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Our File: 33

Hon. David Anderson, P.C., M.P.
Minister of the Environment
House of Commons
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Dear Minister Anderson:

RE: Proposed Strategy for Protecting Species at Risk

The Environmental Law Centre is a non-profit organization that has operated in Alberta since 1982. The Environmental Law Centre provides services in environmental law education and assistance, environmental law reform and environmental law research to achieve its objective of making the law work to protect the environment. Accordingly, we have prepared comments on the Proposed Strategy for Protecting Species at Risk.

We would like to see a strong, effective federal strategy that protects all species at risk and their critical habitats. We support the proposal that cooperation between federal, provincial and territorial governments continue to progress under the Accord for the Protection of Species at Risk. In addition, we support the proposal to use 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.

However, we believe that these measures will be undermined without the existence of powerful legislation. To be effective, the proposed *Species at Risk Act* ("SARA") must provide certainty of legal protection for all species at risk and their critical habitats. According to the proposal, SARA will consist of several elements – listing, prohibitions, recovery planning and critical habitat protection. We have comments on each element of the proposed SARA.

Listing

According to the proposal, the decision to list a species for protection under *SARA* will be made by the federal government rather than by scientists. 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 in the proposal as being necessary to consider the social and economic implications of listing a species. It is our submission that 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.

Failure to list a species that has been scientifically determined to be at risk means that it will derive 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 be limited.

It is our recommendation that the list of species at risk developed by COSEWIC be adopted in its entirety under *SARA*. 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.

Prohibitions

The proposal indicates that killing or harming endangered or threatened species will be prohibited. In addition, the destruction of the residences of an endangered or threatened species will be prohibited. According to the proposal, these prohibitions will apply to all endangered and threatened species on federal lands or otherwise under federal jurisdiction.

It is our recommendation that *SARA* provide a clear requirement that the prohibitions must apply to all species at risk wherever they are located. The Supreme Court of Canada decision *The Attorney General of Canada v. Hydro-Quebec* would support such assertion of federal legislative jurisdiction under constitutional authority over criminal matters. If the federal Government will not take this approach, then at minimum *SARA* must broadly construe established federal jurisdiction throughout Canada over migratory birds, coastal and inland fisheries, marine mammals, and transboundary wildlife.

The proposed *SARA* will allow exceptions to these prohibitions where required for public health or safety or national security, or where harm to a species is accidental and unforeseeable. In addition, exceptions would exist for activities undertaken under the

terms of an Aboriginal treaty or land claims agreement where such activities would not jeopardize species recovery efforts. Incidents of incidental harm to individuals of an endangered or threatened species while otherwise legal activities are being undertaken may also be excepted from the above prohibitions. Finally, there may be exceptions for scientific research or management purposes.

It is our recommendation that *SARA* outline the precise exceptions to these prohibitions. It should be expressly recognized that the prohibitions apply in all but the most exceptional cases.

Recovery Plans

The proposal indicates that *SARA* will require a recovery plan for endangered and threatened species. The development of a Recovery Plan will occur in two steps. First, a Recovery Strategy will be prepared by the Recovery Team. This document will establish baseline information about the threatened or endangered species, define the long term recovery goal and short-term objectives. The second step will be the development of an Action Plan by the Action Planning Group in consultation with regional and local stakeholders. The Action Plan will describe specific measures needed to recover a species and the timelines for such measures.

It is intended that the Recovery Strategy will describe critical habitat. However, if there is not sufficient habitat information available, the critical habitat will be later described in the Action Plan. The proposed timeline for the development of a Recovery Strategy is one year for an endangered species and two years for a threatened species.

With respect to species of special concern, the proposal suggests that Management Plans be prepared within three years of listing.

It is our recommendation that *SARA* clearly require the development of Recovery Plans for *all* endangered or threatened species. Similarly, the development of Management Plans for *all* species of special concern should be required by *SARA*. There should not be any discretion as to the requirement for Recovery and Management Plans.

It is also recommended that the value of a transparent process for development of Recovery and Management Plans that allows for stakeholder participation be acknowledged in *SARA*. The process for developing Recovery and Management Plans should provide for public participation. Allowing public scrutiny of the Recovery and Management Plans at all stages should ensure accountability.

Critical Habitat Protection

Federal Safety Net

The proposal envisions 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 critical habitat safety net. 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.

The federal government will consider use of the safety net only if an affected province or territory requests its use, the 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. Moreover, the federal government will not use the safety net unless measures to protect critical habitat have already been initiated on federal lands.

We are concerned about what can happen to critical habitat between the time when it is identified and the time when the Minister finishes consultation and makes a determination. Nothing in the proposal would protect the habitat during this period and accordingly landowners are free to destroy it. We recommend that *SARA* abandon the federal safety net approach and instead directly mandate critical habitat protection for all listed species. 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 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.

Compensation

The proposal asserts that it is unreasonable to impose the entire economic burden of protecting threatened or endangered species on individual landowners, land users and Aboriginal peoples. As such, if the use of private land is to be highly restricted to protect critical habitats, then individuals should be able to apply for compensation. The proposal notes that compensation becomes a consideration when stewardship and other measures have been insufficient to protect critical habitat, and where the critical habitat safety net is required.

We have serious concerns over the compensation provisions. 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. 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.

We see many grave consequences resulting from *SARA*'s offering to compensate landowners for land use limitations when there is no established legal obligation to so.

First, this approach will 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.

Second, *SARA*'s offers of compensation for limitations on land uses on critical habitat will further the view that property rights somehow give landowners the right to forever destroy for humanity habitat on

which species at risk depend on for survival. This distorted, arrogant view of property rights should be rejected and not promoted by governments.

Third, this approach will set back and burden the excellent work of conservation agencies such as Nature Conservancy Canada, Ducks Unlimited Canada, the Canadian Wildlife Federation and the World Wildlife Fund, and others. Many activities of these organizations depend on landowners choosing not to develop habitat for reasons other than economic benefit to them.

Consequently we recommend that *SARA* abandon the compensation approach. Instead *SARA* should encourage stewardship education and offer assistance, including financial assistance where appropriate, to assist landowners in enhancing habitat. It must not, however, reward landowners for not destroying habitat. As well, with the proclamation of *SARA*, we recommend concurrent changes to the federal *Income Tax Act* to improve incentives relating to donations of conservation easements and other interests in land to protect critical habitat. A necessary change is to treat such dispositions the same as donations of Canadian cultural property for capital gains tax purposes.

On behalf of the Environmental Law Centre, we thank you for considering our comments on the proposed Strategy for Protecting Species at Risk and, in particular, the proposed *SARA*. Please feel free to contact either of us at (780) 424-5099 if you have any questions regarding our comments.

Sincerely,

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Staff Counsel

and

Arlene J. Kwasniak
Executive Director