

## THE SPECIES AT RISK ACT

Protecting the Biodiversity of Salmon in Canada

**Disclaimer: "I'm not a lawyer, and this is still a DRAFT"**

### Introduction:

The Species At Risk Act (SARA) is part of Canada's commitment to protect biodiversity. For this reason, SARA explicitly protects not just species, but what are termed "Designatable Units or DU's". While the benefits of protecting species at risk were debated at length prior to the passage of the SARA, the process is fairly straight forward. COSEWIC assesses the status of the DU. If warranted, it is listed by COSEWIC. The listing by COSEWIC triggers a series of decisions by the Government to either list the stocks or not, and these decisions under the Act have very well defined timelines to prevent endless stalling that would serve to prevent the SARA from working as it was intended to work by Parliament (particularly for those DU's listed under the emergency provisions of SARA).

### COSEWIC Assessment

Any assessment of a salmon population under COSEWIC essentially addresses four issues: (1) is the assessed population eligible for listing as a 'species' (is it genetically unique, geographically and reproductively isolated etc); (2) is the population endangered and facing imminent extinction; (3) does the population lack protection against threats; and (4) is the population of special significance to human populations. Aboriginal traditional knowledge is explicitly addressed in these assessments, and the advice of the Aboriginal Traditional Knowledge Sub-Committee of COSEWIC is sought and considered.

### Listings to Date and why they worked:

All three of the salmon populations listed to date had already been assessed by the appropriate DFO Science Branch Staff. These assessment documents were submitted to the Pacific Science Advice and Review Committee (PSARC), and the approved documents were part of the public record. This allowed the Scientists involved in the assessment to prepare COSEWIC assessment documents, and provided the basis for the request for emergency listing.

### Future Listings and why they will be more difficult:

For 25 years, COSEWIC decisions and the work of the many Species Specialists Groups had little direct impact on Canadians, and so avoided public scrutiny. Now that COSEWIC decisions have effect in law, both the workload and the level of public scrutiny of COSEWIC work has increased dramatically.

DFO is struggling internally to redefine their mandate, avoid fisheries disruptions, and still address their obligations to protect salmon biodiversity. The last few years have seen steady and even dramatic declines in the funds spent to assess the status of salmon stocks. By reducing the stock assessment budget, and focusing on larger stocks and changing stock assessment priorities without consulting with affected parties outside DFO, the flow in information necessary to the COSEWIC assessment process can be limited significantly. The process can be further controlled by assigning DFO assessment staff to activities that will not lead to the preparation of PSARC documents. Unless assessments are provided to PSARC and approved, the assessments and in many cases the necessary data will not be available to the public. This is a significant concern.

### DFO and the Status Quo

One part of DFO spends their time trying to protect fish, while the other part spends their time trying to harvest them. As a result, DFO's strategy for implementing SARA (if it can be called that) appears to be limited to buying time, in hopes that the internal conflicts are resolved, and that an approach to managing salmon, consistent with the requirements under SARA, can be developed. DFO is considering ways to delay the legal listing of COSEWIC emergency listed and newly listed endangered salmon stocks, while at the same time exploring ways to allow directed fisheries on these stocks to continue after the legal listing occurs.

### Allowing Harm to Legally Listed Salmon:

Once a species is legally listed there are essentially two ways to kill them without running afoul of the protections and prohibitions in SARA. If the killing is incidental to the activity undertaken, and consistent with the incidental harm provisions under the Act, the Minister of Fisheries can authorize the activity under Section 73 of the Act. The incidental harm provisions clearly spell out the reasons for allowing incidental harm. An incidental harm permit or agreement can only be entered into if the competent minister (in this case the Minister of Fisheries) "**is of the opinion that**

- (a) **the activity is scientific research relating to the conservation of the species and conducted by qualified persons;**
- (b) **the activity benefits the species or is required to enhance its chance of survival in the wild; or**
- (c) **affecting the species is incidental to the carrying out of the activity" SARA Sec 73. (2)**

Section 73 (3) goes on to say that the Minister must also be of the opinion that

- (a) *all reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted;*
- (b) *all feasible measures will be taken to minimize the impact of the activity on the species or its critical habitat or the residences of its individuals; and*
- (c) *the activity will not jeopardize the survival or recovery of the species*

It is unlikely that killing Thompson and upper Fraser coho in directed coho fisheries or killing listed sockeye in sockeye fisheries could be considered incidental in the majority of cases. However, it is possible to allow directed fisheries for listed stocks of salmon provided the fishing mortality is allowed or authorized in a management plan under the recovery planning process. Section 83 (4) of the Act states that the protections and prohibitions under the Act “**do not apply to a person who is engaging in activities that are permitted by a recovery strategy, an action plan or a management plan and who is also authorized under an Act of parliament to engage in that activity**”

If the harvest is allowed under the recovery plan, and recommended by the recovery team, and accepted by the minister, the fishery can go ahead. Its implicit in this process that the harvest allowed under the recovery plan will still allow the stock to recover. Note that certain aboriginal harvests are also authorized under this section of the Act, and the minister is free to appoint the recovery team and modify the recovery plan as he or she sees fit.

### **The Way Forward**

DFO managers are struggling to redefine their jobs. It's not enough to simply manage the harvest and

abundance of large aggregates of salmon; DFO also wants to avoid listing stocks under COSEWIC and SARA. The obvious solution is to manage the stocks in such a way that each DU is managed and assessed, and declines in any DU are detected and fisheries are regulated to reverse these declines. In the case of Fraser sockeye, this is likely to prove very difficult, because sockeye within each lake, and in many cases even timing components within each lake will qualify as DU's. In the Fraser alone, for example, there may be more than 150 spawning populations that comprise perhaps 50 to 75 DU's. Only about 20 to 30 populations of Fraser sockeye are assessed each year, and all Fraser sockeye are managed as part of four major timing aggregates. This means that many DU's are not assessed, and even when DU's are assessed, addressing declines in one population or DU requires regulating fisheries for dozens of stocks harvested and managed as part of the same timing group. This would disrupt Fraser sockeye fisheries and lead to significant economic and political impacts, and helps to explain why Cultus sockeye declined for years, and continue to decline without any effective management response from DFO. Unless DFO changes their entire approach to managing Fraser sockeye, it appears almost unavoidable that Fraser sockeye DU's will continue to fall through the cracks and land in the SARA safety net.

It may be appropriate to focus on several legal issues raised by DFO's strategy. Specifically, a legal opinion concerning the timelines for a legal listing decision by GIC could be sought. Public pressure could be used to focus on DFO's delaying tactics in general, and point to the inconsistencies of their approach to COSEWIC/SARA, and their obligations to manage, conserve and protect salmon.

It may also be appropriate to consider strategies to hold DFO accountable for their implementation of SARA and their

management of COSEWIC listed stocks. One option remains legal action on behalf of those First Nations most closely associated geographically and culturally with the COSEWIC listed stocks.

Finally, some sort of information campaign targeting the commercial and sport sectors and outlining the status of Fraser salmon stocks, the reasons for the declines, and the impacts of their fisheries on these stocks could be helpful. **For further information, contact Ken Wilson at [wilsonkh@telus.net](mailto:wilsonkh@telus.net) or phone (604) 301-0418.**

### **SOCKEYE SEASON IS WINDING DOWN**

So here we are its mid-October and although there are still some sockeye migrating up the Fraser, from a PSC and Fraser Panel perspective, the 2003 season is pretty much over. Sure, there will be some adjustments from the PSC office to the final numbers, but Mission has been shut down for a couple of weeks (due to the relatively large numbers of pinks in the lower Fraser) as has test fishing. The following numbers were adopted by the Fraser River Panel as of September 26.

Total run sizes for the four stock aggregates are as follows: Early Stuarts returned at 30,000; Early Summers at 585,000; Summers at 3.2 million; and Late Summers at 1.575 million (of which 375,000 were Birkenhead and 1.2 million were late Lates). Still not finalized are harvest numbers. Stay tuned for a more thorough description of the season.

### **UPCOMING MEETINGS & TELECONFERENCES**

**October 15-17/03:** BCAFC Post Season Conference. Merritt Civic Center, Merritt. For further information, contact BCAFC at (604) 913-9060.