subsection (1) are likely to result in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery, and a description of the serious harm to fish.”

[Schedule 1, Subsection 8(2)]

“*Serious harm to fish*” is defined in Subsection 2(2) of the *Fisheries Act* and means “the death of fish or any permanent alteration to, or destruction of, fish habitat”.

The purpose of this information is to differentiate and identify likely serious harm to fish based upon the effects identified in response to Schedule 1, Subsection 8(1) of the *Fisheries Act* Applications Regulations. This description is important as it specifically identifies which potential effects will require the application of measures and standards to avoid and mitigate serious harm to fish.

Note: The information required for Schedule 1, Subsection 8(2) of the *Fisheries Act* Applications Regulations is about the serious harm to fish likely to result from the carrying on the proposed work, undertaking or activity prior to the consideration of the implementation of measures and standards to avoid or mitigate those effects. The description of the serious harm to fish after the consideration of the application of measures and standards should be provided for Schedule 1, Sections 9 and 12 of the *Fisheries Act* Applications Regulations as listed below.

The information should be presented by the applicant in a format which identifies the following:

- The proposed work, undertaking or activity that is likely to result in serious harm to fish;
- The specific effects identified for Schedule 1, Subsection 8(1) (as noted above) that are likely to result in serious harm to fish;
- Quantitative (metrics) or qualitative description of the serious harm to fish (e.g., number of fish killed or a percentage of the fish present, number of square metres of permanently altered fish habitat, number of square metres of spawning habitat for a specific species, etc.); and
- An explanation of the likelihood of the proposed work, undertaking or activity to result in serious harm to fish (i.e., there is probability, in percentage, that an area of habitat destruction will occur during the dam construction from infilling of spawning habitat for the footprint of the dam structure).

Note: Applicants are encouraged to review DFO’s *Fisheries Protection Policy Statement* (2013) for more information on “serious harm to fish”.

Measures and Standards to Avoid or Mitigate Serious Harm to Fish

“9. A description of the measures and standards that will be implemented to avoid or mitigate the serious harm referred to in subsection 8(2), including an analysis of the expected effectiveness of those measures and standards.”

[Schedule 1, Section 9]

DFO’s mitigation hierarchy, as described in the *Fisheries Protection Policy Statement* (2013), emphasizes that efforts must be made by an applicant to prevent (avoid) impacts first. When avoidance is not possible, then efforts must be made to minimize (mitigate) impacts. After these actions, any residual impacts require authorization and must be addressed by offsetting measures.

The applicant must provide comprehensive information about all of the best available measures and standards that are proposed to address the serious harm to fish that may result from the proposed work, undertaking or activity described in response to Schedule 1, Subsection 8(2) of the *Fisheries Act* Applications Regulations. The provision of a comprehensive list of proposed measures and standards to avoid or mitigate serious harm to fish is important as these measures and standards may be referenced as conditions of the authorization.

Note: Measures and standards to avoid or mitigate serious harm to fish are not offsetting measures. Offsetting measures should be identified for the information requirements in Schedule 1, Section 13 of the *Fisheries Act* Applications Regulations.

The information about measures and standards should include the following:

- A statement to demonstrate how avoidance measures were first considered prior to the proposed mitigation action;
- Details which describe the best available measures and standards to be applied;
- Details which describe how the measures and standards will be applied to avoid or mitigate serious harm to fish;
- Analysis of the effectiveness of the measures and standards proposed to be used as mitigation, including the expected outcome (i.e., qualitative characterization and quantitative metrics for the reduction of likely serious harm to fish, such as how serious harm to fish is reduced by the proposed measures and standards);
- Identification of any reductions in serious harm to fish and when these will be achieved;
- Identification of all methods used to assess the effectiveness of the identified measures and standards; and
- Indication of the reference of any standard used.

Some examples of commonly accepted avoidance measures include the use of alternative designs and/or locations to avoid negative effects altogether. Some examples of common mitigation measures include installing sediment and erosion control measures, taking measures to prevent damage to the bed or banks, adhering to fisheries timing windows, using appropriately sized screens on water intakes to prevent fish mortality or planting vegetation in the riparian area.

“10. A description of the monitoring measures that will be put in place to assess the effectiveness of the measures and standards referred to in section 9.”

[Schedule 1, Section 10]

The objective of effectiveness monitoring is to document whether the proposed measures and standards (identified in relation to Schedule 1, Section 9 of the *Fisheries Act* Applications Regulations) employed by an applicant to avoid or mitigate serious harm to fish are effective.

Details about the monitoring measures to be put in place by the applicant should describe the following:

- Goal of the measures and standards (e.g., reduction of serious harm to fish);
- The monitoring indicators to be used (e.g., physical habitat, vegetation, invertebrates, fish abundance, fish community composition, etc.);
- The methods or techniques to be used (e.g., before–after design, spatial, multi-year sampling etc.);
- Rationale for selecting the monitoring method or techniques;
- The timing/frequency of the monitoring; and
- The date(s) for submitting the monitoring report(s).

“11. A description of the contingency measures that will be implemented if the measures and standards referred to in section 9 are not successful in avoiding or mitigating the serious harm to fish that is referred to in subsection 8(2).”

[Schedule 1, Section 11]

Contingency measures are planned secondary measures which will be implemented by the applicant if the planned avoidance and mitigation measures do not meet their objective(s).

The applicant must describe the contingency measures to be taken if, over the course of the monitoring, it is determined that avoidance and mitigation measures are found to not be functioning as intended. The description of the contingency measure should also describe any monitoring actions which would be taken to ensure that contingency measures are performing as planned.

Residual Serious Harm to Fish after Implementation of Avoidance and Mitigation Measures and Standards

“12. A quantitative description of the anticipated serious harm to fish that is likely to result from the work, undertaking or activity despite the implementation of the measures and standards referred to in section 9.”

[Schedule 1, Section 12]

Residual serious harm to fish is any serious harm to fish remaining after the consideration of the application of proposed measures or standards to avoid or mitigate serious harm to fish. This is determined using the information provided in response to Schedule 1, Subsection 8(2) and Section 9 of the *Fisheries Act* Applications Regulations.

It is important that an applicant describes and quantifies residual serious harm to fish as this establishes the framework to account for offsets to serious harm to fish on which the offsetting plan will be focused. The Minister will use this information as part of their decision about whether to issue an authorization.

The information presented by an applicant must quantify the likely residual serious harm to fish in relation to each proposed work, undertaking or activity, as well as each phase of the proposed work, undertaking or activity. Some examples include the number of fish killed, area of habitat destroyed, area of habitat permanently altered, duration of the mortality event, duration of the alteration, and the degree of the alteration (e.g., degraded quality: high/medium/low).

Note: It is recommended that applicants include a summary of the information in response to Schedule 1, Sections 9 to 12 of the *Fisheries Act* Applications Regulations. An example of a format for summarizing the information is provided below.

Table 1: Example of Summary of Table

Date	Proposed Work, Undertaking or Activity	Serious Harm to Fish	Avoidance Measure and Standard	Measure and Standard to Mitigate Serious Harm to fish	Residual Serious Harm to Fish
Month, Year to Month, Year	Lake infill (Construction and operation of a 1,500 metre airstrip)	Destruction of 5,000 square metres of lake trout habitat	Proposed site relocated to avoid sensitive habitat	Infill reduced by 500 square metres	4,500 square metres of lake trout habitat

Offsetting Plan

“13. An offsetting plan in respect of the serious harm to fish referred to in section 12, including

- (a) a description of the measures that will be implemented to offset the serious harm to fish;*
- (b) an analysis of how those measures will offset the serious harm to fish;*
- (c) a description of the measures and standards that will be put in place during the implementation of the offsetting plan to avoid or mitigate any adverse effects on fish and fish habitat that could result from the implementation and an analysis of how those measures and standards will avoid or mitigate those adverse effects;*
- (d) a description of the monitoring measures that will be put in place to assess the effectiveness of the offsetting measures referred to in paragraph (a);*
- (e) the timeline for the implementation of the offsetting plan;*
- (f) a description of the contingency measures and associated monitoring measures that will be put into place if the measures referred to in paragraph (a) are not successful in offsetting the serious harm to fish;*
- (g) an estimate of the cost of implementing each element of the offsetting plan; and*
- (h) if the implementation of the offsetting plan requires access to lands, water sources or water bodies that are not owned by the applicant, a description of the steps that are proposed to be taken to obtain the authorization required for the applicant, the Department of Fisheries and Oceans and anyone authorized to act on the Department's behalf to access the lands, water sources or water bodies in question. This information is not required if the applicant is Her Majesty in right of Canada, Her Majesty in right of a province or the government of a territory.”*

[Schedule 1, Section 13]

DFO's approach to offsetting is set out in the *Fisheries Protection Policy Statement* (2013) and *Fisheries Productivity Investment Policy* (2013).

An applicant's offsetting plan must include information about the objective(s) of the offsetting measures, the measures to offset residual serious harm to fish, and an analysis of how the offsetting measure will meet their objective(s). The analysis should describe the methodology used and an estimate of the offset. Applicants should also use scientifically defensible methods and techniques in their analyses.

In certain circumstances, the implementation of proposed offsetting measures may result in adverse impacts to fish and fish habitat and may require additional measures and standards to avoid or reduce the adverse effects. When this is the case, the applicant's offsetting plan must include a description of proposed measures and standards to be used in order to avoid these adverse effects to fish and fish habitat, and an analysis which demonstrates how the proposed measures and standards will avoid or mitigate the anticipated adverse effects. An example of such a scenario is the use of timing windows when working around water.

The applicant's schedule included in the offsetting plan should include start and end dates for implementing the offsetting measures. In complex offsetting plans, it may also be necessary to describe the timing for the various offsetting measures.

The objective of effectiveness monitoring is to determine whether the proposed offsetting measures will be effective in offsetting the serious harm to fish. The description of the monitoring measures to be undertaken by the applicant as part of the offsetting plan should include a schedule of each monitoring element. Monitoring should also cover the timeframe to allow for the demonstration that the offsetting measures have stabilized and are functioning as intended.

Contingency measures are planned secondary measures which would be implemented if the planned offsetting measures did not meet their objective(s). The applicant must provide a description of the contingency measures to be taken if, over the course of the monitoring, it is determined that offsetting measures proposed to offset serious harm to fish are found to be not functioning as intended. The description of the contingency measure should also describe any monitoring actions which would be taken to ensure that contingency measures are performing as planned.

The applicant's cost estimate will determine the monetary value of the letter of credit (see section 3.2 of this guide). The estimate should include the cost for implementing all elements of the offsetting plan, including elements related to monitoring and maintenance of offsetting features. The estimate should also consider any additional expenses that could be incurred by DFO to complete the offsetting plan (e.g., costs for additional project management, costs for inflation, etc.).

In addition, the offsetting plan must include a brief explanation of the steps which will be undertaken by the applicant to secure access to the lands, water sources and water bodies required for implementing the offsetting measure(s). **Note:** This is not required when the applicant is Her Majesty in right of Canada, Her Majesty in right of a province or the government of a territory.

3.2 Other Available Information

Although the applicant is not required to submit the following information with their application, it may serve to facilitate DFO's review:

- Summary of any public engagement activities and outcomes;
- Summary of any Aboriginal engagement activities and outcomes;
- Fisheries management objectives; and
- Results from the consideration of how the proposed work, undertaking or activity and offsetting plan align with fisheries management objectives.

3.3 Letter of Credit

Financial securities are common tools used to manage compliance with the conditions of an authorization with environmental risks. DFO uses a letter of credit to provide a financial assurance mechanism in the event that an offsetting plan is not completed. This allows the Department to access funds to ensure the implementation of the offsetting plan or elements of the plan which have not been implemented by the applicant in the timeframe allotted in their authorization.

The *Fisheries Act* Applications Regulations exempt an applicant who is Her Majesty in right of Canada, Her Majesty in right of a province or the government of a territory from the requirement of providing a letter of credit.

A letter of credit must be sufficient to cover the cost for implementing all elements of the offsetting plan, including monitoring measures. The amount of the letter of credit is determined by the cost estimates set out/described in an applicant's offsetting plan. See Annex A for information on how to determine the amount of a letter of credit. It is strongly recommended that an applicant discuss the amount of their letter of credit with DFO before their application is submitted.

A letter of credit must be issued by a recognized Canadian financial institution and the beneficiary addressed to the Receiver General for Canada on behalf of Fisheries and Oceans Canada. An example of a letter of credit is provided in Annex B.

4.0 Process and Time Limits

Sections 4 to 9 of the *Fisheries Act* Applications Regulations set out the procedures and time limits for processing applications under normal circumstances. A flow chart of the general process is illustrated in Figure 1.

4.1 Time Limits: 60 and 90 day

The *Fisheries Act* Applications Regulations provide for two time limits by which the Minister must abide when reviewing applications:

- From the date of receipt of an application, the Minister has 60 calendar days to determine if the application is complete or incomplete, and to notify the applicant of this determination. If the application is not complete, the notification will identify the information or documentation that must still be provided by the applicant. [Section 6]; and
- From the date of the notification that the application is complete, the Minister has 90 calendar days to issue an authorization or notify the applicant that the authorization is denied. [Section 7]

The time limits established in the regulations apply to the Minister and not to the applicant.

4.2 Ceasing Time Limits

The time limit for reviewing the application (either the 60- or 90-day time limit) may cease to apply if one of the circumstances set out in Schedule 1, Subsection 8(1) of the *Fisheries Act* Applications Regulations should occur.

Changes to the Application [Paragraph 8(1)(a)]

If the applicant proposes changes to the work, undertaking or activity, or the offsetting plan that was in the original application, additional or amended information or documentation may be required before a decision on the authorization application can be made. In such a case, the time limit will cease. The process and applicable time limit will resume when the required information or documentation is provided.

An applicant should contact DFO if their requested changes warrant submission of additional or amended information.

Applicant's Request [Paragraph 8(1)(b)]

If the applicant requests, in writing, that the processing of the application be suspended, the time limit will cease until the applicant requests, in writing, that the processing of the application be resumed.

In the event that an applicant determines that the proposed work, undertaking or activity will not be carried out, the applicant should inform the Minister so that the application process may be closed.

Additional Information [Paragraph 8(1)(c)]

A proposed work, undertaking or activity or related aspects of a project may be under review by other federal, provincial or territorial agencies or environmental assessment bodies. These processes may influence details of the proposed work, undertaking or activity, or the offsetting plan included in the application for a *Fisheries Act* authorization. If these processes affect an application such that additional or amended information is required to support the Minister's review, the process and time limits may be ceased.

This provision may also apply in relation to unique aspects of a proposed work, undertaking or activity that may require further information or documentation beyond that included in Schedule 1 of the *Fisheries Act* Applications Regulations.

The Minister will communicate with the applicant when the process and time limit have ceased and identify the information or documentation required to resume the process.

Consultation [Paragraph 8(1)(d)]

Consultation with Aboriginal groups occurs when the Crown proposes conduct (such as the issuance of a Paragraph 35(2)(b) *Fisheries Act* authorization) that has the potential to adversely impact Aboriginal or Treaty rights. The time limit for processing an application will cease in cases when DFO is required to undertake Aboriginal consultation. This will provide DFO with the time necessary to carry out meaningful consultation.

Note: In most cases, DFO will be able to inform an applicant if there is a requirement to meet the duty to consult relatively early in the review of the application.

Other Federal Requirements [Paragraph 8(1)(e)]

Prior to making a decision with respect to a Paragraph 35(2)(b) *Fisheries Act* authorization, DFO may be required to meet the requirements of other federal legislation, regulations or requirements set out in a land claims agreement. These may include:

- Section 7 of the *Canadian Environmental Assessment Act, 2012*;
- Section 67 of the *Canadian Environmental Assessment Act, 2012*;
- Section 73 or 74 of the *Species at Risk Act*;
- Section 75, 76 or 77 of the *Yukon Environmental and Socio-economic Assessment Act*;
- Section 118 of the *Mackenzie Valley Resource Management Act*;
- Article 12, Part 10, Paragraph 12.10.1 of the *Nunavut Land Claims Agreement*⁴; or
- Chapter 18, Section 18.10.1 of the *Eeyou Marine Region Land Claim Agreement*.

Note: In most cases, DFO will be able to inform an applicant if the Department must meet other federal requirements relatively early in the review of the application.

When a time limit ceases to apply as a result of the circumstances set out in Paragraphs 8(1)(c), (d) or (e) of the *Fisheries Act* Applications Regulations, as described above, the Minister will notify the applicant with the reasons for the cessation, as well as the next steps to resume the process. The Minister will also notify the applicant when the process and time limit are resumed.⁵

5.0 Application Requirements in Emergency Circumstances

In the emergency circumstances prescribed in Section 4 of the *Fisheries Act* Applications Regulations, an applicant requires their application to be considered immediately by DFO such that the proposed work, undertaking or activity can be carried on without delay.

Section 4 and Schedule 2 of the *Fisheries Act* Applications Regulations set out the information requirements to be submitted by an applicant when they are applying for an authorization to carry on a work, undertaking or activity in response to emergency circumstances. This information is the basic information required to process applications under emergency circumstances.

⁴ Section 75 of the *Nunavut Planning and Project Assessment Act* (when in force).

⁵ When a time limit resumes, the 60- or 90-day time limit will begin at day one.

Unlike applications received under normal circumstances, applications for authorizations made in response to emergency circumstances are processed without time limits. The Department will process these applications on a priority basis, consistent with any other federal legislation that may apply.

The applicant should use [*Application Form for Paragraph 35\(2\)\(b\) Fisheries Act Authorization \(Emergency Circumstances\)*](#) in these cases.

5.1 Information to be Provided in Emergency Circumstances

Contact Information

"1. The applicant's name, address, telephone number and, if applicable, the name, address and telephone number of their duly authorized representative."

[Schedule 2, Section 1]

The applicant must provide their full legal name and primary mailing address. The applicant must sign the application.

When the applicant is a company, the full legal registered name of the company and the company's representative must be identified. This representative must sign the application.

If relevant, the applicant must also provide a duly authorized representative and the role of this representative in relation to the application.

Nature of the Matter of National Security, National Emergency or Emergency

"2. A description of the nature of the matter of national security, national emergency or emergency and the reasons why the proposed work, undertaking or activity needs to be carried on without delay."

[Schedule 2, Section 2]

Note: National security and national emergencies are those which are declared by the federal government in relation to public security, public health, and public safety, typically declared under an Act, a Regulation or an Order. Other emergencies may include situations when there is potential for immediate damage to property, the environment, or to public health and safety that requires the carrying on of the proposed work, undertaking or activity.

The applicant must describe the nature of the emergency which requires the proposed work, undertaking or activity to be carried on without delay.

Proposed Work, Undertaking or Activity

"3. A description of the proposed work, undertaking or activity, and how it relates to the matter of national security, national emergency or emergency."

[Schedule 2, Section 3]

The applicant must describe the proposed work, undertaking or activity in the context of the emergency. In addition to describing all proposed works, undertakings or activities that would likely result in serious harm to fish and, hence, require an authorization, the applicant must provide an explanation as to how the proposed work, undertaking or activity will address the emergency.

Timeline

“4. The timeline for carrying on the proposed work, undertaking or activity.”

[Schedule 2, Section 4]

The applicant must provide the dates and duration for carrying on the proposed work, undertaking or activity. The timeline information in an application must also describe all temporal aspects about the proposed work, undertaking or activity.

Location

“5. A description of the location of the proposed work, undertaking or activity, including its geographic coordinates and the name of any water sources and water bodies that are likely to be affected.”

[Schedule 2, Section 5]

The applicant must provide the location of the proposed work, undertaking or activity, including:

- Geographic co-ordinates of the proposed work, undertaking or activity (e.g., Latitude and Longitude or Universal Transverse Mercator Grid co-ordinates with zones);
- The names of any water sources and water bodies that are likely to be affected;
- Description of the proposed work, undertaking or activity in relation to landmarks, high water mark, etc.; and/or
- Site plans or maps.

Serious Harm

“6. A description of the serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery, that is likely to result from the proposed work, undertaking or activity.”

[Schedule 2, Section 6]

The applicant must identify and explain the anticipated serious harm to fish that is likely to be caused by the carrying on of the proposed work, undertaking or activity. If possible, they must also describe the fish species potentially affected, how they may be affected, and the type of fish habitat that may be affected.

Other Available Information

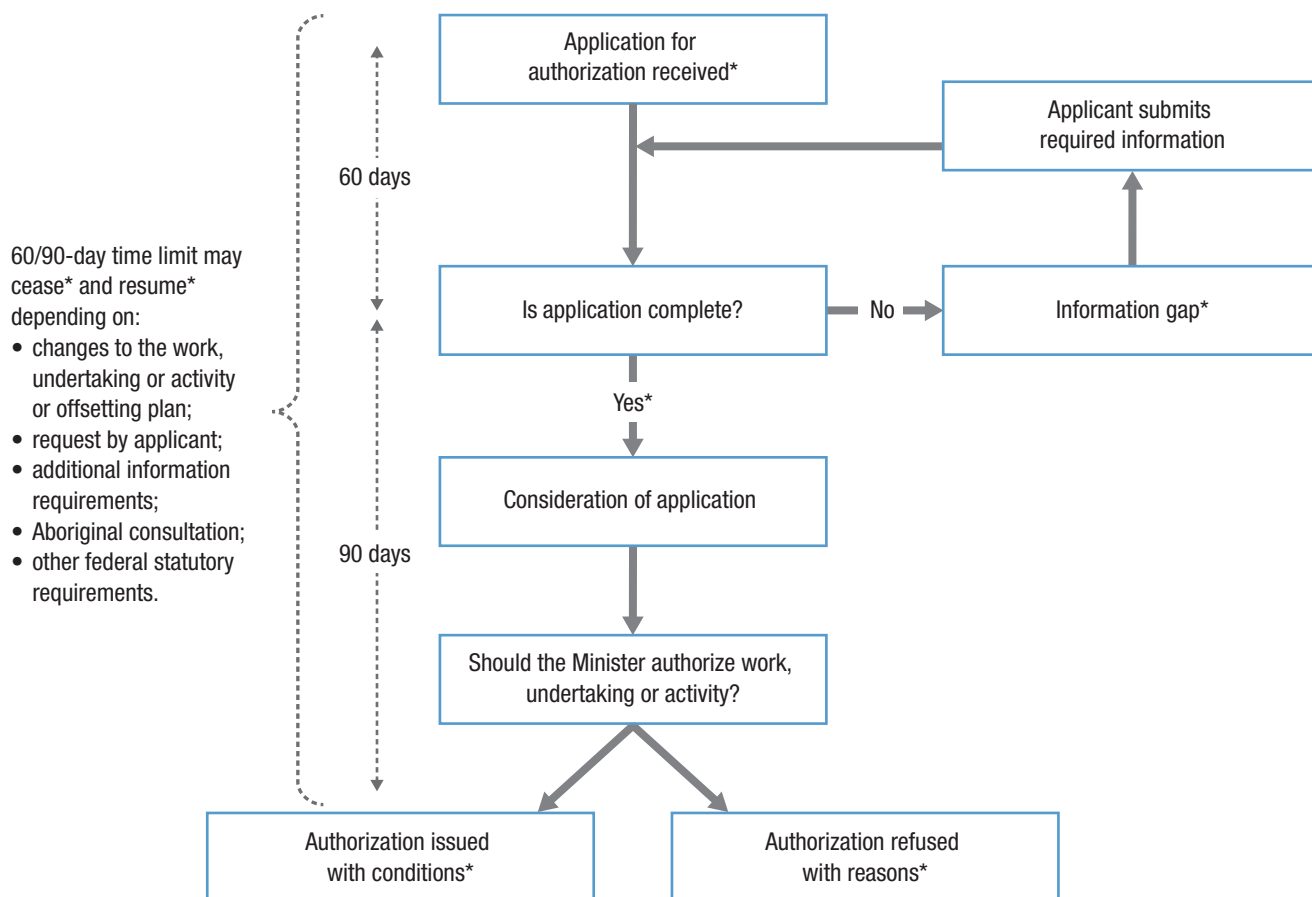
Although the applicant is not required to submit other information, should additional information⁶ be available about the location of the proposed work, undertaking or activity including the aquatic environment or the potential effects on fish and fish habitat, it may serve to facilitate DFO's review. For example, details of any measures and standards that an applicant plans to implement to avoid or mitigate impacts to fish and fish habitat during the carrying on of the proposed work, undertaking or activity would be beneficial.

6.0 Decisions

Applicants will be notified in writing when an authorization is issued or refused.

⁶ Conditions set out in the Paragraph 35(2)(b) *Fisheries Act* authorizations for emergency circumstances may require authorization holders to provide additional information to DFO.

Figure 1: Process for the Review of an Application for a Paragraph 35(2)(b) Fisheries Act Authorization (Normal Circumstances)



*Regulations require the Minister to notify the applicant.

Annex A: Determining the Amount of the Letter of Credit

It is an applicant's responsibility to supply a cost estimate to implement the offsetting plan that they submitted with an application for a Paragraph 35(2)(b) *Fisheries Act* authorization. It is DFO's responsibility to ensure that the letter of credit reasonably relates to the amount required to complete this offsetting plan.

An applicant should follow three basic steps to ensure that their estimate accurately reflects the costs that will be incurred to complete the offsetting plan.

1. **Verify the offsetting plan costs:** This includes labour, project supervision, equipment, materials, report preparation and printing, property purchase or lease, monitoring, and maintenance.
2. **Determine any additional costs to complete the offsetting plan** if the implementation of the plan must be managed by DFO. This includes project management costs, seasonal adjustment, availability of local expertise, inflation protection, etc.
3. **Establish the total estimate:** This is the sum total of the offsetting plan costs and any additional costs.

Examples of Additional Costs

The following is a list of potentially relevant factors to consider when estimating additional costs, which would typically increase according to the size and complexity of the offsetting plan:

1. **Increased project management:** Additional project management costs may be incurred if a third party is required to complete the offsetting plan on schedule and within the allocated budget.
2. **Seasonality:** The costs of completing a plan may vary by the time of year. It may also be more expensive to complete an aspect of a plan at a different time of the year than was originally planned.
3. **Available local expertise:** Per diem travel and living expenses associated with non-local contractors may significantly increase overall costs (e.g., as much as 20–30%).
4. **Inflation protection:** Applicants should consider the impact of inflation on overall costs for longer-term plans. It is suggested that applicants use the consumer price index to calculate the annual inflation rate of the total project costs, and to add this amount to their letter of credit.

Annex B: Letter of Credit Template

Financial Institution: {Name and Address}

Applicant: {Name and Address of Applicant}

Letter of Credit Number: {Provided by Financial Institution}

Date of Issue: {Date required}

DFO Referral File No.: {REF/FILE NO.}

IRREVOCABLE STANDBY LETTER OF CREDIT

Beneficiary: {Receiver General for Canada on behalf of Fisheries and Oceans Canada}

Dear Sir or Madam:

We hereby authorize you to draw upon the {Financial Institution, address} for the account of our Customer {Applicant}, up to the sum total of \${amount} Canadian Dollars available on demand as follows:

Pursuant to the request of our Customer, we the {Financial Institution} hereby establish and give to you an irrevocable Standby Letter of Credit (the "Credit") in your favour in the total amount of \${amount}. The Credit may be drawn on, by you, at any time and from time to time upon written demand by you. We will honour any such demand made by you without inquiring whether you have a right as between yourself and our Customer to make such demand and without recognizing any claim, instructions, direction or notification to the contrary from the Customer.

Provided, however, that you are to deliver to us at such time as a demand for payment is made upon us, a sight draft purported to be signed by you, agreeing and/or confirming that monies drawn pursuant to this Credit will be retained and used by you to meet our Customer's obligations in connection with offsetting and monitoring as set out in the {Offsetting Plan Name}, {Version No. (if available)}, dated {date of plan}. This original Letter of Credit must also be presented at the time for endorsement of the claim paid and will be returned to you.

It is understood and agreed that the obligation of the undersigned under this Credit is an obligation to pay money only and that in no circumstances shall the undersigned be obliged to perform or cause to perform any of our Customer's actual obligations to you.

Conditions:

1. The sum total of this Credit shall be reduced from time to time as advised by written notice given to this Branch from time to time by you.
2. The Credit will continue until {MM/DD/YYYY} and will expire at the Branch address at the close of banking business on that date.
3. This Credit is irrevocable until that date.
4. This Credit shall be deemed to be automatically extended for one year from the present or any future expiration date hereof, unless 30 days before any such date we give you written notice that we elect not to consider this Credit renewed for any such additional period. Upon receipt of such notice, you may draw upon, accompanied by a signed sight draft, the amount to be retained and used by you to meet obligations incurred or to be incurred in connection with the Authorization.
5. Partial drawings on this Credit are permitted.
6. Upon successful completion of {Applicant} responsibilities under the offsetting and monitoring conditions of the Authorization, as determined by Fisheries and Oceans Canada, the original Letter of Credit shall be returned to {Financial Institution, address} for cancellation.

{Signatures of responsible officials}