



March 15, 2018

Dear Minister McKenna,

We are writing to you because we share a primary objective with your department: to ensure that boreal caribou survive and recover across Canada and would like to express our concern about the use of conservation agreements in the implementation of the Species at Risk Act (SARA) and to seek clarification on your department's intent in using such an instrument to implement the Act.

Our organizations strive to find progressive solutions to the conservation challenges that face our country. With our collective work to achieve caribou habitat maintenance and restoration for over a decade, we fully understand the complexities of the task at hand.

In light of the poor condition of many boreal caribou ranges in Canada, conservation organizations have called for: 1) the federal government to work with the provinces to ensure that interim protection of undisturbed habitat in ranges that have exceeded the disturbance thresholds is provided until such time as range plans are developed and implemented in accordance with disturbance thresholds as set out in the federal Recovery Strategy; 2) the fulfillment of Canada's obligation under SARA to release a section 63 report that identifies steps that will be taken to protect unprotected caribou critical habitat; and 3) where needed, the fulfillment of the Minister's duties under section 61(4).

Based on the language below contained in the finalized boreal caribou Action Plan, (released on February 13), we have significant concerns that your department is embarking in a fundamentally different direction for boreal caribou recovery than the direction outlined in the Recovery Strategy:

ECCC will continue to work with provinces and territories to ensure that robust range plans are in place across the boreal caribou distribution. However, ECCC will also explore with provinces, territories and other parties, as appropriate, the establishment of conservation agreements under SARA to formalize the commitments each party is making to protect and recover boreal caribou. Where they are established, these agreements will provide a framework for substantial conservation actions toward achieving the population and distribution objectives for boreal caribou. The federal government will enter into such agreements if they provide specific, measurable, achievable, and time-bound measures for the protection and recovery of the species and its critical habitat.¹

This paragraph implies that conservation agreements could potentially replace range plans. Although we understand that the lack of range plans completed and implemented using appropriate legal tools to provide critical habitat protection by provinces and territories is a continuing frustration, we submit that the solution is not to fall back on an inappropriate instrument.

First, as you know, SARA section 11 outlines that:

A competent minister may, after consultation with every other competent minister, and with the Canadian Endangered Species Conservation Council or any of its members if he or she considers it appropriate to do so, enter into a conservation agreement with any government in Canada, organization or person to **benefit** a species at risk or **enhance its survival** in the wild.² (emphasis ours)

Yet despite repeated queries to ECCC staff, the department has not been able to explain how the words 'benefit' or 'enhance' are being interpreted.

When Bill C51 was discussed by the Standing Committee on Environment and Sustainable Development, those involved in the original drafting were clear that their intent was that this section would not be utilized with respect to activities that harm a species. Specifically, they noted: "... it was our intention to create an agreement that would only benefit the species."³

Conservation agreements were clearly developed to stand apart from other sections in the Act that governed activities that harmed a species, as noted by Ms. Ruth Wherry, Director, Species at Risk Office, Department of the Environment:

If you look at subclause 74(3) for example, those criteria are basically designed for activities that are harmful to a species, its residence, or its critical habitat. The purpose of conservation agreements is to benefit, so it doesn't quite make sense to talk about the criteria of 74(3) with respect to conservation agreements.⁴

This was echoed by Mr. David Near, Senior Counsel, Department of Justice:

When we drafted clause 11, the sole intent was that a clause 11 agreement would only be beneficial to the species. When we drafted clause 74, it was contemplated that there might be instances in which there would be a negative impact [...] If we're speaking in terms of consistency, they are two different types of agreement. One is for the benefit of the species—in effect, a stewardship-type agreement. The other contemplates a permitting or licensing situation in which someone may be doing something that may have a negative impact on the species, but the government has decided that, following certain procedural steps, such an activity will be allowed.⁵

This interpretation was clearly not applied, however, in the case of the first draft conservation agreement for caribou with the province of British Columbia. Upon careful review, we contend that the document does not provide a pathway for benefitting the species and outlines extremely limited measures to protect critical habitat.

Rather, the stated aims of the draft conservation agreement revolve around further analyses and the creation of future plans. They implicitly condone further industrial disturbance within the range in the meantime. This deviation from the intent of the law should be of deep concern to anyone working towards protection of this species, given that other provinces are already looking to this first draft conservation agreement as a template.

We agree that conservation agreements that contain spatially-explicit commitments to protect habitat can be useful as interim measures where provinces have the willingness to protect habitat but do not

yet have the full suite of legal instruments needed to provide non-discretionary protection. However, these agreements must not be used to mask provincial inaction.

For far too long (since 2008, when the federal science was first released,⁶) the provinces have ignored the empirically-based relationship between habitat condition and population condition and continue with status-quo industrial operations. As a result, habitat condition in the majority of ranges has worsened since 2012 and the boreal caribou population as a whole has continued to decline, as your own *Report on the Progress of Recovery Strategy Implementation for the Woodland Caribou (Rangifer tarandus caribou), Boreal population in Canada for the Period 2012-2017* indicates.⁷

Such declines will continue unless provinces take the steps required to a) spatially identify present and future critical habitat within ranges in accordance with the disturbance threshold and b) ensure that sufficient critical habitat is legally protected.

We truly hope that your department is not deviating, through inappropriate conservation agreements, from its commitment to ensure that the provinces do the work needed to apply the disturbance threshold and protect critical habitat. We look forward to working with you to recover boreal woodland caribou.

Sincerely,



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¹ Environment and Climate Change Canada. 2018. Action Plan for the Woodland Caribou (*Rangifer tarandus caribou*), Boreal Population, in Canada – Federal Actions. *Species at Risk Act* Action Plan Series. Environment and Climate Change Canada, Ottawa. p. 5

² SARA sec. 11

³ October 30, 2001: <https://www.ourcommons.ca/DocumentViewer/en/37-1/ENVI/meeting-45/evidence> ; See also November 27, 2001: <https://www.ourcommons.ca/DocumentViewer/en/37-1/ENVI/meeting-54/evidence>

⁴ October 23, 2001: <https://www.ourcommons.ca/DocumentViewer/en/37-1/ENVI/meeting-42/evidence>

⁵ Ibid.

⁶ Environment Canada. 2008. Scientific Review for the Identification of Critical Habitat for Woodland Caribou (*Rangifer tarandus caribou*), Boreal Population, in Canada. August 2008. Ottawa: Environment Canada. 72 pp. plus 180 pp Appendices; <https://www.theglobeandmail.com/news/national/article36794694.ece/BINARY/scientists-letter-caribou.pdf>

⁷ Environment and Climate Change Canada 2017 Report on the Progress of Recovery Strategy Implementation for the Woodland Caribou (*Rangifer tarandus caribou*), Boreal population in Canada for the Period 2012 2017 Species at Risk Act Recovery Strategy Series. Environment and Climate Change Canada, Ottawa. p. 8