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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: Proposed Species at Risk Act Permitting Policy

I am counsel to the Alberta Wilderness Association and the Timberwolf Wilderness Society (collectively referred to herein as ‘we’ or ‘our’ as the context dictates) and hereby submit the following written comments on behalf of these two organizations on the proposed Government of Canada. Species at Risk Act Permitting Policy [Proposed]. Species at Risk Act: Policies and Guidelines Series. Government of Canada, Ottawa. We appreciate this opportunity to contribute to policy formation under SARA.

This submission begins by setting out principles which should guide the interpretation of the *Species at Risk Act*, SC 2002, c 29 [SARA]. This submission then provides the relevant portions of section 73 along with judicial consideration thereof. This submission then proceeds by providing our comments on the proposed policy guidance.

As an overall comment, we are of the opinion the proposed Species at Risk Act Permitting Policy is inconsistent with SARA and thus unlawful in that it purports to allow for the authorization of industrial development and other commercial activity that will harm listed endangered or threatened species and their critical habitat. More particularly we submit the following two proposals if implemented would be unlawful:

1. the proposal that industrial development will normally satisfy the condition set out by section 73(2)(c) as only incidental harm is fundamentally inconsistent with the purpose of SARA to protect listed endangered or threatened species and facilitate their recovery;
2. the proposal for consideration of biodiversity offsets in a section 73(3)(c) determination is fundamentally inconsistent with the meaning of critical habitat and the purpose of SARA to protect listed endangered or threatened species and their critical habitat.

Guiding Principles in the Interpretation of SARA

Protection and Recovery of Endangered or Threatened Species. Section 6 of SARA states the purpose of the legislation is "to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened". The overall purpose of SARA is to both protect listed endangered or threatened species and facilitate their recovery. Any interpretation or application of SARA must be consistent with both of these objectives of protection and recovery. It follows that any interpretation or application of SARA which serves to impair either protection or recovery of listed endangered or threatened species is inconsistent with SARA and accordingly unlawful.

Listed Endangered or Threatened Species are on life support. A species becomes listed as endangered or threatened under SARA because it is on the verge of becoming extinct or extirpated, in other words the species is on life support. Life support provided to listed endangered or threatened species under SARA includes the obligation to develop a recovery strategy and an action plan, as well as legislated prohibitions against harming individual members of such species or destroying any part of its critical habitat. Critical habitat is defined in SARA 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. Any interpretation or application of SARA which allows for the destruction of critical habitat is thereby necessarily impairing the survival or recovery of a listed species and is thus inconsistent with the purpose of SARA and unlawful.

Cumulative effects must be considered. Most if not all listed endangered or threatened species find themselves depending on the life support mechanisms of SARA because they have been subjected to 'death by a thousand cuts'. Accordingly, any assessment of impact on a listed endangered or threatened species or its habitat must be done within a rigorous cumulative effects framework. Otherwise, the purpose of SARA is defeated by allowing the same incrementalism which has led to their listing in the first place. Cumulative effects considerations must include: (1) Consideration of potential impacts on other species at risk; (2) Program level reviews to analyze, avoid and minimize impacts before more individual projects are considered; (3) An incorporation of baseline of pre-industrial conditions in both the permitting area and the relevant range (if a migratory species); and (4) All historic anthropogenic impacts should be considered (including climate change), and all future permitted activities and reasonably foreseeable changes and activities (including climate change), should be included in both the permitting area and the relevant range if dealing with a migratory species.

Decision-making under SARA must be transparent and open to public participation. The preamble to SARA provides that all Canadians have a role to play in the conservation of wildlife in this country, including the prevention of wildlife species from becoming extirpated or extinct. The public is unable to perform this role without transparency in government decision-making and meaningful opportunities to participate in SARA decision-making. While certain components of SARA are transparent and encourage public engagement – such as the recovery planning process – other components of SARA are less so. In particular relevance to this submission, the section 73 permitting process currently has very little transparency and no opportunity for public scrutiny. We encourage you to consider this deficiency in the section 73 policy review process.

Section 73 of SARA

73(1) The competent minister may enter into an agreement with a person, or issue a permit to a person, authorizing the person to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals.

(2) The agreement may be entered into, or the permit issued, only if the competent minister is of the opinion that

- (a)** the activity is scientific research relating to the conservation of the species and conducted by qualified persons;
- (b)** the activity benefits the species or is required to enhance its chance of survival in the wild; or
- (c)** affecting the species is incidental to the carrying out of the activity.

(3) The agreement may be entered into, or the permit issued, only if the competent minister is of the opinion that

- (a)** all reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted;
- (b)** all feasible measures will be taken to minimize the impact of the activity on the species or its critical habitat or the residences of its individuals; and
- (c)** the activity will not jeopardize the survival or recovery of the species.

Canadian courts have yet to directly interpret the extent to which section 73 allows for activity that destroys critical habitat of a listed species under SARA, but the Federal Court of Appeal references this portion of SARA in its *Georgia Strait Alliance v Canada*, 2012 FCA 40 decision. The language chosen by the Federal Court in *Georgia Strait*, strongly suggests these permitting provisions of SARA are to be given a restrictive interpretation to allow for activity that harms listed species under SARA in very limited circumstances:

. . . SARA restricts the authority of a "competent minister" — including the appellant Minister in this case — from entering into an agreement, issuing a permit or licence or making an order under another Act of Parliament — such as the Fisheries Act — authorizing a person to engage in an activity "affecting" the critical habitat of a listed wildlife species unless (a) the activity is scientific research relating to the conservation of the species and conducted by qualified persons; (b) the activity benefits the species or is required to enhance its survival; or (c) affecting the species is incidental to the carrying out of the activity.

Even in such limited circumstances, the agreement may be entered into, or the permit issued, . . . only if the competent minister is of the opinion that all reasonable alternatives have been considered and the best solution has been adopted, measures have been taken to minimize the impact of the activity, and the activity will not jeopardize the survival or recovery of the species.

Comments on the proposed Species at Risk Act Permitting Policy

The remainder of this submission sets out verbatim portions of the proposed Species at Risk Permitting Policy (within bordered text boxes) followed by our comments in relation thereto.

3.2.1 Subsection 73(1)

Policy Statement

For the purposes of section 73 of SARA, the phrase “an activity affecting” will be interpreted as an action that would be prohibited under SARA without a permit.

Clarification

Only prohibited activities require a permit under SARA. The general reference to “affecting” does not imply that non-prohibited activities require a permit under SARA.

This proposed interpretation of ‘an activity affecting’ as solely an action that is prohibited under SARA without a permit is inconsistent with section 73(2)(b) which contemplates the legislated need for a section 73 permit for activity which benefits a listed species or is required to enhance its chance of survival in the wild. Accordingly, this proposed interpretation is unlawful as it renders section 73(2)(b) to be a nullity.

3.2.2.1 “Scientific research” and “qualified persons” – paragraph 73(2)(a)

Policy Statement

To satisfy paragraph 73(2)(a), the scientific research in question: 1) must have as its main purpose the conservation of the species at risk; 2) must be consistent with the recovery documents that have been developed for the species under SARA; 3) in the absence of a recovery document, must support the recovery of the species based on an assessment of the best information available; 4) must be intended to generate scientific results that will be used to advance the recovery of the species, and any such results must be accessible to the public, unless doing so could place a species at risk at greater risk; and 5) must be overseen by individuals with demonstrated expertise relevant to the species.

Clarification

Recovery documents required under SARA, such as recovery strategies and action plans, guide the recovery of species at risk. Any scientific research related to the conservation of the species must be consistent with the direction and desired outcomes in any relevant recovery documents that have been developed for the species. This could include research directed at understanding what may prevent or limit recovery as well as what may promote recovery.

In cases where a recovery document under SARA is not yet available, other relevant information will be considered, including a provincial or territorial recovery document or the species status assessment prepared by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC).

In the context of SARA, a “qualified person” cannot be a generalist; he or she must have expertise related to the biological requirements of, and threats to, the species at risk in question or similar species. Criteria for determining whether a person is qualified include, but are not limited to, previous experience, knowledge of the species and specific training related to the proposed handling of the species.

This proposed guidance for section 73(2)(a) could be improved. In particular, there must be an additional consideration of the potential cumulative effects that the research in combination with other activities may have on a species. For example, if a species is very limited in numbers, then repeated exposures to research may contribute to further stressing the species and slowing recovery as well.

3.2.2.2 “Benefits the species” – paragraph 73(2)(b)

Policy Statement

To satisfy paragraph 73(2)(b), the activity in question must support the implementation of recovery actions as described in recovery documents for the species, where these are available. Where recovery documents are not available, the activity must support the recovery of the species based on an assessment of the best information available.

Clarification

Recovery documents, such as recovery strategies and action plans, are developed using the best available information on the species and the threats to the survival and recovery of the species. As such, they are the best reference for activities that could be considered beneficial for a species at risk.

When recovery documents are not available for a species, other relevant information will be considered, including a provincial or territorial recovery document or the species status assessment prepared by COSEWIC. In addition, species experts and best-available peer-reviewed information about the species or similar species, including its recovery needs and threats to its survival, can be consulted to support determining whether an activity benefits the species.

At a minimum, it must be clear that the species would be better off as a result of the activity and any accompanying action. In the case of research intended to help with the conservation of species at risk, the timeframe for achieving the overall benefit for the species may be long-term.

We submit the reference to ‘any accompanying action’ – and accordingly biodiversity offsets – is not a lawful consideration in a determination on whether an activity will benefit a species. The consideration of biodiversity offsets in a section 73 determination is fundamentally inconsistent with the purpose of SARA and accordingly unlawful. We elaborate on this further below in relation to section 73(3)(c).

We note a draft 2005 Environment Canada draft policy on section 73(2)(b) stated that an activity will fulfil the requirements of this subsection only if (1) it is consistent with an approved recovery strategy for the species, and will support the achievement of population and distribution objectives identified in the strategy, or (2) it will address recognized conservation needs of, or threats to, the species when a recovery strategy has not been approved (e.g., those identified in COSEWIC status reports or scientific literature).

3.2.2.3 “Incidental to” – paragraph 73(2)(c)

Policy Statement

Paragraph 73(2)(c) will be interpreted as meaning that the effect that carrying out the activity has upon the species must not be the purpose of the activity.

Clarification

While some definitions of “incidental” consulted in the development of this policy include the notion of minor, all of the definitions of “incidental to” did not include this notion. Accordingly, the scale of the project, or its impact, is not a consideration for meeting this condition. Scale will be taken into account when determining if the activity is likely to jeopardize survival or recovery (see sub-section 3.2.3.3).

With the exception of activities covered by paragraphs 73(2)(a) and (b), activities where the intent is to affect the species cannot be permitted. For example, hunting and fishing where the target species is listed would be prohibited, even if the activity does not result in mortality (e.g. catch-and release fishing). If the listed species, however, is accidentally harmed during hunting or fishing activities aimed at other species (e.g., by-catch), this may qualify for permitting further to this provision of SARA.

Industrial development projects will usually satisfy this paragraph of SARA, as they are usually not directed at wildlife species. However, this does not mean that they will satisfy the other permitting provisions of SARA.

We note that 2005 Environment Canada draft policy defined an incidental activity as “an activity ... that is not directed at the species, but that can reasonably be expected to affect it. Activities that may accidentally affect a species will be considered under this purpose.” We submit the 2005 draft guidance is easier to follow and understand, and the current proposed guidance is unnecessarily convoluted for the reason that the policy is drafted as a prohibition yet the statutory provision it purports to interpret is drafted as a permissive provision.

We are aware that section 73 permits have been issued to authorize activity on the justification that effects on a listed species will be incidental as per section 73(2)(c). However, the overwhelming majority of such permits we reviewed concerned the authorization of incidental harm caused by infrastructure maintenance on physical works such as bridges or roads. We submit it is contrary to the purpose of SARA and thus unlawful to read section 73(2)(c) in a manner that allows the section to justify industrial development more generally. In particular, we submit it is unlawful to read section 73(2)(c) in a manner that justifies harm to a listed endangered or threatened species or its critical habitat in the context of, for example, authorizing commercial logging activity or the construction of a new industrial or resource development project such as a coal mine.

There are technical concerns with issuing permits using section 73(3)(c) as a justification. In particular, it is scientifically difficult and often impossible to determine quantitatively before the fact what the actual incidental effects, and their magnitude, of an activity will be on a listed species. This is especially true with incidental effects which, because they are not deliberate (as the interpretation of “incidental” contemplates), are inherently unexpected. It is illogical that all unexpected events could ever be anticipated and properly assessed for authorizing harm to species and habitat which is already threatened or on the verge of extinction. In practice, quantitative evaluations of risk and estimation error are seldom made.

The practical consequence of this problem is that mistakes in risk assessments are likely, and will have disproportionately large consequences for survival of populations that are already at risk. For these reasons the precautionary principle should be the default, and no permit should be

issued under the policy's proposed interpretation of "incidental" unless the activity is minor – as might be the case with routine maintenance or repair of existing physical works.

Furthermore, there are no quantitative standards for guiding the competent minister's decisions under this proposed policy. In light of the fact that listed species have already been identified scientifically and legally as at serious risk of extirpation or extinction, how much additional risk is tolerable? To what extent can these species sustain any further harm if SARA is to meet its objective?

The proposed interpretation of "incidental" would result in banning certain relatively harmless activities (the examples given included catch-and-release fishing with zero mortality), while permitting largescale industrial developments, many of which have inherently high probability of destruction of critical habitat, and even direct mortalities of nominally protected species, however incidentally. We submit this is an absurd reading of section 73(2)(c). It is plain that successive permitting of industrial development projects under the proposed interpretation of "incidental" would inevitably lead to further decline and ultimately extirpation or extinction of listed species under SARA.

We submit the sentence "Industrial development projects will usually satisfy this paragraph of SARA, as they are usually not directed at wildlife species" must be struck from the proposed permitting policy. The purpose of SARA and the context within which section 73 has been drafted by Parliament cannot bear this interpretation of 'incidental' without effectively rendering the legislation meaningless in its effort to both protect listed endangered or threatened species and facilitate their recovery. We submit that the only interpretation of the word "incidental" consistent with the purposes of SARA is "minor" or "inconsequential."

3.2.3.1 “All reasonable alternatives” – paragraph 73(3)(a)

Policy Statement

Paragraph 73(3)(a) will be interpreted as meaning that the applicant is required to consider all reasonable alternatives to their activity with a view to reducing the impact on the species, make a choice among the alternatives considered, and justify why this choice is the best one. The range of alternatives considered will be proportional to the significance of the activity’s anticipated impact on species at risk. Costs may be considered when deciding whether a given alternative is reasonable. Among the reasonable alternatives identified, the solution that best advances conservation of the species must be adopted.

Clarification

The English version of SARA specifies that it is “reasonable” alternatives that must be considered. While the qualification of “reasonable” is not in the French version, as a matter of policy, applicants will only be expected to consider reasonable alternatives. The determination of whether an application meets the requirements of this paragraph will be case-specific based on the facts of the situation. The decision whether to issue a permit must be evidence-based and the amount of analysis undertaken must reflect the significance of the impact of the activity on species at risk. Applicants need to demonstrate that all reasonable alternatives to their proposed activity were considered and that the needs of the species were considered when doing so. The option of not proceeding with the activity must be considered among the alternatives, although it would not necessarily be identified as a reasonable alternative (i.e., it must be considered whether not proceeding with the activity is a reasonable alternative). Biological, ecological, technical and economic limitations are to be considered when determining what alternatives can be considered “reasonable”. Once the reasonable alternatives have been identified based on consideration of the above-noted factors, the solution that best advances conservation (i.e., “the best solution”) must be adopted. As all the alternatives have been deemed “reasonable”, the only determining factor for selecting the best solution must be the impact on conservation of species at risk.

Section 73(3) of SARA sets out conditions that must be met in order for the Minister to enter into an agreement or issue a permit to a person. While in general it is agreed that it is beneficial for an applicant to provide information to the Minister that will help guide decision making, the responsibility lies not only on the applicant to demonstrate that they have met all conditions set out in section 73(3), but also on the Minister to consider whether proceeding with the activity with all reasonable alternatives and feasible measures taken will nonetheless still impair survival or recovery of the species and thus be inconsistent with the purpose of SARA. This consideration must include an analysis of the cumulative impacts of all activities and permits regarding the species and must prove that survival and recovery of the species in question will remain unimpaired if the permit is issued.

The option of not proceeding with the activity must be considered among the alternatives, but it must be considered not only by the applicant but also by the competent Minister and be subject to public scrutiny. We have little confidence that an applicant for a permit will provide full, true, and plain disclosure for the purposes of a section 73(3) assessment in the absence of meaningful public scrutiny and a transparent process.

We are supportive of the statement that 'the solution that best advances conservation (i.e., “the best solution”) must be adopted'. This of course includes consideration of not proceeding with the activity.

3.2.3.2 “All feasible measures” – paragraph 73(3)(b)

Policy Statement

For the purposes of paragraph 73(3)(b), the feasibility of measures will be determined based on an evaluation of biological, ecological, technical and economic factors. The amount of analysis required to identify all feasible measures, and the nature of such measures, must be proportional to the significance of the activity’s impact on species at risk.

Clarification

The determination of whether an application meets the requirements of this paragraph will be case-specific based on the facts of the situation. The decision whether to issue a permit must be evidence-based and the amount of analysis undertaken must reflect the significance of the impact of the activity on species at risk.

The applicant is responsible for demonstrating that the needs of the species were considered during the design of the activity and for identifying feasible measures to minimize impacts of the activity. Consideration must be given by the applicant to identifying and adopting best practices for the species.

Biological, ecological, technical and economic limitations are to be considered when considering what measures are “feasible”.

We submit this reading of section 73(3)(b) is consistent with SARA.

3.2.3.3.1 Addressing jeopardy with biodiversity offsets

Biodiversity offsets proposed by an applicant are among the tools and actions that will be considered when assessing whether the survival or recovery of the species would be jeopardized by a proposed activity. The applicant must demonstrate that the proposed activity, with any proposed offsets and any other accompanying actions, would not jeopardize the survival or recovery of the species. The applicant must also demonstrate that the offset is being used only to address residual effects after applying avoidance and mitigation measures to comprehensively reduce the effects of the activity on species at risk individuals, residences and critical habitat, as required under paragraphs 73(3)(a)&(b) of SARA.

We submit the proposal for consideration of biodiversity offsets in a section 73(3)(c) determination is fundamentally inconsistent with the meaning of critical habitat and the purpose of SARA to protect listed endangered or threatened species and their critical habitat.

Research on biodiversity offsets has found that such offsets have been largely inconsistent in meeting conservation objectives, finding that while compensation and no net loss are worthy goals, and bartering biodiversity might appear more promising than simple and weakly enforced prohibitions, policies that enable biodiversity trading may perversely yield worse biodiversity outcomes. We direct your attention to The Policy for the Management of Fish Habitat (1986) which purported to implement offsets under the *Fisheries Act* (Canada), and which was later considered to be flawed with serious and irreparable problems in compliance and actual effectiveness of offsetting measures.

In practice biodiversity offsets are likely to be institutionalized as any other mitigation measure - merely costs of doing business as usual. The so-called mitigation hierarchy of only considering biodiversity offsets after all possible harm avoidance looks good on paper but has very substance to support its effectiveness in practice. The use of offsets is more likely to impair the development of innovative ways to avoid and minimize harm to habitat damage. SARA is not the place to experiment with this sort of 'pie-in-the-sky' policy.

We reiterate the proposal for consideration of biodiversity offsets in a section 73(3)(c) determination is fundamentally inconsistent with the meaning of critical habitat and the purpose of SARA to protect listed endangered or threatened species and their critical habitat, and is therefore unlawful. In further support of this position, we provide the following.

Critical habitat is defined in SARA as "the habitat necessary for the survival or recovery of a listed wildlife species." Critical habitat is the absolute minimum requirement and typically does not include the entire habitat range and needs for the species. By definition critical habitat is scarce and unique, and is thus not a fungible commodity or replaceable. The concept of offsets requires the subject of the offset to be fungible and replaceable and have functional equivalency. Biodiversity offsets are incapable of serving the role proposed for them in this policy.

Actual implementation rates of biodiversity offsets are poor. For example, the US Wetland Banking mechanism was found to have 50% of offsets fully implemented. In Canada, the Department of Fisheries and Oceans (DFO) found that only 37% of compensation projects achieved the conservation policy of no net loss of habitat productivity under the Fisheries Act (Bull et al. 2013).

This policy proposes to allow for a time lag between the destruction of critical habitat and the implementation of the offset. A review by the Department of Fisheries and Oceans (DFO) in 2006 of their offsetting policy found that "temporal losses are exacerbated due to the time lag until compensatory habitats function ecologically in a manner comparable to pre-impact conditions. In many cases, the time lag may be considerable because some projects will likely never achieve equivalent functionality" (Quigley and Harper 2006). Offsets would have to be implemented before any habitat loss or degradation took place, be biologically relevant to the sub-population in question, and ensure connectivity between populations. Additionally, given the low success rate of offsetting measures, it would have to be proven that survival and recovery of a species would continue even if offsetting was unsuccessful. Habitats which have been exhaustively researched as technically very difficult and/or very lengthy (requiring many decades) to reclaim include native prairie, old growth forests and peatlands.

There are serious problems with compliance of offsetting measures. A review of Policy for the Management of Fish Habitat (1986) compliance found that "noncompliance with HADD and compensation areas contributed to substantial losses of habitat. The prevalence and magnitude of larger HADD areas and smaller compensatory works far exceeded gains in fish habitat due to authorisations with smaller HADD areas or larger compensation. Habitat loss as a result of improperly installed or designed compensatory structures (e.g., perched culverts, impassable weirs, dry channels) was also considerable. In many cases, these habitat losses exceeded the original HADD that necessitated the compensation habitat" (Quigley and Harper 2005). Constant enforcement (pre and post construction) to ensure compliance and effectiveness would be necessary, and enforcement would have to be managed in perpetuity. Additional funding measures would have to be put in place for enforcement and as insurance against default. Failure to appropriately complete biodiversity offsets would be in direct contravention of Sections 58 and 73 of SARA, yet the likelihood of a proponent being prosecuted for non-compliance is low. The same review of compliance under the Fisheries Act found that from 2000-2005, more than 2529 authorizations were issued, yet DFO had only ever issued 3 charges for noncompliance to date (Quigley and Harper 2005). It is highly unlikely that sufficient resources would be available to fund adequate enforcement.

Sincerely,

Shaun Fluker
Associate Professor of Law
Barrister & Solicitor

References

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