

# Alberta Caribou Background

## Boreal caribou

Boreal woodland caribou (“boreal caribou”) are endemic to Canada, in the boreal forest region of seven provinces and two territories. They are distributed across 51 local populations, also referred to as herds.<sup>1</sup> These herds require large areas of suitable habitat, low levels of anthropogenic disturbance, and low threats from predation in order to survive and thrive.

This petition focuses on boreal caribou in the province of Alberta, and specifically the following five herds located in the northeastern corner of the province: Cold Lake; Richardson; Red Earth; West Side Athabasca River (WSAR); and East Side Athabasca River (ESAR). These herds are critically threatened by the combination of oil sands development, forest harvesting, and other industrial activities. Environment Canada data indicates that their populations have been declining dramatically, with the exception of Richardson.<sup>2</sup>

## Critical habitat

Boreal caribou were listed as threatened under the *Species at Risk Act* (“SARA”) when it was first enacted in 2002. Under SARA, when a species is listed as extirpated, endangered, or threatened, the federal government must prepare a strategy for its recovery.<sup>3</sup> The federal *Recovery Strategy* was released in 2012. It establishes a critical habitat target of a minimum of 65% undisturbed habitat in each caribou herd’s range, which it estimates will give the herds a 60 percent chance of becoming self-sustaining.<sup>4</sup>

The *Recovery Strategy* requires provinces to produce range plans outlining how each province will meet the minimum 65% undisturbed habitat target.<sup>5</sup> Although provincial range plans were due in October 2017, none have yet been produced for the northeastern herds.<sup>6</sup> In fact, levels of disturbance in these ranges are very high and are increasing. In 2014, levels of habitat disturbance were above the 35 percent disturbance threshold for all of the northeastern ranges, and extended up to 93 percent disturbance in the ESAR range.

## The *Species at Risk Act* safety net

Section 58(1) of SARA prohibits the destruction of threatened species’ critical habitat, but only covers critical habitat on federal land. Section 61(1) prohibits the destruction of any part of the critical habitat of a listed threatened species that is *not* part of federal lands, but only applies to

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<sup>1</sup> Environment Canada, *Recovery Strategy for the Woodland Caribou (Rangifer tarandus caribou), Boreal population, in Canada*, Species at Risk Act Recovery Strategy Series (Ottawa: Environment Canada, 2012) at p 4.

<sup>2</sup> *Ibid.*, at p 68; Environment Canada, *Report on the Progress of Recovery Strategy Implementation for the Woodland Caribou (Rangifer tarandus caribou), Boreal population, in Canada for the Period 2012-2017*, Species at Risk Act Recovery Strategy Series (Ottawa: Environment Canada, 2017) at p 32.

<sup>3</sup> *Species at Risk Act*, SC 2002, c 29 at s 37(1) [SARA].

<sup>4</sup> *Recovery Strategy*, *supra* note 1 at 14. Self-sustaining populations are those that are stable or growing, large enough to withstand human-caused pressures and random events, and no longer require recovery actions such as predator control.

<sup>5</sup> *Ibid* at pp 38-39.

<sup>6</sup> *Report on the Progress of Recovery Strategy Implementation*, *supra* note 2 at pp 17-18.

those portions of critical habitat that the Governor in Council (essentially, the federal Cabinet) specifies by order on the recommendation of the Minister of the Environment. The Minister must recommend that Cabinet make such an order if she is of the opinion that:

- (a) there are no other provisions under *SARA* or other federal Acts that protect the particular portion of critical habitat, including agreements under section 11 of *SARA*; and
- (b) the laws of the province do not effectively protect the critical habitat.<sup>7</sup>

The Minister has not yet recommended pursuant to section 61(4) of *SARA* that an order be made to protect the northeastern herds' critical habitat on provincial lands.

*SARA* contains certain exemptions to the prohibition on the destruction of critical habitat, as well as discretionary measures under which the Minister may authorize activities that may affect critical habitat. However, these exemptions or authorizations are subject to strict pre-conditions and/or qualifications with the aim of minimizing harm to the species.<sup>8</sup>

### **Effective protection**

The following test was used to evaluate whether a federal or provincial law provides effective protection for critical habitat:

Does the provincial or federal law prevent the destruction of the portion or parts of the critical habitat on non-federal lands to an extent that results in a protection outcome equivalent to the outcome that would be achieved if subsection 61(1) of *SARA* was in effect?

Neither federal nor provincial laws provide effective legal protection of the northeastern herds' critical habitat on provincial lands. **The Minister is therefore required by section 61(4) to recommend that the Governor in Council make an order to protect the specified habitat.**

### **Federal legislation**

The following summary illustrates that neither *SARA* nor any other federal laws provide effective protection for the northeastern herds' critical habitat:

(1) *Species at Risk Act*, SC 2002, c 29

The Minister has not made a recommendation under subsection 61(4) of *SARA* with respect to the critical habitat of the northeastern herds. Therefore, no protection is currently offered under subsection 61(1). Although section 11 of *SARA* authorizes the federal government to enter into agreements with the provinces to protect critical habitat, there are no conservation agreements in place with respect to the critical habitat of the northeastern herds. Neither the *Recovery Strategy* nor the proposed *Action Plan*<sup>9</sup> provide any mandatory legal protection for the critical habitat of the northeastern herds.

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<sup>7</sup> *Ibid* at ss 61(2) & (4).

<sup>8</sup> *Ibid* at ss 6, 73(1), (2), (3), 83(1), (2).

<sup>9</sup> Environment and Climate Change Canada, *Action Plan for the Woodland Caribou (Rangifer tarandus caribou), Boreal Population, in Canada – Federal Actions [Proposed]*, Species at Risk Act Action Plan Series (Ottawa: Environment and Climate Change Canada, 2017).

(2) *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19 (“*CEAA 2012*”)

*CEAA 2012* does not mandate environmental assessments for all activities likely to harm caribou habitat on non-federal lands.<sup>10</sup> Even when an environmental assessment is mandated, the Governor in Council has absolute discretion to allow a project to go ahead despite a finding that it is likely to cause significant adverse environmental effects.<sup>11</sup> Although a *CEAA 2012* decision statement could include conditions requiring the protection of critical habitat, such conditions are not mandatory and the relevant enforcement provisions are much weaker than those applicable to a safety net order under section 61 of *SARA*.<sup>12</sup>

(3) *National Energy Board Act*, RSC 1985, c N-7 (“*NEB Act*”)

The *NEB Act* regulates the construction and operation of interprovincial pipelines on non-federal lands. If a proposed pipeline requires an environmental assessment under *CEAA 2012*, the National Energy Board (“NEB”)’s report to the Governor in Council must include the environmental assessment, and must indicate whether the pipeline project will result in significant adverse environmental effects.<sup>13</sup> However, the Governor in Council may still approve the project despite any anticipated environmental harm.<sup>14</sup> Although the NEB approval process may set conditions requiring the protection of caribou critical habitat,<sup>15</sup> this has not yet been done. Even if such conditions were set, the protection would only apply to a small portion of the critical habitat in the northeastern ranges.

### **Provincial legislation**

As outlined below, none of Alberta’s provincial laws provide effective protection for the critical habitat of the northeastern herds.

(1) *Alberta Land Stewardship Act*, RSA 2000, v A-26.8 and the Lower Athabasca Regional Plan (“LARP”)

The LARP<sup>16</sup> was established pursuant to the *Alberta Land Stewardship Act*, and covers northeast Alberta. Although the LARP contains a number of promising commitments, including the establishment of new conservation areas, these commitments are purely statements of policy.<sup>17</sup> They do not provide mandatory protection of caribou critical habitat.

(2) *Wildlife Act*, RSA 2000, c W-10

The *Wildlife Act* prohibits anyone from wilfully molesting, disturbing, or destroying a house, nest, or den of an endangered species,<sup>18</sup> including woodland caribou. However, this prohibition does not protect caribou habitat because caribou do not have “houses, nests, or dens.” The Act also allows (but does not require) the Minister of Environment and Parks to prepare recovery

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<sup>10</sup> *CEAA 2012* at ss 6-7; *Regulations Designating Physical Activities*, SOR/2012-147, ss 2(a), (c), 4, 6, 9.

<sup>11</sup> *CEAA 2012* at s 52(2).

<sup>12</sup> *CEAA 2012* at ss 6, 98, 99(1); *SARA*, *supra* note 3 at ss 97(1), (1.1).

<sup>13</sup> *CEAA 2012* at ss 29(1), 31(1)(a); *NEB Act*, s 52(3).

<sup>14</sup> *CEAA 2012* at s 31(1)(a).

<sup>15</sup> *CEAA 2012* at s 31(1)(b).

<sup>16</sup> Government of Alberta, *Lower Athabasca Regional Plan, 2012-2022* (Edmonton: Government of Alberta, 2012).

<sup>17</sup> *Ibid* at p 30. Only those sections of LARP specifically identified as being part of the Regulatory Details Plan are legally binding.

<sup>18</sup> *Wildlife Act*, s 36(1).

plans for endangered species.<sup>19</sup> However, neither the *Alberta Woodland Caribou Recovery Plan*<sup>20</sup> nor the *Woodland Caribou Policy for Alberta*<sup>21</sup> identify caribou critical habitat or prohibit destructive human activities within caribou ranges.

(3) *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*, RSA 2000, c W-9 (“*Wilderness Areas Act*”)

The *Wilderness Areas Act* authorizes the Minister of Environment and Parks to designate land according to the four designations in the Act’s title.<sup>22</sup> Only the “ecological reserve” designation currently applies to land within the ranges of the northeastern herds, and the reserves located within these ranges are quite small.<sup>23</sup> In addition, the Minister maintains the discretion to continue or renew existing dispositions within ecological reserves.<sup>24</sup> This Act could effectively protect critical habitat if the Minister decided to discontinue land dispositions within the relevant reserves, but the protection would only extend to a small portion of the northeastern ranges.

(4) *Provincial Parks Act*, RSA 2000, c 35

Under the *Provincial Parks Act*, the Lieutenant Governor in Council may designate public lands as provincial parks, wildland provincial parks or recreation areas.<sup>25</sup> Eight existing and three proposed (but not yet designated) wildland provincial parks overlap in whole or in part with the ranges of the northeastern herds, totalling 16.2 percent of the ranges.<sup>26</sup> However, existing public land dispositions of all types within these parks are continued and may be renewed,<sup>27</sup> and new dispositions for mineral extraction and grazing may be granted in certain circumstances.<sup>28</sup> These parks could provide effective protection for caribou critical habitat if the Minister of Environment and Parks exercised her discretion to discontinue existing dispositions within the parks and refuse to issue new dispositions. However, critical habitat in over 80 percent of the ranges would remain unprotected.

(5) *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 (“*EPEA*”)

The *EPEA* establishes a process for the environmental assessment of certain projects prior to their approval. However, not all projects that could destroy caribou critical habitat are subject to mandatory environmental assessments.<sup>29</sup> In addition, the designated decision-maker may still allow a project to proceed despite a finding that the project will have adverse impacts on the

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<sup>19</sup> *Ibid* at s 6(1)(a).

<sup>20</sup> Alberta Woodland Caribou Recovery Team, *Alberta Woodland Caribou Recovery Plan 2005/04 – 2013/14*, Alberta Species at Risk Recovery Plan No. 4 (Edmonton: Alberta Sustainable Resource Development, Fish and Wildlife Division, 2005).

<sup>21</sup> Government of Alberta, *A Woodland Caribou Policy for Alberta* (2011) online: <http://aep.alberta.ca/fish-wildlife/wildlife-management/caribou-management/documents/WoodlandCaribouPolicy-Alberta-Jun2011.pdf>.

<sup>22</sup> *Wilderness Areas*, s 3-4.1.

<sup>23</sup> Alberta Environment and Parks, “Parks by Class: Ecological Reserves”, (2017) online: <http://www.albertaparks.ca/albertaparksca/library/land-reference-manual/parks-by-class/?id=Ecological%20Reserve>

<sup>24</sup> *Wilderness Areas Act*, *supra* note 30 at ss 6(2) & (3).

<sup>25</sup> *Provincial Parks Act*, s 6.

<sup>26</sup> *Recovery Strategy*, *supra* note 1 at 99-103; *LARP*, *supra* note 23 at p 84.

<sup>27</sup> *Ibid* at s 8.1.

<sup>28</sup> *Provincial Parks (Disposition) Regulation*, AR 241/77, s 2.1.

<sup>29</sup> *EPEA*, s 59 [*EPEA*]; *Environmental Assessment (Mandatory and Exempted Activities Regulation)*, AR 111/93.

critical habitat of species at risk.<sup>30</sup> Although the responsible authority may set conditions on the project's approval, there is no requirement that these conditions protect caribou critical habitat.

(6) *Forests Act*, RSA 2000, c F-22

The *Forests Act* allows Crown timber to be harvested pursuant to a forest management agreement ("FMA"), a timber quota certificate, or a timber permit.<sup>31</sup> FMAs cover almost all of the northeastern herds' ranges.<sup>32</sup> However, the relevant FMAs do not prohibit the destruction of caribou critical habitat.<sup>33</sup> Although each FMA holder is required to prepare a forest management plan in accordance with standards set by the Minister of Agriculture & Forestry, the relevant standards<sup>34</sup> do not preclude harvesting within caribou critical habitat.

(7) *Public Lands Act*, RSA 2000, c P-40 ("*PLA*")

Industrial uses of public lands in Alberta require an authorization under the *PLA*. However, none of the policies developed pursuant to the *PLA* prohibit the destruction of caribou critical habitat.<sup>35</sup> The *PLA* also authorizes the Lieutenant Governor in Council to make regulations declaring any area of land to be a public land use zone ("*PLUZ*") and setting restrictions on permitted activities within the *PLUZ*.<sup>36</sup> Although this mechanism could theoretically provide effective protection for caribou critical habitat, there are currently no *PLUZs* within the ranges of the northeastern herds.

(8) *Mines and Minerals Act*, RSA 2000, c M-17 ("*MMA*")

The *MMA* governs the management and disposition of rights in Crown owned mines and minerals, including oil and gas. However, nothing in the *MMA* authorizes any restrictions on surface access (which is governed by the *PLA*). The *MMA* does not protect critical habitat.

(9) *Oil Sands Conservation Act*, RSA 2000, c O-7 ("*OSCA*")

The *OSCA* and the *Oil Sands Conservation Rules* ("*OSC Rules*") regulate the approval process and operation of oil sands mines, in situ operations, and processing plants. The *OSCA* does not contain any provisions requiring the conservation of caribou critical habitat. The *OSC Rules*

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<sup>30</sup> *EPEA*, s 53.

<sup>31</sup> *Forests Act*, s 15.

<sup>32</sup> Alberta Agriculture and Forestry, "Forest Management Agreement Boundaries," online: [http://www1.agric.gov.ab.ca/\\$department/deptdocs.nsf/ba3468a2a8681f69872569d60073fde1/24481e0cfc600d9687257f64008147bd/\\$FILE/FMA-BoundariesMap-Feb2016.pdf](http://www1.agric.gov.ab.ca/$department/deptdocs.nsf/ba3468a2a8681f69872569d60073fde1/24481e0cfc600d9687257f64008147bd/$FILE/FMA-BoundariesMap-Feb2016.pdf).

<sup>33</sup> Government of Alberta, "Forest Management Agreement – Alberta-Pacific Forest Industries Inc." (27 July 2011); Government of Alberta, "Forest Management Agreement – Daishowa-Marubeni International Ltd." (28 July 2009); Government of Alberta, "Forest Management Agreement – Tolko Industries Ltd., Norbord Inc. and La Crete Sawmills Ltd." (24 November 2011); Government of Alberta, "Forest Management Agreement – Tolko Industries Ltd." (13 April 2017).

<sup>34</sup> Alberta Sustainable Resource Development, *Alberta Forest Management Planning Standard – Version 4.1*, (Edmonton: Alberta Sustainable Resource Development, April 2006) at 7.

<sup>35</sup> *PLA*, ss 20(1), 47(1); Alberta Environment and Sustainable Resource Development, *Caribou Protection Plan Guidelines and Caribou Calving Information*, (2012), online: <http://aep.alberta.ca/fish-wildlife/wildlife-management/caribou-management/caribou-protection-plans/documents/CaribouProtectionPlan-CaribouCalvingInfo-2012.pdf>; Alberta Energy Regulator, *Manual 008: Oil Sands and Coal Exploration Guide*, (19 August 2014); Alberta Energy Regulator, "Public Lands Disposition Process", (accessed 15 September 2017), online: <http://www.aer.ca/applications-and-notice/application-process/pla-disposition-process>.

<sup>36</sup> *Public Lands Act*, *supra* note 44 at s 71.1(1).

mandate that applications for oil sands schemes and operations include the information set out in the applicable directives, which may require an environmental assessment.<sup>37</sup> However, none of the directives contain a prohibition on the destruction of caribou critical habitat.

(10) *Oil and Gas Conservation Act*, RSA 2000, c O-6 (“OGCA”)

The *OSCA* requires that an application be made for a licence for oil and gas wells and facilities.<sup>38</sup> Applications for wells or compressor stations must include certain information related to the environmental impacts of the project, as per *Directive 056: Energy Development Applications and Schedules*.<sup>39</sup> However, neither the *OSCA* nor the *Oil and Gas Conservation Rules* or related directives contain any conditions or prohibitions that would protect the critical habitat of the northeastern herds.

(11) *Coal Conservation Act*, RSA 2000, c C-17 (“CCA”)

Proposed coal developments in Alberta require approval pursuant to the *CCA*.<sup>40</sup> However, neither the *CCA* nor the *Coal Conservation Rules*<sup>41</sup> mandate the protection of caribou critical habitat. The only existing Directive (created pursuant to the *Rules*) on applying for coal projects does contain conditions relevant to habitat protection, but only applies to in situ coal schemes.<sup>42</sup> Further, it does not include any specific obligations to protect the habitat of rare, threatened, or endangered species.

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<sup>37</sup> *Oil Sands Conservation Rules*, AR 76/88, s 2; Alberta Energy Regulator, *Directive 023L Guidelines Respecting an Application for a Commercial Crude Bitumen Recovery and Upgrading Project*, (1991) at p 28.

<sup>38</sup> *OSCA*, ss 11(1), 15(1).

<sup>39</sup> *Oil and Gas Conservation Rules*, AR 151/71, ss 2.010, 15.210; Alberta Energy Regulator, *Directive 056: Energy Development Applications and Schedules*, (1 September 2011), at pp 5-6.

<sup>40</sup> *CCA*, ss 10, 11, 24, 29.

<sup>41</sup> *Coal Conservation Rules*, AR 270/81.

<sup>42</sup> *Ibid* at ss 21.1 – 21.5; Alberta Energy Regulator, *Directive 061: How to Apply for Government Approval of Coal Projects in Alberta*, (August 1983).