

August 17, 2010

The Honourable Jim Prentice
Minister of Environment
10 Wellington Street
Gatineau, Quebec K1A 0H3

Via Fax (613)947-9475
and Courier

Dear Minister Prentice:

**Re: *Species at Risk Act*, s. 80(2)
Petition for an emergency order to protect Woodland Caribou – Boreal
population in northeastern Alberta**

We are legal counsel to the Alberta Wilderness Association, the Pembina Institute and the Sierra Club Prairie (collectively, the “**ENGOS**”) in respect of this matter.

The Alberta Wilderness Association is the oldest wilderness conservation group in Alberta dedicated to the completion of a protected areas network and the conservation of wilderness throughout the province.

The Pembina Institute is an Alberta-based not-for-profit organization with a mandate to advance sustainable energy solutions through innovative research, education, consulting and advocacy. The Pembina Institute envisions a world in which energy needs are met in a manner that protects the earth’s living systems.

The Sierra Club Prairie is a grassroots network of individuals working to protect the integrity of ecosystems in the Prairie Provinces.

By way of a letter to you dated July 15, 2010, Woodward & Co., on behalf of the Beaver Lake Cree Nation, Enoch Cree Nation, Chipewyan Prairie Dene First Nation and Athabasca Chipewyan First Nation (collectively the “**First Nations Petitioners**”), requested that you take immediate steps to protect the full ranges of the remaining local populations (or herds) of Woodland Caribou – Boreal population (hereinafter, “**Boreal caribou**”) in northeastern Alberta by preventing further industrial activity anywhere within those ranges.



The First Nations Petitioners requested the emergency protection of the following herds:

- Red Earth herd
- West Side Athabasca River herd
- Richardson herd
- East Side Athabasca River herd
- Cold Lake Air Weapons Range herd
- Nipisi herd
- Slave Lake herd.

As public interest groups representing many Albertans with an interest in and concern regarding the survival and recovery of Boreal caribou in northeastern Alberta, the ENGOs also request that you take immediate steps pursuant to subsection 80(2) of the *Species at Risk Act*¹ to protect the full ranges of these same herds of Boreal caribou in northeastern Alberta. The ENGOs acknowledge that the survival and recovery of Boreal caribou in northeastern Alberta is essential to ability of the First Nations Petitioners to exercise their constitutionally-protected right to hunt and use Boreal caribou for sustenance, cultural and spiritual purposes.

Failure to Protect Boreal Caribou in Northeastern Alberta

The Alberta Woodland Caribou Recovery Team prepared the *Alberta Woodland Caribou Recovery Plan, 2004/05-2013/14* (“*Alberta Recovery Plan*”) in July 2005.² The Government of Alberta adopted the recommendations of the *Alberta Recovery Plan*, with the explicit exception of a recommendation that a moratorium be placed on further mineral and timber resource allocations until range plans are completed, evaluated and implemented.³ Further, to the detriment of Boreal caribou herds in northeastern Alberta, the Government of Alberta had been ineffective in restricting industrial activity within the existing ranges of those herds. As a result, the populations of the Boreal caribou herds in northeastern Alberta have continued to decline since 2005.⁴

Boreal caribou were listed as threatened under the *Species at Risk Act* when it came into force in 2002. Under the *Species at Risk Act*, the federal Minister of the Environment had a clear responsibility to prepare a recovery strategy for Boreal caribou no later than June 2007.⁵ To date, no national recovery strategy for Boreal caribou has been completed. It is Environment Canada’s position that it does not currently have enough

¹ *Species at Risk Act*, S.C. 2002, c. 29, s. 80(2).

² Alberta Woodland Caribou Recovery Team, *Alberta Woodland Caribou Recovery Plan, 2004/05 – 2013/14*, (Edmonton: Government of Alberta, July 2005).

³ *Ibid.*, cover.

⁴ Alberta Caribou Committee, *Research and Monitoring Subcommittee Annual Report, Reporting Period: April 1st, 2008 to March 31st, 2009*, (Edmonton, 2009) at Table 2, p. 7.

⁵ *Species at Risk Act*, *supra* note 1 at s. 37(1), 41.

information to identify critical habitat for Boreal caribou.⁶ Environment Canada indicates that it needs to carry out the following activities prior to developing the national recovery strategy for Boreal caribou:

1. Consulting with provincial and territorial departments responsible for conservation and natural resource management, Aboriginal governments, organizations and communities, land managers, environmental organizations, industry, and other affected parties to gather information on key elements of the national recovery strategy.
2. Ensuring Aboriginal traditional knowledge about boreal caribou informs the national recovery strategy.
3. Conducting scientific studies on boreal caribou habitat needs.
4. Drafting the national recovery strategy in collaboration with provinces, territories and Aboriginal representatives from wildlife management boards that are authorized by a land claims agreement to perform functions in respect of wildlife species. The national recovery strategy will be informed by the consultations, Aboriginal traditional knowledge and the scientific studies on boreal caribou habitat needs.
5. Establishing advisory groups, with representatives from environmental organizations, industry and national Aboriginal organizations, to review the draft recovery strategy and provide input and advice to the drafting team.
6. Posting the proposed national recovery strategy on the Species at Risk Public Registry in the summer of 2011 for a 60-day comment period.⁷

While there is a commitment to provide a proposed national recovery strategy by summer 2011, it is the ENGOs' understanding that it will take another three to five years after the development of the national recovery strategy to develop and implement action plans for the recovery of Boreal caribou.⁸

The ENGOs are supportive of Environment Canada ensuring full and fair consultation with affected Aboriginal governments.

⁶ Environment Canada, *Working Together to Recover Boreal Caribou*, online: http://www.sararegistry.gc.ca/virtual_sara/files/public/cd_working_together_boreal_caribou_0410i_e.pdf [*Working Together*]

⁷ *Ibid.* at 8.

⁸ Personal communication, David Duncan, Acting Regional Director, Canadian Wildlife Service, Environment Canada, 22 July 2010.

However, the rapid pace of industrial development in the oil sands area of northeastern Alberta, combined with the failure to produce and implement a recovery strategy in a timely manner, results in an imminent threat to the survival and recovery of the Boreal caribou herds in northeastern Alberta.

Therefore, the ENGOs request that you immediately take the mandatory action required by subsection 80(2) of the *Species at Risk Act* to recommend to the Governor in Council the interim emergency protection of all current ranges of Boreal caribou herds in northeastern Alberta until such time as the recovery strategy is completed and implemented, including the identification and protection of the critical habitat of all Boreal caribou herds in northeastern Alberta. In particular, the ENGOs require that you recommend to the Governor in Council a moratorium on any further industrial activity within the current ranges of Boreal caribou in northeastern Alberta until such time as the recovery strategy is completed and implemented, including the identification and protection of the critical habitat of all caribou herds in northeastern Alberta.

Evidence of the Imminent Threat to the Survival or Recovery of Boreal Caribou in Alberta

In August 2007, Environment Canada initiated an expert, science-based review of the state of knowledge of Boreal caribou critical habitat with the mandate to develop a consolidated, scientifically defensible identification of critical habitat and/or to identify further scientific studies required to identify that critical habitat. The results of that review were published in the *Scientific Review for the Identification of Critical Habitat for Woodland Caribou (Rangifer tarandus caribou), Boreal Population, in Canada* (the "*Scientific Review*").⁹

The *Scientific Review* established a framework for the identification of critical habitat for Boreal caribou that included the identification of the current distribution of Boreal caribou in Canada, the location of local populations, the local population size and trends, the degree of range disturbance for each population and the probability of a self-sustaining local population. The *Scientific Review* also presented a level of proposed critical habitat identification for each local population.

The following chart, derived from Table 6 of the *Scientific Review*, summarizes the results for the seven local populations in northeastern Alberta:

⁹ Environment Canada, *Scientific Review for the Identification of Critical Habitat for Woodland Caribou (Rangifer tarandus caribou), Boreal Population, in Canada*, (Ottawa: Environment Canada, 2008) at 1 [*Scientific Review*].

Local Population Name	Population	Population Trend	Range Disturbance Category	Probability of Self-Sustaining Population	Proposed Critical Habitat Identification
Red Earth	250-350	Decline	High	0.2 Not self-sustaining	Current Range and Improved Conditions
West Side Athabasca River	300-400	Decline	Moderate	0.4 Not self-sustaining	Current Range and Improved Conditions
Richardson	<100	Unknown	Moderate	0.4 Not self-sustaining	Current Range
East Side Athabasca River	150-250	Decline	Very High	0.2 Not self-sustaining	Current Range and Improved Conditions
Cold Lake Air Weapons Range	100-150	Decline	Very High	0.2 Not self-sustaining	Current Range and Improved Conditions
Nipisi	60-70	Unknown	High	0.4 Not self-sustaining	Current Range and Improved Conditions
Slave Lake	75	Unknown	Very High	0.3 Not self-sustaining	Current Range and Improved Conditions

Population Trends

Four of the seven herds in northeastern Alberta are documented to be in decline. The population trend is unknown for the other three herds. Two of the herds were reported as rapidly declining (Red Earth and Cold Lake Air Weapons Range).

A population exhibiting a declining trend is, by definition, not self-sustaining, and thus has a low probability of persisting.¹⁰ Where a population trend is unknown, the

¹⁰ *Ibid.* at 21.

population is considered to have an equal likelihood of being either self-sustaining or not, and thus may or may not persist.¹¹

Therefore, several of the herds in northeastern Alberta are declining, some rapidly, and for the remaining herds, the populations may or may not persist. The population trends indicate a need for immediate action to prevent serious or irreversible damage to these herds, and to Boreal caribou.

Range Disturbance Category

The range disturbance category is very high ($\geq 59\%$ total disturbance) for three of the northeastern herds, high (50-58% total disturbance) for two of the herds and moderate (24-49% total disturbance) for two of the herds.

Total disturbance includes both fire and human activities although analysis in the *Scientific Review* indicated that most of the explained variance in population recruitment was attributed to the human disturbance component of the total disturbance measure.¹² The impact of human caused disturbance is discussed in the *Scientific Review* as follows:

Recent research in Alberta suggests that landscape disturbance and the ensuing changes in predator-prey interactions affects boreal caribou habitat use. Caribou in northeastern Alberta reduced their use of suitable habitat in close proximity to seismic lines, roads and well sites; caribou avoided roads and well sites by approximately 230 m and 1 km, respectively (Dyer 1999). The rate of caribou crossing roads was less than expected in all seasons except calving (Dyer et al. 2002). Because of this avoidance, roads may act as semi-permeable barriers to caribou movement, potentially restricting caribou use of otherwise suitable areas (Dyer 1999, Dyer et al. 2002, Smith 2004). Linear corridors such as roads and seismic lines may also facilitate wolf travel and hunting behaviour within caribou range (Dyer 1999, James 1999, McCutchen 2007).¹³

Boreal caribou require large areas of old growth conifer forests and peatlands, with low levels of human disturbance, and low numbers of predators such as wolves and bears.¹⁴ The primary anti-predator strategy that Boreal caribou employ is to disperse themselves widely, spatially separating themselves from predators and alternative prey such as moose and deer. Consequently, Boreal caribou require large, contiguous tracts of habitat to maintain low population densities across their range. Boreal caribou generally

¹¹ *Ibid.*

¹² *Ibid.* at 26.

¹³ *Ibid.* at 96-97.

¹⁴ *Ibid.* at 109; *Working Together*, *supra* note 6 at 4.

avoid disturbed or fragmented areas that may support higher alternative prey populations and consequently, higher predator populations.¹⁵

The Boreal caribou ranges in northeastern Alberta are already highly impacted by industrial disturbance such as logging, seismic activity, conventional oil and gas development and oil sands development. The amount of industrial disturbance continues to increase. This increasing industrial disturbance further fragments Boreal caribou habitat and increases the proportion of habitat in early seral stages of vegetation that support high densities of predators and alternate prey. The ranges of Boreal caribou herds in northeastern Alberta have already experienced disturbance up to or beyond the level these herds can tolerate and continue to survive over the long term. Therefore, increased industrial disturbance in remaining Boreal caribou habitat will exacerbate the decline in population. Therefore, there is a need for immediate steps to prevent further human disturbance in the remaining ranges of the northeastern Alberta caribou herds.

Probability of Self-Sustaining Populations

For each local population in Alberta, the *Scientific Review* calculated a probability that the population is self-sustaining based on an integration of population trends, current range conditions and range disturbance. All herds in northeastern Alberta are rated as not self-sustaining, that is having a probability of less than 0.5 or 50% that the population will continue to exist over the long term without intensive intervention.¹⁶ Therefore immediate intervention, in the form of protection of remaining habitat, is required to maintain these populations.

Proposed Critical Habitat Identification

For each Alberta population, the *Scientific Review* identified one of three proposed critical habitat outcomes:

Current Range: Current range condition and extent are required to maintain potential for self-sustaining population. **Further degradation of the current range may compromise the ability to meet the recovery goal...**

Current Range and Improved Conditions: Current range conditions and/or extent would need to be improved to restore the potential to support a self-sustaining population. **Further degradation of the range may have serious consequences for local population persistence...**

¹⁵ *Scientific Review*, *supra* note 9 at 109.

¹⁶ *Ibid.* at Fig. 2, p. iv, 3.

Current Range and Consider Resilience: Current range condition and extent may be sufficient to absorb additional disturbance while maintaining capacity to support a self-sustaining population.¹⁷

(Emphasis added.)

For 6 of the 7 northeastern herds, the *Scientific Review* proposed “Current Range and Improved Conditions” indicating the need to protect all existing range, as well as the need to improve the current range condition and/or extent in order to restore and support a self-sustaining population. Thus, according to Canada’s leading caribou biologists, any further degradation of these ranges would have serious consequences for the survival of the local populations. Even if all additional degradation ceased immediately, some improvement in the current range condition and/or extent is already required.

For the Richardson herd, protection of the current range condition and extent is required as the minimum for the population to be self-sustaining.

None of the ranges for the northeastern Alberta herds are able to absorb additional disturbance and still support a self-sustaining population.

Therefore, as a minimum, there is an immediate need to protect all existing Boreal caribou ranges in northeastern Alberta from any further industrial activity, and for 6 of the 7 local populations, there is a need to improve or extend those ranges to support self-sustaining populations. Again, immediate intervention, in the form of protection of remaining ranges from industrial disturbance, is required to maintain these local populations.

Legal Principles

The purposes of the *Species at Risk Act* are stated in section 6 of the *Act*:

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.¹⁸

Further, the Preamble to the *Species at Risk Act* states the following:

Recognizing that...

the Government of Canada is committed to conserving biological diversity and to the principle that, if there are threats of serious or

¹⁷ *Ibid.* at 50-52.

¹⁸ *Species at Risk Act*, *supra* note 1, s. 6.

irreversible damage to a wildlife species, cost-effective **measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty**,...

the habitat of species at risk is key to their conservation,...¹⁹

(Emphasis added.)

The Supreme Court of Canada in *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville)* 2001 SCC 40 has further clarified the precautionary principle in the face of a lack of full scientific certainty:

31 The interpretation of By-law 270 contained in these reasons respects international law's "precautionary principle," which is defined as follows at para. 7 of the *Bergen Ministerial Declaration on Sustainable Development* (1990):

In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

Canada "advocated inclusion of the precautionary principle" during the Bergen Conference negotiations (David VanderZwaag, CEPA Issue Elaboration Paper No. 18, *CEPA and the Precautionary Principle/Approach* (Ottawa: Environment Canada, 1995), at p. 8). The principle is codified in several items of domestic legislation: see, for example, the *Oceans Act*, S.C. 1996, c. 31, Preamble (para. 6); *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 ("CEPA"), s. 2(1)(a); *Endangered Species Act*, S.N.S. 1998, c. 11, ss. 2(1)(h) and 11(1).²⁰

Therefore, the Minister, while awaiting the results of further studies and consultation, is obligated to act in a precautionary manner where there is a threat of irreversible damage to the habitat necessary for the survival or recovery of Boreal caribou in northeastern Alberta.

The Minister's obligation in this matter is mandatory:

¹⁹ *Ibid.*, Preamble.

²⁰ *114957 Canada Ltée. (Spray-Tech, Société d'arrosage) v. Hudson (Ville)*, 2001 SCC 40, 200 D.L.R. (4th) 419 at para. 31.

80(2) The competent minister **must** make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery.²¹

With respect to species other than aquatic species and migratory birds, the Minister has the power, pursuant subsection 80(4)(c)(i), on federal lands, to:

80(4)(c)(i)...

(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(B) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat.²²

On lands other than federal lands, the Minister has the power, pursuant to subsection 80(4)(c)(ii), to:

80(4)(c)(ii)...

(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(B) include provisions prohibiting activities that may adversely affect the species and that habitat.²³

The Minister has indicated that the emergency order provisions of section 80 of the *Species at Risk Act* are intended to protect the habitat that is necessary for the survival or recovery of a species **before** such habitat is identified as critical habitat in a recovery strategy or an action plan.²⁴

As discussed above, the *Scientific Review* recommended that all current ranges of the Boreal caribou herds within northeastern Alberta be identified as critical habitat. For most herds, the *Scientific Review* identified the need to further improve the condition and/or extent of the existing ranges in order to support self-sustaining populations. The *Scientific Review* identified that further degradation of these ranges would have serious consequences for the survival of the local populations. Allowing continued fragmentation and destruction of this habitat through industrial activity while awaiting the development and implementation of the recovery strategy, including the identification and protection of critical habitat, would be unreasonable and contrary to

²¹ *Species at Risk Act*, *supra* note 1 at s. 80(2).

²² *Ibid.* at s.80(4)(c)(i).

²³ *Ibid.* at s. 80(4)(c)(ii).

²⁴ *Environmental Defence v. Minister of Fisheries and Oceans*, 2009 FC 878 at para. 50 [*Environmental Defence*].

the intent of the *Species at Risk Act* and would pose an immediate threat to the survival or recovery of the species in Alberta.

The 2007 draft *Recovery Strategy for Woodland Caribou (*Rangifer tarandus caribou*), Boreal Population, in Canada*, prepared by Environment Canada, stated the recovery goal, and population and distribution objective, for Boreal caribou as follows:

Recovery Goal:

Boreal caribou are conserved and recovered to self-sustaining levels, **throughout their current distribution (extent of occurrence) in Canada.**

Population and Distribution Objective:

Maintain existing local populations of boreal caribou that are self-sustaining and achieve population growth of local populations that are not self-sustaining, to the extent possible, **throughout the current distribution (extent of occurrence) of boreal caribou in Canada.**²⁵

(Emphasis added.)

The population and distribution objectives were recently restated by Environment Canada for discussion purposes as:

“...to increase local populations that are not currently self-sustaining, to the extent possible, **in all the provinces and territories where boreal caribou currently live.**”²⁶

Therefore, there is a clear intent that Boreal caribou populations should be maintained and recovered throughout their current ranges.

Further, it would be unreasonable and inconsistent with the stated purpose of the *Species at Risk Act* to permit an imminent or irreversible threat to the survival or recovery of the species to continue across any portion of the species range.

The use of the section 80 emergency order powers to provide interim protection for local populations on a regional basis was addressed in testimony in *Environmental Defence v. Minister of Fisheries and Oceans* 2009 FC 878:

So, for example, just -- hopefully this will help. An endangered species of plant could be found on both the Ontario side of the border and the Quebec side of the border. And Quebec could have implemented robust species protection legislation that prohibited any interference with that

²⁵ *Scientific Review*, *supra* note 9 at 2.

²⁶ *Working Together*, *supra* note 6 at 6.

plant's survival and recovery. Ontario, and I say this only hypothetically, could have enacted meeker *Endangered Species* legislation that was not sufficiently protecting the plant and resulting in an increased imminent risk to the plant. Or not preventing it in any way. So this emergency order allows the Minister to apply the order just to one area, as opposed to the entire area where the plant is found. And whether that be according to provincial legislative lines or the fact that the species is widely disbursed and doing one [sic] on one area and not in another.²⁷

This interpretation was not challenged by the Minister of Environment.²⁸ Clearly, the survival and recovery of the Boreal caribou species, according to Canada's leading caribou experts, includes the survival and recovery of all local populations throughout their current extent of occurrence. Therefore, it is a reasonable expectation that the Minister will take emergency action to protect the habitat of Boreal caribou within northeastern Alberta, where expanding industrial activity poses an imminent threat to the survival or recovery of the herds, regardless of the presence or absence of such threats in other locations or jurisdictions.

Actions Requested

Therefore, the ENGOs request that you immediately take the mandatory action required by subsection 80(2) of the *Species at Risk Act* to recommend to the Governor in Council the interim emergency protection of all current ranges of Boreal caribou herds in northeastern Alberta until such time as the recovery strategy is completed and implemented, including the identification and protection of the critical habitat of all Boreal caribou herds in northeastern Alberta. In particular, the ENGOs require that you recommend to the Governor in Council a moratorium on any further industrial activity within the current ranges of Boreal caribou in northeastern Alberta until such time as the recovery strategy is completed and implemented, including the identification and protection of the critical habitat of all caribou herds in northeastern Alberta.

Further, the ENGOs acknowledge the constitutionally-protected right of the First Nations Petitioners to hunt and use Boreal caribou for sustenance, cultural and spiritual purposes. The survival and recovery of Boreal caribou in northeastern Alberta is essential to the exercise of those rights. Therefore, the Minister has an obligation to the First Nations Petitioners to address imminent threats to the survival and recovery of the Boreal caribou populations in northeastern Alberta that have been traditionally used by the First Nations Petitioners for these purposes.

Therefore, the ENGOs support the request for an emergency order to protect Boreal caribou in northeastern Alberta that was made by the First Nations Petitioners by way of a letter to you from Woodward & Co. dated July 15, 2010.

²⁷ *Environmental Defence*, supra note 24 at para. 60.

²⁸ *Ibid.*

The ENGOs require that you comply with this request by August 31, 2010.

Sincerely,

A handwritten signature in cursive script that reads "Barry Robinson".

Barry Robinson
Staff Lawyer

Cc: Sean Nixon, Woodward & Co.
Clients

Enclosures: 1. *Alberta Woodland Caribou Recovery Plan, 2004/05 – 2013/14*
 2. *Alberta Caribou Committee, Research and Monitoring Subcommittee Annual Report, Reporting Period: April 1st, 2008 to March 31st, 2009*
 3. *Environment Canada, Working Together to Recover Boreal Caribou*
 4. *Environment Canada, Scientific Review*
 5. *Environmental Defence v. Minister of Fisheries and Oceans, 2009 FC 878*