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## Secrecy in *Species at Risk Act* Permits

**By:** Drew Yewchuk & Daniella Marchand

**Permit Commented On:** [Explanation for issuing permit \(19-HCAA-01862\) pursuant to the provisions of section 73 of SARA - Bull Trout](#)

Public Interest Law Clinic staff have been monitoring the *Species at Risk Act*, [SC 2002, c 29](#) (SARA) [public registry](#) from the early days of the clinic in 2016, when the clinic looked [at a proposed permitting policy under SARA](#). Maintaining the public registry is a requirement of SARA (see SARA sections 120-124), and one type of document that must be posted to the registry are the explanations for the granting of section 73 permits to affect species at risk or their critical habitat. The clinic has found instances where they are either never being posted at all or posted very late – so late that the permits are expired by several months by the time they are posted to the registry. This blog describes the problem with the long delays in posting explanations for permits and argues these delays violate the intention of SARA. This post ends with a brief reflection on the usefulness of online registries meant to increase transparency.

### Permits and the *Species at Risk Act* Registry

The first portion of section 73 of the *Species at Risk Act* reads:

#### **Powers of competent minister**

**73 (1)** The competent minister may enter into an agreement with a person, or issue a permit to a person, authorizing the person to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals.

#### **Purpose**

**(2)** The agreement may be entered into, or the permit issued, only if the competent minister is of the opinion that

**(a)** the activity is scientific research relating to the conservation of the species and conducted by qualified persons;

**(b)** the activity benefits the species or is required to enhance its chance of survival in the wild; or

**(c)** affecting the species is incidental to the carrying out of the activity.

## Pre-conditions

(3) The agreement may be entered into, or the permit issued, only if the competent minister is of the opinion that

(a) all reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted;

(b) all feasible measures will be taken to minimize the impact of the activity on the species or its critical habitat or the residences of its individuals; and

(c) the activity will not jeopardize the survival or recovery of the species.

## Explanation in public registry

(3.1) If an agreement is entered into or a permit is issued, the competent minister must include in the public registry an explanation of why it was entered into or issued, taking into account the matters referred to in paragraphs (3)(a), (b) and (c).

SARA Section 73 continues up to subsection (11), but only subsections (1) to (3.1) are relevant. The purpose of subsection 3.1 was explained in the Parliamentary committee considering an early version of [SARA](#):

...the amendment we have in place, by the Progressive Conservative Party, forces the government to publicly justify why it is granting an exemption for the provisions of the act. Public scrutiny will prevent open-ended abuse of exemptions so that the public will have a chance to see how often the Government of Canada is using the exemption provisions under clause 74. It would in turn have to be published as well in the registry. ... It's quite simple. If you're going to make an exemption, you may as well tell the public why.

(House of Commons, Standing Committee on Environment and Sustainable Development, *Evidence*, 37-1, ([20 November 2001](#)) at 1140 (Mr. John Herron)

In short, what became subsection 73(3.1) was meant to introduce public accountability by ensuring the public was aware of permits to affect species at risk or their critical habitat to ensure the public could hold the government to account for their decision making in applying the restrictions on permits in subsections 73(2) and (3).

## How Did We Notice?

One thing that made this issue so hard to identify was that the explanations for permits posted to the SARA registry do not show the date the permit was posted to the registry or the date the issuing agency granted the permit. On the SARA registry, almost every other type of document on the registry shows a publication date (including action plans, recovery strategies, critical habitat orders). Some [Assessment and Status Reports](#) from the Committee on the Status of Endangered

Wildlife in Canada (COSEWIC) even indicate both when the Minister received the document and when it was posted to the registry.

In contrast, the explanations for permits only show when the permit took effect and when it expired. If a person wants to identify a permit being posted late, they must check the *SARA* registry regularly. They need to have a familiarity with permits already posted in order to be able to identify when a new permit is posted. Further, since the registry organizes permits by when the permit took effect, a ‘new’ permit will be sorted into where it falls in the registry’s timeline, and so when the number of permits increases, the most recent one is not necessarily the most recently posted permit. When supervising the registry, a person needs to keep track of the number of permits issued in a particular region or type of species. This is no small feat, as there are currently 276 active permits, 3478 inactive permits, and in Alberta, 329 permits as of February 21<sup>st</sup>, 2022. By using this method, clinic staff identified a number of permits posted well after they had expired.

Permit [19-HCAA-01862](#) expired on August 31, 2021, but was not posted until early February 2022. Permit 19-HCAA-01862 was issued for the purpose of improving a fish passage by replacing a culvert with a larger culvert, after it was identified as a potential barrier in fish migration. The work was necessary because of a roadway alignment needed by a gas company. The permit was issued by the Department of Fisheries and Oceans (DFO).

As required by section 73(3), the DFO considered whether there were any alternatives to the work, what measures would be implemented to minimize or avoid adverse effects to the population, and found the activity would not jeopardize the survival or recovery of the species.

Although the work under Permit 19-HCAA-01862 was expected to have a positive outcome for the Bull Trout, the delay in posting the explanation for the permit prevented any public oversight or knowledge of this permit at the time the work was being conducted.

Two other permits affecting Bull Trout or their critical habitat were brought to the attention of the clinic: No. 21-HCAA-0070 and No. 21-HCAA-01141. They were respectively granted in October 2021 and January 2022. Neither of them have been posted yet, but the DFO confirmed that the explanations for those permits, with species at risk conditions, are complete and are undergoing final review and translation into French.

### **Why Does It Matter?**

A Minister’s power to grant *SARA* section 73 permits is meant to be limited by the criteria set out in subsections 73(2) and 73(3). A limitation which is only to be effective if the decision is made public in time for the public to voice opposition, make a complaint to an ombudsperson, or challenge the decision by way of judicial review. Keeping these permits secret until months after the permit expires prevents any litigation or meaningful public objections to these permits. No one can challenge a secret decision.

Posting the section 73(3.1) explanations for the permits months after permits end is not realistically compliant with the plain wording or intent of section 73(3.1). Explanations of permits should be posted to the registry when the permits are granted, typically before any work that may affect the

species, or their habitat, begins. Although section 73(3.1) does not explicitly say the explanation for a permit needs to be posted to the public registry immediately, or within any set timeline, neither do most of the other sections of *SARA* that require documents to be posted to the public registry (for example, *SARA* sections 50(1), 52(1), 72, 127(2) and (3)). Where *SARA* requires a document to be posted to the public registry, that is meant to occur when the associated document is completed. In our view, *SARA* intended that no section 73 permit would be effective before the explanation for the permit is posted in the registry.

## Conclusion

The delays in posting explanations for *SARA* permits is another example of the Canadian government's two decades of shoddy work implementing *SARA*, in addition to their [resistance to protecting any habitat under SARA](#), their [ridiculous delays in listing species](#) after the species are identified as being at risk of extirpation, their [difficulties preparing recovery strategies in legislated timelines](#), and their difficulties reporting on [recovery strategy implementation](#). *SARA* had a lot of potential when it was enacted. Much of that potential has not been realized due to long administrative delays and the government's peculiar interpretations of *SARA*.

## Postscript on Federal Registries

The *SARA* permit registry is one of several online registries that the federal government now maintains in order to provide information related to federal legislation. Key purposes of these online registries are to make government decisions transparent and allow Canadians to participate in decision-making processes. Although online registries can be useful tools to hold government to account, challenges with the design and maintenance of these registries have prevented them from living up to their initial promise.

One major online registry is the [Canadian Impact Assessment Registry](#), which is a requirement of section 104 of the *Impact Assessment Act*, [SC 2019, c 28, s 1](#) and includes records relating to the assessment of projects subject to the *Impact Assessment Act*. While the government has worked to improve the Impact Assessment registry, it remains troubled by a lack of document organization. Most projects ultimately have hundreds or thousands of records, and the registry's search function makes it inaccessible for a casual user – though this registry does show the date each record is added.

Recently, the federal government launched a [common project registry](#), which allows users to search through projects and assessments submitted to a number of government departments including: Fisheries and Oceans Canada, the Impact Assessment Agency of Canada, and Transport Canada's Navigation Protection Program.

The registry of [Completed Access to Information Requests](#) is troubled by unclear descriptions of the completed requests and a short retention time. Completed requests are only shown on the registry for two years. Further, the records are not available on the registry, a person needs to send a request for the records, which public bodies can take weeks to respond to, and records are often sent on CD-ROMs even where the records are small enough to be an e-mail attachment.

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