

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 Swift Fox (*Vulpes velox*) 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 Swift Fox (Vulpes velox) in Canada* (the *Recovery Strategy*).¹

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 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 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 extirpation of the swift fox in Canada appears to have occurred in the late 1930s although it was not formally recognized until 1978.⁶ As of 2006 it is thought that approximately 1162 swift

¹ Environment Canada, *Recovery Strategy for the Swift Fox (Vulpes velox) in Canada [Proposed]*, online: Government of Canada <http://www.sararegistry.gc.ca/plans/showDocument_e.cfm?id=1459>.

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>>.

⁵ *Ibid.*

⁶ *Supra* note 1 at 2.

foxes are supported in an area covering Alberta, Saskatchewan and Montana.⁷ Reintroduction of the species has been effective, with population increases being observed.⁸

The ELC has reviewed the *Recovery Strategy* and has concerns regarding steps outline to address threats to the species and with the timeliness of critical habitat designation.

Addressing threats through SARA

SARA states that a recovery strategy must include:⁹

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;

The *Recovery Strategy* cites the threat posed to swift fox by the use of strychnine (1080) and other poisons. The steps proposed to address this threat (and other direct mortalities) of swift fox are insufficient.¹⁰ The ELC recommends that the *Recovery Strategy* include indications that failure to provide legal protections for species at risk on non-federal lands may result in federal application of *SARA* to these lands. This is particularly the case where provincial policies not only fail to protect species at risk but actually promote or allow activities that are likely to result in contravention of *SARA* provisions, if *SARA* prohibitions were to be applied on provincial land. The *Recovery Strategy* should therefore outline timelines for assessing provincial laws and policies in this regard and indicate that the Minister will formulate an opinion about the adequacy of provincial laws within a specified time.¹¹

Critical Habitat

Critical habitat is defined in *SARA* as habitat necessary for the survival or recovery of the species.¹² 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.¹³

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”.¹⁴ 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**”.¹⁵ A precautionary

⁷ *Ibid.* Almost half of the population is thought to be supported in the Montana area.

⁸ *Ibid.* at 12.

⁹ *Supra* note 2, s.41(1)(b).

¹⁰ *Supra* note 1 at 14.

¹¹ *Supra* note 2, ss.34(3) and 61(4).

¹² *Ibid.* at s. 2

¹³ *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, s. 91(27).

¹⁴ *Supra* note 2, s. 41(1)(c) [emphasis added].

¹⁵ *Ibid.* at s. 38 [emphasis added].

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 timely, protective, and allow for the refinement of critical habitat as more information becomes available.

The rationale provided for not identifying critical habitat for the swift fox is "uncertainty about the ecological definition and location of suitable habitat required to achieve recovery of the species."¹⁶ The *Recovery Strategy* proposes extensive delays prior to identifying swift fox habitat, with knowledge collection occurring by September 2008 and critical habitat being identified by July 2011.¹⁷ This provides almost three years for consultation on discussion papers and a draft action plan. The impact of these delays on the recovery of species and its habitat is not assessed.

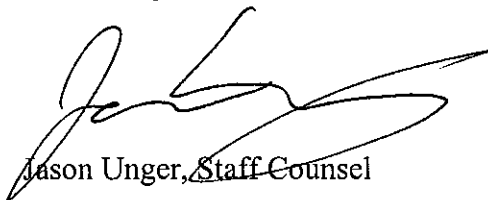
The definition of critical habitat must reflect a scientific determination of habitat necessary for recovery of the species. While consultation may be relevant to action plan and recovery strategy development, timely determination of critical habitat is essential. The ELC recommends amending the timelines for defining critical habitat of swift fox and to identify critical habitat with the information available, as contemplated by *SARA*.

Conclusion

The ELC recommends that the *Recovery Strategy* be amended to provide additional details in relation to addressing threats to swift fox, particularly in relation to direct mortality from anthropogenic causes. These amendments should directly address steps to be taken in relation to regressive policies that may result in direct mortalities of swift fox. Further, the *Recovery Strategy* should be amended to identify critical habitat for swift fox based on the best available information.

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,



Jason Unger, Staff Counsel

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

¹⁶ *Supra* note 1 at 17.

¹⁷ *Ibid.* at 17 and 18.