a place of mind
THE UNIVERSITY OF BRITISH COLUMBIA

To: Susan Milburn-Hopwood, Assistant Deputy Minister, Canadian Wildlife Service
CC: Minister Catherine McKenna, Minister Dominic LeBlanc, Daniel Watson, MP Jonathan Wilkinson, Minister Kirsty Duncan.

Dear Ms. Milburn-Hopwood, November 21, 2016

The Species at Risk Act (SARA) was passed by parliament in 2002 to conserve biological diversity in Canada and to protect our most vulnerable species from extinction. While the Act itself is far reaching with many laudable provisions, there have been impediments that have prevented the legislation from being fully implemented, with delays at all stages under SARA (listing, recovery strategies, action plans), biases in listing[1], limited use of all available tools (e.g., conservation agreements, stewardship plans, emergency orders), and comparatively few on-the-ground & in-the-water actions.

As scientists concerned with species at risk issues, we are very pleased that Environment and Climate Change Canada (ECCC) has recognized some of these problems and has taken initiatives to address them through the proposed policy suite. We highlight the following substantial improvements:

- The policies contribute positively to transparency in decision-making.
- The policies recognize the importance of the precautionary principle and provide more concrete guidance about its applicability in the face of scientific uncertainty (as noted in SARA, e.g., s.38).
- The draft "*Policy on Survival and Recovery*" clarifies the aspirations of SARA in important ways. This policy makes it clear that the goal is not to keep endangered species endangered (survival) but to recover self-sustaining populations.

On the other hand, we have identified a number of limitations in the current policy suite that, in our judgment, will continue to reduce the efficacy of SARA:

- The "*Policy on Listing*" fails to specify exactly when species at risk reports will be transmitted from the Minister to Cabinet. Prior to 2006, most files were transmitted <100 days following receipt from COSEWIC. Current delays are often years long.
- The "*Policy on Survival and Recovery*" lacks quantitative, unambiguously measurable targets for recovery, making it difficult to assess progress, and does not apply retroactively to the > 250 species that already have (mostly weak) recovery objectives.
- The "*Permitting Policy*" does not account for cumulative impacts when considering permits and is ambiguous about what activities are considered to have impacts "incidental to" the purposes of the activity.
- The "*Anthropogenic Structures*" Policy should address habitats created by anthropogenic structures (e.g., lakes created by dams), as well as the structures themselves.

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[1] Mooers, A. O., Prugh, L. R., Festa-Bianchet, M. & Hutchings, J. A. (2007) Biases in legal listing under Canadian endangered species legislation. *Conserv Biol* 21, 572–575. McDevitt-Irwin, J. M., Fuller, S. D., Grant, C. & Baum, J. K. (2015) Missing the safety net: evidence for inconsistent and insufficient management of at-risk marine fishes in Canada. *Can J Fish Aquat Sci* 72, 1596–1608.

More generally, specific criteria for evaluating the *effectiveness* of policies (*Policy Principle* 1), as well as the *evidence* to be used in assessing efficacy (*Policy Principle* 6), are missing from the present policy suite and should be added. In particular,

- Add specific criteria to measure progress towards critical habitat protection on non-federal lands;
- Add specific criteria for evaluating the reasonableness of "alternative measures" in permitting decisions;
- Add specific criteria for evaluating the proposed effectiveness of offsetting.

Below we consider each policy in turn. We strongly encourage ECCC both to address the general and specific policy gaps and, importantly, to develop a transparent plan and timeline to clear the backlog of listing decisions and action plans, akin to the existing **Three-year Recovery Document Posting Plan**[2]. Doing so will not only improve SARA implementation and outcomes for species at risk, but send two clear signals: one, that the Ministry intends to get Canada back on track to protect our most vulnerable species, and two, that it intends to engage the full range of scientific, policy and legal expertise in Canada to do so. To this end, we are eager to work with ECCC on these and additional initiatives to improve outcomes for species at risk.

Sincerely,

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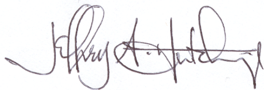

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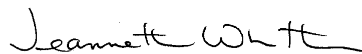

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[2] https://www.registrelep-sararegistry.gc.ca/default.asp?lang=En&n=09A60D9E-1

Species at Risk Act Policy Principles

The first of the Policy documents is a set of eight principles that we expect to be widely supported (Effectiveness; Transparency; Respect the complementary roles of jurisdictions; Foster on-the-ground stewardship; Act in collaboration; Evidence-based approaches; Take a precautionary approach; Embrace adaptability). While this first document is not marked as a draft, the statement of these general principles provides an opportunity to reflect more broadly on improvements to SARA.

Principle 1 (Effectiveness): SARA's stated objectives are "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" (s. 6). To assess whether the Act is effective requires that we (a) **monitor changes in abundance and distribution** and (b) **evaluate changes in scope and severity of threats**. In our view, these assessments, as well as explicit standards for monitoring effort and best practices, are essential for evaluating the effectiveness of SARA. To uphold this principle, we recommend that ECCC commit to coordinated scientific assessments of abundance, distribution and threats.

Principle 2 (Transparency): We also recommend that all data gathered in support of SARA by ECCC and others be made freely available to the public and scientific community (with appropriate safeguards, e.g., providing coarse-grained GPS coordinates for at-risk species vulnerable to collection). Publically available monitoring data, alongside information about effort and methods, are essential for independent assessments of species status and for evaluating the efficacy of particular policy approaches. At present, scientists must rely on COSEWIC reassessments to gauge the efficacy of SARA[3]; such reassessments are, however, affected by changes in monitoring effort, newly discovered populations, and shifts in COSEWIC guidelines, making it difficult to determine what is working and what needs improvement.

Principle 6 (Evidence-based approaches): An evidence-based approach entails gathering and weighing of evidence, but it also requires specifying how that evidence will be used (presumptions), what thresholds are required for the evidence (standards of proof), and who must demonstrate that the thresholds are reached (burden of proof). Decision outcomes differ dramatically depending on these standards. For example, over the past decade, the federal government has been the target of four judicial reviews under SARA concerning what evidence should be gathered and how it should be used[4]. We recommend that all SARA policies explicitly specify **what evidence will be taken as proof, what is the standard of proof, and where the burden of proof lies** (e.g., with the proponent or with government).

A Missing Principle: Accountability. To date, Canada's species at risk have not received the level of protection intended by SARA, because of "SARA's slow pace, incomplete recovery measures, and inadequate implementation"[5]. These problems stem from a lack of **accountability**. Put simply, over the past ten years, the government has not held itself responsible to meet the legal obligations of SARA, as found both in court[6] and by the Commissioner of the Environment and Sustainable Development[7]. By aiming higher – *aiming for accountability* – this government can avoid past failures. Rather than being held responsible by the courts, the government should strive to hold itself responsible, meeting (as opposed to just setting) timelines for listings, recovery strategies, and action plans, and ensuring that recovery targets are met. We recommend that the government consider a Principle of Accountability and the mechanisms to support it.

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[3] Favaro *et al*. (2014) *PLoS ONE* **9,** e113118

[4] Including an inappropriate presumption that critical habitat need not be identified in a recovery strategy and an overly strict standard of proof to define critical habitat only with highly detailed information on habitat use.

[5] McDevitt-Irwin *et al*. (2015) *Can J Fish Aquat Sci* **72,** 1596–1608

[6] "Ministers' failure to include proposed recovery strategies for the four species in the public registry within the statutory time periods…unlawful"; Western Canada Wilderness Committee v. Canada (Fisheries and Oceans) 2014 FC 148 (http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/66803/1/document.do)

[7] "Environment Canada, Fisheries and Oceans Canada, and Parks Canada have not met their legal requirements for establishing recovery strategies, action plans, and management plans under the *Species at Risk Act*" (http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201311_00_e_38670.html)

Policy Regarding the Identification of Anthropogenic Structures as Critical Habitat under the *Species at Risk Act*

Points of agreement: This document provides important clarification about whether human-made structures should be considered as critical habitat for species at risk. In an increasingly human-altered landscape, many species are shifting towards use of the human-constructed environment. From threatened (COSEWIC 2011) barn swallows to endangered (SARA) chimney swifts, many species are turning to built homes from their natural homes (e.g., hollow trees, which have declined in number with current forestry practices).

We therefore agree with the statement:

> "Whereas an anthropogenic structure may not constitute an area or type of site where an individual or wildlife species *naturally* occurs, it may nonetheless be an area or type of site upon which the species *depends directly or indirectly* in order to carry out its life processes."

We also agree that it is consistent with the intent of the Act that such structures be identified as critical habitat where they positively contribute to species survival and reproduction. Similarly, we agree with the application of the precautionary principle in cases where it is difficult to know if a structure is "required" for survival or recovery of the species.

Suggested changes: We recommend that it be clarified in footnote 1 whether the draft Policy applies to *habitats* that would not exist *but for* the presence of anthropogenic structures (e.g., wetlands created by road obstructions, sewage ponds by treatment plants, meadows by tile drainage, lakes by dams, etc.). Similarly, it is unclear whether the Policy applies to other landscapes shaped by humans (e.g., gardens, hedgerows, fallow fields).

Statement 4, as written, states that "If it is unknown whether there is sufficient natural habitat available to support survival or recovery of the species, recovery practitioners will need to consider the available information" to make a determination about whether anthropogenic structures (upon which the species depends directly or indirectly) are required for survival or recovery. However, if the best available information indicates that it is *unknown* whether there is sufficient natural habitat, then it must be *unknown* whether the structure is necessary for survival and recovery. In such situations, we recommend that the precautionary principle be invoked, for example:

> "4. If after considering all available information there is insufficient evidence to reliably conclude that there is sufficient natural habitat to support survival or recovery of the species, the anthropogenic structures in question should be presumed to be required for survival or recovery (and hence, identified as critical habitat) until sufficiently compelling evidence to the contrary is obtained, in keeping with the precautionary principle. In such cases, the critical habitat schedule of studies can be used to address the knowledge gaps/uncertainty."

Species at Risk Act Permitting Policy

Points of agreement: Permitting is an important component of SARA (s. 73) that allows for actions impacting species at risk to occur when the benefits are deemed greater than the risk. This policy clarifies what issues should be considered when assessing a permit application.

We agree with the restriction of scientific research to those activities that support the recovery of the species. We also agree that findings from such research "must be accessible to the public," and indeed, we would encourage this approach to all data (with appropriate safeguards). We also agree with the interpretation of s.73(2)b that permits should be granted for activities that benefit the species and that the recovery strategy should guide what is most likely to be beneficial (e.g., mitigating specific threats).

Suggested changes: Nevertheless, we recommend greater clarity in the interpretation of provision s.73(2)c of SARA. This provision states that permits may be granted when "affecting the species is incidental to the carrying out of the activity." The draft policy interprets this provision as "meaning that the effect that carrying out the activity has upon the species must not be the purpose of the activity" (e.g., hunting and fishing for the target species). What is not clear is how to interpret this provision when the purpose of the activity involves the damage or destruction of residences, which are also considered detrimental effects in the context of the general prohibitions of SARA (s.32&33). We recommend that activities whose purpose includes the damage or destruction of residences must not be considered incidental to the carrying out of the activity and that this exclusion be added to the policy document[8].

Furthermore, because the policy interpretation of 73(2)c might confuse "incidental to" as implying a minor effect, we recommend that this policy statement be explicit:

> "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. The finding that effects are non-purposeful (i.e. "incidental to") shall *not* be interpreted as having any bearing on the evaluation of the intensity, magnitude, or scope of such effects, which must be considered under s.73(3) before issuing a permit.

An additional concern is in the interpretation of SARA 73(3)a, which states: "all reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted". We agree with the draft policy statement that "not proceeding with the activity must be considered among the alternatives." What concerns us, however, is that there are no criteria for what should be considered a "reasonable alternative." Furthermore, the **proponent is in a conflict of interest**, because their project can go forward only by claiming that it is not a "reasonable alternative" not to proceed. We suggest that ECCC develop an Operational Policy Statement (OPS) or Technical Guidance Statement (TGS) that explicitly lays out the criteria by which reasonableness will be assessed. This guidance should be quantifiable and externally verifiable.

Guidance is also needed in the determination of whether "the activity will not jeopardize the survival or recovery of the species" (73(3)c). We recommend that if the activity is likely to result in direct take, destruction of residence, or destruction of critical habitat, then the presumption is that in fact it *will* do so, unless the proponent can provide sufficiently compelling evidence to the contrary, in line with a precautionary approach. That is, the onus of proof should be on the proponent to demonstrate that the project will not jeopardize survival or recovery, or that any impacts will be demonstrably offset.

Of additional concern is the **lack of consideration of cumulative impacts in the permitting process**. The draft policy statement argues that the permitting decision for 73(3)c will be made on a "case-by-case basis." Any one small project may not, on its own, tip the balance between survival and extinction,

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[8] For example, if logging is the activity and harvesting includes trees with cavity nests, then it should be excluded by 72(2)c, whereas if logging avoids harvesting trees with cavity nests, then permitting may be considered, if s.73 is satisfied.

but many similar small projects would. In this case, the policy interpretation must consider the cumulative impact of all such projects (as in section 3.3 in the draft **Policy on Critical Habitat Protection on Non-federal Lands**) and ensure that the cumulative impact does not jeopardize survival or recovery. We thus recommend the change:

> "The assessment of whether an activity would jeopardize the survival or recovery of the species will be determined on a case-by-case basis, viewed in light of the cumulative impacts of previously permitted activities. Permitting will become more restrictive when past permitted activities have the potential for substantive cumulative impacts on a species at risk."

Regarding offsets, we agree with the principles outlined in section 3.2.3.3.1 and 3.2.3.3.2 for activities that receive permits. The policy well describes the need for offsets to have additional benefits to the species, equivalent duration, and comparable protection of individuals and critical habitat. However, we suggest that the precautionary principle be invoked here as it is in many other places in this policy suite, i.e. replacing "offsetting…is not appropriate where there is a high probability of the offset failing" with "offsetting…will be considered only when there is compelling evidence that the offset will succeed."

Approach to the Identification of Critical Habitat under the *Species at Risk Act* when Habitat Loss and Degradation is Not Believed to be a Significant Threat to the Survival or Recovery of the Species

Points of agreement: This draft policy statement takes a pragmatic approach to species that are at risk for reasons that do not have to do with habitat loss or degradation. We agree with the stated principle that:

> "In situations where habitat quantity and quality are not currently limiting species recovery, recovery efforts should focus on the primary threats to the species (e.g., disease or harvest)."

We also agree that it is proactive to identify the habitat required for survival or recovery to ensure that habitat does not become limiting in the future. While habitat remains in abundance, we further agree, with slight modification, with the policy that:

> "Activities Likely to Destroy Critical Habitat will focus on maintaining habitat of sufficient quantity and quality to ensure survival or recovery and may not be particularly restrictive."

Suggested changes: Draft policy statement (8) raises substantial concerns, however, in that it states that socio-economic concerns "may be considered in the identification of critical habitats." This suggests that the portion of available habitat that is identified as "critical habitat" can be moved and shifted over time, depending on current socioeconomic conditions, potentially leading to widespread habitat degradation. Evaluating the fraction of available habitat that is critical habitat should remain an **evidence-based decision**, and all habitat that is available should be considered when taking measures to protect species at risk. Furthermore, removing potential habitat from the collection of what is considered critical habitat may misdirect future efforts (e.g., reduce the chance that land conservancies purchase the land). Moreover, the points made in draft policy statement (8) are better covered elsewhere. Draft policy statement (7) already notes that management may not be restrictive when natural habitat is sufficient to support recovery and the "Policy Regarding the Identification of Anthropogenic Structures as Critical Habitat under the *Species at Risk Act*" also explicitly covers this case. **We therefore recommend that policy statement (8) be removed.**

One further suggestion for improving this policy document is to note that **accessibility**, not just amount, matters for critical habitat. For example, if a disease has limited a species to a narrow range, recovery will depend not just on how much habitat exists but whether the remnant population can disperse into that habitat. Thus, this policy should highlight the importance of connectivity and access to habitat. For example:

> "However, in these cases there may still be habitat-related recovery measures that are appropriate in the context of recovery for the species. In particular, the ability to access habitat by the remnant population(s) should be considered, with priority placed on measures that provide for significant connectivity to appropriate habitats."

Policy on Survival and Recovery[9]

Points of agreement: Two of the stated purposes of SARA (6) are "to prevent wildlife species from being 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." According to this draft policy, ECCC interprets the first purpose as equivalent to a "survival" statement and the second as a "recovery" statement for species at risk. The draft policy then clarifies the Ministry's interpretation of survival and recovery, which in our view is a major step forward in implementing SARA.

We agree with the definition developed for survival: survival implies that the species has a high probability of persistence, with indicators of this state being stable or increasing population sizes, sufficiently large population size to provide resilience, sufficient spatial distribution to withstand catastrophic loss, connectivity, and low levels of human-induced threats.

Recovery is appropriately recognized as a graded term, between a minimum threshold and the historical condition. The draft policy clarifies that the minimum recovery threshold lies above the survival threshold by three additional requirements: representation of the species across its historical range, improvement in condition relative to first listing, and ability to persist naturally without further intervention.

Suggested changes: We would suggest, however, that **quantitative guidance** be provided about what probability of persistence is considered sufficiently "high" for survival. The definition of survival in the Glossary is "not at significant risk of extirpation or extinction" but no time frame or risk value is provided. If the ECCC has a working goal for a survival threshold (e.g., less than a 10% chance of extinction within 100 years), then **stating the survival threshold probability would ensure consistency of application and increase transparency**.

Furthermore, guidance should be provided about the **scale at which representation** is meant when assessing recovery in the context of a species' historical range (section 5); the implications are very different if this scale is coarse (e.g., presence in a province or territory) or fine (e.g., occupation in every square kilometer of the historical range).

We also suggest that some ongoing ecosystem management should be allowed when defining whether or not a species is recovered. We thus suggest a modification in section 3.2:

> "Once achieved, **perpetuation** of the recovered state is not reliant on significant, direct and ongoing intervention to maintain populations. Recovery can, however, be considered in cases where perpetuation of the recovered state depends on ongoing indirect ecosystem management, such as fire management, grasslands management, or control of invasive or problematic species."

Our biggest concern in this draft policy is about what constitutes an irreversible decline in a species. Recovery is deemed not possible if achieving the minimum threshold is "not technically and biologically feasible." However, the Glossary definition of irreversible includes examples that are not strictly irreversible. For example, toxic contamination is not irreversible, nor is loss of genetic diversity (e.g., this can be reversed through assisted migration, or through the accumulation of mutations, even on an ecological time frame); in many cases permanent infrastructure is also not irreversible but could be modified or moved (e.g., as was done to protect the Banff Springs snail).

We recommend that **irreversibility be limited to factors that cannot be changed, regardless of investment** (e.g., loss of all females). Socio-economic factors and cost benefit analyses would instead be considered when developing an action plan.

Finally, we suggest that targets be quantified, where feasible, so that progress towards recovery can be measured. For example, in section 3.4, we suggest the following modification:

> "In general population and distribution objectives will be set based on the best biologically and technically achievable scenario, provided it does not exceed historical norms. These objectives must set quantitative targets, so that progress can be measured."

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[9] Minor corrections: "it's situation" -> "its situation", "insuring" -> "ensuring"

Listing Policy for Terrestrial Species at Risk[10]

Listing of species at risk in Canada is a two-stage process. The first involves assessment by COSEWIC, an arms length body that evaluates scientific and indigenous knowledge. The second involves the Minister of Environment making a recommendation to Cabinet (and via Cabinet to the Governor in Council, GIC), for official listing under SARA.

Suggested changes: Revised Policies are necessary for the second stage to avoid prolonged delays in listing that do not reflect the intention of SARA, as stated in the preamble of the Act. Indeed, between 2011 and 2015, none of the normal files for species at risk submitted by COSEWIC to the Minister were transmitted to Cabinet[11]. Several earlier files have also been delayed at the listing stage. On the SARA website[12], the Ministry lists 154 species that are awaiting listing decisions. While some of these are reevaluations of species already listed (on Schedule 1 of SARA), over 100 species have been waiting for listing, some since 2005. These delays have been common even for species deemed to require only the "normal" consultation stream (almost 40 species waiting for listing). During these delays, species at risk are not legally protected, and many have declined further. For example, bobolink, barn swallows, and Eastern meadowlarks (recommended for listing as threatened by COSEWIC in 2010, 2011, and 2011, respectively) have recently shown highly significant declines in Canada according to the Breeding Bird Survey (2002-2012)[13], declining annually by 2.42%, 1.85%, and 3.53%.

This loophole in the legislation has diminished the Government of Canada's capacity to fulfill its commitments under SARA and international agreements, such as the Convention on Biological Diversity.

The draft Policy only partially describes the timeline that should be followed for species at risk. Within 90 days of receipt from COSEWIC of a file for a species at risk, the Minister must file a Response Statement, which indicates that the "consultations follow either a normal timeline (typically three to four months) or an extended timeline (typically nine months to a year)". These Response Statements have been made in a timely manner.

The delays have occurred after the Response Statements have been issued and have to do with a change in interpretation about when the Governor in Council formally receives the file for a species at risk. As stated in SARA and in the draft Policy, SARA requires that the Governor in Council decide to list, not list, or return the file to COSEWIC within nine months after "receiving an assessment of the status of a species by COSEWIC". While the law states that the timeline should occur following receipt by COSEWIC, the draft policy states that the timeline begins only once an *Order Acknowledging Receipt of the Assessments Done Pursuant to Subsection 23(1)* has been issued. The major problem with this draft policy is that there is **no deadline for when this Order must be issued.**

Parliament's Standing Joint Committee on Scrutiny of Regulations (2008)[14] determined that delays at the listing stage were not consistent with the goals of SARA, stating that "The intent of section 27 of the Act is that action on an assessment is to be taken within a fixed period of time." They further noted that "Parliament must have assumed the nine month deadline would be calculated from the date of receipt of

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[10] Minor corrections: "'Terrestrial species' means all wildlife species1 that are migratory birds" → "'Terrestrial species' means all wildlife species1, including migratory birds". "defines aquatic species as ''aquatic species'' means a wildlife species that is a fish" → "defines aquatic species as a wildlife species that is a fish". "section 3.0 and Error! Reference source not found"- "section 3.0 and Figure 2". "herefore" → "Therefore"

[11] Table 3 in 2015 annual SARA report http://registrelep-sararegistry.gc.ca/virtual_sara/files/reports/Sar%2Dv00%2D2016Oct28%2DEng%2Epdf . Some files have been transmitted in 2016, but there remain no new finalized listings and no clear timeline for listing the remaining species.

[12] http://www.sararegistry.gc.ca/default.asp?lang=En&n=25DF0E8F-1

[13] http://www.ec.gc.ca/ron-bbs/P002/A001/?lang=e

[14] http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3502486&Language=E&Mode=1&Parl=39&Ses=2

an assessment by the Minister." The report of this committee recommended that SARA be amended to make it clear when species at risk files must be transmitted to the Governor in Council, in keeping with "Parliament's intent that action on an assessment be taken within a fixed period of time".

Furthermore, in the first few years of SARA, the *Order Acknowledging Receipt* was issued within days of issuing the Response Statement. Starting in 2006, however, the Orders became increasingly delayed or were never made.

We therefore recommend the following change to the draft policy on listing:

> "The start of the nine months for Governor in Council's decision begins on the date that the *Order Acknowledging Receipt of the Assessments Done Pursuant to Subsection 23(1) of the Act* is made. These Orders are published in Canada Gazette, Part II and can also be found on the SAR Public Registry. For species following a normal consultation pathway, the *Order Acknowledging Receipt of the Assessments Done Pursuant to Subsection 23(1) of the Act* will be submitted within 90 days of receipt of the file by the Minister from COSEWIC, along with the Response Statement. For species following an extended consultation pathway, a date will be published on the SARA registry when the Response Statement is issued indicating when the *Order Acknowledging Receipt* will be submitted (normally within one year)."

For normal consultations, this time frame – 90 days plus 9 months between submission from COSEWIC and decisions to list – is sufficient to accomplish consultations and their analysis. For extended consultations, **a published deadline allows for transparency and clear targets, against which performance can be measured**. Adding the above statements to the draft policy also signals to future governments that the current government is committed to abiding by the intent of SARA[15], avoiding the extensive delays in listing that we have witnessed over the past decade.

We would also recommend that it be made clearer, when stating the General Prohibitions in the box in section 3.0 and in the text 3.1.1, that SARA is restricted (s.34(1)) to federal lands or lands under the authority of the Minister of Environment, as noted in Figure 2 and section 6.0 (with exceptions for migratory birds or aquatic species). This narrow spatial application of the General Prohibitions is important to state explicitly because it proscribes the appropriate scale for assessing potential socioeconomic consequences of listing (or non-listing).

Finally, we are concerned with the wording about the basis of decisions not to list (section 4.1). The draft policy states that "The reasons may include considerations regarding the species, management of the threats to it, and implications for the species of not listing, as well as social, economic or other factors relevant to the decision." In our view, this is insufficiently prescriptive to be very useful in practice. We suggest that the policy:

- recognize explicitly that COSEWIC's advice constitutes a strong presumption (as is the case under DFOs new listing policy for aquatic species[16]); and
- include a statement that there must be compelling evidence (a) of large negative socioeconomic impacts resulting from listing; or (b) that proposed alternative management approaches in lieu of a decision to list will have an effect on the species' abundance or distribution equal to or greater than those anticipated from a decision to list.

It is our view that listing under SARA is a statement to Canadians about what species are most at risk in our country and that this should be an **evidence-based and transparent** reflection of the status of species.

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[15] http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3502486&Language=E&Mode=1&Parl=39&Ses=2

[16] http://www.registrelep-sararegistry.gc.ca/virtual_sara/files/policies/policy-politique-eng.pdf

Policy on Critical Habitat Protection on Non-federal Lands

Points of agreement: As many species currently listed under Schedule 1 of SARA occur on non-federal lands, protection of critical habitat on non-federal lands is necessary for survival and recovery. To date, implementation of SARA s. 61(4) has been substantially hampered by the lack of an explicit policy on how protection is to be assessed on non-federal lands and the steps to be taken subsequent to this assessment. As such, the proposed policy is a welcome – indeed, much needed – addition to the current SARA policy suite.

An important benefit of the increased application of SARA s.61(4), in consultation with provincial, territorial, Indigenous, and local governments, is that it will help ensure that consistent protection is in place for species at risk across all levels of government.

We concur that, with respect to the "effective protection" provision (SARA s. 61(4)(b)), the appropriate test is whether critical habitat is being protected to a level equivalent to that which would be obtained were the prohibitions of SARA s. 61(1) in place. We also find that the general approach to determining whether critical habitat is effectively protected on non-federal lands (i.e., the proposed Critical Habitat Protection Assessment (CHPA) protocol) is both scientifically sound and operationally feasible. In particular, we welcome: (a) the distinction between parts and portions of critical habitat; (b) the criteria for determining the "strength" of non-federal laws and agreements (CHPA steps 1, 2); and (c) the stipulation that, even if assessment suggests that there is no gap in protection, critical habitat will nonetheless be monitored to ensure this remains the case.

Suggested changes: This having been said, there are several ways the proposed policy could be improved:

(1) While the CHPA states that it considers all **parts** and **portions** of critical habitat (section 4.1.2), only "portion" is explicitly mentioned in the following steps. Clarification is needed in section 4.1.2 to the effect that "portion" is considered to apply to both "part" and "portion" *sensu stricto*.
(2) CHPA steps 1 and 2 (sections 4.2 and 4.3) will be difficult to interpret. Sections 4.2.2 (laws) and 4.3.3 (measures) consider whether laws and measures *could* provide protection and whether they *have* provided protection based on past applications. The next sections (4.2.3 and 4.3.4) categorize laws and measures as "strong" or "moderate", but how these categories are determined is not clear; sections 4.2.3 and 4.3.4 appear to refer only to whether the laws and measures could provide protection, not whether they have a history of doing so. We recommend that the difference between "weak", "moderate", and "strong" be precisely specified. We further recommend that law(s) and measure(s) should be moderate or strong in structure *and* that their history is consistent with being effective in order to conclude that there is no "gap" in protection.
(3) CHPA step 3 includes few specifics on how, precisely, the risk of critical habitat degradation and destruction will be assessed. An appropriate method, with associated protocols and criteria, must be developed for both the current policy, as well as the policy concerning conservation agreements. We believe that the scientific community could provide considerable assistance to the Ministry in developing an appropriate method.
(4) We are unsure of the rationale for the restriction of monitoring (CHPA step 4) to only those cases where it is determined that there are no gaps in protection (steps 1 and 2) or, if there are, the risk of critical habitat destruction is low (step 3). To our mind, it is particularly important to monitor critical habitat if there is reason to believe the habitat is *not* being effectively protected. We therefore suggest that as matter of policy, critical habitat on non-federal lands should be monitored irrespective of whether the CHPA protocol determines it is effectively protected.

(5) In the event that the CHPA identifies gaps in protection, or the risk of critical habitat destruction is considered moderate to high, we strongly recommend including a defined time period (e.g. 2 years) for ensuring that consultations are completed in a timely fashion (5.1.5).
(6) Although we agree that Ministerial discretion is properly exercised in a determination of whether "reasonable steps" are being taken to protect unprotected critical habitat, we believe that criteria and thresholds for "reasonable" in this context must be developed (6.2.1). For example, CHPA steps 1-3 are concerned with laws and conservation measures that are *already in place*; yet proposed laws or measures may also be a factor in a Ministerial determination of whether "reasonable steps" are being taken to secure unprotected habitat on non-federal lands.
(7) In cases where critical habitat is not being effectively protected, we are concerned that the only necessary action of the Minister is to report this gap every 180 days (6.2.1). A **higher standard of accountability** is needed to avoid repeatedly submitting reports without progress on protecting species at risk.
(8) In keeping with overarching Principle 2 (Transparency), the critical habitat monitoring plan and all associated data specified in CHPA should be made available on the SARA registry.

Policy on Protecting Critical Habitat with Conservation Agreements under Section 11 of the *Species at Risk Act*

Points of agreement: The Policy on Conservation Agreements is also very welcome. The previous lack of a clear policy direction on critical habitat protection using conservation agreements has hampered what could be one of the most effective tools for protection and recovery of species at risk.

We agree that a conservation agreement should be regarded as providing effective protection only if the risk of critical habitat destruction is low under the measures put in place as part of the agreement and that there must be compelling evidence (rather than "it remains apparent") that the measures are being undertaken. Moreover, the criteria to be applied against the policy statement are, in the main, reasonable, scientifically sound, and feasible.

Suggested changes: We recommend, however, that the standards of evidence be made explicit when establishing whether or not a conservation agreement is effective. In the draft policy, the set of criteria only includes a provision that "Monitoring and reporting requirements and any financial considerations are structured in a manner that provides assurance that the conservation measures in the agreement are being and will continue to be undertaken". Assurance is not the same as evidence. We therefore suggest that this criterion be rewritten as:

> "The agreement must include a *monitoring plan* that (a) will be implemented as part of the agreement; (b) will provide data sufficient to evaluate the efficacy of protection measures and to assess changes in the quantity and quality of critical habitat; and (c) will be posted on the SARA registry, along with associated data and information."
>
> "The agreement must provide compelling evidence that any associated financial considerations are sufficient for the implementation of the monitoring plan and any associated reporting for the tenure of the agreement."

We are concerned that the policy cites COSEWIC status reports and recovery documents, as well as peer-reviewed literature, as "best available sources" for evaluating conservation agreements. COSEWIC, however, must re-assess the status of Schedule 1 species only once every 10 years (SARA s. 24), and reports on implementation of recovery strategies must be made every 5 years (SARA s. 46). During an interval of 5-10 years, species may undergo considerable changes in abundance and distribution. As such, tying a review of protection measures to documents that are produced only at these time intervals means that measures could well be continued for years after they are no longer required or may be delayed until well after they are required.

Moreover, recovery documents and COSEWIC status assessments are national in scope, whereas conservation agreements usually have a much more restricted (i.e., local or regional) geographical range. Pressures on critical habitat at local scales may show dramatic geographical variation for species that have anything other than very restricted ranges. Assessments designed for national scales may therefore not be relevant at the geospatial scales usually associated with conservation agreements.

Given the above, we suggest that any decision regarding habitat protection measures be based on the monitoring plan described above. In keeping with the overall Principle 8 (Embrace adaptability), monitoring at a local scale allows adaptive management, implementing additional measures for protection when data indicate that critical habitat continues to be lost, while relaxing measures as status improves and threats are alleviated.