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FISHERIES ACT BRIEF

ECOLOGICALLY SIGNIFICANT AREAS

By Susanna Fuller, Vice-President of Operations and Projects, Oceans North | January 2021

I. THE ISSUE

The lack of protection and slow pace of restoration of fish habitat continues to be one of the major threats that impedes recovery of aquatic species, particularly those in freshwater and nearshore ecosystems. While the *Fisheries Act* included the ability to designate "ecologically significant areas" (ESAs), to date this tool has not been used to effectively protect fish habitat (defined but not limited to spawning grounds and nursery, rearing, foody supply and migrations areas[1]). Fisheries and Oceans Canada (DFO) has invested in habitat restoration programs, together with other levels of government as well as non-government organizations. In marine and coastal areas, DFO has also identified "ecologically or biologically significant areas (EBSAs), however these areas have no express governance framework. While ESAs have been included in the Act before the 2019 modernization, this tool has not been used to protect fish habitat. The 2019 *Fisheries Act* modernization strengthens the ESA provisions, however there is no regulatory framework to date. Protection of fish habitat through ESAs will be critical to protecting aquatic diversity and restoring key habitat areas. The ESA provisions also offer an opportunity to regulate habitat protection in partnership with existing programs, stakeholders and rightsholders.

II. RELEVANT SECTIONS IN THE *FISHERIES ACT* AND IMPROVEMENTS

The modernized *Fisheries Act* has strengthened the provisions for ESAs, by including provisions for restoration of degraded habitat under and stronger provisions for establishing and managing ESAs. There are stronger provisions related to habitat authorizations within established ESAs. To date however, there are no regulations for formal establishment. Relevant provisions of the Act are included in Appendix I.

III. OPPORTUNITIES FOR IMPLEMENTATION

Canada has several tools for protecting marine areas, including the *Oceans Act, National Marine Conservation Areas Act, National Wildlife Act* and more recently Canada has used authorizations under the *Fisheries Act* to implement the Policy for the Management of Fishing on Sensitive Benthic Areas (Sensitive Benthic Areas Policy) to create "marine refuges" as "other effective conservation measures." These tools are effective for protecting large marine areas from industrial threats and will be further strengthened as minimum standards are integrated into regulatory policy frameworks for the three legal tools. Because the Ecologically Significant Areas designation applies directly to Section 34 and 35 of the *Fisheries Act*, there are opportunities to protect aquatic habitats where the other existing tools are not suitable.

Currently there are limited mechanisms to protect freshwater ecosystems, estuaries, river systems or specific coastal habitats that may be important for carbon sequestration (i.e. salt marsh habitat, eel grass beds, kelp and rockweed beds) or to protect habitat-forming species, such as eelgrass, that are essential to the functioning of coastal and estuarine ecosystems and designated by DFO as Ecologically Significant Species.

[1] DFO Fish and Fish Habitat Policy Statement (2019) https://www.dfo-mpo.gc.ca/pnw-ppe/policy-politique-eng.html#toc-8

Prior to the 2012 changes to the *Fisheries Act* and now with the restoration of HADD, and strengthening of the ESA provisions, there is an opportunity to identify areas that provide important fish habitat that otherwise are unlikely to be protected. For areas that are considered marine refuges but where the Sensitive Benthic Areas policy does not apply, these could be designated as ESAs. Habitat for COSEWIC assessed aquatic species could also be designated under the ESA regulations and this would be particularly beneficial for species where a SARA listing is not deemed the most effective process for recovery (i.e. American eel, Atlantic salmon as examples of designated but not listed species).

If ESAs are identified together with local stewardship groups they can also provide a galvanizing mechanism to enhance habitat restoration efforts. Canada has already invested in partnership programs including the Aquatic Habitat Partnership[2], Coastal Restoration Fund[3] and the Natural Heritage Conservation Program.[4] An extension of these programs could be to expedite habitat protection through the identification of ESAs. Additionally, Canada has adopted and provided funding for the Wild Atlantic Salmon Conservation Policy[5] and the Policy for the Conservation of Wild Pacific Salmon Wild Salmon Policy[6], and protection of ESAs could form a part of the implementation of each of these policies.

ESAs can be used to protect fish habitat through partnerships with municipalities, provinces and territories well as Indigenous communities, reduce threats that are not addressed through other tools such codes of practice or offsets, and to protect habitat-forming ESAs.

IV. KEY CONSIDERATIONS

Clarity is needed on how and where DFO intends to use ESA designations and where they fit within the larger suite of tools for fish habitat protection. A decision-making framework would be helpful so that there is a clear rationale for when ESA's would be designated rather than some other type of habitat protection under DFO or ECCC. This should include a clear set of criteria against which candidate ESA sites are evaluated, which would help facilitate effective consultation with stakeholders and rightsholders. Clarity is also needed on how identified EBSAs could facilitate the process of ESA identification and designation.

Regulations are needed for designation generally and clarification is needed as to whether or not each ESA would require a new regulation (as in marine protected areas under the Oceans Act) or if overarching regulations could apply with conservation objectives differing between areas. The path that is most expedient in terms of actually designating ESAs should be followed, which may well be regulations and prohibitions for a specific ESA.

There are numerous stewardship groups and Aboriginal Aquatic Resource and Ocean Management programs across Canada that would benefit from the establishment of ESAs as tangible outcomes of their programs, many of which are already funded by DFO.[7] The US established the National Habitat Partnership Program to work with communities on restoring and protecting rivers, lakes, streams and estuaries.[8]

Importantly, careful consideration should be given as to how these regulations apply to areas or threats that are under the jurisdiction of other levels of government, particularly for freshwater and nearshore ecosystems. For example, for nearshore habitats like eelgrass meadows, key threats may originate on land (i.e. nutrient run-off) or under provincial jurisdiction (e.g. open net-pen salmon aquaculture). For ESAs to be effective in such situations, it will be critical to solve jurisdictional issues to ensure key threats are mitigated.

[2] Aquatic Habitat Canada http://aquatichabitat.ca/
[3] Coastal Restoration Fund https://dfo-mpo.gc.ca/oceans/crf-frc/index-eng.html
[4] Natural Heritage Partnership https://www.natureconservancy.ca/en/what-we-do/government-of-canada-partnership/natural-heritage-conservation-program/
[5] Wild Atlantic Salmon Conservation Policy https://www.dfo-mpo.gc.ca/reports-rapports/regs/wildsalmon-atl-saumonsauvage-eng.htm
[6] https://www.pac.dfo-mpo.gc.ca/fm-gp/salmon-saumon/wsp-pss/index-eng.html
[7] https://www.dfo-mpo.gc.ca/fisheries-peches/aboriginal-autochtones/aarom-pagrao/index-eng.html
[8] https://www.fws.gov/fisheries/fishhabitat-partnership.html

Finally, there is an opportunity to address cumulative effects through the designation of cumulative effects on a watershed basis. As Canada has no clear mechanism to protect rivers and tributaries important for many anadromous species, ESAs could address this gap.

V. RECOMMENDATIONS AND NEXT STEPS

- DFO should begin to consult with existing programs, stakeholders and rightsholders on the regulatory framework for establishing ESAs and use a case study approach so that examples could be brought forward to which regulations might apply. Tangible case studies should be developed so that once regulations are developed and in force, establishment of ESAs can happen quickly with specific prohibitions of works, undertakings or activities dependent on level of habitat impacts.
- To enhance cooperation between other levels of government, DFO should consult with other federal departments as well as provincial and municipal governments to determine how the designation of ESAs may interact with existing legislation, regulations and policies under other jurisdictions.
- Potential ESA designations for protection or restoration should be selected from a variety of freshwater, coastal and where relevant, offshore habitats so that jurisdictional issues may be addressed in advance of the finalization of regulations.
- Immediate engagement with existing programs, as noted above, should explore tangible options for establishing ESAs as part of these programs. For example, funding through the Coastal Restoration Fund may also be contributing to restoring areas that could be designated as ESAs.
- ESA regulations could explore a habitat -based approach to achieve the maximum efficiencies possible on a national level (i.e. seagrass / eelgrass regulations,salt marsh regulations, deep-sea coral and sponge regulations) and a site by site approach for watersheds. This would reduce the requirement for individual site-based science processes and also allow for batch designating ESAs across habitat types.
- In consultation with stakeholders and rightsholders, DFO should develop a clear set of criteria by which candidate ESA sites will be evaluated as well as methods of monitoring and assessing the effectiveness of these areas
- DFO should establish a clear process by which communities and local stewardship groups can propose areas for consideration as ESAs.
- An ESA regulatory framework should be finalized by the end of 2021, with a view towards formal implementation in 2022 in a variety of aquatic habitats.
- DFO should establish a reporting mechanism for the establishment of ESAs and where necessary periodic monitoring to ensure regulatory effectiveness.
- Depending on habitat type, ESA's should be evaluated based on their potential contribution to climate change and sequestration of "blue carbon".

APPENDIX: PROVISIONS OF THE *FISHERIES ACT* PERTAINING TO ECOLOGICALLY SIGNIFICANT AREAS

Section 34 (1) defines an ecologically significant area and applies to Sections 34.1 to 42.5: *ecologically significant area* means an area designated by regulations made under subsection 35.2(2); (zone d'importance écologique).

Section 34.4(2)(g) references works, undertakings and activities that may be carried out within an ESA if authorized under 35.2(7).

Section 35.2(1) provides for increased protections from works, undertakings or activities that may impact fish habitat within an ESA:

> **35.2** (1) No person shall carry on a work, undertaking or activity prescribed under paragraph (10)(a) or that belongs to a prescribed class under that paragraph, in an ecologically significant area except in accordance with an authorization issued under subsection (7).

Section 35.2(2) allows for regulations to be made designating ecologically significant areas.

> (2) The Governor in Council may, on the recommendation of the Minister, make regulations designating ecologically significant areas.

Section 35.2 (3) requires additional information for activities within an ESA, to be provided to the Minister:

> Any person who proposes to carry on a work, undertaking or activity referred to in subsection (1) in an ecologically significant area shall provide the Minister with any document and other information that is required by regulation in respect of the prescribed work, undertaking or activity, or the water, place, fish or fish habitat that is likely to be affected by the prescribed work, undertaking or activity.

Section 35.2(7) provides further clarity on what the Minister may do with the information provided by a proponent, including additional conditions should a habitat authorization be granted.

> (7) If the Minister is satisfied, after having reviewed any document and other information provided under subsection (3) or (4), that avoidance and mitigation measures may be implemented to achieve the prescribed objectives for the conservation and protection of fish and fish habitat, he or she may authorize, subject to the regulations made under subsection (10), the carrying on of the work, undertaking or activity referred to in subsection (1) in an ecologically significant area, on any conditions that he or she considers appropriate.

Section 35.2(9) provides for restoration of areas designated as ESAs.

> (9) The Minister shall, as soon as feasible, prepare a fish habitat restoration plan for an ecologically significant area, if he or she is of the opinion that fish habitat restoration in that ecologically significant area is required in order to meet any prescribed objectives for the conservation and protection of fish and fish habitat.

Section 35.2(10) provides for regulations regarding specific objectives for the designated ESA and prohibitions to activities within the designated ESA.

> (10) The Governor in Council may, on the Minister's recommendation, make regulations
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> - (c) respecting the objectives for the conservation and protection of fish and fish habitat in an ecologically significant area;
> - (d) prescribing works, undertakings or activities or classes of works, undertakings or activities that the Minister shall not authorize under paragraphs 34.4(2)(b) and 35(2)(b) to be carried on in an ecologically significant area.