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Docket: T-1529-07

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Ottawa, Ontario, September 9, 2009

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

**ENVIRONMENTAL DEFENCE CANADA
GEORGIA STRAIT ALLIANCE
WESTERN CANADA WILDERNESS COMMITTEE
and DAVID SUZUKI FOUNDATION**

Applicants

and

MINISTER OF FISHERIES AND OCEANS

Respondent

REASONS FOR ORDER AND ORDER

[1] By these reasons, the Nooksack Dace, a small minnow whose habitat is four fresh water streams in the Lower Mainland of British Columbia, has the distinction of being the first endangered species in Canada to benefit by a comprehensive interpretation by this Court of key elements of its protective legislation: the *Species at Risk Act*, 2002, c. 29 (SARA).

A decision of the Minister of Fisheries and Oceans (Minister) pursuant to *SARA* has prompted the Applicants to bring the present Application as a “test case” respecting the Minister’s interpretation of *SARA* as displayed in the decision under review. The Applicants argue that the Minister knowingly failed to follow the mandatory requirements of s. 41(1)(c) and (c.1) of *SARA* with respect to the Final Recovery Strategy for the Nooksack Dace. However, during the course of the hearing, Counsel for the Applicants stressed that no allegation of bad faith is being made respecting this conduct.

[2] Nevertheless, in my opinion, the story that gave rise to the present litigation and the conduct of the litigation itself is important to be told. This is so because a review of the Minister’s decision-making under *SARA* applied to the Nooksack Dace provides ample proof that the bringing of the present Application was absolutely necessary. This is a story about the creation and application of policy by the Minister in clear contravention of the law, and a reluctance to be held accountable for failure to follow the law. Therefore, this is a case about the rule of law described by Justices Bastarache and LeBel at paragraph 28 of *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190:

By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[3] In the end result, the Applicants' judicial review argument concerning the Minister's failure in decision-making is limited to a question of statutory interpretation. For the reasons which follow, I find that the Minister acted contrary to the law intended by Parliament to protect the Nooksack Dace.

I. Overview of the Present Dispute

[4] The Applicants' purpose in launching the present Application is stated in the following paragraphs of the Notice of Application:

15. The Applicants are "public interest groups" in that they are charities that work for environmental protection and have no personal, proprietary or pecuniary interest in the outcome of the Application.

16. The Applicants believe that they need to bring this Application to address federal failure to implement the SARA, which failure is further endangering Canada's at risk species. They believe that an order requiring SARA to be complied with is in the public interest because the viability of Canada's wildlife populations is a matter affecting all Canadians.

17. The Applicants also believe that, unfortunately, they have no choice but to litigate this matter. Each of the Applicants has a record of working to protect at-risk species and also a record of working, using non-litigious means, to ensure that the federal government, including the Respondent Minister, implements the SARA. They bring this Application only in the face of overwhelming evidence that: (a) the Canadian government is attempting to avoid its obligation to implement the SARA so as to protect Canada's at-risk species; and, (b) non-litigious means have not proven effective in ensuring this whereas litigation, or its threat, has proven effective.

The Applicants' detailed position in the present Application is stated in précis form in the Notice of Application; the factual statements are not in dispute:

The grounds for the application are:

The Species at Risk Act and the Nooksack Dace

1. The Species at Risk Act (SARA) received Royal Assent on December 12, 2002 and came into force in three phases. On March 24, 2003, sections 134 to 136 and 138 to 141 setting out amendments to other national wildlife legislation came into force. On June 5, 2003, sections 2 to 31, 37 to 56, 62, 65 to 76, 78 to 84, 120 to 133 and 137 came into force. On June 1, 2004, the remainder of the SARA's sections came into force: sections 32 to 36, 57 to 61, 63, 64, 77, and 85 to 119.
2. The purpose of the SARA is:

...to prevent wildlife species from becoming 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 (s.6).
3. The Nooksack dace is a small (<15 cm) stream-dwelling minnow. Within Canada it is known from four lowland streams in British Columbia's Fraser Valley. The global distribution includes approximately 20 additional streams in north-west Washington.
4. The Nooksack dace is "listed" pursuant to the SARA as an "endangered" species, meaning that it on the List of endangered Wildlife Species set out in Schedule 1 to the SARA. The dace's status as "endangered" means that it is "a wildlife species that is facing imminent extirpation." "Extirpated" means no longer existing in the wild in Canada, but existing elsewhere in the wild. (s.2). The Nooksack dace is extirpated from some tributaries in Canadian watersheds where it was abundant in the 1960s.
5. Listing triggers SARA's provisions to prevent extirpation and provide for recovery of species. These include prohibitions against harm (s.32), protections for residence (s.33) and the requirement of the Minister to undertake

recovery planning (ss.37-46) and recovery plan implementation (“action planning”) (ss.47-64).

6. Essential to the recovery planning process is the Minister’s preparation of “recovery strategies” which “must address the threats to survival of the species” (s.41). Recovery strategies must, *inter alia*:
 - describe the species and its needs,
 - identify the threats to its survival and threats to its habitat; and
 - identify “critical habitat, to the extent possible, based on the best available information” including examples of activities likely to result in the destruction of critical habitat (s.41) (a), (b) & (c).
7. Protecting critical habitat is often necessary to the survival and recovery of a species. This is reflected in the preamble to the SARA - “habitat of species at risk is key to their conservation.” This is also recognized by the definition of critical habitat - “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” (s.2).
8. By this definition, protection of critical habitat occurs only if it is identified in a recovery strategy or action plan, which triggers a prohibition against its destruction (s.58). But, unlike recovery strategies which must be prepared according to mandatory timelines (s.42), the SARA contains no time limits for preparing action plans. Thus, failure to identify critical habitat at the recovery strategy stage risks indefinite delay in its eventual identification and protection.

The Nooksack Dace Recovery Strategy and federal intention to disregard the SARA

9. The Nooksack dace was a species listed on Schedule 1 of the SARA when the Act came into force, therefore the Recovery Strategy was due June 5th, 2006 (ss.42(2)).

10. The SARA requires a proposed recovery strategy to be placed on a SARA Public Registry where, for 60 days, the public may file written comments with the Minister (s.43(1)). 30 days after this, the Minister must include the final recovery strategy on the Public Registry (s.43(2)).
11. A draft [proposed] Nooksack Dace Recovery Strategy was posted to the Public Registry on or about September 25th, 2006. Comments were submitted on behalf of the Applicants which noted, *inter alia*, the failure of the Recovery Strategy to identify critical habitat notwithstanding that its location is known. On July 23, 2007, one year after it was due, the final Nooksack Dace Recovery Strategy was posted to the Public Registry.
12. The Recovery Strategy does not identify critical habitat while identifying loss of habitat as one of the main threats to the Nooksack dace's survival, and recommending habitat protection in ensuring the species' survival and recovery.
13. The Recovery Team, formed to provide the minister with advice on the Recovery Strategy and comprised of leading experts regarding the Nooksack dace, could and did identify critical habitat and wished to include that identification of critical habitat in the Nooksack Dace Recovery Strategy.
14. But, at the direction of the Minister and/or his delegate, the Recovery Team removed the identification of critical habitat from the Recovery Strategy and inserted it into a separate document which was not posted to the Public Registry.

[Emphasis in the original]

[5] Thus, the present Application primarily concerns the recovery strategy provisions of *SARA* as applied to the Nooksack Dace and, in particular, the correct interpretation of s. 41(1)(c) and (c.1):

41. (1) If the competent minister determines that the recovery of the listed wildlife species is feasible, the recovery strategy must address the threats to the survival of

41. (1) Si le ministre compétent conclut que le rétablissement de l'espèce sauvage inscrite est réalisable, le programme de rétablissement doit traiter des

the species identified by COSEWIC, including any loss of habitat, and must include

menaces à la survie de l'espèce — notamment de toute perte de son habitat — précisées par le COSEPAC et doit comporter notamment :

(a) a description of the species and its needs that is consistent with information provided by COSEWIC;

a) une description de l'espèce et de ses besoins qui soit compatible avec les renseignements fournis par le COSEPAC;

(b) an identification of the threats to the survival of the species and threats to its habitat that is consistent with information provided by COSEWIC and a description of the broad strategy to be taken to address those threats;

b) une désignation des menaces à la survie de l'espèce et des menaces à son habitat qui soit compatible avec les renseignements fournis par le COSEPAC, et des grandes lignes du plan à suivre pour y faire face;

(c) an identification of the species' critical habitat, to the extent possible, based on the best available information, including the information provided by COSEWIC, and examples of activities that are likely to result in its destruction;

c) la désignation de l'habitat essentiel de l'espèce dans la mesure du possible, en se fondant sur la meilleure information accessible, notamment les informations fournies par le COSEPAC, et des exemples d'activités susceptibles d'entraîner sa destruction;

(c.1) a schedule of studies to identify critical habitat, where available information is inadequate;

c.1) un calendrier des études visant à désigner l'habitat essentiel lorsque l'information accessible est insuffisante;

(d) a statement of the population and distribution objectives that will assist the recovery and survival

d) un énoncé des objectifs en matière de population et de dissémination visant à favoriser la survie et le

of the species, and a general description of the research and management activities needed to meet those objectives;

rétablissement de l'espèce, ainsi qu'une description générale des activités de recherche et de gestion nécessaires à l'atteinte de ces objectifs;

(e) any other matters that are prescribed by the regulations;

e) tout autre élément prévu par règlement;

(f) a statement about whether additional information is required about the species; and

f) un énoncé sur l'opportunité de fournir des renseignements supplémentaires concernant l'espèce;

(g) a statement of when one or more action plans in relation to the recovery strategy will be completed.

g) un exposé de l'échéancier prévu pour l'élaboration d'un ou de plusieurs plans d'action relatifs au programme de rétablissement.

[Emphasis added]

[Je souligne]

[The COSEWIC referred to in the provision is the Committee on the Status of Endangered Wildlife in Canada established by s. 14]

Of primary concern with respect to s. 41(1)(c) and (c.1) is the definitions of "habitat" for aquatic species and "critical habitat" provided in s. 2 of SARA:

"habitat" means

« habitat »

(a) in respect of aquatic species, spawning grounds and nursery, rearing, food supply, migration and any other

a) S'agissant d'une espèce aquatique, les frayères, aires d'alevinage, de croissance et d'alimentation et routes

areas on which aquatic species depend directly or indirectly in order to carry out their life processes, or areas where aquatic species formerly occurred and have the potential to be reintroduced; and

migratoires dont sa survie dépend, directement ou indirectement, ou aires où elle s'est déjà trouvée et où il est possible de la réintroduire;

...

[...]

"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.

« habitat essentiel » L'habitat nécessaire à la survie ou au rétablissement d'une espèce sauvage inscrite, qui est désigné comme tel dans un programme de rétablissement ou un plan d'action élaboré à l'égard de l'espèce.

The issue is whether the term “habitat” includes two features: a defined geographic area capable of being located on a map and the physical and biological attributes of that area that allow a species to use it for the function of carrying out its life processes.

[6] The recovery strategy provisions of *SARA* are one component of a comprehensive protection strategy. Following meeting the recovery strategy requirements in s. 41, the action plan element takes effect as set out in sections 47 to 55. There is no dispute that the scheme of these two elements is to first provide a baseline of information about the biology and ecology of a species and a broad strategy to address conservation threat. In contrast, action plans are intended to describe more detailed “action” measures to achieve a species' survival and recovery, including evaluation of the socio-economic costs and benefits of such measures.

[7] For contextual clarification, the recovery strategy and action plan elements of *SARA* are quoted in the Annex “A” to these reasons.

II. The Minister’s Final Recovery Strategy Decision

[8] The process leading to the posting of the Final Recovery Strategy of the Nooksack Dace involved the preparation of a Draft Proposed Recovery Strategy, the posting of the Proposed Recovery Strategy, public consultation, and then the posting of the Final Recovery Strategy.

[9] Therefore, five sequential actions are the focus of the present judicial review: the preparation of a Draft Proposed Recovery Strategy in June 2005; the June 21, 2006 direction by Ms. Allison Webb, the Regional Director of Policy for the Department of Fisheries and Oceans (DFO) in the Pacific Region with respect to the contents of the Proposed Recovery Strategy to be posted and which was posted for comment on September 25, 2006; the July 18, 2007 departmental recommendation of Mr. Pardeep Ahluwalia, Director General, *SARA* Secretariat, directed to Mr. Larry Murray, Deputy Minister of Fisheries and Oceans to approve Ms. Webb’s decision; Mr. Murray’s concurrence to the recommendation on behalf of the Minister on July 18, 2007; and the July 23, 2007 posting of the Final Recovery Strategy. It is agreed that Mr. Murray had authority to concur on behalf of the Minister and, thus, the concurrence is the decision of the Minister.

[10] While the present Notice of Application cites the decision under review as that of the posting of the Final Recovery Strategy by the Minister on July 23, 2007, it is agreed that the

decision under review is composed of the actions of Ms. Webb, Mr. Ahluwalia, Mr. Murray, and the content of the Final Recovery Strategy considered together.

A. The Recovery Team's Draft Proposed Recovery Strategy

[11] Recovery strategies under *SARA* in British Columbia for freshwater fish are developed by a Recovery Team composed of a core group of experts and others added to assist with individual species as needed. With respect to the Nooksack Dace, a subcommittee of such a team was formed in December 2003 to begin assessment of the Nooksack Dace and to continue assessment of the Salish Sucker; one of the members of the sub-working group was Dr. Mike Pearson, a self-employed professional biologist who is the lead authority in Canada on the ecology, conservation, and habitat needs of freshwater fish generally and, in particular, the Nooksack Dace and Salish Sucker. Dr. Pearson has provided his expertise to DFO under contract since 2003.

[12] Dr. Pearson was requested to prepare a preliminary draft of a recovery strategy for both the Nooksack Dace and Salish Sucker for the consideration of the Recovery Team with an eye towards placing a final draft before the Minister as the Proposed Recovery Strategy required to be posted pursuant to s. 42(1) of *SARA*. Dr. Pearson's affidavit filed in the present Application supplies contextual information about meeting this request (see Affidavit of Mike Pearson, Applicants' Application Record, Vol. 1, Tab 6).

[13] At paragraph 15, Dr. Pearson provides the Minutes of the Recovery Team's meeting on December 10, 2003 which contains the following description of the challenge that the definition of critical habitat presented:

...the main protective measures of SARA do not kick in until critical habitat is defined. Although there is much within -and among- agency discussion about how to go about defining critical habitat there is at present no clear direction coming from the agencies on how to do this. The wording of SARA implies that the legislators are deferring to the expertise of relevant groups to define critical habitat.

At paragraphs 17 and 18, Dr. Pearson makes the following comment about meeting the challenge:

I considered it very important that we identify critical habitat. Nooksack dace are under threat primarily from habitat loss and degradation in each of the four watersheds they inhabit in Canada. Various forms of habitat loss and degradation including water withdrawal from wells and streams, toxicity associated with urban storm drainage, channel dredging for drainage, and loss of riparian (stream-side) vegetation are all major concerns in one or more of these watersheds. Because of this, protection of critical habitats is key to addressing the primary threats endangering Nooksack dace. Indeed, it is the key factor in ensuring the survival of the species.

According to the SARA, 'critical habitat' means the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified in the recovery strategy or in an action plan for the species. In biological terms, I recognized two thresholds in this definition: survival and recovery. In biological terms, I interpreted the *survival* threshold as the habitat required to support the minimum viable population size (MVP) for the species in each of the watersheds it currently occupies. The *recovery* threshold was as set out as the recovery goal in the Nooksack dace Recovery Strategy: "To ensure the long-term viability of Nooksack dace populations throughout their natural distribution in Canada." It includes some amount of additional habitat, but recognizes that the full recovery of Nooksack dace populations to historic levels is not possible given the extent and permanence of habitat loss and degradation in their native watersheds.

[14] At paragraphs 19 to 24, Dr. Pearson describes the process of identifying the critical habitat of the Nooksack dace:

When I began preparing the Nooksack dace Recovery Strategy, direction on identifying critical habitat was drawn from a template for recovery strategy preparation contained in an October 2004, species at risk recovery planning handbook produced by the Canadian Wildlife Service, an agency of Environment Canada. The template was forwarded to me by Dr. Todd Hatfield, Coordinator of the Recovery Team. The template states:

“Critical habitat is defined in SARA as “the habitat that is necessary for the survival or recovery of a listed wildlife species...” It should relate to the recovery goal: if the goal is survival (maintaining existing population size and distribution), then the critical habitat would be the habitat currently occupied by the species. If the recovery goal is full recovery, then the critical habitat would be the habitat needed by the species in order to maintain a self-sustaining and viable population level. In most cases, the recovery goal and the identified critical habitat will fall somewhere within the continuum from survival to full recovery.

*Note that critical habitat is not formally identified until the recovery strategy or action plan for the species that contains the critical habitat identification has been included as the final in the SARA public registry. Until that time, the identification of critical habitat should be developed to the extent possible, but be considered a proposal only (as advice to the competent minister).

The critical habitat proposal should be developed with reference to population and distribution goals, particularly with respect to the amount, distribution and connectivity of habitat patches. Where data are incomplete, critical habitat identification should be done in stages. Identify what you can in well-studied areas now and develop a schedule of studies (see below) for areas that are more poorly known.”

I was also aware that SARA requires identifying critical habitat to the extent possible, I took that at face value, seeking to identify critical habitat in terms of describing both the qualities of critical habitat as well as describing as best I could where it was; that is, delineating its specific location and extent on a map.

To illustrate the process of identifying Nooksack Dace critical habitat, I briefly set out below the method the Recovery Team chose. This method was based on:

1. an estimate of minimum viable population size (MVP) for the species. This is the minimum number of breeding adults necessary for a population to be likely to survive in the wild.
2. a definition allowing the identification of suitable (potential critical) habitat in the field.
3. an estimate of the area of suitable habitat on the landscape.
4. an estimate of mean population density of Nooksack dace in suitable habitat.

1. Estimation of the minimum viable population size (MVP).

Statistical methods of assessing MVP exist, but depend on detailed demographic data not available for Nooksack dace or many other species at risk. High quality estimates for well over 100 species do exist in the literature, however. They range from 2000 to 10,000 reproductive individuals. The Recovery Team concluded that the Nooksack dace MVP was likely to be in the low to mid thousands. The Team further concluded that the population of Nooksack dace in each watershed (creek) needed to be assessed separately as they are geographically isolated from one another. Being geographically isolated means that Nooksack dace cannot move between the watersheds and the population in one watershed thus cannot contribute to the survival of that in another watershed. In effect, each watershed's population must be managed as though the others do not exist, so to maximize the chances that the Nooksack dace will survive in Canada. Therefore, each watershed's population must be kept at least as large as the MVP. Therefore, critical habitat for the species as a whole must include all critical habitat for each of the populations.

2. A definition allowing the identification of suitable (potential critical) habitat.

The Nooksack dace is a habitat specialist with a small geographic distribution. It is found only in and around riffle habitats (areas of shallow turbulent flow over rocky substrate). This is well documented by every researcher who has studied them. The Nooksack dace is considered a subspecies of the longnose dace (*R. cataractae*), also a well known as a riffle specialist across its continental range. Nooksack dace spawn, rest, forage, and overwinter in riffles, and many appear to remain in very small home ranges, covering less than 50 m of stream. In the course of my research, I waded or canoed the entire length of all streams Nooksack dace are known to inhabit in Canada, and mapped the extent of riffle habitat under low flow conditions. As is customary in stream surveys, I divided each stream into a number of reaches (segments of streams with relatively homogenous habitats). For of the 72 reaches identified in the Nooksack Tributaries (The Brunette River population was not included as it was only discovered in 2005, after this study was completed.) I measured the length of major stream habitat types (pools, riffles, glides), categorized substrate particle size, in-stream cover availability and land use within 200m of the channel, and sampled for Nooksack dace presence using minnow traps. I used a statistical model (logistic regression) to show that the extent of riffle habitat in a reach is, by far, the best predictor of Nooksack dace presence. They are found in fewer than half of all reaches containing less than 10% riffle by length. In aggregate these data provided a strong scientific basis for identifying areas of suitable, or potential critical habitat.

3. An estimate of the area of suitable habitat on the landscape.

I multiplied the length of riffle habitat in each reach by the average channel width in that reach to estimate total riffle area in the watershed.

4. An estimate of mean population density in suitable habitat.

I used a field-derived estimate of Nooksack dace density in high quality habitat of $1.9/m^2$.

Multiplying of riffle area in each watershed by the population density in high quality habitat yielded an estimate of the watershed's maximum achievable population (carrying capacity) for Nooksack dace if all of the habitat were in excellent condition. We then compared this to our estimate of minimum viable population size

(MVP) for each watershed, which is low to mid thousands of Nooksack dace.

The riparian portion of potential critical habitat was assessed and mapped using an adaptation of the BC Governments Riparian Area Regulation assessment methodology as described in Exhibit “G”, which are consistent with the habitat needs of Nooksack dace.

If the area of suitable habitat available in the landscape is less than that necessary to support the MVP, either all available habitat should be identified as critical, and additional habitats be restored until enough is available to support the MVP, or recovery should be declared not feasible. This is because a population of Nooksack dace that is smaller than the MVP cannot be expected to persist in the wild. If the suitable habitat area far exceeds the area necessary to meet the MVP, not all of the habitat may be needed in order to ensure survival. In either case, more habitat than just that needed to support the MVP of Nooksack dace would still need to be identified as critical habitat, to meet the recovery goal for the Nooksack dace by moving the population towards the higher threshold of recovery.

The maximum achievable population size of Nooksack dace for the Nooksack tributaries, assuming all habitat was of excellent quality, ranged from 3000 to 5700 fish. This led the Recovery Team to conclude in the Recovery Strategy (pg 19) that “the maximum achievable population size is close to the minimum viable population size and that all suitable habitats should be designated critical.” Actual populations are believed to be much lower than this ideal-world estimate, as most habitat is degraded, In the recently accepted COSEWIC status report on Nooksack dace (referred to in paragraphs 8 and 13), I estimated that only 300 and 800 Nooksack dace remain in Fishtrap and Pepin Creeks respectively. These numbers are significantly lower than the estimated MVP for Nooksack dace.

Based on the application of these 4 variables, we were able to determine with a reasonable degree of certainty the quantity and location of critical habitat needed for survival of the Nooksack dace. Because we concluded, as stated above, that “the maximum achievable population size is close to the minimum viable population size and that all suitable habitats should be designated critical” we recognized the necessity for protecting critical habitat in each of the Nooksack Tributaries.

[Emphasis added]

[15] Dr. Pearson provided his draft to the Recovery Team in June 2004, and a second draft in January 2005. The Recovery Team then provided its final “Draft Recovery Strategy” to DFO in June 2005.

B. Ms. Webb’s direction

[16] With respect to the Recovery Team’s Draft Recovery Strategy, and with respect to compliance with s. 41(1)(c) of SARA, Ms. Webb made the critical decision to direct the altering of all draft recovery strategies then in progress in the Pacific Region of DFO, including the Nooksack Dace Draft Recovery Strategy; the altered document was proposed three months later as the Proposed Recovery Strategy. The action taken by Ms. Webb is described in the following email sent on her behalf on June 21, 2006 by Ms. Liane O’Grady a DFO employee:

Subject: Update on Critical Habitat Identification and Policy Development

Hi Everyone,

Just thought I would send along a few recent developments with regards to the identification of critical habitat in recovery strategies and a renewed focus on SARA policy development in NHQ.

Critical Habitat ID:

Recently, a decision that was made regarding direction on critical habitat in recovery strategies. This has been a difficult and long standing issue for us in Pacific Region as well as for others (there have been similar concerns in C&A). As a result, after extensive regional discussion it has been decided that critical habitat should be removed from all RS [Recovery Strategies in the Pacific Region] in

process and for the foreseeable future until a clear policy direction has been provided. The reasons for this decision are as follows:

- Critical habitat identified in some recovery strategies had not yet undergone scientific peer review. To complete this would require further time delays (2-4 months). In addition, PSARC is still in the process of considering how to move forward on the peer review of SARA habitat related science.
- The Act itself and current draft policy are very clear that consultation must occur with any parties affected by the identification of critical habitat. At this point it is not clear that all potentially affected parties have been consulted.
- Neither the policy nor operational guidelines on the identification of critical habitat have been finalized leading to the potential for inconsistent identification and protection within the region and across the department.
- There has been no legal review of this policy. Also, the request for a legal opinion as to the legal obligations of the Minister with respect to posted recovery strategies has not yet been completed.
- Current expectations are that the *Fisheries Act* and *Oceans Act* are to be used to protect critical habitat, yet the definition of critical habitat is not consistent with the SARA definition.
- We would like to proceed cautiously with the identification of critical habitat, while still recognizing that we have a legal obligation to do so, given that we may be setting a precedent where we are uncertain as to the potential impacts of doing so.

The region is cognizant of the fact that it has already missed the deadline for posting the Nooksack Dace, Hotwater Physa, and Killer Whale recovery strategies on the SARA Public Registry and believes that it would not be beneficial to encounter further substantial delays pending resolution of the above noted concerns. I realize that this will cause some frustrations amongst staff who have worked diligently on our recovery teams, but it is better to have thoughtfully considered the impacts of critical habitat identification and to move forward in a coherent manner consistent with national direction. We will continue to work actively with our counterparts in NHQ to

ensure that policy work done on critical habitat includes discussion and adequate direction for staff working at the operational level.

Policy Framework Development:

The recent SARA program evaluation flagged the urgent need for EC/DFO/PCA to complete the SARA policies and guidelines in order to assist in effective implementation of the Species at Risk Act. As a result, the DM Steering Committee and the SARA ADM Committee have flagged a number of policy priorities (listing/delisting, socio-economic analysis, identification and protection of critical habitat, protection of species at risk, permits and agreements, activities authorized in recovery planning documents, feasibility of recovery, and consultation), which have now been incorporated into the draft SARA Policy Framework which is attached. There is currently a push to move forward on external consultations of this policy framework, however adequate regional review and comment has not yet been completed. I am hoping to provide NHQ with a regional response for their consideration prior to the framework being finalized and external consultations being initiated. If you would like to provide comments, please pass them on to me by Wednesday July 5th. (My apologies to those of you who may have now received this information more than once).

[Emphasis added]

(Respondent's Record, Vol. 1, Tab 20, pp. 16 – 17)

[17] The details of “critical habitat” that Ms. Webb decided to remove are described by Dr.

Pearson as follows:

In September 2006, the Proposed Recovery Strategy was posted on the SARA public registry with some of the information related to the critical habitat removed. Specifically, our map of Nooksack Dace critical habitat (Figure 4, page 13 of Exhibit “D”), and a table listing activities likely to result in destruction of critical habitat (page 14) were removed, and the description of critical habitat altered to remove references to its length and the specific definition. For example, the sentence “The combined length of proposed critical

habitat in the three watersheds where it has been surveyed is 21.3 km (of 36.4 km of surveyed stream channel)” was removed.

(Pearson Affidavit, para. 30)

C. The recommendation to Mr. Murray

[18] The following Memorandum, dated July 18, 2007 was sent by Mr. Pardeep Ahluwalia, Director General of the SARA Secretariat, to Mr. Larry Murray for his concurrence as an authorized delegate of the Minister of Fisheries and Oceans:

MEMORANDUM FOR THE DEPUTY MINISTER

POSTING ON THE PUBLIC REGISTRY OF FINAL RECOVERY STRATEGIES FOR THE MORRISON CREEK LAMPREY, NOOKSACK DACE AND SIX STICKLEBACK SPECIES UNDER THE *SPECIES AT RISK ACT (SARA)*

(For your signature)

Summary

- Under the *Species at Risk Act (SARA)*, a proposed version of a recovery strategy must first be posted on the SARA public registry for a 60-day comment period. The competent minister then has 30 days to incorporate comments received as appropriate, and post the final recovery strategy on the public registry.
- A proposed recovery strategy for the Morrison Creek Lamprey, one for the Nooksack Dace, and one covering six Stickleback species were posted on the SARA public registry on September 20, September 26, and October 10, 2006, respectively.
- None of the recovery strategies identify critical habitat. The David Suzuki Foundation and Sierra Legal Defence have sent letters voicing their concerns regarding missed timelines for posting recovery strategies, and notably, the absence of

critical habitat identification in the Nooksack Dace recovery strategy.

- The critical habitat section of the Nooksack Dace and Stickleback recovery strategies has been modified to indicate that DFO will conduct peer reviews of the Recovery Team's recommendations related to critical habitat before it is identified in a SARA action plan. No substantial changes have been made to the final Recovery Strategy for the Morrison Creek Lamprey.
- It is recommended that you approve posting on the public registry of the final versions of all three recovery strategies. The proposed versions of these recovery strategies were approved by ADM Science, ADM Oceans & Habitat, ADM FAM and ADM Policy in the fall of 2006, and no significant content changes have been made to the final versions.

Background

- The Morrison Creek Lamprey, Nooksack Dace, and Paxton Lake and Vananda Creek Stickleback species pairs were included as endangered species on the List of Wildlife Species at Risk (Schedule 1) of the *Species at Risk Act* (SARA) when the Act came into force in June 2003. Under s. 42(2) of *SARA*, the proposed recovery strategy for these species was to be posted on the public registry by June 2006.
- The Enos Lake Stickleback pair was listed as endangered under SARA in January 2005, and a proposed recovery strategy for this species was due in January 2008. A single recovery strategy covering all three Stickleback species pairs (each pair comprising a benthic form and limnetic form, for a total of six species) was prepared due to similar ecology and threats.
- The 60-day public comment period of proposed recovery strategies ended on November 19, 2006 for the Morrison Creek Lamprey, on November 25 for the Nooksack Dace, and on December 9 for the Stickleback species pairs.

- Following the comment period, the competent minister has 30 days to review the comments received, make changes as appropriate, and post the final version of the recovery strategy on the SARA public registry. Final recovery strategies for the Morrison Creek Lamprey, Nooksack Dace, and Stickleback species pairs were to be posted on the public registry on December 19, 2006, December 25, 2006, and January 8, 2007, respectively.

Analysis / DFO Comment

- No significant changes have been made to the final recovery strategies for Morrison Creek Lamprey, Nooksack Dace, and Stickleback species pairs. One comment on each proposed recovery strategy was received through the public registry, and the information has been incorporated where appropriate after consultation with the Province of British Columbia and the Recovery Team.
- The declaration in the final version of the documents has been modified to the effect that the British Columbia Ministry of Environment has reviewed and accepts the recovery strategies as scientific advice. This wording makes it more explicit that recommendations therein do not impose commitments on the province of BC. The Province has participated in the development of the three recovery strategies as per the requirements of SARA and of the Bilateral Agreement.
- Critical habitat is not identified in any of the three recovery strategies. The David Suzuki Foundation and Sierra Legal Defence have raised concerns on the absence of critical habitat identification in the Nooksack Dace Recovery Strategy specifically. Given the possibility that this issue may arise with recovery strategies for other freshwater species in BC, internal discussions on a path forward were warranted, resulting in the delay in posting the final versions of these recovery strategies.
- Specifically, the David Suzuki Foundation sent a letter on December 15, 2006 concerning the absence of critical habitat in the proposed Nooksack Dace recovery strategy. The Department responded on May 2, 2007 to clarify that although the recovery team identified key features of critical

habitat for this species as well as a proposal for its spatial delineation, DFO was of the opinion that critical habitat should be scientifically peer reviewed prior to its inclusion in a SARA recovery strategy. The response also indicated that the Recovery Team supports this approach.

- Subsequent to this, Sierra Legal Defence wrote to the Department on June 7, 2007 to again note that the recovery strategy for Nooksack Dace was one year overdue and to seek departmental confirmation that the recovery strategy for Nooksack Dace would include critical habitat identification.
- Discussions with DFO-Pacific Region, the SARA Secretariat and Department of Justice concluded that it is justifiable for DFO to conduct a scientific peer review of the recommendations of the recovery team for defining critical habitat before it is identified in a recovery strategy.
These peer reviews are warranted to confirm that critical habitat identification is scientifically defensible, as well as to ensure that it is consistently identified across all departmental recovery strategies. Peer reviews are a standard DFO process to confirm the validity of scientific findings. The Province of BC, who co-chairs all freshwater recovery strategy development, is also supportive of this approach.
- Consequently, the critical habitat section of the Nooksack Dace and Stickleback species pairs presents general habitat features to be considered when critical habitat will be identified, but does not make specific geospatial delineations.
The Recovery Team has developed biologically-based recommendations for defining critical habitat for these species as a separate document, which is available to the public upon request to the Recovery Team.
The recommendations will be submitted for external scientific peer review through the Pacific Science Advisory Review Committee.
- There is the potential for this issue to be raised in the media by conservation groups when the Nooksack Dace recovery strategy is posted without critical habitat. As such, media lines, which will also be applicable to the Stickleback recovery strategy, are currently being drafted.

- Department officials will, at the request of Sierra Legal Defence, set up a meeting to discuss recovery strategy development processes. It can be expected that as part of that dialogue, the critical habitat concerns related to Nooksack Dace and Sticklebacks will be raised. During that session, the explanation of using the peer review process will have to be reiterated.

Next Steps

- It is recommended that you approve the posting on the SARA public registry of the final recovery strategies for the Morrison Creek Lamprey, Nooksack Dace, and Paxton Lake, Enos Lake and Vananda Creek Stickleback species pairs.

Pardeep Ahluwalia
Director General
SARA Secretariat

I concur,
Larry Murray

Attachments (3): 1) Recovery Strategy for the Morrison Creek Lamprey in Canada
2) Recovery Strategy for the Nooksack Dace in Canada
3) Recovery Strategy for Paxton Lake, Enos Lake, and Vananda Creek Stickleback species pairs in Canada

[Emphasis added]

(Exhibit 1, filed in the course of the hearing of the present Application)

[19] Thus, Mr. Murray was asked to approve Ms. Webb's direction. It appears that a legal opinion from the Department of Justice regarding the interpretation of s. 41(1)(c) of SARA played a role in the development of the recommendation.

D. Mr. Murray's concurrence to the recommendation

[20] Mr. Murray concurred to the recommendation on July 18, 2007.

E. The Final Recovery Strategy

[21] As a result of Mr. Murray's concurrence, the Final Recovery Strategy contains the following statement with respect to the critical habitat of the Nooksack Dace:

CRITICAL HABITAT

Identification of Critical Habitat

The Recovery Team has developed biologically-based recommendations for defining critical habitat for Nooksack dace. These recommendations have been prepared as a separate document (Pearson 2007), which is available to the public upon request to the Recovery Team. The proposed critical habitat document will be submitted for external scientific peer review through the Pacific Science Advisory Review Committee. After the peer review process, a final version will form the biological recommendations for designating critical habitat. To conform with current policy on species at risk and recovery strategy content, the following discussion on critical habitat presents general habitat features that should be considered when defining and designating critical habitat, but does not make specific geospatial recommendations.

Critical habitat is defined in SARA as "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." [SARA S. 2(1)]. Attributes of critical habitat for Nooksack dace have been defined but not mapped or designated in this recovery strategy. A quantity of proposed critical habitat sufficient to ensure the survival and recovery of Nooksack dace will be designated through the action planning process, which will include socioeconomic analysis and consultation with affected interests. The Recovery Team has compiled scientific data that will provide the basis for an official designation of critical habitat (Pearson 2007). Further studies are required to confirm the presence

of other Nooksack dace populations and their critical habitats, and to characterize specific threats. Designating critical habitat will contribute to the refinement of recovery objectives and the management of activities that impact the species.

Potential critical habitat for Nooksack dace consists of reaches in their native creeks that contain or are known to have previously contained more than 10% riffle by length. It includes all aquatic habitat and riparian reserve strips of native vegetation on both banks for the entire length of the reach. Reserve strips should be continuous with width requirements based on reach-scale assessments as described in Pearson (2007; in review through PSARC).

Critical Habitat Features

Based on available physical and biological data, potential Nooksack dace critical habitat features likely include the following key elements:

The Reach Scale

Riffles and shallow pools (see below) are the required habitats of Nooksack dace, but critical habitat should be defined at the reach scale, a larger, natural unit of river morphology that ranges from hundreds to thousands of metres in length (Frissell et al. 1986). There are three reasons for adopting this scale. First, the reach scale corresponds to the distribution of subpopulations within watersheds (Pearson 2004a). Second, the 'channel units' of critical habitat (riffles and shallow pools) are dynamic and frequently move during flood events in these streams. In Bertrand Creek, this occurs on an annual basis (Pearson pers. obs.). Effective protection and management of critical habitat in these circumstances must allow for normal channel processes and must, therefore, occur at a spatial scale larger than the channel unit. The reach scale is the next largest in accepted stream habitat classifications (Frissell et al. 1986; Imhof et al. 1996). Third, the reach scale corresponds most closely to that of land ownership in these watersheds and, consequently, to most potential recovery actions.

Riffle Habitat

Available information overwhelmingly suggests that riffles are critical to species persistence. Nooksack dace typically occur in riffles over loose gravel and cobble substrates where water velocity exceeds 0.25 m s^{-1} . They spawn near the upstream end of riffles (McPhail 1997) between late April and early July (Pearson 2004a)

and forage nocturnally for riffle dwelling insects (McPhail 1997). The percent of riffle in a stream reach is a good predictor of dace presence. Riffles that are isolated by long stretches of deep pool, however, are seldom inhabited (Pearson 2004a). A threshold of 10% riffle by length would exclude these small isolated riffles that have little value to Nooksack dace.

Shallow Pool Habitat

Young-of-the-year Nooksack dace inhabit shallow (10-20 cm) pools adjacent to riffles where they swim above sand, mud, or leaf litter substrates and feed upon chironomid pupae and ostracods (McPhail 1997). Loss of these habitats will likely produce negative population-level impacts.

Riparian Habitat

Riparian vegetation should be included in critical habitat to the extent it is necessary to protect the integrity of in-stream critical habitat.

Required widths would vary among sites and should be defined in reach scale assessments. Reserves must be sufficient to control sediment entry to the stream from overland flow, to prevent excessive bank erosion and to buffer stream temperatures. Reserve areas will also remove significant amounts of nitrate and phosphorous from groundwater, although their efficiency depends strongly on hydrogeologic conditions (Martin et al. 1999; Puckett 2004; Wigington et al. 2003). The effectiveness of a riparian reserve in preventing materials (e.g., sediments, nutrients, toxins) from entering a stream depends strongly on its continuity in addition to its width (Weller et al. 1998). Consequently, riparian reserves in critical habitat reaches should be continuous. In open landscapes, such as agricultural fields, vegetation from reserve areas will collect windblown insects (Whitaker et al. 2000). Such insects, falling from riparian vegetation into the water constitute an important food source headwater streams (Allan et al. 2003; Schlosser 1991).

It is important to understand that in some circumstances, more than 30 m of riparian vegetation may be required for full mitigation of warming (Brown & Krygier 1970; Castelle et al. 1994; Lynch et al. 1984) and siltation (Davies & Nelson 1994; Kiffney et al. 2003; Moring 1982), and for long-term maintenance of channel morphology (Murphy et al 1986; Murphy & Koski 1989). At least 10 m are required to maintain levels of terrestrial food inputs similar to those of forested landscapes (Culp & Davies 1983). Reserves as narrow as 5 m provide significant protection from bank erosion and

sediment deposition from overland flow (Lee et al. 2003; McKergow et al. 2003).

Failure to maintain an adequate riparian reserve as part of critical habitat would be highly likely to cause population-level impacts. In habitats lacking sufficient flow or groundwater sources, lack of shade may increase water temperatures to harmful levels. Increased erosion due to poorer bank stability will cause sediment deposition in riffles, impairing spawning and incubation, reducing food availability and eliminating the interstitial spaces in coarse substrate that dace occupy. Nutrient loading will be higher in reaches without adequate riparian vegetation (Dhondt et al. 2002; Lee et al. 2003; Martin et al. 1999) and is likely to contribute to hypoxia through eutrophication. Solar radiation will also be higher in reaches lacking adequate riparian shading (Kiffney et al. 2003) and will contribute to eutrophication. Reserves of 30 m or more should be maintained around Nooksack dace habitat wherever feasible to provide a high level of protection from impacts of adjacent land uses.

[Emphasis added]

(Applicants' Application Record, pp. 1237 – 1239)

III. The Conduct of the Present Application

A. The Applicants' position on the interpretation of s. 41(1)(c) and (c.1) of SARA

[22] In support of the present Application, Counsel for the Applicants supplied a detailed argument that the statement of the critical habitat of the Nooksack Dace in the Final Recovery strategy resulting from Mr. Murray's decision is contrary to law. The basic features of this argument are as follows:

1. It is mandatory that each of the requirements listed in s. 41(1)(a) to (g) be met, including those specified in s. 41(1)(c) and (c.1);
2. Sections 41(1)(c) and (c.1) impose conjunctive duties;

3. The mandatory requirement in s. 41(1)(c) to identify a species' critical habitat is met by determining and stating its features and providing a geospatial delineation of its location in a Final Recovery Strategy because only after critical habitat is so identified can an important object of SARA be met; providing legal protection for a species at risk;

4. The mandatory requirement in s. 41(1)(c) to identify a species' critical habitat "to the extent possible" means identifying as much critical habitat as possible, and in as much detail as possible, even if it is not possible to identify all critical habitat areas or features;

5. The mandatory requirement in s. 41(1)(c) to identify a species' critical habitat to the extent possible "based on the best available information" means that the identification of a species critical habitat to the extent possible must be based on the information in existence not the best possible information that can be acquired in the future.

B. The Minister's initial position in response

[23] The most significant feature of the initial position taken by the Minister in the present Application is an obvious attempt to avoid a finding on the correct interpretation of s. 41(1)(c) and (c.1) of SARA.

[24] In written argument provided three weeks before the commencement of the hearing of the present Application, the Minister took the position that the decision under review is made in error of law, but only on the basis of two issues framed as follows:

The substantive issues arising from this case are the following:

1. did the Minister have authority under ss. 41(1) of the SARA to defer the making of a determination about the adequacy of the available information to identify critical habitat to the extent possible until the completion of the PSARC scientific peer review of Dr. Pearson's assessment of potential critical habitat; and

2. was the Minister's discretion to make a determination under ss. 41(1) about the identification of critical habitat fettered?

(Respondent's Memorandum of Fact and Law, para. 28)

With respect to these issues, the Minister was prepared to agree to declarations that the answers to the questions are "no" and "yes" respectively. Given these admissions on the part of the Minister, Counsel for the Minister argued that none of the statutory interpretation issues raised by the Applicants in their statutory interpretation argument arise from the facts of this case, and, therefore, are irrelevant and need not be addressed in order to dispose of the present Application.

Nevertheless, having advanced this argument, Counsel for the Minister presented the following statement to support the position taken as set out in the following paragraphs of written argument:

31. The Minister's position to the issues in this case are as follows:

a. the competent minister must, in a recovery strategy, identify critical habitat to the extent possible, based on the best available information, within the timelines set out in ss. 42-43 of the SARA. Where available information is adequate, the competent minister must identify critical habitat to the extent possible. To the extent available information is inadequate, the competent minister must include in the recovery strategy a schedule of studies to identify critical habitat;

b. in approving the posting of the 2007 Recovery Strategy, the Minister was required to determine, on the basis of the information that was available, to what extent it was possible to identify critical habitat for the Nooksack dace;

c. because a scientific peer review is a standard DFO process to assess the validity of scientific information and the conclusions reached, the Minister deferred making the decision about the adequacy of available information to identify critical habitat to the extent possible until a scientific peer review of the Nooksack Recovery Team's recommendations related to critical habitat was conducted;

d. to the extent that a scientific peer review was required to allow the Minister to determine whether the available information was adequate to identify critical habitat to the extent possible, such peer review should have been completed before the expiration of the timelines set out in ss. 42-43 of the SARA so that the Minister could have determined whether the information available was adequate to identify critical habitat to the extent possible;

e. the Minister did not, in the circumstances of the Nooksack dace case, have the authority to defer the identification of critical habitat pending a scientific peer review after the timelines set out in ss. 42-43 of SARA had expired; and

f. the June 2006 Direction to remove critical habitat from all recovery strategies was unwarranted and fettered the Minister's discretion.

32. The positions set out above fully address the issues arising in this case, including the Applicants' submissions regarding the mandatory nature of paragraph 41(1)(c) and the interplay between paragraphs 41(1)(c) and (c.1).

33. None of the other statutory interpretation questions put forward by the Applicants arise on the facts of this case. They are therefore irrelevant and this Court does not need to address them in order to dispose of this judicial review.

34. Specifically, the question as to whether or not paragraph 41(1)(c) requires the competent minister to geospatially delineate critical habitat is not in issue in this case. In issue is simply the Minister's decision to defer or postpone the determination about the adequacy of the available information, which information included maps describing potential critical habitat to a point in time when that information had been scientifically peer reviewed. As set out in the 2007 Recovery Strategy:

The Recovery Team has developed biologically-based recommendations for defining critical habitat for Nooksack dace. These recommendations have been prepared as a separate document (Pearson 2007), which is available to the public upon request to the Recover Team. The proposed critical habitat document will be submitted for external scientific

peer review through the Pacific Science Advisory Review Committee. After the peer review process, a final version will form the biological recommendations for designating critical habitat.

(Webb Affidavit, Exhibit "J", p.12, Respondent's Record, Tab 1, Vol. 1, p.142)

35. The Minister does not allege that the description of general habitat features in the final recovery strategy constituted or amounted to identification of critical habitat. Therefore, contrary to the Applicants' submissions, there was no "erroneous construction" of paragraph 41(1)(c) by the DFO about the manner in which the critical habitat must be described in a recovery strategy. Rather there was no identification of critical habitat at all because no determination had been made about the possibility of identifying some critical habitat.

[Emphasis added]

(Respondent's Memorandum of Fact and Law, paras. 31 to 35)

The statement in paragraph 31 is apparently an interpretation of s. 41(1)(c) and (c.1). However, to the contrary, in the course of oral argument Counsel for the Minister explains its purpose as follows:

This really was made for the purposes of illustrating or agreeing with the possibility that you have to meet both obligations in the same decision. That's all it is, and that's the only purpose for which this particular admission is set out in paragraph (a). It's not for the purposes of actually trying to give some sort of an interpretation as to what is the scope of the obligation. That's not what it's seeking to do.

(Transcript Vol. 3, p. 149)

[25] With respect to the argument made in paragraph 35, in the course of oral argument, Counsel for the Minister made the unsupported argument that Mr. Murray approved the recommendation of July 18, 2007 without turning his mind to the interpretation of s. 41(1)(c) and (c.1). I find there is no basis to engage this argument. There is no evidence on the record of what was in Mr. Murray's

mind at the time he concurred in the recommendation presented; Mr. Murray did not file an affidavit. As a result, the recommendation, and his concurrence to it as quoted on the record, speaks for itself.

C. Opportunity provided to the Minister to argue interpretation

[26] Given that there is no obvious support within s. 41(1)(c) and (c.1) for the Minister's position on the law that "where available information is adequate, the competent minister must identify critical habitat to the extent possible" and, given the nature and content of the other features of the argument advanced by Counsel for the Minister, in the course of the hearing I gave the following direction:

With respect to the Minister's decision of July 18th, 2007, presently under review, counsel for the applicants have produced a very detailed, contextual and purposive analysis of the *Species at Risk Act*, known as "SARA", to argue that the decision is contrary to law on a number of grounds. This is considered necessary because the legislation has yet to be interpreted by this Court.

Without a response to the applicants' argument on the law, counsel for the respondent admits that an error in law did occur in the issuance of the decision, but places limits on the nature of the error. The applicants do not accept this limited argument as correct in law, or as a just result to the application, and therefore do not consent to the conclusion of the present application on the basis of the respondent's consent.

Counsel for the respondent argues that, given the admission of error, a contextual and purposive determination of the correct interpretation of SARA is not relevant. This argument is supported by the Minister's position as stated at paragraph 31 of the respondent's Memorandum of Fact and Law. It is a statement which is an interpretation of section 41(1)(c) and (c.1) of SARA, which counsel for the applicants argues raises a statutory interpretation controversy.

I agree that an interpretation controversy is at the heart of the decision under review. I disagree with counsel for the respondent's argument that a contextual and purposive interpretation of *SARA* is not relevant. In my opinion it is not possible to determine the present application on the basis of the consent alone, particularly given the objection of counsel for the applicants, because it is only a proper and correct interpretation of *SARA* that can ground a finding of error of law. The admission made by the respondents is merely a position adopted; it is not a legal conclusion. Only this Court can determine a conclusion, and it is only fair and just that this be accomplished in the usual manner, which is to first interpret the law and then examine the Minister's conduct to determine whether it is contrary to law, and if so, in what specific way or ways.

Therefore, I find that counsel for the respondent must be provided with an opportunity to make a full argument on the correct interpretation of *SARA* in response to the argument completed by counsel for the applicants.

(Transcript, Vol. 3, pp. 152 – 154)

D. The Minister's response

[27] The Minister decided to take up the opportunity to provide a statutory interpretation argument which is addressed in the analysis which follows.

[28] However, in making the argument, the Minister continues to assert the position that Mr. Murray did not make a decision under s. 41(1)(c) or (c.1) of *SARA*. While it is clear on the record that the Minister did not make the determinations required by the provisions, the Minister did make a decision not to do so. This decision applied the belief that the determinations could be postponed on policy grounds as a defensible action. The Applicants' position with respect to this conduct is that it is not simply unwarranted but is contrary to law. I agree with this argument.

[29] I agree with the Applicants that the decision-making conducted by Ms. Webb and Mr. Murray requires a definitive interpretation of s. 41 of *SARA* to dispel any idea that policy can supersede Parliament's purpose as expressed in *SARA*. Indeed, the present Application brings the constitutional imperative of the rule of law into sharp focus.

[30] As an outcome to the present pressure exerted by the Applicants to have the Minister and the officials at DFO recognize and meet their statutory responsibility under *SARA*, which has been met by initial resistance but ultimate willingness, the interpretation of s. 41(1)(c) and (c.1) has become less of a challenge. On some key features there is agreement while on others there is a difference of opinion. The following analysis distinguishes between these two results.

IV. **The Correct Interpretation of s. 41 (1)(c) and (c.1)**

A. Points of agreement

1. The standard of review is correctness

[31] In the present Application the Applicants question the Minister's authority to alter the terms of *SARA* by government policy. As authority is a question of law, it is agreed that the Minister's decision must be considered on the standard of correctness (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190).

2. Interpretation of SARA requires a textual, contextual, and purposive analysis

[32] The correct interpretation of *SARA* must be found in the approach to modern statutory interpretation. It is agreed that the test to be applied is that stated by the Supreme Court in *Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, at para. 10:

It has been long established as a matter of statutory interpretation that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: see 65302 *British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[Emphasis added]

3. Section 38 is a codification of the precautionary principle

[33] The preamble to *SARA* states its objectives:

Recognizing that

Canada’s natural heritage is an integral part of our national identity and history,

wildlife, in all its forms, has value in and of itself

Attendu :

que le patrimoine naturel du Canada fait partie intégrante de notre identité nationale et de notre histoire;

que les espèces sauvages, sous toutes leurs formes,

and is valued by Canadians for aesthetic, cultural, spiritual, recreational, educational, historical, economic, medical, ecological and scientific reasons,

ont leur valeur intrinsèque et sont appréciées des Canadiens pour des raisons esthétiques, culturelles, spirituelles, récréatives, éducatives, historiques, économiques, médicales, écologiques et scientifiques;

Canadian wildlife species and ecosystems are also part of the world's heritage and the Government of Canada has ratified the United Nations Convention on the Conservation of Biological Diversity,

que les espèces sauvages et les écosystèmes du Canada font aussi partie du patrimoine mondial et que le gouvernement du Canada a ratifié la Convention des Nations Unies sur la diversité biologique;

providing legal protection for species at risk will complement existing legislation and will, in part, meet Canada's commitments under that Convention,

que l'attribution d'une protection juridique aux espèces en péril complétera les textes législatifs existants et permettra au Canada de respecter une partie des engagements qu'il a pris aux termes de cette convention;

the Government of Canada is committed to conserving biological diversity and to the principle that, if there are threats of serious or irreversible damage to a 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,

que le gouvernement du Canada s'est engagé à conserver la diversité biologique et à respecter le principe voulant que, s'il existe une menace d'atteinte grave ou irréversible à une espèce sauvage, le manque de certitude scientifique ne soit pas prétexte à retarder la prise de mesures efficaces pour prévenir sa disparition ou sa

responsibility for the conservation of wildlife in Canada is shared among the governments in this country and that it is important for them to work cooperatively to pursue the establishment of complementary legislation and programs for the protection and recovery of species at risk in Canada,

it is important that there be cooperation between the governments in this country to maintain and strengthen national standards of environmental conservation and that the Government of Canada is committed to the principles set out in intergovernmental agreements respecting environmental conservation,

the Canadian Endangered Species Conservation Council is to provide national leadership for the protection of species at risk, including the provision of general direction to the Committee on the Status of Endangered Wildlife in Canada in respect of that Committee's activities and general directions in respect of the development,

décroissance;

que la conservation des espèces sauvages au Canada est une responsabilité partagée par les gouvernements du pays et que la collaboration entre eux est importante en vue d'établir des lois et des programmes complémentaires pouvant assurer la protection et le rétablissement des espèces en péril au Canada;

que la coopération entre les gouvernements du pays pour le maintien et le renforcement des normes nationales de conservation de l'environnement est importante et que le gouvernement du Canada est attaché aux principes énoncés dans les accords intergouvernementaux en matière de conservation de l'environnement;

que le Conseil canadien pour la conservation des espèces en péril a la responsabilité d'établir les orientations pour l'ensemble du pays en matière de protection des espèces en péril, notamment en ce qui concerne les activités du Comité sur la situation des espèces en péril au Canada et l'élaboration et la coordination des mesures

coordination and implementation of recovery efforts,

the roles of the aboriginal peoples of Canada and of wildlife management boards established under land claims agreements in the conservation of wildlife in this country are essential,

all Canadians have a role to play in the conservation of wildlife in this country, including the prevention of wildlife species from becoming extirpated or extinct,

there will be circumstances under which the cost of conserving species at risk should be shared,

the conservation efforts of individual Canadians and communities should be encouraged and supported,

stewardship activities contributing to the conservation of wildlife species and their habitat should be supported to prevent species from becoming at risk,

community knowledge and interests, including socio-

de protection et de rétablissement de ces espèces;

qu'est essentiel le rôle que peuvent jouer les peuples autochtones du Canada et les conseils de gestion des ressources fauniques établis en application d'accords sur des revendications territoriales dans la conservation des espèces sauvages dans ce pays;

que tous les Canadiens ont un rôle à jouer dans la conservation des espèces sauvages, notamment en ce qui a trait à la prévention de leur disparition du pays ou de la planète;

que, dans certains cas, les frais de la conservation des espèces en péril devraient être partagés;

que les efforts de conservation des Canadiens et des collectivités devraient être encouragés et appuyés;

que les activités d'intendance visant la conservation des espèces sauvages et de leur habitat devraient bénéficier de l'appui voulu pour éviter que celles-ci deviennent des espèces en péril;

que la connaissance et les intérêts — notamment

economic interests, should be considered in developing and implementing recovery measures,

the traditional knowledge of the aboriginal peoples of Canada should be considered in the assessment of which species may be at risk and in developing and implementing recovery measures,

knowledge of wildlife species and ecosystems is critical to their conservation,

the habitat of species at risk is key to their conservation,
and

Canada's protected areas, especially national parks, are vital to the protection and recovery of species at risk,

[Emphasis added]

socioéconomiques — des collectivités devraient être pris en compte lors de l'élaboration et de la mise en oeuvre des mesures de rétablissement;

que les connaissances traditionnelles des peuples autochtones du Canada devraient être prises en compte pour découvrir quelles espèces sauvages peuvent être en péril et pour l'élaboration et la mise en oeuvre des mesures de rétablissement;

que la connaissance des espèces sauvages et des écosystèmes est essentielle à leur conservation;

que l'habitat des espèces en péril est important pour leur conservation;

que les aires protégées au Canada, plus particulièrement les parcs nationaux, sont importants pour la protection et le rétablissement des espèces en péril,

[Je souligne]

[34] Canada has ratified the *United Nations Convention on the Conservation of Biological Diversity* (the *Convention*) and, therefore, is committed to apply its principles. An important feature

of the *Convention* is the “precautionary principle” which is stated by the Supreme Court of Canada as follows:

In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(114957 *Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 at para. 31)

It is agreed that s. 38 of *SARA* is a codification of the precautionary principle which, as stated in the Preamble, in part, meets Canada’s commitments under the *Convention*:

Commitments to be considered	Engagements applicables
<p>38. In preparing a recovery strategy, action plan or management plan, the competent minister <u>must consider the commitment of the Government of Canada to conserving biological diversity</u> and to the principle that, if there are threats of serious or irreversible damage to the listed wildlife species, <u>cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty.</u></p>	<p>38. Pour l’élaboration d’un programme de rétablissement, d’un plan d’action ou d’un plan de gestion, le ministre compétent <u>tient compte de l’engagement qu’a pris le gouvernement du Canada de conserver la diversité biologique</u> et de respecter le principe selon lequel, s’il existe une menace d’atteinte grave ou irréversible à l’espèce sauvage inscrite, le manque de certitude scientifique <u>ne doit pas être prétexte à retarder la prise de mesures efficaces pour prévenir sa disparition ou sa décroissance.</u></p>

[Emphasis added]

[Je souligne]

[35] Therefore, s. 38 is a mandatory interpretative principle that applies during the preparation of recovery strategies. However, in this respect, Counsel for the Minister emphasizes two factors: the codification in s. 38 introduces the factor of “cost effective” measures to Canada’s commitment and, as stated in the Preamble, community knowledge and interests, including “socio-economic interests”, should be considered in “developing and implementing recovery measures”. It is important to clarify the precise role that each of these factors plays in the recovery strategy process composed of, first, preparing a recovery strategy, and, second, acting on it.

[36] The use of “cost effective measures” is understandable in a situation of scarce economic resources, but, nevertheless, the words in the provision are precise and unequivocal: the measures required to “prevent the reduction or loss of the species” must still be taken and “should not be postponed for a lack of full scientific certainty”.

[37] The words in the Preamble are also precise and unequivocal; the “development and implementation of recovery measures” is an action taken with respect to a final recovery strategy. Once a final recovery strategy is prepared, an action plan involving recovery measures is required to be developed and implemented; s. 49(1)(e) of *SARA* makes it clear that it is only at this stage of the process that “socio-economic costs” are considered.

[38] For clarification with respect to their position on the application of the *Convention*, the Applicants make the following argument:

The *Convention* is a binding treaty, and *SARA* was enacted in part to implement Canada’s treaty commitments. Furthermore, the *Convention* is part of the “entire context” to be considered in

interpreting the SARA. Therefore, not only must the SARA be construed to conform to the values and principles of the *Convention*, but the Court must avoid any interpretation that could put Canada in breach of its *Convention* obligations.

(Applicants' Further Reply Submission, para. 25)

[39] As the Minister does not disagree with this argument, I find it is correct in law.

4. The provisions of s. 41 of SARA are mandatory

[40] It is agreed that the provisions of s. 41 of *SARA* are mandatory. Most recently, Justice Zinn has made this point very clear in *Alberta Wilderness Association Assn. v. Canada (Minister of Environment)*, 2009 FC 710, [2009] F.C.J. No. 876 at paragraph 25:

There is no discretion vested in the Minister in identifying critical habitat under the SARA. Subsection 41(1)(c) requires that the Minister identify in a recovery strategy document as much critical habitat as it is possible to identify at that time, even if all of it cannot be identified, and to do so based on the best information then available. I note that this requirement reflects the precautionary principle that “where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation,” as it was put by the Supreme Court of Canada, citing the *Bergen Ministerial Declaration on Sustainable Development in 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40.

[Emphasis added]

Therefore, as argued by the Applicants, I find that Ms. Webb's direction and Mr. Murray's approval of her direction are actions contrary to law. The result of these actions is that the Minister failed to meet the mandatory requirements of s. 41 (1)(c) in the Final Recovery Strategy. The totality of this conduct is fundamentally inconsistent with the precautionary principle as codified in *SARA*.

[41] Ms. Webb gave six reasons for directing the removal of information with respect to the location of the critical habitat identified by Dr. Pearson. As stated above, in addition to the peer review and policy excuses offered for not meeting deadline or content requirements, the following statement is important to emphasize:

We would like to proceed cautiously with the identification of critical habitat, while still recognizing that we have a legal obligation to do so, given that we may be setting a precedent where we are uncertain as to the potential impacts of doing so.

[Emphasis added]

A proper question to ask about this statement is: potential impacts on what or whom? It is obvious that the impact on the Nooksack Dace is not the focus. The Applicants have advanced the suggestion that political and socioeconomic considerations came into play in Ms. Webb's direction and Mr. Murray's decision. While I consider that this suggestion is not directly relevant to the determination of the present Application, it is clear that no political or socioeconomic consideration can be applied by a competent Minister in meeting Parliament's intention as expressed by the mandatory provisions of s. 41(1) of *SARA*.

[42] With respect to the requirement on the Minister to identify critical habitat to the extent possible based on the best available information at the recovery strategy stage without political or socioeconomic considerations in play, as argued by the Applicants, I find that the following statement made in the Final Recovery Strategy as quoted above is an error in law:

Attributes of critical habitat for Nooksack dace have been defined but not mapped or designated in this recovery strategy. A quantity of

proposed critical habitat sufficient to ensure the survival and recovery of Nooksack dace will be designated through the action planning process, which will include socioeconomic analysis and consultation with affected interests.

5. Sections 41(1)(c) and (c.1) impose conjunctive duties based on the best available information

[43] It is agreed that with respect to a competent Minister making the determinations required under s. 41(1)(c), the phrase “best available information” comprises relevant scientific, community, and Aboriginal traditional knowledge, and requires a competent Minister to gather, review, and evaluate the available information during the preparation of a recovery strategy and not to disregard, ignore, or remove reliable information about a species’ critical habitat. It is agreed that where the available information so evaluated is determined by the competent Minister to be inadequate, the recovery strategy must include a schedule of studies.

[44] It is also agreed that the determinations made by a competent Minister under s. 41(1)(c) and (c.1) are subject to judicial review on the standard of reasonableness. This principle is confirmed by Justice Zinn’s decision in *Alberta Wilderness Assn.*, above.

B. The primary point of disagreement: the definition of “habitat” and “critical habitat”

[45] In the final result, after the full conduct of the decision-making and challenge that is the focus of the present Application, this is the primary question in dispute: what are the constituents that must be included in the identification of a species’ critical habitat? The answer to the question

lies in the correct interpretation of the definition of “habitat” because “critical habitat” is a sub-set of the definition of “habitat”. The definitions found in s. 2 of *SARA* are worth repeating:

<p>"habitat" means</p> <p><i>(b)</i> in respect of aquatic species, spawning grounds and nursery, rearing, food supply, migration and any other areas on which aquatic species depend directly or indirectly in order to carry out their life processes, or areas where aquatic species formerly occurred and have the potential to be reintroduced; and</p> <p>...</p> <p>"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.</p>	<p>« habitat »</p> <p><i>a)</i> S'agissant d'une espèce aquatique, les frayères, aires d'alevinage, de croissance et d'alimentation et routes migratoires dont sa survie dépend, directement ou indirectement, ou aires où elle s'est déjà trouvée et où il est possible de la réintroduire;</p> <p>[...]</p> <p>« habitat essentiel » L'habitat nécessaire à la survie ou au rétablissement d'une espèce sauvage inscrite, qui est désigné comme tel dans un programme de rétablissement ou un plan d'action élaboré à l'égard de l'espèce.</p>
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[46] The Applicants maintain that the constituents of the habitat, and accordingly the critical habitat, of a specific species are an identifiable location and the attributes of that location that meet the criteria of the statutory definition of both terms. When the present Application was commenced, there was no apparent dispute about location and attributes as the constituents. The Final Recovery Strategy for the Nooksack Dace makes it clear that, in the identification of critical habitat, location

and attributes are inextricably linked. The bone of contention that fuelled the present Application was the Minister's removal of the location constituent from the Final Recovery Strategy.

[47] It is important to note that in the preparation of the Draft Recovery Strategy the approach of citing both location and attributes was consistent with Canadian government policy statements and, indeed, the policy statements were followed in the Final Recovery Strategy but for the removal of location for the stated reason that a peer review of Dr. Pearson's findings was necessary. A primary source of the policy statements on the record of the present Application is a document dated March 10, 2005 and entitled *Species at Risk Act Implementation Guidance: Draft: Technical Guidelines for Identifying Critical Habitat (Technical Guidelines)* which is intended to provide guidance to practitioners, such as Dr. Pearson, respecting the identification of critical habitat. Coincidentally, the document was issued contemporaneously with the submission of the Draft Recovery Strategy.

[48] In the *Technical Guidelines* under the heading "Statement of Intent and Purpose" the following explanation is provided:

These guidelines provide a summary of technical guidance for the identification of critical habitat under SARA. They aim to promote: i) a common understanding of the policy requirements for identification; ii) a consistent methodological framework for identification; and iii) the preparation of biologically and legally defensible critical habitat proposals.

[Emphasis added]

Under the heading "The Expected Product" the following expectations are stated:

Advice on crucial habitat must consist of several basic elements and recovery practitioners should be aware of them before starting the

identification process. The *Federal Policy Discussion Paper: Critical Habitat* outlines the minimal standards for communicating proposed critical habitat as follows:

1. **NARRATIVE** of the species' critical habitat(s), which may include such things as: an account of appropriate natural communities; habitat types; habitat features; necessary and sufficient quantities (e.g., hectares) (see section 5.0 How much Critical Habitat is Enough? for additional discussion); compositional arrangement; and any essential ecological processes (e.g., pollination, parasitism, dispersal, fire, flood). In essence, this section describes proposed critical habitat by answering the question - **WHAT IS IT?**

2. **RANGE COORDINATES** (e.g., UTM zone, UTM easting, UTM northing, datum of coordinates) in order to geospatially locate the proposed critical habitat within Canada. Within the area(s) delineated by the range coordinates only habitat fitting the narrative is considered actual critical habitat. In essence, this section contributes to the identification of proposed critical habitat by answering the question - **WHERE IS IT?**

(Respondent's Record, Vol. 1, pp. 370(a) – 371)

1. The Minister's interpretive argument

[49] It appears that in the present Application the Minister is fostering a statutory interpretation which is in conflict with the policy that was effectively accepted, but not followed as mentioned. As a result, in the present interpretative process, the Minister is the proponent and the Applicants are the respondent.

[50] A primary obligation which the Minister was required to meet in the Final Recovery Strategy for the Nooksack Dace under s. 41 (1)(c) was the "identification of the species' critical habitat". In meeting the interpretive standard set in *Trustco Mortgage Co.*, above, the Minister's textual, contextual, and purposive analysis places strong weight on the text of the definition of

“habitat” to support the argument that the words of the provision are precise and unequivocal, and, therefore, the ordinary meaning of the words play a dominant role in the interpretative process. Thus the argument is that, given the use of the word “areas” in the definition of habitat for an aquatic species, the critical habitat for an aquatic species is a geographic location, and while the attributes which cause the location to be a species’ habitat are capable of precise description, the attributes themselves are not a constituent of that critical habitat for the purposes of s. 41(1)(c) and (c.1) of *SARA*. With respect to a supporting contextual and purposive analysis to find a meaning that is harmonious with *SARA* as a whole, the Minister’s argument proceeds as follows:

Interpreting ‘identification of critical habitat’ in terms of a place or location is also consistent with the scheme and context of the *SARA*, which consistently refers to ‘critical habitat’ and ‘habitat’ in terms of an ‘area’. For example, ss. 49(1) requires an action plan to “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” (emphasis added).

Similarly, ss. 80(4) prescribes the contents of an emergency order, which is intended to protect the habitat that is necessary for survival or recovery of a species before such habitat is identified as critical habitat in a recovery strategy or an action plan. Subsection 80(4) makes it abundantly clear that the reference to the identification of “habitat that is necessary for the survival or recovery of the species” is in relation to an area by prescribing that the following:

- (4) The emergency order may
 - (a) in the case of an aquatic species,
 - (i) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates ...

The exact same language applies to migratory species and other species.

Further, sections 58-62 of the SARA, which provide for the protection of critical habitat, prescribe various processes by which destruction of critical habitat becomes prohibited. The applicable process is determined by the place or location of the critical habitat so that, for example, where the identified critical habitat is in a national park or other area described in ss. 58(2), publication in the *Canada Gazette* is all that is required to protect the critical habitat. In contrast, where all or part of the critical habitat is “not in a place referred to in ss. [58(2)]”, a ministerial order may be required in accordance with ss. 58(4).

Finally, the preamble also recognizes that “Canada’s protected areas, especially national parks, are vital to the protection and recovery of species at risk”.

The SARA’s consistent, repeated and exclusive use of language that refers to a geographically identifiable place, location or area directly contradicts the Applicants argument that the identification of critical habitat must include a description of such habitat’s ‘features’ or ‘attributes’ to ensure that the prohibitions against destruction of critical habitat can be enforced.

The Minister submits that reading in such additional requirements would be contrary to the plain and ordinary meaning of the ‘identification of critical habitat’ as reflected in the language and scheme of the SARA and the intention of Parliament, as discussed above.

The Supreme Court of Canada has expressly recognized that a broad and general approach to describing the prohibited activity is fully acceptable in the field of environmental protection “given that the nature of the environment (its complexities, and the wide range of activities which might cause harm to it) is not conducive to precise codification” (*R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, [1995] S.C.J. No. 62 (Q.L.) para. 43). Therefore, it can be fairly anticipated that the obligation to identify threats to habitat, in combination with examples of activities that are likely to result in destruction of critical habitat in a recovery strategy, as provided for in paragraphs 41(1)(b) and (c) of the SARA, will be sufficient to address enforcement and notice requirements.

Therefore, there is no need or any justification for reading in non-statutory requirements to the meaning of ‘identification of critical habitat’.

[Emphasis in the original]

(Respondent’s Further Reply Submissions, paras. 49 – 55)

2. The Applicants’ interpretive response

[51] The Applicants dismiss the Minister’s textual dominance argument on the following basis:

Even read without referring to legislative purpose at s.6 or in the entire context of the SARA, the definition of “habitat” for an aquatic species cannot be given the narrow and selective construction proposed by the Minister...

Firstly, this definition clearly makes reference not simply to areas, but rather to areas that provide species with certain physical and biological amenities that allow them to carry out their life processes. To be habitat under the SARA definition, an area must contain features useful to a species. Those features would ensure the species could spawn, rear its young, have available food and free migration passage, among other life functions. In the case of the Nooksack Dace, while the dace is not located up in the trees of the riparian buffer zone, it depends on this biological component of habitat to survive and to recovery.

Secondly, the SARA definition of habitat includes places where aquatic species formerly occurred but do not presently occur. The only way to analyze whether an aquatic species has “the potential to be reintroduced” to a formerly occupied area is to assess whether that formerly occupied area contains the biological and physical features that could sustain the species. It would make no sense to identify the geospatial coordinates of a streambed where an endangered fish could be reintroduced, if that streambed had run dry.

(Applicants’ Further Reply Submissions, paras. 57 – 59)

With respect to Counsel for the Applicants' reliance on s. 6 of *SARA*, under the heading "Purposes", the provision reads as follows:

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.

La présente loi vise à prévenir la disparition — de la planète ou du Canada seulement — des espèces sauvages, à permettre le rétablissement de celles qui, par suite de l'activité humaine, sont devenues des espèces disparues du pays, en voie de disparition ou menacées et à favoriser la gestion des espèces préoccupantes pour éviter qu'elles ne deviennent des espèces en voie de disparition ou menacées.

[52] In the Applicants' contextual and purposive analysis two cogent issues in favour of an expanded definition of "habitat" are presented: it is required for a species' protection; and it conforms to the values and principles of the *Convention*.

[53] The preamble to *SARA* makes the point that "the habitat of species at risk is key to their conservation". With respect to conservation and the definition of "habitat", the Applicants' argument is as follows:

The Applicants reply that the Minister's construction of critical habitat as merely a location, that does not contain any physical or biological features that a species relies on directly or indirectly for survival or recovery, renders s.41(1)(c) absurd and defeats the Act's purposes.

For example, it would be frankly impossible, at the action planning stage, to devise "measures that are proposed to be taken to protect the species' critical habitat" if the specific features of the critical habitat needing protection measures had not been identified

[s.49(1)(b)]. Likewise, it would be impossible to prohibit the destruction of any part of a species' critical habitat – like trees, water, or food – if those parts went unidentified [s.58(1)]. The Minister's interpretation thus undermines the operation of provisions of the SARA specifically aimed at providing for the recovery of endangered species.

Except perhaps by nuclear Armageddon, one cannot destroy a place in its entirety. Nor can one destroy a set of geospatial coordinates. Rather, the destruction of critical habitat involves destruction of the *components* of that habitat. Put concretely, to destroy a spotted owl's habitat involves clear-cutting the old-growth forest it relies on for food and protection from predators. To destroy an endangered frog's habitat may involve filling and paving a wetland and placing a shopping mall atop it. To destroy the Nooksack Dace's habitat could involve removal of riparian vegetation, which the dace rely on to regulate temperature, erosion, and pollution; or removing water from the streambed. Clear-cutting trees, filling wetlands and draining streams does not destroy the location; rather, it destroys the *features* and *components* that were relied on by endangered species.

Critical habitat must be the area that contains biological and physical features needed to sustain a species' life processes. Without those features, the areas could not satisfy the statutory definition of "critical habitat." Namely, without those features, the areas would not be necessary for a species' survival and recovery.

The second half of s.41(1)(c) requires examples of activities likely to destroy critical habitat. Other than nuclear Armageddon, it is very different to think of any activities that would destroy an entire location. Read as a whole, s.41(1)(c) clearly requires the identification of the features of critical habitat, and examples of activities that could destroy these features.

[Emphasis in the original]

(Applicants Further Reply Submissions, paras. 40 – 44)

[54] Thus, the Applicants argue that the "habitat" and "critical habitat" definition sections of SARA must be read in context with its protection provisions. That is, the definition of "habitat" must

be read to include attributes in order for the definition of “critical habitat” to include attributes, and, thereby, the protection provisions have effect with respect to the location and attributes of the critical habitat of a species. In making this argument, Counsel for the Applicants allows that, with an important exception, the protection of the attributes of a critical habitat is only relevant where there is some evidence that a certain species actually uses a certain area as habitat. The exception is found in the definition of habitat for an aquatic species which refers to an area upon which the species directly or indirectly presently depends “or areas where aquatic species formerly occurred and have the potential to be reintroduced”.

[55] As to purposive construction, the Applicants stress that the preamble to *SARA* expresses Canada’s commitments under the *Convention*. With respect to the *Convention* and the definition of “critical habitat”, the Applicants’ argument is as follows:

In reply to the Minister’s submission that the identification of critical habitat should be limited to its location and not refer to its physical or biological features, the Applicants submit that this interpretation is not consistent with the values and principles of the *Convention on Biological Diversity*, and risks Canada’s non-compliance with the treaty.

The international law context demonstrates that s.41(1)(c) must be interpreted so as to satisfy Canada’s commitment, under Article 8(b) of the *Convention*, to promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings. “Ecosystem” is defined to include both physical and biological components:

Ecosystem means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.

Furthermore, Article 7 obligates each Contracting Party, for the purposes of *in-situ* conservation of ecosystems, natural habitats and species under Article 8, to:

(a) Identify components of biological diversity important for its conservation and sustainable use having regard to the indicative list of categories set down in Annex 1;

(b) Monitor, through sampling and other techniques, the components of biological diversity identified pursuant to subparagraph (a) above, paying particular attention to those requiring urgent conservation measures and those which offer the greatest potential for sustainable use; ...

In the Applicants' submission, the Court should interpret s.41(1)(c) in light of Article 7, which itself is aimed at achieving the conservation of species and habitats under Article 8. To conserve natural habitat under Article 8, the Contracting Parties agreed that all components of biological diversity, and not just its location, should be identified.

[Emphasis in the original]

(Applicants Further Reply Submissions, paras. 45 – 48)

[56] As additional support for the argument on the constituents of critical habitat, Counsel for the Applicants refers to the American jurisprudential experience which clearly concludes that attributes are a constituent of critical habitat. Counsel for the Minister objects to this reference because the American law with respect to the determination of “habitat” and “critical habitat” is notably different from *SARA*. This is a point conceded by Counsel for the Applicants but, nevertheless, the American experience is advanced as evidence of the logic of interpreting *SARA* in the way that has been developed in the American jurisprudence. However, given the conceded legislative difference, I find that the American experience is not a useful aid to the present statutory interpretation exercise.

3. Conclusion

[57] I find the Minister's textual, contextual, and purposive argument to be weak.

[58] First, I agree that the definition of "habitat" places a focus on a certain location but it is implicit that the location is only identifiable because special features exist at that location upon which the species depends to carry out its life processes. Therefore, in the definition of "habitat", a location is inextricably linked to its special identifiable features and includes its special identifiable features. Therefore, with respect to the use of the word "areas" in the definition of "habitat", I find that the word can support more than one reasonable meaning; it is not just a location, but a location that includes its special identifiable features. Therefore, I find that the ordinary meaning of "areas" plays a lesser role in the interpretation process.

[59] Second, the mere repeated use of the term "area" in various provisions of *SARA* does not bolster the Minister's textual argument without a primary analysis of contextual and purposive considerations in the use of the term which, I find, has not been accomplished.

[60] Third, specifically with respect to the Minister's reference to the emergency order provisions as support for a textual interpretation of *SARA*, in oral argument Counsel for Applicants provided the following understanding:

The applicants don't believe this provision is particularly relevant at all to understanding Section 41, but they can offer an explanation of how this provision generally works. Subsection (4), paragraph (a), subparagraph (i) refers to the fact that an emergency order may identify habitat that is necessary for the survival or recovery of the species. Now, the reason, in the applicants'

submission, that that doesn't simply say "identify critical habitat" is because critical habitat as defined by the *Act* is that which is identified in a recovery strategy or action plan, and these emergency orders may be issued, or made, prior to the completion of a recovery strategy or action plan. So, that is the reason for the fact that the *Act* here, unlike other places, refers to habitat that is necessary for the survival or recovery, which substantively means the same thing as critical habitat, but critical habitat is further defined under the *Act* as that which has been set out in one of those two recovery documents. So that's just to clarify why the language is somewhat different.

And then there was some reference to why it seems to be an area within an area. And I just wanted to clarify that emergency orders may be issued or made by the Minister of Environment where there is a concern that the species is not receiving -- is at imminent risk of not receiving adequate protection. Now, the reason that it says identified habitat that is necessary for the recovery -- survival or recovery of the species in the area to which the emergency order relates, is that some species, plants or animals, in our submission, are transboundary or found in more than one area.

So, for example, just -- hopefully this will help. An endangered species of plant could be found on both the Ontario side of the border and the Quebec side of the border. And Quebec could have implemented robust species protection legislation that prohibited any interference with that plant's survival and recovery. Ontario, and I say this only hypothetically, could have enacted meeker *Endangered Species* legislation that was not sufficiently protecting the plant and resulting in an increased imminent risk to the plant. Or not preventing it in any way. So this emergency order allows the Minister to apply the order just to one area, as opposed to the entire area where the plant is found. And whether that be according to provincial legislative lines or the fact that the species is widely disbursed and doing one on one area and not in another.

I just wanted to -- again, I don't know how to clarify it or not. But I just wanted to attempt to clarify that the reason that it appears to be an area within an area is that, in fact, the emergency order may apply to only part of the habitat, depending on legislative, political and/ or geographical circumstances. And I don't know to what degree that is

helpful, but it -- in any event, the applicants say that this really isn't material to interpreting Section 41(1)(c).

(Transcript, Vol. 6, pp. 48 – 51)

Counsel for the Minister did not challenge this understanding in reply. As a result, I find that the emergency measures component of the textual argument is disconnected from the main point of the present interpretative analysis and is, therefore, irrelevant.

[61] Fourth, the Minister's textual argument does not meaningfully address what I find to be the compelling logic of interpreting "habitat" to include its essential attributes; the argument is completely unresponsive to this important issue. As described by Dr. Pearson, for the Nooksack Dace, habitat is all about the "riffles". Thus, as a practical matter, the identification of the habitat of the Nooksack Dace must include the identification of the riffles feature of its critical habitat; doing so is, in my opinion, also a legal matter.

[62] Fifth, as noted, the Applicants' *Convention* argument is presented in written submissions in response to the Minister's interpretation argument. As Counsel for the Minister did not specifically address the argument by way of reply, I find that the argument is unchallenged. As a result, I give it strong weight as support for the Applicants' contextual and purposive analysis.

[63] And sixth, the Applicants effectively argue that little weight should be given to the Minister's textual interpretation on the meaning of "habitat" and "critical habitat" because it is contrary to the published expectations of the government of Canada with respect to the development

of recovery strategies. Counsel for the Minister's response is essentially that the *Technical Guidelines* are irrelevant because the interpretation of *SARA* is required to be conducted according to the statute. In my opinion this submission neglects the critical point that a contextual and purposive analysis requires a broad approach. In a broad approach to identifying the constituents of critical habitat, the *Technical Guidelines* cited above provide an informed understanding of the purpose of the identification of critical habitat as required in s. 41(1)(c) of *SARA* and the required content of the identification to meet the purpose. Appropriately, the *Technical Guidelines* were effectively applied in the breach in the preparation of the Final Recovery Strategy. In my opinion, for the Minister to now resile from this position undermines the weight to be given to the textual argument presented; I am not able to take it seriously.

[64] As a result, I find that the Applicants are correct in their interpretation of the definition of "habitat" and "critical habitat".

C. The meaning of "to the extent possible"

[65] Any dispute about the meaning of this phrase is resolved by Justice Zinn in *Alberta Wilderness Assn.*, above, where at paragraphs 24 and 25 he accepted an agreement between Counsel for the Minister of the Environment and the Applicants that "[s]ubsection 41(1)(c) requires that the Minister identify in a recovery strategy document as much critical habitat as it is possible to identify at that time, even if all of it cannot be identified, and to do so based on the best information then available". There is no question that this ruling applies to the Minister in the present case.

IV. Conclusion

[66] For the reasons provided, I find that, whether by agreement or by contest, the Applicants are wholly successful in the present Application.

ORDER

THIS COURT ORDERS that

1. For the reasons provided in conclusion of the present Application, pursuant to s. 18.1(3) of the *Federal Courts Act*, I declare that the Minister acted contrary to law by failing to meet the mandatory requirements of s. 41(1)(c) of *SARA* in the Final Recovery Strategy for the Nooksack Dace.
2. By agreement, each party is to bear its own costs.

“Douglas R. Campbell”

Judge

ANNEX “A”

*Species at Risk Act, 2002, c. 29*RECOVERY OF ENDANGERED, THREATENED
AND EXTIRPATED SPECIES*Recovery Strategy*

Preparation — endangered or threatened species

37. (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.

Commitments to be considered

38. 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.

*Loi sur les espèces en péril, 2002, ch. 29*RÉTABLISSMENT DES ESPÈCES EN VOIE DE
DISPARITION, MENACÉES ET DISPARUES DU
PAYS*Programme de rétablissement*

Élaboration

37. (1) Si une espèce sauvage est inscrite comme espèce disparue du pays, en voie de disparition ou menacée, le ministre compétent est tenu d'élaborer un programme de rétablissement à son égard.

Élaboration conjointe

(2) Si plusieurs ministres compétents sont responsables de l'espèce sauvage, le programme de rétablissement est élaboré conjointement par eux. Le cas échéant, la mention du ministre compétent aux articles 38 à 46 vaut mention des ministres compétents.

Engagements applicables

38. Pour l'élaboration d'un programme de rétablissement, d'un plan d'action ou d'un plan de gestion, le ministre compétent tient compte de l'engagement qu'a pris le gouvernement du Canada de conserver la diversité biologique et de respecter le principe selon lequel, s'il existe une menace d'atteinte grave ou irréversible à l'espèce sauvage inscrite, le manque de certitude scientifique ne doit pas être prétexte à retarder la prise de mesures efficaces pour prévenir sa disparition ou sa décroissance.

Cooperation with others

39. (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.

Collaboration

39. (1) Dans la mesure du possible, le ministre compétent élabore le programme de rétablissement en collaboration avec :

- a) le ministre provincial ou territorial compétent dans la province ou le territoire où se trouve l'espèce sauvage inscrite;
- b) tout ministre fédéral dont relèvent le territoire domanial ou les autres aires où se trouve l'espèce;
- c) si l'espèce se trouve dans une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, le conseil;
- d) toute organisation autochtone qu'il croit directement touchée par le programme de rétablissement;
- e) toute autre personne ou organisation qu'il estime compétente.

Accord sur des revendications territoriales

(2) Si l'espèce sauvage inscrite se trouve dans une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, le programme de rétablissement est élaboré, dans la mesure où il s'applique à cette aire, en conformité avec les dispositions de cet accord.

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.

Determination of feasibility

40. In preparing the recovery strategy, the competent minister must determine whether the recovery of the listed wildlife species is technically and biologically feasible. The determination must be based on the best available information, including information provided by COSEWIC.

Contents if recovery feasible

41. (1) If the competent minister determines that the recovery of the listed wildlife species is feasible, the recovery strategy must address the threats to the survival of the species identified by COSEWIC, including any loss of habitat, and must include

(a) a description of the species and its needs that is consistent with information provided by COSEWIC;

(b) an identification of the threats to the survival of the species and threats to its habitat that is consistent with information provided by COSEWIC and a description of the broad strategy to be taken to address those threats;

(c) an identification of the species' critical

Consultation

(3) Le programme de rétablissement est élaboré, dans la mesure du possible, en consultation avec les propriétaires fonciers et les autres personnes que le ministre compétent croit directement touchés par le programme, notamment le gouvernement de tout autre pays où se trouve l'espèce.

Caractère réalisable du rétablissement

40. Pour l'élaboration du programme de rétablissement, le ministre compétent vérifie si le rétablissement de l'espèce sauvage inscrite est réalisable au point de vue technique et biologique. Il fonde sa conclusion sur la meilleure information accessible, notamment les renseignements fournis par le COSEPAC.

Rétablissement réalisable

41. (1) Si le ministre compétent conclut que le rétablissement de l'espèce sauvage inscrite est réalisable, le programme de rétablissement doit traiter des menaces à la survie de l'espèce — notamment de toute perte de son habitat — précisées par le COSEPAC et doit comporter notamment :

a) une description de l'espèce et de ses besoins qui soit compatible avec les renseignements fournis par le COSEPAC;

b) une désignation des menaces à la survie de l'espèce et des menaces à son habitat qui soit compatible avec les renseignements fournis par le COSEPAC, et des grandes lignes du plan à suivre pour y faire face;

c) la désignation de l'habitat essentiel de

habitat, to the extent possible, based on the best available information, including the information provided by COSEWIC, and examples of activities that are likely to result in its destruction;

l'espèce dans la mesure du possible, en se fondant sur la meilleure information accessible, notamment les informations fournies par le COSEPAC, et des exemples d'activités susceptibles d'entraîner sa destruction;

(c.1) a schedule of studies to identify critical habitat, where available information is inadequate;

c.1) un calendrier des études visant à désigner l'habitat essentiel lorsque l'information accessible est insuffisante;

(d) a statement of the population and distribution objectives that will assist the recovery and survival of the species, and a general description of the research and management activities needed to meet those objectives;

d) un énoncé des objectifs en matière de population et de dissémination visant à favoriser la survie et le rétablissement de l'espèce, ainsi qu'une description générale des activités de recherche et de gestion nécessaires à l'atteinte de ces objectifs;

(e) any other matters that are prescribed by the regulations;

e) tout autre élément prévu par règlement;

(f) a statement about whether additional information is required about the species; and

f) un énoncé sur l'opportunité de fournir des renseignements supplémentaires concernant l'espèce;

(g) a statement of when one or more action plans in relation to the recovery strategy will be completed.

g) un exposé de l'échéancier prévu pour l'élaboration d'un ou de plusieurs plans d'action relatifs au programme de rétablissement.

Contents if recovery not feasible

Rétablissement irréalisable

(2) If the competent minister determines that the recovery of the listed wildlife species is not feasible, the recovery strategy must include a description of the species and its needs, an identification of the species' critical habitat to the extent possible, and the reasons why its recovery is not feasible.

(2) Si le ministre compétent conclut que le rétablissement de l'espèce sauvage inscrite est irréalisable, le programme de rétablissement doit comporter une description de l'espèce et de ses besoins, dans la mesure du possible, et la désignation de son habitat essentiel, ainsi que les motifs de la conclusion.

Multi-species or ecosystem approach permissible

Plusieurs espèces ou écosystème

(3) The competent minister may adopt a

(3) Pour l'élaboration du programme de

multi-species or an ecosystem approach when preparing the recovery strategy if he or she considers it appropriate to do so.

Regulations

(4) The Governor in Council may, on the recommendation of the Minister after consultation with the Minister responsible for the Parks Canada Agency and the Minister of Fisheries and Oceans, make regulations for the purpose of paragraph (1)(e) prescribing matters to be included in a recovery strategy.

2002, c. 29, s. 41; 2005, c. 2, s. 21.

Proposed recovery strategy

42. (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.

First listed wildlife species

(2) With respect to wildlife species that are set out in Schedule 1 on the day section 27 comes into force, the competent minister must include a proposed recovery strategy in the public registry within three years after that day, in the case of a wildlife species listed as an endangered species, and within four years after that day, in the case of a wildlife species listed as a threatened species or an extirpated species.

rétablissement, le ministre compétent peut, s'il l'estime indiqué, traiter de plusieurs espèces simultanément ou de tout un écosystème.

Règlement

(4) Sur recommandation faite par le ministre après consultation du ministre responsable de l'Agence Parcs Canada et du ministre des Pêches et des Océans, le gouverneur en conseil peut prévoir par règlement, pour l'application de l'alinéa (1)e), les éléments additionnels à inclure dans un programme de rétablissement.

2002, ch. 29, art. 41; 2005, ch. 2, art. 21.

Projet de programme de rétablissement

42. (1) Sous réserve du paragraphe (2), le ministre compétent met le projet de programme de rétablissement dans le registre dans l'année suivant l'inscription de l'espèce sauvage comme espèce en voie de disparition ou dans les deux ans suivant l'inscription de telle espèce comme espèce menacée ou disparue du pays.

Liste des espèces en péril originale

(2) En ce qui concerne les espèces sauvages inscrites à l'annexe 1 à l'entrée en vigueur de l'article 27, le ministre compétent met le projet de programme de rétablissement dans le registre dans les trois ans suivant cette date dans le cas de l'espèce sauvage inscrite comme espèce en voie de disparition ou dans les quatre ans suivant cette date dans le cas de l'espèce sauvage inscrite comme espèce menacée ou disparue du pays.

Comments

43. (1) Within 60 days after the proposed recovery strategy is included in the public registry, any person may file written comments with the competent minister.

Finalization of recovery strategy

(2) Within 30 days after the expiry of the period referred to in subsection (1), the competent minister must consider any comments received, make any changes to the proposed recovery strategy that he or she considers appropriate and finalize the recovery strategy by including a copy of it in the public registry.

Existing plans

44. (1) If the competent minister is of the opinion that an existing plan relating to a wildlife species meets the requirements of subsection 41(1) or (2), and the plan is adopted by the competent minister as the proposed recovery strategy, he or she must include it in the public registry as the proposed recovery strategy in relation to the species.

Incorporation of existing plans

(2) The competent minister may incorporate any part of an existing plan relating to a wildlife species into a proposed recovery strategy for the species.

Amendments

45. (1) The competent minister may at any time amend the recovery strategy. A copy of the amendment must be included in the public registry.

Observations

43. (1) Dans les soixante jours suivant la mise du projet dans le registre, toute personne peut déposer par écrit auprès du ministre compétent des observations relativement au projet.

Texte définitif du programme de rétablissement

(2) Dans les trente jours suivant la fin du délai prévu au paragraphe (1), le ministre compétent étudie les observations qui lui ont été présentées, apporte au projet les modifications qu'il estime indiquées et met le texte définitif du programme de rétablissement dans le registre.

Plans existants

44. (1) Si le ministre compétent estime qu'un plan existant s'applique à l'égard d'une espèce sauvage et est conforme aux exigences des paragraphes 41(1) ou (2), et qu'il l'adopte à titre de projet de programme de rétablissement, il en met une copie dans le registre pour tenir lieu de projet de programme de rétablissement de l'espèce.

Incorporation d'un plan existant

(2) Il peut incorporer toute partie d'un plan existant relatif à une espèce sauvage dans un projet de programme de rétablissement de celle-ci.

Modifications

45. (1) Le ministre compétent peut modifier le programme de rétablissement. Une copie de la modification est mise dans le registre.

Amendments relating to time for completing action plan

(2) If the amendment relates to the time for completing an action plan, the competent minister must provide reasons for the amendment and include a copy of the reasons in the public registry.

Amendment procedure

(3) Sections 39 and 43 apply to amendments to a recovery strategy, with any modifications that the circumstances require.

Exception

(4) Subsection (3) does not apply if the competent minister considers the amendment to be minor.

Reporting

46. The competent minister must report on the implementation of the recovery strategy, and the progress towards meeting its objectives, within five years after it is included in the public registry and in every subsequent five-year period, until its objectives have been achieved or the species' recovery is no longer feasible. The report must be included in the public registry.

Action Plan

Preparation

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.

Modification du délai

(2) Si la modification porte sur le délai pour terminer un plan d'action, le ministre compétent est tenu de fournir les motifs de la modification et de mettre une copie de ceux-ci dans le registre.

Procédure de modification

(3) Les articles 39 et 43 s'appliquent, avec les adaptations nécessaires, à la modification du programme de rétablissement.

Exception

(4) Le paragraphe (3) ne s'applique pas si le ministre compétent estime que la modification est mineure.

Suivi

46. Il incombe au ministre compétent d'établir un rapport sur la mise en oeuvre du programme de rétablissement et sur les progrès effectués en vue des objectifs qu'il expose, à intervalles de cinq ans à compter de sa mise dans le registre, et ce, jusqu'à ce que ces objectifs soient atteints ou que le rétablissement de l'espèce ne soit plus réalisable. Il met son rapport dans le registre.

Plan d'action

Élaboration

47. Le ministre compétent responsable d'un programme de rétablissement est tenu d'élaborer un ou plusieurs plans d'action sur le fondement de celui-ci. Si plusieurs ministres compétents sont responsables du programme, les plans d'action peuvent être élaborés conjointement par eux.

Cooperation with other ministers and governments

48. (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.

Collaboration

48. (1) Dans la mesure du possible, le plan d'action est élaboré en collaboration avec :

- a) le ministre provincial ou territorial compétent dans la province ou le territoire où se trouve l'espèce sauvage inscrite;
- b) tout ministre fédéral dont relèvent le territoire domanial ou les autres aires où se trouve l'espèce;
- c) si l'espèce se trouve dans une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, le conseil;
- d) toute organisation autochtone que le ministre compétent croit directement touchée par le plan d'action;
- e) toute autre personne ou organisation qu'il estime compétente.

Accord sur des revendications territoriales

(2) Si l'espèce sauvage inscrite se trouve dans une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, le plan d'action est élaboré, dans la mesure où il s'applique à cette aire, en conformité avec les dispositions de cet accord.

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.

Contents

49. (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-

Consultation

(3) Le plan d'action est élaboré, dans la mesure du possible, en consultation avec les propriétaires fonciers, les locataires et les autres personnes que le ministre compétent croit directement touchés ou intéressés, notamment le gouvernement de tout autre pays où se trouve l'espèce.

Contenu du plan d'action

49. (1) Le plan d'action comporte notamment, en ce qui concerne l'aire à laquelle il s'applique :

a) la désignation de l'habitat essentiel de l'espèce dans la mesure du possible, en se fondant sur la meilleure information accessible et d'une façon compatible avec le programme de rétablissement, et des exemples d'activités susceptibles d'entraîner sa destruction;

b) un exposé des mesures envisagées pour protéger l'habitat essentiel de l'espèce, notamment la conclusion d'accords en application de l'article 11;

c) la désignation de toute partie de l'habitat essentiel de l'espèce qui n'est pas protégée;

d) un exposé des mesures à prendre pour mettre en oeuvre le programme de rétablissement, notamment celles qui traitent des menaces à la survie de l'espèce et celles qui aident à atteindre les objectifs en matière de population et de dissémination, ainsi qu'une indication du moment prévu pour leur exécution;

d.1) les méthodes à utiliser pour surveiller le rétablissement de l'espèce et

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.

Regulations

(2) The Governor in Council may, on the recommendation of the Minister after consultation with the Minister responsible for the Parks Canada Agency and the Minister of Fisheries and Oceans, make regulations for the purpose of paragraph (1)(f) prescribing matters to be included in an action plan.

2002, c. 29, s. 49; 2005, c. 2, s. 22.

Proposed action plan

50. (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.

sa viabilité à long terme;

e) l'évaluation des répercussions socioéconomiques de sa mise en oeuvre et des avantages en découlant;

f) tout autre élément prévu par règlement.

Règlement

(2) Sur recommandation faite par le ministre après consultation du ministre responsable de l'Agence Parcs Canada et du ministre des Pêches et des Océans, le gouverneur en conseil peut prévoir par règlement, pour l'application de l'alinéa (1)f), les éléments additionnels à inclure dans un plan d'action.

2002, ch. 29, art. 49; 2005, ch. 2, art. 22.

Projet de plan d'action

50. (1) Le ministre compétent met le projet de plan d'action dans le registre.

Observations

(2) Dans les soixante jours suivant la mise du projet dans le registre, toute personne peut déposer par écrit auprès du ministre compétent des observations relativement au projet.

Texte définitif du plan d'action

(3) Dans les trente jours suivant la fin du délai prévu au paragraphe (2), le ministre compétent étudie les observations qui lui ont été présentées, apporte au projet les modifications qu'il estime indiquées et met le texte définitif du plan d'action dans le registre.

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.

Existing plans

51. (1) If the competent minister is of the opinion that an existing plan relating to a wildlife species meets the requirements of section 49, and the plan is adopted by the competent minister as a proposed action plan, he or she must include it in the public registry as a proposed action plan in relation to the species.

Incorporation of existing plans

(2) The competent minister may incorporate any part of an existing plan relating to a wildlife species into a proposed action plan for the species.

Amendments

52. (1) The competent minister may at any time amend an action plan. A copy of the amendment must be included in the public registry.

Amendment procedure

(2) Section 48 applies to amendments to an action plan, with any modifications that the circumstances require.

Exception

(3) Subsection (2) does not apply if the competent minister considers the amendment to be minor.

Sommaire en cas de retard

(4) Si le plan d'action n'est pas terminé dans le délai prévu par le programme de rétablissement, le ministre compétent est tenu de mettre dans le registre un sommaire des éléments du plan qui sont élaborés.

Plans existants

51. (1) Si le ministre compétent estime qu'un plan existant s'applique à l'égard d'une espèce sauvage et est conforme aux exigences de l'article 49, et qu'il l'adopte à titre de projet de plan d'action, il en met une copie dans le registre pour tenir lieu de projet de plan d'action à l'égard de l'espèce.

Incorporation d'un plan existant

(2) Il peut incorporer toute partie d'un plan existant relatif à une espèce sauvage dans un projet de plan d'action portant sur celle-ci.

Modifications

52. (1) Le ministre compétent peut modifier le plan d'action. Une copie de la modification est mise dans le registre.

Procédure de modification

(2) L'article 48 s'applique, avec les adaptations nécessaires, à la modification du plan d'action.

Exception

(3) Le paragraphe (2) ne s'applique pas si le ministre compétent estime que la modification est mineure.

Regulations

53. (1) The competent minister must, with respect to aquatic species, species of birds that are migratory birds protected by the *Migratory Birds Convention Act, 1994*, regardless of where they are located, or with respect to any other wildlife species on federal lands, make any regulations that are necessary in the opinion of the competent minister for the purpose of implementing the measures included in an action plan, but, if the measures relate to the protection of critical habitat on federal lands, the regulations must be made under section 59.

Consultation

(2) 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 making the regulation.

Consultation

(3) 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 making the regulation.

Incorporation by reference

(4) The regulations may incorporate by reference any legislation of a province or territory, as amended from time to time, insofar as the regulations apply in that province or territory.

Règlements

53. (1) Le ministre compétent prend, par règlement, à l'égard des espèces aquatiques, des espèces d'oiseaux migrateurs protégées par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*, où qu'elles se trouvent, ou de toute autre espèce sauvage se trouvant sur le territoire domanial, les mesures qu'il estime nécessaires pour la mise en oeuvre d'un plan d'action. Si les mesures concernent la protection de l'habitat essentiel sur le territoire domanial, les règlements sont pris en vertu de l'article 59.

Consultation

(2) Si le ministre compétent estime que le règlement touchera une réserve ou une autre terre qui a été mise de côté à l'usage et au profit d'une bande en application de la *Loi sur les Indiens*, il est tenu de consulter le ministre des Affaires indiennes et du Nord canadien et la bande avant de le prendre.

Consultation

(3) Si le ministre compétent estime que le règlement touchera une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, il est tenu de consulter le conseil avant de le prendre.

Incorporation par renvoi

(4) Les règlements peuvent incorporer par renvoi, dans la mesure où ils s'appliquent à une province ou à un territoire, toute mesure législative de la province ou du territoire, avec ses

Consultation

(5) If the competent minister is of the opinion that a regulation would affect land in a territory, he or she must consult the territorial minister before making the regulation.

Exception

(6) Subsection (5) 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* and their habitat; or

(b) in respect of land under the authority of the Minister or the Parks Canada Agency.

Use of powers under other Acts

54. For the purpose of implementing the measures included in an action plan, the competent minister may use any powers that he or she has under any other Act of Parliament.

Monitoring and reporting

55. The competent minister must monitor the implementation of an action plan and the progress towards meeting its objectives and assess and report on its implementation and its ecological and socio-economic impacts five years after the plan comes into effect. A copy of the report must be included in the public registry.

modifications successives.

Application dans les territoires

(5) Si le ministre compétent estime que le règlement touchera des terres dans un territoire, il est tenu de consulter le ministre territorial avant de le prendre.

Exception

(6) Le paragraphe (5) ne s'applique pas :

a) à l'égard des individus d'une espèce aquatique ou d'une espèce d'oiseau migrateur protégée par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*, et de leur habitat;

b) à l'égard des terres relevant du ministre ou de l'Agence Parcs Canada.

Pouvoirs conférés au titre d'autres lois

54. Le ministre compétent peut, en vue de la mise en oeuvre d'un plan d'action, exercer tout pouvoir qui lui est conféré au titre d'une autre loi fédérale.

Suivi et rapport

55. Cinq ans après la mise du plan d'action dans le registre, il incombe au ministre compétent d'assurer le suivi de sa mise en oeuvre et des progrès réalisés en vue de l'atteinte de ses objectifs. Il l'évalue et établit un rapport, notamment sur ses répercussions écologiques et socioéconomiques. Il met une copie de son rapport dans le registre

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1529-07

STYLE OF CAUSE: ENVIRONMENTAL DEFENCE CANADA et al v.
MINISTER OF FISHERIES AND OCEANS

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: MAY 4, 5, 6 and 7, 2009
JULY 2 and 3, 2009

**REASONS FOR ORDER
AND ORDER:** CAMPBELL J.

DATED: SEPTEMBER 09, 2009

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