Protection of Threatened Species in New Zealand

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The need to protect threatened species and facilitate their recovery to viable population levels enjoys widespread international support, but it is the domestic legal rules of individual nations that will implement international calls for protection and recovery. New Zealand purports to protect threatened species primarily with the Wildlife Act 1953, a statute whose purpose is more concerned with wildlife management than implementing a legal framework to protect threatened species. The consensus is that the Wildlife Act 1953 and other applicable legislation such as the Resource Management Act 1991 is not up to the task of protection and recovery of threatened species in New Zealand. In this article we explore how dedicated threatened species legislation in New Zealand might improve on the existing legal framework, and in particular with respect to the designation and planning on threatened species, recovery programmes and habitat protection. For an illustration of how these components may contribute to the threatened species problem we look to Canada as a nation which enacted dedicated threatened species legislation in 2002. The story thus far in Canada suggests legal rules are not a panacea for species decline, but nonetheless dedicated legislation can offer substantial benefits such as transparency and a systematic approach to species planning, better integration with resource development, and a measure of accountability in law to hold public officials to their promises on threatened species protection.

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1. INTRODUCTION

It is widely accepted that conserving existing biodiversity and halting any further decline is vital to human wellbeing.[1] New Zealand's ratification of the Convention on Biological Diversity in September 1993 signified commitment to this intent.[2] The commitment included the enactment of legislation by signatory nations to protect threatened species and their habitat.[3]

More recently, the adoption of the Strategic Plan for Biodiversity 2011–2020 including the Aichi Biodiversity Targets[4] strengthens measures considered necessary to reverse decline. New Zealand as a signatory to the Convention must canvass the measures necessary to implement the Targets, which includes the prevention of species extinction in Target 12:[5]

> By 2020 the extinction of known threatened species has been prevented and their conservation status, particularly of those most in decline, has been improved and sustained.

The ancestry of these international commitments on conserving threatened species is the earlier concerns about the loss of wildlife and its habitat that arose in the 19th century. Legal rules to conserve wildlife date back to this time when statutory provisions were enacted in many nations, including New Zealand and other commonwealth jurisdictions, experiencing the decline of terrestrial fauna. These rules were enacted to manage and conserve wildlife populations as a public resource.

The rise of environmentalism in the 20th century led to a greater awareness or appreciation of the impacts of modern humanity on its surrounding environment. The science and philosophy underlying environmentalism revealed shortcomings in traditional law and policy concerned with wildlife management and conservation. In particular, the problem of species extinction due to increasing global population and the human consumption of resources is now a well-understood and documented global phenomenon.[6] Habitat loss

1 United Nations Environment Programme *GEO5 Global Environment Outlook: Environment for the Future we Want* (United Nations Environment Programme, 2012) ch 5 Biodiversity.

2 Convention on Biological Diversity (opened for signature 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

3 Article 8(k).

4 Decision X/2.

5 Decision X/2, cl (IV) (13), Strategic Goal C, Target 12.

6 SL Pimm, CN Jenkins, R Abell and others "The Biodiversity of Species and their Rates of Extinction, Distribution, and Protection" (2014) 344 Science 1246752-1 at 1246752-4; RT Kingsford, JEM Watson, CJ Lundquist and others "Major Conservation Policy Issues for Biodiversity in Oceania" (2009) 23 Conservation Biology 834.

and incidental harm to wildlife are now seen to demand a more systematic and integrated approach to protection than the earlier wildlife laws provide for.

The primary law in New Zealand for wildlife protection is the Wildlife Act 1953, and thus this statute also serves as the primary law governing threatened species in the country. The Wildlife Act 1953 was enacted prior to the dawn of the environmentalism era, and thus has been the subject of sustained criticism in the literature for its lack of a systematic and integrated approach to wildlife protection demanded by the modern problems noted above. Notable criticisms of the Wildlife Act 1953 include its central role in a fragmented and aged legislative approach,[7] the absence of provisions focused on the recovery and management of species,[8] the absence of integration with legislation governing the development of natural resources,[9] the limited focus on species take and habitat protection,[10] the absence of duties on wildlife officials to take proactive steps to address significant threats to wildlife populations such as mammalian predators,[11] the absence of conservation plans and strategies with a clear guiding philosophy,[12] and the discretionary character of the legislation which allows for the taking of threatened wildlife populations.[13] In addition to shortcomings in the content of the law itself, species management under the Wildlife Act 1953 has been criticised as being inconsistent and alarmingly under-resourced.[14]

7 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Waitangi Tribunal, 2010) 299.

8 MNH Seabrook-Davison, W Ji and DH Brunton "New Zealand Lacks Comprehensive Threatened Species Legislation: Comparison with Legislation in Australia and the USA" (2010) 16 Pacific Conservation Biology 54.

9 Seabrook-Davison and others, above n 8; PJ Wallace "Where the Wild Things Are: Examining the Intersection between the RMA 1991 and the Wildlife Act 1953" (2009) Resource Management Journal 21.

10 C Warnock and N Wheen "Climate Change, Wildlife Movement and the Law: A Case Study from New Zealand" (2008) 34 Commonwealth Law Bulletin 527 at 533; L Blue and G Blunden "(Re)making Space for Kiwi: Beyond 'Fortress Conservation' in Northland" (2010) 66 New Zealand Geographer 105 at 112; DJ Round "The Lion, the Nurse and the Weasel: Law and Policy Concerning Endangered Species in New Zealand" (2011) 15 NZJEL 147 at 154.

11 Round, above n 10, at 154; M Clout "Where Protection is not Enough: Active Conservation in New Zealand" (2001) 16 Trends in Ecology & Evolution 415; DR Towns and others "Raising the Prospects for a Forgotten Fauna: A Review of 10 Years of Conservation Efforts for New Zealand Reptiles" (2001) 99 Biological Conservation 3.

12 MN Clout and AJ Saunders "Conservation and Ecological Restoration in New Zealand" (1995) 2 Pacific Conservation Biology 91 at 94.

13 Warnock and Wheen, above n 10, at 534; K Bosselmann and P Taylor "The New Zealand Law and Conservation" (1995) 2 Pacific Conservation Biology 113 at 114.

14 LN Joseph, RF Maloney, SM O'Connor and others "Improving Methods for Allocating Resources Among Threatened Species: The Case for a New National Approach in New Zealand" (2008) 14 Pacific Conservation Biology 154 at 155.

In this article we add to the calls for law reform in New Zealand to protect threatened species, and investigate what dedicated threatened species legislation might offer in this regard. Dedicated threatened species legislation typically consists of the following components: (1) status designations; (2) a legal process for designating threatened species (known as the listing process); and (3) measures to recover and protect threatened species and their habitat. In order to make the case for dedicated legislation in New Zealand we explore shortcomings in the current legal framework in relation to these components and we look to dedicated threatened species legislation in Canada as a possible model for New Zealand to follow.

2. WILDLIFE PROTECTION LEGISLATION IN NEW ZEALAND

The Wildlife Act 1953 is the primary source of law governing threatened species in New Zealand, but the statute is not the only legislation that applies. Other statutes which have some application to threatened species and their habitat include the Marine Mammals Protection Act 1978, the Resource Management Act 1991, the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, the Fisheries Act 1996, the Conservation Act 1987, the National Parks Act 1980, the Reserves Act 1977, the Marine Reserves Act 1971, and the Biosecurity Act 1993. What this list does not include is dedicated legislation on threatened species, and others have suggested this absence as a significant shortcoming in fulfilling New Zealand's international commitments to protect species and biodiversity.

New Zealand, despite its comparatively low population, has an accentuated species loss profile due to unique biogeographical conditions matched with high numbers of endemic species. Species composition contributes to the profile of loss, as evolution in the absence of mammals means that New Zealand species are particularly susceptible to invasive mammalian predators. Habitat destruction and human hunting are additional key agents of decline.

In contrast to global averages, New Zealand levels of threatened species are elevated.[15] In 2013, of the 12,223 taxa assessed, 3,540 were listed as Threatened or as At Risk, demonstrating an increase from the 2,788 taxa listed in 2005. Of this change it is estimated that 59 taxa genuinely worsened in status

15 IUCN *Red List Table 1: Numbers of threatened species by major groups of organisms (1996–2013)* (IUCN, 2013) <http://www.iucnredlist.org/documents/summarystatistics/2013_1_RL_Stats_Table1.pdf>.

whilst 12 taxa genuinely improved in status as a result of successful species management.[16]

A recent assessment of freshwater fish identifies that a concerning 74 per cent are considered to be threatened and 25 per cent of freshwater invertebrate freshwater species are likewise classified.[17] Increasing threat status is attributed to "pressures including eutrophication, habitat loss and population isolation caused by the damming of rivers, habitat destruction, species invasion, overharvesting, and climate change".[18] Intensification of agriculture causing water quality degradation is seen as a major driver, and is further associated with loss of habitat, particularly wetland loss.[19] For birds, compared with global statistics, New Zealand has a higher percentage of Threatened or At Risk species. Of 417 New Zealand species, 77 (18.5%) are Threatened and 92 (22.1%) are At Risk. In 2013 the global figures were 1,313 (13.2%) Threatened and 880 (8.9%) Near Threatened.[20] The recent downward trends in birds are thought to be related to changes in land use, particularly conversion of sheep farming to dairy farming, changes in oceanic productivity, possibly linked with global warming, fisheries bycatch and predation, or a combination of those named.

This evidence suggests existing legal rules are not effective in protecting threatened species in New Zealand and provides further support for the critical observations in the literature that the current legal framework is wanting in terms of providing comprehensive protection for threatened species.

2.1 Wildlife Act 1953

The Wildlife Act 1953 purports to provide absolute legal protection to wildlife in New Zealand. This sounds like strong legal protection for threatened species yet a closer examination reveals significant exceptions to the provision.

The intent of the Wildlife Act 1953 is the protection and control of wild animals and birds, the regulation of game shooting seasons, and provision for

16 R Hitchmough *Summary of Changes to the Conservation Status of Taxa in the 2008–11 New Zealand Threat Classification System Listing Cycle* (Department of Conservation, Wellington, 2013) at 4.

17 JM Goodman, NR Dunn, PJ Ravenscroft and others *Conservation status of New Zealand freshwater fish, 2013* (Department of Conservation, 2014); Department of Conservation *Department of Conservation Annual Report for the year ended 30 June 2011* (Department of Conservation, 2014) at 31.

18 MK Joy and RG Death "Freshwater Biodiversity" in John Dymond (ed) *Ecosystem Services in New Zealand* (Nationwide Books, New Zealand, 2014) 448 at 454.

19 At 454.

20 Hugh A Robertson, John E Dowding, Graeme P Elliott and others *Conservation Status of New Zealand Birds, 2012* (Department of Conservation, 2013) and BirdLife International *State of the World's Birds: Indicators for our Changing World* (2013) at 7.

the constitution and powers of acclimatisation societies. Part 1 identifies wildlife species to be protected,[21] and enables the establishment of protected areas such as sanctuaries and wildlife refuges.[22] Additionally, it provides for management planning to be carried out by the Department of Conservation (DOC),[23] and for the preparation of policy and plans including general policy,[24] conservation management strategies[25] and conservation management plans.[26] Part 2 regulates the hunting of game, and is supported by administrative provisions contained in pt 3. The management of injurious species was previously covered by pt 4, but was repealed by s 91(2) of the Biosecurity Law Reform Act 2012. Part 5 is of particular relevance due to the enabling of statutory authorisation for species take,[27] vesting of species ownership in the Crown,[28] and the provision of offences and penalties.[29] Finally, the schedules to the Wildlife Act 1953 relate back to pt 1 and assign varying grades of protective status to listed animals. The limits to this protective status will now be examined.

2.1.1 Exclusion through definition and exception

Section 3 of the Wildlife Act 1953 provides for the protection of wildlife throughout New Zealand and in the offshore exclusive economic zone. This protection, however, is subject to exclusions administered with the definition of wildlife or wildlife expressly excluded through schedules in the legislation.

Wildlife is defined by s 2 to mean:

> any animal that is living in a wild state; and includes any such animal or egg or offspring of any such animal held or hatched or born in captivity, whether pursuant to an authority granted under this Act or otherwise; but does not include any animals of any species specified in Schedule 6 (being animals that are wild animals subject to the Wild Animals Control Act 1977)

Animal means:

> any mammal (not being a domestic animal or a rabbit or a hare or a seal or other marine mammal), any bird (not being a domestic bird), any reptile, or

21 Wildlife Act 1953 ss 3–7C.
22 Sections 9–14AA.
23 Section 14B.
24 Section 14C.
25 Section14D.
26 Section 14E.
27 Sections 53–54.
28 Section 57.
29 Sections 62–70.

> any amphibian; and includes any terrestrial or freshwater invertebrate declared to be an animal under section 7B and any marine species declared to be an animal under section 7BA; and also includes the dead body or any part of the dead body of any animal

The definition of wildlife thus excludes all threatened native fish, and many marine species and invertebrates also fail to gain protection through ss 7B and 7BA as scheduled protection is restricted to a few named species (schs 7 and 7A). For the biodiversity of New Zealand these are significant exclusions as considerable numbers of species remain unprotected through definition.

For those species defined as "wildlife", absolute protection is the default position pursuant to s 3. However, exceptions to this status are set out in schedules to the Act. The schedules are the key to ascertaining levels of protection ascribed to species within and between classes of animals, and are adjusted according to perceived value and or risk.

Schedule 5 status excludes protection entirely and is generally applied to common introduced animals, with no particular perceived value, such as game. Protection can also be limited through inclusion in schs 1–3 which respectively enable take for game, partial protection, or hunting or killing subject to Ministerial notice.

2.1.2 Limits to extent of protection: dilution through definition of "hunting or killing"

The key provision in the Wildlife Act 1953 in relation to wildlife protection is s 63(1) which provides:

> **63 Taking protected wildlife or game, etc**
> (1) No person may, without lawful authority,—
> (a) hunt or kill any absolutely protected or partially protected wildlife or any game:
> (b) buy, sell, or otherwise dispose of, or have in his or her possession any absolutely protected or partially protected wildlife or any game or any skin, feathers, or other portion, or any egg of any absolutely protected or partially protected wildlife or of any game:
> (c) rob, disturb, or destroy, or have in his or her possession the nest of any absolutely protected or partially protected wildlife or of any game.

This section prohibits hunting or killing of absolutely or partially protected wildlife without lawful authority. Where the absolutely or partially protected status applies, permission must be obtained from DOC in order to hunt or kill the animal pursuant to s 53. The allowance of permitted take (both direct and

incidental) enabled by s 53, and associated inadequate implementation of these provisions, represents a significant compromise in wildlife protection. We discuss this further in part 2.1.5 below.

Section 2 of the Wildlife Act 1953 defines the phrase "hunt or kill" to include the hunting, killing, taking, trapping, or capturing of any wildlife by any means. Judicial interpretation has included incidental loss, where it is known that actions may interfere with the natural and ordinary activities of the wildlife and may harm the wildlife.[30]

More significantly for the protection of species, *Royal Forest and Bird Protection Society v Minister of Conservation*[31] established that incidental habitat destruction resulting from otherwise lawful activity may constitute "hunting or killing" and equate to a breach of s 63 of the Wildlife Act 1953 if permission has not been obtained. The Court held that any such case would involve fact-specific considerations. This is potentially important for threatened species as it would extend the application of the s 63 prohibition to acts such as clearance of vegetation and drainage of wetlands.

Pursuing, disturbing, or molesting wildlife, taking or using firearms, dogs or like methods to hunt or kill are also forbidden under the s 2 definition of "hunt or kill". Inclusion of the terms "taking" and "disturbing" potentially widens the breadth of protection and moves beyond considerations of mortality. However, the scope of disturbance has been read down by judicial interpretation to not include unintentional disturbance unless it occurs in designated refuges.[32] This effectively limits the application of this provision to wildlife refuges which make up less than one per cent of the public conservation estate.[33]

2.1.3 Limits to extent of protection: strict liability and statutory defences

Liability under the Wildlife Act 1953 is strict rather than absolute, such that a person has a defence against liability under s 63 if he or she can demonstrate they took reasonable steps to prevent the commission of the act in question. Section 68AB(3) provides for this due diligence defence against liability for hunting or killing wildlife:

> (3) It is a defence in any prosecution for an offence not listed in subsection (5) if the defendant proves—

30 *Solid Energy New Zealand Ltd v Minister of Energy* [2009] NZRMA 145 at [86].

31 *Royal Forest and Bird Protection Society v Minister of Conservation* [2006] NZAR 265 at paras 21–22.

32 *Solid Energy New Zealand Ltd v Minister of Energy* [2009] NZRMA 145 at [83]; *Kirkby v Ngamoki* HC Rotorua M172/84, 11 July 1985 at 3.

33 Controller and Auditor General *Department of Conservation: Planning for and managing publicly owned land* (Office of the Auditor-General, Wellington, 2006) at 17.

> (a) that the defendant did not intend to commit the offence; and
> (b) that,—
> (i) in any case where it is alleged that anything required to be done was not done, the defendant took all reasonable steps to ensure that it was done:
> (ii) in any case where it is alleged that anything prohibited was done, that the defendant took all reasonable steps to ensure that it was not done.

Such a limitation on liability for unintended harm is necessary; but where loss is avoidable, considerable care should be taken in providing statutory defences. Difficulty arises where knowledge is limited in terms of the presence of a species. Ignorance of species presence can currently be used to avoid liability. This is not unreasonable in many instances of unintentional harm, but a lack of power under the Wildlife Act 1953 to compel enquiry in terms of species presence, prior to damaging actions being undertaken, is a limiting factor in terms of protection. The lack of linkage between absolute protection and the control of development in the Wildlife Act 1953 weakens the strength of the standard. The matter falls to be resolved under the Resource Management Act 1991 (RMA) and underscores the necessity of ensuring that comprehensive provisions in RMA plans capture important habitat, and require fauna surveys prior to development which may damage absolutely protected species.

Section 68B of the Wildlife Act 1953 provides specific defences in relation to the loss of marine wildlife. A defence is available under s 68B(3) if the offence took place "in circumstances of stress or emergency and was necessary for the preservation, protection, or maintenance of human life". A second and more significant defence arises through s 68B(4)(a) which excuses all forms of accidental or incidental take provided reporting requirements were complied with. This is an extensive sectoral exception which significantly reduces legislated protection for all marine wildlife under the Wildlife Act 1953. Where the loss arises as part of a commercial fishing operation, for example, s 68B(4)(b) operates as a defence provided all necessary reporting requirements were fulfilled, a measure which has significant ramifications for pelagic species, of particular concern due to the significant impact of bycatch upon New Zealand species.

2.1.4 Lack of direction for comprehensive protection, management and recovery planning

Ownership in all wildlife is vested in the Crown under s 57(3) of the Wildlife Act 1953. However, the existence and extent of any duty upon the Crown to protect the species owned is not expressly set out in the Act, and, in any event,

faces considerable hurdles. The most notable hurdle is the fact that the majority of terrestrial New Zealand is subject to private ownership and the extent to which the Crown may exercise statutory powers to protect wildlife on private lands is not clear.

Approximately one third of terrestrial land in New Zealand is public conservation estate administered by DOC, and the balance of the land is in private ownership or public ownership for purposes other than conservation. Management of species and areas, under the Wildlife Act 1953, is carried out in conjunction with conservation management by DOC under the Conservation Act 1987, the Marine Reserves Act 1971, the National Parks Act 1980, the Queen Elizabeth the Second National Trust Act 1977, and the Reserves Act 1977.

The protection afforded to species will be to a level consistent with the purposes for which the area is reserved, and in general terms protection is higher than to that accorded on private land, and notable gains for species are well documented.[34] However, these statutory frameworks were not enacted specifically to protect species, and their boundaries may have been set for recreation or aesthetic purposes. Often, protected areas under these statutes cover lands that are not otherwise viewed as economically productive (eg alpine rock and ice) and are not representative of habitat of threatened species. For instance, national parks include little coastline, which significantly limits representation and protection of coastal species, a high proportion of which are threatened or at risk.[35] This problem is exacerbated by the predominance of people living by the coast, a trend which is continuing.[36]

Section 6(a) of the Conservation Act 1987 limits the conservation management functions of DOC to land or resources held under the Act, thus constraining activity for conservation purposes upon private land without agreement of the landowner.

For areas beyond the public conservation estate, s 6(b) confers an advocacy role upon DOC to conserve natural and historic resources. The spatial division between the public conservation estate and private land is significant in many ways, but particularly so in the case of survival rates of populations and species, as the public estate produces fewer species declines than private land.[37]

34 PJ Wallace "Boundaries of Absolute Protection: Distribution of Benefit and Harm to Birds through Law and Planning in New Zealand" (PhD thesis, University of Waikato, 2014) ch 7.

35 JE Dowding *Sites of importance to coastal and estuarine birds on the east coast of the Waikato region* (Waikato Regional Council, 2013) at 2.

36 Statistics New Zealand "Are New Zealanders Living Closer to the Coast?" (2013) <http://www.stats.govt.nz/browse_for_stats/population/Migration/internal-migration/are-nzs-living-closer-to-coast.aspx>.

37 CM Miskelly, JE Dowding, GP Elliott and others "Conservation Status of New Zealand Birds, 2008" (2008) 55 Notornis 117 at 123.

Section 41(1)(fa) of the Wildlife Act 1953 states that the Minister of Conservation may from time to time "protect and preserve wildlife that are absolutely protected under this Act". The extent of this discretionary power is unclear. The phrase "protect and preserve" is not defined in the Wildlife Act 1953, although definitions of both protection and preservation are included in s 2 of the Conservation Act 1987.[38] Does this power extend to enabling access to private land without agreement in order to protect and preserve species? While the Conservation Act 1987 limits the power of DOC to land or resources held under that legislation, no such limitation is expressed in the Wildlife Act 1953.

The closest provision to addressing this point is s 41(2)(g) which provides:

> (2) In the exercise of the powers conferred on him by subsection (1), the Minister may from time to time—
>
> (g) with the written consent of the occupier, and subject to the provisions of any other Act, construct and maintain on any land any roads, roadways, tracks, paths, bridges, culverts, ferries, and other means of access necessary for the purposes of this Act:

We were unable to locate any authority or discussion in the secondary literature on the extent of discretion held by the Minister under s 41.[39] Nonetheless, it seems likely the power of the Crown to protect wildlife located on private lands would be more constrained than its powers in relation to public lands. This assertion is further underscored in the context of permitted taking of wildlife under the Wildlife Act 1953, which we address in part 2.1.5 below.

The creation of recovery plans for threatened species is not the subject of an express legal obligation under New Zealand law. Section 41(e) of the Wildlife Act 1953 comes closest in this regard by providing permissive authority for the development of plans for wildlife management. However, this provision does not impose an obligation and moreover does not explicitly mention threatened species. In practice, few such plans have been created. Threatened bird species in New Zealand provide a good illustration. Of the 170 bird species that are threatened, only 27 species have a recovery plan and only 12 of those are

38 Section 2 provides the following definitions: "**preservation**, in relation to a resource, means the maintenance, so far as is practicable, of its intrinsic values:" and "**protection**, in relation to a resource, means its maintenance, so far as is practicable, in its current state; but includes—
(a) Its restoration to some former state; and
(b) Its augmentation, enhancement, or expansion".

39 Searches of the case law and several legal databases relating to the Wildlife Act 1953 and land law failed to produce commentary.

monitored by an active recovery group.[40] This is unfortunate from a species perspective as a recovery plan is an essential component of restoring a viable population.

The information detailed in the plan, for example, typically identifies the needs of a species, its distribution and the threats it faces, which can inform management responses, particularly upon private land where levels of development are elevated. As well, in the assessment of direct and incidental loss, recovery plans may support decision-making and these plans could also usefully be woven into landscape-level conservation plans which better direct development which affects species. Recovery plans cut across distinctions of place and are fundamental mechanisms to support integrated species protection across all New Zealand environments. Their absence in the New Zealand legal framework diminishes the power to protect, plan for, and manage threatened species, with a particular vacuum arising on private land.

2.1.5 Inadequate implementation, and poor integration with resource use legislation

Section 53 of the Wildlife Act 1953 provides that the Director-General may authorise taking or killing of wildlife for certain purposes thus further reducing extent of protection.

Discretionary exceptions to any absolute provision are widely enabled by the law, yet for a rule to retain sufficient protective force clear statutory and associated policy parameters should be set to guide decision-making in this context. This is not the case with the Wildlife Act 1953.

DOC requires permits for incidental loss to be applied for. However, the requirement is reputedly not uniformly applied, and treatment can be uneven.[41] There is a lack of clarity surrounding the nature of activities which trigger the requirement for permits, the process to be followed, and the decision-making principles to be applied. No apparent mechanism exists for the general public, or other interest groups, to participate and readily challenge any such decisions. Table 1 below documents all permits applied for, pursuant to s 53 of the Wildlife Act 1953, in relation to the take of wildlife, and those issued in the Waikato Conservancy in the five years preceding October 2013.[42]

40 JG Ewen, L Adams and R Renwick "New Zealand Species Recovery Groups and Their Role in Evidence-Based Conservation" (2013) 50 Journal of Applied Ecology 281.

41 G Kessels, pers comm, 2011.

42 Information obtained by request pursuant to the Official Information Act 1982.

Table 1: Authorisation pursuant to s 53 of the Wildlife Act 1953 issued by Waikato Conservancy in the period October 2008–October 2013, in relation to human activity in the environment (excluding for scientific purposes).

Applicant	**Date Issued**	**Purpose**	**Approved**
Earnslaw One Ltd WK291117	20 April 2012	Permit for incidental loss of protected wildlife. Production Forestry, Whangapoua Forest	✓
Titoki Sands Ltd WK32730	1 December 2011	Authority to disturb long-tailed bats, through the removal of potential roost trees	
Transfield Services NZ BP25230	22 April 2009	Authority to disturb protected wildlife, for the purposes of removal of heron nests from the Waipapa and Maraetai dams causing a hazard	✓
Whangamata Marina WK24506	9 June 2009	Incidental loss of absolutely protected wildlife	✓

Given the number and scale of production activities and developments in the Waikato Conservancy, it seems likely that Wildlife Act 1953 permits are often not applied for. A specific request in relation to the Te Uku Wind Farm in Raglan confirmed that no permit under the Wildlife Act 1953 was sought for incidental loss arising from that development.[43] For such projects, it appears the RMA is being used to fill this "gap" through the use of environmental impact assessment (EIA) in the permitting process.

From a species protection perspective, the most significant issue here is that the RMA brings a focus on sustainable management of natural and physical resources as opposed to absolute protection.[44] Integrating the provisions of the Wildlife Act 1953 and the RMA with respect to the protection of wildlife has the potential to improve the legal framework applicable to threatened species by, for example, requiring the consideration of threatened species in the environmental impact assessment. However, from a species perspective this could only be recommended if provisions were added to the RMA to specifically address the effects of resource development on threatened species.[45]

43 Information obtained by request pursuant to the Official Information Act 1982.

44 The purpose of the Resource Management Act 1991 [RMA], s 5.

45 Wallace, above n 34, at ch 7 Conclusions.

2.2 The Resource Management Act 1991

The mandate for absolute protection of wildlife under the Wildlife Act 1953 sits uneasily with the purpose of the Resource Management Act 1991, although the recent Supreme Court decision in *Environmental Defence Society v NZ King Salmon Ltd* (*King Salmon*)[46] may provide the opportunity to strengthen protection for threatened species. The RMA is the principal legislation in New Zealand governing resource use development and protection. Managing activities within terrestrial and coastal marine areas,[47] the RMA provides mechanisms to protect biodiversity including purpose and principle clauses,[48] resource use restrictions,[49] the preparation of extensive resource management standards, policies and plans,[50] and development permitting procedures with mandatory EIA requirements.[51]

Although the RMA is directed at integrated management of natural resources including animals,[52] integrated management of indigenous species and their habitat is complicated by divisions created through ownership and control of resources and insufficient unifying or integrating policy.[53] Under the RMA, maintaining biological diversity and enhancing particular ecosystems is a concern of both regional and territorial authorities.[54] A functional overlap exists for biodiversity responsibility, and allocation of roles between agencies varies widely according to direction from the regional policy statement pursuant to s 62(1)(i)(iii).[55]

Decisions made about protecting species and their habitats are informed by the purpose and principles of the RMA described in ss 5–8. Section 5 of the RMA states the purpose of the Act as follows:

> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way,

46 *Environmental Defence Society v NZ King Salmon Ltd* [2014] NZSC 38.
47 As defined by s 2.
48 Sections 5–8, 17.
49 Sections 9–17.
50 Part 5, ss 43–86G.
51 Part 6, ss 87AA–139A.
52 Section 2.
53 Wallace, above n 34, at ch 8; PJ Wallace "Integrated Conservation Management: Spatial Planning for the Movement of Species in the Landscape" (2011) 15 NZJEL 185.
54 Sections 30(1)(ga) and 31(1)(b)(3).
55 Contrast Horizons Regional Council *Proposed One Plan* (Decisions version 2010) Policy 7.4 and Waikato Regional Council *Proposed Waikato Regional Policy Statement* (Decisions version 2012) Methods 11.1.1 and 11.2.2.

> or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Focusing on both development and protection, s 5 envisages an outcome whereby development is promoted whilst the natural environment is sustained through recognition of environmental limits.[56] Species protection is implicit in s 5(2)(a)–(c), but the extent of protection provided by s 5 is widely debated.

Enabling mitigation as an alternative to avoidance of effects to species and habitat is a measure which may reduce effective protection. A further limitation of the RMA is its failure to provide specific protection for threatened and at risk species, a position only partially resolved by s 6(c) which requires, as a matter of national importance, that decision-makers recognise and provide for areas of significant indigenous vegetation and significant habitats of indigenous fauna.

For threatened species, the protection afforded at this point is critical, due to the lack of dedicated threatened species legislation, and, as seen in part 2.1 above, the absolute protection extended to birds through the Wildlife Act 1953 is reduced by statutory exception and a lack of implementation.

The recent *King Salmon* decision has departed from the traditional "overall broad judgment approach" to the application of s 5 and taken a stronger position on the protection of the environment. The decision emphasises that preservation and protection are elements of sustainable management of resources, and that a particular planning document may give primacy to preservation and protection in particular circumstances.[57] This decision supports application of policies of avoidance of harm to threatened species as a legitimate response in particular plans and circumstances.[58] Such a policy is in line with a widely held view that avoidance should be the first choice in terms of selecting remedial actions,

56 G Palmer "The Resource Management Act — How we got it and what changes are being made to it" (address to the Resource Management Law Association, New Plymouth, 27 September 2013) at 10.

57 *Environmental Defence Society v NZ King Salmon Ltd* [2014] NZSC 38 at [146], [149].

58 At [150].

particularly where the impacts relate to threatened species and habitats and where effects could be irreversible.[59]

The decision makes evident the need to create strong directive policy which limits discretionary power and recognises the particular vulnerability of threatened and at risk species and the particular imperative for protection.

National policy statements[60] are a key means of delivering protective environmental policy which may resonate effectively in lower-order plans and consenting decisions as demonstrated in *King Salmon*, and the example of the New Zealand Coastal Policy Statement 2010 (NZCPS).[61] Yet the reach of the NZCPS is confined to the coastal environment, as is for species, the protection from policies such as 7 "Strategic planning", 11 "Indigenous biodiversity" and 13 "Preservation of natural character". The absence of strong directive national policy applied to protect species across all environments is a significant weakness of the current framework.

This exposure is increased by a lack of rigorous and systematic identification and protection of critical habitat/sites in lower-order documents as demonstrated in the recent Environment Court decision *Opoutere Ratepayers and Residents' Association v Waikato Regional Council*.[62] In this decision it was found that provision of criteria in regional policy statements for the assessment of areas of ecological value was an insufficient method employed by regional councils to provide the requisite protection directed by national policy, and that actual area identification was required. Judge Harland states: "In our view, identifying areas is very different from providing criteria for the assessment of them."[63]

59 P Morris and R Therivel *Methods of Environmental Impact Assessment* (3rd ed, Routledge, London, 2009) at 347; Institute of Ecology and Environmental Management *Guidelines for Ecological Impact Assessment in the United Kingdom* (IEEM, 2006) at 47; B McKenney and J Kiesecker "Policy Development for Biodiversity Offsets: A Review of Offset Frameworks" (2010) 45 Environmental Management 165 at 167; US Environmental Protection Agency and US Department of the Army (US EPA and DA) *Memorandum of Agreement Between the Environmental Protection Agency and The Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(B) (1) Guidelines* (1990) cl II (C); DA Norton "Biodiversity Offsets: Two New Zealand Case Studies and an Assessment Framework" (2009) 43 Environmental Management 698 at 702; C Wood *Environmental Impact Assessment: A Comparative Review* (2nd ed, Prentice Hall, Harlow, UK, 2003) at 258; J Treweek *Ecological Impact Assessment* (Wiley-Blackwell, Oxford, 1999) at 16.

60 RMA, s 57.

61 Note that debate exists as to the confining effect of *King Salmon* on lower-order plans, where permissive elements of the plans fail to correspond with directive requirements of the NZCPS policies: *Man O War Station Ltd v Auckland Council* [2015] NZHC 1537.

62 [2015] NZEnvC 105.

63 At [103].

Lack of direction for strategic planning at the national level informed in a systematic manner of the presence of threatened species is a further shortcoming of the current system. Policy 7 of the NZCPS addresses this gap, to a certain extent, in the coastal environment, and in doing so explicitly directs identification of values under threat from adverse cumulative effects of activities. Threatened species in New Zealand would benefit from more effective strategic planning at multiple scales, for resource use and development, informed by the mapping of ecological areas of value. Contemporary geographic information systems and mapping approaches (eg aerial photography and/or satellite imagery) enable detailed inventory of habitat and efficient collation of ecological site values.

The lack of statutory force and effect and the lack of connection between any recovery plans and protection of habitat under the RMA is a related problem. No statutory response mechanism exists to enable protection through prohibition or limitation of particular activities identified in the recovery plan where a threshold was triggered.

A final shortfall of the RMA can be demonstrated by comparison to the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZA), legislation regulating the management of natural resources of the exclusive economic zone (EEZ) and the continental shelf.[64] Unlike the RMA, EEZA is limited to natural resources and it applies a more precautious and protective approach to the use and development of the resources than evident in the RMA.

Protection for threatened and at risk species is strengthened through the application of decision-making criteria and information principles[65] which require that where information available is uncertain or inadequate, the Minister must favour caution and environmental protection.[66] This provision was central to a recent decline of consent[67] under the legislation, where it was considered that information was inadequate and further that the position would not be cured by application of an adaptive management approach secured through conditions of consent as mandated through s 34(3).

Similar provision in the RMA would be of benefit to threatened species. Although the EEZ area is less well charted than terrestrial areas, decisions

64 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 [EEZA], s 10.

65 Section 10(3)(a) and (b).

66 Section 34(2).

67 In the matter of an application for a marine consent by Trans-Tasman Resources Ltd to the Environmental Protection Authority, June 2014 at [15].

under the RMA concerning species are commonly made where information is lacking and decisions are finely balanced.[68]

In addition, protection is enhanced through the power of the Minister of Conservation to declare threatened species,[69] and through a requirement to consider the importance of protecting rare and vulnerable ecosystems and the habitats of threatened species when promulgating regulations.[70]

2.3 A Brief Summary

Legal provision for the protection of threatened species in New Zealand has significant limitations. This article identifies deficiencies in the Wildlife Act 1953 related to the extent of protection for species due to definition, statutory exception, and spatial application. The absence of a statutory listing process,

68 For example, in relation to birds and RMA, s 6(c): Final Report and Decision of the Board of Inquiry into the Hauāuru mā Raki Wind Farm and Infrastructure Connection to Grid, May 2011 at [525] (wind farm collision risk); *Hapu Kotare Ltd v Manukau City Council* Environment Court Auckland A133/0515, August 2005 at [60] (bird distribution); *New Zealand Jet Boat Association — Otago Branch v Queenstown Lakes District Council* Environment Court Christchurch C109/200313, August 2003 at [25] (bird distribution and impact); *Lower Waitaki River Management Society Inc v Canterbury Regional Council* [2010] NZEnvC 257 at [28] (bird distribution); *Southern Alps Air Ltd v Queenstown Lakes District Council* [2010] NZEnvC 132 at [67] (impact on birds); *West Coast Environmental Network Inc v West Coast Regional Council* [2013] NZEnvC 253 at [43] (ecosystem constitution and impact); *Mangawhai Harbour Restoration Society Inc v Northland Regional Council* [2012] NZEnvC 232 at [83] (impacts of bird disturbance); *Sandspit Yacht Club Marina Soc Inc v Auckland Council* [2012] NZEnvC 196 at [107] (impact on birds); *Mainpower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384 at [199] (wind farm collision risk); *Director-General of Conservation v Marlborough District Council* [2010] NZEnvC 403 at [489] (impact on birds); *Earnslaw One Ltd v Waikato Regional Council* Environment Court Wellington W009/07, 19 February 2007 at [40] (use of riparian corridors by birds); *Save Happy Valley Coalition Inc v Solid Energy New Zealand Ltd* Environment Court Christchurch C170/06, 14 December 2006 at [35] (impact of snail translocation); *Friends of Nelson Haven and Tasman Bay v Marlborough District Council* Environment Court Wellington W036/06, 16 May 2006 at [14] (impact on dusky dolphin); *Kuku Mara Partnership (Admiralty Bay West) v Marlborough District Council* (2005) 11 ELRNZ 466 at [16] (impact on dusky dolphin); *Ngataki v Auckland Regional Council* Environment Court Auckland A093/2004, 22 July 2004 at [50] (lack of bird baseline study); *Kuku Mara Partnership (Forsyth Bay) v Marlborough District Council* Environment Court Wellington W025/02, 16 July 2002 (causation, baseline study and bird disturbance); *Royal Forest & Bird Protection Society of New Zealand Inc v Manawatu-Wanganui Regional Council* [1996] NZRMA 241 (lack of fauna survey); *Environmental Defence Society Incorporated v New Zealand King Salmon Company Ltd* [2013] NZHC 1992, [2013] NZRMA 371 at [97].

69 EEZA, s 19; although it must be first classified as "threatened or at-risk under the New Zealand Threat Classification System" (s 19(2)).

70 Section 33(3)(e).

mandatory definition of critical habitat and associated recovery plans, and of the power to make emergency orders are further notable shortcomings.

The relationship between absolute protection and development, particularly as it concerns incidental loss (excluding bycatch), is not well articulated in the Wildlife Act 1953 or subordinate documents. Protection is further diminished by a failure to implement requirement for authorisation of take of protected species. As a result the RMA becomes the de facto authority where loss is captured by the RMA, and take may go unauthorised where it is not.

The protection of threatened species is not a clear goal of the RMA, and any protection provided is diluted by a mandate of sustainable management which entertains mitigation as an option for harm to threatened species. Strong directive national policy on the subject is absent, and confined to the coastal environment under the NZCPS. Threatened species in New Zealand would benefit from comprehensive mapping of critical habitat, supported by mandatory recovery plans and contained within strategic plans contemplating development opportunity. In addition, enhanced protection for threatened species in New Zealand would be secured through extension to all New Zealand land and waters of the approach to precaution and protection demonstrated by the EEZA.

The next part of this article examines Canadian law applicable to threatened species protection. This examination is provided to illustrate the benefits to species that can be delivered with a legal framework that sets out a listing process, a mandatory recovery planning process, and critical habitat protection for threatened species.

3. THREATENED SPECIES PROTECTION LAW IN CANADA

Canada is a federal state with legislative authority shared between the national government, 10 provinces, and three territories. Accordingly, the legal framework governing threatened species protection is shared between the Canadian Parliament (the national legislature) and each of the provincial and territorial legislatures. In 1996 all these Canadian jurisdictions agreed to work cooperatively towards a national approach to threatened species protection whereby each committed to enacting legislation to protect threatened species and their habitat.[71]

71 Accord for the Protection of Species at Risk <http://sararegistry.gc.ca/default.asp?lang=En&n=92D90833-1> (accessed 19 February 2015).

In 2002 Parliament enacted the federal Species at Risk Act.[72] The 13 provincial and territorial legislatures have either enacted dedicated threatened species protection legislation or amended existing legislation that governs wildlife management. The province of Alberta is one of seven Canadian jurisdictions that has not enacted dedicated threatened species legislation, but instead amended its provincial Wildlife Act[73] to add provisions on the designation and protection of threatened species in Alberta.

The applicable provisions in the Wildlife Act (Alberta) are similar to those examined above for New Zealand in the Wildlife Act 1953: there is the possibility of protection and recovery planning for threatened species under the legislation, but the discretionary nature of the provisions means there is no absolute protection and no transparency or accountability in the process. So while some references are made to Alberta's provincial framework below, the discussion in this part focuses primarily on the federal Species at Risk Act in Canada and the contribution that dedicated threatened species legislation may offer in New Zealand.

3.1 The Designation of Threatened Species

The home for planning and science on threatened species in Canada is the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). COSEWIC was established in 1977 to assess the status of wildlife populations in Canada. To this day the primary function of COSEWIC is to assess the status of wildlife species at risk. COSEWIC itself summarises its purpose as follows:[74]

> In doing its work, COSEWIC develops the prioritized COSEWIC Candidate List of wildlife species needing assessment, manages the production of wildlife species status reports, and holds meetings at which wildlife species are assessed and assigned to risk categories. In all of its actions, COSEWIC uses the best available information relevant to assessing a wildlife species' risk of extinction or extirpation, which it may obtain from any credible source of knowledge of the wildlife species and its habitat. The evaluation process is independent and transparent, and the results are reported to CESCC [Canadian Endangered Species Conservation Council] and the public.

COSEWIC identifies candidate species for risk assessment on an annual basis and determines whether to proceed with a formal status assessment using prescribed criteria. High-priority species are put forward by COSEWIC

72 Species at Risk Act, SC 2002, c 29.

73 Wildlife Act, RSA 2000, c W-10.

74 COSEWIC <http://www.cosewic.gc.ca/eng/sct6/sct6_1_e.cfm> (accessed 20 February 2015).

as candidates for a status assessment. The scientific assessment includes a compilation of known biological information on the species including matters such as population distribution and trends, habitat, and threats or limiting factors affecting the population in Canada.[75] The assessment culminates with a status designation for the species as either threatened or not at risk.[76]

While COSEWIC has performed its functions since 1977, its legal status in Canada was entrenched in 2002 with the enactment of the federal Species at Risk Act. These legal rules give COSEWIC a measure of permanency and some protection from the winds of politics. The functions of COSEWIC are set out in the legislation, and the legislation requires that a member of COSEWIC have expertise in the conservation of wildlife.[77] The legislation also requires the federal Minister of the Environment to provide COSEWIC with the resources necessary to carry out its functions.[78]

The process by which a species becomes designated as a species at risk in Canadian legislation varies from being completely within the discretion of politicians in some jurisdictions to a designation by operation of law based on science in other jurisdictions. The legal designation is commonly known as listing, and being listed under legislation is of utmost importance for threatened species since legal protections only apply to listed species.

The province of Alberta is an example of a jurisdiction that employs the discretionary method for listing. The listing process under the Wildlife Act (Alberta) amounts to nothing more than the Minister enacting a regulation that adds a species to the list of threatened species set out in a schedule attached to the legislation. In other words, there is no necessary connection between the science on the status of a species established by COSEWIC and its legal designation under the Wildlife Act (Alberta). It is likely that the scientific assessment underlies a designation under the Wildlife Act (Alberta), but there is no necessary connection between science and designation.

A science-based listing process leaves no room for the exercise of political discretion in designating threatened species. In a jurisdiction with a science-based listing process, the law will expressly adopt the status assessment called for by a COSEWIC assessment. In Canada there is one jurisdiction — the province of Ontario — with a science-based listing process.[79] The federal listing process under the Species at Risk Act is known as a hybrid between

75 An overview of the assessment process is available on the COSEWIC website <http://www.cosewic.gc.ca/eng/sct0/assessment_process_e.cfm> (accessed 20 February 2015).

76 There are seven possible status designations ranging from Extinct to Not At Risk. See COSEWIC status designations <http://www.cosewic.gc.ca/eng/sct0/assessment_process_e.cfm#tbl5> (accessed 20 February 2015).

77 Species at Risk Act, ss 15, 16.

78 Species at Risk Act, s 20.

79 See Endangered Species Act, RSO 2000, c 6.

full discretion and science-based. The COSEWIC status assessment for a particular species is provided to the responsible federal Minister who then must recommend to federal Cabinet whether to accept the COSEWIC assessment and list the species as such under the Species at Risk Act. Where Cabinet fails to make its listing decision within a prescribed timeline, the COSEWIC designation governs the listing.[80]

3.2 Recovery Planning and Critical Habitat Protection

Threatened species protection laws generally have two objectives: (1) to provide for the recovery of a threatened species to sustainable population levels; and (2) to prevent the further demise of an identified threatened species by prohibiting activities which threaten its survival and facilitating the protection of its habitat. As well, it is common for these laws to include "no take" provisions which prohibit the infliction of harm or the killing of individual members of a listed species at risk.

The Species at Risk Act requires the Canadian Government to prepare a recovery strategy for threatened species that, among other things, identifies known threats to the species and its habitat, identifies critical habitat necessary for the survival and recovery of the species, and sets out population and distributional objectives for the recovery of the species in Canada. The responsible Minister must publish a proposed recovery strategy no more than one year after the species is listed under the legislation for a species facing imminent extinction, and no more than two years for other threatened species. Once a proposed recovery strategy is published, the Species at Risk Act provides for a 60-day public comment period and stipulates that a final recovery strategy be published by the Minister 30 days thereafter.[81]

The Canadian Government has failed to adhere to these legislated timeframes on implementing recovery strategies under the Species at Risk Act, and a 2014 decision of the Federal Court of Canada declared this to be unlawful with the following strong words to conclude its ruling:[82]

> To state the obvious, the Species at Risk Act was enacted because some wildlife species in Canada *are at risk*. As the applicants note, many are in a race against the clock as increased pressure is put on their critical habitat, and their ultimate survival may be at stake.

80 See generally Species at Risk Act, ss 25–27.

81 Section 43.

82 *Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*, 2014 FC 148 at paras 100, 101.

> The timelines contained in the Act reflect the clearly articulated will of Parliament that recovery strategies be developed for species at risk in a timely fashion, recognizing that there is indeed urgency in these matters. Compliance with the statutory timelines is critical to the proper implementation of the Parliamentary scheme for the protection of species at risk.

A recovery strategy produced under the Species at Risk Act for a threatened species must identify critical habitat based on best available science. Critical habitat is defined in the legislation as habitat necessary for the survival or recovery of the species. The Federal Court of Canada has added important meaning to this legislated definition of critical habitat by interpreting it to include both a defined geographic area capable of being located on a map and the physical and biological attributes of that area that allow a species to use it for the function of carrying out its life processes.[83]

The identification and description of critical habitat in a federal recovery strategy should lead to habitat protection under the Species at Risk Act. The responsible Minister is required to formally designate critical habitat identified in a recovery strategy no later than 180 days after the recovery strategy is published, and the legislation prohibits any person from destroying any part of that critical habitat.[84] The Federal Court of Canada has ruled this protection must be absolute and non-discretionary.[85] Unfortunately, the effectiveness of the federal Species at Risk Act in protecting critical habitat has thus far been impaired by the failure of the Canadian Government to adhere to its own legislated timeframes. As of March 2015 only one critical habitat protection order has been enacted under the federal Species at Risk Act. The absence of critical habitat orders significantly limits the breadth of critical habitat protection offered by the Species at Risk Act against the impacts of resource development.

There is no provision in the Species at Risk Act that prohibits government officials from approving or authorising an activity that will adversely impact upon a threatened species or its habitat. The legislation does, however, require officials to consider harm to critical habitat in issuing a resource project approval and to be of the opinion that all reasonable alternatives to the project that would reduce the impact have been considered, the best solution has been adopted, and all feasible measures to reduce the impact will be taken.[86] Moreover, the environmental impact assessment of a resource development project must identify adverse project impacts to threatened species and ensure measures are taken to mitigate those impacts.

83 *Environmental Defence Canada v Canada (Fisheries and Oceans)*, 2009 FC 878.
84 Species at Risk Act, s 58.
85 *Georgia Strait Alliance v Canada (Minister of Fisheries and Oceans)*, 2012 FCA 40.
86 Species at Risk Act, s 77.

These provisions are having a noticeable effect on resource project approvals in Canada. The environmental impact assessment for a resource development project whose footprint covers identified habitat for a threatened species must address impacts on those species. In many cases the threatened species will serve as a key environmental indicator in the overall assessment process.[87] However, none of these provisions offer absolute non-discretionary protection for critical habitat in the face of resource development. In the absence of critical habitat orders, management and mitigation continue to govern the interaction of resource development and threatened species protection under the Species at Risk Act.

The plight of the greater sage-grouse species provides a good illustration of how threatened species law applies in Canada. The sage-grouse is a large prairie bird which is listed as threatened under both the Wildlife Act (Alberta) and the federal Species at Risk Act. The sage-grouse population has fallen 98 per cent since population numbers were first studied in the late 1960s, and the bird is undisputedly on the brink of extinction in Canada.

Habitat loss is the primary culprit in the demise of the sage-grouse, and the species currently remains in only seven per cent of its historical range in Canada. The biophysical attributes of known sage-grouse habitat include sagebrush cover, above average moisture, minimal human presence, minimal noise, and no higher structures that provide good perch sites for predators.

The enactment of the federal Species at Risk Act in 2002 brought mandatory recovery planning for the sage-grouse, including the obligation on federal officials to identify specific threats to the sage-grouse and its habitat. The sage-grouse recovery strategy identifies threats such as grazing and agricultural activity that results in the clearing of sagebrush and other native vegetation used by the bird for food and cover, and other development which leads to the construction of structures, roads and other facilities that produce chronic noise in mating sites.[88]

With no substantive legal protection given by provincial Alberta law, the impact of human activities such as agriculture, ranching, or resource development on the sage-grouse had been addressed by conditions imposed by government officials responsible for approving projects on public lands. A good example of this approach is the approval granted by the Alberta energy

87 For an example of this in the context of a major oil pipeline see Shaun Fluker "Get Ready For a Whale of a Time: Northern Gateway and Species at Risk" (posted 5 February 2014) <http://ablawg.ca/2014/02/05/get-ready-for-a-whale-of-a-time-northern-gateway-and-species-at-risk/>.

88 See generally K Lungle and S Pruss *Recovery Strategy for the Greater Sage-Grouse (*Centrocercus urophasianus urophasianus*) in Canada* in Species at Risk Act Recovery Strategy Series (Parks Canada Agency, Ottawa, 2008) <http://sararegistry.gc.ca/document/default_e.cfm?documentID=1458>.

regulator for the construction and operation of an oil pipeline in the mid-1990s crossing through what is now considered critical habitat for the sage-grouse.[89] The environmental assessment process for the project revealed that wildlife surveys conducted by the project proponent did not take place at the proper time of year to properly identify sage-grouse habitat. Nonetheless, the regulatory panel accepted the proponent's assertions that the project would have minimal impact on the bird or its sagebrush habitat, and any potential impacts would be mitigated with minor pipeline setbacks should mating grounds be encountered during construction.

This management and mitigation approach did nothing to halt the demise of the sage-grouse in Alberta. It remains to be seen whether the legal protection provided by the Species at Risk Act is too late to prevent the sage-grouse from extinction in Canada.[90]

4. ANALYSIS AND CONCLUSION

Our glance to Canada provides several observations on the potential contribution of dedicated legislation to address the legal protection of threatened species in New Zealand. One is the structure and process offered by the legislation. The provisions governing COSEWIC, for example, establish a systematic and transparent planning regime for threatened species in Canada. A statutory listing process gives a measure of predictability on how the legal framework will be implemented. The transparency of a dedicated legal regime also stimulates the pursuit of knowledge. The public registry administered under the Species at Risk Act contains all published records concerning known species at risk in Canada.[91] Scholars and scientists who work with threatened species can use information generated by the assessment and listing processes to identify trends in listing decisions or study recovery strategies to identify common threats to listed species.

From the perspective of threatened species themselves, the most crucial components of any legal framework are mandatory recovery planning and a

89 See *Express Pipeline Project — Report of the Joint Review Panel* (National Energy Agency/ Canadian Environmental Assessment Agency, May 1996) <http://www.ceaa.gc.ca/default.asp?lang=en&n=DFBF51A8-1>.

90 The Canadian Government issued an emergency protection order for the sage-grouse under s 80 of the Species at Risk Act: Emergency Order for the Protection of the Greater Sage-Grouse <http://sararegistry.gc.ca/default.asp?lang=En&n=F25868B7-1>. For more discussion on this emergency order see Shaun Fluker "The Curious Case of the Greater Sage Grouse in Alberta" (posted 17 January 2014) <ABlawghttp://ablawg.ca/2014/01/17/the-curious-case-of-the-greater-sage-grouse-in-alberta/>.

91 See Government of Canada Species at Risk Public Registry <http://sararegistry.gc.ca/>.

focus on habitat protection. Traditional wildlife management regimes such as that currently administered in New Zealand typically either make no mention of these matters or do not make them the subject of legal obligation. The management and mitigation approach of these traditional wildlife management regimes does little or nothing to halt the demise of species at risk. The sage-grouse population declined significantly in Canada despite being listed as a threatened species under provincial Alberta law, providing strong evidence that the discretionary management and mitigation approach under the Wildlife Act (Alberta) has not provided effective protection for the threatened species. The plight of threatened species in New Zealand appears to be on a similar track under the Wildlife Act 1953.

The Species at Risk Act has also infused legality into the threatened species problem and allows harm to threatened species to be a justiciable issue. Canadian courts have repeatedly held the federal government to account under the Species at Risk Act in judicial review challenges concerning the legislation. Public interest environmental groups in Canada have been notably successful in obtaining judicial orders that require the federal government to comply with statutory obligations to identify critical habitat in recovery strategies, publish recovery strategies in a timely manner, legally protect critical habitat identified in recovery strategies, and form reasoned opinions on the need to issue emergency habitat protection orders under the legislation.

The fact that Canadian courts have been asked repeatedly by species advocates to order the Canadian Government to comply with the recovery and protection provisions in the Species at Risk Act is an indication, however, that legislation alone is not enough to solve the threatened species problem. This is likely because it is a problem of competing worldviews. Those who view the protection and recovery of threatened species as a moral or ethical concern will not accept any solution less than absolute legal protection for threatened species and their habitat as well as mandatory duties on recovery action. Those who view the problem of threatened species as more of a land-use conflict between protection and development are more likely to accept the management and mitigation approach which is more accommodating of resource development and impacts on threatened species. Government officials are far more likely to be in the latter camp and exercise discretionary power accordingly. Commentators note the rise and primacy of primary industry[92] as being a factor influencing the strength of protection afforded to the environment.

A literal reading of the federal Species at Risk Act purports to implement absolute protection for threatened species in Canada, but in practice the Canadian Government has been reluctant to adhere to its own legislation. The

92 S Wood, G Tanner and BJ Richardson "What Ever Happened to Canadian Environmental Law?" (2010) 37 Ecology Law Quarterly 981 at 1025.

Government has been slow to produce recovery plans and issue critical habitat protection orders, despite mandatory obligations to do so under the Species at Risk Act. The absence of critical habitat orders means that the legislation still implements more of a management and mitigation approach to threatened species in the environmental impact assessment process. We might say that while the Canadian legislation purports to reflect the need to respect the intrinsic value of species and implement absolute non-discretionary protection for threatened species, in practice the legislation is being implemented with the more traditional instrumental view of non-human species wherein management techniques and the mitigation of adverse impacts is the norm. The review of New Zealand law suggests a comparable position, entrenched further by a lack of the essential tools evident in the Canadian regime.

Taylor and Grinlinton state that "despite more than 40 years of environmental law development the strength of legal protection accorded property rights continues to facilitate and incentivize forms of economic activity that cause widespread ecological harm".[93] Where the state owns species but fails to assert its right to protect its property, or any corresponding duty upon those causing the loss, then those who cause the damage to the species will bear no responsibility for the loss which will be socialised, whether the loss arises on private or public property. Freyfogle asserts: "If the public own wildlife, even on private land, then presumably it has a legitimate claim that land uses make room for that wildlife."

At this point in the Earth's evolutionary history there is very good reason to re-examine approaches to the protection of threatened species, and indeed it is likely that securing of the Aichi Targets requires this review. We conclude that New Zealand currently lacks the tools and approach necessary to prevent further declines of species and that reform of the law is required.

The law is compromised through definition, extensive statutory exception, poor implementation, a lack of focus on threatened species, and a vacuum in terms of the comprehensive protection, planning for and management of threatened species, particularly as it relates to private property. The Canadian example provides support for the argument that a statutory listing process, mandatory recovery programmes, and related critical habitat protection are tools which would assist New Zealand to better meet its international obligations.

93 P Taylor and D Grinlinton "Property Rights and Sustainability: Toward a New Vision of Property" in D Grinlinton and P Taylor (eds) *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff Publishers, The Netherlands, 2011) 1 at 9.