

Policy for Applying Measures to Offset Harmful Impacts to Fish And Fish Habitat

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Policy for Applying Measures to Offset Harmful Impacts to Fish and Fish Habitat

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Context and purpose of this policy

Fish and fish habitat can be negatively affected by development activities that result in loss of ecological function and harmful effects on fish. Fisheries and Oceans Canada (DFO) regulates works, undertakings or activities (referred to as “projects” in this Policy) that could result in the death of fish or the harmful alteration, disruption or destruction of fish habitat (collectively referred to in this document as “harmful impacts to fish and fish habitat” or simply “harmful impacts”¹).

Under [paragraphs 34.4\(2\)\(b\)](#) and [35\(2\)\(b\)](#) of the *Fisheries Act*, the Minister or responsible official (referred to as “DFO”) may authorize harmful impacts and set out conditions under which the impacts can occur. In making the decision to issue an authorization, one of the factors that DFO must consider is whether there are measures and standards to avoid, mitigate or offset death of fish and harmful alteration, disruption or destruction of fish habitat.

Offsetting measures are the actions taken by a proponent to counterbalance the residual effects to fish and fish habitat that are caused by their project, after avoidance and mitigation measures have been applied. DFO strives to balance unavoidable habitat losses with habitat replacement on a project-by-project basis so that further reductions to Canada’s fish and fish habitat due to habitat loss or damage may be prevented.

This Policy for Applying Measures to Offset Harmful Impacts to Fish and Fish Habitat (this Policy) provides guidance to proponents² on the use of offsetting measures to counterbalance the death of fish or the harmful alteration, disruption or destruction of fish habitat. This includes the development of conservation project plans for habitat banks (see [Fish habitat banks](#)). It is meant to support the [Applicant’s Guide Supporting the Authorizations Concerning Fish and Fish Habitat Protection Regulations](#) (the Regulations) and expand upon the information provided on offsetting measures in DFO’s [Fish and fish habitat protection policy statement](#).

The legal context for offsetting, including the *Fisheries Act*, the *Species at Risk Act*, the *United Nations Declaration on the Rights of Indigenous Peoples Act* and [section 35](#) of the *Constitution Act, 1982*, is set out in [Annex A](#).

This Policy is organized into 3 parts:

[Part 1](#): Guiding principles for proposing measures to offset

[Part 2](#): Measures to offset provides information on the types of offsetting measures and their application, as well as the options for implementing measures to offset.

[Part 3](#): Additional information provides information about additional considerations associated with implementing measures to offset.

¹ For more information about what constitutes “harmful impacts” see the [Fish and fish habitat protection policy statement](#), August 2019 (<https://www.dfo-mpo.gc.ca/pnw-ppe/policy-politique-eng.html>)

² Proponents can include individuals, organizations or entities that propose projects or activities that may impact fisheries, aquatic ecosystems or marine resources.

Disclaimer

This Policy is not a substitute for the *Fisheries Act*, the *Species at Risk Act* or their regulations. In the event of an inconsistency between this Policy and the legislation, the legislation will prevail.

Part 1. Guiding principles for offsetting

Proponents should adhere to these principles and clearly demonstrate how they have been considered in the development of their offsetting plans or, for those developing fish habitat banks, in their habitat bank conservation project plan. Note that the principles are not listed in order of priority.

Principle 1: Offsetting is last in a hierarchy of measures

Aquatic ecosystems are dynamic and complex, making it difficult to predict how they will respond to changes resulting from work in or near water. For this reason, an internationally recognized “hierarchy of measures” is considered a best practice for reducing such risks. This hierarchy of measures is as follows:

1. **Avoid:** Avoid temporary or permanent changes to fish and fish habitat whenever possible. This is the first and most important step when planning a project.
2. **Mitigate:** When pressures on fish and fish habitat cannot be avoided, apply mitigation measures to reduce their spatial scale, duration and intensity to an acceptable level.
3. **Offset:** Consider opportunities to counterbalance harmful impacts to fish and fish habitat through the implementation of offsetting measures (or the application of habitat banking credits) only after all options to avoid and mitigate have been exhausted.

A conceptual diagram of this hierarchy of measures is provided in Figure 1.

These measures are interpreted as follows:

Measures to avoid are actions taken to prevent pressures on fish and fish habitat, and include the choice of design, location and timing so that there is no interaction with fish or fish habitat. For some projects, pressures on fish and fish habitat may be fully avoided, while for others they may only be partially avoided.

Measures to mitigate include the implementation of best management practices during planning, construction, operation, maintenance, and temporary or permanent closures. They may also include project-specific components or features that provide some benefit to fish or fish habitat, thereby reducing the pressures on fish and fish habitat resulting from the project. Mitigation measures include on-site remediation for the purpose of returning the project site to a natural form after construction activities are completed (e.g., reinstating stream banks and slopes, revegetating the affected riparian zone). Mitigation measures reduce the need for measures to offset.

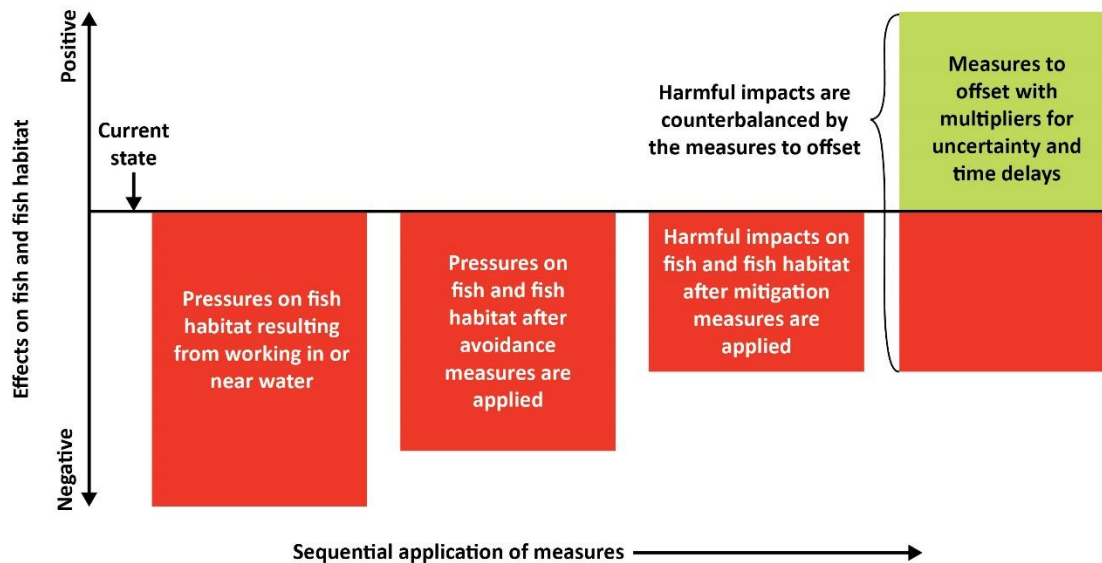


Figure 1. Conceptual diagram of the hierarchy of measures. (Note: the size of these boxes is for illustrative purposes only).

Measures to offset are actions taken to benefit fish and fish habitat that will counterbalance harmful impacts to fish and fish habitat when pressures cannot be avoided or mitigated.

As indicated in [section 10 of Schedule 1](#) of the *Authorizations Concerning Fish and Fish Habitat Protection Regulations*, proponents are required to describe the avoidance and mitigation measures that they will implement, including an analysis of the expected effectiveness of those measures.

For more guidance to proponents on implementing avoidance and mitigation measures, please see DFO's [Projects near water website](#)³ and the [Talk Fish Habitat website](#)⁴ for:

- [Measures to protect fish and fish habitat](#)⁵
- [Standards](#)
- [Codes of practice](#)⁶
- [Pathways of Effects](#) diagrams⁷
- [DFO's Risk Management Framework Overview](#)⁸

³ <https://www.dfo-mpo.gc.ca/pnw-ppe/index-eng.html>

⁴ <https://www.talkfishhabitat.ca/>

⁵ <https://www.dfo-mpo.gc.ca/pnw-ppe/measures-mesures-eng.html>

⁶ <https://www.dfo-mpo.gc.ca/pnw-ppe/practice-practique-eng.html>

⁷ <https://www.dfo-mpo.gc.ca/pnw-ppe/pathways-sequences/index-eng.html>

⁸ <https://www.talkfishhabitat.ca/46335/widgets/194689/documents/143957>

- [Standardized General Avoidance and Mitigation Measures](#)⁹

[Section 16 of Schedule 1](#) of the Regulations requires proponents to describe their plan to offset the death of fish and harmful alteration, disruption or destruction of fish habitat that were not offset by the habitat credits. The different options for measures to offset are set out in [Part 2: Measures to offset](#).

Note that if the Minister forms the opinion that the activity could jeopardize the survival or recovery of a listed aquatic species at risk, the *Species at Risk Act* compels them to refuse to authorize the project

Principle 2: There are limits to what can be offset

In some situations, offsetting measures cannot fully compensate for harmful impacts. Offsetting measures are less likely to counterbalance harmful impacts to fish and fish habitat if:

- the fish species or habitat being affected is rare or at risk (e.g., critical habitat for a listed species at risk);
- the fish or fish habitat is of exceptional ecological value or provides essential ecosystem services;
- the fish or fish habitat is dependent on a unique or geographically specific feature (e.g., groundwater upwelling);
- restoration or rehabilitation is very difficult, and few techniques have been demonstrated to be effective at replicating the fish or fish habitat in question;
- the site is of irreplaceable ecological or cultural significance to Indigenous Peoples (e.g., traditional harvesting sites, archeological sites, or other areas they define as such);
- the ecosystem service provided by the fish or fish habitat cannot be substituted by an alternative, or any alternatives are inaccessible, unaffordable or unacceptable to affected communities; or,
- the severity of the harmful impact is too great or difficult to predict.

As part of early planning for their project, proponents should carry out a case-specific assessment to determine whether harmful impacts can be counterbalanced by offsetting measures, taking into account the vulnerability of the fish and fish habitat being impacted, the severity of the harmful impact, the offsetting opportunities available, and the feasibility of the offsetting measures. Proponents should involve potentially affected Indigenous Peoples in this assessment as part of their early engagement. Early engagement activities should correspond

⁹ <https://www.talkfishhabitat.ca/46335/widgets/194689/documents/143958>

with the scale and scope of project and the risk to Indigenous rights. If the analysis shows that the impacts cannot be counterbalanced, the proponent may want to reconsider their application.

In some cases, there may already be protections in place, such as an area recognized in the [Guidance for recognizing marine Other Effective Area-Based Conservation Measures \(OECM\)](#)¹⁰.

Principle 3: The benefits from offsetting measures must counterbalance the harmful impacts, including time lags and uncertainties

The benefits from measures to offset must counterbalance the harmful impacts of the proposed project, resulting in no net loss of fish habitat. The offsetting measures must compensate for:

- the harmful impacts themselves;
- any losses due to the time lag between project impacts and the point at which offsetting measures are fully functional; and,
- any uncertainties associated with project impacts or offsetting success.

The final result is that the fish and fish habitat lost due to the project is effectively replaced.

The benefits of offsetting measures are to be assessed with reference to both the conditions at the impact site and at the offset site prior to both the project and the offsetting measures taking place. It is important that the proponent collect benchmark data to accurately determine if harmful impacts are counterbalanced. An overview of equivalency analyses is provided in publications by DFO's Canadian Science Advisory Secretariat^{11,12}.

If the project being authorized is likely to affect one or more aquatic species at risk, their residences or their critical habitat, a sufficient portion of the measures to offset should be specifically targeted to benefit and promote the recovery of the affected species to ensure that the activity does not jeopardize the species' survival or recovery. These offsetting measures may include rehabilitation or enhancement of habitat features that are important to the species or that address a pressure on recovery.

¹⁰ <https://www.dfo-mpo.gc.ca/oceans/publications/oecm-amcepz/guidance-directives-2022-eng.html>

¹¹ DFO. 2017. Science Advice on the Determination of Offset Requirements for the Fisheries Protection Program. DFO Can. Sci. Advis. Sec. Sci. Advis. Rep. 2017/009.

¹² Bradford, Michael J; Smokorowski, K.E; Clarke, Keith D; Keatley, B.E; Wong, Melisa C. 2016. Equivalency metrics for the determination of offset requirements for the Fisheries Protection Program. Canadian Science Advisory Secretariat. National Capital Region. (https://www.dfo-mpo.gc.ca/csas-sccs/Publications/ResDocs-DocRech/2016/2016_046-eng.html)

Principle 4: Indigenous Peoples are engaged in the planning, design, implementation and monitoring of measures to offset

Proposed projects and measures to avoid, mitigate and offset should be designed from the outset to take into account concerns raised by Indigenous Peoples whose rights may be affected by the authorization.

The benefits to the proponent from establishing positive working relationships with Indigenous Peoples extend beyond compliance or project execution. These relationships can lead to sustainable project outcomes, foster cultural respect and understanding, and create shared benefits. Early and sustained engagement sets a foundation for an efficient consultation process to occur when DFO proceeds with its legal duty to consult.

Additionally, Indigenous Peoples may wish to share Indigenous Knowledge¹³ and their own priorities for habitat restoration, remediation or enhancement. This knowledge and prioritization can be relevant to identifying potentially suitable offsetting measures and sites.

Consequently, it is expected that proponents will employ the best practice of engaging early and often with Indigenous Peoples on the planning, design, implementation and monitoring of measures to offset, as well as the project itself. The scale of engagement should be commensurate with the risk and scale of the project and the potential impact to Indigenous rights. With regard to fish habitat banks, proponents are expected to engage Indigenous Peoples on the habitat banking arrangement, conservation project plans, and the application of credits when Indigenous rights may be adversely impacted.

Proponents are particularly encouraged to explore partnerships with Indigenous Peoples to plan and collaborate on offsetting measures or habitat bank conservation projects, where they have the capacity to do so. By incorporating Indigenous Knowledge, building trust and promoting shared responsibilities, these partnerships can lead to more effective, culturally relevant and sustainable conservation outcomes that honour both ecological and Indigenous Peoples' needs.

When the duty to consult applies (or if other consultation requirements apply) to an authorization decision, DFO will undertake Crown-Indigenous consultation, as required. Work by the proponent to design and develop offsetting measures with Indigenous Peoples will not remove the Crown consultation requirement, but it could help facilitate the process and contribute to respecting the concept of free, prior, and informed consent. Conversely, if a proponent fails to engage Indigenous Peoples, they run the risk of having to substantially redesign both their project and offsetting plan, which can considerably increase project approval timelines.

In cases where the duty to accommodate applies under the circumstances, and the offsetting measures proposed are not adequate to accommodate Indigenous Peoples for the effects of

¹³ The term 'Indigenous Knowledge' is not universally used, and so other terms such as Indigenous Knowledge Systems, Traditional Knowledge, Traditional Ecological Knowledge or Aboriginal Traditional Knowledge, which all convey the same concept, may be used instead.

the project on the exercise of Indigenous rights, the Crown is obligated to ensure that additional sufficient and appropriate accommodation measures will be put in place before approving the project. This process is deeply rooted in legal requirements, ethical considerations, and the pursuit of reconciliation, emphasizing the importance of respecting Indigenous rights and ensuring that affected communities are supported and involved in decision-making processes.

Principle 5: Measures to offset are in addition to what would have otherwise occurred

Additionality is a term used to describe that proposed offsetting measures must be over and above (or in addition to) any other existing requirements, incentives or benefits arising from legislation, regulations, plans and programs. In other words, measures to offset must deliver benefits to fish and fish habitat that would not have occurred had there been no obligation to undertake offsetting measures.

Examples of situations where the principle of additionality would **not** be met include:

- The measures being proposed by the proponent as offsetting measures are a standard part of project design or are operational requirements in the proponent's industry.
- The proponent committed to the measures for business purposes unrelated to its *Fisheries Act* offsetting obligations.
- The measures proposed as offsetting are required by law, regulation (other than the *Authorizations Concerning Fish and Fish Habitat Protection Regulations*) or as a condition of operation.
- The measures proposed as offsetting are undertaken with charitable or government funds intended for altruistic conservation and restoration endeavours.
- The benefits to fish and fish habitat from the measures proposed as offsetting would have likely resulted from natural processes or the actions of other parties, without any action on the proponent's part.

The approach for achieving additionality must be described in the offsetting plan or habitat bank conservation project plan, and may vary depending on the offsetting approach selected.

In some cases, a proponent may choose to incorporate additional habitat restoration measures into the design of their development project. This is acceptable as offsetting if the measures are done primarily to benefit fish and fish habitat, and are over and above what is required to fulfill the development project.

Incidental benefits that are expected to arise from the project are not considered offsetting measures, but they may reduce the pressures on fish and fish habitat that need to be counterbalanced, and can thus decrease the amount of offsetting measures that are needed. This will depend on the extent to which the incidental benefits support fisheries management objectives or restoration priorities.

Depending on the ecological benefits they provide, efficient measures to offset might serve the overlapping requirements from different decision-making authorities, such as different federal departments or the federal government and other jurisdictions (e.g., Indigenous, provincial, municipal). This would be determined on a case-by-case basis.

Principle 6: Offsetting measures are located to optimize ecological outcomes, taking into account the needs of rights holders and resource users

Under most circumstances, offsetting measures should take place in close enough proximity to harmful impacts so as to maintain the function and integrity of the affected ecosystem, and to ensure that rights holders and resource users impacted by the project are those who will benefit from the measures to offset.

There are, however, circumstances where it may be appropriate to undertake measures to offset at a more distant location, for example, when the local area is largely ecologically intact and there are few meaningful offsetting opportunities available nearby, or there are higher priority restoration needs beyond the immediate area.

If the project could adversely affect the exercise of Indigenous rights, then it is important that the offsetting measures occur in the traditional territory or the treaty area of the affected Indigenous group. Placing offsetting measures outside the traditional territory of an Indigenous Nation or community can significantly undermine the exercise of their Indigenous rights. It can disrupt cultural practices, limit access to vital resources, and challenge the ecological relevance of conservation efforts. To respect Indigenous rights fully and effectively mitigate impacts, proponents must carefully consider the location of offsetting measures in collaboration with affected communities, ensuring that their rights, cultural values, and traditional practices are acknowledged and supported. If offsetting measures do not fully address adverse effects on Indigenous rights, additional accommodation measures will be required¹⁴.

Proponents should select offsetting sites taking into account local, regional, provincial and federal restoration priorities, fisheries management objectives, watershed planning initiatives, and, in particular, the restoration priorities and fisheries management objectives of Indigenous Peoples. [Regional restoration priorities](#) developed under DFO's [Framework to identify fish and fish habitat restoration priorities](#)¹⁵ may be used to identify priority areas for restoration that can inform the development of offsetting plans. Meaningful engagement with Indigenous Peoples and discussions with resource users, land owners and interested parties can help proponents understand the importance of a given location to local people, and how they use its resources. If aquatic species at risk are affected by the project, then the offsetting measure

¹⁴ For more information on accommodation of Indigenous Rights, see [Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult](#) (https://www.rcaanc-cirnac.gc.ca/eng/1100100014664/1609421824729#chp3_4)

¹⁵ See Fisheries and Oceans Canada. 2023. Framework to identify fish habitat restoration priorities. Fish and Fish Habitat Protection Program. iii+12 pp. (<https://waves-vagues.dfo-mpo.gc.ca/library-bibliotheque/41104602.pdf>.)

must be located at a site that will support the population and distribution objectives for the species, including any objectives for place-based sub-populations. These are found in the relevant recovery strategy, action plan or management plan. These documents can be found at the [Species at Risk Public Registry](#).

Principle 7: Measures to offset generate benefits that last over the long term

Measures to offset must generate benefits to fish and fish habitat that last long enough to counterbalance the harmful impacts of the project being authorized. If aquatic species at risk are affected, it is particularly important that the benefits continue to support long-term conservation or recovery of the species.

If the project results in permanent loss of fish habitat, then offsetting measures should be permanent and self-sustaining. Fish habitat bank conservation projects should also be self-sustaining. Ideally, the restored or enhanced ecosystem will behave and function like a natural system, with a comparable level of variability. Some natural systems are highly dynamic, and these tend to naturally recover from periodic disturbances, so the offsetting measure should behave likewise. Depending on the offsetting measures, long-term monitoring (10 years or more) may be necessary to ensure the system is in stable equilibrium.

If the loss of fish or fish habitat is temporary, then the measures to offset should be maintained until the impacts of the project, including any death of fish that occurred from the temporary habitat impact, have been counterbalanced.

In order to ensure the offsetting measures continue to function over the long term, an offsetting plan or habitat bank conservation project plan should consider how the offsetting measures are expected to function in the context of well-known, reasonably predictable effects of climate change such as droughts, flash flooding, warmer water temperatures, sea level rise, loss of permafrost, etc.

An offset requiring ongoing active maintenance in order to provide its intended benefits may only be considered for a temporary loss, except in extraordinary circumstances. Active maintenance in the short- to medium-term is acceptable while new ecosystem components become established and fully functional (e.g., replanting of riparian vegetation with native species along with periodic removal of invasive species until the native vegetation is successfully established).

Principle 8: Time lags between the impact and offsetting measures are avoided or minimized

Measures to offset are best implemented **before** any harmful impacts to fish and fish habitat occur. When this is not possible, proponents should make all reasonable efforts to minimize time lags between harmful impacts and when measures to offset are functioning effectively.

When a time lag is unavoidable, extra offsetting must be implemented. This counterbalances the pressures on fish during the time when neither the original habitat nor the offset is fully functioning. The longer the time lag, the more offsetting measures are required.

The degree of extra measures needed will depend on the length of the time lag, when it occurs, and the impact resulting from the temporary loss of fish or habitat function during that time. For example, there may be a greater impact if habitat is unavailable during a critical time in the life cycle of the fish (e.g., spawning season). Proponents must also consider impacts on resource users and, in particular, any effects on the exercise of Indigenous rights, as determined during engagement.

For aquatic species at risk, measures to offset should be implemented before the harmful impact occurs, and ideally they will be fully functional so as to avoid a temporary loss from which it may be difficult for the species to recover. If a delay is anticipated between when the impact of the project occurs and when the offsetting measures become fully functional, the effect of the delay on the species will be taken into account when determining whether the project will jeopardize the survival or recovery of the species. Projects can only be authorized if they will not jeopardize survival or recovery of listed aquatic species at risk.

Part 2. Measures to offset

This part of the policy sets out the different types of measures to offset and options for their implementation. The selection of one or more measures should respect the guiding principles provided in [Part 1: Guiding principles for offsetting](#).

The key criterion for measures to offset is that they provide benefit to fish and fish habitat. If that criterion is met, there is flexibility in the selection of types of measures to offset. In evaluating proposed measures, DFO gives priority to offsetting measures that focus on the restoration of degraded fish habitat pursuant to [paragraph 34.1\(1\)\(f\)](#) of the *Fisheries Act*.

Offsetting measures should be designed to complement and contribute to fisheries management objectives, where they exist, which include, but are not limited to:

- regional restoration plans developed under DFO's [Framework to identify fish habitat restoration priorities](#)¹⁶
- restoration plans developed as part of Ecologically Significant Area designations
- federal and provincial fisheries management plans
- the conservation and restoration priorities of Indigenous Peoples
- marine protected area objectives
- [marine refuges](#) established as “other effective area-based conservation measures”

¹⁶ See Fisheries and Oceans Canada. 2023. Framework to identify fish habitat restoration priorities. Fish and Fish Habitat Protection Program. iii+12 pp. (<https://waves-vagues.dfo-mpo.gc.ca/library-bibliotheque/41104602.pdf>)

- recovery strategies, action plans and management plans related to aquatic species at risk

Since offsetting measures and habitat banks can touch on matters affecting other jurisdictions, proponents need to be aware of any other licences or regulatory approvals needed from federal, provincial or Indigenous governments in order to carry out their offsetting measures or habitat bank conservation projects. Proponents also need to consult with other federal departments or levels of government about their plans, as necessary. For example, stocking, and chemical and biological manipulations (described below) will likely require additional regulatory approvals.

For more information on the use of different offsetting techniques, see [Offsetting Techniques for Managing the Productivity of Freshwater Fisheries](#)¹⁷. Detailed technical guidance on the use of these measures is beyond the scope of the current document.

Note: under the federal *Aquatic Invasive Species Regulations* (2015) it is prohibited to engage in any activity that may lead to the release of members of an aquatic invasive species or to introduce such species into an area where they are not native. Therefore, care must be taken to ensure measures to offset do not facilitate the spread of invasive species.

Types of measures to offset

Habitat restoration

DFO gives priority to measures to offset that focus on the restoration of degraded fish habitat pursuant to [paragraph 34.1\(1\)\(f\)](#) of the *Fisheries Act*. Habitat restoration involves actions to modify degraded habitat to improve its capacity to produce and sustain fish and improve ecosystem functions.

DFO's Framework to Identify Fish Habitat Restoration Priorities (the Framework) includes several principles that provide the foundation for what restoration should aim for in planning, design and implementation to achieve the greatest ecological, cultural and socio-economic benefits. According to the Framework, habitat restoration activities should:

- address the root causes of degradation
- result in self-sustaining improvement to habitat
- consider ecological, cultural and socioeconomic contexts

¹⁷ DFO. 2014. Science Advice on Offsetting Techniques for Managing the Productivity of Freshwater Fisheries. DFO Can. Sci. Advis. Sec. Sci. Advis. Rep. 2013/074. https://www.dfo-mpo.gc.ca/csas-sccs/Publications/SAR-AS/2013/2013_074-eng.html

- be decided based on the best available information from all sources
- be assessed for effectiveness through monitoring, and be subject to adaptive management
- incorporate engagement and collaboration
- integrate policies and activities across programs or jurisdictions

Some examples of habitat restoration include:

- reconnecting floodplain and/or wetland habitat to streams or lakes
- maintaining and improving conditions in cold-water streams by vegetating (shading)
- stabilizing streambanks in the upper reaches of the watershed

The Framework encourages the strategic use of resources to target restoration activities for maximum benefit to fish habitat based on important species, habitats, ecosystem functions and cultural values.

Habitat-related offsetting measures for aquatic species at risk should aim, where possible, to restore or enhance habitats that support a part of the species' life cycle that has been a limiting factor to its survival or recovery. Species at risk recovery strategies and action plans provide insights into these habitat needs.

Habitat enhancement

Habitat enhancement involves taking actions to improve the quality of fish habitat, and is often aimed at a particular fish species. It is best used in circumstances where restoring the habitat to its original form is not feasible.

Some examples of habitat enhancement include:

- increasing structure through the placement of coarse material or large woody debris to improve fish habitat components such as spawning beds, reefs, etc.
- building artificial reefs
- increasing shoreline complexity

Habitat enhancement is not recommended in undisturbed, naturally functioning or pristine areas. Alteration of intact natural habitat should be avoided as there may be unexpected effects on ecosystem dynamics and harm to other ecological components or non-target fish species. The exception is when there are no other offsetting opportunities, the enhancement has support from Indigenous Peoples or local resource users, and the offset site does not currently have high biodiversity value or provide important ecosystem services.

Habitat construction

Habitat construction is the development or expansion of aquatic habitat into a terrestrial, riparian or wetland area. Examples of measures to offset using habitat construction may include, but are not limited to, the construction or expansion of stream channels, lakes, side

channel habitats, or bays. Proponents can use these measures to offset when opportunities to restore or enhance fish habitat are not available.

Experience has shown that habitat construction can be a challenge, and long-term effectiveness of constructed habitat can be uncertain. Therefore, it is recommended that proponents use reliable and proven techniques that are shown to benefit fish and the larger ecosystem, along with long-term effectiveness monitoring.

When undertaking habitat construction, it is important to consider the larger scale impacts of converting terrestrial, riparian or wetland habitat into aquatic habitat. The importance of the terrestrial, riparian or wetland habitat that will be lost or impacted must be described by the proponent and taken into account. Destruction of rare or sensitive terrestrial, riparian or wetland habitat must be avoided.

Impacts from habitat construction may also affect downstream communities (including infrastructure), ecological processes, hydrology or fish communities. Careful consideration must be given to all aspects of the environment that may be impacted upstream and downstream of the site where the habitat construction is being contemplated.

Stocking and translocation

Stocking is the practice of releasing fish into a natural ecosystem to augment the natural supply of individuals, increase productivity of a wild population, overcome a recruitment limitation, increase fishery yields or boost declining fish stocks. Stocking may occur through the translocation of wild adults (trap, truck, and transfer); harvesting eggs from wild adults which are then hatched, reared in captivity and released; or, releasing individuals that have been reared from domesticated stock.

There are a number of risks associated with stocking, and stocking will not always be a viable offsetting option. In situations where it is considered to be appropriate, careful planning will be required to avoid negative ecological or genetic impacts. Considerations include:

- the complexity of the ecosystem
- species abundance and diversity
- disease
- habitat size and scale
- water quality and hydrological dynamics
- long-term stability
- human-induced stressors
- cost and resource constraints
- monitoring efforts

Proponents will need to work closely with Indigenous Peoples, and both federal and provincial resource managers in the development of an offsetting plan or habitat bank conservation plan that involves stocking.

Stocking is not a recommended measure to offset harmful impacts to habitat, but could be used in conjunction with habitat restoration and enhancement to accelerate the establishment of fish communities. It may also be considered as a measure to offset temporary losses of fish habitat associated with time lags between harmful impacts occurring and habitat offsets becoming fully functional, or when natural reproduction and self-sustaining populations become re-established.

For aquatic species at risk, stocking should only be used to augment natural reproduction when it enhances other recovery efforts, is identified as a recovery implementation measure in the species' recovery strategy or action plan, and uses appropriate genetic strains (e.g., local, wild-origin brood stocks or fish from a live gene bank).

Stocking and translocation activities should comply with the [National Code on Introductions and Transfers of Aquatic Organisms](#)¹⁸. More information on movements of live fish can be found at DFO's [Moving Fish Safely webpage](#).¹⁹

Chemical or biological manipulations

This group of measures to offset includes nutrient alteration or chemical manipulation of water bodies to address water quality issues (e.g., acidification) and/or actions to control or eliminate aquatic invasive species.

Chemical or biological manipulations are best used to re-establish ecological equilibrium of fish habitat that has been shifted to an alternative state. Otherwise, few chemical or biological nutrient manipulations are likely self-sustaining and would need ongoing intervention to prevent their success from eroding over time. They should be used only when site-specific issues are well understood, the limitations to fish production are known, opportunities for habitat restoration are not available, and fisheries management objectives support the approach. In particular, any effects of the proposed measures on species that are harvested for food or are of importance to Indigenous Peoples should be understood.

For aquatic species at risk, chemical or biological manipulations should only be used when identified as one of the recovery implementation measures in the recovery strategy or action plan for the species.

Complementary measures

Complementary measures are actions like data collection, scientific research and public education activities related to maintaining or enhancing the conservation and protection of fish and fish habitat. Complementary measures are not regarded as measures to offset on their own

¹⁸ www.dfo-mpo.gc.ca/aquaculture/moving-fish-deplacement-poissons-eng.html

¹⁹ <https://www.dfo-mpo.gc.ca/aquaculture/moving-fish-deplacement-poissons-eng.html>

because they do not give rise to measurable, on-the-ground restoration outcomes. However, they may indirectly support meeting these outcomes.

Complementary measures should only be considered in exceptional circumstances where there are limited opportunities for on-the-ground measures to offset harmful impacts to fish and fish habitat, such as in remote, pristine areas, and/or where there is a lack of information or data regarding fish and fish habitat, and research would be pivotal to restoration efforts.

Complementary measures may comprise up to 10% of the cost of all of the measures to offset (e.g., restore or enhance fish habitat). The remaining 90% of the cost must be spent on measures that result in concrete benefits for fish and fish habitat. The value of the proposed complementary measures is calculated from the estimated cost of implementing measures to offset.

An exception to this 10% limit will be considered for formal adaptive management research²⁰ that will generate information on habitat restoration techniques that can be applied to future offsetting measures. This will allow proponents to test innovative offsetting ideas on the understanding that the information generated will justify the uncertainties associated with the plan. Such complementary measures will need to:

- address an identified research need
- include a habitat restoration component or another concrete offsetting measure that is being tested to determine its capacity to deliver on-the-ground results
- have a hypothesis or research question related to better understanding and achieving a restoration or offsetting objective
- describe how data will be collected, and how it will be analysed and used for subsequent decision making
- be scientifically defensible

Complementary measures should be undertaken in a transparent, scientifically robust and timely manner by qualified individuals or organizations. Proponents are encouraged to develop partnerships with Indigenous Peoples and explore how Indigenous Knowledge can inform research design. This approach not only enhances the quality and relevance of research outcomes, but may also aid in supporting Indigenous rights, cultural values and long-term sustainability.

The proponent should discuss with DFO whether their complementary measures are appropriate to include in their application for authorization. Both a sound rationale for using complementary measures and a detailed plan are required.

²⁰ Holling, C.S. (1978). Adaptive Environmental Assessment and Management. John Wiley & Sons. ISBN 9781932846072

Combination of measures

Measures to offset may incorporate more than one of the measures previously described to counterbalance the harmful impacts that will be generated by the proposed project. Depending on the circumstances, different types of offsetting measures could complement one another.

As with all other types of measures to offset, the proposal for combined measures needs to be justified in the offsetting or habitat bank conservation plan.

Options for implementing measures to offset

Proponents typically apply measures to offset in one of 2 ways: through project-specific measures or through fish habitat banks.

Project-specific measures

Project-specific measures to offset are selected and designed by the proponent in order to counterbalance harmful impacts to fish and fish habitat resulting from their specific project. The offsetting plan is part of the application for the *Fisheries Act* authorization needed to lawfully undertake the project.

Fish habitat banks

The *Fisheries Act* defines a fish habitat bank as an area of fish habitat that has been restored, enhanced or constructed by the carrying on of one or more conservation projects²¹ within a service area²² and in respect of which area the Minister has certified habitat credits²³ under [paragraph 42.02\(1\)\(b\)](#) of the *Fisheries Act*. Once certified, the owner of the fish habitat bank can, subject to review, use the habitat credits to offset the harmful impacts to fish and fish habitat of a project or projects until the balance of habitat credits in the bank reaches zero.

There are currently no provisions in the *Fisheries Act* that allow proponents to sell or trade their credits to a third-party. The credits generated through a banking arrangement can only be used by the owner of the bank. Accordingly, fish habitat banks may be useful for proponents who are considering multiple development projects, project phases, or programs that may result in harmful impacts to fish and fish habitat. If a proponent makes contractual arrangements with a third party to design and build an offsetting or habitat banking conservation project, it is the proponent, rather than the contractor, who is accountable to DFO.

Prior to building a conservation project for a bank, the proponent must enter into an arrangement with DFO. This arrangement governs the administration, management and

²¹ [Section 42.01](#) of the *Fisheries Act* defines ‘conservation project’ as a work, undertaking or activity that is carried on by a proponent for the purpose of constructing, restoring or enhancing fish habitat within a service area in order to acquire habitat credits.

²² [Section 42.01](#) of the *Fisheries Act* defines ‘service area’ as the geographical area that encompasses a fish habitat bank and one or more conservation projects, and within which area a proponent carries on a work, undertaking or activity.

²³ [Section 42.01](#) of the *Fisheries Act* defines ‘habitat credit’ as a unit of measure that is agreed to between any proponent and the Minister under [section 42.02](#) that quantifies the benefits of a conservation project.

general operation of the bank, defines its service area and describes the habitat credit certification process. Habitat banking conservation projects are expected to adhere to the same principles (set out in [Part 1: Guiding principles for offsetting](#)) as project-specific offsetting measures.

Habitat banks are preferred over project-specific offsetting since greater ecological benefits may be achieved by a larger conservation project that counterbalances a number of projects than by multiple smaller offsets for individual projects. Additionally, as a bank is established in advance of future works, undertakings or activities, the risk of defaults on the implementation of an offsetting plan is eliminated, there is minimal uncertainty related to the effectiveness of the measures to offset, and there is less delay for the habitat to become functional. This timing advantage also applies to project-specific offsets that have been undertaken in advance.

Administratively, banks are advantageous to proponents as, once a habitat bank is established, it helps to reduce the time and resources required to develop an application for authorization and have it processed by DFO. The proponent simply needs to state the number of habitat credits that they plan to use to offset the harmful impacts of their project, rather than providing an offsetting plan and financial guarantee. Additionally, banks built with the participation and support of Indigenous Peoples can make the consultation process that occurs during the authorization stage go more smoothly.

The use of habitat banks is particularly encouraged for proponents of projects that will affect an aquatic species at risk, the residence of their individuals or their critical habitat. When employing banks under such circumstances, the allocated credits will specify which species or assemblage of species benefit from the bank. When withdrawing credits, only those that have been specified to target the particular listed aquatic species can be used to offset harmful impacts on that species.

These credits cannot be used for harmful impacts to a species at risk with different habitat needs, though they may be transferred for use for harmful impacts to general fish habitat, if they are no longer needed to offset harmful impacts to the species. For example, offsetting measures that benefit Eastern Sand Darter (a listed species at risk) could not be used to counterbalance the harm to Pugnose Shiner (another species at risk) or its habitat, but they could potentially be used to offset harmful impacts to a non-listed species that use the habitat. If the species is subdivided into designatable units or populations for the purpose of recovery, the credits would need to be specific to that designatable unit or population.

DFO and Crown proponents are obligated to consult Indigenous Peoples if the exercise of Indigenous rights may be adversely affected by:

- entering into or renewing an arrangement
- defining the service area for the habitat bank
- approving a fish habitat bank conservation project
- authorizing a work, undertaking or activity that proposes the use of habitat credits as an offsetting measure

While project proponents who are Crown entities have their own obligation to consult Indigenous Peoples on any habitat bank conservation project they propose, non-Crown proponents are also expected to engage with potentially affected Indigenous Peoples when contemplating establishing a habitat bank. Establishing a habitat bank in partnership with an Indigenous Peoples is particularly encouraged.

All projects will be reviewed on a case-by-case basis using the same approach that is used for applications with project-specific offsetting plans. While it is recognized that a habitat bank conservation project can represent a significant investment, the availability of habitat credits within a fish habitat bank does not automatically oblige DFO to authorize any future project or to accept the credits as offsetting for a project where there is a valid reason to deny the application or where the habitat credits are not applicable to the impact. For example, if a project may cause the harmful alteration, disruption or destruction of irreplaceable fish habitat, an authorization may be refused even though a habitat bank exists and is proposed as the offset.

For more information about fish habitat banks, see the [Interim Policy for Establishing Fish Habitat Banks to Support the Administration of the Fisheries Act and the Species at Risk Act - February 2021](#).

Part 3. Additional information

Preparing an offsetting plan

Developing a complete and comprehensive offsetting plan that reflects guidance herein at the outset of project planning will reduce delays in the approval process and better protect fish and fish habitat. The *Authorizations Concerning Fish and Fish Habitat Protection Regulations*²⁴ set out the information requirements and documentation that proponents must submit in an application for authorization under [paragraphs 34.4\(2\)\(b\)](#) and/or [35\(2\)\(b\)](#). The requirements for the Offsetting Plan are set out in [section 16 of Schedule 1](#) of the Regulations.

Since offsetting plans can be complex, with lasting changes to fish and fish habitat, qualified environmental professionals should be engaged to help develop the plan. The proponent is also expected to undertake early engagement with Indigenous Peoples and may also want to engage interested parties, including other federal departments, provincial resource managers, and local land owners and resource users potentially affected by the proposed project or offsetting plan, before submitting an application for authorization.

For the development of fish habitat bank conservation project plans, see [Interim Policy for Establishing Fish Habitat Banks to Support the Administration of the Fisheries Act and the Species at Risk Act - February 2021](#).

Cost of implementing the offsetting plan and financial guarantee

[Subsection 2\(1\)](#) of the Regulations requires that an application for authorization include an irrevocable letter of credit, issued by a recognized Canadian financial institution, or another equivalent financial guarantee such as a performance bond, to cover the costs of implementing the offsetting plan should the proponent fail to complete the offsetting required as a condition of their authorization.

All costs associated with measures to offset are the responsibility of the proponent. If the offsetting plan is not fully implemented in accordance with the conditions of the authorization, DFO will use the financial guarantee that the proponent²⁵ submitted with their application for authorization to ensure that the plan is completed. The financial guarantee helps to shield taxpayers from the costs of non-compliance on the part of the proponent.

Annex A of [Applicant's Guide Supporting of Authorizations Concerning Fish and Fish Habitat Protection Regulations](#) provides a template for a letter of credit. Annex B provides guidance on determining the monetary value of the financial guarantee.

²⁴ Additional guidance on these regulations can be found in the Applicant's Guide Supporting of *Authorizations Concerning Fish and Fish Habitat Protection Regulations*. dfo-mpo.gc.ca/pnw-ppe/reviews-revues/applicants-guide-candidats-eng.html.

²⁵ A proponent who is His Majesty in right of Canada His Majesty in right of a province or the government of a territory is exempt from the requirement of providing financial guarantee.

The secured amount of financing can be reduced at set points in project implementation by amending the original letter of credit if sufficient progress in implementing the offsetting plan has been made. The authorization should explicitly outline the conditions that must be met by the proponent for the financial security to be reduced. The final installment will be held until the proponent has no further obligations.

The amount of the financial guarantee can be lower if the offsetting measures are implemented in advance of the impacts occurring, since it would only be needed to cover the costs of monitoring and contingency measures. When credits from a habitat bank are used as the offset, no financial guarantee is required.

Completion of measures to offset

A proponent's *Fisheries Act* authorization outlines their obligations to implement the offsetting measures, including a description of contingency measures and how they will be monitored, and how the results will be reported to DFO.

The proponent will be deemed to have discharged their obligations once they have fulfilled all the requirements set out in their *Fisheries Act* authorization, for example:

- the offsetting measures have been fully implemented including any contingency measures that were necessary
- all the follow-up monitoring is completed
- all the performance goals and targets have been met

For fish habitat bank conservation projects, it is the arrangement and the conservation project plan that will specify the proponent's obligations and when they will be deemed to be discharged.

Once the objectives of the offsetting measures have been achieved, the offset (or bank) site will be afforded the same protection under the *Fisheries Act* as natural or pristine fish habitat. That is to say, the prohibitions against the carrying on of projects that result in the death of fish or the harmful alteration, disruption or destruction of fish habitat will apply. A new *Fisheries Act* authorization would be required if new works, undertakings or activities are proposed to impact the offset (or bank) site. A new authorization would require that the proponent prepare a new offsetting plan to counterbalance new impacts to the site.

If species at risk are present at the offset site, then the relevant provisions of the *Species at Risk Act* will apply, including the prohibitions against harming, harassing or killing a species at risk, or damaging or destroying their residences. If the offset site is legally identified and protected as critical habitat, then its destruction will also be prohibited. Any project subsequently affecting the individuals of the species, their residences, or any part of their critical habitat will require the proponent to undergo the permitting process under the *Species at Risk Act*.

DFO guidance documents

The following departmental guidance documents are available on DFO's [Projects near water website](#):²⁶

- [Applicant's Guide Supporting the Authorizations Concerning Fish and Fish Habitat Protection Regulations](#)
- [Fish and fish habitat protection policy statement, August 2019](#)
- [Framework to identify fish habitat restoration priorities](#)
- [Pathways of Effects](#)
- [Project planning: What is offsetting and how to prepare an offsetting plan](#)

The Projects near water website also provides information on how to contact your local [DFO office](#).

²⁶ <https://www.dfo-mpo.gc.ca/pnw-ppe/index-eng.html>

Annex A: Legislative context related to offsetting

Proponents are responsible for complying with the *Fisheries Act*, the *Species at Risk Act* and their associated regulations, among other federal, territorial, provincial and municipal requirements.

In reviewing applications for authorization and deciding if an authorization is to be granted (and, if so, the applicable terms and conditions), the Minister of Fisheries and Oceans has a number of responsibilities. These responsibilities include considering a number of factors, most notably the rights and perspectives of Indigenous Peoples.

This Annex briefly summarizes provisions of legislation that are relevant to this Policy. It is not meant to provide a comprehensive guide to complying with the *Fisheries Act*, the *Species at Risk Act*, or any other federal or provincial legislation that governs or influences proponent's projects. For more information and context please see the following relevant legislation.

Relevant fish and fish habitat protection provisions of the *Fisheries Act*

The prohibitions against harmful impacts

The *Fisheries Act* includes prohibitions against the carrying on of a work, undertaking or activity that results in certain harmful impacts to fish and fish habitat, more specifically:

- a prohibition against the carrying on of works, undertakings or activities that result in the death of fish, by means other than fishing ([subsection 34.4\(1\)](#)); and,
- a prohibition against the carrying on of works, undertakings or activities that result in the harmful alteration, disruption or destruction of fish habitat ([subsection 35\(1\)](#)).

Proponents are responsible for complying with the *Fisheries Act* by ensuring that their projects do not result in the death of fish or the harmful alteration, disruption or destruction of fish habitat (i.e., "harmful impacts"). If the project will cause harmful impacts prohibited by [subsections 34.4](#) and [35\(1\)](#), the proponent may apply to DFO for authorization in order to lawfully carry out their proposed project.

As specified in DFO's position statement the [Management of Existing Facilities and Structures under the Fisheries Act and the Species at Risk Act](#), these provisions apply to the ongoing operation, modification, maintenance and decommissioning of existing facilities, including those that were constructed prior to the implementation of before the fish and fish habitat protection provisions were implemented.

Factors to consider

Before a decision to approve or deny an application for authorization can be made, [subsection 34.1\(1\)](#) of the *Fisheries Act* compels the Minister to consider several factors²⁷ before making a decision to approve or deny the application. The 2 factors that are the focus of this Policy are:

²⁷ Proponents should refer to the Fish and fish habitat protection policy statement, August 2019 for more information about these and the other factors that the Minister must consider under [subsection 34.1\(1\)](#).

- Whether there are measures and standards to avoid the death of fish or to mitigate the extent of their death or offset their death or to avoid, mitigate or offset the harmful alteration, disruption or destruction of fish habitat ([paragraph 34.1\(1\)\(c\)](#))
- Whether any measures and standards to avoid, mitigate or offset the harmful alteration, disruption or destruction of fish habitat give priority to the restoration of degraded fish habitat ([paragraph 34.1\(1\)\(f\)](#))

Fish habitat bank provisions

The *Fisheries Act* also contains provisions empowering the Minister to enter into a fish habitat bank arrangement with any proponent and to establish a system for the creation, allocation and management of a proponent’s habitat credits ([section 42.02](#)). These credits can be used to offset the harmful impacts of a proponent’s project. The *Fisheries Act* specifies what needs to be included in the habitat banking arrangement, and defines a “conservation project” as “a work, undertaking or activity that is carried on by a proponent for the purpose of creating, restoring or enhancing fish habitat within a service area in order to acquire habitat credits”. More information about habitat banking can be found in under [Fish habitat banks](#) in this Policy and in the [Interim Policy for Establishing Fish Habitat Banks to Support the Administration of the Fisheries Act and the Species at Risk Act - February 2021](#)²⁸.

The Authorizations Concerning Fish and Fish Habitat Protection Regulations

Schedule 1 of the [Authorizations Concerning Fish and Fish Habitat Protection Regulations](#)²⁹ set out what must be included in an application for authorization under [34.4\(2\)\(b\)](#) or [35\(2\)\(b\)](#) of the *Fisheries Act* under non-emergency conditions.

[Schedule 1, section 15](#) specifies that the proponent state the number of habitat credits from a fish habitat bank that they plan to use to offset the harmful impacts of their project (if any).

[Schedule 1, section 16](#) lists what must be included in the offsetting plan.

For more detailed information about the *Authorizations Concerning Fish and Fish Habitat Protection Regulations* and the process for applying for a *Fisheries Act* authorization, please see the [Applicant’s Guide Supporting the Authorizations Concerning Fish and Fish Habitat Protection Regulations](#)³⁰.

The Species at Risk Act

The *Species at Risk Act* includes provisions to protect listed aquatic species at risk³¹, any part of their critical habitat, and the residences of their individuals.

²⁸ <https://www.dfo-mpo.gc.ca/pnw-ppe/reviews-revues/policies-habitat-politiques-eng.html>

²⁹ <https://laws.justice.gc.ca/eng/regulations/SOR-2019-286/page-1.html>

³⁰ <https://www.dfo-mpo.gc.ca/pnw-ppe/reviews-revues/policies-habitat-politiques-eng.html>

³¹ The term “listed aquatic species at risk” in this document will be used to mean aquatic species that are afforded protection under the *Species at Risk Act*, that is, are listed under Schedule 1 of the *Species at Risk Act* as endangered, threatened or extirpated. In the absence of the word “listed”, the definition can extend to mean species at risk that have not been listed, or are listed as Special Concern.

Proponents are responsible for ensuring that their activities do not contravene the prohibitions of the *Species at Risk Act*³². If that is not possible and the proponent still wishes to proceed with an activity, the proponent will require a permit under [subsection 73\(1\)](#) of the *Species at Risk Act*, or may use another approval issued under another Act of Parliament (such as a *Fisheries Act* authorization) that have the same effect as a permit, pursuant to [section 74](#) of the *Species at Risk Act*. In making this decision, the competent minister must be of the opinion that the requirements of [subsections 73\(2\) to \(6.1\)](#) are met. In particular, the requirements of [subsection 73\(3\)](#) state that the competent minister must be of the opinion that:

- all reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted;
- all feasible measures will be taken to minimize the impact of the activity on the species, its critical habitat or residences; and,
- the activity will not jeopardize the survival or recovery of the species.

While the *Species at Risk Act* does not specifically include provisions related to offsetting, any offsetting measures that are designed to benefit a listed species at risk may help the Minister in forming an opinion that the activity does not jeopardize that species' survival or recovery. For more information on the *Species at Risk Act*, see the [Species at Risk Public Registry](#)³³.

Consideration of the rights and perspectives of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples

The *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDA) came into force in 2021. The purpose of this Act is to provide a framework to advance implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) at the federal level. UNDRIP emphasizes the importance of obtaining a “free, prior, and informed consent” when decisions are made that may affect Indigenous Peoples. More information about the UNDRIP and Canada’s implementation of it can be found on the [Department of Justice website](#).³⁴

Duty to consult

The Government of Canada recognizes that the fundamental purpose of [section 35](#) of the *Constitution Act, 1982*, is to recognize and affirm the existing Aboriginal and treaty rights of First Nations, Inuit and the Métis (referred to in this document as “Indigenous rights”), which is integral to advancing reconciliation. The Crown has a duty to consult and accommodate when its actions may negatively impact Indigenous rights. This includes decisions made under the *Fisheries Act* or the *Species at Risk Act*. The consultation process is not just a formality but a critical step in fulfilling the government's obligations to uphold and respect Indigenous rights.

³² For more information on the prohibitions, see [sections 32, 33](#), and [subsection 58\(1\)](#) of the *Species at Risk Act*.

³³ <https://www.canada.ca/en/environment-climate-change/services/species-risk-public-registry.html>

³⁴ <https://www.dfo-mpo.gc.ca/species-especies/sara-lep/permits-permis/index-eng.html>

Proponents who are taking Crown actions (i.e., are a part of a government or a Crown corporation) also carry a significant responsibility to consult with Indigenous Peoples in a respectful, thorough and legally compliant manner, recognizing that consultation and accommodation are crucial components of both the project and the offsetting plan. Consultations should be coordinated with those of other regulators, if appropriate.

While proponents who are not the Crown (i.e., private companies or non-governmental organizations) do not have a legal duty to consult and accommodate under federal law, it is the best practice and recommended for proponents to engage early and often with potentially affected Indigenous Peoples in all phases of their project, including offsetting and habitat banking components (i.e., planning, design and implementation) commensurate with the scale of potential impact to rights. This is explained in [Principle 4](#) of this Policy.

If the duty to accommodate applies under the circumstances and the offsetting measures are not adequate to accommodate the effects of the authorization on the exercise of Indigenous rights, then the Crown is obligated to ensure that additional accommodation measures are put in place to address them.

For more information about the Crown's duty to consult please see the [Updated Guidelines for Federal Officials to Fulfill the Duty to Consult](#).³⁵

Relevant factors to consider under the *Fisheries Act*

[Section 2.4](#) of the *Fisheries Act* requires the Minister to consider any adverse effects that the decision may have on the rights of Indigenous Peoples in Canada when making a decision under the Act. This includes any decision to authorize any project and the accompanying measures to offset, as well as any decision associated with habitat banking, such as approving habitat bank conservation projects and authorizing the use of habitat credits as offsetting measures. This is independent from the common law duty to consult described above, although there is considerable overlap.

[Paragraph 34.1\(1\)\(g\)](#) of the *Fisheries Act* requires that the Minister consider any Indigenous Knowledge that has been provided to the Minister. This requirement means that if Indigenous Peoples provide Indigenous Knowledge to DFO in relation to a *Fisheries Act* authorization decision, it must be considered and not be dismissed or disregarded.

Consultation obligations under the *Species at Risk Act*

There are separate obligations under [subsections 73\(4\)](#) and [73\(5\)](#) of the *Species at Risk Act* regarding consultations. If a listed aquatic species at risk is found in an area in which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, then the Minister must consult the board before issuing a permit or an authorization that has the same effect as a permit under the *Species at Risk Act* ([subsection 73\(4\)](#)). Similarly, if the species is found in a reserve, under the *Indian Act*, the Minister must

³⁵ https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-CNSLTENGE/STAGING/texte-text/intgui_1100100014665_eng.pdf

consult the band before issuing a permit or an authorization that has the same effect as a permit under the *Species at Risk Act* ([subsection 73\(5\)](#)).

Provincial legislation

A number of matters under provincial jurisdiction could come into play when working in or near water and developing offsetting plans or habitat banks. Provinces and Yukon Territory have primary jurisdiction over most areas of water management and protection within their borders, with certain authorities being delegated to municipalities (e.g., drinking water). Most major uses of water are permitted or licensed under provincial water management authorities, such as industrial water use and water diversions. Some provinces have their own offsetting regimes to address impacts as a result of provincially regulated activities, and each is valid for their own specific mandate. For example, Alberta has enabled the use of offsets under the *Alberta Land Stewardship Act*.

The Territories (Yukon, Nunavut and Northwest Territories) have been delegated varying degrees of province-like powers. The extent to which they are responsible for fisheries, natural resources, and lands depends on the territory in question. Proponents should be aware of which territorial laws apply to their offsetting plans and habitat banks (and projects).

Proponents need to be aware of any provincial permits or licences needed to carry out their offsetting measures or habitat bank conservation projects and recognize that regulatory decisions by DFO will not presuppose decisions associated with areas of provincial or territorial jurisdiction. Proponents should also be aware of provincial land, water and resource management plans and priorities.

Project proponents are advised to contact any relevant provincial or territorial government agencies about the offsetting measures or habitat banks they are proposing to ensure that:

- all provincial or territorial requirements will be met
- any necessary approvals are in place
- measures or banks are compatible with any relevant plans and priorities

Annex B: Bibliography and further reading

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