

# Protecting endangered species in Canada: Comments on Bill C-65 – *The Canada Endangered Species Protection Act*

by  
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*Why should we care? What difference does it make if some species are extinguished, if even half of all the species on earth disappear? Let me count the ways. New sources of scientific information will be lost. Vast potential biological wealth will be destroyed. Still undeveloped medicines, crops, pharmaceuticals, timber, fibers, pulp, soil-restoring vegetation, petroleum substitutes, and other products and amenities will never come to light. It is fashionable in some quarters to wave aside the small and obscure, the bugs and weeds, forgetting that an obscure moth from Latin America saved Australia's pasture from overgrowth by cactus, that the rosy periwinkle provided the cure for Hodgkin's disease and childhood lymphocytic leukemia, that the bark of the Pacific yew offers hope for victims of ovarian and breast cancer, that a chemical from the saliva of leeches dissolves blood clots during surgery, and so down a roster already grown long and illustrious despite the limited research addressed to it....Field studies show that as biodiversity is reduced, so is the quality of the services provided by ecosystems. As extinction spreads, some of the lost forms prove to be keystone species, whose disappearance brings down other species and triggers a ripple effect through the demographics of the survivors. The loss of a keystone species is like a drill accidentally striking a powerline. It causes lights to go out all over.<sup>1</sup>*

# I. INTRODUCTION

## ***West Coast Environmental Law Association.***

WCELA is a non-profit society that provides legal services for the protection of the environment. (See West Coast's [Web site at http://vcn.bc.ca/wcel](http://vcn.bc.ca/wcel)) Since its formation in 1974, WCELA has been extensively involved in the development and implementation of environmental law at both the provincial and federal levels in Canada.

West Coast has a long history of involvement with endangered species protection and legislation. In recent years, West Coast lawyers have worked with federal Members of Parliament and provincial Members of the Legislative Assembly to prepare draft new endangered species laws at the federal and provincial levels. The author is a member of the Steering Committees of both the B.C. Endangered Species Coalition and the Canadian Coalition for Biodiversity. She also was the environmental non-governmental organization representative on the Canadian delegation to the 3rd Conference of the Parties to the *Convention on Biological Diversity*, held in November 1996. Recent publications include "Biodiversity Protection Law and Policy in British Columbia" in *Biodiversity Law in Canada* (Canadian Institute of Environmental Law and Policy: Toronto, 1996) and [\*Protecting Wetlands in B.C. - A Citizens' Guide\*](#), Linda Nowlan and Bill Jeffries, (WCELR and BC WETNET: Vancouver, 1996).

### ***Legal protection for Endangered Species in B.C.***

Why are we so concerned about this issue in British Columbia? Our province's rich biological heritage is under threat.

B.C. is the most biologically diverse province in Canada, in terms of the number of species.<sup>2</sup> About three-quarters of the total number of bird species in Canada make their home or breed in BC.<sup>3</sup> B.C. also has the richest plant life of any Canadian province, with 2,850 vascular plants out of the Canadian total of 4,150.<sup>4</sup> B.C. is home to myriad species of seaweeds and other marine plants, marine invertebrates, fish species and marine mammals making the province's coastal waters one of the most biologically diverse marine environments in the world.<sup>5</sup> But the number of endangered species in BC continues to rise. There are 68 species of vertebrate animals and 224 vascular plant species that are threatened and endangered in the province. Another 451 species are classified as vulnerable.<sup>6</sup>

Although we have made advances in environmental protection in recent years with the passage of new laws federally (such as the pulp pollution regulations, *CEPA*, *CEAA*, and the *Canada Oceans Act*) and provincially (such as the pulp pollution regulations, *BCEAA*, product stewardship and contaminated sites regulations, and the *Forest Practices Code*), a major gap in environmental legal protection still exists

for species at risk in the province.

The B.C. *Wildlife Act* is very weak and has been used to designate only four species as endangered since 1980: the burrowing owl, white pelican, sea otter and the Vancouver Island marmot. The law has been used only once to protect the critical habitat of an endangered species, for the Vancouver Island marmot.

West Coast Environmental Law Association welcomes the *Canada Endangered Species Protection Act* as a positive new legal tool which has the potential to increase the protection available for endangered species in our province. We also applaud the BC government, the federal government and the other provincial governments for pledging in the National Accord for the Protection of Species At Risk to ensure that complementary federal and provincial legislation and programs provide *effective protection* of species at risk. But we are concerned that the present draft of the Bill will not effectively protect even those species in B.C. for which the federal government has clear and exclusive jurisdiction. Our comments are designed to strengthen the current bill's powers to protect endangered species in B.C.

## **II. Bill C-65 *Canada Endangered Species Protection Act***

Protection of species is critical for many reasons: to maintain biodiversity, to fulfill our international legal obligations under the 1992 *Convention on Biological Diversity*, to provide key ecological services, as sources of new drugs and foods, for spiritual, aesthetic, and recreational values and for economic benefits. There are substantial economic benefits to protecting wildlife. In 1991, 18.9 million Canadians (90.2% of the population) took part in one or more wildlife related activities, devoting \$5.6 billion to these activities.<sup>z</sup> The government has recognized that the protection we have is inadequate, so this submission will not dwell on the reasons for this legislation, but on ways to ensure that the legislation fulfills its purpose.

This submission will concentrate on four ways to improve the *Act*:

1. Improve the sections of the *Act* that protect habitat.
2. Limit the broad exemptions from the *Act*.
3. Provide an advance review process for projects which have the potential to disturb, damage or destroy a species at risk or its critical habitat.
4. Create incentives for private landowners to protect species at risk that live on their land.

### **1. *Habitat Protection***

Habitat loss is the single most important factor affecting species loss in BC.<sup>8</sup>

The amount of land protected in the province specifically for wildlife habitat is less than .010% of the total land base, consisting of:

- seven Migratory Bird Sanctuaries (federal), amounting to .003% of the provincial land base
- five National Wildlife Areas (federal), amounting to .002% of the provincial land base
- one Ramsar site (federal), statistically insignificant portion of the provincial land base
- thirteen Wildlife Management Areas (provincial), amounting to 0.028% of the province's area.<sup>9</sup>

In addition, not enough marine areas have not been set aside for conservation. Less than one-tenth of 1% of coastal and marine areas in British Columbia are protected.<sup>10</sup> The B.C./Washington Marine Science Panel's 1994 report on marine waters rated destruction, alteration or degradation of habitat as the highest environmental priority for the region, noting that habitat destruction is irreversible and habitat losses are highly preventable.<sup>11</sup>

A report from Wildlife Habitat Canada on endangered species documents the continued deterioration in the status of endangered species and their habitats across the country over the past ten years.<sup>12</sup> Although habitat loss has been identified as the major factor in species decline, habitat receives little legal protection. The existing laws are not used to their full capacity to increase protection, and there are notable gaps and weaknesses in those laws. One of the key problems identified by Wildlife Habitat Canada in its report was fragmented jurisdiction resulting in scattered and hesitant responses.

Habitat protection is found in several places in Bill C-65: in the section on prohibitions, the section containing exceptions to the prohibitions, and the section on recovery plans.

## **Recovery Plans**

The *requirement* for the responsible minister to prepare a recovery plan within a set time period for species listed as endangered, threatened or extirpated is a very positive feature of the bill (s.38 (1)). Other welcome sections of the bill include the requirement for the recovery plan to:

- identify critical habitat, s.38 (2) (a);
- identify threats to the survival of the species, s.38 (2) (b);
- provide a description of any broader ecosystem management or multi-species approach, s.38 (2) (e); and
- provide a description of the measures needed to reduce or eliminate the threats to the survival of the species , s.38 (2)(g).

The duty to consult with others in the preparation of the plan, publish the plan, receive public comment on the plan, and prepare an implementation report are also all commendable new legal requirements. They will help address previous criticisms that "the major weakness in the federal approach to the conservation of wildlife-at-risk is the lack of tools for habitat conservation."<sup>13</sup>

*But these recovery plans and implementation reports will not be sufficient to protect habitat.* The Act does not create a duty for the government to implement a recovery plan. Although section 38 (5) (g) requires the recovery plan to contain a description of "regulations needed to regulate or prohibit activities that will adversely affect the species or its critical habitat", and section 42 gives the minister the power to make regulations for the purpose of implementing a plan, at this crucial stage, there is no *requirement* for any steps to be taken to protect the critical habitat. There is no *requirement* to implement the measures needed to reduce or eliminate the threats to the survival of the species. The minister may make regulations to implement a recovery plan, but does not have to. A preferred approach is to require the government to comply with a recovery plan. If a recovery plan is prepared, it should be implemented, according to the terms of the implementation report (s.40(2)), and within a reasonable time frame.

### **Prohibiting Damage or Destruction to a Residence**

An easier way to protect habitat is to prohibit anyone from disturbing, damaging or destroying critical habitat of a listed species. Yet the prohibition section does not take this clear step to protect habitat.

Section 32 is the key habitat protection provision in the bill. It states:

32. No person shall damage or destroy the residence of an individual of a listed endangered or threatened species.

There are a number of ways that this section is limited in its ability to protect habitat.

- The term "residence" is far too restrictive to describe the habitat needs of species. This term should be replaced with "critical habitat", a term that is defined and used elsewhere in the Act.
- Habitat may be disturbed by human activities that do not amount to damage or destruction but which may be equally harmful to an animal or plant. The section should be amended to prohibit disturbance of critical habitat.
- This prohibition is weakened by the broad and sweeping exemptions which are contained in section 36 of the bill. These exemptions must be considerably restricted, and are dealt with separately below.

*Replace "residence" with "critical habitat"*

Residence is defined as "a specific dwelling place, such as a den, nest or other similar area habitually occupied by an individual during all or part of its life cycle." (s.1)

Yet many species do not have a specific dwelling place. Habitat is a broader concept - it is the physical and biological setting in which organisms live and in which the other components of the environment are encountered.<sup>14</sup> A recent report from the U.S. National Research Council found "no disagreement in the ecological literature about one fundamental relationship: sufficient loss of habitat will lead to species extinction."<sup>15</sup> This is why the concept of critical habitat is so important. It is the minimum amount of habitat that is essential to the continued survival of a species. Without preservation of this habitat, the species will decline, and if no steps are taken to help the species recover, it will go extinct.

Saving a species' residence will not save the species. For example, most aquatic species have no specific residence, a fact recognized by the federal *Fisheries Act* which defines "fish habitat" as "any spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes." Critical habitat for a fish species would include all these elements of habitat.

And only the federal government has the power to protect marine aquatic species, so even improved provincial endangered species laws cannot address this problem. For example, the North Pacific right whale, whose population is believed to be declining, and whose population is estimated only in the low hundreds, requires identification and protection of critical habitat for mating, breeding and calving.<sup>16</sup> The right whale does not have a "specific dwelling place", and so this bill cannot be used to protect the habitat of this endangered species.<sup>17</sup>

Prohibiting destruction of or damage to the specific dwelling place will also not adequately protect endangered migratory birds, another type of wildlife that is clearly a federal responsibility. Only the federal government has the power to enact legislation to implement treaties such as the *Migratory Birds Convention*, and only the federal government can regulate species that migrate across international or interprovincial borders. But even birds listed in the *Migratory Birds Convention Act 1994*, will receive no greater habitat protection from Bill C-65. The *Migratory Birds Convention Act 1994* protects the nests, eggs, and shelters of the birds, but does not protect the broader range of habitat required by these species. And many migratory birds are not listed under the *Migratory Birds Convention Act 1994* (such as bald eagles, spotted owls and falcons) and so will have no additional protection from this Act and cannot be protected by provincial law, since they are an exclusive federal responsibility.

Other migratory animals will also be left unprotected, including those that are national symbols, like the grizzly and the woodland caribou, Western population. Both these species live in B.C., are listed as vulnerable on the COSEWIC list, and require large areas of undisturbed habitat for their continued survival, as well as

protection of their "dwelling places." Bill C-65 will not adequately protect their habitat, and so their continued existence is in jeopardy. The section on cross-boundary species, s.33, does not even give the Minister of the Environment the power to make regulations protecting these species' critical habitat.

*Disturbance should also be prohibited*

Disturbance may also negatively affect endangered species, yet only damage or destruction to the residence is prohibited. The section must be amended to include disturbance.

**Recommendation 1**

The sections on habitat protection should be amended as follows:

- The Act should create a duty for the government to implement a recovery plan for a listed species. A new subsection, s. 40(3), should be added to the Act, requiring the government to implement the recovery plan.
- The term "residence" in s. 32 is far too restrictive to describe the habitat needs of species, and this term should be replaced with "critical habitat".
- The definition of "critical habitat" should be amended to include habitat that is critical to the recovery of a listed species.
- Section 32 should be amended to prohibit disturbance of critical habitat.
- Section 32 should be amended to prohibit attempts to disturb, destroy or damage critical habitat.
- The section on cross-boundary species, s.33, should give the Minister of the Environment the power to make regulations protecting these species' critical habitat.

**2. Exemptions**

The Act's protection for endangered species and their habitat is considerably weakened by section 36 which lists the general exceptions or exemptions from the Act. These exemptions are far too broad. Only one of the exemptions makes survival of the species paramount. And the exemptions do not follow the recommendations of the multi-stakeholder Task Force on federal endangered species legislation, a group composed of the major resource industries in the country including the Canadian Pulp & Paper Association, as well as environmental and wilderness groups.

Section 36 says that the prohibitions against killing an endangered or threatened species or damaging or destroying the residence of that species (sections 31 and 32) and any regulations to protect some cross-boundary species (section 33) and regulations to implement recovery plan obligations (section 42) all do not apply to persons engaging in any of the activities described in the three sub-paragraphs (a),

(b) and (c) of s. 36.

The first alarming thing about this section is the lack of restrictions on the exemptions. The most crucial parts of the *Act* simply do not apply to persons engaging in any of the authorized activities.

Only the third broad exemption (activities authorized under section 46 or 47 by an agreement, permit, licence, order or similar document) is restricted in any way. Section 46 sets certain essential preconditions which should also apply to the first two subsections of section 36. These preconditions are that before any agreement is made or permit issued:

*"the responsible Minister must be satisfied that (a) all reasonable alternatives to the activity have been considered; (b) all feasible measures will be taken to minimize the impact of the activity on the species or its habitat or residence; and (c) the activity will not imperil the survival of the species."*

The federal Task Force recommended that these preconditions should be required for all exemptions. None of the exemptions should be allowed to imperil the survival of the species. All reasonable alternatives should be considered before allowing any exemptions. When exempting any activity from the application of this Act, the decision-makers should be required to consider all feasible measures to minimize the impact of the activity on the species or its critical habitat.

And the final precondition recommended by the federal Task Force is not included at all in the Act. The Task Force recommended that if adverse impacts on the species or its habitat are allowed by any of these exemptions, they must be approved and justified in writing by the Minister of the Environment.

Looking at the first two very broad exemptions which are not restricted by any preconditions, it is easy to imagine activities which would be allowed and could potentially have drastic negative effects on endangered or threatened species. For example, s.36(1)(a) says the key parts of the Act do not apply to "activities authorized by or under any other Act of Parliament for the protection of national security, safety or health including animal and plant health;" so for example, if the Armed Forces were conducting military drill exercises on federal land which also happened to be critical habitat for an endangered species, there is no requirement to even consider holding the drill exercises in another location.

Similarly subsection (b) "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 that deals with wildlife species;" is too broad. Regulatory measures to protect wildlife in any of these agreements may not specifically address endangered species. For example, the Nisga'a Agreement-in-Principle is a blueprint for an eventual treaty between the Nisga'a Nation and the provincial government. The Agreement-in-Principle



contains an extensive section on fisheries including provisions respecting entitlements to salmon and non-salmon species, the respective rights of the parties in relation to conservation of the resource, and joint management of the resource. This agreement is silent on the issue of endangered species. If a treaty is concluded with the Nisga'a on the basis of the Agreement-in-Principle, even if a particular stock of salmon is designated as threatened or endangered, the Nisga'a would not be restricted in continuing to harvest this particular stock of salmon. Given the fragile state of some salmon stocks in the province, and the general concern over sustainable use of the fisheries resource, it is clear that this exemption from the application of the Act could have major negative (and perhaps unintended) consequences for endangered species.

To adequately protect habitat, these exemptions must be considerably restricted. A permit should be required before any exemption is granted.

## **Recommendation 2**

A permit should be required for any exemption from the Act. Sections 36 (1) (a) and (b) should be amended to read "activities authorized by a permit." Before a permit is granted, the following prerequisite conditions should be met:

- Survival of the species should be a paramount consideration;
- Reasonable alternatives to the activities must be considered;
- The Minister should be obligated to give written reasons for granting a permit which may jeopardize threatened or endangered species or their critical habitat to ensure full public accountability for the decision; and
- Section 48 of the Act should be amended to require all permits to be placed in the public registry.

## **3. *Advance Review***

The bill does not require advance review for projects that will affect species at risk or their habitat.

Helping endangered species back to a healthy population is an expensive and time-consuming process. Preparing and implementing recovery plans takes scientific expertise and bureaucratic time. It is therefore important to use a preventative approach to species protection whenever possible. One of the best ways to do this is through an "advance review" process, whereby proposed projects that may jeopardize the continued survival of the threatened or endangered species or result in destruction or adverse modification of critical habitat are subject to review to see if these projects should proceed or if alternatives are available.

The federal Task Force on endangered species conservation recommended that this type of preventative measure be included in the Act. Recommendation 8.1 of the

Task Force's report states

*"the Act should demonstrate some commitment to a preventative approach and recognize that landowners and users should examine proposed new projects and activities likely to adversely affect threatened and endangered species and/or their habitat and look for alternatives or mitigation options where species may be impacted. The process should not be duplicative of any other process in existence and only used should there be no alternative and within the extend of federal powers."*

Section 49, Project Review, does not take this preventative approach. This provision provides that any project that is already subject to a federal environmental assessment review under the *Canadian Environmental Assessment Act (CEAA)* should be subject to an additional requirement. The responsible authority must notify the Minister of the Environment of a project that is likely to affect a wildlife species or its critical habitat that is listed as vulnerable, threatened or endangered or will have an effect on a threatened or endangered species outside of Canada. The duty to notify the Minister of the Environment of potential impacts certainly does not qualify as an advance review process.

Section 49(2) further requires the responsible authority to "ensure that measures are taken to identify the effects of the project on the wildlife species and its critical habitat, to lessen the effects and to monitor them." But this approach assumes that a project will proceed even where it is likely to affect a vulnerable, threatened or endangered species. The government's only obligation in that case would be to identify the effects, lessen the effects and monitor them. There is no obligation to avoid harmful effects. There is no obligation to consider alternatives for the proposed project, for example, an alternative location for the project which would not affect endangered species.

Activities which are subject to review under the *Canadian Environmental Assessment Act (CEAA)* are not the only activities which will harm an endangered species or its habitat. New urban developments, logging practices, wetlands destruction, agricultural practices, and road building, for example, are all activities which can harm species and destroy habitat but are not subject to federal environmental assessment procedures.

These types of activities are also not subject to environmental assessment under the equivalent law in British Columbia, the *BC Environmental Assessment Act*. The *BC Environmental Assessment Act* applies only to projects listed by regulation. Those projects are in the categories of industrial projects, mine projects, energy projects, water management containment and diversion projects, waste disposal projects, food processing projects, transportation projects and tourism and recreational projects. All these projects have defined minimum thresholds and assessment is required only if a proposed project exceeds those minimum thresholds. The BC Act also does not require any specific consideration of the impact of the proposed project on endangered, threatened or vulnerable species or their habitat. Therefore,

neither level of governments' environmental assessment procedures will specifically provide advance review of projects that may jeopardize the continued existence of an endangered, threatened or vulnerable species.

The advance review process is available under section 7 of the U.S. *Endangered Species Act*. Section 7 gives the U.S. Fish and Wildlife Service and the National Marine Fisheries Service the responsibility of advising other agencies whether their planned actions comply with their duty not to jeopardize the continued existence of listed species, or result in the destruction or adverse modification of critical habitat of listed species.

There is a widespread perception in the United States that designation of critical habitat acts as a red light on development. But this is not the case. In a typical year between 10,000 and 20,000 federal actions with the potential to affect one or more listed species receive some level of scrutiny by federal bureaucrats.

*"More than 95% of these are given a green light by the appropriate service after cursory review in a process known as informal consultation. The remainder, because they required more detailed evaluation, are considered at greater length in a 'formal consultation' process that ends with the services issuance of a biological opinion. During the 5 year period between 1987 and 1991, 2,248 formal consultations occurred. A total of 353 of those consultations resulted in a determination that the federal action was likely to cause jeopardy – roughly 15% of the total...The 5 year total of jeopardy opinions is 129, or about 6% of all consultations. The consultation process does not stop with the jeopardy determination, however, and neither necessarily does the federal action. Instead, the Act requires that a searching inquiry be made to determine whether there are any modifications or other 'reasonable and prudent alternatives' that can be pursued to avoid jeopardy. In most cases, such alternatives exist. Indeed during the most 5 year period, only 18 of the 353 actions received jeopardy opinions were abandoned or halted as a result of section 7 of the Endangered Species Act."<sup>18</sup>*

It can therefore be seen from the American experience that the advance review process does not stop development. Projects may still proceed if alternatives exist and the objective evidence from the U.S. shows that alternatives do exist for the vast majority of cases.

Incorporating an advance review process into federal law is easily accomplished. Assessment of the environmental impact of proposed projects is already required through *CEAA* and an extensive regulatory procedure has already been established under that Act. We agree with the recommendation of Mr. Stewart Elgie of Sierra Legal Defence Fund that the simplest way to accomplish advance review of projects that may jeopardize endangered, threatened or vulnerable species or their habitat is to add sections 46 and 47 of this Act to the Law List Regulations under *CEAA*.

### **Recommendation 3**

Sections 46 and 47 of this *Act* should be added to the Law List Regulations under *CEAA* to create an advance review process that will avoid or minimize the impact of proposed projects on species at risk.

#### **4. Incentives**

A combination of "carrots" (positive incentives) and "sticks" (prohibitions and other command and control regulations) will provide the most comprehensive protection for endangered species. Incentives are particularly important for convincing private landowners to manage their land to ensure the survival and recovery of endangered species. The draft *Act* provides two forms of positive incentives:

- section 7 (2), conservation agreements, which allow the Minister to enter into agreements with "one or more governments of provinces or countries, or organizations or persons" to conserve species at risk and protect their habitat, and
- section 8, funding agreements, which allow the Minister with the approval of Cabinet to enter into agreements with "the government of a province, a municipal authority or organization or any other person to provide for the payment of contributions to the costs of programs and measures for the conservation of wildlife species".
- these sections are welcome additions to the Act.

Other types of incentives should also be considered, including:

- a requirement to plan for multiple species, rather than preparing a recovery plan for each individual species, known as a "habitat conservation plan" or a "natural community conservation plan". This procedure is increasingly being used under the U.S. *Endangered Species Act*<sup>19</sup>;
- tax breaks for habitat conservation;
- income tax deductions for expenses incurred in planning or implementing habitat conservation agreements;<sup>20</sup>
- stewardship payments, based on the extent of management activity required, rather than the extent of depreciation in property value (the claim is often made that designation of critical habitat reduces property values, but no empirical evidence exists to support this argument)<sup>21</sup>; and
- payments for proven economic losses resulting from designation of species as endangered, for example, the Minnesota state law compensates owners of livestock for proven kills by the endangered grey wolves, thus proving the actual extent of harm caused by these wolves and raising public awareness of the importance of their survival ("if the government will pay for it, it must be important").<sup>22</sup>

## **Recommendation 4**

The government should consider expanding the range of incentives available to private landowners for endangered species and habitat conservation.

## **Conclusion**

West Coast Environmental Law welcomes Bill C-65, and applauds the federal government for introducing this law to fill a major gap in our current array of environmental protection laws. To effectively protect species at risk in Canada, we believe the Bill should be amended in several key areas, as this submission indicates. The most important change that should be made to the Act, in our opinion, is to prohibit the damage, destruction or disturbance of the critical habitat of a listed species.

The report from the eminent panel of scientists convened by the U.S. National Research Council provides a fitting conclusion to this presentation:

*"Habitat protection is a prerequisite for conservation of biological diversity. Habitat protection is essential not only to protect those relatively few species whose endangerment is established, it is also in essence a pre-emptive approach to species conservation..."*<sup>23</sup>

## **Summary of Recommendations**

### **Recommendation 1**

The sections on habitat protection should be amended as follows:

- The Act should create a duty for the government to implement a recovery plan for a listed species. A new subsection, s. 40(3) should be added to the Act, requiring the government to implement the recovery plan.
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- The section on cross-boundary species, s.33, should give the Minister of the Environment the power to make regulations protecting these species' critical habitat.

### **Recommendation 2**

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(b) should be amended to read "activities authorized by a permit." Before a permit is granted, the following prerequisite conditions should be met:

- Survival of the species should be a paramount consideration;
- Reasonable alternatives to the activities must be considered;
- The Minister should be obligated to give written reasons for granting a permit which may jeopardize threatened or endangered species to ensure full public accountability for the decision; and
- Section 48 of the Act should be amended to require all permits to be placed in the public registry.

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Sections 46 and 47 of this *Act* should be added to the Law List Regulations under *CEAA* to create an advance review process that will avoid or minimize the impact of proposed projects on species at risk.

### **Recommendation 4**

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## ENDNOTES

1. E.O. Wilson, *The Diversity of Life*, Cambridge, Mass.: The Belknap Press, 1992, 347-8.

2. L. Harding, ed. "Introduction" in *Biodiversity in B.C. \_ Our Changing Environment*, Environment Canada, 1994, at 1.

3. Richard Cannings, "Threatened and Endangered Birds in British Columbia" in *Biodiversity in British Columbia*, Environment Canada, Canadian Wildlife Service, 1994, at 153.

4. L. Harding, ed. "Introduction" in *Biodiversity in B.C. \_ Our Changing Environment*, Environment Canada, 1994, at 1.

5. Ibid.

6. B.C. Ministry of Environment, Lands and Parks, *Species at Risk in British Columbia*, Environmental Indicator Series, June 1996.

7. Environment Canada, Canadian Wildlife Service. *The importance of wildlife to*

*Canadians: Highlights of the 1991 Survey*, 1.

[8.](#) B.C. Ministry of Environment, Lands and Parks, *State of the Environment Report for British Columbia* (Victoria, 1993) at 55.

[9.](#) Morrison & Turner, "Protected Areas" in L. Harding, ed. *Biodiversity in B.C. — Our Changing Environment*, Environment Canada, 1994, 360.

[10.](#) Richard Paisley, Regional Marines Issues Overview Paper — West Coast. Prepared for National Marine Conservation Strategy Program in the CARC/CNF *National Marine Conservation Strategy Program Vancouver Workshop*, Westwater Research Centre March 7-8, 1995 at 11.

[11.](#) *The Shared Marine Waters of British Columbia and Washington*, A Scientific Assessment of Current Status and Future Trends in Resource Abundance and Environmental Quality in the Strait of Juan de Fuca, Strait of Georgia and Puget Sound, Report to the British Columbia and Washington Environmental Cooperation Council by the British Columbia and Washington Marine Science Panel, August 1994 .

[12.](#) *Saving Species: Building Habitat into Endangered Species Conservation in Canada*. (Wildlife Habitat Canada: Ottawa, 1995)

[13.](#) *Saving Species: Building Habitat into Endangered Species Conservation in Canada*. (Wildlife Habitat Canada: Ottawa, 1995)

[14.](#) National Research Council, Committee on Scientific Issues in the Endangered Species Act, *Science and the Endangered Species Act*, National Academy Press, 1995, at.

[15.](#) Ibid, at 72.

[16.](#) *Saving Species: Building Habitat into Endangered Species Conservation in Canada*. (Wildlife Habitat Canada: Ottawa, 1995) at 202-4.

[17.](#) The *Marine Mammal Regulations*, SOR/93-56, prohibit disturbance of marine mammals, but do not protect habitat. The *Fisheries Act* does prohibit damage to fish habitat and the definition of fish includes marine mammals, but court decisions have limited habitat protection to instances where a fishery of commercial or recreational value exists: *R.v.MacMillan Bloedel Ltd.* (1984) 50 B.C.L.R. 280 (C.A.). The habitat of the right whale may or may not coincide with the existence of a fishery.

[18.](#) Michael J. Bean, "Taking Stock: The *Endangered Species Act* in the Eye of a Growing Storm" [1992] 13 *Public Land Law Review* 77 at 81. Mr. Bean is a senior attorney and was chairman of the wildlife program of the Environmental Defence

Fund at the time this article was written.

[19](#). The coastal sage scrub community in southern California provides an example of how this type of plan works. In 1991, the Manomet Bird Observatory and the Natural Resources Defence Council petitioned to list the California gnatcatcher as an endangered species. They presented evidence that between 70-90% of the coastal sage scrub habitat on which the gnatcatcher depends had been lost to agricultural and residential development. Because of the value of the real estate involved, developers aggressively opposed the petitions. The California state government decided this was a good opportunity to try out its new natural community conservation plan (NCCP) program. Instead of proceeding with a single species recovery plan, the California Fish and Game Commission sought the advice of a scientific review panel on a conservation plan for the coastal sage scrub ecosystem. The panel focused on three species of vertebrates of concern and produced interim guidelines for limits on land development: for example, no more than 5% of the coastal sage scrub was to be affected. The plan that was developed protects the gnatcatcher as well as more than 20 other threatened or endangered vertebrates and nearly 100 other rare or endangered plant species, while allowing some limited development to occur. See Jonathan L. Atwood & Reed Noss, "Gnatcatchers and Development : A 'Train Wreck' Avoided?" (1994) 10 *Illahee* 123; Michael Mantell, "Beyond Single Species: The California Experiment" (1994) 10 *Illahee* 131.; National Research Council, Committee on Scientific Issues in the Endangered Species Act, *Science and the Endangered Species Act*, National Academy Press, 1995, at 84-89. The Committee identified this NCCP program as a model for better recovery planning.

[20](#). These two incentives have been recommended for inclusion in the American regulatory regime for endangered species protection; *Rescuing the Endangered Species Act*, Conservation Issues, vol. 2, no.4, World Wildlife Fund: Washington, U.S., August, 1995.

[21](#). David Farrier, "Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?" (1995) vol. 19, no.2, *Harvard Environmental Law Review*, 303 -408.

[22](#). James Salzman, "Evolution and Application of Critical Habitat under the Endangered Species Act", (1990) vol. 14, *Harvard Environmental Law Review*, 311-342.

[23](#). National Research Council, Committee on Scientific Issues in the Endangered Species Act, *Science and the Endangered Species Act*, National Academy Press, 1995, at 72.