



October 19, 2004

The Hon. Stéphane Dion
Minister of the Environment
Les Terrasses de la Chaudière
10 Wellington Street, 28th Floor
Hull, Québec
K1A 0H3

Dear Mr. Dion:

Re: Decision by the Nunavut Wildlife Management Board concerning the proposed legal listing of Polar Bear, Grizzly Bear and Wolverine as Species of Special Concern under the *Species at Risk Act*

The Nunavut Wildlife Management Board (NWMB or Board) wishes to congratulate you on your recent appointment as Minister of the Environment. The NWMB looks forward to continuing a productive and cooperative relationship with the Department under your stewardship.

Recent correspondence between Environment Canada and the NWMB

In April of this year, the Director of the Species at Risk Branch of the Canadian Wildlife Service (CWS) provided the NWMB with a copy of an Environment Canada document entitled, “*Consultation on Amending the List of Species under the Species at Risk Act*” (March 2004). Three species found within Nunavut were briefly addressed in the document – Grizzly Bear, Polar Bear and Wolverine. The Director’s covering letter indicated that the document’s release provided “...the opportunity to comment on whether or not newly assessed species should be considered for the List ... under SARA.”

The NWMB replied by letter to the Director on June 11th 2004 that the Board exercises a vital decision-making authority under the *Nunavut Land Claims Agreement* (NLCA) to approve the designation of species at risk in the Nunavut Settlement Area. It consequently requires “*a more detailed, specific and involved approach from Government than one designed to elicit comments from stakeholders and the general public.*”

The NWMB's letter went on to request that CWS provide a presentation of all relevant information and views – including those received through public consultations - to the Board at the NWMB's meeting to be held during the week of October 4th 2004. The

NWMB indicated that it would then make a formal decision concerning the three species at a subsequent Board meeting.

The NWMB received a response letter on September 16th 2004 from the CWS Regional Director (Environmental Conservation Branch, Prairie and Northern Region). That letter informed the NWMB that the requested presentation would be made and – to the Board’s surprise and disappointment – that the proposed listing order would be published in early October, “*quite apart from our meeting on October 4*”.

Concerns with consultations to date in the listing process

The presentation at the NWMB’s meeting last week revealed that the only consultations carried out to date have been:

- Posting of the proposed listings on the SARA Public Registry for a couple of months;
- Limited distribution of the document entitled, “*Consultation on Amending the List of Species under the Species at Risk Act*”;
- The request to the NWMB for its comments on whether these species should be considered for the List; and
- The presentation at the October NWMB meeting.

Mr. Minister, the level of consultation carried out by Environment Canada with respect to these proposed listings has been seriously inadequate, especially considering the extremely high economic and cultural importance of Polar Bears within Nunavut. The NWMB is expected to make crucial approval decisions without having been provided with any comments – received as a result of the above consultations – from the public, Inuit hunters, the Government of Nunavut, Nunavut Tunngavik Inc., Nunavut Hunters and Trappers Organizations, Nunavut Regional Wildlife Organizations, or any other person or body.¹

It is also worth noting that the Department’s document entitled, “*Consultation on Amending the List of Species under the Species at Risk Act*” is not readily accessible on the Public Registry. The “*Public Consultations*” page within the Registry does not list the document either under “*Current Public Consultations*” or under “*Archived Public Consultations*”.

In any case, Inuit are an oral people, generally not oriented towards electronic consultation and often with reduced access to the Internet. As a result, any consultation effort in Nunavut is doomed to failure if it almost exclusively relies on the Internet.

¹ Nevertheless, Environment Canada takes the position that, “*The results of this public consultation are of great relevance to the entire process of listing species at risk. The comments received will be carefully reviewed and evaluated.*” (“*Consultation on Amending the List of Species under the Species at Risk Act*”, page 3)

Concerns with the assessment process

In addition to inadequate consultation on the proposed listings, the NWMB has two primary concerns with the assessment process:

- The timing of these assessments, and of the Minister's and the Governor in Council's responses under the terms of SARA; and
- The insufficiency of information before COSEWIC at the time of the assessments.

The timing of the assessments and responses

It appears that COSEWIC assessed these three species pursuant to SARA subsection 23(1), which requires COSEWIC to assess a species within one year after it receives a status report on the species.² COSEWIC relied upon subsection 23(1) even though the Act had not received Royal Assent (December 2002) at the time of the Grizzly Bear and Polar Bear assessments (May 2002 and November 2002, respectively). The Act was not even passed by Parliament until June 5th 2003.

Under SARA subsection 25(3), within 90 days of receiving a COSEWIC assessment, the Minister is required to provide a response statement in the public registry. In fact, the Minister's response statements for these species are all dated April 21st 2004 – practically two years after the Grizzly Bear assessment, almost one and a half years after the Polar Bear assessment, and just under a year after the Wolverine assessment (May 2003). Subsection 25(3) has been in force since June 5th 2003.³

Under SARA subsection 27(1.1), the Governor in Council must make a decision in respect of assessment within nine months after receiving an assessment by COSEWIC. It has been approximately 17 months since COSEWIC assessed Wolverines, 23 months since it assessed Polar Bears and 29 months since it assessed Grizzly Bears. Subsection 27(1.1) has been in force since June 5th 2003.⁴

The insufficiency of information at the time of the assessments

All three of these species were on Schedule 3 of SARA at the time the Act came into force. Subsection 130(6) of the Act makes it clear that subsection 15(2) must apply to the assessment of Schedule 3 species. Subsection 15(2) requires COSEWIC to carry out its functions – including the assessment of species – “*on the basis of the best available information on the biological status of a species, including scientific knowledge, community knowledge and aboriginal traditional knowledge.*” [Emphasis added]

It is clear from a review of the status reports for all three species that COSEWIC did not meet the requirements of subsection 15(2), at least with respect to making its assessments on the basis of the best available community knowledge and aboriginal traditional

² See, for instance, the *Order Acknowledging Receipt of the Assessments Done Pursuant to Subsection 23(1) of the Species at Risk Act*, P.C. 2004-413.

³ See also SARA subsection 130(6): “Subsections 15(2) and (3) and 21(1) and section 25 apply with respect to assessments under subsection (1).” Subsection 130(1) states that, “COSEWIC must assess the status of each wildlife species set out in Schedule 2 or 3...”

⁴ See also SARA section 131: “Section 27 applies in respect of a wildlife species referred to in section 130...”

knowledge.⁵ This is not surprising, since SARA was not in force at the time the reports were being prepared or at the time the species were actually assessed. COSEWIC had no statutory mandate or capacity in 2002 and early 2003 to undertake this essential work.⁶ In fact, COSEWIC's Aboriginal Traditional Knowledge Subcommittee – required under SARA subsection 18(1) – is still in the process of becoming operational today.

Significantly, the “*Regulatory Impact Analysis Statement*” accompanying the June 5th 2003 “*Order Extending the Time for the Assessment of the Status of Wildlife Species*” listed the following as a **serious disadvantage** for proceeding with Schedule 2 species assessments without an extension order:

“Status reports written prior to SARA did not require the inclusion of Aboriginal Traditional Knowledge, even in the case of species of particular interest to aboriginal people and the Wildlife Management Boards.”⁷

That disadvantage is all the more serious when contemplating the listing of species under the terms of SARA on the basis of not just status reports, but also assessments completed prior to SARA.

New information available on Polar Bears in Nunavut

The authors of the 2002 addendum to the Polar Bear status report wrote in their conclusion that, “*The COSEWIC status report for polar bears could be revised in the next 2-4 years.*” In fact, important new information – including Inuit Qaujimajatuqangit (Inuit traditional knowledge) and community knowledge – has become available, and reflects the widespread view that a number of polar bear populations in Nunavut are increasing.

Conclusion

Because of NMWB concerns over both the assessment and the listing processes for Polar Bear, Grizzly Bear and Wolverine, the Board decided on October 6th 2004 not to approve the designation of those three species as being of special concern under the terms of SARA. The NWMB made this decision pursuant to NLCA subsection 5.2.34(f), and hereby forwards it to you in accordance with NLCA Section 5.3.17.

Immediately upon making the above decision, the Board passed another resolution that “*the NWMB and CWS (Prairie and Northern Region) work cooperatively to:*

- (a) develop a proposed standardized process, compatible with both the NLCA and SARA, for the listing of species at risk in the future; and*

⁵ Indeed, it is arguable that, in certain instances, COSEWIC did not rely upon the best available scientific knowledge. For instance, Table 1 (page 9) of the Polar Bear status report provided the *Status of Canadian polar bear populations* as of January, 1997. However, a more up to date PBTC Table was available as of February 2002.

⁶ While COSEWIC is permitted by SARA subsection 130(7) to “*take into account and rely on any report on the species that was prepared in the two-year period before this Act receives royal assent*”, this permission does not relieve COSEWIC of the statutory obligation to make every assessment of Schedule 3 species on the basis of the best available scientific knowledge, community knowledge and aboriginal traditional knowledge.

⁷ Canada Gazette Part II, Vol. 137, No. 13, page 1747.

(b) participate with the territorial government in the development of a bilateral agreement addressing relevant SARA issues.”

Mr. Minister, in these early days of the implementation of SARA, it is essential that the NWMB and Environment Canada carefully develop the necessary protocols to ensure that the overall listing process is efficient, thorough and carried out in accordance with the cooperative spirit of both SARA and the NLCA. That cooperative work has yet to be undertaken, a fact which has at least contributed to the unfortunate result in this particular case. However, the NWMB remains confident that, working together, we can ensure success in the future.

In the meantime, based upon the assessment concerns that are set out above, the NWMB urges you to recommend that the Governor in Council “*refer the matter* [of the assessment of these three species] *back to COSEWIC for further information or consideration*”, pursuant to SARA subsection 27(1.1)(c).

Should you or your officials have any questions or concerns with respect to this letter, or should you require any further or follow-up information, please do not hesitate to contact me or my staff at your convenience.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ben Kovic', is written over a horizontal line.

Ben Kovic
Chairperson and Chief Executive Officer
of the Nunavut Wildlife Management Board