

August 22, 2007

Our File: 33

The Honourable John Baird
Minister of the Environment
Les Terrasses de la Chaudière
10 Wellington Street, 28th Floor
Gatineau, Quebec
K1A 0H3

Dear Minister Baird:

RE: Comments on the Recovery Strategy for the Burrowing Owl (*Athene cunicularia*) in Canada [Proposed]

The Environmental Law Centre (ELC) is a charitable organization incorporated in 1982 to provide an objective source of information on environmental law and policy in Alberta and Canada. The ELC's mission is to ensure that laws, policies and legal processes protect the environment. The ELC is pleased to provide comments on the *Recovery Strategy for the Burrowing Owl (Athene cunicularia) in Canada* (the *Recovery Strategy*)¹, as well as the general recovery strategy process.

Introduction

The *Species at Risk Act*² (SARA) is an essential component in the recovery of species at risk in Canada as well as helping Canada to meet its international obligations under the *Convention on Biological Diversity*.³

The ELC has reviewed the *Recovery Strategy* and has concerns regarding critical habitat designation and the capacity and timelines with which recovery efforts are proceeding for all listed species. To date, the administration of SARA has involved significant delays in both the completion of recovery strategies and designation of critical habitat. To date, critical habitat has only been identified for three listed species out of the 235 species that should have recovery plans in place.⁴ Such delays put species at risk in further jeopardy. If insufficient resources exist to do the requisite work that would allow recovery strategies to be completed in a timely, adequate manner this capacity shortfall must be addressed.

¹ Environment Canada, *Recovery Strategy for the Burrowing Owl (Athene cunicularia) in Canada [Proposed]*, online: Government of Canada <http://www.sararegistry.gc.ca/plans/showDocument_e.cfm?id=964>.

² S.C. 2002, c. 29.

³ 5 June 1992, 31 I.L.M. 818 (1992), (entered into force 29 December 1993).

⁴ This information was obtained by conducting a search of the SARA registry, online: Government of Canada <<http://www.sararegistry.gc.ca>> in July 2007. Only the Roseate Tern and the Horsetail Spike-rush have critical habitat statements. Critical habitat for the Piping Plover has been identified in an addendum to its recovery strategy but no order has been made identifying this habitat.

The Committee on the Status of Endangered Wildlife in Canada (COSEWIC) designates a species as “endangered” when it is “facing imminent extirpation or extinction”.⁵ This designation is significant when compared to “threatened”, which is applied to a species that is “likely to become endangered if limiting factors are not reversed”.⁶ Clearly, a species that is listed as endangered is facing a serious threat of extirpation or extinction, requiring the immediate application of protective measures.

The Canadian Burrowing Owl population was first recognized as being under threat in 1979, almost 30 years ago.⁷ In 1995, the Burrowing Owl was reassessed as endangered and was legally listed as such in 2003 when *SARA* came into force. *SARA* required that a recovery strategy be prepared by June 2006 but this was delayed for over a year. Between 1988-2004 the population of this species declined 91 percent in both Saskatchewan and Alberta and, as of 2006, is considered “essentially extirpated” from both Manitoba and British Columbia.⁸ The continued decline of this species suggests that provinces have inadequate laws and policies to ensure effective protection of species at risk and indicates that more substantive federal measures are required to ensure recovery.

Critical Habitat

Critical habitat is defined in *SARA* as habitat necessary for the survival or recovery of the species.⁹ Critical habitat designation is a vital component to the protection of *SARA* species. Without the protection of critical habitat, many activities that threaten species survival may continue. The federal government, through its international obligations and power over criminal laws, has the constitutional mandate to ensure protection of species at risk across Canada.¹⁰

Although there are likely many reasons for the lack of critical habitat designation, the absence of a guiding document that recovery teams can rely on to make these decisions is a contributing factor. An evaluation of the species at risk program has noted “where provinces/territories are leading recovery planning efforts, they report a reluctance to identify critical habitat on non-federal lands until the supporting policy framework is clarified (e.g., compensation, effective protection, identification of critical habitat, etc.)”.¹¹ Reluctance at the recovery planning stage, in combination with the failure of the federal government to strongly assert jurisdiction over species at risk, is resulting in

⁵ Committee on the Status of Endangered Wildlife in Canada (COSEWIC), “COSEWIC’s Assessment Process and Criteria”(2006), online: COSEWIC <<http://www.cosewic.gc.ca>>.

⁶ *Ibid.*

⁷ *Supra* note 1 at 1.

⁸ *Ibid.* at 5, “Operation Burrowing Owl recorded a 91 percent decline in its Saskatchewan Burrowing Owl population index from 1988-2004 ... Severe declines were reported by Operation Grassland Community in Alberta where the number of reported pairs declined by 91 percent from 1991-2001”; see Committee on the Status of Endangered Wildlife in Canada, “COSEWIC Assessment and Update Status Report on the Burrowing Owl (*Athene cunicularia*) in Canada” (Ottawa: Environment Canada, 2006) [COSEWIC] at 22.

⁹ *Supra* note 2, s. 2

¹⁰ *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, s. 91(27).

¹¹ Stratos Inc., “Formative Evaluation of Federal Species At Risk Programs” (2006), online: Environment Canada <<http://www.ec.gc.ca/ae-ve/default.asp?lang=En&n=53869FF3-1>> at 34.

significant delays. Currently, the *SARA* registry only contains a draft discussion document for identifying critical habitat.¹² This document needs to be finalized and proclaim a strong federal role in preserving species at risk. Furthermore, any guiding document needs to be in-line with the purpose of *SARA*.

SARA states, “[t]he recovery strategy ... **must include** ... an identification of the species critical habitat, **to the extent possible**, based on the best available information”.¹³ A plain and literal reading of this section indicates that so long as there is some information available, it should be used to identify critical habitat. Further, “cost-effective measures to prevent the reduction or loss of the species should not be postponed for a **lack of full scientific certainty**”.¹⁴ A precautionary approach to critical habitat identification must be undertaken to ensure that further degradation and loss of species at risk are minimized, particularly in federally protected areas. The importance of this protective approach to critical habitat designation needs to be reflected, and emphasized in the department’s guidance documents. The designation process must be protective, iterative and adaptive to allow for refining critical habitat as more information becomes available.

The *Recovery Strategy* for the Burrowing Owl indicates that critical habitat will be identified in action plans by the end of 2009, a full 30 years after it was first identified as a species at risk.¹⁵ The rationale provided for not identifying critical habitat at this time is inadequate. The *Recovery Strategy* states, “not enough information is available at this time to allow the identification of critical habitat for Burrowing Owls”.¹⁶ It continues by explaining:¹⁷

Critical habitat cannot currently be defined for the Burrowing Owl in Canada because of inadequate knowledge of the majority of owl locations, a limited understanding of owl habitat associations during breeding at both landscape and home-range levels...and because Burrowing Owls do not exhibit high site-fidelity to their nesting burrows.

The problems with this reasoning are outlined and discussed below.

“Inadequate knowledge of the majority of owl locations ... limited understanding of owl habitat associations”

The reasons given for not identifying critical habitat at this time include “inadequate knowledge of the majority of owl locations” and a “limited understanding of owl habitat

¹² Environment Canada, “Federal Policy Discussion Paper: Critical Habitat”, online: Government of Canada <http://www.sararegistry.gc.ca/policies/showDocument_e.cfm?id=271>.

¹³ *Supra* note 2, s. 41(1)(c) [emphasis added].

¹⁴ *Ibid.* at s. 38 [emphasis added].

¹⁵ *Supra* note 1 at 15.

¹⁶ *Ibid.* at iv.

¹⁷ *Ibid.* at 15.

associations”.¹⁸ Applying this reasoning, migrant species at risk will never have critical habitat identified because their actual residences are constantly shifting. This outcome is antithetical to the purpose of the critical habitat designation and flies in the face of the precautionary principle as stated in *SARA*.¹⁹ The lack of full scientific certainty, according to section 38 of *SARA*, is not an adequate reason to postpone measures to protect the species. The fact that there is knowledge of even a minority of owl locations is sufficient to warrant proper protection of these locations. Nothing in *SARA* suggests a need to identify all nests or residences to identify critical habitat; rather, the habitat that may accommodate a species at risk is what must be identified and protected. To do otherwise would undermine any recovery efforts, relegating a species to the list for perpetuity.

“Burrowing Owls do not exhibit high site-fidelity to their nesting burrows”

To begin, nowhere in *SARA* does it state that critical habitat only includes nesting sites to which a species shows a high fidelity. The fact that the species has the potential to return to the nest site at all should be sufficient to warrant the protection provided by *SARA*. This statement is also contradicted by the *Recovery Strategy* itself where it notes, “[b]anding studies suggest that adult owls have fairly high breeding site fidelity, but juvenile owls often move great distances between their hatch sites and where they breed as adults in their first year”.²⁰ Precaution would dictate that sites where burrow fidelity is occurring, together with sites containing appropriate habitat for juveniles seeking a new burrow, should be designated as critical habitat.

Furthermore, the *Recovery Strategy* states that the loss of burrows is one of the threats to the species.²¹ If the loss of burrows is threatening the survival of this species, it follows that known burrows should be protected, “to the extent possible”.²²

The recovery strategy for the Roseate Tern provides a good example of how critical habitat should be identified.²³ According to that recovery strategy, “critical habitat is only identified partially in this document and covers the actual location of Roseate Tern nesting sites...schedule of studies could lead to a more comprehensive identification of critical habitat for the Roseate Tern...”²⁴ This approach should be adopted in other recovery strategies, including the Burrowing Owl, as it reflects a proactive and precautionary approach to protecting critical habitat that is currently known, in addition to meeting the requirements of *SARA*.²⁵

¹⁸ *Ibid.* at 15, although the majority of Burrowing Owl locations may not be known, many locations are known. For an example of known locations in Alberta see R.F. Russel, “2002 Burrowing Owl Trend Block Survey and Monitoring, Brooks Area” (2002), online: Alberta Sustainable Resource Development <http://www.srd.gov.ab.ca/fishwildlife/speciesatrisk/pdf/SAR_58.pdf>.

¹⁹ *Supra* note 2, s. 38.

²⁰ *Supra* note 1 at 15.

²¹ *Ibid.* at iv.

²² *Supra* note 2, s. 41(1)(c).

²³ Environment Canada, “Final Recovery Strategy for the Roseate Tern (*Sterna dougallii*) in Canada” (2006), online: Government of Canada <http://www.sararegistry.gc.ca/plans/showDocument_e.cfm?id=913>.

²⁴ *Ibid.* at 9.

²⁵ *Supra* note 2, s. 41(1)(c).

A schedule of planned studies can be used to further refine the parameters of critical habitat. However, lack of full scientific certainty should not be used as an excuse to ignore currently available information. The Burrowing Owl has been extensively studied over several generations, with significant aspects of its ecosystem requirements being gleaned in the process.²⁶ The *Recovery Strategy* identifies “Quantitative habitat associations of Burrowing Owls, at multiple scales, during all seasons” as a knowledge gap.²⁷ This statement is not instructive as it is so broad and general that it fails to reflect current knowledge. Existing information about essential habitat makes initial identification of critical habitat possible at this time.

It is imperative that critical habitat be identified because “loss and degradation of suitable nesting and foraging habitat are cited as the most important threats to Burrowing Owls over most of their North American range”.²⁸ At the very least, the recovery strategy for the Burrowing Owl should identify known active burrows and home ranges as critical habitat. According to the *Recovery Strategy*, night-time foraging occurs in an area ranging between 2.4 - 3.3 km² while mammal hunting occurs within 1-2 km of nests.²⁹ The COSEWIC status assessment reports the Alberta home range as 3.73 km².³⁰ The *Recovery Strategy*, citing the same author³¹, reports a home range of 3.3 km². To ensure appropriate protection of the species, the information reported must be accurate. This discrepancy of more than 400 m² must be addressed and corrected.

It is recommended that critical habitat be identified as encompassing both active burrow locations and a scientifically defensible radius around the burrows to ensure the owls have continued access to food and so that anthropogenic causes of mortality can be managed or prohibited.

Conclusion

According to the COSEWIC status assessment, the Burrowing Owl population consisted of 2540 pairs in 1991, declining to approximately 795 individuals by 2004.³² It is clear

²⁶ The *Recovery Strategy* itself contains five pages of references, hardly indicative of a species lacking adequate information. Examples of habitat related studies referenced in the *Recovery Strategy* include, but is not limited to: E.A. Haug & L.W. Oliphant, “Movements, activity patterns, and habitat use of Burrowing Owls in Saskatchewan” (1990) 54 *Journal of Wildlife Management* 27; R.A. Sissons, K.L. Scalise & T.I. Wellicome, “Nocturnal foraging-habitat use by male Burrowing Owls in a heavily-cultivated region of southern Saskatchewan” (2001) 35 *Journal of Raptor Research* 304; R.G. Warnock & M.A. Skeel, “Habitat features important to Burrowing Owl breeding success in Saskatchewan” (2002) 60 *Blue Jay* 135; R.A. Sissons, *Food and habitat selection of male Burrowing Owls (Athene cunicularia) on southern Alberta grasslands* (Ottawa: National Library of Canada, 2004); R.G. Poulin *et al.*, “Factors associated with nest and roost-burrow selection by Burrowing Owls (*Athene cunicularia*) on the Canadian prairies” (2005) 83 *Canadian Journal of Zoology* 1373.

²⁷ *Supra* note 1 at 13.

²⁸ *Ibid.* at 9.

²⁹ *Ibid.* at 7., “Burrowing owls hunt for small mammals within 1-2 km of nests...Nocturnal foraging ranges averaged 3.3 km² in Alberta and 2.4 km² in Saskatchewan”.

³⁰ COSEWIC, *supra* note 8 at 7.

³¹ R.A. Sissons, *Food and habitat selection of male Burrowing Owls (Athene cunicularia) on southern Alberta grasslands* (Ottawa: National Library of Canada, 2004).

³² *Supra* note 30 at 11.

that for this population to recover, substantive measures to protect species habitat will be needed.

The ELC recommends that the *Recovery Strategy* be amended to identify critical habitat. At the bare minimum, critical habitat should be identified as active burrows and a scientifically defensible foraging radius around the burrows. Furthermore, habitat mapping based on available knowledge should be conducted to further identify critical habitat to be used in the recovery and restoration of the species. Excessive reliance on protecting only existing burrows may guarantee that actual recovery and delisting of the Burrowing Owl never occurs.

We thank you for the opportunity to provide comments on the *Recovery Strategy*. If you have any questions regarding our comments, please do not hesitate to contact us at (780) 424-5099.

Yours truly,

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