Fisherman Life

March 2004 - **Legal Desk**

The Practical & Devastating Implications of the *Species at Risk Act.*

There is an issue boiling, an issue that was moved from the back-burner to the front-burner when the Federal Government's *Species at Risk Act* (endeared as "SARA") came into force in June of 2003. Basically, the issue is the "Listing" of certain species and the effect that this Listing may have on, well, nothing less than <u>everything</u> in some sectors of the fishing industry.

What is "the List"?

The "Listing" of a species refers to the placement of a species on the *List of Wildlife Species at Risk*, a schedule to the SARA and referred to as the "List". Once a species is placed on the List it receives the protection of the Act and its regulations. There are two major effects. First, persons are prohibited from killing, harming, harassing, taking, selling or buying a member of the species, or harming the residence of the species. Secondly, persons are prohibited from harming the "critical habitat" of the species. "Critical habitat" is defined by SARA as the area "necessary for the survival or recovery of a listed wildlife species". Combine this definition with the Government's statutory mandated duty to apply the *Precautionary Principle* (to err on the side of caution in environment matters), and the translation for "critical habitat" for some species becomes: the entire Coast.

The Practicalities

The problem arises from the fact that marine species are fantastic at co-mingling. Sole hang out with Turbot, Canaries like to rub pectoral fins with Lingcod, and Boccaccio are often bedfellows with Silvergreys. It is almost impossible for some gear types to catch one species without catching, at least one, of the other species, or somehow affecting their residence or habitat. No big deal, unless one of those species, or any species within its natural habitat, has been "Listed". Since the Listing of one species means you cannot get remotely near the species or their residence, you may effectively be prevented from taking any species in the area. Where a Listed species has a large habitat, fishing that targets healthy stocks but indirectly affects the Listed species, may be banned coast-wide. The Listed species could be a miniscule sea sponge no one but the scientist studying it has heard of.

Where a Listed species has a large habitat, fishing that targets healthy stocks but indirectly affects the Listed species may be banned coast-wide.

Consider also that spiny dogfish and boccaccio ("long jaws") may be on the List soon, and SARA becomes the nuclear bomb of environmental laws that could spell doomsday for some fisheries.

The Actors

The Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") was originally established in 1977, and is composed primarily of various scientists specializing in conservation biology, population dynamics and other important areas of research. Its purpose is to study and report on the status of various species thought to be at risk, that is, species that may be extinct, threatened, endangered or of special concern. COSEWIC reports to the Canadian Endangered Species Conservation Council ("CESCC"), which is composed of the Federal Ministers of Environment, Fisheries and Heritage, as well as their provincial counter-parts.

Prior to SARA, COSEWIC's purpose of reporting and listing species as threatened did not substantively threaten commercial fisheries. It was not until SARA was brought into force that COSEWIC began to grow real teeth. SARA now provides COSEWIC with the means to make recommendations to government about the Listing of a species, and backs that Listing up with the enforcement capabilities of various ministry powers such as Fisheries Enforcement, Coast Guard, and provincial Food and Fish.

Red Flags for Industry

A significant problem with this legislation is the manner in which species get put on the List. SARA allows <u>any person</u> to apply to COSEWIC for an assessment that a particular species may be at risk, and therefore should be Listed. Given the scary extent of self-informed busybodies that run amuck on this coast, industry should keep its eyes and ears open for signs that their fishery may be indirectly under attack by environmental groups or similarly motivated individuals. As with most government programs, financing is the only practical impediment to COSEWIC making an assessment of a species and Listing it.

Once COSEWIC has prepared an assessment of a species it must provide it to the Minister of Environment and CESCC. There is no provision that the Governor in Council (Cabinet) be provided a copy, though it is filed in a public registry. The Cabinet then has nine months in which to receive a recommendation from the Minister of Environment and decide on how to proceed (accept, reject or refer back) with the Listing. The law provides that, if Cabinet does not make a decision within nine months, the Minister "shall" amend the List in accordance with COSEWIC's recommendation. This results in a Listing by default.

The net effect is that if Cabinet is not on the ball, aware of the issues and able to take a position, the recommendation of the scientists in COSEWIC results in the species being

Listed – this is perhaps without any thought or consultation in respect of socio-economic impact. The nine month window for Cabinet to receive the Minster's recommendation and make a decision may be the last window of opportunity for industry to plead their case about why a species should not be Listed, or whether certain activities should be 'permitted' despite the Listing. Industry cannot afford to miss this window.

Glimmers of Hope

The Act sets out various points that may assist industry in avoiding this type of result. The Act allows for the Minister to enter into agreements (called "Stewardship Action Plans") with persons, such as groups of licence holders, that promote the voluntary protection of the species. The benefit to this is that the industry group has more control over what the terms of protection are, and avoid Listings by default. However this requires an aggressive pro-active approach by industry.

The Act also allows for "agreements" to be entered into between the Minister and a person or persons, and "permits" be issued to them permitting activity that affects a Listed species. Again, this is point where industry must be pro-active in acquiring these rights. There is no statutory obligation in SARA for industry consultation – it must be forced on government.

It is interesting to note that COSEWIC is required by law to carry out its function of Listing on the basis of the "best available information", this includes scientific, community and traditional knowledge. In this regard, industry should be vigilant in ensuring the COSEWIC has employed the "best available knowledge" approach, and challenge COSEWIC when it is not clear they have. In my opinion, if the commercial fishing industry has not been consulted in-depth, COSEWIC has failed to employ the "best available knowledge" approach.

The issue of Listing is the tip of an iceberg that may sink many a ship across Canada in the coming decades. It represents a new battle to be waged by industry against misinformation and bureaucratic decisions made on the basis of scanty information. A strong degree of lobbying will be necessary to ensure that bad decisions, decisions which do not fairly account for the socio-economic impacts, are not made. The recognition by COSEWIC and CECSS of the *National Aboriginal Council on Species at Risk* begs the question of whether industry's approach to dealing with SARA is best implemented through various individual fisheries, or whether there should be constituted a *Pacific Fisheries Council on Species at Risk*, a group whose mandate is to prevent the extinction of its individual component fisheries. Time will tell.

We will speak more about this issue, and issues like emergency Listings and emergency orders under SARA in later editions of Fisherman Life.

Darren Williams is a marine and fisheries lawyer with the law firm of Williams & Company in Victoria, B.C. and can be reached for comment at 250-478-9928, gdw@MarineLaw.ca or through www.MarineLaw.ca.