

COURT OF APPEAL FOR ONTARIO

BETWEEN:

**WILDLANDS LEAGUE and  
FEDERATION OF ONTARIO NATURALISTS**

Appellants

**and**

**LIEUTENANT GOVERNOR IN COUNCIL and  
MINISTER OF NATURAL RESOURCES**

Respondents

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**FACTUM OF THE RESPONDENTS**

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## **PART I - OVERVIEW**

1. The Appellants appeal the Divisional Court's unanimous decision dismissing their application for judicial review challenging the *vires* of Ontario Regulation 176/13<sup>1</sup> ("*Regulation*") made pursuant to the *Endangered Species Act, 2007*<sup>2</sup> ("*ESA*" or "*Act*"). The *Regulation* authorizes proponents to engage in activities that would otherwise be prohibited by the *ESA* (*i.e.*, harming species at risk). However, the activities will only be permitted if the proponent can satisfy a number of onerous conditions designed to minimize impacts on species at risk ("*SAR*").

2. Pursuant to s. 57 of the *ESA*, before the Lieutenant Governor in Council ("*LGIC*") can promulgate a regulation that creates exemptions from prohibited impacts on the effected SAR, the Minister of Natural Resources and Forestry ("*Minister*") must form an opinion on whether the regulation is "likely to jeopardize the survival of the species in Ontario or to have any other significant adverse effect on the species" (ss. 57(1)1). It is only if the Minister forms the opinion that the proposed regulation is "likely to jeopardize the survival of the species in Ontario or to have any other significant adverse effect on the species", that the Minister is required, among other things, to obtain an expert opinion on the effect of the proposed regulation on the effected SAR before the regulation can be recommended to the LGIC. In this case, based on extensive research and considered advice from Ministry staff, the Minister formed the opinion that the *Regulation* was not likely to jeopardize the survival of the effected SAR in Ontario or to have any other significant adverse effect on SAR.

3. The Appellants challenged the *vires* of the *Regulation* on two grounds. First, the Appellants argued that the Minister did not satisfy s. 57 of the *ESA* because the Minister did not assess the

<sup>1</sup> O Reg 176/13, amending O Reg 242/08, under the *Endangered Species Act, 2007*, SO 2007, c 6, **Joint Book of Authorities** ("*JBOA*").

<sup>2</sup> *Endangered Species Act, 2007*, SO 2007, c 6.

effect of the proposed regulation on each species on the Species at Risk list.<sup>3</sup> Second, the Appellants claimed that the *Regulation* is inconsistent with the objects and purposes of the *ESA*, as the *Regulation* permits harm to SAR that is inconsistent with the protection and recovery purposes of the *Act*.<sup>4</sup> The Divisional Court unanimously dismissed the application finding that the Minister formed the opinion required by s. 57, therefore satisfying the precondition to recommending the *Regulation* to the LGIC, and that the *Regulation* was consistent with the purposes of the *ESA*.

4. On this appeal, the Appellants submit that the Divisional Court erred in finding that: (1) the Minister complied with the s. 57 statutory precondition; (2) the Minister's opinion was not subject to review on the merits; and (3) the *Regulation* was consistent with the *ESA*. Before the Divisional Court, the Appellants argued that it was "premature" to determine whether the Minister's opinion was reasonable because the statutory precondition had not been satisfied.<sup>5</sup> Despite advancing this position before the Divisional Court, the Appellants now argue that this Honourable Court should act as a court of first instance and determine whether the Minister's opinion was reasonable.

5. The Respondents respectfully submit that the appeal should be dismissed as:

- (a) The Divisional Court did not err in finding that the Minister complied with s. 57;
- (b) The Appellants should be precluded from challenging the merits of the Minister's opinion as they effectively abandoned their request for a declaration that the Minister's opinion was unreasonable at the hearing below. The Appellants made a tactical decision and should not now be entitled to raise this argument for the first time on appeal. In any event, the Divisional Court was correct in deciding that the Minister's opinion was not subject to review on its merits;
- (c) If this Honourable Court finds that the Minister's opinion is reviewable and that the Appellants are entitled to address this issue on appeal, then the Minister's opinion was reasonable.
- (d) The *Regulation* is consistent with the *ESA*. The *ESA* establishes a scheme that enables the Minister to issue permits and enter agreements. These provisions explicitly provide the Minister with the authority to consider social, economic, health and cultural considerations when determining whether to authorize activities that would

<sup>3</sup> Factum of the Applicants (Appellants), Divisional Court, **Respondents' Compendium, Tab 1, at para 85.**

<sup>4</sup> Factum of the Applicants (Appellants), Divisional Court, **Respondents' Compendium, Tab 1, at paras 92-97.**

<sup>5</sup> Factum of the Applicants (Appellants), Divisional Court, **Respondents' Compendium, Tab 1, at para 75.**

otherwise be prohibited under the *Act*, in a manner that is consistent with the *ESA*'s SAR protection and recovery purposes. Through the permitting scheme, a proponent can be subject to significant conditions that are intended to minimize adverse effects on a SAR and, in some cases, provide benefits to SAR. The *Regulation* operates under the same approach. The *Regulation* imposes significant limitations and rigorous conditions on proponents seeking to rely on exemptions, and in some cases, excludes certain species from the application of an exemption. The exclusions, limitations and conditions are intended to minimize or avoid adverse effects and, in some cases, provide benefits to SAR while increasing administrative and economic efficiencies.

## **PART II – THE FACTS**

### **A. The Endangered Species Act, 2007**

#### ***(i) Preamble and Purpose Section***

6. The *ESA* is a regulatory scheme that provides statutory protection to species listed as threatened, endangered and extirpated. The *Act* contains a preamble and purposes section. The preamble of the *ESA* includes the following statement, that “the People of Ontario wish to do their part in protecting SAR, with appropriate regard to social, economic and cultural considerations”.<sup>6</sup> Reflecting these aims, the *ESA* identifies, in general terms, four purposes of the *Act*: (a) identifying SAR; (b) protecting SAR and their habitats; (c) promoting the recovery of SAR; and (d) promoting stewardship activities to assist in the protection and recovery of SAR (collectively “the protection and promotion purposes”).<sup>7</sup>

#### ***(ii) Species at Risk and the prohibitions***

7. Subsection 5(1) of the *ESA* sets out five species classifications defining five different levels of vulnerability or risk: (i) Extinct; (ii) Extirpated; (iii) Endangered; (iv) Threatened; and (v) Special Concern.<sup>8</sup> Pursuant to s. 7 of the *ESA*, a Ministry official must make and file a regulation that lists all the species that the Committee on the Status of Species at Risk in Ontario (“COSSARO”) has classified as extirpated, endangered, threatened or special concern as described

<sup>6</sup> *Endangered Species Act, 2007*, SO 2007, c 6, Preamble (“*ESA*”).

<sup>7</sup> *ESA*, s 1.

<sup>8</sup> *ESA*, s 5(1).

in ss. 5(1). The regulation is titled the *Species at Risk in Ontario List*<sup>9</sup> (“SARO List”).

8. Subsection 9(1) of the *ESA* prohibits killing, harming, harassing, possessing, capturing, taking, collecting, buying, selling, trading, leasing or transporting species listed as threatened, endangered or extirpated. Subsection 10(1) of the *ESA* prohibits the damage or destruction of the habitat of a species listed as threatened, endangered or extirpated<sup>10</sup> (ss. 9 and 10 collectively, “the prohibitions”).<sup>11</sup>

**(iii) *Exceptions to the prohibitions***

9. As reflected in the preamble, the *ESA* does, however, create exceptions to the prohibitions which allow for a balancing of the protection and recovery of SAR with economic, social, health and cultural concerns.

10. Section 17 of the *ESA* authorizes the Minister to issue a permit exempting a person from the prohibitions in four scenarios: (i) when the Minister is of the opinion that the activity authorized by the permit is necessary for the protection of human health or safety (s. 17(2)(a)); (ii) when the main purpose of the activity authorized by the permit is to assist in the “protection or recovery” of the species specified in the permit (s. 17(2)(b)); (iii) when the main purpose of the activity authorized by the permit is not to assist in the “protection or recovery” of the species, but the Minister is of the opinion that, amongst other things, the permit conditions will create an overall benefit to the species (“overall benefit condition”) (s. 17(2)(c)); and (iv) where the main purpose of the activity authorized by the permit is not to assist in the “protection or recovery” of the species but the Minister is of the opinion that the activity will result in significant social or economic benefit to

<sup>9</sup> The consolidated regulation is Ontario Regulation 230/08 (Species at Risk in Ontario List).

<sup>10</sup> The prohibition against damaging or destroying the habitat of an extirpated species only applies if the species is prescribed by a regulation for the purpose of that prohibition.

<sup>11</sup> *ESA*, ss 9, 10.

Ontario, and that the activity will not jeopardize the “survival or recovery” of species in Ontario (s. 17(2)(d)).<sup>12</sup>

11. Clauses 17(2)(a),(c) and (d) provide the Minister with the authority to authorize activities that negatively impact SAR even where the purpose of the activity exempted is not to assist in the protection and promotion of recovery purposes of the *ESA*.<sup>13</sup> Importantly, clauses 17(2)(a) and (d) allow the Minister to issue permits without requiring an overall benefit condition. Clause 17(2)(a) enables the Minister to authorize impact without requiring conditions intended to minimize adverse effects to species.

12. Section 19 of the *ESA* enables the Minister, by way of agreement or permit, to grant certain Aboriginal persons or bodies an exemption to the prohibitions if the Minister forms the opinion that authorized activity would not jeopardize the survival or recovery of a SAR.<sup>14</sup> Like ss. 17(2)(a) and (d), s. 19 does not require the Minister to form the opinion that an overall benefit would result to a SAR before providing the authorization.

**(iv) *Regulation making Authority***

13. The regulation making authority also foresees that a regulation can create exemptions to the prohibitions that are not meant to benefit SAR. Pursuant to clause 55(1)(b) of the *ESA*, the LGIC may make regulations, “prescribing exemptions from subsections 9(1) or 10(1), subject to any conditions or restrictions prescribed by the regulations”.<sup>15</sup> Clause 55(1)(b) does not circumscribe the activities that can be exempted, nor does it describe the types of “conditions or restrictions” required by the regulation. Rather, the LGIC has the discretion to determine what, if any, “conditions or restrictions” are appropriate.

14. Section 57 sets out the steps required before the LGIC can promulgate a regulation pursuant

<sup>12</sup> *ESA*, s 17(2)(a)-(d).

<sup>13</sup> *ESA*, s 17(2).

<sup>14</sup> *ESA*, s 19(4).

<sup>15</sup> *ESA*, s 55.



to ss. 55(1)(b). Subsection 57(1) reads as follows:

**Special requirements for certain regulations**

57. (1) If a proposal for a regulation under subsection 55 (1) is under consideration in the Ministry, the proposed regulation would apply to a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species, and either or both of the following criteria apply, the Minister shall consult with a person who is considered by the Minister to be an expert on the possible effects of the proposed regulation on the species:

1. In the case of any proposed regulation under subsection 55 (1), the Minister is of the opinion that the regulation is likely to jeopardize the survival of the species in Ontario or to have any other significant adverse effect on the species.

The Minister is only required to obtain an expert report if the Minister forms the opinion that the regulation is “likely to jeopardize the survival of the species in Ontario or to have any other significant adverse effect on the species”.

15. If the Minister is required to consult with an expert, then the Minister cannot recommend the regulation to the LGIC unless: (a) the Minister forms the opinion that the regulation “will not result in the species no longer living in the wild in Ontario” (ss. 57(2)(a)); (b) the Minister obtains an expert report (ss. 57(1)); and (c) the Minister complies with a number of procedural requirements (ss. 57(2)(c)-(e)). One of the procedural steps requires the Minister to provide notice of the regulation on the Environmental Registry. The notice must include, among other things, the Minister’s “reasons for making the proposed regulation, including any significant social or economic benefit to Ontario” (ss. 57(2)(e)(vi)).

16. Importantly, ss. 57(1) and ss. 57(2) permit the Minister to recommend a proposed regulation to the LGIC that does not provide overall benefit to an affected SAR and explicitly permits the Minister to propose an exemption regulation for the purpose of creating social or economic benefits.

**(v) Purpose of the ESA**

17. Section 1 of the *ESA* does not preclude balancing the protection and recovery of SAR with other appropriate considerations. As such, in determining what, if any, factors can be balanced with the protection and recovery of SAR, one must review the *Act* as a whole.

18. When reviewed as a whole, the *ESA* demonstrates the Legislature's intent to permit the balancing of the protection and recovery of SAR with other appropriate considerations. This is made clear by the explicit language of the *ESA*. In particular:

- (a) the Preamble for the *ESA*;<sup>16</sup>
- (b) clauses 17(2)(a), (c) and (d) which permits exemptions to the prohibitions in situations where the primary purpose of the activity is not the protection and recovery of SAR (clause 17(2)(a) and (d) do not require an overall benefit condition);<sup>17</sup>
- (c) section 19 which permits the Minister to enter into an agreement with or issue a permit to specified Aboriginal groups that permit exemptions to the prohibitions without requiring an overall benefit condition;<sup>18</sup> ; and
- (d) subsection 57(1) and (2) which permits the Minister to recommend proposed regulations relating to exemptions from the prohibitions without requiring an overall benefit condition. In addition, ss. 57(2) explicitly states that the Minister's reasons for recommending the regulation can include "significant social or economic benefit to Ontario".<sup>19</sup>

19. The Legislative Assembly debates from the second and third reading of the *ESA* further demonstrate the Legislature's intent to establish a robust legislative scheme that permits the balancing of the protection and recovery purposes of the Act with other appropriate factors:

The proposed legislation would also allow the government to make decisions that would accommodate compatible land use activities and, at the same time, support sustainable social and economic development. The goal would be an overall outcome that ultimately benefits the species and its habitat.

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When the decision was made to update and modernize the existing Endangered Species Act, the government was mindful of a number of these considerations:

—the need to provide better protection measures for species and their habitat, while at the same time allowing for social and economic concerns to be addressed<sup>20</sup>

<sup>16</sup> *ESA*, Preamble.

<sup>17</sup> *ESA*, s 17(2).

<sup>18</sup> *ESA*, s 19(2).

<sup>19</sup> *ESA*, s 57(1)-(2).

<sup>20</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No 148, (28 March 2007): Bill 184, Second Reading (Hon David Ramsay, Minister of Natural Resources), **JBOA**; Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No 174A, (16 May 2007): Bill 184, Third Reading (David Oraziotti) **JBOA**.

20. Based on the above, the Respondents respectfully submits that the *ESA* reflect a nuanced approach that places the protection and recovery of SAR as a central concern to be balanced with appropriate social, economic, health and cultural considerations.

**B. The Minister's Explanatory Note and the *Regulation***

21. On May 15, 2013, the *Regulation* was promulgated by the LGIC amending Ontario Regulation 242/08 to include, amongst other things, 14 activity based exemptions (total 19 exemptions).<sup>21</sup> The *Regulation* provides exemptions to the prohibitions for activities that are narrowly defined and limited in scope. An exemption will only apply to an activity that falls within the scope of the provisions and that complied with several stringent conditions directed at minimizing the adverse effects on SAR.

22. As required by ss. 57(1) of the *ESA*, before the *Regulation* came into force the then Minister of Natural Resources, the Honourable David Oraziotti came to the opinion, based on advice from the Ministry, that the “effect of the proposed regulation was not likely to jeopardize the survival of the affected endangered or threatened species in Ontario or to have any other significant adverse effect on these species at risk” (“Opinion”).<sup>22</sup> The Minister's Opinion was based upon a review of the proposed regulation and a 45 page Minister's Explanatory Note dated April 29, 2013 (“EN”),<sup>23</sup> which included the SARO List.

23. The 14 activity based exemptions can be divided into three general categories:

**Administrative Efficiencies:** Possession for science and education (s. 23.15); Trapping - incidental catch (s. 23.19); Commercial cultivation of vascular plants (s. 12); and Human Health and Safety Activities (s. 23.18).

**Ecosystem Protection and Activities to Benefit Species at Risk:** Ecosystem protection (s. 23.11); Species protection and recovery (s. 23.17); and safe harbour habitat (s. 23.16).

**Industrial and Development Activities:** Transition for Activities that are Approved or Planned, but not Completed or Operating (s. 23.13); Early Mineral Exploration (s. 23.10);

<sup>21</sup> O Reg 176/13, JBOA.

<sup>22</sup> Minister's Explanatory Note (“Minister's EN”), **Appellants' Appeal Book and Compendium (“AABC”), Vol 1, Tab 4 at 68.**

<sup>23</sup> Minister's EN, AABC, Vol 1, Tab 4.

Waterpower Operations (s. 23.12); Aggregate Operations (s. 23.14); Operation of a Wind Facility (s. 23.20); Drainage (s. 23.9); and Forestry Operations (s. 22.1).

24. In addition to the 14 activity based exemptions, the *Regulation* created five species specific exemptions: Bobolink and Eastern Meadowlark (s. 23.6); Barn Swallow (s. 23.5); Chimney Swift (s. 23.8); Butternut (s. 23.7) and Aquatic Species (s. 23.4). These species specific sections exempt proponents from the prohibitions in relation to the specific species.

25. Despite the Appellants' unfounded claims to the contrary,<sup>24</sup> all SAR in Ontario still receive the benefit of the "presumption of protection" and retain the full level of protection afforded by the *ESA*. Each of the 19 exemptions requires a proponent to strictly adhere to the conditions imposed by the exemption section. If a proponent does not comply with the conditions, then the proponent is **not** exempt from the prohibitions. Pursuant to s. 36 of the *ESA*,<sup>25</sup> a person in contravention of the prohibitions is guilty of an offence and can be subject to prosecution under Part III of the *Provincial Offences Act*.<sup>26</sup> In addition, an *ESA* enforcement officer that has reasonable grounds to believe that the *Act* is not being complied with can issue a stop work order pursuant to s. 27 of the *ESA*.<sup>27</sup>

**(i) Reasons for recommending the Regulation**

26. The EN begins with an explanation of the relevant sections of the *ESA* that must be considered, including s. 55 and s. 57 of the *ESA*.<sup>28</sup> The EN explains that the *Regulation* would exempt a number of activities from the prohibitions if certain conditions are satisfied by the proponent.<sup>29</sup> The EN describes the reasons for recommending the *Regulation* stating that it will "increase administrative efficiency and reduce burdens on individuals and businesses engaged in

<sup>24</sup> Appellants' Factum at paras 42, 105.

<sup>25</sup> *ESA*, s 36(1).

<sup>26</sup> RSO 1990, c P.33.

<sup>27</sup> *ESA*, s 27.

<sup>28</sup> Minister's EN, AABC, Vol 1, Tab 4 at 33.

<sup>29</sup> Minister's EN, AABC, Vol 1, Tab 4 at 35-36.

activities that affect species at risk and their habitat while providing for the protection of species at risk”.<sup>30</sup>

27. Pursuant to the *Environmental Bill of Rights*,<sup>31</sup> the Ministry was required to post a notice of the proposed regulation on the Environmental Registry. The “Regulation Proposal Notice” added further insight into the reasons for recommending the *Regulation*:

The Ministry is considering approaches, which could include regulatory amendments that consider the protection of species at risk while providing certainty to a range of sectors, including forestry, renewable energy, development, mineral exploration and aggregates. These changes would preserve socio-economic vitality relating to both existing and planned activities on the landscape....

Through experience in administering the *ESA*, MNR has identified certain activities that follow standard procedures, have predictable effects, and require common approaches for minimizing adverse effects and achieving benefits for species. For these types of activities, shifting from an application and review approach to an approach where individuals or businesses would follow rules aimed at benefiting species at risk established in the form of a regulation, which may include registration with MNR, provides a more efficient method for delivery of government services.<sup>32</sup>

28. Creating economic efficiencies and providing a mechanism for “more efficient method for delivery of government services” is consistent with sub-clause 57(2)(e)(vi) of *ESA* that explicitly permits the Minister to recommend regulations for economic or social benefit reasons.<sup>33</sup>

**(ii) Suite of Conditions**

29. The EN states that SAR will remain protected by the proposed regulation because of the suite of conditions that attach to each exempted activity. It is the suite of conditions applicable to each regulatory exemption that “ensure the regulation provisions are not likely to result in jeopardizing the survival of, or have any other significant adverse effect on, species at risk”.<sup>34</sup> As described by the EN, the suite of conditions are intended to result in one of three outcomes: “(1) a beneficial action to a specific species; (2) a mitigation of adverse effects to species or habitat

<sup>30</sup> Minister’s EN, **AABC, Vol 1, Tab 4 at 34.**

<sup>31</sup> SO 1993, c 28, ss 5, 27.

<sup>32</sup> *Regulation Proposal Notice*, initially published December 5, 2012, Exhibit “O” to the Affidavit of Caroline Schulz, **AABC, Vol 1, Tab 70.**

<sup>33</sup> *ESA*, s 57(2)(e)(vi).

<sup>34</sup> Minister’s EN, **AABC, Vol 1, Tab 4 at 36.** A summary chart of the exempted activities and the suite of conditions required for each activity was included in the EN. Minister’s EN, **AABC, Vol 1, Tab 4 at 39.**

created by existing activities or newly proposed activities; and (3) an increased ability for individuals/organizations to undertake actions which will benefit the species”.<sup>35</sup>

30. The suite of conditions are described in the EN as follows:

1. Registration with the Ministry prior to undertaking an activity that would contravene ss. 9(1) or 10(1) of the ESA and result in an adverse effect on a species or its habitat;
2. Minimizing adverse effects on the species;
3. Development, implementation and maintenance of a plan that describes how the adverse effects of the activity on the species will be avoided, minimized and mitigated over time, and/or how beneficial actions have been undertaken for the species; and
4. Monitoring, including monitoring the effectiveness of the steps taken to minimize adverse effects, and reporting on the completion of the mitigation plan and beneficial actions;
5. Reporting of information related to the species to the Natural Heritage Information Centre (NHIC) thereby contributing to knowledge and understanding of the species.<sup>36</sup>

**(iii) *Creation of Exemptions and Conditions***

31. The EN describes how the exemptions and conditions were prepared based on the best available scientific information obtained from a team of staff from the Species at Risk Branch of the Ministry as well as a mix of staff from various Ministry divisions including advisors from Policy Divisions and biologists from both Regional Operations Division and Science and Information Division. In addition, taxa specialists from the Species at Risk Branch provided taxa-based advice on the likely effects of exemptions on individual species.<sup>37</sup>

32. The Regulation Proposal Notice adds further insight into how the exemptions and conditions were created:

This proposal provides suggested approaches that derive from MNR’S experience on the ground and could include amendments to Ontario Regulation 242/08 under the *Endangered Species Act*....

Through experience in administering the *ESA*, MNR has identified certain activities that follow standard procedures, have predictable effects, and require common approaches for minimizing adverse effects and achieving benefits for species. For these types of activities, shifting from an application and review approach to an approach where individuals or businesses would follow rules aimed at benefiting species at risk established in the form of a regulation, which may include registration with MNR, provides a more efficient method for

<sup>35</sup> Minister’s EN, AABC, Vol 1, Tab 4 at 34.

<sup>36</sup> Minister’s EN, AABC, Vol 1, Tab 4 at 34.

<sup>37</sup> Minister’s EN, AABC, Vol 1, Tab 4 at 36.

delivery of government services.

For certain types of activities, where overall benefit permit conditions have been well-established, activities could proceed without an *ESA* approval, provided that individuals or businesses follow rules established in regulation, which may include registration with MNR, that are designed to benefit the species and to draw on the experience MNR has had with standard overall benefit permit conditions.<sup>38</sup>

33. In crafting the *Regulation*, the Ministry relied on the experience of its internal experts on the potential effects the exempted activities will have on SAR and crafted conditions necessary to protect, minimize and mitigate any adverse effects. The conditions imposed by the *Regulation* on proponents of various activities are consistent with the conditions that have or would be imposed on similar activities through the *ESA* permitting process.

34. The Divisional Court held that the Minister was entitled to rely on the suite of conditions in determining that the *Regulation* would neither jeopardize the survival of nor cause any other significant adverse effect on any of the affected SAR.<sup>39</sup> The Divisional Court emphasized three aspects of the *Regulation*: (1) the requirement to prepare a species specific mitigation plan;<sup>40</sup> (2) the requirement to take reasonable steps to minimize adverse harm to SAR;<sup>41</sup> and (3) the “scoping” of each activity eligible for an exemption.<sup>42</sup>

*(iv) Species specific mitigation plan*

35. With the exception of the Forest Operations exemption,<sup>43</sup> all exemptions within the Industrial and Development Activities category require a proponent to prepare a species specific mitigation plan **and** to take steps to minimize the adverse effects of the activity on the specific

<sup>38</sup> *Regulation Proposal Notice*, initially published December 5, 2012, Exhibit “O” to the Affidavit of Caroline Schulz, **AABC, Vol 1, Tab 70**.

<sup>39</sup> Divisional Court Reasons for Decision, **AABC, Vol 1, Tab 3 at paras 35 and 36**.

<sup>40</sup> Divisional Court Reasons for Decision, **AABC, Vol 1, Tab 3 at paras 11 and 14**.

<sup>41</sup> Divisional Court Reasons for Decision, **AABC, Vol 1, Tab 3 at paras 15 and 22**.

<sup>42</sup> Divisional Court Reasons for Decision, **AABC, Vol 1, Tab 3 at para 20**.

<sup>43</sup> Neither mitigation plans nor reasonable steps to minimize adverse effects are required for Forest Operations because the exemption is limited to proponents who have received a license pursuant to section 42 of the *Crown Forest Sustainability Act, 1994*, SO 1994, c 25. As part of the licensing process, proponents must include a Forest Management Plan that includes a SAR assessment. The provisions related to Incidental Trapping of SAR and possession for Scientific or Educational Purposes are excluded from the mitigation plan and reasonable steps conditions because of the limited risk involved in both activities. See Minister’s EN, **AABC, Vol 1, Tab 4 at 65-67**.

species affected by the activity. Where applicable, the *Regulation* requires mitigation plans to, amongst other things: (a) be prepared by a species specific expert using the best available information on the steps that may help minimize or avoid adverse effects on the species; (b) identify the endangered or threatened species that could be adversely affected by the activity; (c) provide detailed plans on the reasonable steps the proponent will take to minimize adverse effects on the species; and (d) describe the monitoring steps that will be taken.<sup>44</sup> Mitigation plans must be produced to the Ministry within 14 days of a request.<sup>45</sup>

**(v) *Reasonable steps to minimize adverse effects***

36. In addition to a mitigation plan, most of the exemptions require proponents to take reasonable steps to minimize the adverse effects of the activity on SAR. Where applicable, the *Regulation* includes a number of activities, species or geographical area specific steps that must be included in the reasonable steps taken to minimize adverse effects.<sup>46</sup> In all but a few cases, the exemption conditions require the proponent to monitor the effectiveness of the steps taken to minimize the adverse effects on SAR and, in some cases, prepare an annual report or similar record detailing the monitoring results.<sup>47</sup> Reports must be produced to the Ministry within 14 days of a request.

**(vi) *Scoping of Activity***

37. The EN also provides a comprehensive review of how each of the activity based exemptions were scoped to “[exclude] high-risk activities” or “clearly [define]...the intent and application of the exemption”.<sup>48</sup> The following provides a non-exhaustive list of how each exempted Industrial and Development Activity is limited in scope and application:

<sup>44</sup> See for example *Regulation*, s 23.12(1), 1, 4, 5, and s 23.13(4), “Hydro-electric generating station”, **JBOA**. See also Minister’s EN, **AABC, Vol 1, Tab 4 at 36-38**.

<sup>45</sup> See for example *Regulation*, s 23.9(6)5(ii) – “Drainage Works”, **JBOA**.

<sup>46</sup> See for example *Regulation*, s 23.12(5)5, “Hydro-electric generating stations”, **JBOA**.

<sup>47</sup> See for example *Regulation*, s 23.12(1)7, “Hydro-electric generating station”, **JBOA**.

<sup>48</sup> Minister’s EN, **AABC, Vol 1, Tab 4 at 37**.



**Forestry Operations** (s. 22.1) – (i) Time limited to forest operations conducted before July 1, 2018 on behalf of the Crown or under the authority of a licence under the *Crown Forest Sustainability Act, 1994*<sup>49</sup> (“*CFSA*”); and (ii) only applies to forest operations undertaken in accordance with approved forest management plans (“*FMP*”) under the *CFSA* that includes consideration of SAR and their habitat.<sup>50</sup>

**Drainage** (s. 23.9) – (i) only applies to activities undertaken under the *Drainage Act*<sup>51</sup> for the purpose of maintenance, repair or improvement of a drainage work; and (ii) 10 species have been excluded from the exemption.<sup>52</sup>

**Early Mineral Exploration** (s. 23.10) – (i) activity cannot occur in an area that is being used or has been used by a SAR at any time in the previous three years for hibernation or reproduction; and (ii) one species excluded from the exemption.<sup>53</sup>

**Waterpower Operations** (s. 23.12) – (i) exemption only applies to the operation of a hydro-electric station; and (ii) two species excluded from the exemption.<sup>54</sup>

**Aggregate Operations** (s. 23.14) – (i) activity is scoped to pits or quarries that began operations before a species was first listed or before the SAR first appeared on the site; or, in the case of species listed on January 24, 2013, that met certain approval requirements and begin operations within specified dates; (ii) otherwise, new pits that begin to operate after a species is listed or first appears on site will require an approval under the *ESA*; and (iii) seven species excluded from the exemption.<sup>55</sup>

**Operation of a Wind Facility** (s. 23.20) – (i) the exemption does not apply to the construction of a wind facility; (ii) the wind facility must be operated in a manner that is unlikely to damage or destroy habitat; and (iii) one species excluded from the exemption.<sup>56</sup>

**Transition for Activities that are Approved or Planned, but not Completed or Operating** (s. 23.13):

- (i) activities exempted are limited to those that have been previously reviewed and approved pursuant to other legislative schemes, the majority of which that include consideration of impacts on SAR;<sup>57</sup>
- (ii) the exemption only applies to “transition species”<sup>58</sup> and “newly listed species”;<sup>59</sup>
- (iii) the exemption to the s. 9 prohibition only applies to “newly listed species” (*i.e.*, in July, 2013 - five species). The exemption provided for “transition species” is limited

<sup>49</sup> SO 1994, c 25.

<sup>50</sup> *Regulation*, s 22.1(1)-(2), **JBOA**; Minister’s EN, **AABC, Vol 1, Tab 4 at 43-44.**

<sup>51</sup> RSO 1990, c D.17.

<sup>52</sup> *Regulation*, s 23.9 (1)-(2), **JBOA**; Minister’s EN, **AABC, Vol 1, Tab 4 at 48-49.**

<sup>53</sup> *Regulation*, ss 23.10(10)1, 23.10(13), **JBOA**; Minister’s EN, **AABC, Vol 1, Tab 4 at 44.**

<sup>54</sup> *Regulation*, s 23.12(1), 23.12(9), **JBOA**; Minister’s EN, **AABC, Vol 1, Tab 4 at 46.**

<sup>55</sup> *Regulation*, s 23.14(1)-(3), **JBOA**; Minister’s EN, **AABC, Vol 1, Tab 4 at 48.**

<sup>56</sup> *Regulation*, s 23.20(1), 23.20(8)(b)(iii), 23.20(16), **JBOA**; Minister’s EN, **AABC, Vol 1, Tab 4 at 51.**

<sup>57</sup> Minister’s EN, **AABC, Vol 1, Tab 4 at 40-43.**

<sup>58</sup> Transition species are species that are listed in Schedule 3 or 4 to the *ESA* and to which clause 10(1)(a) does not apply until June 30, 2013 by the operation of subsection 10(1) and 10(3) of the *ESA*. See *Regulation*, s 23.13(1), **JBOA.**

<sup>59</sup> Newly Listed Species are species that were added for the first time to the SARO List as endangered or threatened species on January 24, 2013. This is limited to the five identified species that received species and habitat protection as of that date. See *Regulation*, s 23.13(1), **JBOA.**

to an exemption from the s. 10 prohibitions on damage or destruction of habitat;<sup>60</sup>

- (iv) the exemption only applies to projects that meet timing eligibility;<sup>61</sup> and
- (v) the activity cannot occur in an area while it is being used by SAR for hibernation or reproduction.<sup>62</sup>

**(vii) Assessment of impacts on each SAR**

38. In arguing that the “[EN] failed to determine whether the proposed regulation would jeopardize each individual species to which it would apply”,<sup>63</sup> the Appellants fail to draw this Honourable Court’s attention to two sections of the EN wherein the note explicitly states that the effect of each regulatory proposal on each SAR was considered when determining whether a particular species should be excluded from a particular exempted activity:

As a result of an assessment of risk for each proposal, several high risk activities have been excluded to further reduce the risk of significant adverse effects on affected species. In addition, some proposals also exclude specific species at risk or highly sensitive ecological communities due to an identified higher risk to the species at risk as a result of potential activity impacts, or where impacts are too complex to manage using standardized rules.<sup>64</sup>

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**Excluding specific species:** Specific species were excluded from provisions in the regulation so that the activities eligible for those provisions could not affect species at risk that are at greater risk of being negatively affected from the proposed regulation. The criteria used to identify these species generally include circumstances where ...

Several species were excluded from the regulations based on the above assessment. **All endangered and threatened species on the Species at Risk were considered in this assessment; these species are listed in Schedule 1.**<sup>65</sup> (emphasis added)

**C. Divisional Court Decision**

39. The Divisional Court unanimously dismissed the application finding that the Minister had satisfied the statutory precondition and that the *Regulation* was consistent with the *ESA*. In

<sup>60</sup> *Regulation*, s 23.13(5)-(6), **JBOA**.

<sup>61</sup> For transition species, the activity exempted must have reached a specified stage of approval and have commenced before June 30, 2015 or have been issued a permit pursuant to s. 17 of the *ESA* before June 30, 2013. For the “newly listed species”, the activities must reach a specified stage of approval by January 24, 2015, and must be commenced, in most cases, prior to January 24, 2020, or earlier in some cases, depending on when the approval was granted.

<sup>62</sup> *Regulation*, s 23.13(8)2, **JBOA**.

<sup>63</sup> Appellants’ Factum at para 44.

<sup>64</sup> Minister’s EN, **AABC, Vol 1, Tab 4 at 36**.

<sup>65</sup> Minister’s EN, **AABC, Vol 1, Tab 4 at 37**. Of the 19 exemptions, six include exceptions for particular species (29 threatened or endangered species have been excluded from the six exemptions). Attached as Schedule “C” to this factum is a chart detailing the species excluded from various exemptions.

determining that the Minister satisfied the requirement of ss. 57(1), the Divisional Court correctly noted that ss. 57(1) requires the Minister to engage in a two-step process. The first step is to determine whether the proposed regulation would apply to a species that is listed on the SARO List.<sup>66</sup> If the proposed regulation does apply to any species on the SARO List, then the second step requires the Minister to determine whether the proposed regulation is likely to jeopardize the survival of the species identified in step one or whether it will have any other significant adverse effect on those species.

40. With respect to the second step, the Divisional Court held that the Minister was not precluded from relying on the suite of conditions in forming the opinion that the *Regulation* would not jeopardize the survival of applicable SAR or cause any significant adverse effects on those SAR:

There is nothing that says that the Minister has to examine the impact on each species to which the regulation would apply separately or independently of the others. There could be a program, approach or other condition that, in the opinion of the Minister, demonstrates there will be no jeopardy to the survival of **any of them and no risk of other significant adverse effects**. While it may not be independent and separate, **this could be said to be a means by which each of the species at risk, to which the regulation would apply, was considered**. Whether it is or is not, it is enough to satisfy the condition precedent imposed by section 57(1) of the *ESA*. It is what happened in this case. The Explanatory Note reviewed “the detailed provisions of the proposed regulation”, which included the suggested conditions and offered the opinion that the regulation was not likely to jeopardize the survival of any of the affected endangered or threatened species or to have any other significant adverse effect on these species at risk.<sup>67</sup>

41. Having found that the Minister complied with ss. 57(1) and based on the Appellants’ position that a review of the reasonableness of the opinion was “premature”, the Divisional Court was not required to address the issue of whether the Opinion was reviewable. Nevertheless, the Divisional Court ruled, in *obiter*, that the Opinion was not reviewable on a correctness or reasonableness standard because the Opinion was intimately tied to the *Regulation*. Permitting a review of the Opinion would effectively be a review of whether the *Regulation* was “...necessary,

<sup>66</sup> Divisional Court Reasons for Decision, AABC, Vol 1, Tab 3 at paras 34-35.

<sup>67</sup> Divisional Court Reasons for Decision, AABC, Vol 1, Tab 3 at paras 34, 35.

wise, or effective in practice”. Such a review of a regulation is prohibited by Supreme Court of Canada jurisprudence.<sup>68</sup>

42. Finally the Court ruled that the *Regulation* was consistent with the purposes of the *ESA* and rejected the Appellants’ argument that the *ESA* prohibited consideration of any factors outside of the protection and recovery purposes of the *Act*. Relying on the preamble, ss. 17, 57(2) and 48(h)<sup>69</sup> of the *ESA*, the Divisional Court held that the economic considerations underlying the promulgation of the *Regulations* were consistent with the *Act*.<sup>70</sup>

### **PART III – THE ISSUES**

43. The Respondents’ position on this appeal is as follows:

- (a) the Divisional Court was correct in deciding that the Minister satisfied the statutory precondition required in ss. 57(1);
- (b) that the Appellants should not be entitled to raise on appeal an argument they effectively abandoned in the proceedings below (*i.e.*, that the Minister’s opinion was unreasonable) and, in any event, the Divisional Court was correct in determining that the merits of the Opinion are not reviewable;
- (c) If this Honourable Court finds that the Minister’s opinion is reviewable, then the opinion is reasonable; and
- (d) the Divisional Court correctly held that the *Regulation* was consistent with the purposes of the *ESA*.

### **PART IV – THE LAW**

#### **Issue 1: The Condition Precedent was satisfied**

44. Before addressing this issue, it is important to crystalize the crux of the disagreement

<sup>68</sup> Divisional Court Reasons for Decision, **AABC, Vol 1, Tab 3 at para 36.**

<sup>69</sup> Divisional Court Reasons for Decision, **AABC, Vol 1, Tab 3 at para 39.** Clause 48(h) of the *ESA* permits the Minister to establish a committee to make recommendations “...on any matter specified by the Minister that relates to approaches that may be used under [the *ESA*] to promote sustainable social and economic activities that assist in the protection or recovery of species”.

<sup>70</sup> Divisional Court Reasons for Decision, **AABC, Vol 1, Tab 3 at para 54.**

between the parties. Both parties agree that the Divisional Court correctly held that ss. 57(1) requires a two-step analysis and that the Minister satisfied the first step of the analysis (*i.e.*, determining whether the proposed regulation would apply to a species).<sup>71</sup> The parties also agree that the second part of the ss. 57(1) analysis requires the Minister to determine whether the proposed regulation will likely jeopardize the survival of or have any other significant harm to the SAR identified in step one. The parties agree that step two involves an assessment of the degree of impact on an individual SAR.

45. Where the parties diverge is whether the second step permits the Minister to rely on the conditions imposed by each exemption as a basis for determining that the exemption will neither jeopardize the survival of nor have any other significant effect on each SAR identified in step one. The Appellants take the position that the Minister cannot “simply point to the *existence* of regulatory conditions as satisfying his duty to *assess* those regulatory conditions”.<sup>72</sup>

46. With respect, the Appellants’ argument ignores that the EN demonstrates that each SAR was considered against each regulatory exemption and that the conditions imposed by the *Regulation* are targeted to mitigate the impacts of activity on each impacted SAR.<sup>73</sup>

**(i) *The EN demonstrates that each SAR was considered against each regulatory exemption***

47. On the record before this Honourable Court, it is clear that the Minister considered the effects of each regulatory exemption on each SAR when determining whether to exclude certain species from certain regulatory exemptions.<sup>74</sup> The Appellants argue that the Minister’s consideration of each species was limited to the first step of the ss. 57(1) analysis and does not relate to the “Minister’s duty to assess jeopardy to each affected species” (*i.e.*, the second step).<sup>75</sup> Respectfully, the Appellants’ position is without merit.

<sup>71</sup> Divisional Court Reasons for Decision, **AABC, Vol 1, Tab 3 at paras 75-76.**

<sup>72</sup> Appellants’ Factum at para 79.

<sup>73</sup> Divisional Court Reasons for Decision, **AABC, Vol 1, Tab 3 at paras 34-35.**

<sup>74</sup> Minister’s EN, **AABC, Vol 1, Tab 4 at 36-38.**

<sup>75</sup> Appellants’ Factum at para 76.

48. The two extracts of the EN reproduced at paragraph 38 demonstrate the following:

- (a) That each species on the SARO List (as it then was) was considered when determining whether to exclude the species from a specific exemption; and
- (b) In determining whether to exclude a SAR from each exemption, the Ministry engaged Ministry experts to determine whether (i) the activity represented a higher risk to a particular SAR based on several criteria; and (ii) the activity's impact on a SAR was too complex to be managed by conditions.

Step one of the ss. 57(1) analysis only requires the Minister to determine whether the proposed exemption will impact a particular species on the SARO List. In determining whether to exclude certain SAR from each regulatory proposal, the Minister was, in fact, assessing the degree of the impact of each regulatory proposal on each species on the SARO List. As such, the EN demonstrates that the Minister complied with the second step of ss. 57(1) for each species.

**(ii) *The conditions imposed by the Regulation are applicable to each species impacted by the exempted activity***

49. Noting that s. 57 does not stipulate the method by which the Minister must form the requisite opinion, the Divisional Court correctly held that the Minister could rely on the standard suite of conditions identified in the EN to satisfy the second step.<sup>76</sup>

50. The Appellants take issue with the Minister's reliance on the standard suite of conditions in satisfying the second step of s. 57(1). The Appellants' factum does not describe the conditions prescribed by the *Regulation*; it merely baldly asserts: "the proposed regulation would contain standardized conditions rather than species-specific conditions".<sup>77</sup> This is inaccurate. As detailed above, the mitigation plan must be prepared identifying the SAR impacted by the activity and include details on how the proponent will mitigate the impacts on each SAR identified. Similarly, reasonable steps to minimize adverse effects must be taken for each specific SAR. For example, in some exemptions, the activity cannot occur in an area while it is being used by SAR for hibernation or reproduction (this necessarily requires species specific considerations). Moreover, as detailed

<sup>76</sup> Divisional Court Reasons for Decision, **AABC, Vol 1, Tab 3 at para 35.**

<sup>77</sup> Appellants' Factum at para 80.

above, many exemptions have been scoped to exclude specific SAR.

51. The *Regulation* does protect each SAR because the mitigation and minimizing adverse effects conditions must be taken for each SAR impacted by the activity. If a proponent fails to do so, he or she would not benefit from the exemption provided in the *Regulation* and could be subject to prosecution. Further provisions exclude or limit the application of the exemption for some SAR. As such, it would make little sense to prohibit the Minister from considering and relying on these conditions when formulating his opinion.

## **Issue 2: The Minister’s Opinion is not reviewable**

### ***(i) The Appellants effectively abandoned their challenge of the merits of the Opinion***

52. At the Divisional Court, the Appellants took the position that it was “premature” to decide whether the opinion was reasonable.<sup>78</sup> Having effectively abandoned the argument, the Appellants should not be permitted to now challenge the merits of the Opinion. This Honourable Court has held that it would be “manifestly unfair” to allow an argument on appeal that was abandoned at the court of first instance.<sup>79</sup>

53. In requesting this relief on appeal, the Appellants seek to have this Honourable Court act as a “court of first instance”. Absent extraordinary circumstances, this Honourable Court has held that it “will be reluctant to make any order concerning a matter that has not been the subject of an order from the tribunal appealed from”.<sup>80</sup> As noted by Justice Sharpe, this Honourable Court is “ill-equipped to make factual findings without the benefit of a full record and findings from the tribunal appealed”.<sup>81</sup>

### ***(ii) In any event, the Minister’s Opinion is not subject to review***

54. In any event, the Respondents respectfully submit that the Divisional Court was correct in

<sup>78</sup> Factum of the Applicants (Appellants), Divisional Court, **Respondents’ Compendium, Tab 1, at para 75.**

<sup>79</sup> *Shaver Hospital for Chest Diseases v Slesar et al*, [1979] OJ No 4504 (CA) at para 19, **JBOA**. See also *Pedwell v The Corp of the Town of Pelham*, [2003] OJ No 1774 (CA) at para 50, **JBOA**.

<sup>80</sup> *Schaeffer v Wood*, 2011 ONCA 716 (CanLII) at para 51, **JBOA**.

<sup>81</sup> *Schaeffer v Wood*, 2011 ONCA 716 (CanLII) at para 51, **JBOA**.

finding that reviewing the *vires* of the *Regulation* did not permit the Court to determine whether the Opinion was correct or reasonable (*i.e.*, that, in fact, the *Regulation* will not likely jeopardize the survival of, or have any other significant adverse effect on a SAR). Respectfully, the Divisional Court’s *obiter* comments are consistent with established case law.

55. The Respondents respectfully submit that a review of the correctness or reasonableness of the Opinion would amount to an analysis of whether the *Regulation* is “necessary, wise, or effective in practice” – an area of review that the Supreme Court has deemed inappropriate.<sup>82</sup> A review of the *vires* of the *Regulation* is limited to determining whether the s. 57 condition precedent has been satisfied and whether the *Regulation* is “irrelevant”, “extraneous” or “completely unrelated” to the statutory purposes of the *ESA*. Based on *Katz Group*, a court cannot engage in a review of the merits of the *Regulation*.

56. The Respondents respectfully submit that subjecting the conclusion of the Opinion to judicial review will, in effect, require the *Regulation* to be reviewed on a broader basis than what is permitted in *Katz Group*. Because the Opinion is directly tied to the *Regulation*, any attack on the conclusion of the Opinion is an indirect attack on the merits of the *Regulation*.

57. Despite the Appellants’ argument to the contrary,<sup>83</sup> Ontario law has definitively answered whether a statutory precondition is subject to review. In *Hanna v Ontario (Attorney General)*, the applicant challenged the promulgation of a regulation on the basis that the Minister had not satisfied a statutory precondition in that he failed to consider the Ministry’s statement of environmental values (the “SEV”) before recommending the regulation. The Minister had, in fact, considered the SEV in recommending the regulation. In addressing the permissible scope of the review, the Divisional Court held as follows:

Furthermore, government policy, expressed through a regulation, is not subject to judicial review unless it can be demonstrated that the regulation was made without authority or is

<sup>82</sup> *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 at paras 25-26 (“*Katz Group*”), **JBOA**.

<sup>83</sup> Appellants’ Factum at para 50.



unconstitutional. A regulation may be said to have been made without authority only if the Cabinet has failed to observe a condition precedent set forth in its enabling statute or if the power is not exercised in accordance with the purpose of the legislation.

It is not the court's function to question the wisdom of the minister's decision, or even whether it was reasonable. **If the minister followed the process mandated by section 11 of the EBR, his decision is unassailable on a judicial review application.** If he did not comply with the mandated process, the court would have to decide if the failure to do so means he acted without lawful authority.<sup>84</sup> (emphasis added)

58. In support of the position that the Opinion is subject to review on a reasonableness standard, the Appellants primarily rely on the Federal Court of Appeal's decision in *Alberta Wilderness Assn v Canada*.<sup>85</sup> In *Alberta Wilderness* (decided before *Katz*), the issue was whether to require the Minister of Environment to produce documents relating to whether the Minister recommended to Cabinet that an emergency order be issued to protect the Sage-grouse pursuant to s. 80 of the *Species at Risk Act* ("SARA").<sup>86</sup> Section 80 permitted the Minister to make a recommendation to Cabinet that emergency orders for a species be issued if the Minister formed the opinion "that the species faces imminent threats to its survival or recovery".<sup>87</sup> In that case, the Minister refused to advise whether a recommendation to Cabinet was made. The Minister claimed Cabinet immunity over the documents requested.

59. The Federal Court of Appeal overturned the motion court's decision on the basis that the Minister could not claim Cabinet immunity unless the Minister had, in fact, made a recommendation to Cabinet. Without knowing that, there could be no legal basis for claiming Cabinet immunity.<sup>88</sup> As such, the Court required the Minister to reveal whether a recommendation was made and then argue the merits of a Cabinet immunity argument. In *obiter*, the Federal Court of

<sup>84</sup> *Hanna v Ontario (Attorney General)*, [2011] OJ No 944 at paras 11, 32 (Div Ct), **JBOA**. See also *Animal Alliance of Canada v Ontario (Minister of Natural Resources)*, [2014] OJ No 2216 at para 23 (Div Ct) **JBOA**; *Huron-Perth Children's Aid Society v Ontario (Ministry of Children and Youth Services)*, [2012] OJ No 4982 at para 55 (Div Ct), **JBOA**; *Hamilton-Wentworth (Regional Municipality) v Ontario (Minister of Transportation)*, [1991] OJ No 439 at para 48 (Div Ct), leave to appeal refused, [1991] OJ No 3201 (CA), **JBOA**; *Metropolitan General Hospital v Ontario (Minister of Health)*, 1979 CarswellOnt 841 at paras 12-13 (H Ct J), **JBOA**.

<sup>85</sup> *Alberta Wilderness Assn v Canada*, 2013 FCA 190 ("Alberta Wilderness"), **JBOA**.

<sup>86</sup> SC 2002, c 29.

<sup>87</sup> SARA, s 80.

<sup>88</sup> *Alberta Wilderness* at para 50, **JBOA**.

Appeal relied upon the Supreme Court of Canada's decision in *Roncarelli v Duplessis* in holding that the Minister's refusal to make a recommendation could be subject to judicial review on a reasonableness standard.<sup>89</sup>

60. Respectfully, the Federal Court of Appeal's reliance on *Roncarelli v Duplessis* in its *obiter* comments is misplaced. The *Roncarelli* decision stands for the proposition that a court has jurisdiction to review administrative decisions on the basis of bad faith or an improper purpose. It does not stand for the proposition that legislative action, such as the Minister's Opinion would be subject to judicial review on a correctness or reasonableness standard.

61. In any event, the Respondents respectfully submit that the Federal Court of Appeal's analysis is not applicable to this appeal because of the significant differences between the legislative regime in the *SARA* and the *ESA*. Pursuant to s. 80 of the *SARA*, where a "competent minister" recommends an emergency order, the Governor in Council ("GIC") may make an emergency order to protect a species. The "competent minister" must make a recommendation to the GIC if she is of the "opinion that the species faces imminent threats to its survival or recovery". Once a recommendation is made, the GIC may make an emergency order that identifies the habitat that is necessary for the survival or recovery of the species and includes provisions requiring the "doing of things" that protect the species.<sup>90</sup>

62. Under the *SARA*, the Minister's opinion is not in any way tied to the contents of the emergency order in the same way that the Minister's opinion under the *ESA* is inextricably linked to the contents of the proposed regulation. As such, a review of the Minister's opinion under the *SARA* does not engage the limiting principles set out in *Katz Group*. Presumably, the "emergency order", which is the functional equivalent of an order in council or regulation, would not be reviewable on a reasonableness standard. This legislative difference is a significant distinguishing feature between

<sup>89</sup> *Alberta Wilderness* at para 48, **JBOA**.

<sup>90</sup> *SARA*, s 80(1)-(5).

the current appeal and the *SARA* cases relied upon by the Appellants.<sup>91</sup>

63. Finally, the Appellants also rely on *Halifax (Municipality) v Canada*<sup>92</sup> in support of subjecting the Opinion to a reasonableness review. In *Halifax*, the municipality challenged the manner in which the Minister calculated the “property value” for payments made in lieu of taxes (“PILT”) to be paid by the federal government for federal property situated in Halifax. The dispute between the Minister and Halifax was the appropriate value of certain property. In the context of making an administrative decision on the appropriate “property value” to be used, the Supreme Court determined that the Minister’s decision was subject to a reasonableness standard. Importantly, this case did not involve the promulgation of a regulation and, as such, was not subject to the limiting review principles described in *Katz*.

64. Unlike the case at hand, the Minister in *Halifax* was required to make a completely administrative decision—*i.e.*, how the local assessment authority would value the property. The Minister was not engaging in his legislative function.<sup>93</sup> In this appeal, the Minister was acting solely within his legislative function when satisfying the condition precedent for the enactment of the *Regulation*. As such, the *Halifax* decision is distinguishable.

### **Issue 3: In the alternative, the Opinion is Reasonable**

65. If this Honourable Court determines that the Opinion is reviewable and that the Appellants are entitled to assert this argument on appeal, then the Respondents respectfully submit that the Opinion was reasonable.

66. The Appellants argue that the Minister’s Opinion is not “transparent or intelligible” because

<sup>91</sup> *Alberta Wilderness*, **JBOA**; *Centre québécois du droit de l’environnement c Canada (Ministre de l’Environnement)*, 2015 FC 773, **JBOA**; *Athabasca Chipewyan First Nation v Canada (Minister of the Environment)*, 2011 FC 962, **JBOA**.

<sup>92</sup> *Halifax (Municipality) v Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 SCR 108 (“*Halifax*”), **JBOA**.

<sup>93</sup> *Halifax* at para 43, **JBOA**.

it does not explicitly detail the effect of each proposal on each SAR.<sup>94</sup> As an example, the Appellants rely on the extract of the EN that relates to Early Mining Exploration. The Appellants correctly state that the EN advises that the Golden Eagle is excluded from the exemption; however, the Appellants argue that the Opinion is not “transparent or intelligible” because the EN does not describe which SAR are subject to the exemption.<sup>95</sup> Respectfully, the Appellants’ argument amounts to a requirement that the Minister must state the obvious: that the exemption applies to all SAR other than the Golden Eagle.

67. Further, the Appellants argue that the EN is not “transparent or intelligible” because it fails to specifically address how each species would be impacted by each regulatory exemption. The Appellants suggest that the EN does not describe how Early Mining Exploration will impact the Eastern-Whip-poor-will.<sup>96</sup> With respect, the Appellants’ argument ignores two important aspects of the EN.

68. First, the EN describes the adverse impacts posed by early mining exploration to SAR as disturbances in the natural habitat on which the species depend for “critical life processes such as hibernation or reproduction, including rearing”.<sup>97</sup> Second, the EN explains that the *Regulation* prohibits any activity relying on the exemption from being “carried out in an area that is being used, or has been used, by a member of the species at any time in the previous three years for hibernation, or reproduction including rearing”.<sup>98</sup> Put simply, the EN describes the adverse impacts of the activity on all SAR and then scopes the activity in a manner that **protects all SAR**. As such, the EN provides a “transparent or intelligible” basis for ascertaining how the Minister determined that the types of adverse impacts caused by early mining exploration would be avoided for all SAR, including the Eastern Whip-poor-will.

<sup>94</sup> Appellants’ Factum at paras 82-85.

<sup>95</sup> Appellants’ Factum at para 83.

<sup>96</sup> Appellants’ Factum at para 83.

<sup>97</sup> Minister’s EN, **AABC, Vol 1, Tab 4 at 44**.

<sup>98</sup> Minister’s EN, **AABC, Vol 1, Tab 4 at 44**.

69. When read as a whole, the EN advised the Minister of the following:

- (a) Why the regulatory proposals were developed;
- (b) A description of each condition and why each condition is required;
- (c) That the activities subject to an exemption have been scoped and restrictively defined to ensure that high risk activities do not fall within the exemption;
- (d) The adverse impacts likely caused by each of the activities and the conditions imposed to mitigate the adverse impacts;
- (e) That a majority of the regulatory proposals requires a species specific mitigation plan that must be prepared by a species specific expert;
- (f) That the Ministry considered **every** species that the prohibitions apply to when determining whether a particular species should be excluded from each regulatory proposal; and
- (g) Based on the above, the proposed regulation was not likely to jeopardize the survival of the affected endangered or threatened species in Ontario or to have any other significant adverse effects on these SAR.

70. The exhaustive nature of the EN reflects the considered analysis provided by the Ministry and reviewed by the Minister before forming his Opinion. The record reflects that the Minister took his obligation seriously and relying on information from the Ministry, he came to a well-informed and reasoned opinion.

71. Finally, the Appellants rely on two purported expert reports that are meant to establish that the *Regulation* does, in fact, jeopardize the survival of or cause significant adverse effects to the American Eel and Blanding's Turtle.<sup>99</sup> Respectfully, the two reports merit no weight.

72. Mr. MacGregor was asked, amongst other things, to determine the effects of the *Regulation* on the American Eel.<sup>100</sup> A review of his report and transcript of cross-examination reveal that Mr. MacGregor was not actually concerned with whether the conditions imposed by ss. 23.12(5) would adequately protect the American Eel. Rather, Mr. MacGregor was concerned that the *Regulation* does not require the Ministry to approve a mitigation plan or the proponent's reasonable steps to minimize adverse effects before the exemption applies. In other words, Mr. MacGregor does not

<sup>99</sup> Appellants' Factum at paras 86, 87.

<sup>100</sup> Report of Robert MacGregor dated December 13, 2013, **AABC, Vol 2, Tab 8B at 607, 637-640**; Transcripts of the Cross-Examination of Robert MacGregor, **Respondents' Compendium, Tab 4**.

trust that proponents will comply with the *Regulation* and believes the Minister will not ensure compliance with the *Regulation*.<sup>101</sup>

73. Dr. Congdon was asked, amongst other things, to determine the effects of the *Regulation* on the Blanding's Turtle. Dr. Congdon opined that the construction activities set out in s. 23.13 could have serious impacts on the Blanding's Turtle and that the *Regulation* did not adequately protect the species. A review of his report and transcript of cross-examination reveals the following:

- (a) Dr. Congdon's understanding of the Blanding's Turtle situation in Ontario was based on counsel's suggestion of electronic documents to review and his own Google search;<sup>102</sup>
- (b) Dr. Congdon has no experience working with the *ESA* or obtaining permits pursuant to the *ESA*;<sup>103</sup> and
- (c) Dr. Congdon's entire report is based on the assumption that the exemption in s. 23.13 permitted construction related activity to "kill, harm, or harass" the Blanding's Turtle.<sup>104</sup> Dr. Congdon was not aware that s. 23.13 does not permit any activity to "kill, harm, or harass" the Blanding's Turtle.<sup>105</sup>

74. Mr. MacGregor's opinion is based on an assumption that proponents will not comply with the *Regulation* and that the Ministry would not require compliance with the same. Dr. Congdon does not have any significant experience with Blanding's Turtles in Ontario and the heart of his report is based on a false assumption, namely the applicability of s. 23.13 to the Blanding's Turtle. Put simply, the evidence of Mr. MacGregor and Dr. Congdon does not demonstrate that the Minister's Opinion was unreasonable in any respect.

#### **Issue 4: The *Regulation* is consistent with the *ESA***

75. As detailed above, the Respondents submit that the *ESA* reflects a nuanced approach that places the protection and recovery of SAR as a central concern to be balanced with appropriate

<sup>101</sup> Report of Robert MacGregor dated December 13, 2013, **AABC, Vol 2, Tab 8B at 640**; Transcripts of the Cross-Examination of Robert MacGregor, **Respondents' Compendium, Tab 4, q 87-99, 107-115, 159-154, 241-291, 300-315, 321-337**.

<sup>102</sup> Transcripts of the Cross-Examination of Dr. Justin Congdon, **Respondents' Compendium, Tab 5, q 82-98**.

<sup>103</sup> Transcripts of the Cross-Examination of Dr. Justin Congdon, **Respondents' Compendium, Tab 5, q 96-104**.

<sup>104</sup> Transcripts of the Cross-Examination of Dr. Justin Congdon, **Respondents' Compendium, Tab 5, q 113-117**.

<sup>105</sup> Transcripts of the Cross-Examination of Dr. Justin Congdon, **Respondents' Compendium, Tab 5, q 199-201, 206-207, 226-248**.

social, economic, health and cultural considerations. Sub-clause 57(2)(e)(vi) explicitly permits the Minister to recommend regulations based on reasons relating to significant social and economic benefits to Ontario. As such, it cannot be said that the *Regulation* is “irrelevant”, “extraneous” or “completely unrelated” to the statutory purpose.<sup>106</sup>

76. Respectfully, the Appellants’ argument is based on two errors: (1) that the Purposes section of the *ESA* is a trump card that requires any activity that negatively impacts a SAR to create an overall benefit to the affected species; and (2) that the stated reasons for recommending the *Regulation* are the equivalent of “promoting industry”.

77. With respect to the Appellants’ first error, a review of the *ESA* demonstrates that the statute permits activities that negatively impact SAR without requiring an overall benefit to the affected species. There is simply no basis for the Appellants to assert that the *ESA* requires an overall benefit before permitting an impact on a SAR.

78. With respect to the second error, the Respondents respectfully submit that creating economic efficiencies and developing a better delivery model for government services is not akin to “promoting economics of industry”. The *Regulation* imposes onerous conditions on proponents. Conditions that were developed based on the conditions that have been relied upon in the permit process to minimize adverse effects on SAR. The purpose of the *Regulation* was not to promote industrial activity, but to create a more cost-effective mechanism for the delivery of government services, an economic benefit explicitly permitted by ss. 57(2)(e)(vi).

79. Contrary to the Appellants’ argument,<sup>107</sup> the Divisional Court did not conclude that economic purposes or objectives are at the “core” of the *ESA*. Rather, the Divisional Court found that economic factors could be considered in the context of proposing and making a regulation

<sup>106</sup> *Katz Group* at paras 24-28, **JBOA**.

<sup>107</sup> Appellant’s Factum at para 93.

under that *Act*. In a portion of the Divisional Court's judgement that is only partially quoted by the Appellants that Court stated:

The economic considerations brought to bear on the making of O. Reg. 176/13 are not a peripheral purpose. They are a consideration which, pursuant to the ESA, is to be part of the efforts undertaken in acting to protect and restore species at risk.<sup>108</sup>

The Divisional Court did not find that either a central or peripheral purpose of the *ESA* is to accomplish economic objectives. Rather, the Divisional Court found that the *Act* clearly provides authority for the Minister to consider economic factors when implementing the *Act* and in recommending regulations.

80. In support of their argument, the Applicants rely upon the 1976 Divisional Court case in *Doctors Hospital v Minister of Health*.<sup>109</sup> In *Doctors*, a number of hospitals challenged an Order-in-Council issued by the LGIC purporting to cancel the licenses of a number of hospitals for financial reasons or budgetary restraints. The Divisional Court held that the Order-in-Council was *ultra vires* because the legislative scheme was regulatory in nature and did not contemplate exercising financial or budgetary control over hospitals. The Divisional Court held that exercising the power to revoke approval for financial reasons was extraneous to the purpose of the statute and therefore invalid.<sup>110</sup> Subsequent decisions of the Divisional Court have held that the case stands for the proposition that parliament cannot use a statute designed for one purpose for another.<sup>111</sup>

81. *Doctors* is not applicable to the present case because the *ESA* explicitly contemplates exclusions to the prohibitions and allows for a balancing of social, economic, safety and cultural considerations with the protection and recovery of SAR. In *Doctors*, the legislative scheme did not contemplate exercising financial or budgetary control over hospitals. Here, clause 55(1)(b)

<sup>108</sup> Divisional Court Reasons for Decision, **AABC, Vol 1, Tab 3 at para 53**.

<sup>109</sup> *Doctors Hospital v Minister of Health* (1976), 12 OR (2d) 164 (Div Ct), **JBOA**.

<sup>110</sup> *Doctors Hospital v Minister of Health* (1976), 12 OR (2d) 164 at paras 34-38 (Div Ct), **JBOA**.

<sup>111</sup> *Hamilton-Wentworth (Regional Municipality) v Ontario (Minister of Transportation)*, [1991] OJ No 439 at para 48 (Div Ct), leave to appeal refused, [1991] OJ No 3201 (CA), **JBOA**. See also *Metropolitan General Hospital v Ontario (Minister of Health)*, 1979 CarswellOnt 841 at paras 12-13 (H Ct J), **JBOA**.



explicitly provides the LGIC with the power to promulgate regulations granting exemptions to the prohibitions with any conditions or requirements deemed appropriate and ss. 57(2)(e)(vi) permits the Minister to recommend a regulation that is intended to confer an economic or social benefit to Ontario. The *Regulation* is not an attempt to use the *ESA* for a purpose it was not intended for.

**PART V – ORDER SOUGHT**

82. The Respondents respectfully request an order dismissing the Appellants' appeal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Date: January 26, 2016



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**BILL MANUEL / SUNIL MATHAI**

## **SCHEDULE “A”**

### **Authorities Relied Upon**

1. *Shaver Hospital for Chest Diseases v Slesar et al*, [1979] OJ No 4504 (CA)
2. *Pedwell v The Corp of the town of Pelham*, [2003] OJ No 1774 (CA)
3. *Schaeffer v Wood*, 2011 ONCA 716 (CanLII)
4. *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64
5. *Hanna v Ontario (Attorney General)*, [2011] OJ No 944 at paras 11, 32 (Div Ct),
6. *Animal Alliance of Canada v Ontario (Minister of Natural Resources)*, [2014] OJ No 2216 at para 23 (Div Ct)
7. *Huron-Perth Children’s Aid Society v Ontario (Ministry of Children and Youth Services)*, [2012] OJ No 4982 at para 55 (Div Ct)
8. *Hamilton-Wentworth (Regional Municipality) v Ontario (Minister of Transportation)*, [1991] OJ No 439 (Div Ct), leave to appeal refused, [1991] OJ No 3201 (CA)
9. *Metropolitan General Hospital v Ontario (Minister of Health)*, 1979 CarswellOnt 841 at paras 12-13 (H Ct J)
10. *Alberta Wilderness Assn v Canada*, 2013 FCA 190
11. *Centre québécois du droit de l’environnement c Canada (Ministre de l’Environnement)*, 2015 FC 773
12. *Athabasca Chipewyan First Nation v Canada (Minister of the Environment)*, 2011 FC 962
13. *Halifax (Municipality) v Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 SCR 108
14. *Doctors Hospital v Minister of Health* (1976), 12 OR (2d) 164 (Div Ct)

**SCHEDULE “B”****Legislation Relied Upon**

1. *Endangered Species Act*, 2007, S.O. 2007, c 6
2. O. Reg. 242/08: *General Regulation* promulgated pursuant to the *Endangered Species Act*, 2007, S.O. 2007, c 6(as it was on July 1, 2013), ss. 12, 22.1, 23.4, 23.5, 23.6, 23.7, 23.8, 23.9, 23.10, 23.11, 23.12, 23.13, 23.14, 23.15, 23.16, 23.17, 23.18, 23.19, 23.20
3. *Environmental Bill of Rights*, SO 1993, c 28, ss. 5, 27
4. *Crown Forest Sustainability Act*, 1994, SO 1994, c 25, ss. 8-9, 42(1), 64(1)
5. *Species at Risk Act*, SC 2002, c 29, s. 80-83

1. **Endangered Species Act, 2007, S.O. 2007, c 6 Preamble, ss. 1, 5(1), 7, 9, 10, 17, 19, 27, 36(1), 48(h), 55, 57**

**Preamble**

Biological diversity is among the great treasures of our planet. It has ecological, social, economic, cultural and intrinsic value. Biological diversity makes many essential contributions to human life, including foods, clothing and medicines, and is an important part of sustainable social and economic development.

Unfortunately, throughout the world, species of animals, plants and other organisms are being lost forever at an alarming rate. The loss of these species is most often due to human activities, especially activities that damage the habitats of these species. Global action is required.

The United Nations Convention on Biological Diversity takes note of the precautionary principle, which, as described in the Convention, states that, where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.

In Ontario, our native species are a vital component of our precious natural heritage. The people of Ontario wish to do their part in protecting species that are at risk, with appropriate regard to social, economic and cultural considerations. The present generation of Ontarians should protect species at risk for future generations.

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

**Purposes**

1. The purposes of this Act are:

1. To identify species at risk based on the best available scientific information, including information obtained from community knowledge and aboriginal traditional knowledge.
2. To protect species that are at risk and their habitats, and to promote the recovery of species that are at risk.
3. To promote stewardship activities to assist in the protection and recovery of species that are at risk. 2007, c. 6, s. 1.

[...]

**Rules for classification**

5. (1) For the purposes of this Act, COSSARO shall classify species in accordance with the following rules:

1. A species shall be classified as an extinct species if it no longer lives anywhere in the world.
2. A species shall be classified as an extirpated species if it lives somewhere in the world, lived at one time in the wild in Ontario, but no longer lives in the wild in Ontario.
3. A species shall be classified as an endangered species if it lives in the wild in Ontario but is facing imminent extinction or extirpation.

4. A species shall be classified as a threatened species if it lives in the wild in Ontario, is not endangered, but is likely to become endangered if steps are not taken to address factors threatening to lead to its extinction or extirpation.
5. A species shall be classified as a special concern species if it lives in the wild in Ontario, is not endangered or threatened, but may become threatened or endangered because of a combination of biological characteristics and identified threats. 2007, c. 6, s. 5 (1).

[...]

### **Species at Risk in Ontario List**

7. (1) The Ministry official who holds the office designated under subsection (6) shall make and file a regulation that lists the following:

1. All the species that are classified by COSSARO as extirpated species.
2. All the species that are classified by COSSARO as endangered species.
3. All the species that are classified by COSSARO as threatened species.
4. All the species that are classified by COSSARO as special concern species. 2007, c. 6, s. 7 (1).

### **Contents of regulation**

(2) The Ministry official shall ensure that the regulation contains the following information for each species:

1. The common name and scientific name of the species.
2. COSSARO's classification of the species.
3. If COSSARO indicated that the classification applies only to a specified geographic area, the area specified by COSSARO. 2007, c. 6, s. 7 (2).

### **Amendments to regulation**

(3) The Ministry official shall make and file such amendments to the regulation as are required to ensure that the regulation accurately reflects new information reported to the Minister by COSSARO. 2007, c. 6, s. 7 (3).

### **Same**

(4) For the purpose of subsection (3), if the Minister receives a report from COSSARO classifying or reclassifying a species, the Ministry official shall, not later than three months after the day the report is received, make and file an amendment to the regulation so that the regulation accurately reflects new information contained in the report. 2007, c. 6, s. 7 (4).

### **Commencement of regulations**

(5) A regulation under this section comes into force on the day it is filed. 2007, c. 6, s. 7 (5).

### **Ministry official**

(6) The Minister shall, for the purposes of this section, designate an office within the Ministry that is held by a public servant. 2007, c. 6, s. 7 (6).

### **Transition**

(7) The Ministry official shall make and file the first regulation under this section not later than the day this section comes into force, and the regulation shall,

- (a) list each of the species set out in Schedule 1 as an endangered species and, if a footnote to Schedule 1 specifies a geographic area for a species, indicate that the classification of the species as an endangered species applies to that area;
- (b) list each of the species set out in Schedule 2 as an extirpated species;
- (c) list each of the species set out in Schedule 3 as an endangered species;
- (d) list each of the species set out in Schedule 4 as a threatened species; and
- (e) list each of the species set out in Schedule 5 as a special concern species and, if a footnote to Schedule 5 specifies a geographic area for a species, indicate that the classification of the species as a special concern species applies to that area. 2007, c. 6, s. 7 (7).

**Same**

(8) For the purpose of subsections (1) and (2), any classifications or geographic areas that are required by subsection (7) to be included in a regulation and that are not classifications made by or geographic areas specified by COSSARO shall be deemed to be classifications made by or geographic areas specified by COSSARO, but nothing in subsection (7) or this subsection prevents COSSARO from submitting a report to the Minister under this Act that reclassifies a species listed in the regulation under subsection (7). 2007, c. 6, s. 7 (8).

**Same**

(9) If, on or after March 20, 2007 and before this section comes into force, COSSARO reported the classification or reclassification of a species to the Minister, the Ministry official shall,

- (a) if the species is not set out in any of Schedules 1 to 5 and is classified by COSSARO as an extirpated, endangered, threatened or special concern species, include COSSARO's classification of the species in the regulation made under subsection (7);
- (b) if the species is set out in any of Schedules 1 to 5 and is reclassified by COSSARO as an extirpated, endangered, threatened or special concern species, include COSSARO's reclassification of the species in the regulation made under subsection (7), instead of the classification that would otherwise apply under subsection (7); and
- (c) if the species is set out in any of Schedules 1 to 5 and clause (b) does not apply, not include the species in the regulation made under subsection (7), despite that subsection. 2007, c. 6, s. 7 (9).

**Same**

(10) Despite subsection (5), if a regulation is made under subsection (7) before this section comes into force, the regulation comes into force on the day this section comes into force. 2007, c. 6, s. 7 (10).

[...]

**Prohibition on killing, etc.**

- 9. (1)** No person shall,
  - (a) kill, harm, harass, capture or take a living member of a species that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species;
  - (b) possess, transport, collect, buy, sell, lease, trade or offer to buy, sell, lease or trade,

- (i) a living or dead member of a species that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species,
- (ii) any part of a living or dead member of a species referred to in subclause (i),
- (iii) anything derived from a living or dead member of a species referred to in subclause (i);  
or
- (c) sell, lease, trade or offer to sell, lease or trade anything that the person represents to be a thing described in subclause (b) (i), (ii) or (iii). 2007, c. 6, s. 9 (1).

**Possession, etc., of species originating outside Ontario**

(2) Clause (1) (b) does not apply to a member of a species that originated outside Ontario if it was lawfully killed, captured or taken in the jurisdiction from which it originated. 2007, c. 6, s. 9 (2).

**Specified geographic area**

(3) If the Species at Risk in Ontario List specifies a geographic area that a classification of a species applies to, subsection (1) only applies to that species in that area. 2007, c. 6, s. 9 (3).

**Possession by Crown**

(4) Clause (1) (b) does not apply to possession by the Crown. 2007, c. 6, s. 9 (4).

**Transfer for certain purposes**

(5) If the Crown is in possession of anything referred to in clause (1) (b), the Minister may transfer it to another person or body and authorize the person or body to possess it, despite clause (1) (b), for,

- (a) scientific or educational purposes; or
- (b) traditional cultural, religious or ceremonial purposes. 2007, c. 6, s. 9 (5).

**Interpretation**

- (6) A reference in this section to a member of a species,
  - (a) includes a reference to a member of the species at any stage of its development;
  - (b) includes a reference to a gamete or asexual propagule of the species; and
  - (c) includes a reference to the member of the species, whether or not it originated in Ontario. 2007, c. 6, s. 9 (6).

**Prohibition on damage to habitat, etc.**

**10.** (1) No person shall damage or destroy the habitat of,

- (a) a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species; or
- (b) a species that is listed on the Species at Risk in Ontario List as an extirpated species, if the species is prescribed by the regulations for the purpose of this clause. 2007, c. 6, s. 10 (1).

**Specified geographic area**

(2) If the Species at Risk in Ontario List specifies a geographic area that a classification of a species applies to, subsection (1) only applies to that species in that area. 2007, c. 6, s. 10 (2).

## Transition

(3) Clause (1) (a) does not apply to a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species under clause 7 (7) (c) or (d) until the earlier of the following dates:

1. The date that a regulation made under clause 55 (1) (a) that applies to the species comes into force.
2. The fifth anniversary of the day section 7 comes into force. 2007, c. 6, s. 10 (3).

[...]

## Permits

**17.** (1) The Minister may issue a permit to a person that, with respect to a species specified in the permit that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species, authorizes the person to engage in an activity specified in the permit that would otherwise be prohibited by section 9 or 10. 2007, c. 6, s. 17 (1).

## Limitation

- (2) The Minister may issue a permit under this section only if,
  - (a) the Minister is of the opinion that the activity authorized by the permit is necessary for the protection of human health or safety;
  - (b) the Minister is of the opinion that the main purpose of the activity authorized by the permit is to assist, and that the activity will assist, in the protection or recovery of the species specified in the permit;
  - (c) the Minister is of the opinion that the main purpose of the activity authorized by the permit is not to assist in the protection or recovery of the species specified in the permit, but,
    - (i) the Minister is of the opinion that an overall benefit to the species will be achieved within a reasonable time through requirements imposed by conditions of the permit,
    - (ii) the Minister is of the opinion that reasonable alternatives have been considered, including alternatives that would not adversely affect the species, and the best alternative has been adopted, and
    - (iii) the Minister is of the opinion that reasonable steps to minimize adverse effects on individual members of the species are required by conditions of the permit; or
  - (d) the Minister is of the opinion that the main purpose of the activity authorized by the permit is not to assist in the protection or recovery of the species specified in the permit, but,
    - (i) the Minister is of the opinion that the activity will result in a significant social or economic benefit to Ontario,
    - (ii) the Minister has consulted with a person who is considered by the Minister to be an expert on the possible effects of the activity on the species and to be independent of the person who would be authorized by the permit to engage in the activity,
    - (iii) the person consulted under subclause (ii) has submitted a written report to the Minister on the possible effects of the activity on the species, including the person's opinion on whether the activity will jeopardize the survival or recovery of the species in Ontario,
    - (iv) the Minister is of the opinion that the activity will not jeopardize the survival or recovery of the species in Ontario,



- (v) the Minister is of the opinion that reasonable alternatives have been considered, including alternatives that would not adversely affect the species, and the best alternative has been adopted,
- (vi) the Minister is of the opinion that reasonable steps to minimize adverse effects on individual members of the species are required by conditions of the permit, and
- (vii) the Lieutenant Governor in Council has approved the issuance of the permit. 2007, c. 6, s. 17 (2).

### **Response to recovery strategy**

(3) Before issuing a permit under this section, the Minister shall consider any statement that has been published under subsection 11 (8) with respect to a recovery strategy for the species specified in the permit. 2007, c. 6, s. 17 (3).

### **Conditions**

(4) A permit issued under this section may contain such conditions as the Minister considers appropriate. 2007, c. 6, s. 17 (4).

### **Same**

- (5) Without limiting the generality of subsection (4), conditions in a permit may,
  - (a) limit the time during which the permit applies;
  - (b) limit the circumstances in which the permit applies;
  - (c) require the holder of the permit to take steps specified in the permit, and require that steps be taken before engaging in the activity authorized by the permit;
  - (d) require the holder of the permit to furnish security in an amount sufficient to ensure compliance with the permit;
  - (e) require the holder of the permit to ensure that the activity authorized by the permit, and the effects of the activity, are monitored in accordance with the permit;
  - (f) require the holder of the permit to rehabilitate habitat damaged or destroyed by the activity authorized by the permit, or to enhance another area so that it could become habitat suitable for the species specified in the permit; or
  - (g) require the holder of the permit to submit reports to the Minister. 2007, c. 6, s. 17 (5).

### **Compliance**

(6) An authorization described in subsection (1) does not apply unless the holder of the permit complies with any requirements imposed by the permit. 2007, c. 6, s. 17 (6).

### **Amendment or revocation**

- (7) The Minister may,
  - (a) with the consent of the holder of a permit issued under this section,
    - (i) amend the permit, if the permit was issued under clause (2) (a), (b) or (c) and the Minister is of the opinion that he or she would be authorized under the same clause to issue the permit in its amended form,
    - (ii) amend the permit, if,
      - (A) the permit was issued under clause (2) (d),
      - (B) the Minister has consulted with a person who is considered by the Minister to be an expert on the possible effects of the amendment on the species specified in the

- permit and to be independent of the person who would be authorized by the permit in its amended form to engage in an activity,
- (C) the Lieutenant Governor in Council has approved the amendment, and
  - (D) the Minister is of the opinion that he or she would be authorized under clause (2) (d) to issue the permit in its amended form, or
- (iii) revoke the permit; or
  - (b) without the consent of the holder of the permit issued under this section, but subject to section 20, amend or revoke the permit, if,
    - (i) the Minister is of the opinion that the revocation or amendment,
      - (A) is necessary to prevent jeopardizing the survival or recovery, in Ontario, of the species specified in the permit, or
      - (B) is necessary for the protection of human health or safety, and
    - (ii) the Lieutenant Governor in Council has approved the revocation or amendment, in the case of a permit that was issued with the approval of the Lieutenant Governor in Council. 2007, c. 6, s. 17 (7).

### **Delegation**

(8) In addition to any authority under any Act to delegate powers to persons employed in the Ministry, the Minister may, in the circumstances prescribed by the regulations, delegate his or her powers under this section to a person or body prescribed by the regulations, subject to any limitations prescribed by the regulations. 2007, c. 6, s. 17 (8).

[...]

### **Aboriginal persons**

**19.** (1) The Minister may, for the purposes of this Act, enter into an agreement with any of the following persons or bodies that relates to a species specified in the agreement that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species:

1. A band as defined in the *Indian Act* (Canada).
2. A tribal council.
3. An organization that represents a territorially-based aboriginal community. 2007, c. 6, s. 19 (1).

### **Authorization**

(2) An agreement under subsection (1) may authorize aboriginal persons described in the agreement or a party to the agreement to engage in an activity specified in the agreement that would otherwise be prohibited by section 9 or 10. 2007, c. 6, s. 19 (2).

### **Permits**

(3) The Minister may issue a permit to a person or body referred to in subsection (1) that, with respect to a species specified in the permit that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species, authorizes aboriginal persons described in the permit or the holder of the permit to engage in an activity specified in the permit that would otherwise be prohibited by section 9 or 10. 2007, c. 6, s. 19 (3).

### **Limitation**

(4) The Minister shall not enter into an agreement or issue a permit under this section if he or she is of the opinion that the agreement or permit would authorize an activity that would jeopardize the survival or recovery, in Ontario, of the species specified in the agreement or permit. 2007, c. 6, s. 19 (4).

### **Response to recovery strategy**

(5) Before entering into an agreement or issuing a permit under this section, the Minister shall consider any statement that has been published under subsection 11 (8) with respect to a recovery strategy for the species specified in the agreement or permit. 2007, c. 6, s. 19 (5).

### **Permit conditions**

(6) Subsections 17 (4) and (5) apply, with necessary modifications, to a permit issued under this section. 2007, c. 6, s. 19 (6).

### **Reliance on authorization**

- (7) An authorization described in subsection (2) or (3) does not apply to,
- (a) an aboriginal person who seeks to rely on the authorization, unless he or she complies with any requirements imposed on the aboriginal person by the agreement or permit; or
  - (b) a person or body referred to in subsection (1) who seeks to rely on the authorization, unless the person or body complies with any requirements imposed on it by the agreement or permit. 2007, c. 6, s. 19 (7).

### **Compliance with permit**

(8) The holder of a permit issued under this section and the aboriginal persons who are authorized by the permit to engage in an activity that would otherwise be prohibited by section 9 or 10 shall comply with any requirements imposed on them by the permit. 2007, c. 6, s. 19 (8).

### **Amendment or revocation of permit**

- (9) The Minister may,
- (a) with the consent of the holder of a permit issued under this section, revoke or amend the permit; or
  - (b) without the consent of the holder of a permit issued under this section, but subject to section 20, revoke or amend the permit, if the Minister is of the opinion that the revocation or amendment,
    - (i) is necessary to prevent jeopardizing the survival or recovery, in Ontario, of the species specified in the permit, or
    - (ii) is necessary for the protection of human health or safety. 2007, c. 6, s. 19 (9).

[...]

**27.** (1) An enforcement officer may make an order requiring a person to stop engaging in or not to engage in an activity if the enforcement officer has reasonable grounds to believe that the person is engaging in the activity, has engaged in the activity or is about to engage in the activity and, as a result, is contravening, has contravened or is about to contravene any of the following provisions:

1. Section 9 or 10.

2. Any provision of an agreement entered into under section 16 or 19, if the agreement authorizes a person to engage in an activity that would otherwise be prohibited by section 9 or 10.
3. Any provision of a permit issued under section 17 or 19.
4. Any provision of an order made under section 27, 28 or 41. 2007, c. 6, s. 27 (1).

**Information to be included in order**

- (2) The order shall,
  - (a) specify the provision that the enforcement officer believes is being, has been or is about to be contravened;
  - (b) briefly describe the nature of the contravention and its location; and
  - (c) state that a hearing on the order may be required in accordance with section 30. 2007, c. 6, s. 27 (2).

[...]

**Offences**

**36.** (1) A person is guilty of an offence if the person contravenes any of the following provisions:

1. Subsection 9 (1), 10 (1), 24 (2) or 26 (5), section 35, or subsection 49 (1) or (2).
2. Any provision of an agreement entered into under section 16 or 19, if the agreement authorizes a person to engage in an activity that would otherwise be prohibited by section 9 or 10.
3. Any provision of a permit issued under section 17 or 19.
4. Any provision of an order made under section 27, 28 or 41. 2007, c. 6, s. 36 (1).

[...]

**Advisory committee**

**48.** Subject to the approval of the Lieutenant Governor in Council, the Minister may establish a committee to make recommendations to the Minister on any matter specified by the Minister that relates to,

- (h) approaches that may be used under this Act to promote sustainable social and economic activities that assist in the protection or recovery of species;

[...]

**Regulations**

**55.** (1) Subject to subsection (2) and section 57, the Lieutenant Governor in Council may make regulations,

- (a) prescribing, for the purpose of clause (a) of the definition of “habitat” in subsection 2 (1), an area as the habitat of a species that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species;

- (b) prescribing exemptions from subsection 9 (1) or 10 (1), subject to any conditions or restrictions prescribed by the regulations;
- (c) providing that subsection 11 (1) or (7) has no application to a species, if subsections 9 (1) and 10 (1) have no application to the species;
- (d) governing the preparation of recovery strategies under section 11 and management plans under section 12;
- (e) prescribing or respecting any matter that this Act refers to as a matter prescribed by the regulations or as otherwise dealt with by the regulations, other than regulations that are required by section 7. 2007, c. 6, s. 55 (1).

### **Consideration of recovery strategy**

(2) Before a regulation is made under clause (1) (a) prescribing an area as the habitat of a species, the Minister shall consider any recovery strategy that has been prepared for the species under section 11 and any statement that has been published under subsection 11 (8) with respect to the recovery strategy. 2007, c. 6, s. 55 (2).

### **Description of habitat**

(3) Without limiting the generality of clause (1) (a), a regulation under that clause prescribing an area as the habitat of a species,

- (a) may describe the area by,
  - (i) describing specific boundaries for the area,
  - (ii) describing features of the area, or
  - (iii) describing the area in any other manner;
- (b) may prescribe areas where the species lives, used to live or is believed to be capable of living; and
- (c) may prescribe an area that is larger or smaller than the area described by clause (b) of the definition of “habitat” in subsection 2 (1). 2007, c. 6, s. 55 (3).

### **Conditions and restrictions on exemptions**

(4) Without limiting the generality of clause (1) (b), a regulation under that clause may, as a condition or restriction on an exemption, provide that the exemption only applies to a person if the person complies with an agreement entered into between the person and the Minister. 2007, c. 6, s. 55 (4).

[...]

### **Special requirements for certain regulations**

**57.** (1) If a proposal for a regulation under subsection 55 (1) is under consideration in the Ministry, the proposed regulation would apply to a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species, and either or both of the following criteria apply, the Minister shall consult with a person who is considered by the Minister to be an expert on the possible effects of the proposed regulation on the species:

1. In the case of any proposed regulation under subsection 55 (1), the Minister is of the opinion that the regulation is likely to jeopardize the survival of the species in Ontario or to have any other significant adverse effect on the species.

2. In the case of a proposed regulation under clause 55 (1) (a), the Minister is of the opinion that the regulation is likely to result in a significant reduction in the number of members of the species that live in the wild in Ontario. 2007, c. 6, s. 57 (1).

### **Limitation**

(2) If the Minister is required by subsection (1) to consult with a person who is considered by the Minister to be an expert on the possible effects of a proposed regulation on a species, the Minister shall not recommend the regulation to the Lieutenant Governor in Council, and the Lieutenant Governor in Council shall not make the regulation, unless,

- (a) the Minister is of the opinion that the regulation will not result in the species no longer living in the wild in Ontario;
- (b) the person consulted by the Minister under subsection (1) submitted a written report to the Minister on the possible effects of the proposed regulation on the species and the report included the person's opinion on,
  - (i) in the case of any proposed regulation under subsection 55 (1), whether the regulation will jeopardize the survival of the species in Ontario or have any other significant adverse effect on the species, and, if so, whether the regulation will result in the species no longer living in the wild in Ontario, and
  - (ii) in the case of a proposed regulation under clause 55 (1) (a), whether the regulation will result in a significant reduction in the number of members of the species that live in the wild in Ontario;
- (c) the Minister considered alternatives to the proposal for a regulation, including,
  - (i) entering into one or more agreements under section 16 or issuing one or more permits under section 17, or
  - (ii) making a different regulation;
- (d) the Minister gave notice of the proposal for a regulation to the public under section 16 of the *Environmental Bill of Rights, 1993* at least two months before the day the regulation is made; and
- (e) the notice given under clause (d),
  - (i) in the case of any proposed regulation under subsection 55 (1),
    - (A) set out the Minister's opinion on whether the regulation will jeopardize the survival of the species in Ontario or have any other significant adverse effect on the species, and
    - (B) stated that the Minister is of the opinion that the regulation will not result in the species no longer living in the wild in Ontario,
  - (ii) in the case of a proposed regulation under clause 55 (1) (a), set out the Minister's opinion on whether the regulation will result in a significant reduction in the number of members of the species that live in the wild in Ontario,
  - (iii) gave the Minister's reasons for the opinions referred to in subclauses (i) and (ii),
  - (iv) set out a copy of the report referred to in clause (b),
  - (v) set out alternatives to the proposal for a regulation that the Minister considered under clause (c),

- (vi) set out the reasons for making the proposed regulation, including any significant social or economic benefit to Ontario, and
- (vii) set out steps that could be taken to minimize any adverse effects of the proposed regulation on individual members of the species. 2007, c. 6, s. 57 (2).

**Fundamental changes in a proposal**

(3) For the purposes of subsection (1), the question of whether a proposal has been so fundamentally altered as to become a new proposal is in the sole discretion of the Minister. 2007, c. 6, s. 57 (3).

**Interpretation**

(4) In this section,  
“proposal for a regulation” has the same meaning as in the *Environmental Bill of Rights, 1993*. 2007, c. 6, s. 57 (4).

2. **O. Reg. 242/08: General Regulation promulgated pursuant to the *Endangered Species Act*, 2007, S.O. 2007, c 6 (as it was on July 1, 2013), ss. 12, 22.1, 23.4, 23.5, 23.6, 23.7, 23.8, 23.9, 23.10, 23.11, 23.12, 23.13, 23.14, 23.15, 23.16, 23.17, 23.18, 23.19, 23.20**

**Commercial cultivation of vascular plants, etc.**

12. (1) Clauses 9 (1) (a) and (b) of the Act do not apply in respect of a vascular plant species to a person who is engaged in the commercial cultivation of that species, if,

- (a) the person cultivates the species without the use of any material from the species, such as seeds, roots or cuttings, that was taken from the wild in Ontario on or after the date the species was listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species;
- (b) the person is not engaged in cultivating the species in the wild in Ontario; and
- (c) the person is not engaged in cultivating the species in a manner that is likely to spread disease or pests to, or to compromise the genetic integrity of, wild populations of the species.

(d), (e) REVOKED: O. Reg. 176/13, s. 7 (1).

O. Reg. 242/08, s. 12 (1); O. Reg. 294/11, s. 2 (1); O. Reg. 176/13, s. 7 (1).

(1.1) REVOKED: O. Reg. 176/13, s. 7 (2).

(2) Clause 9 (1) (b) of the Act does not apply to a person who buys, sells, leases, trades, possesses or transports a vascular plant cultivated in the manner described in subsection (1) unless the person does so for the purpose of growing a member of the species in the wild in Ontario. O. Reg. 176/13, s. 7 (2).

(3) In this section,

“pest” means any thing that is injurious or potentially injurious, whether directly or indirectly, to plants or to products or by-products of plants. O. Reg. 176/13, s. 7 (2).

[...]

**Forest operations in Crown forests**

22.1 (1) This section applies to a person who conducts forest operations in a Crown forest before July 1, 2018 if the person does so on behalf of the Crown or under the authority of a licence granted under the Crown Forest Sustainability Act, 1994. O. Reg. 176/13, s. 10 (1).

(2) Subject to subsection (3), clause 9 (1) (a) and subsection 10 (1) of the Act do not apply to a person who, while conducting forest operations described in subsection (1), kills, harms, harasses or takes a member of a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species, or damages or destroys the habitat of such a species, if the person satisfies one of the following conditions:

1. In cases where the applicable forest management plan includes an operational prescription for an area of concern that specifically applies to the species, the person must conduct the forest operations in accordance with the prescription.

2. In cases where the applicable forest management plan does not include an operational prescription for an area of concern that specifically applies to the species, but does include a



condition on regular operations that specifically applies to the species, the person must conduct the forest operations in accordance with the condition.

3. In cases where the applicable forest management plan does not include an operational prescription for an area of concern, nor a condition on regular operations, that specifically applies to the species, and where the person, while conducting forest operations, encounters a nest, hibernaculum, den or other feature of the species' habitat that is established or exists at a specific site within the habitat, the person must do all of the following upon encountering the site-specific feature:

- i. suspend forest operations in the area of the site-specific feature,
- ii. ensure that an application is made to the Ministry for an inclusion in the applicable forest management plan of an operational prescription for an area of concern, or for a condition on regular operations, with respect to the site-specific feature, and
- iii. upon the Ministry amending the applicable forest management plan as appropriate, resume forest operations in accordance with the operational prescription or the condition on regular operations, as the case may be.

4. If none of the cases described in paragraphs 1, 2 and 3 apply, the person must conduct the forest operations in accordance with the applicable forest management plan. O. Reg. 176/13, s. 10 (1).

(3) Clause 9 (1) (a) and subsection 10 (1) of the Act do not apply to a person who kills, harms or harasses a woodland caribou (forest-dwelling boreal population), or damages or destroys its habitat, while conducting forest operations described in subsection (1) within the woodland caribou (forest-dwelling boreal population) continuous distribution area if, in addition to meeting one of the conditions set out in paragraphs 1, 2, 3 and 4 of subsection (2), all of the following conditions are met:

- 1. The applicable forest management plan provides, directly or indirectly, for,
  - i. the continuous availability of habitat for woodland caribou (forest-dwelling boreal population), both spatially and temporally,
  - ii. the establishment and growth of areas of conifer forests that are suitable to provide woodland caribou (forest-dwelling boreal population) habitat in the future, and
  - iii. road-use management strategies that assist in maintaining or improving habitat conditions for woodland caribou (forest-dwelling boreal population).

2. The person conducts the forest operations in accordance with the applicable forest management plan.

3. If the person conducting the forest operations is the holder of a licence granted to the person under section 26 of the Crown Forest Sustainability Act, 1994 in respect of the management unit in which the forest operations were conducted, and the forest operations are conducted during a one-year period that begins on April 1 and ends on the following March 31, the management unit annual report for that one-year period that is required under the Forest Management Planning Manual must be prepared by the person in accordance with the Forest Management Planning Manual and submitted to the Minister at the time and in the manner required by the Forest Management Planning Manual, unless the person no longer holds the licence to conduct forest operations in the management unit at the time the annual report is due. O. Reg. 176/13, s. 10 (1).

(4) Subclauses 9 (1) (b) (i) and (ii) of the Act do not apply to a person who transports or possesses a member of a species if, pursuant to subsection (2) or (3), clause 9 (1) (a) of the Act did not apply with respect to the member of the species. O. Reg. 176/13, s. 10 (1).

(5) In this section,

“condition on regular operations” means a condition that applies to the carrying out of harvesting, renewal or tending operations and is specified in a forest management plan but is not addressed by an operational prescription for an area of concern set out in the forest management plan; (“condition d’exécution des opérations normales”)

“forest management plan” has the same meaning as in the Crown Forest Sustainability Act, 1994; (“plan de gestion forestière”)

“Forest Management Planning Manual” has the same meaning as in the Crown Forest Sustainability Act, 1994; (“Manuel de planification de la gestion forestière”)

“forest operations” has the same meaning as in the Crown Forest Sustainability Act, 1994; (“opérations forestières”)

“woodland caribou (forest-dwelling boreal population) continuous distribution area” means the area identified as a continuous distribution area on a map entitled “Woodland Caribou (forest-dwelling boreal population) Continuous Distribution Area / Aire de répartition continue du caribou des bois (population boréale sylvicole)”, dated April 23, 2013, that is available on the Ministry website. (“aire de répartition continue du caribou des bois (population boréale sylvicole)”) O. Reg. 176/13, s. 10 (1).

[...]

### **Aquatic species**

**23.4** (1) Subject to subsection (2), this section applies to a person who is carrying out one of the following activities in or adjacent to a river, creek, stream, brook or similar watercourse, other than a watercourse identified in subsection (3), if the watercourse is the habitat of a species listed in the Schedule to this section:

1. The maintenance, repair, modification, expansion, removal or replacement of a bridge, culvert, pier or other structure.
2. The construction, maintenance, repair, modification, expansion, removal or replacement of a pipeline or conduit other than a pipeline or conduit situated under a watercourse that was or will be installed using open-cut trench techniques. O. Reg. 176/13, s. 14.

(2) This section does not apply to the following activities:

1. Any modification or replacement of a structure that would increase the portion of the existing footprint of the structure that is within the bankfull width of the watercourse by more than 25 per cent.
2. Any activity that would damage,
  - i. more than a total of 300 square metres of land situated either within the watercourse or outside of the watercourse but within 30 metres of the bankfull width of the watercourse, subject to subparagraph ii, or
  - ii. more than 100 square metres of land situated within the watercourse below the bankfull width.
3. Any activity that involves,

- i. the installation of a temporary bridge or a temporary culvert, or
    - ii. the deposition of material in a watercourse to establish a temporary road access.
  - 4. Any activity that involves a change to the alignment of any part of a watercourse.
  - 5. Any activity described in subsection (1) that would have an incidental impact on a coastal wetland, lake or other body of water that is not a river, creek, stream, brook or similar watercourse.
  - 6. Any activity to which section 23.9 applies.
  - 7. Any construction, maintenance, repair, modification, expansion, removal or replacement of a dam or hydro-electric generating station. O. Reg. 176/13, s. 14.
- (3) This section does not apply to activities carried out in or adjacent to the following watercourses or portions of watercourses:
- 1. The Detroit River.
  - 2. The Niagara River.
  - 3. The St. Clair River.
  - 4. The St. Lawrence River.
  - 5. The portion of the main channel of the Sydenham River from the downstream edge of the bridge on Tuppersville Road within the Municipality of Chatham-Kent extending upstream to the upstream edge of the bridge on County Road 77/Murphy Drive within the Township of Adelaide-Metcalf.
  - 6. The portion of the main channel of the Ausable River from the downstream edge of the bridge on Bog Line/Parkhill Drive/County Road 18 within the Municipality of Lambton Shores to the upstream edge of the bridge on Crediton Road/County Road 10 within the Municipality of South Huron. O. Reg. 176/13, s. 14.
- (4) Clause 9 (1) (a) and subsection 10 (1) of the Act do not apply to a person who is engaged in an activity described in subsection (1) and who, in the course of carrying out the activity, kills, harms, harasses, captures or takes a member of a species listed in the Schedule to this section, or damages or destroys the habitat of such a species, if the person satisfies the conditions set out in subsection (6). O. Reg. 176/13, s. 14.
- (5) Subclauses 9 (1) (b) (i) and (ii) of the Act do not apply to the possession or transport of a member of a species if,
- (a) pursuant to subsection (4), clause 9 (1) (a) of the Act did not apply with respect to the member of the species; or
  - (b) the possession or transport of the member of the species is necessary in order to satisfy the conditions set out in subsection (6). O. Reg. 176/13, s. 14.
- (6) The following are the conditions that a person who carries out an activity described in subsection (1) must satisfy for the purposes of subsection (4):
- 1. Before commencing the activity, the person must,
    - i. give the Minister notice of the activity by submitting a notice of activity form available on the Registry to the Minister through the Registry, and
    - ii. prepare in accordance with subsection (7) a mitigation plan that meets the requirements of subsection (8).
  - 2. The person must ensure that the notice of activity includes,

- i. a description of the activity,
    - ii. the proposed start and end dates of the activity and the location at which it will be carried out, and
    - iii. the name of every species referred to in the Schedule to this section that will likely be affected by the activity.
  - 3. The person must follow the requirements of section 23.3 with respect to the completion of the notice of activity form, the keeping of records relating to the notice of activity form and the updating of the information on the Registry.
  - 4. While carrying out the activity, the person must,
    - i. comply with all the requirements of the mitigation plan, including the requirements that relate to the action that the person must complete under paragraph 8 in order to provide a benefit to the species identified in the notice of activity form, and
    - ii. ensure that reasonable steps are taken to minimize the adverse effects of the activity on the species identified in the notice of activity form, including the steps described in subsection (9) and such other steps as may be described in the mitigation plan.
  - 5. After the plan is prepared, the person must,
    - i. retain a copy of the mitigation plan for at least five years after the activity is completed, and
    - ii. provide a copy of the mitigation plan to the Ministry within 14 days of receiving a request for it.
  - 6. While carrying out the activity and for a period of five years following the completion of the activity, the person shall monitor the effectiveness of,
    - i. the steps taken under subparagraph 4 ii to minimize the adverse effects of the activity on each species identified in the notice of activity form, and
    - ii. the action completed under paragraph 8 to benefit each species identified in the notice of activity form.
  - 7. While the person is carrying out the activity and carrying out the monitoring requirements of paragraph 6, the person must create and maintain a monitoring record and the person must,
    - i. retain the record for at least five years after the activity is completed, and
    - ii. provide a copy of the record to the Ministry within 14 days of receiving a request for it.
  - 8. Subject to subsection (12), within one year of the completion of the activity, the person must complete one of the actions described in subsection (11) in order to provide a benefit to each species identified in the notice of activity form and the action must be carried out in an area that would benefit the species.
  - 9. If the person or an employee or agent of the person observes a species identified in the notice of activity form in the course of carrying out the activity, the person must ensure that, within three months of the observation, the Natural Heritage Information Centre Rare Species Reporting Form available on the Ministry website is completed, detailing the species and number of individual members that were observed, the date and location of observation and any other information requested on the form. O. Reg. 176/13, s. 14.
- (7) A mitigation plan shall be prepared and updated by one or more persons with expertise in relation to every species that is the subject of the plan, using the best available information on

steps that may help minimize or avoid adverse effects on the species, which includes consideration of information obtained from the Ministry, aboriginal traditional knowledge and community knowledge if it is reasonably available. O. Reg. 176/13, s. 14.

(8) A mitigation plan shall include the following information:

1. The name and contact information of the person who is proposing to carry out an activity described in subsection (1).
2. A map indicating the geographic location of the property on which the activity will occur and the names and location of all watercourses on the property.
3. With respect to the activity that the person proposes to carry out,
  - i. a description of the activity,
  - ii. the proposed start and completion dates of the activity, and
  - iii. a description of all of the stages of the activity and a timeline for the stages.
4. A list of species referred to in the Schedule to this section that may be affected by the activity and,
  - i. a description of the survey methodology used or the records reviewed to determine if a species referred to in the Schedule to this section could be affected by the activity, and
  - ii. a description of how the activity may affect the species or its habitat, including a list of any works to be carried out in or adjacent to the habitat of the species, such as works involving water crossings, structures, or any other works that may affect the species or its habitat.
5. Detailed plans on the steps the person shall take during the activity to minimize the adverse effects on the species, including,
  - i. details of the steps described in subsection (9), including the specific dates, locations and methods applicable to each step,
  - ii. the times during the year at which a species identified under paragraph 4 is likely to be carrying out a life process related to reproduction or rearing and at which activities should not be carried out in the habitat of a species,
  - iii. details of the steps the person must take in accordance with paragraph 2 of subsection (9) to isolate the work area and relocate a species identified under paragraph 4, including the coordinates of the relocation area, and
  - iv. details of the steps the person must take to restore substrate and riparian areas that are damaged during the activity in accordance with paragraph 13 of subsection (9).
6. A description of the steps the person must take in accordance with subsection (10) to monitor the effectiveness of,
  - i. the actions taken to minimize the adverse effects of the activity on the species, and
  - ii. the action completed under paragraph 8 of subsection (6) to benefit the species identified in the notice of activity form.
7. With respect to an action described under paragraph 8 of subsection (6) that will be completed to benefit the species identified in the notice of activity form, reports or other evidence that the action will meet the requirements of one of the paragraphs of subsection (11), such as studies or evidence of the conditions of the area before the beneficial action was undertaken.

8. Details of the action that will be completed under paragraph 8 of subsection (6) to benefit the species identified in the notice of activity form, including the dates, locations at which the action will be completed and the methods that will be employed to carry it out. O. Reg. 176/13, s. 14.
- (9) The following are the steps that a person must take to minimize the adverse effects of the activity described in the notice of activity form on the species identified in the form:
  1. The person must not carry out any part of the activity that is likely to kill, harm or harass a member of the species or damage or destroy the habitat of the species while the species is likely to be carrying out a life process related to reproduction, including rearing.
  2. The person must isolate the work area within the watercourse in a manner that prevents members of the species from entering the work area, and must relocate any fishes or mussels from within the work area to suitable habitat for the species.
  3. If the activity will take place in the habitat of a mussel species referred to in the Schedule to this section, any relocation of mussels must be carried out in accordance with the requirements for mussel relocation described in the document entitled "Protocol for the detection and relocation of freshwater mussel species at risk in Ontario-Great Lakes Area (OGLA)", dated 2008, a Canadian Manuscript Report of Fisheries and Aquatic Sciences 2790, published by Fisheries and Oceans Canada and available on the Fisheries and Oceans Canada website.
  4. No vehicles or machinery may enter the watercourse at any time, except in an area of the watercourse in which the species have been isolated and from which they have been relocated in accordance with paragraph 2, and after the area has been de-watered.
  5. The flow of the watercourse that is redirected around the work area must be maintained to ensure that water quantity and quality is not affected downstream of the activity.
  6. If the activity involves the maintenance, repair, modification, expansion or replacement of an open-bottom culvert, the culvert must remain as an open-bottom culvert or may be converted to a clear span bridge.
  7. If the activity involves the construction, maintenance, repair, modification, or expansion of a pipeline or conduit under the watercourse,
    - i. the activity must not take place in an area that a fish species uses to carry out a life process related to reproduction, including rearing,
    - ii. the activity must be conducted using trenchless techniques, which must be applied at a minimum of two metres below the bed of the watercourse,
    - iii. no part of the activity may be conducted in the watercourse and there must be no damage to the watercourse bed or banks as a result of the activity,
    - iv. bore pits for directional drilling must be located outside the floodplain and bore pits for other trenchless techniques must be located a minimum of five metres outside of the bankfull width, and must include the appropriate erosion and sediment controls, as set out in paragraph 11, and
    - v. a contingency plan, including an emergency response plan to deal with a failure of the trenchless techniques referred to in subparagraph ii, must be prepared and all necessary equipment and materials to implement the plan must be available on site until the activity is complete.

8. All construction equipment used for the purpose of carrying out the activity must be operated in a way that minimizes adverse effects on the habitat of the species and prevents deleterious substances from entering the watercourse.
  9. No machinery or equipment may be maintained or refuelled within 30 metres of the watercourse.
  10. Any equipment, stockpiled material or construction material must be stored a minimum distance of 30 metres from the habitat of the species and in a manner that prevents sediment or deleterious substances from entering the habitat of the species.
  11. The person must establish and maintain sediment and erosion control measures, which must include installing and maintaining a double row of sediment control fencing consisting of a non-woven material with staked straw bales, to prevent sediment from entering any part of the watercourse.
  12. Any water that is laden with sediment that the person proposes to discharge must be filtered to remove the sediment before it enters any part of the watercourse.
  13. Riparian areas that are damaged during the activity must be restored to provide suitable conditions for the species, by stabilizing exposed soils and planting native non-invasive plants, as soon as possible after the area is damaged.
  14. If the person discovers that steps described in paragraphs 1 to 13 or in the mitigation plan have not been effective in minimizing the adverse effects of the activity on the species or that the action completed to benefit the species under paragraph 8 of subsection (6) has not been effective, the person shall take such actions as are necessary to increase their effectiveness, including,
    - i. adjusting the sediment and erosion control measures,
    - ii. installing tree guards or wire mesh to protect trees or shrubs,
    - iii. replacing dead plants, and
    - iv. repairing areas that have suffered due to failed sediment and erosion control measures.

O. Reg. 176/13, s. 14.
- (10) The monitoring required by paragraph 6 of subsection (6) must include,
- (a) daily inspections of the activity site while the activity and the action for the benefit of the species required under paragraph 8 of subsection (6) are being carried out; and
  - (b) annual inspections of the activity site for a period of five years after the activity is completed. O. Reg. 176/13, s. 14.
- (11) For the purposes of paragraph 8 of subsection (6), the following are the actions that a person may complete in order to provide a benefit to the species identified in the notice of activity form:
1. Remediation of an area of degraded riparian habitat to create the conditions that are required by the species adversely affected by the activity, which may include bank stabilization and riparian planting, if,
    - i. the area is in a degraded state prior to the activity taking place, and
    - ii. the area of degraded riparian habitat is at least two times the size of the total area that is adversely affected by the activity, including the areas that are both in the watercourse and adjacent to the watercourse.

2. Improvement of an existing storm water management facility, by planting native non-invasive plants that will shade the storm water management pond, in order to reduce the water temperature and improve the quality of water being discharged at the outlet of the facility and, in so doing, create the conditions that are required by the species adversely affected by the activity, if,
  - i. the area is not adequately vegetated prior to the activity taking place, and
  - ii. the area planted is at least two times the size of the total area that is adversely affected by the activity, including the areas that are both in the watercourse and adjacent to the watercourse.
3. Improvement of an existing storm water management facility, by installing a bottom draw outlet or a cooling trench to the facility, in order to reduce the temperature of water being discharged at the outlet of the facility and, in so doing, create the conditions that are required by the species adversely affected by the activity.
4. Remediation of an existing perched culvert to remove barriers to fish passage that exist in the watercourse and, in so doing, create the conditions that are required by the species adversely affected by the activity. O. Reg. 176/13, s. 14.

(12) The requirement in paragraph 8 of subsection (6) to complete an action described in subsection (11) in order to provide a benefit to the species identified in the notice of activity form does not apply if the activity identified in the notice of activity form is the replacement of a closed-bottom culvert with an open-bottom culvert or a clear span bridge. O. Reg. 176/13, s. 14.

(13) The monitoring record required under paragraph 7 of subsection (6) shall,

- (a) document the data and information collected during monitoring conducted at the site, such as the effectiveness of erosion control measures and the growing progress of riparian plantings;
- (b) evaluate and summarize the effectiveness of the steps taken by the person to minimize adverse effects of the activity on the species identified in the notice of activity form;
- (c) evaluate and summarize the effectiveness of the action completed under paragraph 8 of subsection (6) in order to provide a benefit to the species identified in the notice of activity form, such as the effectiveness of bank stabilization measures or the growing progress of riparian plantings;
- (d) document details of any encounters with members of the species identified in the notice of activity form; and
- (e) describe any measures that were followed during the course of carrying out the activity described in the notice of activity form or of the action that was completed under paragraph 8 of subsection (6) to increase the effectiveness of the steps taken to minimize the adverse effects of the activity or the effectiveness of the action completed under paragraph 8 of subsection (6). O. Reg. 176/13, s. 14.

(14) In this section,

“bankfull width” means the width of a watercourse at the point where the water begins to leave the channel and move into the floodplain. O. Reg. 176/13, s. 14.



SCHEDULE  
SPECIES TO WHICH SECTION APPLIES

1. The following species of mussels listed as endangered or threatened on the Species at Risk in Ontario List:
  - i. Eastern Pondmussel.
  - ii. Fawnsfoot.
  - iii. Hickorynut.
  - iv. Kidneyshell.
  - v. Rayed Bean.
  - vi. Round Pigtoe.
  - vii. Salamander Mussel.
  - viii. Snuffbox.
  - ix. Mapleleaf Mussel.
  - x. Rainbow Mussel.
  - xi. Wavy-rayed Lampmussel.
2. The following species of fish listed as endangered or threatened on the Species at Risk in Ontario List:
  - i. Eastern Sand Darter.
  - ii. Pugnose Shiner.
  - iii. Redside Dace.
  - iv. Black Redhorse.
  - v. Channel Darter.
  - vi. Cutlip Minnow.
  - vii. Silver Shiner.
  - viii. Spotted Gar.

O. Reg. 176/13, s. 14.

**Barn swallow**

**23.5** (1) In this section,

“barn swallow active season” means the period of each year when barn swallow carry out life processes relating to breeding, nesting and rearing, and that begins around the beginning of May and ends around the end of August, the exact dates varying according to the area of the Province in which the barn swallow are located and the climate conditions of each year; (“saison active de l’hirondelle rustique”)

“nest cup” means a container, receptacle or vessel that may be used as a nest by barn swallow. (“nid artificiel”) O. Reg. 176/13, s. 14.

(2) Clause 9 (1) (a) and subsection 10 (1) of the Act do not apply to a person who harms or harasses a barn swallow, or who damages or destroys its habitat, while carrying out the maintenance, repair, modification, replacement or demolition of a building or structure that provides barn swallow habitat, if the person satisfies the conditions set out in subsections (3) to (12). O. Reg. 176/13, s. 14.

(3) The following are the conditions that a person who carries on an activity described in subsection (2) must satisfy for the purposes of subsection (2):

1. Before commencing the activity, the person must,
  - i. give the Minister notice of the activity by submitting a notice of activity form available on the Registry to the Minister through the Registry,
  - ii. ensure that the notice includes,
    - A. a description of the activity,
    - B. the proposed start and end dates for the activity,
    - C. the location of the building or structure that will be the object of the activity, and
    - D. notice of the fact that the activity will impact barn swallow habitat,
  - iii. prepare a barn swallow mitigation and restoration record in accordance with subsection (4).
2. The person must follow the requirements of section 23.3 with respect to the completion of the notice of activity form referred to in subparagraph 1 i, the keeping of records relating to the notice of activity form and the updating of the information on the Registry.
3. Before, during and after carrying out the activity described in subsection (2), the person must,
  - i. follow the steps set out in subsections (5) to (9) to minimize the adverse effects of the activity on barn swallow and its habitat, and
  - ii. update the barn swallow mitigation and restoration record to include the steps referred to in subparagraph i.
4. The person must carry out the monitoring and record keeping activities described in subsections (10) to (12).
5. Every year that the person is required to monitor barn swallow habitat under subsection (10), the person must notify the Ministry of barn swallow observed during the monitoring by completing, within three months following the completion of the monitoring, the Natural Heritage Information Centre Rare Species Reporting Form available on the Ministry website detailing the species, number of barn swallows, the date and location of observation and any other information requested on that form. O. Reg. 176/13, s. 14.

(4) A barn swallow mitigation and restoration record referred to in subparagraph 1 iii of subsection (3) shall, when first prepared, include the following information:

1. The name and contact information of the person who is proposing to carry out an activity described in subsection (2).
2. A description of the activity the person proposes to carry out, including the proposed start and completion dates.
3. A description of the building or structure that is the object of the activity.
4. The number, location, and description of barn swallow nests located on the building or structure, and the amount of area suitable for nesting that the building or structure provides. O. Reg. 176/13, s. 14.

(5) The following are the measures a person who proposes to carry out an activity described in subsection (2) must follow to minimize the adverse effects of the activity on barn swallow and its habitat:

1. If any part of the activity is to be carried out during the barn swallow active season, the person must ensure that barn swallow are excluded from any part of the building or structure that is the object of the activity by doing the following before the barn swallow active season begins:
    - i. removing from the building or structure any existing barn swallow nests that may be impacted by the activity, and
    - ii. installing tarps and netting or taking other such measures to prevent barn swallow from accessing any part of the building or structure that is the object of the activity.
  2. If, despite following the measures described in paragraph 1, barn swallow enter the building or structure to establish nests, any part of the activity that would harm or harass barn swallow while nesting must be suspended until the end of the barn swallow active season.
  3. If, as a result of carrying out the activity or the requirements of paragraph 1, barn swallow nests on a building or structure will be removed, damaged or destroyed, the person must create habitat for barn swallow as follows:
    - i. for each nest that was removed, damaged or destroyed, the person must substitute one nest cup,
    - ii. the substitute nest cup must be installed,
      - A. in the building or structure that was the object of the activity and in any area of the building or structure that continues to provide conditions that are suitable for barn swallow nesting,
      - B. in any building or structure that exists within one kilometre of the building or structure that was the object of the activity if it provides conditions that are suitable for barn swallow nesting, or
      - C. in any building or structure that the person constructs within one kilometre of the building or structure that was the object of the activity, that meets the requirements of subsection (8),
    - iii. the substitute nest cup must be installed within the time period set out in subsection (6).
  4. The person must create habitat for barn swallow in accordance with subsections (7), (8) and (9) and within the time period set out in subsection (6) if, as a result of carrying out the activity, a building or structure that provides barn swallow habitat,
    - i. will be destroyed, or
    - ii. will be altered so that it no longer provides suitable conditions for barn swallow nesting or provides a smaller area for barn swallow nesting.
  5. The person must maintain a building or structure constructed or modified under paragraph 4 for a period of three years after the habitat is created. O. Reg. 176/13, s. 14.
- (6) A person who proposes to carry out an activity described in subsection (2) must create habitat for barn swallow under paragraph 3 or 4 of subsection (5) within one of the following time frames:
1. If the activity will begin outside of the barn swallow active season, before the beginning of the next barn swallow active season.

2. If the activity will begin during the barn swallow active season, before the beginning of that barn swallow active season. O. Reg. 176/13, s. 14.

(7) A person who is required to create habitat for barn swallow under paragraph 4 of subsection (5) must do so,

(a) in one of the following ways:

- (i) by constructing one or more structures that meet the requirements of subsection (8), or
- (ii) by modifying one or more existing buildings or structures that do not provide habitat for barn swallow so that they meet the requirements of subsection (8); and

(b) in a location that is within one kilometre of the building or structure that will be the object of the activity described in subsection (2) and within 500 metres of an area that provides suitable foraging conditions for barn swallow and that is accessible to barn swallow. O. Reg. 176/13, s. 14.

(8) A building or structure constructed or modified under clause (7) (a) must provide suitable conditions for barn swallow nesting and must,

- (a) provide horizontal ledges or rough vertical surfaces with a sheltered overhang;
- (b) provide surface areas suitable for nest attachment at a height that minimizes disturbances to barn swallow and in a location that minimizes predation;
- (c) allow barn swallow to freely enter and exit nests;
- (d) provide suitable area to accommodate appropriate spacing between nests; and
- (e) be structurally sound and capable of providing habitat for barn swallow on a long term basis. O. Reg. 176/13, s. 14.

(9) The amount of habitat provided by a building or structure constructed or modified under clause (7) (a) must be greater than the amount of habitat that was lost in the building or structure that was the object of the activity described in subsection (2). O. Reg. 176/13, s. 14.

(10) For a period of three years after a person has created habitat for barn swallow under paragraph 3 or 4 of subsection (5), the person shall monitor the use of the habitat by barn swallow during the barn swallow active season of each year and shall record information collected during monitoring, including the following information:

- 1. The number, description and location of new nests created by barn swallow.
- 2. An estimate of the number of barn swallow using the building or structure. O. Reg. 176/13, s. 14.

(11) A person who carries out an activity described in subsection (2) shall retain the barn swallow mitigation and restoration record created under subsection (4) for a period of two years after the monitoring required under subsection (10) is completed and shall update the record from time to time to include the following information:

- 1. A description of the steps followed by the person in accordance with subsection (5) to minimize the adverse effects of the activity on barn swallow and its habitat, including details of,
  - i. nest cups installed on buildings or structures in accordance with paragraph 3 of subsection (5), and

- ii. buildings or structures constructed or modified in accordance with paragraph 4 of subsection (5), the amount of nesting area created in the buildings or structures and their location.
- 2. The information recorded during monitoring activities described in subsection (10).
- 3. Any change to the information included in the record under subsection (4). O. Reg. 176/13, s. 14.

(12) A person who carries out an activity described in subsection (2) shall provide a copy of the barn swallow mitigation and restoration record to the Ministry within 14 days of receiving a request for it. O. Reg. 176/13, s. 14.

### **Bobolink, eastern meadowlark**

**23.6** (1) This section applies with respect to any activity to develop land, such as the construction of buildings, structures, roads or other infrastructure and the excavation and landscaping of land, in an area that is the habitat of bobolink or eastern meadowlark, but does not apply to an activity to which section 23.2 applies. O. Reg. 176/13, s. 14.

(2) Clause 9 (1) (a) and subsection 10 (1) of the Act do not apply to a person who, while carrying out an activity described in subsection (1), kills, harms, harasses, captures or takes a bobolink or an eastern meadowlark, or damages or destroys its habitat, if,

- (a) the size of the area of habitat of bobolink or eastern meadowlark that is damaged or destroyed by the activity is equal to or less than 30 hectares; and
- (b) the person satisfies all of the conditions set out in subsection (4). O. Reg. 176/13, s. 14.

(3) Subclauses 9 (1) (b) (i) and (ii) of the Act do not apply to the possession or transport of a bobolink or an eastern meadowlark if, pursuant to subsection (2), clause 9 (1) (a) of the Act did not apply with respect to the bobolink or eastern meadowlark. O. Reg. 176/13, s. 14.

(4) The following are the conditions that a person who carries out an activity described in subsection (1) must satisfy for the purposes of clause (2) (b):

- 1. Before commencing the activity, the person must,
  - i. give the Minister notice of the activity by submitting a notice of activity form available on the Registry to the Minister through the Registry,
  - ii. prepare a habitat management plan in accordance with subsections (5) and (6), and
  - iii. give the Minister a written undertaking to continue, after the end of the five-year period referred to in paragraph 7, to manage any habitat created or enhanced in accordance with paragraph 6 by carrying out the measures described in subsection (9) until the earlier of,
    - A. the end of the 20-year period that follows the creation or enhancement of the habitat under paragraph 6, or
    - B. if the area of habitat that was destroyed by the activity is eventually returned to a suitable state to be used by bobolink or eastern meadowlark, the day on which the area reaches that state.
- 2. The person must ensure that the notice of activity form submitted under subparagraph 1 i includes,
  - i. a description of the activity,

- ii. the proposed start and end dates of the activity and the area in which it will be carried out, and
  - iii. an indication as to whether the activity will be carried out on land that is habitat for bobolink, for eastern meadowlark, or for both, as the case may be.
- 3. The person must follow the requirements of section 23.3 with respect to the completion of the notice of activity form, the keeping of records relating to the notice of activity form and the updating of the information on the Registry.
- 4. Once a habitat management plan is prepared under subparagraph 1 ii, the person must,
  - i. comply with any provisions in the habitat management plan with respect to the manner in which,
    - A. the activity should be carried out, and
    - B. the habitat for bobolink or eastern meadowlark referred to in paragraph 6 should be created or enhanced, as the case may be, and managed,
  - ii. retain a copy of the habitat management plan for at least five years after the activity is complete, and
  - iii. provide a copy of the habitat management plan to the Ministry within 14 days of receiving a request for it.
- 5. While carrying out the activity, the person must,
  - i. not perform any part of the activity that is likely to damage or destroy the habitat of bobolink or eastern meadowlark or kill, harm or harass bobolink or eastern meadowlark, between May 1 and July 31 of any year, and
  - ii. take reasonable steps to minimize adverse effects of the activity on bobolink and eastern meadowlark, including, if applicable, routing access roads along existing fencerows or hedgerows if possible.
- 6. The person must either create new habitat for bobolink or eastern meadowlark or enhance an already existing habitat for bobolink or eastern meadowlark as follows:
  - i. the area of the new or enhanced habitat must,
    - A. be located outside of the area where the activity is carried out but within the same ecoregion as that area or in an ecoregion that is adjacent to that area, and
    - B. meet the requirements of subsection (7) with respect to its size and dimensions,
  - ii. within 12 months after the day the activity described in subsection (1) is commenced, the work of creating or enhancing the habitat must be completed in a manner that ensures that the habitat meets the requirements of subsection (8) with respect to the types of vegetation it provides.
- 7. For five years after habitat is created or enhanced in accordance with paragraph 6, the person must do the following annually:
  - i. manage the habitat by carrying out the measures described in subsection (9), and
  - ii. monitor the area in which the habitat was created or enhanced by conducting at least three surveys every year at a time when bobolink or eastern meadowlark are likely to be present, to determine if the species are in fact present and, if so, to assess fledgling success.

8. The person must prepare and maintain a record in respect of the activity and the habitat created or enhanced under paragraph 6 and ensure that the record meets the requirements of subsection (10) and the person must,
  - i. retain the record until December 31 of the final year of the five-year period during which the person must manage and monitor the new or enhanced habitat, and
  - ii. provide a copy of the record to the Ministry within 14 days of receiving a request for it. O. Reg. 176/13, s. 14.
- (5) A habitat management plan shall be prepared by a person with expertise in relation to bobolink or eastern meadowlark, or both, as the case may be. O. Reg. 176/13, s. 14.
- (6) A habitat management plan shall include the following information:
  1. The name and contact information of the person on whose behalf the activity described in subsection (1) is being carried out.
  2. With respect to the area of bobolink or eastern meadowlark habitat that is likely to be damaged or destroyed by the activity described in subsection (1),
    - i. a description of the area's location, including a detailed map,
    - ii. the ecoregion in which the area is located, and
    - iii. the size of the area in hectares.
  3. With respect to the activity described in subsection (1) that the person proposes to carry out,
    - i. a description of the activity, and
    - ii. the proposed start date of the activity,
  4. With respect to the area intended as new or enhanced habitat under paragraph 6 of subsection (4),
    - i. a description of the area's location, including a detailed map,
    - ii. the ecoregion in which the area is located,
    - iii. the size of the area in hectares,
    - iv. the composition of the soils covering the area, and
    - v. the percentage of the area covered by grass species at the time the habitat management plan is prepared.
  5. A description of how the area intended as new or enhanced habitat under paragraph 6 of subsection (4) will be created or enhanced and managed for eastern meadowlark or bobolink, including,
    - i. a description of the areas to be seeded, and of the composition of the seed mixture such as the species and their relative percentage within the seed mixture,
    - ii. phasing and times of the year for site preparation, planting, seeding, tending and maintenance, and
    - iii. a description of the practices that will be undertaken for site preparation, planting, seeding, tending and maintenance, including the requirements set out in subsections (8) and (9). O. Reg. 176/13, s. 14.
- (7) An area that will be converted into new or enhanced habitat for bobolink or eastern meadowlark must meet the following requirements as to its size and dimensions:

1. The area must be larger than the area of the habitat for bobolink or eastern meadowlark that is damaged or destroyed by the activity.
  2. The area may be made up of separate parcels of land, but the minimum size of any individual parcel must be no less than four hectares.
  3. No portion of the area shall be less than 200 metres in width. O. Reg. 176/13, s. 14.
- (8) Habitat for bobolink or eastern meadowlark that has been created or enhanced under paragraph 6 of subsection (4) must meet the following requirements with respect to the types of vegetation it provides:
1. A minimum of 60 to 80 per cent of the habitat must be covered with at least three different grass species and any remaining part of the habitat that is not covered with grass species must be covered with forbs or legumes.
  2. Among the grass species referred to in paragraph 1, at least one must grow greater than 50 centimetres high under normal growing conditions. O. Reg. 176/13, s. 14.
- (9) The following are the requirements to manage habitat for bobolink or eastern meadowlark that has been created or enhanced under paragraph 6 of subsection (4):
1. The area shall not be harvested, mowed or cut between April 1 and July 31 of any year.
  2. If the habitat is used for pasture, grazing farm animals must be excluded from at least 50 per cent of the habitat from April 1 until July 31 of each year.
  3. In each of the five years following the creation or enhancement of the habitat, take such actions as are necessary to maintain the grass species, forbs and legumes in the area in the proportions described in paragraph 1 of subsection (8) and remove woody vegetation and invasive species. O. Reg. 176/13, s. 14.
- (10) The record required under paragraph 8 of subsection (4) shall,
- (a) document the steps taken by the person under subparagraph 5 ii of subsection (4) to minimize adverse effects of the activity described in subsection (1) on bobolink or eastern meadowlark;
  - (b) document the steps taken by the person to create or enhance habitat under paragraph 6 of subsection (4) and to manage that habitat under subparagraph 7 i of subsection (4);
  - (c) include photographs of the area created or enhanced as habitat under paragraph 6 of subsection (4) that show the area prior to and after the habitat is created or enhanced;
  - (d) include data and information collected during monitoring under subparagraph 7 ii of subsection (4); and
  - (e) include details of any encounters with the species. O. Reg. 176/13, s. 14.

## **Butternut**

**23.7** (1) In this section,

- “butternut health assessor” means a person or member of a class of persons designated by the Minister for the purpose of assessing whether, and the extent to which, butternut trees are affected by butternut canker; (“évaluateur de la santé des noyers cendrés”)
- “seed zone” means a seed zone identified in the document entitled “Southern Ontario Tree Seed Zone Atlas” that is published by the Ministry of Natural Resources, dated 2011, as amended from time to time, and that is available to the public at the Ministry’s district offices, at the



Ministry's corporate library in Peterborough or on the Ministry's website. ("zone de semences") O. Reg. 176/13, s. 14.

(2) The following classes of butternut trees are established for the purposes of this section:

1. Category 1 tree — the butternut tree is affected by butternut canker to such an advanced degree that retaining the tree would not support the protection or recovery of butternut trees in the area in which the tree is located.
2. Category 2 tree — the butternut tree is not affected by butternut canker or the butternut tree is affected by butternut canker but the degree to which it is affected is not too advanced and retaining the tree could support the protection or recovery of butternut trees in the area in which the tree is located.
3. Category 3 tree — the butternut tree may be useful in determining sources of resistance to butternut canker. O. Reg. 176/13, s. 14.

(3) This section does not apply to a butternut tree if a butternut health assessor has conducted an assessment of the tree in accordance with the practices and requirements referred to in subparagraph 1 ii of subsection (4) and determined that the tree is a category 3 tree. O. Reg. 176/13, s. 14.

(4) Subject to subsection (5), clause 9 (1) (a) of the Act does not apply to a person who kills, harms or takes butternut trees if the following conditions are satisfied:

1. The following events must be completed at least 30 days before the person kills, harms or takes the butternut trees,
  - i. the person must request a butternut health assessor to conduct an assessment of the health of the butternut trees,
  - ii. the butternut health assessor must conduct an assessment of the health of the butternut trees in accordance with the practices and requirements for such assessments set out in the document entitled "Butternut Assessment Guidelines: Assessment of Butternut Tree Health for the Purposes of the *Endangered Species Act, 2007*", published by the Ministry of Natural Resources, dated May 2011, as amended from time to time, and available to the public on the Ministry's website,
  - iii. the butternut health assessor must provide a written report in respect of the butternut trees that is completed in accordance with the guidelines set out in the document referred to in subparagraph ii and that meets the requirements of subsection (6),
  - iv. the person must give the butternut health assessor's report to the district manager of the Ministry for the district in which the butternut trees are located.
2. The butternut health assessor's report must indicate that, in the opinion of the butternut health assessor, the butternut trees are either category 1 trees or category 2 trees and are not category 3 trees.
3. During the 30-day period that follows the day the person gives the report of the butternut health assessor to a district manager, the person must give permission to enter the property on which the trees are located for the purpose of examining the trees to the district manager or any employee of the Ministry who request the permission to do so.
4. If the butternut health assessor's report indicates that one or more of the butternut trees are category 2 trees, the person must satisfy the following additional conditions with respect to those trees after the 30-day period described in paragraph 3 has elapsed:

- i. before killing, harming or taking the category 2 trees, the person must give the Minister notice of the activity by submitting a notice of butternut impact form available on the Registry to the Minister through the Registry,
- ii. the person must ensure that the notice of butternut impact form includes,
  - A. the number of category 2 trees that the person proposes to kill, harm or take,
  - B. whether the category 2 trees will be killed, harmed or taken,
  - C. the location of each category 2 tree and the diameter of each tree at breast height, and
  - D. the date and report number of the butternut health assessor's report prepared in respect of the butternut trees in question,
- iii. the person must follow the requirements of subsections (7) and (8) with respect to the completion of the notice of butternut impact form, the keeping of records relating to the notice of butternut impact form and the updating of the information on the Registry, and
- iv. the person must comply with the requirements set out in subsection (10) for planting seedlings to replace butternut trees that are killed, harmed or taken and for monitoring and tending to those seedlings, and keeping records in relation to the seedlings. O. Reg. 176/13, s. 14.

(5) The exemption from clause 9 (1) (a) of the Act provided in subsection (4) is subject to the following limitations:

- 1. If the report of a butternut health assessor identifies more than 10 butternut trees as category 2 trees among the butternut trees that a person proposes to kill, harm or take, the exemption shall not apply with respect to more than 10 such trees.
- 2. The exemption shall not apply if,
  - i. the person has previously been exempted, pursuant to subsection (4), from clause 9 (1) (a) of the Act with respect to 10 butternut trees that were identified by a butternut health assessor as category 2 trees,
  - ii. the butternut trees that the person is proposing to kill, harm or take are located in the same area as the 10 butternut trees with respect to which the person was previously exempted from clause 9 (1) (a) of the Act, or in an area situated in close proximity to that area, and
  - iii. the reasons for which the person is proposing to kill, harm or take butternut trees are the same as, or similar to, the reasons for which the person previously killed, harmed or took butternut trees. O. Reg. 176/13, s. 14.

(6) A butternut health assessor's report shall, for each butternut tree that a person is proposing to kill, harm or take,

- (a) identify the precise location of the tree;
- (b) set out the diameter of the tree at breast height or indicate that the tree is shorter than breast height;
- (c) state whether, in the opinion of the butternut health assessor, the tree is affected by butternut canker, describe the extent of the canker and classify the tree as a category 1 or 2 tree depending on the extent of the butternut canker;

- (d) determine if, in the opinion of the butternut health assessor, the tree may be useful in determining sources of resistance to butternut canker and should be categorized as a category 3 tree; and
  - (e) identify the reason the person is proposing to kill, harm or take the butternut tree, if known to the butternut health assessor. O. Reg. 176/13, s. 14.
- (7) Before submitting a notice of butternut impact form to the Minister, the person must ensure that,
- (a) all mandatory information requested on the form, including the person's contact information, has been provided; and
  - (b) the information provided on the form is complete and accurate. O. Reg. 176/13, s. 14.
- (8) After submitting a notice of butternut impact form to the Minister, the person must,
- (a) promptly upon obtaining from the Ministry confirmation that a notice of butternut impact form submitted through the Registry has been received by the Minister, make a record of the confirmation;
  - (b) for as long as the activity is being carried out,
    - (i) keep the record of the confirmation and, if applicable, ensure that a copy of the record is kept at the site where the activity is being carried out, and
    - (ii) make the record of the confirmation available to the Ministry upon receiving a request for it; and
  - (c) if there is a change in the contact information for the person who submitted the notice of butternut impact form, update the information on the Registry within 10 business days of the change. O. Reg. 176/13, s. 14.
- (9) A person who provides incomplete, false or misleading information on a notice of butternut impact form or when updating information on the Registry shall be deemed to have not submitted the notice of butternut impact form. O. Reg. 176/13, s. 14.
- (10) A person who kills, harms or takes one or more butternut trees that are category 2 trees and who, pursuant to subsection (4), is exempt from clause 9 (1) (a) of the Act shall comply with the following requirements:
1. For each tree that is killed or taken, the person shall plant butternut seedlings in accordance with the following rules:
    - i. at least two butternut seedlings, if the tree that is killed or taken is described in the butternut health assessor's report as shorter than breast height or less than three centimetres in diameter at breast height,
    - ii. at least five butternut seedlings, if the tree that is killed or taken is described in the butternut health assessor's report as at least three centimetres but less than 15 centimetres in diameter at breast height, and
    - iii. at least 20 butternut seedlings, if the tree that is killed or taken is described in the butternut health assessor's report as 15 centimetres or greater in diameter at breast height.
  2. For each tree that is harmed, the person shall plant butternut seedlings in accordance with the following rules:

- i. at least one butternut seedling, if the tree that is harmed is described in the butternut health assessor's report as shorter than breast height or less than three centimetres in diameter at breast height,
  - ii. at least three butternut seedlings, if the tree that is harmed is described in the butternut health assessor's report as at least three centimetres but less than 15 centimetres in diameter at breast height, and
  - iii. at least 10 butternut seedlings, if the tree that is harmed is described in the butternut health assessor's report as 15 centimetres or greater in diameter at breast height.
3. Every butternut seedling that is planted must have been grown from seed that originated from the seed zone in which it is planted.
4. All butternut seedlings must be planted within three years of the person submitting the relevant notice of butternut impact form under subparagraph 4 i of subsection (4).
5. Butternut seedlings must be planted in an area with the following characteristics:
  - i. the soil must be greater than one metre deep, moist but well-drained and have a fine to medium texture with a recognizable organic layer and with a pH ranging from 6.8 to 7.2, and
  - ii. the area must provide full sunlight conditions to the butternut seedlings.
6. In order to avoid a monoculture of butternut, the person shall plant deciduous trees and shrubs that are not butternut seedlings and that are native to the area in which the seedlings are planted in such numbers to ensure that there are an equal number of butternut trees and other native Ontario species in the area.
7. Every butternut seedling and companion tree or shrub referred to in paragraph 6 must be planted either between March 1 and May 15 or between September 20 and October 30 of any year, except for a butternut seedling or companion tree or shrub that was grown in a container which may be planted between May 16 and May 25 of any year.
8. No more than 200 butternut seedlings shall be planted in a hectare.
9. Butternut seedlings must be planted at least,
  - i. three metres from other planted butternut seedlings,
  - ii. two metres from other trees or shrubs that are likely to be the same height or shorter than the butternut tree at full growth,
  - iii. four metres from other trees or shrubs that are likely to be taller than the butternut tree at full growth,
  - iv. 15 metres from the canopy drip line of trees that are greater than four metres in heights at the time of planting, and
  - v. 100 metres from a highway consisting of two or more lanes in either direction.
10. Every butternut seedling that is planted under this subsection must be monitored once annually between May 15 and September 20 for two years after it is planted to assess the health of the tree and its habitat conditions.
11. In order to ensure the good growth and health of the butternut tree, every butternut seedling that is planted under this subsection must be tended to in accordance with the following rules:

- i. tending activities shall take place once a week from May 15 to September 20 during the first growing season after the butternut seedling is planted,
    - ii. tending activities during the first growing season after the butternut seedling is planted will include,
      - A. maintenance of tree guards to protect the lower stem from rodents,
      - B. vegetation control 60 centimetres around the base of the tree until the tree is above the herbaceous vegetation, and
      - C. watering during drought or low rainfall periods, and
    - iii. tending activities shall take place during the second growing season after the butternut seedling is planted as required to ensure that,
      - A. vegetation is controlled 60 centimetres around the base of the tree until the tree is above the herbaceous vegetation, and
      - B. the tree is watered during drought or low rainfall periods.
  - 12. The person must plant a butternut seedling to replace any butternut seedling planted under this subsection that dies within two years of the planting of the seedling and must do so in accordance with the planting requirements of this subsection.
  - 13. For each butternut seedling planted under this subsection, the person must maintain a record of the planting, monitoring and tending activities required under this subsection, which record shall include,
    - i. the date the butternut seedling was planted,
    - ii. the date of each time a person attended to monitor or tend to the butternut tree,
    - iii. a description of every monitoring and tending activity,
    - iv. an assessment of the health status of the butternut seedling every time it is monitored or tended to to indicate if its health is good, poor or whether it is dead, and
    - v. whether the butternut tree shows evidence of butternut canker and, if so, a description of the extent to which the tree is affected by butternut canker.
  - 14. Within 14 days of receiving a request from the Ministry, the person shall provide the record maintained under paragraph 13. O. Reg. 176/13, s. 14.
- (11) Clause 9 (1) (a) of the Act does not apply to a person who kills, harms or takes a butternut tree that was cultivated if the person is the owner or occupier of the land on which the tree is located or is acting on behalf of the owner or occupier of such land. O. Reg. 176/13, s. 14.
- (12) The exemption from clause 9 (1) (a) of the Act provided under subsection (11) does not apply in respect of a butternut tree that was cultivated as a result of the requirements for an exemption under subsection (4) or of a condition of a permit issued under section 17 of the Act. O. Reg. 176/13, s. 14.
- (13) Clause 9 (1) (b) of the Act does not apply with respect to butternut. O. Reg. 176/13, s. 14.
- (14) Subsection 10 (1) of the Act does not apply with respect to the damage or destruction of the habitat of a butternut tree that occurs when a person kills, harms or takes a butternut tree if the person is exempt from clause 9 (1) (a) of the Act pursuant to an exemption under subsection (4) or (12). O. Reg. 176/13, s. 14.
- (15) Subsection 9 (1) of the Act does not apply to nuts from a butternut tree. O. Reg. 176/13, s. 14.

(16) Section 12 of this Regulation does not apply to the commercial cultivation of butternut trees. O. Reg. 176/13, s. 14.

### **Chimney swift**

**23.8** (1) In this section,

“chimney swift active season” means the period of each year when chimney swift carry out life processes relating to breeding, nesting and rearing, and that begins around the end of April and ends around the middle of October, the exact dates varying according to the area of the Province in which the chimney swift are located and the climate conditions of each year. O. Reg. 176/13, s. 14.

(2) Clause 9 (1) (a) and subsection 10 (1) of the Act do not apply to a person who harms or harasses a chimney swift, or who damages or destroys its habitat, while carrying out the maintenance, repair, modification, replacement or demolition of a chimney that provides chimney swift habitat, if the person satisfies the conditions set out in subsections (3) to (11). O. Reg. 176/13, s. 14.

(3) The conditions that a person must satisfy for the purposes of subsection (2) are as follows:

1. Before commencing an activity described in subsection (2), the person must,
  - i. give the Minister notice of the activity by submitting a notice of activity form available on the Registry to the Minister through the Registry,
  - ii. ensure that the notice includes,
    - A. a description of the activity,
    - B. the proposed start and end dates for the activity,
    - C. the location of the chimney that will be the object of the activity, and
    - D. notice of the fact that the activity will impact chimney swift,
  - iii. prepare a chimney swift mitigation and restoration record in accordance with subsection (4).
2. The person must follow the requirements of section 23.3 with respect to the completion of the notice of activity form referred to in subparagraph 1 i, the keeping of records relating to the notice of activity form and the updating of the information on the Registry.
3. Before, during and after carrying out the activity described in subsection (2), the person must,
  - i. follow the steps set out in subsections (5) to (7) to minimize the adverse effects of the activity on chimney swift and its habitat, and
  - ii. update the chimney swift mitigation and restoration record to include the steps referred to in subparagraph i.
4. The person must carry out the monitoring and record keeping activities described in subsections (8) to (11).
5. Every year that the person is required to monitor chimney swift habitat under subsection (8), the person must notify the Ministry of chimney swift observed during monitoring by completing, within three months following the completion of the monitoring, the Natural Heritage Information Centre Rare Species Reporting Form available on the Ministry website detailing the species, number of chimney swifts, the date and location of observation and any other information requested on that form. O. Reg. 176/13, s. 14.

(4) A chimney swift mitigation and restoration record referred to in subparagraph 1 iii of subsection (3) shall, when first prepared, include the following information:

1. The name and contact information of the person who is proposing to carry out an activity described in subsection (2).
2. A description of the activity the person proposes to carry out, including the proposed start and completion dates.
3. A description of the chimney that will be affected by the activity, including the height, internal square footage and material.
4. An estimation of the number of chimney swift using the chimney. O. Reg. 176/13, s. 14.

(5) The following are the steps a person who proposes to carry out an activity described in subsection (2) must follow to minimize the adverse effects of the activity on chimney swift and its habitat:

1. If any part of the activity is to be carried out during the chimney swift active season, the person must take measures, such as capping the chimney, to prevent chimney swift from accessing the chimney that will be affected by the activity both before and during the chimney swift active season.
2. If, despite following the measures described in paragraph 1, chimney swift begin to use the chimney during their active season to nest, rest or roost, any part of the activity that would affect the chimney must be suspended until the end of the chimney swift active season.
3. If, as a result of carrying out the activity, a chimney that provides habitat for chimney swift will be unavailable for chimney swift nesting, resting or roosting during the chimney swift active season, but will be available by the following chimney swift active season and will provide at least the same amount of suitable habitat for chimney swift at that time, the person must improve the conditions for chimney swift nesting, resting or roosting provided by the chimney by ensuring that the activity includes measures such as any of the following:
  - i. increasing the height of the chimney,
  - ii. installing a sun collar on the opening of the chimney, or
  - iii. cutting back vegetation encroaching on the chimney's opening.
4. The person must create new habitat for chimney swift in accordance with subsection (6) if, as a result of carrying out the activity, a chimney that provides habitat for chimney swift,
  - i. will be destroyed,
  - ii. will be altered so that it no longer provides suitable conditions for chimney swift nesting, resting or roosting or provides a smaller area for chimney swift nesting, resting or roosting, or
  - iii. will be unavailable for chimney swift nesting, roosting or resting for more than one chimney swift active season.
5. The person must maintain habitat created under paragraph 4 for a period of three years after the habitat is created. O. Reg. 176/13, s. 14.

(6) If a person is required to create new habitat for chimney swift under paragraph 4 of subsection (5), the habitat must be created as follows:

1. The habitat shall be created by either,

- i. constructing one or more new structures, which may or may not be chimneys, that provide appropriate conditions for chimney swift nesting, resting or roosting, or
  - ii. modifying one or more existing structures which may or may not be chimneys, that do not currently provide habitat for chimney swift to provide appropriate conditions for chimney swift nesting, resting or roosting.
2. The habitat must include features to attract chimney swift to the structure or to enhance the suitability of the structure for chimney swift, such as installing a sun collar at the opening of the chimney or planting native shrubs, trees or flowers to attract insects.
3. The structure that is constructed or modified must be located within two kilometres of the chimney that will be affected by the activity described in subsection (2) and must be capable of providing habitat for more chimney swifts than the chimney that was affected by the activity.
4. If a single structure is constructed or modified, the structure must be of a greater height and have greater internal square footage available to chimney swift than the chimney affected by the activity described in subsection (2), but must not be greater than one and a half times the size of the chimney affected by the activity.
5. If more than one structure is constructed or modified, one of the structures must be of at least the same height and have at least the same internal square footage available to chimney swift as the chimney affected by the activity described in subsection (2).
6. A structure must be constructed or modified so as to provide suitable conditions for chimney swift nesting, resting or roosting, including the following:
  - i. the structure must have a temperature range that is suitable for chimney swift nesting, resting and roosting during the chimney swift active season,
  - ii. the opening of the structure must be accessible for chimney swift to enter and exit,
  - iii. the interior surface of the structure must be composed of unpainted, rough-textured material such as brick or cinder block appropriate for clinging and nest adherence,
  - iv. the interior dimensions of the structure must be suitable for chimney swift nesting, resting or roosting,
  - v. the height of the structure must be suitable for chimney swift nesting, resting or roosting having regard to the ground level, the roofline of associated structures and other structures or vegetation within reasonable proximity. O. Reg. 176/13, s. 14.
- (7) A person who proposes to carry out an activity described in subsection (2) and is required to create habitat for chimney swift under paragraph 4 of subsection (5) must do so within one of the following time frames:
  1. If the activity will begin outside of the chimney swift active season, before the beginning of the next chimney swift active season.
  2. If the activity will begin during the chimney swift active season, before the beginning of that chimney swift active season. O. Reg. 176/13, s. 14.
- (8) After a person has created habitat for chimney swift under paragraph 4 of subsection (5), the person shall monitor the use of the habitat by chimney swift during the chimney swift active season for a period of years determined under subsection (9) and shall record information collected during monitoring, including the following information:
  1. An estimate of the number of chimney swift entering or exiting the structure.



2. Evidence of chimney swift nesting in the structure. O. Reg. 176/13, s. 14.

(9) The number of years during which a person must monitor the effectiveness of habitat under subsection (8) shall be determined in accordance with the following rules:

1. If chimney swift are observed and recorded entering and exiting the structure during the first three years of monitoring, the person is not required to conduct further monitoring after the end of the three-year period.
2. If chimney swift are not observed and recorded entering and exiting the structure during the first three years of monitoring, the person shall continue to monitor the habitat until five years have passed after the creation of the habitat under paragraph 4 of subsection (5). O. Reg. 176/13, s. 14.

(10) A person who carries out an activity described in subsection (2) shall retain the chimney swift mitigation and restoration record created under subsection (4) for a period of five years after the activity is completed and shall update the record from time to time to include the following information:

1. A description of the steps followed by the person in accordance with subsection (5) to minimize the adverse effects of the activity on chimney swift and its habitat, including the location, square footage and description of the habitat created under paragraph 4 of subsection (5) or improved under paragraph 3 of subsection (5).
2. The information recorded during monitoring activities described in subsection (8).
3. Any change to the information included in the record under subsection (4). O. Reg. 176/13, s. 14.

(11) A person who carries out an activity described in subsection (2) shall provide a copy of the chimney swift mitigation and restoration record to the Ministry within 14 days of receiving a request for it. O. Reg. 176/13, s. 14.

## **Drainage works**

**23.9** (1) This section applies to a person who carries out one of the following activities in a drainage works or ditch that is the habitat of a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species:

1. Improving or maintaining drainage works, if an agreement for the improvement or maintenance was filed under subsection 2 (2) of the *Drainage Act*.
2. Improving, maintaining or repairing drainage works, if a report that applies to the drainage works was adopted under subsection 45 (1) of the *Drainage Act* or under subsection 3 (15) of that Act, as that subsection read on October 24, 2010.
3. Maintaining a ditch constructed under *The Ditches and Watercourses Act*, being chapter 109 of the Revised Statutes of Ontario, 1960, in accordance with subsection 3 (18) of the *Drainage Act*. O. Reg. 176/13, s. 14.

(2) This section does not apply with respect to the following species, except in the circumstances described in subsection (3):

1. Bogbean Buckmoth.
2. Cherry Birch.
3. False Hop Sedge.

4. False Rue Anemone.
5. Grey Fox.
6. Heart-leaved Plantain.
7. Pugnose Minnow.
8. Scarlet Ammannia.
9. Small-mouthed Salamander.
10. Toothcup. O. Reg. 176/13, s. 14.

(3) This section applies with respect to a species referred to in paragraphs 1 to 10 of subsection (2) if a person is carrying out an activity described in subsection (1) in an area that is the habitat of, or used by, the species and,

- (a) before June 30, 2010, the person had entered into an agreement with the Minister under subsection 23 (2);
- (b) the agreement applied specifically to the species and with respect to an activity described in subsection (1); and
- (c) the person submits a notice of drainage works form to the Minister in accordance with paragraph 1 of subsection (6) and complies with the other conditions set out in subsection (6). O. Reg. 176/13, s. 14.

(4) Clause 9 (1) (a) and subsection 10 (1) of the Act do not apply to a person who, while carrying out an activity described in subsection (1), kills, harms, harasses, captures or takes a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species, or damages or destroys the habitat of such a species, if the person satisfies all of the conditions set out in subsection (6). O. Reg. 176/13, s. 14.

(5) Subclauses 9 (1) (b) (i) and (ii) of the Act do not apply to the possession or transport of a member of a species if,

- (a) pursuant to subsection (4), clause 9 (1) (a) of the Act did not apply with respect to the member of the species; or
- (b) the possession or transport of the member of the species is necessary in order to satisfy the conditions set out in subsection (6). O. Reg. 176/13, s. 14.

(6) The following are the conditions that a person who carries on an activity described in subsection (1) must satisfy for the purposes of subsection (4):

1. Before doing anything, in the course of carrying out an activity described in subsection (1), that is prohibited under clause 9 (1) (a) or subsection 10 (1) of the Act, the person must,
  - i. submit a notice of drainage works form available on the Registry to the Minister through the Registry, thereby giving the Minister notice that,
    - A. the person is responsible for the improvement, maintenance or repair of the drainage works or ditch, and
    - B. as part of the improvement, maintenance or repair of the drainage works or ditch, an activity described in subsection (1) will be carried out at various times in the future in the drainage works or ditch that will likely affect one or more species listed on the Species at Risk in Ontario List as endangered or threatened species, and

- ii. subject to subsection (10), prepare in accordance with subsection (11) a mitigation plan that,
    - A. meets the requirements of subsection (12), and
    - B. applies to all activities described in subsection (1) that will be carried out in the future in the drainage works or ditch with respect to the species listed on the Species at Risk in Ontario List as endangered or threatened species that are identified in the notice of drainage works form.
- 2. The person must ensure that the notice of drainage works form includes,
  - i. the location of the drainage works or ditch, and
  - ii. the name of every species listed on the Species at Risk in Ontario List as endangered or threatened species that will be affected by the activity.
- 3. The person must follow the requirements of subsections (7) and (8) with respect to the completion of the notice of drainage works form, the keeping of records relating to the notice of drainage works form and the updating of the information on the Registry.
- 4. Whenever carrying out an activity described in subsection (1) in the drainage works or ditch identified in the notice of drainage works form, the person must,
  - i. comply with the requirements of the mitigation plan,
  - ii. take reasonable steps to minimize adverse effects of the activity on the species identified in the notice of drainage works form, including the steps described in subsection (13).
- 5. After the mitigation plan is prepared, the person must,
  - i. retain a copy of the mitigation plan for as long as the person continues to be responsible for the improvement, maintenance and repair of the drainage works or ditch,
  - ii. provide a copy of the mitigation plan to the Ministry within 14 days of receiving a request for it, and
  - iii. ensure that the mitigation plan is updated in accordance with subsections (11) and (12) at least once every five years to include information obtained from observing the effects of the activity on the species.
- 6. For as long as the person continues to be responsible for the improvement, maintenance and repair of the drainage works or ditch, the person must,
  - i. on or before December 31 of each year, prepare an annual report in accordance with subsection (14) on the effects that any activity described in subsection (1) that was carried out in the course of that year has had on the species identified in the notice of drainage works form,
  - ii. retain a copy of the annual report for at least five years after it is prepared, and
  - iii. provide a copy of the annual report to the Ministry within 14 days of receiving a request for it. O. Reg. 176/13, s. 14.
- (7) Before submitting a notice of drainage works form to the Minister, a person who proposes to carry out an activity described in subsection (1) must ensure that,
  - (a) all mandatory information requested on the form, including the person's contact information, has been provided; and

(b) the information provided on the form is complete and accurate. O. Reg. 176/13, s. 14.

(8) After submitting a notice of drainage works form to the Minister, a person must,

(a) promptly upon obtaining from the Ministry confirmation that a notice of drainage works form submitted through the Registry has been received by the Minister, make a record of the confirmation;

(b) for as long as the person continues to be responsible for the improvement, maintenance and repair of the drainage works or ditch,

(i) keep the record of the confirmation, and

(ii) make the record of the confirmation available to the Ministry upon receiving a request for it; and

(c) if there is a change in the contact information of the person who submitted the notice of drainage works form, update the information on the Registry within 10 business days of the change. O. Reg. 176/13, s. 14.

(9) A person who provides incomplete, false or misleading information on a notice of drainage works form or when updating information on the Registry shall be deemed to have not submitted the notice of drainage works form. O. Reg. 176/13, s. 14.

(10) A person who carries out an activity described in subsection (1) is not required to complete the preparation of a mitigation plan until the following dates if the following circumstances apply:

1. If the mitigation plan relates to a species that was added to the Species at Risk in Ontario List as an endangered or threatened species for the first time on January 24, 2013, the third anniversary of that day.
2. If the mitigation plan relates to a species that first appears in the drainage works or ditch after the person begins being responsible for the improvement, maintenance and repair of the drainage works or ditch, three years after the date the species first appears in the drainage works or ditch. O. Reg. 176/13, s. 14.

(11) A mitigation plan must be prepared and updated by one or more persons with expertise in relation to every species that is the subject of the plan, using the best available information on steps that may help minimize or avoid adverse effects on the species, which includes consideration of information obtained from the Ministry, aboriginal traditional knowledge and community knowledge if it is reasonably available. O. Reg. 176/13, s. 14.

(12) A mitigation plan prepared with respect to an activity identified in a notice of drainage works form submitted to the Minister under subparagraph 1 i of subsection (6) must include the following information:

1. The name and contact information of the person who is carrying out the activity.
2. A description of the area within the drainage works or ditch that will be affected by the activity and that is used by, or is the habitat of, a member of a species identified in the notice of drainage works form.
3. Details of how the person will carry out the steps described in subsection (13) that are required to minimize the adverse effects of the activity on a species identified in the notice of drainage works form, including the dates during the year when the species is likely to be carrying out a life process related to hibernation or reproduction, including rearing, and

when the person must take reasonable steps to minimize or avoid killing, harming or harassing members of the species.

4. A description of any steps the person will take to minimize the adverse effects of the activity on a species identified in the notice of drainage works form, in addition to the steps described in subsection (13), including a description of any measures to restore or enhance the habitat of the species that is affected by the activity. O. Reg. 176/13, s. 14.

(13) The following are the steps that a person must take to minimize the adverse effects of an activity described in the notice of drainage works form submitted to the Minister under subparagraph 1 i of subsection (6) on a species identified in the form:

1. The person must take reasonable steps to minimize or avoid the killing, harming or harassing of members of the species during a time of year when the species is likely to be carrying out a life process related to hibernation, overwintering, or reproduction, including rearing.
2. If the person encounters an animal that is a member of a species while carrying out the activity, the person must cease carrying out the activity in the area of the encounter and provide the animal with a reasonable amount of time to leave the area before continuing with the activity.
3. If, after providing an animal with a reasonable amount of time in accordance with paragraph 2 the animal does not leave the area, the person must take measures to relocate the animal to a nearby location that is suitable and safe for the animal.
4. The relocation of an animal in accordance with paragraph 3 must be undertaken by or in consultation with a person knowledgeable about, or having training in, the handling of the species.
5. The person must take reasonable steps to exclude members of the species from an area in the drainage works or ditch in which the activity is being carried out or is likely to be carried out, such as installing temporary fencing to prevent members of the species from accessing the area.
6. If the species is a turtle species, the person must not reduce the level of the water in an area of a drainage works or ditch where a member of the turtle species is likely to be hibernating.
7. The person must take reasonable steps to control erosion and sediment, and to stabilize water banks in any area affected by the activity if,
  - i. the area is the habitat of the species, or
  - ii. a member of the species is likely to be present in the area.
8. If the person discovers that the steps described in paragraphs 1 to 7 or in the mitigation plan have not been effective in minimizing the adverse effects of an activity described in subsection (1) on the species, the person shall,
  - i. take such actions as are necessary to increase the effectiveness of those steps, or
  - ii. take such other reasonable steps as may be necessary to minimize the adverse effects of an activity described in subsection (1) on the species. O. Reg. 176/13, s. 14.

(14) An annual report required under paragraph 6 of subsection (6) must include,

- (a) a record of the steps taken by the person when carrying out an activity described in subsection (1) in the previous 12 months, to minimize adverse effects of the activity on a

species identified in the notice of drainage works form submitted under subparagraph 1 i of subsection (6);

- (b) an assessment of the effectiveness of the steps referred to in clause (a); and
- (c) details of any observations of a species identified in the notice of drainage works form submitted under subparagraph 1 i of subsection (6) in the course of carrying out the activity in the previous 12 months, including,
  - (i) the name of the species,
  - (ii) the location of the observation, and
  - (iii) the date and time of the observation. O. Reg. 176/13, s. 14.

(15) This section does not apply to a person carrying on an activity described in subsection (1) who has entered into an agreement with the Minister with respect to that activity under subsection 23 (2) until the earlier of,

- (a) the day the person gives notice to the Minister under paragraph 1 of subsection (6); and
- (b) July 1, 2015. O. Reg. 176/13, s. 14.

(16) If a person described in subsection (15) plans to give notice to the Minister under paragraph 1 of subsection (6) of the activity referred to in subsection (15), the mitigation plan that is required to be prepared with respect to the activity under subparagraph 1 ii of subsection (6) must be prepared by the person before the notice of drainage works form is submitted to the Minister under subparagraph 1 i of subsection (6), and not within three years after the notice of drainage works form is given as would otherwise be the case. O. Reg. 176/13, s. 14.

### **Early exploration mining**

**23.10** (1) This section applies with respect to a mining activity that constitutes early exploration as defined in subsection 1 (1) of Ontario Regulation 308/12 (Exploration Plans and Exploration Permits) made under the *Mining Act* if,

- (a) the activity is listed in Schedule 2 of Ontario Regulation 308/12 and is included in an exploration plan that was submitted to the Director under section 5 of that regulation;
- (b) the activity is listed in Schedule 3 of Ontario Regulation 308/12 and is authorized by a permit issued under section 78.3 of the *Mining Act*; or
- (c) the activity is authorized by a permit issued under section 78.3 of the *Mining Act* that was required by a Director under section 18 of Ontario Regulation 308/12. O. Reg. 176/13, s. 14.

(2) Clause 9 (1) (a) and subsection 10 (1) of the Act do not apply to a person who, while carrying out an activity described in subsection (1), kills, harms, harasses, captures or takes a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species, or damages or destroys the habitat of such a species, if the person satisfies all of the conditions set out in subsection (4). O. Reg. 176/13, s. 14.

(3) Subclauses 9 (1) (b) (i) and (ii) of the Act do not apply to the possession or transport of a member of a species if,

- (a) pursuant to subsection (2), clause 9 (1) (a) of the Act did not apply with respect to the member of the species; or

(b) the possession or transport of the member of the species is necessary in order to satisfy the conditions set out in subsection (4). O. Reg. 176/13, s. 14.

(4) The following are the conditions that a person who carries on an activity described in subsection (1) must satisfy for the purposes of subsection (2):

1. Before doing anything, in the course of carrying out the activity, that is prohibited under clause 9 (1) (a) or subsection 10 (1) of the Act, the person must,
  - i. subject to subsection (5), give the Minister notice of the activity by submitting a notice of activity form available on the Registry to the Minister through the Registry,
  - ii. subject to subsection (6), prepare in accordance with subsection (7) a mitigation plan that meets the requirements of subsection (8).
2. The person must ensure that the notice of activity form includes,
  - i. the proposed start and end dates for the activity,
  - ii. the location at which the activity will be carried out, and
  - iii. a list of all the species that are listed on the Species at Risk in Ontario List as endangered or threatened species and that will likely be affected by the activity.
3. The person must follow the requirements set out in section 23.3 with respect to the completion of the notice of activity form, the keeping of records relating to the notice of activity form and the updating of the information on the Registry.
4. While carrying out the activity, the person must,
  - i. comply with the requirements of the mitigation plan, and
  - ii. ensure that reasonable steps are taken to minimize the adverse effects of the activity on the species identified in the notice of activity form, including the steps described in subsection (10) and such other steps as may be described in the mitigation plan.
5. The person must,
  - i. retain a copy of the mitigation plan for at least five years after the activity is complete,
  - ii. provide a copy of the mitigation plan to the Ministry within 14 days of receiving a request for it, and
  - iii. ensure that, at the times determined under section (9), the mitigation plan is updated in accordance with subsection (7) to include information obtained while monitoring the effects of the activity under paragraph 6.
6. While carrying out the activity, the person must monitor,
  - i. the effects of the activity on each species identified in the notice of activity form, and
  - ii. the effectiveness of the steps taken to minimize or avoid adverse effects on each species.
7. Within 180 days of the completion of the activity, the person must,
  - i. prepare a report on the activity in accordance with subsection (11), and
  - ii. if the activity occurs within the habitat of woodland caribou (forest-dwelling boreal population), prepare the information specified in subsection (12) and submit it to the Minister.

8. The person must retain a copy of the report on the activity referred to in subparagraph 7 i for at least five years after it is prepared and provide a copy of it to the Ministry within 14 days of receiving a request for it.
9. If the person or an employee or agent of the person observes a species identified in the notice of activity form in the course of carrying out the activity, the person must ensure that, within three months of the observation, the Natural Heritage Information Centre Rare Species Reporting Form available on the Ministry website is completed, detailing the species and number of individual members that were observed, the date and location of observation and any other information requested on the form. O. Reg. 176/13, s. 14.

(5) If a person commences an activity described in subsection (1) before a species that is listed on the Species at Risk in Ontario List as endangered or threatened first appears in the area where the activity is being carried out, the person is not required to submit a notice of activity form before doing anything in relation to that species that is prohibited under clause 9 (1) (a) or subsection 10 (1) of the Act, so long as the person submits the notice of activity form to the Minister as soon as is reasonably possible after the date the species first appears. O. Reg. 176/13, s. 14.

(6) A person who carries out an activity described in subsection (1) is not required to complete the preparation of a mitigation plan until the following dates if the following circumstances apply:

1. If the mitigation plan relates to a species that was added to the Species at Risk in Ontario List as an endangered or threatened species for the first time on January 24, 2013, the second anniversary of that day.
2. If the mitigation plan relates to a species that first appears in the area of the activity after the activity commences, the earlier of,
  - i. three years after the date the species first appears in the area, and
  - ii. if the activity is completed before the end of the three-year period described in subparagraph i, the day the person begins to restore, create or enhance habitat as required under paragraph 11 of subsection (10). O. Reg. 176/13, s. 14.

(7) A mitigation plan shall be prepared and updated by one or more persons with expertise in relation to every species that is the subject of the plan, using the best available information on steps that may help minimize or avoid adverse effects on the species, which includes consideration of information obtained from the Ministry, aboriginal traditional knowledge and community knowledge if it is reasonably available. O. Reg. 176/13, s. 14.

(8) A mitigation plan prepared with respect to an activity described in subsection (1) must include the following information:

1. The name and contact information of the person carrying out the activity.
2. The following information with respect to the activity:
  - i. the proposed start and completion dates of the activity,
  - ii. a description of all of the stages of the activity and a timeline for the stages, and
  - iii. a map indicating the geographic location of the activity at a scale of no greater than 1:20,000.



3. A list of species that are listed on the Species at Risk in Ontario List as endangered or threatened species that will likely be affected by the activity and an assessment of those effects on the individual members of the species and their habitat.
  4. Details of the steps the person will take during the activity to minimize or avoid the adverse effects on species identified under paragraph 3, including,
    - i. details of the steps described in subsection (10), such as the dates on which, and locations at which, each step will be taken, and
    - ii. the times during the year at which a species identified under paragraph 3 is likely to be carrying out a life process related to hibernation or reproduction, including rearing, and at which activities that are likely to kill, harm or harass a member of the species should not be carried out.
  5. Details regarding the steps the person will take to monitor the effects of the activity on members of the species identified under paragraph 3 and the effectiveness of the steps taken to minimize adverse effects on the species. O. Reg. 176/13, s. 14.
- (9) A person who is carrying out an activity described in subsection (1) shall update the mitigation plan prepared with respect to the activity on or before the following time:
1. If the activity is included in an exploration plan referred to in clause (1) (a) and the plan reaches the end of its effective period before the activity is complete, the day the effective period ends.
  2. If the activity is authorized by a permit referred to in clause (1) (b) or (c) and the permit expires before the activity is complete, the day the permit expires. O. Reg. 176/13, s. 14.
- (10) The following are the steps that a person must take to minimize the adverse effects of the activity described in the notice of activity form submitted to the Minister under subparagraph 1 i of subsection (4) on the species identified in the form:
1. The person must not kill, harm or harass woodland caribou (forest-dwelling boreal population) during a time of year when woodland caribou (forest-dwelling boreal population) are likely to be carrying out a life process related to feeding, migration or reproduction, including rearing.
  2. The person must take reasonable steps to minimize or avoid killing, harming or harassing a member of a species identified in the notice of activity form, other than the woodland caribou (forest-dwelling boreal population), during a time of year when the species is likely to be carrying out a life process related to hibernation or reproduction, including rearing.
  3. The person must not carry out any part of the activity in an area that is being used, or has been used at any time in the previous three years, by a member of a species identified in the notice of activity form to carry out a life process related to hibernation or reproduction, including rearing.
  4. The person must not possess or transport a member of a species identified in the notice of activity form for a period longer than is necessary to avoid or minimize adverse effects to the member.
  5. If the person encounters an animal that is a member of the species while carrying out the activity, the person must cease carrying out the activity in the area of the encounter and provide the animal with a reasonable amount of time to leave the area before continuing the activity.

6. If, after providing an animal with a reasonable amount of time in accordance with paragraph 5 the animal does not leave the area, the person must take measures to relocate the animal to a nearby location that is suitable and safe for the animal.
  7. If the person encounters a moss, lichen or vascular plant that is a member of the species in the course of carrying out the activity and it is not necessary to kill or harm the member for the purpose of carrying out the activity, the person must,
    - i. cease the activity in the area of the encounter,
    - ii. install and maintain barriers or other structures to create a protective zone around the species, and
    - iii. after establishing the protective zone referred to in subparagraph ii, continue the activity in a manner that does not impair the ability of the species to carry out its life processes, including reproduction.
  8. If it is necessary to kill or harm a moss, lichen or vascular plant referred to in paragraph 7 for the purpose of carrying out the activity, the person must relocate the moss, lichen or vascular plant to a nearby location within the species' habitat that is suitable and safe for the species so that it is not killed or harmed, provided it is feasible to do so.
  9. The determination under paragraph 8 as to whether it is feasible to relocate a moss, lichen or vascular plant must be made by the person using the best available information with respect to the suitability of relocating that species, including information obtained from the Ministry.
  10. The relocation of an animal or of a moss, lichen or vascular plant in accordance with paragraph 6 or 8 must be undertaken by, or in consultation with, a person who is knowledgeable about, or has training in, the handling of the species.
  11. Before the end of the activity, the person must take reasonable steps to,
    - i. restore any habitat of the species that was damaged or destroyed by the activity, to the extent it is feasible to do so, or
    - ii. create habitat for the species, or enhance an existing habitat for the species, in the same ecoregion as the habitat that was damaged or destroyed by the activity, in a manner that minimized the overall loss of habitat for the species resulting from the activity. O. Reg. 176/13, s. 14.
- (11) The report on the activity that the person is required to prepare under subparagraph 7 i of subsection (4) shall include,
- (a) a list of the species identified in the notice of activity form submitted to the Minister under subparagraph 1 i of subsection (4) that were observed in the course of carrying out the activity and the circumstances relating to the observation, including the location, date and time of the observation; and
  - (b) a description of the steps taken by the person in the course of carrying out the activity to minimize adverse effects on the species identified in the notice, including the locations where the steps were taken, and an assessment of the effectiveness of those steps. O. Reg. 176/13, s. 14.
- (12) The information that a person is required to prepare under subparagraph 7 ii of subsection (4) shall include a detailed description of,
- (a) the nature of the activity; and

- (b) the area within the habitat of woodland caribou (forest-dwelling boreal population) in which the activity was carried out, including its geographic location and size. O. Reg. 176/13, s. 14.

(13) This section does not apply to Golden Eagle. O. Reg. 176/13, s. 14.

### **Ecosystem protection**

**23.11** (1) This section applies with respect to an activity consisting of ecological conservation work that is carried out for the purpose of protecting, maintaining, enhancing or restoring an ecosystem native to Ontario, other than an ecosystem described in subsection (2), if the activity is carried out by or on behalf of one of the following entities:

1. A conservation authority established under the *Conservation Authorities Act*.
2. A municipality.
3. The Ministry.
4. A band as defined in the *Indian Act* (Canada).
5. A post-secondary institution that is a member of the Association of Universities and Colleges of Canada.
6. A corporation incorporated under the *Not-for-Profit Corporations Act, 2010* or a predecessor of that Act or under the *Not-for-Profit Corporations Act, 2011* (Canada) or a predecessor of that Act, if the corporation has among its primary objectives natural heritage conservation, ecological conservation or a similar objective.
7. A corporation that is a registered charity under the *Income Tax Act* (Canada) if the corporation has among its primary objectives natural heritage conservation, ecological conservation or a similar objective.
8. A trustee of a charitable foundation that is a registered charity under the *Income Tax Act* (Canada) if the foundation has among its primary objectives natural heritage conservation, ecological conservation or a similar objective. O. Reg. 176/13, s. 14.

(2) This section does not apply to an activity that is carried out for the purpose of protecting, maintaining, enhancing or restoring an ecosystem in the following areas:

1. An area belonging to any of the following community classes, as identified under the land classification system for southern Ontario:
  - i. A fen.
  - ii. A bog.
  - iii. A sand barren or dune.
  - iv. A beach bar.
  - v. An alvar.
  - vi. A cliff.
  - vii. A talus.
2. An area situated in a part of Ontario to which the land classification system for southern Ontario does not apply but that has all of the characteristics necessary to be classified as a community class referred to in subparagraphs 1 i to vii if it were situated in a part of southern Ontario to which the classification system applies. O. Reg. 176/13, s. 14.

(3) In subsection (2),

“land classification system for southern Ontario” means the land classification system set out in the document entitled *Ecological Land Classification for Southern Ontario: First Approximation and its Application*, dated September, 1998, that is published by the Ministry of Natural Resources and available at the Ministry of Natural Resources District offices and the Ministry of Natural Resources corporate library in Peterborough, Ontario. O. Reg. 176/13, s. 14.

(4) Clause 9 (1) (a) and subsection 10 (1) of the Act do not apply to a person who kills, harms, harasses, captures or takes a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species, or damages or destroys its habitat, while carrying out an activity described in subsection (1) if the entity referred to in subsection (1) who carries out the activity, or on whose behalf the activity is carried out, satisfies all of the conditions set out in subsection (6). O. Reg. 176/13, s. 14.

(5) Subclauses 9 (1) (b) (i) and (ii) of the Act do not apply to the possession or transport of a member of a species if,

- (a) pursuant to subsection (4), clause 9 (1) (a) of the Act did not apply with respect to the member of the species; or
- (b) the possession or transport of the member of the species is necessary in order to satisfy the conditions set out in subsection (6). O. Reg. 176/13, s. 14.

(6) The following are the conditions that an entity referred to in subsection (1) must satisfy for the purposes of subsection (4):

1. Before commencing an activity described in subsection (1), the entity must,
  - i. subject to subsection (7), give the Minister notice of the activity by submitting a notice of activity form available on the Registry to the Minister through the Registry, and
  - ii. subject to subsection (8), prepare a mitigation plan in accordance with subsections (9) and (10) to identify the steps that will be taken,
    - A. to minimize the adverse effects of the activity on the species identified in the notice of activity form, and
    - B. to monitor the effectiveness of the steps referred to in sub-subparagraph A.
2. The notice of activity form shall include,
  - i. a description of the activity,
  - ii. the proposed start and end dates for the activity,
  - iii. the location at which the activity will be carried out, and
  - iv. a list of all the species that are listed on the Species at Risk in Ontario List as endangered or threatened species and that will be affected by the activity.
3. The entity must follow the requirements set out in section 23.3 with respect to the completion of the notice of activity form, the keeping of records relating to the notice of activity form and the updating of the information on the Registry.
4. While carrying out the activity, the entity must,
  - i. comply with the requirements of the mitigation plan, and
  - ii. ensure that reasonable steps are taken to minimize the adverse effects of the activity on the species identified in the notice of activity form, including the steps described in subsection (12), and such other steps as may be described in the mitigation plan.

5. The entity must,
  - i. retain a copy of the mitigation plan until at least five years after the activity is complete,
  - ii. provide a copy of the mitigation plan to the Ministry within 14 days of receiving a request for it, and
  - iii. ensure that the mitigation plan is updated in accordance with subsections (9) and (10) at least once every five years to include information obtained while monitoring the effects of the activity under paragraph 6.
6. While carrying out the activity, the entity shall ensure that the following is monitored:
  - i. the effects of the activity on each species identified in the notice, and
  - ii. the effectiveness of the steps taken to minimize adverse effects on each species.
7. Within 180 days of the completion of the activity, the entity must prepare a report in accordance with subsection (13) and thereafter the entity must,
  - i. retain a copy of the report for at least five years after it is prepared, and
  - ii. provide a copy of the report to the Ministry within 14 days of receiving a request for it.
8. If an employee or agent of the entity observes a species identified in the notice of activity form in the course of carrying out the activity, the entity must ensure that the employee or agent, within three months of the observation, completes the Natural Heritage Information Centre Rare Species Reporting Form available on the Ministry website detailing the species and number of individual members that were observed, the date and location of observation and any other information requested on the form. O. Reg. 176/13, s. 14.

(7) If a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species first appears in an area in which an entity is carrying out an activity described in subsection (1) after the activity is commenced, the notice of activity form required under subparagraph 1 i of subsection (6) may, for the purposes of subsections (4) and (5), be provided after a member of the species is killed, harmed, harassed, captured or taken, or its habitat is damaged or destroyed, so long as the entity submits the notice of activity form to the Minister in accordance with subparagraph 1 i of subsection (6) as soon as is reasonably possible after the date the species first appears, and in no case later than 30 days after that date. O. Reg. 176/13, s. 14.

(8) If a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species first appears in an area in which an entity is carrying out an activity described in subsection (1) after the activity is commenced, and the activity is likely to continue thereafter for at least another 60 days, the entity is not required to complete the preparation of a mitigation plan relating to that species until 60 days after the day the species first appeared in the area. O. Reg. 176/13, s. 14.

(9) A mitigation plan shall be prepared and updated by one or more persons with expertise in relation to every species that is the subject of the plan, using the best available information on steps that may help minimize or avoid adverse effects on the species, which includes consideration of information obtained from the Ministry, aboriginal traditional knowledge and community knowledge if it is reasonably available. O. Reg. 176/13, s. 14.

(10) A mitigation plan shall include the following information:

1. The following information with respect to the activity identified in the notice of activity form submitted under subparagraph 1 i of subsection (6) that an entity referred to in subsection (1) proposes to carry out:
    - i. a description of the activity and its purpose,
    - ii. the proposed start and completion dates of the activity,
    - iii. a description of all of the stages of the activity and a timeline for the stages, and
    - iv. a map indicating the geographic location of the property on which the activity will occur.
  2. A list of species that are listed on the Species at Risk in Ontario List as endangered or threatened species that will likely suffer adverse effects as a result of the activity and an assessment of those effects on the local population of each species.
  3. With respect to each species identified under paragraph 2, a written opinion prepared by a person with expertise in relation to the species and stating that the activity is not likely to have an enduring adverse effect on a local population of the species, and in particular will not have either of the following adverse effects:
    - i. An overall decrease in the number of members of a local population of the species over the period of time commencing on the date the person gives notice, and ending on the earlier of,
      - A. the end of the period of time it is expected to take three generations of the species to be born and die off after the date the notice is given, and
      - B. ten years after the date the person gives notice.
    - ii. The elimination of conditions that are necessary to allow members of a local population of the species to move through an area that,
      - A. is contiguous to the area that is the habitat of that local population and to areas that are the habitat of one or more other local populations of the species, and
      - B. provides conditions that are suitable for foraging, dispersal or migration.
  4. Detailed plans on the steps an entity referred to in subsection (1) will take during the activity to minimize the adverse effects on the species identified under paragraph 2, including,
    - i. details of the steps described in subsection (12), including the times, locations and methods applicable to each step,
    - ii. the times during the year at which a species identified under paragraph 2 is likely to be carrying out a life process related to hibernation or reproduction, including rearing, and at which activities that are likely to kill, harm or harass a member of the species should not be carried out.
  5. Details regarding the steps an entity referred to in subsection (1) will ensure are taken to monitor the effects of the activity on members of the species identified under paragraph 2 and the effectiveness of steps taken to minimize adverse effects on the species. O. Reg. 176/13, s. 14.
- (11) In paragraph 3 of subsection (10),
- “local population”, with respect to a species, means a geographically distinct group of the species that has little demographic or genetic exchange with other groups of the species in Ontario. O. Reg. 176/13, s. 14.

(12) The following are the steps that an entity referred to in subsection (1) must take to minimize the adverse effects of the activity described in the notice of activity form submitted under subparagraph 1 i of subsection (6) on the species identified in the form:

1. The entity must ensure that the activity is carried out by or under the supervision of a person with expertise in the type of ecological conservation work involved in the activity.
2. The entity must ensure that the entity's employees, agents and contractors receive training on the following subjects before carrying out any part of the activity that is likely to affect the species identified in the form:
  - i. a list of the species identified in the form that are present in the area where the activity is carried out,
  - ii. how to identify the species and their habitat,
  - iii. potential threats posed to the species and their habitat by the activity, and
  - iv. the steps that must be taken under paragraphs 3 to 14 to minimize adverse effects of the activity on individual members of the species.
3. The entity must ensure that a person acting on its behalf takes reasonable steps to avoid killing, harming or harassing members of a species identified in the form during a time of year when the species are likely to be carrying out a life process related to hibernation or reproduction, including rearing.
4. The entity must ensure that reasonable steps are taken to control erosion and sediment, and to stabilize banks, in any area of water affected by the activity if,
  - i. the area is the habitat of a species identified in the form, or
  - ii. a member of a species referred to in subparagraph i is likely to be present in the area.
5. If carrying out the activity would pose a risk to members of a species identified in the form who might enter the area of the activity, the entity must ensure that reasonable steps are taken to prevent the members of the species from entering the area, including, if appropriate, installing temporary fencing around the area.
6. The entity must ensure that, if a person carrying out the activity encounters an animal that is a member of a species identified in the form in the course of carrying out the activity, the person ceases carrying out the activity in the area of the encounter and provides the animal with a reasonable amount of time to leave the area before continuing the activity.
7. If, after providing an animal with a reasonable amount of time in accordance with paragraph 6 the animal does not leave the area, the person must take measures to relocate the animal to a nearby location that is suitable and safe for the animal.
8. If a person carrying out the activity encounters a moss, lichen or vascular plant that is a member of the species in the course of carrying out the activity and it is not necessary to kill or harm the member for the purpose of carrying out the activity, the entity must ensure that the person,
  - i. ceases the activity in the area of the encounter,
  - ii. installs and maintains barriers or other structures to create a protective zone around the species, and
  - iii. after establishing the protective zone referred to in subparagraph ii, continues the activity in a manner that does not impair the ability of the species to carry out its life processes, including reproduction.

9. If it is necessary to kill or harm a moss, lichen or vascular plant referred to in paragraph 8 for the purpose of carrying out the activity, the entity must ensure that the person carrying out the activity relocates the moss, lichen or vascular plant to a nearby location within the species' habitat that is suitable and safe for the species so that it is not killed or harmed, provided it is feasible to do so.
  10. The determination under paragraph 9 as to whether it is feasible to relocate a moss, lichen or vascular plant must be made by the entity using the best available information with respect to the suitability of relocating that species, including information obtained from the Ministry.
  11. The relocation of an animal or of a moss, lichen or vascular plant in accordance with paragraph 7 or 9 must be undertaken by, or in consultation with, a person who is knowledgeable about, or has training in, the handling of the species.
  12. If a member of a species is relocated in accordance with paragraph 7 or 9, the entity, or a person carrying out the activity on the entity's behalf, must not possess the member for longer than is necessary to carry out the relocation, and in no case longer than seven days.
  13. If the activity is carried out in only a part of the habitat of a species identified in the form, the entity must ensure that steps are taken to avoid impairing the ability of members of the species to move within and between other parts of the habitat that the species depends on to carry out life processes related to hibernation or reproduction, including rearing.
  14. The entity must ensure that reasonable steps are taken to avoid the spread of disease,
    - i. among the species identified in the notice, and
    - ii. between the species identified in the notice and any other species. O. Reg. 176/13, s. 14.
- (13) The report referred to in paragraph 7 of subsection (6) must include,
- (a) a description of the reasonable steps taken by the person carrying out the activity described in the notice of activity form submitted under subparagraph 1 i of subsection (6) to minimize the adverse effects of the activity on the species identified in the notice of activity form, including the locations in which, and times at which, the steps were taken, the methods according to which the steps were taken and an assessment of the effectiveness of those steps; and
  - (b) a summary of the results of the activity, including a detailed assessment of the extent to which the activity assisted with protecting, maintaining, enhancing or restoring the ecosystem native to Ontario that was the object of the activity, with recommendations for how similar activity may be conducted in the future. O. Reg. 176/13, s. 14.

### **Hydro-electric generating stations**

**23.12** (1) Clause 9 (1) (a) and subsection 10 (1) of the Act do not apply to a person who is engaged in the operation of a hydro-electric generating station and who, in the course of operating the station, kills, harms, harasses, captures or takes a member of a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species, or damages or destroys the habitat of such a species, if the person satisfies the following conditions:

1. Before doing anything, in the course of operating the hydro-electric generating station, that is prohibited under clause 9 (1) (a) or subsection 10 (1) of the Act,



- i. the person must give the Minister notice of the fact that the person is operating a hydro-electric generating station by submitting a notice of activity form available on the Registry to the Minister through the Registry, and
  - ii. subject to subsection (2), prepare in accordance with subsection (3) a mitigation plan that meets the requirements of subsection (4).
2. The person must ensure that the notice of activity form includes,
  - i. the location of the hydro-electric generating station, and
  - ii. the name of every species listed on the Species at Risk in Ontario List as an endangered or threatened species that will likely be affected by the operation of the hydro-electric generating station.
3. The person must follow the requirements of section 23.3 with respect to the completion of the notice of activity form, the keeping of records relating to the notice of activity form and the updating of the information on the Registry.
4. While operating the hydro-electric generating station, the person must,
  - i. comply with the requirements of the mitigation plan,
  - ii. take reasonable steps to minimize the adverse effects of the operation of the hydro-electric generating station on the species identified in the notice of activity form, including the steps described in subsection (5) and such other steps as may be described in the mitigation plan.
5. The person must,
  - i. retain a copy of the mitigation plan while operating the hydro-electric generating station and for a period of five years after the person ceases to operate the station,
  - ii. ensure that the plan is updated in accordance with subsection (3) at least once every five years to include information obtained while carrying out the monitoring requirements described in paragraph 6, and
  - iii. provide a copy of the mitigation plan to the Ministry within 14 days of receiving a request for it.
6. The person must monitor the effects that the operation of the station has on the species identified in the notice of activity form and the effectiveness of the mitigation plan.
7. On or before December 31 of each year, the person must prepare an annual report in accordance with subsection (6) on the effects that the operation of the station has on the species identified in the notice of activity form and the person must,
  - i. retain a copy of the annual report for at least five years after it is prepared, and
  - ii. provide a copy of the annual report to the Ministry within 14 days of receiving a request for it.
8. If the person, or an employee or agent of the person, observes a species identified in the notice of activity form in the vicinity of the station in the course of operating the station, the person must ensure that, within three months of the observation, the Natural Heritage Information Centre Rare Species Reporting Form available on the Ministry website is completed, detailing the species and number of individual members that were observed, the date and location of observation and any other information requested on that form. O. Reg. 176/13, s. 14.

(2) A person who operates a hydro-electric generating station is not required to complete the preparation of a mitigation plan until the following dates if the following circumstances apply:

1. If the mitigation plan relates to a species that was added to the Species at Risk in Ontario List as an endangered or threatened species on January 24, 2013, the third anniversary of that day.
2. If the mitigation plan relates to a species that first appears in the area of the hydro-electric generating station after the station begins operation, three years after the date the species first appears in the area of the station. O. Reg. 176/13, s. 14.

(3) A mitigation plan shall be prepared and updated by one or more persons with expertise in relation to every species that is the subject of the plan, using the best available information on steps that may help minimize or avoid adverse effects on the species, which includes consideration of information obtained from the Ministry, aboriginal traditional knowledge and community knowledge if it is reasonably available. O. Reg. 176/13, s. 14.

(4) A mitigation plan shall include the following information:

1. The name and contact information of the person who operates the hydro-electric generating station.
2. A map indicating the geographic location of the hydro-electric generating station and any associated structures.
3. A list of the species that are identified in the notice of activity form submitted under paragraph 1 of subsection (1) and that are the subject of the mitigation plan.
4. A description of the adverse effects that the operation of the hydro-electric generating station may have on the species referred to in paragraph 3, including effects,
  - i. on the ability for the members of the species to carry out their life processes, including migration and spawning, and
  - ii. on areas that are habitat of the species.
5. Details on how the person will carry out the steps described in subsection (5) to minimize the adverse effects of the operation of the hydro-electric generating station on the species referred to in paragraph 3, including the dates on which, and locations at which, each step will be carried out.
6. A description of the reasonable steps the person will carry out to minimize the adverse effects of the operation of the station on the species referred to in paragraph 3 in addition to the steps described in subsection (5), including a description of,
  - i. steps the person will take to avoid killing, harming or harassing individual members of the species or damaging or destroying habitat,
  - ii. actions that are necessary to help provide suitable conditions to enable the members of the species to carry out the life processes that are adversely affected by the station, including spawning, attraction, hibernation, nesting and migration or if such actions are not feasible, provide the reasons why they are not feasible at this time,
  - iii. if the operation of the station results in the damage or destruction of the habitat of the species, measures to replace or restore habitat in a suitable area for the species,
  - iv. training that will be provided to all employees, agents and contractors that are likely to encounter members of the species while performing their duties, in order to satisfy the obligations under this section, and

v. steps the person will take if an individual member of the species is encountered or injured in the vicinity of the station.

7. A description of the steps the person will take to monitor the effects of the operation of the station on the species referred to in paragraph 3 and the effectiveness of the actions set out in the mitigation plan. O. Reg. 176/13, s. 14.

(5) The following are the steps that a person must take to minimize the adverse effects of the operation of a hydro-electric generating station on a species identified in a notice of activity form submitted under paragraph 1 of subsection (1):

1. The person must inform all employees, agents and contractors conducting activities at the station that members of the species are present at or near the station and of the steps required under paragraphs 2 to 4.
2. If the species uses nests or hibernacula or other terrestrial features to carry out its life processes, the person must, before and during the period of time when the species is likely to require the terrestrial features to carry out its life process,
  - i. install and maintain barriers or other structures to create a protective zone around the terrestrial features and to protect the terrestrial features and limit the adverse effects that may be caused by the operation of the station, and
  - ii. make adjustments to the operation of the station so as to minimize the adverse effects of the operation of the station on the terrestrial features and the species' life processes.
3. The person must, if feasible, undertake maintenance activities of the station at such times and in such a manner as to minimize the impact of such activities on the species and must, if feasible, select maintenance activities that may have a benefit to the species and carry them out in a manner that may have a benefit to the species.
4. If, in carrying out the steps required under the person's mitigation plan, it is necessary to capture, take, possess or transport a member of the species, such actions must be undertaken by, or in consultation with, a person who is knowledgeable about, or has training in, the handling of the species.
5. If the person discovers that the steps described in paragraphs 1 to 4 or in the mitigation plan have not been effective in minimizing the adverse effects of the operation of the station on the species, the person shall,
  - i. take such actions as are necessary to increase the effectiveness of those steps, or
  - ii. take such other reasonable steps as may be necessary to minimize the adverse effects of the operation of the station on the species. O. Reg. 176/13, s. 14.

(6) The annual report required under paragraph 7 of subsection (1) shall include,

- (a) the steps taken by the person who operates the hydro-electric generating station to minimize adverse effects of the station on the species identified in the notice of activity form submitted under paragraph 1 of subsection (1) and an assessment of their effectiveness;
- (b) information collected during the monitoring referred to in paragraph 6 of subsection (1);
- (c) records of any activities carried out in accordance with the mitigation plan; and
- (d) details of any encounters with members of the species identified in the notice of activity form submitted under paragraph 1 of subsection (1). O. Reg. 176/13, s. 14.

(7) Subclauses 9 (1) (b) (i) and (ii) of the Act do not apply to the possession or transport of a member of a species if,

- (a) pursuant to subsection (1), clause 9 (1) (a) of the Act did not apply with respect to the member of the species; or
- (b) the possession or transport of the member of the species is necessary in order to satisfy the conditions set out in subsection (1). O. Reg. 176/13, s. 14.

(8) This section does not apply to a person who operates a hydro-electric generating station and who, pursuant to section 11, is exempt from clause 9 (1) (a) and subsection 10 (1) of the Act. O. Reg. 176/13, s. 14.

(9) This section does not apply to the following species:

- 1. Hungerford's Crawling Water Beetle.
- 2. Pygmy Snaketail. O. Reg. 176/13, s. 14.

(10) This section does not apply to the person who operates the R.H. Saunders Station on the St. Lawrence River near Cornwall in respect of American eel. O. Reg. 176/13, s. 14.

### **Newly-listed and transition species — development**

**23.13** (1) In this section,

“effective date” means,

- (a) with respect to a newly-listed species, January 24, 2013, and
- (b) with respect to a transition species, June 30, 2013, being the date on which clause 10 (1) (a) of the Act begins to apply to transition species; (“date d’effet”)

“newly-listed species” means a species that was listed on the Species at Risk in Ontario List as an endangered or threatened species for the first time on January 24, 2013; (“espèce nouvellement inscrite”)

“transition species” means a species that is listed in Schedule 3 or 4 to the Act and to which clause 10 (1) (a) of the Act does not apply until June 30, 2013. (“espèce touchée par des mesures transitoires”) O. Reg. 176/13, s. 14.

(2) Subsections (5) to (15) apply with respect to the following activities that have an adverse effect on a transition species or a newly-listed species and that are commenced within the following time periods in relation to the species' effective date:

- 1. Constructing drainage works under an agreement filed under subsection 2 (2) of the *Drainage Act* if,
  - i. the agreement is filed before the effective date or within two years after that date, and
  - ii. the construction is commenced before the effective date or it is commenced after the effective date but no later than,
    - A. in a case relating to a newly-listed species,
      - 1. the fifth anniversary of the day the agreement is filed, where the agreement is filed on or after June 30, 2010, or
      - 2. June 30, 2015 where the agreement was filed before June 30, 2010, or
    - B. in a case relating to a transition species, June 30, 2015.
- 2. Constructing drainage works in respect of which an engineer's report was adopted under subsection 45 (1) of the *Drainage Act* if,

- i. the report is adopted before the effective date or within two years after that date, and
  - ii. the construction is commenced before the effective date or it is commenced after the effective date but no later than,
    - A. in a case relating to a newly-listed species,
      - 1. the fifth anniversary of the day the report is adopted where the report is adopted on or after June 30, 2010, or
      - 2. June 30, 2015 where the report was adopted before June 30, 2010, or
    - B. in a case relating to a transition species, June 30, 2015.
- 3. Laying down highways and lots upon the ground within a plan of subdivision under the authority of subsection 51 (57) of the *Planning Act* if,
  - i. the draft plan of subdivision is approved under the *Planning Act* before the effective date or within two years after that date, and
  - ii. the laying down of highways and lots is commenced before the effective date or it is commenced after that date but no later than,
    - A. in a case relating to a newly-listed species,
      - 1. the fifth anniversary of the day the draft plan of subdivision is approved where the draft plan of subdivision is approved on or after June 30, 2010, or
      - 2. June 30, 2015 where the draft plan of subdivision was approved before June 30, 2010, or
    - B. in a case relating to a transition species, June 30, 2015.
- 4. Development of land within a plan of subdivision approved under the *Planning Act*, including a plan of subdivision registered under the *Registry Act* or the *Land Titles Act* if,
  - i. the land is within a draft plan of subdivision approved under the *Planning Act* before the effective date or within two years after that date,
  - ii. the development is commenced before the effective date or is commenced after that date but no later than,
    - A. in a case relating to a newly-listed species,
      - 1. the fifth anniversary of the day the draft plan of subdivision is approved where the draft plan of subdivision is approved on or after June 30, 2010, or
      - 2. June 30, 2015 where the draft plan of subdivision was approved before June 30, 2010, or
    - B. in a case relating to a transition species, June 30, 2015,
  - iii. the approval of the plan of subdivision has not lapsed, and
  - iv. the development is not prohibited by any zoning by-law passed under subsection 34 (1) of the *Planning Act* or by any order made under section 47 of that Act.
- 5. Development in an area designated as a site plan control area under subsection 41 (2) of the *Planning Act* and in respect of which appropriate approvals have been obtained under subsection 41 (4) of that Act if,
  - i. the appropriate approvals are obtained under the *Planning Act* before the effective date or within two years after that date, and

- ii. the development is commenced before the effective date or after that date but no later than,
    - A. in a case relating to a newly-listed species,
      - 1. the fifth anniversary of the day the approvals are obtained where the approvals are obtained on or after June 30, 2010, or
      - 2. June 30, 2015 where the approvals were obtained before June 30, 2010, or
    - B. in a case relating to a transition species, June 30, 2015.
- 6. Development that is authorized by a development permit issued under Ontario Regulation 608/06 (Development Permits) made under the *Planning Act* after 2005 if,
  - i. the development permit is issued before the effective date or within two years after that date, and
  - ii. the development is commenced before the effective date or is commenced after that date but no later than,
    - A. in a case relating to a newly-listed species,
      - 1. the fifth anniversary of the day the development permit is issued where the development permit is issued on or after June 30, 2010, or
      - 2. June 30, 2015 where the development permit was issued before June 30, 2010, or
    - B. in a case relating to a transition species, June 30, 2015.
- 7. Development of a unit within the meaning of the *Condominium Act, 1998*, including a unit in respect of which a declaration and description are registered under the *Land Titles Act*, in respect of which a declaration and description are approved or exempted under section 9 of the *Condominium Act, 1998* if,
  - i. the declaration and description are approved or exempted before the effective date or within two years after that date, and
  - ii. the development is commenced before the effective date or is commenced after that date but no later than,
    - A. in a case relating to a newly-listed species,
      - 1. the fifth anniversary of the day the declaration and description are approved or exempted where the declaration and description are approved or exempted on or after June 30, 2010, or
      - 2. June 30, 2015 where the declaration and description were approved or exempted before June 30, 2010, or
    - B. in a case relating to a transition species, June 30, 2015,
  - iii. the approval or exemption has not lapsed, and
  - iv. the development is not prohibited by any zoning by-law passed under subsection 34 (1) of the *Planning Act* or by any order made under section 47 of that Act.
- 8. Carrying out an undertaking in respect of which approval to proceed was given under Part II of the *Environmental Assessment Act* if,
  - i. the approval to proceed is given before the effective date or within two years after that date, and

- ii. the undertaking is commenced before the effective date or is commenced after that date but no later than,
    - A. in a case relating to a newly-listed species,
      - 1. the fifth anniversary of the day the approval to proceed is given where the approval to proceed is given on or after June 30, 2010, or
      - 2. June 30, 2015 where the approval to proceed was given before June 30, 2010, or
    - B. in a case relating to a transition species, June 30, 2015.
- 9. Carrying out an undertaking to which a class environmental assessment approved under Part II.1 of the *Environmental Assessment Act* applies and in respect of which the requirements that are necessary to proceed with the undertaking under the class environmental assessment have been satisfied if,
  - i. the requirements are satisfied before the effective date or within two years after that date, and
  - ii. the undertaking is commenced before the effective date or is commenced after that date but no later than,
    - A. in a case relating to a newly-listed species,
      - 1. the fifth anniversary of the day the requirements to proceed with the undertaking are satisfied where they are satisfied on or after June 30, 2010, or
      - 2. June 30, 2015 where the requirements to proceed with the undertaking were satisfied before June 30, 2010, or
    - B. in a case relating to a transition species, June 30, 2015.
- 10. Carrying out a transit project, as defined in subsection 1 (1) of Ontario Regulation 231/08 (Transit Projects and Metrolinx Undertakings) made under the *Environmental Assessment Act*, in respect of which the Minister has given a notice to proceed with the transit project under clause 12 (1) (a) or (c) of Ontario Regulation 231/08 if,
  - i. the notice is given before the effective date or within two years after that date, and
  - ii. the transit project is commenced before the effective date or is commenced after that date but no later than,
    - A. in a case relating to a newly-listed species,
      - 1. the fifth anniversary of the day the notice is given where the notice is given on or after June 30, 2010, or
      - 2. June 30, 2015 where the notice was given before June 30, 2010, or
    - B. in a case relating to a transit species, June 30, 2015.
- 11. Carrying out an undertaking that is designated as an undertaking to which the *Environmental Assessment Act* applies under Ontario Regulation 116/01 (Electricity Projects) made under that Act, that is required under that regulation to be carried out in accordance with the Environmental Screening Process described in that regulation and in respect of which all the requirements of the Environmental Screening Process that are necessary to proceed with the undertaking have been satisfied if,
  - i. the requirements are satisfied before the effective date or within two years of that date, and

- ii. the undertaking is commenced before the effective date or is commenced after that date but no later than,
    - A. in a case relating to a newly-listed species,
      - 1. the fifth anniversary of the day the requirements to proceed with the undertaking are satisfied where they are satisfied on or after June 30, 2010, or
      - 2. June 30, 2015 where the requirements to proceed with the undertaking were satisfied before June 30, 2010, or
    - B. in a case relating to a transition species, June 30, 2015.
- 12. Carrying out an undertaking that is designated as an undertaking to which the *Environmental Assessment Act* applies under Ontario Regulation 101/07 (Waste Management Projects) made under that Act, that is required under that regulation to be carried out in accordance with the Environmental Screening Process for Waste Management Projects described in that regulation and in respect of which all the requirements of the Environmental Screening Process for Waste Management Projects that are necessary to proceed with the undertaking have been satisfied if,
  - i. the requirements are satisfied before the effective date or within two years of that date, and
  - ii. the undertaking is commenced before the effective date or is commenced after that date but no later than,
    - A. in a case relating to a newly-listed species,
      - 1. the fifth anniversary of the day the requirements to proceed with the undertaking are satisfied where they are satisfied on or after June 30, 2010, or
      - 2. June 30, 2015 where the requirements to proceed with the undertaking were satisfied before June 30, 2010, or
    - B. in a case relating to a transition species, June 30, 2015.
- 13. Constructing a hydrocarbon line or station under the authority of an order made under Part VI of the *Ontario Energy Board Act, 1998* if,
  - i. the order is made before the effective date or within two years after that date, and
  - ii. the construction is commenced before the effective date or is commenced after that date but no later than,
    - A. in a case relating to a newly-listed species,
      - 1. the fifth anniversary of the day the order is made, where the order is made on or after June 30, 2010, or
      - 2. June 30, 2015, where the order was made before June 30, 2010, or
    - B. in a case relating to a transition species, June 30, 2015.
- 14. Constructing a renewable energy generation facility under the authority of, and in accordance with, a renewable energy approval issued under Part V.0.1 of the *Environmental Protection Act* if,
  - i. the approval is issued before the effective date or within two years after that date, and
  - ii. the construction is commenced before the effective date or is commenced after that date but no later than,
    - A. in a case relating to a newly-listed species,



1. the fifth anniversary of the day the approval is issued, where the approval is issued on or after June 30, 2010, or
  2. June 30, 2015, where the approval was issued before June 30, 2010, or
  - B. in a case relating to a transition species, June 30, 2015.
15. An activity described in section 3 of Ontario Regulation 350/12 (Registrations under Part II.2 of the Act — Solar Facilities) made under the *Environmental Protection Act* in respect of which a confirmation of registration has been provided under section 20.22 of that Act by the Director appointed under section 5 of that Act if,
- i. the confirmation of registration is provided before the effective date or within two years of that date, and
  - ii. the activity is commenced before the effective date or is commenced after that date but no later than,
    - A. in a case relating to a newly-listed species,
      1. the fifth anniversary of the day the confirmation of registration is provided, where the confirmation of registration is provided on or after June 30, 2010, or
      2. June 30, 2015, where the confirmation of registration was provided before June 30, 2010, or
    - B. in a case relating to a transition species, June 30, 2015.
16. Advanced exploration carried out under Part VII of the *Mining Act* in respect of which the Director of Mine Rehabilitation has issued a written acknowledgement of receipt of a certified closure plan under subsection 140 (5) of that Act or a written acknowledgement of receipt of amendments to a certified closure plan under subsection 143 (8) of that Act if,
- i. the written acknowledgement is received before the effective date or within two years of that date, and
  - ii. advanced exploration is commenced before the effective date or is commenced after that date but no later than,
    - A. in a case relating to a newly-listed species,
      1. the fifth anniversary of the day the written acknowledgement is received where it is received on or after June 30, 2010, or
      2. June 30, 2015, where the written acknowledgement was received before June 30, 2010, or
    - B. in the case of a transition species, June 30, 2015.
17. Mine production carried out under Part VII of the *Mining Act* in respect of which the Director of Mine Rehabilitation has issued a written acknowledgement of receipt of a certified closure plan under clause 141 (4) (a) of that Act or a written acknowledgement of receipt of amendments to a certified closure plan under subsection 143 (8) of that Act if,
- i. the written acknowledgement is received before the effective date or within two years of that date, and
  - ii. mining production is commenced before the effective date or is commenced after that date but no later than,
    - A. in a case relating to a newly-listed species,

1. the fifth anniversary of the day the written acknowledgement is received where it is received on or after June 30, 2010, or
  2. June 30, 2015, where the written acknowledgement was received before June 30, 2010, or
- B. in the case of a transition species, June 30, 2015.
18. Rehabilitation of a mine hazard in compliance with a certified closure plan filed pursuant to an order made under subsection 147 (1) of the *Mining Act* if,
- i. the certified closure plan is filed before the effective date or within two years of that date, and
  - ii. rehabilitation of the mine hazard is commenced before the effective date or is commenced after that date but no later than,
    - A. in a case relating to a newly-listed species,
      1. the fifth anniversary of the day the certified closure plan is filed where it is filed on or after June 30, 2010, or
      2. June 30, 2015, where the certified closure plan was filed before June 30, 2010, or
    - B. in the case of a transition species, June 30, 2015.
19. Voluntary rehabilitation of a mine hazard that was approved by the Director of Mine Rehabilitation under section 139.2 of the *Mining Act* if,
- i. the written approval of the Director was granted before the effective date or within two years of that date, and
  - ii. the voluntary rehabilitation of the mine hazard is commenced before the effective date or is commenced after that date but no later than,
    - A. in a case relating to a newly-listed species,
      1. the fifth anniversary of the day the approval is granted where it is granted on or after June 30, 2010, or
      2. June 30, 2015, where the approval was granted before June 30, 2010, or
    - B. in the case of a transition species, June 30, 2015. O. Reg. 176/13, s. 14.
- (3) The carrying out of an undertaking referred to in paragraph 8, 9 or 11 of subsection (2) does not include the operation of a hydro-electric generating station or the operation of a wind facility within the meaning of Ontario Regulation 359/09 (Renewable Energy Approvals under Part V.0.1 of the Act) made under the *Environmental Protection Act*. O. Reg. 176/13, s. 14.
- (4) Despite anything in subsection (2), subsections (5) to (15) do not apply to an activity described in section 23.4 in respect of a species listed in the Schedule to that section. O. Reg. 176/13, s. 14.
- (5) Subsection 10 (1) of the Act does not apply to a person who, while engaging in an activity described in subsection (2), damages or destroys the habitat of a newly-listed species or transition species if the conditions set out in subsection (7) are satisfied. O. Reg. 176/13, s. 14.
- (6) Clause 9 (1) (a) of the Act does not apply to a person who, while engaging in an activity described in subsection (2), kills, harms, harasses, captures or takes a member of a newly-listed species if the conditions set out in subsection (7) are satisfied. O. Reg. 176/13, s. 14.

(7) The following are the conditions that a person carrying out an activity described in subsection (2) must satisfy for the purposes of the exemptions set out in subsections (5) and (6):

1. The person must give the Minister notice of the activity by submitting a notice of activity form available on the Registry to the Minister through the Registry.
2. The person must ensure that the notice of activity form includes,
  - i. a description of the activity the person is carrying out or is proposing to carry out,
  - ii. a statement that the activity has already commenced or the date the activity will commence,
  - iii. the location at which the activity is being carried out or will be carried out, and
  - iv. the name of every newly-listed or transition species that will be affected by the activity.
3. The person must give notice under paragraph 1,
  - i. promptly after June 30, 2013, if the activity has already commenced on that date, or
  - ii. before the activity is commenced, if the activity has not commenced on or before June 30, 2013.
4. The person must follow the requirements of section 23.3 with respect to the completion of the notice of activity form, the keeping of records relating to the notice of activity form and the updating of the information on the Registry.
5. While carrying out the activity, the person must take reasonable steps to minimize the adverse effects of the activity on each species identified in the notice of activity form, including those steps identified in subsection (8).
6. The person must,
  - i. ensure that a mitigation plan is prepared in accordance with subsections (9) and (10),
  - ii. subject to subsection (11), ensure that the mitigation plan referred to in subparagraph i is prepared within two years of the day a notice of activity form is submitted to the Minister under paragraph 1 and before the person begins to take steps to restore, create or enhance habitat as required under paragraph 10 of subsection (8), and
  - iii. in the case of a person described in subsection (11), ensure that the conditions set out in subsection (12) are satisfied.
7. After a mitigation plan is prepared, the person must,
  - i. carry out the activity in accordance with the mitigation plan,
  - ii. ensure that the mitigation plan is updated in accordance with subsections (9) and (10) at least once every five years to include information obtained while monitoring the effects of the activity under paragraph 8.
  - iii. retain a copy of the mitigation plan until at least five years after the activity is complete, and
  - iv. provide a copy of the mitigation plan to the Ministry within 14 days of receiving a request for it.
8. The person must,
  - i. monitor the effects of the activity on the species identified in the notice of activity form until the day the activity is complete,

- ii. monitor the effectiveness of steps described in paragraphs 1 to 9 of subsection (8) that are taken to minimize adverse effects of the activity on the species until the day those steps are complete, and
    - iii. monitor the effectiveness of the steps taken to restore, create or enhance habitat under paragraph 10 of subsection (8) until 12 months after those steps are completed.
  - 9. On or before December 31 of each year in which the activity is carried out and in which the person is required under paragraph 8 to monitor the effectiveness of any steps taken to minimize adverse effects of the activity, the person must prepare an annual report in accordance with subsection (14) and thereafter the person must,
    - i. retain a copy of the annual report for at least five years after it is prepared, and
    - ii. provide a copy of the annual report to the Ministry within 14 days of receiving a request for it.
  - 10. If the person or an employee or agent of the person observes a species identified in the notice of activity form in the course of carrying out the activity, the person must ensure that, within three months of the observation, the Natural Heritage Information Centre Rare Species Reporting Form available on the Ministry website is completed, detailing the species and number of individual members that were observed, the date and location of the observation and any other information requested on that form. O. Reg. 176/13, s. 14.
- (8) The following are the steps that a person must take to minimize adverse effects of an activity described in a notice of activity form submitted under paragraph 1 of subsection (7) on a species identified in the notice of activity form:
- 1. The person shall take steps to minimize or avoid the killing, harming or harassing of members of the species during a time of year when the species is likely to be carrying out a life process related to hibernation or reproduction, including rearing.
  - 2. The person must not carry out any part of the activity in an area while it is being used by a member of the species to carry out a life process related to hibernation or reproduction, including rearing.
  - 3. The person shall take steps to exclude animals that are members of the species from an area in which the activity is occurring or is likely to occur, such as installing temporary fencing to prevent members of the species from accessing the area.
  - 4. If the person encounters an animal that is a member of the species in the course of carrying out the activity, the person must cease carrying out the activity and provide the animal with a reasonable amount of time to leave the area in which the activity is occurring before continuing with the activity.
  - 5. If, after providing an animal with a reasonable amount of time in accordance with paragraph 4 the animal does not leave the area, the person must take measures to relocate the animal to a nearby location that is suitable and safe for the animal.
  - 6. If the person encounters a moss, lichen or vascular plant that is a member of the species in the course of carrying out the activity and it is not necessary to kill or harm the member for the purpose of carrying out the activity, the person must,
    - i. cease the activity in the area of the encounter,
    - ii. install and maintain barriers to create a protective zone around the species, and

- iii. after establishing the protective zone referred to in subparagraph ii, continue the activity in a manner that does not impair the ability of the species to carry out its life processes, including reproduction.
- 7. If it is necessary to kill or harm a moss, lichen or vascular plant for the purpose of carrying out the activity, the person must relocate the moss, lichen or vascular plant to a nearby location within the species' habitat that is suitable and safe for the species so that it is not killed or harmed, provided it is feasible to do so.
- 8. The determination under paragraph 7 as to whether it is feasible to relocate a moss, lichen or vascular plant must be made by the person using the best available information with respect to the suitability of relocating that species, including information obtained from the Ministry.
- 9. The relocation of an animal or of a moss, lichen or vascular plant in accordance with paragraph 5 or 7 must be undertaken by, or in consultation with, a person who is knowledgeable about, or has training in, the handling of the species.
- 10. Within two years of the day the person submitted the notice of activity form to the Minister under paragraph 1 of subsection (7), the person shall begin to take steps to,
  - i. restore any habitat of the species that is damaged or destroyed by the activity, to the extent that it is feasible to do so, or
  - ii. create habitat for the species or enhance any existing habitat for the species in an area that is in the same ecoregion as the habitat that was damaged or destroyed by the activity and in a manner that minimizes the overall loss of habitat for the species resulting from the activity.
- 11. The person must not carry out any part of the activity in an area that is being used, or has been used at any time in the previous three years, by woodland caribou (forest-dwelling boreal population) to carry out a life process related to reproduction, including rearing. O. Reg. 176/13, s. 14.

(9) A mitigation plan must be prepared and updated by one or more persons with expertise in relation to every species that is the subject of the plan, using the best available information on steps that may help minimize or avoid adverse effects on the species, which includes consideration of information obtained from the Ministry, aboriginal traditional knowledge and community knowledge if it is reasonably available. O. Reg. 176/13, s. 14.

(10) A mitigation plan prepared in respect of an activity described in subsection (2) must include the following information:

- 1. The following information with respect to the activity:
  - i. a description of the activity,
  - ii. the proposed start and completion dates of the activity,
  - iii. a description of all of the stages of the activity and a timeline for the stages, and
  - iv. a map indicating the geographic location of the property on which the activity will occur.
- 2. A list of the newly-listed species or transition species that will likely suffer adverse effects as a result of the activity and an assessment of the activity's likely effects on the local population of each newly-listed or transition species.

3. Details on the steps the person will take to minimize adverse effects of the activity on the species identified in paragraph 2, including,
  - i. a description of each step to be taken and the dates and locations at which the steps will be taken,
  - ii. the times during the year at which a species identified under paragraph 2 is likely to be carrying out a life process related to hibernation or reproduction, including rearing, and at which activities that are likely to kill, harm or harass a member of the species, or damage or destroy its habitat, must not be carried out.

4. Details regarding the monitoring the person plans to conduct to assess the effects of the activity on members of the species identified under paragraph 2 and the effectiveness of steps taken to minimize adverse effects on the species. O. Reg. 176/13, s. 14.

(11) A person who proposes to carry out an activity described in paragraph 14 of subsection (2) and who has not been issued a renewable energy approval under Part V.0.1 of the *Environmental Protection Act* on or before the effective date must prepare a mitigation plan in respect of the activity before either of the following days:

1. If the person has not submitted an application for a renewable energy approval under Part V.0.1 of the *Environmental Protection Act* on or before the effective date, the day the person submits the application.
2. If the person has submitted an application for a renewable energy approval under Part V.0.1 of the *Environmental Protection Act* on or before the effective date, the day the renewable energy approval is issued. O. Reg. 176/13, s. 14.

(12) A person who prepares a mitigation plan under subsection (11) shall ensure that the following conditions are satisfied:

1. The person must submit the mitigation plan to the Minister promptly after it is prepared.
2. The Minister must approve the mitigation plan, subject to subsection (13).
3. The person must receive written notice of the approval of the Minister. O. Reg. 176/13, s. 14.

(13) The Minister may refuse to approve a mitigation plan submitted under subsection (12) if, in his or her opinion,

- (a) the mitigation plan has not been prepared by one or more persons with expertise in relation to every species that is the subject of the plan, using the best available information; or
- (b) the steps set out in the mitigation plan may not be sufficient to,
  - (i) restore any habitat of the species that is damaged or destroyed by the activity, to the extent that it is feasible to do so,
  - (ii) create habitat for the species or enhance any existing habitat for the species in a manner that minimizes the overall loss of habitat for the species resulting from the activity, or
  - (iii) otherwise effectively minimize the adverse effects of the activity on the species. O. Reg. 176/13, s. 14.

(14) An annual report referred to paragraph 9 of subsection (7) shall document, and assess the effectiveness of, the steps taken by the person in the previous 12 months to minimize adverse effects of an activity described in a notice of activity form submitted under paragraph 1 of

subsection (7) on the newly-listed or transition species identified in the notice of activity form, including the locations where the steps were taken. O. Reg. 176/13, s. 14.

(15) Subclauses 9 (1) (b) (i) and (ii) of the Act do not apply to the possession or transport of a member of a species if,

- (a) pursuant to subsection (5) or (6), clause 9 (1) (a) or subsection 10 (1) of the Act did not apply with respect to the species or its habitat; or
- (b) the possession or transport of the member of the species is necessary in order to satisfy the conditions set out in subsection (7). O. Reg. 176/13, s. 14.

(16) Subsection 10 (1) of the Act does not apply to a person who damages or destroys the habitat of a newly-listed or transition species while carrying out the undertaking described in the order made under section 3.2 of the *Environmental Assessment Act* and approved by Order in Council 2174/99 on December 8, 1999 with respect to hydroelectric facilities on the Mattagami River if the person satisfies the conditions set out in subsection (7). O. Reg. 176/13, s. 14.

(17) Clause 9 (1) (a) of the Act does not apply to a person who kills, harms, harasses, captures or takes a living member of a newly-listed species while carrying out the undertaking described in the order made under section 3.2 of the *Environmental Assessment Act* and approved by Order in Council 2174/99 on December 8, 1999 with respect to hydroelectric facilities on the Mattagami River if the person satisfies the conditions set out in subsection (7). O. Reg. 176/13, s. 14.

(18) Subclauses 9 (1) (b) (i) and (ii) of the Act do not apply to the possession or transport of a member of a species if,

- (a) pursuant to subsection (16) or (17), clause 9 (1) (a) or subsection 10 (1) of the Act did not apply with respect to the species or its habitat; or
- (b) the possession or transport of the member of the species is necessary in order to satisfy the conditions set out in subsection (7). O. Reg. 176/13, s. 14.

(19) Clause 10 (1) (a) of the Act does not apply to a person who, after the effective date, damages or destroys the habitat of a transition species while carrying out an activity that is authorized by a permit issued under section 17 of the Act before June 30, 2013 if,

- (a) the permit is still in effect; and
- (b) the activity is carried out in accordance with the conditions of the permit. O. Reg. 176/13, s. 14.

### **Pits and quarries**

**23.14** (1) This section applies with respect to a pit or quarry that,

- (a) is operated under the authority of a licence, wayside permit or aggregate permit issued under the *Aggregate Resources Act*; or
- (b) is located in an area in Ontario to which the *Aggregate Resources Act* does not apply and operated in accordance with the applicable zoning by-laws. O. Reg. 176/13, s. 14.

(2) This section does not apply with respect to the following species:

1. Blue racer.
2. Butler's gartersnake.
3. Common five-lined skink (Carolinian population).
4. Henslow's sparrow.

5. Small-mouthed salamander.
6. Virginia mallow.
7. Yellow-breasted chat. O. Reg. 176/13, s. 14.

(3) Subject to subsection (5), clause 9 (1) (a) and subsection 10 (1) of the Act do not apply to a person who operates a pit or quarry and who, in the course of operating a pit or quarry, kills, harms, harasses, captures or takes a member of a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species, or damages or destroys the habitat of such a species, if,

- (a) in the case of a species that was listed on the Species at Risk in Ontario List as an endangered or threatened species before January 24, 2013, the pit or quarry began operations,
    - (i) before the day the species was listed on the Species at Risk in Ontario List as an endangered or threatened species, or
    - (ii) before the day the species first appeared on the site on which the pit or quarry is located; or
  - (b) in the case of a species that was listed on the Species at Risk in Ontario List as an endangered or threatened species for the first time on January 24, 2013,
    - (i) the pit or quarry began operations before January 24, 2013,
    - (ii) the pit or quarry began operations before the day the species first appeared on the site on which the pit or quarry is located, or
    - (iii) the pit or quarry begins operations after January 24, 2013, so long as on or before January 24, 2015,
      - (A) an application for a licence, wayside permit or aggregate permit has been made under the *Aggregate Resources Act* in respect of the land comprising the pit and quarry, and
      - (B) the Ministry has given the applicant notice that the application complies with the requirements of the *Aggregate Resources Act*. O. Reg. 176/13, s. 14.
- (4) Subclauses 9 (1) (b) (i) and (ii) of the Act do not apply to the possession or transport of a member of a species if,
- (a) pursuant to subsection (3), clause 9 (1) (a) and subsection 10 (1) of the Act did not apply with respect to the member of the species; or
  - (b) the possession or transport of the member of the species is necessary in order to satisfy the conditions set out in subsection (5). O. Reg. 176/13, s. 14.
- (5) Subsection (3) does not apply unless the person referred to in that subsection satisfies the following conditions:
1. Before doing anything, in the course of operating the pit or quarry, that is prohibited under clause 9 (1) (a) or subsection 10 (1) of the Act in respect of a species to which subsection (3) applies, the person must,
    - i. give the Minister notice of the fact that the person is operating a pit or quarry by submitting a notice of activity form available on the Registry to the Minister through the Registry, and



- ii. subject to subsection (6), prepare in accordance with subsection (7) a mitigation plan that meets the requirements of subsection (8).
  - 2. The person must ensure that the notice of activity form includes,
    - i. the location of the pit or quarry, and
    - ii. the name of every species to which subsection (3) applies that will likely be affected by the operation of the pit or quarry.
  - 3. The person must follow the requirements of section 23.3 with respect to the completion of the notice of activity form, the keeping of records relating to the notice of activity form and the updating of the information on the Registry.
  - 4. For as long as the operation of the pit or quarry is likely to adversely affect the species identified in the notice of activity form, the person must,
    - i. comply with the requirements of the mitigation plan,
    - ii. ensure that reasonable steps are taken to minimize the adverse effects of the activity on the species identified in the notice of activity form, including the steps described in subsection (9), and such other steps as may be described in the mitigation plan.
  - 5. The person must,
    - i. retain a copy of the mitigation plan while operating the pit or quarry and for a period of five years after the person ceases to operate the pit or quarry,
    - ii. ensure that the plan is updated in accordance with subsections (7) and (8) at least once every five years to include information obtained while carrying out the monitoring requirements described in paragraph 6, and
    - iii. provide a copy of the mitigation plan to the Ministry within 14 days of receiving a request for it.
  - 6. The person must monitor the effectiveness of the steps taken to minimize the adverse effects of the operation of the pit or quarry on the species identified in the notice of activity form.
  - 7. The person must,
    - i. on or before December 31 of each year, prepare an annual report in accordance with subsection (10) on the effects that the operation of the pit or quarry has on the species identified in the notice of activity form,
    - ii. retain a copy of the annual report for at least five years after it is prepared, and
    - iii. provide a copy of the annual report to the Ministry within 14 days of receiving a request for it.
  - 8. If the person or an employee or agent of the person observes a species identified in the notice of activity form in the course of carrying out the activity, the person must ensure that, within three months of the observation, the Natural Heritage Information Centre Rare Species Reporting Form available on the Ministry website is completed, detailing the species and number of individual members that were observed, the date and location of the observation and any other information requested on that form. O. Reg. 176/13, s. 14.
- (6) A person who carries out an activity described in subsection (1) is not required to complete the preparation of a mitigation plan until the following dates if the following circumstances apply:

1. If the mitigation plan relates to a species that was added to the Species at Risk in Ontario List as an endangered or threatened species on January 24, 2013, the second anniversary of that day.
2. If the mitigation plan relates to a species that first appears on the site of the pit or quarry after the pit or quarry begins operation, two years after the date the species first appears on the site. O. Reg. 176/13, s. 14.

(7) A mitigation plan must be prepared and updated by one or more persons with expertise in relation to every species that is the subject of the plan, using the best available information on steps that may help minimize or avoid adverse effects on the species, which includes consideration of information obtained from the Ministry, aboriginal traditional knowledge and community knowledge if it is reasonably available. O. Reg. 176/13, s. 14.

(8) A mitigation plan must include the following information:

1. The name and contact information of the person who operates the pit or quarry.
2. A map indicating the geographic location of the pit or quarry.
3. A list of the species identified in a notice of activity form submitted under paragraph 1 of subsection (5) and that are the subject of the mitigation plan.
4. A description of the places within the pit or quarry that are the habitat of, or used by, the species identified under paragraph 3.
5. Details on how the person will carry out the steps described in subsection (9) that the person must take to minimize the adverse effects of the operation of the pit or quarry on the species referred to in paragraph 3, including,
  - i. the dates on which, and locations at which, each step will be carried out, and
  - ii. the dates during the year when the species is likely to be carrying out a life process related to hibernation or reproduction, including rearing, and during which the person must avoid killing, harming or harassing members of the species.
6. A description of the steps the person plans to take to minimize the adverse effects of the operation of the pit or quarry on the species identified under paragraph 3, in addition to the steps described in subsection (9), including a description of,
  - i. the training that will be provided to employees, agents and contractors that are likely to encounter members of the species while performing their duties, in order to satisfy the obligations under this section,
  - ii. if the operation of the pit or quarry results in the damage or destruction of the habitat of the species, any measures to enhance or restore habitat for the species,
  - iii. the steps the person will take to avoid or minimize killing, harming or harassing members of the species or damaging or destroying habitat, in addition to the steps described in paragraph 1 of subsection (9), and
  - iv. the steps the person will take if a member of the species is encountered during the operation of the pit or quarry, in addition to the steps described in paragraphs 2, 3, 4, 5 and 6 of subsection (9).
7. A description of the steps the person will take to monitor the effectiveness of the steps taken to minimize the adverse effects of the operation of the pit or quarry on the species identified under paragraph 3. O. Reg. 176/13, s. 14.

(9) The steps that a person must take to minimize the adverse effects of the operation of a pit or quarry on a species identified in a notice of activity form submitted under paragraph 1 of subsection (5) are as follows:

1. The person must take steps to avoid or minimize killing, harming or harassing members of the species during a time of year when the species is likely to be carrying out a life process related to hibernation or reproduction, including rearing.
2. If the person encounters an animal that is a member of the species while operating the pit or quarry, the person must cease operations in the area of the encounter and provide the animal with a reasonable amount of time to leave the area before continuing the operation of the pit or quarry.
3. If, after providing an animal with a reasonable amount of time in accordance with paragraph 2 the animal does not leave the area, the person must take measures to relocate the animal to a nearby location that is suitable and safe for the animal.
4. If the person encounters a moss, lichen or vascular plant that is a member of the species while operating the pit or quarry and it is not necessary to kill or harm the member for the purpose of carrying out the activity, the person must,
  - i. cease the activity in the area of the encounter,
  - ii. install and maintain barriers or other structures to create a protective zone around the species, and
  - iii. after establishing the protective zone referred to in subparagraph ii, continue the operation of the pit or quarry in a manner that does not impair the ability of the species to carry out its life processes, including reproduction.
5. If it is necessary to kill or harm a moss, lichen or vascular plant referred to in paragraph 4 for the purpose of operating the pit or quarry, the person must, provided it is feasible to do so, relocate the moss, lichen or vascular plant to a nearby location within the species' habitat that is suitable and safe for the species.
6. The determination under paragraph 5 as to whether it is feasible to relocate a moss, lichen or vascular plant must be made by the person using the best available information with respect to the suitability of relocating that species, including information obtained from the Ministry.
7. The relocation of an animal in accordance with paragraph 3, or the relocation of a moss, lichen or vascular plant in accordance with paragraph 5, must be undertaken by, or in consultation with, a person who is knowledgeable about, or has training in, the handling of the species.
8. The person must take steps to exclude members of the species from an area of activity in the pit or quarry, such as installing fencing to prevent reptiles and amphibians from accessing active stockpiles of aggregates or areas of operation.
9. If the species uses nests or hibernacula to carry out its life processes, the person must, before and during the period of time when the species is likely to use the nests or hibernacula, install and maintain barriers or other structures to create a protective zone around the nests or hibernacula to limit the adverse effects that may be caused by the operation of the pit or quarry.
10. During a period of time when the species is likely to be using the nests or hibernacula to carry out life processes, the person must not carry out operations,

- i. within the protective zone installed under paragraph 8, or
  - ii. in a manner that would impair the ability of the species to carry out its life processes within the protective zone.
- 11. The person must inform all employees, agents and contractors engaged in operating the pit or quarry that the species are present at the pit or quarry and of the steps required under paragraphs 1 to 10 and must install signs at the pit or quarry to that effect.
- 12. If the person discovers that the steps described in paragraphs 1 to 11 or in the mitigation plan have not been effective in minimizing the adverse effects of the operation of the pit or quarry on the species, the person shall,
  - i. take such actions as are necessary to increase the effectiveness of those steps, or
  - ii. take such other reasonable steps as may be necessary to minimize the adverse effects of the operation of the pit or quarry on the species. O. Reg. 176/13, s. 14.
- (10) The annual report required under paragraph 7 of subsection (5) shall include,
  - (a) the steps taken by the person operating the pit or quarry to minimize adverse effects of the operation of the pit or quarry on the species identified in the notice of activity form submitted under paragraph 1 of subsection (5) and an assessment of their effectiveness;
  - (b) information collected during the monitoring referred to in paragraph 6 of subsection (5);
  - (c) records of any activities carried out in accordance with the mitigation plan; and
  - (d) details of any observations of the species identified in the notice of activity form submitted under paragraph 1 of subsection (5) in the course of operating the pit or quarry, including,
    - (i) the name of the species,
    - (ii) the location of the observation, and
    - (iii) the date and time of the observation. O. Reg. 176/13, s. 14.
- (11) This section does not apply to a person who operates a pit or quarry and who has entered into an agreement with the Minister under clause 22 (1) (b) or (2) (b), unless the person gives notice to the Minister in accordance with paragraph 1 of subsection (5). O. Reg. 176/13, s. 14.

**Possession for educational purposes, etc.**

- 23.15** (1) In this section,
- “educational organization” means, subject to subsection (2),
- (a) a curatorial institution, including a museum or science centre, that is owned or operated by the Province or by a municipality,
  - (b) a post-secondary institution that is a member of the Association of Universities and Colleges of Canada, or
  - (c) a college of applied arts and technology established under the *Ontario Colleges of Applied Arts and Technology Act, 2002*. O. Reg. 176/13, s. 14.
- (2) This section applies to an educational organization only if it,
- (a) gives the Minister notice that it is engaged in scientific or educational activities that require that, from time to time, it acquire and possess living or dead members of various species that are listed on the Species at Risk in Ontario List as extirpated, endangered or threatened species, parts of members of such species or anything derived from members of such species;

- (b) gives the notice under clause (a) by submitting a notice of activity form available on the Registry to the Minister through the Registry;
- (c) includes in the notice of activity form a description of the scientific or educational activities which it carries out; and
- (d) follows the requirements of section 23.3 with respect to the completion of the notice of activity form, the keeping of records relating to the notice of activity form and the updating of the information on the Registry. O. Reg. 176/13, s. 14.

(3) Clause 9 (1) (b) of the Act does not apply to an educational organization that possesses or collects, for scientific or educational purposes, a living or dead member of a species that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species, a part of a member of such a species or anything derived from a member of such a species, if the following conditions are met:

1. The educational organization must acquire the member of the species, the part or the thing, from a person who is authorized to possess it under the Act.
2. After acquiring the member of the species, the part or the thing, the educational organization must create a record relating to it containing the following information:
  - i. a statement describing what was acquired, whether a living or dead member of a species, a part of a member of a species or a thing derived from a member of a species, and identifying the relevant species,
  - ii. if more than one member of the species, or more than one part or thing is acquired, the number of members, parts or things,
  - iii. the date the member of the species, the part or the thing comes into the possession of the educational organization,
  - iv. the person from whom the member of the species, the part or the thing was acquired and a description of the circumstances under which it was acquired,
  - v. in the case of a living member of a species, a description of any injury to the member and, if applicable, the time and circumstances of the death and of the disposal of the member, and
  - vi. if the member of the species, the part or the thing is transferred to another educational organization, the date of the transfer and the name of the other educational organization.
3. The educational organization must maintain the records required under paragraph 2 for as long as the member of the species, the part or the thing is in its possession and provide copies of the records to the Ministry on request.
4. In the case of a living member of a species, the educational organization must take reasonable steps to ensure that the member is safe from harm while in its possession. O. Reg. 176/13, s. 14.

(4) Clause 9 (1) (b) of the Act does not apply to the transport by an educational organization of anything that the organization is permitted to possess or collect under subsection (3), if the transportation is to another educational organization or to a veterinarian. O. Reg. 176/13, s. 14.

(5) Subclauses 9 (1) (b) (i) and (ii) of the Act do not apply to a person who possesses or transports a dead member of a species that is listed on the Species at Risk in Ontario List as an

extirpated, endangered or threatened species, or a part of a member of such a species, if the person,

- (a) possesses the member or part for no more than seven days; and
- (b) after possessing the member or part for a maximum of seven days, transports it to an educational organization. O. Reg. 176/13, s. 14.

(6) Subclauses 9 (1) (b) (i) and (ii) of the Act do not apply to a person who possesses a dead member of a species that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species, or a part of a member of such a species, for the purpose of carrying out a scientific or educational activity, if the person,

- (a) upon acquiring the member or part, gives notice to the Minister that the person has possession of the member or part for the purpose of carrying out a scientific or educational activity;
  - (b) gives the notice under clause (a) by submitting a notice of possession form available on the Registry to the Minister through the Registry;
  - (c) includes in the notice of possession form,
    - (i) the identity of the species to which the member or part belongs,
    - (ii) the date on which the member or part was acquired, and
    - (iii) a description of the scientific or educational activity that the person is carrying out;
  - (d) follows the requirements of subsections (7) and (8) with respect to the completion of the notice of possession form, the keeping of records relating to the notice of possession form and the updating of the information on the Registry; and
  - (e) after completing the scientific or educational activity, transports the member or part to an educational organization. O. Reg. 176/13, s. 14.
- (7) Before submitting a notice of possession form to the Minister, a person shall ensure that,
- (a) all mandatory information requested on the form, including the contact information for the person, has been provided; and
  - (b) the information provided on the form is complete and accurate. O. Reg. 176/13, s. 14.
- (8) After submitting a notice of possession form to the Minister, the person shall,
- (a) promptly upon obtaining from the Ministry confirmation that a notice of possession form submitted through the Registry has been received by the Minister, make a record of the confirmation;
  - (b) for as long as the scientific or educational activity referred to in subsection (6) is being carried out,
    - (i) keep the record of the confirmation at the premises where the activity is being carried out, and
    - (ii) make the record of the confirmation available to the Ministry upon receiving a request for it; and
  - (c) if there is a change in the contact information for the person who submitted the notice of possession form, update the information on the Registry within 10 business days of the change. O. Reg. 176/13, s. 14.

(9) A person who provides incomplete, false or misleading information on a notice of possession form or when updating information on the Registry shall be deemed to have not submitted the notice of possession form. O. Reg. 176/13, s. 14.

(10) Subclauses 9 (1) (b) (i) and (ii) of the Act do not apply to a person who transports a dead member of a species that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species, or a part of a member of such a species, to an educational organization in accordance with clause (6) (e). O. Reg. 176/13, s. 14.

### **Safe harbour habitat**

**23.16** (1) In this section,

“safe harbour habitat” means the habitat of a species listed on the Species at Risk in Ontario List as an endangered or threatened species that was created or enhanced in accordance with subsection (2); (“habitat refuge”)

“safe harbour instrument” means one of the following instruments:

1. A permit issued under clause 17 (2) (b) or (c) of the Act that includes a condition that safe harbour habitat be created or enhanced and that meets the requirements of subsection (3).
2. A stewardship agreement entered into under section 16 of the Act that includes a condition that safe harbour habitat be created or enhanced and that meets the requirements of subsection (3). (“acte concernant un habitat refuge”) O. Reg. 176/13, s. 14.

(2) This section applies to the habitat of a species listed on the Species at Risk in Ontario List as an endangered or threatened species only if,

- (a) the habitat was created,
  - (i) in fulfilment of a condition of a safe harbour instrument, and
  - (ii) for the purpose of providing habitat to the species for a limited period of time specified in the safe harbour instrument; or
- (b) in the case of habitat of bobolink or eastern meadowlark, an area that is existing habitat for the species is enhanced,
  - (i) in fulfilment of a condition of a safe harbour instrument, and
  - (ii) for the purpose of ensuring that the habitat continue as habitat for the species for a limited period of time specified in the safe harbour instrument. O. Reg. 176/13, s. 14.

(3) A safe harbour instrument under which safe harbour habitat is created or enhanced shall include a statement by the Minister that he or she is of the opinion that,

- (a) in the case of an area in which it is proposed that safe harbour habitat be created for a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species, other than bobolink or eastern meadowlark, the area,
  - (i) is not currently the habitat of a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species, and
  - (ii) is suitable for the creation of habitat for the species in question;
- (b) in the case of an area of habitat for bobolink or eastern meadowlark that is proposed to be enhanced as safe harbour habitat for either or both of those species, the area,
  - (i) is not currently the habitat of a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species, other than bobolink or eastern meadowlark, and

- (ii) is suitable for the enhancement of habitat for bobolink or eastern meadowlark; and
- (c) the period of time specified in the safe harbour instrument as the period of time for which the safe harbour habitat must continue to provide habitat for a particular species is sufficient to,
  - (i) in the case of a stewardship agreement or of a permit issued under clause 17 (2) (b) of the Act, assist with the protection or recovery of the species in Ontario, and
  - (ii) in the case of a permit issued under clause 17 (2) (c) of the Act, achieve an overall benefit to the species. O. Reg. 176/13, s. 14.
- (4) Subsection 10 (1) of the Act does not apply to a person who damages or destroys safe harbour habitat if,
  - (a) the damage or destruction occurs after the end of the period of time specified in the safe harbour instrument as the period of time for which the habitat must continue to provide habitat for a particular species;
  - (b) all the requirements of the safe harbour instrument under which the habitat was created or enhanced that are applicable to the habitat have been satisfied; and
  - (c) the person satisfies the conditions set out in subsection (5). O. Reg. 176/13, s. 14.
- (5) The following are the conditions that a person who damages or destroys safe harbour habitat must satisfy for the purposes of clause (4) (c):
  1. Before beginning an activity that will damage or destroy the safe harbour habitat, the person must give the Minister notice of the activity by submitting a notice of activity form available on the Registry to the Minister through the Registry.
  2. The person must ensure that the notice of activity form includes,
    - i. a description of the activity,
    - ii. the proposed start and end dates of the activity,
    - iii. the location at which the activity will be carried out,
    - iv. the name of the species for which the safe harbour habitat was created or enhanced, and
    - v. the identification number given by the Minister to the applicable safe harbour instrument and that appears on the safe harbour instrument.
  3. The person must follow the requirements of section 23.3 with respect to the completion of the notice of activity form, the keeping of records relating to the notice of activity form and the updating of the information on the Registry.
  4. While carrying out the activity, the person must take reasonable steps to minimize adverse effects of the activity on members of the species for which the safe harbour habitat was created or enhanced, including the steps described in subsection (6).
  5. Within 90 days of the completion of the activity that damages or destroys safe harbour habitat, the person must prepare a report that includes,
    - i. a description of the effects of the activity on members of,
      - A. the species for which the safe harbour habitat was created or enhanced, and
      - B. any other species listed on the Species at Risk in Ontario List as endangered, threatened or of special concern,



- ii. a description of the reasonable steps the person took in accordance with paragraph 4 to minimize adverse effects of the activity on the species for which the safe harbour habitat was created or enhanced, and
    - iii. the date on which the damage or destruction of the habitat began and the date on which it ended.
  - 6. The person must retain the report referred to in paragraph 5 for no less than five years after it is created, and provide a copy of the report to the Ministry within 14 days of receiving a request for the report from the Ministry. O. Reg. 176/13, s. 14.
- (6) The following are the steps that a person must take to minimize the adverse effects of an activity to damage or destroy safe harbour habitat on the species for which the safe harbour habitat was created or enhanced:
- 1. The person must take steps to minimize damaging or destroying the habitat of the species at a time of year when the species is likely to be carrying out a life process related to hibernation or reproduction, including rearing.
  - 2. If the person encounters an animal that is a member of the species while carrying out the activity, the person must cease carrying out the activity in the area of the encounter and provide the animal with a reasonable amount of time to leave the area before continuing with the activity.
  - 3. If, after providing an animal with a reasonable amount of time in accordance with paragraph 2 the animal does not leave the area, the person must take measures to relocate the animal to a nearby location that is suitable and safe for the animal.
  - 4. If the person encounters a moss, lichen or vascular plant that is a member of the species in the course of carrying out the activity and it is not necessary to kill or harm the member for the purpose of carrying out the activity, the person must,
    - i. cease the activity in the area of the encounter,
    - ii. install and maintain barriers or other structures to create a protective zone around the species, and
    - iii. after establishing the protective zone referred to in subparagraph ii, continue the activity in a manner that does not impair the ability of the species to carry out its life processes, including reproduction.
  - 5. If it is necessary to kill or harm a moss, lichen or vascular plant referred to in paragraph 4 for the purpose of carrying out the activity, the person must, provided it is feasible to do so, relocate the moss, lichen or vascular plant to a nearby location within the species' habitat that is suitable and safe for the species.
  - 6. The determination under paragraph 5 as to whether it is feasible to relocate a moss, lichen or vascular plant must be made by the person using the best available information with respect to the suitability of relocating that species, including information obtained from the Ministry.
  - 7. The relocation of an animal in accordance with paragraph 3, or the relocation of a moss, lichen or vascular plant in accordance with paragraph 5 must be undertaken by, or in consultation with, a person who is knowledgeable about, or has training in, the handling of the species.

8. The person must not capture, collect, take, possess or transport a member of the species unless,
  - i. doing so is necessary to minimize adverse effects on the member,
  - ii. the member is captured, collected, taken or possessed in the safe harbour habitat that was created or enhanced in accordance with this section or is transported from the safe harbour habitat, and
  - iii. the capture, collection, taking, possessing or transporting of the member is carried out by, or in consultation with, a person with expertise or training related to the species. O. Reg. 176/13, s. 14.

(7) Subsection (4) applies to a safe harbour habitat even if, since the day the safe harbour habitat was created or enhanced for a particular species, the area of the safe harbour habitat has become the habitat of one or more other species listed on the Species at Risk in Ontario List as endangered or threatened species. O. Reg. 176/13, s. 14.

(8) Subsection 10 (1) of the Act does not apply to a person who damages or destroys the habitat of a species listed on the Species at Risk in Ontario List as an endangered or threatened species if,

- (a) the habitat is located within the same area as a safe harbour habitat;
- (b) the damage or destruction of the habitat occurs while the person carries out an activity to damage or destroy the safe harbour habitat in respect of which notice has been given to the Minister under paragraph 1 of subsection (5); and
- (c) pursuant to subsection (4), subsection 10 (1) of the Act does not apply to the damage or destruction of the safe harbour habitat by the person. O. Reg. 176/13, s. 14.

(9) Clause 9 (1) (a) of the Act does not apply to a person who, while carrying out an activity to damage or destroy safe harbour habitat, kills, harms, harasses, captures or takes a member of a species for which the safe harbour habitat was created or enhanced, or a member of any other species that is listed in the Species at Risk in Ontario List as an endangered or threatened species if, pursuant to subsection (4), subsection 10 (1) of the Act does not apply to the damage or destruction of the safe harbour habitat by the person. O. Reg. 176/13, s. 14.

(10) Clause 9 (1) (b) of the Act does not apply to the possession, collection or transport of a member of a species if,

- (a) pursuant to subsection (9), clause 9 (1) (a) of the Act did not apply with respect to the member of the species; or
- (b) the possession, collection or transport of the member of the species is necessary in order to satisfy the conditions set out in subsection (6). O. Reg. 176/13, s. 14.

### **Species protection, recovery activities**

**23.17** (1) Subsections (4) to (9) apply with respect to the following activities intended to assist in the protection or recovery of one or more species listed on the Species at Risk in Ontario List as an endangered or threatened species:

1. Any activity that implements, or that supports or assists in the implementation of, an action that the Government intends to take or support in response to a recovery strategy prepared for the species under subsection 11 (1) of the Act and that is identified in a statement published by the Minister under subsection 11 (8) of the Act.

2. If the Minister has not yet published a statement under subsection 11 (8) of the Act in response to a recovery strategy prepared for the species under subsection 11 (1) of the Act, any activity that is identified as an approach to achieving the recommended objectives set out in the recovery strategy.
3. If a recovery strategy has not yet been prepared for the species under subsection 11 (1) of the Act, any activity that implements, or assists in the implementation of, an action or approach recommended in a recovery strategy prepared for the species under subsection 37 (1) of the *Species at Risk Act* (Canada) or in a management plan prepared for the species under section 65 of that Act.
4. If a recovery strategy has not yet been prepared for the species under subsection 11 (1) of the Act and if neither a recovery strategy nor a management plan has been prepared for the species under subsection 37 (1) or section 65 of the *Species at Risk Act* (Canada), any of the following activities:
  - i. an activity to enhance, maintain or restore the species' habitat, including,
    - A. the maintenance or enhancement of vegetation that forms a component of the species' habitat,
    - B. the maintenance or restoration of the ecological integrity of a species habitat,
    - C. the maintenance of water quality, quantity or flow within the species' habitat at levels that are suitable for the species to carry out its life processes, or the enhancement of water quality, quantity or flow within the species' habitat to such levels, or
    - D. the creation or enhancement of habitat features for the species such as nesting or hibernation sites,
  - ii. an activity to reduce a threat to the species that is identified in a status report referred to in section 21 of the *Species at Risk Act* (Canada),
  - iii. an activity to develop scientific knowledge related to,
    - A. the distribution or abundance of the species or its habitat in Ontario,
    - B. the manner in which the species depends upon or uses its habitat, or
    - C. a threat to the species identified in a status report referred to in subparagraph ii. O. Reg. 176/13, s. 14.

(2) The reference to ecological integrity in sub-subparagraph 4 i B of subsection (1) refers to a condition in which biotic and abiotic components of ecosystems and the composition and abundance of native species and biological communities are characteristic of their natural regions, and rates of change and ecosystem processes are unimpeded and, when used with reference to an area, indicates that the area,

- (a) has healthy and viable populations of native species, including species listed on the Species at Risk in Ontario List, and maintains the habitat on which the species depend; and
- (b) has levels of air and water quality consistent with protection of biodiversity. O. Reg. 176/13, s. 14.

(3) Despite subsection (1), subsections (4) to (9) do not apply to any activity described in that subsection if the killing of one or more members of a species listed on the Species at Risk in Ontario List as an endangered or threatened species was an intentional part of the activity, rather than an incidental consequence of the activity. O. Reg. 176/13, s. 14.

(4) Clause 9 (1) (a) and subsection 10 (1) of the Act do not apply to a person who, while carrying out an activity described in subsection (1), kills, harms, harasses, captures or takes a member of a species that is the object of the activity, or damages or destroys the habitat of such a species, if the person satisfies all of the conditions set out in subsection (6). O. Reg. 176/13, s. 14.

(5) Subclauses 9 (1) (b) (i) and (ii) of the Act do not apply to the possession or transport of a member of a species if,

- (a) pursuant to subsection (4), clause 9 (1) (a) of the Act did not apply with respect to the member of the species; or
- (b) the possession or transport of the member of the species is necessary in order to satisfy the conditions set out in subsection (6). O. Reg. 176/13, s. 14.

(6) The following are the conditions that a person who carries out an activity described in subsection (1) must satisfy for the purposes of subsection (4):

1. Before commencing the activity, the person must,
  - i. give the Minister notice of the activity by submitting a notice of activity form available on the Registry to the Minister through the Registry, and
  - ii. prepare in accordance with subsection (7) a mitigation plan that meets the requirements of subsection (8) and that identifies the steps that will be taken,
    - A. to minimize the adverse effects of the activity on the species that is the object of the activity, and
    - B. to monitor the effectiveness of the steps referred to in sub-subparagraph A.
2. The person must ensure that the notice of activity form includes,
  - i. a description of the activity,
  - ii. the proposed start and end dates for the activity,
  - iii. the location at which the activity will be carried out, and
  - iv. the name of each species that is the object of the activity.
3. The person must follow the requirements set out in section 23.3 with respect to the completion of the notice of activity form, the keeping of records relating to the notice of activity form and the updating of the information on the Registry.
4. After the mitigation plan is prepared, the person must,
  - i. ensure that the activity is carried out in accordance with the mitigation plan,
  - ii. retain a copy of the mitigation plan for at least five years after the activity is complete,
  - iii. provide a copy of the mitigation plan to the Ministry within 14 days of receiving a request for it, and
  - iv. if the activity occurs over a period of more than five years, ensure that, at least once every five years, the mitigation plan is updated in accordance with subsection (7) to include information obtained while monitoring the effects of the activity under paragraph 6.
5. While carrying out the activity, the person must ensure that the steps described in subsection (9), and such other steps as may be described in the mitigation plan, are taken to minimize the adverse effects of the activity on each species that is the object of the activity.
6. While carrying out the activity, the person shall ensure that the following are monitored:

- i. the effects of the activity on each species that is the object of the activity, and
    - ii. the effectiveness of the steps taken to minimize adverse effects on each species.
  - 7. While carrying out the activity, the person must create and maintain a record of,
    - i. the effects of the activity on each species that is the object of the activity,
    - ii. the steps that are taken by the person carrying out the activity to minimize the adverse effects of the activity on each species that is the object of the activity, including the locations where the steps are taken, and an assessment of the effectiveness of those steps, and
    - iii. the names of each individual with expertise who was responsible for carrying out or supervising the activity.
  - 8. The person must,
    - i. retain a copy of the record created under paragraph 7 for at least five years after it is prepared, and
    - ii. provide a copy of the record created under paragraph 7 to the Ministry within 14 days of receiving a request for it.
  - 9. Within 180 days of the completion of the activity, the person must prepare a report on the activity and submit it to the Natural Heritage Information Centre and the report must include the following information:
    - i. a description of the activity, including its purpose and a statement as to whether the activity is a type of activity described in paragraph 1, 2, 3 or 4 of subsection (1),
    - ii. a copy of the record created under paragraph 7, and
    - iii. a summary of the outcome of the activity, including a detailed assessment of the extent to which the activity achieved its purpose.
  - 10. If the person or an employee or agent of the person observes a species identified in the notice of activity form in the course of carrying out the activity, the person must ensure that, within three months of the observation, the Natural Heritage Information Centre Rare Species Reporting Form available on the Ministry website is completed, detailing the species and number of individual members that were observed, the date and location of observation and any other information requested on the form. O. Reg. 176/13, s. 14.
- (7) A mitigation plan shall be prepared and updated by one or more persons with expertise in relation to every species that is the subject of the plan, using the best available information on steps that may help minimize or avoid adverse effects on the species, which includes consideration of information obtained from the Ministry, aboriginal traditional knowledge and community knowledge if it is reasonably available. O. Reg. 176/13, s. 14.
- (8) A mitigation plan prepared with respect to an activity identified in a notice of activity form submitted to the Minister under subparagraph 1 i of subsection (6) must include the following information:
- 1. The name and contact information of the person carrying out the activity.
  - 2. The following information with respect to the activity:
    - i. a description of the activity, including an explanation of its nature and purpose,
    - ii. the proposed start and completion dates of the activity,
    - iii. a description of all of the stages of the activity and a timeline for the stages, and

- iv. a description of the location of the activity.
  - 3. The identity of the species that is the object of the activity and an assessment of the likely effects of the activity on the members of the species.
  - 4. Detailed plans of the steps the person will take during the activity to minimize the adverse effects of the activity on the species that is the object of the activity, including details of the steps described in subsection (9), such as the dates on which and locations at which each step will be taken.
  - 5. If the activity requires the handling of a member of a species listed on the Species at Risk in Ontario List as an endangered or threatened species that is an amphibian, bird, reptile or mammal,
    - i. procedures relating to the handling and care of the species that the person will ensure are followed, and
    - ii. a written opinion prepared by an animal care committee established under subsection 17 (1) of the *Animals for Research Act*, stating that the procedures included under subparagraph i provide for the proper handling and care of the species.
  - 6. Details regarding the steps the person will take to monitor the effects of the activity on members of the species that is the object of the activity and the effectiveness of the steps taken to minimize adverse effects on the species. O. Reg. 176/13, s. 14.
- (9) The following are the steps that a person must take to minimize the adverse effects of the activity described in the notice of activity form submitted to the Minister under subparagraph 1 i of subsection (6) on a species that is the object of the activity:
- 1. The person must ensure that the activity is carried out by or under the supervision of a person with expertise in the type of species protection or recovery work involved in the activity.
  - 2. The person, and any employee, agent or contractor of the person, must receive training on the following subjects before carrying out any part of the activity that is likely to affect the species:
    - i. the identity of the species,
    - ii. how to identify the species and its habitat,
    - iii. potential threats posed to the species and its habitat by the activity, and
    - iv. the steps that must be taken under paragraphs 3 to 5 to minimize adverse effects on members of the species.
  - 3. Any part of the activity that could reasonably be expected to have an adverse effect on a member of the species must be carried out by or in consultation with a person with expertise related to the species.
  - 4. If a member of the species is captured, collected or taken while carrying out the activity, the person must not,
    - i. possess a living member of the species for a period longer than is necessary to carry out the activity or minimize adverse effects to the member, and in no case longer than seven days,
    - ii. possess a dead member, or a part of a living or dead member, of the species for a period longer than is necessary to carry out the activity, or

- iii. release or introduce a living member of the species into an area other than the area from which the member was captured, collected or taken.
- 5. The person must ensure that steps are taken to avoid the spread of disease,
  - i. among members of the species, and
  - ii. between the members of the species and members of any other species. O. Reg. 176/13, s. 14.
- (10) Subsections (11) and (12) apply with respect to a stewardship activity that is,
  - (a) intended to assist in the protection or recovery of one or more species listed on the Species at Risk in Ontario List as an endangered or threatened species;
  - (b) part of the Species at Risk in Ontario Stewardship Program and funded by a grant made by the Minister under subsection 47 (3) of the Act; and
  - (c) carried out in accordance with the conditions of the grant. O. Reg. 176/13, s. 14.
- (11) Clause 9 (1) (a) and subsection 10 (1) of the Act do not apply to a person who, while carrying out an activity described in subsection (10), kills, harms, harasses, captures or takes a member of a species that is the object of the activity, or damages or destroys the habitat of such a species, if the person satisfies the following conditions:
  - 1. If the activity requires the handling of a member of a species listed on the Species at Risk in Ontario List as an endangered or threatened species that is an amphibian, bird, reptile or mammal, then before commencing the activity the person must prepare a document that sets out,
    - i. procedures relating to the handling and care of the species that the person will ensure are followed while carrying out the activity, and
    - ii. a written opinion prepared by an animal care committee established under subsection 17 (1) of the *Animals for Research Act*, stating that the procedures included under subparagraph i provide for the proper handling and care of the species.
  - 2. The person must,
    - i. retain a copy of the document referred to in paragraph 1 for at least five years after the activity is completed, and
    - ii. provide a copy of the document referred to in paragraph 1 to the Ministry within 14 days of receiving a request for it.
  - 3. If a member of the species is captured, collected or taken while carrying out the activity, the person must not,
    - i. possess a living member of the species for a period longer than is necessary to carry out the activity or minimize adverse effects to the member, and in no case longer than seven days,
    - ii. possess a dead member, or a part of a living or dead member, of the species for a period longer than is necessary to carry out the activity, or
    - iii. release or introduce a living member of the species into an area other than the area from which the member was captured, collected or taken. O. Reg. 176/13, s. 14.
- (12) Subclauses 9 (1) (b) (i) and (ii) of the Act do not apply to the possession, collection or transport of a member of a species if,

- (a) pursuant to subsection (11), clause 9 (1) (a) and subsection 10 (1) of the Act did not apply with respect to the member of the species or its habitat; or
- (b) the possession, collection or transport of the member of the species is necessary in order to satisfy the conditions set out in subsection (11). O. Reg. 176/13, s. 14.

### **Threats to health and safety, not imminent**

**23.18** (1) This section applies with respect to the following activities that are necessary to avoid or reduce a threat to human health or safety in situations where the threat is not imminent but is likely to have serious consequences in the short or long term if the activity is not carried out:

1. Work undertaken to prevent the contamination or pollution of the earth, air or water or to remove or clean an area that has been contaminated or polluted or any other work undertaken to protect the quality of the earth, air or water, but not including any part of the work that relates to the construction of new infrastructure.
2. Work undertaken to prevent the spread of disease, such as eliminating or removing bacteria, species or other disease causing agents from structures, buildings, lands or water and cleaning and disinfecting after their removal.
3. Work to maintain, repair, remove or replace an existing structure or any infrastructure described in subsection (2), including the decommissioning of a mine, or to upgrade an existing structure or any infrastructure described in subsection (2) to meet a safety standard, if,
  - i. the maintenance, repair, removal, replacement, decommissioning or upgrade does not require,
    - A. a temporary or permanent change to the location of the structure or infrastructure, or
    - B. a temporary or permanent extension of the area the structure or infrastructure occupies, except in the case of the replacement of an existing culvert with a new culvert that is larger than the one it replaces, or
  - ii. in the case of work to maintain, repair, replace or upgrade a structure or infrastructure, the work does not alter the way in which the structure or infrastructure is used or operated.
4. Work to protect against drought, flooding, forest fires, unstable slopes and erosion as long as the protection does not include the building of new infrastructure. O. Reg. 176/13, s. 14.

(2) Paragraph 3 of subsection (1) applies to infrastructure that is part of or related to,

- (a) a communications system;
- (b) an electric power system, oil or gas pipeline, alternative energy system or renewable energy system;
- (c) a road or railway system;
- (d) water works, wastewater works, stormwater works and associated facilities; or
- (e) drainage works designed to control surface water runoff, other than a drainage work to which section 23.9 applies. O. Reg. 176/13, s. 14.

(3) Subject to subsection (8), clause 9 (1) (a) and subsection 10 (1) of the Act do not apply to a person who, while carrying on an activity described in subsection (1), kills, harms, harasses, captures or takes a member of a species that is listed on the Species at Risk in Ontario List as an



endangered or threatened species, or damages or destroys the habitat of such a species, if all of the conditions set out in subsection (5) are satisfied. O. Reg. 176/13, s. 14.

(4) Subclauses 9 (1) (b) (i) and (ii) of the Act do not apply to the possession or transport of a member of a species if,

- (a) pursuant to subsection (3), clause 9 (1) (a) and subsection 10 (1) of the Act did not apply with respect to the member of the species or its habitat; or
- (b) the possession or transport of the member of the species is necessary in order to satisfy the conditions set out in subsection (5). O. Reg. 176/13, s. 14.

(5) The following are the conditions that a person who carries on an activity described in subsection (1) must satisfy for the purposes of subsection (3):

1. Before commencing the activity, the person must,
  - i. give the Minister notice of the activity by submitting a notice of activity form available on the Registry to the Minister through the Registry, and
  - ii. in the case of an activity described in paragraph 3 of subsection (1) that results in the upgrade or removal of a structure or infrastructure, the decommissioning of a mine or the replacement of an entire structure or infrastructure, have a mitigation plan prepared in accordance with subsections (6) and (7).
2. The person must ensure that the notice of activity form includes,
  - i. the proposed start and end dates of the activity described,
  - ii. a description of the activity and of the area in which it will be carried out, and
  - iii. the name of every species listed on the Species at Risk in Ontario List as endangered or threatened species that will likely be affected by the activity.
3. The person must follow the requirements set out in section 23.3 with respect to the completion of the notice of activity form, the keeping of records relating to the notice of activity form and the updating of the information on the Registry.
4. Once the mitigation plan is prepared, the person must,
  - i. ensure that the activity is carried out in accordance with the mitigation plan,
  - ii. retain a copy of the mitigation plan for at least five years after the activity is complete, and
  - iii. provide a copy of the mitigation plan to the Ministry within 14 days of receiving a request for it.
5. While carrying out the activity, the person must take reasonable steps to minimize the adverse effects of the activity on a species identified in the notice of activity form, including,
  - i. taking steps to minimize or avoid killing, harming or harassing a member of the species and to avoid damaging or destroying its habitat, during a time of year when the species is likely to be carrying out a life process related to hibernation or reproduction, including rearing,
  - ii. if the person encounters an animal that is a member of a species while carrying out the activity, ceasing from carrying out the activity in the area of the encounter and providing the animal with a reasonable amount of time to leave the area before continuing with the activity,

- iii. if, after providing an animal with a reasonable amount of time in accordance with subparagraph ii the animal does not leave the area, taking measures to relocate the animal to a nearby location that is suitable and safe for the animal,
  - iv. if the person encounters a moss, lichen or vascular plant that is a member of the species in the course of carrying out the activity and it is not necessary to kill or harm the member for the purpose of carrying out the activity,
    - A. ceasing the activity in the area of the encounter,
    - B. installing and maintaining barriers or other structures to create a protective zone around the species, and
    - C. after establishing the protective zone referred to in sub-subparagraph B, continuing the activity in a manner that does not impair the ability of the species to carry out its life processes, including reproduction,
  - v. if it is necessary to kill or harm a moss, lichen or vascular plant referred to in subparagraph iv for the purpose of carrying out the activity, relocating the moss, lichen or vascular plant to a nearby location within the species' habitat that is suitable and safe for the species so that it is not killed or harmed, provided it is feasible to do so,
  - vi. making the determination under subparagraph v as to whether it is feasible to relocate a moss, lichen or vascular plant using the best available information with respect to the suitability of relocating that species, including information obtained from the Ministry,
  - vii. ensuring that the relocation of an animal or of a moss, lichen or vascular plant in accordance with subparagraph iii or v is undertaken by or in consultation with a person knowledgeable about, or having training in, the handling of members of the species,
  - viii. taking steps to exclude members of the species from the area in which the activity is being carried out or is likely to be carried out, such as installing temporary fencing to prevent members of the species from accessing the area,
  - ix. refraining from carrying out work during a period of hibernation or reproduction, including rearing, for the species or any other sensitive period for the species unless the restriction on work would result in a delay that would render the threat to human health or safety unavoidable and unacceptable in the circumstances, and
  - x. if the activity is the maintenance, repair, replacement or upgrade of infrastructure, keep a schedule of the work or a copy of an engineer's report outlining the work that must occur and make the schedule or report available to the Ministry within 14 days of receiving a request for it.
6. If the person or an employee or agent of the person observes a species identified in the notice of activity form in the course of carrying out the activity, the person must ensure that, within three months of the observation, the Natural Heritage Information Centre Rare Species Reporting Form available on the Ministry website is completed, detailing the species and number of individual members that were observed, the date and location of observation and any other information requested on the form. O. Reg. 176/13, s. 14.
- (6) A mitigation plan shall be prepared by one or more persons with expertise in relation to every species that is the subject of the plan, using the best available information on steps that may help minimize or avoid adverse effects on the species, which includes consideration of information obtained from the Ministry, aboriginal traditional knowledge and community knowledge if it is reasonably available. O. Reg. 176/13, s. 14.

(7) A mitigation plan prepared with respect to an activity described in subsection (1) must include the following information:

1. A description of the activity and its main purpose and an explanation of the threat to human health or safety that requires that the activity be carried out and of the serious consequences that would result, in the short or long term, if the activity was not carried out.
2. The proposed start and completion dates of the activity.
3. A description of all of the stages of the activity and a timeline for the stages.
4. A list of all the species that are listed on the Species at Risk in Ontario List as endangered or threatened species and that are likely to be affected by the activity.
5. An assessment of the activity's likely effects on members of each species identified under paragraph 4.
6. A map indicating the geographic location of the activity on the property where it will occur.
7. Details of how the person will carry out the steps described in paragraph 5 of subsection (5) that are required to minimize the adverse effects of the activity on a species identified under paragraph 4, including,
  - i. the dates on which, and locations at which, each step will be carried out, and
  - ii. the times during the year when the species is likely to be carrying out a life process related to hibernation or reproduction, including rearing, and during which the person must avoid killing, harming or harassing members of the species. O. Reg. 176/13, s. 14.

(8) Subsection (3) does not apply with respect to the following species of vascular plant:

1. Bird's-foot Violet.
2. Bluehearts.
3. Forked Three-awned Grass.
4. Heart-leaved Plantain.
5. Juniper Sedge.
6. Spotted Wintergreen.
7. Virginia Goat's-rue.
8. Virginia Mallow. O. Reg. 176/13, s. 14.

### **Trapping — incidental catch**

**23.19** (1) Clause 9 (1) (a) of the Act does not apply to a person who incidentally traps an animal that belongs to a species that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species, if,

- (a) the person is trapping under the authority of a trapping licence under the *Fish and Wildlife Conservation Act, 1997*;
- (b) the person is trapping in accordance with Ontario Regulation 667/98 (Trapping) made under the *Fish and Wildlife Conservation Act, 1997*;
- (c) the person traps the animal despite the exercise of all due diligence;
- (d) the incidentally trapped animal,

- (i) is immediately released in a manner that causes it the least harm, if the animal is alive when it is found and has a reasonable chance of survival in the wild, or
    - (ii) is killed in a humane manner, if the animal is alive when it is found and does not have a reasonable chance of survival in the wild;
  - (e) in cases where the animal is killed and is a furbearing mammal as defined in the *Fish and Wildlife Conservation Act, 1997*, the person obtains a licence to possess a pelt, as required under Part II of Ontario Regulation 666/98 (Possession, Buying and Selling of Wildlife) made under that Act; and
  - (f) in cases where the animal is killed and is not a furbearing mammal as defined in the *Fish and Wildlife Conservation Act, 1997*, the person,
    - (i) promptly after the killing, gives notice of the incidental trapping and killing to the Minister by completing a notice of incidental trapping form available on the Registry and submitting it to the Minister through the Registry, and
    - (ii) follows the requirements of subsections (2) and (3) with respect to the completion of the notice of incidental trapping form, the keeping of records relating to the notice of incidental trapping form and the updating of the information on the Registry. O. Reg. 176/13, s. 14.
- (2) Before submitting a notice of incidental trapping form to the Minister under clause (1) (f), a person must ensure that,
- (a) all mandatory information requested on the form, including the person's contact information, has been provided; and
  - (b) the information provided on the form is complete and accurate. O. Reg. 176/13, s. 14.
- (3) After submitting a notice of incidental trapping form to the Minister, a person who submitted the form must,
- (a) promptly upon obtaining from the Ministry confirmation that a notice of incidental trapping form submitted through the Registry has been received by the Minister, make a record of the confirmation;
  - (b) for as long as the person possesses the animal, or a part of the animal, that was incidentally trapped and killed,
    - (i) keep the record of the confirmation, and
    - (ii) make the record of the confirmation available to the Ministry within 14 days of receiving a request for it;
  - (c) if there is a change in the contact information of the person who submitted the notice of incidental trapping form, update the information on the Registry within 10 business days of the change. O. Reg. 176/13, s. 14.
- (4) A person who provides incomplete, false or misleading information on a notice of incidental trapping form or when updating information on the Registry shall be deemed not to have submitted the notice of incidental trapping form. O. Reg. 176/13, s. 14.
- (5) Clause 9 (1) (b) of the Act does not apply to a person who possesses or transports a dead animal or a part of an animal if, pursuant to subsections (1) to (4), the person is exempt from clause 9 (1) (a) of the Act in respect of the incidental trapping of the animal. O. Reg. 176/13, s. 14.

## Wind facilities

**23.20** (1) This section applies to a person who is engaged in the operation of a wind facility within the meaning of Ontario Regulation 359/09 (Renewable Energy Approvals under Part V.0.1 of the Act) made under the *Environmental Protection Act*. O. Reg. 176/13, s. 14.

(2) Clause 9 (1) (a) and subsection 10 (1) of the Act do not apply to a person who is engaged in the operation of a wind facility and who, in the course of the operation of the wind facility, kills, harms or harasses a member of a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species, or damages or destroys the habitat of such a species, if the person satisfies the conditions set out in subsection (4). O. Reg. 176/13, s. 14.

(3) Subclauses 9 (1) (b) (i) and (ii) of the Act do not apply to the possession or transport of a member of a species if,

- (a) pursuant to subsection (2), clause 9 (1) (a) and subsection 10 (1) of the Act did not apply with respect to the member of the species or its habitat; or
- (b) the possession or transport of the member of the species is necessary in order to satisfy the conditions set out in subsection (4). O. Reg. 176/13, s. 14.

(4) The following are the conditions that a person who operates a wind facility must satisfy for the purposes of subsection (2):

1. Before doing anything, in the course of operating the wind facility, that is prohibited under clause 9 (1) (a) or subsection 10 (1) of the Act, the person must,
  - i. give the Minister notice of the fact that the person is operating a wind facility by submitting a notice of activity form, available on the Registry, to the Minister through the Registry,
  - ii. subject to subsections (5) and (6), prepare in accordance with subsection (9) a mitigation plan that meets the requirements of subsection (10), and
  - iii. in the case of a person described in subsection (6), ensure that the conditions set out in subsection (7) are satisfied.
2. The person must ensure that the notice of activity form includes,
  - i. the location of the wind facility, and
  - ii. the name of every species listed on the Species at Risk in Ontario List as an endangered or threatened species that will likely be affected as a result of the operation of the wind facility.
3. The person must follow the requirements of section 23.3 with respect to the completion of the notice of activity form, the keeping of records relating to the notice of activity form and the updating of the information on the Registry.
4. While the person is operating the wind facility, the person must,
  - i. comply with the requirements of the mitigation plan,
  - ii. ensure that reasonable steps are taken to minimize the adverse effects of the activity on the species identified in the notice of activity form, including the steps described in subsection (11), and such other steps as may be described in the mitigation plan.
5. The person must,

- i. retain a copy of the mitigation plan while operating the wind facility and for a period of five years after the person ceases to operate the wind facility,
    - ii. ensure that the plan is updated in accordance with subsections (9) and (10) at least once every five years to include information obtained while carrying out the monitoring requirements described in paragraph 6, and
    - iii. provide a copy of the mitigation plan to the Ministry within 14 days of receiving a request for it.
  - 6. Subject to subsection (12), the person must monitor,
    - i. the effects of the operation of the wind facility on each species identified in the notice of activity form and its habitat, and
    - ii. the effectiveness of the steps taken to minimize adverse effects on each species identified in the notice of activity form and its habitat,
  - 7. At the times required under subsections (13) and (14), the person must prepare in accordance with subsection (15) a report on the effects that the operation of the wind facility has on each species identified in the notice of activity form.
  - 8. The person must,
    - i. retain a copy of a report required under paragraph 7 for at least five years after it is prepared, and
    - ii. provide a copy of the report required under paragraph 7 to the Ministry within 14 days of receiving a request for it.
  - 9. If the person or an employee or agent of the person observes a species identified in the notice of activity form in the course of carrying out the activity, the person must ensure that, within three months of the observation, the Natural Heritage Information Centre Rare Species Reporting Form available on the Ministry website is completed, detailing the species and number of individual members that were observed, the date and location of observation and any other information requested on the form. O. Reg. 176/13, s. 14.
- (5) A person who operates a wind facility is not required to complete the preparation of a mitigation plan until the following dates if the following circumstances apply:
- 1. If the mitigation plan relates to a species that was added to the Species at Risk in Ontario List as an endangered or threatened species for the first time on January 24, 2013, the third anniversary of that day.
  - 2. If the mitigation plan relates to a species that first appears in the area of the wind facility after the wind facility begins operation, three years after the date the species first appears in the area of the wind facility. O. Reg. 176/13, s. 14.
- (6) A person who proposes to operate a wind facility and who has not been issued a renewable energy approval in respect of the wind facility under Part V.0.1 of the Environmental Protection Act on or before July 1, 2013 must prepare a mitigation plan in respect of the wind facility before either of the following days:
- 1. If the person has not submitted an application for a renewable energy approval under Part V.0.1 of the *Environmental Protection Act* on or before July 1, 2013, the day the person submits the application.

2. If the person has submitted an application for a renewable energy approval under Part V.0.1 of the *Environmental Protection Act* on or before July 1, 2013, the day the renewable energy approval is issued. O. Reg. 176/13, s. 14.

(7) A person who prepares a mitigation plan under subsection (6) shall ensure that the following conditions are satisfied:

1. The person must submit the mitigation plan to the Minister promptly after it is prepared.
2. The Minister must approve the mitigation plan, subject to subsection (8).
3. The person must receive written notice of the approval of the Minister. O. Reg. 176/13, s. 14.

(8) The Minister may refuse to approve a mitigation plan submitted under subsection (7) if, in his or her opinion,

- (a) the mitigation plan has not been prepared by one or more persons with expertise in relation to every species that is the subject of the plan, using the best available information; or
- (b) the steps set out in the mitigation plan do not include reasonable measures to,
  - (i) avoid the killing, harming or harassing of members of the species,
  - (ii) create or enhance habitat for the species elsewhere in the ecoregion in which the wind facility is located,
  - (iii) operate the wind facility in a manner that is unlikely to damage or destroy the habitat of the species, or
  - (iv) otherwise effectively minimize the adverse effects of the activity on the species. O. Reg. 176/13, s. 14.

(9) A mitigation plan must be prepared and updated by one or more persons with expertise in relation to every species that is the subject of the plan, using the best available information on steps that may help minimize or avoid adverse effects on the species, which includes consideration of information obtained from the Ministry, aboriginal traditional knowledge and community knowledge if it is reasonably available. O. Reg. 176/13, s. 14.

(10) A mitigation plan must include the following information:

1. The name and contact information of the person who operates the wind facility.
2. A description of the location of the wind facility.
3. A list of the species that are listed on the Species at Risk in Ontario List as endangered or threatened species and are likely to be adversely affected by the operation of the wind facility.
4. Details of the steps the person plans to take to minimize the adverse effects of the operation of the wind facility on each species identified under paragraph 3 and its habitat, including the steps described in subsection (11). O. Reg. 176/13, s. 14.

(11) The steps that a person must take to minimize the adverse effects of the operation of a wind facility on a species identified in the notice of activity form submitted under subparagraph 1 i of subsection (4) and its habitat are as follows:

1. Implementing reasonable measures in the wind facility to avoid the killing, harming or harassing of members of the species such as,
  - i. adjusting the blades of wind turbines,
  - ii. reducing cut-in speed of wind turbines, and

- iii. periodically shutting the turbines down during times of day or of the year when the risk of killing, harming or harassing the species is highest.
  - 2. Creating or enhancing habitat for the species elsewhere in the ecoregion in which the wind facility is located, if reasonable.
  - 3. Operating the wind facility in a manner that is unlikely to damage or destroy the habitat of the species, including adopting any techniques to minimize adverse effects of the operation of the wind facility on the species that may be available from the Ministry from time to time.
  - 4. If the person discovers that the steps described in paragraphs 1 to 3 or in the mitigation plan have not been effective in minimizing the adverse effects of an activity described in subsection (1) on the species, the person shall,
    - i. take such actions as are necessary to increase the effectiveness of those steps, or
    - ii. take such other reasonable steps as may be necessary to minimize the adverse effects of an activity described in subsection (1) on the species. O. Reg. 176/13, s. 14.
- (12) The monitoring activities described in paragraph 6 of subsection (4) must be carried out by a person with expertise in the species identified in the notice of activity form submitted under subparagraph 1 i of subsection (4), using the best available information on how to carry out the monitoring activities, including information that may be available from the Ministry from time to time. O. Reg. 176/13, s. 14.
- (13) A report required of a person under paragraph 7 of subsection (4) shall be completed,
- (a) annually for the first three years after the person submits a notice of activity form under paragraph 1 of subsection (4) and, thereafter, every five years; or
  - (b) in the case of a person who completes the preparation of a mitigation plan within the extended timelines provided for under subsection (5), annually for the first six years after the person submits a notice of activity form under subparagraph 1 i of subsection (4) and, thereafter, every five years. O. Reg. 176/13, s. 14.
- (14) A report required under paragraph 7 of subsection (4) shall be in a form acceptable to the Ministry and shall be completed by March 31 that follows the end of the period in respect of which the report is prepared. O. Reg. 176/13, s. 14.
- (15) A report required under paragraph 7 of subsection (4) shall,
- (a) compile information relating to the effects of the operation of the wind facility on each species identified in the notice of activity form submitted under subparagraph 1 i of subsection (4) and its habitat;
  - (b) analyze the results of the information compiled under clause (a);
  - (c) describe any encounters with the species that occurred while carrying out the activity; and
  - (d) document the steps taken by the person to minimize adverse effects of the wind facility on each species identified in the notice of activity form submitted under subparagraph 1 i of subsection (4) and its habitat and assess their effectiveness. O. Reg. 176/13, s. 14.
- (16) This section does not apply with respect to the Golden Eagle. O. Reg. 176/13, s. 14.



### 3. **Environmental Bill of Rights, SO 1993, c 28 ss. 5, 27**

#### **Registry**

5. (1) An environmental registry shall be established as prescribed. 1993, c. 28, s. 5 (1).

#### **Cost of registry**

(2) The cost of establishing and operating the registry shall not be imposed on a municipality. 1993, c. 28, s. 5 (2); 2002, c. 17, Sched. F, Table.

[...]

#### **Means of giving notice of proposals**

27. (1) Notice of a proposal under section 15, 16 or 22 shall be given in the registry and by any other means the minister giving the notice considers appropriate. 1993, c. 28, s. 27 (1).

#### **Contents of notice of proposals**

(2) Notice of a proposal given under section 15, 16 or 22 in the registry shall include the following:

1. A brief description of the proposal.
2. A statement of the manner by which and time within which members of the public may participate in decision-making on the proposal.
3. A statement of where and when members of the public may review written information about the proposal.
4. An address to which members of the public may direct,
  - i. written comments on the proposal, and
  - ii. written questions about the rights of members of the public to participate in decision-making on the proposal.
5. Any information prescribed by the regulations under this Act.
6. Any other information that the minister giving the notice considers appropriate. 1993, c. 28, s. 27 (2).

#### **Rights of participation**

(3) A statement under paragraph 2 of subsection (2) shall include a description of the following rights of public participation in decision-making on the proposal:

1. The right to submit written comments in the manner and within the time specified in the notice.
2. Any additional rights of public participation provided under section 24.
3. Any additional rights of public participation prescribed by the regulations under this Act.
4. Any additional rights of public participation that the minister giving the notice considers appropriate. 1993, c. 28, s. 27 (3).

#### **Regulatory impact statement**

(4) The minister shall include a regulatory impact statement in a notice of a proposal given under section 16 in the registry if the minister considers that it is necessary to do so in order to permit more informed public consultation on the proposal. 1993, c. 28, s. 27 (4).

**Same**

- (5) A regulatory impact statement shall include the following:
1. A brief statement of the objectives of the proposal.
  2. A preliminary assessment of the environmental, social and economic consequences of implementing the proposal.
  3. An explanation of why the environmental objectives, if any, of the proposal would be appropriately achieved by making, amending or revoking a regulation. 1993, c. 28, s. 27 (5).

**4. Crown Forest Sustainability Act, 1994, SO 1994, c 25 ss. 8-9**

**Forest management plans**

**8.** (1) The Minister shall ensure that a forest management plan is prepared for every management unit. 1994, c. 25, s. 8 (1).

**Contents**

(2) A forest management plan shall, in accordance with the Forest Management Planning Manual,

- (a) describe the forest management objectives and strategies applicable to the management unit; and
- (b) have regard to the plant life, animal life, water, soil, air and social and economic values, including recreational values and heritage values, of the management unit. 1994, c. 25, s. 8 (2).

**Certification**

(3) A forest management plan shall be certified by a professional forester in accordance with the Forest Management Planning Manual. 1994, c. 25, s. 8 (3).

[...]

**Approval by Minister**

**9.** (1) A forest management plan is of no effect unless it is approved by the Minister. 1994, c. 25, s. 9 (1).

**Criteria for approval**

(2) The Minister shall not approve a forest management plan unless the Minister is satisfied that the plan provides for the sustainability of the Crown forest, having regard to the plant life, animal life, water, soil, air and social and economic values, including recreational values and heritage values, of the Crown forest. 1994, c. 25, s. 9 (2).

[...]

**Conduct of forest operations**

**42.** (1) A person shall not conduct forest operations in a Crown forest except in accordance with,

- (a) an applicable forest management plan;
- (a.1) any forest operations prescriptions that apply to the forest operations; and
- (b) an applicable work schedule approved by the Minister. 1994, c. 25, s. 42 (1); 1994, c. 25, s. 42 (3).

[...]

## Offences

**64.** (1) A person who,

- (a) without the authority of a forest resource licence, harvests forest resources in a Crown forest or uses forest resources in a Crown forest for a designated purpose is guilty of an offence and on conviction is liable to a fine of not more than \$100,000;
- (b) fails to comply with a forest resource licence is guilty of an offence and on conviction is liable to a fine of not more than \$100,000;
- (c) contravenes subsection 42 (1) or section 43 or 53 is guilty of an offence and on conviction is liable to a fine of not more than \$100,000;
- (d) fails to comply with an order made under clause 55 (1) (a) is guilty of an offence and on conviction is liable to a fine of not more than \$1,000,000;
- (e) obstructs an employee or agent of the Ministry acting under section 60, 61 or 62 is guilty of an offence and is liable on conviction to a fine of not more than \$10,000;
- (f) makes or takes advantage of a false statement with respect to any matter under this Act or the regulations is guilty of an offence and is liable on conviction to a fine of not more than \$10,000;
- (g) fails to provide information to the Minister or to an employee or agent of the Ministry as required under this Act or the regulations is guilty of an offence and is liable on conviction to a fine of not more than \$10,000;
- (h) contravenes any other provision of this Act or the regulations is guilty of an offence and is liable on conviction to a fine of not more than \$100,000. 1994, c. 25, s. 64 (1); 1996, c. 14, s. 1 (4); 2000, c. 26, Sched. L, s. 3 (8).

## Project Review

### Notification of Minister

**79 (1)** Every person who is required by or under an Act of Parliament to ensure that an assessment of the environmental effects of a project is conducted, and every authority who makes a determination under paragraph 67(a) or (b) of the *Canadian Environmental Assessment Act, 2012* in relation to a project, must, without delay, notify the competent minister or ministers in writing of the project if it is likely to affect a listed wildlife species or its critical habitat.

### Required action

**(2)** The person must identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, must ensure that measures are taken to avoid or lessen those effects and to monitor them. The measures must be taken in a way that is consistent with any applicable recovery strategy and action plans.

### Definitions

**(3)** The following definitions apply in this section.

**person** includes an association, an organization, a federal authority as defined in subsection 2(1) of the *Canadian Environmental Assessment Act, 2012*, and any body that is set out in Schedule 3 to that Act. (*personne*)

**project** means

**(a)** a designated project as defined in subsection 2(1) of the *Canadian Environmental Assessment Act, 2012* or a project as defined in section 66 of that Act;

**(b)** a project as defined in subsection 2(1) of the *Yukon Environmental and Socio-economic Assessment Act*; or

**(c)** a development as defined in subsection 111(1) of the *Mackenzie Valley Resource Management Act*. (*projet*)

2002, c. 29, s. 79; 2012, c. 19, s. 59.

## Emergency Orders

### Emergency order

**80 (1)** The Governor in Council may, on the recommendation of the competent minister, make an emergency order to provide for the protection of a listed wildlife species.

## Révision des projets

### Notification du ministre

**79 (1)** Toute personne qui est tenue, sous le régime d'une loi fédérale, de veiller à ce qu'il soit procédé à l'évaluation des effets environnementaux d'un projet et toute autorité qui prend une décision au titre des alinéas 67a) ou b) de la *Loi canadienne sur l'évaluation environnementale (2012)* relativement à un projet notifie sans tarder le projet à tout ministre compétent s'il est susceptible de toucher une espèce sauvage inscrite ou son habitat essentiel.

### Réalisations escomptées

**(2)** La personne détermine les effets nocifs du projet sur l'espèce et son habitat essentiel et, si le projet est réalisé, veille à ce que des mesures compatibles avec tout programme de rétablissement et tout plan d'action applicable soient prises en vue de les éviter ou de les amoindrir et les contrôler.

### Définitions

**(3)** Les définitions qui suivent s'appliquent au présent article.

**personne** S'entend notamment d'une association de personnes, d'une organisation, d'une autorité fédérale au sens du paragraphe 2(1) de la *Loi canadienne sur l'évaluation environnementale (2012)* et de tout organisme mentionné à l'annexe 3 de cette loi. (*person*)

**projet**

**a)** Projet désigné au sens du paragraphe 2(1) de la *Loi canadienne sur l'évaluation environnementale (2012)* ou projet au sens de l'article 66 de cette loi;

**b)** projet de développement au sens du paragraphe 2(1) de la *Loi sur l'évaluation environnementale et socioéconomique au Yukon*;

**c)** projet de développement au sens du paragraphe 111(1) de la *Loi sur la gestion des ressources de la vallée du Mackenzie*. (*projet*)

2002, ch. 29, art. 79; 2012, ch. 19, art. 59.

## Décrets d'urgence

### Décrets d'urgence

**80 (1)** Sur recommandation du ministre compétent, le gouverneur en conseil peut prendre un décret d'urgence visant la protection d'une espèce sauvage inscrite.

### Obligation to make recommendation

(2) The competent minister must make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery.

### Consultation

(3) Before making a recommendation, the competent minister must consult every other competent minister.

### Contents

(4) The emergency order may

(a) in the case of an aquatic species,

(i) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(ii) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat;

(b) in the case of a species that is a species of migratory birds protected by the *Migratory Birds Convention Act, 1994*,

(i) on federal land or in the exclusive economic zone of Canada,

(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(B) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat, and

(ii) on land other than land referred to in subparagraph (i),

(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(B) include provisions requiring the doing of things that protect the species and provisions prohibiting activities that may adversely affect the species and that habitat; and

(c) with respect to any other species,

(i) on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada,

### Recommandation obligatoire

(2) Le ministre compétent est tenu de faire la recommandation s'il estime que l'espèce est exposée à des menaces imminentes pour sa survie ou son rétablissement.

### Consultation

(3) Avant de faire la recommandation, il consulte tout autre ministre compétent.

### Contenu du décret

(4) Le décret peut :

a) dans le cas d'une espèce aquatique :

(i) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,

(ii) imposer des mesures de protection de l'espèce et de cet habitat, et comporter des dispositions interdisant les activités susceptibles de leur nuire;

b) dans le cas d'une espèce d'oiseau migrateur protégée par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs* se trouvant :

(i) sur le territoire domanial ou dans la zone économique exclusive du Canada :

(A) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,

(B) imposer des mesures de protection de l'espèce et de cet habitat, et comporter des dispositions interdisant les activités susceptibles de leur nuire,

(ii) ailleurs que sur le territoire visé au sous-alinéa (i) :

(A) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,

(B) imposer des mesures de protection de l'espèce, et comporter des dispositions interdisant les activités susceptibles de nuire à l'espèce et à cet habitat;

c) dans le cas de toute autre espèce se trouvant :

(i) sur le territoire domanial, dans la zone économique exclusive ou sur le plateau continental du Canada :

**(A)** identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

**(B)** include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat, and

**(ii)** on land other than land referred to in subparagraph (i),

**(A)** identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

**(B)** include provisions prohibiting activities that may adversely affect the species and that habitat.

### Exemption

**(5)** An emergency order is exempt from the application of section 3 of the *Statutory Instruments Act*.

### Equivalent measures

**81** Despite subsection 80(2), the competent minister is not required to make a recommendation for an emergency order if he or she is of the opinion that equivalent measures have been taken under another Act of Parliament to protect the wildlife species.

### Recommendation to repeal

**82** If the competent minister is of the opinion that the species to which the emergency order relates would no longer face imminent threats to its survival or recovery even if the order were repealed, he or she must make a recommendation to the Governor in Council that the emergency order be repealed.

## Exceptions

### General exceptions

**83 (1)** Subsections 32(1) and (2), section 33, subsections 36(1), 58(1), 60(1) and 61(1), regulations made under section 53, 59 or 71 and emergency orders do not apply to a person who is engaging in

**(a)** activities related to public safety, health or national security, that are authorized by or under any other Act of Parliament or activities under the *Health of Animals Act* and the *Plant Protection Act* for the health of animals and plants; or

**(A)** désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,

**(B)** imposer des mesures de protection de l'espèce et de cet habitat, et comporter des dispositions interdisant les activités susceptibles de leur nuire,

**(ii)** ailleurs que sur le territoire visé au sous-alinéa (i) :

**(A)** désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,

**(B)** comporter des dispositions interdisant les activités susceptibles de nuire à l'espèce et à cet habitat.

### Exclusion

**(5)** Les décrets d'urgence sont soustraits à l'application de l'article 3 de la *Loi sur les textes réglementaires*.

### Mesures équivalentes

**81** Malgré le paragraphe 80(2), le ministre compétent n'est pas tenu de recommander la prise d'un décret d'urgence s'il estime que des mesures équivalentes ont été prises en vertu d'une autre loi fédérale pour protéger l'espèce sauvage.

### Recommandation d'abrogation

**82** Si le ministre compétent estime que l'espèce sauvage visée par un décret d'urgence ne serait plus exposée à des menaces imminentes pour sa survie ou son rétablissement si le décret était abrogé, il est tenu de recommander au gouverneur en conseil de l'abroger.

## Exceptions

### Exceptions générales

**83 (1)** Les paragraphes 32(1) et (2), l'article 33, les paragraphes 36(1), 58(1), 60(1) et 61(1), les règlements pris en vertu des articles 53, 59 ou 71 et les décrets d'urgence ne s'appliquent pas à une personne exerçant des activités :

**a)** en matière soit de sécurité ou de santé publiques ou de sécurité nationale autorisées sous le régime de toute autre loi fédérale, soit de santé des animaux et des végétaux autorisées sous le régime de la *Loi sur la santé des animaux* et la *Loi sur la protection des végétaux*;

**(b)** activities authorized under section 73, 74 or 78 by an agreement, permit, licence, order or similar document.

#### **Authorization of activities under other Acts**

**(2)** A power under an Act described in paragraph (1)(a) may be used to authorize an activity prohibited by subsection 32(1) or (2), section 33, subsection 36(1), 58(1), 60(1) or 61(1), a regulation made under section 53, 59 or 71 or an emergency order only if the person exercising the power

**(a)** determines that the activity is necessary for the protection of public safety, health, including animal and plant health, or national security; and

**(b)** respects the purposes of this Act to the greatest extent possible.

#### **Exceptions — land claims agreements**

**(3)** Subsections 32(1) and (2), section 33, subsections 36(1), 58(1), 60(1) and 61(1) and regulations made under section 53, 59 or 71 do not apply to a person who is engaging in activities in accordance with conservation measures for wildlife species under a land claims agreement.

#### **Exemptions for permitted activities**

**(4)** Subsections 32(1) and (2), section 33 and subsections 36(1), 58(1), 60(1) and 61(1) do not apply to a person who is engaging in activities that are permitted by a recovery strategy, an action plan or a management plan and who is also authorized under an Act of Parliament to engage in that activity, including a regulation made under section 53, 59 or 71.

#### **Additional possession exceptions**

**(5)** Subsection 32(2) and paragraph 36(1)(b) do not apply to a person who possesses an individual of a listed extirpated, endangered or threatened species, or any part or derivative of such an individual, if

**(a)** it was in the person's possession when the species was listed;

**(b)** it is used by an aboriginal person for ceremonial or medicinal purposes, or it is part of ceremonial dress used for ceremonial or cultural purposes by an aboriginal person;

**(c)** the person acquired it legally in another country and imported it legally into Canada;

**b)** autorisées par un accord, un permis, une licence, un arrêté ou un autre document visé aux articles 73, 74 ou 78.

#### **Autorisation au titre d'une autre loi**

**(2)** Toute activité interdite aux termes des paragraphes 32(1) ou (2), de l'article 33, des paragraphes 36(1), 58(1), 60(1) ou 61(1), des règlements pris en vertu des articles 53, 59 ou 71 ou d'un décret d'urgence peut être autorisée au titre d'une loi visée à l'alinéa (1)a) si la personne qui l'autorise :

**a)** conclut qu'elle est nécessaire à la protection de la sécurité ou de la santé publiques — notamment celle des animaux et des végétaux — ou de la sécurité nationale;

**b)** respecte, dans la mesure du possible, l'objet de la présente loi.

#### **Exception : accords sur des revendications territoriales**

**(3)** Les paragraphes 32(1) et (2), l'article 33, les paragraphes 36(1), 58(1), 60(1) et 61(1) et les règlements pris en vertu des articles 53, 59 ou 71 ne s'appliquent pas à une personne exerçant des activités conformes aux régimes de conservation des espèces sauvages dans le cadre d'un accord sur des revendications territoriales.

#### **Exemptions : activités autorisées**

**(4)** Les paragraphes 32(1) et (2), l'article 33, les paragraphes 36(1), 58(1), 60(1) et 61(1) ne s'appliquent pas à une personne exerçant des activités autorisées, d'une part, par un programme de rétablissement, un plan d'action ou un plan de gestion et, d'autre part, sous le régime d'une loi fédérale, notamment au titre d'un règlement pris en vertu des articles 53, 59 ou 71.

#### **Exception supplémentaire : possession**

**(5)** Le paragraphe 32(2) et l'alinéa 36(1)b) ne s'appliquent pas à une personne qui possède un individu — notamment partie d'un individu ou produit qui en provient — d'une espèce sauvage inscrite comme espèce disparue du pays, en voie de disparition ou menacée si, selon le cas :

**a)** la personne l'avait en sa possession au moment de l'inscription de l'espèce;

**b)** l'individu ou l'article est utilisé par une personne autochtone à des fins cérémonielles ou médicinales, ou fait partie d'un habit cérémonial utilisé à des fins cérémonielles ou culturelles par une personne autochtone;



(d) the person acquired it by succession from someone who was entitled to possess it under this Act;

(e) the person acquired it under circumstances that would afford them a defence under section 100 and the person possesses it only for as long as is necessary to donate it to a museum, a zoo, an educational institution, a scientific society or a government;

(f) the person is, or is acting on behalf of, a museum, zoo, educational institution, scientific society or government and the person acquired it from someone who was entitled to possess it under this Act; or

(g) it or the person is otherwise exempt by the regulations.

c) la personne l'a légalement acquis à l'extérieur du Canada, puis l'y a importé légalement;

d) elle en a hérité d'une personne qui avait droit à sa possession au titre de la présente loi;

e) d'une part, elle l'a acquis dans des circonstances qui lui permettraient de se disculper au titre de l'article 100 et, d'autre part, elle ne l'a en sa possession que le temps nécessaire pour en faire don à un musée, un jardin zoologique, un établissement d'enseignement, une association scientifique ou un gouvernement;

f) elle est un musée, un jardin zoologique, un établissement d'enseignement, une association scientifique, un gouvernement ou une personne agissant pour le compte de ces derniers et elle l'a acquis d'une personne qui avait droit à sa possession au titre de la présente loi;

g) l'individu ou le possesseur bénéficient par ailleurs d'une exemption réglementaire.

### Regulations

**84** The Governor in Council may, on the recommendation of the Minister after consultation with the Minister responsible for the Parks Canada Agency and the Minister of Fisheries and Oceans, make regulations for the purpose of paragraph 83(5)(g).

2002, c. 29, s. 84; 2005, c. 2, s. 24.

### Règlement

**84** Sur recommandation faite par le ministre après consultation du ministre responsable de l'Agence Parcs Canada et du ministre des Pêches et des Océans, le gouverneur en conseil peut, par règlement, prendre des mesures d'application de l'alinéa 83(5)g).

2002, ch. 29, art. 84; 2005, ch. 2, art. 24.

## Enforcement Measures

### Enforcement Officers

#### Enforcement officers

**85 (1)** A competent minister may designate any person or person of a class of persons to act as enforcement officers for the purposes of this Act.

#### Designation of provincial or territorial government employees

(2) The competent minister may not designate any person or person of a class of persons employed by the government of a province or a territory unless that government agrees.

#### Certificate of designation

(3) An enforcement officer must be provided with a certificate of designation as an enforcement officer in a form approved by the competent minister and, on entering any place under this Act, the officer must, if so requested,

## Contrôle d'application

### Agents de l'autorité

#### Désignation

**85 (1)** Le ministre compétent peut désigner, individuellement ou par catégorie, les agents de l'autorité chargés de contrôler l'application de la présente loi.

#### Fonctionnaires provinciaux

(2) La désignation de fonctionnaires provinciaux ou territoriaux est toutefois subordonnée à l'agrément du gouvernement provincial ou territorial intéressé.

#### Présentation du certificat

(3) Les agents sont munis d'un certificat de désignation en la forme approuvée par le ministre compétent qu'ils présentent, sur demande, au responsable ou à l'occupant du lieu visité.

**SCHEDULE “C”**

**Species Excluded from Regs**

<b>INDUSTRY/ACTIVITY/ SPECIES</b>	<b>SECTION</b>	<b>SPECIES</b>
Drainage	23.9	1. Bogbean Buckmoth. 2. Cherry Birch. 3. False Hop Sedge. 4. False Rue Anemone. 5. Grey Fox. 6. Heart-leaved Plantain. 7. Pugnose Minnow. 8. Scarlet Ammannia. 9. Small-mouthed Salamander. 10. Toothcup.
Early exploration mining	23.10	Golden Eagle
Waterpower Operations	23.12	1. Hungerford’s Crawling Water Beetle. 2. Pygmy Snaketail.
Aggregate Operations	23.14	1. Blue racer. 2. Butler’s gartersnake. 3. Common five-lined skink (Carolinian population). 4. Henslow’s sparrow. 5. Small-mouthed salamander. 6. Virginia mallow. 7. Yellow-breasted chat.
Human Health and Safety Activities	23.18	1. Bird’s-foot Violet. 2. Bluehearts. 3. Forked Three-awned Grass. 4. Heart-leaved Plantain. 5. Juniper Sedge. 6. Spotted Wintergreen. 7. Virginia Goat’s-rue. 8. Virginia Mallow.
Operation of a Wind Facility	23.20	Golden Eagle
<b>Species Specific Exemptions</b>		

Aquatic Species	23.4	<p>The exemption in this section is limited to the following species, other species being excluded from the exemption:</p> <p>1. The following species of mussels listed as endangered or threatened on the Species at Risk in Ontario List:</p> <ul style="list-style-type: none"> <li>i. Eastern Pondmussel.</li> <li>ii. Fawnsfoot.</li> <li>iii. Hickorynut.</li> <li>iv. Kidneyshell.</li> <li>v. Rayed Bean.</li> <li>vi. Round Pigtoe.</li> <li>vii. Salamander Mussel.</li> <li>viii. Snuffbox.</li> <li>ix. Mapleleaf Mussel.</li> <li>x. Rainbow Mussel.</li> <li>xi. Wavy-rayed Lampmussel.</li> </ul> <p>2. The following species of fish listed as endangered or threatened on the Species at Risk in Ontario List:</p> <ul style="list-style-type: none"> <li>i. Eastern Sand Darter.</li> <li>ii. Pugnose Shiner.</li> <li>iii. Redside Dace.</li> <li>iv. Black Redhorse.</li> <li>v. Channel Darter.</li> <li>vi. Cutlip Minnow.</li> <li>vii. Silver Shiner.</li> <li>viii. Spotted Gar.</li> </ul>
Barn swallow	23.5	
Bobolink and Eastern meadowlark	23.6	
Butternut	23.7	
Chimney swift	23.8	

WILDLANDS LEAGUE et al

Appellants

and

LIEUTENANT GOVERNOR IN COUNCIL et al

Respondents

Court File No. 061016

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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