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**Protected on Paper Only:
An Evaluation of Nova Scotia's
Legal Obligations
under the *Endangered Species
Act***

2021 Update

Prepared by
East Coast Environmental Law

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East Coast Environmental Law Association

East Coast Environmental Law is a regional environmental law charity based in Nova Scotia that engages in public-interest research and advocacy throughout Atlantic Canada. Through public legal education, community collaboration, and legal action, we work to support the development and fair application of innovative and effective environmental laws throughout our region.

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Executive Summary

Protected on Paper Only: An Evaluation of Nova Scotia's Legal Obligations under the Endangered Species Act was first published in February 2015. At the time, it was clear that the Government of Nova Scotia was failing to meet several of its legal obligations under Nova Scotia's *Endangered Species Act* ("the *ESA*" or "the Act"). Those obligations exist in the *ESA* because government action is necessary to stop and reverse the biodiversity loss and species extinction that are occurring in Nova Scotia and around the world.

In January 2019, East Coast Environmental Law published a 2019 update to our 2015 *Protected on Paper Only* report. That update made it clear that the Government of Nova Scotia's track record had not only *not* improved since 2015 but had actually *worsened*, and we called on Nova Scotia's Minister of Lands and Forestry ("the Minister") to meet his legal obligations under the Act by:

- completing species recovery and management plans that are required by the Act; and,
- ensuring that all recovery plans include areas to be considered for designation as core habitat.

At the same time, we also called on the Minister to:

- publish a plan of action demonstrating how the obligations listed above would be met;
- facilitate meaningful public participation by providing timely information on his progress in meeting those obligations; and,
- exercise his Ministerial discretion to designate core habitat and create regulations to protect that habitat.

In May 2020, the decision of the Nova Scotia Supreme Court ("the NSSC" or "the Court") in *Bancroft v Nova Scotia (Lands and Forests)*, 2020

NSSC 175 (“*Bancroft*”), amplified our argument that the Minister must take action to fulfil his obligations under the *ESA* and protect species at risk in Nova Scotia. The Court’s decision—authored by the Honourable Justice Christa Brothers—also prompted us to take a new approach in the way we assessed the Government of Nova Scotia’s track record under the Act.

Among other things, the Court’s decision sent strong messages that the Minister:

- cannot rely on federal recovery strategies developed under Canada’s *Species at Risk Act* (“*SARA*”) to protect endangered and threatened species in Nova Scotia unless the Minister has clearly adopted strategies that have actually been completed; and,
- cannot rely on federal recovery strategies or management plans to protect vulnerable species in Nova Scotia instead of preparing provincial management plans for those species.

In our original report and 2019 update, we surveyed the Minister’s legal obligations under the *ESA* and tallied the number of obligations that had clearly been met, “likely” been met, and clearly not been met with respect to the many species that are listed as endangered, threatened, or vulnerable under the Act. In both of those earlier versions, we took a generous approach in assessing the Minister’s obligations to prepare recovery plans for endangered and threatened species and management plans for vulnerable species. Where it appeared that the Minister was using recovery strategies or management plans developed under the federal *SARA* to protect endangered, threatened, and vulnerable species in Nova Scotia, we counted that as likely meeting the requirements of the *ESA*.

Given the strong messages sent by the NSSC in *Bancroft*, this 2021 update presents a new accounting of the Minister’s failures to meet the legal requirements of the *ESA*.

With regard to the Minister’s obligations to endangered and threatened species, we no longer count the Minister’s reliance on federal recovery strategies as likely meeting his obligations to prepare or adopt provincial recovery plans unless the Minister has clearly adopted recovery strategies that meet the requirements of the *ESA*. For the purposes of our analysis in this report, we have treated formal adoption by the Department of Lands and Forestry as sufficient to meet the *ESA*’s requirements even if the Minister himself has not signed the adoption notice: we note, however, that a strict reading of the *ESA* requires adoption by the Minister, not by department staff.

With regard to the Minister’s obligations to vulnerable species, we no longer count the Minister’s reliance on federal recovery strategies or management plans as likely meeting his obligation to prepare provincial management plans for those species.

Our 2019 update to *Protected on Paper Only* found that the Minister had met the *ESA*’s requirements for just 23 of the 63 species that are listed as endangered, threatened, or vulnerable under the *ESA*.

Our updated assessment arrives at a similar number, finding that the Minister has now met the *ESA*’s requirements for just 24 of the 63 species that are listed as endangered, threatened, or vulnerable under the *ESA*.

Notably, our new accounting approach reveals that since our 2019 update and the NSSC’s decision in *Bancroft*, some progress by the Department of Lands and Forestry enhanced protections for endangered and threatened species in Nova Scotia, while other attempts at progress were undermined by failures to meet critical *ESA* criteria.

After the NSSC’s decision in *Bancroft*, the Department of Lands and Forestry demonstrated some progress in responding to the Court’s decision and fulfilling the requirements of the *ESA*. In particular, the department formally adopted several federal recovery strategies for species that are listed as endangered or threatened in Nova Scotia, and

it prepared provincial recovery plans for the endangered Hoary Willow, Ram's-head Lady Slipper, and Rockrose.

However, in addition to the progress made since the NSSC's decision in *Bancroft*, there were some worrisome developments as well. Notably, the Department of Lands and Forestry formally adopted several recovery strategies prepared by other jurisdictions that do not actually meet the recovery plan requirements of the *ESA*. In particular, the recovery strategies adopted for the endangered Bank Swallow, Barn Swallow, Canada Warbler, Gypsy Cuckoo Bumble Bee, Red Knot, and Transverse Lady Beetle, along with the recovery strategies adopted for the threatened Common Nighthawk and Olive-sided Flycatcher, fail to identify areas in Nova Scotia that the Minister can consider for designation as core habitat. The identification of areas in Nova Scotia that the Minister could designate as core habitat is an integral component of the recovery plans required by the *ESA* and is critically important for the effective protection of species at risk.

The adoption of recovery strategies that do not meet the requirements of the *ESA* is concerning. We therefore urge Nova Scotia's Minister of Natural Resources and Renewables (a new ministerial position that combines responsibility for the former Department of Lands and Forestry and Department of Energy and Mines) to rectify those failures promptly, whether by revising the adopted strategies, by preparing addenda that identify relevant habitat areas in the province, or by some other appropriate means.

As we stated in our 2019 update, there is an urgent need for immediate action to protect species at risk in Nova Scotia. In its *Living Planet Report 2020: Bending the Curve of Biodiversity Loss*, the World Wildlife Fund ("WWF") calculates that the population sizes of mammals, birds, fish, amphibians, and reptiles around the world have dropped by a staggering average of 68% between 1970 and 2016.¹ In its corresponding *Living Planet Report Canada 2020: Wildlife at Risk*, the WWF concludes that populations of Canadian species assessed as at risk by the Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") have dropped by an average of 59% between 1970 and

2016, and that populations of species of global conservation concern have declined in Canada by an average of 42% in the same period.² When compared against the tallies in previous years' *Living Planet* reports, these numbers demonstrate patterns of steady decline.

As we publish this 2021 update of *Protected on Paper Only*, the world is still grappling with the devastating effects of the COVID-19 pandemic. A July 2020 report by the United Nations Environment Programme makes it clear that global pandemics such as the one we are now experiencing are connected to biodiversity loss, the loss of wildlife species' natural habitats, and the environmental consequences of anthropogenic (human-caused) climate change.³ Although Nova Scotia's *ESA* exists to protect wildlife species at risk for the species' own sakes, global scientists are telling us clearly that biodiversity and human health are intimately interconnected. When we fail to protect wildlife species and preserve biodiversity, we diminish the resilience of the ecological webs that sustain us all.

Governments throughout Canada have created legal mechanisms to protect imperiled species, but those mechanisms will be grossly ineffective unless our governments abide by the laws they create and fulfill the legal obligations those laws impose. East Coast Environmental Law therefore renews its earlier messages to the Minister and calls on him to:

- prepare all of the outstanding recovery and management plans that are required by the *ESA*;
- where lawful and appropriate, clearly adopt recovery strategies prepared by other jurisdictions to serve as recovery plans for species listed as endangered or threatened under the *ESA*;
- ensure that all prepared and adopted recovery plans clearly identify areas in Nova Scotia that could be considered for designation as core habitat;

- publish a plan of action explaining how these obligations will be met;
- facilitate meaningful public participation by providing timely information on the government’s progress towards meeting these obligations; and,
- exercise his Ministerial discretion to designate core habitat and create regulations to protect that habitat.

1.0 Why We Updated Our Report

In January 2019, shortly before East Coast Environmental Law published its 2019 update, Robert Bancroft, the Federation of Nova Scotia Naturalists, the Blomidon Naturalists Society, and The Halifax Field Naturalists initiated a judicial review proceeding in the NSSC, asking the Court to review the Minister’s failures to meet several obligations under the *ESA* and issue declarations stating that the Minister *must* act to protect species at risk in Nova Scotia by doing what the Act requires him to do.

Because our years of work on this issue gave us knowledge and insight that we knew would benefit the Court as it considered the issues, East Coast Environmental Law applied for and was given standing to participate as an intervenor in the proceeding. Oral hearings were conducted in September and October 2019, and further written submissions were sent to the court in February 2020. The Honourable Justice Christa Brothers presided.

On May 29, 2020, Justice Brothers delivered her written decision.⁴ From our respective homes, which had become our new workplaces in the midst of the global pandemic, East Coast Environmental Law staff opened the digital file, scrolled down to the page where the decision began, and saw that Justice Brothers had included as an epigraph a quote from Dr. Seuss’s book *The Lorax*, which states:

UNLESS someone like you cares a whole awful lot, nothing is going to get better. It’s not.

The decision was a resounding victory for species at risk in Nova Scotia—species that desperately need the protections offered by the *ESA* and that will disappear from this province if the Minister does not take the actions that the Act requires.

After the judicial review proceeding was initiated, the Minister and the Department of Lands and Forestry took a number of steps to fulfil some of the legal obligations imposed by the *ESA*. Two particularly significant steps were the appointment of a recovery team for the Canada Warbler and the appointment of a “Plants Recovery Team” to examine the needs of a number of plant species listed under the Act, including the endangered Ram’s-head Lady Slipper and Rockrose. Although the progress made after the initiation of the judicial review proceeding was welcome, it is troubling to see a government ignoring its legal obligations until members of the public assume the personal and financial costs of taking that government to court.

In our first iteration of *Protected on Paper Only* and our 2019 update, East Coast Environmental Law took a generous approach in assessing the Minister’s obligations to prepare recovery plans for endangered and threatened species and management plans for vulnerable species. Where it appeared that the Minister was using federal recovery strategies or management plans developed under the federal *SARA* to protect endangered, threatened, and vulnerable species in Nova Scotia, we counted that as likely meeting the requirements of the *ESA*.

The NSSC’s decision in *Bancroft* made it clear that our former approach to the numbers is not appropriate, for two reasons.

First, subsection 15(1) of the *ESA* requires the Minister to prepare recovery plans for species that are listed as endangered or threatened under the *ESA*, but subsection 15(9) allows the Minister to adopt existing recovery plans that have been prepared by other jurisdictions. Subsection 15(10) of the *ESA* requires the Minister to prepare

management plans for species that are listed as vulnerable, and there is no provision that allows the Minister to adopt existing management plans that have been prepared by other jurisdictions. In *Bancroft*, the NSSC made it clear that the Minister cannot outsource his responsibility to prepare management plans for vulnerable species. Reliance on federal recovery strategies or management plans to protect species that are listed as vulnerable under the *ESA* fails to meet the requirements of the Act.

Second, the NSSC's decision in *Bancroft* states that the Minister cannot rely on the existence of federal recovery strategies as meeting the *ESA*'s requirements unless the Minister has taken some kind of clear and positive action to adopt those strategies in lieu of preparing provincial recovery plans for endangered and threatened species. Before *Bancroft*, the Minister took a passive approach to "adoption" and tended to operate as though the existence of a relevant federal recovery strategy was enough to indicate provincial adoption where no province-specific recovery plan existed. The Court's decision in *Bancroft* made it clear that "adoption" under subsection 15(9) of the *ESA* cannot be passive.

For these reasons, our assessment no longer counts the existence of federal recovery strategies as helping the Minister to meet his obligations unless the Minister has clearly adopted recovery strategies that meet the requirements of the *ESA*.

2.0 Government Obligations

The Government of Nova Scotia created the *ESA* in 1998, and the Act was proclaimed in 1999. The Act's primary purpose is "to provide for the protection, designation, recovery and other relevant aspects of conservation of species at risk in the Province, including habitat protection."⁵ Among other things, the *ESA* provides mechanisms to identify and list species at risk, to classify those species as endangered, threatened, or vulnerable, to create and implement recovery and management plans, and to assess whether the status of listed species has improved or deteriorated. Habitat conservation for species at risk is

a key aspect of the Act's protective approach. The Act endorses the precautionary principle, which states that a lack of full scientific certainty must not be used as a reason to postpone measures to avoid or minimize the threat facing a species at risk,⁶ and it also prohibits people from directly harming, disturbing, interfering with, or taking species at risk and their immediate habitats, such as nests or den sites.

In order for the *ESA* to achieve its intended purpose, it places important legal obligations on the Minister. Key components of species protections under the Act are the development of recovery and management plans for listed species.

Within one year of listing an endangered species and within two years of listing a threatened species, the Minister must appoint a recovery team and prepare a recovery plan for the species.⁷

Within three years of listing a vulnerable species, the Minister must prepare a management plan for the species.⁸

The *ESA* also requires a recovery plan to "identify habitat" of the endangered or threatened species⁹ and "identify areas to be considered for designation as core habitat".¹⁰ Recovery plans are to be reviewed every five years to assess progress and determine whether modifications need to be made.¹¹ Additionally, the Act requires the Minister to "ensure the implementation of the portions of the recovery or management plan which are provincial responsibilities and which, in the Minister's discretion, are considered feasible".¹²

Over the past several years, the federal government has made significant progress in the creation of federal recovery strategies and management plans that are required under the federal *SARA*. This could benefit species at risk in Nova Scotia if relevant federal recovery strategies were clearly adopted, where lawful and appropriate, to serve as provincial recovery plans for species that are listed as endangered or threatened under the *ESA*. Species at risk in Nova Scotia could also benefit if federal recovery strategies or management plans were used to

inform the development of provincial management plans for vulnerable species.

In the past four years, 11 additional species have been listed under the *ESA*: 5 as endangered species, 4 as threatened species, and 2 as vulnerable species. In total, there are now 71 species listed under the Act: 33 are endangered, 13 are threatened, 17 are vulnerable, 3 are extirpated from the province, and 5 are extinct.¹³

3.0 Examples of Government Failure to Meet Obligations under the Act

3.1 Endangered Species

There are 33 species listed as endangered under the *ESA*.

Provincial recovery plans have been prepared for 6 of those species: Blanding's Turtle, Canada Lynx, Hoary Willow, Moose (Mainland Population), Ram's-head Lady Slipper, and Rockrose. There is also a proposed recovery plan for an additional endangered species, the American Marten.

Notably, the provincial recovery plans for the Blanding's Turtle, Canada Lynx, and Mainland Moose fail to clearly identify areas in Nova Scotia that could be considered for designation as core habitat and therefore fail to meet the requirements of the *ESA*.

Subsections 15(8) and 15(9) of the *ESA* enable the Minister to prepare recovery plans in cooperation with other jurisdictions and adopt recovery plans prepared by other jurisdictions. Federal recovery strategies established under *SARA* have been prepared for 17 species that are listed as endangered under Nova Scotia's *ESA* and for which there are no province-specific recovery plans in place. The Department of Lands and Forestry participated in the creation of at least some of those federal recovery strategies. Some of the federal strategies include content specific to Nova Scotia, but others do not.

Whereas in our 2015 report and our 2019 update we counted the existence of those federal recovery strategies as likely meeting the Government of Nova Scotia's obligations under the *ESA* despite the fact that the Minister had not taken clear and positive action to formally "adopt" them, in this 2021 update we have instead assessed whether the Minister has clearly adopted strategies that meet the recovery plan requirements of the *ESA*.

After the NSSC's decision in *Bancroft*, the Department of Lands and Forestry formally adopted federal or Ontario-based recovery strategies for several of the *ESA*'s endangered species, including: Atlantic Whitefish, Bicknell's Thrush, Blanding's Turtle, Boreal Felt Lichen, Eastern Mountain Avens, Little Brown Myotis, Northern Myotis, Plymouth Gentian, Pink Coreopsis, Piping Plover, Roseate Tern, Tall Beakrush, Thread-leaved Sundew, Tri-coloured Bat, Vole Ears Lichen, and Water Pennywort. Notably, the adoption of the federal recovery strategy for the Blanding's Turtle rectified a failing of the provincial recovery strategy, which had not clearly identified areas in Nova Scotia that could be considered for designation as core habitat.

Troublingly, a number of the recovery strategies that the Department of Lands and Forestry adopted after the NSSC's decision in *Bancroft* fail to meet the requirements of the *ESA* because they do not identify areas in Nova Scotia that could be considered for designation as core habitat. The strategies that have been adopted for the Bank Swallow, Barn Swallow, Canada Warbler, Gypsy Cuckoo Bumble Bee, Red Knot, and Transverse Lady Beetle are missing critical elements that are needed to protect these species, and these failings should be rectified promptly.

2 of the *ESA*'s endangered species (Canada Lynx and Mainland Moose) have provincial recovery plans that do not clearly identify areas that could be designated as core habitat; 2 species (Canada Warbler and Red Knot) have adopted federal recovery strategies that do not clearly identify areas in Nova Scotia that could be designated as core habitat; 4 species (Bank Swallow, Barn Swallow, Gypsy Cuckoo Bumble Bee, and Transverse Lady Beetle) have adopted Ontario-based recovery plans that do not clearly identify areas in Nova Scotia that could be

designated as core habitat; and, 6 species have no recovery plans whatsoever.

This means that 14 of 33 endangered species are not receiving the legal protections they require.

3.2 Threatened Species

There are 13 species listed as threatened under the *ESA*.

A provincial recovery plan has been prepared for just 1 of those threatened species: Black Ash. Notably, that recovery plan fails to clearly identify areas in Nova Scotia that could be considered for designation as core habitat and therefore fails to meet the requirements of the *ESA*.

After the NSSC's decision in *Bancroft*, the Department of Lands and Forestry formally adopted federal recovery strategies for 6 of the *ESA*'s threatened species: Common Nighthawk, Eastern Baccharis, Eastern Ribbonsnake, Olive-sided Flycatcher, Sable Island Sweat Bee, and Wood Turtle. 2 of those adopted strategies (the strategies for the Common Nighthawk and the Olive-sided Flycatcher) fail to meet the recovery plan requirements of the *ESA* because they fail to clearly identify areas in Nova Scotia that could be considered for designation as core habitat.

1 threatened species (Eastern Whip-poor-will) has a federal recovery strategy which the Minister has not clearly adopted in lieu of preparing a provincial recovery plan. We note, however, that the federal recovery strategy does not clearly identify areas in Nova Scotia that the Minister could consider for designation as core habitat and would therefore not meet the recovery plan requirements of the *ESA*.

There are no recovery plans whatsoever for the remaining 5 species.

This means that 9 of 13 threatened species are not receiving the legal protections they require.

3.3 Vulnerable Species

There are 17 species listed as vulnerable under the *ESA*.

The *ESA* requires the Minister responsible for the Act to prepare management plans for vulnerable species. A management plan for a species must be completed within three years of the species being listed under the Act.

Currently, just 1 vulnerable species (Eastern White Cedar) has a provincial management plan.

There are federal management plans in place for 11 of the 16 other vulnerable species, but the *ESA* does not allow the Minister to adopt management plans developed by other jurisdictions. Conceivably, the Minister could use the federal management plans to inform the preparation of provincial management plans, but the Minister has not yet done so.

This means that 16 of 17 vulnerable species are not receiving the legal protections they require.

3.4 Results

Using the accounting approach taken in this 2021 update, our tally of the prepared and adopted recovery and management plans that are currently in place indicates that, as of October 15, 2021, the Government of Nova Scotia has failed to meet its legal obligations to prepare or adopt appropriate recovery and management plans for 39 of Nova Scotia's 63 endangered, threatened, and vulnerable species.

4.0 Core Habitat

4.1 Identifying Areas to Be Considered for Designation as Core Habitat

The *ESA* defines “core habitat” as “specific areas of habitat essential for the long-term survival and recovery of endangered or threatened species”.¹⁴ The *ESA* recognizes that in order to stop or reverse the decline of a species, it is crucial to identify habitat that is critical to the species’ long-term survival. Not least for that reason, subsection 15(4) of the Act requires that recovery plans for endangered and threatened species identify areas that the Minister can consider for designation as core habitat. Since the Minister is only empowered to designate core habitat within Nova Scotia, we understand subsection 15(4) to mean that recovery plans for endangered and threatened species must clearly identify areas *within Nova Scotia* that the Minister could designate as core habitat.

Among the 6 provincial recovery plans that are currently in place for endangered and threatened species, only three (the recent recovery plans prepared for Hoary Willow, Ram’s-head Lady Slipper, and Rockrose) clearly identify areas in Nova Scotia that can be considered for designation as core habitat as required by subsection 15(4) of the *ESA*.¹⁵

Habitat needs are discussed or mentioned in the provincial recovery plans prepared for Blanding’s Turtle, Canada Lynx, Mainland Moose, and Black Ash; however, the references generally indicate that more research is required before areas to be considered for designation as core habitat can be identified.

The 2003 Recovery Plan for the Blanding’s Turtle states:

This Recovery Plan does not explicitly define core habitat for Blanding’s turtle in Nova Scotia, as the necessary research is still in progress.¹⁶

The 2007 Recovery Plan for the Canada Lynx states:

Research that specifically addresses habitat needs has been completed in Maine, which, in combination with local research, may provide direction for the definition of significant habitat for lynx in Nova Scotia.¹⁷

The 2007 Recovery Plan for Moose in Mainland Nova Scotia states:

Insufficient qualitative, quantitative, spatial and temporal information exists at this time necessary to identify core habitat for mainland moose.¹⁸

And, finally, the 2015 Recovery and Action Plan for Black Ash in Nova Scotia states:

These factors, plus a lack of clear understanding as to what is necessary to recover the species suggest that there is currently insufficient information to provide a complete definition of core habitat, although a more complete definition may be possible in the future.¹⁹

These failures to identify areas to be considered for designation as core habitat are clear failures to meet the requirements of the *ESA*. Recovery plans are not complete if they do not identify areas to be considered for designation as core habitat.

As we noted above, the failings of the provincial recovery plan for Blanding’s Turtle have been rectified by the adoption of a federal recovery strategy that identifies areas in Nova Scotia that could be considered for designation as core habitat. The failings of the other recovery strategies that do not identify relevant habitat areas as required should be rectified promptly.

4.2 Designating and Protecting Core Habitat

The identification of areas to be considered for designation as core habitat is a crucial first step toward the legal designation and protection of that habitat under the *ESA*. Once a potential core habitat area has been identified in a recovery plan, the Minister has the authority to designate areas as core habitat²⁰ and create regulations to control, restrict, or prohibit any use of the habitat, access to the habitat, activity on the habitat, or release of any substances on or in the habitat.²¹

Disturbingly, the steps necessary to provide such legal protections for species' core habitats have never been taken under the *ESA*.²² This failure is deeply concerning because it means that the habitats needed by species at risk to ensure their survival have not been protected sufficiently under the law.

Under the federal *SARA*, federal recovery strategies must identify “critical habitat” for endangered and threatened species. *SARA*'s definition of “critical habitat” is similar to, but not exactly the same as, the definition of “core habitat” under Nova Scotia's *ESA*.

Critical Habitat (federal)	Core Habitat (provincial)
means the habitat that is necessary for the survival or recovery of a listed wildlife species	means specific areas of habitat essential for the long-term survival and recovery of endangered or threatened species

Federal recovery strategies have been adopted for 24 species that are listed as endangered or threatened under Nova Scotia's *ESA*. Some of these strategies identify critical habitat areas in Nova Scotia, but others do not.

Importantly, although the federal *SARA* provides legal protections for critical habitat areas, those protections apply most straightforwardly in areas within federal jurisdiction, such as on federal lands and in waters

that are under federal control. Although *SARA* protections can be implemented on provincial Crown lands and on privately-owned lands in Nova Scotia, implementation is complicated. *SARA* can only be used on provincial Crown lands and privately-owned lands when provincial governments fail to protect species at risk appropriately, and, even in those cases, the federal government rarely exercises its authority under the Act. This means that although some federal recovery strategies identify critical habitat areas within Nova Scotia, those areas are not necessarily being protected under *SARA* (unless they fall within territories that are federally controlled, such as national parks). For these reasons, the Government of Nova Scotia cannot rely on federal protection of *SARA* critical habitats to protect the core habitats of *ESA* species.

If the Minister does not ensure that core habitats are identified within Nova Scotia and does not exercise his Ministerial discretion to protect those habitats under the *ESA*, few core habitat areas in the province will receive the legal protections they so desperately need.

In the more than twenty years that the *ESA* has been in place, no Minister responsible for the *ESA* has exercised their discretion to designate core habitat in the province, and no regulations to control or prohibit activities on or in core habitat have been created.

5.0 Conclusion

This update to *Protected on Paper Only* demonstrates that the Government of Nova Scotia has made some significant progress since we published the 2019 version of our report.

The development of provincial recovery plans for the Hoary Willow, Ram's-head Lady Slipper, and Rockrose is particularly encouraging, as is the adoption of a federal recovery strategy for the endangered Blanding's Turtle, which rectified the provincial recovery plan's failure to identify areas in Nova Scotia that could be designated as core habitat for the species. Additionally, a new webpage now charts the government's progress under the *ESA* and makes it easier for Nova

Scotians to access recovery and management plans for listed species. In our view, the website improvements enhance the government's transparency and accountability under the Act and improve public access to information.

Despite these positive developments, however, it is still the case that fewer than half of Nova Scotia's endangered, threatened, and vulnerable species have received the protections that the *ESA* requires.

It is also noteworthy that a recent assessment by Nova Scotia's Auditor General found that among the five recommendations that the Auditor General made to the Government of Nova Scotia in 2016 to improve the management and recovery of species at risk in the province, two of those recommendations have still not been implemented.²³

The Auditor General's report, published in July 2021, found that the Department of Lands and Forestry had not yet followed through on the Auditor General's recommendations that it:

- “establish recovery teams, and develop and review recovery and management plans for species at risk, as required under the Endangered Species Act”; and
- “review all species listed in the Endangered Species Regulations and amend or develop appropriate practices, as guided by recovery plans, to protect their habitat”.²⁴

As the Auditor General concluded: “There is a risk that, by not completing these recommendations, endangered species are not being properly monitored and conserved”.²⁵

From recent communication with staff in the Department of Natural Resources and Renewables, we understand that the department is directing significant resources to the task at hand, is working to address the remaining failures under the Act, and anticipates releasing a number of additional recovery and management plans in the weeks and months

to come. We look forward to those developments, and we hope that our next update to this report will demonstrate further, meaningful progress in the protection of species at risk in the province.

In the meantime, we continue to urge the Minister to take the actions that are necessary to comply with all of his legal obligations under the *ESA*. We reiterate the calls we made in our 2019 update, and we once again call on the Minister to:

- prepare all of the outstanding recovery and management plans that are required by the *ESA*;
- where lawful and appropriate, clearly adopt recovery strategies prepared by other jurisdictions to serve as recovery plans for species listed as endangered or threatened under the *ESA*;
- ensure that all prepared and adopted recovery plans clearly include areas in Nova Scotia to be considered for designation as core habitat;
- publish a plan of action explaining how these obligations will be met;
- facilitate meaningful public participation by providing timely information on the government's progress towards meeting these obligations; and,
- exercise his Ministerial discretion to designate core habitat and create regulations to protect that habitat.

Endnotes

- ¹ WWF, *Living Planet Report 2020: Bending the Curve of Biodiversity Loss* (2020) at page 7, online: <<https://f.hubspotusercontent20.net/hubfs/4783129/LPR/PDFs/ENGLISH-FULL.pdf>>.
- ² WWF-Canada, *Living Planet Report Canada 2020: Wildlife at Risk* (2020) at page 6, online: <<https://wwf.ca/wp-content/uploads/2020/08/WWF-FINAL-EN-1.pdf>>.
- ³ United Nations Environment Programme, “Preventing the Next Pandemic – Zoonotic Diseases and How to Break the Chain of Transmission” (6 July 2020), online: <<https://www.unenvironment.org/resources/report/preventing-future-zoonotic-disease-outbreaks-protecting-environment-animals-and>>.
- ⁴ *Bancroft v Nova Scotia (Lands and Forests)*, 2020 NSSC 175.
- ⁵ *Endangered Species Act*, SNS 1998, chapter 11, at subsection 2(1) [“*Endangered Species Act*”].
- ⁶ *Ibid* at subsection 2(1)(h).
- ⁷ *Ibid* at subsection 15(1).
- ⁸ *Ibid* at subsection 15(10).
- ⁹ *Ibid* at subsection 15(4)(g).
- ¹⁰ *Ibid* at subsection 15(4)(h).
- ¹¹ *Ibid* at subsection 15(11).
- ¹² *Ibid* at subsection 15(12).
- ¹³ *Categorized List of Species at Risk Regulation*, NS Reg 146/2017, Schedule A. Notably, among the 17 vulnerable species, the 2 added in 2017 are listed as “special concern”.
- ¹⁴ *Endangered Species Act* at subsection 3(b).
- ¹⁵ *Ibid* at subsection 15(4)(h).
- ¹⁶ The Blanding’s Turtle Recovery Team, “National Recovery Plan for the Blanding’s Turtle (*Emydoidea blandingii*) Nova Scotia Population” (2002) at page 46, online: <speciesatrisk.ca/blandings/Blandings_Turtle_Recovery_Plan_Jan2003.pdf>.
- ¹⁷ Nova Scotia Lynx Recovery Team, “Provincial Recovery Plan for the Canada Lynx (*Lynx canadensis*)” (2006) at page 12, online: <http://www.catsg.org/fileadmin/filesharing/3.Conservation_Center/3.4.Strategies_Action_Plans/Canada_lynx/Nova_Scotia_lynx_recovery_team_2006.Provincial_recovery_plan_for_the_Canada_lynx.pdf>.
- ¹⁸ Nova Scotia Department of Natural Resources, “Recovery Plan for Moose (*Alces alces Americana*) in Mainland Nova Scotia” (2007) at page 30, online: <novascotia.ca/natr/wildlife/biodiversity/pdf/recoveryplans/MainlandMooseRecoveryPlan.pdf>.
- ¹⁹ Nova Scotia Department of Natural Resources and Black ash Recovery Planning Team, “Recovery and Action Plan for Black ash (*Fraxinus nigra*) in Nova Scotia” (2015) at page 19, online: <novascotia.ca/natr/wildlife/biodiversity/pdf/Black_Ash_Recovery_Plan_Nova_Scotia.pdf>.
- ²⁰ *Endangered Species Act* at subsection 16(2).
- ²¹ *Ibid* at subsection 16(5).
- ²² According to subsections 16(3) and (4) of the *Endangered Species Act*, the Minister can designate the entire geographical range of a species if its inclusion is considered essential for the continued survival in Nova Scotia of the species in question. The Minister can also designate private land as core habitat if the available public land is considered insufficient for the species’ recovery.
- ²³ Office of the Auditor General, *2021 Report of the Auditor General to the Nova Scotia House of Assembly: Follow-up of 2016, 2017, and 2018 Performance Audit Recommendations* (July 2021) at page 14, online: <<https://oag-nb.ca/sites/default/files/publications/2021Follow-upFull-Web.pdf>>.
- ²⁴ *Ibid*.
- ²⁵ *Ibid*.

Appendix

Endangered Species

ESA Requirements Have Been Met:

The Minister has prepared a provincial recovery plan which identifies areas that could be designated as core habitat.

The Minister has adopted a federal recovery strategy which meets the recovery plan requirements of the *ESA*.

ESA Requirements Have Not Been Met:

The Minister has prepared a provincial recovery plan, but that recovery plan does not identify areas that could be designated as core habitat.

There is a federal recovery strategy which meets the recovery plan requirements of the *ESA*, but the Minister has not clearly adopted that strategy.

The Minister has adopted a federal recovery strategy, but that recovery strategy does not meet the recovery plan requirements of the *ESA*.

The Minister has adopted a recovery plan prepared by a jurisdiction other than the federal government, but it does not meet the requirements of the *ESA*.

The Minister has not prepared a provincial recovery plan, and there is no appropriate federal recovery strategy to adopt.

Endangered Species Name	When was the species listed under the <i>ESA</i> ?	Has the Minister prepared a provincial recovery plan?	Does the recovery plan identify areas that could be designated as core habitat?	Is there a federal recovery strategy under <i>SARA</i> ?	Does the federal recovery strategy identify areas in NS that could be designated as core habitat?	Has the Minister clearly adopted the federal recovery strategy?	Additional Information
American Marten (Cape Breton Population)	2001	No (proposed)	N/A	No	N/A	N/A	There is a proposed provincial recovery plan.
Atlantic Whitefish	2002	No	N/A	Yes	Yes	Yes	
Bank Swallow	2017	No	N/A	No	N/A	N/A	The Minister has adopted a recovery strategy prepared by the Government of Ontario. That recovery strategy does not clearly identify areas in NS that could be designated as core habitat and therefore does not meet the recovery plan requirements of the <i>ESA</i> .

Endangered Species Name	When was the species listed under the <i>ESA</i> ?	Has the Minister prepared a provincial recovery plan?	Does the recovery plan identify areas that could be designated as core habitat?	Is there a federal recovery strategy under <i>SARA</i> ?	Does the federal recovery strategy identify areas in NS that could be designated as core habitat?	Has the Minister clearly adopted the federal recovery strategy?	Additional information
Barn Swallow	2013	No	N/A	No	N/A	N/A	The Minister has adopted a recovery strategy prepared by the Government of Ontario. That recovery strategy does not clearly identify areas in NS that could be designated as core habitat and therefore does not meet the recovery plan requirements of the <i>ESA</i> .
Bicknell's Thrush	2013	No	N/A	Yes	Yes	Yes	
Blanding's Turtle	2000	Yes	No	Yes	Yes	Yes	
Boreal Felt Lichen	2003	No	N/A	Yes	Yes	Yes	
Canada Lynx	2002	Yes	No	No	N/A	N/A	
Canada Warbler	2013	No	N/A	Yes	No	Yes	The federal recovery strategy adopted by the Minister does not clearly identify areas in NS that could be designated as core habitat.
Chimney Swift	2007	No	N/A	No	N/A	N/A	
Eastern Mountain Avens	2000	No	N/A	Yes	Yes	Yes	

Endangered Species Name	When was the species listed under the <i>ESA</i> ?	Has the Minister prepared a provincial recovery plan?	Does the recovery plan identify areas that could be designated as core habitat?	Is there a federal recovery strategy under <i>SARA</i> ?	Does the federal recovery strategy identify areas in NS that could be designated as core habitat?	Has the Minister clearly adopted the federal recovery strategy?	Additional information
Gypsy Cuckoo Bumble Bee	2017	No	N/A	No	N/A	N/A	The Minister has adopted a recovery strategy prepared by the Government of Ontario. That recovery strategy does not clearly identify areas in NS that could be designated as core habitat and therefore does not meet the recovery plan requirements of the <i>ESA</i> .
Harlequin Duck	2000	No	N/A	No	N/A	N/A	
Hoary Willow	2013	Yes	Yes	No	N/A	N/A	
Little Brown Myotis	2013	No	N/A	Yes	Yes	Yes	
Macropis Cuckoo Bee	2013	No	N/A	No	N/A	N/A	
Moose (Mainland Population)	2003	Yes	No	No	N/A	N/A	
Monarch	2017	No	N/A	No	N/A	N/A	
Northern Myotis	2013	No	N/A	Yes	Yes	Yes	
Plymouth Gentian	2013	No	N/A	Yes	Yes	Yes	
Pink Coreopsis	2000	No	N/A	Yes	Yes	Yes	
Piping Plover	2000	No	N/A	Yes	Yes	Yes	
Ram's-head Lady Slipper	2007	Yes	Yes	No	N/A	N/A	
Red Knot	2007	No	N/A	Yes	No	Yes	The federal recovery strategy adopted by the Minister does not clearly identify areas in NS that could be designated as core habitat.
Rockrose	2007	Yes	Yes	No	N/A	N/A	

Endangered Species Name	When was the species listed under the <i>ESA</i> ?	Has the Minister prepared a provincial recovery plan?	Does the recovery plan identify areas that could be designated as core habitat?	Is there a federal recovery strategy under <i>SARA</i> ?	Does the federal recovery strategy identify areas in NS that could be designated as core habitat?	Has the Minister clearly adopted the federal recovery strategy?	Additional information
Roseate Tern	2000	No	N/A	Yes	Yes	Yes	
Rusty Blackbird	2013	No	N/A	No	N/A	N/A	
Tall Beakrush	2017	No	N/A	Yes	Yes	Yes	
Thread-leaved Sundew	2000	No	No	Yes	Yes	Yes	
Transverse Lady Beetle	2017	No	No	No	N/A	N/A	The Minister has adopted a recovery strategy prepared by the Government of Ontario. That recovery strategy does not clearly identify areas in NS that could be designated as core habitat and therefore does not meet the recovery plan requirements of the <i>ESA</i> .
Tri-coloured Bat	2013	No	N/A	Yes	Yes	Yes	
Vole Ears Lichen	2013	No	N/A	Yes	Yes	Yes	
Water Pennywort	2001	No	N/A	Yes	Yes	Yes	

There are 33 species listed: the requirements of the *ESA* have been met for 19.

2 species have provincial recovery plans that do not clearly identify areas that could be designated as core habitat.

2 species have adopted federal recovery strategies which do not clearly identify areas in NS that could be designated as core habitat.

4 species have adopted Ontario-based recovery plans which do not clearly identify areas in NS that could be designated as core habitat.

6 species have no recovery plans whatsoever.

Threatened Species

ESA Requirements Have Been Met:

The Minister has prepared a provincial recovery plan which identifies areas that could be designated as core habitat.

The Minister has adopted a federal recovery strategy which meets the recovery plan requirements of the *ESA*.

ESA Requirements Have Not Been Met:

The Minister has prepared a provincial recovery plan, but that recovery plan does not identify areas that could be designated as core habitat.

There is a federal recovery strategy which meets the recovery plan requirements of the *ESA*, but the Minister has not clearly adopted that strategy.

The Minister has adopted a federal recovery strategy, but that recovery strategy does not meet the recovery plan requirements of the *ESA*.

The Minister has adopted a recovery plan prepared by a jurisdiction other than the federal government, but it does not meet the requirements of the *ESA*.

The Minister has not prepared a provincial recovery plan, and there is no appropriate federal recovery strategy to adopt.

Threatened Species Name	When was the species listed under the <i>ESA</i> ?	Has the Minister prepared a provincial recovery plan?	Does the recovery plan identify areas that could be designated as core habitat?	Is there a federal recovery strategy under <i>SARA</i> ?	Does the federal recovery strategy identify areas in NS that could be designated as core habitat?	Has the Minister clearly adopted the federal recovery strategy?	Additional Information
Black Ash	2013	Yes	No	No	N/A	N/A	
Black Foam Lichen	2017	No	N/A	No	N/A	N/A	
Brook Floater	2013	No	No	No	N/A	N/A	
Common Nighthawk	2007	No	N/A	Yes	No	Yes	The federal recovery strategy adopted by the Minister does not clearly identify areas in NS that could be designated as core habitat.
Eastern Baccharis	2013	No	N/A	Yes	Yes	Yes	
Eastern Ribbonsnake	2003	No	N/A	Yes	Yes	Yes	
Eastern Water Fan	2017	No	N/A	No (proposed)	N/A	N/A	There is a proposed federal recovery strategy.
Eastern Whip-poor-will	2013	No	N/A	Yes	No	No	
Olive-sided Flycatcher	2013	No	N/A	Yes	No	Yes	The federal recovery strategy adopted by the Minister does not clearly identify areas in NS that could be designated as core habitat.
Sable Island Sweat Bee	2017	No	N/A	Yes	Yes	Yes	

Threatened Species Name	When was the species listed under the <i>ESA</i> ?	Has the Minister prepared a provincial recovery plan?	Does the recovery plan identify areas that could be designated as core habitat?	Is there a federal recovery strategy under <i>SARA</i> ?	Does the federal recovery strategy identify areas in NS that could be designated as core habitat?	Has the Minister clearly adopted the federal recovery strategy?	Additional Information
Wood Turtle	2013	No	N/A	Yes	Yes	Yes	The federal recovery strategy adopted by the Minister indicates that relevant habitat areas in Nova Scotia have been identified and are known to government, but it does not describe those sites directly due to the species' vulnerability to illegal collection.
Wrinkled Shingle Lichen	2017	No	N/A	No	N/A	N/A	
Yellow Lampmussel	2006	No	N/A	No	N/A	N/A	

There are 13 species listed: the requirements of the *ESA* have been met for 4.

1 species has a provincial recovery plan that does not clearly identify areas that could be designated as core habitat.

2 species have adopted federal recovery strategies which do not clearly identify areas in NS that could be designated as core habitat.

6 species have no recovery plans whatsoever.

Vulnerable Species

ESA Requirements Have Been Met:

The Minister has prepared a provincial management plan.

ESA Requirements Have Not Been Met:

The Minister has not prepared a provincial management plan.

Vulnerable Species Name	When was the species listed under the <i>ESA</i> ?	Has the Minister prepared a provincial management plan?	Is there a federal management plan upon which the Minister could draw?
Blue Felt Lichen	2013	No	Yes (proposed)
Bobolink	2013	No	No
Eastern Lilacopsis	2006	No	Yes
Eastern White Cedar	2006	Yes	N/A
Eastern Wood Peewee	2013	No	No
Evening Grosbeak	2017	No	No
Golden Crest	2013	No	Yes
Long's Bulrush	2001	No	Yes
New Jersey Rush	2001	No	Yes
Peregrine Falcon	2007	No	Yes
Prototype Quillwort	2006	No	Yes
Redroot	2013	No	Yes
Snapping Turtle	2013	No	Yes
Spotted Pondweed	2013	No	No
Sweet Pepperbush	2000	No	Yes
Tubercled Spike-rush	2013	No	Yes
Yellow-banded Bumble Bee	2017	No	No

There are 17 species listed: the requirements of the *ESA* have been met for 1.

11 of the 16 species without provincial management plans have federal management plans upon which the Minister could draw.