COMMENTS TO THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT OF THE HOUSE OF COMMONS ON BILL C-5, AN ACT RESPECTING THE PROTECTION OF WILDLIFE SPECIES AT RISK IN CANADA

Brenda Heelan Powell, Staff Counsel
Environmental Law Centre
204, 10709 Jasper Avenue
Edmonton, Alberta
T5J 3N3

May, 2001

TABLE OF CONTENTS

INTRODUCTION

A. Endangered Species Legislation and the Environmental Law Centre

The Environmental Law Centre is a non-profit, charitable organization that was incorporated in 1982. The Centre's overall objective is making the law work to protect the environment. In pursuit of this objective the Centre provides a number of services, a key one being law monitoring and law reform. We make our comments on Bill C-5 - *An Act Respecting the Protection of Wildlife Species at Risk in Canada* ("*SARA*") - with consideration of the overall objective that federal legislation should work to protect the environment.

The federal plan for protecting species at risk was announced by Minister Anderson in December, 1999. The plan intends to build upon the existing *Accord for the Protection of Species at Risk* and to promote voluntary stewardship efforts through incentive programs and funding. In addition, the plan provides for the introduction of federal legislation designed to protect Canada's species at risk.

The intention of *SARA* is to provide a balanced approach to the protection of species at risk by promoting cooperation among federal, provincial and territorial governments, and by promoting voluntary stewardship efforts by individuals. In the event such efforts fail to provide adequate protection of species and their critical habitat, *SARA* is intended to provide a "safety net".

Powerful legislation is required to support the commendable intentions of the federal plan for protecting species at risk. However, our view is that *SARA* fails to provide strong legislative support for the federal plan. This legislation is weakened by a political listing process, a restrictive application of prohibitions, a discretionary critical habitat safety net and the use of landowner compensation.

B. Environmental Law Centre's Principles Underlying its Comments on *SARA*

Several principles are embraced by the Centre and provide the foundation for its comments on *SARA*:

1. Every species is inherently valuable. This value exists apart from the economic value that is traditionally placed on certain species.

2. The human species has an obligation - not a choice - to carry on activities in a manner that does not threaten the existence of other species. This obligation arises from the inherent value of other species, the debt owed to future generations and the dependence of humans on a healthy environment.

3. The preservation of species diversity and abundance makes good economic, social and political sense.

4. Loss and fragmentation of habitat is the primary cause of species being placed at risk. As such, effective protection of species at risk requires protection of critical habitat across jurisdictional, political and ownership barriers.

5. The critical habitat of species extends beyond their dens and immediate residences. Critical habitat includes the breeding areas, feeding areas and migratory pathways of species.

6. Effective protection of all species at risk and their critical habitats requires that cooperation among federal, provincial and territorial governments continue to progress under the Accord for the Protection of Species at Risk. It also requires the use of incentive programs and funding to promote stewardship and to assist citizens, organizations, Aboriginal peoples, land users and private landowners who are helping to protect species' habitat. Finally, protection of all species at risk and their critical habitats requires powerful federal legislation.

7. To be effective, the proposed *SARA* must provide certainty of legal protection for *all* species at risk and their critical habitats throughout Canada.

COMMENTS AND RECOMMENDATIONS

It is our view that *SARA* fails to provide strong legislative support for the federal plan for protecting species at risk. This legislation is weakened by a political listing process, a restrictive application of prohibitions, a discretionary critical habitat safety net and the use of landowner compensation.

A. Preamble and Purposes

The fifth paragraph of the preamble states that the Government of Canada is committed to the principle that, in the face of threats of serious or irreversible damage to a wildlife species, "*cost-effective* measures to prevent the reduction or loss of the species should not be postponed for a lack of scientific certainty" (emphasis added). We appreciate that this statement reflects the federal government's commitment to the precautionary principle. However, the use of the term "cost-effective" derogates from the precautionary principle.

The precautionary principle requires that where there is a serious - especially potentially irreversible environmental effects - lack of scientific certainty should not be used as a reason not to proceed with measures to avoid or correct those effects. By adding the concept of cost-effectiveness, the strength and effectiveness of the precautionary principle is lessened. Unlike the economic benefits of development, the value of environmental effects cannot be quantified. The true costs of environmental effects cannot be reflected in an analysis of cost-effectiveness. Extinction of a species is a loss that cannot be measured. For this reason, a strong commitment to the concept of precaution is necessary.

Recommendation: The reference to "cost-effective" should be removed from the fifth paragraph of the preamble.

The purposes of *SARA* are set out in section 6:

- to prevent species from being extirpated or becoming extinct;
- to provide for the recovery of species that are extirpated, endangered or threatened as a result of human activity; and
- to manage species of special concern to prevent them from becoming endangered or threatened.

The phrase "as a result of human activity" should be removed from this provision. Recovery of species that are extirpated, endangered or threatened should be undertaken regardless of the cause of their status. Inclusion of this phrase may have the effect of unduly restricting recovery activities under *SARA*.

Recommendation: Remove the phrase "as a result of human activity" from section 6 of SARA.

Noticeably absent from section 6 is a statement regarding provision of a "safety net" for the protection of the critical habitat of species at risk. As acknowledged in Environment Canada's document *Canada's Plan for Protecting Species at Risk: An Update* (page 15), loss of habitat is a major contributor to the endangerment, extirpation and extinction of species. In response to this

fact, *SARA* provides for protection of critical habitat. This is an essential purpose of the Act and should not be overlooked in section 6.

Recommendation: Section 6 should expressly provide that provision of a "safety net" for the protection of the critical habitat of species at risk is a purpose of SARA.

B. Listing of Species

The measures to protect species at risk - general prohibitions, recovery strategies, action plans and the critical habitat safety net - can only be used for those species that are listed by regulations promulgated pursuant to *SARA*. The decision to list a species for protection under *SARA* will be made by the Governor in Council on the recommendation of the Minister rather than by scientists.

The Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") will continue to operate at arm's length from government to scientifically assess and identify species at risk. The list of species at risk prepared by COSEWIC will not be adopted under *SARA*. Rather, a political decision as to which species will be listed under *SARA* will be made. That is, COSEWIC will act as a mere advisor to the federal government on the issue of species at risk.

This listing process is rationalized as being necessary to consider the social and economic implications of listing a species. However, this rationale is flawed. The determination of whether a particular species is at risk is a scientific matter. Once this determination has been made, social and economic concerns can be considered in formulating an appropriate response to this fact. That is, social and economic concerns can be considered when determining the appropriate level of habitat protection, the issuance of exemption permits and so forth.

Experience has demonstrated that statutes that provide for political listing do not effectively protect all species at risk. For example, Alberta's *Wildlife Act*, S.A. 1984, c. W-9.1 offers protection to approximately only 28% of species at risk in Alberta. Similar results have been experienced in other jurisdictions with political listing of species at risk.

Failure to list a species that has been scientifically determined to be at risk means that it will derive absolutely no benefit from *SARA*. This means that there will be no prohibition against killing the species, no recovery plan to canvass protection alternatives and no financial support for conservation. In addition, the public awareness and voluntary efforts that follow upon listing will likely be curtailed.

It is our recommendation that the list of species at risk developed by COSEWIC be adopted in its entirety under *SARA*. The listing of species should not be left to political discretion. The determination of listing is not the appropriate stage at which to consider social and economic concerns. Rather, such concerns should be addressed in formulating the appropriate response to the fact that a species is at risk.

At the very least, the current COSEWIC species at risk list should be adopted at the initial list under *SARA* to be revised by Cabinet in the future as needed.

Recommendation: The list of species at risk developed by COSEWIC should be adopted in its entirety under SARA. The listing of species should not be left to political discretion. At the very least, the current COSEWIC species at risk list should be adopted at the initial list under SARA to be revised by Cabinet in the future as needed.

C. General Prohibitions

There are a few general prohibitions contained in *SARA*. Section 32 provides that a person shall not kill, harm, harass or take an individual of a threatened, extirpated or endangered species. Also prohibited is the possession, collection, purchase, sale or trade of an individual - including any part or derivative of an individual - of a threatened, extirpated or endangered species. Section 33 provides that a person shall not damage or destroy the residence of a threatened or endangered species, or an extirpated species whose recovery strategy has recommended its reintroduction into Canada.

The application of these prohibitions is unduly restricted (sections 34 and 35). The prohibitions apply only to aquatic species, migratory bird species and species on federal lands. There is no provision made for transboundary species. Unless a *discretionary* order is made by the Governor in Council, the prohibitions do not apply on lands in a province or the territories.

It is our recommendation that the prohibitions in *SARA* apply to all species at risk wherever they are located. Given the Supreme Court of Canada decision in *The Attorney General of Canada* v. *Hydro-Quebec*, extension of the prohibitions in this manner should be a valid assertion of federal legislative jurisdiction over criminal matters. At a minimum, *SARA* must broadly construe established federal jurisdiction over migratory birds, coastal and inland fisheries, marine mammals, and transboundary wildlife throughout Canada (including non-federal lands in a province).

An "equivalency" approach - similar to that taken in the *Canadian Environmental Protection Act* - could be taken with respect to the prohibitions in *SARA*. In other words, the prohibitions could be waived in provinces whose laws provide equivalent protection to species at risk.

Recommendation: The prohibitions in SARA should apply to all species at risk wherever they are located in Canada. At a minimum, SARA must broadly construe established federal jurisdiction over migratory birds, coastal and inland fisheries, marine mammals, and transboundary wildlife throughout Canada (including non-federal lands in a province).

D. Recovery Strategies and Action Plans

Under *SARA*, a recovery strategy must be prepared for all endangered and threatened species. In addition, one or more action plans based on the recovery strategy must be prepared.

We commend the use of a transparent process that allows for stakeholder participation in the development of recovery strategies and action plans. It is our recommendation that *SARA* provide for more regular assessment of the implementation of the recovery strategies and action

plans. The Act currently provides for assessment by the Minister every five years. A publicly accessible assessment conducted on an annual basis would provide more effective monitoring of progress and ensure accountability.

Recommendation: SARA should provide for more regular assessment of the implementation of the recovery strategies and action plans. A publicly accessible assessment conducted on an annual basis would provide more effective monitoring of progress and ensure accountability.

E. Management Plans

A management plan must be developed for all species of special concern. We commend this as a proactive approach which will assist in preventing species from gaining the precarious status of threatened or endangered.

We also commend the use of a transparent process that allows for stakeholder participation in the development of management plans. However, it is our recommendation that *SARA* provide for more regular assessment of the implementation of management plans. The Act currently provides for assessment by the Minister every five years. A publicly accessible assessment conducted on an annual basis would provide more effective monitoring of progress and ensure accountability.

Recommendation: SARA should provide for more regular assessment of the implementation of the management plans. A publicly accessible assessment conducted on an annual basis would provide more effective monitoring of progress and ensure accountability.

F. Protection of Critical Habitat

i. Federal Safety Net

According to Environment Canada's document *Canada's Plan for Protecting Species at Risk: An Update*, it is envisioned that federal and provincial or territorial actions on the lands within their own jurisdiction, combined with stewardship and incentive programs to protect habitat on private lands, should be sufficient to protect critical habitat in most cases. However, where this approach is not sufficient to protect critical habitat, the federal government may implement its safety net for the critical habitat of endangered and threatened species. This safety net will allow the federal government to protect critical habitat on non-federal lands where other effective means are not in place or cannot be put into place.

Section 58 provides for use of the safety net for areas of critical habitat on federal lands, in the exclusive economic zone of Canada and on the continental shelf of Canada. Critical habitat in these areas will be protected only if an order is issued by the Governor in Council on the recommendation of a competent minister. The recommendation of the competent minister is required if he is of the opinion there are no other measures to protect the area. In other words, an order to protect critical habitat in areas clearly within federal jurisdiction is discretionary.

Similarly, an order to protect the critical habitat in a province or territory not on federal lands is discretionary. Section 61 provides that this critical habitat can be protected by order of the Governor in Council made on the recommendation of the Minister. Such a recommendation can be made only if an affected province or territory requests its use, the Canadian Endangered Species Conservation Council requests its use, or the Minister determines that its use is necessary following consultation. The latter situation will only arise where efforts by affected jurisdictions, private landowners or both are assessed to be insufficient to effectively protect critical habitat.

Our recommendation is that *SARA* abandon the federal safety net approach outlined above. Rather, *SARA* should directly mandate critical habitat protection for all listed species throughout Canada. As has been mentioned, loss of habitat is a major contributor to the endangerment, extirpation and extinction of species. Mandatory - not discretionary - protection of critical habitat is required to effectively protect species at risk. Further, protection of critical habitat should begin as soon as the critical habitat has been identified.

If the federal Government will not abandon the federal safety net approach, then we recommend that *SARA* require critical habitat protection for all listed species on federal lands and for all listed species under established federal jurisdiction. We further recommend that *SARA* create an express obligation, not a discretion, to invoke the critical habitat safety net when all possible stewardship incentives and other efforts are insufficient to protect critical habitat. There should be an established time period for determining whether all possible stewardship incentives and other efforts are insufficient. At the expiration of this period, the federal safety net must be cast. Finally, there must be a mandatory mechanism to protect critical habitat for the period between the time it is identified and the time when the Minister finishes consultation and makes a determination regarding protection. *SARA* does not provide for any protection of critical habitat during this interim.

Recommendation: Our recommendation is that SARA abandon the federal safety net approach outlined in the Act. Rather, SARA should directly mandate critical habitat protection for all listed species throughout Canada.

Recommendation: If the federal Government will not abandon the federal safety net approach, then we recommend that SARA require critical habitat protection for all listed species on federal lands and for all listed species under established federal jurisdiction. Further, SARA should create an express obligation, not a discretion, to invoke the critical habitat safety net when all possible stewardship incentives and other efforts are insufficient to protect critical habitat. Finally, there must be a mandatory mechanism to protect critical habitat for the period between the time it is identified and the time when the Minister finishes consultation and makes a determination regarding protection.

ii. Compensation

Section 64 of *SARA* provides that the Minister may pay compensation to any person for "losses suffered as a result of any extraordinary impact of the application" of the federal safety net or an emergency order. Details - such as the methods to be used in determining eligibility for compensation and the amount of compensation payable - are to be set out in regulations pursuant to *SARA*.

We have serious concerns about the provision for compensation in *SARA*. Canadian jurisprudence has established that governments have broad right to legislate land use limitations for valid public purposes without having to pay compensation. Indeed, Canadian jurisprudence indicates that legal rights to compensation are limited to cases where property has been taken and legislation explicitly or implicitly requires compensation. As stated in the Supreme Court of Canada's decision in *R.* v. *Tener* [1985] 1 S.C.R. 533 at 547:

> Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on the ground that his land is "injuriously affected", unless he can establish a statutory right.

Our research indicates that there are no clear high court level cases where compensation has been ordered for mere regulation of land uses, in contrast to actual taking or expropriation of a property right. There is no established legal obligation to offer compensation to landowners for mere regulation of their land use. Thus, the compensation approach in *SARA* could create a legal entitlement which does not otherwise exist at common law.

We foresee several grave consequences resulting from *SARA*'s use of compensation. Firstly, this approach enforces the mistaken view that property entitlements grant landowners the right to forever destroy critical habitat on which species at risk depend for survival. This distorted and arrogant view of property entitlements should be rejected, not promoted, by governments. The entitlement to use property in certain ways is not an absolute, intractable property right but rather is in the nature of a civil entitlement.

Secondly, this approach will act as an incentive to encourage development and destruction of critical habitat. This is because qualifying for compensation likely will require evidence of actual intent to develop critical habitat. This in turn will promote development planning on habitat that would not have otherwise occurred. Without doubt, carrying out some of such plans would prove to be more lucrative to landowners than applying for federal compensation.

Finally, this approach will set back and burden the excellent work of conservation agencies. Many activities of these organizations depend on landowners choosing not to develop habitat for reasons other than economic gain.

It is our recommendation that *SARA* abandon the compensation approach. A perverse incentive to develop land must not be created by rewarding landowners for not destroying habitat. Rather, *SARA* should be used to encourage voluntary stewardship efforts by individuals. Efforts must be

made to provide stewardship education and assistance, including financial assistance where appropriate, to assist landowners in enhancing habitat. Incentives - rather than compensation - are required to encourage stewardship efforts by individuals.

As well, changes to the federal *Income Tax Act* should be made to improve incentives relating to donations of conservation easements and other interests in land to protect critical habitat. For capital gains tax purposes, these dispositions should be treated in the same manner as donations of Canadian cultural property. These changes to the federal *Income Tax Act* should be made concurrently with the proclamation of *SARA*.

If the federal Government insists on using the compensation approach in *SARA*, several changes must be made to the existing provision. Firstly, the meaning of "extraordinary impact" is not clear. The Act should specify that compensation will be offered only where there is a complete taking or total extinguishment of all rights associated with ownership of the property. Given its importance to the issue, eligibility for compensation is a matter for the text of *SARA* and not a matter for the regulations. Secondly, the Act should specify the forms of compensation that are payable. Compensation should not be limited to payments of money but could include items such as land swaps, tax benefits and the like.

Recommendation: The compensation approach in SARA should be abandoned. Rather, SARA should be used to encourage voluntary stewardship efforts by individuals. Efforts must be made to provide stewardship education and assistance to assist landowners in enhancing habitat.

Recommendation: Changes to the federal Income Tax Act should be made concurrently with the proclamation of SARA to improve incentives relating to donations of interests in land to protect critical habitat. For capital gains tax purposes, these dispositions should be treated in the same manner as donations of Canadian cultural property.

Recommendation: We do not agree with the use of compensation in SARA. However, if the federal Government will not abandon the compensation approach in SARA, ***both*** *of the following changes should be made to the existing provision:*

- *The meaning of "extraordinary impact" is not clear. The Act should specify that compensation will be offered only where there is a complete taking or total extinguishment of all rights associated with ownership of the property.*
- *In addition, the Act should specify the forms of compensation that are payable. Compensation should not be limited to payments of money but could include items such as land swaps, tax benefits and the like.*

G. Public Registry

We support the creation of a public registry. However, we would like to see some other items included in the public registry:

1. composition of COSEWIC;
2. the rules and procedures of COSEWIC;
3. the list of species at risk composed by COSEWIC;

4. the Minister's response to the COSEWIC list, including explanations for those species which are not listed under *SARA*;
5. applications for emergency status submitted to COSEWIC;
6. the Minister's annual report to parliament; and
7. enforcement activities under *SARA*.

This information would assist in monitoring and assessing the effectiveness of the activities conducted under *SARA*.

H. Public Participation

While *SARA* does provide citizens the opportunity to request investigations (section 93), other accountability mechanisms must be incorporated into *SARA* to ensure effective operation and enforcement of the Act. We recommend the use of two accountability mechanisms: citizen petitions and citizen suits.

SARA should provide that any citizen may petition the Minister to invoke the federal safety net for critical habitat. Further, the Minister should be required to provide reasons for the decision made in response to the petition.

As well, *SARA* should include a citizen suit provision similar to that in the *Canadian Environmental Protection Act*. Such a provision will provide a mechanism to ensure that the Act is enforced by future governments.

Recommendation: To ensure effective operation and enforcement of SARA, citizen petitions and citizen suits should be permitted under the Act. SARA should provide that any citizen may petition the Minister to invoke the federal safety net for critical habitat. As well, SARA should include a citizen suit provision similar to that in the Canadian Environmental Protection Act.

I. Interaction of *SARA* and the *Canadian Environmental Assessment Act*

Section 74 of *SARA* provides that agreements or permits may be issued to authorize a person to engage in an activity affecting a listed species, its residence or its critical habitat. Any such agreements or permits should constitute a "trigger" of the operation of *Canadian Environmental Assessment Act* ("*CEAA*"). As such, the *Law List Regulations* pursuant to *CEAA* should be amended to include the issuance of such agreements and permits. This amendment should be concurrent with the proclamation of *SARA*.

Recommendation: Any agreements entered into or permits issued pursuant to SARA's provisions should constitute a "trigger" of the operation of CEAA. As such, the Law List Regulations pursuant to CEAA should be amended to include the issuance of such agreements and permits. This amendment should be concurrent with the proclamation of SARA.

In sections 79 and 137, *SARA* addresses its interaction with *CEAA*. Section 79 provides that every person required by federal legislation to conduct an assessment of environment effects of a

project must notify the Minister if a listed species or its critical habitat is likely to be affected. That person is required to identify the adverse effects of the project on the listed species and its critical habitat. Further, that person must ensure that the project is conducted in a manner to avoid or lessen those adverse effects in a way that is consistent wiht applicable recovery strategies and action plans.

Although we agree that a proponent must notify the Minister if a listed species or its critical habitat is likely to be affected, we find this provision to be too narrow. The phrase "critical habitat" is a technical legal term defined in the *Species at Risk Act* . In any particular case, it is extremely unlikely that habitat that falls within the perimeters of a proposed project will actually have been designated as "critical habitat". Accordingly, section 79 should require notification where a listed species, its residence or its habitat - whether or not designated as "critical habitat" - is likely to be affected.

Recommendation: Section 79 should be amended to delete the word "critical". This will require a project proponent to notify the Minister if a listed species, its residence or its habitat is likely to be affected.

Section 137 of the *Species at Risk Act* provides that the first part of the definition of "environmental effect" in *CEAA* will be amended as follows:

> environmental effect" means, in respect of a project, any change that the project may cause in the environment, including any effect of any such change on
> (i) health and socio-economic conditions,
> (ii) physical and cultural heritage,
> (iii) the current use of lands and resources for traditional purposes by aboriginal persons,
>
> (iv) any structure, site or thing that is a historical, archeological, paleontological or archeologically significant
> *(v) a listed wildlife species, its critical habitat or the residence of any individual of that species, as those terms are defined in subsection 2(1) of the Species at Risk Act.*
> [emphasis added]

Only subparagraph (v) of the definition is new. We have concerns regarding this amendment.

First, we point out that subparagraphs (i) to (iv) were apparently originally included in the definition because these are not obvious environmental effects. In contrast, subpargraph (v) obviously refers to an environmental effect. As such, we wonder why it is proposed to specifically include effects on listed species, residences or habitat in the definition of environmental effect.

Without the inclusion of subparagraph (v), an effect on *any* wildlife, residences or habitat is an environmental effect. Since this is so, any effect on a *listed* species, its residence or its habitat is an environmental effect. Our concern is that by specifically including a change to a listed species, its residence or its critical habitat as an "environmental effect", the provision will limit consideration of effects on wildlife, residences or habitat to the effects on listed species or

critical habitat. In other words, by specifically including subparagraph (v), the definition of "environmental effect" will be narrowed - if not by law, then in practice.

Second, by amending the definition of "environmental effect", the amendment to *CEAA* proposed in section 137 of *SARA* can significantly affect the operation of that Act. We suggest that it might be more appropriate that such a significant change should not be made as a related amendment under *SARA* but rather should be made as a direct amendment to *CEAA*. This would better ensure proper consideration of the implications of changing CEAA's definition of "environmental effects". In this regard, we note that the Standing Committee will be reviewing the CEAA in connection with the Five Year Review. At this time the Committee will have opportunity to consider amendments to that statute.

Third, if the federal Government determines that *SARA* will contain amendments to *CEAA*, we suggest an amendment different than currently proposed in *SARA*. We urge that the Act be amended to deem any environmental effect on a listed species, its residence or its habitat - whether or not critical habitat (see our comment on section 79 of *SARA*) - to be a "significant environmental effect" for the purposes of section 16 (1) of CEAA. By deeming such effects to be significant for the purposes of section 16 (1), every screening, comprehensive study, mediation or panel review, must consider whether any effect on a listed species, its residence or its habitat can be mitigated. If such effect cannot be mitigated, then the deciding authority cannot take federal action - such as issuing a regulatory authority or lending money - unless the unmitigatable effects on the listed species or its habitat are otherwise justified and the circumstances.

The adverse effects on a listed species, its residence or its critical habitat should not be weighed equally with other environmental effects. If an effect on a listed species or its habitat is not a significant environmental effect, it is difficult to see what would qualify. An impact on a listed species or its critical habitat that cannot be mitigated or justified in the circumstances should be treated as sufficient reason - in itself - to disallow a project. The rationale for this treatment of listed species and their critical habitat is the urgency and the irreversibility of the situation of species at risk. Once a species is lost, it is lost forever.

Recommendation: SARA's proposed related amendment to the Canadian Environmental Assessment Act will significantly affect the operation of that Act. Such a significant change should not be made as a related amendment under SARA but rather should be made as a direct amendment to CEAA.

Recommendation: If the federal Government determines that SARA will contain amendments to CEAA, that Act must be amended so that any adverse impact on a listed species, its residence or its habitat is deemed a significant adverse environmental effect for the purposes of section 16 (1) of that Act.

SUMMARY OF RECOMMENDATIONS

Preamble and Purposes

1. The reference to "cost-effective" should be removed from the fifth paragraph of the preamble.

2. Remove the phrase "as a result of human activity" from section 6 of *SARA*.

3. Section 6 should expressly provide that provision of a "safety net" for the protection of the critical habitat of species at risk is a purpose of *SARA*.

Listing of Species

4. The list of species at risk developed by COSEWIC should be adopted in its entirety under *SARA*. The listing of species should not be left to political discretion. At the very least, the current COSEWIC species at risk list should be adopted at the initial list under SARA to be revised by Cabinet in the future as needed.

General Prohibitions

5. The prohibitions in *SARA* should apply to all species at risk wherever they are located in Canada. At a minimum, *SARA* must broadly construe established federal jurisdiction over migratory birds, coastal and inland fisheries, marine mammals, and transboundary wildlife throughout Canada (including non-federal lands in a province).

Recovery Strategies and Action Plans

6. *SARA* should provide for more regular assessment of the implementation of the recovery strategies and action plans. A publicly accessible assessment conducted on an annual basis would provide more effective monitoring of progress and ensure accountability.

Management Plans

7. *SARA* should provide for more regular assessment of the implementation of the management plans. A publicly accessible assessment conducted on an annual basis would provide more effective monitoring of progress and ensure accountability.

Federal Safety Net

8. *SARA* should abandon the federal safety net approach outlined in the Act. Rather, *SARA* should directly mandate critical habitat protection for all listed species throughout Canada.

9. If the federal Government will not abandon the federal safety net approach, then we recommend that *SARA* require critical habitat protection for all listed species on federal lands

and for all listed species under established federal jurisdiction. The federal safety net approach should include the following elements:

- if all possible stewardship incentives and other efforts are insufficient to protect critical habitat, the safety net *must* be implemented;
- there should be a limited time period for determining whether all possible stewardship incentives and other efforts are insufficient to protect critical habitat; and
- there should be mandatory interim protection of critical habitat until the determination regarding the sufficiency of other approaches has been made.

Compensation

10. The compensation approach in *SARA* should be abandoned. Rather, *SARA* should be used to encourage stewardship efforts by individuals. Efforts must be made to provide stewardship education and assistance to assist landowners in enhancing habitat.

11. Changes to the federal *Income Tax Act* should be made concurrently with the proclamation of *SARA* to improve incentives relating to donations of interests in land to protect critical habitat. For capital gains tax purposes, these dispositions should be treated in the same manner as donations of Canadian cultural property.

12. We do not agree with the use of compensation in *SARA*. However, if the federal Government will not abandon the compensation approach in *SARA*, *both* of the following changes should be made to the existing provision:
    - The meaning of "extraordinary impact" is not clear. The Act should specify that compensation will be offered only where there is a complete taking or total extinguishment of all rights associated with ownership of the property.
    - In addition, the Act should specify the forms of compensation that are payable. Compensation should not be limited to payments of money but could include items such as land swaps, tax benefits and the like.

Public Registry

13. The public registry should include the following information:
    - composition of COSEWIC;
    - the rules and procedures of COSEWIC;
    - the list of species composed by COSEWIC;
    - the Minister's response to the COSEWIC list, including explanations for those species which are not listed under *SARA*;
    - applications for emergency status submitted to COSEWIC;
    - the Minister's annual report to parliament; and
    - enforcement activities under *SARA*.

Public Participation

14. To ensure effective operation and enforcement of SARA, citizen petitions and citizen suits should be permitted under the Act. SARA should provide that any citizen may petition the Minister to invoke the federal safety net for critical habitat. As well, SARA should include a citizen suit provision similar to that in the Canadian Environmental Protection Act.

Interaction of *SARA* and the *Canadian Environmental Assessment Act*

15. Any agreements entered into or permits issued pursuant to *SARA*'s provisions should constitute a "trigger" of the operation of *CEAA*. As such, the *Law List Regulations* pursuant to *CEAA* should be amended to include the issuance of such agreements and permits. This amendment should be concurrent with the proclamation of *SARA*.

16. Section 79 should be amended to delete the word "critical". This will require a project proponent to notify the Minister if a listed species, its residence or its habitat is likely to be affected.

17. *SARA*'s proposed related amendment to the *Canadian Environmental Assessment Act* will significantly affect the operation of that Act. Such a significant change should not be made as a related amendment under *SARA* but rather should be made as a direct amendment to *CEAA*.

18. If the federal Government determines that SARA will contain amendments to CEAA, that Act must be amended so that any adverse impact on a listed species, its residence or its habitat is deemed a significant adverse environmental effect for the purposes of section 16 (1) of that Act.