



Habitat Law in Alberta

EXECUTIVE SUMMARY

Environmental Law Centre

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Environmental
Law Centre

The Environmental Law Centre (Alberta) Society

The Environmental Law Centre (ELC) has been seeking strong and effective environmental laws since it was founded in 1982. The ELC is dedicated to providing credible, comprehensive and objective legal information regarding natural resources, energy and environmental law, policy and regulation in the Province of Alberta. The ELC's mission is to educate and champion for strong laws and rights so all Albertans can enjoy clean water, clean air and a healthy environment. Our vision is a society where laws secure an environment that sustains current and future generations.

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Habitat is essential to the survival of all species. Our activities across the landscape have a significant impact on the habitat of other species. As the human footprint has expanded, we have seen habitat degradation and destruction and its resulting impact on species abundance and distribution.

Habitat laws and regulation are a central component to how we start to address this human footprint. The Environmental Law Centre's (ELC) four-volume series provides a review of habitat law and policy in Alberta. These reports provide a review of statutes that can be used for habitat management and protection in the province; identify legislative barriers facing habitat management and protection; consider approaches in other jurisdictions; and identify a path forward for improving laws and regulations for habitat outcomes.

The volumes are as follows:

- [Habitat Law in Alberta Volume 1: The State of Habitat Laws in Alberta](#)
- [Habitat Law in Alberta Volume 2: Barriers to Habitat Management and Protection in Alberta](#)
- [Habitat Law in Alberta Volume 3: Jurisdictional Review of Habitat Laws](#)
- [Habitat Law in Alberta Volume 4: Recommended Reforms to Habitat Management & Protection Regulations in Alberta](#)

The focus of this four-part series is on the “management” and “protection” of habitat. As such, it aims to cover not only prohibitions in law that may serve to “protect” habitat, but also discretionary decisions that can be used to manage habitat in a way that is responsive to science and known habitat factors. As well, this series of reports looks at codified aspects of habitat management and protection. While policy is often relevant, these reports only highlight certain policies to provide broader context.

For the purposes of these reports the ELC considers the following core components of effective habitat laws:

- 1) Monitoring, assessment, and planning tools which enable large-scale habitat planning to conserve biological diversity and for the recovery of species at risk;
- 2) Area-based conservation tools, including the designation of habitat management areas and protected areas;
- 3) Localized/biophysical conservation, such as protection for species' residence, nests, dens, or other habitat features;
- 4) Mandatory habitat consideration in decision-making and integration of habitat considerations into decisions and authorizations; and
- 5) Effective conservation compliance including enabling the use of administrative orders for habitat protection and administrative penalties and fines that provide an effective deterrence to those impacting habitat.

Figure 1: Core Components of Habitat Laws

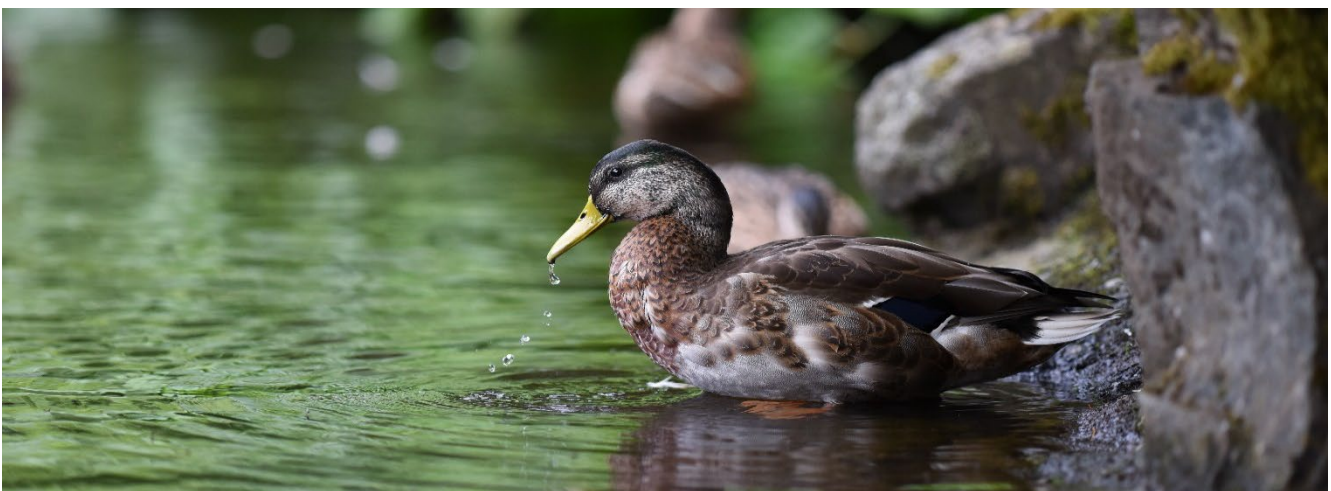


Volume 1: The State of Habitat Laws in Alberta

This volume sets out, in summary form, the broad suite of laws most directly relevant to habitat management in the context of the five core components outlined above. It provides a snapshot of the habitat regulatory tools, both mandatory and discretionary, that are relevant to the Alberta context. Provincial and federal statutes that are most directly related to managing impacts on habitat are highlighted.

This volume highlights the paucity of habitat assessment, monitoring and planning that is required in Alberta law. It also illustrates the various regulatory silos that exist, across departments of the provincial government and between levels of government (municipal, provincial and federal). Habitat is not the focus of a specific regulatory scheme in Alberta, reflecting a tremendous reliance on the exercise of discretion and an increasing relevance of policy to drive towards habitat policy objectives.

Overall, Alberta is lacking in strong, enforceable, and clearly defined habitat protection laws. Rather, habitat management in Alberta is highly discretionary and heavily reliant on individual decisions and voluntary conservation efforts. This means evaluating the overall habitat management system is extremely difficult, as regulatory clarity and accountability for habitat outcomes remains elusive. Where habitat is considered, it is often embedded in individual authorizations and restrictions on resource tenures.



Volume 2: Structural and legal barriers to effective habitat management and protection

Volume 2 of the ELC's report on Habitat Law in Alberta focuses on some of the barriers to more effective habitat management and protection. This report identifies key structural, legal and practical barriers in how habitat is managed in Alberta.

These include:

- fragmented planning and decision-making;
- a major legislative gap caused by the absence of dedicated endangered species legislation;
- a highly discretionary disposition process which does not address habitat needs proactively or effectively;
- a disconnect between law and science (for example in the selection and level of protection provided by protected areas, and listing of species at risk);
- lack of flexibility and resiliency to respond to rapidly changing ecosystem conditions and knowledge; and
- excessive discretion in decision-making that impacts upon habitat and a lack of sufficient mechanisms for democratic accountability, providing limited avenues for individuals to challenge, question or require laws to be upheld.

Insufficient resources also play a significant role in addressing degraded habitats, insofar as there is a lack of funding for stewardship on private lands, and a lack of sufficient enforcement and compliance capacity.

Volume 3: A jurisdictional review

Managing and preserving habitat is a challenge the world over. As the human population continues to rise, encroachment on and conversion of habitat has had a significant impact on species across the globe. This volume reviews approaches to habitat management in other jurisdictions.

Species at risk legislation is reviewed for the Canadian provinces of Ontario and Nova Scotia. The United States Federal *Endangered Species Act (US ESA)* is reviewed due to its long history of implementation and the fact that it has been subjected to significant evaluation and critique. A review of a broader habitat-based approach in the European Union is also conducted. Finally, jurisdictions that are highlighted in the global Environmental Performance Indicators of 2018 (*EPI*) published by the Yale Center for Environmental Law and Policy (including Germany, Zambia and Botswana) are reviewed.

The ELC review suggests that there is no single perfect piece of habitat protection legislation. Nevertheless, many jurisdictions do some things well and Alberta's habitat protection and management regime would do well to incorporate some of these lessons.

For instance, the European Union (EU) Nature Directives stand out for its approach to combining species protection with large-scale habitat planning and protection (e.g. the Natura 2000). Furthermore, while each country within the EU has the discretion to implement the Nature Directives as they see fit, the European Commission requires regular reporting and monitors their status and does not hesitate to enforce them at the European Court of Justice when necessary.

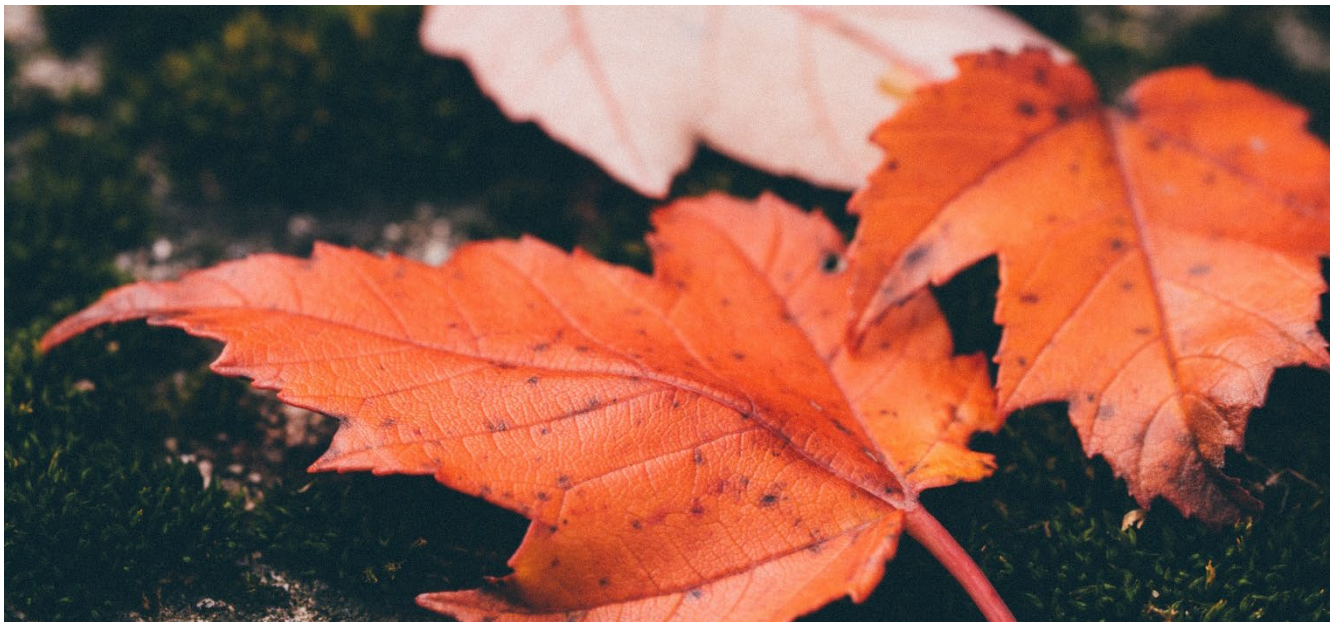
The *US ESA* appears to be at the forefront of working with landowners to protect species and habitat on private land. The Act has incorporated various conservation agreements such as Safe Harbor Agreements, Habitat Conservation Plans, Candidate Conservation Agreements, and more that give US Fish and Wildlife Service and private landowners additional flexibility to overcome perverse incentives and promote conservation on private lands. While the cumulative effect of these types of agreements remains to be seen, early research appears promising. The *US ESA* also

permits more citizen engagement, and, thus, more government accountability than most other pieces of habitat protection legislation. It should be noted that recently several significant changes to the Code of Federal Regulations were made in US that may have impacts on the efficacy of the Act.¹

Within Canada, Ontario's *ON ESA* does well to rely mostly on scientific evidence when it comes to listing and ensure that recovery planning and the government response to these plans are prescribed by legislation.

Yet, in the end, our analysis of the above jurisdictions has shown that even the best habitat protection laws in the world cannot overcome a lack of political or public will. There will always be some way to subvert the law or its enforcement.

Accordingly, legislation is important, but perhaps even more so is the political fortitude necessary to enforce it, as well as a social consensus that the protection of our habitat, species, and biodiversity is urgent and important.



¹ Amendments are made to Title 50 of the Regulation, Parts 17, 402, and 424. See U.S. Fish and Wildlife Service, Endangered Species, online: https://www.fws.gov/endangered/improving_ESA/regulation-revisions.html.

Volume 4: Recommendations for better habitat management

The ELC's fourth volume provides recommendation for clearer and more accountability habitat management. It is recognized that the recommended regulatory approach requires foundational commitments to creating habitat objectives that will guide planning and decision making. It also requires resources to monitor and assess habitat and to ensure there is a suite of programming to address the need to adapt how we manage landscapes as habitat information comes available or changes.

The underlying premise of the recommendations is twofold:

1. manage habitat to avoid species becoming at risk; and
2. where species are at risk, enable a suite of clear prohibitions, clear government direction and programs to restore habitat.



The recommendations are set out in Table 1.

Table 1: Recommendations for better habitat management in Alberta

#	Recommendation
Habitat oriented statutory direction and planning	
1	A statute (Habitat Protection and Management Act) should be drafted and passed to create a governance system and relevant rules to effectively manage and, where required, protect valued habitats, in line with the recommendations herein.
2	Articulate habitat objectives to guide development of habitat monitoring, assessment, and planning.
3	<p>Prescribe a regulatory system that includes effective consideration of “at risk” habitats and habitat aspects of relevance for plants, invertebrate, and fungi (i.e., species that are often overlooked or ignored in legislation).</p> <p>Legislate prohibitions and regulations to appropriately protect and/or manage localized and/or valued biophysical habitat traits, particularly for species at risk and at-risk habitats.</p>
4	Create a statutory “habitat hub” or central registry for habitat relevant data.
5	Mandate the creation of a scientific and technical habitat data committee.
6	Establish a methodology of assessing and evaluating habitat outcomes and thresholds for valued habitats and valued habitat functions. This methodology should be applied consistently across regulatory process and environmental assessments.
7	Establish habitat mapping layers to be used by planners to integrate into statutory plans.
8	Initiate habitat planning at relevant scales with relevant stakeholders to achieve stated habitat policy outcomes.
9	Direct relevant public authorities to implement habitat plans.

Catalyse existing legislative tools	
10	<p>Establish, implement and periodically review disturbance standards using the best available knowledge and integrating cumulative effects.</p> <p>Disturbance standards should be accompanied by scientific rationale. Disturbance standards should be reviewed for accuracy and effectiveness every 5 years. This review should have a regulatory linkage with dispositions so that they can be revised in a sequential fashion to reflect any changes to the standard.</p>
11	<p>Formalize a system of regulation and management of conservation offsets for use towards valued habitats.</p>
12	<p>Integrate substantive adaptation and augmentation language and approaches in resource allocation statutes, regulations, dispositions, and authorizations.</p> <p>“Substantive adaptation” means having clear processes and accountability for adapting regulations, dispositions and authorizations in law, such that evolving habitat knowledge is reflected directly in activities on the landscape and in how discretionary decisions are made.</p>
13	<p>Identify “compensable adaptation” measures and create a compensation system to address these measures.</p>
14	<p>Create and fund through conservation levies to provide for compensation to allow for “compensable adaptation” in certain instances. (Existing mechanism under the Alberta Land Stewardship Act exists, however regulations are required).</p>
Enforcement and compliance	
15	<p>Legislate clear enforcement powers across sectors for habitat management outcomes.</p>
16	<p>Review, evaluate, and, as needed, amend administrative penalties and fines to foster deterrence.</p>
17	<p>Legislate a public investigation trigger process for alleged offences of habitat standards and rules.</p>