SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT REGARDING BILL C-5 (SPECIES AT RISK ACT)

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SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT REGARDING BILL C-5 (SPECIES AT RISK ACT)

By
Karyn Keenan[1]

SECTION 1.0 - INTRODUCTION

The Canadian Environmental Law Association (CELA) is a public interest law group founded in 1970 for the purpose of using and improving Canada's laws to protect the environment and conserve natural resources. Funded as a community legal clinic specializing in environmental law, CELA represents individuals and citizens' groups before trial courts, appellate courts and administrative tribunals on a wide variety of environmental issues. In addition to casework, CELA undertakes public education, community organization, and law reform activities at both the federal and provincial levels.

Like many other environmental organizations across Canada, CELA regards biodiversity conservation as high-priority issue. Accordingly, CELA has undertaken, sponsored, or endorsed numerous projects, programs and casework aimed at conserving biological diversity at the local, provincial, national and international level.

In order to conserve biodiversity, a wide variety of regulatory and non-regulatory tools are required to ensure that resource management, land use and development, and industrial activities are carried out in an environmentally sensitive and sustainable manner. However, the protection of wildlife species at risk (and their habitat) cannot be left solely to voluntary programs, economic instruments, unenforceable guidelines, or vague industrial codes of conduct. In CELA's view, endangered species conservation requires an effective and enforceable legislative framework designed to protect species at risk and their habitat.

Accordingly, CELA has been involved in the widespread push for the enactment of long overdue endangered species legislation at the federal level. For example, CELA supports the invaluable work of the Canadian Endangered Species Coalition, and CELA submitted a detailed brief in response to Environment Canada's 1995 discussion paper on endangered species

[1] Ms Keenan is Student-at-Law at the Canadian Environmental Law Association, Toronto, Ontario. The author acknowledges the seminal work of Mr. Stewart Elgie on behalf of the Canadian Endangered Species Coalition. This submission is largely based on CELA Brief No. 305: Submissions of the Canadian Environmental Law Association to the Standing Committee on Environment and Sustainable Development Regarding Bill C-65 by Richard D. Lindgren and Paul R. Muldoon, December 10, 1996.

conservation.[2] In addition, CELA participated in the national workshop on endangered species sponsored by the Canadian Wildlife Service in Ottawa in December 1995. CELA has also published public education materials regarding the need for federal endangered species legislation.[3]

CELA has used its environmental law experience, and its public interest perspective, to evaluate Bill C-5, the Species at Risk Act. CELA believes that there are significant deficiencies and loopholes that must be rectified as Bill C-5 proceeds through the legislative process.

Accordingly, although CELA supports Bill C-5 in principle, and indeed supports many of the specific provisions contained within the Bill, CELA submits that Bill C-5 should be enhanced and strengthened through various amendments, particularly amendments that:

- expand the application and scope of Bill C-5;
- clarify key definitions under Bill C-5;
- enhance the public registry;
- limit delegation powers;
- improve the listing process and ensure that listing decisions are made on a sound scientific basis;
- strengthen the general prohibitions within Bill C-5;
- enhance the emergency order powers;
- improve and expedite the recovery strategy and action plan processes;
- provide for appeals of "exception" permits and agreements;
- ensure the application of environmental assessment obligations to proposed projects that may adversely affect a listed species or the residences or critical habitat of its individuals;
- strengthen enforcement measures under Bill C-5;
- provide for citizen suits; and
- improve reporting requirements under Bill C-5.

[2] R. Lindgren, "Endangered Species and Spaces: The Need for Federal Legislation" (CELA, 1995).

[3] See, for example, R. Lindgren, "Pressure Increases to Protect Wildlife", The Lawyers Weekly, 15:13 (August 11, 1995), at p.12; and R. Lindgren, "Federal Endangered Species Law: An Update", Intervenor 20:4 (July/August 1995), p.5.

SECTION 2.0 - THE RATIONALE FOR FEDERAL LEGISLATION

2.1 The Need for Action

The staggering loss of biological diversity at the global level has been well-documented,[4] and does not need to be reviewed here in detail. It has been estimated that two to three species become extinct every hour, which translates into the loss of approximately 27,000 species each year. The vast majority of these modern extinctions are due to human activity rather than natural causes. These human activities include:

- habitat destruction and degradation (i.e. loss of wetlands, grasslands, old growth forests and other critical habitat);

- incompatible land use and development (i.e. urban sprawl);

- resource exploitation (i.e. overhunting or overfishing);

- climate change (i.e. excessive carbon emissions);

- toxic pollution (i.e. bioaccumulation of persistent toxics).

Individually and cumulatively, these activities threaten the long-term sustainability of wildlife species, particularly those already at risk. However, the single greatest threat to species at risk is habitat loss.

Canada, too, has experienced the extinction or extirpation of numerous species of flora and fauna, while hundreds of other species remain endangered, threatened or vulnerable within Canada. These alarming statistics are reflected in the following wildlife status designations prepared by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC):[5]

CATEGORY	**TOTAL**
Extinct	12
Extirpated	15
Endangered	107
Threatened	76
Special Concern	154
	276

[4] R. Lindgren, "Endangered Species and Spaces: The Need for Federal Legislation" (CELA, 1995), pp.2-3.
[5] As of November 2000.

The most significant threat to most of the Canadian species at risk is habit at loss. Accordingly, it is critically important for endangered species legislation, at both the federal and provincial level, to require, not just permit, habitat protection for species at risk. As described below, however, the habitat protection provisions of Bill C-5 are woefully inadequate and must be substantially strengthened.

2.2 The Rationale for Protecting Species at Risk

It is well-recognized that conserving biodiversity in general, and protecting wildlife species in particular, is important for many different reasons, including:[6]

Ecosystem Benefits: Flora and fauna play important roles in maintaining healthy ecological functions and processes.

Recreational, Economic and Aesthetic Benefits: Wildlife-based activities, such as bird-watching or eco-tourism, is a billion dollar industry in Canada which provides numerous social, cultural, and aesthetic benefits.

Food and Medicine: Much of Canada's food, medicine, and other material needs are provided by, or derived from, plant and animal species.

Ethics: Many persons believe that the human species does not have the moral right to cause the extinction of another species.

In summary, the continuing loss of biodiversity in Canada is undesirable from these ecocentric, anthropocentric, and ethical perspectives.

Not surprisingly, then, there has been overwhelming public support in Canada for the enactment of federal endangered species legislation. For example, a 1996 survey revealed that 92% of Canadians support endangered species legislation, while close to 90% believe that the federal government must assume a leadership role in protecting endangered species within Canada.[7]

2.3 The Inadequacy of the Existing Regulatory Framework

In the past, the federal, provincial and territorial governments within Canada slowly developed a policy and regulatory framework to protect wildlife, habitat and natural heritage.

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[6] Generally, see S. Elgie, "Protected Spaces and Endangered Species", in Hughes, Lucas and Tilleman (eds.), Environmental Law and Policy (Emond Montgomery, 1993), pp.468-69.

[7] Environment Canada, "News Release - Backgrounder #1: What Protecting Endangered Species Means to Canadians" (October 31, 1996), p.1.

However, the effectiveness of the existing framework is highly questionable, given that hundreds of wildlife species have been designated at risk by COSEWIC, and the COSEWIC list keeps growing each year. It is also noteworthy that few provinces have actually enacted endangered species legislation.

As described below, Canadian wildlife officials adopted, in 1996, a "National Accord on the Protection of Species At Risk" in order to address the numerous deficiencies within the existing regulatory framework. However, we have seen that the National Accord has not translated into the prompt enactment and timely enforcement of comprehensive endangered species legislation at the provincial and territorial levels.

(a) Existing Federal Laws

Unless and until Bill C-5 is amended and passed, Canada will continue to lack an effective endangered species law at the federal level. This is a completely unacceptable situation since this would leave many species at risk subject only to indirect and piecemeal protection through other existing federal statutes, such as the Canada Wildlife Act, Fisheries Act, Migratory Birds Convention Act, National Parks Act, and the regulations thereunder. While these other statutes serve important purposes, they confer only limited protection to species at risk, and the mere existence of these other statutes does not negate the clear and compelling need for federal endangered species legislation.

Canada's legislative inertia regarding endangered species stands in stark contrast to the experience in the United States, which has had strong federal endangered species legislation in place since 1973. CELA hastens to point out that while the American model has not been problem-free, the U.S. experience clearly demonstrates that it is possible to protect endangered species and their habitat and still provide for appropriate land use or resource development opportunities. CELA does not advocate the wholesale incorporation of the U.S. Endangered Species Act into Bill C-5. However, in considering how, and to what extent, Bill C-5 can be expanded and improved, particularly in relation to habitat protection, CELA submits that it is instructive to have regard for, and to learn from, the American endangered species experience, as described below.

(b) Existing Provincial Laws

At the present time, several Canadian provinces and territories do not have any specific endangered species legislation. Accordingly, these provinces, of necessity, can only rely upon general wildlife and parks laws that are simply not designed to adequately ensure the protection of species at risk.

Even in the few provinces that currently have endangered species laws,[8] the respective legislative regimes cannot be viewed as uniform or comprehensive. For example, Ontario's Endangered Species Act,[9] which was first passed in the early 1970s, suffers from a number of serious flaws and loopholes, such as:

- The listing of endangered species is entirely discretionary. Only a small number of flora and fauna have been designated as being "threatened with extinction" in Ontario,[10] including two species that have already been extirpated from Ontario.[11] Ontario's legislation does not impose a mandatory duty upon government to identify, assess, or report upon the species at risk within the province. Accordingly, the Ontario list may be characterized as bureaucratic rather than scientific in nature, and it does not constitute a credible or accurate assessment of the current status of species at risk within the province.

- The listing process lacks adequate public notice and comment opportunities. Ontario's law provides no formal opportunities for public input into the listing process, and there has been unconscionable delay in updating the list to include COSEWIC-listed species at risk in Ontario.

- Recovery plans are not required by law. Even for the few species designated as "endangered" in Ontario, the existing legislation does not require the preparation and implementation of plans to assist in the recovery of such species. This is widely regarded as one of the major shortcomings of the Ontario law, and the present lack of mandatory recovery plans in Ontario will undoubtedly perpetuate the precarious status of such species until they are extirpated or extinct.

- Preventative measures are not required by law. Ontario's law provides no legal protection for species that are threatened or vulnerable. This is a regrettable oversight since it is important to undertake protection and recovery efforts for such species before they reach "endangered" status.

- There is no requirement for prior assessment of projects or undertakings that may impact species at risk or their habitat. Ontario's law does not require prior assessment of projects, developments or undertakings that may adversely affect species at risk or their habitat. If applicable, Ontario's Environmental Assessment Act would require such an assessment. To date, however, the application of the Environmental Assessment Act has been largely restricted to a small number of public sector proponents, and private sector development (other than waste management facilities) has remained largely untouched by environmental assessment requirements. In general, this means that private sector activities -- such as urban development, aggregate extraction, or tree cutting upon private woodlots -- can occur without an environmental assessment, even where such activities may adversely species at risk or their habitat.

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[8] Such as Ontario, New Brunswick, Quebec, and Manitoba.
[9] R.S.O. 1990, c.E.15.
[10] Regulation 328, R.R.O. 1990.
[11] Patricia Mohr, "Wildlife", in Estrin and Swaigen (eds.), Environment on Trial (Emond Montgomery, 1993), p.360.

- Enforcement of the Ontario law has been sporadic and ineffective. Although Ontario's law has existed since 1971, it appears that only four prosecutions have been undertaken by the Ministry of Natural Resources over the past 25 years.[12] It is also noteworthy that these four cases involved "takings" of endangered species, which means that the habitat protection provision of the Ontario law[13] has never been enforced. This abysmal enforcement track record, combined with Ontario's apparent unwillingness to designate additional species as "endangered", does not provide sufficient deterrence to potential offenders, nor does it confer adequate protection upon species at risk in Ontario. The fact that the Ministry of Natural Resources is experiencing extensive budget cuts and staffing reductions leaves CELA with even less confidence that Ontario's law will be enforced in a timely and effective manner by government officials.

Many of the above-noted deficiencies in Ontario's law were targeted in a private member's bill introduced for First Reading in the Legislature on June 5, 1996.[14] Among other things, this Bill proposed to: (1) extend protection to threatened and vulnerable species; (2) establish an advisory committee regarding species at risk; (3) require the preparation of status reports and recovery plans; and (4) enhance investigation and enforcement powers. Bill 62 was not proclaimed into force. It is unclear whether Ontario's endorsement of the National Accord (discussed below) will cause the present government to promulgate similar legislation. Accordingly, until this uncertainty is settled, it can be safely concluded that Ontario's Endangered Species Act remains outdated and ineffective.

(c) The National Accord for the Protection of Species at Risk

In October 1996, federal, territorial and provincial wildlife ministers agreed "in principle" to a "National Accord for the Protection of Species at Risk in Canada". The goal of the National Accord is laudable: "to prevent species in Canada from becoming extinct as a consequence of human activity".[15]

Among other things, the National Accord stipulates that all jurisdictions will: (1) participate in the Canadian Endangered Species Conservation Council; (2) recognize COSEWIC as a source of independent advice on the status of species at risk nationally; (3) establish complementary legislation and programs for effective protection of species at risk throughout Canada; and (4) refer any disputes under the Accord to the Canadian Endangered Species Conservation Council for resolution. The National Accord provides few technical details on how and when the required steps should be implemented, but goes on to stipulate that "additional guidance" on implementation "is provided in the national evolving national framework for the conservation of species at risk".

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[12] Ibid.

[13] R.S.O. 1990, c.E.15, section 5(b).

[14] Bill 62 (An Act to revise the Endangered Species Act and to protect Threatened and Vulnerable Species).

[15] Arguably, the National Accord should have also included a second related goal: to ensure the recovery of species at risk to healthy, self-sustaining population levels.

While the goal of the National Accord is unobjectionable, CELA submits that continued reliance upon the "evolving national framework" is misguided and counterproductive. In CELA's opinion, the Canadian approach to endangered species protection must be substantially restructured so as to expand and enhance the role of the federal government.

The primary problem with Bill C-5 is that it is entirely consistent with the "evolving national framework", which relies principally upon the provinces to get the job done. As described below, CELA submits that Bill C-5 should not attempt to confine the federal government's regulatory role to fish, migratory birds, or federal lands. Having regard for the long-standing provincial inertia respecting species at risk, and having regard for the constitutional inability of provinces to deal effectively with the extraprovincial and international aspects of species at risk, it is CELA's opinion that leaving the provinces with the primary responsibility for protecting species at risk means that the necessary legislative reforms may not be implemented properly or at all.

CELA acknowledges that the National Accord attempts to identify the minimum content requirements for provincial legislation and programs in order to ensure some degree of uniformity and consistency across the country. Nevertheless, the general language of the National Accord offers considerable latitude to the provinces to merely "finetune" or "tinker with" their existing regimes, which, as described above, are widely regarded as inadequate. Moreover, the National Accord fails to establish any firm timelines, targets or deadlines for the necessary reforms, which again gives each jurisdiction additional opportunity to delay and obfuscate.

Indeed, the National Accord does not even seem to specify that each jurisdiction must pass or maintain legislation to protect species at risk. This ambiguity is to be contrasted with the wording of Article 8(k) of the Rio Convention, which expressly bound signatories to enact legislation to meet their obligations, as described below. In CELA's view, the loose language in the National Accord's agreement to "establish complementary legislation and programs" appears to give the provinces the option of addressing most or all of the prescribed minimum requirements through non-regulatory "programs" rather than "legislation". In fact, provinces (such as Ontario) that already have endangered species laws may be tempted to resist substantive overhauls of their legislation, preferring instead to meet any additional obligations under the National Accord through "programs".

CELA recognizes that there is a clear need for integrated and coordinated action at the provincial and territorial levels in order to maximize the effectiveness of Canada's endangered species regime. CELA also acknowledges that First Nations exercising treaty and aboriginal rights, including self-government resource management authority, also have an important role to play in the protection and conservation of species at risk. Coordination and cooperation among these various levels of government is both desirable and necessary.

However, CELA submits that the federal government cannot shirk or evade its endangered species responsibilities by resorting to unpersuasive constitutional arguments,

unproductive jurisdictional buck-passing, or unenforceable "feel-good" National Accords. There is a compelling need for a strong federal presence in endangered species protection, and there is a strong constitutional basis for such action, as described below. In CELA's view, the centrepiece of Canada's endangered species regime must be comprehensive federal legislation that goes beyond fish, migratory birds or federal lands. Under such a regime, the provinces and territories would still be free to pursue their own wildlife priorities and to supplement, not supplant, these minimum federal standards. However, for the reasons set out below, Bill C-5 appears to fall way short of the mark in many key respects.

2.4 Canada's International Obligations: The Rio Convention

Before and during the 1992 Rio Earth Summit, Canada played a key role in the development and adoption of the Convention on Biological Diversity, which Canada subsequently ratified. Among other things, Article 8(k) of the Convention requires Canada to "... as far as possible and as appropriate, develop or maintain necessary legislation... for the protection of threatened species and populations" (emphasis added). In 1993, Parliament's Standing Committee on the Environment considered Canada's obligations under the Convention, and properly concluded that the lack of a federal endangered species law was a "legislative gap" that should be addressed. The Standing Committee also unanimously recommended:

... that the Government of Canada, working with the provinces and territories... take immediate steps to develop an integrated legislative approach to the protection of endangered species, habitat, ecosystems and biodiversity in Canada (emphasis added).[16]

In light of its significant loopholes and limited application, it is debatable whether Bill C-5 fully satisfies Canada's international obligations under the Rio Convention. Similarly, it is questionable whether Bill C-5 fully addresses the intent of the Standing Committee's recommendations respecting the protection of species at risk and their habitat, particularly in light of the non-binding nature of the National Accord. Thus, CELA submits that Bill C-5 should be substantially strengthened in accordance with the numerous recommendations set out below in Section 3.0 of this submission.

2.5 Constitutional Basis for Federal Endangered Species Law

It is beyond the scope of this submission to provide an exhaustive review of the constitutional basis for comprehensive federal endangered species legislation. On this issue, CELA fully concurs with the legal opinion prepared for the Canadian Endangered Species Coalition by Professor Dale Gibson, a leading constitutional expert.[17] Professor Gibson concluded as follows:

[16] Standing Committee on Environment, A Global Partnership: Canada and the Conventions of the United Nations Conference on Environment and Development (April 1993), p.30.

[17] Dale Gibson, "Endangered Species and the Parliament of Canada: A Constitutional Opinion" (SLDF, 1994).

There is a persuasive argument to be made that the Parliament of Canada has sufficient competence under the "national dimension" facet of its "P.O.G.G. [peace, order, and good government] power" (including the "treaty power", however interpreted) to exercise jurisdiction over all aspects of endangered species protection, both direct and necessarily incidental, regardless of the nature of the species or its location. Even if that argument should fail, it is indisputable that federal authorities have such jurisdiction over:

- all fish and other aquatic life-forms (s.91(12));

- all species inhabiting (for at least part of their life-cycles) property that is federally owned or federally controlled, whether beyond the geographic bounds of the provinces or on federal enclaves within the provinces (s.91(1A); s.91(24); P.O.G.G.);

- all species that move across provincial or national boundaries, or whose survival depends on trans-boundary measures (P.O.G.G.);

- all protections embodied in criminal law (s.91(27));[18]

- statistical studies of endangered species and related matters (s.91(6));

- at least some threats caused by agricultural activities (s.95).

The totality of these federal powers are so sweeping, in my opinion, as to leave very few, if any, gaps in the ability of the Government of Canada to act for the protection of all endangered species in Canada (emphasis added).[19]

Professor Gibson further concluded that while there is room for provincial endangered species legislation, and while interjurisdictional cooperation may be desirable, in the final analysis the federal government can play the lead role in protecting species at risk:

The provinces are capable of providing much protection for endangered species within their own territories under their own authority (although major aspects of the subject cannot be dealt with by the provinces alone, and all provincial action is subject to federal paramountcy). Virtually any kind of federal-provincial collaboration that might be considered desirable is constitutionally feasible through delegation, cost sharing and other co-operative measures. The constitutional powers of the federal Parliament are so sweeping in this area that federal authorities would have no difficulty performing a paramount role in any such co-operative schemes if they chose to so.[20]

CELA reached the same conclusions in its previous submission on federal endangered

[18] In *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, the Supreme Court of Canada upheld the protection of the environment as a public purpose that would support a federal law under the criminal-law power.
[19] Ibid, p.25.
[20] Ibid, p.26.

species legislation,[21] and CELA wholly adopts Professor Gibson's reasoning and conclusions in this matter.

Given the strong constitutional basis for comprehensive federal endangered species legislation, CELA is unclear why Bill C-5 has been deliberately drafted to only apply to fish, migratory birds, and federal lands.[22] It is equally unclear why Bill C-5 does not provide substantive protection to transboundary species and their habitat, particularly since the provinces cannot act effectively or comprehensively to deal with the extraprovincial and international aspects of transboundary species. In CELA's opinion, there is no compelling constitutional reason why Bill C-5 has been so tightly circumscribed in its application and scope. Thus, CELA can only conclude that the narrow application of Bill C-5 was primarily motivated by political, not legal, considerations.

SECTION 3.0 - CRITIQUE OF BILL C-5

3.1 Essential Elements of Endangered Species Law

In a previous submission on federal endangered species legislation,[23] CELA outlined the minimum requirements for the new federal statute as follows:

- national standards covering all species at risk throughout Canada;
- listing of species on a sound scientific basis by a non-partisan, expert and independent scientific committee;
- advance assessment and review of undertakings that may affect species at risk;
- development and implementation of recovery plans for all species at risk;
- prohibitions against harming endangered or threatened species or their habitat;
- strong penalties for violations under the legislation; and
- effective enforcement and compliance mechanisms, including administrative orders and recourse to the civil courts.

These essential elements represent the benchmark used by CELA to evaluate the various components of Bill C-5. In evaluating Bill C-5, CELA also considered the extent to which the Bill reflects or incorporates the recommendations of the Minister's Task Force on endangered

[21] R. Lindgren, "Endangered Species and Spaces: The Need for Federal Legislation" (CELA, 1995), pp.7-8.
[22] Bill C-5, section 33.
[23] R. Lindgren, "Endangered Species and Spaces: The Need for Federal Legislation" (CELA, 1995), p.23.

species reform. This multi-stakeholder Task Force, which was established in 1995, reached an important consensus on the key components of federal endangered species legislation. Among other things, the Task Force recommended that:

- the new Act should apply to the full extent of federal jurisdiction, including protection of transboundary species;

- listing decisions should be made by COSEWIC, not politicians;

- the new Act should prohibit harming endangered species or disturbing their homes; and

- the new Act should protect the critical habitat of endangered species, as may be identified through recovery plans.

Applying this analytical framework to Bill C-5, it is clear that several of CELA's previous recommendations and the Task Force recommendations have been reflected or addressed in Bill C-5. Nevertheless, some key recommendations have been omitted or seriously weakened in Bill C-5, and there is considerable room to improve Bill C-5 in order to increase its effectiveness and to meet current public expectations regarding federal endangered species legislation.

CELA's specific findings and recommendations respecting Bill C-5 are described below in Sections 3.2 to 3.11 of this submission.

3.2 Preamble and Statement of Purpose

The preamble of Bill C-5 contains a number of recitals that emphasize the need for federal endangered species legislation. In general, CELA supports the preamble as drafted, but submits that the preamble should be amended to include additional recitals that underline the constitutional basis for Bill C-5. Indeed, the only reference in the proposed preamble to the constitutional basis of Bill C-5 is the fourth recital, which correctly indicates that: "providing legal protection for species at risk ... will, in part, meet Canada's commitments under [the Rio] Convention".

In CELA's view, the preamble (which will be an important interpretive aid if constitutional challenges are brought in court) should include the following two paragraphs:

The existence of species at risk is a matter of national concern,

Species at risk are not always contained within geographic boundaries.

Section 6 of Bill C-5 sets out the purposes of the legislation. CELA supports this statement of purposes, but submits that several key provisions of Bill C-5 require substantial improvement if the federal government is serious about achieving the purposes of Bill C-5.

CELA RECOMMENDATION #1: The preamble of Bill C-5 should be amended to include paragraphs that refer to or invoke the constitutional basis for the legislation, particularly the "national concern" branch of the "peace, order, and good government" power.

3.3 Interpretation, Application, and Administration

Bill C-5 contains numerous provisions that help define the intended ambit of the legislation. As described below, CELA submits that some provisions dealing with the interpretation, application and administration of Bill C-5 require further amendment so as to clarify the scope and content of the legislation.

(a) Interpretation Sections

In CELA's view, most of the proposed definitions in section 2(1) of Bill C-5 are sufficiently clear and concise. However, CELA would suggest new or amended definitions for the following terms: "critical habitat", "extinct", "habitat", "residence", and "wildlife species". In general, Bill C-5's proposed definitions for these terms are either too narrow or non-existent.

For these terms, CELA would suggest the following wording:

"critical habitat" means habitat that is necessary for the survival and recovery of a wildlife species, as identified in a status report under section 21 or recovery strategy under subsection 41(1).

"extinct species" means a wildlife species formerly present in Canada but no longer in existence anywhere.

"habitat" means the air, land or water, including flora, geological features, and ecological functions, where an individual of a species at risk currently occurs, formerly occurred, or could occur if reintroduced.

"residence" means a specific dwelling place or other area habitually occupied by an individual of a species at risk for all or part of its life cycle, including dens, nests, or areas used for breeding, feeding, hibernating, rearing, staging, or wintering purposes.

"wildlife species" means a species, subspecies, or geographically or genetically distinct population of animal, plant or other organism that is wild by nature and,

(a) is native to Canada; or

(b) extended its range into Canada without human intervention and has been present in Canada for at least 50 years.

For the purposes of this definition, a species, subspecies or geographically or genetically distinct population is, in the absence of evidence to the contrary, presumed to have been present in Canada for at least 50 years.

In CELA's view, tightening up these key definitions in this manner will clarify the intended scope of Bill C-5.

(b) Application of Bill C-5

i) Species Protected

Sections 34 and 35 of Bill C-5 provide, in effect, that the Bill applies only to: (1) aquatic species and their residences; (2) species of migratory birds and their residences that are protected by the Migratory Birds Convention Act, 1994; and (3) species on federal lands.

For example, section 34(1) of Bill C-5 suggests that only those birds that are protected under the Migratory Birds Convention Act, 1994 are eligible for protection under Bill C-5 on provincial land. Among other things, this means that birds of prey -- such as owls, hawks, falcons, and eagles -- are not caught by the scope of section 34(1) because they are not protected under the Migratory Birds Convention Act, 1994.[24] In CELA's view, this is an extremely serious oversight since many of Canada's avian species at risk are, in fact, birds of prey.[25] Except for those individuals that may happen to reside upon federal lands within a province, it appears that these bird species at risk remain largely unprotected under the Bill C-5 regime.

In CELA's view, this very narrow and highly selective application of Bill C-5 is arguably the most objectionable aspect of the legislation. As described above, there is both a strong need and a strong constitutional basis for comprehensive federal endangered species legislation. CELA submits that there is no compelling policy or legal reason to apply Bill C-5's protective provisions in such a limited and piecemeal fashion to three discrete matters under undisputed federal jurisdiction, viz. fish, migratory birds, and federal lands. As Professor Gibson has correctly concluded, the federal government has abundant constitutional authority to protect all species at risk and their habitat, regardless of the nature of the species or its location. Accordingly, the excessively narrow application of Bill C-5 is unnecessary and unacceptable, and CELA submits that sections 34 and 35 be deleted or substantially amended, as described below.

CELA is also concerned about Bill C-5's failure to protect transboundary species, including those that range or migrate between provinces and across international boundaries. The lack of protection for such species is clearly inconsistent with the Task Force's

[24] Patricia Mohr, "Wildlife", in Estrin and Swaigen (eds.), Environment on Trial (Emond Montgomery, 1993), p.349.
[25] Such as the burrowing owl, peregrine falcon, spotted owl, and red-shouldered hawk.

recommendations on this issue, as described above. Moreover, there is no constitutional or legal reason to justify Bill C-5's failure to protect transboundary species. As Professor Gibson and others have concluded, Parliament enjoys clear constitutional authority over all transboundary species. Accordingly, CELA is at a loss to understand why the drafters of Bill C-5 have failed to protect such species and their habitat.

In CELA's view, the federal government should not attempt to evade its responsibilities regarding transboundary species and those species at risk that are found on provincial lands. By power of sections 34 and 35, these species will only receive federal protection when the Governor in Council makes a determination, on a species-by-species basis, that provincial or territorial laws are not protective. This is a wholly discretionary exercise. The scheme set out in Bill C-5 provides no assurance that transboundary species and species found on provincial lands will be adequately protected. As described above, provincial protection of endangered species is currently inconsistent and inadequate. Given this regulatory backdrop, it simply is not prudent to rely on the provincial "safety net," buttressing provincial laws with federal protection if and when they are determined, on a discretionary and piecemeal basis, to be faulty. Bill C-5 must instead confer effective protection upon transboundary species, and species found on provincial and territorial lands, leaving the provinces free to supplement these minimum national standards with more stringent protective measures if necessary.

ii) Habitat Protected

A primary limitation of Bill C-5 is its failure to protect the critical habitat of species at risk. Section 33 limits habitat protection to wildlife residences. This wholly inadequate level of protection is further limited by sections 34 and 35, which restrict section 33 protection to the residences of aquatic species, migratory birds that are protected under the Migratory Birds Convention Act, and species on federal lands. Section 33 also limits residence protection for extirpated species to those species with recovery strategies that recommend reintroduction of the species into the wild in Canada.

Section 58 offers similarly limited protection. It prohibits the destruction of critical habitat of only endangered or threatened species (not extirpated species). It is restricted to habitat found on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada. Incredibly, this inadequate provision is further weakened by having exclusive application to those federal areas that the Governor in Council designates by order. Such designation is completely discretionary.

Section 60 of Bill C-5 is a similar provision for critical habitat found in areas of federal land that are located in the provinces. These areas, if identified by a provincial minister to be essential to the survival or recovery of a species, may be designated by order of the Governor in Council. It is then prohibited to destroy any part of such habitat. Once again, this power is discretionary and depends on the initiative of a provincial minister.

The protection of critical habitat that is found in the provinces and territories but that is

not federal land is considered in section 61 of Bill C-5. Once again, only those areas that are designated, by order, by the Governor in Council, are protected. This is a discretionary power. Subsection 61(5) deems that such orders expire five years after the day they are made or renewed. There is no obligation for the competent minister to assess the need for a renewal of the order at the time of expiry. Nor is the Minister obliged to provide the public with reasons if he or she does not recommend that the order be renewed.

Section 59 grants the Governor in Council discretionary power to pass regulations to protect critical habitat on federal lands. This provision should be mandatory and should apply to all areas that are identified as providing critical habitat to endangered, threatened or extirpated species, regardless of where those areas may be found.

Under section 57 of Bill C-5, the competent minister is given discretion to establish codes of practice, national standards or guidelines with respect to the protection of critical habitat. Codes of practice, standards and guidelines are non-enforceable instruments and provide no guarantee that critical habitat will be adequately protected. They are inappropriate mechanisms for the protection of critical habitat

Given the essential role that habitat protection plays in the protection of endangered species, and the government's stated commitment to habitat protection, including recognition that the habitat of species at risk is key to their conservation in the preamble to Bill C-5, the limitations described above are unacceptable.

In summary, sections 34 and 35 unjustifiably limit the applicability of Bill C-5's protective provisions. As a consequence, Bill C-5 does not provide any meaningful protection for many, if not most, of the species at risk listed by COSEWIC at the present time. For example, except for those individuals occurring on federal lands (i.e. national parks), Bill C-5 does not guarantee protection of grizzly bears, woodland caribou, pine marten, and over 100 other species at risk across Canada. In CELA's opinion, it is completely unacceptable for Parliament to propose an endangered species law that does little or nothing for the majority of species at risk in Canada. Similarly, Bill C-5 does not provide meaningful protection of critical habitat.

CELA recommends that sections 34 and 35 be deleted.

CELA recommends that section 32 be amended to specify that the Act applies to all species at risk in Canada, not just fish, migratory birds, or species upon federal lands.

CELA recommends that section 33 be re-worded as follows:

No person shall damage or destroy the residence or critical habitat of a wildlife species that is listed as an endangered, threatened or extirpated species.

In the alternative, CELA recommends that sections 34 and 35 be amended such that

sections 32 and 33 apply to endangered species on provincial and territorial lands unless a provincial or territorial government establishes that endangered species provisions in that province or territory are as protective or more protective than provisions in Bill C-5. Details of a process by which provincial and territorial governments could make application that sections 34 and 35 not apply in their jurisdictions would be established by regulation.

CELA recommends that sections 58, 59, 60 and 61 be deleted.

In the alternative, section 58 should be amended to include critical habitat on all federal lands. Sections 60 and 61 should be amended such that Bill C-5 critical habitat provisions apply to lands in provinces and territories unless a provincial or territorial government establishes that critical habitat provisions in that province or territory are as protective or more protective than Bill C-5 provisions. Details of a process by which provincial and territorial governments could make application that the amended sections 60 and 61 not apply in their jurisdictions would be established by regulation.

Under section 64 of Bill C-5, the Minister may provide compensation to any person for losses suffered as a result of any extraordinary impact from the application of section 58, 60 or 61, or an emergency order in respect of habitat that is identified as necessary for the survival or recovery of a wildlife species. CELA is concerned about the ambiguity of this section and its potentially broad application. CELA recommends that section 64 be amended such that compensation be explicitly restricted to expropriations.

(c) Administration of Bill C-5

Under section 8(1) of Bill C-5, the Bill is to be administered by the federal Minister of Environment, except where the Bill gives responsibility to either the Minister of Canadian Heritage or the Minister of Fisheries and Oceans. Under section 8(2) of Bill C-5, each of these Ministers can delegate any of their powers or functions to "any person."

CELA has a number of concerns about this very broad delegation power. First, it must be noted that very important powers and functions can be delegated, particularly since section 74 of Bill C-5 allows the Ministers to issue permits allowing "exceptions" to the Bill's protective provisions, as discussed below. For this reason, CELA cannot support the proposal to delegate such powers to "any person", which presumably includes not only governmental employees but any private person or corporation. For the purposes of greater certainty and accountability, CELA submits that the term "any person" should be deleted from section 8(2). If the intent is to permit delegation of these Ministerial powers to Crown employees (either federal or provincial), then section 8(2) should be amended accordingly.

Second, CELA does not support the use of section 8(2) to delegate permit-issuing powers to provincial ministries, agencies, or employees. In principle, CELA does not object to the possible delegation of enforcement powers to the provinces. Nevertheless, CELA remains

concerned about the practical effect of delegating enforcement powers to provincial bodies -- such as Ontario's Ministry of Natural Resources -- that are being substantially downsized in terms of staffing and budgets. However, CELA submits that permit-issuing powers should not be delegated to the provinces. Such a delegation would undermine the principles of accountability, certainty, and predictability in relation to one of the most significant decisions under Bill C-5: whether, and to what extent, should harm to a species or its habitat be authorized? In CELA's view, these critically important decisions should remain in the federal domain, subject to clear and consistent federal regulations, guidelines or policies.

Third, Bill C-5 fails to provide sufficient safeguards to ensure that delegated powers are actually exercised properly by the delegatee. In CELA's view, where the Minister proposes to delegate powers pursuant to section 8, there should be prior public notice (i.e. the public registry and the Canada Gazette) and comment opportunities with respect to the proposed delegation arrangement. Finally, section 8 lacks any constraints on how long the delegation can remain in effect, and it fails to provide for periodic review of the delegation. Similarly, section 8 fails to specify that the Ministers can attach terms and conditions to the delegation. In CELA's view, section 8 must be expanded to address these important accountability issues.

Section 10 of Bill C-5 permits agreements between the federal government and any other government in Canada, organization or wildlife management board respecting the administration of the Bill. This section also raises accountability issues. For example, section 10 fails to place a time limit on such agreements, nor does section 10 require periodic review or annual reports. Administrative agreements made under section 10 are not subject to public comment. Thus, CELA submits that section 10 must be amended accordingly to address these matters. CELA further notes that these agreements are to be limited to the administration of Bill C-5 -- they are not to be used to permit the holus bolus delegation (or abdication) of Ministerial duties, powers and responsibilities under Bill C-5. This comment applies equally to "conservation agreements" executed pursuant to sections 11 and 12 of Bill C-5.

CELA RECOMMENDATION #2: Section 2(1) of Bill C-5 should be amended to include new or reworded definitions for the following terms: "critical habitat", "extinct", "habitat", "residence", and "wildlife species".

CELA RECOMMENDATION #3: Sections 34 and 35 of Bill C-5 should be deleted. Sections 32 and 33 should be amended to:

- specify that the Act applies to all species at risk in Canada, not just fish, migratory birds, or species upon federal lands;

- specify that the Act applies to the residences *and critical habitat* of all species at risk in Canada, not just fish, migratory birds, or species upon federal lands;

- ensure that transboundary species at risk, and their residences and critical habitat, receive

mandatory protection under the Act.

CELA RECOMMENDATION #4: Failing adoption of Recommendation #3, CELA recommends that sections 34 and 35 be amended such that sections 32 and 33 apply to endangered species on provincial and territorial lands unless a provincial or territorial government establishes that endangered species provisions in that province or territory are as protective or more protective than provisions in Bill C-5. Details of a process by which provincial and territorial governments could make application that sections 34 and 35 not apply in their jurisdictions would be established by regulation.

CELA RECOMMENDATION #5: CELA recommends that sections 58, 59, 60 and 61 be deleted.

CELA RECOMMENDATION #6: Failing adoption of Recommendation #5, CELA recommends that section 58 be amended to include critical habitat on all federal lands. Sections 60 and 61 should be amended such that Bill C-5 critical habitat provisions apply to lands in provinces and territories unless a provincial or territorial government establishes that critical habitat provisions in that province or territory are as protective or more protective than Bill C-5 provisions. Details of a process by which provincial and territorial governments could make applications that the amended sections 60 and 61 not apply in their jurisdictions would be established by regulation.

CELA RECOMMENDATION #7: Section 64 of Bill C-5 should be amended to restrict compensation to situations involving expropriations.

CELA RECOMMENDATION #8: Section 8 of Bill C-5 should be amended to:

- delete the term "any person" and, if necessary, include the term "Crown employee" in section 8(2);

- ensure that permit-issuing powers cannot be delegated to provincial ministries, agencies, or employees;

- provide for periodic review of delegation agreements;

- place limits on the time that delegation can remain in effect, and empower the responsible Ministers to attach terms and conditions to the delegation as may be appropriate; and

- provide for public notice and comment with respect to proposed delegations;

CELA RECOMMENDATION #9: Section 10 of Bill C-5 should be amended to:

- require the filing of annual reports regarding federal-provincial agreements;

- provide for periodic review of federal-provincial agreements; and

- place limits on the time that a federal-provincial agreements can remain in effect.

3.4 Public Access

CELA fully supports the requirement in section 120 of Bill C-5 to create and maintain a public registry to facilitate access to information and to enhance public participation in matters under the Bill. A similar on-line public registry was established under Ontario's Environmental Bill of Rights, 1993 (EBR), and it has proven to be a very popular and useful tool, particularly since the Registry can be accessed easily and free of charge.[26] However, the EBR Registry has experienced some technical difficulties, and federal officials establishing the Bill C-5 registry would be well-advised to carefully review the Ontario experience in order to avoid start-up problems.[27]

Under section 123 of Bill C-5, the following documents are to included in the public registry:

(1) regulations and orders made under the Act;
(2) administrative agreements entered into under section 10;
(3) COSEWIC's classification criteria;
(4) wildlife status reports;
(5) the List of Wildlife Species at Risk;
(6) codes of practice, national standards or guidelines established;
(7) agreements and reports filed under section 111 or subsection 113 (2) or notices that such agreements have Ben filed; and
(8) all reports made under sections 126 and 128.

Additional reporting requirements are contained in Bill C-5. CELA supports the inclusion of these documents on the public registry, but submits that the registry should also include the following documents:

- the full text of Bill C-5;

- the National Accord on the Protection of Species at Risk;

- all agreements between a competent minister and any government in Canada, organization or person;

- agreements and permits made under sections 74, 75 and 78, which authorize a person to engage in an activity that affects a listed wildlife species, any part of its critical habitat or

[26] Since May 1994, approximately 11,000 user accounts have been opened under the EBR Registry.

[27] Some common complaints about the EBR Registry include: short comment periods; incomplete or misleading notices; and lack of interactive capability.

the residences of its individuals; and

- concise public education materials (i.e. "how to" factsheets) about Bill C-5.

This list is similar to what is currently available under Ontario's EBR Registry, and CELA submits that such information should be available under the Bill C-5 registry.

CELA RECOMMENDATION #10: Section 123 of Bill C-5 should be amended to ensure that the following documents are included in the public registry:

- the full text of Bill C-5;

- the National Accord on the Protection of Species at Risk;

- all agreements between a competent minister and any government in Canada, organization or person;

- agreements and permits made under sections 74, 75 and 78, which authorize a person to engage in an activity that affects a listed wildlife species, any part of its critical habitat or the residences of its individuals; and

- concise public education materials (i.e. "how to" factsheets) about Bill C-5.

3.5 Wildlife Species Listing Process: The Role of COSEWIC

CELA is pleased to see that COSEWIC has received long overdue legislative recognition in section 14 of Bill C-5. In CELA's view, the statutory establishment of COSEWIC will go a long way in providing credibility and scientific soundness in the wildlife species listing process.

Nevertheless, there are some amendments to Bill C-5 that are necessary to enhance the effectiveness, independence and functions of COSEWIC. For example, COSEWIC members are to be appointed by the Minister after consulting the Canadian Endangered Species Conservation Council, which consists solely of governmental representatives and any experts that the Minister, in her or his discretion, consider to be appropriate. In CELA's view, section 16(1) should be amended to require consultation with the Royal Society of Canada and other knowledgeable non-governmental organizations and/or individual persons. In CELA's view, the COSEWIC appointments are critically important to the credibility and integrity of the listing process, and Canadians must be confident that only the most qualified persons, possessing relevant scientific expertise and free of political influence, are appointed as members of COSEWIC.

CELA is unclear about the intent of section 20 of Bill C-5, which appears to make it optional for the Minister to provide administrative support to COSEWIC. In CELA's view,

section 20 must be amended to impose a mandatory duty on the Minister (or the responsible Ministers) to provide the administrative and financial support necessary for COSEWIC to fully carry out its various duties and functions under Bill C-5.

Section 16 of Bill C-5 attempts to prescribe the minimum qualifications and expertise for COSEWIC appointees. In general, CELA supports these provisions, but submits that there should be a limit on the number of Crown employees that can be appointed to COSEWIC. In particular, CELA submits that no more than 50% of COSEWIC appointees should be drawn from the federal or provincial government. This recommendation is not intended to be a slight against the numerous experienced governmental employees who have been instrumental in COSEWIC's work in the past. However, without such a limitation, there is likely to be a well-founded public perception that COSEWIC is, or will be, predominated by government interests, which may undermine the credibility and independence that COSEWIC requires under Bill C-5.

To further guard against this public perception, CELA submits that a new clause should be added to section 16 to provide that governmental appointees to COSEWIC shall carry out their duties and functions under Bill C-5 free of undue influence or interference from their respective employers. Guidance in drafting this provision can be derived from section 22 of the federal Environmental Assessment and Review Process Guidelines Order and section 33(1)(a) of the Canadian Environmental Assessment Act.

One of COSEWIC's most important duties under Bill C-5 is found in section 15, which requires COSEWIC to designate species at risk and to classify them as extinct,[28] extirpated, endangered, threatened or of special concern. CELA strongly supports the provisions in sections 22 and 28 of Bill C-5 which allow members of the public to formally apply to COSEWIC for an assessment of a species' status and an emergency designation of a wildlife species. In addition, CELA generally supports sections 21 and 23 to 26 of Bill C-5, which require status reports, timely COSEWIC decisions with reasons, periodic reviews of designations and classifications, and COSEWIC reports to the Council.

CELA's greatest concern, however, with Bill C-5's listing process is the fact that the federal government has virtually unfettered discretion not to list species at risk, notwithstanding COSEWIC's decisions on designation and classification. Section 27(1) of Bill C-5 provides that the Governor in Council, on the recommendation of the Minister, "may" make regulations to establish and amend the List of Wildlife Species at Risk. This provision offers the federal government considerable latitude to not list species at all, and allows the government to base listing decisions on factors that are not ecological in nature. Thus, it is likely that the listing decision will become a highly charged political issue, rather a decision based solely on the survival and recovery requirements of the species in question.

In CELA's view, the listing decision should not be determined by which faction, industry association or province can mount the best lobbying efforts in Ottawa. CELA submits that it is completely unacceptable to allow politicians, not scientists, to make the ultimate decision on

[28] This is why section 2(1) of Bill C-5 requires a definition of "extinct" species.

which species should be on the List of Wildlife Species at Risk. As drafted, section 27 makes COSEWIC's listing work merely advisory in nature. It represents a step backwards from the 1995 Legislative Proposal, which had proposed that "the Act would require the Minister of Environment to annually establish a federal list of species at risk that includes all species listed by COSEWIC".[29]

It must be recalled that wildlife species only receive protection under Bill C-5 if they are actually listed. Thus, injecting political uncertainty and unpredictability into the listing process strikes at the very heart of Bill C-5.

For these reasons, CELA strongly submits that section 27 must be redrafted to place an express duty on the Minister to pass regulations that place species on the List of Wildlife Species at Risk in accordance with COSEWIC's decisions under sections 23 and 24. Such regulations should be passed within 60 days of COSEWIC's decisions respecting designation, classification, or reclassification.

In addition, Bill C-5 should explicitly state that at the time of promulgation, the initial List of Wildife Species at Risk will be COSEWIC's existing list of designations and classifications, which should be appended to Bill C-5 as Schedule I. Future additions or amendments to Schedule I should be made through regulation, just as the Schedule I List of Toxic Substances under CEPA is updated by orders from time to time. Time is of the essence for species at risk and there is no value in waiting for COSEWIC to re-evaluate and re-submit its 364 current designations and classifications to the Minister for eventual incorporation into the List of Wildife Species at Risk.

CELA's suggested rewording for section 27 is as follows:

(1) The List of Wildlife Species at Risk is established as Schedule I to this Act.

(2) Within 60 days of a decision by COSEWIC under section 23 or 24, the Minister shall by regulation amend Schedule I in accordance with the COSEWIC decision.

(3) The Minister may by regulation add a species to Schedule I where a provincial minister has requested the addition and has agreed to participate in the preparation and implementation of a recovery plan for the species.

(4) The List of Wildlife Species at Risk shall be included in the public registry.

CELA RECOMMENDATION #11: Section 16 of Bill C-5 should be amended to:

- require the Minister to consult about COSEWIC appointees with the Council, Royal

[29] Environment Canada, The Canadian Endangered Species Protection Act: A Legislative Proposal (1995), page 14, Recommendation 6.1.

Society of Canada, and such other organizations or persons as may be appropriate; and

- require the Minister (or the responsible Ministers) to provide the administrative and financial support necessary to permit COSEWIC to fully carry out its duties and functions under Bill C-5.

CELA RECOMMENDATION #12: Section 16 of Bill C-5 should be amended to:

- ensure that no more than 50% of the appointments to COSEWIC are drawn from the federal or provincial governments; and

- provide that government employees who are appointed to COSEWIC shall exercise their duties and functions free of undue influence or interference from their employers.

CELA RECOMMENDATION #13: Section 27 of Bill C-5 should be amended to:

- establish COSEWIC's current list as the List of Wildlife Species at Risk and append it as Schedule I to Bill C-5;

- impose a mandatory duty on the Minister to pass regulations that place species on the Schedule I List of Wildlife Species at Risk in accordance with COSEWIC decisions under sections 23 and 24;

- ensure that such regulations are passed within 60 days of COSEWIC's decisions respecting designation, classification or reclassification; and

- permit the Minister to pass regulations adding species to the Schedule I List of Wildlife Species at Risk where a provincial minister has requested the addition and has agreed to participate in the preparation and implementation of recovery plans for the species.

3.6 Measures to Protect Listed Species

Bill C-5 sets out a number of different tools intended to protect listed species, including: prohibitions; emergency orders; recovery and action plans; agreements and permits; and project review. As described below, these provisions require further amendments in order to increase their efficacy and availability.

(a) Prohibitions

Section 32(1) of Bill C-5 establishes a general prohibition against harming an individual of a listed endangered, threatened or extirpated species. Section 31(2) goes on to prohibit the possession of an individual of a listed endangered or threatened species, or any part of derivative

of one. Although these prohibitions appear to be sufficiently broad, CELA submits that there are some significant gaps in the prohibitions which must be addressed through further amendments.

For example, the section 32(1) prohibition fails to outlaw disturbing or interfering with a listed species. Moreover, this prohibition does not outlaw attempts to undertake the prohibited activities. Ontario's Endangered Species Act contains language that prohibits attempts to harm endangered species,[30] and CELA submits that section 32(1) of Bill C-5 should likewise prohibit attempts to undertake conduct contrary to the section.

CELA's suggested wording for section 32(1) is as follows:

No person shall kill, harm, harass, disturb, capture, take or interfere with an individual of a listed extirpated, endangered or threatened species, or attempt to do so.

CELA submits that similar amendments should be made to the "possession" prohibition in section 32(2). CELA's suggested re-wording of the section 32(2) prohibition is as follows:

No person shall possess, collect, buy, sell or trade an individual of a listed extirpated, endangered or threatened species, or any part or derivative of one, or attempt to do so.

Section 33 sets out a general prohibition against damaging or destroying the residence of an individual of a listed endangered or threatened species. Again, this provision should prohibit disturbing and interfering, and prohibit attempts to undertake the prohibited activities. In addition, CELA recommends that the prohibition apply not only to residences but also to critical habitat, as defined above. Finally, application to extirpated species should not be limited to those situations where a re-introduction program has been identified.

CELA's suggested re-wording for the section 33 prohibition is as follows:

No person shall damage, destroy, disturb or interfere with the residence or critical habitat of an individual of a listed extirpated, endangered or threatened species, or attempt to do so.

Given the lack of protection in Bill C-5 of transboundary species, CELA would suggest the addition of the following section:

(1) In this section, "transboundary species" means a species that COSEWIC has found to range or migrate across a provincial, territorial, or international boundary.

(2) Within 60 days after this Act comes into force, the Minister shall make regulations prohibiting any person from,

[30] R.S.O. 1990, c.E.15, section 5(a). It is noteworthy that the Ontario prohibition also outlaws interfering with an endangered species or its habitat.

(a) killing, harming, harassing, disturbing, capturing, taking or interfering with an individual of a listed transboundary species that is extirpated, endangered or threatened, or attempting to do so;

(b) possessing, collecting, buying, selling or trading an individual of a listed transboundary species that is extirpated, endangered or threatened, or any part or derivative of one, or attempting to do so; or

(c) damaging, destroying, disturbing or interfering with the residence or critical habitat of an individual of a listed transboundary species that is extirpated, endangered or threatened, or attempting to do so.

(b) Emergency Orders

On the recommendation of the competent minister, section 80 of Bill C-5 permits, but does not require, the Governor in Council to make emergency orders in respect of species that face imminent threats to survival or recovery. The competent minister is obliged to make such a recommendation if he or she is of the opinion that a species faces such a threat. Section 80 goes on to provide that emergency orders "may" identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and "may" include provisions requiring protective actions or prohibiting activities that may adversely affect the species or their critical habitat in the area to which the emergency order relates. In the case of species that are not aquatic and are not protected under the Migratory Birds Convention Act, the emergency order may only mandate the prohibition of activities in areas of land that are not federal, are not in the exclusive economic zone of Canada or on the continental shelf of Canada.

In principle, CELA strongly supports the inclusion of an "emergency order" power in Bill C-5. However, there are a number of serious deficiencies with section 80 that should be addressed through further amendments. Firstly, it should not be left to the opinion of the competent minister whether an emergency order is needed. Such assessments should be scientifically-based and should be made by COSEWIC. Secondly, the Governor in Council should be obliged to issue an emergency order when recommended by COSEWIC. In all cases, regardless of where the wildlife habitat occurs, emergency orders should include, as requisite components, an identification of critical habitat, provisions requiring protective actions and provisions that prohibit activities that harm species and their habitats.

In addition, section 80 should be amended to require the responsible Minister to make an emergency order where COSEWIC makes a "regular" designation or reclassification, but determines that immediate action should be undertaken pending the addition of the species to the List of Wildlife Species at Risk, or pending the preparation of a recovery strategy.

CELA's proposed re-wording for section 80 is as follows:

(1) The responsible minister shall forthwith make an emergency order providing for the protection of a wildlife species if COSEWIC designates or reclassifies the species as endangered or threatened on an emergency basis.

(2) The responsible minister shall forthwith make an emergency order providing for the protection of a wildlife species if the responsible Minister, based on the advice of COSEWIC, determines that the recovery strategy for the species no longer adequately protects the species.

(3) The responsible minister shall forthwith make an emergency order providing for the protection of a wildlife species that COSEWIC has designated or classified if the responsible minister, based on the advice of COSEWIC, determines that immediate action is required to protect the species or the residences or critical habitat of individuals of the species.

(4) An emergency order issued under subsections (1), (2) or (3) shall include,

- **(a) provisions regulating or prohibiting activities that may adversely affect the species or the residences of its individuals; and**

- **(b) provisions regulating or prohibiting activities that may adversely affect the critical habitat of the species where COSEWIC has determined that there is an imminent threat to such habitat.**

(5) If the responsible minister is the Minister of Canadian Heritage or the Minister of Fisheries and Oceans, he or she must notify the Minister before making an emergency order under subsections (1), (2) or (3).

(6) The responsible minister shall repeal an emergency order made under subsection (1) when,

- **(a) the responsible minister, based on the advice of COSEWIC, determines that adequate measures have been implemented to eliminate any immediate threats to the species or the residences or critical habitat of its individuals; or**

- **(b) COSEWIC determines that the emergency designation or reclassification of the species is no longer necessary; or**

- **(c) the species has been added to, or reclassified within, the List of Wildlife Species at Risk.**

(7) The responsible minister shall repeal an emergency order made under subsection (2) when the responsible minister, based on the advice of COSEWIC, determines that a revised recovery strategy that adequately protects the species has been prepared and implemented.

(8) The responsible minister shall repeal an emergency order made under subsection (3) when,

(a) the species has been added to the List of Wildlife Species at Risk; and

(b) the responsible minister, based on the advice of COSEWIC, determines that immediate action is no longer necessary to protect the species or the residences or critical habitat of its individuals.

(9) No person shall contravene the provisions of an emergency order while it remains in effect.

(10) An emergency order under subsections (1), (2) or (3) may be limited territorially or as to time or otherwise.

Section 83 of Bill C-5 purports to establish sweeping exceptions to the prohibitions in section 33, subsections 32(1), 32(2), 36(1), 58(1), 60(1), 61(1), regulations under sections 53, 59 and 71, and emergency orders. In CELA's view, these exceptions have been defined far too broadly, and they will only serve to undermine the key prohibitions under Bill C-5. CELA acknowledges there may be a need to prescribe certain limited exceptions, but CELA submits that such exceptions should be for truly extraordinary or urgent circumstances. By way of comparison, it is noteworthy that Ontario's Endangered Species Act does not provide for any exceptions to its general prohibition. In CELA's opinion, if persons cannot fit themselves into narrowly prescribed exceptions (as proposed below), then they should either apply for a permit under section 74, or better yet, refrain from activities that harm species at risk or their habitat or residences.

CELA suggests the following wording for section 83:

Section 33, subsections 32(1), 32(2), 36(1), 58(1), 60(1), 61(1), regulations under sections 53, 59 and 71, and emergency orders do not apply to persons who are engaging in,

(a) activities that are necessary to address an immediate threat to human life or safety;

(b) activities that are authorized as regulatory or conservation measures for endangered species under an aboriginal treaty, land claims agreement, self-government agreement, or co-management agreement; or

(c) activities that are authorized under section 74 or 75.

(c) Recovery Strategies, Action Plans and Management Plans

i) Recovery Strategies

Section 37 of Bill C-5 imposes a general duty on responsible ministers to prepare recovery strategies for endangered and threatened species. In principle, CELA strongly supports the statutory obligation to prepare recovery plans, but CELA submits that several amendments are necessary to improve the recovery strategy provisions of Bill C-5.

Firstly, subsection 37(3) provides that the competent minister "may" prepare a strategy for the recovery of an extirpated species. CELA submits that the preparation of such strategies should be mandatory. Accordingly, CELA suggests that subsection 37(1) be amended to include, "an endangered species, a threatened species or an extirpated species."

CELA further submits that a new subsection should be added to section 37 in order to ensure that all persons, including federal and provincial agencies, do not contravene the provisions of a recovery plan. This new subsection should take the form of a general prohibition in Bill C-5.

CELA's suggested wording for the new subsection in section 37 is as follows:

No person shall contravene or fail to comply with the provisions of a recovery plan.

Subsection 39(1) identifies the parties with whose cooperation recovery strategies must be prepared. Paragraph (e) cites any other person or organization that the competent minister considers appropriate. CELA proposes that this paragraph be amended to include, in addition to those whom the minister deems appropriate, those stakeholders with a demonstrated interest in the recovery strategy.

Section 40 requires the responsible Minister to determine whether the species' recovery is "feasible". In CELA's view, the word "feasible" may be too restrictive since it appears to require a full-blown technical and biological analysis of recovery options before a recovery strategy is prepared. CELA recommends that "feasible" be replaced with "possible", which would maintain the section's intent that the responsible minister give preliminary consideration to whether a recovery strategy can be prepared in the circumstances.

By section 42 of Bill C-5, the competent minister must include a proposed recovery strategy in the public registry within one year after a species is listed as endangered, and within two years if the species is listed as threatened. Given the identified dangers to endangered and threatened species, CELA submits that these time periods are too long and that they be shortened to six months for endangered species and one year for threatened species. CELA further submits that section 42 be amended to require that a proposed recovery strategy be published in the Canada Gazette within 30 days after completion. In addition, the Minister should be obliged by law to incorporate the recovery strategy (or at least the key provisions thereof) into timely

regulations under section 42 in order to enhance the effectiveness and enforceability of recovery plans.

By section 46 of Bill C-5, the competent minister must report on the implementation of a recovery strategy within five years after it is posted to the public registry and in every subsequent five-year period. CELA suggests that this period be reduced to 3 years, as five years is a great deal of time when considering endangered and threatened species.

ii) Action Plans

By power of section 47 of Bill C-5, the competent minister must prepare one or more action plans based on the recovery strategy for a species. The action plan includes an identification of the species' critical habitat including those portions that have not been protected, as well as a statement of the measures that are to be taken to implement the recovery strategy and when they are to take place. While CELA supports such an obligation, CELA submits that section 47 should be amended to include key aspects of the recovery strategy process.

Section 47 fails to establish time limitations for the preparation of action plans. Section 50 requires that action plans be included in the public registry. However, there is no public comment period for action plans afforded in Bill C-5 such as that found in section 43 for recovery strategies. Subsection 48 should be amended to require that action plans are prepared in cooperation with stakeholders with a demonstrated interest in the action plan. Moreover, subsection 53(1) should be amended to permit the adoption of regulations regarding the implementation of measures included in an action plan, regardless of where the affected species is found.

Under section 56 of Bill C-5, the competent minister must monitor the implementation of an action plan and report on its implementation five years after the plan comes into effect. As with recovery strategies, CELA suggests that this time period be limited to three years and that it include the requirement to report every three years thereafter.

iii) Management Plans

Within three years of being listed as a species of special concern, section 65 of Bill C-5 requires the competent minister to prepare a management plan for the listed species and its habitat. While CELA supports such an obligation, CELA submits that section 65 should be amended to include key aspects of the recovery strategy process. In particular, section 65 needs guidelines similar to those found in section 41 regarding the content of management plans. Subsection 66(1) should be amended to require that management plans are prepared in cooperation with stakeholders with a demonstrated interest in the management plan. In addition, provision should be made in section 68 for public comment following the posting of a management plan to the public registry such as that found in section 43. Moreover, subsection 71(1) should be amended to permit the adoption of regulations regarding species of special concern and their habitat, regardless of where they are found. In CELA's view, such amendments

are necessary to ensure that management plans are effective in preventing species of special concern from becoming threatened or endangered.

(d) Agreements and Permits

Section 74 of Bill C-5 allows the responsible minister to issue permits to, or make agreements with, any person to authorize activities affecting listed endangered or threatened species or their critical habitat. Section 75 goes on to provide that agreements or permits under other federal legislation can also authorize such activities, provided that the requirements listed in section 74(2) to (6) are met and that the minister complies with subsection 74(7).

CELA recommends that an appeal provision be added to section 74 of Bill C-5, permitting the review of permit and agreement decisions, by both applicants and third parties.

Finally, section 77 of Bill C-5 provides that the Governor in Council may, by order, provide that section 32, 33, 36, 58, 60 or 61, or any regulation made under section 53, 59 or 71 does not apply, for a period of up to one year from the date of listing of a wildlife species, to agreements, permits, licences, orders or other similar documents authorizing persons to engage in an activity affecting the listed wildlife species, any part of its critical habitat or the residences of its individuals that were entered into, issued or made under another Act of Parliament before the species was listed. CELA submits that if a species has been listed as a species at risk, outstanding authorizations to engage in activities that affect the species should not be permitted. Consequently, CELA submits that section 77 should be amended to include a process for the review and revocation of existing authorizations, particularly where there is any concern that such authorizations would jeopardize the survival or recovery of a species.

(e) Project Review

Section 79(1) of Bill C-5 imposes an obligation upon every "person," as defined under the Canadian Environmental Assessment Act (CEAA), to notify the competent minister or ministers if a proposed project is likely to impact a listed wildlife species or its critical habitat. Section 79(2) goes on to require responsible authorities to ensure that measures are taken to identify, minimize and monitor the projects' impacts on such species.

While CELA supports the general intent of "project review", section 79, as drafted, does very little to protect species at risk. For example, many undertakings affecting species at risk -- such as pesticide spraying or timber management -- do not necessarily trigger the application of the CEAA. Among other things, this means that notice to the Minister will not be required under Bill C-5, and more importantly, no environmental assessment will be required and no preventative or mitigative measures will be forthcoming from a responsible authority under the CEAA.

In CELA's view, section 79 should be redrafted to ensure that projects which may adversely affect a listed species, or the residences or critical habitat of its individuals, "trigger" environmental assessment obligations under the CEAA. This could be accomplished through different means: (1) using Bill C-5 to amend section 5(1) of the CEAA to include projects affecting listed species; (2) amending the Comprehensive Study List under the CEAA to include projects affecting listed species; or (3) amending the Law List under the CEAA to include a permit or authorization under section 74 or 75 of Bill C-5.

CELA RECOMMENDATION #14: Section 32 of Bill C-5 should be amended to:

- ensure that section 32(1) prohibits disturbing and interfering, and prohibits attempts to kill, harm, harass, disturb, capture, take or interfere with an individual of a listed extirpated, endangered or threatened species; and

- ensure that the section 32(2) prohibits attempts to possess, collect, buy, sell or trade an individual of a listed extirpated, endangered or threatened species, or any part or derivative of one.

CELA RECOMMENDATION #15: Section 33 of Bill C-5 should be amended to include extirpated species and their habitat regardless of whether recovery strategies have recommended their reintroduction into the wild in Canada.

CELA RECOMMENDATION #16: Bill C-5 should be amended through the addition of a new section to:

- define "transboundary species";

- impose a mandatory duty upon the Minister to make regulations that establish "harm", "possession", and "residence/critical habitat" prohibitions in order to protect listed transboundary species that are extirpated, endangered or threatened; and

CELA RECOMMENDATION #17: Section 80 of Bill C-5 should be amended to:

- prescribe circumstances where the issuance of emergency orders is mandatory;

- prescribe the mandatory content requirements for emergency orders; and

- prescribe when emergency orders should be repealed.

CELA RECOMMENDATION #18: Section 83 of Bill C-5 should be deleted and replaced with a provision that provides only the following exceptions:

- activities that are necessary to address an immediate threat to human life or safety;

- activities that are authorized or permitted as regulatory or conservation measures for endangered species under an aboriginal treaty, land claims agreement, self-government agreement, or co-management agreement; and

- activities that are authorized under section 74 or 75.

CELA RECOMMENDATION #19: Subsection 37(3) should be deleted. Subsection 37(1) should be amended to say, "[i]f a wildlife species is listed as an endangered species, a threatened species or an extirpated species, the competent minister must prepare a strategy for its recovery."

CELA RECOMMENDATION #20: Section 37 of Bill C-5 should be amended to include a general prohibition against contravening the provisions of a recovery strategy.

CELA RECOMMENDATION #21: Subsection 39(1) paragraph (e) should be amended to include, in addition to those whom the minister deems appropriate, those stakeholders with a demonstrated interest in the recovery strategy.

CELA RECOMMENDATION #22: Sections 40 and subsections 41(1) and (2)of Bill C-5 should be amended to replace the word "feasible" with "possible."

CELA RECOMMENDATION #23: Section 42 of Bill C-5 should be amended to reduce the time periods for the preparation of a recovery strategy to six months for an endangered species and one year for a threatened species. Section 42 should require that the responsible minister provide notice of a proposed recovery strategy in the Canada Gazette within 30 days upon completion. Section 42 should also require that the minister pass regulations within 90 days of the Canada Gazette notice to implement measures in the recovery plan, including regulations prohibiting activities that may adversely affect a species or the residences or critical habitat of its individuals.

CELA RECOMMENDATION #24: Section 46 of Bill C-5 should be amended to require that the competent minister report on the implementation of a recovery strategy within three years after it is posted to the public registry and in every subsequent three-year period.

CELA RECOMMENDATION #25: Section 47 of Bill C-5 should establish clear time limitations for the preparation of action plans.

CELA RECOMMENDATION #26: Section 50 of Bill C-5 should be amended to include a public comment period for action plans such as that found in section 43 for recovery strategies.

CELA RECOMMENDATION #27: Subsection 48 of Bill C-5 should be amended to require that action plans are prepared in cooperation with stakeholders with a demonstrated interest in the action plan.

CELA RECOMMENDATION #28: Subsection 53(1) of Bill C-5 should be amended to permit the adoption of regulations regarding the implementation of measures included in an action plan, regardless of where the affected species is found.

CELA RECOMMENDATION #29: Section 56 of Bill C-5 should be amended to require that the competent minister report three years after an action plan comes into effect and every three years thereafter.

CELA RECOMMENDATION #30: Section 65 should be amended to include guidelines regarding the content of management plans.

CELA RECOMMENDATION #31: Subsection 66(1) should be amended to require that management plans are prepared in cooperation with stakeholders with a demonstrated interest in the management plan.

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CELA RECOMMENDATION #34: Section 74 of Bill C-5 should be amended to include an appeal provision for permit and agreement decisions, available to both applicants and third parties.

CELA RECOMMENDATION #35: Section 77 of Bill C-5 should be amended to include a process for the review and revocation of existing authorizations, particularly where there is any concern that such authorizations would jeopardize the survival or recovery of a species.

CELA RECOMMENDATION #36: Section 79 of Bill C-5 should be amended to ensure that projects that may adversely affect a listed species, or the residences or critical habitat of its individuals, "trigger" the application of the CEAA. This could be accomplished by:

- using Bill C-5 to amend section 5(1) of the CEAA to include such projects;

- using Bill C-5 to amend the Comprehensive Study List under the CEAA to include such projects; or

- using Bill C-5 to amend the Law List under the CEAA to include permits or authorizations under sections 74 or 75 of Bill C-5.

3.7 Enforcement Measures

In general, CELA supports the straightforward enforcement provisions in sections 85 to 92 of Bill C-5, which deal with the appointment of enforcement officers, inspection powers, search and seizure, and custody and disposition of seized items.

(a) Investigation Requests

In general, CELA supports sections 93 to 96 of Bill C-5, which permit members of the public to formally request investigations of suspected offences. These sections closely resemble sections 108-110 of CEPA and Part V of Ontario's EBR. However, CELA recommends that section 94 of Bill C-5 should be amended to require the responsible minister to estimate the time required to complete the investigation if it has otherwise not been completed within 90 days. On this point, CELA notes that section 79 of Ontario's EBR requires such a estimate.

Although the investigation request will likely be a useful tool under Bill C-5,[31] CELA submits that the investigation request should not be a condition precedent for a citizen's suit action, as described below.

(b) Ministerial Powers

As drafted, Bill C-5 fails to empower the Minister to issue binding administrative orders (i.e. "stop orders") to immediately enjoin activity that is contrary to the Bill. In CELA's view, this is a major legislative oversight, and such a power would be an important addition to the "emergency order" power in section 80. CELA submits that Bill C-5 should be amended to include such a power. CELA's proposed wording for this new section is as follows:

The Minister may order any individual or corporation to stop immediately any activity that may be contrary to this Act, the regulations, or emergency orders.

In addition, or in the alternative, the Minister should be expressly empowered to go to civil court for injunctive relief. Such a provision is included in CEPA, and CELA submits that this provision could be worded as follows:

Where, on the application of the Minister, it appears to a court of competent jurisdiction that a person has committed, or is about to commit, an offence under this Act, the regulations, or emergency orders, the court may issue an injunction ordering any person named in the application,

(a) to refrain from any activity that may constitute, or be directed towards, the

[31] Under the similar provisions of Ontario's EBR, approximately 28 applications for investigation were filed from 1994 to 1996.

commission of an offence under this Act, the regulations, or emergency orders;

(b) to do any act or thing that may prevent the commission of an offence under this Act, the regulations, or emergency orders; or

(c) to take all necessary steps to restore or rehabilitate residences or critical habitat that have been harmed in contravention of this Act, the regulations, or emergency orders.

3.8 Citizen Suits

Although previous endangered species bills included provisions enabling members of the public to access the civil courts in order to seek redress for violations of those bills, Bill C-5 contains no corresponding right. This is a serious weakness of Bill C-5. Such a right of action serves three important purposes: (1) to secure compliance with the Bill; (2) to facilitate public access to the courts in instances involving non-compliance; and (3) to enhance governmental accountability for its enforcement and compliance activities under Bill C-5.

It is noteworthy that the federal government has committed to include a similar "citizen suit" provision in the Canadian Environmental Protection Act (CEPA)[32] after the Standing Committee on Environment and Sustainable Development had recommended that this reform be incorporated into CEPA.[33] These reforms are consistent with the recent trend at the provincial level to grant citizens various civil rights to go to court to protect the environment.[34]

CELA submits that Bill C-5 would be significantly strengthened through the addition of a citizen suit provision that focuses on actual or imminent offences under the prohibition against takings (section 32), the prohibition against harm to residence (section 33), destruction of critical habitat (section 58), and emergency orders (section 80). The action should be available to any person, regardless of whether an investigation request has been filed. For details regarding such a citizen suit provision please see P.Muldoon and R.Lindgren, *The Environmental Bill of Rights: A Practical Guide*, Emond Montgomery, 1995; R.Lindgren and P.Muldoon, Submissions of the Canadian Environmental Law Association to the Standing Committee on Environment and Sustainable Development Regarding Bill C-65, 1996; and P.Muldoon and M. Winfield, Submission on Bill C-32, the Canadian Environmental Protection Act, 1998.

CELA RECOMMENDATION #37: Section 94 of Bill C-5 should be amended to require the

[32] See CEPA Review: The Government Response (1995), page 27, Recommendation 3.9.

[33] Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention - CEPA Revisited (June 1995), page 228, Recommendation 119.

[34] Generally, see P. Muldoon and R. Lindgren, The Environmental Bill of Rights: A Practical Guide (Emond Montgomery, 1995), Chapter 1; P. Muldoon and J. Swaigen, "Environmental Bill of Rights", in Estrin and Swaigen (eds.), Environment on Trial (Emond Montgomery, 1993); and M. Valiante and P. Muldoon, "A Foot in the Door: A Survey of Recent Trends in Access to Environmental Justice", in Kennett (ed.), Law and Process in Environmental Management (Canadian Institute of Resources Law, 1993), pp.142-69.

responsible minister to estimate the time required to complete an investigation if it has otherwise not been completed within 90 days.

CELA RECOMMENDATION #38: Bill C-5 fails should be ammended to empower the Minister to issue binding administrative orders (i.e. "stop orders") to immediately enjoin activity that is contrary to the Bill.

CELA RECOMMENDATION #39: A citizen suit provision that focuses on actual or imminent offences under the prohibition against takings (section 32), the prohibition against harm to residence (section 33), destruction of critical habitat (section 58) and emergency orders (section 80) should be added to Bill C-5. The action should be available to any person, regardless of whether an investigation request has been filed.

3.9 Alternative Measures

Sections 108 to 119 of Bill C-5 provide for alternative measures to deal with a person who is alleged to have committed an offence under the Bill. It is CELA's position not to consider such alternative measures in the absence of a citizen suit power.

3.10 Offences, Punishment and Alternative Measures

Section 97(1) of Bill C-5 sets out the penalties for contraventions under the Bill. CELA submits that, in light of the gravity and significance of harming species at risk, consideration should be given to amending section 97(1) so as to prescribe substantial minimum fines (i.e. $25,000). Thus, potential offenders would know that if convicted, they will automatically receive the minimum fine, and they may, in fact, receive a higher fine ranging up to the maximum.

CELA RECOMMENDATION #40: Section 97(1) of Bill C-5 should be amended to include substantial minimum fines for offences.

3.11 Reports and Review of Act

Section 126 of Bill C-5 requires the Minister to prepare and table annual reports on the administration of Bill C-5. In order to ensure that meaningful reports are tabled, CELA submits that section 126 should be amended to require that reports also include:

- a summary of all agreements entered into under Bill C-5 including under section 8;

- a summary of the monitoring of recovery strategies, action plans and management plans;

and

- recommendations, if any, to improve the effectiveness of Bill C-5.

Unless the annual reports include these types of information, it will be difficult for Parliament and the public at large to assess the success or failure of Bill C-5 in meeting its stated purposes.

Section 128 of Bill C-5 requires the Minister to prepare reports every five years on the status of wildlife in Canada, while section 129 requires Parliamentary review of Bill C-5. CELA strongly supports both provisions on the understanding that there will be meaningful opportunities for public input into the section 129 review process, as was done during the recent review of CEPA.

CELA RECOMMENDATION #41: Section 126 of Bill C-5 should be amended to require that annual reports also include:

- a summary of all agreements entered into under Bill C-5 including under section 8;

- a summary of the monitoring of recovery strategies, action plans and management plans; and

- recommendations, if any, to improve the effectiveness of Bill C-5.

SECTION 4.0 - CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

CELA is pleased that the federal government has finally introduced a federal endangered species law. However, as described in Section 3.0 of this submission, there are numerous and significant loopholes and deficiencies in Bill C-5 that must be addressed if the government is serious about achieving the purposes of the Bill and meeting its obligations under the Rio Convention and the National Accord. In particular, CELA is recommending the following amendments to Bill C-5:

CELA RECOMMENDATION #1: The preamble of Bill C-5 should be amended to include paragraphs that refer to or invoke the constitutional basis for the legislation, particularly the "national concern" branch of the "peace, order, and good government" power.

CELA RECOMMENDATION #2: Section 2(1) of Bill C-5 should be amended to include new

or reworded definitions for the following terms: "critical habitat", "extinct", "habitat", "listed", "residence", and "wildlife species".

CELA RECOMMENDATION #3: Sections 34 and 35 of Bill C-5 should be deleted. Sections 32 and 33 should be amended to:

- specify that the Act applies to all species at risk in Canada, not just fish, migratory birds, or species upon federal lands;

- specify that the Act applies to the residences *and critical habitat* of all species at risk in Canada, not just fish, migratory birds, or species upon federal lands;

- ensure that transboundary species at risk, and their residences and critical habitat, receive mandatory protection under the Act.

CELA RECOMMENDATION #4: Failing adoption of Recommendation #3, CELA recommends that sections 34 and 35 be amended such that sections 32 and 33 apply to endangered species on provincial and territorial lands unless a provincial or territorial government establishes that endangered species provisions in that province or territory are as protective or more protective than provisions in Bill C-5. Details of a process by which provincial and territorial governments could make application that sections 34 and 35 not apply in their jurisdictions would be established by regulation.

CELA RECOMMENDATION #5: CELA recommends that sections 58, 59, 60 and 61 be deleted.

CELA RECOMMENDATION #6: Failing adoption of Recommendation #5, CELA recommends that section 58 be amended to include critical habitat on all federal lands. Sections 60 and 61 should be amended such that Bill C-5 critical habitat provisions apply to lands in provinces and territories unless a provincial or territorial government establishes that critical habitat provisions in that province or territory are as protective or more protective than Bill C-5 provisions. Details of a process by which provincial and territorial governments could make application that the amended sections 60 and 61 not apply in their jurisdictions would be established by regulation.

CELA RECOMMENDATION #7: Section 64 of Bill C-5 should be amended to restrict compensation to situations involving expropriations.

CELA RECOMMENDATION #8: Section 8 of Bill C-5 should be amended to:

- delete the term "any person" and, if necessary, include the term "Crown employee" in section 8(2);

- ensure that permit-issuing powers cannot be delegated to provincial ministries, agencies,

or employees;

- provide for periodic review of delegation agreements;

- place limits on the time that delegation can remain in effect, and empower the responsible Ministers to attach terms and conditions to the delegation as may be appropriate; and

- provide for public notice and comment with respect to proposed delegations;

CELA RECOMMENDATION #9: Section 10 of Bill C-5 should be amended to:

- require the filing of annual reports regarding federal-provincial agreements;

- provide for periodic review of federal-provincial agreements; and

- place limits on the time that a federal-provincial agreements can remain in effect.

CELA RECOMMENDATION #10: Section 123 of Bill C-5 should be amended to ensure that the following documents are included in the public registry:

- the full text of Bill C-5;

- the National Accord on the Protection of Species at Risk;

- all agreements between a competent minister and any government in Canada, organization or person;

- agreements and permits made under sections 74, 75 and 78, which authorize a person to engage in an activity that affects a listed wildlife species, any part of its critical habitat or the residences of its individuals; and

- concise public education materials (i.e. "how to" factsheets) about Bill C-5.

CELA RECOMMENDATION #11: Section 16 of Bill C-5 should be amended to:

- require the Minister to consult about COSEWIC appointees with the Council, Royal Society of Canada, and such other organizations or persons as may be appropriate; and

- require the Minister (or the responsible Ministers) to provide the administrative and financial support necessary to permit COSEWIC to fully carry out its duties and functions under Bill C-5.

CELA RECOMMENDATION #12: Section 16 of Bill C-5 should be amended to:

- ensure that no more than 50% of the appointments to COSEWIC are drawn from the federal or provincial governments; and

- provide that government employees who are appointed to COSEWIC shall exercise their duties and functions free of undue influence or interference from their employers.

CELA RECOMMENDATION #13: Section 27 of Bill C-5 should be amended to:

- establish COSEWIC's current list as the List of Wildlife Species at Risk and append it as Schedule I to Bill C-5;

- impose a mandatory duty on the Minister to pass regulations that place species on the Schedule I List of Wildlife Species at Risk in accordance with COSEWIC decisions under sections 23 and 24;

- ensure that such regulations are passed within 60 days of COSEWIC's decisions respecting designation, classification or reclassification; and

- permit the Minister to pass regulations adding species to the Schedule I List of Wildlife Species at Risk where a provincial minister has requested the addition and has agreed to participate in the preparation and implementation of recovery plans for the species.

CELA RECOMMENDATION #14: Section 32 of Bill C-5 should be amended to:

- ensure that section 32(1) prohibits disturbing and interfering, and prohibits attempts to kill, harm, harass, disturb, capture, take or interfere with an individual of a listed extirpated, endangered or threatened species; and

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the competent minister report on the implementation of a recovery strategy within three years after it is posted to the public registry and in every subsequent three-year period.

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- using Bill C-5 to amend the Comprehensive Study List under the CEAA to include such projects; or

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- recommendations, if any, to improve the effectiveness of Bill C-5.