Revival

June, 2006

Dr. James White completed an extensive analysis of the federal Species at Risk Act (SARA) for the Ontario Property and Environmental Rights Alliance (OPERA) almost six years ago. Although the named incumbent of the Environment ministry has since been replaced, the thrust, direction and language of that legislation and this commentary are essentially unchanged. Now the Ontario government is intent on revising provincial species legislation to meet and EXCEED its federal counterpart. All landowners are accordingly urged to review Dr. White's comprehensive analysis as detailed below and then carefully examine the up-dated provincial statute currently being proposed by the Ontario government for endangered species protection.

CANADA'S PLAN FOR PROTECTING **SPECIES AT RISK**

Background

The Honourable David Anderson introduced Canada's Plan for Protecting Species At Risk: An Update (The Plan) in December 1999 (1). This position paper, referred to as The Plan, is the latest step in the Government of Canada's efforts to pass legislation to protect species of animals, birds and plants which are threatened by extinction. This commitment derives from signing the United Nations Convention on Biological Diversity proclaimed at Rio de Janeiro in 1992.

Similar legislation, Bill C-65 (2), presented in 1996 to protect wildlife species from extirpation or extinction, was introduced into the Canadian Parliament following the development of the Accord for the Protection of Species At Risk (3). This legislation, Bill C-65, after many hearings and much debate, died on the order paper in June 1998 when an election was called. It is understood that new legislation for introduction to the current session of Parliament is now being prepared to replace Bill C-65. Submissions on this issue include a position paper on Landowners' Compensation by the Alberta Land and Resources Partnership (4), a series of Briefs by World Wildlife Fund Canada (5), a bulletin from the Fraser Institute entitled Crying Wolf (6) and a commentary entitled Issues and Concerns from the Ontario Property and Environmental Rights Alliance.

Opinions on a Species At Risk legislation range from the position of the Fraser Institute that, because similar legislation has failed in the United States, should not be duplicated in Canada, to that of a Private Members Bill 441 (7) introduced by M.P. Charles Caccia. Bill 441, had it been passed, would have facilitated third party suits against landowners, criminalized and fined non-cooperators up to $250,000 and incarcerated them for up to five years.

This document attempts to identify those aspects of The Plan considered appropriate and to raise concerns regarding those sections believed unsuitable or unworkable. Rather than just raise concerns, this paper also provides specific suggestions for ways these deficiencies can be resolved, while still providing protection for species truly at risk. This paper explicitly rejects the command and control approach inherent in the United States Endangered Species Act (8). It has been unsuccessful in protecting endangered species while bringing heartbreak and financial ruin to individuals and communities across the country. For details, see a paper by M. Smith (9).

Legislation of the type proposed by Bill 441 and supported by some extreme environmentalists can be passed by the government, but it will inevitably fail, because there aren't enough resources to police draconian regulations if landowners and users decide it is not in their best interest to comply. Endangered species cannot be protected without the active cooperation of landowners and land users.

(1) See references at end of this paper.

Improvements from Previous Proposals

The Minister of Environment Canada is commended for several significant and important improvements in The Plan document. The commitment to eliminate civil suits, which were included in Bill C-65, is very much appreciated. Allowing third parties to bring a suit against a landowner, especially when they have been found by a government agency not to be threatening a species or their habitat, was extremely inappropriate. We welcome this change but ask for assurance that sections of the Environmental Protection Act (12), which allow environmental protection actions by individuals, will not be employed against private landowners. We entreat the government to stand firm against the self-interests of a few environmental organizations that use such suits as a profit centre.

We strongly support the attempt to clarify the distinction between the Government of Canada's Constitutional Authority called the Criminal Law power to intervene when a province or landowner fails to protect a species or habitat and the use of the Criminal Code to prosecute individuals. This distinction was not clear in the earlier Bill and lead to concern that criminal laws would be used to prosecute landowners. Statutory laws are quite capable of punishing lawbreakers. While the distinction has been made, it is still not clear when and to what extent the Species at Risk Act (SARA) takes precedence over provincial legislation.

We appreciate the recognition that "protecting species is everybody's responsibility and nobody should be asked to bear an unfair part of the load". While the statement is encouraging we are not convinced that the implications are well understood, because the concept of compensation is not adequately recognized in the proposed policies. We have a number of suggestions for ensuring that landowners and users interests are adequately protected.

Intentional and repeated actions which destroy species or habitat must not be condoned but relaxation of prohibitions when accidental and unforeseeable damage occurs is noted and appreciated. A farmer who inadvertently destroys a plant or plows up a den when performing regular farming practices should not be prosecuted for a first offence.

The tone of The Plan is considerably more acceptable to landowners and users than the previous legislation and position papers. However, a number of concerns still exist regarding the intent, process and implications of legislation which could flow from this Plan.

Concerns and Recommendations

Introduction

Our concerns are presented not in order of priority but in order of occurrence as one works through the process from the identification of new species at risk to the implementation of an action plan. This process, which is outlined in detail in The Plan, is summarized in Figure 1.

Figure 1. Steps Proposed in the Species at Risk Program

Step 1. Listing of Species

Species will continue to be identified by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). The list of species is submitted to the Minister of the Environment and is subject to approval by the Federal Cabinet.

Step 2. Response Statements

The responsible jurisdictions on the Canadian Endangered Species Conservation Council (Council), that is, the federal and provincial governments, will prepare a Response Statement for each threatened or endangered species. The Response Statement would provide detailed information on the species and its habitat and identify the members of a Recovery Team.

Step 3. Recovery Team Activities

The Recovery Team for each species would involve experts who do additional research, identify recovery goals, etc. The Recovery Team would also create an Action Planning Group of regional and local stakeholders who are responsible, along with the Recovery Team for updating the Recovery Strategy and the Action Plan.

Step 4. Recovery Strategy/Action Plans

The Recovery Team has up to one year to prepare a Recovery Strategy. Next, Action Plans to implement the five-year Recovery Strategy would be prepared. These would require approval by the lead jurisdiction, i.e. provincial or federal government.

Step 5. Recovery Implementation

The Responsible Minister(s) would administer the implementation of the Action Plans. If provinces or individual landowners do not participate, the federal government has the power to implement the Action Plans above. Recovery Implementation will include the funding of stewardship initiatives, using non-government agencies and/or provincial ministries.

1.0 Overview of SARA

1.1 Application of SARA

The relationship between the proposed SARA and provincial endangered species legislation is unclear. Which has precedence? Does SARA act as a safety net in those provinces where endangered species legislation does not exist or is not implemented, or does it apply to private property in provinces which have not responded, or in all provinces? The extent and application of Criminal Law Power is unclear.

1-1 *We request that the relationship between provincial and the proposed legislation be clearly stated so individuals will know which laws apply in their jurisdiction.*

1-2 Objectives of SARA

The intent, purpose, objectives and costs of the Species at Risk Act (SARA) legislation have not been thoroughly explained or debated. Voters need to know why the government is attempting to preserve species and habitats at risk. Is it because of their utilitarian potential to increase the gross national product, a moral imperative to protect the earth's inhabitants, or a feel good, make work program to benefit environmental non-government organizations (ENGOs)? In any case, if public support is desired, it is essential that the costs and benefits of the government's actions be carefully considered within the context of limited resources. The public needs to know the costs of the initiatives being proposed before they decide how much they are prepared to spend on Species At Risk compared to health care, housing the homeless, education and other public services.

Biodiversity is nice but so are a job, financial security and access to social services. The role of government is to establish priorities and tradeoffs. The discussion on what Canadians must give up to save some or all endangered species has not yet begun. The federal government has a responsibility to lead this discussion, not just assume we all agree with the priorities of international agencies and environmental non-government organizations.
1-2 *We recommend that the Government of Canada provide and distribute a clear statement of SARA objectives, the true costs to all program shareholders, participants and beneficiaries, before proceeding with legislation.*

2.0 Definitions
2-1 Categories

The Committee on the Status of Endangered Wildlife in Canada (COSEWIC) categorizes species in seven groups:

extinct – no representatives exist;
extirpated – no longer exists in the wild in Canada but occurs elsewhere;
endangered – facing imminent extirpation or extinction;
threatened – likely to become endangered if limiting factors not reversed;
vulnerable – particularly sensitive to human activities or natural events;
indeterminate – cannot designate because of lack of scientific information; and
not at risk – has been evaluated and found not at risk.

.2-1 *"Extinct", "extirpated" and "not at risk" counts should be ignored at this time, in all planned legislation. The categories should be consistent with those in use by other national and international agencies.*

2-3 Estimates of Species At Risk

There are major differences of opinions as to the number of species in each category. See Table 2.

Table 2. Estimated Species At Risk

Category	COSEWIC	WWF	Fraser Institute
Year	**1999**	**2004**	**1999**
Endangered	87	292 and up	44
Threatened	75		37
Vulnerable	151	271	Not estimated
Total	313	563	81

Almost half of the COSEWIC and WWF listed species are vulnerable but not threatened. Since the WWF estimates are for the year 2004, one must question their relevance at this time. The results of the three very disparate estimates suggest a system which is more political than scientific.

The Fraser Institute proposes the removal from endangered and threatened lists all species which are:

a) only vulnerable;
b) really subspecies;
c) distinct or geographically defined populations;
d) multiple listings;
e) at the northern limit of their range but for which unthreatened populations exist in the United States.

2-2 *COSEWIC must develop better definitions and counts of species truly in need of action. We strongly endorse the position of the Fraser Institute that species at the limit of their northern range, if not threatened in the U.S., be removed. Subspecies which cannot be differentiated by DNA testing and geographic sub-groups should not be included on lists of species at risk.*

Habitat Designations

The Plan refers to Endangered Species Habitat and Critical Habitat.

2-3 *The differences in and implications of programs to protect these two types of habitat must be explained.*

3.0 Listing of Species

3-1 Over Listing

The members of COSEWIC are appointed by the Minister of the Environment after consultation with the Council (Provinces). We are concerned that biologists who have no financial stake in the process will err on the side of over-designating the number of species because it costs them nothing to do so. The areas designated on private property will therefore be inflated beyond those required to protect species at risk. Our concern is heightened by reports that advocacy groups wish to add hundreds of additional species to the species at risk lists.

3-1 *Rigorous guidelines and definitions must be developed and the Minister must carefully evaluate the reasons for and impacts of all designations.*

4.0 Response Statements

4-1 Identification of Agencies to Lead Recovery. We are concerned that environmental non-farm NGOs will be paid to lead recovery efforts. This is an abdication of responsibility and accountability by governments.

4-1 *We recommend only provincial or federal government agencies lead recovery efforts so accountability is maintained.*

5.0 Recovery Planning

5-1 Economic Factors . While the designation of species at risk is a biological process, the decision whether and how to prepare a recovery program must give consideration to economic factors. The protection of endangered species cannot be undertaken in economic isolation. Professors Shogren and Tschirhirt, point out in Choices (13), that human economic behaviour matters to species protection for at least three reasons. First, the risk faced by a species is influenced by the price of land because it determines the cost to landowners of setting aside areas for habitat. Second, scarcity of resources, both physical and financial is a reality.

The third is that economic incentives guide human behaviour. The availability of economic incentives and compensation for the taking of lands encourages preservation. If resources are not provided, landowners will not be motivated to protect species.

The mandate of the Committee on the Recovery of Nationally Endangered Wildlife (RENEW) (14) states as its first objective, "No endangered species in Canada will become extirpated or extinct." Such an objective is idealistic but there needs to be a realistic consideration of costs. We are concerned that expensive but futile efforts will be initiated to protect subspecies or species at the edge of their traditional range which are common in other countries. While benefits of intangible values are difficult to estimate, the relative advantages of saving different species can be compared and priorized. If adequate resources are not available to protect all species, economics provides a means of priorizing resources.

5-1a. *The decision to preserve a species must be considered in terms of costs and benefits.*

5-1b*. Recovery Planning must take into account the resources available.*

5-1c*. We recommend that Recovery Planning develop and utilize a triage system which allows designation of species at risk into three groups: 1) those for which any further action is futile either because recovery plans are unlikely to be successful or stable populations exist in other areas; 2) those which can be saved if immediate action is taken; and 3) those which require action but can be given lower priority. We assume that most "endangered and threatened" species fall into the second category and vulnerable species into the third category.*

5-2 Environmental Factors

In assessing the potential for the protection or re-establishment of species, basic changes in habitat must be considered. Changes in climate, urbanization, competition from more aggressive species and changes in land use and resource management practices alter the biological environment, and thus may hasten or encourage the extinction or extirpation of a species. Some of these factors and their impacts cannot be corrected at any, and others only at very substantial, costs.

5-2 *Both biological and economic reality dictate that winners and losers must be determined when developing recovery programs.*

5-3 Membership of Recovery Teams

The Recovery Teams and the Action Plan membership determines both the approaches taken and the success or failure of all activities. We are quite concerned that the Plan adequately involve the individuals and governments which own the habitat where species breed and feed. Farmers owned or leased 168 million acres in 1996. These lands are located in the southern areas of Canada which coincidentally is where the majority of species live. Very large areas of land are also owned or leased by rural residents, forestry operators, mining and petroleum companies. These individuals and firms are key to the successful protection of threatened species. The interests and concerns of these individuals and firms have not been adequately recognized in The Plan.

The issue of landowner's interests has been diffused by the use of the term stakeholders. While self-elected environmental groups have taken the mantle of "stakeholder" upon themselves, they actually have no financial investment in the environment. The primary problem faced by Canadian landowners is that they have no constitutional property rights, and the common law rights they *do* have can be legislated out of existence by either the provincial or federal governments without any notification or compensation. Landowners have no guarantee that their rights to use their lands will not be arbitrarily revoked. They are themselves an endangered species.

5-3a. *We recommend the federal and provincial governments recognize the primacy and needs of landowners and land users. Landowners want their privacy respected, their management efforts acknowledged, the ability to protect their investments and to receive fair compensation for all lost income and assets. Landowners must have the opportunity to participate in the Recovery Planning process.*

5-3b. *Landowners and users need: property rights legislation which protects the landowners' interests from further erosion; prior notification of all changes in land use designations; the opportunity to challenge new designations at no cost to the landowner; and compensation for all land which is taken or has its uses reduced.*

5-4 Design of Action Plans

The membership of the Action Planning groups identified in The Plan includes, but is not limited to, representatives of the resource sector, environmental organizations, aboriginal peoples, local communities, landowners, people with traditional or local knowledge of species conditions and others as appropriate. The ranking implicitly demonstrates the low priority given to landowners. The development and implementation of Recovery Strategies and Action Plans must not occur behind closed doors or at long distance from where the species exists.

5-4a. *In the establishment of Action Plans, priority be given to membership of owners or managers of the land on which the species resides.*

5-5 Designation of Endangered Habitat

No discussion has been seen in The Plan or other papers, of how endangered species habitat will be identified, by whom, using what criteria, or if landowners will be informed of such designations. The designation of endangered species habitat must be done on a limited basis by experienced government staff. The use of amateur bird watchers, who submit reports of endangered species while trespassing on private property, is not acceptable. Specific, publicly reviewed criteria are needed to establish regulations for endangered species areas. The existence of what is perceived to be appropriate or potential habitat should not alone result in a designation. Designations should be reviewed every five years and cancelled if a species is no longer present or at risk.

5-5a. *Criteria for designating species at risk habitat must be developed and publicly reviewed.*

5-5b. *All designations must be based upon recent sightings confirmed by a government wildlife biologist.*

5-5c. *The areas designated as habitat must be of minimum area required.*

5-5d. *All landowners must be notified before their property is designated endangered species habitat*

5-5e. *A process for designation removal must be readily available at no cost to the affected landowners.*

5-5f. *Compensation programs must be available for the landowners and users of designated properties .*

6.0 Recovery Implementation

6-1 Population Surveys and Monitoring

While species at risk must be monitored, we are concerned that over-monitoring by too many people, especially birders intent on extending their "life lists", are a threat to the species, the habitat and local landowners.

6-1 *We recommend that endangered habitats not be publicly identified and that access be strictly limited to a few key individuals who must inform landowners at all times of their desire to visit the targeted site.*

6-2 Habitat Enhancement Projects

Project implementation can best be achieved if landowners and users are part of the team. They have greater knowledge of the site than outsiders and their cooperation is essential if the plan is to be successful.

6-2 *We recommend affected landowners serve on teams that develop/implement action plans on their properties.*

6-3 Reintroduction of Species

Extirpated and severely endangered species are regularly reintroduced into what is believed to be appropriate habitat. The re-introduction of an endangered species may result in the designation of a new area as endangered habitat. Not only the property on which it is reintroduced but abutting properties may be so designated. The implications to adjoining and area landowners must be considered because the uses and market value of these lands will be reduced.

6-3a. *The re-introduction of species should only occur in rare cases involving unique species which are not simply at the limit of their range.*

6-3b. *Species must only be re-introduced on public lands or on the lands of willing private landowners who are told the implications of such re-introduction in advance.*

6-3c. *All landowners, whose properties are to be designated as Endangered Habitat, must be informed in advance and compensated in accordance with a prescribed schedule .*

7.0 Access To Private Lands

7-1 Trespass

In the Plan and all previous papers reviewed, we found no references to the concept of trespass. Most species at risk cannot be identified, recovery or action plans prepared or implemented without access to private lands. This omission has probably occurred because the Common Law principle of trespass is derived from the concept of ownership, an issue which still has not received adequate recognition. The entry of government employees and other individuals onto private lands must be resolved because many individuals could trespass on private lands and disrupt farm and other businesses during preservation activities. Trespass onto crop lands, orchards and livestock facilities is not only a threat to personal space but also a threat to the owner's livelihood. The advocates of preservation would be horrified if the public started walking into their backyards and to hold picnics, admire the flowers or count the birds

7-1a. *All persons entering private property must give notice and seek permission of the owner, user or manager.*

7-1b. *No further legislation shall be passed which reduces Common Law landowner protections against trespass.*

8.0 Critical Habitat

8-1 Definition

The term "critical habitat" is used in The Plan to refer to the total area, not just immediate lands or residences of a species, required for its survival. It may include hunting grounds, sheltered areas, nearby streams or other natural features. In the case of birds or large mammals, quite large areas could be so defined.

We are very concerned that the concept of critical habitat will be used to designate large areas of private property as endangered species habitat. Whole river basins or areas where migrating birds spend only a few days each year, may be so designated by environmentalists who have no financial investment in the lands involved.

8-1a. *Critical habitat must be defined as to minimum owned or leased areas necessary to species protection.*

8-1b. *The designation of critical habitat must be justified to the landowners, who must be informed of the intention to so designate their property, before any designation occurs.*

9.0 Compensation

9-1 Incentives vs. Compensation

Incentives are those rewards paid to landowners to change their farming or forestry practices to protect species at risk. Compensation is payment made to reimburse a landowner for income lost or foregone and for decrease in the market value of their property resulting from its designation as endangered species habitat. Incentives such as information and assistance, recognition awards and payments for works completed are very important but are not adequate. Landowners and lessees must be compensated for all losses both immediate and long term.

9-1 *Both incentives and compensation must be utilized to reimburse landowners.*

9-2 Reduction in Value of Property

The Plan does not recognize the reduction in market value of property caused by federal and/or provincial designations such as Endangered Species Habitat. Many woodlot and wetland owners will find they simply cannot harvest nor crop their own property. Denial of capital losses is especially serious if a substantial area is defined as "endangered species habitat". The cumulated losses in cropping are much less than the loss in property value when an affected farm or woodlot is offered for sale.

9-2a *Affected owners of designated lands must be compensated for both lost profits and capital losses.*

9-2b *If the market value of a property is reduced significantly, the owner should have the right to have it expropriated upon request. They would be paid fair market value for all properties designated, using standard expropriation procedures or paid compensation for the reduced value of the property on an annual basis as long as the land is designated.*

9-3 Compensation Principle

The Nova Scotia Endangered Species Act (15) is an example of an inadequate approach to compensation. Compensation may only be paid if a particular use of private lands is prohibited by the Act and the owner is actually making that particular use of the lands when the use is prohibited. "Any listing, designation, order, prohibition or other action will not be considered a taking or an injurious affection to a private property". This Act, in effect, purports to provide compensation, while in fact it severely restricts the circumstances under which compensation will be paid. This legislation, which violates and cancels common law principles, must not be used as a guide to federal legislation because it is misleading and condones expropriation without compensation.

The last Principle of the Compensation Principles, page 17 (1), that states "compensation should only be available where there is significant impact on the landowner and alternative acceptable users of land are not available" contradicts the first Principle of "fairness". The Plan statement that compensation will only be available in "rare cases" is accurate only if private land is seldom designated as "endangered" or "critical habitat". In some areas, substantial number of private properties may be impacted.

9-3a ***P****ayment of compensation based on "fairness" means preservation costs must be shared by all Canadians.*

9-3b *The government must accept the responsibility of compensating all landowners who suffer damages.*

9-3c *Compensation must not be limited to stewardship and other incentives.*

9-3d *Existing provincial legislation for assessing/calculating compensation or expropriation should be utilized.*

9-3e ***A****reas defined, loss of use, incidental damages, injurious affection and adverse effect to determine payment.*

9-3f *Where a portion of private property hosts a Recovery Plan, the remainder will be immune to the legislation.*

9-3g *Regulatory sanction i.e. charges of habitat destruction must only apply to lands covered by a Recovery Plan.*

9-3h *Community fund-raising should continue but government should fund habitat acquisition from willing sellers*

10.0 Compliance and Enforcement

10-1 Need

We accept that enforcement may be necessary in rare cases.

10-1 *We recommend that extremely onerous fines and jail terms not be legislated. They may make the legislation so draconian that it will be challenged and/or rejected as unfair by the public with the result that endangered species may be deliberately destroyed.*

10-2 Investigation

Enabling individuals to request an investigation of alleged offenses may get out of control and become a means of harassing landowners. This could become a diluted version of third party civil suits which are totally unacceptable.

10-2 *Any request for investigation must be open to the public and the initiator's name provided to the landowner.*

11.0 Dispute Resolution

11-1 Recognition of Rights

The avoidance and resolution of disputes are a challenge. The removal of civil suits is a major move toward this end. Three factors are important to landowners: fairness, promptness and minimizing costs. The disproportionate power of the state should not be used to delay or overwhelm landowners.

11-1 *The most effective way to reduce disputes is to enact legislation that recognizes the rights and damages experienced by landowners. Owners forced to litigate should be receive funding and the right to recover costs.*

11-2 Education of Landowners

Landowners will benefit from educational information regarding species at risk and means of protecting them. Such information should be provided by industry experts working with credible farm, rancher and forestry groups. Urban-based environmental NGOs, which call themselves non-profit charities but pay their staff high salaries and benefits, while amassing substantial real estate holdings, are not qualified to provide information to landowners.

11-2a *Educational and stewardship programs must be planned and implemented by credible, local farmer and forestry groups with a proven track record.*

11-2b *The role of environmental NGOs should be to raise funds to pay for credible Recovery Programs.*

References

(1) Environment Canada, Canada's Plan For Protecting Species At Risk: An Update , Dec. 1999.

(2) Bill C-65, An Act for Protection of Wildlife Species in Canada, House of Commons, Oct. 31, 1996.

(3) The Accord For The Protection of Species At Risk, Ottawa 1996.

(4) Alberta Land and Resource Partnership, Species At Risk Act, Position Statement, Calgary, Nov., 1999.

(5) World Wildlife Fund, News Release and Six Briefs, Ottawa, Nov. 22, 1999.

(6) Laura Jones, Crying Wolf, Public Policy on Endangered Species, the Fraser Institute, Oct., 1999.

(7) Bill 441, An Act for Protection of Wildlife Species in Canada, House of Commons, Oct. 8, 1998.

(8) Endangered Species Act, Government of United States, 1973.

(9) Smith, M. Danielle Endangered Species Protection, Property Rights Journal, Volume #1, 1997.

(10) The Environmental Protection Act, Parliament of Canada, 1999.

(11) Shogren and Tschirhirt, The Endangered Species Act at Twenty-Five, Choices, Third Quarter 1999,

(12 Renew, Canadian Wildlife Service, Report #9, 1998-1999.

(13) Bill No.65, Endangered Species Act, 1st Session, Nova Scotia Government, Dec.03, 1998