



*Canadian Hydropower  
Association  
Association canadienne  
de l'hydroélectricité*

*Species at Risk Act*

**Five Year Review**

**Submission to the Parliamentary Committee on Environment and  
Sustainable Development**

**Canadian Hydropower Association**

May 8, 2009

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## **PART I - INTRODUCTION**

### **1. The CHA and SARA**

Founded in 1998, the Canadian Hydropower Association (CHA) is the national trade association dedicated to representing the interests of the hydropower industry. Its members span the breadth of the industry and, with nearly 50 members, include hydropower producers, manufacturers, developers, engineering firms, organizations and individuals interested in the field of hydropower. The CHA is the principal voice of Canada's hydropower industry. CHA members represent close to 95 per cent of the total product capacity of all hydropower in Canada.

The CHA advocates the responsible use of hydropower to meet our present and future electricity needs in a sustainable manner and is supportive of the value placed on Canadian wildlife as set out in the preamble of the *Species at Risk Act* ("SARA") and to Canada's commitment to conserving biological diversity.

Of the greenhouse gases produced in Canada, 17 per cent come from electricity generation, of which 84 per cent comes from coal-burning generating stations. Greenhouse gases and the consequent climate change are major threats to our forests and fisheries, and particularly to species at risk. The hydroelectric power industry uses a renewable resource to generate electricity without creating air pollution or contributing to global warming. Hydropower already meets 60 per cent of Canada's electricity needs, and Canada still has a large undeveloped hydropower potential that represents over twice the amount currently in operation. The further development of these resources can play a major role in reducing our future GHG emissions while providing reliable, flexible and competitive power to meet our future needs. A large number of hydropower projects are being considered, planned or built in most regions of Canada.

The projects currently being planned represent over 50 billion dollars in capital investment. However, such massive long-term development requires a reasonably certain legal framework that will encourage investment while providing the necessary protection for the environment. Investors in new hydropower infrastructure would be reluctant to put at risk billions of dollars without such reasonable regulatory certainty, which is currently lacking under SARA; particularly given that hydropower facilities require long construction periods (e.g. five years) and that they have long lives (up to 100 years). As currently drafted, SARA introduces unusually large uncertainties which do not exist under other legislation such as the *Fisheries Act*, the *Canadian Environmental Assessment Act* and the *Navigable Waters Protection Act*. There are significant uncertainties and concerns as to what the requirements, costs and regulatory time would be to achieve licences and authorisations under such legislation, but at least once the licences, approvals and authorisations are received, there is generally reasonable assurance that if the project is then built, the regulatory requirements are mainly known. However with SARA, there is only limited ability to obtain such level of assurance for three or five years, and none beyond that.

The CHA has several concerns with SARA itself, and with policy and implementation of the Act. The CHA understands that while Environment Canada and the DFO have acknowledged the need for better policy and implementation, they are not convinced that the Act needs major revising. The CHA believes that even if SARA is not to undergo comprehensive amendment,

certain of its provisions in their current form have major adverse impacts on the hydropower industry and must be modified. The CHA submits that the full implementation and enforcement of SARA, as currently drafted, would threaten the continued operation of some existing hydropower facilities, and that in many cases it would become an obstacle to the development of new projects. However, the CHA further submits that, with appropriate revision, SARA can protect Canada's species at risk, and allow for the development and operation of clean renewable energy, particularly hydropower.

## 2. Authorisation of Activities: the CHA's Priority Issue

The most critical issue facing this industry under SARA is the inadequate provision for authorisation of both existing and new facilities. Without improvement to these provisions, once SARA is fully implemented many hydroelectric power facilities will not be able to continue to operate with the certainty that they are in full compliance with SARA. This is clearly untenable and with respect, must be addressed. While it may be possible to implement some policy initiatives to address some of the limitations with SARA's permitting provisions, such solutions will only be workable if they are supported by legislative amendment.

The CHA has identified the following two principal solutions to the "authorisation" issue:

- 1) Amendments to the exemptions provisions to allow for activities to go forward in compliance with conservation agreements.
- 2) Amendments to the existing permitting provisions to remove the three or five year restrictions and to allow for efficient renewal.

The CHA believes both of these solutions should be implemented, as one or the other may be appropriate for use depending upon the particular species or critical habitat at issue. Details of the suggested amendments are set out in the discussion to follow, however, the CHA stresses that the amendments required to implement these solutions are *not extensive*. What is needed is a straightforward mechanism for the permitting of activities that have incidental impacts to listed species but do not affect their survival or recovery.

If it is the Committee's recommendation that only one of the suggested solutions is to be considered, the CHA prefers the first, that is, amendments to SARA to provide exemptions from its prohibitions provided there is compliance with a conservation agreement. It is the CHA's understanding that conservation agreements were intended to be a flexible instrument, which can be written to suit the individual circumstances of each species (or group of species) and the needs of the contracting parties and the CHA believes that such flexibility is essential. These agreements should allow for a wide variety of management techniques which could be tailored to the needs of the species, the community and the economy. In addition, they provide more scope for application to multi-species, that is, an ecosystem-based approach. This flexibility and scope is needed to address the complex issues facing hydroelectric power facilities in complying with SARA.

While current and previous governments have publicly stated that the focus of their attempts to protect and recover at risk species are in cooperative stewardship, SARA actually has very few

mechanisms supporting this approach. The experience of CHA members has been that the focus is on prohibitions and permitting. It is instructive that five years after SARA came into force, no conservation agreements have been completed. However with amendments to SARA as recommended herein, the CHA believes there will be renewed focus on a cooperative stewardship based approach.

### 3. **Comments on Amendment and Implementation**

The CHA believes that better mechanisms are needed in SARA to encourage participation by the industry early in the processes, to provide guidance to regulatory authorities in the way they interpret and enforce the Act, and to encourage stewardship and cooperation rather than confrontation and enforcement.

The CHA notes that while aquatic species are of principal concern for the hydropower industry, terrestrial animals and plants are also vital. As a consequence, many members deal with both Environment Canada (EC) primarily through its agency the Canadian Wildlife Service (CWS), and the Department of Fisheries and Oceans (DFO), regarding SARA's implementation. A number of the issues that have arisen under SARA are exacerbated by more than one agency having responsibility for its implementation. The CHA believes the recommendations set out below may, to a large extent, alleviate the inconsistency in the manner in which SARA is being interpreted and implemented between agencies and between jurisdictions.

The CHA hereby submits recommendations for amendments to SARA and improvement of its implementation.

## **PART II - SUMMARY OF RECOMMENDATIONS**

The following are the key recommendations identified by CHA's members for both legislative change or policy initiatives. Greater detail of these recommendations is set out in the "Detailed Discussion" portion of this submission.

### 1. **Legislative change**

The areas where CHA members have identified the need for legislative change are set out below. These are placed in order of importance to the industry.

#### (a) **Authorisation of Activities**

SARA must be revised to provide for a comprehensive mechanism for authorisation of hydroelectric power facilities that cause incidental impacts on species at risk or their critical habitats. The CHA specifically recommends the following:

- 1) Section 11 of SARA must be amended to include enumeration of activities impacting species and critical habitat that are authorised.

- 2) Section 73 of SARA must be amended to allow for authorisations which are not restricted by an end date and/or allow for either automatic or efficient renewal.
- 3) Section 83(1) must be amended to add subsection (c): activities authorised under a section 11 conservation agreement.
- 4) The exemptions established in s. 83(4) of SARA must be revised to allow for the following:
  - a) Activities carried out in accordance with requirements in a recovery strategy, action plan or a regulation under SARA.
  - b) Activities carried out in accordance with authorisations under another federal act. While SARA currently does this, consideration should be given to:
    - i) Enumeration of the specific provisions of federal legislation which provide for such authorisation. This could be done in a Schedule to SARA or through regulations, such as is utilized under the *Canadian Environmental Assessment Act*.<sup>1</sup> The CHA prefers the concept of regulations which would allow for amendments when the relevant federal legislation is changed.
    - ii) Broadening the scope of the equivalency provisions to include provincial or territorial law.
    - iii) Grandfathering of existing federal authorisations as SARA authorisations.
  - c) Activities carried out under a conservation agreement under s. 11 of SARA.

**(b) Implementation Provisions**

The interpretation provisions of SARA need to be amended to clarify that socio-economics and sustainable development must be considered in all decision-making undertaken by competent ministers.

Consideration should be given to revising SARA to impose mandatory requirements for the development and implementation of policy direction on the interpretation and implementation of SARA.

Consideration should be given to mandatory timelines in SARA, especially with respect to key decision-making for permits and approvals. At the same time, deadlines need to be realistic. Time

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<sup>1</sup> S.C. 1992, c. 37. See for example, the *Law List Regulations*, SOR/94-636.

frames for preparation of recovery strategies have proved to be unworkable, and must be revised. Priority must be directed to those species in imminent danger of extinction or extirpation.

(c) **Recovery Planning**

Section 39 of SARA needs to be amended to clarify that the socio-economic impact of critical habitat designation must be considered by the recovery teams developing recovery strategies.

SARA should mandate that key stakeholders be invited to participate on the recovery teams.

(d) **Definitions**

The CHA recommends the definition of residence in s. 2 of SARA be amended as follows:

*“residence” means a dwelling place, such as a den, nest or similar area or place, that is occupied or habitually occupied by one or more individuals during all or part of its life cycles, including breeding, rearing, staging, wintering, feeding or hibernating, and is described in a residence description.*

*“residence description” means a description of the residence of a species listed as endangered or threatened posted by a competent minister to the public registry.*

(e) **Canadian Environmental Assessment Act**

Section 79 of SARA should be amended in a manner similar to s. 20(1.1) of CEAA. This will ensure that federal authorities’ duties to ensure measures committed to in environmental assessments can be met through reliance on implementation of mitigation measures for listed species by persons or bodies other than federal authorities.

(f) **Assessment and Listing of Species**

The CHA recommends the following improvements to the assessment and listing process:

- 1) Section 15 of SARA be revised to state that COSEWIC must do the following when assessing species:
  - a) Take into account the global status of the species and, in particular, the status of the species in North America, and whether human activity in Canada will impact the species survival or recovery.
  - b) Seek input from public and private entities directly impacted by listings or who are known to have information which would assist COSEWIC in its assessments, and take such information into account in preparing its status reports.
- 2) Section 27(2) be revised as follows:

- a) To state that the Minister must consult with the public before making a recommendation to the Governor in Council.
- b) To set out the considerations that the Minister must take into account in making his/her recommendations to the Governor in Council. These considerations must include a socioeconomic impact analysis.

(g) **Federal Safety Net**

The CHA recommends ss. 34, 35 and 61 of SARA be amended to clarify the parameters of what constitutes adequate protection for the purpose of relying on other federal, provincial or territorial statutes or regulations, or to include a listing of acceptable provisions of other statutes or regulations.

2. **Policy Initiatives**

Key to the implementation of SARA is the provision of funding for the departments charged with implementation (EC, DFO and Parks Canada) to complete key policy documents which have been under development for years. Additionally, the government must provide sufficient funding for the planning and approvals that must be undertaken in order for SARA's provisions to be implemented in a manner that achieves its goals and allows for existing hydropower projects to operate and new projects to be planned and brought online.

In particular, there is urgent need for policy direction in the following areas:

- 1) Clear criteria for granting of permits and the development of recovery strategies, action plans and conservation agreements must be established to ensure there is an understanding of the mechanisms that must be in place to ensure both protection of species and critical habitat as well as long term operational certainty for hydroelectric activities.
- 2) The Government's policy that conservation agreements are the preferred method of dealing with critical habitat must be clarified and properly funded. Recovery teams should be directed to work with the hydroelectric industry to develop conservation agreements early in the process, rather than after the recovery strategy identifying critical habitat is registered.
- 3) The government's criteria for identifying critical habitat and for what constitutes "destruction" of that habitat must be finalised. This must include specific requirements for consideration of other legal requirements, including local, provincial and international obligations, and analysis of the socio-economic impact of the designation of critical habitat.
- 4) The government's interpretation of what constitutes 'harm', 'harass', 'capture' or 'take' is urgently needed.

- 5) Clear direction must be given that socio-economic analysis must be carried out by the competent ministers in all decision making.
- 6) The *Framework for the Application of Precaution on Science-based Decision Making about Risk*,<sup>2</sup> (the “Precautionary Framework”) must be formally adopted under SARA.
- 7) COSEWIC's *Assessment Process and Criteria* needs to be amended to ensure that input from public and private entities directly impacted by listings or who are known to have information which would assist COSEWIC, is collected in a consistent and thorough manner, and that the global status of the species and, in particular, the status of species in North America, is taken in account.
- 8) The consultation process undertaken by the minister prior to making recommendations to the Governor in Council on listing of species must be formalised. Such a policy must include both the manner in which the consultations are carried out, and the considerations of the minister must take into account when making his/her recommendations. These considerations must include a socio-economic analysis.

### **PART III - DETAILED DISCUSSION OF KEY ISSUES**

#### **1. Species Listing**

##### **(a) Discussion**

The listing of species under SARA is a two step process whereby there is a scientific assessment of the species followed by a determination at the federal cabinet level of whether a species should be listed. Generally, CHA members support the listing process as the nature of the decision-making by the Governor in Council allows for determinations based on a variety of considerations, and also creates public accountability for the decision. However, the CHA has concerns about the quality of information being reviewed by COSEWIC. Further, the question of the role of a socio-economic analysis in the decision-making at the ministerial level is unclear and the CHA believes it should be clarified.

The CHA is concerned that some status reports prepared by COSEWIC contain inadequate or incomplete information. The CHA believes this could be avoided if there was opportunity for input into COSEWIC's processes at an earlier stage, especially from entities with extensive experience with the relevant species, such as many of the CHA's members. Further, assessment of species with transboundary populations should take the status of the species in the United States into consideration as there are instances of listings in Canada for species not at risk south of the border. This is particularly an issue with species that exist close to the Canada- U.S. border, whose range in Canada is limited by factors such as climate.

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<sup>2</sup> Office of the Privy Council (Canada), July 23, 2003.

After receiving a species assessment from COSEWIC, the minister conducts a consultation, and in turn, makes a recommendation to the Governor in Council on whether COSEWIC's recommendations should be followed. Although the minister is required to consult with the competent ministers and relevant wildlife management boards prior to making a recommendation to the Governor in Council, there is no specific requirement to consult with industry or the public, and the considerations relevant to the minister's consultations are not prescribed. Further, while the legislation requires the Minister of the Environment to carry out the consultations, in reality, when aquatic species are involved the DFO actually carries them out. The different processes for consultation carried out by EC and the DFO prior to the minister's recommendation are confusing and inefficient. The CHA believes that notification and consultation for listing by the minister should be integrated and consistent between the DFO and EC and recommends the government consider amending SARA to ensure this occurs.

(b) **Recommendations**

(i) *Legislative Change*

The CHA recommends s. 15 of SARA be revised to state that COSEWIC must do the following when assessing species:

- 1) take into account the global status of the species and, in particular, the status of species in North America, and whether human activity in Canada will impact the species survival or recovery;
- 2) seek input from public and private entities directly impacted by listings or who are known to have information which would assist COSEWIC in its assessment; and take such information into account in preparing its status reports.

Section 27(2) should be revised to state that the Minister must conduct consultation with stakeholders and the public before making a recommendation to the Governor in Council.

In addition, s. 27 should be revised to set out the considerations of the Minister in making his/her recommendations to the Governor in Council. These considerations must include a socio-economic impact analysis.

(ii) *Policy initiative*

COSEWIC's *Assessment Process and Criteria* should be amended to ensure that input from public and private entities directly impacted by listings or who are known to have information which would assist COSEWIC is collected in a consistent and thorough manner throughout Canada, and that the global status of the species and, in particular, the status of species in North America is taken in account.

Policies on the consultation process undertaken by the minister prior to making recommendations to the Governor in Council on listing of species must be developed. Such policies must include both the manner in which the consultations are to be carried out to ensure that all relevant parties are included, and the considerations the minister must take into account

when making his/her recommendations. These considerations must include a socio-economic analysis.

## 2. **Section 32 and 33 definitions**

### (a) **Discussion**

Once a species is classified as either endangered, threatened, or extirpated, prohibitions apply to prevent the species and its residence from being harmed. Specifically, SARA prohibits activities which would kill, harm, harass, capture or take an individual of a wildlife species that is listed as extirpated, endangered or threatened. However the terms *harm*, *capture*, *harass*, and *take* are not defined. CHA members note that the lack of definitions for these terms has created circumstances where varying subjective interpretations have occurred, which in turn, has led to inconsistent enforcement. It also has resulted in government staff being reluctant to make decisions.

To some extent the problem caused by differing views of what constitutes terms such as harm is caused by a lack of clear policy direction from Ottawa. While providing definitions of these terms in the statute could provide for less subjectivity, CHA members believe that it would be preferable for this uncertainty to be dealt with through policy rather than legislative amendment, which provides for more flexibility in terms of adapting to new information or specific circumstances of the species.

SARA also prohibits the damage or destruction of the residence of a listed endangered or threatened species, or a listed extirpated species if a recovery strategy has recommended that the species be reintroduced into the wild in Canada (s. 33). Residence is defined as follows:

“residence” means a dwelling place, such as a den, nest or similar area or place, that is occupied or habitually occupied by one or more individuals during all or part of its life cycles, including breeding, rearing, staging, wintering, feeding or hibernating.

CHA members note that the DFO takes the position that certain species, such as fish, do not have a specific residence. Environment Canada has publicly stated that it does not consider that all species have a residence as defined by SARA. However, SARA does not specifically exempt any species from the prohibition of damage or destruction to its residence. Since SARA has come into force, Environment Canada has issued “residence descriptions” for a number of species. These descriptions are not mandated in the statute, but they do provide clear guidelines as to what residences Environment Canada considers should be protected. CHA members believe this is a logical approach and suggest SARA be amended to incorporate it for all species.

### (b) **Recommendations**

#### (i) *Legislative Change*

The CHA recommends the definition of residence in s. 2 of SARA be amended as follows:

“residence” means a dwelling place, such as a den, nest or similar area or place, that is occupied or habitually occupied by one or more individuals during all or part of its life cycles, including breeding, rearing, staging, wintering, feeding or hibernating, and is described in a residence description.

“residence description” means a description of the residence of a species listed as endangered or threatened posted by a competent minister to the public registry.

(ii) *Policy Initiatives*

The government must establish policies clearly setting out its view of what constitutes ‘harm’, ‘harass’, ‘capture’ or ‘take’.

3. **Critical Habitat Designation and Protection**

(a) **Discussion**

Once critical habitat is defined in a recovery strategy, it must be protected either through orders from the federal cabinet or from the relevant minister, depending on the species and the location. If provincial or territorial laws do not adequately protect the habitat, there is the potential for a “safety net” order from the Governor in Council.

The implications of the identification and protection of critical habitat for existing and future hydroelectric power facilities cannot be underestimated. For some facilities, if critical habitat is designated as currently proposed, continued operation will be in jeopardy. However, this need not be the case. The CHA’s members, without exception, have a depth of knowledge about their facilities’ impact on the environment and are committed to finding effective measures to protect and recover species at risk. For this reason, it is vital that CHA members be included in both the planning and implementation stages of recovery strategies and action plans.

SARA requires recovery strategies be developed in consultation with particularly affected groups such as First Nations and landowners. However, SARA does not set out how recovery teams are to be established. The CHA urges this Committee to amend SARA to require consultation with a broader category of stakeholders, and to specifically require entities directly impacted by recovery measures to be invited to have representatives on the recovery teams.

The CHA is concerned that the term *critical habitat* is not sufficiently well defined under SARA, which results in uncertainty and an unacceptable level of subjectivity in the decision-making process at the recovery planning level. The lack of a clear definition of the term *critical habitat* or criteria for establishing what it includes results in uncertainty of how SARA may affect existing and future hydropower developments.

Environment Canada developed a draft policy discussion paper regarding critical habitat in 2004 which discussed the process for identifying critical habitat within the context of recovery planning. However, this policy was never finalised.<sup>3</sup>

Another problem is a lack of a clear understanding of what constitutes “destruction” of critical habitat. In a recent meeting with the DFO, a draft definition of habitat destruction was provided.<sup>4</sup> The CHA understands that this definition is being considered by EC, DFO and Parks Canada. However a “draft” definition which is not formally signed off by the government is not workable for the hydroelectric power sector.

Another concern regarding the impact of the designation and protection of critical habitat on hydropower is where operations are dictated by other legal and jurisdictional requirements, including international commitments. Of concern is not only operational flexibility, but also how this may influence decisions about future operating agreements, or how it may impact industry’s ability to meet Canada’s commitments under international treaties. The government must be required to address those conflicts and consider compensation for affected parties, which may include private industry or provincial governments if there is lost revenue because of an inability to meet other requirements.

(b) **Recommendations**

(i) *Legislative change*

SARA needs to be amended to clarify the parameters of what constitutes adequate protection for the purpose of relying on other federal statutes or regulations, or should include a listing of acceptable provisions of other statutes or regulations. Consideration should be given to broadening the scope of these provisions to include provincial or territorial law.

SARA should mandate that key stakeholders be invited to participate on the recovery teams.

The CHA also recommends SARA be amended to clarify that the socio-economic impact of critical habitat designation must be considered by the recovery teams developing recovery strategies.

The CHA also recommends parliament make the development of a policy on critical habitat a requirement before any further critical habitat designation occurs.

(ii) *Policy Initiatives*

The government must complete its policy on the criteria for identifying critical habitat and for what constitutes “destruction” of that habitat. Such policies must include specific requirements for consideration of other legal requirements, including local, provincial and international

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<sup>3</sup> Environment Canada, *Federal Policy Discussion Paper: Critical Habitat* (February, 2004).

<sup>4</sup> “Persistent change that renders the habitat completely unsuitable for survival or recovery of the species, including a change which completely eliminates the utility of the habitat for carrying out the life processes for which it was identified.”

obligations, and must include specific analysis of the socio-economic impact of the designation of critical habitat.

#### 4. **Permitting of Incidental Harm**

##### (a) **Discussion**

Generally, harm that will occur to individual listed species from hydroelectric power activities is what is referred to as “incidental”. That is, the harm occurs when an entity is carrying out an activity not specifically intended to harm the species. This is distinctive from direct harm, where the activity is intended to do the harm, such as hunting or fishing. To continue operating, hydroelectric facilities must have access to some form of authorisation that allows incidental harm.

SARA does allow for permitting of incidental harm to species or destruction of its critical habitat under specific circumstances. There are, in essence, three ways in which activities causing incidental harm may be allowed:

- 1) under a permit or agreement;
- 2) under a permit, agreement, license, order or other similar document under another federal statute; or
- 3) in accordance with a recovery strategy or an action plan *and* authorised under either another federal statute or a regulation under SARA.

Conservation agreements do not provide for exemptions from the prohibition against harm to the species themselves or critical habitat once it is designated. This is discussed in the next section.

Each of the potential exemptions from the prohibitions for harm or destruction which would allow a hydroelectric facility to operate has limitations. None of these options provide a clear solution for hydroelectric facilities and their ability to operate when causing incidental harm to species or critical habitat. As a result, none of the CHA member’s facilities currently have permits or approvals under SARA. This is the issue of greatest concern to the CHA. There are facilities currently in existence which may not be able to continue to operate and be in compliance with SARA unless there are critical amendments to SARA’s permitting provisions to allow activities that may cause incidental harm.

There is a very real potential that SARA permits or authorisations will require upgrades to existing operations. Such upgrades could be extraordinarily costly and may be of questionable value to the species as a whole. For this reason, permitting mechanisms must be developed in close cooperation with industry representatives who have extensive knowledge of the impact of their operations on such species.

It is also unclear how, or if, an entity could acquire approval with sufficient long-term certainty to allow for the development of future facilities. The environmental assessment and construction phase alone for large hydroelectric facilities can take upwards of a decade (or more) and the

current restrictions on the manner in which operations may be authorised create business uncertainty that is unacceptable. In addition to the problem of developing future facilities without long-term regulatory certainty, there is also difficulty in arranging long-term agreements of benefit to Canada (such as international agreements).

It is apparent that the permitting provisions were intended more for short term activities, such as fishing or hunting, or projects that are limited in duration. As written, they do not assist with allowing hydroelectric projects to operate and remain in compliance with SARA, or with new projects. In particular, the three to five year restriction on the life of such instruments makes them of little use to facilities with operational lives in excess of 50 years.

While the two exemptions which arise while acting in accordance with a recovery strategy have the potential to allow for the long-term operation of hydroelectric facilities, there are limitations on the effectiveness of both of these options, the level of certainty they provide, and the scope of the protection. For example, a s. 83(4) exemption is not available until after the registration of a recovery strategy. As the development of recovery strategies does not occur until after listing, and in some cases, has been delayed well past the statutory deadlines, these provide no protection from the potential for harm to the species or their residences in the interim period. This is particularly an issue for those existing facilities which are currently undertaking activities which may now have the potential to harm species. Further, this exemption requires recovery strategies to have specific direction on how activities causing harm may occur. While such specifics may be possible to put in a recovery strategy, it is questionable how this could be done for new facilities, especially those not contemplated by the recovery teams developing the strategies.

For facilities in the planning stages, the lack of certainty over what might be required in a recovery strategy makes planning of new facilities extremely difficult, especially given the level of financial commitment required for large hydroelectric projects. Additionally, the manner in which recovery strategies can be amended, i.e. through sign off by the minister, makes reliance on them for long-term certainty problematic.

If a recovery strategy is developed that will satisfy the requirements of s. 83, there still remains the need to comply with the second requirement in order for the exemption to apply. One of these is to comply with a regulation under SARA. For this option, *if* a recovery strategy sets out how an activity may occur, and *if* an action plan includes authorisation of such activities, and *if* the minister develops regulations to implement the action plan, then there will be an exemption for that activity. Thus, there are three regulatory steps required before this exemption is operative.

The other manner in which a s. 83 exemption arises is through authorisation under another act of parliament. However it is unclear that there are authorisations available under other statutes which would qualify as “authorisations of activities” for the purpose of s. 83. For example, under s. 35 of the *Fisheries Act*, harm to habitat may be authorised. However, such an authorisation would not address the prohibition against harming species themselves. Similarly, an authorisation under s. 32 of the *Fisheries Act* to harm an individual of a species is limited by its applicability only to the species and not to the habitat.

**(b) Recommendations**

*(i) Legislative Change*

SARA must be revised to provide for a comprehensive mechanism for authorisation of hydroelectric power facilities which cause incidental impacts on species at risk or their critical habitats. These must include, at a minimum, the following:

- 1) Section 73 of SARA must be amended to allow for authorisations which are not restricted by an end date and/or allow for either automatic or efficient renewal.
- 2) Section 83(1) must be amended to add subsection (c): activities authorised under a section 11 conservation agreement.
- 3) The exemptions established in s. 83(4) of SARA must be revised to allow for the following:
  - a) Activities carried out in accordance with requirements in a recovery strategy, action plan or a regulation under SARA.
  - b) Activities carried out in accordance with authorisations under another federal act. While SARA currently does this, consideration should be given to:
    - i) Enumeration of the specific provisions of federal legislation which provide for such authorisation. This could be done in a Schedule to SARA or through Regulations, such as is utilised under the *Canadian Environmental Assessment Act*.<sup>5</sup> The CHA prefers a regulation which would allow for amendments when the other legislation changes.
    - ii) Broadening the scope of the equivalency provisions to include provincial or territorial law.
    - iii) Grandfathering of existing federal authorisations as SARA authorisations.
  - c) Activities carried out under a conservation agreement under s. 11 of SARA.

*(ii) Policy Initiatives*

Policy development must include clear direction to the competent ministers on the criteria for permits, recovery strategies, action plans and conservation agreements to ensure there is an understanding of the mechanisms that must be in place to ensure both protection of species and critical habitat as well as long term operational certainty for hydroelectric activities.

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<sup>5</sup> S.C. 1992, c. 37. See for example, the *Law List Regulations*, SOR/94-636.

## 5. Conservation Agreements

### (a) Discussion

Section 11 of SARA allows for the establishment of conservation agreements between the competent ministers and any government in Canada, organization or person. The purpose of the conservation agreement is to benefit the species and enhance its survival in the wild. According to Environment Canada, conservation agreements are of strategic benefit to species recovery as they establish management of critical habitat as opposed to a draft blanket prohibition on harm as would otherwise occur under SARA. However, despite suggestions that stewardship could occur in the future under conservation agreements, as of yet, none have been completed.

Conservation agreements are considered to have the flexibility to capture broad planning objectives such as water use plans, and to deal with species on a larger ecosystem basis. Generally there appears to be some consensus that, on a theoretical level, they are the preferred tool for habitat protection. However they only provide protection from enforcement of the critical habitat prohibitions under SARA and thus there is limited incentive for industry to enter into them.

There are two ways in which the prohibitions against harming critical habitat will not apply<sup>6</sup>:

- 1) if the designated critical habitat is not subject to a protection order, or
- 2) once a protection order is issued, under a s. 83 exemption.

Conservation agreements provide an alternative to an order protecting critical habitat, and consequently the application of the mandatory prohibitions against destroying that habitat. Thus, if a conservation agreement is in place *before* the expiration of six months after the registration of a recovery strategy or action plan designating critical habitat, they can provide protection against the issuance of a protection order and the application of the prohibitions against destroying that habitat. However if they are not in place at that time, then the minister will not be able to state that the critical habitat is protected by a conservation agreement, and may be required to issue a protection order, at which time the prohibitions against destroying the habitat would apply.

A conservation agreement would be relevant to the s. 83 exemption from the prohibition against harming species and their residences, or destroying critical habitat, only if it is either:

- 1) an agreement for the purpose of s. 73, and thus covered by the exemption under s. 83(1) (b), or
- 2) an authorisation for the purpose of s. 83(4).

There is no language in the definitions in SARA, or in ss. 11, 73 or 83, specifying that a conservation agreement is an agreement or authorisation for the purposes of any of the s. 83

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<sup>6</sup> This discussion does not include the inapplicability of the prohibitions to non-federal species and non-federal lands.

exemptions. Indeed, the language describing the purpose of s. 11 and s. 73 agreements is quite different. Further, there is no language in s. 11 suggesting conservation agreements are authorisations for specific activities. Thus the CHA understands conservation agreements are not applicable for the purpose of the s. 83 exemptions, and provide no protection from the prohibitions against destroying critical habitat which has been the subject of a protection order. Further, they also do not provide any relief from the prohibitions on harming species or their residences.

**(b) Recommendations**

(i) *Legislative Change*

In order for conservation agreements to truly be the preferred tool for habitat protection, they need to provide protection from the enforcement mechanisms in SARA. Pursuant to this, the following changes should be made:

- 1) Section 11 of SARA must be amended to include enumeration of activities impacting species and critical habitat that are authorised.
- 2) Section 83(1) must be amended to add subsection (c): activities authorised under a section 11 conservation agreement.
- 3) Section 83 must be amended to clarify that a conservation agreement is an authorisation for the purpose of s. 83(4).

(ii) *Policy Initiatives*

There must be clear policy direction to the competent ministers that conservation agreements are the preferred method of dealing with critical habitat and that recovery teams must be working with the hydroelectric industry to develop such agreements early in the process, rather than after the recovery strategy identifying critical habitat is registered.

**6. Consideration and Calculation of Socio-Economics in Decision-Making**

**(a) Discussion**

SARA's preamble states that community knowledge and interest, including socio-economic interests, should be considered in developing and implementing recovery measures. However, socio-economics are not specifically mentioned in a number of areas where decision-making is required under SARA, such as the decision to recommend listing by the minister, and the development of recovery strategies.

The CHA has noted that there are differing interpretations of the role of socio-economics in decision-making by the regulators. While some officials are open to consideration of socio-economic concerns, others have specifically stated that they will not consider them at certain stages, such as in the development of recovery strategies.

**(b) Recommendations****(i) *Legislative Change***

SARA should be amended to clarify that socio-economics and sustainable development must be considered in all decision-making.

More formalised inclusion of socio-economic analysis in specific areas such as permitting or recovery strategy development has been included in the recommendations earlier in this paper.

**(ii) *Policy Initiatives***

Policies for how socio-economic analyses must be carried out by the competent ministries in all decision-making must be developed.

**7. Need for Firm Timelines****(a) Description**

SARA contains some specific prescribed deadlines, specifically for the development of recovery strategies and cabinet's consideration of listing decisions. However, there are a number of areas where there are no mandatory time frames. For example, the length of time between a status update on a species by COSEWIC and the minister's recommendation to the cabinet is not prescribed. Another example is the timeline for development of an action plan after a recovery strategy has been completed. With or without mandatory timelines, however, Environment Canada and the DFO have been slow to implement SARA's provisions, which have caused uncertainty in the industry.

Uncertainty with the timeliness of decision-making, and the potential for prolonged process delays are an operational risk to hydroelectric generation facilities. A number of CHA members have had ongoing problems with delays by the government in carrying out its mandatory requirements prescribed in SARA, and in responding to applications for authorisation. Even where there are mandated timelines, such as for the development of recovery strategies, the government departments have, in many instances, failed to achieve them. The CHA is concerned about the limited capacity by the federal government departments to deal with the extensive consultation process required under SARA and to complete the necessary planning.

The lack of deadlines in SARA requiring the government to act makes it very difficult for the industry to consider planning for future generation and/or operation of existing facilities. This in turn may result in an inability to meet energy supply contracts with outside purchasers, loss of access to transmission infrastructure, lower reliability of supply to consumers, reduced energy security and an inability to negotiate export contracts with U.S. customers.

**(b) Recommendations**

(i) *Legislative Change*

Consideration should be given to mandatory timelines in SARA, especially with respect to key decision making for permits and approvals. At the same time, deadlines need to be realistic. Time frames for preparation of recovery strategies have proved to be unworkable, and must be revised. Priority must be directed to those species of imminent danger of extinction or extirpation.

(ii) *Policy Initiatives*

The government must provide the competent ministries with sufficient funding to allow for timely implementation of the planning and approvals that must be undertaken in order for SARA's provisions to be implemented in a manner that achieves its goals and allows for existing hydropower projects to operate and new projects to be planned and brought online.

8. **Link to Canadian Environmental Assessment Act**

**(a) Discussion**

SARA requires federal authorities overseeing environmental assessment to ensure listed species at risk are considered. CHA members agree this is reasonable, however, the relevant provisions also require these authorities to directly ensure commitments for mitigation are carried out and monitored after the assessment is complete. Problems arise when the species at issue are not "federal" species, as it is unclear how a federal authority can ensure measures are taken after completion of an assessment, when the governmental body regulating activities affecting the particular species is a province or a territory.

The CEAA contains provisions requiring responsible authorities to exercise their powers or perform their duties while taking into account mitigation measures the responsible authority considers appropriate. The CEAA was amended in 2003 to clarify that such measures can include those that will be implemented by other persons or bodies (s. 20(1.1)). These amendments allow federal responsible authorities to rely on implementation of mitigation plans by provinces or territories. SARA does not contain similar language.

**(b) Recommendations**

(i) *Legislative Change*

SARA needs to be amended in a manner similar to s. 20(1.1) of CEAA to ensure that federal authorities have the duty to ensure measures committed to environmental assessments can be met through reliance on implementation of mitigation measures for listed species by persons or bodies other than federal authorities.

## 9. **Lack of Policy Direction**

### (a) **Discussion**

Despite the fact that it has been in force for more than five years, as of yet, neither Environment Canada nor the DFO have finalised any policies with respect to the manner in which SARA is to be interpreted and implemented. There have been a number of draft policies developed, but as of yet, none have been finalised.

The lack of certainty on behalf of the government departments as to how to interpret and implement SARA's provisions has resulted in uneven application and contributed to the slowness of its implementation. Differing interpretations of *harm*, *critical habitat*, and the *precautionary principle*, or of the manner in which incidental harm may be permitted, all discussed above, are examples of the problems that arise partially because of the lack of policy development. Other examples of problems experienced by CHA members which could be dealt with through policy are as follows:

- 1) One government department has stated that they will be treating all matters related to a species which is not listed but which is under review for listing, as though the species was already listed.
- 2) Officials have changed their position with respect to whether a hydroelectric facility would be required to change its water flows for the purposes of critical habitat protection.
- 3) The term "precautionary approach" has been subjectively and inconsistently interpreted by individual officials. For example, an officer stated that as long as there might be a sustainable population of a species in an area that they would have to designate it as critical habitat, and noted the precautionary principle as the reason for this approach.
- 4) The lack of field experience by regulatory officials who are now charged with providing authorisations or permits for activities under SARA is problematic. This is particularly the case with Environment Canada, which has little operational experience as compared to the DFO.

### (b) **Recommendations**

#### (i) *Legislative Change*

The CHA recommends parliament consider revising SARA to impose mandatory requirements for the development and implementation of policy direction on interpretation and implementation of SARA.

(ii) *Policy Initiatives*

Parliament must provide both direction and funding for Environment Canada (and/or the DFO) to complete key policy documents which have been under development for years. The specific policy initiatives needed have been identified above under the individual subject headings in Part III and are summarised Part II.