



ASSEMBLY OF FIRST NATIONS

**An Analysis of the
Species At Risk Act Policies on the
Conservation Cycle**

November 2010



TABLE OF CONTENTS

Introduction	3
Background to Policy Suite	3
Purpose of Policy Suite	4
Assessment	6
Protection	9
Recovery Planning	13
Implementation	16
Monitoring and Evaluation	18
Appendix 1: AFN Recommendations to the Standing Committee on the 5 Year Review of the Species At Risk Act.	19



INTRODUCTION

The *Species At Risk Act (SARA; the Act)* provides legislative protection to species and their critical habitat that are assessed as extirpated, extinct or threatened and are listed on Schedule 1 of the *Act*. *SARA* meets Canada's obligation under the international Convention on Biodiversity. The *Act* is one pillar in a three-pillar national strategy intended to protect wildlife species deemed to be at risk, and to protect their critical habitats. The other two pillars of the national strategy are the *Accord for the Protection of Species at Risk*, and the *Habitat Stewardship Program for Species at Risk*.

In April 2010 the AFN appeared before the Standing Committee on Environment and Sustainable Development to make a submission on the legislated five year review of the *Species At Risk Act*. A significant recommendation by the AFN was the creation of a First Nation specific advisory body to the Minister under sections 9.1&9.2 of the *Act*. Appendix 1 is a complete list of the AFN recommendation before the Standing Committee. The analysis and recommendations made regarding the policy suite reflect the recommendations made before the standing committee. To date the committee has not prepared a report on the review.

There are 14 regulations, including a regulation on compensation, and numerous policies that are meant to complete the Act that require First Nation specific input, advise, engagement and meaningful consultation. First Nations are rights holders, whose rights are protected under section 35 of the Constitution and numerous case law. The federal departments must work collaboratively with First Nations on whose lands *SARA* apply and meaningful consultation under *SARA* is required under numerous sections of the *Act*.

The *Act* s. 127 requires that the Minister hold a roundtable at least every 2 years to advise the Minister on the protection of wildlife species in Canada. The last roundtable was held in 2008, with little Aboriginal participation, 2010 should be the next roundtable required under the *Act* and First Nations must be present to ensure that our concerns and issues on this *Act* are being heard.

SARA POLICY SUITE BACKGROUND

The *SARA* policy suite is Environment Canada's policies to complement the *Act*, provide an overarching policy framework and an understanding of the Act as well as outline the government's obligations.

The policy suite is based on the *National Framework for Species at Risk Conservation*. The *SARA* policies are viewed to be a cycle of five inter-dependent elements: assessment; protection; recovery planning; implementation; and monitoring and evaluation known as the *Species At Risk Conservation Cycle* (see figure 1 Source Environment Canada).

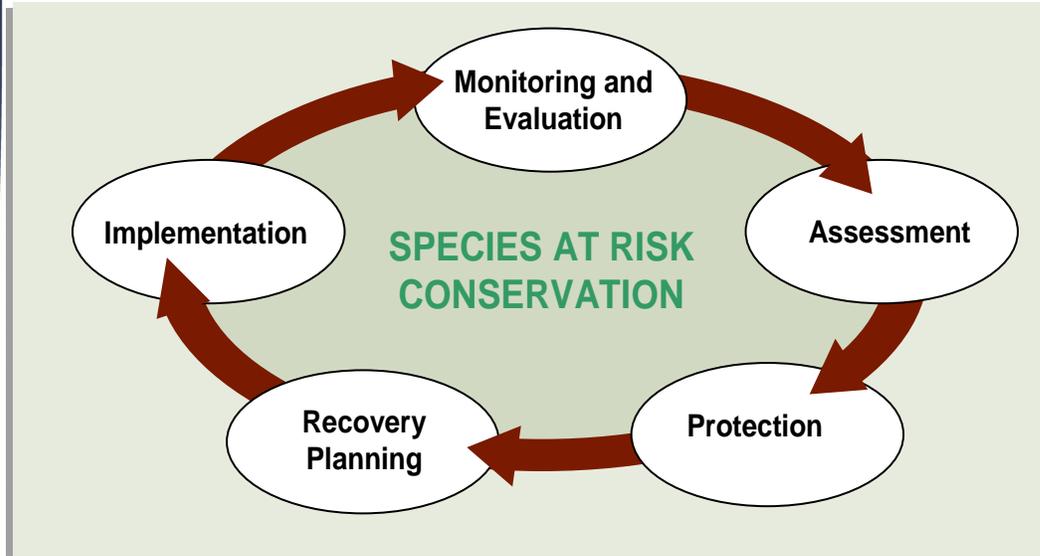


Figure 1

PURPOSE OF THE SARA POLICY SUITE:

The federal government has three primary objectives for the drafting of the *SARA* policy suite that attempts to meet the government's obligations under the Act:

- Clarify intent of authorities and provision under *SARA*
- Establish guiding principles for implementation of the Act
- Clarify government understanding of the various roles and responsibilities for various jurisdictions involved in species at risk protection and recovery.

Administrative matters such as costs, collaboration on recovery strategies or action plans, implementing recovery or management plan are to be dealt with in bilateral agreements. This may be instrumental for First Nation participation in the *SARA* conservation cycle under the following sections of *SARA*:

- 9.1 - Advisory committee to assist Minister (AFN 5 Yr Review Submission)
- 9.2 – Advisory committee to assist council
- 10.0 – Administrative Agreements
- 10.1 – Stewardship Action plans
- 11.1 – Conservation Agreements for species at risk
- 12.1 – Conservation agreements for all other species
- 13. 1 – Funding Agreements



Each policy is structured as follows:

Definitions
Context
Guiding principles
Roles and responsibilities
Specific policy content

For the purpose of this analysis each element on the conservation cycle will be examined according to the structure set out by Environment Canada. An analysis will follow with recommendations and if necessary suggested or alternative text.

The term federal government used throughout the document refers to the departments or minister responsible for *SARA*:

- ◆ Minister of Fisheries and Oceans is responsible for aquatic species at risk
- ◆ Minister for Park Canada Agency is responsible for species at risk found in national parks, national historic sites or other protected heritage sites
- ◆ Minister of Environment is responsible for all other species at risk and is also responsible for the administration of *SARA*.
- ◆ Minister of Indian Affairs under *SARA* s. 59(5) Consultations on Regulations to protect critical habitat & 71(2) Regulations that may impact on lands reserved for Indians on Migratory Birds.



ASSESSMENT

Definitions

The policy re-iterates and does not deviate from the definitions that are provided within the Act for “wildlife species” that means an animal, plant, or other organisms native to Canada or has extended range into Canada, present for 50 years without human intervention.

SARA does not define Aboriginal Traditional Knowledge (ATK) despite the acts requirement that ATK must be used within a species assessment. There is a lot of controversy surrounding the use and any definition on ATK. An appropriate definition of ATK may be difficult to achieve given the unique nature and diversity of Aboriginal peoples and their languages, culture and traditions in Canada.

Recommendation

It is recommended that the policy on assessment includes recognition of First Nations with implemented policies and or protocols on the use of ATK as part of a definition for ATK.

Suggested text:

“Aboriginal Traditional Knowledge is not defined within SARA, however it is recognized that many First Nations have implemented guidelines, protocols and or policies on the use of such knowledge that should be respected by federal, territorial, provincial governments.”

Context

This policy describes the role between the federal government and the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) in the assessment of species process. SARA recognizes that COSEWIC is the authority for the assessment of the status of species that may be at risk in Canada. The policy describes the federal interaction with COSEWIC as an independent body.

Guiding Principles

The policy lays out *guiding principles* on:

Information sharing – the best available information is provided for purpose of preparing General Status Reports and to COSEWIC.

Respect of COSEWIC independence - Under SARA, s. 22(1) anyone, including Aboriginal organizations, may apply to COSEWIC for a species assessment or



write to COSEWIC on an assessment if they have new information that could affect the status of a species assessment. The policy states that the federal government will encourage provincial, territorial and Aboriginal communities and organizations in contributing to sound assessment of species.

COSEWIC is an independent body of experts who evaluate the conservation status of a wildlife species based on the best available scientific knowledge, community knowledge and Aboriginal Traditional Knowledge. SARA s. 18(1) creates the Aboriginal Traditional Knowledge Subcommittee (ATK SC) to assist in the preparation and review of status reports on wildlife species considered to be at risk. Once COSEWIC has provided a status report SARA requires that a recovery strategy is prepared. The ATK SC does not participate in recovery, action planning or management plans despite the fact that ATK can assist in the recovery and management of species.

Recommendation

It is important that this policy recognize that SARA section 18(3) creates a further independent body under COSEWIC the *Aboriginal Traditional Knowledge Subcommittee* whose members are appointed by the Minister in consultation with any aboriginal organizations that the Minister considers appropriate. It is recommended that the policy identify that appropriate aboriginal organizations should be representative of Aboriginal title and right holders on whose lands SARA applies, as opposed to Aboriginal organizations that serve special interests or are service providers.

First Nations must be supported with the appropriate capacity to participate effectively in assessment.

The ATK SC does not participate in the rest of the conservation cycle under the Act, despite the fact that ATK can provide crucial and important information. It is recommended that the policy encourages the use of ATK throughout the conservation cycle.

Effectiveness and timeliness - SARA provides and sets out a timeline from the moment a species is listed requiring a recovery or action planning implemented one year after listing, under s. 42(1) and within 5 years the Minister must report on the achievement of the recovery and every 5 years until the recovery strategy objectives are met. These timelines have been problematic for First Nations that require meaningful consultation and accommodation in accordance with section 35 of the Canadian Constitution and as set out case law.



Collaboration – the federal government encourages provincial and territorial governments, Aboriginal communities and organizations and knowledgeable public groups in contributing to sound assessment of species.

Recommendation

The federal departments responsible for *SARA* work with First Nations on the creation of a federally coordinated specific and separate consultation process with and for First Nations.

The federal departments responsible for *SARA* create a memorandum of understanding under *SARA* to work collaboratively with First Nations and avoid the various federal departments working on *SARA* from duplicating work on *SARA* including the collection of ATK.

Federal Interaction with COSEWIC

The policy describes Environment Canada's relationship with COSEWIC as independent but provides professional, technical, secretarial, clerical and other assistance, facilities and supplies to carry out its function. The policy indicates that the federal government "will facilitate the collection of Aboriginal Traditional Knowledge and community knowledge".

The policy provides an extensive list that the federal government will support COSEWIC with: includes compiling information; monitoring candidate lists; inform COSEWIC of significant research; acquire information where possible for COSEWIC; engage in dialogue with author's of status reports; participate in the assessment review process; work with COSEWIC to identify information gaps; and give COSEWIC priority to collecting information when conducting an emergency assessment.

Recommendation

The policy needs to recognize the work of the ATK SC as equal to its counterparts with COSEWIC. This includes appropriate and equal support in terms of professional, technical, secretarial, clerical and other assistance including recognition of ATK knowledge holders as equivalent to western scientists, engineers, doctors and any other expert.



PROTECTION

The policy on protection is the federal government's principles and directions to guide its efforts to protect species, their residence and critical habitat under SARA through:

The listing process
Emergency listing and orders
Protection of species at risk, their residence and critical habitat
Compliance promotion and enforcement
Authorizations

Recommendation

The policy indicates that species protection is subject to the consultation requirements set out in *SARA*. It is imperative that First Nations are engaged within the consultations requirements set out in the Act, destruction of critical habitat on reserve lands and land claims in sections 58(7), 58(8).

A separate policy is established in consultation with First Nations on protection, this policy is comprehensive covering many issue that First Nations must be engaged in that include the listing process, emergency listing and orders, protection of species, residence, critical habitat, compliance and enforcement and authorizations.

Compensation *SARA* section 64

NOTE: This policy does not discuss section 64 Compensation under *SARA*. It is imperative that First Nations are involved in the negotiations and drafting of this important policy

It is recommended that the importance to include First Nations in the negotiation and drafting stage on the policy on compensation should be noted in this policy.

Definitions

The policy provides a definition for "authorization" to mean a permit, agreement, license, order or similar document issued under section 73, 74, 77 and 78 to



authorize prohibited activity affecting a listed species its critical habitat or residence.

Regulatory impact analysis statement (RIAS) is defined as a requirement of the *Cabinet Directive on Streamlining Regulations* that describes the impact of any proposed federal regulation. The policy notes that a RIAS is not a specific requirement but a document including amendments to schedule 1 describing proposed federal regulation, what the government is delivering and consultation. The RIAS must prove that the proposed regulation is preferred to achieve objectives, analyze the costs and benefits and explain the strategy to ensure compliance with and enforcement of *SARA*.

Recommendation

The RIAS has been particularly problematic for First Nations who are not meaningfully consulted nor included in the socio-economic analysis. First Nations have serious concerns regarding the costs and benefits associated with the listing of species under *SARA*, who often bear the burden of conservation at the cost of economic development and sustenance.

The policy must acknowledge the importance of including First Nations in the RIAS and establish an engagement process to involve First Nations in the RIAS.

Species Protection

The policy defines species protection as the protection of species listed as extirpated, endangered or threatened, their residence, or the protection on critical habitat. Species listed as special concern are not included in the definition.

Recommendation

Many First Nations prefer a proactive approach to species protection rather than a reactive approach such as outlined in *SARA* conservation cycle to recover species that are in danger. It is recommended that the policy acknowledge Aboriginal peoples as stewards to the land who have extensive knowledge on conservation that has long protected species prior to the implementation of the Act.

The policy must acknowledge section 59(5) requirement of consultation with the Minister of INAC on regulations to protect critical habitat and that the process is inclusive of First Nations.



Context

The policy describes the role in species protection as required under SARA to prevent extirpation, extinction, recovery of species at risk due to human activity and to ensure species listed as special concern do not become further at risk.

SARA establishes legal protection for species and their residence that are listed as threatened, endangered or extirpated on federal lands in the provinces; lands under the authority of Minister of Environment or Parks Canada; for migratory birds and aquatic species.

Guiding principles

The guiding principles for the protection policy include:

Transparency – the federal government will ensure information on decision making and recommendations regarding protection are made public

Knowledge based – the Minister will use the best information available including ATK

Precautionary principle – will not postpone cost effective measures for a lack of full scientific certainty.

Respects jurisdictional roles and responsibilities – The competent Minister and provincial and territorial Ministers have all signed onto the Accord for the Protection of Species At Risk and will consult with the provinces and territories on recovery and management planning.

Encourages protection through existing measures and complementary legislation

Recommendations

The guiding principles must be inclusive of First Nations and it is recommended that text be added under the principles of:

Transparency – will ensure that affected First Nations are informed on protection measures by the federal departments.

Knowledge based- this includes recognition on First Nation policies, protocols or guidelines on the use of ATK.



Respects jurisdictional roles and responsibilities – This should include First Nation governments with the creation of an Aboriginal Accord for the Protection Species At Risk could be developed.

Encourages protection through existing measures and complementary legislation: This must policy must include First Nation government's right to create their own species protection legislation.

Promote Stewardship: The policy must encourage the development of bi-lateral agreements with First Nations rather than relying on Aboriginal Funds for Species At Risk, sections under SARA include section 10, administrative agreements, 11 conservation agreements for species at risk and section 12 conservation agreements for other species.

DRAFT



RECOVERY PLANNING

Definitions

The policy defines *recovery planning* as a two stage process that involves the development of a recovery strategy and the action plan (or action plans).

Management planning is defined as the preparation of a plan to conserve species of special concern and its habitat and identifies conservation measures needed to prevent a species from becoming threatened or endangered. SARA does not require that management.

Recommendation

This policy includes Aboriginal traditional knowledge in the definition for *best available information*. Currently the COSEWIC ATK SC does not participate in the recovery strategy process.

It is recommended that the federal government must provide capacity to ensure the appropriate collection of ATK and is in compliance with ATK protocols already in place in some aboriginal communities. ATK must be afforded legal protection as intellectual property belonging to the knowledge holders.

Context

The federal government must complete recovery strategies, action and management plans in compliance with SARA and the *Accord for Species At Risk*; meaning that provinces, territories and wildlife management boards are also involved either under the Accord or through other legislation or land claims. The policy requires that where possible recovery and management planning involve Aboriginal organizations.

Recommendation

It is recommended that the policy recognize First Nation government's right to create species protection and recovery legislation and work with those First Nations that have such regulations implemented and provide capacity to First Nations to engage in recovery and management work.

The current response period and use of the SARA public registry for recovery and management plans is not a feasible for many First Nations who lack capacity and personnel to respond meaningfully.



Guiding principles

The policy states recovery or management planning will be guided by a set of overarching principles and that Environment Canada, Park Canada and Fisheries and Oceans Canada will foster a process based on these guiding principles:

Respects jurisdictional roles and responsibilities – there are concurrent provincial and territorial legislation that the federal government will cooperate with and under the *Accord for Species At Risk*.

Priority – To meet the timelines set out in SARA the federal government will manage departmental resources based on priorities and consider factors such as the status of species in Canada and globally, threats to the species, habitat and the likelihood of recovery.

Adaptive Approach – The federal government proposes a iterative approach that considers the long term populations and distributions objectives for species involving periodical reviews of actions and approaches to reflect progress.

Precautionary Approach – This is also referred to as the precautionary principle and is consistent with section 38 of SARA that requires the Minister not postpone cost effective measures to prevent the reduction or loss of species for a lack of full scientific certainty.

Roles and responsibilities

SARA requires that recovery strategies and action plans are prepared for species listed under Schedule 1. However the role of the department and Minister responsible will differ depending on the species and location. The policy states that the responsible department will work with a range of parties including Aboriginal organizations and any other affected or interested parties that the minister considers appropriate. Departments will coordinate relevant inter governmental programs and processes and maintain a suite of guidance materials.

Recommendation

First Nations deal with different federal government departments on terrestrial and aquatic species. The set of overarching principles referred to in the policy must be inclusive of First Nation requirements in species recovery. As recommended previously, a memorandum of understanding between the federal departments would assist First Nations in the recovery process and prevent duplication if all federal departments worked collaboratively. First Nations must be engaged by responsible departments in the development of policies and guidance materials that may impact Aboriginal rights including consultation on the recovery process.



Approaches to Recovery Planning

The policy describes cooperation, consultation and multi-species approaches in recovery planning under that Act. The policy describes a process that each competent minister will within the timelines set out in SARA work with provinces and territories; cooperate with every Minister in Government of Canada with authority over federal lands, management boards created under land claims, Aboriginal organizations that the competent minister considers will be directly affected by the recovery process. The Minister may establish an expert advisory group i.e. recovery team, who will establish the terms of reference, set clear expectations on role of the group and define any related roles and responsibilities.

Consultation

“the competent minister recognize that they have a duty to consult and if appropriate, to accommodate where they have real or constructive knowledge of potential Aboriginal rights or treaty rights, and they contemplate conduct, through a recovery strategy, action plan or management plan, that might adversely affect those rights (SARA Policy Suite2009, pg 27)”.

Recommendation

The federal departments in conjunction with First Nations establish either through an Accord, Memorandum of Understanding or bi-lateral agreement for a separate, meaningful process of consultation, respecting First Nation consultation protocols already established under the SARA conservation cycle.



IMPLEMENTATION

The purpose of this policy states that it is to provide direction and guiding principles for activities undertaken by federal departments to:

- Implement recovery strategies, action plans and management plans for migratory birds, aquatic species and other species on federal lands
- encourage and facilitate appropriate implementation activities by other governments, organizations and persons

Definitions - This policy does not have any additional or supplemental definitions.

Context

The policy provides that after listing and preparation of a recovery and action plan or management plan that will improve the status of species at risk in Canada. Actions that preceded SARA include activities through the Recovery of Nationally Endangered Wildlife program. The policy includes the Habitat Stewardship Fund and the Aboriginal Funds for Species At Risk. The AFSAR program has been problematic for many First Nations and does not provide adequate funding for species at risk work for communities.

Guiding principles

Promotes collaboration – the federal government will collaborate with responsible jurisdictions and the engagement of interested or affected parties as an important aspect of implementation. SARA is legislation that applies to First Nation reserve lands and was enacted without meaningful consultation and accommodation with First Nations on whose land the act applies.

Is results based – Implementation will prioritize recovery measures expected to make the most direct impact to recovery and priority will be given to actions that benefit more than one species through multi-species or ecosystem approaches. Implementation has been hampered by the failure of government departments to identify critical habitat.

Promotes early action and prevention – Serious or irreversible threats to species will not be compromised for cost-effective measures. Early action is encouraged however the policy does not describe any other early action activities other than those outlined in a recovery strategy, action or management plan. First Nations have for generations been advocating for the protection of lands, resources and animals and prefer preventative action rather than reacting.



Roles and responsibilities

The competent department will have a key role in supporting and encouraging stewardship actions by a broad range of organizations, institutions and persons across Canada. First Nations are not eligible for funding under the Habitat Stewardship Fund which has a larger amount of funding than the Aboriginal Funds for Species at Risk. To date the Minister has not entered into any conservation agreements with any First Nation or Aboriginal organization under section 11 of SARA.

Recommendations

The policy must acknowledge that implementation of recovery plans, action plans or management plans on Federal Reserve lands is the responsibility of affected First Nations. That should include providing stewardship, education and engagement, and extra funding equivalent to what is already provided in the policy.

DRAFT



MONITORING & EVALUATION

Definitions

Monitoring: The action of collecting, organizing and tracking information on the progress of achieving the recovery strategy objectives.

Evaluation: assessing the significance of progress tracked through monitoring, in relation to goals, objectives and actions.

Reporting: the action of rendering public the results of monitoring and evaluation.

Context

The focus of the policy is on the federal government's activities under SARA and the provinces and territories that also have monitoring, evaluation and reporting activities from respective species at risk legislation.

Guiding principles

Promotes long term monitoring & evaluation – reflects the need for high quality, long-term data to assess responses of species to recovery actions and threat abatement.

Results based evaluation – based on performance measures that are specific, measurable, time dependent and clearly linked to recovery objectives. This may be problematic for ATK as there is not way to measure such knowledge.

Promotes collaboration and cooperation – among responsible jurisdictions the policy does not include First Nations or Aboriginal organizations.

Transparency – monitoring information is made available to the public

Roles and responsibilities

The purpose of the policy is to determine that monitoring and evaluation is carried out and reported on the implementation of recovery strategies, action or management plans. Aboriginal organizations are included as playing an important role in monitoring efforts. Aboriginal organizations only represent their constituency and that role should rest with the rights holders.



Recommendation

First Nations must be recognized as partners in collaboration and cooperation with the Federal departments. The policy under roles and responsibilities acknowledges the federal government as the lead on monitoring and evaluation in accordance with recovery strategies, action and management plans. SARA applies on federal lands much of which is First Nation reserve land and therefore First Nation requires greater involvement in monitoring and evaluation of species.

DRAFT



APPENDIX 1

AFN Submission to the Standing Committee on the 5 Year Review of SARA Recommendations

SUMMARY OF RECOMMENDATIONS

The AFN has made several recommendations for the committee to consider and are listed here for the committee's convenience:

1. That *SARA* be amended to limit the use of ministerial discretionary powers to prevent further erosions of First Nation reserve lands and infringements of aboriginal and treaty rights.
2. *SARA* be amended to establish a formal process whereby First Nations can provide advice and put forth recommendations on cost effective means to reduce infringement of First Nations rights and interests as a result of a *SARA* listing and protection of critical habitat or the failure to invoke *SARA* protections.
3. First Nations are given administrative authority under *SARA* to administer *SARA* on reserve lands established under treaty or the Indian Act.
4. *SARA* is exempt from First Nations reserves especially where First Nations create their own specific species at risk legislation, policies and or by-laws to apply on reserve lands.
5. First Nations lands should be exempt from *SARA*'s application.
6. The appointment of NACOSAR members, under s. 8.1, must include specific recognition of Aboriginal peoples as identified in s.35 (2) of Constitution of Canada. Selection must be made from "appropriate Aboriginal organizations" legitimately able to prove the claim of representation of a majority of those who hold the inherent collective rights of the Aboriginal Peoples' of Canada. Therefore section 8.1 of *SARA* must be amended to serve in the best interests of Aboriginal Peoples' of Canada. It is recommended that S. 8.1 of *SARA* be amended to read:

"The Minister shall establish the National Aboriginal Council on Species At Risk, consisting of six representatives of the aboriginal peoples as identified in s.35 (2) of the Constitution Act of Canada. These members shall be selected by the Minister based upon recommendations from the Assembly of First Nations (AFN), the Inuit Tapiriit Kanatami (ITK) and the Métis National Council (MNC)."
7. The term "aboriginal organizations" is clearly defined within the Act and is limited to the legitimate Aboriginal rights holders and national organizations.
8. The AFN recommends that *SARA* be amended to include explicit recognition and involvement of First Nations' governments in the amendment and implementation of the legislation and its regulations.
9. *SARA* be amended to include defining wildlife management boards that are Aboriginal specific to land claims and the details of their involvement should be clarified.

/21



10. The preamble to the Act should be amended to state that “*the traditional knowledge of the aboriginal peoples in Canada shall be considered in accordance to domestic and international protocols, ATK shall be afforded adequate protection to ensure knowledge is not part of the public domain and intellectual property rights are protected...*”.

11. *SARA* be amended to provide legislative protections for the use of aboriginal traditional knowledge with explicit clauses that deem any knowledge supplied by First Nation communities are not in the public domain.

12. The creation of a new legal regime developed with First Nations that provides adequate protections and remedies for First Nations over their traditional knowledge. Civil and Criminal remedies should be part of this regime, with mandatory minimal prison sentences for those persons, researchers and professors who misuse, misappropriate, patent and steal First Nation traditional knowledge.

13. In order to carry out this important work it is important that section. 9 (1) be amended as follows adding section 9.1(a):

9. (1) A Minister may, after consultation with the other two competent Ministers establish one or more First Nation committees to advise the Minister on the administration of this Act.

a.) The Minister shall provide the committee or committees with any professional, technical, secretarial, clerical and other assistance, and any facilities and supplies that, in his or her opinion, are necessary to carry out its functions.

(2) The Minister may, after consultation with the other two Ministers and the Canadian Endangered Species Conservation Council, establish one or more First Nation committees to advise the Council on matters related to the Council’s role.

14. Section 13 be amended to include First Nations and Aboriginal Organizations and the federal government enter into section 13 funding agreements directly with First Nations and or Aboriginal organizations.

15. The federal government compensate First Nations for loss of reserve lands and loss of traditional foods as a result of development in heavily urbanized areas.