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Fish and Fish Habitat Protection Program Fisheries and Oceans Canada 867 Lakeshore Road Burlington, Ontario L7S 1A1

Subject: Framework for Aquatic Species at Risk Conservation – Discussion Paper Policy for Applying Measures to Offset Harmful Impacts to Fish and Fish Habitat Guidelines for Establishing and Managing Fish Habitat Banks Interim Standard and Codes of Practice - In-Water Site Isolation; Repair, Maintenance and Construction of Docks, Moorings and Boathouses; Municipal and Agricultural Drain Maintenance; Repair and Maintenance of In-Water Structures; Bridge Repair and Maintenance.

The Ontario Federation of Anglers and Hunters (OFAH) is Ontario's largest, non-profit, fish and wildlife conservation-based organization, representing 100,000 members, subscribers and supporters, and 725 member clubs. We appreciate the ongoing consultation under the Fish and Fish Habitat Protection Program's (FFHPP) Wave 3 Engagement and offer feedback on the following modules: Framework for Aquatic Species at Risk Conservation – Discussion Paper; Policy for Applying Measures to Offset Harmful Impacts to Fish and Fish Habitat; Guidelines for Establishing and Managing Fish Habitat Banks; and an Interim Standard and Codes of Practice.

Framework for Aquatic Species at Risk Conservation – Discussion Paper

Better species at risk funding

In their 2020 analysis, Woo-Durand et al. determined that habitat loss is the most important anthropogenic threat to species at risk (SAR) in Canada. Similarly, information shared by the Government of Canada (2019) and reports made under the Convention on Biological Diversity (2006, 2010) identify habitat loss as the primary catalyst for declines in global biodiversity. Despite the implications for vulnerable species and biodiversity, Fisheries and Oceans Canada (DFO) is allowing habitat degrading and destroying projects to proceed without proper compensation and whose harmful impacts are accumulating. Such a lack of accountability compromises the larger conservation objectives outlined in the framework.

Considering existing long-term funding constraints, we are concerned that the intended benefits of the framework for SAR may be unattainable. Again, we recommend DFO investigate opportunities for establishing a fee-in-lieu program to allow project proponents to pay money in exchange for anticipated environmental damages caused by routine projects. Not only would this offset important losses, but fees could be put towards a conservation bank and used to fund the recovery of SAR and multi-species approaches in a more meaningful way.

Strategies for enhancing species at risk conservation

Although we support DFO's proposed multi-species approaches, there are other aspects to SAR conservation in Canada that require attention. Below, we outline several examples to help describe areas that are underperforming and offer guidance on how to enhance aquatic SAR policies now and into the future.

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Variation below the species level

The OFAH recognizes the importance of variation below the species level but providing full protection under *Species at Risk Act* (SARA) for certain Designatable Units of the same species may be inappropriate at times and has the potential to compromise conservation objectives for other SAR.

For example, DFO is considering listing Lake Opeongo small- and large-bodied forms of Lake Whitefish as Threatened under SARA. Considering the MNRF acknowledges there are greater than 2,200 waterbodies in Ontario where Lake Whitefish has been observed, notwithstanding the many others across Canada, there is potential for innumerable other fisheries where coevolved species pairs of whitefish may occur.

Not only would protecting and recovering whitefish in this way be impractical, but it would also take away already constrained resources needed for other lower-profile SAR. The OFAH recommends enhancing SAR policies by exploring alternative opportunities for conserving variation below the species level.

Range-edge populations

The OFAH recognizes the significance of local adaptations of species at the extent of their range, but providing full protection for these populations may be counterproductive in certain situations.

According to the global conservation status for the Spotted Gar, they are at very low risk of extinction or elimination (NatureServe, 2012). Spotted Gar is considered secure nationally and within various subnational jurisdictions in the United States and are described by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) as one of the most abundant shallow water piscivores in the southern United States (2015).

Despite not being at risk within its core distribution, Spotted Gar is provided the highest level of protection in Canada (Schedule 1 Endangered under the SARA). Although fringe populations can be important to the evolution and persistence of a species, there should be greater emphasis on the protection and recovery of endemic SAR or species that are at risk on a global scale.

Improving single-species approaches

Multi-species approaches involve complex social, ecological, jurisdictional, and feasibility considerations to benefit a wider variety of species on a landscape level. However, DFO's track record for implementing comparatively simpler single species approaches to recovery is falling short.

For example, there has been extensive delays on whether to add American Eel to Schedule 1 of SARA as a Threatened species as per COSEWIC's assessment that was completed over a decade ago (COSEWIC, 2012). A designation in this way could help with upholding Canada's 2021 commitment to the *United Nations Declaration* on the Rights of Indigenous People yet, since DFO's public comment period closed in 2016, no proposed listing decision has been published in Canada Gazette Part I. Despite significant ongoing declines in American Eel abundance, DFO continues to permit the killing of American Eel by existing hydroelectric facilities that also prevent their upstream passage.

There is a need for strong federal leadership to balance multi-jurisdictional issues and socio-economic and cultural considerations related to the American Eel. These could be mitigated through legislative exemptions as well as defining exemptions for acceptable activities in recovery strategies (i.e., sustainable use). In the interim, DFO could use ministerial discretion under the *Fisheries Act* to require hydropower facilities to provide upstream passage for American Eel and implement solutions for turbine mortalities.

Although we support multi-species approaches for the conservation of SAR, DFO has shown that it has difficulty even listing single species such as the American Eel. These challenges and others could easily become magnified and more unmanageable when attempting to protect multiple species which could also lead to inaction and stall recovery.

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Indigenous engagement

A priority of DFO's FFHPP is to support Canada's commitment to reconciliation with Indigenous peoples; however, what this means within the context of the program isn't so clear. The Government of Canada offers grants and contributions opportunities, but what types of funding streams are being specifically provided to Indigenous proponents/partners? Considering the intimate connection Indigenous communities have with SAR, Indigenous inclusion should be prioritized within the FFHPP to facilitate and foster greater participation in the stewardship of imperiled species and their habitats.

Policy for Applying Measures to Offset Harmful Impacts to Fish and Fish Habitat

General comments and recommendations

The OFAH supports DFO's approach to the policy on *Applying Measures to Offset Harmful Impacts to Fish and Fish Habitat* and offer the following comments and recommendations for further consideration.

The OFAH is pleased to see DFO has included our requests to account for, not only the harmful impacts caused by a work, undertaking, or activity (WUA), but also the time lags and uncertainties for the offsetting to come online and be fully functional. We appreciate the inclusion of additionality to the offsetting policy as we advocated for this consideration early in the engagement process.

Quantitative minimum offset ratios should also be established to avoid defaulting to the lowest possible offsetting ratio of habitat gained to habitat lost. Requiring performance goals and measurable parameters in monitoring plans including targets is a step in the right direction; however, the policy objectives should be "*SMART*" (i.e., <u>Specific</u>, <u>M</u>easurable, <u>A</u>chievable, <u>R</u>ealistic, and <u>T</u>ime-sensitive).

While reference scenarios and baseline information are sufficiently reflected in the offsetting policy, we would like to reinforce the importance of monitoring prior to implementing an offset. This is a critical step for any successful offsetting plan but is oftentimes insufficient and data deficient making it impossible to fully quantify the contributions of an offset. Moving forward, we insist on DFO making improvements in this regard by being more stringent with the requirements for proponents including greater consideration of seasonality and longerterm year-to-year variation.

Stocking can be a useful management tool and, as outlined in Section 3.1.3, can be used in conjunction with habitat restoration and enhancement as part of an offsetting plan. It may be pertinent to note that supplemental stocking should be avoided where a naturally reproducing stock of the same species occurs. The Ministry of Natural Resources and Forestry's 2002 inland stocking guidelines indicate supplemental stocking can have serious ecological effects on fish populations, is generally ineffective, and rarely cost efficient, which could seriously impact the outcomes of an offsetting plan. The guidelines also recommend a thorough aquatic habitat inventory is completed prior to any stocking which may be an important consideration for the policy.

Averted loss offsets involve protecting an existing area where the natural habitat is declining and there is a high degree of probability that it would otherwise be lost in the foreseeable future. We question whether these offsets uphold additionality and policies outlined in Section 2.1.4 as the habitat is likely imperiled due to human-related effects (direct and indirect). This type of "offsetting" also has the potential to affect socio-economic and cultural values (i.e., rights-based, access, sustainable use). Good consultation and engagement will be essential if DFO intends to move forward with this option.

The OFAH recommends DFO add a section on proponent compliance with the offsetting plan that includes checks, balances, and scalable penalties, and routine follow-up and inspections by DFO staff. DFO should also elaborate on their expectations for contingency plans, triggers for implementation, and how they will be considered in the event offsets are shown to not be functioning as intended.

Section 2.1.1 defines mitigation as the prevention of harmful impacts on fish and fish habitat. This implies an action is occurring to stop something from happening which is, in fact, avoidance. Mitigation or minimisation, as outlined in the *Business and Biodiversity Offsets Programme* (2013) and the ICMM IUCN's *Independent Report on Biodiversity Offsets* (2012), indicate harmful impacts cannot be fully avoided; meaning, some residual harm exists which would necessitate offsetting under the hierarchy of measures. This has important implications when counterbalancing the harmful and cumulative effects caused by routine projects managed under the *Prescribed Works and Waters Regulations* (PWWR), codes of practice, or permitted through letters of advice.

Generally, the OFAH is supportive of the use of habitat credits but would like to see greater consideration and prioritization of other mitigation techniques prior to "withdrawals" from habitat banks. We are supportive of not allowing proponents to sell or trade proponent credits to a third-party because the habitat banking system remains in an early stage of development.

Establishing regulations for fees-in-lieu

DFO acknowledges harmful impacts are unlikely to be fully avoided for projects that fall under PWWR. It should also be noted that many projects managed under codes of practice or letters of advice are also, to some degree, causing harmful alteration, disruption or destruction of fish habitat (HADD) and/or death of fish. The ecological losses associated with the many of these projects cannot be fully avoided and are going unchecked, not being compensated for, and contributing to cumulative effects.

The goal of measures to offset are to support the conservation and protection of fish and fish habitat by, after exhausting avoidance and mitigation measures, counterbalancing harmful impacts to fish and fish habitat resulting from WUAs taking place in or near water. The same principles must be applied to smaller, routine projects. We acknowledge that having full reviews, authorizations, and traditional offsetting requirements for these projects would be impractical and would take resources away from larger projects and/or bigger threats. However, establishing a fees-in-lieu framework for routine projects to fund largescale habitat restoration or research projects would help counterbalance the losses.

DFO has gone on record stating that there is currently no method to enable a fee-in-lieu of offsetting system, but there are various kinds of fees the *Fisheries Act* does authorize including Section 13 (Fees for rights and privileges). This provision allows the Minister to impose fees, by regulation, in connection to authorizations for the death of fish or impacts to fish habitat and would likely permit fees to compensate for harm. To be clear, we do not want fees-in-lieu to be applied to projects that require authorization and traditional offsetting; rather, the fee structure could be scaled appropriately for various types of smaller, routine projects.

The OFAH requests that DFO engage stakeholders through the *talkfishhabitat* website on the development of a fees-in-lieu offsetting regulation under the *Fisheries Act* by leveraging Section 13.

Guidelines for Establishing and Managing Fish Habitat Banks

The OFAH supports DFO's Guidelines for Establishing and Managing Fish Habitat Banks.

Interim Standard and Codes of Practice

General feedback

According to DFO, the measures for each code of practice, even when implemented correctly, are limited to *mitigating* or *managing* the risk of harmful impacts. This suggests some level of harm is occurring because these terms (i.e., mitigating and managing) refer to making something harmful less severe/serious or having control over something (that is causing harm). This conflicts with other sections of the codes of practice that go on to describe the measures as requirements to *prevent* harmful impacts to fish and fish habitat and *avoid* contravention of the *Fisheries Act* and the SARA. Prevention and avoidance imply no harmful impacts are occurring which is very different from the meanings and intentions of "mitigating" or "managing" harmful impacts. While prevention and avoidance are the preferred outcomes for any project, the reality is that under most circumstances harm is occurring and should be adequately accounted for.

As outlined by DFO, the codes of practice can all cause disturbances to the waterbody bed and banks, may release sediments or other deleterious substances, and can result in changes to aquatic habitat. Most of the sections on 'protection of the riparian zone' involve reinstating stream banks and slopes and re-vegetating the affected riparian zone. This indicates some degree of harm is occurring to the riparian vegetation which, according to DFO, "directly contributes to fish habitat by providing shade, cover and areas for spawning and food production." Although the harm is relatively short-term, by definition, HADD refers to any temporary (or permanent) change to fish habitat that directly or indirectly impairs the habitat's capacity to support one or more life processes of fish. Therefore, from our perspective, many projects managed under codes of practice are likely in contravention of the HADD provisions under the *Fisheries Act*.

There is a spectrum of harm ranging from less severe activities (e.g., general dock maintenance) compared to more harmful activities such as undertaking extensive bridge repairs. Regardless, if harm is occurring it should be offset while also considering the potential for cumulative effects. That said, too much of an onus is being placed on proponents and good faith that they will act according to their legislative responsibilities. While DFO insists on taking a hands-off approach and when harm is occurring under the guise of "mitigation", this makes us question how proponents are being held accountable for their actions when they are rarely serving the best interest of fisheries.

Guiding measures, conditions, notifications, and other requirements are helpful but we insist that the implementation of the plan be fully documented and kept as a record by the proponent. A requirement like this will also greatly aid inspections. It may also be important to explore opportunities for automatically forwarding notifications directly to affected indigenous communities.

Interim in-water site isolation standard

The interim in-water site isolation standard is not an avoidance or preventative measure. It is only meant to mitigate/manage sediment laden water caused by in-water work, the objective of which is to reduce the intensity, spatial scale, and duration of sedimentation of fish habitat. Inevitably, this means that sediment is being released, causing HADD to some degree, and contravening the *Fisheries Act*.

The methods included in this standard involve dewatering areas, capturing and relocating fish, and restoring the bed and banks, gradient, and contour affected by the project. The installation of turbidity curtains (Section 3.2) involves limiting the dispersion of sediments in the aquatic environment, while pump arounds (Section 3.3) refer to blocking a watercourse from one bank to the other to undertake work in the dry.

The potential for HADD to occur is evident and, without sufficient evidence and/or justification as to why these activities don't cause harm, we feel strongly that compensation should be a requirement. Moreover, at the very least, we recommend DFO reevaluate and reassign riskier activities (i.e., greater threats) to the PWWR to allow for greater consideration of their cumulative effects.

Closing remarks

In general, the OFAH supports multi-species approaches for the conservation of aquatic SAR but recommend DFO seek out alternative strategies for protecting variation below the species level, reevaluate how range-edge populations are managed, and improve the conservation of single species (e.g., American Eel). We support the offsetting policy and guidelines for fish habitat banks but urge DFO to consider establishing a fees-in-lieu framework for counterbalancing losses associated with smaller routine projects.

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We look forward to future engagement under DFO's FFHPP and thank you for your consideration of our comments.

Yours in Conservation,

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References

Business and Biodiversity Offsets Programme. 2013. To No Net Loss and Beyond: An Overview of the Business and Biodiversity Offsets Programme, Washington, D.C. 20pp.

COSEWIC. 2012. COSEWIC assessment and status report on the American Eel Anguilla rostrata in Canada. Committee on the Status of Endangered Wildlife in Canada. Ottawa. xii + 109 pp. (www.registrelep-sararegistry.gc.ca/default_e.cfm).

COSEWIC. 2015. COSEWIC assessment and status report on the Spotted Gar Lepisosteus oculatus in Canada. Committee on the Status of Endangered Wildlife in Canada. Ottawa. xii + 40 pp. (<u>http://www.registrelep-sararegistry.gc.ca/default_e.cfm</u>).

Government of Canada. 2019. Learn About the Top Five Threats to Nature – Protect Nature Challenge. [Online] <u>https://www.canada.ca/en/environment-climate-change/services/nature-legacy/activities/learn-top-five-threats.html</u>. Date modified: 2021-07-30.

International Council on Mining and Metals and the International Union for Conservation of Nature. 2012. Independent report on biodiversity offsets. Prepared by The Biodiversity Consultancy. [Online] www.icmm.com/biodiversity-offsets. 59pp.

Ministry of Natural Resources. 2002. Guidelines for stocking fish in inland waters of Ontario. Fisheries Section, Fish and Wildlife Branch. Peterborough, Ontario. 43pp.

NatureServe. 2012. Spotted Gar (*Lepisosteus oculatus*) – Explorer. [Online] https://explorer.natureserve.org/Taxon/ELEMENT_GLOBAL.2.104136/Lepisosteus_oculatus.

Secretariat of the Convention on Biological Diversity. 2006. Global Biodiversity Outlook 2. Montreal, 81 + vii pages.

Secretariat of the Convention on Biological Diversity. 2010. Global Biodiversity Outlook 3. Montréal, 94 pages.

Woo-Durand, C; Matte, J.-M; Cuddihy, G; McGourdji, CL; Venter, O; Grant, JWA. 2020. Increasing importance of climate change and other threats to at-risk species in Canada. NRC Research Press, Environ. Rev. 28: 449–456.