

January 17th, 2011

Commission for Environmental Cooperation
393 rue St. Jacques Ouest, bureau 200
Montreal (Quebec), Canada H2Y 1N9

Attention: Evan Lloyd, Executive Director

Dear Sir:

Re: Submission SEM-06-005

On October 10, 2006, Ecojustice, formerly Sierra Legal Defence Fund, on behalf of fourteen Canadian and U.S. environmental organizations¹ (the Submitters), made a submission under Article 14 of the NAAEC asserting that the Canadian federal government was failing to effectively enforce the Species at Risk Act (SARA) with respect to at least 197 of the 529 species identified as at risk in Canada.

On September 10, 2007, the Secretariat recommended the preparation of a factual record pursuant to Article 15 of the NAAEC, with respect to our allegations that Canada is failing to enforce s. 80 of SARA regarding two species, SARA s. 41(1)(c) regarding 66 species included in 37 recovery strategies and SARA s. 42 regarding 69 species.

On December 20, 2010, more than 3 years after this recommendation was made, the CEC Council passed a resolution instructing the Secretariat to prepare a factual record only with respect to two of our allegations, and it limited the scope to five species under SARA s. 41(1)(c) and to six species under SARA s. 42.

We have reviewed the Council resolution and conclude that:

- 1) The Council delayed materially in resolving to produce the factual record;
- 2) The Council incorrectly limited the scope of the factual record in a way that is inconsistent with the letter and spirit of the NAAEC; and,

¹ The Sierra Club (United States and Canada), Nature Canada, the David Suzuki Foundation, Conservation Northwest, Environmental Defence, ForestEthics, Ontario Nature, Western Canada Wilderness Committee, BC Nature, Nature Alberta (formerly Federation of Alberta Naturalists), the Natural History Society of Newfoundland and Labrador, Nature Nova Scotia and Nature Quebec.

- 3) The Council arbitrarily limited the scope of the factual record in a manner designed to frustrate objective evaluation of Canada's failure to enforce the SARA.

Each of these points will be dealt with in turn:

Excessive and Material Delay

The original submission was dated October 6th, 2006. On September 10, 2007, the Secretariat recommended the preparation of a factual record. Given this excessive delay until the resolution recommending production of a factual record, and further anticipated delay in preparing the factual record, the Submitters believe the anticipated record will be stale and irrelevant.

The Submitters consider the Council's delay particularly egregious given that the submission contemplates Canada's failure to enforce a protective law for endangered species defined as "facing imminent extirpation or extinction."

Narrow scope arising from Error in interpreting NAAEC

In excluding considering Canada's record in failing to enforce the "emergency order" provision (s.80) because of a current ongoing court case, Council Resolution 10-005 is inconsistent with the NAAEC.

NAAEC Art. 14(3) (a) provides that the reason to "proceed no further" in considering an allegation under the NAAEC is that "the matter is the subject of a pending administrative or judicial proceeding". An "administrative or judicial proceeding" is in turn defined by NAAEC Art. 45(3) as a proceeding "initiated by the Party".

This submission co-occurred with a judicial proceeding related to SARA s. 80 concerning the Northern Spotted Owl, which has been discontinued, and which was brought by private parties, represented by Ecojustice, not the Party (Canada). Similarly, a judicial review concerning the Alberta Woodland Caribou, ongoing, was brought by private parties, represented by Ecojustice not by Canada.

For the Council to interpret the NAAEC to exclude broad consideration of failure to enforce by a party, when a party is subject to a lawsuit for a specific occurrence of failure to enforce, affects a self-serving policy to avoid scrutiny when it is most needed.

Arbitrary scoping to avoid review

The Secretariat recommended preparing a factual record for 66 species for which recovery strategies that did not identify critical habitat were posted on the SARA Registry at the time, and for the 69 species for which recovery strategies were due in September 2007. Council Resolution 10-005 limits the scope of the factual record from 124 species to 11 species and provides no reason for doing so.

The NAAEC does not authorize the Council to limit the scope of a factual record to its convenience. The 124 species excluded by the Council include those for which the mandatory timeline has been egregiously missed (including both subspecies of American badger (*jacksoni* and *jeffersonii*), the white-headed woodpecker, and Long's Braya, whose recovery strategies are currently over 4.5 years late) and one for which the Federal Court of Canada has ordered the government to identify critical habitat (Nooksack dace).

Moreover, of those species selected for consideration, our clients consider this subset deliberately chosen for having characteristics most likely to frustrate objective review of Canada's failure to enforce SARA. In other words, the species were "cherry picked" to show Canada in the best light.

Of the six species chosen by Council to investigate failure to enforce SARA s.42, just one of the six species (17%) still does not have a recovery strategy, and the other five species had their recovery strategies finalized less than two years late. Yet 39 of the 110 species (35%) whose recovery strategies were due June 5, 2006, **still** do not have a recovery strategy. The species chosen by Council will give a different and misleading impression compared to an analysis of all relevant species. To provide some current context, as of January 13, 2011 recovery strategies were due for 201 species listed as endangered, of which 109 or 54% do not have recovery strategies. For species listed as threatened, recovery strategies were due for 114 species of which 77 species or 68% do not have a recovery strategy. Thus Council's chosen species misrepresent the state of implementation of s.42 at the time we made our complaint, and yet more egregiously misrepresent the current state of implementation.

Just five species, out of a possible 66, were chosen by Council to investigate failure to enforce SARA s.41 (1) (c). It is not scientifically possible to determine whether there is systematic failure to identify critical habitat from such a small sample size – no statistical power is available. But, if analyzed as a group, the 66 species whose recovery strategies were recommended by the CEC as the basis for the factual record show that multiple socioeconomic factors affected whether critical habitat was identified. For example:

- Responsible agency: DFO identified critical habitat in .04% of recovery strategies, Parks Canada Agency in 12% of recovery strategies, and Environment Canada in 53% of recovery strategies.
- Province in which the species is found: Species found in Ontario had critical habitat identified 37% of the time (7/19 species) but in BC critical habitat was identified only .06% of the time (2/33 species).

These indications of unlawful application of s.41 (1) (c) could not be identified through an analysis of any subgroup of five species.

Further, the five species chosen do not include the at least 39 species among the list of 66 for which clear evidence exists of illegal failure to enforce s.41 (1) (c). These 39 species include:

- Eight species for which court documents² show that critical habitat was not identified because an illegal federal policy was applied: Nooksack dace, hotwater physa, and the six species of stickleback species-pairs from Paxton Lake, Enos Lake, and Vananda Creek.
- A further 23 species which did not get critical habitat identified due to application of a British Columbia policy, which federal officials accepted, of not identifying critical habitat.³ For three recovery strategies covering 20 of these species, documents obtained under Freedom of Information requests showing federal employees removed identifications of critical habitat for some species because of this policy.
- Eight species of freshwater mussel from southern Ontario for which critical habitat is clearly identified for all scientific purposes in their recovery strategies, but is not labeled critical habitat.

In fact, though the issue of provincial versus federal jurisdiction is an obvious challenge for critical habitat identification, all five species chosen are either aquatic species or migratory birds – species under federal jurisdiction.

Conclusion

We conclude that a factual record prepared under the Council's instruction would not serve as an independent assessment of the facts surrounding our allegations of Canada's failure to effectively enforce SARA.

We further conclude that there exists a material risk that any factual record on these terms will jeopardize meaningful review and informed debate about Canada's actions, an outcome not in the public interest.

² Environmental Defence Canada v. Canada (Fisheries and Oceans), 2009 FC 878 (CanLII).

³ Ibid.

Accordingly, we advise that the Submitters hereby withdraw submission SEM 06-005 made on October 10, 2006 and respectfully ask that the Secretary and Council halt further activities regarding the submission.

Sincerely,

A handwritten signature in blue ink, appearing to read "Devon Page", is written over a light blue horizontal line.

Devon Page
Executive Director

cc: Council
cc: Joint Public Advisory Committee