

West Coast Environmental Law Association
Submission to Fisheries and Oceans Canada Regarding its *Draft National Framework for Identifying, Establishing and Managing Ecologically Significant Areas*

January 20, 2023

I. INTRODUCTION

1. West Coast Environmental Law Association (WCELA) is dedicated to safeguarding the environment through law. Since 1974, our staff lawyers have successfully worked to develop proactive legal solutions to protect and sustain the environment. Our marine program seeks to strengthen Canada's legal framework for ocean conservation.
2. We are grateful for the opportunity to contribute to the development of Fisheries and Oceans Canada's (DFO) *National Framework for Identifying, Establishing and Monitoring Ecologically Significant Areas* (the Framework). We are encouraged by the release of such a strong and comprehensive policy framework, and want to see this conservation tool used to protect those areas of fish habitat that cannot be protected through existing legal designations. In particular, we view ESAs as an important tool for protecting fish habitat in freshwater and intertidal areas.
3. This submission focuses on three areas: (1) legal or regulatory elements of the Framework that should be strengthened to ensure effective implementation on the water; (2) the application of Ecologically Significant Areas (ESAs) to the marine environment, including estuaries and intertidal areas; and (3) potential candidate sites for ESAs in the Pacific region. In addition, we support the recommendations made in the submissions by the Northern Confluence Initiative.

II. STRENGTHENING THE LEGAL FOUNDATIONS OF THE FRAMEWORK

4. The Framework should be supported by an overarching regulation that applies to all ESAs. This would allow DFO to legally implement several important elements of the Framework, including timelines, interim protection tools, and protection standards.

Addressing Lag Times in Site Establishment

5. Experience with other regulatory conservation tools, such as *Oceans Act* Marine Protected Areas (MPAs), has demonstrated that there can be a significant lag time between the identification of candidate sites and their protection. During this time, harmful activities may continue within the area, threatening the conservation values for which those areas were originally identified for protection. The Framework should address this issue through two legal mechanisms: regulatory timelines for the establishment of ESAs, and an interim protection tool to protect sites as soon as they are identified for ESA designation.

6. In order to avoid lags in the regulatory process that delay protection, DFO should be mandated via regulation to establish ESAs within 2-3 years of the identification of ESA candidate sites. MPAs are well-known to take 7 to 10 years for designation, in part because there are no regulatory timelines to guide their designation. These delays can be avoided by legislating timelines for the establishment of ESAs. Timelines have been implemented in other conservation legislation. For example: the *Species At Risk Act* imposes timelines for the listing of species and the protection of critical habitat;¹ regulations under the Fisheries Act require fish stock rebuilding plans to be developed within 24 months of knowledge of their decline;² and the Oceans Act requires that interim MPAs designated by Ministerial order be completed within five years.³
7. Additionally, an interim protection tool should be created to protect areas identified as candidate ESAs, to ensure that no harmful alteration, disruption or destruction of fish habitat is permitted within the area while the ESA is being established.

Protection Standards

8. Protection standards for ESAs should also be prescribed in an overarching ESA regulation. Although DFO has indicated that it does not intend to apply minimum protection standards to ESAs,⁴ we respectfully suggest that these standards would be a helpful and clarifying addition to the Framework. In our experience with MPA establishment, the absence of clear protection standards in law has led to uncertainty in the designation process for all stakeholders and for government. Additionally, the four activities prohibited by DFO's minimum standards for MPAs easily translate to the ESA context: bottom trawl fishing, dumping, mining and oil and gas activities would all be considered incompatible with any fish habitat conservation and protection objective.⁵

Establishing Conservation and Protection Objectives in Law

9. Conservation and protection objectives (CPOs) should be set in regulation rather than in management plans. The Framework suggests that at times, CPOs may be applied through management plans as well as through ESA regulations.⁶ However, the strength of the ESA designation comes from setting strong CPOs that become legal management tools. It is essential that CPOs be established in regulation so that they are legal and enforceable objectives.

¹ See e.g. *Species At Risk Act*, SC 2002, s 42(1), 57, 58(5).

² *Fishery (General) Regulations*, SOR/93-53, s 70(2).

³ *Oceans Act*, SC 1996, s 35.3(1).

⁴ Fisheries and Oceans Canada, [“Ecologically Significant Areas Framework: Frequently Asked Questions”](#) (2022).

⁵ Fisheries and Oceans Canada, [“Protection Standards to better conserve our oceans”](#) (2022).

⁶ Fisheries and Oceans Canada, [Draft National Framework for Identifying, Establishing, and Managing Ecologically Significant Areas](#), (2022) at 8 [ESA Framework].

III. APPLYING THE FRAMEWORK TO THE MARINE ENVIRONMENT

10. The Framework notes that ESAs may be applied in the marine environment.⁷ DFO and other federal departments and agencies already have several strong protection and conservation tools to apply in the marine environment, including *Oceans Act* MPAs, national wildlife areas, marine national wildlife areas, and national marine conservation areas. These existing tools can and should be prioritized to protect marine areas, particularly in the context of MPA networks.
11. As noted in the draft Framework, ESAs that are identified and developed in the marine environment should focus on intertidal areas and estuaries, where MPAs may not be the appropriate tool as they would not be able to protect areas of an ecosystem that fall above the low-tide line.⁸
12. Where ESAs are designated in marine areas, they must be coupled with long-term, comprehensive fisheries closures, as fisheries remain the biggest threat to fish in the marine environment. This will enable positive conservation outcomes, and is essential if DFO wishes to count ESAs towards Canada's marine conservation targets.⁹ The Framework should identify a mechanism to streamline the designation of fisheries management measures in parallel with the development of ESAs, to ensure that ESAs provide comprehensive protection on the water.
13. Additionally, ESA designations should also be used to protect networks of smaller sites that support salmon and other fish habitat, filling an important gap in conservation tools. For example, a multi-site ESA could be used to designate a network of smaller sites within a given region that would otherwise not receive protection. This is particularly important in areas with higher populations and development pressures, where the entire area may not be seen as a suitable candidate for protection and individual sites may be considered too small for a designation process. Átl'ka7tsem/Howe Sound is one example of a region where one multi-site ESA could be used to protect the estuaries of salmon spawning streams and intertidal ecosystems within Howe Sound.¹⁰ This would support salmon populations within an area that is also contains urbanized and industrialized elements.

IV. POTENTIAL CANDIDATE ESA SITES IN THE PACIFIC REGION

14. In order to advance the use of this tool as quickly as possible, we propose three sites on the Pacific Coast that would be ideal candidates for initial ESA designation. These include the Skeena River Estuary, the Heart of the Fraser, and estuaries of salmon spawning streams and intertidal salmon habitat within the Átl'ka7tsem/Howe Sound Biosphere Region.
15. We see these sites as potential candidates for ESAs given the multi-stakeholder interest in salmon habitat conservation in these places, their highly productive and unique features, and the fact they fall

⁷ *Ibid* at 6.

⁸ *Ibid* at 5; *Oceans Act*, ss 4, 5(d), 35(1).

⁹ ESA Framework, *supra* note 6, at 6.

¹⁰ See e.g. David Suzuki Foundation, [UNESCO Biosphere Reserve: Átl'ka7tsem/Howe Sound - Marine Conservation Map](#), (2023).

outside of existing conservation areas. Fish habitat organizations have developed case studies on the Skeena Estuary and the Heart of the Fraser which we adopt as part of this submission.¹¹ Additionally, significant mapping and conservation work has been done to identify salmon habitat within Átl'ka7tsem/Howe Sound Biosphere Region, and while protections are in place for some major fish habitat areas like the Squamish River Estuary, other salmon habitat remains under threat from growing development pressures.¹²

16. In addition to these proposed sites, we recommend that DFO work with Indigenous nations and fish habitat organizations across Canada to identify additional case studies, with the intention to move several areas forward into regulation on a rolling basis.

V. CONCLUSION

17. WCELA thanks DFO for the opportunity to present our views. We look forward to seeing a strong ESA Framework established in policy and law.

¹¹ Northern Conference Initiative, [Ecologically Significant Areas Case Study: The Skeena River Estuary](#), (2022); Northern Confluence Initiative, [Ecologically Significant Areas Case Study: The Heart of the Fraser](#), (2022).

¹² See David Suzuki Foundation, *supra* note 10, for map layers detailing salmon habitat, current protected areas, and human activities.