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Sent via e-mail to Steven.Guilbeault@parl.gc.ca

The Honourable Steven Guilbeault
Minister of Environment and Climate Change
Ottawa, Ontario K1A 0A6

Dear Minister Guilbeault:

Re: Proposed Conservation Agreement for Boreal Caribou in Ontario

We are legal counsel for Wildlands League, Ontario Nature, and David Suzuki Foundation in respect of the proposed Conservation Agreement for Boreal Caribou in Ontario (“Draft Agreement”) between Canada and Ontario. The Draft Agreement as proposed would not only be the weakest conservation agreement in Canada, it would also leave you in breach of your legal obligations under the *Species at Risk Act*, SC 2002, c 29 (“SARA”). It must be revised to include mandatory and immediate interim protection for caribou critical habitat. Failing that, the conservation agreement approach should be abandoned in favour of a safety net protection order under section 61 of SARA.

Background: Petition for a Protection order

In November 2018, we submitted to your predecessor Minister McKenna a Petition for the Protection of Critical Habitat for Two Local Ranges of Boreal Caribou in Northwestern Ontario (“Petition”). In it, our clients requested that the Minister recommend to Cabinet that the critical habitat of the Brightsand and Churchill caribou populations be protected by an order under section 61 SARA. Since the Petition was submitted, our clients have done a significant amount of work with ECCC to examine the regulatory context and industrial pressures in Ontario caribou ranges, and on how a critical habitat protection order could be implemented to meet the legal requirements of section 61 of SARA.

The Draft Agreement is in breach of SARA

It is a settled and acknowledged fact that caribou critical habitat remains unprotected in Ontario, and that measures to protect critical habitat are now long overdue.¹ We understand that your predecessor, Minister Wilkinson, made a recommendation to the Governor in Council to pursue the protection of critical caribou habitat in Ontario under s. 61 of SARA, while reiterating Canada's preference to make a conservation agreement under section 11. We assume therefore that it is your expectation that the conservation agreement will fulfil your obligations under s.61 of SARA. However, as detailed below, the Draft Agreement contains no protection for the critical habitat of the Brightsand and Churchill caribou populations, or for any caribou population in Ontario. In fact, the Draft Agreement encourages destruction of critical habitat by endorsing and financing forestry practices that have already pushed caribou ranges beyond maximum acceptable disturbance levels. It is the weakest conservation agreement yet proposed in Canada and is far from meeting the statutory standard for habitat protection. If the Draft Agreement is enacted without significant revision to include SARA-equivalent protections, it will place you in continuing breach of your legal obligations under the Act.

SARA imposes legal constraints and mandatory requirements on the Minister in preparing conservation agreements. The Draft Agreement is in breach of **all** these legal obligations: contrary to section 11(1), the Draft Agreement will not benefit caribou or enhance their survival. Contrary to section 11(2), the Draft Agreement does not take conservation measures consistent with the purpose of SARA.

Further, the Minister has a continuing obligation to recommend protection of caribou critical habitat if he or she is of the opinion there are no provisions in, or other measures under, SARA or any other Act of Parliament that protect critical habitat, including agreements under section 11.² The Draft Agreement will not protect caribou critical habitat in the Brightsand and Churchill ranges or elsewhere. The Minister cannot rely on it to avoid making a recommendation for a protection order.

A. Failure to benefit caribou or enhance their survival

SARA mandates that conservation agreements “benefit a species at risk or enhance its survival in the wild.”³ Contrary to this statutory directive, the Draft Agreement will neither benefit boreal caribou in Ontario nor enhance their survival. It contains no commitment or targets for the protection or restoration of caribou critical habitat. Instead, it perpetuates approaches that have stymied the recovery of caribou as a result of human activity.

A concrete and effective plan to enhance the survival of boreal caribou has already been produced under SARA, yet the Draft Agreement ignores it. The Recovery Strategy for the Woodland Caribou (*Rangifer tarandus caribou*), Boreal population, in Canada (“Recovery Strategy”) establishes the critical habitat target requirement as a minimum of 65 percent undisturbed habitat in a range in order to give the population a 60 percent chance of being self-

¹ See the “Progress report on unprotected critical habitat for the Woodland Caribou (*Rangifer tarandus caribou*), Boreal population, in Canada” - April 2018, pp. 8-9 and “Progress Report on Steps Taken to Protect Critical Habitat for the Woodland Caribou (*Rangifer tarandus caribou*), Boreal Population, in Canada” - December 2018, p. 1.

² SARA s. 61(4)

³ SARA s. 11(1)

sustaining.⁴ This disturbance management threshold is considered a minimum threshold because, at 65% undisturbed habitat, there remains a significant risk (40%) that local populations will not be self-sustaining.⁵ The table of proposed conservation measures fails to even mention the established federal objectives for survival and recovery of boreal caribou.

Our clients have consistently communicated that the *minimum* criteria for a conservation agreement to benefit caribou in Ontario and enhance their survival in the wild are:

- Mandatory and enforceable protection of boreal caribou critical habitat;
- Immediate, interim protection of boreal caribou critical habitat until such time as cumulative disturbance management, including the application of the minimum 65% management threshold, is applied in all authorization approvals in caribou habitat including forestry, mining, road building, the building of transmission lines, etc.
- A commitment to significant, interconnected protected areas that advance caribou survival and recovery, embedded within a broader range-planning context; and
- A commitment to significant restoration where required at the range-level, also embedded within a broader range-planning context.

The Draft Agreement contains none of these elements.

The Agreement contains no language that prevents any person from damaging critical caribou habitat. In fact, it endorses practices that are responsible for the most damage to critical habitat: forestry operations and road building authorized in Ontario law and policy. Contrary to the requirements of the Recovery Strategy and the critical habitat protection framework in SARA, Ontario has confirmed its belief that “the inclusion of a disturbance threshold indicator” for Caribou “is not required in FMPs [forest management plans].”⁶ Further, Ontario has permanently exempted forestry operations from the provincial *Endangered Species Act*. Forestry operations in Ontario caribou habitat are thus being planned and implemented through a schedule of logging that is contrary to the requirements of SARA.

Nothing in the Draft Agreement alters Ontario’s approach, which the Ontario Auditor General concluded was failing to protect species at risk.⁷ Her report found that the regulation under the *Endangered Species Act* exempting forestry operations on Crown lands resulted in some species losing habitat protections, which is certainly the case for caribou since forestry is the principal

⁴ Environment Canada, Recovery Strategy for the Woodland Caribou (*Rangifer tarandus caribou*), Boreal population, in Canada, Species at Risk Act Recovery Strategy Series (Ottawa: Environment Canada, 2012) [Recovery Strategy].

⁵ It is important to note that the 65% undisturbed management threshold is not an ecological transition point; it is instead an expression of management tolerance for risk to boreal caribou local population persistence. It therefore may not even be appropriately cautious. The threshold was established using a risk-based framework, applying a probabilistic approach to assessing the adequacy of the current range conditions to support a self-sustaining population to help managers understand the level of risk involved in management choices.

⁶ See letter from Ontario Ministry of Natural Resources and Forestry to Wildlands League, available at http://wildlandsleague.org/media/2021-02-18_Wildlands_Kenogami_2021_FMP_Proposed_Ops.pdf.

⁷ Value-for-Money Audit: Protecting and Recovering Species at Risk, Office of the Auditor General of Ontario, November 2021.

https://www.auditor.on.ca/en/content/annualreports/arreports/en21/ENV_ProtectingSpecies_en21.pdf

agent of habitat disturbance in Ontario. The audit concluded that the “Environment Ministry’s systems and processes for approvals facilitate and enable harm to species at risk and their habitats.”⁸ The Draft Agreement fails to account for this regulatory context, and its effect on the prospects for the meaningful recovery of caribou in Ontario.

Instead of instituting protections for caribou critical habitat in Ontario, the Draft Agreement contemplates vague processes for review of policy and the identification of lands that may or may not receive protection and that may or may not be critical habitat. This is far from a mandatory prohibition on critical habitat destruction.

The Draft Agreement does not require Ontario to implement range planning, or other measures to achieve the required 65 percent undisturbed habitat target. In fact, the agreement contains no standards or targets whatsoever. The agreement is best described as a “plan to make plans,” through assessments and reviews. It fails to implement any direct and immediate protection of the kind contemplated under SARA, or by the Action Plan for the Woodland Caribou, Boreal Population which specifies that the federal government will only enter into conservation agreements “if they provide specific, measurable, achievable, and time-bound measures for the protection and recovery of the species and its critical habitat.”

Finally, there are no enforcement provisions under the Draft Agreement. To meet the threshold of protection under SARA, the agreement itself requires public reporting regarding compliance with the agreement, and strict enforcement and penalty provisions equivalent to the penalties available under the statute.

B. Failure to take conservation measures consistent with SARA

By law, conservation agreements must include the “taking of conservation measures and other measures consistent with the purpose of SARA,”⁹ which are as follows:

... 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.¹⁰

Though the Draft Agreement claims that it will “support the implementation of conservation measures that create the environmental conditions necessary to maintain and recover self-sustaining local populations of boreal caribou” and includes a “table of conservation measures”, the measures described will manifestly fail to fulfil the Act’s purposes. Instead, the Draft Agreement focuses on at best “balancing” and even prioritizing economic considerations, for example by proposing to “evaluate the impacts to sectors/projects (e.g., Indigenous community roads in the Ring of Fire region, transmission lines to northern/Indigenous communities, forestry, mineral exploration and development, etc.) to provide for the economic prosperity of Ontario business and the communities that depend on them today and in the future.” This is contrary to the purposes of SARA.

⁸ Value-for-Money Audit, p. 10

⁹ SARA s. 11(2)

¹⁰ SARA s. 6.

Without establishing a target of achieving the federal requirement for a minimum of 65% undisturbed critical habitat, or even defining what constitutes effective protection of critical habitat anywhere in the Draft Agreement, it is impossible for this proposal to be consistent with the purposes of SARA let alone to meet its legal requirements.

Conservation Measures

Key proposed measures in the Draft Agreement are evaluated below in view of the federal caribou objective as set out in the Recovery Strategy.

1. Monitoring and Science

1.1 Boreal Caribou Monitoring Program

The goal of “improved understanding of the status of caribou at a range scale” is salutary, since there has been no population monitoring of the status of boreal caribou in Ontario since 2013¹¹, nor any habitat disturbance data published since 2018.¹² It is alarming, however, that Ontario intends to spend the first several years of the proposed agreement “developing an ongoing monitoring program that builds on past investments”, and that it will only engage in monitoring of select ranges. Population trends must be updated for *all* of the ranges. Having a base knowledge of the current state of caribou populations and their habitat is the bare minimum, especially since the federal Recovery Strategy has been in place for ten years already. This agreement is not the place to start implementing Ontario’s long overdue requirements, all the while allowing critical habitat to continue to be destroyed and degraded. While getting a robust monitoring program up and running, strong interim protection measures must be put in place.

Further, the Draft Agreement contains no targets for recovery of caribou populations, at the range scale or otherwise. It does not even reference the state of the caribou ranges in Ontario, nor does it make range-specific recommendations consistent with the federal recovery objectives. For example, seven out of eight ranges have a declining population trend in the ranges that overlap with the commercial forest.¹³ Without corresponding recovery goals, monitoring is an empty exercise.

1.2 Caribou Range Boundary Review and Updating

This proposal elides the fact that Ontario has *never* implemented range planning in accordance with the Recovery Strategy. It, therefore, has no plan to keep habitat disturbance thresholds at levels the Recovery Strategy determined are necessary for caribou’s survival and recovery. Nothing in the Draft Agreement indicates that range planning will be completed as required, nor does it set out any plan to achieve the required disturbance thresholds. Unilaterally “adjusting” range boundaries without regard to the long-established disturbance targets for them will not aid in recovery.

¹¹ The most recent publicly available caribou monitoring data for Ontario caribou populations is in the Integrated Range Assessments: MNRF. 2014. Integrated Range Assessment for Woodland Caribou and their Habitat: Brightsand Range 2010. Species at Risk Branch, Thunder Bay, Ontario, xi + 74pp. and MNRF. 2014. Integrated Range Assessment for Woodland Caribou and their Habitat: Churchill Range 2012. Species at Risk Branch, Thunder Bay, Ontario x + 71 pp.

¹² Latest published provincial data is from: Elkie, P. & K. Green. 2018. Cumulative impacts monitoring 2018 estimates: disturbance models and simulated ranges of natural variation. Ontario Ministry of Natural Resources.

¹³ Recovery Strategy, p. 74.

Ontario has made clear that, contrary to the requirements of the Recovery Strategy, it will continue its failure to limit disturbance to caribou habitat. In the absence of sufficient statutory protection for caribou habitat, the Draft Agreement points to Ontario’s “range management approach,” as described in two policies – the Ontario Woodland Caribou Conservation Plan (2009) and Range Management Policy in Support of Woodland Caribou Conservation and Recovery (2014). As documented in the Petition, neither plan prohibits the destruction of critical habitat.¹⁴ Moreover, Ontario has yet to produce any “range plans” at all, meaning that eight years later it has not even begun to implement its inadequate policy.

1.3 Habitat Restoration Assessment Initiative

The Draft Agreement proposes an “[a]ssessment of the effectiveness and efficiency of habitat restoration approaches in contributing to self-sustaining populations and managing cumulative disturbance at a range scale,” and to apply the assessment’s recommendations. The assessment phase is slated to take four years. In year five, it will be assessed and next steps determined. This amounts to a five-year delay before there is any chance of habitat protection, and even then it is highly unlikely that the assessment will result in the application of the federal disturbance threshold. The Draft Agreement privileges a bureaucratic process over actual protection measures for caribou or their habitat. The latter is what SARA legally requires.

1.4 Caribou Science Plan for Ontario

Under this proposal, Canada and Ontario would “assess the current status of federal and provincial science related to caribou and identify gaps” and “design the approach for developing a caribou science plan....” and then implement the “priorities” of that plan. However, the so-called science plan makes no mention of seeking input and review from scientists. Moreover, this proposal is duplicative of the mechanisms under SARA which already require Canada and Ontario to collaboratively collect and update science on caribou and caribou habitat to create plans for recovery.¹⁵ If a conservation agreement is to achieve the objectives of SARA, it should focus on implementing the strategies and plans already created under the statute. Indeed, SARA expressly provides that a recovery strategy may include “developing and implementing recovery strategies, action plans and management plans”. The Draft Agreement does not do this.

2. Habitat protection and restoration

2.1 Habitat Restoration Initiative

The proposed habitat restoration initiative displays little understanding, or even acknowledgment, of the critical habitat framework under SARA, nor what qualifies as critical habitat protection or restoration. The agreement fails to even use the term “critical habitat”. SARA defines critical habitat as “the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species’ critical habitat in the recovery strategy or in an action plan for the species” and expressly provides that a conservation agreement may include measures “protecting the species’ habitat, including its critical habitat”.¹⁶ The 2020 boreal caribou recovery strategy defines critical habitat as: “(i) the area within the boundary of each boreal caribou range that provides an overall ecological condition that will allow for an

¹⁴ See Petition, pp. 30-31.

¹⁵ SARA ss. 37-55: Recovery strategies and action plans.

¹⁶ SARA ss. 2 and 11 (2)(d).

ongoing recruitment and retirement cycle of habitat, which maintains a perpetual state of a minimum of 65% of the area as undisturbed habitat in all ranges other than SK1, and a minimum of 40% undisturbed habitat in SK1; and ii) biophysical attributes required by boreal caribou to carry out life processes.” (p. vii)

Contrary to the statutory language and intention, the proposed “restoration initiative” makes no reference to the Recovery Strategy or action plan. Instead, it proposes to “develop a prioritized list of Crown land locations for habitat restoration” without requiring that the lands identified are indeed critical caribou habitat, and without any targets that the identification of lands achieve or contribute to the goal of 65% undisturbed habitat. Nor is the identification of land linked to the “protected areas” initiative discussed below, such that even if restoration actions occur, the areas may or may not be protected from further disturbance.

2.2 Protected Areas Initiative

Ontario proposes to continue applying its “range scale” approach to conservation, but that approach has only resulted in increasing disturbance in caribou ranges that have already exceed the disturbance threshold in the Recovery Strategy. Ontario has made clear that, contrary to the requirements of the Recovery Strategy, it will continue to support increasing disturbance to critical caribou habitat at the range level. The agreement proposes to continue these failed approaches without committing to achieving and implementing the goals and measures in the Recovery Strategy that Canada has determined are necessary to protect and recover caribou. Moreover, the agreement contains no targets for the creation of new protected areas (as opposed to “management areas” which continue to allow disturbance) that could achieve or contribute to the goal of 65% undisturbed habitat.

3. Planning and Management

3.1 Forest Management Planning

The Draft Agreement proposes to “continue to integrate the direction in the Forest Management Guide for Boreal Landscapes (BLG) into forest management plans (FMPs) that intersect with boreal caribou ranges and review forest management guide direction to assess the effectiveness of existing direction in supporting boreal caribou populations.” Ontario’s forest management planning regime, including the BLG, has hindered and not helped caribou recovery.

As documented in the Petition, and as recognized by the federal Recovery Strategy for the Woodland Caribou, forestry (logging and road building) is one of the primary industrial activities threatening the critical habitat. Yet, Ontario has permanently exempted forestry activities from compliance with its *Endangered Species Act* (“ESA”). This absolves the forestry industry from responsibility for habitat improvement and recovery of caribou on the false premise that the *Crown Forest Sustainability Act* (CFSA) is equivalent to the ESA or other species at risk legislation. In fact, the two statutes serve different purposes and pursue different standards. The ESA aims to recover species, whereas CFSA aims only to minimize impacts. Only the ESA has purposes equivalent to SARA. The exemption from ESA compliance comes as Ontario proposes to double the amount of logging in the province, without first addressing the need for caribou recovery (or the recovery of any other species at risk).¹⁷ The Draft Agreement fails to honestly

¹⁷ Ontario Ministry of Natural Resources. 2020. Sustainable Growth: Ontario’s Forest Sector Strategy. <https://www.ontario.ca/page/sustainable-growth-ontarios-forest-sector-strategy>

reflect the current regulatory environment in Ontario, in which the ESA is not applied to critical caribou habitat being degraded by forestry activities. To the contrary, the Draft Agreement endorses this deregulation.

The BLG is inadequate to compensate for real legal protection of caribou habitat. As leading wildlife scientists have noted, it is out of date, having been produced prior to significant research on caribou in Ontario and Quebec.¹⁸ More fundamentally, the BLG provides no consideration of the contribution of forest management activities over time to cumulative disturbances (including roads, railways, mining, hydro, wildfires, etc.) within the ranges, which is a key documented risk to caribou.¹⁹

It is inadequate and ineffective to “integrate” the BLG into all 20 Forest Management Plans that intersect with Boreal Caribou Ranges by 2027, as the Draft Agreement contemplates. The BLG, and Ontario’s forest management regime more broadly, has proven ineffective to recover caribou and has actually damaged their critical habitat. The Draft Agreement would only enshrine the destruction of critical habitat beyond 35%, contrary to the Recovery Strategy. “Assess[ing] the effectiveness of existing BLG direction” five years after the agreement comes into force, as the draft contemplates, is far too little far too late.

4. Updates to the Caribou Conservation Frameworks

4.1 Evidence-based approaches

It is not clear which existing approaches are said to be “evidence-based”, or how reviewing such approaches will lead to the protection of caribou critical habitat as required under SARA. What is clear is that Ontario’s approaches, discussed above, have not and do not effectively protect habitat. The Draft Agreement also contains no plan to do so.

4.2 Updating federal and provincial policy frameworks

Existing policy frameworks have not achieved the purposes of SARA, and caribou critical habitat remains unprotected. This section of the agreement contains a vague promise to re-visit policy, but no actual protection or conservation measures.

C. Continuing obligation to recommend protection

The Draft Agreement is not only contrary to s.11 of SARA, it is insufficient to discharge the Minister’s responsibility under s.61(4). That section of SARA provides that the Minister must make a recommendation to specify habitat to be protected by subsection 61(1) if the Minister is of the opinion that there are no provisions or measures under SARA or any other federal law that protect that particular portion of the critical habitat, including agreements under section 11 of SARA. Minister Wilkinson formed that opinion, and made a recommendation for a protection order last year. If the Draft Agreement is implemented as currently envisioned, the Minister will remain obligated to recommend, or re-recommend, a protection order to Cabinet.

¹⁸ See enclosed letter from J. Ray and I. Thompson to Mr. T. Anthony, MNRF, January 19 2020, also available at http://wildlandsleague.org/media/RayThompson-re-CFSA-amendments_ERO019-1020_19Jan2019-1.pdf.

¹⁹ Ibid. See further critique of the BLG on p. 4.

The petition sets out a test to evaluate whether a law, or in this case a conservation agreement, provides effective protection to critical habitat. The test is based on and informed by SARA itself, various policies on critical habitat protection and the assessment of effective protection, the application of those policies in other critical habitat protection assessments, and the common law:

Does the agreement prevent the destruction of the portion or parts of the critical habitat on non-federal lands to an extent that results in a protection outcome equivalent to the outcome that would be achieved if subsection 61(1) of SARA was in effect?

The Draft Agreement fails this test. It enshrines status quo critical habitat destruction rather than protecting or enhancing it. As a result, it would be unreasonable and contrary to the purposes of SARA for you to form the opinion, based on the agreement, that there are sufficient legal measures in place to protect the critical habitat of *any* boreal caribou in Ontario.

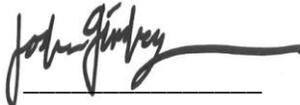
Conclusion and next steps

If the Draft Agreement is enacted without significant revision to include SARA-equivalent protections, it will place you in continuing breach of your legal obligations under the Act. As organizations devoted to upholding and enforcing Canada's legal protections for caribou, our clients fully intend to use all available lawful means to uphold obligations under SARA, and to ensure that caribou receive the legal protections necessary for their survival as a species.

Yours truly,



Lindsay Beck
Barrister & Solicitor



Joshua Ginsberg
Barrister & Solicitor

cc: The Hon. David Piccini, Minister of Environment, Conservation and Parks; The Hon. Greg Rickford, Minister of Northern Development, Mines, Natural Resources and Forestry; Tara Shannon, Assistant Deputy Minister, Canadian Wildlife Service; Michael Brewster, Office of the Minister of Environment and Climate Change; Joshua Swift, office of the Minister of Environment and Climate Change