



CANADIAN INSTITUTE FOR ENVIRONMENTAL LAW AND POLICY
L'INSTITUT CANADIEN DU DROIT ET DE LA POLITIQUE DE L'ENVIRONNEMENT

Est. 1970

SUBMISSION ON NEW FEDERAL ENDANGERED SPECIES LEGISLATION

Prepared by Ian Attridge
Research Associate

CIELAP Brief 3/99

CIELAP Shelf:
Attridge, Ian; Canadian Institute for Environmental Law
and Policy
Submission On New Federal Endangered Species
Legislation

RN 27257

Canadian Institute for Environmental Law and Policy
February 1999

SUBMISSION ON NEW FEDERAL ENDANGERED SPECIES LEGISLATION (DRAFT)

Submitted by the Canadian Institute for Environmental Law and Policy

Background on CIELAP's Perspective

Over the past 30 years, the Canadian Institute for Environmental Law and Policy (CIELAP) has provided independent, well-researched advice on environmental law and policy issues. CIELAP is established as a widely-respected national research organization with a long track record. Over the last several years, as the federal government has considered new federal endangered species legislation (FESL), CIELAP has participated extensively in the consultations. We are well aware of the issues and diverse perspectives on this initiative.

Nationally, CIELAP has also led research efforts and created momentum towards effective incentives to promote voluntary conservation measures, often called "stewardship". These latter efforts are intended for broader landscape conservation, but in the sensitive FESL context have particular relevance for encouraging species at risk conservation by private landowners and managers. In addition, the Canadian Wildlife Service has contracted CIELAP to assess whether all federal, provincial and territorial jurisdictions' have fully identified their capacity, and gaps in this capacity, to implement their commitments under the *National Accord for the Protection of Species at Risk*. Accordingly, we are intimately familiar with available opportunities to foster stewardship and the capacities of provincial and territorial governments to protect species at risk.

Context for Species at Risk

CIELAP lead a collective response from the environmental law and policy community to drafts of the *Canadian Biodiversity Strategy*, and has maintained an active interest and role in the implementation and protocols under the *Convention on Biological Diversity*. Given the requirement in Article 8(k) of the Convention to have endangered species legislation, the need to demonstrate Canada's delivery on its international commitments, the value of expressing federal intentions and authority in this area, as well as intense public interest and support for conservation, it is clear that new federal endangered species legislation is necessary. Indeed, it is a critical plank in the government's political platform, and the most prominent of these from an environmental perspective.

Existing, general or non-regulatory authority will not be sufficient. Existing or general authority does not create the full mandate, certainty, accountability nor profile necessary to fulfil Canada's international obligations in this regard. As a representative from the forest industry, Bill Bourgeois of Lignum, expressed during one of the national consultation sessions on FESL, there are and likely always will be "bad apples" that will not respond to incentives or to stewardship from an ethical standpoint and thus legislation will be necessary. A FESL stewardship workshop also heard that there were serious concerns by woodlot owners about liquidation cuts in private woodlots in Eastern Canada. Obviously, industrial and private landowners are concerned about poor practices that harm biodiversity in their own sectors.

The task, then, is to craft effective FESL that will turn around the continuing and increasingly documented losses and degradation of our country's biodiversity. It must help deliver on our international commitments, take its direction from the *Canadian Biodiversity Strategy*, and fulfill the letter and the spirit of the *National Accord for the Protection of Species at Risk*. Towards this end, CIELAP has prepared this submission. In summary, we recommend:

- **the enactment of strong, effective federal endangered species legislation which emphasizes protection and accountability;**
- **the independent, scientific listing of species at risk;**
- **clear protections for listed species, with narrowly crafted exceptions if truly necessary; and,**
- **diverse mechanisms to protect species' habitat, including both regulatory measures and a prominent and clear role for stewardship.**

These recommendations are elaborated below under the headings: scientific listing and designation, species protections, habitat protection, and stewardship.

Scientific Listing and Designation

The listing of a species by COSEWIC as endangered, threatened or vulnerable must be science-based with clear, specified science criteria and the absence of socio-economic factors (as required in the *National Accord*). It also must be made through independent membership and voting (ie. at least half must not be government employees subject to the potentially political directives of their superiors). Listing decisions must be publicly reported, and the current list of COSEWIC species should be grandparented in order to reduce time delays in affording protections. Particular reviews can be commissioned later, if necessary, but should not hold up the process; further, extra protection until such a review may demonstrate a lower category of protection will still be advantageous to the species at risk, and thus still consistent with the legislation's purpose.

Our preference is that listing decisions by COSEWIC regarding species be final. If acceptance by the Canadian Endangered Species Conservation Council is to be required,

then this should occur automatically, within a set period of time (eg. three months), unless specific written reasons are provided that fall within or outside of set criteria. This creates the presumption that COSEWIC's science will be the preferred position and that a failure by CESC to act will not prevent initial protections from being established. It also avoids the very time-consuming and costly lobbying of Cabinet for each decision.

Species Protections

Designated species must be provided with the minimum *National Accord* protections: killing, harming, possession and trade. These must not be subject to a "willful" determination of the person's state of mind, since this creates a difficult situation to prove and thus demands considerably more enforcement and prosecution resources to implement effectively. Most federal and provincial offences allow for a demonstration of due diligence, and thus this approach should be adopted for FESL as well.

Discussions have occurred concerning related exceptions to these protections, such as for emergencies, national security, animal or plant health, human health and safety, and others. Exemptions should only be granted on an explicit and case by case basis, not on the basis of the invocation of a category. Criteria for the granting of such exemptions should be explicitly stated in legislation.

The process should make a presumption in favour of conservation of the species and following the new FESL. The review/permitting process should involve wildlife expertise except in a clearly-defined emergency, as per appropriate emergency legislation. Any exemption should be subject to a direction to make, document and report all efforts to avoid or mitigate harm to listed species and habitat; and Where domestic animal or plant health is concerned, this should not automatically trump species at risk protections since it is the latter which has less flexibility to respond in the future.

Habitat Protection

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

The federal government has legal jurisdiction to regulate habitat, particularly for migratory species and those which cross provincial and international borders. This has been articulated by a number of prominent legal opinions, is grounded in several constitutional heads of federal powers, and is buttressed by increasing Supreme Court of Canada confirmation of federal environmental authority. The challenge for protecting habitat is thus largely political, not legal. In the provincial jurisdictions which have enacted specific endangered species legislation, the political will has been found to have mandatory,

automatic habitat protection.

We support a broad habitat jurisdiction and offer the following recommendations to address this sensitive yet vitally important question.

- Stepping outside of the regulatory question for a moment, federal habitat authority for stewardship programs should extend over the entire country. FESL must provide sufficiently broad authority to enable stewardship efforts and programming throughout the nation for all landowners, and thus this should be cast not solely within a narrowed regulatory scope.
- As in the *Migratory Birds Convention Act's* prohibitions not to destroy nests etc., FESL should at minimum automatically protect "residences" of listed species. The protection of critical habitat is also clearly desirable. This should be subject to Aboriginal and treaty rights.
- Critical habitat must be identified and conservation objectives determined for all listed species, as repeatedly advocated by Wildlife Habitat Canada, among others. This will be elaborated primarily through the recovery planning process, but status reports will also list key sites and protection should not be delayed until recovery plans are finalized. This is not a regulatory but rather an informational and planning step that has significant value for all players, but cannot be conceived as infringing on provincial jurisdiction. Cooperation in achieving this step is encouraged.
- Where identified critical habitat exists on lands or waters within federal jurisdiction, these lands and waters must be automatically protected in FESL. All federal authorities, actions, and especially land and water managers, among others, should be directed to identify and protect to a certain prescribed standard such critical habitat, and to do so within their plans and actions. Perhaps a particular type or types of designation could be deemed to be in place for all critical habitat within federal jurisdiction as an interim measure, until a plan and designation is put in place that provides sufficient protection.
- Particularly in the Territories, it will be important for the federal government to clarify responsibilities for wildlife habitat with the Territorial governments in order that ongoing challenges are resolved and conservation is more easily achieved (see the discussion in the territories Chapter of CIELAP's 1996 leading text, *Biodiversity Law and Policy in Canada: Review and Recommendations*).
- On private lands, there should be an automatic protection of identified critical habitat to come into force for a set interim period, subject to the exception of where there is an alternative plan in place. This will provide interim protection yet put pressure on all parties to come up with an alternative plan (the National Accord requires recovery plans within set, short periods). Qualifications for this alternative could include: existing programs where they have a discrete species at risk component;

development of a specific recovery plan; demonstration of provincial equivalency for the species concerned; identification of habitat or jurisdictions where there is not habitat for species at risk; and determining where there is a new plan to deal with listed species, either on an individual or regional basis. Some further criteria could include impact thresholds for vulnerable species (such as percentage habitat in a region, or population viability within a region) or a no net loss of habitat policy (like under the *Fisheries Act*) that allows negotiation and strict criteria for replacement. Areas under the alternative plan would also be immune to prosecution under the habitat provisions of the FESL, so long as landowners acted within the parameters of the plan (the "safe harbour" option). Notification to landowners of habitat and preference for public lands could also be required, as in Nova Scotia's new endangered species legislation.

- Voluntary stewardship should be supported and enabled throughout the legislation and in accompanying announcements (see discussion in the following section).

Stewardship

As noted at the outset, CIELAP has provided leadership in analysis of voluntary stewardship opportunities and legislation in Canada, and has provided leading materials on the subject in recent years. Along with many other local and national organizations, CIELAP strongly urges the federal government to include a clear mandate and outline for stewardship in the legislation as well as in complementary announcements. This will be essential to offset regulatory fears about FESL, demonstrate federal commitment to a coordinated stewardship approach over the landscape, fulfill *National Accord* and other commitments, as well as generate public support and involvement in addressing species at risk issues.

Legislative expressions of stewardship will create confidence, set important directions and principles, and attract priority funding, as well as create clear legal authority or overcome legal impediments. Consequently, the endangered species legislation should include:

- a nation-wide mandate for stewardship programming;
- recognition in the preamble (or otherwise) of land owners' and managers' existing efforts at stewardship, and how this substantially contributes to the legacy of biodiversity that remains on the landscape, the prevention of species becoming at risk, and also their recovery;
- recognition of the importance of capacity, coordination and continuity in stewardship programming in order to support land owners and managers;
- declaration and commitment of a significant federal role in delivery of stewardship support, including the six main elements of stewardship (ie. research and information, education and extension, recognition and awards, incentives, funding and landowner commitment or securement);
- the power of federal agencies to make agreements and arrangements with a

- diverse range of partners (private, local, sub-national, international);
- the power of federal agencies to make land management agreements and conservation easements under the legislation, and thus confirm independent federal authority for such agreements in this FESL and in complementary amendments to the *Federal Real Property Act*;
- enabling term and permanent legal dedication of private property towards conservation, with associated federal benefits to be outlined in regulations;
- establishment of a national stewardship award and recognition program;
- legal direction to prepare a National Stewardship Action Plan (in consultation, and with the six stewardship elements identified) within one year of passage of the Act, and to review it, provide reports to Parliament and hold hearings every few years on its implementation (this is necessary in order to accelerate and sustain the Plan's development, attract resources, and ensure ongoing accountability);
- powers to provide diverse forms of compensation in appropriate circumstances (yet carefully designed to avoid payments as of right and extreme property rights arguments, and not necessarily through direct payments nor for all regulatory actions);
- inclusion within recovery plans of stewardship needs and the analysis of necessary tools or removal of impediments to foster stewardship;
- enabling Cabinet to direct donations as well as the legislation's revenues from fines and fees into a special stewardship fund;

Such legislative provisions are important, but can only provide a broad direction and framework. A package of initial program announcements must accompany the tabling of the legislation, and could be enhanced by federal budget announcements or, at minimum, markers for program development (including the involvement and active and constructive contribution of the Finance Department).

Conclusion

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

CIELAP has been engaged in the process to develop legislation, and continues to offer its expertise as may be appropriate in order to achieve a comprehensive and effective legislative package. The previous Bill C-65 contained many valuable provisions, but it must be strengthened in the habitat and stewardship dimension in order to achieve its goals.