

April 23, 2021

Reporting Obligations Under the *Species at Risk Act*: A Review of the Westslope Cutthroat Trout Recovery Strategy Implementation Progress Report

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Matter Commented On: Fisheries and Oceans Canada, [Report on the Progress of Recovery Strategy Implementation for the Westslope Cutthroat Trout \(*Oncorhynchus clarkii lewisi*\) Alberta Population \(also known as the Saskatchewan-Nelson River Populations\) in Canada for the Period 2014 to 2019](#) (*Species at Risk Act* Recovery Strategy Report Series) (Ottawa: Fisheries and Oceans Canada, 2021)

This post discusses the recent “[Report on the Progress of Recovery Strategy Implementation for the Westslope Cutthroat Trout \(*Oncorhynchus clarkii lewisi*\) Alberta Population](#)” (WSCT Implementation Report), assesses whether the WSCT Implementation Report meets the criteria set out in the *Species at Risk Act*, [SC 2002 c 29](#) (*SARA*), and describes the overall problems with implementation reports under *SARA*.

The Westslope Cutthroat Trout is a freshwater fish native to western North America, recognizable for the orange-red slashes under its lower jaw. Throughout much of its range, this species is the only native true trout, and as such it plays an important role in its ecosystems and is viewed as an indicator species of general ecosystem health (*SARA* Registry, “[Species Details](#)”). The Committee on the Status of Endangered Wildlife in Canada (COSEWIC) assessed the Alberta population of Westslope Cutthroat Trout as threatened in both [2006](#) and [2016](#). The reason for this designation was that the population had been reduced by almost 80 percent through over-exploitation, habitat degradation, and hybridization and competition with introduced, non-native trout. As well, the range of the Westslope Cutthroat Trout is currently less than 20 percent of its observed historical range, and the existing range is severely fragmented (WSCT Implementation Report at 3, citing the [2016 COSEWIC Assessment](#)).

The species was listed as threatened in 2013 under *SARA*. A threatened species is one that “is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction” (*SARA*, s 2(1)). Once a species is listed as extirpated, endangered, or threatened, the competent minister (in this case, the Minister of Fisheries and Oceans, “the Minister”) for that species must prepare a strategy for its recovery (*SARA*, s 37(1)). The first [Recovery Strategy](#) for the Westslope Cutthroat Trout Alberta population was included in the *SARA* public registry in 2014, and was replaced by an updated [Recovery Strategy and Action Plan](#) in 2019.

In preparing a recovery strategy, the competent minister must determine whether the recovery of the species is feasible (*SARA*, s 40). Both recovery documents for the Westslope Cutthroat Trout

Alberta population concluded that “maintenance and recovery of the Westslope Cutthroat Trout is deemed to be biologically and technically feasible across parts of its native range and for some life history types, but restoration of Westslope Cutthroat Trout throughout their historical range is not feasible” (2014 Recovery Strategy at 35; 2019 Recovery Strategy and Action Plan at 34). When the Minister determines that recovery is feasible, as is the case for the Westslope Cutthroat Trout Alberta population, section 41(1) of *SARA* sets out mandatory contents for the recovery strategy. Under section 41 of *SARA*, a recovery strategy must include “a statement of the population and distribution objectives that will assist the recovery and survival of the species, and a general description of the research and management activities needed to meet those objectives” (s 41(1)(d)). These objectives and activities are discussed below in the section summarizing the WSCT Implementation Report.

Another aspect of recovery planning for *SARA* listed species is the protection of critical habitat. See a previous ABlawg post regarding protection of the Westslope Cutthroat Trout’s critical habitat [here](#).

Reporting Under Section 46 of *SARA*

Section 46 of *SARA* places an obligation on the Minister to report on the progress of implementation of a recovery strategy:

The 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. The report must be included in the public registry.

We will discuss three aspects of section 46. First, the significance of the mandatory language requiring that the minister *must* report, and *must* include the report in the public registry. Second, the deadline for the report: five years after the recovery strategy is included in the public registry, and in every subsequent five-year period. Third, the content of the report: the report must be on the implementation of the recovery strategy as well as the progress towards meeting the recovery strategy’s population and distribution objectives. This post will focus on section 46 and recovery strategy reporting, but *SARA* also creates similar reporting obligations for the implementation of action plans (s 55) and management plans (s 72). We will provide a brief summary of the WSCT Implementation report before addressing these requirements.

The Westslope Cutthroat Trout Implementation Report

The Minister included the WSCT Implementation Report in the public registry on February 22, 2021, almost two years overdue. To be exact, since the Recovery Strategy was included in the public registry on March 28, 2014, the five-year deadline for the WSCT Implementation Report was set at March 28, 2019. This means the report was one year, ten months, and 25 days late.

The population and distribution objectives of the Westslope Cutthroat Trout recovery strategy are to “protect and maintain the existing distribution of ≥ 0.99 genetically pure populations of

Westslope Cutthroat Trout,” and “re-establish genetically pure populations to self-sustaining levels, within the species’ original distribution in the Saskatchewan-Nelson rivers watershed in Alberta” (2014 Recovery Strategy at 4; 2019 Recovery Strategy and Action Plan at 4; WSCT Implementation Report at 7).

The WSCT Implementation Report discusses progress towards recovery in terms of four broad strategies: research, monitoring, management and regulation, and education and outreach (at 9). (These broad strategies were initially described in the 2014 Recovery Strategy at 4, and the 2019 Recovery Strategy and Action Plan at 6). Each of these broad strategies is associated with activities meant to support recovery of the Westslope Cutthroat Trout (Table 3, starting at 9). For example, research activities include studies to improve knowledge of population genetics and studies on the feasibility of recovering existing populations within their historical range. Monitoring activities include ongoing population monitoring on priority populations and measured population estimates, relative abundance, distribution, population structure, genetic status, as well as abundance and distribution of non-native species. Management and regulation activities are aimed at limiting the spread of non-native species and recovering populations of Westslope Cutthroat Trout within their historical range. Education and outreach activities are meant to improve awareness of the species, and include the production of a [short film](#) about the introduction of Westslope Cutthroat Trout into Rainbow Lake, two campaigns about aquatic invasive species, preparation of a Westslope Cutthroat Trout fact sheet, in-park interpretive activities in Banff National Park where some populations of Westslope Cutthroat Trout are found, educational signage, stakeholder workshops, and other outreach activities. As well, a number of studies are in progress or completed with the aim of identifying critical habitat for the Westslope Cutthroat Trout (WSCT Implementation Report, Table 4, starting at 33).

Discussion

Here we return to the three reporting requirements outlined above. Did the Minister fulfill their obligation under section 46 of *SARA* with respect to the Implementation Report for the Alberta population of Westslope Cutthroat Trout? The first issue is whether the WSCT Implementation Report was issued and included in the *SARA* public registry. It was: so far, so good. This is more than can be said for many species. Searching the *SARA* registry (at the time of writing) shows [246 Recovery Strategies](#) were in the *SARA* registry by the end of 2015, whereas only [36 Reports on the Progress of Recovery Strategy Implementation](#) are currently in the *SARA* registry. This means over 200 implementation reports are overdue for recovery strategies of threatened, endangered, and extirpated species.

The second issue is the timeliness of the WSCT Implementation Report. As noted above, the Minister included the WSCT Implementation Report in the public registry almost two years past the deadline created by section 46 of *SARA*. Unfortunately, this sort of disregard for the mandatory statutory deadlines in *SARA* is a pattern. Currently there are 36 implementation reports on the *SARA* public registry issued by the Minister of Fisheries and Oceans or Minister of Environment and Climate Change pursuant to section 46 of *SARA*. None of those reports were included in the registry within the five-year statutory timeframe. The severity of the lateness ranged from several weeks to six years. In the case of the Westslope Cutthroat Trout Alberta population, we cannot know exactly what compelled the MFO to include the WSCT

Implementation Report in the public registry when they did. However, it is worth noting that Timberwolf Wilderness Society filed for judicial review of the MFO's delay on the WSCT Implementation Report shortly before the Implementation Report was published (Federal Court file T-294-21). We are only aware of that litigation because the Public Interest Law Clinic acted as counsel.

Shaun Fluker has written multiple ABlawg posts on the problem of delay for other documents under *SARA* (see [here](#) and [here](#), and an article on the specific failures to protect the Westslope Cutthroat Trout [here](#)). A good way to understand why ministerial delays matter to species at risk is to look at the purpose of *SARA* itself, stated in section 6:

The purposes of this Act are to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened.

The importance of adhering to the timelines set out in *SARA* was recognized by Justice Mactavish in *Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*, [2014 FC 148 \(CanLII\)](#):

To state the obvious, the *Species at Risk Act* was enacted because some wildlife species in Canada *are at risk*. ... [M]any are in a race against the clock as increased pressure is put on their critical habitat, and their ultimate survival may be at stake.

The timelines contained in the Act reflect the clearly articulated will of Parliament that recovery strategies be developed for species at risk in a timely fashion, recognizing that there is indeed urgency in these matters. Compliance with the statutory timelines is critical to the proper implementation of the Parliamentary scheme for the protection of species at risk. (at paras 101–102, emphasis in original)

Western Canada Wilderness Committee was about a delay in the posting of a recovery strategy, rather than the publication of a report on the implementation of a recovery strategy. Courts have only dealt with implementation reports pursuant to section 46 of *SARA* in passing remarks (see *Bancroft v Nova Scotia (Lands and Forests)*, [2020 NSSC 175 \(CanLII\)](#) at para 86 and *Canada (Fisheries and Oceans) v David Suzuki Foundation*, [2012 FCA 40 \(CanLII\)](#) at para 19). However, the logic of Justice Mactavish in *Western Canada Wilderness Committee* should be extended to the reports on the implementation of recovery strategies. The reports are intended to tell Canadians if a recovery strategy is working, and whether a species' population is recovering or not. Justice Mactavish found that there was urgency in the preparation of a recovery strategy, and similarly there is urgency in assessing whether that recovery strategy is achieving its objectives. While no court has explicitly ruled that the delay in issuing implementation reports is unlawful, it seems clear that it is, given the discussion of the timelines for recovery strategies in *Western Canada Wilderness Committee*.

As we note above, more than 200 species listed as threatened, endangered, or extirpated should have an implementation report for their recovery strategy by now, but do not. This parallels the

systemic delay in posting recovery strategies that was acknowledged in *Western Canada Wilderness Committee*, where Justice Mactavish called the four species that were the subject of the litigation “the tip of the iceberg” and stated that the 167 species with outstanding recovery strategies constituted an “enormous systemic problem” (at para 85).

The third point of discussion on the WSCT Implementation Report is whether or not the *content* of the report fulfills the MFO’s reporting obligation. The minister “must report on the implementation of the recovery strategy, and the progress towards meeting its objectives” (SARA, s 46). The content of the report is thus contingent on the content of the recovery strategy, and will be specific to the species in question. Both the 2014 and 2019 recovery strategies for the Westslope Cutthroat Trout Alberta population includes overarching population and distribution objectives, as well as more specific recovery objectives. As noted above, the population and distribution objectives are to “protect and maintain the existing distribution of ≥ 0.99 genetically pure populations of Westslope Cutthroat Trout,” and “re-establish genetically pure populations to self-sustaining levels, within the species’ original distribution in the Saskatchewan-Nelson rivers watershed in Alberta” (WSCT Implementation Report at 7).

With respect to the goal of protecting and maintaining the existing distribution of genetically pure populations, the WSCT Implementation Report says nothing about progress towards this goal. It is possible that the more specific recovery objectives will contribute to achieving the population and distribution objectives, but this link is not explicit. For instance, it is difficult to see how the activities to increase education and awareness about the Westslope Cutthroat Trout, which the report describes, tell us whether or not the existing populations were protected and maintained. The WSCT Implementation Report does give some details on efforts to re-establish genetically pure populations, but these efforts were mainly exploratory, such as the East Slope Assessment project and the study of the trout population in Picklejar Lakes (at 38).

The WSCT Implementation Report should describe the change in abundance and distribution of existing genetically pure populations for the 2014–2019 period in question. This would show whether progress is being made towards recovery and would fulfill the Minister’s reporting duty. Instead, the WSCT Implementation Report qualitatively describes the progress on specific recovery objectives. While the Minister reports progress in all of the categories of research, monitoring, management and regulation, and education and outreach, the WSCT Implementation Report does not state whether the Westslope Cutthroat Trout has actually been protected and maintained or re-established, which is the overarching population and distribution objective. A simple solution to this deficiency could be for the WSCT Implementation Report to summarize the results of the monitoring studies, instead of merely saying the monitoring has taken place.

In contrast to many listed species, considerable work has been done to document the population distribution and abundance of Westslope Cutthroat Trout Alberta population, and as such lack of scientific information is not an excuse for this data to not be included in the WSCT Implementation Report. The information exists – it just has not been reported. There is evidence that the Westslope Cutthroat Trout have gone extinct from some streams it previously inhabited during the recovery period: the Westslope Cutthroat Trout population in Evan-Thomas Creek collapsed in 2013 (David W Mayhood, “[Emergency Report: Alberta Native Cutthroat Trout Populations & Critical Habitat at Risk](#)”, FWR Technical Note No 2017/08-1, *Freshwater*

Research Limited (August 2017) at 5–6), the population of Westslope Cutthroat Trout at Silvester Creek declined by 74 percent between 2006 and 2016 (David Mayhood, “[Comments on the 2019 Proposed Recovery Strategy & Action Plan for the Alberta Population of Westslope Cutthroat Trout](#)”, FWR Technical Note No. 2019/07-1, *Freshwater Research Limited* (July 2018) at 7), the populations of Westslope Cutthroat Trout in both Gold Creek and Blairmore Creek were found to have declined by more than half from 2016 to 2017 ([Grassy Mountain Coal Project Hearing Transcript, Volume 16 \(16 November 2020\)](#) at 3399), and no Westslope Cutthroat Trout were found in Speers Creek and Hidden Creek in a recent attempt at sampling ([Grassy Mountain Coal Project Hearing Transcript, Volume 22](#) (23 November 2020) at 4779-80). Surely, the sharp declines and losses of populations of Westslope Cutthroat Trout is the sort of information that is meant to be included in the WSCT Implementation Report, especially given that the recovery objective is to protect and maintain the existing populations of the species. In other words, the lengthy WSCT Implementation Report reports on unhelpful details about recovery activities and leaves out the basic story: in the race against the clock to save the Westslope Cutthroat Trout, Canada and the Westslope Cutthroat Trout are losing. This information is particularly important because of [planned coal development](#) in Westslope Cutthroat Trout Habitat.

The WSCT Implementation Report is part of a larger trend of implementation reports not portraying the most important information with respect to species’ recovery. The content of implementation reports in general is determined by the specific contents of the recovery strategy for a given species. In most cases the recovery objectives do not include quantitative population abundance targets, which leads to ambiguity about whether the species is recovering. Instead, the recovery objectives refer to very general goals like ensuring the long-term viability of a species or maintaining self-sustaining populations of a species, which are difficult goals to report on in a five-year timeframe. For many species, the population and distribution remain largely unknown, and the implementation reports describe activities aimed at gaining a better understanding of the species abundance, location, and habitat requirements (see for example implementation reports of the [Eastern Sand Darter](#); [Lake Chubsucker](#); [Pacific Leatherback Sea Turtle](#); and [Pacific Blue, Fin and Sei Whales](#)). In some cases the species is well-understood and the implementation reports describe population trends in locations where the species is known to occur, even going as far as to set and report on quantitative population targets, however these are often sedentary species, or species confined to a small area, that are easier to observe (see implementation reports for [Northern Abalone](#); [Banff Springs Snail](#); and [Eastern Prickly Pear Cactus](#)). Some more mobile species are well-studied, have quantitative recovery objectives, and these objectives are reported on, but this is the exception rather than the norm (see the implementation report for [Woodland Caribou, Boreal Population](#)).

Our major concern is with species that are well-studied and known to be in severe decline, but for which the implementation reports obscure that information. A good example of this is the Report on the Progress of Recovery Strategy Implementation for the [Northern and Southern Resident Killer Whales](#). The report states that population modelling of the Southern Resident Killer Whale shows the species is declining at a rate of 0.91 percent per year and has a 49 percent likelihood of becoming extinct in one hundred years (Table 3 at 8). This prognosis is alarming, and yet the Resident Killer Whale’s implementation report reads optimistically. The report describes the multitude of research activities that have taken place, and then states that

there has been “significant progress” (at 42) towards meeting the recovery objective of long-term viability of the species and that recovery is feasible (at 41–42). There is a clear mismatch in the Resident Killer Whale report between the known decline of the species and the sunny tone of the report. The key takeaway from that report should be that the Recovery Strategy is not working.

Conclusion

The Report on the Progress of Recovery Strategy Implementation for the Westslope Cutthroat Trout Alberta population was included in the *SARA* public registry almost two years late, after litigation was commenced against the Minister, and the *WSCT* Implementation Report does not actually report on the progress towards meeting the population and distribution objectives for the species. Instead, it qualitatively describes recovery activities and leaves the reader guessing about the actual status of the species, which other sources indicate is continuing to decline. To fulfill their duties under section 46 of *SARA* ministers must start placing implementation reports on the public registry within the mandatory timeframe, and must report on whether actual progress towards meeting the recovery objectives of the species has been made. This is another example of the government’s reluctance to implement *SARA*, and gives the troubling impression that the government is sweeping evidence that *SARA* is failing to protect species at risk under the rug.

This post may be cited as: Dana Poscente and Drew Yewchuk, “Reporting Obligations Under the *Species at Risk Act*: A Review of the Westslope Cutthroat Trout Recovery Strategy Implementation Progress Report” (April 23, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/04/Blog_DP_DY_SARA_Implementation_Reports.pdf

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