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## Disappointment at the Bank: The Fish Habitat Banking Provisions of Bill C-68

By: Dave Poulton

**Legislation Commented On:** [Bill C-68: An Act to amend the Fisheries Act and other Acts in consequence](#)

Over the past weeks several ABlawg contributors have posted their summaries and commentary on the suite of environmental assessment and protection legislation introduced by the federal government in the form of Bills [C-68](#) and [C-69](#). The series started with [Martin Olszynski's overview](#) of the two pieces of legislation, to which readers are referred for background to my contribution.

The purpose of this post is to examine fish habitat banking, a fisheries management tool that for the first time stands to be legislated through the amendments to the *Fisheries Act*, [RSC 1985, c F-14](#) found in Bill C-68. Habitat banking is a mechanism to enable the provision of habitat “offsetting”. To understand habitat banking, therefore, it is necessary to start with the concept of offsetting.

### Offsetting for Habitat

Offsetting is the intentional creation of environmental benefits in order to compensate for the residual negative impacts of development projects or programs, after all reasonable measures have been taken to avoid and mitigate the negative impacts. Almost universally, offsetting is seen as the final stage (and last resort) in what is often referred to as the “mitigation hierarchy”. The hierarchy is the principle that offsetting should not be used in order to shortcut the dedication of resources to avoidance and mitigation. Likewise, it should not be an excuse for any slackening of environmental project review or oversight.

In order for offsetting to be ecologically valid there must be some equivalency of both kind and size between the negative impacts of development and the positive impacts brought about by offset measures. Where that equivalency cannot be demonstrated, or where the state of our knowledge or practical constraints dictate that offsets are unlikely to be successful, offsetting should be viewed with particular skepticism. Within these constraints, or perhaps in spite of them, offsetting is seen increasingly, in Canada and around the world, as an important tool for negating, or at least reducing, the environmental impacts of burgeoning development. [A recent report from ForestTrends](#) found that 99 jurisdictions worldwide have offset programs in place. Offsetting has been a part of Canada’s fisheries regime since the late 1980s. Since 1986 it has been routine for development proponents to be required to offset their negative impact on fish habitat through creation of new fish habitat or enhancement of existing habitat. This process has not been explicitly dealt with in legislation or regulation, but has been governed by policies

based on the Minister's discretion under section 35(2) of the *Fisheries Act* to attach conditions to authorizations for development impacting fish habitat.

The most recent policy, the [Fisheries Protection Policy Statement](#), was issued in 2013 following the amendments to the *Act* by the Harper government in Bill C-38. That policy, after a credible statement of the mitigation hierarchy, speaks of offsetting in expansive terms:

Offsetting measures could take a variety of forms ranging from localized improvements to fish habitat to more complex measures that address limiting factors to fish production. The choice of appropriate offsetting measures will be guided by threats to fisheries productivity and fisheries management objectives.

That high-level policy guidance was elaborated upon in a concurrent document, the [Fisheries Productivity Investment Policy: A Proponent's Guide to Offsetting](#). The Proponent's Guide sets out a series of principles and considerations which are to be incorporated into the use of offsetting in particular circumstances. Both the Policy Statement and the Proponent's Guide remain in force, though presumably they will require some substantial tweaking if Bill C-68 passes. While the documents reflect the Harper government's emphasis on the anthropocentric benefits of fisheries, as statements of offset principles we could do a lot worse.

## **Habitat Banking**

And so at last I come to habitat banking. Banking is a variation on habitat offsetting whereby offset benefits are provided not in response to the negative impacts of a particular development project, but rather proactively in anticipation of future development projects. Offset credits, created through proactive habitat restoration, creation or enhancement, are valuable regulatory assets that may be applied to satisfy the offset obligations of later developments. The term "bank" is often used to refer to either the physical location of the offset work or the pool of offset credits that is produced through the work.

The ecological argument in favour of offset banking is that it encourages the production of offset benefits in advance of the negative impacts of development. This is in contrast to more conventional offsetting which usually sees the development proceed with offsetting coming after. Another benefit is that the ecological gains can be verified through inspection of a completed offset project, rather than on the basis of a mere plan, no matter how well-founded. This latter point is particularly salient for the Canadian fisheries regime, as it has in the past been roundly criticized for using offsetting to allow development, with little tracking of the actual performance of offsets (see Quigley and Harper's well-known article [here](#) and my 2016 review of critiques of the program, "Offsetting for 'Serious Harm': The Recent Evolution of Section 35 of the *Fisheries Act*" 29 J Envtl L & Prac 19). A further claimed benefit is that habitat banking encourages the concentration of offset measures into areas of high ecological value, where a canny banking proponent can produce substantial benefits in a cost-efficient manner.

There are two varieties of banking. Under "first party" or "self" banking a regular development proponent who expects to require offset credits for future developments

may undertake advance offsets and create a bank of credits for its own future use. First party bankers are typically large enterprises such as port authorities, transportation agencies, or large resource developers. First party banking can take place with little to no involvement of parties other than the proponent and the regulator. For that reason it is often low profile and uncontroversial.

A more ambitious form of banking is “third party” banking. Third party banking allows parties other than a development proponent (typically conservation organizations, environmental consultants, or landscape architects) to proactively undertake environmentally beneficial work. Through some prescribed process these offset developers may submit their plans and the outcomes of their work for review and accreditation as offsets. The resulting offset credits may then be transferred (usually by commercial sale) to a development proponent who faces a requirement for offsets of that type. This means that a pool of developers may work together to exchange offset credits among them as needed.

It also means that other parties may enter into offset creation and banking. This gives rise to another economic argument for banking: it encourages the growth of an entrepreneurial class of offset providers (often called “habitat bankers”), who may develop both the skills and opportunities to produce offsets at a level and efficiency that would be unlikely were they to be generated one at a time in a conventional scheme. Ideally, banking opens the door to ecologically beneficial work as a profitable business venture, which should encourage more of it, something we badly need. It could provide a profit centre for many entities, including conservation groups and Indigenous groups who might have special opportunities or insights into what work could bring the most benefits.

Third party banking creates this economic and ecological benefit by treating the benefits to and from nature as commodities to be exchanged in the marketplace. For this reason banking sometimes generates controversy as a form of “commodifying” nature. For those who see inherent value in nature and wish to see that respected independent of utilitarian benefits, the idea of trading in components of nature is offensive. Very briefly, my counterargument is that we already trade nature far too often for roads, subdivisions, mines and a myriad of other things, so trading one piece of nature for another hardly seems like a worse idea. (Post your own comments below.)

The other possible negative in creating an offset credit market is that it makes the process dependent on market forces. In particular, the restoration and enhancement work that creates offset credits is done in anticipation of future demand from the forces of development. A sluggish or uncertain future development scenario will not stimulate the work we want to see. This applies equally and more directly to conventional offsetting as it does to banking.

Banking, especially third party banking, originated in the United States, where it grew organically at the regional level out of the federal requirement to offset any losses to a wetland area or function pursuant to [section 404 of the Clean Water Act](#). Over the years it

has seen an increasing level of formalization and has been generally viewed favourably as an efficient way to promote quality offsets. Hundreds of wetland banks have been established, and the process has been emulated for endangered species habitat. A community of private mitigation bankers has grown up, with its own [annual conference](#). Attending that conference a couple of years ago, I was struck by the ambitious entrepreneurial spirit, but also by what a novel and uncertain business habitat banking is. Those considering it should have a high tolerance for risk.

### **Habitat Banking in Bill C-68: Only Going Half Way**

Habitat banking has not been a significant feature of fisheries management in Canada to date. The Proponent's Guide discusses banking in a favourable manner, but little use has been made of the tool. A [2011 study by Senes Consultants Limited](#) reviewed 10 of the known 25 cases of so-called "self-banking" in fish habitat. Most of those cases were in Quebec and Nova Scotia, and most of the proponents were government agencies. We have seen little of the broader, market-oriented use of third-party banking where most of the benefits set out above are expected to arise.

Bill C-68 explicitly provides for habitat banking in new sections 42.01 through 42.04 of the *Fisheries Act*. Unfortunately, those provisions seem to be drafted to allow only self-banking, and may preclude third party banking initiatives.

The banking provisions of Bill C-68 contain their own definition section (42.01) where we find that "*fish habitat bank* means an area of a fish habitat that has been created, restored or enhanced by the carrying on of one or more conservation projects within the service area and in respect of which area the Minister has certified any habitat credit . . .". Several of the terms used there are themselves defined terms.

The first indication that the drafters mean to exclude third party banking comes in the definition of "proponent". Typically this is a term applied to those who propose a new economic development, not to one who seeks to establish a habitat bank. The definition in section 42.01 combines the two roles: "*proponent* means a person who proposes the carrying on of a conservation project **and** any other work, undertaking or activity within the proposed service area" (emphasis added). The use of "and" between the conservation project and other work in this definition appears to mean that in order to qualify to propose a bank one must also propose other work in the service area. This dictates against a party merely weighing into a banking initiative. The sign on the door might as well say "Developers Only!"

The same direction is strongly suggested by the definition of "service area". Typically the term refers to that geographic area that is both sufficiently ecologically similar and proximate in distance so that a bank credit can be applied to a development project. In other words, the delineation of a service area for an offset bank ensures the ecological equivalence of the development and offset impacts. It also delineates the geographic area in which third party banking credits can be transferred and applied. Section 42.01 of the Bill, however, says that "*service area*" means the geographic area that encompasses a

fish habitat bank and one or more conservation projects and within which “**a proponent** carries on a work, undertaking or activity” (emphasis added). As just discussed, a proponent is one who is involved in both banking and other works and activities. Again, this does not appear to allow for one to undertake banking as a separate activity, so third party banking is precluded.

On the same theme, section 42.03, which provides for how habitat credits may be used, states: “**a proponent** may only use **their** certified habitat credits in respect of a fish habitat bank within the service area to offset the adverse effects on fish or fish habitat in the carrying on of **the** work, undertaking or activity authorized or permitted to be carried on in that service area” (emphasis added). The words I emphasized seem to speak to a proponent using the credits they generate to offset their own work in the service area. In other words, this only speaks to self-banking.

The remainder of these provisions give guidance on the process to be followed as an offset proponent seeking to establish an offset bank and to receive authorization from the Minister to do so. It also provides for the promulgation of regulations in this regard. These sections only speak about the prescription for the “creation, allocation and management” of habitat credits (sections 42.02(1)(a) and 42.04(a)). There is no mention of any transfer or exchange of credits.

The inclusion of the habitat banking provisions in Bill C-68 should be welcomed. Canada has discussed the implementation of habitat banking in many forms over several years. While the concept has generally been viewed favourably in both official and informal circles we have seen little move toward implementation. Bill C-68 lays some groundwork for progress. If, however, I am correct in the above interpretation, it will only be of assistance to a narrow class of major developers. That may have some positive impact, but the legislation seems to take a pass on the much greater ecological and economic benefits and opportunities that could be opened up by a well-conceived third party banking system. If that is so, then this legislation will be a lost opportunity for both Canadians and fish.

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