

Sunshine Coast Conservation Association
Briefing Note

Law, Policy and Marbled Murrelets in the Sunshine Coast Forest District

D. Bouman, Habitat Coordinator, SCCA

February 7, 2016

SCCA Commentary

For almost 20 years, the SCCA has pursued protection for species-at-risk in the greater Sunshine Coast region. Of the species that concern the SCCA, the Marbled Murrelet has taken up more time, energy, and resources than any other species. On this issue alone the SCCA has been in the BC Supreme Court three times and won each case, which protected some habitat but failed to precipitate a comprehensive resolution. We have also had a logging approval overturned through an administrative review process, we've complained to the foresters' professional association and also challenged a logging company's certification. These actions, although successful, also failed to bring about the needed solutions. And finally, we participated in forest development planning, landscape unit planning and various other biodiversity related processes initiated by the Province of British Columbia. We nevertheless remain optimistic and committed to the welfare of at-risk species in our region.

A new provincial process has been initiated for the Marbled Murrelet (and also for the Northern Goshawk). This process is referred to as an *Implementation Plan*. Its purpose is to satisfy British Columbia's obligations under the *Accord for the Protection of Species at Risk in Canada* and the *Canada – British Columbia Agreement on Species at Risk*. The SCCA will participate and will assist others in participating as well.

Biology: The Marbled Murrelet is a small secretive west coast seabird that ranges from Alaska to northern California. It feeds on herring and various forage fish and nests exclusively in the canopy old growth forests. This bird population has been in steep decline for more than 50 years.

For nesting purposes, the Marbled Murrelet requires an open stand structure of tall ancient trees with large limbs supporting moss platforms that can be used as nest sites. Murrelets will travel long distances from marine foraging areas to find the appropriate nest sites. Females only lay one egg a year. Habitat identification is accomplished primarily through low-elevation helicopter reconnaissance. Population sizes are determined on a watershed by watershed basis through radar surveys.

To summarize, the biology of this species, its environmental requirements, the locations of its nesting habitats and the size of its populations on watershed-by-watershed basis are all well studied and understood in the Sunshine Coast Natural Resource District.

Conservation status: The federally appointed body that determines the conservation status of species and ecosystems is the *Committee on the Status of Endangered Wildlife in Canada* (COSEWIC). Its assessments are entirely science based and do not consider social or economic circumstances. COSEWIC has determined that the Marbled Murrelet is threatened (imperiled) and that this has been caused primarily by loss of nesting habitat from logging. There are also other contributing factors.

Species-At-Risk Act (SARA): The federal government has placed the Marbled Murrelet on Schedule 1 of SARA. This means that the protections mandated by the *Act* are mandatory. One protection in the *Act* is the requirement for a recovery plan and identification of “critical habitat” is an important element of recovery planning. The *Act* also requires the provinces to establish processes that allow it to implement the required protections. Another part of SARA allows the federal government to intervene when provinces neglect or obstruct SARA requirements.

The *Marbled Murrelet Recovery Planning Team* has now completed a draft recovery plan and the plan recognizes nesting sites as critical habitat. The plan requires protection of approximately 70% of the habitat existing as of 2002 in order to stabilize murrelet populations and achieve adequate conservation. The planning team has also determined that, to date, British Columbia has only achieved approximately 30% of the required amount of protection.

British Columbia and SARA: BC has initiated the SARA required processes. It also has a process for considering the needs of wildlife that potentially conflict with forestry: the *Identified Wildlife Management Strategy* (IWMS). BC uses Wildlife Habitat Area (WHA) and Old Growth Management Area (OGMA) designations to resolve these issues. Currently, BC also has an Implementation Plan process underway that will respond to SARA related objectives and agreements. Unfortunately, BC also has a number of policies in place that obstruct conservation uses.

Forest planning and inventory in BC: Every five years the province’s Chief Forester carries out a Timber Supply Review (TSR) which establishes an Annual Allowable Cut (AAC) calculation for Timber Supply Areas, Tree Farm Licenses, Woodlot Licenses and Community Forest Licenses. There are two inventory categories of note: the Timber Harvesting Land Base (THLB) and the Non-Contributing Land Base (NCLB). Provincial policy allows for a 1% impact to the THLB to meet the needs of *all* at-risk species in managed landscapes. Most of this allowance was used up years ago. Also, provincial policy specifically directs license holders, wherever possible, to satisfy the needs of at-risk species in the NCLB where, presumably, habitat can be protected without timber harvesting conflicts.

Federal Court Case - Ecojustice verses Government of Canada (2014): In this case, Ecojustice, acting for an alliance of BC environmental groups, alleged that the federal government was obstructing implementation of SARA by prohibiting, among other things, identification of critical habitat during the recovery planning process. The Federal Court in Vancouver agreed and found that Ministers of the Crown were deliberately and unlawfully obstructing the *Act*. The federal government was ordered to bring its policies and practices into compliance with SARA. The Implementation Plan process is probably BC's response to these court ordered changes.

About BC Forest and Range Practices Act 2004 (FRPA)

The Goals and Objectives of Government: The “objectives” for management of at-risk species (and other environmental values) on crown land in BC are expressed in FRPA Section 14 (*Forest Planning and Practices Regulations*). Logging companies must show how they will achieve compliance with FRPA objectives in a Forest Stewardship Plan (FSP).

Minimum FSP requirements: If an FSP meets the minimum requirements of the Act, the statutory decision-maker, who is usually a District Manager of the Ministry of Forests Lands and Natural Resource Operations (FLNRO), “must approve” the plan. Once an FSP is established by a logging licensee, the Province relies on privately employed Registered Professional Foresters (RPF) to authorize logging plans and ensure compliance with FRPA objectives. This is called “professional reliance”. Government officials **do not** have a roll in authorizing logging plans or enforcing compliance with FRPA objectives.

Declared Areas: FRPA also provides protection for areas that are already subject to development planning for logging. In the situation where a licensee has invested in developing an area for logging, it can file for a “Declared Area” status. If government then decides to establish a different land use in a declared area, such as park or wildlife habitat, it must pay significant compensation to the logging company that has established the Declared Area.

FRPA and Professional Reliance: FRPA is a results-based code, meaning that government sets the objectives (which are the results) and professionals are tasked with meeting these objectives. Under the former *Forest Practices Code Act*, a credentialed person in government, usually a Ministry of Forests District Manager, acted as a statutory decision maker approving forest development plans (or not) depending on his/her determination that a logging plan complied with legislation and “adequately managed and conserved all forest values”. Under FRPA, a private professional (usually a Registered Professional Forester) employed by a logging company, authorizes logging activities, not a public servant.

FRPA objectives for the Marbled Murrelet: The objectives in the FRPA regulations specify that all Marbled Murrelet nesting habitat in the NCLB must be protected. Each licensee adopts this objective in their FSPs. FRPA regulation also allows for 1% of the

THLB to be used for protection of species at risk; however, this allowance for impacts to timber supply was used up at least ten years ago.

The Forest Practices Board (FPB): The Forest Practices Board serves the public as the independent watchdog for sound forest and range practices in British Columbia. They have sufficient resources and expertise to carry out audits and investigate public complaints. The FPB may also report on special investigations, publish information bulletins and issue press releases. In the course of their work, they assess compliance with resource law and they also assess whether or not existing law is adequate to protect the public interest in forest resources. Below are a few highlights from FPB publications about FRPA, FSPs, and at-risk species, particularly the Marbled Murrelet. Please bear in mind that, in terms of fully understanding FPB recommendations, there is no substitute for reading their original publications.

FPB News Release: Provincial Systems Fail to Protect Threatened Species; March 3, 2005

In the era immediately preceding FRPA, the FPB found that "... there is a systematic failure in government policy to protect threatened species such as marbled murrelets on crown forest lands."

FPB/SR/28 A Review of Early Forest Stewardship Plans Under FRPA, May, 2006

The FPB outlines a number of major concerns with the first batch of approved FSPs. These concerns generally involve a lack clarity, measurable results, government oversight and accountability. The FPB questions the enforceability of the plans; all of these issues are problematic for the Marbled Murrelet. Here are some select quotes:

"...the plans do not describe for the public an understandable vision of how the forest will be managed or what it will look like in the future. "

"...FSPs tend not to make commitments to measurable results or outcomes..."

"...District level [government] decision makers appear to have little influence or authority to direct how forest management should take place..."

"The commitments in FSPs tend to be somewhat vague and non-measurable."

FPB/SIR/22 Conservation of Species at Risk under the FRPA: Marbled Murrelets on the Sunshine Coast; April 2008

This special investigation report is the FPB's response to a complaint from the SCCA. It assesses how the Marbled Murrelet is fairing under FRPA and what factors support

progress towards habitat protection. The report focuses on Interfor operations within the Sunshine Coast Forest District. The FPB considered the protective influences of government policies and agencies, the effect of professional ethics and the impact of third party certification programs.

The FPB found that Interfor's certification program had a positive influence and that Interfor, to the limited extent possible, was mindful of Marbled Murrelet habitat as required by their certification program.

On the effect of foresters' ethical obligations, the FPB found no positive influence at all. The forester's professional organization, the Association of BC Forest Professionals (ABCFP), considers species at risk habitat to be a land use issue and therefore government's domain. They refuse to hold their members accountable for damages to species at risk habitat. And finally the FPB looked at government policy and resource law finding that FRPA and its FSPs are vague, not measurable and unenforceable.

FPB/SIR/44 FSPs: Are They Meeting Expectations? August, 2015

This Special Investigation Report revisits the issue of FSPs and finds discouraging results. The quality of FSPs in several key regards is worse than in the FPB's original analysis. Below are several quotes that are relevant to the issue of the Marbled Murrelet in our region.

“A high proportion of the results, strategies and measures in FSPs are not measurable or verifiable and therefore not enforceable.”

“In the Board's opinion, many results or strategies in FSPs do not demonstrate consistency with government's objectives.

“All sampled FSPs include a professional forester's signature and seal, yet all of these FSPs contained results, strategies or measures that were not measurable or verifiable”.

The ABCFP professional practice guidelines state, “competent members provide professional work that is measurable or verifiable...”. In the SCCA's experience, the ABCFP does not hold its members accountable for FSPs in general or specifically for logging related impacts to at-risk species.

FPB/SR/52 District Managers' Authority Over Forest Operations; December, 2015

As previously mentioned, Resource District Managers were the “on the ground” government approving officials that authorized logging plans under the old *Forest Practices Act of BC*. They used an “adequate management and conservation” test before approving or rejecting logging plans. Under FRPA, public officials do not approve logging plans or any level of logging development. There are no independent government

officials providing oversight and representation of the public interest in the forest development process. To quote from the above report:

“In recent years, the Forest Practices Board has seen situations arise where forestry development was putting local environmental and community values at risk, yet [government] district managers could do little to affect the development and protect the public interest.”

“These situations have led the Board to conclude that there is a need for district managers to have authority over operational decision-making by giving them conditional discretion over the issuance of cutting permits and road permits.”

The Morris Report

Morris Report: GETTING THE BALANCE RIGHT: IMPROVING WILDLIFE HABITAT MANAGEMENT IN BRITISH COLUMBIA; AUGUST, 2015

This report is from BC MLA Mike Morris. At the time, he was the Parliamentary Secretary to the Minister of FLNRO. Mr. Morris’s opinions are compatible with the concerns raised by the BC FPB. Mr. Morris severely criticized the use of vague terms in FRPA and in particular the use of the phrase “without unduly reducing the supply of timber from British Columbia’s forests”. Mr. Morris states that the phrase:

“...is a very subjective “default” term that significantly lowers the threshold protecting our biodiversity. This ambiguity has contributed to a degradation of biodiversity and ultimately, a reduced ability for professionals to meet the spirit and intent of the legislation.”

There is nothing in FRPA giving guidance about what “unduly” reducing actually means. As well, public officials in FLNRO do not have authority to approve or review the application of the term and phrase in FSPs or any other document. Mr. Morris, who is now the province’s Solicitor General, has major concerns about FRPA and wildlife in BC which are very well justified.

Discussion

The concerns raised by the Forest Practices Board are very well founded as are those raised by the Hon. Mike Morris. As advocates for sustainability, particularly with regard to species at-risk, we are alarmed and concerned. It appears that the purpose of FRPA was not, as explained by the Minister in the legislature, to maintain BC’s “world class” environmental protections while simplifying the regulatory framework. Rather it appears that the purpose of the *Act* was to destroy transparency, accountability and enforceability of forestry law and free logging companies from oversight by public officials. In this writer’s opinion, FRPA has been wildly successful in deregulating the forest industry.

Recently, the BC has brought forward an “Implementation Plan” process in order to satisfy provincial obligations to the Marbled Murrelet under the federal *Species At Risk Act*. This could be what is needed to ensure a future for this species or, it could be just another process that creates little new habitat protection while justifying deforestation of critical nesting habitat in the Timber Harvesting Land Base (THLB).

The approach that will be taken in the Implementation Plan process will be similar to that taken in Landscape Unit Planning (LUP). Stands that are in the Non-Contributing Land Base (NCLB), meaning areas that are not log-able or already constrained under some other designation, are selected for Wildlife Habitat Area (WHA) designation first. Only then can stands in the THLB be considered for protection.

There are problems with the LUP approach. The focus in LU planning is on avoiding conflict with logging interests. This results in a protected land base that consists of scattered, unconnected, mostly not log-able fragments. This land base is far too small to capture much of the diversity of coastal forested ecosystems.

According to COSWIC, the status of the Marbled Murrelet is *Threatened* and the main cause of this status is logging of nesting habitat. Obviously, protecting habitat that can't be logged will not succeed in stabilizing this species' populations. Another practice that won't ensure a future for the species is overlapping of designations. Labeling an Old Growth Management Area (OGMA) as WHA doesn't create any new protection. It just produces a misleading change in the statistical picture.

Another problem relates to the distinction between the timber harvesting land base (THLB) and the land base that does not contribute to the harvesting land base (NCLB). The distinction between these land bases is obvious in the realm of timber supply reviews (TSR) which do utilize a 'line on the map'. However, the scale of the TSR line is not operationally defined and we cannot say with precision what is and is not timber harvesting land base (except for parks, ecological reserves, etc.). In operational reality, the implication is that the timber harvesting land base is whatever a logging company considers to be potentially harvestable. Again, if the focus is primarily on avoiding conflict with logging companies, the end result could easily be a failure to protect documented suitable wildlife habitat.

Conclusion

The public interest in the matter of the marbled murrelet is best served through compliance with legislation created by democratically elected legislators at both the federal and provincial level. Specifically, this means complying with both the letter and the intent of the *Species At Risk Act* (SARA) as well as several national and international agreements, for example the *Migratory Birds Convention Act*, to which Canada is a signatory. This should not be difficult to do as the biology, distribution and conservation status of the species has been well known to government and resource licensees for many years now.

The *Forest and Range Practices Act of BC* (FRPA) is highly problematic for at-risk species, especially so for the Marbled Murrelet because FRPA primarily accomplishes operational deregulation of the forest industry, while also eliminating meaningful oversight by FLNRO officials. Government objectives in FRPA sound acceptable but in reality they are vague and unenforceable. Another aggravating circumstance is that the foresters' professional body refuses to hold their members accountable for damages to species at-risk or for stewardship plans that do not comply with FRPA.

Fortunately there are other influences on forestry practices in BC, for example, certification programs, federal law, court findings and international agreements. BC has initiated a Marbled Murrelet Implementation Plan process and this is open to public and stakeholder input until March 31, 2016. For this process to be effective, the first priority should be on protecting land that is scientifically verifiable as the highest classes of nesting habitat of the Marbled Murrelet. This land may occur in either the harvesting land base or the non-harvesting land base. For the implementation plan to stabilize and possibly reverse population decline, high class nesting habitat should be protected wherever it is found. This is especially true for the southern mainland and southern Vancouver Island conservation areas where nesting habitat has been severely impacted by timber harvesting.

Further to the opportunity to participate in implementation planning, members of the public should ask their provincial and federal elected representatives to pay attention to this process. We also advise concerned individuals and organizations to make implementation plan leaders aware that we need to have access to documentation about habitat location and class, harvesting and non-harvesting demarcation and location of conflicting Declared Areas or site plans in high value habitat.

And finally, we need to impress on decision makers that recovery plan objectives need to be regarded as imperative and not as some sort of "science advice" to be accepted or disregarded for the convenience of private vested interests.

Thank you for your attention to conservation issues.

-Daniel Bouman

Abbreviations

SCCA	Sunshine Coast Conservation Association
MAMU	Marbled Murrelet
NOGO	Northern Goshawk
COSEWIC	Committee on the Status of Endangered Wildlife in Canada
SARA	Species-At-Risk Act
IWMS	Identified Wildlife Management Strategy
WHA	Wildlife Habitat Area
MBCA	Migratory Birds Convention Act

OGMA	Old Growth Management Area
TSR	Timber Supply Review
TSA	Timber Supply Area
AAC	Annual Allowable Cut
TFL	Tree Farm License
FL	Forest License
CFL	Community Forest License
WL	Woodlot License
THLB	Timber Harvesting Land Base
NCLB	Non Contributing Land Base
FRPA	Forest and Range Practices Act
FSP	Forest Stewardship Plan
FPPR	Forest Planning and Practices Regulations [of FRPA]
FLNRO	Ministry of Forests Lands and Natural Resource Operations
RPF	Registered Professional Forester
ABCFP	Association of BC Forest Professionals
FPB	Forest Practices Board
FPB/SR	FPB Special Report
FPB/SIR	FPB Special Investigation Report
OIPC	Office of the Information and Privacy Commissioner
WCEL	West Coast Environmental Law
UVic/ELC	University of Victoria Environmental Law Center