Saving the Northern Spotted Owl

The Northern Spotted Owl (*Strix occidentalis caurina*) is one of three Spotted Owl sub-species in North America and among the most well known and most studied bird species in the world. In Canada, the Northern Spotted Owl (Spotted Owl) is found only in southwest British Columbia and was listed as endangered by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) in 1986. The BC Spotted Owl population was estimated to be 500 breeding pairs prior to European settlement. In 1991, the population was less than 100 breeding pairs. By 2006, the BC government announced that 22 Spotted Owls remained, including only 6 breeding pairs.

The most important factor in the decline of B.C.’s Spotted Owl population is logging activity in old-growth forests. Spotted Owls are dependent on old-growth forest for habitat, nesting sites, and prey. Spotted Owl conservation has been highly controversial in both Canada and the United States due to the high economic value of timber associated with Spotted Owl habitat.

Old-growth Forest and the Northern Spotted Owl

The Northern Spotted Owl relies on old-growth forests to survive and reproduce. Although there is evidence that Spotted Owls may forage in secondary growth forests, forest age and successful reproduction are positively correlated. For example, a study in western Oregon found 95% of paired owls in undisturbed old-growth. Another study found 84% of the nest trees used by Spotted Owls were over 300 years old. In British Columbia, Spotted Owls have been shown to

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4 Blackburn, supra note 2 at 2.
7 Western Canada Wilderness Committee. *Logging to Extinction: The Last Stand of the Spotted Owl in Canada*. Western Canada Wilderness Committee (Vancouver: 2002) at 16. [WCWC]
8 Kirk, supra note 2 at 6-7.
9 William S. LaHaye, and R.J. Gutierrez. “Nest sites and nesting habitat of the Northern Spotted Owl in Northwestern California” (1999) 101 The Condor 324. [LaHaye]
10 WCWC, supra note 7 at 13.
12 LaHaye, supra note 9.
prefer stands with the most complex canopy cover and widest range of coarse woody debris classes – characteristics generally found in stands over 140 years old.\textsuperscript{13}

Old-growth habitat is important to Spotted Owls for several reasons. It provides nesting sites, home ranges, feeding activities, and predator avoidance. Spotted Owls are not nest builders and thus rely on broken trees crowns and tree cavities for nesting sites.\textsuperscript{14} Nesting habitat is particularly important to this sub-species as they are slow to reproduce, with monogamous breeding pairs rarely breeding every year and small clutch sizes of one or two young.\textsuperscript{15} They also occupy large home ranges of 2,675 to 3,321 hectares and require undisturbed forest habitat within these ranges.\textsuperscript{16} More importantly, juvenile Spotted Owls require large, undisturbed ranges when they leave the nest and attempt to find and establish their own territory. Juvenile owls have the highest risk of mortality, with only 15-29\% reaching independence.\textsuperscript{17} The rate of mortality increases in fragmented areas as they face an increased risk of predation and are not as successful hunting.\textsuperscript{18}

Spotted Owls also depend upon old-growth forests for their most important food source, the flying squirrel.\textsuperscript{19} Flying squirrels are also strongly associated with old-growth habitat as they depend on an ectomycorrhizal fungi found in Douglas-fir stands.\textsuperscript{20} Spotted Owls use a “sit and wait” hunting technique that requires suitable perches to wait on, as well as open forest understory.\textsuperscript{21}

**Habitat Loss and Fragmentation**

In BC, the single greatest threat to the Spotted Owl habitat is commercial logging.\textsuperscript{22} Since the 1940s, over 80\% of suitable Spotted Owl habitat has been lost as a result of logging practices.\textsuperscript{23} By 1995, less than 30\% of historic Spotted Owl habitat remained and commercial logging has

\textsuperscript{13} Kirk, supra note 2 at 6.

\textsuperscript{14} WCWC, supra note 7 at 13.


\textsuperscript{16} Kirk, supra note 2 at 7-8: habitat requirements have yet to be estimated in BC, and these numbers are based on the habitat requirements of Northern Spotted Owls in Washington State. Kirk also notes that as range size of Northern Spotted Owls tend to increase with increasing latitudes, these numbers may actually be an underestimate for British Columbia.


\textsuperscript{18} Ibid.

\textsuperscript{19} Kirk, supra note 2 at 6.

\textsuperscript{20} Ibid.

\textsuperscript{21} WCWC, supra note 7 at 14.

\textsuperscript{22} Ibid. at 16.

\textsuperscript{23} Ibid. at 17.
since continued in these areas. Each year, approximately 3,000 hectares of suitable habitat is logged within the British Columbian range of the Spotted Owl.

Logging affects Spotted Owl populations by reducing habitat and altering the structure and composition of the forests they depend on. Logging also isolates individual pairs, increasing the risk of genetic and demographic stochasticity in an already small population.

Increased habitat fragmentation can also indirectly influence Spotted Owl survival. Spotted Owls have a number of predators, with Great Horned Owls being the most common. As Great Horned Owls are associated with open areas and increased fragmentation, logging in old-growth forests makes the Spotted Owl more susceptible to predation.

**Spotted Owl meets Barred Owl**

The Barred Owl (*S. varia*), a close relative of the Northern Spotted Owl associated with younger, more open forests, has historically occupied eastern North America, but has expanded its range westward across central Canada then southward into the three western coastal U.S. states. A variety of hypotheses have been proposed to explain this range expansion, including climate change and forest management practices, but none have been proven as of yet. Nonetheless, the ranges of these two species now overlap considerably, and the more aggressive Barred Owl has displaced and out-competed Spotted Owls for nesting habitat. Scientists believe that if the two species fail to reach some sort of equilibrium, Barred Owls may eventually displace Spotted Owls entirely.

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26 Kirk, supra note 2 at 8.
27 Ibid. at 7-8.
29 Kirk, supra note 2 at 9.
30 Ibid.
31 WCWC, supra note 7 at 13.
35 Kelly, supra note 34; Also see: Eric D. Forsman, Stephen DeStefano, Martin G. Raphael and R.J. Gutierrez (editors) *Demography of the Northern Spotted Owl.* (1996) 17 Studies In Avian Biology 1.
36 Ibid. at 16.
37 Kelly, supra note 34 at 52.
Equally concerning is that Spotted Owls and Barred Owls can mate and produce viable hybrid offspring. Hybridization and associated gene flow can result in reduced fitness and lowered genetic variability. Because hybridization may occur between a threatened and healthy species, hybridization can interfere with the conservation status and legal protection of species at risk. At present, the frequency of hybridization between the two owl species is unknown, but at least 50 hybrid individuals have been identified in BC and the Pacific Northwest. The fitness consequences of hybridization have not been examined, but such interspecies mating should be considered a threat to Northern Spotted Owls.

Legislation

British Columbia lacks specific species at risk legislation. Instead, the Spotted Owl is currently afforded protection under two existing provincial statutes – the Wildlife Act and the Forest and Range Practices Act.

The Spotted Owl is protected by Section 34 of the Wildlife Act, which prohibits the taking of eggs, or the destruction of nestlings, or nesting adults. This protection is not specific to endangered or threatened species. The Spotted Owl is also on the provincial Red List, meaning that it has been designated "endangered" under Section 6 of the Wildlife Act. In addition, sections 3 to 5 of the Wildlife Act provide that the Minister of Environment may acquire land, and/or timber rights, for the purposes of managing or protecting a wildlife species.


Ibid, Haig at 1348.

Ibid.

Ibid.


Wildlife Act, supra note 45 at s. 34. Note that the nest of a Spotted Owl is only protected while the nest is occupied.

Wildlife Act, supra note 45 at s. 6.

Ibid. at ss. 3-5.
Prior to 2002, the *Forest Practices Code Act* was responsible for management of the Spotted Owl. By designating the Spotted Owl as a "forest resource," the *Forest Practices Code Act* mandated that a logging company’s forest development plans only be approved if they adequately manage and conserve all forest resources in the area. Whether a given forest development plan is "adequate" with regard to Spotted Owl conservation was subject to a lengthy court challenge. But in 2002, the BC government overhauled BC forest practices by enacting the *Forest and Range Practices Act*, as a replacement for the *Forest Practices Code Act*. In 2002, BC enacted the *Forest and Range Practices Act*, replacing the FPCA. The Forest and Range Practices Act ("FRPA") is less prescriptive than the prior legislation, with most wildlife-related provisions being only discretionary in nature. The *Forest and Range Practices Act Regulations* also seems to discourage the Minister of Environment from curtailing logging to protect Spotted Owls, as it provides that any such orders must not unduly reduce the British Columbia’s timber supply.

The federal *Species at Risk Act* ("SARA") mandates legal protection for endangered species, but only for species that are on federal land, are aquatic organisms, or covered by the federal *Migratory Birds Convention Act 1994*. As only one percent of BC land is federally owned, SARA affords little protection for the Spotted Owl. SARA allows the federal government to intervene and protect endangered species, and their "critical habitat," when provincial conservation actions are deemed inadequate, but the federal government has declined to use this discretionary power thus far.

**The BC Spotted Owl Management Plan**

In 1990, the BC government established the Spotted Owl Recovery Team ("SORT") at the request of the Committee for the Recovery of Nationally Endangered Wildlife. SORT’s mandate was to develop a Spotted Owl recovery plan. In 1993, BC revised SORT’s mandate, requesting that it prepare a "management options report" instead of a national recovery plan. The resulting report included six options that ranged in their degree of protection, but SORT indicated that only three of these options were ecologically acceptable. In 1995, the BC government rejected all six of SORT’s management options and approached the Ministry of Forests and the Ministry of Environment, Lands and Parks to develop a new management plan with the goal of achieving "a reasonable level of probability that owl populations will stabilize, and possibly improve, over the long term without significant short-term impacts on timber supply and forestry

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49 Ibid. at s. 41.
51 Ibid.
52 Ibid. at s. 149.1; Government Actions BC Reg 582/2004 section 2.
53 *Species at Risk Act*, S.C. 2002, c. 29. [SARA]
55 WCWC, supra note 7 at 25.
56 SARA, supra note 56 at ss. 35, 61.
employment." This resulted in the institution in 1997 of the Spotted Owl Management Plan, or "SOMP."

The SOMP involves managing 363,000 hectares of land for the Spotted Owl. 159,000 hectares is drawn from new and existing protected areas (mostly parks) and 204,000 hectares are maintained within a system of Special Resource Management Zones ("SRMZs"). The primary goal of SRMZs is to integrate spotted owl and forest management by simultaneously considering environmental, social, and economic concerns. SRMZs are managed such that a minimum of 67% of each SRMZ will always be suitable as Spotted Owl habitat. The B.C. government claims that this strategy would "create, enhance and maintain" Spotted Owl habitat over the long-term. The SOMP also encourages the use of silvicultural techniques such as commercial thinning in young forests (60-100 years) and partial harvesting in mature forests (100-140 years) in order to accelerate the development of suitable Spotted Owl habitat within the SRMZs.

In addition, the SOMP provides for "Matrix Activity Centres" for owls found outside of the SMRZs before June 1, 1995. Matrix Activity Centres are to be harvested "in a manner that attempts to maintain Spotted Owls for as long as possible." Eight 3,200-hectare Matrix Activity Centres were established and continue to be managed to maintain 67% suitable owl habitat. Matrix Activity Centres will be phased out (harvested) over 50 years to offset the timber supply and forestry employment impacts. The SOMP predicts that the phasing out of Matrix Activity Centres would have minimal impact on the Spotted Owl population since the rate of phase out would approximate the rate at which suitable habitat would be restored within the SRMZs. In reality, harvesting within Matrix Activity Centres occurs in a circular fashion, spiraling towards central Spotted Owl habitat.

As the SOMP was clearly a compromise among conservation, economic and social concerns, Spotted Owl populations continued to face significant risks. Recognizing these risks, the SOMP predicted that Spotted Owl populations would continue to decline during the 20 to 30 years after SOMP implementation as a result of continued timber harvest. Furthermore, the SOMP predicted that these efforts would only provide Spotted Owl populations with a 60% chance of

57 Ministry of Sustainable Resource Management. Spotted Owl Management Plan. Government of British Columbia (British Columbia, Canada: 1997) 58 Ibid. 59 SOMP, supra note 25. 60 Ibid. 61 Ibid. 62 Ibid. 63 Ibid. 64 Ibid. 65 SOMP, supra note 25. 66 Ibid. 67 Ibid. 68 WCWC, supra note 7 at 27. 69 SOMP, supra note 25.
stabilizing over the long-term. The Ministry of the Environment admits that the compromises within the SOMP led to a plan that may or may not save the Spotted Owl.

SOMP drew immediate criticism from scientists and environmentalists. SORT’s biologists were unsatisfied with SOMP conservation initiatives, leading to their refusal to endorse the plan. The SOMP also relied on unproven presumptions that silvicultural techniques could turn young forests into suitable Spotted Owl habitat. Also, the SOMP presumed that Spotted Owls would automatically relocate to other territories once their habitat is at risk.

Court Battles

Despite the SORT, Spotted Owl numbers have continued to decline, producing legal challenges. In June 2001, Western Canada Wilderness Committee (“WCWC”) filed a petition for judicial review of a Ministry of Forests District Manager’s decision to grant approval of a Forest Development Plan (“FDP”) submitted by Cattermole Timber. The petition alleged that the District Manager approved the FDP without receiving and considering necessary information regarding spotted owl habitat in the areas from the then Ministry of Environment, Lands and Parks. In the interim, WCWC was granted an injunction against continued logging. A month later, Mr. Justice Henderson ordered that a different decision-maker be appointed to reconsider the FDP, solely with respect to adequately managing Spotted Owls as a forest resource with respect to s. 41(1)(b) of the then Forest Practices Code Act (“FPCA”). This new decision-maker, Cindy Stern, found that Cattermole’s FDP would adequately manage and conserve the forest resources in the area. The BC Supreme Court upheld this decision.

WCWC appealed this decision to the BC Court of Appeal. WCWC argued, focusing on one cutblock in particular, that both the decision-maker and the chambers judge erred in their interpretation and application of s. 41(1)(b) of the Forest Practices Code Act as it relates to the Spotted Owl, and that the chambers judge erred in according too much deference to the Stern’s decision. The Court of Appeal upheld the Supreme Court decision, finding that Stern applied the FPCA correctly, and that her findings of fact were not "patently unreasonable," the standard of review applicable to administrative findings of fact.

In 2004, Sierra Legal Defence Fund and several other environmental groups petitioned the federal government to invoke the "safety net" provisions of SARA, the provisions that allow the federal Minister of the Environment to intervene if the province is failing to protect species at

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70 Ibid.
71 Ibid.
72 WCWC, supra note 7 at 26-27.
73 WCWC, supra note 7 at 28.
74 The Matrix Activity Circles are based on the concept that owls will move to neighbouring territory as their habitat is destroyed.
Then-federal Environment Minister David Anderson wrote BC Premier Gordon Campbell and warned that he could not avoid invoking SARA’s emergency provisions if circumstances warranted. However, in 2005, Anderson’s successor, Stephane Dion, stated that the federal government would wait until the provincial government implemented a recovery strategy. Sierra Legal responded by filing an application to federal court for judicial review of the Minister’s failure to exercise his statutory duty to recommend emergency protection of the Spotted Owl pursuant to s. 80(2) of SARA. After a federal election and change in government, in August 2006, the new federal Environment Minister Rona Ambrose formally responded to Sierra Legal’s Petition. Although the BC government had recently announced that only 22 Spotted Owls remain, Minister Ambrose stated that she had “formed the opinion that the Northern Spotted Owl does not currently face imminent threats to its survival or recovery.” Sierra Legal filed another application for judicial review of Ambrose’s refusal, but dropped the application in June 2007.

Interestingly, two of the ten most active logging companies within the range of the Spotted Owl, International Forest Products (Interfor) and Canadian Forest Products (Canfor), announced that they would discontinue logging in Spotted Owl habitat. A spokesman for Interfor stated, "New scientific information makes it appear that the problem is worse than everyone thought, and we do not really want to be in the eye of the storm over this. Loggers care about the spotted owl, too."

What Next?

In April 2006, the BC government announced that it was initiating a $3.4-million, five-year action plan to recover the Spotted Owl. The province made a number of commitments, one of which was to focus on captive breeding and release. BC has now taken steps to initiate the world’s first Spotted Owl captive breeding program – three Spotted Owls were moved to wildlife refuge facilities in 2007. Sierra Legal Defence Fund has accused the BC government of failing to protect critical habitat and relying on a captive breeding program to avoid the embarrassment

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77 E.g., s. 34 of SARA.
78 Western Canada Wilderness Committee. In Defence of Canada’s Spotted Owl Western Canada Wilderness Committee (Vancouver: 2005) at 25. [WCWC 2]
79 Ibid.
80 Copies of this application can be obtained online:
81 Then Environment Minister Rona Ambrose’s response to the petitioners can be viewed online:
http://www.sierralegal.org/m_archive/spotted_owl_letter_aug06.pdf
82 Larry Pynn, “Government doesn’t seem to give a hoot” The Vancouver Sun (23 July 2007) B2. [Hoot]
84 Ibid. Mickleburgh
86 Ibid.
87 Catherine Rolfsen “Endangered owls captured for breeding” The Vancouver Sun (8 August 2007) A1.
of having the Spotted Owl population die-out prior to the 2010 Olympics. Conservation groups and biologists have objected to the captive breeding program, arguing that there is little point to breeding Spotted Owls for release if inadequate habitat remains in the wild.

The U.S. Experience

The U.S. Experience is highly relevant because SARA was drafted and passed with much awareness of how endangered species regulation has fared in the U.S. Much of what is and is not in the Species At Risk Act is a conscious inclusion or omission of what is in the Endangered Species Act, (ESA) the U.S. legislation and the first of its kind in the world. Northern Spotted Owl populations in the U.S. have also declined considerably, despite the stringent prohibitions of the ESA.

Northern Spotted Owl conservation has taken a markedly more litigious path in the United States. The following is an abbreviated history of the Spotted Owl controversy in the U.S.:

- 1950: only 10-15% of historic old-growth forest remain and almost exclusively on public lands managed by two federal agencies, the U.S. Forest Service (USFS) and the Bureau of Land Management (BLM).
- 1973: the Endangered Species Act is passed by both the House of Representatives and the Senate (by a 98-0 vote in the U.S. Senate), and signed into law by President Richard Nixon.
- 1975: conservation efforts are initiated by the State of Oregon, which designate the Owl as "threatened" under state law.
- 1985: scientists commissioned by an environmental advocacy group, the National Audubon Society, conclude that the species is heading towards extinction.
- 1987: environmental advocacy groups petition the U.S. Fish and Wildlife Service (FWS), the agency charged with administering the ESA, to list the Northern Spotted Owl as "endangered" under the ESA. The FWS conducts a status review of the Spotted Owl and concludes that listing under the ESA is not warranted.
- 1988: A U.S. Federal District Court finds that the FWS's decision to not list the Spotted Owl under the ESA was "arbitrary and capricious" and ordered the FWS to "supplement" its status review.
- 1988: the FWS adopts a special management plan for Spotted Owls, criticized by environmentalists for failing to comply with environmental laws, and criticized by the timber industry for causing unjustified economic hardship.

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89 Sierra, supra note 82.
92 Ibid.
93 Northern Spotted Owl (Strix Occidentalis Caurina) v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988).
• 1990: the FWS lists the Northern Spotted Owl as "threatened" under the ESA, but
declines to concurrently designate, as required by the ESA, the "critical habitat" of the
Owl.94 Environmental advocacy groups sue.
• 1991: Judge Lilly, who heard the initial lawsuit against the FWS, orders the FWS to
designate critical habitat, giving the FWS two months.95
• 1991: in a separate but related case, a U.S. Federal District Court enjoins the USFS from
selling timber harvested from Spotted Owl habitat.96
• 1992: the FWS finally designates critical habitat, triggering additional rules regarding any
activities within such critical habitat. Logging and timber sales on federal public lands –
USFS and BLM land – is curtailed but not completely prohibited.97
• 1993: the new Clinton Administration assembles a Forest Ecosystem Management
Assessment Team (FEMAT), a technical committee with federal, state, local and
university experts, to develop an ecosystem-based approach to forest management.98
FEMAT produces a report with ten management options. Option 9 was selected, calling
for old-growth forest reserves, "forest matrix reserves" for timber production, and some
lands set aside for experimental silviculture.99
• 1995 through 2005: American Spotted Owl populations continue to decline.
• 2005: the Seattle chapter of the National Audubon Society sues the FWS for failing to
formulate a recovery plan for the Spotted Owl.100
• 2007: a draft recovery plan is released in April 2007 identifying the Barred Owl, not
habitat destruction, as the primary threat to the Spotted Owl. The draft recovery plan
continues to set aside some federal lands as habitat, but exempts 1.5 million acres of
federal land from Endangered Species Act application.101
• 2007: the FWS commissions two independent scientific reviews of the draft recovery
plan, involving the Society for Conservation Biology and the American Ornithologists
Union. One study concludes that there was no scientific justification for the 1.5 million
acre exemption, the FWS failed to use the best available science, and selectively cited
from the available science to justify a reduction in habitat protection.103 The study also
recommended that the Spotted Owl be uplisted from "threatened" to "endangered."104

97 Ibid. at 5.
98 Ibid. at 11.
99 Ibid.
100 WCWC 2, supra note 75 at 20.
102 Correspondence between Society for Conservation Biology and Kemper McMaster (Field Supervisor, US Fish and Wildlife Service), 10 Aug 2007.
103 Ibid.
104 Ibid.
to the recovery of the Spotted Owl, and recommended that an entirely new recovery plan should be drafted by a different group of scientists using the best available science.\textsuperscript{105}

\textbf{No Answers Yet}

In both Canada and the U.S., the future of the Spotted Owl remains uncertain. Populations continue to decline, and conservation plans are currently in a state of flux. BC is attempting a compromise – captive breeding to increase the number of owls in the province, while avoiding large-scale habitat protection. Although both Canada and the U.S. have adopted very different approaches to conservation, Spotted Owl numbers have continued to dwindle in both countries.

\textbf{Discussion Questions:}

1. Review the Western Canada Wilderness Committee petition (a pdf file) and then-
   Minister of the Environment Rona Ambrose's response. What do you think of the "safety
   net" provisions of SARA (§§ 34 and 35)? Are they within the scope of Parliament’s
   constitutionally-granted powers? What heads of power could be used to justify these
   provisions? How would you change the safety net provisions of SARA (if you would)?

2. Compare the U.S. \textit{Endangered Species Act} and the Canadian \textit{Species At Risk Act}. List
   some of the comparative advantages and disadvantages of the ESA and SARA, and be
   prepared to discuss them in class. SARA was enacted in 2002, twenty-nine years after
   the enactment of the ESA, and after the ESA had already had a long history. What do
   you think were the conscious decisions in drafting SARA to avoid some of the problems
   encountered and created by the ESA?

3. Is it likely that logging activities in BC that destroy the habitat of the Spotted Owl would
   violate SARA? Why, and under what conditions? What specific provisions and what
   sources of law would serve as the basis of the violation?

4. Read the excerpt from the article on habitat conservation planning (Appendix D). What
   is the authority for habitat conservation planning under the ESA? What is the similar
   mechanism in SARA? Are the problems addressed by habitat conservation planning in
   the U.S. also problems in the Canadian context? Does SARA have other provisions to
   address this type of problem?

5. Is there something glaringly missing from both the SOMP, and the U.S. Spotted Owl
   plans? What provisions would you include in SARA to remedy this shortcoming? Or
   what other mechanisms would you establish or tap into to remedy this shortcoming?

\textsuperscript{105} The Wildlife Society. \textit{Peer Review of Draft Northern Spotted Owl Recovery Plan}. (2007) Online:
APPENDIX A
Species at Risk Act
2002, c. 29

INTERPRETATION

§ 2 Definitions
(1) The definitions in this subsection apply in this Act.

"competent minister" means
(a) the Minister responsible for the Parks Canada Agency with respect to individuals in or on federal lands administered by that Agency;
(b) the Minister of Fisheries and Oceans with respect to aquatic species, other than individuals mentioned in paragraph (a); and
(c) the Minister of the Environment with respect to all other individuals.

"critical habitat" means the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or in an action plan for the species.

"endangered species" means a wildlife species that is facing imminent extirpation or extinction. "extirpated species" means a wildlife species that no longer exists in the wild in Canada, but exists elsewhere in the wild.

"federal land" means
(a) land that belongs to Her Majesty in right of Canada, or that Her Majesty in right of Canada has the power to dispose of, and all waters on and airspace above that land;
(b) the internal waters of Canada and the territorial sea of Canada; and
(c) reserves and any other lands that are set apart for the use and benefit of a band under the Indian Act, and all waters on and airspace above those reserves and lands.

"Minister" means the Minister of the Environment.

"species at risk" means an extirpated, endangered or threatened species or a species of special concern.

"species of special concern" means a wildlife species that may become a threatened or an endangered species because of a combination of biological characteristics and identified threats.

"threatened species" means a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction.

PURPOSES

§ 6 Purposes
The purposes of this Act are to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or
threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened.

* * *

STEWARDSHIP ACTION PLAN

§ 10.1 Stewardship action plan
The Minister, after consultation with the Canadian Endangered Species Conservation Council, may establish a stewardship action plan that creates incentives and other measures to support voluntary stewardship actions taken by any government in Canada, organization or person. A copy of the stewardship action plan must be included in the public registry.

§ 10.2 Contents
The stewardship action plan must include, but is not limited to, commitments to
(a) regularly examine incentives and programs that support actions taken by persons to protect species at risk;
(b) provide information and increase public awareness about species at risk;
(c) methods for sharing information about species at risk, including community and aboriginal traditional knowledge, that respect, preserve and maintain knowledge and promote their wider application with the approval of the holders of such knowledge, with other governments and persons;
(d) create awards and recognition programs;
(e) provide information respecting programs related to stewardship agreements, land conservation easements and other such agreements; and
(f) provide information relating to the technical and scientific support available to persons engaged in stewardship activities.

STEWARDSHIP

§ 11 Conservation agreements — species at risk
(1) A competent minister may, after consultation with every other competent minister, and with the Canadian Endangered Species Conservation Council or any of its members if he or she considers it appropriate to do so, enter into a conservation agreement with any government in Canada, organization or person to benefit a species at risk or enhance its survival in the wild.

Contents
(2) The agreement must provide for the taking of conservation measures and any other measures consistent with the purposes of this Act, and may include measures with respect to
(a) monitoring the status of the species;
(b) developing and implementing education and public awareness programs;
(c) developing and implementing recovery strategies, action plans and management plans;
(d) protecting the species’ habitat, including its critical habitat; or
(e) undertaking research projects in support of recovery efforts for the species.
§ 12 Conservation agreements — other species
(1) A competent minister may, after consultation with every other competent minister, and with the Canadian Endangered Species Conservation Council or any of its members if he or she considers it appropriate to do so, enter into an agreement with any government in Canada, organization or person to provide for the conservation of a wildlife species that is not a species at risk.

Contents
(2) The agreement may provide for the taking of conservation measures and any other measures consistent with the purposes of this Act, including measures with respect to
(a) monitoring the status of the species;
(b) developing and implementing education and public awareness programs;
(c) protecting the species' habitat; and
(d) preventing the species from becoming a species at risk.

§ 13 Funding agreements
(1) A competent minister may enter into an agreement with any government in Canada, organization or person to provide for the payment of contributions towards the costs of programs and measures for the conservation of wildlife species, including programs and measures under an agreement entered into under subsection 11(1) or 12(1).

Provisions to be included
(2) The agreement must specify
(a) the contribution towards the cost of the program or measure that is payable by any party and the time or times at which any amounts under the agreement will be paid;
(b) the authority or person who will be responsible for operating and maintaining the program or measure or any part of it;
(c) the proportions of any revenue from the program or measure that is payable to the parties; and
(d) the terms and conditions governing the operation and maintenance of the program or measure.

WILDLIFE SPECIES LISTING PROCESS
Committee on the Status of Endangered Wildlife in Canada

§ 14 Establishment
The Committee on the Status of Endangered Wildlife in Canada is hereby established.

§ 15 Functions
(1) The functions of COSEWIC are to
(a) assess the status of each wildlife species considered by COSEWIC to be at risk and, as part of the assessment, identify existing and potential threats to the species and
(i) classify the species as extinct, extirpated, endangered, threatened or of special concern,
(ii) indicate that COSEWIC does not have sufficient information to classify the species, or
(iii) indicate that the species is not currently at risk;
(b) determine when wildlife species are to be assessed, with priority given to those more likely to become extinct;
(c) conduct a new assessment of the status of species at risk and, if appropriate, reclassify or declassify them;
(c.1) indicate in the assessment whether the wildlife species migrates across Canada's boundary or has a range extending across Canada's boundary;
(d) develop and periodically review criteria for assessing the status of wildlife species and for classifying them and recommend the criteria to the Minister and the Canadian Endangered Species Conservation Council; and
(e) provide advice to the Minister and the Canadian Endangered Species Conservation Council and perform any other functions that the Minister, after consultation with that Council, may assign.

Best information and knowledge
(2) COSEWIC must carry out its functions on the basis of the best available information on the biological status of a species, including scientific knowledge, community knowledge and aboriginal traditional knowledge.

Treaties and land claims agreements
(3) COSEWIC must take into account any applicable provisions of treaty and land claims agreements when carrying out its functions.

§ 16 Composition
(1) COSEWIC is to be composed of members appointed by the Minister after consultation with the Canadian Endangered Species Conservation Council and with any experts and expert bodies, such as the Royal Society of Canada, that the Minister considers to have relevant expertise.

Qualifications of members
(2) Each member must have expertise drawn from a discipline such as conservation biology, population dynamics, taxonomy, systematics or genetics or from community knowledge or aboriginal traditional knowledge of the conservation of wildlife species.

§ 21 Status reports
(1) COSEWIC's assessment of the status of a wildlife species must be based on a status report on the species that COSEWIC either has had prepared or has received with an application.

§ 22 Applications
(1) Any person may apply to COSEWIC for an assessment of the status of a wildlife species.
Regulations
(2) The Minister may, after consultation with the Minister responsible for the Parks Canada Agency, the Minister of Fisheries and Oceans and the Canadian Endangered Species Conservation Council, make regulations respecting the making of applications to COSEWIC under subsection (1) and the dealing with of those applications by COSEWIC.

§ 23 Time for assessment
(1) COSEWIC must assess the status of a wildlife species within one year after it receives a status report on the species, and it must provide reasons for its assessment.

Notification of applicant
(2) If the assessment results from an application, COSEWIC must notify the applicant of the assessment and the reasons.

Reviews and Reports

§ 24 Review of classifications
COSEWIC must review the classification of each species at risk at least once every 10 years, or at any time if it has reason to believe that the status of the species has changed significantly.

§ 25 Copies to Minister and Council
(1) When COSEWIC completes an assessment of the status of a wildlife species, it must provide the Minister and the Canadian Endangered Species Conservation Council with a copy of the assessment and the reasons for it. A copy of the assessment and the reasons must also be included in the public registry.

COSEWIC list
(2) COSEWIC must annually prepare a complete list of every wildlife species it has assessed since the coming into force of this section and a copy of that list must be included in the public registry.

Report on response
(3) On receiving a copy of an assessment of the status of a wildlife species from COSEWIC under subsection (1), the Minister must, within 90 days, include in the public registry a report on how the Minister intends to respond to the assessment and, to the extent possible, provide time lines for action.

§ 26 Annual reports
COSEWIC must annually provide a report on its activities to the Canadian Endangered Species Conservation Council and a copy of that report must be included in the public registry.

List of Wildlife Species at Risk

§ 27 Power to amend List
The Governor in Council may, on the recommendation of the Minister, by order amend the List in accordance with subsections (1.1) and (1.2) by adding a wildlife species, by reclassifying a listed wildlife species or by removing a listed wildlife species, and the Minister may, by order, amend the List in a similar fashion in accordance with subsection (3).

**Decision in respect of assessment**

(1.1) Subject to subsection (3), the Governor in Council, within nine months after receiving an assessment of the status of a species by COSEWIC, may review that assessment and may, on the recommendation of the Minister,

(a) accept the assessment and add the species to the List;
(b) decide not to add the species to the List; or
(c) refer the matter back to COSEWIC for further information or consideration.

**Statement of reasons**

(1.2) Where the Governor in Council takes a course of action under paragraph (1.1)(b) or (c), the Minister shall, after the approval of the Governor in Council, include a statement in the public registry setting out the reasons.

**Pre-conditions for recommendation**

(2) Before making a recommendation in respect of a wildlife species or a species at risk, the Minister must

(a) take into account the assessment of COSEWIC in respect of the species;
(b) consult the competent minister or ministers; and
(c) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of a wildlife species, consult the wildlife management board.

**Amendment of List by Minister**

(3) Where the Governor in Council has not taken a course of action under subsection (1.1) within nine months after receiving an assessment of the status of a species by COSEWIC, the Minister shall, by order, amend the List in accordance with COSEWIC's assessment.

§ 28 Applications for assessment of imminent threat

Any person who considers that there is an imminent threat to the survival of a wildlife species may apply to COSEWIC for an assessment of the threat for the purpose of having the species listed on an emergency basis under subsection 29(1) as an endangered species.

**Information to be included in application**

(2) The application must include relevant information indicating that there is an imminent threat to the survival of the species.

**Regulations**
(3) The Minister may, after consultation with the Minister responsible for the Parks Canada Agency, the Minister of Fisheries and Oceans and the Canadian Endangered Species Conservation Council, make regulations respecting the making of applications to COSEWIC under subsection (1) and the dealing with of those applications by COSEWIC.

Notice
(4) COSEWIC must provide the applicant, the Minister and the Canadian Endangered Species Conservation Council with a copy of its assessment. A copy of the assessment must be included in the public registry.

§ 29 Emergency listing
If the Minister is of the opinion that there is an imminent threat to the survival of a wildlife species, the Minister must, on an emergency basis, after consultation with every other competent minister, make a recommendation to the Governor in Council that the List be amended to list the species as an endangered species.

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MEASURES TO PROTECT LISTED WILDLIFE SPECIES
General Prohibitions

§ 32 Killing, harming, etc., listed wildlife species
(1) No person shall kill, harm, harass, capture or take an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species.

Possession, collection, etc.
(2) No person shall possess, collect, buy, sell or trade an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species, or any part or derivative of such an individual.

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§ 33 Damage or destruction of residence
No person shall damage or destroy the residence of one or more individuals of a wildlife species that is listed as an endangered species or a threatened species, or that is listed as an extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada.

§ 34 Application - certain species in provinces
(1) With respect to individuals of a listed wildlife species that is not an aquatic species or a species of birds that are migratory birds protected by the Migratory Birds Convention Act, 1994, sections 32 and 33 do not apply in lands in a province that are not federal lands unless an order is made under subsection (2) to provide that they apply.

Order
(2) The Governor in Council may, on the recommendation of the Minister, by order, provide that sections 32 and 33, or either of them, apply in lands in a province that are not federal lands with respect to individuals of a listed wildlife species that is not an aquatic species or a species of birds that are migratory birds protected by the Migratory Birds Convention Act, 1994.

**Obligation to make recommendation**
(3) The Minister must recommend that the order be made if the Minister is of the opinion that the laws of the province do not effectively protect the species or the residences of its individuals.

**Consultation**
(4) Before recommending that the Governor in Council make an order under subsection (2), the Minister must consult
(a) the appropriate provincial minister; and
(b) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, the wildlife management board.

§ 35 Application - certain species in territories
Sections 32 and 33 apply in each of the territories in respect of a listed wildlife species only to the extent that the Governor in Council, on the recommendation of the Minister, makes an order providing that they, or any of them, apply.

**Exception**
(2) Subsection (1) does not apply
(a) in respect of individuals of aquatic species and their habitat or species of birds that are migratory birds protected by the Migratory Birds Convention Act, 1994; or
(b) on land under the authority of the Minister or the Parks Canada Agency.

**Obligation to make recommendation**
(3) The Minister must recommend that the order be made if the Minister is of the opinion that the laws of the territory do not effectively protect the species or the residences of its individuals.

**Pre-conditions for recommendation**
(4) Before recommending that an order be made under subsection (1), the Minister must
(a) consult the appropriate territorial minister; and
(b) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, consult the wildlife management board.

§ 36 Prohibitions re provincial and territorial classifications
(1) If a wildlife species that is not listed has been classified as an endangered species or a threatened species by a provincial or territorial minister, no person shall
(a) kill, harm, harass, capture or take an individual of that species that is on federal lands in the province or territory;
(b) possess, collect, buy, sell or trade an individual of that species that is on federal lands in the province or territory, or any part or derivative of such an individual; or
(c) damage or destroy the residence of one or more individuals of that species that is on federal lands in the province or territory.

Application
(2) Subsection (1) applies only in respect of the portions of the federal lands that the Governor in Council may, on the recommendation of the competent minister, by order, specify.

Recovery of Endangered, Threatened and Extirpated Species
Recovery Strategy

§ 37 Preparation - endangered or threatened species
(1) If a wildlife species is listed as an extirpated species, an endangered species or a threatened species, the competent minister must prepare a strategy for its recovery.

More than one competent minister
(2) If there is more than one competent minister with respect to the wildlife species, they must prepare the strategy together and every reference to competent minister in sections 38 to 46 is to be read as a reference to the competent ministers.

§ 38 Commitments to be considered
In preparing a recovery strategy, action plan or management plan, the competent minister must consider the commitment of the Government of Canada to conserving biological diversity and to the principle that, if there are threats of serious or irreversible damage to the listed wildlife species, cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty.

§ 39 Cooperation with others
(1) To the extent possible, the recovery strategy must be prepared in cooperation with
   (a) the appropriate provincial and territorial minister for each province and territory in which the listed wildlife species is found;
   (b) every minister of the Government of Canada who has authority over federal land or other areas on which the species is found;
   (c) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, the wildlife management board;
   (d) every aboriginal organization that the competent minister considers will be directly affected by the recovery strategy; and
   (e) any other person or organization that the competent minister considers appropriate.

Land claims agreement
(2) If the listed wildlife species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, the recovery strategy must be prepared, to the extent that it will apply to that area, in accordance with the provisions of the agreement.

Consultation

(3) To the extent possible, the recovery strategy must be prepared in consultation with any landowners and other persons whom the competent minister considers to be directly affected by the strategy, including the government of any other country in which the species is found.

§ 42 Proposed recovery strategy

(1) Subject to subsection (2), the competent minister must include a proposed recovery strategy in the public registry within one year after the wildlife species is listed, in the case of a wildlife species listed as an endangered species, and within two years after the species is listed, in the case of a wildlife species listed as a threatened species or an extirpated species.

Action Plan

Preparation -- s. 47

47. The competent minister in respect of a recovery strategy must prepare one or more action plans based on the recovery strategy. If there is more than one competent minister with respect to the recovery strategy, they may prepare the action plan or plans together.

§ 48 Cooperation with other ministers and governments

(1) To the extent possible, an action plan must be prepared in cooperation with

(a) the appropriate provincial and territorial minister of each province and territory in which the listed wildlife species is found;
(b) every minister of the Government of Canada who has authority over federal land or other areas on which the species is found;
(c) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, the wildlife management board;
(d) every aboriginal organization that the competent minister considers will be directly affected by the action plan; and
(e) any other person or organization that the competent minister considers appropriate.

Land claims agreement

(2) If the listed wildlife species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, an action plan must be prepared, to the extent that it will apply to that area, in accordance with the provisions of the agreement.
Consultation
(3) To the extent possible, an action plan must be prepared in consultation with any landowners, lessees and other persons whom the competent minister considers to be directly affected by, or interested in, the action plan, including the government of any other country in which the species is found.

§ 49 Contents
(1) An action plan must include, with respect to the area to which the action plan relates,
(a) an identification of the species' critical habitat, to the extent possible, based on the best available information and consistent with the recovery strategy, and examples of activities that are likely to result in its destruction;
(b) a statement of the measures that are proposed to be taken to protect the species’ critical habitat, including the entering into of agreements under section 11;
(c) an identification of any portions of the species’ critical habitat that have not been protected;
(d) a statement of the measures that are to be taken to implement the recovery strategy, including those that address the threats to the species and those that help to achieve the population and distribution objectives, as well as an indication as to when these measures are to take place;
(d.1) the methods to be used to monitor the recovery of the species and its long-term viability;
(e) an evaluation of the socio-economic costs of the action plan and the benefits to be derived from its implementation; and
(f) any other matters that are prescribed by the regulations.

§ 50 Proposed action plan
(1) The competent minister must include a proposed action plan in the public registry.

Comments
(2) Within 60 days after the proposed action plan is included in the public registry, any person may file written comments with the competent minister.

Finalization of action plan
(3) Within 30 days after the expiry of the period referred to in subsection (2), the competent minister must consider any comments received, make any changes to the proposed action plan that he or she considers appropriate and finalize the action plan by including a copy of it in the public registry.

Summary if action plan not completed in time
(4) If an action plan is not finalized in the time set out in the recovery strategy, the competent minister must include in the public registry a summary of what has been prepared with respect to the plan.
Protection of Critical Habitat

§ 57 Purpose
The purpose of section 58 is to ensure that, within 180 days after the recovery strategy or action plan that identified the critical habitat referred to in subsection 58(1) is included in the public registry, all of the critical habitat is protected by
(a) provisions in, or measures under, this or any other Act of Parliament, including agreements under section 11; or
(b) the application of subsection 58(1).

§ 58 Destruction of critical habitat
(1) Subject to this section, no person shall destroy any part of the critical habitat of any listed endangered species or of any listed threatened species - or of any listed extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada - if
(a) the critical habitat is on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada;
(b) the listed species is an aquatic species; or
(c) the listed species is a species of migratory birds protected by the Migratory Birds Convention Act, 1994.

Protected areas
(2) If the critical habitat or a portion of the critical habitat is in a national park of Canada named and described in Schedule 1 to the Canada National Parks Act, a marine protected area under the Oceans Act, a migratory bird sanctuary under the Migratory Birds Convention Act, 1994 or a national wildlife area under the Canada Wildlife Act, the competent Minister must, within 90 days after the recovery strategy or action plan that identified the critical habitat is included in the public registry, publish in the Canada Gazette a description of the critical habitat or portion that is in that park, area or sanctuary.

Application
(3) If subsection (2) applies, subsection (1) applies to the critical habitat or the portion of the critical habitat described in the Canada Gazette under subsection (2) 90 days after the description is published in the Canada Gazette.

Application
(4) If all of the critical habitat or any portion of the critical habitat is not in a place referred to in subsection (2), subsection (1) applies in respect of the critical habitat or portion of the critical habitat, as the case may be, specified in an order made by the competent minister.

Obligation to make order or statement
(5) Within 180 days after the recovery strategy or action plan that identified the critical habitat is included in the public registry, the competent minister must, after consultation with every other competent minister, with respect to all of the critical habitat or any portion of the critical habitat that is not in a place referred to in subsection (2),
(a) make the order referred to in subsection (4) if the critical habitat or any portion of the
critical habitat is not legally protected by provisions in, or measures under, this or any other
Act of Parliament, including agreements under section 11; or
(b) if the competent minister does not make the order, he or she must include in the public
registry a statement setting out how the critical habitat or portions of it, as the case may be,
are legally protected.

§ 59 Regulations re federal lands

(1) The Governor in Council may, on the recommendation of the competent minister after
consultation with every other competent minister, make regulations to protect critical habitat on
federal lands.

Obligation to make recommendation

(2) The competent minister must make the recommendation if the recovery strategy or an
action plan identifies a portion of the critical habitat as being unprotected and the competent
minister is of the opinion that the portion requires protection.

Contents

(3) The regulations may include provisions requiring the doing of things that protect the
critical habitat and provisions prohibiting activities that may adversely affect the critical habitat.

Consultation

(4) If the competent minister is of the opinion that a regulation would affect land in a
territory that is not under the authority of the Minister or the Parks Canada Agency, he or she
must consult the territorial minister before recommending the making of the regulation.

Consultation

(5) If the competent minister is of the opinion that a regulation would affect a reserve or
any other lands that are set apart for the use and benefit of a band under the Indian Act, he or she
must consult the Minister of Indian Affairs and Northern Development and the band before
recommending the making of the regulation.

Consultation

(6) If the competent minister is of the opinion that a regulation would affect an area in
respect of which a wildlife management board is authorized by a land claims agreement to
perform functions in respect of wildlife species, he or she must consult the wildlife management
board before recommending the making of the regulation.

§ 60 Provincial and territorial classifications

(1) If a wildlife species has been classified as an endangered species or a threatened
species by a provincial or territorial minister, no person shall destroy any part of the habitat of
that species that the provincial or territorial minister has identified as essential to the survival or
recovery of the species and that is on federal lands in the province or territory.
Application
(2) Subsection (1) applies only to the portions of the habitat that the Governor in Council may, on the recommendation of the competent minister, by order, specify.

§ 61 Destruction of critical habitat
(1) No person shall destroy any part of the critical habitat of a listed endangered species or a listed threatened species that is in a province or territory and that is not part of federal lands.

Exception
(1.1) Subsection (1) does not apply in respect of
(a) an aquatic species; or
(b) the critical habitat of a species of bird that is a migratory bird protected by the Migratory Birds Convention Act, 1994 that is habitat referred to in subsection 58(5.1).

Application
(2) Subsection (1) applies only to the portions of the critical habitat that the Governor in Council may, on the recommendation of the Minister, by order, specify.

Power to make recommendation
(3) The Minister may make a recommendation if
(a) a provincial minister or territorial minister has requested that the recommendation be made; or
(b) the Canadian Endangered Species Conservation Council has recommended that the recommendation be made.

Obligation to make recommendation
(4) The Minister must make a recommendation if he or she is of the opinion, after consultation with the appropriate provincial or territorial minister, that
(a) there are no provisions in, or other measures under, this or any other Act of Parliament that protect the particular portion of the critical habitat, including agreements under section 11; and
(b) the laws of the province or territory do not effectively protect the critical habitat.

Expiry and renewal of order
(5) An order made under subsection (2) expires five years after the day on which it is made or renewed, unless the Governor in Council, by order, renews it.

Recommendation to repeal order
(6) If the Minister is of the opinion that an order made under subsection (2) is no longer necessary to protect the portion of the critical habitat to which the order relates or that the province or territory has brought into force laws that protect the portion, the Minister must recommend that the order be repealed.

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§ 64 Compensation
(1) The Minister may, in accordance with the regulations, provide fair and reasonable compensation to any person for losses suffered as a result of any extraordinary impact of the application of
(a) section 58, 60 or 61; or
(b) an emergency order in respect of habitat identified in the emergency order that is necessary for the survival or recovery of a wildlife species.

Regulations
(2) The Governor in Council shall make regulations that the Governor in Council considers necessary for carrying out the purposes and provisions of subsection (1), including regulations prescribing
(a) the procedures to be followed in claiming compensation;
(b) the methods to be used in determining the eligibility of a person for compensation, the amount of loss suffered by a person and the amount of compensation in respect of any loss; and
(c) the terms and conditions for the provision of compensation.

Agreements and Permits

Powers of competent minister -- s. 73
(1) The competent minister may enter into an agreement with a person, or issue a permit to a person, authorizing the person to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals.

Purpose
(2) The agreement may be entered into, or the permit issued, only if the competent minister is of the opinion that
(a) the activity is scientific research relating to the conservation of the species and conducted by qualified persons;
(b) the activity benefits the species or is required to enhance its chance of survival in the wild; or
(c) affecting the species is incidental to the carrying out of the activity.

Pre-conditions
(3) The agreement may be entered into, or the permit issued, only if the competent minister is of the opinion that
(a) all reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted;
(b) all feasible measures will be taken to minimize the impact of the activity on the species or its critical habitat or the residences of its individuals; and
(c) the activity will not jeopardize the survival or recovery of the species.

Explanation in public registry
(3.1) If an agreement is entered into or a permit is issued, the competent minister must include in the public registry an explanation of why it was entered into or issued, taking into account the matters referred to in paragraphs (3)(a), (b) and (c).

Consultation
(4) If the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, the competent minister must consult the wildlife management board before entering into an agreement or issuing a permit concerning that species in that area.

Consultation
(5) If the species is found in a reserve or any other lands that are set apart for the use and benefit of a band under the Indian Act, the competent minister must consult the band before entering into an agreement or issuing a permit concerning that species in that reserve or those other lands.

Terms and conditions
(6) The agreement or permit must contain any terms and conditions governing the activity that the competent minister considers necessary for protecting the species, minimizing the impact of the authorized activity on the species or providing for its recovery.

Review of agreements and permits
(7) The competent minister must review the agreement or permit if an emergency order is made with respect to the species.

Amendment of agreements and permits
(8) The competent minister may revoke or amend an agreement or a permit to ensure the survival or recovery of a species.

Maximum term
(9) No agreement may be entered into for a term longer than five years and no permit may be issued for a term longer than three years.

Regulations
(10) The Minister may, after consultation with the Minister responsible for the Parks Canada Agency and the Minister of Fisheries and Oceans, make regulations respecting the entering into of agreements, the issuance of permits and the renewal, revocation, amendment and suspension of agreements and permits.

Exemption for existing agreements, permits, etc. -- s. 76
The Governor in Council may, on the recommendation of a competent minister, by order, provide that section 32, 33, 36, 58, 60 or 61, or any regulation made under section 53, 59 or 71,
does not apply, for a period of up to one year from the date of listing of a wildlife species, to agreements, permits, licences, orders or other similar documents authorizing persons to engage in an activity affecting the listed wildlife species, any part of its critical habitat or the residences of its individuals that were entered into, issued or made under another Act of Parliament before the species was listed.

* * *

Emergency Orders

§ 80 Emergency order

(1) The Governor in Council may, on the recommendation of the competent minister, make an emergency order to provide for the protection of a listed wildlife species.

Obligation to make recommendation

(2) The competent minister must make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery.

Consultation

(3) Before making a recommendation, the competent minister must consult every other competent minister.

Contents

(4) The emergency order may

* * *

(c) with respect to any … species [other than aquatic species or species protected by the Migratory Birds Convention Act],

(i) on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada,

(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(B) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat, and

(ii) on land other than land referred to in subparagraph (i),

(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(B) include provisions prohibiting activities that may adversely affect the species and that habitat.

Exceptions

§ 83 General exceptions

(1) Subsections 32(1) and (2), section 33, subsections 36(1), 58(1), 60(1) and 61(1), regulations made under section 53, 59 or 71 and emergency orders do not apply to a person who is engaging in

(a) activities related to public safety, health or national security, that are authorized by or under any other Act of Parliament or activities under the Health of Animals Act and the Plant Protection Act for the health of animals and plants; or
(b) activities authorized under section 73, 74 or 78 by an agreement, permit, licence, order or similar document.

**Authorization of activities under other Acts**

(2) A power under an Act described in paragraph (1)(a) may be used to authorize an activity prohibited by subsection 32(1) or (2), section 33, subsection 36(1), 58(1), 60(1) or 61(1), a regulation made under section 53, 59 or 71 or an emergency order only if the person exercising the power

(a) determines that the activity is necessary for the protection of public safety, health, including animal and plant health, or national security; and

(b) respects the purposes of this Act to the greatest extent possible.

**Exceptions - land claims agreements**

(3) Subsections 32(1) and (2), section 33, subsections 36(1), 58(1), 60(1) and 61(1) and regulations made under section 53, 59 or 71 do not apply to a person who is engaging in activities in accordance with conservation measures for wildlife species under a land claims agreement.

**Exemptions for permitted activities**

(4) Subsections 32(1) and (2), section 33 and subsections 36(1), 58(1), 60(1) and 61(1) do not apply to a person who is engaging in activities that are permitted by a recovery strategy, an action plan or a management plan and who is also authorized under an Act of Parliament to engage in that activity, including a regulation made under section 53, 59 or 71.

**Additional possession exceptions**

(5) Subsection 32(2) and paragraph 36(1)(b) do not apply to a person who possesses an individual of a listed extirpated, endangered or threatened species, or any part or derivative of such an individual, if

(a) it was in the person's possession when the species was listed;

(b) it is used by an aboriginal person for ceremonial or medicinal purposes, or it is part of ceremonial dress used for ceremonial or cultural purposes by an aboriginal person;

(c) the person acquired it legally in another country and imported it legally into Canada;

(d) the person acquired it by succession from someone who was entitled to possess it under this Act;

(e) the person acquired it under circumstances that would afford them a defence under section 100 and the person possesses it only for as long as is necessary to donate it to a museum, a zoo, an educational institution, a scientific society or a government;

(f) the person is, or is acting on behalf of, a museum, zoo, educational institution, scientific society or government and the person acquired it from someone who was entitled to possess it under this Act; or

(g) it or the person is otherwise exempt by the regulations.

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**ENFORCEMENT MEASURES**

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Investigations

Application for investigation -- s. 93

93. (1) A person who is a resident of Canada and at least 18 years of age may apply to the competen minister for an investigation of whether an alleged offence has been committed or whether anything directed towards its commission has been done.

Statement to accompany application -- s. 93(2)

(2) The application must be in a form approved by the competent minister and must include a solemn affirmation or declaration containing

(a) the name and address of the applicant;
(b) a statement that the applicant is at least 18 years old and a resident of Canada;
(c) a statement of the nature of the alleged offence and the name of each person alleged to be involved;
(d) a summary of the evidence supporting the allegations;
(e) the name and address of each person who might be able to give evidence about the alleged offence, together with a summary of the evidence that the person might give, to the extent that information is available to the applicant;
(f) a description of any document or other material that the applicant believes should be considered in the investigation and, if possible, a copy of the document; and
(g) details of any previous contact between the applicant and the competent minister about the alleged offence.

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APPENDIX B
The Endangered Species Act
16 U.S.C. §§ 1631 et seq.

§ 3 Definitions

For the purposes of this chapter--

(5)(A) The term "critical habitat" for a threatened or endangered species means--

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of [§ 4] of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of [§ 4] of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

(6) The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

(7) The term "Federal agency" means any department, agency, or instrumentality of the United States.

(13) The term "person" means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.
(15) The term "Secretary" means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this chapter and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

(16) The term "species" includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

* * *

(19) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(20) The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

§. 4. Determination of endangered species and threatened species

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:
   (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
   (B) overutilization for commercial, recreational, scientific, or educational purposes;
   (C) disease or predation;
   (D) the inadequacy of existing regulatory mechanisms; or
   (E) other natural or manmade factors affecting its continued existence.

   ***

(3) The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable—
   (A) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and
   (B) may, from time-to-time thereafter as appropriate, revise such designation.

(b) Basis for determinations
(1) (A) The Secretary shall make determinations required by subsection (a)(1) of this section solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction; or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been—

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

(3) (A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553 (e) of Title 5, United States Code, to add a species to, or to remove a species from, either of the lists published under subsection (c) of this section, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

(B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

(ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

(iii) The petitioned action is warranted, but that—

(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and
(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) of this section and to remove from such lists species for which the protections of this chapter are no longer necessary, in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

* * *

(4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of section 553 of title 5, United States Code, (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this chapter.

(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3) of this section, the Secretary shall—

(A) not less than 90 days before the effective date of the regulation—
(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and
(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county, or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;
(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;
(C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;
(D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and
(E) promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.

(6) (A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register—
(i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either—
(I) a final regulation to implement such determination,
(II) a final regulation to implement such revision or a finding that such revision should not be made,
(III) notice that such one-year period is being extended under subparagraph (B)(i), or
(IV) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based; or (ii) subject to subparagraph (C), if a designation of critical habitat is involved, either—

(I) a final regulation to implement such designation, or

(II) notice that such one-year period is being extended under such subparagraph.

(B) (i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

(ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.

(iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination or revision concerned, a finding that the revision should not be made, or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that—

(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

(7) Neither paragraph (4), (5), or (6) of this subsection nor section 553 of title 5, United States Code, shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish or wildlife or plants, but only if—

(A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and
in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each State in which such species is believed to occur. Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

(8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this chapter shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation; and if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.

§ 7. Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an “agency action”) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that
an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 4 of this Act or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

§ 8. International cooperation

(a) Financial assistance
As a demonstration of the commitment of the United States to the worldwide protection of endangered species and threatened species, the President may, subject to the provisions of section 1306 of title 31, use foreign currencies accruing to the United States Government under the Agricultural Trade Development and Assistance Act of 1954 [7 U.S.C. 1691 et seq.] or any other law to provide to any foreign country (with its consent) assistance in the development and management of programs in that country which the Secretary determines to be necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 4 of this Act. The President shall provide assistance (which includes, but is not limited to, the acquisition, by lease or otherwise, of lands, waters, or interests therein) to foreign countries under this section under such terms and conditions as he deems appropriate. Whenever foreign currencies are available for the provision of assistance under this section, such currencies shall be used in preference to funds appropriated under the authority of section 15 of this Act.

(b) Encouragement of foreign programs
In order to carry out further the provisions of this chapter, the Secretary, through the Secretary of State, shall encourage—
(1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 4 of this Act;
(2) the entering into of bilateral or multilateral agreements with foreign countries to provide for such conservation; and
(3) foreign persons who directly or indirectly take fish or wildlife or plants in foreign countries or on the high seas for importation into the United States for commercial or other purposes to develop and carry out with such assistance as he may provide, conservation practices designed to enhance such fish or wildlife or plants and their habitat.

§ 9. Prohibited acts

(a) Generally
(1) Except as provided in sections 6(g)(2) and 10 of this Act, with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to—
   (A) import any such species into, or export any such species from the United States;  
   (B) take any such species within the United States or the territorial sea of the United States;  
   (C) take any such species upon the high seas;  
   (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);  
   (E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of commercial activity, any such species;  
   (F) sell or offer for sale in interstate or foreign commerce any such species; or  
   (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this chapter.  

(2) Except as provided in sections 6(g)(2) and 10 of this Act, with respect to any endangered species of plants listed pursuant to section 4 of this Act, it is unlawful for any person subject to the jurisdiction of the United States to—
   (A) import any such species into, or export any such species from, the United States;  
   (B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law;  
   (C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;  
   (D) sell or offer for sale in interstate or foreign commerce any such species; or  
   (E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this chapter.  

§ 10. Exceptions

(a) Permits

(1) The Secretary may permit, under such terms and conditions as he shall prescribe—
   (A) any act otherwise prohibited by section 9 of this Act for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) of this section; or  
   (B) any taking otherwise prohibited by section 9 (a)(1)(B) of this Act if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.
(2) (A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies—

(i) the impact which will likely result from such taking;

(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that—

(i) the taking will be incidental;

(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(iii) the applicant will ensure that adequate funding for the plan will be provided;

(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) the measures, if any, required under subparagraph (A)(iv) will be met; and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

(C) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.

§ 11. Penalties and enforcement

(2) (g) Citizen suits

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 6(g)(2)(B)(ii) of this Act, the prohibitions set forth in or authorized pursuant to section 4(d) or 9(a)(1)(B) of this Act with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 4 of this Act which is not discretionary with the Secretary.
The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2) (A) No action may be commenced under subparagraph (1)(A) of this section—
(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;
(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or
(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section—
(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or
(ii) if the Secretary has commenced and is diligently prosecuting action under section 6(g)(2)(B)(ii) of this Act to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3) (A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.
(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).

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APPENDIX C

Bruce Babbitt, Secretary of the Interior, et al., Petitioners
v.
Sweet Home Chapter of Communities for a Great Oregon, et al., Respondents
Supreme Court of the United States

Justice STEVENS delivered the opinion of the Court.

The Endangered Species Act of 1973 (ESA or Act) contains a variety of protections designed to save from extinction species that the Secretary of the Interior designates as endangered or threatened. Section 9 of the Act makes it unlawful for any person to “take” any endangered or threatened species. The Secretary has promulgated a regulation that defines the statute's prohibition on takings to include "significant habitat modification or degradation where it actually kills or injures wildlife." This case presents the question whether the Secretary exceeded his authority under the Act by promulgating that regulation.

Section 9(a)(1) of the Act provides the following protection for endangered species:

"Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to-

.....

"(B) take any such species within the United States or the territorial sea of the United States."

Section 3(19) of the Act defines the statutory term "take": “The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”

The Act does not further define the terms it uses to define "take." The Interior Department regulations that implement the statute, however, define the statutory term "harm": "Harm" in the definition of ‘take’ in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 CFR § 17.3 (1994).

This regulation has been in place since 1975.

A limitation on the § 9 “take” prohibition appears in § 10(a)(1)(B) of the Act, which Congress added by amendment in 1982. That section authorizes the Secretary to grant a permit for any taking otherwise prohibited by § 9(a)(1)(B) “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”

In addition to the prohibition on takings, the Act provides several other protections for endangered species. Section 4 commands the Secretary to identify species of fish or wildlife that
are in danger of extinction and to publish from time to time lists of all species he determines to be endangered or threatened. . . . Section 7 requires federal agencies to ensure that none of their activities, including the granting of licenses and permits, will jeopardize the continued existence of endangered species "or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary ... to be critical."

Respondents in this action are small landowners, logging companies, and families dependent on the forest products industries in the Pacific Northwest and in the Southeast, and organizations that represent their interests. They brought this declaratory judgment action against petitioners, the Secretary of the Interior and the Director of the Fish and Wildlife Service, in the United States District Court for the District of Columbia to challenge the statutory validity of the Secretary's regulation defining "harm," particularly the inclusion of habitat modification and degradation in the definition. Respondents challenged the regulation on its face. Their complaint alleged that application of the "harm" regulation to the red-cockaded woodpecker, an endangered species, and the northern spotted owl, a threatened species, had injured them economically.

* * *

. . . .[W]e must assume, arguendo, that those [logging] activities will have the effect, even though unintended, of detrimentally changing the natural habitat of both listed species and that, as a consequence, members of those species will be killed or injured . . . . The Secretary . . . submits that the § 9 prohibition on takings, which Congress defined to include "harm," places on respondents a duty to avoid harm that habitat alteration will cause the birds unless respondents first obtain a permit pursuant to § 10.

The text of the Act provides three reasons for concluding that the Secretary's interpretation is reasonable. First, an ordinary understanding of the word "harm" supports it. The dictionary definition of the verb form of "harm" is "to cause hurt or damage to: injure." Webster's Third New International Dictionary 1034 (1966). In the context of the ESA, that definition naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species.

Respondents argue that the Secretary should have limited the purview of "harm" to direct applications of force against protected species, but the dictionary definition does not include the word "directly" or suggest in any way that only direct or willful action that leads to injury constitutes "harm." Moreover, unless the statutory term "harm" encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate the meaning of other words that § 3 uses to define "take." A reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary's interpretation.

Second, the broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid. . . . As stated in § 2 of the Act, among its central purposes is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved...."
Respondents advance strong arguments that activities that cause minimal or unforeseeable harm will not violate the Act as construed in the “harm” regulation. Respondents, however, present a facial challenge to the regulation. Thus, they ask us to invalidate the Secretary's understanding of “harm” in every circumstance, even when an actor knows that an activity, such as draining a pond, would actually result in the extinction of a listed species by destroying its habitat. Given Congress' clear expression of the ESA's broad purpose to protect endangered and threatened wildlife, the Secretary's definition of "harm" is reasonable.

Third, the fact that Congress in 1982 authorized the Secretary to issue permits for takings that § 9(a)(1)(B) would otherwise prohibit, "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity," strongly suggests that Congress understood § 9(a)(1)(B) to prohibit indirect as well as deliberate takings. The permit process requires the applicant to prepare a "conservation plan" that specifies how he intends to "minimize and mitigate" the impact of his activity on endangered and threatened species, making clear that "Congress had in mind foreseeable rather than merely accidental effects on listed species. No one could seriously request an "incidental" take permit to avert § 9 liability for direct, deliberate action against a member of an endangered or threatened species, but respondents would read "harm" so narrowly that the permit procedure would have little more than that absurd purpose. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." Congress' addition of the § 10 permit provision supports the Secretary's conclusion that activities not intended to harm an endangered species, such as habitat modification, may constitute unlawful takings under the ESA unless the Secretary permits them.

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When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary. The task of defining and listing endangered and threatened species requires an expertise and attention to detail that exceeds the normal province of Congress. Fashioning appropriate standards for issuing permits under § 10 for takings that would otherwise violate § 9 necessarily requires the exercise of broad discretion. The proper interpretation of a term such as "harm" involves a complex policy choice. When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his. In this case, that reluctance accords with our conclusion, based on the text, structure, and legislative history of the ESA, that the Secretary reasonably construed the intent of Congress when he defined "harm" to include "significant habitat modification or degradation that actually kills or injures wildlife."

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The judgment of the Court of Appeals is reversed.
Habitat conservation planning is a mechanism by which landowners subject to [Endangered Species Act, or "ESA"] restrictions may obtain qualified regulatory relief from the U.S. Fish and Wildlife Service (the "Service"), which is the agency that administers the ESA. A Habitat Conservation Plan ["HCP"] sets forth mitigation measures to which the landowner agrees in order to aid endangered species protected under the ESA, such as enhancing habitat on-site or acquiring property off-site that can be managed as habitat. In exchange, the landowner receives an incidental take permit that allows the landowner to engage in actions that would otherwise be ESA violations. The Service may issue an incidental take permit if it believes that the permitted actions taken in conjunction with the HCP will "not appreciably reduce the likelihood of the survival and recovery of the species in the wild."

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HCPs also have a number of other benefits. They create some opportunities in which the Service and the landowner share information. For example, as part of an HCP the Service often secures permission from the landowner to access the landowner's property in order to monitor and study sensitive species. . . .

HCPs also address, albeit incompletely, the "Achilles heel" of the ESA: regulation of behavior on private property. Even proponents of the ESA acknowledge deficiencies in the ESA as it relates to private land. And yet with half of all species listed under the ESA having at least eighty-one percent of their habitat on private land, the ESA is woefully inadequate for regulating most private behavior that affects listed species. As a practical matter, the Service, with its limited resources, is powerless to stop most actions on private land that would be prohibited under the ESA. Landowners often degrade habitat, and possibly even kill endangered or threatened species, before the Service is even aware of the presence of species, giving rise to the phrase "shoot, shovel, and shut up." Though there are numerous accounts of these types of occurrences, the frequency of such conduct cannot be quantified empirically. Suffice it to say, the abundance of anecdotes relating to such occurrences indicates that this could be a serious problem confronting the Service.

In other cases, when landowners become aware of the prospective listing of a species that may affect their property, they may legally preempt future ESA restrictions by degrading their property so that it ceases to be habitat. Absent a critical habitat designation, landowners may even degrade quality habitat of a listed species if there is no indication that the species has colonized the landowner's property to prevent future colonization with attendant ESA restrictions. Consider the example of a timber harvesting company in the Northwest that holds a vast amount of the old-growth forest that is prime habitat for the northern spotted owl but is not currently occupied by owls. The company has an incentive to extract the timber before it is
colonized by owls and becomes subject to ESA restrictions. Accelerating the harvest is not economically optimal or even profitable to the company because it disrupts the cash flow of such an enterprise. But if such a company does not increase its harvest now, its only alternative might be to abandon the timber indefinitely if it became colonized by a northern spotted owl (a fairly common occurrence). Thus, the company may harvest immediately to salvage some timber from the land and avoid the imposition of ESA restrictions.

This type of quandary provided the impetus for the development and implementation of an HCP for a North Carolina landowner who previously managed his timberlands in a manner that was conducive to colonization by the endangered red-cockaded woodpecker. After the landowner threatened to cease managing his property in such a manner, the Service negotiated and successfully consummated an HCP with the landowner. The Service reasoned that there was nothing to be lost by agreeing to an HCP because some prime red-cockaded woodpecker habitat might be lost without the HCP. . . .

Thus, HCPs ameliorate both the Service's enforcement problem in detecting illegal "shoot, shovel and shut up" actions and the landowner preemption problem by offering landowners an alternative to destructive and wasteful land use practices. HCPs, if expeditious enough, allow the Service to offer some reward to landowners for conservation despite strong incentives for the landowner to do otherwise. HCPs give landowners less reason to fear prospective ESA restrictions.

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On the downside, substantial questions exist as to whether the Service has faithfully adhered to the legal standards that constrain its negotiating authority in the HCP process. While few landowners have sued the Service to challenge its regulatory authority, environmental organizations have sued the Service for issuing incidental take permits that allegedly concede too much to landowners and fail to adequately provide for species recovery. All four of the cases brought by environmental organizations, at least in part, depend upon whether it was arbitrary and capricious for the Service to issue an incidental take permit, in light of the evidence of harm accruing to the species. The Service lost two out of the four cases. While the lawsuits do not prove that the Service is neglecting the needs of species, they raise a substantial concern that the Service is being overly generous towards landowners.

Not all of the problems with HCPs are immediately solvable, but some improvements are clearly in order. A clarification (preferably a statutory one) of the phrase “appreciably reduce the likelihood of survival of species in the wild” is necessary to delineate what the Service can and cannot do in negotiating HCPs. In negotiating an HCP, there should be at least as much habitat of equivalent quality after the HCP to prevent detriment to listed species. Although off-site acquisition of habitat has been a popular mitigation measure for permittees, much more could be done to contribute to the recovery of sensitive species. Standards should ensure that the habitat acquired is not land already owned by the federal government or land that was reasonably susceptible to federal acquisition.
Northern Spotted Owl Exercise

Group 1 – Plum Creek, a forestry company with private landholdings

You are Plum Creek, a forestry company with about 100,000 hectares of forested land on the Olympic Peninsula in Washington State that you own, and that you harvest on even-aged rotations over a 80- or 90-year cycle. That means that the property is divided up into 80 or 90 units, and one unit is logged each year, and allowed to grow back while the other 79 or 89 units logged during the other years. You regularly comply with all state permit requirements. Since you own your land, you only have to comply with a few environmental and forestry regulations, such as riparian area protection, and these are not onerous. You suspect that some of your landholdings have been colonized by a pair of Northern Spotted Owls, which are listed as "threatened" under the U.S. Endangered Species Act ("ESA"). Moreover, you worry that some of your stands are old enough that they may be colonized by Northern Spotted Owls, if not already.

There are very specific "take" regulations under the ESA, much like the "matrix activity centres" established under the BC Spotted Owl Management Plan. In oversimplified terms, if the regulatory agency, the U.S. Fish and Wildlife Service, determines that there is a Northern Spotted Owl or a pair of Northern Spotted Owls, a one kilometer circle is drawn around that nesting site, and your ability to log in that circle is highly restricted. Of course, it would be a very significant financial problem for you if it turns out that you do have Northern Spotted Owls on your property, and a bigger one still if there are more that colonize your property.

Say you are Plum Creek's corporate counsel, and the CEO has come to you. Only a few people in the company, including the company's wildlife biologist, know about the potential Northern Spotted Owl problem you may already have. Most people in and out of the company know about the general problem of Spotted Owl colonization, and the potential for old-ish growth forests such as yours to provide habitat for the Spotted Owl.

What do you do, if anything? What are the company's options?
Northern Spotted Owl Exercise

Group 2 – U.S. Fish and Wildlife Service

You are the U.S. Fish and Wildlife Service, the regulatory agency charged with enforcing the Endangered Species Act ("ESA"). You have many regional offices, and you have an excellent staff on the ground on the Olympic Peninsula in Washington State, a place where there is a lot of forestry industry and a lot (relatively) of Northern Spotted Owls.

These are small towns on the Olympic Peninsula, and there is some word going around that Plum Creek may have some Northern Spotted Owls on their privately-held forestlands, on which they otherwise lawfully log under all applicable Washington State environmental and forestry regulations. Plum Creek owns about 100,000 hectares and harvests trees on fairly long rotations, like 80 or 90 years. That means that the property is divided up into 80 or 90 units, and one unit is logged each year, and allowed to grow back while the other 79 or 89 units logged during the other years. This is a rumour that your on-the-ground staff on the Olympic Peninsula has turned up by hanging around the bars and chatting with loggers. If true, you must investigate and issue appropriate orders against Plum Creek "taking" any of the owls.

There are very specific "take" regulations under the ESA, much like the "matrix activity centres" established under the BC Spotted Owl Management Plan. In oversimplified terms, if you determine that there is a Northern Spotted Owl or a pair of Northern Spotted Owls, a one kilometer circle is drawn around that nesting site, and the company's ability to log in that circle becomes highly restricted. Of course, that is a fairly serious problem for most forestry companies.

Assume you have the full support of the Interior Secretary, who is your boss. You are obligated to uphold and enforce the ESA, and this rumour may trigger duties on your part.

As a legal matter, what do you do?
Northern Spotted Owl Exercise

Group 3 – Canadian Forest Products, a forestry company logging on provincial lands

You are Canadian Forest Product, Inc. or Canfor, a forestry company with licenses to log on about 100,000 hectares of forested land on provincial land in BC. Your tree farm license, covering an area adjacent to Glacier National Park in the Kootenays, just East of Revelstoke, allows you harvest on even-aged rotations over a 80- or 90-year cycle. That means that the property is divided up in to 80 or 90 units, and one unit is logged each year, and allowed to grow back while the other 79 or 89 units logged during the other years. You regularly comply with all provincial permit requirements. You generally do not have a lot of problems, except that you suspect that a pair of Northern Spotted Owls has colonized some forested land in Glacier National Park, just inside the park's borders, but close to the land covered by your tree farm license. If you logged all of your land, or logged that parcel near the owls, you might be considered to be "harming" those owls (if they're there). Moreover, you worry that this could be the beginning of more colonizations by Northern Spotted Owls, which seem to be fleeing Washington State and Idaho. If they colonized the provincial land on which you have a license to log, the BC Spotted Owl Management Plan would require the drawing of a circle around the owl, designated a "matrix activity area," within which 67% would have to be managed for owl habitat. That would impose costs upon you.

Say you are Canfor's corporate counsel, and the CEO has come to you. Only a few people in the company, including the company's wildlife biologist, know about the potential Northern Spotted Owl problem. Most people in and out of the company know about the general problem of Spotted Owl colonization, and the potential for old-ish growth forests such as that covered by your tree farm license to provide habitat for the Spotted Owl.

How do you advise the CEO? What are the company's options?
Northern Spotted Owl Exercise

Group 4 – Minister of the Environment, Canada

You are John Prentice, the Canadian Minister of the Environment. Your ministry is charged with enforcing the Species at Risk Act ("SARA"). You have many regional offices, and you have an excellent staff on the ground in mountainous Eastern BC, where there is a lot of forestry industry and a few Northern Spotted Owls.

There have been some sightings of a Northern Spotted Owl in Glacier National Park in BC, just inside the park's borders. Canfor, a major forestry company that logs trees in that area, has a provincial license to log on some lands just outside of Glacier National Park in BC. If Canfor were to log that land near Glacier National Park, it would be logging very close to the sighted Northern Spotted Owl in the park.

You are obligated to uphold and enforce the SARA. As a legal matter, what do you do?