305

SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT REGARDING (CANADA ENDANGERED SPECIES PROTECTION ACT) BILL C-65

Publication # 305
ISBN# 978-1-77189-422-7

By
Richard D. Lindgren and Paul R. Muldoon
December 10, 1996

VF:
CANADIAN ENVIRONMENTAL LAW
ASSOCIATION.
CELA BRIEF NO.305; Submissions o
the Canadian Environmen...RN1974

TABLE OF CONTENTS

Page

SECTION 1.0 - INTRODUCTION 1

SECTION 2.0 - THE RATIONALE FOR FEDERAL LEGISLATION 3

2.1 The Need for Action 3

2.2 The Rationale for Protecting Species at Risk 4

2.3 The Inadequacy of the Existing Regulatory Framework 5

(a) Existing Federal Laws 5

(b) Existing Provincial Laws 6

(c) The National Accord for the Protection of Species at Risk 8

2.4 Canada's International Obligations: The Rio Convention 10

2.5 Constitutional Basis for Federal Endangered Species Law 10

SECTION 3.0 - CRITIQUE OF BILL C-65 12

3.1 Essential Elements of Endangered Species Law 12

3.2 Preamble and Statement of Purpose 13

3.3 Interpretation, Application and Administration 14

(a) Interpretation Sections 14

(b) Application of Bill C-65 15

(c) Administration of Bill C-65 18

3.4 Public Access 21

3.5 Wildlife Species Listing Process: The Role of COSEWIC 22

3.6 Measures to Protect Listed Species 26

(a) Prohibitions 26

(b) Emergency Orders 28

(c) Recovery and Management Plans 31

(d) Agreements and Permits 33

(e) Project Review 33

3.7 Enforcement Measures 37

(a) Investigation Requests 37

(b) Ministerial Powers 38

3.8 Endangered Species Protection Actions 40

(a) General 40

(b) Conditions Precedent for Suing under Bill C-65 41

(c) Nature of the Endangered Species Protection Action 42

(d) Relief Available in an Endangered Species Protection Action 43

(e) Defences to an Endangered Species Protection Action 44

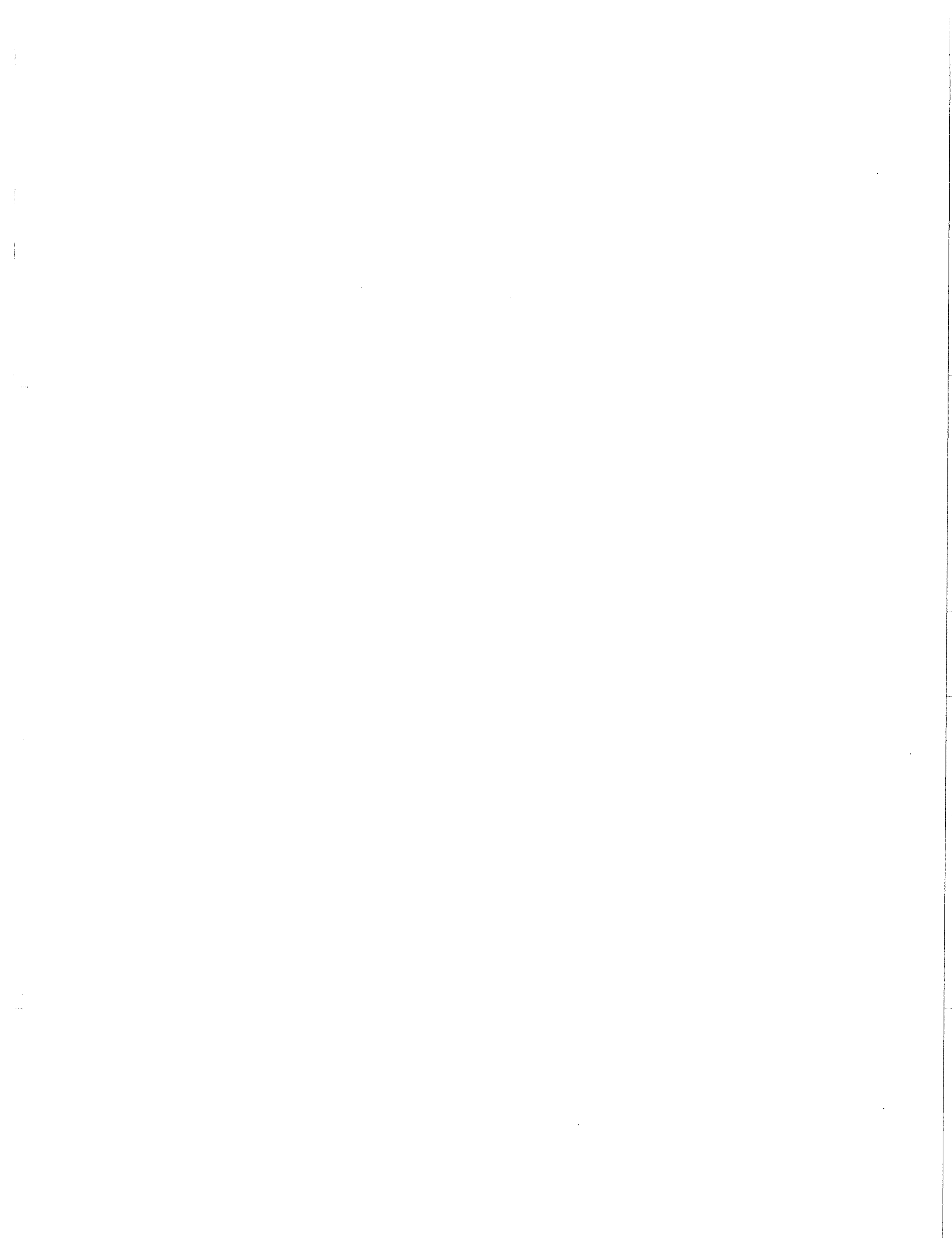
(f) Costs, Security for Costs, and Undertakings for Damages 44

(g) Civil Liability for Damages Arising from Contraventions 45

3.9 Offences, Punishment and Alternative Measures 48

3.10 Reports and Review of Act 49

SECTION 4.0 - CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS . . . 50



SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT REGARDING BILL C-65 (CANADA ENDANGERED SPECIES PROTECTION ACT)

By
Richard D. Lindgren and Paul R. Muldoon[1]

SECTION 1.0 - INTRODUCTION

The Canadian Environmental Law Association (CELA) is a public interest law group founded in 1970 for the purpose of using and improving Canada's laws to protect the environment and conserve natural resources. Funded as a community legal clinic specializing in environmental law, CELA represents individuals and citizens' groups before trial courts, appellate courts and administrative tribunals on a wide variety of environmental issues. In addition to casework, CELA undertakes public education, community organization, and law reform activities at both the federal and provincial level.

Like many other environmental organizations across Canada, CELA regards biodiversity conservation as high-priority issue for the 1990's. Accordingly, CELA has undertaken, sponsored, or endorsed numerous projects, programs and casework aimed at conserving biological diversity at the local, provincial, national and international level.

In order to conserve biodiversity, a wide variety of regulatory and non-regulatory tools are required to ensure that resource management, land use and development, and industrial activities are carried out in an environmentally sensitive and sustainable manner. However, the protection of wildlife species at risk (and their habitat) cannot be left solely to voluntary programs, economic instruments, unenforceable guidelines, or vague industrial codes of conduct. In CELA's view, endangered species conservation requires an effective and enforceable legislative framework designed to protect species at risk and their habitat.

Accordingly, CELA has been involved in the widespread push for the enactment of long overdue endangered species legislation at the federal level. For example, CELA supports the invaluable work of the Canadian Endangered Species Coalition, and CELA submitted a detailed brief in response to Environment Canada's 1995 discussion paper on endangered species conservation.[2] In addition, CELA participated in the national workshop on endangered species sponsored by the

---

[1] Mr. Lindgren and Mr. Muldoon are staff lawyers with the Canadian Environmental Law Association, Toronto, Ontario. The authors hereby acknowledge the seminal work of Mr. Stewart Elgie on behalf of the Canadian Endangered Species Coalition.

[2] R. Lindgren, "Endangered Species and Spaces: The Need for Federal Legislation" (CELA, 1995).

Canadian Wildlife Service in Ottawa in December 1995. CELA has also published public education materials regarding the need for federal endangered species legislation.[3]

CELA has used its environmental law experience, and its public interest perspective, to evaluate Bill C-65, the Canada Endangered Species Protection Act. While there is little doubt that Bill C-65 represents an improvement over the flawed legislative proposal brought forward by the previous Minister of Environment,[4] there are nevertheless some significant deficiencies and loopholes that must be rectified as Bill C-65 proceeds through the legislative process.

Accordingly, although CELA supports Bill C-65 in principle, and indeed supports many of the specific provisions contained within the Bill, CELA submits that Bill C-65 should be enhanced and strengthened through various amendments, particularly amendments that:

- **expand the application and scope of Bill C-65;**
- **clarify key definitions under Bill C-65;**
- **enhance the public registry;**
- **improve the listing process and ensure that listing decisions are made on a sound scientific basis;**
- **strengthen the general prohibitions within Bill C-65;**
- **enhance the emergency order powers;**
- **improve and expedite the recovery plan process;**
- **restrict the availability of "exception" permits and agreements;**
- **ensure the application of environmental assessment obligations to proposed projects that may adversely affect a listed species or the residences or critical habitat of its individuals;**
- **strengthen enforcement measures under Bill C-65;**
- **enhance the availability and utility of endangered species protection actions;**

---

[3] See, for example, R. Lindgren, "Pressure Increases to Protect Wildlife", The Lawyers Weekly, 15:13 (August 11, 1995), at p.12; and R. Lindgren, "Federal Endangered Species Law: An Update", Intervenor 20:4 (July/August 1995), p.5.

[4] See The Canadian Endangered Species Protection Act: A Legislative Proposal (Environment Canada, 1995).

- **increase the penalty provisions to make them consistent with other federal environmental statutes; and**

- **improve reporting requirements under Bill C-65.**

SECTION 2.0 - THE RATIONALE FOR FEDERAL LEGISLATION

2.1 The Need for Action

The staggering loss of biological diversity at the global level has been well-documented,[5] and does not need to be reviewed here in detail. It has been estimated that two to three species become extinct **every hour**, which translates into the loss of approximately 27,000 species each year. The vast majority of these modern extinctions are due to human activity rather than natural causes. These human activities include:

- habitat destruction and degradation (i.e. loss of wetlands, grasslands, old growth forests and other critical habitat);

- incompatible land use and development (i.e. urban sprawl);

- resource exploitation (i.e. overhunting or overfishing);

- climate change (i.e. excessive carbon emissions);

- toxic pollution (i.e. bioaccumulation of persistent toxics).

Individually and cumulatively, these activities threaten the long-term sustainability of wildlife species, particularly those already at risk. However, the single greatest threat to species at risk is habitat loss.

Canada, too, has experienced the extinction or extirpation of numerous species of flora and fauna, while hundreds of other species remain endangered, threatened or vulnerable within Canada. These alarming statistics are reflected in the following wildlife status designations prepared by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC):[6]

---

[5] R. Lindgren, "Endangered Species and Spaces: The Need for Federal Legislation" (CELA, 1995), pp.2-3.

[6] As of September 1996.

CATEGORY	TOTAL
Extinct	10
Extirpated	11
Endangered	65
Threatened	65
Vulnerable	125
	276

The most significant threat to most of the Canadian species at risk is habitat loss. Accordingly, it is critically important for endangered species legislation, at both the federal and provincial level, to **require**, not just permit, habitat protection for species at risk. As described below, however, the habitat protection provisions of Bill C-65 are woefully inadequate and must be substantially strengthened.

2.2 The Rationale for Protecting Species at Risk

It is well-recognized that conserving biodiversity in general, and protecting wildlife species in particular, is important for many different reasons, including:[7]

> **Ecosystem Benefits:** Flora and fauna play important roles in maintaining healthy ecological functions and processes.
>
> **Recreational, Economic and Aesthetic Benefits:** Wildlife-based activities, such as bird-watching or eco-tourism, is a billion dollar industry in Canada which provides numerous social, cultural, and aesthetic benefits.
>
> **Food and Medicine:** Much of Canada's food, medicine, and other material needs are provided by, or derived from, plant and animal species.
>
> **Ethics:** Many persons believe that the human species does not have the moral right to cause the extinction of another species.

In summary, the continuing loss of biodiversity in Canada is undesirable from these ecocentric, anthropocentric, and ethical perspectives.

Not surprisingly, then, there has been overwhelming public support in Canada for the enactment of federal endangered species legislation. For example, a 1996 survey revealed that 92% of Canadians support endangered species legislation, while close to 90% believe that the federal

---

[7] Generally, see S. Elgie, "Protected Spaces and Endangered Species", in Hughes, Lucas and Tilleman (eds.), Environmental Law and Policy (Emond Montgomery, 1993), pp.468-69.

government must assume a leadership role in protecting endangered species within Canada.[8] Similarly, upon introducing Bill C-65 in Parliament, the Minister of Environment noted that he had received more public comments on endangered species than any other environmental issue.[9]

2.3 The Inadequacy of the Existing Regulatory Framework

In the past, the federal, provincial and territorial governments within Canada slowly developed a policy and regulatory framework to protect wildlife, habitat and natural heritage. However, the effectiveness of the existing framework is highly questionable, given that hundreds of wildlife species have been designated at risk by COSEWIC, and the COSEWIC list keeps growing each year. It is also noteworthy that few provinces have actually enacted endangered species legislation.

As described below, Canadian wildlife officials have recently signed a "National Accord on the Protection of Species At Risk" in order to address the numerous deficiencies within the existing regulatory framework. However, it is doubtful whether the National Accord per se will translate into the prompt enactment and timely enforcement of comprehensive endangered species legislation at the provincial and territorial levels.

(a) Existing Federal Laws

Unless and until Bill C-65 is amended and passed, Canada will continue to lack an effective endangered species law at the federal level. This is a completely unacceptable situation since this would leave many species at risk subject only to indirect and piecemeal protection through other existing federal statutes, such as the Canada Wildlife Act, Fisheries Act, Migratory Birds Convention Act, National Parks Act, and the regulations thereunder. While these other statutes serve important purposes, they confer only limited protection to species at risk, and the mere existence of these other statutes does negate the clear and compelling need for federal endangered species legislation.

Canada's legislative inertia regarding endangered species stands in stark contrast to the experience in the United States, which has had strong federal endangered species legislation in place since 1973. CELA hastens to point out that while the American model has not been problem-free, the

---

[8] Environment Canada, "News Release - Backgrounder #1: What Protecting Endangered Species Means to Canadians" (October 31, 1996), p.1.

[9] The Hon. Sergio Marchi, "Press Conference Notes on the occasion of the tabling of the Canada Endangered Species Protection Act" (October 31, 1996), p.1.

U.S. experience clearly demonstrates that it is possible to protect endangered species and their habitat **and** still provide for appropriate land use or resource development opportunities. CELA does not advocate the wholesale incorporation of the U.S. Endangered Species Act into Bill C-65. However, in considering how, and to what extent, Bill C-65 can be expanded and improved, particularly in relation to habitat protection, CELA submits that it is instructive to have regard for, and to learn from, the American endangered species experience, as described below.

(b) Existing Provincial Laws

At the present time, several Canadian provinces and territories do not have any specific endangered species legislation. Accordingly, these provinces, of necessity, can only rely upon general wildlife and parks laws that are simply not designed to adequately ensure the protection of species at risk.

Even in the few provinces that currently have endangered species laws,[10] the respective legislative regimes cannot be viewed as uniform or comprehensive. For example, Ontario's Endangered Species Act,[11] which was first passed in the early 1970's, suffers from a number of serious flaws and loopholes, such as:

- **The listing of endangered species is entirely discretionary.** Only a small number of flora and fauna have been designated as being "threatened with extinction" in Ontario,[12] including two species that have already been extirpated from Ontario.[13] Ontario's legislation does not impose a mandatory duty upon government to identify, assess, or report upon the species at risk within the province. Accordingly, the Ontario list may be characterized as bureaucratic rather than scientific in nature, and it does not constitute a credible or accurate assessment of the current status of species at risk within the province.

- **The listing process lacks adequate public notice and comment opportunities.** Ontario's law provides no formal opportunities for public input into the listing process, and there has been unconscionable delay in updating the list to include COSEWIC-listed species at risk in Ontario.

---

[10] Such as Ontario, New Brunswick, Quebec, and Manitoba.

[11] R.S.O. 1990, c.E.15.

[12] Regulation 328, R.R.O. 1990.

[13] Patricia Mohr, "Wildlife", in Estrin and Swaigen (eds.), Environment on Trial (Emond Montgomery, 1993), p.360.

- **Recovery plans are not required by law.** Even for the few species designated as "endangered" in Ontario, the existing legislation does not require the preparation and implementation of plans to assist in the recovery of such species. This is widely regarded as one of the major shortcomings of the Ontario law, and the present lack of mandatory recovery plans in Ontario will undoubtedly perpetuate the precarious status of such species until they are extirpated or extinct.

- **Preventative measures are not required by law.** Ontario's law provides no legal protection for species that are threatened or vulnerable. This is a regrettable oversight since it is important to undertake protection and recovery efforts for such species before they reach "endangered" status.

- **There is no requirement for prior assessment of projects or undertakings that may impact species at risk or their habitat.** Ontario's law does not require prior assessment of projects, developments or undertakings that may adversely affect species at risk or their habitat. If applicable, Ontario's Environmental Assessment Act would require such an assessment. To date, however, the application of the Environmental Assessment Act has been largely restricted to a small number of public sector proponents, and private sector development (other than waste management facilities) has remained largely untouched by environmental assessment requirements. In general, this means that private sector activities -- such as urban development, aggregate extraction, or tree cutting upon private woodlots -- can occur without an environmental assessment, even where such activities may adversely species at risk or their habitat.

- **Enforcement of the Ontario law has been sporadic and ineffective.** Although Ontario's law has existed since 1971, it appears that only four prosecutions have been undertaken by the Ministry of Natural Resources over the past 25 years.[14] It is also noteworthy that these four cases involved "takings" of endangered species, which means that the habitat protection provision of the Ontario law[15] has never been enforced. This abysmal enforcement track record, combined with Ontario's apparent unwillingness to designate additional species as "endangered", does not provide sufficient deterrence to potential offenders, nor does it confer adequate protection upon species at risk in Ontario. The fact that the Ministry of Natural Resources is experiencing extensive budget cuts and staffing reductions leaves CELA with even less confidence that Ontario's law will be enforced in a timely and effective manner by government officials.

Many of the above-noted deficiencies in Ontario's law have been targeted by a private member's bill introduced for First Reading in the Legislature on June 5, 1996.[16] Among other things, this

---

[14] Ibid.

[15] R.S.O. 1990, c.E.15, section 5(b).

[16] Bill 62 (An Act to revise the Endangered Species Act and to protect Threatened and Vulnerable Species).

Bill proposes to: (1) extend protection to threatened and vulnerable species; (2) establish an advisory committee regarding species at risk; (3) require the preparation of status reports and recovery plans; and (4) enhance investigation and enforcement powers. It is CELA's understanding that Bill 62 has not reached Second Reading stage, and it is unlikely to proceed any further in the legislative process.

If enacted, Bill 62 would replace the Ontario's Endangered Species Act, and the Bill is clearly a major improvement over the existing regime within the province. However, it must be noted that Bill 62 is not a government-sponsored Bill, and it does not appear that Bill 62 will receive Third Reading, Royal Assent, and be proclaimed into force. Similarly, it is unclear whether Ontario's endorsement of the National Accord (discussed below) will cause the present government to adopt and/or enact Bill 62, or to promulgate its own legislation. Accordingly, until this uncertainty is settled, it can be safely concluded that Ontario's Endangered Species Act remains outdated and ineffective.

(c) The National Accord for the Protection of Species at Risk

In October 1996, federal, territorial and provincial wildlife ministers agreed "in principle" to a "National Accord for the Protection of Species at Risk in Canada". The goal of the National Accord is laudable: "to prevent species in Canada from becoming extinct as a consequence of human activity".[17]

Among other things, the National Accord stipulates that all jurisdictions will: (1) participate in the Canadian Endangered Species Conservation Council; (2) recognize COSEWIC as a source of independent advice on the status of species at risk nationally; (3) establish complementary legislation and programs for effective protection of species at risk throughout Canada; and (4) refer any disputes under the Accord to the Canadian Endangered Species Conservation Council for resolution. The National Accord provides few technical details on how and when the required steps should be implemented, but goes on to stipulate that "additional guidance" on implementation "is provided in the national evolving national framework for the conservation of species at risk".

While the goal of the National Accord is unobjectionable, CELA submits that continued reliance upon the "evolving national framework" is misguided and counterproductive. In CELA's opinion, the Canadian approach to endangered species protection must be substantially restructured so as to expand and enhance the role of the federal government.

The primary problem with Bill C-65 is that it is entirely consistent with the "evolving national framework", which relies principally upon the provinces to get the job done. As described below,

---

[17] Arguably, the National Accord should have also included a second related goal: to ensure the recovery of species at risk to healthy, self-sustaining population levels.

CELA submits that Bill C-65 should not attempt to confine the federal government's regulatory role to fish, migratory birds, or federal lands. Having regard for the long-standing provincial inertia respecting species at risk, and having regard for the constitutional inability of provinces to deal effectively with the extraprovincial and international aspects of species at risk, it is CELA's opinion that leaving the provinces with the primary responsibility for protecting species at risk means that the necessary legislative reforms may not be implemented properly or at all.

CELA acknowledges that the National Accord attempts to identify the minimum content requirements for provincial legislation and programs in order to ensure some degree of uniformity and consistency across the country. Nevertheless, the general language of the National Accord offers considerable latitude to the provinces to merely "finetune" or "tinker with" their existing regimes, which, as described above, are widely regarded as inadequate. Moreover, the National Accord fails to establish any firm timelines, targets or deadlines for the necessary reforms, which again gives each jurisdiction additional opportunity to delay and obfuscate.

Indeed, the National Accord does not even seem to specify that each jurisdiction must pass or maintain legislation to protect species at risk. This ambiguity is to be contrasted with the wording of Article 8(k) of the Rio Convention, which expressly bound signatories to enact legislation to meet their obligations, as described below. In CELA's view, the loose language in the National Accord's agreement to "establish complementary legislation and programs" appears to give the provinces the option of addressing most or all of the prescribed minimum requirements through non-regulatory "programs" rather than "legislation". In fact, provinces (such as Ontario) that already have endangered species laws may be tempted to resist substantive overhauls of their legislation, preferring instead to meet any additional obligations under the National Accord through "programs".

CELA recognizes that there is a clear need for integrated and coordinated action at the provincial and territorial levels in order to maximize the effectiveness of Canada's endangered species regime. CELA also acknowledges that First Nations exercising treaty and aboriginal rights, including self-government resource management authority, also have an important role to play in the protection and conservation of species at risk. Coordination and cooperation among these various levels of government is both desirable and necessary.

However, CELA submits that the federal government cannot shirk or evade its endangered species responsibilities by resorting to unpersuasive constitutional arguments, unproductive jurisdictional buck-passing, or unenforceable "feel-good" National Accords. There is a compelling need for a strong federal presence in endangered species protection, and there is a strong constitutional basis for such action, as described below. In CELA's view, the centrepiece of Canada's endangered species regime must be comprehensive federal legislation that goes beyond fish, migratory birds or federal lands. Under such a regime, the provinces and territories would still be free to pursue their own wildlife priorities and to supplement, not supplant, these minimum federal standards. However, for the reasons set out below, Bill C-65 appears to fall way short of the mark in many key respects.

2.4 Canada's International Obligations: The Rio Convention

Before and during the 1992 Rio Earth Summit, Canada played a key role in the development and adoption of the Convention on Biological Diversity, which Canada subsequently ratified. Among other things, Article 8(k) of the Convention requires Canada to "... as far as possible and as appropriate, develop or maintain necessary legislation... for the protection of threatened species and populations" (emphasis added). In 1993, Parliament's Standing Committee on the Environment considered Canada's obligations under the Convention, and properly concluded that the lack of a federal endangered species law was a "legislative gap" that should be addressed. The Standing Committee also unanimously recommended:

> ... that the Government of Canada, working with the provinces and territories... take immediate steps to develop an integrated legislative approach to the protection of endangered species, habitat, ecosystems and biodiversity in Canada (emphasis added).[18]

In light of its significant loopholes and limited application, it is debatable whether Bill C-65 fully satisfies Canada's international obligations under the Rio Convention. Similarly, it is questionable whether Bill C-65 fully addresses the intent of the Standing Committee's recommendations respecting the protection of species at risk and their habitat, particularly in light of the non-binding nature of the National Accord. Thus, CELA submits that Bill C-65 should be substantially strengthened in accordance with the numerous recommendations set out below in Section 3.0 of this submission.

2.5 Constitutional Basis for Federal Endangered Species Law

It is beyond the scope of this submission to provide an exhaustive review of the constitutional basis for comprehensive federal endangered species legislation. On this issue, CELA fully concurs with the legal opinion prepared for the Canadian Endangered Species Coalition by Professor Dale Gibson, a leading constitutional expert.[19] Professor Gibson concluded as follows:

> There is a persuasive argument to be made that the Parliament of Canada has sufficient competence under the "national dimension" facet of its "P.O.G.G. [peace, order, and good government] power" (including the "treaty power", however interpreted) to exercise jurisdiction over **all** aspects of endangered species protection, both direct and necessarily incidental, regardless of the nature of the species or its location. Even if that argument should fail, it is indisputable that federal authorities have such jurisdiction over:

---

[18] Standing Committee on Environment, A Global Partnership: Canada and the Conventions of the United Nations Conference on Environment and Development (April 1993), p.30.

[19] Dale Gibson, "Endangered Species and the Parliament of Canada: A Constitutional Opinion" (SLDF, 1994).

- all fish and other aquatic life-forms (s.91(12));

- all species inhabiting (for at least part of their life-cycles) property that is federally owned or federally controlled, whether beyond the geographic bounds of the provinces or on federal enclaves within the provinces (s.91(1A); s.91(24); P.O.G.G.);

- all species that move across provincial or national boundaries, or whose survival depends on trans-boundary measures (P.O.G.G.);

- all protections embodied in criminal law (s.91(27);

- statistical studies of endangered species and related matters (s.91(6));

- at least some threats caused by agricultural activities (s.95).

> The totality of these federal powers are so sweeping, in my opinion, as to leave very few, if any, gaps in the ability of the Government of Canada to act for the protection of all endangered species in Canada (emphasis added).[20]

Professor Gibson further concluded that while there is room for provincial endangered species legislation, and while interjurisdictional cooperation may be desirable, in the final analysis the federal government can play the lead role in protecting species at risk:

> The provinces are capable of providing much protection for endangered species within their own territories under their own authority (although major aspects of the subject cannot be dealt with by the provinces alone, and all provincial action is subject to federal paramountcy). Virtually any kind of federal-provincial collaboration that might be considered desirable is constitutionally feasible through delegation, cost sharing and other co-operative measures. The constitutional powers of the federal Parliament are so sweeping in this area that federal authorities would have no difficulty performing a paramount role in any such co-operative schemes if they chose to so.[21]

CELA reached the same conclusions in its previous submission on federal endangered species legislation,[22] and CELA wholly adopts Professor Gibson's reasoning and conclusions in this matter.

Given the strong constitutional basis for comprehensive federal endangered species legislation,

---

[20] Ibid, p.25.

[21] Ibid, p.26.

[22] R. Lindgren, "Endangered Species and Spaces: The Need for Federal Legislation" (CELA, 1995), pp.7-8.

CELA is unclear why Bill C-65 has been deliberately drafted to only apply to fish, migratory birds, and federal lands.[23] It is equally unclear why Bill C-65 does not provide substantive protection to transboundary species and their habitat, particularly since the provinces cannot act effectively or comprehensively to deal with the extraprovincial and international aspects of transboundary species. In CELA's opinion, there is no compelling constitutional reason why Bill C-65 has been so tightly circumscribed in its application and scope. Thus, CELA can only conclude that the narrow application of Bill C-65 was primarily motivated by political, not legal, considerations.

SECTION 3.0 - CRITIQUE OF BILL C-65

3.1 Essential Elements of Endangered Species Law

In its previous submission on federal endangered species legislation,[24] CELA outlined the minimum requirements for the new federal statute as follows:

- national standards covering all species at risk throughout Canada;
- listing of species on a sound scientific basis by a non-partisan, expert and independent scientific committee;
- advance assessment and review of undertakings that may affect species at risk;
- development and implementation of recovery plans for all species at risk;
- prohibitions against harming endangered or threatened species or their habitat;
- strong penalties for violations under the legislation; and
- effective enforcement and compliance mechanisms, including administrative orders and recourse to the civil courts.

These essential elements represent the benchmark used by CELA to evaluate the various components of Bill C-65. In reviewing Bill C-65, CELA has also considered the five underlying principles espoused by the Minister upon introducing Bill C-65:

- decisions respecting species at risk will be based on science;

---

[23] Bill C-65, section 3.

[24] R. Lindgren, "Endangered Species and Spaces: The Need for Federal Legislation" (CELA, 1995), p.23.

- habitat protection is fundamentally important to the protection of species;
- tough penalties will be included within Bill C-65;
- international cross-border species will be protected; and
- the public will have meaningful opportunities to participate in the listing process, recovery plans, and enforcement activities.[25]

In evaluating Bill C-65, CELA also considered the extent to which the Bill reflects or incorporates the recommendations of the Minister's Task Force on endangered species reform. This multi-stakeholder Task Force, which was established in 1995, reached an important consensus on the key components of federal endangered species legislation. Among other things, the Task Force recommended that:

- the new Act should apply to the full extent of federal jurisdiction, including protection of transboundary species;
- listing decisions should be made by COSEWIC, not politicians;
- the new Act should prohibit harming endangered species or disturbing their homes; and
- the new Act should protect the critical habitat of endangered species, as may be identified through recovery plans.

Applying this analytical framework to Bill C-65, it is clear that many of CELA's previous recommendations, the Minister's stated principles, and the Task Force recommendations have been reflected or addressed in Bill C-65. Nevertheless, some key recommendations have been omitted or seriously weakened in Bill C-65, and there is considerable room to improve Bill C-65 in order to increase its effectiveness and to meet current public expectations regarding federal endangered species legislation.

CELA's specific findings and recommendations respecting Bill C-65 are described below in Sections 3.2 to 3.10 of this submission.

3.2 Preamble and Statement of Purpose

The preamble of Bill C-65 contains a number of recitals that emphasize the need for federal endangered species legislation. In general, CELA supports the preamble as drafted, but submits

[25] The Hon. Sergio Marchi, "Press Conference Notes on the occasion of the tabling of the Canada Endangered Species Protection Act" (October 31, 1996), pp.1-3.

that the preamble should be amended to include additional recitals that underline the constitutional basis for Bill C-65. Indeed, the only reference in the proposed preamble to the constitutional basis of Bill C-65 is the fourth recital, which correctly indicates that: "providing legal protection for wildlife species at risk will in part meet Canada's commitments under [the Rio] Convention".

In CELA's view, the preamble (which will be an important interpretive aid if constitutional challenges are brought in court) should include the following two paragraphs:

> **The existence of species at risk is a matter of national concern,**
>
> **Species at risk are not always contained within geographic boundaries.**

Section 5 of Bill C-65 sets out the purposes of the legislation. CELA supports this statement of purposes, but submits that several key provisions of Bill C-65 require substantial improvement if the federal government is serious about achieving the purposes of Bill C-65.

CELA RECOMMENDATION #1: **The preamble of Bill C-65 should be amended to include paragraphs that refer to or invoke the constitutional basis for the legislation, particularly the "national concern" branch of the "peace, order, and good government" power.**

3.3 Interpretation, Application, and Administration

Bill C-65 contains numerous provisions that help define the intended ambit of the legislation. As described below, CELA submits that some provisions dealing with the interpretation, application and administration of Bill C-65 require further amendment so as to clarify the scope and content of the legislation.

(a) Interpretation Sections

In CELA's view, most of the proposed definitions in section 2(1) of Bill C-65 are sufficiently clear and concise. However, CELA would suggest new or amended definitions for the following terms: "critical habitat", "extinct", "habitat",[26] "listed", "residence", and "wildlife species". In

---

[26] CELA was surprised to see that "habitat" has not been defined in Bill C-65, although the term is used throughout the legislation.

general, Bill C-65's proposed definitions for these terms are either too narrow or non-existent.

For these terms, CELA would suggest the following wording:

> **"critical habitat" means habitat that is necessary for the survival and recovery of a wildlife species, as identified in a status report or decision under section 24.**
>
> **"extinct species" means a wildlife species formerly present in Canada but no longer in existence anywhere.**
>
> **"habitat" means the air, land or water, including flora, geological features, and ecological functions, where an individual of a species at risk currently occurs, formerly occurred, or could occur if reintroduced.**
>
> **"listed" means identified on the List of Wildlife Species at Risk in Schedule I.**
>
> **"residence" means a specific dwelling place or other area habitually occupied by an individual of a species at risk for all or part of its life cycle, including dens, nests, or areas used for breeding, feeding, hibernating, rearing, staging, or wintering purposes.**
>
> **"wildlife species" means a species, subspecies, or geographically or genetically distinct population of animal, plant or other organism that is wild by nature and,**
>
> > **(a) is native to Canada; or**
> >
> > **(b) extended its range into Canada without human intervention and has been present in Canada for at least 50 years.**
>
> **For the purposes of this definition, a species, subspecies or geographically or genetically distinct population is, in the absence of evidence to the contrary, presumed to have been present in Canada for at least 50 years.**

In CELA's view, tightening up these key definitions in this manner will clarify the intended scope of Bill C-65.

(b) Application of Bill C-65

Section 3 of Bill C-65 provides, in effect, that the Bill applies only to: (1) aquatic species and their habitats; (2) species of migratory birds and their habitats that are protected by the Migratory Birds Convention Act, 1994; and (3) species upon federal lands. In addition, section 33 of Bill C-65 permits, but does not require, the Minister of Environment to pass regulations prohibiting

harm to endangered or threatened species that range or migrate across Canada's international boundaries.[27]

In CELA's view, this very narrow and highly selective application of Bill C-65 is arguably the most objectionable aspect of the legislation. As described above, there is both a strong need and a strong constitutional basis for comprehensive federal endangered species legislation. CELA submits there is no compelling policy or legal reason to apply Bill C-65's protective provisions in such a limited and piecemeal fashion to three discrete matters under undisputed federal jurisdiction, viz. fish, migratory birds, and federal lands. As Professor Gibson has correctly concluded, the federal government has abundant constitutional authority to protect all species at risk and their habitat, regardless of the nature of the species or its location. Accordingly, the excessively narrow application of Bill C-65 is unnecessary and unacceptable, and CELA submits that sections 3(1) and (2) and section 33 must be deleted or substantially amended, as described below.

In addition to these fundamental objections, CELA is gravely concerned about the practical consequences that flow from a literal interpretation of section 3 of Bill C-65. For example, section 3(1)(b) of Bill C-65 appears to suggest that only those birds and habitats that protected under the Migratory Birds Convention Act, 1994 are eligible for protection under Bill C-65. Among other things, this means that birds of prey -- such as owls, hawks, falcons, and eagles -- are not caught by the scope of section 3(1)(b) because they are not protected under the Migratory Birds Convention Act, 1994.[28] In CELA's view, this is an extremely serious oversight since many of Canada's avian species at risk are, in fact, birds of prey.[29] Except for those individuals that may happen to reside upon federal lands within a province, it appears that these bird species at risk remain largely unprotected under the Bill C-65 regime.

Even for those migratory birds that are protected under the Migratory Birds Convention Act, 1994, there is considerable uncertainty as to the nature and extent of the protection conferred under Bill C-65. For example, the ambiguous language of section 3(1)(b) appears to limit Bill C-65's protective provisions to only those habitats that are protected under the Migratory Birds Convention Act, 1994. Unfortunately, this Act does little to protect the habitat of migratory birds, although the regulations under the Act do offer some protection to nests and "areas frequented by migratory birds". In CELA's opinion, section 3(1)(b) should be amended to make it abundantly clear that both the "residence" and "critical habitat" (as defined above) of migratory birds are protected under Bill C-65.

---

[27] Section 33 also permits, but does not require, the Minister to pass regulations prohibiting harm to the residences of these transboundary species.

[28] Patricia Mohr, "Wildlife", in Estrin and Swaigen (eds.), Environment on Trial (Emond Montgomery, 1993), p.349.

[29] Such as the burrowing owl, peregrine falcon, spotted owl, and red-shouldered hawk.

CELA also has numerous concerns about Bill C-65's uneven and haphazard treatment of transboundary species, particularly those that range or migrate between provinces. As drafted, section 33 of Bill C-65 merely authorizes the Minister to pass regulations to prohibit any person from harming an international transboundary species, or to prohibit the deliberate destruction of the residences of such species. First, it must be noted that section 33 is permissive rather than mandatory in nature, which means that there is no legal requirement upon the Minister to pass even a single regulation under this section. Second, the scope of section 33 appears limited to only those species that cross international boundaries, not provincial boundaries. Third, section 33 does not appear to provide the Minister with authority to pass regulations protecting the habitat of transboundary species -- only residences can be protected through such regulations. Fourth, section 33 obliges the Minister to consult with the provinces before making such regulations, which, in CELA's view, is a surefire recipe for further delay and jurisdictional wrangling. Fifth, section 33, on its face, is limited to "animal species", which has the effect of excluding flora at risk whose range extends across provincial, territorial or international boundaries.

For the foregoing reasons, Bill C-65's provisions respecting transboundary species are wholly inadequate, and they are clearly inconsistent with the Task Force's recommendations on this issue, as described above. Moreover, there is no constitutional or legal reason to justify Bill C-65's shoddy treatment of transboundary species. As Professor Gibson and others have concluded, Parliament enjoys clear constitutional authority over all transboundary species. Accordingly, CELA is at a loss to understand why the drafters of Bill C-65 have proposed a completely untenable framework for the protection of such species and their habitat.

The net result of section 33's various shortcomings is to leave many of Canada's transboundary species virtually unprotected under the very law that most Canadians would reasonably expect to safeguard such species. Moreover, the highly discretionary nature of section 33 leaves the protection of transboundary species (and their habitat) to the vagaries of existing provincial laws, and to the whims and priorities of provincial wildlife bureaucrats. In CELA's view, the federal government should not attempt to evade its responsibilities over transboundary species in the hope that the provinces may actually cooperate and coordinate their legislation accordingly. CELA submits that the survival and recovery of transboundary species is far too important to leave to the provinces to sort out. Bill C-65 must confer effective protection upon transboundary species and their habitats, leaving the provinces free to supplement these minimum national standards with more stringent protective measures if necessary.

In summary, sections 3(1), 3(2), and 33 unjustifiably limit the applicability of Bill C-65's protective provisions. As a consequence, Bill C-65 does not provide any meaningful protection for many, if not most, of the species at risk listed by COSEWIC at the present time. For example, except for those individuals occurring on federal lands (i.e. national parks), Bill C-65 does not guarantee protection of grizzly bears, woodland caribou, pine marten, and over 100 other species at risk across Canada. In CELA's opinion, it is completely unacceptable for Parliament to propose an endangered species law in the mid-1990's that does little or nothing for the majority of species at risk in Canada.

CELA's suggested re-wording for section 3(1) and (2) is as follows:

(1) **This Act applies to all wildlife species at risk in Canada.**

(2) **This Act applies to the residences and critical habitat of all wildlife species at risk in Canada.**

CELA's recommended re-wording for section 33 is set out below in section 3.6 of this submission.

Subject to the following comments, CELA supports section 4 of Bill C-65, which specifies that the Bill is binding on the federal and provincial governments. However, section 4 goes on to provide, in effect, that federal Crown corporations are only bound in relation to fish, migratory birds, and other wildlife species to the extent prescribed by regulation. In CELA's view, this legislative presumption should be reversed: all federal Crown corporations should be subject to Bill C-65 in its entirety, except as may be otherwise provided by regulation. If this amendment is not adopted, then federal Crown corporations could harm species at risk (other than fish or migratory birds) or their habitat with impunity unless and until regulations were passed to bind Crown corporations in respect of these other wildlife species. CELA doubts that Parliament intended to permit this anomalous situation to occur, and submits that section 4 should be amended accordingly to avoid this undesirable scenario.

(c) Administration of Bill C-65

Under section 6(1) of Bill C-65, the Bill is to be administered by the federal Minister of Environment, except where the Bill gives responsibility to either the Minister of Canadian Heritage or the Minister of Fisheries and Oceans. Under section 6(2) of Bill C-65, each of these Ministers can delegate their enforcement powers or permit-issuing powers to "any person" or "government body".

CELA has a number of concerns about this very broad delegation power. First, it must be noted that the delegatable functions -- enforcement powers and permit-issuing powers -- are very important, particularly since section 46 of Bill C-65 allows the Ministers to issue permits allowing "exceptions" to the Bill's protective provisions, as discussed below. For this reason, CELA cannot support the proposal to delegate such powers to "any person", which presumably includes not only governmental employees but any private person or corporation. For the purposes of greater certainty and accountability, CELA submits that the term "any person" should be deleted from section 6(2). If the intent is to permit delegation of these Ministerial powers to Crown employees (either federal or provincial), then section 6(2) should be amended accordingly.

Second, CELA does not support the use of section 6(2) to delegate permit-issuing powers to provincial ministries, agencies, or employees. In principle, CELA does not object to the possible

delegation of enforcement powers to the provinces. Nevertheless, CELA remains concerned about the practical effect of delegating enforcement powers to provincial bodies -- such as Ontario's Ministry of Natural Resources -- that are being substantially downsized in terms of staffing and budgets. However, CELA submits that permit-issuing powers should not be delegated to the provinces. Such a delegation would undermine the principles of accountability, certainty, and predictability in relation to one of the most significant decisions under Bill C-65: whether, and to what extent, should harm to a species or its habitat be authorized? In CELA's view, these critically important decisions should remain in the federal domain, subject to clear and consistent federal regulations, guidelines or policies.

Third, Bill C-65 fails to provide sufficient safeguards to ensure that delegated powers are actually exercised properly by the delegatee. In CELA's view, where the Minister proposes to delegate powers pursuant to section 6, there should be prior public notice (i.e. the public registry and the Canada Gazette) and comment opportunities with respect to the proposed delegation arrangement. CELA notes that "pre-publication" notice is required in section 7(3) of Bill C-65 in respect of proposed federal-provincial agreements, and CELA sees no reason why a similar requirement cannot be added to section 6. In addition, section 6 should be further amended to require the delegatee to file annual reports with the Minister in order to provide particulars on how the delegated powers have been exercised. These annual reports should be posted on the public registry established under section 9 of Bill C-65, and should otherwise be widely available to the public. Finally, section 6 lacks any constraints on how long the delegation can remain in effect, and it fails to provide for periodic review of the delegation. Similarly, section 6 fails to specify that the Ministers can attach terms and conditions to the delegation. In CELA's view, section 6 must be expanded to address these important accountability issues.

Section 7 of Bill C-65, which permits federal-provincial agreements respecting the administration of the Bill, suffers from some of the concerns discussed above in relation to section 6. For example, section 7 fails to place a time limit on such agreements, nor does section 7 require periodic review or annual reports. Thus, CELA submits that section 7 must be amended accordingly to address these matters. CELA further notes that these agreements are to be limited to administration of Bill C-65 -- they are not to be used to permit the holus bolus delegation (or abdication) of Ministerial duties, powers and responsibilities under Bill C-65. This comment applies equally to "conservation agreements" executed pursuant to section 7(2) of Bill C-65.

CELA RECOMMENDATION #2: **Section 2(1) of Bill C-65 should be amended to include new or reworded definitions for the following terms: "critical habitat", "extinct", "habitat", "listed", "residence", and "wildlife species".**

CELA RECOMMENDATION #3: **Section 3(1) and (2) of Bill C-65 should be deleted and replaced with provisions that:**

- **specify that the Act applies to <u>all</u> species at risk in Canada, not just fish, migratory birds, or species upon federal lands;**

- **specify that the Act applies to the residences and critical habitat of <u>all</u> species at risk in Canada, not just fish, migratory birds, or species upon federal lands;**

- **ensure that transboundary species at risk, and their residences and critical habitat, receive <u>mandatory</u> protection under the Act.**

CELA RECOMMENDATION #4: **Section 4 of Bill C-65 should be amended to ensure that the Act is binding on all federal Crown corporations in respect of all species at risk and their habitats, except as may be otherwise be provided by regulation.**

CELA RECOMMENDATION #5: **Section 6 of Bill C-65 should be amended to:**

- **delete the term "any person" and, if necessary, include the term "Crown employee" in section 6(2);**

- **ensure that permit-issuing powers <u>cannot</u> be delegated to provincial ministries, agencies, or employees;**

- **provide for public notice and comment with respect to proposed delegations, and require the filing of annual reports regarding delegated powers;**

- **provide for periodic review of delegated powers; and**

- **place limits on the time that delegation can remain in effect, and empower the responsible Ministers to attach terms and conditions to the delegation as may be appropriate.**

CELA RECOMMENDATION #7: **Section 7 of Bill C-65 should be amended to:**

- **require the filing of annual reports regarding federal-provincial agreements;**

- **provide for periodic review of federal-provincial agreements; and**

- **place limits on the time that a federal-provincial agreements can remain in effect.**

3.4 Public Access

CELA fully supports the requirement in section 9 of Bill C-65 to create and maintain a public registry to facilitate access to information and to enhance public participation in matters under the Bill. A similar on-line public registry was established under Ontario's Environmental Bill of Rights, 1993 (EBR), and it has proven to be a very popular and useful tool, particularly since the Registry can be accessed easily and free of charge.[30] However, the EBR Registry has experienced some technical difficulties, and federal officials establishing the Bill C-65 registry would be well-advised to carefully review the Ontario experience in order to avoid start-up problems.[31]

Under section 26 of Bill C-65, the following documents are to included in the public registry: (1) COSEWIC's designation and classification criteria; (2) wildlife status reports; and (3) COSEWIC's decisions, with reasons, on wildlife designations and classifications. Similarly, section 30(4) requires the List of Wildlife Species at Risk to be included in the registry, while section 38(4) requires notices respecting recovery plans to be placed on the registry. In addition, section 40(1) requires recovery plans to be included in the public registry, and section 91 requires alternative measures agreements and reports to be included in the public registry.

CELA supports the inclusion of these documents on the public registry, but submits that the registry should also include the following documents:

- the full text of Bill C-65, regulations, and emergency orders;

- the National Accord on the Protection of Species at Risk;

- federal-provincial agreements, conservation agreements, delegation arrangements, and national recovery planning agreements;

---

[30] Since May 1994, approximately 11,000 user accounts have been opened under the EBR Registry.

[31] Some common complaints about the EBR Registry include: short comment periods; incomplete or misleading notices; and lack of interactive capability.

- COSEWIC's lists of extinct, extirpated, endangered, threatened, and vulnerable species, prepared under section 18;

- all notices, decisions and reports required by Bill C-65; and

- concise public education materials (i.e. "how to" factsheets) about Bill C-65.

This list is similar to what is currently available under Ontario's EBR Registry, and CELA submits that such information should be available under the Bill C-65 registry.

CELA RECOMMENDATION #8: **Section 9 (or section 26) of Bill C-65 should be amended to ensure that the following documents are included in the public registry:**

- **the full text of Bill C-65, regulations, and emergency orders;**

- **federal-provincial agreements, conservation agreements, delegation arrangements, and national recovery planning agreements;**

- **the National Accord on the Protection of Species at Risk;**

- **COSEWIC's lists of extinct, extirpated, endangered, threatened, and vulnerable species prepared under section 18;**

- **all notices, decisions and reports required by Bill C-65; and**

- **concise public education materials (i.e. "how to" factsheets) about Bill C-65.**

3.5 Wildlife Species Listing Process: The Role of COSEWIC

CELA is pleased to see that COSEWIC has received long overdue legislative recognition in section 13 of Bill C-65. In CELA's view, the statutory establishment of COSEWIC will go a long way in providing credibility and scientific soundness in the wildlife species listing process.

Nevertheless, there are some amendments to Bill C-65 that are necessary to enhance the

effectiveness, independence and functions of COSEWIC. For example, COSEWIC members are to be appointed by the Minister after consulting the Canadian Endangered Species Conservation Council, which consists solely of governmental representatives. In CELA's view, section 13(2) should be amended to require additional consultation with the Royal Society of Canada and other knowledgeable non-governmental organizations and/or individual persons. In CELA's view, the COSEWIC appointments are critically important to the credibility and integrity of the listing process, and Canadians must be confident that only the most qualified persons, possessing relevant scientific expertise and free of political influence, are appointed as members of COSEWIC.

CELA is unclear about the intent of section 13(4) of Bill C-65, which appears to make it optional for the Minister to provide administrative support to COSEWIC. In CELA's view, section 13(4) must be amended to impose a mandatory duty on the Minister (or the responsible Ministers) to provide the administrative and financial support necessary for COSEWIC to fully carry out its various duties and functions under Bill C-65.

Section 14 of Bill C-65 attempts to prescribe the minimum qualifications and expertise for COSEWIC appointees. In general, CELA supports these provisions, but submits that in order to ensure that COSEWIC is truly "representative" (as required by section 14(2)), there should be a limit on the number of Crown employees that can be appointed to COSEWIC. In particular, CELA submits that no more than 50% of COSEWIC appointees should be drawn from the federal or provincial government. This recommendation is not intended to be a slight against the numerous experienced governmental employees who have been instrumental in COSEWIC's work in the past. However, without such a limitation, there is likely to be a well-founded public perception that COSEWIC is, or will be, predominated by government interests, which may undermine the credibility and independence that COSEWIC requires under Bill C-65.

To further guard against this public perception, CELA submits that a new clause should be added to section 14 to provide that governmental appointees to COSEWIC shall carry out their duties and functions under Bill C-65 free of undue influence or interference from their respective employers. Guidance in drafting this provision can be derived from section 22 of the federal Environmental Assessment and Review Process Guidelines Order and section 33(1)(a) of the Canadian Environmental Assessment Act.

One of COSEWIC's most important duties under Bill C-65 is found in section 18, which requires COSEWIC to designate species at risk and to classify them as extinct,[32] extirpated, endangered, threatened or vulnerable. CELA strongly supports the provisions in sections 19 and 22 to 25 of Bill C-65 which allow members of the public to formally apply to COSEWIC for a regular or emergency designation, classification or reclassification of a wildlife species. In addition, CELA generally supports sections 20, 21, and 27 to 29 of Bill C-65, which require status reports, timely COSEWIC decisions with reasons, periodic reviews of designations and classifications, and COSEWIC reports to the Council.

---

[32] This is why section 2(1) of Bill C-65 requires a definition of "extinct" species.

However, CELA questions the need for the "List of Non-Designated Species" contemplated by section 21(3) of Bill C-65. If there is insufficient reason or evidence for designating a species at risk, then the COSEWIC decision should simply say so without further burdening COSEWIC with the duty to prepare and maintain yet another list under Bill C-65. CELA can discern no useful purpose in maintaining a "List of Non-Designated Species", and recommends that section 21(3) be deleted.

CELA's greatest concern, however, with Bill C-65's listing process is the fact that the federal government has virtually unfettered discretion not to list species at risk, notwithstanding COSEWIC's decisions on designation and classification. Section 30(1) of Bill C-65 provides that the Governor in Council, on the recommendation of the Minister, "may" make regulations to establish and amend the List of Wildlife Species at Risk. This provision offers the federal government considerable latitude to not list species at all, and allows the government to base listing decisions on factors that are not ecological in nature. Thus, it is likely that the listing decision will become a highly charged political issue, rather a decision based solely on the survival and recovery requirements of the species in question.

In CELA's view, the listing decision should not be determined by which faction, industry association or province can mount the best lobbying efforts in Ottawa. CELA submits that it is completely unacceptable to allow politicians, not scientists, to make the ultimate decision on which species should be on the List of Wildlife Species at Risk. As drafted, section 30 makes COSEWIC's listing work merely advisory in nature, and section 30 is inconsistent with the Minister's commitment to base decisions regarding species solely on science. Section 30 is also inconsistent with the Task Force recommendations respecting the listing process. Indeed, section 30 represents a step backwards from the 1995 Legislative Proposal, which had proposed that "the Act would require the Minister of Environment to annually establish a federal list of species at risk that includes all species listed by COSEWIC".[33]

It must be recalled that wildlife species only receive protection under Bill C-65 if they are actually listed. Thus, injecting political uncertainty and unpredictability into the listing process strikes at the very heart of Bill C-65.

For these reasons, CELA strongly submits that section 30 must be redrafted to place an express duty on the Minister to pass regulations that place species on the List of Wildlife Species at Risk in accordance with COSEWIC's decisions under sections 21 and 24. Such regulations should be passed within 60 days of COSEWIC's decisions respecting designation, classification, or reclassification.

Moreover, once Bill C-65 is in force, CELA can see no value in waiting for COSEWIC to re-evaluate and re-submit its 276 current designations and classifications to the Minister for eventual incorporation into the List of Wildlife Species at Risk. Time is of the essence for species at risk,

[33] Environment Canada, The Canadian Endangered Species Protection Act: A Legislative Proposal (1995), page 14, Recommendation 6.1.

and CELA recommends that COSEWIC's current list should be immediately adopted as the List of Wildlife Species at Risk, and should be appended to Bill C-65 as Schedule I. Future additions or amendments to Schedule I should be made through regulations, just as the Schedule I List of Toxic Substances under CEPA is updated by orders from time to time.

CELA's suggested rewording for section 30 is as follows:

(1) The List of Wildlife Species at Risk is established as Schedule I to this Act.

(2) Within 60 days of a decision by COSEWIC under section 21 or 24, the Minister shall by regulation amend Schedule I in accordance with the COSEWIC decision.

(3) The Minister may by regulation add a species to Schedule I where a provincial minister has requested the addition and has agreed to participate in the preparation and implementation of a recovery plan for the species.

(4) The List of Wildlife Species at Risk shall be included in the public registry.

CELA RECOMMENDATION #9: **Section 13 of Bill 65 should be amended to:**

- **require the Minister to consult about COSEWIC appointees with the Council, Royal Society of Canada, and such other organizations or persons as may be appropriate; and**
- **require the Minister (or the responsible Ministers) to provide the administrative and financial support necessary to permit COSEWIC to fully carry out its duties and functions under Bill C-65.**

CELA RECOMMENDATION #10: **Section 14 of Bill C-65 should be amended to:**

- **ensure that no more than 50% of the appointments to COSEWIC are drawn from the federal or provincial governments; and**
- **provide that government employees who are appointed to COSEWIC shall exercise their duties and functions free of undue influence or**

interference from their employers.

CELA RECOMMENDATION #11: **Section 21(3) of Bill C-65 should be deleted to omit COSEWIC's obligation to prepare a "List of Non-Designated Species".**

CELA RECOMMENDATION #12: **Section 30 of Bill C-65 should be amended to:**

- **establish COSEWIC's current list as the List of Wildlife Species at Risk and append it as Schedule I to Bill C-65;**
- **impose a <u>mandatory</u> duty on the Minister to pass regulations that place species on the Schedule I List of Wildlife Species at Risk in accordance with COSEWIC decisions under section 21 and 24;**
- **ensure that such regulations are passed within 60 days of COSEWIC's decisions respecting designation, classification or reclassification; and**
- **permit the Minister to pass regulations adding species to the Schedule I List of Wildlife Species at Risk where a provincial minister has requested the addition and has agreed to participate in the preparation and implementation of recovery plans for the species.**

3.6 Measures to Protect Listed Species

Bill C-65 sets out a number of different tools intended to protect listed species, including: prohibitions; emergency orders; recovery and management plans; agreements and permits; and project review. As described below, these provisions require further amendments in order to increase their efficacy and availability.

(a) Prohibitions

Section 31(1) of Bill C-65 establishes a general prohibition against harming an individual of a

listed endangered or threatened species. Section 31(2) goes on to prohibit the possession of an individual of a listed endangered or threatened species, or any part of derivative of one. Although these prohibitions appear to be sufficiently broad, CELA submits that there are some significant gaps in the prohibitions which must be addressed through further amendments.

For example, the section 31(1) prohibition fails to outlaw disturbing or interfering with a listed species, nor does the prohibition extend to individuals of extirpated species -- such as the swift fox -- that have been re-introduced. Moreover, this prohibition does not outlaw attempts to undertake the prohibited activities. Ontario's Endangered Species Act contains language that prohibits attempts to harm endangered species,[34] and CELA submits that section 31(1) of Bill C-65 should likewise prohibit attempts to undertake conduct contrary to the section.

CELA's suggested wording for section 31(1) is as follows:

> **No person shall kill, harm, harass, disturb, capture, take or interfere with an individual of a listed extirpated, endangered or threatened species, or attempt to do so.**

CELA submits that similar amendments should be made to the "possession" prohibition in section 31(2). CELA's suggested re-wording of the section 31(2) prohibition is as follows:

> **No person shall possess, collect, buy, sell or trade an individual of a listed extirpated, endangered or threatened species, or any part or derivative of one, or attempt to do so.**

Section 32 sets out a general prohibition against damaging or destroying the residence of an individual of a listed endangered or threatened species. Again, this prohibition should be expanded to cover extirpated species, prohibit disturbing and interfering, and prohibit attempts to undertake the prohibited activities. In addition, CELA recommends that the prohibition apply not only to residences but also to critical habitat, as defined above.

CELA's suggested re-wording for the section 32 prohibition is as follows:

> **No person shall damage, destroy, disturb or interfere with the residence or critical habitat of an individual of a listed extirpated, endangered or threatened species, or attempt to do so.**

Section 33 of Bill C-65 permits, but does not require, the Minister to pass regulations prohibiting harm to international transboundary species or their residences. As described above, CELA has a number of fundamental objections to the permissive nature and inadequate scope of this section. If CELA's recommendations regarding section 3 (application of Bill C-65) and section 30 (List

---

[34] R.S.O. 1990, c.E.15, section 5(a). It is noteworthy that the Ontario prohibition also outlaws interfering with an endangered species or its habitat.

of Wildlife Species at Risk) are adopted, then it is doubtful that section 33 is even required since transboundary species would be protected by the general prohibitions in sections 31 and 32.

However, if these recommendations are not adopted, then CELA would suggest the following re-wording for section 33:

(1) In this section, "transboundary species" means a species that COSEWIC has found to range or migrate across a provincial, territorial, or international boundary.

(2) Within 60 days after this Act comes into force, the Minister shall make regulations prohibiting any person from,

(a) killing, harming, harassing, disturbing, capturing, taking or interfering with an individual of a listed transboundary species that is extirpated, endangered or threatened, or attempting to do so;

(b) possessing, collecting, buying, selling or trading an individual of a listed transboundary species that is extirpated, endangered or threatened, or any part or derivative of one, or attempting to do so; or

(c) damaging, destroying, disturbing or interfering with the residence or critical habitat of an individual of a listed transboundary species that is extirpated, endangered or threatened, or attempting to do so.

It should be noted that CELA's suggested re-wording of section 33 deletes the words "wilfully" and "knowingly", which are proposed in Bill C-65's version of section 33. CELA strongly objects to the inclusion of these words in the "transboundary" prohibitions for several reasons. First, these words do not appear in the general prohibitions in sections 31 or 32. Second, the inclusion of these words in the "transboundary" prohibitions would transform these provisions into full mens rea offences, which makes prosecution much more difficult and uncertain. In CELA's view, the prohibitions under Bill C-65 should be "strict liability" offences. This would still leave defendants with the opportunity to avoid conviction if they can satisfy the court that they exercised "reasonable care" (or "due diligence") to prevent the commission of the offence. Indeed, section 80 of Bill C-65 expressly recognizes the due diligence defence for offences under Bill C-65.

(b) Emergency Orders

Where COSEWIC designates or reclassifies a species as endangered or threatened on an

emergency basis, section 34 of Bill C-65 permits, but does not require, the responsible Minister to make emergency orders in respect of such species. Section 34 goes on to provide that emergency orders "may" include provisions regulating or prohibiting activities that may adversely affect the species or their residences. Emergency orders are also available where the responsible Minister determines that the relevant recovery plan is inadequate, or that immediate action is required to protect the species. In addition, section 34(4) stipulates that emergency orders "must" include provisions regulating or prohibiting activities that may adversely affect the species' critical habitat if the responsible Minister determines that there is an imminent threat to such habitat.

In principle, CELA strongly supports the inclusion of an "emergency order" power in Bill C-65. However, there are a number of loopholes in section 34 that should be addressed through further amendments. For example, as drafted, section 34(1) gives the responsible Minister the option of doing nothing at all, even in the face of COSEWIC emergency designations or reclassifications. Even where an emergency order is issued under section 34(1), the responsible Minister has the option of <u>not</u> including provisions regulating or prohibiting activities that may adversely affect the species or their residences. In CELA's view, section 34(1) must be amended to eliminate this excessive Ministerial discretion. This comment applies equally to the discretion that exists under section 34(2).

In addition, section 34 should be amended to require the responsible Minister to make an emergency order where COSEWIC makes a "regular" designation or reclassification, but determines that immediate action should be undertaken pending the addition of the species to the List of Wildlife Species at Risk, or pending the preparation of a recovery plan.

CELA's proposed re-wording for section 34 is as follows:

(1) **The responsible minister shall forthwith make an emergency order providing for the protection of a wildlife species if COSEWIC designates or reclassifies the species as endangered or threatened on an emergency basis.**

(2) **The responsible minister shall forthwith make an emergency order providing for the protection of a wildlife species if the responsible Minister, based on the advice of COSEWIC, determines that the recovery plan for the species no longer adequately protects the species.**

(3) **The responsible minister shall forthwith make an emergency order providing for the protection of a wildlife species that COSEWIC has designated or classified if the responsible minister, based on the advice of COSEWIC, determines that immediate action is required to protect the species or the residences or critical habitat of individuals of the species.**

(4) **An emergency order issued under subsections (1), (2) or (3) shall include,**

(a) provisions regulating or prohibiting activities that may adversely affect the species or the residences of its individuals; and

(b) provisions regulating or prohibiting activities that may adversely affect the critical habitat of the species where COSEWIC has determined that there is an imminent threat to such habitat.

(5) If the responsible minister is the Minister of Canadian Heritage or the Minister of Fisheries and Oceans, he or she must notify the Minister before making an emergency order under subsections (1), (2) or (3).

(6) The responsible minister shall repeal an emergency order made under subsection (1) when,

(a) the responsible minister, based on the advice of COSEWIC, determines that adequate measures have been implemented to eliminate any immediate threats to the species or the residences or critical habitat of its individuals; or

(b) COSEWIC determines that the emergency designation or reclassification of the species is no longer necessary; or

(c) the species has been added to, or reclassified within, the List of Wildlife Species at Risk.

(7) The responsible minister shall repeal an emergency order made under subsection (2) when the responsible minister, based on the advice of COSEWIC, determines that a revised recovery plan that adequately protects the species has been prepared and implemented.

(8) The responsible minister shall repeal an emergency order made under subsection (3) when,

(a) the species has been added to the List of Wildlife Species at Risk; and

(b) the responsible minister, based on the advice of COSEWIC, determines that immediate action is no longer necessary to protect the species or the residences or critical habitat of its individuals.

(9) No person shall contravene the provisions of an emergency order while it remains in effect.

(10) An emergency order under subsections (1), (2) or (3) may be limited territorially or as to time or otherwise.

Section 36 of Bill C-65 purports to establish sweeping exceptions to the prohibitions in sections 31, 32, regulations under section 33 and 42, and emergency orders. In CELA's view, these exceptions have been defined far too broadly, and they will only serve to undermine the key prohibitions under Bill C-65. CELA acknowledges there may be a need to prescribe certain limited exceptions, but CELA submits that such exceptions should be for truly extraordinary or urgent circumstances. By way of comparison, it is noteworthy that Ontario's Endangered Species Act does not provide for any exceptions to its general prohibition, nor does Ontario's Bill 62 provide for any exceptions. In CELA's opinion, if persons cannot fit themselves into narrowly prescribed exceptions (as proposed below), then they should either apply for a permit under section 46, or better yet, refrain from activities that harm species at risk or their habitat or residences.

CELA suggests the following wording for section 36(1) to (3):

> **Sections 31 and 32, regulations under section 33 or 42 and emergency orders do not apply to persons who are engaging in,**
>
> **(a) activities that are necessary to address an immediate threat to human life or safety;**
>
> **(b) activities that are authorized as regulatory or conservation measures for endangered species under an aboriginal treaty, land claims agreement, self-government agreement, or co-management agreement; or**
>
> **(c) activities that are authorized under section 46 or 47.**

CELA has no objection to section 36(4) as drafted in Bill C-65.

(c) Recovery and Management Plans

Section 38 of Bill C-65 imposes a general duty on responsible Ministers to prepare, with public input, timely recovery plans for extirpated, endangered and threatened species. These recovery plans are primarily directed at addressing the habitat requirements of such species. In principle, CELA strongly supports the statutory obligation to prepare recovery plans, but CELA submits that several amendments are necessary to improve the recovery plan provisions of Bill C-65.

For example, section 38(4) requires the responsible Minister to determine whether the species' recovery is "feasible". In CELA's view, the word "feasible" may be too restrictive since it appears to require a full-blown technical and biological analysis of recovery options before a recovery plan is prepared. CELA recommends that "feasible" be replaced with "possible", which would maintain the section's intent that the responsible minister give preliminary consideration

to whether a recovery plan can be prepared in the circumstances. In comparison, it is noteworthy that Ontario's Bill 62 does not require such a preliminary analysis: once a species is listed as endangered or threatened, "the Minister shall prepare and implement a recovery plan for the species".[35]

Section 38(5) of Bill C-65 prescribes the content requirements for recovery plans. CELA generally supports the proposed content requirements, but submits that this subsection should be amended to ensure that the plan contents will be "based on the advice of COSEWIC", rather than leaving it all to the minister's discretion.

CELA further submits that section 40(1) should be amended to require posting of the completed recovery plan on the public registry and Canada Gazette "within 30 days" after the completion of the plan. Similarly, section 40(1) should be amended to provide a public comment period of 30 days in relation to the proposed recovery plan. In addition, section 40(2) should be amended to require the federal government an implementation report no later than 90 days after the Canada Gazette notice. Unless these amendments are adopted, the timelines for the preparation and implementation of recovery plans are far too long and uncertain.

CELA further submits that a new subsection should be added to section 40 in order to ensure that all persons, including federal and provincial agencies, do not contravene the provisions of a recovery plan. This new subsection should take the form of a general prohibition in Bill C-65. In addition, the Minister should be obliged by law to incorporate the recovery plan (or at least the key provisions thereof) into timely regulations under section 42 in order to enhance the effectiveness and enforceability of recovery plans.

CELA's suggested wording for the new subsection in section 40 is as follows:

> **No person shall contravene or fail to comply with the provisions of a recovery plan.**

CELA's suggested re-wording of section 42 is as follows:

> **Within 90 days of the Canada Gazette summary required in section 40(2), the responsible minister shall make regulations for the purposes of implementing measures in recovery plans, including regulations that prohibit activities that may adversely affect the species or the residences or critical habitat of its individuals.**

CELA further suggests that section 44 of Bill C-65 be expanded to authorize the responsible minister to prepare and implement amendments to recovery plans where warranted by a change in circumstances or new information.

Section 45 of Bill C-65 requires responsible Ministers to prepare management plans for vulnerable species. While CELA supports such an obligation, CELA submits that section 45

---

[35] Bill 62, section 6(1).

should be amended to include the key aspects of the recovery plan process, with necessary modifications (i.e. public notice, public comment, implementation report, tight timelines, amendments, and regulations). In CELA's view, such amendments are necessary to ensure that management plans are effective in preventing vulnerable species from becoming threatened or endangered.

(d) Agreements and Permits

Section 46 of Bill C-65 allows the responsible minister to issue permits to, or make agreements with, any person to authorize activities affecting listed endangered or threatened species or their critical habitat. Section 47 goes on to provide that agreements or permits under other federal legislation can also authorize such activities, provided that the factors listed in section 46(2) (i.e. no reasonable alternatives, mitigation measures, no peril to species' survival) were taken into account.

CELA cannot support section 46(1) as drafted since it potentially allows the minister to approve virtually any activity affecting species at risk, provided that the subsection (2) factors are satisfied. In CELA's view, the ambit of section 46(1) is far too wide, and the provision should be expressly limited to discrete activities, such as collecting individuals for scientific research or for a zoo or museum. In addition, this provision should apply to extirpated species, since such species should be protected by the general prohibitions in sections 31 and 32 of Bill C-65. CELA submits that the responsible Minister must be required to impose protective, preventative or remedial terms and conditions in "exception" permits and agreements -- conservation measures should not be optional. CELA further submits that such permits and agreements should be subject to a prescribed time limit (i.e. three years), subject to possible renewal, to ensure that the terms and conditions are still adequate to protect the species.

Finally, CELA submits that section 47 should be amended to ensure that authorizations under other federal laws are effective only if the requirements of section 46(2) to (4) have been satisfied.

(e) Project Review

Section 49(1) of Bill C-65 imposes an obligation upon "responsible authorities" under the Canadian Environmental Assessment Act (CEAA) to notify the Minister if a proposed project may impact certain wildlife species inside or outside of Canada. Section 49(2) goes on to require responsible authorities to ensure that measures are taken to identify, minimize and monitor the projects' impacts on such species.

While CELA supports the general intent of "project review", section 49, as drafted, does very

little to protect species at risk. For example, many undertakings affecting species at risk -- such as pesticide spraying or timber management -- do not necessarily trigger the application of the CEAA. Among other things, this means that notice to the Minister will not be required under Bill C-65, and more importantly, no environmental assessment will be required and no preventative or mitigative measures will be forthcoming from a responsible authority under the CEAA.

In CELA's view, section 49 should be redrafted to ensure that projects which may adversely affect a listed species, or the residences or critical habitat of its individuals, "trigger" environmental assessment obligations under the CEAA. This could be accomplished through different means: (1) using Bill C-65 to amend section 5(1) of the CEAA to include projects affecting listed species; (2) amending the Comprehensive Study List under the CEAA to include projects affecting listed species; or (3) amending the Law List under the CEAA to include a permit or authorization under section 46 or 47 of Bill C-65.

CELA RECOMMENDATION #13: **Section 31 of Bill C-65 should be amended to:**

- **ensure that the section 31(1) prohibition covers extirpated species, prohibits disturbing and interfering, and prohibits attempts to kill, harm, harass, disturb, capture, take or interfere with an individual of a listed extirpated, endangered or threatened species; and**

- **ensure that the section 31(2) prohibition covers extirpated species, and prohibits attempts to possess, collect, buy, sell or trade an individual of a listed extirpated, endangered or threatened species, or any part or derivative of one.**

CELA RECOMMENDATION #14: **Section 32 of Bill C-65 should be amended to include extirpated species, prohibit disturbing or interfering, and prohibit attempts to damage, destroy, disturb, or interfere with the residence of an individual of a listed extirpated, endangered or threatened species.**

CELA RECOMMENDATION #15: **If CELA Recommendations #3 and #12 are not adopted, then section 33 of Bill C-65 should be amended to:**

- **define "transboundary species";**

- impose a mandatory duty upon the Minister to make regulations that establish "harm", "possession", and "residence/critical habitat" prohibitions in order to protect listed transboundary species that are extirpated, endangered or threatened; and

- delete the words "wilfully" and "knowingly".

CELA RECOMMENDATION #16: **Section 34 of Bill C-65 should be amended to:**

- **prescribe circumstances where the issuance of emergency orders is mandatory;**

- **prescribe the mandatory content requirements for emergency orders; and**

- **prescribe when emergency orders should be repealed.**

CELA RECOMMENDATION #17: **Section 36(1) to (3) of Bill C-65 should be deleted and replaced with a provision that provides only the following exceptions:**

- **activities that are necessary to address an immediate threat to human life or safety;**

- **activities that are authorized or permitted as regulatory or conservation measures for endangered species under an aboriginal treaty, land claims agreement, self-government agreement, or co-management agreement; and**

- **activities that are authorized under section 46 or 47.**

CELA RECOMMENDATION #18: **Section 38 of Bill C-65 should be amended to:**

- **replace the word "feasible" with "possible" in section 38(4), (5) and (7); and**

- **ensure that recovery plan contents are based on the advice of COSEWIC.**

CELA RECOMMENDATION #19: **Section 40 of Bill C-65 should be amended to:**

- **require posting of a recovery plan on the public registry, and notice in the Canada Gazette, "within 30 days" after the completion of the plan;**

- **provide a public comment period of 30 days on the completed recovery plan;**

- **require the responsible minister to prepare and publish an implementation report no later than 90 days after the Canada Gazette notice; and**

- **include a general prohibition against contravening the provisions of a recovery plan.**

CELA RECOMMENDATION #20: **Section 42 of Bill C-65 should be amended to require the responsible minister to pass regulations within 90 days to implement measures in the recovery plan, including regulations prohibiting activities that may adversely affect a species or the residences or critical habitat of its individuals.**

CELA RECOMMENDATION #21: **Section 44 of Bill C-65 should be amended to permit the responsible minister to prepare and implement amendments to recovery plans where warranted by a change in circumstances or new information.**

CELA RECOMMENDATION #22: **Section 45 of Bill C-65 should be amended to ensure that the key aspects of the recovery plan process (i.e. public notice, public comment, implementation reports, tight timelines, amendments, and regulations) apply, with necessary modifications, to management plans for vulnerable species.**

CELA RECOMMENDATION #23: **Section 46 of Bill C-65 should be amended to:**

- **narrowly define the types of activities that may authorized under an "exception" permit or agreement;**

- **empower the responsible minister to impose and/or amend protective, preventative or remedial terms and conditions in "exception" permits and agreements; and**

- **prescribe a time limit for "exception" permits and agreements.**

CELA RECOMMENDATION #24: **Section 47 of Bill C-65 should be amended to ensure that authorizations under other federal statutes are effective <u>only</u> if the requirements of section 46(2) to (4) have been satisfied.**

CELA RECOMMENDATION #25: **Section 49 of Bill C-65 should be amended to ensure that projects that may adversely affect a listed species, or the residences or critical habitat of its individuals, "trigger" the application of the CEAA. This could be accomplished by:**

- **using Bill C-65 to amend section 5(1) of the CEAA to include such projects;**

- **using Bill C-65 to amend the Comprehensive Study List under the CEAA to include such projects; or**

- **using Bill C-65 to amend the Law List under the CEAA to include permits or authorizations under sections 46 or 47 of Bill C-65.**

3.7 Enforcement Measures

In general, CELA supports the straightforward enforcement provisions in sections 50 to 55 of Bill C-65, which deal with the appointment of enforcement officers, inspection powers, search and seizure, and custody and disposition of seized items.

(a) Investigation Requests

In general, CELA supports sections 56 to 59 of Bill C-65, which permit members of the public to formally request investigations of suspected offences. These sections closely resemble sections

108-110 of CEPA and Part V of Ontario's EBR, but CELA submits that there are some amendments that are necessary to strengthen this important remedy. For example, section 56(1) expressly excludes corporations from filing an investigation request. The rationale for excluding corporations is unclear to CELA, particularly since many non-governmental organizations active in conservation issues are, in fact, corporations without share capital. CELA notes that Part V of the EBR does not exclude corporations, and CELA recommends that section 56(1) should be amended to omit this unwarranted exclusion.

In addition, CELA recommends that section 57(1) of Bill C-65 should be amended to require the responsible Minister to acknowledge receipt of the application within 20 days of receiving it. This is similar to the timeframe imposed under section 74 of Ontario's EBR. To address confidentiality and privacy concerns, CELA further recommends that section 57 should be amended to ensure that the notice required under subsection (4) does not reveal the name, address, or other personal information that may identify the applicant. Such a restriction is found in section 59(3) of Bill C-65 in relation to the investigation report, and a similar provision is found in section 81 of Ontario's EBR.

Finally, CELA recommends that section 58(1) of Bill C-65 should be amended to require the responsible minister to estimate the time required to complete the investigation if it has otherwise not been completed within 90 days. On this point, CELA notes that section 79 of Ontario's EBR requires such a estimate.

Although the investigation request will likely be a useful tool under Bill C-65,[36] CELA submits that the investigation request should not be a condition precedent for an endangered species protection action under section 60, as described below.

(b) Ministerial Powers

As drafted, Bill C-65 fails to empower the Minister to issue binding administrative orders (i.e. "stop orders") to immediately enjoin activity that is contrary to the Bill. In CELA's view, this is a major legislative oversight, and such a power would be an important addition to the "emergency order" power in section 34. CELA submits that Bill C-65 should be amended to include such a power. CELA's proposed wording for this new section is modelled on section 7 of Ontario's Bill 62, which simply provides as follows:

> **The Minister may order any individual or corporation to stop immediately any activity that may be contrary to this Act, the regulations, or emergency orders.**

[36] Under the similar provisions of Ontario's EBR, approximately 28 applications for investigation were filed from 1994 to 1996.

In addition, or in the alternative, the Minister should be expressly empowered to go to civil court for injunctive relief (without going through the hoops and hurdles of the endangered species protection action under section 60). Such a provision is included in CEPA, and CELA submits that this provision could be worded as follows:

> **Where, on the application of the Minister, it appears to a court of competent jurisdiction that a person has committed, or is about to commit, an offence under this Act, the regulations, or emergency orders, the court may issue an injunction ordering any person named in the application,**
>
> **(a) to refrain from any activity that may constitute, or be directed towards, the commission of an offence under this Act, the regulations, or emergency orders;**
>
> **(b) to do any act or thing that may prevent the commission of an offence under this Act, the regulations, or emergency orders; or**
>
> **(c) to take all necessary steps to restore or rehabilitate residences or critical habitat that have been harmed in contravention of this Act, the regulations, or emergency orders.**

CELA RECOMMENDATION #26: **Section 56(1) of Bill C-65 should be amended so as to permit corporations to file an application for investigation.**

CELA RECOMMENDATION #27: **Section 57 of Bill C-65 should be amended to:**

- **require the responsible minister to acknowledge receipt of an investigation application within 20 days of receiving it; and**
- **prohibit the disclosure of any information that may identify the applicant.**

CELA RECOMMENDATION #28: **Section 58(1) of Bill C-65 should be amended to require the responsible minister to provide the applicant with a written estimate of the time required to complete the investigation where the investigation has not been completed within 90 days.**

CELA RECOMMENDATION #29: **Bill C-65 should be amended to empower the Minister to:**

- **issue binding administrative orders (i.e. stop orders) against any individual or corporation who may be contravening the Act, regulations, or emergency orders; and**

- **seek injunctive relief in civil courts in respect of actual or imminent contraventions of the Act, regulations, or emergency orders.**

3.8 Endangered Species Protection Actions

(a) General

Subject to certain qualifications and conditions precedent, sections 60 to 76 of Bill C-65 enable members of the public to go the civil courts to seek redress for violations under Bill C-65. Known as an "endangered species protection action", this new right of action serves three important purposes: (1) to secure compliance with the Bill; (2) to facilitate public access to the courts in instances involving non-compliance; and (3) to enhance governmental accountability for its enforcement and compliance activities under Bill C-65.

It is noteworthy that the federal government has committed to include a similar "citizen suit" provision in the Canadian Environmental Protection Act (CEPA)[37] after the Standing Committee on Environment and Sustainable Development had recommended that this reform be incorporated into CEPA.[38] These reforms are consistent with the recent trend at the provincial level to grant citizens various civil rights to go to court to protect the environment.[39]

CELA fully supports the creation of the new right of action under Bill C-65, but submits that there are a number of amendments that are necessary to improve the effectiveness and availability of endangered species protection actions. The main problem with Bill C-65's citizen suit provision is that it needlessly incorporates too many of the qualifications and restrictions found

---

[37] See CEPA Review: The Government Response (1995), page 27, Recommendation 3.9.

[38] Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention - CEPA Revisited (June 1995), page 228, Recommendation 119.

[39] Generally, see P. Muldoon and R. Lindgren, The Environmental Bill of Rights: A Practical Guide (Emond Montgomery, 1995), Chapter 1; P. Muldoon and J. Swaigen, "Environmental Bill of Rights", in Estrin and Swaigen (eds.), Environment on Trial (Emond Montgomery, 1993); and M. Valiante and P. Muldoon, "A Foot in the Door: A Survey of Recent Trends in Access to Environmental Justice", in Kennett (ed.), Law and Process in Environmental Management (Canadian Institute of Resources Law, 1993), pp.142-69.

in Part VI of Ontario's EBR.[40] At the same time, Bill C-65 omits a key feature of the EBR's citizen suit provision, viz. the ability of citizens to go immediately to court in emergency circumstances without filing the prescribed investigation request with government officials. In CELA's view, these and other shortcomings must be addressed through several amendments to Bill C-65's citizen suit provision.

(b) Conditions Precedent for Suing under Bill C-65

Section 60 of Bill C-65 establishes two conditions precedent before a person can commence an endangered species protection action: (1) the person must have applied for an investigation pursuant to section 56 of Bill C-65; and (2) the responsible minister has not responded to the investigation request in a reasonable or timely manner.[41] These conditions precedent appear to have been lifted directly from section 84(2) of Ontario's EBR.

In contrast, it must be noted that the citizen suit provisions in American environmental statutes do not include these conditions precedent. Instead, these statutes confer broad public rights to seek civil relief in respect of environmental offences under federal and state law.[42] Similarly, the public right of action under section 19.1 of Quebec's Environment Quality Act does not require the filing of an investigation request before an action can be commenced. The Yukon and Northwest Territories environmental rights statutes also permit citizens to go directly to court in civil enforcement actions without pre-filing an investigation request or waiting for a government response.[43]

The American and Canadian citizen suit provisions have existed for a number of years, and the litigation experience under these statutes indicates that only serious and substantive cases are brought forward. In other words, it does not seem necessary to impose conditions precedent (i.e. filing investigation requests/waiting for a government response) in order to screen out or prevent frivolous or vexatious lawsuits. As noted above, the investigation request under Bill C-65 is an important tool for triggering governmental enforcement activity, but it is inappropriate to use investigation requests/governmental response as a barrier to public interest litigation intended to protect endangered species or their habitat.

In Ontario, where these conditions precedent have been superimposed upon the EBR cause of action, not a single citizen suit has been commenced under the EBR since its enactment in 1993.

---

[40] S.O. 1993, c.28.

[41] Bill C-65, section 60(1)(a) to (d).

[42] Generally, see P. Muldoon, Cross-Border Litigation (Carswell, 1986).

[43] See P. Muldoon and R. Lindgren, The Environmental Bill of Rights: A Practical Guide (Emond Montgomery, 1995), pp.22-25.

This complete lack of litigation activity suggests that the EBR's numerous qualifications and restrictions have made the citizen suit provision somewhat illusory. For these reasons, CELA strongly recommends that Bill C-65 be amended so as to delete the requirement that prospective plaintiffs be required to file an investigation request and wait for a government response before going to court.

In the alternative, if these conditions precedent are to be retained in Bill C-65, then the Bill must be amended to establish an "emergency exception" to the conditions precedent. It is indeed curious that when the drafters of Bill C-65 lifted section 84(2) from Ontario's EBR, they failed to lift from the EBR an important exception to these conditions precedent. In particular, Ontario's EBR specifically permits citizens to skip the conditions precedent "where the delay involved in complying with them would result in significant harm or risk of harm to a public resource".[44] In CELA's view, such an "emergency exception" is particularly appropriate for an endangered species protection action, and should therefore be incorporated into Bill C-65.

It should be recalled that the principal purpose of an endangered species protection action is to prevent, enjoin, or remediate ongoing or imminent harm to species at risk or their critical habitat. Where, for example, critical habitat is about to be unlawfully destroyed, it makes little sense to make prospective plaintiffs wait two or three months (or more) for a government response to an investigation request before the plaintiff can commence an action to seek interlocutory injunctive relief.

(c) Nature of the Endangered Species Protection Action

Section 60(2) suggests that the new right of action is only available for offences that: (1) were alleged in the plaintiff's investigation request; and (2) caused or will cause significant harm to a listed endangered species or threatened species or its critical habitat. In CELA's view, neither constraint is warranted. First, as described above, investigation requests should not serve as a condition precedent for Bill C-65's citizen suit provision. Second, Bill C-65 should be amended to delete the requirement that "significant harm" be done to a species or its critical habitat. In CELA's view, any harm to a species or its habitat in contravention of Bill C-65 or its regulations is, by definition, significant.

In addition, the phrase "significant harm" appears to have borrowed from section 84(1) of Ontario's EBR (although the drafters of Bill C-65 declined to include the Ontario definition of "harm" in section 1(1) of the EBR). It must be recalled that the requirement for "significant harm" was incorporated into section 84 of the EBR because that citizen suit provision potentially applies to **all** contraventions of prescribed environmental laws, regulations and approvals in

---

[44] EBR, section 84(6).

Ontario.[45] On the other hand, the Bill C-65 citizen suit is limited to the serious offences under the Bill and its regulations, which, by definition, are highly significant and involve an element of harm. Thus, it does not seem necessary or appropriate to superimpose the concept of "significant harm" into section 60 of Bill C-65. Moreover, the deletion of this concept from section 60 will neatly avoid endless and intractable debates about what types of harm are "significant" and what types are not "significant".

For the foregoing reasons, CELA submits that the Bill C-65 citizen suit provision should be reframed to focus on actual or imminent offences under the prohibition against takings (section 31), the prohibition against harm to residence (section 32), the regulations (section 33), and emergency orders (section 34). The action should be available to any person, regardless of whether an investigation request has been filed. CELA's suggested re-wording for the Bill C-65 cause of action is as follows:

Where a person has contravened, or will imminently contravene,

(a) section 31;

(b) section 32;

(c) a regulation enacted under section 33; or

(d) an emergency order under section 34,

any person resident in Canada may bring an action in a court of competent jurisdiction against the person in respect of the actual or imminent contravention.

(d) Relief Available in an Endangered Species Protection Action

In general, CELA supports the types of judicial relief available under section 60(3) of Bill C-65, such as injunctive orders, declaratory orders, and restoration orders. CELA also supports the prohibition against awarding damages to the plaintiffs in such actions. However, CELA suggests that the court should be empowered to order the defendant to pay compensation to the responsible Minister in two circumstances: (1) where harm to a species' residence or critical habitat cannot be restored or rehabilitated; or (2) the responsible Minister has taken steps (and incurred costs) to address the harm to a species or its habitat.

In such instances, any compensation payable to the Minister should be expressly used for the

[45] Such as conditions of approval that require proponents to file monitoring reports. If this requirement is contravened by a proponent, it is unlikely, in most instances, to directly result in environmental harm, which calls into question the need for a citizen suit to address this "paper" offence.

protection of species at risk or their habitat, which could include funding site-specific remediation, endangered species research, public education programs, or recovery plans. CELA notes that under Bill C-65, the criminal court is empowered to make similar monetary orders against a person convicted of an offence under Bill C-65,[46] and CELA sees no reason why the civil court should not have the same power. CELA further notes that similar compensatory provisions exist in Ontario's EBR,[47] but suggests that unlike the EBR, the compensatory provisions under Bill C-65 should not be dependent upon the consent of the defendant.

(e) Defences to an Endangered Species Protection Action

Section 62 of Bill C-65 prohibits an endangered species protection action in certain circumstances, such as where the impugned conduct was taken to protect species at risk or its habitat. CELA has no objection to this specific limitation, on the understanding that the defendant, on a balance of probabilities, will have to satisfy the court that the unlawful conduct was actually necessary to protect a species or its habitat.

However, CELA strongly objects to the other limitations set out in section 62, which would prohibit the civil action where the impugned conduct was alleged undertaken to "protect the environment", "national security", safety and health, including plant and animal health", and "reasonable and consistent with public safety". These ambiguous phrases are so overbroad that they are devoid of any precise content, definition, predictability, or certainty. Moreover, most of these "quasi-defences" are not known in law at the present time, which means that considerable judicial resources will inevitably be spent in trying to determine the meaning, scope and effect of these phrases.

In CELA's view, only common law defences (i.e. statutory authority) should be available in an endangered species protection action. However, CELA would have no objection if section 62 were amended to provide that a statutory authorization issued under section 46 of Bill C-65 was a defence available in an endangered species protection action. CELA was pleased to see that the drafters of Bill C-65 wisely chose to avoid the wholly inappropriate "mistake of law" defence prescribed in section 85(3) of Ontario's EBR.

(f) Costs, Security for Costs, and Undertakings for Damages

Section 74 of Bill C-65 requires the court to consider various factors when deciding which party, if any, should pay the costs of the endangered species protection action. Again, this provision

[46] Bill C-65, section 84(d).

[47] EBR, sections 95(3) and (8).

appears to have been lifted directly out of section 100 of Ontario's EBR, and it merely directs the court to consider whether the action involved "special circumstances", a "test case" or a "novel point of law". Generally, these factors are traditional cost considerations that may be taken into account by the court, regardless of whether these considerations are incorporated into Bill C-65. Therefore, section 74, on its face, does not prohibit an adverse cost award against a plaintiff bringing an endangered species protection action. This lingering uncertainty over cost exposure will undoubtedly inhibit many persons from commencing an endangered species protection action, which, in effect, defeats the whole purpose of creating a citizen suit provision in Bill C-65.

Having regard for the public interest nature of an endangered species protection action, CELA submits that section 74 should be redrafted to build in a general presumption against cost awards in such actions, unless the court finds special reasons to award costs. Such an amendment would be consistent with recent revisions to the Federal Court Rules, which now provide that costs will not normally be awarded in judicial review applications. CELA's suggested rewording for section 74 of Bill C-65 is as follows:

> **Costs will not be awarded to or against any party in an endangered species protection action, unless the court finds that there are special reasons to make a cost award.**

If this amendment is adopted, then there is little need to address the issue of whether defendants should be able to seek security for costs against public interest plaintiffs in an endangered species protection action. If this amendment is not adopted, then CELA submits that section 74 should be amended to either prohibit motions for security for costs, or alternatively, limit security for costs to $500.00. Public interest plaintiffs already face a number of legal and fiscal constraints in commencing an endangered species protection action. In CELA's view, these plaintiffs should not be burdened with unnecessary economic barriers that may shield unlawful conduct from judicial scrutiny if plaintiffs are unable to pay large amounts of money into court in order to proceed with their litigation.

CELA further submits that a similar limitation should be placed on the plaintiff's undertaking to pay damages pursuant to section 68 of Bill C-65. CELA notes that a similar limitation exists in section 19.4 of Quebec's Environment Quality Act.

(g) Civil Liability for Damages Arising from Contraventions

Sections 76(1) and (2) of Bill C-65 provide that the endangered species protection action does not affect any other legal remedy that may be available in relation to the impugned conduct. CELA submits that section 76 should go one step further and create a new civil cause of action to permit persons to recover damages for loss or injury, or to be reimbursed for cleanup or restoration costs and expenses, arising from contraventions of Bill C-65. CELA notes that a

similar cause of action already exists in section 136 of CEPA, and there is a civil liability provision in the Fisheries Act that permits commercial fishermen to sue for loss of income resulting from the unlawful deposit of deleterious substances into water frequented by fish.[48] CELA suggests that Bill C-65's civil liability provision could be worded as follows:

> **Any person who has suffered loss or damage, or who has incurred cleanup, restoration, or preventative costs and expenses, resulting from a contravention of,**
>
> **(a) section 31;**
>
> **(b) section 32;**
>
> **(c) a regulation under section 33; or**
>
> **(d) an emergency order under section 34,**
>
> **may commence an action in a court of competent jurisdiction against the person responsible for the contravention, and if entitled to judgment, the person may be awarded:**
>
> **(a) an amount equal to the loss or damage proven to have been suffered by the person;**
>
> **(b) an amount equal to the costs and expenses proven to have been incurred by the person;**
>
> **(c) injunctive or declaratory relief;**
>
> **(d) costs; or**
>
> **(e) such further or other orders as may be appropriate.**

The imposition of civil liability arising from contraventions of Bill C-65 will not only assist affected persons in recovering compensation, but it should also provide a further incentive to persons, corporations and governments to comply with Bill C-65.

CELA RECOMMENDATION #30: **Section 60 of Bill C-65 should be amended in order to:**

- **delete the conditions precedent in section 60(1) for commencing an endangered species protection**

[48] Fisheries Act, R.S.C. 1985, c.F-14, section 42(3).

action; or

- **in the alternative, create an emergency exception to the conditions precedent in section 60(1) for commencing an endangered species protection action;**

- **reword section 60(2) so that the endangered species protection action may be brought by any person in relation to actual or imminent offences under section 31, section 32, regulations under section 33, or emergency orders under section 34; and**

- **expand the list of remedies in section 60(3) to empower the court to order the defendant to pay monetary compensation to the responsible Minister where restoration or rehabilitation of harm resulting from the defendant's conduct is not possible, or where the responsible Minister has undertaken steps (and incurred costs) to address the harm arising from the defendant's conduct.**

CELA RECOMMENDATION #31: **Section 62 of Bill C-65 should be amended so as to delete references to "protect the environment", "national security", "safety and health, including plant and animal health", and "reasonable and consistent with public safety".**

CELA RECOMMENDATION #32: **Section 68 of Bill C-65 should be amended to limit a plaintiff's undertaking to pay damages to a maximum of $1,000.00.**

CELA RECOMMENDATION #33: **Section 74 of Bill C-65 should be amended to:**

- **provide that costs will not be awarded to or against any party in an endangered species protection action, unless the court finds that there are special reasons for making a cost award; or**

- **in the alternative, prohibit motions for security for costs in endangered species protection actions,**

or alternatively, limit security for costs to a maximum of $500.00.

CELA RECOMMENDATION #34: **Section 76 of Bill C-65 should be amended to include a new civil cause of action to permit persons to recover damages for loss or injury, or to recover cleanup, restoration, or preventative costs and expenses, resulting from contraventions of section 31, section 32, regulations under section 33, or emergency orders under section 34.**

With these few, relatively straightforward amendments, public access to the courts under Bill C-65 will be significantly enhanced.

3.9 Offences, Punishment and Alternative Measures

Section 77(1) of Bill C-65 sets out the penalties for contraventions under the Bill. While the prescribed maximum fines appear impressive on paper, CELA notes that these penalties are actually lower than those established under other federal environmental statutes. For example, persons who harm fish habitat, or who deposit a deleterious substance into water frequented by fish, face maximum fines under section 40 of the Fisheries Act of $300,000 upon summary conviction, and $1,000,000 if convicted on an indictable basis. Similar maximum fines are found in sections 113 and 114 of CEPA.

In comparison, section 77(1) of Bill C-65 prescribes maximum fines of only $50,000 (persons) and $100,000 (corporations) for summary conviction offences, and maximum fines of $250,000 (persons) and $500,000 (corporations) for indictable offences. To ensure consistency and to enhance deterrence value, CELA submits that section 77(1) should be amended to make the penalty provisions at least equivalent to those found under the Fisheries Act and CEPA.

Indeed, in light of the gravity and significance of harming species at risk, it could be argued that contraventions of endangered species legislation should attract higher fines that those available under more general environmental statutes. For the same reason, consideration should be given to amending section 77(1) so as to prescribe substantial minimum fines (i.e. $25,000). Thus, potential offenders would know that if convicted, they will automatically receive the minimum fine, and they may, in fact, receive a higher fine ranging up to the maximum.

Subject to the foregoing comments about section 77(1), CELA generally supports the offence, punishment, and alternative measures provisions of Bill C-65. However, CELA recommends that section 84(b) be amended to include a reference to "residence or habitat" to allow the court to make remedial or preventative orders in relation to these matters if appropriate.

CELA RECOMMENDATION #35: **Section 77(1) of Bill C-65 should be amended to prescribe maximum fines that are at least equivalent to those found in section 40 of the Fisheries Act and sections 113 and 114 of CEPA.**

CELA RECOMMENDATION #36: **Section 84(b) should be amended to permit the court to order the defendant to undertake remedial or preventative actions in respect of the residence or habitat of listed species.**

3.10 Reports and Review of Act

Section 101 of Bill C-65 requires the Minister to prepare and table annual reports on the administration of Bill C-65. CELA supports this provision, but it is unclear about what is intended by the term "administration". In order to ensure that meaningful reports are tabled, CELA submits that section 101 should be amended to prescribe the minimum content requirements for annual reports, such as:

- a summary of all agreements entered into under Bill C-65;
- a summary of the species considered for designation, classification or reclassification by COSEWIC, and COSEWIC's decisions respecting such species;
- a summary of all regulations or emergency orders issued under Bill C-65;
- a summary of all permits issued under section 46;
- a summary of the preparation, implementation, and monitoring of recovery plans
- a summary of the number of requests for investigation filed under section 56, and a summary of the governmental response thereto;
- a summary of all enforcement and compliance measures, including prosecutions and endangered species protection actions, undertaken under Bill C-65; and
- recommendations, if any, to improve the effectiveness of Bill C-65.

Unless the annual reports include these types of information, it will be difficult for Parliament and the public at large to assess the success or failure of Bill C-65 in meeting its stated purposes.

Section 102 of Bill C-65 requires the Minister to prepare periodic reports on the status of wildlife in Canada, while section 103 requires periodic Parliamentary reviews and reports regarding Bill

C-65. CELA strongly supports both provisions on the understanding that there will be meaningful opportunities for public input into the section 103 review process, as was done during the recent review of CEPA.

CELA RECOMMENDATION #37: **Section 101 of Bill C-65 should be amended to prescribe the minimum content requirements of annual reports, such as:**

- **a summary of all agreements entered into under Bill C-65;**
- **a summary of all species considered for designation, classification, or reclassification by COSEWIC, and COSEWIC's decisions respecting such species;**
- **a summary of all regulations or emergency orders issued under Bill C-65;**
- **a summary of all permits issued under section 46;**
- **a summary of the preparation, implementation and monitoring of recovery plans;**
- **a summary of all investigation requests filed under section 56, and a summary of the governmental response thereto;**
- **a summary of all enforcement and compliance measures, including prosecutions and endangered species protection actions, undertaken under Bill C-65; and**
- **recommendations, if any, to improve the effectiveness of Bill C-65.**

SECTION 4.0 - CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

CELA is pleased that the federal government has finally introduced a federal endangered species

law. However, as described in Section 3.0 of this submission, there are numerous loopholes and deficiencies in Bill C-65 that must be addressed if the government is serious about achieving the purposes of the Bill and meeting its obligations under the Rio Convention and the National Accord. In particular, CELA is recommending the following amendments to Bill C-65:

CELA RECOMMENDATION #1: **The preamble of Bill C-65 should be amended to include paragraphs that refer to or invoke the constitutional basis for the legislation, particularly the "national concern" branch of the "peace, order, and good government" power.**

CELA RECOMMENDATION #2: **Section 2(1) of Bill C-65 should be amended to include new or reworded definitions for the following terms: "critical habitat", "extinct", "habitat", "listed", "residence", and "wildlife species".**

CELA RECOMMENDATION #3: **Section 3(1) and (2) of Bill C-65 should be deleted and replaced with provisions that:**

- **specify that the Act applies to all species at risk in Canada, not just fish, migratory birds, or species upon federal lands;**

- **specify that the Act applies to the residences and critical habitat of all species at risk in Canada, not just fish, migratory birds, or species upon federal lands;**

- **ensure that transboundary species at risk, and their residences and critical habitat, receive mandatory protection under the Act.**

CELA RECOMMENDATION #4: **Section 4 of Bill C-65 should be amended to ensure that the Act is binding on all federal Crown corporations in respect of all species at risk and their habitats, except as may be otherwise be provided by regulation.**

CELA RECOMMENDATION #5: **Section 6 of Bill C-65 should be amended to:**

- **delete the term "any person" and, if necessary, include the term "Crown employee" in section**

6(2);

- **ensure that permit-issuing powers <u>cannot</u> be delegated to provincial ministries, agencies, or employees;**

- **provide for public notice and comment with respect to proposed delegations, and require the filing of annual reports regarding delegated powers;**

- **provide for periodic review of delegated powers; and**

- **place limits on the time that delegation can remain in effect, and empower the responsible Ministers to attach terms and conditions to the delegation as may be appropriate.**

CELA RECOMMENDATION #7: **Section 7 of Bill C-65 should be amended to:**

- **require the filing of annual reports regarding federal-provincial agreements;**

- **provide for periodic review of federal-provincial agreements; and**

- **place limits on the time that a federal-provincial agreements can remain in effect.**

CELA RECOMMENDATION #8: **Section 9 (or section 26) of Bill C-65 should be amended to ensure that the following documents are included in the public registry:**

- **the full text of Bill C-65, regulations, and emergency orders;**

- **federal-provincial agreements, conservation agreements, delegation arrangements, and national recovery planning agreements;**

- **the National Accord on the Protection of Species at Risk;**

- **COSEWIC's lists of extinct, extirpated, endangered, threatened, and vulnerable species prepared under section 18;**

- **all notices, decisions and reports required by Bill C-65; and**

- **concise public education materials (i.e. "how to" factsheets) about Bill C-65.**

CELA RECOMMENDATION #9: **Section 13 of Bill 65 should be amended to:**

- **require the Minister to consult about COSEWIC appointees with the Council, Royal Society of Canada, and such other organizations or persons as may be appropriate; and**

- **require the Minister (or the responsible Ministers) to provide the administrative and financial support necessary to permit COSEWIC to fully carry out its duties and functions under Bill C-65.**

CELA RECOMMENDATION #10: **Section 14 of Bill C-65 should be amended to:**

- **ensure that no more than 50% of the appointments to COSEWIC are drawn from the federal or provincial governments; and**

- **provide that government employees who are appointed to COSEWIC shall exercise their duties and functions free of undue influence or interference from their employers.**

CELA RECOMMENDATION #11: **Section 21(3) of Bill C-65 should be deleted to omit COSEWIC's obligation to prepare a "List of Non-Designated Species".**

CELA RECOMMENDATION #12: **Section 30 of Bill C-65 should be amended to:**

- **establish COSEWIC's current list as the List of Wildlife Species at Risk and append it as Schedule I to Bill C-65;**

- **impose a <u>mandatory</u> duty on the Minister to pass regulations that place species on the Schedule I List of Wildlife Species at Risk in accordance with COSEWIC decisions under section 21 and 24;**

- **ensure that such regulations are passed within 60 days of COSEWIC's decisions respecting designation, classification or reclassification; and**

- **permit the Minister to pass regulations adding species to the Schedule I List of Wildlife Species at Risk where a provincial minister has requested the addition and has agreed to participate in the preparation and implementation of recovery plans for the species.**

CELA RECOMMENDATION #13: **Section 31 of Bill C-65 should be amended to:**

- **ensure that the section 31(1) prohibition covers extirpated species, prohibits disturbing and interfering, and prohibits attempts to kill, harm, harass, disturb, capture, take or interfere with an individual of a listed extirpated, endangered or threatened species; and**

- **ensure that the section 31(2) prohibition covers extirpated species, and prohibits attempts to possess, collect, buy, sell or trade an individual of a listed extirpated, endangered or threatened species, or any part or derivative of one.**

CELA RECOMMENDATION #14: **Section 32 of Bill C-65 should be amended to include extirpated species, prohibit disturbing or interfering, and prohibit attempts to damage, destroy, disturb, or interfere with the residence of an individual of a listed extirpated, endangered or threatened species.**

CELA RECOMMENDATION #15: **If CELA Recommendations #3 and #12 are not adopted, then section 33 of Bill C-65 should be amended to:**

- **define "transboundary species";**

- impose a mandatory duty upon the Minister to make regulations that establish "harm", "possession", and "residence/critical habitat" prohibitions in order to protect listed transboundary species that are extirpated, endangered or threatened; and
- delete the words "wilfully" and "knowingly".

CELA RECOMMENDATION #16: Section 34 of Bill C-65 should be amended to:

- prescribe circumstances where the issuance of emergency orders is mandatory;
- prescribe the mandatory content requirements for emergency orders; and
- prescribe when emergency orders should be repealed.

CELA RECOMMENDATION #17: Section 36(1) to (3) of Bill C-65 should be deleted and replaced with a provision that provides only the following exceptions:

- activities that are necessary to address an immediate threat to human life or safety;
- activities that are authorized or permitted as regulatory or conservation measures for endangered species under an aboriginal treaty, land claims agreement, self-government agreement, or co-management agreement; and
- activities that are authorized under section 46 or 47.

CELA RECOMMENDATION #18: Section 38 of Bill C-65 should be amended to:

- replace the word "feasible" with "possible" in section 38(4), (5) and (7); and
- ensure that recovery plan contents are based on the advice of COSEWIC.

CELA RECOMMENDATION #19: Section 40 of Bill C-65 should be amended to:

- require posting of a recovery plan on the public registry, and notice in the Canada Gazette, "within 30 days" after the completion of the plan;
- provide a public comment period of 30 days on the completed recovery plan;
- require the responsible minister to prepare and publish an implementation report no later than 90 days after the Canada Gazette notice; and
- include a general prohibition against contravening the provisions of a recovery plan.

CELA RECOMMENDATION #20: Section 42 of Bill C-65 should be amended to require the responsible minister to pass regulations within 90 days to implement measures in the recovery plan, including regulations prohibiting activities that may adversely affect a species or the residences or critical habitat of its individuals.

CELA RECOMMENDATION #21: Section 44 of Bill C-65 should be amended to permit the responsible minister to prepare and implement amendments to recovery plans where warranted by a change in circumstances or new information.

CELA RECOMMENDATION #22: Section 45 of Bill C-65 should be amended to ensure that the key aspects of the recovery plan process (i.e. public notice, public comment, implementation reports, tight timelines, amendments, and regulations) apply, with necessary modifications, to management plans for vulnerable species.

CELA RECOMMENDATION #23: Section 46 of Bill C-65 should be amended to:

- narrowly define the types of activities that may authorized under an "exception" permit or agreement;

- empower the responsible minister to impose and/or amend protective, preventative or remedial terms and conditions in "exception" permits and agreements; and

- prescribe a time limit for "exception" permits and agreements.

CELA RECOMMENDATION #24: Section 47 of Bill C-65 should be amended to ensure that authorizations under other federal statutes are effective only if the requirements of section 46(2) to (4) have been satisfied.

CELA RECOMMENDATION #25: Section 49 of Bill C-65 should be amended to ensure that projects that may adversely affect a listed species, or the residences or critical habitat of its individuals, "trigger" the application of the CEAA. This could be accomplished by:

- using Bill C-65 to amend section 5(1) of the CEAA to include such projects;

- using Bill C-65 to amend the Comprehensive Study List under the CEAA to include such projects; or

- using Bill C-65 to amend the Law List under the CEAA to include permits or authorizations under sections 46 or 47 of Bill C-65.

CELA RECOMMENDATION #26: Section 56(1) of Bill C-65 should be amended so as to permit corporations to file an application for investigation.

CELA RECOMMENDATION #27: Section 57 of Bill C-65 should be amended to:

- require the responsible minister to acknowledge receipt of an investigation application within 20 days of receiving it; and

- prohibit the disclosure of any information that may identify the applicant.

CELA RECOMMENDATION #28: Section 58(1) of Bill C-65 should be amended to

require the responsible minister to provide the applicant with a written estimate of the time required to complete the investigation where the investigation has not been completed within 90 days.

CELA RECOMMENDATION #29: **Bill C-65 should be amended to empower the Minister to:**

- **issue binding administrative orders (i.e. stop orders) against any individual or corporation who may be contravening the Act, regulations, or emergency orders; and**

- **seek injunctive relief in civil courts in respect of actual or imminent contraventions of the Act, regulations, or emergency orders.**

CELA RECOMMENDATION #30: **Section 60 of Bill C-65 should be amended in order to:**

- **delete the conditions precedent in section 60(1) for commencing an endangered species protection action; or**

- **in the alternative, create an emergency exception to the conditions precedent in section 60(1) for commencing an endangered species protection action;**

- **reword section 60(2) so that the endangered species protection action may be brought by any person in relation to actual or imminent offences under section 31, section 32, regulations under section 33, or emergency orders under section 34; and**

- **expand the list of remedies in section 60(3) to empower the court to order the defendant to pay monetary compensation to the responsible Minister where restoration or rehabilitation of harm resulting from the defendant's conduct is not possible, or where the responsible Minister has undertaken steps (and incurred costs) to**

address the harm arising from the defendant's conduct.

CELA RECOMMENDATION #31: **Section 62 of Bill C-65 should be amended so as to delete references to "protect the environment", "national security", "safety and health, including plant and animal health", and "reasonable and consistent with public safety".**

CELA RECOMMENDATION #32: **Section 68 of Bill C-65 should be amended to limit a plaintiff's undertaking to pay damages to a maximum of $1,000.00.**

CELA RECOMMENDATION #33: **Section 74 of Bill C-65 should be amended to:**

- **provide that costs will not be awarded to or against any party in an endangered species protection action, unless the court finds that there are special reasons for making a cost award; or**

- **in the alternative, prohibit motions for security for costs in endangered species protection actions, or alternatively, limit security for costs to a maximum of $500.00.**

CELA RECOMMENDATION #34: **Section 76 of Bill C-65 should be amended to include a new civil cause of action to permit persons to recover damages for loss or injury, or to recover cleanup, restoration, or preventative costs and expenses, resulting from contraventions of section 31, section 32, regulations under section 33, or emergency orders under section 34.**

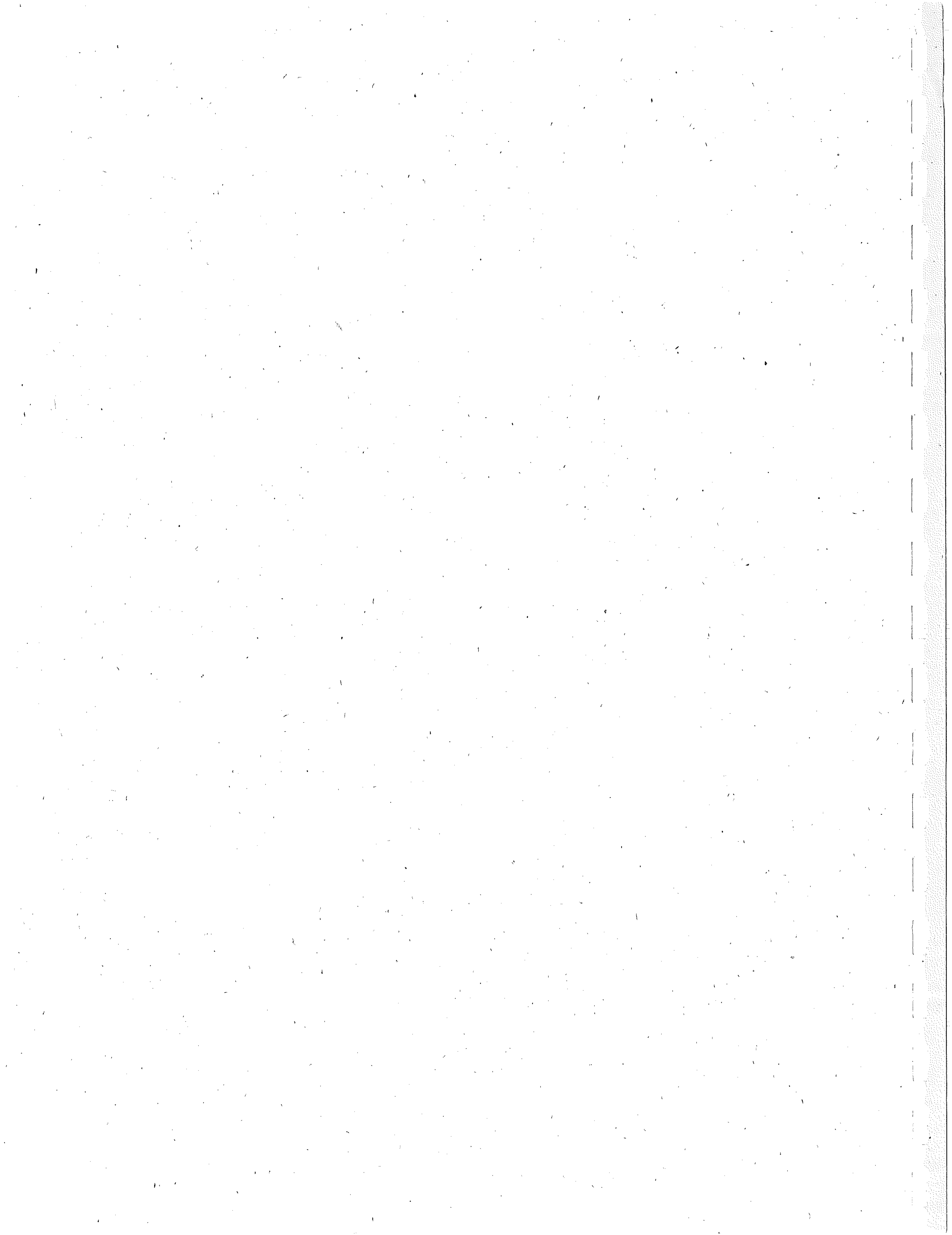
CELA RECOMMENDATION #35: **Section 77(1) of Bill C-65 should be amended to prescribe maximum fines that are at least equivalent to those found in section 40 of the Fisheries Act and sections 113 and 114 of CEPA.**

CELA RECOMMENDATION #36: **Section 84(b) should be amended to permit the court to order the defendant to undertake remedial or preventative actions in respect of the residence or habitat of listed species.**

CELA RECOMMENDATION #37: **Section 101 of Bill C-65 should be amended to prescribe the minimum content requirements of annual reports, such as:**

- **a summary of all agreements entered into under Bill C-65;**
- **a summary of all species considered for designation, classification, or reclassification by COSEWIC, and COSEWIC's decisions respecting such species;**
- **a summary of all regulations or emergency orders issued under Bill C-65;**
- **a summary of all permits issued under section 46;**
- **a summary of the preparation, implementation and monitoring of recovery plans;**
- **a summary of all investigation requests filed under section 56, and a summary of the governmental response thereto;**
- **a summary of all enforcement and compliance measures, including prosecutions and endangered species protection actions, undertaken under Bill C-65; and**
- **recommendations, if any, to improve the effectiveness of Bill C-65.**

December 10, 1996



Canadian Environmental Law Association
517 College Street • Suite 401 • Toronto • Ontario • M6G 4A2
Telephone 416/960-2284 • Fax 416/960-9392 • E-Mail cela@web.net