
Secretariat of the Commission for Environmental Cooperation

**Article 15(1) Notification to Council that Development of
a Factual Record is Warranted**

Submitters: Nature Canada
Sierra Club (U.S. and Canada)
Conservation Northwest
David Suzuki Foundation
Environmental Defence
ForestEthics
Ontario Nature
Western Canada Wilderness Committee
BC Nature (formerly Federation of BC Naturalists)
Federation of Alberta Naturalists
Natural History Society of Newfoundland and Labrador
Nature Nova Scotia
Nature Quebec

Represented by: Sierra Legal Defence Fund

Concerned Party: Canada

Date received: 10 October 2006

Date of this notification: 10 September 2007

Submission I.D.: SEM-06-005 (Species at Risk)

I. Executive Summary

On 10 October 2006, the Submitters listed above filed with the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) a submission on enforcement matters pursuant to Article 14 of the North American Agreement on Environmental Cooperation (“NAAEC” or “Agreement”). Under Article 14 of the NAAEC, the Secretariat may consider a submission from any nongovernmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law if the Secretariat finds that the submission meets the requirements of Article 14(1). When the Secretariat determines that those requirements are met, it then determines whether the submission merits requesting a response from the Party named in the submission (Article 14(2)).

The Submitters assert that Canada is failing to effectively enforce the federal *Species at Risk Act* (“SARA” or the “Act”) in regard to the process and timelines for listing species, developing and adopting recovery strategies, and ensuring that SARA requirements are met on non-federal lands.

On 11 December 2006, the Secretariat determined that the following assertions, contained in the submission, meet the criteria set forth in Article 14(1) and merited requesting a response from Canada in light of the factors contained in Article 14(2): (1) Canada is failing to effectively enforce the SARA's recovery planning requirements as regards identification of critical habitat (s. 41) and mandatory planning timelines (s. 42), and (2) Canada is failing to effectively enforce the emergency order provision in s. 80 with respect to the Northern Spotted Owl in British Columbia and the Woodland Caribou in Alberta.

Canada filed its response with the Secretariat on 8 February 2007. In the response, Canada states that the assertions pertaining to the enforcement of SARA ss. 41 and 80 are the subject of pending judicial proceedings. Pursuant to Article 14(3)(a) of the NAAEC, Canada asks that the Secretariat proceed no further with those assertions. Canada states that it cannot address the assertions regarding its alleged failure to meet mandatory planning timelines pursuant to SARA s. 42 because the submission does not identify actual, fact-based incidents to which Canada could respond.

After considering the submission in light of Canada's response, the Secretariat concludes that the response leaves open central questions raised in the submission concerning the enforcement of SARA ss. 41, 42, and 80. In this notification, the Secretariat provides its reasons for considering that development of a factual record is warranted.

II. Summary of the Submission

The Submitters assert the failure of the Canadian federal government to effectively enforce the SARA with respect to at least 197 of the 529 species identified as at risk in Canada, so as to frustrate the Act's purpose: preventing wildlife species from becoming extirpated or becoming extinct and providing for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity.¹ More particularly, the Submitters allege that Environment Canada, Parks Canada Agency, the Minister of the Environment and the Department of Fisheries and Oceans are failing to enforce the SARA with regard to listing (s. 27), recovery planning (ss. 41 and 42), and national enforcement through "safety net" and emergency orders (ss. 34 and 80).²

The Submitters summarize the SARA's provisions as follows:

An overview of how the foregoing provisions work together to address species endangerment is as follows: a scientific body for the classification of species, the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), is created which assesses the status of species, species are "listed" on the official list of species that are extirpated, endangered, threatened or of special concern (ss. 27-31) which triggers obligations under the Act including prohibitions against harm (ss. 32-36), and protections of residence or habitat (ss. 33-36 and ss. 56-64), recovery planning and critical habitat identification (ss.37-46), and recovery plan implementation (action planning) (ss.47-64). The SARA also contains a provision to enable protecting species and habitat on an emergency basis (s.80).³

¹ Submission at 1.

² *Ibid.*

³ Submission at 2.

The Submitters claim that responsibility for enforcing and implementing the SARA lies primarily with the federal Minister of the Environment and Environment Canada, as well as with the federal Department of Fisheries and Oceans and Parks Canada Agency.⁴

The Submitters state that listing is a prerequisite to protection under the SARA, and that Canada is failing to effectively enforce the listing process by adopting an interpretation of s. 27 of the SARA that circumvents the statutory timeline for listing and allows Environment Canada to conduct protracted socio-economic consultations prior to deciding whether to make a listing recommendation to the Governor in Council.⁵ According to the Submitters, the legislative record as well as the wording of s. 27 of the SARA reflect a compromise whereby the Governor in Council (and not the Minister of the Environment) is allowed to take into account socio-economic considerations in a listing decision, provided it makes a decision within nine months of COSEWIC completing its assessment in respect of a species and not, as advanced by the Minister, within nine months of the Minister forwarding to the Governor in Council a copy of the COSEWIC assessment along with the Minister's listing recommendation.⁶ According to the Submitters, the federal government is failing to honor the compromise reflected in s. 27 because it was not adequately prepared to implement SARA when it came into force.⁷

As regards recovery planning, the Submitters maintain that Canada has fallen behind in meeting statutory timelines for posting recovery strategies for listed species, with only 23 of 133 strategies due in 2006 posted as of 29 September 2006 (contrary to s. 42).⁸ Further, they assert that Canada is not systematically identifying critical habitat in recovery strategies (as required by s. 41(1)(c)), in particular where such habitat is located on non-federal lands.⁹

Finally, the Submitters maintain that the federal government is failing to effectively enforce the SARA by refusing to extend the application of the Act to lands other than federal lands and species other than those otherwise protected under federal law (migratory birds and aquatic species).¹⁰ The Submitters maintain that in accordance with the SARA, the application of the Act must be extended, by ministerial order, if the Minister finds that the laws of a province or territory do not effectively protect species at risk, their residences or critical habitat (s. 34), or a species faces an imminent threat to its survival or recovery (s. 80).¹¹ The Submitters allege that Alberta, British Columbia, the Northwest Territories and the Yukon lack laws protecting endangered species or biological diversity,¹² and they assert that the federal Environment Minister's failure to recommend to the Governor in Council that the

⁴ *Ibid.*

⁵ Submission at 2-6.

⁶ *Ibid.*

⁷ Submission at 3.

⁸ Submission at 7-8.

⁹ Submission at 9: “[...] to date, of the 23 recovery strategies posted on the SARA registry, only 3 identify critical habitat, and 5 partially identify critical habitat. There is little certainty as to whether the prohibitions in the SARA apply where critical habitat has been identified only partially. Moreover, the 3 species where recovery plans identify critical habitat are located within protected areas (Aurora Trout and Horsetail Spike-rush), or have restricted distribution (Barrens Willow).”

¹⁰ Submission at 9-13.

¹¹ Submission at 9-10.

¹² Submission at 11.

SARA's provisions be made to apply in those provinces and territories amounts to a failure to effectively enforce s. 34 of the SARA in respect of the SARA-listed species that occur therein, with the result that the SARA is no longer an act of national application.¹³ In addition, the Submitters cite the Northern Spotted Owl (British Columbia) and the Woodland Caribou (Alberta) as examples of species that, according to the Submitters, face imminent threats to their survival or recovery,¹⁴ and they assert that the failure to issue emergency orders in respect of these species amounts to a failure to effectively enforce s. 80 of the SARA.¹⁵

III. Summary of the Response

On 11 December 2006, the Secretariat determined that some of the allegations contained in the submission met the admissibility criteria in Article 14(1) and merited requesting a response from Canada in accordance with Article 14(2).¹⁶ Accordingly, the Secretariat asked for a response from Canada to the following assertions:

- (1) Canada is failing to effectively enforce the SARA's recovery planning requirements as regards identification of critical habitat (s. 41) and mandatory planning timelines (s. 42), and
- (2) Canada is failing to effectively enforce the emergency order provisions under s. 80 with respect to the Northern Spotted Owl in British Columbia and the Woodland Caribou in Alberta.¹⁷

Canada responded to the submission on 8 February 2007.¹⁸ In the response, Canada explains that "jurisdiction for protecting species at risk is shared in Canada."¹⁹ Canada notes that the SARA "is a relatively new and complex piece of legislation that requires extensive consultations and collaboration"²⁰ and that the "SARA is the federal government's main legal tool for preventing the extinction of Canadian wildlife and is key to protecting Canada's biodiversity."²¹

In the response, Canada states that assertions pertaining to SARA s. 41 (identification of critical habitat) and SARA s. 80 (emergency orders with respect to the Northern Spotted Owl) are the subject of pending judicial proceedings in Canada.²² In accordance with Article 14(3)(a) of the NAAEC, Canada requests that the Secretariat proceed no further on these matters in order to avoid duplication or interference with these proceedings.²³

¹³ *Ibid.*

¹⁴ Submission at 11-13.

¹⁵ Submission at 13.

¹⁶ SEM-06-005 (Species at Risk) Determination in accordance with Articles 14(1) and (2) (11 December 2006).

¹⁷ *Ibid.*

¹⁸ Canada, "Response of the Government of Canada to Submission SEM-06-005 on Enforcement Matters (Species at Risk)" (8 February 2007) [hereinafter the "response"].

¹⁹ Response at 1.

²⁰ *Ibid.*

²¹ *Ibid.*

²² Response at 3.

²³ *Ibid.* at 3.

Regarding s. 41, Canada notes that several of the Submitters are parties to a court action challenging the validity of the Piping Plover recovery strategy on the grounds that it does not identify critical habitat to the extent possible,²⁴ and alleging that identification of critical habitat in recovery strategies is being delayed by the federal government and the provinces pending finalization of a critical habitat policy.²⁵ According to Canada, it would be inappropriate for the Secretariat to further consider s. 41 because to do so would be duplicative and interfere with the pending judicial proceeding.²⁶

Concerning s. 80, in the response, Canada refers to a court action in which Western Canada Wilderness Committee and others allege that the federal Minister of the Environment violated a statutory duty by not issuing an emergency order for the protection of the Northern Spotted Owl in British Columbia. Canada states that since s. 80(2) of SARA has not yet been judicially considered, the outcome of the Northern Spotted Owl proceedings could very well influence how the Minister of Environment approaches matters under s. 80(2) in the future, including as regards the Woodland Caribou.²⁷

With respect to identification of critical habitat under SARA s. 41, in the response, Canada states “the relevant enforceable element of these [recovery planning] requirements [in the SARA] is related to the protection of critical habitat if it was identified in the recovery strategy.”²⁸ Canada notes that at the time of preparing its response, only two recovery strategies had identified critical habitat: Roseate Tern and Horsetail Spike Rush.²⁹ Canada notes that identification of critical habitat can be a component of the action plan phase of recovery planning and that “[w]hile recovery strategies set timelines for the preparation of an action plan, there are no legislated timelines associated with developing the plans themselves.”³⁰

In the response, Canada addresses the Submitters’ allegations regarding the alleged failure to meet statutory timelines for posting recovery strategies under SARA s. 42. Canada explains that s. 42 of the SARA outlines recovery planning timelines which are dependent on the status of the species and the date of listing.³¹ Canada states that at “proclamation of SARA in 2003, 190 species were added to the legal list of species at risk as extirpated, endangered or threatened.”³² Canada states that there are currently 303 species listed in the three categories and a recovery strategy and action plan must be prepared for each of those species. In its response, Canada notes that “recovery strategies can address more than one species and must be developed with an appropriate level of scientific expertise and biological information.”³³

Canada states that the recovery planning process requires “extensive consultations with provinces and territories and with stakeholders as well as significant engagement of

²⁴ Response at 4.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Response at 8.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Response at 6-7.

³² Response at 7.

³³ *Ibid.*

Aboriginal peoples.”³⁴ In the response, Canada notes that under the 1996 *Accord for the Protection of Species at Risk*, “federal and provincial/territorial governments (excluding Québec) agreed to participate in a national recovery program”³⁵ in which governments in whose jurisdictions species at risk are present work together to develop recovery planning documents. Collaboration on recovery strategy development is led by the competent minister of the jurisdiction that has management responsibility for the species.³⁶ Canada notes that most recovery planning for SARA-listed species is led by provinces and territories.³⁷ If provincial or territorial recovery planning documents meet SARA requirements, they can be adopted under the SARA.³⁸

Canada rejects as speculative the Submitters’ expression of concern that the 103 strategies due in 2007 may not be delivered on time, stating that this assertion should not be considered by the Secretariat.³⁹ As regards Canada’s alleged failure to effectively enforce SARA s. 42 by not meeting statutory timelines for 110 recovery strategies that were overdue as of 29 September 2006, Canada states in the response that the scope and purpose of Articles 14 and 15 of the NAAEC are not to examine broad based allegations but to examine particular fact-based incidents and that therefore, the Secretariat should not consider these allegations.⁴⁰ According to Canada, the “the lack of actual incidents precludes the Canadian government from addressing the allegations in a factual manner.”⁴¹

Regarding emergency orders, Canada states that SARA s. 80 gives authority to the federal government to take emergency action to protect a listed species or its habitat anywhere in Canada.⁴² Canada notes that the SARA requires the minister to consult with all other competent ministers before making a recommendation for an emergency order, with additional commitments for consultation and cooperation included in the 1996 *Accord for the Protection of Species at Risk* and the Canada/British Columbia bilateral agreement on species at risk.⁴³

Canada states that s. 80 of the SARA grants discretionary and legislative power to competent ministers. Canada observes that pursuant to NAAEC Article 45(1)(a), action or inaction of a Party is not a failure to enforce where it reflects a reasonable exercise of discretion.⁴⁴ In addition, Canada states that applying s. 80 can result in “the making of an Order in Council, a legislative act, which could result in the setting of new standards”⁴⁵ and that “legislative powers should not be considered by the Secretariat.”⁴⁶

³⁴ *Ibid.*

³⁵ *Ibid.*, see also Annex 5 of the response.

³⁶ Response at 7.

³⁷ *Ibid.*

³⁸ Response at 7-8.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Response at 5.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

Canada states that the litigation regarding the Northern Spotted Owl will affect the interpretation of SARA s. 80(2) in a general sense and thus affect the case of the Woodland Caribou. Canada states that given the legislative and discretionary aspects of SARA s. 80, the Secretariat should not examine it.⁴⁷

In the response, Canada provides information regarding Woodland Caribou protection and recovery planning in Alberta.⁴⁸

IV. Preparation of a Factual Record is Warranted

After considering the submission in light of Canada's response, the Secretariat concludes that the response leaves open central questions raised in the submission regarding whether Canada is failing to effectively enforce the SARA emergency order provisions (s. 80) in regard to the Northern Spotted Owl in British Columbia and the Woodland Caribou in Alberta, as well as the SARA recovery planning requirements (s. 41, identification of critical habitat and s. 42, mandatory planning timelines). Additional information is required for a proper consideration of the assertions of concern contained in the submission. This information would be gathered during development of a factual record. A factual record would present information relevant to a full and objective understanding of Canada's actions to enforce and promote compliance with SARA sections 41, 42 and 80.

(1) Enforcement of the SARA's Recovery Planning Requirements

The Submitters allege that Canada is failing to effectively enforce the SARA by not meeting statutory timelines for publication of recovery strategies, and by failing to identify species' critical habitat in recovery strategies that have been made public.

a. Section 42 – Mandatory Planning Timelines

Section 42 of the SARA sets out the time within which a proposed recovery strategy must be posted on the SARA public registry. Pursuant to s. 42(1), recovery strategies for endangered species must be posted on the public registry within one year of the species being listed; for threatened or extirpated species, within two years. Pursuant to s. 42(2), the timelines for preparing recovery strategies for species that were listed in Schedule 1 to the Act prior to the coming into force of s. 27 (on or before 5 June 2003) are extended by two years. The Submitters assert that as of 29 September 2006, only 23 recovery strategies out of the 133 that were due by July 2006 were posted on the SARA public registry.⁴⁹ The Submitters note that an additional 103 strategies are due in 2007, but that independent analysis of the implementation of the SARA raises concerns that future timelines will not be enforced.⁵⁰

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Submission at 9.

⁵⁰ *Ibid.*

According to Canada’s response, the Submitters’ allegations regarding Canada’s failure to post recovery strategies on time lack specificity.⁵¹ Canada states that the lack of “fact-based incidents precludes the Canadian government from addressing the allegations in a factual manner.”⁵² The Secretariat finds that the following statement, contained in the submission, does, in fact, refer to specific examples: “only 23 recovery strategies out of 133 that are due [as of September 29, 2006] are posted on the SARA registry.”⁵³

Each of the overdue recovery strategies is associated with a specific species, for which specific factual information relevant to the factors listed in s. 42 can be presented in a factual record. The 2006 annual report to Parliament on the administration of the SARA is not yet public.⁵⁴ The 2005 annual report, however, contains the following table:⁵⁵

SARA Responsible Agency	Number of Species for Which a Recovery Strategy is Due by Date								
	2006			2007			2008		2009
	January	June	July	January	June	July	January	July	January and July
Environment Canada	9	68	6	7	52	6	7	4	12
Fisheries and Oceans Canada	3	17	1	0	20	0	8	0	2
Parks Canada Agency	4	20	5	4	13	0	0	0	3
Total (271)	16	105	12	11	85	6	15	4	17

On 23 June 2006, counsel for the Submitters sent a letter to the federal Environment Minister which reads, in part, as follows:

Section 42 of the Act creates a mandatory obligation for including recovery strategies in the public registry at set times. The first deadlines for doing so elapsed on January 12th, 2006 and June 5th, 2006 yet, to date, only one recovery plan is posted on the SARA registry. (66 have been identified as delayed

⁵¹ Response at 8.

⁵² *Ibid.*

⁵³ Submission at 9.

⁵⁴ SARA s. 126: “The Minister must annually prepare a report on the administration of this Act during the preceding calendar year and must have a copy of the report tabled in each House of Parliament within the first 15 days that it is sitting after the completion of the report. The report must include a summary addressing the following matters: [...] (b) the preparation and implementation of recovery strategies, action plans and management plans.” E-mail from Project Officer, SARA Public Registry (16 August 2007): “The 2006 report is currently in development however there is no anticipated publishing date at this point.”

⁵⁵ Government of Canada, *Species at Risk Act: Report to Parliament, 2005* (posted on the SARA Public Registry on 15 June 2007); online: SARA Registry http://www.sararegistry.gc.ca/gen_info/showDocument_e.cfm?id=1338 (date accessed: 16 August 2007).

until January 2007, 11 until June 200[7] and 16 are delayed indefinitely.) The Act does not provide the discretion to delay listing.⁵⁶

On 22 September 2006, the federal Environment Minister responded in a letter which reads, in part, as follows:

Thank you for your letter of June 23, regarding the delays in posting recovery plans under the *Species at Risk Act*.

I assure you that my officials are aware of the delays and are doing everything within their power to overcome the unexpected obstacles which have arisen. You may be aware that, on June 5, Environment Canada posted a message on the Species at Risk Registry explaining the delay in posting recovery strategies. The outstanding recovery strategies should be ready for posting starting in January 2007.⁵⁷

The Secretariat finds no lack of specificity in the Submitters' allegation regarding Canada's failure to meet the SARA s. 42 deadline for 110 species. For each species, the Act requires that a recovery strategy be posted on the SARA registry by a specific date. There is no disagreement between Canada and the Submitters regarding the fact that recovery strategies were due, the date on which they were due, and the fact that they were not posted on the SARA registry on the due date. Each time a deadline was not met constitutes a particular, fact-based incident. The Secretariat notes that while failure to meet a statutory timeline may not always be, in and of itself, serious enough to warrant recommending development of a factual record, in this case, it is. Publishing a recovery strategy is the first step in a process designed to arrest a species' progress toward extinction. Delay risks compromising this objective.

Each of the 110 recovery strategies that were due, but not filed, as of September 2006 relates to a specific species whose identity is known to Canada, even if it was not listed by name in the submission. Specific, factual information regarding delays in posting those recovery strategies is available for all of those species. It is therefore difficult to understand Canada's statement, in the response, that specific information regarding delays in posting those strategies could not be provided. Development of a factual record is warranted to gather specific, factual information, relevant to the factors listed in s. 42, for each of the 110 recovery strategies the Submitters allege were overdue as of 29 September 2006,⁵⁸ including as regards unexpected obstacles and any other factors that affected the federal government's ability to post a recovery strategy on the SARA registry on time.

⁵⁶ Submission, Appendix 11.

⁵⁷ *Ibid.*

⁵⁸ The Secretariat notes that as of 25 July 2007, the SARA Registry contained a list of 69 species for which recovery strategies that were due in 2006 were not yet finalized (see Annex 1 to this notification). For each delayed recovery strategy, the registry contains the following message:

The recovery strategy for this species is in final stages of preparation. After it is completed, the Province of [name of province] will provide it to the Government of Canada for adoption and posting on the SARA Registry. Environment Canada will continue to work in cooperation with the Province of [name of province] to ensure a draft is completed and posted on the SARA Public Registry in a timely manner.

In its response to the submission, Canada dismisses as speculative concerns raised by the Submitters regarding timing for delivery of recovery strategies due in 2007.⁵⁹ The Secretariat notes that the statement to which the submission refers is drawn from an independent assessment of federal species at risk programs conducted by a consulting firm at the request of Environment Canada, Fisheries and Oceans Canada and Parks Canada Agency.⁶⁰ During development of a factual record, the Secretariat would gather information on measures adopted, on the basis of that formative evaluation, to ensure that deadlines for posting recovery strategies are met.

Canada's response to the submission highlights the imperative for cooperation in recovery planning.⁶¹ Canada notes that recovery planning under the SARA requires extensive consultations with provinces and territories and with stakeholders, as well as significant engagement of Aboriginal peoples.⁶² Canada states that in addition, pursuant to the 1996 *Accord for the Protection of Species at Risk*, federal and provincial/territorial governments (excluding Québec) agreed to participate in a national recovery program.⁶³ Canada points out that provinces and territories lead recovery planning for approximately 60% of all SARA-listed species (73% of all terrestrial SARA-listed species).⁶⁴ In the response, Canada observes: "A recovery planning document developed by a province/territory can be adopted under SARA if it meets SARA content and process requirements. The federal government is responsible for ensuring that these requirements are met."⁶⁵ On this topic, the 2006 Formative Evaluation Report notes the following issues and challenges:

Both departments [Environment Canada and Fisheries and Oceans Canada] face particular challenges, uncertainty, risks, and a lack of confidence that the SARA requirements will be met in situations where provinces or territories lead or co-lead the development of the recovery strategies. In the case of Environment Canada, provinces and territories have agreed to lead the development of more than 90 percent of the 227 species for which the Minister of the Environment is the competent minister. While provinces/territories may agree to lead the development of species recovery strategies, SARA is explicit in assigning accountabilities to competent federal ministers to ensure that such strategies are posted in accordance with the time lines and other requirements of the Act.⁶⁶

Preparation of a factual record would allow the Secretariat to gather detailed, relevant, missing information on methods, structures, and processes for consultation and cooperation

⁵⁹ Response at 8.

⁶⁰ Appendix 3 of the submission: Stratos Inc., "Formative Evaluation of Federal Species at Risk Programs" (Final Report, July 2006) Prepared for: Environment Canada, Fisheries and Oceans Canada, Parks Canada Agency [hereinafter "2006 Formative Evaluation Report"] at 32-33: "The evaluation found that Environment Canada is struggling to meet the legislated deadlines for recovery strategies for which the Minister of the Environment is the competent minister. Strategies due in January 2006 had not been posted on the Public Registry at the time of preparing this report. Time lines for recovery strategies due in June and July 2006 are unlikely to be fully met, given the progress to date. Similarly, Fisheries and Oceans Canada is facing challenges in meeting legislated deadlines for some freshwater aquatic species, noting a lack of scientific information and scientific capacity on freshwater species as key limitations. In addition, both departments express concerns that they are falling even further behind with those strategies and management plans due in 2007 and later."

⁶¹ Response at 7.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Response at 7-8.

⁶⁶ 2006 Formative Evaluation Report, *supra* note 60 at 33.

between and among the federal and provincial/territorial governments, and other stakeholders, and their connection, if any, to the Submitters' assertions regarding Canada's failure to post recovery strategies on the SARA registry on time.

b. Section 41(1)(c) – Identification of Critical Habitat

The preamble of the SARA states that the habitat of species at risk is key to their conservation. The SARA seeks to achieve the recovery of extirpated, endangered and threatened species by mandating the development and implementation of strategies that will lead to the protection of a species' critical habitat.⁶⁷ The SARA provides, at s. 41(1)(c):

If the competent minister determines that the recovery of the listed wildlife species is feasible, the recovery strategy must address the threats to the survival of the species identified by COSEWIC, including any loss of habitat, and must include:

[...]

(c) an identification of the species' critical habitat, to the extent possible, based on the best available information, including the information provided by COSEWIC, and examples of activities that are likely to result in its destruction.

The SARA addresses the situation where available information on a species' critical habitat is inadequate at the time a recovery strategy is prepared: the Act requires that the recovery strategy include a schedule of studies to identify critical habitat.⁶⁸

According to the Submitters, "even though the SARA requires recovery strategies to identify critical habitat, the Canadian government is failing to enforce this section of the Act."⁶⁹ Specifically, the submission asserts that "of the 23 recovery strategies posted on the SARA registry, only three identify critical habitat, and five partially identify critical habitat."⁷⁰ In its response, Canada states that two recovery strategies have identified critical habitat.⁷¹

The Submitters assert that for two of the recovery strategies where habitat was not identified, or only partially identified (Piping Plover, Spotted Owl), science for full identification does exist but was not incorporated into the strategy.⁷² Canada did not respond to this assertion.⁷³

⁶⁷ In the response, Canada notes, at 8: "At the outset, it is important to note that with respect to recovery planning requirements, the relevant enforceable element of these requirements is related to the protection of critical habitat if it was identified in the recovery strategy."

⁶⁸ SARA s. 41(1)(c.1).

⁶⁹ Submission at 9. See also 2006 Formative Evaluation Report, *supra* note 60 at 34: "Core departments have made very limited, and less than anticipated progress in identifying critical habitat through the recovery planning process." *Ibid.* at 56: [4.0 Conclusions and Recommendations] "Despite the important achievements realized, however, species at risk programs and activities are not yet on track to ensure that the Act's objectives and intended outcomes will be realized. In particular, recovery strategies are not being developed in a consistent manner or in accordance with the Act's timelines; critical habitat is not being identified and legally protected. [...]"

⁷⁰ Submission at 10. The three recovery strategies noted in the submission as having identified critical habitat are: Aurora Trout, Horsetail Spike-rush and Barrens Willow.

⁷¹ Response at 8: Roseate Tern and the Horsetail Spike-rush.

⁷² Submission at 11.

⁷³ Response at 4.

According to the Submitters, identifying critical habitat in only two or three recovery strategies amounts to a failure to effectively enforce s. 41 of the SARA by systematically deferring critical habitat identification.⁷⁴ They contend:

Moreover, because critical habitat is not identified, the SARA's prohibitions against harming critical habitat cannot be enforced and the Act's intent to protect endangered or threatened species by protecting their habitat is frustrated.⁷⁵

In the response, Canada does not address these assertions.⁷⁶ Canada observes that identification of critical habitat can also occur in the subsequent, action plan phase of recovery planning.⁷⁷

Preparation of a factual record regarding Canada's enforcement of SARA s. 41 is warranted in order to gather information that is missing from Canada's response for a proper consideration of the allegations made by the Submitters. In the response, Canada states that the Piping Plover (*circumcinctus* population) judicial review application precludes the Secretariat from examining the Submitters' broad-based assertions regarding Canada's enforcement of SARA s. 41.⁷⁸ That proceeding has lapsed and is therefore no longer pending.⁷⁹ Further, the Secretariat sees no inconsistency between the language in s. 41 (content of recovery strategies) and that of s. 49 (content of action plans): both recovery strategies and action plans must include identification of critical habitat "to the extent possible, based on the best available information" available at the time the recovery strategy or action plan is prepared.

In developing a factual record, the Secretariat would gather information regarding how and when critical habitat has been identified for species for which recovery strategies were posted on the SARA public registry as of 29 September 2006, the state of available scientific information, including information provided by COSEWIC, as well as information regarding measures adopted to ensure compliance with s. 41(1)(c) for recovery strategies developed by provinces and territories.⁸⁰

(2) Section 80 – Enforcement of the SARA Emergency Order Provisions

The Submitters allege that Canada is failing to effectively enforce the emergency order provisions (s. 80) of the SARA with respect to the Northern Spotted Owl in British Columbia and the Woodland Caribou in Alberta.

⁷⁴ Submission at 11.

⁷⁵ *Ibid.*

⁷⁶ Response at 4.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Nature Canada v. Canada (Minister of Environment)* (7 August 2007) Federal Court of Canada, Case No. T-2143-06: "Order dated 7 August 2007 rendered by Roger Lafrenière, Esq., Prothonotary. Matter considered without personal appearance. The Court's decision is with regard to Status Review Result: dismissed. This action is dismissed. Final Decision."

⁸⁰ As of 18 August 2007, 37 final recovery strategies, associated with specific species and groups of species, are posted on the SARA Registry. These are listed in Appendix 2 to this notification.

According to the Submitters, only 17 Spotted Owls were identified in British Columbia during a 2006 survey, down from an estimated historical population of 500 adult pairs,⁸¹ and yet logging by the British Columbia government continues in Spotted Owl habitat, allegedly threatening their recovery and survival.⁸² The Submitters affirm that British Columbia lacks endangered species protection laws, and yet three consecutive federal environment ministers have failed to recommend to cabinet that an emergency order be issued to protect the Spotted Owl. The Submitters add that they consider the foregoing circumstances egregious and observe that they likely represent a worst-case scenario in terms of emergencies facing species.⁸³

Regarding Woodland Caribou, the Submitters maintain that they are at particular risk of extinction in Alberta.⁸⁴ According to the Submitters, while Alberta has a Caribou recovery strategy, the province is not taking any meaningful steps to maintain herds at immediate risk of extinction, as it continues to allow logging and petroleum development to take place in their range, allegedly threatening their recovery and survival.⁸⁵

Canada states in its response that the matter of the Northern Spotted Owl is before the Federal Court of Canada and therefore, the Secretariat should proceed no further in its review of the Submitters' allegations.⁸⁶ Canada adds that a judgment in the Spotted Owl case will affect the interpretation of SARA s. 80(2) as it applies to the case of the Woodland Caribou. The Secretariat notes that the judicial proceeding referred to by Canada in its response has been discontinued and is therefore no longer pending.⁸⁷

Concerning Woodland Caribou, Canada's response notes that a recovery strategy for that species is expected to be posted on the SARA registry on or before June 2007.⁸⁸ However, as of 17 August 2007, no recovery strategy for Woodland Caribou has been posted for public comment. In its response to the submission, Canada explains that following receipt of a letter from counsel for the Submitters dated 15 December 2005, requesting the federal Environment Minister to recommend issuance of an emergency order pursuant to SARA s. 80 in respect of the Woodland Caribou in Alberta, "Environment Canada is assessing the science on the status and threats to the Woodland Caribou in Alberta. In addition, as required under SARA, Environment Canada is consulting with the province of Alberta."⁸⁹

In its response, Canada states that "the process under section 80 can lead to the making of an Order in Council, a legislative act, which could result in the setting of new standards."⁹⁰ The Secretariat notes that the Submitters allege a failure by successive environment ministers to

⁸¹ Submission at 13.

⁸² *Ibid.* at 14.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Submission at 9.

⁸⁷ *Western Canada Wilderness Committee v. Canada (Minister of the Environment)*, Federal Court of Canada, Case No. T-1681-06 (7 June 2007): "Discontinuance on behalf of Applicant with consent on behalf of Respondent filed on 7 June 2007."

⁸⁸ Appendix 5 of the response, "Woodland Caribou in Alberta" at 2.

⁸⁹ *Ibid.* at 3.

⁹⁰ Submission at 9.

recommend to cabinet that an emergency order be issued, regarding the Northern Spotted Owl and the Woodland Caribou.⁹¹ The relevant subsection of s. 80 reads as follows:

(2) The competent minister must make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery.

The focus of the Submitters is therefore on the absence of a recommendation by the Minister, and not on the absence of an Order-in-Council by cabinet. Therefore, no consideration of the exercise of legislative powers is requested or required.

In the response, Canada states that s. 80 gives discretionary powers to competent ministers, and that pursuant to NAAEC Article 45(1)(a), action or inaction of a Party is not a failure to enforce where it reflects a reasonable exercise of discretion. While the portions of s. 80 concerning the Governor in Council are discretionary (the Governor in Council *may* make an emergency order, and such order *may* identify habitat and prescribe or prohibit the doing of certain things), under s. 80, the competent minister *must* act when certain conditions are met. Thus, pursuant to s. 80(2), the competent minister is required to make a recommendation for an emergency order if he or she is of the opinion that a species faces imminent threats to its survival or recovery. In its initial review of the submission, the Secretariat stated:

The Secretariat finds that whether facts exist which trigger the Minister's duty to recommend the issuance of an emergency order pursuant to s. 80 of the SARA in respect of the Spotted Owl and the Woodland Caribou involves factual questions of enforcement to which the submissions on enforcement matters process under Articles 14 and 15 of the NAAEC is well-suited.⁹²

In previous submissions, the Secretariat determined that assertions similar to those regarding SARA s. 80(2) were assertions of a failure to effectively enforce or fulfill a specific legal obligation that the Secretariat could consider under Article 14.⁹³

In its response, Canada emphasizes that pursuant to s. 80(3), the Minister must consult all other competent ministers before making a recommendation for an emergency order.⁹⁴ Further, Canada notes that additional commitments for consultation and cooperation are found within the 1996 *Accord for the Protection of Species at Risk* and the Canada/British Columbia bilateral agreement on species at risk.⁹⁵ In that regard, the 2006 Formative Evaluation Report concluded:

⁹¹ *Ibid.*

⁹² SEM-06-005 (Species at Risk), Determination in accordance with Articles 14(1) and 14(2) (11 December 2006).

⁹³ See SEM-98-003 (Great Lakes), Determination in accordance with Articles 14(1) and 14(2) (8 September 1999) and SEM-03-001 (Ontario Power Generation) Determination in accordance with Articles 14(1) and 14(2) (19 September 2003).

⁹⁴ Response at 5.

⁹⁵ *Ibid.* See also response at Annex 5.

Federal and provincial/territorial authorities continue to cooperate well in support of the Accord, but cooperation to date has been insufficient to ensure that the federal government can address its obligations under the Act without recourse to more unilateral action or the Act's safety net provisions.⁹⁶

The submission raises central questions, left open by Canada's response, regarding Canada's enforcement of SARA s. 80(2) in regard to the Northern Spotted Owl in British Columbia and the Woodland Caribou in Alberta. Development of a factual record is warranted in order to gather relevant information that is missing for a proper consideration of the assertions contained in the submission. In developing a factual record, the Secretariat would gather information concerning steps taken by the competent minister to form an opinion regarding whether the Northern Spotted Owl and the Woodland Caribou face imminent threats to their survival or recovery, notably, in light of information presented to the competent minister by the Submitters, information which the Submitters claim establishes the existence of such a threat.⁹⁷ The Secretariat would also gather information regarding how the competent minister's opinion is informed by consultation with all other competent ministers pursuant to SARA s. 80(3).

V. Recommendation

For the foregoing reasons, the Secretariat considers that the submission, in light of Canada's response, warrants the development of a factual record and hereby so informs the Council. The submission and response, taken together, leave open central questions for which a more detailed presentation of factual information will assist in considering whether Canada is failing to effectively enforce sections 41, 42 and 80 of the SARA.

As discussed above in detail, a factual record is warranted to develop and present information regarding the Submitters' assertions that the Government of Canada is failing to effectively enforce the SARA's recovery planning requirements as regards (i) meeting statutory deadlines for posting recovery strategies on the public registry (s. 42); and (ii) identifying critical habitat, within recovery strategies, to the extent possible, based on the best available information (s. 41). Development of a factual record is also warranted regarding Canada's alleged failure to effectively enforce SARA s. 80 as regards recommending to cabinet that emergency orders be issued for the Northern Spotted Owl in British Columbia and the Woodland Caribou in Alberta.

Accordingly, pursuant to NAAEC Article 15(1), and for the reasons set forth in this notification, the Secretariat informs the Council of its determination that the objectives of the NAAEC would be well served by developing a factual record regarding the submission, as recommended herein.

⁹⁶ 2006 Formative Evaluation Report, *supra* note 60 at 58.

⁹⁷ Submission, appendices 7 and 8.

Respectfully submitted on this 10th day of September 2007.

(original signed)
Per: Felipe Adrián Vázquez-Gálvez
Executive Director

Annex 1**Delayed SARA Recovery Strategies due in 2006, as of 25 July 2007
(Sorted by date)**

Species (Common Name)	Due Date
Margined Streamside Moss	12-Jan-06
Mormon Metalmark, Southern Mountain population	12-Jan-06
Oregon Forestsnail	12-Jan-06
Silver Hair Moss	12-Jan-06
Streambank Lupine	12-Jan-06
Western Screech-owl, macfarlanei subspecies	12-Jan-06
Yucca Moth	12-Jan-06
Acadian Flycatcher	5-Jun-06
American Badger, jacksoni subspecies	5-Jun-06
American Badger, jeffersonii subspecies	5-Jun-06
American ginseng	5-Jun-06
Barn Owl, Eastern population	5-Jun-06
Bluehearts	5-Jun-06
Blunt-lobed Woodsia	5-Jun-06
Coastal Giant Salamander	5-Jun-06
Drooping Trillium	5-Jun-06
Eastern Mountain Avens	5-Jun-06
Eastern Prickly Pear Cactus	5-Jun-06
Ermine haidarum subspecies	5-Jun-06
False Hop Sedge	5-Jun-06
Furbish's Lousewort	5-Jun-06
Gattinger's Agalinis	5-Jun-06
Greater Sage-Grouse	5-Jun-06
Heart-leaved Plantain	5-Jun-06
Island Blue	5-Jun-06
Juniper Sedge	5-Jun-06
King Rail	5-Jun-06
Large Whorled Pogonia	5-Jun-06
Loggerhead Shrike, migrans subspecies	5-Jun-06

Species (Common Name)	Due Date
Long's Braya	5-Jun-06
Maritime Ringlet	5-Jun-06
Newfoundland Marten	5-Jun-06
Nightsnake	5-Jun-06
Nodding Pogonia	5-Jun-06
Northern Cricket Frog	5-Jun-06
Northern Leopard Frog, Southern Mountain population	5-Jun-06
Oregon Spotted Frog	5-Jun-06
Pink Coreopsis	5-Jun-06
Pink Milkwort	5-Jun-06
Piping Plover, melodus subspecies	5-Jun-06
Pitcher's Thistle	5-Jun-06
Poor Pocket Moss	5-Jun-06
Purple Twayblade	5-Jun-06
Red Mulberry	5-Jun-06
Rigid Apple Moss	5-Jun-06
Rocky Mountain Tailed Frog	5-Jun-06
Sage Thrasher	5-Jun-06
Scarlet Ammannia	5-Jun-06
Sharp-tailed Snake	5-Jun-06
Showy Goldenrod	5-Jun-06
Skinner's Agalinis	5-Jun-06
Slender Bush-Clover	5-Jun-06
Small White Lady's-slipper	5-Jun-06
Southern Maidenhair Fern	5-Jun-06
Spotted Wintergreen	5-Jun-06
Swift Fox	5-Jun-06
Tall Bugbane	5-Jun-06
Thread-leaved Sundew	5-Jun-06
Tiger Salamander, Southern Mountain population	5-Jun-06
Toothcup	5-Jun-06
Vancouver Island Marmot	5-Jun-06
Virginia Goat's-rue	5-Jun-06

Species (Common Name)	Due Date
White Prairie Gentian	5-Jun-06
White-headed Woodpecker	5-Jun-06
Yellow-breasted Chat, auricollis subspecies, British Columbia population	5-Jun-06
Butternut	14-Jul-06
Sand-verbena Moth	14-Jul-06
Slender Collomia	14-Jul-06
Stoloniferous Pussytoes	14-Jul-06

Annex 2

Final SARA Recovery Strategies, as of 16 August 2007

Recovery Strategy for Blue, Fin, and Sei Whales (*Balaenoptera musculus*, *B. physalus*, and *B. borealis*) in Pacific Canadian Waters (2006-07-14)

Recovery Strategy for Cucumber Tree (*Magnolia acuminata* L.) in Canada (2007-06-20)

Recovery Strategy for Forked Three-awned Grass (*Aristida basiramea*) in Canada (2007-02-14)

Recovery Strategy for Hotwater Physa (*Physella wrighti*) in Canada (2007-01-29)

Recovery Strategy for Leatherback Turtle (*Dermochelys coriacea*) in Atlantic Canada (2007-02-23)

Recovery Strategy for Leatherback Turtles (*Dermochelys coriacea*) in Pacific Canadian Waters (2007-02-23)

Recovery Strategy for Morrison Creek Lamprey (*Lampetra richardsoni* var. *marifuga*) in Canada (2007-07-23)

Recovery Strategy for Multi-Species at Risk in Garry Oak Woodlands in Canada (2006-08-11)

Recovery Strategy for Multi-Species at Risk in Maritime Meadows associated with Garry Oak Ecosystems in Canada (2006-08-11)

Recovery Strategy for Multi-Species at Risk in Vernal Pools and other Ephemeral Wet Areas Associated with Garry Oak Ecosystems in Canada (2006-08-11)

Recovery Strategy for Nooksack Dace (*Rhinichthys cataractae*) in Canada (2007-07-20)

Recovery Strategy for Northern Riffleshell (*Epioblasma torulosa rangiana*), Snuffbox (*Epioblasma triquetra*), Round Pigtoe (*Pleurobema sintoxia*), Mudpuppy Mussel (*Simpsonaias ambigua*) and Rayed Bean (*Villosa fabalis*) in Canada. (2007-01-29)

Recovery Strategy for Paxton Lake, Enos Lake, and Vananda Creek Stickleback Species Pairs (*Gasterosteus* spp.) in Canada (2007-07-20)

- Recovery Strategy for the Atlantic Whitefish (*Coregonus huntsmani*) in Canada (2007-02-23)
- Recovery Strategy for the Aurora Trout (*Salvelinus fontinalis timagamiensis*) in Canada (2006-07-24)
- Recovery Strategy for the Banff Springs Snail (*Physella johnsoni*) in Canada (2007-02-14)
- Recovery Strategy for the Barrens Willow (*Salix jejuna* Fernald) in Canada (2006-10-25)
- Recovery Strategy for the Boreal Felt Lichen (*Erioderma pedicellatum*), Atlantic Population, in Canada (2007-06-20)
- Recovery Strategy for the Engelmann's Quillwort (*Isoetes engelmannii*) in Canada (2007-02-13)
- Recovery Strategy for the Eskimo Curlew (*Numenius borealis*) in Canada (2007-06-20)
- Recovery Strategy for the Few-flowered Club-rush/Bashful Bulrush in Canada (*Trichophorum planifolium* (Sprengel) Palla) (2007-06-20)
- Recovery Strategy for the Horsetail Spike-rush (*Eleocharis equisetoides*) in Canada (2006-10-25)
- Recovery Strategy for the Kirtland's Warbler (*Dendroica kirtlandii*) in Canada (2006-10-25)
- Recovery Strategy for the Mountain Plover (*Charadrius montanus*) in Canada (2006-10-25)
- Recovery Strategy for the Northern Spotted Owl (*Strix occidentalis caurina*) in British Columbia (2006-10-25)
- Recovery Strategy for the Pink Sand-verbena (*Abronia umbellata*) in Canada (2007-02-14)
- Recovery Strategy for the Piping Plover (*Charadrius melodus circumcinctus*) in Canada (2007-07-13)
- Recovery Strategy for the Red Crossbill, perca subspecies (*Loxia curvirostra perca*), in Canada (2006-10-25)
- Recovery Strategy for the Roseate Tern (*Sterna dougallii*) in Canada (2006-10-25)
- Recovery Strategy for the Round Hickorynut (*Obovaria subrotunda*) and Kidneyshell (*Ptychobranthus fasciolaris*) in Canada (2006-07-13)
- Recovery Strategy for the Seaside Centipede Lichen (*Heterodermia sitchensis*) in Canada (2007-02-14)
- Recovery Strategy for the Small Whorled Pogonia (*Isotria medeoloides*) in Canada (2007-06-20)
- Recovery Strategy for the Spoon-leaved Moss (*Bryoandersonia illecebra*) in Canada (2006-10-25)
- Recovery Strategy for the Tiny Cryptanthe (*Cryptantha minima*) in Canada (2006-10-25)
- Recovery Strategy for the Wavyrayed Lampmussel (*Lampsilis fasciola*) in Canada (2007-02-23)
- Recovery Strategy for the Western Prairie Fringed-orchid (*Platanthera praeclara*) in Canada (2006-10-25)
- Recovery Strategy for the Wood-poppy (*Stylophorum diphyllum*) in Canada (2007-06-20)