

**A Guide to the
Implementation of CEEA
by DFO's Marine Environment and Habitat Directorate**

**Prepared by
Policy and Programs Branch
Marine Environment and Habitat Directorate
Ottawa
January 1995**

TABLE OF CONTENTS

	<u>Page</u>
1. Introduction	1
2. DFO's Role as a Responsible Authority	2
3. Objectives and Guiding Principles of the CEAA	2
4. Applicability of the CEAA to DFO	3
4.1 Do You Have a Project?	3
4.2 Is the Project Excluded?	5
4.3 Is There a Federal Authority?	5
4.4 Is There a CEAA Trigger?	5
4.5 Does DFO Have a Role as an Expert Department?	6
5. The Law List Trigger and DFO Policy	7
6. Initial EA Considerations	8
6.1 EA Timing	8
6.2 Working With Other Governments and RAS	10
6.2.1 Other Governments	10
6.2.2 Other RAS	10
6.3 Selecting the EA Track	12
6.3.1 Is a Comprehensive Study Required?	12
6.3.2 Is a Class Screening Report Available?	12
6.3.3 Has the Project Been Previously Assessed?	13
6.4 Establishing the Public Registry	13
7. Conducting the EA	15
7.1 Step 1: Scoping	15
7.1.1 Scope of the Project	15
7.1.2 Scope of the EA	16
7.1.3 Interested Parties	18
7.1.4 Level of Effort	19
7.2 Step 2: Assessment of Environmental Effects	19
7.3 Step 3: Mitigation of Environmental Effects	21
7.4 Step 4: Determining the Significance of Adverse Effects	22
7.5 Step 5: Preparing the EA Report	23
7.6 Step 6: Review of the EA Report	25
7.7 Step 7: Decision on the Project	25
7.8 Step 8: Post-Decision Activity	26
8. DFO Responsibilities in a Public Review	27

Appendix I: Listing of DFO Reference Documents
Appendix II: **CEAA** Regulations

LIST OF FIGURES

	<u>Following</u> <u>Page</u>
1. Decision-making process for determining whether the CEAA applies to a project.	3
2. Decision-making process for selecting the EA track	12
3. Steps for conducting a screening or comprehensive study.	15

1. INTRODUCTION

The **Canadian Environmental Assessment Act (CEAA)** received Royal Assent on June 23, 1992. On September 18, 1993, four key regulations that are essential to the technical implementation of the Act were pre-published in the Canada Gazette, Part I: the **Exclusion List; Inclusion List; Comprehensive Study List and Law List** regulations. Following public consultation, the regulations were revised and eventually published in the Canada Gazette, Part II on October 19, 1994. It is anticipated that the **CEAA** and the regulations will be promulgated in January 1995. Assuming this occurs, the existing **Environmental Assessment Review Process (EARP) Guidelines Order** will no longer apply.

The Marine Environment and Habitat Directorate (MEHD) of Fisheries and Oceans Canada (DFO) recognized the need to develop a policy document that interpreted and described the legal requirements of the new legislation with respect to the responsibilities of regional MEHD staff. That document, entitled **An Interim Guide to Implementation of CEAA by DFO's Habitat Management Division**, was prepared in November 1993 to provide guidance and assistance to MEHD staff in meeting the requirements of the **CEAA** as they conduct environmental assessments (EAs) of proposed projects. The present document is a revised version of the November 1993 **Interim Guide** which reflects the revised regulations, proposed amendments to the **CEAA** and an enhanced understanding of the Act's requirements.

The new **Canadian Environmental Assessment Agency** (referred to as the **Agency** in this document), that will replace **FEARO**, has prepared **The Responsible Authority's Guide to the Canadian Environmental Assessment Act (the RA Guide)** which describes in detail the requirements of the Act and the procedures to be followed in meeting these requirements. The **RA Guide** includes three reference guides that deal with assessment of cumulative environmental effects, identification of significant environmental effects and the public registry.

The present document is not intended to be a duplication of the material contained in the **RA Guide**. Rather, it is designed to interpret the requirements of the legislation in terms of the responsibilities it places on DFO's MEHD. Reference is made to the **RA Guide** where appropriate and the reader is encouraged to consult this material for more detailed information.

The MEHD has drafted a number of additional policy and procedural documents for the assistance and guidance of staff carrying out **EAs**. The present document is intended to complement this material and refers the reader to these guides where additional information is required. Appendix I contains a listing of these documents.

This policy document represents the current status of the **CEAA** and its regulatory regime. It will be revised periodically as

changes are made to the Act and its regulations, as additional regulations are promulgated and as experience in implementing the new legislation is gained. Suggestions for improving this guide are welcome and encouraged.

2. DFO'S ROLE AS A RESPONSIBLE AUTHORITY

Under the CEAA, both DFO and its Minister are considered to be a federal authority. When DFO is required to ensure that an EA of a project is conducted, it becomes a responsible authority (or RA) for that project. For a given project, there may be more than one RA.

Other terms used in the Act will be defined as they are introduced.

3. OBJECTIVES AND GUIDING PRINCIPLES OF THE CEAA

The CEAA applies to projects for which the federal government has a decision-making authority as a proponent, land manager, source of funding or regulator. The federal government's overall policy on environmental assessment is embodied in the objectives and guiding principles of the Act.

The CEAA has four fundamental objectives:

- to ensure that the environmental effects of projects receive careful consideration before RAs take action;
- to encourage RAs to take actions that promote sustainable development, thereby achieving or maintaining a healthy environment and a healthy economy;
- to ensure that projects to be carried out in Canada or on federal lands do not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out;
- to ensure that there is an opportunity for public participation in the EA process.

The CEAA is founded on several guiding principles:

- the process should be applied as early in the project's planning process as practicable, and before irrevocable decisions are made, so that environmental factors are incorporated into decisions in the same way that economic, social and policy factors have traditionally been incorporated;
- the self-directed assessment of projects for environmental effects by federal departments and bodies is a cornerstone

of an effective and efficient EA process;

- public participation and accountability are important elements of an open and balanced EA process;
- the level of effort required to undertake an EA of a project should match the scale of the project's likely environmental effects.

The fundamental purpose of the Act is to ensure that federal decision-makers are aware of and fulfill their obligation to assess the environmental impacts of a project prior to determining whether it should undertake any action that enables the project to proceed.

4. APPLICABILITY OF THE CEAA TO DFO

DFO's MEHD receives a large number of project referrals that require decisions to be made with respect to potential harmful effects on fish and fish habitat. Not all of these projects will qualify for an EA under the CEAA. They may not qualify because they do not meet one or more of the criteria specified by the Act. This section describes the process for determining whether an EA is required under the Act. The flowchart in Figure 1 illustrates the decision-making process.

Some project referrals may not require an EA under the Act on the basis of DFO's **Interim Directive on the Issuance of Subsection 35(2) Authorizations**. The decision-making process regarding subsection 35(2) authorizations and the need to conduct an EA under the CEAA is addressed in section 5. **THE LAW LIST TRIGGER AND DFO POLICY**.

4.1 Do You Have a Project?

The first stage in the EA process is to determine whether a proposed project referred to DFO for review constitutes a project under the CEAA. This is a crucial stage that needs to be well understood.

Under the Act, a project must be either:

- an undertaking in relation to a physical work; or
- a physical activity not relating to a physical work that is listed in the Inclusion List Regulations.

An undertaking is described in the Act to include any proposed construction, operation, modification, decommissioning, abandonment or similar activity. It must be a fixed, physical thing which has been or will be constructed in order to qualify as a physical work. Something is fixed if it has a permanent

location. Cars, boats and aircraft are mobile and, therefore, are not **physical works**. An idea is a mental rather than a physical thing and does not constitute a **physical work**.

Similarly, if an activity is solely a mental activity, it does not qualify as a **physical activity** under the Act. Fishing and ocean dumping both qualify as **physical activities** because they are tangible activities that are not carried out in relation to a **physical work**.

Where it has been determined that the project constitutes a **physical activity**, it must be described in the **Inclusion List Regulations** in order for the Act to apply. If the activity is not on the **Inclusion List**, it is not a project under the Act and no EA is required. Appendix II contains a copy of the proposed **Inclusion List Regulations**.

The **Inclusion List Regulations** include a number of **physical activities** directly relating to fish and fish habitat:

- the destruction of fish by any means other than fishing where an authorization is required under section 32 of the **Fisheries Act** (paragraph 42);
- the deposit of a deleterious substance that requires an authorization by the Governor in Council under subsection 36(5) of the **Fisheries Act** (paragraph 47); and
- various activities that would result in the harmful alteration, disruption or destruction of fish habitat and would require an authorization under subsection 35(2) of the **Fisheries Act**:
 - **physical activities** carried out in a water body, including dredge or fill operations (paragraph 43);
 - draining or altering the water levels of a water body (paragraph 44);
 - placement of erosion control measures adjacent to a water body (paragraph 45); and
 - removal of vegetation in or adjacent to a water body (paragraph 46).

A "water body" is defined in the **Inclusion List Regulations** as any water body, including a canal, reservoir, an ocean, and a wetland, up to the high-water mark, but does not include a sewage or waste treatment lagoon or a mine tailings pond.

If a project involved one or more of the **physical activities** listed, an EA under the CEAA may be required.

4.2 Is the Project Excluded?

A project could be excluded from assessment under the CEAA:

- for reasons of national security;
- if it is carried out in response to an emergency; or
- if it is described in the **Exclusion List Regulations**.

The **Exclusion List Regulations** identify projects or classes of projects that are exempt from the CEAA because they are considered to have insignificant environmental effects. If the project is on the Exclusion List, it is not a project under the Act and no EA is required. Appendix II contains a copy of the proposed **Exclusion List Regulations**.

4.3 Is There a Federal Authority?

An EA under the CEAA must be triggered by a proposed action of a federal authority. A federal authority includes:

- a federal Minister of the Crown;
- a federal agency accountable to Parliament through a federal Minister; and
- a federal department or departmental corporation included in Schedule I or II of the **Financial Administration Act (FAA)**.

Crown corporations, as defined in the FAA, and certain harbour commissions are not federal authorities.

4.4 Is There a CEAA Trigger?

A federal authority, such as DFO, must carry out an EA before it exercises any power, duty or function that would enable a project to proceed either in part or in whole (section 5). The requirement for an EA is triggered when DFO:

- is the project proponent;
- provides financial assistance;
- grants an interest in land;
- performs a regulatory duty in relation to the project, such as issuing a permit, authorization or other approval, included in the **Law List Regulations**; or

- recommends that the Governor in Council performs a regulatory duty in relation to the project included in the **Law List Regulations**.

MEHD does not normally act in the capacity of a project proponent - rather, it responds to projects referred to it by project proponents, provincial agencies or other federal agencies. Similarly, the financial assistance or land triggers do not generally apply to MEHD. However, provision of funds by the MEHD for habitat restoration projects under the Habitat Action Plan, for example, would trigger an **EA** under the **Act**.

Small Craft Harbours Branch would be the proponent or funding agency for projects involving the construction of new harbours or modification of existing ones and would be required to conduct an **EA** for those projects under the **CEAA** prior to construction. The contribution of funds by Fishing Industry Services Branch for aquaculture development, for example, could trigger the requirement for an **EA** by that Branch.

The requirement for **EAs** to be conducted by MEHD would most likely be triggered by one of the **Fisheries Act** provisions contained in the **Law List Regulations**. Where MEHD may exercise its decision-making authority in accordance with one of these regulatory provisions, the **Act** would apply and an **EA** would be required. These provisions are dealt with in section 5. **THE LAW LIST TRIGGER AND DFO POLICY**.

Similarly, an **EA** would be required under the **Act** before DFO could recommend that the Governor in Council perform a regulatory duty under one of the Law List provisions.

It should be noted that, if a project is likely to have transboundary environmental effects and none of the section 5 triggers apply, the **Act** authorizes the Minister of the Environment to refer the project to a mediator or review panel if he or she believes that these effects might be significant. However, such a referral can be made only when there is no other federal Act or regulation that applies to the project.

4.5 Does DFO Have a Role as an Expert Department?

Where DFO is not involved in a project as a proponent, source of funding, land manager or regulator under the **Law List Regulations**, DFO is not an **RA** for the project. However, it may still have a role as an expert department.

Subsection 12(3) of the **CEAA** requires that every federal authority that is in possession of specialist or expert information or knowledge with respect to a project shall make it available to the **RA** or a mediator or a review panel. In this role, MEHD would provide advice to **RAs** with respect to the

effects of a project on fish and fish habitat. This advice could include recommendations for project relocation, design changes or other forms of mitigation that are required in order to prevent significant adverse effects on fish habitat and to meet the No Net Loss principle of DFO's Policy for the Management of Fish Habitat (Habitat Policy).

* 5. THE LAW LIST TRIGGER AND DFO POLICY

The Law List Regulations include the following Fisheries Act habitat protection provisions that involve decision-making by DFO as a federal authority:

- Subsection 22(1) relating to provision of a sufficient flow of water below an obstruction to permit the safe and unimpeded descent of fish
- Subsection 22(2) relating to provision of free passage of both ascending and descending migratory fish during construction of an obstruction
- Subsection 22(3) relating to provision of a quantity of water below an obstruction sufficient for the safety of fish and for the flooding of spawning grounds to the extent necessary for the safety of the ova
- Section 32 relating to destruction of fish by means other than fishing
- Subsection 35(2) relating to alteration, disruption or destruction of fish habitat
- Subsection 37(2) relating to requiring modifications to works and undertakings and restricting the operation thereof

The Law List Regulations also include subsection 5(2) of the Metal Mining Liquid Effluent Regulations under the Fisheries Act.

Subsections 22(1), 22(2) and 22(3) provide the Minister with the authority to issue orders or directives specifying requirements for protecting fish at an obstruction. When the Minister chooses to exercise this decision-making authority, the CEAA applies and an EA must be conducted prior to any order or directive being issued.

Similarly, if the Minister decides to authorize the destruction of fish under section 32 or to make an order regarding works and undertakings under subsection 37(2), the CEAA is triggered and an EA is required before such actions can be taken.

Subsection 5(2) of the **Metal Mining Liquid Effluent Regulations** authorizes the Minister to designate a tailings impoundment area at a specific site. Currently, the Minister of the Environment administers these regulations on behalf of the Minister of Fisheries and Oceans. Therefore, although the Minister of Fisheries and Oceans would be responsible for making the final screening decision, the Minister of the Environment would be expected to provide advice to assist in the decision making.

Subsection 35(2) enables the Minister of Fisheries and Oceans to authorize the harmful alteration, disruption or destruction of fish habitat. Under the No Net Loss Principle of DFO's **Habitat Policy**, harmful alteration, disruption or destruction of fish habitat is interpreted to mean a reduction of the current productive capacity of fish habitats supporting Canada's fisheries resources.

Due to the large number of referrals that DFO receives involving section 35, subsection 35(2) is the most common potential Fisheries Act trigger for an EA. However, not all of these referrals will result in issuance of authorizations under subsection 35(2). Therefore, It is necessary to address the question: when does subsection 35(2) trigger the requirement for an EA?

A document prepared for DFO, entitled **Decision Framework for the Determination and Authorization of Harmful Alteration, Disruption or Destruction of Fish Habitat**, is a useful reference guide in determining whether the proposed project is likely to result in the harmful alteration, disruption or destruction of fish habitat. This determination must be made first before the possible issuance of a subsection 35(2) authorization can be addressed.

According to DFO's **Interim Directive on the Issuance of Subsection 35(2) Authorizations**, such authorizations would be issued only when it is impossible or impractical to maintain the same level of habitat productive capacity using mitigation measures or where it is not technically feasible to avoid harmful effects to habitat. Although not a strictly legal requirement, in practical terms, DFO would normally require a proponent to develop compensation measures prior to issuing a subsection 35(2) authorization in order to satisfy the No Net Loss principle of DFO's **Habitat Policy**.

DFO's **Habitat Conservation and Protection Guidelines** indicate that habitat compensation is a viable option if project relocation, redesign or mitigation are not feasible and if the habitat requires only moderate (in the case of Class 2 habitat) or minimum (in the case of Class 3 habitat) protection. If the habitat that would be adversely affected by the project is considered to be Class 1 or critical habitat, compensation is not

an option.

Subsection 35(2) would trigger the requirement for an **EA** under the **CEAA** only when a subsection 35(2) authorization would be issued for the project. Where no authorization is to be issued, there is no trigger for an **EA** under the Act and DFO would not be an **RA** for the project.

From a practical standpoint, DFO must first meet its **Fisheries Act** and habitat policy obligations by screening a project to determine whether harmful alteration, disruption or destruction of fish habitat is likely to occur, whether the potential impacts could be mitigated or whether a subsection 35(2) authorization would be issued. Once the decision has been made to issue an authorization, the requirement for an **EA** under the **CEAA** is triggered and a formal assessment of the project must be carried out.

When DFO is not required to conduct an **EA** as an **RA**, it is still responsible for ensuring that the No Net Loss principle is satisfied through project relocation, redesign or the application of mitigating measures. This responsibility flows from both its mandate under the **Fisheries Act** and its role as an expert department under the **CEAA**.

The **Law List Regulations** include several **Fisheries Act** provisions that confer powers, duties or functions on the Governor in Council: section 32, subsection 35(2), subsection 37(2) and paragraphs 36(5) (a) to (e). These provisions authorize the Governor in Council to make regulations for the purpose of protecting fish or fish habitat. Paragraphs 36(5) (a) to (e) pertain to the making of regulations regarding the deposit of deleterious substances. For the purpose of the **Law List Regulations**, only the making of site-specific regulations would trigger the need for an **EA**.

Under the Memorandum of Intent between DFO and Environment Canada (DOE), respecting habitat management responsibilities, DOE would be the **RA** respecting the making of site-specific regulations by the Governor in Council for the deposit of deleterious substances from land-based facilities. However, DFO would be the **RA** where the regulations would apply to the deposit of deleterious substances from marine-based facilities or from activities in the marine environment. As an expert department, DOE would provide input to DFO on the possible effects of contaminants to be released to enable DFO to assess the possible effects of the project on fish and fish habitat.

With respect to the other provisions (section 32, subsection 35(2) and subsection 37(2)), DFO would be required to conduct an **EA** under the **CEAA** before recommending that the Governor in Council make site-specific regulations concerning a project

proposed for the marine environment, or the freshwater environment in B.C., the Yukon or the Northwest Territories. This is because DFO would be involved in decision-making that could influence the outcome of the project. It should be added that specific responsibilities for habitat management are currently under review and are, therefore, subject to change.

6. INITIAL EA CONSIDERATIONS

6.1 EA Timing

Once it has been determined that the CEAA applies to a project, section 11 of the Act requires that the RA ensures that an EA is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made. The RA must not exercise any power or perform any duty or function in relation to the project until the EA has been completed.

Since, in most cases, DFO does not become aware of a project until there is a request for a review or an authorization, the Department does not have control over the timing of the EA in relation to the project planning cycle. In some cases, this may limit the extent to which DFO can influence the final design of a project through the EA process. However, the project must still be guided by DFO's No Net Loss principle which will ensure that no reduction of habitat productive capacity occurs as a result of the project.

6.2 Working With Other Governments and RAs

6.2.1 Other Governments

Where a project requires authorization from both the federal government and a province or territory, the EA of the project may be covered by an EA harmonization agreement established by the two governments.

Harmonization agreements are based on the **Framework for Environmental Assessment Harmonization** approved by the Canadian Council of Ministers of the Environment (CCME) in 1992. The bilateral agreements are designed to eliminate unnecessary duplication by providing a "single-window" approach to EA. They provide guidelines for the roles and responsibilities of each government involved in the EA.

The Canada-Alberta Agreement for Environmental Assessment Cooperation is the first bilateral agreement to be established.

6.2.2 Other RAs

A project may have two or more RAs. For example, the Department of National Defence (DND) might wish to construct a culverted

road crossing across an Atlantic salmon rearing area in a stream located on one of its bases. DND is an RA for the project because it is the project proponent. DFO would also be an RA if there was the potential for harmful alteration of fish habitat requiring a subsection 35(2) authorization.

In another example, a project might be the construction of a river crossing that involves the placement of abutments on the riverbed. If the project has the potential to substantially interfere with river navigation, an approval would be required from Transport Canada, in accordance with paragraph 5(1)(a) of the **Navigable Waters Protection Act**, and Transport Canada would be an RA for the project. If DFO was required to consider authorizing harmful alteration of fish habitat by the project, it too would be an RA.

Whenever there are two or more RAs for a project, the CEAA indicates that the RAs must together determine the manner in which to best carry out their individual EA responsibilities. Assistance is available from the Agency if needed. A lead RA could be identified that would be responsible for coordinating the EA process or the RAs could coordinate their assessment using a team or working group approach. Where a lead RA is to be designated, the following process can be used to determine which RA should be the lead.

As stated earlier in this document, under the CEAA, a federal authority is the RA when it:

- (a) is the project proponent;
- (b) provides financial assistance;
- (c) grants an interest in land; or
- (d) takes a regulatory action pursuant to the **Law List Regulations**.

The lead RA can be determined using the following guidelines:

- where one of the RAs is a proponent, it is the lead RA;
- where there are RAs under (b) and (d), the RA under (b) is the lead;
- where there are RAs under (c) and (d), the RA under (c) is the lead;
- where there are RAs under (b) and (c), the RA under:
 - (b) is the lead when the proposed funding is greater than the fair market value of the land;

(c) is the lead when the proposed funding is less than the fair market value of the land.

Where there are two or more RAs that may both take regulatory actions covered by the **Law List Regulations**, such as in the second example described above, identification of the lead RA becomes more difficult. In these situations, the lead would have to be determined on a case by case basis by mutual agreement of the RAs.

6.3 Selecting the EA Track

Figure 2 illustrates the different options available for carrying out an EA and the decision-making that is used in determining the appropriate track to follow.

6.3.1 Is a Comprehensive Study Required?

The first question that must be asked is: is the project described on the Comprehensive Study List contained in the **Comprehensive Study List Regulations**? These **Regulations** list projects or classes of projects that are considered likely to have significant adverse environmental effects before site-specific mitigation. Appendix II contains a copy of the **Comprehensive Study List Regulations**.

If the project is included in the Comprehensive Study List, the EA must take the form of a **comprehensive study** and a comprehensive study report prepared. Because of the likelihood of significant adverse environmental effects, a **comprehensive study** requires a more intensive and rigorous assessment of the environmental effects than a simple **screening**. The requirements for carrying out a **comprehensive study** are covered in section 7. **CONDUCTING THE EA.**

6.3.2 Is a Class Screening Report Available?

If the project is not on the Comprehensive Study List, then the project must be subjected to some form of **screening**. The next question that should be asked is: has the **Agency** designated a class screening report that could be used to carry out a **screening** of the project? A class screening report presents the accumulated knowledge about the environmental effects of a given class or type of project and identifies the known mitigation measures.

A class screening report is not a substitute for an EA and its availability does not relieve the RA from having to conduct a screening. However, it can help to simplify and streamline the screening process. Class screening is addressed further in section 7. **CONDUCTING THE EA.**

6.3.3 Has the Project Been Previously Assessed?

If there is no class screening report available that applies to the project, a **screening** must be carried out and a screening report prepared. At this point, the question must be asked: has the project already been assessed, either through a **screening** or **comprehensive study**? Under Bill C-56, which proposes a number of amendments to the **CEAA**, a previous **EA** must be used when:

- the project did not proceed after the **EA** was completed;
- in the case of a project in relation to a **physical work**, the proponent proposes an **undertaking** in relation to that work different from that proposed when the **EA** was conducted;
- the manner in which the project is to be carried out has subsequently changed; or
- the renewal of a license, permit, approval or other action under a **Law List Regulations** provision is sought.

Use of a previous **EA** is addressed further in section 7. **CONDUCTING THE EA.**

6.4 Establishing the Public Registry

Before conducting an **EA** in the form of a **screening** or **comprehensive study**, a public registry must be established for the project. The purpose of the public registry is to facilitate public participation in the federal **EA** process.

The **CEAA** requires **RAs** to:

- establish a public registry for the purpose of facilitating public access to the records relating to the **EA**; and
- maintain the registry in a manner that ensures convenient public access.

The **RA** must maintain the registry from the start of the **EA** to the completion of any follow-up program. However, where a project is referred for mediation or panel review, the **Agency** maintains the registry from the time of referral until the report of the mediator or panel is submitted to the **RA** and the Minister of the Environment.

The **Agency** has established a public registry system framework within which all **RAs** are expected to fulfil their public registry obligations. The framework consists of three components:

- the Federal EA Index, an electronic database listing of all EAs conducted under the CEAA;
- RA document listings, maintained by each RA, of all publicly-available documents relating to their respective EAs; and
- the EA documents themselves.

The RA is responsible for the collection and input of information for the database and the electronic transfer of information to the Agency each month. The RA is also responsible for maintaining a document listing for each of its respective EAs and for managing the collection of documents that comprise the registry established for each EA.

DFO's computerized Habitat Referral Tracking System (HRTS) will be used as a means for establishing public registries for project referrals. The HRTS will also be used to maintain document listings with respect to the registries established for each EA carried out under the CEAA. Database information for each EA will be transferred electronically from the HRTS to the Agency's Federal EA Index on a monthly basis.

Where there is more than one RA for a project, the RAs must together ensure that each EA is entered only once on the Federal EA Index. Where a lead RA has been designated, that RA should be responsible for transmitting the EA document listing information to the Agency. Therefore, the lead RA must ensure that its document listing includes EA documents contained in the public registries of the other RA.

Public registries are maintained and updated regularly by the RA throughout the EA process for each project. They must contain all publicly-available records produced, collected or submitted with respect to the EA, subject to the exclusions described in the Act. In general, any document normally available to the public through access to information procedures should be included in the public registry.

The Agency's RA Guide contains a reference guide on the public registry. This reference guide provides more detailed information on the public registry and issues such as document clearing, cost recovery, responding to requests for information and official languages obligations. In addition, DFO is in the process of developing its own procedures for managing its public registry obligations, including document clearing or screening procedures.

Where MEHD is not an RA for a project but participates in the EA process as an expert department, it is not required to establish a public registry under the CEAA. However, depending on the level of its participation in providing advice with respect to a

project and the nature of the project, MEHD should still document its activities using the HRTS.

This would be particularly useful when, for example, MEHD decides not to issue a subsection 35(2) authorization for a given project and, therefore, is not an RA under the Act. The HRTS can be used to document this decision and its rationale (e.g. describe the mitigation measures that the proponent will be implementing).

7. CONDUCTING THE EA

Figure 3 contains a flowchart of the EA process to be followed when carrying out either a screening or a comprehensive study.

7.1 Step 1: Scoping

Scoping enables the spatial and temporal boundaries of the project and the EA to be established and focuses the analysis on the relevant issues and concerns.

Scoping is carried out in order to:

- determine what undertakings and activities must be assessed as part of the project;
- determine what factors and issues need to be considered in the EA;
- determine the parties that should be involved in the project and their interests and concerns; and
- determine the appropriate level of effort for the EA.

7.1.1 Scope of the Project

Determining the scope of the project involves identifying those components of the proposed development that should be considered part of the project for the purposes of the EA under the CEAA.

The first step is to determine the "principal project" being proposed. The principle project is either the specific undertaking(s) in relation to a **physical work** or specific **physical activity** which has triggered the need for an EA. As explained earlier in this document, for DFO the trigger would likely be the issuance of an authorization included in the **Law List Regulations**. The principle project must always be included as part of the scoped project.

There may also be other **physical works** or **physical activities** "accessory" to the principle project. In order to determine what is accessory to the principle project, the following criteria should be applied:

- **interdependence:** if the principle project could not proceed without the undertaking of another **physical work** or **physical activity**, the other **physical work** or **physical activity** may be considered as a component of the scoped project
- **linkage:** if the decision to undertake the principle project makes the decision to undertake another **physical work** or **physical activity** inevitable, the other **physical work** or **physical activity** may be considered as a component of the scoped project

For example, a proposed mine in B.C. requires the use of a small lake as a tailings pond. A road would also have to be constructed to provide access to the mine site. If a subsection 35(2) authorization was to be issued for the tailings pond, as an RA DFO would conduct an EA of both the principle project, the mine facilities, as well as the road, under the principle of **interdependence**, since the mine could not be constructed and operated without first building the road.

Alternatively, if the trigger for the EA was the issuance of a subsection 35(2) authorization with respect to crossing of a stream by the mine access road, the principle of **linkage** would require that the mine facilities be addressed in the EA as well as the stream crossing since construction of the mine would be inevitable once the road was built.

It should be noted that the CEAA does not provide direction with respect to determining the **physical works** or **physical activities** that are within the scope of a project. Consequently, there is uncertainty and disagreement over how to define the scope of a project when conducting an EA under the CEAA. Therefore, the preceding guidelines should be treated as being tentative.

The CEAA requires that, in the case of a **physical work**, an RA must consider all phases of a **physical work**, such as construction, operation and eventual decommissioning, in the EA.

Under the CEAA, two or more closely-related projects may be considered to be one project for the purposes of an EA. In order to determine whether the two projects can be combined, the criteria of **interdependence** and **linkage** should be applied. The **proximity** of the two projects should also be considered: if the study areas defined in relation to the scope of the EAs of the individual projects overlap, the two projects may be considered to form a single project.

7.1.2 Scope of the EA

In the majority of cases, DFO would become an RA for a project due to a **Law List Regulations** trigger. According to the **RA Guide**,

DFO could include in the EA of a project consideration of all environmental effects regardless of whether or not the effects fall within federal jurisdiction. However, from a practical standpoint, DFO would have to restrict its assessment to areas of federal jurisdiction where mitigation measures or conditions such as compensation could be specified.

The scope of an EA resulting from a Law List trigger is influenced by the scope of the authority provided by the regulatory trigger. The scope of the authority provided by the sections of the Fisheries Act contained in the Law List Regulations is fairly narrow, compared to other statutory instruments such as the Navigable Waters Protection Act or National Energy Board Act.

Where an EA of a project is required as a result of a federal funding or land trigger, the RA can again consider all environmental effects, regardless of jurisdiction, but can also attach conditions to the project that fall outside federal jurisdiction.

The preceding principles reflect current interpretations of the CEAA and recent EARP Guidelines Order court decisions in the area of EA scoping. Amendments to these principles may be required as a result of further legal analysis and increased understanding.

Section 16 of the Act requires the following factors to be addressed in both a screening and a comprehensive study:

- the environmental effects of the project, including:
 - the environmental effects of malfunctions or accidents that may occur in connection with the project;
 - any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;
- the significance of the environmental effects;
- comments received from the public;
- technically and economically feasible measures that would mitigate any significant adverse environmental effects of the project;
- other matters relevant to the EA that the RA may require, such as the need for and alternatives to the project.

Due to the definition of environmental effects in the Act, consideration of environmental effects must include:

- direct changes in the environment caused by the project;
- the effect of any such changes on:
 - health and socio-economic conditions;
 - physical and cultural heritage;
 - current use of lands and resources for traditional purposes by aboriginal persons; or
 - any structure, site or thing that is of historical, archaeological, paleontological or architectural significance; and
- any change to the project caused by the environment.

In addition to the factors listed above, a **comprehensive study** must also consider:

- the purpose of the project;
- technically and economically feasible means of carrying out the project as well as the environmental effects of those alternate means;
- the need for, and requirements of, any follow-up program; and
- effects on the capacity of those renewable resources likely to be significantly affected by the project to meet present and future needs.

The geographic and temporal boundaries will be determined to a large extent by the nature and scale of the project. The **EA** boundaries will also be influenced by the nature of the environmental effects. For example, the **EA** must consider the time during the year that the project will take place and the timing of biological events, such as spawning, or socio-economic activities, such as fishing, that may conflict with the project.

Further scoping of the **EA** occurs during the analysis of project-environment interactions in **Step 2** of the **EA** process.

7.1.3 Interested Parties

It is necessary to determine who has an interest in the project, what their concerns are and how they should be involved in the **EA**. Interested parties might be other federal departments, other levels of government, private sector organizations or the public.

Other federal departments may also be RAs for the project, in which case a lead RA may be determined and arrangements made for coordination of the EA process. Alternatively, a federal department might be the source of baseline data, knowledge or expertise relevant to the EA and would participate in the EA as an "expert federal department".

Another level of government could also be the source of baseline information, expertise or specialized knowledge. Alternatively, where a project is also subject to a provincial review, the project could be assessed through a joint EA procedure. In this situation, the existence of a federal-provincial agreement on EA procedures should be determined and the EA carried out accordingly.

A private sector organization might be involved in the EA as the project proponent, as a source of environmental information or expertise or because it might be affected by the project.

It is important to determine the level of interest the public has over a project and whether any sector of the public might be directly or indirectly affected by the project. The RA needs to be aware of public concerns about a project and to be in a position to respond to these concerns throughout the EA. It should also determine the level and form of public involvement in the EA process that is appropriate for the project.

7.1.4 Level of Effort

The appropriate level of effort for a screening or comprehensive study will depend on the nature and complexity of the project, the environmental setting, the nature of the environmental effects, the availability of information and the degree of uncertainty about the environmental effects or mitigation measures.

Scoping of the issues and concerns and identification of the interested parties will make it easier to determine the level of analysis required for the EA.

7.2 Step 2: Assessment of Environmental Effects

If the project has been previously assessed, the screening report or comprehensive study report prepared for the previous EA must be adapted for use in the present EA to whatever extent is appropriate, according to a proposed amendment to the CEAA contained in Bill C-56.

Also, the report must be adjusted to take into account any significant changes in the environment and in the circumstances of the project that have occurred since the previous EA was conducted and any significant new information relating to the

environmental effects of the project.

If a suitable class screening report is available, it can be used as the basis of a screening report. However, the RA must factor in any site-specific issues and must take into account any cumulative environmental effects that may result from the project in combination with other projects or activities that have been or will be carried out.

In the absence of these reports, the RA must start the EA from the beginning. The RA may delegate this responsibility to the proponent.

Assessment of the environmental effects of the project consists of:

- describing the project;
- describing the existing environment;
- identifying the project-environment interactions (environmental effects); and
- considering cumulative environmental effects.

The Agency's RA Guide provides guidance on assessment of environmental effects, including effects on human health and socio-economic and cultural areas.

Also contained in the RA Guide is a reference guide on assessment of cumulative impacts entitled **Addressing Cumulative Environmental Effects**.

In brief, the assessment of cumulative environmental effects must consider the environmental effects of the project in combination with existing or planned projects and activities. Addressing cumulative environmental effects involves considering:

- time and geographic boundaries;
- interactions between the project's environmental effects;
- interactions between the project's environmental effects and those of existing projects and activities; and
- interactions between the project's environmental effects and those of planned projects and activities.

In this assessment:

- only planned projects that will be carried out need to be considered;

- only likely cumulative environmental effects should be taken into account; and
- the significance of the cumulative effects must be determined.

Where there is more than one RA and DFO has been designated the lead, DFO must obtain the results of assessments of the other RA(s) on environmental effects under their jurisdiction. DFO would also obtain additional information, as required, from expert departments that are not RAs for the project. DFO would then consolidate all of the assessments and additional information into one screening report which could also be used by the other RAs as their screening report for the project.

7.3 Step 3: Mitigation of Environmental Effects

The CEAA requires that mitigation measures be developed to address potentially significant adverse environmental effects. However, mitigation should be considered for all environmental effects whether they are significant or not.

Mitigation measures are considered to be part of the project when determining the significance of any adverse environmental effects under the CEAA. It should be noted that compensation measures are included in the definition of mitigation under the Act.

As discussed in section 5. **THE LAW LIST TRIGGER AND DFO POLICY**, DFO policy calls for subsection 35(2) authorizations to be issued only when it is impossible or impractical to maintain the same level of habitat productive capacity using mitigation measures or where it is not technically feasible to avoid potential damage to habitat. In those situations, compensation options are considered in order to meet the No Net Loss principle where Class 2 or Class 3 habitat is involved (compensation is not an option for critical Class 1 habitat).

DFO's **Habitat Conservation and Protection Guidelines** provide a hierarchy of preferred compensation options ranging from most preferred to least preferred:

- creating similar habitat at or near the project site within the same ecological unit;
- creating similar habitat in a different ecological unit that supports the same stock or species;
- increasing the productive capacity of existing habitat at or near the project site and within the same ecological unit;

- increasing the productive capacity of a different ecological unit that supports the same stock or species; and
- increasing the productive capacity of existing habitat for a different stock or a different species either on or off site.

7.4 Step 4: Determining the Significance of Adverse Effects

Determination of the significance of adverse environmental effects that could be caused by the project is a crucial part of the EA. This determination directly affects whether the RA can take a course of action with respect to the project, or whether further review will be required through mediation or panel review.

In this step, the RA must determine whether or not the project is likely to cause significant adverse environmental effects, taking into account mitigation (including compensation) measures. This requires three questions to be considered:

- are the environmental effects adverse?
- are the adverse environmental effects significant?
- are the significant adverse environmental effects likely to occur?

Guidance for determining the significance of adverse environmental effects is provided in the reference guide entitled **Determining Whether a Project is Likely to Cause Significant Adverse Environmental Effects** contained in the Agency's RA Guide.

Again, it should be noted that the Act considers compensation to be a form of mitigation. As a result, it would be possible to conclude, pursuant to subsection 35(2), that a project may have harmful effects on fish habitat, that an authorization is required and compensation to be undertaken, but that, in the context of the CEAA, the environmental effects would be insignificant. Only in situations where an authorization is to be issued without adequate compensation would potential significant environmental effects be likely.

Following a screening or comprehensive study, the Act provides for the following range of conclusions on the significance of the effects, taking into account the implementation of appropriate mitigation measures:

- the project is not likely to cause significant adverse environmental effects;

- the project is likely to cause significant adverse environmental effects that cannot be justified;
- the project is likely to cause significant adverse environmental effects and it is uncertain whether they can be justified in the circumstances; or
- it is uncertain whether the project is likely to cause significant adverse environmental effects.

In addition, it may be concluded that there are public concerns associated with the project.

7.5 Step 5: Preparing the EA Report

Depending on which EA track has been selected, either a screening report or comprehensive study report must be prepared based on the results of the assessment. The RA may prepare this report or it may require the proponent to perform this task. The EA report must be included in the public registry established for the project.

As a minimum, the screening report should include:

- a description of the project activities;
- a description of the relevant environmental components;
- a summary of the environmental effects, including cumulative effects;
- a description of the proposed mitigation (compensation) measures;
- a determination of the significance of the adverse environmental effects;
- comments received from the public, if applicable;
- a statement and rationale of the screening conclusion; and
- an identification of the departmental contact responsible for the screening.

The RA may also choose to require the screening report to address other matters, including:

- the need for the project, alternatives to the project and alternate means of carrying out the project;
- a record of consultations with expert federal departments;

- a description of any necessary follow-up programs; and
- additional supporting information, such as results of environmental studies.

As a minimum, the comprehensive study report should include:

- a description of project activities;
- a description of alternate means of carrying out the project;
- a discussion of the rationale for the scope of the EA;
- a description of the relevant environmental components;
- consideration of effects on sustainable use of renewable resources;
- a description of the proposed mitigation (compensation) measures;
- a determination of the significance of the adverse environmental effects;
- a statement and rationale of the conclusion;
- a record of consultations with expert federal departments;
- comments received from the public and how these comments have been considered in the comprehensive study report;
- a description of any necessary follow-up programs;
- additional supporting information, such as results of environmental studies; and
- identification of the department contact responsible for the **comprehensive study**.

Where there is more than one RA for a project, and a lead RA has been designated, the lead RA would be responsible for coordinating the preparation of the EA report. Each RA would assess the effects of the project on its area of responsibility and provide the results of its assessment to the lead RA. The report would also reflect the advice and information received from expert departments (non-RAs).

The final document would serve as a common screening or comprehensive study report for use by all RAs. Each RA would include the report in its own public registry for the project. Only the lead RA would enter the EA on the Agency's Federal EA Index.

7.6 Step 6: Review of the EA Report

Where a **comprehensive study** is required, the comprehensive study report must be submitted to the **Agency** after all relevant expert federal departments have had an opportunity to review the report and comment on its scientific and technical accuracy.

Upon receipt of a comprehensive study report, the **Agency** is responsible for reviewing the report, publishing a notice to facilitate public comment on the report, reviewing the public comments received and making recommendations to the Minister of the Environment about the next step in the **EA** process. In addition, the **Agency** must ensure that the report and all public comments are filed in the public registry for the project.

At this point, the Minister of the Environment may decide that a public review in the form of mediation or a panel review is required. The responsibilities of DFO during the public review of a project are covered in section 8. **DFO RESPONSIBILITIES IN A PUBLIC REVIEW.**

Where a **screening** has been carried out, the **RA** has the option of allowing public review and comment on the screening report. It may also choose to obtain comments on the report from expert federal departments.

7.7 Step 7: Decision on the Project

When the review of the **EA** report is completed, the **RA** must decide whether to take any action that enables the project to proceed. Figure 2 illustrates the range of possible decisions.

Where DFO is the proponent (e.g. a new harbour facility), this decision determines the ultimate fate of the project. If DFO is considering providing financial assistance (e.g. for aquaculture development) or issuing some form of approval (e.g. a subsection 35(2) authorization), a decision not to take action would influence the proponent's decision on whether to proceed with the project.

The **RA** may make a decision when the following situations apply:

- where the **RA** has concluded that the project is not likely to cause significant adverse environmental effects, taking into account appropriate mitigation measures, it may take action that enables the project to proceed; or
- where the **RA** has concluded that the project is likely to cause significant adverse environmental effects that cannot be justified, taking into account appropriate mitigation measures, it may not take action that enables the project to proceed.

The RA's decision on the project must await the results of a public review when the RA has concluded that:

- it is uncertain whether the project is likely to cause significant adverse environmental effects;
- the project is likely to cause significant adverse environmental effects that may or may not be justified; or
- public concerns warrant a public review.

7.8 Step 8: Post-Decision Activity

After the RA has completed the screening report or comprehensive study report, and has determined whether it should take any action that would enable the project to proceed, a number of post-decision activities are required under the Act.

If it does not undertake action, the RA must file a notice of that decision in the public registry. If it does decide to take action, the RA must:

- ensure that the mitigation measures identified during the EA are implemented;
- decide whether a follow-up program is appropriate; and
- ensure that any required follow-up program is implemented.

Under the CEAA, a follow-up program may be required in order to verify the accuracy of the EA or to determine the effectiveness of any mitigation measures (including compensation) that have been implemented. The proponent would normally implement the follow-up program.

Where the RA decides to take action with respect to the project, it must also advise the public of:

- the action it has decided to take;
- any mitigation measures or compensation agreements that are to be implemented;
- any follow-up program that is to be implemented; and
- the results of any follow-up program.

The need for and requirements of a follow-up program need not be considered during a screening or the preparation of a screening report. However, if on completion of the report the RA determines that it may provide federal support to the project, it must make a decision about whether a follow-up program is appropriate. A

comprehensive study must consider the need for and requirements of a follow-up program.

8. DFO RESPONSIBILITIES IN A PUBLIC REVIEW

Most of the involvement of the MEHD under the CEAA will occur at either the **screening** or **comprehensive study** phase of the **EA** process. This involvement would be in the capacity of either an **RA** or expert department.

Mediation or a panel review might be required by a referral made by the **RA** to the Minister of the Environment following completion of a screening report or comprehensive study report. The **Act** also enables the **RA** to refer a project to the Minister at any time where it is of the opinion that:

- after taking into account appropriate mitigation measures, the project may cause significant adverse environmental effects; or
- public concerns warrant a reference to a mediator or a review panel.

The **Act** also authorizes the Minister of the Environment to refer a project, for which an **EA** is required, to a mediator or review panel where he is of the opinion that one or both of the above two situations apply. However, he is required to consult with the **RA** first before making the referral.

Mediation is a voluntary process of negotiation in which an independent and impartial mediator helps interested parties resolve their issues. Members of the public as representatives of interested parties, along with representatives of the **RA**, the proponent and other groups, as appropriate, participate in the mediation process.

In a panel review, the Minister of the Environment appoints the panel and establishes its terms of reference in consultation with the **RA**. An Environmental Impact Statement (EIS) is prepared for the project and interested parties are invited to participate in the assessment of the project through public hearings.

Recommendations made by the mediator or review panel are presently not binding on the **RA**. However, under one of the amendments to the CEAA proposed in Bill C-56, the report issued by the mediator or panel must be approved by the Governor in Council. The **RA's** course of action would have to be in conformity with the approval of the Governor in Council.

The following is a list of the roles and responsibilities of an **RA** in a mediation or panel review:

- must not exercise any power, duty or function to allow the project to proceed until completion of the EA;
- recommends to the Minister of the Environment whether mediation or a panel review is an appropriate step;
- for mediation, advises the Minister on the terms of reference for the mediator and provides background information;
- for a panel review, ensures that an EIS is prepared in accordance with guidelines established by the review panel;
- for a panel review, ensures that any deficiencies in the EIS, identified by the panel, are addressed by the proponent;
- participates in the panel's public hearings or mediation process;
- maintains a public registry from the time the mediator's or panel's report is submitted to the Minister and the RA until the completion of any follow-up program;
- determines, after a successful mediation or panel review, whether it may take action to enable the project to proceed;
- provides public notice of its course of action, including the extent to which the mediator's or panel's recommendations have been adopted;
- ensures that all necessary mitigation measures are implemented for the project; and
- ensures that, when appropriate, a follow-up program is developed and implemented.

Where DFO is not an RA for a project undergoing a public review, it may still have a responsibility to participate in the review. Subsection 12(3) of the **CEAA** requires that every **federal authority** that is in possession of specialist or expert information or knowledge with respect to a project must make it available to a mediator or review panel.

Also, it should be noted that section 35 of the **Act** authorizes a review panel to summons any person to appear before the panel to give evidence and produce such documents and things that the panel considers is necessary for conducting an **EA** of a project. DFO might be involved in a panel review of a project as either an **RA** or an expert department. In either case, a MEHD staff member

could be called upon to provide information to the panel.

Appendix I. Listing of DFO Reference Documents

DFO's Policy for the Management of Fish Habitat (Habitat Policy)

Interim Directive on the Issuance of Subsection 35(2)
Authorizations (September 1, 1994)

Habitat Conservation and Protection Guidelines

Decision Framework for the Determination and Authorization of
Harmful Alteration, Disruption or Destruction of Fish Habitat
(November 8, 1994)