

SARA and the Electricity Industry



The members of the Canadian Electricity Association (CEA) – electricity generators, transmitters, distributors, retailers and power marketers from coast to coast to coast – recognize that delivering electricity to Canadians can have an impact on wildlife species and habitat. Over the years these companies have undertaken efforts to reduce that impact wherever it occurs. These efforts are now being seen in a new light with the establishment of the federal *Species at Risk Act* (SARA). This document provides a brief snapshot of SARA and its

implications from the electricity sector's perspective, as well as CEA's thoughts on striking a balance between protecting species and their habitat and meeting the electricity needs of Canadians.

Overview of SARA

The *Species at Risk Act* (SARA) is meant to prevent Canadian indigenous wildlife, including birds, fish, mammals, amphibians, reptiles, insects and plants, from becoming extirpated or extinct, to provide for the recovery of endangered or threatened species, and to prevent other species from becoming at risk. It is administered by Environment Canada (EC), Fisheries and Oceans Canada (DFO), and Parks Canada (PCA). A public registry has been created to provide access to documents relating to matters under SARA (www.sararegistry.gc.ca).

Jurisdictional Issues

In Canada, constitutional authority for wildlife is shared between the federal and provincial governments. Since SARA is a federal act, it is limited to federal land, except for aquatic species and migratory birds, both of which fall under federal jurisdiction. However, SARA also contains provisions for the protection of species in provinces and territories (ss. 34 & 35) where the federal minister is of the opinion that provincial and territorial laws do not adequately protect the species. SARA also contains an Emergency Order provision to allow the federal minister to prescribe actions on federal land and to prohibit activities that might adversely affect the species and identified habitat on federal land. The net result then is that SARA amounts to very broad federal legislative authority to protect species and habitat.

Species Listing

With SARA fully in effect as of June, 2004, all species on Schedule 1 benefit from the protection afforded by the Act and legally require recovery planning. The current list of protected species is contained in SARA Schedule 1, and SARA stipulates that other species may be added to the list, further to approval by the Federal Cabinet.

Species are assessed by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), an independent scientific committee legally recognized under SARA. COSEWIC assesses the extent to which wildlife species are at risk, and then submits its assessment to Cabinet for review. Cabinet will take the COSEWIC assessment into account when making a listing decision.

Focus on Stewardship

Consistent with the Act's emphasis on stewardship, the minister may enter into a conservation agreement with any government in Canada, organization or person to benefit a species at risk or enhance its survival in the wild, as long as the agreement provides for measures consistent with the Act (s. 11). Such agreements can also cover non-listed species. The legislation also makes provision for the Minister to provide funding towards the costs of such programs (s. 13).



Some Key SARA provisions



Definitions Under the Act

Extirpated species: a wildlife species that no longer exists in the wild in Canada, but exists elsewhere in the wild.

Endangered species: a wildlife species that is facing imminent extirpation or extinction.

Threatened species: a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction.

Species of Special Concern: a wildlife species that may become a threatened or an endangered species because of a combination of biological characteristics and identified threats.

Sections 10-13: set out provisions for stewardship action plans and conservation agreements to prevent species from becoming at risk.

Sections 14-31: define the process for listing a species as threatened or endangered.

Section 32: makes it an offence to kill, harm, harass, capture, take, possess, collect and sell endangered or threatened species.

Section 33: makes it illegal to damage or destroy the residence, for example the nest or den, of an endangered or threatened species.

Sections 37-55: mandate a process of establishing a recovery strategy for any listed species and requires identification of a species' critical habitat (the habitat necessary for survival or recovery of a wildlife species to the extent possible).

Section 58: prohibits the destruction of any part of the critical habitat of an endangered or threatened species.

Recovery Strategies

For newly assessed species added to Schedule 1, SARA stipulates that recovery strategies for endangered species must be prepared within one year of listing, and for threatened or extirpated species within two years of listing (s. 42). For species re-assessed from Schedules 2 and 3, recovery strategy timelines are longer - 3 years for endangered species and 4 years for threatened or extirpated species. Once a species has been listed under SARA, recovery strategies and action plans must be developed to identify species' critical habitat and measures necessary for recovery (ss. 37 & 47). SARA

also prohibits the destruction of any critical habitat identified in a recovery strategy or action plan (s. 58). If a species is listed as a species of special concern, a management plan for the species and its habitat must be prepared (s. 65). All of these plans have requirements for consultation with provincial and territorial governments, aboriginal communities, landowners, and others directly affected by the plans.

Enforcement

Contravention of SARA's prohibitions on a first offence can result in maximum fines ranging from \$50,000 to \$1,000,000 and/or imprisonment for up to five years (s. 97), calculated per individual plant, animal or organism affected. Subsequent offences can double applicable fines. Moreover, SARA allows any person who is a resident of Canada and 18 years of age to apply to the Minister for an investigation if the person believes that a SARA offence may have been committed or something has been done towards the commission of a SARA offence (s. 93). The Act does make provision for an accused to raise the defence of "due diligence" (s. 100). SARA also introduces creative sentencing possibilities, called "alternative measures" (ss. 108-119).

CEAA Issues

SARA amends the definition of "environmental effect" under the *Canadian Environmental Assessment Act* (s. 137). Effectively, this requires a project undergoing environmental assessment review to consider the effects of the project on listed species, their residence, and their critical habitat. If the proposed project is carried out, the Act requires that measures be taken to avoid or lessen these effects, and to monitor them, in a way that is consistent with applicable recovery strategies and action plans (s. 79). In addition, SARA creates a Public Registry to provide public access to documents relating to matters under the legislation (s. 120).

Implications for the Electricity Industry

CEA considers three issues under SARA to be of high priority for the electricity industry:

The Recovery of Species, Scope of "Critical Habitat" and "Residence" Definitions

CEA member operations take place on lands and waterways that may fall within the "critical habitat" of listed species. With the ongoing listing of new species and ever expanding designation of critical habitat, uncertainty about the impact of SARA on existing operations and new projects is inevitable and needs to be addressed. The electricity industry is also interested in how the definition



and protection of critical habitat under SARA meshes with the habitat protection provisions of the *Fisheries Act* and the *Migratory Birds Convention Act (MBCA)*. To date, DFO has indicated that it will use existing mechanisms under the *Fisheries Act*, although details remain to be worked out. With amendments to the *MBCA* pending it is uncertain how its habitat protection provisions will be reconciled with those of SARA.

Likewise, the term “residence” and associated terms of “damage” and “destroy” (the *Act* does not define these terms) require much greater clarity of definition to facilitate the practical implementation of these concepts. To date the definition of these terms have been jointly developed by EC, DFO and PCA and reviewed by the provinces and territories. Pending federal approval, the process for describing “residence” is being implemented provisionally by EC, DFO, PCA, the provinces and territories. While this effort is supported by CEA, the Association would recommend that non-government organizations (including industry sectors) also be included in this process. This would reduce the likelihood of third party challenges under SARA and, in so doing, significantly reduce costs to government and industry, and enhance benefits for the species and habitat in question.

CEA would also like to clarify industry’s role in recovery planning strategies and management plans. We would recommend that priorities for undertaking recovery planning be based upon a risk assessment approach. Under the risk assessment approach, priorities for recovery planning would be based upon the risks to population viability of listed species and the likelihood of reducing those risks. We recognize that the development of strategies and plans are largely driven by the timelines outlined in the *Act*, however, where there is flexibility, CEA recommends the federal government use this approach to prioritize which strategies should be completed or started first. Additionally, CEA suggests that measures that the electricity industry sector, or indeed any sector, might be expected by regulators to undertake to avoid or mitigate impacts be proportional to the impacts from the particular sector.

Permitting for “Incidental Take” in the course of Normal Operations

During the course of normal operations of existing facilities (i.e. within the operating range of licenses or permits) individuals of a species at risk may be destroyed or critical habitat and residences damaged or destroyed. Under certain conditions, agreements and permits under SARA could authorize the industry to carry out normal activities that would otherwise violate the *Act* if it doesn’t jeopardize the survival or recovery of the species (a maximum term of five years in the case of an agreement and three for a permit).

Currently, these agreements and permits (ss.73-78) envision situations such as a scientist being allowed to handle and tag an endangered species so that its movements can be tracked, or diversion of water flow in a marsh to improve habitat and enhance survival and recovery of listed species over the long

term. In the case of the electricity industry, normal operations will sometimes result in incidental harm of individuals, or damage or destruction of habitat. For these types of activities, CEA believes it is reasonable for the Minister to issue a permit under SARA for the incidental harm of listed species, but the ground rules around the granting of such incidental harm permits need to be defined. One option under consideration by DFO is to use an existing mechanism, a *Fisheries Act* authorization if it meets the requirements of SARA, as a permit under SARA (s. 74). However, this option creates its own set of difficulties. As electricity facilities are in existence for decades, CEA member companies are particularly concerned about the interplay of SARA requirements with those of other federal acts applicable to the industry, above all the *Fisheries Act*. The *Fisheries Act* requires an authorization under s. 35 for any activity that would result in a harmful alteration, disruption or destruction of fish habitat, commonly known as HADD. Duration of *Fisheries Act* authorizations vary nationally as well as with facilities and circumstances – some are lifetime; some are only for a few years or run concurrently with the period of the water license of the facility. In contrast, under SARA, permits can only be granted for a period of three years. Another example is permitting under the *Migratory Birds Convention Act (MBCA)*. The *MBCA* focuses on protection of populations, whereas SARA focuses on the protection of individuals (s. 32) alongside protection of critical habitat for the species as a whole (s. 58). Exactly how *Fisheries Act* or *MBCA* permits and authorizations provisions would be reconciled with SARA permits is unclear at this time. CEA supports the additional protection offered to a species by SARA, but needs to ensure clarity and predictability for the sake of its ongoing member operations in order to provide electricity to Canadians.



Relating Compliance to “Cooperation” and “Stewardship” under SARA

In order to best carry out SARA’s intent, the electricity industry wants to clarify the scope of the terms “cooperation” and “stewardship” under the *Act* and how much is enough to ensure effective protection and compliance under SARA. The terms “effectively protected” and “effectively recovered” also need to be defined. CEA submits that when a species is “effectively protected” and when a species population is “effectively recovering” then all stakeholders involved in the recovery process will have done enough; CEA will work with EC and DFO to achieve clarity on this point. CEA recognizes that stewardship actions are not a substitute for species recovery but they can complement recovery efforts and so our industry supports species recovery occurring in tandem with broader stewardship efforts. However, CEA (along with other industry sectors) is greatly interested in what compliance

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incentive there is for industries or resource users who practice cooperation and stewardship. CEA strongly recommends that EC and DFO develop regulatory and fiscal incentives to help support the transition period while SARA related policies and guidelines are being developed.

CEA is exploring the development of an independent industry certification or accreditation process that is recognized by regulators as a tool for achieving compliance under SARA. As a first step, the industry is profiling good stewardship practices through the Association's Environmental Commitment and Responsibility program. CEA sees great value in developing certification mechanisms for beneficial stewardship practices – ultimately, this will reduce costs and regulatory burden through consistent rules and partnerships. Another option is to pursue SARA stewardship agreements with a focus on preserving “at risk” populations (without the time limitation) for achieving compliance under the *Act*.

An Incremental Approach

The ongoing process of listing new species and identification of critical habitat creates uncertainty about the impact of SARA on existing operations and new projects as well as on existing rights, licenses and programs. Licensed and permitted utility operations and facilities need to exist for a reasonable operating period and so CEA is recommending that regulators take a prudent and incremental approach to implementing SARA. This would minimize the risk of uncertainty for the electricity industry, minimize impacts on utility companies' ability and flexibility to generate and distribute electricity and would encourage utilities to continue their environmental and stewardship programs to offset impacts and preserve biodiversity. Similar to many other sectors, balancing economic values with social and environmental values is an essential cornerstone for the way CEA members conduct their business. CEA is encouraged by the efforts of government to incorporate the socio-economic costs and benefits of species listing and habitat protection and recovery in its decision-making and is highly committed to working with government to ensure these considerations are balanced and effectively implemented in a timely way.

Clear guidance is needed for the criteria that would satisfy the “due diligence” defence as well as what constitutes a “good steward”. These terms need to be given precise meaning in order to provide industry with the standard to be met. Given the policy gaps and imprecision that exist in the *Act*, CEA is concerned that third party court challenges will ultimately determine the interpretation of “reasonableness” under SARA implementation and enforcement. It is both in the government and the electricity industry's interest to avoid this situation. CEA has additional concerns around the sufficiency of government resources to properly implement SARA. Given the large number of recovery strategies that must be prepared over the next

four years, it will be a challenge for government departments to effectively implement the legislation. Moreover, it is unclear how the federal “safety net” will be applied and how the effectiveness of provincial legislation will be determined.

As a concrete means of facilitating an incremental approach, CEA encourages EC, DFO, and PCA to develop training material for staff and for landscape users to ensure good understanding of the *Act*, its stewardship objectives and compliance requirements under the legislation. In like manner, CEA is developing complementary training material on the electricity industry for government staff to increase the regulator's understanding of the day-to-day challenges facing the generation, transmission and distribution of electricity.

Our industry is fully disposed to cooperate with the Government of Canada in developing regulations, policies and products under SARA. One opportunity for such cooperation is the Species at Risk Advisory Committee (see box), where federal policy makers, NGOs, and other industry sectors meet regularly to identify, review and discuss key policy and regulatory issues. Through dialogue and partnerships, government, NGOs and industry will identify and reconcile conflicts between SARA objectives and other regulatory and industry objectives, and thereby serve the best interests of all Canadians.



Species at Risk Advisory Committee

Shortly after the *Act's* assent, CEA along with other resource industries petitioned the Minister of the Environment to establish a multi-stakeholder body to

advise the Minister on development of regulations, guidelines, policies and procedures under SARA.

This Committee is chaired by Environment Canada; members include a balance of industry and NGO representatives along with scientific advisors.

Ultimately, CEA sees the Advisory Committee's role as an important opportunity for achieving certainty, consistency and effectiveness under SARA.

In particular, it is hoped that the Committee's work will provide certainty around the interpretation of “reasonableness” under SARA and not leave this determination to third-party court challenges.

