

Policy and Practice Report

**Enforcement of the Habitat Protection and Pollution Prevention Provisions of the
*Fisheries Act***

7 March 2011

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Introduction

1. This policy and practice report (“Report”) provides an overview of the policies and practices of the Department of Fisheries and Oceans (“DFO” or “the Department”) with respect to enforcement of sections 35 and 36 of the *Fisheries Act*. It also addresses the responsibilities of the Department of Environment (“Environment Canada” or “EC” or “DOE”) with respect to section 36. This Report relies principally on information obtained from documents disclosed to the commission or otherwise made available during the commission’s investigations. The accuracy of this report is contingent on the accuracy of those documents.¹
2. This Report does not purport to be comprehensive nor authoritative, but instead aims to provide a contextual background to inform the hearings on issues of habitat enforcement. This Report should be read alongside the policy and practice report concerning habitat management (“Habitat Management PPR”). The Habitat Management PPR provides much of the context for the current report, such as the structure of the Habitat Management Program, both nationally and regionally; and recent changes in policy in respect of habitat protection, such as the Environmental Processes Modernization Plan (“EPMP”) and Habitat Compliance Modernization (“HCM”) mentioned briefly below. One topic related to habitat enforcement that is not addressed in detail in this report is enforcement related to fin fish aquaculture operations. That topic is expected to be addressed in a subsequent policy and practice report focussing on aquaculture.
3. There is a list of acronyms and abbreviations used in this Report at Appendix A.
4. This Report distinguishes between and uses the terms “compliance” and “enforcement” consistently with the descriptions set out in Canada’s 2001

¹ The commission’s Terms of Reference direct the Commissioner to use the automated documents management program specified by the Attorney General of Canada, Ringtail Legal. Some references in this Report list the unique document identifier attached to a given document by the Ringtail database, such as “CAN002605.”

Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the *Fisheries Act*.²

Compliance means the “state of conformity” with the law. Regulatory officials will secure compliance with the habitat protection and pollution prevention provisions of the *Fisheries Act* through two types of activity: promotion and enforcement.

Measures to promote compliance include:

- i) communication and publication of information;
- ii) public education;
- iii) consultation with parties affected by these provisions of the *Fisheries Act*, and
- iv) technical assistance.

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:

- i) inspections to monitor or verify compliance;
- ii) investigations of alleged violations;
- iii) issuance of warnings, directions by Fishery Inspectors, authorizations, and Ministerial orders, without resorting to court action; and
- iv) court actions, such as injunctions, prosecution, court orders upon conviction, and civil suits for recovery of costs.

Legislation and Jurisdiction

The Fisheries Act

5. The *Fisheries Act*³ contains provisions on “Fish Habitat Protection and Pollution Prevention” in sections 34 to 42.1. The key prohibitions with respect to fish habitat are set out in sections 35 and 36 as follows:

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

² Environment Canada, Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the *Fisheries Act* (November 2001) at 3

³ R.S.C. 1985, c. F-14, as am.

(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.

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).

6. In short, section 35 prohibits the harmful alteration, disruption or destruction (“HADD”) of fish habitat, and section 36 prohibits the deposit of deleterious substances into water frequented by fish.⁴ The enforcement of both these sections is discussed more fully in this Report below. For a more general discussion of the policies and practices of the Department with respect to

⁴ Section 36 is often colloquially called the “pollution prevention” provision, while section 35 is referred to as the “habitat protection” provision.

protecting fish habitat, including the issuance of authorizations for HADDs under s. 35, see the commission's Habitat Management PPR.

7. Section 36(5) goes on to describe the things that the Governor in Council may prescribe in regulations related to s. 36(4). The Governor in Council has made the following regulations under s. 36(5):⁵
 - *Chlor-Alkali Mercury Liquid Effluent Regulations*, C.R.C., c. 811;
 - *Meat and Poultry Products Plant Liquid Effluent Regulations*, C.R.C., c. 818;
 - *Metal Mining Effluent Regulations*, SOR/2002-222;
 - *Petroleum Refinery Liquid Effluent Regulations*, C.R.C., c. 828;
 - *Potato Processing Plant Liquid Effluent Regulations*, C.R.C., c. 829; and
 - *Pulp and Paper Effluent Regulations*, SOR/92-269.
8. Additionally, the Governor in Council proposed the *Wastewater Systems Effluent Regulations* in March 2010. For more information on some of the regulations developed under section 36(5), see the forthcoming commission policy and practice report related to wastewater, pulp and mining effluents.
9. The *Fisheries Act* also sets out requirements for the provision of information to the Minister on request (or without request if prescribed by regulation) in relation to “any work or undertaking that results or is likely to result in the alteration, disruption or destruction of fish habitat, or in the deposit of a deleterious substance in water frequented by fish...”⁶

⁵ Note that the Commissioner of the Environment and Sustainable Development in 2009 stated that “Environment Canada actively administers two of these regulations—the Pulp and Paper Effluent Regulations and the Metal Mining Effluent Regulations. The four remaining regulations date back to the 1970s and are based on outdated technology and practices, making them difficult to enforce.” (See: Commissioner of the Environment and Sustainable Development, Chapter 1: Protecting Fish Habitat (2009) [CAN024152] at40

⁶ *Fisheries Act*, s. 37

10. Contraventions of sections 35(1) or 36(1) or (3) may be prosecuted as summary or indictable offences, with potential penalties of fines up to \$300,000 and/or six months imprisonment for summary offences, and fines up to \$1,000,000 and/or imprisonment for up to three years for indictable offences.⁷
11. Additionally, sections 42(1) and 42(2) provide for civil liability for damages to the Crown (either federal or provincial) incurred in mitigation or remediation of any deposits of deleterious substances contrary to section 36. Further, section 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...”⁸

Division of responsibilities for sections 35 and 36

12. Sections 35 (HADDs) and 36 (deposit of deleterious substances in water frequented by fish), both give rise to broadly defined offences; some events or occurrences may give rise to offences under both provisions. For example, sediments entering water frequented by fish as a result of land clearing, road building and other land use activities, might give rise to a violation of either section 35 or 36.
13. While the Minister of Fisheries is ultimately responsible for the implementation of the *Fisheries Act*, including both sections 35 and 36,⁹ the administrative responsibility for these sections has been split between two different

⁷ *Fisheries Act*, s. 40

⁸ *Fisheries Act*, s. 42(3)

⁹ Note that the definition of Minister in s. 2 of the *Fisheries Act* sets out one exception to this: “Minister’ means the Minister of Fisheries and Oceans or, in respect of any matter related to the Northern Pipeline referred to in the Northern Pipeline Act, the member of the Queen’s Privy Council for Canada designated as the Minister for the purposes of that Act.”

departments: DFO and Environment Canada. This division has been a source of concern for some observers and within government.¹⁰

14. During the early 1970s, the respective roles and expertise of the DFO and Environment Canada developed. In a 2008 historic overview of DFO's habitat work, former DFO habitat biologist, Otto Langer, describes how by the early 1970s, DFO had a "well established pollution control unit (PCU)."¹¹ He goes on to say,

The PCU unit consisted of about 15pys but most were voluntarily transferred to the government's newly created Department of Environment – Environmental Protection Service (DOE-EPS) in 1972. DOE was established with EPS in 1971 and section 33(2) [now s. 36] of the Fisheries Act was transferred to DOE- EPS. DFO for a short time became a service in DOE—the Fisheries Service. This newly built empire, by the then Fisheries Minister Jack Davis, was reversed by Prime Minister Trudeau in the next federal election campaign due to Eastern Canada complaints that Fisheries had disappeared. DFO and DOE then became independent departments. That meant that the Fisheries Act habitat provisions (including WQ [water quality]) would now be divided between two departments and that issue has plagued water quality protection in Canada for the past four decades.¹²

15. On 17 April, 1978, Prime Minister Trudeau issued a prime ministerial directive that formalized the existing arrangements between the two departments: DFO took the administrative lead with respect to section 35 and Environment Canada took the administrative lead with respect to section 36.¹³
16. In May 1985, the DFO and Environment Canada signed a Memorandum of Understanding ("1985 MOU") on "The Subject of the Administration of Section 33

¹⁰ For example see: "Memorandum to the Director General. Fisheries and Oceans Canada and Environment Canada Administration of Section 36 of the *Fisheries Act* 2004 [CAN014253]; or Commissioner of Environment and Sustainable Development, Chapter 1 Protecting Fish Habitat (2009) [CAN024152]

¹¹ Otto E. Langer, *Historic Overview of DFO's Pacific Region Habitat Management's Workload from 1965 to 2008* [CON000123] at 2

¹² *Ibid.* at 3

¹³ See discussion in Environment Canada, *Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the Fisheries Act* (November 2001) at 1

[now s. 36] of the *Fisheries Act*.¹⁴ A DFO news release described the 1985 MOU in this way:

Under the terms of the Memorandum, the Minister of Fisheries and Oceans will continue to be legally responsible to Parliament for all sections of the Fisheries Act. For Section 33 [now 36], the Environmental Protection Service of Environment Canada will continue to administer those aspects dealing with the control of pollutants affecting fish, on behalf of the federal government. Fisheries and Oceans will cooperate with Environment Canada in the establishment of federal priorities for the protection of fish and their habitats from harmful activities.

The agreement is expected to simplify industry and provincial government dealings with the federal government on water pollution matters by setting out one responsible agency for administration. The measure promotes increased efficiency of services from the federal government and opens the way for greater cooperation with the provinces.¹⁵

17. The 1985 MOU set out the parties' agreement formalizing their roles, and included agreement on the following:¹⁶

- Regional senior managers would be responsible for communicating with each other on matters of substance and concern to the parties, such as on investigations; departmental positions; plans to release public statements; plans to consult with the public; plans to monitor and audit approved projects; funding and coordination of research and monitoring programs; proposed regulations and amendments; proposed policies on fish habitat and environmental quality; and annual program reviews;
- The parties would not discuss decisions respecting the disposition of a project application publically until the parties had discussed the matter and made determinations;
- The assistant deputy ministers would meet at least annually;
- The parties may "mutually determine such informal procedures as are needed at headquarters or in regions for purposes of rapidly communicating with each other and generally meeting the terms of this agreement;"

¹⁴ Memorandum of Understanding between the Department of Fisheries and Oceans and The Department of the Environment on the subject of the Administration of Section 33 of the *Fisheries Act*, Ottawa, Ontario May, 1985 [CAN002960]

¹⁵ Fisheries and Oceans, news release, "Fisheries and Oceans, Environment Canada Sign Memorandum of Understanding on Administration of Section 33 of the *Fisheries Act*," Tuesday, May 7, 1985 [CAN002960]

¹⁶ Memorandum of Understanding between the Department of Fisheries and Oceans and The Department of the Environment on the subject of the Administration of Section 33 of the *Fisheries Act*, Ottawa, Ontario May, 1985 [CAN002960]

- The 1985 MOU “will not require additional resources for either Party, as each Party regularly allocates funds and human resources as part of its A-Base for purposes of administering a fish habitat management program in the case of the Party of the first part [DFO] and Section 33 [now 36] in the case of the Party of the second part [DOE];”
 - The operation of the 1985 MOU would be reviewed annually; and
 - Appropriate working agreements could be developed in particular regions and may become annexes to the 1985 MOU.
18. In 1987 Environment Canada and DFO in BC and the Yukon signed a regional working agreement (the “Regional Working Agreement” or “RWA”).¹⁷ The stated purpose of this agreement is “to identify DOE and DFO 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.”¹⁸ The RWA provides for such things as annual reviews, arbitration procedures, technical roles, division of responsibilities for interagency permit referrals, emergency responses, communications, and enforcement and compliance procedures.
19. Clause 2.1 on technical roles states, in part, that the Environmental Protection Directorate of DOE (“EP”) will “conduct enforcement activities in accordance with established policies and procedures; provide other relevant technical expertise; review all planned prosecutions under Section 33 [now 36] in accordance with the DFO Habitat Prosecution Procedures Paper.” Similarly, DFO will “conduct enforcement activities in accordance with established policies and procedures; and review all prosecutions planned by EP under Section 33 [now 36] consistent with DFO’s Fish and fish habitat mandate in BC and Yukon.”¹⁹

¹⁷ Regional Working Agreement Between the Department of Environment and the Department of Fisheries & Oceans for Administration of Section 33 of the *Fisheries Act* in British Columbia and Yukon, Vancouver, BC, Signed 19 June 1987 [CAN006053]

¹⁸ *Ibid.* at clause 1.1

¹⁹ *Ibid.* at clause 2.1

20. The Regional Working Agreement also speaks to responding to major events, such as spills or discharges of large volumes of oil or other substances posing a threat to fish.²⁰ DOE's EP Environmental Emergencies Branch will coordinate such responses in accordance with a Federal-Provincial MOU on spill responses. DFO will respond to requests from EP for assistance, and "In remote areas, initial coordination of response procedures may be assumed by DFO in consultation with EP Environmental Emergencies Branch."²¹
21. The Regional Working Agreement says that "enforcement and compliance procedures will be consistent with the national enforcement and compliance policy currently under development by DOE, DFO and DOJ".²² (The enforcement and compliance policy, ultimately published in 2001, is discussed further below.)
22. Finally, the 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 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...²³

23. In recent years, DFO has internally discussed whether the current arrangements for administration of section 36 of the *Fisheries Act* are working.²⁴ A 2004 internal DFO memorandum indicates the following "key flaws" in the current arrangements:
 - "EC has not been sufficiently proactive in the administration and enforcement of section 36; and
 - In the eyes of the public and stakeholders, DFO is *de facto* held accountable for activities we expect EC to carry out."²⁵

²⁰ *Ibid.* at clause 2.9.1

²¹ *Ibid.*

²² *Ibid.* at clause 4.2

²³ *Ibid.* at clause 4.3

²⁴ See, for example, "Memorandum to the Director General. Fisheries and Oceans Canada and Environment Canada Administration of Section 36 of the *Fisheries Act*' 2004 [CAN014253]

²⁵ *Ibid.* at p. 5

24. The memorandum discusses three potential options in respect of section 36: “repatriation” to DFO; a full transfer along with responsibility for the legislative provisions to DOE; or renegotiation of the 1985 MOU.²⁶ To date, none of these options have been concluded, though DFO’s Conservation and Protection (“C&P”) Program identified a review of the 1985 MOU as a national priority for 2010-11, following on the heels of the Commissioner of Environment and Sustainable Development’s (“CESD’s”) recommendation that such a review be completed (discussed below).²⁷
25. The current report deals primarily with DFO’s policies and practices in respect of enforcing section 35 of the *Fisheries Act*. To the extent possible, given that document disclosure from Canada in respect of government departments other than DFO has not been completed at the time of writing, this report also deals with EC’s policies and practices in respect of enforcing section 36.

Annual reports to Parliament

26. The Minister of Fisheries is required to prepare annual reports on the administration and enforcement of the fish habitat and pollution prevention provisions of the *Fisheries Act*.²⁸ The “Annual Report to Parliament on the Administration and Enforcement of the Fish Habitat Protection and Pollution Prevention Provisions of the Fisheries Act” speak to both DFO’s Habitat Management Program and Environment Canada’s Pollution Prevention Program, highlighting the two department’s national and regional activities.²⁹ The majority of each annual report summarizes DFO’s habitat management initiatives, such as the numbers of referrals dealt with and authorizations granted under s. 35 of the *Fisheries Act*. However, the annual report also provides summaries of charges laid and prosecutions completed under both section 35 and 36 on a regional basis.

²⁶ *Ibid.* at p. 5

²⁷ Conservation and Protection Program – National Priorities 2010/11 [CAN251560]

²⁸ *Fisheries Act*, s. 42.1

²⁹ See, for example, the reports for 2002-2003 [CAN014475], 2003-2004 [CAN014511], 2004-2005 [CAN015844], 2005-2006 [CAN027789], and 2007-2008 [CAN180495]

Provincial laws and federal–provincial agreements

27. While the federal government has constitutional responsibility for sea coast and inland fisheries, the province has exclusive power over property and civil rights in the province.³⁰ A discussion of the division of powers on matters related to fish and fish habitat generally is found in the commission’s policy and practice report entitled “Legislative Framework Overview” dated November 1, 2010. Many of the activities regulated by the province (e.g., forestry, mining, land use and development) may impact upon fish habitat. Accordingly, these activities may have to comply with both federal and provincial laws in conducting these activities.
28. In addition to sanctions imposed in industry specific legislation,³¹ the Province of BC has enacted the *Wildlife Act*,³² which makes it an offence if a person “alters, destroys or damages wildlife habitat, or deposits on land or water a substance or manufactured product or by product in a manner that is harmful to wildlife or wildlife habitat in a wildlife management area...”³³ “Fish” fall within the definition of wildlife.³⁴ Wildlife management areas are specific areas designated under the *Act*.³⁵ The penalties for contravention include fines and imprisonment³⁶ and may be supplemented with “creative sentencing” measures. For example, a convicted person might be directed to pay the government “an amount of money as compensation, in whole or in part, for the cost of any remedial or preventative action taken by or caused to be taken on behalf of the government as a result of the commission of the offence.”³⁷

³⁰ *Constitution Act, 1867*

³¹ Some industry-specific provincial legislation will be discussed in forthcoming policy and practice reports by the commission.

³² *Wildlife Act*, R.S.B.C. 1996, C. 488

³³ *Ibid.*, at s. 7

³⁴ *Wildlife Act*, s. 1

³⁵ *Ibid.* at s.4

³⁶ *Ibid.* at s. 84

³⁷ *Ibid.* at s. 84.1

29. The province has designated conservation officers under its *Environmental Management Act*³⁸ to enforce the *Wildlife Act* as well as the *Environmental Management Act* and other provincial environmental statutes such as the *Water Act*,³⁹ and the *Water Protection Act*.⁴⁰ The powers of conservation officers are set out in Part 9 of the *Environmental Management Act*.
30. As discussed more fully in the commission's Habitat Management PPR, in 2000, Canada and British Columbia signed a Fish Habitat Management Agreement.⁴¹ This agreement provides for the establishment of a "Federal-Provincial Habitat Management Committee which would meet annually and would, among other things, "examine and pursue opportunities to enable additional cross-designation of fish habitat protection enforcement powers."⁴² It also provides for the establishment of "Local Habitat Management Committees" to develop a coordinated local approach to the following (among other things):
- 4.2.8 Improved fish habitat protection enforcement including but not limited to:
- a) setting enforcement priorities in consultation with respective enforcement staff;
- b) examining options for enforcement and technical support teams that will specialize in fish habitat protection enforcement issues; and,
- c) sharing of expert witnesses and technical support within the region;⁴³
31. In 2002, the British Columbia Conservation Officer Service and the DFO's Conservation and Protection Pacific Region signed a memorandum of understanding respecting "Mutual Assistance."⁴⁴ Aside from clauses related to disclosure of documents or information, and to limitations on liability, the

³⁸ *Environmental Management Act*, S.B.C. 2003 c. 53

³⁹ *Water Act*, R.S.B.C. 1996, c. 483

⁴⁰ *Water Protection Act*, R.S.B.C. 1996, c. 484

⁴¹ Canada - British Columbia Fish Habitat Management Agreement, 13 July 2000 [CAN094864] and see date on CAN010966.

⁴² *Ibid.* at clause 4.1.6, p. 3

⁴³ *Ibid.* at clause 4.2.8, p. 4

⁴⁴ Memorandum of Understanding between British Columbia Conservation Officer Service and Department of Fisheries and Oceans Conservation and Protection Pacific Region Respecting Mutual Assistance. Original MOU Effective Date September 5, 2002 – Revision 2 Effective Date July 15, 2007. [CAN002981]

remainder of the document is “not legally binding.”⁴⁵ 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.⁴⁶

The Conservation and Protection Program

Program Overview

32. The Department’s C&P Program “promotes and maintains compliance with legislation, regulations and management measures implemented to achieve the conservation and sustainable use of Canada’s aquatic resources, and the protection of species at risk, fish habitat and oceans.”⁴⁷
33. Habitat related enforcement activities are only one small part of C&P’s work. For 2009, six percent of C&P’s total program effort, nationally, was spent on “habitat” initiatives, compared to 44 percent on commercial fishing, 23 percent on recreational fishing, and 10 percent on aboriginal fishing.⁴⁸ Other program efforts nationally include work related to the Canadian Shellfish Sanitation Program, seal hunt, foreign fishing and the *Species at Risk Act*.⁴⁹
34. C&P is a largely decentralized organization, with a staff of less than 30 at national headquarters. In comparison, in 2009, C&P Pacific Region had approximately 34 different offices with 161 fishery officers.⁵⁰

⁴⁵ *Ibid.* at clause 1.4

⁴⁶ Cross-designation of fishery officer powers for provincial habitat enforcement officers is also referred to in Government of Canada, *Fisheries Act* Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy, July 2001 [CAN015912] at 7, and in Conservation and Protection Program National Outlook 2009 [CAN185940] at 11

⁴⁷ Conservation and Protection Program National Outlook 2009 [CAN185940] at 7

⁴⁸ *Ibid.* at 8

⁴⁹ *Ibid.* at 8

⁵⁰ Conservation and Protection Program National Outlook 2009 [CAN185940] at 12

35. There is a functional relationship between C&P nationally and regionally, but no reporting relationship. The national director general of C&P (Paul Steele at time of writing) reports to the Assistant Deputy Minister of Ecosystems and Fisheries Management, who in turn reports to the Deputy Minister. The Pacific Regional Director of C&P (Randy Nelson at time of writing) reports to the Regional Director General (Sue Farlinger at time of writing). In response to the 2005 Williams Inquiry and the 2005 Report of the Standing Committee on Fisheries and Oceans, C&P implemented line reporting⁵¹ in the Pacific Region on a pilot project basis in 2005.⁵² In 2008 line reporting was adopted for C&P regions across Canada.⁵³ Each fishery officer reports directly to a field supervisor. Field supervisors report to detachment supervisors, who report to the C&P area chiefs, who in turn report to the C&P Regional Director.⁵⁴
36. C&P delivers its programs through DFO's National Compliance Framework,⁵⁵ based on three pillars:
- "Education/shared Stewardship;
 - Monitoring, Control and Surveillance; and
 - Major Case/Special Investigations."⁵⁶

⁵¹ Stratos Inc. describes "line reporting" as follows: "Line reporting: enforcement activities are centralized in an organization that specializes in enforcement within the Ministry or Department. Officers report up the line to Headquarters to a senior manager who is a member of the Ministry or Department management team. Enforcement priorities are set at the Ministry or Department level, taking into account regional and other programmatic considerations." See: Stratos Inc. Organisation of Enforcement Activities in Selected Natural Resource Agencies, Working Paper Submitted to: Department of Fisheries and Oceans Audit and evaluation Directorate (7 February 2007) [CAN244652] at 2

⁵² Regional Management Committee Decision Paper (8 November 2005) [CAN018647]; and Stratos Inc., Evaluation of the Pacific Region Conservation and Protection Pilot Line Reporting Project (12 June 2007) [CAN024022] at 4-6

⁵³ Backgrounder: Improving the Conservation and Protection Program by Changing to a Line Reporting Organizational Structure [CAN019963]

⁵⁴ See generally, discussion of reporting in Fisheries and Oceans Canada, Management Review Assignment Report Draft 3.0 (5 January 2009) [CAN096034] at 7-9

⁵⁵ The purpose of the DFO National Compliance Framework is to "provide a solid foundation for the activities the department undertakes to achieve and maintain compliance. It stems from the DFO Compliance Review and Modernization initiative aimed at re-orienting the departmental compliance program, integrating cross-sectoral compliance issues and needs in a comprehensive compliance regime." Fisheries and Oceans Canada, National Compliance Framework [CAN285247]

37. Several principles underlie the National Compliance Framework:

- “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 under-taken to achieve compliance).”⁵⁷

38. A “risk profile” of C&P conducted in June 2008 by a consultant found the organization, nationally, to be at high risk (defined as requiring action by the Deputy Minister within six months) for “events” to occur in a number of categories including voluntary compliance, knowledge, civil disobedience, departmental compliance, and human resource capacity.⁵⁸ The study does not specifically address habitat-related risks. However, in a C&P Pacific Integrated Risk-Based Workplanning Pre-season Session held on February 23-26, 2009, “Habitat Management” was identified as an activity that faced risk in both “roles and responsibilities” and in “voluntary compliance.”⁵⁹ C&P Pacific Region listed its risk mitigation strategies for habitat management in 2009 as follows:

- “Develop and operationalize the Area Operational Protocols for habitat (HCM Annex) [all Areas Chiefs + Director]

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Interis, “Fisheries and Oceans Canada Conservation and Protection Risk Profile 2009” (23 June 2008) [CAN285248]

⁵⁹ C&P Pacific Integrated Risk-Based Workplanning Pre-Season Session (23-26 February 2009) [CAN178071] at 7

- Clarify roles and responsibilities in the new Area Operational Protocols (HCM Annex) through C&P-HMP joint training; Director to follow-up with RD OHESAR to gain commitment for joint Chiefs workshop [Director]
- Establish formal process for determining habitat priorities by watershed and/or strategic objectives of HMP; strategic planning exercise would make efforts more effective and clarify what part of work to respond to, given the high volume
- Assess participation on intergovernmental habitat roundtables (eg Cowichan) – very labour intensive but results are being seen – is it worth the level of resources and cost to other program areas?⁶⁰

Enforcement personnel and responsibilities

39. The *Fisheries Act* allows the Minister to designate people as “fishery officers,”⁶¹ “fishery guardians”⁶² and “inspectors.”⁶³ Fishery officers and guardians are appointed “for the purposes of this *Act*”⁶⁴ and their powers are set out in sections 49-56.⁶⁵
40. Both fishery officers and fishery guardians have **powers of inspection** under the *Act*. A fishery officer or fishery guardian “may enter and inspect any place, including any premises, vessel or vehicle, in which the officer or guardian believes on reasonable grounds there is any work or undertaking...in respect of which this *Act* or the regulations apply”⁶⁶ including conducting tests or analyses and taking measurements, and requiring any person to produce books, records, or other documents that “the officer or guardian believes on reasonable grounds contain information that is relevant to the administration of this *Act* or the regulations.”⁶⁷ One limit on the powers of inspection is that a fishery officer or

⁶⁰ *Ibid.* at 12

⁶¹ *Fisheries Act*, s. 5

⁶² *Fisheries Act*, s. 5

⁶³ *Fisheries Act*, s. 38

⁶⁴ *Fisheries Act*, s. 5

⁶⁵ See also, FA-LP 301 Habitat Inspections & Investigations, Reference Binder, Version 1.0, September 2008 [CAN027769] at pp. 2-13; and discussion of powers in Environment Canada, Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the *Fisheries Act* (November 2001) at 6-11

⁶⁶ *Fisheries Act*, s. 49(1)

⁶⁷ *Fisheries Act*, s. 49(1) (a) – (d)

guardian may not enter a “dwelling-house without the consent of the occupant except under the authority of a warrant issued under subsection (3).”⁶⁸

41. A fishery officer also has **powers of search** in certain circumstances. A fishery officer with a warrant “may enter and search any place, including any premises, vessel or vehicle, in which the officer believes on reasonable grounds there is (a) any work or undertaking that is being or has been carried on in contravention of this *Act* or regulations...”⁶⁹ A fishery officer may also exercise the power of search without a warrant “if the conditions for obtaining the warrant exist but by reason of exigent circumstances it would not be practical to obtain the warrant.”⁷⁰ “Exigent circumstances” include those “in which the delay necessary to obtain the warrant would result in danger to human life or safety or the loss or destruction of evidence.”⁷¹
42. Both fishery officers and fishery guardians may **arrest without warrant** a person who they believe “on reasonable grounds, has committed an offence against this *Act* or any of the regulations” or who is in the purpose of committing such an offence.⁷²
43. Fishery officers and fishery guardians also 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*...”⁷³
44. Inspectors, appointed under section 38 of the *Act*, also have powers of inspection (without a warrant) and search (with a warrant), however both of these powers are limited to places, premises, vehicles or vessels “other than a private dwelling

⁶⁸ *Fisheries Act*, s. 49(2)

⁶⁹ *Fisheries Act*, s. 49.1 (1)

⁷⁰ *Fisheries Act*, s. 49.1(3)

⁷¹ *Fisheries Act*, s. 49.1(4)

⁷² *Fisheries Act*, s. 50

⁷³ *Fisheries Act*, s. 51

place,” including a “temporary” private dwelling place in respect of searches.⁷⁴ As with fishery officers and guardians, an inspector may search without a warrant only if the “conditions for obtaining the warrant exist but by reason of exigent circumstances it would not be practical to obtain the warrant.”⁷⁵ Inspectors do not have powers of arrest or seizure.

45. Inspectors have one power that fishery officers and 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.”⁷⁶ Fishery officers who also have an inspector designation are also able to issue inspector’s directions.
46. Training and recruitment of fishery officers is coordinated on a national basis through the Fishery Officer Career Progression Program.⁷⁷ Training takes approximately 34 months, including 17 weeks of classroom training and nine weeks at the RCMP Academy in Regina.⁷⁸ Training includes “fish identification, conducting patrols, communication, negotiation and enforcement methods in support of the Department’s mandate to conserve and protect fisheries resources.”⁷⁹ In 2009, C&P reported on fishery officer graduate numbers as follows:

The number of Fishery Officer Graduates fluctuated significantly over the past ten years. Between 1999 and 2002, there were between 48 and 60 Fishery Officer Graduates per year. Starting in 2003, the number of Fishery Officer graduates declined due to decreases in C&P’s recruitment budget. In fact, a hiring freeze was instituted in 2004, resulting in zero graduates in 2005. More

⁷⁴ *Fisheries Act*, s. 38 (3), (3.1)

⁷⁵ *Fisheries Act*, s. 38(3.4)

⁷⁶ *Fisheries Act*, s. 38 (4), (5) and (6)

⁷⁷ Fishery Officer Career: Training and Recruitment (webpage) [CAN185465]

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

aggressive recruitment since 2006 has helped stabilize the workforce and meet many of our program needs. C&P is now close to its full operating capacity.⁸⁰

47. In 2010, Pacific Region C&P proposed, for discussion, that fishery officers be designated as “Special Provincial Constables” in order to give them “clarity when facing unique enforcement challenges” such as “criminal activity outside of their fisheries enforcement mandate.”⁸¹ The proposed Special Provincial Constable designation “is not meant to be a mandate creep but simply a measure the department is taking in order to minimize liability to officers that are faced with exigent circumstances in the course of their duties that fall outside of *Fisheries Act* enforcement.”⁸²

Data management systems

48. C&P 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.⁸³ FEATS enables officers to assign a work element to their hours (e.g., “Aboriginal – Salmon” or “Habitat – Forestry”).⁸⁴ It can then be used to generate reports of time spent by officers on various activities in different geographical areas.⁸⁵ DFO staff has internally discussed concerns about the accuracy of FEATS data due to possible inconsistencies in the way fishery officers enter data into the system.⁸⁶

⁸⁰ Conservation and Protection Program National Outlook 2009 [CAN185940] at 23

⁸¹ Pacific Region C&P Special Provincial Constable Designation Discussion February 1st, 2010 (Revised March 30th 2010) [CAN203359] at 2

⁸² *Ibid.*

⁸³ For an example of the FEATS interface see CAN265250

⁸⁴ See list of FEATS activities and work elements at CAN285252. See also Fisheries Enforcement Activity Tracking System Glossary of Terms. Draft (August 2008) [CAN223108]

⁸⁵ For example, see “FEATS Email Report” (24 February 2009) [CAN130719]

⁸⁶ See various emails concerning “FEATS – inconsistency in Data Entry” and “FEATS Definitions”: CAN158660, CAN158658, CAN219160, CAN158656, and CAN219093

49. C&P also uses a violation tracking database called the Departmental Violation System (“DVS”). DVS is used by fishery officers to track occurrences and violations (described below), 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”).⁸⁷
50. Another database used in habitat work, thought not accessible by fishery officers directly, is Program Activity Tracking for Habitat system (“PATH”), which is described, along with other habitat related databases, in the commission’s Habitat Management PPR.
51. In recent years C&P has transitioned FEATS and DVS into web-based platforms with improved functionality.⁸⁸ FEATS and DVS are incompatible with and not integrated with PATH.

Priority setting and time spent on “habitat”

52. As noted above, habitat enforcement is only one component of the work undertaken by C&P. With fishery officers being responsible for enforcement of the fisheries provisions of the *Fisheries Act* as well as habitat, some critics say that habitat falls to the wayside as so few resources are devoted to habitat enforcement.⁸⁹
53. Estimates of the time spent by fishery officers in the Pacific Region on habitat issues vary. One estimate based on FEATS data for 2009, says that fishery

⁸⁷ See list of DVS fields CAN285251 and example of the DVS Main Screens [CAN285249]

⁸⁸ Fisheries and Oceans Canada Pacific Region Implementation Plan 2006-2010 Report on Progress as of March 2008 [CAN022344] at 9

⁸⁹ For example, see: David Suzuki Foundation, *The Will to Protect: Preserving B.C.’s Wild Salmon Habitat* (2006) [CAN024219] at 8

officers in the Pacific Region spent 9.5 percent of their total time on “habitat enforcement”; the remainder on “fisheries enforcement.”⁹⁰ Another document, also based on FEATS, shows that, out of the total number of hours logged by fishery officers, 3.61 percent were attributed to “habitat” in 2009. However, that same document shows that fishery officers identified “no work element” for 59.35 percent of their hours.⁹¹ From 2001 to 2010, the percentage of hours spent by fishery officers on habitat in the Pacific Region has varied from a low of 3.61 to a high of 10.61 (in 2003); “no work element identified” ranged from 55.47 to 64.21 percent of the hours logged.⁹² Also, the amount of time fishery officers spend on habitat related work in different areas of the Pacific Region varies. For example, for the 2009-10 fiscal year, the Fraser Coastal Area (within the Lower Fraser Area) only spent one percent of its fishery officer effort on habitat.⁹³

54. As part of the commission’s investigation, commission counsel requested that C&P look at the FEATS data 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 verses 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. They suggest that, on average for the last 12 years, 16.65 percent of all fishery officer hours and 12.2 percent of patrol hours are spend on habitat work. Time spent on habitat appears to have dropped significantly in 2005 – from 22.88 percent in 2004 to 13.81 percent in 2005 and lower since then.

⁹⁰ Hours Pacific/Pacifique [CAN285253]

⁹¹ 2001-2010 – Regional % by category. Document received from Randy Nelson (17 February 2011).

⁹² *Ibid.*

⁹³ Email from Herb Redekopp to Glenn Kostiuk et al, “Workplanning for 2010/2011” (7 May 2010) [CAN130509]

55. Since 2004-05, C&P has used an Integrated Risk Management (“IRM”) process to design its programs and to establish operational priorities in the Pacific Region.⁹⁴
56. C&P’s national priorities for 2010/11 includes the following in relation to habitat issues:
- “Response to the Auditor General’s report on Habitat enforcement – continue to report on progress
 - National Habitat Compliance Management Protocol (role of inspectors) – NHQ to lead discussions with Habitat Management on the roles and responsibilities of C&P related to monitoring, occurrences and all enforcement actions
 - Review of MOU with Environment Canada on s. 36 delegation – NHQ to work closely with Habitat Management and EC on the review of the MOU”⁹⁵
57. C&P Pacific Region’s priority statement for 2010/11 ranked habitat compliance as its fifth priority, ahead of commercial and recreational fisheries; aquaculture ranked first.⁹⁶ Interestingly, the Pacific priority statement describes both “habitat management” and “aquaculture” as having high importance but low achievability.⁹⁷

Funding and resources

58. In the last two decades, the Department has made several cuts to the number of fishery officers in the Pacific Region.⁹⁸
59. As described in a 2010 letter to C&P regional directors from National Director General Paul Steele, C&P has a salary shortfall problem and is likely facing further budget reductions and uncertainty from the 2010-2011 departmental strategic review:

⁹⁴ Fisheries and Oceans Canada Pacific Region Implementation plan 2006-2010 Report on Progress as of March 2008 [CAN022344]

⁹⁵ Conservation and Protection Program – National Priorities 2010/11 [CAN251560]

⁹⁶ C&P Priorities Statement F2010-11 National & Pacific Region. Final May 27, 2010. [CAN178147]

⁹⁷ *Ibid.* at p. 8

⁹⁸ Email from Randy Nelson to Paul Steele “FW: Aquaculture recruitment” (29 April 2010) [CAN115283]

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 2010.⁹⁹

60. C&P Pacific Region did receive funding in 2010 for new fishery officer positions to be dedicated to aquaculture enforcement.¹⁰⁰

Enforcement of Sections 35 and 36 of the *Fisheries Act*

61. As noted above, the administrative responsibilities for sections 35 and 36 of the *Fisheries Act* have been spread over two departments: DFO and EC. Irrespective of which department takes the lead for investigations and prosecutions, the enforcement tools and procedures are common to both. However, the division of labour between the two departments is not always clear. Indeed, in the past decade, “more than half of the convictions under s. 36 have been the result of prosecutions by DFO.”¹⁰¹
62. Enforcement procedures, such as inspections or investigations are initiated in response to an occurrence. The terms “occurrence” “inspection” “investigation” and “violation” are defined in the National Habitat Compliance Protocol (2010), discussed further below, as follows:

“Inspection” means the carrying out of a detailed systematic field examination based on the premise that an activity, or certain work or undertaking is subject to regulatory requirements.

⁹⁹ See Email from Paul Steele to Randy Nelson et al, “Strategic Priorities Letter” (16 June 2010) [CAN251558] attaching Letter to C&P Directors [CAN251559]

¹⁰⁰ Enforcement in respect of aquaculture will be discussed in a forthcoming policy and practice report on aquaculture issues.

¹⁰¹ FA-LP 301 Habitat Inspections & Investigations Reference Binder Version 1.0 (September 2008) [CAN027769 at 16

“Investigation” means the systematic gathering of evidence of a suspected violation, conducted when there is suspicion that a violation has occurred, or when there are reasonable grounds to believe that an offence is being or has been committed.

“Occurrence” means an observed or reported incident which is a potential violation of a statute or regulation.

“Violation” means the act or instance of failing to comply with provisions of a statute or regulation.¹⁰²

63. DFO has produced a “Habitat Inspections & Investigations Reference Binder,” which was developed by the National Training Program for the Habitat Management Directorate.¹⁰³ It provides descriptions of what fishery officers, guardians and inspectors might do at each stage of the enforcement process, including information on the following:¹⁰⁴

- Occurrences/incidents;
- Site visits – gathering evidence, stopping offences in progress, arrests, seizures, inspector directions;
- Determining the appropriate responses to occurrences and violations, including prosecutions, warning letters, official warnings and voluntary remediation; and
- In the event that prosecution is deemed the appropriate response, detailed information on how to put together a court brief.

64. The “FA-LP 301 Habitat Inspections & Investigations Reference Binder”¹⁰⁵ provides a fulsome description of the roles of investigators, experts, prosecutors, case coordinators and the process for the prosecution of a habitat offence.

65. Similarly, Environment Canada’s Enforcement Branch in the Pacific Region uses a “Regional Investigations Team Standard Operating Procedures” (“SOP”) to

¹⁰² National Habitat Compliance Protocol between Habitat Management Program and Conservation and Protection Directorate (December 2010) at clause 4.0. See also, similar definitions used by Environment Canada in NEMISIS Version 4.5 Emergencies and Enforcement Terminology Information Management Services. Draft – May 29, 2006 Version 1.10. [CAN299726]

¹⁰³ FA-LP 301 Habitat Inspections & Investigations Reference Binder Version 1.0 (September 2008) [CAN027769]

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

ensure that its investigations under s. 36(3) of the *Fisheries Act* and other environmental legislation are “conducted in a manner conducive to a successful prosecution.”¹⁰⁶ The SOP includes discussion of roles and responsibilities of investigative team members and advice on how officers should respond to environmental incidents, secure the scene, and collect evidence, among other things.¹⁰⁷

The role of C&P and others in enforcing habitat protection (section 35)

66. Responsibilities for habitat enforcement and compliance are shared between DFO’s habitat staff and C&P.¹⁰⁸ In the Pacific Region, DFO’s national Habitat Management Program (“HMP”) is administered by the Oceans, Habitat and Enhancement Branch (“OHEB”).¹⁰⁹
67. In 2005 Minister Geoff Regan announced a new action plan for sustainable development in DFO, including a “science-based risk management framework to protect fish habitat under the Environmental Process Modernization Plan” (“EPMP”).¹¹⁰ The sixth element of EPMP is Habitat Compliance Modernization (“HCM”).¹¹¹ An internal DFO update describes the impact of EPMP and HCM for habitat and C&P staff as follows:

Under EPMP (including HCM) the DFO HMP will be moving from a strict “control” based habitat management framework to a Risk Management Framework approach, which will help focus effort on high risk activities. Lower risk activities will be managed proactively with a strong focus on education, stewardship and the application of transparent guidelines and best management practices. HCM requires an adjustment in the roles and responsibilities of HMP and C&P staff in

¹⁰⁶ Environment Canada Enforcement Branch Environmental Enforcement Division Pacific and Yukon Region, Regional Investigations Team Standard Operating Procedures (16 January 2009) [not available in Ringtail]

¹⁰⁷ *Ibid.*

¹⁰⁸ See Environment Canada, Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the *Fisheries Act* (November 2001) at 6

¹⁰⁹ For more details about DFO’s Habitat Management Program, see the commission’s Habitat Management PPR.

¹¹⁰ Draft news release: Regan announces new action plan for sustainable development [CAN011819] (Final news release available on DFO website: <http://www.dfo-mpo.gc.ca/media/npres-communication/2005/hq-ac10-eng.htm>)

¹¹¹ Both EPMP and HCM are discussed in detail in the Habitat Management PPR.

the delivery of the department's overall habitat compliance management program. These modified roles and responsibilities will be documented in the National Habitat Compliance Protocol between the programs, and operational details will be described in a regional annex to that Protocol.¹¹²

68. Around the same time, DFO announced it would be cutting 24 fishery officers from the Pacific Region over three years. The rationale was as follows:

DFO will be shifting habitat protection away from traditional enforcement activities to compliance monitoring and stewardship. There will be some reductions in Fishery Officer positions in B.C., but the remaining officers will be able to concentrate their efforts on fisheries enforcement, including poaching on the Fraser River.¹¹³

(Twelve of those 24 fishery positions were eventually returned to C&P.¹¹⁴) Habitat personnel were to take on a greater role in compliance monitoring, while C&P would spend less time on habitat, only responding to high risk incidents, budgets allowing. As described in an email chain from the spring of 2005, budgets in the BC Interior allowed at that time "for only 1-3 incidents to be responded to each year," despite there being 20-30 incidents warranting C&P review.¹¹⁵ From 2004 to 2005, habitat enforcement by C&P in the BC Interior (measured by patrols, patrol hours, and sites checked) "was seriously impacted with reductions of 75% each and violations observed down by 1,000% (32 in 2004 vs 3 in 2005)."¹¹⁶

69. Within C&P, fishery officers enforce all provisions of the *Fisheries Act*, including both the fisheries-related and habitat-related provisions. However, over the years there have been some changes in how the habitat related work is distributed among fishery officers. As of the mid-1990s, C&P Pacific Region had some

¹¹² Email from Greg Savard to XPAC OHEB ALL and XPAC FM C&P ALL "FW: Update on HCM – from Directors of OHEB and C&P" (18 October 2006) [CAN158546]; see also: Memorandum to Habitat Management Staff Pacific Region from Denis D'Amours A/Regional Director, OHEB, "Habitat Compliance Modernization – Conference Call to update staff on implementation in Pacific Region" (14 December 2005) [CAN038587]

¹¹³ Salmon Poaching on Fraser River (25 February 2005) [CAN009884]

¹¹⁴ Email from Randy Nelson to Paul Steele "FW: Aquaculture recruitment" (29 April 2010) [CAN115283]

¹¹⁵ Email from Susan Farlinger to Greg Savard "Fw: Habitat occurrences in the Kootenays" (18 April 2005) [CAN128984]

¹¹⁶ BC Interior C&P Summary (2005) [CAN043594] at 3

dedicated “habitat” fishery officers who specialized in the investigation of HADDs, and had identified a need for additional habitat specialized officers.¹¹⁷ Currently, no fishery officers work exclusively on habitat, though in 2010 C&P Pacific Region dedicated some fishery officers to aquaculture positions.¹¹⁸

70. For most habitat offences, a fishery officer cannot complete an investigation alone. Habitat prosecutions under the *Fisheries Act* require evidence on several elements of the offence, and the Department’s approach is to use experts to provide opinion evidence to establish the following:¹¹⁹

- The site was fish habitat;
- The water is frequented by fish;
- A substance is deleterious; or
- Habitat was destroyed or harmfully altered.

71. Habitat investigations and prosecutions involve teams of people including DFO staff from C&P and HMP, and legal support from the Department of Justice or Crown agents. Other departments such as DOE, DFO science branch, or outside consultants may also be involved.¹²⁰

Numbers of and descriptions of common occurrences under section 35

72. For the 2009-10 fiscal year, fishery habitat occurrences entered by C&P field staff in the Pacific Region were as follows:¹²¹

Count of Field Office		
Region	Fishery	Total

¹¹⁷ Conservation & Protection, Fraser River (Lower and Upper Divisions) Post-Season Analysis Pacific Region [CAN097739] at 18

¹¹⁸ Aquaculture enforcement will be discussed in a forthcoming policy and practice report.

¹¹⁹ FA-LP 301 Habitat Inspections & Investigations Reference Binder Version 1.0 (September 2008) at 16 and 101

¹²⁰ *Ibid.* at 16

¹²¹ Table reproduced from Letter from Murry Gilchrist to Randy Nelson (1 November 2010). Document obtained from Randy Nelson.

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
Grand Total		698

73. In almost 60 percent of those occurrences (417), an investigation was initiated. In 83 occurrences, no action was warranted; 102 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.¹²²
74. Between 2000 and 2010, the habitat occurrences responded to by C&P Pacific Region has declined. A document prepared by C&P for the commission lists the following numbers of habitat occurrences since 2000:¹²³

Year	Habitat Occurrences
2000	1522
2001	1677
2002	1835
2003	1780
2004	1641
2005	1176

¹²² *Ibid.*

¹²³ 2001-2010 – Occurrences by Activity, Region. Document obtained from Randy Nelson.

2006	1119
2007	1000
2008	953
2009	643
2010	367

The role of Environment Canada in the enforcement of pollution prevention (section 36)

75. Environment Canada's Enforcement Branch is "responsible for the protection and conservation of both the environment and wildlife for future generations."¹²⁴

Enforcement officers enforce a variety of federal environmental and wildlife laws, including the following:¹²⁵

- *Canadian Environmental Protection Act, 1999;*
- *Fisheries Act, s. 36;*
- *Migratory Birds Convention Act, 1994;*
- *Canada Wildlife Act;*
- *The Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act;* and
- *Species at Risk Act.*

76. EC also has authority for the new *Environmental Enforcement Act*, S.C. 2009, c. 14 and the *Environmental Violations Administrative Monetary Penalties Act*, S.C. 2009, c. 14.

77. Like fishery officers, Environment Canada's enforcement officers must complete a training program, including basic training in law enforcement.¹²⁶ Enforcement officers who work to enforce s. 36 of the *Fisheries Act* must be designated as fishery officers under that *Act*.

¹²⁴ "About the Enforcement Branch" available online at Environment Canada's website: www.ec.gc.ca

¹²⁵ *Ibid.*

¹²⁶ "Careers in Enforcement" available online at Environment Canada's website: www.ec.gc.ca

78. Environment Canada has approximately 29 enforcement officers for BC and the Yukon, who 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 region.¹²⁷ The operational managers report to a regional director (Marko Goluzza at time of writing), who reports to the National Director of the Environmental Enforcement Directorate (Manon Bombardier at time of writing). The National Director reports to the Chief Enforcement Officer, who in turn reports to the Deputy Minister of Environment Canada. Regionally, the enforcement branch has four operational experts (or advisors or program liaisons) who report directly to the Regional Director.¹²⁸
79. In 2008-2009, Environment Canada reported that its enforcement program, nationally, had been strengthened with funding to hire and train 106 new enforcement officers (\$22 million), and funding to assist enforcement officers and legal staff in investigations (\$21 million).¹²⁹ The CESD, in its report of 2009, notes that in that same time period EC planned to “spend \$5.5 million and employ about 55 employees to administer the pollution prevention provisions [of the *Fisheries Act*].”¹³⁰
80. Similar to DFO’s DVS database, Environment Canada uses a system called the National Emergencies and Enforcement Management Information System and Intelligence System (“NEMISIS”) to “record, monitor and track occurrences, inspection activities, investigation activities and all compliance and enforcement measures undertaken” by enforcement officers.¹³¹

¹²⁷ Environment Canada / Enforcement Branch Organizational Chart [current version not available in Ringtail database]

¹²⁸ *Ibid.*

¹²⁹ “Protecting Wildlife and Our Natural Environment” available online at Environment Canada’s website: www.ec.gc.ca; see also Commissioner of the Environment and Sustainable Development, Chapter 1: Protecting Fish Habitat (2009) [CAN024152] at 17

¹³⁰ CESD, *ibid.*

¹³¹ NEMISIS Version 4.5 Emergencies and Enforcement Terminology Information Management Services. Draft – May 29, 2006 Version 1.10. [CAN299726]

81. DFO has noted limitations on DOE's powers in respect of enforcing the pollution prevention provisions of the *Fisheries Act*. For example, while the 1985 MOU and the 1987 RWA empower DOE to administer and enforce s. 36, these documents "did not provide for accountability, auditing or joint planning" nor do they allow DOE to "make [ministers] orders, call for plans, exercise other discretionary powers or enact regulations"¹³²—those powers remain with DFO or the Governor in Council. Subsequently, in 2006 the two departments signed a regional "Interim Operational Working Arrangement" to clarify their roles and responsibilities.¹³³ However, in 2009, as discussed below, the CESD reported that Environment Canada had not yet clearly identified what it has to do to fulfil its responsibilities in respect of section 36, nor does it have a systematic approach to addressing risks of non-compliance with that provision.¹³⁴
82. Last year, Environment Canada reported that work is underway to develop a "Results-based Management and Accountability Framework (RMAF) for its *Fisheries Act* responsibilities" and to identify current risks and risk management activities.¹³⁵ 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*.¹³⁶

¹³² See discussion in "Fisheries Act – Section 36: DFO Pacific Region – Habitat Management Role in Section 36 Past, Present and Future" Presentation (28 April 2004) [CAN157797] at 5

¹³³ Interim Operational Working Arrangement on Enforcement of Section 36(3) Fisheries Act between Environment Canada and Department of Fisheries and Oceans Pacific & Yukon (February 2006) [CAN269592]. This document is discussed further below.

¹³⁴ Commissioner of Environment and Sustainable Development, Chapter 1 Protecting Fish Habitat (2009) [CAN024152]

¹³⁵ DFO & EC Response to May 2009 CESD Audit Report & Progress Made (October 28, 2010) [not in Ringtail database]

¹³⁶ *Ibid.*

Current policies and protocols for enforcement of sections 35 and 36

Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the Fisheries Act (November 2001)

83. In 2001, DFO and DOE jointly developed a national “Compliance and Enforcement Policy” in respect of sections 35 and 36 of the *Fisheries Act*.¹³⁷ The Compliance and Enforcement Policy lists its purpose as being to assist those “who administer the laws and those who must comply with them” understand how the government intends to achieve compliance with sections 35 and 36 of the *Fisheries Act*.¹³⁸ It sets out the following general principles to govern application of the habitat protection and pollution prevention provisions:

- “Compliance with the habitat protection and pollution prevention provisions and their accompanying regulations is mandatory.
- Compliance will be encouraged through communication with parties affected by the habitat protection and pollution prevention provisions.
- Enforcement personnel will administer the provisions and regulations in a manner that is fair, predictable and consistent. Rules, sanctions and processes securely founded in law will be used.
- Enforcement personnel will administer the provisions and accompanying regulations with an emphasis on preventing harm to fish, fish habitat or human use of fish caused by physical alteration of fish habitat or pollution of waters frequented by fish. Priority for action to deal with suspected violations will be guided by:
 - the degree of harm to fish, fish habitat or human use of fish caused by physical alteration of habitat or pollution of waters frequented by fish, or the risk of that harm; and/or
 - whether or not the alleged offence is a repeat occurrence.
- Enforcement personnel will take action consistent with this Compliance and Enforcement Policy.

¹³⁷ Environment Canada, *Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the Fisheries Act* (November 2001) [November 2001 version not in Ringtail database]

¹³⁸ *Ibid.* at 1

- The public will be encouraged to report suspected violations of the habitat protection and pollution prevention provisions of the Fisheries Act.”¹³⁹

84. The Compliance and Enforcement Policy discusses the responsibilities of DFO and DOE, and the powers of fishery officers, fishery guardians, the attorney general, and the courts.¹⁴⁰ It sets out measures to promote compliance, including the following:¹⁴¹

- Review of works or undertakings/authorizations;
- Education and information;
- Promotion of technology development and evaluation;
- Technology transfer;
- Consultation on regulation development and amendment;
- Guidelines and codes of practice;
- Promotion of environmental audits; and
- Compliance monitoring.

85. The Compliance and Enforcement Policy also sets out two main types of enforcement activities under the habitat protection and pollution prevention provisions: inspections (to verify compliance) and investigations (to gather evidence of a suspected violation).¹⁴²

86. The criteria for selecting responses to alleged violations include consideration of the following:

- the nature of the alleged violation, including factors such as
 - the seriousness of the damage,
 - intent of the alleged violator,
 - whether it is a repeat occurrence, and

¹³⁹ *Ibid.* at 4

¹⁴⁰ *Ibid.* at 5-11

¹⁴¹ *Ibid.* at 12-16

¹⁴² *Ibid.* at 17

- whether the alleged violator attempted to conceal information or circumvent the objectives of the habitat protection or pollution prevention provisions);
- the effectiveness of achieving the desired result with the alleged violator (the desired result being “compliance with the Act in the shortest possible time and with no further occurrence of violations”);
- and consistency in enforcement.¹⁴³

87. The Compliance and Enforcement Policy identifies the following responses to alleged violations:¹⁴⁴

- Warnings;
- Directions by Fishery Inspectors;
- Orders by the Minister;
- Injunctions; and
- Prosecution.

88. The Compliance and Enforcement Policy sets out considerations for enforcement personnel to take into account when preparing recommendations on sentencing in a successful prosecution.¹⁴⁵ It also says that “enforcement personnel will recommend that the Crown request the court to impose an order under section 79.2 of the *Fisheries Act*,” which allows the court to do such things as prohibit the person from engaging in activities that may result in continuation of the offence, direct the person to perform community service, or direct the person to compensate the Minister for the costs of remedial or preventative actions.¹⁴⁶

89. Finally, 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, and it says “The Crown will attempt to obtain recovery of costs through negotiation with

¹⁴³ *Ibid.* at 18

¹⁴⁴ *Ibid.* at 19

¹⁴⁵ *Ibid.* at 24

¹⁴⁶ *Ibid.* at 24

those responsible. In the event that negotiation is unsuccessful, the Crown will initiate or proceed with civil action under the *Fisheries Act*.”¹⁴⁷

Interim Operational Working Arrangement on Enforcement of Section 36(3) Fisheries Act between Environment Canada and Department of Fisheries and Oceans Pacific & Yukon (February 2006)

90. In February 2006, EC and DFO in the Pacific and Yukon Region signed an “Interim Operational Working Arrangement on Enforcement of Section 36(3) Fisheries Act.”¹⁴⁸ The then director of C&P Pacific Region, Greg Savard, noted that the Agreement “is intended as a guide only” and that “there is an annual review clause in the protocol.”¹⁴⁹ The agreement acknowledges and supplements the 1987 Regional Working Agreement discussed above. In the main, it sets out a response protocol for spills and section 36(3) enforcement, answering such questions as the following:

- How does occurrence and spill information get distributed?
- In what circumstances does a response agency become the lead?
- When will DFO be asked to assist?
- Who will investigate?

91. The agreement sets out that “If the spill is on land or from land into fresh water the lead agency is the Ministry of Environment,” but “If the spill is related to a deposit of sediment (or a HADD) into fish bearing waters, DFO is the lead agency.”¹⁵⁰ It also provides that when contacted by EC, DFO “will make every effort to assist,” performing such functions as a “first responder” role where it may not be practicable or possible for EC to attend at a scene. Further, where a

¹⁴⁷ *Ibid.* at 26

¹⁴⁸ Interim Operational Working Arrangement on Enforcement of Section 36(3) Fisheries Act between Environment Canada and Department of Fisheries and Oceans Pacific & Yukon (February 2006) [CAN269592]

¹⁴⁹ Email from Greg Savard to various recipients (13 February 2006) [CAN220630]

¹⁵⁰ Interim Operational Working Arrangement on Enforcement of Section 36(3) Fisheries Act between Environment Canada and Department of Fisheries and Oceans Pacific & Yukon (February 2006) [CAN269592]

preliminary response has been completed by DFO, EC will assume responsibility for an investigation, though the two agencies may, in consultation 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.”¹⁵¹

Draft National Enforcement Policy for Conservation and Protection

92. Canada also has a draft (undated) “National Enforcement Policy for Conservation and Protection,” which “focuses on providing guidance to Fishery Officers in the exercise of their enforcement powers, and in particular in providing policy guidance on the various courses of action available to officers in securing compliance with the law.”¹⁵² This policy is a more focused and detailed guide for fishery officers than the 2001 Compliance and Enforcement Policy, describing their powers and providing criteria for making decisions about enforcement actions. This draft policy is not specific to habitat related work.

National Habitat Compliance Protocol between Habitat Management Program and Conservation and Protection Directorate (December 2010)

93. As discussed further in the Habitat Management PPR, in 2007 OHEB and Fisheries and Aquaculture Management (then the regional “home” of C&P) signed a National Habitat Compliance Protocol to define roles, responsibilities and accountability for habitat compliance work.¹⁵³ OHEB and C&P Pacific Region developed a Regional Protocol, annexed to the National Habitat Compliance Protocol.¹⁵⁴ Different areas within DFO’s Pacific Region then developed draft area protocols or operational plans.¹⁵⁵ In December 2010, the National Habitat

¹⁵¹ *Ibid.*

¹⁵² National Enforcement Policy for Conservation and Protection (Draft) [CAN285246]

¹⁵³ National Habitat Compliance Protocol between Oceans and Habitat and Fisheries and Aquaculture Management (10 January 2007) [CAN220642]

¹⁵⁴ Pacific Region Habitat Compliance Protocol between Oceans, Habitat and Enhancement Branch and Conservation and Protection Fisheries and Oceans Canada Pacific Region. Annex to National Habitat Compliance Protocol between Oceans and Habitat and Fisheries and Aquaculture Management. (11 June 2007) [CAN186074]

¹⁵⁵ For examples, see South Coast Area Operational Plan Annex to the Pacific Region Habitat Compliance Protocol (23 December 2008) [CAN186076]; Draft Lower Fraser Area Interim Habitat

Compliance Protocol was revised and replaced.¹⁵⁶ The current “National Habitat Compliance Protocol between Habitat Management Program and Conservation and Protection Directorate” (“NHCP 2010”) sets out the respective responsibilities of each organization for habitat compliance.

94. The NHCP 2010 is build on the premise that “HMP 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*.”¹⁵⁷ The purpose of the NHCP 2010 is as follows:

The purpose of this Protocol is to facilitate collaboration between the programs and define the scope, principles, roles, responsibilities, accountabilities, governance, reporting requirements and terms in implementing the Habitat Compliance Decision Framework (Annex 1) that provides effective protection of fish and fish habitat through joint delivery of an integrated, coherent and adaptive habitat compliance program, informed by risk.¹⁵⁸

95. Two main changes make the NHCP 2010 distinct from its 2007 predecessor. First, the NHCP 2010 includes a compliance risk assessment for occurrence screening such that “HMP shall lead in determining the *Level of Compliance Risk* in the application of the *Compliance Risk Assessment* in Annex 1, based on the assessments of impacts on fish and fish habitat”¹⁵⁹ (Compliance risk assessment is discussed further in the Habitat Management PPR). The 2007 protocol did not contain a risk assessment framework. Second, habitat staff no longer issue inspector’s directions. In the old protocol, habitat staff, in collaboration with C&P, took the “lead in conducting activities aimed at voluntary restoration and the

Compliance Protocol Implementation of the Pacific Region Habitat Compliance Protocol (February 2010) [CAN178153]; and Draft BC Interior Area Operational Plan Area Implementation of the Pacific Region Habitat Compliance Protocol (7 November 2008) [CAN186070].

¹⁵⁶ National Habitat Compliance Protocol between Habitat Management Program and Conservation and Protection Directorate (December 2010)

¹⁵⁷ National Habitat Compliance Protocol between Habitat Management Program and Conservation and Protection Directorate (December 2010) [not in ringtail]

¹⁵⁸ *Ibid.* at clause 1.0

¹⁵⁹ *Ibid.* at clause 5.4.4

issuance of Inspector's directions, warnings and Ministerial orders."¹⁶⁰ Now, "C&P shall lead in the issuance of Inspector's directions, warnings and Ministerial orders."¹⁶¹

96. Annex 2 to the NHCP 2010 provides a summary of the roles and responsibilities of the HMP and C&P with respect to habitat compliance activities. That annex is reproduced in this report at Appendix C.

Recent audits, recommendations and responses

Audit of the Conservation and Protection Program (2009)

97. In 2008 and 2009, the Audit and Evaluation Directorate of DFO undertook an internal audit of C&P (the "2009 Internal Audit").¹⁶² The audit was not directed specifically at habitat enforcement; rather, the purpose of the audit was as follows:

...to: provide assurance that effective policies, procedures, management practices and controls are in place for the C&P program; provide assurance on the adequacy of processes to plan, manage and support law enforcement operations; and determine the adequacy of the professional practices and training employed to maintain proficiency and transparency of enforcement operations.¹⁶³

98. The 2009 Internal Audit found "insufficient detailed policies and procedures in place, and inconsistencies in program delivery methods and procedures."¹⁶⁴ It made the following ten recommendations:

1. The Director General C&P should, in conjunction with Regions and with supported Sectors as appropriate, update existing policies and further develop a comprehensive suite of program policies and procedures which are centrally managed to strengthen and standardize compliance and

¹⁶⁰ National Habitat Compliance Protocol between Oceans and Habitat and Fisheries and Aquaculture Management (10 January 2007) [CAN220642] at clause 4.5.1.2

¹⁶¹ National Habitat Compliance Protocol between Habitat Management Program and Conservation and Protection Directorate (December 2010) at clause 5.5.3

¹⁶² See: Audit and evaluation Directorate, Audit of the conservation and Protection Program Project Number 6B011, Draft Audit Report June 17, 2008 [CAN057521] and Audit of the Conservation and Protection Program, Project Number 6B011 Final Audit Report, June 18, 2009 [CAN024036]

¹⁶³ *Ibid.* CAN024036 at 2

¹⁶⁴ *Ibid.* at 2

enforcement efforts as a cohesive Departmental Enforcement Service. (*High importance*)

2. The Director General C&P should annually, in conjunction with Regional authorities review all compliance and enforcement memoranda of understanding and major formal agreements with other sectors, departments, levels of Government and other enforcement services as a means to improve accountability and to ensure the agreements remain current, relevant and effective. (*High importance*)
3. The ADM Fisheries and Aquaculture Management and ADM Oceans and Habitat should revise the National Habitat Compliance Protocol to make a clear distinction between administrative and law enforcement functions, to facilitate a common collaborative approach across the department and to mitigate the potential health and safety risk to habitat officials. (*High importance*)
4. The Director General C&P should, in consultation with other Sectors and Regions, promulgate an annual DFO compliance and enforcement strategy that communicates strategic program objectives and priorities with performance measures and allocates the nationally controlled resources to guide Regional planning and maximize the effectiveness of the decentralized operations through a cohesive departmental plan. (*Medium importance*)
5. The Director General C&P should establish minimum national enforcement equipment scales and specifications for application in all Regions; and monitor future program requirements through lifecycle planning in cooperation with the Regional HQs. (*Low importance*)
6. The Director General C&P should establish a national intelligence program in partnership with other organizations to more effectively manage the program by possessing the capacity to: advise other sectors of trends or threats adversely affecting fisheries resources and fish habitat; promulgating effective strategic guidance for Regional C&P activities; and supporting the Regional efforts in all three pillars with useful intelligence products. (*Medium importance*)
7. The ADM Fisheries and Aquaculture Management should strengthen controls for fishery officer, guardian and inspector designations pursuant to Sections 5 and 38 of the Fisheries Act by: centralizing the designation and monitoring authority under the Director General C&P; and making compliance with the code of Conduct for Fishery Officers, or for other enforcement services, their own professional enforcement code of conduct or equivalent measures agreeable to the Director General C&P, a condition of designation under the Act. (*Medium importance*)
8. The Director General C&P should develop competency profiles stating knowledge, skill and experience standards and expand the FOCPP beyond GT-04 through the management levels to support human resource development and succession planning. (*Low importance*)

9. The Director General C&P should introduce a professional standards audit program independent of line reporting relationships to maintain professional competencies at all levels. (*Low importance*)
10. The Director General C&P should introduce a formal public complaint process independent of line reporting as a means to enhance professional competence, accountability and transparency for those who perform fisheries and habitat compliance, inspection and enforcement functions pursuant to Section 5 and 38 of the Fisheries Act. (*Medium importance*)¹⁶⁵

99. In response to the 2009 Internal Audit, C&P prepared a management action plan (“MAP”) setting out intended actions in response to each of the ten recommendations.¹⁶⁶ In responding to the recommendations, C&P managers noted the following:

The audit report identifies additional legitimate gaps and shortcomings in the C&P program. Many of these have been recognized by C&P managers for some time and some progress is being made on certain fronts (as detailed in the MAP). If we were to accept all or most of the recommendations, however, and then devote the required resources to implement them, there is a real risk that the on-going work on the important CRM [compliance review and modernization] and line reporting initiatives described above would be de-railed. The number of staff available to work on these projects is very limited, and we have very real capacity issues to address as we try to move our current initiatives forward. For that reason, we have made it clear from the outset that the implementation of changes will take time but that we will make every effort to make steady and incremental progress. There is very little capacity to undertake significant new projects such as the ones recommended by the audit report.¹⁶⁷

100. Since formulating the MAP in response to the 2009 Internal Audit, C&P management has released three status report updates on progress towards completing actions identified, the latest being on 17 December 2010.¹⁶⁸ The December 2010 status report update states that most of the action plan elements have been completed to that date.

¹⁶⁵ *Ibid.* at 17-22

¹⁶⁶ The original MAP in response to the 2009 Audit is found at the end of the 2009 Audit report [CAN024036].

¹⁶⁷ *Ibid.* at 17

¹⁶⁸ Status Report on the Implementation of the Management Action Plan [CAN285255]. The MAP and progress towards its completion is too lengthy to detail here; the full report can be found in Canada’s disclosure to the commission at CAN285255.

Commissioner of Environment and Sustainable Development's Report on Habitat Protection (2009)

101. Also in 2009, the CESD to the House of Commons released an audit report looking at how the Department and DOE “carry out their respective responsibilities for fish habitat protection and pollution prevention under the *Fisheries Act*” (2009 CESD Report).¹⁶⁹ In brief, the 2009 CESD Report found, in part, as follows:

- “Fisheries and Oceans Canada and Environment Canada cannot demonstrate that fish habitat is being adequately protected as the *Fisheries Act* requires...
- Fisheries and Oceans Canada has made progress in implementing the Environmental Process Modernization Plan (EPMP) so that it can better manage risks that various projects pose to fish habitat...however the Department has little documentation to show that it monitored the actual habitat loss that occurred, whether habitat was protected by mitigation measures required as a condition for project approval, or the extent to which project proponents compensated for any habitat loss. Moreover, the Department reduced enforcement activity by half and at the time of our audit had not yet hired habitat monitors to offset this reduction.
- Environment Canada has not clearly identified what it has to do to fulfill its responsibility for the *Fisheries Act* provisions that prohibit the deposit of substances harmful to fish in waters they frequent...
- Environment Canada does not have a systematic approach to addressing risks of non-compliance with the Act that allows it to focus its resources where significant harm to fish habitat is most likely to occur...”¹⁷⁰

102. The 2009 CESD Report made a number of recommendations. Those that relate to habitat enforcement and compliance (distinguished here from more general habitat management recommendations) are as follows:

1.48 Recommendation. 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.

¹⁶⁹ Commissioner of Environment and Sustainable Development, Chapter 1 Protecting Fish Habitat (2009) [CAN024152]

¹⁷⁰ *Ibid.* at pp. 12-13

1.126 Recommendation. 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.

1.134 Recommendation. Fisheries and Oceans Canada, with the support of Environment Canada, should clearly establish the expectations for Environment Canada's administration of the pollution prevention provisions, including the expected interactions between the two departments to support the delivery of the 1986 Habitat Policy.¹⁷¹

103. Both DFO and DOE accepted the above noted recommendations,¹⁷² and have reported on their progress towards addressing them.¹⁷³ In respect of recommendation 1.48 quoted above, DFO notes "operational protocol to ensure consistency with the Compliance and Enforcement Policy completed" and that "Operational protocol provides guidance o [sic] the type of complaints that fishery officers should respond to and take action on."¹⁷⁴ In respect of recommendation 1.126, DOE reports "The Enforcement Branch's Environmental Enforcement Directorate has established a dedicated Quality Assurance officer at headquarters and a national working group to review data quality issues on an ongoing basis."¹⁷⁵ In respect of recommendation 1.134, DFO reports "Fisheries and Oceans Canada and Environment Canada are reviewing the administration of section 36 and expect to have a renewed MOU by March 2012."¹⁷⁶

¹⁷¹ *Ibid.*

¹⁷² *Ibid.* at 47-52

¹⁷³ DFO & EC Response to May 2009 CESD Audit Report & Progress Made (October 28, 2010) [not in Ringtail database]

¹⁷⁴ *Ibid.* at 3

¹⁷⁵ *Ibid.* at 5

¹⁷⁶ *Ibid.* at 2

Appendix A: List of Acronyms Used

1985 MOU – Memorandum of Understanding between the Department of Fisheries and Oceans and The Department of the Environment on the subject of the Administration of Section 33 of the Fisheries Act, Ottawa, Ontario May, 1985

C&P – Conservation and Protection Directorate (of DFO)

DFO – Department of Fisheries and Oceans

DOE – Environment Canada (synonymous with Department of Environment)

DVS – Departmental Violation System (database used by C&P)

EC – Environment Canada (synonymous with Department of Environment)

EP – Environmental Protection (a directorate within DOE)

EPMP – Environmental Process Modernization Plan

FEATS – Fisheries Enforcement Activity Tracking System (database used by C&P)

HADD – harmful alternation, disruption or destruction (of fish habitat under s. 35 of the *Fisheries Act*)

HCM – Habitat Compliance Modernization

HMP – Habitat Management Program (of DFO)

IRM – Integrated Risk Management

MAP – Management Action Plan

NEMISIS – National Emergencies and Enforcement Information System and Intelligence System (database used by EC Enforcement Branch)

OHEB – Oceans, Habitat and Enhancement Branch (of DFO)

PATH – Program Activity Tracking for Habitat (database system used by HMP)

RWA – Regional Working Agreement

SOP – Standard Operating Procedures

Appendix B: Fishery Officer hours analysis provided by C&P Pacific Region

Q 13 ADDITIONAL QUESTION ON HABITAT

All activities		PACIFIC REGION												
Sum of total (Hours)	year (Rptdate)	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	Grand Total
CAT		18.44%	24.33%	23.80%	22.88%	13.81%	11.88%	12.54%	11.32%	11.32%	8.94%	9.94%	12.27%	16.65%
HABITAT		81.56%	75.67%	76.20%	77.12%	86.19%	88.12%	87.46%	88.68%	91.08%	90.08%	87.73%	83.36%	83.36%
OTHER		100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%
Grand Total														

Patrol activities only		PACIFIC REGION												
Sum of total (Hours)	year (Rptdate)	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	Grand Total
CAT		13.00%	16.51%	16.07%	16.10%	17.47%	11.42%	9.86%	9.32%	9.32%	6.26%	7.18%	10.12%	12.20%
HABITAT		86.40%	83.49%	83.93%	83.90%	82.53%	88.58%	90.14%	90.68%	91.32%	93.74%	92.82%	89.88%	87.80%
OTHER		100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%
Grand Total														

Area (Multiple Items)		LF BCI AND I&I ONLY												
Sum of total (Hours)	year (Rptdate)	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	Grand Total
CAT		22.51%	32.20%	35.51%	33.82%	18.85%	15.00%	15.07%	13.18%	11.78%	12.08%	18.94%	21.86%	21.86%
HABITAT		77.49%	67.80%	64.49%	66.18%	81.15%	85.00%	84.93%	86.82%	88.21%	87.92%	81.06%	78.14%	78.14%
OTHER		100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%
Grand Total														

Area (Multiple Items)		LF BCI AND I&I ONLY												
Sum of total (Hours)	year (Rptdate)	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	Grand Total
CAT		16.14%	23.98%	26.06%	28.53%	30.86%	18.67%	13.95%	11.20%	11.17%	10.08%	9.50%	17.86%	18.25%
HABITAT		80.86%	76.02%	73.94%	71.47%	69.12%	81.33%	86.05%	88.80%	88.83%	89.91%	90.50%	82.11%	81.75%
OTHER		100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%
Grand Total														

Appendix C: Summary of Roles and Responsibilities of Habitat Management Program and Conservation and Protection in Delivery of Habitat Compliance Activities¹⁷⁷

Annex 2: Summary of Roles and Responsibilities of Habitat Management Program and Conservation and Protection in Delivery of Habitat Compliance Activities.

Component	Tasks	Lead	Support
5.1 Strategic Planning	<ol style="list-style-type: none"> 1. Identification of habitat compliance promotion, monitoring and management priorities; 2. Integrating habitat compliance priorities into HMP and C&P work plans. 	Habitat Management Program Both	Conservation and Protection
5.2 Compliance Promotion	<ol style="list-style-type: none"> 1. Education, training and raising awareness; 2. Partnering agreements; 3. Incentive and stewardship programs and activities. 	Habitat Management Program Habitat Management Program Habitat Management Program	Conservation and Protection Conservation and Protection Conservation and Protection
5.3 Monitoring of Reviewed Works or Undertakings	<ol style="list-style-type: none"> 1. Work planning; 2. Conducting compliance monitoring activities. 	Habitat Management Program Habitat Management Program	Conservation and Protection Conservation and Protection
5.4 Occurrence Screening	<p>Compliance Risk Assessment:</p> <ol style="list-style-type: none"> 1. Risk to fish and fish habitat; 2. Compliance risk factors; 3. Information gathering in support of occurrence screening; 4. Determine level of compliance risk: No Risk, Minor Risk, Moderate Risk, and Significant Risk. 	Habitat Management Program Conservation and Protection Both Habitat Management Program	
5.5 Response to Compliance Issues	<ol style="list-style-type: none"> 1. Conducting activities aimed at voluntary restoration; 2. Conducting activities aimed to compel compliance; 3. Issuance of Inspector's directions, warnings and Ministerial orders; 4. Conducting investigations, laying of charges, preparing court briefs, executing warrants, coordinating with the Department of Justice, providing evidence in court and supporting prosecution process; 5. Recommendations to prosecute; 6. Follow-up monitoring on compliance issue. 	Habitat Management Program Conservation and Protection Conservation and Protection Conservation and Protection Both Both	Habitat Management Program Habitat Management Program
5.6 Information Management	<ol style="list-style-type: none"> 1. Tracking and maintaining information related to compliance promotion, compliance monitoring, occurrences, and response to non-compliance in Program Activity Tracking for Habitat (PATH) database; 2. Tracking and maintaining information related to inspections, investigations and prosecutions in Departmental Violation System (DVS) database. 	Habitat Management Program Conservation and Protection	

¹⁷⁷ Annex 2 to the National Habitat Compliance Protocol between Habitat Management Program and Conservation and Protection Directorate (December 2001)