



First Nations Fish Habitat Program **FACT SHEET**

Introduction to Fish Habitat-Related Legislation

An understanding of legislation is important because it impacts Aboriginal peoples' fishing and fish habitat.

The legislative framework for the protection, use, and management of fish and fish habitat is complex. The Canadian Constitution, treaties, various federal and provincial legislation, and supporting regulations and policies all influence fish management.

Put simply, protection of fish and fish habitat is under the authority of the federal government, while the use and allocation of fish in fishing waters is under the authority of the provincial government.

Focus	Responsible Authority	Applicable Legislation
Conservation of fish resource	Federal government	<i>Fisheries Act</i> (1985, Canada) and the Manitoba Fishery Regulations made under the Act.
Use and allocation of fish	Provincial government	<i>The Fisheries Act</i> (1987, Manitoba) and regulations under the Act.
Governance, stewardship, management and harvest of fish	First Nations governments	Treaties, self-government agreements, land claims agreements and unextinguished Aboriginal rights.

Federal Authority

The Constitution Act, 1867

Section 91(12) gives the federal government exclusive legislative authority to make laws regarding "Sea Coast and Inland Fisheries". This has been interpreted to mean only the federal government can make laws about the conservation and preservation of fisheries.



Fisheries Act (1985) (fed.)

Key federal legislation for the protection and management of Canada's fisheries resources. Includes provisions for fish and fish habitat protection, including preventing pollution into fish-bearing waters.



Manitoba Fishery Regulations, 1987

Regulations, made under the (federal) *Fisheries Act*, to address specific fish management issues in Manitoba.



Policy for the Management of Fish Habitat (1986)

This policy supports the provisions of the (federal) *Fisheries Act*. The policy's goals include conservation, restoration, and creation of fish habitats.

Provincial Authority

Natural Resources Transfer Agreement (1930) (Manitoba)

Transferred ownership of lands and resources in the province to Manitoba, giving Manitoba the right to use, allocate, and regulate rights to take fish (e.g. licensing). This constitutional agreement is subject to agreements, such as treaties with First Nations, that were in place at that time.

The Fisheries Act (1987) (prov.)

Key provincial legislation governing fish harvest. Includes provisions for freshwater fish marketing, licensing, quota entitlements, and enforcement.



The *Fisheries Act* (administered by the Department of Fisheries and Oceans) is the most important federal legislation for the protection of fish habitat. Key sections of the Act include:

- **Section 35:** prohibits the “harmful alteration, disruption or destruction of fish habitat” (HADD). Habitat must be proven as an area on which fish depend on to carry out their life processes. However, the offence does not apply when DFO has authorized the activity or project leading to potential damage of fish habitat. In theory, a project will only be approved if damaged habitat is newly created or improved in other areas. For example: a HADD can be caused by a range of activities, from hydro development to construction of a culvert.
- **Section 36:** prohibits the deposit of a deleterious substance into waters frequented by fish. The definition of deleterious substance has been contested, but in general it has to be proven that the substance could harm fish. The offence does not apply if the deposit of a substance has been authorized. For example: a sewage spill or unauthorized effluent discharge from industrial operations could be considered a contravention to section 36.

Other federal legislation related to fish and fish habitat includes:

- *Canadian Environmental Assessment Act* (CEAA) – outlines requirements and procedures for federal environmental assessments
- *Species at Risk Act* (SARA) – prohibits killing, harming, or destroying a species at risk or its critical habitat
- *Fish Inspection Act* - regulates activities concerning the handling, processing, and inspection of fish
- *Freshwater Fish Marketing Act* – regulates interprovincial and export trade in freshwater fish

Inter-jurisdictional Cooperation

Although the federal government has the authority to manage fish habitat, it essentially has no other fisheries-related power regarding inland waters, beds of watercourses, or shorelines that fall under provincial jurisdiction. Similarly, the provinces cannot make regulatory decisions concerning fish habitat. In order to aid collaboration in fish habitat management, the federal government and Province of Manitoba signed a Memorandum of Understanding (MOU) on Fish Habitat Management in 2003. The MOU describes joint activities and programs aimed at increasing the consistency and effectiveness of administering and enforcing fish habitat protection provisions.

Although legislative responsibility for the management of fish habitat has not been delegated to Manitoba, the Provincial Government (Ministry of Water Stewardship) does in practice manage fish habitat, along with other fish management activities. Manitoba’s Ministry of Water Stewardship is responsible for provincial legislation, regulations, and programs related to the sustainable use of the fisheries resource.

Treaty and Aboriginal Rights

The rights of First Nations people related to fish and fish habitat are based on their Aboriginal, treaty, or legislation-based rights.

Existing Treaty and Aboriginal rights related to fishing are recognized and affirmed by section 35 of the *Constitution Act, 1982*.

The Natural Resources Transfer Agreement for Manitoba is an affirmation of treaty obligations and states that “Indian people have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which (they) may have a right of access.”