Challenges in Receiving SARA Protections: A killer (whale) case study

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The *Species at Risk Act*[1] ("SARA"), enacted in 2002 and coming into force fully in 2004, includes important tools to protect species at risk but has been plagued by poor implementation. Since it was enacted, listed species have thus far continued to decline, on average by 2.7 per cent annually.[2]

This paper uses a SARA-listed endangered aquatic species, the Southern Resident Killer Whale population, to illustrate the challenges that listed species face in actually receiving the protections promised by SARA – challenges that occur even when the species is listed as endangered, is an iconic charismatic megafauna species, and is entirely under federal jurisdiction.

Overview of purposes and selected provisions of the Species at Risk Act:

The purposes of the *Species at Risk Act*[3] ("SARA") are to prevent species from being extirpated or becoming extinct and to provide for the recovery of species that are endangered or threatened due to human activity.[4]

SARA sets out a listing process to identify species at risk. Once listed, species and their habitat receive certain legal protections:

- It is an offence to kill, harm, harass, capture or take an individual (s. 32(1));
- The competent minister must, within a specified timeline, prepare a recovery strategy that, *inter alia*, identifies the species' critical habitat and threats to the species and its critical habitat, describes the broad strategy to be taken to address those threats, and indicates when an action plan will be completed (ss. 37, 41(1), 42 & 43);
- The competent minister must prepare one or more action plans based on the recovery strategy, which must include, *inter alia*: identification of critical habitat, including any portions not yet protected; examples of activities likely to result in destruction of critical habitat; as well as a statement of the measures proposed to protect critical habitat and implement the Recovery Strategy, including when these measures will take place (ss. 47-50);
- Once critical habitat is identified for a species under federal jurisdiction (aquatic species, migratory birds and species with critical habitat on federal lands), the competent minister must ensure that critical habitat is legally protected from destruction within 180 days, at which point it becomes an offence to destroy critical habitat (ss. 57-58);
- Activities affecting listed species or any part of their critical habitat require permits, which the competent minister may only issue if he or she is of the opinion that all reasonable alternatives have been considered and the best solution adopted, measures have been taken to minimize the activity's impact, and the activity will not jeopardize survival or recovery (ss. 73-74); and

[1] SC 2002, c 29.
[2] WWF-Canada, "Living Planet Report Canada: A national look at wildlife loss", Toronto (October 2017) at pages 9-10.
[3] SC 2002, c 29.
[4] SARA s. 6.

- Listed species and their critical habitat are protected from the potentially adverse effects of proposed projects or activities (ss. 79 and 77(1)).

Key facts about Southern Resident Killer Whales:

SRKW were listed under Schedule I of SARA in 2002. They are listed as "endangered", defined as "facing imminent extirpation or extinction".[5] The SRKW Recovery Strategy was finalized in 2008, then amended in 2011 following litigation; the Action Plan was finalized in 2017. Since they were listed, the population has decreased from approximately 85 to 76.

The competent minister responsible for protection of the SRKW and their critical habitat is the Minister of Fisheries and Oceans, as well as the Minister of the Environment, who, as the Minister responsible for the Parks Canada Agency, is charged with protecting the small portions of critical habitat which are on federal lands administered by Parks Canada.

Three are three types of killer whales found in Canadian Pacific waters: offshore, Bigg's or transient, and resident. They each have distinct diets, genetics, morphology, and behavior. They do not interbreed, and avoid each other rather than interact. There are two resident populations off the British Columbia coast, the threatened northern residents and the endangered SRKW, which have overlapping but distinct ranges, are linguistically distinct and genetically isolated, and do not interact.[6]

SRKW are among the world's best-studied marine mammals. They have been closely monitored, including with an annual census, since 1976. SRKW have a unique social structure and language. They feed almost exclusively on salmon, and particularly large, fatty Chinook salmon. They have evolved in an important migratory corridor for Chinook salmon, and their location and movements are dictated largely by their diet.[7]

SRKW critical habitat is in the transboundary waters of the Salish Sea, off the south coast of British Columbia and the north coast of Washington State. Critical habitat includes not only this area but also its acoustic quality, marine environmental quality, and the availability of Chinook salmon.

SRKW are considered endangered due to their small population size and low reproductive rate, as well as exposure to three main threats: lack of availability their primary prey, Chinook salmon; acoustic and physical disturbance from vessels; and contamination of their environment.[8]

Unfortunately, this already endangered population is now is in a decline. The threat that appears most urgent and most directly correlated with their current decline is the lack of availability of

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[5] *SARA* s 2(1).
[6] Fisheries and Oceans Canada. 2011. Recovery Strategy for the Northern and Southern Resident Killer Whales (*Orcinus orca*) in Canada. Species at Risk Act Recovery Strategy Series, Fisheries and Oceans Canada, Ottawa [Recovery Strategy] at pages 2-3.
[7] *Ibid* at pages 4, 6, 10.
[8] *Ibid* at pages 13, 16-17; *Canada (Fisheries and Oceans) v David Suzuki Foundation*, 2012 FCA 40 [*Canada v David Suzuki Foundation*] at para 27.

Chinook salmon – a threat which is exacerbated by physical and acoustic disturbance from boats.[9]

History of efforts to achieve SARA protections for SRKW:

1. Critical habitat: Litigation to achieve identification and legal protection

To recover species to healthy population levels, SARA prescribes a process for species at risk to be listed and given legal protections, which process includes the development of a recovery strategy.[10] Subsection 41(1)(c) of SARA requires the recovery strategy for a species to identify critical habitat, including biological features, and threats to it.

The final Recovery Strategy was completed approximately 18 months behind the mandatory timelines in s. 42 of SARA, following delay due to disagreement between the recovery team preparing the recovery strategy and DFO, and to a lesser extent the Department of National Defence, over whether to include information identifying critical habitat, and in particular references to the acoustic degradation and prey availability threats.[11] The final Recovery Strategy identifies the presence and availability of prey as a component of critical habitat, and includes diminished prey availability, chemical and biological contamination, and acoustic degradation as threats to critical habitat.[12]

Sections 57-58 of SARA require that critical habitat identified in a recovery strategy be legally protected from destruction within 180 days of the recovery strategy being finalized in one of two ways. Critical habitat can be protected indirectly under other Acts of Parliament, which is confirmed through a protection statement under s. 58(5)(b) of SARA that describes how critical habitat is already protected. Otherwise, a protection order under s. 58(4) of SARA is required, which applies the prohibition against destruction of critical habitat under s. 58(1) to the areas and components of critical habitat described in the protection order.[13]

In the case of SRKW, the Minister initially took the approach of issuing a Protection Statement that relied heavily on the ability to protect habitat through non-binding policy and guidelines, and discretionary provisions of the *Fisheries Act*. Further, the Minister took the position that the law only requires protection of the geophysical attributes of critical habitat, not biological attributes, such as prey availability.[14]

Nine conservation organizations filed an application for judicial review in October 2008, alleging that the Minister erred by relying on non-binding policy, prospective legislation and ministerial discretion, none of which legally protect critical habitat for the purposes of s. 58 of

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[9] See Ecojustice on behalf of David Suzuki Foundation, Georgia Strait Alliance, Natural Resources Defense Council, Raincoast Conservation Foundation and World Wildlife Fund Canada, Petition for an Emergency Order for the Southern Resident Killer Whales under s. 80 of the Species at Risk Act, online at https://www.ecojustice.ca/wp-content/uploads/2018/01/Petition-for-SRKW-Emergency-Order.pdf [Emergency Order Petition] at pages 4-9.
[10] *David Suzuki Foundation v Canada (Fisheries and Oceans)*, 2010 FC 1233 [*David Suzuki Foundation v Canada*] at para 13.
[11] *Ibid* at paras 13-26.
[12] Recovery Strategy, *supra* note 6 at page 41.
[13] *David Suzuki Foundation v Canada*, *supra* note 10 at paras 31-22.
[14] *Ibid* at paras 31-36.

SARA, and erred by including only geophysical elements of critical habitat, not biological attributes.[15]

In February of 2009, DFO reversed itself and the Minister replaced the Protection Statement with a Protection Order. DFO refused to confirm that the Protection Order protected biological features of critical habitat when the applicants sought confirmation. The applicants filed a second application for judicial review, this time of the Protection Order, on the basis that it was limited to geospatial areas or geophysical attributes of critical habitat.[16]

The two applications were consolidated and heard by Justice Russell of the Federal Court. Russell J. held that a protection statement can only be used in place of a protection order where the legal protection under other Acts of Parliament is equal to that provided under a protection order. Ministerial discretion under another Act of Parliament is not adequate legal protection of critical habitat under s. 58 of SARA; nor are prospective laws or regulations. He further held, as the Federal Court had decided previously[17], and as the Minister conceded during the proceeding, that critical habitat includes not only a location but also ecosystem features, and it was unlawful to limit the Protection Order to geophysical aspects alone.[18]

The Minister of Fisheries and Oceans appealed the Federal Court's declaration that ministerial discretion under the *Fisheries Act* cannot legally protect critical habitat for the purposes of s. 58. The appeal was dismissed, and the Federal Court of Appeal confirmed that "Ministerial discretion does not legally protect habitat within the meaning of section 58", which requires non-discretionary, compulsory protection. The Court also re-iterated that critical habitat includes both a geographic location and the attributes that make it important for the species.[19]

The Federal Court of Appeal made several statements about the importance of critical habitat protection, and the mandatory nature of SARA protections.[20] The Court held that Parliament's intent "was to provide for compulsory and non-discretionary legal protection for the identified critical habitat of listed endangered or threatened aquatic species", and that s. 58 should be interpreted accordingly.[21] The Court held that "a textual, contextual and purposive analysis of section 58 shows that Parliament is precisely seeking to avoid the destruction of identified critical habitat of listed endangered and threatened aquatic species through any means, including through activities authorized under discretionary permits or licences."[22]

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[15] *Ibid* at para 37.
[16] *Ibid* at paras 38-45.
[17] See *Environmental Defence Canada v Canada (Fisheries and Oceans)*, 2009 FC 878.
[18] *David Suzuki Foundation v Canada*, *supra* note 10 at para 340.
[19] *Canada v David Suzuki Foundation*, *supra* note 8 at paras 150, 150.
[20] *Ibid* at paras 8, 9, 115, 117, 124, 125.
[21] *Ibid* at para 8.
[22] *Ibid* at para 125.

Under s. 58(1) of SARA and an order made under s. 58(4) of SARA, SRKW critical habitat is now protected against destruction of "any part" of it, including the biological "parts" or attributes such as acoustic quality.[23]

This example illustrates two challenges that endangered species have experienced in receiving SARA protections.

First, delay in meeting mandatory timelines under SARA is a perennial problem, even for aquatic species that are fully within federal jurisdiction.[24] The Recovery Strategy for SRKW was delayed 18 months because DFO did not want to fully identify critical habitat and threats to it. The Action Plan for SRKW was delayed by four years; this is discussed further under heading 3 below.

Second, ensuring implementation of the protections promised by SARA too often requires extraordinary efforts by civil society. In this case, conservation organizations had to take the Minister to court to get the mandatory protection of critical habitat that s. 58 requires, both in terms of the s. 58(5) requirement for a protection order or its equivalent which includes legally enforceable mandatory, not discretionary, protection, and in terms of recognizing not only the location but the attributes that make critical habitat valuable to a species.

2. Action Plan: Delays and a lack of action

Action plans are one of the key practical instruments in SARA for achieving its purpose of preventing extinction and providing for recovery. As described above, they must identify critical habitat, including any portions that have not yet been protected, include a "statement of the measures that are to be taken to protect the species' critical habitat", and include a statement of the measures that will be taken "to implement the recovery strategy, including those that address the threats to the species and those that help to achieve the population and distribution objectives," and including when those measures will take place.[25] The Minister must make any regulations that in his opinion are necessary to implement the measures, or recommend them to the Governor in Council if they concern protection of critical habitat.[26] The Minister may do so using powers under any other Act of Parliament.[27]

The SRKW Action Plan was produced four years behind schedule. The 2011 Recovery Strategy established a deadline of March 31, 2013 for the Action Plan. A draft Action Plan was made

[23] *Critical Habitats of the Northeast Pacific Northern and Southern Resident Populations of the Killer Whale (Orcinus orca) Order*, SOR/2009-68.
[24] In 2014, the Federal Court heard an application for judicial review by five conservation organizations of the Minister of Fisheries and Oceans and Minister of Environment's failure to comply with statutory timelines for the preparation and publication of recovery strategies, using four SARA-listed species (a terrestrial mammal and migratory bird for whom the Minister of Environment is responsible, and an aquatic mammal and a fish for whom the Minister of Fisheries and Oceans is responsible) to represent this endemic, systemic problem: *Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*, 2014 FC 148.
[25] SARA ss 47-50.
[26] SARA ss 53, 59.
[27] SARA s 54.

available for public comment in March 2014. A proposed Action Plan was made available for public comment in June 2016. The final Action Plan was published in March 2017.

There is a troubling lack of action in the Action Plan. As described above, an Action Plan must include, *inter alia*, a statement of measures proposed to protect critical habitat, identification of any portions of critical habitat that have not been protected, and a statement of measures to implement the recovery strategy, including ones that address the threats to the species and ones that help achieve population objectives, and an indication of when those measures to implement the recovery strategy are to take place. However, the SRKW Action Plan largely lacks action. It is primarily a plan for further research and monitoring, replete with words such as "examine", "investigate", "identify", "assess", "monitor"; it states that "the majority of activities in the plan focus on research."[28]Where it refers to actually implementing measures, it most often does so using the non-committal formulation of "investigate...and implement where appropriate". Where it does refer to something more concrete, it refers to "guidelines and/or regulations", leaving open whether measures will be enforceable or not. The timelines given for several items are "Unknown" or "Uncertain".

The Action Plan does not comply with the broad purposes or specific requirements of SARA. It should contain concrete actions that help recover SRKW. Instead, it fails to mitigate or prevent threats to SRKW or their critical habitat, or prevent extinction and provide for recovery. By focusing on research to the exclusion of action, it maintains status quo conditions. The Action Plan does not "implement" the Recovery Strategy, as required by s. 49(1)(d) of SARA. It does not identify a quantitative recovery goal, as envisioned in the Recovery Strategy.[29] It does not describe how the Minister will use his powers under SARA or other Acts of Parliament to make regulations to implement the Action Plan.

This example illustrates difficulties in receiving SARA protections in two ways: it illustrates the chronic problem of delay in SARA implementation, and it illustrates that formal implementation of SARA provisions does not necessarily translate into protection on the ground.

3. The Trans Mountain Expansion Project environmental assessment: A narrow interpretation of environmental assessment law excludes application of SARA from the review of a major project under federal jurisdiction that will adversely affect SRKW and critical habitat

The Trans Mountain Expansion Project would triple the capacity of the existing Trans Mountain oil pipeline from Alberta to British Columbia, and increase the number of oil tankers departing the Westridge Marine Terminal in Burnaby, and travelling through SRKW critical habitat to the open ocean, from approximately five to approximately 34 Aframax class tankers per month. This will adversely affect SRKW by exacerbating one of the three main threats, physical and acoustic disturbance, in critical habitat, and by increasing the risk of an oil spill in critical habitat.

The National Energy Board conducted the review and environmental assessment of the project and concluded that project-related marine shipping "is likely to result in significant adverse

[28] Fisheries and Oceans Canada. 2017. Action Plan for the Northern and Southern Resident Killer Whale (*Orcinus orca*) in Canada. *Species at Risk Act Action Plan Series*. Fisheries and Oceans Canada, Ottawa at page 26.
[29] Recovery Strategy, *supra* note 6 at page 47.

effects to the Southern resident killer whale", will "further contribute to cumulative effects that are already jeopardizing the survival and recovery of [SRKW]", will "impact numerous individuals of the [SRKW] population in a habitat identified as critical to [their] recovery", and will result in vessel noise that is "a threat to the acoustic integrity of [...] critical habitat."[30] It found that the project-related death of an individual SRKW could "result in population level impacts and could jeopardize recovery".[31] It cited the Recovery Strategy statement that "while the probability of [SRKW] being exposed to an oil spill is low, the impact of such an event is potentially catastrophic."[32]

Nevertheless, the NEB recommended, and the Governor in Council approved, the project, and did so without conditions to mitigate these effects. The result is that Project-related shipping, which the NEB found will have significant adverse effects on the SRKW and their critical habitat and will jeopardize their recovery, will proceed absent any measures to mitigate those effects.

Two conservation organizations brought applications for judicial review of the NEB's recommendation and the Governor in Council's approval, arguing that both decision-makers failed to comply with s. 79(2) of SARA, and that the Governor in Council failed to comply with additional obligations under s. 77(1).[33]

As stated above, the express purposes of SARA include preventing wildlife species from becoming extinct and providing for the recovery of species that are endangered due to human activity.[34] In support of these purposes, SARA's protective provisions, including ss. 77 and 79, work together to protect endangered species from existing threats and ensure that the effects of new activities are addressed before th3ey begin in order to prevent extinction and to allow for recovery. To give effect to sections 79 and 77 of *SARA*, the NEB and the GIC had to consider the Project in a way that fulfilled these broad statutory purposes.

Section 77 of SARA is intended to protect critical habitat from potential harm that may result from activities authorized under other Acts of Parliament. Subsection 77(1) applies to any person or body other than a competent minister who is authorized under any other Act to "issue or approve [...] any [...] authorization that authorizes an activity that may result in the destruction of any part of the critical habitat" of a SARA-listed species. Before issuing any authorization, this person must consider the impact on critical habitat and be of the opinion that "all feasible measures will be taken to minimize the impact of the activity on the species' critical habitat."

The applicants in the judicial review argued that the Governor in Council erred in authorizing the project because, when faced with the NEB's factual findings indicating that project-related

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[30] National Energy Board, National Energy Board Report: Trans Mountain Expansion Project, Calgary (May 2016) [NEB Report] at pages xii, 351, 350.
[31] *Ibid* at page 398.
[32] *Ibid*.
[33] These applications, brought by Raincoast Conservation Foundation and Living Oceans Society, were consolidated with other applications brought by First Nations and municipalities as *Tsleil-Waututh Nation et al v Attorney General of Canada et al* and were heard by the Federal Court of Appeal between October 2-13, 2017. The Court's decision is pending.
[34] SARA s 6.

shipping may destroy critical habitat, the Governor in Council either failed to form an opinion that all feasible measures would be taken, or, if it did, that opinion was unreasonable in the absence of any conditions to mitigate the effects of marine shipping on SRKW critical habitat identified by the NEB.

Section 79 of *SARA* is intended to protect endangered species and their critical habitat from the effects of new projects. It ensures that the harmful effects of proposed projects and activities are mitigated as part of the review and approval process. Section 79(2) of SARA is triggered by the *Canadian Environmental Assessment Act, 2012*[35] ("CEAA 2012") and applies when a proposed project that is subject to either a full environmental assessment or a determination under s. 67 is likely to affect a listed species or its critical habitat. Subsection 79(1) requires the person conducting the environmental assessment or making the determination to notify the competent minister(s) if the project is likely to affect a SARA-listed species or its critical habitat. Subsection 79(2) further requires that person to identify the project's effects on the listed species and its critical habitat and to "ensure that measures are taken to avoid or lessen" them. The measures must be taken in a way that is consistent with any applicable recovery strategy or action plan.

The applicants argued that s. 79(2) should have applied either because shipping is part of the "designated project" as defined in s. 2(1) of CEAA 2012 (being "incidental" to it), or, alternatively, because it is a "project" under s. 67. Despite its factual conclusions about the effects of marine shipping on SRKW, the NEB took the position that s. 79(2) of SARA did not apply to its assessment of shipping, on the basis that the project for the purposes of CEAA 2012 included only the pipeline and facilities, up to the Westridge Marine Terminal. The NEB conceded that it had not ensured any measures to avoid or lessen effects of shipping on SRKW on its recommended conditions.[36] The Governor in Council approved the NEB's recommendations and adopted its recommended conditions without changes.[37]

This example illustrates difficulties in receiving SARA protections because such a narrow reading of the law severely limits SARA's ability to protect species and their critical habitat, and undermines SARA's purposes. This is a case of, depending on one's perspective, a technicality or an unlawfully narrow interpretation of the law standing in the way of meaningful protection.

Sections 79 and 77 play an integral role in the purposes of preventing extinction and providing for recovery. Circumventing these provisions defeated the purpose of these provisions and of SARA as a whole, which is intended to prevent extinction and provide for recovery of listed species, including by addressing the effects of new activities that might further imperil species at risk before those new activities occur. Activities causing new (and significant) adverse effects that contribute to cumulative effects on SRKW and their critical habitat will continue to proceed unabated, even in a case when there were decision points where these effects could have been addressed.

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[35] SC 2012, c 19, s 52.
[36] See NEB Report at pages 332, 349, 350.
[37] Order in Council, PC 2016-1069, (2016) C Gaz I, Vol. 150, No. 50.

The case is yet to be decided by the Federal Court of Appeal, but if the NEB and Canada are correct, this leaves a hole in the application of SARA. This approach to project review would render species at risk protections meaningless and let significant effects on an endangered species go unaddressed. The kind of compulsory protection described by the Federal Court of Appeal[38] is missing in practice in cases such as this.

This example further illustrates that a critical habitat protection order does not protect critical habitat in and of itself. This project was approved despite involving activities identified in the Recovery Strategy as likely to result in destruction of critical habitat.

4. Emergency Order: A last resort

Subsection 80(1) of SARA enables the Governor in Council to make an emergency order to provide for the protection of a listed species on the recommendation of the competent minister. Pursuant to s. 80(2), "[t]he competent minister must make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery." An emergency order may include, in the case of an aquatic species, identification of habitat that is necessary for survival or recovery, and provisions requiring actions that protect the species and that habitat and prohibiting activities that may adversely affect the species and habitat (s. 80(4)).

This tool has only been used twice, for the Greater Sage-Grouse and the Western Chorus Frog. In both cases it was only used after conservation organizations initiated litigation.[39]

Despite the legal protections afforded to SRKW and their critical habitat under SARA, and the existence of a Recovery Strategy and Action Plan, measures have not yet been taken to reduce the threats identified in the Recovery Strategy. DFO conducted a "science based review of recovery actions" – a step not required by SARA – in 2017.[40] It reveals that only research-based, information-gathering and monitoring measures are underway, and that DFO is unable to report at all on the status of several Action Plan measures.[41]

At the time of writing, there are only 76 SRKW. The population is in a decline. Individual whales are showing signs of malnutrition, the majority of pregnancies are failing, and, troublingly, some reproductive-aged females are dying, instead of living into their post-reproductive years as would normally be expected. This ongoing decline, and the current size and demographics of the population, put the population in a precarious position. When DFO convened a symposium to discuss SRKW in October 2017, two of the leading experts on the

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[38] As discussed under subheading 1 above, see *Canada v David Suzuki Foundation*, *supra* note 8, addressing the compulsory nature of SARA protections, at paras 8, 9, 115, 117, 124, 125.

[39] Greater Sage-Grouse: The Alberta Wilderness Association, Western Canada Wilderness Committee, Nature Saskatchewan and Grasslands Naturalists brought an application for judicial review of the Minister of Environment's refusal to recommend an emergency order on February 14, 2012 (Federal Court File T-341-12). Cabinet ultimately issued an emergency order and the application was discontinued. Western Chorus Frog: *Centre québécois de droit et de l'environnement v Canada (Environment)*, 2015 FC 773.

[40] Fisheries and Oceans Canada, 2017, *Southern Resident Killer Whale: A science-based review of recovery actions for three at-risk whale populations*, Ottawa, online: <http://www.dfo-mpo.gc.ca/species-especes/whalereview-revuebaleine/review-revue/killerwhale-epaulard/page01-eng.html>

[41] *Ibid* at pages 12, 17-28.

population – Dr. John Ford, emeritus DFO scientist and SRKW specialist, and Dr. Lance-Barrett-Lennard, a long-time SRKW researcher and a co-author of the Recovery Strategy – both stressed the need for urgent actions to support SRKW.[42]

On January 30, 2018, five conservation organizations with a longstanding interest in SRKW wrote to the Minister of Fisheries and Oceans and Minister of Environment to demand that they recommend an emergency order for SRKW by March 1.[43] The petition to the Ministers summarized the best available information on the status of SRKW and threats to them, included a statement from Dr. Barrett-Lennard, and conveyed the petitioners' position that the only reasonable conclusion to draw from this information is that there are imminent threats to the survival and recovery of SRKW, such that the Ministers must recommend an emergency order. At the time of writing, the Ministers had not provided their opinion as to whether there are imminent threats to survival and recovery, and had neither made nor declined to make a recommendation.

This example illustrates difficulties in receiving SARA protections because it should not have been necessary. SRKW have a Recovery Strategy, protected critical habitat, and an Action Plan – more than many listed species have – and the species and its critical habitat are entirely within federal jurisdiction. Yet, there has been a lack of action by the federal government, and the SRKW are now in an emergency situation, with leading experts who have worked for or with DFO calling for urgent action and conservation organizations having to demand action.

Conclusions: Difficulties in receiving SARA protections

The case of the SRKW shows that, even for a species that is charismatic and an icon of the west coast, critically endangered, and entirely within federal jurisdiction – and has received, on paper, the full suite of SARA protections – has been granted protections belatedly, and in some cases only due to litigation forcing the government's hand. Further, meaningful protection is still lacking, with the result that the species is declining. This supports two broad conclusions.

First, SARA and the Ministers responsible for SARA-listed species are not doing their job if SARA is only implemented when civil society groups resort to litigation. This is not a sustainable or effective way for SARA to be applied.

Second, SARA is only as good as its implementation. Research and scientific information are essential, but cannot be pursued indefinitely to the exclusion of concrete action. A persistent reluctance to act, chronic foot-dragging, and a failure to make endangered species' survival and recovery a priority can undermine SARA's effectiveness.

[42] Emergency Order Petition, *supra* note 9, at pages 5-7.
[43] Emergency Order Petition, *supra* note 9.