



FEDERAL COURT OF CANADA

DAVID SUZUKI FOUNDATION,
DOGWOOD INITIATIVE,
ENVIRONMENTAL DEFENCE CANADA,
GREENPEACE CANADA,
INTERNATIONAL FUND FOR ANIMAL WELFARE,
RAINCOAST CONSERVATION SOCIETY, and
WESTERN CANADA WILDERNESS COMMITTEE

APPLICANTS

AND:

MINISTER OF FISHERIES AND OCEANS

RESPONDENT

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following page.

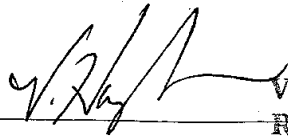
THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at *Vancouver, British Columbia*.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules, 1998* and serve it on the applicants' solicitor, or where the applicants are self-represented, on the applicants, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Court Rules, 1998*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE
GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: October 8, 2008

Issued by: 

VISHVA HAJIRAKAR
REGISTRY OFFICER
AGENT DU GREFFE

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APPLICATION

This is an application for judicial review of a decision of the Minister of Fisheries and Oceans or his delegate (the "Minister") on September 10, 2008. The Minister declined to make an order prohibiting the destruction of critical habitat of the endangered Southern Resident Killer Whales and the threatened Northern Resident Killer Whales, under subsection 58(4) of the *Species at Risk Act*, S.C. 2002, c.29 ("SARA").

Specifically, the Applicants challenge the Minister's determination, under paragraph 58(5)(b) of the SARA, that critical habitat of the Southern and Northern Resident Killer whales is already "legally protected". This determination is set out in the impugned Critical Habitat Protection Statement published by the Minister on the SARA Public Registry on September 10, 2008 (the "Statement").

The Applicants make application for:

1. An order or orders in the form of a declaration:
 - a. Declaring that the Minister erred in law in determining that critical habitat of the Southern and Northern Resident Killer Whales is already legally protected from destruction.
 - b. More specifically, declaring that:
 - i. Outreach programs, stewardship programs, voluntary codes of conduct or practice, voluntary protocols and/or voluntary guidelines do not legally protect of critical habitat within the meaning of section 58 of the SARA;
 - ii. Non-binding policies, plans and government programs do not legally protect critical habitat within the meaning of section 58 of the SARA;
 - iii. Discretionary provisions of statutes and regulations of general application do not legally protect critical habitat within the meaning of section 58 of the SARA;
 - iv. Prospective laws, regulations and other legally-binding measures that are not yet in force do not legally protect critical habitat within the meaning of section 58 of the SARA; and
 - v. Provincially protected areas are not provisions in or measures under an Act of Parliament, and do not legally protect critical habitat within the meaning of section 58 of the SARA unless identified in a conservation agreement made under section 11.

2. An order declaring that the Minister erred in law and/or acted without jurisdiction in issuing the Statement.
3. An order declaring that the Minister failed to take relevant considerations into account when issuing the Statement.
4. In the alternative, an order declaring the Minister unreasonably concluded that the programs, policies, laws and regulations in the Statement have the effects of “management and mitigation” of threats to, or prohibiting the destruction of, the critical habitat of the Southern and Northern Resident Killer Whales.
5. An order setting aside the Statement, and referring back to the Minister for redetermination forthwith the Minister’s decision under section 58.
6. An order that the Applicants shall not be required to pay costs to the Respondent of the Application, pursuant to Rule 400 of the *Federal Courts Rules*, in the event that the Application is dismissed.
7. Such further and other relief as this honourable court deems just.

The grounds for the application are:

The Scheme of the Species at Risk Act

1. Two distinct populations of killer whales (*Orcinus orca*), known as the Northern and Southern Residents, occupy the waters off the west coast of British Columbia (hereinafter jointly referred to as the “Resident Killer Whales”).
2. Resident Killer Whale populations in British Columbia are species-at-risk because of their small population size, low reproductive rate, and the existence of a variety of human-caused threats that have the potential to prevent recovery or to cause further declines in the populations. Principal among these human-caused threats are environmental contamination, reductions in prey abundance, and both physical and acoustic disturbance.
3. To address the needs of these and other species-at-risk in Canada, Parliament passed the *Species at Risk Act* in 2002. The purpose of the SARA, as stated at section 6, is:

...to prevent wildlife species from becoming extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened.

4. The SARA generally prescribes a two-step process whereby species-at-risk are first listed, and then legally protected from various harms with the objective of ensuring recovery of the species to healthy population levels. In order to achieve this latter goal, the SARA requires the creation of a Recovery Strategy for each species listed as endangered or threatened (ss. 37-46).
5. Central to the SARA, and to the recovery planning process thereunder, is the mandatory identification and protection of the critical habitat of an endangered or threatened species. The importance of protection of critical habitat is reflected in the preamble to the SARA, which recognizes that the "habitat of species at risk is key to their conservation."
6. "Critical habitat" is defined in section 2 as "the habitat that is necessary for the survival or recovery of a listed species and that is identified as the species' critical habitat in the recovery strategy or in an action plan for the species."
7. Identification of the critical habitat of an endangered or threatened species, in a recovery strategy, is a mandatory duty under paragraph 41(1)(c) of SARA. Paragraph 41(1)(c) also requires all recovery strategies to identify examples of activities that are likely to result in the destruction of critical habitat.
8. Protection of critical habitat for endangered or threatened species is a mandatory requirement of the SARA pursuant to section 58.

Listing and Recovery Planning for the Southern and Northern Residents

9. The Southern Resident Killer Whale population is listed in Schedule 1 of the SARA as an endangered species. Under section 2, an 'endangered species' is defined as "a wildlife species that is facing imminent extirpation or extinction."
10. The Northern Resident Killer Whale population is listed in Schedule 1 of the SARA as a threatened species. Under section 2, a 'threatened species' is defined as "a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction."
11. The Killer Whale Recovery Team, comprised of leading independent and governmental experts, was formed to provide recovery planning advice to the Minister and to develop a recovery strategy for the Resident Killer Whales.
12. Pursuant to mandatory timelines in section 42 of the SARA, the Minister was obligated to post a proposed recovery strategy for the Southern Residents to the Public Registry by June 5, 2006, and obligated to post a proposed recovery strategy for the Northern Residents on the Public Registry by June 5, 2007.
13. On June 21, 2007, the Minister posted to the Public Registry the Proposed Recovery Strategy for the Northern and Southern Resident Killer Whales, a "multi-species" recovery strategy authorized by subsection 41(3) of SARA.

14. Pursuant to section 43, the Minister was required to finalize the Recovery Strategy for the Northern and Southern Resident Killer Whales, by posting it to Public Registry, after a public comment period, by September 19, 2007.
15. On March 14, 2008, the Minister posted the finalized Recovery Strategy for the Northern and Southern Resident Killer Whales (“the Recovery Strategy”) to the Public Registry.
16. Within 180 days of critical habitat being identified in a species’ recovery strategy, section 58 requires the Minister to take action to ensure that the species’ critical habitat is legally protected from destruction.
17. On September 10, 2008 the Minister posted a Statement to the Public Registry.

The Recovery Strategy Identifies Critical Habitat

18. The Recovery Strategy, *inter alia*, identifies critical habitat for the Northern and Southern Resident Killer Whales (section 3.1 of the Recovery Strategy).
19. The Recovery Strategy, at section 3.2, also identifies threats to critical habitat, including but not limited to:
 - a) Geophysical disturbances from industrial activities, fishing activities, physical structures, and damage from vessels;
 - b) Acoustic degradation from seismic surveys, military and commercial sonars, vessel noise, construction and dredging;
 - c) Chemical and biological contamination including the risk of oil spills or other toxic substances;
 - d) Diminished prey availability as a result of declining numbers of salmon, in particular chum and Chinook salmon.

The Minister’s decision fails to ensure critical habitat is “legally protected”

20. The Resident Killer Whales are an aquatic species such that section 58 applies.
21. In accordance with subsection 58(5), the Minister must take one of two actions to legally protect the critical habitat of the Resident Killer Whales.
22. Where “the critical habitat or any portion of the critical habitat is not legally protected by provisions in, or measures under, this or any other Act of Parliament, including agreements under section 11,” the Minister must make a protection order under subsection 58(4). The order must identify that portion of critical habitat to which the prohibition in section 58(1) will apply.

23. Where the critical habitat or any portion of the critical habitat is already legally protected by provisions in, or measures under SARA or any other Act of Parliament, including agreements under section 11, the Minister must include in the Public Registry a statement "setting out how the critical habitat or portions of it, as the case may be, are legally protected."
24. The Minister made no protection order for the Resident Killer Whales under section 58(5)(a). Instead the Minister made the Statement pursuant to section 58(5)(b).
25. In doing so, the Minister made an error of law by concluding that the Resident Killer Whales' critical habitat is already "legally protected."
26. As the Minister's conclusion that the Resident Killer Whales' critical habitat is already "legally protected" was legally erroneous, the Statement was issued without jurisdiction.
27. More specifically, when the Minister determined that the Resident Killer Whales' critical habitat was already legally protected, the Minister erred in law and jurisdiction by relying on plans, policies, and other government initiatives, agreements and programs that do not legally protect critical habitat from destruction, including but not limited to:
 - a) Voluntary guidelines such as the Whale Watching Guidelines, codes of conducts, and outreach initiatives;
 - b) Legally non-binding and unenforceable government policies, such as the Fisheries and Oceans Canada policy on Managing the Impacts of Fishing on Sensitive Benthic Areas, and the Wild Salmon Policy
 - c) Legally non-binding and unenforceable statements of practice and protocols, such as the Statement of Practice with Respect to the Mitigation of Seismic Sound in the Marine Environment;
 - d) Prospective or draft measures that do not yet have the force of law; and
 - e) Protected areas designated under laws that are not laws of Canada and therefore not within the statutory jurisdiction and control of the Minister.
28. Additionally, when the Minister incorrectly determined that Resident Killer Whales' critical habitat was already "legally protected" within the meaning of section 58 of SARA, he made the following errors of law and jurisdiction:
 - a) Incorrectly concluding that section 35 of the *Fisheries Act*, R.S. 1985, c. F-14 (the "*Fisheries Act*") or the *Canadian Environmental Protection Act, 1999* (1999, c.33), as supported by processes under the *Canadian Environmental Assessment Act, 1992*, c. 37, ("*CEAA*") makes critical habitat legally protected from destruction from industrial activities;

- b) Incorrectly concluding that provisions of the *Fisheries Act* or regulations made thereunder, specifically s.22(1) of the Fishery (General) Regulations, make critical habitat legally protected from destruction by fishing or fishing vessels;
 - c) Incorrectly concluding that sections 35 and/or 36 of the *Oceans Act* (1996 c. 31) legally protect the Northern and Southern Resident Killer Whales' critical habitat, as there are no Marine Protected Areas created under the *Oceans Act* present in this location;
 - d) Incorrectly equating "management and mitigation" of threats to critical habitat as equivalent to making critical habitat "legally protected" from destruction.
 - e) Failing to set out how all portions of the critical habitat identified in the Recovery Strategy are legally protected from destruction.
29. Additionally, the Minister's Statement unreasonably concludes that programs, policies, laws and regulations enumerated in the Statement achieve "management and mitigation" of threats to the Resident Killer Whales' critical habitat or protect this critical habitat from destruction.
30. Individually and cumulatively, these legal errors deprived the Minister of jurisdiction to issue this Statement or to take action under paragraph 58(5)(b).

The Applicants

31. The Applicants are all non-profit organizations that work for environmental protection. They have no personal, proprietary or pecuniary interest in the outcome of this Application. Some Applicants have a record of working to ensure that the federal government implements the SARA and ensures the protection of critical habitat of at-risk species. Some Applicants have a record of working to address threats to the critical habitat of the Resident Killer Whales, or to promote the conservation of cetacean species generally.
32. The Applicants believe that they need to bring this Application to address the federal government's failure to implement the SARA and to ensure the protection of critical habitat necessary for the survival and recovery of species-at-risk such as the Resident Killer Whales. They believe that an order requiring SARA to be complied with is in the public interest because the viability of Canada's wildlife populations is a matter affecting all Canadians.

Additional Grounds

33. In addition to the grounds noted above, the Applicants rely generally on SARA, sections 18, 18.1 and 18.2 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and the *Federal Courts Rules*, and such further additional grounds as counsel may identify and this Honourable Court may consider.

This Application will be supported by the following material:


1. An affidavit on behalf of the David Suzuki Foundation, to be served,
2. An affidavit on behalf of Environmental Defence Canada, to be served.
3. An affidavit on behalf of Dogwood Initiative, to be served
4. An affidavit on behalf of Greenpeace Canada, to be served
5. An affidavit of behalf of the International Fund for Animal Welfare, to be served
6. An affidavit on behalf of the Raincoast Conservation Society, to be served.
7. An affidavit on behalf of the Western Canada Wilderness Committee, to be served.
8. The Record of Materials considered by the Minister of Fisheries and Oceans.
9. The Recovery Strategy for the Northern and Southern Resident Killer Whales.
10. Such further and additional materials as counsel may advise and the Court may allow.

Rule 317 request:

The Applicants request that the Minister send a certified copy of the following material, not in the Applicants' possession but in the possession of the Minister or of every other competent minister, to the Applicants and to the Registry:

1. The record of materials before the Minister in making his decision under s.58(5), including the record of his consultation with every other competent minister under s.58(5).

Date: October 8th, 2008


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