

Environment Canada Workshop
to obtain advice on
essential elements for
federal endangered species legislation

Workshop Proceedings

October 22-23, 1998
Hull, Québec

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These Workshop Proceedings were compiled by the Workshop Facilitator (Hajo Versteeg) and by the Breakout Group facilitators (Lynne Betts, Paul Emond, Stephen Hazell, Richard Laing, and Sheila McCrindle). Overall responsibility for the contents of these Proceedings remains with Hajo Versteeg. Participation in the Workshop should not be construed as universal endorsement of the recommendations contained herein.

**Proceedings of the Environment Canada
Workshop to Obtain Advice on Essential Elements
for Federal Endangered Species Legislation;
October 22—23, 1998**

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1. BACKGROUND & CONTEXT

In October 1996, federal, provincial and territorial wildlife ministers agreed in principle to the Accord for the Protection of Species at Risk in Canada. The Accord commits governments to a national approach, including complementary legislation and programs to protect endangered species.

In February 1998, the Canadian Wildlife Directors convened a national workshop to discuss and resolve issues related to the workplan to implement the Accord. At this meeting there was a clear resolve by Workshop participants on the need to rebuild and maintain collaborative partnerships to work together to conserve and protect species at risk in Canada. There was also general agreement on the need to systematically plan the Accord implementation strategy with stakeholders, and then to deliver the activities described in the plan, including the component pertaining to federal endangered species legislation. At this meeting, Environment Canada reaffirmed its commitment to introduce endangered species legislation as one of its principle contributions to the implementation of the Accord. Environment Canada also committed to public consultations including a national workshop in the fall of 1998 to seek advice/recommendations on the essential elements for that legislation.

In August 1998, a second national workshop was convened to update interested parties on progress in implementing the Accord, to further identify areas of agreement and disagreement on key issues related to the Accord, and to identify themes for the October workshop on essential elements of the federal endangered species legislation.

Throughout this period, several other initiatives (multi-stakeholder, sectoral and individual) addressed various aspects of federal endangered species legislation. Many of these are highlighted in the background papers prepared for this workshop (*see Appendix A-3 for details*).

The Environment Canada Workshop to obtain advice on Essential Elements for Federal Endangered Species Legislation was held in Hull, Quebec on October 22—23, 1998. The workshop was attended by 150 participants affiliated with all orders of government, industry, labour, academia, environmental non-governmental organizations, aboriginal groups and the natural resource and agriculture sectors. The following sections detail the workshop purpose and structure, summarize plenary presentations and Breakout Group discussions, and identify next steps in the development of the federal endangered species legislation. The Appendices to this Report include the list of workshop participants, the workshop agenda, background information on the workshop themes, related documents relevant to workshop discussions and copies of transparencies/papers presented in the workshop plenary sessions.

2. PURPOSE AND STRUCTURE OF THE WORKSHOP

Prior to the Workshop, participants were sent a Participants' Kit which included a proposed Agenda, a Statement of Purpose and Anticipated Workshop Outputs, and Background Information pertaining to 6 identified themes for focused discussion in the breakout sessions.

Following receipt of correspondence, discussions between government wildlife personnel and invitees, and bilateral discussions between the facilitator and many of the invitees, the purpose, outputs and structure of the Workshop were refined as follows:

Purpose: To seek advice on the essential elements for federal endangered species legislation.

Outputs: Better understanding by all participants of the various perspectives pertaining to the essential elements for federal endangered species legislation; and recommendations of the participants that the federal government can use in drafting federal endangered species legislation.

On Day 1, Breakout Groups 1 and 2 discussed the scope of application for federal endangered species law (including the federal role in the Safety Net); Breakout Group 3 discussed the consequences of the Committee on the Status of Endangered Species in Canada (COSEWIC) listing (including how COSEWIC listing is reflected in legislation, prohibitions and emergency orders); and Breakout Group 4 discussed citizen's access to dispute resolution to enforce federal endangered species legislation. During the afternoon plenary, each Breakout Group reported back on its deliberations and engaged in general discussions.

During the morning plenary on Day 2, two additional breakout themes were identified. In the result, Breakout Group 1 addressed habitat/stewardship (including incentives, compensation and agreements); Breakout Group 2 addressed recovery planning and implementation; Breakout Group 3 discussed exceptions and issuance of permits; Breakout Group 4 addressed Terms of Reference for COSEWIC; and Breakout

Group 5 addressed Aboriginal Protocol. During the afternoon plenary on Day 2, each group reported back on its deliberations and engaged in general discussions. The workshop then concluded with a plenary discussion on next steps.

The next two sections of this Report summarize the presentations of the morning plenary on Day 1 and Day 2, and the results of the breakout deliberations, which are based primarily on the overheads presented by the facilitators for each group during the afternoon plenaries. The reader is reminded that although there were some broad areas of agreement within and among Breakout Groups, the workshop was not designed to validate consensus among participants.

3. SUMMARY OF PLENARY PRESENTATIONS

DAY 1 PLENARY PRESENTATIONS

The Honourable Christine Stewart, Minister of the Environment opened the Workshop by stressing the critical importance of protecting wildlife species at risk and the high expectations from the Canadian public for comprehensive and effective wildlife conservation. Minister Stewart reaffirmed her resolve to introduce endangered species legislation as one of the federal government's principal contributions to the implementation of the Accord. But the Minister also stressed that federal legislation was only part of the answer, as effective protection for species at risk remains the responsibility of all Canadians. The Minister then described the new reporting relationship between COSEWIC and the Canadian Endangered Species Conservation Council (CESCC) to ensure a direct link between the group that assesses species at risk to those with the public accountability for determining response actions. The Minister highlighted that the new reporting relationship will not affect the independent scientific process by which species are listed and that the federal government intends to see the COSEWIC list faithfully reflected in federal legislation. The Minister stressed the importance of consultations including this workshop and the upcoming regional meetings in helping to shape the content of federal endangered species legislation, and wished the participants well in their deliberations.

During plenary discussions, the Minister was asked to address the concern that the new reporting structure between COSEWIC and CESCC would compromise the independent, scientific nature of COSEWIC and would lead to political listing. The Minister replied that the status of COSEWIC would in fact be elevated by establishing a direct reporting relationship with those in a position to act when a species is listed and who are publicly accountable for their decisions. In response to a question about the new Terms of Reference for COSEWIC, the Minister stressed that the independent scientific process by which species are listed would not be affected. COSEWIC will continue to make its assessments based on the best scientific, traditional and local information. COSEWIC will

remain transparent and all of their assessments and recommendations will be made available to the public and will not be altered by CESCC. One participant stressed the need for direct representation on COSEWIC of Aboriginal Peoples with traditional knowledge. Several participants expressed serious concern about the lack of effective consultation efforts with Aboriginal Peoples given the importance attached to wildlife management by Aboriginal Peoples, their knowledge and the significant impacts that federal endangered species legislation will have on them. The Minister agreed on the need for more consultations with all people affected by the legislation, including Aboriginal Peoples, and expressed the hope that the workshop would provide a fair opportunity for consultation and identify further opportunities. Another participant asked the Minister to base her new legislation on a report prepared by the Species at Risk Working Group, entitled *Conserving Species at Risk and Vulnerable Ecosystems: Proposals for Legislation and Programs*. (This report is posted on the Canadian Wildlife Service website: http://www.ec.gc.ca/cws-scf/es/endan_e.html). The Working Group was comprised of individuals (not representative of sectors) who were affiliated with the following organizations: the Canadian Nature Federation; the Canadian Pulp and Paper Association; the Canadian Wildlife Federation; The Mining Association of Canada; the National Agriculture Environment Committee; and the Sierra Club of Canada. The participant stated the Federation of Canadian Municipalities which represents approximately 20 million people will use the report as a base for discussion.

Speaking points used by the Minister are reproduced in Appendix A-5.1.

Karen Brown, Assistant Deputy Minister, Environmental Conservation Service, Environment Canada summarized progress in identifying the content and context of federal endangered species legislation since the February 1998 national workshop. Ms. Brown highlighted the amendments to the Accord approved by Wildlife Ministers in September 1998 as a direct result of stakeholder input. The evolution of the Terms of Reference for COSEWIC and CESCC, the significant advances made by non-government focus groups in addressing national habitat/stewardship strategies, third party review of enforcement, cross-border species, recovery planning and implementation, and the independent CIELAP study to assess gaps across jurisdictions in implementing the Accord were all highlighted.

Ms. Brown stressed the importance of continued discussions with Aboriginal Peoples and management boards under land claims agreements about their roles in the protection of species at risk.

Ms. Brown also underscored the importance of working towards common ground in discussing the identified workshop themes in order to influence the content of federal endangered species legislation. However, she stressed that opportunities for input into the legislation would continue beyond this workshop as the legislation evolves. Several of these opportunities, particularly as they related to rural communities were identified. Ms. Brown urged participants to routinely monitor the Endangered Species in Canada website (http://www.ec.gc.ca/cws-scf/es/endan_e.html) to obtain information on consultation opportunities and to comment on procedural and substantive issues pertaining to federal endangered species legislation.

Note: During the closing plenary, Ms. Brown presented a schedule of regional meetings and contact names. These are all reproduced in Section 5—Next Steps, below.

Ms. Brown closed her presentation by asking participants to suggest further input/consultation opportunities, being mindful of human and financial resource and time considerations. Ms. Brown reminded participants that as the legislation moves through the parliamentary process there would also be opportunities for further input.

Overhead transparencies used during Ms. Brown's presentation are reproduced in Appendix A-5.2

Steve Curtis, Associate Director General, Canadian Wildlife Service, Environment Canada provided workshop participants with a detailed overview of federal endangered species legislation. The purposes of this presentation were to position the workshop breakout themes within the "bigger picture", to underscore that the themes themselves were all linked and sometimes overlapped, to provide opportunity for plenary discussions on aspects of federal endangered species legislation which might not be addressed during breakout discussions, and to highlight areas for discussion during breakout sessions. Mr. Curtis began his presentation by outlining the need for, the purpose of, and the principles governing federal endangered species legislation. Mr. Curtis then provided some details on the CESSC, COSEWIC, and conservation agreements. Mr.

Curtis also highlighted the differing views pertaining to the scope of application (including a proposed safety net) and the extent of legal protection that should be provided to species at risk in the federal legislation. *These views are further detailed in the background documentation—see in particular Appendix A-3.1, below.*

It was made clear that any federal endangered species legislation would include a non-derogation clause respecting the aboriginal and treaty rights of the Aboriginal Peoples of Canada. Various provisions within the former Bill C-65 dealing with the roles of Aboriginal Peoples and wildlife management boards would be carried over into the new legislation. Options for converting the COSEWIC list for species at risk into the federal legal list, emergency orders, exceptions to the application of the automatic prohibitions, various aspects of recovery planning and implementation, and enforcement provisions, especially those pertaining to third party review were all identified as needing focused Breakout Group discussion.

Most of the discussion following Mr. Curtis' presentation addressed the resource implications associated with implementing, monitoring and enforcing the new legislation, and compensation issues. Mr. Curtis reiterated that realistic cost analysis is fundamental to successfully developing and implementing the new legislation. Mr. Curtis also cautioned that parties interested in the compensation issue should not look to open-ended, wide-ranging direct compensation provisions. In response to questions from a representative of the Canadian Federation of Woodlot Owners and from aboriginal groups on the compensation issue, Mr. Curtis agreed on the need to examine economic incentives and disincentives in promoting stewardship and that the compensation issue would benefit from further consultation.

One participant expressed concern that the Accord and supporting documentation did not include a clear strategy for linking all public and private sector interests to accomplish the goals of the Accord and relevant endangered species legislation. This participant emphasized that cross-sectoral integration is extremely important given that the values, policies and socio-economic perspectives of these sectors will significantly influence overall goals of species recovery and conservation. Mr. Curtis agreed that various sectors (e.g., forestry, transportation, energy, agriculture, mining, fisheries) can significantly impact on, and play a vital role in protecting species at risk. Mr. Curtis also agreed that as part of its

leadership role, the CESSC must develop a clear strategy to ensure strong linkages with these sectors to achieve the goals of the Accord. Mr. Curtis pointed out that several federal government departments have, and would continue to play, an important role in the evolution of the Accord and federal endangered species legislation. Several representatives of these departments were then identified as Workshop participants.

Overhead transparencies used for Mr. Curtis' presentation are reproduced in Appendix A-5.3.

David Brackett, Director General, Canadian Wildlife Service, Environment Canada detailed the decisions made at the September 28th meeting of the Wildlife Ministers' Council of Canada (WMCC).

Wildlife Ministers discussed a number of issues under the general heading of Implementing the Accord, and began by agreeing to amend the Accord to include more explicit recognition of the importance of stewardship activities, as suggested in earlier consultation sessions [*see Appendix A-4.1 for the full text of Accord*].

Ministers also agreed on the Terms of Reference for the two important national institutions suggested in the Accord; the CESSC and COSEWIC [*see Appendix A-4.2 and 4.3*]. The only change in the approved Terms of Reference for the CESSC was the clarification that the Council would be Co-Chaired by the federal Minister of Environment and the Chair of the Wildlife Ministers Council of Canada. Ministers agreed the inaugural meeting of the CESSC should take place in 1999, hosted by Quebec, in conjunction with the next meeting of the WMCC.

The approved Terms of Reference for COSEWIC include a number of changes from the final draft circulated prior to the Ministerial meeting. These changes ensure that the assessments made by COSEWIC are reported directly to CESSC and are published in cooperation with CESSC, which includes the Ministers who are publicly accountable for taking action for the protection of species at risk. COSEWIC is to report its assessments, and reasons for those assessments, to CESSC within a short time period (to be determined) after the close of the COSEWIC meeting, and then publish the assessments and reasons in conjunction with CESSC. Ministers made it clear there was no intention of vetting or modifying in any way the assessments of COSEWIC, but did indicate a hope that they would be in a position to announce conservation action at

the same time as the assessments are made public, underlining their commitment to early and effective action. Ministers also modified the proposed membership of the COSEWIC Committee, limiting membership to four scientific experts nominated by federal agencies, one from each of the provinces and territories, and three to be drawn from the wider conservation community. All nominees would be required to meet the standard of being considered an expert in the scientific, traditional or local knowledge criteria listed later in the Terms of Reference. The important role of chairs of the Species Specialist Groups was recognized, and their active participation in debates at the Committee level was expected, but in the event of a failure to reach consensus, they would not be voting members of the Committee.

The WMCC agreed to produce a report by 2000 on monitoring wild species in Canada. There was agreement on the two-stage recovery process, and that COSEWIC listing would trigger initial recovery planning efforts. The WMCC also agreed that Wildlife Directors would develop a national action plan for wildlife stewardship activities and endorsed the North American Waterfowl Management Plan renewal in accordance with the vision that has been developed.

There was considerable plenary discussion following Mr. Brackett's presentation. Questions focused on the lack of consultation on the revised Terms of Reference for COSEWIC, the potential that vetting the COSEWIC list through the CESSC could politicize the listing process, the disenfranchisement of sub-committee chairs, and the recommendations for candidacy on COSEWIC being made by CESSC. In response Mr. Brackett reiterated Minister Stewart's comments that the restructuring was not an attempt to control or ensure "political" vetting of the COSEWIC list but rather to ensure political recognition and accountability. The COSEWIC process will remain open, transparent and independent. COSEWIC must continue to use a process based on the best available science and traditional and local knowledge to make its assessments, report the list of species at risk and its findings to CESSC, and then make public the complete reasons for each assessment and identify all uncertainties. Species Specialist Group chairs will continue to play a vital role in the assessment process. Candidates for COSEWIC will be recommended by CESSC and will include scientific experts from each of the provinces and territories. This does not mean that these candidates will necessarily be

government employees. In any event three seats are expressly designated for non-government scientific experts who will also have to demonstrate credentials in the areas mentioned, including traditional and local knowledge.

One participant stressed that Aboriginal Peoples required further extensive consultations on federal endangered species legislation, including the membership of COSEWIC to ensure that Aboriginal Peoples with traditional knowledge have a seat on COSEWIC. This participant also reiterated that involvement by Aboriginal Peoples was not to be treated as "stakeholder" or NGO involvement, but rather was to be accorded equal status with other governments.

It was also suggested that COSEWIC should draw on "traditional rural knowledge" from people who work with the land.

DAY 2 – PLENARY PRESENTATIONS

In response to a request from one of the Breakout Groups on Day 1, **Stewart Elgie, Executive Director of the Sierra Legal Defence Fund** and **David Brackett, Director General, Canadian Wildlife Service, Environment Canada** briefly discussed constitutional principles that justify federal and provincial legislative powers over species at risk in Canada. While it is clear that the federal parliament has the constitutional authority to regulate certain species in certain locations in Canada, and that provincial governments can regulate certain species and their habitats in certain locations within a province, there is a debatable gray area where the boundaries of federal and provincial legislative competence over species at risk and their habitats are not at all clear. It is within this context that both Mr. Elgie and Mr. Brackett stressed the need for cooperation and partnership between both levels of government to ensure that all species at risk throughout Canada, including their habitats are afforded effective legal protections.

Michael d'Eça, legal advisor to the Nunavut Wildlife Management Board then presented a paper on *Canada's Commitments under Land Claims Agreements and Implications for Endangered Species Legislation*. Mr. d'Eça began by pointing out that the 13 comprehensive land claims that have been settled so far cover several million square kilometres of Canada's territory. Over the coming years, many more claims are expected to be completed. Mr. d'Eça went on to describe the legal significance of land claims, indicating that their protection by the constitution means both security against extinguishment or change and supremacy over inconsistent legislation.

Mr. d'Eça emphasized, however, that there should be no cause for concern as a result of the emergence of land claims within Canada's legal order. The guiding principle for the management of wildlife and wildlife habitat within land claims areas is always conservation. In fact, Mr. d'Eça strongly advocated that the processes set out in land claims be seen as models for the protection of wildlife and wildlife habitat, and that Environment Canada's proposed endangered species legislation adopt such processes.

Finally, Mr. d'Eça stated that, both in the *Convention on Biological Diversity* and in its own "Biodiversity Strategy", Canada has committed itself to using traditional knowledge to help conserve and sustainably use biological diversity. He expressed the view that the introduction of endangered species legislation provides Canada with an ideal opportunity to put this commitment into practice - by fully including traditional and community or local knowledge in the processes necessary for the protection and recovery of wildlife species.

Mr. d'Eça's full speech is reproduced in Appendix A-5.4.

4. BREAKOUT GROUP (BOG) REPORTS TO PLENARY

DAY 1

BOG 1—SCOPE OF APPLICATION FOR FEDERAL ENDANGERED SPECIES LAW (INCLUDING THE FEDERAL ROLE IN THE SAFETY NET)

FACILITATOR: LYNNE BETTS

At the outset of this discussion participants agreed to work as a large group and consider the key focus questions outlined in the *Participants Kit [see Appendix A-3.1]*. The group then identified a number of issues they wished to discuss related to the scope of the application. These included: scope, recovery plans, habitat, incentives, management agreements, vulnerable species, the purpose of the Act, land claims and the capability to deliver the Act. In addition, participants considered the concept of a safety net.

WHAT SHOULD THE SCOPE OF THE APPLICATION FOR THE FEDERAL ENDANGERED SPECIES LEGISLATION BE?

Scope of Application

Participants noted and agreed on the following general comments. The legislation should:

- Fill existing functional and legal gaps at the Federal level (although there was no general agreement on the nature or jurisdictional implications of these gaps)

- Provide resources to other jurisdictions;
- Enable responsible ministers to take action; and
- Provide for both co-operation and co-ordination.

The group agreed that their discussion would benefit from knowing the results of the recently drafted gap analysis. (*The Independent Review of Jurisdictions Gap Analysis for Implementing the Accord—see Appendix A-4.4 for an update*)

The group did not agree on the landbase that should be covered by the legislation. Some felt the legislation should be as broad and comprehensive as possible and include all lands and waters (not just Federal lands and waters). Others noted that such an approach would result in unacceptable legislation that would not survive parliament and a preferred approach would be to limit the scope to Federal lands and waters. Still others felt strongly that weak legislation is not necessarily better than an absence of legislation. Some suggested that the legislation should focus its efforts on initiatives that will not require a constitutional change.

Recovery Plans

The group was unanimous that recovery planning efforts:

- Should be multi-jurisdictional;
- Should be based on a co-operative approach; and
- There is a need to co-ordinate efforts, possibly through existing mechanisms.

Participants recognized that there is much more work required following listing and many agreed that at the time of listing the intact area be immediately protected through a management plan until a recovery plan is prepared. Many supported the idea of including compensation in recovery plans. Participants did not discuss definitions for “intact areas” or “compensation”.

While some felt the legislation should spell out the recovery planning roles and responsibilities of individual parties, others felt this type of implementation issue, while important, cannot be addressed through legislation.

Some felt strongly that the federal government has a responsibility to co-ordinate and resource recovery plans, while others felt these responsibilities should be determined on a case-by-case basis and the role for the federal government is more appropriately one of enabling from the bottom up through various incentives.

Habitat

With regard to habitat and the scope of the application, members of the group agreed on the following:

- Habitat applies equally to land and water;
- Habitat protection should be based on a preventative approach (although one member of the group could not agree with this statement primarily because the “preventative approach” was not defined by the group);
- The word “residence” is not a biologically acceptable term and should be replaced with language that encourages “...federal provincial co-operation to protect...*a buffer zone, core area, critical habitat, significant habitat, immediate habitat, home space, habitat necessary for immediate survival.*” (italics indicates numerous suggestions but not consensus among participants). A few participants argued that the discussion on “residence” was misplaced as closure was brought to this definition in previous consultations.
- The act should reflect the concept that upon listing a species, the habitat necessary for its conservation will be protected until a recovery plan is developed. One individual in the group did not agree with this statement.

Some felt that habitat could be addressed adequately at the recovery

planning stage while others disagreed strongly noting that would be too late.

Incentives

On the subject of incentives and how this issue could be addressed within the Act, the group agreed on the following:

- The Act should explicitly enable appropriate incentives. While the Act itself cannot change the *Income Tax Act* it can and should enable such changes;
- Education is an effective incentive to change land use behaviour;
- Compensation should be mentioned specifically in the Act;
- The Act should use co-operative not confrontational language.

Participants cited the Ontario Property Tax Rebate as an example of an effective incentive that cost little but has been successful.

Management Agreements

It was suggested that Section 8 of the former Bill C-65 should be included in the new Act and considered as a starting point for further consideration related to management agreements. Participants agreed that some form of agency (e.g., a foundation) be established to collect and direct funds towards habitat protection.

Vulnerable Species

Participants did not agree on whether or not the Act should address vulnerable species as well as threatened and endangered. Some suggested doing so would infringe on provincial rights and others noted the safety net concept would adequately address vulnerable species.

There was agreement that as a minimum, the Act's preamble or principle sections specifically mention vulnerable species.

Purpose of the Act

Following the discussion on vulnerable species, the group briefly

considered the overall purpose of the Act. Some agreed with the purpose statement presented in plenary *"to prevent wildlife species from becoming extirpated or becoming extinct and to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity."* Others suggested the purpose should be broadened to protect species from becoming at risk in the first place. There was no agreement within the group.

Land Claims

The group unanimously supported the concept that the Act must explicitly embrace/recognize the jurisdictional responsibilities spelled out in land claims.

Capability

This discussion considered the ability to deliver the Act and how it should be addressed within the Act. There was a brief discussion regarding whether or not the Act should be scoped to reflect the ability of all parties to deliver it. This idea was not unanimously supported. Those opposed suggested the Act should spell out the most desirable of intentions and not be limited to ever changing (downward) resources. Participants recognized that managers will have to make difficult programming decisions.

All agreed that:

- The preamble or principle sections of the Act should mention the effective partnerships that will be required to deliver the Act, and provide for the redirection of monies collected through fines away from general revenues and into specific protection initiatives (although this issue was not fully discussed);
- An implementation strategy is critical to the success of the Act and should be developed; and
- The focus should be on actions, not bureaucracy.

HOW SHOULD THE CONCEPT OF THE SAFETY NET BE REFLECTED IN FEDERAL LEGISLATION?

Participants supported the concept of a safety net and offered the following suggestions, which were supported by all participants:

- There is a need to clarify “who” (what department/jurisdiction) looks after “what.” For example, there are opportunities for the *Fisheries Act*, which is being reviewed, to cover off some of the elements of this legislation, as it relates to fish;
- The safety net should provide for co-operative agreements where gaps exist;
- Private landowners want to be effectively engaged in the process but issues related to compensation, incentives and non-threatening language need to be addressed; and
- A compensation plan must be developed.

For some participants, a lack of clarity regarding constitutional powers made it difficult to offer full advice. Some felt that the safety net goes beyond legal interpretation when it addresses “...*willful destruction of their residence.*”

Participants also noted language related to “willful killing” is inconsistent in the workshop material, resulting in confusion (see pages 17, 20 and 21 of the Participants Kit and the overheads used by Steve Curtis in the morning plenary).

BOG 2—SCOPE OF APPLICATION

FACILITATOR: STEPHEN HAZELL

ISSUES

The issues to be addressed in the Breakout Group were as follows:

- What should the scope of application for the federal endangered species legislation be?
- How should the concept of the Safety Net be reflected in federal legislation?

After an initial review of these issues to determine their ambit and to understand the concept of the safety net, the group agreed that the second issue should be addressed first.

SAFETY NET

The concept of the safety net is that there should be no gaps in the protection of endangered species and their habitats. Several members stated at the outset that the safety net proposal described in the Workshop Background Paper is inadequate to ensure no such gaps. In considering this proposal, the group focused on three propositions described below.

The first proposition is set out in the Accord, and states that jurisdictions in Canada agree that immediate and effective protection must be afforded throughout Canada to all threatened and endangered species listed by COSEWIC and to provide protection for the habitat of threatened or endangered species. The group accepted this proposition.

The second proposition is that under the proposed safety net, all federal, provincial and territorial governments would agree to provide within their jurisdiction similar legal prohibitions for the killing or harming or an individual of any listed COSEWIC threatened, endangered or extirpated species or the destruction or harm of its residence.

The group accepted this proposition subject to several caveats. First, the meaning of terms such as "residence", "destruction", and "harm" need

to be clarified. It was suggested that "harm" could be defined as "activities that negatively affect individuals or their reproductive viability". The second caveat is that these legal prohibitions need to be offset by preventative, non-regulatory approaches that encourage voluntary efforts to protect endangered species.

The third proposition in the Workshop Background Paper is that federal legislation provide discretionary authority to impose mens rea prohibitions against the killing of any species designated by COSEWIC as endangered or threatened if provincial or territorial governments have not already done so within a specified period of time. Any such action would be developed in consultation with the appropriate provincial or territorial governments. This option was characterized as the Enabling Option. The term "discretionary" was used to indicate that the Minister would have authority to bring the prohibitions into force through a regulation or other statutory instrument, but would not be obliged to do so.

The Enabling Option enjoyed the support of some participants but not a consensus. The advantages of this option were that it implied trust between levels of government, and that it provides provinces with opportunity to act before federal government applies prohibitions. The disadvantage is that there would be a time delay in protecting species. A possible refinement to the Enabling Option would be to shorten the time delay in protecting species by limiting the time period before the federal government would step in to regulate.

A second option, the so-called Automatic Option, would establish general prohibitions under federal legislation that would apply to all species until such time as equivalent provisions were in place under a provincial or territorial law. A possible refinement of this option would be to delay by one or two years the bringing into force of the provisions establishing the federal general prohibitions in order to allow time for provinces and territories to develop the required legislation if they have not already done so.

The advantage of this option is that it ensures that there is no time delay in the protection of listed species. Disadvantages are that the federal prohibitions may be difficult to remove once in place, and that cooperation of provinces and territories may be threatened.

An important issue that arose in relation to the Automatic Option in particular was who would decide whether or not the provincial and territorial

provisions were equivalent to the federal provisions. The provincial and territorial governments would be less supportive of the Automatic Option if a federal Minister had sole authority for making such a determination, than if some more neutral body, such as the Canadian Endangered Species Conservation Council (CESCC) had authority to certify prohibitions under provincial laws as equivalent. The CESCC could develop standards for such prohibitions for all jurisdictions to meet.

SCOPE OF APPLICATION

In addressing the issue of the scope of application of the federal legislation, the group examined two questions:

- Which species would be subject to the federal legislation? and
- Which lands and waters would be subject to the legislation?

In addressing these questions, it was agreed that Canada's international obligations, in particular those under the Biodiversity Convention, need to be considered.

Which Species?

It was agreed at the outset that a necessary implication of the safety net proposal is that it includes all species. Provisions in the federal legislation other than the safety net general prohibitions could apply only to so-called "federal" species. Federal species would include:

- International transboundary species
- Non-indigenous species that come into Canada (e.g. captive breeding)
- Aquatic species and marine mammals (i.e., species subject to the federal *Fisheries Act*)
- Migratory birds
- Species on federal lands.

The possible inclusion of bacteria as a category for inclusion was also

discussed.

Which Lands and Waters?

The following lands and waters were identified as categories of federal lands that should be subject to the federal legislation:

- Federal lands in northern territories
- Comprehensive land claim areas
- National Parks, National Wildlife Areas
- Defence bases
- Transport Canada properties
- Indian Reserve lands
- Federal Crown corporation lands.

It was recognized that the application of the federal endangered species protection law would vary depending on which category of land was involved and the statutory and constitutional regimes governing these lands.

OTHER ISSUES

Other issues raised in the context of the scope of application of the federal law included the following:

- To what extent could a federal law be applied extraterritorially to assist in the protection of endangered species not indigenous to Canada?
- To what extent are federal legal prohibitions required at all? Should such offences be limited to mens rea offences as opposed to strict liability offences?
- Should the federal law be comprehensive or enabling?

No consensus emerged as to how these issues should be addressed.

Finally, the group considered the issue of how to address global threats (e.g., climate change) to endangered species in Canada. It was considered that this was more a listing and recovery planning issue than an issue in relation to the scope of the federal legislation.

BOG 3—CONSEQUENCES OF COSEWIC LISTING

FACILITATOR: SHEILA MCCRINDLE

The majority of the participants expressed serious concern over changes made by the Wildlife Ministers' Council of Canada on September 28, 1998 to the Terms of Reference for COSEWIC. The group was upset over the lack of consultation on these changes and were concerned that the changes could result in the politicization of COSEWIC work. As this was not the topic for discussion, the group agreed to the proposal that a Breakout Group would be added to the next morning's agenda to discuss concerns about changes to the COSEWIC Terms of Reference more fully.

Participants then discussed how COSEWIC listing should be given the force of law. Everyone agreed that the list must be based on science and traditional or community/local knowledge. There was validation that the listing process involve the participation of Environment Canada, Department of Fisheries and Oceans, and Parks Canada. Several group members also expressed support that COSEWIC membership should include expertise from departments in addition to Environment Canada, Department of Fisheries and Oceans and Parks Canada. A representative from Agriculture and Agri-Foods Canada stated that her department should be represented on COSEWIC. There was complete agreement that the legislation must protect the integrity of the listing process, based on scientific, traditional and community/local knowledge. There was agreement that any additional information solicited by the Canadian Endangered Species Conservation Council upon publication of the COSEWIC list, should be submitted to COSEWIC for review.

Two options for implementing COSEWIC listings were discussed. In the first option the COSEWIC list would be transferred unaltered into law. In order for this to happen there would be a limited selection of prohibitions with limited and clearly identified implications.

In the second option the COSEWIC list may not be entirely adopted by the Canadian Endangered Species Conservation Council. The Council may decide to list species but defer some of the prohibitions. This would permit the application of more extensive prohibitions if warranted. There

was complete agreement on the need for transparency in this process and that any discrepancies between the COSEWIC list and the legal list must be explained.

Many group members expressed strong support for Option One (the COSEWIC list would be transferred unaltered into law). Group members generally agreed that both of these options would be subject to land claim agreements.

The preference of the group was that the list should be made law through regulations by the responsible minister (i.e., Environment, Department of Fisheries and Oceans or Parks Canada). However it was agreed that the most likely process would be through the Governor in Council.

The participants then discussed the prohibitions and recovery actions that should be triggered.

The prohibitions against killing etc., possessing, and destroying residence (as outlined in the background material) were supported as automatic prohibitions by all but a few participants. A significant number of participants supported enabling the Minister to enact prohibitions to protect "critical habitat" where warranted. Wording similar to that for emergency measures was recommended. It was felt by many that COSEWIC should be involved in identifying prohibitions, as they are charged with identifying threats in the status reports. Most felt that blanket prohibitions were inappropriate, but, there was agreement that the automatic prohibitions provide meaningful protection for listed species. It was suggested that a responsible decisionmaker could have discretion to disallow certain prohibitions for social, scientific or economic reasons. The rationale for such a decision must be published. The concern was expressed that the term "residence" was not particularly meaningful, particularly for aquatic species and that habitat was a more scientific and useful term.

There was agreement that recovery planning should be an automatic outcome of listing. It was also agreed that social and economic factors would be considered in the recovery planning phase. It was also agreed that when a recovery process was taking place within a land claim area, that the recovery process would be led by the wildlife management board of the land claim area.

The need to compensate those who may lose income or livelihood was endorsed.

BOG 4—THIRD PARTY REVIEW (ALTERNATIVE DISPUTE RESOLUTION)

FACILITATOR: PAUL EMOND

A. INTRODUCTION

This Breakout Group discussion [Alternative Dispute Resolution (ADR)] evolved from the development and circulation of a Consensus Report from the ADR Committee. (*The ADR Committee Report is included in Appendix A-3.3*). (The Committee was formed following the August consultation meetings.) That report had proposed a form of third party review for those enforcement and compliance disputes that could not be resolved through negotiation and/or mediation. This Breakout group discussion advanced the earlier consultations and the work of the ADR Committee in a number of ways. First, it confirmed those areas in which there is consensus among members of the group. Secondly, it identified those areas in which there is no consensus among members of the group. And finally, it supported the work of the ADR Committee by: (1) expanding the membership of the Committee; and (2) providing specific instructions on the tasks that the Committee should undertake.

B. BREAKOUT GROUP AGREEMENT

The group agreed that any person should have the right to request a ministerial (departmental) investigation of an alleged offence, and that there should be an obligation on the Minister to respond to the request in writing and with reasons within a specific time period. The expectation was that formal requests for investigations would be a "last resort" step that would only arise after the parties had used other means to resolve enforcement disputes. These "other means" might include:

- Informal requests to government to respond to an alleged breach of the Act;
- Discussions with the alleged offender;
- Mediated negotiation with the parties.

Some group members pointed out that these "other means" are options available to citizens, but they are not legal conditions precedent that a citizen must explore before requesting an investigation. The group also noted that any member of the public may attempt to hold the government accountable for the proper administration and enforcement of endangered species protection legislation through existing mechanisms. For example, a person might encourage government to take appropriate action by:

1. Alerting the media to the government's alleged failure to act;
2. Pursuing political action (for example, urging politicians to raise questions in the House of Commons);
3. Requesting administrative or departmental review; and
4. Initiating judicial review of government action or inaction.

Finally, the group agreed that while public participation and government accountability were important principles, neither formal requests for ministerial investigations nor recourse to existing mechanisms would necessarily meet the needs of all persons who were dissatisfied with the government's response to alleged breaches of the Act. There was, however, no agreement among group members on how the dispute created by this dissatisfaction should be resolved.

C. *ADR OPTIONS*

How might disputes arising under Part B of this report be resolved? The group identified two alternative approaches. The first approach was some form of binding third party review. One obvious form of such review is the citizen civil suit, in which the review is conducted by a court. Another form of third party review is the type that was outlined in the ADR Committee Consensus Report, namely, review by an independent "arbitrator" or panel of arbitrators.

The other approach to disputes was to rely on existing oversight mechanisms, especially the Auditor General's review of environmental performance (through the Environmental Commissioner.) The principal difference between the two approaches is that the first anticipates a decision that binds the Minister and department; the second relies on a variety of non-binding mechanisms (an approach that relies on moral and

political suasion).

D. NEXT STEPS

How to proceed in light of these differences within the group? There was general agreement that the group should continue its efforts to find consensus on this matter through the ADR Committee. Specifically, the group recommended:

1. That the ADR Committee be expanded to six members;¹
2. That the ADR Committee examine the previous ADR Committee's Consensus Report with a view to addressing the concerns raised by some members of the group, especially concerns about using this approach to deal with compliance disputes and, more generally, concerns about compensation in a regime in which a third party may make binding decisions on government and individuals; and
3. That the Committee explore ways in which the Auditor General's oversight and review alternatives might be expanded to address concerns raised by some members of the group that such an option "lacked real teeth" (i.e. its powers were limited to reports and recommendations rather than binding decisions.)

¹ The membership of the expanded ADR Committee would be: Jerry DeMarco, Sarah Dover, Brenda Dunbar, Peter Miller, plus Richard Lindgren and Tony Rotherham.

DAY 2

BOG 1—HABITAT/STEWARDSHIP

FACILITATOR: RICHARD LAING

SUPPORT FOR STEWARDSHIP The group began by expressing support for stewardship and the important role stewardship plays in conserving biodiversity. The following points were emphasized:

- The group felt that it was important that stewardship be recognized in the Act, and stressed the need for the Act to enable a wide range of stewardship activities.
- Some members of the group thought that discussion on stewardship needed to be focused on species at risk in order to make progress. Others saw stewardship playing a valuable role in terms of assisting the recovery of species at risk but also stressed the importance that stewardship currently plays in preventing species from becoming at risk.
- Some members of the group noted that the draft document produced through the Stewardship Forum, entitled *Habitat Stewardship Strategy: Conserving our Biological Future—Challenge to Canadians* provided a good starting point for discussions. [This document is available from Sheila Forsyth, telephone: (613) 821-3163].
- Members of the group acknowledged that stewardship was difficult to define as many types of activities contribute

to the conservation of biodiversity and the conservation of non-living natural resources including air, water and soil. A few members of the group raised the point that the focus of discussion should be on a “conservation program” and not on a “national stewardship program”, in part because “stewardship” is a nebulous term that is not easy to define.

- Many members of the group stressed the importance of partnerships to advance stewardship and the need for cooperation among government departments, among sectors and among diverse organizations. They also noted that cooperation, rewards and partnerships are the keys to stewardship – rather than long lists of prohibitions.

ADDRESSING STEWARDSHIP IN A FEDERAL ENDANGERED SPECIES PROTECTION ACT

- The group made several suggestions on what the Government of Canada could consider in terms of addressing stewardship in developing the Act. The group did not attempt to provide negotiated text; rather they identified several key elements, which they hoped would be considered by those drafting the text of the Act. With one exception, the group did not attempt to provide directions as to where their suggested stewardship elements would be located in the Act. The group’s suggestions are as follows:
 - The Act should recognize the importance of stewardship in the preamble, both in terms of preventing species from becoming at risk, and in contributing to the recovery of species that are already at risk.
 - The Act should empower the Minister responsible for the Act to enter into agreements or arrangements with a wide-range of partners to promote and implement stewardship activities. (Several group members stressed that the term “agreement” be used in the broadest sense as many stewardship activities already occur without any sort of formal agreement).

- The Act should acknowledge that several Federal Ministers have responsibilities for aspects of stewardship, and thus, the Act should serve to promote coordination and shared leadership among Federal Departments to ensure that Departmental policies and programs do not conflict, or result in unintentional disincentives to stewardship. The group saw Departmental Sustainable Development Strategies and Plans as a basis for interdepartmental coordination. (Some members of the group stressed that the Government should not attempt to coordinate the stewardship activities of non-government organizations, but by being aware of their activities could play a role in filling gaps or building on existing initiatives).
- The Act should recognize and promote the many stewardship activities that are already occurring and contributing to the conservation of Canada's biodiversity.
- The Act should encourage and provide for capacity building in the areas of research, monitoring and development of management tools, and that the Government of Canada has a key role to play in building this capacity. (Members of the group stressed the importance of scientific and management capacity as essential to making the Act effective in the long term. They also noted how critical research and reliable management approaches are to support listing of species, recovery efforts and to provide land owners and resource developers with the tools they need to continue their activities and contribute to the conservation of biodiversity).
- The Act should encourage and promote education and extension services to assist stewardship activities and that the Government of Canada has a key role to play in both supporting education and extension services. (Several members of the group stressed the need to establish workshops and other forums for scientists, government staff, landowners and resource developers to share their ideas and experiences; that stewardship was something

that must result from mutual understanding and respect for the ideas, needs, opportunities and constraints of all participants – not a one way exchange of information).

- The Act must recognize the need for financial resources to ensure the recovery of species at risk and to implement stewardship initiatives to prevent species from becoming at risk, and that the Government of Canada needed to enhance its financial contribution to recovery of species at risk and stewardship initiatives. (Some workshop participants stressed that stewardship programs needed to be sustainable over long periods of time and that this required establishment of long-term partnerships. Some members of the group stated that the Act should specify the source of financial resources that would be used to implement provisions of the Act).
- The Act must contain provisions to fairly compensate landowners and resource developers if they are negatively impacted by activities that result from the Act. The group noted that compensation could be required to initiate, enhance or sustain some stewardship activities. Several members of the group indicated that the Act should enable compensation but specific details should be determined on a case by case basis. A few members of the group, and in particular the representative from the Canadian Cattlemen's Association stated that they did not expect that compensation would cover a wide variety of situations. Rather compensation was to be utilized in extreme situations when there does not appear to be any other option except to ask the landowner to change "normal agricultural practices" for the good of a species. Since the resulting change in practice has a negative economic impact on the producer the government should be required to pay compensation. This was seen as a very different situation from programs that would involve incentives to change management practices without a negative impact on the producer's bottom line.
- Some members of the group stressed that even

uncertainty regarding restrictions on land use and resource development as the result of species at risk concerns could impact individuals and companies, and therefore, informed decisionmaking was essential.

DISCUSSION ON A NATIONAL STEWARDSHIP ACTION PLAN

- The group did not discuss the issue of "habitat" per se but rather focused their discussion on stewardship. The group in addition to acknowledging the importance of stewardship in the Act, strongly supported the development of a National Stewardship Action Plan, which Wildlife Ministers endorsed at their last meeting in September 1998.
- Members of the group indicated that Wildlife Ministers needed to provide leadership to advance stewardship, but they must also ensure participation of other relevant Ministers, such as those responsible for forests, agriculture, and fisheries.
- The group stressed that the National Stewardship Action Plan should build on the existing wealth of reports and studies that have been devoted to advancing stewardship.
- The group provided several suggestions for the scope and content of a National Stewardship Action Plan, recommending that the Action Plan:
 - Help increase understanding of the underlying causes of the loss of biodiversity and clearly define the issues and options.
 - Increase recognition of the role that stewardship could play in the recovery of species at risk and in preventing species from becoming at risk.
 - Address policies and programs that act as disincentives to the conservation of biodiversity.
 - Examine the potential of establishing additional economic or other types of incentives to support stewardship activities that contribute to the conservation of biodiversity.

- Identify sources of government funding for stewardship activities. (Several members of the group stressed the importance of partnerships to leverage funds and to use existing mechanisms for distributing funds, when possible).
 - Identify education and extension service needs, and means to develop and implement stewardship education and extension services. (Several members of the group stressed the importance of establishing appropriate means to share information, making them as interactive as possible. The group again stressed the need to ensure that stewardship education and extension services provide opportunities to share information and understanding – noting that stewardship would not be advanced from a one-way exchange of data and information.
 - Recognize the need for enhancing science capacity and establishing research priorities to provide a basis for stewardship programs; to promote development of better ways and means to distribute data and information on Canada's biodiversity; and to identify monitoring requirements to assess the impact of policies and programs and stewardship activities. (The group emphasized that the Federal Government has a key role to play in advancing science and science capacity).
 - Acknowledge and identify ways and means to facilitate and improve establishment of land management agreements.
 - Serve to establish biodiversity conservation goals, objectives and targets; and recommended that the Action Plan include a commitment by Wildlife Ministers to report regularly on efforts to advance stewardship.
- In addition to the key elements listed above, the group recommended that the Action Plan also contain a vision statement and realistic goals and objectives.

- The group stressed the need to ensure that the process for development of the National Stewardship Action Plan be open and inclusive - that the process be one of building cooperative arrangements based on mutual understanding and respect, (i.e., a bottom-up-approach).
- The group repeatedly stressed that the Action Plan must respect and promote cooperation among government departments and among and within sectors, if it was going to be successful in advancing stewardship.
- The group stressed the need to build on efforts that had already been undertaken to develop in preparing a framework for the National Stewardship Action Plan for consideration by Ministers in 1999. To support and advance the Action Plan, the group:
 - Acknowledged the importance of the National Stewardship Action Plan;
 - Recommended the establishment of expert multi-stakeholder focus groups to advance work on stewardship in the areas of a) Taxation; b) Incentives; c) Enhancing Scientific Capacity; and d) Sources of Funding.
 - Recommended that the process for developing the National Stewardship Action Plan, encourage and promote widespread participation in stewardship activities within and among governments, sectors and interested parties.

BOG 2—RECOVERY PLANNING AND IMPLEMENTATION

FACILITATOR: SHEILA MCCRINDLE

All but a few of the participants had attended the previous workshops on this topic. The issues the group raised for discussion were: the 2-stage approach; who leads the development of the plans; ecosystem vs. species approach; introduction of socio-economic factors; need for plans to take a long view; better to focus on vulnerable species; and the need to discuss funding and compensation. Not all of these issues were discussed specifically.

The participants agreed that legislation should enable the production of recovery plans. These plans must: be produced according to a timeframe; recognize that habitat considerations are inherent in recovery planning; involve all relevant stakeholders; respect jurisdictional responsibilities; and recognize that the cost of species conservation should be borne by all Canadians.

The group endorsed the guiding principles for the recovery planning process that were developed in the August 1998 workshop.

The participants also discussed how recovery plans should be developed. They agreed to a set of principles for what is required in recovery plans:

1. Identify species needs including habitat requirements (based on COSEWIC assessment).
2. Identify threats (based on COSEWIC assessment).
3. Identify suitable recovery objectives including habitat, population, distribution, etc.
4. Detail research and management objectives necessary to meet recovery goals.
5. Identify impacts and evaluate costs and benefits, including social and economic inputs.

6. Employ an ecosystem or multi-species approach where appropriate.
7. Describe measures to address threats, including threats to habitat.
8. Identify co-operative measures, including stewardship.
9. Put in place mechanisms to monitor and evaluate effectiveness of recovery actions.
10. Consult and involve those affected and interested parties.
11. Identify the funding requirements for the process, compensation, and mitigation and put in place appropriate processes to meet funding requirements through partnerships, removal of disincentives, conservation agreements, incentives and others as appropriate.
12. The plan must set a time-table for action and put in place an accountability framework.

There was considerable discussion around the issue of compensation and how extensively compensation should be made available. There was agreement, that recovery plans should address the issue of compensation and that a full range of creative approaches be brought to bear on this topic, including conservation agreements and the removal of economic disincentives. The group noted that the Breakout Session dealing with Habitat/Stewardship [Day 2 - BOG 1] had identified the compensation issue as a theme of discussion.

There was also considerable discussion on who is involved in the development of the plan. Almost half of the participants felt strongly that all relevant stakeholders should be involved in the planning process from the outset. Reference was made to the Species at Risk Working Group Report (*Conserving Species at Risk and Vulnerable Ecosystems*), which outlines how and why recovery planning should include stakeholders at an early stage. Others felt that this would slow down the initial phase of the process. There was agreement that those who had information relevant to what is needed for species recovery should be involved. It was agreed that the jurisdiction where the species was located should lead the planning

exercise.

BOG 3—EXCEPTIONS AND PERMITS

FACILITATOR: STEPHEN HAZELL

ISSUE TO BE ADDRESSED

The issue to be addressed by the Breakout Group was as follows:

- What exceptions to the automatic prohibitions or emergency orders should be provided for in federal endangered species legislation?

GENERAL CONSIDERATIONS

The Breakout Group agreed on several general points relating to exemptions and permits as follows:

- There are a number of activities that require exemptions from general prohibitions
- Exemptions to general prohibitions apply equally to emergency orders.
- The approach taken in the former Bill C-65 with respect to permits (S.46(1.1) and equivalent permits (S. 47) was sound.

A key issue that arose in addressing specific exemptions was whether to use an automatic (sometimes called blanket) exemption, or the S.46(1.1)/S.47 case-by-case permitting process.

POTENTIAL EXEMPTIONS

The group identified the following potential exemptions:

- Emergencies
- Animal and Plant Health
- Regulated and Lawful Unregulated Activities
- Activities under a Recovery Plan

- By-catch in Fisheries
- Scientific Research/Education
- National Security
- Public Health and Safety

Emergencies

The group agreed on the need for an exemption for emergencies in such areas as national security and natural disasters. The definition of emergency must be clear, and could include reference to other federal or provincial statutory authorities to declare emergencies. The definition could also include a qualitative description of emergency such as those set out in the *Canadian Environmental Assessment Act* and the *Canadian Environmental Protection Act*. Further, the group agreed that the authority to declare an emergency could be delegated in at least some circumstances.

Animal and Plant Health

No consensus was reached on the need for an automatic exemption for all regulatory actions taken under the *Health of Animals Act* or the *Plant Protection Act* that could adversely affect endangered species or their habitat.

Regulated and Lawful Unregulated Activities

The group agreed that there was a need to distinguish regulated/registered activities from lawful but unregulated activities for the purposes of determining eligibility for an exemption from the general prohibitions.

Federally or provincially regulated activities that cause incidental harm to endangered or threatened species or their habitat should be eligible for an exemption. As well, the use of a registered pest control product that causes incidental harm should be exempt; however, the registration process should reconsider the product in such circumstances.

The group did not reach consensus on whether or not lawful activities

that incidentally harm endangered species should be eligible for an exemption, nor whether or not such an exemption should be provided through a case-by-case permit, automatic exemption or recovery plan exemption only.

Activities Under a Recovery Plan

The group agreed that activities authorized under a recovery/management plan should be automatically exempted from the general prohibitions, along the lines set out in s. 36(3) of the former Bill C-65. New activities not authorized under an existing recovery/management plan could be dealt with either by amending the plan or issuing a section 46(1.1) permit.

By-Catch in Fisheries

The group discussed sections 46(1.1)/47 permitting processes under the former Bill C-65. Section 46(1.1) would prevent permits being issued unless the activity to be authorized was scientific research relating to conserving the species by qualified individuals; an activity that benefited the species; or a lawful activity that only incidentally harmed the species. No situation was identified that would require a specific by-catch exemption other than the above exemption laid out in section 46(1.1)/47; however, there was no consensus on dropping such a scientific by-catch exemption from the federal endangered species protection statute.

Scientific Research/Education

Legislation to protect endangered species may affect scientific research (a) which is conducted pursuant to a recovery/management plan, (b) which is carried out on the endangered species itself or on other species within the residence or critical habitat of the endangered species, and (c) which requires the collection and possession of specimens of the endangered species or other species in proximity.

The group agreed that the Sections 46(1.1)/47 permit should be required for scientific research that could affect a listed species, its residences or any other part of its critical habitat. Scientific research conducted pursuant to a recovery/management plan should be exempt.

Possession for scientific/education purposes should be exempted by a

permit, with a grandfather clause for pre-listing possession. This approach is similar to that set out in s. 36 of the former Bill C-65.

One group member pointed that Agriculture & Agri-Food Canada (AAFC) already has internal mechanisms to assess the environmental impact of their scientific research and that such research is authorized by another Act of Parliament. The group agreed that no new obstacles to research should be created by the proposed legislation where such research is authorized by another Act of Parliament in the interest of the public good, but did not agree on the need for permits or exemptions regarding scientific research taking place within the habitat of endangered species.

National Security

The issue of exemptions for national security was categorized according to whether or not there was an emergency. Non-emergency situations would typically be dealt with pursuant to a recovery plan, and by the exemption relating to recovery plans.

OTHER ISSUES

The group discussed but did not agree on whether the general prohibitions should include strict liability as well as mens rea offences. The approach suggested by the group implied that much of the decision making would be delegated to the recovery planning level, which would represent a challenge at that level.

The issue of exemptions in relation to aboriginal comprehensive land claim agreements was not discussed by the group.

BOG 4—TERMS OF REFERENCE FOR COSEWIC

FACILITATOR: PAUL EMOND

A. INTRODUCTION

This Breakout session was added to the meeting agenda in response to requests from individuals during the Day 1 plenary session.

The events leading up to the request and subsequent decision to have a Breakout session on the Terms of Reference for COSEWIC were reported to the group as follows. The Terms of Reference had been the subject of extensive consultation. The latest version of the Terms of Reference was reviewed at the September 28th meeting of the Wildlife Ministers' Council of Canada. At that meeting, the Ministers approved the Terms of Reference, with a number of amendments. One of the amendments stated that the chairs of the six COSEWIC subcommittees would no longer be voting members of COSEWIC. This change, which was not anticipated by those interested in the Committee and its work, including some Committee members, has caused considerable frustration and anger. The Chair of COSEWIC, Dr. David Green, reported at the consultation meeting that if something is not done to address this frustration, the Chairs of subcommittees (all of whom are volunteers) may resign.

While there was some speculation among members of the consultation group about why the Terms of Reference were changed and whether the concerns that lead to the change might have been met in other ways, the group agreed that its contribution to the consultation process should be organized around three themes. The first was to provide an evaluation or assessment of COSEWIC as it is presently constituted, highlighting its strengths and noting those areas in which there was room for improvement. The second contribution was to propose ways in which the new Terms of Reference could be interpreted and implemented to address the concerns of the group. The third contribution was to provide input to the Minister on the consequences of the changes to the Terms of Reference, the process that was used to make the changes, and to discuss needed changes to the TOR that could not be met through interpretation (the second contribution).

B. EVALUATION OF COSEWIC

This evaluation of COSEWIC was designed to accomplish two goals. The first was to identify its strengths and challenges with a view to determining whether the new Terms of Reference could be "interpreted" in a way that was consistent with its strengths and respond effectively to the challenges. The second was to remind the Minister that COSEWIC enjoys a strong international reputation as a body that is open, independent and credible.

1. Strengths of the Presently Constituted COSWIC

- Impartial (members participate as experts, not as representatives of a particular interest group or agency. No group has a majority vote on the Committee);
- Scientific credibility;
- Diversity of expertise across a number of areas, including:
 - taxonomic
 - regional issues
 - process issues
- Enjoys "buy in" from governments and other constituents;
- Effective, both with regard to its output (decisions) and its operating procedures. Its process is marked by collaboration; its decisions by a general consensus;
- There is continuity;
- Cost-effective, arising in large part as a result of the
- Volunteer efforts of the subcommittees.

2. Challenges of the presently constituted COSEWIC

- Needs to draw in more expertise from other government departments, from aboriginal governments and from non-

governmental groups;

- Needs to draw more broadly on other information sources including experiential information and traditional and local knowledge;
- Biological diversity of species groups is not truly represented on Committee;
- The Committee has done a poor selling job of its good work and the very good work of the subcommittees.

C. CREATIVE WAY OF PRESERVING STRENGTHS/RESPONDING TO CHALLENGES UNDER THE NEW TERMS OF REFERENCE

This part of the discussion focused on ways in which the amended Terms of Reference might be interpreted or applied to preserve the strengths of COSEWIC and, where possible, enhance the effectiveness of the Committee. The group also considered additional ways of enhancing COSEWIC, such as adopting principles or guidelines designed to achieve a particular result.

1. Interpretations of the Amended Terms of Reference

While the new Terms of Reference state that subcommittee chairs are not voting members of COSEWIC, the Terms of Reference do not prohibit those persons from participating fully in the discussions at COSEWIC meetings.

2. Rules of Procedure

COSEWIC may give effect to the interpretation noted above by adopting rules of procedure that prescribe in detail the participatory roles of subcommittee chairs in COSEWIC discussions.

3. Guidelines

The Committee could develop principles or guidelines regarding preferred approaches on a number of important matters. For example, guidelines on COSEWIC membership might prescribe that:

- Governments appoint non-governmental scientists to

COSEWIC from across Canada (other subcommittee members argued that the guidelines should encourage the appointment of qualified government scientists); or

- Governments appoint scientists to COSEWIC who meet specified criteria (or credentials) or appoint scientists whose contribution to the Committee will fill a particular need or gap (purpose driven appointments); or
- Governments appoint the subcommittee chairs from the COSEWIC membership or appoint subcommittee chairs to COSEWIC. (The result would be that most if not all subcommittee chairs would be full voting members of COSEWIC); or
- Governments appoint scientists to COSEWIC from a roster of scientists created by a well respected organization such as the Royal Society.

Guidelines could also be adopted by COSEWIC with regard to its subcommittees. For example, the guidelines might encourage that the membership of the subcommittees be expanded to increase the representativeness of the subcommittees. Guidelines might also prescribe that government provide resources to the subcommittees that are sufficient to enable them to carry out their functions more effectively. Some members of the consultation group proposed, for example, that the subcommittees have the resources to summarize their reports and circulate them more broadly by utilizing internet site(s).

D. CRITIQUE OF TERMS OF REFERENCE

Notwithstanding the many good ideas generated in the previous discussion, many members of the group believed that these creative suggestions fell short of rectifying the real problem and that was that the change to the Terms of Reference would undermine COSEWIC's credibility and the community's confidence in its work. For that reason they believed it appropriate to send a strong message to the Minister about the effect of the substantive change and about their disappointment with the process followed.

1. Substantive Critique

The principal problem is that under the new Terms of Reference the effectiveness of COSEWIC depends very much on the goodwill of the Ministers. There is nothing that mandates the Ministers to behave in a way that will ensure that COSEWIC is an open, effective and hence credible body. Some members feared that COSEWIC will be driven by political issues rather than taxonomic and ecological issues and that the trust that it has enjoyed will be lost. The conclusion appeared to be that while COSEWIC may need some fixing, the fix that has arrived in the form of amended Terms of Reference may have created new problems amidst new opportunities.

2. Process Critique

Criticism of the way in which the Terms of Reference were changed focused on what many described as a failure to comply with a fair or appropriate process. Participants noted the following concerns with the amending process adopted by the Ministers:

- a) There was no advance notice of the specific issues of concern to the Ministers, and no notice of the significant amendments being considered by the Ministers to address those concerns;
- b) There was no opportunity for stakeholders to provide input on either the validity of the concern, how they might best be addressed, or the pros and cons of the particular approach adopted by the Ministers;
- c) The decision points in the process were not clearly delineated. Many stakeholders were surprised that changes were made to the Terms of Reference at the September Ministers' meeting.

Some members commented that an additional consequence of pursuing changes in this manner is that the Terms of Reference appear to be inconsistent with the National Accord. In particular, the Accord states that the Wildlife Ministers "agree to recognize COSEWIC as a source of independent advice on the status of species at risk in Canada". The ability of politicians to alter the decisions of COSEWIC would be completely

inconsistent with the principal of independence for COSEWIC as adopted in
the Accord.

BOG 5—ABORIGINAL PROTOCOL

FACILITATOR: LYNNE BETTS

On Day 1, Aboriginal Peoples attending a session concurrent with the stakeholder Breakout Group sessions requested a facilitated breakout discussion on Day 2 of the workshop. The purpose of this breakout session was to identify issues necessary for aboriginal support for the legislation and the process leading up to it. Some participants felt that the issues discussed, while useful for Canadian Wildlife Service (CWS) staff to hear directly, would be used to develop a position paper for the Minister.

At the outset participants identified a number of key issues for discussion. These included recognition of aboriginal government, traditional knowledge, consultation, compensation, and recovery plans.

RECOGNITION OF ABORIGINAL GOVERNMENT

Participants in this group underscored the need for the Federal government to recognize Aboriginal governments and engage in a government-to-government process. Aboriginal Peoples are not a stakeholder group or another non-government organization and have a right to be involved in decision-making (Chapter 26, Agenda 21).

In order to recognize Aboriginal governments the following suggestions were made:

- The Minister of Indian Affairs should be a responsible minister under the Act;
- By making the Minister a responsible minister, they would automatically have a position on the CESCC and be able to make agreements related to implementation of the Act;
- The Act needs a constitutional definition of Aboriginal people;
- COSEWIC and the CESCC should have Aboriginal representation;
- The Act should recognize that land claim agreements are paramount;

- The Act should include “Aboriginal government” whenever references are made to Federal and Provincial governments (“...*Federal, Aboriginal and Provincial governments*”); and
- The Terms of Reference for the CESSC should say, “....work with wildlife management boards established under land claim agreements.” This should also be stated within the Act.

Members of the group noted that the primacy of conservation could override Aboriginal rights. And since this potential legislation deals with conservation there are many serious concerns about its potential impacts.

Participants also made the point that their attendance at this workshop and participation in this discussion group does not indicate their support for the process or the legislation.

TRADITIONAL KNOWLEDGE

The discussion on Traditional Knowledge (TK) underscored the group’s desire for TK to be officially recognized within the Act and its implementation. Specifically the group noted:

- TK should be reflected within COSEWIC’s composition;
- TK Wording from the Convention on Biological Diversity (Article 8-J and 10-C) should be put into the new Act;
- Recognize TK as being equal to science;
- Recognize TK in the preamble of the new Act; and
- Ensure that TK references appear beside any references to science.

The group also discussed intellectual and cultural property and the need to protect both in the Act. One way to do this would be to ensure Aboriginal Peoples’ involvement in all aspects of a project resulting in a “true partnership.”

CONSULTATION WITH ABORIGINAL PEOPLES

Many people in the group expressed frustration that Aboriginal Peoples have again been left out of a process that could have very direct impacts on them. For many, this workshop was the first time they have heard about the potential new legislation and still many others know nothing about it. There was considerable concern that a full, transparent consultation process has not occurred and the legislation should be delayed until this has happened. Discussion related to Aboriginal Peoples involvement in the process revealed a number of concerns and recommendations:

- There is not enough time to consult/involve Aboriginal Peoples between the time of the workshop and the anticipated introduction of the legislation (February 1999);
- There is no available funding to consult effectively;
- The number of bands in each province make regional workshops unrealistic;
- Effective consultation will need to be culturally appropriate and involve each band and community;
- Consultation must be government-to-government;
- Any type of consultation must consider all bands, including the Metis National Council, as expressed in the constitution;
- A working group (made up of technicians and leaders) of Aboriginal representatives should be established to help develop a consultation program among other things. There may be a role for the Assembly of First Nations to co-ordinate the working group; and
- Delay the legislation for at least one year until full and effective consultation can be concluded.

It was suggested that CWS staff should attend Aboriginal meetings as a way to get the message out. Such a meeting will be held in Manitoba on November 23—24 and a speaker would be welcome.

COMPENSATION

Members of this group recognized the need for a clear compensation program or policy and identified a number of issues and suggestions:

- Compensation does not necessarily mean money. It could be an increased landbase in exchange for land that is lost as a result of the Act;
- Because of territorial boundaries it may not always be possible to increase the landbase. Where there is no opportunity to expand the landbase, then financial compensation should be considered;
- When a land claim is being settled a buffer zone could be established around the claim that would allow for increasing or changing the landbase in the event that some land is lost as a result of endangered species;
- Revenue and resource sharing may be one way to address compensation;
- The Act should spell out the need/requirement for impact benefit agreements for claims being settled and those already negotiated;
- Companies that deplete resource (e.g. fisheries) should be responsible for the costs of restoration;
- If/when the Act is passed, it will result in more careful consideration being given to the land that is being claimed;
- The Act needs to provide for a flexible approach to compensation; and
- Mitigation measures should be pursued at all times to avoid getting to a situation where compensation is required.

This group recognized that many endangered species reside on traditional lands and this new Act will therefore have a significant impact on Aboriginal Peoples. Some concern was expressed about the

overpopulation of a species at risk that can occur and its negative impact on another species. The example of grizzlies eating salmon on the West Coast was cited.

RECOVERY PLANS

Discussion on recovery plans was brief and the key suggestions were to involve Aboriginal Peoples and their concerns in all phases of recovery planning. Additionally, it was suggested that recovery team members should live on the land affected.

5. NEXT STEPS

During the closing plenary, **Karen Brown** promised that participants would be kept informed as events pertaining to the federal endangered species legislation unfolded. She reiterated the need to continue consultations and stressed that the advice/recommendations to come out of consultations would influence the efforts of all governments to protect wild species in Canada. Ms. Brown asked participants to inform Canadian Wildlife Service personnel of opportunities to interact with them and then outlined some of the upcoming regional meetings and contact names for further information, as listed on the following pages.

**Regional Talks Planned to Date to Discuss Essential Elements for
Endangered Species Legislation**

CWS Region	Province	Location	Date
RICK MCKELVEY 604-940-4646	British Columbia	Nanaimo, Vancouver, Kamloops, Prince George, Kelowna	TBC during Nov. 2 – 13
		Aboriginal – TBD (being discussed) <i>(see Note 1 below)</i>	TBD
LONEY DICKSON 403-951-8851	Alberta	Red Deer	November 10
		Edmonton	November 16
		Alberta Forest Products Assoc	Nov 2
		Land Resource Partnership, Alta	Nov 4
		PHJV Board	January 14
	Saskatchewan	Saskatoon	TBD
		Aboriginal – TBD (being discussed)	November 9
	Manitoba	Aboriginal – TBD (being discussed)	TBD
		Winnipeg	October 27
Man. Habitat Heritage Corp.		November 19	
RICK PRATT 613-952-0932	Ontario	Aboriginal – TBD (being discussed)	TBD
		Toronto Bilaterals with interest groups	November 16
		Aboriginal – TBD (being discussed)	TBD (TO BE RUN BY WALPOLE ISLAND)

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CWS Region	Province	Location	Date
ISABELLE RINGUET 418-648-2543	Quebec	Bilaterals Planned with key interest groups	early November
		la Table de concertation	November 17
		Aboriginal – TBD (being discussed) ²	TBD
DOUG BLISS 506-364-5048	New Brunswick	Maritimes Meeting, Moncton	October 29
	Nova Scotia	Presentation to Nova Scotia Land Resource Coordination Committee Shubenacadie	October 28
		National Annual mtg of Can. Council of Professional Fish Harvesters, Cape Breton	October 26
		Atlantic Aboriginal Peoples – Sydney (being coordinated with other regional discussions)	October 26 - evening

² Environment Canada is discussing with the Assembly of First Nations how to design and implement regional discussion sessions for First Nations across Canada. The locations, dates and other details are still being worked out. Walpole Island Heritage Centre will be holding a regional discussion session for Ontario. Environment Canada intends to approach other national organizations: Congress of Aboriginal Peoples, Inuit Tapirisat of Canada and Metis National Council, and others - about how best to consult with the Aboriginal Peoples these organizations represent (other First Nations; off-reserve status and non-status; Inuit; and Metis).

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	Newfoundland, Labrador	St. John's Innu, Metis, Inuit - Goose Bay	November 6 November 3-5
Federal Coordinators Anthony Westenberg 819-994-3828 Jill Watkins 819-994-1936			

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**REGIONAL DIRECTOR ENVIRONMENTAL CONSERVATION SERVICE
 E-MAIL, PHONE AND FAX NUMBERS**

REGIONS	DIRECTOR	TEL #	FAX #	E-MAIL ADDRESS
QUÉBEC	MICHEL LAMONTAGNE	418-648-7808	418-649-6591	michel.lamontagne@ec.gc.ca
	ISABELLE RINGUET	418-648-2543	418-649-6475	isabelle.ringuet@ec.gc.ca
ONTARIO	SIMON LLEWELLYN	416-739-5839	416-739-4408	simon.llewellyn@ec.gc.ca
	RICK PRATT	613-952-0932	613-952-9027	rick.pratt@ec.gc.ca
ATLANTIC	GEORGE FINNEY	506-364-5011	506-364-5062	george.finney@ec.gc.ca
	DOUG BLISS	506-364-5048	506-364-5062	doug.bliss@ec.gc.ca
PRAIRIE & NORTHERN	GERALD McKEATING	403-951-8853	403-495-2615	Gerald.McKeating@EC.gc.ca
	LONEY DICKSON	403-951-8851	403-495-2615	Loney.Dickson@EC.gc.ca
PACIFIC & YUKON	VIC NIEMELA	604-664-4065	604-664-4068	vic.niemela@ec.gc.ca
	RICK MCKELVEY	604-940-4646	604-946-7022	rick.mckelvey@ec.gc.ca

With respect to the 'Next Steps" for the production of the Report on the workshop, it was agreed that the facilitator would email or courier a draft Report of Workshop Proceedings to participants as soon as possible following the workshop. Participants would then be given 7 days to review the Report to ensure that it accurately summarized the discussions and advice coming out of the Workshop. The facilitator stressed that it would be inappropriate for participants to request that comments not recorded during plenary or breakout sessions be included in the Report of Workshop Proceedings. The final Report will then be completed and made available to participants and any other interested party.

APPENDIX 1—LIST OF PARTICIPANTS

LIST OF CONFIRMED WORKSHOP PARTICIPANTS (AS OF OCTOBER 15, 1998)

Participation at the Workshop should not be construed as endorsement by all individuals of the contents of these proceedings. In particular, several Aboriginal participants stated in Plenary that their attendance at this workshop was not to be construed as endorsement of the process as an acceptable consultative exercise nor of the content/outputs of the Workshop.

<u>LAST NAME</u>	<u>FIRST NAME</u>	<u>ORGANIZATION</u>
Addario	Andrea	International Fund for Animal Welfare
Aniskowicz	Theresa	Canadian Wildlife Service, Environment Canada
Anka	Gary	Canadian Forest Service
Arnott	Siobhan	Assembly of First Nations
Attaran	Dr. Amir	University of British Columbia
Attridge	Ian	Canadian Institute for Environmental Law and Policy
Badger	Jim	Treaty #8 First Nations of Alberta
Baumgartner	Sandy	Canadian Wildlife Federation
Beaton	Holly	Indian Affairs & Northern Development Canada
Bernier	Daniel	Canadian Council of Professional Fish Harvesters
Betts	Lynne	Facilitator
Birney	Peter	Union of New Brunswick Indians
Bliss	Doug	Canadian Wildlife Service, Environment Canada
Boer	Arnold	New Brunswick Natural Resources & Energy
Brazil	Joe	Resource and Agri-Foods, Dept. of Forestry, Nfld.
Brooke	Roy	Fisheries & Oceans Canada
Brown	Karen	Environment Canada
Burgers	Helen	Canadian Wildlife Service, Environment Canada
Caissie	Ronald	PEI Fishermen's Association
Carnio	John	Canadian Association of Zoos and Aquariums

Catling	Dr. Paul	Canadian Botanical Association
Caza	Caroline	Wildlife Habitat Canada
Chekay	Doug	Ducks Unlimited Canada
Christie	V.S.	Canadian Electricity Association
Clark	Andrew	Canadian Federation of Woodlot Owners
Comba	David	Prospectors & Developers Association of Canada
Comeau	Roxanne	Canadian Institute of Forestry
Comeau	Louise	Federation of Canadian Municipalities
Conway	Jeremy D.	Fisheries & Oceans Canada
Couture	Gerry	Yukon Fish and Wildlife Management Board
Curry	Philip	Ducks Unlimited of Canada
Curtis	Steve	Canadian Wildlife Service, Environment Canada
Darroch	Richard	Canadian Association of Zoos and Aquariums
Dauvergne	John	Industry Canada
d'Eça	Michael	Nunavut Wildlife Management Board
Décarie	Robert	Canadian Pulp and Paper Association
DeMarco	Jerry	Sierra Legal Defence Fund
Dickson	Loney	Canadian Wildlife Service, Environment Canada
Dooley	Tom	Fisheries and Aquaculture, Newfoundland & Labrador Government
Dorey	Dwight	Congress of Aboriginal Peoples
Dormer	Paul	TransCanada Pipelines
Dover	Sarah	Canadian Endangered Species Coalition
Drolet	René	Pêches & Océans Canada
Dunbar	Brenda	Canadian Aquaculture Industry Alliance
Ecclestone	Susan	Environment Canada
Elgie	Stewart	Sierra Legal Defence Fund
Emond	Paul	Facilitator
Ewins	Peter	World Wildlife Fund Canada
Flett	Bill	Manitoba Metis Federation Inc.
Fong	David	Newfoundland & Labrador Forest Resources, Agrifoods
Ford	Violet	Inuit Tapirisat
Forsyth	Sheila	National Agriculture Environment Committee
Foster	Sue	B.C. Hydro
Fraser	Philip	New Brunswick Aboriginal Peoples Council Fisheries Strategy
Friesen	Lyle	Canadian Wildlife Service, Environment Canada
Gelfand	Julie	Canadian Nature Federation

Gillespie	Brian	Manitoba Natural Resources
Girt	Hilary	Agriculture Agri-Food Canada
Greco	Erin	Government Policy Consultants
Green	Dr. David	COSEWIC
Griff	Debbie	Canadian Wildlife Service, Environment Canada
Grose	Allison	North American Wetlands Conservation Council
Hagan	Doug	Ontario Natural Resources
Harris	Debbie	Canadian Wildlife Service, Environment Canada
Hazell	Stephen	Facilitator, Marbek Resource Consultants Ltd.
Hebert	Daryll	Alberta Pacific Forest Industry
Holden	Jackie	Environment Canada
Huggett	Ian	EcoWatch
Hughson	Barry	Parks Canada
Hyslop	Colleen	Canadian Wildlife Service, Environment Canada
Jacob	Gisèle	Mining Association of Canada
Jenkins	Jack	TransCanada Pipelines
Johnson	Marc	Canadian Nature Federation
Knockwood	Cheryl	Atlantic Policy Congress of First Nation Chiefs
Ladner	Kiera	Canadian Wildlife Service, Environment Canada
Laing	Richard	Integrated Planning Services Ltd.
Langlois	Jean	Canadian Parks and Wilderness Society - Ottawa Valley Chapter
Lapalme	Lise-Aurore	Natural Resources Canada
Lavallée	Betty Ann	New Brunswick Aboriginal Peoples' Council
Lear	Henry	Fisheries & Oceans Canada
Lindgren	Richard	Canadian Environmental Law Association
Lopoukhine	Nik	Parks Canada
Louis	Byron	Okanagan Nation Alliance
Lounds	John	Nature Conservancy of Canada
Luciuk	Gerry	Prairie Farm Rehabilitation Agency
Lynn	Joanne	Treasury Board Secretariat
MacLeod	Keith	Canadian Environmental Assessment Agency, Environment Canada
Maltby	Lynda	Canadian Wildlife Service, Environment Canada
May	Elizabeth	Sierra Club of Canada
Maynard	Laurie	Canadian Wildlife Service Environment Canada
McCrinkle	Sheila	Facilitator, Demeter Environmental Inc.
McKelvey	Rick	Canadian Wildlife Service, Environment Canada
McLean	Robert	Canadian Wildlife Service, Environment Canada
McManus	Robert	Canadian Association of Petroleum Producers

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Miller	Peter	Imperial Oil Limited
Minish	Barbara	Canadian Wildlife Service, Environment Canada
Mitchell	Anne	Canadian Institute for Environmental Law and Policy
Mitchell	Lisa	Health Canada
Monlezun	Shelley	Environment Canada
Moran	John	Canadian Association of Zoos & Aquariums
Morbia	Rita	Sierra Club of Canada
Mundell	Elizabeth	Fisheries & Oceans Canada
Nadeau	Simon	Canadian Wildlife Service, Environment Canada
Nancarrow	Richard	Ontario First Nations Technical Services Corporation
Near	David	Environment Canada
Neave	David	Wildlife Habitat Canada
Newkirk	Kerry	Canadian Wildlife Federation
Nyce	Jacob	Native Brotherhood of BC
Olpinski	Stas	Makivik Corporation
Oppen	Bill	Yukon Government
Pasteris	Remo	Canadian Food Inspection Agency
Payne	Brigid	Fisheries & Oceans Canada
Peabody	Corey	Transport Canada
Pinkerton	John	National Parks/Canadian Heritage
Pollock	Kim	Industrial Wood and Allied Workers of Canada
Pope	Frank	Ottawa Field Naturalists
Powles	Howard	Fisheries and Oceans Canada
Pratt	Rick	Canadian Wildlife Service, Environment Canada
Prior	Kent	Canadian Wildlife Service, Environment Canada
Richardson	Richard B.	Canadian Federation of Nature
Risvold	Ross	Town of Hinton
Rodger	Lindsay	World Wildlife Fund Canada
Rosborough	Joanna	Industry Canada
Rotherham	Tony	Canadian Pulp and Paper Association
Rutherford	Sally	Canadian Federation of Agriculture
Ryan	Craig	Environment Canada
Savoie	André	Parks Canada
Shalapey	Liz	Metis National Council of Women
Shearon	Jim	Canadian Wildlife Service
Silver	Thea	Nature Conservancy Canada
Silverstone	Deana	Lawyer, Environment Canada

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Smith	Rick	International Fund for Animal Welfare
Smith	Jamie	University of British Columbia
Smith	Duane	Inuvialuit Game Council
Sorensen	Sandra	International Fund for Animal Welfare
Spencer	Carrie	Agriculture & Agri-Food Canada
Stevenson	Bob	Metis National Council/Akwesasne Environment
Stewart- Ferreira	Lydia	Law student
Straby	Judi	Revenue Canada
Strankman	Peggy	Canadian Cattlemen's Association
Tevlin	Tom	Forest Alliance of British Columbia
Thompson	Paul	Privy Council Office
Thomson	Gregory	EnvironmentCanada
Tremblay	Jean- Francois	Finance Canada
Twolan	Lisa	Canadian Wildlife Service, Environment Canada
Versteeg	Hajo	Facilitator
Watkins	Jill	Canadian Wildlife Service, Environment Canada
Wendt	Steve	Canadian Wildlife Service, Environment Canada
Wenting	Robert	Canadian Wildlife Service, Environment Canada
Westerberg	Anthony	Canadian Wildlife Service, Environment Canada
Wherry	Ruth	Canadian Wildlife Service, Environment Canada
White	Jim	BC Aboriginal Fishing Vessel Owners Association
Willis	John	Greenpeace
Wolf Leg	Allan J.	Siksika Nation
Woods	Bob	Department of National Defense
Young	Ken	Assembly of First Nations
Young	Don	Ducks Unlimited Canada
Zurbrigg	Eleanor	Canadian Wildlife Service, Environment Canada

APPENDIX 2—WORKSHOP AGENDA (as amended³)

THURSDAY, OCTOBER 22—DAY 1

(PALAIS DES CONGRÈS, SALLE PONTIAC)

7:15—08:30	Registration Desk open in Foyer across from Salle Pontiac. (Participants to confirm their Breakout Group assignments). Please register as early as possible to avoid the rush before the Plenary.	
07:15—08:30	Juice, coffee and muffins will be available.	
08:30—11:00	Plenary 1, Salle Pontiac: Workshop Overview	
08:30	Welcoming Remarks	Honourable Christine Stewart, Minister of the Environment (Scheduled)
09:00—09:10	Workshop Structure/Rules of Procedure (see Sections 5 and 6)	Hajo Versteeg, Workshop Facilitator
09:10—10:40	Overview of Issues: <ul style="list-style-type: none">• <i>Where We Have Been: Where We Go From Here</i>• Overview of a federal endangered species law.• Update from September 28th meeting of Wildlife Ministers, including agreement on the Terms of Reference for COSEWIC and the CESCC.	<i>Karen Brown, Assistant Deputy Minister, Environmental Conservation Service, Environment Canada</i> Steve Curtis, Associate Director General, Canadian Wildlife Service Dave Brackett, Director General, Canadian Wildlife Service

³ Content in italics was added to Agenda during the workshop.

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10:40—11:00	Coffee Break	
11:00	Breakout Group discussions begin. All participants to report to their selected Breakout Groups.	
Theme 1	Scope of application for federal endangered species law (including the federal role in the Safety Net)—see Section 7.1	Breakout Group 1 and 2
Theme 2	The consequences of COSEWIC listing (including how COSEWIC listing is reflected in legislation, prohibitions and emergency orders)—see Section 7.2	Breakout Group 3
Theme 3	Citizen's access to dispute resolution to enforce federal endangered species legislation—see Section 7.3	Breakout Group 4
12:00—13:00	LUNCH (provided in Salle Gatineau)	
13:00—16:00	Breakout Groups resume discussions	
15:00	Coffee/juices available outside breakout rooms.	
16:30—16:45	Regroup in Plenary	
16:45—18:00	Plenary 2 in Salle Pontiac: Each Breakout Group to report to Plenary on its progress.	

FRIDAY, OCTOBER 23—DAY 2

(PALAIS DES CONGRÈS, SALLE PONTIAC)

07:30—08:30	Juice, coffee, muffins provided.	
08:30—09:00	Plenary 3: Salle Pontiac: Facilitator's Update Michael D'Eca of the Nunavut Wildlife Management Board: Canada's Commitments Under Land Claims Agreements and Implications for Endangered Species Legislation.	
09:00—12:00	Breakout Group discussions. All Participants to report to their Breakout Group.	
Theme 4	Habitat/stewardship (including incentives, compensation and agreements)—see Section 7.4	Breakout Group 1
Theme 5	Recovery planning and implementation—see Section 7.5	Breakout Group 2

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Theme 6	Recovery planning and implementation—see Section 7.5	Breakout Group 3
<i>Theme 7</i>	<i>Terms of Reference for COSEWIC</i>	<i>Breakout Group 4</i>
<i>Theme 8</i>	<i>Aboriginal Protocol</i>	<i>Breakout Group 5</i>
12:30—13:30	LUNCH (provided in Salle Gatineau)	
13:30—15:30	Plenary 4: Salle Pontiac: Wrap-up	
	<ul style="list-style-type: none">• Each group to report to Plenary on its progress.• <i>Next Steps/</i>Wrap-up	Karen Brown

APPENDIX 3— BACKGROUND INFORMATION

APPENDIX 3-1 SCOPE OF APPLICATION FOR FEDERAL ENDANGERED SPECIES LAW (INCLUDING THE FEDERAL ROLE IN THE SAFETY NET)

ISSUE

What should the scope of application for the federal endangered species legislation be?

How should the concept of the Safety Net be reflected in federal legislation?

BACKGROUND

There is general recognition that responsibility for the legal protection and management of Canada's wildlife is shared among Federal/Provincial/Territorial governments and by those Wildlife Management Boards with specific accountability arising from Land Claim Agreements. These jurisdictions have a long history of working cooperatively for the conservation of wildlife in Canada. No single jurisdiction can ensure the conservation of Canada's biodiversity by acting alone.

Previous proposals pertaining to the scope of application for federal legislation have identified species at risk under federal jurisdiction as migratory birds, fish and aquatic organisms and all species occurring on federal lands.

These proposals included strict liability prohibitions that provided that: no person shall kill or have a listed extirpated, endangered or threatened species; no person shall possess or trade in such listed species or any parts thereof; and no person shall damage or destroy

the residence of such species. As strict liability offences, the prosecution need only prove beyond a reasonable doubt the illegal act and the onus then shifts to the accused to prove on a balance of probabilities honest mistake of fact or due diligence.

To enable the federal government to meet some of its international obligations, previous proposals also included mens rea (guilty mind) prohibitions to ensure federal protection of international cross-border species that would normally be under provincial jurisdiction. These provisions stated that no person shall kill or harm an individual of a listed extirpated, endangered or threatened wildlife animal species if the species migrates across an international boundary of Canada or has a range extending across such a boundary; or damage or destroy the residence of the individual. As a mens rea offence, the prosecution would need to establish beyond a reasonable doubt both the illegal act and the guilty state of mind of the accused in order to obtain a conviction.

These proposals also included an equivalency provision which stated that if a province were recognized as having provisions in its own jurisdiction that provided protection similar to the federal provision protecting cross-boundary species, the federal provision would not apply.

The scope of application provisions in previous proposals, including the provisions for protecting cross-border species and related equivalency provisions, generated a great deal of controversy.

Many environmental/conservation groups felt that federal legislation should put in place automatic strict liability prohibitions to protect all listed wildlife species at risk throughout Canada and their critical habitat (not simply their residence). Such a scope would not only protect international and interprovincial species but also listed species-at-risk that are found exclusively within a province or territory.

Provincial and territorial governments on the other hand felt strongly that the cross-border provisions in previous proposals including the equivalency provisions were a serious infringement on

their constitutional powers, would involve unnecessary and costly duplication of effort and were contrary to the cooperative spirit of the Accord.

Many industry and agricultural organizations also expressed similar, serious reservations and added their concern that federal control over cross-border species would only expand the opportunities to use the civil law suit which they also opposed.

Although the Report of the Species at risk Working Group (September 18, 1998) clearly states that legislation must ensure that no species will become extinct in Canada, and that "there can be no gaps in the federal/provincial/ territorial safety net", the Report does not expressly address the issues pertaining to the scope of application of proposed federal endangered species legislation. The Report does, however state that "the federal government has jurisdiction in matters of a transboundary nature both between sovereign states (Canada/USA/Mexico) and between provinces." To meet the cooperative nature of the Accord, among other instruments, federal authority in these areas is to be tempered by federal/provincial/territorial partnerships. The Report also notes that many jurisdictions have a role to play to ensure that species-at-risk, which migrate or range across borders are adequately protected. The jurisdictional complexities of this country should not impede effective conservation. Through the Accord, and legislation and programs to fulfill its commitments, all jurisdictions should implement a no-gap protection strategy.

The scope of application of the Canadian Endangered Species Protection Bill (Bill C-441, a private member's bill introduced to the House of Commons on October 8, 1998, by the Honourable Charles Caccia) automatically imposes strict liability prohibitions for any individual killing or harming a listed species-at-risk anywhere in Canada; or destroying or damaging the "critical habitat" of any listed species-at-risk. A coalition of environmental/conservation groups (the Canadian Endangered Species Campaign) supports this scope.

PROPOSAL FOR A SAFETY NET

Under the Accord, jurisdictions in Canada have agreed that immediate and effective protection must be afforded throughout Canada to all threatened and endangered species listed by COSEWIC (which would include any species identified as a cross-border species), and to provide protection for the habitat of threatened or endangered species.

Under the proposed Safety Net, all federal/provincial/territorial governments would agree to provide within their jurisdiction similar legal prohibitions for the killing or harming of an individual of any listed COSEWIC threatened or endangered (or extirpated?) species or the destruction or harm of its residence.

"Residence" has been defined as "a specific dwelling place, such as a den, nest or other similar area occupied or habitually occupied by one or more individuals during all or part of their life cycles, such as breeding, rearing or hibernating".

Proposed federal endangered species legislation could then impose strict liability prohibitions for federal species (migratory birds, and fish and marine mammals) and species on federal lands, and their residences.

A proposed definition for "Federal lands" which is consistent with the intent of this term as defined in several other legislative enactments could include: (a) lands that belong to Her Majesty in right of Canada or in respect of which, Her Majesty in right of Canada has power to dispose and waters on and air above such lands, (b) the following lands and areas, namely, (i) the internal waters of Canada, (ii) the territorial sea of Canada, (iii) the exclusive economic zone of Canada, and (iv) the continental shelf of Canada, and (c) Reserves, surrendered lands or any other lands vested in Her Majesty and subject to the Indian Act, and all waters on and air above such reserves or lands.

In accordance with the principles of the Accord, the federal legislation could also include provisions that provide for the discretionary authority to impose mens rea prohibitions against the

killing of any species designated by COSEWIC as threatened or endangered if provincial or territorial governments have not already done so within a specified period of time. Any such action would be developed in consultation with the appropriate provincial or territorial governments.

This approach, along with the commitment to immediately initiate recovery planning for listed COSEWIC species at risk, (see Section 7.2) comprises the Safety Net. The result of the Safety Net approach is that all listed COSEWIC species, including all crossborder (international and interprovincial) species are accorded legal protection. No listed species will "fall through the cracks".

The Safety Net approach would also help Canada fulfill its international obligations pertaining to the protection of species-at-risk, including its obligations under the United Nations Convention on Biological Diversity.

**APPENDIX 3-2 THE CONSEQUENCES OF COSEWIC
LISTING (INCLUDING HOW COSEWIC
LISTING IS REFLECTED IN
LEGISLATION, PROHIBITIONS AND
EMERGENCY ORDERS)**

ISSUE

How should COSEWIC's assessments be given the force of law, and what prohibitions and recovery actions should be triggered by such legal listing?

What provisions should there be in federal legislation for emergency listings, and for emergency orders?

BACKGROUND

At the September 28th, 1998 Wildlife Ministers Council of Canada (WMCC) meeting it was agreed that COSEWIC's status assessments and the rationale for the assessments will be reported to the Canadian Endangered Species Conservation Council (CESCC) of federal, provincial and territorial ministers responsible for the management of Canada's native wild species. CESCC members will consider their responses to COSEWIC's assessments, and will coordinate those responses with other jurisdictions that share the species. COSEWIC's assessments will be accepted as presented by COSEWIC. COSEWIC, with the assistance of the CESCC, will then make public the list and will publish both the national list of Canada's Species at risk, and the rationale for the assessments. The Federal Government (Canadian Wildlife Service), as per the Terms of Reference for COSEWIC, will provide the Secretariat to support COSEWIC, and it will be the Secretariat, acting on behalf of COSEWIC and the CESCC that will publish the list.

In the public review of documents leading up to the September 28th WMCC meeting considerable concern was expressed over what actions governments would take once presented with

COSEWIC's assessments. Many believe that COSEWIC's list must be transformed directly into the federal government's legal list by the Minister of the Environment. That is the approach recommended by Mr. Caccia in Private Member's Bill C-441, by the Species at Risk Working Group, and the original Task Force Report among others. However, because legal listing triggers automatic prohibitions some feel that an accountable regulatory process is needed.

In previous proposals listing was to be achieved by enabling the Governor in Council (GIC), on the recommendation of the Minister of the Environment, to establish or amend the list of Species at Risk in Canada by regulation.

The Minister's recommendations in such a scenario would reflect COSEWIC's assessments, and any discrepancies between COSEWIC's list and the final list established in regulation would be identified and explained.

In addition, the provisions of several Comprehensive Land Claims Agreements require that before a species occurring within the area governed by the Land Claims Agreement can be formally included in the final list, the Wildlife Management Board or other formal entity established by the Agreement must be directly involved in the decision. Such requirements are generally binding on the Federal Government, and on the governments of the Territories (Provinces) within which the area governed by the Agreement occurs. Further, in recommending legal listing to the GIC, the Minister will respect the requirements of any relevant Land Claims Agreement or self government agreement.

The report of the Species at Risk working group has recommended that the Minister of the Environment, upon making the list public, solicit any additional verifiable scientific information or traditional or local knowledge that may be available on the status of the species in COSEWIC's new listings that may have a bearing on such listings. Their report proposes a 45 day period to provide such input, and a further 45 days after receipt of such information for COSEWIC to reassess or reconsider their assessments in light of the new information provided.

PROHIBITIONS

As part of the federal government's implementation of the Accord for the Protection of Species at risk in Canada, the intention is provide for immediate protection for species listed as threatened or endangered [or extirpated].

For fish and marine mammals, and any other species covered by the Federal Fisheries Act, and for migratory birds covered by the Migratory Birds Convention Act, and for any other species occurring on federal lands (or waters) the federal legislation could provide for either strict liability or mens rea prohibitions:

"No person shall [knowingly] kill, harm, harass, capture or take an individual of a listed extirpated, endangered or threatened species"

"No person shall [knowingly] possess, collect, buy, sell or trade an individual of a listed extirpated, endangered or threatened species, or any part of derivative of one."

"No person shall [knowingly] damage or destroy the residence of an individual of a listed extirpated, endangered or threatened species".

In addition, legal listing would trigger recovery action and formal recovery planning. In discussions with provinces and territories around the Accord for the Protection of Species at risk in Canada, there has been support for COSEWIC's listing to be the trigger for recovery planning. Recovery plans would be required within one year of legal listing for endangered species, and within two years for extirpated and threatened species. For vulnerable species, an action plan would be required within three years of listing.

SAFETY NET

At the September 28th, 1998 meeting of the Wildlife Ministers Council of Canada ministers discussed the concept of a Safety Net for all species listed by COSEWIC as threatened or endangered. The common standard might be that each Federal, provincial or jurisdiction would put in place measures to prohibit the willful killing

or harming of the individuals of any threatened or endangered species listed by COSEWIC if that species occurred in that jurisdiction. The standard would also prohibit knowingly destroying the residence of the individuals of such species. See section 7.1 for further details on how the Safety Net might operate.

EMERGENCY LISTING

Most groups, in recommending approaches for federal legislation, have included provisions for listing of species on an emergency basis. They believe COSEWIC should have the means/authority to list or reclassify a wildlife species as threatened or endangered before receiving a status report if it believes there is an imminent threat to the survival of the species. There could also be provisions enabling COSEWIC to receive recommendations for emergency listing from any person as long as such recommendations were fully supported by verifiable information.

In previous discussions around emergency listing concerns were expressed that emergency listings could be abused, and perhaps even used with regularity to list species. In its recent recommendations the Species at Risk Working Group underscored the need for there to be a true emergency (although this remains to be defined), and suggested provisions for overturning emergency designations and any prohibitions that flowed from them within prescribed timelines.

EMERGENCY ORDERS

The Act could require the responsible Minister to make an emergency order providing for the protection of any species designated or reclassified by COSEWIC on an emergency basis - and to do so within a limited number of days of COSEWIC's making public its emergency assessment. The order would include the prohibitions that are triggered by a "normal" listing, but may include additional provisions regulating or prohibiting activities that may adversely affect the species or the residences of its individuals. An emergency order must include provisions regulating or prohibiting activities that may adversely affect the critical habitat of the species

(on federal lands) if the responsible minister, based on the advice of COSEWIC, believes that habitat measures are needed on an emergency basis. The responsible minister must review the continuing need for such an order on a regular basis, and must repeal an emergency order whenever it is no longer required.

Standards for emergency actions would be developed through CESCC as part of the implementation of the Accord for the Protection of Species at risk in Canada.

APPENDIX 3-3 CITIZEN'S ACCESS TO DISPUTE RESOLUTION TO ENFORCE FEDERAL ENDANGERED SPECIES LEGISLATION

ISSUE

Should federal endangered species legislation provide for citizen's access to dispute resolution to enforce the Act, and, if so, what and how?

BACKGROUND

The issue of whether to include civil suit provisions in federal endangered species legislation was addressed by the multistakeholder Task Force on Endangered Species Conservation. In its second report issued in May 1996, the Task Force was unable to reach a consensus on whether or not to recommend inclusion of citizen suit provisions in federal endangered species legislation. In the report, some Task Force members argued that members of the public should have the opportunity to ensure that the government does its job, while others took the view that responsibility for law enforcement should be exclusively reserved for governments. The Task Force was aware that the issue of civil suits was being discussed in the context of renewing the Canadian Environmental Protection Act and suggested that this debate should be taken into account in making recommendations for endangered species legislation.

During the Standing Committee's hearings, the civil suit provisions in the former the former Bill C-65 generated much controversy. Two opposing viewpoints were expressed: environmental groups were in favour of the inclusion of civil suit provisions, while the industrial sector was opposed to their inclusion. Provincial governments also expressed reservations with the inclusion of civil suit provisions. In addition, private landowners expressed serious concerns with the inclusion of civil suits in proposed federal endangered species legislation.

It is clear that the provinces and territories do not want to retain civil suit provisions. These provisions are also the greatest sore point and focus for criticism by landowners and resource sector interests.

A meeting of experts on civil suits and dispute resolution was held in Hull on July 8. A discussion paper on potential dispute resolution mechanisms in federal endangered species legislation was developed from the meeting and widely distributed to interested stakeholders prior to the August 10-11 workshop.

Participants at the dispute resolution breakout discussion session of the August 10-11 workshop agreed that the objective of a dispute resolution provision(s) in new federal endangered species legislation should be to enable citizens to participate in a process that will promote government accountability with regard to the enforcement of a new Act. Participants agreed that this objective could be achieved by a three-step process:

- A provision that permitted a citizen to request that government conduct an investigation of an alleged offense;
- If a dispute arose over the government's response to the citizen request, the investigation, or the government's proposed action following the investigation (to prosecute or not), the parties (i.e. the citizen, the department and, if appropriate, the alleged offender) may attempt to resolve the dispute with the assistance of a third party (mediator or facilitator);
- If mediation does not resolve the dispute, a citizen (and/or the alleged offender) may initiate third-party review, to determine whether the Minister's decision was 'reasonable'.

While there was consensus on Steps (1) and (2), there was no agreement on the type of review that might be conducted, by whom, or the powers of the review body or person. The participants' discussion ended with outstanding issues related to the type of third-party review to be carried out.

A small representative committee was formed at the August 10-11 workshop to further explore alternatives to citizen civil suits and to attempt to reach consensus on a recommended approach to the issue.

The following paper is the consensus report of that Alternative Dispute Resolution Committee.

Report of the
Ad Hoc Alternative Dispute Resolution Committee
Introduction

At the conclusion of the August 10, 11 meetings in Hull, the ADR Working Group established a small, ad hoc committee. The committee was comprised of Jerry DeMarco, Sarah Dover, Peter Miller, and Brenda Dunbar. Paul Emond facilitated the Committee's discussions and prepared the Committee discussion papers and reports. The Committee's mandate was to attempt to achieve consensus on a process for resolving enforcement and compliance disputes and to report on the results of these efforts to the ADR working group at the stakeholder consultations scheduled for late October.

The Committee's work began with the facilitator drafting and circulating an ADR discussion paper for member review and comments. Following written and oral input, the Committee met by teleconference on Friday, September 18th. The Committee subsequently met all day in Toronto on September 24th. That meeting was also attended by Ruth Wherry who participated as an "observer". The Toronto meeting resulted in a consensus on most ADR enforcement and compliance issues. The Committee's consensus was subsequently expressed as a "consensus document" (Appendix I of this Report).

The parties expect that the consensus document will be presented to the October 22, 23, Hull meetings where it will be the subject of further discussion and refinement. The ADR Working Group agreed to a number of principles (see earlier ADR Discussion Paper and August 10, 11 Workshop Report) and the consensus document should be reviewed in light of these principles.

APPENDIX 1

ADR Consensus Document of the ADR Committee Introduction

This document represents the consensus achieved by the ADR Committee at its meeting of September 24, 1998 in Toronto. While the Committee recognizes and acknowledges the important contribution of voluntary, non-binding dispute resolution process, such as mediation and ombudsperson, committee members agreed that these processes could not achieve the goals of a citizen civil suit. The focus of the Committee's discussion and of this paper, therefore, is on third party review and in particular on third party review that leads to a binding decision.

While the Committee reached consensus on a third party review process, it felt strongly that clearly worded legislation that created mandatory government obligations, an administrative and regulatory regime that used recovery plans, incentives and advanced reviews of projects that could affect species at risk, and effective government enforcement of the Act, would alleviate the need for frequent use of third party reviews. The Committee members, in agreeing to the third party review process set out below, recognize that:

- government is primarily responsible for ensuring that endangered species protection legislation is complied with;
- third party review is a "last resort" and that permits and prior approvals should be used to enable persons to avoid contravening the act and the regulations;
- compensation is an important issue for land owners whose activities have been curtailed as a result of an order or injunction, especially in those cases in which government has made an initial determination that the activity in question will not adversely affect an endangered species;
- the proposed third party review process is similar to appeal board models that are in place in many provinces.

THIRD PARTY REVIEW

(a) Enforcement Disputes

Third party review of enforcement matters may be initiated by either a citizen or an alleged offender with regard to either process or substantive issues. Process issues relate to the process followed by government in concluding that a citizen request for enforcement is frivolous and/or vexatious, and/or the way in which government investigated an alleged offense. The Committee agreed that process issues should be reviewed and evaluated on the basis of whether the government's decision or action was reasonable. Substantive issues relate to enforcement decisions and encompass voluntary compliance plans (agreed to by government and the alleged offenders, but not the citizen), administrative orders, and a government decision not to take action against the alleged offender. The Committee agreed these decisions should be reviewed on the basis of whether the action is "in accord with the Act".

The Committee members agreed that the third party review body should be ad hoc, and generally comprised of one person selected from a roster of qualified arbitrators and mediators. The review body's powers will vary, depending on whether the dispute relates to process or substantive issues. With regard to process issues, a review body, after conducting a hearing, may order government to conduct an investigation or conduct a new investigation, presumably pursuant to guidelines proposed by the third party reviewer for the way in which the investigation should be conducted. With regard to substantive matters, the review body may order the parties to attempt to negotiate a compliance plan, again presumably with the assistance of proposed guidelines. In addition to ordering negotiation, the review body could also issue an interim order to preserve the status quo. (This order would expire if the parties reached agreement on a compliance plan, or after a certain time period, whichever occurred first.)

The Committee also agreed that the hearing body (officer) would also have the power to determine its own procedure. Committee members also emphasized that all reviews should be conducted expeditiously and cost-effectively.

While the Committee members expected that most, if not all, substantive disputes would be resolved by a third party order (with guidelines) to negotiate, possibly with the assistance of a mediator, there may be cases in which the parties cannot reach agreement. Here, the Committee envisaged a second level of review, conducted by a panel of three persons selected from the roster of arbitrator/mediators. This review would likely involve an oral hearing and adherence to the rules of evidence, although again the panel would have the power to determine its own procedure. The powers of the panel would be expanded to include the following:

- issue an injunction or mandatory order to prevent harm to the habitat and/or endangered species;
- order the offender to clean up and/or restore the habitat;
- order the offender to pay damages to be used for restoration or clean up the habitat and/or compensate for harm to the habitat and/or endangered species.

Hearing body orders would be final and binding, subject, presumably, to an application by a party to the hearing for judicial review of the panel's procedure or order.

(b) Compliance Disputes

The Committee also reached a consensus on how to resolve compliance disputes. Unlike enforcement, where disputes might arise over how to respond to and deal with an alleged breach of the act, compliance raises the spectre of disputes over future harm to an endangered species. The Committee agreed that compliance disputes will be marked by two characteristics:

1. a citizen allegation that a person is likely to breach a Recovery Plan (and hence a regulation); and
2. a potential breach of a regulation that poses imminent harm to a species (as contrasted with an individual member of the species).

The Committee agreed that compliance disputes could not proceed to third party review unless the citizen complainant provided notice to government of his/her intent to invoke the review process.

Third party reviews of compliance disputes will be conducted by a three person panel (similar to the final review panel) chosen from a roster of qualified arbitrators and mediators, with each panel having the ability to determine its own procedure. The panel's powers would include those three noted above, as well as the power to order the parties to attempt to negotiate (with mediation) a resolution of their dispute, pursuant to panel proposed guidelines. The panel would review compliance disputes on the same basis as enforcement disputes, namely, whether the actions in question were, are or will be "in accord with the Act".

GENERAL

A general concern of all parties was the question of who pays the cost of this form of third party dispute resolution. The Committee agreed that government should be responsible for the costs of the third party review body itself, in the same way that it pays the cost of the administration of justice. Participation costs, on the other hand, are the responsibility of the parties with the following exceptions:

1. with process disputes, government would be responsible for party costs if the body found that government was in error;
2. with substantive disputes (including all compliance disputes), the government would be responsible for party costs in those cases in which the reviewing body did not uphold the government's action. The reviewing body would also be empowered to award costs against a party in those cases (exceptional) in which a party (complainant or alleged contravenor) had misused the dispute resolution process (i.e., frivolous or vexatious conduct).

Finally, the Committee members agreed on the need for timelines with respect to both investigations and third party reviews.

**APPENDIX 3-4 HABITAT/STEWARDSHIP (INCLUDING
INCENTIVES, COMPENSATION AND
AGREEMENTS)**

ISSUE

What is the role for federal legislation in the protection of habitat for species at risk?

What is the role of stewardship programs in the protection of habitat for species at risk?

BACKGROUND

Most anyone who thinks about the protection of species at risk believes that protecting habitat is a critical element. Some believe that for endangered species legislation to be effective, it must provide for mandatory habitat protection. Others feel that such protection, especially on private lands, can only be achieved with the cooperation of landowners - and that habitat protection should not be legislated (other than through enabling mechanisms, incentives, tax considerations, etc.). It is clear that protection of habitat, whether legislated or not, will require the active cooperation of governments at all levels and landowners and managers in all jurisdictions. Non-governmental groups and associations will continue to have an important role to play as well.

Some key considerations in the development of federal legislation might be:

Monitoring and early identification of likely problems at the landscape level and implementation of ecosystem level responses will help prevent species from becoming at risk

COSEWIC will identify (where possible in carrying out its assessments) the extent to which habitat is a limiting factor.

Safety Net prohibitions after listing should apply to individuals, or their "residences" and not to habitat as such. Residence has been defined as "a specific dwelling place, such as a den, nest or other similar area occupied, or habitually occupied by one or more individuals during all or part of their life cycles, such as breeding, rearing or hibernating".

Where COSEWIC has specifically identified habitat degradation/loss as a key threat, the recovery plan must address the issue and, to the extent possible, define and protect the critical habitat of the species in question.

Voluntary action on the part of individual land owners for the conservation of habitat on their lands (stewardship) will be an important component of an effective program and must be fostered.

Cooperative program delivery, including partnerships among a broad spectrum of government agencies, aboriginal organizations, non-governmental organizations, business associations, and even individuals are more likely to be effective than stand-alone attempts.

FEDERAL LANDS

Where a recovery plan has identified habitat loss or degradation on federal lands as a key threat the affected department(s) must be involved in the implementation of that recovery plan. Such involvement must include the effective consideration of the habitat requirements of listed species in the management of the land in question. For instance, the habitat requirements of a listed species should be built into protected area management plans, or grazing plans for community pastures, or the timing and gear requirements for a fishery.

Specific protection for habitat on federal lands can be accomplished through the designation of a protected area under any one of several existing pieces of legislation, including the National Parks Act, Canada Wildlife Act, Oceans Act, Fisheries Act, Migratory Birds Convention Act, and others. Amendments to one or more of these existing acts to make their application more flexible may be useful.

Legislation might provide for interim orders to address the protection of the critical habitat of a listed threatened or endangered species (assuming such habitat exists and can be defined) on federal lands. These could apply after listing, and until completion of the recovery plan. Interim orders could establish buffer zones, or provide measures to protect critical habitat.

PROVINCIAL LANDS

Provincial governments have made a commitment in the Accord for the Protection of Species at Risk in Canada to provide for the protection of habitat in their jurisdictions.

Federal legislation could enable the Minister to negotiate non-regulatory habitat protection measures with affected parties, including the provinces, where habitat had been identified as a key threat for a listed species.

PRIVATE LANDS

The Act could provide for Conservation Agreements with private landowners, including measures for protecting habitat.

The Act could provide for incentives to facilitate the securement of parcels of private lands considered critical for species at risk, including such things as tax incentives, improved access to instruments such as easements, covenants and so on.

In some cases, outright purchase of the parcel of private land for inclusion in a formal network of protected areas might be the best option.

STEWARDSHIP

Voluntary action on the part of individual land owners for the conservation of habitat on their lands will be the most effective means of protecting habitat for species at risk on private lands. Such actions may be strictly voluntary, driven only by an ethic for the

protection of biodiversity; or may be encouraged through the provision of information about the needs of species at risk on the lands in question and education about how to effectively respond to those needs; or may be enabled through the provision of incentives, including financial assistance for implementation of habitat protection measures, or compensation.

Stewardship activities, by definition, are not driven by legislation but some legislation action may be necessary to provide the enabling framework or to remove existing disincentives to habitat conservation.

Many stewardship activities, especially in the wildlife conservation field, are facilitated by the work of conservation-oriented non-governmental organizations. Such partnerships should remain an important feature of future stewardship initiatives.

Many individuals who take private action to conserve wildlife on their private land will do so for their own reasons, and will not seek or want any public recognition of their efforts. For others, recognition of their efforts will provide an important incentive, and may well provide an important communication bonus for the broader program. Public recognition initiatives that respond to such opportunities may be a useful component of species at risk programs.

In public opinion surveys many individuals express a willingness to consider stewardship activities on their lands, but say they do not know what to do. Public education and outreach initiatives may be a useful component of species at risk programs.

The implementation of recovery actions may be assisted through the creation of joint ventures similar to those that have been so successful in the implementation of the North American Waterfowl management Plan, bringing together federal, provincial and territorial, aboriginal, non-government, and private sector partners to manage the delivery of a full range of recovery actions. Such joint ventures could be organized on the species, ecosystem, or geographic area level.

Some commentators have suggested the creation of an Endangered Species Conservation Fund, to be managed by a non-

government organization in much the same way the World Wildlife Fund - Canada manages the Endangered Species Recovery Fund, to provide for the securement of key endangered species habitat from willing sellers and the broader implementation of recovery actions.

The Species at risk Working Group has suggested that key actions in support of stewardship initiatives will revolve around: tax treatments, education and information sharing, recognition, knowledge management, and land stewardship and commitments. In their report they provide some specific suggestions and some areas for further exploration.

The contact group that has been lead by Sheila Forsyth believes that priorities for specific stewardship initiatives should be selected from the many suggestions that have been made. They have suggested that Environment Canada leadership within the federal government and with the provinces is required if stewardship is to be further encouraged, and that expert groups should be established as needed to develop and refine specific initiatives.

APPENDIX 3-5 RECOVERY PLANNING AND IMPLEMENTATION

ISSUE

What is the role of federal endangered species legislation in recovery planning and implementation?

BACKGROUND

Prompt attention to recovery of threatened and endangered species is accepted as a key component of endangered species legislation and programs.

Under the Accord for the Protection of Species at risk in Canada, federal, provincial and territorial jurisdictions have committed to develop recovery plans that address the identified threats to the species and its habitat within one year for endangered species and two years for threatened species. Recovery actions for extirpated species was not addressed in the Accord.

In discussions with provinces and territories around the Accord, there has been support for a COSEWIC listing to be the trigger for recovery planning and action.

The Accord also requires that recovery efforts be expanded to all taxonomic groups. Currently, the existing recovery system encompasses 52 species of terrestrial mammals, birds, reptiles, and amphibians, including one ecosystem, for which 36 species have had some form of recovery action. The recovery system has not yet addressed recovery needs of an additional 100+ threatened, endangered, and extirpated species currently listed by COSEWIC – including marine species, invertebrates and plants.

Efforts are now underway through a Recovery Working Group to streamline the recovery process in Canada, to reduce the time between listing and action, to shift emphasis from planning to on-the-ground action. At the August workshop, guiding principles for an improved recovery system were reviewed and favourably received.

The intent is to build an expanded role for interested parties and improved cooperation into the recovery process.

Some groups want recovery planning and implementation to be mandatory and to occur within strict timelines. Others believe that, under specific circumstances, there should be provisions for not proceeding with recovery actions.

Some commentators have suggested that government be held publicly accountable for the implementation of recovery plans and that there should be a monitoring and evaluation system in place to ensure this.

Others have suggested that the details of the recovery process and the format of recovery plans should be put into guidelines or regulations, not the act – thus providing greater flexibility to modernize the system from time to time as knowledge of recovery improves.

TWO-STAGE RECOVERY PROCESS

A coordinated, Two-Stage Process has been proposed for the national recovery system that would add a sense of urgency to the process. The recovery plan would reflect this two-stage process. Coordination of such efforts would be a focus of the Canadian Endangered Species Conservation Council.

Stage One is the production of a concise recovery strategy within months of COSEWIC listing. Action would be rapid. A preliminary team (responsible jurisdictions and experts) would be established and a strategy developed that outlines what needs to be done and sets targets. The strategy would identify if recovery is biologically or ecologically feasible. Sign-off of the strategy would be done by the responsible jurisdiction(s).

In Stage One, for species under federal jurisdiction, the federal government [Responsible Ministers] would be responsible for bringing together an initial team to draft the recovery strategy.

For a multi-jurisdictional recovery strategy, the suggestion has been made that the federal government could play a coordination and facilitation role, much as it does through regional coordinators under the North American Waterfowl Management Plan.

Stage Two would flow directly from the recovery strategy, with responsible jurisdictions leading implementation in cooperation with other agencies and key stakeholders through action on manageable projects. Priorities would be set, socio-economic factors examined, and details for how to implement targets determined.

In Stage Two, federal Responsible Ministers (i.e. Minister of Environment, Fisheries and Oceans, or Canadian Heritage) would lead or cooperate in pulling together the implementation plan for those species having federal aspects (migratory birds, fish and marine mammals, species occurring on federal lands). For example, in the case of terrestrial species Environment Canada would lead (together with an affected department if the species occurred on its lands), in National Parks the Department of Canadian Heritage would lead, and for fish and marine mammals the Department of Fisheries and Oceans would lead. In many cases, it is likely that management plans already exist (for instance, parks management plans), and will simply have to be enhanced or expanded to take into account the special requirements identified in the recovery planning.

FEASIBILITY, SOCIO-ECONOMIC CONSIDERATIONS AND PRIORITY SETTING

Some groups believe that there should be a provision for not acting to recover a species in specific circumstances. One such instance could be where the recovery of a species is clearly not biologically or ecologically feasible. Another could be when the socio-economic costs would greatly outweigh the ecological benefits of species recovery. At the August workshop, there was agreement that socio-economic impacts should be taken into consideration after a scientific assessment has been undertaken and probability of recovery determined.

Budgetary constraints may also be a reason to defer undertaking low priority actions. The Species at risk Working Group (September

1998) has suggested that RENEW could set priorities among plans, and that not all actions within low priority plans had to be implemented. A list of unfunded plans would have to be made public. Top priority plans would need to be fully implemented.

PARTNERSHIP, COORDINATION, SCIENCE

Responsibility for wildlife management is shared among various levels of government, and therefore the federal government cannot develop and implement recovery plans on its own. It also requires the cooperation and willingness from the private sector to obtain common goals, thus consultation with interested parties is essential to gain willing partners. Legislation could enable government to enter into cooperative and funding arrangements with partners for recovery initiatives including recovery of species shared with other countries.

Program initiatives may support partnerships and participation of interested parties in recovery through, for example, education and outreach programs, provision of technical advice and assistance, science and research, and funding mechanisms such as the Endangered Species Recovery Fund.

IMPLEMENTATION OF RECOVERY PLANS

The federal government will need access to a full range of legislative authorities and program tools to implement the requirements of recovery plans. There are a number of situations where the requirements of a recovery plan may be best implemented using other legislation (as for example, the Fisheries Act, the Canadian Environmental Protection Act or regulations established under Land Claims Agreements).

Provinces and other jurisdictions will need to avail themselves of the full range of authorities and tools that could be applied to meet the goals of recovery efforts.

Progress in implementing recovery plans should be monitored and evaluated, to ensure that recovery objectives are being achieved.

APPENDIX 3-6 EXCEPTIONS AND ISSUANCE OF PERMITS

ISSUE

What exceptions to the automatic prohibitions or emergency orders should be provided for in federal endangered species legislation ?

BACKGROUND

Putting in place blanket prohibitions on the killing, harming, etc. of extirpated, endangered and threatened species upon the legal listing of such species, together with prohibitions on destruction of residences and prohibitions on possession provides an obvious measure of protection for species at risk. However, blanket prohibitions do not always result in the best measures for the protection of species in all situations. As well, there are certain circumstances where public policy considerations will override the needs of individuals of listed species. Hence, there need to be exceptions to the application of the broad prohibitions in circumstances where public health or safety override, or where national security may be compromised. Other exceptions relating to protecting Canadian livestock or agricultural crops from diseases are also necessary in some circumstances.

In exercising an exception based on the above, the person responsible for authorizing the activity otherwise prohibited by the endangered species Act would need to determine that the activity is necessary for the protection of national security, safety or health, including animal and plant health, and in doing so must respect the purposes of the endangered species Act to the extent possible.

Application of broad prohibitions must also respect the Constitutionally protected arrangements that have been established under Land Claims Agreements and self-government agreements with the Aboriginal peoples of Canada. Blanket prohibitions would therefore not necessarily apply in all circumstances for persons who

are engaging in activities in accordance with regulatory or conservation measures for wildlife species under an aboriginal treaty, land claims agreement, self-government agreement or co-management agreement.

Some aspects of the above provisions are seen as too broad and open ended by a number of people. In their Sept 24th report on Species at risk and Vulnerable Ecosystems the authors are recommending tightening the exemptions so that they are available only on a case-by-case basis, with no "blanket exemptions" being available except for national security and public health. The case-by-case exceptions would have to be approved by a responsible Minister. The aspect of the above exceptions that causes the greatest concern is the reference to animal and plant health. This exception was originally included to capture necessary activities under the Health of Animals Act and the Plant Protection Act. The Species at risk working group has recommended that those two Act be amended to provide for action in emergency situations - which would then be acceptable exceptions to the prohibitions of the endangered species Act.

PERMITS, LICENSES, AGREEMENTS ETC.

Exceptions to the application of the prohibitions may also be made available to persons engaged in authorized activities such as:

- a) for scientific research relating to the conservation of the species;
- b) one that benefits the species or is required by a recovery plan;
- c) a lawful activity that will only incidentally harm the species.

In such cases the minister issuing such a permit must determine that reasonable alternatives to the activity that would reduce impact on the species have been considered; and that the activity will not jeopardize the survival or recovery of the species.

There are a number of practical examples of when such exceptions would be needed, or where the exceptions would assist

in achieving a better overall conservation result. For example, some species require some disturbance to their surroundings in order to survive - a number of plant species and invertebrate species require regular grazing, or fire in order to prevent encroachment by woody plants. In such circumstances, grazing by cattle should not be considered an offence - as it is often what the species actually needs to thrive. There should be flexibility in working out arrangements with land owners, or with users of Crown lands whereby the long term, sustainable management of the lands in question is the best public policy objective, while acknowledging that in doing so some individuals of a listed species at risk might be affected in order to sustain the broader ecosystem for many others. As well individuals involved in an approved recovery effort may need to "possess" endangered species, or may need to conduct research that might harm some individuals of a listed species.

There are a number of situations where the requirements of an endangered species Act may be best implemented by a minister other than the Minister of the Environment. It would be more logical to add the requirements of species at risk to the existing permitting and management regimes already in place, and administered under other legislation. Such an approach saves administrative overhead, but more importantly, accesses a broad range of authorities which can be invoked for the protection of species at risk.

Hence, agreements, licences, permits, orders, or other similar instruments may be issued under another Act of Parliament and would serve as legitimate exceptions to the prohibitions provided that the minister issuing the permit or making the agreement is satisfied that the requirements outlined above have been met.

Issuance of such permits, licences, etc., or making of agreements could be delegated to another federal minister, or to a province or territory pursuant to an administrative delegation agreement.

RECOVERY PLAN EXCEPTIONS

As outlined above, there should be provisions for exemptions for persons engaged in activities authorized by a recovery plan, or by a regulation or order made to facilitate the implementation of a recovery plan. For example, in some circumstances, it may be desirable to provide for the limited hunt or harvest of a threatened species - especially by Aboriginal people, or by local communities. One such example is provided by the Wood Buffalo which on introduction to some areas was so successful that a limited hunt has been provided in the recovery plan as an appropriate conservation initiative.

POSSESSION EXCEPTIONS

The prohibitions against possession should not prevent a person from possessing an individual, part or derivative of a listed extirpated, endangered or threatened species: if the item was in their possession before the species was listed; if they acquired it legally in another country and imported it legally into Canada; if they inherited the item from someone who was entitled to possess it; if they are acting on behalf of a museum, zoo or other scientific, educational, or government institution.

BY-CATCH EXCEPTION FOR MARINE SPECIES

In Government amendments recommended in previous proposals and tabled in late March of 1997 a "By-catch" provision was added. The prohibitions on killing, capturing, taking, etc. would not apply to a person who takes one or more individuals of a listed extirpated, endangered or threatened species as By-catch in a fishery authorized by an agreement, permit, licence, order or other similar document made or issued, under the Fisheries Act. The term "By-catch" means a catch that is incidental to the authorized fishery. However, the authorizing document must be made or issued in accordance with the conditions outlined above, unless the By-catch is unforeseeable.

APPENDIX A.4—RELATED DOCUMENTS

APPENDIX 4-1 ACCORD FOR THE PROTECTION OF SPECIES AT RISK IN CANADA

Federal, provincial and territorial ministers responsible for wildlife commit to a national approach for the protection of species at risk. The goal is to prevent species in Canada from becoming extinct as a consequence of human activity.

We recognize that:

- i) Species do not recognize jurisdictional boundaries and cooperation is crucial to the conservation and protection of species at risk;
- ii) The conservation of species at risk is a key component of the Canadian Biodiversity Strategy, which aims to conserve biological diversity in Canada;
- iii) Governments have a leadership role in providing sound information and appropriate measures for the conservation and protection of species at risk, and the effective involvement of all Canadians is essential;
- iv) Species conservation initiatives will be met through complementary federal and provincial/territorial legislation, regulations, policies, and programs;
- v) Stewardship activities contributing to the conservation of species should be supported as an integral element in preventing species from becoming at risk; and
- vi) Lack of full scientific certainty must not be used as a reason to delay measures to avoid or minimize threats to species at risk.

We agree to:

- i) Participate in the Canadian Endangered Species Conservation Council in order to coordinate our activities and resolve issues for the protection of species at risk in Canada;
- ii) Recognize the Committee on the Status of Endangered Wildlife in Canada as a source of independent advice on the status of species at risk in Canada; and,
- iii) Establish complementary legislation and programs that provide for effective protection of species at risk throughout Canada, and that will:
 - a) Address all native wild species;
 - b) Provide an independent process for assessing the status of species at risk;
 - c) Legally designate species as threatened or endangered;
 - d) Provide immediate legal protection for threatened or endangered species;
 - e) Provide protection for the habitat of threatened or endangered species;
 - f) Provide for the development of recovery plans within one year for endangered species and two years for threatened species that address the identified threats to the species and its habitat;
 - g) Ensure multi-jurisdictional cooperation for the protection of species that cross borders through the development and implementation of recovery plans;
 - h) Consider the needs of species at risk as part of environmental assessment processes;
 - i) Implement recovery plans in a timely fashion;

- j) Monitor, assess and report regularly on the status of all wild species;
 - k) Emphasize preventive measures to keep species from becoming at risk;
 - l) Improve awareness of the needs of species at risk;
 - m) Encourage citizens to participate in conservation and protection actions;
 - n) Recognize, foster and support effective and long term stewardship by resource users and managers, landowners, and other citizens; and
 - o) Provide for effective enforcement.
- iv) Refer any disputes that may arise under this Accord to the Canadian Endangered Species Conservation Council for resolution.

Additional guidance on the implementation of this approach is provided in the evolving framework for the conservation of species at risk.

**APPENDIX 4-2 TERMS OF REFERENCE—COMMITTEE
ON THE STATUS OF ENDANGERED
WILDLIFE IN CANADA (COSEWIC)**

COSEWIC will assess the biological status of species that may be at risk in Canada and provide its assessments according to the probable risk of extinction. The Committee will use a process based on science and traditional or local knowledge to assess species at risk. This process will be independent, open and transparent. COSEWIC will report its assessments to the Canadian public and to the Canadian Endangered Species Conservation Council (CESCC).

Role—To assess the status of species suspected to be at risk nationally, to report the list of species at risk and its findings to the Canadian Endangered Species Conservation Council, and subsequently to make the list public.

STRUCTURE AND COMPOSITION

COSEWIC will retain its present structure, therefore building on the successful model refined over the past twenty years. COSEWIC will consist of eight Species Specialist Groups (currently called subcommittees) and the general COSEWIC Committee. As well, a Standing Committee and a Secretariat play supporting roles.

Species Specialist Groups—There will be eight Species Specialists Groups representing birds, terrestrial mammals, freshwater fish, marine fish, marine mammals, plants, amphibians and reptiles, and invertebrates (lepidoptera and molluscs). Each Species Specialist Group is led by a Chair, selected by the COSEWIC Committee. To complement the present structure, a list of species experts outside these main groups, including those with traditional and local knowledge, would be established and drawn on as required. The need for new Species Specialist Groups will be assessed in consultation with the Council.

COSEWIC Committee—The COSEWIC Committee will be the decision making body. Candidates for the COSEWIC committee will be recommended by the Canadian Endangered Species

Conservation Council and will be appointed under federal legislation. The committee will be composed of scientific experts from each of the provinces and territories (1 each for a total of 13) and one from each of four federal agencies/departments (CWS, DFO, Parks, Museum of Nature). In addition, the Council will solicit nominations for non-government scientific experts, from which three will be recommended for appointment to COSEWIC. (Current non-government members are: World Wildlife Fund, Canada; Canadian Wildlife Federation; and Canadian Nature Federation). The position of Chair of the COSEWIC Committee is a two-year appointment determined by the Committee by secret ballot. The current committee will include experts in fields such as conservation biology, ecology, taxonomy, wildlife management, stock assessment, population biology, traditional or local knowledge, and other related fields. A roster of experts will provide additional and specific expertise as required to support deliberations of the Committee.

Standing Committee—The COSEWIC Standing Committee consists of the Species Specialist Group chairs, together with the chair of COSEWIC. This committee is advisory to the COSEWIC Committee and supports rather than leads the COSEWIC Committee.

Secretariat—Administration services and technical support will be provided by a Secretariat funded by and directed by the Canadian Wildlife Service.

MODE OF OPERATION

Assessments are made on the basis of the best available science and biological information, including appropriate traditional and local knowledge.

Following the current model, assessments will be made on the basis of consensus whenever possible. When this is not possible, assessments will be determined by vote (minimum two thirds majority required for acceptance).

The committee will provide to CESCC and the public the

complete reasons for each assessment and identify any uncertainties.

FUNCTIONS

Species Specialist Groups

1. To commission status reports on eligible candidate species and to receive unsolicited reports that meet the criteria based on science and traditional or local knowledge.
2. To review draft status reports to ensure accuracy, completeness, and quality of analysis and application of relevant listing criteria.
3. To review draft status reports with outside experts, range jurisdictions, and wildlife management boards as appropriate to ensure completeness and accuracy.
4. To establish, with input from the Standing Committee, priority lists of species to be assessed.
5. Each Species Specialist Group has a Chair with the primary responsibility for the functions listed above. The chairs also function as information contact for the taxonomic group.

COSEWIC Committee

1. To apply criteria based on science and to include traditional or local knowledge in the assessment of the status of species
2. To report the national list of species at risk and its findings to the CESCC for action and subsequently, with the CESCC, to publish the national list of species assessed to be at risk in Canada and the status reports on which the assessments were based.
3. To include information from range jurisdictions and outside experts with knowledge, including aboriginal organizations, wildlife management boards, and Councils with traditional and local knowledge, about species under review.

4. To recommend to the CESCC those species that require emergency action. Emergency action may be recommended to the Chairs of the CESCC at any time of the year. Range jurisdictions will respond immediately to emergency listings from the CESCC.
5. To develop and periodically review scientific assessment criteria to categorize species' risk of extinction and to forward those criteria to the CESCC for endorsement.
6. To review and approve plans, annual reports, budgets, and activities of species subcommittees.
7. To establish ad hoc working groups to deal with specific issues.
8. To provide direction to the Secretariat.
9. To prepare, with the Secretariat, an annual report of all COSEWIC activities.

The Chair of the COSEWIC Committee is the primary COSEWIC contact with the CESCC. The Chair runs the meetings of COSEWIC and is responsible for ensuring that they proceed in an orderly fashion maintaining the principles of independence, openness, transparency, and scientific integrity upon which COSEWIC is based. The Chair also heads the Standing Committee. The Chair of COSEWIC is a contact person and spokesperson to CESCC, news media, and the general public concerning all aspects of the Committee.

Standing Committee

1. To recommend priorities for species status reviews by reviewing the general status of species within and among each taxonomic group.
2. To establish Terms of Reference for status reports.

3. To undertake actions requested by membership.
4. To provide day to day administration and advice to the COSEWIC Committee.

Secretariat

1. To provide administrative services, such as organizing and servicing meetings.
2. To provide technical support to subcommittees.
3. To administer financial support for status reports.
4. To maintain financial records.
5. To maintain files, records and other archival materials.
6. To disseminate information to the public.

**APPENDIX 4-3 TERMS OF REFERENCE—CANADIAN
ENDANGERED SPECIES
CONSERVATION COUNCIL (CESCC)—
SEPTEMBER 28, 1998**

The CESCC is responsible for national leadership and direction for preventing wild species from becoming at risk. The CESCC is composed of Ministers responsible for the management of wild species whose responsibilities and actions are stipulated in the National Accord for the Protection of Species at Risk and the National Framework. The Council will work with wildlife management boards and councils established under land claims agreements to identify and manage species at risk occurring in areas governed by land claims agreements. The Council will be assisted by the Canadian Wildlife Directors' Committee. The Council will be supported by a permanent Secretariat provided by the federal government.

Composition: The Council will consist of the federal, provincial and territorial ministers responsible for wild species.

Chair—Co-chaired by the Minister of the Environment and the chair of the Wildlife Ministers' Council of Canada.

Role—To direct a national program to prevent any species from becoming extinct in Canada as a consequence of human activity. This is outlined in the National Accord and further described in the National Framework for the Conservation of Species at Risk.

Functions

1. To provide national leadership for preventing species from becoming at risk.
2. To provide support and general direction to the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). COSEWIC is a committee of experts who, using the best scientific, traditional and local knowledge available, independently assess the

biological status of species believed to be at risk nationally. Candidates for the committee are recommended by the Council and will be appointed under federal legislation.

3. To consult with and recognize the mandated roles of renewable resource boards and councils, and wildlife management boards established under aboriginal land claims agreements, on matters relating to the implementation of the National Accord in areas governed by such land claims agreements.
4. To endorse species assessment criteria developed by COSEWIC for determining risk categories for species believed to be at risk.
5. To receive the COSEWIC assessments of species at risk and to determine the most effective response action, including priorities for further action.
6. To coordinate emergency protection efforts by range jurisdictions for those species identified by COSEWIC as requiring emergency action.
7. To ensure coordination of activities among all jurisdictions, particularly as it relates to recovery planning and actions.
8. To serve as a forum for addressing any issues and disputes among jurisdictions that may arise in implementing the Accord and Framework.
9. To report annually to the public on the state and progress of the national program.
10. To review annually progress related to recovery planning and implementation for species at risk and to review the National Accord and Framework at least every five years to ensure its effectiveness.
11. To endorse definitions and categories for the assessment of the general status of all wild species and species groups.

12. To produce a report on the known status of wild species and species groups in Canada at least every five years.
13. To seek and consider advice and recommendations from aboriginal groups for the implementation of the National Accord and Framework.
14. To seek and consider advice and recommendations from stakeholder groups for the implementation of the National Accord and Framework.
15. To establish ad hoc or standing committees to provide advice to address specific issues.
16. To encourage the effective stewardship of Canada's rich biological diversity.

**APPENDIX 4-4 UPDATE ON THE INDEPENDENT
REVIEW OF JURISDICTIONS' GAP
ANALYSES FOR IMPLEMENTING THE
ACCORD**

Last winter, all jurisdictions prepared a gap analysis to identify how they measured up to the provisions in the Accord, what gaps existed that needed further action, and included plans to address gaps.

The Canadian Institute for Environmental Law and Policy (CIELAP) was commissioned by Environment Canada, on behalf of all jurisdictions, to do an independent review of the gap analyses.

CIELAP's draft report was received by the federal government, provinces and territories in the middle of September.

Jurisdictions are currently reviewing CIELAP's draft report for accuracy and are sending their comments to CIELAP.

The independent review is intended to assist each jurisdiction in assessing gaps, and will identify any overall national gaps that all jurisdictions should consider.

CIELAP is working on its final report, which is intended to be completed later this fall, and which then will be made available to interested parties.

APPENDIX A.5— TRANSPARENCIES/PAPERS PRESENTED IN PLENARY SESSIONS

APPENDIX 5—1 THE HONOURABLE CHRISTINE STEWART, MINISTER OF THE ENVIRONMENT—SPEAKING POINTS

- Welcome and thank you for coming today and being part of the workshop on federal endangered species legislation.
- This workshop is one more step on our path towards having federal endangered species legislation – a path which you have helped us to define.
- In Canada, we are blessed with an abundance of wildlife and a variety of plant species.
- We also have some special responsibilities to ensure the long term health of our flora and fauna, which is why the protection of our endangered species is so important.
- Time and again, Canadians have stated their support for wildlife conservation – we all know how important nature is to our collective psyche.
- Recent results from Statistics Canada demonstrate the commitment of Canadians to take local action for the sake of the environment. Many Canadians reported providing food and shelter for wildlife.
- Environment Canada's Millennium Eco-Communities Initiative is designed to draw on this demonstrated sense of personal

responsibility for the environment by helping communities set local environmental goals and get to work on them.

- Partnership is key. No one group or body can protect endangered species on their own and it is vital for all of us to come together to help species at risk to ensure that they never need to be listed.
- Recently, it was announced that the Government of Canada will provide funding for Natural Legacy 2000 – a millennium initiative that enables Canadians to engage in activities that will safeguard our natural heritage. This is an innovative approach to how we can work together to ensure a rich environmental legacy for our future generations.
- One of the projects to receive funding is the Endangered Species Recovery Fund, which will be sponsored by the World Wildlife Fund with a view to enlarging the scope of the existing program to permit more rapid recovery and conservation action for all species at risk.
- Bringing a species back from the brink of extinction is an incredible challenge, but it can be done when people work together.
- The responsibility for wildlife is shared between the federal, provincial and territorial governments. By working together with people like yourselves—naturalists, environmentalists, landowners, business organizations, First Nations and other individual Canadians—successful recovery programs to rejuvenate or re-establish wildlife populations have been realized.
- The swift fox, which disappeared from the Canadian Prairies in the 1930's, has been reintroduced into Alberta and Saskatchewan.
- A recent survey found close to 200 Whooping Cranes at breeding grounds in the Northwest Territories, up from an all-time low of 21 in 1941.

- Populations of Peregrine falcons have made a comeback in many parts of Canada, after dipping down to only 34 nesting pairs in 1975.
- We know this collaborative approach works.
- Over the past few months, I have been working hard with my colleagues and other Canadians to find the best way to protect our endangered species.
- Federal legislation is part of the answer, but federal legislation alone is not the only answer. It has to be part of a broader approach which engages all Canadians.
- The Accord for the Protection of Species at Risk in Canada, which was agreed to in principle by all Wildlife Ministers in 1996, will ultimately ensure that all species get the protection they need.
- The Accord is the umbrella that covers federal, provincial and territorial legislation, policies and programs to protect endangered species in Canada.
- As you know, at the end of September, I met with Provincial and Territorial Wildlife Ministers in Victoria to discuss implementation of the Accord. I am pleased to report that steps have been taken to strengthen that commitment.
- Together, my colleagues and I agreed, at your recommendation, to amend the Accord to emphasize the importance of stewardship in preventing species from becoming at risk.
- We also talked about building a Safety Net - which would coordinate federal and provincial conservation efforts - to ensure that no species is lost as a consequence of human activity. Governments, together with the active involvement of thousands of Canadian volunteers, landowners and organizations across the country must ensure that no species fall between the cracks.

- In Victoria, we also approved new terms of reference for the Committee on the Status of Endangered Wildlife in Canada – better known as COSEWIC – and for the Canadian Endangered Species Conservation Council – a council of Ministers responsible for the management of wild species in Canada, including the federal Fisheries Minister and the Minister responsible for National Parks.
- Under these terms of reference, COSEWIC will report its findings directly to the Canadian Endangered Species Conservation Council.
- The reporting relationship will create a direct link between the group that assesses species at risk to those with the accountability for determining response actions.
- I want to be clear that the change will not affect the independent scientific process by which species are listed.
- You should also know that I intend to see COSEWIC's list faithfully reflected in federal legislation.
- At the meeting, Ministers also agreed that recovery planning is important, but actions to implement those plans are even more important. Therefore we agreed it is important to improve the effectiveness of recovery efforts through better planning and a capacity to monitor the impact of our actions.
- Wildlife Ministers also agreed to continue consultations with interested Canadians on the roles that governments, stakeholders and individuals can take to protect endangered species.
- These consultations play an important role in shaping my legislation.
- I know that many of you attended the workshops held last February and August to discuss the Accord. Thank you for your participation in these important discussions and for your input and guidance.

- There will continue to be opportunities for Canadians to contribute to the endangered species discussion. For instance, a series of regional consultations are planned following this workshop.
- It is important that we do our “homework” thoroughly before I bring a new bill to the House of Commons.
- I am committed to the re-introduction of endangered species legislation. It is one of the federal government’s principal contributions to the implementation of the Accord.
- The new federal endangered species bill will be designed to support the national program for endangered species, to provide for national coordinating bodies such as COSEWIC and the Canadian Endangered Species Conservation Council, and to make sure the federal government conserves and protects species at risk within its jurisdiction.
- I want to hear your views on what elements federal legislation should include, especially in a number of key areas that have been contentious in the past.
- As my legislation takes form, I will continue to welcome your ideas on how we can best protect our wildlife. I remain open to all good suggestions.
- During your discussions, I urge you to be open and creative, and to build upon the cooperative approach that has come to characterize these workshops.
- Remember, effective protection for species at risk is the bottom line.
- I look forward to hearing the results of your discussions and promise that your advice will be given careful consideration during the development of my legislation.
- Our nation’s wildlife deserve our best efforts.

Thank you.

**APPENDIX 5—2 KAREN BROWN: WHERE WE HAVE
BEEN: WHERE WE GO FROM HERE**

Where we have been

**Workshop on the Essential Elements for
Endangered Species Legislation**

Where we go from here

Environment Canada
Environnement Canada
Date 07/2000

- 1 -



Progress To Date

- Amended Accord to reflect stewardship
- Terms of Reference for COSEWIC and the Council
- Monitoring the general status of wild species
- Protection of cross-border species
- Recovery planning and implementation
- Dispute resolution mechanisms

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Date 07/2000

- 2 -



Today and Tomorrow

- Scope of application and the Safety Net
- Consequences of COSEWIC listing
- Citizens access to dispute resolution
- Habitat/Stewardship requirements
- Recovery planning and implementation
- Exceptions to prohibitions, and permits and agreements

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Date 07/2000

- 3 -



Where to from here

- Web site (http://www.ec.gc.ca/cws-scf/es/endan_e.html)
- Regional consultations
- Facilitated meetings on particular issues, if necessary
- Parliamentary process

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Date 07/2000

- 4 -



**APPENDIX 5—3 STEVE CURTIS: FEDERAL
ENDANGERED SPECIES LEGISLATION:
AN OVERVIEW**

**Federal Endangered
Species Legislation**
An Overview

Environment Canada
Environnement Canada
Date 07/22/98

- 1 - For Discussion Purposes Only



Why Federal Legislation?

- Global stewardship of biodiversity
- Strengthen existing efforts in Canada
- Ensure coordinated approach
- Support for Accord, including COSEWIC
- Responsible action by federal government

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Purpose

To prevent wildlife species from being
extirpated or becoming extinct and to
provide for the recovery of wildlife
species that are extirpated, endangered or
threatened as a result of human activity.

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Principles

- Sustainable ecosystems and resources.
- All Canadians have a role to play
- Cost should be shared by all Canadians
- Jurisdictions should ensure no gaps occur

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Approach

- Cooperation
- Emphasize prevention, foster stewardship
- Scientific assessment of species
- Legal protection for listed species
- Co-ordinated recovery measures

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Canadian Endangered Species Conservation Council

- The Council (CESCC) will be composed of federal, provincial and territorial ministers responsible for the management of native wild species
- Council will provide leadership for programs protecting species at risk; general direction for COSEWIC; and coordination of recovery efforts.

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Prevention Tools

- Monitor general status of all species
- early detection of trends/declines
 - early conservation response
 - improve data systems

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Conservation Agreements

A responsible minister may conclude agreements with any person or government for conservation of species at risk.

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Application

- Aquatic species and habitats
- Migratory bird as protected by MBCA, and their residences
- Species on federal lands or waters
- In the territories, the Act will respect the devolved and delegated authorities of the territorial governments (as currently carried out under the Territorial Wildlife Acts)

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Proposed Safety Net

- Under the Accord, all jurisdictions have agreed to prohibiting the willful killing, harming of listed threatened or endangered species, or willful destruction of their residence.
- For species other than federal species, or species on federal lands, the Act would enable prohibitions where no others exist.

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Aboriginal and Treaty Rights

Aboriginal or treaty rights
of the aboriginal peoples of Canada
will be respected.

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Date 972288

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Committee on the Status of Endangered Wildlife in Canada

- Assessments based on science and traditional or local knowledge
- COSEWIC's assessments to be reported to the Council, and made public as COSEWIC list of Species at Risk in Canada
- Working structure as before

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The Legal List

- **Options for converting the COSEWIC list to the federal legal list**
1. Governor in Council, on recommendation of the Minister, may make regulations to establish and/or amend the list.
 2. Minister of Environment shall establish List as a schedule to the Act.

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Legal Protection

For any listed threatened or endangered species, no person shall [knowingly]:

- kill, harm, harass, capture or take,
- possess, collect, buy, sell or trade an individual, or any part or derivative,
- damage or destroy the residence of an individual.

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Emergency Orders

- For species listed on emergency basis
- Would include basic prohibitions

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Exceptions to application of the automatic prohibitions

What exceptions should be provided for?

- Public health or safety, national security
- Health of Animals or Plants
- Special considerations under aboriginal treaties, land claims agreements, or self-government agreements
- Recovery plan requirements
- Permits, licences, orders, agreements, etc.

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Recovery Plans

Key recovery attributes

- priority attention and prompt action upon COSEWIC listing or legal listing
- reduce time between listing and action
- reasonable timelines for completing plans for threatened and endangered species

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Two-stage Recovery Process

- **Stage one** - recovery strategy produced within months of COSEWIC listing
 - preliminary recovery team, early action
 - identify if recovery is biologically feasible
 - outline needs and set targets

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Two-stage Recovery Process

- **Stage two** - development, implementation of projects for ensuring recovery
 - socio-economic factors to be considered
 - consultation with affected parties
 - partners engaged

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Implementation of Recovery Plans

- Political accountability for implementation
- Implementation on a priority basis
- Partnerships and Funding arrangements

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Enforcement Provisions

- Appointment of officers
- Build on existing enforcement capacity
- Inspections
- Search and seizure
- Dispute resolution mechanisms
- Offences and fines
- Orders of the court

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Project Review

- A person required under CEEA to assess environmental effects of a project shall:
 - notify the Minister if the project is likely to affect a listed species at risk
- Must ensure measures are taken and monitored to avoid or mitigate the effects.

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Transitional Measures

- COSEWIC to reassess existing list of species at risk
- Timeframes for reassessments
- In the interim, basic prohibitions apply

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**APPENDIX 5—4 MICHAEL D'ÉÇA: CANADA'S
COMMITMENTS UNDER LAND CLAIMS
AGREEMENTS AND IMPLICATIONS
FOR ENDANGERED SPECIES
LEGISLATION**

(i) INTRODUCTION

Thanks to the organizers of the workshop for allowing me this opportunity to speak to you all today regarding Canada's commitments under land claims agreements, and how those commitments ought – at least in my view – to be reflected in the *Canada Endangered Species Act*.

For those of you who don't know me I am, and have been for the last several years, the legal adviser to the Nunavut Wildlife Management Board, also known as the NWMB.

The Board is an independent administrative agency, established pursuant to the terms of the *Nunavut Land Claims Agreement*, with a variety of duties – some of which I will describe over the next few minutes. For now, suffice to say this: the NWMB is a regulatory body, with an extensive jurisdiction over wildlife in what is known as the Nunavut Settlement Area (the NSA) – a massive region spanning almost 2 million square kilometres, including 40% of Canada's ocean coastline, and including all of the territorial sea adjacent to Nunavut.

**(ii) THE AMOUNT OF CANADA'S TERRITORY GOVERNED BY
ABORIGINAL LAND CLAIMS**

That leads me to my first point: a tremendous amount of Canada – especially Canada's north – is governed by the terms of aboriginal land claims.

In 1973 – following the famous *Calder* decision in the Supreme Court of Canada – the federal government announced its willingness to negotiate land claims based on outstanding aboriginal title. In the

25 years that have since passed, thirteen (almost fourteen) comprehensive claims agreements have been settled:

- The James Bay and Northern Quebec Agreement (1977) covers well over a million square kilometres;
- The Northeastern Quebec (Naskapi) Agreement (1978) increases that territorial jurisdiction by a further 5,000 square kilometres;
- The Inuvialuit Settlement Region (1984) encompasses a million square kilometres;
- The Gwich'in (1992) and Sahtu Dene and Metis (1994) Land Claim Agreements between them cover some 350,000 square kilometres;
- Seven land claims agreements in the Yukon (between 1995 and 1998), settled pursuant to the terms of the Umbrella Final Agreement (1993) between the Council for Yukon Indians and the federal and territorial governments cover 27,300 more square kilometres;
- Finally, there is the Nisga'a Agreement-in-Principle, which – when ratified – will entail a territorial jurisdiction of some 8,000 square kilometres within the province of British Columbia, including ownership and self-government over 1,900 square kilometres in the Nass River Valley.

So, thirteen have been settled, but in the wings are many, many more. For instance, the British Columbia Treaty Commission has, to date, accepted 51 statements of intent to negotiate land claims.

On the East Coast, the Innu Nation and the federal and provincial governments initialed a framework agreement in October of 1995. The Labrador Inuit are presently involved in negotiations to complete an agreement-in-principle. Nunaviq (Northern Quebec) Inuit are expected to soon conclude an Offshore Land Claims Agreement.

Here in Ontario, the Algonquins of Golden Lake are negotiating with Canada and Ontario regarding 34,000 square kilometres on the

Ontario side of the Ottawa River watershed. Also, a number of Quebec Algonquin bands have submitted a formal comprehensive claim to lands comprising the Ottawa River watershed.

(iii) THE LEGAL SIGNIFICANCE OF LAND CLAIMS

Land claims agreements are protected by S.35 of the *Constitution Act, 1982*. The Constitution is the supreme law of Canada. As you all know, it is very difficult to amend – generally requiring the assents of the federal Parliament and two thirds of the provinces representing 50 percent of the population. So, constitutional protection means, first of all, protection against extinguishment or change.

It also means supremacy over inconsistent legislation. Section 52 of the Constitution states:

...any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

The practical effect of this aspect of constitutional status is - to give a concrete example - that any term of a *Canada Endangered Species Act* that is found to be inconsistent or in conflict with the *Nunavut Land Claims Agreement* is of no force or effect, to the extent of its inconsistency or conflict.⁴

All of this raises the following question – at least among people who are not familiar with land claims agreements:

(iv) SHOULD THERE BE ANY CAUSE FOR CONCERN AS A RESULT OF THE EMERGENCE OF LAND CLAIMS WITHIN CANADA'S LEGAL ORDER?

One of the universal features of land claims agreements is their jurisdictional interest in wildlife and wildlife habitat; that is, all of them put in place a regime that addresses the matter of authority over wildlife and wildlife habitat.

⁴ See also NLCA Section 2.12.2, and Section 6 of the *Nunavut Land Claims Agreement Act*.

Clearly, legislators – and people and organizations, such as are assembled here today – must take into account land claims agreements when considering, planning, drafting and implementing legislation dealing with Canada's wildlife and wildlife habitat, both because of the constitutional status of such agreements and because of their vast geographical coverage.

Now, here's the good news: land claims reflect the ethos of Aboriginal Peoples; that is, they reflect the characteristic spirit and beliefs of such peoples. That spirit and those beliefs do not contemplate dominion over the natural world; nor do they countenance a model of nature as mere commodity.

Rather – and you will see this in every claim – they contemplate respect for the natural world, balance, an ecosystemic or holistic approach, and development only if it is sustainable. The guiding principle is always, always conservation.

If I can have people take away just one message from my remarks today, it is this: land claims agreements and the processes set out in them are models for the management of wildlife and wildlife habitat. They are examples of "how it should be done".

As such, legislation dealing with the protection of wildlife and wildlife habitat has nothing to fear and much to gain from adopting, and incorporating within its own procedures, the processes agreed to by Government and Aboriginal Peoples in land claims agreements.

**(v) THE WILDLIFE MANAGEMENT REGIME UNDER THE
NUNAVUT LAND CLAIMS AGREEMENT**

(a) The concept of co-management

I will turn now to the land claim with which I am most familiar - the *Nunavut Land Claims Agreement* or NLCA.

As I mentioned earlier, the NWMB is an independent administrative agency. However, it is also what is known as a co-management body.

The concept of co-management, although it is not prone to a precise definition, clearly has at its heart the dual notions of cooperation and shared management.

Co-management, in my view, is one of the central rights provided to Inuit under the NLCA – although co-management boards are not aboriginal organizations. That is an important point, and one that is often missed.

Co-management offers Inuit an opportunity to participate equally in resource management. At the same time, it provides Government with the same opportunity. The resulting synthesis has proven to be tremendously exciting, and very effective.

In the case of the NWMB, it has brought together the best of the Inuit way and the best of the Anglo-European way; it has brought together traditional knowledge and modern science; it has brought together a knowledge of the land and animals, based upon thousands of years of experience, and a knowledge of the workings of modern government and its bureaucracy.

Side by side around the NWMB table sit hunters and scientists, senior bureaucrats and traditional community leaders. Together, they forge an alliance to work on behalf of the public of Nunavut. Their guiding principles are the principles of conservation.

Another of the benefits of co-management is the confidence in resource management that it provides to the public at large. The people in the communities of Nunavut know that Inuit are equal members of the NWMB, and that the Board must follow the management directions set out in their land claim. In turn, the Canadian public elsewhere can be confident that the NWMB – a public board - does not represent a single constituency or a single point of view. It is not an agent of either the Crown or of Inuit.

The result is that when the Board must institute stringent controls, say, on polar bear hunting, Inuit in the communities of the NSA voluntarily agree to abide by those controls. Enforcement is not an issue.

The result is also that when the NWMB removes quotas on

particular stocks of animals, Government and the Canadian public outside Nunavut can be confident that this is a prudent and appropriate wildlife management decision.

(b) The NWMB's jurisdiction within the NSA⁵

Within its extensive wildlife management jurisdiction, the NWMB has exclusive decision-making authority with respect to establishing, modifying or removing quotas or other restrictions on wildlife harvesting in the NSA⁶.

In addition, the Board also has the exclusive discretionary decision-making authority:

- i) to approve the designation of rare, threatened and endangered species; and
- ii) to approve plans for the management and protection of particular wildlife, including endangered species, and wildlife habitat as well⁷.

The NWMB's decision-making authority is subject only to the Minister's authority to accept, reject or vary a Board decision, in accordance with the terms of the NLCA⁸.

The above description constitutes at least some of Canada's commitments under the NLCA. There are, naturally, many others. For instance, I have not spoken about Inuit harvesting and access rights,

⁵ The NWMB also has an extensive advisory jurisdiction in the vast marine environment adjacent to the NSA. See NLCA Article 15.

⁶ See NLCA Sections 5.6.4, 5.6.16, 5.6.48 and 5.6.51. In addition, in the Outer Land Fast Ice Zone – an area off the east coast of Baffin Island extending to the maximum limit of land-fast ice between the years 1963 and 1989 – the NWMB's jurisdiction extends to all harvesting from land-fast ice, and to all marine mammals in open waters. See NLCA Sections 16.1.1 and 1.1.1 ("*Outer Land Fast Ice Zone*").

⁷ See NLCA Sub-sections 5.2.34(c), (d)(i) and (f).

⁸ See Part 3 of Article 5 of the NLCA (Sections 5.3.1 to 5.3.25).

nor about environmental assessments, and so on. Clearly, time does not permit a thorough review of all of Canada's commitments under land claims agreements.

(vi) WHAT ARE THE IMPLICATIONS FOR ENDANGERED SPECIES LEGISLATION?

For this talk, I only have time to set out what I see as four general considerations necessary for those attempting to draft an *Endangered Species Act*. They are:

- 1) Land claims cover a significant portion of Canada's territory.
- 2) Land claims agreements already contain the tools and processes necessary to protect wildlife and wildlife habitat. Those tools and processes have already been agreed to both by Government and by the people living in the land claims areas - and they work. They ought therefore to be applied in the protection of endangered species and endangered species habitat within land claims areas. They can also serve as models in other areas.
- 3) The inevitable result of a failure to take account of the substantive requirements of land claims agreements, including the jurisdictions of bodies established under such agreements, will be: jurisdictional disputes; misunderstandings by officials trying, in good faith, to administer the Act; confusion among the public; costly attempts to assert and/or defend perceived rights; and the diversion of valuable time, resources and attention away from endangered species.
- 4) The constitutionally-protected land claim will trump the endangered species statute, in the case of inconsistency or conflict.

The 1997 version of the Act, in some instances, applied these considerations very effectively. In other instances, it fell somewhat short of the mark. In still others, in my view, it fell far short of the mark.

(vii) TRADITIONAL AND COMMUNITY KNOWLEDGE

Finally, there is the matter of traditional and community or local knowledge. The 1997 Act did attempt to include such knowledge in some of its processes. Status reports, for instance, must contain a summary of the best available scientific information and traditional or community knowledge.⁹ In appointing members to COSEWIC, the Minister may consult with bodies possessing traditional or community knowledge.¹⁰ Also, such knowledge is included in the list of disciplines that the COSEWIC members must draw their expertise from.¹¹

Are the Act's attempts to include such knowledge sufficient? Does the inclusion of traditional and community knowledge in the Act satisfy Canada's commitments under land claims agreements? What, in fact, is traditional and community knowledge? How important is it in preventing the extirpation or extinction of species, or in helping to provide for the recovery of species?

Lots of questions – but not much time remaining. I won't even attempt to deal with this topic in a comprehensive manner. I simply wish to make the following points:

- The 1992 *Convention on Biological Diversity* is a treaty which binds the states that are party to it in international law. Canada is well known as an important player in developing and implementing the Convention. In fact, it was the first industrialized country to ratify it.¹²
- Article 8 of the Convention set an important precedent, in stating that the Parties to the Convention must, within certain limits,

⁹ See CESA Subsection 2.(1) ("*status report*").

¹⁰ See CESA Subsection 13.(2).

¹¹ See CESA Subsection 14.(1)

¹² See the *Canadian Biodiversity Strategy: Canada's Response to the Convention on Biological Diversity* (Minister of Supply and Services Canada, 1995) (*Canadian Biodiversity Strategy*), p.2. See also the Prime Minister's remarks at the 1996 IUCN World Conservation Congress, hosted by Canada.

respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities, and must promote their wider application and encourage the equitable sharing of their benefits.¹³

- In its own “Biodiversity Strategy”, Canada has committed itself to following - and to expanding – this precedent. Canada’s Strategy states, in part, that:

“Traditional knowledge can provide an excellent basis for developing conservation and sustainable use policies and programs. All too often, however, traditional knowledge is inappropriately used or disregarded by policy-makers, scientists, resource planners and managers.”¹⁴

- A key element of Canada’s biodiversity strategy is to introduce new legislation aimed at meeting Canada’s international obligations, and at achieving its domestic conservation goals.¹⁵ The *Canada Endangered Species Act* is one of those pieces of legislation.
- The recently-completed Terms of Reference for the COSEWIC Committee call for it to be composed of the following:
 - 13 scientific experts from the provinces and territories;
 - 4 scientific experts from each of CWS, DFO, Parks and the Museum of Nature; and

¹³ *Each Contracting Party shall, as far as possible and as appropriate:*

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;

¹⁴ *Canadian Biodiversity Strategy*, p.49. See also pages 17, 37, 48 and 70-71.

¹⁵ *Canadian Biodiversity Strategy*, p. 3.

- 3 non-government scientific experts.¹⁶
- Although the Terms of Reference do include references elsewhere to the use of traditional or local knowledge, they appear to indicate that the COSEWIC Committee will be composed exclusively of these 20 scientific experts. If my reading of the Terms is correct, this runs counter to the spirit and intent of the Convention, to Canada's biodiversity strategy, and even to the intention of the 1997 wording for the Act.

I don't intend to say anymore on this matter, except that it would be a terrible shame for Canada not to seize this opportunity to fully include traditional and community or local knowledge in the prevention and recovery efforts set out in its Endangered Species legislation.

I know that the NWMB, in its own operations and experience, has found that the knowledge and observations of those who have traditionally lived in a particular area and relied upon its wildlife for their survival, gathered over the course of countless years, complements and strengthens the insights and discoveries of modern science.

With that, I will end my formal remarks. I thank you very much for taking the time to listen.

¹⁶ See the September 28 draft of the *Terms of Reference Committee on the Status of Endangered Wildlife in Canada (COSEWIC)*, pages 1 and 2.

National Accord Consultation Forum on the Internet

This electronic discussion forum on the internet was launched in June 1998 by Environment Canada's Canadian Wildlife Service on behalf of Canada's federal, provincial and territorial wildlife directors. It is intended to help facilitate consultations on the National Accord for the Protection of Species at Risk and to augment workshop consultations..

The National Accord Consultation Forum can be found on the internet at:
<http://www.ec.gc.ca/cws-scf/es/forum/consforu.htm>

**For further information on the protection of species at risk
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