

SUBMISSION TO THE COMMISSION FOR ENVIRONMENTAL COOPERATION

Pursuant to Article 14, *North American Agreement On Environmental Cooperation*

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On behalf of

**Sierra Club (U.S. and Canada), Nature Canada, the David Suzuki Foundation,
Conservation Northwest, Environmental Defence, ForestEthics,
Ontario Nature, Western Canada Wilderness Committee, BC Nature (formerly Federation
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Table of Contents

I. SUMMARY 1

II. BACKGROUND 1

III. THE *SPECIES AT RISK ACT (SARA)* 1

IV. FAILURE TO ENFORCE LISTING UNDER THE SARA 2

A. Failure to enforce the process for listing 3

B. Socio-economic considerations in listing decisions 7

V. FAILURE TO ENFORCE RECOVERY PLANNING UNDER THE SARA 8

A. Recovery planning timelines are not being respected 8

B. Recovery planning requirements are not being met 9

VI. FAILURE TO ENFORCE THE SARA NATIONALLY 11

A. Failure to enforce the “safety net” 11

B. Failure to apply emergency order provisions 13

VII. NAAEC ARTICLE 14 REQUIREMENTS 15

Table of Tabs 18

I. SUMMARY

This submission asserts, for the purposes of Articles 14 and 15 of the North American Agreement on Environmental Cooperation (*NAAEC*), the failure of the Canadian federal government to effectively enforce the *Species at Risk Act*¹ (*SARA*) with respect to at least 197 of the 529 species identified as at risk in Canada, so as to frustrate the Act's purpose: preventing wildlife species from becoming extirpated or becoming extinct and providing for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity.²

More particularly, as set out below, the Submitters allege that Environment Canada, Parks Canada Agency, the Minister of the Environment and the Department of Fisheries and Oceans are failing to enforce the *SARA* with regard to Listing, Recovery Planning, and national enforcement through the "Safety Net" and Emergency Orders.

II. BACKGROUND

While Canada is internationally renowned for its natural beauty, the country's natural spaces are becoming increasingly degraded. This is illustrated by the circumstance of over 500 species being identified as at risk, including Canadian icons like the Grizzly Bear, Beluga Whale, Polar Bear and Caribou, as well as species like the Spotted Owl and the Small-flowered Sand Verbena.

Unfortunately, Canada may be doing more to preserve its reputation as a country of unspoiled biodiversity than to actually protect biodiversity. For example, while Canada was the first industrialized nation to ratify the *Convention on Biological Diversity*,³ it took Canada nearly a decade to address its commitment under the Convention to pass legislation, such as the *SARA*, to protect at-risk species.^{4,5} Now, as this submission sets out, Canada is failing to enforce the *SARA*.

III. THE SPECIES AT RISK ACT (SARA)

The *SARA* finally received Royal Assent on December 12, 2002 and came into force in three phases. On March 24, 2003, sections 134 to 136 and 138 to 141 that set out amendments to other

¹ Species at Risk Act, 2002, c.29 ("SARA")

² *SARA*, s.6

³ Convention on Biological Diversity – Concluded at Rio de Janeiro, 5 June 1992. Entered into force, 29 December 1993, 31 I.L.M. 818 (1992) (the "Convention")

⁴ Two federal endangered species bills died on the Order Paper when federal elections were called: C-65, the Canada Endangered Species Protection Act, died on the Order Paper when the 1997 federal election was called, and Bill C-33, the Species at Risk Act, died on the Order Paper when the 2000 federal election was called. The former Bill C-5, the Species at Risk Act, died on the Order Paper when the government prorogued Parliament in September 2002. The bill was reintroduced under a new parliamentary procedure which allowed the bill to be reinstated in the Senate in October, 2002, i.e. the bill did not have to go through three readings again in the House of Commons.

⁵ The Convention contains 13 specific requirements for the preservation of biological diversity including Article 8 which addresses "in situ" or "on the ground" conservation and requires conserving and protecting biodiversity in its natural state. This includes Article 8(f), which requires the rehabilitation and restoration of degraded ecosystems and the recovery of threatened species, and 8(k), which requires developing or maintaining necessary legislation and/or other regulatory provisions for the protection of threatened species and populations.

national wildlife legislation came into force. These provisions are not the subjects of this Submission.

On June 5, 2003, sections 2 to 31, 37 to 56, 62, 65 to 76, 78 to 84, 120 to 133 and 137 came into force. This brought into effect many provisions in that part of the *SARA* entitled, “Measures to Protect Listed Wildlife Species” and which this Submission alleges are not being enforced. This includes listing (ss.27-31) and recovery planning provisions (ss.37-46), as well as the “emergency order” provision of the *SARA* (s.80).

On June 1, 2004, the remainder of the *SARA*’s sections came into force: sections 32 to 36, 57 to 61, 63, 64, 77, and 85 to 119. These include the prohibitions against harming endangered or threatened species (ss.32-36), which this Submission alleges are also not being enforced, and the enforcement provisions (ss.85-19).

An overview of how the foregoing provisions work together to address species endangerment is as follows: a scientific body for the classification of species, the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), is created which assesses the status of species, species are “listed” on the official list of species that are extirpated, endangered, threatened or of special concern⁶ (ss. 27-31) which triggers obligations under the Act including prohibitions against harm (ss. 32-36), and protections of residence or habitat (ss. 33-36 and ss.56-64), recovery planning and critical habitat identification (ss.37-46), and recovery plan implementation (action planning) (ss.47-64).⁷ The *SARA* also contains a provision to enable protecting species and habitat on an emergency basis (s.80).

Responsibility for enforcing and implementing the *SARA* lies primarily with Minister of the Environment and Environment Canada (EC), through its agency the Canadian Wildlife Service, as well as with the Department of Fisheries and Oceans (DFO), and the Parks Canada Agency. The Minister of the Environment also has direct responsibility for enforcing some provisions of the *SARA*. As set out below, the Submitters allege that the Government of Canada, including these ministries, and the Minister of the Environment, is failing to enforce the *SARA* with regard to Listing, Prohibitions, Recovery Planning, and national enforcement through the “Safety Net” and Emergency Orders.

IV. FAILURE TO ENFORCE LISTING UNDER THE SARA

Listing is the pre-requisite to protection under the *SARA*. Unless a species has been included on the legal list under the Act – the “List of Wildlife Species at Risk” it will not be legally protected.⁸ As set out below, the Submitters allege that the Government of Canada is failing to enforce the listing provisions of the Act.

⁶ “endangered species” means a wildlife species that is facing imminent extirpation or extinction; “extirpated species” means a wildlife species that no longer exists in the wild in Canada, but exists elsewhere in the wild; “species of special concern” means a wildlife species that may become a threatened or an endangered species because of a combination of biological characteristics and identified threats; “threatened species” means a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction - *SARA*, s.2

⁷ A detailed review of the *SARA* is contained in Smallwood, K. *A Guide to Canada’s Species at Risk Act*, (Vancouver: Sierra Legal Defence Fund, 2003) at:

http://www.sierralegal.org/reports/SARA_Guide_May2003.pdf

⁸ *SARA*, s.25(1)

A. Failure to enforce the process for listing

The process for listing envisioned by the *SARA* begins with the COSEWIC, which the *SARA* formally establishes.⁹ One of COSEWIC's principle functions is to assess the status of each wildlife species considered by COSEWIC to be at risk as extinct, extirpated, endangered, threatened or of special concern.¹⁰ Thereafter, it must provide such assessments to the Minister of the Environment and the Canadian Endangered Species Conservation Council comprised of the Minister of the Environment, the Minister of Fisheries and Oceans, the Minister of Canadian Heritage, and the ministers of provincial and territorial governments responsible for conservation of species.¹¹ On receiving a copy of an assessment of the status of a wildlife species from COSEWIC, the Minister of the Environment must, within 90 days, publish a report on how the Minister intends to respond to the assessment and, to the extent possible, provide time lines for action.¹²

The *SARA* s.27 sets out the steps for inclusion of species on the legal list:

27. (1) The Governor in Council may, on the recommendation of the Minister, by order amend the List in accordance with subsections (1.1) and (1.2) by adding a wildlife species, by reclassifying a listed wildlife species or by removing a listed wildlife species, and the Minister may, by order, amend the List in a similar fashion in accordance with subsection (3).

(1.1) Subject to subsection (3), the Governor in Council, within nine months after receiving an assessment of the status of a species by COSEWIC, may review that assessment and may, on the recommendation of the Minister,

- (a) accept the assessment and add the species to the List;
- (b) decide not to add the species to the List; or
- (c) refer the matter back to COSEWIC for further information or consideration.

(1.2) Where the Governor in Council takes a course of action under paragraph (1.1)(b) or (c), the Minister shall, after the approval of the Governor in Council, include a statement in the public registry setting out the reasons.

(2) Before making a recommendation in respect of a wildlife species or a species at risk, the Minister must

- (a) take into account the assessment of COSEWIC in respect of the species;
- (b) consult the competent minister or ministers; and
- (c) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of a wildlife species, consult the wildlife management board.

(3) Where the Governor in Council has not taken a course of action under subsection (1.1) within nine months after receiving an assessment of the status of a species by

⁹ *SARA*, s.14

¹⁰ *SARA*, s.15

¹¹ *SARA*, s.7

¹² *SARA*, s.25(3)

COSEWIC, the Minister shall, by order, amend the List in accordance with COSEWIC's assessment.

The effect of sub-sections 27(1.1) and 27(3) is to create a 9-month time limit for listing species which begins when COSEWIC completes an assessment. Further, sub-section 27(3) creates a "reverse onus" scenario, requiring the automatic listing of species if the Governor in Council has not made a decision within 9 months. Thus, a timely response is intended so as to address the threat posed to at-risk species, an approach echoed throughout the *SARA*.

The Submitters submit, however, that the federal government is failing to enforce the 9-month timeline for listing, as well as frustrating the listing process by considering matters not contemplated by the *SARA*.

To explain, after the *SARA* came into force, the federal Government realized that it was not adequately prepared to implement the *SARA*. The Government therefore began interpreting the *SARA* to allow it to delay the 9-month listing requirement. They did so by interpreting the *SARA* as providing the Minister of the Environment with discretion to dictate when the Governor in Council "receives" the COSEWIC assessments, so as to delay the triggering of the 9-month time limit under s.27. For example, the Department of Fisheries and Oceans placed the following interpretation of the *SARA* listing process on their website:

The Minister of the Environment must make a response in the *SARA* Public Registry within 90 days of receiving an assessment from COSEWIC, outlining the actions he intends to take in light of the assessment. In many cases, the response will be followed by a process of consultation with stakeholders, interested Canadians and the public, during which the Minister will develop his recommendation for further action to be presented to the Governor in Council¹ (GIC). Once he has made his recommendation, GIC has nine months to act upon it. If the decision is to list the species, the order will be posted in the Canada Gazette Part I for further public comment, and will be included in the *SARA* Public Registry. If the decision is taken not to list the species, the reasons will be posted in the *SARA* Public Registry. If no decision is taken by the end of nine months, the Minister will list the species in Schedule I of the *Species at Risk Act* in accordance with the COSEWIC assessment.¹³

Environment Canada followed suite by posting a "Backgrounder: *Species at Risk Act* Listing Process":

2. COSEWIC sends its assessment of the species to the Minister of the Environment. The assessment and the reasons for it are also posted in the Public Registry.
3. The Minister of the Environment (MOE) has 90 days to publish, in the *SARA* Public Registry, a report on how the Minister intends to respond to the COSEWIC assessment and, to the extent possible, provide time lines for action.
4. The MOE forwards COSEWIC assessments to GIC and when they confirm receipt, the 9 month clock starts.¹⁴

¹³ http://www-comm.pac.dfo-mpo.gc.ca/pages/consultations/SARA/involve_e.htm, accessed Aug 16, 2005

¹⁴ http://www.ec.gc.ca/press/2004/040423-2_b_e.htm, accessed Sept 2, 2005

The Submitters submit, however, that there is a clear record both for the proper interpretation of the *SARA* to require a 9 month listing period and to support the submission that, only after the *SARA* was passed and the Canadian government realized it was behind its implementation of the *SARA* and would not be able to prepare for the 9-month listing process, did the Canadian government start to discuss options for frustrating the 9-month legal requirement.

This is illustrated by documents obtained by the Submitters pursuant to requests made under the *Access to Information and Protection of Privacy Act*. Attached at Tab 1 is an Environment Canada interdepartmental email attaching a briefing note “for the DM [Deputy Minister] for the meeting with the PCO [Privy Council Office] and DFO [Department of Fisheries and Oceans.” This is dated January 21, 2004, 6 months *after* the *SARA* had been passed. The briefing note addresses the issue of:

“how to implement the legal listing process under *SARA* in a way which addresses Parliament’s intention that government move expeditiously, while at the same time addressing DFO’s concern regarding the need for sufficient time to undertake consultations...”.

Thereafter, the briefing note sets out options for listing species noting, in option 1, that immediately beginning the 9 month listing deadline:

“is closest to the political understanding that the 9-month timeline for a listing begins with COSEWIC’s submission of its species assessments to the Minister of the Environment...”

The Submitters state that this letter is clear acknowledgement by the Canadian government that the legislation intended the *SARA* to permit only a 9-month delay between COSEWIC assessment and Governor in Council listing, but that government officials intended to disregard this legal requirement. Indeed, the option to delay listing set out in this briefing note was ultimately chosen.

Tab 2 contains a detailed discussion of how the government’s interpretation of section 27 is contrary to the letter of the *SARA* and to the Canadian Parliament’s intent in its passing. For ease of reference, this discussion is summarized as follows:

- There is a clear record of the intention of the Canadian Parliament to ensure that only 9 months passes from COSEWIC assessment to a Governor in Council decision on species listing. This is based on the plain wording and structure of the *SARA* itself, statements as to legislative intention made by parliamentarians when the *SARA* was passed, and documents obtained pursuant to the *Access to Information and Protection of Privacy Act* indicating the position the Government of Canada to avoid its obligations under the timelines *after the SARA was passed*.
- Regarding the plain wording, in the context of the *SARA*’s attention to timelines throughout and the attention paid to the lack of a timeline for action plans as an exception, a clear legislative intent emerges to ensure each species progresses through the various steps in a controlled and timely manner. This reflects the fact that timeliness is critical to achieving the purposes of the Act (section 6 and preamble).
- Debate in the Canadian House of Commons indicated unanimous understanding of the intention that there be a fixed timeline for listing under the Act. For example, in the

debate in House at report stage (March 21, 2002 -1345), Mr. Larry Spencer (Regina--Lumsden--Lake Centre, Canadian Alliance, stated:

The Standing committee on Environment and Sustainable Development finished its study of amendments to Bill C-5 at the end of November. The Canadian Alliance worked hard to achieve several key changes to the bill. Most important of these was the reverse onus listing. It would give cabinet the final decisions about the listing of species but it would have to make them within a limited time. Listing decisions it did not make within the allowed time would default to the list compiled by the scientists.

- Concluding that the *SARA* provides for an arbitrary delay prior to cabinet ‘receiving’ COSEWIC’s assessments for the purpose of the nine-month listing timeline renders the timelines in s.27 meaningless. More particularly, section 27(3), the reverse onus provision, is rendered meaningless because, if the Minister can arbitrarily and indefinitely delay sending an assessment to cabinet, why would the *SARA* require Cabinet to act within a specified time? The reverse onus provision represented a compromise between a science-based listing and the ability of the Governor in Council to consider the socio-economic implications of listing. For this compromise to have any meaning, the 9-month timeline must have meaning, i.e., that the 9-month timeline applied from when COSEWIC completed its assessment. In other words, if the 9-month listing requirement does not apply, the reverse onus clause is meaningless.

Since the Canadian government’s failure to enforce the *SARA*’s listing provisions, 46 species¹⁵ have undergone or are in the process of undergoing ‘extended listing consultations’, all of which are marine species for which the Department of Fisheries and Oceans (DFO) has management responsibility. In effect, the Government’s interpretation of the *SARA* permits arbitrary and unlimited delay in the listing of at-risk species under the *SARA*, regardless of the level of endangerment (see next section). This, the Submitters allege, constitutes a failure by Canada to effectively enforce the *SARA* listing process with respect to a total of 46 species.

¹⁵ These species are: Atlantic Cod (Arctic population), Atlantic Cod (Laurentian North population), Atlantic Cod (Maritimes population), Atlantic Cod (Newfoundland and Labrador population), Bocaccio, Channel Darter, Coho Salmon (Interior Fraser population), Cusk, Harbour Porpoise (Northwest Atlantic population), Lake Winnipeg Physa Snail, Northern Bottlenose Whale, Shortjaw Cisco, Beluga Whale (Eastern Hudson Bay population), Beluga Whale (Ungava Bay population), Beluga Whale (Cumberland Sound population), Beluga Whale (Eastern High Arctic – Baffin Bay population), Beluga Whale (Western Hudson Bay population), Porbeagle, White Sturgeon (Lower Fraser population), White Sturgeon (Middle Fraser population), White Sturgeon (Kootenay population), White Sturgeon (Nechako population), White Sturgeon (Upper Columbia population), White Sturgeon (Upper Fraser population), Striped Bass (St. Lawrence Estuary population), North Pacific Right Whale, Winter Skate (Southern Gulf population), Winter Skate (Eastern Scotian Shelf population), Shortnose Cisco, Bowhead Whale (Davis Strait – Baffin Bay population), Bowhead Whale (Hudson Bay – Foxe Basin population), Bowhead Whale (Bering – Chuckchi – Beaufort population), Fin Whale (Pacific population), Fin Whale (Atlantic population), Black Redhorse, “Eastslope” Sculpin (St. Mary and Milk River populations), Striped Bass (Bay of Fundy population), Striped Bass (Southern Gulf of St. Lawrence population), Narwhal, Winter Skate (Georges Bank, Western Scotian Shelf, Bay of Fundy population), Bering Cisco, Grass Pickerel, Green Sturgeon, Shortnose Sturgeon, and Upper Great Lakes Kiyi.

B. Socio-economic considerations in listing decisions

Moreover, the decision to disregard the spirit and intent of the *SARA* and engage in extended consultations is aggravated by the nature of those consultations, which are conducted not solely with regard to scientific analyses of the COSEWIC assessments but with regard to socio-economic and political considerations. In effect, what was intended by Parliament to be a science-based activity of COSEWIC completing the assessments, followed by a political process of the Governor in Council deliberating on whether to list a species (including considering socio-economics) has been further diluted by the Minister of the Environment undertaking a socio-economic analysis and deciding, on that basis, whether to forward the COSEWIC assessments to the Governor in Council. As a result, to date, 22 species have been denied inclusion in the *SARA* list, despite scientific evidence from COSEWIC showing their risk of extinction.^{16,17}

Supporting the notion that only science-based factors are to be taken into consideration prior to Cabinet's assessment is the fact that, when the *SARA* was brought into force in 2003, it adopted COSEWIC's list of 233 species, and their status, as the first Schedule 1 of species to which the *SARA* applied, and did so without consideration of socio-economic consequence of listing. As the *SARA* is now being applied, those original species are the only to enjoy the intended science-based listing.

(Again, Tab 2 contains the legal analysis of the government's breach of the 9-month listing requirements with regard to socio-economic considerations.)

To summarize the argument: the Submitters take the position that section 27 of the *SARA* requires that species be listed within 9 months and does not admit an extended consultation by the Minister of the Environment. Additionally, there is no jurisdiction for the Minister of the Environment to consider the socio-economic consequences of listing in determining whether or not to recommend to the federal Cabinet to list a species. By creating indefinite timelines and undertaking socio-economic assessments of the implications of species listing prior to the statutory 9-month time frame for discussion by the federal Cabinet, the Government of Canada is failing to enforce the listing provisions of the *SARA*. The consequences of this failure to enforce, by the design of the *SARA* which requires listing as a precondition to all protections and recovery measures that flow from the Act, is to jeopardize the *SARA* in its entirety.

For example, the *SARA*'s "general prohibitions" state that "no person shall kill, harm, harass, capture or take an individual of a wildlife species that is listed...and no person shall damage or destroy the residence of one or more individuals of a wildlife species that is listed."¹⁸ If a species

¹⁶ These species are: Grizzly Bear (Northwestern population), Polar Bear, Sockeye Salmon (Cultus population), Sockeye Salmon (Sakinaw population), Wolverine (Western population), Atlantic Cod—(Laurentian North population), Atlantic Cod (Maritimes population), Atlantic Cod (Newfoundland and Labrador population), Peary Caribou, Plains Bison, Porsild's Bryum, Barren-ground Caribou (Dolphin and Union population), Coho Salmon (Interior Fraser population), White Sturgeon, Porbeagle, Beluga Whale (Ungava Bay population), Beluga Whale (Cumberland Sound population), Beluga Whale (Eastern Hudson Bay population), Beluga Whale (Western Hudson Bay population), Beluga Whale (Eastern High Arctic-Baffin Bay population), and Verna's Flower Moth.

¹⁷ Orders giving notice of decisions not to add certain species to the list of endangered species can be found at: http://www.SARAreistry.gc.ca/regs_orders/showASCII_e.cfm?ocid=3954, http://www.SARAreistry.gc.ca/regs_orders/showHTML_e.cfm?ocid=1473, and http://www.SARAreistry.gc.ca/regs_orders/showHTML_e.cfm?ocid=1345

¹⁸ *SARA*, s.32, 33 (emphasis added)

is never listed, then it or its residence is never afforded legal protection, and the potential for its recovery is severely diminished.

Because listing is fundamental to achieving *SARA*'s purpose of providing for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity,¹⁹ the Canadian government's failure to enforce the listing provisions of the *SARA* under section 27 has resulted in the denial of listing for 22 species to date and, therefore, a denial of the *SARA*'s protections for these species which COSEWIC has identified as at-risk.

V. FAILURE TO ENFORCE RECOVERY PLANNING UNDER THE SARA

There are 529 species listed by COSEWIC as at risk, ranging from Woodland Caribou to Wolverine to Spotted Owl. The timely development of effective recovery strategies for these species is essential to enable Canada to meet its commitments to the conservation of biodiversity. This goal is being frustrated by the Canadian government's failure to enforce the recovery planning provisions of the *SARA*, particularly the failure to follow legislated timelines and the failure to identify critical habitat.

A. Recovery planning timelines are not being respected

Once a species is listed, the *SARA* requires recovery planning to be undertaken. Recovery strategies are the primary tool for mapping and bringing about the actions needed to reverse the decline of species at risk and chart their way to recovery. Within *SARA*, the fact that recovery strategies have a mandatory time-line makes them pivotal for laying the foundation for recovery efforts to happen in a timely manner.

The *SARA* sections 37 to 46 set out the process of recovery planning, the content of recovery strategies (addressed below), and the timing of recovery planning. Regarding timing, section 42(2) describes the timing for both newly listed species, as well as for species that were listed by COSEWIC when the listing section of the *SARA* came into force:

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.

So, for example with regard to endangered species, newly listed species must have recovery strategies posted in the public registry within 1 year of listing whereas endangered species that were listed when the Act came into force must have recovery strategies posted within 3 years of the section coming into force which was June 3, 2003.

¹⁹ *SARA*, s.6

But with regard to newly listed species, as of September 29th, 2006, only 23 recovery strategies out of 133 that are due are posted on the *SARA* registry.²⁰

Also, an additional 103 strategies are due in 2007, but independent analysis of the implementation of the *SARA* raises concern that future timelines will not be enforced. This review, released in July 2006, independently evaluated the federal government's progress on species at risk programs, stating:

The evaluation found that Environment Canada is struggling to meet the legislated deadlines for recovery strategies for which the Minister of the Environment is the competent Minister. Strategies due in January 2006 have not been posted on the Public Registry at the time of preparing this report. Time lines for recovery strategies due in June and July 2006 are unlikely to be fully met, given the progress to date. Similarly, Fisheries and Oceans Canada is facing challenges meeting legislated deadlines for some freshwater and aquatic species...In addition, both departments express concerns that they are falling even further behind with those strategies and management plans due in 2007 and later." (Attached at Tab 3)²¹

The *SARA* does not permit delaying preparation of recovery strategies. Accordingly, Canada is systematically failing to enforce the recovery strategy provisions of the *SARA* as set out in section 42.

B. Recovery planning requirements are not being met

Unfortunately for those recovery strategies that are being prepared, Canada is failing to enforce the *SARA*'s content requirements for recovery strategies, jeopardizing one the elements of the *SARA* most key to recovery of species – protection of critical habitat.

For example, as noted in the preamble of the *SARA* "the habitat of species at risk is key to their conservation." Section 2 defines "critical habitat" as "the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or in an action plan for the species."

As such, the *SARA* recognizes that protecting critical habitat is a critical component (and perhaps *the* critical component) in recovering at-risk species. But, because "critical habitat" is defined as that "identified in the recovery strategy or action plan", if a recovery strategy fails to identify critical habitat, this habitat cannot be protected. Even though the *SARA* requires recovery strategies to identify critical habitat, the Canadian government is failing to enforce this section of the Act.

²⁰ 16 were due in January 2005, 105 were due in June 2006, and 12 were due in July 2006.

²¹ Stratos Inc. *Formative Evaluation of Federal Species at Risk Programs*, prepared for Environment Canada, Fisheries and Oceans Canada and Parks Canada Agency (Ottawa, July 2006). This independent evaluation of the federal government's progress on species at risk programs states: "The evaluation found that Environment Canada is struggling to meet the legislated deadlines for recovery strategies for which the Minister of the Environment is the competent Minister. Strategies due in January 2006 has not been posted on the Public Registry at the time of preparing this report. Time lines for recovery strategies due in June and July 2006 are unlikely to be fully met, given the progress to date. Similarly, Fisheries and Oceans Canada is facing challenges meeting legislated deadlines for some freshwater and aquatic species...In addition, both departments express concerns that they are falling even further behind with those strategies and management plans due in 2007 and later." (2006 Stratos Review)(pg. 32 – 33) (Attached at Tab 3)

To explain, the *SARA* requires recovery strategies to address the threats to the survival of the species identified by COSEWIC, including any loss of habitat, and to 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.²²

As set out in s.41(1)(c), recovery plans must identify critical habitat “to the extent possible, based on the best information.” Because of the wording of s.41(1)(c), one would presume that critical habitat will be identified unless it is scientifically impossible to do so. Unfortunately, however, the government of Canada is failing to enforce the s.41(1)(c) requirement to identify critical habitat in recovery strategies with government agencies deliberately withholding from identifying critical habitat notwithstanding the *SARA* obligation to do so. This concern is again identified in the 2006 Stratos Review of *SARA* implementation, wherein the authors stated:

Core departments have made very limited, and less than anticipated progress in identifying critical habitat through the recovery planning process...Policy considerations are also a factor [in not identifying critical habitat]. Where provinces/territories are leading recovery planning efforts, they report a reluctance to identify critical habitat on non-federal lands until the supporting policy framework is clarified.²³

...

These delays and challenges in identifying critical habitat could have significant repercussions on the progress made in implementing the Act and achieving its related intended outcomes

As a result, to date, of the 23 recovery strategies posted on the *SARA* registry, only 3 identify critical habitat, and 5 partially identify critical habitat. There is little certainty as to whether the prohibitions in the *SARA* apply where critical habitat has been identified only partially. Moreover, the 3 species where recovery plans identify critical habitat are located within protected areas (Aurora Trout and Horsetail Spike-rush), or have restricted distribution (Barrens Willow).

²² *SARA*, s.41 (emphasis added)

²³ Stratos Inc. *Formative Evaluation of Federal Species at Risk Programs*, prepared for Environment Canada, Fisheries and Oceans Canada and Parks Canada Agency (Ottawa, July 2006) (pg. 34) at Tab 2

Further, research into two of the plans indicates that where habitat was not identified, or only partially identified, science for full identification does exist but has not been incorporated into the strategy (see Submitters' comments on Piping Plover and Spotted Owl recovery strategies at tabs 4 and 5).

Therefore, the Submitters allege that Canada is failing to enforce section 41 of the *SARA* by systematically deferring critical habitat identification.

Moreover, because critical habitat is not identified, the *SARA*'s prohibitions against harming critical habitat cannot be enforced and the Act's intent to protect endangered or threatened species by protecting their habitat is frustrated.

VI. FAILURE TO ENFORCE THE *SARA* NATIONALLY

Most Canadians believe that the *SARA* protects endangered wildlife across Canada; however, as it is currently enforced, this is not the case. While the *SARA* offers automatic protection only for "federal" species –migratory birds and aquatic species, or species that live on federal lands – the remaining species, in fact the vast majority, in provinces and territories are protected *only* if the federal Minister of the Environment recommends protection. The Minister must do this in two circumstances: (1) if "the laws of a province do not "effectively protect" species, their residences²⁴ or their critical habitat;²⁵ or, (2) if a species faces imminent threat to its survival or recovery.²⁶

These are known, respectively, as the "safety net" and the "emergency order" and this federal ability to intervene where provinces do not protect species is a critical part of the *SARA* because in most provinces, federal lands cover only a small fraction of the area. The Submitters allege, however, that the federal government is failing to enforce these two provisions in the *SARA* in the provinces.

To be clear, as set out below, the Submitters allege that while the "safety net" and the "emergency order" provisions give the Minister of the Environment *discretion* to act to enforce these provisions, as a matter of course in Canadian law, decision makers cannot exercise their discretion so as to frustrate the intention of law. Here, the Submitters allege that the Minister, in refusing to exercise her jurisdiction, is abusing her discretion.

A. Failure to enforce the "safety net"

The *SARA* prohibitions against harming listed species and their residence²⁷ do not apply on provincial lands to listed wildlife species that are not aquatic species or species of birds that are migratory birds protected by the *Migratory Birds Convention Act, 1994* (hereafter referred to as "federal jurisdiction" species) unless the Governor in Council makes an order that they apply "in

²⁴ Species At Risk Act, 2002, c. 29, ss.33, 34

²⁵ Species At Risk Act, 2002, c. 29, s. 61 (Also, "critical habitat" habitat can be protected only if it is designated in a recovery strategy or action plan.)

²⁶ *SARA*, s.80

²⁷ *SARA*, s.32,33

lands of a province that are not federal lands.”²⁸ Given that the majority of lands in Canada are not under federal jurisdiction, the effectiveness of the Act hinges on the “safety net.”

Canada’s Governor in Council may make a “safety net” order if this is recommended by the Minister of the Environment, who “must recommend that the order be made if the Minister is of the opinion that the laws of the province do not effectively protect the species or the residences of its individuals.”²⁹

“Effective protection” is not expressly defined in the *SARA* but its meaning may be discerned in light of the purpose of the *SARA* “to prevent wildlife species from becoming extirpated or becoming extinct” and “to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity.”³⁰ Therefore, a contextual interpretation of ‘effective protection’ means that an endangered or threatened species can only be protected from extinction if it is identified as needing protection, if harm to it and its habitat is prohibited, and if recovery actions are undertaken. This requirement for the three elements, identification, protection and recovery, recognizes the simple reality that threatened and endangered species are, by both definition and circumstance, in need of intervention to reverse the threat of imminent extinction or extirpation, and require both protection and recovery.

The provisions in the *SARA*’s “Measures to Protect Listed Wildlife Species” to achieve this purpose therefore provide a benchmark against which a province’s laws may be measured and the Minister’s obligation in section 34 determined. If a province’s laws do not address these components of the *SARA* to ensure a species is effectively protected, the Minister has no choice but to recommend to the Governor in Council that section 32 and/or section 33 apply to the provincial lands.

The Submitters allege that the Government of Canada is failing to enforce sections 32 and 33 nationally because it has not applied these sections in accordance with section 34, because several of Canada’s provinces do not have species at risk protection legislation to achieve the purpose as defined in the *SARA*.³¹

The province of Alberta particularly illustrates this circumstance. Attached at tab 6 is a copy of correspondence dated August 1, 2006, from the Submitters to the Minister of the Environment asking the Minister to enforce the *SARA* in Alberta. For ease of reference, the following summarizes the straightforward analysis of the requirement to implement the *SARA* in Alberta in the absence of laws that provide effective protection for species (this is set out in full at tab 6).

Alberta currently has no particular law that may be characterized as protecting endangered species or biological diversity. The only Alberta law that contains any meaningful reference to endangered species is the *Wildlife Act*, however, while eight endangered and threatened plant species³² that are listed under the *SARA* occur in Alberta, neither the *Wildlife Act* nor its regulations prescribes any endangered or threatened plants so as to enable any measure of protection for them.³³ Even if they were listed, there is no provision for prohibiting harm to their

²⁸ *SARA*, s.34(2)).

²⁹ *SARA*, s.34

³⁰ *SARA*, s.6

³¹ Alberta, British Columbia, the Northwest Territories and the Yukon

³² These species are: Tiny cryptanthe, Small-flowered sand verbena, Bolander's quillwort, Slender mouse-ear-cress, Smooth goosefoot, Soapweed, Western blue flag, and Western spiderwort.

³³ Alta. Reg. 143/97, s.4(1)(k)

habitat, no requirement for identifying critical habitat, and no requirement to prepare or implement strategies to recover populations.

Therefore, in the context of “effective protection” requiring laws “to prevent wildlife species from becoming extirpated or becoming extinct” and “to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity,” Alberta cannot be said to effectively protect the eight endangered and threatened plant species in Alberta.

Yet, while this situation reoccurs in British Columbia, the Northwest Territories, and the Yukon, the Minister of the Environment has never exercised her statutory obligation to recommend to Cabinet that the *SARA* apply in these provinces and territories.

Accordingly, by failing to apply the safety net provisions in Alberta, British Columbia, the Northwest Territories and the Yukon, the Minister of Environment is failing to effectively enforce the *SARA* with respect to the *SARA* listed species that occur therein. In effect, as a result of non-enforcement, the *SARA* is no longer an Act of national application.

B. Failure to apply emergency order provisions

The Submitters allege that the Minister of the Environment is failing to enforce the “emergency order” provisions of the *SARA*. These sections enable the federal government to intervene to list a species on an emergency basis, or protect a species in a province, if the Minister of the Environment is of the opinion that a species faces imminent threats to its survival or recovery.³⁴

The Submitters allege that the Minister of the Environment is failing to enforce section 80 of the *SARA* with respect to the Northern Spotted Owl (Spotted Owl) and the Woodland Caribou.

Attached at Tab 7 is correspondence dated February 27th, 2004 from the Submitters to the Minister of the Environment seeking a recommendation pursuant to *SARA* to protect the Spotted Owl. For ease of reference, the circumstances are summarized as follows:

The Spotted Owl lives in Canada only in British Columbia’s (BC’s) southwest mainland. The principal threat to the Spotted Owl is loss of its old-growth forest habitat. The principal cause of habitat loss is logging that is regulated and approved by the BC provincial government.

In 1986, COSEWIC designated the Spotted Owl as “endangered” and all status assessments have prioritized logging of habitat as the principal threat to the species’ survival.

Historically, prior to logging in its habitat, the Spotted Owl population in Canada was believed to have numbered approximately 500 adult pairs. The BC government has conducted surveys of Spotted Owls in BC from 1991 to present. These surveys describe a dramatic decline in the Spotted Owl population during that time (>80%). In 1997, at the time of the management plan’s introduction, BC biologists calculated that fewer than 100 Spotted Owl pairs remained. In 2007, surveys in BC, the only province in Canada where the Spotted Owl occurs, found *only 17 owls*.

In 2002, the BC government formed a Spotted Owl Recovery Team (SORT) with the mandate of preparing a Spotted Owl recovery strategy. In January 2003, SORT recommended a limited moratorium on logging in Spotted Owl habitat while they were undertaking recovery planning.

³⁴ *SARA*, ss. 29,80

The BC government did not implement a moratorium and continued to approve logging in Spotted Owl habitat.

By correspondence dated February 27th, 2004 and following (at Tab 7), the Submitters provided the then Minister of the Environment with detailed information regarding the Spotted Owl demonstrating the imminent threats to its survival and recovery, including:

- i. the Spotted Owls' past and current status;
- ii. the Spotted Owls' precipitous rate of population decline;
- iii. the harmful effect of continued logging of Spotted Owl habitat on the species;
- iv. the fact that although some logging companies have stopped logging in Spotted Owl habitat to protect the species, the BC government, through its BC Small Timber Sales program, continues to log owl habitat and is now the largest logger of Spotted Owl habitat;
- v. the circumstance of BC government policy expressly prioritizing logging over the recovery needs of the Spotted Owl; and,
- vi. BC's lack of endangered species protection laws.

Notwithstanding the foregoing, three consecutive Environment Ministers failed to recommend to cabinet that an emergency order be issued to protect the Spotted Owl. The Submitters consider that the foregoing circumstances are egregious and likely represent a worst-case scenario in terms of emergencies facing endangered species. They consider that by failing to recommend the emergency order, the Minister of the Environment is failing to enforce the Act.

With regard to Article 14(2)(c), in December of 2005, members of the Submitters launched a court action to compel the Minister to fulfill her obligation under section 80 of the Act to recommend that the *SARA* apply in BC. On August 16, 2006, the Minister of the Environment responded by refusing to exercise her discretion to recommend protection of the Spotted Owl. On September 15, 2006, the Submitters launched another court action to review the minister's decision and have it declared patently unreasonable.

As an additional example, attached (at Tab 8) is a copy of correspondence dated December 15, 2005 to the Minister of the Environment with regard to the Boreal population of woodland caribou, listed as threatened under the *SARA*. For ease of reference, the position taken by the Submitters is summarized as follows:

Woodland caribou are at particular risk of extinction in Alberta, where their numbers have dropped by almost 60% since the 1960s. While Alberta has adopted a caribou recovery strategy, the province isn't taking any meaningful steps to maintain herds at immediate risk of extinction, as it is still allowing logging and petroleum development in their range.

The Alberta government has failed to protect woodland caribou despite 30 years of studies and warnings from scientists that the province's caribou are being decimated. There are fewer than 3,000 caribou left in Alberta, and many herds face imminent extinction under current development plans. The Alberta government has approved logging in all of the remaining caribou range in west-central Alberta and most ranges in northern Alberta. A recent study shows that if industrial development proceeds as planned, caribou will be extirpated from the entire province in less than 40 years.

By its Dec. 15, 2005 correspondence, the Submitters requested the Minister of Environment recommend to cabinet that an emergency order be issued pursuant to section 80 of the *SARA* seeking protection of critical habitat in Alberta until such time as recovery planning is completed on the basis that Woodland Caribou in Alberta face imminent threat to their survival or recovery. Attached (at Tab 9) is a copy of correspondence received from the office of the Minister of the Environment indicating discussions regarding Woodland Caribou. No action has been taken to protect woodland caribou from extirpation in Alberta. This constitutes a failure by Canada to effectively enforce section 80 of the *SARA* to protect threatened Woodland Caribou in Alberta.

VII. NAAEC ARTICLE 14 REQUIREMENTS

For greater clarity concerning how this submission meets Article 14 of the *NAAEC*, we state the following:

- This submission is aimed at protecting Canada's at-risk species by ensuring that the provisions of the *SARA* are enforced. Review of this submission in the process under Articles 14 & 15 of the *NAAEC* will promote the goals of the agreement by, among other things: fostering the protection and improvement of the environment in Canada for the well-being of present and future generations; avoiding the creation of trade distortions; enhancing compliance with, and enforcement of, environmental laws and regulations; and promoting compliance by Canada of its obligation to effectively enforce the *SARA* through appropriate governmental action, under Article 3 of the *NAAEC*.³⁵
- The matter has been communicated to the relevant Canadian authority in several ways:
 - The Submitters' concerns regarding the failure to enforce listing requirements were submitted to the Government of Canada in writing by an environmental petition to the Commissioner of the Environment and Sustainable Development (Petition no. 121). Attached (at Tab 10) is a copy of the Petition and the response from then Minister of the Environment Stéphane Dion dated November 4th, 2004. The response of the Minister, summarized, is essentially that the process for placing materials before the Governor in Council requires interpreting the *SARA* to enable extended consultation prior to delivery to Cabinet. (Please see Tab 2 for the legal analysis supporting our argument that *SARA* listing requirements are not being enforced.)
 - The Submitters' concerns regarding the failure to enforce the *SARA* with regard to several matters related to listing were submitted to the Government of Canada in writing by letters dated June 10, 2004 to the Canadian Wildlife Service and Fisheries and Oceans Canada; and July 14, 2004 to Fisheries and Oceans Canada. Attached at Tab 12 is a copy of this correspondence. The Submitters have received no response.
 - As referred to above, the Submitters' concerns regarding the failure to meet recovery plan deadlines were submitted to the Government of Canada in writing by letter dated August 1st, 2006 to the Minister of the Environment, Rona Ambrose. Attached at Tab 11 is a copy of that correspondence as well as reply correspondence dated September 22nd, 2006, the Minister replied indicating that officials are aware of the delay, are doing everything within their power to overcome the "unexpected obstacles that have arisen"

³⁵ *NAAEC*, Articles 1 (a), (e), (g) and 5.

and that outstanding recovery strategies should be ready for posting starting in January 2007.

- The Submitters' concerns on the failure to enforce the *SARA* effectively with regard to identification of critical habitat in recovery strategies were submitted to the Government of Canada in writing by a letter dated May 14, 2004 to the Canadian Wildlife Service. Attached at Tab 13 is a copy of this correspondence. The Submitters received no written response, but there was a workshop at which some of these matters were discussed.
 - Several matters raised in this submission were communicated to the Government of Canada in writing by letter dated August 30, 2006 to Rona Ambrose, Minister of the Environment. Attached at Tab 14 is a copy of this correspondence. The Submitters have received no response.
 - The Submitters' concerns on the failure to enforce the *SARA* safety net in Alberta were submitted to the Government of Canada in writing by a letter dated August 1st, 2006 to the Minister of the Environment. On September 22nd, the Submitters received an acknowledgement of receipt that indicates that a response will be provided on December 1st. Attached at Tab 6 is a copy of this correspondence.
 - The Submitters' concerns regarding the failure to enforce the emergency order concerning Woodland Caribou in Alberta were submitted to then Minister of the Environment Stéphane Dion to which a response was received dated June 1, 2006 that stated a response would be forthcoming in one month. Attached at Tab 9 is a copy of further correspondence. As of yet, no action has been taken.
 - The Submitters' concerns regarding the failure to enforce the emergency order concerning Spotted Owl in British Columbia were submitted to then Minister of the Environment David Anderson. No action was taken resulting in court proceedings, which are ongoing. Attached at Tab 7 is a copy of this correspondence.
 - In addition to the direct communications listed herein, the matters raised in this submission were communicated to the Government of Canada through the press releases dated March 03, 2004, March 4, 2004, October 22, 2004; Sierra Club of Canada's August 2005 report "Economy over Ecology: The Federal Government's Failure to List Endangered Species"; and Nature Canada's *SARA* reports for years 2004 and 2006 (all attached at Tab 15). The Submitters received no response.
- The issue of harm: The *SARA* was adopted to prevent species extinction and extirpation in Canada. This submission asserts a systemic failure to enforce the provisions of the *SARA* which frustrates the Act's purpose of preventing wildlife species from becoming extirpated or becoming extinct and providing for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity.³⁶ Failure to effectively enforce the *SARA* deprives Canadians of their natural capital and heritage and prejudices future generations of Canadians. In addition, the Submitters - non-governmental organizations dedicated to the protection of nature and the environment- are directly concerned by the disappearance of species in Canada and by Canada's failure to enforce the law that has been

³⁶ *SARA*, s.6

adopted to protect species at risk. The public's trust in elected officials is diminished when laws enacted for the public good are not enforced. International agreements must also be implemented with particular vigour because they carry Canada's reputation into the global arena. Canada is failing to enforce the *SARA* and by doing so, it is failing to deliver on its conservation commitments to Canadians and on its obligations under the *Convention on Biological Diversity*.

- Private remedies under Canadian law: The submitters have taken reasonable actions to pursue private remedies with respect to enforcement of the *SARA* in British Columbia through its emergency order provisions to protect the Spotted Owl from becoming extirpated in Canada. (As discussed in above.) This has proven protractile and strongly suggests that private remedies are unsuitable concerning listing, recovery planning, critical habitat identification and failure to enforce prohibitions (before critical habitat is identified), particularly where many species, by both their legal status and their circumstances, require timely action to avoid extirpation. Given a lack of jurisprudence in Canada and a lack of success in earlier proceedings in provinces to protect species, such as those occurring in British Columbia concerning the Spotted Owl, Canada's courts are not proving to be an effective forum for addressing concerns regarding species endangerment.
- The submission is drawn primarily on the submitters' longstanding work to promote the protection of species at risk and their habitat in Canada and to track progress in the effective implementation and enforcement of the *SARA* since its coming into force, as well as on our research and an *Access to Information* request.

All of which is respectfully submitted.

Date: October, 6th, 2006

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Table of Tabs

Tab 1: Copy of Environment Canada interdepartmental email dated January 20th, 2004 attaching a briefing note regarding listing

Tab2: Legal analysis of the 9-month requirement for listing assessed species

Tab 3: Copy of Stratos Inc. Formative Evaluation of Federal Species at Risk Programs, prepared for Environment Canada, Fisheries and Oceans Canada and Parks Canada Agency (Ottawa, July 2006)

Tab 4: Submission to Environment Canada on failure to identify full critical habitat where possible to do so for spotted owl recovery strategy

Tab 5: Submission to Environment Canada for failure to identify critical habitat where possible to do so for piping plover

Tab 6: Copy of correspondence dated August 1, 2006, from the Submitters to the Minister of the Environment regarding implementing the SARA “safety net” in Alberta (without exhibits)

Tab 7: Correspondence dated February 27th, 2004 from the Submitters to the Minister of the Environment seeking a recommendation pursuant to SARA to protect the Spotted Owl (without exhibits)

Tab 8: Correspondence dated December 15th, 2005 from the Submitters to the Minister of the Environment seeking a recommendation pursuant to SARA to protect the Woodland Caribou in Alberta (without exhibits)

Tab 9: Copy of correspondence dated June 1, 2006 received from the office of the Minister of the Environment regarding Woodland Caribou

Tab 10: Copy of the Petition to the Commissioner of the Environment and Sustainable Development (Petition no. 121) and response from then Minister of the Environment Stéphane Dion dated November 4th, 2004

Tab 11: Copy of correspondence dated June 23, 2006 from the Submitters to the Minister of the Environment expressing concern regarding missed recovery planning deadlines with attached response dated September 22, 2006

Tab 12: Copy of correspondence dated June 10, 2004 to the Canadian Wildlife Service and Fisheries and Oceans Canada; and July 14, 2004 to Fisheries and Oceans Canada

Tab 13: Copy of correspondence dated May 14, 2004 from the Canadian Nature Federation to the Canadian Wildlife Service regarding concerns on the failure to enforce the SARA effectively with regard to identification of critical habitat in recovery strategies

Tab 14: Copy of correspondence dated August 30, 2006 from Nature Canada to Rona Ambrose, Minister of the Environment, Government of Canada

Tab 15: Nature Canada Media releases dated March 03, 2004, March 4, 2004, October 22, 2004; Sierra Club of Canada's August 2005 report "Economy over Ecology: The Federal Government's Failure to List Endangered Species"; and, Nature Canada's *SARA* reports for years 2004 and 2006