

## **Reasons for Council Instructions, by a Two-Thirds Vote, Regarding Submission SEM-11-003 (Protection of Polar Bears)**

Pursuant to its commitment to transparency and in its capacity as the governing body of the Commission for Environmental Cooperation responsible for overseeing the implementation of the *North American Agreement on Environmental Cooperation* (NAAEC or the "Agreement"), the Council of the Commission of Environmental Cooperation (the "Council"), hereby makes public the reasons for its instructions, decided by a vote of two-thirds majority, to the Secretariat regarding submission SEM-11-003 (*Protection of Polar Bears*).

### **1.1. The Secretariat's Article 15(1) Notification**

In its Article 15(1) Notification, issued on 7 November 2013, the Secretariat recommended to the Council that the preparation of a factual record was warranted on assertions included in the *Protection of Polar Bears* Submission on Enforcement Matters (SEM-11-003) that Canada is failing to effectively enforce the *Species at Risk Act* (SARA) with respect to the listing of the polar bear as a species of special concern.

### **1.2. The Council's Instruction to the Secretariat**

The Council has voted not to authorize the preparation of a factual record for the submission, based on the conclusion that a factual record would be:

- a. duplicative, given information already included in Canada's Party Response (23 January 2013);
- b. redundant, given information already in the public domain regarding the assessment process and the use of the best available information by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) for the assessment of the polar bear, as evidenced by the letter provided to the Secretariat (22 January 2013),
- c. beyond the purview of the Secretariat, given that certain issues the Secretariat deemed to be "central open questions" are aimed at seeking details on protected government decision-making processes and cabinet deliberations, which is not permitted under Article 39 of the Agreement; and
- d. an ineffective use of public resources to allow a factual record to be prepared on information that is already part of the public record.

### **1.3. Summary of Letter from the Committee on the Status of Endangered Wildlife in Canada**

On 22 January 2013 the Chair of the Committee on the Status of Endangered Wildlife in Canada (COSEWIC or the "Committee") issued a letter describing COSEWIC's role under the *Species at Risk Act* (SARA), the composition and expertise of the Committee and the process followed in developing its assessment of the polar bear as a species of special concern. The letter specifically addresses the submitter's assertions regarding COSEWIC's consideration of the best available information.

The letter explains that COSEWIC is an independent national scientific advisory body that annually provides results of species assessment to the Minister of the Environment. Its assessments are developed by expert biologists, including experts in Aboriginal traditional knowledge, who serve on 11 specialist subcommittees and must, by law, exercise their discretion in an independent manner. With respect to the polar bear, the process for the gathering, reviewing and assessing the best available information was rigorous and consistent with the requirements of SARA subsection 15(2). COSEWIC commissioned the polar bear status report in 2006 following an open and competitive bidding process. The draft report was completed in 2007 and circulated to federal, provincial territorial jurisdictions responsible for polar bear science and management as well as wildlife management boards and independent scientists for comments. The report was then revised based on the feedback received and circulated

for further input. The second draft of the report was presented to the Terrestrial Mammals Specialist Committee (TMSS), which is the COSEWIC subcommittee responsible for analyzing reports on the polar bear species. The subcommittee's discussion focused on the number of Designatable Units, the available population and climate change models, as well as the application of significant contributions of Aboriginal Traditional Knowledge expertise. Based on these discussions, a revised report was subsequently distributed to all COSEWIC members for consideration at their Wildlife Assessment Meeting (April 2008). After extended discussions on the evidence provided in the status report, members then held a vote on Designatable Units and the status of the species, both issues requiring a two-thirds majority for a COSEWIC decision. In sum, the information used in the assessment underwent several reviews by multi-jurisdictional and independent scientific experts.

Annexed to the COSEWIC letter was a 2009 article by J.A. Hutchings and M. Festa-Bianchet, published in the *Environmental Reviews* (available at <http://www.nrcresearchpress.com/doi/full/10.1139/A09-002>), which discusses COSEWIC's scientific approach to species assessments through a comparative analysis of processes utilized in Canada, the United States, and by the *International Union for Conservation of Nature* (IUCN). The article examines the 2008 COSEWIC assessment of the polar bear species and highlights four factors that distinguish the organization's scientific analysis: 1) the broader range of species' status categories directed by the *Species at Risk Act*; 2) the difference in status category definitions, whereas in Canada a threat of extinction is set at a higher threshold that is partly dependent upon the absence of previous preventative action; 3) the use of quantitative criteria similar to the IUCN, as opposed to qualitative criteria; and 4) a focus on the geographical range of 13 of the world's 19 polar bear subpopulations that exist within Canada.

The article also provides clarification on an assertion raised in the submission concerning the use of the "best available information" and particularly the assertion of COSEWIC's failure to appropriately consider a study by Amstrup et.al (2007) on projected changes to polar bear habitat in its 2008 assessment. On this point the article clarifies that COSEWIC did indeed consider the Amstrup et.al. (2007) study and determined that its conclusions could only be viewed as a prototype, since the measurement model used requires the input of multiple experts to be considered "final" and the Amstrup et.al. (2007) study only provided the judgement of a single polar bear expert to support its projections.

In conclusion, COSEWIC recommended to the Minister of Environment that a special concern listing was appropriate to address the primary threats it found were facing the polar bear: 1) reduction in sea ice, caused by climate change, particularly for subpopulations in the southern part of the species' range; 2) overhunting for subpopulations shared by Canada and Greenland; and 3) habitat threats from industrial development.

#### 1.4. Answers to "Central Open Questions"

The tables below constitute a list of the "central open questions" identified by the Secretariat, with information on where the answers to these questions may be found (*paragraph numbers correspond to numbering in the Secretariat's Article 15(1) Notification*).

##### A) Information provided in Canada's Party Response

Article 15(1) Secretariat Notification  "Central Open Question" Excerpts	Location of Information
Para 67 "Canada's Response does not address the timelines in which the Minister of the Environment and the GIC, according to the Submission, took various procedural steps."	Party Response, Page 9

<p>Para 101 “[A] factual record would provide information about the procedures followed by Canada in determining which information to consider in arriving at its SARA subsection 27(1.1) decision. For example, after consulting with WMBs, the GIC could have made the decision in paragraph 27(1.1)(b) (deciding not to add the species to the List) or (c) (referring the matter back to COSEWIC for further information or consideration). It chose instead to accept the assessment and add the species to the List (subsection 27(1.1)(a)) as a species of special concern.”</p>	<p>Party Response, Annexes 9-11</p>
<p>Para 91 “The Response outlines the procedure for consultation with the Nunavut Wildlife Management Board, but does not cite particular statutory or other legal provisions as authority for this procedure, for example by providing the relevant land claim agreements and citing the relevant provisions.”</p>	<p>Party Response, Annexes 9-11</p>
<p>Para 92 “The Response explains that consultation is meant to satisfy the constitutional duty to consult arising from the common law and from section 35 of the <i>Constitution Act, 1982</i>, noting that “[t]he appropriate scope of consultation, and accommodation if appropriate, is to be proportionate to the strength of the asserted aboriginal right and the potential for adverse impact on those rights.” However, the Response does not apply this analysis to the context of the polar bear listing decision; nor does it say how any consultation was conducted or whether such consultation affected the decisions that were ultimately made about the listing of the polar bear...</p>	<p>Party Response, Annexes 9-11</p>
<p>Para 84 “[T]here remain central open questions about Canada’s enforcement of subsection 25(3). Canada’s Response provides some information that applies generally to COSEWIC’s preparation of assessments, and suggests that the Official Languages Act applies to the posting of the assessment and reasons in the online SARA registry, but does not provide particulars (including dates) of what happened in the case of the polar bear assessment.”</p>	<p>Party Response, Annexes 4 and 5</p>

**B) Information provided by COSEWIC**

<p><b>Article 15(1) Secretariat Notification “Central Open Question” Excerpts</b></p>	<p><b>Location of Information</b></p>
<p>Para 58 “[T]he Response provides no information on how particular scientific and traditional knowledge led to COSEWIC’s ‘conclusion’...”</p>	<p>COSEWIC letter to the Secretariat, 22 January 2013</p>
<p>Para 61 “[i]t is not clear to what extent the listing decision made by Canada respecting the polar bear took the [Amstrup] study into account. This</p>	<p>COSEWIC letter;</p>

circumstance leaves a central open question regarding the assertion in the submission that COSEWIC failed to “carry out its functions on the basis of the best available information.”	throughout Exhibit A of the <i>Protection of Polar Bears</i> submission (SEM-11-003)
Para 64 “[a] factual record is likely to provide more information about the process followed by COSEWIC in considering certain information and not considering other information...”	In the Hutchings and Festa-Bianchet article annexed to COSEWIC letter  ( <a href="http://www.nrcresearchpress.com/doi/full/10.1139/A09-002">http://www.nrcresearchpress.com/doi/full/10.1139/A09-002</a> )

**C) Confidential governmental decision-making covered by NAAEC Article 39**

Article 15(1) Secretariat Notification “Central Open Question” Excerpts	Location of Information
Para 58 “The Response does not “provide information on how consideration of different information may have affected the Minister’s and [Governor in Council’s] recommendations and decisions in the process of listing the polar bear species.”	N/A  confidential governmental decision-making
Para 64 “There remain central open questions about the determination and application of the best available information <i>throughout</i> the SARA process.”	N/A  confidential governmental decision-making
Para 64 “[a] factual record is likely to provide more information about the process followed by COSEWIC in considering certain information and not considering other information, and <i>which of this information the Minister and the GIC took into account in making their recommendations and decisions pursuant to the Act.</i> ”	N/A  confidential governmental decision-making
Para 68 “The Secretariat considers that there remain central open questions about how and whether SARA was effectively enforced in 2005. Specifically, a factual record would provide information about <i>the procedures that were followed, including the reasons pursuant to subsection 27(1.2) for the GIC’s decision</i> not to add the species to the List, and provide information about why an explanation required by that subsection to be published in the public registry was not in fact published.”	N/A  confidential governmental decision-making

**D) Reasonable exercise of discretion as per NAAEC Article 45(1)(a)**

Article 15(1) Secretariat Notification “Central Open Question” Excerpt	Location of Information

Para 81 “The agreement evidently made between the Minister and COSEWIC by way of the correspondence contained in Annexes 4 and 5 modifies the procedure in section 25 of SARA.”	Party Response, Annexes 4 and 5
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**E) Information in the public record**

<b>Article 15(1) Secretariat Notification “Central Open Question” Excerpts</b>	<b>Location of Information</b>
Para 66 “nor does the Submission or Response include any information about consultations that were to have taken place in spring 2005...”	Canada Gazette July 27, 2005, in particular p. 1770
Para 67 “The Response also does not address whether Canada “reconsider[ed] the matter” of whether to recommend listing the polar bear in spring 2005, as Canada indicated would occur, in the Order published in the <i>Canada Gazette</i> in January 2005.”	Canada Gazette July 27, 2005, in particular p. 1770
Para 77 “The Response does not identify any particular provisions of the <i>Official Languages Act</i> setting out how it applies to the Submission.”	SARA ss.120; and Part II of the <i>Official Languages Act</i> , in particular  ss.11-13
Para 91 “The Response outlines the procedure for consultation with the Nunavut Wildlife Management Board, but does not cite particular statutory or other legal provisions as authority for this procedure, for example by providing the relevant land claim agreements and citing the relevant provisions.”	Nunavut Land Claims Agreement, particularly Article 5 Part 3