

# Species on Life Support with Proposed Permitting Policy



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## **S**pecies on Life Support: Section 73

Species at risk are on life support. University of Calgary legal experts Shaun Fluker and Drew Yewchuk use this analogy to underline their perilous position: “A species becomes listed as endangered or threatened under SARA because it is on the verge of becoming extinct or extirpated.” So then, why does the *Species at Risk Act* (SARA) include Section 73? This section appears to allow a permit to be issued to authorize harm to listed endangered or threatened species or their critical habitat. If an endangered species is on life support, harming the individual or its habitat is like unplugging their ventilator.

To the contrary Section 73 is not designed to permit harm to species. Rather, it allows for permits to be issued when the activity (meaning, anything human-caused) ultimately should be beneficial to the species. One example of this would be a permit for scientific research relating to the conservation of species. Another would when the activity benefits the species or is required to enhance its chance of survival in the wild. A third type of activity permitted by Section 73 would be when affecting the species is incidental to the carrying out of the activity (I’ll return to what “incidental” means shortly). SARA goes on to say a permit can only be issued if it is the best solution out of all reasonable options. Measures must be taken to lessen the impact of the activity. Most importantly perhaps, the permitted activity must **not jeopardize the survival or recovery of the species**. Further to the

life support analogy, a permit might be issued to disconnect the flow of oxygen, but just for a moment in order to put a better mask on.

Threatened westslope cutthroat trout offer us a real-world example of permitting under Section 73. Permit DFO-16-PCAA-00028 was a Section 73 permit issued in August 2016 to remove a collapsed bridge that was creating a damaging barrier in critical habitat for westslope cutthroat trout. Removing the bridge and restoring the bottom, banks, and riparian areas was intended to improve this fish habitat. There is always a risk of damage to habitat or the fish themselves, so permits contain pre-conditions so that the proponent can outline mitigation measures to lessen that risk.

Last year, a new policy was proposed for Section 73. AWA and the Timberwolf Wilderness Society, receiving legal counsel from Shaun Fluker at the University of Calgary Faculty of Law, argued in a November 18 letter that the new policy contradicts the purpose of SARA and is therefore unlawful. Our work and especially the valuable work of environmental lawyers like Shaun is a bit like trying to understand the fine print. Our main concerns are with the changes that introduce industrial development in critical habitat, and the concept of biodiversity offsets.

### **“Incidental”...to Whom or What?**

**Section 73(2)(c): A permit can be issued only if the competent minister is of the opinion that affecting the spe-**

**cies is incidental to the carrying out of the activity**

Using the term “incidental” in Section 73 is troubling. The proposed policy interprets “incidental” to mean that the effect of carrying out the activity upon the species must not be the purpose of the activity (my emphasis). The policy explicitly says that industrial development projects may satisfy this paragraph of SARA. Most permits issued under this provision so far have been for infrastructure maintenance like roads or bridges, not industrial development. The concern is that, with this language, this provision could instead be used to allow industrial development. Could a mining company apply for a Section 73 permit on the grounds that, if any damage was done to westslope cutthroat habitat, the damage was only incidental?

AWA believes “incidental” needs qualifiers such as “minor” or “inconsequential” because large scale industrial developments have no place within critical habitats of species at risk. A previous draft policy by Environment Canada in 2005 could be brought forward instead. It interpreted “incidental” as an activity that is not directed at the species but that can reasonably be expected to affect it.

### **Biodiversity Offsets:**

**Section 73(3)(c): A permit can be issued only if the competent minister is of the opinion that the activity will not jeopardize the survival or recovery of the species.**

Under Section 73(3)(c), the policy also attempts to introduce the concept of bio-

diversity offsets. Biodiversity offsets are a way to re-create the same amount, type, and quality of habitat to replace habitat that will be impacted.

There is a fundamental problem with allowing “offsets” while damaging critical habitat. Critical habitat is just that: *critical* to the survival and future of the species. We must be very careful with relying on offsets when they have proven in practice to be ineffective.

Everyone envisions best case scenarios in which the fish would not only survive, but thrive, while humans reap the economic benefits. Unfortunately, the worst case scenario is too often the reality: dollars for enforcement run out, managers are noncompliant, and the habitat is less productive or even completely unviable for the species in question. A 1986 fish habitat offset policy under the Fisheries Act in Canada was considered to be flawed due to serious and irreparable problems in compliance and actual effectiveness. A 2006 study of Canada’s fisheries offsets found about two thirds of habitat compensation projects resulted in net losses of habitat productivity. In the United States a wetland banking offset mechanism saw only 50 percent of the promised offsets fully implemented.

Another disadvantage to offsets is that they arguably weaken the *Species at Risk Act*. Providing an offset, one that may never be implemented effectively, might be considered as merely a cost of doing business. It may discourage and impair efforts to identify innovative ways to avoid and prevent significant harm to critical habitat.

The proposed policy also allows a time lag between the destruction of critical habitat and the implementation of an offset. This raises a big red flag. This means critical habitat and the flora and fauna it nurtures could be gone years before an offset measure is put in place. Albertans want oil and gas companies to commit to reclamation funds from the outset of projects so that the province doesn’t end up with the huge liability of orphaned wells; in the same way, if biodiversity

offsets are allowed they must be established and proven to work *before* species habitat is disturbed. Of course, successful well-reclamation demands that sufficient funds be set aside; biodiversity offsets must receive the funding needed to establish their biological relevance and connectivity to other populations.

And then there’s the issue of enforcement. Habitat compensation will demand additional investments by government into the public service to supply the dedicated staff this goal will require.

## Our Wildlife

Canadians all have a stake in wildlife management. Species recovery plans are transparent, but Section 73 permits are seldom, if ever, available for timely public scrutiny. However, there’s a chance now until March 31 to voice your opinion that species at risk policies should be designed to protect and recover Canada’s struggling species.

The purpose of the *Species at Risk Act* is to maintain or recover species at risk. One might have thought it should be obvious that when an activity is likely to harm a species at risk the activity

shouldn’t be allowed. Full stop. As it is written, SARA is a strong law that provides a backbone to protect and recover species at risk in Canada. But, like the species it is concerned with, the Act is at risk of being weakened by interpretations that may benefit industrial developments rather than species at risk. We need policies that support the purpose and intention of SARA, not ones with the troubling potential to undermine it. 🐾

*AWA thanks Sean Fluker and Drew Yewchuk at the University of Calgary for their valuable contributions to this subject.*

*To read AWA’s letter on the permitting policy, visit: <https://albertawilderness.ca/awa-tws-letter-proposed-species-risk-act-permitting-policy/>*

*To submit your own comments on the permitting policy and the other five policy changes under the Species at Risk Act, write to [ec.registrelep-sararegistry.ec@canada.ca](mailto:ec.registrelep-sararegistry.ec@canada.ca) by March 31, 2017.*



*“Don’t worry, the government says right here that pulling the plug is just an “incidental” activity.”*  
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