

Nova Scotia Needs a Biodiversity Act

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Last week, Nova Scotia's Minister of Lands and Forestry introduced Bill 4—[a proposed Biodiversity Act for Nova Scotia](#)—in the provincial House of Assembly.

East Coast Environmental Law has been advocating for the creation of a Nova Scotian *Biodiversity Act* for some time, and we were pleased to see the Bill tabled. Others have responded with concern, and we are aware of several contentions now being voiced in opposition to the Bill.

In hopes of addressing concerns that are now being raised, this blog post explores why we need a *Biodiversity Act* in Nova Scotia and offers East Coast Environmental Law's interpretation of what Bill 4 will and will not do if passed.

The Global Biodiversity Crisis

Earth's biodiversity has been diminishing rapidly over the past several decades, drawing significant public concern on global, national, and local levels and inspiring international and domestic governmental efforts to address the problem.

In May 2019, the United Nations ("UN") released the [IPBES Global Assessment Report on Biodiversity and Ecosystem Services](#). This is the most comprehensive report of its kind ever completed and the first such intergovernmental report. The report includes contributions from 145 expert authors from 50 countries, with input from another 310 authors, and it draws (for the first time ever on this scale) on Indigenous and local knowledge to address issues relevant to Indigenous peoples and local communities. The report assesses changes in human societies over the past half century to produce a comprehensive understanding of the relationship between human economic development and its impacts on nature, and it also projects possible scenarios for the coming decades. The report's message is clear:

- 1,000,000 species worldwide are threatened with extinction;
- nature is declining globally at rates unprecedented in human history;
- the current global response is insufficient;
- transformative changes are needed to restore and protect nature; and
- opposition from vested interests can be overcome for the public good.

In its [2020 Living Planet Report](#), the World Wildlife Fund ("WWF") documents an overall decline of 68% in the population sizes of monitored mammals, birds, amphibians, reptiles and fish between 1970 and 2016. Like the *IPBES Global Assessment Report on Biodiversity and Ecosystem Services*, the *Living Planet Report* demonstrates that global biodiversity loss is occurring at a frighteningly rapid pace, but it also concludes that we can reverse this trend if we work collectively to take decisive action now.

As I write this, the world is still grappling with the devastating effects of the COVID-19 pandemic that entered our lives in 2020. Millions of confirmed cases worldwide have resulted in hundreds of thousands of human deaths, and those numbers may continue to rise for some time. In July 2020, the UN Environment Programme published a report entitled "[Preventing the next pandemic – Zoonotic diseases and how to break the chain of transmission](#)". The report 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. 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.

Creating Law to Stem the Flow of Biodiversity Loss in Canada

Biodiversity in Nova Scotia is likewise under threat. The laws in place in Nova Scotia today provide some basic protection to species that exist in protected areas and to species that are legally defined as endangered or threatened, but more is needed to address the threats to biodiversity.

In March 2019, Nova Scotia's Minister of Lands and Forestry stepped up for biodiversity when he introduced Bill 116—an earlier version of the proposed Biodiversity Act that Minister Chuck Porter tabled last week. Ultimately, Bill 116 was not passed that winter because the government decided that further consultation with stakeholders and the public would help to ensure that the Bill responded suitably to Nova Scotia's needs. The Department of Lands and Forestry hosted five public engagement sessions on the proposed *Biodiversity Act* in the summer of 2019. I participated in one of them, and it included a facilitated discussion with representatives from a broad range of sectors, including forestry, agriculture, private woodlot ownership, and environmental organizations.

Like much legislation, the proposed *Biodiversity Act* seeks to balance a number of interests in order to meet a pressing need. Personally, I wish that the proposed Act took a stronger stance on several key issues; however, my colleagues and I at East Coast Environmental Law and the Ecology Action Centre agree with the Minister that Bill 4 has the potential, if passed, to contribute positively to biodiversity protection in Nova Scotia.

What Will the Proposed Biodiversity Act Do, If Passed?

To address concerns that have been raised since the proposed *Biodiversity Act* was tabled last week, I would like to address a few key aspects of the Bill that appear to be inspiring some opposition.

Biodiversity Management Zones [Sections 15 to 17]

If passed, the proposed *Biodiversity Act* would give the Minister of Lands and Forestry power to establish Biodiversity Management Zones ("BMZs"). That power would not be unlimited, as I explain in more detail below.

The proposed Act defines a BMZ as "a specified area of land managed, for a period of time, for the purpose of supporting the conservation or sustainable use of specified biodiversity values". Imagine, for example, that a specific area of land was known to support a rare or particularly fragile ecosystem and that certain activities could harm the ecosystem and jeopardize the biodiversity values identified onsite. Under the proposed Act, the Governor in Council (Cabinet) will have power to make regulations that restrict those certain activities in BMZs in order to protect and preserve valuable biodiversity.

When the proposed Act's approach to BMZs is considered in full and in context, it is clear that the Bill offers an innovative and context-specific approach to biodiversity protection. Under the proposed Act, BMZs and their corresponding restrictions can be spatially and temporally dynamic. For example, a BMZ could be implemented

in a particular area that is known to be nesting habitat for a species of bird for certain months of the year. During the rest of the year, when the bird is elsewhere, the BMZ status could be inactive, enabling other uses of the area to occur.

Importantly, whereas section 15 of the proposed Act allows the Minister to create a BMZ on Crown land with the approval of Cabinet, section 16 allows the Minister to enter into an agreement with private landowners to create BMZs on privately-owned land. In other words, the Bill does not allow the Minister to create BMZs on privately-owned land without landowners' consent.

Bill 4 is not an *Expropriation Act*—Nova Scotia already has one of those. I understand that confusion about the Bill may be causing private landowners to fear that it will give the government power to interfere with their privately-owned lands, but the reality is that the Bill only allows government to create a BMZ on privately-owned lands in circumstances where private landowners have given their consent. Additionally, under the proposed *Biodiversity Act*, if a landowner agrees to have a BMZ on their land, their agreement with the government may include compensation.

Notably, the power given to the Minister by the proposed *Biodiversity Act* is more limited than the power the Minister has under Nova Scotia's *Endangered Species Act* (passed in 1998) to designate privately-owned lands as core habitats for endangered or threatened species and prohibit activities that could harm the species in question. Under the *Endangered Species Act*, the Minister can designate core habitat areas on privately-owned lands without landowners' consent. That law has been in place for more than 20 years in Nova Scotia and has not yet eroded property owners' rights.

Given the requirement for landowner consent, in my view there is no foundation for concerns that the Minister's power to create BMZs will infringe private landowners' rights.

Biodiversity Emergency Orders [Sections 23 to 29]

If passed, the proposed *Biodiversity Act* would give the Minister of Lands and Forestry and government employees authorized to act on the Minister's behalf the power to issue a Biodiversity Emergency Order to prevent, control, manage, or eliminate serious adverse effects to biodiversity.

A Biodiversity Emergency Order could require a person to cease engaging in unlawful and harmful activity and take action to remedy harm that has already been caused or is being caused. Importantly, a Biodiversity Emergency Order can only be used by the Minister or an enforcement officer when:

- (1) they have reasonable and probable grounds to believe that there is a violation of section 38 of the Act; and
- (2) the violation is likely to lead to serious adverse effects to biodiversity; and
- (3) corrective action is needed to deal with the serious adverse effects; and
- (4) they have considered all of criteria set out in section 24 of the Act.

A Biodiversity Emergency Order can only be issued when all of the criteria listed above have been met.

Section 38 of the Act prohibits specific activities such as killing specified species, introducing specified species, and destroying specified habitat without a permit. The Biodiversity Emergency Order only applies to section 38, and no prohibitions in section 38 will be in place until regulations under the Act are created. Before he can create those regulations, the Minister must "consult with the public, including landowners and stakeholders" (section 54(2), emphasis added).

The Minister cannot create regulations without first engaging in public consultation.

Essentially, the Biodiversity Emergency Order only exists to enable the Minister to step in when an illegal action will result in a serious adverse effect to biodiversity and there are no other reasonable options. It is the Ministers' duty to act in the public interest, and there are significant limitations on his authority which ensure that his authority can only be exercised when all necessary criteria have been met.

In my opinion, the proposed power to issue Biodiversity Emergency Orders is not a threat to private landowners: it is a tool to prevent a serious loss of or impact to biodiversity caused by unlawful and harmful activities.

Fines

The fine structure set out in the proposed *Biodiversity Act* is essentially the same as the fine structure set out in the provincial *Endangered Species Act* (passed in 1998) and the provincial *Environment Act* (passed in 1995).

The proposed *Biodiversity Act* sets out maximum fines. Any actual fine would be determined by a judge, based on a number of factors and following a conviction. A judge could not set a fine higher than what the statute allows, but the judge would have full discretion to set a lower fine, and in fact the Act does not set a minimum fine. Historically, the fines set by Nova Scotian courts for comparable offences have been very low.

Conclusion

I have lived in rural Nova Scotia for much of my life, and I know that most Nova Scotian landowners act as stewards of the land and waters that support the biodiversity that they enjoy or in some cases draw their living from. However, the numbers are unequivocal: the world is experiencing a global biodiversity crisis, and the crisis does not stop at the Nova Scotian border. It is our human actions that are causing the decline, and it will be our actions that will make a difference.

The proposed *Biodiversity Act* provides opportunities to enhance education, collaboration, and tools that could facilitate biodiversity conservation in Nova Scotia. In light of the staggering trend of global biodiversity loss, we need this law in Nova Scotia to address the crisis effectively.

Passing Bill 4 will not cause the overnight creation of BMZs across the Nova Scotian landscape, nor will it allow the government to unilaterally restrict the activities of private property owners anywhere in the province. If passed, the proposed *Biodiversity Act* will give the government tools it needs to begin conversations and actions that are desperately needed to conserve biodiversity in Nova Scotia.

[To read this blog post on the East Coast Environmental Law website, click here.](#)

	Biodiversity Act, 2021	Endangered Species Act, 1998
Example of key prohibitions	38 Prohibits consuming, using, taking, killing of prescribed species; prohibits the introduction, release etc. of prescribed species, prohibits activities that result in the loss of an at-risk habitat or ecosystem prescribed by the regulations, without a permit.	13 Prohibits killing, injuring, etc. an endangered or threatened species; destroying, disturbing or interfering with a dwelling including the nest or den; contravening any regulation made with respect to a core habitat, without a permit.
Do prohibitions apply to private land?	Yes, but the prohibitions are not operational until regulations are passed.	Yes, the prohibitions apply to designated species regardless of location.
Can private land be designated under the Act?	16 Only with agreement of the landowner - Biodiversity Management Zone.	16 Yes, the Minister can designate core habitat on private land without landowner consent if the Minister is satisfied that the core habitat of the endangered or threatened species on public lands is not sufficient to meet the recovery needs of the species.
Example of order-making power	23 The Minister may issue a Biodiversity Emergency Orders when there are reasonable and probable grounds that a violation of section 38 will occur, and specific criteria are met.	18 The Minister may issue an order where the Minister believes it is necessary to control, restrict or prohibit activities that may adversely affect the endangered or threatened species or the core habitat of the species.
Fines	44 Individual, to a fine of not more than \$500,000; Corporation, to a fine of not more than \$1,000,000.	22 Corporation, to a fine not exceeding one million dollars; individual, to a fine not exceeding five hundred thousand dollars.
Do regulations require public review?	53, 54 Yes.	No

Example of key prohibitions

Environment Act, 1995

Wilderness Areas Protection Act, 1998

67 Prohibits the release of any substance into the environment that causes or may cause and adverse effect, without an approval.

17 Prohibits specified activities in a Wilderness Area without a license or permit, including industrial activities, farming, camping, etc. unless permitted.

Do prohibitions apply to private land?

Yes, the prohibitions apply to the environment, regardless of location

No, prohibitions only apply in a designated Wilderness Area.

Can private land be designated under the Act?

87 Yes, where the Minister is of the opinion that a substance that may cause, is causing or has caused an adverse effect is present in an area of the environment, the Minister may designate that area of the environment as a contaminated site.

Only with agreement of the landowner. 14 The Minister shall promote the voluntary establishment of privately owned lands as new wilderness areas or as parts of designated wilderness areas.

Example of order-making power

125 The Minister can issue orders where there are reasonable and probable grounds to believe that the Act is being violated including an order requiring the owner of a site to remediate it, an order to stop an activity, shut down an operation, etc. Specific criteria must be met.

22 The Minister may issue an order temporarily restricting or prohibiting activities in a wilderness area to protect property, the environment or the health or safety of humans.

Fines

159 Person to a fine of not less than one thousand dollars and not more than one million dollars.

30 Corporation, to a fine not exceeding one million dollars; individual, to a fine not exceeding five hundred thousand dollars

Do regulations require public review?

26 Yes

39(4) Yes