



Steelhead Emergency Order Listing Process

Identified Flaws

(from 'Document FNR 90110')

MAIN ISSUES

Identified Flaw:

- **The summary bullet points contained in the publically available Science Advisory Report (SAR) – which is the document used to inform decision-makers on the Steelhead Trout emergency listing situation – are not consistent with the actual scientific message contained within the peer-reviewed Research Document (RD). The summary bullets are also not consistent with those that were agreed upon following the principles of ‘consensus’ in the peer-review meeting¹**
- **It is significant to note that all three of the authors of the Research Document find that the Summary Bullet points, as altered, do not reflect the scientific message contained within the RD²**
- The changes to the scientific message are significant for 2 reasons: (i) the current conclusion marginalizes the significance of bycatch mortality;³ and (ii) the current conclusions focus on ‘recovery potential’ as opposed to ‘population growth potential’⁴

¹ Pp 930

² Pp 58; 1055-1057; pp 640. See also pp. 1479, 1450-1452, 38-39

³ Pp 930

⁴ When using the lens of ‘recovery potential’ there is no feasible likelihood of Steelhead Trout recovery, no matter what actions are taken now. This lens supports allowing fisheries to operate as normal because Steelhead are beyond the point of help. With the lens of ‘population growth potential’, Steelhead populations have the potential of stabilizing, under a simulation where bycatch mortality and exploitation rates are zero. Although the graph line for ‘recovery’ would remain flat over a 3-5 year period, stabilizing the population allows for more years to implement actions that would eventually work towards ‘recovery.’ This lens supports the idea that there is still a

- **DFO's Position:** The DFO contends that they correctly followed the Canadian Scientific Advisory Secretariat (CSAS) process when creating the Recovery Potential Assessment (RPA),⁵ which becomes the set of 3 advisory documents that inform decision-makers about the Steelhead Emergency Listing⁶
 - DFO believes that they have the authority to unilaterally create the SAR, using the information and edits gathered at the peer-review meeting, which function on the principle of 'consensus'
 - DFO believes that the wording of the SAR **can** diverge from what was exactly agreed up on the peer-review meetings because these meetings are to establish the *intent* of the bullet point. The DFO contends that the wording is expected to inevitably change as the Chair receives edits and comments after the peer-review meetings⁷
 - The DFO hold that a few of the changes made were based off of Trevor Davies comments. As Trevor Davies is a BC Government staffer, they hold that due consultation was conducted⁸
 - The DFO believes that the BC Government is only entitled to comments and edits in a scheduled review period directly following the peer-review meetings,⁹ but that providing them an opportunity to review the critically important SAR is not mandatory – even though the SAR document is the one decision makers rely upon¹⁰

chance to save Steelhead in the future because population growth is a precursor to recovery; see also Robert Bison's comments pp 1443-1445 on why the changes are 'not scientifically defensible'

⁵ Pp 1452-1453

⁶ Pp 1452-1453

⁷ Pp 61-63

⁸ Pp 60-63 - Trevor Davies is a Stock Assessment Analysis in the FLNR Fish Management department

⁹ Pg. 61-63

¹⁰ DFO emails regarding CSAS process notes that the SAR is the document that decision-makers rely upon. See pp. 38-39 – Draft briefing about BC government's concern includes the motivation that altering the SAR makes them concerned that Minister McKenna will not be accurately informed when making her decision; see also pp 642 – Robert Bison and Greg Andrusak discuss that they want to "simply ensure that [Minister McKenna] is accurately informed about the Thompson and Chilcotin Steelhead matter", implying she would only look at the SAR

- The DFO believe that, at this stage in the CSAS process, BC Government’s only entitlement for recompense is to publish a dissenting opinion as part of the Proceedings document (one of the 3 RPA documents produced).¹¹ The DFO does not believe the writing of the SAR needed to include consultation or joint work with BC or the authors of the RD
 - The DFO has refused to offer any recompense other than BC writing a dissenting opinion for the Proceedings, which is still an unpublished document [see identified flaws below for more details]
 - **BC Government’s (BCG) Position:** BCG does not believe that there should have been a need for additional review after the aforementioned scheduled reviews. The issue they hold is that the DFO unilaterally changed the summary bullets **in a way that alters the scientific message** without consultation with the BC Science Team or the authors of the RD *after* a consensus had been reached
 - BCG would likely agree with the DFO that the consensus points reached in the peer-review are focused on *intent* and not *wording*. However, in this situation, it is the actual scientific message (intent) that is altered by the change in wording
 - BCG believes that after DFO was notified of the objections of the BCG and the RD authors about the alterations made to the scientific message without consultation¹², the DFO should have retracted the incorrect SAR and replaced it with a version where the SAR conclusions are consistent with the RD conclusions¹³
 - Among other things, BC science team member, Trevor Davies, in conjunction with BCG, specifies that his comments were taken incorrectly and that he does not support the changes made in the SAR¹⁴
 - Significantly, the BC Government does not support the position taken by the current SAR.¹⁵ **Indeed, the BC Government believes that Minister McKenna**

¹¹ Pp 60

¹² Pp 58; see also pp 38-39; pp 631; pp 1057; pp 1050; pp 867; pp 1454-1456; pp 640; pp 1465; pp 1040; pp 610; pp 598

¹³ Pp 930

¹⁴ Pp 59; see also pp 610

¹⁵ Pp 1045 – Tom Either to Rebecca Reid (DFO): “I understand that the SAR summary bullets were changes as a result of comments sent directly to the CSAS chair and that time had run out to put edits back to the three authors. My concern remains that the source and nature of these comments remain a mystery to me and my team, and their inclusion runs contrary to the intent and purpose of a peer review process”

will be incorrectly informed if she makes a decision based on the currently published SAR¹⁶

Publishing Timeframe Expectations for CSAS Publications and the SARA Public Registry

Identified Flaw:

- **Contrary to clear government policy, as of August 16, 2019, only the summary Science Advisory Report (SAR) [the accuracy of which is disputed by the three chief scientific authors – see footnotes for details] can be found on the Canadian Science Advisory Secretariat (CSAS) website for the Emergency Assessment of Steelhead Trout.¹⁷ Significantly, the RD, with its very different message, is missing.**
- **According to the Policy, a record of the Proceedings, as well as the Research Document (RD), which is the peer-reviewed scientific document used to create the more simplified SAR, should be included and readily available on the CSAS website – but they are not. This lack of the RD on the website surprised DFO staff and the lead author¹⁸.**
- **Since the peer-review process was conducted September 20-21, 2019¹⁹ and participants were allegedly given an opportunity to review the draft SAR from September 27 – October 4, 2019,²⁰ there does not seem to be any question that these documents should be easily accessible on the CSAS website by now, as per the timelines given in DFO’s policy entitled,**

¹⁶ Pp 835-839; Pp 673. Also, see pp. 38-39 – Draft briefing about BC government’s concern includes the motivation that altering the SAR makes them concerned that Minister McKenna will not be accurately informed when making her decision; see also pp 642 – Robert Bison and Greg Andrusak discuss that they want to “simply ensure that [Minister McKenna] is accurately informed about the Thompson and Chilcotin Steelhead matter” → implying she would only look at the SAR

¹⁷ CSAS follows the *Communications Policy of the Government of Canada* (<https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=30683>) “to ensure the CSAS of the Department of Fisheries and Oceans (DFO) publications are distributed to clients in a cost-effective manner while meeting federal obligations...”; S. 6.3.1 of the above policy requires information be disseminated in a timely, clear, objective, factual and non-partisan fashion. Further, S. 4.2 notes that the government uses innovative digital tools and online platforms. With these two provisions in mind, all three publications regarding the Steelhead Trout Emergency Assessment should be published and available online at this point (<http://www.dfo-mpo.gc.ca/csas-sccs/process-processus/distribution-diffusion-eng.html>)

¹⁸ Following the completion of the CSAS process, three documents are typically published: (i) Research Document (the approved, revised Working Paper); (ii) the Science Advisory Report; (iii) Proceedings (record of discussion during the peer review process). It is further noted that “in matters of high public interest, a high level summary of a peer-review is frequently shared with media before the final CSAS report is published” (<https://www.canada.ca/en/fisheries-oceans/news/2019/02/understanding-the-canadian-science-advisory-secretariat.html>). See also pp 1057 – Paul Grant DFO staff and Josh Korman lead author note that the Research Document is not publically available on the day the SAR was published and this was a surprise to both of them

¹⁹ http://www.dfo-mpo.gc.ca/csas-sccs/Publications/SAR-AS/2018/2018_050-eng.html

²⁰ Pp 1454-1455

*Policy on Timelines for Submission and Publication of Documents.*²¹ [See footnote below for the policy timelines that have been breached.]

Consensus as part of the CSAS Peer-Review

Identified Flaw:

- **The BC Government was not given the opportunity – in the correct timeframe – to write a ‘minority report,’ which is written in the event that a consensus cannot be reached or that there are two or more equally scientifically-supported conclusions, during the CSAS process.**
 - o Through communications in an e-mail between Carmel Lowe of the DFO, and Jennifer Davis of the FLNRORD, on December 13, 2018, **it is clear that there was no opportunity for the province to provide a dissenting opinion during the CSAS process, or even anytime before the date of this e-mail.**²² Given that a dissenting opinion is meant to be discussed and recorded *during* the peer-review meeting, allowing the BC Government an opportunity 2 months *after* these meetings and *after* the SAR has already been published, seems out of line with the expectations contained in this policy.
 - **This is the MAIN ASPECT that BC has issue with**

Identified Flaw:

- **Even if the ‘minority report’ exists somewhere, and one puts aside the timeframe issue, another point is that the Proceedings are not currently publicly available.** Therefore, this ‘minority report’ (if written) cannot be considered by either decision makers or the public, which is presumably the intention behind allowing for the publication of a dissenting opinion.

²¹ The most important submission timelines for this situation are the following: (i) SARs should be submitted to CSAS as soon as possible, and within 8 weeks of the end of a meeting at the latest; (ii) Proceedings and Research Documents (RD) should be submitted to CSAS as soon as possible, and within 4 months of the end of the meeting at the latest. The expectation, according to this policy, is that all the above documents must be finalized, properly formatted, translated and approved before submitted to CSAS for posting on the internet site; The most impactful publication timelines that arise from this policy are as follows: (i) SARs should be posted as soon as possible and within 10 days of reception of the final document by CSAS; (ii) RD and Proceedings should be posted as soon as possible and within 3 weeks of reception of the final document by CSAS. Further, as noted at the bottom of this policy documents, “products from science peer review processes need to be published in a timely manner. Delays in producing Science Advisory Reports, Science Response Reports, Proceedings and Research Documents can result in delayed management decisions and create the impression that advice is either being withheld, massaged or otherwise influenced. These delays can, in turn, undermine the credibility of the science peer review process.” (<http://www.dfo-mpo.gc.ca/csas-sccs/process-processus/timelines-delais-eng.html>)

²² Pp 60

- It is important to note the BC Government has indicated that at the time of the CSAS peer-review meetings they had no issues with the SAR summary bullets. **It was *after* a ‘consensus’ was reached during the September 20-21, 2018 peer-review meeting, and *after* the subsequent opportunity for review between September 27 – October 4, 2018, that these objectionable changes were made to the SAR²³.**

Identified Flaw:

The Canadian Environmental Advisory Secretariat, in coordination with the DFO, did not act in accord with their *Policy on the Principle of Consensus*²⁴ when writing and publishing the expected documents for the Emergency Assessment of Steelhead.

Consensus in this policy is defined as follows: “for the purpose of DFO Canadian Science Advisory Secretariat peer-review meetings, **consensus means an absence of opposition to the meeting conclusions and advice that are based on scientific data and information and not on external considerations such as the potential impacts of future decisions.**”

- Had this policy been followed correctly the below should have resulted:
 - All three documents (SAR, RC and the Proceedings) should have been published and be available to the public through the CSAS or DFO webpages by January 2019;²⁵
 - The Proceedings should include, in detail, any dissenting opinions, as well as a documentation of their associated discussions, including why the alternative conclusions were not retained. **This cannot be assessed at this time because the Proceedings are not publicly available;**
 - The Proceedings *and* the SAR should have included information regarding the nature and weight of evidence, and the associated uncertainties that support each possible conclusion. It is unclear if this information was included in the Proceedings, however, according to the BC Government, this information is not a part of the currently circulating SAR.

²³ Pp 1450-1451

²⁴ <http://www.dfo-mpo.gc.ca/csas-sccs/process-processus/consensus-eng.html>; This policy directly indicates that the CSAS and DFO must use the provided definition of ‘consensus’ when conducting their peer-reviewed meetings.

²⁵ <https://www.canada.ca/en/fisheries-oceans/news/2019/02/understanding-the-canadian-science-advisory-secretariat.html>

Identified Flaw:

- Under the Policy, it is the chair’s responsibility to remind participants that the conclusions and advice of a scientific review must be based on demonstrated evidence or facts.²⁶ The current situation where the SAR has been published without the counterpoint SD. is inconsistent with the chair’s responsibility.
- The BC Government has stated that they do not believe the current report to be scientifically defensible as it stands²⁷.
- According to the BC Government, the SAR as currently published does not align with the science provided in the Research Document, and does not reflect the evidence provided, which seems in opposition to the chair’s obligations in this situation.

Compelling Rationale Expectation Policy**Identified Flaw:**

- The DFO has a policy called *Fisheries and Oceans Canada Species at Risk Act Listing Policy and Directive for “Do Not List” Advice*, last modified online December 19, 2016. This policy document clearly sets out that the:

“Default Listing Position means that DFO will advise that the List be amended for a species as assessed by COSEWIC, unless DFO can provide a Compelling Rationale not to do so [emphasis added].”²⁸ More importantly, “a Compelling Rationale must stem from a rigorous, structured, comprehensive and transparent analysis described in the Directive for “Do Not List” Advice (Annex B)”²⁹ [emphasis added. More details provided in footnotes].³⁰

²⁶ See Policy on the Principle of Consensus, Part 5. CONTEXT which states: “The chair has the responsibility to remind participants that the conclusions and advice of a scientific review must be based on demonstrated evidence or facts...”

²⁷ Pp 1450-1451

²⁸ <http://www.dfo-mpo.gc.ca/species-especes/publications/sara-lep/policy-politique/index-eng.html>

²⁹ <http://www.dfo-mpo.gc.ca/species-especes/publications/sara-lep/policy-politique/index-eng.html>

³⁰ According to this document, “the Default Listing Position recognizes the benefits for a species of being on the List, but respects those cases where a Compelling Rationale can be made to allow use of other federal authority, or stewardship actions by partners (i.e. provinces or territories), resource users or others to protect and recover the species at risk. The required discussion, as part of a Compelling Rationale, would set out why, among other things, the alternative approach is a more efficient use of Canadian resources than listing. This policy also endorses the use of the precautionary principle as part of the preamble to SARA; that is, where there are threats of serious or irreversible damage to a wildlife species, cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty. The Default Listing Position is aligned with this principle, as it requires ‘do not list’ advice be

- Due to the fact that **the SAR summary bullet points were significantly altered after the peer-review process, without further consultation** with the Province, other stakeholders, and the authors of the initial Research Document, it does not appear possible for the DFO to provide a Compelling Rationale described as stemming from a ‘comprehensive and transparent analysis’.
- The BC Government notes the lack of transparency in process and voices their concerns over this aspect a number of times, including directly with DFO staff members³¹
- Ironically, the fact that authors of the original RD substantially disagree with the changes to the SAR is itself compelling evidence of a contrary proposition – the challenged SAR can not provide a compelling rationale.

compelling and based on rigorous, structured, comprehensive and transparent analysis.” (<http://www.dfo-mpo.gc.ca/species-especies/publications/sara-lep/policy-politique/index-eng.html>)

³¹ Pp 875; Pp 1454; pp 930; pp 1067; pp 1045