HOW THEY BUILT THE ARK: COMPARING FEDERAL ENDANGERED SPECIES LEGISLATION IN THE UNITED STATES AND CANADA

by

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Abstract

Although both Canada and the US have seen the need to introduce endangered species legislation, the two countries' statutes are strikingly different. Enacted in 1973, the US Endangered Species Act (ESA) is notorious for its stringency, exemplified by non-discretionary provisions backed by a citizen suit provision. For its part, after three failed attempts, Canada finally passed its Species at Risk Act (SARA) in 2002, almost thirty years after the ESA. While technically providing for the protection of all species anywhere in Canada, SARA is a much weaker Act on paper than the ESA in that the former does not compel the government to protect species either through a citizen suit provision or through an emphasis on non-discretionary language. The main research question that follows is: why do Canada and America's federal endangered species legislation differ so much in stringency and scope?

In answering this question, this thesis finds that the differences in public opinion, institutions, actors, and cross-national lesson drawing in the two countries are consistent with the policy differences between the ESA and SARA. The high public concern for the environment in the US in the early 1970s provided the government with electoral incentives to enact strong legislation, while the low salience of environmental issues in Canada in the late 1990s did not give the Canadian government that same incentive. Institutional differences reinforced this effect. Institutional changes in the US around 1970, made possible through the separation of powers and federal system, paved a new path for Congress to write a stringent, non-discretionary ESA. In contrast, Canada's fusion of legislative and executive functions, decentralized federalism, and overlapping jurisdiction of the environment yielded a discretionary statute.

The key difference in the role of actors was the lack of protest by the US business and agricultural community to a tough legislation, which contrasts with the active lobbying by their Canadian counterparts. American scientists and environmental groups also had more influence in shaping the ESA since there was no substantial opposition in the US to a prohibitive policy. However, unique to Canada was the Species at Risk Working Group, a small coalition of environmental and industry groups who brokered a remarkable consensus, including recommendations for stewardship and incentives for landowners. There was also more extensive consultation with and lobbying by aboriginal groups in Canada than in the US.

Cross-national lesson drawing reinforced the institutional and interest group dynamics. Most notably, industry and landowner groups were much more active in Canada because they were able to draw negative lessons from the controversial US experience and thus lobbied to avoid a legalistic, ESA-style law. Indeed, Canadian policymakers themselves wanted to veer away from an adversarial US approach. For their part, Canadian environmentalists and scientists who were knowledgeable of the ESA learned both positive and negative lessons from the experience south of the border. The five chapters of this thesis elaborate on these findings and provide a comprehensive explanation of the policy differences between the two countries' legislation.

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List of Abbreviations

AFN	Assembly of First Nations
ALA	American Lands Alliance
ANCSA	Alaska Native Claims Settlement Act
AWG	Aboriginal Working Group
BSFW	Bureau of Sport Fisheries and Wildlife
CAA	Clean Air Act
CAP	Congress of Aboriginal Peoples
CBD	Center for Biological Diversity
CCA	Candidate Conservation Agreements
CEAA	Canadian Environmental Assessment Act
CEC	Commission for Environmental Cooperation
CESC	Canadian Endangered Species Coalition / Campaign
CESCC	Canadian Endangered Species Conservation Council
CEPA	Canadian Environmental Protection Act
CESPA	Canada Endangered Species Protection Act
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COSEWIC	Committee on the Status of Endangered Wildlife in Canada
CWF	Canadian Wildlife Federation
CWS	Canadian Wildlife Service
DES	[BSFW] draft environmental statement
DFO	Department of Fisheries and Oceans
EARP	Environmental Assessment and Review Process
EIS	Environmental Impact Statement
ENGO	Environmental Non-governmental Organization
ESA	Endangered Species Act
FWS	Fish and Wildlife Service
HCP	Habitat Conservation Plan
House Committee	House of Commons Standing Committee on Environment and Sustainable Development
IA	[HCP] Implementation Agreement
ITK	Inuit Tapiriit Kanatami
MBCA	Migratory Birds Convention Act
MMPA	Marine Mammal Protection Act
MNC	Métis National Council
MNCW	Métis National Council of Women
NACOSAR	National Aboriginal Council on Species at Risk
NAFTA	North American Free Trade Agreement
NAWA	National Aboriginal Women's Association
NELS	National Environmental Law Section [of the Canadian Bar Association]
NEPA	National Environmental Policy Act
NESARC	National Endangered Species Act Reform Coalition
NFMA	National Forest Management Act
NMFS	National Marine Fisheries Service
NWF	National Wildlife Federation
PFW	Partners for Fish and Wildlife program
POGG	Peace, Order, and Good Government

List of Abbreviations

PSG	Private Stewardship Grants
RENEW	Recovery of Nationally Endangered Wildlife
SARA	Species at Risk Act
SARWG	Species at Risk Working Group
SCLDF	Sierra Club Legal Defense Fund
SHA	Safe Harbor Agreement
TVA	Tennessee Valley Authority
WMCC	Wildlife Ministers Council of Canada

Dedicated to

The Holy Trinity
God the Father, the Son, and the Holy Spirit,

for the strength, blessings, and inspiration needed to complete my thesis and degree

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Acknowledgments: list of interviewees and others

Amos, William. Former Special Assistant to Former Federal Environment Minister David Anderson on Species at Risk Legislation. Telephone interviews by Mary Illical. June 29, 2004 and July 15, 2004. **Also obtained articles from Mr. Amos.*

Anderson, David. Former Minister of Environment; current Member of Parliament, Victoria. Telephone interview by Mary Illical. August 26, 2004.

Baumgartner, Sandy. Manager of Programs and Communication, Canadian Wildlife Federation. Telephone interview by Mary Illical. July 26, 2004.

Brackett, David. Former Director General, Canadian Wildlife Service; current Senior Advisor, International Conservation, Environmental Conservation Service, Environment Canada. Telephone interview by Mary Illical. August 4, 2004.

Caccia, Charles. Former Chair of the House of Commons Standing Committee on Environment and Sustainable Development; currently working at the Centre for Environmentally Sustainable Development. Interview by Mary Illical. September 28, 2004.

Czech, Brian. Conservation Biologist, Division of Natural Resources, US Fish and Wildlife Service, National Wildlife Refuge System. **Obtained articles from Dr. Czech.*

Confidential interview with environmental member of the Canadian Endangered Species Coalition. August 6, 2004.

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Curtis, Steven. Former Associate Director General, Canadian Wildlife Service; current Executive Director, NatureServe Canada, Agriculture and Agri-Food Canada. Telephone interview by Mary Illical. July 29, 2004.

d'Eça, Michael. Legal Adviser to the Inuit Tapiriit Kanatami. Telephone interview by Mary Illical. March 21, 2005.

Durham, Patrick. US Fish and Wildlife Service, Native American Liaison. Telephone interview by Mary Illical. March 7, 2005.

Elgie, Stewart. Associate Professor, Faculty of Law, University of Ottawa; Associate Director, Institute of the Environment, University of Ottawa. Telephone interview by Mary Illical. August 5, 2004. **Also obtained articles from Professor Elgie.*

Festa-Bianchet, Marco. Chair of COSEWIC; Professor, Département de biologie, Universite de Sherbrooke. Telephone interview by Mary Illical. July 23, 2004.

Gibson, Dale. Barrister & Solicitor. **Obtained articles from Mr. Gibson.*

Gratton, Pierre. Vice President, Public Affairs and Communications, Mining Association of Canada. Telephone interview by Mary Illical. July 16, 2004. **Also obtained article from Mr. Gratton.*

Green, David. Current Member and Former Chair of COSEWIC; Associate Professor and Curator of Vertebrates at Redpath Museum, McGill University. Telephone interview by Mary Illical. July 6, 2004.

Heighington, Paul. Former Environment Director for the Métis National Council. Telephone interview by Mary Illical. February 24, 2005.

Ignace, Lawrence. Manager of the Environment Secretariat, Assembly of First Nations. Interview by Mary Illical. August 19, 2004.

Kraft Sloan, Karen. Former Vice-Chair of the Standing Committee on Environment and Sustainable Development; current Canadian Ambassador for the Environment. **Ms. Kraft Sloan answered technical questions about the House Committee process via email.*

Mills, Robert. Conservative Party Environment Critic and Vice Chair of the House of Commons Standing Committee on Environment and Sustainable Development. Telephone interview by Mary Illical. July 5, 2004.

Mooers, Arne. Assistant Professor of Biodiversity at Simon Fraser University. Telephone interview by Mary Illical. July 14, 2004. **Also obtained article from Professor Mooers.*

Near, David. Senior Counsel, Environment Canada. Telephone interview by Mary Illical. August 21, 2004.

Rabe, Barry. Professor, Gerald R. Ford School of Public Policy; Professor, School of Natural Resources and Environment; Faculty Associate, Program in the Environment, University of Michigan. **Obtained articles from Dr. Rabe.*

CHAPTER I
Introduction and Background Information

> *The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species....*
>
> – Section 2(b) of the US Endangered Species Act

> *The purposes of this enactment are to prevent Canadian indigenous species...from becoming extirpated or extinct, to provide for the recovery of endangered or threatened species, to encourage the management of other species to prevent them from becoming at risk...It recognizes that compensation may be needed to ensure fairness following the imposition of the critical habitat prohibitions...It is consistent with Aboriginal and treaty rights and respects the authority of other federal ministers and provincial governments.*
>
> – Preamble of Canada's Species at Risk Act

Ringing with promise, the above quote from the 1973 US *Endangered Species Act* (ESA) reflects an ambitious vision for protecting endangered species and their ecosystems, but belies the subsequent controversy of the Act's 32 years of implementation.[1] The constellation of public opinion, actors, and institutions worked favourably in the creation of prohibitive legislation, but on-the-ground application of such a tough law soon bred antagonism among industry and landowners. The second quote testifies to the policymakers' vision of creating a *Species at Risk Act* (SARA) in Canada that gives something to everyone. After signing the 1992 UN *Convention on Biological Diversity,* and after three previous failed attempts, the Canadian government finally fulfilled its obligations under the Convention by passing SARA in 2002.[2] To achieve that goal Canadian policymakers walked a ten year long tightrope that often wobbled under the pressure of public opinion, actors, and institutions, specific to Canada. As such, Canada has notably lagged behind the US in passing federal endangered species legislation, with the government passing SARA almost thirty years after the ESA.[3]

Interestingly, although both countries have seen the need to introduce endangered species legislation – not least due to the fact that there are 1267 endangered and threatened

listed species in the US and 345 listed species at risk in Canada – the two countries' legislation are strikingly different in their provisions. The 1973 ESA is notorious for its stringency, exemplified by non-discretionary language concerning species listing, prohibitions on takings, and critical habitat protection, all backed by a citizen suit provision. While technically providing for the protection of all species anywhere in Canada, SARA is a much weaker Act *on paper* than is the ESA in that the former does not compel the government to protect species either through mandatory provisions, since most provisions are written in discretionary language, or through a citizen suit provision. As there are currently no comparative analyses of endangered species legislation in the US and Canada, this thesis seeks to fill that gap by answering the question – Why do America and Canada's federal endangered species legislation differ so much in stringency and scope? Specifically, what variables best explain the policy differences between the ESA and SARA? [4]

This thesis will demonstrate that the differences in public opinion, institutions, actors, and cross-national lesson drawing in the two countries are consistent with the policy differences between the ESA and SARA. Further, while the main finding is that a combination of all four variables are equally important in explaining the policy differences between the ESA and SARA, there is an emphasis on the unique contribution of cross-national lesson drawing to this thesis' analysis. To summarize briefly here, the high public concern for the environment in the US in the early 1970s provided the government with electoral incentives to enact strong legislation, while the low salience of environmental issues in Canada in the late 1990s did not give the Canadian government that same incentive. Institutional differences reinforced this effect. Institutional changes in the US around 1970 paved a new path for Congress to write a stringent, non-discretionary ESA. By contrast, Canada's fusion of legislative and executive functions, decentralized federalism, and overlapping jurisdiction of the environment contributed to the government's decision to make SARA a discretionary statute.

As for actors, the key difference was the lack of protest by the US business community preceding the ESA versus the active lobbying by industry and landowner groups in Canada preceding SARA. American scientists and environmental groups then played a stronger role than their Canadian counterparts in shaping the respective legislation since there was no substantial opposition in the US to a prohibitive policy. However, unique to Canada was the Species at Risk Working Group (SARWG), a small coalition of environmental and industry groups who brokered a remarkable consensus, including recommendations for stewardship and incentives for landowners. There was also more extensive consultation with and lobbying by aboriginal groups in Canada than the US.

For its part, cross-national lesson drawing amplified the institutional and interest group differences, leading Canadian policymakers and politicians to consciously veer away from ESA-style legislation. In particular, cross-national lesson drawing explains the strong lobbying by Canadian industry and landowner groups to avoid a legalistic, US-style law. The five chapters of this thesis will elaborate on these findings and provide a comprehensive explanation of the policy differences between the US *Endangered Species Act* and Canada's *Species at Risk Act.*

This chapter, in providing both introductory and background information, is structured in four parts. The first section gives a short history of endangered species legislation in the US and Canada. Second, there is a comparison of the policy differences that this thesis sets out to explain. The third section provides an overview of the theoretical framework consisting of four variables: public opinion, actors, institutions and cross-national lesson drawing. Lastly, a thesis outline will be given, concisely summarizing the content of each chapter.

Historical Development of Legislation

Brief History of SARA

Six Canadian statutes provided varying degrees of federal protection to species at risk before SARA: the *Fisheries Act*, the 1916 Canada-US *Migratory Birds Convention Act* (amended in 1994), the 1933 *National Parks Act* (amended in 2000), the 1973 *Canadian Wildlife Act* (amended in 1994), the 1992 *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* which is in accordance with the 1973 *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, and the 1996 *Oceans Act*.[5] However, none of these Acts' sole purpose is to protect and recover endangered species. Although the government did establish the Recovery of Nationally Endangered Wildlife (RENEW) Committee in 1988 to develop recovery plans for species at risk, these recovery plans are not mandated by law.

In June 1992, the Canadian government made a commitment to develop endangered species legislation when it signed the international Convention on Biological Diversity. By April 1994, the government began efforts to fulfill its commitment. Under the direction of then Environment Minister Sheila Copps various means were used to gain stakeholder and public comment on proposed legislation, notably a Task Force on Endangered Species Conservation that included representatives from academia, environmental groups, and the business and landowner community.[6] In October 1996, the National Accord for the Protection of Species at Risk was signed by the federal, provincial, and territorial wildlife ministers recognizing the importance of intergovernmental cooperation, leadership, and complementary legislation and programs, for the protection of endangered species and habitats.[7] Bill C-65, the Canada Endangered Species Protection Act (CESPA), was introduced the same month as the National Accord and was the first attempt at federal endangered species legislation. The bill contained a citizen suit provision, perceived to be stringent by some groups, but was also limited in scope as

it did not protect animal and plant species on provincial and private land. The government failed to obtain support for the Act as CESPA "was attacked by virtually every stakeholder group – industry, landowners, environmentalists, First Nations, and provincial governments" – for various reasons.[8] Bill C-65 eventually died on the order paper when an election was called in June 1997.

Bill C-33, the Species at Risk Act, was the second attempt at passing endangered species legislation and was introduced in April 2000. Amos et al identify three ways in which Bill C-33 differed from the former bill. First, the emphasis was on spending instead of regulation, and if there was the need for regulation, then there was the potential for compensation. Second, the scope of the statute was technically widened to protect all species anywhere in Canada. However, the third change entailed that while the federal government had authority to protect species on provincial land, it would not resort to using that authority if the provinces were already doing an adequate job. Industry and private landowners and even some environmental groups showed a modicum of support, but there were several environmental groups (ENGOs) who opposed the legislation. Bill C-33 ended up with the same fate as CESPA; it died on the order paper when another federal election was called in November 2000.

Then came Bill C-5, also called the Species at Risk Act, introduced into the House in February 2001. This first version of Bill C-5 was virtually the same as Bill C-33, however, to the relief of ENGOs and scientists, some Liberal MPs were able to garner two important concessions from the government: first, to make COSEWIC's listing have the force of law unless vetoed within nine months by Cabinet and second, to make critical habitat protection mandatory on federal lands and for federal species. The bill passed in the House on June 11, 2002 by a vote of 148-85; however, it died on the order paper when parliament was prorogued in September 2002. Fortunately, Bill C-5 was reinstated on October 9, 2002 and received Senate approval and Royal Assent on December 12, 2002. In a press release Environment Minister

David Anderson announced, "Today we fulfilled a commitment made by this government to ensure protection for species at risk and the places where they live...This Act ensures the federal responsibility is met...."[9] Thus, after a ten year long process beginning with the signing of the 1992 Biodiversity Convention, the Canadian government had finally passed federal endangered species legislation.

Brief History of the ESA

Prior to the first green wave in the US, discussed in Chapter 2, several statutes were enacted that helped the federal government reassert its authority over wildlife management relative to the States. These bills included the 1900 *Lacey Act*, the 1918 *Migratory Bird Treaty Act*, the 1929 *Migratory Bird Conservation Act*, and the 1940 *Bald Eagle Protection Act*. It was in the late 1960's and early 1970's, however, that the government focused on enacting stand-alone endangered species legislation. Such legislation started with the 1966 Endangered Species Preservation Act, but the statute was not far-reaching in scope and stringency since it only restricted takings of wildlife on conservation reserves, did not restrict interstate commerce, and protected only native species.[10] Consequently, commercial interests did not contest the bill.

The subsequent 1969 Endangered Species Conservation Act in some ways expanded the scope of federal endangered species law. For example, the Lacey Act's ban on interstate commerce of endangered species was extended through the 1969 Act to include reptiles, amphibians, molluscs, and crustaceans, and the listing of species was widened to include both vertebrate and invertebrate fish and wildlife.[11] The Act also recognized the international dimension of species endangerment and banned the importation of an endangered species or its product, including those species not found in the United States.[12] Further, in response to environmental pressure, the Act also included a provision committing the government to set a date for an international meeting. The objective of the meeting was for participants to sign a

binding international agreement promoting the protection of endangered species; the agreement when eventually signed became known as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

The fur and leather industries actively lobbied the government against the stringent provisions of the 1969 Act. These industries appeared before congressional hearings and also negotiated separately with the Interior Department and congressional committees on the substance of the Act. These actions marked the only time commercial interests became extensively involved in the creation of endangered species legislation.[13] Industry lobbying efforts were successful in garnering such provisions as "the requirement that species be threatened with extinction worldwide before being considered endangered," the granting of permits in circumstances of "economic hardship", and a "180-day grace period before enforcement of the law."[14]

The government sought to expand the 1969 Act as early as 1970 with the process really picking up momentum in 1972.[15] In his "Special Message to Congress Outlining the 1972 Environmental Program" President Nixon expressed his unhappiness with the current legislative framework to protect endangered species and called for enacting prohibitive legislation that would pre-empt State authority over the taking of species. In Nixon's words,

> ...even the most recent act to protect endangered species, which dates only from 1969, simply does not provide the kind of management tools needed to act early enough to save a vanishing species. In particular, existing laws do not generally allow the Federal Government to control...taking of endangered species...My proposal would make the taking of endangered species a Federal offence for the first time....[16]

A year later the ESA's provisions, discussed below, reflected the type of legislation that Nixon had envisioned. Moreover, unlike the 1969 Act, there were no major objections to such a prohibitive policy. Indicating the popularity of the legislation, the ESA was immediately passed in Congress by a unanimous voice vote in Senate and a 355 to 4 vote in the House.[17] President

Nixon signed the bill into law on December 28, 1973, giving the US the title of being "the first country to pass a law on endangered species...."[18]

Policy Differences[19]

Overall, *on paper* the ESA is a much more prohibitive policy than SARA. SARA is often regarded as a 'weaker' statute than the ESA, especially by ENGO and scientists, in terms of the protection it gives endangered species and their habitat. This section will elaborate on the following eight key differences between SARA and the ESA: listing, basic prohibitions, habitat protection, federal-state or federal-provincial cooperation, discretionary versus non-discretionary language, citizen enforcement, regulatory approaches, and the inclusion of Aboriginal-related provisions.

Listing

In terms of listing, section 4(b) of the ESA states that the Secretary of the Department of the Interior must determine which species should be listed "*solely* on the basis of the best scientific and commercial data."[20] A brief description of the listing process is necessary to shed light on the discussion of the ESA's implementation controversies. As specified in US Fish and Wildlife Service (FWS) publications, the listing process can be initiated by the candidate assessment process or by the petition process.[21] In the former, the FWS identify "candidate" species that meet the criteria of being threatened or endangered. In the petition process citizens can petition the FWS or National Marine Fisheries Service (NMFS) – the two federal agencies which administer the ESA — to list a species.

When adequate scientific information is gathered from the candidate assessment process or the petition process to indicate that listing is needed, FWS biologists then draft a proposed listing rule. Some candidate species make it onto the draft proposals while others are left as candidate species; likewise, some petitioned species that are warranted for listing either make it

onto the draft proposal or are deferred. The draft proposal is then reviewed by the FWS Regional Office, the FWS Washington Office, and, after any necessary changes, is approved and signed by the Director of the FWS. The proposed listing rule is then published in the *Federal Register*. Once published the proposed listing is publicized and people can give their input on the listing during a 60-day comment period, during which time a peer review process is also conducted. Further, public hearings may also be held. A final listing rule is then drafted and goes through the same review process as the proposed listing rule. If the scientific data supports it and after being approved by the Director, the listing becomes effective 30 days after being published in the *Federal Register.*

While the ESA states that listing must be based *only* on scientific considerations, SARA allows Cabinet to veto, within nine months, any species that are scientifically designated as at risk by the scientific Committee on the Status of Endangered Wildlife in Canada (COSEWIC). Socio-economic considerations are thus allowed in Cabinet's decision and, due to Cabinet's veto over COSEWIC's designations, some species at risk may never get listed and receive the formal protection accorded under SARA. This was the case in October 2004 when the Cultus and Sakinaw Lake sockeye salmon were not added to SARA's list due to socio-economic reasons, despite the fact that COSEWIC assessed the two salmon populations as endangered.[22] In fact, Cabinet actually has more than nine-months to consider COSEWIC's designations, much to the indignation of ENGOs and scientists who fought to have a strict nine-month deadline. Specifically, before COSEWIC's list is passed on to Cabinet, it is given to the Minister of the Environment. Only when the Minister passes COSEWIC's list of species on to Cabinet does the nine-month timeline kick-in. The Minister thus may deem it necessary to temporarily keep some species off the list that is passed on to Cabinet until an "extended consultation" is completed. Through this legal "loop-hole" the nine-month timeline can be, and has been, extended.[23]

Basic Prohibitions

With regards to basic prohibitions, the ESA forbids the killing or harming of all endangered species. Section 9 of the ESA states that it is unlawful for any person to take any listed species within the US and its territorial seas or on the high seas, selling or offering such species for sale in international trade, and so forth. The term ''take'' is defined broadly in Section (3)(19) to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." The prohibition on harming an endangered species also includes substantially modifying or degrading an endangered species habitat. The Fish and Wildlife Service enforced this understanding of the prohibition and in 1995 the interpretation that "harm" included significantly altering wildlife habitat was confirmed in *Babbitt v. Sweet Home.*[24] Further, while basic prohibitions apply to everyone, section 7 specifically mandates that, in consultation with the FWS, a federal agency ensure that "any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species...." Section 7 also adds that federal agency action must not "result in the destruction or adverse modification of habitat." After consultation, the agency whose action is being evaluated will have to follow one of three options: it will be able to proceed if its action does not jeopardize a listed species; it may proceed if its planned action is modified to avoid species jeopardy; or it may not proceed at all.[25]

After the passing of the 1973 ESA, the restrictive socio-economic impact of species protection soon became apparent. Members of Congress, lobbied by industry and landowners, attempted to water-down the ESA's stringent provisions and two notable changes to the ESA were made. First, the 1978 reauthorization of the ESA added an exemption to Section 7 in the form of the Endangered Species Committee.[26] This Committee, dubbed the 'god squad', evaluates an application for exemption and, under certain criteria, can exempt federal projects

from the ESA's provisions. However, "[h]istorically, the committee has been convened only a few times and has granted exemptions even less frequently."[27] In 1982 an amendment was added to the ESA under section 10(a)(1)(B) that authorizes the FWS or NMFS to issue an incidental take permit as a means by which private landowners can qualify for permission to incidentally take an endangered species. To qualify for a permit, applicants must submit a Habitat Conservation Plan (HCP) along with their application for the permit. Applicants must ensure that the HCP includes the following: the impact of the taking, the steps taken to minimize the impact and to fund the mitigation of the impact, the alternatives that were considered and why such alternatives are not viable, and additional measures that are deemed necessary to conserve the species involved.

SARA is a bit more complex. Mandatory prohibitions apply against killing species on federal lands (i.e. national parks, Aboriginal reserves and military bases) and for federal species (aquatic species and migratory birds protected under the *Migratory Birds Convention Act, 1994*). The prohibition applies to threatened, endangered and extirpated species, but not species of special concern. As with critical habitat protection, discussed below, at the discretion of the Governor in Council and the recommendation of the Minister of Environment, a safety net can be invoked to prohibit the killing of species on provincial and territorial land. However, there are no specific criteria by which to assess whether a province is doing the job adequately and when to invoke the safety net. Thus, while a significant change in Bill C-5 is its wider authoritative scope to protect all species anywhere in Canada, in discretionary language typical of Canadian environmental statutes, there is "a clear presumption of federal deference" to the provinces.[28]

Critical Habitat Protection

In the ESA, explicit protection for critical habitat came in 1978, when an amendment to the Act made it mandatory for critical habitat to be designated for all listed species on all lands, including State land. Under SARA critical habitat protection is not mandatory on provincial or private land, rather it is required only for federal species and for species on federal lands and federal waters (exclusive economic zone of Canada and continental shelf of Canada). Although in the US critical habitat designation provides for economic considerations to be taken into account, designations are still very controversial because citizens and groups are successfully compelling the FWS to protect habitat through court orders.[29] Canadian policymakers wanted to steer away from such a litigious approach. As such government publications explicitly state that stewardship is "the first line of defence to protect critical habitat on private land" under the belief that "[t]he best way to protect species habitat is through voluntary preventive measures, rather than having to resort to legal restrictions on land use."[30]

Further, although under section 33 of SARA there is a mandatory prohibition against destroying a listed species' "residence" – defined under section 2(1) as a "dwelling-place, such as a den, nest or other similar area or place..." – the definition's wording and the fact that it is not a scientific concept casts uncertainty on how many species and how much of their habitat will be covered under a species' so-called 'residence'.[31] In accordance with the bill's wider authoritative scope, under section 61 the federal government does have discretionary power to invoke a critical habitat safety net on provincial and territorial land if these sub-national governments are not doing an adequate job. Again, however, the safety net is discretionary and there are no criteria by which to assess whether they are doing a proper job or when the federal government should invoke the safety net.[32] That said, as Chapter 4 illustrates, David Anderson had to engage in quite a bit of diplomacy to appease nervous provinces about the basic prohibition and critical habitat safety nets.

Federal and State/Provincial Cooperation

The primary responsibility for species protection in the US lies with federal agencies, although under section 6 the Interior Secretary must cooperate and consult with the States "to the maximum extent practicable." The Interior Secretary can enter into management or cooperative agreements with a State, so that the latter can retain some control over the management of resident species, but a State's program to protect species first has to "meet or beat" federal standards.[33]

As will be discussed, in Canada since the harmonization initiative of the 1990's, greater effort has been made by the federal government to stick to a cooperative, residual approach, rather than to assert a strong unilateral, regulatory presence. Thus, while SARA's federal safety net is much broader in scope than Canada's previous legislative attempts, the federal government does not protect species and their habitats on provincial and territorial land *in the first instance.* Instead, the federal government defers to the provinces and territories, giving the sub-national levels of government initial authority over species not under federal jurisdiction. Further, provinces and territories are not required by SARA to meet any equivalent federal standards under an equivalency provision.[34]

Discretionary versus Non-Discretionary Language

As seen from the above provisions, the ESA is a classic action-forcing statute, typical of US environmental legislation in the 1970s. As Amos et al note, "the ESA does not simply *authorize* protection, it *compels* it."[35] Such mandatory requirements are exemplified in the Act's non-discretionary language – the use of "shall" or "shall not" instead of "may" or "may not". In contrast, most of SARA's provisions are written in discretionary language enabling the federal government to take action if necessary but legally allowing the government the political ease to defer to the provinces when needed. Thus, SARA is an enabling statute in that it gives the

federal government the potential authority to protect all species anywhere in Canada but does not compel action.

Citizen Suit Provision

The citizen suit is one of the most notorious aspects of the ESA because it gives further backing to the Act's strict provisions. Under section 11, the ESA gives citizens the right to bring a private law suit against anyone, including the government, who is in violation of the Act. Combined with the non-discretionary language of the ESA, these citizen suits have often been successful. Due to the consequent litigation costs citizen suits have placed strain on the FWS' funds for conservation. SARA on the other hand does not provide for a citizen suit. On one hand, SARA then avoids costly litigation, but on the other hand, there is no strong legal recourse if the government does not properly enforce or implement the law. It should be noted that a citizen suit would have had few 'teeth' under SARA, given SARA's discretionary language. However, a citizen suit would enable citizens to force the federal government to implement the few mandatory provisions applicable in federal jurisdiction. Interestingly, Bill C-65, Canada's first attempt at crafting federal endangered species law did include a citizen suit provision, but in light of the US experience the provision was opposed by industry groups, landowners, and the provinces.

Regulatory Approach

As a consequence of the above provisions, SARA has a more *cooperative approach* while the ESA has a *litigious and adversarial regulatory approach*, the latter particularly due to the citizen suit provision.[36] The ESA has given way to heated protests and debates over the implementation and reauthorization of the Act. Most notably, the environmentalists are often pitted against industry and landowners in bitter disputes over how the ESA should be implemented. As will be described in Chapter 2's epilogue, ever since the socio-economic costs

of species protection became obvious the US federal government has made a shift towards granting more incentives for landowners. Although the FWS' application of an unlegislated, incentive-based policy approach may mitigate the severity of the ESA's adversarialism, unless the Act is drastically amended during reauthorization its non-discretionary provisions backed by a citizen suit will still give way to a litigious approach. SARA emphasizes incentives instead of regulation especially on private land. These incentives include voluntary conservation and stewardship agreements which may be (publicly) funded and are intended to foster cooperation between industry, landowners, environmentalists, scientists, Aboriginals, and governments.[37] Further, unlike the ESA, under section 64 of SARA persons may be compensated for losses suffered due to "any extraordinary impact" of critical habitat provisions.

Aboriginal-Related Provisions

As will be discussed in Chapter 2, the ESA only makes brief reference to exempting Alaska Natives from the ESA's provisions; other Native Americans are not named in the Act. SARA on the other hand includes several inclusive Aboriginal-related provisions. This difference between the ESA and SARA is not that striking considering that the ESA was enacted thirty years before SARA when Native Americans did not formally lobby the government. However, how Aboriginals were consulted and incorporated into SARA represents a very important part of Canada's endangered species legislation and thus deserves some discussion here in comparison to the ESA.

Recovery Plans

Recovery plans do not differ significantly between the two countries as the ESA's recovery plans are mandatory for all listed species and SARA's recovery strategies and action plans are mandatory for all listed extirpated, endangered, and threatened species under SARA.[38] In fact, neither the ESA's recovery plans or SARA's recovery action plans have a prescribed

legal time period or deadline for completion.[39] SARA does have a timeline for recovery strategies,[40] which precedes an action plan; the latter however is arguably the more important stage in the recovery process since it specifies the actions for implementing a recovery strategy on the ground.

From an ENGO perspective, one potential weakness under SARA's recovery process compared to the ESA is the fact that action plans are only required if recovery is deemed "feasible."[41] In contrast, under the ESA recovery plans are not only mandatory regardless of feasibility but no distinction is even made between whether recovery plans are feasible or not. However, SARA's provision does not seem to be a compelling weakness or a major difference compared to the ESA since under section 40 it is *technical* and *biological* feasibility that is being determined and this determination "must be based on the best available information, including information provided by COSEWIC." SARA's recovery process also has one potential improvement on the ESA in that under section 41(3) the Minister "may adopt a multi-species or an ecosystem approach when preparing the recovery strategy if he or she considers it appropriate to do so." The ESA on the other hand does not specifically address a multi-species approach in its recovery process. However, SARA's ecosystem approach is only a discretionary provision.

Theoretical Framework

In order to explain the above differences between the ESA and SARA this thesis will utilize and evaluate the effectiveness of four variables: public opinion, actors, institutions and cross-national lesson drawing. Cross-national lesson drawing applies only to the Canadian case and is particularly helpful in understanding how SARA was shaped by the lessons learned from the thirty-year US experience. The thesis' conclusion will evaluate the explanatory utility of each variable and elaborate more on the contribution of cross-national lesson drawing.

Public Opinion

Public opinion is important in both advancing the credibility of certain groups over others and in motivating government actors to enact policy. For example, when an actor's cause or issue is significantly salient among the public, that actor has more leverage when pressuring the government. Likewise, public opinion is important in that it provides incentives for election-minded politicians. As William Amos, Kathryn Harrison and George Hoberg demonstrate in their article on SARA, general public approval of endangered species legislation is not enough impetus for politicians, the issue must also be a priority for citizens, that is, the issue must have salience.[42] It can thus be expected that in the country where the issue of endangered species is actively supported and salient, there would be stronger legislation.

Actors

Actors are defined by Cashore et al as "individuals and organizations, both public and private, that play an important role in the formulation and implementation of public policies."[43] These individuals and organizations have specific interests and goals that they pursue, they have resources that they can draw upon to influence public policy, and they have strategies that they employ to plan how to effectively use their resources.[44] The role of actors is crucial since it is interest group contestation that pushes and pulls policymakers in different directions, with actors hoping to garner a policy that will meet their needs, often over the interests of others. However, government actors are particularly important as they have the final authority and influence to make decisions, as opposed to individuals and groups on the outside who are often only on the receiving end of decisions.

The interests and strategies of actors, specifically interest groups, are often studied through the theoretical lens of (neo) pluralism. Pluralism has evolved from scholars first articulating that actors hold equal power and influence in the policy-making process to now

understanding that actors interact on an uneven playing field where some individuals and organizations have more sway in influencing policy outcomes. As described by Amos et al, Olson's contribution to pluralist theory sheds an interesting light on the issue of endangered species legislation.[45] Essentially Olson evaluates how the concentrated costs and diffuse benefits of public policy can promote or discourage collective action. To this effect, industry and private landowners who suffer the concentrated costs of prospective endangered species regulation have more incentive to overcome obstacles to collective action and to lobby the government to avoid those costs, while the wider public who reap the benefits of endangered species protection are less likely to mobilize because the benefits are diffuse. Consequently, the government is more inclined to steer away from a strong regulatory approach when facing an organized industry and business lobby who "offer politicians more than just votes or even campaign contributions. They create jobs...."[46] One would expect, such an outcome in both the US and Canada, but other factors would tip the balance between environmental and industry groups. For example, the country with stronger business interests relative to the environmental community can be expected to have a weaker endangered species statute.

Institutions

Neo-Institutionalism suggests that the institutional differences between the US and Canada would lead to policy divergence between the two countries. Institutions, for their part, can be defined as the "rules and procedures that allocate authority over policy and structure relations among various actors in the policy process."[47] Institutions are important because public policy is a product of more than just competing interests in society. Cashore et al identify two ways that institutions can shape policy. First, institutions structure the authority and relations among the different branches of government actors (executive, legislative, and judicial actors) or among the different levels of government (i.e. federal government and States/provinces).

Institutions are thus important because of their "relational character", that is, "the way in which they structure the interactions of individuals" and groups within the policymaking process.[48] Second, they have an effect on state-society relations as institutional rules, for example, can stipulate how and which interest groups participate in the policymaking process.[49] Thus, political institutions can structure the kinds of societal interests most likely represented in the policy process, giving "some groups or interests disproportionate access to the decision-making process...."[50] Another important concept that institutionalists often refer to is the notion of path dependence which refers to the process of institutional development where "[i]nstitutions are seen as relatively persistent features of the historical landscape and one of the central factors pushing historical development along a set of 'paths'."[51] Consistent with this theorizing, institutional differences between the US and Canada have implications for endangered species legislation. As will be demonstrated in Chapter 2, for example, one would expect non-discretionary statutes under a congressional system and discretionary statutes under a parliamentary system.

In summary, just as the influence of actors do not solely explain policy outcomes, institutions are best understood in the context of other variables. As Kathleen Thelen and Sven Steinmo summarize:

> The emphasis on institutions as patterned relations that lies at the core of an institutional approach does not replace attention to other variables – the players, their interests and strategies, and the distribution of power among them. On the contrary, it puts these factors in context, showing how they relate to one another by drawing attention to the way political situations are structured. Institutions constrain and refract politics, but they are never the only cause of outcomes.[52]

Cross-national lesson drawing

The study of policymaking is often overshadowed by the notion of competition between interests or by the influence of institutions on political processes, with little focus on lesson

drawing between governments. As Colin Bennett notes, "[t]he pervasive assumption that conflict and power are a *sine qua non* of policy-making has especially obscured the insight that governments learn, or draw lessons from, each other. It is a simple point, but one often overlooked in the theoretical literature and underrepresented in empirical work."[53] The literature often refers to policy transfer, lesson drawing, and/or emulation, sometimes interchangeably, but there are analytical distinctions between the three processes.[54] In general though these three terms "all refer to a process in which knowledge about policies, administrative arrangements, institutions, etc. in one time and/or place is used in the development of policies, administrative arrangements and institutions in another time and/or place."[55]

Emulation

Aside from Richard Rose's brief reference to emulation, discussed below, George Hoberg's work has analyzed emulation in more detail with respect to the Canada-US relationship.[56] Emulation is commonly defined as the cross-national transfer of ideas where one country adopts policy innovations similar to another country's because the former finds the innovations attractive.[57] Hoberg's work cites several examples of Canada's emulation of US environmental policy, an unsurprising result given the US' size and influence.[58] He notes that emulation occurs through two modes, one elite driven and the other activist driven.[59] What is unique about the Canada-US comparison on endangered species legislation is that, unlike the cases of policy convergence cited in Hoberg's studies, this is a case of divergence in which Canadian policymakers decided to avoid the perceived negative lessons of the ESA. In the words of Amos et al, it is an example of "reverse emulation."[60] Indeed, Hoberg's article "Sleeping with an Elephant" mentions that emulation – as a type of lesson drawing – "can be negative as well, where Canada deliberately avoids particular policies because of the undesirable consequences it sees resulting from U.S. policy."[61]

Lesson Drawing

Richard Rose's seminal work on lesson drawing serves as a point of reference for the work of many other scholars.[62] Lesson drawing "addresses the question: Under what circumstances and to what extent can a programme that is effective in one place transfer to another."[63] Lesson drawing can be lessons of history and can thus be drawn across time in which governments search their own past for policy solutions that worked before. Lessons can also be drawn across space in which governments look to other jurisdictions within their country or within foreign countries.

A lesson is drawn through one of five ways: copying, emulation or adaptation,[64] hybridization, synthesis, and inspiration.[65] A notable omission in Rose's list is his failure to specifically incorporate drawing a negative lesson. Negative lessons are examples of policy failure that show on looking countries what *not* to emulate. A summary of some of the references to negative lesson drawing in the literature can give a sense of the influence of negative lessons; however, it should be noted that on the whole scholars have not theoretically or empirically developed the concept of "negative lessons" or "reverse emulation."

Although negative lessons are not identified in Rose's five ways of drawing lessons, he does at least mention that lesson drawing can be both positive and negative.[66] In his words, "If the lesson is positive, a policy that works is transferred, with suitable adaptations. If it is negative, observers learn what not to do from watching the mistakes of others."[67] Rose also explains that only "if another country is doing better in handling a specific problem can a positive lesson be drawn. If it is evaluated as doing worse, then any lesson will be about what not to do."[68] Crucial in lesson drawing across nations is the existence of exemplars that epitomize certain programs or policies. These exemplars can attract admiring policymakers or critics "looking for ammunition to use against similar proposals at home."[69] Dolowitz and Marsh make a point of stating that the terms policy transfer and lesson drawing are analytically

distinct but they "use the term lesson drawing because, in many cases, lessons are drawn from other places or times which do not result in policy or institutional change. So, for example, in some cases a negative lesson may be drawn about how not to proceed."[70] Likewise, Colin Bennett and Michael Howlett also mention in a footnote the implications of drawing negative lessons, stating that "learning is both about what to do, and about what not to do, so the same program can act as a model or exemplar for one country, and exactly the reverse for another."[71]

Lesson drawing is important to this story because the US ESA came 29 years before SARA so Canadian actors were able to use the ESA experience to draw positive and negative lessons. Indeed, in this analysis it was the negative lessons that were the most pronounced, especially among the Canadian business community and policymakers. As will be shown, cross-national lesson drawing then exaggerated the differences between the two endangered species statutes.

Thesis Outline

The rest of the thesis proceeds in four chapters. Chapter 2 analyzes how public opinion, actors, and institutions shaped the 1973 US Endangered Species Act. The chapter starts with a discussion of how public opinion shaped the ESA, boosting as it did the cause of environmentalists and providing electoral incentives to politicians to enact environmental legislation. The strong influence of scientists, environmentalists, and bureaucrats in creating a stringent ESA, as well as industry and landowner silence on the issue, will also be demonstrated. The institutional changes that occurred during the early 1970s and their impact on the US separation of powers and federalism will also be examined, with the two most applicable changes being the centralization of environmental policy and the re-structuring of the Congress-executive relationship. Although there is a dearth of information on why only Alaska Natives were exempted in the ESA, what is known about the provision will be elucidated. The chapter's

epilogue then discusses the controversies post-1973, which will shed light on Chapter 3's analysis of cross-national lesson drawing.

Chapter 3 examines the influence of public opinion, actors, and cross-national lesson drawing on Canada's Species at Risk Act. In terms of public opinion, as discussed by Amos et al, the environment and endangered species were not top priority issues for the public. Politicians had few electoral incentives to enact tough endangered species legislation but had much more incentive to do the opposite since Canadian industry and landowner groups, learning from their US counterparts, opposed adopting an ESA-style policy. In addition to discussing industry and landowner groups, Chapter 3 also evaluates the role of scientists, environmentalists, and the Species at Risk Working Group in shaping the Act, including an analysis of how all these actors drew positive or negative lessons from the US experience. Policymakers themselves also learned from the American example, building on a long history of Canada-US collaboration. The chapter further analyzes the interesting politics behind the Aboriginal-related provisions in SARA, a unique process and aspect of the Act.

Chapter 4 focuses on the workings of Canada's parliamentary government in shaping SARA including how interdepartmental negotiation and the fusion of executive and legislative branches yield highly discretionary statutes like SARA. Interestingly, due to the atypical political timing of the SARA, party discipline in this case was not able to keep some adept Liberal MPs from garnering key concessions from the government. An analysis of the impact of Canadian federalism on the Acts will also be conducted, specifically looking at the shared jurisdiction over the environment, provincial reactions and sensitivities to the legislation, and the subsequent intergovernmental negotiation.

Chapter 5 will briefly restate the insights from the previous chapters, but most importantly draw comparisons between the ESA and SARA. As such there will be an evaluation of: a) how public opinion hindered or overcame obstacles to collective action; b) whether the

differences in political institutions between the US and Canada are consistent with the differences in the ESA and SARA's provisions; and c) whether the differences in the constellation of actors and their relative influence are consistent with the differences in policy outcomes. Further, the conclusion will show how the two cases are not completely independent due to cross-national lesson drawing as Canada learned from the US experience. Specifically, the US's controversial experience helps explain why the business community was very active in Canada and the US example also reinforces Canada's parliamentary predisposition to adopt a discretionary and more cooperative statute.

CHAPTER II
The US' 1973 Endangered Species Act: Public Opinion, Actors and Institutions

The plight of imperilled wildlife was seen as the quintessential environmental issue when the United States enacted its *Endangered Species Act of 1973*. Species endangerment was a poignant, symbolic issue about which everyone was concerned. Scientists and environmentalists helped galvanize the public in favour of the legislation while industry stood by silently, seemingly unaware that there could be any negative implications from the ESA. Indeed, spurred on by widespread support policymakers crafted a very "prohibitive policy,"[72] so much so that the Act earned the title of being "the pit bull of environmental laws"[73] and "the most far-reaching wildlife statute ever adopted by any nation."[74] The ESA's non-discretionary provisions, from its listing requirements to its strict prohibitions, demonstrate why the Act has earned such titles. More specifically, it is the various controversies that have developed *from* the implementation of these provisions that have given the ESA its infamous reputation.

This chapter is structured in five parts. First, public opinion will be discussed to provide context to the endangered species issue. Second, the role of actors in shaping the ESA's provisions will be evaluated. Third, there will be an examination of how the separation of powers, federalism, and the four institutional changes that characterize 'pluralist legalism' impacted the creation of the ESA. Fourth, there will be an analysis of how public opinion, actors and institutions – dealt with separately in the body of this chapter – combine and interact to effectively explain the policy provisions of the 1973 Endangered Species Act. Finally, an epilogue will be given describing the main controversies that occurred in the post-1973 ESA implementation stage; this section is meant to be a backdrop for the cross-national lesson drawing phenomenon discussed in Chapter 3.

Public Opinion

Since an Olsonian analysis would predict that politicians would not want to enact environmental legislation, especially legislation that is extremely prohibitive, the question that must be asked is why did the US government enact the ESA? Harrison answers this question, as it applies to environmental legislation in general, by stating that "[t]he most compelling explanation for environmental policy is that public opinion occasionally overcomes the obstacles to collective action, thus transforming politicians' incentives."[75] A combination of factors such as political entrepreneurship and unusual events that gain media attention can provide the impetus needed for a diffusely affected public to see the environment as a high priority issue that they want to support. Politicians seeking re-election will accordingly take notice and respond. In a Downsian fashion, then, politicians will be most responsive to enacting environmental legislation when there are peaks in environmental salience among the public.[76]

One such peak occurred in the US in 1970; the period from the late 1960s to early 1970s is, in fact, known as the first environmental wave. During this wave environmental groups flourished, Americans increasingly participated in outdoor activities, and the media focused immense attention upon the environment.[77] Further, civil rights and anti-war activism fostered "a sense that change is possible" and created "a search for a less conflictual issue" – conditions that were ideal for the rise of environmentalism.[78] Arguably the climax of this increased public awareness of the environment took place during the extensively media-covered 'Earth Day' of April 1970 where "literally thousands of schools and organizations staged demonstrations, sit-ins, automobile burials, debates, and harassment of various industries."[79] Gallup polls conducted in 1965 and 1970 showed that air and water pollution went from being rated as the ninth to second highest priority for Americans,[80] as 17% of the public named air and water pollution as a national problem in 1965 while that figure more than tripled to 53% in 1970.[81]

Politicians took notice and a steady stream of environmental legislation was enacted. These included the 1969 National Environmental Policy Act (NEPA), the 1970 Clean Air Act amendments (CAA), the 1972 Federal Water Pollution Control Act Amendments,[82] the 1972 Federal Environmental Pesticide Control Act, the 1972 Coastal Zone Management Act, and the 1972 Marine Mammal Protection Act (MMPA). Specific to endangered species were the 1966 Endangered Species Preservation Act, the 1969 Endangered Species Conservation Act, and the 1973 Endangered Species Act (ESA). Also, as will be expanded upon in the institutions section below, after public opinion gave an impetus for the creation of prohibitive policy in the form of NEPA and CAA; these Acts then provided the template for subsequent environmental legislation, including the ESA.

All three endangered species statutes were extremely popular among the public as the policies addressed a classic 'motherhood' issue. The media picked up on the popularity of defending endangered species as early as 1965 with the *Washington Post* featuring an article on "Wildlife: The Vanishing Americans" and the television show "The Wild Kingdom" drawing attention to the predicament of species at risk.[83] As Steven Yaffee asks and answers, "Why was the endangered species issue so popular? For one thing, the image of furry animals drawing their last breath is an extremely poignant one."[84] The legislation's symbolic popularity was not lost on politicians who vied to be seen as the champions of imperilled wildlife.

Some scholars regard the 1970 Earth Day as representing the climax of the first environmental wave,[85] with some evidence existing that the salience of environmental issues did decline thereafter. For example, the Louis Harris study showed that only 13% of Americans polled in 1972 and 11% of those polled in 1973 volunteered an environmental issue as one of the biggest problems that they faced, a significant drop from 41% in 1970.[86] Similar results were found in a State poll, the Wisconsin study, in which 15% of respondents polled in 1972 offered

environmental problems as one of the two most important problems facing the State, compared to 40% in 1970.[87]

In interpreting these findings, Riley Dunlap offers a caveat. In his opinion, there is no clear answer to the question, "What, in fact, happened to public concern for environmental quality in the years immediately following 1970 and the first Earth Day? Sadly, the data needed for providing anything approximating a definitive answer to this question are not available."[88] Dunlap states that pollsters often stopped asking the same questions as they had in the sixties and did not ask new questions to provide a baseline for following data trends in the seventies.[89] There are also questions around the validity of polls which ask for "most important problem" responses, such as the Harris study cited above, as respondents are easily susceptible to change in media attention and even if there is a credible decline in salience it may "*not* [be] matched by decline in strength of commitment to environmental protection."[90] Also, since the research conducted for this thesis did not uncover any opinion poll data relating specifically to support for endangered species legislation, it is not completely evident that, when the ESA was enacted in 1973, the issue of wildlife protection had lost its importance among the public. These caveats notwithstanding and although not completely conclusive, it is fair to conclude that some degree of decline in public attention toward the environment certainly occurred after 1970. Thus, politicians were riding the environmental wave, even as it dissipated, and the 1973 ESA was an outcome of that.[91]

Overall, it is also noteworthy that the ESA was enacted in 1973, at the tail end of the green wave, when, as suggested by the qualitative evidence, endangered species legislation was still popular if not as salient among the public. In fact, rather than 1970 signifying the end of the green wave, Yaffee believes that the "[e]nactment of the Endangered Species Act of 1973 probably represents the peak of this wave."[92] Further, the fact that several of the environmental policies listed above were enacted after 1970 gives some indication that the government felt the

environment was still a significant issue for the public. Specifically, the fact that there was high bipartisan support for endangered species legislation – particularly surprising when associated with Republicans – suggests that politicians perceived that that public was in favour of the legislation. In addition, the impetus for the ESA started in 1970 when bills were introduced into Congress to widen the scope of the 1969 Act, with the ESA then really getting off the ground in 1972.[93] Consequently, public opinion from 1970 to 1973 represents a more accurate reflection of the support for the ESA than an analysis of polls conducted only in the final year that the Act was adopted.

The Strategies of Actors

Scientists

Growth in scientific knowledge in the US first expanded during the post-war years in such fields as ecology and ecosystem modeling, consequently helping to increase the scientific understanding of wildlife and its protection. Scientific organizations addressing wildlife and conservation also proliferated in the mid-twentieth century, including the American Conservation Association, the American Institute of Fishery Research Biologists, and the Conservation and Research Foundation.[94] However, it was the 1960s and 1970s in particular which "saw an explosion of theories and data in community ecology and island biogeography."[95] The expansion of scientific knowledge changed the understanding of the cause of species endangerment. According to Yaffee, those studying species endangerment moved from viewing this as a problem of overutilization of species, with the policy implication that it could be "corrected by regulating the taking of and commerce in endangered species", to conceptualizing the policy problem as dealing with habitat loss which could be "corrected by refuge acquisition."[96] Although scientific understanding was increasing it was only in the 1980s that the term 'biodiversity' was used and the discipline of conservation biology developed.[97]

Scientists during this period were not just objective experts in their fields; many of them played an active role in bringing forward issues of concern to the public and government. In his 1972 analysis of the emerging conservation movement, Donald Fleming labelled these scientists as a new group of "politico-scientists" and these experts often focused on endangered species.[98] Fleming notes that there were always influential scientists who at times conferred with politicians, but that these scientists often bypassed the public. The politico-scientists on the other hand actively educated and organized the public. As Fleming puts it,

> The new politico-scientists came to perceive themselves as a kind of Fifth Estate of the realm, working in tandem with the Fourth Estate to keep the public and public officials informed and aroused about scientific issues with a social dimension....the new category of politico-scientists...were precisely trying to stir up a lay constituency and to organize lay, as well as professional, pressures upon Congress and the President.[99]

Perhaps the best-known politico-scientist at the time was Rachel Carson, renowned ecologist and editor for the Interior Department's Bureau of Sport Fisheries and Wildlife (BSFW). Carson's *Silent Spring*, a "...calculated political effort to stem the widespread use of pesticides", was published in 1962 and represented the early beginnings of the environmental movement in the US.[100]

Relating specifically to the ESA, the government scientists in the BSFW, in particular the Committee on Rare and Endangered Wildlife Species, were important actors in the endangered species policy arena. The Committee, composed of nine biologists, was created in 1964 to be part of the BSFW. That year they drafted the first official list of endangered species, known as the "Red Book", in which the Committee members made a conscious choice to have a strictly scientific understanding of endangered species, a definition of the policy problem which excluded socio-economic considerations. Since the Committee's "Red Book" did not trigger any formal federal protection these scientists were able to frame the policy problem as a purely scientific issue. Their decision regarding which species to list was based only on biological information and was made independent of the influence listing might have on the BSFW.[101]

The BSFW scientists and wildlife managers, particularly those who were part of the Committee, then proceeded to pressure the government internally for endangered species legislation.[102] The Committee's technical codifications – in which their initial listing of species had no perceived policy implications – then became part of the 1966, 1969 and 1973 endangered species legislation and thus suddenly *did* have policy implications. As scientists were the first to define the endangered species problem as a technical matter in 1964, policymakers and politicians accepted the definition in all subsequent efforts at addressing the policy problem. That the BSFW scientists took an active stance to pressure the government is indicative of the fact that these scientists were not only distributors of (im)partial scientific knowledge but also political "actors" in the endangered species policy field. The technical definition of species endangerment and listing was critical to the 1973 ESA because it helped increase the scope of the Act and because the definition of a problem at the agenda setting stage affects all of the policy's subsequent stages: policy formulation, decision-making, policy implementation, and policy evaluation.[103] These stages then constrain and affect the behaviour of the public, particularly industry and landowners whose work on the land has an impact on endangered species.

It is interesting to note that policymakers and politicians did not attempt to change the scientific problem definition of species endangerment despite the fact that the issue potentially tested the frontiers of what scientific knowledge understood about preventing species endangerment. That the knowledge of wildlife loss was not a definitive science in the late sixties and early seventies is alluded to in Sheila Jasanoff's discussion of the contested boundary between the concept of "science" and "trans-science" [104] She notes that in the 1960s the technical information scientists provided government was rarely questioned for being biased or subjective. Only in the early 1970s with the pressure on science to know "the possibly

unknowable" in areas of environmental policy, such as prevention of wildlife loss, did the indeterminacy of science and uncertainty of scientific advice become more apparent.[105]

It would thus seem that the scientific framing of the endangered species problem in the ESA would also be called into question, particularly given its creation in the early 1970s as a preventative policy which too "placed unprecedented demands on the capacity of science to predict future harm."[106] Yet, although knowledge in ecology, ecosystem modeling, and island biogeography was only just burgeoning, it seems that the Committee did not draw attention to any possible grey areas of scientific knowledge concerning wildlife loss in their technical codification of the endangered species issue. Since the Committee framed the problem in 1964, it could be that the idea was not controversial in the early 1970s because it was already accepted as the norm, presumably due to the fact that this knowledge had not yet been extensively tested.

Politicians accepted the scientific framing of the issue because no alternative was offered. As will be discussed, despite the ESA's expanded stringency, even business and landowners did not challenge the 1973 Act nor did they tell policymakers to change the solely scientific understanding of the problem.[107] Everyone assumingly bought into the scientists' framing of the issue. In the end, because scientists were given the reigns to define the endangered species problem at the agenda setting stage, it was not apparent that there should be anything but strict legislation since factoring in the socio-economic impact was not seen as necessary or relevant.

Environmentalists

Politico-scientist Rachel Carson's *Silent Spring* marked the beginning of newfound awareness and appreciation for the environment among the public. People were drawn to outdoor recreation and buoyed by increased public attention to the environment, ENGOs flourished during the 1960s. Old and new environmental groups were able to take hold of the

opportunities afforded by increased visibility of wildlife issues. Traditional conservation groups such as the National Wildlife Federation were effective in lobbying the government and garnering additional members and support for the state-level management of wildlife. Furthermore, there was a growing constituency of preservation groups who were not hunters and wanted federal legislation to protect, and not just manage, wildlife.[108]

ENGOs played an important part in bringing about several pieces of legislation before the ESA through their mobilization of the public and their ability as lobbyists.[109] Indeed, politicians felt the pressure to appease increasingly powerful environmental lobbies, which successfully capitalized on the public's mood to enhance their positions. Indeed, the ENGOs "ability to mobilize significant numbers of supporters and their developing expertise became both a potent weapon and a resource valued by elected officials" especially since politicians realized they "could get elected on environmental platforms."[110]

Indicative of the influence of environmental groups is the fact that prominent politicians became associated with ENGOs. Yaffee gives the example of John Dingell (D-Michigan) who was "considered by pro-wildlife groups as their patron."[111] Dingell helped introduce various versions of successive endangered species legislation into the House; he was also the chairperson of the Subcommittee on Fisheries and Wildlife Conservation which held hearings on the endangered species acts. In the record of one such hearing, Dingell's introduction of Louis Clapper of the National Wildlife Federation reflects the amicable relations between the ENGO and himself. As Dingell warmly said, "Our next witness is an old friend, Mr. Louis S. Clapper...it is always a pleasure to have you before the committee."[112]

The preservationists in particular lobbied effectively for stringent measures to be included in the ESA; these provisions included the following: broadening the definition of species, expanding the understanding of 'taking' to include activities which cause indirect harm to a listed species such as the destruction of habitat, enabling the States to enact more

prohibitive legislation, and including a citizens suit provision. In addition, preservationists, joined by BSFW experts and House Committee staff, stressed that federal agencies should be mandated to cooperate with the Act. Consequently, the words "where practicable" were deleted and all federal agencies were compelled to use their authority in furthering the purpose of the ESA regardless of whether it was "practicable." This was a decisive change in the legislation. While earlier wording allowed agencies to implement the law at their discretion, "making trade-offs between endangered species objectives and their other agency goals," now the mandate was absolute and government agencies were required to take such action as necessary to protect endangered species and their critical habitat.[113]

The influence of ENGOs seem to stem from two particular factors. First was the timing of the 'green wave' and public opinion. ENGOs were benefiting from the fact ESA came at the tail-end of the green-wave, when both the public and those in government were still championing this seemingly no-lose, popular, symbolic issue. Second, commercial interests did not oppose the 1973 Act, seemingly unaware that such a prohibitive policy would have any effect on their interests. This interesting lack of action by industry is the subject to which we now turn.

Industry and Landowners

The fact that industry and landowner interests played virtually no role in the policymaking process leading up to the 1973 ESA is a unique aspect of this legislation.[114] For their part, agricultural interests never voiced any protest throughout the entire policymaking process of US endangered species legislation; in fact, they never mobilized until the 1980s by which time the impact of the ESA on private property was readily apparent.[115] Indeed, when asked for a report by the House Committee on Merchant Marine and Fisheries, the Department of Agriculture wrote of their strong support for the proposed 1973 legislation.[116] Since the fur

and leather industries were aware of the negative impact of the 1969 Act and avidly lobbied at that time, it is surprising that in 1973 no groups testified at the House hearings and only "a couple of groups representing the fur industry and state fish and game agencies" appeared before the Senate hearings, even though policymakers made the ESA much more prohibitive than previous legislation.[117] In fact, even the two groups who voiced their opposition to the bill were not paying full attention as they only expressed concern about the pre-emption of State authority.

It is also interesting to note that in 1969 the fur industry was cognizant of the implications of leaving the listing decision exclusively up to BSFW scientists. In fact, in 1969 they had unsuccessfully lobbied to make listing permissible only if "such determination shall not be contrary to the public interest in terms of its impact on domestic consumers and businesses."[118] Yet a few years later in 1973 industry groups and landowners never protested the fact that scientists were the only ones defining the policy problem, and that these individuals framed species endangerment as a purely scientific issue that left out socio-economic considerations. Industry completely overlooked the fact that the listing of species triggers all the other steps in the implementation process – from prohibitions to recovery plans – which in turn constrains the ability of industries and landowners to use and generate income from the land. [119]

In hindsight many of the Act's provisions should have been 'red flags' for industry groups. The citizen suit provision gives citizens the right to bring private law suits against industry. There is the potential for severe restrictions on the use and value of land due to the mandatory prohibitions and recovery plans, with no possibility for compensation. There is also the issue of regulatory uncertainty related to the enforcement of the prohibition on taking a listed species since the definition of 'take' is so broad and even includes modifying an endangered species habitat. Nonetheless, the aforementioned negative impacts of creating a stringent policy apparently were not evident to observers. Scholars state that it was just not

obvious at the time that the ESA would be controversial since it "did not threaten any readily identifiable interests"[120] and "[i]t was viewed largely as a symbolic issue with few obvious costs."[121]

Industry and landowners were clearly blindsided by a bill that everybody was in favour of at the time. There was also remarkable bipartisan support in Congress for the ESA, "with Democrats and Republicans in clumsy competition to be considered the more devoted defenders of wildlife."[122] Support for the issue was augmented by the policy problem being framed in such a way that "it [was and] is difficult (at least in the abstract sense) to argue in favour of extinction."[123] Moreover, it is not so much that industry and landowners were caught up in the popularity of the issue, as much as they were simply caught off guard. Commercial interests were just not paying attention in 1973 as they had been in 1969.

Government Actors

The role of the BSFW's Committee scientists was discussed above, but the BSFW staff as a whole also had an important role in pressuring for certain provisions and even crafting the various draft bills leading up to the ESA. For example, in 1972 the BSFW co-authored the draft administration bill along with the House Subcommittee on Fisheries and Wildlife Conservation; this bill was the basis for the 1973 ESA.[124] The participation of the BSFW did not occur in a vacuum, its efforts were guided by public opinion and pressure from environmental groups. The stringency and scope envisioned by the BSFW for the 1973 Act is seen in its draft environmental statement (DES) on the proposed Endangered Species Conservation Act of 1972.[125] This document was the basis for the testimony by Nathaniel Reed, Assistant Secretary for Fish and Wildlife and Parks in the Department of the Interior. The following four statements contained in the DES, and commented on by Reed, demonstrate the role played by the BSFW in creating an Act that would go much farther than the previous two bills.

First, as testified by Reed, the BSFW at this point was beginning to understand the importance of habitat as "a key factor in protection and restoration" of endangered species.[126] As such, the BSFW recommended "the deletion of current ceilings on the acquisition of habitat for endangered species."[127] Second, the BSFW felt strongly that there needed to be adequate steps taken to prevent species from becoming endangered instead of just protecting a species once it reaches an endangered state. Hence, the draft report states that they extended the definition of "endangered" to include species that are "likely within the foreseeable future to become threatened with extinction...."[128] Reed reiterated this in his testimony before the House. In his words, "[a]lthough it is imperative that we take immediate steps to prevent species presently threatened...it is equally, if not more important that we not overlook other species whose populations have been reduced, but are not yet threatened with extinction."[129]

Third, the BSFW recommended that *all* federal agencies and departments be required, "when practicable," to ensure that any actions taken by them are in accordance with the new Act and do not jeopardize endangered species in any way.[130] As mentioned above, due to pressure from preservationists, the words "when practicable" were subsequently deleted. In fact, as stated in the DES this provision was "the first piece of substantive law which agencies would have to adhere to in carrying out their programs and duties, as it would prevent them from taking action which would jeopardize the continued existence of endangered species."[131] Finally, the scope of the ESA was broadened considerably, as the BSFW drafted the Act such that the taking of a listed species would be "a Federal offence for the first time and would in effect remove listed species from the States' jurisdiction."[132] Reed's concern was that it was legal in some States to take endangered species and that in some instances States did not provide adequate protection for species. Thus, the BSFW drafted a policy that would apply everywhere in the US unless a State's program was deemed comparable to the ESA.[133] As Reed put it tactfully

> Mr. Chairman, we do not intend to usurp the privilege of the States to manage their resident wildlife. However...one State, acting alone, cannot effectively protect its native endangered species...All States must agree to certain standards, to certain management practices, to certain controls or restraints if we, as a Nation, are to assume the responsibility for safeguarding our environment for future generations.[134]

Interestingly, the DES also shows that the BSFW had a modicum of awareness that the ESA *may* lead to negative impacts on "commercial uses such as agriculture."[135] The BSFW devotes a section on the impacts that the ESA could have on animals and humans but felt that the "adverse effects [on humans]...are generally restricted to unique human groups and are related to the taking of these species; i.e. hunting, fishing, trapping...."[136] The DES also contained a section on "mitigating measures" in which the BSFW outlined ESA provisions which would diminish any potential problems. For example, the Secretary could grant permits, authorize takings for scientific or education purposes, and delegate regulatory and management authority to States.

On the whole, however, it does not seem that the BSFW felt there would be any significant problems with the Act's implementation, indicating that it just did not foresee the controversy that could surround an Act which had no opponents at the time. Indeed, it was largely the lack of protest and lobbying by industry and landowners that lulled members of Congress into believing there were no obvious costs from enacting such a stringent Act. As Yaffee notes, "Congress defined the law prohibitively because no one told them not to."[137] On the other hand, there were many who did tell them to enact such a prohibitive policy. Members of Congress were reacting to public opinion in support of protecting endangered species. Senators and Members of the House were also constrained by the technical definition of species endangerment in which listing excluded the evaluation of socio-economic considerations. In addition, ENGOs were lobbying especially hard, with preservationists demanding and getting many of their tough recommendations. In the end the BSFW was able to garner the stringent Act it had envisioned in the 1973 DES.

Alaska Natives and Native Americans

One of the obvious differences between the ESA and SARA is the lack of consultation with and lobbying by Native Americans and the paucity of provisions relating to Native Americans in the ESA. The ESA does, however, contain *one* provision under section 10(e): Alaska Natives are exempted from prohibitions on taking or importing a listed species if such action(s) are for subsistence uses and traditional handicrafts. Although policymakers addressed the interests of Alaska Natives, the tribal members in the lower 48 states are not mentioned in the Act. Two possible reasons exist to explain why Alaska Natives were the only Native Americans specifically referred to in the ESA: first, during the time of the ESA the Alaska Native Claims Settlement Act (ANCSA) was being negotiated and eventually passed in 1971; second, there was discussion about, and approval being sought for, the building of the Alaska Oil Pipeline, both of which put the interests of Alaska Natives at the forefront of politicians' minds.

However, it is interesting to note that the BSFW actually intended to include all Native Americans in the exemption. As previously mentioned, the BSFW co-authored the draft bill of the ESA with the House Subcommittee on Fisheries and Wildlife Conservation. In its draft environmental statement outlining its vision for the bill, the BSFW stated that "[t]he prohibition against taking or importing would not apply to American Indians, Aleuts or Eskimos residing within the jurisdiction of the United States insofar as their taking of a listed animal was for personal consumption or for ritual purposes."[138] This bill was introduced into the House on February 8, 1972, with an identical bill also introduced in the Senate on February 18, 1972.[139]

According to Yaffee, in July 1972 a second more stringent bill was introduced in the Senate which, among other things, "deleted the exemption for Eskimo use of endangered species...."[140] Unless Yaffee meant to say 'exemption for Native Americans', sometime between the drafting of the first bill and the 1972 Senate bill, the exemption was limited from all

Native Americans to only Alaska Natives, after which, in July 1972, even the Alaska Native exemption was deleted. The 92nd Congress ended before the ESA was passed, but in the beginning of the 93rd Congress another House bill was introduced which also "deleted the exemption for Eskimos...."[141]

Yaffee does not say when the Alaska Native exemption was reintroduced, or by whom, but it might have been in February 1973 when a new administration bill was introduced to Congress shortly after President Nixon's Environmental Message, as the new bill initially weakened certain aspects of the ESA.[142] However the provision was reintroduced, the Alaska Native exemption remained in the conference report, which worked out differences between the final Senate and House bills. The conference bill was immediately passed in Congress and then signed into law by the President on December 28, 1973.[143]

The Role of Institutions

Separation of Powers and Federalism

In the US congressional system, with its system of checks and balances, there is a separation of powers between the legislative and executive branches of government. The legislative and executive branches are separate in that the president cannot choose Cabinet members who are from the legislature and, in turn, members of Congress cannot be part of the executive. As will be described in more detail, this separation applies to the ESA in that "[i]n the American separation-of-powers system, Congress does not trust the executive, and it therefore writes highly specific statutes."[144] As put by Terry Moe and Michael Caldwell, one feature of the separation of powers is that the winning groups, that have authority today, want to safeguard the agencies they have structured from changes by their opponents, who could gain authority and control tomorrow. Indeed, "[t]he most direct method [to do so] is to narrow the discretion of bureaucrats and future authorities by specifying in great detail what agencies are to

do – through decision criteria, procedures, timetables, personnel rules, and other restrictive rules."[145]

The ESA is an example of such a carefully crafted statute, with restrictive standards and prohibitions written in non-discretionary language. Such a statute gives environmentalists the legal tools to ensure implementation of the statutory mandates and makes it difficult for the executive branch to deviate from the statute even after the prominence of environmental issues has waned from public consciousness. In particular the non-discretionary language of prohibitions and citizen suits leaves little-to-no-room for interpretation, giving way to court decisions that, though highly controversial, are still in line with the spirit of the ESA. The best example of such a court decision is the 1978 Supreme Court decision to stop construction of the $110 million Tellico Dam project, in order to protect the population of a three-inch fish called the snail darter.[146] In delivering the opinion of the Supreme Court, Chief Justice Burger stated that "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*. This is reflected...in literally every section of the statute."[147]

US federalism also helps explain the ESA. As will be discussed below, since 1970 the federal government in the US has taken the lead role in the environment. According to Denise Scheberle, the idea was that federal agencies would set stringent environmental standards and monitor State progress while the State and local governments would be given the responsibility of achieving these standards and implementing environmental programs. As such, the 1970s signified the beginning of federal intervention into what was once State jurisdiction over policy, including environmental policy.[148] As Scheberle puts it, "[t]he prevailing national pattern for environmental policy was to write strong statutory language that relied on command-and-control regulatory schemes and an initial pre-emption of State laws, then permit devolution of responsibility back to State and local governments."[149] Under legislation like the ESA, the

"principle of primacy" was also prominent, essentially meaning that a State's laws and regulations could not be less strict than federal law and regulations, but could meet or beat federal standards.

The dynamics of federalism explain the federal-state provisions under section 6 in which States can enter into agreements with the federal government and in that way control the management, research and monitoring of endangered species through State programs.[150] As indicated by Scheberle, the caveat is in the legislation's principle of primacy in which State programs must meet federal standards. Specifically, section 6(f) of the ESA specifies that State programs may be more restrictive than the exemptions, permits or regulations in the ESA "but not less restrictive than the prohibitions so defined."

It must be noted that the passage of the ESA is not a "partial-preemption" approach with the federal government then delegating complete authority back to the States.[151] Rather, the primary responsibility for species protection lies with the federal government and enforcement is carried out by federal agencies. As John Ernst states,

> The Endangered Species Act of 1973 took away state control of taking for species listed under the act, setting in place an uneasy relationship between state and federal wildlife agencies. Like unwelcome in-laws, the federal government stepped in to work with the states on these key species. While working with the state agencies, the federal government retains control over the purse strings and the ultimate control – takings.[152]

In general, though, the States still have some role to play through section 6 which specifies that the Interior Secretary must cooperate with the States "to the maximum extent practicable." This includes consultation with the States before acquiring State land for protecting species. Thus, the States do have some room to manoeuvre in managing resident species.

Institutional Changes in the 1970s

Congress both drastically limiting the discretion of the executive and centralizing environmental policy was made possible by the US separation of powers and the dynamics of

US federalism in the 1970s respectively; these phenomena were a novel approach that occurred during the first environmental wave. Specifically around 1970, four significant institutional changes occurred that increased the institutional significance of the US' separation of powers and federalism on the creation of the ESA. Since these changes, alluded to above, occurred during the time of the policymaking process leading up to the ESA, they had a direct impact on the way the ESA was structured. As described by Hoberg, these four institutional changes are the centralization of environmental regulatory authority, the restructuring of the Congress-executive relationship, the transformation of the citizen-administrative state relationship, and the opening up of the court process to public interest groups.[153]

The first of the four institutional changes – regulatory authority over the environment being "dramatically expanded and centralized at the federal level"[154] – effectively gave power to the federal authorities to enact a stringent endangered species policy in non-discretionary language without difficult state-level interference. As discussed above, the ESA was very much a product of this newly emerging national pattern of centralization. Indeed, the BSFW said as much in their draft environmental statement, indicating that the ESA would make taking of a listed species "a Federal offence for the first time and would in effect remove listed species from the States' jurisdiction."[155]

Centralization occurred amid "an increased belief in federal regulation as appropriate public policy."[156] This sentiment, as it applies to the centralization of environmental policy, was reinforced by that fact that public attention towards the environment reached an all time high in 1970 and that ENGOs were pushing for strong legislation. These factors, in turn, prompted several federal environmental statutes to be enacted prior to the ESA. Most notably, the 1969 National Environmental Policy Act and the 1970 Clean Air Act Amendments were the first two proto-typical policies of this newly centralized regime. The CAA was particularly stringent in that it required that car emissions be eliminated by 90 percent over a five-year period, earning

the Act the name of being "perhaps the most extreme version of these so-called action-forcing statutes."[157] As Harrison states, the CAA "served as a template for subsequent US federal environmental statutes..." and really set the aggressive tone and path for the stringent Acts that immediately followed it, including the ESA.[158]

The second institutional change was that these new statutes restructured the relationship between the Congress and the executive branch; Congress no longer delegated large amounts of discretion to the executive branch but rather wrote comprehensive legislation in such a way as to limit the discretion of administrators.[159] This indeed was a new path because Congress had seldom previously relied on such an approach. Once the approach to limit executive discretion was in place, the path was resistant to change and persisted into the 1990s. Similar to Moe and Caldwell's statement above, Paul Pierson notes that one of the reasons why formal institutions (including policies) are change-resistant is that "those who design institutions and policies may wish to bind their successors."[160] Political actors are wary of political rivals and so create rules that are hard to reverse.[161] This concept can thus be applied to the fact that, as stated above, in the American separation-of-powers system, Congress writes highly specific statutes because it distrusts the executive. This second institutional change thus helped produce the stringent, non-discretionary language of the ESA. In addition, the ESA has not undergone much change and is in many ways path dependent, helping to explain why it remains a prohibitive and controversial policy more than thirty years after its enactment.

Third, the new statutes, including the ESA, "transformed the relationship between citizens and the administrative state" with citizen groups like ENGOs being given access to the courts that they were previously denied.[162] The incorporation of citizen suits in environmental statutes, and the nondiscretionary language of the statutes which specified particular objectives and deadlines, "gave these groups a 'cause of action' to take to court."[163] The ESA is a classic

action-forcing statute. This is seen in both the ESA's citizen suit provision – a provision which was first incorporated into the CAA – and in the strictly defined wording of the Act.

Fourth, several changes occurred within the courts. These changes include the following: courts began to provide access to public interest groups, courts were able to review more types of administrative decisions, judicial review of these administrative decisions were intensified, and these reviews occurred earlier in the process.[164] In essence, judicial activism became a feature of the institutional landscape.

These four institutional changes culminated in a new doctrine that Hoberg labels "pluralist legalism" which is "both a set of formal institutional relations and a guiding public philosophy"; it is similar to what Robert Kagan has recently labelled "adversarial legalism."[165] Pluralist legalism opened the policy process to groups besides business organizations. This is important because the inclusion of environmental groups in the institutional process enhanced these groups' lobbying power and was an important reason for why such statutes as the ESA were created.[166] The concept of pluralist legalism is thus consistent with the institutionalists' argument that political institutions can structure the kinds of societal interests most likely represented in the policy process and give some groups privileged access to the decision-making process. Overall, the four main points – centralization, restructuring of the Congress-executive relationship, transformation of the relationship between citizens and the administrative state, and judicial activism – are also consistent with the institutionalist perspective, which holds that institutions and the rules of formal organization help lead to distinct policy outcomes.

Conclusion

To summarize, the ESA's seven policy provisions outlined at the beginning of this paper – listing, basic prohibitions, habitat protection, federal-State cooperation, non-discretionary language, citizen enforcement, and adversarial and litigious regulatory approach – can be

explained vis-à-vis an understanding of actors and institutions in the context of public opinion. This section will evaluate how each separate variable explains some, but not all, of the ESA's provisions and at the same time demonstrate how each variable fills in the explanatory gaps left by the others.

Public opinion provides the foundation for explaining the ESA. An Olsonian analysis would predict that a government would not enact endangered species legislation, or at least not such a prohibitive policy as that of the ESA. Public opinion explains why such an analysis is inconsistent with the ESA. Specifically, the increased public support for the environment during the first green wave overcame obstacles to collective action. Environmental groups were able to tap into citizens' growing concern over species endangerment and the media responded by providing increased attention to environmental issues. Public opinion thus gave impetus to governments to enact stringent legislation. As Hoberg states, "[p]oliticians read the polls, and the environment suddenly became an issue with which politicians struggled to become associated."[167] Even as late as 1972, Nixon was ardently championing the cause of strong endangered species legislation, which, for a Republican President to do, is an indication that he perceived he was backed by public support. Public opinion, however, does not explicitly explain the particular form that the statute took. For example, while public opinion gave a reason for politicians to enact strong legislation, it does not explain why the Act did not take into consideration socio-economic factors or why non-discretionary language was used. The role of actors helps explain the former while the role of institutions helps explain the latter.

With regards to actors, as stated above, scientists were not objective distributors of (im)partial scientific knowledge; many of them were active "actors" in the policy field. Such experts included "politico-scientists" such as Rachel Carson, who worked to bring scientific issues to the public, to organize a lay constituency, and to put pressure on the government. In particular, the government scientists in the BSFW's Committee, who framed the endangered

species problem as a purely scientific matter, successfully pushed for legislation to be enacted. As a result, the idea was incorporated into the ESA, with the Act stating that the listing process must be based *only* on the best scientific knowledge and thus exclude socio-economic factors. Politicians did not attempt to change the scientific framing of the policy problem because no one told them to do so. In fact, industry remarkably did not even testify before the House, as they seemingly did not understand the implications of a stringent statute. Perhaps they bought into the idea or, if they did have reservations, found it difficult to argue against the need for tough protection of imperilled wildlife. Whatever the case, lack of industry involvement also explains why an Olsonian analysis – which would predict that industry would protest and government would listen to such protest – cannot account for the ESA.

Government actors also enacted strong legislation because they had to satisfy an increasingly powerful environmental lobby that was strengthened by the current public mood. Preservation groups played a key role in garnering such provisions as a citizen suit provision, a mandate that federal agencies should be required to cooperate with the tenets of the Act, and an understanding that "take" includes indirect harm to a listed species such as that brought about by habitat destruction. The BSFW, as co-drafters of the legislation, also played a crucial role in ensuring that the Act was stringent. The draft environmental statute, which outlined their vision of the ESA, minimized the potential negative implications of the Act and instead emphasized habitat protection, mandated federal agency adherence to the ESA, and called for the taking of species to become a federal offence. In essence, politicians were told by everyone, from scientists to environmentalists to bureaucrats, to enact a prohibitive policy. By their silence industry implicitly approved the ESA as well. However, underlying this support was the fact that public opinion gave leverage to the pro-regulatory actors who put pressure on politicians. However, missing from an analysis of pluralism is an understanding of how the institutional context, within which actors participated, affected the creation of the ESA. Specifically, only a

discussion of institutional factors will shed light on how the US' characteristic system of separation of powers, federalism, and pluralist legalism structured the ESA.

Pluralist legalism set the US on a new path in terms of how the government created and enforced environmental legislation. The following two institutional changes that characterized pluralist legalism arguably had the most impact on the creation of the ESA. First, centralization of environmental regulatory authority helps explain how the ESA became a prohibitive federal policy without the need for extensive State consultation in the creation of the Act. With the move to centralized environmental policy, US federalism entered a new phase. The national pattern was now for the federal government to have primary authority over environmental statutes with some role given to the States provided they meet the primacy provision. Section 6 of the ESA reflects this change in intergovernmental relations dealing with environmental policy.

Second, the restructuring of the Congress-executive relationship meant that, for the first time, Congress was drastically limiting executive discretion by writing highly specific statutes. The separation of powers made such action by Congress possible.[168] Highly specific provisions translate into stringent, non-discretionary language as was used in the ESA. From the non-discretionary language in the ESA came stringent and broad provisions on listing, prohibitions, habitat protection, and recovery plans. Of course, the efforts of government scientists, the BSFW, and the environmental lobby also contributed to making the ESA's provisions stringent and non-discretionary. The fact that public sentiment was pro-environment aided these efforts. In addition, the doctrine of pluralist legalism set environmental policy on a brand new path in 1969, a path which can be explained, in part, by the role of public opinion and interest groups in giving Congress the impetus to start on such a new course.

As demonstrated above, no one variable explains why policymakers created such stringent provisions specifically or such prohibitive legislation generally. However, a

multicausal theoretical lens through which to understand the policymaking process leading up to the 1973 ESA does explain the Act's strongly worded provisions. Perhaps the most interesting and hotly debated issues of the ESA, though, are how effectively these provisions have been applied on the ground. The next section will discuss this topic in more detail.

Chapter Epilogue: Post-1973 Controversies

While no one foresaw any negative repercussions from the ESA in 1973, the socio-economic impacts on, and negative reactions among, industry and landowners soon became apparent. For their part, some environmentalists and scientists are calling attention to the problems in the implementation of the Act, seeing the ESA's key provisions as a watered down version of what the letter of the law intends. While this thesis is strictly a comparison of the policymaking process and provisions of the ESA and SARA, this chapter's epilogue is necessary to provide context for Chapter 3's analysis of cross-national lesson drawing. This section will first begin with two case studies that demonstrate how controversial the ESA has become and then discuss the positions of both industry/landowner groups and ENGOs/scientists.[169]

The Tellico Dam Controversy

Within five years of the Act's implementation, the ESA was marked by one of its most well known controversies – the Tellico Dam Project, a $110 million project conducted by the Tennessee Valley Authority (TVA) on the Little Tennessee River. The Tellico Dam was authorized in 1966 but was plagued with criticism over its impact on everything from fishing to Native American religious sites.[170] In 1971 environmentalists filed a lawsuit arguing that the Tellico Dam's Environmental Impact Statement (EIS) was inadequate and violated NEPA; construction of the Dam was subsequently stalled and then resumed in 1973. In 1973 David

Etnier of the University of Tennessee discovered a species of fish – a three-inch snail darter – that would be impounded by the Tellico Dam. After failed appeals by the FWS asking the TVA to stop development, the FWS listed the snail darter as an endangered species in 1975. However, the TVA continued construction. A University of Tennessee student, Hiram Hill, and his professor, lawyer Zygmunt Plater, filed a lawsuit arguing that the TVA violated section 7 of the ESA. The case made its way up to the Supreme Court, which affirmed an appellate court's decision that the TVA was violating the ESA. In delivering the majority opinion of the Supreme Court, Chief Justice Burger stated that "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*. This is reflected...in literally every section of the statute."[171] If anyone was unaware of the power of the Act, this decision wiped that away.

In an effort to avoid similar decisions in the future, there were failed attempts to eliminate section 7 of the ESA. Then a successful 1978 amendment was added to the ESA which created the Endangered Species Committee, quickly dubbed the god squad.[172] The Committee has the authority to exempt a federal project if the socio-economic benefits outweigh the impact on the species, but if an exemption is granted, the Committee has to create procedures that mitigate the impact on the species in question.[173] However, the god squad chose not to exempt the Tellico Dam. In the end, Congressman John Duncan, a republican from Tennessee, attached an amendment to the Energy and Water Development Appropriations Act, to authorize the Tellico Dam's completion. Following a heated debate in Senate, the bill was passed by Congress. Fortunately, other populations of snail darters were found in the area.[174]

The Tellico Dam controversy illustrates two points. First, the Supreme Court's ruling demonstrated that the ESA's non-discretionary language left little-to-no-room for interpretation as the court upheld the Act's stringency. Second, the ESA was politically very difficult to change. Section 7 could not be eliminated and, even with the creation of the god squad, the

Supreme Court's decision was not reversed. In fact, the Tellico Dam was completed only because members of Congress realized that they could not get approval for such action by changing the ESA, but could only do so by side-stepping the ESA altogether and attaching a rider to a completely different bill.

'War in the Woods' in the Pacific Northwest

Another infamous controversy that relates to the application of the ESA is the "War in the Woods" in the US Pacific Northwest. The 'War' pitted the forest industry against environmentalists in a fierce battle concerning the protection of the spotted owl's habitat in old growth forests. Attention around the plight of the spotted owl in the Pacific Northwest began in the 1970s, but as the title of a chapter in Yaffee's *The Wisdom of the Spotted Owl* states, "All Hell Breaks Loose: [from] 1989-1993."[175] According to Hoberg, environmentalists successfully used two strategies: they nationalized the issue through a lobbying strategy and stopped logging in the region using a litigation strategy.[176] With regards to the former, environmentalists nationalized the issue, garnering favourable public opinion on their side at a time when the salience of the environment was again increasing. The nationalization strategy by ENGOs was made possible due to the fact that the great majority of old growth forests were in national (i.e., publicly owned) forests.[177]

The litigation strategy is what really fuelled the fires of the controversy. The strategy was initiated in the late 1980s when the Sierra Club Legal Defense Fund (SCLDF) legally challenged the FWS' decision to not list the spotted owl, a decision that was contrary to the FWS scientists' recommendation. After a federal district court ordered the agency to reconsider, the FWS finally listed the spotted owl as a threatened species in 1990.[178] Making front-page news, the *Seattle Times* called it a "landmark decision" that "figures to be the most costly in the 17-year history of the Endangered Species Act" and "will likely lead to the loss of thousands of

jobs."[179] The timber industry and dependent communities were anxious and outraged about the kind of protection the listing would trigger. At one timber rally, a *Washington Post* journalist observed protestors wearing t-shirts with the words "Save a Logger – Eat an Owl" and "I Love Spotted Owls...Fried"; indeed striking an equally poignant note as an imperilled bird, "young children [were] carrying placards that asked: "Who's more important, the owl or me?"[180] Apart from further polarizing the issue, the court ruling that led to the listing of the owl "signalled the entry of the judicial branch into the old-growth controversy."[181] According to Hoberg, the more effective part of the SCLDF legal strategy was the series of successful suits that they filed challenging the adequacy of the Forest Service's efforts to comply with NEPA and the 1976 National Forest Management Act (NFMA). The resulting injunctions on timber sales led to the effective shut down of logging and the wood products industry in the region.[182]

Eventually a compromise was reached by way of Clinton's Northwest Forest Plan or Plan 9, which reserved 80 percent of old growth forests and afforded a $1.2 billion economic assistance package for the region.[183] Despite being criticized and legally challenged by both ENGOs and industry, Clinton's plan was approved by Federal District Judge William Dwyer. Since then Republicans, most notably the current Bush administration, have revised the Plan in response to industry lobbying and legal challenges, although ENGOs are protesting the changes in various ways, including litigation.[184]

Even though it was through NEPA, and especially the NFMA, that environmentalists secured the majority of court injunctions, the eventual ESA listing of the owl finally provided added legal legitimacy to the need for protection of the owl and its habitat in the old growth forests. In addition, the ESA was critical to the perception of the debacle. The spotted owl was both the symbol, and indeed the reason, behind the controversy that ignited such heated debate; as such, the actual effect of the ESA and the owl's listing on the War in the Woods was amplified, if not exaggerated. As will be discussed in Chapter 3, Canadian industry groups saw

the War in the Woods as the proto-typical controversy that might occur if Canada adopted an ESA-style legislation. Canadian forest industries thus took note and wanted to avoid a legalistic legislation that would give ENGOs a cause of action to engage in such effective litigation in Canada.

Too Tough: Criticism From Industry and Landowner Groups

Over the past 32 years of the ESA's implementation, industry and landowner groups have increasingly complained that the ESA does not adequately consider their socio-economic interests. One example of this problem is the ESA's emphasis on tough restrictions and penalties instead of incentives. This is seen in the fact that the ESA's strict provisions are backed up by equally stringetn fines, with a $25,000 civil penalty for knowingly taking an endangered or threatened species and a $50,000 criminal penalty or incarceration for up to a year or both. If a person is in violation of any other ESA provision, the civil penalty is $12,000 and the criminal penalty is $25,000 or six months in prison or both. Federal agencies enforce the ESA and may inspect property and arrest any person who is holding an endangered species.

One of the most controversial provisions is Section 9. It is controversial for two reasons: first, because the term 'take' is defined so broadly to even include modifying or degrading an endangered species habitat; and second because before 1982 there were no exceptions to this prohibition. In addition to the potential for severe restrictions on land use and value, there is the issue of regulatory uncertainty related to the broad definition of the word 'take.' On its website, the National Endangered Species Act Reform Coalition (NESARC) – which represents approximately 150 members including industries, landowners, and developers – states that its members have been particularly frustrated with the uncertainty associated with land and water uses, such as tilling or brush clearing, that have an indirect affect on species.[185] Complicating matters is that it is often "difficult to discern what type of action may constitute a take with

respect to a particular species. It may not be obvious that a listed species is present...it may require a high degree of sophistication to tell a particular listed animal...from a common variety" and so forth.[186]

There are many 'horror stories' describing how Section 9's restrictions have affected the business community and landowners.[187] While these stories may be labelled as anecdotal, they reflect how the perceived unjust application of the Act is an impetus for reform of the ESA. There are also stories of how the impact of critical habitat designations, although allowing for economic considerations, has been too restrictive. Critical habitat designation has given way to "heated disputes about protected critical habitat for the desert tortoise, Mexican spotted owl and southwestern willow flycatcher in southern Utah, where the designations have restricted land use by ranchers and off-road recreationists."[188]

Furthermore, the ESA also gives citizens the right to bring private law suits against any person, industry, or, for that matter, government agency that is in violation of the Act. In fact, the use of court orders to require critical habitat designations has been crippling for the Fish and Wildlife Service. In a May 2003 press release, Assistant Secretary of the Interior for Fish and Wildlife and Parks, Craig Manson, stated that, "[t]he Endangered Species Act is broken. This flood of litigation over critical habitat designation is preventing the Fish and Wildlife Service from protecting new species and reducing its ability to recover plants and animals already listed as threatened or endangered..."[189] In its 2003 press release the FWS also announced that it would have to divert funds from other endangered species programs to cover the costs of litigation requiring critical habitat designation and that, as it is, the Service is spending two-thirds of its listing budget on court orders and settlement agreements. In the FWS' opinion, using limited resources on critical habitat designation for species that are already listed does not provide much additional protection. Further, even without such designations federal agencies have to consult with the FWS when their actions jeopardize species. Indeed, as will be discussed

below, although the FWS follows the mandatory terms of the Act, especially when they are compelled by the courts to do so, there is now more of an effort to recover listed species "...through voluntary cooperative partnerships, not regulatory measures such as critical habitat."[190]

Several commentators have noted that this seemingly draconian nature of the ESA may lead to perverse incentives where landowners silently destroy endangered species and/or destroy species' habitat in an effort to avoid stringent penalties and regulations.[191] Richard Pombo (R-CA), Chairman of the Committee on Resources, has asserted that landowners engage in this "shoot, shovel, and shut up" strategy where they "actually destroy species habitat to rid their property of the liability that comes with endangered species."[192] NESARC too concedes that "to avoid ESA regulation, some property owners have destroyed habitat to discourage the entry of protected species. [193] Burgess confirms that "[m]ultiple sources have related instances of developers clearing their property of plants that provide habitat for birds and insects suspected of being endangered."[194] While there is a lack of hard empirical data to support the "shoot, shovel, and shut-up" occurrence or the "preemptive habitat destruction" strategy, as discussed in the next chapter, the phenomena was cited by Canadian landowners and conservative politicians as examples of why ESA-style legislation should be avoided in Canada.

As Benjamin Cashore notes, ESA restrictions are not only a source of frustration to landowners whose harvesting is restricted, it is also a source of aggravation to landowners who see this as a property rights issue.[195] Landowners believe that government regulation of land use, i.e. for protecting endangered species, constitutes a taking of private property and thus an infringement on their Fifth Amendment constitutional rights. Such an infringement they argue requires compensation. The construction of ESA regulatory takings as a property rights issue has been part of both the private property rights movement and the larger "Wise-Use" land movement which has adopted the property rights argument as well; the latter movement is

perceived by ENGOs as a particularly anti-environment campaign.[196] Members of the Wise-Use and private property rights movements lobby the government to modify the ESA and litigate against taking prohibitions. Their efforts have also been successful. Burgess notes that the US Claims Court in Washington, DC has settled compensation suits against the government, even awarding "a New Jersey developer $2.68 million in damages when he was prevented from building on 12.5 acres of wetlands" a large sum considering that the acres at issue represented "only 5 percent of the total parcel of land originally purchased for $300,000."[197]

One particular charge against the ESA that US politicians have responded to is the argument that the Act offers no incentives for industry and landowners to comply with such stringent provisions, specifically Section 9's complete ban on all types of takings. Indeed, after the Tellico Dam incident, the Section 7 consultation process ran smoothly for federal projects on public lands, with such consultations even including authorization for incidental takings; but before 1982 such a consultation process and allowance for incidental takings was not provided for Section 9's application on private property.[198] Moreover, Section 9 was difficult to enforce and led to antagonism between landowners and regulators. The result was that since the 1982 reauthorization of the Act there have been several incentive programs for the private sector, including Habitat Conservation Plans (HCP), the related "No Surprises" policy, Safe Harbor Agreements (SHA), Candidate Conservation Agreements (CCA), Private Stewardship Grants (PSG), and the Partners for Fish and Wildlife (PGW) program.

With regards to Habitat Conservation Plans, when the ESA was amended in 1982 it permitted the incidental takings of endangered species on private property but only with the submission and acceptance of an HCP. According to Burgess, instead of being a much-needed solution, plans are costly and time-consuming, making its implementation by corporations and landowners very difficult and frustrating.[199] Further, when new species are discovered on an applicant's property, additional HCPs have to be made, making a long process even longer.[200]

Consequently, the Department of the Interior introduced several policies to overcome the challenges of HCPs and enhance regulatory certainty for landowners. As described by the FWS, the No Surprises policy assures private landowners that, once given an incidental take permit, if such "unforseen circumstances" arise as the finding of another endangered species, the FWS and NMFS will not require that the landowner go beyond what he/she committed in the HCP.[201] With regards to Safe Harbor Agreements, private landowners commit to a voluntary agreement to manage listed species and conserve habitat on their property in return for "assurances that no additional restrictions will be imposed" if species migrate to their land as a result of conservation efforts.[202] Candidate Conservation Agreements are voluntary agreements in which landowners, federal, State and local agencies, conservation organizations, and so forth, agree to contribute towards "stabilizing or restoring" a candidate species "so that listing is no longer necessary."[203] Specific to landowners, there are Candidate Conservation Agreements with Assurances in which private landowners voluntarily agree to manage species and habitats on their land with the assurance that if a species covered in the Agreement is eventually listed in the ESA the FWS "will not assert additional restrictions or...actions above those the property owner voluntarily committed to in the Agreement."[204]

Additional incentives for landowners come in the form of voluntary stewardship programs, namely the FWS' Private Stewardship Grants (PSG) program and the Partners for Fish and Wildlife (PFW) program. The PSG program gives "grants and other assistance on a competitive basis to individuals and groups engaged in...voluntary conservation efforts that benefit...at-risk species."[205] Applicants must pay at least 10% of the project's cost, which can be in cash or in-kind contributions such as time and materials. The PFW program provides "financial and technical assistance to private landowners through voluntary cooperative agreements" in order to help landowners restore species' habitat on their land.[206]

Not Tough Enough: Criticisms from Environmentalists and Scientists

According to Reed Noss, Michael O'Connell and Dennis Murphy, "[a]pproximately 60 percent of the land in the United States is privately owned. More important, those private lands, in most regions, comprise the most productive and biologically diverse habitats."[207] Daniel Simmons and Randy Simmons further specify that "nearly 80 percent of listed species are found partially or entirely on private lands."[208] The pragmatic environmentalists and scientists, realize that "[d]espite its appeal...absolute prohibition of impact to listed species is neither a practical nor politically tenable policy."[209] From this perspective some kind of incentives are in the best interests of: a) biodiversity – much of which is found on private land, b) private landowners – who may otherwise purposefully destroy species and habitats, and c) regulators – who depend on private landowner cooperation. However, these environmentalists and scientists are also very much aware of the shortcomings of incentive policies; thus they reserve their approval of HCPs based on the actual requirements of the plan and also offer their recommendations on how a good 'idea' can be improved.[210] For instance, Michael Bean and David Wilcove of the Environmental Defense Fund state that

> ...we believe the key to judging habitat conservation planning lies in what follows the 'if,' not in the existence of the 'yes.' Landowners need a mechanism to resolve endangered species conflicts on their property, *but the government can and should impose substantive mitigation requirements for doing so. Done right*, habitat conservation planning offers *the possibility of* accomplishing things that were never done – and could not have been – with a simple prohibition against harming endangered species.[211]

The purists, however, argue that in reality the HCPs are not 'done right' – that even when plans have substantive requirements they are not being implemented according to those standards and the result is that species protection is weakened.[212] The American Lands Alliance (ALA) argues that the majority of HCPs do not meet scientific and legal standards; specifically, HCPs allow incidental takes without adequately working towards the net recovery of species. Rather "most HCPs simply plan for the continued loss of species' habitats."[213] Moreover,

deficient HCPs are then 'locked in' for decades because of the No Surprises guarantees. The ALA also charges that "most forest HCPs' implementation agreements (IAs)", if the HCP even includes an IA, "fail to provide adequate assurances that the landowners will continue implementing the plans' mitigation measures over time...meaning that "once 'take' has occurred and the landowners no longer need a 'take' permit, they will have little incentive to maintain their plans."[214] A further critique is that HCPs were supposed to be the exception to the rule, but these " 'special cases'...now cover million[s] of acres, and more are being approved."[215] In fact, as of May 2005, the US' "nearly 400 habitat conservation plans now cover more than 37 million acres..."[216] An investigation by the *Seattle Post-Intelligencer* revealed that these charges were not that far gone; they found that few plans "spell out an exit strategy if things go wrong" and that the public and scientists can only offer input when the plans are "virtually a done deal."[217]

A research team from the National Center for Ecological Analysis and Synthesis and American Institute of Biological Sciences set out to assess conservationist concerns that HCPs, while proliferating, were not meeting adequate scientific standards. The team analyzed data on 208 HCPs and among other findings commented that

> In many cases...crucial, yet basic, information on species is unavailable for the preparers of HCPs. By crucial, we mean information necessary to make determinations about status of the species, the estimated take under the HCP, and the impact of that take on the species. For example, in only one-third of the species assessments was there enough information to evaluate what proportion of the population would be affected by a proposed "take." If we do not know whether one-half or one-hundredth of a species' total population is being affected by an action, it is hard to make scientifically justified decisions.[218]

Part of the problem could be the fact that the FWS and NMFS "do not have the resources to obtain the data that are needed for many of the decisions that must be made."[219]

The implementation of the ESA has also revealed that the listing process is not as stringent in its application as set out in the actual statute. This is specifically due to the fact that

politics has a bearing on species listing even though on paper the ESA states that listing must be based only on scientific data. Politics can potentially influence the listing process at a number of levels. First, environmentalists argue that political influence can affect the listing process since top FWS and NMFS officials are appointed by the president and his officials, and agency staff are subject to directives and other forms of control from top administration officials. Politicians can thus apply pressure on the agency officials to take socio-economic considerations into account.

Such political influence was seen during the War in the Woods when Reagan "issued an executive order directing federal agencies to minimize interference with private property rights...."[220] Further, the FWS did not initially list the spotted owl even though FWS scientists had recommended this listing; in fact, the report by FWS scientists which originally stated that listing was warranted "was altered under the directions of Reagan political appointees."[221] More recently, in a unscientific mail-in survey by the Union of Concerned Scientists and Public Employees for Environmental Responsibility, 56 percent of the 414 FWS scientists who responded "said agency officials have reversed or withdrawn scientific conclusions under pressure from industry groups" and 44 percent that they "have been asked by their superiors to avoid making findings that would require greater protection of endangered species."[222]

Second, if listing a species is controversial, the process can be delayed. For instance, the species in question can be put on the candidate list where even the stated goal is to use other means to recover the species so that formal protection is not needed. Writing in 1982, Yaffee attests to this occurrence, citing a General Accounting Office study which found that the listings of species were delayed "because they were potentially controversial and [FWS officials] feared the political ramifications of listing."[223] Yaffee's interviews revealed that "[m]ost of the FWS biologists concede that the process of determining the status of species and their habitat does indeed include political considerations" and that "[i]n listing species and designating critical

habitat, this balancing usually occurs at bureaucratic levels...."[224] A more recent argument of political influence in an ostensibly "science-only" process is found in Todd Wilkinson's 1998 *Science Under Siege*; in one chapter he describes how political meddling in Utah blocked protection of the western spotted frog. Wilkinson states that the trend started in 1992 when Utah's congressional delegation applied pressure on the FWS to not list the frog because the proposed listing would hinder development; the result was that the frog was kept off the list.[225]

The Center for Biological Diversity (CBD) has also criticized the listing process. A 2004 CBD publication states that "[t]he agency has knowingly delayed listing to avoid political controversy even when it knew the likely result would be the extinction of the species."[226] The CBD critiqued both the lengthy listing process, and the candidate list that defers listings, as being dangerous for species on the brink of extinction. For example, in their study of the 108 species that became extinct from 1973-1994, "[t]here were lengthy delays in the listing process for 83 (77%) of the species" with 24 specifically becoming extinct after being placed on the candidate list.[227] Burgess also concludes that, "[a]lthough the law helps stave off species extinction when implemented promptly, its implementation has been subject to political whims throughout its...history."[228] In sum, as a result of delay and political meddling, environmentalists and concerned citizens consequently feel compelled to take such measures as filing a citizen suit in order to garner a listing or critical habitat designation.

Critics of the ESA cite FWS statistics that out of "a grand total of 1304 species in the Act's history...only 12...have been recovered"; in other words, this means the ESA is an "unsustainable program" which is failing to meet its mandate.[229] However, there is evidence indicating that the problem is not in the Act itself but in the implementation of the Act. First, political meddling impacts a species' recovery by hindering the full protection that should be accorded to a species. Further, Michael O'Connell pointed to the fact that "Congress has been sluggish in appropriating funds for general recovery programs; nearly one-half of recovery

funds are earmarked specifically for 12 species that are either of low conservation priority or have high public appeal...."[230]

It is also a common understanding that some administrations are more agreeable to the ESA than others, with the current Bush administration coming under particular criticism. Indeed, Richard Pombo, now Chairman of the Committee on Resources, has been actively seeking to reform the ESA. Pombo and his colleagues are hoping to produce a successful, single reauthorization bill to be introduced in the House and Senate. The bill will include more involvement by the States and incentives for landowners.[231] Environmentalists have been watching Pombo's efforts wearily. Sarah Matsumoto of the Endangered Species Coalition voiced her concerns that "[a] lot of these reforms are really backed by developers and industries that are trying to remove the checks and balances that are in the Endangered Species Act and weaken the protections that are in there for the species."[232] On May 17, 2005 Pombo released a report critiquing the ESA; he stated the report will guide Congress in 'updating' the ESA.[233]

It remains to be seen whether the planned reauthorization will be approved, but the intended amendments to the ESA could forever change an Act held up as the proto-typical prohibitive endangered species policy. That said, since October 1992 all efforts to reauthorize the ESA have failed. According to Burgess, with the subject of changing the ESA being a source of heated debate between politicians, industry groups, landowners, environmentalists, and scientists, legislators have purposefully avoided reauthorizing the ESA to avoid such a controversial issue.[234] Republicans have had some success in attaching riders to different bills in an attempt to weaken the ESA. Yet even this demonstrates the difficulty of changing the Act as politicians are having to resort to indirect means to do so. The non-discretionary language further compounds this problem, for if the ESA was a discretionary statute like SARA, politicians and regulators would have more "wiggle" room in interpreting the law, enabling them to back away from implementing provisions that are politically controversial.

What can be taken from this section is that on one hand, the ESA on the ground is too tough a statute for industry groups and landowners, especially without incentives, but on the other hand, environmentalists and some scientists argue that the Act is not being applied as intended by the letter of the law. The controversies of the ESA thus include both the charges of being too restrictive and costly to implement on public and private land and being too watered down because of political influence in what should be a largely science-only process. As the next chapter will show, these negative lessons learned from the US experience were not lost on Canadian policymakers, politicians, or interest groups.

CHAPTER III
Canada's 2002 Species at Risk Act: Public Opinion, Actors and Cross-National Lesson Drawing

Thirty years of controversy south of the border had a major impact on the recommendations put forward by Canadian stakeholders and the decisions of Canadian policymakers, particularly former federal Environment Minister David Anderson who oversaw SARA. As can be expected, there initially was a distinction between the recommendations of environmentalists and scientists on one hand, and industry and landowners on the other. The former, while learning both positive and negative lessons from the US experience, lobbied for tough provisions similar to those found in the ESA. The latter had paid close attention to events in America and wanted to avoid the legalistic restrictions of the ESA. With the issue failing to register as a top priority for Canadians, policymakers had few electoral incentives to enact tough legislation. Public opinion therefore strengthened the position of industry and landowner groups. However, after the failure of Bill C-65, and with Bill C-33 in the works, there came a new lobbying coalition, the Species at Risk Working Group (SARWG), remarkably consisting of three environmental groups and two industry associations.[235] SARWG achieved a compromise in their recommendations that, in many ways, was reflected in the policy provisions of the final version of SARA, Bill C-5. The strategies of the above groups and the influence of their lobbying efforts on policymakers' decisions will be the analyzed in this chapter.

To fully analyze the interaction of public opinion, actors, and cross-national lesson drawing in the creation of SARA this chapter is structured in three sections. The first section briefly evaluates the influence of public opinion on policymakers. The second section comprehensively addresses the contribution of actors to the creation of SARA and the lessons each actor drew from the US experience. Lastly, there will be a brief analysis of the extent to

which the variables – public opinion, actors and cross-national lesson drawing – explain the policy provisions of Canada's Species at Risk Act.

Public Opinion

Throughout the policymaking process of SARA, environmentalists emphasized the fact that there was high public support for endangered species legislation. Polls seemed to substantiate this. In a 1995 Angus Reid poll, 94 percent of those surveyed said they would support federal endangered species legislation.[236] Similarly in a 2001 Pollara survey, commissioned by the Sierra Legal Defence Fund, a total of 94 percent of those polled showed some degree of support for legislation, with 66 percent of respondents indicating that "they 'strongly supported' a law to protect endangered species" and 28 percent reporting that "they 'somewhat supported' such a law".[237]

However, Amos et al note that the depth of this support is questionable. For example, a 1999 Pollara poll highlighted the ignorance of Canadians on the issue, with 66% of respondents believing that a federal endangered species legislation already existed when in fact no such law existed at the time, "and another 21 per cent [not knowing] whether such a law existed."[238] Moreover, in a 1998 Pollara study only 6% of those surveyed said the environment/pollution was the most important national issue, taking back seat to such issues as unemployment, national unity and the economy/recession. Further, the 1998 study showed that endangered species was not even one of the top 10 environmental issues for Canadian.[239] Thus, unlike the ESA, the policymaking process leading up to SARA did not occur during an environmental wave, when the public would consider the environment a top priority for the country and where politicians would respond accordingly. Canadian politicians thus had no electoral incentives to enact tough legislation since the diffusely affected public was largely unorganized and ignorant of the issue; indeed, politicians had *dis*incentive to take such action since those who would bear

the brunt of a prohibitive policy were more organized in their opposition and ready to respond at election time.[240]

The Strategies of Actors and Cross-National Lesson Drawing

Aboriginal Community

Aboriginals played an important role in SARA's creation. Initially aboriginals were dissatisfied with Bill C-65, in part because they felt they were not adequately consulted.[241] In an attempt to rectify this lack of consultation, the federal government created the Aboriginal Working Group (AWG), thereby providing aboriginals another avenue to put forward recommendations other than testifying before the House Committee. Created in early 1998, the AWG was co-chaired by an aboriginal representative and a government representative. At the outset of the process, many aboriginal groups had reservations about how the Act was going to be implemented, whether or not there would be a commitment to follow through on recommendations by the Working Group, what kind of ongoing role aboriginals would be given in the Act, and, in particular, how the Act would affect aboriginal rights.

Steven Curtis, former Associate Director General of the Canadian Wildlife Service (CWS), was the key person running the AWG prior to October 2000 and also served as point person on native communication on SARA.[242] Curtis and his staff visited aboriginal communities, met with leaders, and had a major role in alleviating the worries of aboriginals. In Curtis' view, "it's fair to say that most of the Aboriginal organizations had major concerns [about SARA], the most significant of which were addressed through the [AWG] process."[243] Paul Heighington was the Métis National Council (MNC) representative on the AWG until 2002. He credited Curtis for really moving the AWG forward. In his words, "We had a good working relationship with the Canadian Wildlife Service that was run then by Steve Curtis. He was a champion of ours, I think a champion of aboriginal concerns within this important piece

of legislation, and he really moved it to another level."[244] Michael d'Eça, who acted as the legal adviser to the Inuit Tapiriit Kanatami (ITK), also felt that "Steve Curtis...really won the hearts and the trust of the aboriginal peoples." Mr. d'Eça also emphasized the critical role played by Minister Anderson in the process. "On the government side," Mr. d'Eça stated, "the Minister appeared to be a key person in support of having the AWG in place, and in ensuring that its views were fully taken into account."[245]

The AWG was open to any aboriginal organization wishing to participate. In fact, regularly in attendance were members of all the national aboriginal organizations, including the Assembly of First Nations (AFN), the Congress of Aboriginal Peoples (CAP), the Inuit Tapiriit Kanatami (ITK), the Métis National Council (MNC), the Métis National Council of Women (MNCW), and, on occasion, the National Aboriginal Women's Association (NAWA). The purpose of the AWG was three fold. First, it provided a basis for Environment Canada to interact with a fairly wide and diverse range of aboriginal interests. Second, through the AWG, aboriginals were able to give their recommendations on SARA and advise Environment Canada on how the government should be approaching detailed consultation with both regional organizations and individual communities and bands. Third, the AWG also tried to bring forth a National Aboriginal Accord for the Protection of Species at Risk. However, the Accord is currently in limbo until the National Aboriginal Council on Species at Risk (NACOSAR) is established.[246] In the spring of 2004, the Environment Canada Minister unexpectedly withdrew his support for the Accord, informing Aboriginal leaders in a letter that "*I believe that the decision on the need for an Aboriginal Accord should be revisited by the members of NACOSAR once the Council is operational.*"[247] It is not known why this decision was made.

The AWG was also based on a consensus process with the discussions being open-ended. The representative groups that participated in the AWG often had their leaders or chiefs present. As well, there were occasional meetings with then Minister of the Environment, David

Anderson, and the leaders of the national aboriginal groups. The purpose of these meetings was to confirm that the aboriginal leaders were in agreement with the positions taken within the Working Group and with the progress of AWG.[248]

What was groundbreaking about the AWG process was not only that the discussion with aboriginals was so in depth, but also that Cabinet approved showing the draft legislation to the aboriginal groups before it was tabled.[249] Apart from the provinces and those internal to the federal government, the aboriginal groups were the first to see the draft legislation. In a two-day session, aboriginal groups and their lawyers reviewed the bill and met with lawyers from the Department of Justice and representatives from Environment Canada. Although failing to secure total support from aboriginals, Curtis felt that aboriginal representatives "...were very pleased with the openness of the process, and the fact that they were able to see the text in advance of the tabling, which hadn't been done for any other piece of Federal legislation prior to that, other than on land claims which directly affects them."[250]

There was also a fair amount of money put into the process. The government provided aboriginal groups with reasonable resources to do their own analysis, in addition to analysis that was conducted in conjunction with regional government staff. Resources were also provided so that aboriginal groups could hire their own legal advisors.[251] Furthermore, regional meetings were held in communities where there were known to be a significant number of species at risk, and finances were given to regional offices to work with the key aboriginal organizations to explain the intentions of the proposed legislation and how it might affect aboriginal reserves. Overall, the process was quite inclusive. Anderson in particular insisted that aboriginal support was key for the passage of SARA and that the process should be genuine, based on mutual trust, and part of an ongoing relationship.[252]

However, the AWG process did have some obstacles. While agreeing to general principles and values, national aboriginal groups had distinct regional views on SARA; this

variation "caused numerous differences at the table as well as political views."[253] As Lawrence Ignace, Manager of the Environment Secretariat in the Assembly of First Nations stated, "the regional variations mean that you would not want Inuit to be speaking on issues that affect reserves lands, nor would First Nations want to speak to issues of Inuit lands"; in other words, the government had the difficult job of reaching consensus while also addressing concerns specific to individual groups.[254] However, not all concerns could be dealt with separately, for in order to reach a common understanding the government had to "address issues on a pan aboriginal point of view as well as develop policy in the best interests of Canadians."[255]

There were a number of other barriers to the AWG process including aboriginal misunderstandings of the workings of the federal government, including Treasury Board guidelines; a species at risk secretariat within the federal government that was understaffed; and frustration with a process that was drawn out over several years.[256] Further, as stated by d'Eça, on several occasions during the AWG process tensions arose between Aboriginals and the government. Those tensions reached a fever pitch in the winter of 2002, when the government – through a proposed motion introduced at the report stage of the SARA Bill – tried to reduce its mandatory obligation to establish an Aboriginal Council to a mere discretionary authority to establish an Aboriginal Committee. A fierce Aboriginal protest campaign ensued and – to his credit – Minister Anderson soon relented.[257]

Overall, the process was a success. Both Anderson and Curtis speak of aboriginal groups being happy with the consultation process.[258] While discussing the larger picture – complete with difficulties, Ignace also said as much:

> I think they did their best...it was obviously a huge step forward in terms of legislative process...ten years ago there would never have been even the comprehension of an Aboriginal Working Group. Obviously it took leadership of David Anderson...and there was actual leadership within the bureaucracy that also worked to allow this to happen.[259]

Thus, the Aboriginal Working Group, while not without its challenges, brought together a coalition of aboriginal organizations from across the country. The government invested the time and resources to make the process credible and the combined efforts of the major aboriginal organizations provided the needed political leverage to the AWG's recommendations on SARA.

As a result of aboriginal lobbying, and the efforts of MPs like Métis Rick Laliberte – discussed in Chapter 4 – several aboriginal-related provisions were included in SARA. Such provisions include a non-derogation clause under section 3 of SARA, which states that nothing in SARA will "be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights...."[260] In addition, under section 8.1 of SARA, a National Aboriginal Council on Species at Risk was created to advise the Environment Minister on the administration of the Act and to make recommendations to the Canadian Endangered Species Conservation Council.[261] Furthermore, under section 18 of SARA the aboriginal traditional knowledge sub-committee for COSEWIC is now established for the purpose of assisting COSEWIC in assessing species. SARA also provides for consultation with aboriginal peoples who are affected by a recovery strategy, action plan, or critical habitat protection measures.[262] Lastly, under section 83(5)(b) aboriginals are exempted from prohibitions on possessing, collecting, buying, selling or trading a (or part of a) listed species if "it is used for ceremonial or medicinal purposes, or it is part of ceremonial dress used for ceremonial or cultural purposes by an aboriginal person."[263]

Scientists

In both the Canadian and American cases, the scientific community played an important role in bringing attention to provisions in the bill which they felt needed to be changed. While Amos et al analyze scientific knowledge under the category of ideas and causal knowledge, the

analysis herein examines three key areas of the scientists' *lobbying* effort under the category of actors: how the scientific community used its letter campaign as a lobbying tool to get provisions incorporated into the Act, how there was some division among scientists on the listing provision, and what influence the American ESA had on the scientific community's recommendations.

The scientific community, with the administrative assistance of the Sierra Legal Defence Fund, was able to mobilize a large number of scientists to lobby the government with regards to endangered species legislation. They became known as 'Scientists for Species'.[264] In addition to sending letters to then Environment Minister Sheila Copps in October 1995 and to her successor Sergio Marchi in February 1997, hundreds of scientists signed three major letters sent to the Prime Minister in 1997, 1999 and 2001. Each letter was signed by more signatories than the last, with the first letter collecting 300, the second 642, and the last reaching 1,331 signatories.

The 1997 letter, reacting to Bill C-65, stressed the importance of the protection of, and mandatory habitat protection for, all species anywhere in Canada, including for transboundary species.[265] In addition, the signatories wanted a listing process governed only by science because "[a]llowing political interference with the listing process threatens to undermine the credibility of the entire Act."[266] The 1999 letter made essentially the same recommendations, also emphasizing that "scientific findings – and scientific findings alone – should determine if a species needs to be listed as endangered."[267]

The 2001 letter was also similar in that it pressed for "mandatory habitat protection" and "science-based" listing.[268] Interesting to note is that through their recommendation for science-*based* listing this last letter showed that scientists, being more cognizant of the political process, were willing to compromise on the listing provision. Science-based listing was the signatories' lowest-denominator in the negotiations: "*At the very least*, COSEWIC's listing decisions should take effect within a fixed time (say 60 days) unless Cabinet exercises a 'veto'

and provides reasons."[269] This compromise – termed the "negative option" or "reverse onus" listing – is important. Considerable debate took place amongst the government and stakeholders as to whether there should be a 'science-only' listing process, in which COSEWIC's list would become the legal list under SARA, or whether a 'political listing' process should be adopted, which would give COSEWIC an advisory role but leave Cabinet with the ultimate authority to list species.

Although early in the process ENGOs and a significant number of scientists – as indicated by the 1997 and 1999 scientists' letters – wanted a science-only listing process, surprisingly COSEWIC members were not entirely on board with that suggestion. Dr. David Green, then chair of COSEWIC, and his colleagues present at the House Committee hearing felt there needed to be a compromise that would ensure that their job assessing species as independent scientists would *not* be deterred by lobbying efforts against them. In fact, Green stated that "[a]ll but a few members of COSEWIC who expressed their opinions agree that the minister should have the discretionary power to exclude a species from the list even if COSEWIC has designated it as being at risk."[270] As Dr. Marco Festa-Bianchet, current chair of COSEWIC, stated before the Committee, lobbying is not only seen as interfering with the scientists' job of objectively assessing species, but it could also interfere with the process of making the assessment under particular conditions: "if there was a group that was interested in having a certain status assigned...[they could try] intervening at the level of the report author, at the level of the provincial jurisdiction that is supposed to feed information to the report author, at the level of the chair who selects an author" and so forth.[271] Thus, the feeling was that there needed to be a compromise between the option of science-only listing and the option of relegating COSEWIC's list to that of a recommendation bearing no legal weight. In Green's words:

> What we want is a compromise between these two extreme positions. If COSEWIC's list automatically became legal, as has been advocated by a number of groups, then there would be no recourse for people who have these social, political, and economic concerns except to try to pressure COSEWIC and put that in the forefront of what COSEWIC is trying to do...We can't get into that game.[272]

Therefore, their recommendation was the negative option, the same provision that was proposed by the signatories of the scientists' 2001 letter. Essentially, Cabinet had a certain time period in which to change COSEWIC's list; if Cabinet did not, COSEWIC's list would become the legal list. Scientists like Green, then, were not opposed to COSEWIC's assessment having the force of law, quite the contrary. Green emphasized that, "[t]he work of COSEWIC will carry little weight under SARA if its designations are not translated into a legal list."[273] The negative option, though, would ensure that the scientific listing would be done without scientists having to fear that they would become the target of lobbying.

Dr. Arne Mooers, Assistant Professor of Biodiversity at Simon Fraser University, commented that the agreement on listing was "one of the most divisive aspects of SARA from the point of view of scientists."[274] In the end, the signatories of the scientists' letter conceded, as the 2001 letter shows, to the negative option. When the law was enacted, the time period was longer than many would like: COSEWIC's list would become the legal list within *nine* months unless vetoed by Cabinet. Even then it was a last minute concession that was only achieved after much pressure from backbench, Liberal MPs who had the credibility of these scientists' recommendations to back their effort. In fact, as described in Chapter 1, Cabinet actually has more than a nine month deadline to veto species, as the Minister of the Environment can call for an "extended consultation" period before passing the names of species on to Cabinet.[275]

The fact that the issue of listing was divisive among scientists makes the organization of hundreds of scientists to lobby the government difficult. For instance, the letter had to be broad enough that many scientists could agree with its tenets but be specific enough to carry weight as scientific advice to policymakers.[276] Scientists were also putting their credibility on the line

especially when they attached their "name to something someone else ha[d] written based on data collected by others...."[277] Furthermore, scientists come from a variety of backgrounds and are trained in different fields, for this reason, the depth of each signatory's understanding of the complexities of SARA may be questioned. In Anderson's words, "they [the signatories] are all people of high repute from our universities and other institutions in the country, but it must be noted that fewer than 3% of them are known to be involved in research on species at risk."[278] Anderson even made a point of calling some of the scientists who signed the 2001 letter and remarked that although he "found a genuine concern for species at risk and a serious resolve to help Canada pass a solid law" he also found that those he spoke to had "little intimate awareness of the details of Bill C-5."[279]

Regarding the issue of organizing scientists of various disciplines, the scientific community was able to overcome collective action problems through the administrative assistance of the Sierra Legal Defence Fund. While the scientists' letter was theirs alone, "there was some coordination between Sierra Legal and the scientists signing that letter."[280] As the scientists are not trained to read law, Sierra Legal provided the coordinating capacity to organize such a large-scale letter, not only in terms of collecting signatures but also with regard to helping the scientists understand the legalese and political process so the scientists could better put forth their views. Thus, despite the obstacles to their effective organization, scientists were able to lend their credibility to the campaign.[281]

The questionable depth of this credibility, given the fact that not all the signatories shared the same understanding of or involvement with SARA, is perhaps just the nature of letter campaigns. This does not mean, however, that their campaign was ineffective. Mooers points out that "these letter writing campaigns are blunt instruments" especially because they can be attacked by people who say "well a thousand people wrote it but how many of those people actually read the legislation?"[282] Yet, having said that, he also indicates that senior

scientists who get involved can use letter campaigns to give added weight to what they are presenting before government officials and the House Committee.[283] Thus, at the very least, the letter was effective in that when renowned scientists like Dr. Geoffrey Scudder and Dr. David Schindler – who organized the letter campaign and *were* involved with the SARA process – went before the House Committee, they had the support of hundreds of scientists as well. Indeed, the scientists' letters also gave credibility to what environmentalists were asking for, particularly with respect to habitat protection. As Amos et al state, that "[t]he two communities' shared interest in maximizing habitat protection provisions allowed each to benefit from a symbiotic alliance, with environmentalists offering valuable organizational support and scientists in turn lending their credibility to the campaign against Bill C-65."[284]

One more aspect of the letter writing campaign bears mentioning – the fact that cross-national lesson drawing took place. Those scientists who were most actively involved in the letter campaign did make comparisons to the US Endangered Species Act as well as the Mexican law.[285] This is indicated by the reference to the ESA in the 2001 letter: "The U.S. and Mexican endangered species laws make habitat protection mandatory for cross-border species, and the absence of similar protection in Canada could seriously undermine these international efforts."[286] As Green notes, "the pre-existing model for an endangered species law was the ESA over the border, it was hard not to take a look at it."[287] With regards to the cross-national lesson drawing that took place among the involved scientists, the US experience "was definitely a starting point."[288] The scientists who knew the ESA, were impressed with the Act's strength and considered how similar provisions would work given the political realities of Canada, in particular the federal-provincial relationship. In the end, "the Canadian law was found wanting on all sorts of aspects" and the fact that America had such a strong law, enacted 30 years ago, while Canada was a progressive country without such legislation was a source of impetus for improving Canada's Act.[289]

Green notes while some scientists did not know the Act well, most knew about the law suits. Thus, even some of the scientists "wanted to avoid that kind of litigiousness."[290] Ironically, as described above, scientists wanted such provisions as mandatory habitat protection which has the strong potential to lead to litigation. That said, it can be speculated that since the scientists' letters did not propose a citizen suit they hoped to avoid a litigious approach that way. Overall, the scientists' effort at 'activist-driven emulation' can be seen in their 2001 letter's reference to how strong the US law is when it comes to habitat protection. However, the fact that some scientists also wanted to avoid the mistakes made in the US with endangered species legislation means that negative lesson drawing also took place among some of the involved and knowledgeable members of the scientific community.

In the end there is a variety of opinions on SARA among these scientists, opinions that are bound to change as the Act is implemented. As Mooers remarked,

> I don't think anybody was particularly happy, but I think that the longer people were involved with the process, the more they realized that political compromise was inevitable. Among my colleagues different people had different opinions...It ran the whole gamut for the people who were intimately involved. So some people were very upset and some were actually happy.[291]

Interestingly, these divisions among scientists were not evident to the average observer; indeed, the scientists' letters reflected a consensual proposal from a significantly large number of scientists. In any case, their effort was translated into key provisions. That more emphasis was placed on habitat protection, that the definition of the "residence" of species was expanded to be more scientifically acceptable, that COSEWIC was given the status as a legal body, and that mandatory prohibitions and habitat protection was given to species on federal lands and for federal species anywhere in Canada, *is* due in part to the credibility that scientists lent to these recommendations.

Environmentalists

In addition to facing an uphill battle because the environment, and endangered species in particular, was not a salient issue for the public, one of the disadvantages for ENGOs is the fact that the environmental movement "is fragmented and diverse, lacking peak associations to concentrate pressure on government."[292] For a period of time, however, the environmental movement was able to organize into a peak association to pressure the Canadian government for effective endangered species legislation. The association, which came to be known as the Canadian Endangered Species Coalition (CESC), was formed in March 1994 after a meeting with "leading environmentalists and scientists from across Canada."[293] Initially this Coalition was led by a six member steering committee and supported by over 100 national and regional groups "representing all sectors of Canadian society: labour, business, religion, fishing, farming, law and the environment." [294] Amos et al. note that using their organizational capacity CESC sponsored letter-writing campaigns for other groups, such as Canadian artists and US ENGOs, to demonstrate the breadth of support for strong federal endangered species legislation in Canada.[295]

In 1999, CESC went through administrative changes and the Canadian Endangered Species Coalition morphed into the Canadian Endangered Species Campaign or Network. Essentially while the Coalition and its members took a uniform position on every issue and utilized the same strategy to pursue their common objectives, the Network discussed and coordinated on issues but did not necessarily have to lobby for their bottom line recommendations using the same strategy. This provided a little more flexibility and opportunity for differing viewpoints. Thus, while the Coalition had submitted a brief in 1996/97 to the House Committee, the Network did not, although there was a template brief that groups were able to draw on for their own submissions.

Like scientists, environmentalists also looked to the American example. However it is important to note that not all organizations had a deep understanding of the Act. According to Elgie, there were probably two or three people in the environmental movement who had a good understanding of the ESA and this was a reflection of the different roles played by CESC members. As he remarked, "Like any movement you have a division of roles, and you rely on certain people to take the lead on some roles and other people to lead on other roles." [296]

Indeed, Elgie was one of the three main persons in the Coalition with a good knowledge of the ESA. In 1995 he wrote a comprehensive paper for the Coalition drawing on models of endangered species laws in Canada, the US, and Australia and analyzing what worked and what did not. He looked at the different models that had been adopted for the various elements of an endangered species law, discussed them as options, and came up with recommendations. In his words, "A lot of those recommendations ended up becoming pretty much the positions of most of the environmental groups."[297] This paper also had a chain effect. It ended up having influence over the 1995 Endangered Species Task Force's final recommendations, and these recommendations in turn had a lot of influence over the National Accord for the Protection of Species at Risk in Canada documents that then Minister of the Environment, Sergio Marchi, and the provinces agreed to in October 1996.[298]

In many ways environmentalists drew positive lessons from the US experience, namely that the ESA makes mandatory three important provisions: it requires that threatened and endangered species be listed using only scientific criteria, it prohibits anyone from harming a listed species or destroying its critical habitat, and it requires recovery plans for all listed species. In addition, federal departments are required to first consult the US Fish and Wildlife Service before they approve a project that has the potential to adversely affect a listed species or its critical habitat. Elgie evaluated these provisions as doing a remarkable job of preserving and preventing harm to species at risk.[299]

The negative lessons drawn about the US experience are somewhat surprising given the fact that Canadian environmental groups are often seen as wanting to adopt a command-and-control approach to environmental policy. Nonetheless, there are certain provisions of the ESA that ENGOs found unfavourable. Summarized by Elgie, the flaws within the ESA include the fact that the Act only lists endangered or threatened species (not species of special concern like SARA) and so it is a "purely reactive approach to species protection" at which point "recovery efforts are often difficult and expensive."[300] Second, the ESA's recovery efforts are inefficiently focused on single species instead of taking an ecosystem approach, recognizing that if one species is threatened or endangered that could be a sign that other species in the ecosystem are also in danger. Third, not enough is being done to foster support from private landowners to protect species at risk. [301]

Taken together, the positive and negative lessons drawn from the US experience were part of a larger effort to follow what had worked in the US and improve on the parts that had not. As Elgie summarized, "I think on the whole there was a sense that the US Act had made a positive difference, that it was more effective legislation than any of the existing provincial laws in Canada, but that we could do better, we could essentially improve on the weaknesses of that Act. I don't think anyone wanted to clone the US Act..."[302] If not an exemplar, the ESA was then an example that some Canadian environmentalists looked to when they formed their recommendations.

By 1997 the Coalition had reached agreement on the minimum acceptable elements necessary for endangered species legislation. That year CESC publicized a "checklist" for effective legislation that included the following requirements:[303] 1) the act should apply "to the full extent of federal jurisdiction" and thus needs to include a safety net with an equivalency provision; 2) the listing of species at risk and their critical habitat should be based on scientific criteria and SARA should require the listing of species assessed by COSEWIC; 3) the

protection for species at risk should be mandatory including mandatory prohibitions on takings of listed species, mandatory critical habitat protection, and mandatory and timely recovery plans; and 4) there should be advanced, mandatory review of projects which may adversely affect listed species and their habitats.[304] Another CESC document also stated that endangered species legislation should include "citizen action" which would help "safeguard the law when governments are failing to do so."[305]

Bill C-65 failed to meet these recommended standards: COSEWIC was given only an advisory role, there was a lack of focus on critical habitat, and environmentalists perceived the bill as being too narrow in scope. The environmentalists' lack of support for Bill C-65, coupled with opposition from other stakeholders, was an important reason for the Bill's defeat.[306] By the time of Bill C-5 in 2001 the government made sure that some provisions would be included to accommodate environmentalist interests. The scope of federal jurisdiction was widened to give the federal government authority to protect all species anywhere in Canada through the use of a federal safety net. However, environmentalists critique the lack of an equivalency provision and the discretionary nature of the safety net, stating that the safety net will very rarely be used given the poor track record of the federal government to invoke similar safety net provisions under other federal environmental statutes.[307] During the report stage the government made two last-minute concessions: a science-based listing process (as described above) and mandatory habitat protection on federal lands and for federal species throughout Canada. Stewart Elgie notes that with those two concessions the Act became acceptable (albeit minimally) for most environmental groups.[308]

Industry and Private Landowner Groups

Based on House Committee evidence, it is obvious that nowhere was the cross-national lesson drawing dynamic more prevalent than with Canadian industry and private landowner

groups, which includes developers and the agricultural community. The ESA's implementation history, as discussed in Chapter 2, is riddled with controversy and, as such, Canada's industry and landowners had the opportunity to learn from their neighbours to the south. The business community was therefore much more active in Canada because they had learned much from the US experience.

The most lasting example is the controversy over the Northwest Forest Plan to protect the endangered spotted owl, which had resulted in the effective shut down of logging in the Pacific Northwest during the early 1990s. It remains a source of fear for industries wanting to make sure that such an occurrence does not happen in Canada. Wilf McIntyre, National Vice President of the Industrial, Wood and Allied Workers of Canada implored the House Committee to take into account the needs of Canadian forest workers and their communities. In his words,

> We are particularly cognizant of the impact that flowed from the application of the United States Endangered Species Act to the habitat of the northern spotted owl in the Pacific northwest... some 29,000 workers lost their jobs as a result of the owl injunctions and the resulting implementations of Plan 9. These peoples' lives were disrupted and many were uprooted from communities they and their families had lived in for generations...we also see in the bill [SARA] elements that would allow similar impacts to affect Canadian forest workers and their communities.[309]

Thus, there was a "reverse emulation"[310] dynamic coming from Canadian industry and agricultural groups who lobbied the government to avoid a confrontational and litigious ESA style law. This was backed by pressure from the Canadian Alliance who pushed for private landowner interests and were quick to criticize what they felt was the government's bias towards "US-style" legislation. For example, Alliance MP Charlie Penson strongly opined that,

> The approach the government is suggesting is much like the approach taken by the United States...It would backfire...The Liberal government seems intent on pushing through a heavy handed approach in the House after six years of knowing it would not work. Why does the government not listen to the people?[311]

This fear was also shown in the testimonies of farmers. David Pope, Vice-President of the Western Stock Growers' Association concluded his testimony with these words,

> In summary, we believe Bill C-5 is a very command-and-control, top-down, American-style piece of legislation. This has not worked for the folks in the United States for the last 28 years. I've talked to many of them and the lawyers who have defended them, and the kind of heartache they've had down there we should not repeat up here. Hopefully, we can find a Canadian way through cooperation and partnership. And where land has to be taken out of production for protection of the habitat of species at risk, it would be done with fair market value compensation.... [312]

Indeed, compensation was one of the key demands made by industry and landowners in light of their knowledge of the US experience. Amos et al cite compensation, scope of application, and civil (citizen) suits as the three main concerns of industry and private landowner groups during Bill C-65 negotiations.[313] Of the three, compensation remained the top concern of both groups; scope of application came up in various testimonies, and citizen suits were no longer an issue since the government eliminated this controversial provision after Bill C-65. However, industry and landowners remained strongly against a perceived punitive approach in terms of fines and regulations. In other words there was not enough of the 'carrot' and too much of the 'stick'.

Given the fact that the US private property rights movement and Wise Use movement have been strongly lobbying for compensation, it is not surprising that over the decade that SARA was negotiated compensation remained the most salient issue. Compensation was seen as part of the "cost-sharing" principle for which these groups argued – the idea that industry groups and landowners should not have to bear the brunt of costs to protect species at risk, but rather such costs should be shared by all concerned. There is the obvious belief among industry and landowners that socio-economic interests also needed to be adequately considered. Compensation was both a matter of principle – from the perspective of a property rights approach – and a matter of pragmatics – from the belief that incentives should be in place for

industry and landowners to cooperate with the Act, which in turn would act as a disincentive to the oft-cited 'shoot, shovel, and shut up' threat.[314]

On April 11, 2000, then Environment Minister David Anderson appointed Dr. Peter Pearse to provide advice on compensation. Pearse's report was criticized on a number of grounds and received mixed reactions among industry and landowners.[315] For instance, Pearse recommended that the farmer or rancher had to cover the first 10% in addition to 50% of the remaining costs.[316] Jack Horner of the Alberta Grazing Lease Holder Association retorted, "Some carrot. Dr. Pearse can't seriously expect much cooperation."[317] Adding weight to his words, Horner warned, "Further, Dr. Pearse suggests we in Canada do not want to make the same mistakes as the United Stated in the endangered species legislation. I'm afraid we may be headed the same way, and ranchers may adopt the policy of shoot, shovel, and shut up."[318] Many groups also testified that nothing short of 100% compensation would be adequate. These groups also wanted a guarantee of compensation in the Act and that such a provision be made mandatory.

As for the scope of application, industry and landowners generally felt that the bill threatened to infringe on provincial jurisdiction. In this vein the Western Wheat Growers' Association argued that "Bill C-5 is an extreme intrusion into provincial jurisdiction."[319] The Council of Forest Industries of B.C. recommended that the federal safety net be removed from the bill because they believe it is not based on the spirit of cooperation.[320] The Canadian Association of Petroleum Producers expressed similar reservations and warned the federal government against infringing on the National Accord for the Protection of Species at Risk in Canada and "inappropriately intrud[ing] into provincial jurisdiction."[321] As noted by Amos et al., industries are opposed to overlapping federal and provincial regulations, preferring that provinces take the lead role, as "they benefit not only from a symbiotic relationship between resource owner and developer, but from the threat of jurisdictional mobility.'[322]

Although relieved by the fact that citizen suits were removed, thus enabling Canadian industry and landowner groups to avoid the costly litigation for which the ESA is infamous, the potential threat of exorbitant penalties – between $50,000 to $1,000,000 and between 1 year to 5 years in jail – were "an outrage"[323] or at least "far too onerous for unintentional damage or destruction."[324] Some groups were also concerned that if charged under SARA, a person has to prove 'due diligence'– due diligence being defined as the effort that an industry or landowner makes to avoid harm to endangered species. The argument is that it would be difficult for resource users and landowners to prove their innocence under a due diligence requirement, but, on the other hand, if prohibitions were made '*mens rea*' offences the onus would be on the Crown to prove that violations were intentional. Obviously the latter would make it harder for the government to prosecute. In place of punitive measures industry and landowners wanted more of a focus on the 'carrot', or cooperative approach, with an emphasis on strong stewardship programs, incentives, and recovery measures that include industries and landowners.

Given their ability to overcome obstacles to collective action through their financial and organizational capacity, and also given the presence of peak business associations, industry and landowners represent a powerful lobby group. As such – and as hypothesized at the outset of this chapter – the government should lean towards meeting business concerns more than that of environmentalists. The government did in fact try to appease industry and landowners. Compensation was made a priority and at one point, at the risk of "[f]acing a massive caucus revolt by rural Liberal backbenchers," Anderson was forced to agree to stronger provisions for landowner compensation.[325]

Furthermore, with regards to the scope of application, the federal safety net, while expanding federal authority, was made discretionary and deferential to the provinces. Lastly, "the new bill represented a shift in the choice of central policy instrument from regulation to

spending."[326] So while there were heavy fines and penalties, as noted by the landowner groups in particular, this was offset by the fact that "voluntary, publicly funded stewardship programs would be relied on in the first instance."[327] Putting their money where their mouth was, the federal government's 2000 budget committed $90 million over three years and $45 million per year thereafter to programs to protect species at risk.[328] In addition to this, the 2003 budget "provide[d] $33 million over two years for the implementation of the Species at Risk Act."[329]

Species at Risk Working Group

As mentioned in Chapter 1, the federally appointed Task Force on Federal Endangered Species Conservation included member from academia, environmental organizations, and the business community. While the representatives reached a consensus on some proposals and presented their final report in May 1996, the first Bill, C-65, failed to heed their recommendations such as those concerning a science-only listing process and provisions for compensation.[330] Aboriginal groups were also left out of the Task Force. As a result, there was much frustration and dissatisfaction with the first attempt by the federal government to develop endangered species legislation.

The Species at Risk Working Group (SARWG) was an attempt to take something from the ashes of the Task Force and begin building a new base of agreement among industry and environmental groups. SARWG is an ad hoc group of environmental and industry organizations that first met in April 1998. Members include the Mining Association of Canada, the Canadian Pulp and Paper Association, the Canadian Nature Federation, the Canadian Wildlife Federation, and the Sierra Club of Canada. Overall, SARWG aimed to "to develop creative solutions for the protection and recovery of species at risk that would reconcile the need for wildlife conservation and the needs of those whose livelihoods are dependent on natural resources."[331]

The group was noteworthy because it represented the breaking down of barriers between environmentalists and industry and was indicative of the more conciliatory atmosphere in which Bill C-5 was negotiated. Indeed, while the 1995 multi-stakeholder Task Force was spearheaded *by the government*, in SARWG's case environmental and industry groups came together *on their own* and came to a consensus. Interestingly, an Olsonian analysis suggests that industry would be more likely than environmental groups to overcome obstacles to collective action since industry bears the brunt of habitat protection measures, with government responding accordingly. So while it may not be that surprising that ENGOs were willing to get together with industry, facing an uphill battle as environmentalists were in terms of public attention, the fact that industry felt that it was beneficial to organize with environmentalists is unique.

In November 1998 SARWG released a report that contained several general recommendations. It proposed a complementary "two-stream conservation strategy" in which there was an 'ecosystem stream' – focused on species and habitat conservation from a preventative perspective – and a 'species at risk stream' – focused on protection and recovery of listed species.[332] The 1998 report included several specific recommendations, with the following seven being key examples. First they proposed a science-only listing process. Second, they believed that habitat protection should be incorporated in recovery plans and that in the intermediate time between listing and recovery plans there should be interim habitat protection. SARWG also recommended that partnerships with stakeholders and socio-economic considerations be considered in the recovery plan.

Third, the document stated that transboundary species while under the authority of the federal government still needed to be "tempered by federal/provincial/territorial partnerships" in order to respect the National Accord.[333] Fourth, there was a focus on stewardship – an important preventative step – and incentives, financial and otherwise. Fifth, there was a

commitment to compensation – though there was the belief that stewardship initiatives and proper incentives would minimize the need for compensation – a belief also shared by industry groups pressuring for compensation. Sixth, there was the call for adequate funding and resources to support the above recommendations. Finally, SARWG expressed displeasure over Bill C-65's citizen suit – which is consistent with an industry/landowner perspective. SARWG also wanted "[m]andatory language in key sections of the federal Act (and corresponding provincial/territorial Acts)" such as "for listing species and passing regulations" – which is consistent with an ENGO perspective.[334] Under the same heading, SARWG also called for flexibility in other areas such as in the implementation of recovery plans.

Two years later, during the introduction of Bill-33, SARWG presented another publication. "We are pleased to see many elements of what we proposed included in the 'three-pronged approach' announced December 17, 1999 by the Honourable David Anderson" reads part of the introduction of this brief.[335] Some of the elements referred to in Anderson's report, which SARWG endorsed, included the support of stewardship measures, the elimination of citizen suit provisions, the inclusion of a compensation provision, an inclusive recovery process, and the proposed funding at that time.

Realizing that the government was not going to budge on the listing process, in their 2000 brief SARWG compromised and advocated the negative billing option in which COSEWIC's list would have the force of law unless vetoed by Cabinet within a brief period of time. They also recommended that the mandatory prohibitions against destroying a listed species or its residence be made mandatory and "should apply across Canada, without qualification."[336] SARWG further proposed that critical habitat protection be made mandatory for birds protected under the *Migratory Birds Convention Act,* aquatic species, and species found on all federal lands, including the territories. A less stringent recommendation was that critical habitat "be identified and protected through the recovery planning process rather than at

the time of listing,"[337] although to compensate they supported some type of interim habitat protection. In a separate document describing SARA, Kate Smallwood, who was not a member of SARWG, criticized the fact that under SARA critical habitat protection is "left unresolved for at least two to three years after listing", labelling the provision as "a major deficiency with the Act."[338] This suggests that not all environmentalists would agree with SARWG's positions, although this is only speculation.

The group's recommendation about jurisdictional scope was a bit more complicated but they did reach an agreement. Although SARWG's diverse members "have distinct views regarding the limits or extent of federal jurisdiction" over the environment, they all agreed that the federal safety net was unlikely to be effectively implemented and that it rested on uncertain constitutional merit.[339] SARWG also recommended that the 'due diligence' clause be changed because it could prove to be "very cumbersome and difficult for many resource users and landowners."[340] The group asked that instead prohibitions be made *mens rea* offences, which would shift the onus to the Crown to prove that violations were intentional. Another new recommendation was to have only one Minister responsible for administration of the Act in order to avoid, for example, increased bureaucracy and inconsistency in the application of the Act.[341] Furthermore, Sandy Baumgartner of the Canadian Wildlife Federation notes that

> We were also concerned about the reluctance by the Department of Fisheries and Oceans, in particular, to, in our view, be entirely on side with the legislation. There had been a number of examples certainly over time where we felt they were not as motivated to look after the interests of endangered species as the Minister of the Environment. And so for being more productive as well as for the reluctance of their involvement we wanted it to be one minister.[342]

SARWG's recommendations were based on many sources, one of which included the insights they gained through cross-national lesson drawing. The group wanted an Act that worked both for wildlife and for people. With that as its guiding philosophy, SARWG "looked at everything possible" to help develop their actual recommendations, from talking to

COSEWIC members and forest managers to referring to legislation in other countries such as the US and Australia.[343] Pierre Gratton, who represented the Mining Association of Canada, commented on the variety of sources utilized to draw lessons from the US experience, adding that while SARWG members did not try to become experts in the ESA – their focus was on Canadian law – they "knew enough to know what to avoid."[344] SARWG generally found that the ESA was too conflictual, something that the group wanted to avoid. As Gratton remarked, the ESA "hadn't really done much to protect species, it just resulted in a lot of law suits. We were also quite keen to avoid litigation."[345]

SARWG's members, both environmental groups and industry organizations, had counterparts in the US. This was another avenue of discovering information from Canada's neighbour to the south. On the industry side, there are members working in the US who are quite familiar with the US experience – the forestry sector being a key example. For their part, the Canadian Wildlife Federation (CWF) is associated with the National Wildlife Federation (NWF) in the US and their interaction provides one more example of negative lesson drawing.

Baumgartner attended a NWF conference addressing the implementation of the ESA's habitat provisions. From her interactions with the US environmental groups present, she took away "one lasting impressing and message...the advice not to do it the way they had."[346] The reason: only in the past five to ten years was the US really looking at the habitat provisions and how they can achieve habitat plans with landowners. Thus, only 20 years after the ESA had been enacted were there real initiatives being formed on how to make the legislation work for both wildlife and people.

The advice then was not to just focus on the legislation but to focus also on those broader aspects such as habitat provisions, because legislation is only one tool in the protection of endangered species. These ENGOs "weren't saying necessarily to lessen the strength of the legislation but that they were certainly acknowledging that it had to be more than just

legislation as the tool."[347] Baumgartner acknowledged that "[t]here is no question [that] the views of the environment community on SARA are really quite broad", with some groups wanting to adopt a command-and-control style ESA, but the CWF and SARWG felt they "had to look at the realities of the situation in Canada and we recognized that command-and control-was not going to work. We needed to be looking much broader than just a legislative approach."[348]

It is surprising, or at least counterintuitive, that environmental groups in SARWG would challenge the constitutionality of a federal safety net and steer away from a command-and-control approach to SARA. This does suggest that the environmental groups in SARWG – especially the CWF – represent more conservative organizations. However, it is not certain that all the ENGOs in SARWG were conservative to the same degree. For instance, Gratton noted in an interview that, "it may surprise you but quite often the group discussions or debates often took place between the ENGO representatives themselves [rather] than between industry and ENGOs."[349]

In the end, Bill C-5 did include the negative billing option, mandatory critical habitat protection in areas of federal jurisdiction to be implemented during an inclusive recovery process, the compensation provision, and an emphasis on stewardship programs, as proposed by SARWG. The federal safety net was also implemented despite SARWG's misgivings about the provision, but, as discussed in the next chapter, this was based on the federal government's criminal law power and is thus considered by the Department of Justice to be constitutionally sound. Furthermore, in the opinion of many environmentalists, this provision will likely never be used, although Anderson still had to engage in a great deal of diplomacy in order to pacify nervous provinces about this provision.[350] Although SARWG wanted prohibitions against killing a listed species or destroying its residence to be mandatory even on provincial and private land, this recommendation was not heeded. Further, their proposal that the Minister of

the Environment should be the only responsible Minister did not materialize; rather both the Ministers of the Environment and Fisheries and Oceans administer SARA.

Attempts to change the due diligence provision to that of a *mens rea* provision also failed. David Near, Senior Counsel, Environment Canada gives two reasons for this. From a legal perspective it is more difficult to achieve a successful prosecution because it is up to the Crown to prove that the accused has acted intentionally. Under due diligence it would be the accused who has to prove he/she took preventative measures necessary to protect species. This is a more stringent stance by the government, seemingly such a provision would be in the interests of environmentalists. Second, because the Fisheries Act and Migratory Birds Convention Act incorporate due diligence provisions when the species are relatively plentiful, it would not make sense for SARA's prohibitions to fall under *mens rea* making it more difficult to prosecute offences when species are not plentiful and are in fact endangered.[351]

Both Baumgartner and Gratton note that there was reluctance on the part of the government to embrace SARWG's recommendations in their entirety.[352] There was some criticism that SARWG was not representative of a sufficiently broad community, although the group made it clear that they did not represent individual sectors, but were rather trying to come up with a common position.[353] Gratton further noted,

> The government at various times saw us more as a threat than a help because here was a coalition where industry was actually further ahead than government was prepared to go. Usually they like to divide and conquer, ride up the middle and say 'look both sides hate us we must be good.' We didn't allow that to happen. So they often didn't know quite how to deal with us. Our effectiveness was, as a result, sometimes not as strong as we hoped in our hearts that we would be. We really thought that we represented a new way and they should just embrace us, and sometimes that turned out not to be the case.[354]

For the most part, though, Baumgartner and Gratton also believe SARWG's lobbying effort was fairly effective. As Gratton remarked regarding SARA: "It was not as robust an act as we

wanted so in that sense we were a bit disappointed. Having said that we were asking for the Cadillac and the fact that we got a Chevy well sure it's disappointing but it still runs."[355]

Why did the ENGOs and business interests come together on their own under SARWG?[356] It may be that both sides were sufficiently powerful and thus sufficiently worried that the other side might prevail. After the failure of the Bill C-65, apparently neither ENGOs nor industry felt they had the upper hand or the Minister's ear in the creation of Bill C-33, for if one side was stronger than the other there would be no need for the stronger one to participate in SARWG. The fact that they did get together may mean that each side was uncertain of their ability to garner what they wanted by lobbying *on their own.* They may have felt that by acting together, rather than by acting alone, there was a greater likelihood that they could both get at least part of what they wanted. Indeed, while not every recommendation of SARWG was included, the particular form the concession to business took – spending rather than regulation, and compensation if regulation – is consistent with the ENGO-business compromise reached in SARWG.

SARWG's proposal, and the government's decision, to implement publicly funded stewardship programs and compensation as part of the Act is also ingenious. One would think that Canadians would not be keen on having their taxes spent on subsidizing *industry*. However, although anyone is eligible for compensation, the issue was framed as one of financially assisting *landowners* (often read as farmers), which makes stewardship incentives and compensation at the taxpayers' expense much more palatable in the public's eye. As early as December 1999, newspaper headlines read "Incentives proposed to protect animals: Minister seeks aid for landowners hurt by strict new rules"[357] and "Land owners crucial in conservation plan: Government offers incentives to help save endangered species"[358] Further, in April 2002, rural Liberal backbenchers fought to have some guarantee of compensation for their constituents. The headline read "Backbenchers win one for rural landowners: Liberals forced to

strengthen compensation rules in Species at Risk Act."[359] The Government of Canada's *Species at Risk Act: A Guide* says stewardship initiatives include resource users, and both SARA and the *Guide* specify that anyone is eligible for compensation.[360] Specifically, section 64 (1) of SARA states that "The Minister may...provide fair and reasonable compensation to *any* person...."[361] Presumably, then, industry is just as eligible for stewardship and compensation payments as landowners.

The Federal Government and Cross-National Lesson Drawing

When asked which factor(s) were vital in shaping SARA, David Anderson responded: "Well the most important factor was the American experience in front of us...in terms of shaping the actual drafting of the legislation it was the American experience."[362] He noted that while the ESA "breezed through the Congress" without a murmur of dissent in 1973, thirty years later that "cooperative spirit [has] completely evaporate[d]."[363] The extreme animosity throughout rural America and the intrusion of the federal government on States' rights through the implementation of the ESA has made the issue of endangered species legislation especially relevant in Canada, and Canadian policymakers were very well aware of this phenomenon. As Anderson commented,

> Given that background scenario we were very, very keen to try and avoid some of the flashpoints that had caused the American legislation to fall in disrepute among constituencies that are vital for its success...You can pass laws, but if they run in the face of public attitudes you don't achieve your objectives except at enormous cost and considerable social friction. We were seeing that develop in the States and so we wished to avoid the ESA concern that had developed."[364]

As noted above, Canadian ranchers were particularly cognizant of the American experience as their industry is tied closely to their counterparts in the US, a fact demonstrated by the closure of the border due to the BSE problem in Canada in 2003. In addition, through their reading of the Canadian Cattleman's Magazine these ranchers were very much aware of

the controversial implementation of the ESA on US farmers' and ranchers' land; as a result, industry and landowner groups made their concern over a US style law known to Anderson.[365]

These negative lessons were not lost on Anderson or policymakers and bureaucrats. This was reflected in his comments to the media. In an *Ottawa Citizen* article titled "Anderson blasts U.S. critics", Anderson commented that the US had nothing to teach Canada about species protection since it was importing Canadian wolves, lynx and bighorn sheep to bolster failing US animal populations.[366] This was in response to a coalition of 60 American environmental groups who sent a letter to the government demanding that it increase the stringency of SARA, an ineffective example of cross-border lobbying. Anderson defended SARA saying that its cooperative approach was the only way to get agreement, contrasting the "Canadian, cooperative approach" with the US' confrontational "them versus us" approach.[367]

Industry was not the only group pressuring the government. The same phenomenon existed among farmers, forestry workers, and fishermen. MPs who received letters from these constituents were also questioning the Bill.[368] It must be noted, though, that as brought up in interviews and testimony before the House Committee, it was not that landowners were hostile to the concept of endangered species legislation; they were committed to seeing an Act that protected species, but one that also took into consideration socio-economic interests. "They were willing to cooperate, willing to help, as long as they did not feel that their economic future was threatened by arbitrary decisions."[369]

The federal government did not learn these lessons just from the lobbying efforts of the business and landowner community or from analysis conducted on the ESA. Cooperative efforts between the two governments began as far back as 1916 with the Canada-US Migratory Birds Treaty, a joint effort to protect migratory birds. Furthermore, in the late 1940s, "government agencies in Canada and the United States began actively sharing data and expertise to prevent the extinction of the whooping crane" and, since then, Canadian and US

government agencies and wildlife experts have shared information regularly about other species such as the piping plover.[370] Also in existence is the 1994 Migratory Bird Convention Act which implements the 1916 treaty. In this capacity the Canadian Wildlife Service meets quite regularly with its US counterparts. There is also the Canada-US-Mexico, Trilateral Committee for Wildlife and Ecosystem Conservation and Management that meets annually and has seven active working tables on different topics, one of which is species at risk, which also meet annually.[371] In addition, the Commission for Environmental Cooperation (CEC) under NAFTA has a Conservation of Biodiversity program that promotes North American cooperation on conservation through such efforts as information and data sharing.[372]

David Brackett, former Director General of the Canadian Wildlife Service, further elaborated on the extensive communication at the conservation level: "The endangered species biologists in a region would be in monthly if not weekly contact with their counterparts on the US side of the border, and those counterparts may be in the Fish and Wildlife Service regional offices or may be with state wildlife agencies." As Anderson summarizes, "Our people spent a lot of time with our American counterparts, so there is very good knowledge of what goes on in the States within our Department. We had this long history and we had considered the models of the States previously, because American legislation is always different from ours."[373]

The removal of a citizen suit provision was in large part a result of lobbying by Canadian farmers and ranchers who, "thanks to this information flow from the United States, knew chapter and verse" about the negative implications of citizen suits in the US.[374] As noted in the above section on industry and landowners, the elimination of citizen suits, the emphasis on spending rather than regulation, the promise of compensation, the focus on publicly-funded stewardship programs, all helped garner the support of this key constituent group. In large part, these concessions were based on learning from the US experience.

In the end, SARA was at least minimally acceptable to all the aforementioned stakeholders, even if this entailed not "support" per se but at least a realization that this was the best that could be achieved in the circumstances. In any case, it represents a stark contrast to the unanimous opposition to Bill C-65 and can be seen as quite an achievement of diplomacy after three previous failed attempts. Whether it lives up to expectations during the implementation phase remains to be seen. As one scientist remarked wearily, "We'll see, the proof in the pudding will be in the eating."[375]

Conclusion

This section will analyze the extent to which public opinion, actors and cross-national lesson drawing explain SARA's eight provisions: listing, basic prohibitions, habitat protection, federal-provincial cooperation, discretionary language, lack of citizen enforcement, cooperative approach to implementation and enforcement, and the inclusion of several aboriginal-related provisions. As with the US case, it is a combination of variables that has the best explanatory utility. Cross-national lesson drawing, in particular, exaggerated the differences between the two Acts.

Public opinion in Canada demonstrates that an Olsonian analysis is consistent with SARA's empirical evidence. The depth of public support for endangered species legislation was questionable and the salience of the issue was low. Amidst other national concerns like unemployment and the economy, the public was not making endangered species legislation an election issue. Hence, Canadian ENGOs did not have the lobbying leverage that comes with an attuned electorate and Canadian politicians had few electoral incentives to enact tough legislation. However, while public opinion generally explains why politicians enacted a less stringent statute than the US, it does not explain the specific provisions or why the bill was enacted at all. For example, it does not explain why the citizen suit provision, while in the

original bill, was taken out of the final Act, nor does public opinion explain why SARA emphasizes spending instead of regulation and compensation if regulation. To answer these questions, one must look at the interaction of actors and cross-national lesson drawing.

For their part, scientists and environmentalists, who were generally aware of the experiences south of the border, expressed the desire to avoid the problem areas of the ESA but *did* want to emulate other aspects of the Act like mandatory habitat protection. These two groups lobbied for mandatory habitat protection and, at minimum, a "negative option" listing process. ENGOs also lobbied for mandatory prohibitions on the taking of listed species and mandatory recovery plans. Industry and landowner groups were keenly aware of the US experience and lobbied against anything akin to a "command-and-control, top-down, American-style piece of legislation."[376] Consistent with an Olsonian analysis, policymakers did heed industry and landowner warnings about a legalistic, ESA-style law; but policymakers also drew the same conclusions through their own observations of how controversial the ESA was and still is. In the end, the emphasis on a discretionary statue without a citizen suit provision, that also utilizes compensation and relies on publicly funded stewardship programs, was in accordance with the lobbying efforts of industry and landowner groups.

However, this is not to say that SARA is weighted in favour of industry groups over environmental interests as an Olsonian analysis would suggest. Indeed, the very existence of the Act belies straightforward Olsonian predictions. Moreover, some of the key recommendations by environmentalists and scientists were incorporated into the Act. In fact, although not as stringent as the ESA, the mandatory provisions that were to be applied in areas of federal jurisdiction and the discretionary safety net that could be applied in areas of provincial jurisdiction were a drastic expansion of legislative protection compared to Bill C-65. Other than being a reflection of the lobbying and cross-national lesson drawing of actors, the exact policy balance achieved by Canadian policymakers – spending instead of regulation,

compensation if regulation, and a wider (but discretionary) scope to protect all species anywhere in Canada – seems to be, in part, a result of the lobbying efforts of the coalition of environmentalists and industry groups in SARWG. Lastly, aboriginal lobbying, and the efforts of government actors such as Curtis and Anderson, gave way to extensive consultation between the government and aboriginals for Bill C-5 and the inclusion of several aboriginal-related provisions. It would be remiss, however, to suggest that interest group contestation alone, underscored by cross-national lesson drawing, achieved the key provisions of SARA. The institutional constraints and incentives particular to Canada's parliamentary government and Canadian federalism were just as vital in shaping the Act, which is the subject of the next chapter.

CHAPTER IV
SARA: Institutions

SARA is very much a product of the institutional features particular to Canadian governance. Canada's parliamentary and federal system helped create a very different endangered species statute than the US ESA. Even with heavy pressure from lobby groups, Canadian policymakers could only respond to stakeholders' demands within the constraints of institutional rules and parameters. This chapter is divided into three sections. The first section discusses SARA's discretionary nature as a product of the parliamentary system, interdepartmental Cabinet negotiation, and political wrangling as a backdrop to the House of Commons vote on SARA. The second section analyzes associated aspects of federalism that influenced the creation of the bill, including provincial reactions to the bill, jurisdictional ambiguity over species at risk, and political circumstances that provided further incentives for a discretionary statute. Lastly, like previous chapters, the conclusion will evaluate to what extent institutional factors explain SARA's provisions.

Parliamentary Government

Canada's parliamentary, Westminster-style government is composed of an executive branch, led by the Cabinet, who are also members of the legislative branch, the House of Commons. Thus, the executive is dependent on the legislature, with a "fusion of powers" rather than a separation of power between the branches of government. Since the executive and legislative branches are fused, legislators do not usually write non-discretionary statutes as there is no need to; the lack of incentive to limit the discretion of the executive branch then yields highly discretionary legislation. SARA is such a statute since, with the few exceptions noted in Chapter 1, most of SARA's provisions are written in discretionary language.

Cabinet: Interdepartmental Negotiation

To the extent possible, given Cabinet secrecy, two distinct phenomena can be seen in Cabinet discussions leading up to SARA. First, some Cabinet departments sought to represent the interests of their department, essentially an institutional reinforcement of the interest group argument. Second, some departments sought to extend their autonomy and budgets so that they could implement provisions relating to SARA.

Context for Interdepartmental Negotiation:

Interdepartmental negotiation is part of a larger context, in that the negotiating or balancing of departmental interests is necessary to the legislative process no matter what kind of legislation is being passed. Part and parcel of the Westminister-style, Cabinet government is that the Environment Minister, in shepherding a bill through, must seek the approval of Cabinet colleagues. If what he/she is trying to get approval for only affects that Minister's limited group of clients, or direct sphere of influence, it is usually an easy task to obtain Cabinet approval. However, for a piece of legislation like SARA, with broad sweeping application, which impacts various departments and affects both Canadian environmental and economic interests, it is a more difficult challenge to get everyone to agree.[377]

Thus, Anderson had to be cognizant of other Cabinet departments affected by SARA. As such, SARA was crafted to ensure that it acknowledged other ministerial jurisdictions, and that the Act did not become an effective transfer of executive authority to the Environment Minister from their ministries.[378] This is reflected in the fact that both Bill C-33 and Bill C-5 explicitly involved more than one ministry in the administration of SARA. Under section 8 of SARA the Act is jointly administered by the Ministers of the Environment, Fisheries and Oceans, and Canadian Heritage.[379]

Department's Representing Interests:

Federal departments such as Fisheries and Oceans (DFO), Industry, Agriculture, and Natural Resources have an added stake in the final outcome of the bill because they need to take into account the interests of their "constituents" or "clients".[380] It can also be hypothesized that as part of their mandate, departments often represent certain interests when they argue over elements of legislation. For example, DFO focuses on commercial fishing interests, Agriculture Canada supports the interests of private landowners, and the Departments of Industry and Natural Resources defend the interests of industry.[381] Taken together, these interests must be balanced when crafting endangered species legislation. As one civil servant put it, each department has their own clients' needs to meet as these constituents are lobbying hard to put pressure on the Environment Department to not pass the legislation or to amend it.[382] In effect, each department wants to know how SARA is going to affect their constituents, and as a result, a lot more questions need to be answered by the Environment Minister.[383] In the end the whole process of internal lobbying affects the outcome of SARA.

Departments Extending Autonomy and Budgets:

The discussions that applicable departments had over endangered species legislation also reflected their effort to secure for themselves the ability to implement the statute. Essentially, without the proper funding for implementation it was hard to get departments to back endangered species legislation. Consequently, there was a degree of unwillingness to support a species at risk legislation with strong provisions, for example, mandatory critical habitat protections, without any guarantees that the resources would be available for the departments to accomplish such a task.[384]

As a result, during Cabinet deliberations the DFO, Industry, and Agriculture, in particular, had their concerns. The key point for the Agriculture ministry was compensation, as

this was a "deal breaker" for its constituents. Once compensation was promised the department started getting on board.[385] The DFO was especially nervous about being politically required to assume major new conservation responsibilities, like critical habitat protection mandated by law, without significant new funds.[386] It seems that the Department had to set aside their fears when one of the last minute concessions was to make habitat protection mandatory on federal land and for "federal species" (i.e. aquatic species) anywhere in Canada. The government's cooperative approach, however, emphasizes spending rather than regulation, that is, publicly funded stewardship programs first, and regulation only if that fails, which makes the Act more workable for departments such as the DFO, Industry, and Agriculture. Furthermore, the listing process gives Cabinet the final say over which species are listed, and thus which species receive the protections accorded by SARA, and the extended consultation period gives Cabinet more time to decide whether to list species or not.

House of Commons and Committee Stage

The House Committee on Environment and Sustainable Development was a unique committee in that it was strongly independent, most obviously due to a "trio of tenacious, sometimes contrarian MPs who formed the ecological conscience of the [Liberal] party."[387] These MPs – whom David Suzuki called the three 'eco-heroes' – were Committee Chair Charles Caccia, Karen Kraft-Sloan, and Clifford Lincoln.[388] In April 2000, when Bill C-33 was tabled in the House of Commons, the three MPs were quick to voice their opinions on SARA. Liberal MPs and ENGOs contended that the bill was too weak without amendments even though Anderson warned his colleagues that the introduced legislation could not survive major amendments.[389] Nonetheless, Karen Kraft Sloan specifically said that she was "sure there [was] going to be a lot of amendments required to bring the bill up to speed", in part to address such

concerns as Cabinet rather than scientists having the final decision about which species should be protected.[390]

The tenacity of these MPs did not let up during Bill C-5 debates. In fact, under Caccia's leadership the House Committee, after spending several months studying the bill and hearing from witnesses, came up with over 100 amendments.[391] The Committee's amended bill was then brought back to the House for the report stage. Once an amended bill is reported back to the House from the Committee stage, the government can move for a motion to delete a Committee's amendment(s) altogether or to change part of the Committee's amendment(s) to reflect what the government wants. In fact, most of the government's motions clawed back the Committee's amendments because the government said the Committee's amended bill, which limited the federal discretion, was contrary to "the co-operative spirit" of SARA.[392] The government's actions created bitter feelings among many MPs on both sides of the House.[393] However, this did not stop the "the green threesome"[394] from fighting back. When Bill C-5 entered report stage, Kraft Sloan informed one reporter that Liberal members were told that if any government motions were defeated the bill would be killed, but that this would not stop her from voting against the government amendments with which she disagreed.[395]

The government's perceived high-handedness came at an inopportune time in terms of political circumstances and timing. In political terms, then Prime Minister, Jean Chretien, was executing an unprecedented 'long-goodbye' with many MPs restless to see a successor to Chretien. There was also escalating tension between Chretien and his finance minister, Paul Martin, with the latter openly campaigning to succeed the former. The timing was crucial in that the Chretien-Martin debacle was taking place when SARA was being debated in the House. Moreover, tensions reached an all time high when Martin was fired (or resigned depending on which story one believes) just seven days before the final June 11th (2002) vote on SARA.[396]

Sensing that a window was opening due to political circumstances, key members of the House Committee – Rick Laliberte, Karen Kraft-Sloan, Charles Caccia, and Clifford Lincoln – fought to keep some of the important amendments proposed by the Committee. In early June 2002, the latter three MPs pressured the government to make COSEWIC's listing have the force of law unless vetoed within nine-months by Cabinet and to make critical habitat protection mandatory on federal lands and for federal species.[397] In fact, Kraft Sloan and Caccia publicly said they were going to vote against the legislation unless the government strengthened these provisions on listing and habitat protection. Their threat worked because they were able to capitalize on the discontent of backbench politicians. Discontent stemmed largely from those MPs unhappy with the Chretien-Martin fiasco,[398] and was further exacerbated by many politicians' frustration with Cabinet's decision to overturn almost all of the Committee's amendments,[399] and rural Liberals' successful threats to vote against a government motion for SARA, unless there were guarantees of compensation.[400]

While Kraft-Sloan, Caccia, and Lincoln fought for stricter listing and habitat measures, their Committee colleague, Rick Laliberte, another Liberal backbencher, gained government approval for amendments that strengthened aboriginal involvement and knowledge in SARA. Much to the dismay of aboriginal organizations, Cabinet, through its own amendments, had watered down the Committee's amendments specific to the National Aboriginal Council on Species at Risk (NACOSAR). First, the government changed the National Aboriginal *Council* on Species at Risk to a *committee* whose function was also revised to advise only the Minister of the Environment rather than the Canadian Endangered Species Conservation Council (CESCC) as a whole.[401] The government also insisted that this advisory committee only consist of six aboriginals and not include the three federal ministers in charge of implementing SARA. Laliberte remarked that this was a surprising change since "it had unanimous support from the standing committee, and it also was the exact wording that the minister had negotiated with our

office when I presented the amendment."[402] Second, the Minister had the discretion of choosing whether or not to create the council, as "the wording was changed from stating that the minister 'shall' establish the council to that the minister 'may' establish the committee."[403] This could be a problem in the future, because a new Environment Minister might decide there is no longer a need for NACOSAR; the Council would then become subject to the whims of the Minister. After the House Committee's provisions were initially watered down by Cabinet, some aboriginal leaders "threaten[ed] to pull their support of the bill."[404]

Fortunately, Laliberte was able to reverse some of the changes by the government. Journalist Kate Jaimet notes that in "an apparent moment of inattention by Mr. Anderson's parliamentary secretary"[405] and with "increasing unrest within the Liberal caucus"[406] Laliberte was able to slip in last-minute amendments and successfully pressure the government to support his changes.[407] These amendments reinstated NACOSAR as a council, who would advise the Minister *and* CESCC, and changed the wording back to "shall" instead of "may." Laliberte did make some compromises, probably in order to obtain government support for his amendments. First, he left NACOSAR's composition at six aboriginals without the recommended three federal ministers. Second, the government eliminated the House Committee's sub-clause that specified one of the roles of CESCC was to seek and consider advice and recommendations from NACOSAR. Laliberte did not attempt to change this.

During this time, newspaper headlines told the tale of political wrangling amongst the caucus as a whole: "Chretien's waning power imperils new legislation", "Liberals demanded favours to pass bill", "Backbenchers flex muscles"[408], and "Backbenchers win one for rural landowners: Liberals forced to strengthen compensation rules in Species at Risk Act."[409] Such "flukey" political circumstances and timing meant that MPs could exert a degree of independence and "demand political favours in exchange for supporting government legislation"[410] that, in theory, is usually not a feature of parliamentary systems due to party

discipline. In the end the government was forced to make concessions concerning listing and habitat protection to ensure that the bill would pass in the House. As Anderson recalled in a year-end interview, "The broader dynamics meant that we really didn't know who would vote for or against the bill [SARA], for reasons totally divorced from the bill".[411] Interestingly, on one hand, with SARA, Chretien's "long goodbye" meant that he faced a rebellious caucus. On the other hand, Chretien also had the particularly powerful threat to call a snap election with him still as the Liberal party's leader; this latter point enabled him to ratify the Kyoto protocol not long after SARA's passage.[412]

Canadian Federalism

Canadian federalism is unique in that "Canada is a model of extreme decentralization among Western democracies. Constitutional mandates and political realities preclude a significant federal role in environmental issues."[413] Consistent with this description of Canadian federalism, intergovernmental negotiation was key in fostering a less stringent Act. Paradoxically, however, while the bill was mostly discretionary in nature, it did have a wider scope due to the basic prohibition and critical habitat safety nets which could be invoked to trigger provisions on provincial and private land. A discussion of the provincial reactions to the bill will first be conducted to give a sense of whether the provinces really thought the discretionary safety net was that unthreatening. This will be followed by an analysis of the jurisdictional ambiguity and political circumstances which provide context for intergovernmental negotiation on SARA.

Provincial Reactions to Bill C-5

First and foremost it must be noted that the provinces, with the exception of Quebec, did sign on to the National Accord, indicating their acceptance of the general principles of federal legislation protecting endangered species.[414] That said, the federal government's wider scope of

authority in both Bill C-33 and Bill C-5 did not go unnoticed by wary provinces. Alberta and Quebec were the two provinces that voiced their concerns about the constitutionality of Bill C-33.[415] Alberta was ready to challenge the constitutionality of C-33 and failing that, Environment Minister Gary Mar said that "the province would seriously consider withdrawing from the National Accord for the Protection of Species at Risk...."[416] By the time of Bill C-5 many of the provinces were definitely nervous about the federal safety net, in particular Alberta and Quebec raised jurisdictional issues with respect to this provision.[417] As Brackett summarized, "...for species that are managed by the provinces and territories, those provinces and territories feel that it should be their right to make the decisions on how to protect, and, in fact, whether to protect those species. Bill C-5 to some extent arrogates that responsibility to the federal government level."[418] Despite the nervousness among provinces, the fact is that with the exception of Quebec, the provinces remained publicly quiet about Bill C-5. In fact, there is a dearth of newspaper articles documenting provincial reactions to SARA when it was enacted.

Correspondence with the two provinces over Bill C-5 turned up two surprisingly different responses. The Alberta government although seething publicly about Bill C-33's wider scope, has been silent since then. In a letter to the author, Steve Brechtel, Head of Resource Data and Species at Risk for the Alberta government explained that they "...have difficulty in accurately responding to the incomplete picture we have of the possible operation and impacts of the Species at Risk Act (SARA)"; but that their overall reaction is that "[t]o the extent that the SARA legislation eventually supports the cooperative approach outlined in the Accord, we welcome it as a new contribution to the Canadian conservation effort for species at risk."[419]

The Quebec government responded to questions in writing and were far more forthcoming in their answers. In fact, when asked if the Quebec government supports Bill C-5, the answer was an unequivocal "No." [420] The Quebec official who was interviewed elaborated that

> Since the beginning of the process, the Government of Quebec has indicated its opposition to the different Bill projects regarding species at risk elaborated by the Federal government. All these projects included, in our opinion, dispositions encroaching upon our fields of jurisdiction...Quebec has never officially announced that it recognizes SARA. When SARA was sanctioned on December 12, 2002, the Quebec Environment junior Minister, Jean-François Simard, declared himself to be very disappointed by the new Canadian law that did not take into account Quebec's preoccupations. [421]

In fact, Quebec has never signed the National Accord on Species at Risk, "preferring to know the content of the federal legislation to be adopted in order to make sure that the principles included in the Accord would be respected."[422] When the Quebec government did know Bill C-5's provisions it felt that the Act fundamentally intruded on Quebec's jurisdiction, a position consistent with Quebec's views of other federal environmental laws like the Canadian Environmental Protection Act (CEPA) and the Canadian Environmental Assessment Act (CEAA). The Quebec government was particularly critical of the federal safety net provision. The interviewee stated that "Quebec has always opposed this provision of the federal law judging it contrary to the distribution of fields of jurisdiction in Canada," further believing that "[t]he Federal government has definitely imposed this provision of the safety net in spite of the opposition, amongst others, of Quebec."[423]

Nonetheless Quebec understands the necessity of working with the federal government, and, as such, the federal and Quebec governments are currently negotiating a bilateral agreement on species at risk. However, the interviewee points out that Quebec's drafting of the agreement "in no way suggests that Quebec recognizes SARA." Although "the Federal...opposes many of the modifications made" in this version drafted by Quebec, "[t]here

still is a will to agree and a meeting was recently held to try to find solutions." As a result of the discussions around this agreement "some of Quebec's fears [have] indeed faded."[424]

However, with the exception of Quebec, it must be emphasized that despite the nervousness over the federal safety net, so far neither the provision nor the Act have been legally challenged or protested against by the provinces as fervently as before. The intriguing question is why the provinces, and especially Alberta, backed off publicly since Bill C-33. Two points can be made here. First, as some have pointed out, the discretionary nature of the federal safety net means that it will rarely if ever be invoked. There is a huge difference between a prohibition that actually applies and one that could only apply in the future if Cabinet decides to bring it in.[425] Second, "there is no iron fist in the velvet glove" since the track record of the federal government to invoke somewhat similar safety net provisions under other federal environmental statutes is extremely poor.[426] If the federal government has failed to invoke similar measures before, why would it choose to change its ways now? As Elgie warns, "it's anyone's guess, but it's a pretty safe bet that that power is going to be exercised very rarely...So you're in a much weaker position if the activity is prohibited under the safety net."[427]

However, such assurances have not reassured Alberta and Quebec in the past, for example, with regards to CEPA or CEAA.[428] Indeed, regardless of whether the federal safety net is discretionary and the present government rarely if ever uses it, future governments may have a different take on environmental matters and may want to invoke the safety net. This, then, seems to be a reason for why the provinces are very wary of even a discretionary safety net. That said, when answering the author's question of whether the talks for a bilateral agreement have pacified the Quebec government's initial fear of federal intrusion, the interviewee expressed his/her views on the future effect of the safety net. She wrote that, "[t]he negotiations [for the bilateral agreement] went smoothly in a collaborative mood, each party conscious of the advantages on the operational level of a signed agreement. Some of Quebec's fears indeed

faded. *As for the safety net, the mechanism to install it is so complex that it might make the Federal more hesitant to intervene."* [429] It can be speculated that for a Quebec official to think that the federal safety might not be as big a threat as once thought, the federal government's intergovernmental negotiation with the provinces were quite successful.

Indeed, one can only speculate about why most provinces bit their tongue publicly despite being uneasy about SARA. Did the federal government make any assurances to the provinces about the use of the safety net? Were the provinces just convinced that they could not win a legal battle if they challenged the constitutionality of SARA? Whatever the case the federal government did craft the safety net in such a way as to give flexibility to the federal government and to be as deferential as possible to the provinces. SARA itself does not include any criteria for when to invoke the safety net and one of the main critiques by the Senate Committee was that SARA did not require the government to specify the criteria that would be used to assess the adequacy of provincial programs.[430] The government in fact had also rejected the House Committee's amendment incorporating this requirement to include assessment criteria. Thus, perhaps the federal government purposefully left out the details of how the federal safety net would work and when it would be invoked, so that such details could be hammered out in private. *If* private discussions have yielded a complex set of hurdles for the federal government to clear before invoking the safety net, such hurdles would also hinder future governments' use of the safety net. Perhaps, this is why there was a lack of provincial outcry against SARA – the provinces were convinced that the safety net would be very difficult to use by any federal government.

The fact that the provinces, most notably, Alberta and Quebec, have retreated from assertions of challenging the Act in court is in Anderson's words, "an example of successful internal Canadian diplomacy at the federal-provincial-territorial level."[431] Anderson notes that he had spent a great deal of time addressing provincial concerns. He firmly believes that

deferring to the provinces in their jurisdiction is the best way of giving "the provinces an opportunity to demonstrate their good faith."[432] He also opined that with the establishment of the Accord and SARA the provinces are moving ahead quite rapidly to bring in their own legislation to avoid any threat of the federal safety net being used. Thus, although many provinces were suspicious of Bill C-5, based on the extensive negotiation and the federal effort to placate the provinces, it is likely that the provinces will not challenge the Act if it is implemented responsibly.

Theory and Practice: Jurisdiction over Species at Risk

Due to the ambiguous jurisdictional responsibilities over the environment shared between the two levels of government the federal government does not usually assert centralized, unilateral regulatory authority over the environment as seen in the US in 1970. This is especially the case during times of low public concern for environmental issues, as there is no credit to be claimed for 'going it alone' and snubbing the provinces in the process. The specifics of this overlapping jurisdiction and how it applies to Canada's endangered species legislation is the subject of this section.

In terms of the overlapping jurisdiction, the BNA Act does not overtly give responsibility over the environment to either level of government. Rather, federal and provincial power over the environment comes from other fields of jurisdiction specifically listed in the Constitution, namely sections 91 and 92 of the *Constitution Act, 1867.* The very vagueness of the distribution of power between the federal government and the provinces regarding environmental concerns has resulted in friction between these two levels of government, as was evidenced with the evolution of endangered species legislation in Canada. Both levels of government have authority to protect endangered species, but the provinces have more concrete constitutional authority over species at risk than does the federal government, "primarily on the

grounds that legislative jurisdiction over wildlife species, like other natural resources, rests primarily with the provinces pursuant to the *Constitution Act, 1867.*"[433] Section 92 enumerates all the heads of powers that the provinces can use to protect endangered species. The provinces' proprietary authority over Crown lands, their authority to regulate matters concerning 'property and civil rights' within the province, and their ability to dictate how natural resources within their lands are developed, conserved and managed, give them significant constitutional authority to protect species at risk. The federal government, in turn, has proprietary authority over federal lands (including those in national parks and federal Crown corporation lands) and federal waters (exclusive economic zone of Canada and continental shelf of Canada). Through its constitutional authority over fisheries vis-à-vis the Fisheries Act, lands reserved for Aboriginals, and the power to protect migratory birds stemming from the Migratory Birds Convention Act (MBCA)[434], the federal government also has the ability to assert its legislative authority over the protection of endangered species.

Grace Skogstad and Paul Kopas, among other scholars, also note that the federal government can assert its legislative and regulatory presence over environmental matters through its authority to make laws for the peace, order, and good government (POGG) of Canada, trade and commerce, and criminal law.[435] Legal scholars have also argued as much vis-à-vis species at risk legislation. The POGG power gives the federal government the most influence to justify mandatory critical habitat protection across Canada. According to Gibson, under the "national dimension" or "national concern" facet of POGG the federal government can arguably "exercise jurisdiction over all aspects of endangered species protection...regardless of the nature of the species or its location."[436] The National Environmental Law Section (NELS) of the Canadian Bar Association supports such an interpretation. According to NELS, "[g]eneral federal legislation concerning protection of *all* endangered species in Canada would be found constitutional...We believe the principal

constitutional authority for such legislation is found under the federal government's 'peace,order, and good government' power, particularly the power to address matters of 'national concern', and under the criminal law power." [437] Gibson, when referring to all the federal heads of power, argued that "[t]he totality of these federal powers are so sweeping, in my opinion as to leave few, if any, gaps in the ability of the Government of Canada to act for the protection of all endangered species in Canada."[438]

As for what the courts have said on the manner, several Supreme Court decisions have sustained a comprehensive role for federal jurisdiction in the environment. As Harrison summarizes, this includes the 1988 *Crown Zellerbach* decision on marine pollution being a valid subject under POGG; the 1992 *Oldman River Dam* decision which supported broad federal constitutional authority to conduct environmental impact assessments as well as federal reliance on narrow heads of power such as navigation; and the 1994 *Grand Council of Crees* decision which suggested the use of trade and commerce power was a legitimate exercise of federal environmental authority. Most importantly, there was the watershed 1997 *Hydro-Quebec* decision in which the Supreme Court supported extensive federal regulation of toxic substances under CEPA as a legitimate exercise of the criminal law power. This case answered in the affirmative a long-standing question about the federal government's authority to regulate based on the criminal law power. [439]

Presumed constitutional authority aside, jurisdictional ambiguity is the political reality faced when creating federal endangered species legislation. Perceived federal failure to respect provincial jurisdiction when crafting Bill C-65 resulted in unanimous provincial concern over this bill, particularly with regards to the asserted authority of the federal government to protect cross-boundary species, discussed below.[440] The same mistake was not made again in Bill C-5. Even by the time of Bill C-33 the Act was specifically designed "to avoid a constitutional quagmire since land use and wildlife resources are provincial responsibilities."[441] This reality is

reflected in the heads of power used under SARA: proprietary authority over federal lands and federal waters, constitutional authority over fisheries, lands reserved for Aboriginals, the power to protect migratory birds stemming from the Canada-U.S. Migratory Birds Convention and Act, and the criminal law power.

The use of the criminal law power is particularly important as it represents a turning point in the understanding of the federal government's constitutional authority over endangered species vis-à-vis the provinces. According to David Near, Senior Counsel, Environment Canada, the federal government did not really have any difficulty in proceeding with the use of the criminal law power, "it was more a policy decision as to how far the government wished to push its use."[442] In Bill C-65 the only use of the criminal law power was for prohibitions with respect to residence. When SARA was introduced in updated versions the federal government decided that the use of the criminal law power could be expanded to provide the basis for prohibitions on provincial and territorial land; these prohibitions would be triggered when the government invoked a discretionary federal safety net.

The criminal law power, as opposed to POGG, was a more constitutionally sound head of power for several reasons. For example, "unlike the federal authority over marine pollution under POGG established by the *Crown Zellerbach* decision, federal environmental authority under both trade and commerce and criminal law *can coexist with concurrent provincial environmental authority.*"[443] For the Department of Justice, the criminal law power is a well-established source of federal jurisdiction and "in the context of the legislation (SARA) and the prohibitions proposed we did not feel that there was much of a constitutional risk to use the criminal law power. Hydro-Quebec is but one example, albeit in an environmental context where the federal government has successfully utilized the criminal law power. Certainly the supplementary nature of the criminal law power was a factor in this analysis."[444]

With regards to the federal government's decision not to employ its POGG power, Near gives two reasons: "part of it would have been on the advice of the Department of Justice and part of it would have been simply a policy choice...."[445] For the latter the Department of Justice simply, for undisclosed reasons, took a legal view that was different from Gibson, Elgie and LaForest and advised the government accordingly. After meetings with the Deputy Minister of Justice it came down to "an agreement to disagree on certain positions that were being put forward by Mr. [Dale] Gibson and [Mr.] Stewart [Elgie] at the time."[446] As for the "policy" questions about using POGG, there were three factors. First, David Anderson states that Chretien did not want to have more battles with the provinces than necessary.[447] Second, as stated above, the Supreme Court interpreted POGG as displacing rather than supplementing provincial authority.[448] Third, and related to the former, Anderson feared that the federal government would be taken to the courts on the use of POGG, the provinces would win such a court battle, and there would be no legislation at all; it was a chance that they did not want to take.[449] In Anderson's words,

> If we use the peace, order and good government power, which is a very, very general head and the courts are determined to restrict that power...we probably would have lost the ball game and we would be tied up in court cases now on the basic law, without even ever having used it...nobody knows the natural limits to peace, order and good government and it was a very tricky thing contemplating using. It was highly, highly theoretical. So we didn't use that...It was not a question of a certain win and it was a big political cost.[450]

Despite the wider authoritative scope of SARA, it is not as extensive as the ESA. Mandatory prohibitions and habitat protection do not apply on provincial or private land, but rather apply only on federal land and for federal species. As discussed above, ENGOs and environmental lawyers have criticized this. Richard Lindgren of the Canadian Environmental Law Association summarizes by saying that "[b]ecause there are no compelling constitutional grounds to limit the nature and scope of the SARA, it is reasonable to conclude that the narrow

application of the SARA was primarily motivated by political considerations rather than constitutional constraints."[451]

Of course, although environmentalists would like to test the limits of the federal government's constitutional power in order to better protect imperilled wildlife, lawyers from the Department of Justice do not want to draft a law that could potentially be struck down as *ultra vires.* Overall, although the federal government made Bill C-5 wider in scope than previous versions of SARA, given the fact that the federal government did not assert a *unilateral,* regulatory presence and make the basic prohibitions and critical habitat provisions mandatory on provincial land, the government obviously chose to respect provincial sensitivities and the cooperative nature of the Act. Fostering a more cooperative legislation has been all the more apparent since the harmonization initiative of the 1990's, discussed below.[452]

Political Context

Provincial sensitivity to federal intervention thus stems from the provinces wanting to safeguard their jurisdiction from federal infringement, a reality that is muddied by jurisdictional ambiguity over the environment more generally and endangered species specifically. Moreover, as Amos et al note, provinces essentially have the same concerns as industry and landowners because "...assertions of federal environmental jurisdiction, including authority to protect species at risk, represent a more fundamental threat...to provincial authority to direct economic development" within provincial borders and to exploit their Crown lands.[453] This threat of federal interference was made all the more real by previous legal-political events. First, the 1989 Federal Court decision ruled that the federal government was *required* to conduct an environmental review of two dams being constructed by the Saskatchewan government on the Rafferty and Alameda rivers. This interpretation came from the government's own Environmental Assessment and Review Process (EARP) Guidelines Order, an Order which

environmental groups used to challenge dozens of major projects in almost every province.[454] Second, in the Supreme Court's Oldman River Dam decision environmental groups successfully forced the federal government to conduct environmental assessments of provincially owned projects after-the-fact, that is after the projects were underway.

The litigation resulting from environmental assessment showed both levels of government that non-discretionary language in an environmental statute gives citizen groups the power to force the federal government to assert authority over areas of provincial jurisdiction. When SARA was put on the table the controversy over the Rafferty-Alameda and Oldman Dam decisions were fresh in the provinces' memory. This can be seen as another reason for provincial opposition to citizen suits and non-discretionary language and one underlying reason for the federal government's use of discretionary language and a more cooperative approach for SARA.

The 1990's "harmonization initiative" was an effort to mend fences between the federal and provincial governments' fall out over the controversial environmental assessments; federal-provincial negotiations concerning species at risk protection took place within this larger context.[455] Specifically, the harmonization initiative was geared towards restoring intergovernmental harmony; eliminating overlap between federal and provincial environmental programs; implementing "Canada-wide" standards (rather than federal standards), based on federal-provincial consensus; and utilizing a 'single-window' approach where one level of government, preferably the provinces, would implement policy.[456] That both the House Committee and scholars alike have questioned the actual extent of duplication in the environment field[457] means that on a more pragmatic level, the problem of overlap is also a problem of federal interference in provincial jurisdiction. The single-window approach, then, is one more expression of the provinces' desire to keep the federal government out of their affairs.

The harmonization initiative's single-window approach, and rationalization of federal and provincial roles to ensure that federal unilateralism would be avoided, is explained not only by federalism (intergovernmental negotiation and cooperation) but also by the cyclical nature of public opinion. Since the environment was not a salient issue among the public, the federal government had no incentive to assert a strong federal role and instead deferred to the provinces. However, in cases where environmental issues were more salient, as during the first green wave, the federal government responded by enacting federal legislation which led to intergovernmental relations being "characterized by tension and conflict" and which made some provinces resent federal encroachment on provincial jurisdiction through federal policies.[458]

These same goals of establishing "Canada-wide" standards and a single-window approach materialized in the National Accord for the Protection of Species at Risk and in the mandate of the institutional forums through which the two levels of government conducted negotiations for endangered species legislation. With regards to the latter, the two main forums are the Wildlife Ministers Council of Canada (WMCC) and the Canadian Endangered Species Conservation Council (CESCC).[459] Both the WMCC and CESCC are consensus-based; consensus-based executive federalism has proven, in Canada, to give the provinces substantial leverage when negotiating with the federal government. Since both organizations are consensus based, the provinces are on a generally equal playing field with the federal government and have a relatively strong position to resist federal proposals that will infringe upon their jurisdiction.[460] This is then another reason why the federal government has had to take such a discretionary approach to endangered species legislation.

Within these forums the federal government and provinces were able to negotiate on matters relating to SARA. The federal government in particular used the years of negotiation to address provincial sensitivities that had flared up over endangered species legislation since the introduction of Bill C-65. The provinces had unanimously opposed Bill C-65[461] and wanted

several provisions in this first endangered species bill changed. First, the provinces opposed the potential of infringement on provincial land imposed by an equivalency provision, citizen suits, and the overall use of non-discretionary language. By the time Bill C-5 was introduced,[462] the equivalency and citizen suit provisions were eliminated and there was more emphasis placed on discretionary language. It can be assumed that these changes were a response to stakeholder pressure – such as from the business community, landowners, and SARWG – and a realization by government, based on hindsight, that such provisions in environmental legislation could do damage to federal-provincial relations. The second notable problem that the provinces had with Bill C-65 was over the listing process. The provinces wanted COSEWIC appointments to be based in part on provincial consent, accordingly the provinces were given a greater role in COSEWIC appointments.[463] Lastly, the provinces' biggest grievance was what they perceived as too broad a federal regulatory role over international transboundary species (section 33 in Bill C-65). Although this provision was eliminated in subsequent bills, it was replaced by the still controversial use of the safety net, discussed above. Thus, it is unusual that the provinces were less publicly opposed to Bill C-5, when the Act is a broader constitutional assertion than Bill C-65.

Conclusion

From the above analysis it is clear that institutional factors help explain a number of SARA's provisions, namely, the listing process, the discretionary nature of the safety net, federal-provincial cooperation, the lack of citizen suits, the overall use of discretionary language, a more cooperative approach emphasizing stewardship and compensation, and the inclusion of several aboriginal-related provisions. However, such an explanation by institutional factors cannot be separated from the role of actors and public opinion discussed in Chapter 3. The variables combined, though, do present a more nuanced and convincing argument.

As discussed in Chapter 3, the 'negative option' listing process was advocated by most stakeholders. The recommendation was to make COSEWIC's list have the force of law unless vetoed within a short and definite time period. Scientists, environmentalists, and SARWG also specifically lobbied for strong habitat protection measures. Backed by these stakeholders' recommendations, the MPs in the House Committee, particularly Caccia, Kraft Sloan, and Lincoln were then able to pressure the government into agreeing to provisions on habitat protection and listing. Laliberte was also able to effectively secure more provisions for aboriginals. Furthermore, rural Liberal MPs successfully garnered stronger promises for compensation. These MPs' efforts were successful due, in large part, to the timing of the Chretien-Martin fiasco. While such independence by MPs is not consistent with a notion of party discipline typical of parliamentary systems, Cabinet influence over the bill is in keeping with a parliamentary government's greater centralization of legislative power in the Cabinet. The listing provision still gives Cabinet the final decision making authority over the listing process. Indeed, as discussed a legal loophole gives Cabinet more than nine-months within which to veto COSEWIC's assessment of species. In addition, Cabinet departments were appeased as well; specifically, the DFO is named in SARA as one of the administering departments of the Act and the Agriculture Ministry was placated by the promise of compensation for its constituents.

The federal safety net was an expression of federal authority that was much wider in scope than previous legislation. The provision was the source of opposition from a number of provinces namely, and not surprisingly, Alberta and Quebec. However, the fact that all but Quebec have publicly shied away from opposing Bill C-5 is somewhat surprising. It seems that the federal government's emphasis on making the provision discretionary and giving provinces full control of species protection on provincial land in the first instance appeased the wary provinces. This is an indication of a great deal of diplomacy on the part of Anderson. It may

also suggest that a federal-provincial deal was struck to appease the provinces, although this latter point is merely speculation. In fact, while the safety net may represent a threat to provincial jurisdiction, the fact that it is discretionary and that SARA does not delineate exactly when it should be invoked, leaves ENGOs believing that the federal safety net will rarely if ever be used. Indeed, environmental lawyers are of the opinion that the federal government could have used its criminal law and POGG head of power to create *mandatory* habitat protection for, and prohibitions on takings of, all species anywhere in Canada, including provincial land.

The reality, however, is that jurisdictional ambiguity over the environment and species at risk means that for political reasons the federal government tends not to unilaterally assert its authority to protect species on provincial land in consideration of federal-provincial relations. Essentially, the federal government, by giving greater deference to the provinces despite assertion of wider federal authority, has put the provinces and territories in the driver's seat when it comes to their jurisdiction. For their part, the federal government, while trying not to be a back seat driver, provides directions vis-à-vis SARA and the National Accord.

Lastly, the avoidance by both governments of non-discretionary language, the extensive federal-provincial cooperation, and the provincial opposition to such provisions such as a citizen suit and an equivalency clause reflects the hindsight attained from a number of political circumstances. Court decisions in the late 1980s and early 1990s, in which there was litigation resulting from environmental assessment, demonstrated the need for discretionary language in environmental statutes such as SARA. Further, the goals of achieving Canada-wide standards, a single window approach to policy, and eliminating overlap as part of the harmonization initiative, were reflected in both the National Accord and the mandate of the WMCC and CESCC. The former provides a guideline for federal-provincial cooperation on protecting species at risk and the latter two forums are venues of executive federalism where provincial governments held, and continue to hold, great sway in having their concerns heard. Underlying

such cooperation has been the low public concern for environmental issues, giving the federal government the ability to delegate responsibility to the provinces instead of asserting a more unilaterally regulatory presence. In this context, the extremely decentralized nature of Canadian federalism is apparent, giving way to an Act which, as Anderson says, strikes a delicate balance between provinces, landowners and wildlife.[464]

CHAPTER V
The Sum of the Parts: Conclusion and Comparison

When comparing the US' Endangered Species Act and Canada's Species at Risk Act on paper, the two policies are strikingly different in terms of stringency and scope. This thesis analyzed eight main differences between the two statutes: listing, basic prohibitions, habitat protection, federal-state or federal-provincial cooperation, discretionary versus non-discretionary language, citizen enforcement, regulatory approaches and the inclusion of Aboriginal-related provisions. The main finding is that all four variables were important in explaining the provisions of the ESA and SARA, as each individual variable accounts for some of the policy differences, with the other variables then filling in the explanatory gaps.

To enhance the analysis thus far, this concluding chapter will draw comparisons between the two cases to demonstrate three points. First, institutions, actors and cross-national lesson drawing actually varied in the two cases and can account for the differences between the ESA and SARA. Second, it is a combination of variables that best accounts for the policy differences between the ESA and SARA, as this combination provides the more nuanced and complete explanation. Lastly, this conclusion will further elaborate on the contribution of cross-national lesson drawing to this analysis.

Public opinion

As reiterated in this thesis, when there is a peak in environmental salience among the public, politicians are most responsive to enacting strong environmental statutes, such as endangered species legislation, in large part because of increased electoral incentives to do so. Indeed, politicians come under additional pressure from ENGOs since favourable public opinion gives these groups' arguments added legitimacy. As is the case with the cyclical nature of public opinion, when the green wave subsides and the public turns its attention to 'bread and butter'

issues, politicians tend to also change course. Thus, during a 'trough' in public opinion, when the issue of endangered species does not register as the public's top priority, governments are more willing to respond to the more organized and attentive business and industry groups, who are opposed to a US-style, prohibitive endangered species policy.[465]

The empirical evidence for the ESA and SARA are consistent with such predictions. In the US the first environmental wave occurred from the late 1960s to early 1970s. The impetus for the ESA started in 1970, the peak of the green wave, and got off the ground in 1972, at the tail-end of the green wave. Politicians 'rode the wave' even as the salience of the issue was dissipating, sure as they were of the popularity of the issue. As noted in Chapter 2, the fact that Republicans were jostling with Democrats to be seen as the defenders of wildlife, with virtually all politicians voting in favour of the prohibitive ESA, indicates that they perceived that their actions were supported by a strong level of public support. Almost thirty years later SARA was not created during a peak in environmental salience and thus public opinion in Canada was very different between 1997 and 2002 – the most relevant time period preceding the Act. When prompted in polls, the average Canadian was ignorant about the issue, did not regard the environment as a top national concern, and did not feel that species endangerment was a top environmental issue. Politicians thus had few electoral incentives to enact stringent legislation, especially since such legislation went against constituencies who *were* aware of the issue, namely industry and landowner groups.

The difference in public opinion in the US and Canada was therefore important to the ESA and SARA. On one hand, in the US it gave more leverage to environmentalists' demands for tough legislation and provided electoral reasons for politicians to bend to such pressure and to enact strong legislation. On the other hand, in Canada, ENGOs were at a disadvantage because the salience of the issue was not high, and this trough in public opinion meant that election-minded politicians were more willing to respond to an attentive business community

that was against a US-style policy. However, while public opinion motivated US and Canadian politicians to enact strong or weak legislation respectively, public opinion does not explain the specific provisions of the two policies such as non-discretionary versus discretionary language or the adversarial regulatory approach versus cooperative approach. For such an explanation there needs to be an analysis of the institutional and interest group differences, reinforced on the Canadian side by cross-national lesson drawing.

Institutions

A neo-institutionalist approach places emphasis on the "rules and procedures that allocate authority over policy and structure relations among various actors in the policy process."[466] Such an approach would suggest that institutions shape policy by structuring the authority and relations among the different branches of government and by structuring which interests are given access to the policymaking process. Important also is the concept of path dependence. Out of all the variables, institutionalism would be the most obvious causal factor to look at when analyzing differences in Canadian and US policies, given notable distinctions between the two countries' legislative-executive relations and federalism.

With regards to the former, in the US congressional system, there is a separation of powers between the legislative and executive branches. In such a system Congress tends to write highly specific statutes to limit the discretion of the executive. By contrast, in Canada's parliamentary system, the fusion of the legislative and executive branches and the existence of party discipline yield discretionary statutes, as there is no reason or incentive for the governing party to limit its own discretion.

These differences varied in ways that account for some of the diverging policy provisions of SARA and the ESA. In 1970 one of the important institutional changes that occurred in the US, made possible by separation of powers, was that for the first time Congress

no longer delegated large amounts of discretion to the executive when drafting legislation, but rather greatly limited executive discretion. The ESA was a statutory result of this institutional change; the ESA's provisions were written in highly specific, non-discretionary language and were backed by a citizen suit provision. Such provisions, when implemented, led to the ESA's infamous litigious and adversarial regulatory approach. For SARA, with the exception of a few provisions such as prohibitions and habitat protection in federal jurisdiction, most provisions are written in discretionary language and are thus consistent with parliament's predisposition to not limit the executive's discretion. Furthermore, Cabinet's influence over SARA, particularly the fact that it still has the final say over listing, are consistent with the parliamentary government's greater centralization of legislative power in the Cabinet. There is one notable dynamic *in*consistent with Canada's Westminster-style government. Due to the timing of political circumstances, particularly the Chretien-Martin fiasco, some MPs were able to exert their independence in spite of party discipline and gain concessions from the government on the content of SARA, such as aboriginal-related provisions, compensation, listing, and habitat protection.

In terms of federalism, Rabe and Lowry succinctly capture the distinctions between Canada and the US:

> While both nations are federal systems, they take very different approaches to intergovernmental allocations of environmental policy responsibilities. Canada is a model of extreme decentralization among Western democracies. Constitutional mandates and political realities preclude a significant federal role in environmental issues…The United States offers a more mixed approach to intergovernmental relations, with the federal government retaining substantial control over many environmental policies…As a result, Canadian provincial governments are more powerful, more independent, and more influential than are American state governments in most issues of environmental policy.[467]

These differences are reflected in the ESA and SARA's provisions. With regards to the US, another significant institutional change in 1970 was the centralization of environmental regulatory authority, helping to explain how the ESA became a prohibitive federal policy

without the need for extensive federal-State consultation. This contrasts with Canada where intergovernmental negotiations through the WMCC and CESCC were important in the creation of SARA. Most importantly, such centralization in the US gave the federal government the authority to extend *mandatory* prohibitions and protections for all species anywhere in the US, even on State land. Section 6 of the ESA provides for federal-State cooperation, but the provision specifies that State programs have to meet or beat federal standards. SARA, on the other hand, has no equivalency provision.

Given Canada's jurisdictional ambiguity over the environment and the 1990s harmonization initiative, Canada's decentralization meant that the provinces were able to exert a great deal more influence over SARA's provisions, compared to the US where there is no account of the States having any say over the ESA. The Canadian government did enact the federal safety net in spite of provincial opposition, which while not mandatory, still extends potential protection for species to provincial land. However, a great deal of federal diplomacy was associated with that provision, such that the safety net is discretionary and the Act lacks any criteria for when the provision should be invoked. Indeed, cognizant of the impact of non-discretionary environmental assessments, the provinces were against a citizen suit, an equivalency provision, and generally any non-discretionary language for provisions applying on provincial land, and they wanted a greater role in the listing process, all of which they got when the government crafted Bill C-5. Of course the fact that many of these provisions were backed by other stakeholders also helped the position of the provinces. Indeed, two of the institutional arguments discussed in Chapter 4 reinforce interest group dynamics: first, that Cabinet departments such as the DFO and Agriculture represent the interests of their constituents; and second, the fact that provinces are also landowners and, like landowners, do not want the federal government encroaching upon their economic development, particularly their ability to exploit Crown resources.

Institutional factors go a long way towards explaining the provisions associated with the legislative-executive relations and federalism, but they do not explain why the US only moved to non-discretionary statutes and such an assertive role in 1970. This is explained in part by the surge in public attention in America in 1970 and the pressure from conservation groups which prompted politicians to respond and enact tough legislation, like the ESA. The ESA was also a product of path dependence, as the Act followed the pattern of earlier statutes. Institutional factors also do not explain the mandatory prohibitions and habitat protection in federal jurisdiction, as the actions of MPs who garnered these provisions are not consistent with the usually strong party discipline of Canada's parliamentary system. Lastly, an institutional explanation does not explain why the Canadian government emphasized subsidized stewardship instead of regulation. Indeed, to understand SARA's cooperative stewardship approach, one has to look at how the Canadian government was very much responding to the lobbying efforts of industry and private landowner groups, and acting on the lessons they had learned from the US experience, as will be discussed below.

Actors

The theoretical discussion on actors/pluralism complements the literature on public opinion, particularly the insights posited by an Olsonian analysis of endangered species legislation. Such an analysis postulates that industry and landowner groups have more incentive than the wider public to overcome obstacles to collective action and lobby the government since it is the business community who bears the brunt of the concentrated costs of endangered species regulation. As such, governments tend to steer away from a strong regulatory approach. On the other hand, as suggested above, during times of low public concern for the environment, the general public is less likely to mobilize because the benefits of endangered species

protection are so diffuse. Lacking the leverage afforded by an attentive and mobilized public, environmental groups have a harder time translating their recommendations into policy.

Assessing if the empirical evidence for SARA and the ESA is consistent with the theoretical analysis of pluralism is a complex task. The important question to answer first is whether there was a *difference* between the two cases with regards to which groups were involved or the groups' relative strength. The several aboriginal-related provisions in SARA and the dearth of such provisions in the ESA can be explained by the fact that in Canada aboriginal groups were extensively consulted and were more organized than Native Americans in the early 1970s. Through the AWG process and with the help of MP Rick Laliberte, Canadian aboriginals were able to garner several important provisions, including a National Aboriginal Council on Species at Risk to advise the government and an aboriginal traditional knowledge subcommittee to play a role in listing decisions. In contrast, the ESA contains only one provision exempting Alaska Natives from certain prohibitions; other Native American groups are not addressed in the Act.

By far the most important point to be made when comparing the stringency of the ESA and SARA is the difference in the roles played by the business community. In terms of the ESA, there was virtually no protest or opposition to such a prohibitive policy from industry and landowner groups. The lack of industry involvement shows why an Olsonian analysis – which would predict that industry would protest and politicians would listen to such protest – does not apply to the ESA. Usually it is assumed that actors, particularly the business community, know if an important legislation like the ESA would be contrary to its interests; in this case, industry groups and landowners completely 'missed the boat.' By stark contrast, Canadian commercial and agricultural interests had a significant role in shaping SARA, as they were extremely vocal against any perceived litigiousness in SARA's provisions. Consistent with an Olsonian analysis, government actors avoided a US-style law, emphasizing instead publicly funded stewardship

and compensation. Although, as will be shown below, such an outcome cannot be separated from cross-national lesson drawing.

It should be noted, however, that relating to SARA, an Olsonian analysis would also "predict a biased interest group competition, with business interests tending to prevail over environmental interests."[468] Such a prediction is not completely consistent with the Canadian experience, in which *both* ENGOs and business obtained key provisions that they wanted at the expense of taxpayers instead of each other. This is in accordance with the lobbying efforts of SARWG who were able to reach a consensus on recommendations that benefited both industry and environmentalists, for instance, stewardship and compensation on one hand, and a 'negative option' listing process and mandatory critical habitat protection in federal jurisdiction on the other. Thus, while Canadian scientists and ENGOs did not have the same political influence as industry groups and landowners, the lobbying efforts of scientists and ENGOs were strengthened by the fact that some of their recommended provisions were also taken up by SARWG members.

That said, even though Canadian scientists and ENGOs achieved some inroads in terms of garnering stronger provisions, compared to the ESA, Canada's Species at Risk Act is still a much weaker legislation on paper. This outcome can be explained not only by the different roles played by the business community but also by the stronger roles of US ENGOs and scientistss. Unlike their Canadian counterparts, US scientists were the first to frame the policy problem as a purely scientific matter, which was eventually translated into law, specifically the science-only listing provision. Canadian scientists did not have nearly as crucial or exclusive a role in defining the policy problem.

Furthermore, in the US environmental groups used public opinion to their favour and successfully pressured politicians to incorporate more stringent provisions, such as the citizen suit and a mandate that federal agencies be required to follow the tenets of the Act. The actions

of scientists and ENGOs were of course aided by the fact that the business community did not protest such measures. The Bureau of Sport Fisheries and Wildlife was also pro-environment in its stance and drafted the legislation to reflect these views. In the context of public opinion and the institutional changes occurring at the time, politicians thus affirmatively responded to the external and internal pressure for tough legislation in the US. ENGOs in Canada did not have the leverage afforded by favourable public opinion, and bureaucrats were as reluctant as politicians to adopt a legalistic law. To better understand the reason why the business community was much more involved than its US counterpart in 1973 and why government actors were wary about adopting a prohibitive policy, one must look to cross-national lesson drawing.

Cross-national lesson drawing

Cross-national lesson drawing demonstrates how the two cases are not completely independent, as Canadian actors learned much from the US experience. Once enacted, the ESA's implementation soon led to controversy – most notably the Tellico Dam decision and the War in the Woods – making the US business community suddenly realize the full force of such a prohibitive policy. Canadian industry and landowner groups learned from their US counterparts, feeling that they had to challenge any potential areas of litigousness in SARA in order to avoid the controversy south of the border. Commercial and agricultural interests persistently pressured the government to avoid a US-style law, particularly the citizen suit provision. In fact, their push for compensation mirrors the strong lobbying efforts by the US private property rights and Wise Use movements for compensation. The cross-national lesson drawing phenomenon is clearly documented in the testimonies of both industry and landowner groups to the House Committee, where explicit references were made to avoid the experience of

the ESA. In the words of Rose, the US ESA was an exemplar that attracted critics "looking for ammunition to use against similar proposals at home"[469]

On the other side, Canadian ENGOs and scientists drew both positive and negative lessons from the ESA. Furthermore, there was activist-driven emulation from US ENGOs. However, the US ENGOs received a cool reception from David Anderson who spoke out strongly against the lobbying pressure from American environmental groups, groups which criticized the strength of the Canadian statute.[470]

As described in Chapter 3, government actors, themselves having a long working relationship with the US, also took note of the ESA; in fact, according to Anderson, in terms of drafting the legislation, "the most important factor was the American experience in front of us."[471] Indeed, the ESA has not only been controversial but has been difficult to change. Thus, Canadian policymakers drew mostly negative lessons about the ESA from their own observations and the lobbying efforts of other actors, reinforcing Canadian parliament's predisposition to adopt a discretionary and more cooperative statute. In the end, it can be seen that policymakers made an evaluation that adopting a policy similar to the US would not work in Canada. Indeed, one of the key insights gained from the cross-national lesson drawing dynamic is to better understand why US policymakers and especially commercial and agricultural interests were completely blindsided by the negative impact of the ESA. The fact that the US was the first country to adopt an endangered species law in 1973,[472] meant that US actors did not have the benefit of learning from the mistakes of another country, an advantage possessed by Canada.

Concluding Thoughts

It is obvious that no one variable can be separated from the other as they all complement and interact with each other. Since each variable alone cannot adequately elucidate the policy

differences, it is then a combination of public opinion, institutions, actors, and cross-national lesson drawing which offers the most comprehensive explanation. Public opinion provided the context, institutional factors predisposed legislators towards a certain approach, the unique constellation of actors pushed and pulled the two governments in different directions, and cross-national lesson drawing reinforced these dynamics.

Cross-national lesson drawing offered a unique perspective to this thesis for two reasons. First, cross-national lesson drawing amplified the policy divergence between the two Acts, and showed that due to the negative lessons drawn, Canadian legislators *intentionally* made SARA's cooperative approach different from the ESA's legalistic approach. This is noteworthy because previous comparisons of Canadian and US environmental policy have highlighted emulation and policy convergence.[473] Second, cross-national lesson drawing shed light on this policy story in ways that institutionalism and pluralism did not, especially as these latter two theoretical approaches did not adequately address external influences, such as learning, in the policy process.

Indeed, the learning dynamic is important for understanding public policy because it reveals how countries can avoid policy problems by learning from the example of other jurisdictions. Although, this is a seemingly obvious point, it has great practical consequences, with the thirty year trail of the ESA leaving an real life example of how problematic a policy can be when a country, being the first to legislate in a particular policy area, has no exemplar from which to learn. Industry and landowner groups in the US obviously wish they were more cognizant of what was at stake in 1973, while their Canadian counterparts avoided being blindsided by learning from the mistakes south of the border.

Overall, the insights gained from all three theoretical approaches have normative implications. Explaining change is critical to making change. It helps policymakers understand the present situation by shedding light on which factors need to be altered in order to make the

policy change feasible. For example, endangered species legislation continues to be an intractable policy issue in the US. Congressman Richard Pombo and his political colleagues will have to take into account public opinion, institutional factors, and pluralist contestation when trying to change the ESA. Indeed, now they have their own history from which to learn. As for SARA, more time is needed to reveal what advantages and challenges arise from the application of SARA, which while "weak" on paper may be more effective on the ground. Indeed, with the five year review of SARA fast approaching, legislators will have to be cognizant of public opinion, institutional constraints, the recommendations of actors, and any further lessons learned from the US and elsewhere.

Interestingly, US policymakers easily walked across the political tightrope when enacting the ESA, supported as they were by public opinion, institutional changes, and actors who all had the same vision for the Act. It was only once they reached the end and enacted the bill that they fell in the mire of implementation controversies. Canadian legislators had the difficult task of slowly walking down the same tightrope; however, the political environment was windy and they had the challenge of balancing variables that were blowing them in somewhat competing directions. Since Canadian policymakers already faced their share of controversy during the policymaking process; now it remains to be seen whether, as intended, legislators will be able to avoid falling into a similar implementation quandary as the ESA.

Notes

[1] When referring to the species at risk the following definitions are applicable: 1) extinct: "species [that] no longer exist"; 2) extirpated: species that no longer exist in the wild in the host country, but they occur elsewhere; 3) endangered: "species [that] are facing imminent extinction or extirpation"; 4) threatened: "species [that] are likely to become endangered if limiting factors are not reversed"; 5) vulnerable / 'species of special concern': "species that are of special concern because of characteristics that make them particularly sensitive to human activities or natural events." The ESA does not refer to "vulnerable" or "species of special concern." Canadian Wildlife Service, "Endangered Species in Canada," (Ottawa: Canada Wildlife Service, 1999).

[2] SARA was preceded by the 1997 Bill C-65 (Canada Endangered Species Protection Act), the 2000 Bill C-33 (Species at Risk Act) and the first version of the 2001 Bill C-5 (Species at Risk Act). The former two bills died on the order paper when federal elections were called and the latter bill died on the order paper when parliament was prorogued. Bill C-5 was then reinstated on October 9, 2002 and received Senate approval and Royal Assent on December 12, 2002.

[3] For a comprehensive analysis of the failure of Bill C-65, Canada's first legislative attempt at enacting federal endangered species legislation, see William Amos, "Federal Endangered Species Legislation in Canada: Explaining the Lack of a Policy Outcome," MA thesis, (Vancouver: University of British Columbia, 1999).

[4] A comparison and analysis of how the ESA and SARA has been implemented is outside the scope of this thesis, as is an extensive analysis of the effectiveness of 'tough' or 'weak' endangered species laws when implemented on the ground. However, it must be said that although classifying the ESA as a more "tough" legislation than SARA *on paper*, this is not to suggest that it is a more effective policy on the ground. As will be described below, due to the difficulty of enforcing the ESA and controversies resulting from the implementation of such a stringent statute, US policymakers are trying to change the ESA.

[5] See Jean-Luc Bourdages and Christine Labelle, "Protecting Wild Species at Risk in Canada," (Ottawa: Library of Parliament, Research Branch, 2000); Amos, "Federal Endangered Species Legislation in Canada," pp. 14-16.

[6] For full history of the legislation see Amos, "Federal Endangered Species Legislation in Canada," pp. 14-31; William Amos, Kathryn Harrison, and George Hoberg, "In Search of a Minimum Winning Coalition: The Politics of Species-at-Risk Legislation in Canada," in *Politics of the Wild: Canada and Endangered Species*, eds. Karen Beazley and Robert Boardman (Oxford: Oxford University Press, 2001), pp. 140-144.

[7] Government of Canada, "Species at Risk: The Accord for the Protection of Species at Risk," <http://www.sararegistry.gc.ca/gen_info/Accord_Backgrounder_e.pdf>. Accessed May 8, 2005.

[8] Amos et al, p. 144. For a full history and analysis of failure of Bill C-65 (CESPA) see Amos et al, "In Search of a Minimum Winning Coalition," pp. 137-166 or Amos, "Federal Endangered Species Legislation in Canada."

[9] As quoted in Environment Canada, News Release: "Species at Risk Act Given Royal Assent," December 12, 2002 <http://www.ec.gc.ca/press/2002/021212_n_e.htm>. Accessed May 10, 2005.

[10] Kathryn Kohm, "The Act's History and Framework," in *Balancing on the Brink of Extinction*, ed. Kathryn Kohm (Washington, D.C.: Island Press, 1991), pp. 12-13.

[11] *Ibid.*, pp. 13-14.

[12] Shannon Petersen, *Acting for Endangered Species: The Statutory Ark* (Lawrence: University of Kansas Press, 2002), p. 25.

[13] Yaffee, *Prohibitive Policy,* pp. 45-46. Voicing an argument typical of industry, Peter J. Clancy warned that, "To be blunt, our industry would be seriously handicapped if the United States were unilaterally to declare a species endangered while other countries permitted skins to be taken and processed...[Such action] would help neither the species in question nor the United States unemployment rate." Peter J. Clancy, President, Peter Baron & Sons, Inc., in *Hearings Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the Committee on Merchant Marine and Fisheries House of Representatives*, Serial No. 91-2, 91st Congress, First Session, (Washington, DC: US Government Printing Office, February 19, 1969), p. 42.

[14] Yaffee, *Prohibitive Policy,* pp. 45-46.

[15] *Ibid.*, p. 49.

[16] Richard Nixon, "Species Message to Congress Outlining the 1972 Environmental Program," 8 February 1972, The Richard Nixon Library and Birth Place, <http://www.nixonfoundation.org/Research_Center/PublicPapers.cfm?BookSelected=1972#P136_3131>. Accessed April 14, 2005; also partly cited in Yaffee, *Prohibitive Policy,* p. 49.

[17] Petersen, *Acting for Endangered Species*, p. 29; Yaffee, *Prohibitive Policy,* p. 56.

[18] Bourdages and Labelle, p. 22.

[19] Scientists for Species provides a barebones outline, written by Kate Smallwood, summarizing some of the differences between SARA and the ESA. See Scientists for Species, "Canadian Species At Risk Act and U.S. Endangered Species Act," <http://www.sfu.ca/~amooers/scientists4species/comparisonCaUS.html>. Accessed February 20, 2004.

[20] Quotations from the ESA are taken from an online copy of the Act. See Fish and Wildlife Service, "Endangered Species Act of 1973," <www.endangered.fws.gov/esaall.pdf>. Accessed February 11, 2004. Emphasis added.

[21] US Fish and Wildlife Service, "Listing a Species as Threatened or Endangered: Section 4 of the Endangered Species Act," <http://endangered.fws.gov/listing/listing5_04.pdf>. Accessed April 21, 2005; Joy Nicholopoulos, "The Endangered Species Listing Program," *Endangered Species Bulletin* 24:6 (1999) <http://endangered.fws.gov/esb/99/11-12/6-9.pdf>. Accessed April 21, 2005.

[22] Environment Canada, News Release: "Minister of the Environment Makes Recommendations on Adding New Species to the *Species at Risk Act,*" October 22, 2004, <http://www.ec.gc.ca/press/2004/041022_n_e.htm> . Accessed October 26, 2004; Environment Canada, News Release: "73 new species protected under the *Species at Risk Act,*" January 21, 2005, <http://www.ec.gc.ca/press/2005/050121_n_e.htm>. Accessed January 21, 2005.

[23] See Arne Mooers, "Why did the fish miss the boat?" *Globe and Mail,* April 30, 2004, A21.

[24] Babbitt v. Sweet Home Chapter of Communities for a Great Oregon. (63 USLW 2500 [1995]. For a quick summary of this case and other important cases relevant to the ESA see Bonnie Burgess, *Fate of the Wild: The Endangered Species Act and the Future of Biodiversity* (Athens: University of Georgia Press, 2001), pp. 16-19.

[25] Burgess, p. 6.

[26] The Endangered Species Committee consists of the Secretary of the Interior, the Secretary of Agriculture, the Secretary of the Army, the Chair of the Council of Economic Advisers, the administrator of the Environmental Protection Agency (EPA), and the administrator of the National Oceanic and Atmospheric

Administration (also known as the National Marine Fisheries Service). The President also selects one representative to sit on the Committee from each state that is affected by the decision.

[27] University of Arizona Wildlife Alternatives, "The Endangered Species Act of 1973: The Endangered Species Committee or 'God Squad'," <http://walter.arizona.edu/society/policy/esa/ESA1-4.asp>. Accessed May 11, 2005. The God Squad controversially exempted thirteen timber sales from the ESA in 1993 during the "War in the Woods" but environmentalists were able to overturn the decision through a court challenge. See Shannon Petersen, *Acting for Endangered Species: The Statutory Ark* (Lawrence: University of Kansas Press, 2002), p.109.

[28] Amos et al., p.159.

[29] US Department of Interior, "Endangered Species Act 'Broken' – Flood of Litigation Over Critical Habitat Hinders Species Conservation," May 28, 2003 <http://www.doi.gov/news/030528a.htm>. Accessed April 28, 2005.

[30] Environment Canada, "Canada's Plan for Protecting Species at Risk: An Update," December 1999, p.8. See also Kate Smallwood, *A Guide to Canada's Species at Risk Act: A Sierra Legal Defence Fund Report* (Vancouver: Sierra Legal Defence Fund, 2003), p. 28. A link to Smallwood's *Guide* is provided on the Scientists for Species website at <http://www.scientists-4-species.org/>. Accessed May 2, 2004.

[31] Specifically, section 33 of SARA prohibits the destruction of endangered or threatened species that are listed, or of a listed extirpated species "if a recovery strategy has recommended the reintroduction of the species into the wild in Canada." A residence is defined under section 2(1) as "...a dwelling-place, such as a den, nest or other similar area or place, that is occupied or habitually occupied by one or more individuals during all or part of their life cycles, including breeding, rearing, staging, wintering, feeding, or hibernating." This definition is a change from the first draft of Bill C-5 which did not include the words "staging, wintering, feeding." Scientists and environmentalists had opposed the definition of residence "because it was too narrow, rendering it biologically inapplicable to many species." Further, Smallwood points to the fact that the word "similar" in the definition was questionable since animals like caribou, that do not have a dwelling-place "similar" to a den or nest, would not be eligible for protection. Hence due to lobbying efforts, the definition was broadened to include "staging, wintering, feeding." However, because the word "similar" was not deleted, exactly how many species and how much of their habitat will be protected under "residence" is still debatable. See Smallwood, p. 25, 30: footnote 31.

[32] One similar aspect (that is also an arguable deficiency) of SARA's and the ESA's critical habitat protection measures, is that such protection does not come automatically after listing. Furthermore, there is no required interim habitat protection while critical habitat designations are being developed. Under section 4(a)(3) the ESA designations are to be done concurrently with a listing decision "*to the maximum extent prudent and determinable*." For SARA, section 2(1) specifies that critical habitat is identified "in the recovery strategy or in an action plan" meaning that habitat protection does not come into effect until the recovery stage process. Under section 42(1) of SARA a proposed recovery strategy must be posted on the SARA Public Registry within one year for endangered species and within two years for threatened and extirpated species. However, "[t]his time period has been extended for species on the initial legal list to three years for species listed as endangered and four years for species listed as threatened or extirpated." Smallwood 42; see section 42(2). Thus, critical habitat protection under SARA is delayed between one to four years after a species is listed. In fact, the actual implementation of habitat protection is postponed even later due to the action plan stage which implements the recovery strategy for a species. Each action plan's timeline varies depending on what is identified in the recovery strategy. Thus, since there is no prescribed legal time period for the completion of action plans there is the possibility for delay of habitat protection.

Further, under section 80 of SARA, the federal government can invoke an emergency order to protect a species, including its habitat. However, an emergency order is likely to be rarely invoked. Such reticence was most recently displayed during the Species at Risk 2004: Pathways to Recovery conference in Victoria. Environment Minister David Anderson was petitioned by environmentalists during the conference to ask

Cabinet to issue an emergency order under SARA to protect the habitat of Canada's northern spotted owl and save it from extinction. Anderson was very reluctant to resort to such a measure and stated that SARA is not to be used as a "club" which tests out "its muscle," stating that only if B.C. failed to provide adequate recovery measures, "would I be able to act as minister." Cindy E. Harnett, "Anderson urged to save spotted owl: Environmentalists challenge minister to test Species at Risk Act," *Victoria Times Colonist,* March 2, 2004, A3.

[33] Further, with a cooperative agreement in place, federal funding is provided for up to 75% of the State's program costs or for up to 90% of the costs if two or more States work together. However, there has been consistent underfunding. For a brief description of the funding problems associated with Section 6, see John Ernst, "Federalism and the Act," in *Balancing on the Brink of Extinction: The Endangered Species Act and Lessons for the Future,* ed. K.A. Kohm (Washington, D.C.: Island Press, 1991), pp. 102-104.

[34] As defined by Amos et al, the equivalency provision entails that "a federal regulatory role is asserted in the first instance, and withdrawal is authorized only if a province [or territory] can satisfy conditions demonstrating that it is implementing equivalent policies." Amos et al, p. 159.

[35] Amos et al, p. 140.

[36] See Robert Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge: Harvard University Press, 2001).

[37] Government of Canada, *Species at Risk Act: A Guide,* October 2003 <http://www.sararegistry.gc.ca/the_act/SARA_guide_oct03_e.pdf> pp. 2-3. Accessed May 29, 2005.

[38] Under section 4(f)(1) of the ESA, recovery plans are mandatory for all listed species. The recovery plans must include, "to the maximum extent practicable": a description of site-specific management actions necessary for the survival of the species; objective and measurable criteria for determining when a species can be removed from the list; and estimates of the time and cost needed to achieve the recovery plan's goals. Under SARA there are two stages to the recovery process. First a mandatory recovery strategy for a species is prepared. The content of the recovery strategy is different depending on whether or not recovery is deemed "technically and biologically feasible."[38] In determining feasibility, as in the preparation of the recovery strategy as a whole, no socio-economic considerations are taken into account. Second, an action plan(s) is prepared which specifies the actions for implementing a recovery strategy on the ground. Under section 49, *action plans must explicitly take socio-economic costs into account.* On paper, action plans are mandatory, although in practice they are logically not prepared if recovery is deemed unfeasible at the recovery strategy stage.

[39] Although under section 41(1)(g) recovery strategies "must include...a statement of when one or more action plans in relation to the recovery strategy will be completed", Smallwood notes, "this is substantially different from a prescribed legal time period for completion...potentially allowing for lengthy delays or even non-completion of action plans." Smallwood, p. 46.

[40] Under section 42(1) of SARA a proposed recovery strategy must be posted on the SARA Public Registry within one year for endangered species and within two years for threatened and extirpated species. However, "[t]his time period has been extended for species on the initial legal list to three years for species listed as endangered and four years for species listed as threatened or extirpated." Smallwood 42; see section 42(2). Further, under section 46, "[t]he competent minister must report on the implementation of the recovery strategy, and the progress towards meeting its objectives, within five years after it is included in the public registry and in every subsequent five-year period, until its objectives have been achieved or the species' recovery is no longer feasible."

[41] Scientists for Species, "Canadian Species At Risk Act and U.S. Endangered Species Act"

[42] Amos et al, pp. 144-146.

[43] Benjamin Cashore, George Hoberg, Michael Howlett, Jeremy Rayner, and Jeremy Wilson, *In Search of Sustainability: Forest Policy in British Columbia in the 1990s* (Vancouver: UBC Press, 2001), p. 10.

[44] *Ibid.*

[45] Amos et al, pp. 147-148; Mancur Olson, *The Logic of Collective Action* (Cambridge, Massachusetts: Harvard University Press, 1965).

[46] Kathryn Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy* (Vancouver: UBC Press, 1996), p. 14.

[47] Cashore et al, p. 11.

[48] Peter Hall, *Governing the Economy: The Politics of State Intervention in Britain and France* (Oxford: Oxford University Press, 1986), p. 19.

[49] *Ibid.*

[50] Peter Hall and Rosemary Taylor, "Political Science and the Three Institutionalisms," *Political Studies* 38 (1990), p. 941.

[51] *Ibid.*

[52] Kathleen Thelen and Sven Steinmo, "Historical Institutionalism in Comparative Politics," p. 13.

[53] Colin Bennett, "The Formation of a Canadian Privacy Policy: The Art and Craft of Lesson-Drawing," *Canadian Public Administration* 33:4 (1990), p. 553.

[54] David Dolowitz and David Marsh state that they "do not use the terms policy transfer and lesson drawing interchangeably...In our view, the term 'lesson drawing'...focuses on 'voluntary' policy transfer...yet, as we shall see later...Policy transfer, [is] a term that can cover 'voluntary' and 'coercive' transfer...." Richard Rose refers to emulation as a type of lesson-drawing, but not all examples of lesson-drawing is through emulation. David Dolowitz and David Marsh, "Who Learns What From Whom? A Review of the Policy Transfer Literature," *Political Studies* 44:2 (1996), p. 344; Richard Rose, "What is Lesson Drawing?" *Journal of Public Policy* 11:1 (1991), pp. 21-22.

[55] Dolowitz and Marsh, "Who Learns What From Whom?" p. 344.

[56] George Hoberg, "Sleeping with an Elephant," *Journal of Public Policy* 11:1 (1991), pp. 107-131; George Hoberg, "Governing the Environment: Comparing Canada and the United States" in *Degrees of Freedom Canada and the United States in a Changing World,* eds. Keith Banting, George Hoberg, and Richard Simeon (Montreal and Kingston: McGill-Queen's University Press, 1997), pp. 341-385; George Hoberg, Keith Banting, and Richard Simeon, "The Scope for Domestic Choice: Policy Autonomy in a Globalizing World" in *Capacity for Choice,* ed. George Hoberg (Toronto: University of Toronto Press, 2002), pp. 252-298.

[57] Hoberg et al, "The Scope for Domestic Choice," p. 254.

[58] In his article "Sleeping with an Elephant" George Hoberg finds that Canada emulated the US in the regulation of such areas as air pollution, automobile emissions, and some cases of pesticides and toxic substances. Also, in terms of environmental impact assessment Canada also 'partially emulated' the US. Hoberg, "Sleeping with an Elephant."

[59] Elite driven emulation occurs when officials or policy experts learn of attractive American policies through the media, specialized publications, cross-border policy communities or formal and informal meetings.

Activist driven emulation, occurs when activists use "the existence of an American program or standard to support their argument for policy change in Canada", often by trying to "shame" the Canadian government into emulating the U.S.' tougher standards. Hoberg, "Sleeping with an Elephant," p. 110; Hoberg, "Governing the Environment," p. 359.

[60] Amos et al, p. 162: footnote 7.

[61] Hoberg, "Sleeping with an Elephant" p. 109.

[62] Rose, "What is Lesson Drawing?" pp. 3-30; Rose, *Lesson-Drawing in Public Policy: A Guide to Learning Across Time and Space* (Chatham: Chatham House Publishers, Inc., 1993); Bennett, "The Formation of a Canadian Privacy Policy," pp. 551-570; Colin Bennett and Michael Howlett, "The Lessons of Learning: Reconciling Theories of Policy Learning and Policy Change," *Policy Sciences* 25 (1992), pp. 275-294; Dolowitz and Marsh, "Who Learns What From Whom?" pp. 343-357; Dolowitz and Marsh, "Learning from Abroad," pp. 5-23.

[63] Rose, "What is Lesson Drawing?" p. 3. Rose defines a lesson as "*a program for action based on a program or programs undertaken in another city, state, or nation, or by the same organization in its own past.*" Rose, *Lesson-Drawing in Public Policy*, p. 21, italicized in original

[64] In his article "What is Lesson Drawing?" Rose uses the term "emulation", pp. 21-22; In his book *Lesson-Drawing in Public Policy* Rose refers to the same process as "adaptation", pp. 30-31.

[65] A lesson is drawn one of five ways: copying, in which a program is adopted from another jurisdiction basically as is; emulation or adaptation, in which a program is adopted from another jurisdiction adjusting for circumstances and contextual differences; hybridization, in which programmes from two different places are combined; synthesis, in which programmes from three or more different places are combined; and inspiration, in which programmes elsewhere are the inspiration for a completely novel programme. Rose, "What is Lesson Drawing?" p. 22; Rose, *Lesson-Drawing in Public Policy*, p. 30.

[66] Rose, "What is Lesson Drawing?"; Rose, *Lesson-Drawing in Public Policy*.

[67] Rose, "What is Lesson Drawing?" p. 4.

[68] *Ibid.*, p. 19.

[69] *Ibid.*, p. 14.

[70] Dolowitz and Marsh, "Who Learns What From Whom?" p. 344. They identify eight categories or 'objects' of policy transfer, one of which is negative lessons. The other seven objects of transfer are: policy goals, policy content, policy instruments, policy programs, institutions, ideologies, ideas and attitudes. Dolowitz and Marsh, "Learning from Abroad," p. 12. Dolowitz and Marsh's earlier article gives seven slightly different objects of transfer: "policy goals, structure and content; policy instruments or administrative techniques; institutions; ideology, ideas, attitudes and concepts; and negative lessons." Dolowitz and Marsh, "Who Learns What From Whom?" p. 350.

[71] Bennett and Howlett, "The Lessons of Learning," p. 291: footnote 2. Bennett also draws both positive and negative lessons in his article, "The Formation of a Canadian Privacy Policy," p. 564.

[72] The term as it relates to the ESA was popularized by Steven L. Yaffee, *Prohibitive Policy: Implementing the Federal Endangered Species Act* (Cambridge: The Massachusetts Institute of Technology Press, 1982).

[73] As quoted in William Pendley, *War on the West: Government Tyranny on America's Great Frontier* (Washington, D.C.: Regnery Publishing, Inc., 1995), p. 86.

[74] William Reffalt, "The Endangered Species Lists: Chronicles of Extinction?" in *Balancing on the Brink of Extinction: The Endangered Species Act and Lessons for the Future*, ed. K.A. Kohm (Washington, D.C.: Island Press, 1991), p. 78.

[75] Harrison, *Passing the Buck,* p. 16.

[76] *Ibid.*, pp. 16-17. Anthony Downs' issue-attention cycle model illustrated how issues like the environment rise and fall from public attention.

[77] Riley Dunlap, "Public Opinion and Environmental Policy" in *Environmental Politics and Policy: Theories and Evidence,* ed. James P. Lester (Durham: Duke University Press, 1989), p. 95.

[78] *Ibid.*

[79] Charles O. Jones, *Clean Air: The Policies and Politics of Pollution Control* (Pittsburgh, University of Pittsburgh Press, 1975), p. 146.

[80] Jones, p. 152; also cited in George Hoberg, "Governing the Environment: Comparing Canada and the United States," p. 344.

[81] Dunlap, p. 96 and Jones, pp. 152-153.

[82] In 1977 further amendments were added to the Federal Water Pollution Control Act Amendments of 1972 and the Act became known as the Clean Water Act.

[83] As quoted in Yaffee, *Prohibitive Policy,* p. 38.

[84] *Ibid.*

[85] This is posited by Hoberg, "Governing the Environment," pp. 343-344.

[86] Dunlap, p. 99. Another national trend study cited by Dunlap, the Michigan National Election Survey, showed a decline but it was not as significant. In this poll, 10% of respondents volunteered an environmental issue as one of the country's "most important problems" compared to 17% in 1970.

[87] *Ibid.*

[88] *Ibid.*, p. 102.

[89] *Ibid.*, p. 102.

[90] As paraphrased in Dunalp, p. 103. These quotes were paraphrases of other scholars concerns.

[91] The author acknowledges Kathryn Harrison for this point. As suggested above, scholars speculate that politicians continued to side with this popular if not salient issue for several reasons. Yaffee notes that some politicians believed the popularity of environmental issues "could get [them] elected on environmental platforms." Shannon Petersen notes that some capitalized on the popularity of the environment with the hopes that "they could unite a country deeply divided by civil rights, women's liberation, and the Vietnam War", that Nixon himself, deeply immersed in Watergate, was likely "yearn[ing] for a little unity by the end of 1973", and that the Republicans in Congress "were hoping to rehabilitate their party." Yaffee, *Prohibitive Policy,* p. 48; Shannon Petersen, *Acting for Endangered Species: The Statutory Ark* (Lawrence: University of Kansas Press, 2002), p. 30.

[92] Yaffee, *Prohibitive Policy,* p. 48.

[93] *Ibid.*, p. 49.

[94] Brian Czech and Paul Krausman, *The Endangered Species Act: History, Conservation Biology, and Public Policy* (Baltimore: The Johns Hopkins University Press, 2001), p. 19.

[95] Michael E. Soulé, "Conservation Biology and the Real World," in *Conservation Biology: The Science of Scarcity and Diversity,* ed. Michael E. Soulé (Sunderland: Sinauer Associates, 1986), p. 4.

[96] Yaffe, p. 34.

[97] Shannon Petersen notes that "the word 'biodiversity' was not known prior to the 1980s" and that the "very idea of biodiversity 'represented a distinct advance in conceptualization' because it stressed the importance of all species and because of its emphasis on habitat protection." Petersen, *Acting for Endangered Species*, p. 34. In 1978 ecologist Michael Soulé arranged the First International Conference on Conservation Biology and "proposed a new interdisciplinary approach that could help save plants and animals from the threat of human-caused extinctions." Soulé, with two other colleagues, then began efforts to develop conservation biology as a new discipline, with the Society for Conservation Biology being founded a few years later in 1985. Richard Primack, *Essentials of Conservation Biology,* 3rd ed. (Sunderland: Sinauer Associates, 2002), p. 22.

[98] Donald Fleming, "Roots of the New Conservation Movement" in *Perspectives in American History* 6 (1972), pp. 40-41; briefly cited in Czech and Krausman, p. 20.

[99] Fleming, pp. 40-41.

[100] Czech and Krausman, p. 20.

[101] Yaffee, *Prohibitive Policy,* p. 35. As Yaffee points out, the Committee's independence was demonstrated in its listing of the bighorn sheep even though such action was opposed to the interests of hunters – the BSFW's traditional constituency – and in its listing of the Utah prairie dog "at the same time the bureau's Animal Damage Control unit was funding a prairie dog poisoning program to protect the ranchers' interest

[102] *Ibid.*, p. 39.

[103] For a synopsis of the stages see Michael Howlett and M. Ramesh, *Studying Public Policy: Policy Cycles and Policy Subsystems*, 2nd ed. (Toronto: Oxford University Press, 2003), pp. 13-15.

[104] Trans-science was a term coined by Alvin Weinberg in his article "Science and Trans-Science" in which he defined "trans-science" as questions "which can be asked of science and yet which cannot be answered by science." Sheila Jasanoff elaborates that the concept refers to a "grey zone between science and policy." Sheila Jasanoff, "Contested Boundaries in Policy-Relevant Science" in *Social Studies of Science* 17 (1987), p. 201.

[105] *Ibid,* pp. 200-201. As Jasanoff puts it, "[f]or science in the policy context, the age of innocence ended in the early 1970s...The United States...enacted a spate of new legislation in order to prevent...degradation of the environment, loss of wildlife and depletion of natural resources. These preventive policies placed unprecedented demands on the capacity of science to predict future harm....[T]his shift of scientific attention to the unknown, and possibly unknowable...highlighted the intuitive, subjective and uncertain underpinnings of much of the advice that scientists provide to government."

[106] *Ibid.*

[107] This is striking and interesting when compared to industry involvement in 1969. In fact, the fur industry proposed several amendments, two of which recommended that species listing require "official agreement of nations with 75 percent of the world's supply of the species" and that species listing only be permitted if

"such determination shall not be contrary to the public interest in terms of its impact on domestic consumers and businesses." Yaffee, *Prohibitve Policy,* p. 44.

[108] *Ibid.,* pp. 37-38, 47.

[109] As mentioned before, these legislative acts included the 1966 Endangered Species Preservation Act, the 1969 Endangered Species Conservation Act, the 1969 National Environmental Policy Act, the 1970 Clean Air Act amendments, the 1972 Federal Water Pollution Control Act Amendments, the 1972 Federal Environmental Pesticide Control Act, the 1972 Coastal Zone Management Act, and the 1972 Marine Mammal Protection Act.

[110] Yaffee, *Prohibitive Policy,* p. 48.

[111] *Ibid.,* p. 196: footnote 59.

[112] John Dingell, *Hearings Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the Committee on Merchant Marine and Fisheries House of Representatives*, Serial No. 93-5, 93rd Congress, First Session, (Washington, DC: US Government Printing Office, March 27, 1973), p. 292.

[113] Yaffee, *Prohibitive Policy,* pp. 54-55.

[114] The lack of involvement by industry and landowner groups is particularly noteworthy given the strong lobbying efforts by Canadian industry and landowner groups.

[115] Burgess notes that the inspiration for the private property rights movement and Wise Use movement began only in the 1980s, when the effects of the ESA on private property were readily apparent. The movements grew in strength and political influence since then. Burgess, pp. 62-63.

[116] J. Phil Campbell, Under Secretary, Department of Agriculture, Reprinted in *Hearings Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the Committee on Merchant Marine and Fisheries House of Representatives*, Serial No. 93-5, 93rd Congress, First Session, (Washington, DC: US Government Printing Office, March 23, 1973), p. 194.

[117] According to Petersen "[d]uring the Senate hearings in June 1973…[t]he only opposition came from a couple of groups representing the fur industry and state fish and game agencies, which worried about the pre-emption of state authority…Nor did significant special interest opposition materialize during the House hearings…." Petersen, p. 30. According to Yaffee "[c]ommercial interests did not testify in either House or Senate hearings." Yaffee, *Prohibitive Policy*, p. 51.

[118] Yaffee, *Prohibitive Policy,* p. 44.

[119] Yaffee, *The Wisdom of the Spotted Owl: Policy Lessons for a New Century* (Washington, DC: Island Press, 1994), pp. 3-115; Pendley, *War on the West,* pp. 85-114; NESARC, "How has the ESA impacted America?" <http://www.nesarc.org/stories.htm>. Accessed January 22, 2005.

[120] *Ibid.,* p. 51.

[121] Kohm, p. 15.

[122] Pendley, p. 86.

[123] Kohm, p. 15.

[124] Yaffee, *Prohibitive Policy,* pp. 49-50.

[125] Bureau of Sport Fisheries and Wildlife, *Draft Environmental Statement DES 72-44,* Reprinted in *Hearings Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the Committee on Merchant Marine and Fisheries House of Representatives*, Serial No. 93-5, 93rd Congress, First Session, (Washington, DC: US Government Printing Office, March 27, 1973), pp.187-194; excerpts also cited in Yaffee, *Prohibitive Policy,* pp. 51-53.

[126] Nathaniel P. Reed, *Hearings Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the Committee on Merchant Marine and Fisheries House of Representatives*, Serial No. 93-5, 93rd Congress, First Session, (Washington, DC: US Government Printing Office, March 27, 1973), p. 206.

[127] BSFW, pp. 188; 205-206.

[128] *Ibid.,* p. 188.

[129] Reed, p. 204.

[130] BSFW, p. 188.

[131] *Ibid.*

[132] *Ibid.,* pp. 188-189.

[133] Reed, pp. 204-205.

[134] *Ibid.,* p. 205.

[135] BSFW, p. 190.

[136] *Ibid.*

[137] Yaffee, *Prohibitive Policy,* p. 47.

[138] BSFW, p. 189.

[139] Yaffee, *Prohibitive Policy,* p. 49.

[140] *Ibid,* p. 51.

[141] *Ibid.,* p. 54.

[142] For example, in this version of the bill invertebrates were not protected and more permits were allowed.

[143] Yaffee, *Prohibitive Policy,* p. 56.

[144] Hoberg, "Governing the Environment," p. 354

[145] Terry M. Moe and Michael Caldwell, "The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems," *Journal of Institutional and Theoretical Economics* 150:1 (1994), p. 174.

[146] Burgess, pp. 10-11.

[147] *TVA v. HILL*, 437 US 153 [1978]. Emphasis added.

[148] Denise Scheberle, *Federalism and Environmental policy: Trust and the Politics of Implementation* (Washington, DC: Georgetown University Press, 2004), p. 5.

[149] *Ibid.*, p. 8.

[150] Also summarized in Burgess, p. 6.

[151] Scheberle, p. 8.

[152] Ernst, p. 101.

[153] Hoberg, "Governing the Environment," pp. 348-350; Hoberg also discusses these changes in Hoberg, *Pluralism By Design: Environmental Policy and the American Regulatory State.* (New York: Praeger Publishers, 1992), pp. 45-54.

[154] Hoberg, "Governing the Environment," p. 349.

[155] BSFW, pp. 188-189.

[156] Yaffee, *Prohibitive Policy,* p. 48.

[157] Hoberg, "Governing the Environment," p. 349.

[158] Quotation taken from Harrison, "The Origins of Nations Standards: Comparing Federal Government Involvement in Environmental Policy in Canada and the United States," in *Managing the Environmental Union: Intergovernmental Relations and Environmental Policy in Canada,* eds. Patrick Fafard and Kathryn Harrison (Montreal and Kingston: McGill-Queens University Press, 2000), p. 50.

[159] Hoberg, "Governing the Environment," p. 349.

[160] Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," *American Political Science Review* 94 (2000), p. 262.

[161] *Ibid.*

[162] Hoberg, "Governing the Environment," p. 349.

[163] *Ibid.*

[164] Hoberg, *Pluralism By Design,* pp. 48-49; Hoberg, "Governing the Environment," p. 349.

[165] Hoberg, "Governing the Environment," p. 350; Robert Kagan, *Adversarial Legalism,* specifically pp. 207-228.

[166] In his study of air pollution and pesticide regulation, Hoberg states that "[c]learly one of the most important forces behind policy changes analyzed here was the rise of the organized environmental movement." Hoberg, *Pluralism By Design,* p. 40.

[167] *Ibid.*, p. 43.

[168] As a brief point of comparison to illustrate this point, in such regimes as parliamentary governments the legislative and executive branches are fused so there is no incentive to reduce executive discretion, but in congressional systems, like the US, the executive and legislative branches are separate making it possible for Congress to limit executive discretion.

[169] This section is not meant to be an exhaustive evaluation of the criticisms of the ESA. However, references to further reading are given as much as possible.

[170] Pamela Baldwin and M. Lynne Corn, "Endangered Species Act: The Listing and Exemption Processes," in *Endangered Species: Issues and Analyses,* ed. Paul Foreman (New York: Nova Science Publishers, Inc., 2002), p. 49.

[171] *TVA v. HILL,* 437 US 153 [1978]. Emphasis added.

[172] The Endangered Species Committee consists of the Secretary of the Interior, the Secretary of Agriculture, the Secretary of the Army, the Chair of the Council of Economic Advisers, the administrator of the Environmental Protection Agency (EPA), and the administrator of the National Oceanic and Atmospheric Administration (also known as the National Marine Fisheries Service). The President also selects one representative to sit on the Committee from each state that is affected by the decision.

[173] Burgess, p. 12.

[174] *Ibid.*

[175] Yaffee, *The Wisdom of the Spotted Owl,* p. 115.

[176] Hoberg, "The Emerging Triumph of Ecosystem Management: The Transformation of Federal Forest Policy," in *Western Public Lands and Environmental Politics,* 2nd ed., ed. Charles Davis, (Boulder: Westview Press, 2001), p. 67.

[177] Hoberg, "How the Way We Make Policy Governs the Policy We Make," in *Sustaining the Forests of the Pacific Coast: Forging Truces in the War in the Woods,* eds. Debra Salazar and Donald Alper (Vancouver: UBC Press, 2000), p. 40.

[178] *Ibid,* p. 39.

[179] David Schaefer and Sylvia Nogaki, "Threatened – Wildlife Agency Makes It Official On Spotted Owl," *Seattle Times,* June 22, 1990, A1.

[180] Paul Taylor, "Spotted Owl Creates Flap in Governor's Campaign," *Washington Post,* July 6, 1990, A6. Similar quotes cited in Petersen, *Acting for Endangered Species,* p. 95.

[181] Hoberg "How the Way We Make Policy Governs the Policy We Make," p. 39.

[182] *Ibid.* For a more detailed analysis of the "War in the Woods", see Yaffee, *The Wisdom of the Spotted Owl* and Petersen, *Acting for Endangered Species,* pp. 81-125.

[183] *Ibid,* p. 42. For a current article on the recovery efforts and status of the spotted owl in Washington see Robert McClure, "Spotted Owl Debate Renewed," *Seattlepi.com,* May 20, 2005, <http://seattlepi.nwsource.com/local/225140_spottedowl20.html>. Accessed May 21, 2005.

[184] Larry Swisher, "Bush's planned revisions to forest plan unrealistic," *The Gifford Pinchot Task Force,* May 10, 2003, <www.gptaskforce.org/newswire_detail.php?id=96>. Accessed May 14, 2003; Environmental Protection Information Center, News Release: "Bush Administration Moves to Dismantle Northwest Forest Plan," May 23, 2003, <http://www.wildcalifornia.org/pressreleases/number-34>. Accessed May 23, 2003; Christine Ambrose and Ray Vaughan, the Environmental Protection Information Center, News Release: "Groups Sue over the Deceptive Bush Administration's 'Healthy Forests Initiative'," July 1, 2003 <http://www.wildcalifornia.org/pressreleases/number-30>. Accessed May 15, 2005; Michael Milstein, "Bush ready to reshape federal forests," *OregonLive.com,* November 18, 2004, <http://www.oregonlive.com/news/oregonian/index.ssf?/base/front_page/1100782987290610.xml>. Accessed

November 18, 2004; Robert McClure and Charles Pope, "Bush relaxes forest wildlife protection," *Seattle Post-Intelligencer,* December 23, 2004, <http://seattlepi.nwsource.com/local/204976_forests23.html>. Accessed December 23, 2004; D. Noah Greenwald and R. Scott Greacen, "Protecting Species of Northwest Old-Growth Forests: Saving All the Parts" *Centre for Biological Diversity* et al. <http://www.endangeredearth.org/library/nwfp-saving-the-pieces.pdf>. Accessed April 24, 2005.

[185] NESARC, "Restoring Balance to the Endangered Species Act: An Outline for Federal Legislation," <http://www.nesarc.org/compbill.htm>. Accessed January 22, 2005.

[186] NESARC, "Restoring Balance to the Endangered Species Act: An Outline for Federal Legislation." There is an exception to the taking regulations. If a person can prove that the taking was done to protect oneself or someone else, an exception can be made, but a victorious outcome in such a case is far from certain. In a story for the National Geographic, Douglas Chadwick writes of a Montana rancher who killed a grizzly bear in defence of the life of his sheep and arguably his life, his wife's and the herder's. However, he had to pay a $2,500 fine nonetheless and spent an additional $60,000 unsuccessfully appealing his case. Douglas Chadwick, "Dead or Alive: The Endangered Species Act," *National Geographic* 187 (3), p. 12, 14.

[187] Pendley, pp. 89-90 and NESARC, "How has the ESA impacted America?" <http://www.nesarc.org/stories.htm>. Accessed January 22, 2005.

[188] Robert Gehrke, "Plan seeks to limit 'critical habitat' cases," *Salt Lake Tribune,* April 29, 2004, <http://www.sltrib.com/2004/Apr/04292004/utah/161678.asp>. Accessed April 29, 2004.

[189] As quoted in US Department of Interior, "Endangered Species Act 'Broken' – Flood of Litigation Over Critical Habitat Hinders Species Conservation," May 28, 2003, <http://www.doi.gov/news/030528a.htm>. Accessed April 28, 2005.

[190] US Department of Interior, "Endangered Species Act 'Broken'"

[191] Richard Pombo, "The ESA at 30: Time for Congress to Update & Strengthen the Law," House Resources Committee, <http://resourcescommittee.house.gov/issues/more/esa/whitepaper.htm>. Accessed January 22, 2005; NESARC, "What NESARC is Fighting For," <http://www.nesarc.org/fighting.htm>. Accessed January 22, 2005; See also, Benjamin Cashore, "Comparing Endangered Species Protection in Canada and the United States: What are the Lessons for Future Policy Development?" Forest Policy Center: Internal Working Paper Series, No. 118, pp. 12-13; Daniel Simmons and Randy Simmons, "The Endangered Species Act turns 30," *Regulation* 26:4 (2003/2004), pp. 6-7.

[192] Richard Pombo, "The ESA at 30: Time for Congress to Update & Strengthen the Law."

[193] NESARC, "What NESARC is Fighting For."

[194] Burgess, p. 70; Burgess also states that "...fear of federal regulation caused many private landholders to take measures to avoid attracting species to their property. Worse, owners sometimes drove species from their property to protect themselves." Burgess, pp. 121-122.

[195] Benjamin Cashore, "Comparing Endangered Species Protection in Canada and the United States," p. 12.

[196] According to Burgess the private property rights movement is distinct from the "Wise-Use" movement even though the two movements share similar goals and strategies, see Burgess, pp. 61-73. For a discussion of the environmentalists' position on the Wise Use and Private Property Rights Movements, see John Echeverria and Raymond Booth Eby, eds. *Let the People Judge: Wise Use and the Private Property Rights Movement* (Washington, D.C.: Island Press, 1995).

[197] Burgess, p. 65.

[198] Burgess, p. 13.

[199] For a discussion of HCPs see Burgess, pp. 14-15, 121-127.

[200] Burgess, p. 121.

[201] US Fish and Wildlife Service, " 'No Surprises' Questions and Answers," <http://endangered.fws.gov/hcp/NOSURPR.HTM>. Accessed April 26, 2005.

[202] US Fish and Wildlife Service, "Safe Harbor Agreements for Private Property Owners: Questions and Answers," <http://endangered.fws.gov/recovery/harborqa.pdf>. Accessed April 28, 2005.

[203] US Fish and Wildlife Service, "Candidate Conservation Agreements With Assurances For Non-Federal Property Owners," <http://endangered.fws.gov/listing/cca.pdf>. Accessed April 28, 2005.

[204] *Ibid.*

[205] US Fish and Wildlife Service, "Private Stewardship Grants Program," <http://endangered.fws.gov/grants/private_stewardship/>. Accessed April 28, 2005; See also FWS publication of the same title <http://endangered.fws.gov/grants/private_stewardship/FY2005/psgp_2005.pdf>. Accessed April 28, 2005.

[206] US Fish and Wildlife Service, "Partners for Fish and Wildlife Program: Voluntary Habitat Restoration on Private Lands," <http://www.fws.gov/partners/pdfs/partnersfs.pdf>. Accessed April 28, 2005.

[207] Reed Noss, Michael A. O'Connell and Dennis D. Murphy, *The Science of Conservation Planning: Habitat Conservation Under the Endangered Species Act* (Washington DC: Island Press, 1997), p. 26.

[208] Simmons and Simmons, "The Endangered Species Act turns 30," p. 6.

[209] Noss et al, p. 64.

[210] Noss et al devote a chapter to addressing the main criticisms against habitat-based conservation planning and also offer recommendations on how the process can be improved. See Noss et al, pp. 49-72.

[211] Michael Bean and David Wilcove, "Editorial: The Private-Land Problem," *Conservation Biology* 11:1 (1997), p. 1. Emphasis added.

[212] Burgess gives a short description of how not all US ENGOs criticize the same aspects of the ESA's implementation or criticize the ESA's application with the same severity. For example, she notes that with regards to the reauthorization of the ESA there is a division between the purists and the pragmatists. The purists developed a proposed legislation which emphasized recovery of species instead of survival but which did not address the private property controversy. The pragmatists in addition to agreeing to provisions that would improve species protection, also addressed the private property issue by calling for simplifying the HCP process and creating more incentives for landowners. As labelled by Burgess, the purists include, among others, the Sierra Club, Earthjustice Legal Defense Fund, Defenders of Wildlife, Friends of the Earth, Humane Society of the United States and Fund for Animals. While the pragmatists include, among others, Environmental Defense, Center for Marine Conservation, Nature Conservancy, World Wildlife Fund, and the Western Urban Water Coalition. Burgess, p. 59.

[213] American lands Alliance, "The Case for Reforming HCPs," October 16, 2000, <http://www.americanlands.org/documents/1091740596_casereformhcp.pdf>. Accessed April 28, 2005.

[214] *Ibid.*

[215] Cashore, p. 12.

[216] Currently, there is a proposed Forest and Fish Plan which would cover 9.1 million acres in Washington; this HCP is designed to establish tougher environmental standards for logging in the State's private forestland but at the same time it "effectively would give the timber industry a half-century of immunity from prosecution under the Endangered Species Act." Robert McClure and Lisa Stiffler, "Flaws in Habitat Conservation Plans Threaten Scores of Species." *Seattle Post-Intelligencer*, May 3, 2005, <http://seattlepi.nwsource.com/specials/licensetokill/222273_enviro03.html>. Accessed May 5, 2005.

[217] *Ibid.*

[218] Peter Kareiva et al, "Using Science in Habitat Conservation Plans," 1999, <http://www.aibs.org/books/resources/hcp-1999-01-14.pdf>. Accessed April 28, 2005, p. 4; also cited in Cashore, p. 13.

[219] *Ibid.* For a detailed evaluation of the criticisms launched against HCPs see Noss et al, pp. 49-72.

[220] Petersen, p. 86.

[221] Hoberg, "How the Way We Make Policy Governs the Policy We Make," p. 39.

[222] The survey was mailed to 1,400 scientists and 414 scientists responded. Zachary Coile, "Scientists say they've been told to withhold species findings," *Seattle Post-Intelligencer*, February 11, 2005, <http://seattlepi.nwsource.com/national/211626_wildlife11.html>. Accessed May 18, 2005.

[223] Yaffee, *Prohibitive Policy*, p. 87.

[224] Yaffee, *Prohibitive Policy*, p. 87.

[225] Todd Wilkinson, *Science Under Siege: The Politicians' War on Nature and Truth* (Boulder: Johnson Printing, 1998), p. 119.

[226] Kieran Suckling, Rhiwena Slack, and Brian Nowicki, "Extinction and the Endangered Species Act," Center for Biological Diversity, May 1, 2004, <http://www.sw-center.org/swcbd/Programs/policy/esa/EESA.pdf>. Accessed April 28, 2005, p. 2.

[227] *Ibid.*

[228] Burgess, p. 21.

[229] Richard Pombo, "The ESA at 30: Time for Congress to Update & Strengthen the Law."

[230] Michael O'Connell, "Response to 'Six Biological Reasons Why the Endangered Species Act Doesn't Work – and What to Do About It," in *Environmental Policy and Biodiversity*, ed. R. Edward Grumbine (Washington DC: Island Press, 1994), p. 202. O'Connell's article is a response to an article by Daniel Rohlf in which Rohlf criticizes the ESA itself for failing to conserve biodiversity. O'Connell retorts that Rohlf's critique is misleading because the shortcomings of the Act are in its implementation not in the Act itself. See Daniel J. Rohlf, "Six Biological Reasons Why the Endangered Species Act Doesn't Work – and What to Do About it," in *Environmental Policy and Biodiversity*, ed. R. Edward Grumbine (Washington DC: Island Press, 1994), pp. 181-200.

[231] Associated Press, "GOP lawmakers mount new push against wildlife protection," *Contra Costa Times*, February 11, 2005, <http://www.contracostatimes.com/mld/cctimes/living/science/10874039.htm>. Accessed April 28, 2005. See also, Erica Werner, "Pombo wants Schwarzenegger, other govs to help change

Endangered Species Act," *North County Times,* December 1, 2004, <http://www.nctimes.com/articles/2004/12/01/news/state/16_28_4012_1_04.prt>. Accessed April 28, 2005; US Newswire, "Chairman Pombo Issues ESA Report: A Mandate for Modernization; Resources Committee to Begin Efforts to Repair Broken Law," April 27, 2004, <http://releases.usnewswire.com/GetRelease.asp?id=29428>. Accessed April 28, 2005.

[232] Keith Chu, "Endangered Species Act reconsidered," *The Bulletin,* May 11, 2004, <http://www.bendbulletin.com/news/story.cfm?story_no=13435>. Accessed May 11, 2004.

[233] US House Resources Committee's Oversight and Investigations staff, *Implementation of the Endangered Species Act (ESA) of 1973,* May 2005, <http://resourcescommittee.house.gov/issues/more/esa/ESA_Implementation_Report5.17.05.pdf>. Accessed May 18, 2005; House Resources Committee, News Release: "Pombo Releases Oversight Report on ESA Implementation," May 17, 2005, <http://resourcescommittee.house.gov/Press/releases/2005/0517ESAreport.htm>. Accessed May 18, 2005.

[234] Congress has, however, appropriated funds to continue the implementation of the ESA. For a comprehensive history see Burgess, specifically, pp. 77-102.

[235] SARWG consisted of the Canadian Nature Federation, the Canadian Wildlife Federation, the Sierra Club of Canada, the Canadian Pulp and Paper Association, and the Mining Association of Canada.

[236] Cited in Amos et al., p. 145.

[237] Cited in Kate Jaimet, "90% of public backs protection of species," *Ottawa Citizen,* January 29, 2001, A1.

[238] Cited in Amos et al., p. 145.

[239] *Ibid;* see Pollara, "Canadians' Views on Climate Change," May 1998, <http://www.pollara.ca/new/Library/Climate/Intro.html>. Accessed May 18, 2005.

[240] Amos et al, p. 146.

[241] Amos et al, p. 138. Indeed, as Amos et al describe in their article, all the stakeholders challenged the first bill, Bill C-65, on some level.

[242] Curtis has not worked on SARA or for CWS/Environment Canada since October 2000.

[243] Steven Curtis, Former Associate Director General, Canadian Wildlife Service. Current Executive Director, NatureServe Canada, Agriculture and Agri-Food Canada. Telephone interview by Mary Illical. July 29, 2004.

[244] Paul Heighington, Former Environment Director for the Métis National Council. Telephone interview by Mary Illical, February 24, 2005.

[245] Michael d'Eça, legal adviser to the Inuit Tapiriit Kanatami. Telephone interview by Mary Illical, March 21, 2005.

[246] NACOSAR is a provision under SARA which establishes a Council of aboriginal representatives to advise the Environment Minister on the administration of the Act and to make recommendations to the Canadian Endangered Species Conservation Council. The Canadian Endangered Species Conservation Council is composed of provincial and territorial wildlife ministers and two federal Ministers, the Minister of the Environment and the Minister of Fisheries and Oceans.

[247] Telephone interview with Michael d'Eça, March 21, 2005.

[248] For example, in the summer of 2000 there was a meeting in Iqaluit involving Minister Anderson, representatives from Parks Canada and the Department of Fisheries and Oceans, the provincial and territorial ministers responsible for wildlife, and all the national Aboriginal leaders. Telephone interview with Steve Curtis, July 29, 2004.

[249] *Ibid.*

[250] *Ibid.*

[251] *Ibid.*

[252] *Ibid.*

[253] Lawrence Ignace, Manager of the Environment Secretariat, Assembly of First Nations. Telephone interview by Mary Illical, August 19, 2004.

[254] *Ibid.*

[255] *Ibid.*

[256] *Ibid.*

[257] Telephone interview with Michael d'Eça, March 21, 2005.

[258] Telephone interview with Steve Curtis, July 29, 2004; David Anderson, Former Minister of Environment; Current Member of Parliament, Victoria. Telephone interview by Mary Illical, August 26, 2004.

[259] Telephone interview with Lawrence Ignace, August 19, 2004.

[260] Interestingly, the original wording of the non-derogation clause in Bill C-65 section 2(2), before it was amended, read, "For greater certainty, nothing in this Act is to be construed so as to abrogate or derogate from any existing aboriginal or treaty rights of the aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982.*" [Underlined emphasis added]. The Department of Justice changed the definition in the third draft of SARA, Bill C-5, section 3, to read as follows: "For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982.*" [Underlined emphasis added].

Michael d'Eça, who acted as the legal adviser to the Inuit Tapiriit Kanatami (ITK), told the author that, although Department of Justice only modified slightly the wording of the non-derogation clause, that modification profoundly changed the meaning of the clause. Essentially, the original non-derogation clause was a positive statement of legislative intention that the Act in which it appears does not infringe Aboriginal or treaty rights. As changed, the clause now merely indicates that the Act does not affect the constitutional protection of Aboriginal or treaty rights. Legally, the new wording means that the Act in question may or may not infringe Aboriginal or treaty rights. Aboriginal complaints regarding this new "Crown derogation" clause did not result in a change back to the original wording, even though the Department of Justice made this change without consulting Aboriginals. Indeed, this new wording is occurring in other statutes besides SARA. Telephone interview with Michael d'Eça, March 21, 2005.

[261] Government of Canada, *Species at Risk Act: A Guide,* October 2003, (Ottawa: Environment Canada,2003), p. 2. The Canadian Endangered Species Conservation Council is composed of provincial and territorial wildlife ministers and two federal Ministers, the Minister of the Environment and the Minister of Fisheries and Oceans.

[262] *Ibid.*

[263] There is clearly still a considerable amount of work to be done in terms of regulations and orders, enforcement, recovery plans, and aboriginal capacity building. Additional effort is required to ensure that this consultation process is sustainable both in terms of resources and in terms of following through on provisions in the implementation process. There are also concerns over how the two forms of knowledge, scientific and aboriginal, will coalesce. The five-year review process also gives aboriginal groups the opportunity to raise old and emerging concerns with the hindsight of how the Act has worked or not worked thus far on aboriginal land and for aboriginal people.

[264] See Scientists for Species, <http://www.scientists-4-species.org>. Accessed March 11, 2004.

[265] This comes as no surprise as conservation scientists, Reed Noss, Michael O'Connel, and Dennis Murphy, cite habitat destruction and degradation as leading to the endangerment of 88% of the species listed as threatened and endangered in the United States. Reed Noss, Michael O'Connell, and Dennis Murphy, *The Science of Conservation Planning: Habitat Conservation Under the Endangered Species Act* (Washington D.C.: World Wildlife Fund, 1997), p. 7. In 1999 the scientists' letter to the Prime Minister stated that "over 80% of the species listed by COSEWIC are at risk because their habitats are threatened." Scientists for Species, "1999 letter," <http://www.scientists-4-species.org>. March 11, 2004.

[266] Scientists for Species, "1997 letter," <http://www.scientists-4-species.org>. March 11, 2004.

[267] Scientists for Species, "1999 letter," <http://www.scientists-4-species.org>. March 11, 2004.

[268] Scientists for Species, "2001 letter," <http://www.scientists-4-species.org>. March 11, 2004.

[269] *Ibid.* Emphasis added.

[270] David Green. Current Member and Former Chair of COSEWIC and Associate Professor and Curator of Vertebrates at Redpath Museum, McGill University. House of Commons Standing Committee on the Environment and Sustainable Development. *Evidence,* Meeting No. 54, October 19, 2000, line #: 0940, <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=54373>. Accessed June 11, 2004.

[271] Marco Festa-Bianchet, COSEWIC Chair and Professor, Département de biologie, Universite de Sherbrooke. House of Commons Standing Committee on the Environment Sustainable Development. *Evidence,* Meeting No. 54, October 19, 2000, line #: 1045, <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=54373>. Accessed June 11, 2004.

[272] David Green, House of Commons Standing Committee on the Environment and Sustainable Development. *Evidence,* Meeting No. 54, October 19, 2000, line #: 1025.

[273] David Green. House of Commons Standing Committee on the Environment and Sustainable Development. *Evidence,* Meeting No. 54, October 19, 2000, line #: 0940.

[274] Arne Mooers, Assistant Professor of Biodiversity at Simon Fraser University. Telephone interview by Mary Illical, July 14, 2004.

[275] See Mooers, "Why did the fish miss the boat?" *Globe and Mail,* April 30, 2004, A21.

[276] Arne Mooers, "How better to use (im)partial scientists to help shape public policy." Paper presented at the Species at Risk 2004: Pathways to Recovery Conference. March 2004.

[277] *Ibid.* It also must be noted that collecting hundreds of signatures does not mean that the 'scientific community' speaks with one voice. 'Scientists for Species', for instance, is an ad hoc organization and does not act as a spokesperson for the signatories.

[278] David Anderson, House of Commons Standing Committee on the Environment and Sustainable Development. *Evidence,* Meeting No. 38, October 3, 2001, line #: 1540, <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=55292>. Accessed 15, 2004.

[279] *Ibid.*

[280] Stewart Elgie, Associate Professor, Faculty of Law, University of Ottawa. Associate Director, Institute of the Environment, University of Ottawa. Telephone interview by Mary Illical, August 5, 2004.

[281] Amos et al., p. 147. Indeed, Amos et al note that "according to one signatory to the scientists' letters, the Sierra Legal Defence Fund, which was a CESC [Canadian Endangered Species Coalition] steering committee member, effectively orchestrated the scientists' letter-writing campaign." CESC was headed by six environmental groups and supported by over 100 additional groups. Amos et al, p. 148.

[282] Telephone interview with Arne Mooers, July 14, 2004.

[283] *Ibid.*

[284] Amos et al., p. 147.

[285] Telephone interview with Arne Mooers, July 14, 2004.

[286] Scientists for Species, "2001 letter," <http://www.scientists-4-species.org>.

[287] Telephone interview with David Green, July 6, 2004.

[288] Telephone interview with Arne Mooers, July 14, 2004.

[289] *Ibid.*

[290] Telephone interview with David Green, July 6, 2004.

[291] Telephone interview with Arne Mooers, July 14, 2004.

[292] Hoberg, "Governing the Environment: Comparing Canada and the United States," p. 346.

[293] Stewart Elgie, *Endangered Species Legislation: A Bear Necessity.* Author's copy.

[294] These groups include the Canadian Labour Congress, the Council of Canadians, the United Church of Canada, United Fish and Allied Workers Union, the National Farmers' Union, the Canadian Bar Association, and Greenpeace. Canadian Endangered Species Coalition (CESC), "Getting Their Acts Together: A Report Card on the Implementation of the National Accord for the Protection of Species at Risk," <http://www.chebucto.ns.ca/Environment/FNSN/cesc/report97.html>. Accessed June 19, 2004.

[295] Amos et al., p. 148.

[296] Stewart Elgie, Sarah Dover, (the Canadian Endangered Species Coalition Director until 2000), and Elizabeth May of the Sierra Club were the main persons in the Coalition with a good knowledge of the ESA. Telephone interview with Stewart Elgie, August 5, 2004.

[297] *Ibid.*

[298] *Ibid.* As mentioned on page 4 of this thesis, under the direction of then Environment Minister Sheila Copps, various avenues were explored to gain stakeholder and public comment on proposed legislation, notably a Task Force on Endangered Species Conservation.

[299] Elgie, *Endangered Species Legislation: A Bear Necessity.*

[300] *Ibid.*

[301] *Ibid.*

[302] Telephone interview with Stewart Elgie, August 5, 2004.

[303] CESC's checklist is also cited in William Amos, "Federal Endangered Species Legislation in Canada: Explaining the Lack of a Policy Outcome," MA thesis, University of British Columbia. 1999, p. 64.

[304] CESC, "Federal Endangered Species Legislation – Background: Summer 1997," <http://www.chebucto.ns.ca/Environment/FNSN/cesc/bck-su97.html>. Accessed June 19, 2004; See also Steward Elgie, *Endangered Species Legislation: A Bear Necessity* (Toronto: Sierra Legal Defence Fund, 1995).

[305] CESC, "Getting Their Acts Together: A Report Card on the Implementation of the National Accord," <http://www.chebucto.ns.ca/Environment/FNSN/cesc/report97.html>. Accessed June 19, 2004.

[306] See Amos, "Federal Endangered Species Legislation in Canada: Explaining the Lack of a Policy Outcome"; Amos et al, "In Search of a Minimum Winning Coalition: The Politics of Species-at-Risk Legislation in Canada."

[307] Smallwood cites, s. 12 (b) of the *Canada Wildlife Act,* ss. 46-47 of the *Canadian Environmental Assessment Act,* s. 6 and s. 13 of the *Canada Water Act,* and s. 61 of the *Canadian Environmental Protection Act* as similar provisions to the safety net but which have never been used. As Elgie warned in an interview with the author, "it's anyone's guess, but it's a pretty safe bet that that power is going to be exercised very rarely...So you're in a much weaker position if the activity is prohibited under the safety net." Telephone interview with Stewart Elgie, August 5, 2004; Testimony by Senator Mira Spivak Spivak, Senate of Canada, *Debates* 140:27. December 9, 2002. Line #: 1620. <http://www.parl.gc.ca/37/2/parlbus/chambus/senate/deb-e/027db_2002-12-09-E.htm?Language=E&Parl=37&Ses=2>. Accessed May 12, 2004; Smallwood, p. 36: footnote 34.

[308] Telephone interview with Stewart Elgie, August 5, 2004.

[309] Wilf McIntyre, National Vice President of the Industrial, Wood and Allied Workers of Canada. House of Commons Standing Committee on the Environment and Sustainable Development. *Evidence,* Meeting No. 22, May 10, 2001, line #: 1005, <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=54968>. Accessed July 14, 2004.

[310] Referred to briefly by Amos et al, see footnote 7, p. 162.

[311] Charlie Penson, House of Commons. *Hansard.* Feb 26, 2002, line No. 1340, <http://www.parl.gc.ca/37/1/parlbus/chambus/house/debates/149_2002-02-26/HAN149-E.htm>. Accessed September 4, 2004.

[312] David Pope, Vice-President, Western Stock Growers' Association. House of Commons Standing Committee on the Environment and Sustainable Development. *Evidence,* Meeting No. 21, May 9, 2001, line #: 1630, <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=54943>. Accessed July 14, 2004.

[313] Amos et al, p. 150.

[314] See Norman Ward, Western Wheat Growers Association. House of Commons Standing Committee on the Environment and Sustainable Development. *Evidence,* Meeting No. 21, May 9, 2001, line #: 1620, <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=54943>. Accessed July 14, 2004; Peter deMarsh, Canadian Federation of Wood Lot Owners. House of Commons Standing Committee on the Environment and Sustainable Development. *Evidence,* Meeting No. 22, May 10, 2001, line #: 0935, <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=54968>. Accessed July 14, 2004.

[315] The Alberta Grazing Lease Holder Association and Canadian Association of Petroleum Producers were very critical of Pearse's report, while the Council of Forest Industries of British Columbia were more agreeable to the recommendations suggested by Pearse. See Jack Horner, Alberta Grazing Lease Holder Association. House of Commons Standing Committee on the Environment and Sustainable Development. *Evidence,* Meeting No. 21, May 9, 2001, line #: 1615, <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=54943>. Accessed July 14, 2004; Nick Schultz, Canadian Association of Petroleum Producers. House of Commons Standing Committee on the Environment and Sustainable Development. *Evidence,* Meeting No. 28, May 31, 2001, line #: 0925, <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=55202>. Accessed July 14, 2004; Peter Affleck, Council of Forest Industries of British Columbia. House of Commons Standing Committee on the Environment and Sustainable Development. *Evidence,* Meeting No. 22, May 10, 2001, line #: 0955, <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=54968>. Accessed July 14, 2004.

[316] Peter Pearse, *The Pearse Report on Compensation* (no title page or publication date provided). Copy obtained from Pierre Gratton, Vice-President Public Affairs and Communication, the Mining Association of Canada.

[317] Jack Horner, Alberta Grazing Lease Holder Association, line #: 1615.

[318] Jack Horner, Alberta Grazing Lease Holder Association, line #: 1615.

[319] David Pope, Vice-President, Western Stock Growers' Association, line #: 1630.

[320] Anne Mauch, Council of Forest Industries of British Columbia. House of Commons Standing Committee on the Environment and Sustainable Development. *Evidence,* Meeting No. 22, May 10, 2001, line #: 0950, <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=54968>. Accessed July 14, 2004.

[321] Andy Teal, Canadian Association of Petroleum Producers. House of Commons Standing Committee on the Environment and Sustainable Development. *Evidence,* Meeting No. 28, May 31, 2001, line #: 0925 <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=55202>. Accessed July 14, 2004.

[322] Harrison, *Passing the Buck,* p.176; cited in Amos et al., p. 151.

[323] Jack Horner, Alberta Grazing Lease Holder Association, line #: 1620.

[324] Ted Menzies, Western Canadian Wheat Growers Association. House of Commons Standing Committee on the Environment and Sustainable Development. *Evidence,* Meeting No. 21, May 9, 2001, line #: 1640, <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=54943>. Accessed July 14, 2004.

Member of Parliament and House Committee member, Joe Comartin, had this to say about the fines, a statement also applicable to jail terms under SARA:

> The final point I would make...is about, again, the fear, the concern that was being expressed over the issue of the size of the fines on the enforcement side. I'm just putting this on the record of this committee. Those fines are to deal with the whole of the country and all of the potential people or corporations who could in fact infringe the act, perhaps in some very gross ways. So we need those large fines. The reality is that the individual farmer-rancher, who in some ways breaches the law, even if convicted, is looking at a very minimal fine, if you look at any kind of jurisprudence on this

> type of legislation. The fine would probably be suspended in most cases if you follow the patterns. I don't see any reason why a judiciary would not follow their normal pattern. Or if there was a fine, it would be at the low end of the $500 to $5,000 type of range. I'm not demeaning the size of that or the importance of it, but it's not the $50,000 or the $300,000 or the million, which clearly is designed to deal with a flagrant violation, because it's the top end in every case, by a large multinational MacMillan-Bloedel type of company....

Joe Comartin, Member of Parliament, NDP. House of Commons Standing Committee on the Environment and Sustainable Development. *Evidence,* Meeting No. 22, May 10, 2001, line #: 0910-0915, <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=54968>. Accessed July 14, 2004.

[325] Jaimet, "Backbenchers win one for rural landowners."

[326] Amos et al, p. 158.

[327] *Ibid.*

[328] Harrison, "Passing the Environmental Buck," p. 332.

[329] Government of Canada, "The Habitat Stewardship Program 2003-2004," April 13, 2004, <http://www.sararegistry.gc.ca/gen_info/HTML/Habitat_e.cfm>. Accessed April 14, 2004.

[330] William Ambrose Amos, "Federal Endangered Species Legislation in Canada: Explaining the Lack of a Policy Outcome," MA thesis, Vancouver: University of British Columbia, 1999, p. 58-59.

[331] Species at Risk Working Group, "Conserving Species at Risk Cooperatively: A Response to the Species at Risk Act," 2000, <www.mining.ca/english/publications/SARWG-Eng.pdf> p. ii. Accessed February 11, 2004.

[332] Species at Risk Working Group, "Conserving Species at Risk and Vulnerable Ecosystems: Proposals for Legislation and Programs," 1998, pp. 10-19.

[333] *Ibid,* p. 20.

[334] *Ibid.*

[335] Species at Risk Working Group, *Conserving Species at Risk Cooperatively,* p. 1.

[336] *Ibid,* p. 5.

[337] *Ibid,* p. 7.

[338] Smallwood, p. 30.

[339] In SARWG's report it states that the federal safety net "...assumes a remarkable and unrealistic degree of government efficiency, common purpose and federal-provincial cooperation. Taking on and embarrassing a provincial government is unlikely to foster the atmosphere of cooperation and harmony sought by the federal government...." Species at Risk Working Group, "Conserving Species at Risk Cooperatively," p. 7.

[340] SARWG, "Conserving Species at Risk Cooperatively," p. 8.

[341] *Ibid,* p. 15.

[342] Sandy Baumgartner, Manager of Programs and Communication, Canadian Wildlife Federation. Telephone interview by Mary Illical, July 26, 2004.

[343] *Ibid.*

[344] Telephone interview with Pierre Gratton, July 16, 2004.

[345] *Ibid.*

[346] Telephone interview with Sandy Baumgartner, July 26, 2004.

[347] *Ibid.*

[348] *Ibid.*

[349] Telephone interview with Pierre Gratton, July 16, 2004.

[350] Telephone interview with David Anderson, August 26, 2004.

[351] David Near, Senior Counsel, Environment Canada. Telephone interview by Mary Illical, August 21, 2004.

[352] Telephone interview with Sandy Baumgartner, July 26, 2004; Telephone interview with Pierre Gratton, July 16, 2004.

[353] Telephone interview with Sandy Baumgartner, July 26, 2004.

[354] Telephone interview with Pierre Gratton, July 16, 2004.

[355] *Ibid.*

[356] The author would like to thank and acknowledge Dr. Kathryn Harrison for her comments, which have been incorporated in the following three paragraphs.

[357] Anne McIlroy, "Incentives proposed to protect animals: Minister seeks aid for landowners hurt by strict new rules," *Globe and Mail,* December 17, 1999.

[358] Andrew Duffy, "Land owners crucial in conservation plan: Government offers incentives to help save endangered species," *Ottawa Citizen,* December 19, 1999, A5.

[359] Jaimet, "Backbenchers win one for rural landowners: Liberals forced to strengthen compensation rules in Species at Risk Act," April 23, 2002, A1.

[360] Government of Canada, *Species at Risk Act: A Guide* (Ottawa: Environment Canada: 2003), pp. 3, 9.

[361] Emphasis added.

[362] Telephone interview with David Anderson, August 26, 2004.

[363] *Ibid.*

[364] *Ibid.*

[365] *Ibid.*

[366] Andrew Duffy, "Anderson: Blistering attack on U.S. critics" and "Anderson blasts U.S. critics," *Ottawa Citizen,* March 4, 2000, A6. For a concise account of the activist-driven emulation by Canadian and US

environmental groups, see Andrew Duffy, "Critics denounce bill to protect at-risk species: 'Canada will be the weak link in the chain of extinction,' U.S. group charges," *Ottawa Citizen,* February 25, 2000, A5.

[367] Andrew Duffy, "Blistering attack on critics" and "Anderson blasts U.S. critics".

[368] Telephone interview with David Anderson, August 26, 2004.

[369] *Ibid.*

[370] Environment Canada, "Conserving Borderline Species: A Partnership between the United States and Canada," <http://www.speciesatrisk.gc.ca/publications/cbs/birds_e.cfm>. Accessed September 15, 2004.

[371] Trilateral Committee for Wildlife and Ecosystem Conservation and Management, "Background," <http://www.trilat.org/general_pages/background_eng.htm>. Accessed September 15, 2004.

[372] North American Commission for Environmental Cooperation, "Conservation of Biodiversity," <http://www.cec.org/programs_projects/conserv_biodiv/index.cfm?varlan=english>. Accessed June 8, 2005.

[373] Telephone interview with David Anderson, August 26, 2004.

[374] *Ibid.*

[375] Telephone interview with Arne Mooers, July 14, 2004.

[376] David Pope, Vice-President, Western Stock Growers' Association. House of Commons Standing Committee on the Environment and Sustainable Development. *Evidence,* Meeting No. 21, May 9, 2001, line #: 1630, <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=54943>. Accessed July 14, 2004.

[377] *Ibid.*

[378] William Amos, Former Special Assistant to Former Federal Environment Minister David Anderson on Species at Risk Legislation. Telephone interview by Mary Illical, July 15, 2004.

[379] As of December 12, 2003, Parks Canada as a special operating agency was moved to report through the Minister of the Environment so Canadian Heritage is no longer directly engaged. In addition, SARA is not the only piece of environmental legislation that has multiple accountabilities. Certain sections of the Fisheries Act are under the authority of the Minister of the Environment and the Canadian Environmental Protection Act has several ministerial accountabilities for different sections. Telephone interview with David Brackett, Former Director General, Canadian Wildlife Service, August 4, 2004.

[380] Telephone interview with Steve Curtis, July 29, 2004; See William Ambrose Amos, "Federal Endangered Species Legislation in Canada: Explaining the Lack of a Policy Outcome," MA thesis, Vancouver: University of British Columbia, 1999, pp. 91-93.

[381] See Amos, "Federal Endangered Species Legislation in Canada," p. 93

[382] Telephone interview with Steve Curtis, July 29, 2004.

[383] *Ibid.*

[384] Telephone interview with William Amos, July 15, 2004.

[385] *Ibid.*

[386] *Ibid.*

[387] *Ibid.*

[388] The three MPs left politics as of the 2004 federal election. Jaimet, "Liberal party to lose its three 'eco-heroes'," *Ottawa Citizen*, March 7, 2004, A3.

[389] Andrew Duffy, "Wildlife bill strikes balance, minister says: Species at Risk Act 'a titanic failure,' environmentalists argue," *Ottawa Citizen,* April 12, 2000, A3.

[390] *Ibid.*

[391] Scientists for Species, "Amendments and 'Counter-Amendments'" adapted from summaries prepared by Kate Smallwood <http://www.scientists-4-species.org/>. Accessed July 4, 2004.

[392] Jaimet, "Liberals demanded favors to pass bill," *Ottawa Citizen,* December 27, 2002, A1; Jaimet, "Chretien's waning power imperils new legislation," *Vancouver Sun*, December 27, 2002, A4.

[393] Jaimet, "Backbenchers win one for rural landowners: Liberals forced to strengthen compensation rules in Species at Risk Act," *Ottawa Citizen,* April 23, 2002, A6.

[394] Jaimet, "Liberal party to lose its three 'eco-heroes'"

[395] Jaimet, "Backbenchers win one for rural landowners."

[396] See Jaimet, "Chretien's waning power imperils new legislation."

[397] Jaimet, "Liberal party to lose its three 'eco-heroes'"

[398] *Ibid.*

[399] Jaimet, "Chretien's waning power imperils new legislation."

[400] Jaimet, "Backbenchers win one for rural landowners."

[401] CESCC is composed of the aforementioned three ministers responsible for the implementation of the Act and the provincial and territorial ministers responsible for wildlife conservation. CESCC's role is to provide direction in the implementation of SARA's provisions and coordinate intergovernmental activities related to protecting endangered species.

[402] As quoted in Cheryl Petten, "Bill C-5 MP amends the amendments," *Windspeaker* 20:1 (2002), p. 9.

[403] *Ibid.*

[404] *Ibid.*

[405] Jaimet, "Backbenchers win one for rural landowners"

[406] Jaimet, "Species bill passes in Commons after late compromises," *Times Colonist,* June 12, 2002, A3.

[407] Jaimet, "Backbenchers win one for rural landowners: Liberals forced to strengthen compensation rules in Species at Risk Act," *Ottawa Citizen,* April 23, 2002, A6; Jaimet, "Species bill passes in Commons after late compromises," *Times Colonist,* June 12, 2002, A3.

[408] Jaimet, "Chretien's waning power imperils new legislation," Jaimet, "Liberals demanded favors to pass bill," and Jaimet, "Backbenchers flex muscles," *Edmonton Journal,* December 27, 2002, A6.

[409] Jaimet, "Backbenchers win one for rural landowners."

[410] Jaimet, "Chretien's waning power imperils new legislation."

[411] *Ibid.*

[412] There are two reasons for this distinction between SARA and Kyoto. First, Chretien made Kyoto a motion of confidence, which he did not do for SARA. Second, there was the issue of timing. SARA's final vote of the first version of Bill C-5 came a week after the Chretien-Martin debacle reached a climax and Martin was fired/resigned. MPs were rebelling during this time. The ratification of Kyoto came six months after this episode on December 17, 2002. Chretien had effectively dealt with Martin's overt campaigning to succeed him and now, with Kyoto, "took a hard line, insisting on a parliamentary resolution in favour of ratification even though none was legally required and declaring that resolution a motion of confidence." MPs did not want to face a snap election – in which Martin supporters would see Chretien at the helm of the party yet again – and thus "fell into line and the motion passed easily." See Kathryn Harrison, "Passing the Environmental Buck," in *New Trends in Canadian Federalism,* 2nd ed., eds. Francois Rocher and Miriam Smith (Peterborough: Broadview Press, 2003), pp. 331-334, 339.

[413] Barry Rabe and William Lowry, "Comparative Analyses of Canadian and American Environmental Policy: An Introduction to the Symposium," *Policy Studies Journal,* 27:2 (1999), p. 264.

[414] Amos et al, p. 155.

[415] Gina Teel, "Alberta opposes wildlife legislation," *Calgary Herald,* April 12, 2000, A10; Louis-Gilles Francoeur, "Espèces menacées: Québec accuse Ottawa de jouer dans sa cour," *Le Devoir,* April 12, 2000, A3. (NB: Author is not fluent in French, but basic idea is understood from reading title and abstract of article). David Anderson recalls that both Alberta and Quebec said " they were going to take us to court and thrash us". Telephone interview with David Anderson, August 26, 2004.

[416] Teel, "Alberta opposes wildlife legislation."

[417] Telephone interview with David Brackett, August 4, 2004.

[418] *Ibid.*

[419] Steve Brechtel, letter to Mary Illical, July 26, 2004.

[420] Confidential interview with Quebec official, email to Mary Illical, December 10, 2004.

[421] The response in French was: "Le gouvernement du Québec a depuis le début manifesté son opposition aux différents projets de loi sur les espèces en péril élaborés par le fédéral. Tous ces projets comportaient selon lui des dispositions qui empiétaient dans ses champs de compétence... Le Québec n'a jamais officiellement annoncé qu'il reconnaissait la LEP. Lors de la sanction de la LEP le 12 décembre 2002, le ministre délégué à l'environnement, Jean-François Simard, s'est dit très déçue de la nouvelle loi canadienne qui ne tenait pas compte des préoccupations du Québec. " *Ibid*

[422] The response in French was, "Le Québec n'a d'ailleurs jamais signé l'Accord national sur les espèces en péril, car il attendait de connaître le contenu de la législation qui serait adoptée par le fédéral afin de s'assurer que les principes de l'Accord national seraient respectés. " *Ibid.*

[423] The response in French was, "Le Québec s'est toujours opposé à cette disposition de la loi fédérale qu'il juge contraire à la répartition des champs de juridiction au Canada...Le gouvernement fédéral a

définitivement imposé cette disposition du filet de sécurité en dépit de l'opposition, entre autres, du Québec. " *Ibid.*

[424] The whole response in French was, Un premier projet d'entente sur les plans administratif et technique a d'abord été préparé. Un deuxième projet intégrant les préoccupations plus juridiques du Québec a ensuite été produit par le Secrétariat aux affaires intergouvernementales canadiennes. Ce nouveau texte a été rédigé de façon à ne suggérer d'aucune façon que le Québec reconnaît la Loi fédérale sur les espèces en péril. Cette nouvelle version a été soumise au fédéral qui s'oppose à plusieurs des modifications apportées. Il y a encore une volonté de s'entendre et une rencontre s'est récemment déroulée pour essayer de trouver des solutions. Les parties impliquées ont espoir d'en arriver à une entente d'ici la fin de l'année... Les négociations se sont déroulées dans un bon esprit de collaboration, chaque partie étant consciente des avantages sur le plan opérationnel d'une entente signée. Certaines des craintes du Québec se sont en effet estompées. Quant à la clause de filet de sécurité, le mécanisme pour le mettre en place est tellement complexe qu'il pourrait rendre le fédéral plus hésitant à intervenir. " *Ibid.*

[425] Telephone interview with Stewart Elgie, August 5, 2004.

[426] Specifically, environmentalists cite section 12 (b) of the *Canada Wildlife Act*, sections 46-47 of the *Canadian Environmental Assessment Act*, sections 6 and 13 of the *Canada Water Act*, and section 61 of the *Canadian Environmental Protection Act* as being similar to the safety net provision, but having never been used. Testimony by Senator Mira Spivak in Senate of Canada, Debates140:27. December 9, 2002. Line #: 1620; Smallwood, p. 36, p. 36: footnote 34.

[427] Telephone interview with Stewart Elgie, August 5, 2004. Both the House and Senate Committee recommended that the federal safety be made mandatory; however, the House Committee's amendment to make the provision mandatory was rejected by the government at report stage.

[428] The author acknowledges Dr. Kathryn Harrison for this point.

[429] The response in French was: "Les négociations se sont déroulées dans un bon esprit de collaboration, chaque partie étant consciente des avantages sur le plan opérationnel d'une entente signée. Certaines des craintes du Québec se sont en effet estompées. Quant à la clause de filet de sécurité, le mécanisme pour le mettre en place est tellement complexe qu'il pourrait rendre le fédéral plus hésitant à intervenir." Confidential interview with Quebec official. Email to Mary Illical, December 10, 2004.

[430] See Standing Senate Committee on Energy, the Environment, and Natural Resources, "Third Report," and testimony by Senator Mira Spivak in Senate of Canada, 140:27 (December 2002),

[431] *Ibid.*

[432] Telephone interview with David Anderson, August 26, 2004.

[433] Richard Lindgren, "The *Species at Risk Act*: An Overview," Canadian Environmental Law Association, September 25, 2001, <http://www.healthyenvironmentforkids.ca/img_upload/f8e04c51a8e04041f6f7faa046b03a7c/408sara.pdf> p. 11. Accessed May 21, 2004.

[434] "The *Migratory Bird Convention Act* implements the 1916 treaty between Canada and the United States, in which the two countries agree to adopt a co-ordinated system to protect migratory birds from indiscriminate harvesting and destruction." Environment Canada, "Acts Administered by the Minister of the Environment: Migratory Birds Convention Act," <http://www.ec.gc.ca/EnviroRegs/Eng/SearchDetail.cfm?intAct=1010>. Accessed July 19, 2004.

[435] Grace Skogstad and Paul Kopas, "Environmental Policy in a Federal System: Ottawa and the Provinces," in *Canadian Environmental Policy: Ecosystems, Politics, and Process,* ed. Robert Boardman (Toronto:

Oxford University Press, 1992), p. 44; National Environmental Law Section, Canadian Bar Association, "Submission on Bill C-33 *Species at Risk Act*," May 2002, <http://www.cba.org/cba/submissions/pdf/00-33-eng.pdf> pp. 7-8. Accessed May 6, 2004.

[436] Dale Gibson, *Endangered Species and the Parliament of Canada* (Sierra Legal Defence Fund: 1995), p. 25.

[437] National Environmental Law Section, "Submission on Bill C-33 *Species at Risk Act,*" p. 5. Emphasis added.

[438] Gibson, *Endangered Species and the Parliament of Canada*, p. 25. Statements like this notwithstanding, there have been arguments to the contrary. Amos et al. for instance opine that the cumulative potential of the above federal heads of power "is not sufficient to justify a sweeping federal species at risk statute." Amos et al., p. 153

[439] For a summary of cases see Harrison, "Passing the Environmental Buck," pp. 318-319 and National Environmental Law Section, "Submission on Bill C-33 *Species at Risk Act,*" p. 4.

[440] See Amos et al., pp. 155-156.

[441] Duffy, "Wildlife bill strikes balance, minister says: Species at Risk Act 'a titanic failure."

[442] Telephone interview with David Near, August 21, 2004.

[443] Harrison, "Passing the Environmental Buck," p. 319. Emphasis added.

[444] David Near, Email to Mary Illical, August 27, 2004.

[445] Telephone interview with David Near, August 21, 2004.

[446] *Ibid.*

[447] Telephone interview with David Anderson, August 26, 2004.

[448] Telephone interview with David Near, August 21, 2004.

[449] Telephone interview with David Anderson, August 26, 2004.

[450] *Ibid.*

[451] Richard Lindgren, "The *Species at Risk Act:* An Overview," p. 13.

[452] See Harrison, "Passing the Environmental Buck."

[453] Amos et al, p. 154.

[454] Harrison, "Passing the Environmental Buck," p. 326.

[455] Amos et al., p. 154.

[456] *Ibid.*, pp. 154-155.

[457] Stewart Elgie, "The Harmonization Accord: A Solution in Search of a Problem" *CanadaWatch* 6:1 (January 1998) and as quoted in Harrison, "Intergovernmental Relations and Environmental Policy: Concepts and Context," in *Managing the Environmental Union: Intergovernmental Relations and Environmental Policy*

in Canada, eds. Patrick Fafard and Kathryn Harrison (Montreal and Kingston: McGill-Queens University Press, 2000), p. 10.

[458] Harrison, "Passing the Environmental Buck," p. 320.

[459] The members and purpose of both forums are the same; the only real difference between a WMCC meeting and a CESCC meeting is the formal addition of federal ministers responsible for parks and for fisheries and oceans to the latter. The WMCC was already in place before SARA. It is a forum which the federal and provincial governments have used to jointly address species at risk. Unanimity is required among ministers and the Council in effect "gives each province a veto over any joint federal-provincial vision of Canada's species at risk protection policies." Amos et al., p. 153.

[460] Amos makes the same point in more detail in "Federal Endangered Species Legislation in Canada: Explaining the Lack of a Policy Outcome," pp. 104-108. Further, the provinces have considerable leverage in negotiating environmental matters due to "the considerable strength and independence of the Canadian provinces – due to their size and number, the presence of the "Quebec factor"..., the tradition of anti-Ottawa sentiment and province-building in Alberta and British Columbia, and provincial control over the all important natural resource economy." Deborah L. VanNijnatten, "Intergovernmental Relations and Environmental Policy-Making: A Cross-National Perspective," in *Managing the Environmental Union: Intergovernmental Relations and Environmental Policy in Canada,* eds. Patrick Fafard and Kathryn Harrison (Montreal and Kingston: McGill-Queen's University Press, 2000), p. 33.

[461] As quoted in Amos et al., p.155. Amos et al's article goes into detail about why Bill C-65 never materialized.

[462] As Bill C-5 was introduced less than a year after Bill C-33 died on the order paper and contained virtually the same provisions, only the details of the federal government's concessions to the provinces in Bill C-5 will be detailed. A summary of Bill C-33's provisions can be found in Amos et al, pp. 157-162.

[463] As described by David Green, the earlier model for COSEWIC was that, de facto, organizations, including the provinces, territories, and the NGOs, were the members of COSEWIC and were able to send whomever they wished to represent them. Under the new model, which arose in the process of removing the NGOs, there were a few changes. First, individual people are the members, not the organizations they come from. Second, these members do not officially represent anyone but themselves. Lastly, although the Minister appoints all COSEWIC members, the provinces and territories still wanted to retain the right to send whomever they wanted. It is, therefore, the provinces and territories that tell the federal government who they want to send and the Minister who appoints those members. This is then what 'consultation' refers to. David Green, email to Mary Illical, July 18, 2004.

[464] Duffy, "Wildlife bill strikes balance, minister says: Species at Risk Act 'a titanic failure."

[465] Amos et al, pp. 144-145.

[466] Cashore et al, p. 11.

[467] Rabe and Lowry, 264.

[468] Amos et al, p. 148.

[469] Rose, "What is Lesson Drawing?" p. 14.

[470] Andrew Duffy, "Anderson: Blistering attack on U.S. critics" and "Anderson blasts U.S. critics," *Ottawa Citizen,* March 4, 2000, A6. For a concise account of the activist-driven emulation by Canadian and US environmental groups, see Andrew Duffy, "Critics denounce bill to protect at-risk species."

[471] Telephone interview with David Anderson, August 26, 2004.

[472] Bourdages and Labelle, p. 22.

[473] Hoberg, "Sleeping with an Elephant"; Hoberg, "Governing the Environment."

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