



Environmental
Law Centre

An Endangered Species Act for Alberta:

A Draft Bill for Species at Risk Protection in the Province

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THE ENVIRONMENTAL LAW CENTRE (ALBERTA) SOCIETY

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Richard Sniezko-US Forest Service, A group of Whitebark Pines (Jun 8, 2001)

Montana west slope cutthroat (Sept 1, 2011)

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Introduction

The International Union for Conservation of Nature has found that “a quarter of all species face a high risk of extinction” and that “[h]uman activity has severely altered more than 75% of the Earth’s land and freshwater areas and 66% of the oceans.”¹ Clearly, species are facing serious declines and the wildlife in Alberta is no different.

At the time of writing, the federal scientific organizations responsible for the recommendation of species at risk in Canada have recommended the listing of 70 species in Alberta, of which 59 have been federally listed under the *Species at Risk Act*.² For comparison, the provincial *Wildlife Act* lists 35 species.³ The figure below highlights the differences in recommendations and listing federally and provincially.

STATUS OF SPECIES	COSEWIC	FEDERAL SPECIES AT RISK ACT (SCHEDULE 1)	ALBERTA'S WILDLIFE REGULATION (SCHEDULE 6)
Endangered	35	28	24
Threatened	35	31	9
Special Concern	45	35	—

Figure 1: Listing differences between COSEWIC, Federal SARA and Alberta’s Wildlife Regulation Listing of Species

Alberta’s legislative approach to species at risk has been to focus on specific prohibitions related to harming or “hunting” at-risk wildlife listed under the provincial *Wildlife Act* and through conditioning statutory authorizations on public lands. For additional information on current legislation, see [Habitat Law in Alberta Volume 1: the State of Habitat Laws in Alberta](#).⁴

The current provincial approach to the protection and recovery of species at risk is inadequate. Alberta’s species at risk are best served by legislative protections that are timely, habitat-oriented and science-based.⁵

¹ SOS IUCN, “Why Protect Species” online: <https://iucnsos.org/what-we-do/why-protect-species/#:~:text=Species%20and%20their%20populations%20are,pest%20control%20and%20climate%20regulation.>

² *Species at Risk Act*, SC 2002, c. 29 (SARA).

³ *Wildlife Act*, RSC 2000, c. W-10 (*Wildlife Act*).

⁴ Environmental Law Centre, (Edmonton, October 2019), online: <https://elc.ab.ca/wp-content/uploads/2019/10/Habitat-Law-in-Alberta-VOLUME-1-The-State-of-Habitat-Laws-in-Alberta-1.pdf>

⁵ See Chapron, Guillaume, Yaffa Epstein, Arie Trouwborst, and José Vicente López-Bao. "Bolster legal boundaries to stay within planetary boundaries." *Nature Ecology & Evolution* 1, no. 3 (2017): 0086.

Why protect species at risk?

We can look to science, philosophy, Indigenous traditional knowledge, and other fields of study for clear reasons as to why it is critical to protect wildlife and to manage species at risk to ensure their survival. For example, the philosophical idea of the rights of nature argues that beyond a species' utility to humans, species have rights and values unto themselves. The rights of nature philosophy suggests that each aspect of the environment is a "rights-bearing entity and not mere property to be exploited at will" and "acknowledges that nature in all its life forms has the right to exist, persist, maintain and regenerate its vital cycles."⁶ While this report does not take a full rights-of-nature perspective, it does illustrate one of the many reasons why species at risk should be legally protected.

Biodiversity and species at risk protection also have a very human-oriented utility, that is, nature as objects for human consumption and use. This may come in the form of direct harvest, ecosystem functions, and foundations for medicinal and biotechnical benefits.⁷

The valuation of a given species to humans however can often be elusive. The concept of a keystone species highlights how a single species can have a tremendous impact on the surrounding ecosystem (and all the values those ecosystems hold, from intrinsic to human extrinsic value). Keystone species were first identified in 1966 when Dr. Robert Paine highlighted the role that *Pisaster* starfish played in a marine ecosystem.⁸ Since then, further research has confirmed that species diversity is essential to a functioning ecosystem. For example:

- the loss of species, even those with low abundance, can have significant impacts on an ecosystem;
- the preservation of a particular species of concern may be affected by the distribution and abundance of other species; and
- the loss of one species may reverberate to all species in the surrounding ecosystem.⁹

⁶ Global Alliance for the Rights of Nature, "About Us" & "What are the Rights of Nature?" online: <https://www.garn.org/>.

⁷ The extent of present day science and medicine based on nature is well beyond the scope of this report but includes such things as anti-biotics and acetylsalicylic acid. Further nature has inspired a variety of human endeavours and products, from velcro to flight. See Katiyar, N.K., Goel, G., Hawi, S. *et al.* Nature-inspired materials: Emerging trends and prospects. *NPG Asia Mater* 13, 56 (2021). <https://doi.org/10.1038/s41427-021-00322-y>

⁸ Robert T. Paine, "Food Web Complexity and Species Diversity" (Feb 1966) *The American Naturalist* 100:910 65.

⁹ Mary E. Power et al., "Challenges in the Quest for keystones" (Sep 1996) *Bioscience* 46:8 609 at 617.

In any given ecosystem, a keystone species may be a top predator that keeps other species' populations at a manageable level or may be a plant species that feeds pollinators thereby feeding other plants and herbivores in the area.¹⁰

Beyond keystone species, species diversity more generally also has benefits for ecosystem health including that:¹¹

- communities represented by many species are more likely to contain species with particularly important dominant traits than species-poor communities (i.e. communities with few species);
- communities represented by many species contain a greater range of species traits than species-poor communities, and can therefore use resources more completely than species-poor communities; and
- the frequency of facilitative interactions between species could increase as species diversity increases.

Further, there is evidence that a lack of species diversity increases the effect of each extinction event in contrast with an ecosystem with high species diversity.¹² This is by no means an exhaustive argument as to why we should prevent the deterioration of species at risk, but it does serve to suggest the starting point for this report.

Common challenges in species at risk management

A summary of causes of species declines related directly and indirectly to human activities include:

1. Disease introduction,
2. Invasive species impacts,¹³
3. Habitat destruction, augmentation, impairment, and disruption,
4. Direct taking (hunting, trade, cultural, medicinal),

¹⁰ See Paul R. Ehrlich & Harold A. Mooney, "Extinction, Substitution, and Ecosystem Services" (Apr 1983) *BioScience* 33:4 248 at 250 for Costa Rican example online:

<https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=3b32565fc7b74ff31aafa28d17617e2d7791b011>.

¹¹ Owen L. Petchey, "Species Diversity, Species Extinction, and Ecosystem Function" (May 2000) 155:5 *The American Naturalist* at 696 online: https://www.researchgate.net/profile/Owen-Petchey/publication/12540191_Species_Diversity_Species_Extinction_and_Ecosystem_Function/links/5460d49b0cf27487b452610f/Species-Diversity-Species-Extinction-and-Ecosystem-Function.pdf.

¹² Ibid.

¹³ See Tamburello, Natascia, and M. Aline Litt. "Multiple impacts of invasive species on species at risk: a case study in British Columbia, Canada." *FACETS* 8 (2023): 1-13.

5. Indirect taking (harvest by-catch, entrainment, non-target mortality), and
6. Climate change-related stressors on ecosystems.

The diversity and scope of these causes can further be contextualized in terms of regulating or managing human activities in a way that counters or mitigates these causes. These regulatory challenges include:

1. Timely and accurate identification of habitat requirements;¹⁴
2. Science-based listings;
3. Ensuring prohibitions around habitat are enforceable (i.e. clarity in habitat definitions and ability of the regulator to monitor changes in habitat);¹⁵
4. Timely recovery actions;¹⁶
5. Managing pre-existing activities and disturbances (with vested legal interests and compensation);
6. Ensuring sufficient monitoring infrastructure to facilitate compliance;
7. Effective engagement of private landowners where species occur;¹⁷

¹⁴ Palm, Eric C., Shaun Fluker, Holly K. Nesbitt, Aerin L. Jacob, and Mark Hebblewhite. "The long road to protecting critical habitat for species at risk: The case of southern mountain woodland caribou." *Conservation Science and Practice* 2, no. 7 (2020): e219. Hagen, Amy N., and Karen E. Hodges. "Resolving critical habitat designation failures: reconciling law, policy, and biology." *Conservation Biology* 20, no. 2 (2006): 399-407. Nagy-Reis, Mariana, Melanie Dickie, Anna M. Calvert, Mark Hebblewhite, Dave Hervieux, Dale R. Seip, Sophie L. Gilbert et al. "Habitat loss accelerates for the endangered woodland caribou in western Canada." *Conservation Science and Practice* 3, no. 7 (2021): e437. Maltman, James C., Nicholas C. Coops, Gregory JM Rickbeil, Txomin Hermosilla, and A. Cole Burton. "Quantifying forest disturbance regimes within caribou (*Rangifer tarandus*) range in British Columbia." *Scientific Reports* 14, no. 1 (2024): 6520. McLellan, Michelle L., Melanie Dickie, Stan Boutin, Marcus Becker, Bevan Ernst, Darcy Peel, Kathryn L. Zimmerman, and Robert Serrouya. "Prioritizing populations based on recovery potential." *Conservation Science and Practice* 5, no. 4 (2023): e12905.

¹⁵ See for example *Bancroft v. Nova Scotia (Lands and Forests)*, 2020 NSSC 175 (CanLII), <<https://canlii.ca/t/j7xwm>>, retrieved on 2024-07-22. Also see Palm, Eric C., Shaun Fluker, Holly K. Nesbitt, Aerin L. Jacob, and Mark Hebblewhite. "The long road to protecting critical habitat for species at risk: The case of southern mountain woodland caribou." *Conservation Science and Practice* 2, no. 7 (2020): e219. Nagy-Reis, Mariana, Melanie Dickie, Anna M. Calvert, Mark Hebblewhite, Dave Hervieux, Dale R. Seip, Sophie L. Gilbert et al. "Habitat loss accelerates for the endangered woodland caribou in western Canada." *Conservation Science and Practice* 3, no. 7 (2021): e437. Maltman, James C., Nicholas C. Coops, Gregory JM Rickbeil, Txomin Hermosilla, and A. Cole Burton. "Quantifying forest disturbance regimes within caribou (*Rangifer tarandus*) range in British Columbia." *Scientific Reports* 14, no. 1 (2024): 6520.

¹⁶ A recent study found that "allocating more than half of effort to research and monitoring for species with the highest extinction probability is unlikely to abate threats or improve species status. Imperiled species require fast action if extinction is to be avoided (Martin et al., 2012b), and research and monitoring do not contribute directly to meeting recovery objectives". See Buxton, Rachel T., Shamri Hamit, Joshua JW Geauvreau, Sierra Davis, Paul A. Smith, and Joseph R. Bennett. "Balancing research, monitoring, and action to recover Canada's species at risk." *Environmental Science & Policy* 132 (2022): 198-205.

¹⁷ Some studies have observed land owners pre-emptively undermining the appropriateness of their habitat in areas in close proximity to known habitat. see Lueck, Dean, and Jeffrey A. Michael. "Preemptive habitat destruction under the Endangered Species Act." *The Journal of Law and Economics* 46, no. 1 (2003): 27-60. Sorice, Michael G., Wolfgang Haider, J. Richard Conner, and Robert B. Ditton. "Incentive structure of and private landowner participation in an endangered species conservation program." *Conservation Biology* 25, no. 3 (2011): 587-596.

8. Lack of established efficacy in conservation offset programs for species at risk;¹⁸
9. The existence of regulatory and policy incentives that undermine recovery efforts;¹⁹
10. Challenges in relation to recovery and reintroduction to areas previously occupied by species (moving from a “maintain” to a “restore” paradigm of management);
11. Identifying effective responses to address climate-related pressures; and
12. Administrative and regulatory responses to uncertainty.²⁰

Many of these challenges can be seen as major economic challenges as well. One of the central questions around species at risks management is “At what cost?”. This question leads to arguments that society should triage conservation efforts towards most viable populations and/or most “valuable” species.

The *Endangered Species Act* proposed below attempts to address many of these challenges while recognizing certain challenges will require broader societal changes around resource allocation and extraction, power generation, land use planning, and recreation.²¹

The goal of species at risk legislation: delisting species

The goal of species at risk legislation is to delist species because their populations have recovered and are sustainable. Indeed, assessment of the efficacy of a species at risk regulatory system can be done by looking at the extent to which listed species are de-listed, how many species have gone from a high threat of extirpation to a lower threat level, or less ambitiously, whether a species is not extirpated. Admittedly, this approach does not show the causal relationship between a policy approach and species delisting; however, it can be seen as a contributory factor. Unfortunately, using this as a measure of regulatory efficacy tells us that

¹⁸ Walker, Susan, Ann L. Brower, RT Theo Stephens, and William G. Lee. "Why bartering biodiversity fails." *Conservation Letters* 2, no. 4 (2009): 149-157. zu Ermgassen, Sophus OSE, Julia Baker, Richard A. Griffiths, Niels Strange, Matthew J. Struebig, and Joseph W. Bull. "The ecological outcomes of biodiversity offsets under “no net loss” policies: A global review." *Conservation Letters* 12, no. 6 (2019): e12664. Devenish, Katie, Sébastien Desbureaux, Simon Willcock, and Julia PG Jones. "On track to achieve no net loss of forest at Madagascar’s biggest mine." *Nature Sustainability* 5, no. 6 (2022): 498-508.

¹⁹ Economic subsidies continue to drive impacts in critical habitat areas – royalty credits for operators. DiSilvestro, Adriana Maria, and Audrey Irvine-Broque. "Spatializing oil and gas subsidies in endangered caribou habitat: Identifying political-economic drivers of defaunation." *Conservation Science and Practice* 5, no. 10 (2023): e13007.

²⁰ See Meek, Mariah H., Caitlin Wells, Katharine M. Tomalty, Jaime Ashander, Esther M. Cole, Daphne A. Gille, Breanna J. Putman et al. "Fear of failure in conservation: the problem and potential solutions to aid conservation of extremely small populations." *Biological Conservation* 184 (2015): 209-217, which describes the challenges in conservation in the face of fear and uncertainty.

²¹ For additional commentary on some of the deficiencies of the federal Species at Risk Act see Turcotte, Audrey, Natalie Kermany, Sharla Foster, Caitlyn A. Proctor, Sydney M. Gilmour, Maria Doria, James Sebes, Jeannette Whitton, Steven J. Cooke, and Joseph R. Bennett. "Fixing the Canadian Species at Risk Act: identifying major issues and recommendations for increasing accountability and efficiency." *Facets* 6, no. 1 (2021): 1474-1494. Also see Kraus, Daniel, Stephen Murphy, and Derek Armitage. "Ten bridges on the road to recovering Canada’s endangered species." *Facets* 6, no. 1 (2021): 1088-1127.

species at risk recovery is elusive and that no regulatory structures to date have been overly successful.

A 2020 review of the efficacy of the US's *Endangered Species Act* found that using delisting as an evaluation tool is challenged by the fact that not only must there be recovery of a species, but protections must be in place to ensure that future population declines do not recur.²² The 2020 review ultimately concluded that delisting is not an appropriate measurement for success.

Nevertheless, if a species has not been delisted or has not had population increases, one can fairly say that the regulatory approach has not been effective (except for internationally migrating species where impacts may be extra-jurisdictional).

Experience to date

Reviews and evaluation of delisting or downlisting the threat level to species indicate that species at risk regulatory frameworks have had limited effect on the overall trend in maintaining and restoring biodiversity.

For example, in the United States, the *Endangered Species Act* (ESA) has had some success, with the US Fish and Wildlife Service noting in 2021 that "[i]n total, 54 species have been delisted from the ESA due to recovery, and another 56 species have been downlisted from endangered to threatened."²³ However, 23 species were de-listed due to extinction (many of which were listed after their last sighting).²⁴ A 2024 review found that 1677 species still remain listed under the ESA.²⁵

By similar measure, a review of species recovery in Australia between 2000 and 2022 found that only 3 species were delisted by virtue of recovery.²⁶ The review also found that a further 43 species could be de-listed based on the criteria for listing but had not been.²⁷ The review concludes:²⁸

Notwithstanding the recoveries that we document, these are vastly outweighed by the increases in the numbers of species listed over this period, and the general trend for ongoing or accelerating declines for Australia's listed threatened species

²² Andreen, William L. "Separating Fact from Fiction in Evaluating the Endangered Species Act: Recognizing the Need for Ongoing Conservation Management and Regulation." *Idaho L. Rev.* 56 (2020): 39.

²³ [U.S. Fish and Wildlife Service Proposes Delisting 23 Species from Endangered Species Act Due to Extinction | U.S. Department of the Interior \(doi.gov\)](#), Sept 29, 2021, press release.

²⁴ Ibid.

²⁵ Davis, Olivia N., Brenda Molano-Flores, Ya-Wei Li, Maximilian L. Allen, Mark A. Davis, Jean M. Mengelkoch, Joseph J. Parkos III et al. "Tracking species recovery status to improve US endangered species act decisions." *Conservation Science and Practice* (2024): e13159.

²⁶ Woinarski, John CZ, Stephen T. Garnett, Graeme Gillespie, Sarah M. Legge, Mark Lintermans, and Libby Rumpff. "Lights at the end of the tunnel: The incidence and characteristics of recovery for Australian threatened animals." *Biological Conservation* 279 (2023): 109946.

²⁷ Ibid.

²⁸ Ibid. at page 10.

(Bayraktarov *et al.*, 2021; Garnett *et al.*, 2022; Janke *et al.*, 2022). Clearly, on balance, the conservation actions applied to date have been insufficient to recover the majority of Australia's threatened species.

For Canada's part there has been minimal delisting or down-listing since the introduction of the federal *Species Act Risk Act*. One example is the Small Flowered Sand Verbena which is set to be down-listed from endangered to a species of special concern following increased knowledge of the plant's population. While regional recovery of some species has occurred (for instance, the Swift Fox and Peregrine Falcon in Alberta), there remain many challenges in implementing an effective endangered species regulatory framework.²⁹

The authors of the US ESA 2024 review identified several challenges in the ESA processes, including:³⁰

- inconsistent and variable 5-year reviews of species status;
- lack of knowledge and data around species status, threats and effectiveness of conservation measures;
- insufficient funding and resource allocation for long-declining species; and
- prioritization of extinction prevention over species recovery.

It is also evident from the US ESA experience that species at risk management and regulation can require a significant budget.

Although delisting and down-listing have not been extensive under the various species at risk frameworks reviewed as part of this work, this does not mean that regulatory frameworks are not necessary or effective in saving species from further population declines. The failure to effectively delist species comes as no surprise, given that direct and indirect impacts on species and their habitats often continue unabated due to failures to address historical impacts and challenges in both knowing and providing the biophysical space that species need. In other words, the failure to have significant delisting is indicative of the regulatory and management challenge that lies at the heart of species at risk management. The various impacts on species that are incurred by society's current development paradigm need to be reversed.

Constitutional Jurisdiction over Species at Risk

In Canada, all authority to pass legislation federally and provincially is derived from the *Constitution Act, 1867* and before a government can enact law, they must ensure that they have the constitutional authority to do so.

²⁹ See the discussion and review of Kraus, Daniel, Stephen Murphy, and Derek Armitage. "Ten bridges on the road to recovering Canada's endangered species." *Facets* 6, no. 1 (2021): 1088-1127.

³⁰ *Ibid.*

Under the *Constitution Act, 1867* provincial governments are granted the jurisdiction to legislate over matters set out in section 92 and the federal government has jurisdiction over section 91 matters. This is referred to as the division of powers. Each level of government has the jurisdiction to legislate on their respective subject matters, and if they try to pass a law on a subject matter that falls outside of their jurisdiction, it can be declared unconstitutional, *ultra vires* and therefore invalid. While the division of powers assigns authority to each level of government, issues arise because the categories set out in the *Constitution Act, 1867* are not exclusive of all possible legislative topics and are broad. This can result in both levels of government passing overlapping pieces of legislation and certain areas of law are exercisable by both levels of government (concurrent authority). In those cases, the courts may be called upon to distinguish whether a law is intruding upon the other level of government's jurisdiction or whether both laws can exist side by side.

Notably, neither section 91 nor 92 makes any reference to species at risk or wildlife more broadly. Instead, species at risk, have been "considered to fall under mainly provincial jurisdiction: namely, under ss 92(5), (13), (16), and s 109" of the Constitution.³¹ These sections refer to "the management and sale of public lands", "property and civil rights in the province", "all matters of a merely local or private nature", and "all lands, mines, minerals and royalties belonging to the several Provinces of Canada", respectively. Much of this control originates in provincial jurisdiction over public lands (i.e. those lands owned by the Alberta Crown) and resources.

However, in several instances, there is also overlap with federal jurisdiction. Specifically, the federal government has authority over aquatic species due to section 91(12) of the *Constitution Act, 1867* which designates "Sea Coast and Inland Fisheries" as a federal head of power and migratory birds listed under the *Migratory Birds Convention Act, 1994*.³² Additionally, as the owner of all federal lands - such as national parks - the federal government exerts authority over the organisms living on those lands.

The federal government also has jurisdiction over criminal law, although it remains the subject of litigation as to whether the federal government can enact criminal prohibitions regarding species that reside on provincial land and that do not otherwise fall under federal jurisdiction.

Another complicating factor is many activities that impact the environment will cross the jurisdictional buckets around species management. For example, many activities that occur on land have impacts on waterways, and through this, impacts on fisheries. Many of these activities are not regulated federally, although the federal *Fisheries Act* and its prohibitions may apply.

³¹ Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, ss 92(13), (16), & 109; Sara L. Jaremko, "Laws Protecting the Sage Grouse in Alberta as Compared to Saskatchewan and the United States" (15 March 2019) *Canadian Institute of Resources Law Occasional Paper #69* at 4 online: <https://cirl.ca/sites/default/files/Occasional%20Papers/Occasional%20Paper%20%2369.pdf>.

³² Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s 91(12); *Migratory Birds Convention Act, 1994*, SC 1994, c 22.

This includes a variety of areas of provincial jurisdiction around water diversions and other activities that constitute nonpoint source pollution of Alberta’s surface waters.

We consider this jurisdictional dilemma in our report, ***Threatened Jurisdiction: Species at Risk and the Constitution***. While details of the constitutional overlap may be complicated, there is a place for species at risk management at the provincial level and an *Endangered Species Act* for Alberta would be constitutionally valid.³³

The International Level: United Nations Convention on Biological Diversity

In December 2022, the world came together in Montreal for the 15th Conference of the Parties (“COP”) to the United Nations Convention on Biological Diversity. This Convention confirms the critical importance of global biodiversity and recognizes the impact of human activities on the destruction of this biodiversity.³⁴ It also requires all contracting parties to “establish a system of protected areas” (art 8(a)) and to “promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings” (art 8(d)). Similarly, it expects parties to the Convention to “support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced” (art 10(d)). At the most recent COP, the Kunming-Montreal Global Biodiversity Framework was created, setting out “four goals and 23 targets to be achieved by 2030.”³⁵

The goals of the framework identify many of the same themes we will include in our proposed Act, including:³⁶

- that the integrity, connectivity, and resilience of all ecosystems are maintained, enhanced, or restored to substantially increase the area of natural ecosystems by 2050 and the end of human-induced extinction of known threatened species, including a reduction in the extinction rate and risk of all species tenfold by 2050;
- the sustainable use of biodiversity, including ecosystem functions and services, should be valued, maintained, and enhanced; and
- a focus on adequate implementation, including through financial resources.

The achievement of these goals is set out through 23 targets. Targets 1 through 8 under the heading ‘Reducing threats to biodiversity’ are the most relevant for our purposes and we summarize some of the salient points here:³⁷

³³ Manitoba, Ontario, Quebec, Newfoundland & Labrador, New Brunswick, and Nova Scotia all have their own version of a species at risk specific statute.

³⁴ United Nations Convention on Biological Diversity 1992 at page 1.

³⁵ <https://prod.drupal.www.infra.cbd.int/sites/default/files/2022-12/221222-CBD-PressRelease-COP15-Final.pdf>

³⁶ <https://prod.drupal.www.infra.cbd.int/sites/default/files/2022-12/221222-CBD-PressRelease-COP15-Final.pdf>

³⁷ <https://prod.drupal.www.infra.cbd.int/sites/default/files/2022-12/221222-CBD-PressRelease-COP15-Final.pdf>

- end the loss of areas of high biodiversity importance, including ecosystems of high ecological integrity with a goal of close to zero loss by 2030;
- ensure that at least 30% of areas of degraded terrestrial, inland water, and coastal and marine ecosystems are under effective restoration by 2030;
- ensure that at least 30% of areas of degraded terrestrial, inland water, and coastal and marine ecosystems are effectively conserved and managed by 2030;
- ensure urgent management actions to halt human-induced extinction of known threatened species and for the recovery and conservation of species;
- reduce pollution risks and the negative impact of pollution from all sources by 2030; and
- minimize the impact of climate change on biodiversity.

While these targets may not be specifically achieved through the enactment of an *Endangered Species Act*, the focus on increased biodiversity, the end of human-induced extinction, and the management of habitat all underpin why an endangered species-specific act is necessary in Alberta.

Current Species at Risk Legal Framework at the Federal Level

At the federal level, the *Species at Risk Act* (“SARA”) aims 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.”³⁸ As we highlight in our section on constitutional authority above, SARA prohibitions, at least in the first instance, apply primarily to federal lands, aquatic species, and migratory birds. This means that when species at risk are on federal lands, for example in a national park, they are protected under the SARA but when they migrate across provincial borders, they are at the whim of provincial legislation. This has resulted in unequal protection.

The Act establishes the Committee on the Status of Endangered Wildlife in Canada (“COSEWIC”), which meets twice yearly to assess Canadian species and classify them under one of the categories listed in the ‘Categories of Species at Risk.’³⁹ Once a classification has been made, COSEWIC can recommend that any species determined to be at risk be added to the SARA list of protected species – a recommendation which is not binding upon the Minister.⁴⁰ If the Minister chooses to exercise this discretion, he or she must prepare a strategy for the species’ recovery.⁴¹ Based on the recovery strategy, the competent Minister must go on to prepare an action plan,

³⁸ *Species at Risk Act*, SC 2002, c 29, s 6.

³⁹ *Species at Risk Act*, SC 2002, c 29, s 14.

⁴⁰ *Species at Risk Act*, SC 2002, c 29, s 25(3).

⁴¹ *Species at Risk Act*, SC 2002, c 29, s 37(1).

identifying the species' critical habitat, including activities likely to result in its destruction.⁴² The SARA also sets out certain protections for the critical habitat of species at risk, including specifying that no person shall destroy any part of the critical habitat of any endangered, threatened, or extirpated (if reintroduced) species if:⁴³

- a) the critical habitat is on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada;
- b) the listed species is an aquatic species; or
- c) the listed species is a species of migratory bird protected by the MBCA, 1994.

These protections for critical habitat do not exist at the provincial level and, as such, even if a species is listed as at risk under both the SARA and under the *Wildlife Act*, it will have more protection when it is on federally controlled land and less when it crosses a border onto provincial land. This lack of species at risk legislation in Alberta conflicts with the goals of the SARA.⁴⁴

It is critical for this to occur at the provincial level, primarily because most species at risk reside on provincial land. In those cases, unless dealing with an aquatic species or migratory birds, the province will have primary jurisdiction over the management of species at risk. If the species at risk is not located on federal land, nor is an aquatic species or migratory bird, the only way for the federal *Species at Risk Act* to exert its jurisdiction is using a few specific provisions. These include sections 32-33, which enable the SARA to prohibit harm or taking of an individual of a listed species or residence on provincial land after the passage of a Ministerial order which can only be used if the Minister is of the opinion "that the laws of the province do not effectively protect the species or the residences of its individuals."⁴⁵ Another option is section 58(1) which prohibits the destruction of a critical habitat of a species; however, again if located on provincial land, the prohibition only applies if specified in a ministerial order.⁴⁶ Section 61(1) of the SARA enables the Minister to recommend an order which, if passed, would prohibit anyone from destroying any part of the critical habitat of a listed species that is in a province or territory and not located on federal land.⁴⁷ The Minister may recommend a section 61 order if a province, territory, or the Canadian Endangered Species Conservation Council has requested one.⁴⁸ However, the Minister is only required to make an order if they are of the opinion that "there are

⁴² *Species at Risk Act*, SC 2002, c 29, ss 47 & 49(1)(a).

⁴³ *Species at Risk Act*, SC 2002, c 29, s 58(1); Three major legal decisions, *Alberta Wilderness Association v Canada* (Environment), 2013 FCA 190, *Environmental Defence Canada v Canada* (Minister of Fisheries and Oceans), 2009 FC 878, and *David Suzuki Foundation v Canada* (Fisheries and Oceans), 2010 FC 1233 at para 299, also clarified the definition of 'critical habitat'. These cases specified that critical habitat means more than the geophysical attributes required by a species but also includes biological attributes necessary for the survival of the species. These cases also specify that both forms of habitat must be included in a protection order or recovery strategy.

⁴⁴ Shaun Fluker & Jocelyn Stacey, "The Basics of Species of Risk Legislation in Alberta" (2012) 50:1 AB L Rev 95 at 99-100.

⁴⁵ *Species at Risk Act*, SC 2002, c 29, ss 32-34.

⁴⁶ *Species at Risk Act*, SC 2002, c 29, ss 58(1) & 58(4).

⁴⁷ *Species at Risk Act*, SC 2002, c 29, s 61(1).

⁴⁸ *Species at Risk Act*, SC 2002, c 29, s 61(3).

no provisions in, or other measures under, this or any other Act of Parliament that protect the particular portion of the critical habitat, including agreements under section 11 and the laws of the province or territory do not effectively protect the critical habitat.”⁴⁹

Studies have shown that protection offered under the federal *Species at Risk Act* is limited due to the inability to provide SARA protection beyond federal land (with certain exceptions). For example, Clark Bollinger et al. found that in 2020 on average “SARA protects a terrestrial species within only 8.1% of its Canadian range” and “50 terrestrial species receive no protection via SARA within their ranges.”⁵⁰ They found similarly that if provincial and territorial land were added to the protected areas, the protection would nearly double.⁵¹ This provision will ensure cooperation across jurisdictions to help manage species at risk regardless of where they reside.

Finally, section 80 allows the Governor in Council, upon recommendation of the Minister, to issue an emergency order providing for the protection of a listed wildlife species.⁵² The Minister is required to make such a recommendation if they are of the opinion that the species faces imminent threats to its survival or recovery.⁵³ Emergency orders may identify the habitat necessary for the survival or recovery of a listed species—including aquatic species and migratory birds.⁵⁴ When an emergency order applies to species other than an aquatic species or a migratory bird located on land outside of federally owned land, an emergency order is restricted to prohibiting those activities that may adversely affect the species and their habitat but cannot impose obligations, i.e. emergency orders related to provincial lands and non-federal species are prohibitive only and can’t be used to direct specific actions.⁵⁵

In each case, the use of these provisions has occurred on only rare occasions and cannot be relied upon to manage species at risk more generally.

Current Species at Risk Legal Framework in Alberta

Alberta’s species at risk have been managed primarily through the *Wildlife Act*, which is focused primarily on hunting regulation rather than on the management and protection of wildlife or species at risk.⁵⁶ In fact, wildlife legislation in the province derives its roots from British game legislation which, if it had any focus on the protection of species at all, was only to protect animals and their habitat for the purpose of continued hunting. While the current iteration of the *Wildlife Act* has some reference to endangered species and the protection of individual animals and their residences, it is limited in scope. Specifically, the current *Wildlife Act* includes

⁴⁹ *Species at Risk Act*, SC 2002, c 29, s 61(4).

⁵⁰ Clark S. Bollinger et al., “Spatial coverage of protection for terrestrial species under the Canadian Species at Risk Act” (1 Mar 2020) *EcoScience* 27:1 141 at 143.

⁵¹ Clark S. Bollinger et al., “Spatial coverage of protection for terrestrial species under the Canadian Species at Risk Act” (1 Mar 2020) *EcoScience* 27:1 141 at 143.

⁵² *Species at Risk Act*, SC 2002, c 29, s 80(1).

⁵³ *Species at Risk Act*, SC 2002, c 29, s 80(2).

⁵⁴ *Species at Risk Act*, SC 2002, c 29, s 80(4).

⁵⁵ *Species at Risk Act*, SC 2002, c 29, s 80(4)(c)(ii) in contrast with s 80(4)(c)(i).

⁵⁶ *Wildlife Act*, RSA 2000, c W-10.

“designation of protected areas including habitat conservation areas, wildlife sanctuaries, migratory bird lure sites, and wildlife control areas.”⁵⁷ However, it has very little with regard to species at risk and their habitat. This is in part due to a lack of substantive definitions of the terms ‘endangered,’ ‘threatened,’ ‘species of special concern,’ or ‘critical habitat’ and due to the lack of legal protection for habitat.

The Act does provide the Minister with the ability to make regulations that could benefit the habitat of species at risk, including regulations “respecting the protection of wildlife habitat and the restoration of habitat that has been altered, and enabling the Minister to order persons responsible for the alteration to restore the habitat and to charge them with the cost of it if they have failed to effect the restoration” and “respecting the protection of endangered species, the hunting of endangered animals and the possession, importation and exportation of or trafficking in endangered organisms.”⁵⁸ However, no regulations of this nature have been passed at the time of writing.

The impact and scientific basis for actions under the current *Wildlife Act* is also limited as final decision-making rests in the hands of the Minister. For example, if the species at risk committee recommends that a species be protected or listed as at risk, the Minister has the final say and can weigh political, economic, or social reasons alongside the scientific basis for the recommendation. Further, even before getting to the Minister’s decision, there is no requirement for the committee members to have a specific scientific background, nor is there room for Aboriginal traditional knowledge, which may result in a politicized process throughout.

Other legislative instruments are also relevant insofar as species may be protected through proxy prohibitions embedded in statute. Arguably, this is the case with the provincial Public Lands Act, where prohibitions exist against the destruction of public land.⁵⁹ Further, in administering and managing Crown lands, the *Public Lands Act* enables the conditioning of dispositions on Crown land. This is informed by the *Master Schedule of Standards and Conditions* which sets out a variety of species conditions that may accompany specified activities on the landscape.⁶⁰ The *Master Schedule* identifies various operational requirements that can be placed through conditions on authorizations issued on public lands. There is no transparency in the extent to which these conditions are in place and further, the extent to which there is compliance, and the extent to which they are effective in protecting species habitat.

Further, habitat assessments and related prohibitions may find their way into binding regional plans under the *Alberta Land Stewardship Act*. However, this has not been the approach to date, as neither of the currently approved regional plans in Alberta has offered a regulatory approach

⁵⁷ Sara L. Jaremko, “Laws Protecting the Sage Grouse in Alberta as Compared to Saskatchewan and the United States” (15 March 2019) Canadian Institute of Resources Law Occasional Paper #69 at 14 online:

<https://cir.ca/sites/default/files/Occasional%20Papers/Occasional%20Paper%20%2369.pdf>.

⁵⁸ *Wildlife Act*, RSA 2000, c W-10, ss 103(1)(u) & (z).

⁵⁹ *Public Lands Act*, RSA 2000, c. P-40 at s.54.

⁶⁰ Government of Alberta, *Master Schedule of Standards and Conditions* (February 2024), online:

<https://open.alberta.ca/dataset/133e9297-430a-4f29-b5d9-4fea3e0a30c2/resource/ac2391b3-086b-4ab1-996f-62fc36fc3b88/download/fp-master-schedule-of-standards-and-conditions-table-2024-02.xlsx>

to species and habitat. Indeed, frameworks around land disturbance and biodiversity contemplated in the *Lower Athabasca Regional Plan* have failed to be published.

Overall, there is heavy reliance at the provincial level on discretionary tools for species at risk management. The *Model ESA* aims to elevate the rigour and focus of the species at risk management in the province with a clear focus on regulatory tools that focus on both organisms, habitat and ecological communities.

A Model Endangered Species Law for Alberta

Below, we set out the ELC's proposed Model *Endangered Species Act* for Alberta (hereinafter ELC's *Model ESA*). The model provisions appear in blue font, along with annotations providing background information in black.

Legislative drafting is a balance between being prescriptive and being flexible. The focus of *Model ESA* is to ensure sufficient prescriptive approaches such that the recovery of species is not unduly undermined by the exercise of excessive discretion. While policy will have continued relevance to the administration of the Act and its regulations, the reliance on policy instruments is likely to undermine, rather than facilitate recovery. This distinction is evident in the *David Suzuki Foundation v Canada (Fisheries and Oceans)* decision, in which the Federal Court distinguished between policy set out in the Protection Statement for resident killer whales' critical habitat and the required legislative protections under the *Species at Risk Act*.⁶¹ The Court observed that:

Outreach programs, stewardship programs, voluntary codes of conduct or practice, voluntary protocols and/or voluntary guidelines and policy do not legally protect critical habitat within the meaning of section 58 of SARA, and it was unlawful for the Minister to have cited policy documents in the Protection Statement;

The *Model ESA* intends to move species at risk protection in Alberta towards a more strategic, intentional and prescriptive approach to species, habitat and ecological systems. Conservation and habitat stewardship programming and funding will still play an important role.

The *Model ESA* is a clear departure from reliance on public land authorizations and the conditions that may be imposed (via the *Master Schedule of Standards and Conditions*) as this system is lacking in transparency, poses enforcement challenges as it relies heavily on proponent assessments, actions and reporting, and lacks clear legislative accountability.

It must also be acknowledged that the *Wildlife Act* includes the ability to create regulations for the purpose of habitat protection, yet no such regulations have been promulgated to date.

The aim of the *Model ESA* is to provide a clear, transparent and prescriptive management approach that is able to overcome the challenges of species at risk management.

⁶¹ *David Suzuki Foundation v Canada (Fisheries and Oceans)*, 2010 FC 1233 at para 77.

Alberta's Endangered Species Act, SA 2024, c E-[x]

Preamble

The Government of Alberta recognizes that wildlife, in all its forms, has value in and of itself and is valued by Albertans for aesthetic, cultural, spiritual, recreational, educational, historical, economic, medical, ecological, and scientific reasons;⁶²

The Government of Alberta holds and manages Alberta's species for the benefit of all current and future Albertans and for the intrinsic benefit of the species itself;

The Government of Alberta recognizes the importance of protecting and restoring species at risk populations and ensuring that the remaining Alberta species do not become endangered or otherwise at risk;

The precautionary principle shall be employed for the management and protection of Alberta's wildlife and species at risk,

The Government of Alberta recognizes that resource allocation and related economic opportunities and development may need to be curtailed where a species or its habitat may be at risk in the province;⁶³

Albertans recognize that there should be cooperation between governments to maintain and strengthen biodiversity preservation across the province;

The Government of Alberta recognizes the Indigenous peoples of this land and their connection to, and knowledge of, the species and recognizes the importance of traditional knowledge for the management and protection of species in Alberta;

The Government of Alberta recognizes the importance of Indigenous peoples in managing, co-managing and conserving species through the pursuit of nation-to-nation relationships and governance approaches to protecting species at risk and ecological communities; and

Albertans recognize that biological diversity has intrinsic, as well as ecological, social, economic value for our province and that all Albertans have a responsibility to protect it.

Preambles set the stage for the remainder of the contents of the Act. The Alberta *Interpretation Act* states that "[t]he preamble of an enactment is a part of the enactment intended to assist in explaining the enactment."⁶⁴ While they are generally found not to have any force and effect,

⁶² Modeled after *Species at Risk Act*, SC 2002, c 29, preamble.

⁶³ Alana R Westwood et al., "Protecting biodiversity in British Columbia: Recommendations for developing species at risk legislation" (16 May 2019) *Facets* at 140 online: <https://www.zoology.ubc.ca/~bittick/conservation/wp-content/uploads/2019/10/Westwood-et-al.-2019-Protecting-biodiversity-in-British-Columbia-Recommendations-for-developing-species-at-risk-legislation.pdf>

⁶⁴ *Interpretation Act*, RSA 2000, c I-8, s 12(1).

the preamble is often used by Courts to understand later provisions in the Act⁶⁵ and to direct readers to some of the most important legislative themes. However, it is perhaps questionable whether a preamble that is not supported by later provisions can be used for interpretative purposes.⁶⁶

Nonetheless, the preamble and purpose of legislation can set the tone for the legislation, and in the case of species at risk, this has been found to be focused on the issue of urgency.⁶⁷

Therefore, HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Short Title

1 This Act may be cited as the *Endangered Species Act*.

Interpretation

Definitions

2 In this Act

- (a) “activity” means any act, undertaking, including any release of a substance, that is, may or is likely to impact, directly or indirectly, a listed species, a listed species habitat, a listed species critical habitat, or a listed ecological community.
- (b) “appointed officer” means a wildlife officer appointed under section 53 who is an employee of the Crown and subject to the *Public Service Act*;
- (c) “compensable habitat” means the habitat identified pursuant to section 33 that is identified as compensable but does not include critical habitat;
- (d) “critical habitat” means the habitat required to ensure the persistence or recovery of a species or population and that is designated as critical habitat pursuant to section 23 or identified in an order made pursuant to section 35;⁶⁸

How habitat is defined, protected and managed is of central importance and has been the source of past litigation and is an ongoing concern. The aim of critical habitat identification “is to determine which habitats are required for the long-term persistence or recovery of a

⁶⁵ Centre for Constitutional Studies, “Preamble” (4 Jul 2019) online: <https://www.constitutionalstudies.ca/2019/07/preamble/>.

⁶⁶ Kent Roach, “The Uses and Audiences of Preambles in Legislation” (2001) 47 McGill L J 129 at 132.

⁶⁷ *Western Canada Wilderness Committee v. Canada* (Environment and Climate Change), 2024 FC 870 (CanLII), <<https://canlii.ca/t/k539k>>, retrieved on 2024-10-17 and *Athabasca Chipewyan First Nation v Canada (Environment)*, [2011 FC 962](#), [2013] 2 FCR 201,

species.”⁶⁹ Once identified, these areas should be legally protected to ensure species recovery. Importantly, the way in which critical habitat is defined and delineated must be framed in a way that ensures enforceability, which, as we will see, has not been the case under the federal *Species at Risk Act*.

Various definitions of critical habitat have been adopted in other jurisdictions and in academic work. For instance, the *US ESA* defines critical habitat as: “(1) [s]pecific areas within the geographical area occupied by the species at the time of listing, if they contain physical or biological features essential to conservation, and those features may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by the species if the agency determines that the area itself is essential for conservation.”⁷⁰ Others have described critical habitat in contrast with other habitat as “the minimum subset required for persistence and changes in habitat quality outside critical habitat should have relatively less impact on species persistence.”⁷¹ Notably, the definition of critical habitat in the ELC’s *Model ESA* does not refer to species survival as a goal because the standard for recovery is much higher than it is for survival. More generally, recovery is the goal for species at risk in the remainder of the Act and we define what is meant by “recovery” below.

Critical habitat is also the habitat considered most important for protection and should focus on “habitat quality and population dynamics to identify specific habitat components” rather than occurrence maps alone.⁷² This is important because, with historical and ongoing changes to natural habitat, the areas of high occurrence in population numbers may actually be areas of low productivity and low-quality habitat.⁷³ Instead, Julie Heinrichs et al. suggest that “important elements of critical habitat such as individual or groups of breeding habitat patches that make a substantive contribution to long-term regional population persistence” are more important factors to consider.⁷⁴

For example, in a study on Ord’s kangaroo rat, which is present in south-eastern Alberta, Heinrichs and her fellow study authors found that the highest quality habitats “contained the most productive habitat patches in the landscape and appeared to drive the dynamics of this population” even if they only represented a small fraction of the available habitat.⁷⁵ In contrast they found that lower quality habitat did not make “substantive contributions to the persistence of our study species” even if they made up a larger area.⁷⁶ This suggests that determining the

⁶⁹ Julie A. Heinrichs et al., “Assessing critical habitat: Evaluating the relative contribution of habitats to population persistence” (2010) *Biological Conservation* 143 2229 at 2235.

⁷⁰ *Endangered Species Act of 1973*, 16 USC § 35 (1973); Alison Adkins, “Fixing the Holes in the Endangered Species Act” (2021) 14:2 *Ky J Equine Agric & Nat Resources* L 1 at 7.

⁷¹ Abbey E. Camaclang et al., “Current practices in the identification of critical habitat for threatened species” (2014) *Conservation Biology* 29:2 482 at 483.

⁷² Julie A. Heinrichs et al., “Assessing critical habitat: Evaluating the relative contribution of habitats to population persistence” (2010) *Biological Conservation* 143 2229 at 2231.

⁷³ *Ibid.* at 2231.

⁷⁴ *Ibid.* at 2231.

⁷⁵ *Ibid.* at 2234-2235.

⁷⁶ *Ibid.* at 2235.

proper critical habitat is a crucial step in protecting species at risk and that not all habitat is created equal—even with higher occurrence numbers.

In conclusion, “[a]pproaches to assessing critical habitats that rely on short-term occupancy patterns and do not consider long-term population dynamics may undermine conservation efforts by under- or over-estimating the value of habitat patches.”⁷⁷ Another definition of critical habitat considers the primary criteria for identifying critical habitat to be “species persistence, as evaluated in terms of the acceptable threshold extinction risk, population size, or number of patches needed to achieve viable populations over a specified time horizon.”⁷⁸ Each of these concepts should be considered in the critical habitat identification phase.

The identification of habitat therefore challenges the integration of science and the law. Defining critical habitat in a way that is scientifically accurate must be done in the context of precaution and enforceability. Insofar as pervasive data on biophysical traits across the relevant species geography does not typically exist, the question of enforcement of prohibitions arises.

The practice in relation to some species is to identify a collection of biophysical traits that may occur on the landscape as determinative of whether the habitat is “critical. In the absence of significant baseline habitat and biophysical data however, it creates a tremendous enforcement challenge as the Crown must prove that the specific biophysical attributes pre-existed the harm caused by the violating act beyond a reasonable doubt.

For example, Critical Habitat for Boreal Caribou has been defined federally as:⁷⁹

- the area within the boundary of each boreal caribou range that provides an overall ecological condition that will allow for an ongoing recruitment and retirement cycle of habitat, which maintains a perpetual state of a minimum of 65% of the area as undisturbed habitat; and
- biophysical attributes required by boreal caribou to carry out life processes (see Appendix H).

In this regard, the definition combines both the disturbance threshold and biophysical attributes, making enforcement difficult. The federal recovery strategy notes that a “dynamic habitat supply” within the range is required.⁸⁰ The difficulty with this approach is that the given biophysical attributes across the range must be provable beyond a reasonable doubt if the prohibition is to be meaningful. The difficulty in pinning down a clear enforceable area of

⁷⁷ *Ibid.* at 2236.

⁷⁸ Abbey E. Camaclang et al., “Current practices in the identification of critical habitat for threatened species” (2014) *Conservation Biology* 29:2 482 at 483.

⁷⁹ Environment Canada. 2012. Recovery Strategy for the Woodland Caribou (*Rangifer tarandus caribou*), Boreal population, in Canada. Species at Risk Act Recovery Strategy Series. Environment Canada, Ottawa. xi + 138pp.

⁸⁰ At page 32.

critical habitat is illustrated in the recovery strategy's discussion of the "type" of habitat that qualifies as critical.⁸¹

The biophysical attributes for boreal caribou will vary over space and time with the dynamic nature of the boreal forest. In addition, particular biophysical attributes will be of greater importance to boreal caribou at different points in time. Certain biophysical attributes are required more by a local population during different life processes, seasons or at various times over the years.

If the type of habitat required is variable in space and time, the data needs for compliance is going to be constant and evolving.

From a practical perspective this approach to defining critical habitat is also problematic as it assumes a high level of certainty that a specific temporal and spatial arrangement of biophysical attributes in a range will meet the needs of recovery. This overall approach treats assessments and identification of critical habitat too conservatively, and thus undermining a precautionary approach to habitat protection.

A similar approach is seen with trout species at risk in the province.⁸² For this reason, the proposed bill creates two types of habitat that are regulated and requires habitat assessments prior to activities occurring.

- (e) "Crown" means the Crown in right of Alberta;
- (f) "data deficient species" means a species in respect of which the Committee does not have sufficient information to designate further;
- (g) "Director" means, a person designated as a Director for the purposes of this Act by the Minister;
- (h) "ecological community" means an assemblage of species that inhabits a particular area of Alberta and meets the additional criteria specified in the regulations (if any) made for the purpose of this definition.⁸³
- (i) "endangered species" means a species that is facing imminent extirpation or extinction throughout all or a significant portion of its natural range or within its Alberta range;⁸⁴
- (j) "extinct species" means any species that no longer exists;
- (k) "extirpated species" means a species that no longer exists in its historical range in Alberta, but exists elsewhere in the wild;

⁸¹ Ibid. at page 35.

⁸² See Fisheries and Oceans Canada, 2019, Recovery Strategy and Action Plan for the Westslope Cutthroat Trout (*Oncorhynchus clarkii lewisi*) Alberta Population (also known as Saskatchewan-Nelson River Populations) in Canada 2019 [Final] (2019-12-12) https://wildlife-species.az.ec.gc.ca/species-risk-registry/virtual_sara/files/plans/RsAp-TruiteFardeeOuestWestslopeCutthroatTrout-v00-2019-Eng.pdf and Fisheries and Oceans Canada. 2020. Recovery Strategy for the Bull Trout (*Salvelinus confluentus*), Saskatchewan-Nelson Rivers populations, in Canada [Final]. Species at Risk Act Recovery Strategy Series. Fisheries and Oceans Canada, Ottawa. viii + 130 pp. https://wildlife-species.az.ec.gc.ca/species-risk-registry/virtual_sara/files/plans/Rs-BullTroutOmblesTetePlateSaskNelson-v00-2020Sept-Eng.pdf

⁸³ The inclusion of at risk ecological communities occurs under the Australian Environmental Protection and Biodiversity Conservation Act, 1999, No. 91, 1991, as amended.

⁸⁴ Based on *Endangered Species Act of 1973*, 16 USC § 35 (1973), s 3(6) and *Species at Risk Act*, SC 2002, c 29, s 2(1).

- (l) “habitat assessment” means the assessment conducted pursuant to section 31;
- (m) “habitat” means the land, water or air that provides the conditions suitable for a species to carry out its life processes, including breeding, nesting, denning, spawning, rearing, staging, migrating, wintering, feeding, or hibernating;⁸⁵

The Federal Court decision of *Environmental Defence Canada v Canada (Fisheries and Oceans)* illustrates how when defining ‘habitat’ for the purposes of species at risk protection, the definition should be cast broadly. Specifically, to be considered “habitat under the SARA definition, an area must contain features useful to a species. Those features would ensure the species could spawn, rear its young, have available food and free migration passage, among other life functions.”⁸⁶ The Court found that despite ‘habitat’ focusing on a certain location, “it is implicit that the location is only identifiable because special features exist at that location upon which the species depends to carry out its life processes.”⁸⁷

- (n) “habitat recovery team” is the team responsible for the creation of multi-species planning and/or recovery strategies;
- (o) “healthy species” means a species whose population is stable and self-sustaining;
- (p) “intrinsic value” means the essential value of the environment or a component of the environment without reference to its value to human wellbeing;
- (q) “Minister” means the Minister determined under section 16 of the *Government Organization Act* as the Minister responsible for this Act;
- (r) “private land” means lands situated in the Province that are not public lands or lands held by the Crown in right of Canada;
- (s) “public land” means land of the Crown in the right of Alberta;
- (t) “registry” means the registry created in section 47;
- (u) “recovery” means a return to a state in which the risk of extinction or extirpation is within the normal range of variability for the species, as indicated in part by its population and distribution characteristics;
- (v) “recovery strategy” means a strategy prepared under section 22 for the recovery of a species;
- (w) “regulations” means the regulations made under this Act;
- (x) “species” means a species, subspecies, variety or geographically or genetically distinct population of animal, plant or other organism, other than a bacterium or virus, that is wild by nature and is native to Alberta or has extended its range into Alberta without human intervention and has been present in Alberta for at least 50 years.
- (y) “species at risk” means an extirpated, endangered or threatened species or a species of special concern;
- (z) “species of special concern” means a wildlife species that may become a threatened or an endangered species because of a combination of biological characteristics and identified threats;

⁸⁵ Based on the *Endangered Species Act*, SNS 1998, c 11 & *Species at Risk Act*, RSNB 2012, c 6.

⁸⁶ *Environmental Defence Canada v Canada (Fisheries and Oceans)*, 2009 FC 878 at para 51.

⁸⁷ *Ibid.* at para 58.

- (aa) “statutory consent” means, subject to subsection (2), a permit, licence, registration, approval, authorization, disposition, certificate, allocation, agreement or instrument issued under or authorized by an enactment or regulatory instrument;⁸⁸
 - (bb) “survival” means a wildlife species has surpassed a threshold for persistence;
 - (cc) “threatened species” means a species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction – from SARA definitions;
- (2) For greater clarification, the definition of statutory consent does not include any permit, licence, registration, approval, authorization, disposition, certificate, allocation, agreement or instrument issued under or authorized by
- (a) the Land Titles Act,
 - (b) the Personal Property Security Act,
 - (c) the Vital Statistics Act,
 - (d) the Wills Act,
 - (e) the Cemeteries Act,
 - (f) the Marriage Act,
 - (g) the Traffic Safety Act, or
 - (h) any enactment prescribed by the regulations.

Purpose and Administration

Purposes

- 3 The purposes of this Act are
- (a) to protect species at risk and their habitats and to undertake activities, programs, and policies for the recovery of species and ecological communities at risk;
 - (b) to undertake activities, programs and policies for the reintroduction of extirpated species into their natural ranges within Alberta;
 - (c) to prevent species from becoming extirpated or becoming extinct;
 - (d) to prevent ecological communities from becoming at risk and pursuing regulatory actions, programs and policies for the recovery of ecological communities; and
 - (e) to conserve and recover biological diversity in Alberta.

⁸⁸ This provision is modeled after and is consistent with Alberta’s Alberta Land Stewardship Act, SA 2009, c. A-26.8.

The purpose provision sets out the primary goals to be achieved by the *Model ESA* and will form a basis for interpretation of the Act by regulatory decision makers, tribunals and the courts.

Duties of the Government of Alberta

- 4 In the administration of this Act, the Government of Alberta shall exercise its powers in a manner that applies the precautionary principle, which provides that the lack of full scientific certainty shall not be used as a reason for postponing measures to prevent harm to species and their habitat and the long-term viability of recovery of listed species or listed ecological communities.
- 5 The precautionary principle shall be applied to all decisions made under this Act, including but limited to decisions made by the Minister or Director pursuant to this Act.
- 6 In the administration of this Act, the Government of Alberta shall exercise its powers in a manner that recognizes the urgency that is required to maximize the probability of successful recovery of at-risk species and ecological communities.

The precautionary principle is an important guiding tool for decision-makers in the context of species at risk as uncertainty may be used, and has been used, to delay timely and responsive action.⁸⁹ This section of the law is modelled after section 2 of the *Canadian Environmental Protection Act, 1999* and section 391 of the *Australian Environmental Protection and Biodiversity Conservation Act, 1999*⁹⁰.

The precautionary principle has often been cited in Canadian law including at the Supreme Court of Canada in the decision of *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)* where Justice L'Heureux-Dube, for the majority, said that "[s]cholars have documented the precautionary principle's inclusion 'in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment'... As a result, there may be 'currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law.'⁹¹ Specifically in the context of species at risk, the Federal Court in *Western Canada Wilderness Committee* stated that "waiting for consensus among stakeholders and improved scientific data is not an excuse to avoid provisions of the SARA."⁹²

As the Nova Scotia Supreme Court noted, "[t]he precautionary principle is a legislative tool that prevents governments from pointing to imperfect data as an excuse for failing to implement a statutory duty."⁹³ The lack of identified critical habitat should not come at the expense of

⁸⁹ See *Alberta Wilderness Association v. Canada (Environment)*, 2009 FC 710 (CanLII), <<https://canlii.ca/t/24rrf>>

⁹⁰ S.C. 1999, c. 33 and Act No. 91, 1999, respectively.

⁹¹ *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, s 32.

⁹² *Bancroft v Nova Scotia (Lands and Forests)*, 2020 NSSC 175 at para 55 citing *Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*, 2014 FC 148 at paras 71-73.

⁹³ *Bancroft v Nova Scotia (Lands and Forests)*, 2020 NSSC 175 at para 56.

activities that are known to help species at risk. We have also seen this type of opinion espoused by the Federal Court, which has held that “the perfect should not become the enemy of the good” and that “the preparation of a recovery strategy for a species at risk should not be postponed for a lack of full scientific certainty.”⁹⁴ In another case, the Federal Court clearly stated that “endangered species do not have time to wait for [the decision-maker] to get it right.”⁹⁵

His Majesty

7 This Act is binding on His Majesty in right of Alberta.

Indigenous and Treaty Rights

8 Nothing in this Act abrogates or derogates from existing Indigenous and treaty rights recognized and affirmed under section 35 of the *Constitution Act, 1982* as aboriginal rights.

Indigenous Legislative Council

- 9 (1) Within 1 year of proclamation of this Act the Minister shall convene a Species at Risk Indigenous Legislative Council to identify actions, decisions, planning, monitoring and stewardship actions that Indigenous nations recommend for inclusion in the Endangered Species Act, its regulations and policy.
- (2) The Species at Risk Indigenous Legislative Council will provide recommendations and advice to the Minister for matters related to, but not limited to, legislative, regulatory, policy or programming around species at risk.
- (3) This advice to the Minister shall be made public except to the extent that the Council wishes certain information to be held to be confidential.
- (4) The Minister shall direct the drafting of legislative provisions to address the recommendations of the council and those draft provisions will be provided to the council for review.
- (5) The Council may approve the draft provisions for publication;
- (6) Upon publication, the Minister may table a bill to amend this Act accordingly.

10 Council Remuneration

The members of the Committee may be paid remuneration and expense for their services in the amounts that the Minister may set.

⁹⁴ *Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*, 2014 FC 148 at para 71.

⁹⁵ *David Suzuki Foundation v Canada (Fisheries and Oceans)*, 2010 FC 1233 (CanLII), [2012] 3 FCR 136 at para 66.

11 Council Legislative Review

An Indigenous Legislative Council may be reconstituted by the Minister under section 9 at any time and, at a minimum the Council shall be reconstituted within 10 years of the Act coming into force, to allow the Council to review any matter related to the Act.

There has been extensive failure on the part of the colonial governments of Canada and Alberta to effectively engage in environmental management and conservation in a manner that respects historic treaties in Alberta.⁹⁶ Conservation actions have been a part of injustices impacting Indigenous people in Canada and Alberta for over a century, as it is based on dispossession and exclusion.⁹⁷ In this section we propose a system of engagement to drive toward political accountability for Alberta to reflect the interests and preferred approaches of the broader Indigenous community.

Currently, neither the Alberta *Wildlife Act* nor the *Species at Risk Act* trigger a full consultation process. The *SARA* does have a limited consultation process stating that “to the extent possible, the recovery strategy must be prepared in cooperation with (d) every aboriginal organization that the competent minister considers will be directly affected by the recovery strategy.”⁹⁸

Land use planning and management impact Indigenous and treaty rights. For example, a protected area with limits on hunting and fishing may have an impact on traditional hunting and fishing rights and consultation should occur to ensure that these historical rights and treaties are being respected. Hill *et al.* recommend that a consultation record should be included in all recovery strategies, or management plans.⁹⁹

A challenge in the approach suggested in the ELC’s *Model ESA* is how Indigenous communities engage in the council and how best to represent diverse perspectives around the issue of species at risk. It is recognized that Nation-specific approaches to species at risk governance may be preferred which would necessitate changes throughout the Act to reflect alternative governance approaches.

⁹⁶ This is exemplified by litigation around the cumulative effects of development on First Nations, as seen in *Ahey v British Columbia*, 2021 BCSC 1287 (CanLII), <<https://canlii.ca/t/jgpbr>>

⁹⁷ M’sit No’kmaq, Albert Marshall, Karen F. Beazley, Jessica Hum, Shalan Joudry, Anastasia Papadopoulos, Sherry Pictou, Janet Rabesca, Lisa Young, and Melanie Zurba. “Awakening the sleeping giant”: re-Indigenization principles for transforming biodiversity conservation in Canada and beyond.” *Facets* 6, no. 1 (2021): 839-869. Binnema, Theodore, and Melanie Niemi. “let the line be drawn now’: Wilderness, Conservation, and the Exclusion of Aboriginal People from Banff National Park in Canada.” *Environmental history* 11, no. 4 (2006): 724-750. Domínguez, Lara, and Colin Luoma. “Decolonising conservation policy: How colonial land and conservation ideologies persist and perpetuate indigenous injustices at the expense of the environment.” *Land* 9, no. 3 (2020): 65. See also Audrey Turcotte et al., “Fixing the Canadian *Species at Risk Act*: identifying major issues and recommendations for increasing accountability and efficiency” (26 Aug 2021) *Facets* 6:1 at s 2.32.

⁹⁸ *Species at Risk Act*, SC 2002, c 29, s 39(1)(d).

⁹⁹ Audrey Turcotte et al., “Fixing the Canadian *Species at Risk Act*: identifying major issues and recommendations for increasing accountability and efficiency” (26 Aug 2021) *Facets* 6:1 at s 2.32.

Agreements and programs

- 12 The Lieutenant Governor in Council may enter into agreements and may create programs in furtherance of species at risk management in conjunction with Indigenous communities in Alberta.
- 13 The agreements under this section may include:
- (a) the monitoring and assessment of the status of species;
 - (b) the integration, conservation and protection of indigenous knowledge in relation to species, ecological communities and any other matter relevant to the administration of this Act;
 - (c) the setting aside of specific locations of public land for the purposes of indigenous management and conservation;
 - (d) the management or co-management of species, public lands and activities that impact a listed species or listed ecological communities;
 - (e) the creation and funding of guardianship programs; and
 - (f) any other matter that may result in the furtherance of the objective of this Act.

Resolution of Conflicting Provisions

- 14 (1) In the case of a conflict or inconsistency between this Act and any other regulation, Act, or policy, this Act prevails.
- (2) Notwithstanding the *Alberta Land Stewardship Act*, any identification of habitat or critical habitat made pursuant to this Act is deemed to be identified in the regional plan.
- (3) In the event of a conflict between a regional plan and this Act, this Act will prevail.

This section specifies that the protections afforded to species at risk in the province cannot be impacted by other provincial legislation. In particular, the *Alberta Land Stewardship Act* which is the primary land use planning legislation in the province, must ensure that any new or updated regional plans abide by those protections in place for species at risk.¹⁰⁰ Further, existing regional plans will be deemed to identify habitat and critical habitat as it is identified under the *Endangered Species Act*. This is important because, as of writing, only two of seven regional plans have been completed. As such, if this type of provision were in force, going forward, regional planning would have to ensure that all habitat and critical habitat for species at risk is included in land use management.

Designation of officials

- 15 (1) The Minister may by order designate any person as a Director for the purposes of all or part of this Act.

¹⁰⁰ *Alberta Land Stewardship Act*, SA 2009, c A-26.8.

- (2) The Minister may, with respect to any Director, and a Director may, with respect to that Director personally, designate any person as an acting Director to act in the Director's place in the event of the Director's absence or inability to act.
- (3) The Minister may by order designate any person as an investigator for the purposes of this Act.
- (4) A designation under this section may direct that the authority conferred by the designation is to be exercised subject to any terms and conditions that the Minister or the Director prescribes in the designation, including limitations on the scope of the designation.

Species Assessment and Listing

Endangered Species Conservation Committee

- 16 (1) The Minister shall establish and maintain a committee to be known as the Endangered Species Conservation Committee, whose functions are to
 - (a) maintain criteria for monitoring, assessing and classifying species as endangered, extirpated, threatened, or as species of special concern including information based on criteria from the International Union for Conservation of Nature Red List;
 - (b) maintain and prioritize a list of species for which there is a deficiency of data regarding the species population and geographic extent;
 - (c) maintain and prioritize a list of species that should be assessed and classified, including species that should be reviewed and, if appropriate, reclassified;
 - (d) assess, review, and classify species in accordance with the list in (1)(b);
 - (e) assess and identify studies and research that are required to inform decision-making related to listed species;
 - (f) to identify and recruit relevant members of a Recovery Team;
 - (g) to receive and make decisions regarding nominations for the Recovery Team made under this Act;
 - (h) to provide the Minister with annual cost estimates for its work and the work of the Recovery Team, including but not limited to:
 - i. the cost of attending meetings;
 - ii. the cost of research and studies;
 - iii. the cost of management actions and species recovery actions, whether performed on Crown land or private land within the province, and
 - (i) publish all information from subsections (a) through (c) on the Public Registry.

- (2) The Endangered Species Conservation Committee shall be composed of such number of members as may be appointed by the Lieutenant Governor in Council.
- (3) The Lieutenant Governor in Council shall designate one of the members as chair of the Endangered Species Conservation Committee.
- (4) A person may be appointed to the Committee only if the Minister considers that the person has relevant expertise in the following:
 - (a) a scientific discipline such as conservation biology, population dynamics, taxonomy, systematics, or genetics; or
 - (b) Indigenous traditional knowledge.and these member qualifications shall be posted on the Registry.
- (5) Each member of the Committee shall perform their functions and exercise their discretion in an independent manner and shall be responsible to adhere to all conflict of interest guidelines;
- (6) The Committee shall ensure that the list referred to in subsection (1)(b) includes every Alberta species that, has been classified by the federal Committee on the Status of Endangered Wildlife in Canada as extirpated, endangered, threatened or of special concern under the Species at Risk Act; and has not yet been assessed by the Alberta Committee.
- (7) The Committee will provide the Minister with an estimation of costs to perform all its duties set out herein, including:
 - (a) costs associated with the creation and implementation of a recovery strategy;
 - (b) costs associated with the recovery of a species, considering matters relevant to an assessment of these costs, including but not limited to:
 - i. the costs of monitoring and assessment of species;
 - ii. the cost of recovery planning,
 - iii. the cost of research and studies that are identified through recovery planning;
 - iv. the costs of entering into agreements with third parties, pursuant to section 27 of this Act;
 - v. costs of creating and maintaining Indigenous programs for the preservation of species or a geographic area; and
 - vi. any other costs the Committee views as necessary for carrying out its role under this Act.
- (8) The Minister shall publish the cost estimates prepared in section (7) in the Registry.

- (9) The Minister shall ensure that the Committee receives adequate annual funding to perform all duties set out herein.
- (10) The Minister may establish regulations or guidelines respecting the appointment of members and the carrying out of the Committee's functions
- (11) The members of the Committee may be paid remuneration and expense for their services in the amounts that the Minister may set.

It is proposed that the Endangered Species Conservation Committee (the "Committee") be responsible for identifying species at risk in the province based in part on the International Union for Conservation of Nature's Red List (the "Red List"). The Red List was created in 1964 and is a list of the "global conservation status of animal, fungi and plant species" from the International Union for the Conservation of Nature ("IUCN").¹⁰¹ The Red List provides quantitative analyses for the determination of where a species fits within nine clearly defined categories – extinct; extinct in the wild; critically endangered; endangered; vulnerable; near threatened; least concern; data deficient; and not evaluated.¹⁰² In order to determine the proper category for any given species, the Red List sets out quantitative criteria including five criteria used to determine whether a species should be classified in one of the categories considered to be threatened.¹⁰³ The five criteria considered for the ICUN Red List are:¹⁰⁴

1. Declining Population;
2. Geographic Range Size and Fragmentation, Decline or Fluctuations;
3. Small Population Size and Fragmentation, Decline or Fluctuations;
4. Very Small Population or Very Restricted Distribution; and
5. Quantitative Analysis of Extinction Risk.

The listing provisions of the *Model ESA* also set out aspects of three 3 essential components for the operation of an effective Committee: Indigenous knowledge, scientific knowledge, and funding for implementation.

Indigenous knowledge

The inclusion of Indigenous knowledge should be actively pursued throughout the species at risk research, listing, and protection processes. This begins with the decision-makers who will help to incorporate Indigenous worldviews along with Indigenous historical and scientific

¹⁰¹ The IUCN Red List of Threatened Species, "What is The IUCN Red List?" online: <https://www.iucnredlist.org/>.

¹⁰² Standards and Petition Subcommittee of the IUCN Species Survival Commission, "Guidelines for Using the IUCN Red List Categories and Criteria" (Feb 2014) V11 at 8-9 online: <https://www.canada.ca/content/dam/eccc/migration/cosewic-cosepac/f746a679-495f-4678-b24e-27485b09048a/redlistguidelines.pdf>.

¹⁰³ Standards and Petition Subcommittee of the IUCN Species Survival Commission, "Guidelines for Using the IUCN Red List Categories and Criteria" (Feb 2014) V11 at 14 online: <https://www.canada.ca/content/dam/eccc/migration/cosewic-cosepac/f746a679-495f-4678-b24e-27485b09048a/redlistguidelines.pdf>.

¹⁰⁴ Standards and Petition Subcommittee of the IUCN Species Survival Commission, "Guidelines for Using the IUCN Red List Categories and Criteria" (Feb 2014) V11 at 14 online: <https://www.canada.ca/content/dam/eccc/migration/cosewic-cosepac/f746a679-495f-4678-b24e-27485b09048a/redlistguidelines.pdf>.

knowledge into the decision-making process in its entirety.¹⁰⁵ In particular, this is critical for conservation and species protection measures as Indigenous worldviews often include a focus on ecological co-existence and biodiversity, “conceived as respectful and reciprocal relationships between life forces, including between human-nonhuman forces.”¹⁰⁶ Reed et al, have also noted that investments “in the revitalization of Indigenous knowledge systems” needs to occur.¹⁰⁷

An essential component of this must be adherence to Article 31 of the United Declaration of the Rights of Indigenous People which states: ¹⁰⁸

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Scientific knowledge

Under Alberta’s *Wildlife Act*, there are requirements to establish an “independent scientific subcommittee” to study and assess species, although it is likely to be composed primarily of members with a scientific background this is not a legal requirement for specific scientific qualifications.¹⁰⁹ In Ontario, the composition of the Committee on the Status of Species at Risk in Ontario was opened up to those with “community knowledge” which was not clearly defined and critics argued that this opened up the possibility of members from industry or politics joining the Committee.¹¹⁰ The choice to require specific scientific experience will serve to ensure the public feels confident in the expertise of the committee and that the decision-making

¹⁰⁵ M’sit No’kaq, et al., “Awakening the sleeping giant: re-Indigenization principles for transforming biodiversity conservation in Canada and beyond” (27 May 2021) *Facets* 6:839 at 848. Also see Danika Billie Littlechild, Chance Finegan & Deborah McGregor, “‘Reconciliation’ in undergraduate education in Canada: the application of Indigenous knowledge in conservation” (2021) *Facets* 6:665 at 679.

¹⁰⁶ M’sit No’kaq, et al., “Awakening the sleeping giant: re-Indigenization principles for transforming biodiversity conservation in Canada and beyond” (27 May 2021) *Facets* 6:839 at 848.

¹⁰⁷ Reed, Graeme, Nicolas D. Brunet, Deborah McGregor, Curtis Scurr, Tonio Sadik, Jamie Lavigne, and Sheri Longboat. “There is no word for ‘nature’ in our language: rethinking nature-based solutions from the perspective of Indigenous Peoples located in Canada.” *Climatic Change* 177, no. 2 (2024): 32.

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¹⁰⁹ *Wildlife Act*, RSA 2000, c W-10, s 6.

¹¹⁰ Jordanna N. Bergman et al., “How to rescue Ontario’s *Endangered Species Act*: a biologist’s perspective” (15 Jun 2020) *FACETS* at 424 online: <https://www.facetsjournal.com/doi/pdf/10.1139/facets-2019-0050>.

process follows the scientific method. This expertise can then inform, along with Indigenous knowledge, the approaches to species study, assessment and regulation.

Funding for Implementation

The funding aspect is also a priority for the *Model ESA*. The necessity of a requirement for adequate funding is put well by Alana R. Westwood et al. in their discussion of a proposed species at risk law for British Columbia, specifically when they say “[n]o matter how well-crafted the text of a [law], the Act cannot accomplish its objectives unless it is sufficiently financed for people to carry out the programs and activities it prescribes.”¹¹¹ In studies of the US ESA, it was also found that there was a “positive correlation between expenditures as a percentage of funding recommended in recovery [strategies] and positive population trends.”¹¹² Again, this suggests that even the best drafted legislation is only as good as the implementation.

The *Model ESA* identifies the need to identify and reporting on any required ongoing research, existing gaps in research, and estimated budgets moving forward. Once a budget is established, funding should focus primarily on ensuring that the Committee has sufficient resources to complete all necessary research and to adequately assess species across the province in an effort to limit the number of data-deficient species.

Species or Ecological Community Assessment

- 17 (1) The Committee shall prepare and publish a priority assessment list for the purpose of guiding species and ecological community assessments.
- (2) The priority assessment list shall be posted on the Registry on January 1 of every year;
- (3) The Committee shall publish a status assessment for each assessed species or ecological community and that status assessment will be posted on the Registry.
- (4) The status assessment must include:
 - (a) The assessment methodology undertaken to conduct the assessment;
 - (b) An evaluation of the uncertainty in relation to the assessment;

¹¹¹ Alana R Westwood et al., “Protecting biodiversity in British Columbia: Recommendations for developing species at risk legislation” (16 May 2019) *Facets* at 141 online: <https://www.zoology.ubc.ca/~bittick/conservation/wp-content/uploads/2019/10/Westwood-et-al.-2019-Protecting-biodiversity-in-British-Columbia-Recommendations-for-developing-species-at-risk-legislation.pdf>.

¹¹² Martin F.J. Taylor et al., “The Effectiveness of the Endangered Species Act: A Quantitative Analysis” (2005) *Cornell Law Faculty Publications* 924 at 363-364 online: <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1730&context=facpub>.

- (c) An indication of how the precautionary approach is being taken in assessing the status;
 - (d) A statement of whether the species or ecological community should be listed as being at risk as endangered, threatened, or a species of special concern;
- (5) The Committee shall ensure that a review of the status of a species or ecological community that is listed is revisited every 5 years;
- (6) The Committee will receive requests for assessments under section 18 and respond in accordance with section 18.

Request for assessment

- 18(1) A person may request that the Committee undertake an assessment of a specific species or of an ecological community.
- (2) A request under (1) must take the form as set out in the Regulations.
- (3) Upon receipt of the request, the Committee shall decide whether to undertake an assessment within 90 days of receipt of the request.
- (4) Where the committee decides not to assess the species or ecological community that is subject to the request, the Committee shall give reasons for not assessing the species or ecological community and post these reasons on the Registry.
- (5) The Committee shall post the reasons for not conducting a request under this section no later than 90 days from receipt of the request.

Species at Risk List

- 19(1) The Minister shall publish and maintain a Regulation that lists all species and ecological communities assessed and classified under this Act.
- (2) A species may be assessed and classified as secure, threatened, endangered, a species of special concern, extirpated or data deficient as determined by the Committee;
- (3) An ecological community may be assessed and classified as secured, threatened, endangered or data deficient by the Committee.

Listing of Species or Ecological Community at Risk

- 20(1) Where the Committee has assessed a species or an ecological community and has determined that the species or ecological community is endangered, threatened or of special concern, the Committee shall publish a report of this determination and shall

- forward this report to the Minister within 30 days of a completed assessment being posted on the Registry.
- (2) Where the Minister receives a report under this section, the determination set out in the Committee's report, the Minister will amend the List to reflect the determination of the Committee within 6 months of receiving the report;
 - (3) Where the Minister has reason to believe that the Committee has made an error or where there is additional evidence that is deemed necessary to make the determination, the Minister may send the report back to the Committee with the Minister's additional information for reconsideration by the Committee
 - (4) Where the Minister mandates a reconsideration of a report under section (3), the Minister must notify the Committee of the reconsideration within 6 months of receiving the Committee report, failing which no reconsideration under this section will occur;
 - (5) Where the Committee is mandated to reconsider a report pursuant to (3) of this section, the Committee will review the Minister's information and provide an updated report with reasons addressing the Minister's reconsideration request within 9 months of receiving the mandate to reconsider under (3).
 - (6) The Minister shall decide whether to list or to refuse listing within 3 months of receiving the reconsideration report pursuant to (5).
 - (7) Written reasons for the decision under (6) must be posted on the Registry within 3 months of receiving the reconsideration report. Where the Minister fails to make a decision within the timeline in (6) the Minister's shall be deemed to accept the Committee's recommendation and shall amend the list accordingly.

The question of the listing process and whether there should be executive discretion in the listing process has been a long-standing controversy. The heart of the controversy is whether decisions in the initial listing should be solely science-based or should it incorporate other economic and social factors. Under the federal *SARA* for instance some listings have not occurred due to potential impacts on existing harvest rights and industries despite scientific evidence for listing.¹¹³

The approach taken in the *Model ESA* is to create timelines and increase transparency around listing decisions. While the Act does not require a specific scientific listing, it ensures that if

¹¹³ Findlay, C. Scott, Stewart Elgie, Brian Giles, and Linda Burr. "Species Listing under Canada's Species at Risk Act." *Conservation Biology* 23, no. 6 (2009): 1609–17. <https://www.jstor.org/stable/40419200> and Audrey Turcotte, Natalie Kermany, Sharla Foster, Caitlyn A. Proctor, Sydney M. Gilmour, Maria Doria, James Sebes, Jeannette Whitton, Steven J. Cooke, and Joseph R. Bennett. 2021. Fixing the Canadian *Species at Risk Act*: identifying major issues and recommendations for increasing accountability and efficiency. *FACETS*. 6(): 1474-1494. <https://doi.org/10.1139/facets-2020-0064>.

choices not to list a species or ecological community are made contrary to scientific advice, these decisions are public, and the reasoning is provided.

Listed Species and Ecological Communities Recovery Teams

- 21 (1) The Committee will identify and appoint members of a Recovery Team for a listed species or Ecological Community within 90 days of the species listing.
- (2) The Recovery Team will consist of members with experience and knowledge relevant to the species or ecological community for which the recovery team is formed.
- (3) Anyone may nominate any person to the Recovery Team pursuant to the Regulations within 30 days of listing the species.
- (4) Any nominations to the recovery team under (3) of this section must be reviewed by the Committee within 60 days of the nomination, and decide whether:
 - (a) the nominated person should be appointed to the Recovery Team, or
 - (b) the nominated person should not be appointed to the Recovery Team.
- (5) The Committee shall provide reasons for its nomination decision under (4).

Habitat Recovery Teams

- 22 (1) If the Committee deems it necessary to create a habitat recovery team for multiple species or areas with multiple species at risk, they can designate the team as needed.
- (2) A habitat recovery team will be responsible for the creation of a multi-species recovery strategy in the event that the recovery strategy for one species will impact on other neighbouring species at risk or it is otherwise deemed scientifically necessary
- (3) Multi-species recovery strategies will be completed within two years of a listing and shall be made available in the Registry within 12 months of completion

Habitat recovery teams work in tandem to release recovery strategies for more than one species at a time. This is useful if there is an overlap between species' needs or if there are attributes specific to an area or ecosystem. In Canada, there are habitat recovery teams working in British Columbia, including the Garry Oak Ecosystem Recovery Team and the Vancouver Island Marmot Recovery Team.¹¹⁴

These teams focus on an ecosystem rather than on a single species and may be extended in other circumstances "when species overlap substantially in a particular ecoregion (ecosystem-

¹¹⁴ Garry Oak Ecosystems Recovery Team online: <https://goert.ca/>; Marmot Recovery Foundation online: <https://marmots.org/recovery-efforts/recovery-strategy/>.

based) or when a subset of species face clearly defined common threats (e.g., pollutants, invasive species, or a disease).¹¹⁵ However, they should be used only when it is deemed beneficial from an evidence-based perspective and should not be relied upon for cost savings. There is evidence that these plans may result in a lower success rate if they do not receive a proper management focus or “sufficient attention to each species’ need.”¹¹⁶

Recovery Strategy

- 23(1) A recovery strategy shall be prepared by a Species Recovery Team for each species classified as endangered or threatened and the Act within two years of the listing of an endangered or threatened species.
- (2) A recovery strategy prepared for a species under subsection (1) shall include the following:
 - (a) a description of the species and its needs;
 - (b) an identification of the threats to the survival of the species and threats to its habitat;
 - (c) an evaluation of the feasibility of recovery activities, particularly the reintroduction of extirpated species;
 - (d) an identification of the geographic area of the species’ habitat;
 - (e) an identification of the species’ critical habitat to the extent possible, based on the best available information;
 - (f) a list of actions that are required to be taken to recover a species population;
 - (g) a list of research needed to address any uncertainties related to the species, its habitat, threats, and actions that can be taken;
 - (h) a schedule for the research to be undertaken under (g);
 - (i) an identification of any cumulative effects that impact the survival and recovery of the species.
- (3) In identifying critical habitat under (2)(e) the Species Recovery Team must consider the potential future use of habitat by a species and its potential to become critical habitat through natural variability or through ecosystems and species interactions with the habitat.
- (4) Upon completion of the proposed recovery strategy the Minister shall publish the strategy on the Registry.
- (5) Within 60 days after the posting of a proposed recovery strategy that is published in the Registry, any person may file written comments with the Minister

¹¹⁵ Alana R Westwood et al., “Protecting biodiversity in British Columbia: Recommendations for developing species at risk legislation” (16 May 2019) *Facets* at 145-146 online: <https://www.zoology.ubc.ca/~bittick/conservation/wp-content/uploads/2019/10/Westwood-et-al.-2019-Protecting-biodiversity-in-British-Columbia-Recommendations-for-developing-species-at-risk-legislation.pdf>.

¹¹⁶ Martin F.J. Taylor et al., “The Effectiveness of the Endangered Species Act: A Quantitative Analysis” (2005) *Cornell Law Faculty Publications* 924 at 365 online: <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1730&context=facpub>.

- (6) Within 30 days after the expiry of the period referred to in (4) the Minister must consider any comments received, make any changes to the proposed recovery strategy that he or she considers appropriate and finalize the recovery strategy by including a copy of it in the Registry.
- (7) Where a recovery strategy identifies critical habitat, the geographic location of that habitat will be provided to the relevant Ministers that issue statutory consents under:
 - (a) the Water Act;
 - (b) the Mines and Minerals Act;
 - (c) the Forests Act; and
 - (d) the Public Lands Act.
- (8) Where a Minister responsible for the issuance of statutory consents receives a geographic location under (5) the Minister or relevant delegates under the respective Acts may no longer accept applications for statutory consents within the geographic location so identified.

A recovery strategy is the integral planning document for the protection of species at risk and their habitat and completion must be done in a timely and scientific way. While some jurisdictions employ a two-step recovery and action plan process, we have set out a one-step process with a single recovery strategy document with a regulatory implementation plan. This is intended to prevent further delays and to enable the Government of Alberta to come out with a priority action list as soon as the recovery strategy is complete.¹¹⁷ Timing of a recovery strategy is a crucial part of the protection of species at risk. A delay in transition time between listing and the release of a recovery strategy could “place some species in danger of being pushed even closer to the brink of extinction” and/or result in the need for an updated listing—for example, from threatened to endangered.¹¹⁸ In order to be effective, it is important that recovery strategies be completed in a timely manner. At the federal level, the SARA requires the completion of recovery strategies within one year for an endangered species and two years for a threatened species.¹¹⁹ Despite these deadlines, recovery strategies are often delayed resulting in litigation.

In the case of *Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*, the applicants sought declaratory relief regarding the Ministers’ conduct and orders of *mandamus* to compel the Ministers to release the recovery strategies required for the White Sturgeon, Humpback Whale, Marbled Murrelet and Woodland Caribou.¹²⁰ In this decision, the Ministers

¹¹⁷ Alana R Westwood et al., “Protecting biodiversity in British Columbia: Recommendations for developing species at risk legislation” (16 May 2019) *Facets* at 146 online: <https://www.zoology.ubc.ca/~bittick/conservation/wp-content/uploads/2019/10/Westwood-et-al.-2019-Protecting-biodiversity-in-British-Columbia-Recommendations-for-developing-species-at-risk-legislation.pdf>.

¹¹⁸ Maria-Lena Di Giuseppe, “Bridging Science and Law Across Jurisdictions in Canadian Species at Risk Policy: Four Case Studies” (2011) A thesis presented to Ryerson University in partial fulfillment of the requirements for the degree of Master in Applied Science in the Program of Environmental Applied Science and Management Toronto, Ontario, Canada, 2011 at 122.

¹¹⁹ *Species at Risk Act*, SC 2002, c 29, s 42(1).

¹²⁰ *Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*, 2014 FC 148 at paras 2-3.

acknowledged that “SARA does not confer any discretion on the Ministers to extend the time for the performance of their statutory duties with respect to the preparation and posting of proposed and final recovery strategies for species at risk.”¹²¹ Instead, they focus on the time required to develop scientific expertise, organizational capacity issues, and notably scientific challenges in relation to the identification of critical habitat.¹²² We highlight this issue below in our section, enabling an interim habitat protection order that would allow for action prior to the finalization of critical habitat to ensure, as Justice Mactavish held, that “the perfect should not become the enemy of the good.”¹²³

The Court goes on to acknowledge the resource issues that seem to have arisen in the research and publication of these recovery strategies but again highlights that this still “does not address any deterioration in conditions for the four species at issue that may have occurred in the intervening years when the Ministers were in breach of their statutory duties.”¹²⁴ Justice Mactavish also highlights that “responding on an *ad hoc* basis” to litigation is not sufficient and “fails to take into account the fact that Parliament has itself assigned priorities in dealing with these matters” for example with different timelines for different tiers of species at risk.¹²⁵ The ELC’s *Model ESA* has used this same tactic, as the timeline for an endangered species recovery strategy is shorter than for a threatened species which signals their respective priority. Below, ELC’s *Model ESA* has also included a section setting out the requirements for adequate funding in order to address some of the issues raised in this decision.

Similarly, in the federal court decision of *Adam v Canada (Environment)*, the Minister argued that without sufficient scientific information on critical habitat, the recovery strategy could not be released until the summer of 2011 – despite a 2007 due date.¹²⁶ In light of this delay, a group of First Nations and environmental organizations went to the Court to ask for an order declaring that the failure to recommend an emergency order was unlawful or unreasonable.¹²⁷ While the Court was satisfied with the Minister’s promise to release a recovery strategy the following summer, this decision highlights that recovery strategies should be released on time without requiring costly and time-consuming litigation.¹²⁸

The publication of recovery strategies should be done in a way that makes them easily searchable and accessible to the public. Not only will this help to ensure compliance with the Act but it will also help those whose land or activities may be impacted by a recovery strategy’s direction to ensure they know about any restrictions.¹²⁹

¹²¹ *Ibid.* at para 41.

¹²² *Ibid.* at paras 50-53.

¹²³ *Ibid.* at para 71.

¹²⁴ *Ibid.* at para 84.

¹²⁵ *Ibid.* at para 87.

¹²⁶ *Adam v Canada (Environment)*, 2011 FC 962 at para 17.

¹²⁷ *Ibid.* at para 2.

¹²⁸ *Ibid.* at para 76.

¹²⁹ Scott McFatrige & Tony Young, “Species in the Balance: Partnering on tools and incentives for recovering Canadian species at risk” (Feb 2018) *Smart Prosperity Institute* at 32 online: <https://institute.smartprosperity.ca/sites/default/files/sr-02-01-18-final.pdf>.

As the Nova Scotia Supreme Court noted “[t]he precautionary principle is a legislative tool that prevents governments from pointing to imperfect data as an excuse for failing to implement a statutory duty.”¹³⁰ The lack of identified critical habitat should not come at the expense of activities that are known to help species at risk. We have also seen this type of option espoused by the Federal Court who have held that “the perfect should not become the enemy of the good” and that “the preparation of a recovery strategy for a species at risk should not be postponed for a lack of full scientific certainty.”¹³¹ In another case, the Court clearly stated that “endangered species do not have time to wait for [the decision-maker] to get it right.”¹³²

An example of inadequate critical habitat identification in recovery planning can be seen in *Alberta Wilderness Association v Canada (Attorney General)*, the Alberta Wilderness Association (“AWA”) sought judicial review of the ‘Recovery Strategy for the Greater Sage-Grouse (*Centrocercus urophasianus urophasianus*) in Canada’ from January 2008.¹³³ In their judicial review application, the AWA argued that the sage grouse recovery strategy was insufficient because it did not identify any critical habitat and instead relegated any identification of critical habitat to a schedule, where it claimed “several knowledge gaps and technical activities must be addressed before critical habitat can be identified.”¹³⁴ Canada argued that while they could identify habitat, they could not identify critical habitat.¹³⁵ The Court disagreed, finding that because habitat was identified including “habitat that is necessary for survival or recovery”, insofar as known leks where sage grouse underwent their courtship behaviours, it was unreasonable to conclude that no critical habitat could be identified.¹³⁶ In a supplementary judgment, the Court ordered the Recovery Strategy to be redrafted to include all known active leks in Alberta and Saskatchewan and source habitat in the area to be identified as critical habitat.¹³⁷

This section also seeks to address the common issue of having critical habitat integrated into the disposition issuance process. Specifically, the Act notes that once critical habitat is identified relevant Crown Ministers and their delegates can no longer issue dispositions within the areas considered to be critical habitat.

Management Plans

24(1) The Minister shall ensure that a management plan is completed for any species listed as a species of special concern within three years of the listing of the species

¹³⁰ *Bancroft v Nova Scotia (Lands and Forests)*, 2020 NSSC 175 at para 56.

¹³¹ *Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*, 2014 FC 148 at para 71.

¹³² *David Suzuki Foundation v Canada (Fisheries and Oceans)*, 2010 FC 1233 (CanLII), [2012] 3 FCR 136 at para 66.

¹³³ *Alberta Wilderness Association v Canada (Attorney General)*, 2009 FC 710 at para 1.

¹³⁴ *Ibid.* at para 10.

¹³⁵ *Ibid.* at para 54.

¹³⁶ *Ibid.* at para 70.

¹³⁷ *Ibid.* at para 9.

- (2) A management plan prepared for a species under subsection (1) shall include the following:
 - (a) an identification of the threats to the survival of the species and threats to its habitat; and
 - (b) an identification of management strategies to prevent the species from becoming a threatened species.
- (3) In the event of new scientific information, the competent Minister may at any time amend the management plan.
- (4) A management plan shall be made public in the Public Registry within 12 months of the completion of the management plan or 12 months of any amendments.

This section provides a separate planning option for species that were identified as species of special concern. This is a critical step in the management and protection of species at risk as a 2014 Canadian study of federally listed species (Favari et al) found that “for species initially classified as special concern or threatened, deterioration in status was the most common outcome.”¹³⁸ This study argues that this means a listing of special concern suggests further deteriorations which should be taken seriously including with a strong management plan and critical habitat protection.¹³⁹

While the federal SARA does require the preparation of management plans, it does not require the identification of critical habitat. In the creation of management plans under this Act, the Minister is required to identify critical habitat which should help to prevent further deterioration of species’ status.

Regulatory Implementation Plan

- 25(1) Within 6 months of posting the recovery strategy or management plan on the Registry, the Minister shall publish a regulatory implementation plan for the listed species or ecological community.
- (2) The regulatory implementation plan shall include:
 - (a) in the case of a recovery strategy, identification of habitat and critical habitat;
 - (b) actions to be undertaken by the Government of Alberta, the Alberta Energy Regulator, the Natural Resources Conservation Board, the Alberta Utilities Commission, the Alberta Environmental Appeals Board, the Public Lands Appeals Board, and the Alberta Land and Property Rights Tribunal;
 - (c) the provision of fees that may be charged in relation to any parts of administering this Act,

¹³⁸ Brett Favari et al., “Trends in Extinction Risk for Imperiled Species in Canada” (17 Nov 2014) *PLOS ONE* 9(11) online: <https://plos.org/plosone/article?id=10.1371/journal.pone.0113118>.

¹³⁹ Brett Favari et al., “Trends in Extinction Risk for Imperiled Species in Canada” (17 Nov 2014) *PLOS ONE* 9(11) online: <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0113118>.

- (d) an assessment of funds required for monitoring, research and other actions that are required under the Act;
 - (e) the identification of statutory consents that may be impacted by the identified habitat and critical habitat;
 - (f) the identification of regulatory options to amend, suspend or terminate the statutory consents in a manner that addresses the identified threats;
 - (g) in the case of a recovery plan, whether habitat for the species may be considered compensable habitat under section 33,
 - (h) a schedule of activities and timelines for the monitoring and further identification of critical habitat.
- (3) The Regulatory Implementation Plan may include any additional prohibitions or direction that the Minister deems appropriate for the carrying out of the recovery strategy or management plan, including any changes to activities that are identified as threats in the recovery strategy or management plan.
- (4) The regulatory implementation plan must be published on the Registry within 30 days of its completion.
- (5) Upon publication under (4), the regulatory implementation plan will be filed and published in accordance with the *Regulations Act*, RSA 2000, c R-14.

This section reflects an added step over and above the recovery strategy mandated in many other species at risk legislation pieces, such as the federal SARA. The intent of this section is to ensure clarity and enforceability around expectations, directions and management actions that are to be taken as part of a recovery strategy.

This section also ensures a level of accountability following the publication of a recovery strategy and its related actions.

Reintroduction Plan

- 26 (1) For species that are listed as extirpated under this Act, the Committee shall prepare an assessment of the feasibility of the reintroduction of the extirpated species in its Alberta Range.
- (2) The feasibility assessment under section (1) will be completed within 3 years of the listing of the species and will be posted on the Registry.
- (3) Where the reintroduction of the species is deemed to be feasible under section (1), the Committee shall prepare a reintroduction plan within 2 years of the feasibility assessment being posted on the Registry.
- (4) The Committee shall post the reintroduction plan on the Registry upon completion.

- (5) The Committee shall provide the Minister with the Reintroduction Plan upon completion and the Minister shall take the necessary steps to implement the Reintroduction Plan.
- (6) In the creation of recovery strategies, management plans and reintroduction plans, the Minister shall ensure cooperation with the federal government as is necessary and possible to ensure that protection is equal across federal and provincial borders.

Review and reporting of species and ecological community status

- 27(1) Within 5 years of the publication of a Regulatory Implementation Plan the Minister shall conduct a review of the effectiveness of the measures taken in the Plan and publish a report on the effectiveness of those measures.
- (2) Where a review is initiated under section (1), the Minister shall place a notice of the review in the Registry.
- (3) Any person may provide the Minister with information relevant to the review under this section within 90 days of the posting of the notice of the review is posted on the registry.
- (4) Information provided to the Minister will be posted on the Registry within 7 days of receipt.
- (5) Where a review under this section indicates that the contents of the recovery strategy are inaccurate or need to be amended the Minister shall initiate revisions of the recovery strategy under section 23.
- (6) Once a species or ecological community has been deemed to be recovered, the monitoring period will be extended for a final 5 years.
- (7) If a recovered species or ecological community sees a decline, the species or ecological community be relisted as appropriate.

Reporting on outcomes is an essential step to ensure accountability in the implementation of recovery strategies. The first step will monitor recovery steps while subsections 2 and 3 apply in the event that a species is categorized as recovered. The *Model ESA* defines 'recovery' as "a return to a state in which the risk of extinction or extirpation is within the normal range of variability for the species, as indicated in part by its population and distribution characteristics" in section 2(s) above.¹⁴⁰ In particular, subsection (3) works to ensure that changes to population numbers are monitored on an ongoing basis to ensure proactive decision-making and action.

¹⁴⁰ Government of Canada, "Species at risk policy on recovery and survival: final version 2014" at s 3.1 online: <https://www.canada.ca/en/environment-climate-change/services/species-risk-public-registry/policies-guidelines/survival-recovery-2020.html#toc2>.

Data-deficient species and ecological communities

- 28(1) The Committee shall identify a list of species and ecological communities for which there is a data deficiency, and the Committee shall prioritize the list of data deficient species and ecological communities for the purpose of allocating resources for research and study;
- (2) The Committee shall publish an annual report on the status of the priority research list established by subsection (1) and identify those species which have moved out of the data deficient categorization.
- (3) The priority research list and annual report shall be published in the Public Registry.

The category of 'data deficient' is derived from the IUCN's 'Red List' and is intended to mean a species with "inadequate information to make a direct, or indirect assessment of its risk of extinction based on its distribution and/or population status."¹⁴¹ It does not mean; however, that these species should be considered those of least concern.¹⁴² In fact, data-deficient species may actually be "amongst those most likely to be endangered as their abundance is low and sightings are rare" and should be awarded extra time and attention.¹⁴³

It is difficult to identify the most effective management strategy for a data-deficient species and as such we focus on ensuring that ongoing monitoring and research occurs without delay. This provision ensures that a finding of 'data deficient' does not stall progress on further research and identification of at-risk species. This is also an example of the precautionary principle in action as a lack of scientific information should not stall further action.

Community Impact Assessment

- 29(1) For each recovery strategy and reintroduction plan under sections 23 and 26 the Minister may appoint a Community Impact Assessment Committee.
- (2) A Community Impact Assessment Committee will consist of members who reside or occupy the geographic regions where the strategy or plan applies.
- (3) The Committee shall draft terms of reference to engage community members on the threats and activities identified in the plan.
- (4) The Committee shall, following public consultation with an impacted community, publish a Community Impact Assessment Report, which may include:

¹⁴¹ IUCN, "2001 IUCN Red List Categories and Criteria" (Version 3.1) online: <http://www.iucnredlist.org/technical-documents/categories-andcriteria/2001-categories-criteria#categories>.

¹⁴² E.C.M. Parsons, "Why IUCN Should Replace 'Data Deficient' Conservation Status with a Precautionary 'Assume Threatened' Status – A Cetacean Case Study" (7 Oct 2016) 3:196 *Frontiers in Marine Science* at 1.

¹⁴³ E.C.M. Parsons, "Why IUCN Should Replace 'Data Deficient' Conservation Status with a Precautionary 'Assume Threatened' Status – A Cetacean Case Study" (7 Oct 2016) 3:196 *Frontiers in Marine Science* at 1; Jan Borgelt et al., "More than half of data deficient species predicted to be threatened by extinction" (2022) 5:679 *Conservation Biology* at 2.

- (a) recommendations of programs to be developed and deployed in the community in furtherance of the purposes of this act;
- (b) identify areas where conservation agreements or offsetting approaches may be appropriate;
- (c) identify potential costs and benefits of implementing the recovery strategy in the community; and
- (d) any other matter that the committee deems relevant to the community and the implementation of the purposes of this Act.

Species habitat

Activities in species habitat

30 No person shall carry out an activity in species habitat as identified in the recovery strategy except as approved under this Part.

Preliminary critical habitat screening

- 31 (1) Where a person is seeking an approval to carry out an activity in a species habitat, they must apply to the Director for a critical habitat screening by providing a detailed description of the location of the proposed activity.
- (2) The Director must reply to the application within 30 days of receiving the application and must, if the location is within identified critical habitat, notify the applicant that the activity is not permitted, or, where the activity location is within species habitat that is not identified as critical habitat, direct the applicant to provide a detailed habitat assessment pursuant to section 32.

Detailed habitat assessment

- 32 (1) Where a party is directed under section 31 to provide a detailed habitat assessment, the assessment must include;
- (a) the areas for which the assessment was undertaken;
 - (b) identification of any biophysical attributes of the area that constitute habitat that are part of critical habitat as described in the recovery strategy for the species;
 - (c) a detailed description of the activity and the duration of the activity;
 - (d) a detailed description of potential impacts of the activity on listed species and its habitat;
 - (e) identification of areas that the applicant believes qualify as compensable habitat and whether the applicant wishes to proceed with an offsetting plan under sections 33;
 - (f) any other information as requested by the Director.

- (2) Where the Director receives a detailed habitat assessment, the Director shall notify the chair of the relevant species' habitat recovery team and the recovery team shall review the habitat assessment and provide a recommendation to the Director in relation to the determination pursuant to section 33 within 60 days of the notification.
- (3) The Director shall publish the detailed habitat assessment information on the Registry upon receipt.
- (4) A person may file a statement of concern with the Director within 30 days of the assessment being published on the registry.
- (5) Where a person disputes any facts of the detailed habitat assessment the Director must inspect the site of the application to confirm whether the assessment is accurate.
- (6) The Director must provide public notice of the date and time when the inspection took place, the assessment methodology that was used, and the findings of the inspection within 30 days of receipt of notice of disputed facts.
- (7) The Minister shall publish detailed assessment guidelines.
- (8) Where the activity requires an environmental assessment under the *Environmental Protection and Enhancement Act*, the environmental assessment may be deemed to be a detailed habitat assessment so long as the assessment complies with this Act and related guidelines.
- (9) The Minister may promulgate regulations for offset programs that apply to a species' habitat except the species critical habitat, including:
 - (a) The application requirements that must be met to participate in the offset programs;
 - (b) Any fees or compensation schemes that may be used to ensure the implementation of the offset program;
 - (c) The monitoring and follow-up on offset programs to confirm their validity; and
 - (d) Any other matter the Minister considers appropriate for the offset program.

Decision regarding habitat and offsetting

- 33(1) Where the Director has received the detailed habitat assessment under section 32, the Director must decide whether to refuse to approve the activity and, in the case of approval, determine whether the habitat is compensable habitat for which an offset the activity's impacts will be required.

- (2) The Director may issue an approval for the activity without a need to offset the activity's impact only where the Director is satisfied that the impact on the species or its habitat would be negligible.
- (3) In determining whether the impact on the species or its habitat is negligible under (2), the Director shall consider both direct and indirect effects on the species and its habitat and the incremental effects of the activity when considered in the context of cumulative effects on the species or its habitat.
- (4) Where the Director issues an approval under (2), the approval must be published on the Registry.
- (5) Where the Director has determined that offsetting the impacts of the activity is required as part of an activity approval the Director shall give the notice to the party that the party should prepare an offsetting plan for the activity.
- (6) An offsetting plan prepared under this part shall include:
 - (a) The identification of the lands for which an offset will be claimed;
 - (b) The biophysical attributes of the land identified in (a) and how those attributes will contribute to the conservation and restoration of a species and its habitat;
 - (c) The current and future risks that may undermine the effectiveness of the offset;
 - (d) Information regarding how the offsetting lands will be encumbered to ensure against future impairment and damage to the species and its habitat;
 - (e) A monitoring plan for confirming the efficacy of the offset; and
 - (f) Any other matter identified by the Director under (7) or matters required pursuant to Regulations.
- (7) The Director may set out the required conditions and content of an offsetting plan.
- (8) A person may submit an offsetting plan to the Director for a determination under section 34.
- (9) The Director will post the offsetting plan on the Registry.

Decision regarding offsetting plan

- 34(1) Where the Director has received an offsetting plan prepared pursuant to section 33 and is satisfied that the offsetting plan is sufficiently certain to be successfully implemented, the Director may approve the activity.
- (2) In determining whether the offsetting program is sufficiently certain to be successfully implemented the Director must consider:
 - (a) Whether the offsetting lands are or will be properly encumbered to maintain the offset for the duration of the activity, including the full decommissioning and restoration of the original habitat;

- (b) Whether the offsetting lands are prone to direct or indirect influences that may, currently or in the future, undermine the effectiveness of the offset;
 - (c) Whether the offset program and lands are sufficient in area and location to be an effective offset the impacts of the proposed activity; and
 - (d) Whether the biophysical attributes and functions of the offsetting lands are substantially similar to the lands being impacted by the activity.
- (3) The Director must provide published reasons for any decisions under (1) and how consideration was given to those matters set out in (2) on the Registry, prior to the issuance of an authorization under section 33.
- (4) The Director shall report on the progress of an offsetting plan that has issued an approval under (1) every two years from the date of approval.

Critical Habitat Order

- 35(1) Within 180 days after the identification of critical habitat in a recovery strategy, the Minister shall pass an order to control, restrict, or prohibit any use or activity within critical habitat, including any use or activity that occurs outside of the critical habitat that may have a direct or indirect impact on critical habitat.
- (2) The order must identify the threats to the habitat and must set out relevant controls, restrictions and prohibitions to address the identified threats.
- (3) The owner and occupier of lands where critical habitat has been identified must be notified and provided a copy of the regulation within 30 days of the regulation coming into force.

The protection of critical habitat is an essential part of the success of a recovery strategy. Without legal protection, it is unlikely that we will see the outcomes required for the recovery of the species. Studies of the US Endangered Species Act have found that “species with critical habitat were more than twice as likely to have increased in the late 1990s and less than half as likely to have declined during the early 1990s than species without critical habitat.”¹⁴⁴ Similarly, research has found that species-specific protections, including critical habitat, were more successful than those in large-scale protection areas.¹⁴⁵ A 2005 study found that “species with critical habitat for two or more years were less than half as likely to be declining (i.e. more likely to be stable or improving) in the early period and more than twice as likely to be improving in the late period, as species without such critical similar habitat.”¹⁴⁶

¹⁴⁴ Amy N. Hagen & Karen E. Hodges, “Resolving Critical Habitat Designation Failures: Reconciling Law, Policy, and Biology” (2006) *Conservation Biology* 20:2 399 at 400.

¹⁴⁵ Amy N. Hagen & Karen E. Hodges, “Resolving Critical Habitat Designation Failures: Reconciling Law, Policy, and Biology” (2006) *Conservation Biology* 20:2 399 at 400.

¹⁴⁶ Martin F.J. Taylor et al., “The Effectiveness of the Endangered Species Act: A Quantitative Analysis” (2005) *Cornell Law Faculty Publications* 924 at 362 online: <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1730&context=facpub>.

The Federal Court has considered the need for critical habitat in the context of the SARA in the decision of *David Suzuki Foundation v Canada (Fisheries and Oceans)*.¹⁴⁷ Section 58 of SARA provides for the protection of identified critical habitat protection. The court observed that this section “provide for compulsory and non-discretionary legal protection from destruction for the identified critical habitat of listed” species.¹⁴⁸ In this case the federal government had asserted that it would rely on discretionary protection under the federal *Fisheries Act*, to protect a species. The Court distinguished between the “compulsory non-discretionary critical habitat protection scheme under the SARA” and “the discretionary management scheme of the *Fisheries Act*”, noting that the *Fisheries Act* scheme was not equivalent and would not adhere to the intent of the legislation.¹⁴⁹ The Court specifies that a discretionary scheme would not apply because the SARA specifies that provisions requiring critical habitat be “legally protected” “leaves little ambiguity as to the intent of Parliament: critical habitat must be preserved through legally enforceable measures.”¹⁵⁰ This section also differentiates between policy “which cannot bind the Minister” and “laws that legally protect critical habitat from destruction” which is a distinction clearly recognized by the Federal Court.¹⁵¹

Timing, including the short 180-day turnaround is also important, as American studies have found that not only does listing enhance recovery over time but that the longer a species is listed, if followed up with critical habitat protections, the more likely they are to be improving which suggests that “measures act cumulatively over time.”¹⁵²

Existing Dispositions in Critical Habitat

- 36(1) Where a statutory consent exists on public land at the time of the identification of critical habitat, the Director shall notify the disposition holder of the location of the critical habitat within 30 days of the critical habitat being identified.
- (2) The disposition holder may apply to terminate or amend their disposition to remove the critical habitat from the disposition area.
- (3) Upon receipt of an application under (2) the Director shall refer the proposed amendment to the relevant Minister and the Minister shall make the requested amendment so long as no direct or indirect effects on any critical habitat result from the amendment or termination.
- (4) The disposition holder may apply to amend their statutory consent to undertake activities beneficial to critical habitat and the Minister may agree to provide compensation for the amended statutory consent.

¹⁴⁷ *David Suzuki Foundation v Canada (Fisheries and Oceans)*, 2012 FCA 40.

¹⁴⁸ *Species at Risk Act*, SC 2002, c 29, s 58; *David Suzuki Foundation v Canada (Fisheries and Oceans)*, 2012 FCA 40 at para 8.

¹⁴⁹ *David Suzuki Foundation v Canada (Fisheries and Oceans)*, 2012 FCA 40 at para 109.

¹⁵⁰ *David Suzuki Foundation v Canada (Fisheries and Oceans)*, 2012 FCA 40 at para 114.

¹⁵¹ *David Suzuki Foundation v Canada (Fisheries and Oceans)*, 2010 FC 1233 at para 76.

¹⁵² Martin F.J. Taylor et al., “The Effectiveness of the Endangered Species Act: A Quantitative Analysis” (2005) *Cornell Law Faculty Publications* 924 at 361 online: <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1730&context=facpub>.

- (6) Any disposition granted under any other Act that is subject to renewal shall not be renewed if critical habitat has been identified within the disposition area.
- (7) Notwithstanding (1), a disposition may be renewed where the disposition is amended under section (2).
- (8) Where the Minister deems that a disposition is not able to be maintained without violating the critical habitat order and the statutory consent is either not subject to renewal or is not subject to renewal within 5 years of the critical habitat regulation coming into force, the Minister may terminate the disposition with compensation being payable in the amount to be determined under the Regulations.
- (9) Compensation payable under (6) is to be paid from the Conservation Fund.
- (10) The Minister shall give the person holding the disposition notice that there is the intention to terminate the disposition and the compensation that will be provided under this section.
- (11) If the person disagrees with the Minister's determination of the fair market value of the land, apply to the Land and Property Rights Tribunal for a determination compensation payable on the date of the notice.
- (12) For the purpose of making a determination under subsection (9), the Land and Property Rights Tribunal may exercise the powers given to it pursuant to section 28 of the Expropriation Act and may also make any order as to costs that it considers appropriate.
- (13) The applicant under subsection (9) and the Minister may, within 30 days after receiving notice of the determination of the Land and Property Rights Tribunal, appeal the determination to the Court of Appeal, and section 37 of the *Expropriation Act* applies to the appeal.
- (14) Any compensation payable under this section must consider whether the disposition is subject to renewal and the impact of section 43 on the amount of fair compensation payable.

This section is aimed at addressing a key challenge in habitat management, that of historically granted and vested legal rights to carry out activities that have had, are having or may have impacts on species, species habitat and ecological communities. The approach taken by this Act is to provide a mechanism to revisit and potentially compensate (through) the creation of a conservation fund, for the amendment, termination or suspension of a statutory consent impacted by the Act and its prohibitions. The provisions related to compensation are modelled after section 19 of the *Public Lands Act* in Alberta.

Conservation Agreements

- 37(1) Where critical habitat has been identified on private lands, the Minister may enter into a Conservation Agreement with the owner or occupier of the land in furtherance of the species recovery.
- (2) Upon a Conservation Agreement being executed between an owner or occupier of land and the Minister under this section, sections 51 and 56 no longer apply.

Habitat Protection Order

- 38(1) The Director may make a Habitat Protection Order described in subsection (2) if a species faces imminent extirpation in a geographic range without immediate action.
- (2) A Habitat Protection Order shall include,
- (a) spatial boundaries for the Order;
 - (b) specific prohibitions related to the protection of the species;
 - (c) positive actions, including habitat restoration and reclamation, to improve species population numbers;
 - (d) the person or persons that are subject to the Order; and
 - (e) the duration of the Order.
- (3) Habitat Protection Orders can be initiated prior to a species being formally listed and prior to the publication of the recovery strategy.

Emergency Protection Order

- 39 The Director may issue an emergency protection order to a person to stop engaging in or not to engage in an activity if the Minister has reasonable grounds to believe that, by engaging in the activity, the person would
- (a) kill, harm, harass, destroy or take an individual of a listed organism;
 - (b) damage or destroy the designated critical habitat of a listed wildlife species; or
 - (c) kill, harm, harass, destroy or take an individual of an organism listed under the federal *Species at Risk Act* but not yet listed pursuant to this Act.

Interim Habitat Conservation Order

- 40(1) The Director may issue an interim habitat conservation order for the period of time from when the species is listed and prior to the completion of the recovery strategy.
- (2) An interim habitat conservation order shall set out;
- (a) the geographic area to which the order relates;
 - (b) the activities that are subject to the order;
 - (c) the duration of the order;
 - (d) to report periodically to the Director;

- (e) to submit to the Director any information, proposal or plan specified by the Director setting out any action to be taken by the person with respect to the subject-matter of the order, and
 - (f) any other matters may be considered necessary to conserve the habitat of the listed species for the interim period.
- (3) An interim habitat conservation order shall be served on the person to whom it is directed.

Amendment and cancellation of habitat protection orders

- 41 (1) The Director may
- (a) amend a term or condition of, add a term or condition to or delete a term or condition from a habitat protection order,
 - (b) cancel a habitat protection order, or
 - (c) correct a clerical error in a habitat protection order.
- (4) The Director may amend a habitat protection order by adding to the list of persons to whom the order is directed.
- (5) The Director may exercise powers under subsection (1) or (2) notwithstanding that the original habitat protection order may have been issued by an inspector or investigator.
- (6) A copy of a habitat protection order amended under subsection (1) shall be served on the same person to whom the original order was directed.
- (7) A copy of a habitat protection order amended under subsection (2) must be served on
- (a) any person whose name was added to it, and
 - (b) the same person to whom the original order was directed.

Court order for compliance

- 42 (1) If the person to whom a habitat protection order is directed fails to comply with the habitat protection order, the Minister may apply to the Court of King's Bench for an order of the Court directing that person to comply with the habitat protection order.
- (2) This section applies whether or not a conviction has been adjudged against the person to whom the habitat protection order is directed for an offence under this Act in respect of the subject-matter that gave rise to the issuing of the habitat protection order.

Failure to comply with habitat protection orders

- 43 (1) If the person to whom a habitat protection order is directed fails to comply with the habitat protection order, the Director may take whatever action the Director considers necessary to carry out the terms of the order.
- (2) Costs incurred by the Director under this section are recoverable by the Government
- (a) in an action in debt against the person to whom the habitat protection order was directed, or
 - (b) by order of the Minister directing any person who purchases land to which the habitat protection order relates including, without limitation, a purchase on the sale of the land to realize a security interest, to pay to the Minister instead of to the vendor an amount not exceeding the amount owing in respect of the costs.
- (3) If the identity of a purchaser to whom an order could be issued under subsection (2)(b) cannot be ascertained, the Minister may nevertheless issue the order, and may take steps to ensure compliance with the order if the identity of the person becomes known to the Minister after the order is issued.
- (4) For the purposes of this section, the costs referred to in subsection (2) include, without limitation,
- (a) any costs incurred in administering, investigating and responding to
 - (b) any matter to which the habitat protection order relates, and
 - (c) the failure to comply with the habitat protection order.
- (5) A purchaser who pays an amount to the Minister under subsection (2)(b) is discharged from any obligation to pay that amount to the vendor.

Ecological community prohibitions

- 44 (1) No person shall carry out an activity in a listed ecological community except as authorized under this Act.
- (2) A person may apply to the Minister for an authorization to carry out an activity in a listed ecological community where the Minister deems that the activity, in isolation or in conjunction with other activities currently occurring in the listed ecological community, can occur with negligible adverse effects on the ecological community.
- (3) The Minister may pass regulations permitting a class of activities that may occur within a listed ecological community and may pass regulations that govern any terms and conditions regarding the class.
- (4) The Minister may request that the Committee create a plan for an ecological community within a prescribed time.

- (5) A plan under section (4) must be published on the Registry.
- (6) Where a plan identifies activities that may cause harm to the ecological community in a way that would undermine its maintenance or recovery, the Minister shall ensure that the regulations under section (3) prohibit the identified activities.

The protection of ecological communities is an effective way to protect at-risk communities rather than individual species. This concept is borrowed from the *Australian Environmental Protection and Biodiversity Conservation Act, 1999*.

Conservation Fund and Reporting

Conservation Fund

- 45(1) There is hereby established a Conservation Fund that is to be administered and managed by the Minister in a manner that furthers the purposes of the Act.
- (2) The Minister may direct money from the Conservation Fund for
- (a) the preparation of recovery strategies and management plans;
 - (b) activities for the recovery strategy and/or management plan of species at risk in the Province;
 - (c) other activities undertaken by the Endangered Species Conservation Committee;
 - (d) the support of private landowners in the protection of species of risk on private land;
 - (e) costs related to the administration and implementation of Conservation Agreements;
 - (f) the acquisition of land for the maintenance and restoration of species at risk; and
 - (g) any other purpose related to species at risk.

This section focuses on ensuring that species at risk protection and recovery is “well-managed” and distinguished from what Stephen Kearney et al. call ‘paper parks’ or “protected areas designated but never implemented” and instead ensures that not only is there legal protection but there is also “adequate funding and resources provided to undertake effective management of threats.”¹⁵³

Studies, including those by Sarah Bird and her co-authors, have found that “limits in funding and expertise are obvious barriers to full and timely implementation of the law” and that protection

¹⁵³ Stephen G. Kearney et al., “Estimating the benefit of well-managed protected areas for threatened species conservation” (13 Nov 2017) *Fauna and Flora International* at 3 online: <https://www.fullerlab.org/wp-content/uploads/2018/10/Kearney-et-al-in-press.pdf>.

on paper does very little for the populations of species on the ground.¹⁵⁴ Similarly, another American study found that it is the implementation, rather than the quality of a recovery strategy, that results in successes and “there is a positive correlation between expenditures as a percentage of funding recommended in recovery [strategies] and positive population trends.”¹⁵⁵ Finally, adequate funding will also help to ensure that the creation and implementation of recovery strategies are done with independence and with minimization of any perceived or real conflicts of interest.¹⁵⁶ Clearly, this is a critical piece to ensure that the creation of a recovery or management plan results in actual impacts on the species it purports to benefit and fulfills the purposes of this Act.

Note that there are challenges when funding is limited. For example, should funds be triaged to the species that are most at risk, or should they be focused on those species that can more easily be brought back to a recovery status?¹⁵⁷ Similarly, there needs to be some assurance that funds will not be designated entirely to charismatic megafauna and must also be available for plant or insect species.¹⁵⁸ This will be a challenge when designating funds but the priority should be that it is done on a scientific rather than political basis.

It also enables the funding of species at risk protection on private land. This may be beneficial in the event that species at risk reside on private property and in order to fully actualize a recovery strategy, protections need to move beyond provincial and federal borders.¹⁵⁹

Public Registry

46(1) The Minister must establish an electronic registry for the purpose of facilitating public access to documents relating to matters under this Act.

- (2) The Registry shall contain every document required to be included in the Registry by this Act including:
- (a) regulations and orders made under this Act;
 - (b) the Committee’s criteria for the classification of species as endangered, threatened, or special concern;
 - (c) the Committee’s species and ecological community assessments;
 - (d) all recovery strategies, management plans, reintroduction plans, and multi-species strategy;

¹⁵⁴ Sarah C. Bird et al., “Critical habitat designation for Canadian listed species: Slow, biased, and incomplete” (2017) *Environmental Science & Policy* 71 1-8 at 6.

¹⁵⁵ Martin F.J. Taylor et al., “The Effectiveness of the Endangered Species Act: A Quantitative Analysis” (2005) *Cornell Law Faculty Publications* 924 at 363-364 online: <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1730&context=facpub>.

¹⁵⁶ Alana R Westwood et al., “Protecting biodiversity in British Columbia: Recommendations for developing species at risk legislation” (16 May 2019) *Facets* at 142 online: <https://www.zoology.ubc.ca/~bittick/conservation/wp-content/uploads/2019/10/Westwood-et-al.-2019-Protecting-biodiversity-in-British-Columbia-Recommendations-for-developing-species-at-risk-legislation.pdf>.

¹⁵⁷ Eric Biber, “Reforming the California Endangered Species Act” (2021) 44:2 *Environs: Env't L & Pol'y J* 113 at 140.

¹⁵⁸ *Ibid.*

¹⁵⁹ Audrey Turcotte et al., “Fixing the Canadian *Species at Risk Act*: identifying major issues and recommendations for increasing accountability and efficiency” (26 Aug 2021) *Facets* 6:1 at 483.

- (e) the priority research list and annual reports on the status of data-deficient species;
 - (f) any documents reporting on outcomes of a recovery strategy, management plan or offsetting plan;
 - (g) any permits issued under this Act; and
 - (h) any policies, guidelines and directives that may be published in relation to any matter under this Act.
- (3) The Minister may refuse to disclose information if the disclosure could reasonably be expected to result in damage to, or interfere with the conservation of, an endangered, threatened or vulnerable species.

Annual Report

- 47 The Committee shall submit an annual report to the Minister which shall include an summary of its work pursuant to this Act including the updated classification of each species that the Committee had classified since its last annual report and the reasons for the classification.
- 48 The Committee's report shall be made public within 6 months of release and shall be released in the Registry
- 49 In the event that a report is more than 12 months delayed, any individual can make a formal request for the release of the delayed report and the Minister must respond with either the finalized report or a written explanation for the delay within 60 days.

The public release of these annual reports is an important requirement to ensure that up-to-date information is available to the public and to allow for public oversight. This information should be made available "for free, without delay, in formats that are transferable, interoperable, and archived in perpetuity."¹⁶⁰ This section also provides individuals with recourse if the Minister does not abide by the above provisions.

General Prohibitions and Permits

General Prohibitions

- 50 (1) No person shall
- (a) kill, harm, harass, capture, destroy, or take an individual of an organism that is listed as an extirpated species, an endangered species or a threatened species;
 - (b) possess for sale, offer for sale, sell, buy, trade or barter an endangered or threatened species or any part or product thereof;

¹⁶⁰ Alana R Westwood et al., "Protecting biodiversity in British Columbia: Recommendations for developing species at risk legislation" (16 May 2019) *Facets* at 142 online: <https://www.zoology.ubc.ca/~bittick/conservation/wp-content/uploads/2019/10/Westwood-et-al.-2019-Protecting-biodiversity-in-British-Columbia-Recommendations-for-developing-species-at-risk-legislation.pdf>.

- (c) destroy, disturb or interfere with or attempt to destroy, disturb or interfere with the specific dwelling place or area occupied or habitually occupied by one or more individuals or populations of an endangered or threatened species, including the nest, nest shelter, hibernaculum or den of an endangered or threatened species; or
 - (d) contravene any orders issued pursuant to this Act.
- (4) These prohibitions come into effect immediately after a species receives a listing as either extirpated, endangered, or threatened
- (5) If a species is designated as special concern and prohibitions are included in the plan for a species of special concern, these same prohibitions apply immediately upon the publication of the plan.

The focus of these prohibitions is primarily on the fact that they come into effect immediately after a species receives a listing of endangered or threatened and do not require a complete recovery or management plan or a critical habitat order. This will ensure that in the interim between the listing of a species and the publication of further recovery work, protections will be in place. One of the main themes throughout this proposed legislation is the minimization of delay and this provides another option in this regard.

Duty to Notify

- 51 Any person who causes, either directly or indirectly, harm, alteration or disruption of a listed species, a species habitat or listed ecological community without a permit must notify the Minister within 36 hours, in a form as set out in the regulations.

Permits/Licenses

- 52 (1) The Minister may issue a permit that authorizes the person to engage in an activity specified in the permit that would otherwise be prohibited as it relates to a listed species or a listed ecological community in Alberta.
- (2) Notwithstanding subsection (1), the Minister may not authorize any permit in critical habitat except where that permit is required to assist in the recovery of the species and its critical habitat or where there is a risk to human safety.
- (3) The Minister may issue a permit under this section only if,
- (a) the Minister is of the opinion that the activity is necessary for the protection of human health or safety; or
 - (b) the Minister is of the opinion that the activity will benefit the recovery of species at risk.
- (4) A permit issued under this section may contain such conditions as the Minister considers appropriate, including but not limited to:
- (a) setting the time during which the permit applies;

- (b) limiting the circumstances in which the permit applies;
- (c) require any steps be taken before the permit takes effect;
- (d) require the monitoring and reporting required in relation to the permitted activity and its impact on a listed species or ecological community;
- (e) require security in an amount necessary to ensure any reclamation, monitoring or mitigation measures;
- (f) require the permit holder to restore or remediate the impact caused by the activity;
- (g) requiring the permit holder to cease operations or activities in prescribed circumstances;
- (h) requiring the permit holder to implement follow-up programs in relation to the activity;
- (i) requiring the decommissioning of reclamation of any structure or land; and
- (j) require the undertaking of a specific study or research.

(5) The Minister may suspend or terminate a permit where the holder of the permit has:

- (a) violated the terms of the permit;
- (b) is indebted to the Crown; or
- (c) has failed to meet any obligations set out in this Act or regulations.

The inclusion of permitting options attempts to recognize that some activities and developments may be beneficial or at least compatible with species at risk protection and recovery. The ELC's *Model ESA* however takes a different approach to critical habitat and habitat management for listed species and ecological communities. This approach recognizes that the permitted system can become a loophole in protection of critical habitat protections. This can be seen in Ontario where extensive permitting has occurred,¹⁶¹ and federally, where permitting can be seen to be failing the intention of the legislative scheme.¹⁶² A search of the SARA permit database indicates that the permitting of activities with incidental but clearly avoidable impacts are being issued. For example permits have been issued for the expansion of a scientific facility (SARA-OR-2024-0873), the construction of new pipelines 21-HCAA-02758, the withdrawal of water for hydrostatic testing and horizontal drilling 21-HCAA-02501, the building of water course spans to facilitate ongoing off high way vehicle recreational access (20-HCAA-01375).¹⁶³ In this way the permitting scheme can be seen to facilitate ongoing yet avoidable impacts.

¹⁶¹ See Office of the Auditor General of Ontario: Value-for-Money Audit: Protecting and recovery Species at Risk, November 2021, online: https://www.auditor.on.ca/en/content/annualreports/arreports/en21/ENV_ProtectingSpecies_en21.pdf

¹⁶² See letter of Katie Morrison, to the federal Ministers of Environment and Climate Change Canada and Fisheries and Oceans Canada, Dated May 12, 2022, which detail several issued permits under SARA, online: https://law.ucalgary.ca/sites/default/files/teams/4/CPAWS%20Letter%20Re%20Sec%2073%20SAR%20Permit%20Posting_12May22.pdf

¹⁶³ See the Species at Risk Registry permit database online: <https://species-registry.canada.ca/index-en.html#/permits?sortBy=issueDate&sortDirection=desc&pageSize=10>

The inclusion of permitting options attempts to recognize the need for ongoing development while also limiting the impacts of allowable activities on species at risk and their habitat. However, it is important to note that when permitting is available, it may have the effect of lessening the protective potential of the legislation and, thus, should be available only within limited circumstances and with limited discretionary provisions.

In this case, permits broaden the scope of the legislation and may recognize extenuating circumstances but should not be used as a carte blanche to impede on otherwise protected land.

Enforcement

Appointed Officers

- 53 (1) The Minister may appoint any person with suitable qualifications and experience as a conservation officer for the purpose of the Act and the regulations.
- (2) The following individuals are conservation officers by virtue of their appointments to the offices respectively referred to, namely individuals appointed as
- (a) members of another police service specified in writing by the Minister;
 - (b) wildlife officers, under section 1.1(1) of the *Wildlife Act*;
 - (c) forest officers, under section 2 of the *Forests Act*, and
 - (d) other peace officers specified in writing by the Minister.
- (3) A conservation officer may, without a warrant, enter on and pass over any land while lawfully engaged in the exercise of powers or performance of duties related to the enforcement of this Act
- (4) Subsection (1) does not authorize the entry into any structure or any search or seizure
- (5) The conservation officer, while lawfully engaged in this activity is only liable for damage that they wilfully cause.
- (6) If distance, urgency, the imminent danger of the loss, removal, destruction or disappearance of evidence or other relevant factors do not reasonably permit the obtaining of a warrant, a conservation officer may, without obtaining a warrant
- (a) enter into and search any premises or place, vehicle, aircraft, boat or a building, tent, or other structure;
 - (b) search any land; or
 - (c) search any container

if the officer believes on reasonable and probable grounds that there is in or on it any evidence of an offence against this Act.

Enforcement Order

- 54 (1) Where in the Director's opinion a person has contravened this Act, the Director may, whether or not the person has been charged or convicted in respect of the contravention, issue an enforcement order ordering any of the following:
- (a) the suspension or cancellation of a permit;
 - (b) the stopping or shutting down of any activity or thing either permanently or for a specified period;
 - (c) the ceasing of the construction or operation of any activity or thing until the Director is satisfied the activity or thing will be constructed or operated in accordance with this Act; or
 - (d) specifying the measures that must be taken in order to effect compliance with this Act.
- (2) Where an enforcement order specifies measures that must be taken under subsection (1) (d), the measures may impose requirements that are more stringent than applicable requirements in the regulations.
- (3) An enforcement order issued under subsection (1) shall contain the reasons for making it and must be served on the person to whom it is directed.

Amendment and cancellation of enforcement orders

- 55 (1) The Director may
- (a) amend a term or condition of, add a term or condition to or delete a term or condition from an enforcement order,
 - (b) cancel an enforcement order, or
 - (c) amend a clerical error in an enforcement order.
- (2) The Director may amend an enforcement order by adding to the list of persons to whom the order is directed.
- (3) The Director may exercise powers under subsection (1) or (2) notwithstanding that the original enforcement order may have been issued by an investigator.
- (4) A copy of an enforcement order issued under subsection (1) must be served on the same person to whom the original order was directed.
- (5) A copy of an enforcement order issued under subsection (2) must be served on
- (a) any person whose name was added to it, and
 - (b) the same person to whom the original order was directed.

Court order for compliance

- 56 (1) If the person to whom an enforcement order is directed fails to comply with the enforcement order, the Minister may apply to the Court of King's Bench for an order of the Court directing that person to comply with the enforcement order.
- (2) This section applies whether or not a conviction has been adjudged against the person to whom the enforcement order is directed for an offence under this Act in respect of the subject-matter that gave rise to the issuing of the enforcement order.

Failure to comply with an enforcement order

- 57 (1) If the person to whom an enforcement order is directed fails to comply with the enforcement order, the Director may take whatever action the Director considers necessary to carry out the terms of the enforcement order.
- (2) Costs incurred by the Director under this section are recoverable by the Government in an action in debt against the person to whom the enforcement order was directed.
- (3) If the identity of a person to whom an order could be issued under subsection (2)(b) cannot be ascertained, the Minister may nevertheless issue the order, and may take steps to ensure compliance with the order if the identity of the person becomes known to the Minister after the order is issued.
- (4) For the purposes of this section, the costs referred to in subsection (2) include, without limitation,
- (5) any costs incurred in investigating and responding to
- (a) any matter to which an enforcement order relates, or
 - (b) the failure to comply with an enforcement order.

Joint and several liability

- 58 Where an enforcement order is issued to more than one person, all persons named in the order are jointly responsible for carrying out the terms of the order and are jointly and severally liable for payment of the costs of doing so, including any costs incurred by the Director under 43.

Priority for costs

- 59 Costs incurred by the Director under 43 and costs incurred by an inspector or investigator constitute a charge in favour of the Government, and the charge is enforceable in the same way as a mortgage or other security on land and ranks

above any other claim, right or charge against the land, notwithstanding any other law of Alberta.

Offences

- 60 (1) A person who
- (a) knowingly provides false or misleading information pursuant to a requirement under this Act to provide information,
 - (b) provides false or misleading information pursuant to a requirement under this Act to provide information,
 - (c) fails to provide information as required under this Act,
 - (d) knowingly contravenes a term or condition of a permit,
 - (e) contravenes a term or condition of a permit,
 - (f) knowingly contravenes an enforcement order,
 - (g) contravenes an enforcement order,
 - (h) knowingly contravenes a habitat protection order, interim habitat protection order, or an emergency protection order;
 - (i) contravenes a habitat protection order, an interim habitat protection order, or an emergency protection order
 - (j) contravenes section 31 of the Act,

is guilty of an offence.

Offences

- 61 (1) A person who contravenes any provision of this Act is guilty of an offence.
- (2) Subsection (1) does not apply to a person who, at the time of the contravention,
- (a) is an employee of the Crown under the Minister's administration who is carrying out powers or duties involving wildlife research, wildlife management, or other activities;
 - (b) is a wildlife officer or an individual acting on behalf of or being supervised by an officer or guardian, who is carrying out powers or duties involving investigations or undercover operations related to the enforcement of this Act; or
 - (c) has been authorized to act according to a permit issued by the Director or the Minister.

Penalty

- 62 (1) Every person who contravenes this Act or the regulations is guilty of an offence and is liable on summary conviction
- (a) in the case of a corporation, to a fine not exceeding \$1,000,000, unless subsection (3) applies; or

- (b) in the case of an individual, to a fine not exceeding \$500,000 or to imprisonment for a term of not more than 2 years, or to both, unless subsection (3) applies.
- (2) Notwithstanding subsection (1), where a person is convicted of an offence under this Act or the regulations a second or subsequent time, the person is liable to a fine not exceeding two times the amount set out in that subsection
- (3) A penalty may include an amount to address the economic benefit derived, either directly or indirectly, as a result of the contravention.
- (4) In the event of an offence involving more than one organism, the penalty may be computed with respect to each organism as though each organism had been the subject of a separate count.

Due diligence defence

- 63 No person shall be convicted of an offence if that person establishes on a balance of probabilities that the person took all reasonable steps to prevent its commission.

Application for investigation

- 64 (1) Any 2 persons ordinarily resident in Alberta who are not less than 18 years of age and who are of the opinion that an offence has been committed under this Act may apply to the Director to have an investigation of the alleged offence conducted
- (2) The application shall be accompanied by a solemn declaration
- (a) stating the names and addresses of the applicants,
 - (b) stating the nature of the alleged offence and the name of each person alleged to be involved in its commission, and
 - (c) containing a concise statement of the evidence supporting the allegations of the applicants.

Investigation on receipt of application

- 65 (1) On receipt of an application under section 43, the Director shall acknowledge receipt of the application and shall investigate all matters that the Director considers necessary for a determination of the facts relating to the alleged offence.
- (2) Within 90 days after receiving the application, the Director shall report to the applicant on the progress of the investigation and the action, if any, proposed to be taken in respect of the alleged offence.
- (3) The Director may discontinue an investigation if the Director is of the opinion that the alleged offence does not require further investigation.
- (4) Where an investigation is discontinued, the Director shall

- (a) prepare a statement in writing stating the reasons for its discontinuance, and
- (b) send a copy of the statement to the applicants and to any person whose conduct was investigated.

Right of entry and inspection

- 67 (1) For the purpose of the administration of this Act, an investigator may, without a search warrant or order to enter and inspect and subject to section 52, at any reasonable time do any or all of the following:
- (a) enter and inspect any place to determine
 - i. extent, if any, to which an activity is causing harm, impairment or disruption of a listed species, its habitat, its critical habitat, or to an ecological community; and
 - ii. how such impacts on a listed species, its habitat or its critical habitat, or on an ecological community may be prevented, eliminated, ameliorated or restored;
 - (b) enter and inspect any place that the investigator reasonably believes is likely to contain documents related to impacts on listed species and listed ecological communities.
 - (c) enter and inspect any place that the investigator reasonably believes is, or is required to be, the subject of or referred to in a permit, habitat protection order or enforcement order;
 - (d) stop and inspect any vehicle, aircraft or vessel that the investigator reasonably believes
 - (e) is being operated in contravention of this Act,
 - (f) is being used in the commission of an offence under this Act;
 - (g) stop and inspect any vehicle, aircraft or vessel to ascertain whether it or the manner in which it is being operated complies with this Act;
 - (h) require the production of any documents that are required to be kept under this Act or any other documents that are related to the purpose for which the investigator is exercising any power under clauses (a) to (h)
- (3) An investigator may not detain or remove a thing under subsection (1)(h) for more than 5 days, excluding holidays, without the consent of the person having charge, management or control of it or the owner of it, except under the authority of an order issued under subsection (4).
- (4) Where a justice is satisfied on evidence under oath by an investigator that there is reasonable ground to believe that a thing detained or removed under subsection (1)(h) should be detained or removed for longer than 5 days, excluding holidays, to protect or conserve a listed species, its habitat or an ecological community, the justice may issue or renew an order authorizing an investigator to detain or remove the thing for the period of time set out in the order.

- (5) An investigator who applies for an order under subsection (4) shall give reasonable notice of the application to the person having charge, management or control of the thing to be detained or removed or the owner of it.
- (6) In the course of exercising powers under subsection (1), the investigator may do any or all of the following:
- (a) require that any thing be operated, used or set in motion under conditions specified by the investigator;
 - (b) use any machine, structure, material or equipment in the place the investigator is inspecting in order to carry out the inspection;
 - (c) take samples of any substance or thing;
 - (d) conduct tests or take measurements;
 - (e) make copies of or take extracts from any documents referred to in subsection (1)(f);
 - (f) use any computer system at any place to examine any data contained in or available to the computer system;
 - (g) record or copy any information by any method;
 - (h) reproduce any record from data in the form of a printout or other intelligible output;
 - (i) take a printout or other output for examination or copying;
 - (j) use any copying equipment to make copies;
 - (k) take any photographs or audio-video records; and
 - (l) make reasonable inquiries of any person, orally or in writing.
- (7) An investigator may remove documents that the investigator is entitled to examine or copy or otherwise reproduce but shall give a receipt to the person from whom they were taken and shall promptly return them on completion of the examination
- (8) An investigator who exercises the power set out in subsection (6)(l) may exclude from the questioning any person except counsel for the individual being questioned.

Order to enter and inspect

- 68 (1) Where a justice is satisfied on evidence under oath by an investigator
- (a) that there is reasonable ground for believing that it is appropriate for the administration of this Act for the investigator to do anything set out in section 68, and

- (b) that the investigator may not be able to effectively carry out duties under this Act without an order under this section because
- i. no person is present to grant access to a place that is locked or is otherwise inaccessible,
 - ii. a person has denied the investigator access to a place or there is reasonable ground for believing that a person may deny the investigator access to a place,
 - iii. a person has prevented the investigator from doing anything set out in section 54 or denied the investigator access to any thing as a result of which the investigator is unable to do anything set out in section 54x,
 - iv. there is reasonable ground for believing that a person may prevent an investigator from doing anything set out in section 54, or may deny the investigator access to any thing as a result of which the investigator may be unable to do anything set out in section 45,
 - v. it is impractical, because of the remoteness of the place to be inspected or because of any other reason, for the investigator to obtain an order under this section without delay if access is denied, or
 - vi. there is reasonable ground for believing that an attempt by the investigator to do anything set out in section 54 without the order might defeat the purpose of that section or endanger human life or health or the environment,

the justice may issue an order to enter and inspect, authorizing the investigator to do anything set out in section 54 that is specified in the order for the period of time set out in the order.

- (2) The period of time referred to in subsection (1) may not extend beyond 30 days after the date on which the order is made, but the order may be renewed for any reason set out in subsection (1) for one or more periods each of which is not more than 30 days.
- (3) An application under subsection (2) may be made before or after the expiry of the period.

Order without notice

69 An order under section 69 may be issued or renewed on application without notice.

Powers to be exercised at a reasonable time

70 An investigator exercising powers under section 68 must do so at a reasonable time unless otherwise authorized in the order under that section.

Seizure without order or search warrant

- 71 (1) An investigator may, without a court order or a search warrant, seize any thing that is produced to the investigator, or that is in plain view, during an inspection under 54 if the investigator has reasonable grounds to believe that there has been an offence committed under this Act and that the thing will afford evidence as to the commission of the offence.
- (2) The investigator may remove the thing seized or may detain it in the place where it is seized.
- (3) The investigator shall inform the person from whom the thing was seized as to the reason for the seizure and shall give the person a receipt for it.

Bringing seized thing before a judge

- 72 An investigator who seizes any thing under the authority of section 58 shall deal with it in the same way as if it were seized under the authority of a search warrant.

Tele-warrant

- 73 (1) Where an investigator has reasonable grounds to believe that
- (a) an offence has been committed under this Act,
 - (b) there is in a place any thing that will afford evidence as to the commission of the offence, and
 - (c) it would be impracticable to appear personally before a justice to make an application for a search warrant,
- the investigator may submit information on oath to a justice by telephone or other means of telecommunication.
- (4) An information submitted by telephone or other means of telecommunication shall be on oath and shall be recorded verbatim by the justice, who shall, as soon as practicable, cause to be filed with the clerk of the Alberta Court of Justice nearest to the area in which the tele-warrant is intended for execution the record or a transcription of the record certified by the justice as to time, date and contents.
- (5) For the purposes of subsection (2), an oath may be administered by telephone or other means of telecommunication.
- (6) An information on oath submitted by telephone or other means of telecommunication shall include
- (a) a statement of the circumstances that make it impracticable for the investigator to appear personally before a justice,
 - (b) a statement of the alleged offence, the place to be searched and the things alleged to be liable to seizure,

- (c) a statement of the investigator's grounds for believing that things liable to seizure in respect of the alleged offence will be found in the place to be searched, and
- (d) a statement as to any prior application for a tele-warrant under this section or any other search warrant in respect of the same matter of which the investigator has knowledge.

(7) A justice who is satisfied that an information on oath submitted by telephone or other means of telecommunication

- (a) is in respect of an offence committed under this Act and conforms to the requirements of subsection (4),
- (b) discloses reasonable grounds for dispensing with an information presented personally and in writing, and
- (c) discloses reasonable grounds for the issuance of a search warrant in respect of the offence,

may issue a tele-warrant to an investigator conferring the same authority respecting search and seizure as may be conferred by a search warrant issued by a justice before whom the investigator appears personally, and may require that the tele-warrant be executed within any time period that the justice may order.

(8) Where a justice issues a tele-warrant under subsection (5),

- (a) the justice shall complete and sign the tele-warrant in the form prescribed in the regulations, noting on its face the time, date and place of issuance,
- (b) the investigator, on the direction of the justice, shall complete, in duplicate, a facsimile of the tele-warrant in the form prescribed in the regulations, noting on its face the name of the issuing justice and the time, date and place of issuance, and
- (c) the justice shall, as soon as practicable after the tele-warrant has been issued, cause the tele-warrant to be filed with the clerk of the Alberta Court of Justice nearest to the area in which the tele-warrant is intended for execution.

(9) An investigator who executes a tele-warrant under subsection (5) shall, before entering the place to be searched or as soon as is practicable after entry, give a facsimile of the tele-warrant to any person present and ostensibly in control of the place.

(10) An investigator who, in any unoccupied place, executes a tele-warrant issued under subsection (5), shall on entering the place or as soon as is practicable

after entry, cause a facsimile of the tele-warrant to be suitably affixed in a prominent place within the place.

- (11) An investigator to whom a tele-warrant is issued under subsection (5) shall file a written report with the clerk of the Alberta Court of Justice nearest to the area in which the tele-warrant was intended for execution as soon as is practicable but within a period not exceeding 7 days after the tele-warrant has been executed, which report shall include:
- (a) a statement of the time and date the tele-warrant was executed, or if the tele-warrant was not executed, a statement of the reasons why it was not executed,
 - (b) a statement of the things, if any, that were seized pursuant to the tele-warrant and the location where they are being held, and
 - (c) a statement of the things, if any, that were seized in addition to the things mentioned in the tele-warrant and the location where they are being held, together with a statement of the investigator's grounds for believing that those additional things had been obtained by, or used in, the commission of an offence.
- (12) The clerk of the Alberta Court of Justice with whom a written report is filed pursuant to subsection (9) shall, as soon as is practicable, cause the report, together with the information on oath and the tele-warrant to which it pertains, to be brought before a justice to be dealt with in respect of any thing that was seized and is referred to in the report, in the same manner as if the things were seized pursuant to a search warrant issued by a justice on an information presented personally by an investigator.
- (13) In any proceeding in which it is material for a court to be satisfied that a search or seizure was authorized by a tele-warrant issued under subsection (5), the absence of the information on oath, transcribed and certified by the justice as to time, date and contents, or of the original tele-warrant, signed by the justice and carrying on its face a notation of the time, date and place of issuance, is, in the absence of evidence to the contrary, proof that the search or seizure was not authorized by a tele-warrant issued under subsection (5).

Private dwelling place

- 74 An investigator may not enter a private dwelling place or any part of a place that is designed to be used and is being used as a permanent or temporary private dwelling place except
- (a) with the consent of the occupant of the place, or
 - (b) under the authority of an order to enter and inspect or a search warrant.

Duty to stop a vehicle or vessel

- 75 The operator of a vehicle or vessel shall stop the vehicle or vessel when required to do so by an investigator who is readily identifiable as an investigator.

Disposal of things seized

- 76 (1) Where a person is convicted of an offence under this Act and anything relating to the conviction that was seized under this Part is then being detained, the thing shall, on the expiration of the time for taking an appeal from the conviction or on the final conclusion of the proceedings, as the case may be,
- (a) be forfeited to the Government, if the court so directs, or
 - (b) be restored to the person from whom it was seized or to any other person who is entitled to possession of it, subject to any terms and conditions imposed by the court.
- (2) Where a thing is forfeited under subsection (1)(a),
- (a) the Minister may dispose of or destroy the thing, and
 - (b) the costs of the forfeiture and disposal or destruction are recoverable from the offender.

Assistance by peace officer

- 77 An investigator may be accompanied by a peace officer while exercising powers or carrying out duties under this Part.

Assistance to inspectors and investigators

- 78 The owner of and every person found in any place in respect of which an inspector or investigator is exercising powers or carrying out duties under this Part shall
- (a) give the inspector or investigator all reasonable assistance to enable the inspector or investigator to exercise those powers and carry out those duties, and
 - (b) furnish all information relative to the exercising of those powers and the carrying out of those duties that the inspector or investigator may reasonably require.

Regulations

- 79 The Minister may pass regulations regarding:
- (a) the payment of fees related to the administration of this act;

- (b) the identification of ecological communities that may be listed under this act;
- (c) the forms of application and nominations that may be made under this act;
- (d) the procedures and approaches to be taken in the assessment and listing of species;
- (e) the creation, confirmation and enforcement related to habitat offsetting occurring under the Act;
- (f) the assessment and listing of the species and ecological communities; and
- (g) the required content of habitat assessments.

- 80 The Lieutenant Governor in Council may pass regulations regarding:
- (a) the calculation of compensation undertaken by the Minister and the Land and Property Rights Tribunal payable under section 36;
 - (b) the use and investment of the Conservation Fund:

Consequential amendments

- 81 (1) *The Alberta Land Stewardship Act*, SA 2009, c A-26.8 is amended as follows:

Section 17(1.1) Notwithstanding (1) a regional plan does not prevail over any regulations, orders, permits, conservation agreements, programs under the *Endangered Species Act*.

Section 5.1 (1) notwithstanding sections 4 and 5, a regulatory implementation plan under the *Endangered Species Act* is deemed to form a part of a regional plan for the geographic region to which it applies.

- 82 The *Financial Administration Act*, RSA 2000, c F-12 is amended by adding section 32.1

32.1 (1) On the direction of the Treasury Board, the Minister responsible shall advance money from the General Revenue Fund to the Conservation Fund in the amounts specified in the direction on any terms and conditions the Treasury Board may impose.

32.1(2) In making a direction under section (1) the Treasury Board will ensure that the Conservation Fund has a minimum of \$200,000,000 at the beginning of each fiscal year.

Additional consequential amendments must be made to the *Wildlife Act* RSA 2000, c. W-10 to repeal those provisions dealing with endangered species but are not included in this *Model ESA*.

Conclusion

Alberta is home to some of the most iconic species in the country and in the world. Yet many of these species, iconic and less known, are in peril. The current system of species at risk management and regulation in Alberta lacks focused intent to manage habitat impacts and to effectively conserve the various species and ecosystems in a way that provides regulatory certainty, fairness and effectiveness.

Reliance on federal legislation may not only be politically unpalatable but also ill-suited to tackling the local challenges of habitat protection in the face of ongoing economic ambitions and development. Federal legislation should not be relied upon as it requires federal administration and has potential constitutional constraints that undermine its relevance to provincial species and ecological communities.

The ELC's *Model ESA* seeks to integrate a new system of habitat assessment management and regulation that is able to address legacy impacts as well as ongoing activities on the landscape in a way that increases the chance of survival of imperilled species and ecological communities.