
Compensating for “Serious Harm”

Recent Changes to Compensation Policy
under *Fisheries Act*, s. 35

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Amendments

Section 6

6. Before recommending to the Governor in Council that a regulation be made in respect of section 35 . . . and **before exercising any power under . . . paragraph 35(2)(b) or (c)** or subsection 35(3), . . . with regard to an offence under subsection 40(1) or with regard to harm to fish, the Minister shall consider the following factors:

(a) the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries;

(b) fisheries management objectives;

(c) whether there are **measures and standards to avoid, mitigate or offset** serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or that support such a fishery; and

(d) the public interest.

Amendments

Section 6.1

6.1 The purpose of section 6, and of the provisions set out in that section, is to provide for the **sustainability and ongoing productivity** of commercial, recreational and Aboriginal fisheries.



Photo: NapaneeGirl, Flickr/CreativeCommons

1986 Habitat Policy

Policy Objective: “net gain for habitat for Canada’s fisheries resources.”

Policy Goals:

1) Fish Habitat Conservation: *Maintain the current productive capacity of fish habitats supporting Canada’s fisheries resources, such that fish suitable for human consumption may be produced.*

2) Fish Habitat Restoration: *Rehabilitate the productive capacity for fish habitats in selected areas where economic and social benefits can be achieved through the fisheries resource.*

3) Fish Habitat Development: *Improve and create fish habitats in selected areas where the production of fisheries resources can be increased for the social or economic benefit of Canadians.*

1986 Habitat Policy

Policy Objective: “net gain for habitat for Canada’s fisheries resources.”

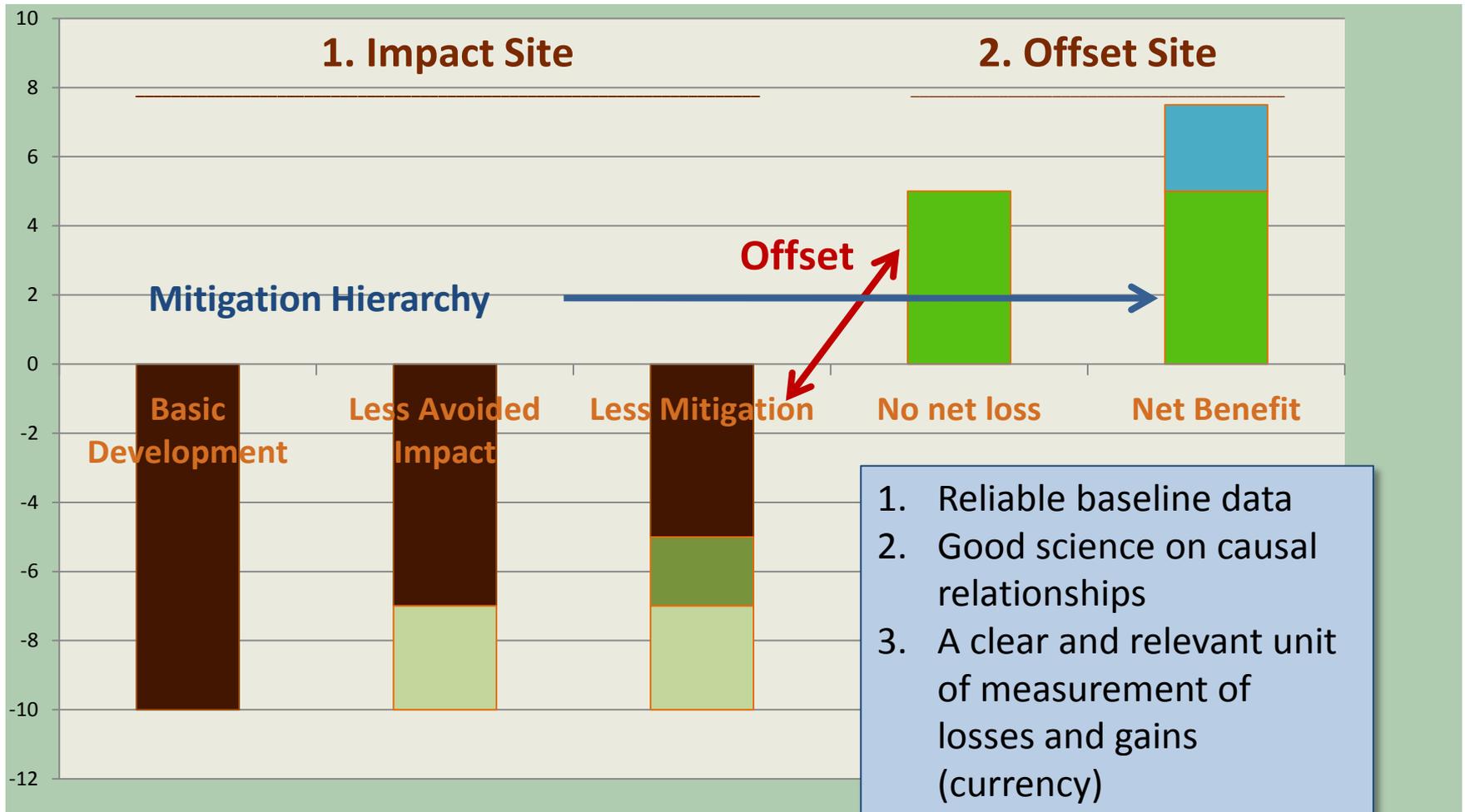
Policy Goals:

- 1) Fish Habitat Conservation:** *Maintain the current productive capacity of fish habitats supporting Canada’s fisheries resources, such that fish suitable for human consumption may be produced.*

Guiding principle: “no net loss of the productive capacity of habitats” (NNL)

“The no net loss principle is fundamental to the habitat conservation goal. Under this principle, the Department will strive to balance unavoidable habitat losses with habitat replacement on a project-by-project basis so that further reductions to Canada’s fisheries resources due to habitat loss or damage may be prevented.”

Biodiversity Offsets



1986 Habitat Policy: Measuring>NNL?

1986 Habitat Policy

*The principle is intended to guard departmental officials and other interested parties, and **should not be interpreted as a statutory requirement to be met in all circumstances. Professional judgement and common sense applied in an informed co-operative environment by personnel experiences in habitat management, combined with supportive research, will achieve no net loss of productive capacity in the majority of cases.***

DFO DM Claire Dansereau 2011– Testimony to Cohen Commission on Fraser River Sockeye Salmon Decline:

It's definitely still the policy . . . and it has over time translated into meaning that it is no net loss centimetre-by-centimetre of habitat. And I don't think, and no one has told me so far that that was the original intention. That is a guiding principle. It would be the original intention to make sure that the fish have the habitat they need in order to survive and to thrive, and that is still the intent that we try to apply.

1986 Habitat Policy: Implementation Features

- Administered by regional offices with little central guidance.
- No prescribed equivalency guidelines, currency or metrics.
- Common default to like-for-like compensation
- Highly collaborative with proponents – resource intensive.
- Equal attention given to all referrals.
- Little capacity for monitoring and enforcement.
- Little prescribed record keeping.
- Severely budget constrained.

Implementing the 1986 Habitat Policy and NNL: Critiques

- **Jones 1995:** NNL of “productive capacity” ambiguous and difficult to quantify – “defining meaningful, measurable metrics of habitat loss (or gain) is a basic need . . . “
- **Minns 1997:** NNL of habitat productivity is “logically inoperable.”
- **Cudmore-Vokey et al 2000:** Literature relied on for decision-making under S. 35 inconsistent between regions, “not scientifically defensible and . . . for the most part not helpful.
- **Senate Committee 2003:** 1) Serious deficiencies in science capacity, and resources to support one, and 2) Need to refocus on activities that pose greatest risk to fisheries.
- **Commissioner of the Environment and Sustainable Development 2004:** *“There are indications that habitat loss of continuing. As the Habitat Policy has been in effect for many years and does not seem to be working, we suggest that the Department re-examine the objectives of the policy and make it work.”*

Implementing the 1986 Habitat Policy and NNL: Critiques

- **Harper & Quigley 2005-06:**

- In review of files of 124 authorizations of HADD (1994-1997), in 86 percent the information on file was insufficient to determine if NNL had been achieved.
- Filed audit of 52 authorized HADD projects and compensation found 86 percent has larger HADD or smaller compensation than authorized.

- **CESD 2009:**

- *“Fisheries and Oceans Canada and Environment Canada cannot demonstrate that fish habitat is being adequately protected as the Fisheries Act requires. In the 23 years since the Habitat Policy was adopted, **many parts of the Policy have been implemented only partially by Fisheries and Oceans Canada or not at all. The Department does not measure habitat loss or gain. It has limited information on the state of fish habitat across Canada**—that is, on fish stocks, the amount and quality of fish habitat, contaminants in fish, and overall water quality. Fisheries and Oceans Canada still cannot determine the extent to which it is progressing toward the Policy’s long-term objective of a net gain in fish habitat.”*

New Policy: Compensating for “Serious Harm to Fish”

- Statutory purpose replaces Net gain objective and NNL principle:
*6.1 The purpose of section 6, and of the provisions set out in that section, is to provide for the **sustainability and ongoing productivity** of commercial, recreational and Aboriginal fisheries.*
- Risk Management Framework
 - High risk occupies DFO’s attention and resources
 - Low risk largely left to proponents to self-assess
- Better use of science and offset/compensation concepts
 - Clearer expression of mitigation hierarchy
 - Clearer consideration of conservation objectives (i.e., not like-for-like)
 - Requires proponents to quantify losses
 - New publication gives clearer consideration of ecological equivalency and currencies.
 - Working on developing a common currency, “adult fish equivalent.”
 - Better science guidance: “pathways of effects” and “measures to avoid causing harm.”

Conclusions

- Old policy suffered from lack of clear goals, principles and tools, at least partly due to lack of resources
 - Inconsistency of application
 - Little accountability for results
- New policy brings
 - Fuzzier objective
 - Better science and offset thinking
 - In great majority of cases, invests more faith and authority in proponent's own self-assessment
- The changes do not rely on the amendments to the *Fisheries Act*.
- For the most part, these same measures could have been taken under the 1986 Habitat Policy, but were not.
- Will the change in policy really make a difference in operations?



Questions?

Comments?