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RESPONSE OF THE GOVERNMENT OF CANADA TO SUBMISSION ON ENFORCEMENT MATTERS UNDER ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL CO-OPERATION (NAAEC), SUBMISSION NO. SEM-97-006, OCTOBER 4, 1997 BY FRIENDS OF THE OLD MAN RIVER

INTRODUCTION

The Friends of Oldman River (FOR) have submitted pursuant to Article 14 of the North American Agreement on Environmental Cooperation (NAAEC) that the Government of Canada (Canada) has failed to enforce its environmental laws.

Canada supports the Article 14 process. The submissions and factual record provisions of the NAAEC are among its most important and innovative. Canada views this process as a positive and constructive tool through which the public can help the Parties to the NAAEC improve their environmental enforcement. **Canada submits it is effectively enforcing its environmental laws and is therefore in full compliance with its obligations under the NAAEC. Therefore, the development of a factual record is not warranted.**

SUMMARY OF CANADA'S RESPONSE:

In their submission to the Secretariat of NACEC, FOR has complained that: "the Government of Canada is failing to comply with and enforce the habitat protection Sections of the Fisheries Act and with CEAA (Canadian Environmental Assessment Act). In particular, the Government of Canada is failing to apply, comply with and enforce Sections 35, 37, and 40 of the Fisheries Act, Section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulation* made pursuant to paragraphs 59(f) and (g) of CEAA." Further, they contend that the Directive invents a decision-making process which frustrates the intention of Parliament and usurps the role of CEAA as a planning and decision-making tool.

The Department of Fisheries and Oceans (DFO) is the federal department responsible for the administration of the Fisheries Act.

Canada rejects these allegations based on the following arguments:

- the method by which Canada enforces Section 35 of the Fisheries Act and the implementing Directives thereof, is a legitimate exercise of its regulatory and compliance discretion as recognized in Article 45 of the Agreement;

- the Directive is not structured so as to allow or disguise Harmful Alteration, Disruption or Destruction (HADD) of fish habitat as prohibited by Section 35 of the Fisheries Act;

- the Directive operates within the law and possesses administrative integrity;

- Subsection 35 (1) is not invoked if no HADD occurs;

- Subsection 35(2) is not required if there is no HADD;

- Section 37 of the Act is not required and therefore is not invoked where proponents voluntarily provide project information and agree to necessary alterations;

- Section 37(1) is not invoked if no HADD occurs or is imminent;

- Section 37(1) of the Act, due to its requirement for Order-in-Council approval in order to effect changes, was never intended to be utilized on a day-to-day basis, but was intended to provide powers to deal with extraordinary situations as is indicated by the requirement for Governor-in-Council approval of Ss. 37(2) orders;

- Section 40 of the Act is not invoked if Section 35 is not contravened; and,

- CEAA is not triggered if DFO does not exercise the decision-making authorities of Sections 35(2) or 37(1), (2) of the Fisheries Act as described in the CEAA *Law List Regulation.*

In addition, FOR contends that there are very few prosecutions under the habitat provisions of the Fisheries Act and the prosecutions that do occur are very unevenly distributed across the country, and in fact, there has been a *de facto* abdication of legal responsibilities by the Government of Canada to the inland provinces.

Canada rejects this allegation. Section 35 of the Fisheries Act does not create a mandatory obligation for a proponent to seek an authorization. There is no authority provided for DFO to require the proponent to seek an authorization. A proponent can proceed with the work at its own risk should it wish to do so. This can give rise to apparent inconsistencies since proponents seek authorizations in different ways.

The nature of the Canadian federation is such that it provides for complementary and overlapping legislative and regulatory responsibilities. Through their responsibilities for the management of natural resources, the provinces have developed their own legislation which in many instances deals with the type of activities targeted under the habitat provisions of the federal Fisheries Act. As a result, activity that could risk legal action under the Fisheries Act is often subject to legal sanction under provincial statute where this is chosen to be the most appropriate route by enforcement officers.

Furthermore, enforcement across the country is influenced heavily by the variety and degree of activity by proponents and the necessary interaction between federal and provincial natural resource and conservation organizations. The pattern of enforcement also reflects the judgment of civil servants whether development activities present a risk to fish and fish habitat. In addition, as is the case with all regulatory enforcement organizations, the pattern of enforcement reflects the level of resources allocated by federal and provincial governments. This factor is specifically identified and allowed for in the Article 45 definitions of the NAAEC.

The balance of this document will set out in additional detail, Canada's position regarding each of the allegations being brought forward by FOR. Given the inter-relatedness of the allegations, there will be some necessary repetition in the response.

A) REASONABLE EXERCISE OF DISCRETION (NAAEC ARTICLE 45)

Canada submits that it effectively enforces its environmental law with respect to Section 35 of the Fisheries Act and the implementing Directives thereof. Article 45 of the Agreement recognizes that Parties to the Agreement, in enforcing their environmental laws, may take actions which reflect a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory, or compliance matters. The method by which Canada enforces and applies Section 35 of the Fisheries Act and the issuance of the Directive is a legitimate application of this discretion. Furthermore, the Agreement acknowledges, in Article 5, that seeking assurances of voluntary compliance, as Canada does through the Directives, is an appropriate government enforcement action. As such, Canada respectfully submits that the development of a factual record in this case is not warranted since the Agreement does not permit the review of the legitimate exercise of a Party's discretion.

Notwithstanding the above, to further the objectives of the Article 14 process Canada's response will address each of the specific allegations concerning environmental laws and in so doing will provide a detailed response to all the environmental issues raised by FOR.

B) ALLEGATION 1

i) Section 35 of the Fisheries Act

The allegation that the Government of Canada is failing to apply, comply with or enforce Section 35 of the Fisheries Act is rejected.

In their submission, FOR identify DFO's application and implementation of the internal Directive for the Issuance of Subsection 35(2) Authorizations (the Directive), (attached) as the basis for this alleged failure. Subsection 35(1) of the Act says that no one may cause a HADD of fish habitat. Subsection 35(2) says that no one violates the Fisheries Act by causing a HADD of fish habitat, provided they are authorized to do so by the Minister of Fisheries and Oceans. It is the exercise of this regulatory power to issue an Authorization by the Minister of Fisheries and Oceans that triggers an environmental assessment (EA) under CEAA.

In order for FOR's allegation to hold true, the Directive would have to be found to disguise or exempt Harmful Alteration, Disruption or Destruction (HADD) of fish habitat as prohibited by Section 35 of the Fisheries Act, i.e. the Directive would have to avoid or preclude the requisite authorization under the Act.

Canada contends that the Directive was not, and is not, structured to allow or disguise Harmful Alteration, Disruption or Destruction (HADD) of fish habitat, as prohibited by Subsection 35 (1) of the Fisheries Act nor does it preclude the genuine need for an authorization. Both the Act and the Directive are explicit that any HADD of fish habitat requires an authorization in order to avoid a violation of the Fisheries Act. The Directive clearly outlines this condition while at the same time providing a consultative mechanism to allow proponents (at their request) to have their proposal reviewed by DFO to determine its potential to create a HADD.

This Directive involves a number of stages, which are outlined as follows:

1. An applicant applies to DFO for a review of a project relative to Section 35 of the Fisheries Act. Section 35 reads in part as follows:

> No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat;
>
> No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorised by the Minister.

2. On receiving the proposal, the DFO representatives examine it to determine whether the project as proposed will result in "the harmful alteration, disruption or destruction of fish habitat".

3. If the answer to this is negative, the applicant is notified that, in the opinion of DFO," an authorization under Section 35(2) of the Fisheries Act is not considered necessary if the proposed work is carried out as specified in the plans provided to the Department of Fisheries and Oceans". At the same time, the proponents are cautioned that: "if harmful alteration, disruption or destruction of fish habitat occurs as a result of the failure to implement the work as proposed, a violation of Section 35(1) of the Fisheries Act may occur".

4. In cases where the project as proposed would have harmful effects on fish habitat, the DFO representatives attempt to assist the proponent to develop and propose mitigation measures that will avoid these effects. Where these measures enable the applicant to comply with subsection 35(1), the DFO representatives inform him or her that the inclusion of these measures, if carried out as outlined, will avoid any HADD and consequently subsection 35(2) will not apply.

5. If the applicant includes the measures necessary to avoid harmful effects, no authorization under subsection 35(2) is necessary. However, where the applicant refuses to include such measures, he or she must obtain an authorization.

Through this consultative process, DFO provides advice to proponents regarding the need to relocate, redesign and incorporate mitigation measures at the planning stage of the project, so that in the technical judgment of DFO, a HADD of fish habitat will not be incurred. If there is to be no HADD, subsection 35 (1) is not invoked and therefore there is no need or justification for an authorization under subsection 35 (2) of the Fisheries Act.

In implementing the Directive, DFO staff take into account all relevant factors concerning the relationship between the proposal's potential impact on fish and fish habitat as directed by the Fisheries Act. When in the technical judgment of officials, no HADD will occur and therefore no authorization is required, the element required to trigger CEAA (through the exercise of the regulatory power contained in subsection 35 (2) of the Fisheries Act and in Section 5(1)(d) of CEAA and Schedule 1, Part 1 Item 6 of the *Law List Regulation* pursuant to paragraphs 59(f) and (g) of CEAA) is not present.

Since the Directive is explicit that any HADD of fish habitat requires an authorization in order to avoid a violation of the Fisheries Act, its characterization as a device or mechanism which facilitates or enables the government to fail to apply, comply with or enforce Section 35 of the Fisheries Act is unfounded.

Furthermore, the Commissioner of the Environment and Sustainable Development (CESD) reported to Parliament in his 1998 report entitled "Managing for Sustainable Development" on

the application of CEAA and particularly noted the issue of Section 35 of the Fisheries Act and letters of advice. His review of the issue did not conclude any misapplication of CEAA with respect of Section 35. The CESD is independent of DFO and his assessment confirms DFO's position in this response.

ii) Section 37 of the Fisheries Act

Subsection 37(1) of the Fisheries Act provides the authority for the Minister to demand that the proponent supply pertinent information (plans, drawings etc.) to enable the Minister to determine whether or not the work or undertaking is likely to result in a HADD and/or the deposit of a deleterious substance. Subsection 37(2) provides the authority for the Minister to order the proponent to undertake such modifications or additions as required to avoid the HADD and/or deposit. These orders can be made in accordance with regulations as set out in the Act or with the approval of the Governor-in-Council.

Since the promulgation of this Section of the Fisheries Act in 1977, no regulations dealing with HADD of fish habitat pursuant to Section 35 or Section 37, have been enacted by any Government of Canada. For this reason, any actions in relation to HADD of fish habitat, under subsection 37 (2), have proceeded by means of approval of Governor-in-Council.

This lack of regulation is a powerful expression that successive Governments of Canada have viewed this Section of the Act as containing powers, which are only intended to be invoked under extraordinary circumstances. Discussion and approval of day-to-day development activities and projects are not the normal purview of the Federal Cabinet. On the contrary, the normal course of events is for government officials to seek the necessary information from proponents on the basis of voluntary compliance.

Implementation of Section 37 of the Fisheries Act must be assessed within the overall context of the Section 35, which FOR's submission also addresses. As pointed out above, Section 35 of the Fisheries Act does not create a mandatory obligation for a proponent to seek an authorization. Under the existing legislation, there is no authority provided for DFO to require the proponent to seek an authorization. Rather, it defines the nature of an offense and a mechanism by which the activity that would otherwise create an offense, may proceed under the authority of the Minister and thereby not constitute an offense.

Similarly, as Section 35 clearly places no proactive responsibility on either proponent or DFO, Section 37 provides a mechanism for government to act if required, but does not imply or require a proactive implementation.

Since, the Act does not require DFO to use the powers of Section 37 in any given set of circumstances, DFO's preference is to proceed on a voluntary basis to obtain the information necessary to deal with Section 35 issues. This reflects a commitment to operational efficiency.

There is no need to invoke legislative powers to obtain information that is readily available through routine relationships involving government agencies, proponents and clients.

In the absence of the exercise of the authorities under Section 37, no related Section 40 offense can occur. Therefore, the required element to trigger CEAA (through the exercise of the regulatory power contained in Subsection 37 (2) of the Fisheries Act, as identified in Section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulation* made pursuant to paragraphs 59(f) and (g) of CEAA), is not present.

When, in the opinion of DFO officials, the information and/or required amendments to plans or changes to undertakings will occur without invoking the powers under Section 37 of the Act, such officials are reflecting a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters as explicitly allowed for under the NAAEC Article 45 definitions. In light of the foregoing, DFO should not be seen in any way to have failed to effectively enforce environmental laws or not to have complied with Article 5.1 of the NAAEC.

C) ALLEGATION 2

i) The Directive on the Issuance of Subsection 35(2) Authorizations

Having responded to the allegations regarding a failure to apply, comply with or enforce environmental laws in the context of the Fisheries Act by means of implementing the Directive, it is necessary to deal with the FOR's allegation regarding the validity of the Directive itself. Specifically, FOR contends that "the Directive invents a decision-making process which frustrates the intention of Parliament and usurps the role of the Canadian Environmental Assessment Act (CEAA) as a planning and decision making tool".

To address this allegation, a step-by-step analysis of the Directive and its relationship to CEAA is provided.

The environmental assessment process established under the CEAA is triggered when one of the conditions in Section 5 is met. In this case, the relevant provisions are paragraph 5(1)(*d*), and the regulations under 59(f). The relevant issue is at what stage the CEAA begins to apply. More specifically, is the CEAA triggered by any one of the stages of the Directive or only when an authorization is issued under Subsection 35(2) of the Fisheries Act? It is Canada's position that it is the Minister's issuance of an authorization under subsection 35(2) of the Fisheries Act that requires the process prescribed by the CEAA. Paragraph 5(1)(*d*) of CEAA, clearly establishes that the environmental assessment of a project must be conducted **before** the power conferred by subsection 35(2) of the Fisheries Act is exercised or any action is taken to allow a project to be carried out in whole or in part.

To consider the legality of the Directive in light of the CEAA, the scope of Section 35 of the Fisheries Act must be determined. First, the purpose of subsection 35(1) is to protect fish habitat, while the purpose of subsection 35(2) is to allow the granting of authorizations to destroy fish habitat under specified conditions. An authorization would not be issued unless the project **will result** in the destruction of fish habitat. By inference, a project that does not affect fish habitat is simply not subject to subsection 35(2). The same conclusion could be drawn with respect to a project that needed mitigation measures in order to satisfy subsection 35(1). It should be further noted that Section 35 of the Fisheries Act does not create a mandatory obligation for a proponent to seek an authorization. Equally, under the legislation, there is no authority provided for DFO to require the proponent to seek an authorization.

The first stage of the Directive addresses the receipt by DFO of a request to review a proposal in the context of Section 35 of the Fisheries Act. This stage alone cannot require that an environmental assessment be conducted in accordance with the CEAA. The mere fact that an application is received does not constitute an exercise of the power conferred on the DFO under subsection 35(2) of the Fisheries Act but is preliminary to the exercise of the power in question. Consequently, this first stage cannot trigger the process under the CEAA.

The second stage of the Directive is to determine the damage a project may cause to fish habitat. From a strictly legal viewpoint, this stage determines whether authorization under subsection 35(2) of the Fisheries Act is necessary or whether the project is in accordance with subsection 35(1). The question is clearly preliminary to the exercise of the power. Therefore, this stage is not the element that triggers an environmental assessment under the CEAA.

The third stage of whether there will be HADD depends on the finding in the second stage that authorization under subsection 35(2) of the Fisheries Act must be obtained because of the damage to fish habitat caused by the project. This is not an exercise of the power conferred under subsection 35(2).

While the results of the third stage ensure that the project complies with subsection 35(1) of the Fisheries Act, the fourth stage is the indication of necessary mitigation measures to the applicant, who is then free to include them and thus avoid the need for authorization under subsection 35(2). Consequently, this stage also does not trigger an environmental assessment under the CEAA.

The fifth stage is the issuance of the authorization by the DFO under subsection 35(2) of the Fisheries Act. This occurs only when HADD is expected and where:

(1) the project cannot be changed to prevent the destruction of the fish habitat; or,

(2) where the applicant refuses to change the project to include the appropriate mitigation measures.

Subsection 11(1) of CEAA helps to determine when CEAA is triggered. Subsection 11(1) provides that the environmental assessment must be conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made. This is interpreted as referring to the time when the DFO official determines that an authorization under subsection 35(2) of the Fisheries Act will be necessary. In addition, the introduction to Section 5 of the CEAA provides that the environmental assessment is required before a federal authority exercises the power conferred under subsection 35(2) of the Fisheries Act. Consequently, the environmental assessment under the CEAA must be completed **before** the DFO representatives recommend that the Department issue an authorization under subsection 35(2) of the Fisheries Act.

In conclusion, individually and collectively, the five steps outlined in the Directive in no way invent a decision-making process which frustrates the intention of Parliament and usurps the role of CEAA as a planning and decision-making tool. Rather, it provides specific direction to officials to ensure a uniform approach to the application of Section 35 of the Fisheries Act that fully respects the requirements of the CEAA and the Fisheries Act.

D) ALLEGATION 3

i) Limited and unevenly distributed prosecutions under the Fisheries Act

FOR contends that "there are very few prosecutions under the habitat provisions of the Fisheries Act and the prosecutions that do occur are very unevenly distributed across the country, and in fact, there has been a *de facto* abdication of legal responsibilities by the Government of Canada to the inland provinces".

Canada contends that the pattern of program implementation and enforcement across the country is appropriate and that current arrangements for the delivery of habitat management are neither a real nor a *de facto* abdication of legal responsibilities for the protection of Canada's fish habitat in the context of the Canadian federation. Rather cooperation with provinces increases the enforcement resources and allows more effective enforcement. Further, the allocation of resources to do the job is consistent with Article 45 definitions of NAAEC.

The pattern of prosecutions and convictions under the habitat provisions of the Fisheries Act reflects the compliance-based approach taken to habitat protection. As has been outlined above, DFO prefers to prevent damage to habitat and avoid losses to the fisheries resource in the first phase, before proponents proceed with projects. However, when voluntary compliance fails, and the Fisheries Act is contravened, such that habitats supporting fisheries resources are harmfully altered, destroyed or degraded, enforcement action is taken.

This approach is supported by the arguments outlined above that Section 35 of the Fisheries Act does not create a mandatory obligation for a proponent to seek an authorization, nor does the legislation provide DFO the authority to require the proponent to seek an authorization. A proponent can proceed with a project without an authorization should she or he wish to do so at the risk of prosecution if the Fisheries Act is contravened.

The 1996/97 Annual Report to Parliament on the Administration and Enforcement of the Fish Habitat Protection and Pollution Prevention Provisions of the Fisheries Act (Annual Report) tabled on May 15, 1998 summarizes Canada's referral/assessment and enforcement activity. While there were relatively few convictions (48) under Section 35(1) over the period, there were 91 authorizations issued and advice provided in 3689 instances to private proponents and in 3223 instances to federal, provincial or territorial agencies for a total of 7003 instances where efforts were made to ensure compliance with Section 35.

These statistics reflect the practice that some proponents approach DFO directly regarding a proposed development while others contact other government agencies so that DFO is made aware of the project via a referral from a third party. There is no consistent pattern across the country with respect to how DFO learns of development projects. However, it is highly improbable given the interwoven and complementary responsibilities of municipal, provincial and federal conservation agencies, that any significant development having potential impacts on fish habitat could proceed without the knowledge of DFO.

The pattern of enforcement and referral/assessment activity also reflects the level and variety of economic development activity across the country. During 1996/97, British Columbia and the Yukon (Pacific Region) where economic development activity has been relatively heavy within Canada, accounted for 32 of the 48 convictions reported and for over 60% of the authorizations and advice given. Further, proximity to fisheries waters is not uniform across the country so that related enforcement cannot be expected to be uniformly distributed.

An additional factor also influences the pattern of compliance and enforcement. While DFO has primary responsibility for enforcing the habitat protection provisions of the Fisheries Act, provinces, particularly the inland provinces, also have the authority to enforce these provisions. Further, given constitutional responsibility for natural resources, provinces have developed their own conservation legislation, water use for example, which may deal with similar development. As a result, activity that could draw legal action under the federal Fisheries Act may instead be subjected to legal sanction under one or more provincial statutes.

It is up to the discretion of enforcement officers of the various enforcement agencies, both federal and provincial, to determine under which statute charges should be laid. As many provinces have mandatory permits with explicit stipulations as to how works are to proceed, the legislation and regulations supporting these requirements may be determined to be the most expedient for bringing the matter before the courts. Consequently, fish habitat related matters frequently find redress through provincial court action under provincial statute.

The assertion by FOR that there has been a *de facto* abdication of legal responsibilities to the provinces is incorrect. The Department of Fisheries and Oceans has identified provincial personnel responsible for the implementation of the habitat provisions and enforcement of the Fisheries Act for every province in Canada. The number of individuals assigned to this work including project assessment/referral and enforcement is in excess of 730 staff across Canada. An estimated 650 provincial conservation and fish and wildlife officers in the four inland provinces have been designated under the Fisheries Act for enforcement purposes in addition to their enforcement duties under provincial legislation. The degree to which these provincial powers are utilized varies depending on the province and is not reflected in the Annual Report.

The FOR Submission Example: the Sunpine Forest Products Forest Access Road

While the FOR submission is clear that the focus of their allegations against Canada regarding the enforcement of the Fisheries Act habitat provisions is broader than the Sunpine log hauling road cited as an example in their submission, Canada would like to provide factual information pertaining to this project and how it was dealt with under federal habitat protection legislation for the public record.

Sunpine Forest Products Ltd. proposed to build a road to access forest areas on the eastern slope of the Rocky Mountains west of the town of Rocky Mountain House. The company approached the provincial government for the required permits and approvals. DFO became aware that as part of Sunpine's proposed undertakings, the company's project would be crossing 21 streams. DFO concluded that 8 of the 21 had potential implications for fish habitat. For two of the stream crossings, Ram River and Prairie Creek, DFO permits for bridge construction were required under the federal Navigable Waters Protection Act thus triggering CEAA screenings for these bridges. The screenings were completed and the permits were issued. DFO concluded that 6 crossings did not have a potential to damage fish habitat if constructed as proposed by the company and that no further action by DFO was required. For the remaining 2 crossings (Ram River and Prairie Creek), DFO wrote letters of advice. Project construction, with the exception of the Prairie Creek Bridge, was completed during 1997. Alberta Fish and Wildlife officials have inspected the 40-kilometer road and have confirmed that the bridges and culverts have been constructed as proposed and that fish habitat has been protected.

The environmental assessment and the permits in this case are currently the subject of judicial review. The decision has been delivered but appeals may still be considered. This matter being the subject of active litigation, it is respectfully suggested that the Sunpine example should not be considered further by CEC.

May 25, 1995

DIRECTIVE ON THE ISSUANCE OF SUBSECTION 35(2) AUTHORIZATIONS

INTRODUCTION

1. The Policy for the Management of Fish Habitat (1986) (Habitat Policy) provides general guidance on the application of the habitat protection provisions of the *Fisheries Act*. It has become evident, however, that there is a need to provide more specific guidance on the administration of Section 35 to ensure national consistency in its application and that the Habitat Policy's "no net loss" guiding principle is met.

2. This directive has been developed in accordance with the Habitat Policy and the Habitat Conservation and Protection Guidelines (1994). The main thrust of the directive is to provide an interpretation of the appropriate sections of the Habitat Policy and to set out how Section 35 of the *Act* is to be applied. This directive is also intended to clarify certain aspects of the Habitat Policy, add precision and promote consistency in the application of Section 35 and establish a nationally consistent process for issuing authorizations.

PURPOSE

1. The purpose of this directive is to clarify the circumstances when authorizations pursuant to Subsection 35(2) may be issued. The directive is intended to be used by those making decisions with respect to the administration of Subsection 35(2) of the *Fisheries Act.*

AUTHORITY

1. Section 35 of the *Fisheries Act* states:

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

   (2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this *Act*.

2. Section 58 of the Fishery (General) Regulations states:

(1) Any person who proposes to carry on any work or undertaking that is likely to result in the harmful alteration, disruption or destruction of fish habitat and who wishes to have the means or conditions of that work or undertaking authorized by the Minister under subsection 35(2) of the *Act* shall apply to the Minister in the form set out in Schedule VI.

(2) An authorization given under subsection 35(2) of the *Act* shall be in the form set out in Schedule VII.

3. The Habitat Policy applies to all projects which have the potential to harmfully alter, disrupt or destroy fish habitat. In reviewing project proposals under the *Fisheries Act,* the Habitat Policy's No Net Loss guiding principle will be applied on a project-by-project basis in order to maintain the productive capacity of fish habitats supporting Canada's fisheries resources. Productive capacity is defined in the Habitat Policy to mean the maximum natural capacity of habitats to produce healthy fish, safe for human consumption, or to support or produce aquatic organisms upon which fish depend. This directive provides a framework within which "No Net Loss" can be achieved on a nationally consistent basis.

While the Habitat Policy refers to the maintenance of productive capacity as a stated objective, it should be noted that the information necessary to estimate productive capacity is often not available on a project-specific basis. As a result, the effects of a project on the physical, chemical and biological components of fish habitat will normally be assessed as surrogates for impacts to productive capacity. Where essential habitat components (physical, chemical or biological) are expected to be harmfully affected in such a way that impacts cannot be mitigated it is assumed that some reduction of productive capacity is likely to occur.

4. A decision Framework for the Determination of Harmful Alteration, Disruption or Destruction (HADD) of Fish Habitat is being developed to assist habitat managers in their work and developers in their project planning. This document sets out a decision-making framework for determining whether harmful alteration is likely to occur as a result of project development and whether an authorization could be issued. The Framework defines HADD as any change in one or more habitat components that causes a reduction in the capacity of habitat to support the life requisites of fish.

DIRECTIVE

1. Subsection 35(2) authorizations are for authorizing the harmful alteration, disruption or destruction of fish habitat and are not intended to authorize works or undertakings. Although subsection 35(2) authorizations are not mandatory in order to carry out a work or undertaking, proponents are strongly advised to consult with the appropriate authorities prior to undertaking projects to ensure that fish habitat concerns and any associated regulatory requirements are taken into account as part of project planning.

2. Subsection 35(2) authorizations should only be considered for habitat which has a link to an existing or potential fishery. The National Application section of the Habitat Policy states that "the policy will apply to those habitats directly or indirectly[1] supporting those fish stocks or populations that sustain commercial, recreational or Native fishing activities of benefit to Canadians." The Habitat Policy also states that "the level of protection given to habitats will take into consideration their actual or potential contribution to the nation's fisheries resources".

3. Subsection 35(2) authorizations should only be issued (note - issuance of an authorization is not mandatory) "when it provides impossible or impractical to maintain the same level of habitat productive capacity by altering the design of the project or using mitigating measures" (as described in the Procedures to Apply the No Net Loss Principle in the Habitat Policy). In practical terms, authorizations should only be issued for works or undertakings which could result in damage to fish habitat which cannot be avoided through relocating or redesigning the project or through mitigation.

   The Procedure to Apply the No Net Loss Principle, as set out in the Habitat Policy indicates that the first preference is to maintain the productive capacity of the habitats in question by avoiding any loss or harmful alteration through project relocation, redesign or mitigation. Only after it becomes impossible or impractical to maintain the same level of habitat productive capacity would the exploration of compensatory options be considered.

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[1] Habitats indirectly supporting fish would include, for example, those habitats that product food organisms critical to maintaining fish populations. Also included in this concept of "indirect" are situations such as changes in ground water hydrology which could have an effect on stream flow.

4. Where it has been determined that adverse effects to habitat cannot be avoided through project redesign or mitigation, compensation options may be considered in some cases. The "Habitat Conservation and Protection Guidelines (1994)" outline the hierarchy of preferences for habitat conservation and describe the process for determining under what circumstances compensation may be considered as an option for achieving the No Net Loss objective. In general, compensation is not an acceptable option for projects which will have harmful effects on critical[2] habitats and in such cases, authorizations would not normally be issued.

   Authorizations will not normally be issued until adequate compensation measures have been developed which will result in achieving the No Net Loss objective. Terms and conditions of authorizations will stipulate the measures to be implemented by the proponent to compensate for habitat which is harmfully altered, disrupted or destroyed.

   Where the loss of a given habitat type or element is determined to be unacceptable, an authorization would not be issued.

5. The issuance of Subsection 35(2) authorizations is not the only means under the *Fisheries Act* to manage fish habitat. In general, proponents are responsible for providing sufficient information with respect to their projects to allow for the assessment of potential impacts to fish habitat, including information concerning proposed measures to prevent, mitigate or compensate for damage to fish habitat. Where appropriate, timely advice and specific requirements will be provided to any person, company or agency engaged in or responsible for work in or near water, in an effort to control the potential adverse effects on fish habitats.

   In cases where it has been determined that harmful effects to fish habitat can be avoided through project relocation, redesign or mitigation, letters of advice may be issued to proponents which set out measures aimed at ensuring that harmful effects do not occur. Although such written advice does not constitute an authorization, proponents will have some protection against enforcement action where due diligence has been applied in implementing the provided written advice.

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[2] Critical habitats are those which are essential for the continued survival of a fish stock. They may include any element of fish habitat. Certain habitats may be sensitive (e.g. a specific spawning bed) but not be critical, in that their loss may not result in a loss of productive capacity).

6. Although it is not mandatory for proponents to obtain letters of advice or authorizations with respect to their projects, failure to do so could result in enforcement action being taken if adverse effects to fish habitat occur as a result of project implementation. In addition, failure to implement measures set out in letters or authorizations which results in harmful effects to habitat could lead to enforcement action.

FACTORS TO CONSIDER IN ASSESSMENT

1. In the review of individual referrals, an ecological approach to habitat management must be adopted as the best means to achieve proper protection and conservation of fish habitat. This is consistent with the first goal of the Habitat Policy which is that resource management procedures will be implemented on an ecosystem basis. This is also consistent with the concept of sustainable fisheries adopted by the federal government.

2. The "Habitat Conservation and Protection Guidelines (1993)" describe the process for determining under what circumstances impact mitigation or compensation should be considered. In general terms, compensation is not an acceptable option for highly sensitive or critical habitats.

3. The terms "mitigation" and "compensation" are not specifically defined in the Habitat Policy. In this directive, the term mitigation is meant to include measures which are undertaken to maintain habitat or to prevent residual damage to habitat at the project site or that occurs as a direct result of the project. The term compensation includes measures which are implemented at the project site or at a location other than the project site intended to replace residual losses to habitat resulting from project development. Compensation normally involves the replacement of damaged habitat with newly created habitat or the improvement of natural habitat to increase its productive capacity. Compensation may also include artificial propagation, although this is not a preferred option.