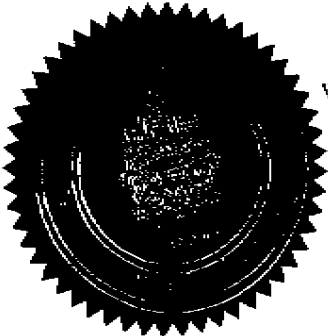


Vancouver No. 1-1529-07

FEDERAL COURT OF CANADA

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PERSON
Officer

BETWEEN:



ENVIRONMENTAL DEFENCE CANADA,
GEORGIA STRAIT ALLIANCE and
WESTERN CANADA WILDERNESS COMMITTEE

APPLICANTS

MINISTER OF FISHERIES AND OCEANS

RESPONDENT

Department of Canada
100
1065
George Street
Vancouver, B.C. V7Y 1B6

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at *Vancouver, British Columbia*.

IF YOU WISH TO OPOSE THIS APPLICATION, to receive notice of any step in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules, 1998* and serve it on the applicants' solicitor, or where the applicants are self-represented, on the applicants, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Court Rules, 1998*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

This document is a true copy of
the original filed in the Court on the
7 2007 A.D. 20
7 7 2007
idea McNeil

APPLICATION

This is an application for judicial review of the decision of the Minister of Fisheries and Oceans (the "Minister") on July 23, 2007 to approve a Recovery Strategy for the endangered Nooksack dace that does not comply with the *Species at Risk Act*, S.C. 2002, c.29 ("SARA").

More particularly, the Applicants submit that the Minister released the Recovery Strategy for the Nooksack dace notwithstanding it failed to comply with section 41(1)(c) of the SARA in that it did not identify the Nooksack dace's critical habitat to the extent possible.

The Applicants make application for:

1. An order quashing or setting aside the Minister's decision to approve the Nooksack dace Recovery Strategy;
2. An order setting aside the Nooksack dace Recovery Strategy and referring it back to the Minister with the direction that it be amended forthwith to identify critical habitat pursuant to section 41 of the SARA and released.
3. An order or orders in the form of a declaration:
 - a. Declaring that the Minister erred in law, acted unreasonably and/or acted without jurisdiction in approving the Nooksack dace Recovery Strategy when it did not comply with section 41 of the SARA;
 - b. Declaring that the Minister considered irrelevant matters or failed to consider relevant evidence in approving the Nooksack dace Recovery Strategy when it did not comply with section 41 of the SARA;
 - c. Declaring that the Minister acted without jurisdiction by fettering his discretion in approving the Nooksack dace Recovery Strategy when it did not comply with section 41 of the SARA;
 - d. Declaring that the Minister based his decision on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before him.
4. An order that the Applicants shall not be required to pay costs to the Respondent of the Application, pursuant to Rule 400 of the *Federal Courts Rules*, in the event that the Application is dismissed.

The grounds for the application are:

The Species at Risk Act and the Nooksack Dace

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

...to prevent wildlife species from becoming extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened (s.6).
3. The Nooksack dace is a small (<15 cm) stream-dwelling minnow. Within Canada it is known from four lowland streams in British Columbia's Fraser Valley. The global distribution includes approximately 20 additional streams in north-west Washington.
4. The Nooksack dace is "listed" pursuant to the SARA as an "endangered" species, meaning that it on the List of endangered Wildlife Species set out in Schedule 1 to the SARA. The dace's status as "endangered" means that it is "a wildlife species that is facing imminent extirpation." "Extirpated" means no longer existing in the wild in Canada, but existing elsewhere in the wild. (s.2). The Nooksack dace is extirpated from some tributaries in Canadian watersheds where it was abundant in the 1960s.
5. Listing triggers SARA's provisions to prevent extirpation and provide for recovery of species. These include prohibitions against harm (s.32), protections for residence (s.33) and the requirement of the Minister to undertake recovery planning (ss.37-46) and recovery plan implementation ("action planning") (ss.47-64).
6. Essential to the recovery planning process is the Minister's preparation of "recovery strategies" which "must address the threats to survival of the species" (s.41). Recovery strategies must, *inter alia*:
 - describe the species and its needs,
 - identify the threats to its survival and threats to its habitat; and,

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

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

9. The Nooksack Dace was a species listed on Schedule 1 of the SARA when the Act came into force, therefore the Recovery Strategy was due June 5th, 2006 (ss. 42(2)).
10. The SARA requires a proposed recovery strategy to be placed on a SARA Public Registry where, for 60 days, the public may file written comments with the Minister (s.43(1)). 30 days after this, the Minister must include the final recovery strategy on the Public Registry (s.43(2)).
11. A draft Nooksack dace Recovery Strategy was posted to the Public Registry on or about September 25th, 2006. Comments were submitted on behalf of the Applicants which noted, *inter alia*, the failure of the Recovery Strategy to identify critical habitat notwithstanding that its location is known. On July 23, 2007, one year after it was due, the final Nooksack Dace Recovery Strategy was posted to the Public Registry.
12. The Recovery Strategy does not identify critical habitat while identifying loss of habitat as one of the main threats to the Nooksack dace’s survival, and recommending habitat protection in ensuring the species’ survival and recovery.
13. The Recovery Team, formed to provide the minister with advice on the Recovery Strategy and comprised of leading experts regarding the Nooksack

Dace, could and did identify critical habitat and wished to include that identification of critical habitat in the Nooksack Dace Recovery Strategy.

14. But, at the direction of the Minister and/or his delegate, the Recovery Team removed the identification of critical habitat from the Recovery Strategy and inserted it into a separate document which was not posted to the Public Registry. By correspondence dated May 28, 2007, the Recovery Team wrote to the Department of Fisheries and Oceans objecting to critical habitat being removed from the Recovery Strategy. They requested that the Recovery Strategy include a disclaimer which would say that the Recovery Team identified critical habitat but produced it in a separate document which was being peer reviewed and that, to conform with current policy, the Recovery Strategy did not make specific recommendations on critical habitat. The final Nooksack dace Recovery Strategy, posted to the Public Registry on July 23, 2007, included this disclaimer.

The Applicants

15. The Applicants are "public interest groups" in that they are charities that work for environmental protection and have no personal, proprietary or pecuniary interest in the outcome of this Application.
16. The Applicants believe that they need to bring this Application to address federal failure to implement the SARA, which failure is further endangering Canada's at risk species. They believe that an order requiring SARA to be complied with is in the public interest because the viability of Canada's wildlife populations is a matter affecting all Canadians.
17. The Applicants also believe that, unfortunately, they have no choice but to litigate this matter. Each of the Applicants has a record of working to protect at-risk species and also a record of working, using non-litigious means, to ensure that the federal government, including the Respondent Minister, implements the SARA. They bring this Application only in the face of overwhelming evidence that: (a) the Canadian government is attempting to avoid its obligation to implement the SARA so as to protect Canada's at-risk species; and, (b) non-litigious means have not proven effective in ensuring this whereas litigation, or its threat, has proven effective.
18. For example, seeking to divert the federal government from its course of not identifying critical habitat in recovery strategies, on December 4th, 2006 some of the Applicants sued the federal government (F-2143-06) for releasing the recovery strategy of the Piping Plover, an endangered bird, where the recovery strategy failed to identify critical habitat when its identification was possible. After issuing the Application and without filing any supporting affidavits, on March 15, 2006 the Minister of the Environment issued a new recovery strategy for the Piping Plover that identified critical habitat. The Application was therefore not pursued.

19. The Plover application was followed by numerous meetings between some of the Applicants and the representatives of the federal government including from the Department of Fisheries and Oceans to attempt to ensure that future recovery strategies would identify critical habitat where it was possible to do so. The release of the Nooksack Dace Recovery Strategy suggests this approach is not, as the Applicants had hoped, effective.
20. Such further additional grounds as counsel may identify and this Honourable Court may consider.

This Application will be supported by the following material:

1. An affidavit on behalf of the Western Canada Wilderness Committee, to be served.
2. An affidavit on behalf of Environmental Defence Canada, to be served.
3. An affidavit on behalf of the Georgia Strait Alliance, to be served.
4. Such further and additional materials as counsel may advise and the Court may allow.

Rule 317 request:

The Applicants request that the Minister send a certified copy of the following material that is not in the Applicants' possession but is in the Minister's and Department of Environment's possession to the Applicants, and to the Registry:

1. The record of materials before the Minister and the Department of Fisheries and Oceans relevant to the preparation and approval of the Nooksack dace recovery strategy.

Date: August 17th, 2007



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