

How the Canadian Forces defended the Sprague's Pipit

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Decisions considered:

Decision Statement issued November 30, 2012 re: *Cenovus (formerly EnCana) Shallow Gas Infill Development Project proposed for the Suffield National Wildlife Area*, online [here](#).

Re: EnCana Shallow Gas Infill Development Project – Review Panel Report under the Canadian Environmental Assessment Act, EUB Decision 2009-008, online [here](#) (the “2009 Panel Report”).

In October 2008 a joint review panel constituted under the *Canadian Environmental Assessment Act*, SC 1992, c 37 heard submissions and evidence from EnCana Corporation as the proponent of a proposed shallow gas well project (up to 1275 wells) to be located at the Canadian Forces Base Suffield National Wildlife Area in southeastern Alberta (the “Cenovus gas project”). The panel also heard submissions and evidence from other interested parties such as Environment Canada, the Department of National Defence, and a coalition of environmental groups including the Alberta Wilderness Association. Being a project located on federal lands (a national wildlife area designated under the *Canada Wildlife Act*, RSC 1985, c W-9), provincial departments such as Alberta Environment and Sustainable Resource Development played a minimal role in the proceedings. The joint review panel issued its assessment on January 27, 2009, essentially recommending to the federal Minister of Environment that the Cenovus gas project should not proceed until (1) critical habitat was designated for 5 listed species under the *Species at Risk Act*, SC 2002, c 29 [SARA], and (2) the project was designed to ensure it would not be located within these designated critical habitat areas or alternatively was expressly permitted to do so under the *Species at Risk Act* (2009 Panel Report at 171). The Minister of Environment responded on November 30, 2012 with a Decision Statement issued under section 54 of the *Canadian Environmental Assessment Act 2012*, SC 2012, c 19, s 52 (*CEAA 2012*) declaring that the Cenovus gas project was likely to cause significant adverse environmental effects that are not justified in the circumstances. Section 6 of *CEAA 2012* prohibits Cenovus from proceeding with the Cenovus gas project and section 7 prohibits a federal authority from approving the project. That is the news. What follows is some commentary.

The demise of the Cenovus gas project is really explainable by the coming together of four elements. One, its location on federal lands and the result that this triggers full application of SARA. Two, the presence of species listed under SARA within the project area. Three, the federal lands here are a national wildlife area under the *Canada Wildlife Act*. Four, federal officials opposed the Cenovus gas project on environmental grounds. The Minister’s recent *CEAA 2012* decision mentions none of these factors. Nevertheless, I hope to demonstrate here

that the *CEAA 2012* decision is really just the wrapping paper for this *SARA* gift to the sprague's pipit and other species residing in the Suffield National Wildlife Area.

The Canadian Forces Suffield National Wildlife Area

The Suffield region served as a wildlife protection area long before the most recent designation under the *Wildlife Area Regulations*, CRC c 1609 enacted pursuant to the *Canada Wildlife Act* in 2003. In the early days of the federal dominion parks agency, federal officials identified these native prairie grasslands as good habitat for threatened antelope populations and thus subsequently designated some of this area as Wawaskesy National Park (See Janet Foster, *Working for Wildlife: The Beginning of Preservation in Canada* 2nd ed (Toronto: University of Toronto Press, 1998) at 98-104). The national park was subsequently delisted in the 1930s and at some point thereafter – likely in conjunction with World War II – the area became a military training ground. However portions of the area continued to be treated as environmentally sensitive, and military operations in what is now the Suffield National Wildlife Area ceased in 1971. The area was designated as a National Wildlife Area under the *Wildlife Area Regulations* in 2003, and is now one of a few remaining large tracts of undisturbed native prairie grassland in Canada.

Sections 3 and 4 of the *Wildlife Area Regulations* prohibit any commercial or industrial activity within the Suffield National Wildlife Area unless a permit has been issued by the Minister and the activity will not interfere with the conservation of wildlife. Some years ago a student in my Law of Species and Spaces class here at the Faculty conducted research into whether a national wildlife area provides more effective environmental protection on federal lands than a national park. Her research looked specifically at the debate going on then over whether Sable Island off the east coast of Nova Scotia should be a national wildlife area or a national park. The result here suggests the national wildlife area designation carries significant weight when it comes to wildlife protection, and is likely more effective than a national park in protecting wildlife habitat (For the shortcomings in national parks in this regard, see Shaun Fluker, “Ecological Integrity in Canada’s National Parks: The False Promise of Law” (2010) 29 Windsor Review of Legal and Social Issues 89).

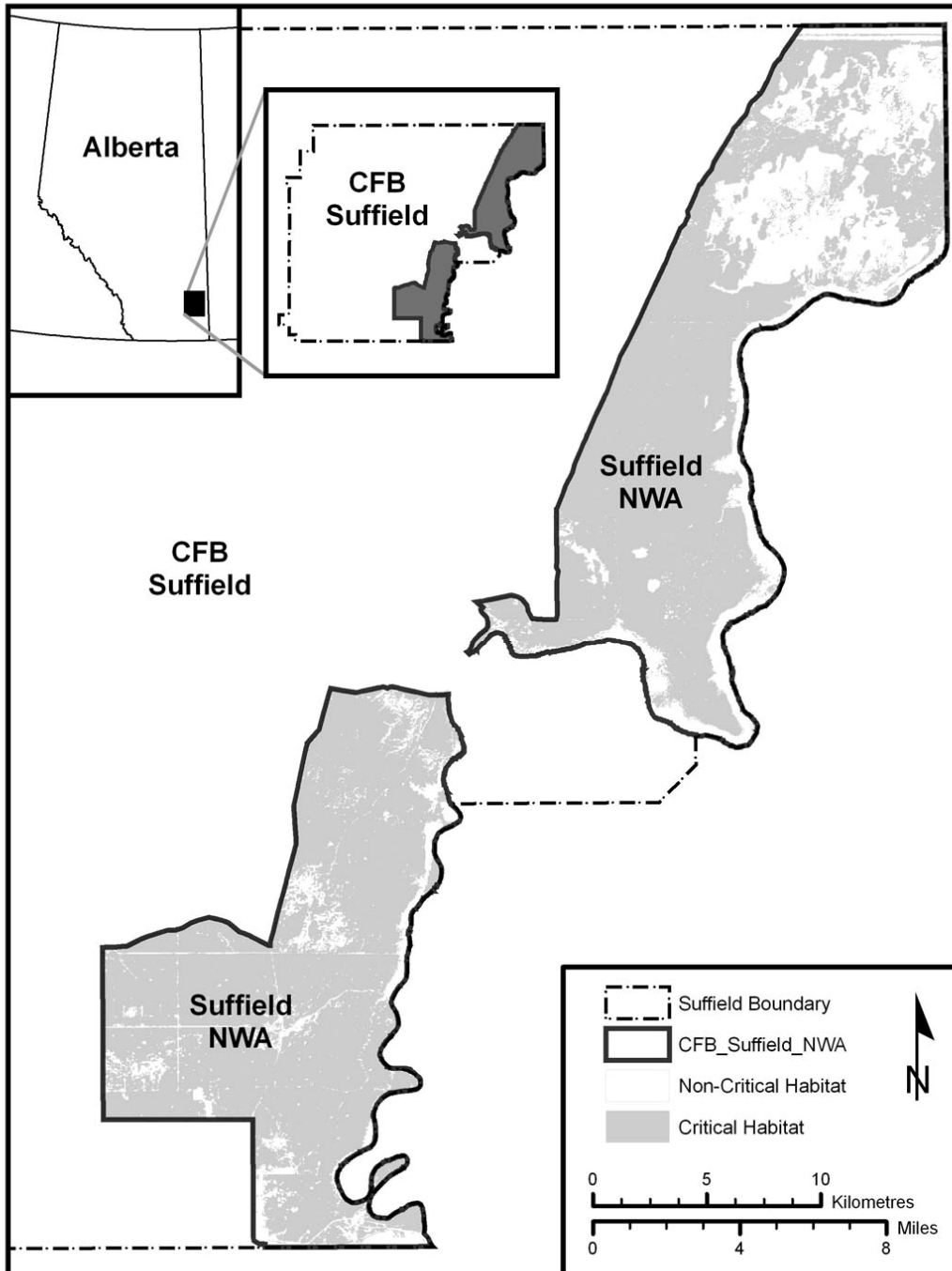
The joint review panel gave particular attention to the wildlife area designation, noting in its 2009 Panel Report that a significant adverse effect on wildlife in a national wildlife area would be a strong reason for recommending under *CEAA* that the Cenovus gas project not proceed (2009 Panel Report at 53). One also gets the sense from reading the 2009 Panel Report that the national wildlife area designation led to a strong defence of species at risk by Environment Canada and the Department of National Defence.

Species at Risk

The impact of the Cenovus gas project on species at risk known to exist in the Suffield National Wildlife Area consumed much of the 2008 environmental assessment proceedings in front of the joint panel. Cenovus generally argued that effects on wildlife would be insignificant or otherwise mitigated. In response, federal officials and the environmental coalition argued that Cenovus had failed to fully consider wildlife impacts and take into account their species at risk status. The panel ultimately ruled that the Cenovus gas project should not proceed until critical habitat was mapped for 5 species listed under *SARA*: ord's kangaroo rat; sprague's pipit; tiny cryptanthe, small-flowered sand verbena; slender mouse-ear-cress (2009 Panel Report at 57, 81).

A recovery strategy for each of these 5 species – including the identification of critical habitat - was posted to the *SARA* public registry on November 30, 2012. The very same day as the

Minister's *CEAA 2012* decision. In the case of the sprague's pipit – a small bird that breeds in native prairie grasslands – its critical habitat encompasses much of the Suffield National Wildlife Area. The excerpt from the recovery strategy showing sprague's pipit critical habitat superimposed onto the national wildlife area is set out below:



Section 58(2) of *SARA* requires the Minister to formally designate this critical habitat by February 2013, and thereafter it will be an offence under *SARA* to destroy any part of this area. The Cenovus gas project simply cannot legally proceed in light of this result.

The Minister's *CEAA 2012* decision statement makes no mention of critical habitat or *SARA*. But there is no doubt the demise of the Cenovus gas project is a *SARA*-inspired outcome. I would suggest this is exactly the result Parliament intended by enacting *SARA* a decade ago. An environmental assessment gives particular attention to project impacts on endangered or threatened species – those on the brink of extinction or extirpation. The environmental assessment accordingly incorporates a precautionary approach by recommending the project be delayed until better information is available to assess the project impact on those species. Upon confirmation that the project is likely to negatively impact these species, responsible authorities decide the project cannot proceed.