

Recent developments: *Species at Risk Act* and *Migratory Birds Convention Act*



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Species at Risk Act

SARA identifies certain species at risk as:



- endangered
- threatened
- extirpated
- of special concern

Jurisdiction

SARA is federal legislation:

- Applies across Canada
- Contains specific provisions designed to be respectful of division of powers
- With exceptions!

Summary of Application of SARA

Species listing

- applies to all species

Recovery Planning

- applies to all species

Environmental Assessment

- applies to all species

Prohibitions on harm to species, their residences and destruction of critical habitat (identified in a recovery strategy or action plan) only automatically apply to certain areas to certain species

Application of Prohibitions re: Species and Residences

- Application of the prohibitions on harm to species and residences is limited to federal lands, except for “federal species” (i.e. aquatic species, and migratory birds protected under the *Migratory Birds Convention Act, 1994*).
- Thus prohibitions apply to
 - all migratory birds
 - all aquatic species
 - all other species on federal lands

Application of Prohibitions re: Critical Habitat

- Prohibition on destroying critical habitat applies to all critical habitat identified in federally protected areas:
 - national parks
 - marine protected areas
 - migratory bird sanctuaries
 - national wildlife areas

Application of Prohibitions re: Critical Habitat

Prohibition on destroying critical habitat of aquatic species, migratory birds, and all critical habitat on other federal lands applies to lands for which the Minister or the Federal Cabinet issues protection orders, within 180 days after publication of recovery strategy, **unless** it is determined the habitat is legally protected by other federal legislation or under a SARA Conservation Agreement

Critical Habitat Protection Orders

- Can be issued for aquatic species and migratory birds
- Only two so far
 - Northeast Pacific Northern and Southern Resident Populations of the Killer Whale (February 2009)
 - Westslope Cutthroat Trout – Alberta Population (November 2015)

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Application of Prohibitions to non-federal species and critical habitat on non-federal land

The Safety Net

Federal Cabinet can order SARA's prohibitions apply to “non-federal species” or its critical habitat on “non-federal land”

- Minister must recommend order if no other federal laws protect and if the province or territory is not “effectively protecting” a species or its critical habitat
- Cabinet has discretion as to whether to issue order
- Never recommended or ordered

Other ways to protect critical habitat

Emergency Orders (s. 80)

- Can be on any lands in Canada
- Can prohibit activities that may adversely impact a species or its critical habitat
- Depending on species and location, can require the “doing of things” to protect species
- Can issue before recovery strategy is completed
- Minister must recommend cabinet make the order if there is imminent threat to survival or recovery of the species
- Cabinet has discretion as to whether to issue order

Greater Sage Grouse



Listed as Endangered

Greater Sage Grouse

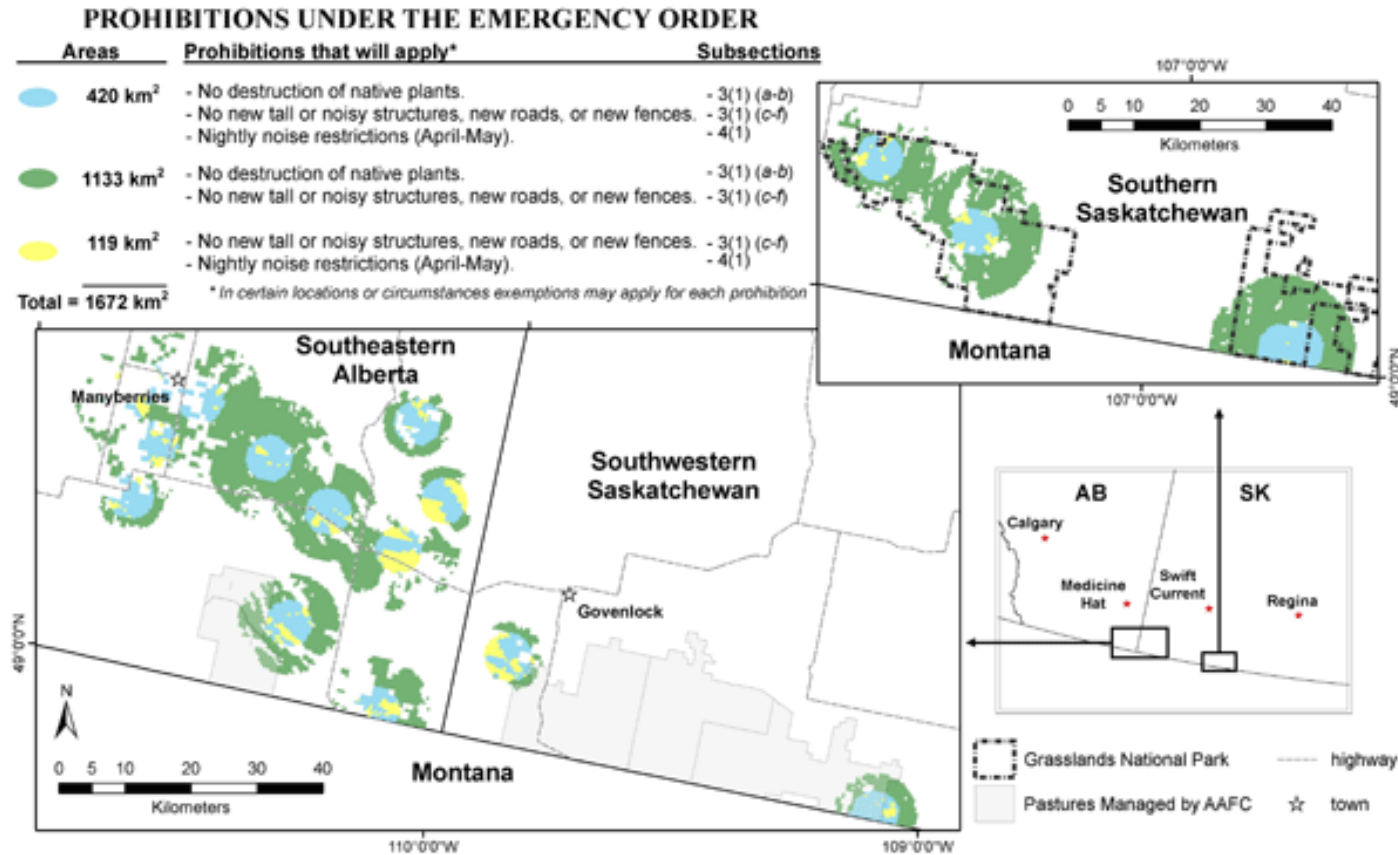
- Issued first recovery strategy January 14, 2008
- Amended October 9, 2009 to add critical habitat
- Published description of critical habitat for federally protected areas
- Sharp decline in numbers
- Without increased protection, likely to be extirpated very soon

Greater Sage Grouse

Emergency Order

- Issued December 4, 2013
- 1276 km² of provincial land in Alberta and Saskatchewan
- 356 km² of federally protected land
- Amended March 7, 2014 to remove 80 ha of land which had been sold by the province to a private landowner before order was issued

Greater Sage Grouse



Greater Sage Grouse

Emergency Order – Prohibited Activities

- Killing or moving specific plant species
- Installing new fences, with exceptions for fences related to grazing animals, which must comply with conditions in the Order
- Constructing structures greater than 1.2 m high
- Constructing new roads or reconstructing existing ones
- Installing or constructing machines or structures that produce chronic noise
- Chronic noise = noise in excess of 45 db(A) for more than 60 minutes per day on 10 or more days of the month
- Seasonal prohibitions on operation of facility, vehicle or machine that produces noise in excess of 45 db(A) between dawn and dusk in mating season
- Some exceptions for operation of motor vehicles to or from a residential building or in relation to agricultural operations
- Exceptions for agricultural operations

Western Chorus Frog



Listed as Endangered

Western Chorus Frog

- May 2013: Nature Quebec requested Environment Minister to recommend an emergency order for a metapopulation in LaPrairie threatened by a development
- March 14, 2014: Minister decided not to make the recommendation as species not facing imminent threat to survival and recovery
- Judicial review launched
- April 2015: Court sent back to Minister for reconsideration
 - Court said the Minister ignored that the species recovery was in danger
 - Gave government six months to reconsider
- Dec 2015: Recovery strategy posted

Western Chorus Frog

- December 7, 2015: Minister release a threat assessment for the species
 - Future phases of development would prevent the population and distribution objective from being met and therefore constitute an imminent threat to recovery of the species.
- Indicated working on scope of proposed emergency order
- This would apply to private land and potentially may stop a significant housing development
- Stay tuned

Migratory Birds Convention Act

Key terms to understand

- Direct harm
- Incidental harm (aka incidental take)

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Migratory Birds Convention Act

Key Prohibitions

- harm to birds
- depositing deleterious substances into areas frequented by migratory birds
- harm to nests and eggs

Prohibition: Harm to Birds

MBR

5 (1) No person shall hunt a migratory bird except under authority of a permit therefore.

Hunt is defined as:

chase, pursue, worry, follow after or on the trail of, lie in wait for, or attempt in any manner to capture, kill, injure or harass a migratory bird, whether or not the migratory bird is captured, killed or injured.

- Likely only prohibits direct harm (but this is not settled)
- All case law under this provision are cases of direct harm
- Recent case against driver of a boat from which hunting was taking place
- EC documents inconsistent

MBCA permits:

- Migratory game bird hunting permit
- Scientific permit
- Avicultural permit
- Migratory bird damage permit
- Airport-kill permit
- Taxidermist permit
- Eiderdown permit
- Special permit

Prohibition: Disturbance of Nests

MBR

6. Subject to subsection 5(9), no person shall
 - (a) disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird, or
 - (b) have in his possession a live migratory bird, or a carcass, skin, nest or egg of a migratory birdexcept under authority of a permit therefore.

- 19 (1) Notwithstanding subsection 5(3), the holder of a scientific permit may, for scientific or educational purposes,
 - (b) take a migratory bird, its nest or eggs

This is definitely a prohibition on incidental harm. Thus, even if the activity is otherwise lawful, the prohibition exists, unless there is a permit.

Prohibition: Disturbance of Nests

- Historically there has been limited (or no) enforcement of this provision
- Challenge to the Commission on Environmental Cooperation re: the Ontario forest industry
- Led to amendment to the MBCA

12. (1) The Governor in Council may make any regulations that the Governor in Council considers necessary to carry out the purposes and provisions of this Act and the Convention, including regulations

(h.1) respecting the conditions and circumstances under which migratory birds may be killed, captured, injured, taken or disturbed, or nests may be damaged, destroyed, removed or disturbed

No Regulations yet under (h.1)

Prohibition: Disturbance of Nests

Case law

- Land developer
 - cleared land in Langley for a commercial development which caused disturbance to a robin's nest
 - \$10,000 payment to Environmental Damages Fund
- J.D. Irving Ltd
 - harvesting contractor drove a feller buncher through a heron rookery
 - destroyed several heron's nests
 - company unsuccessfully challenged the law on a constitutional basis
 - \$60,000 penalty
- VanNes
 - deliberate destruction of swans eggs and killing of a swan
 - \$1,000 fine and seven days in jail
- Point de Chêne Yacht Club
 - repairs to a breakwater caused destruction of bank swallow's nests
 - \$13,000 penalty

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Prohibition: Deposit of Substances

MBCA

- 5.1 (1) No person or vessel shall deposit a substance that is harmful to migratory birds, or permit such a substance to be deposited, in waters or an area frequented by migratory birds or in a place from which the substance may enter such waters or such an area.
- (2) No person or vessel shall deposit a substance or permit a substance to be deposited in any place if the substance, in combination with one or more substances, results in a substance — in waters or an area frequented by migratory birds or in a place from which it may enter such waters or such an area — that is harmful to migratory birds
- (3) Subsections (1) and (2) do not apply if
- (a) the deposit is authorized under the *Canada Shipping Act, 2001*; or
 - (b) the substance is of a type and quantity, and the deposit is made under conditions, authorized under an Act of Parliament other than the *Canada Shipping Act, 2001*, or authorized by the Minister for scientific purposes.

Prohibition: Deposit of Substances

Case law

- Neptune Bulk Terminals:
 - canola oil spill in Burrard Inlet
- Marchbank:
 - spill of diesel fuel along shores of lake
- The Kathy L:
 - trucking company dumped logging equipment and vehicles from a rusty barge into Johnston Strait which caused a 14 km oil slick
- Harvest Operations:
 - crude oil spill from an oil well site which killed 300 birds
- JT Bakeries:
 - 640 litres of vegetable oil spilled and entered a storm water pond, killing and oiling a number of birds
- McCain:
 - seagulls died after eating from used paint cans which had been left in an open dumpster

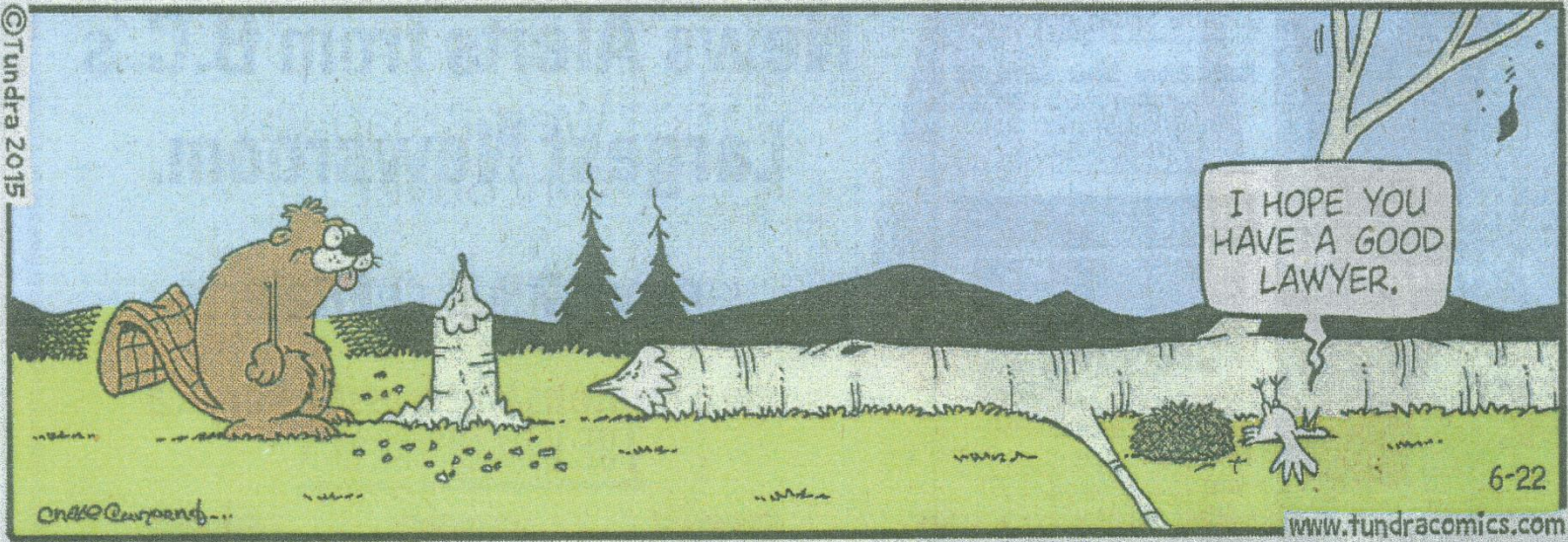
Prohibition: Deposit of Substances

Case law

- Syncrude:
 - 1600 birds died after getting stuck in an oil sands settling pond
 - Part of a fine of \$3 MIL
- Progress Energy:
 - 17 ducks died after being exposed to condensate in a open above ground holding tank
 - \$250,000 fine
- Canaport:
 - 7,500 birds died (in one night) after flying into or near burning natural gas from a flare stack at a refinery located near Bay of Fundy
 - \$750,000 fine
 - Also found guilty under SARA as four the birds were threatened species

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