



ALBERTA WILDERNESS ASSOCIATION

"Defending Wild Alberta through Awareness and Action"

November 18, 2016

The Honourable Catherine McKenna
Minister of Environment and Climate Change
ec.ministre-minister.ec@canada.ca

Sue Milburn Hopwood
Assistant Deputy Minister, Canadian Wildlife Service
Environment and Climate Change Canada
Sue.Milburn-Hopwood@canada.ca

RE: Species at Risk Policy Review - Policy on Critical Habitat Protection on Non-Federal Lands

Dear Minister McKenna:

Thank you for the opportunity to comment on the *Species at Risk Act* (SARA) Policy on Critical Habitat Protection on Non-Federal Lands.

Alberta Wilderness Association (AWA) works throughout Alberta towards more representative and connected protection of the unique and vital landscapes that are the source of our clean water, clean air and wildlife habitat. We have been working in Alberta for more than fifty years to raise the profile of Alberta's spectacular wilderness. AWA helps Albertans learn more about the value of our wilderness and wildlife, and participate in opportunities to protect and care for the legacy that we will leave for future generations. With over 7,000 members and supporters in Alberta and across Canada, AWA remains committed to ensuring protection of wildlife and wild places in Alberta for all Canadians.

Overall, AWA believes the Policy on Critical Habitat Protection on Non-Federal Lands 2016 ("the draft policy") as written weakens the protection of critical habitat, and ultimately species at risk, in Canada and Alberta. The precautionary intent and intention to recover and restore species at risk as stated in the *Species at Risk Act* (SARA) must be adhered to, with a policy that takes timely and meaningful measures (both interim and long-term) to protect and prevent destruction to critical habitat.

3.0 Overarching Policy Statements

We understand that the "SARA's discretionary measures" referred to in Section 3.1 are regarding Section 73 of SARA. AWA has submitted separate comments on the draft Permitting Policy regarding the proposed protection outcome in this section "that critical habitat is not being and will not be destroyed, except in ways that SARA's discretionary measures would allow." For clarity, it would be better to refer to the specific section of SARA this policy is referring to.

3.2. Risk-based Approach to Protection and Effective Protection

Our understanding of the draft policy is that without proper protection measures in place, habitat can still be considered “protected” if there is a low risk of it being destroyed. AWA believes that this ignores the purpose of SARA, which is to recover threatened and endangered species. A lack of information on what constitutes “low risk”, who would be the responsible party for gathering information, and who determines whether there is a “low risk” to damaging critical habitat are important gaps in this policy.

AWA requests that instead of a risk-based approach, a precautionary approach be applied for protection on non-federal lands. A precautionary approach means that species and their critical habitat are not considered protected unless proven otherwise. Critical habitat, defined as “habitat that is necessary for the survival or recovery of a listed wildlife species” is often the last remaining secure habitat that a species is depending on to remain intact in order for it to survive. Adopting this approach would be in accordance with SARA, which states in the Preamble, “if there are threats of serious or irreversible damage to a wildlife species, cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty”.

In a ‘low risk’ assessment, the Critical Habitat Protection Assessment (CHPA) must require that strong habitat protection and restoration rules must be in place. This would capitalize on reduced socio-economic pressures on habitat, and prevent infrequent assessments from becoming outdated and thereby increasing risk for designated species. Section 3.2.1 states that where there is no protection under SARA or other acts of parliament, or the laws of the province or territory that provide for protection, critical habitat will also be considered to be protected or effectively protected if there is a “low level of risk that the critical habitat will be destroyed.” In fact, a ‘low risk’ situation is the best time to insist on strong, binding critical habitat protection measures, as socio-economic pressures will likely be low. An example is woodland caribou and Athabasca rainbow trout in west central Alberta, whose range disturbance was greatly intensified in recent years due to greatly improved techniques of horizontal drilling and fracking for tight oil/gas. These techniques were heavily adopted within a few years, very likely faster than ECCC can react due to resource constraints. Had stronger land disturbance limits already been in place, linear disturbance, access, and restoration challenges would be significantly less than today. Insisting on strong habitat protection measures in a ‘low risk’ situation could well prevent the status of species at risk from deteriorating. As well, this is an opportunity for ECCC to commit to protecting critical habitat before degradation, and thereby avoid resource-intensive measures of recovery.

3.5 First Opportunity to the Province or Territory Responsible for Managing Non-Federal Land

AWA asks that the policy include a mechanism for interim on-the-ground measures while CHPA is undergoing assessment. AWA is concerned that the total time required for provinces to develop range/action plans, for ECCC to complete the CHPA with respect to provincial laws, and then consider provisions in or measures under SARA or other Acts of Parliament will risk lengthy delays in the implementation of on-the-ground measures to protect and restore critical habitat. Instead, a series of escalating interim precautionary measures should be triggered if the entire range/action plan development and CHPA process is longer than six months. This change would uphold the Act’s intent that actions are urgently needed to be tipped in favour of these species’ survival, instead of business-as-usual habitat loss and degradation. It would motivate significantly faster action by both provincial and federally responsible departments to ensure that activities will not jeopardize the survival or recovery of the species.

4.0 Critical Habitat Protection Assessment on Non-Federal Lands

4.1 General Process and Scope

The policy on Critical Habitat Protection Assessment (CHPA) must be expanded to include consideration of “all parts or portions of critical habitat for a given species, or multiple species as appropriate,” and consideration of effective protection of species and residences as well. This would help avoid a potential policy gap where “species” and their “residences” are concerned.

AWA requests that a CHPA review include feasible activities (activities that *could* occur, not just those that are *likely* to occur), that may not be specifically mentioned in the recovery strategy or action plans. The draft policy reads in regards to activities likely to result in the destruction of critical habitat, “the CHPA will review each of these [Recovery Strategy or Action Plan] activities for each portion of critical habitat.” AWA is concerned that this policy does not provide a means to measure emerging or unpredictable threats if it only considers examples of activities in the Recovery Strategy or Action Plan, which are intended only as examples and may not be comprehensive or may differ over time. An example is the emergence of horizontal drilling and fracking for tight oil/gas, which in a few years greatly intensified linear disturbance and access in woodland caribou and Athabasca rainbow trout habitat in west central Alberta. In addition, the policy should clarify the acceptable timeline for review of “best available information” and the methods for how this information will be taken into account, to ensure reviews are meaningful for species protection.

4.2 CHPA Step 1

AWA requests that the policy specify the decision matrices or other tools being used to review specific criteria for evaluating the strength of provincial or territorial laws for each portion and activity outlined in this policy document. This policy must be more transparent in how it uses criteria to evaluate the strength of laws. We also request that the policy reflect a commitment to use the approach to determining “effective protection” taken in the Western Chorus Frog protection assessment.

4.3 CHPA Step 2

A positive aspect of the draft policy is that the strength assessment in CHPA Step 2 considers both the literal interpretation and the history of the application of the law in relation to criteria. This acknowledges that protective measures for species at risk have not always been legislated and that some provinces and territories lack meaningful [effective] species at risk legislation.

4.4 CHPA Step 3

The draft policy states that in its residual risk assessment, the CHPA will consider voluntary conservation measures such as non-regulatory agreements, beneficial management practices and certification schemes. AWA is concerned that this “risk-based approach” violates the precautionary principle. Non-binding or non-regulatory conservation measures can easily be disregarded or discontinued and do not provide strong legal protective measures. They are not required to be reported or documented by provincial/territorial or federal governments or SARA, and may not be monitored or audited by an independent body. For instance, linear disturbance and access in west central Alberta woodland caribou and Athabasca rainbow trout ranges has dramatically increased in the last 10 years under a much-

touted Integrated Land Management program that was easily disregarded. Forest certification programs have allowed extensive new clear-cutting within woodland caribou ranges already far past disturbance thresholds. Even positive best-management practices, such as riparian restoration work, can be harmful to a species at risk if not implemented correctly. It is also not clear how ECCC will monitor non-regulatory conservation measures such as certification schemes and best management practices, which are not necessarily publicly posted. Monitoring these measures may be cumbersome and will require extensive, likely unavailable, government resources to monitor effectively after the initial CHPA assessment.

4.5 CHPA Step 4

The policy must provide clear timelines for reviewing and monitoring the CHPA that are meaningful for species protection. AWA is concerned that this section is in opposition to the intent of the *Species at Risk Act*, which is to prevent and restore species at risk. In the event that “critical habitat destruction has occurred, or is at a moderate to high risk of occurring” (p. 5), the policy has failed to “...prevent the reduction or loss of the species should not be postponed for lack of scientific certainty” and “[prevent] wildlife species from becoming extirpated or extinct” that the law commits to. In the event that critical habitat destruction does occur, this must be posted publicly and the Minister should recommend a critical habitat protection order.

The statements “continued verification that protection is in place and actually providing protection will be ongoing” and “...the CHPA will include monitoring of the critical habitat over time...” (p. 5) do not assure clear timelines or methods for how ECCC will review and monitor critical habitat if protection is deemed in place and should be clarified.

5.0 Using the results of a CHPA

5.1.2 AWA is concerned that “protection will be assessed as in place if there are gaps in protection as identified in Steps 1 and 2, but Step 3 indicates a very low or low risk of critical habitat destruction.” (p. 6). As stated in our Section 3.2 comments, to be precautionary and prevent critical habitat destruction, CHPA should require binding critical habitat protection in low risk situations, when socio-economic factors are most favorable. In this way, emerging threats and the long interval between CHPA assessments will not increase species risk. In addition, the draft policy should outline how the CHPA will be assessed over time, to monitor and measure emerging or changing threats to critical habitat.

Section 5.1.5 (p. 6) states that if the initial CHPA indicates that critical habitat is not protected, consultation will proceed as quickly as possible with stakeholders. Similar to our earlier comments on Section 3.5, AWA is concerned that consulting with governments and stakeholders only after the CHPA is concluded will delay effective protective measures in the event that critical habitat is not protected. A “cooperative” approach to sharing responsibility for species at risk, as stated in the SARA Preamble, should mean engaging all stakeholders early in and throughout the process to avoid delay. Until the CHPA is completed, species at risk under federal jurisdiction should be co-managed by federal and provincial or territorial governments, with escalating interim measures of protection to avoid further decline of critical habitat and motivate swifter development of permanent on-the-ground measures.

6.0 Minister's Opinion, and Reporting on Critical Habitat Protection on Non-Federal Lands

6.1 Minister Forms the Opinion that Critical Habitat is Protected

The draft policy does not set out timelines for how long the CHPA assessment will take, and therefore AWA is concerned that if there are delays, particularly administrative delays or backlog, a timely response from SARA may not occur and will further jeopardize critical habitat protection. AWA asks that ECCC commits through this policy to abide by the 180 day requirement to protect critical habitat (Section 63 of SARA) in the absence of a CHPA decision, with escalating measures, until the CHPA is completed and protection outcome is determined.

Section 6.1.2 does not specify timelines for "ongoing monitoring" (p. 7) to verify if critical habitat continues to be protected. Again, AWA is concerned that lack of specificity in timing may result in delays that will compromise the recovery of species at risk.

The policy should recognize that the deadline for a Section 63 report under SARA is 180 days from the identification of critical habitat (on non-federal lands) in a recovery strategy or action plan. The draft policy states that if the Minister is of the opinion that critical habitat is protected, a report to protect critical habitat is not necessary. However, the Minister's decision regarding the strength of provincial or territorial laws to protect critical habitat, and the criteria used to assess this in the CHPA must be publicly available for public transparency. We recommend that the Minister not only consult with the appropriate provincial or territorial minister, but with independent qualified specialists as well. A summary of the results of these public consultations should be made available as well. Increasing transparency in this policy is an opportunity for ECCC to strengthen SARA.

As currently written, this policy implies that the 180 day timeline is not required while the CHPA is ongoing; delays past 180 days are still unlawful if CHPA has not been completed regardless of its outcome, and the policy should recognize this.

6.2.2. AWA agrees that if deemed unprotected, the Minister makes a recommendation for a protection order. The Minister should also make a recommendation for a protection order when there has been evidence under CHPA Step 4 that critical habitat destruction has occurred even under sufficient provincial protection. AWA does not agree with "As long as reasonable steps to put protection in place are actively underway, the Minister will defer making a recommendation for an order to Governor in Council." This should instead read "As long as *reasonable protection has been implemented*" as "steps... in place" could mean lengthy barriers in regard to timelines such as endless consultation, review, or administrative delay. The order should be in place until the province has implemented its protection. Otherwise, years of 'business as usual' critical habitat loss and degradation will occur during the time given to provinces for range planning, as has occurred for the last three years in the case of Alberta's woodland caribou ranges. As we have stated above, if the Minister has in fact deferred from making a recommendation for an Order, this decision and the rationale behind it must be publicly published.

For the reasons above, AWA does not support the 2016 draft policy as written and requests the changes we have outlined. The policy for Critical Habitat Protection on Non-Federal Lands must exercise the precautionary principle as stated in SARA and commit to effectively recovering and restoring species at risk as Canada has committed under the Convention on Biological Diversity.

Sincerely,

ALBERTA WILDERNESS ASSOCIATION



Andrea Johancsik
Conservation Specialist

cc:

Species at Risk Public Registry Office, ec.registrelep-sararegistry.ec@canada.ca

The Honorable Shannon Phillips, Alberta Minister of Environment and Parks, AEP.Minister@gov.ab.ca

References

Environment and Climate Change Canada. 2016. Policy on Critical Habitat Protection on Non-federal Lands [Proposed]. *Species at Risk Act: Policies and Guidelines Series*. Environment and Climate Change Canada, Ottawa. 9 pp.

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