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February 10, 2010

*Via Mail and Facsimile*

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Dear Sirs/Mesdames:

**Re: Ongoing violations of the *Species at Risk Act* for British Columbia species**

In your role as members of the Canada-British Columbia Species at Risk Steering Committee, we write to you on behalf of the David Suzuki Foundation, Environmental Defence, Georgia Strait Alliance and the Western Canada Wilderness Committee.

These organizations are writing to ask that you address ongoing violations of the *Species at Risk Act* in British Columbia. Specifically, we ask that you direct government officials to identify critical habitat for relevant species in B.C. and, in the instances where information may currently be inadequate, that you direct your officials to gather and assess the best available information.

As you know, these four organizations were successful in Federal Court litigation regarding the Nooksack Dace.<sup>1</sup> That litigation was a test case brought to provide judicial guidance on how to lawfully interpret and apply s.41(1)(c) of the *Species at Risk Act*.

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<sup>1</sup> *Environmental Defence et al v. Canada (Minister of Fisheries and Oceans)*, 2009 FC 878

The Federal Court confirmed that recovery strategies under the *Species at Risk Act* must identify as much critical habitat as possible, including both the geospatial location and the features of a species' critical habitat. Moreover, the Court also confirmed that competent ministers are legally required to “gather, review, and evaluate the available information” and “not to disregard, ignore, or remove reliable information about a species' critical habitat”.

The Court also held that DFO was acting under an unlawful policy, specific to British Columbia, directing that no critical habitat be identified in any recovery strategy for BC aquatic species.

The role of the Canada-BC Species at Risk Coordinating Committee is, in part, to ensure policy coordination between competent ministers like DFO and British Columbia in implementing the *Species at Risk Act*. In view of legal concerns with the implementation of the *Act* in British Columbia, it is now appropriate for the Steering Committee to direct the prompt amendment of both final and draft recovery strategies for BC species at risk. Section 45 of the *Species at Risk Act* gives competent ministers the power to amend final recovery strategies, including for the purpose of identifying critical habitat.

Strategic direction from the Steering Committee is an important aspect of future compliance with s.41(1)(c). We note that since the Court's decision holding that an unlawful policy was in effect in BC, **not one recovery strategy created under that policy has yet been revised to comply with the law.**

Currently, there are only two demonstrably lawful recovery strategies for BC's aquatic species: Northern and Southern Resident Killer Whales, and Nooksack Dace.<sup>2</sup> All other endangered and threatened BC aquatic species have final or draft recovery strategies that appear to unlawfully breach ss.41(1)(c) and/or s.42 of the *Species at Risk Act*.

This situation appears to be replicated for BC's terrestrial species. The only recovery strategies for BC's terrestrial species that even *partially* identify critical habitat are those for the Northern Spotted Owl, Pink Sand Verbena and Poor Pocket Moss.

In response to public concern, and questions from parliamentarians,<sup>3</sup> about the systematic failure to identify critical habitat, senior officials commonly assert that the reason it is not identified is a lack of scientific data. The assertion lacks credibility. It is contrary to all the evidence, including records recently obtained through Access to Information.

Access to Information records show that the Canada-BC Species at Risk Coordinating Committee is aware that critical habitat has not been identified for BC species despite that it is scientifically possible to do so. As stated in the enclosed Discussion Paper for the

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<sup>2</sup> Both the Northern and Southern Resident Killer Whales recovery strategy and the Nooksack Dace recovery strategy were revised to identify critical habitat only after litigation was threatened and/or commenced.

<sup>3</sup> House of Commons Debates (March 10, 2009) (Ms. Linda Duncan, Mr. Francis Scarpaleggia (Members); Mrs. Cynthia Wright, Dr. Pardeep Aluwahlia (witnesses)).

December 6, 2007 meeting of the Coordinating Committee: "There is a substantial list of species where, from a technical perspective only, partial CH ID can appear to be 'obvious'."<sup>4</sup>

This Discussion Paper reveals that, as of December 2007, your officials were aware that it is scientifically possible to identify critical habitat for 49 species. Yet two years later, only 6 of these 49 species have since had any critical habitat identified, leaving 43 of these species without. The Discussion Paper also reveals that for at least another 37 species, your officials had not obtained the requisite data, contrary to the s.41(1)(c) duty to gather and assess the best available information. Moreover, since December 2007, many more species now await lawful recovery strategies with critical habitat identified.

Indeed, our review suggests that, in BC alone, there appear to be **107 endangered and threatened species that have been deprived of lawful recovery strategies** under the *Species at Risk Act*. Please see the attached Appendix. A small sample of these 107 species include: Salish Sucker, White Sturgeon, Northern Goshawk, Vesper Sparrow; Yellow-breasted Chat; Oregon Spotted Frog; Vancouver Island Marmot; Marbled Murrelet and the Southern Mountain population of Woodland Caribou.

We expect that now, with the benefit of the Federal Court's clarification, BC species-at-risk will receive the protection that they are legally entitled to under the *Species at Risk Act*.

We respectfully request that you provide us with written copies of the Steering Committee's new direction to your officials to promptly identify critical habitat for those 43 BC species for which it is scientifically possible to do so. We further request the list of 37 species for which the requisite data for assessment has not been gathered, and a copy of a new direction to your officials to gather the missing data for those 37 species. Finally, we seek an opportunity to discuss your process and timeline for promptly issuing recovery strategies for the remainder of the 107 species not discussed in the Discussion Paper.

With the David Suzuki Foundation, Environmental Defence, Georgia Strait Alliance and the Wilderness Committee, we look forward to working with you and assisting you to ensure all recovery strategies for BC species are amended to identify critical habitat as fully as possible.

Yours sincerely,



Lara Tessaro  
Staff Lawyer  
Encl.



Susan Pinkus  
Staff Scientist

cc. Pardeep Aluwahlia, Director General, SARA Directorate, DFO  
Virginia Potter, Director General, Canadian Wildlife Service, Environment Canada  
Mike P. Wong, Executive Director, Ecological Integrity Branch, Parks Canada

<sup>4</sup> The Federal Court has since confirmed that *only* technical considerations are legally valid under s.41(1) of the *Species at Risk Act*, and that Ministers may not enter any political or socioeconomic considerations. See *Environmental Defence et al, supra* at paragraphs 37 and 41.