

**Petition for the Protection of Critical Habitat for
Two Local Ranges of Boreal Caribou in Northwestern Ontario**

November 2018

ecojustice

Table of Contents

1.0	Introduction	1
2.0	Description of Ranges	1
2.1	Population Numbers and Historical Trends	2
3.0	Critical Habitat Identification.....	4
3.1	Activities Likely to Result in Destruction of Critical Habitat	4
4.0	Federal Caribou Objective.....	5
5.0	Current Anthropogenic Disturbance and Range-Specific Risks from Industrial Developments in Ontario.....	5
6.0	Conclusions	19
7.0	Introduction to the Legal Analysis	20
8.0	The Test for Effective Protection	20
8.1	SARA	21
8.2	National Accord for the Protection for Species at Risk.....	22
8.3	Previous Critical Habitat Protection Assessments	22
8.4	Case Law.....	23
8.5	Draft Policy on Critical Habitat Protection on Non-federal Lands.....	24
9.0	Ontario Legislation.....	24
9.1	<i>Crown Forest Sustainability Act</i> , 1994, SO 1994, c 25	24
9.2	<i>Endangered Species Act</i> , 2007, SO 2007, c 6.....	28
9.3	<i>Environmental Assessment Act</i> , RSO 1990, c E.18	31
9.4	<i>Provincial Parks and Conservation Reserves Act</i> , 2006, SO 2006, c 12	33
9.5	<i>Planning Act</i> , RSO 1990, c P 13, <i>Places to Grow Act</i> , 2005, SO 2005, c 13 & relevant regulations and policies.....	37
9.6	<i>Mining Act</i> , RSO 1990, c M 14.....	40
9.7	<i>Aggregate Resources Act</i> , RSO 1990, c A.8.....	44
9.8	<i>Public Lands Act</i> , RSO 1990, c P 43	45
9.9	<i>Wilderness Areas Act</i> , RSO 1990, c W.8.....	48
9.10	<i>Far North Act</i> , 2010, SO 2010, c 18	49
9.11	<i>Fish and Wildlife Conservation Act</i> , 1997, SO 1997, c 41	51
9.12	<i>Conservation Authorities Act</i> , RSO 1990, c C.27	52
10.0	Federal Legislation	53
10.1	<i>Species at Risk Act</i> , S.C. 2002, c 29.....	53
10.2	Recovery Strategy for the Woodland Caribou (<i>Rangifer tarandus caribou</i>), Boreal population in Canada.....	53
10.3	<i>Action Plan for the Woodland Caribou (Rangifer tarandus caribou), Boreal Population in Canada – Federal Actions</i>	54
10.4	<i>Canadian Environmental Assessment Act</i> , 2012, SC 2012, c 19, s 52	55

10.5	Bill C-69: <i>An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts</i>	56
10.6	<i>National Energy Board Act</i> , RSC 1985, c N-7	57
10.7	Bill C-69: <i>An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts</i>	58
11.0	Conclusion of Legal Analysis	59

EXECUTIVE SUMMARY

Boreal woodland caribou (“boreal caribou”) is listed as threatened under the *Species at Risk Act* (SARA) when it came into force in 2003. Boreal caribou is endemic to Canada, in the boreal forest region of seven provinces and two territories, and are distributed across 51 local populations, also referred to as ranges.¹ Boreal caribou require large areas of suitable habitat, relatively low levels of anthropogenic disturbance and low threats from predation in order to survive and thrive.

The focus of this petition is boreal caribou in the province of Ontario, specifically two local populations in the northwestern part of the province, named the Brightsand and Churchill Ranges. We have compiled and analyzed the latest publicly available population condition data and range disturbance information for these boreal caribou ranges. We have also conducted a review of the relevant federal and provincial laws in place for the protection of boreal caribou critical habitat on non-federal lands, which was identified in the 2012 Recovery Strategy. Our analysis shows that boreal caribou critical habitat degradation has worsened in these two ranges in Ontario since 2011. The Brightsand Range has increased in anthropogenic disturbance by 117,588 ha and the Churchill Range has increased by 140,772 ha since 2011. Ontario’s own data also confirm this increasing trend. The most recent population information collected between 2011-2013 showed declining population trends for both ranges with low adult female survival and low calf recruitment in the Brightsand range and low calf survival in Churchill range. In spite of the knowledge that cumulative disturbance levels were already posing a threat to caribou long-term persistence five years ago, neither range has been surveyed since that time and protection and recovery measures continue to be delayed. We conclude that the province of Ontario has not implemented recovery measures necessary to effectively protect these populations. None of the provincial or federal laws applicable to the Brightsand and Churchill ranges on non-federal lands in Ontario has the same protection outcome as would be the case if the SARA subsection 61(1) protection was in place for critical habitat within these ranges. Our analysis also demonstrates that none of the applicable provincial or federal laws ensures that critical habitat of these ranges is not and will not be destroyed, and the lack of legal protection continues to jeopardize caribou survival and recovery.

We therefore request through this petition that the Minister recommend to the Governor in Council that the critical habitat of these ranges be protected by an order under section 61 of SARA.²

¹ 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) [*Recovery Strategy*] [**Compendium, Tab 1**].

² *Species at Risk Act*, SC 2002, C 29, s 61(1) [SARA] [**Compendium, Tab 2**].

1.0 Introduction

Boreal woodland caribou (“boreal caribou”) is one of Canada’s most iconic species. It is endemic to Canada, residing in the boreal forest region of seven provinces and two territories, and distributed across 51 local populations, also referred to as ranges.³ Boreal caribou require large areas of mature boreal forest habitat, low levels of anthropogenic disturbance and low threats from predation in order to survive and persist. They are highly sensitive to disturbances in their ranges. Much of its habitat is degraded and populations are declining, particularly in the southern part of its range. Ontario has already lost almost half of its historic boreal caribou distribution.⁴

Boreal caribou was listed as threatened under the *Species at Risk Act* (SARA) when it first came into force in 2003, and re-assessed as threatened by the Committee of the Status of Endangered Wildlife in Canada (“COSEWIC”) in 2014. Boreal caribou was listed as threatened under Ontario’s Endangered Species Act (ESA) when it took effect in 2008.

BIOLOGICAL REVIEW: APPROACHES TO CARIBOU RECOVERY IN ONTARIO

This review describes and analyzes the current state of two boreal caribou populations and habitat condition within the ranges, including disturbance levels. This information serves as the basis for determining the extent to which these populations are being protected and recovered.

2.0 Description of Ranges

The federal *Recovery Strategy* identified 9 boreal caribou ranges in Ontario in 2012. Ontario has since refined the delineation of its caribou ranges from those identified in the *Recovery Strategy* (including the re-delineation of the Far North range into 6 ranges), and 14 ranges have now been delineated, forming the basis for management, monitoring and recovery efforts.⁵ According to the *Recovery Strategy*, there were at least 1,284 individual caribou in Ontario as of 2012.⁶ Ontario estimates a population of 5,000 individual boreal caribou.⁷ For the purposes of this petition, it is not possible to confirm current population numbers, particularly given the lack of survey attention.⁸

While all boreal caribou ranges in Ontario require protection, we are focusing this petition on two specific local populations: Brightsand and Churchill. We are highlighting these ranges as they are among the most dire in Ontario. Evidence suggests range recession has already occurred

³ *Recovery Strategy*, *supra* note 1, at 3-4.

⁴ Hummel, M. and J. Ray. 2008. *Caribou and the North: A Shared Future*. Toronto: Dundurn Press.

⁵ Environment and Climate Change 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 and Climate Change Canada, 2017), at 57 [*Progress Report*] [**Compendium, Tab 3**].

⁶ *Recovery Strategy*, *supra* note 1, at 69.

⁷ Ontario Ministry of Natural Resources & Forestry (MNRF). Caribou (boreal population). Available at: <https://www.ontario.ca/page/caribou-boreal-population>. Accessed on August 20, 2018.

⁸ Ontario cannot confirm population numbers because it has not surveyed recently, and survey methods only yield rough estimates.

in the southern portions of these ranges,⁹ and both are in a long-term decline. Further, the ranges continue to be under a multitude of on-going threats, such as an expanding footprint from forestry cutblocks, logging roads and mineral exploration, as well as a proposed major permanent 300 km transmission line in the Churchill range.

Located just north of Thunder Bay, the Brightsand range is 22,000 km² in size, with a landscape characterized as boreal forest with small and medium sized lakes throughout.¹⁰ The southern extent of the range is one of the southernmost extents for boreal caribou occurrence in Ontario. The most prominent ongoing human impacts on the range are forestry cutblocks and logging roads, and the southern portion in particular has been subjected to extensive logging in the past.¹¹ Much of the northern half is protected from major industrial activity within Wabakimi Provincial Park, however there are still human activities and disturbance within the park, as well as natural disturbance. Caribou occupancy on the range is higher in areas with limited disturbance in the northern portion, while the southern portion has been fragmented by roads, forest cutblocks and fire, and has much lower caribou occupancy.¹²

Adjacent to the Brightsand range, the Churchill range is 21,300 km² in size, and similar in landscape and characteristics. Caribou occur across much of the range but have been scarce from southern areas around Lac Seul and Sioux Lookout for decades due to persistent or permanent human activity, including industrial activities such as roads, trails, utility lines, mineral exploration, mining, and forestry cutblocks.¹³ The most prominent ongoing human impact on the range is forest cutblocks and logging roads and the southern portion of the range in particular has been subjected to extensive logging in the past.¹⁴

2.1 Population Numbers and Historical Trends

We compiled population size¹⁵ and trend information for the Brightsand and Churchill populations. Table 1 shows available population size estimates and trends for these ranges from provincial and federal sources.

⁹ MNRF. 2014. Integrated Range Assessment for Woodland Caribou and their Habitat: Brightsand Range 2010. Species at Risk Branch, Thunder Bay, Ontario, xi + 74pp, at 68 [*Integrated Range Assessment Brightsand*] [**Compendium, Tab 4**] and MNRF. 2014. Integrated Range Assessment for Woodland Caribou and their Habitat: Churchill Range 2012. Species at Risk Branch, Thunder Bay, Ontario x + 71 pp, at 65 [*Integrated Range Assessment Churchill*] [**Compendium, Tab 5**].

¹⁰ *Integrated Range Assessment Brightsand*, *supra* note 9, at x.

¹¹ *Ibid.*

¹² *Ibid.*, at 27.

¹³ *Integrated Range Assessment Churchill*, *supra* note 9, at ix.

¹⁴ *Ibid.*

¹⁵ Population size is the most current estimates of the total animals in the population.

Table 1: Population size estimate and trends, Ontario Brightsand and Churchill caribou populations.

Range	Population Size Estimate (minimum annual count) ¹⁶	Population Trend ¹⁷	Population Trend (2017) ¹⁸
Brightsand	224 (2011)	Declining (2011-2013)	Declining
Churchill	262 (2012)	Declining (2012-2013)	Declining

The Ontario Ministry of Natural Resources and Forestry (“MNRF”) has conducted relatively few population surveys of boreal caribou in the province, with the exception of one significant effort from 2008-2013¹⁹, where each of the ranges were surveyed, usually twice, within a 3 year time period. The province has assessed population condition (numbers and demographic information) of boreal caribou using a combination of two-stage (fixed wing and helicopter) winter aerial surveys, recruitment surveys, and GPS collar deployment.²⁰ The most recent monitoring data are available in Integrated Range Assessments for each local population released in 2014. Population surveys have not been conducted since 2013, and no additional survey data have been made available to the public since then.

As per the Integrated Range Assessment²¹ for the Brightsand range, a 2011 aerial winter distribution survey estimated a minimum animal count of 224 caribou. Winter aerial surveys between 2011-2013 assessed calf recruitment rates at 18-26 calves per 100 adult females, which were lower than expected values to support a stable to increasing population trend (28 calves per 100 adult females). Annual adult female survival estimates were comparatively low based on two biological years of data (77-80%), and when modelled with the calf recruitment levels resulted in a declining population trend with a geometric mean of $\lambda = 0.87$.

As per the Integrated Range Assessment²² for the Churchill range, a 2012 aerial winter distribution survey estimated a minimum animal count of 262 caribou. Winter aerial surveys between 2012-2013 assessed calf recruitment rates at 15-25 calves per 100 adult females, which were lower than expected values to support a stable to increasing population trend (28 calves per 100 adult females). The Integrated Range Assessment determined the annual adult female survival was 87%; however, it estimated that the short-term population trend was likely declining with a geometric mean of $\lambda = 0.96$.

¹⁶ Data summarized from available provincial population size estimates from *Integrated Range Assessment Brightsand*, *supra* note 9, at 44, and *Integrated Range Assessment Churchill*, *supra* note 9, at 42.

¹⁷ Data summarized from available provincial population trends from *Integrated Range Assessment Brightsand*, *supra* note 9, at 46, and *Integrated Range Assessment Churchill*, *supra* note 9, at 44.

¹⁸ *Progress Report*, *supra* note 5, at 33. Note that population data was not available in the 2012 *Recovery Strategy*.

¹⁹ MNRF. 2014. State of the Woodland Caribou Resource Report: Part 2. Species at Risk Branch, Thunder Bay, Ontario. + 156 pp., at ii [*State of Caribou Resource Report*] [**Compendium, Tab 6**].

²⁰ *Ibid.*

²¹ *Integrated Range Assessment Brightsand*, *supra* note 9, at 43-46.

²² *Integrated Range Assessment Churchill*, *supra* note 9, at 42-44.

3.0 Critical Habitat Identification

Caribou require large tracts of mature coniferous forest in order to be self-sustaining. A scientific assessment to inform the identification of critical habitat conducted by Environment Canada²³ concluded that the condition of boreal caribou local populations, as represented by calf recruitment, had a strong negative relationship with the total disturbance (calculated as the combined effects of non-overlapping human disturbance buffered by 500 m and fire within last 40 years, with no buffer) within boreal caribou ranges. In other words, the extent of cumulative disturbance in the range is a key determinant of whether or not a population is self-sustaining over time.

The federal *Recovery Strategy* defines “critical habitat” as the habitat necessary for the species to achieve its life processes, and identifies critical habitat in each range as:

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

3.1 Activities Likely to Result in Destruction of Critical Habitat

As per the *Recovery Strategy*, the following broad groupings of activities have the potential to impact caribou critical habitat:²⁴

- Forestry (cutblocks and road building);
- Mining-related (including coal and mineral exploration; road / transmission line building); and
- Oil and gas-related (including road building, pipelines, and forest harvesting as a precursor).

The *Recovery Strategy* also provides examples of human land-use activities likely to destroy critical habitat through habitat alteration (loss, degradation or fragmentation):²⁵

- Any activity resulting in the direct loss of boreal caribou critical habitat, such as: conversion of habitat to agriculture, forestry cutblocks, mines, and industrial and infrastructure development.
- Any activity resulting in the degradation of critical habitat leading to a reduced, but not total loss of both habitat quality and availability for boreal caribou, such as: pollution, drainage of an area, and flooding.

²³ Environment Canada, *Scientific Assessment to Inform the Identification of Critical Habitat for Woodland Caribou (Rangifer tarandus caribou), Boreal Population, in Canada: 2011 update*. (Ottawa: Environment Canada, 2011) [Scientific Assessment] [Compendium, Tab 7].

²⁴ *Recovery Strategy*, *supra* note 1, at 36-37.

²⁵ *Ibid.*

- Any activity resulting in the fragmentation of habitat by human-made linear features, such as: road development, seismic lines, pipelines, and hydroelectric corridors.

4.0 Federal Caribou Objective

The *Recovery Strategy* establishes the critical habitat target requirement as a minimum of 65 percent undisturbed habitat in a range in order to give the population a 60 percent chance of being self-sustaining.²⁶ This is the disturbance management threshold, which is considered a minimum threshold because at 65% undisturbed habitat there remains a significant risk (40%) that local populations will not be self-sustaining. Self-sustaining populations are defined in the *Recovery Strategy* as “those that are stable or growing, large enough to withstand human-caused pressures and random events, and do not require recovery actions”. The *Recovery Strategy* assessed that it is biologically and technically feasible for all local populations to become self-sustaining.

It is important to note that the 65% undisturbed management threshold is not an ecological transition point, nor is there evidence that one exists for boreal caribou. It is instead an expression of management tolerance for risk to boreal caribou local population persistence, and, and therefore may not even be cautious enough.²⁷ The threshold was established using a risk based framework, applying a probabilistic approach to assessing the adequacy of the current range conditions to support a self-sustaining population to help managers understand the level of risk involved in a management choice.²⁸ In the case of the *Recovery Strategy*, there was not a discrete level of disturbance that indicated sustainable versus unsustainable conditions for boreal caribou, but rather levels of risk were assigned to the comparison between percent total disturbance and the probability that a population would remain stable or increase over time. The result was a management decision (i.e., a social choice, informed by science) to select a minimum of 65% undisturbed habitat as the disturbance management threshold for each range.²⁹

5.0 Current Anthropogenic Disturbance and Range-Specific Risks from Industrial Developments in Ontario

Caribou avoid habitat within close proximity to linear features, and the ultimate cause of population declines are human-caused habitat changes such as those that occur through creation of linear features, which results in habitat loss, avoidance of areas by caribou, and increased mortality due to increases in predator populations.³⁰ There is forestry, mining and mineral exploration activity, as well as linear features such as roads, railways and utility lines in both the Churchill and Brightsand ranges, and each of these contribute to the cumulative disturbance in these ranges. If these activities continue in ranges that are approaching or already above the 35%

²⁶ *Recovery Strategy*, *supra* note 1, at 14.

²⁷ Ray, J.C. 2014. Defining Habitat Restoration for Boreal Caribou in the Context of National Recovery: A Discussion Paper. Prepared for Environment and Climate Change Canada, at 8 [**Compendium, Tab 8**].

²⁸ Canadian Boreal Forest Agreement. Understanding Disturbance Thresholds and Opportunities to Achieve Better Outcome for Boreal Caribou in Canada: A Primer, at 3 [**Compendium, Tab 9**].

²⁹ *Ibid*, at 4.

³⁰ *Scientific Assessment*, *supra* note 23.

disturbance threshold (i.e. 65% undisturbed), they are likely destroying boreal caribou critical habitat.

The disturbance-recruitment relationship that underpins the definition of critical habitat in the federal *Recovery Strategy* is an outcome of analyses of federally-available anthropogenic and fire data. Specifically, “the total disturbance footprint was measured as the combined effects of fire that has occurred in the past 40 years and buffered (500 m) human-caused disturbance defined as any human-caused disturbance to the landscape that could be visually identified from Landsat imagery at a scale of 1:50,000.”³¹ First measured in 2010 in association with the critical habitat scientific assessment, disturbance mapping for 2015 followed the same standardized methods and was presented as means of evaluating the performance indicator for habitat condition in the 2017 progress report.

As a jurisdiction in charge of implementing caribou recovery and formulating range plans (as outlined in the *Recovery Strategy*), Ontario uses its own mapping sources to measure and track total disturbance.³² A disturbance layer is made up of compiled resource inventory datasets, such as roads layers, forest harvest blocks, or mining claims that are aggregated to represent cumulative anthropogenic disturbance in addition to provincial natural disturbance layers.

Federal and provincial datasets (presented in Table 2) are valuable in combination for understanding the changes and trends in habitat condition of individual ranges over time. The federally-derived disturbance metric is the most appropriate of the two to use in reference to the management threshold that defines critical habitat (to which it is calibrated), but is not mapped nearly as regularly as its provincial counterpart. The latter datasets are compiled annually by the province as a means to track disturbance and accumulation of restored habitat tracts over time.³³

The provincial data presented in Table 2 and the maps in Figures 1-12, produced by the MNRF,³⁴ document evidence of specific increasing anthropogenic and natural disturbance in the Brightsand and Churchill ranges from 2011 to 2017. Also presented in Table 2 below is the available federal data, which show that habitat disturbance increased in the Churchill range from 31% to 34% between 2010 and 2015, and decreased by 1% in the Brightsand range,³⁵ yet is still above the 35% disturbed management threshold.

³¹ *Progress Report*, *supra* note 5, at 20.

³² Ontario’s disturbance assessment approach has been enhanced for management purposes through the use of Ontario-specific data and data standards for the identification of young forest, roads, forest harvest, fire and non-fire disturbances.

³³ The relationship between recruitment and disturbance on which the threshold is based was calibrated using federal data, while provinces use provincial roads and disturbance data which tend to be finer-scaled.

³⁴ Elkie, P. & K. Green. 2018. Cumulative impacts monitoring 2018 estimates: disturbance models and simulated ranges of natural variation. Ontario Ministry of Natural Resources. [**Compendium, Tab 10**].

³⁵ The decrease is likely an artifact of the data and does not represent a lowering of anthropogenic disturbance in the range.

Table 2: Habitat Disturbance, Ontario Brightsand and Churchill caribou populations.³⁶

Range		2010 ³⁷	2011	2012	2013	2015 ³⁸	2015	2017
Churchill	Federal	31%				34%		
	Provincial		38.4%	42.3%	41.7%		44.1%	45.5%
Brightsand	Federal	42%				41%		
	Provincial		43.4%	44.9%	45.3%		45.4%	43.5%

The MNRF maps below demonstrate the state and increasing trend of disturbance in the Brightsand and Churchill ranges.

Figures 1-6 below illustrate the state and disturbance trend in the Brightsand range.

³⁶ Unless indicated otherwise (as per footnotes 37 and 38) the data is from: Elkie & Green, *supra* note 34. Unless indicated otherwise, the dates represent disturbance levels in those years.

³⁷ Federal disturbance data for 2010 is from the *Recovery Strategy*, *supra* note 1 at 69. Report publication date was 2012, but habitat condition level data is from 2010.

³⁸ Federal disturbance data for 2015 is from the *Progress Report*, *supra* note 5, at 33. Report publication date was 2017, but habitat condition data level is from 2015.

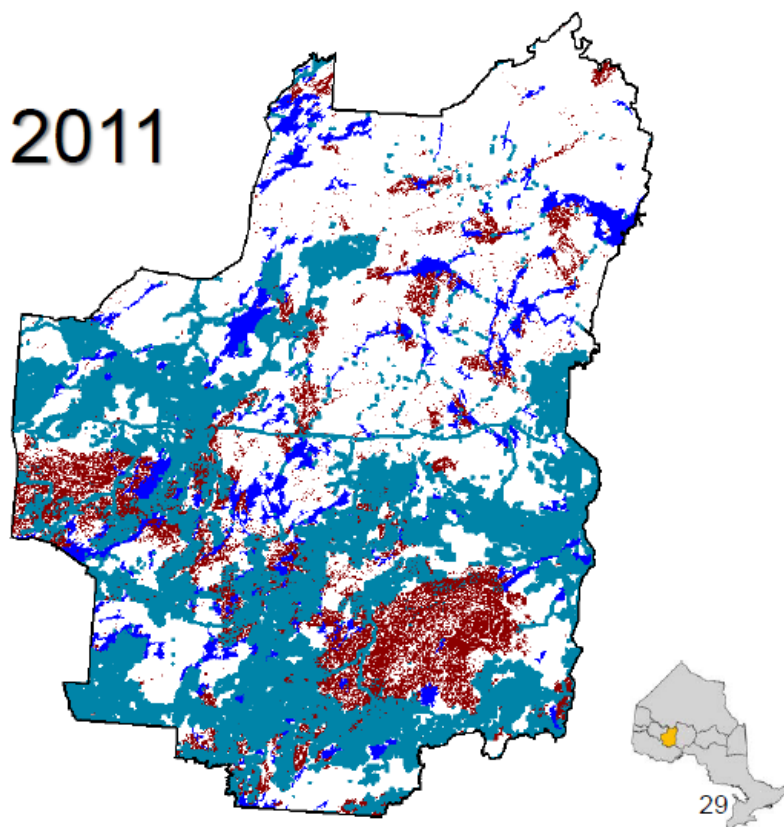
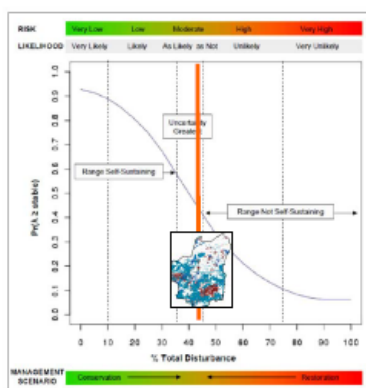
Landscape Statistics (ha)

Range Extent: 2,210,342
 Water Area: 343,406
 FRI Extent: 1,516,494
 Non-FRI Extent: 693,848

Range disturbance indicator
 Anthropogenic:* 731,125
 Natural 229,483

Total 960,607

Percent of range extent 43.4%



Buffered 500 metres.

Statistics are approximate and may contain estimates from forest management planning annual work schedules.

Figure 1: Disturbance in the Brightsand Caribou Range in 2011.

State of Caribou Range - Information Sheet

Range – 4 - Brightsand 2012 Disturbance State

Range Summary

Landscape Statistics (ha)

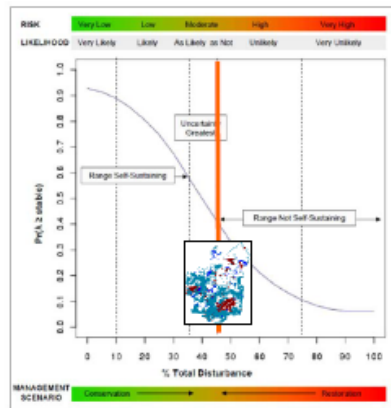
Range Extent:	2,210,342
Water Area:	343,406
FRI Extent:	1,516,494
Non-FRI Extent:	693,848

Range disturbance indicator

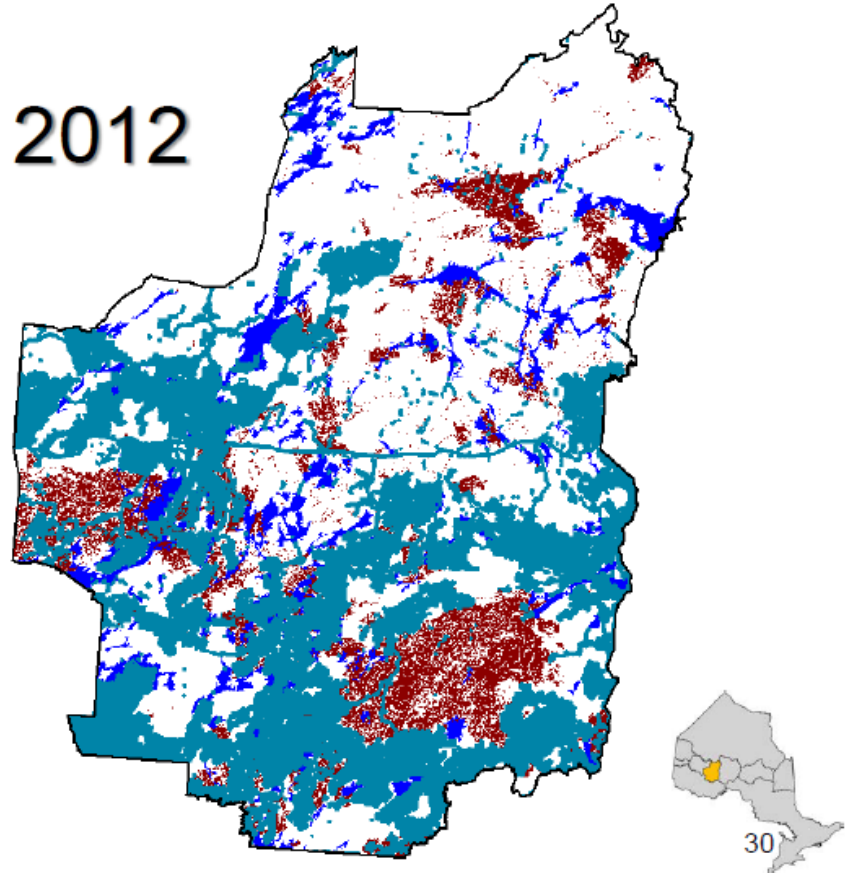
Anthropogenic:*	779,335
Natural	214,801

Total	994,136
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Percent of range extent	44.9%
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2012



* Buffered 500 metres.

Statistics are approximate and may contain estimates from forest management planning annual work schedules.

Figure 2: Disturbance in the Brightsand Caribou Range in 2012.

Landscape Statistics (ha)

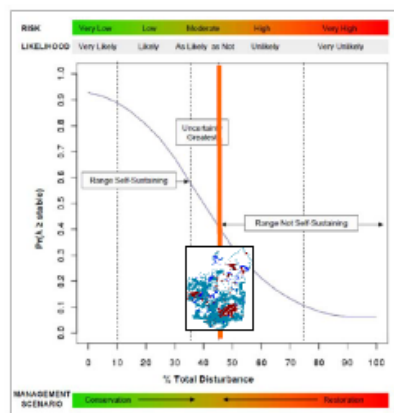
Range Extent: 2,210,342
 Water Area: 343,406
 FRI Extent: 1,516,494
 Non-FRI Extent: 693,848

Range disturbance indicator

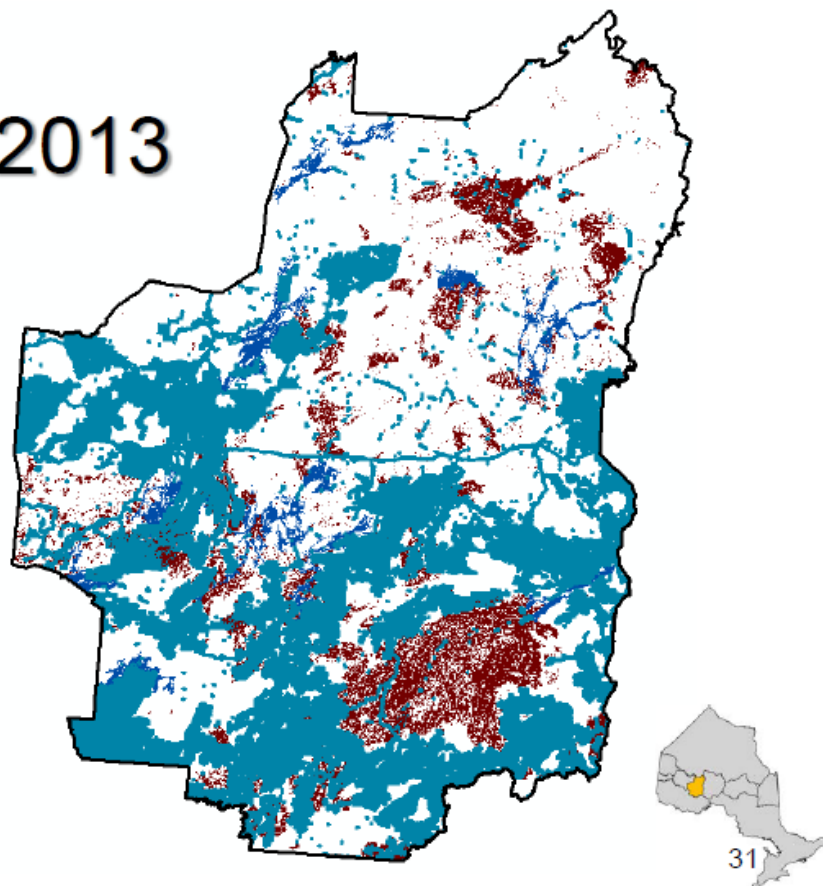
Anthropogenic:* 812,476
 Natural 188,895

Total 1,001,372

Percent of range extent 45.3%



2013



* Buffered 500 metres.

Statistics are approximate and may contain estimates from forest management planning annual work schedules.

Figure 3: Disturbance in the Brightsand Caribou Range in 2013.

State of Caribou Range - Information Sheet

Range 4: Brightsand 2015 Disturbance State

Landscape Statistics (ha)

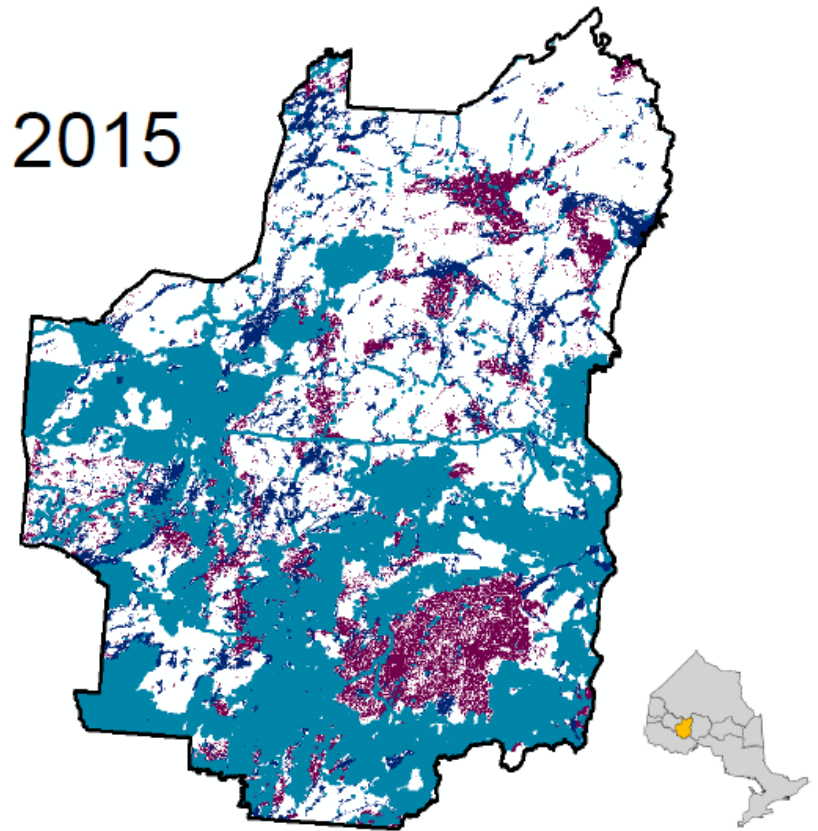
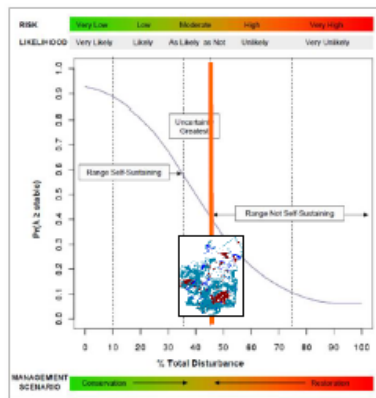
Range Extent:	2,210,342
Water Area:	343,406
FRI Extent:	1,516,494
Non-FRI Extent:	693,848

Range disturbance indicator

Anthropogenic:*	808,082
Natural	195,274

Total	1,003,356
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Percent of range extent	45.4%
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* Buffered 500 metres.

Statistics are approximate and may contain estimates from forest management planning annual work schedules.

Figure 4: Disturbance in the Brightsand Caribou Range in 2015.

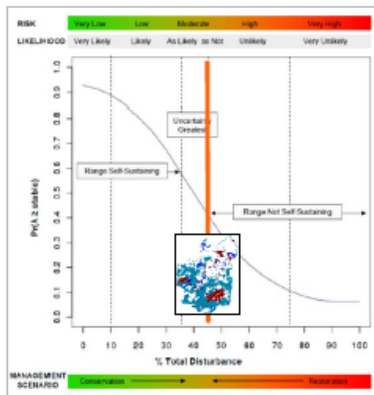
State of Caribou Range - Information Sheet

Range 4: Brightsand 2017 Disturbance State

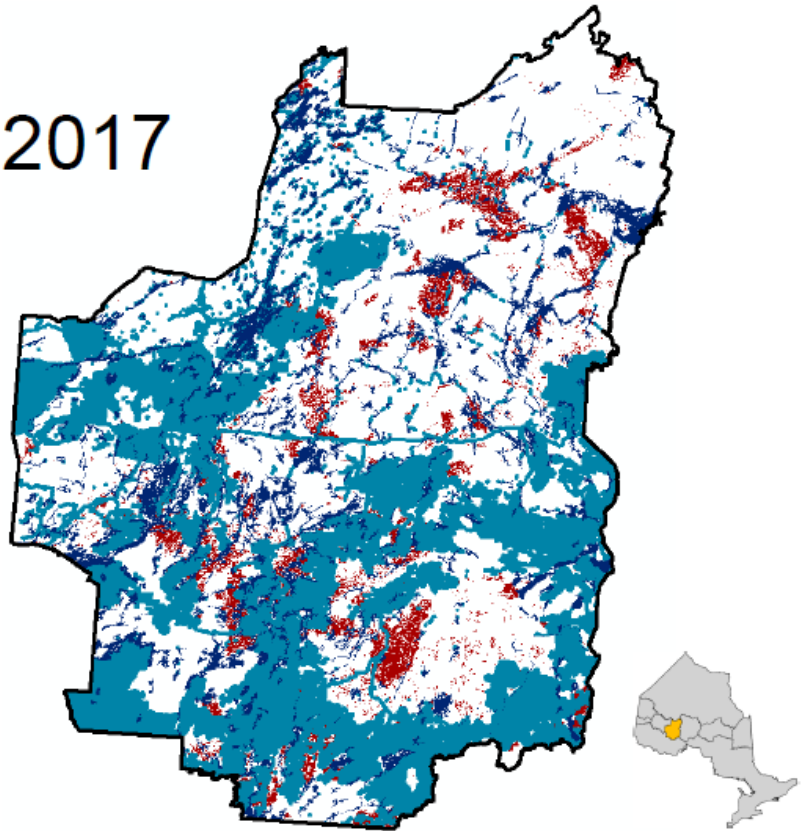
Landscape Statistics (ha)

Range Extent:	2,210,342
Water Area:	343,406
FRI Extent:	1,516,494
Non-FRI Extent:	693,848

Range disturbance indicator	
Anthropogenic:*	848,713
Natural	113,299
Total	
962,012	
Percent of range extent	
43.5%	



2017

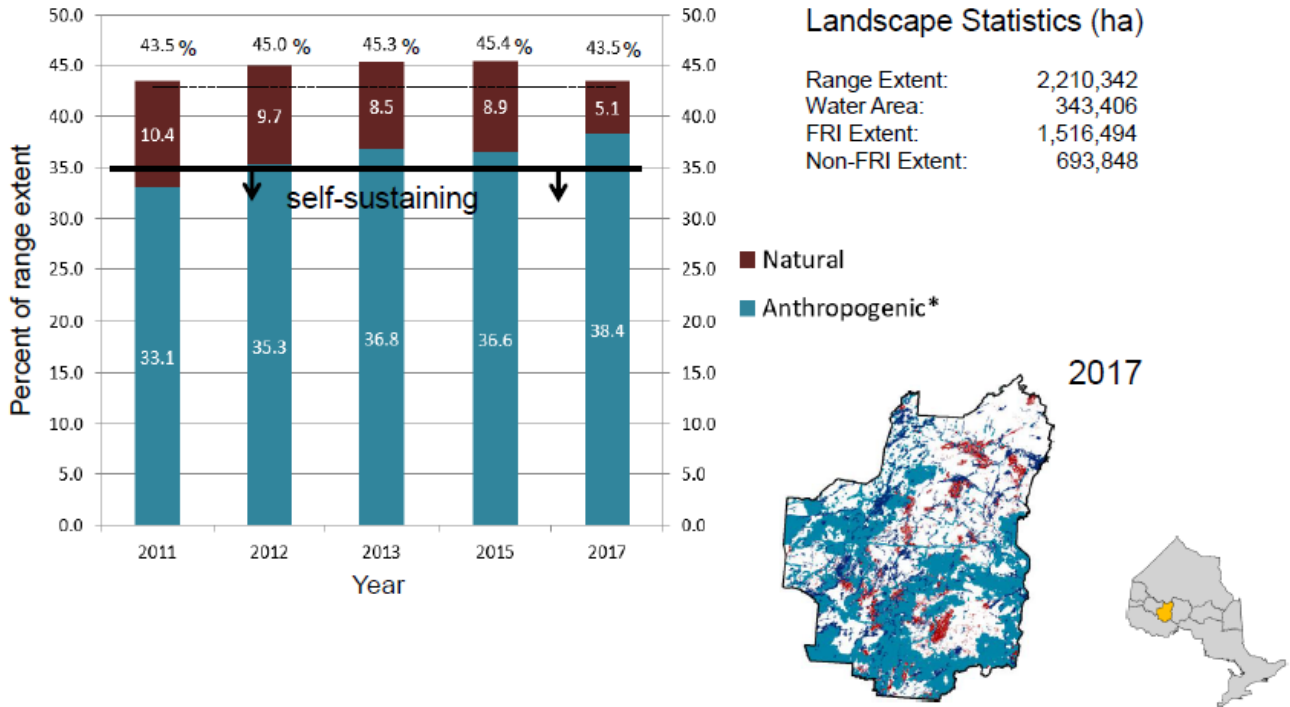


* Buffered 500 metres.

Statistics are approximate and may contain estimates from forest management planning annual work schedules.

Figure 5: Disturbance in the Brightsand Caribou Range in 2017.

Trend-----



* Buffered 500 metres.

Statistics are approximate and may contain estimates from forest management planning annual work schedules.

Figure 6: Increasing Disturbance Trend in the Brightsand Caribou Range, 2011-2017.

As summarized in Figure 6, between 2011 and 2017, anthropogenic disturbance within the Brightsand range increased from 731,125 ha to 848,713 ha. The natural disturbance level is far lower than the anthropogenic disturbance, and in fact decreased from 229,483 ha in 2011 to 113,299 ha in 2017.³⁹ The cumulative disturbance increased from 43.5% to 45.4% between 2011 and 2015. Although this metric decreased between 2015 and 2017, this is explained by the decline in natural disturbance; anthropogenic disturbance in that same time period has, on its own, increased, and is very high.

Figures 7-12 below illustrate the state and disturbance trend in the Brightsand range.

³⁹ There was a large fire in the southeastern portion of the landscape that is no longer considered 'disturbed', having aged out of the categorization according to the MNR, thereby causing the decrease in natural disturbance from 2015-2017.

State of Caribou Range - Information Sheet

Range 3: Churchill 2011 Disturbance State

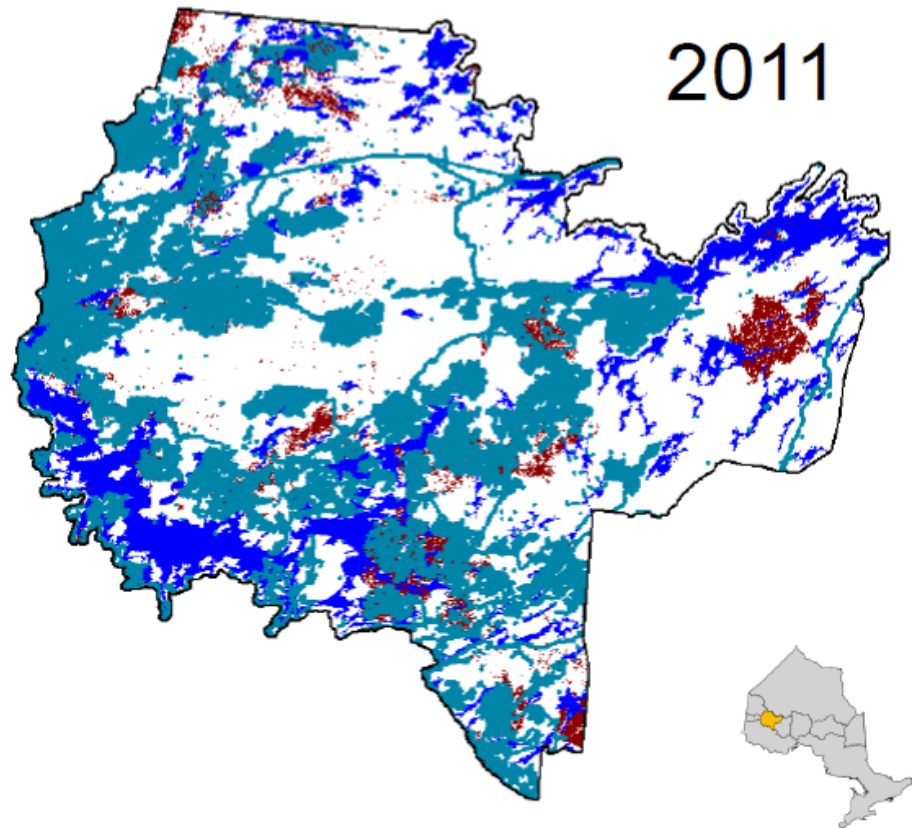
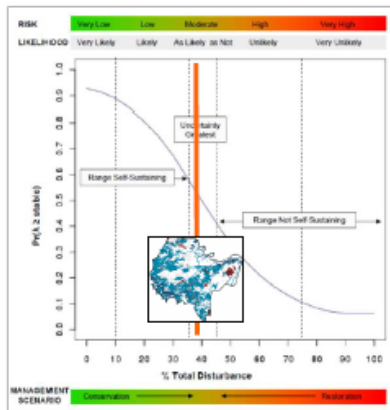
Landscape Statistics (ha)

Range Extent:	2,126,475
Water Area:	426,464
FRI Extent:	2,010,895
Non-FRI Extent:	115,580

Range disturbance indicator	
Anthropogenic:*	733,978
Natural	82,745

Total	816,723
-------	---------

Percent of range extent	38.4%
-------------------------	-------



* Buffered 500 metres.

Statistics are approximate and may contain estimates from forest management planning annual work schedules.

Figure 7: Disturbance in the Churchill Caribou Range in 2011.

State of Caribou Range - Information Sheet

Range 3: Churchill 2012 Disturbance State

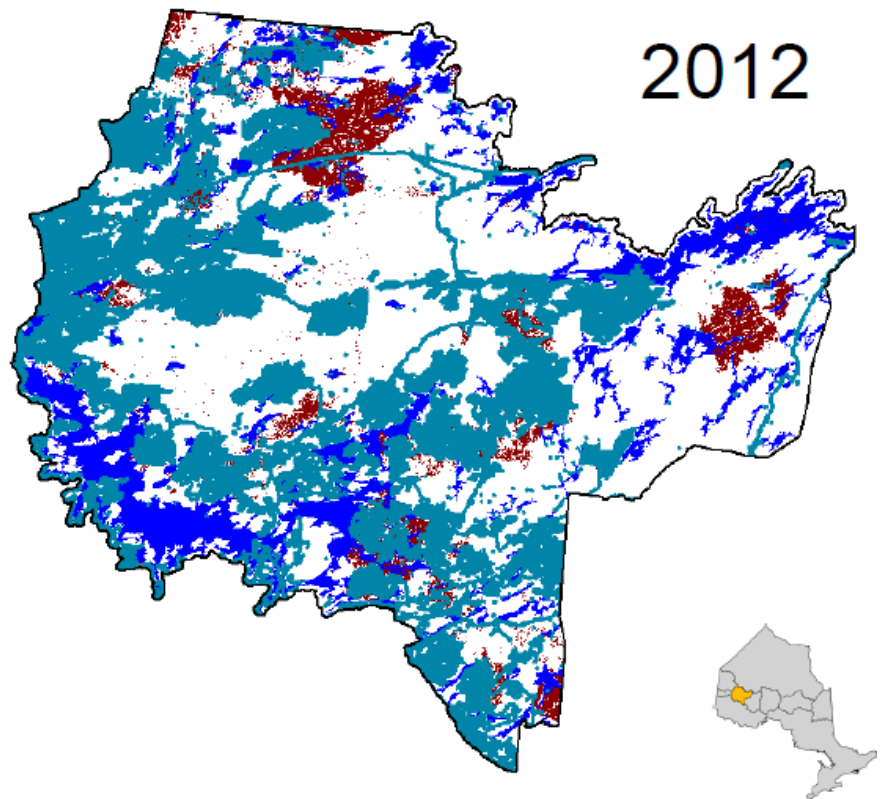
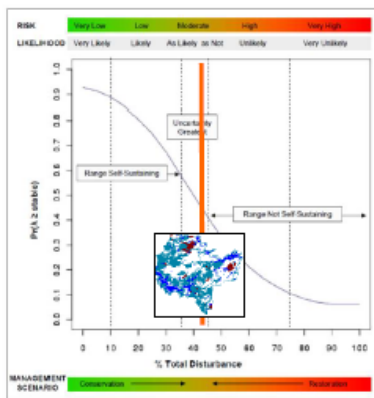
Landscape Statistics (ha)

Range Extent:	2,126,475
Water Area:	426,464
FRI Extent:	2,010,895
Non-FRI Extent:	115,580

Range disturbance indicator	
Anthropogenic:*	791,159
Natural	110,382

Total	901,542
-------	---------

Percent of range extent	42.3%
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* Buffered 500 metres.

Statistics are approximate and may contain estimates from forest management planning annual work schedules.

Figure 8: Disturbance in the Churchill Caribou Range in 2012.

State of Caribou Range - Information Sheet

Range 3: Churchill 2013 Disturbance State

Landscape Statistics (ha)

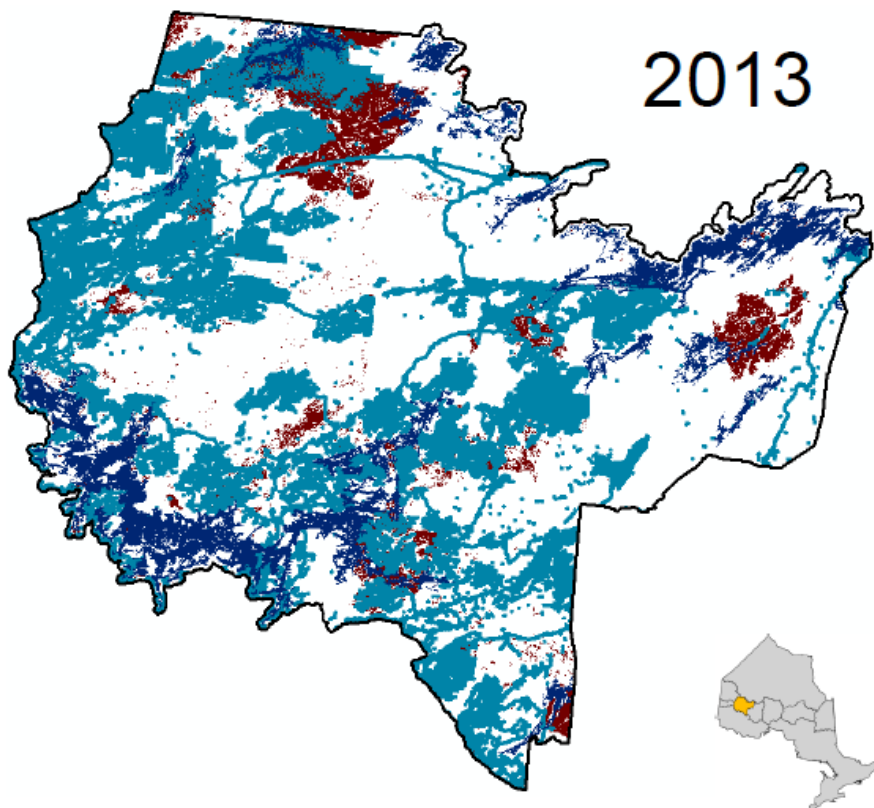
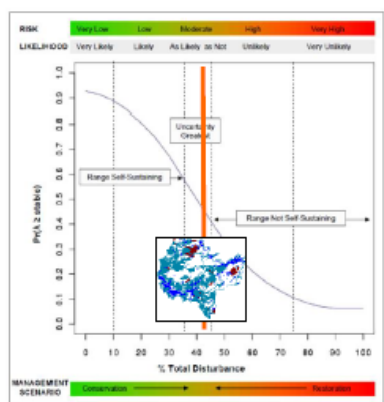
Range Extent:	2,126,475
Water Area:	426,464
FRI Extent:	2,010,895
Non-FRI Extent:	115,580

Range disturbance indicator

Anthropogenic:*	779,706
Natural	106,779

Total	886,485
-------	---------

Percent of range extent	41.7%
-------------------------	-------



* Buffered 500 metres.

Statistics are approximate and may contain estimates from forest management planning annual work schedules.

Figure 9: Disturbance in the Churchill Caribou Range in 2013.

State of Caribou Range - Information Sheet

Range 3: Churchill 2015 Disturbance State

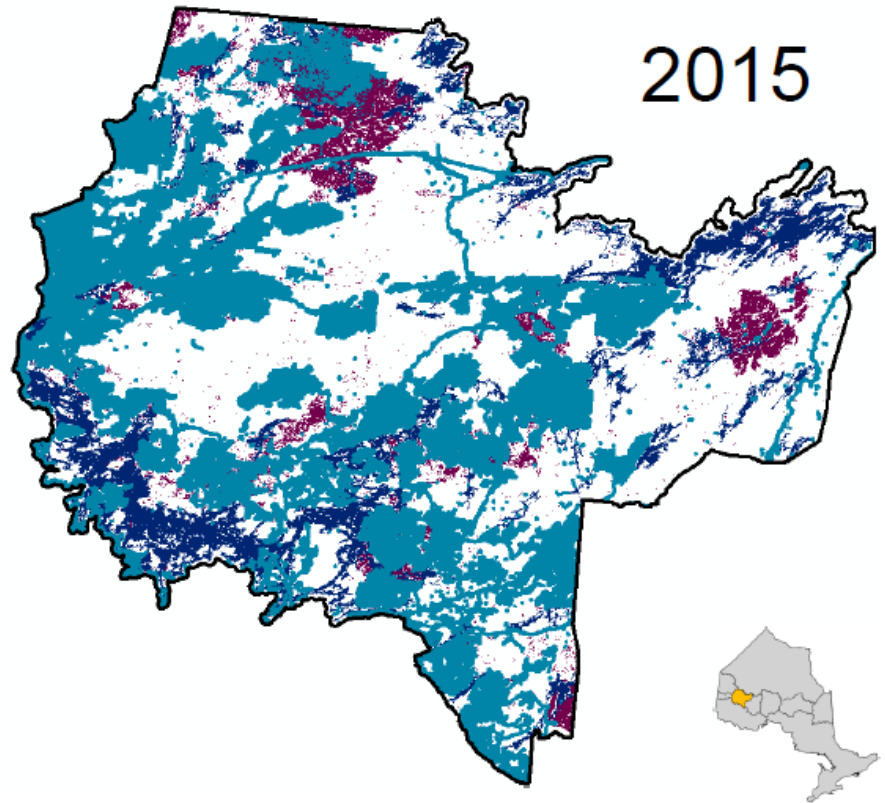
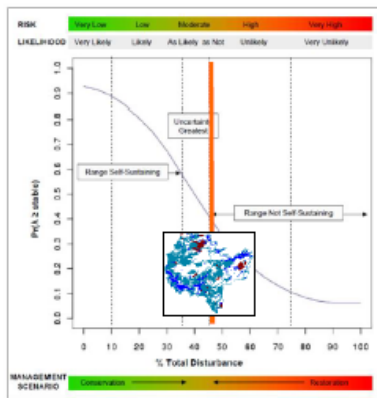
Landscape Statistics (ha)

Range Extent:	2,126,475
Water Area:	426,464
FRI Extent:	2,010,895
Non-FRI Extent:	115,580

Range disturbance indicator	
Anthropogenic:*	834,216
Natural	103,727

Total	937,943
-------	---------

Percent of range extent	44.1%
-------------------------	-------



* Buffered 500 metres.

Statistics are approximate and may contain estimates from forest management planning annual work schedules.

Figure 10: Disturbance in the Churchill Caribou Range in 2015.

State of Caribou Range - Information Sheet

Range 3: Churchill 2017 Disturbance State

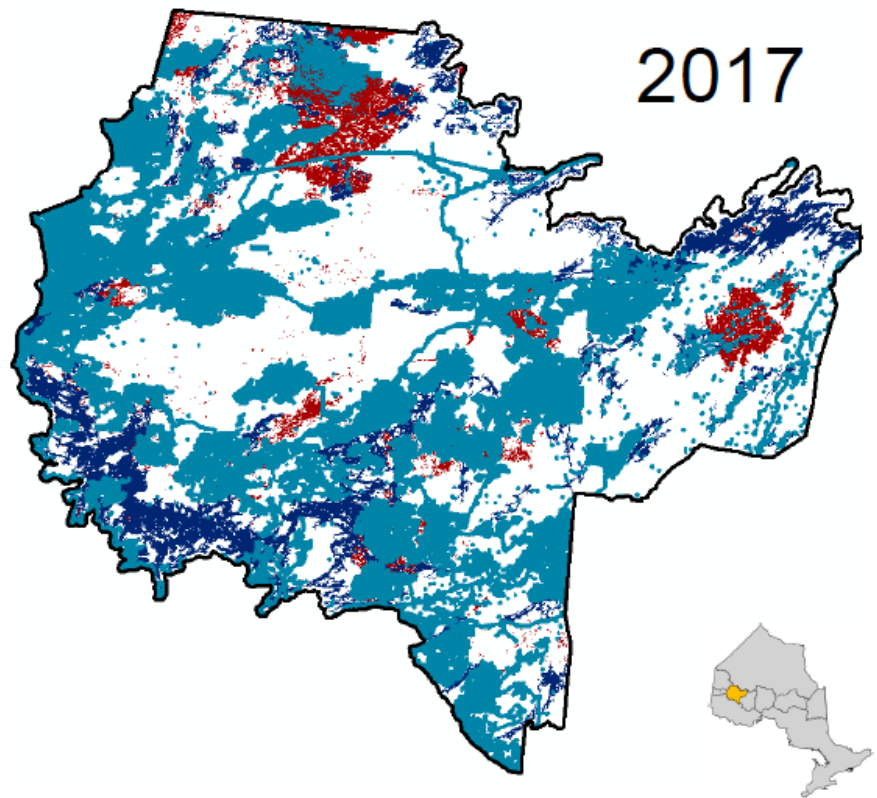
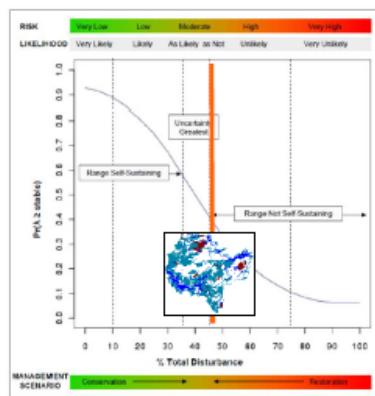
Landscape Statistics (ha)

Range Extent:	2,126,475
Water Area:	426,464
FRI Extent:	2,010,895
Non-FRI Extent:	115,580

Range disturbance indicator	
Anthropogenic:*	874,750
Natural	92,660

Total	967,410
-------	---------

Percent of range extent	45.5%
-------------------------	-------

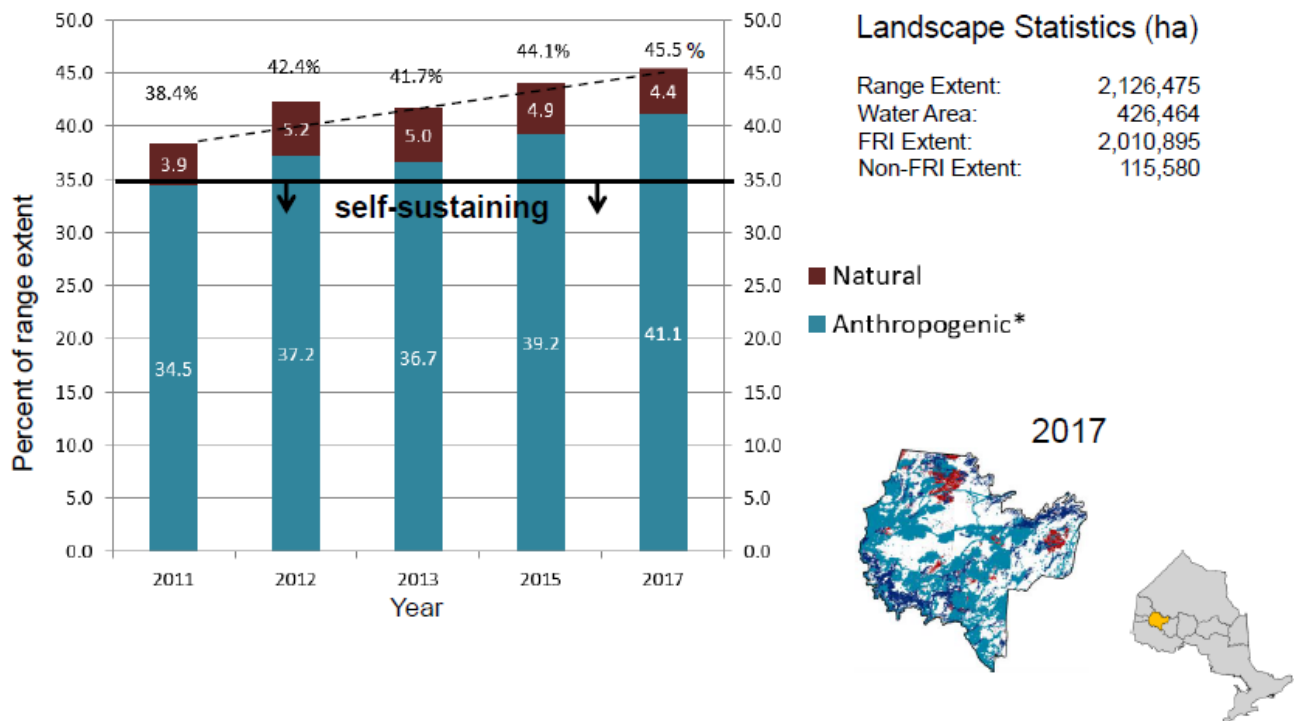


* Buffered 500 metres.

Statistics are approximate and may contain estimates from forest management planning annual work schedules.

Figure 11: Disturbance in the Churchill Caribou Range in 2017.

Trend



* Buffered 500 metres.

Statistics are approximate and may contain estimates from forest management planning annual work schedules.

Figure 12: Increasing Disturbance Trend in the Churchill Caribou Range, 2011-2017.

Similar to the Brightsand range, the Churchill range also experienced an increase in anthropogenic disturbance between 2011 and 2017, going from 34.5% to 41.1%. Natural disturbance increased as well, from 3.9% to 4.4%. Overall, the cumulative disturbance increased from 38.4% to 45.5%, well above the management threshold.

6.0 Conclusions

It is clear from these maps and data that critical habitat degradation has worsened in both ranges since 2011 by additional industrial disturbance. It is important to note that, at the beginning of this period, population levels were already known to be in decline, yet no new surveys have been conducted since 2013, despite the disturbance levels already being at or above the management threshold. Moreover, the 2011-2017 finer-scale provincial data indicate an increasing trend of even more human-caused disturbance. Summaries of forestry companies operating in the two ranges, as well as mining claims, and the routing of a new major 300km transmission line that would bisect the Churchill Range can be found in Appendix 1. There is also potential for one of Canada's largest undeveloped gold mines, the Springpole Gold Project, to be built and operated within the Churchill Range. The project is undergoing an environmental assessment process.

A constellation of factors are converging on boreal caribou in these two ranges making it highly unlikely the local populations will persist in the long term under the current management regime: declining population trends, increasing industrial disturbances and increasing disturbance trend above the 35% management threshold, low reproductive rates and the need for large range areas comprised of continuous tracts of undisturbed forests. Moreover, management decisions regarding development activities within both ranges have been undertaken during most of this time period in the absence of current population data.

SAFETY-NET LEGAL ANALYSIS

7.0 Introduction to the Legal Analysis

Subsection 61(1) of *SARA* prohibits the destruction of any part of the critical habitat of a listed threatened species that is in a province or territory that is not part of federal lands.⁴⁰ This subsection applies only to those portions of critical habitat on non-federal lands that the Governor in Council (GiC) has specified by order on the recommendation of the Minister.⁴¹ The Minister must recommend that the GiC make such an order if he 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.⁴²

The purpose of the following analysis is to determine if there are any provisions under *SARA* or other federal legislation, or if there are any laws of Ontario, that effectively protect critical habitat in the Brightsand and Churchill ranges.

8.0 The Test for Effective Protection

The overarching test we are using to evaluate whether a federal or provincial law provides effective protection to critical habitat is as follows:

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?

This overarching test and the four assessment criteria set out below are based on and informed by *SARA* itself, various policies on critical habitat protection and the assessment of effective protection, the application of those policies in other critical habitat protection assessments, and the common law.

We will use the following four criteria to assess whether a federal or provincial law provides effective protection:

⁴⁰ *SARA*, *supra* note 2, s 61(1).

⁴¹ *Ibid*, s 61(2).

⁴² *Ibid*, s 61(4).

- Does the provincial or federal law contain mandatory prohibitions that prevent the destruction of critical habitat?
- Does the provincial or federal law provide broader exceptions, exemptions or discretion than those *SARA* provides, or include permitting provisions with a lower (i.e. less protective) threshold than those set out in *SARA*?
- Are the offence, enforcement and penalty provisions for breach of the provincial or federal laws at least as strong as those in *SARA*?
- Is there a history of effective application of the provincial or federal law?

8.1 SARA

The purposes of *SARA* are to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity, and to manage species of special concern to prevent them from becoming endangered or threatened.⁴³ The preamble to *SARA* recognizes that “the habitat of species at risk is key to their conservation.”⁴⁴ In recognition of the importance of addressing habitat loss and degradation to the survival and recovery of threatened species, *SARA* contains prohibitions against the destruction of critical habitat on federal lands and on designated non-federal lands.⁴⁵ In light of this recognition, the alternative federal or provincial laws being assessed under subsection 61(4) must provide the same protection outcome as would be the case if the subsection 61(1) prohibition were in place.

SARA contains certain discretionary measures under which the Minister may enter into agreements or issue permits authorizing activities that may affect critical habitat. Under section 73, the Minister may enter into agreements or issue permits for scientific research, for activities that benefit the species, or where the effects on the species are incidental to the activity.⁴⁶ However, the authorizations may be granted only if certain pre-conditions have been met, including that all reasonable alternatives to the activity that would reduce the impacts have been considered, all feasible measures to reduce the impact will be taken, and the activity will not jeopardize the survival or recovery of the species.⁴⁷

In order to provide effective protection, any discretionary permitting and licensing provisions under provincial or federal laws must include pre-conditions at least as stringent as those provided by section 73 of *SARA*.

Section 83 of *SARA* provides that the prohibition under section 61(1) does not apply to a person who is engaging in activities related to the protection of public safety, health or national security and authorized by a federal Act.⁴⁸ The person engaging in an activity necessary for the protection of public safety, health or national security must exercise that power in a manner that respects the purposes of *SARA* to the greatest extent possible.⁴⁹ Therefore, in order to provide effective protection, the exceptions under other provincial or federal laws for such emergency actions

⁴³ *Ibid*, s 6.

⁴⁴ *Ibid*, preamble.

⁴⁵ *Ibid*, ss 58(1), 61(1) and (2).

⁴⁶ *Ibid*, s 73(2).

⁴⁷ *Ibid*, s 73(3).

⁴⁸ *Ibid*, ss 83(1), (2)(a).

⁴⁹ *Ibid*, s 83(2)(b).

must be as narrow as those under section 83 of *SARA* and exercised in a manner that respects the purposes of *SARA* to the greatest extent possible.

8.2 National Accord for the Protection for Species at Risk

The Government of Canada and the Government of Ontario are signatories to the 1996 *National Accord for the Protection of Species at Risk (National Accord)*.⁵⁰ In the *National Accord*, the Province of Ontario agreed to establish legislation and programs that will provide for effective protection of species at risk, including providing protection for the habitat of threatened and endangered species.⁵¹ Section 61 of *SARA* is the mechanism by which the federal government can ensure effective protection of the critical habitat of a threatened or endangered species on non-federal lands where a province has failed to meet its obligations under the *National Accord*.

8.3 Previous Critical Habitat Protection Assessments

A recent assessment of the protection of Western Chorus Frog individuals, residences and habitat on federal and non-federal land examined provincial and federal laws to determine the extent to which they prevented the destruction of critical habitat.⁵² The analysis examined statutory definitions, the nature of the prohibitions, offences and penalties, enforcement, limitations or exceptions, exemptions, discretion, permitting and the history of the legal instrument's application.⁵³ The assessment considered whether the applicable laws "included mandatory, enforceable prohibitions against the destruction of the species' habitat."⁵⁴ The assessment found, for example, that while the provisions of certain federal Acts included prohibitions against the destruction of habitat, the measures were "not equivalent to those required under *SARA*."⁵⁵ For several federal and provincial Acts, the assessment found that the penalties under those Acts were small in comparison to *SARA* and this was a factor in determining that the provisions did not provide equivalent protection.⁵⁶

In June 2017, the federal Minister of Environment and Climate Change and the British Columbia Minister of the Environment jointly released the final *Canada-British Columbia Southern Mountain Caribou (Central Group) Protection Study (SMC Protection Study)*.⁵⁷ The *SMC Protection Study* was intended to inform decisions under sections 34, 61 and 63 of *SARA* as to

⁵⁰ Government of Canada, "National Accord for the Protection of Species at Risk", (1996), online: <https://www.registrelep-sararegistry.gc.ca/6B319869-9388-44D1-A8A4-33A2F01CEF10/Accord-eng.pdf> [Compendium, Tab 11].

⁵¹ *Ibid.*

⁵² Government of Canada, *Protection assessment of Western Chorus Frog individuals, residences and habitat on federal and non-federal land*, (2015), Species at Risk Registry, online: <https://www.registrelep-sararegistry.gc.ca/default.asp?lang=En&n=2903667C-1>, at 1 [WCF Assessment] [Compendium, Tab 12].

⁵³ *Ibid.*

⁵⁴ *Ibid.*, at 6.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, at 3, 5, 6, 7 and 10.

⁵⁷ Environment and Climate Change Canada and British Columbia Ministry of the Environment, *Canada-British Columbia Southern Mountain Caribou (Central Group) Protection Study*, (2017), Species at Risk Registry, online: http://www.registrelep-sararegistry.gc.ca/virtual_sara/files/SmcStudy%2Dv00%2D2017June%2DCompleat%2DEng%2Epdf [Compendium, Tab 13].

whether the critical habitat of the Southern Mountain Caribou (Central Group) was protected. The *SMC Protection Study* applied the criteria from the draft *Critical Habitat Policy* including prohibitions and offences, penalties or consequences, enforcement regime, limitations, exemptions, discretion and permitting.⁵⁸

The *SMC Protection Study* analysed the legislative instruments on a spatial basis and identified:

- areas for which there are no spatially-explicit legislative instruments in place that would constrain any of the relevant groups of activities;
- areas in which some, but not all, activities are constrained by the application of legislative instruments; and
- decision-making related to authorizing activities that is not constrained by a substantive requirement to meet threshold conservation objectives, in this case protection of caribou critical habitat.⁵⁹

These previous protection assessments were reviewed and informed the test and criteria in section 9.0 above and informed the analysis and structure of this current assessment.

8.4 Case Law

In *Minister of Fisheries and Oceans v David Suzuki Foundation*, 2012 FCA 40 (*Orca*), the Federal Court of Appeal dealt with the question of whether the Minister of Fisheries and Oceans could rely on discretionary provisions of the *Fisheries Act* in finding that critical habitat was legally protected under section 58 of SARA. Section 58(1) of SARA parallels section 61(1) in prohibiting any person from destroying any part of the critical habitat of a listed endangered or threatened species on federal land or where the listed species is an aquatic species or migratory bird. Section 58(5) requires that the Minister make an order protecting the critical habitat if the critical habitat is not protected by the provisions of SARA or other federal acts.

The Court in *Orca* found that the non-discretionary critical habitat protection scheme under SARA could not be replaced by the discretionary management scheme under the *Fisheries Act*.⁶⁰ The Court stated:

Section 57 of the SARA provides in no uncertain language that the purpose of section 58 is to ensure that all the critical habitat is protected by provisions in, or measures under, an Act of Parliament or by a protection order issued under subsections 58(1) and (4) of the SARA. Surely this is an indication that there must be some equivalence between the two contemplated means of protection. They need not be the same, but surely they must have the same objective. Pursuant to subsection 58(1), the objective of a protection order is to ensure that “no person [...] destroy any part of the critical habitat of any listed endangered species or of any listed threatened species [...] if the listed species is an aquatic species”. Provisions in, or measures under, an Act of Parliament should thus – in

⁵⁸ *Ibid*, at 35.

⁵⁹ *Ibid*, at 71.

⁶⁰ *Minister of Fisheries and Oceans v David Suzuki Foundation*, 2012 FCA 40, at para 109 [Compendium, Tab 14].

principle – achieve the same objective if they are to be resorted to as a substitute to a protection order.⁶¹

We have applied this same test in our analysis of the Minister’s obligation under section 61(4), namely that the federal or provincial law must meet the same objective of ensuring that no part of the critical habitat of the listed threatened species is destroyed.

8.5 Draft Policy on Critical Habitat Protection on Non-federal Lands

In September 2016, the Minister released the draft *Policy on Critical Habitat Protection on Non-federal Lands* (**Critical Habitat Policy**). The *Critical Habitat Policy* defined the test for effective critical habitat protection as evaluating whether provisions in, or measures under SARA or other Acts of Parliament, or the laws of the province or territory, are having the same “protection outcome” as would be the case if SARA s 61(1) prohibitions were in place. The “protection outcome” is that critical habitat is not being and will not be destroyed, except in ways that SARA’s discretionary measures would allow.⁶²

The *Critical Habitat Policy* proposes criteria for determining if a provincial law will provide the same protection outcome as would be the case if the SARA subsection 61(1) prohibitions were in place. Those criteria include the following: (1) whether the law is mandatory (including an assessment of limitations, exemptions, and discretion); (2) whether the law is enforceable (including an assessment of prohibitions and offences, enforcement regimes, and penalties); (3) whether the law has a history of effective application; and (4) whether any authorized destruction of critical habitat is subject to similar conditions as provided in SARA.⁶³

The *Critical Habitat Policy* proposes to apply the same criteria to the assessment of federal laws applicable on non-federal lands.⁶⁴

The protection outcome and the criteria found in the *Critical Habitat Policy* informed and are reflected in the test and criteria articulated in section 9.0 above.

9.0 Ontario Legislation

This section evaluates the relevant laws of the Province of Ontario to determine if those laws provide effective protection for critical habitat in the Brightsand and Churchill ranges using the test and criteria identified in section 9.0 above.

9.1 Crown Forest Sustainability Act, 1994, SO 1994, c 25

The *Crown Forest Sustainability Act, 1994* (**CFSA**) regulates forest operations on Crown land in Ontario. The *CFSA* authorizes the Minister of Natural Resources and Forestry to designate all or part of a Crown forest as a management unit for the purposes of the Act.⁶⁵ Forest operations on Crown land must be conducted in a designated management unit, and must comply with, among other things, the Ministry of Natural Resources and Forestry (**MNR**)’s Forest Operations and

⁶¹ *Ibid*, at para 117.

⁶² Environment and Climate Change Canada, *Policy on Critical Habitat Protection on Non-federal Lands [Proposed]*, (Ottawa: Environment and Climate Change Canada, 2016), at 1 [**Compendium, Tab 15**].

⁶³ *Ibid*, at 3.

⁶⁴ *Ibid*, at 4.

⁶⁵ *Crown Forest Sustainability Act, 1994*, SO 1994, c 25, s 7 [**Compendium, Tab 16**].

Silviculture Manual and an applicable forest management plan.⁶⁶ All forest management plans are subject to the Minister's approval, and must comply with the MNRF's Forest Management Planning Manual.⁶⁷

Under the *CFSA*, the Minister cannot approve a forest management plan unless he is satisfied "that the plan provides for the sustainability of the Crown forest, having regard to the plant life, animal life, water, soil, air and social and economic values, including recreational values and heritage values, of the Crown forest."⁶⁸ However, the *CFSA* does not prohibit the destruction of caribou critical habitat or require forest management plans to do so.

There are currently two Forest Management Planning manuals (**FMPMs**), one of which was published in 2009 and is in the process of being phased out,⁶⁹ and the other of which was published in 2017 but does not yet apply universally to all forest management plans in Ontario.⁷⁰ The FMPMs outline the forest management planning process and the required contents of forest management plans, and direct that forest operations be conducted in accordance with certain baseline requirements.

With regard to damage to the natural environment, both FMPMs require forest management plans to "contain a conclusion on forest sustainability" and to "include documentation as to how the [forest management plan] has regard for plant life, animal life, water, soil, air, and social and economic values".⁷¹ The 2017 FMPM requires this conclusion to be based on a number of elements, including conditions for the protection of important ecological features.⁷² Relatedly, it requires forest management plans to identify conditions to maintain or protect important ecological features not addressed by operations prescriptions, or conditions for areas of concern, or to implement specific operational standards and guidelines.⁷³

The 2017 FMPM requires forest management plans to identify species at risk on the management unit, and to discuss the extent to which the quality or quantity of habitat for those species could be affected by forest operations.⁷⁴ It requires proponents to take species at risk into consideration when identifying eligible harvest areas⁷⁵ and to develop operational prescriptions/conditions and conditions on regular operations relating to species at risk.⁷⁶ In addition, it provides for the possibility of monitoring programs for species at risk affected by

⁶⁶ *Ibid*, ss 42(1) & 43.

⁶⁷ *Ibid*, ss 9(1) & 68(2).

⁶⁸ *Ibid*, s 9(2).

⁶⁹ Ontario Ministry of Natural Resources, *Forest Management Planning Manual for Ontario's Crown Forests* (Toronto: Queen's Printer for Ontario, 2009) [*FMPM, 2009*] [**Compendium, Tab 17**].

⁷⁰ Ontario Ministry of Natural Resources and Forestry, *Forest Management Planning Manual* (Toronto: Queen's Printer for Ontario, 2017) [*FMPM, 2017*] [**Compendium, Tab 18**].

⁷¹ *Ibid*, at B-44; *FMPM, 2009*, *supra* note 69 at B-38.

⁷² *FMPM, 2017*, *supra* note 70 at B-44. Important ecological features may include a species at risk (such as boreal caribou) or its habitat – see Glossary-12.

⁷³ *Ibid*, at A-58.

⁷⁴ *Ibid*, at B-18.

⁷⁵ *Ibid*, at A-42.

⁷⁶ *Ibid*, at A-55 & A-59.

forest operations.⁷⁷ However, it does not contain basic requirements for protecting caribou habitat, such as mandatory measurement monitoring or a specified disturbance threshold. Overall, the 2017 FMPM does not prohibit destroying the habitat of any species at risk, including boreal caribou.

Likewise, the 2009 FMPM requires management objectives to be developed for forest-related species at risk on the management unit and stipulates that species at risk be considered when identifying eligible areas for harvest.⁷⁸ In addition, it requires that operational prescriptions be developed for species at risk,⁷⁹ and states that species at risk considerations must inform the planning of infrastructure such as roads, landings, and aggregate pits.⁸⁰ However, it does not prohibit the destruction of caribou critical habitat.

The Forest Operations and Silviculture Manual (**FOSM**) sets out the overarching principles and accepted approaches for forest management, the standards for forest operations and silvicultural practices, the minimum qualifications for forestry workers, and the procedures for the evaluation of forest management in Ontario.⁸¹ It does not discuss the impact of forest operations on species at risk, and certainly does not prohibit the destruction of caribou critical habitat.

The FOSM does provide that forestry proponents must apply the direction contained in the various forest management guides when preparing and implementing forest management plans.⁸² For our purposes, the relevant forest management guides are as follows:

- (1) the Forest Management Guide for Boreal Landscapes;
- (2) the Forest Management Guide for Conserving Biodiversity at the Stand and Site Scales;
and
- (3) the Forest Management Guide to Silviculture in the Great Lakes-St. Lawrence and Boreal Forests of Ontario.

The contents of each of these guides will be examined in turn.

The Forest Management Guide for Boreal Landscapes contains a number of specific requirements relating to caribou habitat. For example, forest management plans are required to model caribou habitat using particular habitat classifications,⁸³ and to develop targets for specified caribou habitat indicators.⁸⁴ Planning teams must also identify large landscape patches of value to caribou, and are encouraged to manage those landscape patches in order to provide

⁷⁷ *Ibid.*, at B-42.

⁷⁸ *FMPM*, 2009, *supra* note 69 at A-33 & A-39.

⁷⁹ *Ibid.*, at A-50 & A-51.

⁸⁰ *Ibid.*, at A-55, A-59 & A-61.

⁸¹ Ontario Ministry of Natural Resources and Forestry, *Forest Operations and Silviculture Manual* (Toronto: Queen's Printer for Ontario, 2017) at 4 [**Compendium, Tab 19**].

⁸² *Ibid.*, at 14.

⁸³ Ontario Ministry of Natural Resources, *Forest Management Guide for Boreal Landscapes* (Toronto: Queen's Printer for Ontario, 2014) at 43 [**Compendium, Tab 20**].

⁸⁴ *Ibid.*, at 47.

consistent habitat for caribou ranges.⁸⁵ At the stand and site levels, objectives include maintaining or providing “a long-term supply of suitable woodland caribou habitat” and minimizing “the potential negative impacts to caribou populations associated with forest roads and road networks.”⁸⁶ However, there is a clear absence of mandatory, concrete measures aimed at preserving caribou habitat, such as strategic road planning or a specified disturbance threshold of 35% or below within the range impacted by the Forest Management Unit. As a result, there is no prohibition on the destruction of caribou critical habitat.

Similarly, the Forest Management Guide for Conserving Biodiversity at the Stand and Site Scales contains a number of directives aimed at ensuring that forest practices emulate natural disturbances and landscape patterns to the extent possible, while minimizing adverse effects on plant and animal life.⁸⁷ It does not contain any caribou-specific requirements, and certainly does not prohibit the destruction of caribou critical habitat.

Finally, the Forest Management Guide to Silviculture in the Great Lakes-St. Lawrence and Boreal Forests of Ontario outlines a number of silviculture activities that can be used to meet local forest management objectives, including objectives relating to the conservation of biodiversity.⁸⁸ However, it does not impose any particular conservation targets or require the use of any particular silviculture methods. Nothing in this Guide prohibits the destruction of caribou critical habitat.

The only additional potential source of effective protection for the Brightsand and Churchill ranges in the context of the *CFSA* are the relevant forest management plans (**FMPs**) themselves, which impose binding restrictions on forest operations in the applicable forest management unit.

There are seven forest management units that overlap with the Brightsand and/or Churchill ranges. Although all of the FMPs applicable in these units contain measures aimed at conserving and rehabilitating caribou habitat, none of them prohibits the destruction of caribou critical habitat.⁸⁹ In fact, three of them explicitly set much less stringent thresholds for undisturbed

⁸⁵ *Ibid.*, at 50.

⁸⁶ *Ibid.*, at 51-52.

⁸⁷ Ontario Ministry of Natural Resources, *Forest Management Guide for Conserving Biodiversity at the Stand and Site Scales* (Toronto: Queen’s Printer for Ontario, 2010) at 3 [**Compendium, Tab 21**].

⁸⁸ Ontario Ministry of Natural Resources and Forestry, *Forest Management Guide to Silviculture in the Great Lakes-St. Lawrence and Boreal Forests of Ontario* (Toronto: Queen’s Printer for Ontario, 2015) at 1 & 10 [**Compendium, Tab 22**].

⁸⁹ Ministry of Natural Resources & AbiBow Canada Inc, *Forest Management Plan for the Black Spruce Forest for the 10-year period from April 1, 2011 to March 31, 2021* (Thunder Bay, ON: Ministry of Natural Resources, 2010) [**Compendium, Tab 23**]; Ministry of Natural Resources & Bowater Canada Forest Products Inc, *Forest Management Plan for the Caribou Forest for the 10-year period from April 1, 2008 to March 31, 2018* (Sioux Lookout, ON: Ministry of Natural Resources, 2007) [*Caribou Forest FMP*] [**Compendium, Tab 24**]; Ministry of Natural Resources & AbitibiBowater Inc, *Forest Management Plan for the English River Forest for the 10-year period from April 1, 2009 to March 31, 2019* (Dryden, ON: Ministry of Natural Resources, 2008) [**Compendium, Tab 25**]; Ministry of Natural Resources & McKenzie Forest Products Inc, *Forest Management Plan for the Lac Seul Forest for the 10-year period from April 1, 2011 to March 31, 2021* (Sioux Lookout, ON: Ministry of Natural Resources, 2010) [*Lac Seul Forest FMP*] [**Compendium, Tab 26**]; Ministry of Natural Resources & Lake Nipigon

habitat than the stipulated minimum of 65%.⁹⁰ As a result, none of these FMPs provides effective protection for caribou critical habitat in the Brightsand and/or Churchill ranges.

9.2 *Endangered Species Act, 2007, SO 2007, c 6*

The *Endangered Species Act, 2007 (ESA)* contains Ontario's strongest legislative protections for the province's species at risk. Under the *ESA*, species classified as extirpated, endangered, threatened, or of special concern are listed on the *Species at Risk in Ontario List*, O Reg 230/08, and are subject to the protections contained in the *ESA* (which vary depending on the severity of the classification). Boreal caribou are currently listed as "threatened."⁹¹ Among other things, this listing triggers the prohibition in s 10(1) of the *ESA*, which provides as follows:

- 10(1) No person shall damage or destroy the habitat of,
- (a) a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species [...]

"Habitat" is defined in s 2(1) as:

"[...] an area on which the species depends, directly or indirectly, to carry on its life processes, including life processes such as reproduction, rearing, hibernation, migration or feeding, and includes places in the area described [...] that are used by members of the species as dens, nests, hibernacula or other residences".⁹²

To clarify how this definition applies to boreal caribou ranges, MNRF relies on a policy entitled "General Habitat Description for the Forest-dwelling Woodland Caribou (*Rangifer tarandus caribou*)". According to this policy, MNRF does not interpret the combination of sections 10(1) and 2(1) of the *ESA* as prohibiting the damage or destruction of any part of a boreal caribou range. Rather, the policy states that "[a]ctivities in general protected habitat can continue as long as the *function of these features or areas for caribou is maintained, and individuals of the species are not killed, harmed, or harassed*."⁹³

Forest Management Inc, *Forest Management Plan for the Lake Nipigon Forest Management Unit for the 10-year period from April 1, 2011 to March 31, 2021* (Nipigon, ON: Ministry of Natural Resources, 2010) [*Lake Nipigon Forest FMP*] [**Compendium, Tab 27**]; Ministry of Natural Resources & Domtar Pulp and Paper Products Inc, *Forest Management Plan for the Trout Lake Forest for the 10-year period from April 1, 2009 to March 31, 2019* (Red Lake, ON: Ministry of Natural Resources, 2008) [**Compendium, Tab 28**]; Ministry of Natural Resources, *Forest Management Plan for the Whiskey Jack Forest for the 10-year period from April 1, 2012 to March 31, 2022* (Kenora, ON: Ministry of Natural Resources, 2011) [**Compendium, Tab 29**].

⁹⁰ *Caribou Forest FMP*, *supra* at 115 (target set at 50% "suitable habitat"); *Lac Seul Forest FMP*, *supra* at 138 (targets for winter habitat set at 35% by 2021, 31% by 2061, and 42% by 2111); *Lake Nipigon Forest FMP*, *supra* at 103 (target set at 40% of the forest maintained in "suitable habitat condition").

⁹¹ *Species at Risk in Ontario List*, O Reg 230/08 [**Compendium, Tab 30**].

⁹² Section 2(1) also provides for the possibility that a species' habitat may be defined by a regulation made under s 55(1) of the *ESA*. There is currently no s 55(1) habitat regulation for boreal caribou.

⁹³ Ontario Ministry of Natural Resources, *General Habitat Description for the Forest-dwelling Woodland Caribou (Rangifer tarandus caribou)*, online: <http://files.ontario.ca/environment-and-energy/species-at-risk/mnr_sar_ghd_car_en.pdf> at 8 [**Compendium, Tab 31**].

Despite this ambiguous interpretation, s 10(1) of the *ESA* arguably contains a mandatory prohibition preventing the destruction of the critical habitat of the Churchill and Brightsand ranges. However, the *ESA* provides much broader exemptions to this prohibition than *SARA*.

Section 17 of the *ESA* allows the Minister of Natural Resources and Forestry to issue permits authorizing persons to engage in activities that will damage or destroy the habitat of listed endangered or threatened species. The Minister may only issue these permits where he is of the opinion that: (1) the activity is necessary for the protection of human health or safety;⁹⁴ (2) the activity is intended to assist, and will assist, in the protection or recovery of the affected species;⁹⁵ (3) an overall benefit to the species will be achieved within a reasonable time through requirements imposed by permit conditions;⁹⁶ or (4) the activity will result in a significant social or economic benefit to Ontario.⁹⁷

Although these permitting provisions are quite restrictive, existing regulations under the *ESA* have undermined their efficacy. 2013 amendments to the *ESA*'s General Regulation 242/08 exempt a number of industries from the prohibition against damaging or destroying the habitat of listed threatened or endangered species (among other things). The exemptions apply to activities associated with forestry operations, hydroelectric generating stations, aggregate pits and quarries, drainage, early exploration mining, wind facilities, and more.⁹⁸

As a result of these exemptions, proponents of the exempted activities no longer have to apply for permits under s 17 of the *ESA*. Instead, they may proceed with activities that will damage or destroy the habitat of listed species, including boreal caribou, as long as they meet the criteria outlined in the Regulation. These criteria vary depending on the industry, but are significantly weaker than the s 17 permitting standards. For example, forestry proponents must simply operate in accordance with an applicable forest management plan, which must meet certain enumerated requirements including providing for the “continuous availability of habitat for caribou (boreal population), both spatially and temporally”.⁹⁹ Proponents of early exploration mining are required to prepare and abide by a “mitigation plan” and take “reasonable” steps to minimize adverse impacts on affected species (including steps explicitly outlined in the Regulation, such as avoiding areas used by affected species in the last three years for life processes related to hibernation or reproduction).¹⁰⁰

These exemptions, and the many other industry-specific exemptions contained in the Regulation, are much broader than those that would apply under *SARA*. Consequently, the *ESA*'s prohibition

⁹⁴ *Endangered Species Act, 2007*, SO 2007, c 6, s 17(2)(a) [*ESA*] [**Compendium, Tab 32**].

⁹⁵ *Ibid*, s 17(2)(b).

⁹⁶ *Ibid*, s 17(2)(c).

⁹⁷ *Ibid*, s 17(2)(d).

⁹⁸ *General*, O Reg 242/08 [**Compendium, Tab 33**].

⁹⁹ *Ibid*, ss 22.1(1), (2) & (3). Although this exemption was previously set to expire on July 1, 2018, the MNRF extended the expiry date for an additional two years.

¹⁰⁰ *Ibid*, s 23.10. The Regulation also requires the proponent to comply with a number of detailed administrative requirements that have been omitted from the description above because they do not impact our legal analysis.

against damaging or destroying the habitat of threatened and endangered species does not provide effective protection for the Brightsand and Churchill ranges.

In addition to the prohibition against damaging or destroying the habitat of listed species, the *ESA* requires that certain steps be taken to assist in the recovery of species listed as threatened or endangered. The first step is the preparation of a recovery strategy.¹⁰¹ The MNRF's recovery strategy for boreal caribou was published in July 2008. The recovery strategy identifies the protection of caribou ranges as a key objective¹⁰² and recommends a number of methods for achieving that objective, including landscape-level habitat management.¹⁰³ However, it does not include a prohibition on the destruction of critical habitat. Moreover, the recovery strategy is non-binding – it is prepared merely as “advice to the responsible jurisdictions and the many different constituencies that may be involved in recovering the species.”¹⁰⁴

The MNRF has also published a “response statement” for boreal caribou, as required by s 11(8) of the *ESA*. The response statement, entitled “Ontario’s Woodland Caribou Conservation Plan,” outlines a number of actions MNRF purportedly intends to take in response to the recommendations made in the recovery strategy. These include adopting a “range management approach” to boreal caribou recovery, carrying out regular population monitoring and cumulative impact assessments, and developing policies to manage densities of roads and other linear features in caribou ranges.¹⁰⁵ But again, the response statement does not contain a prohibition on habitat destruction. Moreover, the Minister is only obliged to implement the actions in the response statement that “in the opinion of the Minister, are feasible and are within the responsibilities of the Minister.”¹⁰⁶

Finally, the MNRF has prepared a “Range Management Policy in Support of Woodland Caribou Conservation and Recovery,” which is intended to form the basis for the “range management approach” to recovery outlined in the response statement.¹⁰⁷ The Range Management Policy states that its objective is “To maintain or move towards a sufficient range condition in all caribou ranges in Ontario,”¹⁰⁸ and outlines a number of methods of achieving that objective. However, it does not prohibit the destruction of habitat; rather, it says that proposed activities

¹⁰¹ *ESA*, *supra* note 94, s 11(1).

¹⁰² Ontario Woodland Caribou Recovery Team, *Recovery Strategy for the Woodland Caribou (Rangifer tarandus caribou) (Forest-Dwelling, Boreal Population) in Ontario* (Peterborough, ON: Ministry of Natural Resources, 2008) at 4 [**Compendium, Tab 34**].

¹⁰³ *Ibid*, at 8.

¹⁰⁴ *Ibid*, at iii.

¹⁰⁵ Ontario Ministry of Natural Resources, *Ontario’s Woodland Caribou Conservation Plan* (Peterborough, ON: Ministry of Natural Resources, 2009) at 8, 13 [**Compendium, Tab 35**].

¹⁰⁶ *ESA*, *supra* note 72, s 11(9).

¹⁰⁷ Ontario Ministry of Natural Resources, *Range Management Policy in Support of Woodland Caribou Conservation and Recovery* (Peterborough, ON: Ministry of Natural Resources, 2014) at 1 [**Compendium, Tab 36**].

¹⁰⁸ *Ibid*, at 4.

will be assessed for compliance with the *ESA*'s core prohibitions,¹⁰⁹ which we have already determined do not provide effective protection for boreal caribou critical habitat.

Consequently, neither the *ESA* nor its subordinate legislation or policies provide effective protection for the Brightsand or Churchill ranges.

9.3 *Environmental Assessment Act*, RSO 1990, c E.18

The *Environmental Assessment Act* (*EAA*) and its associated regulations set out the scheme according to which environmental assessments are conducted at the provincial level in Ontario. Undertakings required to undergo an environmental assessment pursuant to the process outlined in the *EAA* cannot proceed until the Minister of the Environment and Climate Change provides his approval under s 9.¹¹⁰

The *EAA* may provide effective protection for caribou critical habitat, but only in very limited circumstances. The limited nature of the protection offered by the *EAA* is a result of two main factors: (1) the heavily restricted scope of the *EAA*'s application; and (2) the discretionary nature of any potential prohibition on the destruction of caribou critical habitat. These two factors will be examined in turn.

To begin with, the *EAA*'s application is largely restricted to the following two categories, as listed in s 3:

- (a) enterprises or activities or proposals, plans or programs in respect of enterprises or activities by or on behalf of Her Majesty in right of Ontario or by a public body or public bodies or by a municipality or municipalities; and
- (b) major commercial or business enterprises or activities or proposals, plans or programs in respect of major commercial or business enterprises or activities of a person or persons, other than a person referred to in clause (a), designated by the regulations.

With respect to s 3(a), the regulations define a number of bodies as “public bodies” for the purposes of the *EAA*. These include, for example, development corporations, the Ontario Energy Board, the Toronto Area Transit Operating Authority, and the Ontario Infrastructure and Lands Corporation.¹¹¹ However, the regulations also exempt numerous bodies and projects from the *EAA*'s application. For example, an undertaking by a municipality is exempt from the Act where it has an estimated cost of \$3.5 million or less,¹¹² or it is a road or a water crossing required to provide access to a renewable energy generation or testing facility.¹¹³ In addition, a number of provincial ministries are exempt from the *EAA*'s application, including the Minister of

¹⁰⁹ *Ibid*, at 8.

¹¹⁰ *Environmental Assessment Act*, RSO 1990, c E.18, s 5(3) [*EAA*] [**Compendium, Tab 37**]. The requirement to undergo an environmental assessment does not apply to undertakings with respect to which an approved class environmental assessment applies – see s 13.

¹¹¹ *General*, RRO 1990, Reg 334, s 3 [**Compendium, Tab 38**].

¹¹² *Ibid*, s 5(2)(a).

¹¹³ *Ibid*, s 5(2)(e).

Community and Social Services, the Minister of Community Safety and Correctional Services, the Minister of Labour, and the Minister of Housing.¹¹⁴

The only other significant category to which the *EAA* applies are undertakings designated by the regulations as “major commercial or business enterprises”. Generally speaking, undertakings designated as falling into this category are limited to certain electricity, transit, waste management, and private sector land development projects.¹¹⁵ In addition, a number of individual projects are specifically designated by regulation as “major commercial or business enterprises”.¹¹⁶ Even among the more general categories (being electricity, transit, waste management, and private sector land development) designated as “major commercial or business enterprises” to which the *EAA* applies, this designation is strictly limited and there are numerous exemptions to the *EAA*’s application.¹¹⁷

Importantly, even with respect to the undertakings to which the *EAA* applies, the Act does not provide for a cumulative effects assessment of any kind.

As a result of the *EAA*’s limited application, which does not extend to all or even most of the activities that may destroy caribou critical habitat, the *EAA* cannot effectively prohibit the destruction of critical habitat.

In addition, even if comprehensive environmental assessment coverage is achieved by a combination of the *EAA* and other environmental assessment statutes (such as the *Canadian Environmental Assessment Act, 2012*), the *EAA* does not effectively protect caribou critical habitat from the impacts of the undertakings it regulates.

Proponents of undertakings required to undergo an individual environmental assessment under the *EAA* must prepare an environmental assessment and submit it to the Minister for approval.¹¹⁸ The environmental assessment must include a description of the potential environmental impacts of the undertaking, and must outline measures that could prevent or mitigate those impacts.¹¹⁹ However, there is no requirement that the Minister reject proposed undertakings that may destroy caribou critical habitat. In fact, the Minister has full discretion to approve such

¹¹⁴ *Ibid*, s 6(1). See also numerous exemptions listed in the following provisions: ss 5(1) & (2), 6, 7.1, 7.2, 8, 9, 11, 11.1, 12, 13, 15, 15.0.1, 15.0.2.

¹¹⁵ See the following regulations: *Designation and Exemption – Private Sector Developers*, O Reg 345/93 [*Private Sector Developers*] [**Compendium, Tab 39**]; *Electricity Projects*, O Reg 116/01 [**Compendium, Tab 40**]; *Transit Projects and Metrolinx Undertakings*, O Reg 231/08 [*Transit Projects*] [**Compendium, Tab 41**]; and *Waste Management Projects*, O Reg 101/07 [**Compendium, Tab 42**].

¹¹⁶ See, for example, *Designation – Recycling Specialties Inc Landfill Site*, O Reg 4/03 [**Compendium, Tab 43**]; *Designation – Kirkland Lake Waste Disposal Site*, O Reg 491/00 [**Compendium, Tab 44**]; and *Designation – Browning-Ferris Industries Limited*, O Reg 222/97 [**Compendium, Tab 45**].

¹¹⁷ See *Private Sector Developers*, *supra* note 115; *Electricity Projects*, *supra* note 115; *Transit Projects*, *supra* note 115; and *Waste Management Projects*, *supra* note 115.

¹¹⁸ *EAA*, *supra* note 110, ss 6.1 & 6.2

¹¹⁹ *Ibid*, s 6.1(2)(c).

undertakings.¹²⁰ This discretionary authority applies with equal force in the context of class environmental assessments under Part II.1 of the *EAA*.¹²¹

The *EAA* does authorize the Minister to approve an undertaking or a class environmental assessment subject to conditions.¹²² In particular, the Minister may specify actions that the proponent must take in order to prevent, mitigate, or remedy the environmental impacts of the undertaking.¹²³ In theory, this could include a prohibition on the destruction of caribou critical habitat. However, the imposition of a prohibition of that nature would be entirely at the Minister's discretion – there is nothing in the *EAA* or its regulations that requires the Minister to prohibit the destruction of caribou critical habitat as a condition of all approvals. Nor does this appear to be done as a matter of course. For instance, none of the approved class environmental assessments listed on the Ministry's website includes a condition prohibiting the destruction of caribou critical habitat.¹²⁴

The *EAA* therefore does not include mandatory prohibitions preventing the destruction of caribou critical habitat. It cannot effectively protect the Brightsand and Churchill ranges.

9.4 *Provincial Parks and Conservation Reserves Act, 2006, SO 2006, c 12*

Ontario's *Provincial Parks and Conservation Reserves Act (PPCRA)* provides for the permanent protection of a system of provincial parks and conservation reserves in the province. Specifically, it authorizes the Lieutenant Governor in Council (LGiC) to "by order set apart as a provincial park or a conservation reserve any area in Ontario".¹²⁵ Each designated provincial park and conservation reserve is managed pursuant to a "management direction" laying out site specific management policies.¹²⁶

Generally speaking, an area designated as a provincial park or conservation reserve under the *PPCRA* is protected from a number of destructive activities. Specifically, the Act prohibits carrying out the following activities in a provincial park or conservation reserve: (1) commercial timber harvest; (2) generation of electricity; (3) prospecting, staking mining claims, developing mineral interests, or working mines; (4) extracting aggregate, topsoil, or peat; and (5) other industrial uses.¹²⁷ However, these prohibitions are subject to a number of exemptions. For instance, oil and gas wells located in a provincial park or conservation reserve either before the *PPCRA* was proclaimed in force or before the area was designated as a provincial park or

¹²⁰ *Ibid*, s 9(1).

¹²¹ *Ibid*, ss 9(1) & 15.

¹²² *Ibid*, ss 9(1)(b) & 15.

¹²³ *Ibid*, ss 9(1)(b)(ii) & 15.

¹²⁴ See generally Ontario Ministry of the Environment and Climate Change, *Class Environmental Assessments: Approved Class EA Information*, online: <<https://www.ontario.ca/page/class-environmental-assessments-approved-class-ea-information>>.

¹²⁵ *Provincial Parks and Conservation Reserves Act, 2006, SO 2006, c 12, s 9(1) [PPCRA]*
[Compendium, Tab 46].

¹²⁶ *Ibid*, ss 10(1) & (3).

¹²⁷ *Ibid*, s 16(1).

conservation reserve are permitted to continue operating.¹²⁸ In addition, facilities for the generation of electricity may be developed in these areas for certain purposes, such as for use in communities not connect to the IESO-controlled grid.¹²⁹

The *PPCRA* also lists a number of activities that are prohibited in provincial parks or conservation reserves except if undertaken in accordance with the terms and conditions of a work permit issued under the Act. These include the following: (1) the construction, expansion or placement of any building, structure, or thing; (2) the construction of any trail or road; (3) the clearing of any land; (4) the dredging or filling of any shore lands; or (5) any activity permitted under s 17, 18, 19 or 20 (including the exemptions to the prohibitions listed in the previous paragraph) that causes, results or is expected to result in a major disruption or impairment of the ecological integrity of a provincial park or conservation reserve.¹³⁰

Although these prohibitions may arguably prohibit the destruction of critical habitat as a result of certain industrial activities, they do not cover the full scope of activities that are destructive of critical habitat. Further, they are subject to broader exceptions than *SARA* provides. Pursuant to O Reg 345/07, work permits shall be issued unless the work for which the permit is required is contrary to law, is inconsistent with either the applicable management direction for a provincial park or conservation reserve or a policy, procedure or directive of the MNRF, or is likely to create a threat to the environment, public safety, or a natural resource.¹³¹

These exceptions are quite broad given the varying nature of management directions (as will be reviewed below). Further, it is unclear what would constitute a “threat” to the environment pursuant to this Regulation. Given that the *PPCRA* allows work permits to be issued for activities that cause “a major disruption or impairment” of ecological integrity, it would appear that the threshold to constitute an impermissible “threat” must be quite high – logically speaking, it would have to threaten the environment *more* than a “major disruption or impairment.” This is certainly a lower standard than the exemption thresholds in *SARA*.

A number of additional activities are permitted in provincial parks and conservation reserves that may damage or destroy caribou critical habitat. For example, s 14 of the *PPCRA* allows the Minister of Natural Resources and Forestry to extend existing private non-commercial leases, land use permits, and licenses of occupation in provincial parks and conservation reserves,¹³² and to issue new leases, permits, and licenses in certain circumstances.¹³³ Pursuant to s 20(1), the Minister has the discretion to approve resource access roads and trails for non-provincial park and conservation reserve uses in provincial parks and conservation reserves, subject only to the conditions that the roads or trail must be required for access to existing mining sites, minerals, or Crown timber and must be in accordance with Ministry policies.¹³⁴ The Minister is also

¹²⁸ *Ibid*, s 18(1).

¹²⁹ *Ibid*, s 19(2).

¹³⁰ *Ibid*, s 22(1).

¹³¹ *Work Permits*, O Reg 345/07, s 1(1) [**Compendium, Tab 47**].

¹³² *PPCRA*, s 14(2).

¹³³ *Ibid*, s 14(2.1).

¹³⁴ *Ibid*, s 20(1).

authorized to approve utility corridors in provincial parks and conservation reserves, subject only to the “policies of the Ministry,” and to approve expansions or improvements of resource access roads, trails, or utility corridors.¹³⁵

As this analysis illustrates, areas designated as provincial parks or conservation reserves under the *PPCRA* do not automatically receive effective protection for caribou critical habitat. However, these areas *may* receive effective protection, depending on the contents of the management direction applicable to the individual park or reserve. As noted, the majority of the activities permitted in provincial parks and conservation reserves that may damage or destroy caribou critical habitat can only be authorized if they are consistent with the applicable management direction (assuming that management directions constitute “policies of the Ministry” for the purposes of ss 14 and 20). If management direction contains a mandatory prohibition on the destruction of caribou habitat, the *PPCRA* may then provide effective protection for caribou critical habitat in that particular park or reserve.

A few of the conservation reserves that overlap with the Churchill range may provide effective protection for caribou critical habitat in their portion of the range.¹³⁶ For example, both the Brokenmouth River and Harth Lake Conservation Reserve management statements prohibit development that “would alter or disturb this site”.¹³⁷ However, the majority of conservation reserves and provincial parks in the Churchill range either explicitly permit certain destructive activities or fail to explicitly prohibit them.¹³⁸ For instance, the Gull River Provincial Park management statement explicitly provides for the development of new access zones, car campsites, and roads within the park.¹³⁹ In addition, the St Raphael Provincial Park management statement notes that significant development exists and will be maintained in the park, including a five star resort and airstrip, a tourist main base lodge, six tourist outpost camps, and two roads.¹⁴⁰ At the time the management statement was drafted there were also plans to develop up

¹³⁵ *Ibid*, ss 20(2) & (3).

¹³⁶ See Ministry of Natural Resources, *Brokenmouth River Conservation Reserve Management Statement* (Red Lake, ON: Queen’s Printer for Ontario, 2003) [*Brokenmouth River MS*] [**Compendium, Tab 48**]; Ministry of Natural Resources, *Harth Lake Conservation Reserve Management Statement* (Red Lake, ON: Queen’s Printer for Ontario, 2001) [*Harth Lake MS*] [**Compendium, Tab 49**]; Ministry of Natural Resources, *Lac Seul Islands Conservation Reserve Management Statement* (Sioux Lookout, ON: Queen’s Printer for Ontario, 2005) [**Compendium, Tab 50**].

¹³⁷ *Brokenmouth River MS*, *supra* note 136, at 6; *Harth Lake MS*, *supra* note 136, at 4.

¹³⁸ See Ministry of Natural Resources, *Gull River Provincial Park Management Statement* (Thunder Bay, ON: Queen’s Printer for Ontario, 2003) [*Gull River MS*] [**Compendium, Tab 51**]; Ministry of Natural Resources, *St Raphael Provincial Park Management Statement* (Sioux Lookout, ON: Queen’s Printer for Ontario, 2001) [*St Raphael MS*] [**Compendium, Tab 52**]; Ministry of Natural Resources, *Whitemud Conservation Reserve Management Statement* (Red Lake, ON: Queen’s Printer for Ontario, 2001) [**Compendium, Tab 53**]; Ministry of Natural Resources, *Windigo Point Provincial Nature Reserve Management Statement* (Sioux Lookout, ON: Queen’s Printer for Ontario, 1989) [**Compendium, Tab 54**].

¹³⁹ *Gull River MS*, *supra* note 138 at 8.

¹⁴⁰ *St Raphael MS*, *supra* note 138 at 7-8.

to six new road crossings of the park for the purposes of timber extraction in an adjacent Management Area.¹⁴¹

Likewise, a discrete number of conservation reserves that overlap in whole or in part with the Brightsand range may provide effective protection for caribou critical habitat.¹⁴² For instance, the Pantagrue Creek Provincial Nature Reserve Management Statement prohibits all uses with the exception of trapping and wildlife viewing.¹⁴³ Likewise, the Willow Lake Conservation Reserve Management Statement prohibits all development “including campsites or anything that would disturb the forest including its understory” and specifies that no access will be permitted into the area except by foot.¹⁴⁴

However, the majority of the management directions for provincial parks and conservation reserves in the Brightsand range do not contain mandatory prohibitions on the destruction of habitat. In fact, many explicitly provide for destructive activities to take place.¹⁴⁵ For instance, the Albany River Provincial Park Management Statement authorizes the construction of a road and provides for the development of 11 commercial outpost camp sites.¹⁴⁶ In addition, the Obonga-Ottertooth Provincial Park Management Statement notes the possibility of developing new access zones, car campsites, roads, and tourism facilities in the park.¹⁴⁷

Even if all of the existing provincial parks and conservation reserves that overlap in whole or in part with the Brightsand and Churchill range did provide effective protection for caribou critical

¹⁴¹ *Ibid*, at 8.

¹⁴² See Ministry of Natural Resources, *Pantagrue Creek Provincial Nature Reserve Interim Management Statement* (Nipigon, ON: Queen’s Printer for Ontario, 1991) [*Pantagrue Creek MS*] [**Compendium, Tab 55**]; Ministry of Natural Resources, *Upper English River Conservation Reserve Management Statement* (Dryden, ON: Queen’s Printer for Ontario, 2003) [**Compendium, Tab 56**]; Ministry of Natural Resources, *Willow Lake Conservation Reserve Statement of Conservation Interest* (Dryden, ON: Queen’s Printer for Ontario, 1998) [*Willow Lake MS*] [**Compendium, Tab 57**].

¹⁴³ *Pantagrue Creek MS*, *supra* note 142 at 2 & Appendix 1.

¹⁴⁴ *Willow Lake MS*, *supra* note 142 at 4.

¹⁴⁵ See Ministry of Natural Resources, *Albany River Provincial Park Management Statement* (Moosonee, ON: Queen’s Printer for Ontario, 1985) [*Albany River MS*] [**Compendium, Tab 58**]; Ministry of Natural Resources, *Brightsand River Provincial Park Management Plan* (Ignace, ON: Queen’s Printer for Ontario, 1993) [**Compendium, Tab 59**]; Ministry of Natural Resources, *Garden-Pakashkan Conservation Reserve Management Statement* (Thunder Bay, ON: Queen’s Printer for Ontario, 2003) [**Compendium, Tab 60**]; *Gull River, MS*, *supra* note 189; Ministry of Natural Resources, *Kaiashk Provincial Nature Reserve Interim Management Statement* (Thunder Bay, ON: Queen’s Printer for Ontario, 1991) [**Compendium, Tab 61**]; Ministry of Natural Resources, *Kopka River Provincial Park Interim Management Statement* (Thunder Bay, ON: Queen’s Printer for Ontario, 1991) [**Compendium, Tab 62**]; Ministry of Natural Resources, *Obonga-Ottertooth Provincial Park Management Statement* (Thunder Bay, ON: Queen’s Printer for Ontario, 2001) [*Obonga-Ottertooth MS*] [**Compendium, Tab 63**]; Ministry of Natural Resources, *Ottertooth Conservation Reserve Management Statement* (Thunder Bay, ON: Queen’s Printer for Ontario, 2003) [**Compendium, Tab 64**]; Ministry of Natural Resources, *Wabakimi Provincial Park Management Statement* (Thunder Bay, ON: Queen’s Printer for Ontario, 1999) [**Compendium, Tab 65**].

¹⁴⁶ *Albany River MS*, *supra* note 145 at 5, 11.

¹⁴⁷ *Obonga-Ottertooth MS*, *supra* note 145 at 7-8.

habitat, they would come nowhere close to protecting the stipulated minimum 65% of caribou habitat in either range. In the Brightsand range, parks and reserves cover only 36.43% of the range, and in the Churchill range the number sits at 6.10%. The *PPCRA* therefore does not provide effective protection for the Brightsand and Churchill caribou ranges.

9.5 *Planning Act*, RSO 1990, c P 13, *Places to Grow Act*, 2005, SO 2005, c 13 & relevant regulations and policies

The *Planning Act*, *Places to Grow Act*, 2005, and related regulations and policies do not effectively protect caribou habitat in the Brightsand and Churchill ranges; to the extent that they apply within those ranges, they merely duplicate the inadequate protection offered by other laws.

Under the *Places to Grow Act*, 2005, the Minister of Infrastructure must prepare a growth plan for Cabinet-designated growth plan areas.¹⁴⁸ Planning decisions must conform with growth plans issued under the *Places to Grow Act*, 2005.¹⁴⁹

The *Growth Plan for Northern Ontario, 2011 (Growth Plan)* applies within the Churchill and Brightsand ranges.¹⁵⁰ However, while the Growth Plan acknowledges the need to balance development with environmental health,¹⁵¹ it contains no mandatory prohibitions against destroying caribou or other species-at-risk habitat. Therefore, the Growth Plan does not effectively protect caribou critical habitat in the Brightsand and Churchill ranges.

The *Planning Act* creates basic rules for land use planning and control in Ontario. It seeks to “promote sustainable economic development in a healthy natural environment” and recognizes the protection of the environment and ecological systems as a matter of provincial interest.¹⁵² The *Planning Act* typically applies to lands within municipalities or provincially designated planning areas; it “does not generally apply to Crown lands.”¹⁵³ Most of the land within the

¹⁴⁸ *Places to Grow Act*, 2005, SO 2005, c 13, ss 3, 4 [Compendium, Tab 66].

¹⁴⁹ *Planning Act*, RSO 1990, c P.13, ss 1(1), 3(5)(b) [Compendium, Tab 67]; *Places to Grow Act*, *supra*, s 14(1). The requirement that decisions “conform with” a provincial plan is more onerous than the requirement that decisions be “consistent with” a policy statement: *1541179 Ontario Ltd v Waterloo (Region)*, [2012] OMBD No 52 at para 9 [Compendium, Tab 68].

¹⁵⁰ Ministry of Municipal Affairs and Housing, *Provincial Policy Statement under the Planning Act*, online: <<http://www.mah.gov.on.ca/AssetFactory.aspx?did=10463>> [PPS] [Compendium, Tab 69]; Ministry of Infrastructure & Ministry of Northern Development, Mines and Forestry, *Growth Plan for Northern Ontario 2011*, online: <<https://www.placestogrow.ca/images/pdfs/GPNO-final.pdf>> [Compendium, Tab 70]; *Growth Plan Areas*, O Reg 416/05 [Compendium, Tab 71] – although the Growth Plan does not apply to lands within First Nations reserves.

¹⁵¹ *Growth Plan for Northern Ontario 2011*, *supra*, chapter 6.

¹⁵² *Planning Act*, *supra* note 149, s 1.1(a), s 2(a). Under s 2(a), the Minister and local planning bodies must “have regard to” the “protection of ecological systems, including natural areas, features and functions,” when exercising powers under the *Planning Act*.

¹⁵³ Crown Land Use Planning Atlas, online:

<<http://www.gisapplication.lrc.gov.on.ca/CLUPA/Index.html?site=CLUPA&viewer=CLUPA&locale=en-US>> [CLUPA]; Rodney Northey, “The Integration of Environmental and Planning Law: The New Era of Ontario Infrastructure” (2010) 21 J Env L & Prac 305 at 311 [Compendium, Tab 72].

Brightsand and Churchill ranges is Crown land.¹⁵⁴ Therefore, even if it offered stringent habitat protections, the *Planning Act* does not apply to sufficient land within these ranges to effectively protect caribou habitat. However, even if it applied more widely, the *Planning Act* does not offer stringent habitat protections for caribou.

Under the *Planning Act*, the Minister of Municipal Affairs and Housing generally establishes provincial planning policy. In light of that policy, planning authorities formalize local planning goals and policies through official plans, which are in turn implemented through by-laws.¹⁵⁵ In northern Ontario, local planning responsibility may be shared by the Minister, municipalities, planning boards and, on Crown lands, the MNRF.¹⁵⁶ We discuss the latter Ministry's role in managing Crown lands below under the *Public Lands Act*.

The Minister may, with Cabinet approval, issue policy statements on municipal planning matters of provincial interest.¹⁵⁷ Planning decisions must be consistent with any such policy statements, as must official plans and by-laws.¹⁵⁸

The *Provincial Policy Statement, 2014 (PPS)* is one such policy statement. The PPS includes a policy for protecting the habitat of endangered or threatened species:

Development and site alteration shall not be permitted in habitat of endangered species and threatened species, except in accordance with provincial and federal requirements.¹⁵⁹

Boreal caribou are listed as a threatened species under the *ESA* (as discussed in section 10.2 above).¹⁶⁰ Since there is no *ESA* regulation prescribing boreal caribou habitat, the policy applies to all areas on which the species depends, directly or indirectly, to carry on its life processes such

¹⁵⁴ CLUPA, *supra* note 153. There appear to be no planning areas within these ranges. The ranges cover parts of four MNRF territorial districts: Red Lake, Sioux Lookout, Dryden, and Thunder Bay. The Minister of Municipal Affairs and Housing has designated a planning area, and appointed the Lakehead Rural Planning Board to oversee it, in the Thunder Bay district, but only in parts that do not appear to overlap with either range: Ministry of Municipal Affairs and Housing, "Planning Act Approval Authority Chart" online: <<http://www.mah.gov.on.ca/Page15335.aspx#Planning>> [Compendium, Tab 73].

¹⁵⁵ *Planning Act*, *supra* note 149, ss 3, 34, and Part III.

¹⁵⁶ Ministry of Municipal Affairs & Ministry of Housing, "Northern Ontario", online: <<http://www.mah.gov.on.ca/Page1754.aspx>> [Compendium, Tab 74].

¹⁵⁷ *Planning Act*, *supra* note 149, s 3(1).

¹⁵⁸ *Ibid*, ss 3(5), 24(1) (by-laws must conform to OP); 26(1) (OP must be reviewed periodically and amended to conform to provincial plan and be consistent with policy statement); *Places to Grow Act*, *supra* note 148, ss 14(2), (4); *Niagara (Regional Municipality) v Ontario (Municipal Affairs and Housing)*, 63 OMBR 407 at para 7 [Compendium, Tab 75]; *Pine Ridge Building Corp v Toronto (City)*, [2015] OMB No 727 at para 11 [Compendium, Tab 76].

¹⁵⁹ PPS, *supra* note 150, policy 2.1.7.

¹⁶⁰ *Ibid*, s 6.0 "Definitions" *sub verbo* "threatened species"; *Species at Risk in Ontario List*, *supra* note 91, s 3, Sch 3, item 53.

as reproduction, rearing, migration or feeding, as approved by the MNRF – in other words, the general habitat described under the *ESA*.¹⁶¹

In those areas, the PPS prohibits the creation of a new lot, a change in land use, or construction of buildings and structures requiring approval under the *Planning Act*; it also prohibits activities that would change the landform and natural vegetative characteristics of a site, such as grading, excavation and the placement of fill.¹⁶² It does not prohibit any activities that create or maintain infrastructure, such as transportation corridors, under an environmental assessment process or works subject to the *Drainage Act*.¹⁶³

However, these prohibitions do not apply where the development or site alteration will take place “in accordance with provincial and federal requirements” under legislation and policies that aim to protect species at risk and their habitat.¹⁶⁴ As such, any protection offered by the PPS would merely duplicate that already offered under other provincial and federal legislation and policies. As we discuss, those laws and policies do not effectively protect caribou habitat in Ontario; therefore, neither does the PPS.

But the PPS only sets out minimum standards; planning authorities may implement more protective planning measures as long as these measures do not conflict with a PPS policy.¹⁶⁵ For instance, the *Planning Act* authorizes the council of a local municipality or a planning board created by the Minister to pass a zoning by-law prohibiting land use and construction in a significant wildlife habitat area.¹⁶⁶ The Minister can issue a zoning order for the same purposes.¹⁶⁷

Where a planning board passes a zoning by-law, the *Planning Act* prohibits a decision-maker from issuing any licence, permit approval or permission for land use or construction that contravenes the by-law. The same is true for ministerial zoning orders.¹⁶⁸

A zoning by-law or order could also protect habitat by narrowing the scope of an exemption under the *ESA* General Regulation. That regulation withdraws the protections offered by sections 9 and 10 of the *ESA* when a proponent and the Minister of Natural Resources and Forestry have

¹⁶¹ *PPS*, *supra* note 150, s 6.0 “Definitions” *sub verbo* “habitat”; *General Habitat Description*, *supra* note 93; The Ministry’s *Natural Heritage Reference Manual for Natural Heritage Policies of the Provincial Policy Statement, 2005* applies to similar habitat protection policies under the *Provincial Policy Statement, 2005* (online: <<https://dr6j45jk9xcmk.cloudfront.net/documents/3270/natural-heritage-reference-manual-for-natural.pdf>> at 47-55) [**Compendium, Tab 77**]. It confirms this intent at p 48.

¹⁶² *PPS*, *supra* note 150, definitions “development” and “site alteration”.

¹⁶³ *Ibid*, “development”.

¹⁶⁴ *Ibid*, “provincial and federal requirements”.

¹⁶⁵ *Ibid*, s 4.9.

¹⁶⁶ *Planning Act*, *supra* note 149, ss 34(1)3.2, 34(2), 19.1; *PPS*, *supra* note 150, definitions of “wildlife habitat” and “significant”.

¹⁶⁷ *Planning Act*, *supra* note 149, s 47(1)(a).

¹⁶⁸ *Ibid*, s 48.

entered into an agreement about a listed species for certain types of projects.¹⁶⁹ However, this exemption does not apply to development projects that are prohibited under a zoning by-law or order.¹⁷⁰

But the *Planning Act* does not mandate zoning by-laws or orders that prohibit the destruction of caribou critical habitat. Even if such a by-law or order were made, it could not prohibit pre-existing land uses.¹⁷¹

Moreover, the *Planning Act* creates opportunities to seek exceptions from zoning by-laws and orders that are far broader than those available under *SARA*. For example, any person or public body can seek to amend a zoning by-law or order to permit the extension or enlargement of an existing use or building, without consideration for protecting caribou critical habitat.¹⁷² A zoning by-law can be challenged for many reasons, including if it is inconsistent with a policy statement, like the PPS, fails to conform or conflicts with a provincial plan, like the Growth Plan, or fails to conform with an applicable official plan.¹⁷³ Similarly, the Minister, on his own initiative or at the request of any person or public body, can amend or revoke a ministerial zoning order for any reason.¹⁷⁴

Finally, although contravening a zoning by-law or a ministerial zoning order is an offence, the maximum penalties upon conviction are far less stringent than those available under *SARA*.¹⁷⁵ Upon conviction for a first offence, an individual or corporate director or officer is liable to a fine of up to \$25,000; the maximum fine for corporate first offenders is \$50,000.¹⁷⁶ The fines for subsequent convictions increase. Upon conviction, the court may prohibit the offender from continuing or repeating the offence.¹⁷⁷

Therefore, the *Planning Act*, *Places to Grow Act, 2005*, and related regulations and policies do not effectively protect caribou critical habitat in the Brightsand and Churchill ranges.

9.6 Mining Act, RSO 1990, c M 14

The *Mining Act* regulates mineral tenures, including claim staking, and mining activities from prospecting through exploration and development to mine closure and rehabilitation.

¹⁶⁹ *General, supra* note 98, s 23.

¹⁷⁰ *Ibid*, e.g., ss 23(1)(3), 23(1)(4), 23(1)(7).

¹⁷¹ *Planning Act, supra* note 149, s 34(9).

¹⁷² *Ibid*, s 34(10). Where a municipality/planning board has completed a comprehensive zoning bylaw review (repeal and replacement), there is generally a 2 year period where no one can seek an amendment: s 34(10.0.0.1), but this too can be altered by council/planning board: s 34(10.0.0.2).

¹⁷³ *Ibid*, ss 34(19), (19.0.1); the public can also request changes to ministerial zoning orders, but the Minister has more control over such requests: ss 47(1)(a), 47(8)-(16).

¹⁷⁴ *Ibid*, ss 47(8), (8.1), *Request to Amend or Revoke Minister's Zoning Orders*, O Reg 546/06

[Compendium, Tab 78].

¹⁷⁵ *Planning Act, supra* note 149, s 67(1); *SARA, supra* note 2, s 97(1.1).

¹⁷⁶ *Planning Act, supra* note 149, ss 67(1), (2).

¹⁷⁷ *Ibid*, s 67(3).

The *Mining Act* is fundamentally a resource development statute, not a habitat protection statute. Its purpose is “to encourage prospecting, registration of mining claims and exploration for the development of mineral resources, in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, including the duty to consult, and to minimize the impact of these activities on public health and safety and the environment.”¹⁷⁸

Despite this passing reference to the environment, the *Mining Act* does not provide effective protection to caribou critical habitat in the Brightsand and Churchill ranges. The *Mining Act* does not prohibit habitat destruction; on the contrary, it creates a regime for authorizing habitat destruction, including permitting provisions with lower thresholds than those under *SARA*.

- a) At best, the *Mining Act* duplicates existing protection against mineral tenures in critical habitat

Under the *Mining Act*, anyone holding a valid prospector’s licence can register a mining claim and prospect for minerals on any Crown lands, or other lands in which the Crown has reserved the minerals or mineral rights, that are open for prospecting.¹⁷⁹ Although prospecting can take place without a mining claim, exploration and development activities cannot: the holder of a mining claim has the exclusive right to explore for minerals within the claim.¹⁸⁰ A claim holder is, subject to the *Act*, entitled to access the claim lands to prospect, explore and, upon leasing the lands, develop the mineral resources.¹⁸¹

The *Mining Act* automatically prohibits mining claim registration (and, by extension, mineral exploration and development) on certain lands, including provincial parks and conservation reserves.¹⁸² Similarly, the *Act* prohibits claim registration on Far North lands designated, under a community-based land use plan, for a use inconsistent with mineral exploration and development.¹⁸³ However, this prohibition does not apply to pre-existing mining claims or pre-approved activities.¹⁸⁴

Where these prohibitions apply, the *Mining Act* merely duplicates the protection offered from mining under the *Provincial Parks and Conservation Reserves Act (PPCRA)* and the *Far North Act (FNA)*. The *Mining Act* does not, however, duplicate the protections these latter statutes may provide against other development activities, like forestry.

¹⁷⁸ *Mining Act*, RSO 1990, c M 14, s 2 [Compendium, Tab 79].

¹⁷⁹ *Ibid*, s 27. “Crown lands” exclude certain types of land held by the Crown, including where the lands have been set apart for a public purpose: s 1(1).

¹⁸⁰ *Ibid*, ss 27, 50(1).

¹⁸¹ *Ibid*, ss 50(2); Ontario Ministry of Energy, Northern Development and Mines, “Leases” online: <https://www.mndm.gov.on.ca/en/mines-and-minerals/mining-sequence/evaluation/advanced-exploration/leases> [Compendium, Tab 80].

¹⁸² *Ibid*, s 31.

¹⁸³ *Ibid*, s 30(g). This prohibition does not affect pre-existing claims or other forms of tenure: s 205.

¹⁸⁴ *Ibid*, s 205.

Like the *PPCRA*, the *Mining Act* makes it an offence to prospect, explore, occupy or work Crown lands or mining rights for minerals – or to attempt to do any of those things – in a way not permitted by the statute.¹⁸⁵ Both statutes provide for similar penalties upon conviction, though the *PPCRA* creates lower maximum penalties for first-time offenders and higher maximum penalties for repeat “commercial purpose” offenders.¹⁸⁶ However, both statutes fall short of the maximum penalties available for a conviction under *SARA*, particularly for corporate and repeat offenders.¹⁸⁷

Claim registration on certain other types of lands requires the Minister of Northern Development and Mines’ consent, but nothing in the *Mining Act* requires the Minister to withhold that consent to protect caribou habitat.¹⁸⁸ Similarly, the Minister can, but need not, withdraw lands from prospecting and claim registration.¹⁸⁹ The Ministry of Northern Development and Mines has developed a policy to guide its exercise of this power.¹⁹⁰ Although that policy suggests that the Ministry “should” withdraw lands under the *Mining Act* where required to protect “significant wildlife habitat,” the policy is not legally binding.¹⁹¹ As far as we are aware, the only lands within the Brightsand and Churchill ranges that have been withdrawn from mineral exploration activities fall within the boundaries of provincial parks and conservation reserves (as discussed under the *Provincial Parks and Conservation Reserves Act*, above).

b) Prospecting guidelines are not mandatory

The Ministry suggests, but does not require in legislation, that prospectors follow guidelines set out by the Prospectors and Developers Association of Canada.¹⁹² Those guidelines, which are

¹⁸⁵ *Mining Act*, *supra* note 178, ss 164(1)(a), (k); *PPCRA*, s 46(1)(a), (3). Both the *Mining Act* (s 31) and the *PPCRA* (s 16(1.3)) prohibit prospecting, registering/staking mining claims, developing mineral interests and working mines in provincial parks and conservation reserves.

¹⁸⁶ Under the *Mining Act*, the maximum penalty on conviction is a fine of up to \$100,000 or imprisonment for up to one year, or both: *Mining Act*, s 164(1). The *PPCRA* creates different maximum penalties for first-time and repeat offenders, and also punishes “commercial” offences. A first-time offender is subject to a fine of up to \$50,000 and/or up to one year in prison. Repeat offenders are also subject to up to one year in prison, but may be subject to an increased fine of up to \$100,000: *PPCRA*, s 52(1). If the offence was committed for commercial purposes, a first-time offender is subject to a fine of up to \$100,000 and/or up to two years in prison, while a repeat offender is subject to a maximum fine of up to \$200,000 and/or up to two years in prison: *PPCRA*, s 52(2).

¹⁸⁷ *SARA*, *supra* note 2, s 97.

¹⁸⁸ *Ibid*, s 29.

¹⁸⁹ *Ibid*, s 35(1).

¹⁹⁰ Ministry of Natural Resources, “Withdrawal and Reopening of Surface and/or Mining Rights –Section 35, Mining Act”, PL 3.03.03, online: <http://files.ontario.ca/environment-and-energy/crown-land/mnr_e000086.pdf> [Compendium, Tab 81].

¹⁹¹ *Ibid*, at 2.

¹⁹² Ministry of Northern Development and Mines, “Regulatory Requirements Outside of MNDM Affecting Mineral Exploration and Development Activities”, online: <https://www.mndm.gov.on.ca/sites/default/files/regulatory_requirements_outside_mndm.pdf> at 2 [Compendium, Tab 82]; Prospectors & Developers Association of Canada, *Excellence in Environmental Stewardship e-toolkit (EES) Version-01*, online: <<http://www.pdac.ca/pdf-viewer?doc=/docs/default->

not mandatory in any event, recognize the importance of preserving habitat. They also suggest the prospector consult with government and non-government interest groups on endangered and threatened species and whether special precautions are necessary.¹⁹³ But the guidelines do not prohibit habitat destruction; they only recommend practices to minimize habitat loss and to promote land reclamation when work is complete.¹⁹⁴

c) Regulatory requirements for exploration activities do not prohibit habitat destruction

In its Best Management Practices for Mineral Exploration and Development Activities and Woodland Caribou in Ontario, discussed below, Ontario recognizes that early exploration activities have the potential to destroy habitat. To engage in early exploration activities (i.e., exploration activities that are not governed under Part VII of the *Mining Act*),¹⁹⁵ a proponent must comply with certain minimum requirements.¹⁹⁶ To conduct more intrusive early exploration activities, the proponent must submit an exploration plan or obtain an exploration permit.¹⁹⁷

Early exploration activities under an exploration plan or an exploration permit must comply with certain minimum requirements, including meeting the Provincial Standards for Early Exploration.¹⁹⁸

However, none of these minimum requirements prohibits early exploration proponents from destroying caribou habitat. While the Provincial Standards for Early Exploration impose limited rehabilitation requirements, these focus largely on safety.

Although a Director of Exploration appointed under the *Mining Act* can impose additional terms and conditions in an exploration permit,¹⁹⁹ even additional terms and conditions prohibiting the destruction of caribou habitat would fall short of effective protection: the Director can issue an exploration permit without meeting the same pre-conditions found in section 73(3) of *SARA*.

d) Regulatory requirements for mine development and production do not prohibit habitat destruction

[source/priorities/e3-plus---toolkits---environmental-stewardship/environmental-stewardship-toolkit---full-document.pdf](#)> [Environmental Stewardship Guide] [Compendium, Tab 83].

¹⁹³ *Environmental Stewardship Guide*, *supra* at 118- 119.

¹⁹⁴ *Ibid*, at 119-120.

¹⁹⁵ *Exploration Plans and Exploration Permits*, O Reg 308/12, s 1(1) [Compendium, Tab 84].

¹⁹⁶ *Ibid*, s 2.

¹⁹⁷ *Mining Act*, *supra* note 178, ss 78.2(1), 78.3(1). Exploration activities that require a work permit under the *Public Lands Act* regulations (*Work Permit – Disruptive Mineral Exploration Activities*, O Reg 349/98 [Compendium, Tab 85]) are exempt, as are exploration activities conducted under a certified closure plan filed under the *Mining Act: Exploration Plans and Permits*, *supra* note 195, s 3. However, the *Disruptive Mineral Exploration Activities* regulation does not apply within the Brightsand or Churchill ranges due to its limited geographic scope of application.

¹⁹⁸ *Exploration Plans and Exploration permits*, *supra* note 195, ss 10, 17, Schedule 1; Ministry of Northern Development and Mines, “Provincial Standards for Early Exploration”, online: <https://www.mndm.gov.on.ca/sites/default/files/provincial_standards_for_early_exploration_en.pdf> [Compendium, Tab 86].

¹⁹⁹ *Mining Act*, *supra* note 178, s 78.3(3); *Exploration Plans and Exploration Permits*, *supra*, s 17(2).

To conduct advanced exploration work, such as drilling an exploratory shaft, or to proceed to mine development and production activities, a proponent must comply with the requirements of Part VII of the *Mining Act*.

Among other things, a proponent must have filed a certified closure plan with the Director and have met several other notice and consultation requirements.²⁰⁰ The proponent must comply with the closure plan.²⁰¹ The proponent must also take all reasonable steps to progressively rehabilitate an advanced exploration or mine site, even where there is no closure plan or closure has not yet started.²⁰²

However, neither of these requirements prohibit the destruction of caribou habitat. A closure plan must identify the pre-existing terrestrial animal life that the project may affect, any biological monitoring processes that will take place during the project activities, and the expected condition of that animal life community once the project is complete.²⁰³ But while rehabilitation work must meet a series of requirements under the Mine Rehabilitation Code of Ontario, none of those requirements prohibits habitat destruction.²⁰⁴

e) Non-binding Best Management Practices focus on minimizing impacts, not prohibiting habitat destruction

The MNR has published Best Management Practices for Mineral Exploration and Development Activities and Woodland Caribou in Ontario.²⁰⁵ This policy document, which is meant to guide proponent conduct throughout the mineral exploration and exploitation lifecycle, does not effectively protect caribou habitat in Ontario, as it is not legally binding.

The Best Management Practices, and the principles underlying them, largely focus on minimizing impacts on caribou and their habitat.²⁰⁶ They also include rehabilitation practices that are intended to “ensure the long-term habitat disturbance from conducting the activity is remediated.”²⁰⁷ But they do not prohibit the destruction of habitat, and therefore fall short of effective protection for caribou critical habitat in the Brightsand and Churchill ranges.

9.7 Aggregate Resources Act, RSO 1990, c A.8

The *Aggregate Resources Act (ARA)* regulates aggregate operations in Ontario. It applies to all aggregate and topsoil on Crown land, designated private land, and all land under water.²⁰⁸

²⁰⁰ *Mining Act*, *supra* note 178, ss 140(1), 141(1).

²⁰¹ *Ibid*, s 143(1).

²⁰² *Ibid*, s 139.1(1).

²⁰³ *Mine Development and Closure Under Part VII of the Act*, O Reg 240/00, Schedule 2, items 4(v), 10(iii), 11(v) [**Compendium, Tab 87**].

²⁰⁴ *Ibid*, s 4(1), Schedule 1.

²⁰⁵ Ministry of Natural Resources, *Best Management Practices for Mineral Exploration and Development Activities and Woodland Caribou in Ontario*, online: <http://files.ontario.ca/environment-and-energy/species-at-risk/mnr_sar_bmp_min_dev_car_en.pdf> [**Compendium, Tab 88**].

²⁰⁶ *Ibid*, at 5-6.

²⁰⁷ *Ibid*, at 5.

²⁰⁸ *Aggregate Resources Act*, RSO 1990, c A.8, s 5(1) [**Compendium, Tab 89**].

The *ARA* requires all proponents to apply for licences or permits to operate pits or quarries on land to which the Act applies.²⁰⁹ In most cases, the Minister of Natural Resources and Forestry has the discretion to deny an application on various grounds.²¹⁰ In considering whether a licence or a permit should be issued or refused, the Act requires the Minister to have regard to “the effect of the operation of the pit or quarry on the environment”, among other things.²¹¹ However, the *ARA* does not require the Minister to deny a licence or permit application where the pit or quarry in question would destroy caribou critical habitat. The Minister’s decision to issue a licence or permit remains discretionary, and the environmental impact is merely one criterion among many that the Minister must consider.

The *ARA* also authorizes the Minister to impose conditions on licences and permits granted under the Act.²¹² In theory, such conditions could include prohibitions on the destruction of caribou critical habitat. However, the imposition of conditions of that nature would be entirely at the Minister’s discretion, as exercised on project-by-project basis. This does not constitute a mandatory prohibition on the destruction of critical habitat.

9.8 *Public Lands Act, RSO 1990, c P 43*

The *Public Lands Act (PLA)* governs the management, sale, disposition and some uses of provincial Crown lands (**public lands**).²¹³ The *PLA* applies to much of the land within the Brightsand and Churchill ranges, but it does not apply to provincial parks and conservation reserves.²¹⁴

The *PLA* empowers the Minister of Natural Resources and Forestry to conduct land use planning for public lands. The *PLA* also empowers the LGiC and the Minister to control land use activities on public lands. While the *PLA* might empower the Minister to effectively protect caribou habitat in the Brightsand and Churchill ranges, the Minister has not done so.

a) Crown land use plans under the *PLA* could, but do not, protect caribou habitat

The Minister of Natural Resources and Forestry can designate public lands as planning units and can require the preparation of a land use plan for any such planning unit.²¹⁵ The Minister has designated almost all of the lands within the Brightsand and Churchill ranges as part of the

²⁰⁹ *Ibid*, ss 7(1), 23(1), 34(1).

²¹⁰ *Ibid*, ss 11(9), 26(b), 34(5)(c). The *ARA* does not currently allow the Minister to refuse an application for an aggregate permit under s 34. However, it does authorize the Minister to require an applicant for an aggregate permit to apply for a licence under s 7 instead, in which case the Minister would have the authority to refuse the licence application (see ss 11(9) & 12(1)).

²¹¹ *Ibid*, ss 12(1)(a), 26(b). The Minister is not required to consider environmental impacts in the context of applications for aggregate permits unless he exercises his discretion under s 34(5)(c) to direct the proponent to apply for a licence.

²¹² *Ibid*, ss 13(1), 30(1), 37(1).

²¹³ *Public Lands Act, RSO 1990, c P 43*, s 1, sub verbo “public lands” [*PLA*] [**Compendium, Tab 90**]; *PPCRA*, *supra* note 125, s 56.

²¹⁴ *PPCRA*, *supra*, s 56; *CLUPA*, *supra* note 153.

²¹⁵ *PLA*, *supra* note 213, ss 12(1), (2).

Ontario's Living Legacy Planning Area.²¹⁶ The small portions of the Brightsand range that fall within the Cat Lake – Slate Falls Community Land Use Plan do not form part of this planning area.²¹⁷

The Minister has approved a land use plan for the area: the Ontario's Living Legacy Land Use Strategy (LUS).²¹⁸ All activities on public lands within this area must be consistent with the LUS; the Minister can order persons to stop inconsistent activities.²¹⁹

The LUS defines different land use categories; in each category, different land use and management policies apply.²²⁰ The LUS designates most of the lands within the Brightsand and Churchill ranges as "general use areas"; it also designates one remote access Enhanced Management Area and provincial parks and conservation reserves.²²¹

The LUS sets out land use policies and permitted activities for each land use category, although some of these policies have been updated and replaced in the Guide for Crown Land Use Planning.²²² In general use areas, management occurs "in the context of maintaining ecological sustainability."²²³ The Minister can, but does not need to, permit any resource or recreational use in a general use area. However, designating an area as a general use area does not prohibit habitat destruction.

The same is true for the remote access Enhanced Management Area designation. In such areas, many resource development activities – including forestry, mining, aggregate extraction and hydroelectric development – can occur; the designation does not prohibit habitat destruction.²²⁴

b) Crown land management policies do not prohibit habitat destruction

The Ministry has developed several policies to guide land management decisions, including the Strategic Direction for Management of Ontario Crown Land.²²⁵ That policy identifies a healthy

²¹⁶ Ministry of Natural Resources and Forestry, "Guide for Crown Land Use Planning", online: <<https://www.ontario.ca/page/guide-crown-land-use-planning>>, Figure 1[Land Use Planning Guide] [Compendium, Tab 91]; Ministry of Natural Resources and Forestry, *Ontario's Living Legacy*, online: <<http://www.ontla.on.ca/library/repository/mon/2000/10281337.pdf>> [Living Legacy Plan] [Compendium, Tab 92].

²¹⁷ *PLA*, *supra* note 213, s 12(1).

²¹⁸ Land Use Planning Guide, *supra* note 216, Figure 1; Living Legacy Plan, *supra* note 216.

²¹⁹ *PLA*, *supra* note 213, s 12.3.

²²⁰ Living Legacy Plan, *supra* note 216, s 7.1

²²¹ CLUPA, *supra* note 153.

²²² Land Use Planning Guide, *supra* note 216. The Guide has been published pursuant to s 12.1(1) of the PLA, which empowers the Minister to establish land use planning policies and guidelines. All land use plans must be prepared and, where appropriate, amended in accordance with these policies and guidelines: *PLA*, *supra* note 213, ss 12.2(1), (3).

²²³ Land Use Planning Guide, *supra* note 216, s 16.6.

²²⁴ *Ibid*, s 16.5.3.

²²⁵ Ministry of Natural Resources, "Strategic Directions for Management of Ontario Crown Land", PL 1.01.01, online: <http://files.ontario.ca/environment-and-energy/crown-land/mnr_e000072.pdf> [Strategic Direction] [Compendium, Tab 93]; and see generally Ministry of Natural Resources, "Crown land management policies", online: <<https://www.ontario.ca/page/crown-land-management-policies>>.

natural environment and ecosystem integrity as “overriding priorities,” albeit in the sense that they are “essential corequisites to sustainable development and prosperity.”²²⁶ Promoting environmental protection is one objective of the Strategic Direction. To do so, the policy states that the Ministry must encourage land use practices that sustain and enhance ecosystems and protect sensitive land values.²²⁷ While this objective creates room to protect caribou habitat, it falls short of prohibiting habitat destruction. Moreover, this objective is balanced against others that may threaten caribou habitat, like supporting development.²²⁸ In any event, the policy is not legally binding.

The *PLA* provides several tools for managing public lands:

- The LGiC can, but need not, set aside public lands “for any purpose that will benefit research in, and the management, utilization and administration of, the public lands and forests.”²²⁹
- The Minister can designate certain lands as restricted areas within which development activities require a permit. The Minister cannot restrict development activities related to mining or mineral exploration.²³⁰
- The LGiC has enacted regulations prohibiting certain activities on public lands without a permit.

All of these tools create opportunities to protect caribou habitat; however, the existence of these tools does not automatically ensure effective protection for caribou habitat in the Brightsand and Churchill ranges.

For instance, the LGiC has enacted several regulations requiring proponents to secure work permits before conducting certain activities on public lands.²³¹ These work permit requirements are meant to “achieve effective stewardship of public land and to protect Crown interests from activities occurring on adjacent, privately owned shore lands.”²³² Without a work permit, no one can construct buildings, trails, roads, or similar infrastructure on public lands, nor can they do certain work on shore lands.²³³ However, this prohibition does not apply where the activity is authorized under the *Crown Forest Sustainability Act, 1994*, to trails constructed for mineral exploration or extraction purposes, to minor maintenance activities, or to activities on mining

²²⁶ *Strategic Direction*, *supra* at 5.

²²⁷ *Ibid*, at 6.

²²⁸ *Ibid*, at 8.

²²⁹ *PLA*, *supra* note 213, s 11(1).

²³⁰ *Ibid*, s 13(1).

²³¹ *Activities on Public Lands and Shore Lands – Work Permits and Exemptions*, O Reg 239/13 [*Public Lands Permits*] [**Compendium, Tab 94**]; *Work Permit – Disruptive Mineral Exploration Activities*, *supra* note 197 (geographically limited, doesn’t apply in these ranges); *Work Permits*, RRO 1990, Reg 975 [**Compendium, Tab 95**].

²³² Ministry of Natural Resources and Forestry, “Crown Land Management Policies: Public Lands Act work permits – Policy”, online: <<https://www.ontario.ca/page/crown-land-management-policies-public-lands-act-work-permits-policy>> at 1.1 [*Public Lands Act work permits policy*] [**Compendium, Tab 96**].

²³³ *Public Lands Permits*, *supra* note 231, s 2.

claims where the proponent has satisfied “permit by rule” obligations.²³⁴ Those obligations simply require giving notice to the Minister and meeting minimal setback requirements. Furthermore, the provision does not apply to federal or provincial Crown agencies or federally regulated railway companies.²³⁵

Where a person applies and pays for a work permit, the Ministry must issue it unless the work is unlawful, is inconsistent with or does not conform to land use plans or Ministry policies, or is likely to create a threat to public safety or a natural resource, include Crown lands and wildlife.²³⁶

The numerous exemptions to the work permit requirement prevent it from effectively protecting caribou habitat.

9.9 Wilderness Areas Act, RSO 1990, c W.8

The *Wilderness Areas Act* (WAA) permits the LGiC to set aside provincial Crown lands as wilderness areas. Wilderness areas are meant to preserve the lands in as close as possible to their natural state, although research and educational activities are still allowed. The purpose of creating a wilderness area can be to protect the flora and fauna, improve the area in light of its historical, aesthetic, scientific or recreational value, or another purpose set out in the regulations.²³⁷

The LGiC has not established any wilderness areas within the Churchill or Brightsand ranges.²³⁸ Therefore, the WAA does not currently provide effective protection for either range.

However, even if the LGiC established wilderness areas in the Churchill and Brightsand ranges, the WAA would not effectively protect caribou critical habitat in these areas.

First, the WAA contains no mandatory prohibitions that prevent the destruction of critical habitat. While the establishment of a wilderness area is supposed to preserve the area “as nearly as may be in its natural state,” the WAA does not automatically prohibit activities that may damage or destroy critical habitat. Instead, the Minister of Natural Resources and Forestry is tasked with the management and control of the area.²³⁹ The Minister has a discretionary power to take any

²³⁴ *Ibid*, ss 4, 5; See also *Public Lands Act work permits policy*, *supra* note 232, at 3.03.04 and procedure 3.03.04 e.g. 3.1.1.

²³⁵ *Public Lands Act work permits policy*, *supra* note 232 at 3.1.1.

²³⁶ *Work Permits*, *supra* note 231, s 2(1).

²³⁷ *Wilderness Areas Act*, RSO 1990, c W.8, s 1 [**Compendium, Tab 97**]. There is only one regulation under the *Wilderness Areas Act* and it does not identify any other purposes: *Wilderness Areas*, RRO 1990, Reg 1098 [“*Wilderness Areas Regulation*”] [**Compendium, Tab 98**].

²³⁸ *Wilderness Areas Regulation*, *supra*, s 1(1), schedules; see also the Crown Land Use Policy Atlas, online:

<<http://www.gisapplication.lrc.gov.on.ca/CLUPA/Index.html?site=CLUPA&viewer=CLUPA&locale=en-US>>.

²³⁹ *Wilderness Areas Act*, *supra* note 237, s 4.

measure he considers proper for the protection of wildlife in the area.²⁴⁰ The WAA provides no criteria to guide the exercise of that discretionary power.

Although the LGiC can make regulations prohibiting, regulating and controlling the use of and entry to wilderness area lands, no such regulations exist.²⁴¹ In theory, such regulations could contain mandatory prohibitions preventing critical habitat destruction in wilderness areas. However, such regulations could also be weakened by the LGiC, which can also make regulations establishing a permitting system to allow entry to wilderness areas. Again, no such regulations exist.

Critically, neither the Minister nor the LGiC can limit or affect the development or use of natural resources in any wilderness area larger than 260 hectares.²⁴² This constraint severely limits the potential utility of the wilderness area as a habitat protection mechanism.

Second, the offence provision under the WAA is considerably weaker than those under SARA. It provides for a maximum fine of \$500 for breaches of any regulation made under the WAA, or any permit term or condition issued under the regulations. Even if the WAA provided for more stringent penalties, the offence provision is not currently operational. As there are no permitting regulations and the only regulation merely identifies wilderness areas, there cannot, in practice, be any breaches of this regulation.

Finally, the Ministry of Natural Resources and Forestry has stated that it will not establish any more wilderness areas under the WAA and that Crown land use planning processes must not propose the establishment of new wilderness areas.²⁴³

9.10 *Far North Act, 2010, SO 2010, c 18*

The *Far North Act (FNA)* provides for community-based land use planning on provincial public lands in Ontario's Far North.²⁴⁴ Such planning aims, among other things, to maintain biological diversity and enable sustainable development.²⁴⁵ Under the *FNA*, a First Nation can work with the Minister of Natural Resources and Forestry to develop a community-based land use plan. Once finalized and approved by the Minister, that plan guides land use decisions in the area to which it applies.²⁴⁶

The vast majority of the Churchill and Brightsand ranges lie south of the Far North boundary, so the statute applies only in a very small periphery of each range.²⁴⁷ Because the *FNA* applies to so little of each range, it cannot effectively protect caribou habitat within them. However, even

²⁴⁰ *Ibid*, s 5.

²⁴¹ *Ibid*, s 6.

²⁴² *Ibid*, s 2.

²⁴³ Land Use Planning Guide, *supra* note 216, s 16.7.

²⁴⁴ *Far North Act, 2010, SO 2010, c 18, s 3 [FNA] [Compendium, Tab 99]*. The *FNA* does not apply to federal Crown lands, First Nations reserves, within municipalities, or other non-public lands.

²⁴⁵ *Ibid*, s 5.

²⁴⁶ *Ibid*, s 9.

²⁴⁷ *Ibid*, s 2; *Description of the Far North*, O Reg 21/11 [*Compendium, Tab 100*]; CLUPA, *supra* note 153.

where it does apply, the *FNA* does not provide effective protection to caribou habitat because the statute provides broader exceptions to default protections than does *SARA*.

The *FNA* applies to provincial public lands; it does not apply to federal Crown lands, First Nations reserves, municipalities and other non-public land.²⁴⁸ In areas where there is a community-based land use plan, the *FNA* generally prohibits land disposition and development decisions that are inconsistent with a community-based land use plan.²⁴⁹ These rules apply in much of the Far North portion of the Churchill range, in which the Cat Lake – Slate Falls Community Land Use Plan applies.²⁵⁰ Under that Land Use Plan, most of the Far North areas of the Churchill range are “designated protected areas.”²⁵¹ By default, the *FNA* prohibits many new resource-exploitation activities within such areas, including forestry, mining, and aggregate extraction.²⁵² However, other activities – like new energy transmission and communication corridors and road building – are only discouraged, not prohibited.²⁵³ Furthermore, despite these prohibitions, the LGiC can, after taking into account the objectives of the *FNA*, authorize any activity or land disposition decision if it is in the social and economic interests of Ontario.²⁵⁴ The prohibitions also do not apply to pre-existing mining claims or leases or approved *Mining Act* activities conducted thereon.²⁵⁵

Where the protected area prohibitions do apply, and the Minister believes an activity contravenes them or is otherwise inconsistent with the land use plan, he can – but does not need to – order the activity to stop.²⁵⁶ Failure to comply with such an order is an offence, but attracts only nominal penalties that fall far short of those available under *SARA*.²⁵⁷

Slightly different rules apply in areas where there is no land use plan, including the small Far North portion of the Brightsand range and parts of the Far North portion of the Churchill range. In these areas, the *FNA* prohibits many of the same resource-exploitation activities by default.²⁵⁸ Other activities, like mineral exploration, are not prohibited.²⁵⁹ In this case, too, the LGiC may

²⁴⁸ *FNA*, *supra* note 244, s 3.

²⁴⁹ *FNA*, *supra* note 244, s 14(1).

²⁵⁰ Cat Lake First Nation, Slate Falls First Nation & Ontario Ministry of Natural Resources, *Community Based Land Use Plan*, “Niigaan Bimaadiziwin” – A Future Life, online:

<https://dr6j45jk9xcmk.cloudfront.net/documents/2293/cat-lake-slate-falls-community-based-land-use-plan.pdf> [Land Use Plan] [Compendium, Tab 101].

²⁵¹ *FNA*, *supra* note 244, s 9(9)(c); *Land Use Plan*, *supra* at 22.

²⁵² *FNA*, *supra* note 244, s 14(2). Pre-existing mining claims, including full lifecycle activities, are exempt from this prohibition – even if the specific activity or stage of development has not yet begun: s 14(3).

²⁵³ *Land Use Plan*, *supra* note 250 at 29.

²⁵⁴ *FNA*, *supra* note 244, s 14(4), (5) –i.e., where Minister has unsuccessfully attempted to negotiate a change to the plan that would have authorized the activity or disposition.

²⁵⁵ *Ibid*, s 14(3).

²⁵⁶ *Ibid*, s 15(1).

²⁵⁷ *Ibid*, s 15(2), (3): the maximum fine for a contravention is \$10,000, with an additional \$1,000 for each day during which the offence continues.

²⁵⁸ *Ibid*, s 12(1).

²⁵⁹ E.g., *ibid*, s 12(5)(e).

nonetheless authorize any activity if it is in the social and economic interests of Ontario.²⁶⁰ Furthermore, the Minister can authorize some activities in certain circumstances.²⁶¹

9.11 *Fish and Wildlife Conservation Act, 1997, SO 1997, c 41*

The *Fish and Wildlife Conservation Act, 1997 (FWCA)* regulates hunting, trapping, fishing and similar activities in Ontario. Although the *FWCA* therefore largely concerns populations of animals²⁶² rather than their habitat, it does empower the Minister of Natural Resources and Forestry to acquire land for certain purposes.

Section 81 of the *FWCA* authorizes the Minister to acquire land “for the purpose of the conservation or management of wildlife or fish populations or the ecosystems of which those populations are a part.”²⁶³ The Minister may acquire such land under the *Ministry of Infrastructure Act, 2011*. That statute authorizes the Minister to acquire land by purchase, lease, or otherwise, including through expropriation.²⁶⁴ The Minister may also accept gifts of land and enter into binding agreements for those purposes.²⁶⁵

However, this land acquisition power adds little to the Minister’s capacity to effectively protect the Brightsand and Churchill ranges. Most of the lands within those ranges are already Crown lands; the Minister has no need to “acquire” them using this power.

Even if the Minister did exercise his discretion to acquire private lands under this provision, mere acquisition of the lands would not effectively protect them. Although the Minister may only acquire land for conservation purposes, the *FWCA* does not clearly define what that might mean. A contextual reading of the statute suggests “conservation purposes” falls short of a mandatory prohibition on habitat destruction. For instance, section 83(1)(b)(i) authorizes the Minister to establish and charge fees for the use of land acquired under section 81 “for the purpose of hunting, fishing, the propagation of wildlife or invertebrates, aquaculture, or the retention of wildlife, invertebrates or fish.” Thus, acquiring land under section 81 does not necessarily appear to require protecting that land from every sort of development.

The land acquisition power under section 81 of the *FWCA* does not contain a mandatory prohibition against destroying caribou critical habitat. It therefore falls short of the mandatory prohibitions contained in *SARA*.

²⁶⁰ *Ibid*, ss 12(2), (4), (6).

²⁶¹ *Ibid*, ss 12(2), (6).

²⁶² Including woodland caribou, which are defined as “big game” and listed as game mammals – although there is currently no open hunting season for caribou and, in any event, the *Endangered Species Act* would prevail if it provided more protection: *Fish and Wildlife Conservation Act, 1997, SO 1997, c 41*, ss 1(1), 2, Schedule 2 [*FWCA*] [**Compendium, Tab 102**] [which is set to be repealed on a date to be named by proclamation of the Lieutenant Governor in Council]; *Open Seasons – Wildlife*, O Reg 670/98, s 1, Table 10 [**Compendium, Tab 103**]

²⁶³ *FWCA*, *supra*, s 81(1).

²⁶⁴ *Ministry of Infrastructure Act, 2011*, SO 2011, c 9, Sch 27, ss 9, 10 [**Compendium, Tab 104**].

²⁶⁵ *FWCA*, *supra* note 262, ss 81(2), (3), (4).

9.12 *Conservation Authorities Act, RSO 1990, c C.27*

The *Conservation Authorities Act* (CAA) empowers two or more Ontario municipalities and/or First Nations bands designated under the *Indian Act* to request that the LGiC establish a conservation authority. Once such a request is made, the LGiC may establish such an authority, and designate both the municipalities that will participate in that authority and the area over which the authority has jurisdiction.²⁶⁶

There is currently no conservation authority with jurisdiction over any part of the Brightsand or Churchill range.²⁶⁷ The CAA therefore does not currently provide effective protection for either the Brightsand or the Churchill range. The following analysis merely looks at whether the CAA *could* provide effective protection for these ranges *if* a conservation authority were established with jurisdiction over all or part of both ranges.

Section 21 of the CAA authorizes conservation authorities to do a number of things, including the following:

- (1) acquire any land that it may require, whether by purchase, lease, expropriation, or otherwise;²⁶⁸
- (2) enter into agreements with owners of private lands to facilitate carrying out any project;²⁶⁹
- (3) use lands owned or controlled by the authority for purposes it considers proper, as long as those purposes are not inconsistent with its objects;²⁷⁰ and
- (4) use lands owned or controlled by the authority for park or other recreational purposes.²⁷¹

In theory, therefore, if an existing conservation authority had jurisdiction over all or part of the Brightsand or Churchill ranges, it could turn its area of jurisdiction into a park. However, nothing in the CAA explicitly or by necessary implication authorizes conservation authorities to impose mandatory prohibitions on the destruction of habitat.

Section 28.5(1) of the CAA empowers the LGiC to make regulations prohibiting “activities that have or may have an impact on the conservation, restoration, development or management of resources for the purposes of the regulation” in the areas of jurisdiction of conservation authorities. The CAA does not provide for any broad exemptions from such a regulation.

However, a regulation under s 28.5(1) would still fail the “effective protection” test as a result of the CAA’s penalty provisions. Although a violation of a regulation made under s 28.5(1) does constitute an offence, the penalty on conviction is lower than under SARA. In the case of an individual, the penalty is “a fine of not more than \$50,000, or [...] a term of imprisonment of not more than three months” with an additional fine of not more than \$10,000 for each day or part of

²⁶⁶ *Conservation Authorities Act*, RSO 1990, c C.27, ss 2(1) & 3(1) [CAA] [Compendium, Tab 105].

²⁶⁷ See Conservation Ontario, “Find a Conservation Authority,” online:

<<http://conservationontario.ca/conservation-authorities/find-a-conservation-authority/>>.

²⁶⁸ CAA, *supra* note 266, s 21(1)(c).

²⁶⁹ *Ibid*, s 21(1)(g).

²⁷⁰ *Ibid*, s 21(1)(l).

²⁷¹ *Ibid*, s 21(1)(m).

a day on which the offence continues.²⁷² And for a corporation, the penalty is “a fine of not more than \$1,000,000” with an additional fine of a maximum of \$200,000 for each day or part of a day on which the offence is continued.²⁷³ These penalties are clearly less stringent than those imposed for violations of s 61 of SARA, as described above.

The CAA therefore does not, and cannot, provide effective protection for the Brightsand and Churchill caribou ranges.

10.0 Federal Legislation

This section evaluates the relevant federal laws applicable to non-federal lands to determine if those laws provide effective protection of critical habitat in the Brightsand and Churchill ranges using the test and criteria identified in section 9.0 above.

10.1 *Species at Risk Act*, S.C. 2002, c 29

Subsection 61(4) of SARA provides that the minister must make a recommendation to specify habitat to be protected by subsection 61(1) if the minister is of the opinion that there are no provisions or measures under SARA or any other federal law that protect that particular portion of the critical habitat, including agreements under section 11 of SARA.

The Minister has not made a recommendation pursuant to subsection 61(4) with respect to critical habitat in the Brightsand and Churchill ranges. Therefore, no protection is currently offered pursuant to subsection 61(1). Further, there are no conservation agreements in place with respect to the critical habitat of the Brightsand and Churchill pursuant to section 11 of SARA.

Therefore, SARA does not directly offer any protection at present to critical habitat in the Brightsand and Churchill ranges on non-federal lands.

10.2 Recovery Strategy for the Woodland Caribou (*Rangifer tarandus caribou*), Boreal population in Canada

Pursuant to subsection 37(1) of SARA, the Minister is required to prepare a recovery strategy for listed extirpated, endangered or threatened species.²⁷⁴ Pursuant to subsection 42(2) and section 43 of SARA, the Minister was required to post the final recovery strategy for boreal caribou by September 2007.²⁷⁵ The final *Recovery Strategy* was posted on October 5, 2012, over five years later than required by law.

The *Recovery Strategy* identifies habitat alteration from both anthropogenic and natural sources, and increased predation as a result of habitat alteration, as the primary causes of population declines.²⁷⁶ The *Recovery Strategy* sets a recovery goal for boreal caribou to achieve self-sustaining local populations in all boreal caribou ranges, to the extent possible.²⁷⁷

The *Recovery Strategy* specifies that range-specific plans will be developed that would specify how the given range would be managed to maintain or attain a minimum of 65% undisturbed

²⁷² *Ibid*, s 30.5(2)(a).

²⁷³ *Ibid*, s 30.5(2)(b).

²⁷⁴ SARA, *supra* note 2, s 37(1).

²⁷⁵ *Ibid*, ss 42(2), 43.

²⁷⁶ *Recovery Strategy*, *supra* note 1, at vi.

²⁷⁷ *Ibid*.

habitat over time.²⁷⁸ Range plans were to be developed by the responsible jurisdiction within 3-5 years of the posting of the *Recovery Strategy*. As noted previously, no range plans have been released for the Brightsand and Churchill ranges (or for any other local populations in Ontario) as of the date of this petition.

Pursuant to section 47 of *SARA*, the Minister is required to prepare an action plan for boreal caribou. The *Recovery Strategy* required that the Minister complete an action plan for boreal caribou by December 31, 2015.²⁷⁹ The Minister released the final *Action Plan for the Woodland Caribou* on February 13, 2018, over two years after the required deadline. The *Action Plan* provides information on recovery measures that Environment Canada, the provinces and other agencies say they will take.²⁸⁰

The *Recovery Strategy* relies on range plans and action plans to implement the habitat and population recovery measures required to achieve self-sustaining local populations. As discussed, no range plans have been released for the Brightsand and Churchill local populations. The federal *Action Plan*, as discussed below, does not include any mandatory measures to protect caribou habitat on non-federal lands. Therefore, the *Recovery Strategy* does not contain any conditions or prohibitions that would protect critical habitat in the Brightsand and Churchill ranges.

10.3 *Action Plan for the Woodland Caribou (Rangifer tarandus caribou), Boreal Population in Canada – Federal Actions*

The final *Action Plan for the Woodland Caribou (Rangifer tarandus caribou), Boreal Population in Canada – Federal Actions (Action Plan)* was released on February 13, 2018.²⁸¹ The *Action Plan* concedes that it is a partial action plan that does not meet all of the requirements of *SARA*.²⁸² Fulfilment of the *SARA* requirements would require the filing and adoption of range plans which have not yet been completed.

The *Action Plan* sets out three Government of Canada actions to help achieve recovery of boreal caribou:

- knowledge to support recovery (including the creation of a National Boreal Caribou Knowledge Consortium);
- recovery and protection activities; and
- reporting on progress.²⁸³

The *Action Plan* provides that the Minister will, among other things:

- undertake protection assessments of critical habitat on non-federal lands;

²⁷⁸ *Ibid*, at 38.

²⁷⁹ *Ibid*, at 43.

²⁸⁰ *Ibid*.

²⁸¹ Environment and Climate Change Canada, *Action Plan for the Woodland Caribou (Rangifer tarandus caribou), Boreal Population, in Canada – Federal Actions, Species at Risk Act Action Plan Series* (Ottawa: Environment and Climate Change Canada, 2018) [**Compendium, Tab 106**].

²⁸² *Ibid*, at 1.

²⁸³ *Ibid*, at ii-vi.

- explore the use of *SARA* section 11 conservation agreements with provinces to codify provincial measures to protect and recover caribou after range plans are provided;
- report on steps taken to protect critical habitat by April 2018.²⁸⁴

Environment and Climate Change Canada (ECCC) released its *Progress Report on Unprotected Critical Habitat for the Woodland Caribou* in April 2018 (almost 5 years after the deadline imposed by s 63 of *SARA*). The report appears to conclude that Ontario's legal regime does not provide effective protection for boreal caribou on non-federal lands.²⁸⁵ However, it does not identify any current or future actions, besides the potential development of a section 11 conservation agreement that could impose a mandatory prohibition on the destruction of caribou critical habitat on non-federal lands in Ontario.²⁸⁶

The proposed use of section 11 conservation agreements, even if implemented, may not be effective or lawful. In order to provide effective protection, a section 11 conservation agreement would need to protect critical habitat in a manner equivalent to an order under section 61 of *SARA*. Further, it is not apparent how a section 11 conservation agreement could have an enforcement and penalty provision equivalent to the penalties under *SARA* without an amendment to *SARA*.

The *Action Plan* does not provide any legal conditions or prohibitions that protect critical habitat in the Brightsand or Churchill ranges.

10.4 Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52

The *Canadian Environmental Assessment Act, 2012 (CEAA 2012)* applies to certain designated projects and activities on non-federal lands that may destroy caribou critical habitat. An environmental assessment under *CEAA 2012* is only required for projects designated by regulation, including fossil-fuel fired or hydroelectric generating facilities with a production capacity of 200 MW or more, the creation of a dam or dyke that would create a reservoir of 1,500 hectares or more, the construction of a structure for the diversion of 10 million cubic metres or more of water per year, or the construction of an oil sands mine with a bitumen production capacity of 10,000 cubic metres per day or more.²⁸⁷

Environmental assessments under *CEAA 2012* are not required for all activities likely to harm caribou habitat on non-federal lands. For example, forestry operations do not require an environmental assessment under *CEAA 2012*.

Even where *CEAA 2012* may apply, ECCC has noted that *CEAA 2012* “incorporates several points of discretion such that it is not mandatory in its application.”²⁸⁸ First, the Canadian

²⁸⁴ *Ibid*, at 12-13, 20.

²⁸⁵ Environment and Climate Change Canada, *Progress Report on Unprotected Critical Habitat for the Woodland Caribou (Rangifer tarandus caribou), Boreal Population, In Canada, Species at Risk Act Critical Habitat Report Series* (Ottawa: Environment and Climate Change Canada, 2018) at 8 [Compendium, Tab 107].

²⁸⁶ *Ibid*, at 9-10.

²⁸⁷ *Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52*, at ss 6-7 [*CEAA 2012*] [Compendium, Tab 108]; *Regulations Designating Physical Activities*, SOR/2012-147, s 2(a), (c), 4, 6, 9 [Compendium, Tab 109].

²⁸⁸ WCF Assessment, *supra* note 52, at 7.

Environmental Assessment Agency can decide, after completing a screening, that no environmental assessment is required for a designated project.²⁸⁹ If an environmental assessment of a designated project is conducted, the responsible authority determines if the designated project is likely to cause significant adverse environmental effects.²⁹⁰ If a determination is made that a project is likely to cause significant adverse environmental effects, the GiC then has absolute discretion to determine whether those effects are “justified in the circumstances”.²⁹¹ As stated by ECCC, none of these decision points requires that decision makers ensure that “habitat will not be destroyed, or that survival and recovery of the species not be jeopardized as a result of proposed projects.”²⁹²

Even if conditions requiring the protection of critical habitat were included in a *CEAA 2012* decision statement, the maximum penalties for failing to comply with such conditions are lower under *CEAA 2012* than the penalties for failing to comply with subsection 61(1) of *SARA*.²⁹³ Further, *SARA* provides that directors or officers who directed, authorized, assented to, or acquiesced in the commission of the offence may be prosecuted and convicted.²⁹⁴ *CEAA 2012* does not contain a similar provision.

In summary, the environmental assessment process under *CEAA 2012* does not provide any mandatory prohibition against destruction of critical habitat in the Brightsand and Churchill ranges.

10.5 Bill C-69: *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*

CEAA 2012 will soon be replaced by the *Impact Assessment Act (IAA)*. We do not yet know what the final version of the *IAA* will look like, as Bill C-69 has not yet completed its journey through the House of Commons and the Senate. However, in its current iteration the *IAA* would not provide effective protection of critical habitat in the Brightsand and Churchill ranges.

Like *CEAA 2012*, the *IAA* will only apply to certain designated projects that may destroy caribou critical habitat on non-federal lands. The federal government has committed to reviewing and revising the current *Regulations Designating Physical Activities* to “ensure that projects with the greatest potential to cause effects in areas of federal jurisdiction are assessed.”²⁹⁵ However, it is not yet clear what the revised regulations will designate as projects requiring an impact assessment.

Even if the revised regulations do encompass all activities likely to destroy caribou critical habitat, the *IAA* as currently contemplated will not prohibit those activities from going ahead or

²⁸⁹ *CEAA 2012*, *supra* note 287, at s 10.

²⁹⁰ *Ibid*, at s 52(1).

²⁹¹ *Ibid*, at s 52(2).

²⁹² WCF Assessment, *supra* note 52, at 7.

²⁹³ *CEAA 2012*, *supra* note 287, ss 6, 99(1); *SARA*, *supra* note 2, ss 97(1), (1.1).

²⁹⁴ *SARA*, *supra* note 2, s 98.

²⁹⁵ Government of Canada, “Consultation Paper on Approach to Revising the Project List: A Proposed Impact Assessment System,” online:

<<https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/consultation-paper-approach-revising-project-list.pdf>> at 1 [Compendium, Tab 110].

impose mandatory conditions preventing them from destroying critical habitat. To begin with, the definition of “effects within federal jurisdiction” in s 2 of the proposed *IAA* does not encompass terrestrial species at risk on provincial lands. The only impacts on species at risk that would be included in an impact assessment under the *IAA* are those that fall within the following categories: effects on “fish and fish habitat, as defined in subsection 2(1) of the *Fisheries Act*”; effects on “aquatic species, as defined in subsection 2(1) of [SARA]”; effects on “migratory birds, as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*”; effects on “any other component of the environment that is set out in Schedule 3” (Schedule 3 is currently empty); effects on “federal lands”; effects on “a province other than the one where the physical activity or the designated project is being carried out”; or effects “outside Canada”.²⁹⁶

In addition, under the *IAA* the Impact Assessment Agency of Canada (**Agency**) will have the discretion to decide, after reviewing an initial description of the project, that no impact assessment is required.²⁹⁷ If an impact assessment is conducted and concludes that there will be adverse effects, the Minister or the GiC (depending on the scenario) will have the discretion to determine whether those effects are “in the public interest.”²⁹⁸ This discretion will be somewhat constrained by the requirement to consider a number of factors, including “the extent to which the adverse effects [...] are adverse” and the implementation of mitigation measures.²⁹⁹ However, there is no requirement that projects refrain from destroying caribou critical habitat.

If the Minister or the GiC determines that adverse effects are in the public interest, the *IAA* will require the decision maker to impose “any condition that he or she considers appropriate in relation to the adverse effects”.³⁰⁰ This authority could theoretically be used to impose conditions requiring the protection of critical habitat; however, there is nothing requiring the Minister or the GiC to impose conditions of that nature.

The *IAA* as currently drafted will therefore not impose a mandatory prohibition on the destruction of critical habitat in the Brightsand and Churchill ranges.

10.6 National Energy Board Act, RSC 1985, c N-7

The *National Energy Board Act (NEB Act)* regulates the construction and operation of interprovincial pipelines on non-federal lands that may overlap with caribou critical habitat. Subsection 52(3) of the *NEB Act* requires the National Energy Board’s (**NEB**)’s report with respect to an application to construct a pipeline to include an environmental assessment under *CEAA 2012* if the application relates to a designated project under *CEAA*.³⁰¹ The construction and operation of a new pipeline with a length of 40 kilometres or more is a designated project that requires an environmental assessment under *CEAA 2012*.³⁰²

²⁹⁶ Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018, pt 1, cl 2 (third reading 20 June 2018) [**Compendium, Tab 111**].

²⁹⁷ *Ibid*, pt 1, cl 16(1).

²⁹⁸ *Ibid*, pt 1, cl 61, 62.

²⁹⁹ *Ibid*, pt 1, cl 63(b) & (c).

³⁰⁰ *Ibid*, pt 1, cl 64(1) & (2).

³⁰¹ *National Energy Board Act*, RSC 1985, c N-7, s 52(3) [**Compendium, Tab 112**].

³⁰² *Regulations Designating Physical Activities*, *supra* note 287, s 46.

If an environmental assessment is required, the NEB must submit its report with respect to the application to the GiC, including its recommendation as to whether the pipeline project will result in significant adverse environmental effects.³⁰³ After the report has been submitted, the GiC can make an entirely discretionary decision as to whether the pipeline is likely to cause significant adverse environmental effects and, if so, if those effects can be justified in the circumstances.³⁰⁴

While an NEB approval process may set conditions that would prevent the destruction of caribou critical habitat, that has not been the case to date.³⁰⁵ Even if conditions were set prohibiting the destruction of caribou critical habitat on pipeline routes, the protection would apply only to a small portion of the activities that are likely to destroy critical habitat in the Brightsand and Churchill ranges.

In summary, the *NEB Act*, and its reliance on the environmental assessment process under *CEAA 2012*, does not provide any mandatory prohibition against the destruction of critical habitat in the Brightsand and Churchill ranges.

10.7 Bill C-69: *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*

The *NEB Act* will soon be replaced by the *Canadian Energy Regulator Act (CER Act)*. Again, we do not yet know what the final version of the *CER Act* will look like, as Bill C-69 has not yet completed its journey through the House and the Senate. However, in its current form it would not provide effective protection for critical habitat in the Brightsand and Churchill ranges.

Like the *NEB Act*, the *CER Act* will rely heavily on the impact assessment process under the *IAA*. Pipelines that are “designated projects” under the *IAA* will require impact assessments, which will be conducted by an *IAA* review panel.³⁰⁶ Although we do not yet know what the *IAA* regulations will include as “designated projects,” it appears likely that they will include pipelines of 40 km or more in length (as is the case under *CEAA 2012*). The determination as to whether the project may proceed, and any conditions imposed on the project, will then take place as per the process outlined in the *IAA*, as described in section 11.5 above.

Where a pipeline does not require an impact assessment, the application for a certificate of approval will go to a Commission of the Canadian Energy Regulator. The Commission will make a recommendation to the Minister as to whether a certificate should be issued, taking into account a specified list of factors, which includes the environmental effects of the pipeline.³⁰⁷ However, there is no requirement that the Commission recommend that the certificate not be issued if the proposed pipeline will destroy caribou critical habitat. Nor is there a requirement

³⁰³ *CEAA 2012*, *supra* note 287, ss 29(1), 31(1)(a).

³⁰⁴ *Ibid*, s 31(1)(a).

³⁰⁵ *Ibid*, s 31(1)(b). See National Energy Board, *Report, Nova Gas Transmission Ltd.*, GH-002-2015, (June 2016) [**Compendium, Tab 113**].

³⁰⁶ Bill C-69, *supra* note 296, pt 1, cl 43.

³⁰⁷ *Ibid*, pt 2, s 183(2).

that the GiC reject the Commission's recommendation to issue a certificate if the pipeline in question will destroy caribou critical habitat.³⁰⁸

When a certificate is issued for a pipeline, the GiC must always direct the Commission to make the certificate subject to the conditions set out in the Commission's report.³⁰⁹ Such conditions could theoretically prevent the destruction of caribou critical habitat. However, the imposition of conditions of that nature would remain at the Commission's discretion on a project-by-project basis, and any protection gained would only apply to a small portion of the activities likely to impact critical habitat in the Brightsand and Churchill ranges.

As a result, the *CER Act* will not impose a mandatory prohibition against the destruction of critical habitat in the Brightsand and Churchill ranges.

11.0 Conclusion of Legal Analysis

As the above analysis demonstrates, none of the provincial or federal laws applicable to the Brightsand and Churchill ranges on non-federal lands in Ontario has the same protection outcome as would be the case if the *SARA* subsection 61(1) protection was in place for critical habitat within these ranges. None of the applicable provincial or federal laws ensures that critical habitat in the Brightsand and Churchill ranges is not and will not be destroyed. The lack of effective legal protection continues to jeopardize the survival and recovery of caribou in those ranges.

The test for effective protection is whether the provincial or federal laws have been implemented in a manner that provides for mandatory and enforceable protection of critical habitat and that would have the same protection outcome as would be the case if the *SARA* subsection 61(1) prohibition were in place for critical habitat within the Brightsand and Churchill ranges. We can decisively conclude that they have not.

Our conclusion, therefore, is that the Minister of the Environment and Climate Change must recommend to the Governor in Council that critical habitat in the Brightsand and Churchill ranges be protected by an order under section 61 of *SARA*.

³⁰⁸ *Ibid*, pt 2, s 186(1).

³⁰⁹ *Ibid*, pt 2, s 186(1)(a)(ii).

Appendix 1: Industrial Users in the Churchill and Brightsand Caribou Ranges

Brief descriptions of current forestry companies logging and utilizing wood in the ranges, mining cell claims including companies or holders of these claims and of a new 300km proposed transmission line that would bisect the Churchill Range, are presented below. These demonstrate not only the current situation but speak to the potential for future disturbances in each range if the status quo persists (meaning in the absence of effective protection and recovery measures for boreal caribou). Ongoing and planned activities jeopardize the ability of the Churchill and Brightsand Ranges to recover to self-sustaining status.

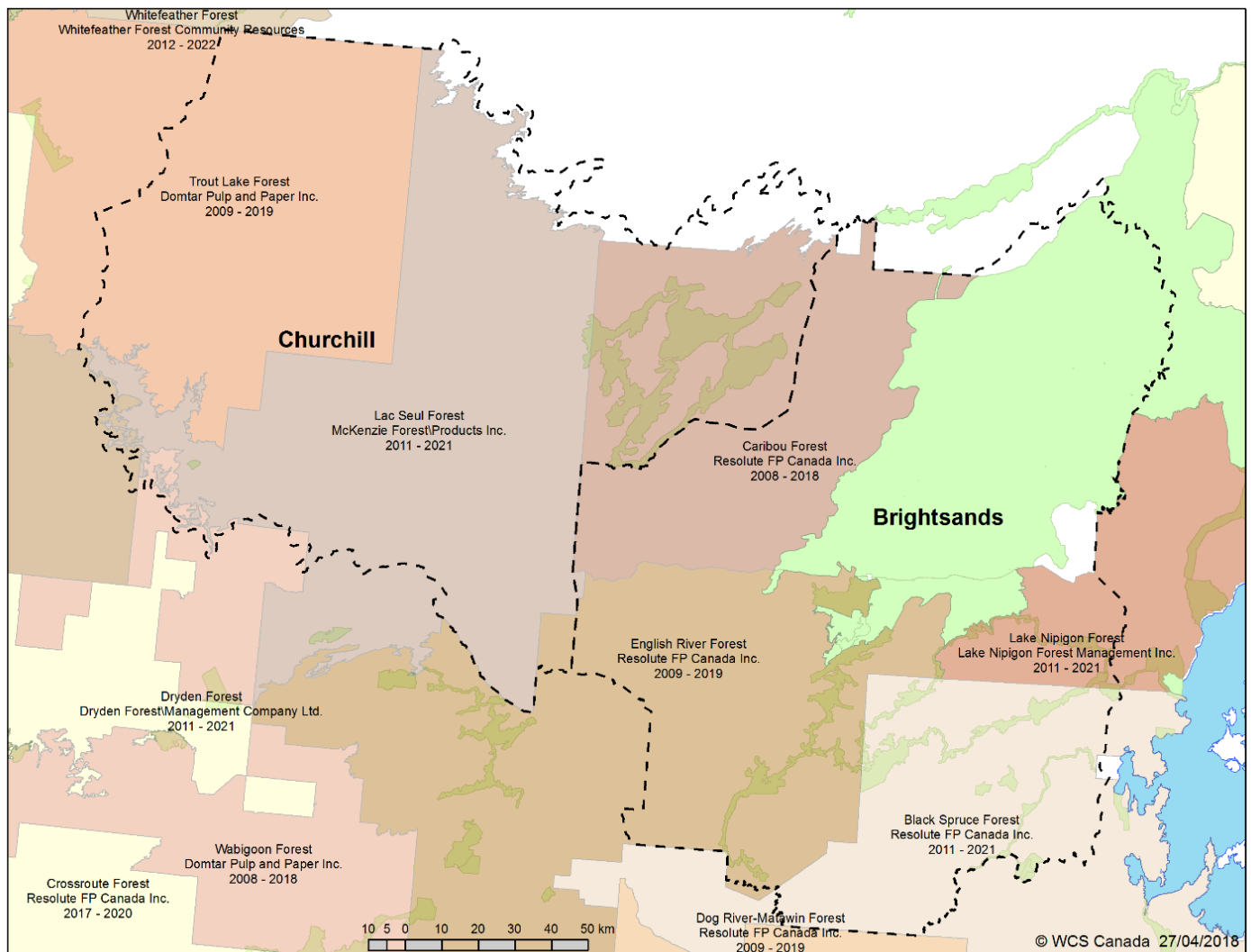


Figure A1: Forest Management Units and SFL holders in the Brightsand and Churchill Caribou Ranges.³¹⁰

Table A1. Companies harvesting and utilizing wood from each Forest Management Unit (FMU) in the Brightsand and Churchill Caribou Ranges, 2016-2017.

Companies harvesting or using wood from each FMU in Brightsand Caribou Range, 2016-2017		
FMU	Harvesting	Utilization
Black Spruce Forest	Resolute FP Canada Inc.	AV Terrace Bay Inc.
	Ma'iingan Development LP	Brushmat Material/Camp Construction/Bridge Construction
	Personal Use Fuelwood	Commercial Fuelwood
	Precision Wood Design Inc.	Dog Lake Firewood Ltd. (Kaministiquia)
		Personal Use Fuelwood
		Precision Wood Design Inc. (Murillo)
		Resolute FP Canada Inc. (Thunder Bay)
		RTK WP2 Canada, ULC (Atikokan)
		Resolute Growth Canada Inc. (Ignace)
		Resolute Growth Canada Inc. (Sapawe)
		Resolute Growth Canada Inc. (Thunder Bay)
		Weyerhaeuser Company Ltd. (Kenora)
Caribou Forest	Resolute FP Canada Inc.	Resolute FP Canada Inc. (Thunder Bay)
	Waawun Corporation	Resolute Growth Canada Inc. (Ignace)
		Resolute Growth Canada Inc. (Sapawe)
		Resolute Growth Canada Inc. (Thunder Bay)
		Weyerhaeuser Company Ltd. (Kenora)
English River Forest	Resolute FP Canada Inc.	Personal Use Building Material (Sawmill)
		Personal Use Fuelwood
		Resolute FP Canada Inc. (Thunder Bay)
		Resolute Growth Canada Inc. (Ignace)
		Resolute Growth Canada Inc. (Sapawe)
		Resolute Growth Canada Inc. (Thunder Bay)
Lake Nipigon Forest		Weyerhaeuser Company Ltd. (Kenora)
	NA - No report available	NA - No report available

³¹⁰ Map generated by Wildlife Conservation Society Canada.

Companies harvesting or using wood from each FMU in Churchill Caribou Range, 2016-2017		
FMU	Harvesting	Utilization
Caribou Forest	Resolute FP Canada Inc.	Resolute FP Canada Inc. (Thunder Bay)
	Waawun Corporation	Resolute Growth Canada Inc. (Ignace)
		Resolute Growth Canada Inc. (Sapawe)
		Resolute Growth Canada Inc. (Thunder Bay)
		Weyerhaeuser Company Ltd. (Kenora)
English River Forest	Resolute FP Canada Inc.	Personal Use Building Material (Sawmill)
		Personal Use Fuelwood
		Resolute FP Canada Inc. (Thunder Bay)
		Resolute Growth Canada Inc. (Ignace)
		Resolute Growth Canada Inc. (Sapawe)
		Resolute Growth Canada Inc. (Thunder Bay)
		Weyerhaeuser Company Ltd. (Kenora)
Lac Seul Forest	1937156 Ontario Inc.	Brushmat Material/Camp Construction/Commercial Fuelwood
	Clifford Sawyer	Domtar Inc. (Dryden)
	Cory Henderson	EACOM Timber Corporation (Ear Falls)
	J. Ayotte Contracting	Northwest Region
	Obishikokaang Resources Corporation	Personal Use Building Material
	Obishikokaang Resources Corporation in trust for Lac Seul First Nation	Personal Use Fuelwood
	Personal Use Building	Resolute Growth Canada Inc. (Ignace)
	Personal Use Fuelwood	Resolute Growth Canada Inc. (Sapawe)
	Robert Young	Weyerhaeuser Company Ltd. (Kenora)
	Steven Henderson	
	Trevor Sawyer	
Trout Lake Forest	D.Riffel Harvesting and Sawing	Brushmat Material/Camp Construction/Bridge Construction
	Domtar Inc.	Commercial Fuelwood
	EACOM Timber Corporation	Domtar Inc. (Dryden)
	Personal Use Fuelwood	EACOM Timber Corporation (Ear Falls)
	Raymond R. Boilard	Kenora Forest Products Ltd. (Prendville Industries)
		Northwest Region
		Oxdrift Tractor Sales Ltd.
		Personal Use Fuelwood

		Weyerhaeuser Company Ltd. (Kenora)
Whiskey Jack	D.Riffel Harvesting and Sawing	Commercial Fuelwood
	Miisun Integrated Resource Management Company	Domtar Inc. (Dryden)
	Miller Northwest Limited	E.&G. Custom Sawing Ltd. (Kenora)
	Personal Use Building	EACOM Timber Corporation (Ear Falls)
	Personal Use Fuelwood	Kenora Forest Products Ltd. (Prendiville)
		Northwest Region
		Personal Use Building Material
		Personal Use Fuelwood
		Weyerhaeuser Company Ltd. (Kenora)

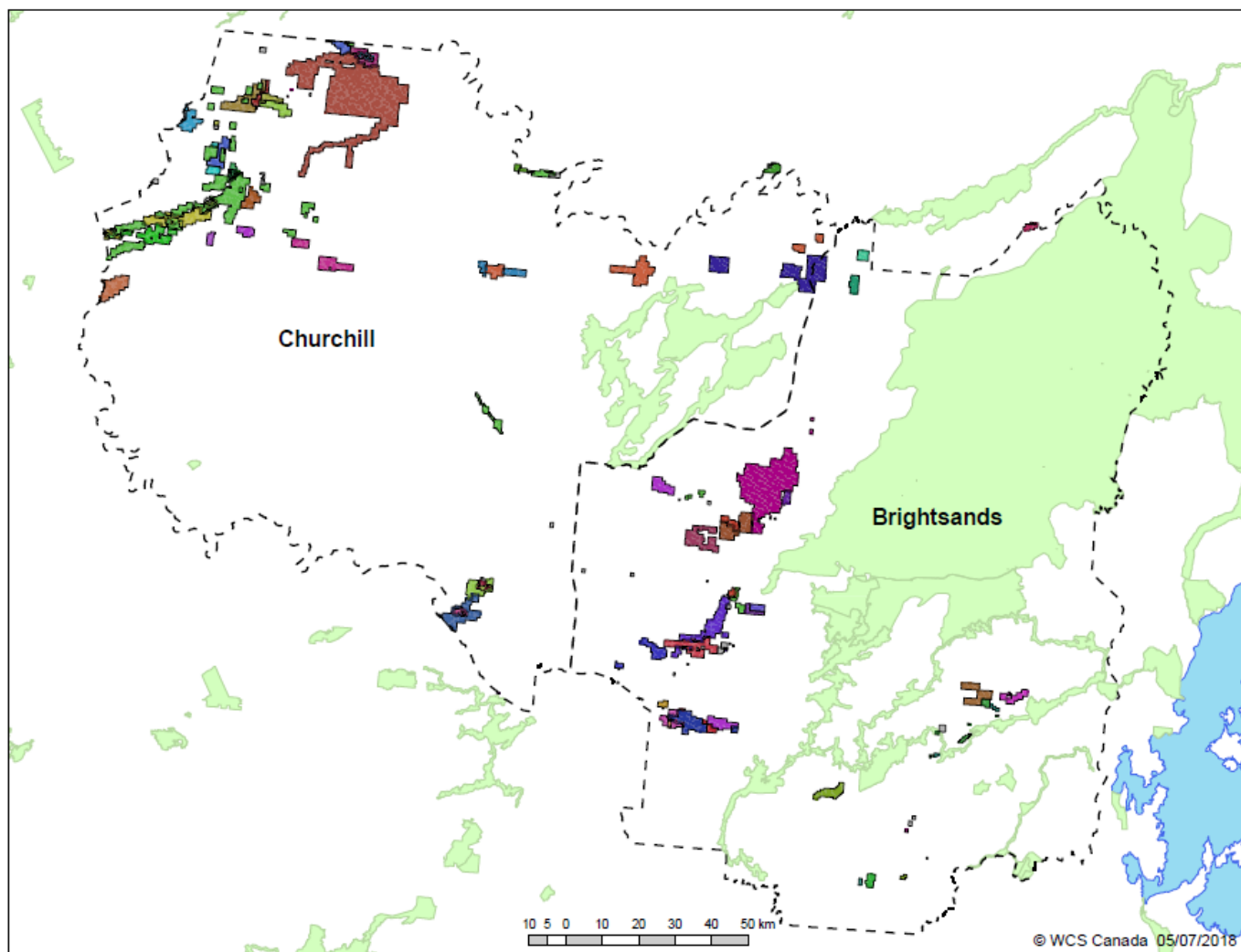


Figure A2: Mining cell claims in the Brightsand and Churchill Caribou Ranges (current as of June 25, 2018).³¹¹

³¹¹ Map and corresponding legend generated by Wildlife Conservation Society Canada.

Mining Claim Owners (2018/06/25) - 10,629 Claims

OWNERS WITH LESS THAN 20 CLAIMS - 207	JERROLD WILLIAMSON (100.00) - 28
2522962 ONTARIO INC. (100.00) - 133	JIMINEX INC. (100.00) - 32
AKI SILTAMAKI (100.00) - 52	JUSTIN BERNARD (100.00) - 50
ARDIDEN LTD (100.00) - 95	KARAS IRON METALLICS INC. (100.00) - 170
ARGO GOLD INC. (100.00) - 101	LIANE BOYER (100.00) - 25
AUR LAKE EXPLORATION LIMITED (100.00) - 110	MICHAEL MAGRUM (100.00) - 213
AURCREST GOLD INC. (100.00) - 309	MICHAEL ROMANIK (100.00) - 31
AUSTIN RESOURCES LTD. (100.00) - 53	MICHAEL STARES (100.00) - 42
AUXIN RESOURCES LTD. (100.00) - 219	N.W.T. COPPER MINES LIMITED (100.00) - 39
BENTON RESOURCES INC. (100.00) - 250	NORTHERN IRON CORP. (100.00) - 185
BOUNTY GOLD CORP. (100.00) - 156	PACIFIC IRON ORE CORPORATION (100.00) - 308
BRIAN YOUNGS (100.00) - 36	PATRICK RIIVES (75.00), ALEXANDER GLATZ (25.00) - 40
CANADIAN OREBODIES INC. (100.00) - 58	PAVEY ARK MINERALS INC. (100.00) - 79
CHRISTAL HANUSZCZAK (100.00) - 187	PELANGIO EXPLORATION INC. (100.00) - 37
CLAUS MEYER (100.00) - 34	PERRY ENGLISH (100.00) - 1,390
COMMANDER RESOURCES LTD. (100.00) - 202	RAND HODGSON (100.00) - 63
DAVID HEALEY (100.00) - 83	ROBERT HEILMAN (100.00) - 133
DONALD HAWKE (50.00), GREGORY CAMPBELL (50.00) - 25	ROCKEX MINING CORPORATION (100.00) - 355
EVANDALE MINERALS PTY LTD (100.00) - 86	RUBICON MINERALS CORPORATION (100.00) - 240
GERARD LANTHIER (100.00) - 38	SABINA GOLD & SILVER CORP. (100.00) - 123
GLENORE CANADA CORPORATION (100.00) - 34	SCOT HALLADAY (100.00) - 34
GOLD CANYON RESOURCES INC. (100.00) - 2,172	SKYHARBOUR RESOURCES LTD. (100.00) - 33
GOSSAN RESOURCES LIMITED (100.00) - 206	STEVEN SIEMIENIUK (100.00) - 1,015
GREGORY HEURING (50.00), BRIAN YOUNGS (50.00) - 36	TECK RESOURCES LIMITED (100.00) - 205
GROUP TEN METALS INC (100.00) - 228	TRANSITION METALS CORP. (100.00) - 104
IAN DASTI (100.00) - 38	TRI ORIGIN EXPLORATION LTD. (100.00) - 49
	ZIMTU CAPITAL CORP (100.00) - 458

Figure A3: Mining Cell Claim Legend of Companies Operating in the Brightsand and Churchill Caribou Ranges and Number of Claims Held by Each Company.³¹²

³¹² There are a total of 10,629 cell claims in the Brightsand and Churchill caribou ranges as of June 25, 2018. The legend shows the percent ownership in brackets, and the number of claims owned after the hyphen.

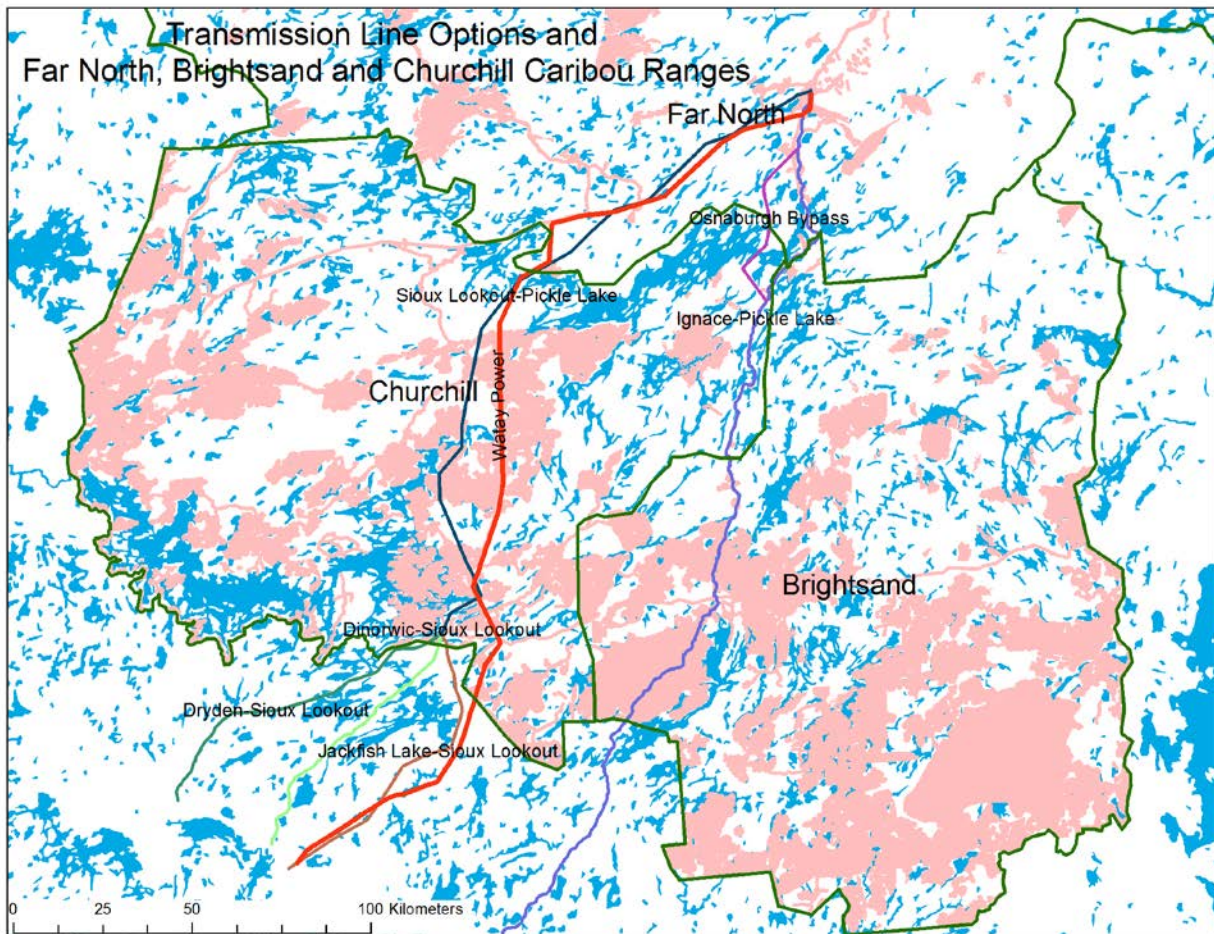


Figure A4: Preferred Transmission Line Route by Wataynikaneyap Power in the Churchill Range (red)³¹³. An alternative transmission line route is shown in purple treading along the Highway 599 corridor in the Brightsand and Churchill Ranges. Pink (or salmon coloured areas) represent anthropogenic and natural disturbances in the ranges using Environment Canada 2012 data.

The Wataynikaneyap Power proposed transmission line is currently undergoing a review under the province's *Environmental Assessment Act*. A Final Environmental Assessment Report has been produced and the ministry review is complete. It represents a major new permanent linear disturbance in the Churchill Range. All indications so far are that this route will ultimately be approved even though it is inconsistent with protecting and recovering a species at risk (boreal caribou). It represents additional destruction of critical habitat in the range, despite the fact that there is a less harmful alternative to caribou that would achieve the same objective of bringing new power to Pickle Lake.

³¹³ Wildlands League. 2013. Crossing Caribou Country: A special report assessing the impacts of new transmission line routes on threatened caribou in NW Ontario. Toronto, Canada. pp. 238. Available at http://wildlandsleague.org/media/CrossingCaribouCountry_Dec2013_WEB1.pdf [Compendium, Tab 114].