

Joint Review Panel Decision Protects Species at Risk in Suffield National Wildlife Area

Report of the Joint Review Panel: EnCana Shallow Gas Infill Development Project Canadian Forces Base Suffield National Wildlife Area, Alberta, (27 January 2009), EUB Decision 2009-008, CEAA Reference No. 05-07-1620

By Jason Unger
Staff Counsel
Environmental Law Centre

A Joint Review Panel (JRP) recently considered the environmental impacts of a proposal by EnCana Corporation (EnCana) to infill drill 1275 gas wells in the Suffield National Wildlife Area (NWA). The JRP issued its decision in late January when the panel set out three prerequisites to the project moving forward:¹

1. Critical habitat for two wildlife species at risk, the Ord's kangaroo rat and the Sprague's pipit, as well as three plant species at risk, the tiny cryptanthus, the small-flowered sand verbena, and the slender mouse-ear-cress, must be finalized.
2. Once critical habitat is finalized, the proposed project facilities should not be located in the defined critical habitat for these five species, unless otherwise permitted under the *Species at Risk Act* [SARA].
3. The Suffield Environmental Advisory Committee [SEAC], established under the 1975 Agreement allowing gas production in the present-day Suffield National Wildlife Area, is not able to oversee a development of this magnitude at present. Its role must be clarified and it must be resourced adequately by the governments of Canada and Alberta to be able to ensure proper regulatory oversight of the proposed project.

If the JRP decision is followed by the federal government, it appears likely that the drilling of more gas wells in the NWA will not occur for some time.

The NWA was established in 2003 to encompass a portion of Canadian Forces Base Suffield. After its establishment, further drilling in the area would require a permit under the *Wildlife Area Regulations*.² This permitting power triggered the *Canadian Environmental Assessment Act*³ (CEAA) and this, in turn, resulted in the order of a public hearing by the federal Minister of Environment.

EnCana's assessment of the infill drilling proposal concluded that the environmental impacts would be negligible or insignificant in light of proposed mitigation measures for the project. Various environmental and scientific groups, individuals and the federal government were of the view that EnCana's assessment included insufficient detail to properly determine the probability of a significant adverse effect as required under the CEAA.

It was argued that mitigation of environmental impacts would be achieved through a series of “pre-disturbance assessments”. This pre-disturbance assessment would essentially be “mini-environmental assessments” used to discern ecological, geographical or hydrological areas of concern that would require specific management practices be put in place. It was further proposed that the SEAC (comprised of a member from each of Environment Canada, the Energy Resources Conservation Board, and Alberta Environment) would be tasked with assessing the pre-disturbance assessment information where there were conflicts or constraints with wildlife or ecological setbacks.⁴ This would constitute a “nonroutine” application, whereas a routine application would be allowed to proceed with SEAC and the Base carrying out a monitoring function.⁵

In addition to the three prerequisites, the JRP made 27 recommendations should the project proceed.⁶ In putting forth these key requirements, the JRP recognized the importance of the NWA to species at risk. While the decision does not foreclose development in the future it is clear that critical habitat protection will be a determining factor in such development.

Implications of the JRP requirements

The first of the JRP requirements is the finalization of the identification of critical habitat for five *SARA* listed species. This brings into focus the issue of how critical habitat is identified. Activities within identified critical habitat areas will likely require a *SARA* permit to proceed.

Environment Canada had put forth a preliminary assessment of critical habitat for these species as part of its evidence. The maps for Ord’s Kangaroo Rat and Sprague’s Pipit are included below.⁷

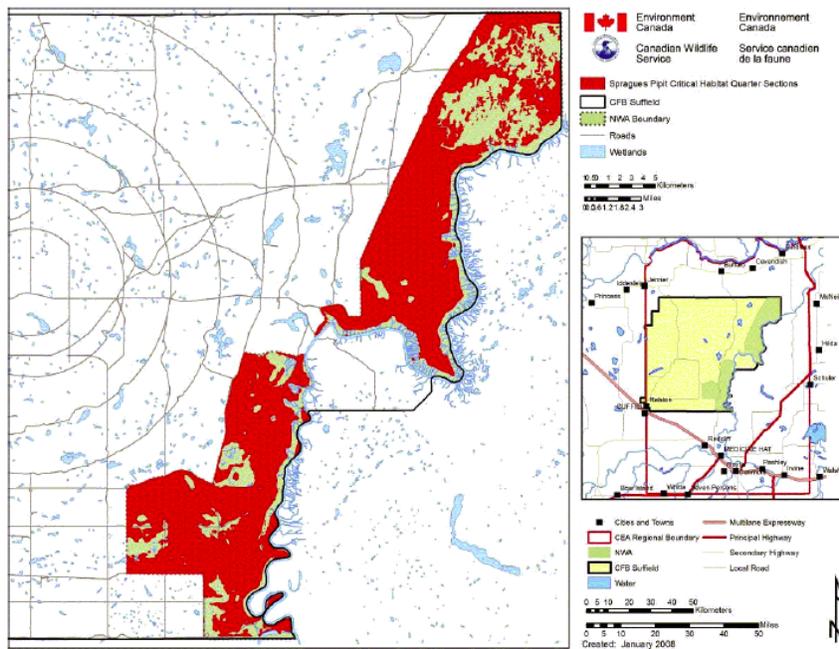


Figure 3 - Map of preliminarily assessed Critical Habitat for Sprague’s Pipit. Model output results (Appendix B). This includes all areas with 10% or better probability of being occupied by the species in one or more environmental conditions.

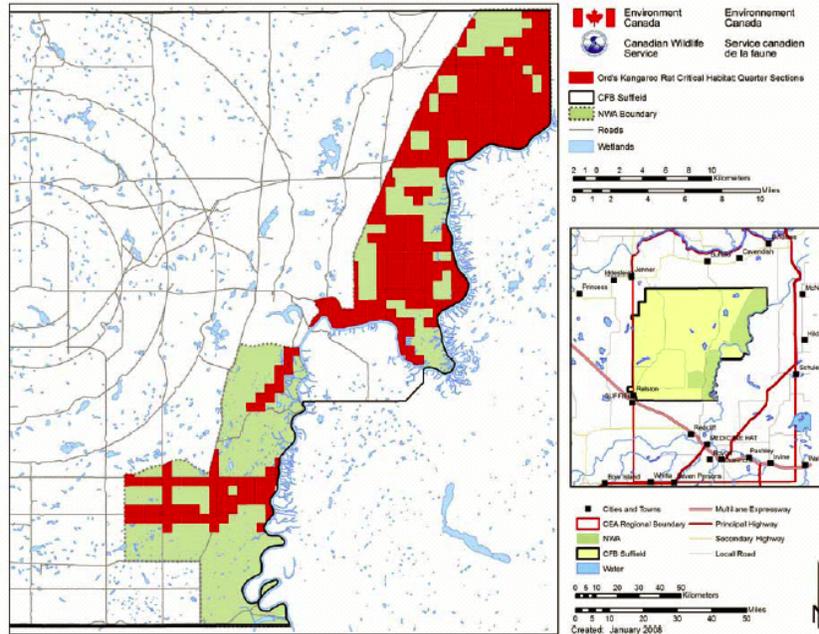


Figure 2 - Map of preliminarily assessed critical habitat for Ord's kangaroo rat (quarter section resolution).

In the event that these preliminary assessments reflect the final definition of "critical habitat" under *SARA*, it appears that there will be significant constraints on further activities in the NWA. However, the finalization of critical habitat identification will likely include significant consultation and may result in an area that is more narrowly defined.

The second JRP requirement incorporates the *SARA* prohibition against destruction of critical habitat and gives rise to a variety of questions around when *SARA* permits will be issued in relation to destruction of critical habitat.⁸ Without getting into detail around the permitting system, there is a need to clarify (either through policy or decisions) interpretation of the permitting discretion under *SARA*, including:

- which effects will be deemed to be "incidental" to the carrying on of an activity;
- what will be viewed as "reasonable alternatives" to the activity;
- what measures will be viewed as "feasible" in relation to minimizing impacts of an activity; and
- which activities will "jeopardize" the species' recovery or survival.

The third JRP requirement seeks clarity and increased resources for SEAC. This requirement is aimed at ensuring a level of government oversight in the NWA that appears to be largely absent at this time.⁹ There remains a question of how compliance with this third requirement will be evaluated.

On the clarity front, there is a need to formalize the decision making process and clarify jurisdictional issues around what SEAC will and will not deal with. This is best

done through a regulatory framework to ensure that SEAC's work is conducted in a consistent and transparent manner.

It is also difficult to say when SEAC will be "adequately" resourced. It is clear that SEAC's current resources are insufficient to fulfill an expanded oversight role in the NWA. Whether this prerequisite is met will therefore be difficult to determine and this minimizes the relevance of this prerequisite. It also may increase the likelihood of a party seeking judicial review application of a decision that allows activities to proceed if SEAC remains clearly under-resourced. This fact may minimize the relevance of this requirement to future development, but would certainly attract a judicial review if activities were contemplated with an under-resourced SEAC.

Conclusion

The JRP decision provides significant direction on what "conservation of wildlife" in an NWA means for listed species at risk. The Panel's approach incorporates the goals and purposes of *SARA* in the context of protected areas. For this reason, the approach sets an important precedent (albeit, non-legal in nature) for future development in federally protected areas where species at risk reside.

¹ *Report of the Joint Review Panel: EnCana Shallow Gas Infill Development Project Canadian Forces Base Suffield National Wildlife Area, Alberta* (27 January 2009), EUB Decision 2009-008, CEAA Reference No. 05-07-1620 at 171, online: Canadian Environmental Assessment Agency <<http://www.ceaa-acee.gc.ca/050/documents/31046/31046E.pdf>>.

² C.R.C., c. 1609, as amended.

³ S.C. 1992, c. 37.

⁴ For more discussion around this see pages 143-145 of the decision, *supra* note 1.

⁵ *Ibid.*

⁶ *Supra*, note 1.

⁷ *Submission of the Government of Canada: Joint Review Panel Established by the Alberta Energy and Utilities Board and the Canadian Environmental Assessment Agency*, submitted February 18, 2008, online: Canadian Environmental Assessment Registry <<http://www.ceaa-acee.gc.ca/050/documents/25482/25482E.pdf>>. The Sprague's Pipit map is located at page 163 of the submission. The Ord's Kangaroo Rat map is located at page 160.

⁸ *SARA*, *supra* note 3, at s. 73 prescribes the availability of permits and related obligations.

⁹ Currently, there appear to be significant gaps in how the environmental impacts of oil and gas development have been managed, particularly in areas of reclamation, the establishment of and compliance with setbacks, and management of invasive species.

Comments on this article may be sent to the editor at elc@elc.ab.ca.

Tougher Fines for Federal Environmental Offences

By Jodie Hierlmeier
Staff Counsel
Environmental Law Centre

On March 4, 2009, federal Environment Minister Jim Prentice introduced Bill C-16, the *Environmental Enforcement Act*,¹ aimed at amending the fines, sentencing provisions and enforcement tools of nine federal statutes. The Bill also introduces a new Act – the *Environmental Violations Administrative Monetary Penalties Act* – which would authorize the use of administrative monetary penalties for infractions under several existing environmental statutes.

If passed, Bill C-16 would amend the following six Environment Canada administered statutes and three Parks Canada administered statutes:

- the *Canadian Environmental Protection Act, 1999*;
- the *Canada Wildlife Act*;
- the *Migratory Birds Convention Act, 1994*;
- the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*;
- the *Antarctic Environmental Protection Act*;
- the *International River Improvements Act*;
- the *Canada National Parks Act*;
- the *Canada National Marine Conservation Areas Act*; and
- the *Saguenay-St. Lawrence Marine Park Act*.

Bill C-16 proposes the following changes to the above-listed statutes:

- **Amount of fines:** raising maximum fines and introducing minimum fines for serious environmental offences under these statutes, for both individuals and corporations. Fines would be doubled for subsequent offences. Proposed minimum fines for corporations that commit serious offences range between \$25,000 and \$6 million. This is an increase from the current maximum fines, which top out at \$1 million per offence for corporations.
- **Use of fines:** directing that court ordered fines be deposited into an Environmental Damages Fund, rather than the government's general revenue, in order to provide funding to community based groups for environmental restoration or research projects.
- **Sentencing:** adding a new clause to each statute that sets out the fundamental purposes of sentencing (such as deterrence, denunciation and restoration) and identifies factors the courts need to consider in sentencing. Aggravating factors would include prior convictions, the occurrence of environmental damage, intentionally or recklessly committing an offence, benefiting financially from the offence, and attempting to conceal the offence after it was committed. The courts would also be able to issue orders, upon conviction of an offender, to cancel or suspend licenses or permits, and require corporations to inform shareholders about offences.

- **Public record:** creating a public registry of corporate offenders by publishing the names of offending corporations on the Environment Canada website.
- **Enforcement tools:** extending the authority to issue compliance orders as well as the use of experts who can assist in inspections and investigations.
- **Administrative monetary penalties:** giving enforcement officers the authority to issue administrative monetary penalties for less serious violations. In other words, such officers could issue tickets to corporations of not more than \$25,000, saving court proceedings for more serious offences.

In tandem with Bill C-16, the government announced it would spend an additional \$21 million to hire more enforcement officers, increasing their numbers almost 50 percent this year to 320 officers across the country.²

These moves follow on the heels of some high profile prosecutions, with federal charges pending against both Syncrude Canada and CN Rail under the *Migratory Birds Convention Act*. In the Syncrude case, charges were laid under both provincial and federal legislation in February 2009 after the deaths of some 1600 ducks in an oil sands tailings pond near Fort McMurray last year.³ In 2008, federal charges were laid against CN Rail following a 2005 derailment that caused hundreds of thousands of litres of oil to spill into Wabamun Lake (provincial charges were laid against CN in 2006).⁴ However, neither Syncrude nor CN will face the higher maximum fines proposed under Bill C-16.

The focus on tougher penalties for environmental crimes appears to follow the federal government's approach to crime control generally: that increasing the penalties will decrease the number or severity of crimes committed. However, in the environmental realm, the key to deterrence is enforcing the laws that are in place. If no enforcement action is taken, then the size of the fine is irrelevant.

¹ Canada, Bill C-16, *An Act to amend certain Acts that relate to the environment and to enact provisions respecting the enforcement of certain Acts that relate to the environment*, 2nd Sess., 40th Parl., 2009 (second reading: March 25, 2009, referred to Committee).

² Environment Canada, News Release, "New Enforcement Legislation Cracks Down on Environmental Offenders" (4 March 2009).

³ Environment Canada, News Release, "Syncrude Canada Ltd. Charged For Migratory Bird Deaths" (9 February 2009). Government of Alberta, News Release, "Province lays environmental charges against Syncrude" (9 February 2009).

⁴ Environment Canada, News Release, "Federal Charges Laid Against the Canadian National Railway Company (CN) for Wabamun Lake Spill" (18 March 2008); Government of Alberta, News Release, "Environmental charges laid against CN" (5 June 2006).

**BC Aquaculture Laws Found Unconstitutional: Federal
Jurisdiction over Fisheries Affirmed**
Morton v. British Columbia (Agriculture and Lands) 2009 BCSC 136

By Jason Unger
Staff Counsel
Environmental Law Centre

A recent case out of British Columbia has confirmed that the constitutional jurisdiction over the management of fisheries, including fish farms, resides firmly with the federal government. Provincial legislation regarding fisheries management was found to be *ultra vires* by Justice Hinkson of the Supreme Court of British Columbia in *Morton v. British Columbia (Agriculture and Lands)*.¹ Specifically, the Court found that the BC *Finfish Aquaculture Waste Control Regulation*² is *ultra vires* the constitutional jurisdiction of the province and that three other pieces of provincial law were to be read down to exclude fishery matters and apply only to the cultivation of marine plants.³ The decision allows the provincial regulatory scheme to continue for 12 months.

The Court considered the pith and substance of the fisheries power and how management and preservation of fisheries were squarely within the jurisdiction of the federal government.⁴ The province, for its part, argued that finfish aquaculture was not a "fishery" as contemplated in the *Constitution Act, 1867*, undoubtedly recognizing that it could not simply step into the federal power regarding "Sea Coast and Inland Fisheries".⁵ The Court held that finfish aquaculture was a fishery and that such management of fish did not create a private fishery beyond the reach of federal jurisdiction.⁶

In reviewing the jurisprudence regarding the ability of provincial governments to regulate fisheries, the Court illustrated a clear distinction between the private property jurisdiction of the province to licence the trading of private goods, including fish, and the federal jurisdiction to deal with the management and preservation of fish:⁷

The inclusion of fisheries in s. 91(12) of the *Constitution Act, 1867*, was a recognition that fisheries, as a national resource, require uniformity of the legislation which affects and protects that national resource.

The province also argued that there was a "double aspect" to the legislation in question and therefore the province had jurisdiction to regulate finfish aquaculture under the constitutional headings over management of land, property and civil rights, matters of a local and private nature, and agriculture. The Court held that provincial constitutional jurisdiction could not be relied upon to justify the legislative provisions in question, as at their core they dealt with the management of a fishery.

Conclusion

On a practical level this decision will likely result in a renewed push to have the federal Government revisit the *Fisheries Act*⁸ and to enable some form of delegation of federal power in relation to aquaculture projects. The decision recognized that there is a vacuum on the federal front related to the impacts of fish farming on fish habitat and general fish preservation.

This vacuum can only be resolved through providing increased resources to the Department of Fisheries and Oceans (DFO) and the promulgation of aquaculture regulations. The vacuum will also require DFO to resolve existing conflicts between its mandates to preserve fish and fish habitat and to promote aquaculture. For example, the Court heard evidence that only one of the area's aquaculture operations had been authorized to "harmfully alter, destroy or disrupt" fish habitat under section 35(2) of the *Fisheries Act*. The Court further observed that all the aquaculture activities created a harmful alteration, destruction, or disruption of fish habitat. Apparently DFO had not viewed this as the case, did not have the requisite resources, or lacked the political imperative to effectively apply the *Fisheries Act* in relation to the aquaculture activities.

This appears to be symptomatic of a general trend that sees provincial governments seeking to minimize the federal regulatory role, notwithstanding the constitutional reality. As regulation of the aquaculture industry has evolved it appears that the federal government has taken a back seat, likely at the behest of the provinces. In the absence of a constitutional amendment, however, it seems that the only practical recourse is to have the federal government meet its constitutional obligations and significantly increase its presence in the regulation of aquaculture.

¹ 2009 BCSC 136, online: CanLII <<http://www.canlii.org/en/bc/bcsc/doc/2009/2009bcsc136/2009bcsc136.html>>.

² B.C. Reg. 256/2002.

³ This includes the B.C. *Fisheries Act*, R.S.B.C. 1996, c. 149, s. 26(2)(a), the *Farm Practices (Right to Farm) Act*, R.S.B.C. 1996, c. 131, ss. 1 (h) and 2 (1) and the *Aquaculture Regulation*, B.C. Reg. 78/2002.

⁴ *Ibid* at paras 128-161.

⁵ (U.K.), 30 & 31 Victoria, c. 3.

⁶ *Supra* note 1 at para. 160.

⁷ *Ibid.* at para. 161.

⁸ R.S.C. 1985, c. F-14.

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