



Fisheries and Oceans  
Canada

Pêches et Océans  
Canada

## Position Statement

# The Management of Death of Fish (other than fishing), under the *Fisheries Act* and the *Species at Risk Act*

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The Management of Death of Fish (other than fishing),  
under the *Fisheries Act* and the *Species at Risk Act* Position  
Statement

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du poisson (par des moyens autres que la pêche) sous le  
régime de la *Loi sur les pêches* et de la *Loi sur les espèces  
en péril*

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## Departmental Position Statement

The Department of Fisheries and Oceans will apply its powers and authorities for regulating works, undertakings and activities (other than fishing) that will likely result in the death of fish (including listed aquatic species at risk), in a manner that conserves and protects fish and respects the rights of the Indigenous peoples of Canada (recognized and affirmed by Section 35 of the *Constitution Act, 1982*).

### Purpose

The purpose of this position statement is to outline the position and approach of the Department of Fisheries and Oceans (the Department) with respect to regulating works, undertakings and activities (other than fishing), that will likely result in the death of fish<sup>1</sup> (including listed aquatic species at risk), in or near water frequented by fish.

This Position Statement replaces the previous position statement '*The Management of Fish Mortality*' (2009).

### Disclaimer

The 'Position Statement for the Management of Death of Fish, by means other than fishing under the *Fisheries Act* and the *Species at Risk Act*', is not a substitute for the *Fisheries Act*, the *Species at Risk Act*, or associated regulations. In the event of an inconsistency between this Position Statement and the *Fisheries Act*, the *Species at Risk Act*, and associated regulations, the legislation(s) and regulation(s) will prevail.

### Scope

This position statement interprets:

- Provisions of the *Fisheries Act* and the *Species at Risk Act* that are administered by the Department to regulate a proposed or existing work, undertaking or activity (other than fishing) in or near water frequented by fish, that is likely to result in the death of fish (including listed aquatic species at risk ) and specifically the provisions outlined in [Appendix 2](#).

This position statement applies to:

- A person who carries on or proposes to carry on any work, undertaking or activity (other than fishing) in or near water frequented by fish<sup>2</sup>, that is likely to result in the death of fish<sup>3</sup> (including listed aquatic species at risk<sup>4</sup>).

1 See [Appendix 1](#) for Legislative Context

2 Subsection 34(1) of the *Fisheries Act* defines "water frequented by fish" as Canadian fisheries waters. According to its definition in subsection 2(1), "Canadian fisheries waters" means all waters in the fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada.

3 Subsection 2(1) of the *Fisheries Act* defines "fish" to include: parts of fish, shellfish, crustaceans, marine animals and any parts of shellfish, crustaceans or marine animals, and the eggs, sperm, spawn, larvae, spat and juvenile stages of fish, shellfish, crustaceans and marine animals.

4 Subsection 2(1) of the *Species at Risk Act* defines "aquatic species" as a wildlife species that is a fish, as defined in subsection 2(1) of the *Fisheries Act*, or a marine plant, as defined in section 47 of the *Fisheries Act*. The term "aquatic species at risk" will be used to refer to aquatic species listed under Schedule 1 of the *Species at Risk Act*, as endangered, threatened, or extirpated and are located outside of lands

## Application of the Position Statement – The Department’s Approach

The Department’s approach to the application of this statement will include:

- Promoting regulatory compliance through communication with the person who carries on or proposes to carry on any work, undertaking or activity (other than fishing) in or near water frequented by fish, that is likely to result in the death of fish (including listed aquatic species at risk), to clarify the requirements of the provisions and approaches outlined in this statement.
- Proponents are encouraged to adopt the important, and recommended, practice of engaging with Indigenous peoples early in the planning phases of their works, undertakings or activities and in the development of management measures and monitoring plans. Indigenous peoples and their knowledge can inform the design of measures to manage impacts on fish, including aquatic species at risk.
- Applying an evidence informed risk-based approach to determine the likelihood and extent of potential death of fish and its implications on the conservation and protection of fish (including listed aquatic species at risk), that is likely to result from a proposed or existing work, undertaking or activity (other than fishing) in or near water frequented by fish. This approach will be informed by the best available information. In doing so, the Department may consider criteria such as:
  - The fish species or fish assemblage that are likely to be affected (e.g., listed aquatic species at risk and other fish species<sup>5</sup>) including their:
    - » Life-history characteristics and lifecycle stages that may be impacted;
    - » Natural death of fish rate;
    - » Generation time;
    - » Spawning success; and
    - » Sensitivity (e.g., resilience, abundance, fecundity, rarity, habitat dependence/availability and the presence of listed aquatic species at risk).
  - The cause, frequency, magnitude, geographic extent and duration of death of fish event(s).
  - The size and state of the fish population (e.g., healthy/stable, cautious/threatened, critical/endangered) that is likely to be affected, its trends (e.g., stable, increasing, declining) and its connectivity to other populations.
  - Other pressures put on the fish population (e.g., on-going loss of fish habitat, fishing activity etc.).
  - Whether there are measures and standards to avoid or mitigate the death of fish (including listed aquatic species at risk) and an assessment of the anticipated death of fish after these measures and standards are implemented.<sup>6</sup>

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administered by Parks Canada. The scope of this document includes aquatic species at risk that are fish and does not include marine plants.

5 This information may include other status considerations, where applicable (e.g. Committee on the Status of Endangered Wildlife in Canada (COSEWIC), provincially listed, available Fisheries Management Objectives, Stock Rebuilding Plans etc.)

6 This information will include a description of monitoring measures to assess the effectiveness of management measures, where applicable.

- Being guided by the following three approaches in its risk-based approach:
  - The precautionary approach – The Department will apply the precautionary approach<sup>7,8</sup> by exercising caution when scientific information is absent, uncertain, unreliable or inadequate and, will not use the absence of adequate scientific information as a reason to postpone or fail to take action to avoid impacts on fish, including in relation to listed aquatic species at risk.
  - The ecosystem approach – The Department will apply the ecosystem approach to better conserve and protect fish, including the survival and recovery of listed aquatic species at risk. Processes linking ecosystems and species are complex, and an action taken in one location may have unforeseen consequences elsewhere and may only be detectable over time. The ecosystem approach is a strategy that integrates the management of land, water and living resources, promoting conservation and sustainable use in an equitable way.<sup>9</sup>
  - The adaptive management approach – The Department will apply the adaptive management approach, as part of the ecosystem approach, to manage uncertainties associated with complex ecosystem processes. An adaptive management approach is one that monitors impacts of a work, undertaking or activity over a period of time and determines the effectiveness of management measures. The use of an adaptive management approach may result in the application of contingency measures or the modification of operations, where impacts to fish, including listed aquatic species at risk are found to be different, than anticipated.
- Determining whether the risk of potential death of fish (including listed aquatic species at risk), from a proposed or existing work, undertaking or activity (other than fishing) is best managed by:
  - Referring the person who carries on or proposes to carry on any work, undertaking or activity (other than fishing) that is likely to result in the death of fish, to applicable best practices (e.g., [The Measures to Protect Fish and Fish Habitat](#), or [Standards and Codes of Practice](#)).
  - Providing advice on how to avoid or mitigate the death of fish, including listed aquatic species at risk, where applicable.
  - Requesting that the person who carries on or is proposing to carry on any work, undertaking or activity (other than fishing) that is likely to result in the death of fish (including listed aquatic species at risk), submit an application for authorization<sup>10</sup> under paragraphs 34.4(2)(b) and 35(2)(b) of the *Fisheries*

7 Canada Privy Council Office, 2003. A Framework for the Application of Precaution in Science-based Decision-Making about Risk

8 Principles of the precautionary and the ecosystem approach can be found in the Department's [Sustainable Fisheries Framework: A fishery decision-making framework incorporating the precautionary approach](#)

9 Secretariat of the Convention on Biological Diversity. 2004. The Ecosystem Approach, (CBD Guidelines) Montreal: Secretariat of the Convention on Biological Diversity 50 p.

10 Legislative considerations and conditions under both the *Fisheries Act* and the *Species at Risk Act* for a *Fisheries Act* authorization, can be found in the Appendices. Where applicable, the *Fisheries Act* authorization will have the same effect as a permit under section 73 of the *Species at Risk Act*, as described in section 74 of the *Species at Risk Act*.

Act and, where applicable, an application for a permit under sections 73 and 74 of the *Species at Risk Act*. A record of any consultations with Indigenous groups, undertaken by the person, must also be included in the application for authorization. The Department reserves the right to not issue an authorization that, for example, conflicts with or compromises:

- » Meeting section 73 pre-conditions of the *Species at Risk Act*.
  - » *Species at Risk Act* recovery strategies or plans.
  - » The exercise of Aboriginal and treaty rights – if impacts on those rights cannot be avoided, measures to accommodate will be sought through consultation with affected Indigenous groups.
  - » The conservation and protection of fish, including aquatic species at risk.
- Requesting information as provided for under subsections 34.3(1) or 37(1) and issuing ministerial orders under subsections 34.3(2)/(and 3) or 37(2), respectively of the *Fisheries Act*.
  - Issuing directions for corrective measures under subsection 38(7.1) of the *Fisheries Act*, to the person who carries on, owns or has the charge, management or control of any work, undertaking or activity, in order to implement all reasonable measures consistent with public safety and with the conservation and protection of fish, to prevent the occurrence or to counteract, mitigate or remedy any adverse effects that result from the occurrence or might reasonably be expected to result from it.
- Applying relevant program policies and guidance (e.g., Position Statement – The Management of Existing Facilities and Structures under the *Fisheries Act* and the *Species at Risk Act*).
  - Carrying out meaningful consultations when the duty to consult is triggered and where appropriate, meaningfully accommodate the potentially affected Indigenous group in relation to the Department’s proposed Crown conduct (e.g., proposed decisions to authorize or permit, or orders requiring modifications to an existing work, undertaking or activity). If any impacts occur on listed aquatic species at risk that are found in an area where a Wildlife Management Board perform functions, or on reserve lands under the *Indian Act*, the Department must also consult the Wildlife Management Board or the band before authorizing the activity.
    - During consultations, Indigenous knowledge may be provided to the Department. In making a decision about whether or not to issue a *Fisheries Act* authorization, Indigenous knowledge provided<sup>11</sup> will be considered alongside the other factors set out in subsection 34.1(1) of the *Fisheries Act*.
  - Continuing to recognize any authorizations issued under previous iterations of the *Fisheries Act*<sup>12</sup> that were valid on August 28, 2019, the date on which the current fish

11 Indigenous knowledge provided in confidence relative to a *Fisheries Act* decision will not be disclosed unless a circumstance set out in section 61.2 of the *Fisheries Act* applies.

12 Bill C-68 includes transitional provisions (clauses 52 and 53) related to authorizations and applications for authorizations made under

and fish habitat protection provisions<sup>13</sup> came into force, including those that act as permits issued under the *Species at Risk Act*. These authorizations continue to apply, as will those authorizations issued after the coming into force of the fish and fish habitat protection provisions of the *Fisheries Act*.<sup>14</sup>

- Taking enforcement actions that are fair, predictable, and consistent, using rules, sanctions and processes founded in law. The Department will prioritize enforcement actions by considering:
  - The extent of death of fish (including listed aquatic species at risk), that is caused by any work, undertaking or activity (other than fishing);
  - Whether or not the alleged offence is a repeat occurrence; and
  - Other situational factors to achieve compliance.

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section 35(2)(b) of the pre-royal assent *Fisheries Act*. For further information and guidance, refer to <https://www.dfo-mpo.gc.ca/pnw-ppe/guidance-ligne-directrice-eng.html>.

13 See the [Fish and Fish Habitat Protection Policy Statement](#) (2019) for details respecting the Department's position and approach dealing with these provisions.

14 A person who carries on any work, undertaking or activity and requests an amendment, suspension or cancellation to their existing *Fisheries Act* authorization, would need to comply with the requirements of the current fish and fish habitat protection provisions of the *Fisheries Act* and relevant provisions of the *Species at Risk Act* (where applicable), regardless of when their *Fisheries Act* authorization was originally issued. Further, under subsection 73(8) of the *Species at Risk Act*, the Department can amend or revoke a permit (including *Fisheries Act* authorizations that have the same effect as *Species at Risk Act* permits), to ensure the survival or recovery of a listed aquatic species at risk (where applicable). The *Fisheries Act* also provides authorities for the Minister to amend, suspend, or cancel valid authorizations (as set out under subsections 34.4(5) and 35(5) of the *Fisheries Act*) at the request of the authorization holder, or on the Minister's initiative. Refer to *The Authorizations Concerning Fish and Fish Habitat Protection Regulations* (SOR/2019-286), for more information.



## Appendix 1. Legislative Context

The Department administers the fish and fish habitat protection provisions of the *Fisheries Act*, in combination with relevant provisions of the *Species at Risk Act* and the *Aquatic Invasive Species Regulations*, in order to conserve and protect fish and fish habitat.

Works, undertakings or activities (other than fishing) that result in the death of fish are offences under the *Fisheries Act* and the *Species at Risk Act* (if listed aquatic species at risk that are fish are also implicated), unless otherwise excepted under subsection 34.4(2) of the *Fisheries Act* and by way of (among other things) a permit issued under section 73 of the *Species at Risk Act*, or an authorization issued under another Act of Parliament having the same effects as a permit issued under section 73 (as described in section 74 of the *Species at Risk Act*). The most common exception to the *Fisheries Act* prohibition, applied by the Department, is the issuance of a Ministerial authorization under paragraph 34.4(2)(b) of the *Fisheries Act*.

If listed aquatic species at risk are also affected by the work, undertaking or activity, the *Species at Risk Act* requires that several conditions outlined in section 73, are met before the activity can be authorized.<sup>1</sup> Included amongst these requirements, subsection 73(3) states that the permit may only be issued if the Minister is of the opinion that:

- a. All reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted;
- b. All feasible measures will be taken to minimize the impact of the activity on the species (i.e., measures to mitigate and offset adverse impacts); and
- c. The activity will not jeopardize the survival or recovery of the species.

The deposit of deleterious substances could also result in the death of fish (including listed aquatic species at risk). Subsection 36(3) of the *Fisheries Act* prohibits the deposit of deleterious substances in water frequented by fish, unless the deposit is authorized by regulations. The Department of Fisheries and Oceans and the Department of Environment and Climate Change Canada share the responsibility for the administration and enforcement of the pollution prevention provisions of the *Fisheries Act* [subsections 36(3) to (6)]. The designation order<sup>2</sup> formally designates the Minister of the Environment as legally responsible for the administration and enforcement of the pollution prevention provisions of the *Fisheries Act*. However, the Minister of Fisheries and Oceans retains administration and enforcement responsibilities in relation to aquaculture facilities or the control or eradication of any aquatic invasive species or aquatic species that constitute a pest to the fisheries that are subject to the *Aquatic Invasive Species Regulations*.

The *Aquatic Invasive Species Regulations* were made under the authority of subsections 34(2), 36(5), 43(1) and (2) of the *Fisheries Act* and came into force in 2015 to protect fish and fish habitat, including listed aquatic species at risk, their critical habitat and residences from the

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<sup>1</sup> If approval for a proposed work, undertaking or activity is sought under both the *Fisheries Act* and the *Species at Risk Act*, and authorization is granted, a *Fisheries Act* authorization will generally be issued and will include the necessary considerations and conditions so as to comply with section 74 of the *Species at Risk Act*. Note that even if the conditions can be met, the Minister has the discretion not to issue a permit.

<sup>2</sup> <https://laws-lois.justice.gc.ca/eng/regulations/SI-2014-21/page-1.html>

threat of aquatic invasive species. The *Aquatic Invasive Species Regulations* provide a suite of regulatory tools that can be used by federal, provincial and territorial authorities to prevent the introduction of aquatic invasive species into Canadian waters and to control and manage their establishment and spread, if introduced. These tools include prohibitions, directions, measures,<sup>3</sup> and licenses to fish for invasive species. The death of fish, invasive or otherwise, resulting from activities authorized under the *Aquatic Invasive Species Regulations* is not an offence under subsection 34.4(1) prohibition of the *Fisheries Act* pursuant to the operation of paragraphs 34.4(2)(d) and (e) of the *Fisheries Act*. However, certain requirements and conditions of the *Species at Risk Act* may still apply.

Before considering whether to issue an authorization, the Minister is required under section 2.4 of the *Fisheries Act* to 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*) and is required to consider the factors (which include provided indigenous knowledge) set out under subsection 34.1(1) of the *Fisheries Act*, as applicable. The Department consults with Indigenous peoples when asserted or established Aboriginal and treaty rights may be adversely affected by its proposed Crown conduct (e.g., proposed decisions to authorize or permit, or orders requiring modifications to an existing work, undertaking or activity).

Under the *Species at Risk Act*, the Department must also consult Wildlife Management Boards when authorized by a land claims agreement to perform functions in respect of the listed aquatic species at risk (i.e. subsection 73(4)), or consult bands under the *Indian Act* if the species is found in a reserve or any other lands set apart for the use and benefit of the band (i.e. subsection 73(5)).

The information, documentation requirements and time limits for processing applications for a *Fisheries Act* authorization under paragraphs 34.4(2)(b) and 35(2)(b), including when the time limits cease to apply and start over, are set out in the *Authorizations Concerning Fish and Fish Habitat Protection Regulations* (SOR/2019-286<sup>4</sup>).

Similarly, the *Permits Authorizing an Activity Affecting Listed Wildlife Species Regulations*<sup>5</sup> establish the information requirements for *Species at Risk Act* permit applications, the time limit for the review of the submitted documents and the circumstances when the time limit stops, restarts or does not apply.

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3 Preventive, eradication or control measures are put in place to prevent, eradicate or control non-indigenous and aquatic invasive species in waters frequented by fish. Non-indigenous aquatic species and aquatic invasive species threaten indigenous fish through competition, predation or habitat impacts. Preventive, eradication or control measures are not equivalent to measures that avoid, mitigate or offset impacts on indigenous fish.

4 <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2019-286/index.html>

5 <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2013-140/FullText.html>

## Appendix 2. Overview of the *Fisheries Act* and the *Species at Risk Act* provisions

Table 1. Overview of provisions under the *Fisheries Act* and the *Species at Risk Act* that are administered by the Department to regulate proposed or existing works, undertakings, and activities (other than fishing) that are likely to result in the death of fish, including listed aquatic species at risk.

Legislation/Regulation and Provision(s)	Description of Provision <sup>1</sup>
<b><i>Fisheries Act</i></b> - Subsection 34.1(1)	<p><b>Framework of Considerations</b></p> <p>Lists factors to guide the Minister of Fisheries and Oceans decision-making functions. Examples of these factors include:</p> <p>Factor (a) – the contribution to the productivity of relevant fisheries by the fish ... that is likely to be affected;</p> <p>Factor (b) – fisheries management objectives.</p> <p>Factor (c) – whether there are measures and standards to avoid, mitigate or offset the death of fish ... ;</p> <p>Factor (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 ... ;</p> <p>Factor (e) – any fish habitat banks...;</p> <p>Factor (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;</p> <p>Factor (g) – Indigenous knowledge of the Indigenous peoples of Canada that has been provided to the Minister;</p> <p>Factor (h) – Any other factor the Minister considers relevant.</p>

<sup>1</sup> See the Fish and Fish Habitat Protection Policy Statement (2019) for details respecting the Department’s position and approach dealing with the fish and fish habitat protection provisions of the *Fisheries Act*.

Legislation/Regulation and Provision(s)	Description of Provision <sup>1</sup>
<b>Fisheries Act</b> - Subsection 34.3	<p><b>Ministerial Powers</b></p> <p>Under subsection 34.3(1) to require a person or owner who carries on, owns or has the charge, management or control over existing obstructions or any other thing detrimental to fish passage to carry out studies and to provide information to the Minister. Under subsection 34.3(2) to order that person or owner to provide for the free passage of fish or the protection of fish and fish habitat including with respect to flows downstream of the obstruction. Under subsection 34.3(3) to order that person or owner to modify, maintain or repair the obstruction or any other thing detrimental to fish passage, as required.</p>
<b>Fisheries Act</b> - Subsection 34.4(1)	<p><b>Prohibition Against Causing the Death of Fish</b></p> <p>A prohibition against a person carrying on any work, undertaking or activity, other than fishing, that results in the death of fish.</p>
<b>Fisheries Act</b> - Section 37	<p><b>Ministerial Powers</b></p> <p>Under subsection 37(1) to require plans or specifications from a person who carries on or proposes to carry on any work, undertaking or activity that results or is likely to result in the death of fish ... and under subsection 37(2) to order changes or restrictions to, or the closure of the work, undertaking or ending of the activity.</p>
<b>Fisheries Act</b> - Subsection 38(4)	<p><b>Duty to Notify</b></p> <p>The duty of the person who carries on, owns or has the charge, management or control of a work, undertaking or activity to notify, without delay, the Department in the event of the death of fish ... that is not authorized under the <i>Fisheries Act</i>, or of the serious and imminent danger of such an occurrence.</p>

Legislation/Regulation and Provision(s)	Description of Provision <sup>1</sup>
<b>Fisheries Act</b> - Subsection 38(6)	<p><b>Duty to take Corrective Measures</b></p> <p>The duty of the person identified under subsections 38(4), to take corrective measures that are consistent with public safety and with the conservation and protection of fish and fish habitat to prevent the occurrence, or to counteract, mitigate or remedy any adverse effects that result from the occurrence or might reasonably be expected to result from it.</p>
<b>Fisheries Act</b> - Subsection 38(7.1)	<p><b>Directions for Corrective Measures</b></p> <p>Allowing an inspector or fishery officer to issue directions for corrective measures, to the person [identified under subsection 38(4)] who carries on, owns or has the charge, management or control of any work, undertaking or activity, in order to implement all reasonable measures consistent with public safety and with the conservation and protection of fish, to prevent the occurrence or to counteract, mitigate or remedy any adverse effects that result from the occurrence or might reasonably be expected to result from it [subsection 38(6)]. An inspector or fishery officer may... take any of those measures at the expense of the person or direct that person to take the measures at their expense.</p>
<b>Species at Risk Act</b> - Subsection 32(1)	<p><b>Prohibition Against the Killing an Individual of a Listed Aquatic Species at Risk</b></p> <p>A prohibition against a person killing ... an individual of a species listed on Schedule 1, as extirpated, endangered or threatened.</p>