

# **SPECIES AT RISK**

## **COMMENTS ON THE PROPOSED NATIONAL APPROACH TO ENDANGERED SPECIES CONSERVATION**

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### **I. INTRODUCTION**

#### **WCELA AND THE B.C. ENDANGERED SPECIES COALITION**

West Coast Environmental Law Association acts as counsel to the B.C. Endangered Species Coalition, an umbrella group of environmental and naturalist organizations in B.C. who seek to improve the legal protection for endangered and vulnerable species in the province. A list of the member groups of the Coalition is attached to this submission.

The Coalition has four broad goals for improving legal protection for endangered species. These goals refer to a proposed provincial Endangered Species Act.

- 1. The Minister of Environment, Lands and Parks must have the power to grant protection to wild, native, endangered, threatened or vulnerable species.<sup>1</sup>**

The current provincial statute dealing with endangered and threatened species allows only non-fish, vertebrate species to be designated as "endangered" or "threatened". Plants, invertebrates and fish are *not* included in existing endangered or threatened species protection.

**2. The new endangered species law should automatically protect the habitat of endangered or threatened species.**

Destruction of habitat is probably the chief threat to most endangered or threatened species, and once a species has been designated, its habitat should receive automatic protection. The current B.C. law does not permit this to occur.

**3. Statutory reform should be implemented to ensure that all biologically endangered, threatened and vulnerable species receive designation through the advice of an Endangered Species Scientific Advisory Board. This Advisory Board would make public recommendations regarding the designation of species and of specific protected habitat zones, and also regarding legislative reform, policy reform, and other actions that the government can take to protect endangered, threatened and vulnerable species.**

All species that are truly endangered, threatened or vulnerable should be properly protected by law. Under the present B.C. *Wildlife Act*, the decision to designate a species as endangered or threatened is the absolute and confidential discretion of Cabinet. One way to encourage the government to make endangered species decisions based on the actual biological vulnerability of a species is to establish an Endangered Species Scientific Advisory Board. All decisions should be made public and subject to public scrutiny and debate.

**4. The provincial government should:**

- a. **devote sufficient resources both financial and human to endangered species recovery, protection of fish, wildlife and their habitats, and conservation of biological diversity;**
- b. **be bound, by law, to ensure that actions it authorizes, funds or carries out do not jeopardize the continued existence of any endangered, threatened or vulnerable species; and**
- c. **conduct a comprehensive review of its legislation and policy to determine ways in which biological diversity can be promoted.**

**2. THE PROPOSAL**

The federal government has released a discussion document outlining a proposed national approach to endangered species conservation at a national level. The document, *A National Approach to Endangered Species Conservation in Canada*, (the "National Approach") was prepared by a Committee of federal, provincial and territorial

wildlife officials. It has been presented for public comment and consultation. The comments that follow have been prepared in response to the discussion document.

### **3. ORGANIZATION OF COMMENTS**

This paper has been divided into sections commenting on the National Approach and providing other suggestions for addressing endangered species issues. The paper begins with a statement of support for the work of the Canadian Endangered Species Coalition. This is followed by a discussion of a critical problem: the proposed legislation gives too much discretion to each jurisdiction. The issues of species loss in B.C. and deficiencies with the current B.C. *Wildlife Act* are then presented and are followed by a discussion of the listing process, response actions, habitat management, the need for a strong federal role, legislation and other ways to improve endangered species conservation in Canada.

## **II. COMMENTS**

### **1. SUPPORT FOR THE INITIATIVE**

West Coast Environmental Law supports the work of the Canadian Endangered Species Coalition, and agrees with its submission titled *Recommendations for Federal Endangered Species Legislation*, May 1, 1995. This submission will concentrate on suggestions for improving B.C.'s endangered species laws.

### **2. PROPOSAL PROVIDES TOO MUCH DISCRETION**

The main defect of the proposed approach is that it leaves too much to the discretion of each jurisdiction. The suggested "agreed set of minimum legislative and regulatory response capabilities" for all jurisdictions (p.7) should include **mandatory** listing of species at risk, **mandatory** prohibitions against killing or harming listed species, and **mandatory** protection of critical habitat of these species.

### **3. SPECIES LOSS IN B.C.**

British Columbia is Canada's most biologically diverse province, and has the most species of wildlife of any province.<sup>2</sup> A recent survey<sup>3</sup> of the state of biodiversity in B.C. included articles from leading scientists working in universities, government agencies and museums. The decline in biodiversity these authors found is alarming. At least 50 species of invertebrates, 15 species of benthic marine algae, 5 amphibians, 26 fish, 63 bryophytes, 124 vascular plants and several bird species are threatened and endangered and many more are rare and vulnerable. Further, at least 23 species and subspecies have already become extinct or been extirpated from the province, although 3 have since been reintroduced. Authorities recommend these losses be addressed through urgent action, including expanding the scope and application of endangered species legislation.

A strong endangered species law in B.C. would protect wildlife at risk from habitat loss due to resource development, urbanization and pollution. The report of the

B.C./Washington Marine Science Panel recently identified habitat loss as one of the region's most important environmental problems.<sup>4</sup> Wetlands provide critical habitat, particularly for birds, and since about three-quarters of the total number of bird species in Canada make their home or breed in B.C., it is crucial to protect wetland habitat.<sup>5</sup> Yet B.C. has no formal wetlands protection policy. Major developments are threatening the health of invaluable foreshore and estuary areas. Boundary Bay, a world renowned site for migratory waterfowl, is currently the site of a major proposed development of condominiums, marinas and golf courses. Fish are particularly at risk in the Columbia River Basin. As one expert notes, "only a few vestiges of natural, large river habitat remain in the main stem of the Columbia River," making conservation of some species of fish in the basin a concern.<sup>6</sup> The collapse of the West Coast salmon fishery is of enormous concern, yet the recent federal inquiry into the astounding losses experienced this past fishing season could not explain why it happened.

#### **4. DEFICIENCIES WITH CURRENT B.C. WILDLIFE ACT**

The current B.C. *Wildlife Act* is deficient in its ability to protect species in a number of respects.

##### **Restricted Definition of Species**

The definition of wildlife under the Act is limited to "raptors, threatened species, endangered species, game or other species of vertebrates prescribed as wildlife" and does not include plants, invertebrates and fish. The scope of a new provincial endangered species act must be expanded to include all taxonomic groups, as proposed in the National Approach.

##### **Information in Different Places**

Including all information about endangered species in the province in one place would be useful. Different jurisdictional responsibilities now mean this information is fragmented. Fish and marine mammals (other than the sea otter) are not included in the provincial Red and Blue Lists (described below). The province does not list these because by agreement all marine vertebrates other than the sea otter are managed by the federal government.<sup>7</sup> The right whale is officially designated as endangered on the International Whaling Commission list. The public wishing to find out about the full range of endangered species in B.C. must look to a variety of sources, some not easy to find. This situation could easily be remedied.

##### **Discretionary Nature of Designation Procedure**

Species continue to decline under B.C.'s current voluntary approach to endangered species protection. The number of endangered species in B.C. rose between 1991 and 1993 from 107 to 151 of known species.<sup>8</sup> Section 6 of the *Act* says the Lieutenant Governor in Council *may* designate a species at risk and section 7 also uses the discretionary word *may* to refer to the power to designate land as habitat for endangered or threatened species.

The current provincial law has rarely been used to designate species, and has only been used once to protect critical habitat. Since 1980, only four species have been designated: the Vancouver Island marmot, the sea otter, the burrowing owl, and the American white pelican. These species were all designated in 1980 and remain the only species to have received legal designation in the province.

The province also prepares Red and Blue Lists of terrestrial vertebrates to help decide on priorities for conservation. The Blue List is for species that are vulnerable or "at risk" and contained 87 taxa as of April 1993. The Red List species are endangered or threatened, or, are under consideration for that status. As of April 1993, the Wildlife Branch had listed 64 taxa on the Red List. When a species has been put on the Red List, it becomes a candidate for legal designation under the Act, and the Wildlife Branch is supposed to prepare a brief for Cabinet to decide if an Order in Council should be issued designating the species. However, that step has never been taken; no species on the Red List has ever been "uplisted" to legal designation under the Act.<sup>9</sup> The Wildlife Branch explains that it focuses on compiling the Red and Blue Lists rather than on asking the government to use its designation power because it is necessary to compile information on the species before working on new administrative and legislative initiatives.<sup>10</sup> In addition, employees of the Wildlife Branch believe that their efforts are put to better use in information gathering and conservation planning since the current Act offers such little protection when a species receives legal designation.<sup>11</sup>

### **Habitat protection powers not used enough**

If the facts about how often the legal designation power has been used compared to the number of endangered species in B.C. are disheartening, the situation with respect to the use of the current law's *habitat* protection powers is even worse. The power to designate critical habitat for an endangered species has only been used once, for the Vancouver Island marmot. The Ministry of Environment, Lands and Parks's power to protect habitat has been described as generally ineffective.

Habitat loss is the single most important factor affecting species loss in B.C.<sup>12</sup> Yet, the Ministry of Environment, Lands and Parks (MELP) does not control most of the habitat on which species depend. MELP controls Crown lands which have been designated as Wildlife Management Areas or Critical Wildlife Areas. The province currently has designated 11 Wildlife Management Areas, but these amount to only 0.02% of the province's area.<sup>13</sup> Most provincial Crown land is managed by the Ministry of Forests for timber production, wildlife and recreation. There is a new B.C. *Forest Practices Code*, but it does not require protection of endangered and threatened species, and offers even weaker protection than the *Wildlife Act*.<sup>14</sup>

A new provincial endangered species law would redress the imbalance between forest management and habitat protection. Under B.C.'s *Forest Practices Code*, timber companies and the Forest Service (rather than conservation officers or other employees of MELP) will be largely responsible for addressing threatened and endangered species. The Forest Service managers will maintain a veto over designations of sensitive areas for specified wildlife. In some cases, MELP staff will jointly make habitat decisions with

Forest Service staff. Providing a legal mechanism to protect critical habitat is necessary to ensure that endangered species are not sacrificed for continued forest operations. The endangered Vancouver Island marmot, for example, is affected by high elevation logging, although the evidence is not clear on exactly what effect the logging has on marmot populations.<sup>15</sup> It is also important to note that fish habitat is affected by logging, a causal factor in reducing salmon populations. Spawning areas are often degraded by materials from logging roads and areas. A recent study which examined the affects of logging on salmon streams in selected cut blocks on Vancouver Island found that 64.2% of streams studied were affected to some degree and 35.3% suffered complete habitat loss.<sup>16</sup> Clearly, protection of endangered species in B.C. requires not only a new provincial endangered species law, but also improved habitat protection in forest planning and practices.

## **5. Listing process**

### **Scientific input**

Federally, we recommend that the COSEWIC listing process be retained, but that it be given legal force. Provincially, a new body called the Endangered Species Scientific Advisory Board should be created. As advocated by the B.C. Endangered Species Coalition, this Board would make public recommendations regarding the designation of species and of specific protected habitat zones. Establishing a new body with an easily understood name would raise the public profile of the issue in the province and would help the public understand the scientific justification behind a listing decision.

### **Subspecies and Populations**

The National Approach suggests that only *species* – not subspecies or populations – be considered as candidates for the national endangered species list. This is not acceptable. To maintain biological diversity, subspecies and geographically isolated populations must also be protected. The province of B.C. does include subspecies on its Red and Blue Lists, and this should be the approach taken by a national system.

### **Public Participation**

The proposed National Approach calls for endangered species conservation initiatives to "include all major partners" (page 7). We recommend that the public (an an integral major partner) be given the right under new federal and provincial legislation to request that a species be listed. The request would have to be investigated by the proposed B.C. Endangered Species Scientific Advisory Board, and/or COSEWIC, and the reasons for any decision would be communicated to the member of the public who initiated the investigation.

### **Preventative Approach**

Use of the international IUCN criteria for categories of risk is acceptable, if the current "vulnerable" category used by COSEWIC is maintained. 'An ounce of prevention is

worth a pound of cure', and gathering scientific information on species at risk before they reach the critical endangered stage is a crucial step towards achieving the main goal of a new national policy: preventing any species from becoming extinct due to human activities.

## **6. RESPONSE ACTIONS**

### **Mandatory Habitat Protection**

Once a species has been listed, the critical habitat for that species must be identified and preserved. The U.S. *Endangered Species Act* provides for the concurrent protection of species *and* their critical habitat, recognizing the interdependency of the relationship. That Act attempts to balance the competing interests in a decision to designate critical habitat: an area may be excluded from the habitat if the economic costs exceed the benefits. This exclusion must not occur, however, if the "best scientific and commercial data available" shows that failure to designate will result in the extinction of that species.<sup>17</sup> The American Act also prohibits federal agency actions which would result in the destruction or modification of critical habitat. Although these provisions have been controversial, they are necessary in order to guard against extinction of species. As stated above, our view is that both federal and provincial endangered species laws must include *mandatory* provisions for the designation of critical habitat if they are to be effective in species protection.

### **Habitat Conservation Plans**

In the U.S., conflicts over habitat designation are increasingly being resolved through the use of habitat conservation plans, which encompass a range of long-term enhancement or protection measures. We recommend that new federal and provincial endangered species laws include provisions for habitat conservation plans to lessen the conflicts frequently associated with endangered species.

### **Recovery Plans**

We strongly recommend that endangered species laws require the preparation of recovery plans for all listed species. COSEWIC or the proposed B.C. Endangered Species Scientific Advisory Board should make decisions about which species should receive priority in the recovery process. These bodies could issue priority guidelines, which could give priority, for example, to keystone and indicator species, on the basis of taxonomic uniqueness or based on the degree of threat faced by the species or, on the symbolic value of the species.<sup>18</sup>

## **7. HABITAT MANAGEMENT**

We recommend that both federal and provincial laws protect the critical habitat of endangered species, regardless of the location of the habitat.

In addition, however, habitat should be managed for ecosystem protection even when endangered species are not present. Taking a preventative approach to ecosystem management means less resources will have to be devoted to endangered species in the future. A positive step in this direction in B.C. is the land use planning done by the Commission on Resources and the Environment.

More work needs to be done to improve habitat management in B.C. The protected areas system will preserve representative portions of all British Columbia's ecosystems, but it must be completed. Both the federal and provincial governments could collaborate on coastal management programs to focus on the rampant development that threatens marine ecosystems. Treaty negotiations with First Nations should take account of ecosystem management. Municipal governments also have a much greater role to play in controlling development in ecologically sensitive areas.

## **8. STRONG FEDERAL ROLE**

The threatened extinction of a species is a matter of concern to all Canadians and is consequently a matter of national concern. This is important, because it is a key constitutional basis for the federal government to legislate in this area.

## **9. LEGISLATION**

We suggest the essential elements of endangered species laws are found on page 20 of the government's discussion document, with the important caveat that the legislation must be mandatory. All jurisdictions should:

- list species at risk through a scientific process;
- prohibit harming, killing, trafficking or disturbing of the species;
- identify the critical habitat needs of the species;
- prohibit destruction of or modification to that habitat;
- prepare recovery plans for the species;
- be bound, by law, to ensure that actions it authorizes, funds or carries out do not jeopardize the continued existence of any endangered, threatened or vulnerable species; and
- conduct a comprehensive review of its legislation and policy to determine ways in which biological diversity can be promoted.

## **10. OTHER WAYS TO IMPROVE ENDANGERED SPECIES CONSERVATION IN CANADA**

### **Resources**

More resources must be devoted to species protection and conservation of biological diversity than is currently the case. Conservation of nature is inherently valuable. As noted biologist E.O. Wilson has said, "allowing species to go extinct is the one sin our children will not be able to forgive us." Species loss is irreversible.



A more selfish reason to devote more money to this endeavour is the enormous *benefits* that humans derive from nature, including economic benefits. In 1991, 18.9 million Canadians (90.2% of the population) took part in one or more wildlife related activities, devoting \$5.6 billion to these activities.<sup>19</sup> Tourism is one of B.C.'s biggest economic sectors, and the province's natural beauty and abundance of wildlife are reasons why tourists continue to come here in droves.

### **Conservation Data Centres**

The Conservation Data Centre in Victoria, B.C., has played a critical role in compiling information on rare species, population distribution and population loss in the province. A national policy should promote the establishment of similar Centres in all jurisdictions in Canada.

### **International Initiative**

Canada should also continue its lead role in promoting biodiversity conservation worldwide. Canadians are proud of our international reputation in this respect. We should practice what we preach, and ensure that our own laws and policies stand as models for adoption by other countries.

## **III. CONCLUSION**

West Coast Environmental Law appreciates the opportunity to present the foregoing comments for consideration in the formulation of a national approach to endangered species conservation. We look forward to participating in the consultation workshops.

We would like to reiterate our strong support for this important initiative. We hope that the necessary steps will be taken to ensure that Canada has an effective system for the protection of endangered species and their habitats.

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## **ENDNOTES**

**1.** Species includes vertebrates, invertebrates, plants and tractable representatives of fungi, monerans and protists.

**2.** State of the Environment Report for British Columbia, B.C. Environment, 1993, at 53.

**3.** Lee Harding, "Conclusions and Recommendations" in Biodiversity in British Columbia, Environment Canada, Canadian Wildlife Service, 1994, at 421.

4. British Columbia/Washington marine Science panel, The Shared Marine Waters of British Columbia and Washington, 1994.
5. Richard Cannings, "Threatened and Endangered Birds in British Columbia" in Biodiversity in British Columbia, Environment Canada, Canadian Wildlife Service, 1994, at 153.
6. Alex Peden, "Threats to Fish Diversity in the Fresh Waters of British Columbia" in Biodiversity in British Columbia.
7. W.T. Munro, "Criteria for the Designation of Endangered and Threatened Species under the B.C. Wildlife Act", vol.9, no.3, Bioline, at 14.
8. Bill Harper et al, "Terms of Endangerment" in Biodiversity in British Columbia, Environment Canada, Canadian Wildlife Service, 1994, at 16.
9. David Nagorsen, "Endangered Mammals in British Columbia" in Biodiversity in British Columbia, Environment Canada, Canadian Wildlife Service, 1994, at 143.
10. Ray Halladay, "Provincial Government Endangered Species Legislation" in Community Action for Endangered Species, FBCN and NWPS, 1991 at 230.
11. Personal Communication with Wildlife Branch, May 9, 1995.
12. State of the Environment Report for British Columbia, B.C. Environment, 1993, at 55.
13. Colin Rankin, Legislation for Biological Diversity: A Review of British Columbia Statutes, 1991, unpublished, citing BC Ministry of Parks, Technical Background Draft System Plan, Draft Working Paper, Jan. 1991, at 11.
14. Mark Haddock, "Threatened and Endangered Species and the Forest Practices Code", October 1994, unpublished.
15. Nagorsen, op cit. at footnote 9.
16. Tripp, A., Nixon & Dunlop, R. The Application and Effectiveness of the Coastal Fisheries Guidelines in Selected Cut Blocks on Vancouver Island. Victoria: Ministry of Environment, Land and Parks Fish and Wildlife Division, 1992.
17. Section 4, Endangered Species Act of 1973 (16 U.S.C. 1533 (2))
18. Keystone species are those whose protection can maintain an entire community and whose loss can disrupt the entire community, while indicator species are those whose health parallels that of the ecosystem: Holly Doremus, Patching the Ark; Improving Legal Protection of Biological Diversity, (1991) vol. 18 Ecology Law Quarterly 265 at 330.

[19.](#) Environment Canada, Canadian Wildlife Service. The importance of wildlife to Canadians: Highlights of the 1991 Survey, 1.