

Fisheries and Oceans
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Canada

Deputy Minister

Sous-ministre

2004-002-00391
EKME # 399877MEMORANDUM FOR THE MINISTER**EMERGENCY LISTING REQUEST FOR TWO SOCKEYE
SALMON POPULATIONS UNDER SARA**

(Information Only)

SUMMARY

- The Committee on the Status of Endangered Wildlife in Canada (COSEWIC) has requested an emergency listing of two sockeye salmon populations under the Species at Risk Act (SARA). COSEWIC has provided a detailed rationale, based on analysis done by departmental scientists, that there is imminent risk to the survival of these two populations. This is the first case of an emergency listing request.
- Legal advice is that SARA requires the Minister of Environment (MoE) to recommend emergency listing to the Governor in Council (GiC) if he is of the opinion there is an imminent threat to survival of the species. Unlike the regular listing process, MoE can only consider biological factors in arriving at a recommendation. At the decision making level, however, as with the regular process, socio-economic factors can be considered. The emergency listing process is an expedited one with less time to consider input from consultations and do impact analyses. If the MoE determines there is not an imminent threat, the normal SARA listing process would apply.
- Because of previous commitments to cooperative implementation of SARA, the department is assessing two possible alternatives to emergency listing: 1) avoid it through appropriate management measures and 2) get a decision rejecting a recommendation to list. Emergency listing would likely result in the virtual closure of south coast commercial sockeye fisheries in 2004 and have a severe impact on the \$30 million commercial industry, as well as on some First Nation fisheries.
- At this time, the Department does not know the MoE's view on the emergency listing request or whether the MoE would consider alternatives to emergency listing. The MoE was briefed by his staff on February 23 on the emergency listing request and we are awaiting a briefing on the meeting.

Ottawa, Canada
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DFO-14519[03-03]

SARA - Emergency Listings
Second Drawer - SARA Cabinet #517
Species at Risk Directorate (SARA)
DFO - NCR

Background

- The MoE has been requested by COSEWIC to add Cultus Lake and Sakinaw Lake sockeye salmon to the SARA list of endangered species on an emergency basis.
- Under SARA, if the MoE is of the opinion that there is an imminent threat to survival of a species, he must, on an emergency basis, after consultation with the competent minister, (the Minister of Fisheries and Oceans) make a recommendation to the GiC to add the species to the list of endangered species.
- COSEWIC is the government's scientific advisory body on status of species at risk in Canada. In October 2002, it assessed these two populations on an emergency basis as endangered and at imminent risk of extinction, and recently wrote to the MoE expressing concerns about the lack of action in response to their advice.
- The abundance of both populations has declined greatly in recent decades due to harvesting, habitat degradation, and more recently due to increased pre-spawning mortality due to unknown factors (for Cultus). Both populations were historically small to medium-sized. They each can be distinguished from other sockeye populations by genetic and biological characteristics (but not on the basis of visual appearance). As such, they are considered "wildlife species" under the SARA and subject to legal protection if listed as endangered.

Analysis / DFO Comment

- The emergency listing process is restrictive. Fishers have expressed concern that it does not permit adequate time for consultation, and that the MoE's decision is limited to biological considerations. They have also raised concern that the SARA definition of wildlife species, and COSEWIC's interpretation of it, will result in dozens of small, lake populations of sockeye in BC being labelled as species, making mixed stock fisheries nearly impossible.
- The assessment results of the two sockeye populations is based on the work of departmental scientists. They are supported by COSEWIC scientists and consistent with methodologies used by U.S. research on salmon populations.
- The department is faced with the following alternatives in the context of this emergency listing request:
 - the MoE recommends listing, with or without your support, and GiC agrees to list; or
 - the department seeks the MoE's agreement on DFO management measures that would, in his mind, remove the imminent threat but still allow some fishing; this would lead to resumption of the regular listing process; or

- seek consideration of a brief, by your cabinet colleagues, opposing an MoE listing recommendation.

Alternative One

- Because the primary "imminent threat" is the fishery, which begins in July, there will be some impetus for MoE to press for listing consideration prior to the fishing season. Listing would result in a significant impact on First Nation fisheries and severe impact on commercial fisheries in 2004. In the longer-term, the salmon industry would have to undergo major structural change and downsizing.

Alternative Two

- Emergency listing would be replaced with DFO management measures. DFO is exploring several variable risk options for managing the 2004 Fraser River sockeye fishery, which are intended to remove the imminent threat and rebuild the two populations, while allowing some fishing. The options range from close to zero fishing mortality on the two populations, with high impact on fisheries but low biological risk of extirpation, to restricted fisheries on the two populations with reduced impact on the fisheries but higher biological risk. The impact on fisheries under the low risk option will be the same as if the populations were listed under alternative one.
- Besides fishery adjustments, the management options will include a broad suite of measures aimed at improving the survival of populations and rebuilding them. Several of these measures, such as more habitat improvement and monitoring of fish passage to the spawning grounds, will be done prior to the return of spawning adults this year to help maximize spawning success.
- The choice of management options that would allow more fishing will depend on the MoE's comfort with a higher level of risk, while being assured that the imminent threat to survival was sufficiently removed. This would likely require the MoE to explain publicly why he is of the opinion there is no imminent threat to the species. As such, he must be comfortable with DFO's management measures in 2004. At this time, the department does not know the MoE's views on variable risk for this emergency listing request, nor his likely response to the three management options. Once the options are flushed out his views will be sought.
- It is noteworthy that with the emergency listing avoided, the normal listing process would continue. There would then be the opportunity to consult further, for MoE to factor socio-economic considerations into a recommendation and ultimately for him to consider a recommendation not to list.

Alternative three

- The MoE would recommend emergency listing on the understanding that his cabinet colleagues would consider a DFO brief opposing the listing. The MoE's recommendation could be rejected as discretion exists to do so. Currently, two legal views are under discussion on the implications of a rejection of an emergency listing. Further analysis with the Department of Justice is underway and will be provided as soon as possible.

Considerations on Alternatives

- At this point in our assessment, alternative two has a number of advantages. It would demonstrate that the department is prepared to put in place management measures to remove the imminent threat, and it would allow us to revert to the normal SARA process with full consultations, and the inclusion of socio-economic and other factors in an assessment of whether or not to list. It is also likely to be preferable to the MoE, since he would have to agree that the management measures were sufficient to remove the threat. Lastly, this alternative would avoid engaging the government in rejecting an emergency listing recommendation at this early stage of SARA implementation, as being proposed in alternative three. Government rejection of an emergency listing recommendation would draw the fire of environmental non governmental organizations (ENGOs) and First Nations who are critical of SARA for allowing for a political decision making process.
- However, the effectiveness of alternative two depends on finding an acceptable balance between the removal of the imminent risk and fishing opportunities. Pacific Region biologists are currently completing risk analyses which will determine whether this is possible. We expect the results within the next week
- Pursuing a decision opposing a listing recommendation (alternative three) could replace alternative two, if it proves impossible to both remove the imminent threat and provide a reasonable level of fishing. However, before proceeding with this alternative, we would first require legal clarification of the implications of a decision to reject an emergency listing.
- Environment Canada has expressed concern about the precedent of an emergency listing at this time. Alternative two and three would avoid this precedent. They have said that they will consult with DFO on the emergency listing process and will not question our scientific risk assessment of these two populations.
- Avoidance of an emergency listing, either through alternative two or three, would set an important precedent for the future management of Pacific salmon. It would allow time for DFO to complete a longer-term approach to the conservation and management of Pacific salmon. The department has been working on a Wild Salmon Policy (WSP) that would protect and rebuild weak stocks while allowing sustainable fisheries. The WSP, which will be completed by December 31, 2004, will establish conservation units for salmon, broadly consistent with SARA. It will provide a framework for setting conservation objectives and priorities, which will avoid incremental SARA listings.

Views of Fishery Interests and First Nations

- Commercial industry groups, including processors, some First Nations, and coastal communities would strongly oppose significant new restrictions on their fisheries to protect these populations. Commercial fishers have already called for compensation if these populations are listed on an emergency basis and First Nations may as well. The government of BC has made its concerns with respect to the socio-economic costs of SARA implementation known at recent meetings. They would likely challenge any significant restrictions on fisheries seen as a "made in Ottawa solution" and likely demand compensation.
- The listing of these two populations, and subsequent conservation measures required to rebuild them, would have a severe impact on the commercial salmon industry. The impact would be amplified by its poor financial state. Listing of these populations could also affect other sectors such as herring processing and harvesting because of its economic interdependence with salmon. Some coastal communities also could be severely affected.
- ENGOs and some First Nations believe strongly that these populations should receive strict protection even if this means severe economic impacts on some commercial harvesters. ENGOs and some Fraser River First Nations submitted the original requests to COSEWIC for emergency designation of these populations. They would strongly oppose a decision not to list them on an emergency basis and point out that the COSEWIC assessments were based on work by DFO scientists.
- There is an important legal consideration respecting the department's approach to SARA and salmon populations threatened with extinction. Failure to take measures to conserve and rebuild an at-risk population under SARA could put DFO in a difficult position with First Nations. If it were biologically and technically possible to rebuild a population, but the government chose not to on the basis of social or economic considerations, a First Nation with an Aboriginal right to fish that population might well argue that failure to conserve and rebuild constitutes an infringement and raise this argument in the context of legal action.
- ENGOs may also seek to legally challenge a decision made under SARA, if they are dissatisfied with the outcome or the process followed.
- Clear communication of the government's intent will be essential, since there are very strong and conflicting points of view on this issue in British Columbia. Whatever decision is taken on this issue, a coordinated communications approach with the MoE would be required.

Timelines

- The intent in SARA is that the emergency listing process be done expeditiously. At this time, the MoE has not indicated his timelines for sending the assessments to GiC and making his recommendation or not.
- Given DFO's timelines for salmon fisheries planning, the department will be looking to expedite a decision on whether to proceed with alternative two or three. In the event that alternative two is appropriate, it will be important to engage the MoE as soon as possible. If his concurrence is obtained, the department will move to intensify consultations and harvest planning in preparation for the 2004 season.

Next Steps

- A memo will be prepared for you detailing a recommended course of action. It could form the basis of a letter to or a meeting with the MoE outlining your position.
- Completion of this decision memorandum will require the completion of the risk assessments on fishing options, and analysis of other management measures to remove any 'imminent threats', under alternative two, and completion of the legal opinion on alternative three, i.e., the implications of a decision to reject an emergency listing.
- The department is initiating an action plan for these two populations. It includes:
 - Undertaking a consultation process soon on the emergency listings. This will be important to assess the views of stakeholders and gather more information on the socio-economic and other impacts of listing.
 - Completion of the risk assessments and management options mentioned above.
 - Initiating more habitat improvement, fish passage restoration and monitoring, freshwater smolt work, enhancement, possible predator controls, and possible tagging and monitoring of migrating smolts.
 - Examining additional biological information related to providing greater fishing flexibility under alternative two.

Larry Murray

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