

# Blakes Bulletin

## Environmental Law

### Consideration of Socio-Economic Impact Irrelevant to Species at Risk Identification of Critical Habitat

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Just two months after its first substantive ruling interpreting the *Species at Risk Act* (SARA), the Federal Court (the Court) has issued another, potentially more significant, decision. Unlike the previous ruling, which was grounded primarily in the facts around the designation of critical habitat for the Sage Grouse, this newer case was decided after an analysis of some key aspects of the law surrounding the definition of critical habitat, and the mandatory nature of its identification in recovery strategies. Unless the decision is successfully appealed, or SARA is amended in response, the ruling of the Court is likely to impact the recovery planning processes that are currently underway for hundreds of species, which could have far-reaching impact on resource users and landowners across Canada. In particular, businesses and landowners currently involved in the recovery planning processes are more likely to find that their concerns over the impact of the designation of critical habitat on their activities will not be considered by species recovery teams in their deliberations over what to include in recovery strategies.

Launched by a number of environmental non-governmental organizations (ENGOS), many of which brought the Sage Grouse case to trial, this judicial review application concerned the recovery strategy of the Nooksack Dace, a minnow-like species which inhabits only four streams in the lower mainland area of British Columbia. The application was brought after the proposed recovery strategy for the Nooksack Dace was posted to the SARA registry without identification of critical habitat, an action which the ENGOS claimed, and the court ultimately agreed, was unlawful.

The Federal Court reached crucial conclusions with respect to interpretation of the following three aspects of SARA:

1. the definition of critical habitat;
2. when critical habitat must be identified in recovery strategies; and
3. the role that analysis of socio-economic impact plays in the recovery planning processes.

#### WHAT IS INCLUDED IN THE DEFINITION OF CRITICAL HABITAT?

The Court reviewed the definitions of "habitat" and "critical habitat", finding that identification of critical habitat must include two components: a geographical area, and a description of the specific identifiable features in that area which are needed to sustain the species' life processes. The Court agreed with the applicants that, without the identification of the attributes that make up the habitat, the prohibition against destruction of critical habitat is meaningless, as there is no way to completely destroy a geographical area, except perhaps through use of a nuclear device.

This aspect of the decision may be of assistance to the many recovery teams currently grappling with what must be included in critical habitat descriptions. But it is unclear as to whether this will make their jobs easier, or more complex. What is clear is that once critical habitat is identified, there should be more clarity over what is protected within the geographical area. However, it may also be the case, with detailed delineation of specific attributes, that there will be an argument that each of those specific attributes is separately protected. This could make any activities in areas designated as critical habitat extremely difficult.

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### **WHEN MUST THE FEDERAL GOVERNMENT INCLUDE CRITICAL HABITAT IDENTIFICATION IN RECOVERY STRATEGIES?**

The evidence in the case was that the scientist who prepared the initial draft of the recovery strategy for the Nooksack Dace had included identification of critical habitat, however, it was removed prior to posting to the SARA Registry for public consultation. Government documents revealed that officials of the Ministry of Fisheries and Oceans (i.e., the DFO) had determined that critical habitat should not be included in recovery strategies for policy reasons. These reasons included lack of internal scientific peer review, questions over consultation with affected parties, a lack of completed policy guidelines, and uncertainty over the impact of the designation of critical habitat.

The Court reviewed SARA's preamble and, in particular, its specific references to the *Convention on Biodiversity* and the precautionary principle. The Court held that the DFO's belief that critical habitat identification could be postponed until the action planning stage was fundamentally inconsistent with the specific mandatory language in SARA which requires identification of critical habitat in recovery strategies, "to the extent possible". The Court held that the DFO acted unlawfully when it removed the critical habitat identification in the Nooksack Dace Recovery Strategy. (The writer notes that prior to the case being argued, the DFO had revised the particular recovery strategy and replaced the critical habitat designations, and thus there was no specific remedy to be ordered by the Court.)

### **WHAT ROLE DOES ANALYSIS OF SOCIO-ECONOMIC IMPACT PLAY IN IDENTIFYING CRITICAL HABITAT?**

The Court held that the language in SARA is unequivocal that measures to prevent loss of species must not be postponed for lack of full scientific certainty, and that socio-economic analysis does not form part of the assessment of what should be in a recovery strategy. The Court reviewed the direction in SARA's preamble that socio-economics should be considered in the development and implementation of recovery planning, but held that this referred only to the action planning stage. The Court ultimately decided that political and socio-economic considerations are irrelevant and cannot be applied by the decision-maker in determining what is to be included in a recovery strategy.

It is this portion of the judgment which the writer finds troubling. If socio-economics are irrelevant at the recovery planning stages, then what is the purpose of the consultation that is required with affected parties, including landowners, prior to the recovery strategy being posted to the SARA registry? Further, this seems at odds with SARA's requirement that "cost effective" measures not be postponed because of scientific uncertainty. How is the planning team able to determine the cost effectiveness of proposed measures if no economic analysis is to be undertaken? Finally, as critical habitat can be identified either at the recovery strategy or action planning stage, this decision raises the potential for some species to have protected critical habitat on the basis of both a scientific and socio-economic analysis, and others for which the science is the only consideration, an inconsistency which would appear to be at odds with SARA's purpose to protect, presumably equally, all species at risk.

### **CONCLUSION**

Ultimately, the decision of the Court on these three points is likely to have a significant impact on the recovery planning that has been done thus far, and on the planning that is currently underway. In the case of recovery strategies which have already been registered, the government may have to revise some of them to add identification of critical habitat, or to add descriptions of the physical attributes of the habitat. For those recovery strategies not yet completed, regulators hesitating over whether to include critical habitat in them are more likely to identify all known and even potential critical habitat, even in light of information which has not been subject to rigorous scientific assessment.

The bottom line is that because of this decision, it is likely that there will be more recovery strategies identifying critical habitat than has occurred up to this point. This is significant, as once critical habitat has been identified, it must also be protected from destruction. So the increased likelihood of critical habitat identification also means increased protection of such habitat, and as a consequence, more restrictions on the ability to carry out operations on the land base.

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