



Legal backgrounder

The Species at Risk Act (2002)

Overview

The *Species at Risk Act* (SARA) is one of Canada's key federal environmental laws. Its passage into law in 2002 represented an important step forward in protecting Canada's wildlife and their habitat, and in addressing the ongoing loss of biodiversity (including loss of species) in Canada.

Humans are now causing the sixth major extinction event in the planet's history; enormous numbers of species are either disappearing or declining rapidly. The federal government stated in the 1995 Canadian Biodiversity Strategy that, "As a result of human activities, ecosystem, species and genetic diversity are being eroded at a rate that far exceeds natural processes. This accelerating decline in diversity threatens the ecological, economic, spiritual, recreational and cultural benefits that we currently derive from the Earth's living resources."

The decline of Canada's species is well illustrated by a 2008 scientific study in British Columbia, which found that 43 per cent of the province's species are at risk (more than 1,600 at-risk species out of about 3,800 species assessed).

There is strong scientific consensus that the main reason for this wave of extinction and species decline is human-caused loss or degradation of wildlife habitat. For example, loss or degradation of the areas where our wildlife live, feed, breed, and raise their young is the main cause of endangerment for 84 per cent of Canada's species at risk. Thus, SARA can only achieve its purposes of preventing extirpation or extinction of species and encouraging the recovery of species at risk by protecting the habitat species need to survive and recover.

There are several reasons why we need a strong federal law to protect species at risk:

- SARA isn't just about protecting species: the loss of Canada's native plants and animals directly threatens our economy and our health. Species act as basic building blocks for the natural systems we rely on to provide us with clean water, clean air, carbon storage, pollination, food and raw materials for industry. The long-term health and stability of these natural systems depends on maintaining the diversity of their species.
- SARA is also important to maintaining Canada's obligations under international law; it was part of Canada's response to the international *Convention on Biological Diversity*. Amongst other things, the *Convention* requires us to develop or maintain necessary laws to protect threatened species.

- The federal government, environmental law experts, and the Canadian public recognized in the 1990s (after we signed the *Convention*) that Canada's ongoing failure to enact legislation to protect species left a major gap in Canada's federal environmental laws. Most industrialized countries have had laws to protect threatened species and their habitat for some time. For example, the United States passed a strong *Endangered Species Act* almost 40 years ago. While certain provinces tried to fill the gap with endangered species legislation, this patchwork approach excludes provinces like B.C. and Alberta, both of which have essentially no legislation at all to protect threatened species and their habitat. Several other provinces have only weak laws to protect species at risk. Even provinces with relatively strong laws have limited powers to address the decline of species that straddle provincial or international borders.
- SARA is the only law we have that requires an overall recovery plan for a species that covers its entire population in Canada on all relevant lands and waters, whether federal, provincial or privately owned — a single, coherent plan is by itself valuable to species' recovery.
- Finally, an effective federal species law also helps maintain Canadian industry's "social licence" to operate — for example, it helps Canadian companies sell their products in other countries that care about the environmental impacts associated with the extraction of natural resources.

History of SARA

- The law is called the *Species at Risk Act* — usually called "SARA" for short. It was passed in 2002, and came into full effect in 2004.
- After Canada signed on to the international *Convention on Biological Diversity* in 1992, there were three unsuccessful attempts to pass federal legislation to protect species at risk, with three separate bills dying on the order paper.
- SARA is by no means a perfect law, and was enacted following years of work and careful compromise before Parliament. The contents of SARA reflect extensive negotiations, debates and consultations among Canadians, including major Canadian industry groups, environmental organizations, landowners' groups, First Nations, all major political parties, and the Canadian public.

How does the law work?

The basic purposes of SARA are to prevent wildlife species from becoming extirpated or extinct, to provide for the recovery of endangered and threatened species, and to prevent other species from becoming endangered or threatened. SARA generally achieves these purposes by requiring the timely identification and protection of critical habitat (the habitat a species needs to survive and recover), especially for "federal species" (aquatic species and migratory birds) and for all listed species on federal lands (First Nations reserves, national parks, national defence property, etc.). The federal government has exclusive jurisdiction to protect these species and lands.

SARA protection may be extended to other species on provincial lands where there are no provincial laws that provide effective protection, if Cabinet issues a so-called “safety-net” order. To date, no such orders have been issued, even when provinces have essentially no laws at all to protect threatened species and their habitat.

Companies or people whose activities may affect a species or its critical habitat may be allowed to continue these activities (as modified to protect the species, where appropriate) by applying for permits that may allow some incidental harm to the species so long as certain pre-conditions are met.

The SARA process is roughly as follows:

- An independent body of scientists (COSEWIC) assesses the condition of species in Canada and recommends to the federal government whether species should be legally “listed” under SARA (as endangered, threatened, special concern, etc.).
- Within nine months of COSEWIC’s listing recommendation, Cabinet must add the species to the legal list of species at risk, or give reasons if it chooses not to do so.
- Listing a species under SARA generally gives little or no immediate protection. “Federal” species, including fish and migratory birds, receive some immediate protection from harm, as do all listed species on federal lands — but the vast majority of listed species (about 70 per cent) receive no automatic protection at all under SARA on 94 per cent of Canada’s land-base, even in provinces that do not have their own laws to protect species.
- The preparation of a recovery strategy (within one year of listing for endangered species, two years for threatened), and related identification and protection of a species’ critical habitat, is perhaps the most important step in protecting species under SARA. SARA defines critical habitat as the habitat necessary for the survival or recovery of a species. For most species, identifying and protecting critical habitat is the most important step in preventing their extirpation or extinction and in recovering them to a healthy state. The Courts have clarified that SARA recovery strategies must be based only on scientific information about a species’ needs and about the threats it faces, and not on socio-economic considerations.
- Once critical habitat is identified, the federal government must prohibit the destruction of that habitat for aquatic species or for any species on federal lands. Critical habitat for migratory birds on provincial lands can be protected by Cabinet order (though this has never been done). The federal government may also protect critical habitat of other species on provincial lands through the use of SARA’s “safety net” provisions (these provisions have never been used).
- After a recovery strategy is completed, SARA requires the federal government to decide, in consultation with all relevant stakeholders, what management actions they will take to carry out the recommendations in the recovery strategy. These

planned management actions are published in SARA “action plans.” The government can take socio-economic factors into account at this stage in determining how to implement recovery actions for species at risk.

- At any point in the process set out above, a company or person whose activities may affect a threatened species or its habitat may apply for a permit. They may also enter conservation agreements with the federal government for the benefit of species at risk. To date, the federal government has not entered into any conservation agreements.

In short: the key point of SARA is to identify and protect the critical habitat of Canada’s species at risk. A law that fails to do this in a rigorous way will not prevent the extirpation or extinction of the majority of Canada’s threatened plant and animal species, or provide for their recovery.

What is SARA helping protect?

SARA is a relatively new environmental law, and the scale of the problem it is meant to address is immense. The federal government has been slow to implement the initial steps in SARA, especially recovery planning and identification of critical habitat. After 10 years, the federal government is only now starting to contemplate protecting the critical habitat of some species. Other countries that have had endangered species laws for long enough to implement them properly have succeeded in saving species from extinction and in moving them towards recovery. For example, scientists estimate that, without the US *Endangered Species Act*, at least 227 additional species would have gone extinct since 1973, when the landmark law was passed ([Scott et al. 2006](#)).

One of the best examples of SARA’s strong protections for species at risk comes from a case Ecojustice brought on behalf of nine environmental groups to protect the Orca (killer whale) and their habitat. Following successful litigation in the Federal Court and Federal Court of Appeal, the federal government is now required under SARA to protect key parts of the critical habitat of the northern and southern resident killer whales off the coast of B.C. Now the Department of Fisheries and Oceans must ensure that the Orca get enough fish to eat, that they are protected from increasing pollution and that they are also protected from noise caused by ever-increasing boat traffic. For example, the Department of Fisheries and Oceans is now required to ensure, including through limiting fisheries, that Chinook salmon are available to the Orca to protect the whales and their young in years when the population of Chinook salmon is low.

There are now recovery strategies completed for roughly 180 species under SARA (146 are final, 33 are drafts). To the extent these strategies use sound science to identify what a species needs to survive and recover, they provide a huge benefit to Canada’s species at risk. The information in these strategies can inform decisions made by all levels of government, and stewardship by the public. The strategies also provide accurate, transparent information for the public about the state of Canada’s wildlife and natural heritage. Based on a review of the timing of Ecojustice’s court cases and the preparation of recovery strategies under SARA, it is clear that Ecojustice’s litigation has prompted the completion of national recovery strategies, the identification of species’ critical habitat, and greater protection for species at risk.

No other legal tool in Canada requires an overall recovery plan for a species that covers its entire population in Canada on all relevant lands and waters, whether federal, provincial or privately owned — a single, coherent plan is by itself valuable to species' recovery. For example, scientifically sound recovery strategies that identify critical habitat are assisting conservation and stewardship of northern and southern resident killer whales, the prairie population of piping plover, and the Aurora trout.

What changes are being proposed to the law?

Under the federal *Budget Implementation Act, 2012* (first reading version of the bill), two main changes to SARA are proposed:

- **No maximum term for SARA permits**
Permits under s. 73 of SARA are currently limited to a five year term, and can be renewed when they expire. Such permits serve as “exemptions” from the law’s prohibition measures, which protect listed species and their critical habitat. The terms and conditions contained in s. 73 permits are intended to ensure the exempted activities do not jeopardize species’ survival or recovery. Under the proposed amendments, SARA permits would no longer have a maximum term — permits could extend for very long periods of time, without any requirement for regular review of permit terms (even, for example, when there is a drastic decline in the status of a species affected by a permitted activity).
- **National Energy Board pipeline approvals need not minimize impacts on the critical habitat of species at risk**
Under s. 77 of SARA, when federal departments and agencies issue permits or approvals, they are generally required to ensure that reasonable measures have been taken to minimize impacts on the critical habitat of species at risk. The proposed amendments in the *Budget Implementation Act* would specifically exempt the National Energy Board from this requirement when it issues approvals for pipelines and other major infrastructure.

Ecojustice understands that further, more substantial changes to SARA will be proposed later in 2012, in a separate bill. We are monitoring the situation carefully and preparing to advocate strongly against further weakening of the law.

What’s the impetus for these changes?

Several industry groups have been asking for more clarity about the renewal of permits under SARA, especially for major projects like hydroelectric dams that operate for long time periods. Ecojustice is generally in favour of clearer terms for renewal of SARA permits (for example, the federal government could use its existing powers under s. 73(10) of the Act to pass regulations clarifying when and how permits may be renewed). In our view, if long-term permits are to be issued at all, they should be issued only in exceptional circumstances and must be subject to regular government review to ensure that permit terms and conditions are not jeopardizing the survival or recovery of listed species. The proposed amendments allowing “eternal” permits go much further than necessary and threaten to undermine the primary purposes of SARA.

The proposed changes exempting the National Energy Board from s. 77 of SARA appear to be designed primarily to expedite the approval of pipelines and other major energy infrastructure projects in Canada by reducing sensible environmental oversight of these projects. The proposed changes would remove the requirement for the NEB to ensure in advance of issuing an approval that reasonable measures have been taken to minimize impacts on the critical habitat of species at risk. The NEB would be the only federal agency or ministry exempt from these requirements. These proposed changes make no sense in the overall context of the federal regulatory scheme, and threaten to undermine the long-term health and survival of Canada's wildlife and natural systems in exchange for questionable short-term benefits to the oil and gas industry.

Ecojustice and SARA

Ecojustice (formerly Sierra Legal) has played a leading role in an extensive campaign for a federal law to protect species since the 1995 inception of the Canadian Endangered Species Coalition. This campaign has included foundational legal research and analysis, national communications and outreach work, national coordination of environmental groups and other stakeholders, and participation throughout parliamentary committee review of the bill(s) that became the *Species at Risk Act*, followed by an extensive, structured legal strategy to ensure SARA's full implementation, enforcement and strategic use.

Much of our more recent litigation has been brought under SARA — it's one of the few federal laws (or Canadian environmental laws generally) that imposes strong, court-enforceable duties on government to protect wildlife and its habitat.

What is Ecojustice doing about potential changes to the law?

Ecojustice has worked to prevent the gutting of SARA for the last couple of years, since the start of the five-year Parliamentary review process for the Act. SARA contains a provision that required the federal government to review the Act five years after it came into effect. We have been working since then to maintain and improve protections for species and their habitat under SARA, by:

- Working with other Canadian environmental groups, moderate industry groups, and farmers' and landowners' groups;
- Making legal submissions to the federal government and to Parliamentary committees;
- Continuing to advocate publicly about the importance of strong, properly-implemented species laws in addressing the ongoing loss and decline of Canada's threatened wildlife and their habitat;
- Clearly demonstrating, through precedent-setting litigation, that SARA needs to be implemented effectively; and
- Ensuring that political debates around appropriate legal habitat protection under SARA are informed by objective science.

