

July 30, 2010

Our File: 5320

Christine Robichaud
Environment Canada
Canada Wildlife Service
Species at Risk Recovery Unit
4999 - 98th Avenue
Edmonton, Alberta
T6B 2X3

Dear Ms. Robichaud,

RE: Comments regarding the preparation of a Recovery Strategy for Woodland Caribou (*Rangifer tranadus caribou*) Boreal Population.

The Environmental Law Centre (ELC) is a charitable organization incorporated in 1982 as a public 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, as part of Environment Canada's consultation process, on the development of a national recovery strategy for on Woodland Caribou (*Rangifer tranadus caribou*) Boreal Population.

a) Interim measures

The boreal caribou recovery strategy is several years past its legislative due date, a fact that is likely to undermine species recovery goals. Continued delays in producing a robust recovery strategy with extensive consultation without interim action to protect existing herds and their habitat is unacceptable. Timing of recovery efforts, including identification of critical habitat and action planning, must not continue at the expense of the species.¹ For this reason, Environment Canada and Cabinet should proceed with the following interim measures.

- (1) Pursue an Emergency Order through Cabinet pursuant to s. 80 of *Species at Risk Act*²

SARA requires that "the competent minister must make the recommendation [to Cabinet] if he or she is of the opinion that the species faces imminent threats to its survival and recovery".³ It is apparent that there are imminent threats to the recovery of some herds

¹ The recovery process is iterative as both recovery strategies and action plans can be amended and updated. See ss. 45 and 52 of the *Species at Risk Act*, S.C. 2002, c. 29.

² S.C. 2002, c. 29.

³ *Ibid.* at s.80(2).

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within Alberta. The *Scientific Review for the Identification of Critical Habitat for Woodland Caribou (rangifer tarandus caribou), Boreal Population, in Canada* indicates significant disturbance and indicates that all of Alberta's ranges are not self-sustaining at this point.⁴ Recovery of the majority of these herds is under imminent threat.

- (2) Create a transparent system of budgeting, monitoring and reporting to illustrate department constraints for effective and timely assessment and recovery planning for listed species at risk.

Recovery strategy work under SARA has been delayed beyond statutory timelines for the majority of listed species. Action planning can extend delays in identification of critical habitat to the detriment of species. For this reason the public should have access to information regarding budgeting for species recovery efforts, anticipated budget requirements to meet timely planning goals, an assessment of the impact on each species as a result of anticipated delays, and an evaluation of other constraints that may cause delay in planning efforts.

b) Population and Distribution Objectives

Environment Canada's consultation documents propose a population and distribution objective as:

Maintain existing local populations of boreal caribou that are self-sustaining, and achieve population growth of local populations that are not currently self-sustaining, to the extent possible, throughout the current distribution (extent of occurrence) of boreal caribou in Canada.⁵

This objective is laudable and should be maintained in the recovery strategy. Some observers may question whether this is reasonable in some areas of Alberta where specific caribou populations are under significant threat due to past, current and planned industrial development. However, in the absence of a credible and accountable, i.e., legally binding, framework to address population distribution and sustainability and habitat protection of caribou within Alberta, there is a need to ensure the *Species at Risk Act* is applied comprehensively to all existing areas where species at risk are found.

The ELC recognizes that possible alternate solutions to broader caribou conservation goals within the province may arise with continued work. In such instances, an alternative objective may become suitable; however unless a robust regulatory system is in place, such alternatives do not warrant consideration.

⁴ Environment Canada, (2008) at 35-37, online: SARA Registry
<http://www.sararegistry.gc.ca/virtual_sara/files/Caribou_Full_0409_e.pdf>.

⁵ Christine Robichaud, Environment Canada, "Working Together to Recover Boreal Caribou" (Presentation, July 2010, Edmonton) [unpublished].

c) Critical habitat identification

The identification of critical habitat in the recovery strategy is very relevant to management of federal lands, and has the potential to be highly relevant to provincial lands. There is a need to ensure that critical habitat is identified in the recovery stage of the recovery planning process. Identification of critical habitat must be done “to the extent possible, based on the best available information.”⁶

Jurisprudence regarding the identification of critical habitat in recovery strategies has indicated that a proactive approach to critical habitat identification is to be pursued. In *Alberta Wilderness Association v. Canada (Environment)*⁷ Justice Zinn, in considering the identification of Sage Grouse critical habitat, noted that “SARA requires that [critical habitat identification] be based on the ‘best available information’ which may be less than precise and which may be less than exact.” Further Justice Zinn, “[s]ubsection 41(1)(c) **requires that the Minister identify in a recovery strategy document as much critical habitat as it is possible to identify at that time**, even if all of it cannot be identified, and to do so based on the best information then available”.⁸ [emphasis added]

This was affirmed by Justice Campbell in *Environmental Defence Canada v. Canada (Fisheries and Oceans)*.⁹ Justice Campbell further noted that, in discerning whether critical habitat should be identified “it is clear that no political or socioeconomic consideration can be applied by a competent Minister in meeting Parliament’s intention as expressed by the mandatory provisions of s. 41(1) of SARA.”¹⁰

It appears that the proposed process seeks to ascertain how much critical habitat can be destroyed as opposed to identifying critical habitat. This effectively turns the precautionary approach espoused by SARA and the proactive approach to habitat identification set out by the judiciary on its head. The question of how much critical habitat can be degraded by anthropogenic processes without impacting on species recovery is highly problematic as it may result in interminable study of the issue, at the expense of taking management actions. It is doubtful whether science can accurately refine the exact level of impact that is acceptable in any given case.

Critical habitat identification should be viewed as an iterative process, whereby increased knowledge results in a refinement of the understanding in critical habitat knowledge that may result in either an increase or decrease in the functional aspects of habitat and geographic area designated as critical habitat.¹¹ The critical habitat identification process must not devolve into

⁶ SARA, *supra* note 2 at s. 41(1)(c).

⁷ 2009 FC 710 at para 60.

⁸ *Ibid* at para 25.

⁹ 2009 FC 878 at para 65.

¹⁰ *Ibid.* at para 41.

¹¹ The current approach to critical habitat identification undertaken by the department appears to adopt the idea that less knowledge mandates less critical habitat identification and more knowledge will justify more. While this is undoubtedly the approach demanded by some activity proponents it is directly contrary to the precautionary approach as set out in SARA.

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the department justifying its actions on some implied legal standard of proof in relation to critical habitat identification.

The critical habitat identification process in no way detracts from the necessity to place an emergency protection order for caribou.

d) Summary and conclusions

Populations of boreal caribou in the province of Alberta are in need of immediate landscape management action to ensure that recovery of the species is not further undermined. These management actions must include substantive habitat protections that are currently only available in the province through federal application of emergency order provisions under *SARA*. This step is necessary to allow for the recovery strategy and action planning process to continue in a manner that does not undermine species recovery.

There is also a need to ensure that population and distribution objectives reflect the intent to have healthy and viable caribou populations across their current distribution in the province. This goal is of particular importance because there currently exists no alternative legal framework that would sufficiently protect caribou in any of their provincial range.

Finally, the judiciary and *SARA* have clearly articulated that a proactive approach be taken to identification of critical habitat. Critical habitat must therefore be identified at the recovery strategy stage of recovery planning as there exists sufficient and credible information about the habitat needs of boreal caribou. Further refinement of these habitat needs can be pursued through future action plans.

If you have any questions regarding the foregoing, please do not hesitate to contact the ELC via email at junger@elc.ab.ca, or via phone at (780) 424-5099.

Yours truly,

[original signed]
Jason Unger
Staff Counsel

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