

January 17, 2014

## The Curious Case of the Greater Sage Grouse in Alberta

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**Legislation commented on:** *Emergency Order for the Protection of the Greater Sage Grouse*, [PC 2013-2045](#)

The Greater Sage Grouse is on the brink of disappearing from the Canadian landscape and, in doing so, is leaving its mark on the *Species at Risk Act*, SC 2002, c 29 (*SARA*). Readers may recall that the sage grouse recovery strategy prepared under *SARA* was the subject of dispute several years back over the extent to which critical habitat for a species listed as endangered or threatened must be identified in the strategy (See Nigel Bankes' ABlawg post "[Is SARA growing teeth?](#)"). The sage grouse recovery strategy has recently been amended (2013) to include all known critical habitat – both mating sites and year-round habitat – in Canada and to identify threats to the sage grouse (see [here](#)). But since the overwhelming majority of sage grouse habitat falls on provincial lands in Alberta, *SARA* offers little real protection to the sage grouse here in the absence of an Order in Council from federal Cabinet directing that *SARA* apply to provincial lands. Cabinet issued an Emergency Protection Order under section 80 of *SARA* in December 2013 that, to my surprise, applies to Alberta lands and the Order comes into force on February 18, 2014. This comment discusses the significance of the Order, adding to existing commentary (see Martin Olszynski's earlier ABlawg post [here](#), Janice Walton of Blakes LLP [here](#) and Jason Unger of the Environmental Law Centre [here](#)).

This discussion is framed by some important observations (generally taken from the 2013 sage grouse recovery strategy). The first is that government officials estimate that only about 100 individual sage grouse remain in Canada. This estimate is based on a count of male birds at mating sites (leks) during 2012. The sage grouse population has fallen rapidly in recent years – 98% since numbers were first reported in the late 1960s – and is undisputedly on the brink of extirpation in Canada. Sage grouse located in Canada occupy the far northern range for the species in North America. The species is not currently listed as endangered in the United States, although a listing decision is pending in 2015.

Habitat loss is the primary culprit in the demise of the sage grouse, and the species currently remains in only 7% of its historical range in Canada. The biophysical attributes of known sage grouse habitat include sagebrush cover, above average moisture, minimal human presence, minimal noise, and no higher structures that provide good perch sites for predators. Specific threats to the sage grouse and its habitat include grazing and agricultural activity that results in the clearing of sagebrush and other native vegetation used for food and cover, an alteration of the hydrology in sage grouse habitat such as a new water diversion or climate change induced events such as drought or other inclement weather, and energy development which leads to the construction of structures, roads and other facilities that produce chronic noise in mating sites.

The species will certainly disappear unless drastic measures are taken in the short term to prevent further deaths and protect what remains of existing habitat.

It is also important to observe that the purpose of *SARA* is to protect the sage grouse from being extirpated and to enable necessary action that aids in the recovery of the species. *SARA* is the realization of Canada's international commitment to protect species at risk under the United Nations [Convention on Biological Diversity](#). In short, it is the end of the line for the sage grouse in Canada and if *SARA* is to realize its purpose the legislation must be interpreted and applied to backstop the species. The federal government deserves credit for applying the emergency protection measures in an attempt to save the sage grouse in Canada.

The sage grouse is listed as an endangered species under both *SARA* and the Alberta *Wildlife Act*, RSA 2000, c W-10. Given that sage grouse habitat largely falls on provincial lands in Alberta, we might expect the *Wildlife Act* to offer some protection, however the legislation provides only minimal legal protection to sage grouse (for some discussion on this point see [here](#) and Shaun Fluker and Jocelyn Stacey, "The Basics of Species at Risk Legislation in Alberta" (2012) 50 *Alta L Rev* 95). The legal protection afforded to sage grouse under the *Wildlife Act* is essentially limited to section 36(1) which prohibits the willful disturbance or destruction of its residence and the inability to get a hunting license. This is hardly law with proactive intentions. The Alberta government has chosen to govern endangered species almost entirely with non-binding policy under the rubric of its 2009-2014 Species at Risk Strategy (see [here](#)). So, for example, the Alberta government has policy that limits the density of oil and gas activity near sage grouse mating sites, but there are no substantive legal mechanisms under provincial law to protect and recover the sage grouse populations in Alberta. Despite being listed as endangered under Alberta's *Wildlife Act* for more than a decade, the sage grouse population has continued to decline rapidly here, faster than scientific predictions, and existing policy is clearly not working. The Alberta government's refusal to enact meaningful legal protection for the sage grouse is almost certainly the primary reason for the application of federal legislation on provincial lands represented by the *Emergency Order for the Protection of the Greater Sage Grouse*.

An emergency protection order issued by the federal Cabinet under *SARA* is reserved for those cases where a listed species faces an imminent threat to its survival. Specifically, section 80(1) provides federal Cabinet with the power to issue the emergency order. This order is issued on the recommendation of the federal Minister of the Environment who must make such recommendation where he or she forms the opinion that the species in question faces an imminent threat to its survival (section 80(2)). In November 2011 a coalition of petitioners (including, amongst others, the Alberta Wilderness Association, the David Suzuki Foundation, the Society of Grasslands Naturalists, and the Sierra Club – Prairie Chapter) requested the federal Minister to make this recommendation concerning the sage grouse (see [here](#)).

The *Emergency Order for the Protection of the Greater Sage Grouse* is the first emergency order to be issued by federal Cabinet under *SARA*. The Minister has previously declined to recommend an emergency protection order for the woodland caribou in Alberta. This decision was subject to judicial review and in *Athabasca Chipewyan First Nation v Canada (Minister of the Environment)*, 2011 FC 962, the Federal Court ruled that the Minister failed to give an adequate explanation in light of scientific evidence on the declining status of caribou populations in Alberta. It would seem that the dire evidence on the sage grouse population left no legal option for the federal Minister other than to recommend emergency protection. What is perhaps most intriguing here is the political decision by federal Cabinet to issue the Order under section 80(4)(c) and thereby apply *SARA* to provincial lands.

Section 80(4) of *SARA* sets out what an emergency protection order may include as measures to protect a species in peril. The legislated parameters of an emergency order vary depending on the same considerations employed throughout *SARA*: an emergency order has widest application to fish, migratory birds, and other species located on federal lands. In this case, the emergency order applies to non-federal species on provincial lands and section 80(4)(c) provides that such an order may identify habitat necessary for the recovery or survival of a species and include provisions that prohibit activities that may adversely affect the species.

The *Emergency Order for the Protection of the Greater Sage Grouse* specifies necessary habitat in southeastern Alberta and southwestern Saskatchewan and sets out a number of prohibitions which apply on the specified lands. Schedule 1 of the Order lists the habitat areas covered by the Order. These areas are a subset of the known habitat identified in the 2013 recovery strategy – in particular the Order covers mating areas and surrounding areas habituated by sage grouse between 2007 and 2012. Generally speaking the Order prohibits the killing or moving of sagebrush and other native vegetation used by the sage grouse for cover and food, prohibits the construction of new structures or roads, and prohibits activity that produces chronic noise above 45 decibels during mating season (April-May) between sunset and sunrise. There are, however, a number of exceptions to these prohibitions that accommodate existing residential, agricultural and grazing activities in the specified habitat. The exceptions do not cover existing or future energy development, so oil and gas operators in the region covered by the Order will be impacted by prohibited new development and alterations to existing practices on current production.

There are undoubtedly a variety of opinions on whether the Order is sufficient to halt the demise of the sage grouse and surely it would be unreasonable for the Order to prohibit all human activity without compensation in some cases. But the exceptions to the prohibited activity do raise an interesting point about whether they belong in the Order at all. They suggest a balance between halting the demise of the sage grouse and maintaining existing activities known to threaten the species. Given that we are talking about the last 100 individual birds and the purpose of *SARA* and the Order is to prevent these birds from known threats – some of which are allowed to continue because of the exceptions – it is quite possible the breadth of the exemptions in the *Emergency Order for the Protection of the Greater Sage Grouse* will compromise the emergency protection effort.

The exceptions come about, in part, as a result of the regulatory impact assessment conducted by the federal government on the implementation of the Order. The Regulatory Impact Assessment Statement (RIAS) – attached to the Order – includes an interesting mix of methodologies to ascertain the costs and benefits of saving the sage grouse in Canada. Jason Unger of the Environmental Law Centre provides a nice overview on the cost/benefit analysis in his post (referenced above). No doubt the costs of protecting the sage grouse using these methodologies is kept low by the fact that existing grazing and agriculture activities are exempted from the prohibitions contained in the Order. I also note that the RIAS only values the sage grouse instrumentally in terms of the benefits the species provides to Canadians (existence value) and the ecosystems it inhabits. It is important, I think, to remember that the enactment of *SARA* was in part to recognize that all species have intrinsic value (see preamble to the legislation). This means that sage grouse and any other species have value apart from whatever benefits they provide to others. However intrinsic value poses a problem for those implementing *SARA*

because assessing it does not allow for cost/benefit calculations and generally is not amenable to quantification. Nonetheless we do not assess our own worth by calculating the costs and benefits of our existence, so why do we insist on doing so for other species – particularly those for which we have accepted an obligation to protect?

Mark Sagoff has published an excellent book that persuasively argues it is a category mistake to apply economic reasoning to endangered species problems (Mark Sagoff, *The Economy of the Earth: Philosophy, Law and the Environment* 2d ed (Cambridge University Press, 2007)). Economic reasoning gives us a means to choose between our preferences (what we want). So, for example, we can use cost/benefit analysis to choose between having a sage grouse population or industrial activity such as grazing, agriculture, and energy development in southeastern Alberta. But *SARA* obligates us *in principle* to protect the sage grouse from extirpation in Canada. It is not a matter of preferences, costs and benefits, or choosing between sage grouse and resource development. Protecting remaining sage grouse habitat and preventing any further individual deaths is the reason why *SARA* was enacted and should be the only concern or purpose under the emergency protection provisions.

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