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Our File: 6020

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**Re: proposed partial identification of Sprague's Pipit critical habitat in Alberta and Saskatchewan**

Dear Recovery team,

**About the ELC**

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 have this opportunity to comment on the proposed amendment for partial identification of critical habitat in the recovery strategy for Sprague's Pipit.<sup>1</sup>

**Sprague's Pipit**

A rare and declining songbird of the northern prairie, Sprague's Pipit is a small bird residing in open native grasslands.<sup>2</sup> In Alberta, the breeding range of the Sprague's pipit once extended from southern Alberta through the aspen parkland to Athabasca and the Peace district, and west to the Foothills of the Rocky Mountains. Today, the range no longer includes northern areas.<sup>3</sup> This species is migratory and resides in Alberta from April to September.

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<sup>1</sup> Environment Canada. 2011 [proposed] Amendment to the final Recovery Strategy for the Sprague's Pipit (*Anthus spragueii*) in Canada RE: Partial identification of critical habitat in Alberta and Saskatchewan and Action Planning, Ottawa.

<[http://www.sararegistry.gc.ca/virtual\\_sara/files/plans/amendment\\_rs\\_spragues\\_pipit\\_proposed\\_2011\\_e.pdf](http://www.sararegistry.gc.ca/virtual_sara/files/plans/amendment_rs_spragues_pipit_proposed_2011_e.pdf)>

<sup>2</sup> COSEWIC, *Assessment and Status Report on the Sprague's Pipit in Canada* (2010) at 18 showing declining population data. <[http://www.sararegistry.gc.ca/virtual\\_sara/files/cosewic/sr\\_Sprague%27s%20Pipit\\_0810\\_e.pdf](http://www.sararegistry.gc.ca/virtual_sara/files/cosewic/sr_Sprague%27s%20Pipit_0810_e.pdf)>

<sup>3</sup> David R.C. Prescott, "Status of the Sprague's Pipit (*Anthus spragueii*) in Alberta (Alberta Wildlife Status Report No. 10) (Edmonton: Alberta Conservation Association, 1997)

<<http://www.srd.alberta.ca/BioDiversityStewardship/SpeciesAtRisk/DetailedStatus/documents/pipit.pdf>>

Sprague's Pipit has a strong association with native prairie grasslands, although it also breeds sporadically in aspen parkland habitats. These pipits generally avoid areas with introduced grasses and cultivated lands such as pastures, hayfields, and croplands, or any area with heavy vegetation cover. This species is most successful on native grassland and experiences lower nest survival and density in high disturbance grassland areas. Approximately 80% of the global breeding population of this species occurs in Canada. It is a habitat specialist that needs large tracts of intact native grassland for breeding.<sup>4</sup>

Sprague's Pipit is listed as threatened on Schedule I of the federal *Species At Risk Act*.<sup>5</sup> The Sprague's Pipit is protected by the federal *Migratory Birds Convention Act*.<sup>6</sup> Under this Act, it is prohibited to kill, harm, or collect adults, young, and eggs.

The recovery strategy for Sprague's Pipit was first adopted in 2008 and in 2011 a proposed amendment was released for consultation which partially identifies critical habitat. This amendment to the recovery strategy for the Sprague's Pipit (*Anthus spragueii*) in Canada is for the purpose of:

- Identifying Sprague's Pipit critical habitat. Research and analysis of information gathered regarding critical habitat for Sprague's Pipit have advanced since the posting of the final Recovery Strategy for this species in 2008, allowing partial identification of critical habitat.
- Revising the Schedule of Studies to identify critical habitat as a number of studies are still required before critical habitat identification can be completed.
- Revising Environment Canada's timelines of the action planning for the Sprague's Pipit.

The ELC thanks you for the opportunity to comment on this recovery strategy.

### **Lack of protection of Sprague's Pipit in Alberta**

The critical habitat identified for this migratory songbird in Alberta is on federal lands in the Suffield Canadian Forces Base. The identification of critical habitat on these lands is an important step forward in the protection of this bird.

The identification of critical habitat outside of federal lands is absolutely essential. Although this bird is listed as a species of special concern and a "non-game bird" in Alberta under the

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<sup>4</sup> *Ibid.*

<sup>5</sup> S.C. 2002, c. 29

<sup>6</sup> S.C. 1994, c. 22

*Wildlife Act*<sup>7</sup> there is no protection for Sprague's Pipit habitat under provincial laws. Likewise Sprague's Pipit is also unprotected in the United States regions bordering Alberta.<sup>8</sup>

The ELC is extremely concerned that there are several other grassland-dependent species at risk whose critical habitat have not been identified in Alberta at all.<sup>9</sup>

Alberta does not currently provide protection for the critical habitat for Sprague's Pipit, or other at risk grassland species on public or private lands in Alberta. Of all the ecosystems in Canada, the grassland ecosystem is the most at risk.<sup>10</sup> Ten species are extinct in Alberta's grasslands and 11 have already been extirpated. 24 of the 31 species at risk in Alberta, rely on prairie habitats.<sup>11</sup>

### Threats to the Sprague's Pipit in Alberta

Sprague's Pipit is intolerant of native grassland disturbance and is most successful on undisturbed native grassland. These areas continue to be lost to cultivation throughout Alberta and Saskatchewan. Remaining habitat is threatened by the recent increase in energy development including oil, gas and wind on large areas of native grasslands in Alberta.<sup>12</sup> Land used by oil and gas industries overlaps with 60% of the remaining grassland in Alberta.<sup>13</sup>

In Alberta, native grasslands cover approximately 42,000 square km. (at 23) of which 23,000 square km are owned by the Alberta Government and managed by Sustainable Resource Development. In addition to this the Easter Irrigation District a statutory body under the *Irrigation Districts Act*<sup>14</sup> is the largest private landowner in Southern Alberta and administers 2,400 square km of grassland most of which (80%) is native grassland. Despite this, only 2 % of native grasslands in the prairies are protected in Alberta.<sup>15</sup>

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<sup>7</sup> R.S.A. 2000, c. W-10

<sup>8</sup> US Fish and Wildlife Service, News release: Listing of Sprague's Pipit under ESA Found Warranted but Precluded (September 14, 2010) <<http://www.fws.gov/mountain-prairie/pressrel/10-61.htm>>

<sup>9</sup> Pruss, S.D., P. Fargey, and A. Moehrensclager. 2008. Recovery strategy for the swift fox (*Vulpes velox*) in Canada. Prepared in consultation with the Canadian Swift Fox Recovery Team. Species at Risk Act Recovery Strategy Series. Parks Canada Agency.

<sup>10</sup> Prairie Conservation Forum, "Alberta Prairie Conservation Action Plan: 2011-2015" (Lethbridge: Alberta Prairie Conservation Forum, January 2011) <[http://www.albertapcf.org/PDF\\_Documents/PCAP2011.pdf](http://www.albertapcf.org/PDF_Documents/PCAP2011.pdf)>

<sup>11</sup> Alberta Parks "The Grassland Natural Region of Alberta" (Alberta Environmental protection, March 1997) at 46 <[http://www.tpr.alberta.ca/parks/heritageinfocentre/docs/Grassland\\_Natural\\_Region\\_of\\_Alberta\\_Report.pdf](http://www.tpr.alberta.ca/parks/heritageinfocentre/docs/Grassland_Natural_Region_of_Alberta_Report.pdf)>

<sup>12</sup> COSEWIC, *supra* at 11.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Irrigation Districts Act*, R.S.A. 2000, c. I-11.

<sup>15</sup> COSEWIC, *supra* at 23-24.

There is no legislation or other mandatory measure in place to protect the remaining native grasslands on provincial and private land in Alberta. On Crown lands, the Alberta government is currently planning to sell 84,000 acres of land, much of which is grassland to counties and municipal districts for a dollar a quarter section.<sup>16</sup>

### **The correct application of the *Species at Risk Act* and identification of critical habitat**

Under the *Species at Risk Act*, critical habitat must be identified in a recovery strategy to be protected. Under s.41(1) (c) critical habitat **must** be identified in a recovery strategy to the extent possible and based on the best available information.

However Recent reviews of critical habitat identification under *SARA* have revealed that habitat in parks or on protected federal lands is the most likely to be identified, while habitat on private lands is the least likely.<sup>17</sup>

However the Canadian *Species At Risk Act* has listed Sprague's Pipit and prepared a recovery strategy for the bird in 2008.<sup>18</sup> This recovery strategy failed to identify critical habitat as required under s.41(1)(c) of *SARA*:

**41. (1)** If the competent minister determines that the recovery of the listed wildlife species is feasible, the recovery strategy must address the threats to the survival of the species identified by COSEWIC, including any loss of habitat, and **must include**

...(c) an identification of the species' critical habitat, to the extent possible, based on the best available information, including the information provided by COSEWIC, and examples of activities that are likely to result in its destruction; [emphasis added]

The issue of failing to identify critical habitat to the extent possible and based on the best available information was discussed extensively in *Alberta Wilderness Association v. Canada (Environment)*<sup>19</sup> where Justice Zinn explained:

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<sup>16</sup> Government of Alberta "Government to transfer land to municipalities for local use" (News Release, February 3, 2011) <<http://alberta.ca/home/NewsFrame.cfm?ReleaseID=/acn/201102/29851ED214D54-A0EE-3226-9D12B0AE2624CF13.html>>

<sup>17</sup> Stewart Elgie, "Saving SARA, or can you lead an (endangered) horse to water and make it drink?" *Renewing Environmental Law*, (Vancouver: February 5, 2011)

<sup>18</sup> Environment Canada. 2008. Recovery Strategy for the Sprague's Pipit (*Anthus spragueii*) in Canada. Species at Risk Act Recovery Strategy Series. Environment Canada, Ottawa  
<[http://www.sararegistry.gc.ca/virtual\\_sara/files/plans/rs\\_sprague%27s\\_pipit\\_final\\_0408\\_e.pdf](http://www.sararegistry.gc.ca/virtual_sara/files/plans/rs_sprague%27s_pipit_final_0408_e.pdf)>

<sup>19</sup> 2009 FC 710

SARA stipulates that the respondent must make the determination of critical habitat based on the best available information, which is to say the best information that exists at any one point in time. That information may change over time, but the identification of critical habitat cannot be postponed for that reason alone.<sup>20</sup>

While the ELC acknowledges that there are difficulties in identifying all critical habitat of Sprague's Pipit in Alberta this does not relieve Environment Canada of the statutory obligation to use the best available information to identify as much critical habitat as possible without delay.

Based on the information in the recovery strategy, we are not satisfied that the proposed identification, which is limited to federal lands, is not an attempt to circumvent sections 61-63 of the Act which provide for protection of critical habitat on non-federal lands. The failure to identify critical habitat off of federal lands nearly three years after the recovery strategy was first posted prevents an order under s.61 of SARA prohibiting the destruction of that habitat. Moreover section 62 would empower the Minister to acquire lands for the purpose of protecting the species and section 63 would require steps taken to protect that critical habitat to be included in the public registry.

The proposed amendment to the Sprague's Pipit Recovery Strategy does not explain why critical habitat was not identified on provincial lands. The proposed amendment explains its methodology as having only considered those sites where "detailed occupancy and demographic information exists, sites (e.g., quarter-sections), or portions of sites, known to be important to pipits were identified based on persistence." This explanation is inconsistent with the definition of critical habitat in SARA. SARA does not require detailed demographic and occupancy information, nor does it require that a site be "important to" a species or that a species persist on a site long-term. Instead, critical habitat is "the habitat that is necessary for the survival or recovery of a listed wildlife species."<sup>21</sup> The methodology used in the proposed amendment does not reflect an attempt to search for habitat that has features that Sprague's Pipit requires, i.e. native grassland habitat, habitat that is essential to the Pipit's recovery.<sup>22</sup>

Environment Canada is or ought to be aware that SARA obliges the identification of critical habitat based on the best information that is available, including on provincial lands. Population models and other information in the original recovery strategy is not mentioned in

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<sup>20</sup> *Ibid.* at para 69 [emphasis added]

<sup>21</sup> SARA s.2(1)

<sup>22</sup> A map of remaining native vegetation cover in southern Alberta grassland and parkland can be found at <[http://www.albertapcf.org/PDF\\_Documents/PCAP-06.pdf](http://www.albertapcf.org/PDF_Documents/PCAP-06.pdf)>

the amendment and does not appear to have been used to identify critical habitat. There is no evidence that the location of critical habitat outside CFB Suffield is completely unknown. According to the Alberta Endangered Species Council:

distribution and population trends are monitored by the Breeding Bird Survey in Alberta, and elsewhere within its range. The species has also been well represented in various generalized surveys conducted over a wide range of southern and central Alberta, and in extensive roadside point counts conducted in 2002 by the Canadian Wildlife Service. Many of these studies have documented habitat use, confirming the species' strong preference for native grasslands that are lightly grazed.<sup>23</sup>

It is also possible to identify critical habitat for Sprague's Pipit using Breeding Bird Survey Data, combined with information on native grassland habitats.

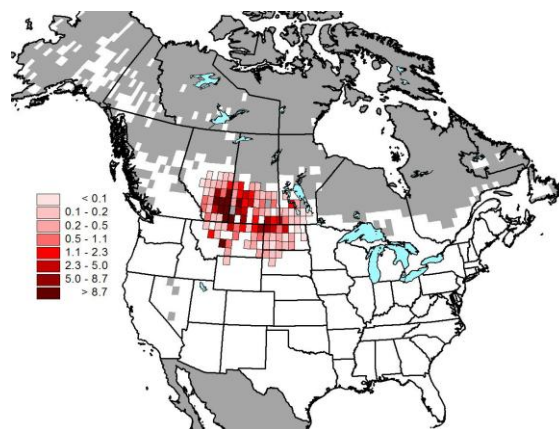


Figure 1: Breeding Bird Survey – Sprague's Pipit habitat<sup>24</sup>

The proposed amendment does not explain why this information has not been used to identify critical habitat outside of federal lands.

Moreover, the criteria used by the recovery team to define critical habitat is restrictive and includes only those areas of upland native prairie that are greater than 65 ha in size, with fair to excellent management, flat topography and limited woody vegetation. This criteria appears to identify only high quality productive habitat, rather than habitat necessary for survival and recovery of the species. No justification is provided in the recovery strategy for how the

<sup>23</sup> Fish and Wildlife Division 2004. Report of Alberta's Endangered Species Conservation Committee: June 2002. Alberta Sustainable Resource Development, Fish and Wildlife Division, Edmonton. At 18.

<sup>24</sup> Breeding Bird Survey, also see COSEWIC, *Assessment and Status Report on the Sprague's Pipit in Canada* (2010) at 7 showing a map of compiled occurrence data from various sources.

[http://www.sararegistry.gc.ca/virtual\\_sara/files/cosewic/sr\\_Sprague%27s%20Pipit\\_0810\\_e.pdf](http://www.sararegistry.gc.ca/virtual_sara/files/cosewic/sr_Sprague%27s%20Pipit_0810_e.pdf)

survival and recovery of the species relates to this criteria or the recovery goals. The ELC notes that **all** habitat that is necessary for the survival and recovery of the species is required by law to be included in the recovery strategy as critical habitat.

The recovery strategy also indicates timelines for obtaining further information on Alberta critical habitat of 2010-2012. It is now three months into 2011 and presumably under this timeline some information would have been collected related to Alberta.

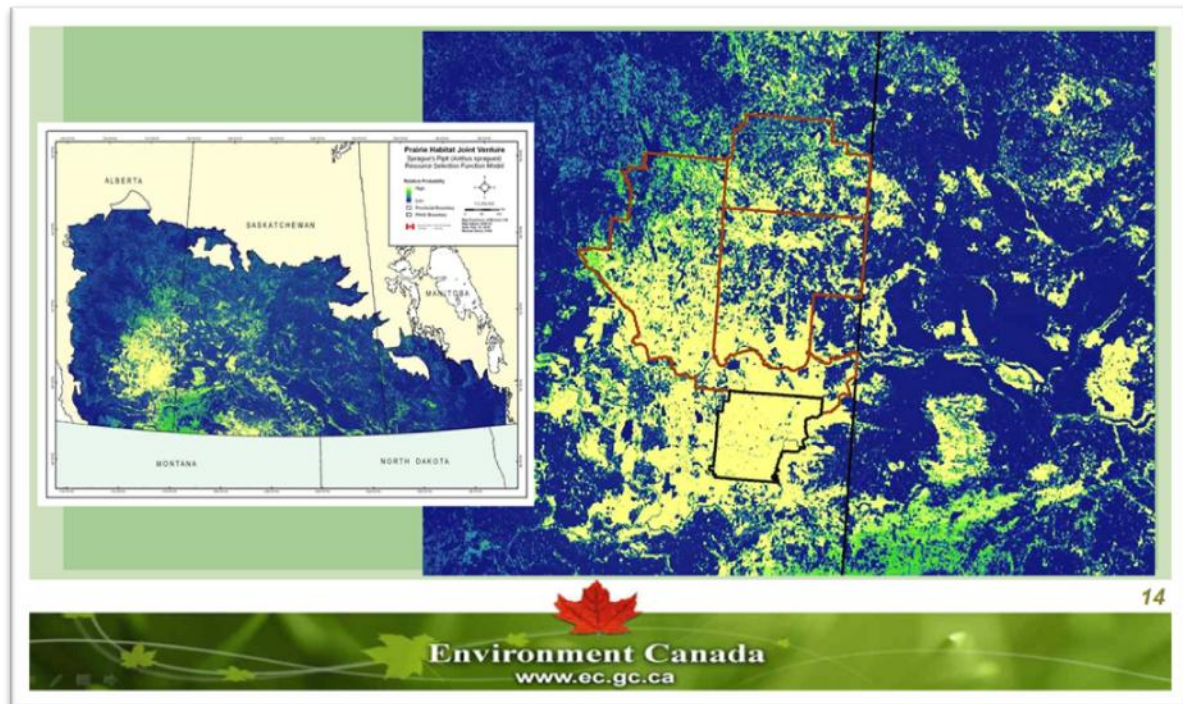


Figure 2: Resource Selection Function Model Map (Stephen Davis, Environment Canada unpublished 2011)

Other habitat modeling for Sprague's Pipit has already been conducted by Environment Canada, as shown above in a presentation by Stephen Davis from Environment Canada. This map of resource selection function models shows that there is a large amount of potential Sprague's Pipit habitat in Alberta and Saskatchewan that is not on federal lands. This is a predictive map for Sprague's Pipit critical habitat that represents at this time the best available information on critical habitat. These areas should be identified as critical habitat in the recovery strategy without delay because Sprague's Pipit is likely to continue to decline even if the existing habitat is protected. Accordingly all existing habitat is necessary to the survival and recovery of the species. In other words, the recovery goal of population abundance and occurrence that was present in the 1980s cannot be achieved without, at a minimum, protecting existing remaining native grassland habitat suitable for the species.

The protection of critical habitat for Sprague's Pipit involves the protection of native prairie grasslands that are extremely important for a variety of threatened and endangered species in Alberta including the Swift Fox, Burrowing Owl, Loggerhead Shrike, Ferruginous Hawk, Long-billed Curlew, McCowan's Longspur and other species. None of these species currently benefits from a recovery strategy that identifies all critical habitat that is necessary for the survival and recovery of the species.

The ELC strongly recommends that all habitat identified in the resource selection function model for Sprague's pipit be identified as critical habitat. Further, the ELC recommends that all habitat identified in the Breeding Bird Survey be identified as critical habitat. If in the future, further studies indicate that this habitat is not necessary for the survival and recovery of the species the critical habitat identification can be refined. This is precisely the precautionary approach required by law under the *Species At Risk Act*. The onus is not on Environment Canada to have certainty that each area identified as critical habitat is necessary for survival and recovery, rather the onus is on Environment Canada to identify all potential critical habitat without delay based on the information it currently has.

If you have any questions or comments about our submission please do not hesitate to contact us.

Yours truly,



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