Analysis of Environmental Regulations and Laws

Submission to the House of Commons Standing Committee on Environment and Sustainable Development

BILL C- 5, The Species At Risk Act

by the Canadian Institute for Environmental Law and Policy

Introduction

For over thirty years, the Canadian Institute for Environmental Law and Policy (CIELAP) has provided independent, well-researched analysis and advice on environmental law and policy issues. CIELAP is established as a widely-respected national and international research organization with a long track record.

CIELAP has also played an important role in the analysis and development of species at risk legislation in Canada. On behalf of all wildlife ministers, we conducted a two-year, independent review and reported on how well the capacity of legislation and policies in every senior Canadian jurisdiction met the commitments made in the national Accord for the Protection of Species at Risk. We identified gaps in the federal approach and where provinces and territories do not have the capacity to protect species at risk and their habitat. Both of these will be significant issues before the Committee.

CIELAP spearheaded an environmental law and policy response to the Canadian Biodiversity Strategy, published the comprehensive book Canadian Biodiversity Law and Policy in Canada: Review and Recommendations, and has maintained an active interest and role in the implementation and protocols under the Convention on Biological Diversity. Most recently, CIELAP was the Canadian partner for a project with law centres throughout the Americas on legal aspects, access to and benefits from genetic resources and is collaborating with an environmental law organization in Costa Rica on the legal issues related to the agricultural products of biotechnology and organic agriculture.

Over the years, CIELAP has also been among the leading proponents and analysts of how a

stewardship approach to protecting species at risk might be accomplished in this legislation. We have attended every national and Ontario consultation session leading up to the development of the Bill. We believe our expertise and experience with these matters will be of considerable assistance to the Committee. Accordingly, we appreciate the privilege of appearing in person before the Committee to make our submissions.

It is clear that new federal endangered species legislation is necessary, considering the requirement in Article 8(k) of the Biodiversity Convention to have endangered species legislation, the need to demonstrate Canada's delivery on its international commitments, the value of expressing federal intentions and authority in this area, as well as intense public interest and support for conservation. Indeed, SARA has been a critical plank in the government's political platform, and the most environmentally prominent. Existing, general or non-regulatory authority is not sufficient. Thus, SARA must help deliver on our international commitments, take its cue from the Canadian Biodiversity Strategy, and fulfill the letter and the spirit of the national Accord for the Protection of Species at Risk. Towards this end, CIELAP has prepared this submission.

In summary, we recommend priority of protection with limited discretion, strengthened reflection of the Accord, extension and improvement of species and habitat protections across the country, and enhanced focus and elaboration of stewardship within SARA.

General Comments

CIELAP has a number of general comments concerning SARA. These focus on the scope of federal Constitutional powers for species and habitat and the extent of federal government discretion.

First, it is our opinion that the federal government has sufficient Constitutional authority to protect species and habitat throughout the country. This authority derives from the criminal, treaty-making and "peace, order and good government" and national concern powers, among others, and has been upheld on numerous occasions by the courts. Accordingly, SARA could take a much more comprehensive approach to achieving species and habitat protection across the nation.

Second, SARA takes an approach which provides substantial scope for federal government discretion. In many cases, the Bill leaves critical government actions such as habitat protection up to the Governor in Council with few guideposts as to how such discretion should be exercised. This does not provide Canadians with confidence that species on the brink of extinction will be given the protection and attention they require, nor does it fulfill promises in past Throne Speeches.

Related to this point, extended protection is left to the Governor in Council in many instances. We propose that the onus for protection be reversed. This protection would be put in place first for: provincial and territorial species, residences and critical habitat (sections 34, 35 and 61), Crown corporations (section 54), federal lands and waters (section 58), and exceptional circumstances (section 83). It would then be up to the Governor in Council to opt out and explain why on the registry. This then would not allow delay or politics to interfere with protection unless it is of true necessity and has received full Cabinet scrutiny. Such a reverse onus is made applicable in other existing sections of the Bill, such as in section 77.

Strengthen Reflection of the National Accord for the Protection of Species at Risk

The national Accord for the Protection of Species of Risk is the foundation of inter-jurisdictional cooperation concerning species at risk in Canada. The discretionary nature of many of the habitat and extended species protections under the proposed Bill is of considerable concern in meeting the federal government's commitments to implement the Accord and thus lead the provinces and territories. SARA should be strengthened to include the following in order to implement the federal government's commitments under the Accord:

- the independence of COSEWIC should be specified and subsection 15(2) should reference that its functions are to be exercised "free of political and socio-economic considerations";
- the ability of competent ministers to make multi-jurisdictional agreements with governments, organizations and individuals outside of Canada should be recognized, with appropriate involvement of other Departments;
- the presence of species at risk should trigger special actions to assess impacts in all cases through consultation with the competent ministers, and should not be limited to projects and the self-assessments required under the Canadian Environmental Assessment Act;
- a new section should be added after section 65 to address broader Accord directions on preventive measures related to "mitigating [human] activities", managing ecosystems "using principles of sustainability", and to "maintain biodiversity"; and
- there should be more and specific emphasis and authority for voluntary stewardship activities reflected throughout SARA, as discussed in detail below.

Species Protections

In section 27, the establishment of the List of Wildlife Species at Risk should be made simply on a scientific basis by COSEWIC. In particular, the current list should be given immediate protection with COSEWIC and Cabinet reviews to follow later, as was in place in Bill C-65. However, should the Governor in Council hold the authority to make regulations to list species, this should be subject to a time limit and a default situation should CESCC, for whatever reason, be unable or unwilling to act to list a species. We recommend that, where the Minister has not made a recommendation and the Governor in Council has not taken a decision regarding listing within sixty days of receipt of a status assessment made by COSEWIC, the species shall be deemed to be listed as proposed by COSEWIC. This will allow the Minister and Cabinet to have the opportunity to make the decision but ensure that a decision is made in a timely fashion to invoke appropriate provisions of the Act.

We are pleased to see the proposed sections 32 and 33 which allows SARA to meet the minimum National Accord protections: killing, harming, possession and trade. Fortunately, these are not subject to a "willful" determination of the person's state of mind, since this would create a difficult situation to prove and thus would demand considerably more enforcement and prosecution resources to implement effectively. SARA still allows for a demonstration of due diligence.

We are disappointed that sections 34 and 35 do not ensure protection of all listed species within the provinces and territories but require Ministerial findings and Governor in Council actions before protection of species and their residences is extended. The evidence from other federal environmental legislation is that such discretion to cover insufficient provincial action has never been used. We thus recommend that, given Canada's international commitments and diverse and ultimate federal Constitutional powers, the onus should be reversed here. SARA's sections 34 and 35 should apply to all species and residences unless the Minister finds that the provincial or territorial laws provide equivalent protection for the species and residence. Similarly, section 36's protections for provincially- or territorially-listed species should automatically apply to federal lands and further to critical habitat, with the Governor in Council provided with the ability to limit or exempt these provisions and post its rationale on the registry.

Section 83 provides for exceptions to the species protections, such as for public safety, national security, human health, or animal or plant health. These are appropriate but should not merely require invocation of the category and then the activity is then broadly authorized. Rather, there should be further standards expected: a presumption in favour of conserving species and following SARA (as in (2)(a)); to have the person exercising the power consult the competent minister wherever possible in order to avail themselves of the Department's expertise and obtain all necessary permits, if required; and a requirement to make, document and report all efforts to avoid or mitigate harm to listed species and habitat while exercising this exempted authority. The survival of wild species at risk should have precedence over domestic

animal or plant health since the former is more vulnerable and has less flexibility to respond and rebound in the future.

Finally, CIELAP supports the broad and substantial enforcement powers and penalties in the Act. A few further improvements could be made. Cancellation of licences, permits and agreements under this or other federal wildlife legislation could be included under a court's powers in section 105, and compliance with other federal or provincial wildlife or habitat legislation should also be an explicit factor considered under paragraph 108(1)(c)(ii).

Habitat Protection

From a science perspective, protection of habitat is critical to the survival and recovery of most species at risk. This is uncontroversial; it is just common sense. It must thus be part of the package for legislation, particularly in areas of clear federal jurisdiction. However, as we also recognize, it is a jurisdictional tangle and a political challenge.

The federal government has legal jurisdiction to regulate habitat, particularly for migratory and fish species and those which cross provincial and international borders. This has been articulated by a number of prominent legal opinions, is grounded in several constitutional heads of federal powers, and is buttressed by increasing Supreme Court of Canada confirmation of federal environmental authority. The challenge for protecting habitat is thus largely political, not legal. In the provincial jurisdictions which have enacted specific endangered species legislation, the political will has been found to have mandatory, automatic habitat protection. We support a broad habitat jurisdiction and offer the following recommendations to address this sensitive yet vitally important question.

Where identified critical habitat exists on lands or waters within federal ownership or control, these lands and waters must be automatically protected in SARA, as in subsection 58(1), upon approval of a recovery strategy. To be effective, SARA must provide interim and long-term protection on all federal lands, the habitat of migratory birds and aquatic species, and species which move across internal and external borders. This protection should not be first subject to actions taken by the Minister and Governor in Council under subsection 58(2) but rather should apply in the first instance. Through this reverse onus in favour of protecting habitat, the Governor in Council could subsequently make specific exceptions upon providing a rationale on the registry. All federal authorities and actions, especially those of land and water managers, should be directed to identify and protect such critical habitat, and to update their plans at the earliest possible opportunity and no later than the next review. For the federal government to show leadership and meet its commitments, it must get its own house in order to protect species at risk habitat before asking others to do the same.

The Canada National Parks Act (CNPA), Bill C?27, came into law in late 2000. While it governs Canada's leading protected areas (and despite the preamble in SARA), there is no specific mandate in CNPA to identify and protect species at risk or their habitat through management planning or actions. Higher fines for poaching large game animal species listed under CNPA's Schedule 3 do not apply to all listed species at risk, and fines under SARA are inconsistently lower or higher than those applying to CNPA Schedule 3 species. This situation should be addressed by having a specific legislative reference to allow for the higher fine or by laying charges under one or the other Act.

Certainly, besides those areas administered by Parks Canada Agency and the Minister of the Environment (see references in subsections 35(2) and 58(4)), other federally protected areas should also be required to protect critical habitat. These include areas under administration of the Department of Fisheries and Oceans, the extensive federal lands north of 60 degrees administered by the Department of Indian Affairs and Northern Development (eg. land management and shoreline zones and other areas reserved for wildlife and habitat purposes under the Territorial Lands Act), Department of National Defence (eg. certain areas within military bases and other facilities designated for conservation purposes), Department of Transport (eg. certain areas at airports, such as portions of the Oak Ridges Moraine and Rouge River valley recently committed in Pickering, Ontario), and the National Capital Commission under the

National Capital Act, among others.

While there should be a general direction to protect critical habitat on federal lands and waters, we recommend that there also be a specific reference to this function in relation to "federally protected areas". This term would then become a new definition in SARA to include national parks, national park reserves, national historic sites, national wildlife areas, migratory bird sanctuaries, national marine areas, and areas withdrawn for conservation purposes under the Territorial Lands Act or designated for similar purposes under other federal legislation. Section 58 of SARA would then require the identification and protection of species at risk habitat in such "federally protected areas" and the corresponding updating of management plans and actions as soon as possible. One alternative is to deem a particular type of designation (e.g. National Wildlife Area) to be in place for all critical habitat within federal jurisdiction as an interim measure, until a plan and designation is in place that provides sufficient and particular protection.

While subject to First Nations interests, the federal government owns most of the lands in the Territories and should protect species at risk habitat on such lands. It will be important for the federal government to clarify responsibilities for wildlife habitat with the Territorial governments in order that ongoing challenges are resolved and integrated conservation of species and habitat is achieved (see the discussion in the territories Chapter of CIELAP's1996 leading text, Biodiversity Law and Policy in Canada: Review and Recommendations). This may require consequential amendments to a number of statutes related to territorial administration and authority.

On private lands, there should be an automatic protection of identified critical habitat to come into force for a set interim period, subject to the exception of where there is an alternative plan or agreement in place. At a minimum, this should apply to federally-mandated migratory bird and fish species habitat. This will provide interim protection yet put pressure on all parties to come up with an alternative plan or agreement (the National Accord requires recovery plans within set, short periods). Qualifications for this alternative plan exemption could include: existing programs where they have a discrete species at risk component; development of a specific recovery plan; demonstration of provincial equivalency for the species concerned; identification of habitat or jurisdictions where there is not habitat for species at risk; and determining where there is a new plan to deal with listed species, either on an individual or regional basis. Some further criteria for the exemption could include impact thresholds for vulnerable species (such as percentage habitat in a region, or population viability within a region) or a no net loss of habitat policy (such as under the Fisheries Act) that allows negotiation and strict criteria for replacement. Areas under the alternative plan would also be immune to prosecution under the habitat provisions of SARA, so long as landowners acted within the parameters of the plan (the "safe harbour" option). Notification to landowners of habitat and preference for public lands could also be required, as in Nova Scotia's endangered species legislation. Such a strong prohibition would provide the background for stewardship plans and agreements.

Stewardship

As noted at the outset, CIELAP has provided leadership in analysis of voluntary stewardship opportunities and legislation in Canada, and has provided leading materials on the subject in recent years. A clear mandate and outline for stewardship in SARA as well as in complementary announcements is essential to offset regulatory fears about the Bill, demonstrate federal commitment to a coordinated stewardship approach over the landscape, fulfill National Accord and other commitments, as well as generate public support and involvement in addressing species at risk issues. Legislative expressions of stewardship will create confidence, set important directions and principles, and attract priority funding, as well as create clear legal authority or overcome legal impediments. Some of this is present and welcome in the current Bill.

SARA provides sufficiently broad authority to enable stewardship efforts and programming throughout the nation, regardless of the regulatory scope adopted in the Act. In the Preamble, there is recognition of all Canadians' roles, the need to encourage and support this, and

acknowledgment of stewardship. Landowners are specifically identified as a group to be consulted in developing strategies, plans and actions. SARA also includes the power of ministers to make agreements and arrangements with a diverse range of partners (private, local, sub-national, national). All of these are important elements in incorporating stewardship within the Bill and have CIELAP's support. Nonetheless, there are certain limitations in the treatment of stewardship in SARA which should be addressed, as follows.

The only means by which to accomplish stewardship in SARA is through agreements to do the various activities in sections 11 to13 and land acquisition in section 62. There is no direct authority for competent ministers to carry out these activities. There is also no authority for some types of programs, such as "recognition" and awards programs, which have been shown elsewhere to move landowners and others towards better conservation practices. There are no direct financial granting powers or reviews of incentives and disincentives, either, just financial agreements. The content provisions of the strategies and plans in subsections 41(1), 49(1) and 65 are more nebulous, without specific mention of stewardship measures nor, significantly, economic incentives or barriers to conservation. Any recommendations for legislative, policy, and program changes should also be explicitly recognized in these sections.

The consultation processes to enter even a simple, local agreement seems to be among the most cumbersome of any process in the Act. Except for land agreements, each one will require consultation with every other competent Minister (except the financial agreement section) and possibly with members of CESCC. This may well be necessary for national-level programs but is indistinguishable and creates a substantial procedural impediment for any local-, provincial-, territorial-focused initiative. Such a requirement will create unnecessary delays, frustration by partners, and failed delivery of stewardship as a key mode of achieving species at risk protection.

The CESCC has no specific stewardship role in subsection 7(2) (nor does COSEWIC, unless asked to do so by the Minister). The CESCC mandate should be explicitly extended to include stewardship, including coordination and preparation within one year and implementation of a national Stewardship Action Plan. Further, there are no provisions in section 105 for court orders to make payments to community organizations (who are the lead organizations for much stewardship work), nor for any stewardship actions besides research and a scholarship to an institution. These concepts need to be rounded out to fully reflect a stewardship approach within SARA.

Proposals by the National Round Table on the Environment and the Economy have suggested that a fund to support stewardship could be beneficial to the protection of species at risk. Indeed, some funds were committed in the Federal 2000/01 Budget. SARA could augment funds for stewardship and blunt concerns about enforcing the regulatory provisions of the Bill by establishing a discrete fund within the legislation to be sourced from fines levied under it (or from other discretionary sources over time, such as donation of taxpayers' income tax refunds via a voluntary election to do so on their tax forms).

As noted earlier, there should also be a specific legal direction to prepare a National Stewardship Action Plan (in consultation, and with the main stewardship elements identified) within one year of passage of the Act, and to review it, provide reports to Parliament and hold hearings every few years on its implementation. This is necessary in order to meet commitments to develop the Plan, attract resources, and ensure ongoing accountability. This direction could be added to the CESCC's mandate.

Finally, compensation paid under section 64 should only occur in extraordinary circumstances, should remain within the discretion of the Minister, and should be subject to a consideration of other programs available to the affected person. While an important political aspect of the Bill, any requirement of compensation for regulatory actions would create a substantial legal precedent in Canada extending beyond even the approach adopted by courts in the United States. Such an approach would hamstring or bankrupt government and lead to excessive bureaucracy. It should be clearly noted that governments are not compensated for approvals they issue and thus they, and Canadian taxpayers, should not be required to pay compensation

for valid regulatory purposes, such as those set out in SARA.

Procedural and Technical Amendments

A number of other procedural and technical suggestions can be made. Along with the CESCC, COSEWIC should be consulted concerning regulation of its membership and functions under section 17. Section 77 simply allows the Governor in Council to exempt the application of certain sections for a year; this power should enable this exemption to be made with limitations or terms and conditions, not simply have the sections apply or not apply. In subsection 83 (1) and (4), the burden of proof for demonstrating that the exception applies should be placed on the person claiming the exemption. Subsection 87(4) concerning release of seized wildlife is appropriate but should also enable officers to provide for the wildlife's welfare, since release may not be reasonable in the circumstances (such as where an animal has been injured). The liability of an owner for enforcement costs under section 89 should only be valid where the person is convicted of an offence, not where an unsuccessful investigation or prosecution has occurred. The powers in subsection 129(5) for the Governor in Council to extend the assessment of species on Schedules 1 or 2 should have a time limit (perhaps 60 days), not be open-ended.

While CIELAP is a strong proponent of public consultation and supports such references and SARA's registry, there are numerous examples in the Bill where consultation requirements are excessive and may well impede timely and effective species protection. This approach is a result of national environmental harmonization initiatives. Examples of excessive consultation in SARA include: sections 8(2), 10, 11(1), 12(1), and 34(4). Surprisingly, these consultation requirements contrast with no such requirements for financial agreements in section 13(1). Providing for consultation "to the extent possible", as in subsections 39(1) and 48(1), is more appropriate in many cases since it does not impede taking of actions but establishes an expected standard.

Conclusion

In comparison to other nations and our nine year old commitment under the Convention on Biological Diversity, federal endangered species legislation is long overdue. Enactment of strong, constructive legislation which truly protects all species and habitat will constitute a significant environmental achievement for the federal government and one that demonstrates follow-through on international and domestic commitments.

CIELAP has been engaged in the process to develop legislation and continues to offer its expertise as may be appropriate in order to achieve a comprehensive and effective legislative package. Bill C-5 contains some important provisions, but it must be strengthened in the habitat and stewardship dimension in order to achieve its goals.

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