

November 23, 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

Via Facsimile: (819) 953-0279

Dear Minister Baird,

**RE: Comments on the Recovery Strategy for the Greater Sage-Grouse
(*Centrocercus urophasianus urophasianus*) in Canada [Proposed]**

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 on the *Recovery Strategy for the Greater Sage-Grouse (Centrocercus urophasianus urophasianus) 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 the Greater Sage-Grouse. To date, the administration of *SARA* has involved significant delays in both the completion of recovery strategies and designation of critical habitat. Such delays put species at risk in further jeopardy of extirpation or extinction. Sufficient resources must be provided to do the requisite work that would allow recovery strategies to be completed in a timely, adequate manner.

The Committee on the Status of Endangered Wildlife in Canada (COSEWIC) designates a species as "endangered" when it is "facing imminent extirpation or extinction".⁴ This

¹ Environment Canada, *Recovery Strategy for the Greater Sage-Grouse (Centrocercus urophasianus urophasianus) in Canada [Proposed]*, online: Government of Canada < http://www.sararegistry.gc.ca/plans/showDocument_e.cfm?id=1458>.

² S.C. 2002, c. 29.

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

⁴ Committee on the Status of Endangered Wildlife in Canada (COSEWIC), "COSEWIC's Assessment Process and Criteria"(2006), online: COSEWIC <<http://www.cosewic.gc.ca>>.

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”.⁵ 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 Greater Sage-Grouse’s current range is approximately 6% of its historic range in Canada.⁶ It is estimated that the Greater Sage-Grouse population in Alberta has declined 77-84% from 1968 to 2005.⁷ The decrease is particularly acute between 1988 and 2005 when the population decreased by between 82-92%.⁸ This trend indicates the need for immediate action to protect Greater Sage-Grouse and its habitat.

Critical Habitat

Critical habitat is defined in *SARA* as habitat necessary for the survival or recovery of the species.⁹ *SARA* recognizes that “the habitat of species at risk is key to their conservation”, making timely critical habitat designation central to any recovery effort. 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

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**” [emphasis added].¹¹ 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**”.¹² A precautionary approach to critical habitat identification must be undertaken to ensure that further degradation and loss of species at risk are minimized. The designation process must be protective, adaptive and allow for refining critical habitat as more information becomes available.

The rationale provided for not identifying critical habitat for the Greater Sage-Grouse at this time is “uncertainty about the ecological definition and location of suitable habitat required to achieve recovery of the species.”¹³ The *Recovery Strategy* for the Greater Sage-Grouse indicates that critical habitat will be identified in action plans, with the final goal of putting the action plan on the registry in 2011.

⁵ *Ibid.*

⁶ *Supra* note 1 at 3.

⁷ *Ibid.* at 5.

⁸ *Ibid.* at 5.

⁹ *Supra* note 2, s. 2

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

¹¹ *Supra* note 2, s. 41(1)(c) [emphasis added].

¹² *Ibid.* at s. 38 [emphasis added].

¹³ *Ibid.* at 27.

This delay is significant and ignores the information that is currently available. Critical habitat designation must be based on science and not on political or non-conservation related considerations. The knowledge that is available, relevant to critical habitat of the Greater Sage-Grouse, as outlined in the *Recovery Strategy*, includes:

- knowledge of breeding, nesting, summer and winter habitats;¹⁴
- the fact that “virtually 100% of the Sage-Grouse winter diet” consists of sagebrush leaves;¹⁵
- the habitat chosen for leks and its proximity to sagebrush;¹⁶
- the fact that “disturbance by oil and gas extraction and construction near leks has resulted in abandonment of at least six leks”;¹⁷ and
- the fact that “loss of sagebrush habitat near leks has resulted in abandonment of leks in both Saskatchewan and Alberta”.¹⁸

In addition, study of Greater Sage-Grouse has been extensive across its North American range, providing a significant amount of information about the Sage-Grouse and its habitat.¹⁹ While not all of this information may be directly applicable to the Alberta and Saskatchewan context, sufficient information exists to identify particular aspects of critical habitat. *SARA* does not state that critical habitat should be identified only when all knowledge gaps are filled, rather that it is identified “to the extent possible, using the best available information”. This must be done in a timely and preventative manner. The available information indicates that destruction of sagebrush habitats and disturbance of leks sites will most certainly impact Greater Sage-Grouse recovery. Identification of critical habitat is an important first step in dealing with these impacts.

Addressing threats

SARA also states that the recovery strategy must include:²⁰

“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...”

There are significant threats outlined in the *Recovery Strategy* but insufficient information about addressing these threats. In particular, the issues of anthropogenic disturbance of leks is not sufficiently dealt with in the *Recovery Strategy*. Where habitat

¹⁴ *Ibid* at 7-9.

¹⁵ *Ibid.* at 6.

¹⁶ *Ibid.* at 7.

¹⁷ *Ibid.* at 12.

¹⁸ *Ibid.* at 9.

¹⁹ For instance see Connely, J.W., S.T. Knick, M.A. Shroeder and S.J. Stiver. 2004. *Conservation Assessment of Greater Sage-Grouse and Sagebrush Habitats*, Western Association of Fish and Wildlife Agencies. Unpublished Report, Cheyenne, Wyoming, available online: Bureau of Land Management

<http://www.blm.gov/ca/pdfs/bishop_pdfs/sagegrouse/ConAssessGSG_Connelly_etal_2004.pdf>. This report provides significant information regarding Greater Sage-Grouse habitat in the United States, much of which will likely be relevant and applicable to the Alberta and Saskatchewan context.

²⁰ *Supra* note 2, s.41(1)(b).

occurs on federally owned or leased lands, where the federal government has direct land management control, steps should be taken to provide sufficient buffers for important Greater Sage-Grouse habitat. This includes a buffer related to oil and gas activities and other disturbances that have shown to have an effect on reproductive success.²¹

On other lands there is a need to provide specific strategies for recovery. Reliance on the Canadian Sage-grouse Recovery Team guidelines is problematic because these documents have no legal mechanism in Alberta through which habitat protection can be guaranteed. Further, the guidelines only discuss buffers around lek sites and even then the action proposed is the addition of a protective notation being added to public lands. In the absence of information regarding the activities that these notations may prohibit it is impossible to assess whether the notation will be effective.

While cooperation and consultation with provincial agencies dealing with species at risk is important to species recovery, excessive reliance on non-legal provincial initiatives should be avoided. The Minister's obligations under *SARA* to address the failures of provincial or territorial laws to be adequately protective must be a central focus.²² Unenforceable provincial policy tools should not be allowed to detract from the Minister's determination of whether provinces have adequate laws in place.

When *SARA* was drafted it was intended to provide a backstop mechanism to provinces and territories that fail to provide adequate legal protection for species at risk. Once a species is listed, assessing legal protection must be a central focus if recovery is to be achieved. The Ministerial determination of the adequacy of laws in the province is essential to an informed discussion of whether reliance on provincial initiatives is appropriate. Where these laws are inadequate the Minister must recommend application of *SARA* to non-federal lands.

Conclusion

The Greater Sage-Grouse has seen significant declines its population, corresponding to anthropogenic impacts on Greater Sage-Grouse habitat in Alberta. It is clear 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 breeding habitat, with a protective buffer, should be established. Habitat maps based on available knowledge of sagebrush should be included to further delineate critical habitat.

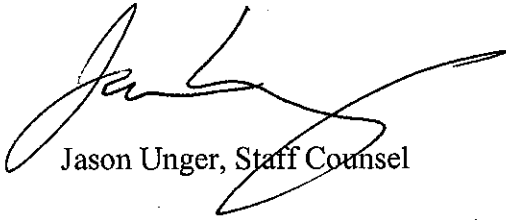
²¹ A study conducted out of the University of Wyoming suggests that oil and gas activities within 3-5km of lek sites caused decreases in male attendance. This study also noted that the Bureau of Land Management guidelines were inadequate to "maintain greater sage-grouse breeding populations within natural gas fields" and that "the effect-distance from disturbance sources to leks during breeding season could be conservatively estimated at 3 to 5 km, especially if that source was located where sound propagation towards a lek was intensified by environmental factors". See Matt Holloran and Stanley H. Anderson "Greater Sage-Grouse response to natural gas field development in Western Wyoming" *Grouse News*, Issue 30, November 2005, available online: <<http://www.gct.org.uk/gsg/gnpdf/gnews30.pdf>> which provides a summary of the research that was conducted.

²² *Supra* note 2, ss.34(3) and 61(4).

Further, an assessment of whether Alberta's laws provide sufficient protection for Sage-Grouse and its habitat must be conducted as soon as possible. Where provincial laws are found to be lacking, reliance on provincial recovery tools must be minimized and a stronger federal role in species protection within a province is justified.

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,

A handwritten signature in black ink, appearing to read 'Jason Unger', with a long, sweeping flourish extending to the right.

Jason Unger, Staff Counsel

cc: Shelley Pruss, Western and Northern Service Centre, Parks Canada (via email)

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