



May 17, 2019

Public Input Coordinator
Species Conservation Policy Branch
300 Water Street
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Peterborough, ON
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By email via ESAReg@ontario.ca

Dear Public Input Coordinator,

Re: Ontario's Endangered Species Act: Proposed changes ERO number 013-5033

Summary of Comments

Wildlands League is a leading not for profit conservation group in Ontario and Canada. We are providing comments in our capacity as policy experts. The ESA is not like other laws. It is designed to be the safety net, to pull species back from the brink. It is predicated on three cornerstones: independent science-based listing of species, automatic and mandatory habitat protections, and timely preparation of recovery strategies and government response statements. All three are being dismantled with Schedule 5 in Bill 108, *More Homes More Choice Act*. Life for endangered species in the province will inevitably be worse if the bill passes with Schedule 5 in it.

Schedule 5 represents an almost complete abdication of Ontario's responsibilities to endangered species. And at the worst possible time. The world is being warned about nature's pending collapse and up to 1,000,000 species are at risk of extinction. It is our view that this bill is not focused on protecting and recovering species. It is focused on expediting development and creating loop holes for developers. It enables bizarre and harmful trade offs between species at risk, effectively abandons overall benefit with an off ramp that includes paying a species conservation charge, and makes it harder for new species to get on the list and easier for existing ones to be downgraded or punted right off (i.e., not by legitimately recovering but by having a more discretionary threshold for reclassification and by artificially lowering their risk status based on populations outside of Ontario). Wildlands League is also concerned that we are likely to see little to no government action on species at risk because the Minister's responsibilities do not include public land management. **Schedule 5 should be removed from Bill 108 in order to protect and recover species consistent with the purpose of the Act.** We are open to a discussion about how to improve implementation without amending the Act.

Introduction

Wildlands League is a leading not for profit conservation group in Ontario and Canada. We are providing comments in our capacity as policy experts. Wildlands League has a long history of engagement on endangered species in Ontario including helping to usher in new legislation in 2007 that was celebrated at the time as the gold standard in North America. The *Endangered Species Act* is built on three cornerstones: independent science-based listing of species, automatic and mandatory habitat protections and timely preparation of recovery strategies and government response statements. It also includes flexibility mechanisms to allow activities to proceed in species at risk's habitat under certain conditions while raising the standard of protection to "overall benefit". This is not the same standard often found in resource statutes, i.e., minimizing impacts, and is what sets the ESA apart. The ESA is the safety net designed to pull species back from the brink.

Since 2007, however, the provincial government has failed to implement the *Endangered Species Act* consistent with its purpose. Moreover in 2013, it exempted many harmful industrial and development activities from the Act thereby depriving species at risk of desperately needed protections. The exemptions originally intended to be used in exceptional circumstances have now shockingly become the norm¹. The exemptions replaced the overall benefit standard with the lower standard of minimizing adverse impacts. Mitigation plans based on minimizing adverse effects do not prevent species at risk from being pushed to the brink of extinction. Those exemptions are still in place today.

The situation was bleak even before Bill 108, *More Homes More Choice Act*. An expanding Species at Risk List in Ontario. Wildlife being upgraded to even higher risk levels. Un-restrained development encroaching upon habitat refuges. But the situation will be worse if the bill passes. It will represent an almost complete abdication of Ontario's responsibilities to endangered species at the worst possible time. The world was just warned about nature's dangerous decline and up to 1,000,000 species are at risk of extinction². This coming two years after a stark warning through the WWF Canada Living Planet Report that Canada is not immune to the biodiversity crisis³. Buried in Bill 108 are more than 20 pages of amendments to the *Endangered Species Act* that don't respond to the needs of endangered species in Ontario. Schedule 5 of Bill 108 is about delays, discretion and developers.

Detailed Comments on Proposed Changes to the *Endangered Species Act*

Each section starts with Wildlands League's comments and then follows with a summary of the various amendments.

Changes to the Committee on the Status of Species at Risk in Ontario and to listing on the Species at Risk in Ontario List

When examined together, the changes represent a weakening and departure from the cornerstone of independent science-based listing. There will be fewer species listed and the threshold for reconsidering the ones that are already listed has been dropped from "is appropriate" to "may be appropriate".

¹ See <https://www.ontario.ca/laws/regulation/r13176>

² See <https://www.ipbes.net/news/Media-Release-Global-Assessment>.

³ See http://www.wwf.ca/about_us/lprc/

Proposed amendments would interfere in the COSSARO assessment by directing COSSARO members to consider “broader biologically relevant geographic range” both inside and outside Ontario and require COSSARO to reflect the lower level of risk. COSSARO already considers the “rescue effect” from healthy and stable populations in neighbouring jurisdictions⁴. This amendment doesn’t make sense in our view unless it’s purpose is to deliberately reduce the total number of species at risk in Ontario and the protections that would otherwise be afforded to them. Numerous delays are also enabled to prevent species at risk from receiving protections.

Worst case scenario will make the listing actually delayed by almost five years. COSSARO will assess a species as being threatened or endangered for the first time after January, not be able to report until almost a year later, be asked to reconsider (with an indeterminate timeline – let’s assume another year), then the species won’t be listed for another year, during which time a temporary suspension of the prohibitions for another 3 years could be applied (discussed below) – making the listing actually delayed by almost 5 years. And then there would be another year’s grace for existing authorization holders. These types of lengthy, discretionary delays will return us to the situation that existed before the *Endangered Species Act, 2007* reforms – with some endangered and threatened species legally protected and others not. Only those that are “officially” listed will (eventually) begin the clock toward developing recovery strategies.

- a) *Regarding the Committee on the Status of Species at Risk in Ontario (COSSARO), it is proposed that two scientific disciplines be added for “relevant expertise”: ecology and wildlife management. Further, it is proposed that “community knowledge” be added for “relevant expertise”. “Community knowledge” is not defined; however, it is listed as a means of obtaining information for the purpose of classifying species based on the “best available scientific information” (ESA, s5(3)).*
- b) *The ESA currently requires COSSARO to “maintain criteria for assessing and classifying species” (ESA, s4(1), para1). Proposed amendments will require that the criteria for assessing and classifying species as endangered, threatened or special concern include: (i) “the species’ geographic range in Ontario” and (ii) “the condition of the species across the broader biologically relevant geographic range” (both inside and outside Ontario). Further, proposed amendments will require that COSSARO reflect the lower the level of risk, if “consideration of the condition of the species both inside and outside of Ontario” would indicate “a lower level of risk to the survival of the species”. It is presumed that COSSARO will determine the “broader biologically relevant geographic area”.*
- c) *There are also proposed changes to COSSARO’s reporting. Currently, COSSARO has discretion to report at any time regarding the classification of a species, including that it is not at risk or that there is insufficient information to be able to classify the species. As well, COSSARO is mandated to submit an annual report on its work, including on all species classified since its last report and the reasons for classification. The amendments will limit COSSARO to one annual report, submitted to the Minister in January of each year, regarding species classified, reasons for classification, and (if*

⁴ See Gray Fox example. http://cossaroagency.ca/wp-content/uploads/2017/06/Accessible_Final_COSSAROEvaluation_Gray-Fox_June2016.pdf

desired) including when a species is assessed to be not at risk or that there is insufficient information to be able to classify the species. Other reports are only permitted if the Minister requests a classification or COSSARO determines that a species not currently listed “may be facing imminent extinction or extirpation.”

- d) There will be an extended delay in listing species at risk, from three months to 12 months. This will apply retroactively to any report received from COSSARO in 2019.*
- e) The amendments will also remove the transition provisions for the initial listing of species in 2007.*
- f) The threshold for the Minister’s opinion regarding reconsideration of a species’ classification is proposed to be changed from “is not appropriate” to “may not be appropriate” (a lower, more discretionary threshold).*
- g) Further, amendments are proposed to enable the Minister, during the 12 month delay before listing, to require COSSARO to reconsider the classification and report back by the specified deadline. The Minister’s opinion is to be supported by “credible scientific information that indicates the classification may not be appropriate”. There will be public notice of the reconsideration request, the Minister’s reasons, and the deadline for COSSARO’s second report posted on a government website (not specified to be the Environmental Registry of Ontario). A request for reconsideration automatically will delay the listing of the species at risk (until 12 months after the Minister’s receipt of the second report). Currently, a request of reconsideration does not delay the listing of the species at risk.*

Suspension of protections upon first time listing

New powers will delay protections for species upon first time listing. This is concerning as it often takes years for species to get listed in the first place. Moreover, several of the criteria the Minister would have to meet to make an order under this section (s8.1) appear to have broad applicability (e.g., the application of the prohibitions would likely have significant social and economic implications for all or *parts of Ontario*—emphasis added) such that it is likely that the temporary suspension of protections upon initial listing will become the norm once the bill is passed.

- h) The proposed amendments will give the Minister discretion, after consulting with the chair of COSSARO, to temporarily suspend the prohibitions against killing species and destroying their habitat(s) by making a regulation. This discretion is limited in the following ways:*
 - It has to occur between receiving the COSSARO classification and listing;*
 - It can only be used for a species that has not ever been listed (on SARO List) as endangered or threatened;*

- *Minister’s opinion is that applying “the prohibitions would likely have significant social or economic implications”, requiring additional time to “determine the best approach to protecting the species and its habitat”, and the temporary suspension “will not jeopardize the survival of the species in Ontario”;*
- *Minister’s opinion is “that the species meets at least one” of,*
 - *Broadly distributed in Ontario*
 - *Species’ habitat is not currently limiting success (survival or recovery)*
 - *“Not currently possible or feasible” to address the primary threats (need more time to find best approach)*
 - *Cooperation with other jurisdictions required to successfully reduce primary threats*
 - *Any other prescribed criteria (in regulation made by Cabinet)*

The temporary suspension regulation will include the date that the temporary suspension will end (which cannot be longer than three years after the date that the species was listed as endangered or threatened for the first time). The proposed amendments also clarify that a temporary suspension cannot be used if the species was previously listed as endangered or threatened under a different common or scientific name.

A temporary suspension regulation will not delay any other timelines (related to recovery strategies, etc).

Prohibitions against harming, possessing, and transporting species, as well as prohibitions against damaging their habitats, will not apply for one year to existing permit or agreement holders when a species is listed as endangered or threatened for the first time. Further, if there is a temporary suspension regulation relating to that first time listed species, the prohibitions are delayed for a year beyond when the temporary suspension ends. During the delay of protections, the permit/agreement holder must take reasonable steps to minimize adverse effects and can only engage in acts that are “necessarily incidental” to the authorization (eg, relevant permit or agreement) or that are necessary for the purpose of minimizing adverse effects. As with the temporary suspension regulation, the proposed amendments also clarify that a temporary suspension cannot be used if the species was previously listed as endangered or threatened under a different common or scientific name.

Exceptions to prohibitions against harming species at risk

The government has given itself more powers for exceptions to the prohibitions against harming species at risk. As mentioned above the exceptions seem to have become the norm in Ontario. More of them is a concern.

- i) *Two new exceptions are proposed to the prohibition against harming species at risk:*
 - *A temporary suspension regulation*

- *An exception regulation (codifying ability to do what already did to create the permit-by-rule regime in O Reg 242/08 in 2013)*

The Minister will be required to consider any government response statement before making an exception regulation.

Further, the existing ability to transfer possession from the Minister to another person or body for scientific, educational, cultural, religious, or ceremonial purposes will be changed to give the Minister discretion to give a general authorization for those same purposes (eg, it will no longer be limited to transferring possession from the Minister). The authorization is also subject to the Minister's discretion to set conditions.

A temporary suspension regulation will be an exception to the prohibition against harming species' habitat.

Recovery strategies, management plans and response statements

The proposed amendments will provide a new ability for the government to delay developing a response statement (with reasons posted on a government website). More distressing, however, is that implementation is limited to areas under the Minister's responsibility (which does not include management of public lands (s 12.1 (5)). This falls under the jurisdiction of the Minister of Natural Resources and Forestry. In practice, there will likely be no government action to protect and recover species. While the Minister of Environment, Conservation and Parks can review and authorize activities, proactive protection of habitat on public lands, for example, would be outside his jurisdiction. Species at risk used to be in the MNRF portfolio but it was moved to MECP in the fall of 2018.

- j) Amendments will make it clear that the mandatory recovery strategy contains "advice and recommendations to the Minister". The time limit for ensuring that a recovery strategy is publicly available is not changed; however, the "start time" can be delayed (e.g., the timelines commence with the listing of a species on the SARO List, which can be delayed as described above). Notices of delay in making a recovery strategy publicly available will be published on a government website (e.g., will no longer be limited to using the Environmental Registry established under the Environmental Bill of Rights, 1993).*

Amendments will make it clear that the mandatory management plan (for special concern species) contains "advice and recommendations to the Minister". The time limit for ensuring that a recovery strategy is publicly available is not changed. Notices of delay in making a recovery strategy publicly available will be published on a government website (eg, will no longer be limited to using the Environmental Registry established under the Environmental Bill of Rights, 1993).

Amendments will create a separate provision of government response statements, which maintain the requirement that responses to recovery strategies and management plans are published within 9 months. A new provision will give the government the ability to extend the deadline, with notice on a government website. The notice will state the Minister's opinion of the need for additional time,

reasons for the Minister’s opinion, and provide the estimate of when the statement will be published. Implementation will be limited to actions that are feasible and within the Minister’s responsibilities.

The Minister will still be required to conduct a 5-year review of progress. A different frequency of review (more frequent or less frequent) of progress can be set in the government response statement.

New authorization: landscape agreements

In addition to the delays, discretion and new exceptions there is another new authorization called landscape agreements focused on allowing a party to carry out multiple activities in a geographic area that would otherwise be prohibited. It introduces terms such as benefitting species and impacted species which seem to be a new way of subdividing endangered and threatened species into categories where they can be deprived of more protections under the ESA. These would be in addition to *first time listing species* and *conservation fund species* (discussed below). Under landscape agreements, some species will get beneficial actions. Other won’t. One criterion, outlines a bizarre and untested concept, the explicit trading off actions between species at risk within a geographical area. This represents another departure from a key tenet of the ESA which is to protect species and promote their recovery, and fails to consider species-specific and site-specific concerns.

Throughout the Schedule and in landscape agreements, we see language that states, such action “will not jeopardize the survival or recovery in Ontario” (s 16.1 (3) (c) (i)). On the face of it, it may seem like a reasonable criterion but in practice and in court we’ve seen otherwise. In *Wildlands League v Ontario (Natural Resources and Forestry)*, Ontario argued that it doesn't always have to protect and restore species as per the purpose of the ESA. The exemption regulation, that was being challenged at the time, was fine in their view because among other things it did not jeopardize the survival of the species in Ontario. *Killing them less*⁵ and waiting until species to be uber-endangered before protecting them was appropriate according to Ontario.

k) Proposed amendments will create a new authorization (s16.1) called “landscape agreements” to be used for:

- Multiple activities through an identified geographic area*
- Activities that would otherwise be prohibited (harming species at risk or their habitats) for one or more “impacted species” (listed as threatened or endangered)*
- Requiring “specified beneficial actions” to one or more species (“benefiting species”) that exist within the identified geographic area and are listed as threatened, endangered, or special concern*

⁵ See Anna Baggio’s blog from 2015 https://www.huffingtonpost.ca/anna-baggio/ontario-endangered-species_b_6531998.html

Mandatory consideration of any government response statements (and any other matters to be set out in regulations made by Cabinet) is required before entering into a landscape agreement. Further, in order to be able to enter into a landscape agreement, the Minister is to be:

- *satisfied that at least one of the benefiting species is also an impacted species*
- *satisfied that the eligibility, activities, geographic area, species, and any other regulatory requirements are met*
- *of the opinion that*
 - *“the agreement will not jeopardize the survival or recovery of an impacted species”*
 - *“reasonable steps to minimize the adverse effects of the authorized activity on the impacted species” are required*
 - *“reasonable alternatives have been considered” (including avoiding adverse effects on “any impacted species”) ○ the “benefits from beneficial actions ... outweigh the adverse effects ... [on] the impacted species”*

The specifics of eligibility, activities, geographic area, species, and anything else that may be required are left to future regulations (to be made by the Minister).

The agreement may be subject to a “species conservation charge” (if an “impacted species” is also a “conservation fund species”).

The Minister will have discretion to issue a policy statement that governs landscape agreements. Such policy statements, if they exist, will be published on a government website and landscape agreements “shall be consistent with” them. Compliance with a landscape agreement’s requirements is required for the authorization to apply.

Alterations to section 17 permits

In this section an off ramp to the overall benefit clause (s17 (2) (c) is in place where a person could pay a “species conservation charge” instead of meeting overall benefit for “conservation fund species”. The best alternative would still need to be adopted among reasonable alternatives and reasonable steps to minimize adverse effects on individual members of the species has been changed to minimizing adverse effects on *the species*. This latter could result in a situation where individuals could be sacrificed because the “species” itself would technically still exist in the province. Take, for example boreal caribou, there are 13 ranges in the area known as continuous distribution in Ontario. The province could authorize harmful activities for example in the Missisa range to facilitate Ring of Fire mining or Churchill Range to facilitate forestry, mining and transmission corridors that might meet the test of minimizing effects *on species* because the species would still exist elsewhere in Ontario. It might be harder to argue the authorizations meet the test to minimize adverse effects on *individual members*. Worst case scenario, one could argue that it would be possible to wipe caribou out in several ranges but as long as they weren’t wiped out in all of them, they would still exist as a species.

For s 17 (2) (d) permits, Cabinet approval will no longer be required and there no longer will be a requirement for the Minister to consult an independent expert. Paying a species conservation charge is available here.

- l) *The Minister’s ability to issue permits under subsection 17(2), paragraph (c) is proposed to be altered to include an option (for “conservation fund species” only) to pay a “species conservation charge”, rather than requiring an “overall benefit”. The reasonable alternatives best alternative adopted requirement has been maintained. Reasonable steps to minimize adverse effects in individual members has been changed to the species as a whole.*

The Minister’s ability to issue permits under subsection 17(2), paragraph (d) is similarly proposed to be altered. There will no longer be Cabinet approval required for this type of permit. There will no longer be a requirement that the Minister consult with an independent expert. There will be an option that there will be a “species conservation charge” (for “conservation fund species” only). Otherwise, the permit requirements are unchanged.

For amendments to or revocation of s17(2)(d) permits, there will no longer be requirements to consult an independent expert and there will no longer need to be Cabinet approval of the amendments/revocation.

Section 18 instruments

Section 18 has been replaced with clauses that enable regulated activities. The standards have been weakened. “Overall benefit” has been replaced with “benefit”. Reasonable alternatives are to be considered but the best alternative is not required to be selected. Reasonable steps on the species, is required, not on individual members. The paying of species conservation charge is also enabled. This instrument was never used in the past. Its replacement may get more uptake given protections have been downgraded.

- m) *The provisions relating to “Minister’s instruments” and “prescribed instruments” (both of which have not been used to date) are to be revoked. There will be provisions enabling “regulated activities” (authorized by federal or Ontario legislation or regulation) to avoid the prohibitions against harming species or their habitats. Details are left to future regulation (which can be made by the Minister), including: which “regulated activities” will be eligible, the species that will be eligible, additional conditions that will be required, and the payment of any “species conservation charge”. The Minister’s authority to make the regulations includes setting out the process, limitations on regulated activities, requirements for achieving a benefit, and whether (or not) a “species conservation charge” is required. The Minister’s discretion in making regulations is limited. The Minister must be of the opinion that:*

- *The regulated activity will not jeopardize the survival of or cause any adverse effects to the regulated species, and*
- *The terms and conditions of the instrument, and any other conditions required by regulation, will:*

- “achieve a benefit” (if reasonable to do so) to the protection/recovery of regulated species,
- “consider reasonable alternatives” (to engaging in the regulated activity), including those “that would not adversely affect” the regulated species, and ○ “take reasonable steps to minimize adverse effects” on the regulated species.

Further, the Minister is required to consider any government response statement.

New Species at Risk Conservation Fund and Species at Risk Conservation Trust

It is unclear yet which species will be designated “conservation fund species”. As mentioned above, proponents could pay a species conservation charge in lieu of meeting the overall benefit clause or as a result of landscape agreements or a section 18 instrument. We concur with CELA, Ecojustice and Lintnew Law⁶ on this:

“Establishing a fund to protect species in lieu of conditions on permits, which is resourced by activities that directly harm species and their habitat, is contrary to the intent of the ESA and should not be advanced. Any action, which provides a ‘get out of jail free card’ – in that proponents can pay a fee to act contrary to the Act – should not be permitted.”

- n) *The proposed amendments (new sections 20.1 to 20.18) will create a regulatory charge (“species conservation charge”), to be collected into the “Species at Risk Conservation Fund” (Fund) and administered by the “Species at Risk Conservation Trust” (Agency).*

The proposed purpose of the Fund (which is expressly not going to be part of the Consolidated Revenue Fund): “to provide for the funding of activities that are reasonably likely to protect or recover conservation fund species or support their protection or recovery”.

The Fund will include “species conservation charges”, any funding provided by the government, and any donations.

The Agency will be established by Cabinet regulation as a “corporation without share capital”. The Agency will be required to manage the Fund according to the purpose. The Agency will adopt a business plan and make it publicly available on the Agency’s website. Annual reports are required (within 120 days after the Agency’s fiscal year end) and are to be made public on the Agency’s website. Every five years, the Agency is required to report on the effectiveness of the Fund. Funded activities are to be:

- *consistent with the purpose of the Fund, and*

⁶ See p. 11-12 in Submission Regarding Legislative Amendments to the Endangered Species Act, Bill 108, Schedule 5 Environmental Registry No. 013-5033. May 16, 2019 by Ecojustice, Canadian Environmental Law Association and Lintner Law.

- “reasonably likely to contribute to or have one or more of the following results” (related to a “conservation fund species”):
 - Abatement/reversal of a declining population
 - Increase in viability/resilience in existing population
 - Increase in distribution of species with its range
 - Increase in reproductively-capable species in the wild
- include activities such as those that:
 - “reduce threats”
 - “expand, improve or secure” habitat
 - “contribute to the body of scientific information” (including obtained from community knowledge and traditional aboriginal knowledge)

If there is a government response statement with respect to a “conservation fund species”, funded activities will need to be consistent with actions identified or (alternatively) be in accordance with the “established written guidelines”.

The Minister has discretion to:

- “establish written guidelines” regarding funding
- issue directions to the Agency relating to governance, administration, management
- require reviews of the Agency and/or its operations

The Minister will set out in regulation which SARO List species are “conservation fund species”.

The Minister will also set out in regulation the amount of the “species conservation charge” and when paid (if not set out specifically in the relevant authorization).

Enforcement Matters

Inspectors will be enabled to determine compliance with any provisions of the regulations. This fills a gap identified during the *Wildlands League v Ontario (Natural Resources and Forestry)* court case. It is a positive step; however, Wildlands League does not support the *Endangered Species Act* being implemented through exemption or exceptions as the norm as it has been to this point. A new species

protection order also is welcome but not within this Schedule that is overwhelmingly focused on facilitating development at the expense of species. We recommend pulling this Schedule at this time.

- a. *It is proposed that the Minister will have discretion to appoint enforcement officers (currently, conservation officers under the Fish and Wildlife Conservation Act, 1997 and park wardens are automatically ESA enforcement officers).*

It is proposed that inspections to determine compliance with, and to issue stop orders, be extended to “any provision of the regulations” (a gap that was identified during the litigation regarding the lawfulness of the 2013 exemptions).

It is proposed that a new species protection order power be added that will allow the Minister to make an order when she/he has reasonable ground to believe that there will be a significant adverse effect on a species and at least one of the following is satisfied:

- a regulatory exemption for the activity prevents the prohibition against harming species from applying*
- a COSSARO report has been received classifying a species, but it has not yet been added to the SARO List*
- a temporary suspension regulation applies to the species*

As well, it is proposed that the availability of the existing habitat protection order be extended to a species’ habitat that is subject to a temporary suspension regulation.

Finally, it is proposed that contravening any provision of a regulation be added to the list of offences.

Please feel free to contact me about these comments. Thank you for your consideration.

Sincerely,



Anna Baggio

Director, Conservation Planning