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**Submission regarding the Fisheries and Oceans Canada “Position Statement on the Consideration of Cumulative Effects on Fish and Fish Habitat in Support of Decision-Making under the *Fisheries Act*”**

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Thank you for the opportunity to provide input to the Department of Fisheries and Oceans and the Canadian Coast Guard (DFO) as it continues to develop regulations and policies to implement the 2019 amendments to the *Fisheries Act*, and to implement the new requirements and opportunities regarding fish habitat protection and conservation.

This submission responds to the Position Statement on the Consideration of Cumulative Effects on Fish and Fish Habitat in Support of Decision-Making under the *Fisheries Act* (the “Position Statement”) prepared by the Fish and Fish Habitat Protection Program (FFHPP). We previously provided input to Fisheries and Oceans Canada regarding the previous *Consultation Paper: Consideration of Cumulative Effects under the Fisheries Act: Engaging with Canadians on Key Issues*, in June 2021 and we note below where progress has been made, and not been made, in the Position Statement.

**1. Summary of key points in this submission**

- The scope of the Position Statement is inadequate in fulfilling the legal requirement in the Fisheries Act to consider cumulative effects because the Position Statement is limited to deciding whether to issue authorizations;
- A specific review period be set for the Position Statement, accompanied by a transparent monitoring process to understand whether the Policy Statement is guiding action to achieve its stated objectives and how it could be improved;
- The Position Statement lacks specificity in some important ways (for example, what is the scale at which it will be applied and what are the “management objectives” referred to) and does not reflect DFO’s own science and experience in relation to cumulative effects;
- The Position Statement appears to minimize the cumulative effects of smaller projects, the “death by a thousand cuts” that has been well documented and observed to be as great a contributor to overall impacts as larger projects;
- The Position Statement does not resolve the problem of how to manage cumulative effects on a project-by-project basis; and
- The Position Statement does not provide guidance that will ensure transparency or consistency in its application.

Finally, given the federal government's commitment to implement the United Nations Declaration on the Rights of Indigenous People, the fact that Indigenous peoples are leading or co-leading watershed management initiatives across the country, and the growing number of Indigenous-led restoration initiatives and Indigenous Guardian programs, it is surprising that the Position Statement offers little indication that DFO intends to work proactively with Indigenous peoples on cumulative effects.

## 2. Introduction

Based on the amended *Fisheries Act*, and in particular, s. 34.1(1)(d), DFO and the Minister have an overarching obligation to consider cumulative effects in both regulatory development and decision-making, including related policies. This legal requirement is a key opportunity to support better outcomes for fish and fish habitat, by:

- refining regulations and policies to meet longstanding DFO objectives around “no net loss” of fish habitat;
- aligning DFO's regulatory approach with emerging DFO-led science initiatives around integrated planning; and
- making meaningful, i.e. responsive and effective, connections between DFO's regulatory activities and Indigenous-led and community-based watershed planning, management and monitoring initiatives across the country;

We note that the current engagement process led by FFHPP has several different streams, in addition to cumulative effects, including:

- Offsetting and Banking Policy;
- Prescribed Works and Waters Regulation;
- Fisheries Act Registry; and
- Codes of Practice.

Based on the legal requirement to consider cumulative effects in the making of regulations, we suggest that DFO would logically develop its approach to the consideration of cumulative effects as a foundation or framework to guide regulatory and policy development by FFHPP. As discussed below, this has not occurred.

## 3. The legal requirement regarding cumulative effects in the *Fisheries Act*

According to section 34.1(1)(d) of the *Fisheries Act*,<sup>1</sup> as amended in 2019, cumulative effects must be considered *before* the Minister recommends to the Governor-in-Council that

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<sup>1</sup> *Fisheries Act*, RSC 1985, c F-14.

regulations be made in regards to fish habitat protection and pollution prevention, and before exercising decisionmaking powers in those sections of the Act.

This requirement was included in the amended legislation to address well-documented evidence of cumulative harms to fish habitat associated with the application of existing *Fisheries Act* regulations, and the need to overhaul regulatory approaches so that those cumulative harms could be identified and managed. In practice cumulative effects often result from activities that harm fish habitat on a relatively smaller scale, but add up over time—the ‘death by a thousand cuts’ scenario. There are decades of empirical observation and analysis from government and non-government sources confirming significant fish habitat losses resulting from the routine application of *Fisheries Act* regulations and related policies and decision-making frameworks.<sup>2</sup>

Under s. 34.1(1)(d) the Minister is now required to consider cumulative effects both in decisionmaking, such as when issuing authorizations for harm to fish and fish habitat, as well as at the time that regulations are being made, that is, at the stage when regulations are being prepared.

The scope of application of this legal responsibility was recognized by DFO in 2019 *Fish and Fish Habitat Protection Policy Statement* [emphasis added]:

Subsection 34.1(1) of the *Fisheries Act* sets out factors that the Minister must consider when exercising his or her authority under the fish and fish habitat protection provisions of the *Fisheries Act*. These authorities include:

- *recommending the making of a regulation* to the Governor in Council; and
- *making decisions related to the fish and fish habitat protection provisions* of the *Fisheries Act*, such as:
  - the issuance of authorizations or permits related to the death of fish or the harmful alteration, disruption or destruction of fish habitat;
  - the making of orders respecting obstructions and the passage of fish and flow of water; or,
  - the modification, restriction or closure of works, undertakings, or activities

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<sup>2</sup> For example, DJ Harper and JT Quigley, “No Net Loss of Fish Habitat: A Review and Analysis of Habitat Compensation in Canada,” (2005) *Environmental Management* 36(3):343-55, DOI:10.1007/s00267-004-0114-x ; Charles K. Minns, “Canadian Fish Habitat Management: Symptoms and Remedies,” (2015) in *American Fisheries Society Symposium* 78:213-248; Megan Lievesley et al, *Assessing habitat compensation and examining limitations to native plant establishment in the Lower Fraser River Estuary* (2016) BC Conservation Foundation & Community Mapping Network, online: [https://www.cmnbc.ca/wp-content/uploads/2018/11/Assessing-Habitat-Compensation\\_2016Appendix-I-IV.pdf](https://www.cmnbc.ca/wp-content/uploads/2018/11/Assessing-Habitat-Compensation_2016Appendix-I-IV.pdf) ; Laura C. Third et al, “Project Review Under Canada’s 2012 Fisheries Act: Risky Business for Fisheries Protection,” (2021) *Fisheries Magazine* 46(6):288-297, <https://doi.org/10.1002/fsh.10594> ; *2009 Spring Report of the Commissioner of the Environment and Sustainable Development*, Chapter 1, Protecting Fish Habitat, online: [https://www.oag-bvg.gc.ca/internet/English/parl\\_cesd\\_200905\\_e\\_32544.html](https://www.oag-bvg.gc.ca/internet/English/parl_cesd_200905_e_32544.html)

that are resulting in, or are likely to result in an offence under subsection 40(1).<sup>3</sup>

The language of s. 34.1(1)(d) requires the Minister to “consider” cumulative effects, but read together with the purpose of the *Fisheries Act*, which includes the “protection and conservation of fish and fish habitat” (s. 2.1(b)), the objective is to exercise the Minister’s responsibilities in a way that prevents and reduces cumulative harms to fish and fish habitat.

#### 4. Specific Comments on the Position Statement

##### 4A. Position Statement 1.0 Introduction

The Position Statement has been scoped to explain

*how the FFHPP considers cumulative effects on fish and fish habitat prior to making a decision to issue or refuse an authorization related to the death of fish and the harmful alteration, disruption or destruction prior to making a decision to issue or refuse an authorization... [emphasis added]*

This is only a subset of the instances when the Fisheries Act requires that the Minister consider cumulative effects.

The Position Statement **does not address** how the Minister will consider cumulative effects:

- when making regulations (despite the fact that regulations to implement the 2019 amendments to the Fisheries Act are concurrently being developed and implemented);
- when making of orders respecting obstructions and the passage of fish and flow of water; or,
- when ordering the modification, restriction or closure of works, undertakings, or activities that are resulting in, or are likely to result in an offence under subsection 40(1).

This narrow and incorrect interpretation of the duties of the Minister to consider cumulative effects was flagged in our June 2021 submission and has not been improved in the current Position Statement. We do note that the public engagement website, talkfishhabitat.ca, under “Cumulative Effects on Fish and Fish Habitat” now specifies that DFO is drafting a “Position Statement for the Consideration of Cumulative Effects on Fish and Fish Habitat: Authorization

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<sup>3</sup> Fisheries and Oceans Canada, *Fish and Fish Habitat Protection Policy Statement, August 2019*, section 8.6 Factors to be Considered (subsection 34.1(1)), online: <https://waves-vagues.dfo-mpo.gc.ca/library-bibliotheque/40971193.pdf>

Decision Process.” While this does make more transparent the limited scope of the Position Statement, it does not address the underlying problem that the scope of the Position Statement does not meet the scope of the legal responsibility set out in the *Fisheries Act*. We are not aware of any public-facing indication that DFO is addressing this problem.

Within the narrow scope of application of the Position Statement, we would recommend a clear statement that considering cumulative effects on fish and fish habitat is done for the purpose of protecting and conserving fish and fish habitat.

#### **4B. Position Statement 2.0 Disclaimer**

We agree with the disclaimer that the legislation will prevail in the event of any inconsistency with the *Fisheries Act*. In particular we note that this may mean that authorizations that do not give adequate consideration to cumulative effects may be legally challenged, and that if the Minister does not consider cumulative effects in making regulations those regulations may be subject to judicial review.

#### **4C. Position Statement 3.0 Effective Date and Review Date**

As stated in the Position Statement, the amendments to the *Fisheries Act* requiring the consideration of cumulative effects have been in force since August 28, 2019. It is disappointing that more than three years later the Position Statement has been scoped so narrowly, and in a way that will make it difficult to operationalize as well. It is encouraging to know that it “is intended to evolve over time and will be reviewed as required”, but we would suggest that a specific review period be set, accompanied by a transparent monitoring process to understand whether the Policy Statement is guiding action to achieve its stated objectives and how it could be improved.

#### **4D. Position Statement 4.0 Defining Cumulative Effects**

The Position Statement has adopted FFHPP’s definition of cumulative effects and this is an improvement from the previous Consultation Paper.

It would be useful to add further guidance to this definition to indicate that the scale of time and space that is considered is important, and “has to reflect the geospatial and temporal distribution of human activities that may impact a given ecosystem component.” In many cases this might be a watershed.<sup>4</sup>

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<sup>4</sup> Roland Cormier, “A Comprehensive Framework for Characterizing Cumulative Effects in Aquatic Ecosystems to Support Regional Environmental Assessments and Integrated Planning and Management” in Neil Fisher et al, *Managing the Impacts of Human Activities on Fish Habitat: The Governance, Practices and Science*, American Fisheries Society, Symposium 78 (2008) at 111.

#### **4E. Position Statement 4.1 Considering Cumulative Effects under the *Fisheries Act***

It isn't clear from this section how DFO will consider the relationship between the state of ecosystem health in a given watershed and its vulnerability to any further harm that might be caused by the project under consideration. For example, a project might have a relatively small impact relative to past projects, but if the watershed is very degraded, the marginal impact could have more serious consequences. In other words, some watersheds may be more sensitive precisely because of the weight of past human activities on the landscape.

The Position Statement does indicate an intention to “contextualize the pressures of the proposed project against the state of impairment” but further explanation would be helpful to have more certainty about how this very important aspect of considering cumulative effects will be managed.

This illustrates the difficulty in managing cumulative effects project-by-project without a set of management objectives related to ecosystem health. Later sections of the Policy Statement refer to management objectives but give no indication of the source of these objectives.

Yet DFO has prior experience investigating and implementing management approaches to cumulative effects. Recent analysis by DFO scientists discusses different types of assessment frameworks as a foundation and how they have been applied, particularly in the context of fisheries management, marine shipping, aquaculture and ocean-based area management.<sup>5</sup> DFO has also applied Ecological and Biological Significant Area Guidelines to develop management plans for human activities based on conservation objectives and relevant thresholds.<sup>6</sup> Risk assessment and risk management have also been used to manage the cumulative effects of placer mining at a watershed scale, along with adaptive management, and in cooperation with the Yukon Government and the Yukon Council of First Nations.<sup>7</sup> It is not clear why any of this experience does not appear to have informed this Position Statement.

In our previous submission we also noted several of the many possible opportunities for DFO to cooperate with other jurisdictions, Indigenous, provincial and territorial, and to adopt or co-develop appropriate management objectives, carry out necessary monitoring, etc. At present we do not see any obvious openings to do this in the Position Statement, except for the limited opportunity provided for DFO to identify threats to fish and fish habitat “through Indigenous knowledge, local knowledge and scientific information.”

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<sup>5</sup> Cathryn Murray, Lucie Hannah, and Andrea Locke, A Review of Cumulative Effects Research and Assessment in Fisheries and Oceans Canada, Canadian Technical Report of Fisheries and Aquatic Sciences 3357 (2020), online: <https://waves-vagues.dfo-mpo.gc.ca/library-bibliotheque/40851576.pdf>

<sup>6</sup> Cormier, op cit at 113.

<sup>7</sup> Steve Gotch, “An Integrated Management Process for Regulating the Effects of Placer Mining on Fish and Fish Habitat in the Yukon,” in Neil Fisher et al, Managing the Impacts of Human Activities on Fish Habitat: The Governance, Practices and Science, American Fisheries Society, Symposium 78 (2008) at 131.

**4F. Position Statement 4.2 Addressing Future Stressors When Considering Cumulative Effects on Fish and Fish Habitat**

It is welcome that the Position Statement includes the consideration of future stressors. We suggest that climate change is very likely to be a future stressor in most aquatic ecosystems and that it deserves current attention, given that climate impacts will only be intensifying for many decades.

**4G. Position Statement 4.3 Scope of Cumulative Effects to be Considered**

This section could be left out.

**4H. Position Statement 5.0 Principles for Considering Cumulative Effects**

We agree that it is impractical to do a cumulative effects assessment in order to decide whether to issue an authorization. In principle it is possible to make decisions about authorizations in the context of cumulative effects at a given scale, provided that information and relevant management direction exists. However, there is no indication in the Policy Statement of how DFO intends to generate or access this type of information.

It has been observed that the impacts of human activities on an ecosystem are not linear, and further that while the impacts of small projects may be difficult to quantify incrementally, there is ample evidence that they do add up to serious impacts when they accumulate.<sup>8</sup> For this reason a precautionary approach for cumulative effects is critical.

We submit that the definitions of spatial and temporal scale need to provide more specific direction and as drafted do not provide any useful guidance for decision-making.

**4I. Position Statement 5.1 Potential Outcomes when Considering Cumulative Effects**

This section does not provide support to the Minister in meeting the Minister's legal obligation to consider cumulative effects prior to making a decision under the *Fisheries Act* fish and fish habitat protection provisions.

Instead, this section describes an approach that seems to tolerate the accumulation of incremental, residual harm from project authorizations. This is exactly the "death by a thousand

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<sup>8</sup> Charles K. Minns, "Canadian Fish Habitat Management : Symptoms and Remedies", in Neil Fisher et al, *Managing the Impacts of Human Activities on Fish Habitat: The Governance, Practices and Science*, American Fisheries Society, Symposium 78 (2008) at 218, 220.



cuts” scenario that has been the status quo for decades.<sup>9</sup> The section downplays the importance of “small” scale projects, while researchers have suggested that these small, routine harms may be as problematic from a fish and fish habitat perspective as the impacts from fewer, larger scale impacts.<sup>10</sup>

There is no evidence in the Position Statement of how the proposed guidance has been developed in relation to actual authorizations, for example, type, or frequency, or occurrence in different geographies or in relation to particular types of activities. There is no indication, in short, that the Position Statement draws on any prior experience from DFO in relation to making decisions about authorizations.

The section also refers to management objectives for fish and fish habitat without any specifics about how or where or by whom those objectives will be generated. It also uses terms that are subject to widely varying interpretations and offer no certainty or transparency, or indeed, guidance for DFO staff trying to implement them: “**small** spatial and temporal scale”, “management objectives are **not compromised**”, “**significant contribution towards** cumulative effects”, “**sufficiently addressed**”. It is difficult to see how the Position Statement “outlines a consistent approach” which was claimed to be an objective in the Section 1.0 Introduction.

## 5. Matters not addressed in the Position Statement

Given the federal government’s commitment to implement the United Nations Declaration on the Rights of Indigenous People, the fact that Indigenous peoples are leading or co-leading watershed management initiatives across the country, the growing number of Indigenous-led restoration initiatives and Indigenous Guardian programs, it is surprising that the Position Statement offers little indication that DFO intends to work proactively with Indigenous peoples on cumulative effects.

It is also surprising that there is no reference to monitoring or an approach to managing authorization decisions in a manner that allows recalibration based on outcomes on the landscape.

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<sup>9</sup> See for example, DJ Harper and JT Quigley, “No Net Loss of Fish Habitat: A Review and Analysis of Habitat Compensation in Canada,” (2005) *Environmental Management* 36(3):343-55, DOI:10.1007/s00267-004-0114-x ; Charles K. Minns, “Canadian Fish Habitat Management: Symptoms and Remedies,” (2015) in *American Fisheries Society Symposium* 78:213-248; Megan Lievesley et al, *Assessing habitat compensation and examining limitations to native plant establishment in the Lower Fraser River Estuary* (2016) BC Conservation Foundation & Community Mapping Network, online: [https://www.cmnbc.ca/wp-content/uploads/2018/11/Assessing-Habitat-Compensation\\_2016Appendix-I-IV.pdf](https://www.cmnbc.ca/wp-content/uploads/2018/11/Assessing-Habitat-Compensation_2016Appendix-I-IV.pdf) ; Laura C. Third *et al*, “Project Review Under Canada’s 2012 Fisheries Act: Risky Business for Fisheries Protection,” (2021) *Fisheries Magazine* 46(6):288-297, <https://doi.org/10.1002/fsh.10594>

<sup>10</sup> See Minns, *op cit*.