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MEMORANDUM FOR THE DEPUTY MINISTER

**DFO RESPONSE TO DAVID SUZUKI
FOUNDATION (DSF) REPORT ON HABITAT ENFORCEMENT**

(Information Only)

SUMMARY

- DSF has produced a report that raises concerns about DFO's lack of habitat enforcement in BC. The report cites 9 specific case studies and documents a downward trend in habitat charges and warnings to reinforce their concerns regarding lack of departmental capacity and resources, increasing reliance on industry self regulation and lack of departmental will to enforce habitat provisions of the *Fisheries Act*.
- A preliminary review of the report indicates that their analysis is often incomplete and contains significant misunderstandings regarding case facts, DFO follow-up actions, program direction and discussions with DFO staff.
- The DSF and Pacific OHEB and C&P staff have agreed to meet on July 25 to discuss the report in advance of release which will provide an opportunity to discuss issues, report conclusions and recommendations and options for improved collaboration in future.
- DSF plans to publicly release an Executive Summary of the report near the end of July (with the detailed report to be placed on their website).
- Communications materials and media lines are now under preparation in anticipation

of the public release in late July.

Background

- Following a July 3, 2007 meeting between DFO and DSF wherein habitat enforcement issues were raised, DSF provided DFO on July 11th with a draft version of a report entitled “High and Dry: An Investigation of Salmon- Habitat Destruction in British Columbia”, and offered to meet prior to public release in late July.
- In October 2006, the DSF also released another report entitled “The Will to Protect- Preserving BC’s Wild Salmon Habitat” which also focuses on perceived DFO shortcomings regarding habitat protection and enforcement in BC.
- Recommendations in the most recent report are very similar to those in “The Will to Protect” report. A comprehensive response to these recommendations was provided to DSF in a letter from the Minister dated April 24, 2007.

Analysis / DFO Comment

- The most recent “High and Dry” report focuses on 9 specific projects that were investigated by DSF between January 2003 and June 2006, and reported to DFO.
- DSF alleges that each case represents a contravention of Sec. 35 of the *Fisheries Act* and that DFO lacks the will to enforce as none resulted in prosecutions.
- The report contends the lack of enforcement results from eroding DFO inspection and enforcement capacity and new policy directions (Environmental Process Modernization) that increase reliance on industry self-regulation with less DFO oversight.
- The overall capacity of the Pacific Habitat Program has been adjusted significantly in recent years as a result of the Canadian Fisheries Adjustment and Restructuring (CFAR) program sunset, the 10 FTE ERC habitat reduction and the recent 12 FTE HCM augmentation. Overall, the program is moving from 120 FTEs under CFAR to a future core level of 75 FTEs. The region’s planned 2007/08 utilization is 86 FTEs which will be reduced to 75 over time via attrition.
- The report highlights a significant downward trend in both warnings and charges over the last 5 years. The factors for this trend are likely numerous (e.g. increasing use of alternate compliance tools and the continuum of compliance approaches under the HCM model, staffing vacancies, capacity and workload issues, other C&P priorities, etc.). The HCM program, which is in early stages of implementation, is intended to improve habitat monitoring and compliance.
- DFO acknowledges several of the cases represent impacts or alterations to fish habitat but contends the DSF analyses in many cases paints an incomplete picture of the nature of the impacts, and the DFO actions taken.

- The report incorrectly assigns responsibility for many of the alleged habitat infractions to EPMP. Other misunderstandings are also apparent (e.g. linkage of EPMP to ERC reductions, DFO / DOJ considerations in making a determination to prosecute, etc.).
- A vigilant ENGO community in BC will continue to bring compliance / enforcement issues to DFO's attention which will likely exceed our capacity to respond in a timely manner.
- A summary of our preliminary analyses for each case is presented in Appendix 1. This, along with key messages contained in Appendix 2, will be used as basis of upcoming discussion with DSF.

Recommendations / Next Steps

- Meet with DSF to discuss factual and program misunderstandings, report conclusions and recommendations, and opportunities for more productive collaboration in future.
- Finalize media materials and press lines in anticipation of the late July public release.
- Continue HCM implementation (i.e. staffing, risk based triage tools for compliance and enforcement, C&P – Habitat working protocols, training, proactive communications options, monitoring and reporting framework, etc.).
- Continue efforts to work with DSF on habitat issues through Regional DFO-ENGO Coalition.

S. Kirby, ADM, Oceans

D. Bevan, ADM, FAM

Attachments (3)

- *High and Dry: An Investigation of Salmon-Habitat Destruction in British Columbia*
- DFO preliminary responses to individual case studies and allegations in DSF report
- DFO key messages to DSF

M. Farrell / K. Smith-R. Nelson / P. Sprout / S. Kirby / D. Bevan / L. Murray

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Appendix 1

Responses to individual case studies in the DSF report entitled “High and Dry”

Case # 1 –Sir Edmund Bay

DFO/MAL joint onsite were conducted at this site in March 2003 following the DSF letter to DFO in Feb 2003. Subsequently a warrant was secured and a comprehensive and rigorous site assessment employing ROV dive transects, benthic cores and grabs, chemical analyses of trace metals, nutrients, as well as macrofauna and benthic debris analyses was undertaken by DFO in June 2003. The site was relatively deep and while pens were fallow at the time they had been fully stocked 4 months earlier and total site recovery was unlikely in such a short time. Despite data indicating that benthic habitat was degraded at the site (elevated sulphides, bacterial mats) the impacts were surprisingly localized, with patchy distribution. Based on the limited geographic extent of impact in conjunction with other mitigating circumstances DFO staff did not recommend proceeding with prosecution in this case and enforcement actions were not taken.

A data and a technical manuscript report in the Canadian Fisheries and Aquatic Sciences report series were generated that summarizes the data and findings of the 2003 benthic surveys. These reports are publicly available.

A renewal application for this site was submitted in 2005 and the Canadian Environmental Assessment Act (CEAA) review (for which TC is the lead federal RA) and is still underway due in part to the FN consultation requirements.

There are a number of inaccurate comments and conclusions drawn in this case:

- 1. The report states that a “rigorous investigation” was undertaken jointly by DFO and the Ministry of Environment in 2000, that concluded the site was severely degraded; however, the 2000 investigation was a preliminary review of chemical and physical data collected at a variety of sites as part of an annual MOE monitoring program. DFO did not participate in this monitoring, but did undertake a comprehensive assessment of the site in June of 2003 (as per above).*
- 2. The report states that DSF had been advised by DFO that the marine monitoring and enforcement team had been disbanded, boats had been pulled from the water and budgets slashed; however, equipment such as the ROV and deep water benthic sampling equipment originally purchased by C&P was reassigned to DFO Science where they could be better utilized.*
- 3. The report states that DSF were advised that the investigation may not have been conducted properly as a result of inadequate resources and that all future*

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investigations were compromised due to a lack of resources; however, DFO is satisfied that the investigation was conducted appropriately and comprehensively with a combined effort involving C&P, OHEB and Science staff. DFO is confident that this investigation was not compromised due to a lack of resources.

- 4. The report states that “offenders have been allowed to go about their business unimpeded by further regulatory oversight”. This is inaccurate as DFO has taken a broad regulatory approach to dealing with and managing potential effects from net-pen aquaculture based on risks identified by Food and Agricultural Organization, DFO Science Branch, DFO Habitat Management, other Federal Agencies, the Province of BC, Industry, First Nations, and stakeholders. This has evolved significantly since the moratorium was lifted, with the creation of the Finfish Aquaculture Waste Control Regulation (FAWCR), the requirement for Fish Health Management Plans including sea lice monitoring, predator control plans, feed monitoring and fish escapes monitoring. DFO also now requires any new applications to include benthic deposition modeling which is used to assess whether a project exceeds DFO’s authorization threshold and triggers a CEAA review.*
- 5. The report states that the federal government was putting the onus for monitoring of benthic impacts in the hands of proponents. The responsibility for monitoring operations and effects of operations does rest with the proponent; however, provincial regulatory and permitting agencies such as MOE and MAL conduct annual monitoring programs and undertake regular inspections and/or audits to confirm results. DFO may also conduct inspections where they are warranted (as occurred in this case).*

CASE #2 Stokes Pit

This project underwent a CEAA review and was authorized under the Fisheries Act. However, in implementing the project, certain elements did go wrong. At one point, there was a large release of sediment which DFO investigated. DFO advised the City who took immediate corrective actions and coordinated removal of sediments from the Little Campbell River and constructed temporary instream weirs to prevent further downstream transport of sediment.

The DFO authorization addressed all elements of potential HADDs associated with this project and the follow up respecting unauthorized impacts associated with this project was conducted with the proponent and the City in a timely and professional manner.

There are a number of inaccurate comments and conclusions drawn in this case:

- 1. The report states that the Fraser Valley Conservation Coalition was concerned about rare and endangered species potentially in the area. The likelihood that Pacific water shrew or painted turtles were present and affected by these activities was low; and as part of the CEAA review process impacts on great blue heron were assessed.*

2. *The report states that the project involved expansion of an exiting gravel pit and lowering of the water table in the Brookswood-Fernridge Aquifer because the site was wetted year round. However, the development was within the existing foot print of the gravel pit, there was no expansion of the footprint, and the site is only seasonally wetted.*
3. *The report states that the project resulted in the loss of fish and fish habitat Latimer Pond (aka Stokes Pit). However, the “lake” is actually a flooded gravel pit and the fish are stocked populations. The area is not considered good habitat for salmonids due to the seasonal fluctuations in water levels.*
4. *The report asserts that there was a lack of adequate site and habitat information for this project. However, during the project review all project elements were evaluated and well understood. The removal of riparian vegetation, the destruction of onsite fish habitat by construction and the dewatering of the sites aquifer were the reasons for the Fisheries Act authorization. The authorization included mitigation and compensation measures for all of these impacts. DFO acknowledges implementation of the erosion and sediment control measures were inadequate, however the the statement that concrete berms were ineffective was due to the fact that these were actually vehicle barriers and were not part of the erosion sediment control measures. Notwithstanding this, corrective actions to address sediment inputs were taken. The City has replanted and is continuing to plant vegetation to address erosion issues and the City’s restoration staff are doing bioremediation works to stabilize any unstable slopes.*
5. *The report states that fish accessible wetlands were lost. However, the wetlands affected by this project are not fish accessible.*
6. *The report states that the DFO official was more concerned about site drainage and storm water control than fish habitat. This misrepresents the conversation. The official considered site drainage and storm water control an integral element of the project and one that represented an important impact to fish habitat. This was only one element of the authorization however, and the official certainly did not mean to suggest it was the only element being considered.*
7. *This is a multi-year project that will be implemented in phases- flows have been restored to the extent that the site has the same hydraulic regime. This includes watercourses that remain wetted and watercourses that are ephemeral.*

DFO uses experienced and qualified habitat practitioners from a variety of disciplines to conduct habitat impact assessments and investigations. The DFO official referred to in this document is well recognized as an expert and has a number of successful prosecutions on his CV that demonstrate his credentials and expertise in habitat enforcement.

Case #3 Sheila Creek- QCI (actually Bragg Creek, within Sheila 220 Logging Block)

An investigation of these concerns was conducted by DFO and the findings relayed to DSF. DFO was satisfied that none of the streams in question were fish bearing based on a recent field survey that led to a reclassification of these streams from fish-bearing (by default) to non-fish (consultant field survey). Nil stream catches, combined with the discovery of a 12-15 m waterfall downstream on the system, satisfied DFO as to the change in status and there was no valid reason to doubt or question this assessment. The habitat practitioner involved would have had no reservations about requesting additional information to support this conclusion had it been warranted. As the field investigation indicated there were no direct impacts to fish or fish habitats associated with the logging activities in the creeks in question and no imminent threat of effects to water quality or other impacts to downstream fish habitat no enforcement actions were taken. Several other sites in Sheila Creek and Kumdis Inlet were also investigated following contact with DSF and in all cases streams were not fish bearing and no direct impacts on fish or fish habitat were observed.

Timber harvesting companies are required to have available the most recent stream classification information but there is no longer a requirement to share this information. This can lead to confusion about the most current stream classification and may have given rise to DSF concerns regarding direct impacts to fish habitat in these cases.

Cases # 4, 5 Forestry infractions in the Kalum Forest District. (Chist and Big Cedar watersheds).

DFO was well aware of the escalating problems with road maintenance in the Kalum Forest District. Remedial action in this case was delayed by the fact that the owners of the TFL were in receivership at the time and the prospective owners had requested additional time to develop an action plan to address these (and other problems) in the TFL. Numerous actions including compliance orders were taken by both BC Ministry of Forests (MOF) and DFO and necessary remediation works were completed by the new licensee in the summer and fall of 2006. Onsite inspections were subsequently conducted by both DFO and MOF and all works were done to the satisfaction of both MOF and DFO. DFO informed DSF of progress in this regard in August 2006.

CASE #6 Millionaire Creek (incomplete analyses- habitat official familiar with this case was unavailable)

DFO agrees that there were sediment and erosion control issues with Millionaire Creek during the construction phase. There was also no site plan submitted to DFO for review and therefore DFO did not get involved until well after development had commenced.

Several on-sites were conducted through November 2005. A series of Inspectors Directives were issued to proponents, and their consultants to address ongoing

sediment discharges, and the file was assigned an occurrence number on November 27, 2005. The occurrence remains open in the Departmental Violation System (DVS) and subsequent on-sites have been conducted that indicate improvements to sediment and erosion control measures have been taken and some improvements have been observed.

DFO also worked directly with the City of Maple Ridge to address the sediment and erosion concerns at this site. The City took immediate action to ensure sediment ponds were pumped out and the sediments removed were also properly managed. As the soils in this area are predominantly clay and fines effective erosion and sediment control during land development is difficult and requires a long term strategic solution. Accordingly, DFO worked with the District staff and the public to put sediment and erosion control bylaws into place to address future development activities.

CASE #7 Private Land Logging, Beaufort Range Port Alberni

Investigations of the situation in the Beaufort Range were conducted by DFO immediately following a major storm with high intensity rainfall in January 2006. None of the upslope drainages were fish bearing. The considerable rainfall led to significant increases in surface flows, increased erosion, slope unravelling, road washouts, culvert blockages and large sediment discharges ultimately to fish bearing waters. The DFO investigation however concluded logging activities by Timber West on the Beaufort could not be established as the causative agent or sole source of these impacts. The slopes in this area are very steep and the high intensity rainfall in January 2006 significantly increased drainage volumes and erosion which led to a number of actively maintained culverts being blocked. Unconsolidated sediment discharges were also occurring above the Timber West cutblock. Sediment and debris discharges were exacerbating existing blockages in unmaintained culverts on an abandoned logging road (now a trail) managed by the Regional District. Overflow drainage onto private property at the bottom of the slope was intensified by the land owner infilling a remnant stream channel during land clearing for development purposes.

A subsequent onsite by a DFO official did not identify any ongoing issues associated with Timber West operations, and there was no reason for issuance of an Inspectors Order. Subsequent actions by Timber West include armouring road crossings, removing culverts, replanting and recontouring side cuts to stabilize slopes. In addition, Ministry of Environment Water Management has also initiated actions to address the culvert problems on the trail managed by the Regional District.

DFO South Coast Area staff did not determine there is “no need for an area habitat enforcement coordinator”; however, it was likely indicated to DSF that DFO enforcement staff have other responsibilities and that the habitat enforcement coordinator was being reassigned. DFO will be establishing an HCM/EPMP position

in South Coast that will become a dedicated habitat monitoring and compliance assessment position.

Case #8 Fraser River Gravel Bar

DFO acknowledges that impacts to fish and fish habitat resulted from this project and accordingly the project and process leading to decisions was subjected to a comprehensive review and evaluation. DSF are aware of this and have a copy of the review titled "A Review of Access Issues Associated with Lower Fraser River Gravel Extraction Operations (September 2006)".

DFO acknowledges there were unintentional delays in responding to initial notifications and as well as in providing the CEAA screening report.

DFO acknowledges other shortcomings such as the inadequacy of information required from (and provided by) the proponent respecting access (e.g. roads and watercourse crossings) to the gravel removal sites. These issues are all the subject of recommendations arising from the review that will prevent similar occurrences in the future.

There are a number of inaccurate comments and conclusions drawn in this case:

- 1. The report states that culvert installation was done without DFO oversight. However, DFO was part of the decision leading to culvert installation. DFO inspected the installation the morning after installation and when it was determined the culverts were ineffective, the operation was terminated and the causeway removed.*
- 2. The report states the contractor constructed a causeway without a bridge in the absence of DFO approval. However, DFO staff did not object to the causeway being built without a bridge based on discussions with the contractor that installation of a bridge would be difficult and dangerous based on site conditions at that time. As this represented a change to the causeway design DFO advised the contractor that Transport Canada (TC) who was the co-responsible Authority for CEAA under the Navigable Waters Protection Act should be consulted. DFO subsequently informed TC of possible changes.*
- 3. The report states a 2004 excavation took place at the same site on Big Bar as the 2006 project, hence there must have fish killed in 2004 as well. However, the 2004 excavation occurred at a different location on Big Bar which had shorter and easier access. The access point for 2004 which was in considerably shallower water was located a considerable distance downstream of the 2006 crossing and did not require a causeway/bridge crossing.*
- 4. With respect to the CEAA review of gravel extraction in 2004 at Big Bar, a CEAA review was conducted on the project, however a full screening report was not produced. The screening was favourable to the project proceeding and the CEAA screening decision was captured in DFO's Activity Project Tracking for Habitat (PATH) Database.*

Case # 9 House building in Nanoose Bay estuary (incomplete analyses- habitat official familiar with this case was unavailable)

DFO did not receive a referral for this project from the Regional District of Nanaimo which is the established process and therefore was not aware of the issue until advised by a citizen. The infill was occurring in the high intertidal zone which was not considered highly sensitive fish habitat. However, had the referral been received by DFO, the proponent would have been requested to redesign or relocate the project.

The actions taken by DFO included contacting the Regional District of Nanaimo and requesting no further approvals or permits be issued without a referral to DFO. DFO also required a detailed assessment of habitat impacts and losses associated with the infill and requested the development of a compensation/enhancement plan by the proponent. The assessment recently delivered to DFO from KWE Environmental proposes several habitat mitigation and enhancements to address impacts. DFO subsequently met with the Regional District of Nanaimo and the proponent to refine the plan and a final design to enhance fish habitat is being prepared. Further, the Regional District of Nanaimo plans to put a restrictive covenant on the property that will restrict its use and protect fish habitat in the future.

DFO did not pursue charges as the impact was not viewed as a significant infraction and DFO believed that given the proponents cooperation the impacts could be adequately compensated or managed.

Appendix 2

Key messages to DSF

1. We appreciate DSF interest in improving habitat compliance in BC and the opportunity to conduct a preliminary review and to discuss the report prior to public release. We hope there is openness to adapt report and plans based on discussion.
2. There are some significant factual misunderstandings and misrepresentations of DFO comments in the document that should be considered and corrected in final report.
3. Additional information that DSF may want to consider is also available on many of these cases before releasing their report. Suggest brief discussion on key points of each case.
4. Personalized nature of report (i.e. use of individual names / specific positions) is not constructive in achieving objective. Statements ascribed to DFO staff that have been taken out of context, are incorrect or are contested as well as allegations of DFO staff incompetence or lack of professional qualifications are inappropriate, embarrassing for individuals, and not conducive to collaboration and therefore should not be included.
5. The report highlights a misunderstanding regarding Environmental Process Modernization (EPMP). Points to be made in this regard include:
 - EPMP is not a policy or policy directive it is an improvement plan for delivery of all elements of the HM program.
 - EPMP does not result in greater reliance on Qualified Environmental Professionals (QEPs), loss of DFO oversight, or abandonment of traditional DFO roles for assessments, monitoring or enforcement.
 - EPMP is not altering DFO dependence on information required from proponents as part of their project proposal. DFO has always made the proponents responsible for providing the necessary habitat and site information on their project in order to complete an assessment and have always expected the proponents to conducting an initial assessment of project impacts. This will not change under EPMP.
 - We will continue to request or require additional information where it is necessary to complete our assessments and EPMP in no way affects our ability to do this.
 - We will continue to focus on those projects that represent high risk to fish and fish habitat, and have now developed tools to assist in managing low risk projects that we would seldom have reviewed in the past.

- A component of EPMP is Habitat Compliance Modernization (HCM). This initiative will **increase** our compliance monitoring capacity, and is in early stages of implementation.
- The monitoring information and results will enable evaluation of DFO's habitat compliance management strategies and form the basis for continual improvement of the program.

6. Regarding Downward Trends in Habitat Changes/Warnings:

- DFO acknowledges a downward trend. The factors for this trend are likely numerous (e.g. increasing use of alternate compliance tools and the continuum of compliance approaches under the HCM model, staffing vacancies, capacity and workload issues, other C&P priorities, etc.). The HCM program, which is in early stages of implementation, is intended to improve habitat monitoring and compliance.

7. Regarding Budget levels:

- We acknowledge there have been adjustments on habitat side – primarily due to sunset of Canadian Fisheries Adjustment and Restructuring (CFAR) program and ERC reductions of 10 FTEs. There has also been re-investment into HCM (12 FTEs).
- Indicate that C&P resources have recently been increased by 22 FTEs to support all enforcement requirements in the region. Also indicate that FO effort on habitat enforcement in Pacific Region since 2001 has been significantly higher than in any other region of the country with the exception of C&A and that nationally 11% of Fishery Officer efforts are focussed on habitat and SARA enforcement whereas in Pacific Region it is 26%.
- While additional resources would benefit habitat and other DFO programs, we are focussing on delivering the best possible program within our available resources. This includes consideration of new approaches. There is recognition that habitat compliance has been and continues to be an ongoing issue and that is the primary rationale behind the HCM program.

8. There appears to be some confusion between the ERC reductions (that affect capacity) and EPMP (which is a program improvement plan and helps us direct available resources as most appropriate to deliver our HM mandate). In order to clarify any possible misunderstandings, we would be willing have a more focussed discussion and make presentations on all elements of EPMP, including the approach, principles and framework for HCM, and update DSF on the emerging Habitat and C&P protocol annexes respecting HCM implementation.

9. We agree that legal actions are a very valuable tool in compliance management, but should be the last resort to ensure compliance and are only one element of a broader compliance strategy. Other measures and steps can, and in fact were,

taken in several of these cases that resulted in an acceptable outcome in protecting fish and fish habitat.

10. We would encourage DSF to continue to participate in the regional DFO /ENGO forum being established (and if interested) in the National DFO/ENGO forum to address ongoing concerns.