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BIODIVERSITY AND CONSERVATION: CROSS-BORDER LEGAL AND REGULATORY PERSPECTIVES

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ABSTRACT

This article provides an overview of the legal and policy frameworks for the protection of threatened and vulnerable wildlife on private lands in Canada and the United States, the approaches adopted in different jurisdictions and the response of key constituencies, and formulates recommendations based on these experiences. Canada and the United States serve as an important source of comparison in terms of biodiversity protection mechanisms for several reasons, ranging from geography and legal systems protections to shared economic concerns and development. Additionally, the shared fundamental dichotomy between governance at the national/federal level and the provincial/state level is a key area of comparison since there are many overlaps in these elements of governance across systems. At the same time, these relationships are governed subject to different forms of legal imperatives given the nature of articulated national and subnational powers and roles in Canadian law and the Constitution of the United States. Since both systems give primacy of place in law and regulation related to biodiversity and associated resources to the national/federal level, any comparisons must start at this level.

Keywords: Biodiversity law; Conservation regulations; Canadian laws, Wildlife

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1. INTRODUCTION

Biodiversity is under threat worldwide and scientists have announced that a sixth mass extinction is currently underway.[1] Indeed, as the Covid-19 pandemic has demonstrated, the loss of biodiversity has many impacts, including to human health and security. One of the main factors in the loss of biodiversity is the destruction of habitat, in particular through "deforestation, the expansion and intensification of agriculture, industrialization and urbanization."[2] Habitat loss has also been identified as the greatest threat to endangered species in Canada.[3] The shrinking habitat means that stewardship of private land is becoming increasingly essential to the protection of species at risk because "the vast majority of species at risk in Canada depends on private land to survive."[4] Similar concerns exist in the United States, where, despite extensive national and state park and reserve protections, species at risk are still impacted by activities on and conservation of private lands.

Given these factors and the inability of protected areas alone to curb the loss of global biodiversity, the importance of conservation measures on private land is increasingly recognized.[5] Indeed, conservation on private lands is essential to building ecosystem resilience at the national and subnational levels, and landowners, conservation authorities, and local and Indigenous governments all play a crucial role in the development and implementation of healthy ecological practices. In addition, understanding of the regulatory and geographic scope of legislative efforts, the range of incentives available and the administrative burden of conservation activities varies considerably among the identified stakeholders.

This article provides an overview of the legal and policy frameworks for the protection of threatened and vulnerable wildlife on private lands in Canada and the United States, the approaches adopted in different jurisdictions and the response of key constituencies, and formulates recommendations based on these experiences.

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1 Gerardo Ceballos, Paul R Ehrlich & Rodolfo Dirzo, "Biological Annihilation via the Ongoing Sixth Mass Extinction Signaled by Vertebrate Population Losses and Declines," (2017) 114:30 PNAS E6089.

2 Francisco Sánchez-Bayoa and Kris AG Wyckhuys, « Worldwide Decline of the Entomofauna: A Review of its Drivers, » (2019) 232 Biological Conservation 8 to 8.

3 Oscar Venter et al, « Threats to Endangered Species in Canada, » (2006) 56:11 Bioscience 1 to 2; Dan Kraus, "Stopping Habitat Loss is the Key to Saving Canada's Endangered Species," Nature Conservancy Canada (18 May 2018), online: <http://www.natureconservancy.ca/en/blog/stopping-habitat-loss-is-the.html>.

4 Andrea Olive, « It Is Just Not Fair: The Endangered Species Act in the United States and Ontario, » (2016) 21:3 Ecology and Society 13 to 13.

5 Sristi Kamal, Malgorzata Grodzinska-Jurczak & Agata Pietrzyk Kaszynska, « Challenges and Opportunities in Biodiversity Conservation on Private Land: An Institutional Perspective from Central Europe and North America, » (2015) 24 Biodivers Conserv 1271 to 1272.

2. FEDERAL LEGAL AND POLICY FRAMEWORKS FOR THE PROTECTION OF SPECIES AT RISK AND WILDLIFE HABITATS IN CANADA AND THE UNITED STATES

Canada and the United States serve as an important source of comparison in terms of biodiversity protection mechanisms for several reasons, ranging from geography and legal systems giving protections to shared economic concerns and development. Additionally, the shared fundamental dichotomy between governance at the national/federal level and the provincial/state level is a key area of comparison since there are many overlaps in these elements of governance across systems. At the same time, these relationships are governed subject to different forms of legal imperatives given the nature of articulated national and subnational powers and roles in Canadian law and the Constitution of the United States. Since both systems give primacy of place in law and regulation related to biodiversity and associated resources to the national/federal level, any comparisons must start at this level.

2.1. Canada

In Canada, jurisdiction over species at risk is shared between the federal government, provinces, territories and local governments. In general, the protection of species at risk and their critical habitats is regulated at the federal level by the *Species at Risk Act* (SARA), which applies to federal lands,[6] as well as to private lands with respect to aquatic species and some migratory birds.[7] In contrast, provincial and territorial governments have jurisdiction over species at risk present on non-federal lands and are required to protect these species according to at least the same standards as those set out in SARA. If this protection does not meet the same standard, the "safety net" provisions of SARA allow the federal government to extend its jurisdiction to protect these species.[8] Finally, local governments are normally required to meet provincial standards for the protection of species at risk. In most cases, local governments regulate much of the private property where species at risk are found.

Critical habitat is to be identified in a recovery strategy or action plan[9] and listed on the SARA Public Registry.[10] In the case of non-aquatic species, provincial laws provide protection for critical habitat in most situations. In the case of aquatic species, the destruction of critical habitat on private land is prohibited, and this habitat must be protected within 180 days of the inclusion of the recovery strategy or action plan in the public registry.[11] In

6 Species at Risk Act, SC 2002, C 29 [SARA].
7 SARA, SS 34-35; Government of CANADA, Species at Risk Act: information note for landowners, (3 October 2014), online: <https://www.canada.ca/en/environment-climate-change/services/species-risk-education-centre/your-responsibility/landowners.html>.
8 SARA, S 78.
9 Ibid, S 2(1).
10 Ibid, SS 42 and 50.
11 Ibid, C 29, S 58.

addition, if the Minister concludes that provincial laws do not effectively protect a species at risk or its habitat, he or she may recommend that the Governor in Council make an order to protect the species.[12] However, to date, no such orders have been made.

The SARA also provides that "[t]he competent minister may enter into an agreement with a government in Canada, an organization or a person for the acquisition of land or of rights in land for the purpose of protection of the critical habitat of a species at risk."[13] In addition, the Minister may grant fair and reasonable compensation to any person for losses resulting from the extraordinary repercussions of the application of the Act, or of an emergency decree protecting the necessary habitat for the survival or recovery of a wildlife species.[14]

With respect to other aspects of conservation, such as habitat protection, jurisdiction is also shared among the federal, provincial, territorial and local governments. For example, wetlands on federal lands and wetland conservation are also linked to a range of federal responsibilities, including maintaining migratory bird populations, inland and marine fisheries and international and cross-border resources.[15] Wetlands that are not under federal jurisdiction, including most wetlands located on private land, are the responsibility of the provincial governments or the delegated responsibility of local governments.

The following subsections present a selection of Canadian federal mechanisms addressing the protection of species at risk or wildlife habitats, or that may affect conservation efforts in general.

2.1.1 Canadian Environmental Assessment Act, 2012

The *Canadian Environmental Assessment Act*, 2012 (CEAA) governs federal environmental assessment and regulatory processes. Pursuant to the CEAA, "environmental effects at issue with respect to a measure, physical activity, designated project or project" include fish and fish habitat, aquatic species and migratory birds.[16] Designated projects are subject to environmental assessments under the CEAA.[17] The CEAA is currently in the process of being replaced by the new Impact Assessment Act.[18]

12 Ibid, ss 34 and 61.
13 SARA, s 62.
14 Ibid, s 64.
15 Pauline Lynch-Stewart, Ingrid Kessel-Taylor & Clayton Rubec, *Wetlands and Government: Policy and Legislation for Wetland Conservation in Canada – Sustaining Wetlands Issues Paper No. 1999-1* (Ottawa: Ducks Unlimited Canada, Environment Canada & North American Wetlands Conservation Council, 1999) at 11-14.
16 *Canadian Environmental Assessment Act*, SC 2012, c. 19 [CEAA], s 5(1).
17 CEAA, s 13
18 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, S.C. 2019, c. 28, Bill C-69 (2018), at art. 79(1).

2.1.2 Canada Wildlife Act

The *Canada Wildlife Act* (RSC, 1985, c. W-9) provides for the establishment, management and protection of wildlife sanctuaries for the purposes of research and conservation, particularly of species at risk. Section 9 of the *Act* addresses the acquisition of land, allowing the federal government to "lease or acquire land, including by purchase, land or rights or interests therein for research activities, conservation or information concerning: a) migratory birds; b) with the agreement of the government of the province concerned, other wild species."[19] Further, section 12 allows the federal government to make regulations relating to the implementation of the *Act*, working in tandem with the terms of the *Wildlife Area Regulations* that were created pursuant to the *Act*.[20]

2.1.3 Federal Policy on Wetland Conservation

The 1991, the *Federal Policy on Wetland Conservation* was created in part to fulfill Canada's obligations under the *Ramsar Convention on Wetlands*.[21] The *Policy* recognizes the importance of wetlands, including their vital ecological function as "habitat for a wide range of waterbirds, plants, fur animals, reptiles and fish" and their role in "[c]onserving [the] biodiversity and [the] vitality of species."[22] The objective of the *Policy* is "to promote the conservation of Canada's wetlands for the maintenance of their ecological and socio-economic functions, now and in the future."[23] To achieve this objective, the *Policy* aims to ensure that there is no net loss of wetland functions on federal lands and waters.[24] It also recognizes that conserving wetlands requires "collaboration and […] coordination among governments at all levels and the people of Canada, including landowners, non-governmental organizations and the private sector."[25]

2.1.4 Fisheries Act

Under the *Constitution Act, 1982*, the federal government has jurisdiction over Canada's inland and coastal fisheries. The main law governing these entities is the *Fisheries Act*.[26] The *Act* provides a range of protective measures for fish and their habitat. Accordingly, no one is allowed to pollute water frequented by fish when such a body of water falls under the jurisdiction and scope of the *Act*.[27] Under the terms of the *Act*, the Governor in Council is also authorized to make regulations related to covered fisheries, particularly with respect to the conservation and

19 *Canada Wildlife Act*, RSC, 1985, c. W-9 at 9.
20 *Wildlife Area Regulations*, CRC c. 1609, s. 3.
21 *Federal Policy on Wetland Conservation* (Ottawa: Environment Canada, 1991) [*Federal Wetland Policy*], at 2.
22 *Federal Wetland Policy*, at 2.
23 Ibid at 5.
24 Ibid at 5.
25 Ibid at 6.
26 *Fisheries Act*, RSC, 1985, c F-14 [*Fisheries Act*].
27 Ibid., at article 36.

protection of fish and the conservation and protection of spawning grounds.[28]

2.1.5 Canada National Parks Act

The *Canada National Parks Act, 2000* establishes park reserves to benefit current and future generations of Canadians and to provide for conservation and knowledge generation.[29] The Governor in Council may also declare a wilderness area in any area of a park that exists in its natural state or is likely to return to its natural state.[30] Under the *Act*, the Governor in Council can make regulations on a variety of subjects, including "the protection of flora, soil, water, fossils, topography, air quality and cultural, historical and archaeological resources" and "the protection of fauna and the destruction or removal of dangerous or surplus wild animals, as well as the capture of wild animals for scientific or reproductive purposes."[31]

2.1.6 Oceans Act

The *Oceans Act, 1996* seeks to balance our need for and access to Canada's oceans with concerns such as environmental protection, conservation and the essential principles of sustainable development, including the precautionary approach. The *Act* provides for the creation of marine protected areas for:

> (a) the conservation and protection of fishery, commercial or other resources, including marine mammals, and their habitats;
> (b) the conservation and protection of endangered and threatened species and their habitat;
> (c) the conservation and protection of unique habitats;
> (d) the conservation and protection of marine areas rich in biodiversity or biological productivity;
> (e) the conservation and protection of other marine resources or habitats, for the fulfillment of the Minister's mandate.[32]

On the recommendation of the Minister, the Governor in Council is empowered to make regulations respecting the zoning of marine protected areas and the prohibition of classes of activities in marine protected areas[33] and may also make orders in an emergency should there be a threat to marine resources.

2.1.7 Migratory Birds Convention Act

The *Migratory Birds Convention Act, 1994* aims to conserve migratory bird populations by regulating potentially harmful human activities.[34] The

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28 Ibid., at articles 43(1)(b) and (i).
29 *Canada National Parks Act*, LC 2000, c 32 [*Canada National Parks Act*], at article 4(1).
30 *Canada National Parks Act*, at article 14(1).
31 Ibid., at article 16(1)(b) and (c).
32 *Oceans Act*, LC 1996, c 36 [*Oceans Act*], at article 35(1).
33 Ibid., at article 35(3).
34 *Migratory Birds Convention Act*, *1994*, SC 1994, c 22 [*Migratory Birds Act*].

Act was first adopted in 1917 under the *Migratory Birds Convention* between Canada and the United States and was updated in 1994. The *Act* provides legal protection for migratory birds, their nests and their eggs wherever they are found in Canada, including on private land.[35] Under the law, it is prohibited for individuals to possess and/or sell a migratory bird or its nest.[36] In addition, the *Act* prohibits any person or vessel from polluting or releasing substances that could be harmful to migratory species or their habitats in Canada.[37]

2.1.8 Conservation Easements

Conservation easements are written instruments by which a landowner grants rights over his land to another party in order to allow a portion of his property to be maintained as a conservation territory into the future.[38] Under the provincial and territorial laws in force in Canada, a conservation easement must be registered in favor of a conservation organization or government agency designated by law.[39] Conservation easements can be granted, paid for or be a "split receipt," which means that part of the easement is paid for and another part is donated. Conservation easements that are conveyed in the latter fashion rather than sold can be classified into two categories: certified ecological gifts and non-certified ecological gifts. Ecological gifts certified under the federal government's Ecological Gifts Program provide tax benefits to Canadians who donate land or a partial interest in land to an eligible recipient, who will in turn ensure that the biodiversity and environmental heritage of lands are kept in perpetuity.[40] Conservation easements that are not certified under the Ecological Gifts Program are still considered charitable donations for income tax purposes.

To be eligible for the Ecological Gifts Program, land must be certified as ecologically sensitive by the Minister of the Environment and Climate Change. Eligible beneficiaries are the federal, provincial and territorial governments, Canadian municipalities and municipal or public bodies that exercise a government function; charities may also be eligible as beneficiaries. The program is administered by Environment and Climate Change Canada in collaboration with federal departments, provincial and municipal governments and non-governmental organizations.

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35 *Migratory Birds Act*, s 4.

36 Ibid., s 5.

37 Ibid., s 5.1.

38 Good, K. & Michalsky, S., 'Summary of Canadian experience with conservation easements and their potential application to agri-environmental policy' (2008) Ottawa: Agriculture and Agri-food Canada, [Online]: <http://publications.gc.ca/collections/collection_2011/agr/A125-17-2011-eng.pdf> accessed 22 November 2021.

39 The provincial and territorial laws permitting conservation easements are discussed in section 1.3 (below).

40 Government of Canada, *Ecological Gifts Program*, online: <https://www.canada.ca/en/environment-climate-change/services/environmental-funding/ecological-gifts-program.html>.

The Natural Areas Conservation Program is one of the main conservation easement management programs in Canada. It is a public-private partnership that aims to "accelerate the conservation of private land and protect important natural habitats in communities in southern Canada".[41] It is administered by the Nature Conservancy of Canada, in partnership with Ducks Unlimited Canada and other land trusts, and receives funding from Environment and Climate Change Canada. Under this program, ecologically sensitive properties are protected by gift, purchase or stewardship agreements with private landowners and are managed for the long term.

2.1.9 Habitat Stewardship Program for Species at Risk

The Habitat Stewardship Program (HSP), created in 2000, funds projects that directly contribute to the recovery of species at risk identified in the SARA and that prevent other species to become a conservation concern.[42] HSP land stewardship projects are administered by Environment and Climate Change Canada, while Fisheries and Oceans Canada is responsible for aquatic stewardship projects. Non-governmental organizations, community groups, Aboriginal organizations and communities, individuals, private corporations and businesses, educational institutions, provincial Crown corporations, and provincial, territorial and municipal governments in Canada are all eligible to receive HSP funds. Projects can take place on private land, provincial Crown land or Aboriginal land anywhere in Canada.

2.2. United States

Given the significant protection of private property rights in the United States, as established under the Constitution, [43] the country's approach to the management of species at risk and critical habitats provides an important comparison with Canadian practices. These rights are fundamentally important in the American legal system, although they can be revoked by the federal, state or local government in certain circumstances, provided that there is a legitimate purpose and that the owner of the property is compensated for this seizure.[44] In addition, there are regulatory foreclosures, whereby a government entity adopts laws or regulations that effectively prohibit the use and enjoyment of private property and/or render the function of the property almost impossible to achieve.[45] Finally, there are further restrictions on the right of private property ownership in particular for the promotion and conservation of nature.

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41 Nature Conservancy Canada, *Natural Areas Conservation Prog*ram, online: <http://www.natureconservancy.ca/en/what-we-do/conservation-program/>.

42 Government of Canada, *Habitat Stewardship Program for Species at Risk*, online: <https://www.canada.ca/en/environment-climate-change/services/environmental-funding/programs/habitat-stewardship-species-at-risk.html>.

43 US const amend V (2018).

44 Ibid.

45 *Kelo v City of New London*, 545 US 469 (2005).

Perhaps surprisingly, the United States Endangered Species Act imposes more stringent regulations and gives less leeway than SARA.[46] While the US federal government retains primary responsibility for the protection of species at risk throughout the country, including on private land, individual states may be allowed to manage the species within their territory if they meet certain federal standards. Further, while there is also endangered species legislation at the state level, this legislation tends to be much weaker than federal law and often mirrors the terms of federal law with additions that reflect the particular needs and concerns of an individual state.

2.2.1 Endangered Species Act

One of the fundamental elements of conservation law in the US is the federal *Endangered Species Act* (ESA), enacted in 1973.[47] The objectives of the ESA "are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species."[48] The ESA highlights the fact that a number of key species in the US – including animals, plants and fish – are extinct or threatened with extinction "as a consequence of economic growth and development untampered by adequate concern and conservation."[49] At the same time, the ESA establishes the role and capacity of the federal and state governments in coordinating efforts to conserve endangered species and protect species from the potential for endangerment and/or extinction in the future.[50]

The determination that a species is endangered or threatened is made by the US government using the following criteria:

> (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.[51]

The federal government has the option to designate an area as critical habitat for endangered or threatened species, meaning its use be restricted to prioritize conservation needs.[52] When this occurs, the federal government is empowered to purchase critical habitat land and incorporate it into national assets, with concomitant oversight.[53]

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46 Ontario Soil and Crop Improvement Association, *A Safe Harbour Policy for Canada? Examining the Potential for Safe Harbour Agreements within the Confines of the Federal Species at Risk Act* (Guelph, ON: Ontario Soil and Crop Improvement Association, 2012) at 15.

47 *Endangered Species Act*, P.L. 93-205, 87 Stat. 884. 16 U.S.C. §§1531-1544) [ESA]§ 1531(b).

48 ESA, at § 1531(a).

49 Ibid., at § 1531(a) (1).

50 Ibid., at § 1531(a) (5).

51 Ibid., at § 1533(1).

52 Ibid., at § 1533.

53 Ibid., at § 1534.

The ESA requires the federal government to maintain lists of species that are classified as endangered or threatened.[54] To make this decision, government actors must take into account a number of scientific facts as well as legal and regulatory requirements.[55] In addition, if the factual and scientific aspects that affect an area designated as critical habitat change over time the designation may be reconsidered and changed.[56] In this context, the ESA requires that the federal government creates recovery plans and monitoring systems and that the implementation of these plans be overseen at the national level.[57]

2.2.2 National Wetlands Conservation Act

Another key instrument for federal conservation is the *National Wetlands Conservation Act, 1989*.[58] The *Act* has three objectives: "to protect, enhance, restore and manage an appropriate distribution and diversity of wetlands ecosystems and habitats associated with wetland ecosystems and other fish and wildlife in North America; to maintain current and improved distribution of wetlands associated migratory birds populations; and to sustain an abundance of waterfowl and other wetland associated migratory birds."[59] The *Act* highlights the importance of wetlands, fish and wildlife for conservation and national heritage, as well as economic development.[60]

The power of government and other designated stakeholders to engage in wetland conservation projects is essential to the *Act*, which defines wetlands conservation as:

> "the obtaining of a real property interest in lands or waters, including water rights, of a wetland ecosystem and associated habitat if the obtaining of such interest is subject to terms and conditions that will ensure that the real property will be administered for the long-term conservation of such lands and waters and the migratory birds and other fish and wildlife dependent thereon; the restoration, management, or enhancement of wetland ecosystems and associated habitat for migratory birds and other fish and wildlife species if such restoration, management, or enhancement is conducted on lands and waters that are administered for the long-term conservation of such lands and waters and the migratory birds and other fish and wildlife dependent thereon."[61]

When assessing the potential of a wetland conservation project, the government is required to consider

54 Ibid., at § 1533(c).
55 Ibid., at § 1533.
56 Ibid.
57 Ibid., at § 1533(f), (g).
58 *North American Wetlands Conservation*, 16 USC § 4401 (1989).
59 Ibid.
60 Ibid., § 4402.
61 Ibid., § 4402(9).

> (1) the extent to which the wetlands conservation project fulfills the purposes of this chapter, the Plan, or the Agreement; (2) the availability of sufficient non-Federal moneys to carry out any wetlands conservation project and to match Federal contributions in accordance with the requirements of section 4407 (b) of this title; (3) the extent to which any wetlands conservation project represents a partnership among public agencies and private entities; (4) the consistency of any wetlands conservation project in the United States with the National Wetlands Priority Conservation Plan; (5) the extent to which any wetlands conservation project would aid the conservation of migratory nongame birds, other fish and wildlife and species that are listed, or are candidates to be listed, as threatened and endangered under the Endangered Species Act; (6) the substantiality of the character and design of the wetlands conservation project; and (7) the recommendations of any partnerships among public agencies and private entities in Canada, Mexico, or the United States which are participating actively in carrying out one or more wetlands conservation projects under this chapter, the Plan, or the Agreement.

The key to implementing the *Act* is the use of specialized government entities to promote conservation activities, including the National Wetlands Conservation Council[62] and the Migratory Birds Commission.[63]

2.2.3 Fish and Wildlife Act

In addition, the United States has enacted several key laws on specific species and subjects directly related to conservation practices. One of the oldest of these laws is the *Fish and Wildlife Act* of 1956, which created the US Fish and Wildlife Service.[64] The *Fish and Wildlife Act* recognized the importance of all fish, their ecosystems and habitats to the national ecosystem and economy based on the value of fishing and related industries.[65]

2.2.4 Marine Turtle Conservation Act

The US has adopted the *Marine Turtle Conservation Act* of 2003 to "assist in the conservation of marine turtles and the nesting habitats of marine turtles in foreign countries by supporting and providing financial resources for projects to conserve the nesting habitats, conserve marine turtles in those habitats, and address other threats to the survival of marine turtles."[66] The *Act* requires the federal government to receive suggestions and information from other government entities, international entities and private

62 Ibid., § 4403(a) (1).
63 Ibid. § 4403(b).
64 *Fish and Wildlife Service*, 16 USC § 742a (1956).
65 Ibid.
66 *Marine Turtle Conservation*, 16 USC § 6601(a) (2) (2004).

individuals or groups in the creation of national policies and practices regarding the conservation and protection of turtle populations.[67]

2.2.5 Marine Mammal Protection Act

Special conservation regimes are also established under the *Marine Mammal Protection Act* of 1972, a broader law informed by the fact that many marine mammals and their ecosystems are under serious threat throughout the US.[68] In this context, the *Act* defines conservation as "the collection and application of biological information for the purposes of increasing and maintaining the number of animals within species and populations of marine mammals at their optimum sustainable population."[69] The *Act* allows the federal government to establish permissible seizures, if any, for the target marine mammal populations, as well as to provide for the imposition of fines and imprisonment in certain cases of violation.[70]

2.2.6 Soil Conservation Programs

With regard to soil and agriculture, the US has put in place a system of economic and technical assistance to farmers for the construction and conservation of crop soils which are considered important to the national economy.[71] In addition, for certain crops there are assistance and economic support programs for farmers, provided that they use a specific area of their land for the designated crop or that they reserve an area determined for conservation purposes.[72] Federal loans are offered to farmers and ranchers for a variety of purposes, including "paying for activities to promote soil and water conservation and protection. . . on a farm or ranch."[73] This is part of the "conservation loan and loan guarantee program," which aims to support qualified conservation projects.[74] Additional financial assistance is available to private agricultural producers through the Conservation Stewardship Program, which aims to promote and encourage the conservation of natural resources in the US.[75]

2.2.7 Federal Conservation Easement

Critically, US law provides for the creation and recognition of conservation easements, through which the US Secretary of Agriculture has the power to enter into contractual relationships relating to land for the

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67 Ibid., at § 6603 (2004). At the present moment, a bill pending before the Congress would allow a larger range of species to be covered by the law, and would include species trafficking among the violations of the law. However, it must be noted that this law has not yet been adopted by both chambers. John D. Dingell, Jr. Conservation, Management and Recreation Act, PL 116-9 (2019).

68 *Marine Mammal Protection*, 16 USC §1361 (1972).

69 *Marine Mammal Protection*, 16 USC § 1362 (1972).

70 *Marine Mammal Protection*, 16 USC § 1373 (1972).

71 7 USC § 1282 (2018).

72 7 USC § 1442 (2018); 7 USC § 1444(4) (2018).

73 7 USC § 1923(a)(1)(D) (2018).

74 7 USC § 1924(b)(2) (2018).

75 7 CFR § 1470.1 (2018); 7 CFR § 1470.24 (2018).

purposes of "conservation, recreation, or wildlife."[76] In a sense, conservation easements extend the conditions and protections that exist in national parks to the private lands surrounding the parks.[77] In addition, the federal government is required to enter into mandatory conservation easements for areas designated as "federally-designated important resources;" that is, land in a 100-year flood plain, land containing species listed or proposed as being endangered or threatened, essential habitats of species at risk or threatened, designated or proposed wilderness areas, designated or proposed wild rivers, scenic rivers, barrier zones and certain aquifers.[78]

2.2.8 Cooperative Forestry Assistance Program

Forests play a key role in American conservation plans, although a significant number of forests are privately owned. To this end, the US program on Cooperative Forestry Assistance aims to promote "the establishment of a coordinated and cooperative Federal, State and local forest stewardship program for management of the non-Federal forest lands; the encouragement of the production of timber; the prevention and control of insects and diseases affecting trees and forests; . . . the improvement and maintenance of fish and wildlife habitat; the broadening of existing forest management, fire prevention, and insect and disease protection programs on non-Federal forest lands to meet multiple use objectives of landowners in an environmentally sensitive manner."[79] The priority areas in the programs authorized for the implementation of this measure are "conserving and managing working forest landscapes for multiple values and uses; protecting forests from threats. . . and restoring appropriate forest types in response to such threats; enhancing public benefits from private forests, including air and water quality, soil conservation, biological diversity, carbon storage, forest products, forestry-related jobs, production of renewable energy, wildlife, wildlife corridors and wildlife habitat, and recreation."[80] To this end, the federal, state and municipal governments are authorized to seek and obtain conservation easements on private forests and related lands.[81]

2.2.9 Agricultural Improvement Act of 2018

Under the *Agricultural Improvement Act of 2018*, the amount of federal funding for conservation easements and wetland mitigation reserves has been increased until at least 2023.[82] Indeed, the *Act* requires that the federal government register and maintain at least 2,000,000 acres for conservation between 2018 and 2023.[83] This means that not only can the federal

76 7 USC § 1997(a), (b) (2018).
77 16 USC § 410iii (4) (2018); 16 USC § 425l(d) (2018); 16 USC § 460nnn (4) (2018).
78 7 CFR § 767.201(b) (2018).
79 16 USC § 2101(b) (2018).
80 16 USC § 2101(c) (2018).
81 16 USC § 2101c(c) (2018).
82 *Agricultural Improvement Act of 2018*, s 2103 (2018).
83 *Agricultural Improvement Act of 2018*, s 2201 (2018).

government provide additional approvals and funds directly, it can also provide new or increased funds to states, which can then use them according to their plans.[84] The new criteria for assessing potential conservation easements include, in the context of agriculture and related uses, whether the land is "cropland, marginal pasture land, and grasslands that will have a positive impact on water quality and will be devoted to – a grass sod waterway; a contour grass sod strip; a strip meadow; a filter strip; a riparian buffer; a wetland or a wetland buffer; a saturated buffer; a bioreactor; or another similar water quality practice."[85] Additional allowances for particularly saline wetlands and associated lands eligible for the national or state conservation easements program are provided for in the *Wells Act*.[86] Throughout these determinations, the *Act* requires that decisions regarding the granting of conservation easements and the reservation of wetland mitigation measures be made pursuant to the *National Endangered Species Act* of 1973 and the laws therein attached to and in support of it.[87]

The *Act* contains provisions for the drafting and designation of drought and water conservation agreements which should operate in the same way as conservation easements in areas where there is a high probability of problems such as drought and access to water.[88] In addition, the *Act* creates the CLEAR (clean lakes, estuaries, and rivers) program as a pilot program to be tested by the national government to create 30-year conservation contracts with private landowners.[89] The objective of these agreements is to create a sense of consistency and expectation in conservation planning and development practices while providing legal bases for the pursuit of activities deemed appropriate on these lands, such as hunting, fishing and forms of agriculture.[90]

3. PROVINCIAL, TERRITORIAL AND STATE LEGAL AND POLICY FRAMEWORKS FOR THE PROTECTION OF THREATENED OR VULNERABLE WILDLIFE SPECIES AND THEIR HABITATS IN CANADA AND THE UNITED STATES

In both Canada and the United States, federal laws and regulatory mechanisms for the protection of biodiversity exist at the national level and are supplemented by similar legal and regulatory mechanisms at the provincial, territorial and state levels. While national level laws and regulatory systems often function to completely fill an area of law (as when they are subject to specific constitutional vesting under the jurisdiction of the US Congress), they also set the standard below which a province, territory

84 *Agricultural Improvement Act of 2018*, s 2103 (2018).
85 *Agricultural Improvement Act of 2018*, s 2201 (2018).
86 Ibid.
87 Ibid.
88 Ibid., at s 2202 (2018).
89 Ibid., at s 2204 (2018).
90 Ibid.

or state cannot go in terms of its legislative protections or conservation measures.

As set out below, there are several areas of significant law and policy confluence between the Canadian provinces and territories and the US states in relation to biodiversity protection and conservation. Within each of these areas, there is a palpable sense of general overlap in legislative purpose and objectives in undertaking biodiversity protection and conservation measures, although the methods used can differ to reflect the particular needs and attributes of communities and constituencies within the provinces, territories and states.

3.1 Species at Risk/Endangered Species/Conservation of Species in Canada and the US

Perhaps the most obvious form of legal and regulatory protection that can be used at the national level in the context of protecting biodiversity is a dedicated law on species at risk or endangered species within a province, territory or state. In instances where these laws have been enacted it is easy to make connections and comparisons. However, in the context of both Canada and the United States, it is frequently the case that such explicit laws have not been enacted directly, although there are other legal regimes that have the same impact.

3.1.1 Provinces & States with Specific Species at Risk/Endangered Species Laws

The *Endangered Species and Ecosystems Act* is the primary law governing species at risk in Manitoba.[91] The *Act* applies to species found in the province, including those on private land.[92] The Act establishes an advisory committee, the Endangered Species, Ecosystems and Ecological Reserves Advisory Committee, to provide advice and recommendations to the Minister regarding species that are "(a) endangered, threatened, uprooted or of concern; [and] b) ecosystems that are endangered or threatened."[93] The *Act* also gives the Lieutenant Governor the power to declare a species endangered, threatened, extinct or of special concern.[94] Once a species has been classified, the government must prepare a recovery strategy or a management plan.[95] The Lieutenant Governor can also make regulations on a range of issues, including regulations "respecting the conservation of the habitat of endangered, threatened, special concern or uprooted species that have been reintroduced" as well as the limitation of access to areas of the province where an endangered species, an endangered species or a species at risk is or is likely to be found.[96]

Ontario has enacted several conservation laws relating to private lands, with the *Endangered Species Act* being of particular importance in this

91 *Endangered Species and Ecosystems Act*, CCSM c E11.
92 Ibid., at article 3(1).
93 Ibid., at article 6.1(1).
94 Ibid., at article 8.
95 Ibid., at article 8.1(1-3).
96 Ibid., at article 9(1).

regard.[97] The *Act* establishes the Committee on the Status of Endangered Wildlife in Ontario, the functions of which include maintaining and prioritizing a list of species for assessment and classification.[98] The Committee must classify the species as extinct, endangered, threatened or of special concern.[99] After this classification, the Minister must include all listed species, except those that are extinct, on the Ontario List of Wildlife Species at Risk.[100] In addition, if the Minister is of the opinion that a species is in imminent danger, s/he may require the Committee to assess and classify the species. As in the national *Species at Risk Act*, the Ontario *Endangered Species Act* provides that a recovery strategy must be prepared for each species listed as endangered or threatened or a management plan for species of special concern.[101] Among other things, the recovery strategy must determine the habitat needs of the species.[102]

The *Species at Risk Act* is the primary provincial legislation for species at risk in New Brunswick.[103] The law works in a similar way to that of the national *Species at Risk Act*. It establishes the Committee on the Status of Endangered Wildlife, responsible for assessing the status of species in the province and classifying them as extirpated, endangered, threatened or of special concern.[104] The Committee provides an assessment of the biological status of wild species to the Minister, who then draws up a List of Species at Risk.[105] The Minister is also authorized to proceed with the emergency designation of a wildlife species if s/he considers that there is an imminent threat to its survival.[106] Under the Act, if a wildlife species is classified as a species of special concern, the Minister must prepare a management plan.[107] If a species is classified as extinct, endangered or threatened, the Minister must ensure that an assessment is carried out to determine whether the recovery of a wild species is feasible.[108] If the Minister determines that recovery is feasible, s/he must prepare a recovery strategy for the species.[109]

Nova Scotia has enacted several conservation laws relating private and provincial lands; the *Endangered Species Act* is an important tool in this regard.[110] The purpose of the *Act* is "to provide for the protection, designation, recovery and other relevant aspects of conservation of species at risk in the Province, including habitat protection."[111] The Act establishes the Species-at-risk Working Group, which is responsible for providing the

97 *Endangered Species Act*, *2007*, SO 2007, c 6.
98 Ibid., s 4(1).
99 Ibid., c 6, s 7.
100 Ibid., c 6, s 8.
101 Ibid., c 6, s 12.
102 Ibid., c 6, s 11(2).
103 *Species at Risk Act*, RSNB 2012, c 6.
104 Ibid., c 6, s 15(1)(a).
105 Ibid. c 6, ss 17(1), 18(1).
106 Ibid., c 6, s 19(1).
107 Ibid., c 6, s 20.
108 Ibid., c 6, s 21(1).
109 Ibid., c 6, s 21(4).
110 *Endangered Species Act*, SNS 1998, c 11.
111 Ibid., s 2(1).

Minister with a categorized list of species at risk in the province, including those species that are included on the national list of species at risk and making recommendations concerning the content and implementation of recovery plans.[112]

Under the Newfoundland and Labrador provincial *Endangered Species Act*, the Species Status Advisory Committee (SSAC) is established to advise the Minister and review the species designations.[113] Following a recommendation from the SSAC or an assessment by the Committee on the Status of Endangered Wildlife in Canada, the Minister may, with the permission of the Lieutenant-Governor in Council, designate a species as vulnerable, endangered, critically endangered, and extinct in the wild.[114] The *Act* also allows the Minister to file an emergency designation to prevent further damage to an endangered or imminently extinct species or associated habitat.[115] When a species is classified as vulnerable, the Minister can protect its habitat by decree and file a management plan.[116] When a species is classified as threatened or at risk, the Minister must file a recovery plan unless the recovery of the species is deemed impracticable.[117] In addition, the law generally prohibits killing, harassing, capturing or destroying the residence of a threatened, endangered or extirpated species.[118] With respect to habitat, the *Act* provides that critical habitat or recovery habitat can be identified in the recovery plan for the species.[119]

From the outset, the Alaska Constitution clearly establishes that there must be a balance between the protection and use of the natural resources found on its territory.[120] Seeking to provide a set of guidelines in the creation and implementation of laws and rules regarding the use of natural resources, the Alaska Constitution establishes that "fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses."[121] The terms of the Constitution apply to everyone, including individuals, private companies and all those who deal with natural resources.[122] Alaska creates a vast body of laws and regulations on endangered species.[123] In order to determine the applicability of endangered species status to a particular species, the State requires that

> "a species or subspecies of fish or wildlife is considered endangered when the commissioner of fish and game determines that its numbers have decreased to such an extent as to indicate that its continued

[112] Ibid., ss 9-10.
[113] *Endangered Species Act*, *2001*, SNL 2001, c E-10.1, at article 6
[114] Ibid., at article 7.
[115] Ibid., at article 9.
[116] Ibid., at article 13.
[117] Ibid., at article 14.
[118] Ibid., at article 16.
[119] Ibid., at article 16.
[120] Alaska const at article 8 § 2.
[121] Alaska const at article 8 § 4.
[122] Alaska const at article 8 § 15.
[123] AS § 16.20.180 (1971).

> existence is threatened. In making this determination the commissioner of fish and game shall consider (1) the destruction, drastic modification, or severe curtailment of its habitat; (2) its overutilization for commercial or sporting purposes; (3) the effect on it of disease or predation; (4) other natural or man-made factors affecting its continued existence."[124]

If a species is identified as endangered under these standards, it must be the subject of a public awareness campaign and re-certified every two years.[125] When projects proposed in the territory of Alaska are likely to cause damage to an endangered species or to other categories of species, project promoters are required to provide information on the measures taken to mitigate it.[126]

The California Constitution gives the State the power to pass laws to create and protect open spaces, including through conservation agreements.[127] Further, California law provides for the protection of fish and wildlife.[128] Endangered species enjoy special legal protection in California, whether on private or public land.[129] To be considered an endangered species under California law, the species must meet the following definition: "a native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant which is in serious danger of becoming extinct throughout all, or a significant portion, of its range due to one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, or disease."[130] At the same time, the State is requested to draw up a list of endangered species as well as those classified as threatened.[131]

Connecticut has enacted an *Endangered Species Act* that applies to all land in the state, regardless of ownership of land.[132] To achieve the goals and objectives of the *Act*, Connecticut law establishes that the state has the ability to investigate and decide on potential claims for endangered species status.[133] The designation of a species as endangered, threatened or otherwise compromised must be reviewed at regular intervals to ensure that the protections and legal rights granted by this status are always appropriate.[134]

Under the Florida *Endangered and Threatened Species Act*, the definition of an endangered species in the state is "any species of fish and wildlife naturally occurring in Florida, whose prospects of survival are in jeopardy

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124 AS §.16.20.190 (a) (1971).
125 AS §.16.20.190 (b) (1971). In Alaskan law, a specific provision establishes the legal definition of the term "species" as including fish and wildlife.AS §.16.20.210 (1971).
126 AS §.16.20.530 (1971).
127 California const at article 13 § 8 (1976).
128 West's Ann Cal.Fish & G Code § 2781 (1990).
129 West's Ann Cal Fish & G Code § 2053 (2019).
130 West's Ann Cal Fish & G Code § 2062 (2019).
131 West's Ann Cal Fish & G Code § 2070 (2019).
132 CGSA § 26-303 (1971).
133 CGSA § 26-305 (1971); CGSA § 26-306 (1971); CGSA § 26-308 (1971).
134 CGSA § 26-307 (1971).

due to modification or loss of habitat; overutilization for commercial, sporting, scientific, or educational purposes; disease; predation; inadequacy of regulatory mechanisms; or other natural or manmade factors affecting its continued existence,"[135] while a threatened species is defined as "any species of fish and wildlife naturally occurring in Florida which may not be in immediate danger of extinction, but which exists in such small populations as to become endangered if it is subjected to increased stress as a result of further modification of its environment."[136] These definitions apply to the whole of the state, whether on public or private land.[137]

Idaho law adopts the definition of an endangered species used in the federal *Endangered Species Act*, while also recognizing the existence of threatened species and "rare and declining species," defined as "those species in need of additional management consideration due to natural rarity, downward trends in populations and habitats, or other factors, natural or human, that, without additional management, might be listed as threatened or endangered species under the [federal] ESA in the future."[138]

When a species is listed on the federal endangered or threatened species lists, it is automatically listed on the same lists under the laws of Illinois.[139] The Endangered Species Protection Board may also add additional species to either list, provided the species is found in the state and there is scientific evidence to show that it meets the definition of endangered or threatened. In addition, the Board may also "delist any non-federally-listed species for which it finds satisfactory scientific evidence that its wild or natural populations are no longer endangered or threatened."[140]

For the purpose of designation of endangered species, Kansas law also incorporates the federal terms of the *Endangered Species Act* as well as the more general terms "any species of wildlife whose continued existence as a viable component of the state's wild fauna is determined to be in jeopardy."[141] Under Massachusetts law, an endangered species is defined as a designated species under the federal *Endangered Species Act* as well as "any species of plant or animal in danger of extinction throughout all or a significant portion of its range . . . and species of plants or animals in danger of extirpation, as documented by biological research and inventory."[142]

New Hampshire uses a broad definition of endangered species: "any species of native wildlife whose continued existence as a viable component of the state's wild fauna is determined to be in jeopardy;" and threatened species: " any species of wildlife which appears likely, within the foreseeable future, to become endangered."[143] The same is true in New Jersey, where the

[135] West's FSA § 379.2291(3)(b) (2011).
[136] West's FSA § 379.2291(3)(c) (2011).
[137] West's FSA § 379.2431 (2016).
[138] IC § 36-2401 (1974).
[139] 520 ILCS 10/7 (1996).
[140] 520 ILCS 10/7 (1996).
[141] KSA 32-958 (1975).
[142] MGLA 131A § 1 (2019).
[143] NH Rev Stat § 212-A:2 (1979).

definition includes "any species or subspecies of wildlife whose prospects of survival or recruitment are in jeopardy or are likely within the foreseeable future to become so due to any of the following factors: (1) the destruction, drastic modification, or severe curtailment of its habitat, or (2) its over-utilization for scientific, commercial or sporting purposes, or (3) the effect on it of disease, pollution, or predation, or (4) other natural or manmade factors affecting its prospects of survival or recruitment within the State, or (5) any combination of the foregoing factors."[144] The State has the capacity to directly regulate endangered species and their habitats, as well as the capacity to delegate these functions to approved private actors.[145]

In North Dakota, the legal definition of an endangered species includes the species identified by the federal *Endangered Species Act*, as well as

> "any species whose prospects of survival or recruitment within the state are in jeopardy due to any of the following factors: a. The destruction, drastic modification, or severe curtailment of its habitat; b. Its overutilization for scientific, commercial, or sporting purposes; c. The effect on it of disease, pollution, or predation; d. Other natural or manmade factors affecting its prospects of survival or recruitment within the state; e. Any combination of the foregoing factors."[146]

In South Carolina, an exhaustive definition of endangered species is used in addition to the terms used in the federal *Endangered Species Act*. More specifically, South Carolina law provides that an endangered species is

> "any species or subspecies of wildlife whose prospects of survival or recruitment within the State are in jeopardy or are likely within the foreseeable future to become so due to any of the following factors: (a) the destruction, drastic modification, or severe curtailment of its habitat, or (b) its over-utilization for scientific, commercial, or sporting purposes, or (c) the effect on it of disease , pollution, or predation, or (d) other natural or manmade factors affecting its prospects of survival or recruitment within the state."[147]

South Dakota uses a broad definition of endangered species:

> "any species of wildlife or plants which is in danger of extinction throughout all or a significant part of its range other than a species of insects determined by the Game, Fish and Parks Commission or the secretary of the United States Department of Interior to constitute a pest whose protection. . . would present an overwhelming and overriding risk to man."[148]

144 NJSA 23:2A-3 (2016).
145 NJSA 23:2A-7 (2016).
146 NDCC 20.1-01-02(16) (2019).
147 Code 1976 § 50-15-10 (1976).
148 SDCL § 34A-8-1(1) (2019).

In accordance with current practice, South Dakota is required to review and recertify the status of an endangered or threatened species at regular intervals to ensure that the protections granted are appropriate.[149] Under South Dakota's endangered and threatened species laws, the state is empowered to enter into agreements with private landowners for the protection, preservation and conservation of these designated species.[150]

3.1.2 Provinces & States with Laws that regulate Species, including Species at Risk/Endangered Species

British Columbia does not have dedicated species at risk legislation, although the *Wildlife Act* does address endangered species. The *Act* states that the Crown owns all of the province's wildlife[151] and that, while some provisions of the *Act* apply only to designated areas, others also apply to private lands. Under the *Act*, the Minister has the authority to designate wildlife management areas, and critical wildlife areas or wildlife sanctuaries within those management areas.[152] The *Act* also prohibits the hunting, taking, trapping, injuring or killing of wildlife that is an endangered or threatened species, or that is found in a wildlife sanctuary.

The province of Saskatchewan has no specific species at risk legislation, although it has several laws that apply to the issue of conservation on private lands. The *Wildlife Act of 1998*[153] is of particular importance in this regard. Under the *Act*, the Minister is responsible for classifying wildlife species as extirpated, endangered, threatened or vulnerable.[154] The Minister's role in species classification distinguishes this *Act* from the national *Species at Risk Act*, in which the Committee on the Status of Endangered Wildlife in Canada, as an independent advisory committee, is responsible for determining the status of wild species. However, the Minister is empowered to appoint committees to act in an advisory capacity.[155] Once the Minister has made a classification decision, the Lieutenant Governor in Council may, by regulation, designate and register the species as extinct, endangered, threatened or vulnerable.[156] Following this registration, the Minister, subject to the regulations, prepares and implements a recovery plan to protect the species.[157]

Prince Edward Island has no specific species-at-risk legislation. However, the *Wildlife Conservation Act*, which mainly regulates hunting, contains provisions relating to species-at-risk and their habitats.[158] Under the *Act*, the Lieutenant-Governor in Council may, on the recommendation of the Minister, designate a species as endangered when threatened with imminent

149 SDCL § 34A-8-4 (2019).
150 SDCL § 34A-8-7 (2019).
151 *Wildlife Act*, RSBC 1996 c 488, s 2(1).
152 *Wildlife Act*, RSBC 1996 c 488, s 4-5.
153 *Wildlife Act*, *1998*, SS 1998, c W-13.12.
154 *Wildlife Act*, *1998*, SS 1998, c W-13.12, at article 48.
155 *Wildlife Act*, *1998*, SS 1998, c W-13.12, at article 8.
156 *Wildlife Act*, *1998*, SS 1998, c W-13.12, at article 49.
157 *Wildlife Act*, *1998*, SS 1998, c W-13.12, at article 50.
158 *Wildlife Conservation Act*, RSPEI 1988, c W-4.1.

extinction, or threatened if it is likely to become so.[159] If the Minister considers that a species of wild animal has "characteristics that make it particularly sensitive to human activities or natural events", it can be designated as a species of special concern.[160] Further, the *Environmental Protection Act* aims "to manage, protect and enhance the environment," and covers a range of issues related to environmental protection, including environmental impact assessment, waste treatment and water supply systems, contaminant releases and contaminated sites.[161] Under the *Act*, the Lieutenant-Governor in Council is also empowered to make regulations deemed necessary or desirable for the improvement and protection of the environment, including regulations respecting watercourses and wetlands.[162]

Yukon does not have a species-at-risk law, although several laws deal with aspects of conservation on private lands. The Yukon *Wildlife Act* primarily regulates hunting and trapping.[163] The *Act* defines "specially protected wildlife species" by regulation, although the definition of wildlife in the *Act* is limited to vertebrate animals and does not include fish, invertebrates or plants.[164] The *Act* prohibits the hunting, trapping or possession of these specially protected species, except for Inuvialuit or persons holding a license, and stipulates that no one may hunt in a wildlife reserve, except by regulation.[165] With regard to habitat, the Commissioner in Executive Council may designate the region as a habitat protection region if he considers it necessary, taking into account the importance of a region as habitat for a species, its susceptibility to disturbance and the likelihood of disturbance.[166]

The Northwest Territories has several conservation laws relating to private lands. The territorial *Species at Risk Act* is of particular importance in this regard.[167] The object of the *Act* is to "prevent the disappearance or extinction of species by developing an integrated and cooperative system for the recovery and conservation of species at risk that incorporates the principles of co-management provided for in land claim agreements, and that recognizes the roles and responsibilities of the authorities Management."[168] The *Act* establishes the Conference of Managing Authorities on Species at Risk, which is made up of co-management boards, the Tåîchô Government, the Government of the Northwest Territories and the Government of Canada,[169] as well as a Committee on Species at Risk to

[159] *Wildlife Conservation Act*, RSPEI 1988, c W-4.1, ss 7(1) and (2).
[160] *Wildlife Conservation Act*, RSPEI 1988, c W-4.1, s 7(3).
[161] *Environmental Protection Act*, RSPEI 1988, c E-9.
[162] *Environmental Protection Act*, RSPEI 1988, c E-9, s 25.
[163] *Wildlife Act*, RSY 2002, c 229.
[164] *Wildlife Act*, RSY 2002, c 229, s 1.
[165] *Wildlife Act*, RSY 2002, c 229, ss 8, 37.
[166] *Wildlife Act*, RSY 2002, c 229, s 92.
[167] *Species at Risk Act*, SNWT 2009, c 16.
[168] *Species at Risk Act*, SNWT 2009, c 16, s 9.
[169] *Species at Risk Act*, SNWT 2009, c 16, s 11.

assess the status of species that may be at risk in the Northwest Territories.[170] Finally, under the *Act*, the Minister is authorized to enter into an agreement with a private landowner to conserve the habitat of a species or the area in which its habitat is located.[171] The Minister must make reasonable efforts to reach an agreement with a landowner before designating a habitat on private land.[172]

The Nunavut *Wildlife Act* is the primary legislation for species at risk in Nunavut. The *Act* reflects Inuit Qaujimajatuqangit or traditional Inuit values, knowledge, behaviours, perceptions and expectations.[173] With respect to species at risk, the law prohibits anyone from harvesting, injuring, harassing, disturbing or interfering with a member of a species designated as endangered or threatened, or possessing or trafficking in the same or a product purporting to contain the same, from the day on which the species is designated until the entry into force of a decree made pursuant to the *Act*.[174] The *Act* also provides habitat protection measures, prohibiting the modification or destruction of habitat, as well as a number of other prohibitions with respect to critical habitats.[175] Once a species has been designated as endangered or threatened, a recovery policy must be prepared and submitted within two years of the date of its designation.[176] When a species is designated as threatened or endangered under the *Act*, the territory is authorized to issue a series of interim or emergency measures, in particular with regard to harvesting and critical habitat.[177] Private land can only be identified as critical habitat if no other land is considered suitable.[178]

Under Colorado law, it is explicitly stated that, regardless of the public or private nature of the land on which it is located, "all wildlife within this state not lawfully acquired and held by private ownership is declared to be the property of this state."[179] In addition, Colorado allows for the recognition and protection of areas that are designated as natural resource areas even if they belong to private interests, provided that the owner agrees with the prospect.[180]

Threatened and endangered species in Louisiana are defined as species designated under the federal *Endangered Species Act* and/or "resident species of wildlife or native plants."[181] The Louisiana Department of Wildlife and Fisheries is responsible for monitoring and enforcing measures to protect endangered and threatened species.[182] Factors to consider in determining

[170] *Species at Risk Act*, SNWT 2009, c 16, s 17.
[171] *Species at Risk Act*, SNWT 2009, c 16, s 79(1).
[172] *Species at Risk Act*, SNWT 2009, c 16, s 81(1).
[173] *Wildlife Act*, SNu 2003, c 26, ss 1(2)(f), 2, 8, 9.
[174] *Wildlife Act*, SNu 2003, c 26, s 63(1).
[175] *Wildlife Act*, SNu 2003, c 26, s 65-66.
[176] *Wildlife Act*, SNu 2003, c 26, s 134(1).
[177] *Wildlife Act*, SNu 2003, c 26, s 132(1).
[178] *Wildlife Act*, SNu 2003, c 26, s 139(2).
[179] CRSA § 33-1-101(2) (2012).
[180] CRSA § 33-33-108 (2012).
[181] LSA-RS 56:1903 (2019).
[182] LSA-RS 56:1903 (2019).

whether a species should be classified as endangered or threatened under Louisiana law are:

> "The present or threatened destruction, modification or curtailment of its habitat or range; Overutilization for commercial, sporting, scientific, educational or other purposes; Disease or predation; The inadequacy of existing regulatory mechanisms; and Other natural or man-made factors affecting its continued existence within this state."[183]

In Maryland, the term "endangered species" is very broadly defined as "any species whose continued existence as a viable component of the State's wildlife or plants is determined to be in jeopardy,"[184] including species listed under of the federal *Endangered Species Act*.[185] In addition, Maryland extends a number of protections to non-game species, which are not covered by the definition of endangered or threatened species by the state or the federal government.[186]

3.1.3 Forests, Forest Management, Rangelands, etc.

The *Alberta Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act* establishes protected areas which must be managed in order to preserve their natural state and protect them from degradation and industrial development.[187] To do this, the *Act* establishes several types of designated territories: wilderness areas, ecological reserves, natural areas and heritage routes. With regard to wilderness areas, ecological reserves, natural areas and heritage routes, the Minister may, in particular, implement programs or measures to enhance or protect the flora, fauna and environment, as well as activities aimed at preservation or protection.[188]

Two important laws deal with aspects of forest land conservation in British Columbia: the *Private Managed Forest Land Act* and the *Forest and Range Practices Act*. The *Private Managed Forest Land Act* applies to private timber lands other than land located in an area covered by a forest farm permit, an area covered by a woodlot permit, or an area covered by a community forestry agreement.[189]

The Saskatchewan *Forest Resources Management Act* regulates natural resources, aiming "to promote the sustainable use of forest land for the benefit of current and future generations by balancing the need for economic, social and cultural opportunities with the need to maintain and enhance the health of forest land."[190] The *Act* gives the Minister a number of powers,

183 LSA-RS 56:1904 (2019).
184 MD Code, Natural Resources § 10-2A-01(d)(1) (2005).
185 MD Code, Natural Resources § 10-2A-01(d)(2) (2005).
186 MD Code, Natural Resources § 10-2A-01(g) (2005).
187 *Wilderness Areas*, *Ecological Reserves*, *Natural Areas and Heritage Rangelands Act*, RSA 2000, c W-9, preamble.
188 *Wilderness Areas*, *Ecological Reserves*, *Natural Areas and Heritage Rangelands Act*, RSA 2000, c W-9, s 5.
189 *Private Managed Forest Land Act*, SBC 2003, c 80, s 3.
190 *Forest Resources Management Act*, SS 1996, c F-19.1, at article 3.

including the power to enter into agreements relating to "the management of any land, including community forests, woodlots, land owned by the Government of Canada, privately owned land or land owned by a municipality, for the purposes of conserving, developing, enhancing, maintaining, managing, protecting and utilizing forest resources in a sustainable manner."[191]

Under the Nova Scotia *Forests Act*, the Minister is responsible for the development and implementation of a range of forest management programs, including programs involving private landowners.[192] The principle of sustainable forest management is the basis of all forest management programs.[193] The Minister may also "undertake a forest management planning process involving the prediction of the effects of various forest management alternatives on wood supply requiring," inter alia, "full consideration of wildlife conservation requirements, potential ecological impacts and outdoor recreation opportunities and needs."[194] In addition, the Minister must "ensure that wildlife, wildlife habitats and the long-term diversity and stability of the forest ecosystems, water supply watersheds and other significant resources are managed."[195] With regard to private land, the Minister can create the Private Land Directorate to help private landowners to establish better forest management techniques.[196]

The PEI[197] *Forest Management Act* concerns the governance of forest land in the province. Under the *Act*, the Minister must prepare a Forest Policy, and "shall encourage the management of private forest lands for the sustained production of forest products in a manner consistent with the Forest Policy and the Provincial Conservation Strategy."[198] The Minister is also responsible for the conservation, use, protection and integrated management of Crown forest lands, including the conservation and development of wildlife resources on the forest lands of the Crown.[199] In addition, the Minister may acquire Crown land for a variety of purposes, including the creation of parks or the acquisition of land for the conservation of wildlife.[200] Finally, the Lieutenant-Governor in Council may make regulations on various matters, including the establishment of programs for the management of private woodlots and the establishment, format, content and duration of plans for forest management of private lands.[201]

The Newfoundland and Labrador *Wilderness and Ecological Reserves Act* allows the Lieutenant-Governor in Council to establish wilderness areas in certain regions of the province

[191] *Forest Resources Management Act*, SS 1996, c F-19.1, at article 7(1)(k).
[192] *Forests Act*, RSNS 1989, c 179, s 5.
[193] *Forests Act*, RSNS 1989, c 179, s 7.
[194] *Forests Act*, RSNS 1989, c 179, s 8(1)(b).
[195] *Forests Act*, RSNS 1989, c 179, s 10.
[196] *Forests Act*, RSNS 1989, c 179, s 14.
[197] Prince Edward Island
[198] *Forest Management Act*, RSPEI 1988, c F-14, ss 4(1), 8(1).
[199] *Forest Management Act*, RSPEI 1988, c F-14, s 9(1)(e).
[200] *Forest Management Act*, RSPEI 1988, c F-14, s 10(1)(j).
[201] *Forest Management Act*, RSPEI 1988, c F-14, ss 25(i), (j).

> "that are subject to no or little human activity, (a) to provide for the continued existence of those areas as large wilderness areas to which people may come and in which they may hunt, fish, travel and otherwise experience and appreciate a natural environment; (b) to allow within those areas undisturbed interactions of living things and their environment; (c) to preserve those large areas that may be necessary for the continued survival of a particular species; or (d) to protect areas with primitive or extraordinary characteristics."[202]

Under the *Act*, the Lieutenant-Governor in Council is also authorized to establish ecological reserves. In addition, the *Act* establishes the Wilderness and Ecological Reserves Advisory Council to make recommendations regarding the establishment, development or closure of reserves.[203] The Minister can create an emergency reserve if the region is considered endangered, and also has the right to expropriate property on a reserve. On reserves, a series of prohibitions apply.[204] For example, it is prohibited to carry out agricultural, forestry, mining, staking or prospecting activities.[205] It is also prohibited to divert a watercourse or modify the flow of water affecting the reserve.[206] However, section 25 gives the Lieutenant Governor in Council the power to create exemptions by regulation.[207] In addition, the Wilderness Reserve Regulations contain more specific prohibitions. Finally, the Botanical, Fossil, and Seabird Ecological Reserves Regulations specifies the conditions or prohibitions applicable in these ecological reserves.[208]

With regard to forest conservation and protection activities, the Arkansas Forestry Commission is entrusted with

> "cooperat[ing] with federal and state agencies, forest landowners, residents, and organizations in the prevention, detection, and suppression of wildland fires, in the control of forest insects and diseases, in the growth and distribution of forest tree seedlings, and in providing technical assistance and information relating to the most scientific methods of timber harvesting, reforestation, and forest resource protection and development, to the end that the forests throughout the state may be perpetuated."[209]

These include the requirement for private forest owners and the state to work together to determine the allowable timber harvest and harvest from private property.[210]

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202 *Wilderness and Ecological Reserves Act*, *1990*, RSNL 1990, c W-9, at article 4.
203 *Wilderness and Ecological Reserves Act*, *1990*, RSNL 1990, c W-9, at article 6.
204 *Wilderness and Ecological Reserves Act*, *1990*, RSNL 1990, c W-9, at article 24.
205 *Wilderness and Ecological Reserves Act*, *1990*, RSNL 1990, c W-9, at article 24 (1)(a)(ii).
206 *Wilderness and Ecological Reserves Act*, *1990*, RSNL 1990, c W-9, at article 24 (1) (b).
207 *Wilderness Reserve Regulations*, NLR 65/97.
208 *Botanical Ecological Reserve Regulations*, *2013*, NLR 31/13; *Seabird Ecological Reserve Regulations*, *2015*, NLR 32/15; *Fossil Ecological Reserve Regulations*, *2009*, NLR 13/09.
209 ACA § 15-31-101(3) (2007).
210 ACA § 15-31-202 (2007).

California has adopted the *Oak Woodlands Conservation Act*, which "[s]upport[s] and encourage[s] voluntary, long-term private stewardship and conservation of California's oak woodlands by offering landowners financial incentives to protect and promote biologically functional oak woodlands over time."[211] Similarly, the California *Forest Legacy Program Act* addresses the issue of the need to conserve State forest resources, including those found on private land.[212]

Regarding agricultural activities and forestry concerns, Florida "recognizes the great value of farming and forestry to this state and that continued agricultural activity is compatible with wetlands protection."[213] Under this legal regime, the definition of agricultural activities includes forestry.[214] In addition, Florida has established a program to support tree planting programs on public and private lands and to promote farming practices and forest conservation on private lands.[215]

The Idaho Constitution states that "forest lands, rangelands and agricultural lands maintained in a healthy condition are a legitimate land use contributing to the economic, social and environmental well-being of the state and its citizens," and that

> "It is essential to the general welfare of all citizens of this state that multiple use conservation improvements be implemented on a broader scale on both public and private lands; due to numerous economic and practical issues relating to the improvements of individual tracts of land, both public and private resource conservation improvements, projects and programs of the nature contemplated by this chapter would enhance the economic productivity and environmental quality of the state."[216]

The same constitutional provisions set out the methods by which these conditions can be fulfilled and by which it is possible to carry out the maximum of conservation activities on public and private lands.[217] In the event that a private owner of forests or related forest land seeks to change or modify the way in which such land is used or exploited, including the transfer of its use to another industry, appropriate deposits must be made with the State and additional permits are usually required.[218]

The State of Illinois recognizes the importance of topsoil for the vitality of agricultural activities and conservation as a whole, and established the Save Illinois Topsoil program. The Save Illinois Topsoil program allows landowners to place land on or adjacent to land used for agricultural purposes in easements with the government, as well as other land deemed

[211] West's Ann Cal Fish & G Code § 1362 (2001).
[212] West's Ann Cal Pub Res Code § 12210 (2008)
[213] West's FSA § 403.927(1) (2011).
[214] West's FSA § 403.927(4)(a) (2011).
[215] West's FSA § 589.277 (2012).
[216] IC § 22-2716(1) (2003).
[217] IC § 22-2716 (2003).
[218] IC § 38-1312 (1974).

important by the Program Administrator.[219] Easements can be of a minimum duration of five years (renewable) and maximum of 50 years.[220] An integral part of easements under this program is that the grantor agrees not to use the areas that support the lands subject to the easement in a manner that compromises their security.[221]

The State of Kentucky has an extensive forest conservation system and legislation that is based on key principles such as

> "healthy, sustainable forests that are ecologically sound, provide economic opportunities and benefit the overall quality of life for all Kentuckians; high quality forests provide clean air and water and biodiversity; a diverse forest economy must include forest product industries, recreation, and tourism; timber harvesting operations must be conducted in an ecologically sound manner; Kentucky must promote the stewardship of its public and private forest lands while recognizing the rights and responsibilities of private landowners."[222]

At the same time, a key aspect of the *Forest Conservation Law* is the obligation for Kentucky to act as a coordinating entity for the education of private forest owners about the environmental needs associated with their territories and the exposure to potentially beneficial means to meet these needs in a sustainable and conservation-oriented manner.[223]

Massachusetts law protects forests and associated lands, public or private, "for the purpose of conserving water, preventing floods and soil erosion, improving the conditions for wildlife and recreation, protecting and improving air and water quality, and providing a continuing and increasing supply of forest products for public consumption, farm use, and for the wood using industries of the commonwealth."[224] This creates a set of public obligations and burdens and also creates a relationship with private landowners under which there "shall further be […] cooperation with the landowners and other agencies interested in forestry practices for the proper and profitable management of all forest lands in the interest of the owner, the public and the users of forest products."[225] Michigan law openly recognizes the importance and place of forestry and related activities within the state, and the desirability and necessity of ensuring that new forms of growth and development do not undermine the forestry and the environmental protections necessary to enable it to prosper in the future.[226] This directly involves private forestry activities and forests, as well as those owned by the State.[227]

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219 505 ILCS 35/2-1 (1996).
220 505 ILCS 35/2-1 (1996).
221 505 ILCS 35/2-1 (1996).
222 KRS § 149.332 (1998).
223 KRS § 149.332 (8) (1998).
224 MGLA 132 § 40 (2019).
225 MGLA 132 § 40 (2019).
226 MCLA 320.2032 (2003).
227 MCLA 320.2032 (2003).

Minnesota has adopted the concept of sustainable forestry and forest resources as a matter of law, and, in order to implement these policies, created a Council of a variety of government officials, private companies and landowners who have interests in the area of sustainable forestry. The purpose of the Council is to provide guidance that balances the rights and interests of public and private property, as well as the needs of economic development and environmental conservation in the short and long term.[228] In addition, Minnesota has enacted the *Forests for the Future Law* to create a program that "identifies and protects private, working forest lands for their timber, scenic, recreational, fish and wildlife habitat, threatened and endangered species, and other cultural and environmental values."[229] Through this program, landowners can turn over part or all of their forest land or land adjacent to forests to the state, usually for a long period, if not in perpetuity.[230]

Missouri provides state-wide regulation of forests and related forest land. In addition, the state provides private owners of forest land with the opportunity to formally establish and have private forest management plans approved and certified.[231] If these plans are approved and certified, the private owner benefits from tax advantages in recognition of the cost incurred by the use of a higher standard.[232] Likewise, through initiatives to promote sustainable forestry, private owners of forest land can participate in a State-administered incentive program in which landowners are compensated or receive tax benefits for maintaining non-commercial uses of their forests.[233]

In New York, it is possible for individuals to cede forests or other land to the State provided they are maintained for conservation and related purposes.[234] However, the State must meet strict requirements to properly assess the ecological and environmental value of the land offered to it by individuals.[235] This is particularly important in areas like the Adirondack Park, one of the largest nature reserves in the country, which is home to a number of diverse habitats which are considered paramount in the decision-making process regarding the possibility of accepting new land as state property.[236]

3.1.4 Water Resources and Wetlands

The *Water Act* governs the way the Province of Alberta manages water. The purpose of the *Act* is to promote water conservation and management while recognizing the need for economic growth and prosperity, as well as

[228] MSA § 89A.03 (2014).
[229] MSA § 84.66 (2009).
[230] MSA § 84.66 (2009).
[231] VAMS 254.100 (2018).
[232] VAMS 254.100 (2018).
[233] VAMS 254.225 (2002).
[234] McKinney's ECL § 9-0107 (1972).
[235] McKinney's ECL § 9-0109 (1972).
[236] McKinney's ECL § 9-0109 (1972).

flexible management.[237] The *Act* governs the diversion, allocation and use of water, regulates and applies measures that affect water management and use, the aquatic environment, protection practices fish habitat and stormwater management.[238] Under the *Act*, the Minister "must establish a strategy for the protection of the aquatic environment as part of the framework for water management planning for the Province", which may include, among other things, guidelines for the establishment of water conservation objectives and issues related to the protection of biological diversity.[239]

The Saskatchewan *Water Security Agency Act* vests ownership and the right to use all the province's ground and surface water in the Crown. The *Act* also creates the Water Security Agency, which has a mandate to regulate and control the flow of water in any lake, river, reservoir or other body of water, issue water rights permits and approvals, and make agreements for the management, administration, planning, conservation, protection and control of the waters, watersheds and resources in the province.[240]

Alabama has the constitutional authority to pass laws regulating and monitoring water resources and wetlands for the purpose of conservation.[241] This includes the possibility of using eminent domain power to purchase eligible areas provided that the constitutional elements are respected and that the land is not used for commercial activities.[242] To strengthen these aspects of water protection and related requirements, Alabama provides for the capacity of state agencies to control pollution and water quality for the purpose of conservation and also for promotion and protection of business and industry.[243] In general, Alabama public policy for wetland conservation is that "the drainage of surface water and the reclamation of wetlands, swamplands, overflowed lands and tidal marshes and flood prevention and the conservation, development, utilization and disposal of water shall be considered a public benefit and conducive to the public health, safety, convenience, utility and welfare."[244] Regarding the protection of wetlands in Alabama, there is a broad legal system governing the ability of private entities to dredge in or near wetlands.[245]

With respect to wetland conservation efforts, California recognizes the rights of private landowners with wetlands on their lands as distinct from the rights and obligations of the state in terms of wetlands located on its territories.[246] California permits the use of public-private partnerships for the maintenance and conservation of wetlands, although it also seeks to promote

[237] *Water Act*, RSA 2000, W-3, s 2.
[238] *Water Act*, RSA 2000, W-3, 2.
[239] *Water Act*, RSA 2000, W-3, s 8(2).
[240] *The Water Security Agency Act*, SS 2005, c W-8.1, at article 6.
[241] Alabama const at article 93.16(1) (2018).
[242] Alabama const at article 93.16(1) (2018).
[243] Alabama Code 1975 § 22-22-2 (1997).
[244] Alabama Code 1975 § 9-9-5 (1997).
[245] Alabama Admin Code r 335-8-2-.02 (1997); Alabama Admin Code r 335-8-2-.03 (1997).
[246] West's Ann Cal Pub Res Code § 5811 (2001)

state purchase of private wetlands where appropriate in order to guarantee their conservation.[247]

In Connecticut, it is legally recognized that there is a great economic, social and environmental need for the conservation of wetlands wherever these environments are present.[248] As part of habitat conservation and protection, Delaware requires that laws concerning water bodies and watercourses be applied uniformly throughout the state, regardless of the use of the watercourse, or public or private land ownership status.[249] As part of the Delaware Wetland Regime, the state requires that private or public landowners apply for and obtain permits for any activity that may have an impact on wetlands.[250]

Wetlands play an important role in Florida's ecosystems and, as such, are highly protected by laws and regulations governing their use and potential uses that could affect them.[251] In the context of wetlands, Florida plans and encourages the creation and implementation of public-private partnerships and working arrangements "to accomplish water storage, groundwater recharge, and water quality improvements on private agricultural lands."[252] Indiana offers owners of certain types of wetlands the opportunity to request the state to have land recognized and protected by law.[253] In this case, the owner of the wetland agrees to be legally responsible in many cases and undertakes not to carry out certain activities likely to damage the wetland and the infrastructure that supports it.[254]

Louisiana has enacted a series of wetland laws, including requirements that those seeking to undertake projects requiring permits must provide mitigation for damage to wetlands.[255] Within this system, the focus is on the uses of compensatory mitigation measures, defined as "replacement, substitution, enhancement, or protection of ecological values to offset anticipated losses of those values caused by a permitted activity. Compensatory mitigation may also include construction or implementation of an integrated coastal protection project consistent with the state's master plan for coastal protection and restoration within the same watershed as the permitted activity."[256]

In general, Michigan recognizes the importance of public and private wetlands as natural resources and the need to provide them with legal and regulatory protection.[257] Where applicable, an attempt is made to strike a balance between the rights of landowners and the interests of the wider community in the protection of wetlands and, in the event of a permit or

247 West's Ann Cal Pub Res Code § 5814 (2001).
248 CGSA § 22a-28 (1971).
249 7 Del C § 6001 (1996).
250 7 Del C. § 6604 (1996).
251 West's FSA § 373.414 (2018).
252 West's FSA § 373.4591(1) (2016).
253 IC 13-18-22-9 (2004).
254 IC 13-18-22-9 (2004).
255 LSA-RS 49:214.41 (2019).
256 LSA-RS 49:214.41(1) (2019).
257 MCLA 324.30302 (1995).

authorization being refused for the development or use an area containing wetland, the private owner "may request a revaluation of the affected property for assessment purposes to determine its fair market value under the use restriction."[258]

Minnesota's identified wetlands, whether on public or private land, are subject to legal and regulatory protections that require permits and other authorizations before taking any action that could impact them.[259] Owners of private land on which wetlands are located can also request that it be recognized and classified as such as a matter of law, which can lead to restrictions on the potential use of the land, but can also bring benefits, especially in the form of tax benefits.[260] In addition, by restoring former wetlands on their property, private landowners have the opportunity to obtain financial incentives from the state.[261] New York's wetlands are subject to comprehensive regulation, particularly on private lands, and property owners with wetlands on their property benefit from tax relief and other compensatory measures as a result.[262] At the same time, New York law recognizes the need to regulate wetlands, particularly those in coastal areas, in a way that also allows for economic and social development.[263]

3.1.5 Land Titles, Land Banking Systems and Conservation Easements

The *Land Titles Act* in British Columbia provides for the registration of undertakings in favour of the Crown, a Crown corporation or agency, a municipality, a Regional district, the South Coast British Columbia Transportation Authority or a local fiduciary committee under the Islands Trust Act.[264] An agreement may provide "that land or a specified amenity in relation to it be protected, preserved, conserved, maintained, enhanced, restored or kept in its natural or existing state in accordance with the covenant and to the extent provided in the covenant,"[265] with the term "amenity" including "any natural, historical, heritage, cultural, scientific, architectural, environmental, wildlife or plant life value relating to the land that is subject to the covenant."[266]

The Alberta *Land Stewardship Act* aims to "provide for the co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment" and "create legislation and policy that enable sustainable development by taking account of and responding to the cumulative effect of human endeavour and other events."[267] The *Act* further provides for the creation of conservation

[258] MCLA 324.30318 (1995).
[259] MSA § 103G.222 (2017).
[260] MSA § 103F.612 (2015).
[261] MSA § 103G.235 (2007).
[262] McKinney's ECL § 24-0905 (1977).
[263] McKinney's ECL § 25-0102 (1973); McKinney's ECL § 25-0401 (1973).
[264] *Land Titles Act*, RSBC 1996, c 250, s 219(1).
[265] *Land Titles Act*, (RSBC 1996, c 250, s 219(4)(b).
[266] *Land Titles Act*, RSBC 1996, c 250, s 219(5).
[267] *Alberta Land Stewardship Act*, SA 2009, c-A-26.8, s 1(2).

easements.[268] In addition, regional plans adopted pursuant to the *Act* may also "permanently protect, conserve, manage and enhance environmental, natural scenic, esthetic or agricultural values by means of a conservation directive expressly declared in the regional plan," although a conservation directive does not constitute an area or interest in land.[269] The Alberta Conservation Association (ACA) was incorporated under the *Societies Act* in 1997 to succeed the Alberta Fish and Wildlife Trust. The ACA has the special status of a delegated administrative organization under the *Wildlife Act* and its responsibilities are defined in a Memorandum of Understanding (MOU) with the Ministry of Environment and Parks of Alberta.[270] Another important program in the context of conservation efforts in the province is the Alberta Land Trust Grant Program. Grants from the Alberta Land Trust Grant Program are offered to eligible land trust organizations and help "establish and administer new conservation easements on private land and/or administer new conservation projects on land trusts titled land."[271] Any registered land trust organization can apply for funding provided that one of its purposes is land conservation.[272] The program does not provide grants to allow the purchase of private land, but rather, "provide[s] grants to land trust organizations to help establish and administer new conservation easements on private land and/or administer new conservation projects on land trusts titled land."[273] Finally, the Conservation Easements Act provides for the creation of a conservation easement as a matter of law and regulatory oversight.[274]

The Manitoba *Conservation Agreements Act* allows private landowners to contribute to the protection and improvement of ecosystems, habitats and wildlife preservation within the province. The *Act* provides for the conclusion of conservation agreements that remain in effect for a specified duration and apply to the land.[275] Ontario has established the Protected Land Tax Incentive Program (PEFTP), a voluntary program that provides landowners with a 100% property tax exemption on eligible portions of their properties in exchange for their long-term commitment to stewardship of protected lands.[276] Those who oppose a municipality's zoning decisions automatically have the right to appeal to the Ontario Municipal Board (OMB) under subsection 34(11) of the *Planning Act*. The OMB is required to

[268] *Alberta Land Stewardship Act*, SA 2009, c-A-26.8, s 29.
[269] *Alberta Land Stewardship Act*, SA 2009, c-A-26.8, ss 37(1), 37(3).
[270] Alberta Conservation Association, *Roles and Responsibilities*, online: <https://www.ab-conservation.com/about/member-groups/>.
[271] Province of Alberta, *Alberta Land Trust Grant Program*, online: <https://www.alberta.ca/alberta-land-trust-grant-program.aspx>.
[272] Province of Alberta, *Alberta Land Trust Grant Program*, online: <https://www.alberta.ca/alberta-land-trust-grant-program.aspx>.
[273] Province of Alberta, *Alberta Land Trust Grant Program*, online: <https://www.alberta.ca/alberta-land-trust-grant-program.aspx>.
[274] *Conservation Easements Act*, SS 1996, c C-27.01, at article 3(1).
[275] *Loi sur les accords de conservation*, CCSM c C173, at article 2(3), 3(2).
[276] Province of Ontario, *Conservation Land Tax Incentive Program policy*, online: <https://www.ontario.ca/page/conservation-land-tax-incentive-program-policy>.

make decisions in accordance with the provincial policy statement.[277] Under the terms of the statement, the development and modification of sites is prohibited in a number of areas, including wetlands, woodlands, valleys, wildlife habitats and coastal wetlands deemed "significant".[278]

New Brunswick's natural areas are protected under the *Protected Natural Areas Act*.[279] On the recommendation of the Minister, the Lieutenant-Governor in Council may establish a protected natural area on Crown land or, subject to certain conditions, a protected natural area on private land. The *Act* also sets out prohibited activities in protected areas and provides exemptions from these prohibitions, as well as a process for issuing permits for certain activities.[280] Under section 33 of the *Act*, the Minister may enter into an agreement for the protection, conservation and management of a protected natural area or part of a protected natural area. Finally, the *Ecological Easements Act* allows private landowners to protect the conservation value of their land.[281] A conservation easement can be created for a fixed term or in perpetuity and extends with the land to which it relates during the period provided for in the conservation easement.[282]

The Nova Scotia *Special Places Protection Act* provides another tool for protecting habitat on private land.[283] The purpose of the law is, among other things, to

> "provide for the preservation, protection, regulation, acquisition and study of ecological sites which are considered important parts of the natural heritage of the Province and, notwithstanding the generality of the foregoing, preserve, regulate, acquire and study those ecological sites that (i) are suitable for scientific research and educational purposes, (ii) are representative examples of natural ecosystems within the Province, (iii) serve as examples of ecosystems that have been modified by man and offer an opportunity to study the natural recovery of ecosystems from such modification, (iv) contain rare or endangered native plants or animals in their natural habitats, (v) provide educational or research field areas for the long-term study of natural changes and balancing forces in undisturbed ecosystems […]."[284]

With respect to ecological sites, the Minister may, on Crown land or on private land with the consent of the owner, designate certain regions of the

[277] Province of Ontario, 2014 Provincial Policy Statement, online: <http://www.mah.gov.on.ca/AssetFactory.aspx?did=10463> at 2.1.4 et 2.1.5.
[278] Province of Ontario, 2014 Provincial Policy Statement, online: <http://www.mah.gov.on.ca/AssetFactory.aspx?did=10463> at 2.1.6 et 2.1.7
[279] *Protected Natural Areas Act*, SNB 2003, c P-19.01.
[280] *Protected Natural Areas Act*, SNB 2003, c P-19.01, ss 11-13, 15.
[281] *Ecological Easements Act*, RSNB 2011, c 130.
[282] *Ecological Easements Act*, RSNB 2011, c 130, ss 2(2), 2(4).
[283] *Special Places Protection Act*, RSNS 1989, c 438.
[284] *Special Places Protection Act*, RSNS 1989, c 438, s 2.

province as ecological sites and formulate a management plan for these sites.[285]

The purpose of the Nova Scotia *Wilderness Areas Protection Act* is to establish, manage, protect and use wilderness areas, in perpetuity, for present and future generations, to maintain and restore the integrity of natural processes and biodiversity, protect representative examples of natural landscapes and ecosystems, and protect, among other things, remarkable, unique, rare and vulnerable natural features and phenomena.[286] Finally, the *Conservation Easements Act* offers private landowners a way to protect their land. Conservation easements are legally binding agreements between a landowner and a conservation or government organization that attaches title to the land and restricts its future use.[287] A conservation easement is established to protect, restore or improve land devoted primarily to the protection of biodiversity and natural processes.[288]

Under the Prince Edward Island *Wildlife Conservation Act*, the Minister can create an advisory committee, acquire property and enter into contracts for the protection of wildlife.[289] The Minister has the power to prohibit habitat modification, in the absence of an exception or regulatory authorization, designate areas as habitat for an endangered or threatened species, and designate and regulate wetlands, marshes and rivers of historic or biological value.[290] In addition, the Minister may enter into an agreement with a private landowner, who may impose a conservation agreement or easement with respect to the lands belonging to the private landowner.[291] Such an agreement or easement may be granted for the protection, improvement or restoration of natural ecosystems, wildlife habitats or habitats of rare, threatened or vulnerable species, conservation of soil, water or soil, and for conservation of botanical, zoological or geological characteristics of a territory.[292]

The Yukon *Parks and Land Certainty Act* allows for the designation of territory as park land. The *Act* covers private land by allowing the acquisition of such land by the province by purchase, gift, subsidy, bequest or exchange in order to create a park.[293] The *Environmental Protection Act* aims to manage, protect and enhance the natural environment of the Northwest Territories. Although the *Act* does not deal directly with conservation, it does include provisions that may affect wildlife habitat on private lands.[294]

In the United States context, a model *Uniform Conservation Easement Act* has been enacted to provide for issues such as the definition and implementation of conservation easements, as well as the governmental and

[285] *Special Places Protection Act*, RSNS 1989, c 438, ss 14(1-2).
[286] *Wilderness Areas Protection Act*, SNS 1998, c 27, s 2.
[287] *Conservation Easements Act*, SNS 2001, c 28.
[288] *Conservation Easements Act*, SNS 2001, c 28, s 4.
[289] *Wildlife Conservation Act*, RSPEI 1988, c W-4.1, s 8.
[290] *Wildlife Conservation Act*, RSPEI 1988, c W-4.1, s 16(3).
[291] *Wildlife Conservation Act*, RSPEI 1988, c W-4.1, ss 18(1) and (2).
[292] *Wildlife Conservation Act*, RSPEI 1988, c W-4.1, s 18(3).
[293] *Parks and Land Certainty Act*, RSY 2002, c. 165.
[294] *Environmental Protection Act*, RSNWT 1988, c E-7.

charitable entities that can administer them. The Act has been adopted as the basis for conservation easements in Alaska, Georgia, Idaho, Kansas, Kentucky, Minnesota, Mississippi, Nevada, Oklahoma, South Carolina, Texas, West Virginia and Wisconsin.[295]

The Alabama *Forever Wild Land Trust* is a state constitutional construction to assist current and future generations by providing the state with resources to purchase plots of land and maintain them as forever wilderness sites.[296] Strict rules govern the use of the Land Trust, particularly regarding non-use for the creation or improvement of land.[297] In addition, funds can be used to support the creation and maintenance of a state-wide natural heritage resource database.[298] In Alabama, a governmental entity, whether at the state level or a governmental subunit, is authorized to enter into conservation easements with individual or collective landowners. Under this law, it is also possible to grant conservation easements to charities that are responsible for conservation-related activities.[299]

The Alaska *Environmental Conservation Act* explicitly provides that

> "it is the policy of the state to improve and coordinate the environmental plans, functions, powers, and programs of the state, in cooperation with the federal government, regions, local governments, other public and private organizations, and concerned individuals, and to develop and manage the basic resources of water, land, and air to the end that the state may fulfill its responsibility as trustee of the environment for the present and future generations,"[300]

thereby recognizing both private property rights and reaffirming the State's commitment to the principles of environmental conservation.

In Arizona, legislators have provided for the funding of the Arizona Wildlife Conservation Fund as an entity "to conserve, enhance, and restore Arizona's diverse wildlife resources and habitats for present and future generations, and which may include the acquisition of real property."[301] Arizona defines a conservation easement as "a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations for conservation purposes or to preserve the historical, architectural, archaeological or cultural aspects of real property."[302] Conservation easement grantors can be anyone with the legal title to grant, while conservation easement holders can be government entities or charities that are active in conservation-related fields.[303]

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295 Ga Code Ann § 44-10-2 (1) (1992); IC § 55-2101 (1988); KSA 58-3810 (1992); KRS § 382.820 (1988); Miss Code Ann § 89-19-3 (1986); NRS 111.410 (1983); 60 Okl St Ann § 49.2 (1999); Code 1976 § 27-8-20 (1991); VTCA Natural Resources Code § 183.001 (1983); W Va Code, § 20-12-3 (1995); WSA 700.40 (1985).
296 Alabama const at article 219.07(3) (2018).
297 Alabama const at article 219.07(3) (b) (2018).
298 Alabama const at article 219.07(11) (2018).
299 Alabama Code 1975 § 35-18-1(2) (1997).
300 AS § 46.03.010 (1971).
301 ARS § 17-299(A) (2002).
302 ARS § 33-271(1) (2018).
303 ARS § 33-271(3) (2018).

Arkansas has created a wetland mitigation bank system.[304] Essentially, these banks operate in the same way as a carbon market system in that they are accepted as compensation for activities whose conservation value may be questionable.[305] Conservation easements in Arkansas are by default considered to be perpetual, although the law provides for the possibility of using a shorter period as long as it is explicitly stated in the deed of transfer.[306]

Similarly, California has established a unique system of mitigation banks and conservation banks that can be used in the same way that carbon credits and carbon markets operate in other jurisdictions.[307] Under this system,

> "the department authorizes the establishment of private and public conservation and mitigation banks that can provide viable consolidated mitigation for adverse impacts caused by projects. Banks sell habitat or species credits to project proponents having mitigation responsibilities that require compensation for impacts to wetlands, threatened or endangered species, and other sensitive resources."[308]

Conservation easements in California are quite important and establish a perpetual concession.[309] Under California law, conservation easements can only be owned by a governmental entity, charity related to protection, preservation and general conservation activities, or Native American tribes.[310] California law defines a conservation easement as "any limitation in a deed, will, or other instrument in the form of an easement, restriction, covenant, or condition, which is or has been executed by or on behalf of the owner of the land subject to such easement and is binding upon successive owners of such land, and the purpose of which is to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition."[311]

The State of Colorado has adopted the use of conservation easements, which are defined as

> "a right in the owner of the easement to prohibit or require a limitation upon or an obligation to perform acts on or with respect to a land or water area, airspace above the land or water, or water rights beneficially used upon that land or water area, owned by the grantor appropriate to the retaining or maintaining of such land, water, airspace, or water rights, including improvements, predominantly in a natural, scenic, or open condition, or for wildlife habitat, or for

304 ACA § 15-22-1002 (2007).
305 ACA § 15-22-1004 (2007).
306 ACA § 15-20-406 (1983).
307 West's Ann Cal Fish & G Code § 1797 (2019).
308 West's Ann Cal Fish & G Code § 1797 (2019).
309 West's Ann Cal Civ Code § 815.2 (2014).
310 West's Ann Cal Civ Code § 815.3 (2014).
311 West's Ann Cal Civ Code § 815.1 (2014); West's Ann Cal Pub Res Code § 5011.7 (2009).

> agricultural, horticultural, wetlands, recreational, forest, or other use or condition consistent with the protection of open land, environmental quality or life-sustaining ecological diversity, or appropriate to the conservation and preservation of buildings, sites, or structures having historical, architectural, or cultural interest or value."[312]

There is another restriction in the form of conservation easements that relate to sites of historical or cultural significance, as they should only be used for sites that have been listed in the national or state register of historic places.[313]

In Connecticut, there are two general forms of restrictions that relate to conservation: conservation restrictions and preservation restrictions.[314] In particular, conservation restrictions are broadly defined to include

> "a limitation, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land described therein, including, but not limited to, the state or any political subdivision of the state, or in any order of taking such land whose purpose is to retain land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming, forest or open space use."[315]

Conservation restrictions can be held either by a governmental unit or sub-unit or charity that works in a conservation-related area.[316]

Although not a large land mass, the District of Columbia maintains conservation easement laws.[317] The State of Delaware allows the creation of conservation easements as a form of "nonpossessory interest of a holder in real property imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural, scenic or open-space values of real property, assuring its availability for agricultural, forest, recreational or open-space use, protecting natural resources, fish and wildlife habitat, rare species and natural communities maintaining or enhancing air or water quality or preserving the historical, architectural, archaeological or cultural aspects of real property."[318] As in other jurisdictions, Delaware allows government entities and charities that are associated with conservation activities to hold conservation easements on private property.[319]

Florida conservation easements are intended to be perpetual and may be granted to a governmental unit or subunit, conservation organization or

[312] CRSA § 38-30.5-102 (1976).
[313] CRSA § 38-30.5-104 (1985)
[314] CGSA § 47-42a (1971).
[315] CGSA § 47-42a(a) (1971).
[316] CGSA § 47-42c (1971).
[317] DC ST § 42-201 (1986).
[318] 7 Del C § 6901 (1996).
[319] 7 Del C § 6901 (1996).

similar charitable organization.[320] It is important to note that agriculture, forestry and related activities may be permitted on land subject to conservation easements.[321] In the same vein, Florida allows the creation of resource conservation easements.[322] In addition to easements, Florida provides annual resource conservation and farm protection agreements, under which private landowners are paid for conservation and/or cultivation practices.[323] As in California, Florida has established a bank mitigation system through which conservation easements can be used to generate credits.[324]

Conservation easements in Hawai'i are perpetual when granted and may be granted to any government entity,[325] sub-entity or charitable entity that focuses on conservation-related matters.[326] In Illinois, it is possible for a single private landowner or group of landowners to establish a wildlife habitat management area for conservation and related purposes, provided that, taken together, the lands owned cover at least "600 acres of contiguous farm lands, or a combination of tillable lands and farm woodlots suitable for the protection and propagation of species of small game ordinarily found upon, or in the immediate proximity of such lands."[327] Illinois also provides for the existence of environmental agreements, commitments that "aris[e] under an environmental response project that imposes activity and use limitations" in relation to contaminated land that is subject to federal or state sanitation laws.[328]

In Indiana, conservation easements are used under the definition of "a nonpossessory interest of a holder in real property that imposes limitations or affirmative obligations with the purpose of: (1) retaining or protecting natural, scenic, or open space values of real property; (2) assuring availability of the real property for agricultural, forest, recreational, or open space use; (3) protecting natural resources; (4) maintaining or enhancing air or water quality; or (5) preserving the historical, architectural, archeological, or cultural aspects of real property."[329] As in other jurisdictions, conservation easements can be owned by government units or subunits as well as by charities that focus on conservation-related subjects.[330]

In Iowa, a conservation easement is defined to "preserve scenic beauty, wildlife habitat, riparian lands, wetlands, or forests; promote outdoor recreation, agriculture, soil or water conservation, or open space; or otherwise conserve for the benefit of the public the natural beauty, natural

320 West's FSA § 704.06 (2016).
321 West's FSA § 704.06 (2016).
322 West's FSA § 570.71(1) (2015).
323 West's FSA § 570.71(4 – 5) (2015).
324 Fla Admin Code r 62-342.650 (1994).
325 HRS § 198-2 (1985).
326 HRS § 198-3 (1985).
327 520 ILCS 20/4 (1961).
328 765 ILCS 122/2 (2015).
329 IC 32-23-5-2 (2002).
330 IC 32-23-5-3 (2002).

and cultural resources, and public recreation facilities of the state."[331] Conservation easements are intended to be perpetual.[332]

Under Louisiana law, it is possible for the state to designate areas of less than 2,000 acres as having "special significance," which means that "a permittee, in order to receive a permit to conduct an activity having a direct and significant adverse impact on unique or special resources of such area, must demonstrate that the public interest benefits of the proposed activity clearly outweigh the public interest benefits of preserving the unique or special ecological values of the area and must, at a minimum, provide full compensatory mitigation for ecological value losses associated with the permitted activity."[333]

In Maryland, conservation easements are created by restrictions "prohibiting or limiting the use of water or land areas, or any improvement or appurtenance there to,"[334] and there exists a separate form of heritage conservation funding which is relevant in this context.[335] Wherever possible, Michigan seeks to create a co-equality relationship in recognizing the importance of reserves and wildlife resources to public and private landowners, as well as the preference of establishing an employment relationship that recognizes these rights and interests, rather than seeking to give primacy to one or the other.[336] Michigan also explicitly defines and recognizes the importance of biodiversity for the territory of the State as a whole.[337] In particular, the state must have the capacity to create new policies that recognize and seek to protect multiple forms of biodiversity, whether on private or state land.[338] Additionally, Michigan uses wetland mitigation banks as part of its overall wetland conservation plans.[339]

Missouri allows the use of conservation easements and several other forms of use restrictions to keep spaces open throughout the state.[340] Open spaces are defined by the State of Missouri as

> "any space or area the preservation or restriction of the use of which would: (1) Maintain or enhance the conservation of natural or scenic resources, (2) Protect natural streams or water supply, (3) Promote conservation of soils, wetlands, beaches or marshes, (4) Enhance the value to the public of abutting or neighboring parks, forests, wildlife preserves, nature reservations or sanctuaries, or other open areas and open spaces, (5) Preserve archaeologic and historic sites, (6) Implement the plan of development adopted by the planning agency

331 ICA § 457A.1 (2019).
332 ICA § 457A.2 (2029)
333 LSA-RS 49:214.41(F)(3) (2019).
334 MD Code, Real Property § 2-118 (2017).
335 MD Code, Natural Resources § 5-1502 (1986).
336 MCLA 324.35104 (1995).
337 MCLA 324.35501 (1995); MCLA 324.35502 (1995).
338 MCLA 324.35506 (1995).
339 MCLA 324.5204f (2013).
340 VAMS 67.880 (1971).

> of the state or county or municipality, or (7) Promote orderly urban or suburban development."[341]

Under Montana law, conservation easements can be made to limit or prohibit the following activities: erection or arrangement of structures; operation of landfills; removal or destruction of vegetation; excavation, dredging and related activities; harmful land uses; "acts detrimental to conservation;" the creation of subdivisions; or "other acts or uses detrimental to such retention of land or water areas in their existing conditions."[342] Conservation easements can be established in perpetuity or for a renewable period of 15 years.[343] Overall, although Montana has a large stock of public land used for hunting, fishing and conservation practices, the vast majority of this land in the state is still private.[344] At the same time, the majority of Montana's conservation easements and trust lands are administered not by the State, but by an intermediary organization, such as the Nature Conservancy, according to a model that is replicated in many states.[345]

In Nebraska, there are several options for private landowners who wish to engage in the conservation of their land, including outright conservation of the land and certain species or water resources located thereon.[346] Nevada has taken note of the serious environmental damage it has already suffered as a result of rapid growth and development and has promulgated laws and rules that aim to address this in the future. As a result, numbers of activities have been put in place to promote the sustainable use of natural resources within the state, including wetland mitigation bank programs.

The State of New Hampshire is concerned with legal regulation and protection of wetlands and has classified wetlands as generally having twelve different functions: "ecological integrity, wetland-dependent wildlife habitat, fish and aquatic life habitat, scenic quality, educational potential, wetland-based recreation, flood storage, groundwater recharge, sediment trapping, nutrient trapping/retention/transformation, shoreline anchoring, and noteworthiness."[347] In addition, to promote wetland conservation and the creation of environmentally friendly practices, New Hampshire allows the use of wetland mitigation banks.[348]

A key component of New Jersey's efforts to promote environmental conservation is to encourage the maintenance and management of arable

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341 VAMS 67.900 (1971).
342 MCA 76-6-203 (1969).
343 MCA 76-6-202 (1969).
344 Montana Wildlife Federation, *We Can Protect Private Property Rights and Public Land Access*, online: <https://montanawildlife.org/we-can-protect-private-property-rights-and-public-land-access/>.
345 Gallatin Valley Land Trust, *Fact or Fiction: Land Trusts and Conservation Easements*, online: <https://gvlt.org/fact-fiction-land-trusts-conservation-easements/>.
346 Nebraska Game & Parks, *Landowner Habitat Programs*, online: <http://outdoornebraska.gov/landownerhabitatprograms/>.
347 NH Rev Stat § 482-A:2 (XI) (2018).
348 NH Rev Stat § 482-A:34 (2018).

land. In this system, private landowners are essential actors, and it provides that

> "administering a program to aid private landowners, informing the public of recreational opportunities and evaluating the operation of the program would best be implemented by establishing an Open Lands Management Program, and by empowering the Department of Environmental Protection to provide financial assistance and in kind services to assist private landowners in maintaining and increasing public recreational opportunities, all as hereinafter provided."[349]

To encourage the development and implementation of sustainable forest and related land management programs by private landowners, New Jersey allows these landowners to voluntarily undertake conservation-related activities and receive tax and other incentives from the State.[350] New Jersey also allows the use of wetland mitigation banks as a method of promoting wetland conservation and overall environmental protection.[351]

The legal system of New Mexico provides for "land use easements," which incorporate the conditions of conservation easements as well as restrictions on open spaces and the protection of natural resources located on private land.[352] New York State defines a conservation easement as "an easement, covenant, restriction or other interest in real property, created under and subject to the provisions of this title which limits or restricts development, management or use of such real purpose of preserving or maintaining the scenic, open, historic, archaeological, architectural, or natural condition, character, significance or amenities of […] real property."[353] Although it is possible for government entities and subunits to hold conservation easements, there is a strong preference in law for the acquisition of conservation easements by charities.[354]

North Carolina has created the Conservation Grant Fund to help the state finance conservation easements.[355] These funds can be used to establish easements on properties meeting the following required elements: "Possess or have a high potential to possess ecological value; Be reasonably restorable; Be useful for one or more of the following purposes: a. Public beach access or use; b. Public access to public waters or trails; c. Fish and wildlife conservation; d. Forestland or farmland conservation; e. Watershed protection; f. Conservation of natural areas; g. Conservation of predominantly natural parkland; and Be donated in perpetuity to and accepted by the State, a local government, or a body that is both organized to receive and administer lands for conservation purposes and qualified to

[349] NJSA 13:1B-15.135 (1984).
[350] NJSA 13:1B-15.139 (1984).
[351] NJSA 13:9B-14 (1988).
[352] NMSA 1978, § 47-12-2 (2019).
[353] McKinney's ECL § 49-0303 (2013).
[354] McKinney's ECL § 49-0307 (2011).
[355] NCGSA § 113A-232 (2018).

receive charitable contributions."[356] In addition, North Carolina has authorized and is currently using a system of wetland mitigation banks that generates credits associated with wetland maintenance and support. Much of the work of easements and conservation trusts in the state of North Carolina is coordinated and overseen by private trust organizations, which act as lobbyists and activists for those concerned and the communities they serve as well as intermediary bodies between state regulators and private landowners.[357]

The banking and exchange of credits for wetlands is permitted in North Dakota for use in agricultural activities.[358] In addition, it is possible for the state to create conservation agreements that directly concern wetlands that belong to private landowners.[359] In Oregon, there are provisions for the implementation of habitat stewardship agreements, under which private landowners voluntarily agree to "terms under which the landowner will self-regulate to meet and exceed applicable regulatory requirements and achieve conservation, restoration and improvement of fish and wildlife habitat or water quality" in relation to the bodies of water (including wetlands) on its property.[360] Landowners derive several benefits from this agreement, including tax incentives and consistent application of state and local government rules.[361] In addition, Oregon allows the issuance of conservation easements to the state on private lands in a manner similar to the creation and implementation of standard easements under state law.[362]

In Rhode Island, conservation restrictions – including conservation easements – are used to ensure the voluntary protection of the territory by private owners.[363] Unlike some systems of state conservation easements, in South Dakota there is no expected or required duration for the terms of the conservation easement.[364] Rather, these conditions must be negotiated by the state and the parties involved.[365]

In Tennessee, it is important to note that over 90% of agricultural and wildlife land and forests are privately owned.[366] At the same time, natural resources that belong to the state or are on public land are also regulated for conservation purposes.[367] As a result, formal entities such as the Tennessee Wildlife Agency and private landowners have established relationships to

356 NCGSA § 113A-232 (2018).
357 Conservation Trust for North Carolina, *Advocacy and Policy*, online: <https://www.ctnc.org/assist/advocacy/ >
358 NDCC 4.1-01-15 (2019).
359 NDCC 61-31-03 (2019).
360 ORS § 541.973 (2018).
361 ORS § 541.973(6) (2018).
362 ORS § 271.725 (2005).
363 Gen Laws 1956, § 34-39-3 (1956).
364 SDCL § 1-19B-57 (1984).
365 SDCL § 1-19B-57 (1984).
366 Tennessee Wildlife Resource Agency, *Wildlife Habitat in Tennessee*, online: <https://www.tn.gov/twra/wildlife/habitat.html>.
367 Tennessee Department of Environment & Conservation, *Natural Areas Program*, online: <https://www.tn.gov/environment/program-areas/na-natural-areas/natural-areas-redirect/natural-areas-program.html>.

work together to achieve their common goals. Government entities and subunits can hold conservation easements, as can charities working in conservation-related fields.[368] Texas has adopted the concept of a wetland mitigation bank as a statewide conservation mechanism and has provided legal means to achieve this in the short and long term.[369]

In Utah, the definition of a conservation easement is

> "an easement, covenant, restriction, or condition in a deed, will, or other instrument signed by or on behalf of the record owner of the underlying real property for the purpose of preserving and maintaining land or water areas predominantly in a natural, scenic, or open condition, or for recreational, agricultural, cultural, wildlife habitat or other use or condition consistent with the protection of open land."[370]

Relevant government entities and charities are designated potential holders of conservation easements.[371]

Virginia defines a conservation easement as

> "a nonpossessory interest of a holder in real property, whether easement appurtenant or in gross, acquired through gift, purchase, devise, or bequest imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural or open-space values of real property, assuring its availability for agricultural, forestall, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural or archaeological aspects of real property."[372]

In general, conservation easements in Virginia are designed to encourage relevant charities to serve as easement holders.[373] Conservation easements must be established in perpetuity.[374]

Washington State uses conservation districts as administrative units and gives them the power to approve or deny permits for activities conducted on private land, including outdoor burning activities.[375] Washington provides for the creation of conservation easements in perpetuity.[376] A landowner has the option of making the concession of easement for a payment from the state directly or can make the concession as a gift.[377] In addition to granting a conservation easement on land, the State of Washington allows the granting of a conservation easement on waters,

[368] TCA § 66-9-303 (1988).
[369] VTCA Natural Resources Code § 221.021 (1997).
[370] UCA 1953 § 57-18-2 (1955).
[371] UCA 1953 § 57-18-3 (1955).
[372] VA Code Ann § 10.1-1009 (1988).
[373] VA Code Ann § 10.1-1009 (1988).
[374] VA Code Ann § 10.1-1010 (1988).
[375] West's RCWA 70.94.6516 (2009).
[376] WAC 222-23-030 (1) (2018).
[377] WAC 222-23-020 (4) (2018).

trees, resources or essential habitats located on a particular parcel of land.[378] Conservation easements may also be established at the county level, particularly for lake and beach management areas where there is concern for conservation and the prevention of overdevelopment.[379] In addition, the State of Washington has created a forest riparian easement program to address concerns about the current and potential future impacts of development and commercialization on the promotion and conservation of forests and related areas.[380]

Wyoming has provisions for conservation easements and has used them to create a number of these instruments. The objectives of these easements are very varied, ranging from agriculture to wildlife in general and/or to target populations specific to migratory protection.[381]

4. CONCLUSION

As noted above, while there are some differences in the ways that biodiversity protection and conservation laws and regulatory mechanisms are used in Canada and the United States at the national and sub-national levels, a striking result can be found from their comparison: significant similarities. In both systems, there is a national base upon which to build for biodiversity promotion efforts, and in both countries, there is a marked tendency of sub-national entities to go well beyond these national standards in order to craft significantly stricter and more contextually appropriate regimes. More than this, sub-national entities are often able to function as areas of evolution for the protection of biodiversity and the conservation of habitats upon which biodiversity depends. For this reason, it is perhaps not surprising that cross-border similarities in biodiversity protection and conservation laws and rules exist, as it is likely that certain provinces, territories and states will have more in common with each other than with other sub-national units within their own countries.

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[378] WAC 222-23-020 (2018).
[379] West's RCWA 36.61.300 (2014).
[380] West's RCWA 76.13.120 (2017).
[381] WS 1977 § 9-15-808 (2013) (Rolling Thunder conservation easement); WS 1977 § 9-15-901 (2014) (Rim Ranch Conservation Easement); W.S.1977 § 9-15-703 (2012) (North Cottonwood Conservation Easement).

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Collected the data	Yes	Yes
Contributed to data analysis & interpretation	Yes	Yes
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