



Fisheries and Oceans
Canada

Pêches et Océans
Canada

Habitat Compliance Decision Framework

Fisheries and Oceans Canada

Version 1.1



Canada

Abstract

The purpose of this document is to provide a nationally coherent decision framework for regional implementation of the habitat compliance decision-making component of Habitat Compliance Modernization. This document focuses solely on compliance monitoring and determining the response to situations of potential non-compliance. Other documents will provide guidance on such matters as effectiveness monitoring for mitigation and compensation measures. This document is intended for internal use by Habitat Management Program staff. If you have any concerns, comments on this document, please refer them to your Regional Monitoring Team Leader.

Résumé

Le présent document a pour objet de fournir un cadre décisionnel cohérent pour la mise en œuvre de la Modernisation des mesures de conformité touchant l'habitat dans l'ensemble des régions. Ce document porte exclusivement sur la surveillance de la conformité et l'identification de la réponse appropriée dans les cas de non-conformité. Le suivi de l'efficacité des mesures d'atténuation et de compensation fera l'objet d'un autre guide. Ce document est destiné à l'usage interne du Programme de gestion de l'habitat. Veuillez adresser tout commentaire au sujet de ce cadre décisionnel à votre chef d'équipe régional du suivi et de la surveillance.

Cette publication est également disponible en français.

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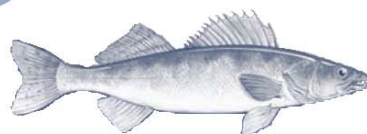


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1.0 Introduction

In 2005, the Department of Fisheries and Oceans (DFO) launched the Habitat Compliance Modernization (HCM) initiative as part of its Environmental Process Modernization Plan (EPMP)¹. The EPMP is an important element of DFO efforts to continuously improve the Habitat Management Program (HMP), which ultimately contributes to the conservation and protection of fish and fish habitat for the benefit of Canadians today and in the future. Through the implementation of the HCM initiative, the EPMP supports a key objective of DFO — to ensure that owners/operators of existing facilities and structures, as well as proponents of new development activities comply with the habitat protection provisions of the *Fisheries Act* (see Annex A) and related policies.

The HCM initiative aims first to build a nationally coherent, strategic, balanced, risk-based and integrated approach that will promote, assist and, where required, compel compliance with the habitat protection provisions of the *Fisheries Act* and related policies. The initiative also aims to clarify the roles, responsibilities and accountabilities of both the HMP and the Conservation and Protection (C&P) program regarding habitat compliance activities and decisions, through the implementation of the National Habitat Compliance Protocol and its annexes. As well, the HCM initiative provides the HMP with additional capacity to conduct monitoring activities to verify compliance with, and effectiveness of, approved measures that will mitigate impacts to fish and fish habitat, compensate for loss of fish habitat and confirm compliance with the requirements of the habitat protection provisions of the *Fisheries Act*.

The purpose of this document is to provide a nationally coherent decision framework for regional implementation of the habitat compliance monitoring component of the HCM initiative. This document focuses solely on compliance monitoring and determining the response to situations of potential non-compliance. Other documents will be developed to provide guidance on related matters, such as effectiveness monitoring.

The decision framework builds on the *Practitioner's Guide to the Risk Management Framework* (DFO, 2005)² and the *Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the Fisheries Act* (Government of Canada, 2001)³. It also provides guidance in implementing the DFO policy on the *Application of the Habitat Protection Provisions of the Fisheries Act to Existing Facilities and Structures* (DFO, 2007)⁴.

It provides guidance to HMP staff in:

- Assessing compliance risks;
- Determining a course of action aimed at achieving compliance; and
- Providing a rationale for compliance management decisions.

¹ http://oceans.nrc.dfo-mpo.gc.ca/habitat/hmp/epmp/default_e.asp

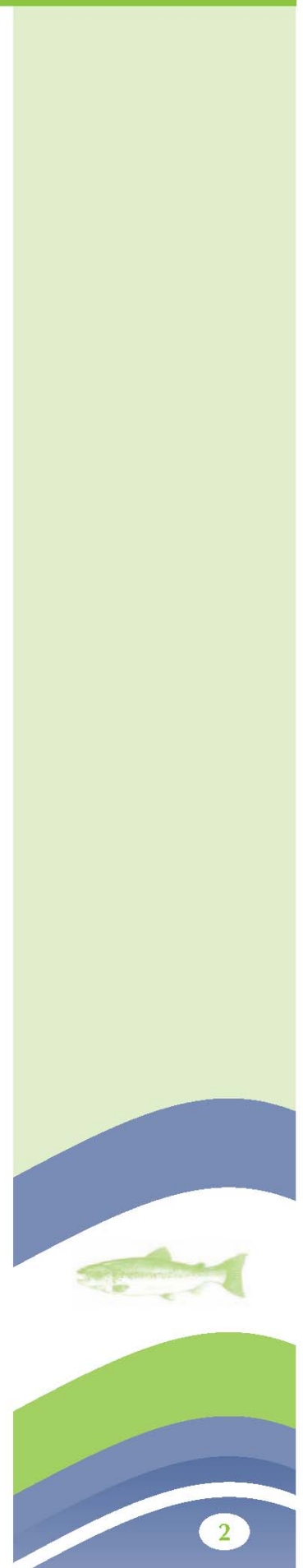
² http://www.dfo-mpo.gc.ca/oceans-habitat/habitat/policies-politique/operating-operation/risk-risques/index_e.asp

³ http://intra.dfo-mpo.gc.ca/hq/fishmgmt/Directorates/CP/PDF_files/TOS-412%20eng.pdf

⁴ http://oceans.nrc.dfo-mpo.gc.ca/habitat/hmp/guides/documents/Existing-Facilities-Position-Statement_e.pdf

Applied in conjunction with the assessment of development proposals (habitat referrals) and activities aimed at increasing the awareness of proponents, this decision framework improves DFO's ability to conserve and protect fish and fish habitat during all stages of development projects, including the continued operation, maintenance and modification of existing facilities and structures.

It is expected that lessons will be learned as monitoring activities are conducted and information is gathered on compliance with mitigation and compensation measures and requirements of the habitat protection provisions of the *Fisheries Act*. Those lessons will help DFO set priorities and improve planning of compliance management activities. This learning process will depend on feedback from all levels of the department, external partners and stakeholders. Comments regarding the implementation of this decision framework should be sent to regional managers of habitat protection and sustainable development, as the responsibility center for habitat compliance.



2.0 Legal and Policy Context

The *Fisheries Act* provides the legal framework for regulating impacts to fish and fish habitat associated with works and undertakings occurring in or around fresh and marine waters throughout Canada (see Annex A). The Act assigns the powers, authorities and duties to regulate impacts to fish and fish habitat in relation to fish passage, in-stream flow needs of fish, destruction of fish by other means than fishing, harm to fish habitat and pollution of fish-bearing waters. While Section 36 of the Act (the provision regarding pollution of fish-bearing waters) is administered by Environment Canada, DFO administers the other sections (commonly known as the habitat protection provisions), through its Habitat Management Program (HMP)⁵.

Although Section 35 (prohibition against harmful alteration, disruption or destruction of fish habitat) of the *Fisheries Act* has been the primary focus of the HMP's regulatory activities, all of the other habitat protection provisions must be considered in monitoring, assessing and responding to compliance issues. These include: Section 20 (fish passage around obstructions), Section 22 (flow requirements below obstructions), Section 30 (screening of water intakes) and Section 32 (destruction of fish by means other than fishing).

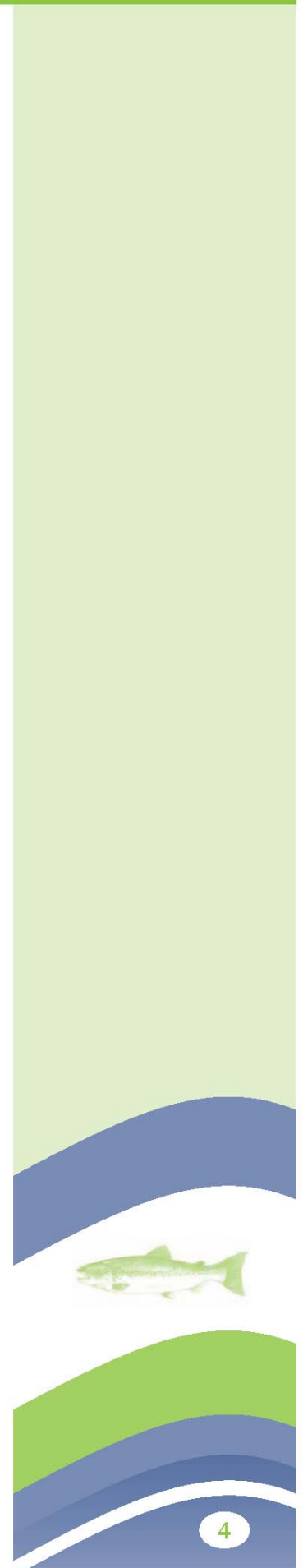
The HMP and the C&P Program share responsibility for compliance management activities related to the habitat protection provisions of the *Fisheries Act*. Co-operation and collaboration between these two programs is critical to the success of the HCM. The roles, responsibilities and accountabilities of the HMP and the C&P program are defined in the National Habitat Compliance Protocol and its regional annexes. The protocol, which is a critical part of applying this framework, also outlines the governance structure for its implementation.

⁵ http://oceans.nrc.dfo-mpo.gc.ca/habitat/hmp/default_e.asp

3.0 Strategic and Operational Planning

It is important to use a strategic approach to identify priorities and set objectives that will advance compliance with the habitat protection provisions of the *Fisheries Act*. Regions will be responsible for developing their own strategic plans to identify development activities that have impacts on fish and fish habitat and areas that require field monitoring. Priorities should be set in relation to potential or ongoing impacts of a given type of development activity, or the sensitivity of fish and of a given habitat type. Activities that support collaborative arrangements with provinces and territories and other partners and stakeholders may be planned with the goal of improving efficiencies and effectiveness in monitoring compliance with and effectiveness of mitigation and compensation measures and requirements of the *Fisheries Act*.

Based on the priorities and objectives identified in their strategic plans, regions will be responsible for developing annual operational plans that identify the monitoring activities to be undertaken within the allocated resources.



4.0 Habitat Compliance Decision Framework

The Habitat Compliance Decision Framework consists of four components: Compliance Monitoring (Section 4.1); Compliance Risk Assessment (Section 4.2); Responding to the Compliance Issues (Section 4.3); and Follow-up (Section 4.4). These components can be represented as a series of discreet steps of the compliance-related decision-making process defined in Figure 1.

4.1 COMPLIANCE MONITORING

Compliance monitoring can be divided into two broad categories:

4.1.1 MONITORING OF REVIEWED WORKS OR UNDERTAKINGS

A work or undertaking that has undergone a *Fisheries Act* review and is subject to an Authorization or an Order should fulfill the conditions identified in the Authorization or Order. Conditions generally include measures aimed at avoiding or mitigating negative effects on fish and fish habitat, or in the particular case of an Authorization pursuant to Section 35(2) of the *Fisheries Act*, measures aimed at compensating for a harmful alteration, disruption or destruction of fish habitat (HADD).

In a case where an Authorization or Order is not necessary (i.e., where a Letter of Advice is issued or where an Operational Statement applies), the proponent of a work or undertaking is still required to apply any relevant measures aimed at protecting fish and fish habitat. The proponent of the work or undertaking should have incorporated these measures into the project description.

Monitoring by DFO staff involves verifying that the conditions of Authorizations or Orders are followed or that any measures aimed at avoiding negative effects to fish and fish habitat are applied. This can be done by obtaining reports related to the work or undertaking from the proponent or a third party (i.e., consultant), and/or by conducting site visits to verify compliance with the established conditions or requirements of the *Fisheries Act*.



4.1.2 MONITORING OF WORKS OR UNDERTAKINGS THAT HAVE NOT BEEN REVIEWED

In any compliance-related program, it is difficult to foresee all the potential events that can lead to non-compliance. Such events can include works or undertakings that DFO was previously unaware of, previously reviewed works or undertakings that are the subject of a complaint, or events related to the operation or maintenance of existing facilities and structures.

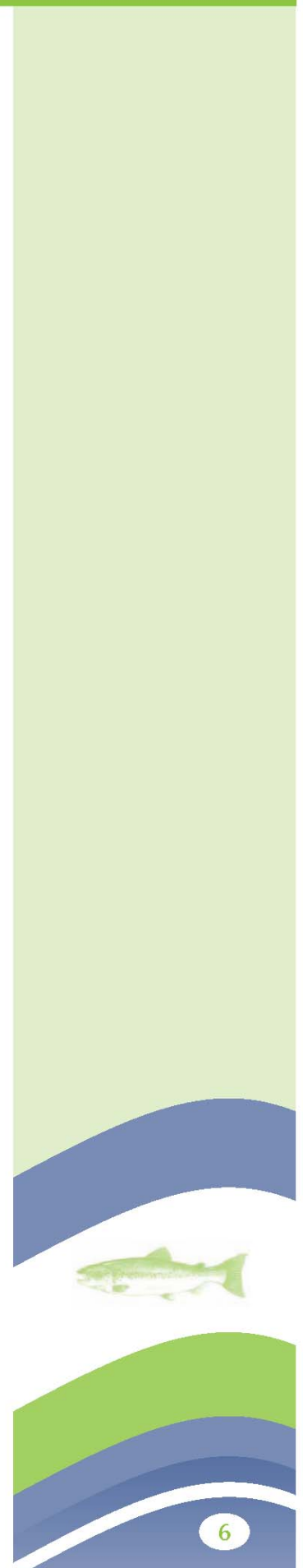
Once informed of such a situation, DFO staff may conduct preliminary monitoring of the works or undertakings to collect the information required to assess whether the habitat protection provisions of the *Fisheries Act* apply and whether there is a potential for non-compliance with these provisions. Again, this can be done by obtaining information directly from the proponent of the works or undertakings, the complainant or other regulatory agencies, or by conducting site visits to verify compliance with the requirements of the *Fisheries Act*. In all cases, DFO staff will always, as a first step, work proactively toward a voluntary solution with the owner/operator to decide what actions are needed to achieve compliance.

The level of effort invested by DFO staff in both types of monitoring should be guided by the regional strategic and operational plans.

Observations and data collected during compliance monitoring should be recorded using standard monitoring forms/reports for use during compliance assessment (see Section 4.2). Monitoring reports will also be used to assess the achievement of compliance objectives as set out in annual operational plans.

Once the necessary information has been collected, the assessment of potential non-compliance with the habitat protection provisions of the *Fisheries Act* can be initiated. Where all the conditions of an Authorization or Order have been followed, where it was determined that no fish habitat was present at the site of an occurrence, or where there is no violation of the relevant habitat protection provision of the *Fisheries Act*, no further assessment is required and it is not necessary to proceed to Section 4.2 (Compliance Risk Assessment, see Figure 1). However, a report should be completed as described in Section 5.0.

In cases where it is determined that the conditions of an Authorization or an Order are not followed, where measures proposed by the proponent to avoid adverse impacts to fish and fish habitat are not applied or are inadequately applied, or where an unforeseen event could have resulted in a violation of the habitat protection provisions of the *Fisheries Act*, a compliance risk assessment is required.



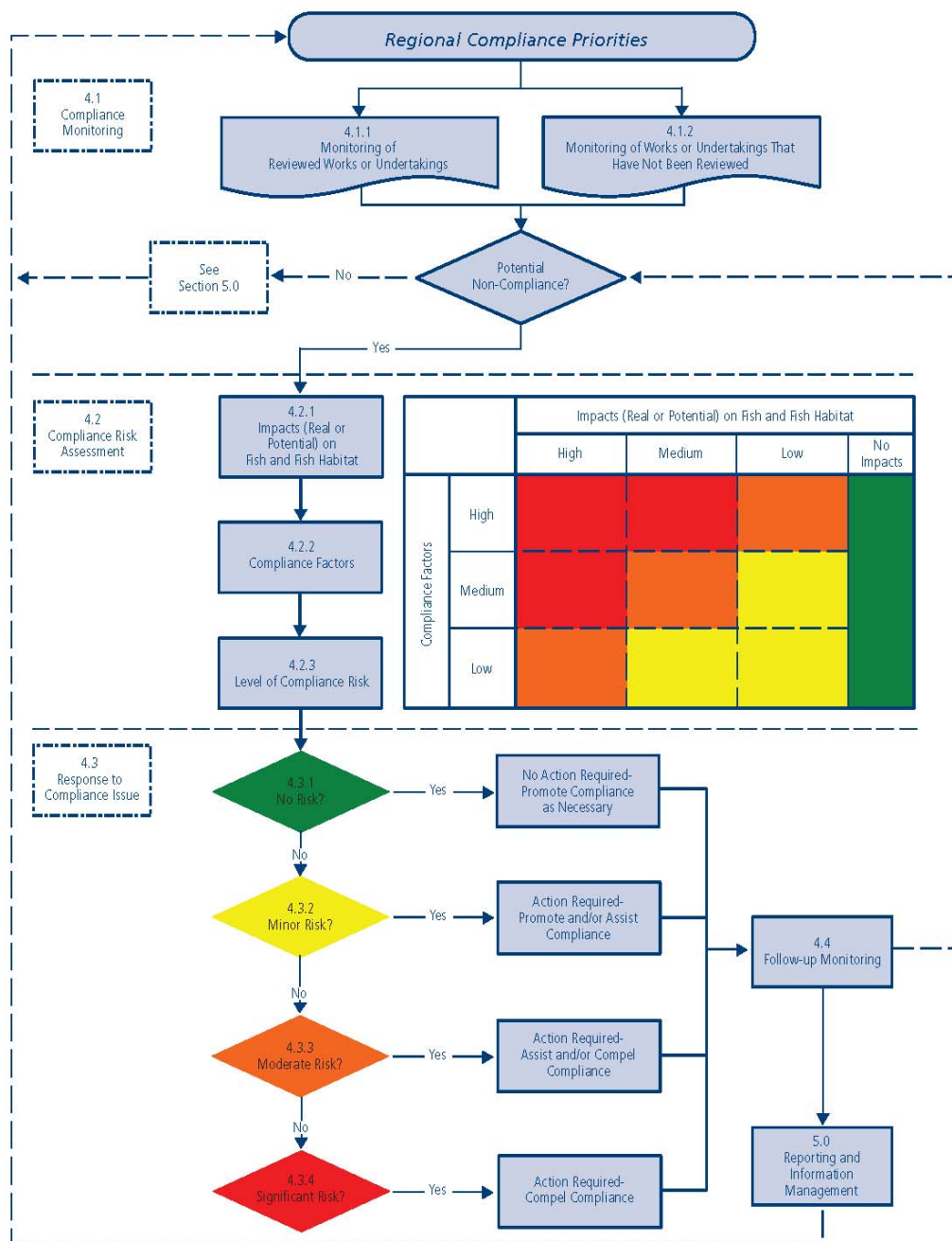


Figure 1: Process map for the application of the habitat compliance decision framework



4.2 COMPLIANCE RISK ASSESSMENT

DFO staff should use the following two-step risk assessment process to determine the type of compliance management response that will be required:

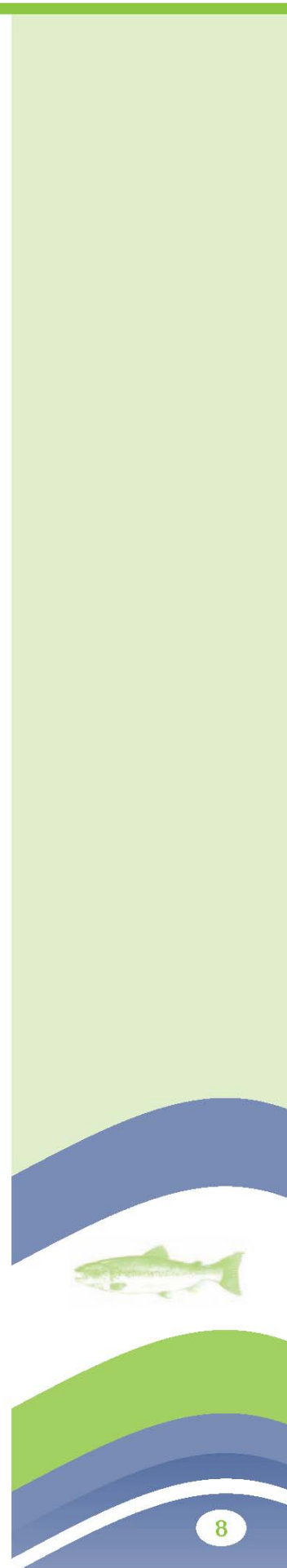
- 1) Determine the **impacts (real or potential) on fish and fish habitat** (Section 4.2.1) related to a work or undertaking.
- 2) Assess the **compliance factors** (Section 4.2.2) (assess the context within which the compliance issue occurred and other related circumstances).

The Compliance Risk Assessment Matrix (Figure 2) incorporates these two risk assessment steps in order to categorize the level of risk associated with a given compliance issue. The level of risk informs which type of compliance management response is appropriate. This process is to be completed in collaboration with C&P Program as described in the National Habitat Compliance Protocol and its regional annexes.

		Impacts (Real or Potential) on Fish and Fish Habitat			
		High	Medium	Low	No Impacts
Compliance Factors	High	Red	Red	Orange	Green
	Medium	Red	Orange	Yellow	Green
	Low	Orange	Yellow	Yellow	Green

(Red = Significant risk; Orange = Moderate risk; Yellow = Minor risk; Green = No risk)

Figure 2: Compliance Risk Assessment Matrix used to illustrate the categories of risk associated with a potential situation of non-compliance.



4.2.1 DETERMINE THE IMPACTS (REAL OR POTENTIAL) ON FISH AND FISH HABITAT

The process for determining the impacts on fish and fish habitat is similar to the process described in the *Practitioner's Guide to the Risk Management Framework for Habitat Management Staff* (DFO, 2005). This involves assessing the scale of negative effect associated with a work or undertaking in the context of the sensitivity of fish and fish habitat being affected. While the *Practitioner's Guide* is intended for assessing the risk to fish and fish habitat associated with a given **proposal** before any work has begun, this decision framework uses the same process to assess the potential impacts of a work or undertaking as the work progresses, or the real impacts that have already occurred or continue to occur.

In most cases, the approach described in the *Practitioner's Guide* will apply to the impacts assessment. However, in situations where an Authorization under the *Fisheries Act* was issued, the authorized impacts must be taken into account in determining potential impacts to fish and fish habitat. When an assessment of impacts from a given work or undertaking is completed, it should be scaled (given a rating) on the x-axis of the Compliance Risk Assessment Matrix (Figure 2) as *high, medium, low or no impacts*."

Where the impacts on fish and fish habitat can be rated as "no impacts" on the x-axis, it is not necessary to assess the compliance factors (Section 4.2.2). In such cases, the risk category is already determined (no risk, green) and the appropriate compliance management response can be applied as described in Section 4.3. In situations where the real, ongoing or potential impacts on fish and fish habitat are considered low, medium or high, it is necessary to proceed to the second risk assessment step, Section 4.2.2, before categorizing the level of risk associated with the compliance issue.



4.2.2 ASSESS THE COMPLIANCE FACTORS

The level of risk associated with compliance factors is represented by the y-axis of the Compliance Risk Assessment Matrix (Figure 2). These factors allow DFO staff to assess the particular context within which a given compliance issue may have occurred. Examples of some factors that may be considered when scaling (or rating) the risk on the y-axis of the Compliance Risk Assessment Matrix (Compliance Factors) are listed in Table 1. **It is important to note that no one factor is determinative and that every case is unique, so the weight to be given to each factor will vary with the individual case.** A more complete list of factors is provided in the *Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the Fisheries Act* (Government of Canada, 2001)⁶.

Table 1. Examples of compliance factors to be considered for a given compliance issue.

Factor	Question
The proponent's intent	Was the situation caused by a deliberate act or was it unintentional? Did the proponent obtain an economic benefit from the situation?
The proponent's willingness to comply with the habitat protection provisions of the <i>Fisheries Act</i>	Was the proponent co-operative when informed that a given work or undertaking constitutes a potential violation of the <i>Fisheries Act</i> ?
The proponent's level of diligence	Did the proponent make a reasonable effort to avoid causing impacts? (This includes heeding recommendations from DFO in the form of Letters of Advice and Operational Statements, and implementing the conditions of an Authorization)
The proponent's compliance history *	Is this the first time that the proponent has been involved in a potential situation of non-compliance?
The probability of habitat recovery	Will taking immediate action make any difference with respect to restoring or protecting habitat?
Action by other regulators	Are other regulators (federal, provincial, municipal) involved and will their intervention achieve DFO's desired compliance results?

* The compliance history is not necessarily limited to compliance with the habitat protection provisions of the *Fisheries Act*. Other federal agencies, such as Environment Canada, and provincial agencies may have relevant information that could be used to establish the compliance history of a proponent.

The assessment of the various compliance factors should allow DFO to identify the level of risk associated with the context of a given compliance issue as *low*, *medium*, or *high* (y-axis – Figure 2).

4.2.3 CATEGORIZE THE LEVEL OF COMPLIANCE RISK

Based on the assessment of impacts on fish and fish habitat (x-axis – Figure 2 and Section 4.2.1) and the assessment of the compliance factors (y-axis – Figure 2 and Section 4.2.2), the colours of the compliance risk matrix (Figure 2) can be used to identify the level of risk among four categories: *no risk* (green); *minor risk* (yellow); *moderate risk* (orange); and *significant risk* (red).

⁶ http://intra.dfo-mpo.gc.ca/hq/fishmgmt/Directorates/CP/PDF_files/TOS-412%20eng.pdf

4.3 RESPONSE TO THE COMPLIANCE ISSUE

Once the appropriate coloured box of the Compliance Risk Assessment Matrix has been identified for a given compliance issue, an appropriate course of action should be selected based on the level of risk.

4.3.1 NO RISK (GREEN)

Compliance issues do not represent any risk if they have not or will not result in impacts on fish and fish habitat and, therefore, no violation of the habitat protection provisions of the *Fisheries Act* has occurred. In such a case, no compliance management action is required. However, DFO may use the opportunity to promote compliance with the habitat protection provisions of the *Fisheries Act*.

An example of a “no risk” compliance issue would be a situation where not all of the conditions included in an Operational Statement are applied by the proponent of a given work or undertaking, but the real or potential impacts on fish and fish habitat that would result from failure to apply these measures are negligible.

4.3.2 MINOR RISK (YELLOW)

In a situation characterized as minor risk, the impacts (real or potential) on fish and fish habitat are medium to low. However, the context allows for the resolution of the non-compliance issue through a combination of compliance promotion and assistance activities by DFO staff.

An example of a minor risk issue would be where a proponent unintentionally installed a sediment trap incorrectly and a small amount of sediment entered or has the potential to enter the water. In this case, the impacts to fish and fish habitat are relatively minor and simple corrective measures could be applied quickly by informing the proponent of the problem and reminding the proponent of his/her obligations under the *Fisheries Act*.

4.3.3 MODERATE RISK (ORANGE)

Moderate risk includes two types of situations. In the first case, the potential impacts on fish and fish habitat are considered low to medium, but the risks associated with the compliance factors are considered to be relatively high. Conversely, the potential impacts to fish and fish habitat may be characterized as high but the risks associated with compliance factors may be medium to low. In each of these cases, DFO intervention would be required to bring the proponent into compliance with the habitat protection provisions of the *Fisheries Act*. Identifying the need for additional mitigation measures may help achieve habitat protection objectives. However, if the collaborative adaptive management approach fails, the use of stronger measures to compel compliance, including inspector’s orders or initiating an investigation, may be considered.



4.3.4 SIGNIFICANT RISK (RED)

A significant risk situation is one in which the potential impacts to fish and fish habitat are considered medium to high and the context surrounding the compliance issue is such that the resolution of the issue will likely require DFO to compel compliance.

An example of a compliance issue with significant risk would be one where a proponent caused the unauthorized destruction of a large area of sensitive fish habitat and, after assessment of the compliance factors in collaboration with C&P; it was found that the proponent was twice convicted of environmental offences. Since both the impacts on the fish habitat and the risk associated with the compliance factors were considered high, the compliance issue was defined as a significant risk and a decision was made to recommend prosecution of the proponent. It is important to note that not all situations categorized as significant risk will result in a recommendation to prosecute. Depending on the situation, other enforcement options could be used to achieve habitat protection and conservation objectives.

4.4 FOLLOW-UP MONITORING

It is important to confirm that measures required by DFO to address a compliance issue were implemented. DFO staff should conduct follow-up monitoring using the same procedures as described in Section 4.1.1. Where measures required by DFO are not implemented, a new compliance risk assessment may be required. The compliance factors should be reconsidered to account for the failure to implement the measures required by DFO.



5.0 Reporting and Information Management

It is important to maintain adequate records at all stages of the compliance assessment process in a nationally consistent and standardized manner. Any observations, data or analyses produced throughout the compliance management process should be recorded in the Program Activity Tracking for Habitat (PATH) system and a conclusion should be entered as to the course of action taken. Care should always be taken to avoid the inclusion of subjective information because all information may eventually be used in court proceedings should an investigation ensue.

A summary report will be required for each potential compliance issue and this report should be included in PATH for future reference. The summary report should include a description of the compliance issue, characterize the level of risk and describe DFO's response to the issue. The results of any follow-up monitoring and subsequent actions should be added as these activities are conducted. The summary report should be provided to proponents that were monitored and to anyone requesting this information⁷.

Each region will be required to provide an annual report to National Headquarters identifying the compliance monitoring activities and actions taken in each fiscal year in order to incorporate the information in the Annual Report to Parliament on the Administration and Enforcement of the habitat Protection and Pollutions Prevention provisions of the *Fisheries Act* ⁸.



⁷ Information should be managed in accordance with the provisions of the *Access to Information Act* and the *Privacy Act*: <http://www.justice.gc.ca/en/ps/atip/index.html>

⁸ http://oceans.nrc.dfo-mpo.gc.ca/habitat/hps/ppg/areport_e.asp

Glossary

Compliance Monitoring: Field or office-based collection of data to determine the conformity with a law or regulation.

Compliance Assistance: Activities aimed at assisting proponents to comply with the habitat protection provisions of the *Fisheries Act*. Assistance could include providing advice, technology transfer and developing partnerships aimed at ensuring compliance and the achievement of fish habitat and fisheries management objectives.

Compliance Promotion: Education, training, consultation and other activities aimed at raising awareness and encouraging compliance with the habitat protection provisions of the *Fisheries Act*.

Compelling Compliance: Actions aimed at compelling a proponent to comply with the *Fisheries Act*. Examples include inspector's directions, ministerial orders and prosecution.

***Enforcement:** Enforcement is achieved through the exercise or application of powers granted under legislation. Enforcement of the habitat protection and pollution prevention provisions is carried out through the following activities:

- 1) Investigations of alleged violations;
- 2) Injunctions, prosecution, court orders on conviction and civil suits for recovery of costs.

*Adapted from: <http://www.ec.gc.ca/ele-ale/default.asp?lang=En&n=D6765D33-1#2>



Annex A

Habitat Protection Provisions of the *Fisheries Act*

The following table summarizes the intent and the legislative history of key habitat protection provisions of the *Fisheries Act*:

Habitat Protection Provision of the <i>Fisheries Act</i>	Subject	Legislative History
Section 20	<p>Ensures safe passage for fish around obstructions to fish migration.</p> <p>Minister may require a fishway be constructed and maintained, and that adequate flows are provided to ensure fish passage.</p> <p>Where a fishway is not feasible, the Minister may require that a fish hatchery be established.</p>	Included in original version of the Act in 1865; amended in 1914 and 1932; not substantively changed since.
Section 22	<p>Ensures that water flows below water-control structures are maintained at a level that protects fisheries.</p> <p>The Minister may remove or destroy an obstruction to fish passage and recover costs.</p> <p>The Minister may require fish stops or diverters to be installed above and below an obstruction.</p> <p>Flows downstream of a dam, control structure or obstruction must be approved.</p>	
Section 30	<p>Water diversions or intakes may require a fish guard or screen to prevent the entrapment of fish.</p> <p>Fish guards or screens must be approved by the Minister.</p>	Introduced in 1894; amended in 1914, 1927, 1932, 1960, 1970 and 1976; not substantively changed since.
Section 32	Prohibits the destruction of fish by means other than fishing without prior approval.	Introduced in 1976; not substantively changed since.
Section 35	<p>Prohibits works or undertakings that result in the harmful alteration, disruption or destruction of fish habitat, unless authorized by the Minister or under regulations made by the Governor in Council.</p> <p>This is the most frequently applied habitat protection provision of the Act, as it applies to most projects that have the potential to negatively affect fish habitat.</p>	Introduced in 1976; not substantively changed since.

