

## Chapter 7 • Enforcement: fisheries and habitat

In this Commission's Terms of Reference, I am directed to consider the Department of Fisheries and Oceans' (DFO's) policies and practices with respect to the Fraser River sockeye salmon fishery, including its management practices and procedures relating to enforcement.<sup>1</sup> As discussed in Chapter 3, Legal framework, the *Fisheries Act* and its related regulations create prohibitions relating to fishing and to fish habitat. In this chapter, I describe DFO's enforcement of the *Fisheries Act* concerning fisheries, fish habitat, and aquaculture.

DFO's enforcement activities are of concern to the public, and I received several submissions, both by email and at public forums, some of which I summarize below:

- People in the communities tell us that when they fish for food, they regularly encounter DFO's Conservation and Protection staff but seldom see or hear of on-the-water checks or checks of vehicles headed east, some of them with freezers full of fish on their trucks.<sup>2</sup>
- There is confusion over and a loss of confidence in DFO regarding who to call if there is a "fish kill" or fish habitat destruction.<sup>3</sup>
- The enforcement and prosecution arm of DFO should be separated from the rest of the organization and given a budget that would put it out of reach of the federal government's political interference.<sup>4</sup>
- There should be legislation to allow private prosecutions under the *Fisheries Act* because the Act is often unenforced.<sup>5</sup>
- Fishery officers are unable to respond to issues on the Fraser River because there are too few of them.<sup>6</sup>
- DFO should be required to make enforcement decisions based on science rather than politics.<sup>7</sup>
- Enforcement must be enhanced.<sup>8</sup>
- High-seas overfishing by foreign nations has decimated our stocks.<sup>9</sup>

## ■ The legal framework of enforcement: fisheries and fish habitat

It is an offence to contravene the *Fisheries Act* and its regulations, which include prohibitions relating to fishing, as well as to fish habitat.<sup>10</sup> Fish habitat is a broad concept. The *Fisheries Act* defines “fish habitat” as “spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes[.]”<sup>11</sup>

### Fisheries prohibitions

The *Fisheries Act* sets out various prohibitions relating to fishing, including but not limited to no fishing during closed fishing times, no unattended fishing gear, no unlawful sale or possession of fish, and no contravention of a fishing plan.<sup>12</sup>

The *Fishery (General) Regulations*<sup>13</sup> apply to fishing and related activities (with some limits\*) and cover a number of topics, such as

- requirements to carry and produce a fishing licence and registration (sections 11–12);
- conditions that may be attached to a licence (section 22);
- suspension or cancellation of licences (section 24);
- identification of fishing vessels and gear (sections 26–29);
- release of incidental catch (section 33);
- no dumping and wasting of fish (section 34);
- restrictions on the sale of fish (section 35);
- requirement to identify, count, weigh, and measure fish (section 36);
- variation in close times, fishing quotas, and size and weight limits of fish (Part I);
- designation and duties of observers (Part V);
- requirements to assist persons engaged in enforcement or administration of the *Fisheries Act* (Part VI);
- ticketable offences (Part XII); and

- Canadian jurisdiction vessels fishing in waters other than Canadian fisheries waters (Part XIII).

Under subsection 35(2) of the *Fishery (General) Regulations*, a person is prohibited from buying, selling, trading, bartering, or offering to buy, sell, trade, or barter any fish “unless it was caught and retained under the authority of a licence issued for the purpose of commercial fishing, a licence issued under Part VII [fishing for experimental, scientific, educational, or public display purposes], or a licence issued under the *Aboriginal Communal Fishing Licences Regulations* in which the minister has authorized the sale of fish ...” This is the subsection which prohibits the sale of any fish not caught pursuant to a licence that authorizes sale. Aboriginal food, social, and ceremonial (FSC) fishing licences do not authorize sale, and so those fish may not be sold. (Food, social, and ceremonial fishing is discussed in detail in chapters 3, Legal framework, and 5, Sockeye fishery management.)

The *Pacific Fishery Regulations, 1993*,<sup>14</sup> apply to the commercial fishery and set out the requirement for registration of commercial fishing vessels and licensing of fishers (sections 22–26). Part I of these regulations contains general prohibitions on the manner of fishing,<sup>15</sup> and Part VI outlines salmon-specific prohibitions, including the following:

- no driving salmon from one area to another (section 51);
- no fishing for salmon in certain closed areas (section 52);
- no fishing for salmon during closed times (section 53);
- restrictions as to gear type and size (sections 54, 57, 60);
- no retention of salmon below a minimum size (section 55); and
- no unattended or anchored gillnets (section 57).

The *British Columbia Sport Fishing Regulations, 1996*,<sup>16</sup> apply to sport fishing in Canadian fisheries waters in the Pacific Ocean (with some limits as per

\* However, parts of the *Fishery (General) Regulations*, including those dealing with the transfer of ownership, loss of vessel, and the identification of fishing vessels and fishing gear, do not apply to fishing and related activities under Aboriginal communal fishing licences; where there is an inconsistency between the *Fishery (General) Regulations* and a regulation specifically enumerated in subsection 3(4), such as the *Pacific Fishery Regulations, 1993*, the enumerated regulation will prevail.

section 3) and set out close times, fishing quotas, size limits, and other restrictions for all recreational salmon fisheries in British Columbia (sections 42–50). The *Aboriginal Communal Fishing Licences Regulations* (ACFLR)<sup>17</sup> provide a licensing mechanism for Aboriginal fisheries and include licence conditions (section 5) and prohibitions (sections 7–9).

Part II of the *Foreign Vessel Fishing Regulations*<sup>18</sup> applies to foreign fishing vessels and to any person on board a foreign fishing vessel (including crew or employees) in the Canadian fisheries waters adjacent to the Pacific Coast.<sup>19</sup> Part II sets out close times for fishing certain species and areas, incidental catch limits, gear restrictions, and requirements for seals and certificates on gear.<sup>20</sup> Although the regulations specifically identify several species, they do not set out incidental catch limits, gear restrictions, or close times in respect of salmon. The *Coastal Fisheries Protection Act*<sup>21</sup> regulates the activities of foreign fishing vessels in Canadian fisheries waters (for example, it restricts the entry of foreign fishing vessels into Canadian waters, foreign vessels fishing in Canadian waters, and the transport of fish into Canadian waters<sup>22</sup>).

## Fish habitat protection prohibitions

The *Fisheries Act* contains a number of fish and fish habitat protection provisions, but section 35 is the primary habitat protection provision, prohibiting the unauthorized carrying on of any work or undertaking that results in the “harmful alteration, disruption or destruction of fish habitat” (HADD). Under subsection 35(2), a HADD may occur with the minister’s authorization or pursuant to regulations:

### 35.

- (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.

While DFO’s regulatory work focuses on section 35, it also considers other sections of the *Fisheries Act*’s “habitat protection and pollution prevention provisions.” These sections are summarized in Table 1.7.1.

Section 36 of the *Fisheries Act* prohibits the unauthorized deposit of a deleterious substance into water frequented by fish and is often referred to as the key “pollution prevention” provision. Although the minister of fisheries and oceans is ultimately responsible for all sections of the *Fisheries Act*, pursuant to an administrative agreement discussed below, Environment Canada, rather than DFO, administers and enforces aspects of pollution control arising from sections 36 through 42. Section 36 provides as follows:

### 36.

- (1) No one shall
  - (a) throw overboard ballast, coal ashes, stones or other prejudicial or deleterious substances in any river, harbour or roadstead, or in any water where fishing is carried on;
  - (b) leave or deposit or cause to be thrown, left or deposited, on the shore, beach or bank of any water or on the beach between high and low water mark, remains or offal of fish or of marine animals; or
  - (c) leave decayed or decaying fish in any net or other fishing apparatus.
- (2) Remains or offal described in subsection (1) may be buried ashore, above high water mark.
- (3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.
- (4) No person contravenes subsection (3) by depositing or permitting the deposit in any water or place of
  - (a) waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council under any Act other than this Act; or

(b) a deleterious substance of a class, in a quantity or concentration and under conditions authorized by or pursuant to regulations applicable to that water or place or to any work or undertaking or class

thereof, made by the Governor in Council under subsection (5).  
 (5) The Governor in Council may make regulations for the purpose of paragraph (4)(b)  
 ...

**Table 1.7.1 DFO’s summary of the Habitat Protection and Pollution Prevention provisions of the Fisheries Act**

Section	Authority
20	The Minister may require fish-ways to be constructed.
21	The Minister may authorize payment, order construction or removal or require fish stops or diverters for fish-ways.
22	The Minister may require sufficient flow of water for the safety of fish and flooding of spawning grounds as well as free passage of fish during construction.
26	Prohibits obstruction of fish passage through channels, rivers and streams. In addition, the Minister may authorize devices to prevent the escape of fish.
27	Prohibits the damage or obstruction of fish-ways, the impediment of fish to fish-ways and nearby fishing.
28	Prohibits the use of explosives to hunt or kill fish.
30	The Minister may require fish guards or screens to prevent the entrainment of fish at any water diversion or intake.
32	Prohibits the destruction of fish by any means other than fishing.
34	Definitions used throughout sections 35 to 42.
35	Prohibits works or undertakings that may result in harmful alteration, disruption or destruction of fish habitat, unless authorized by the Minister or under regulations.
36	Prohibits the deposit of deleterious substances into waters frequented by fish, unless authorized under regulations.
37	The Minister may request plans and specifications for works or undertakings that might affect fish or fish habitat. The Minister may, by regulations or with Governor-in-Council approval, make orders to restrict or close works or undertakings that may harmfully alter fish habitat or lead to the deposit of deleterious substances.
38	Gives the Minister the authority to appoint inspectors and analysts and describes inspectors’ powers, including entry, search and the power to direct preventive, corrective or cleanup measures. Provides for regulations that require reporting of abnormal deposits of a deleterious substance or substances that occur in contravention of the general prohibition, regulations or site-specific authorizations.
40	Sets out penalties in case of a contravention of: sections 35 or 36; failing to provide information or to undertake a project in compliance with section 37; or failing to make a report or to otherwise comply with section 38.
42	Those causing the deposit of deleterious substances in waters frequented by fish are liable for costs incurred by Her Majesty. Also, the Minister shall prepare an annual report on administration and enforcement of the fish habitat protection and pollution prevention provisions of the Fisheries Act as well as a statistical summary of convictions under section 42.1.
43	The Governor in Council may make regulations for carrying out the purposes and provisions of the Fisheries Act, including habitat protection and pollution prevention.

Source: Policy and Practice Report 8, Habitat Management, p. 5; 2008–2009 Annual Report to Parliament on the Administration and Enforcement of the Fish Habitat Protection and Pollution Prevention Provisions of the Fisheries Act (2010), online: <http://www.dfo-mpo.gc.ca/habitat/role/141/reports-rapports/2008-2009/pdf/ann08-eng.pdf>, p. 7.

Contraventions of subsections 35(1) or 36(1) or 36(3) of the *Fisheries Act* may be prosecuted as summary or indictable offences. The potential penalties for summary offences are fines up to \$300,000 and/or six months' imprisonment; for indictable offences, fines up to \$1 million and/or imprisonment for up to three years could be imposed.<sup>23</sup>

Additionally, subsections 42(1) and 42(2) provide for civil liability for damages (monetary payment) to the Crown (either federal or provincial) incurred in mitigation or remediation of any deposits of deleterious substances contrary to section 36. Subsection 42(3) makes the persons who own, have charge of, or cause or contribute to the deposit or danger of a deleterious substance that enters waters frequented by fish contrary to section 36, liable to licensed commercial fishermen for all loss of income incurred "as a result of the deposit or of a prohibition to fish resulting therefrom ..."<sup>24</sup>

I note that Part 3, Division 5, of Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, which received royal assent on June 29, 2012, amends the *Fisheries Act*, sections 2, 20–21, 35–40, 42.1, 43, 63, and 82, and repeals sections 26–27, 30, 32, and 69. In addition, the bill adds sections 39, 43.1, 43.2, and 89–91. In Volume 3, Chapter 3, Legislative amendments, I summarize and address the possible implications of the proposed changes in light of the evidence, findings, and recommendations arising from the Commission's hearings.

Some of the amendments, are likely to affect DFO and Environment Canada's management of enforcement as described in Volume 1, Chapter 3, Legal framework, including in the following ways:

- The sections regarding fishways and obstructions are reorganized and reworded (sections 20–21).
- Section 32, which prohibits the killing of fish by means other than fishing, is changed to broaden the exceptions to the prohibition. Bill C-38 also allows cabinet to repeal this provision at any time.
- The prohibition in subsection 35(1) is amended; there are more categories of exceptions to subsection 35(1); and a new subsection 35(3) allows the minister to make regulations authorizing exceptions to subsection 35(1).
- Changes to section 36 allow the minister to make regulations that except the application of subsection 36(3).
- Powers of fishery officers and inspectors are expanded (sections 38–39).
- New offences and fines are created under section 40.
- There are new categories of regulations under section 43, including regulations providing for the control and management of aquatic invasive species.
- A new subsection 43.2 allows cabinet to designate a minister other than the minister of fisheries and oceans as the minister responsible for the administration and enforcement of subsections 36(3) through (6) of the *Fisheries Act* for the purposes of, and in relation to, subject matters set out by order.

## ■ Relationship between DFO and Environment Canada

On April, 17, 1978, Prime Minister Pierre Elliott Trudeau issued a prime ministerial directive that formalized the existing arrangements between DFO and Environment Canada: DFO took the administrative lead with respect to section 35, and Environment Canada took the administrative lead with respect to section 36, except where sediment has been deposited into fish-bearing waters, in which case DFO is the lead agency.<sup>25</sup>

In May 1985, DFO and Environment Canada signed a Memorandum of Understanding on the Subject of the Administration of Section 33 [now section 36] of the *Fisheries Act* (1985 MOU).<sup>26</sup> The 1985 MOU set out the parties' agreement formalizing their roles.

As required under the 1985 MOU, in 1987, Environment Canada and DFO signed a regional working agreement (Regional Working Agreement, or 1987 RWA).<sup>27</sup> The stated purpose of this agreement is to identify Environment Canada's and DFO's "roles and responsibilities, procedures and guidelines and improve effective communications, coordination and cooperation between the departments for matters within the purview of Section 33 [now 36] in the Province of British Columbia and Yukon Territory."<sup>28</sup> The 1987 RWA provides for such things as annual reviews, arbitration procedures, technical roles, division of responsibilities for

inter-agency permit referrals, emergency responses, communications and enforcement, and compliance procedures.

The Regional Working Agreement says that “enforcement and compliance procedures will be consistent with the national enforcement and compliance policy currently under development” by Environment Canada, DFO, and the Department of Justice.<sup>29</sup> The Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the *Fisheries Act* is discussed further below. This policy sets out general principles that govern application of sections 35 and 36 of the *Fisheries Act*, including the respective roles of Environment Canada and DFO.<sup>30</sup>

Finally, the 1987 RWA notes the following:

Section 8 of the MOU provides DFO with the authority to take direct action in circumstances where the fisheries resource is being affected and where EP [Environmental Protection Directorate of Environment Canada] is unable or unwilling to take such action. It is anticipated that such direct action without some level of prior consultation with EP will be infrequent and would occur only as a result of unique circumstances.<sup>31</sup>

As noted above, Bill C-38 allows cabinet to designate a minister other than the minister of fisheries and oceans as the minister responsible for the administration and enforcement of subsections 36(3) through (6) of the *Fisheries Act*.

### **Interim Operational Working Arrangement on Enforcement of Section 36(3) *Fisheries Act***

In February 2006, Environment Canada and DFO in the Pacific and Yukon Region signed an Interim Operational Working Arrangement on Enforcement of Section 36(3) *Fisheries Act* between Environment Canada and Department of Fisheries and Oceans Pacific & Yukon (Interim Operational Working Arrangement on Enforcement of Section 36(3)).<sup>32</sup> The agreement acknowledges and supplements the Regional Working Agreement discussed above. In the main, it sets out a response protocol for spills and subsection 36(3) enforcement.<sup>33</sup>

The agreement sets out that “[i]f the spill is on land or from land into fresh water the lead agency is the Ministry of Environment,” but “[i]f the spill is related to a deposit of sediment (or a HADD) into fish bearing waters, DFO is the lead agency.”<sup>34</sup> It also provides that, when contacted by Environment Canada, DFO “will make every effort to assist,” performing such functions as a “first responder” role where it may not be practicable or possible for Environment Canada to attend at a scene.<sup>35</sup> Further, where a preliminary response has been completed by DFO, Environment Canada will assume responsibility for an investigation, though the two agencies may decide that it is “appropriate / desirable for DFO to assume responsibility as lead agency for the completion of the investigation up to and including prosecution.”<sup>36</sup>

### **Enforcement of section 36 in relation to salmon farms**

Although Environment Canada is responsible for the administration of section 36 of the *Fisheries Act*, under the federal *Pacific Aquaculture Regulations* (which are described in Chapter 3, Legal framework), Environment Canada is not designated as the agency to which salmon farms must report regarding their discharges. This arrangement differs from Environment Canada’s regulatory oversight provided in other regulations made pursuant to subsection 36(5) of the Act (see, e.g., the *Pulp and Paper Mill Effluent Regulations*<sup>37</sup> and *Metal Mining Effluent Regulations*<sup>38</sup>). Also, I understand from testimony provided by Claire Dansereau, deputy minister, that DFO currently views itself as responsible for the application of section 36 to this industry.<sup>39</sup>

### **Provincial laws and federal-provincial agreements**

In freshwater habitats, DFO deals with enforcement relating to salmon and the province deals with enforcement for all other fish species.<sup>40</sup> According to Randy Nelson, regional director of Conservation and Protection, DFO Pacific Region, provincial involvement in enforcement activities is less likely in the marine environment.<sup>41</sup>

Environment Canada's role with respect to enforcement of subsection 36(3) does not change from freshwater to marine habitats.<sup>42</sup>

In 2000, Canada and British Columbia signed a Fish Habitat Management Agreement (described in Chapter 6, Habitat management).<sup>43</sup> According to Mr. Nelson, fishery officers are trained to follow the principles expressed in this document and they "make it work at the field level."<sup>44</sup> Mr. Nelson said that, in his opinion, the working relationship between provincial conservation officers and fishery officers is very good.<sup>45</sup>

In 2002, the British Columbia Conservation Officer Service and DFO Pacific Region's Conservation and Protection Branch signed a memorandum of understanding respecting mutual assistance.<sup>46</sup> Aside from clauses related to disclosure of documents or information, and to limitations on liability, the document is "not legally binding."<sup>47</sup> The agreement describes the good faith intentions of each service to assist one another in the field in both exigent and non-exigent situations and to consider a process for cross-designation of fishery officers as conservation officers and conservation officers as fishery officers. Mr. Nelson confirmed that, if something needs to be responded to right away, either fishery officers or conservation officers will do the initial response and gather the immediate information and evidence and then turn it over to the other agency.<sup>48</sup>

There are no formal arrangements or agreements between Environment Canada and the province for enforcement purposes.<sup>49</sup>

I note that Part 3, Division 5, of Bill C-38, discussed above, allows the minister of fisheries and oceans to enter into agreements with a province to further the purposes of the Act.<sup>50</sup> Also, if an agreement provides that there are provincial laws that are equivalent in effect to a provision in the regulations, then cabinet could declare, by order, that provisions of the Act or its regulations would not apply in the province.<sup>51</sup> The amendments would also allow the minister to implement programs and projects for the purposes of the Act, and, in exercising these powers, the minister could enter into agreements, arrangements, or transactions with any person or body, or any federal or provincial minister, department, or agency.<sup>52</sup>

## ■ Organizational structure

### DFO's organizational structure

DFO's national Conservation and Protection Directorate (C&P), under the Ecosystems and Fisheries Management sector, is responsible for fisheries and habitat enforcement.<sup>53</sup> The director general of C&P, DFO's head enforcement officer, is responsible for promulgating policies and procedures to facilitate the national delivery of the C&P program, holding ultimate responsibility for the activities of more than 600 fishery officers stationed in 136 offices across Canada.<sup>54</sup> The director general reports to the assistant deputy minister, Ecosystems and Fisheries Management, and is assisted by a director of enforcement and a director of program support and development.<sup>55</sup> There is a functional relationship between regional C&P branches and C&P at DFO national headquarters, but no direct reporting relationship.<sup>56</sup> (For a detailed discussion of the organizational structure of C&P, see Chapter 4, DFO overview.)

In response to the Honourable Bryan Williams's report *2004 Southern Salmon Fishery Post-Season Review* (Williams Report)<sup>57</sup> and the *2005 Report of the Standing Committee on Fisheries and Oceans*,<sup>58</sup> the DFO Pacific Region was reorganized so that the regional director, C&P, now reports directly to the regional director general.<sup>59</sup> (In the other five DFO regions, the regional director of C&P is part of the broader Fisheries and Aquaculture Management group within the region.<sup>60</sup>) The Pacific regional director of C&P reports functionally to the director general of C&P in Ottawa and has line authority over all regional C&P resources.<sup>61</sup> Regional directors are responsible for the regional delivery of the C&P program, which includes development and application of regional C&P policies and guidelines, regional C&P planning and priority setting, collaboration with partner agencies (such as the RCMP), and meeting the requirements of international enforcement agreements.

C&P is a largely decentralized organization, with a staff of less than 30 at DFO's national headquarters in Ottawa.<sup>62</sup> In comparison, in 2009, Pacific Region C&P had approximately 34 different offices with between 161 and 180 fishery officers.<sup>63</sup> The Pacific Region consists of five management areas, each led by a C&P area chief who reports to

the regional director of C&P.<sup>64</sup> Area chiefs oversee detachment supervisors (there are 16 detachments divided among the five areas), who in turn oversee field supervisors, who in turn oversee general duty fishery officers.<sup>65</sup>

In addition to area chiefs, the regional director of C&P has direct line-reporting relationships with eight regional chiefs and coordinators who oversee specific C&P activities, such as aquaculture enforcement, investigation and intelligence services, program integration, program planning and analysis, regulations, recruitment, community justice, and community enforcement.<sup>66</sup>

Although C&P fishery officers enforce fisheries and habitat-related provisions of the *Fisheries Act*, responsibilities for habitat enforcement and compliance are shared with Habitat staff.<sup>67</sup> Habitat staff are the lead for education, promotion, and evaluation. C&P staff take the lead on enforcement.<sup>68</sup> Habitat and C&P staff work together on enforcement: the fishery officers are experts in procedures, prosecution, laying of information, and collection of evidence. However, according to Jason Hwang, area manager, Oceans, Habitat and Enhancement Branch, BC Interior, this work is carefully supported by Habitat staff, who appreciate the impacts on fish habitat and can provide evidence on them.<sup>69</sup>

For 2009, 6 percent of C&P's total program effort, nationally, was spent on "habitat" initiatives, compared with 44 percent on commercial fishing, 23 percent on recreational fishing, and 10 percent on Aboriginal fishing. Other C&P program efforts nationally include work related to the Canadian Shellfish Sanitation Program, the seal hunt, foreign fishing, and the *Species at Risk Act*.<sup>70</sup>

### ***Fishery officers, fishery guardians, and inspectors***

Fishery officers are DFO staff tasked with compliance and enforcement. Designated under subsection 5(1) of the *Fisheries Act*, fishery officers hold the powers and protections of peace officers under the *Criminal Code*\* while enforcing the *Fisheries Act*, the *Coastal Fisheries Protection Act*, certain First

Nations fisheries laws,<sup>71</sup> and associated regulations. Enforcement training, knowledge of fisheries, and special certification are requirements for becoming a fishery officer.

The *Fisheries Act* allows the minister to designate people as "fishery officers," "fishery guardians," and "inspectors."<sup>72</sup> Both fishery officers and fishery guardians have powers of inspection under the Act.<sup>73</sup> A fishery officer also has powers of search in certain circumstances.<sup>74</sup> Both fishery officers and fishery guardians may arrest without warrant a person whom they believe "on reasonable grounds, has committed an offence against this Act or any of the regulations" or who is in the process of committing such an offence.<sup>75</sup> They also both have a power of seizure with respect to "any fishing vessel, vehicle, fish or other thing that the officer or guardian believes on reasonable grounds was obtained by or used in the commission of an offence under this Act or will afford evidence of an offence under this Act."<sup>76</sup>

Inspectors, appointed under section 38 of the Act, have limited powers of inspection (without a warrant) and search (with a warrant). As with fishery officers and fishery guardians, an inspector may search without a warrant only if there are exigent circumstances.<sup>77</sup> Inspectors do not have powers of arrest or seizure, but they have one power that fishery officers and fishery guardians do not have: the power to direct that immediate, "reasonable measures consistent with safety and with the conservation of fish and fish habitat" be taken to stop the "deposit of a deleterious substance in water frequented by fish or a serious and imminent danger thereof by reason of any condition."<sup>78</sup> Fishery officers who also have an inspector designation are able to issue inspector's directions.

As noted above, Bill C-38 expands the powers of inspectors and fishery officers.

Section 79.7 of the *Fisheries Act* addresses "ticketable offences" and provides that a fishery officer, fishery guardian, or inspector may commence proceedings in respect of any offence prescribed by regulations by way of a ticket. The ticketable offences include failing to produce a licence or fisher's registration card, leaving unattended fishing gear not

\* As described by DFO, peace officer status under the *Criminal Code* is conferred on fishery officers only while performing duties or functions under the *Fisheries Act* or the *Coastal Fisheries Protection Act*; fishery officers do not have peace officer status while enforcing any other legislation (Exhibit 694, Draft National Enforcement Policy for Conservation and Protection, p. 10). A detailed table setting out fishery officer authorities under legislation administered by the DFO is set out in Exhibit 694, p. 7.

identified by the owner's name, failing to forthwith return fish to water, and failing to release fish in the least harmful manner.<sup>79</sup>

The key activities of a field-level fishery officer include

- carrying out compliance inspections and enforcement of fisheries-related legislation that governs fishing activity and protects fish habitat and the aquatic environment;
- acting as lead investigator or as a member of a team of fishery officers to collect evidence, including forensic evidence on major cases, to prepare violation reports and court briefs, and to execute court documents and voluntary penalty tickets;
- promoting stewardship of the fisheries resources and fish habitat;
- investigating and gathering intelligence and/or conducting audits on fishing and habitat-related activities;
- participating in the development of training programs;
- developing and delivering public education and awareness presentations; and
- acting as a senior departmental liaison in communities and providing assistance to other federal, provincial, local, and international enforcement agencies.<sup>80</sup>

Fishery officers spend a great deal of their time enforcing and monitoring compliance by patrolling on land, on water, and in the air.<sup>81</sup> Patrols are the primary means to detect and deter non-compliance.<sup>82</sup> According to Mr. Nelson, the presence of fishery officers "is one of the best deterrents [DFO has] ... The presence of a uniformed fishery officer in any fishery and in habitat cases, really it's the best tool [DFO has]."<sup>83</sup>

The mandate of C&P and the areas of responsibility given to fishery officers have grown in recent years with the addition of the Canadian Shellfish Sanitation Program, federal aquaculture management and enforcement, the European Union traceability certificate auditing requirements, the increasing number of Aboriginal organizations with unique licence conditions, increasing catch monitoring requirements, and the increasing complexity of harvest management directions (with a shift toward stock-specific management).<sup>84</sup> As a

result, Mr. Nelson believes that "there's an ever-increasing amount of pressures and workloads put on officers."<sup>85</sup>

### Habitat fishery officers

Over the years there have been changes in how the habitat-related work is distributed among fishery officers. From 1999 to 2003, Pacific Region C&P identified a need for additional officers specializing in habitat and employed some dedicated "habitat" fishery officers, funded under the Habitat Conservation and Stewardship Program, who specialized in the investigation of HADDs.<sup>86</sup> (For further discussion see Chapter 6, Habitat management.) Currently, no fishery officers work exclusively on habitat, although in 2010, Pacific Region C&P dedicated some fishery officers to aquaculture positions after receiving funding to do so.<sup>87</sup> (For further discussion, see Chapter 8, Salmon farm management.) Mr. Nelson testified that specialized habitat fishery officers were very effective but that, with the current funding shortfalls, C&P could not include such positions.<sup>88</sup>

### Aboriginal fishery guardians

In December 1992, DFO announced the Aboriginal Guardian Program, a component of its Aboriginal Fisheries Strategy (AFS), administered through Aboriginal Fisheries Strategies agreements setting out the guardian's responsibilities and authorities, including monitoring and enforcement. Aboriginal guardians may be designated as fishery guardians by the minister under section 5 of the *Fisheries Act*. In 1992, DFO dedicated \$1.3 million to provide training and equipment for Aboriginal guardians in the Lower Fraser area and trained 81 Aboriginal guardians for British Columbia, with an additional 50 for 1993.<sup>89</sup>

Rod Naknakim of the Laich-Kwil-Tach Treaty Society testified that, in his experience, the relationship between Aboriginal guardians and DFO was a good one and the guardians helped to build trust among Aboriginal fishers, commercial fishers, and DFO.<sup>90</sup> Ross Wilson of the Heiltsuk Integrated Resource Management Department told me that the Heiltsuk have Aboriginal guardians but no standard training, so they're not recognized as having a qualified training process.<sup>91</sup>

By the late 1990s, DFO had suspended the Aboriginal Guardian Program as a result of administrative and funding difficulties. By 2008 the number of Pacific Region Aboriginal fishery guardians (employed through AFS agreements) was 15, and by 2011, this number was further reduced to 11.<sup>92</sup> Prior to 2010, after reviews of the program, DFO implemented retraining initiatives for Aboriginal guardians and a revitalization of the Aboriginal Guardian Program through its national Aboriginal Fisheries Guardian Review.<sup>93</sup>

## Environment Canada's organizational structure

Environment Canada's Enforcement Branch is responsible for the protection and conservation of both the environment and wildlife for future generations.<sup>94</sup> Enforcement officers enforce a variety of federal environmental and wildlife laws, including section 36 of the *Fisheries Act* as described above.

The Enforcement Branch is divided into the Environmental Enforcement Directorate (EED) and the Wildlife Enforcement Directorate, the former being the directorate relevant to the Commission's proceedings.<sup>95</sup> Environment Canada's EED is more centralized than DFO's C&P. In the BC and Yukon Region there are approximately 29 enforcement officers, including two in the Yukon office and 19 in Vancouver.<sup>96</sup> The environmental enforcement officers for the BC and Yukon Region report to three operational managers (or district managers): one for the Coastal District based out of Vancouver; one for the Southern Interior District, also based out of Vancouver; and one for the Central and Northern District.<sup>97</sup> The operational managers report to a regional director,\* who reports to the national director of the Environmental Enforcement Directorate.<sup>98</sup> The national director reports to the chief enforcement officer, who in turn reports to the deputy minister of Environment Canada.<sup>99</sup> Regionally, the Enforcement Branch has four operational experts (or advisors or program liaisons), who report directly to the regional director.<sup>100</sup>

\* As of March 2011, Marko Goluzia.

Enforcement officers who work to enforce section 36 of the *Fisheries Act* must be designated as fishery officers under the *Fisheries Act*.

Work related to section 36 has been a top priority for the Environmental Enforcement Directorate for at least the seven years preceding the April 2011 hearings.<sup>101</sup> Annually, Environment Canada carries out about 8,000 inspections under the *Canadian Environmental Protection Act, 1999* (CEPA)<sup>102</sup> and the *Fisheries Act*. Between 2007 and 2011, 40–46 percent of inspections related to section 36.<sup>103</sup>

In 2010, Environment Canada reported that work was under way to develop a Results-Based Management and Accountability Framework (RMAF) for its *Fisheries Act* responsibilities and to identify current risks and risk management activities.<sup>104</sup> It also reported that it has started developing a plan to update regulations, guidelines, and best management practices for its work under the *Fisheries Act*.<sup>105</sup>

In 2007–8, the Enforcement Branch received \$22 million for two years, a sum that allowed it to hire 106 enforcement officers, 68 of whom are environmental enforcement officers. Nine of these officers were located in the Pacific and Yukon Region, mostly in British Columbia. Following this initial sum, Environment Canada received an additional \$21 million to build up the program to support the management of the Enforcement Branch.<sup>106</sup>

## ■ Enforcement policies and practices

In order to provide context for the evidence of DFO and Environment Canada's management of fisheries and fish habitat enforcement, I first describe the key policies and practices governing these two departments' enforcement activities.

### DFO's policy framework for enforcement and compliance

In its 2008–9 internal audit of C&P (National Directorate and regional branches), DFO acknowledged a lack of guiding policies for C&P and the resulting detrimental effect:

There are insufficient detailed policies and procedures in place, and inconsistencies in program delivery methods and procedures are evident. This reduces program effectiveness, increases risk, and may affect credibility with the general public, courts and other enforcement services.<sup>107</sup>

Before the 2008–9 audit, DFO had produced a draft National Enforcement Policy for C&P,<sup>108</sup> as well as a National Compliance Framework<sup>109</sup> and a National Compliance Model<sup>110</sup> (each discussed in turn below).

Paul Steele, the former director general of C&P, DFO, described the draft Enforcement Policy as a document that is currently under development by DFO, the intent of which is to provide a framework piece for enforcement and to “fill a gap that’s been identified in terms of C&P policies and procedures that are available nationally.”<sup>111</sup>

According to this document, the draft policy focuses on providing guidance to fishery officers in the exercise of their enforcement powers, and in particular on providing policy guidance on the various courses of action available to officers in securing compliance with the law.<sup>112</sup> The draft policy applies on a wider basis than the Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the *Fisheries Act* (see discussion below) to the full range of activities in which C&P is engaged. Once approved, it would apply to the national C&P program.<sup>113</sup>

In 2006–7, C&P developed its National Compliance Framework, the purpose of which is to “provide a solid foundation for the activities the department undertakes to achieve and maintain compliance.”<sup>114</sup> The National Compliance Framework has eight underlying principles, which are to guide the application of compliance tools, organized into three pillars. The underlying principles are stated as follows:

- Proactive (promote voluntary compliance);
- Collaborative (build support through partnerships);
- Problem solving (special attention to specific problems);
- Risk based (effort and response proportional to risk);
- Innovative (optimize use of technology and other tools);

- Intelligence-led (increased role of intelligence and analysis in supporting enforcement operations);
- Cost efficient / effective (better use of resources);
- Balanced (appropriate mix of activities undertaken to achieve compliance).<sup>115</sup>

The National Compliance Framework articulates “three pillars of compliance management”:

- *Pillar One – Education and shared stewardship.* Includes informal and formal education of the public, co-management, and partnerships.
- *Pillar Two – Monitoring, control, and surveillance.* Includes patrols, inspections, third-party monitoring, inter-agency partnerships, and fishery officer responses to non-compliance.
- *Pillar Three – Major cases and special investigations.* Includes formal intelligence gathering and analysis, retroactive offence detection and investigation, and the use of specialized skills and technology.<sup>116</sup>

In conjunction with its National Compliance Framework, C&P developed its National Compliance Model (or National Situational Compliance Model), which is composed of four “rings” representing the regulatory framework, policy framework, monitoring and control and surveillance activities, and action / response activities.<sup>117</sup> According to DFO, the “four layers of the national compliance model provide the elements required to deal with the full range of situational factors and client behaviour [and] [t]hey are incorporated in the National Compliance Framework as follows”: the regulatory / legal framework reflects the fundamental rationale and purpose of the National Compliance Framework; compliance and enforcement policies and arrangements are guided by the National Compliance Framework’s policy principles; and the monitoring, compliance, and surveillance activities and action / response activities of the model comprise the National Compliance Framework’s strategic support for specific compliance strategies in programs and regions.<sup>118</sup> In the draft Enforcement Policy (discussed above), DFO sets out certain

guiding principles for fishery officers in the application of the National Compliance Model:

- compliance with fisheries laws is mandatory;
- in promoting compliance with fisheries laws officers will emphasize preventing violations;
- officers will apply fisheries laws in a manner that is fair, predictable, impartial, and consistent. They will use rules, and processes securely founded in law, in keeping with the Canadian Charter of Rights and Freedoms;
- a risk based approach will be applied whereby officers will respond to suspected violations of fisheries laws, giving priority to those that have resulted in the greatest harm, or pose the greatest risk of harm, to the fisheries resource, to fish habitat or to public health; and
- officers will encourage reporting by the public of suspected violations of fisheries laws, and will respond to all such requests in accordance with priorities established within Conservation and Protection.<sup>119</sup>

In addition to these national enforcement and compliance policies, a brief section on enforcement in DFO's 1993 Policy for the Management of Aboriginal Fishing provides that normal enforcement procedures will apply to Aboriginal fishing, subject to the terms of Aboriginal fishing agreements.<sup>120</sup>

David Bevan, associate deputy minister, said that DFO focuses its compliance and enforcement efforts on Pillar One (education and shared stewardship) and Pillar Three (major cases and special investigations), and away from Pillar Two (patrol or monitoring, control, and surveillance) activities.<sup>121</sup> Mr. Nelson, however, reiterated the importance of Pillar Two activities, saying that the presence of fishery officers "is the primary deterrent in any enforcement,"<sup>122</sup> and that "field presence is the biggest deterrent you can have."<sup>123</sup> Despite the importance of patrols and on-the-water presence, C&P is moving toward increased attention to major cases and special investigations.<sup>124</sup> This shifting of priorities is being done despite Mr. Nelson's belief that the intelligence-led policing model will not "enable [C&P] to do the job with a lot less

resources."<sup>125</sup> However, Mr. Bevan disagreed with Mr. Nelson:

[W]e've tried to move to ... education and shared stewardship, bringing people along to understand the need for conservation, the need for compliance. Yes, we'll have monitoring, control and surveillance, but we also need major case investigations so that if you have a systemic problem in a location or in a particular component of fish harvesting and processing ... you spend the resources to get at that systemic problem.

...

I'm not saying that we're going to say we can get rid of lots of fishery officers by introducing new technologies, because here is an increasing workload. But I am saying that it's not a simple number of fishery officers versus what was in the past and what's coming in the future.<sup>126</sup>

## DFO and Environment Canada's policy framework for habitat-specific enforcement policies and practices

### *Compliance and Enforcement Policy*

In 2001, DFO and Environment Canada jointly developed a national Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the *Fisheries Act* (Compliance and Enforcement Policy) in respect of sections 35 and 36 of the *Fisheries Act*.<sup>127</sup> The Compliance and Enforcement Policy lists its purpose as being to assist those "who administer the laws and those who must comply with them" to understand how the government intends to achieve compliance with sections 35 and 36 of the *Fisheries Act*.<sup>128</sup> It sets out general principles to govern application of the habitat protection and pollution prevention provisions.<sup>129</sup>

The Compliance and Enforcement Policy discusses the responsibilities of DFO and Environment Canada, and the powers of fishery officers, fishery guardians, fishery inspectors, the Attorney General, and the courts.<sup>130</sup> It includes

measures to promote compliance.<sup>131</sup> The policy also sets out two main types of enforcement activities under the habitat protection and pollution prevention provisions: (1) inspections (to verify compliance); and (2) investigations (to gather evidence of a suspected violation).<sup>132</sup>

The Compliance and Enforcement Policy identifies the following responses to alleged violations:

- warnings;
- directions by Fishery Inspectors;
- orders by the Minister;
- injunctions; and
- prosecutions.<sup>133</sup>

The policy discusses section 42 of the *Fisheries Act*, which allows for civil suits by the Crown to recover costs incurred to prevent or correct harm from a violation of section 36. It states: “The Crown will attempt to obtain recovery of costs through negotiation with those responsible. In the event that negotiation is unsuccessful, the Crown will initiate or proceed with civil action under the *Fisheries Act*.”<sup>134</sup> According to both Mr. Steele and Dr. Manon Bombardier, national director, Environmental Enforcement Directorate, Environment Canada, to their knowledge section 42 has never been used.<sup>135</sup>

Mr. Steele and Dr. Bombardier (of DFO and Environment Canada, respectively) agreed the Compliance and Enforcement Policy is an “important policy” that provides “significant guidance” to the two departments and is still valid.<sup>136</sup>

### ***National Habitat Compliance Protocol***

The National Habitat Compliance Protocol between the Habitat Management Program and the Conservation and Protection Directorate (Compliance Protocol), discussed in detail in Chapter 6, Habitat management, establishes “lead” and “support” roles for the Habitat Management Program and C&P. C&P leads in several roles:

- integrating habitat compliance priorities into C&P work plans;
- assessing compliance risk factors used in compliance risk assessment;
- gathering information in support of occurrence screening;
- carrying out activities aimed at compelling compliance;
- issuing inspector’s directions, warnings, and ministerial orders;
- conducting investigations, laying charges, preparing court briefs, executing warrants, coordinating with the Department of Justice, providing evidence in court, and supporting the prosecutions process;
- making recommendations to prosecute;
- follow-up monitoring on compliance issues; and
- tracking and maintaining information related to inspections, investigations, and prosecutions in the Departmental Violation System database (see discussion of data and file management below).<sup>137</sup>

The Compliance Protocol is built on the premise that the Habitat Management Program “assumes the lead responsibility for activities and decisions that aim to educate, promote and assist compliance with the habitat protection provisions of the *Fisheries Act*; and C&P assumes the lead responsibility for activities that aim to compel compliance with the *Fisheries Act*.”<sup>138</sup> Annex 2 of the Compliance Protocol provides a summary of the roles and responsibilities of the Habitat Management Program and C&P with respect to habitat compliance activities.<sup>139</sup> As discussed below, the Compliance Protocol removes inspectors’ powers from Habitat staff.<sup>140</sup>

## **Environment Canada’s compliance promotion activities**

Compliance promotion is described in the Compliance and Enforcement Policy as “‘the state of conformity’ with the law.”<sup>141</sup> Measures to promote compliance include:

- communication and publication of information;
- public education;
- consultation with parties affected by provisions of the *Fisheries Act*; and
- technical assistance.<sup>142</sup>

Within Environment Canada, compliance promotion and enforcement are separated into two

different branches (the Environmental Stewardship Branch and the Enforcement Branch, respectively).<sup>143</sup> These divisions try to align their activities, especially in newly regulated sectors; “alignment,” according to Dr. Bombardier, means that compliance promotion provides information and education to the regulatee community about its responsibilities, and the Enforcement Branch then monitors where it thinks there may be significant non-compliance.<sup>144</sup>

During the hearings, Lisa Walls, former acting manager of Environment Canada’s Pollution Prevention and Assessment Section, Environmental Protection Operations, explained that the department’s compliance promotion focuses on encouraging, promoting, and advising potential polluters to avoid creating or depositing waste. In Ms. Walls’s view, given that section 36 is a general prohibition, compliance promotion is important for avoiding the deposit in the first place rather than prosecuting after the damage has been done.<sup>145</sup> However, from about 2004 to 2006, Environment Canada embarked on a major organizational and structural change, and, according to Ms. Walls, this reorganization led to a reduction in Environment Canada’s capacity for section 36 *Fisheries Act* compliance promotion work.<sup>146</sup>

## Data and file management

C&P uses a violation-tracking database called the Departmental Violation System (DVS). DVS is used by fishery officers to track occurrences and violations, including information such as the following:

- actions taken (e.g., “investigation initiated” or “no action warranted”),
- the source of information (e.g., was it a call from the general public or DFO staff observation),
- the occurrence type (e.g., “Aboriginal,” “Domestic / Recreational,” or “non-fisher”), violation action taken (e.g., charges laid, warning issued),
- and violation type (e.g., “illegal buy / sell / possess,” “habitat,” or “gear conflict”).<sup>147</sup>

C&P also uses an activity-tracking database called the Fisheries Enforcement Activity Tracking System (FEATS) to keep track of the effort of fishery

officers. Each fishery officer inputs his or her data for hours worked and activities performed for each day of work. FEATS enables officers to assign a work element to their hours (e.g., “Aboriginal – Salmon” or “Habitat – Forestry”). It can then be used to generate reports of time spent by officers on various activities in different geographical areas. DFO staff have internally discussed concerns about the accuracy of FEATS data owing to possible inconsistencies in the way fishery officers enter data into the system.<sup>148</sup>

Although DFO’s Program Activity Tracking for Habitat (PATH) database is not the primary database for tracking habitat enforcement information (for a description, see Chapter 6, Habitat management), the Compliance Protocol provides that the Habitat Management Program will lead in “tracking and maintaining information related to compliance promotion, compliance monitoring, occurrences, and responses to non-compliance” through the PATH database.<sup>149</sup> However, it further provides that C&P will lead for habitat investigations and prosecutions, which are managed through DVS. When C&P takes over investigation or enforcement related to a file, the transfer is noted in PATH and any further information is then tracked by C&P in DVS.<sup>150</sup> C&P staff may request access to PATH; Habitat staff do not currently have access to DVS.<sup>151</sup>

Mr. Nelson suggested that if the tracking systems for PATH and DVS were compatible and interactive, this integration would improve fishery officers’ ability to do compliance work on habitat issues.<sup>152</sup>

Similar to C&P’s DVS database, Environment Canada uses a system called the National Emergencies and Enforcement Management Information System and Intelligence Systems (NEMISIS) to “record, monitor and track occurrences, inspection activities, investigation activities and all compliance and enforcement measures undertaken” by enforcement officers.<sup>153</sup>

## ■ Fisheries enforcement

This section focuses on compliance and enforcement of those legislative provisions relating to fishing, as opposed to fish habitat and aquaculture, which are discussed below.

There are several reasons why enforcement is relevant to the sustainability of the Fraser River sockeye fishery: illegally harvested fish do not reach their spawning grounds, adversely affecting conservation of the stocks; accurate catch numbers for illegally harvested fish are not usually reported to DFO, and this omission may have a negative impact on the accuracy of necessary information for the management of the fisheries; and the illegal sale of fish may, in turn, motivate the illegal harvest of fish, with the results noted above. (For a discussion on monitoring and reporting, see Chapter 5, Sockeye fishery management.)

I heard two days of evidence devoted to fisheries-related enforcement, although the topic arose throughout the hearings. In particular, I heard repeated concern regarding a reduction and anticipated further reduction in the funding of enforcement and the detrimental effect these cuts may have on the fisheries (see discussion below). DFO's ability to enforce compliance in the Fraser River sockeye fisheries has been the subject of criticism in prior reports, as summarized in this Commission's Interim Report<sup>154</sup> and below.

## Fisheries enforcement issues in previous reports

Two previous reports were especially critical of DFO's capacity to enforce compliance and made recommendations aimed at addressing this shortcoming: the Honourable John Fraser's *Fraser River Sockeye 1994: Problems and Discrepancies*<sup>155</sup> (Fraser Report), and the Williams Report.<sup>156</sup> For example, Recommendation 13 of the Fraser Report stated:

We recommend that, for the 1995 fishing season, DFO institute a plan to ensure that an effective and credible enforcement level is re-established.<sup>157</sup>

The Williams Report contained several recommendations relating to enforcement.<sup>158</sup> In particular, it recommended that DFO properly enforce the *Fisheries Act* and Regulations, through several measures: adequate presence to deter the concealment of over-harvesting of fish

by participants from all sectors; enforcement of the laws against the illegal sale of fish, both fish caught as part of the FSC fishery and fish illegally harvested; and a system to accurately record illegal nets in the Fraser River, through the use of overflights and of night patrols, particularly in areas where illegal fishing has been reported. It also recommended that DFO ensure adequate resources and increase the budget and staffing for enforcement.<sup>159</sup>

In response to these reports (and others), DFO increased the resources dedicated to C&P's enforcement activities and changed the reporting structure in C&P. However, according to Mr. Nelson, a recurring cycle of funding shortfalls has led to reviews and reports, resulting in an influx of money, which then is eroded to create another funding shortfall.<sup>160</sup> Before the Williams Report, Mr. Nelson testified, the funding situation was again similar to what he had experienced prior to the Fraser Report, and "there had been a continual erosion, reduction in resources."<sup>161</sup> As a result, C&P was unaware of what was happening on the Fraser River during closed fishing times (because of a lack of capacity to conduct patrols) and did not have a credible enforcement presence on Fraser River sockeye fisheries.<sup>162</sup>

Following the Williams Report, there was an annual influx of approximately \$1.8 million of "Williams Money" to bolster C&P in the Pacific Region.<sup>163</sup> The primary focus for these funds was to address compliance issues with closed-time patrols on the Fraser River.<sup>164</sup> Approximately \$1.2 million of this "Williams Money" was rolled into the Pacific Integrated Commercial Fisheries Initiative (PICFI, discussed below) in 2007.<sup>165</sup> The influx of the "Williams Money" led to a "dramatic increase" in the patrol capability of C&P.<sup>166</sup> Mr. Nelson estimates that the Williams / PICFI funding currently (as of the date of our hearings) accounts for 60 percent of the budgets on the Fraser River for C&P fishery officers.<sup>167</sup>

At the time he testified, Mr. Nelson told me that he believes C&P has a credible enforcement presence on the Fraser River. "I am satisfied and staff are satisfied that we have a handle on closed time fishing activity and we're doing – we're doing an adequate job," he testified.<sup>168</sup> However, he is concerned about the accumulation of existing salary shortfalls and the potential for future funding shortfalls.

## Non-compliance

Non-compliance of fisheries regulations and licence conditions can take many forms and is not related only to the degree of illegal harvest; it can arise by fishing with improper gear, failing to mark gear, failing to use required selective fishing techniques, failing to carry a designation card, and so on. (For a discussion on selective fishing and commercial and recreational fisheries, see Chapter 5, Sockeye fishery management.) In a presentation to the Integrated Harvest Planning Committee in January 2010, Pacific Region C&P set out its 2009 results for the salmon fisheries, including the rates of compliance by area.<sup>169</sup> Mr. Nelson discussed the information contained in this presentation, noting that he considers the rate of non-compliance in certain 2009 fisheries (29 percent for Aboriginal FSC salmon fisheries on the South Coast area, 20 percent for Aboriginal economic opportunity salmon fisheries in the Lower Fraser River area, and 23 percent for recreational tidal fisheries in the Lower Fraser River area) to be high and requiring attention, as it reflects a lot of illegal activity.<sup>170</sup>

In addition to the issue of enforcement where there is general non-compliance, I heard evidence around the following specific non-compliance issues: the mortally wounded clause, dual fishing, and high-seas drift net fishing.

### *The “mortally wounded” clause*

The “mortally wounded” clause is a provision included in some Aboriginal communal fishing licences in the Fraser River and some in the South Coast (it is not found in commercial or recreational fishing licences).<sup>171</sup> The mortally wounded clause provides that if a fish is “mortally wounded,” it can be retained, even if the fishery for that species is otherwise closed.

The mortally wounded clause is controversial. I heard from some DFO witnesses that it is difficult to enforce the clause because, in many circumstances, it is difficult to determine whether a fish is in fact “mortally wounded.”<sup>172</sup> Mr. Nelson believes the mortally wounded clause is being abused, and he testified that fishery officers have observed fish being pulled in, with “no attempt to revive anything, no attempt to release anything and the officers have to stand there and realize that they can’t do anything about it.”<sup>173</sup>

Scott Coultish, regional chief of intelligence and investigation services, C&P, supported Mr. Nelson’s testimony, adding that the mortally wounded clause is a “loophole” and that, in some cases, hundreds of fish can be kept for that reason.<sup>174</sup> These are fish that are otherwise protected by a conservation closure, so they may be at the greatest risk. Barry Rosenberger, area director, BC Interior, recounted an incident in 2009 where 6,000–7,000 Fraser River sockeye were kept during a dip net fishery for chinook, under the mortally wounded clause. Mr. Rosenberger agreed that this number was “fairly significant” and it exceeded the number of mortally wounded fish that the department anticipated would occur.<sup>175</sup>

However, Ernie Crey, fisheries and policy advisor for the Stó:lō Tribal Council, disagreed with DFO’s evidence about the mortally wounded clause, testifying that the clause is consistent with First Nations perspective (once a fish is caught and is already dead, it should be kept and consumed) and that First Nations are working to determine if a ceiling on mortalities could be implemented.<sup>176</sup>

### *Dual fishing*

In this context, dual fishing refers to fishing by First Nations fishers who hold a licence allowing them to conduct both commercial fishing and FSC fishing, which they do concurrently, or fish commercially immediately before or after FSC fishing.<sup>177</sup> According to Mr. Nelson, the problem with dual fishing is that not all the FSC catch is reported to DFO, and it is very difficult to enforce without costly techniques, such as an onboard observer counting fish.<sup>178</sup> However, I also heard of potential benefits associated with dual fishing. Ross Wilson, director of the Heiltsuk Integrated Resource Management Department, told me that it allows Aboriginal commercial fishers who have gone over their quotas to contribute the excess fish to meet FSC needs.<sup>179</sup> Mr. Rosenberger also told me that, in some cases, dual fishing may result in a lower release mortality rate than having separate commercial and FSC fishing times.<sup>180</sup>

### *High-seas drift net fishing*

Vessels, often foreign ones, illegally use drift nets on the high seas to catch fish, including salmon. DFO has reported an increase in the numbers of

detected and apprehended high-seas drift net vessels since 2006, suggesting a resurgence of this issue.<sup>181</sup> However, according to Mr. Nelson, this increase is the result of a change in the reporting methods applied (all vessels detected were recorded, not just those that were fishing for salmon).<sup>182</sup> Overall, Mr. Nelson testified, the problem of high-seas drift net fishing has decreased significantly.<sup>183</sup> An expert panel assembled by the Pacific Salmon Commission in 2010 for a workshop on the causes of the Fraser River sockeye decline reached the same conclusion.<sup>184</sup> I note, however, that Canada's contribution to aerial surveillance of the North Pacific Ocean has also decreased: overflight hours by the Aurora aircraft have been significantly reduced, and other countries have also decreased their high-seas enforcement presence.<sup>185</sup>

## Illegal harvest

According to Mr. Nelson, “illegal harvest” refers to fishing during closed times.<sup>186</sup>

The Williams Report made the following recommendation:

Illegal fishing in the Fraser River has been described as rampant and out of control. This is unacceptable. DFO must properly enforce the *Fisheries Act* and *Regulations* and initiate measures to provide a reasonable estimate of the scope of this illegal activity and the number of fish actually taken.<sup>187</sup>  
[Recommendation 29]

Since then, Mr. Nelson believes, C&P has “done a reasonable job of the illegal fishing activity” on the Fraser River, and, as far as he knows, he “can say with a high degree of certainty that it may be in the hundreds of thousands, but it’s certainly not in the millions” of fish that are illegally harvested.<sup>188</sup> However, I note that “hundreds of thousands” of illegally harvested fish are still a large number, particularly in the context of years of low abundance, such as 2009, when only 1.36 million sockeye returned.

There are still many unknowns when it comes to illegal harvest. Mr. Nelson relies on “more of a feel or gut instinct, based on the years of experience” to assess the degree of illegal activity.<sup>189</sup> There

is no structure in place to provide a reasonable estimate of the scope of illegal fishing, and “no way to accurately determine” that amount.<sup>190</sup> Rather, effective enforcement is “very difficult to measure, because you don’t know what you’re not finding.”<sup>191</sup>

In the marine and coastal areas, a decrease in C&P enforcement capacity and presence has also made it more difficult to accurately assess illegal activity. Mr. Nelson said that C&P’s marine capacity for fisheries enforcement has “been reduced over the last number of years, along with increases in other priorities that are coming along.”<sup>192</sup> The lost capacity includes a reduction in aerial surveillance flights, reduced access to patrol boats, and the loss of marine enforcement officers (55 marine enforcement officers to none).<sup>193</sup> Mr. Nelson also told me that a charter patrol program that, at one point, had 37 boats operating as “eyes and ears” on the water with limited enforcement activity, has also been lost.<sup>194</sup> Enforcement capacity has been eroded in marine areas where sockeye pass, and some areas of the coast now get minimal attention.<sup>195</sup> Chief Edwin Newman of the Heiltsuk Nation reiterated this point, testifying that there are very few enforcement officers on the coast.<sup>196</sup>

## Sales of FSC fish

Illegal sale of food, social, and ceremonial fish is related to the problem of illegal harvest, but it is not necessarily the same thing – FSC fish which have been legally caught (so not illegal harvest) may be illegally sold.<sup>197</sup> Following the Supreme Court of Canada’s decision in *R. v. Sparrow*, DFO has provided FSC fishing access to Fraser River sockeye salmon to the majority of Aboriginal groups seeking such access. (For a further discussion of FSC fishing, see the section on Aboriginal fishing policies and programs in Chapter 5, Sockeye fishery management.)

In his testimony, Mr. Coultish described the problem of illegal sale of fish:

The issue of illegal sale of fish, salmon, from the Fraser River, out of all sectors, but primarily out of the aboriginal food, social and ceremonial fishery, has been an issue, a long-standing issue for the organization and was highlighted in the

Williams Report. The issue ... to consider is that sale is [a] ... root cause of illegal fishing, primarily. It's an economic-based issue, and most of the fish clearly illegally harvested is intended to be sold.<sup>198</sup>

In their 1992 report, *Managing Salmon in the Fraser: Report to the Minister of Fisheries and Oceans on the Fraser River Salmon Investigation*, Dr. Peter Pearse and Dr. Peter Larkin wrote, “[W]hile the prevalence of ‘illegal sales’ cannot be determined (although estimates run as high as 90 per cent in some areas) it is safe to say that most of the salmon caught in the Indian fishery along the lower Fraser in recent years were sold.”<sup>199</sup>

The Williams Report made the following recommendation:

Throughout the South Coast there is an ongoing problem with the illegal sale of fish, both fish that have been caught as part of an FSC entitlement and fish that have been illegally harvested. We heard little evidence of any serious effort to prevent this activity. This situation is intolerable and must be addressed by DFO.<sup>200</sup> [Recommendation 31]

According to Mr. Nelson, the issue of illegal sales noted in the Williams Report is still an issue for the DFO, in all areas within the region, and although efforts have been made to address illegal sales, the problem has not been resolved.<sup>201</sup> The illegal sale of FSC fish has been a “tremendous problem” for DFO for at least two decades, the level of sophistication has increased, and the techniques used have increased.<sup>202</sup> In Mr. Nelson’s view, C&P is not currently doing a credible job in the Pacific Region enforcing prohibition of illegal sales of Fraser River sockeye.<sup>203</sup>

Illegal sales occur in both the recreational and the Aboriginal FSC fisheries, although Mr. Coultish testified that, in the recreational fishery, the illegal sale of fish is “not significant when it comes to amount and numbers.”<sup>204</sup> In contrast, Mr. Coultish testified that a “very, very high percentage” of FSC fish is sold (which is illegal)<sup>205</sup> – as much as 97 percent or “pretty close” to that figure of Lower Fraser River FSC fish is sold.<sup>206</sup> I note that Mr. Coultish was unable to provide the basis for this estimate, although it is similar to the number

cited by Dr. Pearse in 1992.<sup>207</sup> I heard from other witnesses who confirmed that FSC fish is sold in their communities (see discussion below).<sup>208</sup> However, it does not mean that 97 percent of Aboriginal fishers are selling FSC fish, and Mr. Coultish was adamant that “by far the majority” of Aboriginal fishers comply with the applicable legislation.<sup>209</sup> Both Mr. Nelson and Mr. Coultish are concerned that the illegal sale of fish has prevented Aboriginal elders from receiving fish.<sup>210</sup>

### ***Difficulty in proving illegal sales***

Illegal sales are very difficult to prove: an illegal sale requires proof of the origin of the fish on a criminal standard (beyond a reasonable doubt), a requirement that is difficult or even physically impossible.<sup>211</sup> Fish may be delivered with the actual sale or transfer of cash performed separately and electronically, making the transaction complex to monitor and requiring the ability to track fish and do forensic audits.<sup>212</sup> As a result, enforcement against illegal sales takes a lot of resources for C&P.<sup>213</sup>

### ***Project Ice Storm***

Pacific Region C&P witnesses described one investigation into illegal sales of FSC fish which raises questions about the possible impact that this activity is having on the conservation of Fraser River sockeye. Using funding provided following the Williams Report, C&P conducted an assessment (called “Project Ice Storm”) of the cold-storage facilities located in the Lower Mainland and Vancouver Island in the fall of 2005.<sup>214</sup> As a result of this audit, 1.9 million pounds of FSC sockeye were found in cold storage in 110 plants in the Lower Mainland.<sup>215</sup> (However, because the fish were processed, it is not clear how many sockeye pieces this total represented – the range appeared to be between approximately 345,000 and 470,000 pieces.)<sup>216</sup> The number of pounds of fish was confirmed following an independent audit.<sup>217</sup> There was no general commercial sockeye fishery in 2005, and the allocated Fraser River FSC sockeye catch for the Lower Fraser was 90,000 for the Stó:lō, 7,500 for the Tsawwassen First Nation, and 22,500 for the Musqueam First Nation, although the amount of FSC fish harvested greatly exceeded

the allocation: the Stó:lō harvested 322,464 pieces, the Tsawwassen 28,081 pieces, and the Musqueam 61,858 pieces.<sup>218</sup>

C&P believe that the majority of the FSC fish held in the cold-storage plants were sold. According to Mr. Coultish, the fish were kept in a manner “consistent with the type of processing that you would see for commercial fish and how it was handled or packaged”; and because “there are substantial costs attributed to that,” it “leads [C&P] to believe that this product was simply not just for food, social and ceremonial use.”<sup>219</sup> Mr. Nelson agreed that it is “remotely possible” that the fish were used for FSC, but said, “[I]t’s much more conceivable and likely that this large amount of this fish entered the commercial market.”<sup>220</sup>

A C&P assessment of Project Ice Storm asserted that “the FSC First Nations fishery on the Lower Fraser River is largely out of control and should be considered in all contexts a Commercial Fishery.”<sup>221</sup> Mr. Coultish agreed, stating that the “overwhelming information in evidence that we’ve had in C&P is that the majority of fish harvested under these communal [FSC] licences is sold.”<sup>222</sup> Mr. Nelson said that he was not “surprised by the results.”<sup>223</sup> Project Ice Storm did not result in any charges because storage of fish is not illegal and there was no evidence of illegal activity found.<sup>224</sup> No similar audit of cold-storage facilities has been conducted since.<sup>225</sup>

### *Other evidence of sales of FSC fish*

Several witnesses testified that FSC fish, including Fraser River sockeye FSC fish, is sold. Chief Kimberley Baird of the Tsawwassen First Nation advised that “prior to the [Tsawwassen] treaty, the prohibition on FSC sales was generally not complied with.”<sup>226</sup> Hereditary Chief Robert Mountain of the Mamalilikula First Nation and Councillor of the Namgis First Nation, testified that he is aware that some people in his territory are involved in FSC sales and he believes that, in years of abundance, a large proportion of FSC fish are sold.<sup>227</sup> Chief Newman of the Heiltsuk First Nation stated that there is a “marginal” amount of FSC fish sold in his community, but only to cover costs of fishers providing for those who are physically or financially unable to fish for themselves.<sup>228</sup> Although not specifically referring to FSC fish, Councillor

June Quipp of the Cheam Indian Band testified that her community lives in poverty and recalled that, as a child, her parents had to catch salmon and “actually sell a lot of it in order to ... provide other food for the family and clothing.”<sup>229</sup> Joseph Becker of the Musqueam First Nation advised that, although a fisher “does not eat fish 365 days a year,” he can “certainly go out and convert some of his food fish to a hamburger or steak.”<sup>230</sup>

The sale of food fish, according to Dr. Douglas Harris, of the University of British Columbia Faculty of Law, may be an old problem. He writes that at the turn of the century “the limited food fishery did not, of course, stop Aboriginal fishers from selling or trading fish without a licence.”<sup>231</sup> Grand Chief Clarence Pennier of the Stó:lō Tribal Council similarly acknowledges that the prohibition against selling food fish is a “law that has been broken for, what, over 100 years?”<sup>232</sup> He told me that “aboriginal people will continue to sell fish out of necessity as a means to feed and clothe their families,” and that DFO’s prohibition is ineffective.<sup>233</sup>

In contrast, I heard from Mr. Crey that allegations that a large proportion of FSC fish from the Lower Fraser River are sold are “groundless” and “opinion,” noting that the fishers he knows fish for their families and communities.<sup>234</sup> He finds such allegations hurtful and damaging to the relationship that his community has been working to build with DFO.<sup>235</sup>

According to Technical Report 7, Fisheries Management, which summarizes the annual catch of FSC and economic opportunity fish from 1992 to 2008, a significantly greater number of FSC fish are caught during years where there are few commercial fishery openings.

### *Perspectives on sales of FSC fish*

Although a few witnesses advised me of their personal beliefs that FSC fish should not be sold,<sup>236</sup> the majority expressed the view that the disposition of FSC fish, including sale, should be left to the harvesting group. In the Lower Fraser River, Councillor Quipp testified that fishers in her community believe that, in years of abundance, there is no reason to limit sales of fish caught by Aboriginal fishers and that the sale of fish should be included in the word “social” of “food, social, and ceremonial” fishing.<sup>237</sup> Grand Chief Pennier noted that the Stó:lō Tribal Council has not taken

a formal position on the issue, but his view is that the prohibition on sale should “be eliminated.”<sup>238</sup> Chief Baird finds the restriction paternalistic.<sup>239</sup> To her, it is “no one’s business” what people do with their own fish, a view shared by Mr. Becker.<sup>240</sup> Chief Mountain advises that many Aboriginal people want to sell their FSC fish because “they are aware of other First Nations doing it.”<sup>241</sup> Hereditary Chief Russ Jones of Skidegate (Haida Nation) and technical director / policy analyst / project manager, Haida Fisheries Program, feels that this is a decision for individual First Nations to resolve and notes examples of First Nations that leave it up to the fisher to decide what they’ll do with their fish.<sup>242</sup> Grand Chief Saul Terry from the St’at’imc Nation (in the Upper Fraser River) advised that “a lot of our folks feel that it is wrongful to say that we are doing wrong by selling.”<sup>243</sup> Barry Huber, Aboriginal affairs advisor, BC Interior, DFO, testified that this view is shared in many other Aboriginal communities.<sup>244</sup>

Mr. Bevan, however, considers the prohibition on sales to be important because, in his view, allowing sales may create demand for additional harvesting and increased demand makes it harder to “keep within the limits and have the rules respected relevant to the total catch.”<sup>245</sup> He testified that if DFO were to provide an allocation to First Nations without restrictions on use, this practice would be “a very difficult arrangement to contemplate, given the priority that FSC has over economic opportunities.”<sup>246</sup>

## Habitat enforcement

An “occurrence” is “an observed or reported incident which is a potential violation of a statute or regulation.”<sup>247</sup> Enforcement procedures, such as inspections or investigations, are initiated in response to an occurrence. According to Mr. Nelson, all the occurrences listed in Table 1.7.2 could have, and would have, an impact on Fraser River sockeye habitat if they occurred in the Fraser River watershed. He explained that, with respect to rural / urban development occurrences, individually the violations are generally small activities, but taken together they have a “very big cumulative effect.”<sup>248</sup> In his view, linear developments have “quite significant impacts on fish.”<sup>249</sup>

Table 1.7.2 includes fish habitat occurrences entered by C&P field staff in the Pacific Region for the 2009/10 fiscal year.

In almost 60 percent of occurrences (417), an investigation was initiated. In 83 occurrences, no action was warranted; 102 occurrences were referred to another department or government; in 34, a response was pending at the end of the fiscal year; and in 62, C&P was unable to respond.<sup>250</sup>

Between 2000 and 2010, the habitat occurrences responded to by C&P in the Pacific Region declined.<sup>251</sup> Regarding subsection 36(3) occurrences, I heard from Dr. Bombardier that, nationally, agriculture (e.g., cows in streams, pesticides) is an issue for non-point source pollution.<sup>252</sup>

**Table 1.7.2 Fish habitat occurrences entered by C&P field staff in the Pacific Region, 2009/10**

Count of Field Office		
Region	Fishery	Total
Pacific/Pacifique	HABITAT - AGRICULTURE	46
	HABITAT - AQUACULTURE	16
	HABITAT - FORESTRY	28
	HABITAT - HYDRO	17
	HABITAT - INDUSTRIAL/COMMERCIAL	106
	HABITAT - MINING	27
	HABITAT - OIL/GAS	24
	HABITAT - RECREATIONAL	84
	HABITAT - RURAL/URBAN DEV.	286
	HABITAT - TRANSPORTATION	64
PACIFIC / PACIFIQUE Total		698
<b>Grand Total</b>		<b>698</b>

Source: Policy and Practice Report 9, Habitat Enforcement, pp. 30–31.

Other types of occurrences include aquaculture, industrial / commercial (contaminants in the marine environment), industries not regulated by *Fisheries Act* regulations, and recreational activities.<sup>253</sup>

## Habitat enforcement options

### Section 35

According to Mr. Nelson, the number of habitat cases that go to prosecution in the Pacific Region is not great.<sup>254</sup> Mr. Steele indicated that the number is likely less than 10 per year, although he did not specify whether that estimate was for the Pacific Region or C&P nationally.<sup>255</sup> However, he testified that prosecution is the far end of the continuum in terms of actions available to C&P, and other enforcement options are less costly and less time-consuming.<sup>256</sup> He described how C&P has a three-tier (or three-pillar) approach to achieving compliance:

So what we came up with at the end of the day was sort of a three-tiered approach to doing that, Tier 2 being sort of the traditional methods that we use for enforcement activities on the fisheries side as well as habitat enforcement, regular patrols, that kind of thing including warnings and prosecutions and all of what that entails.

The Tier 1 type activities which we had been somewhat involved in up until then, and that refers to things as we spoke about earlier, public relations activities, stewardship, working with communities and user groups on a more proactive type basis, trying to prevent problems down the road, educate and stewardship activities, that kind of thing. All of that came under what we term Pillar 1 and, as Mr. Nelson referred to earlier, he said that in Pacific Region, I think, there's a general target of ten percent of fishery officer time is sort of the overall objective in terms of activities related to Pillar 1, and that's a national approach that we've taken with the program across the country.

I'm not sure that we're exactly at ten percent everywhere, but there's been a definite increase, I'd say, over the last five to six years in terms of

effort devoted towards those general Pillar 1 type activities to promote and achieve compliance in ways other than laying charges and bringing cases to court.

Pillar 3, not related so much to the habitat files, but more on the fisheries enforcement end of things, Pillar 3 refers to major case investigations, intelligence gathering. The intelligence gathering, I guess, could have some application to the habitat world, but more strictly applied in the fisheries enforcement realm.

So we've made an effort to shift our focus into those two new pillars of activity, 1 and 3, and away from the more traditional approaches to enforcement.<sup>257</sup>

Further, Patrice LeBlanc, director of the Habitat Management Policy Branch, DFO, said there are different ways to enforce the law other than just bringing people to court. According to him, compliance is a balance among several factors: education, advice and assistance, and compelling proponents to take action in cases of non-compliance.<sup>258</sup>

Fines are an enforcement option for violations of the *Fisheries Act*, although Mr. Nelson said more than \$1 million in fines are outstanding in the Pacific Region.<sup>259</sup> C&P does not have a system to collect and follow up on these.<sup>260</sup> Neither he nor Mr. Steele was sure of the reason, but Mr. Steele thought that C&P may have received legal advice to the effect that fishery officers do not have the appropriate authority to execute warrants of committal that would be required to follow through on collection of outstanding fines.<sup>261</sup> Mr. Steele indicated that not collecting fines has the potential to negatively affect compliance and deterrence.<sup>262</sup>

### Section 36

Environment Canada has access to the same enforcement options for section 36 that C&P has for section 35 violations.<sup>263</sup> In Dr. Bombardier's view, although public focus is often on prosecutions, this option is only one tool in the enforcement toolbox. The Compliance and Enforcement Policy sets out an escalating approach where prosecution is the strictest measure.<sup>264</sup> As Dr. Bombardier explained,

Under the Compliance and Enforcement Policy for *Fisheries Act*, the approach is more of

an escalating approach, so depending on their circumstances, warning letters could be issued that may have significant deterrence effect depending on the circumstances. Inspectors' directions is another tool that our fisheries inspectors use and those have been quite effective in achieving deterrence and achieving good environmental outcomes because it does sometimes involve significant investment from the regulatee to take action to prevent or stop a release. So inspectors' direction[s] are very effective. Ministerial orders as well, although we haven't used them too much.

So prosecution is the most strict measure, and we try to use other tools before we go there 'cause it's a lengthy trial, it's also fairly costly. The Compliance and Enforcement Policy has specific circumstances where prosecution will be used, if it's a deliberate release, if there's obstruction. So those are the types of circumstances that will lead to prosecution, but it's not always the best or most effective tool to achieve compliance.<sup>265</sup>

Environment Canada has an internal decision-making process which sets out the types of decisions that might need to be made in relation to a particular enforcement activity, occurrence, or violation, and identifies who has the authority to make that decision.<sup>266</sup>

Under CEPA, but not the *Fisheries Act*, Environment Canada has another enforcement tool called "Environmental Protection Alternative Measures." This agreement between the prosecution and the defence avoids court time and imposes conditions on the regulatee to correct and/or mitigate the violation.<sup>267</sup> Mr. Steele indicated that it has the potential to be a useful enforcement tool for C&P.<sup>268</sup>

### ***Ticketing***

Currently, under the *Fisheries Act*, neither C&P nor Environment Canada can issue a ticket for a violation. However, all the habitat enforcement witnesses thought this idea has potential and should be explored.<sup>269</sup> All also agreed that ticketing would require a legislative change to the *Fisheries Act*.<sup>270</sup> Dr. Bombardier indicated that ticketing would require new offences under the federal *Contraventions*

*Act* and an agreement with the provinces because, although federal officers would issue the tickets, provincial courts would have to administer them.<sup>271</sup>

## **Quality assurance and control**

In 2009, the Commissioner of the Environment and Sustainable Development (CESD) criticized C&P's approach to documenting its enforcement decisions under the Compliance and Enforcement Policy. (For a description of the Compliance and Enforcement Policy, see the enforcement policies and practices section of this chapter.) In its report, the CESD found an overall lack of documentation in the fish habitat occurrence files. Information such as the assessment of violations and the factors to be considered to achieve the desired result from the alleged violator were missing from some audited files, along with information documenting follow-up monitoring to ensure that the requested corrective action was carried out.<sup>272</sup> The CESD recommended that

Fisheries and Oceans Canada should ensure that its enforcement quality assurance and control processes are sufficient to demonstrate that its actions have been taken in accordance with the Compliance and Enforcement Policy. The Department should provide guidance on the type of complaints that fishery officers should respond to and take action on, and the Department should specify minimum documentation requirements for occurrences.<sup>273</sup>

In its October 28, 2010, internal response to the 2009 CESD report, DFO noted the following action items: (1) "operational protocol to ensure consistency with the Compliance and Enforcement Policy completed"; and (2) "Operational protocol provides guidance o [*sic*] the type of complaints that Fishery Officers should respond to and take action on."<sup>274</sup> Mr. Steele stated that the development of the Compliance Protocol is "basically the response to those two action items."<sup>275</sup>

Similarly, the 2009 CESD report found that Environment Canada had no overall process by which headquarters reviews regional enforcement activities to assess whether the Compliance and Enforcement Policy is followed and consistently

enforced, and the department has limited information on the nature and extent of *Fisheries Act* compliance issues.<sup>276</sup> To remedy this situation, the CESD recommended that

Environment Canada should ensure that its enforcement quality assurance and control practices are sufficient to demonstrate that its actions have been taken in accordance with the Compliance and Enforcement Policy.<sup>277</sup>

In response, Environment Canada created a position in its national headquarters for a person to look at enforcement action files in its NEMISIS database and identify inconsistencies. In addition, national guidelines have now been prepared for officers entering data into the NEMISIS database.<sup>278</sup>

## Responsibility for section 36

As described, at the time of the hearings the administrative responsibility for section 36 of the *Fisheries Act* has been delegated to Environment Canada. However, the division of labour between Environment Canada and DFO is not always clear. Indeed, in the past decade, “more than half of the convictions under section 36 have been the result of prosecutions by DFO.”<sup>279</sup> As noted above, Bill C-38 enables cabinet to designate by order any federal minister as the minister responsible for the administration and enforcement of subsections 36(3) through (6). (For a discussion of DFO and Environment Canada’s section 36 responsibilities relating to contaminant research and monitoring [as opposed to enforcement], see also the section on contaminants in Chapter 6, Habitat management.)

Senior management witnesses from Environment Canada and DFO told me that many of the specific requirements of the 1985 MOU on section 36 are not being met, but that work is under way to renew the MOU, and, at the regional level, it is being well implemented.<sup>280</sup> With respect to the two regional working agreements on the division of section 36, Dr. Bombardier’s understanding is that these agreements are working very well at the regional level.<sup>281</sup> On the other hand, Mr. Nelson testified that he does not use the Interim Operational Working

Arrangement on Enforcement of Section 36(3) very often in his work, and Dr. Bombardier admitted that annual reviews under either this document or the 1987 Regional Working Agreement on Section 36 have not been carried out.<sup>282</sup>

DFO’s C&P program identified a review of the 1985 MOU as a national priority for 2010–11, following on the heels of the 2009 CESD report’s recommendation that DFO and Environment Canada should clearly establish the expectations for Environment Canada’s administration of the pollution prevention provisions of the Act.<sup>283</sup>

DFO has also noted limitations on Environment Canada’s powers in respect of enforcing the pollution prevention provisions of the *Fisheries Act*. For example, although the 1985 MOU and the 1987 RWA empower Environment Canada to administer and enforce section 36, these documents did not provide for accountability, auditing, or joint planning, nor do they allow Environment Canada to make ministers’ orders, call for plans, exercise other discretionary powers, or enact regulations – those powers remain with DFO or the Governor in Council.<sup>284</sup> Subsequently, in 2006 the two departments signed a regional Interim Operational Working Arrangement to clarify their roles and responsibilities.<sup>285</sup> However, in 2009, the CESD reported that Environment Canada had not yet clearly identified what it has to do to fulfill its responsibilities in respect of section 36, nor did it have a systematic approach to addressing risks of non-compliance with that provision.<sup>286</sup>

According to Mr. Steele, the arrangement with respect to section 36 and Environment Canada

works reasonably well the closer you are to the field level. From my experience and from what I hear from our own field staff, I think generally the working arrangements are quite good and clear arrangements are in place in terms of an understanding of roles and responsibilities, good interaction at the field level between our officers and DOE [Environment Canada] officers ... from my perspective, as you move higher up probably in both – or at least on the DFO side ... I think there’s probably more room for improvement as you move higher up in the organization, speaking at the Ottawa level. There are, I think, some shortcomings in terms of lack of regular contact and communication at the higher

level, my own level, and even director level, for example, at – in Ottawa. A lot of reasons for that, but I think it’s pretty apparent that there is room for improvement in that respect.

And the other comment I would make generally ... [is] that there does tend to be some confusion, I would say, on the part of probably the public, but also within government, certainly within our organization. I’ve heard accounts of that from field staff and others, some confusion as to who should handle particular files, respective roles and responsibilities. Both organizations, I would say, are faced with workload and resource issues, so sometimes I think there may be a tendency to rely on the other party to take responsibility for certain files.<sup>287</sup>

Mr. Nelson and Dr. Bombardier both agreed with Mr. Steele’s assessment about how the arrangement is working at the field level.<sup>288</sup> Mr. Nelson stated that, in the eyes of the public, it can be confusing because of the involvement of DFO, Environment Canada, and the province, as well as links to the Coast Guard and Transport Canada at times.<sup>289</sup> Also, because Environment Canada is much more centralized than DFO, Environment Canada sometimes calls C&P to be the first responder to a situation and then will take the case over if appropriate.<sup>290</sup> Environment Canada is limited in its ability to respond in remote areas, so it has to rely on its “partners.” This situation may be one reason why there is sometimes an impression by the public that Environment Canada is “passing the buck” to DFO on enforcement matters.<sup>291</sup>

At the national level, Dr. Bombardier agreed with Mr. Steele that there is room for improvement in terms of communication, sharing of information, and joint planning of *Fisheries Act* activities.<sup>292</sup> All three habitat enforcement witnesses indicated that, at the higher level, management positions in both DFO and Environment Canada are beginning to re-establish the working relationship that once existed.<sup>293</sup>

As of October 28, 2010, DFO and Environment Canada’s internal response to the 2009 CESD report’s recommendation on establishing expectations for Environment Canada’s administration of section 36 was that “Fisheries and Oceans Canada and Environment Canada are reviewing the

administration of section 36 and expect to have a renewed MOU by March 2012.”<sup>294</sup>

I heard from Ms. Dansereau that significant progress has been made to clarify the roles of DFO and Environment Canada with respect to the administration of section 36. According to Ms. Dansereau, DFO is working with Environment Canada at “many levels” to update the 1985 MOU.<sup>295</sup>

Mr. Nelson testified that the working relationship between DFO and Environment Canada on section 36 matters could be improved by continuing recent discussions initiated at the management level and by getting officers from both departments together, perhaps every two years, to talk at the field level. He also said that a renewal of the Interim Operational Working Arrangement on Enforcement of Section 36(3), setting out the working relationship, could be helpful, but that it is not as important as bringing staff together.<sup>296</sup> Mr. Steele indicated that, to improve the working relationship between departments, bringing management together at the national level may be even more important than bringing together field staff.<sup>297</sup> However, both he and Dr. Bombardier explained that turnover in staff within both Environment Canada and DFO makes it difficult to realize this goal.<sup>298</sup>

Finally, the witnesses provided other suggestions for improvements in the DFO–Environment Canada relationship, among them:

- improve communication with the public and Environment Canada’s partners;
- decentralize some of Environment Canada’s staff and house them in joint offices with DFO fishery officers;
- integrate the agreements into enforcement training, a practice that could be done jointly with DFO; and
- carry out post-mortems of enforcement cases with DFO and Environment Canada.<sup>299</sup>

### ***Should administration of section 36 remain with Environment Canada?***

I heard evidence regarding Environment Canada’s administrative responsibility for section 36 even though, at the time of the hearings, legislative responsibility remained with DFO. Witnesses were asked whether this arrangement is optimal for protecting Fraser River sockeye salmon.

Mr. Steele's view is that many arguments favour having responsibility for section 36 rest with either DFO or Environment Canada. But he also said that a close working relationship between DFO and Environment Canada would still be necessary because of resource and capacity levels in both organizations. Mr. Steele said that if one department did take over all responsibility for section 36, there would have to be a shifting of resources between the two agencies, which is "never something that's easy to accomplish and usually runs into lots of debates and discussion, usually leads nowhere from my experience."<sup>300</sup>

Mr. Nelson stated that any kind of arrangement can work if it is properly resourced. He pointed out that, from the public's point of view, it would probably be easier if one department had sole responsibility and that this shift warrants consideration although it would be a difficult change to implement.<sup>301</sup>

Dr. Bombardier did not give a direct answer to this question, but she appeared to favour the status quo.<sup>302</sup> She noted that, even if Environment Canada were no longer responsible for subsection 36(3), its expertise in chemical-based pollutants and spills would still be required because of its other responsibilities under CEPA.<sup>303</sup>

Otto Langer, former DFO manager in habitat and water quality positions as well as former Environment Canada manager of the Environmental Protection Service Freshwater Studies and Contaminants Control Program, addressed the question of whether it would change the amount of resourcing involved in habitat enforcement to have responsibility for section 36 moved to DFO from Environment Canada.<sup>304</sup> He testified that if section 36 were to revert back to DFO, then strong direction, leadership, and support from DFO senior management would be required. In his view, the cost of moving responsibility for section 36 back to DFO would not be costly because in the Pacific Region, DFO and Environment Canada share office space, services would not change, and some consolidation could occur and savings result.<sup>305</sup> He also said there would be efficiencies in combining Environment Canada's and DFO's laboratory services.<sup>306</sup> However, he noted that these efficiencies may not apply in national headquarters or other regions of Canada.<sup>307</sup> I note that Mr. Langer has no direct knowledge of staffing levels for section 36-related work after 2001.<sup>308</sup>

## Enforcement priorities

C&P and Environment Canada have different priorities for enforcement activities. This is to be expected, given their overlapping yet distinct administrative mandates for sections 35 and 36 of the *Fisheries Act*.

### *Conservation and Protection Directorate*

DFO's national Conservation and Protection Directorate uses a national integrated risk management process. It is a consensus process whereby regional directors from all regions develop a list of priorities for the coming year.<sup>309</sup> Each region then uses these national priorities to guide its own integrated risk management processes. For fiscal year 2010/11, habitat compliance was ranked as medium to high priority and higher priority than commercial fishing.<sup>310</sup> It was also ranked as having low achievability.<sup>311</sup>

In 2005, then minister of fisheries and oceans Geoff Regan announced the Environmental Process Modernization Plan (EPMP), which is discussed in detail in Chapter 6, Habitat management. In Mr. Nelson's view, the EPMP and the Williams Report sent a very clear signal in about 2004 or 2005 that fishery officers should not be doing habitat enforcement work; this direction was followed in the Pacific Region, including on the Fraser River.<sup>312</sup> Mr. Steele testified that the EPMP and the Williams Report sent a message to shift C&P focus from habitat enforcement to fisheries enforcement, and that such a change, in fact, occurred.<sup>313</sup>

Estimates vary of the time spent by fishery officers in the Pacific Region on habitat issues, but the evidence presented supports the witnesses' views that, about 2004 or 2005, a decrease occurred in habitat enforcement work. One estimate, based on FEATS data for 2009, says that fishery officers in the Pacific Region spent 9.5 percent of their total time on "habitat enforcement"; the remainder on "fisheries enforcement."<sup>314</sup> Another document, also based on FEATS, shows that, of the total hours logged by fishery officers, 3.61 percent were attributed to "habitat" in 2009. However, I note that almost 60 percent of hours were not attributed to a specific work element.<sup>315</sup> From 2001 to 2010, the percentage of hours officers in the Pacific Region spent on habitat issues has varied from

a low of 3.61 percent to a high of 10.61 percent (in 2003); the “no work element identified” ranged from 55.47 percent to 64.21 percent of the hours logged.<sup>316</sup>

As part of the Commission’s investigation, Commission counsel requested that C&P look at FEATS and provide information on the number of hours that fishery officers spend on habitat-related activities in comparison to all other activities, and to provide information on the number of patrol hours spent on habitat patrols versus other patrols. Commission counsel asked, to the degree possible, for C&P to provide information for the whole Pacific Region, and for those parts of the region that most closely match up with the Fraser River watershed. The results of this request are found in Appendix B of Policy and Practice Report 9, Habitat Enforcement (March 7, 2011), and were confirmed by Mr. Nelson in his oral testimony.<sup>317</sup> They suggest that, on average for the past 12 years, 16.65 percent of all fishery officer hours and 12.2 percent of patrol hours were spent on habitat work. Time spent on habitat appears to have dropped – from 22.88 percent in 2004 to 13.81 percent in 2005, and lower since then.<sup>318</sup> Mr. Nelson described this decrease in terms of fishery officer patrol time: in 2003, habitat-related patrol time was 24 percent, which is equivalent to about 36 fishery officers; in 2010, it was 10 percent, which is equivalent to about 12 fishery officers.<sup>319</sup> The decreasing trend in habitat-related patrol time coincides with the EPMP.

Mr. Nelson does not view the effect of the change in direction away from habitat enforcement as something positive. As he put it:

But in my view, removing, reducing the amount of fishery officers out doing any enforcement work, but including habitat enforcement, reduces our effectiveness. Officer presence is one of the best deterrents we have. The presence of a uniformed fishery officer in any fishery and in habitat cases, really it’s the best tool we have.<sup>320</sup>

### ***Environment Canada***

The Environmental Enforcement Directorate has a template work plan that identifies its mission and immediate and long-term outcomes.<sup>321</sup> The work plan also identifies target sectors where

Environment Canada believes there is the highest risk of non-compliance. Environment Canada also conducts an annual exercise on integrated compliance promotion and enforcement effort priority-setting. This process identifies key priorities for the coming year as guides for developing regional work plans, which are then integrated into a National Enforcement and National Compliance Promotion work plan.<sup>322</sup>

### **Removal of inspector powers from habitat staff**

As mentioned above, Habitat Management Program staff are no longer designated as inspectors. Instead, they are designated as fishery guardians, with limited powers, while C&P fishery officers are designated as inspectors. This change means that Habitat Management Program staff can no longer write up an inspector’s direction for a stop-work order if a violation is occurring. Rather, they must call on a fishery officer to do so.<sup>323</sup>

Mr. Nelson testified that, in some cases, a fishery officer may be hours away or may not be reached, and, in the meantime, the potential violation could continue.<sup>324</sup> If the human resources are there, it is not impractical to have fishery officers rather than Habitat staff issue directions. However, Mr. Nelson feels that the result is that C&P staff end up doing more of the habitat compliance work that Habitat staff are supposed to be taking on under the EPMP.<sup>325</sup>

According to Mr. Steele and Mr. LeBlanc, the removal of inspector powers from Habitat staff was made in response to health and safety concerns raised by Habitat Management Program staff in other regions of the country.<sup>326</sup> Mr. LeBlanc stated that this decision was made in Ottawa for a “number of reasons, including safety and the fact that Fisheries officers are specially trained for enforcement purpose and totally dedicated to that function.”<sup>327</sup> However, Mr. Nelson testified that the safety concern arose from a single incident which was an “over-reaction”; and if this was in fact the reason for the change, the change in status does not eliminate the concern since Habitat staff are still on site with fishery guardian status.<sup>328</sup>

Rebecca Reid, former regional director, Oceans, Habitat and Enhancement Branch, and current regional director, Fisheries and Aquaculture

Management, commented that, from the Pacific Region’s perspective, a gain in efficiency resulted when Habitat staff assumed inspector powers.<sup>329</sup>

Dave Carter, regional team leader, Habitat Monitoring Unit, testified that taking inspector status from Habitat staff has the potential to create challenges because, if you have inspector status, you can issue an inspector’s direction under section 38 of the Act to avoid the deposition of a deleterious substance. If C&P officers are the only ones empowered to issue these directions, it becomes more challenging to use this power as a preventive measure.<sup>330</sup>

The removal of inspector status from Habitat staff stands in contrast to Aquaculture Environmental Operations staff (biologists and veterinarians), who are (or are in the process of being) designated as fishery inspectors (see Chapter 8, Salmon farm management).<sup>331</sup>

## ■ Aquaculture enforcement

Responsibility for enforcement activities in relation to fish farms is shared between C&P and DFO’s Aquaculture Management Directorate. According to Brian Atagi, area chief for Aquaculture, C&P, Pacific Region, aquaculture occurrences come to C&P’s attention through DFO’s “observe, record and report” line, through information from partnering agencies or other partners within the department, through C&P inspections, and through intelligence gathering.<sup>332</sup> One or two officers are being identified to take on the role of “area intel officer[s],” but this responsibility will be supplementary to their field operation roles.<sup>333</sup>

The Aquaculture Management Directorate and C&P have developed a draft (as of the time of the aquaculture hearings in August and September 2011) 2011–2013 British Columbia Aquaculture Compliance Protocol.<sup>334</sup> According to this document, where audits, inspections, or monitoring reveals instances of non-compliance, or where public reports generate occurrences, C&P and the Aquaculture Management Directorate collaborate on determining the appropriate response as follows:

- [Aquaculture Management Directorate] shall lead in conducting activities aimed at voluntary restoration.
- C&P shall lead in conducting activities that

aim to compel compliance and the issuance of Inspector’s directions, warning and Ministerial orders.

- [Aquaculture Management Directorate] shall support C&P in the development of the contents of Inspector’s directions, warning and Ministerial orders.
- C&P, in collaboration with [Aquaculture Management Directorate], shall lead in conducting investigations of aquaculture cases, laying of charges, preparing court briefs, executing warrants, coordinating with the Department of Justice, providing evidence in court and supporting prosecution process.<sup>335</sup>

When enforcement issues arise, C&P will issue “non-compliance letters” as soon as possible for the “greatest issues of concern” and will revisit the sites where those are occurring. Sites with “minor issues” would still get a non-compliance letter, but at a later date.<sup>336</sup> Andrew Thomson, director of Aquaculture Management, DFO, emphasized that a “continuum of compliance activities” is presented to salmon farm operators. He said that this continuum begins with informing a salmon farm of its non-compliance through a letter and can continue through to “restorative justice or going to a full prosecution and a fine being assessed by the court.”<sup>337</sup> However, both Mr. Thomson and Mr. Atagi said that, as of the date they testified (September 1, 2011), there had been no convictions against salmon farms in the past 10 years (or ever), although charges have been laid.<sup>338</sup> The fine structure for aquaculture offences is the same for all *Fisheries Act* violations, with a maximum fine of \$500,000.<sup>339</sup>

Mr. Atagi expressed concern that the option of issuing tickets (rather than bringing a quasi-criminal prosecution in court) is not available under the *Fisheries Act* for aquaculture-related violations, and that DFO places much reliance on self-reported data – making data-gathering for prosecutions potentially difficult:

One of the big issues with aquaculture versus a normal harvest fishery is that everything at the current time is by conditions of licence, so we have no ticketable offences in which to rely upon for minor offences. If we were to go further with enforcement action, we would have

to prepare for prosecution. There is no – we are heavily dependent on self-reporting from the industry and there is – in some other fisheries we have independent mechanism such as dockside monitoring, at-sea observers, electronic monitoring to independently provide the department with information, as well.<sup>340</sup>

C&P has assessed its needs with respect to delivering a compliance and enforcement program for aquaculture. The program contemplated includes responsibility for salmon farms as well as shellfish and freshwater aquaculture. Mr. Atagi testified that, in his view, a sufficient number of staff to do that job would be 32 full-time-equivalent workers (FTEs).<sup>341</sup> The latest in a series of draft submissions from C&P to the Aquaculture Management Directorate nationally on its program needs in relation to aquaculture recommended a complement of 18 FTEs: a 13-member dedicated field unit, and a five-member regional support unit.<sup>342</sup> C&P ultimately received funding for an aquaculture program made up of 12 permanent FTEs. At the time of the hearings, there was also one more fishery officer temporarily assigned to aquaculture work. Mr. Atagi testified that, in his opinion, the staffing complement he currently has is adequate for “a marine finfish inspection program”; however, if the aquaculture officers have to enter into any sort of significant investigation, it would take staff away from the inspection program. He said the staffing level for the program is not sufficient to meet the needs of a full aquaculture program that includes shellfish and freshwater facilities.<sup>343</sup>

Kerra Hoyseth, senior aquaculture biologist, Aquaculture Environmental Operations, DFO, said it is a “huge benefit to have dedicated fisheries officers who are working specifically on aquaculture” – that this arrangement makes for a great partnership and allows officers to share information with biologists.<sup>344</sup>

## Compliance at salmon farms

In addition to enforcement activities, responsibility for compliance in relation to fish farms is also shared between C&P and DFO’s Aquaculture Management Directorate. DFO is implementing a system of industry self-reporting coupled with

government audits. I review in more detail the evidence related to compliance activities at salmon farms, and describe monitoring, reporting, and auditing under the federal conditions of licence, in Chapter 8, Salmon farm management.

## Section 36 and fish pathogen and pest treatment at salmon farms

As noted above, section 36 of the *Fisheries Act* prohibits the deposit of deleterious substances in waters frequented by fish. DFO has considered developing a “fish pathogen and pest treatment regulation” to address the topic of drugs and pesticides used at fish farms being deposited into waters frequented by fish.<sup>345</sup> Regulation of products for treating captive salmon for diseases or pests (such as sea lice) is complicated by the involvement of different agencies, such as DFO, Health Canada’s Veterinary Drug Directorate, Health Canada’s Pest Management Regulatory Agency, and the Canadian Food Inspection Agency. To date, no such regulation has been developed, though a letter signed by Deputy Minister Claire Dansereau in November 2011 indicates that “DFO will continue to work with the [Canadian Food Inspection Agency] to include appropriate authorities in the proposed [Fish Pathogen and Pest Treatment Regulation].”<sup>346</sup>

Catherine Stewart, salmon farming campaign manager for the Living Oceans Society and a representative of the Coastal Alliance for Aquaculture Reform, said there is a “black hole around deleterious substances and the pest and pathogen regulation” such that the industry is in effect “exempt from section 36 of the *Fisheries Act* by the absence of requirements under the PARs [*Pacific Aquaculture Regulations*].”<sup>347</sup>

Trevor Swerdfager, former director general of Aquaculture Management, DFO national headquarters, testified that DFO has considered developing a regulation in relation to the application of pesticides, primarily in Eastern Canada. He said that, initially, DFO thought such a regulation would extend to in-feed treatments such as SLICE (the brand name of emamectin benzoate, a drug used to treat farmed salmon for sea lice). However, he added, DFO no longer holds that view.<sup>348</sup> Further, Mr. Swerdfager said that the

idea behind creating a regulation was to remove the outcome of a pesticide application approval potentially being allowed by Health Canada under the *Pest Products Control Act*, but then blocked by Environment Canada, administering section 36 of the *Fisheries Act*. He said DFO has been “experiencing quite a bit of difficulty in terms of figuring out an appropriate legal structure for dealing with this issue.”<sup>349</sup> Ms. Dansereau suggested that Environment Canada may be the better ministry to deal with such issues, and that this arrangement could serve to reduce conflict in DFO’s roles.<sup>350</sup>

Although the creation of a regulation under section 36 of the *Fisheries Act* to deal with pathogen and pest treatments may be a significant issue for those interested in salmon farm regulation, the likely impact on Fraser River sockeye is minimal. As discussed further in Volume 2 of this Report, the authors of Technical Report 5C, Noakes Salmon Farms Investigation, and Technical Report 5D, Dill Salmon Farms Investigation, both agreed that chemical inputs were unlikely to have any significant impact on Fraser River sockeye. Dr. Donald Noakes said drugs and pesticides were unlikely to have any population-level effects on sockeye.<sup>351</sup> Dr. Lawrence Dill said chemical inputs (including SLICE) were very unlikely to have anything but a local effect.<sup>352</sup> However, I view this evidence as another example of how the division of responsibilities between DFO and Environment Canada regarding section 36 is not always clear and may result in gaps with respect to the protection of Fraser River sockeye habitat.

## ■ C&P budget and funding issues

I heard that C&P currently has a salary shortfall problem and is likely facing further budget reductions and uncertainty from the 2010–2011 departmental strategic review.<sup>353</sup> As described in a 2010 letter to C&P regional directors from Mr. Steele:

Two other factors that made the identification of priorities more important than ever are the current C&P salary shortfall problem and the ever increasing likelihood that further budget reductions to the program are going to occur

in the foreseeable future. We will have to focus much of our attention in the coming year, on how to reshape our program for the future so that we can continue to offer the most effective compliance and enforcement program possible, while living within our means. The concurrent Strategic Review and program evaluation exercises that we will be undergoing in 2010/11 further reinforce the need for a major focus in this area. Notwithstanding the workload demands, it will be important that we participate directly and cooperate fully with the teams that will be coordinating these two important initiatives in 2010.<sup>354</sup>

Mr. Nelson told me that DFO’s C&P salary shortfall could reduce its ability to pay for overtime and may eventually lead to a reduction in the number of fishery officers.<sup>355</sup> Mr. Nelson testified that, for the current fiscal year (2011/12), this salary shortfall was approximately \$500,000–\$600,000 and that the department’s plan to account for it was to not fill current vacancies for five fishery officer positions.<sup>356</sup> Mr. Nelson also told me that C&P is now seeing some “serious challenges” in its shortfalls.<sup>357</sup>

Mr. Steele said that C&P has been dealing with the salary shortfall for the past three to four years by accessing funds from some of C&P’s national programs and providing additional salary money to the regions so that, until now, the impacts on C&P’s ability to do enforcement work have been minimized. However, he was clear that, going forward, the availability of this national funding will become more limited every year, and that the amount of funding to the regions is significantly less than in previous years – so there will likely be impacts this year (2011) and into the future.<sup>358</sup> In his view, budget restrictions are impairing the effectiveness of the monitoring and enforcement done by C&P.<sup>359</sup>

Mr. Steele agreed with Mr. Nelson’s concerns that there would be impacts on enforcement, but he said the anticipated impacts are not clear because they depend in part on the outcome of the department’s strategic review and an internal C&P review currently under way.<sup>360</sup>

An added worry about funding is the fact that the Pacific Integrated Commercial Fisheries Initiative, which provides some C&P funding, is scheduled

to sunset at the end of the 2011/12 fiscal year.<sup>361</sup> As discussed above, PICFI funds several C&P enforcement activities. (For a discussion of PICFI, see the monitoring and reporting section of Chapter 5, Sockeye fishery management.) Mr. Nelson expressed concern that when PICFI expires, C&P will be “worse off” (in relative terms) than it was before the 1995 Fraser Report and the 2005 Williams Report.<sup>362</sup> If PICFI expires and the funding is not replaced, Mr. Nelson believes, C&P will not have a credible enforcement presence. It will be forced to cut 30–40 fishery officers, or 25 percent of its existing allotment; cut 10–15 fishery officers on the Fraser River; and close 12–13 of its 35 existing offices.<sup>363</sup> According to Mr. Nelson, to stay within the budget as of the fiscal year beginning April 1, 2012, the Pacific Region C&P would need \$4–\$5 million.<sup>364</sup>

In addition to the expiration of PICFI, a government-wide strategic review initiative may result in additional cuts to C&P funding.<sup>365</sup> According to Ms. Dansereau, the 2010–11 strategic review process requires DFO to cut \$56.8 million nationally from its budget.<sup>366</sup> With respect to funding for C&P specifically, Ms. Dansereau testified that “how we enforce and how we monitor also ought to change, and so budget levels that might have been required a number of years ago may not be the same budget levels that will be required in the future; they may be more, they may be less.”<sup>367</sup> Mr. Bevan added that budgets for C&P require annual re-evaluation and that the introduction of new technologies and enforcement techniques may allow C&P to do its work with a reduced budget.<sup>368</sup> Ms. Dansereau agreed and added that DFO is also looking at the policies that are being enforced and how these are being managed.<sup>369</sup> However, Mr. Bevan could not point to a specific example where the use of new technologies or enforcement techniques has occurred with respect to enforcement and Fraser River sockeye.<sup>370</sup>

## ■ Findings

Fisheries and fish habitat enforcement for Fraser River sockeye is a multi-faceted issue. Based on the evidence I heard, there are a number of challenges for the Department of Fisheries and Oceans (DFO) and Environment Canada in managing this aspect of the fishery.

## Enforcement priorities

In an era of shrinking resources, difficult decisions must be made on how to allocate enforcement funds to achieve the best results. I heard evidence that the purpose of DFO’s 2006–7 National Compliance Framework is to provide a solid foundation for the activities the department undertakes to achieve and maintain compliance. It articulates the following three pillars of compliance management:

- *Pillar One (Education and shared stewardship)* focuses on informal and formal education of the public, co-management, and partnerships.
- *Pillar Two (Monitoring, control, and surveillance)* focuses on patrols, inspections, third-party monitoring, inter-agency partnerships, and fishery officer responses to non-compliance.
- *Pillar Three (Major cases and special investigations)* focuses on formal intelligence gathering and analysis, retroactive offence detection and investigation, and the use of specialized skills and technology.

I observe that these three pillars offer an informative categorization of enforcement activities, but do not purport to identify which activities should have relative priority.

DFO witnesses offered different perspectives on how to prioritize enforcement activities and expenditures. David Bevan, associate deputy minister, testified that DFO is focusing its compliance and enforcement efforts on Pillars One and Three, and away from Pillar Two. He said that the department has tried to bring people along to understand the need for conservation and compliance (Pillar One). At the same time, major case investigations (Pillar Three) are required when DFO identifies a systemic problem in a location or in a particular component of fish harvesting and processing. Randy Nelson, regional director of Conservation and Protection, Pacific Region, emphasized the importance of Pillar Two activities, saying that fishery officer field presence is the primary deterrent in enforcement.

I find on the evidence that fishery officer patrols are the primary means DFO has to detect and deter non-compliance – an important function if the department is to meet its conservation mandate. In

their final submissions, counsel for the participants BC Public Service Alliance of Canada and Union of Environmental Workers BC (PSAC / UEWBC) and the Conservation Coalition both highlighted the role that patrols and inspections by fishery officers have on enforcement efforts. I accept the evidence of Mr. Nelson that the presence of fishery officers “is one of the best deterrents [DFO has] ... The presence of a uniformed fishery officer in any fishery and in habitat cases, really it’s the best tool [DFO has].”

Mr. Nelson persuasively argued that there is no substitute for boots on the ground and on the water, and through overflights. I agree. In my view, however, when it comes to prioritizing enforcement expenditures, I do not find it helpful to engage in a debate over the relative merits of the three pillars; all three have value. Rather, the key is having people enforce the rules and ensure compliance to prevent sockeye from being fished illegally. The overarching principle that should dictate the allocation of enforcement resources should be which activities will best support conservation. I accept the evidence of those witnesses who said that conservation is better served by proactively preventing fish from being illegally taken from the water. Preventing the illegal taking of fish will likely involve a combination of community education, community stewardship, and on-the-ground enforcement.

## Illegal harvest

On the evidence of Mr. Nelson I accept that, since publication of the Honourable Bryan Williams’s report *2004 Southern Salmon Fishery Post-Season Review* (Williams Report) in 2005, DFO has reduced illegal harvesting (meaning “closed-time fishing”) on the Fraser River.

## Sales of FSC fish

I have reviewed the data summarized in Technical Report 7, Fisheries Management, which indicate that, in years where there are no or few commercial fishing opportunities, a larger number of fish are harvested as food, social, and ceremonial (FSC) catch. I have also considered the evidence regarding the investigation known as “Project Ice Storm” as well as the testimony of Chief Baird, Chief Newman, Chief Mountain,

Councillor Quipp, Grand Chief Pennier, Grand Chief Terry, Hereditary Chief Jones, Mr. Crey, Mr. Becker, Mr. Nelson, and Mr. Coultish. I find that, although many people do abide by the FSC sales prohibition, the evidence suggests DFO is not effectively enforcing the prohibition against sales of FSC Fraser River sockeye.

The illegal sale of FSC fish may result in a conservation concern for Fraser River sockeye because this practice could lead to a demand for additional harvesting. Such a demand could encourage under-reporting of FSC catch and/or illegal harvesting. It could also affect the sustainability of the Fraser River sockeye fishery if illegal sales took place in years of low Fraser River sockeye abundance. Those sales could result in some First Nations not getting their FSC fish and would also be unfair to the commercial fishers who may have had their fishing opportunities reduced or eliminated.

## The “mortally wounded” clause

The mortally wounded clause provides that if a fish is “mortally wounded,” it can be retained, even if the fishery for that species is otherwise closed. This clause is controversial. Witnesses from DFO’s Conservation and Protection Directorate (C&P) testified that the mortally wounded clause is capable of being abused and is seen as a loophole. However, I also heard testimony that the clause is consistent with the perspective of First Nations, and that First Nations are working to determine if a ceiling on mortalities could be implemented. I accept the evidence of DFO witnesses that the mortally wounded clause is hard to enforce because it is difficult to determine whether a fish is in fact “mortally wounded” in all circumstances.

## Habitat enforcement

On the evidence, I conclude that DFO does not have a system to collect and follow up on fines issued pursuant to the *Fisheries Act*. Also, under the current *Fisheries Act*, DFO and Environment Canada cannot issue a ticket for a violation of the Act.

I conclude that fishery officers do not dedicate sufficient time to habitat work and that habitat work has become a lower priority for them. In this respect

I agree with the submissions of the Conservation Coalition and First Nations Coalition that habitat enforcement has not received sufficient emphasis or attention within C&P's priorities, and that more work needs to be done in this area.<sup>371</sup>

The Conservation Coalition recommends that DFO should administer section 36 of the *Fisheries Act*.<sup>372</sup> I heard evidence regarding the delegation of administrative responsibility for section 36 to Environment Canada, although at the time of the hearings, DFO was ultimately responsible for ensuring the provision is enforced. Based on this evidence, I conclude that there is a good case for repatriation of section 36 to DFO. Nevertheless, because the focus in the hearings was on the Pacific Region, I am mindful that I am not aware of the national context and implications which may result from repatriation.

Overall, the 2009 report of the Commissioner of the Environment and Sustainable Development recommended that DFO and Environment Canada clearly establish the expectations for Environment Canada's administration of the pollution prevention provisions of the Act. DFO and Environment Canada witnesses testified that, at the field level, delegation of responsibility for enforcement of section 36 appears to be working. On the other hand, Mr. Nelson agreed that, in the eyes of the public, it can be confusing as to who is responsible in certain circumstances – and Dr. Manon Bombardier, national director, Environmental Enforcement Directorate, Environment Canada, and Paul Steele, former director general of C&P, DFO, both said there is room for improvement in terms of communication, sharing of information, and joint planning of *Fisheries Act* activities at the national level. I accept this evidence. I also accept Mr. Nelson's evidence that the working relationship of the departments could be improved.

I conclude that the removal of inspectors' powers from Habitat staff will result in C&P staff doing more of the habitat compliance work that Habitat staff are supposed to be taking on under the Environmental Process Modernization Plan (EPMP) and could result in negative impacts on Fraser River sockeye habitat.

Finally, from the testimony of Mr. Nelson, I conclude that, if the Program Activity Tracking for Habitat (PATH) and Departmental Violation System (DVS) databases were compatible and interactive,

fishery officers' ability to do compliance work on habitat issues would be improved.

## Aquaculture enforcement

I find that C&P does not currently have the financial or human resources capacity to undertake major investigations and keep abreast of its inspection duties with respect to salmon farms.

I also find that the current tools and resources available to C&P to enforce the *Pacific Aquaculture Regulations* (PAR) and the *Fisheries Act* against salmon farms are limited. The only option to ensure compliance is to lay charges under the *Fisheries Act*, necessitating an expensive and time-consuming process for what may be a minor offence. However, I make no specific recommendations about this, as there was little evidence about how this situation could best be remedied. Although there was some mention of ticketing, the evidence did not provide me with enough information to determine how this might be implemented and the implications of such a recommendation. I also note that, if DFO chooses to do so, failure to comply with PAR and the *Fisheries Act* could be dealt with through conditions of licence and licence renewal. Also, C&P does not currently have the financial or human resources capacity to undertake major investigations and keep abreast of its inspection duties with respect to salmon farms.

I note that, although Environment Canada is responsible for the administration of section 36 of the *Fisheries Act*, under the federal *Pacific Aquaculture Regulations* Environment Canada is not designated as the agency to which salmon farms must report to regarding their discharges. This arrangement differs from the regulatory oversight of Environment Canada set out in regulations made pursuant to subsection 36(5) of the Act (see, e.g., the *Pulp and Paper Mill Effluent Regulations* and the *Metal Mining Effluent Regulations*).

## Funding

The Honourable John Fraser's *Fraser River Sockeye 1994: Problems and Discrepancies* (Fraser Report) and the Williams Report were critical of DFO's capacity to enforce compliance and made

recommendations regarding funding which addressed this shortcoming. In response, DFO increased the resources dedicated to C&P's enforcement activities. However, on the evidence before me, I find that there has been a recurring cycle of funding shortfalls. These shortfalls have then led to problems with enforcement, an increase in illegal harvest, and eventually further inquiries and reviews – ultimately resulting in an influx of money to C&P, which then is eroded to create another funding shortfall.

I accept the evidence of Mr. Nelson that C&P at the time of the hearings had a credible enforcement presence on the Fraser River, but I echo his concern about the accumulation of existing salary shortfalls and the potential for future funding shortfalls.

Following the Williams Report, there was an influx of funding to bolster C&P work in the Pacific Region, primarily to address compliance issues with closed-time patrols on the Fraser River. Some of this funding was rolled into the Pacific Integrated Commercial Fisheries Initiative (PICFI) program. Mr. Nelson's testimony was clear that it is only due to increased funding following the Williams Report that C&P has recently been capable of providing adequate enforcement services in the Fraser River. In my view, there is no substitute for this type of on-the-ground and on-the-water enforcement activity, as well as overflights, and Pacific Region C&P needs to continue to receive

funding that will allow it to provide these services at its post-Williams level.

A number of participants urged me to recommend sufficient funding for enforcement activities. Counsel for the participant B.C. Public Service Alliance of Canada / Union of Environment Workers B.C., which represented the union for many DFO employees, submitted that there was compelling evidence regarding the harm posed by budget cuts to DFO enforcement activities. I agree. It is apparent to me that enforcement is an important area to which DFO needs to continue to devote resources. I accept the evidence of Mr. Steele and Mr. Nelson that C&P currently has a salary shortfall problem and is likely to face further budget reductions and uncertainty from the 2010–2011 departmental strategic review. I also accept the evidence of these witnesses that this problem is impairing the effectiveness of the monitoring and enforcement done by C&P. I am further concerned that PICFI, which provides some C&P funding, is scheduled to sunset at the end of the 2011/12 fiscal year. If this funding is not replaced, then I share Mr. Nelson's concern that, when PICFI expires, C&P will be in relative terms "worse off" than it was before the 1995 Fraser Report and the 2005 Williams Report and will not have a credible enforcement presence.

I discuss these findings and any related recommendations in Volume 3 of this Report.

## Notes

- 1 Terms of Reference, a.i.B.
- 2 Public submission, 0236-NCFNSS\_350390, p. 3, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 3 Public submission, 0256-BRAUER, p. 3, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 4 Public submission, 0281-TYLER, p. 1, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 5 Public submission, 0031-TYLER, available at [www.cohencommission.ca](http://www.cohencommission.ca); see also public submission 0281-TYLER, available at [www.cohencommission.ca](http://www.cohencommission.ca). (Chilliwack Public Forum)
- 6 Public submission, 0682-SWANSTON, available at [www.cohencommission.ca](http://www.cohencommission.ca); see also public submission, 0216-HENSELWOOD, p. 7, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 7 Public submission, 0187-FALL, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 8 Public submission, 0190-FETTERLEY, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 9 Public submission, 0094-MacLEOD, available at [www.cohencommission.ca](http://www.cohencommission.ca).
- 10 *Fisheries Act*, RSC 1985, c. F-14, s. 78.
- 11 *Fisheries Act*, RSC 1985, c. F-14, s. 34. I note that Part 3, Division 5, of Bill C-38, *Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, which received royal assent on June 29, 2012, proposes an amendment to the *Fisheries Act*, which would move the definition of "fish habitat" to ss. 2(1).
- 12 *Fisheries Act*, RSC 1985, c. F-14, ss. 25(1) and (2), 33, 33.1(2).
- 13 *Fishery (General) Regulations*, SOR/93-53, ss. 3(1).
- 14 *Pacific Fishery Regulations*, SOR/93-54.
- 15 *Pacific Fishery Regulations*, SOR/93-54, ss. 6-10, 13.
- 16 *British Columbia Sport Fishing Regulations*, 1996, SOR/96-137; see also PPR 7, pp. 5-7.
- 17 *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332; see also PPR 18, pp. 6-8.
- 18 *Foreign Vessel Fishing Regulations*, CRC, c. 815.
- 19 *Foreign Vessel Fishing Regulations*, CRC, c. 815, s. 22.
- 20 *Foreign Vessel Fishing Regulations*, CRC, c. 815, ss. 23-28.
- 21 *Coastal Fisheries Protection Act*, RSC 1985, c. C-33.
- 22 *Coastal Fisheries Protection Act*, RSC 1985, ss. 3-5.
- 23 *Fisheries Act*, RSC 1985, c. F-14, s. 40.
- 24 *Fisheries Act*, RSC 1985, c. F-14, s. 42(3).

- 25 Exhibit 691, p. 3; Rebecca Reid, Transcript, April 4, 2011, p. 80; Randy Nelson, Transcript, April 8, 2011, p. 5.
- 26 Exhibit 689.
- 27 Exhibit 690.
- 28 Exhibit 690, 1.1.
- 29 Exhibit 690, 4.2.
- 30 Exhibit 693, pp. 1, 4.
- 31 Exhibit 690, 4.3.
- 32 Exhibit 691.
- 33 Exhibit 691, pp. 2–4.
- 34 Exhibit 691, p. 3; Rebecca Reid, Transcript, April 4, 2011, p. 80.
- 35 Exhibit 691, p. 3.
- 36 Exhibit 691, p. 4.
- 37 *Pulp and Paper Mill Effluent Regulations*, SOR/92-269.
- 38 *Metal Mining Effluent Regulations*, SOR/2002-222.
- 39 Claire Dansereau, Transcript, September 28, 2011, pp. 36–37.
- 40 Randy Nelson, Transcript, April 7, 2011, p. 25.
- 41 Randy Nelson, Transcript, April 7, 2011, p. 25.
- 42 Manon Bombardier, Transcript, April 7, 2011, p. 25.
- 43 Exhibit 653.
- 44 Transcript, April 7, 2011, p. 34.
- 45 Transcript, April 7, 2011, p. 33.
- 46 Exhibit 692.
- 47 Exhibit 692, 1.4.
- 48 Transcript, April 7, 2011, pp. 34–35.
- 49 Manon Bombardier, Transcript, April 7, 2011, p. 35.
- 50 New section 4.1.
- 51 New section 4.2.
- 52 New section 4.4.
- 53 Paul Steele, Transcript, April 7, 2011, p. 5; Exhibit 686, p. 1; see also PPR 9, pp. 16–17.
- 54 PPR 13, p. 13; see also Exhibit 699, p. 4.
- 55 Exhibit 15, p. 21.
- 56 Paul Steele, Transcript, April 7, 2011, p. 55.
- 57 Exhibit 606.
- 58 Exhibit 605.
- 59 Exhibit 15, p. 15; Paul Macgillivray, Transcript, November 1, 2010, p. 16; Paul Steele, Transcript, April 7, 2011, p. 56.
- 60 Paul Macgillivray, Transcript, November 1, 2010, p. 16.
- 61 Paul Steele, Transcript, April 7, 2011, pp. 55–56; Exhibit 699, p. 4; PPR 9, p. 17.
- 62 Randy Nelson, Transcript, April 7, 2011, p. 55.
- 63 PPR 13, p. 15; see also Randy Nelson, Transcript, April 7, 2011, pp. 12, 55.
- 64 PPR 13, p. 16.
- 65 PPR 13, pp. 15–16; see also Paul Steele, Transcript, April 7, 2011, pp. 55–56; Exhibit 15, p. 30.
- 66 PPR 13, pp. 16–17.
- 67 Exhibit 693; see also Exhibit 657.
- 68 Dave Carter, Transcript, April 6, 2011, p. 43.
- 69 Transcript, April 4, 2011, p. 74.
- 70 PPR 9, p. 16.
- 71 *Fisheries Act*, RSC 1985, c. F-14, ss. 5(4).
- 72 *Fisheries Act*, RSC 1985, c. F-14, ss. 5, 38.
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