

# NEW LAWS: The 3 Steps to Get an Authorization under the New Fisheries Regulations



The federal government introduced major changes to several environmental laws, including the *Fisheries Act*, in Bill C-38, the *Jobs, Growth and Long-term Prosperity Act*. Some of those changes took effect in July 2012, while the rest took effect in Nov. 2013. In addition, the related new *Applications for Authorization Regulations* (Regulations) also took effect in Nov. 2013. If your company has an activity or project that has the potential to cause serious harm to fish, you need to know about these new regulations because you may need authorization from the Department of Fisheries and Oceans (DFO). So here's an overview of the authorization process.

### 3 STEPS IN PROCESS

The amended *Fisheries Act* (Act) bars anyone from carrying on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or that support such a fishery. But Sec. 35(2)(b) of the Act says that a person may carry on a work, undertaking or activity without violating this ban if the carrying on of the work, undertaking or activity is authorized by the Minister and the work, undertaking or activity is carried on in accordance with the conditions established by the Minister.

The new Regulations spell out what a company needs to do to get such authorization. The DFO also released a new *Fisheries Protection Policy (Policy)* that explains these new requirements. There are three steps in the authorization process (see the flowchart at the end of the article, which illustrates the process):

[learn\_more caption="Step #1: Proponent Determines Whether Project Needs Authorization"]

Only works, undertakings or activities (we'll generally refer to all three of these as 'projects' for simplicity's sake unless it's inappropriate) that could result in serious harm to fish that are part of a designated fishery or that support such a fishery require authorization. So you first need to determine whether your project has the potential to result in such harm.

The Act protects fish and fish habitats that are part of or support commercial, recreational or Aboriginal fisheries, which include:

- All three of Canada's oceans;
- Areas of fishing for food, social or ceremonial purposes or under land claims agreements by Aboriginal peoples; and
- Areas covered by federal or provincial fisheries regulations.

'Serious harm to fish' is defined as the death of fish or any permanent alteration to, or destruction of, fish habitat. The Policy adds that any permanent alteration to or destruction of fish habitat must be of a spatial scale, duration or intensity that limits or diminishes the ability of fish to use such habitats as:

- Spawning grounds;
- Nursery, rearing or food supply areas;
- A migration corridor; or
- Any other area in order to carry out one or more of their life processes.

The Policy explains that when considering whether a project is likely to cause serious harm to fish and thus requires an authorization, proponents should identify:

**Impacts to fish and fish habitat caused by the project.** Have all potential impacts been considered? Pathways of effects diagrams, available on the Department's website, may help you determine what kinds of impacts can be expected from typical developments.

**Expected duration of impacts.** Is the duration short enough that it doesn't

diminish the ability of fish to carry out one or more of its life processes' It's important to note that, for many projects, the duration of the impact will be longer than the duration of the work taking place in or near the water.

**Geographic scale of impacts.** Is the scale of the project small enough that the disturbance won't displace fish that would otherwise be occupying the habitat'

**Availability and condition of nearby fish habitat.** Is the habitat that's being altered or destroyed the only habitat of its type and quality in the area of the project'

**Impact on the relevant fish.** Are the fish that are affected by the proposed project likely to experience increased mortality rates, increased stress and reduced fitness as a result of direct injury or reduced habitat function so that a localized effect on a fish population or stock is possible'

**Proposed avoidance and mitigation measures.** Will measures to avoid and mitigate *serious harm to fish* be applied so that all *serious harm to fish* is avoided' If so, your project doesn't require an authorization. But if *serious harm to fish* remains after all avoidance and mitigation measures have been applied, an authorization may be required.

**Insider Says:** Under the new Act, existing Sec. 32 and 35 authorizations issued before Nov. 25, 2013 are valid under the new prohibitions in Sec. 35. But if you wanted to amend or cancel such authorizations, you had to have applied to the DFO by Feb. 24, 2014.

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[learn\_more caption="Step #2: Proponent Applies for an Authorization"]

If you've determined that your project requires an authorization, you should apply for one. Schedule 1 to the Regulations describe the information that must be submitted by a proponent seeking an authorization, including:

- Contact information for the proponent's authorized representative;
- A description of the proposed project and, if applicable, of the project of which the proposed work is a part, including the purpose of the proposed project and, if applicable, the associated infrastructure, any permanent or temporary structure involved and the construction methodologies, building materials, explosives, machinery and other equipment that will be used. If physical works are proposed, you must also include the project engineering specifications, scale drawings and dimensional drawings;
- A timeline'that is, a description of the anticipated phases, including the sequencing of the phases, of the proposed work and, if applicable, of the project of which the proposed work is a part and the schedule for carrying on the proposed work and, if applicable, the project;
- A description of the location of the proposed work and, if applicable, of the location of the project of which the proposed work is a part, including:
  - Geographic coordinates;

- A small-scale site plan identifying the overall location and boundaries;
  - A large-scale site plan indicating the size and spatial relationship of the planned facilities, infrastructure and other components and of any existing structures, landmarks, water sources or water bodies and other geographic features; and
  - The name of any watersheds, water sources and water bodies that are likely to be affected and the geographic coordinates of the water sources and water bodies;
- The name of the community nearest to the location and the name of the county, district or region and the province in which the proposed project will be carried on;
  - A description of the fish and fish habitat found at the location of the proposed project and within the area likely to be affected by the proposed project, including:
    - The type of water source or water body;
    - The characteristics of the water source or water body and how those characteristics directly or indirectly support fish in carrying out their life processes;
    - The fish species that are present and an estimate of the abundance of those species; and
    - A description of how the above information was derived, including the sources, methodologies and sampling techniques used;
  - A description of the likely effects of the proposed project on fish that are part of a commercial, recreational or Aboriginal fishery or that support such a fishery, and the likely effect on the habitat of those fish. The description must include the following information:
    - The fish species that are likely to be affected and the life stages of the individuals of those species;
    - The extent and type of fish habitat that's likely to be affected;
    - The probability, magnitude, geographic extent and duration of the likely effects on fish and fish habitat; and
    - A description of how the above information was derived, including the methodologies used;
  - A description of how the effects referred to above are likely to result in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery or that support such a fishery, and a description of the serious harm to fish;
  - A description of the measures and standards that will be implemented to avoid or mitigate the serious harm to fish that is referred to above, including an analysis of the expected effectiveness of those measures and standards;
  - A description of the monitoring measures that will be put in place to assess the effectiveness of the above measures and standards;
  - A description of the contingency measures that will be implemented if the above measures and standards aren't successful in avoiding or mitigating the serious harm to fish that's referred to above;
  - A quantitative description of the anticipated serious harm to fish that's likely to result from the proposed project despite the implementation of the measures and standards referred to above; and
  - An offsetting plan in respect of the serious harm to fish referred to above, including:
    - A description of the measures that will be implemented to offset the

serious harm to fish;

- An analysis of how those measures will offset the serious harm to fish;
- A description of the measures and standards that will be put in place during the implementation of the offsetting plan to avoid or mitigate any adverse effects on fish and fish habitat that could result from the implementation and an analysis of how those measures and standards will avoid or mitigate those adverse effects;
- A description of the monitoring measures that will be put in place to assess the effectiveness of the offsetting measures referred to above;
- The timeline for the implementation of the offsetting plan;
- A description of the contingency measures and associated monitoring measures that will be put into place if the measures referred to above aren't successful in offsetting the serious harm to fish;
- An estimate of the cost of implementing each element of the offsetting plan; and
- If the implementation of the offsetting plan requires access to lands, water sources or water bodies that aren't owned by the proponent, a description of the steps that are proposed to be taken to obtain the authorization required for the proponent, the DFO and anyone authorized to act on the DFO's behalf to access the lands, water sources or water bodies in question. This information isn't required if the proponent is Her Majesty in right of Canada, Her Majesty in right of a province or the government of a territory.

The Regulations also require the application to include an irrevocable letter of credit issued by a recognized Canadian financial institution to cover the costs of implementing the offsetting plan.

**Insider Says:** Note that there's an expedited process for emergencies, that is, projects that must be carried on without delay in response to:

- A matter of national security;
- A national emergency for which special temporary measures are taken under the *Emergencies Act*; or
- An emergency that poses a risk to public health or safety or to the environment or property.

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[learn\_more caption="Step #3: DFO Considers Application"]

The DFO will confirm receipt of the application and then has 60 days to determine whether it's complete. If it's incomplete, the Ministry must provide a list of the information that has to be provided to make it complete. Once the application is complete, the DFO has 90 days to either issue or reject the authorization. In doing so, it must consider four factors:

**Contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries.** The contribution of relevant fish relates to the role of the fish and fish habitat affected by the project in the overall productivity of the commercial, recreational or Aboriginal fishery. Ongoing productivity is the potential sustained yield of all fish populations and their habitat that are part of or support such fisheries. Effects on productivity may be assessed using a variety of tools but the metrics and level of detail used to provide estimates of such impacts will generally depend on both the type and

scale of the impact.

For projects with a low likelihood of impacting productivity, or in which the impacts are relatively small, proponents must qualitatively document only the key impacts and their associated links to components of productivity, such as growth, performance, survival, migration and reproduction.

For projects likely to cause large-scale impacts, the metrics of productivity should be chosen based on the type of impact, such as metrics related to habitat area or to components of productivity that are linked to the fish's life cycle.

Very large-scale impacts that are likely to result in ecosystem transformation will require the most detailed estimates of impacts to productivity, likely involving quantitative fish population models.

As project proponent, you're responsible for documenting and providing information so that an analysis describing the contribution of relevant fish may be undertaken. This analysis will help determine how the project may affect the relevant fisheries management objectives and the amount and type of avoidance, mitigation and offsetting measures required.

**Fisheries management objectives.** Fisheries management objectives are the stated socio-economic, biological and ecological goals for a fishery that are typically established by federal, provincial or territorial fishery managers or other entities, such as wildlife co-management boards established under land claims agreements.

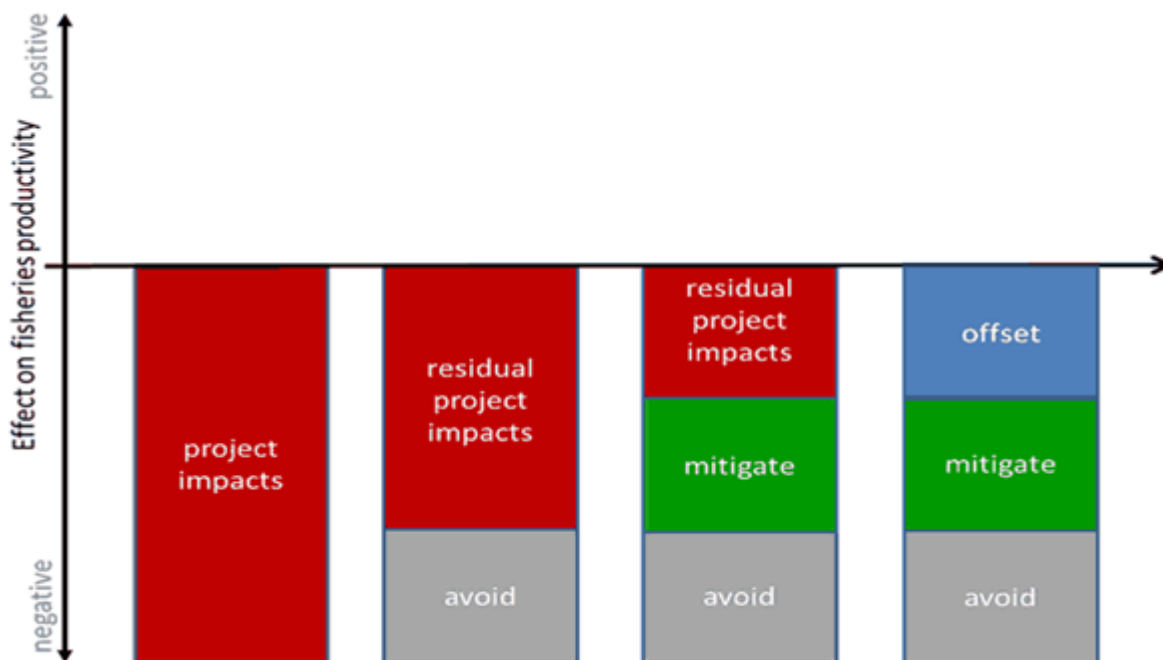
Fisheries management objectives may range from high-level objectives applying widely to multiple fisheries or fish stocks to objectives that are limited in scope to a specific fishery, stock or region. When fishery-specific objectives are included in federal, provincial, territorial or co-management board fishing plans, they'll be considered foremost when making regulatory decisions related to the fisheries protection provisions of the Regulations.

If there aren't any fishery-specific objectives, overarching strategies and policy objectives established by the DFO or other fisheries managers should be considered. In areas where other entities manage the fishery, discussions with relevant authorities may also occur.

Where fisheries management objectives are available, you should consider and document how the impacts from your projects may affect these objectives. You should also describe any effects the project may have on the achievement of these objectives. And fisheries management objectives may guide you in the selection of any required avoidance, mitigation and offsetting measures.

**Whether there are measures and standards to avoid, mitigate or offset serious harm to fish that are part of such a fishery or that support such a fishery.** The Minister must consider whether measures and standards have been applied by project proponents to avoid, mitigate or offset *serious harm to fish* that results from their projects. The fundamentals of 'avoid, mitigate and offset' build on a hierarchy that's internationally recognized as a best practice in reducing risks to biodiversity. This hierarchy emphasizes that efforts should be made to prevent or avoid impacts first. When avoidance isn't possible, then efforts should be made to mitigate any impacts caused by the project. Lastly, if after taking these actions, there are any residual impacts, they'd normally

require authorization and be addressed by offsetting. (See the chart below for a conceptual diagram of the hierarchy).



**The public interest.** Finally, the Minister must take into account the public interest. In most cases, the public interest will be served through consideration of the first three factors. But the public interest factor lets the Minister consider a range of issues deemed relevant to the well-being of society at a given place and time, ranging from issues related to economic development to long-term sustainable development to impacts on ecosystem goods and services. The Minister has discretion on how to apply this factor. So you may want to document any information relevant to any public interest considerations.

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### BOTTOM LINE

There are consequences for carrying on a project that results in serious harm to fish or failing to comply with the conditions of an authorization under these Regulations. The *Fisheries Act* outlines minimum and maximum fines, depending on different classes of offenders and types of offence. And jail is a possibility for repeat offences. So although getting authorization for your company's projects under the new Regulations is still an involved process that requires you to gather and provide a lot of detailed environmental information, make sure that you do so when necessary. But the good news is that authorization is now required for fewer projects so you likely won't have to go through this three-step process that often.

### Flowchart of Authorization Process



