

CANADA'S RESPONSE

INTRODUCTION

The Secretariat of the Commission for Environmental Cooperation (the "Secretariat") requested that the Government of Canada respond to submission (SEM-06-005) which asserts that Canada is failing to effectively enforce the federal *Species at Risk Act* (SARA) (Annex 1).

Jurisdiction for protecting species at risk is shared in Canada. Parliament has jurisdiction in relation to migratory birds protected by the *Migratory Birds Convention Act, 1994*, terrestrial species on federal lands and aquatic species in fisheries. Provinces and territories have jurisdiction in relation to terrestrial species and for birds (which are not protected by the *Migratory Birds Convention Act, 1994*) on or above provincial Crown and private lands, as well as for aquatic species in provincial/territorial waters.

The federal *Species at Risk Act* (SARA) is a relatively new and complex piece of legislation that requires extensive consultations and collaboration. SARA is the federal government's main legal tool for preventing the extinction of Canadian wildlife, and is key to protecting Canada's biodiversity. The three lead federal agencies for SARA programming are Environment Canada, Fisheries and Oceans Canada and the Parks Canada Agency. The Minister of the Environment is the competent Minister for both Environment Canada and the Parks Canada Agency, and as such is responsible for implementing the Act for migratory birds throughout Canada and for terrestrial species on federal lands. The Minister of Fisheries and Oceans Canada is the competent Minister responsible for implementing the Act for aquatic species at risk.

The first section of this response reviews the procedural history of the submission. In the following section, Canada advises the Secretariat of the pending judicial proceedings respecting s.41 and s.80 of SARA. The following section deals with SARA s.42 recovery timelines. Conclusions are then provided.

CEC SECRETARIAT
RECEIVED
02 / 08 / 2007

1. PROCEDURAL HISTORY

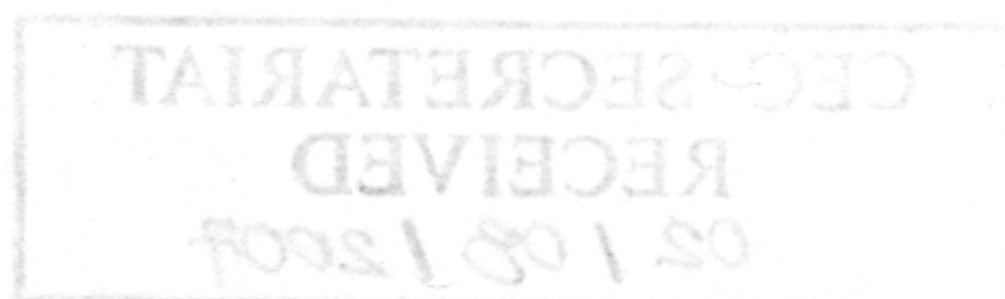
Under Article 14 of the *North American Agreement on Environmental Cooperation* (NAAEC or the "Agreement"), the Secretariat may consider a submission from a non-governmental organization or person asserting that a Party to the Agreement "is failing to effectively enforce its environmental law. . . ." If the submission meets the requirements outlined in Article 14(1) of the Agreement, the Secretariat then determines whether the submission merits requesting a response from the Party named in the submission.

Pursuant to Article 14 of the NAAEC, the Submitters filed a petition with the Commission for Environmental Cooperation on October 6, 2006. The Submitters assert that Canada is failing to effectively enforce SARA provisions pertaining to listing species, developing recovery strategies, and protecting the Northern Spotted Owl (found in British Columbia) and the Woodland Caribou in the province of Alberta.

After reviewing the submission, the Secretariat concluded that it meets the criteria set out in Article 14(1) of NAAEC, and, in light of the factors listed in Article 14(2) of the NAAEC, subsequently requested a response from Canada on the following assertions:

- 1) Canada is failing to effectively enforce SARA's recovery planning requirements as regards identification of critical habitat (s.41) and mandatory planning timelines (s.42);
- 2) Canada is failing to effectively enforce the emergency order provisions (s.80) with respect to the Northern Spotted Owl in British Columbia and the Woodland Caribou in Alberta.

The reasons for the Secretariat's determination are outlined in its December 11, 2006 *Determination in accordance with Articles 14(1) and (2) of the North American Agreement for Environmental Cooperation* document, which was submitted to the Government of Canada for response.



2. PENDING JUDICIAL PROCEEDINGS and DISCRETIONARY MINISTERIAL POWER - SARA s.41 AND s.80

Assertions pertaining to SARA s.41 (identification of critical habitat) and SARA s.80 (emergency orders with respect to the Northern Spotted Owl) are currently the subject of pending judicial proceedings in Canada. Details of these proceeding are outlined below. In accordance with Article 14(3) (a) of NAAEC, Canada requests that the Secretariat proceed no further on these matters in order to avoid duplication or interference with these proceedings. Further, it is to be noted that SARA s. 80 gives discretion as well as power that is legislative in nature to competent Ministers. Article 45(1)(a) of the NAAEC states that action or inaction of a Party is not a failure to enforce where it reflects a reasonable exercise of discretion.

2.1 SARA – s.41 (critical habitat)

2.1.1 Background

Section 41 of SARA sets out the following provisions:

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

- (a) a description of the species and its needs that is consistent with information provided by COSEWIC;
- (b) 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;
- (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;
- (c.1) a schedule of studies to identify critical habitat, where available information is inadequate;
- (d) a statement of the population and distribution objectives that will assist the recovery and survival of the species, and a general description of the research and management activities needed to meet those objectives;
- (e) any other matters that are prescribed by the regulations;
- (f) a statement about whether additional information is required about the species; and
- (g) a statement of when one or more action plans in relation to the recovery strategy will be completed.

(2) If the competent minister determines that the recovery of the listed wildlife species is not feasible, the recovery strategy must include a description of the species and its needs, an identification of the species' critical habitat to the extent possible, and the reasons why its recovery is not feasible.
Multi-species or ecosystem approach permissible

(3) The competent minister may adopt a multi-species or an ecosystem approach when preparing the recovery strategy if he or she considers it appropriate to do so.
Regulations

(4) The Governor in Council may, on the recommendation of the Minister after consultation with the Minister responsible for the Parks Canada Agency and the Minister of Fisheries and Oceans, make regulations for the purpose of paragraph (1)(e) prescribing matters to be included in a recovery strategy.

2.1.2 Response

With respect to SARA s.41 (critical habitat identification), the Submitters assert that Canada is failing to enforce the recovery planning provisions of SARA, and to identify critical habitat under s.41(1)(c).

On December 4, 2006, Nature Canada and other environmental non-government organizations filed an application with the Federal Court of Canada for a judicial review of a decision by the Minister of the Environment to post a recovery strategy for the endangered Piping Plover (*circumcinctus* population) which, the Applicants contend, does not comply with certain requirements in SARA. The Applicants submit that the Minister released the recovery strategy for the Piping Plover (*circumcinctus* population) notwithstanding it failed to comply with s.41(1)(c) of SARA in that it failed to identify the Piping Plover's critical habitat to the extent possible. In addition, the Applicants suggest that the failure to identify critical habitat in the recovery strategy arose from an intention by the provinces and the federal government to disregard the SARA legislative requirements for identification and protection of critical habitat while finalizing a critical habitat policy applying to SARA. The Applicants suggest that this general disregard resulted in a failure to identify critical habitat not only in the piping plover recovery strategy, but also in the majority of recovery strategies posted on the SARA Public Registry. The Notice of Application to the Federal Court of Canada is provided under Annex 2.

Given that this matter is currently before the Federal Court of Canada, the Government of Canada is of the opinion that further consideration of s.41 by the Secretariat would be inappropriate as it would be duplicative and interfere with the pending judicial proceedings.

2.2 SARA – s.80 (emergency order)

2.2.1 Background

SARA provides authority for the federal government to take emergency action to protect a listed species or its habitat anywhere in Canada. If a competent Minister is of the opinion that a listed wildlife species faces imminent threat to its survival or recovery, the competent Minister must recommend to the Governor in Council that an emergency order be issued to provide for the protection of the listed species. The authority for emergency orders is described in s.80 of SARA:

Emergency order:

80. (1) The Governor in Council may, on the recommendation of the competent minister, make an emergency order to provide for the protection of a listed species.

Obligation to make a recommendation:

80. (2) The competent minister must make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery.

Equivalent measures:

81. Despite subsection 80(2), the competent minister is not required to make a recommendation for an emergency order if he or she is of the opinion that equivalent measures have been taken under another Act of Parliament to protect the wildlife species

Subsection 80(4) of SARA states that an emergency order may identify the habitat that is necessary for the survival or recovery of the species in an area, may include provisions requiring action to protect the species and that habitat and may include provisions prohibiting activities that may adversely affect the species and that habitat. Subsection 80(3) of SARA also states that the Minister must consult all other competent Ministers before making the recommendation for an emergency order. Additional commitments for consultation and cooperation are found within the 1996 *Accord for the Protection of Species at Risk* and the Canada/British Columbia bilateral agreement on species at risk.

2.2.2 Response

With respect to s.80 (emergency orders), the Submitters assert that Canada is failing to effectively enforce the emergency order provision of SARA s.80 with respect to the Northern Spotted Owl in British Columbia and the Woodland Caribou in Alberta.

In the case of the Northern Spotted Owl, the matter is currently before the Federal Court of Canada. On September 15, 2006, the Western Canada Wilderness Committee and other environmental non-government organizations filed an application with the Federal Court of Canada that submits that the Minister of the Environment failed to exercise the statutory duty pursuant to s.80 (2) of SARA to recommend that the Governor in Council make an emergency order to provide for the protection of the Northern Spotted Owl in British Columbia. The Notice of Application to the Federal Court of Canada is provided under Annex 3.

Canada's response provides a record of the current situation respecting Woodland Caribou protection and recovery planning in Alberta (see Annex 4). However, it is the Government of Canada's position that a judgement on the Northern Spotted Owl litigation will affect the interpretation of SARA s.80(2) in a general sense. This case will be the first judicial consideration of this subsection. Thus, the results of these judicial proceedings could very well influence how the Minister of Environment approaches matters under s.80(2) in the future, including the Woodland Caribou.

Further, it is to be noted that SARA s. 80 gives discretionary and legislative power to competent Ministers. Article 45(1)(a) of the NAAEC states that action or inaction of a Party is not a failure to enforce where it reflects a reasonable exercise of discretion. Also, it is important to note that the process under section 80 can lead to the making of an Order in Council, a legislative act, which could result in the setting of new standards. Legislative powers should not be considered by the Secretariat.

3. Case Specific Incidents -- SARA s. 42

3.1 Background

Recovery planning timelines are outlined in SARA (s.42). Depending on the species status and the date of listing, the timelines for the development of recovery strategies are as follow:

42. (1) Subject to subsection (2), the competent Minister must include a proposed recovery strategy in the public registry within one year after the wildlife species is listed, in the case of a wildlife species listed as an endangered species, and within two years after the species is listed, in the case of a wildlife species listed as a threatened species or an extirpated species.

(2) With respect to wildlife species that are set out in Schedule 1 on the day section 27 comes into force, the competent minister must include a proposed recovery strategy in the public registry within three years after that day, in the case of a wildlife species listed as an endangered species, and within four years after that day, in the case of a wildlife species listed as a threatened species or an extirpated species.

Upon proclamation of SARA in 2003, 190 species were added to the legal list of species at risk as extirpated, endangered or threatened. Since proclamation, over 195 extirpated, endangered or threatened species assessments have been completed, and a total of 303 species are now listed under these three categories. Recovery strategies and action plans must be prepared for these species. Throughout the recovery planning process, SARA requires extensive consultations with provinces and territories and with stakeholders as well as significant engagement of Aboriginal peoples. It is important to note that recovery strategies can address more than one species, and that the recovery documents must be developed with an appropriate level of scientific expertise and biological information.

Under the national 1996 *Accord for the Protection of Species at Risk* (see Annex 5), federal and provincial/territorial governments (excluding Québec) agreed to participate in a national recovery program. Under this program, governments that share responsibility for a species determine the roles and responsibilities for developing recovery planning documents. Recovery strategies for species for which the federal government has management responsibility are led by the federal government and the responsible competent Minister in collaboration with the provinces and territories, where applicable. Similarly, recovery strategies for which a province/territory has management responsibility are typically developed by the responsible province/territory in collaboration with the federal government.

Provinces and territories lead recovery planning (development of recovery strategies, action plans and management plans) for approximately 60% of all SARA-listed species (73% of all terrestrial SARA-listed species) in addition to other protected species under provincial and territorial legislation. A recovery planning document developed by a province/territory can be

adopted under SARA if it meets SARA content and process requirements. The federal government is responsible for ensuring that these requirements are met.

At the outset, it is important to note that with respect to recovery planning requirements, the relevant enforceable element of these requirements is related to the protection of critical habitat if it was identified in the recovery strategy. To date, two recovery strategies have identified critical habitat: the recovery strategies for the Roseate Tern (bird) and the Horsetail Spike Rush (plant). Critical habitat identification can also occur in the action plan phase of recovery planning. While recovery strategies set timelines for the preparation of an action plan, there are no legislated timelines associated with developing the plans themselves.

3.2 Response

With respect to section 42 of SARA, which establishes a requirement to post recovery strategies within a certain time, the submitters have made general allegations with respect to a failure to take action. The Submitters state that with regard to newly listed species, as of September 29, 2006 only 23 recovery strategies out of 133 that were due were posted. The submission goes on to refer to an additional 103 strategies that are due in 2007 and raises the concern that the deadlines will not be met.

Canada is of the view that any review of a Party's enforcement actions under the citizen submission process must be based on facts. As such, the allegations concerning whether required strategies due in 2007 will in fact be provided in 2007 is speculation and should not appropriately be considered in the citizen submission process.

A further and equally serious concern arises, however, concerning the lack of specificity with respect to the allegation of failure to provide recovery strategies in a timely manner. The position of Canada is that the scope and purpose of Articles 14 and 15 are not to examine broad based allegations but to examine particular fact-based incidents. The lack of actual fact-based incidents precludes the Canadian government from addressing the allegations in a factual manner. Canada is of the view that broad based allegations should not be considered by the Secretariat.

CONCLUSION

Some assertions identified in the submission, and for which the CEC Secretariat requests a response, are the subject of pending judicial proceedings. Specifically, these proceedings relate to SARA s.41 (the identification of critical habitat) and to SARA s.80 (emergency order for the Northern Spotted Owl in the province of British Columbia). Canada requests that, pursuant to NAAEC Article 14 (3), the Secretariat should proceed no further on these two issues, as there will be duplication and interference with the pending judicial proceedings. Further, it is Canada's position that a judgement on the Northern Spotted Owl litigation will affect the interpretation of SARA s.80(2) in a general sense thus effecting the case of the Woodland Caribou. Canada further states that SARA s.80, given its legislative and discretionary aspects, should not be examined by the Secretariat.

Regarding SARA s.42, it is the position of Canada that the scope and purpose of Articles 14 and 15 are not to examine broad based allegations of non-effective enforcement but to examine particular fact based incidents. The lack of actual incidents precludes the Canadian government from addressing the allegations in a factual manner.