

February 20, 2024

The Honourable Andrea Khanjin
Ministry of Environment, Conservation and Parks
5th Floor
777 Bay St.
Toronto, ON M7A 2J3

Dear Minister Khanjin

Re. ERO 019-8016 - Regulatory changes under the Endangered Species Act

On behalf of the xx undersigned organizations, we write to express our deep concern about the proposed amendments to regulations under the *Endangered Species Act, 2007* (ESA). Although the Ministry of Environment, Conservation and Parks (MECP) contends that these changes are to improve implementation of the legislation, this is simply not true from the perspective of protecting and recovering species at risk. The overall direction of the proposed amendments is to speed up approvals and reduce burden and costs for proponents of harmful activities, to the detriment of Ontario's most vulnerable plants and animals. Across the board, so-called administrative changes will weaken the level of protection for the species involved.

We outline our specific concerns and recommendations below.

1. REDUCED HABITAT PROTECTIONS FOR REDSIDE DACE

MECP is proposing to amend the habitat regulation for the endangered reddsides, thereby reducing the area to be prescribed and thus protected as habitat under the ESA. The proposal involves changing the determination of both "occupied" and "recovery" habitat protected under the legislation. For many years, the standard for determining "occupied" habitat has been 20 years. Indeed, 20 years is the general rule of thumb for animal observations, as established in NatureServe's [Element Occurrence Data Standard](#) (sec. 5.2.1).¹ Yet MECP is now proposing to include only areas used by reddsides within the past 10 years, a reduction in timeframe which means that less habitat will be protected or restored to support recovery.

¹ The provincial Natural Heritage Information Centre is a member of NatureServe
<https://www.ontario.ca/page/natural-heritage-information-centre>.

In addition, while recovery habitat currently includes “areas that would support re-establishment of the species to formerly occupied areas,” MECP is proposing to limit recovery habitat to only “streams or other watercourses directly adjacent to occupied habitat” and “areas that are currently suitable for Redside Dace to carry out its life processes.” Again, as a consequence, less habitat will be identified for protection and recovery. The proposed change excludes restoring habitat in areas not currently connected to occupied habitat, which is a small fraction of what it once was. It also undercuts the potential for restoration of formerly occupied sites by focusing on “currently suitable” areas.

The only possible interpretation of these changes is that they are geared towards facilitating development. Indeed, they are being proposed as Ontario is determined to build Highway 413 (GTA West highway), which threatens to extirpate the species by adding impervious surfaces in some of the last remaining potential redside dace habitat in the northern reaches of the Greater Toronto Area. Ontario’s [Recovery Strategy for Redside Dace](#), 2010, recommended that all upstream headwaters be protected. The Impact Assessment Agency of Canada found that the highway proponent proposed 95 watercourse crossings, some of which may occur in areas important for the distribution of endangered species including the redside dace.

Yet instead of mitigating the anticipated highway impacts, the changes now being proposed will contribute to the ongoing decline of the species through further damage and destruction of habitat. This is unacceptable from several perspectives:

i) **The proposal is contrary to the legislated purpose of the ESA**, which is to “protect species that are at risk and their habitats, and to promote the recovery of species that are at risk.” (ESA, sec. 1 (2)).

ii) **Current protections are already inadequate – redside dace numbers are still dropping and habitat is still being lost due to the cumulative effects of development.** Ontario’s 2015 [Five-Year Review of Progress Towards the Protection and Recovery of Species at Risk](#) indicated that of the 17 watersheds where redside dace was known to exist at the time, 13 were experiencing declines. The [proposed 2024 federal Recovery Strategy and Action Plan](#) shows that, based on 2020 data, the population status in those 13 watersheds is poor. The greatest threat to the species is urban development (*Recovery Strategy for Redside Dace*, 2010). According to the proposed *2024 federal Recovery Strategy and Action Plan*, “[m]any of the remaining populations are found in areas currently scheduled for urban development or areas where development could occur” (sec. 5.2). The proposed changes would exacerbate the situation, removing any requirement for development proponents to consider the species in areas no longer covered by the habitat regulation.

iii) **Monitoring of redside dace populations has been inadequate.** According to the proposed *2024 federal Recovery Strategy and Action Plan*, “most of the

monitoring of Redside Dace populations in Ontario has been ad hoc or has been incidental to other sampling programs” (sec. 7.3). Comprehensive sampling of redside dace sites is needed to identify extant populations and determine their area of occupancy. It was identified as a high priority action in the 2015 Five-year Review but has not yet occurred. In other words, MECP is proposing to lower the bar for habitat protection without a clear picture of the baseline and without any requirement to ensure that sites have been properly sampled (as per federal Recovery Strategy) to confirm absence.

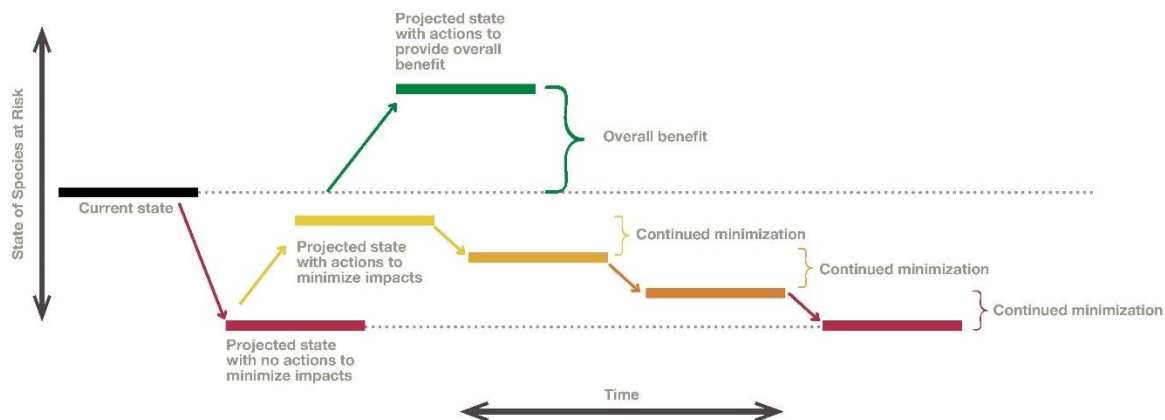
iv) **The proposed changes will compound the overall inadequate implementation of protections for redside dace under the ESA, including the failure to assess cumulative impacts, to achieve overall benefit and to monitor or enforce compliance.** As noted in the Auditor General’s 2021 [*Value-for-Money Audit: Protecting and Recovering Species at Risk* \(auditor.on.ca\)](#), redside dace is one of the species at risk mostly frequently impacted through approvals, i.e., permits and exemptions (p. 51). Yet, according to the same report, the ministry does not assess the cumulative impacts of approvals on regulated species. Rather, approvals proceed in isolation. In their [*2023 follow-up report*](#), the Auditor General found that the ministry had made little to no progress on the issue and had no plans to develop guidelines for staff to assess the cumulative effects of species at risk approvals. Although permits are supposed to provide an overall benefit for the species, the Auditor General found that, in the two years preceding the report, the eight permits issued for activities impacting redside dace “always allowed for more damage or destruction of habitat than what was restored or replaced” (p. 46).

With respect to exemptions, the most frequent type of approval, they are generally premised on minimizing impacts, not providing an overall benefit. The difference between the two standards - overall benefit and minimizing adverse impacts - is clearly described in the government’s policy, [*Endangered Species Act Submission Standards for Activity Review and 17\(2\) c Overall Benefit Permits*](#) (February, 2012):

For the purposes of clause 17(2)(c) of the ESA, the concept of providing an overall benefit to a species involves undertaking actions that contribute to improving the circumstances for the species specified in the permit. Overall benefit is more than no net loss or an exchange of like-for-like ... Overall benefit is grounded in the protection and recovery of the species at risk and must include more than steps to minimize adverse effects on the protected species or habitats. The outcome of the overall benefit actions is meant to improve the relative standing of a species after taking into account the residual adverse effects to the species or its habitat that are authorized by the permit (i.e., the completion of all permit conditions achieves a net positive benefit for the species at risk...) (p.2)

The difference is succinctly illustrated with Figure 1 below, based on a schematic from the same policy document and subsequently adapted by Ecojustice, David Suzuki Foundation and Ontario Nature in their [10-year anniversary review of the ESA](#) (2017).

Figure 1: Comparison of two approaches: providing an overall benefit and minimizing impacts.



Based on original schematic by Ministry of Natural Resources and Forestry (2012) and adapted from schematic by Ecojustice, David Suzuki Foundation and Ontario Nature (2017).

MECP has no power to deny or tailor exemptions to specific circumstances, regardless of potential impacts. Further, although reports summarizing compliance with the conditions of permits or exemptions may be required, they are seldom submitted. Indeed, there are no “procedures in place to track reports or request outstanding reports” (Auditor General, 2021, p.54). Even when reports are received, the ministry does not review them. Nor does it enforce compliance: of the 6,539 approvals for species at risk under the ESA between 2007 and 2020, none of the activities involved has ever been inspected for compliance (p. 54). This hands-off approach undermines any incentive for compliance, any opportunity for enforcement and all accountability.

Recommendation 1: Do not proceed with the proposed amendment to the habitat regulation for redbreasted dace.

Recommendation 2: Implement the Auditor General’s 2021 recommendation to evaluate the cumulative effects of approvals, publicly report on this information and take corrective actions to ensure that approvals contribute to successful outcomes for species at risk and their habitats (rec. 13).

Recommendation 3: Invest in comprehensive, long-term monitoring to identify extant populations of reidside dace, determine their area of occupancy and prioritize areas that should be restored to advance recovery.

2. REGULATORY AMENDMENTS REGARDING BARN SWALLOW AND BUTTERNUT

Barn swallow

The proposed regulatory amendments regarding barn swallow may make administrative sense given the down-listing of the species to “special concern” in 2021 by both the Committee on the Status of Species at Risk in Ontario (COSSARO) and the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). Since it is no longer deemed to be threatened, the ESA prohibitions on harm to the species or damage to its habitat no longer apply.

We note with concern, however, that the population in Canada decreased 64.7 percent between 1970 and 2019. There continue to be “substantial” ongoing declines in Ontario, with an estimated decline of 25.9 percent between 2009 and 2019. During the same time period, barn swallow populations declined in most US states bordering Canada, while in Quebec it experienced an estimated decline of about 27.5 percent ([COSEWIC Assessment and Status Report](#), 2021, Executive Summary; Tables 2 and 3).

Butternut

We do not support the proposed regulatory amendment to remove the 30-day waiting period between the submission of a Butternut Health Expert Report and the registration of an eligible activity that is currently required. As noted in the proposal, the aim is to shorten timelines for those registering for an exemption. It has nothing to do with maintaining or improving outcomes for this species at risk.

Government auditing of the reports is needed to ensure that assessments are conducted in a credible and consistent manner. This is especially the case given that Butternut Health Experts no longer require training before conducting assessments. Further, the 30-day period and possibility of a government review provides incentive for the person completing the assessment to do a proper job.

Recommendation 4: Retain the 30-day period between the submission of a Butternut Health Assessment report and commencement of harmful activities.

Recommendation 5: Audit all Butternut Health Assessment reports to ensure accountability and the quality and consistency of assessments.

3. ADDITIONS OF NEWLY LISTED SPECIES TO EXISTING CONDITIONAL EXEMPTIONS

We take great exception to the stated rationale for adding newly listed species to conditional exemptions, i.e., to “streamline” approvals so that “proponents can engage in their proposed activities impacting recently listed species sooner.” Speeding up harmful activities cannot be seen as improving implementation of a law intended to promote the protection and recovery of species at risk.

We understand that, from a purely administrative perspective, the addition of newly listed species to existing exemptions may serve the interests of proponents. However, the implications of the proposed amendments far exceed such administrative considerations. As noted in the Auditor General’s 2021 report, annual approvals to harm species at risk increased by 6,262 percent between 2008 to 2020, with the biggest jump starting in 2016 (p. 2). In 2020, 96 percent of approvals to harm species at risk and their habitats were through exemptions, which MECP can choose neither to deny nor tailor for specific circumstances. Further, the ministry has never inspected any of the activities allowed through exemptions to ensure compliance with the conditions (p. 54). Nor does it review reports from proponents required as a condition of exemptions (p. 54). There is therefore no evidence to validate the ministry’s hollow claim that through exemptions they are “still maintaining standards for the protection of species at risk” (ERO posting). The ministry can have no idea what the actual impacts have been or whether conditions of the exemptions have been met. This lack of oversight leaves the system wide-open to abuse.

We are relieved to note that according to the Auditor General’s 2023 follow-up report, MECP is implementing “a 2023/24 inspection plan that outlines planned inspection timelines of permit and regulatory exemption conditions and that it has trained 333 staff on compliance and enforcement of the ESA” (p. 16). Nevertheless, there has been little to no progress on recommendations to evaluate the impacts of conditional exemptions, take corrective actions on the scope and requirements of conditional exemptions, or evaluate the cumulative effects of approvals (pp. 12, 15).

Recommendation 5: Fully implement the Auditor General’s 2021 recommendation to develop and implement a comprehensive compliance and enforcement plan, including regular inspections of approval holders.

Recommendation 6: Refrain from adding any newly listed species to existing conditional exemptions until the Auditor General's recommendations regarding compliance, enforcement, corrective actions and evaluation of impacts are fully implemented.

4. REGULATORY AMENDMENTS REGARDING THE CONDITIONAL EXEMPTION FOR EARLY EXPLORATION MINING

Most early mining exploration activities (geophysical surveys, mechanized drilling, line cutting, mechanized surface stripping, pitting and trenching) are already exempt from the ESA. The proposed amendments to the conditional exemption for early exploration mining focus on trails and on mandatory mitigation measures that would be needed to qualify for the exemption (i.e., the mitigation measures needed to allow proponents to harm endangered species and destroy their habitat).

We note with concern that the systemic weaknesses of conditional exemptions, highlighted by the Auditor General's reports, also apply to early exploration mining – a failure to inspect and enforce whether conditions are being met and a failure to report on and assess impacts. Mandatory mitigation measures for early exploration mining are already largely unenforced and unenforceable, as illustrated by the following example from the Auditor General's 2021 report:

In our testing, we found a case of a conditional exemption for early exploration mining where the company was allowed to impact boreal caribou and was required to submit annual monitoring reports to the Environment Ministry. Our Office asked the Ministry to provide the documents that should be in their possession. The Ministry informed us that it did not have them, and would not contact the company to obtain them; the Ministry did not have updated contact information for the new mining company that had bought out the original corporation that registered the conditional exemption. Our Office asked the new mining company for the annual monitoring reports, but we were told that they are unavailable and nothing has been filed for the conditional exemption since 2018. (p. 55)

In addition, the general lack of data on species at risk in northern landscapes (e.g., the location of wolverine dens) means that many of the existing mandatory mitigation measures (e.g., avoidance of wolverine dens) are impossible to follow and thus meaningless. On top of site-specific failures to comply with regulations, there is no system for tracking cumulative impacts of all the approvals.

It is important to note that the proposed changes with respect to early exploration mining follow less than a year after amendments to Ontario's mining regime in Bill 71, the *Building More Mines Act, 2023*. Among other things, those changes weakened requirements for closure plans, despite Ontario taxpayers already being on the hook for the clean-up of abandoned mines, and weakened standards for rehabilitation following recovery of minerals from tailings. Taken together with the current proposed changes,

the effect is to exacerbate the environmental and social risk from the mining sector from early exploration through to closure and rehabilitation.

Recommendation 7: Improve monitoring and data collection on northern species at risk to inform implementation and assessment of the impacts of approvals for early exploration mining.

Recommendation 8: Implement a system to assess the cumulative impacts of approvals for early exploration mining.

Recommendation 9: Refrain from proceeding with the proposed amendments to the early exploration mining exemption until the Auditor General's recommendations on conditional exemptions are fully implemented.

CONCLUDING REMARKS

Overall, the proposed regulatory amendments move Ontario in the wrong direction and exacerbate the weaknesses of MECP's inadequate approach to implementing the ESA to date. The desire for administrative efficiencies and streamlined approvals serves first and foremost the proponents of harmful activities, to the detriment of the province's species at risk. This approach is particularly irresponsible given the profound challenges we face if we are to have any hope of addressing the unprecedented and accelerating loss of biodiversity here in Ontario, across Canada and worldwide. We urge you to implement the ESA as it was intended, with adherence to the precautionary principle and a firm commitment to protecting and recovering our most vulnerable plants and animals.

Yours sincerely,