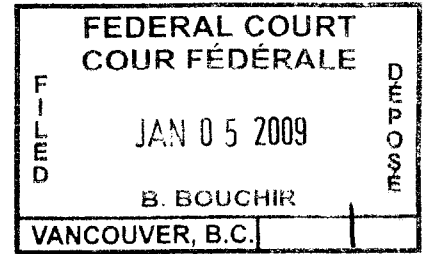


Vancouver No. T-11-09

FEDERAL COURT OF CANADA

BETWEEN:

DAVID SUZUKI FOUNDATION,
ENVIRONMENTAL DEFENCE CANADA and
WESTERN CANADA WILDERNESS COMMITTEE



AND:

MINISTER OF FISHERIES AND OCEANS

APPLICANTS

RESPONDENT

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicants. The relief claimed by the Applicants appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at *Vancouver, British Columbia*.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicants' solicitor, or where the applicants are self-represented, on the applicants, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: January 5th, 2009

Issued by: B. Bouchir

**B. BOUCHIR
REGISTRY OFFICER**

Address of

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Vancouver Regional Office
900 – 840 Howe Street,
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APPLICATION

This is an application for judicial review in respect of the decision of the Minister of Fisheries and Oceans (the “Minister”) on December 5, 2008 declining to make an Order prohibiting the destruction of the critical habitat of the Nooksack Dace (“Protection Order”), pursuant to para. 58(5)(a) of the *Species at Risk Act*, S.C. 2002, c.29 (“SARA”) and instead, to issue a legal protection statement, pursuant to para. 58(5)(b) of SARA, claiming that the critical habitat of the Nooksack Dace is already legally protected.

More particularly, the Minister issued a document entitled “Nooksack Dace in Canada: Critical Habitat Protection Statement” (the “Protection Statement”) pursuant to para. 58(5)(b) of SARA stating erroneously that the critical habitat of the endangered Nooksack Dace is already “legally protected” within the meaning of s. 58 and further that certain threats to Nooksack Dace critical habitat do not give rise to a legal duty to address such threats under s. 58.

The Applicants apply for:

1. An order or orders in the form of a declaration that:
 - a. the Minister erred in law, acted unreasonably and/or acted without jurisdiction in issuing a Protection Statement, pursuant to para. 58(5)(b) of SARA, notwithstanding the fact that the critical habitat of the Nooksack Dace is not currently “legally protected” within the meaning of s. 58 of SARA;
 - b. ss. 35 and 36 of the *Fisheries Act*, R.S. 1985, c. F-14 do not “legally protect” the critical habitat of Nooksack Dace for the purposes of s. 58 of SARA; and
 - c. invasive species, low oxygen levels, and toxic run-off are threats to Nooksack Dace critical habitat giving rise to legal duties under s. 58 of SARA to address them.
2. An order quashing or setting aside the Minister’s decision to issue a Protection Statement pursuant to para. 58(5)(b) of SARA in relation to Nooksack Dace critical habitat.
3. An order in the nature of mandamus directing the Minister, forthwith, to comply with subs. 58(5) of SARA in relation to Nooksack Dace critical habitat.
4. The costs of this Application.
5. Such further and other relief as this Honourable Court deems just.

The grounds for the application are:

The Species at Risk Act

1. The *Species at Risk Act*, Canada's foremost piece of legislation protecting species at risk, received Royal Assent on December 12, 2002.
2. The purposes of SARA, as set out in s. 6 of the Act, are to:

prevent wildlife species from becoming 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.
3. SARA recognizes that protecting a species' habitat is the key to its survival and recovery. In this regard, the Preamble of the Act states that "the habitat of species at risk is key to their conservation".
4. S. 2 of SARA defines the habitat of a species as "critical habitat" where it is: (i) identified in a recovery strategy or action plan, and (ii) is necessary for the survival or recovery of a listed wildlife species.
5. The various sections of SARA create a legal scheme through which species at risk and their critical habitat are to be protected.
6. The first step in protecting a species and its habitat is through a listing process whereby a species will be categorized as extirpated, endangered, threatened or of special concern. The Nooksack Dace is listed as endangered.
7. Depending on the listing of a species, SARA mandates various planning processes and protections. Where a species is listed as "endangered" these processes include: prohibitions against harm (s. 32); protections for the species' residence (s. 33); the requirement to undertake recovery planning (ss. 37-46); and recovery plan implementation ("action planning") (ss. 47-64).
8. The publication of a recovery strategy is an integral part of protecting a listed species and ensuring its recovery. The mandatory contents of a recovery strategy, including identification of critical habitat, are set out at s. 41 of SARA.
9. Pursuant to s. 58 of SARA, within 180 days of finalizing a recovery strategy, the competent minister must: (a) issue a protection order or otherwise (b) issue a protection statement setting out how the critical habitat of a species is already legally protected.

Nooksack Dace and SARA

10. The Nooksack Dace is a small stream-dwelling minnow that measures less than 15 cm in length. The Canadian population of Nooksack Dace is confined to four lowland streams in British Columbia's Fraser Valley. The global distribution of Nooksack Dace includes approximately twenty additional streams in northwest

Washington State, in the United States, although the exact status of the species in Washington State is currently unknown.

11. Nooksack Dace are “riffle specialists” meaning that they are only found in river areas containing at least 10 percent riffle (a shallow, turbulent, highly oxygenated area in a stream), and with shallow, calm pool habitats in close proximity to riffles. In addition, Nooksack Dace require intact riparian vegetation which provides shade, reduces the entry of pollutants into the stream, prevents erosion and creates and maintains conditions conducive to the presence of insects that serve as food for the species.
12. The Nooksack Dace is listed as an “endangered” species under Schedule 1 to SARA, meaning that it is “a wildlife species that is facing imminent extirpation.” An “extirpated species” is defined in s. 2 of SARA as a species “no longer existing in the wild in Canada, but existing elsewhere in the wild.”
13. On July 23, 2007, one year after it was due, the final Nooksack Dace Recovery Strategy (“final recovery strategy”) was posted to the SARA Public Registry. The final recovery strategy did not identify the specific locations of Nooksack Dace critical habitat, despite the fact that such areas were well known and the independent authors of the final recovery strategy tried to include maps of known critical habitat in the recovery strategy.
14. The Applicants hereto commenced an Application for judicial review against the Minister in relation to the final Nooksack Dace recovery strategy on the grounds, *inter alia*, that the Minister had not identified critical habitat to the extent possible as required by para. 41(1)(c) of SARA.
15. The Minister published a revised recovery strategy for the Nooksack Dace in June 2008. The revised recovery strategy identified Nooksack Dace critical habitat to the extent that it was known. The litigation remains active however (Court File No.: T-1529-07).
16. The revised recovery strategy lists threats to Nooksack Dace which, in order of severity, are: (1) physical destruction of habitat (from channelization, dredging and infilling); (2) seasonal lack of water; (3) sediment deposition; (4) riffle loss to beaver ponds; (5) habitat fragmentation; (6) toxicity to water; (7) hypoxia (low oxygen levels); and (8) increased predation.
17. The revised recovery strategy also set out “activities likely to result in Destruction of Critical Habitat” which are: (1) excessive water withdrawal; (2) excessive sediment releases; (3) drainage projects; (4) impoundment; (5) urban storm drainage; (6) riparian vegetation removal; and (7) livestock access to creeks. A number of these threats are directly responsible for decreased oxygen levels in Nooksack Dace critical habitat.

Section 58 and the Nooksack Dace Protection Statement

18. S. 58 imposes a mandatory duty on the Minister to implement legal protections for the critical habitat of the Nooksack Dace.
19. By virtue of subs. 58(5), within 180 days of the identification of critical habitat, the Minister must make an order, pursuant to subs. 58(4), protecting the identified critical habitat from destruction or issue a statement to the SARA public registry setting out how the identified critical habitat is already legally protected.
20. On December 5, 2008, the Minister issued the impugned Protection Statement to the SARA public registry purporting that the critical habitat of the Nooksack Dace is already legally protected for the purposes of SARA.
21. The Protection Statement issued by the Minister, relies upon existing laws to protect Nooksack Dace critical habitat. In particular, the Protection Statement relies upon ss. 35 and 36 of the *Fisheries Act* to protect Nooksack Dace critical habitat.
22. Given that s. 35 of the *Fisheries Act* confers discretion on the Minister to authorize harmful alteration and destruction of fish habitat, it cannot be relied upon to “legally protect” the critical habitat of Nooksack Dace in compliance with s. 58 of SARA. To illustrate this point, an authorization to destroy fish habitat in accordance with ss. 35(2) should be compared and contrasted with an allowable permit to affect critical habitat in accordance with s. 73 of SARA. Clearly, the discretion to affect critical habitat is far more circumscribed than the discretion to allow harmful alterations of habitat in accordance with ss. 35(2) of the *Fisheries Act*.
23. For its part, s. 36 of the *Fisheries Act* prohibits the deposit of a deleterious substance to waters frequented by fish. The power to enforce s.36 of the *Fisheries Act* was delegated to Environment Canada in 1978 and has not, to date, been applied in a manner so as to protect Nooksack Dace critical habitat.
24. Moreover, the Minister implicitly recognizes the limitations of relying upon s. 36 of the *Fisheries Act*, citing it as useful only in relation to two known threats, and, in such cases, only when the point source of a deleterious substance can be identified.

Oxygen Levels, Invasive Species and Toxic Runoff – Threats to Habitat

25. The Protection Statement recognizes low oxygen levels, invasive species and toxic runoff as threats to Nooksack Dace. Despite this however, the Minister states that he need not protect Nooksack Dace critical habitat from these threats as they are threats to Nooksack Dace individuals and populations, not its critical habitat.

26. Sufficient oxygen, absence of invasive species that degrade habitat suitability and absence of toxic pollution is integral to what makes remaining critical habitat suitable for a species' survival.
27. In accordance with ss. 58(5) of SARA, the Minister is legally required to address the threats posed to Nooksack Dace critical habitat by low oxygen levels, invasive species and toxic runoff.

The Applicants

28. The Applicants are "public interest groups" in that they are charities that work for environmental protection and have no personal, proprietary or pecuniary interest in the outcome of this Application.
29. The Applicants believe that they need to bring this Application to address federal failure to implement the SARA, a failure which is further endangering Canada's most vulnerable species. They believe that an order requiring SARA to be complied with is in the public interest because the viability of Canada's wildlife populations is a matter affecting all Canadians.
30. The Applicants also believe that, unfortunately, they have no choice but to litigate this matter. Each of the Applicants has a record of working to protect at-risk species and also a record of working, using non-litigious means, to ensure the federal government, including the Minister, implements SARA. They bring this application only in the face of overwhelming evidence that: (a) the Canadian government is attempting to avoid its obligation to implement SARA so as to protect Canada's at-risk species and the Nooksack Dace in particular; and (b) non-litigious means have proven ineffective in ensuring this whereas litigation, or its threat, has proven effective.
31. Such further additional grounds as counsel may identify and this Honourable Court may consider.

This Application will be supported by the following material:

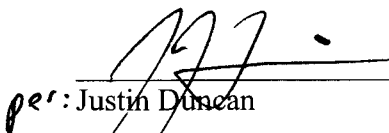
1. An affidavit on behalf of the David Suzuki Foundation, to be served.
2. An affidavit on behalf of Environmental Defence Canada, to be served.
3. An affidavit on behalf of the Western Canada Wilderness Committee, to be served.
4. Such further and additional materials as counsel may advise and the Court may allow.

Rule 317 request:

The Applicants request that the Minister send a certified copy to both the Applicants and the Registry of the following material that is not in the Applicants' possession but is in the Minister's possession:

1. The record of materials before the Minister and the Department of Fisheries and Oceans relevant to the decision to decline to issue a Protection Order and to, instead, issue a Protection Statement under subs. 58(5) of SARA in relation to Nooksack Dace critical habitat including, but not limited to, any material in relation to reliance upon the *Fisheries Act* to protect the critical habitat of aquatic species for the purposes of SARA.

Date: January 5, 2009


per: Justin Duncan

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