Environment Canada

Proposed Species at Risk Act

A Discussion Paper on Compensation

May 2000

www.ec.gc.ca
1-800 668 6767

Canada

DISCUSSION PAPER

COMPENSATION

The proposed Species at Risk Act (SARA) will enable compensation to be paid for losses suffered as a result of any extraordinary impact when it is necessary to prohibit destruction of critical habitat. The details of the compensation scheme will be laid out in regulations and will be based on fair and objective principles.

The Minister of the Environment has asked Dr. Peter H. Pearse to review the issues and to provide him with advice on the principles of the federal compensation scheme. Dr. Pearse was chosen to review the issue on the basis of his extensive experience and expertise in natural resources management, conservation and policy. Over the next six months, he will engage in fact-finding, meet interested parties, and review comments and submissions on compensation from others. He will prepare a report for the Minister, which will then be made public. His advice will be used as the basis for drafting compensation regulations.

This discussion paper is an overview of what we have heard so far on issues related to a compensation scheme under SARA. Its purpose is to serve as a vehicle for dialogue among interested parties and with Peter Pearse on principles for providing compensation. While the main issues concern who and what will be eligible for compensation, other issues revolve around technical components, such as what processes are necessary to make a claim for compensation, or how to settle disputes over the amount of compensation paid.

An Update Paper to inform Canadians on progress towards a compensation regulation, including major elements of the proposed regime will be released in late fall. Regulations will be drafted after the Act has received Royal Assent, and completed in time for Proclamation of the Act. Gazetting of proposed regulations will follow Proclamation of the Act. Having the regulations in place immediately after Proclamation will ensure certainty and fairness for landowners and other interested parties.

OVERVIEW OF WHAT WE HAVE HEARD SO FAR

Providing compensation for land use restrictions to protect critical habitat of endangered species -- in situations short of expropriation -- is not common practice in Canadian environmental or resource management legislation. There are no readily available models to turn to for guidance in determining principles that should guide the compensation scheme.

The issues are complex and there are many strong -- and often divergent -- viewpoints. Part of this stems from misconceptions about the proposed Species at Risk Act. Anecdotal evidence in the United States regarding severe economic losses by landowners, due to endangered species legislation, has generated concern and fears on the part of some in Canada. The Canadian legislation, however, emphasizes cooperative and voluntary measures to protect critical habitat, with incentives and support for Canadians to take conservation actions. Legislation will be the backstop when other efforts do not work. The federal government will ensure certainty of fairness through provision for compensation.

Compensation envisaged under the Act is for extraordinary losses arising out of restrictions on land use to protect the critical habitat of an endangered species. While the compensation provisions must ensure that no one bears an unfair burden, they must not create perverse incentives that may inhibit voluntary habitat protection measures as someone may hope to receive some future financial compensation.

It is a question of balance -- hence, the need to develop just and fair principles. The compensation regulations will be developed in the same way the Government of Canada intends to implement the proposed Species at Risk Act: in an open and transparent manner; and in time for Proclamation of the Act.

Canada's Plan for Protecting Species at Risk, the December update, contained some principles that could guide the compensation scheme. Initial feedback indicates support for some principles, divergent viewpoints on others, and a number of questions that merit discussion.

Compensation should ensure fairness

Canadians who participated in a recent survey, as well as those who submitted comments on the December update, are almost unanimously of the view that it would be unreasonable to impose the entire economic burden of protecting threatened or endangered species on those whose land may be a suitable habitat. Protecting species is seen as everybody's responsibility, and landowners should not be asked to bear an unfair part of the load. Those who have submitted comments fully support the principle that private property owners should be eligible for compensation when it is necessary to impose restrictions on use of their land to protect critical habitat. In a Decima survey conducted last fall, 74% of respondents supported government compensation to private landowners.

There is less agreement when it comes to providing compensation to individuals or companies operating on federal or provincial crown lands for the purpose of harvesting resources, such as timber, minerals, petroleum, natural gas and pasture.

Many who submitted comments are uncomfortable with providing compensation to those holding private interests in crown land. Their view is that no lease to a company for the use of crown land conveys a right to unfettered tenure, regardless of changes in social values and outlook -- and especially when it is to achieve a public purpose and respond to a publicly supported interest. When the crown grants access to and/or use of publicly owned assets, it does so on the premise that activities permitted and carried out under the leases will not impact negatively on public interests and objectives. There is some support for the premise that lease fees should not apply on any leased crown land for which it were necessary to restrict access in order to protect critical habitat, and for the portion of any investments made by the lessee that would be lost.

Representatives of resource industries, however, are concerned that the companies and individuals they represent will bear a disproportionately high share of the cost, and strongly believe that all affected parties must have the right to fair compensation. It is their view that compensation should not discriminate between those who own land and those whose economic activity takes place on leased public land. They question the premise that compensation to lessees of crown land should be limited to refunds of lease fees for the area affected and reimbursement for losses on capital investments pursuant to the lease.

Several support more extensive compensation and argue that compensation should cover both immediate and long-term losses and, in instances where they occur, shutdown costs, severance pay, forgone debt payments, future income, retail business, and so forth. People employed in resource industries share these concerns and want assurance that communities dependent on affected resource companies will be compensated for job losses and/or income losses that might result from protection of habitat for endangered or threatened species.

There seems to be a social consensus that private property owners should be eligible for compensation due to extraordinary restrictions on use of their land. Compensation should also be considered in other exceptional situations such as on Indian reserve lands. Compensation provisions in land claims agreements would have to be respected if the critical habitat in question is in an area governed by a land claims agreement. There is less agreement over the issue of compensation for lease holders on crown lands, and further discussion is warranted. It is important to note that the issues raised by representatives of resource industries and communities dependent on them are a part of the overall context of environmental and resource management issues, and not limited to the proposed species at risk legislation.

Compensation should be for costs associated with normal use of the land

There are divergent viewpoints regarding the principle that compensation should

be for losses from restrictions on normal expected use of the land. Concerns were expressed by some that compensation awards will not fully compensate landowners for losses in market value resulting from prohibitions on the destruction of critical habitat. Several who submitted comments expressed support for compensation awards based on highest and best use and for compensation for loss in value and/or for lost development opportunities.

Others are of the view that compensation should be based on the current, normal use of the land, not potential future uses. Compensating for loss of income in terms of highest and best current use or of possible future uses, could be seen as conferring a kind of windfall benefit on a property owner if those uses differed significantly from current or normal use. Moreover, the cost to the public taxpayer would be greater -- perhaps significantly so in some cases.

The purpose of compensation is to mitigate for loss of value. Under normal use, property has value from a stream of income generated from the use of the land and compensation is primarily for the impact on that stream of income. Since property draws its value from the income it earns, compensation can also be considered to cover losses in property value.

The question of compensation for loss in potential use value and for lost development opportunities, over and above what might be considered fair for actual lost income is not unlike questions of compensation arising from designation of farmland for agricultural use only. It is general practice of the provinces that have zoned land for agricultural use to not compensate for lost development opportunities.

For some, the principle of compensating for costs associated with normal use of the land seems the fairest way to balance the rights of landowners with the public interest in preserving species at risk. However, there may be exceptional circumstances warranting additional compensation. The term normal use requires further precision and professionals in estimating losses for compensation purposes will be among those consulted on the topic.

Compensation should generally not exceed the value of incentives

Views differed on the principle that compensation should not result in greater payments than would have been available through stewardship incentives offered before the compensation phase. Some were concerned that this could result in unfairness, while others argued that stewardship incentives are intended to pay for costs incurred through voluntary participation in recovery planning and should have no impact on access to fair compensation for loss of value, rent or revenue. Others are of the view that no person should be better off by holding out for compensation than by entering into a conservation agreement for similar levels of land use restriction, otherwise compensation will

create a perverse incentive.

Compensation differs from stewardship incentives and conservation agreements, which are another essential element of SARA. Stewardship incentives are the first line of defense by the federal government to encourage conservation agreements to protect critical habitat. So long as landowners are prepared to accept land use restrictions in the interest of species at risk, voluntary stewardship incentives should be sufficient. Exceptional situations may arise where incentives alone may not be feasible. For the most part, however, compensation is most likely to be relevant in cases in where landowners are unwilling to accept voluntary land use restrictions to protect critical habitat.

While there are legitimate concerns about fairness, the underlying principle seems sound. This principle is intended to ensure that there is no incentive to avoid the stewardship process in hopes of gaining a richer settlement through compensation, which would defeat the objective of protecting critical habitat primarily through voluntary conservation actions.

One possible approach may be to maintain the principle as the general rule, but to allow for compensation to exceed stewardship if and when exceptional circumstances warrant it.

Compensation may take various forms

There was strong support for the principle of providing alternatives to purely monetary compensation such as land swaps or payment for moving to land uses more suited to species at risk.

Land swaps could take the form of an exchange of land designated as critical habitat for land of equal value and/or which can support equivalent land use. This alternative could be more affordable if equivalent land were available near to the land designated as critical habitat, and possibly beneficial as well since it would mean less disruption to existing operations.

Land use more suited to species at risk could take the form of compensating for a change in land use (e.g. switching from annual cropping to perennial cover crop) which could result in preserving or creating additional habitat that would protect a species at risk and/or contribute to its recovery. In such cases, compensation could be towards the difference between the loss that would have been incurred if land use was prohibited and the cost of changing to the alternative land use practices. While this alternative is seen to be attractive, further discussion is warranted in the practicalities of how it would work and how regulations would spell out the conditions under which these options would be used.

What procedures should be followed in claiming compensation?

Eligible individuals will be able to apply for compensation. For the most part, developing the application form and the associated administrative procedures for making an application will likely be straightforward. Existing procedures in both provincial and federal jurisdictions will be useful models for the types of information that should form part of the application for compensation. Although different procedures may be appropriate, the underlying objective in developing the application process -- i.e. enabling a fair value for compensation purposes -- will be the same.

What process should be used for compensation appraisals?

Many questions have been raised as to the appropriate mechanisms for assessing compensation. Some are of the view that setting up a new body may be costly and inefficient. They point to the existing institutions and agencies in federal and provincial jurisdictions that already have expertise and authority in assessing losses and fair values of compensation to individuals for a variety of public purposes that impact on land uses. They feel it should be comparatively simple for the SARA regulations to grant existing agencies the authority to apply their process and expertise to compensation for losses flowing from land use restrictions under SARA.

Existing agencies or institutions, however, derive their authority from specific legislation for particular purposes. Moreover, policies and laws differ among the provinces when it comes to compensation for restrictions on land use to protect habitat. For these reasons, it may be necessary to rely on a federal process.

One option could lie in the Ecological Gifts Program, under which ecological gifts will now benefit from a 50% reduction in capital gains that are subject to tax. This program results in the protection of habitats critically important to wildlife. Henceforth, donors of ecological gifts will be required to submit appraisals performed by independent, accredited appraisers.

The fair market value for tax purposes will be determined by the Minister of the Environment through a new procedure, which will be established in the near future, to ensure the certainty of the value of ecological gifts. The Minister will soon establish a panel of experts to provide advice on the design and implementation of the appraisal review and certification process. This process for review and appraisal of value will likely be similar to that which is needed for appraising compensation under SARA.

How would disputes over compensation awards be resolved?

Several stakeholders expressed interest in and/or support for some form of

dispute resolution mechanism in the event that a landowner and Crown were unable to agree on an amount of compensation. In the usual case, it would be expected that the Crown, or its agent, would make a 'final' offer of compensation to the individual. If that offer were accepted, then the process would be essentially completed. However, if the individual felt that it was not satisfactory, should there be some venue to which an individual could appeal for a final and binding decision?

Several models are used in existing laws, and can be simplified as follows:

- A producer applies to existing provincial or federal agency for arbitration/final decision on amount of compensation if parties cannot reach agreement. This is essentially the option currently provided in Nova Scotia's legislation for the protection of species at risk.

- Existing federal or provincial board or agency mediates between landowner and Crown. In this case, the negotiations on the amount of compensation would be mediated by an individual/tribunal. A limiting feature of this approach is that the mediation process need not result in agreement between the parties.

- An independent appraiser, paid by the Crown, makes an assessment of the value of the loss, which becomes the Crown's 'final' offer and is binding on both parties.

Mediation is becoming more common and gaining increasing respect as a mechanism for resolving differences between parties and could play some role in settling disputes about compensation. The mediation process would be more cost effective than processes that involve more of a court like procedure and their associated costs. It is unlikely, however, to be accepted as a final step when a voluntary agreement cannot be reached on the amount of compensation to be awarded.