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West Coast Environmental Law
DEREGULATION BACKGROUNDER

BILL 51 – WILDLIFE AMENDMENT ACT, 2004

On May 12, 2004, the Minister of Water, Land and Air Protection introduced Bill 51, the *Wildlife Amendment Act, 2004*, which will, if passed, make significant changes to the province's *Wildlife Act*, intended to enhance protection for species which are at risk of extinction.

B.C.'s existing legal tools to protect endangered species are extremely weak, and any improvement to the legal framework for the protection for species facing extinction is a positive move. Nonetheless, even with these amendments the *Wildlife Act* falls far short of what is needed to protect species at risk, and BC legislation is far less effective than parallel federal legislation or legislation in other provinces. The failure to require science-based decisions about endangered species, and the wide political discretion left to the cabinet about whether and how to implement these protections, leave species with no guarantee of real protection. Moreover, the legislation may have the impact of actually reducing species protection by delaying federal action to protect species at risk.

Designating a Species at Risk

Since 1980, the current *Wildlife Act* has allowed cabinet to designate and protect endangered or threatened species. The Amendments do not change the basic approach – they let the politicians decide what species will be legally protected as endangered.

The "leave it to the politicians" approach to species at risk has been a complete failure. Between 1980 and the present the provincial cabinet has designated only four endangered species under the *Wildlife Act*: the burrowing owl, white pelican, sea otter and Vancouver Island marmot. During the same period scientists working for the province's Conservation Data Centre identified 138 "red-listed" animal species that are endangered or threatened, and but only four of these species were granted legal protection by cabinet. It is not clear whether new federal legislation will create a sufficient incentive for provincial politicians to list species.

The province's approach stands in contrast with the federal government's *Species At Risk Act* (SARA), which puts scientists front and centre in determining which species are at risk and in need of protection. Under SARA, a national body of scientists (the Committee on the Status of Endangered Wildlife in Canada, or COSEWIC) is charged with making recommendations about what species should be listed as "at risk", and in need of protection. Once a recommendation is made, the species will automatically be added to the list of protected species, unless the federal politicians make an explicit decision to overturn the recommendation. This explicit focus on the recommendations of scientists means that when politicians interfere, it will be obvious and clearly political.

One positive development in the amendments is that the definition of species at risk has been expanded. Since 1980, the *Wildlife Act* included only terrestrial animal species that are

at risk, while the new definition will include species of fish, plants and other organisms (excluding viruses or bacteria) that are at risk.

Protection for a Species at Risk

So, once cabinet has listed a species at risk, what protection does it get?

The amendments make it illegal to harm species at risk in various ways. Many of the list of prohibited activities concern the ownership of, transportation of or trade in designated species. Two prohibited activities relate more directly to harm of species and damage to their habitat:

- A person must not kill or harm a member of a species at risk; and
- A person must not damage or destroy a "species residence" of a species at risk.

However, while potentially useful, these prohibitions have several weaknesses:

- In order for the protection of species residences to have any effect, the cabinet must pass regulations designating that location (or that class of "residences") as a species residence. Once again, there is no requirement that cabinet designate necessary habitat or that scientific advice on the required habitat be considered. In fact, the term "species residence" is not a scientific term, but a merely a legal definition, making it difficult to know whether the Act extends to protecting habitat, particularly for wide-ranging species.
- Cabinet can pass regulations limiting or eliminating these prohibitions.
- The Minister responsible for the Act (currently the Minister of Water, Land and Air Protection) can issue a permit, or enter into an agreement, allowing a person to legally violate these prohibitions. The Minister may use the permit/agreement powers when a person is "otherwise authorized to engage in an activity that incidentally impacts a species at risk…", but is not supposed to do so unless he or she is satisfied that the activity to be carried out is the "reasonable option" which will have the least impact on the endangered species and that the action will not "jeopardize the survival or recovery of that species." There is no requirement for the cumulative impact of many permits/agreements across the landscape to be considered, and the focus on the survival of the species raises real questions as to whether this legislation will be able to effectively protect individual members of a particular species threatened by resource extraction.

The continuation of the "leave it to the politicians" approach to law making may be seen in all three of the above problems. If the politicians choose to act, some species may receive some protection as a result of the Amendments. If politicians do not act, species may go extinct or be extirpated as a result of political indifference.

In addition to these protections the amendments will extend various other sections of the *Wildlife Act* to apply to non-animal endangered species. However, these sections do not provide any particularly new mechanisms to protecting endangered species.

Protections that are missing

What is missing from the Act is as significant as what is in it. Unlike the federal government's SARA, and, indeed, provincial policy, the Amendments do not require, or even provide for, the development of a forward looking vision and plan as to how an endangered species can be brought back. SARA requires that recovery, action and/or management plans be developed for every species listed as at risk under that act. Even if the province decides to engage in such "recovery planning", the Amendments provide no new tools to implement those plans.

The Act also lacks some of the public and scientific input mechanisms contained in SARA. SARA's provisions include sections:

- allowing members of the public to apply to COSIWEC (a committee of scientists) for a recommendation that a species be added to the list of endangered species;
- providing for public access to documents related to protection of endangered species;
- empowering members of the public to request the Minister to investigate whether an offence under the Act has been committed; and
- requiring COSIWEC to reassess the status of species at least every ten years.

Relationship between SARA and the Amendments

The federal *Species at Risk Act* only directly applies to federal lands, which make up only about 1% of the British Columbia land mass. Marine environments and migratory birds, which are federally regulated, receive better protection.

However, the SARA does allow the federal government to step in and make orders to protect an endangered species falling outside federal lands if the provincial government has not effectively protected an endangered species.

The amendments allow the Province to argue that it is protecting species. Especially if this is combined with designation of species, it may prevent or delay the federal government from unilaterally imposing restrictions on the province under SARA. Consequently, SARA does put pressure on the provincial cabinet to actually designate and protect at risk species, at least to create the appearance that something is being done to protect endangered species. On the other hand, the amendments, especially if combined with listing of species, may create a perception that the province is taking action (even if the action is ineffective) and reduce the potential for more effective federal action.

Conclusions

The development of endangered species legislation for B.C. is long overdue. However, the amendments rely almost entirely upon political, rather than scientific, process. This flawed approach has undermined the endangered species legislation in B.C. for more than 20 years and should have been addressed in any new legislation.

The Amendments, while granting politicians the power to do some good, do not give any guarantees when it comes to protecting species at risk. Furthermore, the tools that are provided are narrow, and do not provide opportunities for public and scientific engagement.

The amendments are a mixed blessing. On the one hand they allow designation of a broader range of species and create potential mechanisms for protection. SARA increases the likelihood of provincial action. On the other hand, protection remains at the whim of provincial politicians, and the amendments, whether effective or not, may discourage the federal government from living up to its responsibility to B.C.'s endangered species. Weak legislation may hurt species at risk.

While we applaud the idea of effective and meaningful endangered species legislation for the province, we reluctantly conclude that this is not it. While not negative, per se, the amendments do not meaningfully advance the cause of endangered species in the province.