

## **PROTECTION ASSESSMENT: CRITICAL HABITAT AND INDIVIDUALS OF BOREAL CARIBOU IN ONTARIO**

This assessment reviews the Government of Ontario's main legal tools and highlights Environment and Climate Change Canada's (ECCC) findings on whether those laws are generally consistent with the provisions and protection afforded under the federal *Species at Risk Act* (SARA) for individuals and critical habitat as defined in the federal *Recovery Strategy for the species* (2020), with reference to the proposed *Policy on Critical Habitat Protection on Non-Federal Lands* (2016). The scope of the assessment is limited to the non-federal lands located in the province of Ontario. Laws made by Indigenous governments under modern treaties were not included in this assessment, as there are no modern treaties in Ontario.

### **1 PROTECTION OF CRITICAL HABITAT ON NON-FEDERAL LANDS**

On non-federal lands, the following provincial laws have the potential to provide some protection for boreal caribou critical habitat through prohibitions or restrictions on activities that are likely to cause its destruction:

- *Endangered Species Act, 2007* (ESA)
- *Crown Forest Sustainability Act* (CFSA)
- *Provincial Parks and Conservation Reserves Act, 2006* (PPCRA)
- *Far North Act* (FNA)
- *Public Lands Act* (PLA)
- *Environmental Assessment Act* (EAA)

Further information is provided on each of these laws in Sections 1.1 to 1.6. In addition, the province of Ontario has a suite of documents that support boreal caribou habitat conservation, including Ontario's *Woodland Caribou Conservation Plan* (2009), which directs the adoption of a Range Management Approach to caribou recovery, and the *Range Management Policy in Support of Woodland Caribou Conservation and Recovery* (2014), which outlines Ontario's Range Management Approach. These policy documents are key to understanding the provincial approach to protection.

Ontario considers the implementation of its Range Management Approach to constitute range plans for boreal caribou in Ontario, for all of Ontario's 14 ranges<sup>1</sup> excluding the Coastal Range (ON06). The objective of the Range Management Policy is "to maintain or move towards a sufficient range condition in all caribou ranges in Ontario", where caribou conservation is

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<sup>1</sup> While the federal recovery strategy identified nine boreal caribou ranges in Ontario, since the publication of the recovery strategy, the province of Ontario has sub-divided the Far North Range (ON9) into six new ranges. The province of Ontario therefore currently recognizes 14 ranges, and provincial policies are applied with respect to these ranges.

achieved when range condition is considered sufficient to sustain caribou. The Range Management Policy follows an adaptive management approach. It directs the implementation of the protection provisions afforded to caribou and their habitat in a way that complies with the *Endangered Species Act* (ESA, described in Section 1.1). It provides direction on the integration of range condition (the probability of a range to sustain caribou, based on multiple lines of evidence assessed through integrated range assessments) into activity review and assessment in the context of species and habitat protection under the ESA, which informs planning and decision-making (e.g., the determination of whether an ESA authorization is required). The policy further outlines three principles to be implemented during planning and decision making.

- **Principle 1.** Ranges will be managed such that cumulative disturbance remains at or moves towards a level that supports a self-sustaining population
- **Principle 2.** Amount and arrangement of habitat will be managed consistent with the level that has been estimated to occur in natural landscapes
- **Principle 3.** Forest composition, pattern and structure will be managed to promote the maintenance of the ecological function of sub-range habitat features for caribou in the context of range condition

With respect to Principle 1, in 2017, Ontario officials verbally stated that the province uses the 65% undisturbed habitat threshold established by ECCC in assessing whether cumulative disturbance is at a level that supports self-sustaining populations. In 2022, they stated in a presentation to partners, stakeholders, and Indigenous communities that the target under the ESA's Range Management Policy is over 65% undisturbed area in each range. However, the use of this target by Ontario may change if additional information is obtained that supports the use of an alternate threshold. Nevertheless, the policy does aim to maintain or move towards range conditions sufficient to support self-sustaining caribou populations.

The Range Management Policy provides direction for planning and decision making with respect to all ranges except for the Coastal Range. To date, Ontario has not outlined a detailed approach for managing the Coastal Range; however, general direction for the range was provided in the Caribou Conservation Plan, which stated that: "The Lake Superior coastal population will be managed for population security and persistence. The focus will be to protect and manage habitat and encourage connectivity to caribou populations to the north." Further, under the conservation agreement signed in 2022 under SARA s.10 and 11, Ontario commits to finalizing the approach for the coastal range within two years.

### **1.1 *Endangered Species Act, 2007 (ESA)***

The ESA is the primary piece of provincial legislation for the protection of species at risk and their habitat in Ontario. Its purposes include protecting species that are at risk and their habitats, and promoting the recovery of species that are at risk. The ESA is currently administered by the Ministry of Environment, Conservation and Parks, is a law of general application (i.e., applies to everyone on both private and provincial Crown land) and is binding on the provincial Crown. The most notable exclusion is: forest operations in Crown forests conducted in accordance with an approved forest management plan are excluded from application of the ESA prohibitions through provisions in the *Crown Forest Sustainability Act* (CFSA).

Section 10 of the ESA prohibits the damage or destruction of habitat of species that are listed as endangered or threatened under the Act. Boreal caribou was listed as threatened under the ESA at the time the Act came into force and received general habitat protection under the ESA in June 2013. This prohibition is supported by offences, enforcement provisions, and penalties that are comparable to those in SARA.

Like SARA, the ESA includes exceptions to the application of s.10 through the issuance of permits and through agreements; much like SARA, the discretion to issue permits or enter into agreements is constrained by the ESA. Under the ESA (s.16, 17 and 19), the Minister has discretionary powers to allow activities that would otherwise be prohibited by s.9 or 10 through the issuance of permits and through agreements, if certain conditions are met. Specifically, under the ESA the Minister may issue a permit or enter into an agreement for the purpose of assisting in the protection or recovery of a species (s.16, s.17(2)(b)), and may also issue a permit for activities necessary for protection of human health or safety (s.17(2)(a)); this is similar to the SARA exception for public health and safety. For other types of permits under the ESA, the permit can only be issued if the Minister is of the opinion that the activity will not jeopardize survival or recovery of the species (s.17(2)(d), s.19) or that an overall benefit will be achieved (s.17(2)(c)); this is generally aligned with a key requirement (precondition) under SARA that a permitted activity will not jeopardize survival or recovery of the species (although it is important to acknowledge that policy interpretation of terms used in provincial and federal legislation may differ).

While authorizations for boreal caribou are occasionally issued, each must meet a suite of rigorous conditions based on a case-specific activity assessment, including measures to avoid damage or destruction, minimize potential impacts, or, in some cases, create an overall benefit to the species and its habitat, such as habitat restoration or creation combined with research to fill key knowledge gaps for the species. As a practice, Ontario does not consider research alone to be sufficient to create the overall benefit.

As part of the ESA amendments introduced in 2019, s.16.1 was added to allow the Minister to enter into landscape agreements with proponents proposing to engage in activities otherwise prohibited by s.9 and 10 of the Act. The purpose of a landscape agreement is to allow greater flexibility in providing a single authorization for multiple activities impacting multiple species across a geographic area. Additionally, it should be noted that boreal caribou is not one of the six species for which proponents have the option to pay a fee determined by Ontario into a Conservation Fund in lieu of completing beneficial actions themselves under certain ESA authorization clauses (an option stemming from amendments to the ESA in 2019 which came into effect on April 29, 2022).

Under the ESA, there are also regulations prescribing exemptions to the prohibitions, whereby an activity that would otherwise contravene the prohibitions may occur without the issuance of a permit or agreement in the prescribed circumstances. As part of Ontario's modernization of approvals in 2013, Ontario Regulation 242/08 was amended to include certain regulatory exemptions (provisions referred to by the Ontario government as "rules in regulation" or "registration with rules in regulation") made under the authority of ss.55 (1) of the ESA, which allow for the occurrence of activities that would otherwise contravene s.9 or 10 of the ESA,

without the need for a permit or agreement. Activities exempted through this exercise were considered by the Ontario government to be low risk, and the regulation includes conditions such as activity limitations or exclusions, time limitations, geographic exclusions and activity-specific requirements (e.g., mitigation, monitoring and reporting).

Early exploration mining is one activity included in these exemptions that is highly relevant to boreal caribou habitat. Also included in these exemptions, and of relevance to boreal caribou, are pits and quarries, activities to avoid or reduce threats to human health and safety (not imminent), and certain development/ infrastructure projects underway, where a specified action or approval was completed or obtained by June 30, 2015 (time-limited transition). The exemptions have the potential to allow for activities that may harm or harass boreal caribou or result in the destruction of boreal caribou habitat. However, for each exemption relevant to caribou to apply, there are a number of conditions that must be satisfied. It is noteworthy that, in making a regulation, ss.57 (1) of the ESA requires that the Minister consider whether the regulation is likely to jeopardize the survival of the species in Ontario (in line with one of three key pre-conditions for the issuance of a SARA permit – i.e., that the activity will not jeopardize survival or recovery of the species) or to have any other significant adverse effect on the species.

As noted previously, there is a permanent exclusion of forestry activities from the ESA protection provisions. This means that, for forestry activities within Forest Management Units (FMUs), the ESA does not apply. The area under this exclusion covers some portions of caribou range (and areas containing critical habitat) totaling ~27% of boreal caribou distribution in Ontario. This includes anywhere from ~47-94% of each of the eight southern ranges (i.e., all ranges other than the federal Far North range). In these portions, it is essential to consider the CFSA in assessing habitat for boreal caribou (see Section 1.2 for a description of protection afforded to boreal caribou under the CFSA in the forestry context).

Ontario's *Woodland Caribou Conservation Plan* (2009) provides policy direction for the management and recovery of boreal caribou in Ontario. The goal of the conservation plan includes maintaining self-sustaining, genetically-connected local population of boreal caribou where they currently exist, which is in line with the goal of the federal Recovery Strategy. The *General Habitat Description for the Forest-dwelling Woodland Caribou (Rangifer tarandus caribou)* (2013) (GHD) is the technical document that clarifies the area of habitat protected for the species based on the general habitat definition in the ESA. There is consistency between the GHD and critical habitat as set out in the federal Recovery Strategy, with respect to the scale of habitat protection (i.e., range scale) and the description of habitat features (as per the provincial GHD) and biophysical attributes (as per the federal critical habitat description). Unlike critical habitat as set out in the federal Recovery Strategy, which sets 65% as the minimum numerical threshold for undisturbed habitat within each range, the GHD does not include an explicit, range-scale minimum threshold of undisturbed habitat. This difference could result in protection of different amounts of protected habitat under the federal and provincial regimes (i.e., more or less than 65% undisturbed habitat per range).

The Range Management Policy provides multiple principles for planning and decision-making including direction on determining whether an activity would alter the function of the habitat and contravene the ESA prohibitions. The Range management Policy aims to manage ranges such

that cumulative disturbance remains at or moves towards a level that supports self-sustaining populations of caribou. This policy direction is generally consistent with the goal that underlies the habitat disturbance threshold in the federal Recovery Strategy. A wide range of factors are considered in reviewing/assessing activities, including the effect of the activity on cumulative disturbance, and the location relative to sub-range habitat features. Under the Range Management Policy, proposed activities that would increase cumulative disturbance would be more likely to be considered a contravention of the ESA and require an ESA permit/authorization in ranges that already have at least 35% disturbed habitat. Nevertheless, the Range Management Policy does not include an explicit threshold for range-level disturbance. It is also a policy document and not a legal instrument. While the prohibitions under s.10 of the ESA protect boreal caribou habitat throughout each range in the province, the lack of a requirement to maintain a specific threshold of undisturbed habitat in the GHD presents a challenge in determining alignment of the federal and provincial protection regimes. Although Ontario officials have stated that a 65% undisturbed area is targeted in each range, it is difficult to verify how rigorously this is applied.

For example, there is one range (the Far North range) to which the CFSA forestry exclusion does not apply, making this the only range for which the ESA is the primary legislation governing caribou management. The Far North range, which covers ~53% of the caribou range in Ontario and is currently at 84% undisturbed habitat, is above the 65% undisturbed habitat threshold established in the federal Recovery Strategy. This range has ESA provisions and protections in place, including conditions on exemptions, that are similar to SARA. Given that under the ESA there is no established threshold for undisturbed habitat, the Department is of the view that the boreal caribou critical habitat in that range is only partially protected.

## **1.2 Crown Forest Sustainability Act, 1994 (CFSA)**

Under the CFSA, the Minister of Natural Resources and Forestry may designate all or part of a Crown forest as a FMU for the purposes of the CFSA. Approximately 20 FMUs collectively make up the “Area of the Undertaking<sup>2</sup>”, as per Declaration Order MNR-75 under the EAA, and overlap with all boreal caribou ranges except the Far North range (ON09). As described in Section 1.1, this is ~27% of boreal caribou range (areas containing critical habitat) in Ontario. On provincial Crown land, with the exception of provincial parks, conservation reserves, and dedicated protected areas, forestry may occur within FMUs, subject to forest management plans and other applicable legislation and policies. Under s.47.1 of the CFSA, forest operations in Crown forests conducted in accordance with an approved forest management plan are excluded from the application of the ESA prohibitions; therefore, the framework for species at risk protection in a forestry context is implemented solely through the requirements under the CFSA.

The CFSA requires that a forest management plan be prepared for every FMU. Forest management plans outline the direction for forestry related activities including forest harvesting,

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<sup>2</sup> This refers to the Area of the Undertaking of forest management on Crown lands in Ontario, which consists of an area of approximately 45 million hectares extending throughout the central portion of the province, of which approximately 37.4 million hectares are Crown lands.

regeneration, and the construction of roads within a given management unit. The CFSA requires that forest management plans (which are updated every 10 years) be developed in accordance with the Forest Management Planning Manual (FMPM), which provides for determinations of the sustainability of Crown forests in a manner consistent with two principles: (1) Large, healthy, diverse and productive Crown forests and their associated ecological processes and biological diversity should be conserved; and (2) The long term health and vigor of Crown forests should be provided for by using forest practices that, within the limits of silvicultural requirements, emulate natural disturbances and landscape patterns while minimizing adverse effects on plant life, animal life, water, soil, air, and social and economic values, including recreational and heritage values. Forest management plans are also developed in accordance with forest management guides (FMGs). Both the FMPM and FMGs provide direction with respect to caribou habitat. Those used in the development of existing forest management plans approved prior to April 2017 provide for some protection of boreal caribou habitat through the explicit requirement to plan and account for key habitat features, including consideration of both current and predicted levels of habitat features up to 100 years into the future. A threshold for cumulative disturbance in ranges or FMUs is not explicitly addressed.

The *Forest Management Guide for Boreal Landscapes* (the “Landscape Guide”), released in 2014, includes mandatory direction (standards and guidelines) for forest management planning to maintain or enhance the quality, quantity, and arrangement of habitat for boreal caribou suitable for the persistence of the species in managed Crown forests. For example, the Landscape Guide contains detailed management direction for caribou with the overall objective of providing a continuous, sustainable supply of caribou habitat over the long term. To achieve this, simulated ranges of natural variation (SRNV) are modeled for each FMU that intersects one or more population ranges, to provide estimates of forest composition, structure, and pattern in the absence of human disturbance, while accounting for variation in disturbance regime across the province. The SRNVs are used as objectives in forest management planning and decision making to ensure that the amount and arrangement of habitat remains at levels consistent with natural levels with which caribou have evolved. Targets are established for caribou refuge habitat and caribou winter habitat, and take into account other types of habitat used by caribou. The Landscape Guide also requires a Dynamic Caribou Habitat Schedule to be prepared for each FMP, which is a long-term plan for providing sustainable year-round caribou habitat in large interconnected habitat tracts. Nevertheless, the Landscape Guide does not include an explicit threshold for undisturbed habitat at the range level.

Since April 1, 2017, the FMPM requires that new forest management plans implement the Landscape Guide, resulting in plans that are expected to take into account additional considerations for boreal caribou and reduce impacts to boreal caribou habitat from forestry activities. As such, newer plans should provide additional protection of habitat compared to earlier plans. Eighteen of 20 FMUs now have forest management plans prepared since 2014 using the Landscape Guide, with the remaining two anticipated to be completed in 2024. The Landscape Guide is generally applied at the FMU scale, which is typically smaller than a caribou range. However, the caribou ranges which the FMUs fall within or overlap must also be considered.

In terms of biophysical attributes, the Landscape Guide contains mandatory direction that addresses calving and nursery areas, and provides guidance to manage habitat, including winter and refuge habitat and mature conifer forests. For example, known calving and nursery sites that are in a suitable condition receive a 1-km area of concern (AOC) to limit impacts. Any modification or harvest in calving and nursery areas is done only if the range condition is deemed sufficient, the habitat in the feature is no longer suitable (e.g., over-mature with a dense understory of shrubs), and the supply of these attributes at the range level is sufficient to sustain caribou. However, as harvest or modification could be allowed under some circumstances, this is not equivalent to the explicit protection of biophysical attributes (such as calving and post-calving habitat) that comprise boreal caribou critical habitat as identified in the federal Recovery Strategy<sup>3</sup>.

Once a forest management plan is certified by a professional forester and approved by the Ministry of Natural Resources and Forestry, it is a legal requirement of forest licensees to comply with the plan. It is an offence under s.64(1)(c) of the CFSA to conduct forest operations that are not in accordance with the applicable forest management plan. As noted above, it is a requirement under the CFSA that forest management plans be prepared in accordance with the Forest Management Planning Manual, which in turn requires following the Landscape Guide. Therefore, within each FMU and its forest management plan, there will be areas (portions) of critical habitat that are protected by the plan created under the CFSA. However, some plans currently allow for the destruction of forest habitat beyond the 65% undisturbed habitat threshold for that specific FMU. As FMUs are typically smaller than caribou ranges, the impact of this at the range level is difficult to anticipate. Additionally, Ontario has stated that forest management teams are allowed a certain range of discretion in applying the Landscape Guide in a manner that reasonably suits the specific context (e.g., forest condition and trends). For a FMU totally within, or for the portion of a FMU intersecting with, the range of boreal caribou, the CFSA provides some protection of boreal caribou habitat. However, it is challenging to determine the cumulative extent of habitat protection afforded by the FMUs within each range, given the difficulty in integrating information among plans.

Overall, the lack of an explicit threshold for undisturbed habitat in the Landscape Guide and, in turn the forest management plans, means that there is no prohibition on destruction of habitat beyond the 35% disturbance threshold in a range as laid out in the federal recovery strategy. Moreover, as noted above, the Landscape Guide, and in turn the forest management plans, do not prohibit the destruction of biophysical attributes such as calving and post-calving habitat. Therefore, the CFSA does not achieve a protection outcome for critical habitat that is consistent with the provisions and protections afforded under SARA.

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<sup>3</sup> Similar exceptions, where an identified calving area or a portion of a calving area is not considered 'essential' can be considered for harvesting exist in the 'Forest Management Guidelines for the Conservation of Woodland Caribou: A landscape approach' used prior to the release of the Landscape Guide, and still in use for 2 FMUs.

### **1.3 Provincial Parks and Conservation Reserves Act, 2006 (PPCRA)**

The PPCRA, administered by the Ministry of Environment, Conservation and Parks, applies within provincial parks and conservation reserves, which occur in all boreal caribou ranges in Ontario, but comprise a small percentage (8.3%) of the total area of the ranges overall. The first objective of the PPCRA is to permanently protect representative ecosystems, biodiversity and provincially significant elements of Ontario's natural and cultural heritage, and to manage these areas to ensure that ecological integrity is maintained. Under this Act, the definition of ecological integrity includes, "viable populations of native species, including species at risk."

Within provincial parks and conservation reserves, in addition to the protection afforded through the ESA for caribou habitat, the PPCRA provides another layer of habitat protection through restrictions on activities. S.16(1) of the PPCRA prohibits commercial timber harvest, mining and mineral exploration, generation of electricity, extraction of aggregate and other industrial uses within provincial parks and conservation reserves, with limited exceptions. These prohibitions are supported by offenses, enforcement provisions and penalties that are comparable to those in SARA. The *Mining Act* (s.31) also explicitly prohibits the staking of mining claims or the development of mineral interests or the working of mines in provincial parks and conservation reserves. The CFSA does not apply within provincial parks and conservation reserves, and forestry permits cannot be issued for these lands unless otherwise permitted through the PPCRA. The PPCRA does not contain an exception to allow commercial timber harvest for any parks or conservation reserves within boreal caribou ranges in Ontario.

The PPCRA is expected to prevent some, but not all activities likely to destroy critical habitat for boreal caribou within provincial parks and conservation reserves. Specifically, the PPCRA is expected to protect boreal caribou critical habitat from forestry and new mining and mineral activities within provincial parks and conservation reserves. Like SARA (e.g., for permitting in National Parks), there is permitting discretion in the Act which could allow other activities that could cause destruction of habitat. Under subsection 22(1) of the PPCRA, a work permit is required for the construction of roads and trails, the clearing of any land, and other activities that are expected to impair the ecological integrity of the park or conservation reserve. In deciding whether to issue a work permit, a park superintendent or conservation reserve manager must consider whether the work for which the permit is required is consistent with the management direction for a provincial park or conservation reserve, and if it is likely to create a threat to the environment, public safety or to a natural resource, including lands, waters and watercourses, forests, flora, wildlife and fisheries. Discretion to authorize these other activities likely to destroy critical habitat is not subject to constraints that are fully consistent with those under SARA. For example, there is no requirement to consider whether the activity will jeopardize survival or recovery of the species. It is not known the extent to which discretion to issue permits in boreal caribou habitat has been exercised and the resulting effects. Nevertheless, the PPCRA contributes to avoiding or limiting the destruction of critical habitat where it applies and operates in addition to the protection afforded through the ESA (i.e., an activity being considered for a permit under the PPCRA that is likely to affect boreal caribou, would be subject to a permit under the ESA).



#### **1.4 Far North Act, 2010 (FNA)**

The FNA, administered by the Ministry of Natural Resources and Forestry, provides a legislative framework for community-based land use planning in the Far North of Ontario. Roughly 75% of the Far North planning area overlaps with boreal caribou ranges (including the entire Far North Range (ON09), and the northern portions of some southern ranges). One of the objectives set out in s.5 of the FNA includes protecting areas of cultural value and protecting ecological systems in the Far North by various means, including the designation of protected areas. Policy direction used to guide the community based land use planning process includes guidance for protecting important features and areas, such as caribou habitat.

Working together, as part of the community-based land use planning process, First Nations and the province of Ontario are identifying dedicated protected areas (DPAs), which include valuable caribou habitat, where no industrial activity can occur. As of March 2022, five community-based land use plans have been publicly posted. While some identified DPAs are regulated under the PPCRA (and therefore receive protection under the PPCRA described above), other DPAs are non-regulated and receive protection under the FNA. S.14(1) of the FNA requires that activities in DPAs be consistent with land use designations and permitted uses specified in each community-based land use plan. Activities commonly specified in the plans as being prohibited in DPAs include: commercial timber harvest, mining and mineral exploration and aggregate extraction, and sometimes include: development of linear features including roads and transmission corridors. Further, under s.14(2), no person shall undertake prospecting, mine claim staking, mineral exploration, opening a mine, and commercial timber harvest in a protected area. The (provincial) Minister (of Natural Resources and Forestry) has discretion to enforce these prohibitions by issuing an order to require any person to stop any activity that contravenes s.14(1) or (2).

The FNA is a relatively new Act (i.e., enacted in 2010 and amended in 2021), thus the history of its application is brief and many policies have not yet been developed. As additional community-based land use plans and policy statements are developed and additional protected areas are regulated or designated under the FNA, the ability of the Act to contribute to protection of critical habitat for boreal caribou in the Far North may need to be re-assessed. For example, some protection may come through community-based land use plans via the development of DPAs and other protected areas, yet this would need to be considered on a case-by-case basis as the protection provided by each DPA is unique and the development of protected areas is not a requirement of the FNA. While it is currently unclear whether the FNA fully leads to outcomes similar to SARA, it nevertheless contributes to avoiding or limiting the destruction of critical habitat where it applies and operates, in addition to the protection afforded through the ESA.

#### **1.5 Public Lands Act, 1990 (PLA)**

The PLA contains provisions that enable the Minister of Natural Resources and Forestry to designate as a planning unit an area of public land (other than a planning area to which a community based land use plan, as defined in the FNA, applies). S.12.3(1) of the PLA requires that all activities carried out within a planning unit be consistent with an approved land use plan.

Area-specific policies for certain planning units, including some Enhanced Management Areas (i.e., areas with special features or values requiring more detailed land use direction), contain

direction specific to caribou habitat. In these areas, the PLA may contribute to protection of habitat through restrictions on development activities.

### **1.6 Environmental Assessment Act, 1990 (EAA)**

Ontario's EAA and associated regulations outline the situations requiring a provincial environmental assessment and the process/ requirements for the assessment. Many major development activities on non-federal lands (e.g., construction of highways, pipelines, utility corridors) are typically subject to an assessment. The Minister of Environment, Conservation and Parks must grant approval for the undertaking to proceed, and in doing so considers the environmental assessment, which includes an evaluation of environmental effects.

Through Declaration Order MNR-75, forest management planning as provided for under the CFSA, its regulations, and regulated manuals, on Crown lands in the Area of the Undertaking, is not subject to approvals and offences under the EAA. The Ontario government has developed class environmental assessments (notably, the Class Environmental Assessment for Resource Stewardship and Facility Development, and the Class Environmental Assessment for Provincial Parks and Conservation Reserves), which require the systematic review of proposals for potential environmental impacts, including impacts to species at risk, with the objective of minimizing impacts and making sound decisions.

Because major development projects on non-federal land are often subject to an environmental assessment, the EAA contributes another layer of protection to boreal caribou habitat, in addition to protection afforded through other applicable legislation – e.g., ESA, PPCRA. However, the Act does not contain prohibitions that directly protect boreal caribou habitat in a manner that would lead to outcomes similar to SARA.

## **2 PROTECTION OF INDIVIDUALS ON NON-FEDERAL LANDS**

In Ontario, protection for individuals exists under the following instruments: *Endangered Species Act, 2007* (ESA), *Crown Forest Sustainability Act* (CFSA), *Provincial Parks and Conservation Reserves Act, 2006* (PPCRA), and *Fish and Wildlife Conservation Act* (FWCA). The ESA contains prohibitions for the protection of boreal caribou individuals across all private and provincial Crown lands in Ontario. The ESA does not apply to forestry operations in Crown forests conducted in accordance with an approved forest management plan, where instead the CFSA regulatory framework provides some protection for individuals in the forestry context. The PPCRA and FWCA provide additional layers of protection to boreal caribou individuals in certain circumstances/contexts as described below. As such, collectively, these laws are generally consistent with the provisions and protection afforded under SARA.

### **2.1 Endangered Species Act, 2007 (ESA)**

The ESA is the primary piece of provincial legislation for the protection of species at risk and their habitat in Ontario, and is currently administered by the Ministry of Environment, Conservation and Parks. It is a law of general application (i.e., applies to everyone on both private and provincial Crown land) and is binding on the provincial Crown land. There is one notable exclusion: forest operations in Crown forests conducted in accordance with an approved

forest management plan are excluded from application of the ESA prohibitions through provisions in the *Crown Forest Sustainability Act* (CFSA) (see Section 2.2 for details).

Currently, boreal caribou is listed as Threatened on the Species at Risk in Ontario list under the ESA and, therefore, individuals of the species are afforded protection under s.9 of this Act. Under the ESA, it is prohibited to kill, harm, harass, capture or take a species at risk, or to possess, transport, collect, buy, sell, lease, trade or offer to buy, sell, lease or trade a species at risk. These prohibitions are equivalent to or exceed the prohibitions under s.32 of SARA. Further, these prohibitions are supported by offenses, enforcement provisions and penalties that are comparable to those in SARA. Like SARA, the ESA includes exceptions to the application of the s.9 prohibitions through the issuance of permits and agreements, although it is important to note that, much like SARA, the discretion to issue permits or enter into agreements is constrained (as described below). Under the ESA, there are also regulations prescribing exemptions to the prohibitions, whereby an activity that would otherwise contravene the prohibitions may occur without the issuance of a permit or agreement in the prescribed circumstances.

Like SARA, under the ESA (s.16, 17 and 19) the Minister has discretionary powers to allow activities that would otherwise be prohibited by s.9 (or s.10) through the issuance of permits and agreements if certain conditions are met. Specifically, under the ESA the Minister may issue a permit or enter into an agreement for the purpose of assisting in the protection or recovery of a species (s.16, s.17(2)(b)), and may also issue a permit for activities necessary for protection of human health or safety (s.17(2)(a)) (similar to an exception for public health and safety under SARA). For other types of permits under the ESA, the permit can only be issued if the Minister is of the opinion that the activity will not jeopardize survival or recovery of the species (s.17(2)(d), s.19) or, further, that an overall benefit will be achieved (s.17(2)(c)); this is generally aligned with a key pre-condition under SARA that a permitted activity will not jeopardize survival or recovery of the species.

While authorizations for boreal caribou are occasionally issued, each must meet a suite of rigorous conditions based on a case-specific activity assessment, including measures to avoid damage or destruction, minimize potential impacts, or, in some cases, create an overall benefit to the species and its habitat, such as habitat restoration or creation combined with research to fill key knowledge gaps for the species. As a practice, Ontario does not consider research alone to be sufficient to create the overall benefit.

As part of the ESA amendments introduced in 2019, s.16.1 was added to allow the Minister to enter into landscape agreements with proponents proposing to engage in activities otherwise prohibited by s.9 and 10 of the Act. The purpose of a landscape agreement is to allow greater flexibility in providing a single authorization for multiple activities impacting multiple species across a geographic area. Additionally, it should be noted that boreal caribou is not one of the six species for which proponents have the option to pay a fee determined by Ontario into a Conservation Fund in lieu of completing beneficial actions themselves under certain ESA authorization clauses (an option stemming from amendments to the ESA in 2019 which came into effect on April 29, 2022).

As part of Ontario's modernization of approvals in 2013, Ontario Regulation 242/08 was amended to include certain regulatory exemptions (provisions referred to by the Ontario government as "rules in regulation" or "registration with rules in regulation") made under the authority of s.55(1) of the ESA, which allow for the occurrence of activities that would otherwise contravene s.9 (or s.10) of the ESA, without the need for a permit or agreement. Activities exempted through this exercise were considered by the Ontario government to be low risk, and the regulation includes conditions such as activity limitations or exclusions, time limitations, geographic exclusions and activity-specific requirements (e.g., mitigation, monitoring, and reporting).

Early exploration mining is one activity that is included in these exemptions that is highly relevant to boreal caribou. Also included in these exemptions and of relevance to boreal caribou, are pits and quarries, activities to avoid or reduce threats to human health and safety (not imminent) and certain development/ infrastructure projects underway, where a specified action or approval was completed or obtained by June 30, 2015 (time-limited transition). The exemptions have the potential to allow for activities that may affect (e.g., harm or harass) boreal caribou individuals. However, for each exemption relevant to caribou to apply there are a number of conditions that must be satisfied. It is noteworthy that in making a regulation, s.57(1) of the ESA requires that the Minister consider whether the regulation is likely to jeopardize the survival of the species in Ontario (in line with one of the three pre-conditions for the issuance of a SARA permit – i.e., that the activity will not jeopardize survival or recovery of the species) or to have any other significant adverse effect on the species.

With respect to early exploration mining, the regulatory exemption applies under conditions that pose relatively low risk to caribou individuals. In particular, the person must not carry out any part of the activity in an area that is being used, or has been used at any time in the previous three years, by boreal caribou to carry out a life process related to reproduction, including rearing. Further, the person must not kill, harm, or harass boreal caribou during a time of year when boreal caribou are likely to be carrying out a life process related to feeding, migration, or reproduction, including rearing. If the conditions in the regulation are not met, the person would need to apply for an ESA permit/authorization.

The *Policy Guidance on Harm and Harass Under the Endangered Species Act* describes the approach that the Ministry or a proponent will use to determine whether an activity is likely to kill, harm, or harass a species at risk as per s.9 of the ESA. Additionally, Ontario has developed a series of Best Management Practices (BMPs) to provide guidance for proponents to reduce and/or mitigate direct and indirect impacts to caribou (e.g., *Best Management Practices for Aggregate Activities and Forest-dwelling Woodland Caribou in Ontario*; *Best Management Practices for Mineral Exploration and Development Activities and Woodland Caribou in Ontario*).

Overall, the ESA provides significant protection for boreal caribou individuals where it applies. However, there is a permanent exclusion of forestry activities from the ESA protection provisions (see Section 1.1), which means protection for individuals in the forestry context is limited to measures that are required under the CFSA and the FWCA as described in Sections 2.2 and 2.3.

## 2.2 Crown Forest Sustainability Act, 1994 (CFSA)

Under the CFSA, the Minister of Natural Resources and Forestry may designate all or part of a Crown forest as a FMU for the purposes of the CFSA. FMUs collectively make up the “Area of the Undertaking”, as per Declaration Order MNR-75 under the EAA, and overlap with all boreal caribou ranges except the Far North range (ON09). As described in Sections 1.1 and 1.2, this is ~27% of boreal caribou range (areas containing critical habitat) in Ontario. On provincial Crown land, with the exception of provincial parks and conservation reserves and dedicated protected areas, forestry may occur within FMUs, subject to approved forest management plans and other applicable legislation and policies. Under s.47.1 of the CFSA, forest operations in Crown forests conducted in accordance with an approved forest management plan are excluded from application of the ESA prohibitions (including s.9); therefore, the framework for species at risk protection in a forestry context is implemented solely through the requirements under the CFSA. However, even in the Area of the Undertaking, boreal caribou may still receive protection under the FWCA (see Section 2.3). For activities other than forestry operations occurring in FMUs (e.g., mining, construction of transmission corridors), the ESA applies in the Area of the Undertaking.

The CFSA requires that a forest management plan be prepared for every FMU. Forest management plans outline the direction for forestry related activities including forest harvesting, regeneration, and the construction of roads within a given management unit. The CFSA requires that forest management plans (which are updated every 10 years) be developed in accordance with the Forest Management Planning Manual (FMPM) and forest management guides (FMGs). Under s.2 of the CFSA, among the principles used in forest management planning, is that the long term health and vigor of Crown forests should be provided for by using forest practices that minimize adverse effects on plant and animal life. Forest management guides provide direction to minimize adverse effects for species at risk.

Current guidance documents that must be used in developing forest management plans contain some direction that will reduce the impact of the activities on caribou individuals. In particular, the *Forest Management Guide for Boreal Landscapes* (the “Landscape Guide”) released in 2014 provides science-based direction that is intended to minimize the risk that forest management operations might incidentally kill, harm, or harass caribou. The Landscape Guide requires that new forest management plans follow mandatory direction requiring that for known calving sites and nursery areas that are in a suitable condition, a 1-km area of concern must be established, within which forest operations are not conducted from May 1 to August 15, when caribou are most likely to be present. Additional direction for caribou under the landscape guide is primarily focused on the management of caribou habitat, and does not provide direct protection for individuals from incidental impacts (i.e., no prohibitions against killing, harming, or harassing boreal caribou in the course of conducting forest operations or requirements to halt or delay operations if caribou are encountered). Measures taken to protect/maintain priority habitat in accordance with the guidance could contribute some indirect protection for individuals (i.e., by lowering risk/frequency of incidental encounters and therefore effects on individuals). While the CFSA does not provide explicit prohibitions on the killing, harming, or harassment of boreal caribou, there are provisions in place for the avoidance of these impacts (e.g., establishment of an area of concern around known nursery and calving areas at times when caribou are most

likely to be present), and thus any impacts as a result of forestry activities are only likely to be incidental.

### **2.3 Fish and Wildlife Conservation Act, 1997 (FWCA)**

The FWCA, administered by the Ministry of Natural Resources and Forestry, applies on private and provincial Crown land, where it provides an additional layer of protection for boreal caribou individuals. Notably, s.2 of the FWCA specifies that if a provision of this Act and a provision of the ESA conflict, the provision that gives the animal the most protection prevails. Within FMUs, where forestry activities are exempt from ESA prohibitions, the FWCA prevails as the primary piece of legislation providing protection for boreal caribou individuals.

Under the FWCA, caribou is classified as a “big game” species, and the hunting and trapping of big game is prohibited except in accordance with a licence. A licence cannot be obtained for hunting, trapping, or possessing wildlife for species for which there is no open season, including boreal caribou. The definition of hunting is broad, and includes killing, injuring (which is a different but similar term for “harm” as per SARA), capturing, or harassing wildlife. Therefore, the FWCA is considered likely to provide an equivalent protection outcome to SARA.

### **2.4 Provincial Parks and Conservation Reserves Act, 2006 (PPCRA)**

The PPCRA, administered by the Ministry of Environment, Conservation and Parks, applies within provincial parks and conservation reserves, which occur in all boreal caribou ranges in Ontario, but comprise a small percentage (~8%) of the total area of the ranges overall. The first objective of the PPCRA is to permanently protect representative ecosystems, biodiversity and provincially significant elements of Ontario’s natural and cultural heritage and to manage these areas to ensure that ecological integrity is maintained. Under this Act, the definition of ecological integrity includes, “viable populations of native species, including species at risk.”

In addition to the protection afforded through the ESA, within provincial parks and conservation reserves, another layer of protection for boreal caribou individuals exists through regulations (O. Reg. 319/07 and O. Reg. 347/07) made under the PPCRA. These regulations prohibit killing, harming, harassing, disturbing, and removing of any animal within a provincial park or conservation reserve, unless written authorization is provided by the superintendent (in the case of a provincial park) or conservation manager (in the case of a conservation reserve). The prohibitions are supported by offences and penalties. The constraints on providing an authorization for impacts to individuals under the PPCRA are not as rigorous as the constraints (requirements and pre-conditions) for permitting under SARA. As the PPCRA acts in addition to the ESA, it is not considered to impact the protection outcomes under the ESA.