



ENVIRONMENT IN THE COURTROOM II

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ISBN 978-1-77385-380-2

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Challenges in Receiving *Species at Risk Act* Protections: A Killer (Whale) Case Study

*Dyna Tuytel and Margot Venton*¹

The *Species at Risk Act*² (SARA), enacted in 2002 and which came into force fully in 2004, includes important tools to protect species at risk but has been plagued by poor implementation. Since it was enacted, listed species have thus far continued to decline, on average by 2.7 percent annually.³

This chapter uses a SARA-listed endangered aquatic species, the Southern Resident Killer Whale (SRKW) population, to illustrate the challenges that listed species face in actually receiving the protections promised by SARA. These challenges can occur even when a species is listed as endangered, is an iconic charismatic megafauna species, and is entirely under federal jurisdiction.

The plight of SRKW illustrates two fundamental problems with SARA implementation: first, reluctance on the part of the responsible federal ministers to implement its protections at all, whether they are discretionary or mandatory, sometimes necessitating litigation by civil society groups; and second, failure to implement SARA in a timely manner that is commensurate with halting and reversing the decline of species and degradation of their habitat before it is too late. These problems undermine the purpose of SARA.

Overview of Purposes and Selected Provisions of the *Species at Risk Act*

The purposes of SARA are to prevent species from being extirpated or becoming extinct and to provide for the recovery of species that are endangered or threatened due to human activity.⁴

SARA sets out a listing process to identify species at risk. Once listed, species and their habitat receive certain legal protections:

- It is an offence to kill, harm, harass, capture, or take an individual member of a species (s 32(1));
- The competent minister must, within a specified timeline, prepare a recovery strategy that identifies the species' critical habitat and threats to the species and its critical habitat, describes the broad strategy to be taken to address those threats, and indicates when an action plan will be completed (ss 37, 41(1), 42 & 43);
- The competent minister must prepare one or more action plans based on the recovery strategy, which must include: identification of critical habitat, including any portions not yet protected; examples of activities likely to result in destruction of critical habitat; as well as a statement of the measures proposed to protect critical habitat and implement the recovery strategy, including when these measures will take place (ss 47–50);
- Once critical habitat is identified for a species under federal jurisdiction (aquatic species, migratory birds and species with critical habitat on federal lands), the competent minister must ensure that critical habitat is legally protected from destruction within 180 days, at which point it becomes an offence to destroy critical habitat (ss 57–58);
- Activities affecting listed species, or any part of their critical habitat require permits, which the competent minister may only issue if he or she is of the opinion that all reasonable alternatives have been considered and the best solution adopted, measures have been taken to minimize the activity's impact, and the activity will not jeopardize survival or recovery (ss 73–74); and
- Listed species and their critical habitat are protected from the potentially adverse effects of proposed projects or activities (ss 79 and 77(1)).

Key Facts about Southern Resident Killer Whales

SRKW were listed under Schedule I of SARA in 2001.⁵ They are listed as “endangered,” defined as “facing imminent extirpation or extinction.”⁶ The SRKW recovery strategy was finalized in 2008. The recovery strategy has been amended twice since 2008. It was first amended in 2011 following litigation and subsequently amended again in 2018 to include identification of additional critical habitat for these populations and to provide minor updates to background and species information.⁷ The action plan was finalized in 2017. Since they were listed, the population has decreased from approximately 85 to 72 as of April 2020.

The competent ministers responsible for protection of the SRKW and their critical habitat are the minister of the environment, who, as the minister responsible for Parks Canada, is charged with protecting the small portions of critical habitat that are on federal lands administered by Parks Canada, and the minister of fisheries and oceans.

There are three types of killer whales in Canadian Pacific waters: offshore, Bigg’s (or transient), and resident. They each have distinct diets, genetics, morphology, and behaviour. They do not interbreed and avoid each other rather than interact. The two resident populations off the British Columbia coast—the threatened northern residents and the endangered SRKW—have overlapping but distinct ranges, are linguistically distinct and genetically isolated, and do not interact.⁸

SRKW are among the world’s best-studied marine mammals. They have been closely monitored, including with an annual census, since 1976. The census accounts for the SRKW population as of July 1 and December 31 each year. As of the last census, the population of SRKW is 74.⁹ SRKW have a unique social structure and language. They feed almost exclusively on salmon, and particularly large, fatty Chinook salmon. They have evolved in an important migratory corridor for Chinook salmon, and their location and movements are dictated largely by their diet.¹⁰

SRKW critical habitat is located in the transboundary waters of the Salish Sea, off the south coast of British Columbia and the north coast of Washington state. Critical habitat includes not only this area itself but also its important attributes for SRKW: acoustic quality, marine environmental quality, and the availability of Chinook salmon.¹¹

SRKW are considered endangered due to their small population size and low reproductive rate, as well as exposure to three main threats: lack of availability of their primary prey, Chinook salmon; acoustic and physical disturbance from vessels; and contamination of their environment.¹²

Unfortunately, this already endangered population is experiencing an ongoing decline. The threat that appears most urgent and most directly correlated with their current decline is the lack of availability of Chinook salmon—a threat that is exacerbated by physical and acoustic disturbance from boats.¹³

History of Efforts to Achieve *Species at Risk Act* Protections for Southern Resident Killer Whale

CRITICAL HABITAT: LITIGATION TO ACHIEVE IDENTIFICATION AND LEGAL PROTECTION

To recover species to healthy population levels, *SARA* prescribes a process for species at risk to be listed and given legal protections, which process includes the development of a recovery strategy.¹⁴ Subsection 41(1)(c) of *SARA* requires the recovery strategy for a species to identify critical habitat, including biological features, and threats to it.

The first SRKW recovery strategy was finalized in 2011, approximately eighteen months behind the mandatory timelines in section 42 of *SARA* (the 2011 *Recovery Strategy*).¹⁵ Delay resulted from disagreements between the recovery team preparing the recovery strategy and DFO, and to a lesser extent, the Department of National Defence, over whether to include information identifying critical habitat and, in particular, references to the acoustic degradation and prey availability threats.¹⁶ Ultimately, the 2011 *Recovery Strategy* did identify the presence and availability of prey as a component of critical habitat, and included diminished prey availability, chemical and biological contamination, and acoustic degradation as threats to critical habitat.¹⁷

Sections 57–58 of *SARA* require that the critical habitat identified in a recovery strategy be legally protected from destruction within 180 days of the recovery strategy being finalized in one of two ways. It can be protected indirectly under another Act of Parliament, if this is confirmed through a protection statement under section 58(5)(b) of *SARA* that describes how critical habitat is already protected through the other Act. If it is not already protected by another Act, the minister must issue a protection order under section

58(4) of SARA, which applies the prohibition against destruction of critical habitat under section 58(1) to the habitat described in the protection order.¹⁸

In the case of SRKW, the minister of fisheries and oceans initially took the approach of issuing a protection statement that relied on habitat protection through non-binding policy and guidelines, and on discretionary provisions of the *Fisheries Act*. Further, the minister took the position that SARA only required protection of the geophysical attributes of critical habitat, and not the biological attributes, such as prey availability.¹⁹

Nine conservation organizations filed an application for judicial review in October 2008, alleging that the minister erred by relying on non-binding policy, prospective legislation and ministerial discretion, none of which legally protect critical habitat for the purposes of section 58 of SARA, and further erred by including only geophysical elements of critical habitat, not biological attributes.²⁰

In February of 2009, DFO reversed itself and the minister replaced the protection statement with a protection order. DFO refused to confirm that the protection order protected biological features of critical habitat when the applicants sought confirmation. The applicants filed a second application for judicial review, this time of the protection order, on the basis that it was limited to geospatial areas or geophysical elements of critical habitat and excluded biological attributes.²¹

The two applications were consolidated and heard by Justice Russell of the Federal Court. Russell J. held that a protection statement can only be used in place of a protection order where the legal protection under other Acts of Parliament is equal to that provided under a protection order; ministerial discretion under another Act of Parliament is not adequate legal protection of critical habitat under section 58 of SARA, nor are prospective laws or regulations. He further held, as the Federal Court had decided previously²² and as the minister conceded during the proceeding, that critical habitat includes not only a location but also ecosystem features, and therefore, it was unlawful to limit the protection order to geophysical aspects alone.²³

The minister appealed the Federal Court's declaration that ministerial discretion under the *Fisheries Act* cannot legally protect critical habitat for the purposes of section 58. The Federal Court of Appeal dismissed the appeal and confirmed that "Ministerial discretion does not legally protect habitat within the meaning of section 58," which instead requires non-discretionary, compulsory protection. The court also re-iterated that critical habitat

includes both a geographic location and the attributes that make it important for the species.²⁴

The Federal Court of Appeal further clarified the importance of critical habitat protection, and the mandatory nature of SARA protections.²⁵ The court held that Parliament's intent "was to provide for compulsory and non-discretionary legal protection for the identified critical habitat of listed endangered or threatened aquatic species," and that section 58 should be interpreted accordingly.²⁶ The court further held that

A textual, contextual and purposive analysis of section 58 shows that Parliament is precisely seeking to avoid the destruction of identified critical habitat of listed endangered and threatened aquatic species through any means, including through activities authorized under discretionary permits or licences.²⁷

Under section 58(1) and an order made under section 58(4), the critical habitat of SRKW is now protected against destruction of "any part" of it, including the biological "parts" or attributes such as acoustic quality.²⁸

This example illustrates two challenges that endangered species have experienced in receiving SARA protections. First, ensuring implementation of the protections promised by SARA too often requires extraordinary efforts by civil society. Second, delay in meeting mandatory timelines under SARA is a perennial problem, even for aquatic species that are unambiguously within federal jurisdiction.²⁹ The recovery strategy for SRKW was delayed for eighteen months because DFO did not want to fully identify critical habitat and threats to it. The action plan for SRKW was delayed by four years; this is discussed further in the next section.

THE SOUTHERN RESIDENT KILLER WHALE ACTION PLAN: DELAYS AND A LACK OF ACTION

Action plans are one of the key practical instruments in SARA for achieving its purposes of preventing extinction and providing for recovery. As described above, they must identify critical habitat, including any portions that have not yet been protected; include a "statement of the measures that are to be taken to protect the species' critical habitat"; and include a statement of the measures that will be taken "to implement the recovery strategy, including those that address the threats to the species and those that help to achieve the

population and distribution objectives,” and when those measures will take place.³⁰ The minister must make any regulations that in his or her opinion are necessary to implement the measures, or recommend them to the Governor in Council if they concern protection of critical habitat.³¹ The minister may do so using powers under any other Act of Parliament.³²

The SRKW Action Plan was published four years behind schedule. The 2011 *Recovery Strategy* established a deadline of March 31, 2013, for the action plan. DFO made a draft action plan available for public comment in March 2014 and made a proposed action plan available for public comment in June 2016. The final action plan was published in March 2017.

There is a troubling lack of action in the action plan. Instead of setting out measures to protect critical habitat and implement the recovery strategy, with timelines for each measure, it is primarily a plan for further research and monitoring, replete with words such as “examine,” “investigate,” “identify,” “assess,” and “monitor”; the action plan itself states that “the majority of activities in the plan focus on research.”³³ Where it refers to actually implementing measures, it most often does so using the non-committal formulation of “investigate . . . and implement where appropriate.” Where it does refer to some more concrete-sounding outcomes, those outcomes are characterized as “guidelines and/or regulations,” leaving open the question of whether measures will be enforceable. The timelines given for several items are “Unknown” or “Uncertain.”

The action plan does not comply with either the broad purposes or the specific requirements of SARA. It should contain concrete actions that help recover SRKW. Instead, it fails to mitigate or prevent threats to SRKW or their critical habitat or prevent extinction and provide for recovery. By focusing on research to the exclusion of action, it maintains status quo conditions. The action plan does not “implement” the recovery strategy, as required by section 49(1)(d) of SARA. It does not describe how the minister will use his or her powers under SARA or other Acts of Parliament to make regulations to implement the action plan.

This example illustrates challenges to species receiving SARA protections in two ways: first, the chronic problem of delay in SARA implementation, and second, the fact that formal implementation of SARA provisions does not necessarily translate into protection on the ground.

THE TRANS MOUNTAIN EXPANSION PROJECT ENVIRONMENTAL ASSESSMENT: LITIGATION OVERTURNS AN UNLAWFUL FIRST APPROVAL UNDER THE *SPECIES AT RISK ACT*, AND A SECOND APPROVAL WITHOUT CONCRETE MITIGATION FOR SOUTHERN RESIDENT KILLER WHALES EVADES JUDICIAL REVIEW

The Trans Mountain Expansion Project is set to triple the capacity of the existing Trans Mountain oil pipeline from Alberta to British Columbia. The number of oil tankers departing the Westridge Marine Terminal in Burnaby and travelling through SRKW critical habitat to the open ocean will increase from approximately five to approximately thirty-four Aframax class tankers per month. The increased oil tanker traffic will adversely affect SRKW by exacerbating physical and acoustic disturbance in critical habitats and by increasing the risk of an oil spill or vessel strike of a whale in critical habitat.

The National Energy Board (the NEB) (now the Canada Energy Regulator [CER]) conducted the review and environmental assessment of the project. It concluded that project-related marine shipping “is likely to result in significant adverse effects to the southern resident killer whale,” will “further contribute to cumulative effects that are already jeopardizing the survival and recovery of [SRKW],” will “impact numerous individuals of the [SRKW] population in a habitat identified as critical to [their] recovery,” and will result in vessel noise that is “a threat to the acoustic integrity of . . . critical habitat.”³⁴ It found that the project-related death of an individual SRKW could “result in population-level impacts and could jeopardize recovery.”³⁵ It cited the recovery strategy statement that “while the probability of [SRKW] being exposed to an oil spill is low, the impact of such an event is potentially catastrophic.”³⁶

Nevertheless, the NEB recommended approval of the project without conditions to mitigate these effects, and the Governor in Council followed this recommendation. Two conservation organizations represented by Ecojustice sought and were granted leave for a judicial review of the Governor in Council’s approval, arguing that it had failed to comply with sections 79(2) and 77(1) of SARA.

As stated above, the express purposes of SARA include preventing wild-life species from becoming extinct and providing for the recovery of species that are endangered due to human activity.³⁷ In support of these purposes, SARA’s protective provisions, including sections 77 and 79, work together to protect endangered species from existing threats and ensure that the effects of new activities are addressed before they begin to prevent extinction and allow

for recovery. To give effect to sections 79 and 77 of SARA, the NEB and the Governor in Council had to consider the project in a way that fulfilled these broad statutory purposes.

Section 77 of SARA is intended to protect critical habitat from potential harm that may result from activities authorized under other Acts of Parliament. Subsection 77(1) applies to any person or body other than a competent minister who is authorized under any other Act to “issue or approve . . . any . . . authorization that authorizes an activity that may result in the destruction of any part of the critical habitat” of a SARA-listed species. Before issuing any authorization, this person must consider the impact on critical habitat and be of the opinion that “all feasible measures will be taken to minimize the impact of the activity on the species’ critical habitat.”

The applicants argued that the Governor in Council erred in authorizing the project because, when faced with the NEB’s factual findings indicating that project-related shipping may destroy critical habitat, the Governor in Council either failed to form an opinion that all feasible measures would be taken, or, if it did, that opinion was unreasonable in the absence of any conditions to mitigate the effects of marine shipping on SRKW critical habitat identified by the NEB.

Section 79 of SARA is intended to protect endangered species and their critical habitat from the effects of new projects. It ensures that the effects of new activities that might further imperil species at risk are addressed as part of the review and approval process before those new activities occur. Section 79(2) of SARA was triggered by the *Canadian Environmental Assessment Act, 2012*³⁸ (CEAA 2012) and applies when a proposed project that is subject to an environmental assessment is likely to affect a listed species or its critical habitat.³⁹ Subsection 79(1) requires the person conducting the environmental assessment or making the determination to notify the competent minister(s) if the project is likely to affect a SARA-listed species or its critical habitat. Subsection 79(2) further requires that person to identify the project’s effects on the listed species and its critical habitat and to “ensure that measures are taken to avoid or lessen” them. The measures must be taken in a way that is consistent with any applicable recovery strategy or action plan.

The applicants argued that section 79(2) should have applied because shipping is part of the “designated project” as defined in section 2(1) of CEAA 2012 (being “incidental” to it). Despite its factual conclusions about the effects of marine shipping on SRKW, the NEB took the position that section 79(2) of

SARA did not apply to its assessment of shipping, on the basis that the project for the purposes of *CEAA 2012* included only the pipeline and facilities, up to the Westridge Marine Terminal. The NEB conceded that it had not ensured any measures to avoid or lessen the effects of shipping on SRKW on its recommended conditions.⁴⁰ The Governor in Council approved the NEB's recommendations and adopted its recommended conditions without changes.⁴¹

The application for judicial review on SARA grounds was consolidated with other applications brought by First Nations and municipalities and heard by the Federal Court of Appeal. The court decided in *Tsleil-Waututh Nation v. Canada (Attorney General)*⁴² that the NEB had unreasonably excluded project-related shipping from the scope of the project in its environmental assessment, and as a result failed to comply with mandatory requirements of *CEAA 2012* and SARA, such that the Governor in Council was not able to assess the project's effects and make its decision. The court emphasized that section 79(2) of SARA required the NEB to identify all feasible measures to avoid or lessen the project's effects on SRKW so that "the Governor in Council would be in a position to see that, if approved, the Project was not approved until all technically and economically feasible mitigation measures within the authority of the federal government were in place."⁴³ The court further held that section 77(1) did not apply to the order in council because that decision itself did not authorize marine shipping.⁴⁴ The court quashed the approval and remitted the matter back to the Governor in Council for redetermination.⁴⁵

In response to the court's decision, the Governor in Council ordered the NEB to conduct a reconsideration process to assess the effects of project-related shipping. Following the reconsideration, the NEB released a revised report.⁴⁶ It found that project-related shipping will have significant adverse environmental effects on the SRKW and their critical habitat by increasing underwater noise and the risk of ship strikes.

Nevertheless, the NEB did not recommend any conditions to lessen or avoid effects on SRKW; instead, it made "recommendations" of actions the Governor in Council could take, some of which were directly or indirectly relevant to SRKW. The recommendations are distinct from conditions on the project: they lack timelines or any guarantee that they will be in place before operations begin or remain in place for the duration of operations, they are not enforceable, and they are not known to be feasible or to be effective in reducing effects. The NEB decided that these recommendations satisfied

section 79(2) of SARA despite, in its words, not being immediate mitigation measures.

The Governor in Council approved the project for a second time based on the NEB's reconsideration report, relying on the recommendations to satisfy section 79(2) of SARA, and concluding that the significant adverse environmental effects were justified in the circumstances.⁴⁷

The two conservation organizations represented by Ecojustice sought leave for an application for judicial review of this second approval. They sought leave to argue that the recommendations did not satisfy section 79(2), and that the Governor in Council had no jurisdiction to issue the order in council until the requirements of section 79(2) were met, and no jurisdiction to decide under *CEAA 2012* that significant adverse environmental effects are justified when those effects are contrary to the purposes and provisions of SARA. They were denied leave in a decision by a single judge of the Federal Court of Appeal, on the basis that the applications did not raise a "fairly arguable case," which is the leave test for judicial review of a federal pipeline approval.⁴⁸

The leave decision took an arguably novel approach to the "arguable case" test and appeared to reflect a misunderstanding of the basis for the proposed application.⁴⁹ The applicants had taken the position that section 79(2) of SARA creates independent, mandatory requirements when a project undergoes a federal environmental assessment that are a condition precedent to approval by the Governor in Council, and therefore that an approval relying on recommendations rather than on immediate mitigation measures was unlawful. This was based on the court's confirmation in *Tsleil-Waututh* that section 79(2) requires measures to be in place before a project is approved.⁵⁰ The leave decision seemed to contradict *Tsleil-Waututh*, treating this proposition as not even fairly arguable.

The applicants unsuccessfully sought leave to appeal this leave decision to the Supreme Court, to address two questions: what the duty in section 79(2) of SARA requires, and whether the Governor in Council has jurisdiction under *CEAA 2012* to justify significant adverse effects on a federally protected species that would not be permissible under SARA. Because they did not get leave at the Federal Court of Appeal or the Supreme Court, these questions remain unanswered.

This example illustrates four challenges with SARA protection: the need for civil society to resort to litigation due to government inaction (in this case,

for *SARA* to be applied in the first place, and in an unsuccessful attempt to have it applied consistently with its purposes and provisions), the fact that litigation is an imperfect tool for ensuring *SARA* protections are applied, the ongoing uncertainty concerning what *SARA* requires that result in a lack of protection, and the inability of a critical habitat protection order to protect critical habitat in and of itself.

With respect to the second challenge, litigation is an imperfect tool due to its inherent unpredictability and procedural hurdles. The leave requirement hurdle that prevented the challenge to the second approval from being heard only applies to approvals of pipeline projects assessed by the NEB; if the case had concerned the approval of a different category of project, the applicants' arguments would have been heard and decided. Furthermore, the decision to deny leave was not expected by the parties.⁵¹ As a result of the leave test and unexpected leave decision, litigation could not resolve the question of how *SARA* applied in this case.

With respect to the third challenge, uncertainty in the law, the Federal Court has held that legal uncertainty around *SARA* has “environmental costs” and may result in “serious collateral consequences for other species in need of protection but lacking champions to bring their cause before the Court.”⁵² In this case, the uncertainty has broad implications. A total of 578 species are listed under *SARA*. Any federal environmental assessment of a project likely to affect one or more of them will require compliance with *SARA* and trigger section 79. As of September 24, 2019, 64 of 68 projects undergoing federal environmental assessments by the Impact Assessment Agency, Canadian Nuclear Safety Commission, or CER may affect one or more *SARA*-listed species and therefore could trigger section 79. The legal uncertainty around section 79(2) resulting from the leave decision could be exploited in future.

Finally, this example illustrates that a critical habitat protection order does not, in and of itself, protect critical habitat. This project was approved twice despite involving activities identified in the recovery strategy as likely to result in destruction of SRKW critical habitat.

EMERGENCY ORDER: A LAST RESORT

Subsection 80(1) of *SARA* enables the Governor in Council to make an emergency order to provide for the protection of a listed species on the recommendation of the competent minister. Pursuant to section 80(2), “[t]he competent minister must make the recommendation if he or she is of the opinion that

the species faces imminent threats to its survival or recovery.” An emergency order may include, in the case of an aquatic species, identification of habitat that is necessary for survival or recovery, and provisions requiring actions that protect the species and that habitat and prohibiting activities that may adversely affect the species and habitat (section 80(4)).

This tool has only been used twice, for the greater sage-grouse and the western chorus frog. In both cases it was only used after conservation organizations initiated litigation.⁵³

Despite the legal protections afforded to SRKW and their critical habitat under SARA, and the existence of the 2011 *Recovery Strategy* and the *Action Plan*, as of January 2018, measures had not been taken to reduce the threats identified in the 2011 *Recovery Strategy*. DFO conducted a “science-based review of recovery actions”—a step not required by SARA—in 2017.⁵⁴ It revealed that only research-based, information-gathering, and monitoring measures are underway, and that DFO was unable to report at all on the status of several action plan measures.⁵⁵

On January 30, 2018, five conservation organizations with a long-standing interest in SRKW wrote to the minister of fisheries and oceans and minister of environment to demand that they recommend an emergency order for SRKW by March 1, 2018.⁵⁶ At that time, the species’ current decline had become apparent, with the population dropping to 76. Individual whales were showing signs of malnutrition, the majority of pregnancies were failing, and, troublingly, some reproductive-aged females were dying instead of living into their post-reproductive years as would normally be expected. The ongoing decline, and the size and demographics of the population, put the population in a precarious position. When DFO convened a symposium to discuss SRKW in October 2017, two of the leading experts on the population—Dr. John Ford, emeritus DFO scientist and SRKW specialist, and Dr. Lance Barrett-Lennard, a long-time SRKW researcher and a co-author of the recovery strategy—both stressed the need for urgent actions to support SRKW.

The petition to the ministers summarized the best available information on the status of SRKW and threats to them and conveyed the petitioners’ position that the only reasonable conclusion to draw was that there are imminent threats to the survival and recovery of SRKW, such that the ministers must recommend an emergency order. The petition included measures that should be included in an emergency order.

Following the petition, the ministers introduced measures in the June 2018 summer season designed to help SRKW that summer, including fisheries measures and voluntary measures related to noise, and permanently, through an amendment to the allowed approach distance for SRKW in the *Marine Mammal Regulations*.⁵⁷ The petitioners considered these to be positive but inadequate steps.

The ministers also issued a summary imminent threat assessment on May 25, 2018,⁵⁸ and a complete version on July 30, 2018,⁵⁹ in which they concluded that the SRKW face imminent threats to their survival and recovery. However, the ministers did not recommend that cabinet issue an emergency order and would not confirm whether they would do so or when.

The conservation organizations then filed an application for judicial review at the Federal Court in September 2018, seeking a mandamus order compelling the ministers to comply with their duty under section 80(2) of SARA to recommend that the cabinet issue an emergency order, in light of their imminent threat opinion, and an order that their ongoing delay in making a recommendation was unlawful.⁶⁰ The litigation concluded when, on the eve of the deadline to file the ministers' evidence, cabinet issued an order in council stating that the ministers had recommended an emergency order but declining to make an emergency order, citing other measures that had been or would be taken.⁶¹

Following the conclusion of the litigation, the current recovery strategy was finalized, and the current critical habitat protection order was made in December 2018, to incorporate a new area of critical habitat, the legal protection of which was one of the petition's requests.

This petition and litigation should not have been necessary. SRKW have a recovery strategy, protected critical habitat, and an action plan—more than many listed species have—and the species and its critical habitat are entirely within federal jurisdiction. Yet, until 2018, their emergency situation was not treated as one.

Furthermore, while the federal government has taken steps with the expanded area of critical habitat and with yearly measures concerning protection of the SRKW, which are important progress, SRKW continue to decline in numbers, and new projects that will adversely affect them continue to be approved, indicating that significantly more effort is needed to reduce existing threats and to prevent new ones from emerging.

On April 14, 2021, the government of Canada announced measures to protect SRKW, including fisheries closure protocol to increase the availability of Chinook salmon and reduce vessel disturbance and contamination, interim sanctuary zones in three places, pilot closure protocol for recreational and commercial salmon fishing.⁶² There is also Canada's Oceans Protection Plan, Whales Initiative, and an additional federal investment of \$61.5 million for the protection of SRKW.⁶³ It is hoped that the plague of poor and slow implementation would not affect these measures.

Conclusions: Difficulties in Receiving *Species at Risk Act* Protections

The case of the SRKW shows that, even a species that is charismatic and an icon of the west coast, critically endangered, and entirely within federal jurisdiction—and has received, on paper, the full suite of *SARA* protections—has been granted protections belatedly, or only due to litigation forcing the government's hand, or not at all. Further, effective protection is still lacking, with the result that the species is declining. This supports two broad conclusions.

First, *SARA* and the ministers responsible for *SARA*-listed species are not doing their job if *SARA* is only implemented when civil society groups resort to litigation, and sometimes not even then. This is not a sustainable or effective way for *SARA* to be applied.

Second, *SARA* is only as good as its implementation. Research and scientific information are essential but cannot be pursued indefinitely to the exclusion of concrete action. Persistent reluctance to act, chronic foot-dragging, and the failure to make endangered species' survival and recovery a priority, undermine *SARA*'s effectiveness.

NOTES

- 1 Dyna Tuytel is a staff lawyer at Ecojustice Canada in Vancouver; Margot Venton is the director of the nature program at Ecojustice Canada in Vancouver.
- 2 SC 2002, c 29 [*SARA*].
- 3 World Wildlife Fund Canada, "Living Planet Report Canada: A National Look at Wildlife Loss" (Toronto: World Wildlife Fund-Canada, October 2017) at 9–10.
- 4 *SARA*, *supra* note 2, s 6.
- 5 Species at Risk Registry, "Species Profile: Killer Whale Northeast Pacific Southern Resident Population" (accessed 23 July 2021) *Government of Canada*, online: <wildlife-species.canada.ca/species-risk-registry/species/speciesDetails_e.cfm?sid=699>.

- 6 SARA, *supra* note 2, s 2(1).
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- 14 *David Suzuki Foundation v Canada (Fisheries and Oceans)*, 2010 FC 1233 at para 13 [*David Suzuki Foundation v Canada*].
- 15 Fisheries and Oceans Canada, *Recovery Strategy for the Northern and Southern Resident Killer Whales (Orcinus orca) in Canada, Species at Risk Act Recovery Strategy Series* (Ottawa: Fisheries & Oceans Canada, 2011) [2011 *Recovery Strategy*]. A revised recovery strategy was published in 2018 to include updated critical habitat identification and threat information.
- 16 *David Suzuki Foundation v Canada, supra* note 14 at paras 13–26.
- 17 2011 *Recovery Strategy, supra* note 15 at 41.
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- 21 *Ibid* at paras 38–45.
- 22 See *Environmental Defence Canada v Canada (Fisheries and Oceans)*, 2009 FC 878.
- 23 *David Suzuki Foundation v Canada, supra* note 14 at para 340.
- 24 *Canada v David Suzuki Foundation, supra* note 12 at paras 150, 150.
- 25 *Ibid* at paras 8, 9, 115, 117, 124, 125.
- 26 *Ibid* at para 8.
- 27 *Ibid* at para 125.
- 28 *Critical Habitats of the Northeast Pacific Northern and Southern Resident Populations of the Killer Whale (Orcinus orca) Order*, SOR/2009-68. In 2018 the minister replaced this with a new order that protects the expanded area of critical habitat described in the revised 2018 recovery strategy: *Critical Habitat of the Killer Whale (Orcinus orca) Northeast Pacific Southern Resident Population Order* SOR/2018-278.

- 29 In 2014, the Federal Court heard an application for judicial review by five conservation organizations of the minister of fisheries and oceans and minister of environment's failure to comply with statutory timelines for the preparation and publication of recovery strategies, using four SARA-listed species (a terrestrial mammal and migratory bird for whom the minister of environment is responsible, and an aquatic mammal and a fish for whom the minister of fisheries and oceans is responsible) to represent this endemic, systemic problem: *Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*, 2014 FC 148.
- 30 *SARA*, *supra* note 2, ss 47–50.
- 31 *Ibid*, ss 53, 59.
- 32 *Ibid*, s 54.
- 33 Fisheries and Oceans Canada, *Action Plan for the Northern and Southern Resident Killer Whale (Orcinus orca) in Canada, Species at Risk Act Action Plan Series* (Ottawa: Fisheries and Oceans Canada, 2017) at 26 (accessed 26 July 2021), online: <wildlife-species.canada.ca/species-risk-registry/document/default_e.cfm?documentID=2944> [*Action Plan*].
- 34 National Energy Board, *National Energy Board Report: Trans Mountain Expansion Project OH-001-2014* (Calgary: National Energy Board, May 2016) at xii, 351, 350 [NEB Report].
- 35 *Ibid* at 398.
- 36 *Ibid*.
- 37 *SARA*, *supra* note 2, s 6.
- 38 SC 2012, c 19, s 52.
- 39 In light of new federal environmental assessment legislation, s 79(2) of *SARA* has been amended and is now triggered by determinations under s 82(a) of (b) of the *Impact Assessment Act*, SC 2019, c 28, s 1.
- 40 NEB Report, *supra* note 34 at 332, 349, 350.
- 41 *Order in Council*, PC 2016-1069 (29 November 2016).
- 42 *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at paras 456, 764–766 [*Tsleil-Waututh*].
- 43 *Ibid* at para 456.
- 44 *Ibid* at para 463.
- 45 *Ibid* at para 774.
- 46 National Energy Board, *Application for the Trans Mountain Expansion Project: National Energy Board Reconsideration of Aspects of Its OH-001-2014 Report as Directed by Order in Council PC 2018-1177, MH-052-2018* (Calgary: National Energy Board, February 2019) [*Reconsideration Report*].
- 47 *Order in Council* PC 2019-820 (18 June 2019).
- 48 *Raincoast Conservation Foundation v Canada (Attorney General)*, 2019 FCA 224.
- 49 See Nigel Bankes, Martin Olszynski & David Wright, “Federal Court of Appeal Provides Reasons in TMX Leave Applications” (September 11, 2019), online (pdf): *ABlawg* <ablawg.ca/wp-content/uploads/2019/09/Blog_NB_MO_DW_Raincoast.pdf> [Nigel Bankes et al].
- 50 *Tsleil-Waututh*, *supra* note 42 at para 456.
- 51 The respondents took no position on the leave applications. See Nigel Bankes et al, *supra* note 49 at 4.

- 52 *David Suzuki Foundation v Canada*, *supra* note 14 at paras 66, 245.
- 53 Regarding the greater sage-grouse, the Alberta Wilderness Association, Western Canada Wilderness Committee, Nature Saskatchewan, and Grasslands Naturalists brought an application for judicial review of the minister of environment’s refusal to recommend an emergency order on 14 February 2012 (Federal Court File T-341-12). Cabinet ultimately issued an emergency order and the application was discontinued. Regarding the western chorus frog, see *Centre québécois de droit et de l’environnement v Canada (Environment)*, 2015 FC 773.
- 54 Department of Fisheries and Oceans Canada, *Southern Resident Killer Whale: A Science-based Review of Recovery Actions for Three At-risk Whale Populations* (2017 accessed 27 July 2021), online: <dfo-mpo.gc.ca/species-especes/whalereview-revuebaleine/review-revue/killerwhale-epaulard/page01-eng.html>.
- 55 *Ibid* at 12, 17–28.
- 56 Emergency Order Petition, *supra* note 13.
- 57 SOR/93-56; Transport Canada, “The Government of Canada Takes Immediate Action to Protect Endangered Whales through the Oceans Protection Plan” (22 June 2018, accessed 26 July 2021), online: *NewsWire.ca* <newsWire.ca/news-releases/the-government-of-canada-takes-immediate-action-to-protect-endangered-whales-through-the-oceans-protection-plan-686272471.html>.
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- 59 Government of Canada, “Southern Resident Killer Whale Imminent Threat Assessment” (30 July 2018, accessed 26 July 2021), online: <species-registry.canada.ca/index-en.html#/consultations/3327>.
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- 63 “Ottawa Strengthening Measures to Protect Southern Resident Killer Whales”, *weeklyvoice.com* (4 May 2021, accessed 26 July 2021), online: <weeklyvoice.com/ottawa-strengthening-measures-to-protect-southern-resident-killer-whales/>.