

Date: February 16, 2004

To: Wade Romanko, EPB

From: Vanessa Charlwood

Re: Paramount EA, IR Round 2, IR #1.2.1 Response

Introduction

Environment Canada (EC) submitted its response to round 2 information requests (IR) on January 19, 2004, but its response did not include an answer to IR Number 1.2.1 about the *Species at Risk Act* (SARA). The Canadian Wildlife Service asked for an extension to respond to this request. This document will address the questions raised in IR Number 1.2.1.

IR Number: 1.2.1

Source: GNWT

To: Environment Canada (Canadian Wildlife Service)

Preamble: *Species at Risk Act (SARA)*

Environment Canada (Canadian Wildlife Service) Response:

Please clarify the meaning of the legislation in terms of:

- 1) The interpretation of Environment Canada in the applicability of SARA to existing or planned developments within the Northwest Territories.**

CWS Response:

The *Species at Risk Act* applies to all lands in Canada, and therefore to existing and future approved developments within the Northwest Territories.

- 2) The application of Section 77 to the Mackenzie Valley Land and Water Board, Department of Indian and Northern Affairs and the National Energy Board in authorizing a project within habitat of a Listed Species in the Northwest Territories.**

CWS Response:

Section 77 of SARA applies to the Mackenzie Valley Land and Water Board, Department of Indian and Northern Affairs and the National Energy Board.

Before any of these bodies issues a licence/authorization or approves an activity that may result in the destruction of **critical habitat** of a listed species, they must comply with all parts of Section 77 including:

- To consult with the competent minister (Minister of DFO for marine or freshwater aquatic species, or the Minister of the Environment for all species in National Parks and for all other species elsewhere); and
- To consider the impact of the proposed activity on the species' critical habitat and be satisfied that:
 - all reasonable alternatives to the activity have been considered and the best solution has been adopted; and
 - that all feasible measures will be taken to minimize the impact of the activity on the species' critical habitat.

It is reasonable to assume that the requirements of Section 77(1)(a) and (b) will be addressed through consultation with the competent minister. That is designatd officials on behalf of the competent minister (ie. CWS, DFO or Parks Canada Agency), could provide advice on how the approving/ licencing body may ensure that the Section 77(1)(a) and (b) conditions are met.

**It is important to note that any authorization or approval under section 77 of SARA is not equivalent to a permit issued under section 73 of SARA. This means that even if the requirements of s. 77 are met and approval for an activity is given, it will still be illegal to destroy critical habitat (see: Sections 58 and 61) or violate the prohibitions protecting individuals and residences (see: Sections 32 and 33) when prohibitions are in place.*

**It is also important to point out that Section 77 deals specifically with critical habitat, which for most species that are listed in the NWT, has not yet been identified in a finalized Recovery Strategy or Action Plan that is included in the SARA Public Registry.*

3) The application of Section 79 to the Mackenzie Valley Environmental Impact Review Board when conducting an environmental assessment that includes the range of Listed Species.

CWS Response:

Section 79 of SARA applies to the Mackenzie Valley Environmental Impact Review Board because the Board "...ensures that an assessment of the environmental effects of a project is conducted..." under the *Mackenzie Valley Resource Management Act* (an Act of Parliament). MVEIRB must comply with Section 79 of SARA in its entirety including:

- Notifying the competent ministers in writing if a project is likely to affect a listed species or its critical habitat; and
- Ensuring that adverse effects of the proposed project on listed species and their habitat are identified

- Ensuring that if the project is carried out, measures are taken to avoid or lessen adverse effects on listed species and their critical habitat. The measures must be consistent with any recovery strategy or action plan for the species.
 - Ensuring that if the project is carried out, measures that are consistent with any recovery strategy or action plan for the species are taken to monitor adverse effects on listed species and their critical habitat.
- 4) The role of Environment Canada, DIAND or other Federal Departments in defining steps that must be taken to avoid or lessen the effects of a development and to monitor the effects if a project goes ahead as per Section 77 of the Act in the Northwest Territories.**

CWS Response

CWS is unsure if this question refers to Section 77 or to Section 79 of SARA. The following answer will address both sections.

Section 77

Section 77 of SARA is meant to capture activities **that may result in the destruction of critical habitat, regardless of whether there is a formal environmental assessment** of those activities. Section 77 deals with licences and approvals that are granted by those bodies described in that section. Section 77 places the onus on the authorizing/licencing body to ensure that the requirements of Section 77 are complied with. See our answer to question #2 for details.

Section 79

Section 79 of SARA is meant to capture any projects that undergo a formal environmental assessment under any Act of Parliament **that may affect a listed species OR its critical habitat**. The onus to ensure compliance with Section 79 is on the the person who carries out the environmental assessment (ie. MVEIRB, etc.). Compliance with Section 79 is explained in the answer to question 3. The person who conducts the environmental assessment may consult with federal departments and agencies that have specialized knowledge and expertise in relation to the listed species, their critical habitat.

- 5) The specific federal permits required to permit the harming, or destruction of critical habitat on June 1, 2004 (section 73 of the Act) in the Northwest Territories. Please clarify how a developer applies and who will issue.**

CWS Response

The prohibition protecting critical habitat can only be applied once the critical habitat has been identified in a finalized recovery strategy or action plan posted on the SARA Public Registry. Once critical habitat is identified and the prohibition section becomes

operative, permits may be required. CWS is currently developing a policy on issuing permits and creating agreements under section 73 of SARA.

To determine whether a listed species' critical habitat has been identified, refer to the SARA Registry online at www.sararegistry.gc.ca

**It is important to point out that, as provided for in para. 58(4)(a) of SARA, critical habitat can be legally protected by means other than the application of a prohibition, such as a conservation agreement under s. 11. In instances where critical habitat protection is provided by means other than a prohibition, a permit under s. 73 will not be required.*

As well, the prohibitions protecting individuals and residences (ss. 32 and 33) will apply automatically in the Northwest Territories **only in the case of aquatic species, migratory birds protected by the Migratory Birds Convention Act, 1994 and on land under the authority of the Minister of Environment or the Parks Canada Agency. Otherwise an order of the Governor in Council is required to make the prohibitions in sections 32 and 33 operative. Permits or agreements under s. 73 are required only when these prohibitions apply.*

6) How recovery plans will be developed and the level of coordination between jurisdictions on Federal Lands in the Northwest Territories (e.g. Department of Indian and Northern Affairs, Government of Alberta, etc.)

CWS Response

The *Species at Risk Act* spells out many avenues for consultation and cooperation between the federal government, the public, aboriginal peoples and provincial/territorial governments. Sections 39 and 47 of SARA require that, to the extent possible, recovery strategies and action plans will be developed in cooperation with directly affected parties and interested landowners. The mechanism for these consultations has yet to be determined.

The competent ministers under SARA have already initiated negotiations with the Government of the Northwest Territories for a bilateral agreement on the administration of SARA in the NWT. The bilateral agreement will cover such issues as cooperation for species status assessment, collaboration on the issuance of permits for activities impacting species at risk, recovery planning, enforcement, etc.

7) The requirements for developers and departments managing federal lands to participate in recovery plan development and implementation under Section 78 of the Act in the Northwest Territories.

CWS Response

Section 78 of SARA refers to a situation where an agreement has been made between competent ministers and a province or territory (Section 10 of SARA) and the territory

issues an authorization for an activity that may affect a listed wildlife species, its critical habitat or residence. The authorization issued by the territory is considered equivalent to a permit issued under subsection 73(1) if the conditions of paragraphs 78(1)(a) and (b) are met. It is the responsibility of the territorial minister to ensure compliance with paras. 78(1)(a) and (b).

As noted above, negotiations for a bilateral agreement between the competent ministers under SARA and the GNWT (as per Section 10 of SARA), have already begun.

Any recovery strategy or action plan development will involve cooperation between all affected parties (see answer to question 6).