A Guide to Canada's Species At Risk Act

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SIERRA LEGAL DEFENCE FUND

Sierra Legal Defence Fund is Canada's foremost national non-profit environmental organization dedicated to enforcing and strengthening the laws that safeguard our environment, wildlife and public health.

Sierra Legal Defence Fund

B.C. Head Office
214 - 131 Water Street
Vancouver BC V6B 4M3
Toll-Free 1-800-926-7744
Phone: (604) 685-5618
Fax: (604) 685-7813
Email: sldf@sierralegal.org

Ontario Office
30 St. Patrick Street – Suite 900
Toronto ON M5T 3A3
Phone: (416) 368-7533
Fax: (416) 363-2746
Email: sldfon@sierralegal.org

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May, 2003

By
Kate Smallwood
Sierra Legal Defence Fund

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Introduction[1]

Canada is internationally renowned for its natural beauty. One of the largest countries on the planet, Canada is home to about 20% of the Earth's wilderness, 24% of its wetlands, 20% of its freshwater and 10% of its forests.[2]

This incredible biodiversity is under threat. Over 400 species have been identified as being at risk in Canada, although the number is in fact much higher.[3] A report by the Canadian Endangered Species Council, *Wild Species 2000, The General Status of Species in Canada*, examined the status of over 1,600 Canadian species.[4] Of these species, only 65% were considered to be secure, while 10% were considered to be at risk or potentially at risk. Canada's list of plants and animals at risk includes Canadian icons like the Grizzly Bear, Killer Whale, Polar Bear and Eastern Cougar, as well as species like the Burrowing Owl, the Salish Sucker, the Northern Leopard Frog and the Small White Lady's Slipper.

Species loss and decline is not limited to Canada. Globally, we are now experiencing an unprecedented loss of species and genetic diversity – the sixth major period of extinction in the history of the Earth.[5] In 1992, the international community sought to address this problem by passing the United Nations *Convention on Biological Diversity* (the "Rio Convention"). Article 8 of the Convention, which addresses "in situ" or "on the ground" conservation, includes the specific commitment to pass legislation for the protection of species at risk.[6]

Although Canada was the first industrialized nation to ratify the Rio Convention, it has taken Canada nearly a decade to address this commitment. Bill C-5, the *Species at Risk Act* ("SARA"), was the government's fourth attempt at passing endangered species legislation.[7] SARA passed through the Senate without amendment on December 12, 2002

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[1] This Guide was prepared prior to the *Species at Risk Act* being proclaimed in force and prior to the release of key regulations and orders under the Act. While the provisions of the Act itself will not change, the regulations will affect various procedures under the Act, including payment of compensation, procedures for citizen and emergency listings, and matters to be included in recovery strategies. Some, but not all of these regulations will be drafted by the time the Act is proclaimed into force in early summer 2003.
[2] *Canadian Biodiversity Strategy – Canada's Response to the Convention on Biological Diversity* (Minister of Supply and Services Canada, 1995) at p. 15.
[3] As at November 2002, the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) had identified 415 species at risk. COSEWIC has publicly acknowledged on its website at www.cosewic.gc.ca ("About Us" section) that the numbers of species at risk in Canada are in fact much higher, with at least another 600 species requiring attention. The next COSEWIC list will be released on May 2, 2003 and the total number of species at risk will increase yet again.
[4] Canadian Endangered Species Conservation Council (CESCC) *Wild Species 2000: The General Status of Species in Canada*. (Ottawa: Minister of Public Works and Government Services Canada, 2001).
[5] Wilson, E.O., *The Diversity of Life* ((W. Norton & Co. Inc., New York, 1992) at p. 191.
[6] Article 8 (k).
[7] Two federal endangered species bills died on the Order Paper when federal elections were called: C-65, the *Canada Endangered Species Protection Act*, died on the Order Paper when the 1997 federal election was called, and Bill C-33, the *Species at Risk Act*, died on the Order Paper when the 2000 federal election

and received Royal Assent the same day. SARA will come into force in late spring or early summer 2003, once certain key regulations and orders have been drafted.

SARA took nearly ten years to pass for a variety of reasons, including jurisdictional wrangling between the federal and provincial governments; major policy debates over how habitat should be protected and whether scientists or politicians should decide which species would be legally protected; fears about "US style" litigation over endangered species, concerns about private land issues and compensation, and two federal elections.

SARA is the clearly the product of these policy and jurisdictional debates. As a policy decision, the federal government has elected to protect species and habitat only within a very narrow interpretation of federal jurisdiction and leave the primary role for species and habitat protection in Canada to the provinces and territories. The federal government has also consciously chosen to rely on voluntary conservation and stewardship initiatives as the primary approach for habitat protection, especially on private land.

The end result is a law that is largely restricted to federal lands, aquatic species and migratory birds under the *Migratory Birds Convention Act*. The majority of species listed under the Act will only be protected if they are found on federal land – a mere 5% of Canada outside the territories. Elsewhere in Canada, species at risk will be subject to a patchwork of protection. Significant gaps exist in the legislative framework for species and habitat protection from East to West. Neither BC nor Alberta, for example, has their own species legislation. Other provinces that do have endangered species legislation have consistently failed to list and protect species at risk listed by COSEWIC. None of the provinces or territories is meeting all the requirements for species and habitat protection outlined in the *National Accord for the Protection of Species at Risk*, the primary national policy document on species at risk in Canada.[8]

The next five to ten years will be critical for species and habitat protection in Canada. If species protection and recovery is to succeed in Canada, it will require the support of a broad range of Canadians.

I hope that this Guide helps interested Canadians become educated about the *Species at Risk Act* and engaged in species and habitat protection in their community.

Kate Smallwood
Smithers, British Columbia
Kate@extinctionsucks.org

was called. The former Bill C-5, the *Species at Risk Act*, died on the Order Paper when the government prorogued Parliament in September, 2002. The bill was reintroduced under a new parliamentary procedure which allowed the bill to be reinstated in the Senate in October, 2002 i.e. the bill did not have to go through three readings again in the House of Commons.

[8] For a detailed review of federal, provincial and territorial efforts to satisfy the requirements of the *National Accord*, see the latest National Report Card prepared by the Canadian Endangered Species Campaign at www.cnf.ca.

Key Terms Under SARA

The following terms are used consistently throughout SARA and this Guide:

"Aquatic species" - means a wildlife species that is a fish, as defined in the *Fisheries Act*, (which includes marine animals) or a marine plant, as defined in the *Fisheries Act*.

"**COSEWIC**" - means the Committee on the Status of Endangered Wildlife in Canada, the scientific body responsible for assessing the status of species at risk under SARA.

"Competent minister" – means the *Minister of Canadian Heritage* with respect to species found on federal lands that are national parks, national historic sites or other protected heritage areas under the *Parks Canada Agency Act*; the *Minister of Fisheries and Oceans* with respect to aquatic species; and the Minister of the Environment with respect to all other species.

"Critical habitat" – means the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or in an action plan for the species.

"Endangered species" – means a wildlife species that is facing imminent extirpation or extinction. (See the "Listing Categories" section in the Guide regarding the legal significance of the different listing classifications).

"Extirpated species" – means a wildlife species that no longer exists in the wild in Canada, but exists elsewhere in the wild. (See the "Listing Categories" section in the Guide regarding the legal significance of the different listing classifications).

"List" – means the List of Wildlife Species at Risk set out in Schedule 1 to the Act i.e. the legal list.

"Listed" – means a species is included on the List and is legally protected under the Act.

"Minister" – means the federal Minister of Environment.

"Residence" – means a dwelling-place, such as a den, nest or other similar area or place, that is occupied or habitually occupied by one or more individuals during all or part of their life cycles, including breeding, rearing, staging, wintering, feeding or hibernating.

"Species of special concern" – means a wildlife species that may become a threatened or endangered species because of a combination of biological characteristics and identified threats. (See the "Listing Categories" section in the Guide regarding the legal significance of the different listing classifications). Previously, COSEWIC used the designation "vulnerable" – a term still used by some provinces.

"Threatened species" – means a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction. (See the "Listing Categories" section in the Guide regarding the legal significance of the different listing classifications).

"**Wildlife species"** – means a species, subspecies, variety or geographically or genetically distinct population of animal, plant or other organism, other than a bacterium or virus that is wild by nature and:

(a) is native to Canada; or
(b) has extended its range into Canada without human intervention and has been present in Canada for at least 50 years.

Note – the term "listed wildlife species" has been used interchangeably in this Guide with "listed species".

The "Nuts and Bolts" of SARA

To understand how SARA works, you'll need to understand each of the following components:

- **Listing and COSEWIC –** Listing is the pre-requisite to protection under SARA. Unless a species has been included on the legal list under the Act – the "List of Wildlife Species at Risk" it will not be legally protected. COSEWIC, the Committee on the Status of Endangered Wildlife in Canada, is the body responsible for classifying species at risk in Canada and will play a central role in the listing process under SARA.

- **Basic Prohibitions**- If a species is listed under SARA as an endangered, threatened or extirpated species, two basic prohibitions automatically apply – you cannot harm the species or collect or trade in the species (s. 32) and you cannot destroy its "residence" (s. 33). The prohibitions only apply on federal lands, to aquatic species and to migratory birds under the *Migratory Birds Convention Act*.

- **Protection of "Critical Habitat"** – Habitat is protected under SARA through two main mechanisms – the prohibition against destruction of critical habitat (s. 58) and the promotion of stewardship and conservation initiatives through conservation agreements (s. 11). The critical habitat prohibition is limited to federal lands, aquatic species, the exclusive economic zone and continental shelf of Canada, and to migratory birds under the *Migratory Birds Convention Act*. The prohibition does not apply until critical habitat has been identified in a recovery strategy or action plan – at least several years after a species has been legally listed under the Act.

- **Federal "Safety Net" –** SARA includes two mechanisms to allow for discretionary federal action in the face of provincial or territorial inaction to protect a species or its critical habitat. These mechanisms, known as "safety nets" are the basic prohibitions safety net (federal action to protect a species or its residence) and the critical habitat safety net (federal action to protect critical habitat). They are both **discretionary** and based on experience with other similar provisions in federal environmental law, unlikely to be used.

- **Recovery Strategies and Action Plans** – Recovery of species at risk is a central component of SARA, a stated purpose of the Act and the means by which critical habitat is identified. Recovery is a two-stage process and applies to all species listed under the Act as endangered, threatened and extirpated. The first stage involves preparation of a recovery strategy that outlines the overall scientific framework for recovery. The second stage involves preparation of an action plan or plans that outline the specific measures to be taken on the ground to implement the recovery strategy.

- **Public Registry** – the public registry will be the main source of information relating to matters under the Act. The legal list, recovery strategies, regulations and other key documents will all be available online at www.SARAregistry.gc.ca once the Act is in force. If you're after information related to SARA, the public registry should be your starting point.

- **Compensation** – Compensation has been an extremely contentious issue under SARA, especially for the agricultural community. Much of this concern is founded on the mistaken assumption that SARA's habitat provisions will have extensive application on private land, which is not the case. For the rare instances where the habitat provisions under the Act do apply on private land, SARA provides for discretionary payment of "fair and reasonable" compensation as a result of any "extraordinary impact" of the habitat provisions.

Each of these components is discussed in greater detail below under "The Core Components of SARA".

Opportunities for Citizen Involvement Under SARA

Citizen involvement is essential if SARA is to be a success in protecting species and habitats at risk across Canada. This is especially the case given the government's policy decision that stewardship is to be the first approach under SARA to protecting critical habitat for species at risk and the primary means of habitat protection on private land.

In addition to the general need for citizen engagement in species and habitat protection there are several key points of access for members of the public to get more involved under SARA. **Aside from stewardship, the two most important access points will likely be citizen participation in the listing process and the recovery process**.

The opportunities for citizen involvement under SARA include:

- **Public Registry** – The federal government's public registry, which will come online at www.SARAregistry.gc.ca once SARA is in force, will be a tremendous resource for members of the public wanting more information about SARA and species at risk. The public registry should be the starting point for citizens wanting more information about SARA and species at risk.

- **Stewardship and Conservation Agreements** – Voluntary conservation initiatives are intended to be a central component of SARA. Funding is available to support stewardship initiatives through a variety of sources, including the National Habitat Stewardship Fund. Information about funding and resources to support stewardship is available at www.stewardshipcanada.ca. Landowners can also enter into a conservation agreement under the Act, which will exempt landowners from the prohibition against destruction of critical habitat.

- **Citizen Participation in Listing Species under the Act** – SARA provides two ways for citizens to become involved in the process for including species on the legal list under the Act – a citizen listing application and an emergency listing application. Under a citizen listing application, any person can apply to the Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") for an assessment of the status of a species. Because of the definition of "species", this assessment can include assessment of a species, subspecies, variety or geographically or genetically distinct population. (The fact that the species may be listed province-wide for example, would not preclude listing of a geographically or genetically distinct population of the species). A citizen can also apply to COSEWIC to have a species listed as an endangered species on an emergency basis where the citizen believes that there is an imminent threat to the survival of the species. (See "Citizen Participation in the Listing Process" under "Core Components of SARA").

- **Recovery Process** – Recovery of species at risk is a two stage process under SARA, involving preparation of a recovery strategy (which outlines the general scientific

framework for recovery) and action plans (which outline the specific measures to be taken on the ground to implement the recovery strategy). **It is critical that concerned citizens and conservation groups become involved in the recovery process under SARA because the recovery process is the means by which critical habitat is identified and then eligible for legal protection under the Act.** Community knowledge is recognized under SARA as a valid source of information on species at risk, and the public may submit comments on draft recovery strategies and draft action plans. The relevant federal ministers are also required to consult with landowners and persons directly affected by the recovery strategy or action plan. (See "Recovery Strategies and Action Plans" under "Core Components of SARA").

- **Federal Safety Net** – If a province or territory is failing to protect a species listed under SARA, its "residence" or its critical habitat, the federal government *may* decide to activate the basic prohibitions safety net or the critical habitat safety net under the Act. There is no citizen mechanism under SARA to trigger application of the basic prohibitions and critical habitat safety nets or to trigger an investigation by the Minister of Environment as to whether they should be applied. It is clear, however, that if a province or territory was openly or deliberately failing to protect a listed species, its residence or its critical habitat that significant public pressure could be brought upon the Minister of Environment to invoke one or both of the safety net mechanisms.

- **Citizen Application for investigation** – Any citizen who is over 18 years of age and a resident of Canada can apply to the competent minister (Minister of Canadian Heritage, Minister of Fisheries and Oceans or Minister of Environment) for an investigation of whether an alleged offence has been committed or whether anything has been done towards committing an offence. The pre-condition therefore to use this mechanism is that the citizen must be able to tie the investigation to the commission of an offence.

- **Reports –** SARA requires the preparation of an annual report on the administration of the Act and the preparation of a general report on the status of wild species in Canada. Both these reports will be important reference material for people seeking to assess the success of SARA and Canada's efforts at conservation of biodiversity. Both reports will be available in the public registry.

- **Round Table –** The Minister of Environment must, at least once every two years, convene a round table of people interested in protection of species at risk. This will provide an important national platform to address species issues and SARA's effectiveness.

- **Parliamentary review of SARA** – There will be a one-time parliamentary review of SARA five years after the Act comes into force. This will be a major public review of the Act involving a committee of the House of Commons and/or the Senate.

Quick Checklist – Does SARA Apply?

To see if SARA applies to a certain species and/or a certain area, you should review the checklist below. For most species listed at risk in Canada, however, the provinces and territories will play the lead role for species and habitat protection. Accordingly, you should first check to see what provincial or territorial laws and regulations are in place to protect species at risk and their habitat.

1. **Is the species included on the legal list under SARA?** To see if a species is included on the legal list, go to www.speciesatrisk.gc.ca, download a copy of the Act and go to Schedule 1 at the back of the Act. Schedule 1 contains the legal list.

   Note:
   - Once the Act is in force, the List of Wildlife Species at Risk will be available from the online public registry at www.SARAregistry.gc.ca
   - A "species" as defined includes a species, a subspecies, variety or geographically or genetically distinct population of animal, plant or organism that is wild by nature.

   Further information:

   

   See "Listing" generally, including "The Legal List" and the "First Legal List" under "Core Components of SARA".

2. **If the species IS included on the legal list, determine how the species has been listed (i.e. what category) - endangered, threatened, extirpated or special concern.** (Each of these categories is defined under "Key Terms" above).

   YES - the species is listed as an endangered, extirpated or threatened species under Schedule 1.
   Because the species is included on the legal list under Schedule 1 of the Act and is listed as endangered, extirpated or threatened, the species will be legally protected under the Act.

   In particular, the basic prohibitions against harming the species or its "residence" (see "Key Terms" above) will apply to the species if it is found on federal land, is an aquatic species or is a migratory bird under the *Migratory Birds Convention Act.* A recovery strategy will be required for the species within one year of listing for endangered species and two years of listing for threatened and extirpated species.[9] Once critical habitat has been identified in a recovery strategy or action plan, the

[9] If however, the species is included on the initial legal list in Schedule 1, the time period for preparation of a recovery strategy has been extended to three years for endangered species and four years for threatened and extirpated species (s. 42 (2) and s. 132).

mandatory prohibition against damage or destruction of critical habitat will apply on federal lands, for aquatic species and for migratory birds under the *Migratory Birds Convention Act* provided the bird's habitat is on federal land.

YES - the species is listed as a species of <u>special concern</u> in Schedule 1.
The basic prohibitions against harming a species or its residence and the prohibition against destruction of critical habitat do NOT apply to species listed under SARA as species of special concern. A management plan must be prepared for the species and its habitat within three years of listing.[10]

If you believe that a particular subspecies, variety or geographically or genetically distinct population of the species may be at greater risk than "special concern", consider a citizen listing or emergency listing application under the Act to upgrade the listing.

Further information:

 See "Listing" ("Listing Categories", "Citizen Listing" and "Emergency Listing");"Basic Prohibitions", "Protection of Critical Habitat" and "Recovery Strategies and Action Plans" under "Core Components of SARA".

3. The species is NOT included on the legal list in Schedule 1

If the species is not included on the legal list under the Act it will NOT be legally protected under SARA. Other options to consider would be:

- *Is the species listed in Schedule 2 or Schedule 3 to SARA?* If so, the species has already been listed at risk by COSEWIC, but has not yet been considered for inclusion on the first legal list. These species will be reclassified or deemed classified by COSEWIC at a prescribed time period after the Act comes into force and will then be subject to the normal listing process under the Act. The government is likely to extend the prescribed time periods for COSEWIC to classify these species. Once COSEWIC has classified the species, or been deemed to have classified them, Cabinet has nine months to respond to the COSEWIC listing assessment, and if it fails to do so in that time period, the species will be included on the legal list.

Further information:
 See "First Legal List" under "Core Components".

[10] If the species is listed as a species of special concern on the initial legal list in Schedule 1, the time period for preparation of a management plan has been extended to five years.

- *Is the species listed by COSEWIC?*
  To see if a species is listed by COSEWIC, visit www.cosewic.gc.ca. If a species is listed by COSEWIC after the Act comes into force, the species will be subject to the normal listing process under the Act.

- *Is the species being considered by COSEWIC or sufficiently at risk to warrant either a citizen listing application or an emergency listing application under the the Act?*
  If there is sufficient information available to show that a species, subspecies, variety or geographically or genetically distinct population of the species is at risk, consider a citizen listing application, or if there is an imminent threat to the survival of the species, an emergency listing application to COSEWIC.

  Note: When this Guide was written, no regulations had been released regarding the format for citizen and emergency listing applications to COSEWIC. Contact COSEWIC at www.cosewic.gc.ca to find out what information is required to support these two listing applications.

  Further information:

  
  See "Citizen Listing" and "Emergency Listing" under "Core Components of SARA"

4. **What type of species is it and where is it found?**

   If the species is listed as an endangered, threatened or extirpated species, the basic prohibitions only apply to aquatic species, migratory birds under the *Migratory Birds Convention Act* and species found on federal land. **Most species listed at risk under SARA, such as the burrowing owl, the Vancouver Island marmot and the swift fox, will only be protected if they are on federal land.**

   The mandatory prohibition against damage or destruction of critical habitat applies to listed endangered, threatened and extirpated species (provided a recovery strategy has recommended the reintroduction of the species into the wild in Canada) but not until critical habitat has been identified in a recovery strategy or action plan. The prohibition is limited to federal lands, aquatic species and migratory birds under the *Migratory Birds Convention Act* provided the habitat is on federal land.

   Federal Cabinet *may* elect to extend the basic prohibitions and the prohibition against destruction of critical habitat to provincial or territorial lands under the federal safety net upon the recommendation of the Minister of Environment but only after consultation with the appropriate provincial or territorial minister or wildlife management board. Similar discretionary safety nets in other Canadian environmental legislation have never been used.

   Further information:

   
   See "Federal Safety Net" under "Core Components".

The Core Components of SARA

Public Registry

A public registry must be established under the Act for the purpose of facilitating access to documents relating to matters under SARA.

The public registry will be a central component of SARA and the main source of information relating to matters under the Act. If you're looking for information about SARA or documents required under SARA, the public registry should be your starting point.

The public registry will be an online service that will be accessible to the public once SARA is proclaimed in force. The registry will be available at www.SARAregistry.gc.ca.

The public registry must include every document required to be included in the registry under the Act, including the following information[11]:

- Regulations and orders made under SARA;
- Agreements entered into under section 10 with other governments of Canada for the administration of various provisions of SARA;
- The criteria used by the Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") for the classification of wildlife species;
- Status reports on wildlife species that COSEWIC has prepared or has received with an application;[12]
- The List of Wildlife Species at Risk (the legal list);
- Codes of practice, national standards or guidelines established under the Act;
- Alternative measures agreements (i.e. agreements addressing non-traditional penalties for the commission of an offence under SARA) and reports filed under section 111 or section 113 (2) or notices that those agreements or reports have been filed in court and are available to the public; and
- Every report made under section 126 (annual report to Parliament) and section 128 (general report on the status of wildlife species – required every five years).

[11] Section 123.
[12] The Minister of Environment may, on the advice of COSEWIC, restrict the release of any information required to be included in the public registry if that information relates to the location of a wildlife species or its habitat and restricting the release of this information would be in the best interests of the species (s. 124).

For additional information about the public registry, contact the SARA Public Registry Inquiry Office:

351 St. Joseph Boulevard, 1st Floor
Hull, Quebec
K1A 0H3

Ph: 819-997-2800
Toll-free : 1-800-668-6767
Fax: 819-953-2225
Email: enviroinfo@ec.gc.ca or SARAregistry@ec.gc.ca

Legal Listing of Species at Risk

Overview

Listing is the prerequisite to protection under SARA. Unless a species is included on the "List of Wildlife Species at Risk" in Schedule 1 to the Act – the "legal list" – it will not be eligible for protection under the Act.

Listing has been one of the major areas of debate for Canadian endangered species legislation, along with habitat protection and more recently, compensation. With listing, the debate has been whether the federal government should adopt a scientific listing process or a political listing process. Under a *scientific listing process*, the national list of species at risk prepared by the Committee on the Status of Wildlife in Canada ("COSEWIC") would become the legal list under the Act. Under a *political listing process*, COSEWIC's role would be advisory only – federal Cabinet would have the ultimate decision as to which species would be listed under the Act. Political listing has been a proven failure provincially, as most species listed by COSEWIC are not listed provincially.

At third reading, the government finally agreed to the compromise solution supported by the House Standing Committee on Environment and Sustainable Development – "negative option" or "reverse onus" listing. Under this approach, the COSEWIC list becomes the legal list under the Act unless Cabinet takes contrary action within nine months. This process will ensure that no species will be ignored or indefinitely deferred through Cabinet inaction, and is considered in greater detail in the next section.

The Legal List

The List of Wildlife Species at Risk (the "legal list") is contained in Schedule 1 of the Act and constitutes the legal list under the Act. **Unless a species is included in the legal list, it will not be protected under SARA.**

Under the listing process adopted by the House Environment Committee and retained by the government at third reading, COSEWIC listing assessments will be included on the legal list in Schedule 1 unless within nine months after receiving the assessment federal Cabinet takes contrary action.

Pursuant to section 27, once federal Cabinet has received an assessment from COSEWIC, it has nine months to review the assessment. During that time period, Cabinet may, on the recommendation of the Minister of the Environment, take one of three courses of action:

(a) accept the assessment and add the species to the list;

(b) decide not to add the species to the List; or

(c) refer the matter back to COSEWIC for further information or consideration.

If federal Cabinet decides not to add the species to the legal list or decides to refer the matter back to COSEWIC, the Minister of Environment, after the approval of Cabinet, is required to include a statement in the public registry setting out the reasons for the decision.

If Cabinet takes no action within nine months after receiving an assessment, the Minister of Environment is required to amend the legal list in accordance with COSEWIC's assessment.

Before making a recommendation to Cabinet in respect of a wildlife species, the Minister of the Environment must take into account COSEWIC's assessment in respect of the species, and must consult with the competent minister or ministers (the Minister of Fisheries and Oceans and the Minister of Canadian Heritage). If the species is found in an area governed by a wildlife management board under a land claims agreement, the Minister of the Environment must consult with the wildlife management board before making a recommendation to Cabinet.

First Legal List

Species Included on the First Legal List

The government has included 233 species on the initial legal list in Schedule 1 (17 extirpated species, 105 endangered species, 68 threatened species and 43 species of special concern). The List includes all species re-assessed by COSEWIC up to and including its November 2001 meeting, but does not include species re-assessed at the May 2002 and November 2002 or the May 2003 meetings.

To see the first legal list, visit www.speciesatrisk.gc.ca, download a copy of SARA and go to Schedule 1 at the end of the Act. Once the Act is in force, it the initial legal list will also be included in the public registry at www.SARAregistry.gc.ca.

Extended Period for Recovery Strategies and Management Plans

The prescribed time period for completion of recovery strategies and management plans has been extended for species included on the initial legal list. For species included on the legal list on the day the Act comes into force, the period for completing a recovery strategy has been extended from one year to three years for endangered species and from two years to four years for threatened and extirpated species. For species of special concern, the requirement to complete a management plan within three years of listing has been extended to five years.

Species included on the National List of Species at Risk but not on the Legal List

SARA includes transitional provisions to address those species that are currently listed by COSEWIC as being at risk in Canada, but are not on the first legal list under the Act. Schedule 2 contains the endangered and threatened species and Schedule 3 contains the species of special concern. As noted above, some of these species have already been reassessed by COSEWIC in 2002 but were not included on the legal list.

In assessing Schedule 2 and Schedule 3 species, COSEWIC is entitled to consider and rely upon any official status report on the species that was prepared in the two years previous to Royal Assent (December 12, 2002).

Deemed Listing: Species listed in Schedule 2 must be assessed by COSEWIC within 30 days of section 14 of the Act coming into force (unless an extension is granted – see below). If the assessment of species in Schedule 2 is not completed within this time period, COSEWIC will be deemed to have classified the species as indicated in Schedule 2, i.e. a species currently listed in Schedule 2 as endangered, will be deemed to have been reassessed by COSEWIC as endangered.

Species listed in Schedule 3 must be assessed within one year after the competent minister or competent ministers request the assessment, i.e. the timeline is triggered by ministerial request.

Assessment of Schedule 2 and Schedule 3 species must meet the general SARA requirements for species assessments.[13] In particular, the assessments must be based on a status report and a copy of the assessment and the reasons for it must be provided to the Minister of Environment and the Canadian Endangered Species Conservation Council and included in the public registry.

[13] In particular, COSEWIC must conduct the assessments consistent with section 15 (2) and (3) (which require COSEWIC to carry out its functions based on the best available information on the on the biological status of a species and to take into account any applicable provisions of treaty and land claims agreements).

Extensions: The time period for assessing species listed in Schedule 2 and Schedule 3 may be extended by federal Cabinet, upon the recommendation of the Minister of the Environment, after consultation with the competent minister or competent ministers. The Minister of Environment must include a statement in the public registry setting out reasons for the extension.

COSEWIC will apparently be seeking an extension for at least some of the species listed in Schedules 2 and 3.

SARA Listing Process Applies: Once a species in Schedule 2 or 3 has been assessed and classified by COSEWIC, or deemed classified, the standard "negative option" listing process in section 27 applies. Federal Cabinet will have nine months to accept the assessment and list the species, decline the assessment or refer the matter back to COSEWIC for further information. If Cabinet does not take any action within nine months of receiving the assessment, the Minister of Environment shall amend the legal list in accordance with COSEWIC's assessment.

Listing Categories

There are four different listing categories under SARA. As defined in section 2, the four categories are:

- **Extirpated species:** means a wildlife species that no longer exists in the wild in Canada, but exists elsewhere in the wild.
- **Endangered species:** means a wildlife species that is facing imminent extirpation or extinction.
- **Threatened species:** means a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction.
- **Species of special concern:** means a wildlife species that may become a threatened or endangered species because of a combination of biological characteristics and identified threats.

The listing categories are important because the risk category under which a species is listed dictates the level of protection it will receive under the Act. In general, species of special concern receive a much lower level of protection under the Act and in certain circumstances, extirpated species will only be covered if a recovery strategy has recommended the reintroduction of the species into the wild in Canada.

The three key areas where the difference in listing category becomes important are:

1. **Basic prohibitions –** There are two basic prohibitions in SARA. Section 32 prohibits killing, harming, harassing, capturing or taking a listed species as well as possession or trading of a listed species or any part of a listed species.

Section 33 prohibits damaging or destroying a listed species' "residence". The basic prohibitions only apply to listed extirpated, endangered or threatened species.[14] Species of special concern are not covered. Both sets of prohibitions are limited to federal jurisdiction only i.e. federal lands, aquatic species and migratory birds under the *Migratory Birds Convention Act.*

2. **Critical Habitat Prohibition –** Section 58 prohibits the destruction of critical habitat within federal jurisdiction (federal lands, federal waters, aquatic species and migratory birds under the *Migratory Birds Convention Act*). The critical habitat prohibition applies to listed endangered and listed threatened species. Listed extirpated species are only covered if a recovery strategy has recommended the reintroduction of the species into the wild in Canada. Species of special concern are not covered.

3. **Recovery Process –** Recovery strategies must be prepared for all listed extirpated, endangered and threatened species. The recovery process for species of special concern is addressed through a separate and less prescriptive process involving management plans.

Citizen Participation in the Listing Process

SARA provides two ways for the public to become involved in the listing process – a citizen listing application under section 22 and an emergency listing application under section 28 (considered below).

Citizen Listing

Pursuant to section 22, "any person" may apply to COSEWIC for an assessment of the status of a wildlife species. "Wildlife species" as defined under SARA means " a species, subspecies, variety or geographically or genetically distinct population of animal, plant or other organism" that is wild by nature and native to Canada.[15]

The Minister may, after consultation with the competent ministers and the Canadian Endangered Species Conservation Council, make regulations regarding citizen listing applications under section 22 and how those applications are to be dealt with by COSEWIC. These regulations had not been released when this Guide was prepared. It is likely however, that all citizen listing applications will need to be accompanied by a status report on the species. This report will need to include a summary of the best

[14] The basic prohibition in section 33 against destruction of a species' residence applies to listed extirpated species only if a recovery strategy has recommended their reintroduction into the wild in Canada.

[15] Under the definition in section 2, a wildlife species can also include a species that has extended its range into Canada without human intervention and that has been present in Canada for at least 50 years.

available information on the status of the species, including scientific knowledge, community knowledge and aboriginal knowledge.[16]
COSEWIC must assess the status of a species within one year after receiving a status report on the species and it must give reasons for its assessment. If the assessment is the result of a citizen listing application, COSEWIC must notify the application of the assessment and the reasons for the assessment (s. 23).

Emergency Listing

An emergency listing can be triggered in two ways under SARA – (i) an application by a member of the public and (ii) a listing initiated by the Minister of Environment. With either process, if Cabinet accepts the Minister's recommendation to list the species, on an emergency basis, as an endangered species, the species will be added to the legal list without the usual nine month waiting period i.e. the listing process in section 27 does not apply to emergency listings.

Citizen Application for Emergency Listing

Any person who considers that there is an imminent threat to the survival of a wildlife species may apply to COSEWIC for an assessment of the threat, for the purpose of having the species listed as an endangered species on an emergency basis.

The application must include relevant information indicating that there is an imminent threat to the survival of the species. Regulations may be made by the Minister of Environment (after consultation with the Minister of Fisheries and Oceans and the Minister of Canadian Heritage) regarding applications under section 28 and how those applications are to be dealt with by COSEWIC. These regulations had not been made at the time that this Guide was written.

COSEWIC must provide a copy of the assessment to the applicant, the Minister of Environment and the Canadian Endangered Species Conservation Council. A copy of the assessment must also be included in the public registry.

The species will only be included on the legal list if, upon review of the COSEWIC assessment, the Minister of Environment determines that there is an imminent threat to the species, and federal Cabinet accepts the Minister's recommendation to list the species as endangered (see Ministerial listing process, described below).

[16] Section 2, definition of "status report".

Emergency Listing Initiated by the Minister

If the Minister of the Environment is of the opinion that there is an imminent threat to the survival of a wildlife species, the Minister must, on an emergency basis, after consultation with the Minister of Fisheries and Oceans and the Minister of Canadian Heritage, make a recommendation to federal Cabinet that the legal list be amended to list the species as an endangered species. The Minister can make the recommendation based on his or her own information or on the basis of a COSEWIC assessment. (This could be a COSEWIC assessment triggered by a citizen application for emergency listing).

If federal Cabinet makes an order listing the species, as soon as possible after that order COSEWIC must have a status report prepared on the species. Within one year after the emergency listing order is made, COSEWIC must provide the Minister with a written report which confirms the classification of the species as endangered, recommends that the species be reclassified, or recommends that the species be removed from the legal list. A copy of this report must be included in the public registry within thirty days after the report is received by the Minister.

Committee on the Status of Endangered Wildlife in Canada (COSEWIC)

Overview

Canada's list of species at risk is prepared by the Committee on the Status of Endangered Wildlife in Canada ('COSEWIC'). COSEWIC was established in 1977 and includes representatives from each provincial and territorial government wildlife agency, four federal agencies (Canadian Wildlife Service, Parks Canada, Department of Fisheries and Oceans, and the Federal Biosystematics Partnership, chaired by the Canadian Museum of Nature), three non-jurisdictional members, the co-chairs of the Species Specialist Subcommittees [17]and the co-chairs of the Aboriginal Traditional Knowledge Subcommittee.

COSEWIC is a well-respected, credible and independent scientific committee. COSEWIC meets annually (although recently it has been meeting twice a year) to review and release the latest list of Canadian species at risk.

As of November 2002, COSEWIC has identified 415 species at risk (141 endangered, 99 threatened, 142 species of special concern, 21 extirpated (no longer found in Canada),

[17] Species Specialist Subcommittees focus on unique taxonomic groups of species. At present there are eight Species Specialist Subcommittees – birds, terrestrial mammals, marine mammals, amphibians and reptiles, freshwater fishes, marine fishes, lepidoterans and molluscs and an Aboriginal Traditional Knowledge Subcommittee. For more information about COSEWIC, visit their website at www.cosewic.gc.ca.

and 12 extinct species). Information about COSEWIC and Canada's listed species at risk can be obtained from the COSEWIC website at www.cosewic.gc.ca.

COSEWIC Under SARA

COSEWIC will continue to prepare Canada's list of species at risk once SARA has become law, but its composition, role and the listing process will be different.

Functions

COSEWIC is legally established under SARA and its functions outlined in the Act. These include assessing the status of each wildlife species considered by COSEWIC to be at risk, developing and periodically reviewing criteria for assessing the status of species at risk and recommending such criteria to the Minister of Environment and the Canadian Endangered Species Conservation Council and providing advice to the Minister and the Council.

When assessing a species considered to be at risk, COSEWIC is required to identify existing and potential threats to the species and to:

(i) classify the species as extinct, extirpated, endangered, threatened or of special concern;
(ii) indicate that COSEWIC does not have sufficient information to classify the species; or
(iii) indicate that the species is not currently at risk.

COSEWIC is required to carry out its functions on the basis of the best available information on the biological status of a species, including scientific knowledge, community knowledge and aboriginal traditional knowledge. This requirement is an important one, and helps to ensure that COSEWIC's work will not be deferred for lack of scientific certainty.

Composition and Qualifications

Under SARA, the Minister of Environment is responsible for determining the composition of COSEWIC, after consultation with the Canadian Endangered Species Conservation Council and with any experts and expert bodies, such as the Royal Society of Canada that the Minister considers have relevant expertise.

Although selection of COSEWIC members is left to the discretion of the Minister of Environment, the Act specifically requires that each member of COSEWIC must have expertise drawn from a discipline such as conservation biology, population dynamics, taxonomy, systematics or genetics, or from community knowledge or aboriginal traditional knowledge of the conservation of wildlife species.

Subcommittees

Consistent with COSEWIC's current practice, SARA requires the establishment of subcommittees of specialists to assist in the preparation and review of status reports, including the establishment of a subcommittee specializing in aboriginal traditional knowledge. Although the subcommittees may include people who are not members of COSEWIC, each subcommittee must be presided over by a member of COSEWIC. For a list of current COSEWIC members, visit www.cosewic.gc.ca

Assessments and Status Reports

COSEWIC's assessment of the status of a wildlife species (which can include a subspecies, variety or geographically or genetically distinct population) must be based on a status report on the species. The status report can either be one that COSEWIC has commissioned or has received with a citizen listing application (see "Citizen Listing" above).

Regulations regarding the content of status reports may be made by the Minister of Environment, but had not been released as at the date of this Guide. At a minimum however, a status report will have to contain a summary of the best available information on the status of the species, including scientific knowledge, community knowledge and aboriginal traditional knowledge.[18]

COSEWIC must assess the status of a species within one year after it receives a status report on the species. Reasons must be given for the assessment. A copy of the assessment and the reasons must be given to the Minister of Environment and the Canadian Endangered Species Conservation Council and a copy of the assessment and the reasons must be included in the public registry.

Once the Minister has received a copy of a COSEWIC assessment on the status of a wildlife species, the Minister must, within 90 days, include a report in the public registry regarding how the Minister intends to respond to the assessment and, to the extent possible, provide time lines for action.

COSEWIC List

COSEWIC is required to annually prepare a complete list of every wildlife species it has assessed since the Act came into force and a copy of that list must be included in the public registry. The annual COSEWIC list is not the legal list under the Act (see "Legal List" section above).

[18] As defined in section 2of the Act, '"status report" means a report, prepared in accordance with the regulations governing the content of status reports, that contains a summary of the best available information on the status of a wildlife species, including scientific knowledge, community knowledge and aboriginal traditional knowledge.

Basic Prohibitions

If a species is included in the legal list in Schedule 1 as an endangered, threatened or extirpated species, two prohibitions automatically apply – you cannot kill, harm or trade in the species (s. 32) and you cannot damage or destroy its "residence" (s. 33).[19] Both prohibitions are limited to federal jurisdiction only i.e. federal lands, aquatic species and migratory birds under the *Migratory Birds Convention Act*. Neither prohibition applies to species of special concern.

Most species listed at risk under SARA will not therefore be protected by the basic prohibitions unless they are found at national parks, federal agricultural lands, Indian reserves, military bases, airports, post offices, coast guard stations or other federal land. The notable exception would be if the federal government exercises the "basic prohibitions" safety net (see "Federal Safety Net" below). For the reasons outlined below, the chances of the federal government exercising its discretionary power to apply the basic prohibitions on provincial or territorial lands are extremely limited.

Section 32 – Prohibition against Harm to or Trade in Listed Species

Section 32 prohibits two broad categories of activity – harm to a listed species, and possession or trade in a listed species or parts of a listed species:

> (1) No person shall kill, harm, harass, capture or take an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species.
>
> (2) No person shall possess, collect, buy, sell or trade an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species, or any part or derivative of such an individual.

Section 33 – Prohibition against Damage or Destruction of Species' "Residence"

Section 33 prohibits damage or destruction of a species' "residence". The prohibition applies to listed endangered and threatened species, and listed extirpated species provided a recovery strategy has recommended the reintroduction of the species into the wild in Canada.

The definition of "residence"
The term "residence" is not a biological or scientific concept. It is an artificial tool to minimize the automatic consequences of listing a species under SARA by restricting legal protection to a minimal portion of the species' critical habitat.

[19] The prohibition in section 33 against destruction of a species' residence only applies to listed extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada.

As originally drafted in Bill C-5, "residence" was defined to mean:

> "a dwelling-place, such as a den, nest or other similar area, place or structure, that is occupied or habitually occupied by one or more individuals during all or part of their life cycles, including breeding, rearing or hibernating".

Various stakeholders, especially scientists[20], objected to this definition because it was too narrow, rendering it biologically inapplicable to many species. By restricting the definition to "den, nest or other similar area", many species such as caribou that do not have a den or nest or "similar" area, would not be eligible for protection.

In response to these concerns, the House Standing Committee on Environment and Sustainable Development expanded the definition to include areas used for feeding, staging and wintering, but failed to delete the word "similar". The amended definition was then somewhat contradictory – areas used for wintering and feeding, for example, are not "similar" to a den, nest or other dwelling area.

Aside from one minor amendment, the government retained the Committee's definition. The definition – which remains somewhat contradictory, although it is clear that broader areas are meant to be covered – now reads:

> "a dwelling place, such as a den, nest or other similar area or place, that is occupied or habitually occupied by one or more individuals during all or part of their life cycles, including breeding, rearing, staging, wintering, feeding or hibernating".

Application of Basic Prohibitions on Federal Land for Species Listed by a Province or Territory

Pursuant to section 36, SARA's basic prohibitions may be extended to species not listed by SARA, but classified by a province or territory as endangered or threatened. Federal Cabinet may, on the recommendation of the competent minister, extend the basic prohibitions to such species, provided the species or its residence is found on federal land. The prohibitions will only apply to the portions of federal land identified in the order.

[20] See for example the scientists' letter signed by over 1,300 scientists at www.scientists-4-species.org.

Protection of Critical Habitat

Habitat Loss – The Primary Threat

> *"From prehistory to the present time the mindless horsemen of the environmental apocalypse have been overkill, habitat destruction, introduction of animals such as rats and goats and diseases carried by these exotic animals. In prehistory, the paramount agents were overkill and exotic animals. In recent centuries, and to an accelerating degree during our generation, habitat destruction is foremost among the lethal forces …"*
>
> E. O. Wilson, *The Diversity of Life*[21]

The primary cause of species loss and decline, both in Canada and globally, is habitat loss. The International Union for the Conservation of Nature, upon release of its 2002 *Red List of Threatened Species*, noted that:

> "Habitat loss and degradation affect 89% of all threatened birds, 83% of mammals and 91% of threatened plants assessed".[22]

If we are to save species, we have to save spaces for them. Yet lack of mandatory provisions to protect habitat is the fundamental flaw with SARA. Under SARA, habitat protection comes "too little, too late". Mandatory protection of critical habitat is limited to federal lands, federal waters, aquatic species and migratory birds under the *Migratory Birds Convention Act* provided the habitat is on federal lands. Habitat protection does not commence under SARA until critical habitat has been identified in a recovery strategy or action plan (which could take three years of or more for species on the first legal list under the Act and two years or more for species listed once the Act is passed). Aside from protection of a species' "residence, and certain limited measures under emergency orders, no provision is made for interim habitat protection between the time a species is listed and completion of the recovery process. The fundamental threat to species at risk – habitat loss – is therefore left unresolved for at least two to three years after listing – a major deficiency with the Act.

Policy Approach to Habitat Protection Under SARA

> "*Stewardship is a critical component of the legislation … It is a cornerstone of the bill …Landowners are critical to making this bill a success … cooperative spirit has to be the keystone of this piece of legislation. Only if we have the willing support of landowners and people who work on the land will this legislation work effectively. No amount of money and no amount of federal or provincial*

[21] Wilson, E.O., *The Diversity of Life* (W. Norton & Co. Inc., New York, 1992) at p. 253.
[22] Quoted from www.iucn.org – see News Release "The 2002 IUCN Red List of Threatened Species".

> *legislation can succeed in the face of uncooperative landowners or people who work on the land"*.
>
> Minister of the Environment, David Anderson, testifying before the Senate Standing Committee on Energy, the Environment and Natural Resources.[23]

Prior to drafting SARA, the federal government determined that as a policy decision, **stewardship would be the first approach to protecting critical habitat of species at risk.[24]** The government decided that "the best way to protect species' habitat is through voluntary preventative measures, rather than having to resort to legal restrictions on land use".[25] The government wanted to "build on and support" existing voluntary preventative measures by emphasizing stewardship and incentives as "the preferred option for protecting habitat".

Specifically, it was intended that stewardship and incentive measures "would be the primary and preferred means for protecting habitat on privately owned lands".[26] Federal, provincial and territorial governments would be responsible for protecting habitat on Crown lands and Aboriginal peoples would be involved with stewardship activities on reserve lands and in traditional territories where they have a proprietary or conservation interest.[27]

SARA has been drafted to reflect this policy approach. The mandatory legal prohibition against destruction of a species' critical habitat only applies to federal waters,[28] federal lands and aquatic species and only after critical habitat has been identified through the recovery process. While provision is made to extend the critical habitat prohibition to territorial and provincial land, this provision is discretionary only and can not be applied until the federal government has engaged in consultation with the relevant provincial or territorial ministers.

In terms of incentives for habitat protection on private land, specific provision is made for conservation agreements in section 11. If such agreements cover critical habitat in federal jurisdiction, the prohibition against destruction of critical habitat does not apply.

While the conservation community is fully supportive of incentives and stewardship initiatives as a means to protect critical habitat, this approach is all "carrot" but no "stick". The Act fails to provide a legal back up if voluntary initiatives do not work and fails to ensure a "level playing field" for all Canadians.

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[23] Senate of Canada, Proceedings of the Senate Committee on Energy, the Environment and Natural Resources, Issue No. 5 – Sixth and Seventh meetings on Bill C-5, Tuesday November 26, 2002 and Thursday November 28, 2002 at p. 5:50.
[24] Environment Canada, *Canada's Plan for Protecting Species at Risk – An Update*, December 1999 at p. 8.
[25] Ibid.
[26] Ibid. at p. 15.
[27] Ibid.
[28] Exclusive economic zone of Canada and continental shelf of Canada – s. 58 (1).

Prohibition Against Destruction of Critical Habitat - Section 58

Overview

Section 58 is the primary section under SARA for protection of critical habitat. "Critical habitat" as defined in the Act means:

> "habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or action plan for the species".[29]

Unlike the basic prohibitions therefore, **protection of critical habitat does not apply automatically upon listing a species, but is delayed until the recovery process.**

Section 58 contains an outright prohibition against the destruction of any part of the critical habitat of a listed endangered, threatened or extirpated species, if a recovery strategy has recommend the reintroduction of the species into the wild in Canada. **Section 58 is limited to federal jurisdiction only** i.e. federal lands, federal waters (exclusive economic zone of Canada and continental shelf of Canada), aquatic species and migratory birds under the *Migratory Birds Convention Act*.

Section 57 – the Purpose of Section 58

At third reading, the government amended SARA to include a new provision that outlines the purpose of section 58. Pursuant to section 57, the stated purpose of section 58 is to ensure that within six months after critical habitat has been identified in a recovery strategy or action plan that has been filed in the public registry, that critical habitat is protected by:

- provisions in or measures under SARA, including conservation agreements under section 11;
- provisions in or measures under other federal legislation; or
- the critical habitat prohibition under section 58 (1) of SARA (i.e. critical habitat within federal jurisdiction).

Although the standard of protection in section 58 is "legally" protected (see s. 58 (5) and (5.1)), section 57 does not include the word "legally"- it simply says "protected". Given that section 57 is meant to explain the purpose of section 58, this is clearly an oversight as the prescribed standard of protection under section 58 is "legally protected", not just "protected".

[29] Section 2.

Habitat of Migratory Birds not Automatically Protected

Despite having extensive constitutional authority to protect migratory birds under the *Migratory Birds Convention Act* ("MBCA birds") and their habitat,[30] the federal government has failed to fully exercise this authority under SARA. **Under section 58, mandatory protection for MBCA birds is limited to federal lands and migratory bird sanctuaries under the *Migratory Birds Convention Act*.**

There is discretionary power for federal Cabinet to protect MBCA birds outside federal lands, but this is limited to "habitat to which the [*Migratory Birds Convention Act*] applies". This limitation is problematic because the federal government has sought to restrict habitat protection under the *Migratory Birds Convention Act* to nests only. Accordingly, outside federal lands and migratory bird sanctuaries, protection of the critical habitat of MBCA birds is not only discretionary, it is likely going to be restricted to nests only.

No Interim Habitat Protection

Habitat protection under section 58 is delayed until critical habitat has been identified in a recovery strategy or action plan, which could take three years or more for species on the initial legal list and two years or more for species listed once the Act is passed.

No provision is made under SARA for interim habitat protection (aside from certain limited measures under emergency orders and protection of a species "residence"[31]) between the time a species is listed and identification of critical habitat through the recovery process. The fundamental threat to species at risk – habitat loss – is therefore left unresolved for at least two to three years after listing – a major deficiency with the bill.

Categories of Protection under Section 58

There are three main categories of habitat protection under section 58 and each category has a different process for protection:

1. Protection of critical habitat in federal protected areas (ss. (2) and (3));
2. Protection of critical habitat on federal lands, in the exclusive economic zone or on the continental shelf of Canada, or for aquatic species (ss. (4) and (5)); and

[30] See generally the constitutional opinion by the Hon. Gerald La Forest (former judge of the Supreme Court of Canada) and Dale Gibson (Belzberg Fellow of Constitutional Studies, University of Alberta), *Constitutional Authority for Federal Protection of Migratory Birds, Other Cross-Border Species and their Habitat in Endangered Species Legislation*, November 1999.

[31] For the reasons outlined under in the section under "Basic Prohibitions" on "residence", there is room for debate as to exactly what habitat will be caught under the definition of "residence".

3. Protection of critical habitat outside federal lands for MBCA birds (ss (5.1) and (5.2)).

Although the process for protection varies with each category of federal jurisdiction, the time period for protection under section 58 (1) is the same – 180 days from the date that a recovery strategy or action plan identifying critical habitat is included in the public registry.

Critical Habitat in Federal Protected Areas

The process for protection of critical habitat in federal protected areas is contained in section 58 (2) and (3) and applies to the following protected areas:

- A national park named in Schedule 1 to the *Canada National Parks Act*;
- A marine protected area under the *Oceans Act*;
- A migratory birds sanctuary under the *Migratory Birds Convention Act, 1994*; and
- A national wildlife area under the *Canada Wildlife Act*.

Protection of critical habitat in these areas is through publication of a notice in the *Canada Gazette.* If any critical habitat is found within one of these prescribed federal protected areas, the Minister of Environment must, within 90 days after the recovery strategy or action plan that identified the critical habitat is included in the public registry, publish a description of that critical habitat in the *Canada Gazette*.

The prohibition in section 58 (1) then applies to this critical habitat a further 90 days after the description is published in the *Canada Gazette*. Accordingly, 180 days after the critical habitat has been identified in a recovery strategy or action plan published in the public registry, the habitat will be protected under section 58 (1).

Critical Habitat on Federal Lands or for Aquatic Species

The process for protection of critical habitat on federal lands (outside the federal protected areas covered under s. 58 (2)), in the exclusive economic zone of Canada or the continental shelf of Canada)[32] or for aquatic species is contained in sections 58 (4) and (5). Protection of this critical habitat is by order of the competent minister.

Within 180 days after a recovery strategy or action plan identifying critical habitat is included in the public registry, the competent minister must, for all critical habitat in federal jurisdiction not found within one of the prescribed federal protected areas in

[32] Although s. 58 (1) differentiates between aquatic species and two types of federal waters – exclusive economic zone of Canada or the continental shelf of Canada, presumably most if not all the critical habitat in these federal waters will be habitat of aquatic species.

section 58 (2), make an order protecting that critical habitat if the critical habitat is not legally protected by:

- Provisions in or measures under SARA, including conservation agreements under section 11; or
- Provisions in or measures under other federal legislation.

If the competent minister does not make the order, he or she must include a statement in the public registry setting out how the critical habitat or portions of the critical habitat are otherwise legally protected.

Critical Habitat for Migratory Birds Outside Federal Lands

Although the federal government has jurisdiction to protect migratory birds under the *Migratory Birds Convention Act* ("MBCA birds") and their habitat outside federal lands and migratory bird sanctuaries under the *Migratory Birds Convention Act*, it has not exercised that authority under section 58.

The mandatory prohibition in section 58 (1) only applies to the critical habitat of MBCA birds if that habitat is found on federal land, in the exclusive economic zone of Canada or the continental shelf of Canada or a migratory bird sanctuary under the *Migratory Birds Convention Act*. Critical habitat for MBCA birds in these areas will be protected by order of the competent minister under section 58 (4), unless the critical habitat is located in a federal protected area under section 58 (2).

If the critical habitat of MBCA birds is found outside these recognized areas of federal jurisdiction, it will only be protected if federal Cabinet makes a discretionary order, on the recommendation of the competent minister, protecting that habitat. Furthermore, the discretionary protection only covers "habitat to which the *Migratory Birds Convention Act* applies". The scope of this limitation is still open to legal debate, although the federal government has argued that the *Migratory Birds Convention Act* covers nests only, not broader habitat. On this interpretation, protection of MBCA bird habitat outside the federal areas cited above would be discretionary and limited to nests only.

The process to protect the critical habitat of MBCA birds outside federal lands, the exclusive economic zone of Canada, the continental shelf of Canada and migratory bird sanctuaries under the *Migratory Birds Convention Act* is as follows:

Within 180 days after a recovery strategy or action plan identifying critical habitat that includes habitat to which the *Migratory Birds Convention Act applies* is included in the public registry, the competent minister must, after consultation with every other competent minister, make a recommendation to federal Cabinet that the critical habitat be protected if he or she is of the opinion that the critical habitat or any portion of the critical habitat is not legally protected by:

- Provisions in or measures under SARA, including conservation agreements under section 11; or
- Provisions in or measures under any other federal legislation.

If the competent minister does not make the recommendation to federal Cabinet, he or she must include a statement in the public registry setting out how the critical habitat (which must be habitat to which the *Migratory Birds Convention Act* applies) is otherwise legally protected.

Consultation Requirements

If the competent minister is of the opinion that an order under section 58 (4) (federal lands and aquatic species) or section 58 (5.1) (discretionary protection of MBCA bird habitat) would affect:

- Land in a territory that is that is not under the authorization of the Minister of Environment or Parks Canada;
- Reserve lands or lands set apart for the use and benefit of a band under the *Indian Act*;
- An area in respect of which a wildlife management board is authorized by a land claims agreement in respect of wildlife species; or
- Land that is under the authority of another federal minister,

then the competent minister must comply with the consultation requirements in section 58 (6) to (9) prior to making the order.

Regulations to Protect Critical Habitat on Federal Lands

Federal Cabinet may, on the recommendation of the competent minister, after consultation with every other competent minister, make regulations to protect critical habitat on federal lands (s. 59 (1)).

The competent minister must make the recommendation if a recovery strategy or an action plan identifies a portion of the critical habitat as being unprotected and the competent minister is of the opinion that the portion requires protection (s. 59 (2)).

The regulation may require things to be done to protect habitat and may prohibit activities that may adversely affect the critical habitat.

Protection of Habitat on Federal Lands for Species Listed by a Province or Territory

Section 60 contains a discretionary prohibition against destruction of critical habitat on federal lands for species listed as endangered or threatened by a provincial or territorial minister. The prohibition applies to "any part of the habitat of that species that the provincial or territorial minister has identified as essential to the survival or recovery of the species" and that is on federal lands in that province or territory.

The prohibition only applies to the portions of the critical habitat that federal Cabinet, on the recommendation of the competent minister, specifies in an order.

Acquisition of Lands to Protect Critical Habitat

Pursuant to section 62, a competent minister may enter into an agreement with any government in Canada, organization or person to acquire lands or interests in land for the purpose of protecting the critical habitat of species at risk.

Progress Reports on Unprotected Critical Habitat

As outlined above, the purpose of section 58 is to ensure that within 180 days after a recovery strategy or action plan identifying critical habitat has been filed in the public registry, all of that critical habitat is legally protected.

Pursuant to section 63, if the Minister of the Environment is of the opinion that any portion of the critical habitat of a listed wildlife species remains unprotected after this 180 day period, the Minister must include a report in the public registry outlining the steps taken to protect the critical habitat. The Minister must continue to report every subsequent 180 day period until the relevant portion or portions of the critical habitat is either protected or no longer identified as critical habitat.

Conservation Agreements and Stewardship

Overview

Voluntary conservation and stewardship initiatives are intended to be a cornerstone of SARA, especially for protection of species at risk and habitat on private land (see "Policy Approach under SARA to Habitat Protection" above). The key legal mechanism for conservation and stewardship initiatives under SARA is a conservation agreement under Section 11. Provision is also made under section 12 for conservation agreements for wildlife species that are not at risk.

Conservation Agreements for Species at Risk – Section 11

Pursuant to section 11, a competent minister may, after consultation with the Canadian Endangered Species Conservation Council or any of its members, enter into a conservation agreement with any government in Canada, organization or person. The conservation agreement must be "to benefit a species at risk or enhance its survival in the wild".

Specifically, the agreement "must provide for the taking of conservation measures and any other measures consistent with the purposes of the Act", and may include measures with respect to:

- Monitoring the status of the species;
- Developing and implementing education and public awareness programs;
- Developing and implementing recovery strategies, action plans and management plans;
- Protecting the species' habitat, including its critical habitat; or
- Undertaking research projects in support of recovery efforts for the species.

There is no requirement under either section 11 or section 123 (Public Registry) to include a copy of conservation agreements in the public registry.

Conservation Agreements – Other Species

Provision is also made in section 12 for conservation agreements for species that are not at risk. This is a positive, preventative approach.

Stewardship

In addition to providing for conservation agreements under section 11 and 12, specific provision is made in SARA for development of a "Stewardship Action Plan". This is a discretionary initiative that the Minister of Environment may establish under section 10.1, after consultation with the Canadian Endangered Species Conservation Council.

The purpose of the Action Plan would be to create incentives and measures to support voluntary stewardship actions taken by any government in Canada, organization or person. If developed, a copy of the Action Plan must be included in the public registry and it must address certain prescribed measures in section 10.2.

The federal, provincial and territorial governments have now developed a plan outlining a national vision and operating principles for stewardship - *Canada's Stewardship Agenda* This document and other information related to stewardship initiatives in Canada is available at www.stewardshipcanada.ca.

Protection for Species and Habitat on Provincial and Territorial Lands – the "Safety Net" Mechanism

Overview

In 1996, the federal, provincial and territorial governments approved a national policy governing species at risk – the *National Accord for the Protection of Species at Risk.* [33] Under the *National Accord*, each jurisdiction agreed to establish complementary legislation and programs to provide for "effective protection" of species at risk throughout Canada.

Since the passage of the *National Accord*, jurisdictional issues have played a major role in the delay in passing Canadian endangered species legislation. Canada's first endangered species bill – the *Canada Endangered Species Protection Act* was seen by the provinces as contrary to the *National Accord* and a major intrusion into federal jurisdiction. This strong negative reaction from the provinces to the first species bill played a major role in influencing the policy behind SARA. SARA was deliberately drafted so that the federal government has primary responsibility for protection of species at risk and their habitat on federal lands, for aquatic species and for migratory birds under the *Migratory Birds Convention Act* and the provinces and territories responsibility for species at risk elsewhere.

Recognizing, however, that the federal government does have responsibility to ensure a basic level of species and habitat protection across Canada, SARA does provide for discretionary federal action where a province or territory is failing to protect a listed species or its critical habitat. The mechanism to achieve this protection is known as a "safety net".

The concept of a federal "safety net" – federal action in the face of provincial or territorial inaction – is a good one. Unfortunately, the two safety net mechanisms contained in SARA (one for the basic prohibitions and one for critical habitat) are discretionary only. The federal government *may* act if a province or territory fails to protect listed species or their habitat, but is not *required* to do so. Historically, similar discretionary mechanisms in other Canadian environmental legislation have never been used.[34]

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[33] The *National Accord* is a two page document and is available online at www.speciesatrisk.gc.ca under "Canada's Strategy – Backgrounders".

[34] Elgie, S., *Presentation to the [House] Standing Committee on the Environment and Sustainable Development Concerning Bill C-5, The Species at Risk Act* at Tab 7 citing: *Canada Wildlife Act* – s. 12 (b); *Canadian Environmental Assessment Act* – ss. 46 – 47; *Canada Water Act* – s. 6 and s. 13; *Canadian Environmental Protection Act* – s. 61.

Basic Prohibitions Safety Net

Overview

The "basic prohibitions" safety net is contained in sections 34 and 35 and deals with the discretionary application in the provinces and territories of the prohibitions against harming a listed species or collecting or trading in such species (section 32) or its residence (section 33). Section 34 contains the safety net for the provinces and section 35 contains the safety net for the territories. The process is basically the same for each jurisdiction.

The safety net does not extend to aquatic species and migratory birds under the *Migratory Birds Convention Act*, because the basic prohibitions already apply to both these "federal" species on provincial and territorial lands.

Safety Net Procedure

Under the basic prohibitions safety net, the prohibitions in sections 32 and 33 will only apply on land in a province or territory if the Governor in Council, at its discretion, and upon the recommendation of the Minister of Environment, makes an order that they apply.

The Minister of Environment must make the recommendation if the Minister is of the opinion that the laws of the province do not effectively protect the species or the residences of its individuals. The relevant standard, therefore, is effective legal protection – it is not enough to have provincial policies and programs in place, there must be provincial laws that provide "effective protection".

Before making such a recommendation, the Minister of Environment must consult:

- The appropriate provincial or territorial minister; and
- The appropriate wildlife management board, if the species is found in an area in which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species.

At this stage, is unclear how the federal government will work with the provinces and territories to ensure that listed species and their critical habitat are protected across Canada. Under the current policy framework, once a species has been listed under SARA, each responsible jurisdiction will be required to produce a "response statement" describing existing conservation measures that the jurisdiction has in place for the species. How the federal government will then assess this document and its accuracy remains an open question at present.

There is no citizen mechanism under SARA to trigger application of the basic prohibitions and critical habitat safety nets or to trigger an investigation by the Minister

of Environment as to whether they should be applied.[35] It is clear, however, that if a province or territory was openly or deliberately failing to protect a listed species, its residence or its critical habitat that significant public pressure could be brought upon the Minister of Environment to invoke one or both of the safety net mechanisms.

Critical Habitat Safety Net

Overview

The critical habitat safety net is contained in section 61. It deals with the discretionary application in the provinces and territories of the prohibition against the destruction of critical habitat (section 58). Section 61 contains the safety net for both the provinces and the territories.

As with the basic prohibitions safety net, the critical habitat safety net does not apply where "federal" species are already protected on provincial and territorial lands and waters. Unlike the basic prohibitions safety net, however, aquatic species and birds under the *Migratory Birds Convention Act* ("MBCA birds") are treated differently under the critical habitat safety net for the simple reason that they are treated differently under the critical habitat prohibition.

The critical habitat of aquatic species is automatically protected under section 58 on lands and waters, whether federal, provincial or territorial. With MBCA birds however, critical habitat is only automatically protected if the habitat is found on federal land, a migratory bird sanctuary under the *Migratory Birds Convention Act* or in the exclusive economic zone of Canada or the continental shelf of Canada. Protection of critical habitat outside these areas (i.e. provincial and territorial lands) is at the discretion of federal Cabinet under section 58 (5.1) and is limited to "habitat to which the *Migratory Birds Convention Act* applies".

Accordingly, to reflect this differing level of protection under section 58, the critical habitat safety net does not apply to:

- Aquatic species; and
- Critical habitat of MBCA birds covered under section 58 (5.1) (i.e. habitat on provincial and territorial lands that is habitat to which the *Migratory Birds Convention Act* applies and that federal Cabinet has by order specified).

[35] The citizen investigation mechanism in section 93 of the Act is limited to situations where a person believes an alleged offence has been committed.

Safety Net Procedure

The critical habitat safety net operates much the same way as the basic prohibitions safety net. Under the critical habitat safety net, the prohibition in section 58 (1) will only apply on land in a province or territory if the Governor in Council, at its discretion, and upon the recommendation of the Minister of Environment, makes an order to that effect.

The Minister of Environment must make the recommendation if the Minister is of the opinion, after consultation with the appropriate provincial or territorial minister, that:

- There are no provisions in or measures under SARA, including conservation agreements under section 11, that protect the particular critical habitat;
- There are no provisions in or measures under other federal legislation that protect the particular critical habitat; and
- The laws of the province or territory do not effectively protect the critical habitat.

In contrast to the basic prohibitions safety net, the Minister also has discretionary power to recommend that section 58 apply if:

- A provincial or territorial minister has requested that the recommendation be made; or
- The Canadian Endangered Species Conservation Council has recommended that the recommendation be made.

An order made under section 61 (2) lasts for five years, unless the Governor in Council, by order, renews it (s. 61 (5). If the Minister of Environment is of the opinion that an order made under section 61 (2) is no longer necessary to protect the critical habitat to which the order relates or that the province or territory has brought laws into force which protect that critical habitat, the Minister must recommend that the order be repealed.

As noted above, it is unclear at this stage how the federal government will assess whether the laws of a province or territory do provide effective protection for critical habitat (see "Safety Net Procedure" under "Basic Prohibitions Safety Net" above).

Recovery Strategies and Action Plans

Current Recovery Process - RENEW

Recovery of species at risk in Canada is currently coordinated by RENEW (Recovery of Endangered Wildlife) and is directed by the Canadian Endangered Species Conservation Council. The RENEW program involves federal, provincial and territorial government agencies, wildlife management boards authorized by land claims agreements, aboriginal organizations, other organizations and interested individuals.

Prior to SARA, recovery of species at risk in Canada was an open-ended process, with no legal requirements to produce recovery strategies or complete them in a prescribed time period. Under this process, species recovery in Canada has been extremely slow. The RENEW annual report for 2001 - 2002 showed that of the 387 then species listed at risk in Canada,[36] only 14 had final recovery strategies or plans. The number of recovery teams in place had however, increased from 64 in 2000/2001 to 83 in 2001/2002 and the number of recovery strategies or plans in development had increased from 25 to 68 – a marked improvement in 12 months.

Recovery under SARA

Recovery of species at risk is a central component of SARA and is specifically included in the stated purposes of the Act (s. 6). Under SARA, recovery strategies are *mandatory* for all listed endangered, threatened and extirpated species and must be completed within a prescribed time period – a marked contrast to the previous open-ended recovery process under RENEW. The role of RENEW (a federal/provincial/territorial process) under SARA (federal legislation) is still being finalized, but the federal government's intention is to harmonize recovery efforts into one national process.

Once a species has been listed under SARA as endangered, threatened or extirpated, each responsible jurisdiction is required to prepare a response statement outlining the conservation measures in place to protect and or recover the species. Response statements may also be used as a means to initiate coordinated recovery planning.[37] Further information about response statements and the recovery process with RENEW under SARA is not publicly available at this time.

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[36] As at November 29, 2001.
[37] Canadian Endangered Species Conservation Council, *Response Statements for Extirpated, Endangered and Threatened Species Listed by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) in 2001*.

SARA's recovery process is significant not only because it is the primary mechanism to recover species at risk, but also because it is the means by which critical habitat is identified and then eligible for legal protection under the Act.

As noted above, "critical habitat" means:

> "the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or action plan for the species".

Habitat protection does not therefore commence under SARA until critical habitat has been identified in a recovery strategy or action plan (which could take three years or more for species on the initial legal list and two years or more for species listed once the Act is proclaimed in force).

Despite SARA's weaknesses, the mandatory recovery process under the Act could have significant long-term benefits for biodiversity conservation in Canada provided:

(i) the process is adequately funded and strategically implemented;
(ii) recovery strategies are prepared by a credible and independent scientific experts;
(iii) socio-economic considerations are deferred until the action plan stage, consistent with SARA's requirements; and
(iv) the federal, provincial and territorial governments collaborate on implementing the recovery process consistent with the requirements of the Act.

The recovery process under SARA is a two stage process and applies to all species listed under the Act as endangered, threatened or extirpated. The first stage involves preparation of a *recovery strategy* that outlines the overall scientific framework for recovery. The second stage involves preparation of an *action plan or plans*, which outline the specific measures to be taken on the ground to implement the recovery strategy.

Recovery Strategy

General

Under SARA, recovery strategies must be prepared for all listed endangered, threatened and extirpated species (s. 37). In preparing the recovery strategy, the competent minister (Minister of Environment, Minister of Fisheries and Oceans or Minister of Canadian Heritage) must determine if recovery of the listed species is "*technically and biologically feasible*". This determination must be based on the "best available information, including information provided by COSEWIC".

Timeline

Recovery strategies must by completed within one year of listing for an endangered species and two years of listing for threatened and extirpated species (s. 42). This time period has been extended for species on the initial legal list to three years for species listed as endangered and four years for species listed as threatened or extirpated (s. 42(2); s. 132).

Prescribed content if recovery feasible

If the competent minister determines that the recovery of the listed species is feasible, the recovery strategy must address the prescribed requirements contained in section 41. These include:

- Threats to the survival of the species identified by COSEWIC, including any loss of habitat;
- A description of the species and its needs that is consistent with the information provided by COSEWIC;
- An identification of the threats to the survival of the species and threats to its habitat that is consistent with information provided by COSEWIC and a description of the broad strategy to be taken to address those threats;
- An identification of the species' critical habitat, to the extent possible, based on the best available information, including the information provided by COSEWIC, and examples of activities that are likely to result in its destruction. (If information about critical habitat is inadequate, the recovery strategy must include a schedule of studies to identify critical habitat);
- A statement of the population and distribution objectives that will assist the recovery and survival of the species, and a general description of the research and management activities needed to meet those objectives; and
- A statement of when one or more action plans in relation to the recovery strategy will be completed.

It is important to note that **socio-economic considerations are not to be addressed at the recovery stage – they are deferred to the action plan stage**. The rationale here is clear – develop the scientific framework for recovery first and then, at implementation stage, weigh the scientific considerations together with socio-economic considerations.

Regulations may be made prescribing additional matters to be included in recovery strategies (s. 41 (4)), but these regulations had not been passed when this Guide was written.

Prescribed Content if Recovery not Feasible

If the competent minister determines that recovery of a listed wildlife species is not feasible, a recovery strategy is still required, but need only include:

- A description of the species and its needs;
- An identification of the species critical habitat, to the extent possible;
- The reasons why recovery is not feasible.

Multi-species and Ecosystem Approach to Recovery

SARA makes specific provision for a multi-species or ecosystem based approach to recovery, if the competent minister determines that this approach is appropriate. This is a commendable option, provided that a broader approach is not used to avoid providing stronger and direct protection under the guise of a "one size fits all" approach.

A multi-species and ecosystem based approach is particularly suited for endangered ecosystems with high numbers of species at risk, such as the South Okanagan, in British Columbia, although more research is needed to determine whether such approaches are superior to the traditional single-species approaches.

Recovery Teams

SARA is silent as to the composition of recovery teams, although it is clear from the Act itself and related extrinsic policy materials that the individuals responsible for preparing the recovery strategy should have scientific expertise relevant to the species.

According to the federal government's original policy document for SARA, *Canada's Plan for Protecting Species at Risk – An Update*,[38] the recovery strategy was intended to be the overall scientific framework for recovery of listed species. It was to be prepared by an expert recovery team, which "would include experts from all responsible jurisdictions and would bring together the best available scientific, traditional and local knowledge of a species to assess the threats affecting a species and the ecological needs for its survival".[39]

It is unclear at this stage whether, consistent with current RENEW practice and this original policy framework, recovery teams will be established for each recovery strategy under SARA.

[38] Environment Canada (December, 1999).
[39] Ibid. at p. 13.

Cooperation and Consultation

In preparing the recovery strategy, the competent minister must cooperate with:

- the relevant provincial and territorial minister for each province and territory where the listed species is found;
- every federal minister who has authority over federal land or other areas where the listed species is found;
- any applicable wildlife management board, if the species is found in an area governed by a land claims agreement and the wildlife management board is authorized to perform functions in respect of wildlife species;
- every aboriginal organization that the competent minister considers will be "directly affected" by the recovery strategy; and
- any other person or organization that the competent minister considers appropriate.

The competent minister is also required, "to the extent possible" to consult with landowners and other people whom the minister considers to be "directly affected" by the strategy, including the government of any other country in which the species is found (s.39 (3).

SARA does not therefore, specifically require cooperation or consultation with conservation groups for preparation of recovery strategies. However, given the significant involvement of local and national conservation groups in species recovery in Canada to date and the recognition in SARA of the importance of "local knowledge", it would be highly unusual for relevant conservation groups not to be consulted on recovery strategies.

Public Comment and Finalizing Recovery Strategies

SARA makes specific provision for public comment on proposed recovery strategies. Within 60 days after a proposed recovery strategy has been filed in the public registry, any person may file written comments with the competent minister (s. 43 (1)).

Within 30 days after this date (i.e. 90 days after the proposed recovery strategy has been filed in the public registry), the competent minister must consider any comments received and make any changes to the proposed recovery strategy that he or she considers appropriate. The competent minister must then finalize the recovery strategy by putting a copy of it in the public registry.

Existing Plans

Existing recovery plans or parts of existing recovery plans may be adopted by the competent minister as the proposed recovery strategy under SARA provided the plan

meets the requirements of section 41 (s. 44). If this is the case, and the competent minister adopts the existing plan or part of an existing plan as the proposed recovery strategy, a copy of the plan must be included in the public registry.

The requirement in section 44 that any existing recovery plan meet the specific requirements in section 41 is an important one and will have significant implications for existing and proposed provincial recovery efforts. Unless provincial recovery efforts are consistent with the requirements in section 41, the federal government will not be able to accept the provincial recovery strategy as an "existing plan" and will not be relieved of its legal obligations to prepare its own recovery strategy in accordance with SARA's requirements.

Amendment of Recovery Strategies

Recovery strategies may be amended at any time by the competent minister. A copy of the amendment must be included in the public registry (s. 45 (1)).

Unless the competent minister considers the amendment to be minor, the competent minister is required to cooperate with provincial and territorial ministers, wildlife management boards, aboriginal organizations and any other person or organization the competent minister considers appropriate, consistent with section 39. The amendment, unless minor, will also be subject to the public comment period contained in section 43.

If the amendment relates to the time period for completing an action plan, the competent minister must provide reasons for the amendment and include a copy of the reasons in the public registry (s. 45 (2)). The competent minister is not, however, otherwise required to give reasons for amending a recovery strategy.

Reporting on Progress with Recovery

The competent minister must report on the implementation of each recovery strategy, and the progress towards meeting its objectives, within five years after it is included in the public registry. Reports must be completed in every subsequent five year period, until the recovery strategy's objectives have been met or the species' recovery is no longer feasible. A copy of each report must be included in the public registry.

Action Plans – the Second Stage in Recovery

General

In contrast to a recovery strategy, which outlines the general framework for recovery, action plans include the specific measures that are to be taken to ensure recovery. The competent minister must prepare one or more action plans based on the recovery strategy. If there is more than one competent minister, they may prepare the action plan or plans together (s. 47). (Although the Act is silent on this point, action plans would logically not be required for recovery strategies where the competent minister has determined that recovery is not feasible).

The overall procedure for preparation of action plans is very similar to the procedure for preparation of recovery strategies. There are mandatory requirements for consultation and cooperation, the proposed plan must be filed in the public registry, there is a public comment period, existing plans may be used in whole or part and the competent minister may amend the action plan or plans. The two significant differences between the two processes are

- Unlike recovery strategies, there is no prescribed time period for completion; and
- Socio-economic factors can be taken into account at the action plan stage.

No Prescribed Timeline for Completion of Action Plans

Unlike recovery strategies, there is no prescribed time period for completion of action plans. Although recovery strategies must include a "statement" of when one or more action plans must be completed in relation to the recovery strategy (s. 41 (1)(g)), this is substantially different from a prescribed legal time period for completion. If an action plan is not finalized in the time period set out in the recovery strategy, the competent minister must include a summary in the public registry of what has been prepared with respect to the action plan.

The failure to include a mandatory time period for completion of action plans is a major deficiency with SARA, potentially allowing for lengthy delays or even non-completion of action plans. While the measures outlined in an action plan may well take years to complete, this would not preclude completion of the action plan itself within a prescribed time. Provision could have been made for extensions in appropriate circumstances.

Prescribed Contents of Action Plans

As with recovery strategies, the Act stipulates what information must be included in action plans. Pursuant to section 49, an action plan must include, with respect to the area to which the action plan relates:

- An identification of the species' critical habitat, to the extent possible, based on the best available information and consistent with the recovery strategy, and examples of activities that are likely to result in its destruction;
- A statement of the measures that are to be taken to protect the species' critical habitat, including conservation agreements under section 11;
- An identification of any portions of the species' critical habitat that have not been protected;
- A statement of the measures that are to be taken to implement the recovery strategy, including those that address the threats to the species and those that help to achieve the population and distribution objectives, and an indication as to when these measures are to take place;
- The methods to be used to monitor the recovery of the species and its long-term viability; and
- An evaluation of the socio-economic costs of the action plan and the benefits to be derived from its implementation.

Additional matters to be included in action plans may be prescribed by regulation. The regulations had not been released when this Guide was written.

Consultation and Cooperation

As with recovery strategies, the competent minister is required to cooperate with provincial and territorial counterparts, wildlife management boards and aboriginal organizations where appropriate and any other person or organization that the competent minister considers appropriate (s. 48).

The wording of the consultation provision for action plans is slightly different from the consultation provision for recovery strategies as it also includes specific mention of "lessees" and people "interested in" the action plan.[40] The overall intention however, remains the same – to the extent possible, the competent minister must prepare the recovery strategy in consultation with landowners, people directly affected or interested in the action plan and the government of any other country in which the species is found.

[40] The different wording in section 48 (3) reflects one change made to the clause by the House Standing Committee on Environment and Sustainable Development – the inclusion of the word "lessee".

Public Comment and Finalizing Action Plans

As with recovery strategies, SARA makes specific provision for public comment on proposed action plans. Within 60 days after a proposed action plan has been filed in the public registry any person may file written comments with the competent minister (s. 50 (1)).

Within 30 days after this date (i.e. 90 days after the proposed action plan has been filed in the public registry), the competent minister must consider any comments received and make any changes to the proposed action plan that he or she considers appropriate. The competent minister must then finalize the action plan by putting a copy of it in the public registry.

Existing Plans

An existing plan or part of an existing plans may be adopted by the competent minister as the proposed action plan under SARA provided the plan meets the requirements of section 49 (s. 51 (1). If this is the case, and the competent minister adopts the existing plan or part of an existing plan as the proposed action plan, a copy of the plan must be included in the public registry.

Amendment of Action Plans

As with recovery strategies, the competent minister may at any time amend an action plan. A copy of the amendment must be included in the public registry (s. 52 (1)).

Unless the competent minister considers the amendment to be minor, the cooperation and consultation requirements in section 48 apply to the amendment.

Regulations to Implement Action Plans within Federal Jurisdiction

Pursuant to section 53, the competent minister must pass any regulations that in the opinion of the competent minister are necessary to implement measures in an action plan for listed species within federal jurisdiction i.e. aquatic species and migratory birds under the *Migratory Birds Convention Act*, regardless of where they are located, and for other listed species, on federal land.[41]

The competent minister is also entitled to use the powers he or she may have under other federal legislation to implement measures in an action plan.

[41] If however, the measures relate to the protection of critical habitat on federal land, the regulations must be made under section 59.

Monitoring and Reporting on Action Plans

As with the reporting requirement for recovery strategies, the competent minister must monitor the implementation of an action plan and the progress towards meeting its objectives. The competent minister must also assess and report on implementation of the action plan and its ecological and socio-economic impacts. This report is to be prepared five years after the plan comes into effect and a copy of the report must be included in the public registry (s. 55).

Compensation

Overview

Compensation has been an extremely contentious issue under SARA, especially for the agricultural community. Section 64 of the Act provides for discretionary payment of "fair and reasonable" compensation for losses suffered as a result of any "extraordinary impact" of the application of the critical habitat prohibition, the critical habitat safety net or in regards to habitat identified in an emergency order.

Much of the concern regarding the need for compensation is founded mistakenly on the belief that SARA will have extensive application on private land, which is not the case. Although SARA's basic prohibitions against harming a listed endangered, extirpated or threatened species or its residence will apply on private land in the case of aquatic species and migratory birds under the *Migratory Birds Convention Act*, the Act is otherwise primarily limited to federal lands.

It is particularly important to note that section 58, which contains the mandatory prohibition against harming critical habitat, is limited to federal jurisdiction only (i.e. federal lands, exclusive economic zone or continental shelf of Canada, aquatic species and migratory birds under the Migratory Birds Convention Act provided the habitat is on federal lands).

It is unprecedented in Canadian environmental legislation to provide compensation for anything short of actual expropriation. In his report on compensation issues under SARA, Dr. Peter Pearse noted:

> *"But the courts and governments have historically drawn a distinction between expropriation of property, for which compensation is due, and restrictions on the use of property for some public purpose, for which compensation is generally not payable. Restrictions that might be imposed under the Species at Risk Act are of*

> *this regulatory type, so compensation for them conflicts with long established policy in Canada.*"[42]

The reason for this approach is obvious - compensation has not and should not be paid merely for compliance with environmental legislation. If SARA had provided for compensation in situations other than actual expropriation, it would have set a dangerous precedent, namely that government will pay the cost of private parties complying with environmental legislation, be it the *Fisheries Act* or municipal zoning requirements.

Compensation Regime under SARA

Payment of compensation under SARA is discretionary. The Minister of Environment may, in accordance with the regulations (which will apparently be issued prior to proclamation of SARA) provide "fair and reasonable" compensation to any person for losses suffered as a result of the application of:

- The critical habitat prohibition in section 58;
- The discretionary prohibition against the destruction of habitat on federal land for species classified as endangered by a province or territory (s. 60);
- The critical habitat safety net in section 61; or
- Habitat identified in an emergency order that is necessary for the survival or recovery of a wildlife species.

The regulations governing the procedure for payment of compensation had been not been released when this Guide was written, but apparently will be released before the Act is proclaimed in force.

[42] The *Pearse Report on Compensation* (no title page or publication date provided), at pp. 11 and 12. A full copy of the report is available at www.cbin.ec.gc.ca.

Other Components of SARA

Management of Species of Special Concern

Overview

A species of "special concern" is defined under SARA to mean a species that may become a threatened or endangered species because of a combination of biological characteristics and identified threats. The "special concern" classification is COSEWIC's lowest risk category for species at risk.

In recognition of this lower level or risk, species of special concern are treated significantly differently under SARA than species listed as endangered, threatened or extirpated under the Act. The basic prohibitions against harming a species and its residence (s. 32 and s. 33) and the prohibition against damage or destruction of critical habitat (s. 58) do NOT apply to species listed as special concern under the Act and neither do the recovery provisions. Recovery strategies and action plans are not required for species of special concern.

The main legal consequence of listing a species under SARA as a species of special concern is that a management plan will be required for the species and its habitat. This process is generally less prescriptive than the recovery process for endangered, threatened and extirpated species. The measures required for cooperation and collaboration, use of existing plans, incorporation of public comments, amendment and monitoring are, however, basically the same.

Management Plan

If a species is listed as a species of special concern, the competent minister must prepare a management plan for the species and its habitat (s. 65).

In contrast to the provisions regarding the preparation of recovery strategies and action plans, the contents of management plans are not prescribed under SARA. The only requirement is that the plan must "include measures for the conservation of the species that the competent minister considers appropriate" (s. 65).

The competent minister may develop a management plan with respect to more than one species. As with recovery strategies, the competent minister may adopt a multi-species or an ecosystem approach when preparing the management plan, if the competent minister considers it appropriate to do so (s. 67).

Time line for Management Plans

Management plans must be completed for species of special concern within three years after listing under the Act and a copy included in the public registry (s. 68 (1). For species of special concern included on the initial legal list under the Act, this time period has been extended from three years to five years (s. 68 (2)).

Other Requirements

The overall procedure for preparation of management plans is otherwise fairly similar to that for preparation of recovery strategies and action plans and will therefore not be repeated in detail here. There is a mandatory public comment process, the ability to incorporate existing plans, an amendment procedure and a requirement to monitor the implementation of management plans and assess their implementation every five years.

Federal Permits and Consideration of Species at Risk

Overview

The permitting process under SARA is positive feature of the Act, although limited to consideration of impacts on species under existing federal permits and authorizations.

The permitting process is meant to ensure that competent ministers, and to a lesser extent other federal ministers, take "extra care" in approving activities which affect a listed species, its residence, or its critical habitat. Section 73 deals with permits issued by competent ministers (Minister of Environment, Minister of Fisheries and Oceans and Minister of Canadian Heritage) and section 77 deals with permits, licences and authorizations under other federal legislation.

The House Standing Committee on Environment and Sustainable Development amended section 73 so that a permit would be required for any activity adversely affecting critical habitat within federal jurisdiction (federal lands, aquatic species and migratory birds under the *Migratory Birds Convention Act*).[43] This process in effect provided "back-door" protection for critical habitat because it prohibited activities adversely affecting critical habitat without a permit. The amendment was, however, deleted at third reading.

[43] Under section 74 as amended by the House Environment Committee, the requirement to obtain a permit for any activity adversely affecting critical habitat only applied to critical habitat as identified in an action plan i.e. the permit requirement would not apply until several years after listing under the Act.

Agreements and Permits Issued by Competent Minister

A competent minister may enter into an agreement or issue a permit authorizing a person to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals provided it satisfies the prescribed purposes and pre-conditions requirements in section 73.

Prescribed purpose

The agreement or permit may only be entered into or issued if the competent minister is of the opinion that:

- The activity is scientific research relating to the conservation of the species and conducted by qualified people;
- The activity benefits the species or is required to enhance its chance of survival in the wild; or
- The effect on the species is incidental to carrying out the activity.

Prescribed Pre-conditions – The "Extra Care" Requirements

Pursuant to section 73 (3), in addition to satisfying the prescribed purposes requirement, the competent minister can only enter into an agreement or issue a permit if the competent minister is of the opinion that:

- All reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted;
- All feasible measures will be taken to minimize the impact of the activity on the species or its critical habitat or the residences of its individuals; and
- The activity will not jeopardize the survival or recovery of the species.

If the agreement is entered into or the permit issued, the competent minister must include an explanation in the public registry of why the agreement or permit was approved, taking into account the "extra care" requirements in section 73 (3). The competent minister is required to comply with applicable consultation requirements for wildlife management boards and Indian bands as appropriate.

Terms and Conditions

The agreement or permit must contain any terms and conditions governing the activities that the competent minister considers necessary for protecting the species, minimizing the impact of the authorized activity on the species or providing for its recovery (s. 73 (6)).

Amendment and Review

The competent minister may revoke or amend an agreement or permit to ensure the survival or recovery of a species (s. 73 (8)). If an emergency order is made with respect to the species, the competent minister must review the agreement or permit (s. 73 (7)).

Maximum Term

No agreement may be entered into for a term longer than five years and no permit may be issued for a term longer than three years.

Other Agreements and Permits Issued by Competent Minister

The competent minister may enter into an agreement or issue a permit under other federal legislation authorizing a person or organization to engage in an activity affecting a listed wildlife species, its critical habitat or the residences of its individuals. However, before it the agreement or permit is approved, the competent minister must be of the opinion that the requirements of section 73 (2) to (6) are met, which includes satisfying the prescribed purposes and prescribed pre-conditions in section 73.

The competent minister may add terms and conditions to authorizations under other federal legislation where:

- The permit, licence, order or other similar document authorizes a person to engage in an activity affecting a listed wildlife species, its critical habitat or the residences of its individuals; and
- The terms and conditions are to protect a listed wildlife species, its critical habitat or the residences of its individuals.

The competent minister also has the ability to revoke or amend any term or condition in any authorization under other federal legislation to protect a listed wildlife species, its critical habitat or the residences of its individuals (s. 75 (2)).

Exemption for Existing Agreements and Permits

Federal Cabinet may, on the recommendation of the competent minister, grant exemptions from key provisions of SARA (including the basic prohibitions and the prohibition against destruction of critical habitat) for agreements, permits etc. authorizing a person to engage in activity affecting a listed species, its critical habitat or the residences of its individuals that were entered into, issued or approved under other federal legislation before the species was listed.

The exemption may be granted for a period of up to one year from the date of listing a wildlife species.

The federal government will, apparently, be issuing an exemption order prior to proclamation of SARA seeking a one year exemption for existing agreements, permits etc.

Agreements and Permits Issued Under Other Federal Legislation

Agreements and permits issued under other federal legislation are subject to a similar, if slightly lesser "extra care" requirement to that imposed on competent ministers under section 73.

Pursuant to section 77, any person or body other than a competent minister, authorized under other federal legislation to issue or approve a licence, permit etc. that authorizes an activity that may result in the destruction of any part of the critical habitat of a listed species can only issue or approve the licence etc. if the person or body has:

- Consulted with the competent minister;
- Considered the impact on the species' critical habitat; and
- Is of the opinion that:

    (i) all reasonable alternatives to the activity that would reduce the impact on the species' critical habitat have been considered and the best solution has been adopted; and
    (ii) all feasible measures will be taken to minimize the impact of the activity on the species' critical habitat.

The standard of extra care is less under section 77 for two reasons – first, the section only applies to activities impacting critical habitat, whereas section 73 also covers activities impacting the listed species and its residence. Second, section 73 has one further pre-condition – the activity will not jeopardize the survival or recovery of the species. This condition does not have to be met for agreements and permits issued under other federal legislation.

The prohibition in section 58 against destruction of critical habitat still applies even if a licence, permit or other authorization is issued under section 77.

Emergency Orders

Overview

Emergency orders are addressed in section 80 and apply in cases where a species faces "imminent threats to its survival or recovery". This is a similar standard to that required for emergency listings under the Act.

Procedure for Emergency Orders

Federal Cabinet may, on the recommendation of the competent minister, make an emergency order to provide for the protection of a listed wildlife species. The competent minister must make the recommendation if her or she is of the opinion that the species faces imminent threats to its survival or recovery (s. 80 (1)). Before making the recommendation, the competent minister must consult every other competent minister (s. 80 (2)).

The competent minister is not required to make a recommendation for an emergency order if the competent minister is of the opinion that equivalent measures have been taken under other federal legislation to protect the species.

Emergency orders may generally seek to do two things:

- Identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates; and
- Include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat.

Citizen Application for Investigation

Overview

SARA does include a citizen investigation mechanism, but it is somewhat limited in scope. Bill C-65, the *Canada Endangered Species Protection Act* had included a citizen suit mechanism, but this was extremely contentious, especially for some industry stakeholders, and was not included in SARA. A multi-stakeholder Alternative Dispute Resolution Committee was established in Fall of 1998 and did provide recommendations

regarding alternative mechamisms to a civil suit provision, but these recommendations were not adopted.

Application Procedure

Pursuant to section 93, any person who is a resident of Canada and over 18 years of age may apply to the competent minister for an investigation of whether an alleged offence has been committed or whether anything directed towards its commission has been done. Accordingly, to support an application, the citizen must believe that an offence has been committed, is being committed or is going to be committed.

The application must be in a form approved by the competent minister, and include a solemn affirmation or declaration containing certain prescribed information, including:

- The name and address of the applicant;
- A statement of the nature of the alleged offence and the name of each person alleged to be involved;
- A summary of the evidence supporting the allegations;
- A description of any document or other material that the applicant believes should be considered in the investigation and, if possible, a copy of the document; and
- Details of any previous contact between the applicant and the competent minister about the alleged offence.

Response by Competent Minister

The competent minister must acknowledge receipt of the application within 20 days after receiving it. Unless the competent minister decides that the matter is frivolous or vexatious or decides not to conduct the investigation, the competent minister must investigate all matters that he or she considers necessary to determine the facts relating to the offence (s. 94 (1)). Accordingly, the competent minister has extensive discretion in terms of whether the investigation proceeds and if so, the scope of the investigation.

If the competent minister decides not to conduct an investigation, he or she must, within 60 days after the application for investigation is received, give notice of the decision, with reasons, to the applicant. The competent minister need not give the notice to the applicant if an investigation is ongoing apart from the application (s. 94 (4)) – a somewhat strange exemption, given that it would seem to be reasonable to inform the applicant that an investigation was warranted and is ongoing.

Suspension or Conclusion of Investigation

The competent minister may suspend or conclude the investigation if he or she is of the opinion that the alleged offence does not require further investigation or the investigation does not substantiate the alleged offence.

Concluded Investigations
When the investigation is concluded, the competent minister must prepare a written report describing the information obtained during the investigation and stating the reasons for its conclusion and the action, if any, that the competent minister has taken or proposes to take. A copy of the report must be sent to the applicant and to each person whose conduct was investigated (s. 96 (3)).

For obvious reasons, the copy of the report sent to the person investigated must not disclose the name or address of the applicant or any personal information about the applicant.

Suspended Investigations
If the investigation is suspended, the competent minister must prepare a written report describing the information obtained during the investigation, stating the reasons for its suspension and the action, if any, that the competent minister has taken or proposes to take. A copy of the report must be sent to the applicant. The competent minister must notify the applicant if the investigation is subsequently resumed (s. 96 (2)).

Offences

Offences and punishment are addressed under section 97 of the Act. A person will be guilty of an offence under SARA if they contravene:

- The basic prohibitions against harming a listed species or possessing or trading in a listed species (s. 32 (1) and (2)) or damage or destruction of its residence (s. 33);
- The basic prohibitions for species classified by a province or territory as endangered or threatened if the species is found on federal land and federal Cabinet has ordered that the basic prohibitions apply (s. 36 (1);
- The prohibition against destruction of critical habitat (s. 58 (1));
- The prohibition against destruction of critical habitat for species classified by a province or territory as endangered or threatened if the species is found on federal land and federal Cabinet has ordered that the prohibition applies (s. 60 (1));
- The critical habitat safety net, if it has been applied (s. 61 (1));

- The mandatory requirement to assist enforcement officers (s. 91) and the prohibition against making false or misleading statements to an enforcement officer or otherwise obstructing and hindering the officer's work (s. 92);
- Any prescribed provision of a regulation or an emergency order;
- An alternative measures agreement the person has entered into under SARA.

If the offence is prosecuted as a summary offence, a fine will be payable of up to $300,000 in the case of a corporation (other than a non-profit corporation) or $50,000 in the case of a non-profit corporation. An individual will be liable for a fine of up to $50,000 or imprisonment for up to one year, or both.

If the offence is prosecuted as an indictable offence, the punishment increases dramatically. Fines increase to up to $1 million for corporations, up to $250,000 for non-profit corporations or individuals. Individuals may also be imprisoned for up to five years.

Due diligence is specifically recognized as a defence (s. 100).

Reports and Review of Act

Overview

SARA contains various mechanisms to review and report on implementation of the Act. The data provided through these various reporting and review mechanisms will be an important tool for the public to assess whether or not SARA is meeting its stated purposes.

Reports

Two key reports are required under SARA – an annual report and a regular five yearly report on the status of wild species in Canada. Both reports must be tabled in Parliament and a copy included in the public registry.

- **Annual report** – A report must be prepared annually by the Minister of Enviornment to address the administration of SARA for the previous calendar year (s. 126). The report must include summaries of specific matters including COSEWIC species assessments, the preparation and implementation of recovery strategies and action plans and, regulations and orders made under SARA. The annual reports in particular will be important tool to help gauge the effectiveness of SARA in protecting species and habitat at risk over time.

- **Status of Wild Species Report** - A general report on the status of wildlife species in Canada must be prepared by the Minister of Environment five years after the Act (s. 128) comes into force and every five years thereafter. The requirement for regular reporting on the status of Canada's wild species is an important and commendable requirement under SARA. Of the 140,000 species estimated to exist in Canada, only 71,000 species have been identified.[44] If we are to conserve Canada's biodiversity, we have to invest in research and inventory of Canadian species. An initial report was prepared in 2000, *Wild Species 2000, The General Status of Species in Canada*[45] but this covered a mere two per cent of the 71,000 species known to exist in Canada.

Round Table

In addition to preparation of the Annual Report and the Status of Wild Species report, the Minister of Environment must, at least once every two years, convene a round table of people interested in matters relating to protection of species at risk in Canada to advise the Minister (s. 127).

This is a really positive step forward by the government, as it provides a national platform for interested stakeholders to advise the Minister on species issues and to draw attention to any matters of concern. The round table can make written recommendations to the Minister and if they do so, a copy must be included in the public registry. The Minister is required to respond to any written recommendations from the round table within 180 days of receiving them. A copy of the Minister's response must be included in the public registry.

Parliamentary Review of SARA

Under SARA in its original form, provision was made for one review of the Act by a committee of the House of Commons, of the Senate, or of both the House and the Senate. The review was to be conducted five years after the Act came into force.

The House Environment Committee amended the review clause to provide for an ongoing five yearly review of the Act i.e. there will be an initial review five years after the Act comes into force and every five years thereafter. This amendment is consistent with the review process contained in the *Canadian Environmental Protection Act*, which also requires a review of the Act every five years.

A regular, ongoing review of SARA takes account of the fact that the impacts of the bill will be substantial, long-term and ongoing. In particular, the impacts of the recovery process will certainly not be known five years after passage of the Act. For species

[44]Mosquin, Whiting & McAllister, *Canada's Biodiversity*, supra n. 3 at p. XIII.
[45] Canadian Endangered Species Conservation Council, supra n. 5.

included on the initial legal list under the Act, recovery strategies are not required until three years after the Act comes into force for endangered species and four years for threatened species. Action plans will therefore probably not be implemented for many of these species five years after the Act is passed. Limiting review of the Act to a one-time, initial five year review makes absolutely no sense given that the recovery process – one of the main mechanisms under the Act for species and habitat protection – will still be relatively new with only initial results to report.

Despite the obvious benefits and reasons for an ongoing five yearly review of SARA, the government deleted the House Environment Committee's amendment. As amended by the government, Parliamentary review of the *Species at Risk Act* will be confined to one review, to be conducted five years after the Act comes into force.

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