

Habitat Law in Alberta

VOLUME 1: The State of Habitat Laws in Alberta

Environmental Law Centre

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The Environmental Law Centre (Alberta) Society

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

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

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Part 1: A History of Habitat Management and Protection Legislation in Alberta

A detailed history of wildlife law can be found in John Donihee's *The Evolution of Wildlife Law in Canada*,¹ a history which has direct bearing on habitat and species at risk management and protection in Alberta today.

Originally, wildlife legislation in Alberta derived its roots from British hunting legislation. This “game management legislation” was geared towards protecting animals and their habitat, for the purpose of continued hunting. Game management legislation was known for a focus on game animals (excluding non-game wildlife); an ongoing system of hunting controls including hunting seasons, bag limits, and some restrictions on weapons and gear; the presence of predator control mechanisms; control of market hunting; and some limited mechanism for the preservation of game lands such as in refuges and sanctuaries.² Today, hunting legislation would be woefully

¹ John Donihee, “The Evolution of Wildlife Law in Canada” (May 2000) Canadian Institute of Resources Law Occasional Paper #9 online: <https://dspace.ucalgary.ca/bitstream/handle/1880/47200/OP09Wildlife.pdf;jsessionid=467BBFEBA9E910A6DD5675E69A96C480?sequence=1> [Donihee].

² *Ibid*, at 14.

inadequate at protecting critical habitat, however, the evolution of these laws were important precursors to current habitat protection legislation.³

In his report, Donihee identifies three stages of wildlife legislation:

1. The game management era, which focused on game animals and was mainly an ongoing system of hunting controls, predator control, and some preservation of game lands;⁴
2. The wildlife management era, which included control over non-game animals. It was during this stage that habitat management and protection measures began to appear. These provisions were accompanied by wildlife management objectives and regulations;⁵ and
3. The sustainable wildlife management era. This legislation included a more expansive concept of wildlife; stronger habitat protection capabilities; some foray into aboriginal rights and entitlements and more limits on the trading of wildlife.⁶

In Alberta, the first stage is represented in the *Game Act*, the original piece of legislation in Alberta's habitat protection regime.⁷ This was the Act that created Elk Island Park and Rocky Mountain Park, designating them as game preserves, complete with hunting bans. Later amendments to this Act increased the number of preserves and added more hunting restrictions.⁸

Current Albertan legislation, including the *Wildlife Act*, is now incrementally moving towards the third stage in Donihee's wildlife law progression.⁹

³ *Ibid*, at 12-13.

⁴ Donihee, *supra* note 1, at 14.

⁵ *Ibid*, at 15.

⁶ *Ibid*, at 16-17.

⁷ *Game Act*, SA 1906-1915, c 14.

⁸ Donihee, *supra* note 1, at 18-19.

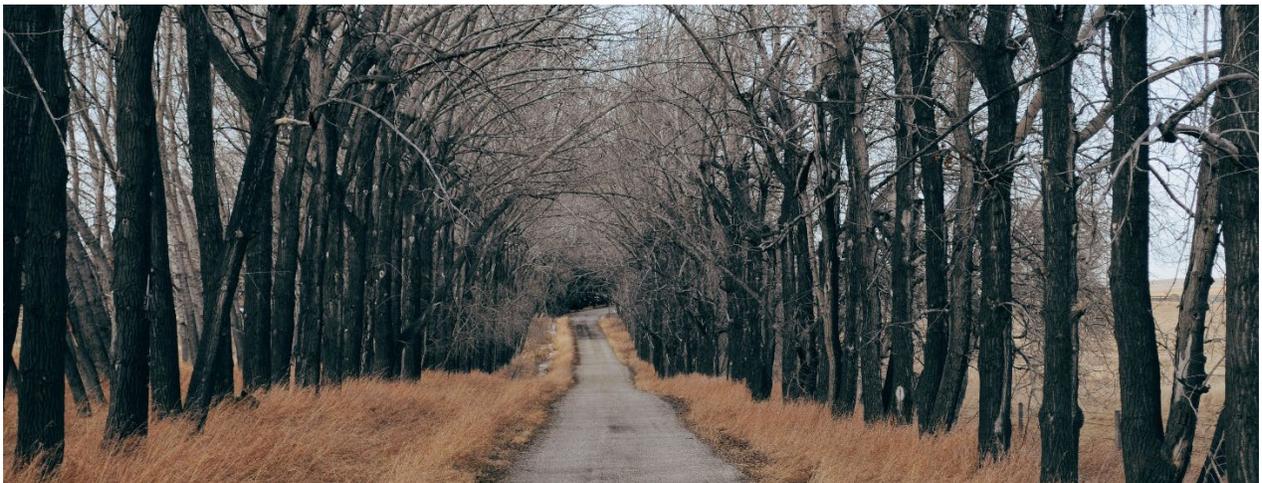
⁹ *Wildlife Act*, RSA 2000, c W-10 [*Wildlife Act*].

Jurisdiction over Habitat

The *Constitution Act, 1867*, divides legislative jurisdiction (or power) between two levels of government – the Canadian federal parliament and the provincial legislatures.¹⁰

At the time of confederation, the environment was not considered a legal entity and legal control over the environment was not specifically assigned to either the federal or provincial governments. Rather, environmental case law and legislation has, over the years, expanded to situate environmental topics amongst the enumerated sections 91 & 92.¹¹ Section 91 sets out the legislative authority of the Parliament of Canada including authority over:¹²

- Laws for the Peace, Order, and good Government of Canada (found in the preamble to the section 91 enumerated powers);
- Sea Coast and Inland Fisheries; and
- the Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matter.



¹⁰ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act*].

¹¹ *Ibid*.

¹² *Ibid*, s 91.

In addition, the federal government may enter into international treaties. These treaties, depending on their content can be implemented either through federal law, provincial law, or both.

Section 92 sets out those heads of power falling to the provinces, including:¹³

- the Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon;
- Municipal Institutions in the Province;
- Local Works and Undertakings;
- Property and Civil Rights in the Province; and
- generally, all Matters of a merely local or private nature in the Province.

A later amendment to the Constitution added section 92A which clarified provincial jurisdiction over non-renewable natural resources, forestry resources and electrical energy. Specifically, it enabled provinces to exclusively make laws in relation to:¹⁴

- exploration for non-renewable natural resources in the province;
- development, conservation, and management of non-renewable natural resources and forestry resources in the province; and
- development, conservation, and management of sites and facilities in the province for the generation and production of electrical energy.

In addition to this division of constitutional control, both levels of government retain ownership over the majority of lands and resources under both the Constitution and through their executive power.¹⁵ Subject to constitutional limits, both levels of government also have power over land use decisions. The provinces, in particular,

¹³ *Constitution Act*, *supra* note 10, s 92.

¹⁴ *Ibid*, s 92A.

¹⁵ Arlene J Kwasniak, *Alberta Wetlands: A Law and Policy Guide*, 2d ed (Canada: Library and Archives Canada Cataloguing in Publication, 2016) at 11 [*Alberta Wetlands: A Law and Policy Guide*].

have broad legislative authority over the development of land-use policy and non-renewable resources such as energy and forestry – all of which may have a significant impact on habitat.¹⁶

Wildlife is not mentioned explicitly in the Constitution however, under the common law, wildlife is considered to be part of the land and, except in areas specifically under federal control, authority falls to the provinces.¹⁷ In Alberta, this ownership structure was confirmed in the *Wildlife Act*, which specifies that the property in all live wildlife is vested in the Crown.¹⁸ Accordingly, the majority of habitat management and protection in Alberta falls under provincial jurisdiction. Despite this, federal statutes award a certain degree of discretion to the federal government, enabling them to have a greater impact in relation to species at risk (as will be discussed).¹⁹

Municipal governments, as enabled by their respective provincial legislatures, have broad land use powers which directly and indirectly impact habitat. However, despite their growing stake in environmental issues, municipalities are limited by statute. These statutory limits may hinder their ability to make land use decisions, although recent amendments to Alberta's *Municipal Government Act* have clarified their role in environmental matters – a change which will be discussed in further depth below.²⁰

¹⁶ Stephane Wojciechowski et al, "SARA's Safety Net Provisions and the Effectiveness of Species at Risk Protection on Non-Federal Lands" 22 J Env L & Prac 203 at 204-205.

¹⁷ *Ibid*, at 204-205.

¹⁸ *Wildlife Act*, *supra* note 9, s 7(1).

¹⁹ SOR/2016-211, Emergency Order for the Protection of the Western Chorus Frog (Great Lakes/St. Lawrence – Canadian Shield Population), (2016) C Gaz, II (*Species at Risk Act*); SOR/2013-202, Emergency Order for the Protection of the Greater Sage-Grouse, (2013) C Gaz, supp (*Species at Risk Act*); Shaun Fluker, "Alberta Suspends Habitat Protection Plans for Endangered Woodland Caribou" (23 March, 2018) online Ablawg: http://ablawg.ca/wp-content/uploads/2018/03/Blog_SF_Caribou_Range_Plan.pdf.

²⁰ *Municipal Government Act*, RSA 2000, c M-26 [MGA].



International Agreements

Habitat and the flora and fauna that inhabit it have been of international concern for decades. Some of the international agreements of highest relevance to these issues include the *United Nations Convention on Biological Diversity*, the United Nations Sustainable Development Goals (SGD), and the *Convention on Wetlands of International Importance (Ramsar Convention)*.²¹

Ratified by Canada in 1992, the *Convention on Biological Diversity (CBD)* has been of central importance to habitat management and protection. Article six of the CBD required national implementation of convention standards by those countries that

²¹ *United Nations Convention on Biological Diversity*, 29 December 1993, 1760 UNTS 79 [*United Nations Convention on Biological Diversity*]; *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, 21 December 1975, 996 UNTS 245 [*United Nations Convention on Wetlands of International Importance especially as Waterfowl Habitat*].

ratified the convention²² and in Canada, the National Biodiversity Strategies and Action Plans became the key instruments in this implementation regime.²³

Upon ratification, Canada was required to prepare a national strategy for the conservation of biodiversity, publishing the Canadian Biodiversity Strategy in 1995.²⁴ Notably, although ratification purported to require a national strategy, the CBD provides no enforcement mechanisms and other convention parties cannot enforce the same internationally. Despite this limitation, federal, provincial, and territorial governments, in response to the CBD and the Canadian Biodiversity Strategy, committed to developing their own biodiversity strategies.²⁵ Some of the legislation that resulted from this commitment includes the federal *Species at Risk Act* and provincial amendments to the *Wildlife Act*, both of which will be discussed later in this volume. In particular, despite this requirement, the *Wildlife Act* is often described as expanded hunting legislation, designed to meet the minimum requirements of the CBD, without truly expanding into a broad, habitat focused statute.²⁶

Another set of targets developed under the CBD are known as the Aichi Biodiversity Targets, adopted at the tenth meeting of the Conference of the Parties (COP) of the *United Nations Convention on Biological Diversity*, in 2010.²⁷ These targets set out an overarching plan for biodiversity for the whole United Nations system and its members, including five strategic goals with 20 targets, each related to biodiversity.

²² *United Nations Convention on Biological Diversity*, *supra* note 21, art 6.

²³ See *Convention on Biological Diversity*, List of Parties, online: <https://www.cbd.int/information/parties.shtml>.

²⁴ Canada, Environment Canada, *Canadian Biodiversity Strategy: Canada's Response to the Convention on Biological Diversity* (Hull: Environment Canada, 1995).

²⁵ Office of the Auditor General of Canada, *2018 Spring Reports of the Commissioner of the Environment and Sustainable Development to the Parliament of Canada*, No 3 (Ottawa: Office of the Auditor General of Canada, 24 April 2018) at 3.4 – 3.6 [Office of the Auditor General of Canada].

²⁶ Shaun Fluker, "Endangered species under Alberta's Wildlife Act: Effective legal protection?" (29 March 2010) ABlawg online: <https://ablawg.ca/2010/03/29/endangered-species-under-alberta%E2%80%99s-wildlife-act-effective-legal-protection/>.

²⁷ *Convention on Biological Diversity*, "Aichi Biodiversity Targets" (2010) online: <https://www.cbd.int/sp/targets/>.

These targets are not enforceable on a national basis, however, they do serve to provide a flexible framework to be implemented into national or regional laws.²⁸ In particular, the Aichi Convention included 20 targets specific to Canada including such goals as:²⁹

- at least 17 percent of terrestrial areas and inland water, and 10 percent of coastal and marine areas are conserved through networks of protected areas and other effective area-based conservation measures;
- biodiversity considerations are integrated into municipal planning and the activities of major municipalities across Canada; and
- all fish and invertebrate stocks and aquatic plants are managed and harvested sustainably, legally, and by applying ecosystem-based approaches.

In 2015, Canada announced 19 national biodiversity targets, under four overarching goals, as a follow up to the Aichi Biodiversity Targets.³⁰ For our purposes, these targets help to frame laws and regulations purporting to protect and enhance habitat protection and management.

The United Nations Sustainable Development Goals (SDGs) are also relevant to our habitat management and protection goals.³¹ The SDGs set out 17 goals that the UN membership agreed were necessary to protect principles of sustainability for future generations. For example, SDG 14 strives to “conserve and sustainably use the oceans, seas and marine resources for sustainable development”³² and SDG 15 sets out to “protect, restore and promote sustainable use of terrestrial ecosystems,

²⁸ Convention on Biological Diversity, “Key Elements of the Strategic Plan 2011-2020, including Aichi Biodiversity Targets” online: Convention on Biological Diversity <https://www.cbd.int/sp/elements/default.shtml>.

²⁹ Convention on Biological Diversity, “National Biodiversity Strategies and Action Plans (NBSAPs)” online: Convention on Biological Diversity <https://www.cbd.int/nbsap/targets/default.shtml>.

³⁰ Office of the Auditor General of Canada, *supra* note 25 at 3.7 – 3.8.

³¹ Stephanie Thomson, “What are the Sustainable Development Goals?” (16 September 2015) World Economic Forum online: <https://www.weforum.org/agenda/2015/09/what-are-the-sustainable-development-goals/>.

³² Sustainable Development Knowledge Platform, “Sustainable Development Goal 14” (2017) United Nations online: <https://sustainabledevelopment.un.org/sdg14>.

sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss."³³

Canada adopted the SDGs in September 2015 and has continued to refer to them while planning and implementing national development strategies.³⁴ For example, Canada implemented the 2016-2019 Federal Sustainable Development Strategy, policy which is intended to incorporate the SDGs into federal decision-making.³⁵



Photo: courtesy Beaver Hills Initiative

Finally, the *Convention on Wetlands of International Importance* (Ramsar Convention) focuses on the conservation and wise use of all wetlands through local and national actions and through international cooperation.³⁶ Under what are known as the three pillars of the Ramsar Convention, all member states commit to the wise use of their wetlands, to the designation of suitable wetlands to the list of "Wetlands of International Importance", and to international cooperation on transboundary wetlands, shared wetland systems, and shared species.³⁷ Since its

³³ Sustainable Development Knowledge Platform, "Sustainable Development Goal 15" (2017) United Nations online: <https://sustainabledevelopment.un.org/sdg15>.

³⁴ Government of Canada, "Achieving a Sustainable Future: A Federal Sustainable Development Strategy for Canada" (18 July 2018) online: <http://www.fds-sfdd.ca/index.html#/en/canada/canada-world#tabs>.

³⁵ *Ibid.*

³⁶ *United Nations Convention on Wetlands of International Importance especially as Waterfowl Habitat*, *supra* note 21.

³⁷ *Ibid.*

inception, member states have developed strategic plans by which to accomplish these goals.

The Ramsar Convention was entered into force in Canada on May 15, 1981, and since that time, Canada has designated 37 sites as a 'Wetland of International Importance,' also known as Ramsar sites.³⁸ Four of these sites are located in Alberta, the Whooping Crane Summer Range (in conjunction with the Northwest Territories), the Peace-Athabasca Delta, the Hay-Zama Lakes, and Beaverhill Lake.³⁹ Once an area is designated as a Ramsar site, Canada, and consequently Alberta, commits to protecting these wetlands and to making information about these protection efforts available to other Convention members.

Current Ramsar sites were chosen because they are important critical habitat for countless bird species, including migratory birds as well as other aquatic or wetland dwelling species. The continued implementation of this Convention and designation of new Ramsar sites can enable the further protection of critical habitat.



³⁸ Ramsar, "Country Profiles: Canada" online: <https://www.ramsar.org/wetland/canada>.

³⁹ Ramsar Sites Information Service, "Annotated List of Wetlands of International Importance: Canada" online: https://rsis.ramsar.org/sites/default/files/rsiswp_search/exports/Ramsar-Sites-annotated-summary-Canada.pdf?1527283238.

Part 2: Provincial Habitat Management and Protection Legislation

Habitat management and protection legislation in Alberta can be viewed through multiple lenses. The lens of dedicated species or habitat management statutes, land use statutes, and/or regulatory statutes with impacts on habitat. Each of the five criteria (monitoring, assessment and planning tools; area-based conservation tools; localized/biophysical conservation tools; habitat consideration in decision-making; and conservation compliance) will be applied to relevant provincial legislation to evaluate the habitat management and protection potential of each individual statute. Any relevant provisions will be identified and, in the event, that a statute does not appear in any one particular section, it can be assumed that the statute does not include provisions that fulfill that particular criterion.

The most relevant statutes include:⁴⁰

- The *Wildlife Act* - this is the primary statute dealing with the management of “wildlife”, including species at risk in Alberta.⁴¹ Although this was originally written as a piece of hunting legislation, amendments introduced new prohibitions and some area-based protection, including provisions for the designation and limited protection of endangered species and their habitat.⁴²
- The *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*⁴³ and the *Provincial Parks Act*⁴⁴ - this creates the majority of Albertan “protected” areas.

⁴⁰ It should be noted that there are on occasion site specific pieces of legislation. An example of this is the *Willmore Wilderness Park Act*, R.S.A., 2000, c. W-11.

⁴¹ *Wildlife Act*, *supra* note 9.

⁴² Shaun Fluker & Jocelyn Stacey, “The Basic of Species at Risk Legislation in Alberta” (2012) 50:1 AB L Rev 95 at 97.

⁴³ *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*, RSA 2000, c W-9 [WAERNAHR Act].

⁴⁴ *Provincial Parks Act*, RSA 2000, c P-35 [Provincial Parks Act].

- The *Alberta Land Stewardship Act (ALSA)* - this focuses on an integrated regional planning system for provincial land use decisions.⁴⁵ It includes a focus on a cumulative effects approach when making decisions about Alberta's future development.⁴⁶ ALSA also states that in the event of a conflict between ALSA and another Act or regulation, ALSA will prevail.⁴⁷ Additionally, ALSA is binding both on private land owners and all levels of government.
- The *Public Lands Act* –this legislates how public lands in Alberta may be managed and administered. It clarifies the Crown's role in public land ownership and use and specifies how leases and dispositions will be administered.⁴⁸ Habitat is not mentioned in the Act, however, there is broad discretion to pursue habitat-based management and protection.
- The *Municipal Government Act (MGA)* - this sets out the purposes, powers, duties, and functions of a municipality in Alberta and one of these purposes is that of fostering the well-being of the environment.⁴⁹ This section, added in 2017, codified what was already a major role for Albertan municipalities – making decisions that affected (whether directly or indirectly) the environment.
- The *Environmental Protection and Enhancement Act (EPEA)* – this is the Act primarily responsible for the assessment process and subsequent approval of large-scale projects in Alberta. Its primary linkage with habitat is by way of environmental assessment requirements. The EPEA is also the primary statute for pollution regulation and management which may have an indirect effect on habitat management and protection.⁵⁰
- The *Water Act* – this “promote[s] the conservation and management of water, including the wise allocation and use of water, while recognizing the need to manage and conserve water resources to sustain our environment and to

⁴⁵ *Alberta Land Stewardship Act*, SA 2009, c A-26.8 [ALSA].

⁴⁶ Maria Lavelle, “Ambiguity and the Amendments to the Alberta Land Stewardship Act” (2012) 49 *Alta L Rev* 579 at 586.

⁴⁷ ALSA, *supra* note 45, s 17.

⁴⁸ *Public Lands Act*, RSA 2000, c P-40 [PLA].

⁴⁹ MGA, *supra* note 20, s 3 (a.1).

⁵⁰ *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [EPEA].

ensure a healthy environment and high quality of life in the present and future.”⁵¹ The *Water Act* provides the planning, assessment, and regulatory framework for authorizations of activities that have impacts on water generally, and on the aquatic environment.

- The *Forests Act* – this sets out the management and administration of Alberta's forests. Under this Act, the director can identify forest management units and may determine an annual allowable cut for each unit.⁵² Once designated, forest management units may be Crown operated or can be assigned to a timber company, under a forest management agreement or by granting rights to timber through quotas or permits.
- Tribunals including the Alberta Energy Regulator, Alberta Utilities Commission, and the Natural Resources Conservation Board and their respective approval processes may also impact upon habitat management and protection.
- Finally, resource management acts including the *Mines and Minerals Act*,⁵³ *Oil and Gas Conservation Act*,⁵⁴ and *Coal Conservation Act*⁵⁵ which govern the management and disposition of rights for Crown-owned mines and minerals, oil and gas, and coal deposits.

⁵¹ *Water Act*, RSA 2000, c W-3 [*Water Act*].

⁵² *Forests Act*, RSA 2000, c F-22, s 14 [*Forests Act*].

⁵³ *Mines and Minerals Act*, RSA 2000, c M-17 [*Mines and Minerals Act*].

⁵⁴ *Oil and Gas Conservation Act*, RSA 2000, c o-6 [*Oil and Gas Conservation Act*].

⁵⁵ *Coal Conservation Act*, RSA 2000, c C-17 [*Coal Conservation Act*].

Monitoring, assessment, and planning



Wildlife Act:

The *Wildlife Act* establishes the Endangered Species Conservation Committee, whose functions include advising the Minister about endangered species, creating recovery plans to manage those animals already identified as endangered, and identifying new species as at risk.⁵⁶

For animals classified as 'at risk', a recovery plan (suggested by the Endangered Species Conservation Committee) is designed to be a scientific plan meant to address the best ways to increase a species' population. There is, however, no actual obligation for the Minister to provide for a recovery plan, nor is there any requirement that a recovery plan include the identification of critical habitat. Although not mandatory, the recovery plans devised by the Minister may include population goals and the identification of critical habitat for the species in question.⁵⁷ Decisions about the content of these recovery plans are discretionary but do afford the government with the ability to protect critical habitat.⁵⁸

The *Wildlife Regulation* also delegates some authority over planning and monitoring species to the Alberta Conservation Association (ACA). The role of the ACA includes

⁵⁶ *Wildlife Act*, *supra* note 9, s 6.

⁵⁷ *Ibid*, s 6(3).

⁵⁸ *Ibid*, s 6.

“the inventorization, development and enhancement of populations and habitats of wildlife, fish and endangered species in Alberta” through:⁵⁹

- (i) implementation and support of projects and improvements that retain, enhance or create any such habitat;
- (ii) implementation and support of restoration and reintroduction projects to enhance populations of wildlife, fish and endangered species;
- (iii) implementation and support of the inventorization of populations and habitats of wildlife, fish, and endangered species; and
- (iv) implementation and support of projects for the stocking of selected water bodies, including transportation.”

Decisions and actions taken by the ACA are, like recovery plans, not enforceable nor mandatory but rather their studies may form the basis for future regulation.⁶⁰

Alberta Land Stewardship Act:

Key to the ALSA, and its effect on habitat in Alberta, is the binding nature of regional plans. An approved regional plan binds the Crown, local government bodies, decision-makers, and all other persons. Regional plans then enable the government to zone areas for habitat protection, set limits on impacts on habitat, and direct how discretionary decisions are made concerning habitat.⁶¹ As of mid-2019, two plans have been completed: the Lower Athabasca Regional Plan and the South Saskatchewan Regional Plan.

Lower Athabasca Regional Plan

The Lower Athabasca Regional Plan (LARP) designated six new conservation areas in the region. Policy objectives for these conservation areas include enhancement of the regional network of conservation areas to support biodiversity and ecosystem

⁵⁹ *Wildlife Regulation*, Alta Reg 143/1997, Sched 2 s 2(2) [*Wildlife Regulation*].

⁶⁰ Alberta Conservation Association, “Roles and Responsibilities” (2019) online: <https://www.ab-conservation.com/about/roles-and-responsibilities/>.

⁶¹ ALSA, *supra* note 45, s 15.

function; regional biodiversity objectives that were developed for various indicators of terrestrial and aquatic biodiversity in the region; avoidance or mitigation of land disturbance impacts to biodiversity; and an increased rate of reclamation for existing tailings ponds.⁶² Permitted land-use activities in provincial parks and recreation areas are also described in the plan.

In conjunction with these areas, the regulatory details section (the legally enforceable section of a regional plan) enables the Minister to take any steps necessary to fulfill the conservation objectives outlined in the strategic plan or implementation plan.⁶³ However, these steps are not mandatory as neither the strategic plan nor the implementation plan create binding requirements and the Minister retains final decision-making discretion regardless.

The regulatory details plan also requires that the Minister establish monitoring programs for conservation areas, indicators, and strategies in relation to the plan objectives along with monitoring and evaluation programs for evaluating the status of these indicators and the effectiveness of the strategy. This includes indicators and strategies for maintaining landscapes for ecosystem function and biodiversity.⁶⁴

Notably, the entirety of the LARP can bind government departments, and other regulators such as the Alberta Energy Regulator and tribunals such as the Alberta Utilities Commission (AUC) and the Natural Resources Conservation Board.⁶⁵

South Saskatchewan Regional Plan

The South Saskatchewan Regional Plan (SSRP) was approved in July 2014 and, similar to the LARP, is made up primarily of policy and direction to government agencies, with the binding provisions relegated to the regulatory details plan.⁶⁶

⁶² Government of Alberta, Lower Athabasca Regional Plan (2012) at 42 online: <https://landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Plan%202012-2022%20Approved%202012-08.pdf>.

⁶³ *Ibid*, s 16.

⁶⁴ *Ibid*, Table 1 at 68.

⁶⁵ *Ibid*, Part 1 ss 3 - 5.

⁶⁶ Alberta Land Use, South Saskatchewan Regional Plan 2014-2024 (July 2014) Government of Alberta at 9 online: <https://open.alberta.ca/dataset/03840d45-05fd-4307-9dd0->

The SSRP created three new Wildland Provincial Parks along with the Pekisko Heritage Rangeland, new recreational areas, and an expansion of some of the existing parks in the region.⁶⁷ Those parks classified as wildland provincial parks are accompanied by a direction that the Minister was not to approve new grants, or renew past ones, in the protected area.⁶⁸ This includes approvals under the *Coal Conservation Act*, *Oil and Gas Conservation Act*, *Pipeline Act*, *Forests Act*, and *Public Lands Act*.⁶⁹ A similar provision prohibits new grants in provincial parks located within the planning region.⁷⁰ There are however exceptions to the prohibitions on leases and dispositions, with dispositions and agreements under the *Mines and Minerals Act* still permitted, amongst others.⁷¹

The regulatory details plan of the SSRP states that “in respect of conservation areas, the Designated Minister may take whatever steps that in the opinion of the Designated Minister are desirable for achieving the relevant conservation objectives of the SSRP Strategic Plan and the SSRP Implementation Plan.”⁷² This opens up the Minister’s options for habitat management and protection, but does not require any action.

Finally, permitted land uses for conservation, recreation and parks areas, and other public lands are set out in appendix L to the plan.⁷³ Unfortunately, the SSRP also states that, in the event of a conflict between appendix L and a management plan or other existing regulations, the other enactments shall prevail - thereby further limiting any enforceability.⁷⁴

[292b04306249/resource/208055c8-4123-44c2-97b5-12c24bd9964c/download/6700580-2014-south-saskatchewan-regional-plan-2014-2024-2014-07.pdf](https://www.albertawilderness.ca/wp-content/uploads/2014/10/2014-2024-2014-07.pdf) [SSRP].

⁶⁷ Brittany Verbeek, “Updates: South Saskatchewan Regional Plan” (2014) Alberta Wilderness Association online: https://albertawilderness.ca/wordpress/wp-content/uploads/2014/10/00_ar_wla_ssrp_update_bverbeek.pdf.

⁶⁸ SSRP, *supra* note 66, ss 18(1) & 19.

⁶⁹ *Ibid*, ss 18(1) & 19.

⁷⁰ *Ibid*, s 43.

⁷¹ *Ibid*, s 18(2).

⁷² *Ibid* at 168.

⁷³ SSRP, *supra* note 66. appendix L.

⁷⁴ *Ibid*, appendix L.

Biodiversity Management Frameworks

Both the LARP and the SSRP committed to the creation of management frameworks to accompany these regional plans. These management frameworks were intended to set out the details for managing the “long-term cumulative effects of development on the environment.”⁷⁵ Both the LARP and the SSRP required regional environmental management frameworks for air, water, and most importantly for our purposes, biodiversity.

The biodiversity management frameworks set to complement these plans are designed to set out monitoring regimes and objectives through the identification of key indicators of biodiversity.⁷⁶ However, they are limited by the fact that they were left out of the Regulatory Details Plan in both regional plans and are therefore non-regulatory and unenforceable.

Additionally, as of writing, neither the LARP nor the SSRP process have resulted in a completed biodiversity management framework, despite the original projected deadlines having come and gone. Although these frameworks have the potential to provide more habitat planning under the ALSA, a lack of implementation makes it impossible to evaluate their effectiveness.

Water Act:

The *Water Act* requires the Minister establish a strategy for the protection of the aquatic environment and incorporate this strategy into a water management framework for the province. This framework and strategy could assist in directing decisions beneficial to habitat because *Water Act* licence approvals, cancellations, or suspensions⁷⁷ require the consideration of a water management plan (which may include protection for habitat), prior to any final decision making. To date, Alberta

⁷⁵ Land Use Planning Hub, “Status of Biodiversity Management Frameworks in Alberta” (25 July 2018) online: <https://landusehub.ca/status-of-biodiversity-management-framework/>.

⁷⁶ Alberta Environment and Parks, “Biodiversity Management Frameworks and Regional Plans” (18 August 2014) Government of Alberta at 2 online: <https://open.alberta.ca/dataset/e94d0bf3-7ab6-4c85-b17c-d7acce8ab53/resource/58113e0d-a0d9-4bc1-9df1-b773704c1a37/download/6659118-biodiversity-management-frameworks-regional-plans-2014-08-18.pdf>.

⁷⁷ *Water Act*, *supra* note 51, s 43(1)(a)(viii).

has only approved two water management plans (for the South Saskatchewan River Basin and Battle River Basin).

Water conservation objectives (WCO) are another tool with relevance to habitat management and conservation and may be focused on protecting aquatic habitat. A WCO may be incorporated into a water licence issued to the government for the purpose of giving the WCO priority over other water diversions. Insofar as WCOs may be based in science and provide priority to instream flows they may be helpful for habitat protection, particularly in basins that were not subjected to large amounts of historical water allocations.⁷⁸ The director may establish WCOs after considering public engagement and input or a WCO may be set through the water management planning process.⁷⁹

Municipal Government Act:

The Municipal Government Act (MGA) sets out the planning requirements for municipalities. This may include aspects of habitat management although it relies on the discretion of the municipality. One of the MGA tools that indirectly affects habitat management and protection is the legislative requirement for intermunicipal planning.⁸⁰

Intermunicipal planning requires two or more municipalities to coordinate zoning or land-use decisions and, particularly, this requirement also applies to ecological features that do not respect municipal boundaries.⁸¹ According to the MGA, if two or more municipalities sharing a common border are not already participating in a growth management board, they must create an intermunicipal development plan and the said plan must address 'environmental matters within the area, either

⁷⁸ The *Water Act* (see note 51) is based on a prior allocation system, meaning that those who have licences that were issued earlier can get their full licenced allocation before someone with a later licence in times of shortage. Licences can be issued to government for the purpose of protecting a WCO.

⁷⁹ *Water Act*, *supra* note 51, s 15.

⁸⁰ MGA, *supra* note 20, s 626.

⁸¹ MGA, *supra* note 20, s 626.

generally or specifically.”⁸² Not only will this provision enable municipalities to take more control over their environmental management, but it may also result in improved cumulative management effects because the ability to plan for habitat on a large-scale can help to ensure that the cumulative effect of many small development decisions is not underestimated.⁸³

Section 617, along with part 17 (Planning and Development) of the MGA, also enables planning decisions that are to be made in order “to achieve orderly, economical and beneficial development, use of land and patterns of human settlement” and “to maintain and improve the quality of the physical environment.”⁸⁴ Although environmental considerations are not mandatory, it does help to set the stage for a conservation minded planning approach.

This includes having habitat management integrated in statutory plans and municipal bylaws. Statutory plans such as mandatory municipal development plans (MDPs), may be used to integrate valued habitat components into land use development through subdivision decisions, zoning, and regulation of development. It should be noted that historically habitat considerations have not been overly integrated into planning decisions and may attract litigation. Recent amendments to the MGA and related big city charter regulations (passed for Calgary and Alberta) have expanded the notion of municipal regulation that could extend to habitat and biodiversity conservation.⁸⁵

Environmental Protection and Enhancement Act:

The *EPEA* environmental assessment process, a major component of this Act, is generally triggered by large-scale projects and the assessment requirements differ

⁸² MGA, *supra* note 20, s 631(2)(a); Dr. Judy Stewart, “Do Recent Amendments to Alberta’s *Municipal Government Act* Enable Management of Surface Water Resources and Air Quality” (December 2017) Canadian Institute of Resources Law Occasional Paper #62 at 25.

⁸³ Arlene J Kwasniak, “Wildlife Management Beyond Wildlife Laws” (February 2007) Canadian Institute of Resources Law Canadian Wildlife Law Project Paper #7 at 20 online: <https://dspace.ucalgary.ca/bitstream/handle/1880/48584/CIRL-WL-Kwasniak-Report-7w.pdf?sequence=1>.

⁸⁴ MGA, *supra* note 20, s 617.

⁸⁵ MGA, *supra* note 20, s 3(a.1); *City of Edmonton Charter, 2018 Regulation*, Alta Reg 39/2018; *City of Calgary Charter, 2018 Regulation*, Alta Reg 40/2018.

based on the degree of anticipated environmental effect. For example, activities that are expected to cause the most substantial environmental impacts trigger the full *EPEA* assessment process.⁸⁶ This is a multi-step process which includes a mandatory public notice and comment period along with a review of the project and its anticipated environmental impacts.⁸⁷

A formal environmental assessment is conducted to fulfill a number of purposes including the goals of environmental protection and sustainable development.⁸⁸ In turn, an environmental impact assessment report, completed by the project proponent and submitted during the assessment process must include modeling for habitat and must indicate how the project proponent plans to identify terrestrial and aquatic habitat and how any impacts on this habitat will be mitigated.⁸⁹ Although the environmental assessment process for each individual project will look different, the Act and the impact assessment reports enable the director to require consideration of habitat management prior to approval.

⁸⁶ *EPEA*, *supra* note 50, ss 40 & 41.

⁸⁷ *Ibid*, ss 40 & 41.

⁸⁸ *Ibid*, s 40.

⁸⁹ Alberta Environment and Parks, "Environmental Assessment Program: Guide to Preparing Environmental Impact Assessment Reports in Alberta" (March 2013) online: <https://open.alberta.ca/dataset/7fc11c66-3691-455f-a27e-389c74cecc9e/resource/23786d37-27c9-48ef-b173-4642803e9f32/download/2013-guidepreparingeiaareportsalberta-2013a.pdf>.

Area based conservation tools (protected areas)



Wildlife Act:

The *Wildlife Act*, although primarily a hunting regulation, does include certain provisions which enable the creation of protected areas. For example, the *Wildlife Act* enables the Minister to make regulations establishing wildlife sanctuaries, establishing habitat conservation areas, and classifying wildlife sanctuaries for the benefit of all wildlife, or specifically for certain prescribed kinds of wildlife.⁹⁰

Once created, wildlife sanctuaries limit hunting unless specifically authorized by a licence⁹¹ and hunting in habitat conservation areas is limited unless authorized by the Minister.⁹² Habitat conservation areas also prohibit overnight stays, camping, or vehicles in the area unless previously authorized by the Minister.⁹³ The areas that have

⁹⁰ *Wildlife Act*, *supra* note 9, s 103(1)(b).

⁹¹ *Ibid*, s 39.

⁹² *Wildlife Regulation*, *supra* note 59, s 102.

⁹³ *Ibid*, s 129.

been designated as either a wildlife sanctuary or habitat conservation area can be found in the Schedule to the *Wildlife Regulation*.⁹⁴

Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act:

The *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act* enables the creation of four types of protected area:

- **Wilderness areas** have the highest level of protection with all development limited in their boundaries.⁹⁵ This includes a prohibition on oil and gas, mining, forestry, or other industrial related activity, as far as practicable.⁹⁶ Wilderness areas provide limited recreational opportunities, restricted to backcountry exploration and no roads or travel by vehicle is permitted;
- **Ecological reserves** are the second highest level of the designated protected areas.⁹⁷ The primary intent of an ecological reserve is to preserve particular natural ecosystems with high ecological or geological value.⁹⁸ Once designated, new dispositions for resource extraction activities are prohibited.⁹⁹ Oil and gas dispositions that exist at the time of designation are allowed to continue while mining, forestry, and other activity involving surface rights may only continue with consent of the Minister.¹⁰⁰ Finally, there is some allowance for science and research within the boundaries of an ecological reserve;¹⁰¹

⁹⁴ Schedule 11 sets out the Wildlife Sanctuary and Wildlife Sanctuary Corridor locations. Although there have not been any Wildlife Sanctuaries created, the Regulation does set out the specifications for a number of Wildlife Sanctuary Corridors, which have some protections in place. Schedule 12 specifies the location of numerous Habitat Conservation Areas.

⁹⁵ *WAERNAHR Act*, *supra* note 43, s 3.

⁹⁶ *Ibid*, ss 6 & 7; Shaun Fluker & Dave Poulton, "A Short Guide to Protected Areas Designations in Alberta: A Chart for the Perplexed" Canadian Parks and Wilderness Society at 1 online: https://cpaws-southernalberta.org/wp-content/uploads/2018/06/Protected_Area_Designations.pdf [Fluker & Poulton].

⁹⁷ *WAERNAHR Act*, *supra* note 43, s 4.

⁹⁸ *Ibid*, s 7.

⁹⁹ *Ibid*, s 7.

¹⁰⁰ *Ibid*, s 6; Fluker & Poulton, *supra* note 96, at 2.

¹⁰¹ *WAERNAHR Act*, *supra* note 43, s 4(a).

- **Heritage rangelands** are designed to protect natural features representative of Alberta's prairies where grazing is used to maintain grassland ecologies.¹⁰² Development or human activity is limited to that which is compatible with the grassland ecology. However, there are no legislative restrictions on mineral leasing or activities;¹⁰³ and
- **Natural areas** are areas designed to protect sites of local significance and the Minister has discretion to designate land uses for a particular natural area.¹⁰⁴ This has led to widely varying protections for natural areas.¹⁰⁵ Overall, they receive less protection, being open to public land and mineral dispositions and a wide range of recreation and access.¹⁰⁶

The *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act* provides various levels of protection for each of the four categories of “protected areas” beginning with the preamble which states that it is in the public interest to protect and preserve certain areas of the province and safeguard them from damage and industrial development for the “benefit and enjoyment of present and future generations”.¹⁰⁷

To do so, the Lieutenant Governor in Council (i.e. the provincial Cabinet) may designate an area by way of order (except for wilderness areas which are designated by amending the schedule to the Act), with each designation being guided by different purposes.¹⁰⁸

¹⁰² *WAERNAHR Act*, *supra* note 43, s 4.1.

¹⁰³ Fluker & Poulton, *supra* note 96, at 2.

¹⁰⁴ *WAERNAHR Act*, *supra* note 43, ss 4.01 & 7.1.

¹⁰⁵ Fluker & Poulton, *supra* note 96, at 4.

¹⁰⁶ Alberta Environment and Parks, “Classification of Alberta Parks” (10 October 2017) Government of Alberta online: <https://www.albertaparks.ca/albertaparksca/management-land-use/legislation-regulations/> [Classification of Alberta Parks].

¹⁰⁷ *WAERNAHR Act*, *supra* note 43.

¹⁰⁸ *Ibid*, ss 4, 4.01 & 4.1

Provincial Parks Act:

The *Provincial Parks Act* sets out five purposes, including the preservation of Alberta's natural heritage and the conservation and management of flora and fauna.¹⁰⁹ In order to fulfill these purposes, the Act establishes a regime for the creation of parks and recreation areas and establishes certain protections for land outside these designated areas.¹¹⁰ Once land is established as a park or recreation area, the Minister can then determine which resource activities (requiring a disposition) should be allowed or withdrawn.¹¹¹

The *Provincial Parks Act* enables the creation of three types of “protected” areas.

- **Wildland provincial parks** are designed to specifically protect natural heritage with only limited opportunities for backcountry exploration. They are intended to allow for the establishment of large protected areas and, once created, they prohibit new rights for oil and gas, mining, or other industrial activities, although they do allow logging and grazing rights;¹¹²
- **Provincial parks** are designed to preserve natural heritage while also allowing for more development including roads and facilities that support tourism in the area. The Act authorizes the Minister to grant, renew, amend or withdraw dispositions in a park as they see fit¹¹³ although the Act does limit the construction or alteration of land in a park, unless previously authorized.¹¹⁴ Significant detail on the prohibitions and protections afforded to a provincial park is left to regulation.¹¹⁵ This level of discretion means that the level of protection afforded to provincial parks varies widely;¹¹⁶ and

¹⁰⁹ *Provincial Parks Act*, *supra* note 44, s 3 (a) & (b).

¹¹⁰ *Ibid*, ss 6(1) & 7.

¹¹¹ *Ibid*, s 8.

¹¹² Fluker & Poulton, *supra* note 96, at 3.

¹¹³ *Provincial Parks Act*, *supra* note 44, s 8.

¹¹⁴ *Ibid*, s 9.1.

¹¹⁵ *Ibid*, s 12(2).

¹¹⁶ Fluker & Poulton, *supra* note 96, at 3-4.

- **Provincial recreation areas** are designed to provide access to lakes, rivers, or other natural features adjacent to Crown land with significantly more allowable development. Unfortunately, this designation provides virtually no protection for habitat.¹¹⁷



¹¹⁷ Fluker & Poulton, *supra* note 96 at 5; Classification of Alberta Parks, *supra* note 106.

Alberta Land Stewardship Act:

Though focused on land-use planning, there are certain provisions of the *Alberta Land Stewardship Act* that enable some level of area-based protection.

a. Conservation easements

Conservation easements are statutorily created property interests that allow private landowners to donate or sell specific land use rights to qualified organizations (such as land trusts or government departments) and preserve the natural and ecological value of the land.¹¹⁸ Their legislative purpose is the protection, conservation, and enhancement of the environmental, natural scenic, esthetic, or agricultural value of land.¹¹⁹ Once a conservation easement has been registered on the land title, it will run with the land and restrictions on land use will apply to all future landowners.¹²⁰

Land designated as a conservation easement may allow for recreation, open space, environmental education, or research and scientific study uses, so long as the uses are consistent with the defined purpose of the conservation easement.¹²¹ Conservation easements are broadly applicable, flexible and can apply to private land.

b. Conservation directives

Conservation directives are designed to permanently protect, conserve, manage, and enhance environmental, natural scenic, esthetic, or agricultural values of land.¹²² However, in order to use this tool, the proposed area must be governed by a regional plan which must expressly declare the directive and must precisely describe its nature.¹²³

¹¹⁸ *ALSA*, *supra* note 45, s 29.

¹¹⁹ *Ibid*, ss 28-35.

¹²⁰ See *ALSA* (note 45) s 33 and the *Land Titles Act*, RSA 2000, c L-4. For more information on conservation easements see <http://www.ce-alberta.ca/>.

¹²¹ *ALSA*, *supra* note 45, s 29(1)(d).

¹²² *Ibid*, ss 37(1) & 39 - 41.

¹²³ *ALSA*, *supra* note 45, s 37.

Unlike conservation easements, conservation directives do not constitute an estate or interest in land. Rather, they set aside a block of land for a stated purpose including the protection, conservation, management, or enhancement of the environment.¹²⁴ Conservation directives may also be imposed on specific parcels of land without the consent of the landowner. Conservation directives enable direct habitat protection through the prohibition of specific land uses in valued habitat and through the required maintenance of wildlife corridors.¹²⁵

To facilitate the use of conservation directives, Cabinet can require a list of candidate areas for the use of conservation directives as part of the planning process.¹²⁶ However, the use of conservation directives is also accompanied by a right to compensation. The Act provides that a "title holder whose estate or interest in land is the subject of a conservation directive has a right to apply for compensation in accordance with the Act."¹²⁷ Compensation amounts would be determined by the decrease in market value of the estate or interest in land and damages for any other loss specified in the regulations.¹²⁸

c. Transferable development credit (TDC) schemes

Transferable development credit (TDC) schemes are a market-based instrument, enabled by the ALSA.¹²⁹ A TDC scheme allows for the conservation of an identified land value by transferring the site of a subdivision or development away from threatened or particularly valuable pieces of land towards more suitable areas, with lower ecological values.¹³⁰ TDC schemes

¹²⁴ *Ibid*, s 37.

¹²⁵ Sarah Palmer, Adam Driedzic & Jason Unger, *Conservation Directives: Alberta's Unknown and Untested Conservation Tool* (October 2015) Environmental Law Centre at 29 online: <http://elc.ab.ca/media/103996/ConservationDirectivesELCRecommendations.pdf> [Palmer, Driedzic, & Unger].

¹²⁶ *ALSA*, *supra* note 45, s 51(1)(f).

¹²⁷ *Ibid*, s 36.

¹²⁸ *Ibid*, s 39(3).

¹²⁹ *Ibid*, ss 48-50.

¹³⁰ Adam Driedzic & Brenda Heelan Powell, "Buying a Better Environment? Market-Based Instruments & the *Alberta Land Stewardship Act*" (December 2016) Environmental Law Centre at 33 [Driedzic & Powell].

operate by zoning certain areas for increased development and others for protection. This is typically done through a development bonusing system for the area to be developed and the granting of a conservation easement on the area to be protected.

Despite being enabled by the legislation, the ALSA does not prescribe a system for a TDC scheme and instead, leaves them to be devised by a regional plan or a municipality – creating uncertainty.¹³¹

d. Conservation off-sets

Conservation off-sets are another tool meant to “counterbalance the effect of an activity” by requiring mitigation or restoration efforts to take place in another, undeveloped area.¹³² Ideally, the restored area is located within the same ecological region as the impacted area in an attempt to replace the same environmental attributes, however this is not required by the program.¹³³

e. Stewardship units

Finally, the ALSA enables the creation of stewardship units, a facilitative tool, or metric, that can be used when conservation occurs.¹³⁴ These units can be exchanged or sold to optimize both development and habitat conservation and would typically form part of a conservation off-set or TDC program. However, the ALSA does not provide any detail or guidance for a stewardship unit scheme and more information is left up to nonexistent regulations.

The Environmental Law Centre has previously published an in-depth series of papers on Market-Based Instruments and the ALSA which may be a helpful guide should a more detailed explanation of each specific tool be required.¹³⁵ You can find these publications here: <http://elc.ab.ca/publications/available-to-download/>.

¹³¹ Palmer, Driedzic, & Unger, *supra* note 125, at 12.

¹³² ALSA, *supra* note 45, s 47.

¹³³ *Ibid*, s 47.

¹³⁴ Driedzic & Powell, *supra* note 130, at 34.

¹³⁵ *Ibid*.

Public Lands Act:

According to the *Public Lands Act (PLA)*, public land can be set aside to be used as a provincial park, natural area, ecological reserve, wilderness area, heritage rangeland, forest reserve, forest recreation area, wildlife sanctuary, or habitat conservation area (by way of cabinet regulation).¹³⁶ The Act also enables the creation of public land use zones, public land recreation areas, or public land recreation trails and may specify which activities are permissible in each.¹³⁷

In addition to these legislatively determined categories, the Minister may also, by order, classify public lands and specify available uses.¹³⁸ This is a broad power, enabling the Minister to protect land by order, however, there is no specific reference to habitat.¹³⁹ The Act also legislates for the ability to exchange public land for private lands, a provision which may be used to protect land with a high habitat value.¹⁴⁰

The Minister may also establish programs designed for conservation and resource management including resource protection and enhancement programs, education and research, and to deal with multiple use concerns.¹⁴¹

¹³⁶ *PLA*, *supra* note 48, s 7(c).

¹³⁷ *Ibid*, s 71.

¹³⁸ *Ibid*, s 11.

¹³⁹ Palmer, Driedzic, & Unger, *supra* note 125, at 16.

¹⁴⁰ Government policy states that when evaluating the potential usefulness of a land exchange, AEP would consider whether the said land provides values such as the protection of watersheds; provision of habitat and corridors for fish and wildlife; preservation of native grasslands and other flora; and protection of species at risk habitat; *PLA*, *supra* note 48, s 8(3)(b); Alberta Environment and Parks, "Land Exchanges" (25 January 2018) online: Government of Alberta <http://aep.alberta.ca/land/programs-and-services/land-exchanges/default.aspx>.

¹⁴¹ *PLA*, *supra* note 48, s 11.1.



Municipal Government Act:

The MGA enables the Lieutenant Governor in Council, on the recommendation of the Minister, to establish certain land use policies.¹⁴² Once established, municipal decision-making must be consistent with these policies and must ensure that any zoning or bylaws are consistent as well.¹⁴³

Some options for area based habitat management and protection, enabled by the MGA, are set out below

Municipal options during the subdivision process:

a. Environmental reserves and environmental reserve easements

Environmental reserves are created during the subdivision process and result in land being transferred from the landowner to the municipality.¹⁴⁴ They may provide protection for areas of valuable habitat but that is not their primary purpose. Rather, environmental reserves are limited by the land types enumerated in the Act, which states that environmental reserves can apply to part of a parcel of land consisting of a “swamp, gully, ravine, coulee or natural

¹⁴² MGA, *supra* note 20, s 622(1).

¹⁴³ *Ibid*, s 622(2).

¹⁴⁴ *Ibid*, s 664.

drainage course; land that is subject to flooding or is unstable; or a strip of land, not less than 6 metres in width, abutting the bed and shore of any body of water.”¹⁴⁵ In addition, the legislation limits the uses of land designated as an environmental reserve.¹⁴⁶ Once created, the land must be left in its natural state or used as a public park.¹⁴⁷

A similar option is known as an environmental reserve easement. In the case of an environmental reserve easement, the title of the land remains with the landowner rather than being transferred to the municipality. Environmental reserve easements may be designated and registered on title and require that the land subject to the easement remain in its natural state.¹⁴⁸ These easements are considered to be an interest in land and are enforceable by the municipality.¹⁴⁹

b. Conservation Reserves

Conservation reserves are created during the subdivision process and can be used for land with environmentally significant features that do not otherwise qualify under the requirements for an environmental reserve or environmental reserve easement.¹⁵⁰ The purpose of conservation reserves is to enable the municipality to protect and conserve land and its ecological value.¹⁵¹ This could include important ecological areas such as wildlife corridors and tree stands. Once land is designated as a conservation reserve, it must remain in its natural state.¹⁵² Title to land designated as a conservation reserve is transferred to the municipality.

Conservation reserves are limited because, unlike an environmental reserve, the creation of a conservation reserve requires compensation be paid to the

¹⁴⁵ MGA, *supra* note 20, s 664(1).

¹⁴⁶ *Ibid*, s 671(1).

¹⁴⁷ *Ibid*, s 671(1).

¹⁴⁸ *Ibid*, ss 664(2) & (3).

¹⁴⁹ *Ibid*, ss 664(2) & (3).

¹⁵⁰ *Ibid*, s 664.2(1).

¹⁵¹ *Ibid*, s 664.2.

¹⁵² *Ibid*, s 664.2.

landowner.¹⁵³ The Act states that, 30 days after the creation of a conservation reserve, the government must pay the landowner an amount equal to the market value of the property,¹⁵⁴ costs which may be an obstacle to the use and creation of conservation reserves. To avoid this extra cost, municipalities can designate parcels of land already owned by the municipality as environmental or conservation reserves.¹⁵⁵

Recreational or habitat zoning/districts:

a. Land use bylaws

The MGA requires every municipality to pass a land use bylaw.¹⁵⁶ This bylaw may “prohibit or regulate and control the use and development of land and buildings in a municipality.”¹⁵⁷ These bylaws may be used to manage certain aspects of land development and thus could be used for habitat management. For example, a land use bylaw may restrict the development of buildings on land subject to flooding or on land adjacent or within a specified distance of the bed and shore of any body of water.¹⁵⁸

The new municipal purposes section, which expanded the ‘purposes of a municipality’ to include fostering the well-being of the environment, may also enable further restrictions on land use for habitat purposes.¹⁵⁹ However, municipalities should be cognizant that the imposition of land use restrictions that overly insulate land from any development, may lead to litigation.

¹⁵³ MGA, *supra* note 20, s 664.2(2).

¹⁵⁴ *Ibid*, s 664.2(2).

¹⁵⁵ *Ibid*, s 665.

¹⁵⁶ *Ibid*, s 639.

¹⁵⁷ *Ibid*, s 640(1).

¹⁵⁸ *Ibid*, s 640(4)(l).

¹⁵⁹ *Ibid*, s 3(a.1).

Combined, the planning and bylaw portions of the MGA allow for municipal management of various aspects of land use that may have value for habitat. Notably, the discretion to act on these management tools remains with the municipality.

Localized/biophysical conservation

Wildlife Act:

Localized or biophysical conservation in the *Wildlife Act* is found primarily in prohibitions. The Act includes prohibitions against “willfully molesting, disturbing or destroying the house, nest or den of prescribed wildlife”¹⁶⁰ and “prescribed animals” are set out in the *Wildlife Regulation* to include:¹⁶¹

(a) to the nests and dens, so far as applicable, of

(i) **endangered animals** that are treated under section 7 the same as non-game animals other than raven, throughout Alberta and throughout the year,

(i.1) **upland game birds** throughout Alberta and throughout the year,

(ii) **migratory game birds, migratory insectivorous birds and migratory nongame birds** as defined in the *Migratory Birds Convention Act, 1994* (Canada), throughout Alberta and throughout the year, and

(iii) **bats** throughout Alberta and from September 1 in one year to April 30 in the next,

(a.1) to the **dens of snakes used as hibernacula or birthing dens**, throughout Alberta and throughout the year,

(a.2) to the **dens of bats**, excluding those constructed by human beings, used as hibernacula, throughout Alberta and throughout the year,

¹⁶⁰ *Wildlife Act*, *supra* note 9, s 36.

¹⁶¹ *Wildlife Regulation*, *supra* note 59, s 96.

(b) to the **houses and dens of beaver**, on any land that is not privately owned land described in section 1(1)(z)(i) or (ii) of the Act throughout the year,

(c) to the **houses, nests and dens of all wildlife**, in a wildlife sanctuary throughout the year, and

(d) to the **nests of game birds**, in a game bird sanctuary throughout the year.

This general prohibition does not apply where the harm to wildlife habitat results from an authorization under the *Agricultural Pests Act* or the *Water Act*; is licenced; when there is written permission of the Minister; or when otherwise permitted by regulation.¹⁶²

The applicability of this section to habitat protection is also restricted by the qualification that the harm is undertaken “willfully”, meaning intentionally or knowingly.¹⁶³ This language means that accidentally destroying an animal’s den or home (even the den or home of an animal considered to be at risk), if the accidental destruction was not reasonably foreseeable, cannot be prosecuted under this section. Additionally, the focus remains on the protection of individual animals rather than on the protection of species.¹⁶⁴



¹⁶² *Wildlife Act*, *supra* note 9, ss 1(y)(ii) & 36.

¹⁶³ *R v Brown*, 1982 ABCA 194 - There is no need to prove malicious intent but only that the impugned act was intentional or knowingly undertaken.

¹⁶⁴ *Wildlife Act*, *supra* note 9, s 36(1).

Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act:

This Act sets out certain prohibited activities, some of which are specific to one or more protected area designation.¹⁶⁵ These include prohibitions against the removal of any plant or animal life, fossils, or other objects of geological, ethnological, historical, or scientific interest in a wilderness area, ecological reserve, or heritage rangeland;¹⁶⁶ the introduction or deposit of a material, substance, or organism that is, or may be, harmful to plant or animal life into a wilderness area or ecological reserve;¹⁶⁷ or the construction, reconstruction, maintenance, addition, or any other action that may alter or disturb the land in a wilderness area, ecological reserve or heritage rangeland.¹⁶⁸

Further, the Act prohibits the general destruction and damage to land, water, plant life, or animal life¹⁶⁹ limited through certain exemptions, including, when a person is destroying or damaging land, water, plant life, or animal life:¹⁷⁰

- a) with Ministerial permission,
- b) in natural areas where the harm is pursuant to a prescribed permission or where no permission is required;
- c) pursuant to a disposition or permission in a natural area or heritage range land; or
- d) in relation to an activity allowed under the *Wildlife Act* or *Fisheries (Alberta) Act* in a natural area or heritage ranchland not otherwise prohibited under the Act.

¹⁶⁵ *WAERNAHR Act*, *supra* note 43, ss 8.1 & 8.2.

¹⁶⁶ *Ibid*, s 8.1 (f).

¹⁶⁷ *Ibid*, s 8.1 (h).

¹⁶⁸ *Ibid* s 8.1 (k).

¹⁶⁹ *Ibid*, s 10(1).

¹⁷⁰ *Ibid*, s 10.

Provincial Parks Act:

The purpose of this Act includes the preservation of specified areas, landscapes and natural features, and objects - a provision which can be used to encourage the government to protect localized habitat.¹⁷¹

In part to fulfill this purpose, the Act prohibits the destruction, damage, or removal of plant and animal life¹⁷² or introduction of “any plant, animal or insect species that has the potential to alter the ecological integrity” of an area.¹⁷³ In addition, the Minister may create regulations to protect rare or sensitive habitat features.¹⁷⁴

The Act prohibits a person from constructing or otherwise altering or disturbing the surface of the land or storing materials or equipment on the land in either a park or recreation area.¹⁷⁵ Disturbance of the surface area is allowed to the extent permitted in a disposition or by permission of the Minister.¹⁷⁶

The *Provincial Parks (General) Regulation* also includes sections prohibiting the deposit of waste in parks or recreation areas; limiting where you can clean equipment near water facilities; and prohibiting the removal of water or firewood.¹⁷⁷

Public Lands Act:

The PLA does not specifically focus on localized habitat management and protection efforts. Rather, the Act focuses on the management and administration of public land in the province. This includes the various dispositions that may be granted to third parties to occupy and use public land. There are also various prohibitions under the Act that may act as a proxy for habitat protections.

¹⁷¹ *Provincial Parks Act*, *supra* note 44, s 3 (c).

¹⁷² *Ibid*, s 9.2.

¹⁷³ *Ibid*, s 9.2.

¹⁷⁴ *Ibid*, s 12(2).

¹⁷⁵ *Ibid*, s 9.1.

¹⁷⁶ *Ibid*, s 10(1).

¹⁷⁷ *Provincial Parks (General) Regulation*, Alta Reg 102/85, ss 12-14.1 [*Provincial Parks (General) Regulation*].

For example, the Act states that no person shall cause or permit a broad range of activities that may result in loss or damage to public land, including undertaking an activity or use that results in damage and permitting structures and conditions that may cause loss or damage.¹⁷⁸ The Act also prohibits activities that may result in harm to watersheds and waterbodies. Specifically, the Act prohibits:¹⁷⁹

- “doing an act on public land that may injuriously affect watershed capacity”;
- causing or permitting a disturbance of public land that injures the bed or shore of water bodies; or
- creating a condition on public land that “is likely to result in soil erosion”.

Further, entering on and occupying public land is prohibited unless approval has been issued for a particular purpose or it is otherwise authorized by the regulations.¹⁸⁰ Purposes may include investigating natural resources or underground formations, exploring or excavating fossil remains or objects, fulfilling a registered fur management agreement under the *Wildlife Act*, fulfilling a timber disposition under the *Forests Act*, or other purposes which have been expressly authorized.¹⁸¹

Recreational access to “vacant public land” **is** permitted under the *Public Lands Administration Regulation (PLAR)*, albeit with some limitations.¹⁸² Access permits may set general recreational access limits¹⁸³ and the Regulation provides a broad prohibition against the use of off-highway vehicles, unless specifically exempted.¹⁸⁴ Specifically, entering on and occupying the bed or shore of a permanent and naturally occurring body of water or river, stream, watercourse, or lake is prohibited except where a boat is used, the ice is frozen, or where it does not involve the use of

¹⁷⁸ *PLA*, *supra* note 48, s 54.

¹⁷⁹ *Ibid*, s 54.

¹⁸⁰ *Ibid*, s 20(1).

¹⁸¹ *Ibid*, s 20(1).

¹⁸² *Public Lands Administration Regulation*, Alta Reg 187/2011, ss 32-48 [*PLAR*].

¹⁸³ *Ibid*, s 37(1).

¹⁸⁴ *Ibid*, s 185(1).

a wheeled or tracked conveyance.¹⁸⁵ This prohibition does not apply where a disposition or a consent allows for the activity under the Act.¹⁸⁶

The PLAR allows the Minister to establish disturbance standards which set out the maximum allowable footprint that can be developed on public land.¹⁸⁷ This includes a limit on the activities, uses, dispositions, or ancillary facilities that may be built.¹⁸⁸

Water Act:

The purpose of the *Water Act* is to “promote the conservation and management of water, including the wise allocation and use of water, while recognizing the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and future.”¹⁸⁹ The Act provides a regulatory framework for authorizations of activities that have impacts on water generally and on the aquatic environment. Water management planning is also enabled in the Act (but is discretionary).¹⁹⁰

The Act defines aquatic environment as, “the components of the earth related to, living in or located in or on water or the beds or shores of a water body, including but not limited to: all organic and inorganic matter and living organisms and their habitat, including fish habitat and their interacting natural systems.”¹⁹¹ The regulatory focus of the Act applies to a broad range of activities that may have an impact on water.

Diversions of water, or activities on land or in a water body that impact water, are likely to trigger the need for an approval or a licence. An activity is defined to include “removing or disturbing ground, vegetation or other material...in or on any land, water or water body”, that could:¹⁹²

¹⁸⁵ *PLAR*, *supra* note 182, s 43.

¹⁸⁶ *Ibid*, s 43(b).

¹⁸⁷ *Ibid*, s 3(1).

¹⁸⁸ *Ibid*, ss 3 & 21(2)(d).

¹⁸⁹ *Water Act*, *supra* note 51.

¹⁹⁰ *Ibid*, s 9(1).

¹⁹¹ *Ibid*, s 1(h).

¹⁹² *Water Act*, *supra* note 51, s 1(b).

- alter the flow or level of water either temporarily or permanently;
- change the location of water or direction of flow;
- cause siltation or erosion of any bed or shore of a water body; or
- cause an effect on the aquatic environment.

For water diversion impacts on habitat there is a major drawback to the Act as historically granted licenses, i.e. licences granted under previous water laws, have priority over the terms of the Act.¹⁹³ In turn, there are limited legislative tools to address habitat related harms resulting from these historic diversions.

Municipal Government Act:

Municipalities are granted bylaw-making powers under the MGA and may enact bylaws that protect local habitat or biophysical features. For example, City of Edmonton bylaws prohibit the damage or removal of elm trees located on city boulevards and set out the requirements for elm tree pruning and for the transportation of elm trees infected by disease.¹⁹⁴



¹⁹³ *Ibid*, s 30.

¹⁹⁴ City of Edmonton, revised by-law, C S 14600, *Community Standards Bylaw*, (20 March 2018) ss 34-37.

Habitat consideration in decision-making

Wildlife Act:

The *Wildlife Regulation* includes provisions that may impact upon the ability of conservation informed authorizations to succeed, including exemptions to prohibitions that would otherwise have been considered a violation under the Act, such as harm to wildlife.¹⁹⁵ Exemptions include those allowing for the possession of live wildlife, hunting without a licence, and hunting out of season.¹⁹⁶ These exemptions are listed and do not require the Minister's approval so long as the activity in question falls under one of the prescribed exemptions.

Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act:

According to this Act, the Minister may establish programs or measures designed to increase the amount and quality of protected areas.¹⁹⁷ These programs are intended for the "management and preservation of its animal and plant life and environment, for environmental research and reclamation" and for preservation and protection.¹⁹⁸

Additionally, the Act prohibits the issuance of dispositions on any land that has been established as a wilderness area or ecological reserve, albeit subject to certain exemptions.¹⁹⁹ These exemptions include instances when a person holds an interest under the *PLA*, *Special Areas Act*, *Forests Act*, *Mines and Minerals Act*, or another surface disposition at the time of the establishment of a wilderness area or ecological reserve.²⁰⁰ In those circumstances, the Minister is required, as far as practicable, to ensure that the interest is terminated as soon as possible.²⁰¹ There are also certain exemptions specific to an ecological reserve – for example, the Minister is not

¹⁹⁵ *Wildlife Regulation*, *supra* note 59, Sched 1 s 8.

¹⁹⁶ *Ibid*, Sched 1, ss 3, 4 & 6.

¹⁹⁷ *WAERNAHR Act*, *supra* note 43, s 5.

¹⁹⁸ *Ibid*, s 5.

¹⁹⁹ *WAERNAHR Act*, *supra* note 43, s 7.

²⁰⁰ *Ibid*, s 7.1.

²⁰¹ *Ibid*, s 6(1).

required to terminate an existing petroleum or natural gas disposition, prohibitions do not apply to privately owned minerals and the Minister may choose to allow petroleum, natural gas, forestry, livestock, or surface dispositions in an ecological reserve.²⁰² In a natural area, allowable dispositions must allow access to privately owned land or minerals or must fall within the meaning of the *Public Lands Act* or the *Forest Act* where the activity to be allowed by the disposition is not prescribed to be prohibited and must be created with the Minister's permission.²⁰³

In heritage rangelands, dispositions are permitted if they provide for livestock grazing rights, are a minerals disposition under the *Mines and Minerals Act*, are a disposition for privately owned minerals, or are a surface disposition required for the aforementioned mineral or livestock rights.²⁰⁴ In addition, the Minister may grant permission for dispositions under the *PLA*, *Special Areas Act*, or *Forest Reserves Act* even after the land is designated a heritage rangeland.²⁰⁵

Provincial Parks Act:

The *Provincial Parks Act* enables the Minister to make regulations governing and managing parks and recreation areas.²⁰⁶ This could include regulations controlling animals and limiting or allowing new dispositions.²⁰⁷ The Minister is not, however, required to consider habitat when making decisions about dispositions located in parks.

The *Provincial Parks (General) Regulation* also enumerates a number of regulated activities, including the collection or removal of flora, fauna, or geological specimens; the collection of, or excavation for, historic resources; work in otherwise prohibited areas of the park; research that involves a physical disturbance to the land; or setting up structures in the park.²⁰⁸ Prior to conducting any of the above

²⁰² *Ibid*, ss 6(2) & 6(3).

²⁰³ *Ibid*, s 7.1.

²⁰⁴ *Ibid*, s 7.2(2).

²⁰⁵ *Ibid*, ss 7.1 & 7.2.

²⁰⁶ *Provincial Parks Act*, *supra* note 44, s 12.

²⁰⁷ *Provincial Parks Act*, *supra* note 44, ss 12(1) & (2).

²⁰⁸ *Provincial Parks (General) Regulation*, *supra* note 177, s 45.

activities, the Minister must authorize the appropriate permit.²⁰⁹ When authorizing these permits, the Minister does not need to consider habitat. Instead, the requirements are proper payment and evidence of insurance.²¹⁰

Alberta Land Stewardship Act:

The ALSA establishes a general regulation-making authority which allows the government to create regulations including those specifying what can or cannot be included in a regional plan.²¹¹ There is no specific regulatory reference to conservation informed authorizations, however, this section does afford an opportunity for their creation.

Additionally, regional plans are binding on all parties, including the Crown and independent tribunals. A regional plan may include specific and clearly articulated habitat consideration requirements that will guide all discretionary decisions under other legislation (considered in this volume). For example, under the *Public Lands Act* the director may amend (at any time) any term or condition of a disposition to make it compliant with a regional plan.²¹² In the case of regional plans, once habitat consideration has been included in a plan's regulatory details, consideration is required and there is no longer any room for discretion.

Public Lands Act:

The PLA does not direct or constrain the Minister's decision to issue new dispositions and provides the government with the overall ability to create regulations concerning land use and development.²¹³ The Minister retains discretion to award, limit, or amend dispositions without consideration for habitat.²¹⁴

²⁰⁹ *Ibid*, s 45(1).

²¹⁰ *Ibid*, ss 45(3) & (4).

²¹¹ ALSA, *supra* note 45, s 66.

²¹² See PLA, *supra* note 48, s 15 and PLAR, *supra* note 182, s 17.

²¹³ PLA, *supra* note 48, ss 8 & 9.

²¹⁴ *Ibid*, ss 8 & 9.

However, this general discretion is constrained under the *PLAR* in which the Minister has established disturbance standards.²¹⁵ Specifically, the Regulation states:²¹⁶

“Where the Minister, the director or an officer is issuing, amending or renewing a disposition, the Minister, director or officer must take into consideration any applicable disturbance standards and may specify any terms and conditions in the disposition that the Minister, the director or officer considers appropriate to help ensure that the disturbance standards are complied with.”

Under the *PLA*, the Minister also has the power to restrict dispositions or limit the issuance of dispositions in specified areas, as the “Minister considers warranted.”²¹⁷ In this way, the Minister can insulate public lands from activities that are likely to harm habitat.²¹⁸ The director has numerous powers to control these dispositions including renewal, amendment, cancellation, and any terms and conditions.²¹⁹

The director may amend a disposition at any time, if it is necessary to comply with an *ALSA* plan; to prevent loss or damage to the land; to provide for a monitoring or reporting requirement for activities on the land; to enforce or stop an order under the *PLA*; or as a condition for a mortgage, assignment, transfer, or sublease of the disposition.²²⁰ These sections, however, do not require habitat consideration. The director may also defer the approval of a disposition until after an investigation into the land and its health has been completed.²²¹

Where the Minister sells public lands, conditions as to the purposes for which the land may be used after sale, may be imposed.²²² These conditions may include the requirement to return the land to the Crown in the event that it is no longer being

²¹⁵ *PLAR*, *supra* note 182, s 3.

²¹⁶ *Ibid*, s 16.

²¹⁷ *PLA*, *supra* note 48, s 14.

²¹⁸ *Ibid*, s 14.

²¹⁹ *Ibid*, ss 15 & 26.

²²⁰ *PLA*, *supra* note 48, s 15(3).

²²¹ *Ibid*, s 16.

²²² *Ibid*, s 21.

used for an agreeable purpose.²²³ In turn, the Act enables the cancellation, suspension or amendment of a disposition on public land in the event that the disposition fails to comply with the Act or Regulations, providing the Crown with even more control over what activities may be authorized on public lands.²²⁴

Additionally, the *PLAR* sets out the duties that can be applied to disposition holders, including the restoration of lands (subject to authorizations) to an “equivalent land capability” of the original land use.²²⁵ Approvals for the restoration and reclamation of land are required and standards for the restoration of land are set out for disposition holders.²²⁶

Environmental Protection and Enhancement Act:

The stated purpose of the *EPEA* is to support and promote the protection, enhancement, and wise use of the environment.²²⁷ However, authorizations under the *EPEA* remain highly discretionary and are not constrained by habitat considerations.

The *Activities Designation Regulation* specifically sets out which activities require a statutory authorization in order to be lawfully carried out.²²⁸ When granting a statutory authorization, such as an *EPEA* approval, the government may include terms and conditions regarding habitat.

Although habitat management and protection does not play a significant role in the *EPEA*, the purposes of the Act reiterate the Act's focus on the protection of the environment as essential to ecosystems and human health; the need to develop in an environmentally responsible manner; the importance of the principle of

²²³ *Ibid*, s 21.

²²⁴ *Ibid*, s 26.

²²⁵ *PLAR*, *supra* note 182, s 21(2)(e).

²²⁶ *Ibid*, s 23.

²²⁷ *EPEA*, *supra* note 50, s 2.

²²⁸ *Activities Designation Regulation*, Alta Reg 276/2003.

sustainable development; and the importance of mitigating the environmental impact of development.²²⁹

The Act also enables some cooperation between landowners and the government. For example, the Minister may enter into an agreement with a landowner, setting out the purposes for which land may be used and binding future landowners to these same standards.²³⁰

Water Act:

The discretion to issue *Water Act* licences and approvals is largely unconstrained, however, when there is an approved water management plan in effect, the director must consider the plan when making licence and approval decisions, renewal decisions, and decisions regarding water conservation objectives.²³¹

In making licence and approval decisions the director *may* consider “any existing, potential, or cumulative effects on the aquatic environment, hydraulic, hydrological, and hydrogeological effects, and effects on household users, licensees and traditional agriculture users” where deemed to be relevant by the director in making decisions about licences and approvals.²³² Habitat considerations may also be considered when exercising discretion to “holdback” up to 10% of the licenced allocation that is subject to a transfer.²³³

The *Water (Ministerial) Regulation*, created under the *Water Act*, also states that a licence may be issued for a number of purposes including management of fish, management of wildlife, implementing a water conservation objective, habitat management, and water management.²³⁴ Further, the director has the authority to amend an approval or licence where there is an adverse effect on the aquatic environment (this adverse effect must be significant in the case of an approval), or

²²⁹ *EPEA*, *supra* note 50, s 2.

²³⁰ *Ibid*, s 21.

²³¹ *Water Act*, *supra* note 51, ss 11(3)(iv), 38(2)(a), 51(4)(a) & 53(a).

²³² *Ibid*, ss 38(1), 38(2) & 51(4)(b)(i).

²³³ *Water Act*, *supra* note 51, s 83; *Water Conservation Trust of Canada v Alberta (Environmental Appeals Board)*, 2015 ABQB 686.

²³⁴ *Water (Ministerial) Regulation*, Alta Reg 205/98, s 11.

the potential for such an effect, and that effect was not reasonably foreseeable at the time of the issuance of the licence.²³⁵ Compensation may be payable in both instances.²³⁶



Forests Act:

Throughout the *Forests Act*, the Minister retains significant discretion and is not required to consider habitat in their decision-making processes. In fact, habitat is only specifically considered in the Operating Ground Rules which are directional rather than legislated.²³⁷

The Act does enable broad regulation making authority, including regulations governing all aspects of reforestation and management of forest land.²³⁸ Under the Act, the Minister also has control over the administration and management of timber on public land.²³⁹

²³⁵ *Water Act*, *supra* note 51, s 55(2).

²³⁶ *Ibid*, ss 54(2), 55(2) & 158.

²³⁷ Alberta Agriculture and Forestry, "Alberta Timber Harvest Planning and Operating Ground Rules Framework for Renewal" (December 2016) Government of Alberta online: [https://www1.agric.gov.ab.ca/\\$department/deptdocs.nsf/all/formain15749/\\$FILE/TimberHarvestPlanning-OperatingGroundRulesFramework-Dec2016.pdf](https://www1.agric.gov.ab.ca/$department/deptdocs.nsf/all/formain15749/$FILE/TimberHarvestPlanning-OperatingGroundRulesFramework-Dec2016.pdf).

²³⁸ *Forests Act*, *supra* note 52, ss 4(f) & (k).

²³⁹ *Ibid*, s 7.

Conservation compliance, including administrative orders and potential sentences

Wildlife Act:

Throughout Part 8 of this Act there are a number of listed offences and prohibitions, applicable when a person contravenes any provision of the Act (including the provisions that create habitat protection measures).²⁴⁰ For example, the Act prohibits hunting within wildlife sanctuaries.²⁴¹

Potential fines and imprisonment for violations of these habitat related provisions are set at \$100,000 or imprisonment of up to two years for corporations or for those who have been previously convicted of any offence involving a contravention of this Act less than five years prior. Fines are capped at \$50,000 or imprisonment of up to one year for a person who is convicted of an offence against this Act and to whom the requirements above do not apply.²⁴²

The Act also enables the court to impose additional powers upon conviction including: taking action to remedy any harm to any animal or endangered organism or its habitat or to pay money for the purpose of promoting the proper management and control or conservation and protection of wildlife or endangered species or both, or their habitats.²⁴³

Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act:

The *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act* establishes a penalty regime, available if a person is found to have contravened

²⁴⁰ The associated *Wildlife Regulation* (see note 59) also regulates certain habitat protection provisions. For example, the Regulation designates corridor wildlife sanctuaries, in which hunting is not allowed, except for by specified licence – section 99(2). Similarly, section 102 prohibits hunting in conservation areas. However, neither the Act nor the Regulations prohibit economic or development activities in these sanctuaries. Further, there is no blanket provision against hunting.

²⁴¹ *Wildlife Act*, *supra* note 9, s 39.

²⁴² *Wildlife Act*, *supra* note 9, s 92.

²⁴³ *Ibid*, s 97.

sections of the Act.²⁴⁴ Penalties include fines and imprisonment for more serious offences ranging from \$100,000 and/or imprisonment for no more than 12 months for an individual, to a fine of \$500,000 for a corporation.²⁴⁵ These penalties can be imposed through an enforcement regime under which conservation officers have all the power required for the performance of their duties including any enforcement, investigation, administration, or anything required for prosecutions or other legal proceedings related to the Act.²⁴⁶

Provincial Parks Act:

The power to create regulations, under the *Provincial Parks Act*, also enables the Minister to establish new prohibitions and penalties respecting activities in parks.²⁴⁷ This power extends to enabling prohibitions against certain uses and activities of the land; the use of motor vehicles; the treatment and feeding of wildlife; tenders or proposals accepted for commercial activity; the planning and zoning of land; designating any part of a park as a nature preserve; and classifying new parks and recreation areas.²⁴⁸

Alberta Land Stewardship Act:

Compliance with conservation easements and conservation directives, both enabled by this Act, rely on enforcement after the fact and, particularly, in the case of conservation easements, require that action be taken through the court system.²⁴⁹ Similarly, conservation directives are only enforceable through their inclusion in regional plans. Overall, for both conservation easements and directives, there is no compliance system set out in the ALSA.

The creation of regulations providing for financial and other incentives to support the purposes of the Act and any objectives in the accompanying regional plans are also

²⁴⁴ *WAERNAHR Act*, *supra* note 43, s 13(1).

²⁴⁵ *Ibid*, s 13(1).

²⁴⁶ *Ibid*, s 15(1).

²⁴⁷ *Provincial Parks Act*, *supra* note 44, s 12(1).

²⁴⁸ *Provincial Parks Act*, *supra* note 44, ss 12(2)(d), (f), (j), (o), (p), (t) & (v).

²⁴⁹ *ALSA*, *supra* note 45, s 30.

enabled through the ALSA.²⁵⁰ Further, general regulations may be created and may be an opportunity to set out conservation compliance requirements.²⁵¹

For compliance proceedings that are embedded within the Act, the ALSA requires monitoring and reporting on regional plan implementation and use and any information gathered be provided to the secretariat to make any necessary recommendations, particularly if it is found that a regional plan is not being properly implemented. Additionally, once a regional plan is in place, there is a complaint procedure which may be used when an individual is concerned that a regional plan is not being adequately followed – the Act sets out the investigative process and how to respond if there is non-compliance.²⁵²

The creation of regional plans would also trigger compliance declarations, which state that every local government body and decision-making body affected by a regional plan must review their regulatory instruments and adjust as necessary to ensure compliance.²⁵³ These requirements would also apply to subregional plans, as necessary.²⁵⁴

Public Lands Act:

This Act legislates instances under which someone may be found guilty of an unauthorized use of public lands and enables the crown to remove that person, who may be penalized, and to seize or destroy any elements that may have illegally ended up on the land.²⁵⁵ Particularly, the Act specifically prohibits the destruction of, or injury to, the surface of the land, unless previously authorized.²⁵⁶ These prohibitions are then confirmed as offences.²⁵⁷

²⁵⁰ *Ibid*, s 67.

²⁵¹ *Ibid*, s 66.

²⁵² *Ibid*, s 62.

²⁵³ ALSA, *supra* note 45, ss 20(1) & 21().

²⁵⁴ *Ibid*, s 22.

²⁵⁵ PLA, *supra* note 48, ss 47-52.

²⁵⁶ *Ibid*, s 53.

²⁵⁷ *Ibid*, s 56.

A person who is guilty of an offence for violating the above prohibitions is then liable for a fine of not more than \$25,000 for an individual or \$100,000 for a corporation.²⁵⁸ In the event of contravention of an offence found elsewhere in the Act, an individual can be subject to a fine of not more than \$100,000. For a corporation a fine cannot be more than \$1,000,000.²⁵⁹

Environmental Protection and Enhancement Act:

One of the tools available in the *EPEA* is known as an environmental protection order. These are orders which may be applied in the event of an adverse environmental effect and which may require the person to whom the order is directed to take certain actions. Environmental protection orders may be issued to ensure remediation²⁶⁰ and conservation and reclamation²⁶¹ making them valuable tools to ensure that pollution or habitat degradation is dealt with. However, they are not specifically meant for habitat protection.

Penalties including fines and potential prison sentences apply to offences such as:

- knowingly commencing an activity that is designated as requiring an approval²⁶² or notice;²⁶³
- releasing a substance into the environment in excess of the amount allowable by regulation²⁶⁴ or that causes an adverse effect;²⁶⁵ or
- knowingly contravening an environmental protection order.²⁶⁶

²⁵⁸ *Ibid*, s 59(1).

²⁵⁹ *Ibid*, s 59(2).

²⁶⁰ *EPEA*, *supra* note 50, s 113.

²⁶¹ *Ibid*, s 140.

²⁶² *EPEA*, *supra* note 50, s 60.

²⁶³ *Ibid*, s 87.

²⁶⁴ *Ibid*, s 108.

²⁶⁵ *Ibid*, s 109.

²⁶⁶ *Ibid* s 227(h).

In the case of an offence under one of these sections, an individual can be liable for a fine of up to \$100,000 or a maximum of 2 years imprisonment, or both, and a corporation can be liable for a fine of up to \$1,000,000.²⁶⁷

Lesser offences can also result in fines or imprisonment, as set out in the Act.²⁶⁸

Water Act:

The *Water Act* sets out a number of offences for which there are options for penalties and enforcement.²⁶⁹ These offences include contravening a water management order and contravening an enforcement order regarding licences, approvals, or otherwise.²⁷⁰

The Act also authorizes an inspector, or the director, to issue a water management order if an adverse effect on the aquatic environment, human health, property, or public safety occurred or may occur; if actions related to a water well may have an adverse effect on the environment, human health, property, or public safety; or if the diversion of water for a household user may have an adverse effect on the environment, human health, property, or public safety.²⁷¹ An order may also be issued if the director is of the opinion that water is not being conserved or is otherwise being diverted improperly. In that instance, the director may issue a water management order for conservation purposes.²⁷²

The terms of a water management order may include an order to prevent, minimize, or remedy any adverse effects on the aquatic environment, human health, property or public safety; to stop wasting water; to restore or reclaim the affected area; or to prevent a water well from having adverse effects on the environment, human health, property or public safety, including by ending drilling.²⁷³ Although water management orders do not need to take habitat into consideration, the director

²⁶⁷ *Ibid*, s 228(1).

²⁶⁸ *Ibid*, ss 228(2) & (3).

²⁶⁹ *Water Act*, *supra* note 51, s 142(1).

²⁷⁰ *Ibid*, s 142.

²⁷¹ *Water Act*, *supra* note 51, ss 97(1)(c), (f) & (i).

²⁷² *Ibid*, s 97(2).

²⁷³ *Ibid*, ss 99(viii), (ix), (xi), (xv) & (xvi).

does have the discretion to issue a water management order with habitat consideration in mind.

Forests Act:

The *Forests Act* authorizes the government to create regulations prescribing the charges for damage to timber or other forest disturbances or creating other administrative penalties.²⁷⁴

The director also has the ability to suspend, cancel, or otherwise reduce a forestry tenure if it is found to be in non-compliance with approved operating plans or other provisions in the Act.²⁷⁵

Beyond failing to comply with operating plans, there are a number of other offences set out in the Act, including, destroying goods under seizure; contravening sections of the Act; failing to comply with an order of the director; providing false or misleading information to a forest officer; contravening a provision of a timber disposition or timber quota; or failing to comply with forestry tenure specifications.²⁷⁶ Particular to habitat management and protection, the Act enables the director to require that a person who damages or destroys timber on forest land pay a sum of money in reparation.²⁷⁷

If land that was set aside for habitat has been improperly used, a development authority may issue a stop order which requires the owner; the person in possession of the land or building; or the person responsible for the contravention to stop the development; demolish, remove or replace the development; or carry out any other required action.

²⁷⁴ *Forests Act*, supra note 52, ss 4(d) & (1.1-1.7).

²⁷⁵ *Ibid*, s 25.

²⁷⁶ *Forests Act*, supra note 52, s 50.

²⁷⁷ *Ibid*, s 58.

Municipal Government Act:

Once a conservation reserve (as described above) is created, the Act prohibits the disposal of the conservation reserve unless it is fully destroyed by fire, flood, or another event outside the municipality's control.²⁷⁸ In the event that a conservation reserve is destroyed, the Act sets out the procedure that must be followed to remove the designation.²⁷⁹

If land that was set aside for habitat has been improperly used, a development authority may issue a stop order which requires the owner; the person in possession of the land or building; or the person responsible for the contravention to:²⁸⁰

- (a) stop the development;
- (b) demolish, remove or replace the development; or
- (c) carry out any other required action.

Although not specific to habitat protection, this section could apply in the event that a development or land use is in contravention of the MGA, a land use bylaw, the regulations, a development permit, or a subdivision approval.²⁸¹

²⁷⁸ MGA, *supra* note 20, s 674.1.

²⁷⁹ *Ibid*, s 674.2.

²⁸⁰ *Ibid*, s 645(2).

²⁸¹ *Ibid*, s 645(1).

Other Provincial Legislative Provisions with an Indirect Impact on Habitat

Tribunal Decision-Making

The Alberta Utilities Commission and its enabling legislation

The AUC is a quasi-government agency enabled by the *Alberta Utilities Commission Act*²⁸² and the *Hydro and Electric Energy Act*.²⁸³ It is tasked with the approval of power plants and associated infrastructure in Alberta. Prior to starting construction, power plant projects must make their way through the AUC approval process including the completion of any required assessments or mitigation. To begin the process, the AUC's Rule 007 sets out the application process for power plants, substations, transmission lines, industrial system designations and hydro development and includes a number of conditions designed to protect habitat and address other environmental concerns.²⁸⁴

For example, during the approval process for a renewable energy project, the AUC requires a Renewable Energy Referral Report.²⁸⁵ This is a report issued by an Alberta Environment and Parks (AEP) biologist evaluating the siting, monitoring, construction and standard risks to wildlife and habitat and what has been done to mitigate these risks.²⁸⁶ To clarify this process, AEP has issued directives specifying what solar and wind energy projects must do to mitigate their effects on wildlife habitat.²⁸⁷

²⁸² *Alberta Utilities Commission Act*, SA 2007, c A-37.2 [Alberta Utilities Commission Act].

²⁸³ *Hydro and Electric Energy Act*, RSA 2000, c H-16 [Hydro and Electric Energy Act].

²⁸⁴ Alberta Utilities Commission, *Rule 007: Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations and Hydro Developments* (2 April 2018) online: http://www.auc.ab.ca/regulatory_documents/Consultations/2018-04-02-Rule007.pdf.

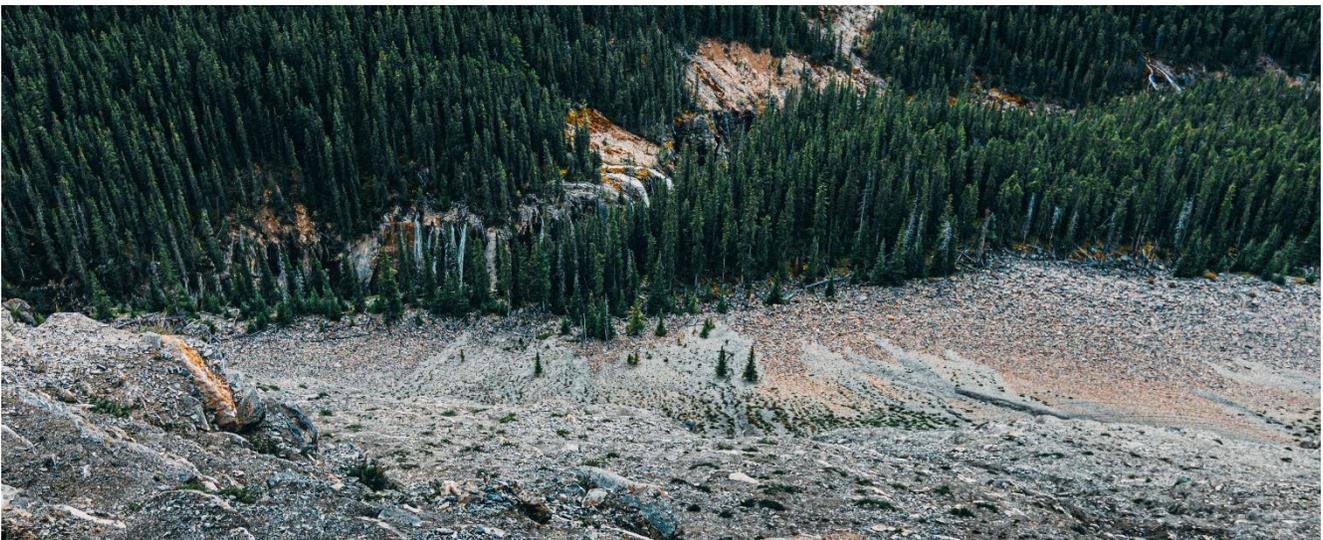
²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*, s PP10.

²⁸⁷ Alberta Environment and Parks, *Wildlife Directive for Alberta Wind Energy Projects* (7 April 2017) AEP Fish and Wildlife 2016 No. 6, Government of Alberta online: <http://aep.alberta.ca/fish-wildlife/wildlife-land-use-guidelines/documents/WildlifeWindEnergyDirective-Apr07-2017.pdf>; Alberta Environment and Parks, *Wildlife Directive for Alberta Solar Energy Projects* (4 October 2017) AEP Fish and Wildlife 2017 No. 5, Government of Alberta online: <http://aep.alberta.ca/fish-wildlife/wildlife-land-use-guidelines/documents/Directive-SolarEnergyProjects-Oct04-2017.pdf>.

For non-renewable energy projects, the AUC is guided by the *Hydro and Electric Energy Act* which requires the AUC to assist the government in controlling pollution and ensuring environmental conservation, among other factors, and requires that a power plant only be approved if found to be in the public interest.²⁸⁸ It is also governed by the *Alberta Utilities Commission Act* – which requires that the AUC determine if a plant is in the public interest, prior to approval and after having considered the social, economic, and environmental effects of the same.²⁸⁹ There is, however, no directive to ensure that power plant proponents are mindful of the effects of their project on nearby wildlife habitat.

The AUC is not directly concerned with land-use planning nor with habitat management, however, their control over energy projects in the province means that they play a role in future development, whether sustainable or not.



²⁸⁸ *Hydro and Electric Energy Act*, *supra* note 283, ss 2 & 3.

²⁸⁹ *Alberta Utilities Commission Act*, *supra* note 282, s 17; Alberta Utilities Commission, “2615991 Canada Ltd. (ATCO Power Canada Ltd.) 440-MW Heartland Natural Gas Power Plant” (3 September 2014) online: http://www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2014/2014-253.pdf.

Natural Resources Conservation Board Act

The Natural Resources Conservation Board is another independent, quasi-government agency set up to conduct project assessments under the *Natural Resources Conservation Board Act*.²⁹⁰ This is the Act that governs approvals of non-energy natural resource projects. The purpose of this Act is to provide an impartial process to review projects that may affect natural resources in Alberta in order to determine whether the said project is in the public interest having regard to social, economic and environmental effects.²⁹¹

Although decisions made according to this Act may have an impact on habitat management and protection, there are no specific provisions creating area based conservation tools, protecting localized conservation, or setting out conservation compliance. Rather, the Natural Resources Conservation Board process is triggered by large-scale projects and may apply to forest industry projects, recreational or tourism projects, metallic or industrial mineral projects, water management projects, and confined feeding operations.²⁹² The requirement to consider environmental effects during the approval process could be classified as a discretionary conservation authorization, however, habitat management and protection is not the focus of this Act nor of the project authorizations.

The Responsible Energy Development Act

The *Responsible Energy Development Act* established the Alberta Energy Regulator (AER), creating a single regulator to govern the development of energy resources in Alberta.²⁹³ This Act sets out the AER's mandate, which includes providing for the efficient, safe, and environmentally responsible development of energy resources in the province and regulating the disposition of public lands, the protection of the

²⁹⁰ *Natural Resources Conservation Board Act*, RSA 2000, c N-3.

²⁹¹ *Ibid*, s 2.

²⁹² *Ibid*, s 4; *Alberta Wetlands: A Law and Policy Guide*, supra note 15 at 60.

²⁹³ *Responsible Energy Development Act*, SA 2012, c R-17.3 [REDA].

environment, and the conservation and management of water.²⁹⁴ It is a “full life-cycle regulator for oil, gas, oil sands, and coal development.”²⁹⁵

The mandate of the AER, as set out in this Act, includes control over energy resource enactments such as how to use and lease public lands for energy resource activities; how to decide applications under the *EPEA*, the *Water Act*, and the *Mines and Minerals Act*; how to oversee the remediation and reclamation of energy sites; and how to monitor the effects of energy resource activities on the environment.²⁹⁶ These powers enable the regulator to take conservation into consideration when approving or overseeing projects, if they so choose.

The Minister also retains the authority to give directions to the Regulator if it is under the impression that the Regulator’s work is not consistent with the principles of public land management, environmental management, and water management.²⁹⁷ There are also certain unauthorized activities which the Regulator may prohibit, including through the use of court orders.²⁹⁸

Part 3 of the Act authorizes the enforcement of private surface agreements. This enables landowners or occupants to register a private surface agreement with the AER and to request AER intervention in the event that a company does not comply with a term or condition of the agreement.²⁹⁹ This could result in an order to comply, even in the event of a dispute between two private entities.³⁰⁰

Finally, the Act authorizes the government to create regulations, which may enable more conservation minded decisions.³⁰¹

²⁹⁴ *Ibid*, s 2(1).

²⁹⁵ Giorilyn Bruno, “Phase 2 of the Implementation of the Alberta Energy Regulator: The Private Surface Agreement Registry” (20 January 2014) ABLawg online: <https://ablawg.ca/2014/01/20/phase-2-of-the-implementation-of-the-alberta-energy-regulator-the-private-surface-agreement-registry/> [Giorilyn Bruno].

²⁹⁶ REDA, *supra* note 293, s 2(2).

²⁹⁷ *Ibid*, s 67.

²⁹⁸ *Ibid*, s 19.

²⁹⁹ *Ibid*, part 3; Giorilyn Bruno, *supra* note 295.

³⁰⁰ REDA, *supra* note 293, s 64.

³⁰¹ *Ibid*, s 26.

The Mines and Minerals Act, Coal Conservation Act and the Oil and Gas Conservation Act

The *Mines and Minerals Act*³⁰² governs the management and disposition of rights for Crown-owned mines and minerals and is administered primarily by Alberta Energy. Tenure to Crown mineral rights is administered under the *Mines and Minerals Act* and in order to renew mineral tenure, there is an expectation that development on the land meets certain production or development standards. Alberta Energy is responsible for granting and extending tenure rights to drill, and due to this decision-making power, has an effect on the habitat management and protection in resource-rich areas and working landscapes. Despite this, the *Mines and Minerals Act* does not include provisions contemplating direct habitat management and protection.

The *Coal Conservation Act* is administered by the AER and sets out the regulatory regime for the development of coal and coal related facilities in Alberta.³⁰³ The purposes of this Act include controlling pollution and focusing on environmental conservation in the development of coal resources in Alberta. There is no reference to decision-making based on environmental or habitat management and protection concerns.³⁰⁴ Rather, it sets out the regime for the approval and regulation of coal resources in Alberta with the potential for discretionary decision-making and some degree of focus on environmental conservation as one purpose of the Act.³⁰⁵

Similar to the *Coal Conservation Act*, the *Oil and Gas Conservation Act* sets out the drilling and extraction regime for the development of oil and gas resources in the province, again administered by the AER.³⁰⁶ The Act's purposes include the conservation of oil and gas resources in Alberta while also ensuring safe and efficient practices during the location, drilling, use, and eventual abandonment of oil and gas

³⁰² *Mines and Minerals Act*, *supra* note 53.

³⁰³ *Coal Conservation Act*, *supra* note 55.

³⁰⁴ *Ibid*, s 4(e).

³⁰⁵ *Ibid*, s 4(e).

³⁰⁶ Open Government, "Oil and Gas Conservation Act" Government of Alberta online: <https://open.alberta.ca/publications/o06>.

facilities.³⁰⁷ Although not the responsible Act for the approval of oil and gas projects, this Act does establish certain requirements for the licences and approvals of these types of projects. Unlike the *Coal Conservation Act*, there is no reference to environmental conservation in the purpose section. Rather, the only environmental reference can be found in a section which purports to control pollution on or around well sites and other oil and gas operations.³⁰⁸



Part 3: Federal Habitat Management and Protection Legislation

The federal government also has a role to play in habitat management and protection and the following section will evaluate federal legislation using the same five criteria (monitoring, assessment, and planning tools; area based conservation tools; localized/biophysical conservation tools; habitat consideration in decision-making; and conservation compliance).

³⁰⁷ *Oil and Gas Conservation Act*, *supra* note 54, ss 4(a)&(b).

³⁰⁸ *Oil and Gas Conservation Act*, *supra* note 54, s 4(f).

The most relevant statutes include:

- The *Species at Risk Act (SARA)* – this is Canada's pre-eminent species at risk management legislation. The purpose of the SARA is 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 being endangered or threatened.”³⁰⁹ It does this through the use of species monitoring and assessment; species and habitat protection provisions; and recovery strategies unique to each listed species. It retains significant relevance to habitat management and protection, in large part because of its unique provisions on critical habitat (discussed later in this volume).

It is important to note that SARA prohibitions, at least in the first instance, apply primarily to federal lands, aquatic species, and migratory birds - covered under the *Migratory Birds Convention Act, 1994 (MBCA, 1994)*. This is a reflection of the federal constitutional linkage to fisheries, implementation of the *MBCA, 1994*, and power over its lands. The SARA goes further, however, in providing for a “safety net” when provinces and territories fail to adequately protect federally listed endangered and threatened species.

Safety net provisions can be used to extend federal protection to species and critical habitat on provincial land and may be invoked if the federal government determines that the provinces are not doing enough to protect an at-risk species.³¹⁰

- The *Canada Wildlife Act* – this enables the creation of wildlife areas. The purpose of this Act focuses on the creation and management of wildlife areas with the goal of protecting and maintaining habitat vital for wildlife.³¹¹ The Act

³⁰⁹ *Species at Risk Act*, SC 2002, c 29, s 6 [SARA].

³¹⁰ *Ibid*, ss 34, 35, 61 & 80.

³¹¹ *Canada Wildlife Act*, RSC 1985, c W-9 [*Canada Wildlife Act*].

is also accompanied by regulations which prohibit those activities that may be harmful to species and their habitat.³¹²

- The *Canada National Parks Act* – this enables the creation and management of national parks.³¹³ National parks are dedicated to the people of Canada and “shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.”³¹⁴ Today, there are 47 national parks in Canada, with five located in Alberta.³¹⁵
- The *Migratory Birds Convention Act, 1994*³¹⁶ (*MBCA, 1994*)- this is focused on the conservation of migratory bird populations. The Act and associated regulations prohibit certain activities, limit hunting or ownership of birds, and can be used to create sanctuaries in areas of habitat important to migratory birds.
- The *Fisheries Act* – this is federal legislation tasked with the protection of fish and fish habitat in Canadian waterways.³¹⁷ In August 2019, this Act was amended to include a new purpose clause, which now states that the purpose of the Act is the proper management and control of fisheries and the conservation and protection of fish and fish habitat.³¹⁸ The changes to this Bill are particularly important for habitat management and protection, largely due to the reinstatement of the HADD provision.³¹⁹ This is the provision which, prior to 2012, prohibited the harmful alteration, disruption, or destruction of fish habitat and which was the primary focus of federal regulation under the Act.

³¹² *Wildlife Area Regulations*, CRC c 1609 [*Wildlife Area Regulations*]; *Designation of Regulatory Provisions for Purposes of Enforcement (Canada Wildlife Act) Regulation*, SOR/2017-107.

³¹³ *Canada National Parks Act*, SC 2000, c 32 [*Canada National Parks Act*].

³¹⁴ *Canada National Parks Act*, *supra* note 313, s 4.

³¹⁵ Parks Canada, “Find a National Park” Government of Canada online: <https://www.pc.gc.ca/en/pn-np/recherche-parcs-parks-search>.

³¹⁶ *Migratory Birds Convention Act, 1994*, SC 1994, c 22 [*MBCA, 1994*].

³¹⁷ *Fisheries Act*, SC 2019, c 14 [*Fisheries Act*].

³¹⁸ Although this clause is more accurately a codification of existing law as set out by the Supreme Court of Canada, it will help to clarify the purpose going forward for both project proponents and those in the pursuit of habitat protection. *Ward v Canada*, 2002 SCC 17; *Comeau’s Sea Foods Ltd. v Canada (Minister of Fisheries and Oceans)* [1997] 1 SCR 12.

³¹⁹ *Fisheries Act*, *supra* note 317, s 35.

- The *Impact Assessment Act* (IAA) – this Act prescribes the federal impact assessment process.³²⁰ The purpose of the Act includes protecting the components of the environment, and the health, social, and economic conditions that are within the legislative authority of Parliament from adverse effects caused by a designated project – among others.³²¹

Monitoring, assessment, and planning

Species at Risk Act:

The SARA 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'.³²² 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.³²³

If the Minister chooses to exercise this discretion, he or she must prepare a strategy for the species' recovery.³²⁴ In doing so, the Minister must take into account the commitment of the Government of Canada to conserving biodiversity and to the precautionary principle.³²⁵

The recovery strategy must address any threats to the survival of the species, including any loss of habitat and must include:³²⁶

- (a) a description of the species and its needs;
- (b) an identification of the threats to the species and its habitat;

³²⁰ *Impact Assessment Act*, SC 2019, c 28 [*Impact Assessment Act*].

³²¹ *Ibid*, s 6(1)(b).

³²² SARA, *supra* note 309, s 14.

³²³ *Ibid*, s 25(3).

³²⁴ *Ibid*, s 37(1).

³²⁵ *Ibid*, s 38.

³²⁶ *Ibid*, s 41(1).

(c) an identification of the species' critical habitat or (c.1) a schedule of studies to identify critical habitat; and

(d) a statement of the population and distribution objectives to assist in recovery;

along with any other relevant matters.

Based on the recovery strategy, the competent Minister must prepare an action plan,³²⁷ identifying the species' critical habitat, including activities likely to result in its destruction.³²⁸ It must also include a statement of proposed measures to protect the species' critical habitat³²⁹ and an identification of any portions of the species' critical habitat that have not yet been protected.³³⁰



Canada National Parks Act:

The *Canada National Parks Act* requires that the Minister, within five years of a national park being established, prepare a management plan for the park.³³¹ The plan must contain a long-term ecological vision for the park; a set of ecological integrity objectives; and indicators and provisions for resource protection and

³²⁷ SARA, *supra* note 309, s 47.

³²⁸ *Ibid*, s 49(1)(a).

³²⁹ *Ibid*, s 49(1)(b).

³³⁰ *Ibid*, s 49(1)(c).

³³¹ *Canada National Parks Act*, *supra* note 313, s 11(1).

restoration, zoning, visitor use, public awareness, and performance evaluation.³³² The management plans must then be reviewed at least once every 10 years.³³³

The Act also provides for the establishment of community plans for park communities. These plans must include:³³⁴

- a description of the lands comprising the park community;
- a description of the lands comprising the commercial zones of the park community; and
- a measure of the maximum floor area permitted within the commercial zones of the park community.

These community plans must:³³⁵

- be consistent with the management plan for the park in which the park community is located;
- accord with any guidelines established by the Minister for appropriate activities within the park community;
- provide a strategy for growth within the park community; and
- be consistent with principles of no net negative environmental impact and responsible environmental stewardship and heritage conservation.

Impact Assessment Act:

Under the *IAA*, federal impact assessments are required for any designated projects as set out in the Regulations.³³⁶ For any projects not included in the Regulations, the Minister still retains discretion to designate the project as requiring an assessment if

³³² *Ibid*, s 11(1).

³³³ *Ibid*, s 11(2).

³³⁴ *Canada National Parks Act*, *supra* note 313, s 33(3).

³³⁵ *Ibid*, s 33(2).

³³⁶ *Physical Activities Regulations*, SOR/2019-285.

the Minister is of the opinion that the project may cause adverse environmental effects.³³⁷

In the event that a federal impact assessment is required, the IAA sets out factors to be considered, including:³³⁸

(a) the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by the carrying out of the designated project, including

(i) the effects of malfunctions or accidents that may occur in connection with the designated project,

(ii) any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out, and

(iii) the result of any interaction between those effects;

(b) mitigation measures that are technically and economically feasible and that would mitigate any adverse effects of the designated project;...

(f) any alternatives to the designated project that are technically and economically feasible and are directly related to the designated project;...

(h) the extent to which the designated project contributes to sustainability;

(i) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change;

(j) any change to the designated project that may be caused by the environment; and...

³³⁷ *Impact Assessment Act*, supra note 320, s 9.

³³⁸ *Impact Assessment Act*, supra note 320, s 22(1).

(t) any other matter relevant to the impact assessment that the Agency requires to be taken into account.

The requirement for impact assessments to take environmental effects into consideration enables the consideration of habitat during the project planning process. The Act does not, however, require a certain outcome in the event that habitat will be affected by a proposed project.

Area based conservation tools (protected areas)

Species at Risk Act:

The SARA recognizes the importance of habitat and protected areas in its preamble. It begins by stating that wildlife has value in and of itself; that wildlife species and ecosystems in Canada are part of the world's heritage; that Canada has ratified the *United Nations Convention on the Conservation of Biological Diversity* and that providing legal protection for species at risk will help to meet Canada's commitments under the same; that the precautionary principle should be employed when making decisions about wildlife; that conservation efforts should be shared; and that the habitat of species at risk, and protected areas, are both key to species conservation.³³⁹

Despite this, the SARA does not provide provisions that deal solely with geographically based protection and management. Rather, it relies on the designation of a listed species' "critical habitat" to provide protection. Critical habitat under the Act may include geographic locations but is typically linked with biophysical attributes of the land base/habitat. Critical habitat is defined as "the habitat that is necessary for the survival or recovery of a listed wildlife species."³⁴⁰

³³⁹ SARA, *supra* note 309, preamble.

³⁴⁰ *Ibid*, s 2(1).

In order to protect this habitat, SARA states that no person shall destroy any part of the critical habitat³⁴¹ of any endangered, threatened, or extirpated (if reintroduced) species if:³⁴²

- 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*.

In order to protect critical habitat, the Governor in Council (i.e. the federal Cabinet) is authorized to make regulations for the protection of critical habitat and the prohibition of any activities that may adversely affect this habitat.³⁴³ Protection also includes a prohibition against destroying any part of the habitat of a species (on federal land) that has been classified as endangered or threatened by a province or territory.³⁴⁴

In addition, if the Governor in Council considers the critical habitat of a species to be unprotected, the Governor in Council may issue an emergency protection order, which would extend the Act's protections to a particular species, and all of its critical habitat, regardless of whether that habitat is located on federal or provincial

³⁴¹ 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.

³⁴² SARA, *supra* note 309, s 58(1).

³⁴³ *Ibid*, ss 59(1) & (3).

³⁴⁴ *Ibid*, s 60(1) - this subsection is for habitat that has been identified as essential to the survival or recovery of the species on federal lands in the province/territory. It does not apply to aquatic species or protected migratory birds. Subsection 61(1) extends this protection to habitat that is not part of federal lands however the use of this section requires an order by Governor in Council. This type of order is recommended by the Minister if they are of the opinion that there are no provisions in the SARA or any other Act of Parliament that protect the particular portion of critical habitat and the laws of the province or territory do not effectively protect the critical habitat (except for aquatic species and migratory birds).

lands.³⁴⁵ The recommendation for an emergency protection order can be made when the Minister forms the opinion that the species in question faces an imminent threat to its survival or recovery, threats which are not being adequately constrained by provincial authorities.³⁴⁶ The emergency protection order may then identify habitat necessary for the survival of the species and include provisions to protect that habitat.³⁴⁷

A similar section enables the Governor in Council to make an order extending protection to lands in a province or territory that are not federal lands and to species that are not an aquatic species or species of migratory birds.³⁴⁸ An order of this sort can be made if the Minister is of the opinion that the laws of the province or territory do not effectively protect the species or the residences of its individuals.³⁴⁹

Canada Wildlife Act:

The *Canada Wildlife Act* enables the creation of wildlife areas. Specifically, Schedule 1 of the *Wildlife Area Regulations* establishes the various wildlife areas in Canada.³⁵⁰

Choosing the location of these wildlife areas is based on a list of criteria set out in federal government policy. These criteria are used to determine whether a proposed area has ecological features which support its candidacy as a national wildlife area – many of which focus on whether the creation of a national wildlife area would protect critical habitat or other rare or underrepresented habitat types.³⁵¹ One constraint is that wildlife areas may only be designated on federal lands, unless a

³⁴⁵ SARA, *supra* note 309, s 80(1).

³⁴⁶ SARA, *supra* note 309, s 80(2).

³⁴⁷ *Ibid*, s 80(4).

³⁴⁸ *Ibid*, ss 34(1) & 35(1).

³⁴⁹ *Ibid*, ss 34(3) & 35(3).

³⁵⁰ *Wildlife Area Regulations*, *supra* note 312, schedule 1.

³⁵¹ Environment and Climate Change Canada, "Selection of sites as national wildlife areas" (5 April 2017) Government of Canada online: <https://www.canada.ca/en/environment-climate-change/services/national-wildlife-areas/site-selection.html>.

prior arrangement with a landowner has been secured. As a result, no new protected areas have been created under this Act since 2003.³⁵²

Canada National Parks Act:

Schedule 1 of the Act establishes the national parks of Canada.³⁵³ The Governor in Council can then, by order, amend the descriptions of the parks, enlarge, or establish a new park, and can do so on any land which they are satisfied has clear title or on which the Crown has an unencumbered right of ownership. The government of the province in which the lands are situated must also have agreed to the proposed use.³⁵⁴

The removal of any portion of a national park is only possible where there is a judicial finding that Canada does not have clear title or an unencumbered right of ownership to the park lands.³⁵⁵ Additionally, before an amendment to park land is made, through changes to Schedule 1, it must be tabled in Parliament with any necessary information.³⁵⁶ The amendment to Schedule 1 is then referred to the standing committee for parks which has 30 days to approve the amendment.³⁵⁷

In addition to the creation of national parks, the Governor in Council may set aside any land to which title is vested in Her Majesty in right of Canada as a national historic site of Canada, to which this Act applies.³⁵⁸

Migratory Birds Convention Act, 1994:

The *Migratory Bird Sanctuary Regulations* provide for the establishment of migratory bird sanctuaries in the territories and provinces, as set out in the schedule to the

³⁵² Environment and Climate Change Canada, "Current national wildlife areas" (3 April 2017) Government of Canada online: <https://www.canada.ca/en/environment-climate-change/services/national-wildlife-areas/locations.html>.

³⁵³ *Canada National Parks Act*, *supra* note 313, schedule 1.

³⁵⁴ *Ibid*, s 5(1).

³⁵⁵ *Ibid*, s 5(3) - In the absence of such a judicial finding, removing portions of a park would require legislative change.

³⁵⁶ *Canada National Parks Act*, *supra* note 313, s 7(1).

³⁵⁷ *Ibid*, s 7(2).

³⁵⁸ *Ibid*, s 42(1).

Regulation.³⁵⁹ These are areas deemed particularly important for migratory birds and help protect the birds from human activity.³⁶⁰

Localized/biophysical conservation

Species at Risk Act:

The SARA prohibits destroying the residence of one or more individuals of a wildlife species, listed as endangered, threatened, or extirpated (if reintroduced).³⁶¹

Additionally, the Act authorizes protections for the residence of wildlife species that have not been classified under SARA, but have been classified as endangered or threatened by a provincial or territorial Minister, so long as they are located on federal lands.³⁶² The Act also enables the extension of these protections into the provinces or territories if the Minister finds that the province or territory is not sufficiently protecting the species in question.³⁶³

Once the critical habitat has been identified, the Act also prohibits the destruction of biophysical attributes of this habitat.³⁶⁴ This prohibition applies only to certain species (as set out above), with the ability of the federal government to extend protections to provincial lands (including private land).

³⁵⁹ *Migratory Bird Sanctuary Regulations*, CRC, c 1036, schedule (2006) [*Migratory Bird Sanctuary Regulations*].

³⁶⁰ *Ibid*, s 3(2).

³⁶¹ SARA, *supra* note 309, s 33.

³⁶² *Ibid*, s 36(1)(c).

³⁶³ *Ibid*, ss 34, 35, & 80.

³⁶⁴ *Ibid*, s 58.



Canada Wildlife Act:

The *Wildlife Area Regulations* set out certain prohibited activities in wildlife areas. This includes prohibitions against:³⁶⁵

- hunting or fishing;
- being in possession of an instrument that could be used for hunting or fishing;
- damaging a plant;
- carrying on agricultural activities;
- destroying or molesting animals, carcasses, nests or eggs;
- disturbing or removing any soil, sand, gravel or other material; and
- dumping any waste or rubbish.

³⁶⁵ *Wildlife Area Regulations*, *supra* note 312, s 3(1).

Canada National Parks Act:

Within national parks, this Act provides for the further designation of wilderness areas.³⁶⁶ By regulation, the Governor in Council may declare any area of a park that exists in a natural state or that is capable of returning to a natural state to be a wilderness area.³⁶⁷ Once designated as such, the Minister may then prohibit activities that are likely to impair the wilderness character of the area. Activities may only be authorized to be carried on in a wilderness area, for the purposes of:³⁶⁸

- park administration;
- public safety;
- the provision of basic user facilities including trails and rudimentary campsites;
- the carrying on of activities in accordance with regulations; or
- access by air to remote parts of the wilderness area.

Additionally, schedule 3 of the Act provides a list of protected species³⁶⁹ and prohibits hunting, trafficking, or possessing any part of those species in a national park or any designated wilderness areas.³⁷⁰

Finally, the *National Parks Wildlife Regulations*, which apply to all parks³⁷¹ and park reserves, prohibit a person from disturbing or destroying a nest, lair, den, or beaver house or dam located in a park.³⁷² The Governor in Council may also make regulations respecting the protection of flora, soil, waters, fossils, natural features, air quality, and cultural, historical, and archaeological resources in designated parks.³⁷³

³⁶⁶ The specific wilderness areas are set out in the *National Parks Wilderness Area Declaration Regulations*, SOR/2000-387.

³⁶⁷ *Canada National Parks Act*, *supra* note 313, s 14(1).

³⁶⁸ *Ibid*, s 14(3).

³⁶⁹ *Canada National Parks Act*, *supra* note 313, schedule 3.

³⁷⁰ *Ibid*, s 26(1).

³⁷¹ Except for Wood Buffalo National Park of Canada - that park has its own separate regulation (*Wood Buffalo National Park Game Regulations*, SOR/78-830) with a similar provision.

³⁷² *National Parks Wildlife Regulations*, SOR/81-401, s 4(1)(e).

³⁷³ *Canada National Parks Act*, *supra* note 313, s 16(1)(b).

For example, under the *National Parks General Regulations*, “[n]o person shall remove, deface, damage or destroy any flora or natural objects in a Park except in accordance with a permit issued under subsection 11(1) or 12(1).”³⁷⁴

Migratory Birds Convention Act, 1994:

This Act sets out certain general prohibitions for the protection of migratory birds, such as a prohibition against being in possession of a migratory bird or nest.³⁷⁵

In addition to the Act, under the *Migratory Bird Sanctuary Regulations*, no person shall, in a migratory bird sanctuary, disturb, destroy, or take the nests of migratory birds, unless previously authorized.³⁷⁶ In non-sanctuary areas, no person shall disturb, destroy, or take a nest, egg, shelter, or bird.³⁷⁷

Fisheries Act:

The *Fisheries Act* prohibits any work, undertaking, or activity that results in the **harmful alteration, disruption, or destruction** (“HADD”) of fish habitat.³⁷⁸ Previously, the Act was focused on fish that were a part of a commercial, recreational or Aboriginal fishery to qualify for protection, however these provisions were recently repealed.³⁷⁹

Additionally, if a person is carrying on a work, undertaking, or activity in an ecologically significant area (as defined by Cabinet), the person, on request of the Minister, shall provide information to the Minister with respect to the activities that are likely to affect fish habitat.³⁸⁰ Based on the information given, the Minister can require the person to modify the work, undertaking, or activity, or restrict it altogether.³⁸¹

³⁷⁴ *National Parks General Regulations*, SOR/78-213, s 10 [*National Parks General Regulations*].

³⁷⁵ *MBCA, 1994*, *supra* note 316, ss 5 & 5.1.

³⁷⁶ *Migratory Bird Sanctuary Regulations*, *supra* note 359, s 3(2).

³⁷⁷ *Migratory Birds Regulations*, CRC, c 1035, s 6 [*Migratory Birds Regulations*].

³⁷⁸ *Fisheries Act*, *supra* note 317, s 35(1).

³⁷⁹ *Ibid*, s 35(1).

³⁸⁰ *Ibid*, s 37(1.1).

³⁸¹ *Ibid*, s 37(2).



Habitat consideration in decision-making

Species at Risk Act:

The competent Minister retains certain decision-making powers under the SARA, including whether to enter into an agreement with a person, or issue a permit to a person, authorizing them to engage in an activity affecting the critical habitat of a listed species – which may have otherwise been prohibited.³⁸² An agreement of this sort may be entered into only if the competent Minister is of the opinion that the activity:³⁸³

- a) is scientific research relating to the conservation of the species and is conducted by qualified persons;
- b) benefits the species or is required to enhance its chance of survival in the wild;
or
- c) affects the species but is incidental to the carrying out of the activity.

³⁸² SARA, *supra* note 309, s 73(1).

³⁸³ *Ibid*, s 73(2).

Pre-conditions to an agreement or permit of this type include that:³⁸⁴

- a) all reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted;
- b) all feasible measures will be taken to minimize the impact of the activity on the species or its critical habitat; and
- c) the activity will not jeopardize the survival or recovery of the species.

The agreement or permit must also include any terms and conditions that the competent Minister considers necessary for protecting the species; minimizing the impact of the authorized activity on the species; or providing for its recovery and these terms may include provisions for the protection of the species' habitat.³⁸⁵

To further protect habitat, a competent Minister may add terms and conditions (or revoke/amend ones)³⁸⁶ to any agreement, permit, licence, order, or other similar document authorizing a person to engage in an activity affecting a species' critical habitat, including those agreements issued under another Act of Parliament.³⁸⁷

The SARA also adds certain mandatory considerations for other federal authorizations that may have an impact on critical habitat.³⁸⁸ Specifically, where an activity that is the subject of an authorization may result in the destruction of any part of a species' critical habitat, the party issuing the authorization must be satisfied that:³⁸⁹

- a) all reasonable alternatives to reduce the impact on the habitat have been considered and the best one adopted; and
- b) all feasible measures will be taken to minimize the impact of the activity on the species' critical habitat.

³⁸⁴ SARA, *supra* note 309, s 73(3).

³⁸⁵ *Ibid*, s 73(6).

³⁸⁶ *Ibid*, s 75(2).

³⁸⁷ *Ibid*, s 75(1).

³⁸⁸ *Ibid*, s 77.

³⁸⁹ *Ibid*, s 77(1).

These exemptions are tempered by the fact that despite a permit being issued, the prohibition against destruction of critical habitat will still apply.³⁹⁰

Further, every person who is required by an Act of Parliament to ensure that an assessment of the environmental effects of a project is conducted must notify the competent Minister if the project is likely to affect a listed wildlife species' habitat.³⁹¹ They must identify the adverse effects of the project and must ensure measures are taken to avoid/lessen those potential effects and to monitor any lasting effects.³⁹²

Certain subsections of the Act³⁹³ set out other provisions relating to habitat protection, regulations, and emergency orders, however, they do not apply when the activity relates to public safety, health, or national security.³⁹⁴

Once an agreement, permit, or license sanctioning human activity has been authorized, the Minister retains discretion to add, revoke, and change any terms and conditions included in the document at hand in order to protect a species, any of its critical habitat, or its residence.³⁹⁵

Canada Wildlife Act:

This Act gives the Minister various powers related to conservation informed decision-making. According to the Act, the Minister may: ³⁹⁶

- undertake, promote, and recommend measures for the encouragement of public cooperation in wildlife conservation and interpretation;
- initiate conferences and meetings respecting wildlife research, conservation, and interpretation;

³⁹⁰ SARA, *supra* note 309, s 77(2).

³⁹¹ *Ibid*, s 79(1).

³⁹² *Ibid*, s 79(2).

³⁹³ *Ibid*, ss 32(1) & (2), 33, 36(1), 58(1), 60(1) & 61(1).

³⁹⁴ *Ibid*, s 83(1).

³⁹⁵ *Ibid*, ss 75(1) & (2).

³⁹⁶ *Canada Wildlife Act*, *supra* note 311, s 3.

- undertake programs for wildlife research and investigation and establish and maintain laboratories and other necessary facilities for that purpose;
- establish such advisory committees as the Minister deems necessary and appoint the members of those committees; and
- coordinate and implement wildlife policies and programs in cooperation with the government of any province having an interest therein.

The Minister may also enter into agreements with the government of any province (including a municipal authority or other organization)³⁹⁷ to provide for the undertaking of wildlife research, conservation, and interpretation programs and measures, and the administration of lands for those purposes.³⁹⁸ In accordance with this provision, regulations can specify particular public lands that have been set aside for wildlife research, conservation, or interpretation.³⁹⁹

The Act also allows the Minister to lease any lands, or purchase or acquire any lands or interests, or rights in lands, for the purpose of research, conservation, and interpretation with respect to migratory birds or other wildlife (with the agreement of the province having an interest).⁴⁰⁰ These lands or interests cannot be disposed of and no person is allowed to use or occupy the lands, except under the authority of the Act or its regulations.⁴⁰¹

Further, the Governor in Council may make a variety of regulations, including:⁴⁰²

- respecting the prohibition against entry by a person on lands under the administration of the Minister;
- specifying measures to be taken for the protection of wildlife;

³⁹⁷ *Canada Wildlife Act*, *supra* note 311, s 7(1).

³⁹⁸ *Ibid*, s 5(a).

³⁹⁹ *Assigning to the Minister of the Environment, the Administration, Management and Control of Certain Public Lands*, S1/82-19.

⁴⁰⁰ *Canada Wildlife Act*, *supra* note 311, s 9(1).

⁴⁰¹ *Ibid*, s 9(2).

⁴⁰² *Ibid*, s 12.

- for the preservation, control, and management of lands purchased, acquired, or leased;
- prescribing measures for the conservation of wildlife; and
- respecting the establishment of facilities for wildlife research, conservation, and interpretation.

The *Wildlife Area Regulations* also authorize the Minister to issue a permit to carry on activities in a wildlife area in the event that they find that the activity in question “will not interfere with the conservation of wildlife.”⁴⁰³ While this provision places an upward limit on the Minister’s discretion to issue permits, the meaning of “interference with the conservation of wildlife” remains broad.

Canada National Parks Act:

This Act designates the national parks of Canada to the people of Canada for their benefit, education, and enjoyment.⁴⁰⁴ To further this purpose, the Act states that parks are to be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.⁴⁰⁵

The Act provides that “[m]aintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Minister when considering all aspects of the management of parks.”⁴⁰⁶ This section guides the Minister’s decision making, however, ecological integrity is not the only factor to be considered.

Despite this apparent priority, the Minister retains discretion to enter into leases, easements, or servitudes for railway lines, oil or gas pipelines, telecommunication, or electrical transmission lines within a park.⁴⁰⁷ The designation of wilderness areas within

⁴⁰³ *Wildlife Area Regulations*, *supra* note 312, s 4.

⁴⁰⁴ *Canada National Parks Act*, *supra* note 313, s 4(1).

⁴⁰⁵ *Ibid*, s 4(1).

⁴⁰⁶ *Ibid*, s 8(2).

⁴⁰⁷ *Canada National Parks Act*, *supra* note 313, s 15(1).

a park also constrains the Minister's discretion by limiting those activities allowable in the area to activities that are not likely to impair its wilderness character.⁴⁰⁸

Does the ecological integrity provision matter?

Since the addition of ecological integrity into the Act's purpose section in 2001, this section's potential application has been limited in both meaning and scope, through judicial interpretation. The first such interpretation and the leading authority on the meaning of 'ecological integrity' arose during a judicial review hearing for the Parks Canada decision to approve a road crossing in Wood Buffalo National Park. In this case, the Court found that although maintaining ecological integrity had been added to the *Canada National Parks Act*, it remained only one of many factors for Parks Canada to weigh during parks decision making (*Canadian Parks and Wilderness Society v Canada (Minister of Canadian Heritage)*, 2001 FCT 1123). The Court in this case determined that although ecological integrity needs to be the first factor weighed by Parks Canada, it does not need to be the only factor, suggesting that although relevant, ecological integrity is not determinative of whether or not an approval can succeed. This is despite the fact that the Ecological Integrity Panel Report, which originally recommended inclusion of ecological integrity into the Act, also recommended that preservation of nature apart from humans should be a **priority** in the national parks. To read more, see Shaun Fluker's "Ecological Integrity in Canada's National Parks: The False Premise of the Law" at page 110.

Migratory Birds Convention Act, 1994:

The *Migratory Bird Sanctuary Regulations* enable the Minister to issue permits authorizing a person to carry out an activity that would otherwise be contrary to the provisions of the Regulation.⁴⁰⁹ Every permit is subject to conditions that the Minister believes are necessary to protect migratory birds, their eggs, nests, or habitats.⁴¹⁰ This constrains discretion to some degree, however the final decision remains with the

⁴⁰⁸ *Ibid*, ss 14(1) & (2).

⁴⁰⁹ *Migratory Bird Sanctuary Regulations*, *supra* note 359, s 9(1).

⁴¹⁰ *Migratory Bird Sanctuary Regulations*, *supra* note 359, s 9(2).

Minister. The Regulations also set out conditions that must be abided by in areas set aside for migratory birds.⁴¹¹

In addition to the issuance of permits, the Regulation authorizes the Minister to refuse a permit or cancel an existing permit for propagation or conservation purposes.⁴¹²

Finally, the Regulation also permits the destruction of nests under certain conditions. For example, the holder of a scientific permit may, for scientific or educational purposes, take a migratory bird's nest.⁴¹³ The holder of such a permit must make a report to the Minister within 30 days setting out the number of nests taken or destroyed⁴¹⁴ and must also allow a game officer to inspect the premises used in their operations and their records.⁴¹⁵

Fisheries Act:

This Act provides the Governor in Council with broad regulatory making powers, including the power to create regulations for the proper management and control of the seacoast and inland fisheries, including for social, economic, or cultural purposes; respecting the conservation and protection of fish, respecting the rebuilding of fish stocks and the restoration of fish habitat; respecting the issuance, suspension, and cancellation of licences and leases; respecting the conservation and protection of fish habitat; respecting the conservation and protection of spawning grounds; and respecting import or export of fish; defining aquatic invasive species; and respecting the management and control of aquatic invasive species.⁴¹⁶

Impact Assessment Act:

The purposes set out in the *Impact Assessment Act* include protecting components of the environment that are within the authority of Parliament and ensuring that any proposed projects are considered in a careful and precautionary manner so as to

⁴¹¹ *Ibid*, s 4(1)(a).

⁴¹² *Migratory Birds Regulations*, *supra* note 377, s 4(7).

⁴¹³ *Ibid*, s 19(1)(b).

⁴¹⁴ *Ibid*, s 19(3)(a).

⁴¹⁵ *Ibid*, s 21.

⁴¹⁶ *Fisheries Act*, *supra* note 317, ss 43(1)(a), (b), (f), (g), (h), (i), (n), (o), (j), (m), & (n).

avoid significant environmental effects.⁴¹⁷ Notably, however, there are still no provisions clarifying what the achievement of these purposes would look like or how success can be measured.

Despite these considerations, the impact assessment process is still the primary focus of this Act and there are no specific habitat considerations required during the approval process. Rather, relevant factors that are to be considered during the assessment process include: the environmental effects of a project (including cumulative effects) and mitigation measures that may mitigate some of these adverse environmental effects (with no direct reference to habitat).⁴¹⁸



Conservation compliance, including administrative orders and potential sentences

Species at Risk Act:

The SARA grants conservation enforcement officers the same powers as peace officers to enforce the Act's provisions.⁴¹⁹ This enables them to enforce offences created under the Act.

⁴¹⁷ *Impact Assessment Act*, *supra* note 320, s 6(l).

⁴¹⁸ *Ibid*, s 22(1).

⁴¹⁹ SARA, *supra* note 309, s 85(4).

In addition to this power, the Act also establishes that every person commits an offence who kills, harms, harasses, captures, or takes an individual of a listed species; possesses, collects, buys, or sells an individual of a listed species; damages or destroys the residence of a listed species; destroys part of the critical habitat of a listed species; or contravenes a prescribed provision of a regulation or an emergency order, among other prohibitions.⁴²⁰

In conjunction with these offences, the Act authorizes the following penalties:⁴²¹

- for corporations, a fine of not more than \$1,000,000 for an indictable offence or \$300,000 for a summary conviction;
- for non-profit corporations, a fine of not more than \$250,000 for an indictable offence or \$50,000 for a summary conviction; and
- for any other person, a fine of not more than \$250,000 and/or imprisonment of not more than 5 years for an indictable offence, or 50,000 and/or imprisonment of not more than 1 year for a summary conviction.

For subsequent convictions, the fine can be doubled.⁴²²

In addition to the penalties listed above, the court may make an order for a variety of effects, including: ⁴²³

- prohibiting acts that could result in repetition of the offence;
- directing action to remedy or avoid harm to wildlife species;
- directing the person to conduct an environmental audit;
- directing the person to perform community service; and
- any other condition the court considers appropriate.

⁴²⁰ *Ibid*, s 97(1).

⁴²¹ *Ibid*, s 97(1.1) (a).

⁴²² *Ibid*, s 97(3).

⁴²³ *SARA*, *supra* note 309, s 105.

Greater Sage Grouse and the Emergency Protection Order Provision

In 2013, the emergency order provision of the SARA was used to authorize protection of the Greater Sage Grouse, a bird whose critical habitat can be found in Southeast Alberta and Southwest Saskatchewan. After a panel of the Federal Court of Appeal in *Alberta Wilderness Association v Canada (Attorney General)*, 2013 FCA 190, found that the Minister was required to identify as much critical habitat as possible in its recovery strategy, the federal Minister of the Environment released the opinion that the Greater Sage Grouse faced imminent threats to its survival and recovery. (See Bankes, Mascher & Olsynski at 6033.) The action plan subsequently released by the federal government prohibited nearly all new industrial development on the Greater Sage Grouse's critical habitat. Although these prohibitions resulted in a burgeoning sage grouse population, the order also resulted in opposition. In response to the order, a junior oil and gas company, along with the city of Medicine Hat filed lawsuits in federal court and in the provincial Court of Queen's Bench, seeking to oppose the federal government's protection order after the oil and gas company went into bankruptcy - a decision has yet to be released.

Canada Wildlife Act:

In order to enforce sections of this Act and its regulations, the Minister may designate any person, or class of persons, to act as wildlife officers or analysts with broad powers of enforcement.⁴²⁴ If a wildlife officer has reason to believe that any provision of the Act or its regulations has been contravened, they may issue a compliance order directing the person to do, or refrain from doing, a variety of actions, including:⁴²⁵

- refrain from doing anything in contravention of the Act or do anything to comply with the Act;
- stop or shut down any activity, work, or undertaking;
- move any conveyance to another location; or

⁴²⁴ *Canada Wildlife Act*, supra note 311, s 11(1).

⁴²⁵ *Ibid*, ss 11.7(1) & (2).

- any other measure, including maintaining records on the matter, reporting to the wildlife officer periodically, or submitting to the wildlife officer any information they require.

In addition, the Act provides for specific fines regarding the contravention of specific provisions.⁴²⁶ Penalties are different for individuals, small revenue corporations, and other persons, but range from \$5,000 to \$12,000,000. If the court is satisfied that undue financial hardship would result from the imposition of a minimum fine, a lesser fine can be imposed.⁴²⁷

The Act also delineates aggravating factors the court may consider during the imposition of a fine. These include that:⁴²⁸

- the offence caused damage or risk of damage to wildlife or wildlife habitat;
- the offence caused damage or risk of damage to any unique, rare, particularly important or vulnerable wildlife or wildlife habitat;
- the damage caused is extensive, persistent, or irreparable;
- the offender committed the offence intentionally or recklessly; and
- the offender failed to take reasonable steps to prevent the commission of the offence, despite having the financial means to do so.

The *Wildlife Area Regulations* also prohibit a variety of activities in wildlife areas, unless a permit has been previously obtained, including:⁴²⁹

- hunting and fishing;
- possessing any animal, carcass, nest, egg, or a part of any of those things;
- damaging, destroying, or removing a plant;

⁴²⁶ *Ibid*, ss 13(1) - 13.01(4).

⁴²⁷ *Ibid*, s 13(5).

⁴²⁸ *Ibid*, s 13.09(2).

⁴²⁹ *Wildlife Area Regulations*, *supra* note 312, s 3(1).

- destroying or molesting animals or carcasses, nests, or eggs thereof;
- disturbing or removing any soil, sand, gravel, or other material; or
- dumping or depositing any rubbish, waste material, or substance that would degrade or alter the quality of the environment.

A permit may be issued authorizing a person to carry on a prohibited activity in a wildlife area, if that activity will not interfere with the conservation of wildlife.⁴³⁰

Canada National Parks Act:

The *Canada National Parks Act* states that where a substance capable of degrading the natural environment; injuring fauna, flora, or cultural resources; or endangering human health is discharged or deposited in a park the person who has charge, management, or control of the substance must take reasonable measures to prevent degradation of the natural environment and any danger that may result from the discharge or deposit.⁴³¹

The Act also sets out specific fines, the amounts of which are dependent upon the section of the Act that was contravened.⁴³² Fines are also different for individuals, corporations, and persons other than a corporation or individual, and depend on whether it is a first offence or a second or subsequent one. Fines range from \$5,000 to \$12,000,000 and can include imprisonment of up to five years.⁴³³ To enforce these provisions, park wardens and enforcement officers are given broad powers dealing with confiscation, arrest, and trespass.⁴³⁴

⁴³⁰ *Ibid*, s 4.

⁴³¹ *Canada National Parks Act*, *supra* note 313, s 32(1).

⁴³² *Ibid*, ss 24-30.

⁴³³ *Ibid*, s 27.2.

⁴³⁴ *Ibid*, ss 18-23.

If a person is convicted of an offence under the Act, the court may impose additional punishments and conditions, having regard to the nature of the offence and the circumstances surrounding its commission.⁴³⁵ These may include:⁴³⁶

- prohibiting the person from doing any act or engaging in any activity that may result in the continuation or repetition of the offence;
- directing the person to take action to remedy or avoid damage to the park or park resources;
- directing the person to compensate any person;
- directing the person to prepare and implement a pollution prevention plan or an environmental emergency plan; and
- directing the person to pay to promote the conservation, protection, or restoration of parks.

In conjunction with the Act, the *National Parks General Regulations* prohibit a person from carrying out any action that unreasonably interferes with fauna or the natural beauty of the park.⁴³⁷

Migratory Birds Convention Act, 1994:

Some of the prohibitions in this Act include prohibitions against:⁴³⁸

- a) being in possession of a migratory bird or nest; or
- b) buying, selling, exchanging, or giving a migratory bird or nest or making it the subject of a commercial transaction.

⁴³⁵ *Ibid*, s 30(1).

⁴³⁶ *Ibid*, s 30(1).

⁴³⁷ *National Parks General Regulations*, *supra* note 374, s 32(1)(c).

⁴³⁸ *MBCA, 1994*, *supra* note 316, s 5.

Additionally, no person or vessel can deposit a substance harmful to migratory birds in an area that is frequented by migratory birds.⁴³⁹

Penalties given out under the Act depend on the activity in question and whether it is a person, individual, or small revenue corporation.⁴⁴⁰ Further, and like other environmental legislation, the Act provides for both fines and imprisonment. The fines increase for second and subsequent violations and for indictable offences rather than summary convictions.⁴⁴¹

In addition to those punishments, the court can make an order for a variety of effects, including:⁴⁴²

- directing the offender to take action to remedy or avoid harm to a migratory bird or their nest;
- directing the offender to pay an amount of money used to promote the protection of migratory birds' habitat; and
- directing the offender to pay an amount for research into the protection of migratory birds.

One legislated purpose of sentencing under this Act is to promote respect for migratory birds, and their nests, and to restore their habitats.⁴⁴³

The Act also grants game officers the same powers as peace officers to carry out enforcement.⁴⁴⁴ Compliance orders are used when game officers have reasonable grounds to believe that any provision of this Act or its regulations have been contravened or are likely to be contravened.⁴⁴⁵

⁴³⁹ *MBCA, 1994, supra note 316, s 5.1*; this does not apply if the deposit is authorized under the *Canada Shipping Act, 2001, SC 2001, c 26*.

⁴⁴⁰ *MBCA, 1994, supra note 316, ss 13(1)-13.05*.

⁴⁴¹ *Ibid, ss 13, 13.01, & 13.03*.

⁴⁴² *Ibid, s 16(1)*.

⁴⁴³ *MBCA, 1994, supra note 316, s 13.09*.

⁴⁴⁴ *Ibid, s 6(4)*.

⁴⁴⁵ *Ibid, s 11.21(1)*.

Under the *Migratory Birds Regulations*, no person may hunt migratory birds in an area as specified in Schedule 1 except during an open season as specified in the Schedule.⁴⁴⁶ Additionally, no person shall hunt in a migratory bird sanctuary except with a permit.⁴⁴⁷ Finally, no person shall sell, expose for sale, offer for sale, trade, barter, or buy migratory birds nests, except as authorized by the Regulations.⁴⁴⁸

Fisheries Act:

The *Fisheries Act* sets out general prohibitions including limits on:⁴⁴⁹

- fishing;
- taking cetaceans into captivity;
- fishing equipment obstruction;
- removal of gear from fisheries; and
- obstructing the passage of fish or waters; and
- shark finning.

Penalties for offences under the Act range in amount and/or length and are dependent upon whether the party is an individual, corporation, small revenue corporation, or otherwise and upon whether the offence is a first offence or subsequent one.⁴⁵⁰

The Act also enables another step towards conservation compliance, in the form of Fisheries Management Orders.⁴⁵¹ These are orders which may be initiated by the Minister if they are of the opinion that fish conservation requires prompt and drastic measures be taken. The provision is broad, allowing the Minister to oppose any

⁴⁴⁶ *Migratory Birds Regulations*, supra note 377, s 5(4).

⁴⁴⁷ *Ibid*, s 5(9).

⁴⁴⁸ *Ibid*, s 12(1).

⁴⁴⁹ *Fisheries Act*, supra note 317, ss 23, 24, 25, 29 & 32.

⁴⁵⁰ *Fisheries Act*, supra note 317, ss 40(1), (2) & (3) & 78.

⁴⁵¹ *Ibid*, s 9.1.

conditions necessary to support the required fish conservation measures.⁴⁵² In particular, the Minister is able to prohibit the type of fishing gear, equipment, or fishing vessel used⁴⁵³ and impose any other requirements with respect to fishing.⁴⁵⁴



The Overall State of Habitat Law in Alberta

This legislative review, despite focusing on different areas of the law, highlighted two overarching themes that can be found in existing habitat management and protection legislation in the province.

The first of these themes is that habitat management and protection weaves its way through legislation of all forms and the creation of a strong habitat management and protection regime relies on a variety of legislation. Habitat management is not consigned solely to species at risk or hunting legislation, but rather it is also

⁴⁵² *Ibid*, s 9.1(2).

⁴⁵³ *Ibid*, s 9.1(1)(b).

⁴⁵⁴ *Ibid*, s 9.1(1)(d).

incorporated into land use planning or resource management statutes, both of which have direct and indirect impacts on habitat management and protection efforts.

Second, the effectiveness of these laws and regulations is often reliant upon the level of discretion granted to the Minister or other government officials by the legislation in question. The issue of discretion is a major one in habitat management and protection law because, despite the fact that certain statutes may enable a robust regime for habitat management and protection, how government discretion is exercised is the determining factor as to whether habitat is managed effectively. The SARA is a good example of this dichotomy, despite having a strong planning and enforcement lens, the Minister retains significant discretion over the decision to enforce these provisions.

Overall, Alberta is lacking in strong, enforceable, and clearly defined habitat protection laws. Rather, habitat management in Alberta is highly discretionary and heavily reliant on individual decisions and voluntary conservation efforts. This means evaluating the overall habitat management system is extremely difficult, as accountability for habitat outcomes does not exist, with measures (of varying consistency) being embedded in individual authorizations and resource tenures. This has meant that clear legal protections for habitat have occurred sporadically and are often dependent upon political decision-making. In order to more fully evaluate the state of habitat management and protection in Alberta, the next volumes in this series will look to other jurisdictions' habitat management and protection regimes for both inspiration and critique and will take on some of the challenges facing the habitat management and protection regime. Finally, the last volume in this series will leave readers with some recommendations for improvement.