March 4, 2019

Public Input Coordinator
Ministry of the Environment, Conservation and Parks
Species Conservation Policy Branch
300 Water Street
Floor 5N
Peterborough, Ontario
K9J 3C7

Dear Sir/Madam,

RE: ERO #013-4143 Review of the *Endangered Species Act, 2007*

On behalf of Ontario Nature, the David Suzuki Foundation, Environmental Defence and the undersigned organizations, we offer our comments and recommendations below on the review of the *Endangered Species Act, 2007* (ESA).

We note, with deep concern, that environmental deregulation – making it easier for industry and development proponents to proceed with activities that harm species at risk and their habitats – appears to be the overall focus and intent of the options put forward for consideration. Reassuring statements that the review is intended to "improve protections," "improve effectiveness" and provide "stringent protections" (p. 2) are misleading, in light of the actual proposed changes that MECP is inviting the public to consider. These include options that would undermine the very cornerstones of the law: science-based listing (including Indigenous Traditional Knowledge), mandatory habitat protection, and legislated timelines for planning and reporting.

Allegedly responding to undocumented and unsubstantiated criticisms that the ESA is administratively burdensome and creates "barriers to economic development," MECP presents options for legislative reform that are contrary to the very purpose and intent of the ESA, which is to protect and recover species at risk. Proposals to "increase efficiencies" and "streamline approvals" consist of simplifying requirements for industry permits and exemptions to undertake harmful activities, extending or removing legislated timelines for planning and reporting, and weakening automatic protections for species-at-risk and their habitats. They have nothing to do with advancing species recovery, and everything to do with allowing economic development to proceed at the fatal expense of Ontario's most vulnerable plants and animals.

For the most part, the challenges outlined in the discussion paper are the result of poor implementation of the ESA, not the law itself. Unreasonable delays in processing permits, a common complaint of industry, would be one example of an issue to be addressed through improved implementation. In her 2017 environmental protection report, the Environmental Commissioner of Ontario provided a detailed analysis of the government's implementation of the ESA and concluded that "MNRF has utterly failed to implement the law effectively" (p. 248). If MECP, as the new ministry in charge, is serious about improving outcomes for species at risk, it needs to invest in and improve ESA implementation, not weaken the law. It must put the protection and recovery of species at risk front and centre while administering the ESA.

Focus 1: Landscape approaches

A "landscape approach" to species at risk recovery is an alluring buzzword, but in the discussion paper MECP explains neither the concept nor the tools that could be used to implement it. In its description of challenges, nevertheless, the ministry indicates that it is contemplating a landscape approach that would enable planning and authorizations of harmful activities at a broad scale: "For species that depend on habitat across wide ranges, a landscape approach that enables planning and authorizing activities at a broad scale may be preferred" (p. 3).

From a planning perspective, no change to the law is needed to accommodate a landscape approach. The ESA (sec. 13, 14) already provides for an ecosystem approach to planning, including the preparation of recovery strategies for multiple species at once:

> **Ecosystem approach**
> 13. A recovery strategy or management plan may be prepared under section 11 or 12 using an ecosystem approach.
>
> **Recovery strategies and management plans for more than one species**
> 14. A recovery strategy or management plan may be prepared under section 11 or 12 for more than one species, whether or not the species are part of the same ecosystem.

There is no legal barrier to advancing a landscape approach to the recovery of species at risk or to considering the needs of multiple species at once. From a planning perspective, landscape approaches are an implementation issue only.

The fine scale species-specific approach to status assessments, listings and protections is critical to robust planning and recovery efforts and must not be abandoned. Landscape approaches must build on and complement these species-specific approaches, not replace them. As already provided for in sections 13 and 14, landscape and multi-species approaches may be used for recovery planning. Section 13 could be used, for example, for species that are wide-ranging or vulnerable to cumulative effects. A case in point is the boreal caribou, and in fact, the need for a landscape approach for that species is recognized in Ontario's Caribou Conservation Plan (2009). Even though the plan sets the stage for a landscape approach, however, it has yet to be implemented – a failure of the government's implementation of the law, not of the law itself. As for habitats that harbour multiple listed species, section 14 already provides for a multi-species approach.

Recommendation 1: Do not amend the ESA to accommodate landscape approaches to planning, as these are already adequately enabled in sections 13 and 14. When implementing a landscape approach, use it to build on and complement the species-specific requirements set out in the ESA.

With regard to "authorizing activities at a broad scale," which refers presumably to authorizing harmful activities otherwise prohibited under the ESA, such an approach is inappropriate for endangered and threatened species. A landscape approach to authorizations doesn't lend itself to addressing site-specific or species-specific concerns and consequently presents unwarranted additional risk for species already in peril. Moreover, this approach has already been tested under the ESA, and has failed. The sweeping regulatory exemptions provided in 2013 to forestry, mining, hydro, infrastructure development and other proponents of harmful activities provide a telling example of the implications of broad authorizations and clearly illustrates the risks inherent in this approach. According to the 2017 report of the Environmental Commissioner of Ontario, the 2013 ESA exemptions have resulted in many more harmful activities going forward and much less protection being provided for at-risk species, all with reduced government authority and oversight (pp. 227 – 242). There is no routine auditing of compliance (p. 238), no effectiveness monitoring (p. 240), and no public access to information unless it is obtained through a freedom-of-information request: "The public is being kept in the dark on what activities are harming species at risk, and where" (p. 242). In other words, this experiment with broad authorizations has drastically reduced transparency, public accountability and protections for species at risk and their habitats. It is not an option that should be explored further. On the contrary, to truly improve protections for species at risk, the 2013 exemptions should be repealed (see Recommendation 10).

Recommendation 2: Do not amend the ESA to authorize harmful activities at a broad scale. Authorizations for harmful activities must address site-specific and species-specific concerns.

Focus 2: Listing process and protections

Science-based listing of species at risk by COSSARO (sec. 3 – 8) and automatic protections of listed species and their habitats (sec. 9, 10) are cornerstones of the ESA and must remain intact. The challenges described in the discussion paper are implementation issues, not problems with the law itself.

No amendments to the ESA are needed to address concerns about notification of new species listings. This is an implementation issue which should be addressed through better communications. In its listing process, COSSARO is required to consider species listed by the federal Committee on the Status of Endangered Wildlife in Canada (sec. 4(2)a), and thus the listing of a species should come as no surprise to the government or to industry/development proponents. There are years of notice embedded in this process, from the release of COSEWIC status reports to the listing under the ESA.

No amendments to the ESA are needed to review a COSSARO decision if warranted. The ESA already allows the Minister to request a review of a COSSARO decision if "credible scientific information" indicates the listing is not appropriate (sec. 8(2)):

Reconsideration
(2) If a species is listed on the Species at Risk in Ontario List and the Minister is of the opinion that credible scientific information indicates that the classification on the List is not appropriate, the Minister may require COSSARO to reconsider the classification and, not later than the date specified by the Minister, to submit a report to the Minister under section 6 indicating whether COSSARO confirms the classification or reclassifies the species.

There should be no changes to the ESA regarding the listing process or the role of COSSARO. The law sets out a transparent approach to listing based on a consideration of "the best available scientific information, including information obtained from community knowledge and aboriginal traditional knowledge" (sec. 5(3)). Tampering with COSSARO decisions will politicize the process and delay or even prevent recovery efforts.

We already have experience in Ontario with a political listing process under the previous Endangered Species Act. As a result, many endangered species were never listed for protection under the law. Indeed, that failure was one of the main reasons why the old law was reviewed and science-based listing was adopted in 2007. Moreover, a return to a political listing process would reduce certainty and decrease the efficiency of the system, given controversies that would arise over each species being considered for listing.

Recommendation 3: Do not amend the ESA with respect to the listing process or the role of COSSARO. The current ESA provisions provide a high level of credibility, accountability and certainty. The challenges described can and should be addressed through better implementation.

We are deeply concerned by the indication that MECP is considering alternatives to automatic species and habitat protections, including removing or delaying these protections at the discretion of the Minister. This is clearly a matter of letting short-sighted economic or political interests override the protection and recovery of species at risk. Alternatives to automatic protection will politicize decisions, undermine intended safeguards, and expose highly vulnerable species to additional risks – all for no good reason. The ESA already provides ample flexibility to consider socio-economic issues and to accommodate proponents of harmful activities through permits and exemptions (sec. 17, 18, etc.). Credibility, transparency and certainty require protections that are not subject to political whims or the influence of powerful industrial interests.

Recommendation 4: Retain automatic protections for threatened and endangered species. The ESA provides more than enough flexibility for proponents of harmful activities through permits and exemptions.

Focus 3: Recovery Policies and Habitat Regulations
The challenges described in this section focus primarily on timelines, yet MECP provides no analysis of why timelines are not being met nor of the potential consequences of lengthened timelines to the species themselves. Again, these challenges are first and foremost implementation issues and do not require legislative changes.

The existing legislated nine-month time limit to produce Government Response Statements (GRS) is reasonable, especially considering the extensive research and consultation that occurs earlier during the development of Recovery Strategies. This earlier research and consultation typically bring to the fore not only science-based considerations, but also socio-economic considerations; consequently, the government would not be caught unaware when the Recovery Strategy is released and could begin preparing the GRS ahead of time.

The GRS is a statement of the government's intentions. It can and should stipulate the government's plans and commitments for actions that it will undertake or support. The government's intentions regarding further consultation with Indigenous peoples, further research on complex issues, and further engagement with stakeholders can all be set out in the GRS, with precise timelines. Nine months is ample time to prepare such a statement of the government's intent.

Failure to meet the legislated nine-month deadline is an implementation issue. Adequate government investment in staffing and consultation are needed to meet deadlines. In many cases, it is also a political issue – and depends on the government's willingness to accept the implications of the Recovery Strategy regarding what is needed for the species. The only solution in such cases is adequate political will.

> **Recommendation 5: Retain the legal requirement to produce Government Response Statements within nine months of listing (sec. 11(8)). Ensure adequate government investment in staffing and consultation to meet this legislated deadline.**

The requirement to report on progress towards protecting and recovering a species within five years of the release of the GRS is reasonable and should not be changed. Reporting ensures transparency and accountability. It also provides an impetus for action, ensuring that effectiveness is assessed, and contributes to institutional learning and adaptive management.

> **Recommendation 6: Retain the requirement to report on progress within five years of the GRS.**

Habitat regulations, which describe specific boundaries of features or areas deemed to be habitat for a threatened or endangered species, provide enhanced certainty and clarity for implementing and enforcing the ESA, particularly the prohibition against damaging or destroying habitat (sec. 10). Habitat regulations also provide an opportunity to protect areas where a species "used to live or is believed to be capable of living" (sec. 55(3)b), presenting a significant opportunity for protection and recovery efforts to extend beyond places where species at risk currently persist and to recover historic habitat. For these reasons, there should be no changes to the legal provisions regarding habitat regulations.

Further, the ESA already allows the Minister to delay the development of a habitat regulation (sec. 56 (1)b) or to not proceed with a habitat regulation (sec. 56 (1)c). No change to the law is needed.

Recommendation 7: Do not amend the ESA provisions regarding habitat regulations. The law already provides the Minister the power to delay or not proceed with a habitat regulation (sec. 56 (1)c).

Focus 4: Authorization Processes

There are already many flexibility mechanisms in the ESA to allow harmful activities to proceed, as described in the discussion paper (p. 6). More are not needed. The options under consideration reflect a desire to make it easier for industry and development proponents to proceed with activities that harm at-risk plants or animals and damage or destroy their habitat. The suggested options are inconsistent with the purpose of the ESA, which is to protect and recover species at risk. Protection and recovery must be the priority.

Wherever and whenever harmful activities are allowed to proceed, authorizations should be premised on providing an overall, on-the-ground benefit to the species affected. Yes, authorization processes may result in delays; but this is the Endangered Species Act, not the Endangered Business Act. Enabling economic development is NOT the purpose of the act, and so-called routine activities can have devastating cumulative impacts – aptly described as "death by a thousand cuts."

Proponents of harmful activities should NOT be allowed to simply pay into a conservation fund rather than meet current requirements to provide an on-the-ground, overall benefit to species that they negatively impact. Habitat loss and degradation are by far the most significant drivers of species decline, underlining the importance of on-the-ground reparation for authorized damage or destruction. A fee-in-lieu fund is an easy way out for proponents of harmful activities that reduces transparency and accountability. And of course, the easier it is to obtain an authorization for harmful activities, the more likely they are to occur. This would run contrary to the stated purpose of the review, which is to enable positive outcomes for species.

Recommendation 8: Do not create a fee-in-lieu conservation fund that will make it easier for industry/development proponents to harm species at risk and damage or destroy their habitats. Continue to require an on-the-ground overall benefit to species negatively affected.

Section 17(2)d permits are intended to be available only for projects that "result in a significant social or economic benefit to Ontario" and that will not "jeopardize the survival or recovery of the species in Ontario." These are appropriate conditions and ensure that such permits are issued only an exceptional basis. Requirements for 17(2)d permits should not be simplified.

Recommendation 9: Make no changes to requirements for sec. 17(2)d permits. These permits should only be available for projects that "result in a significant social or economic benefit to Ontario" and that will not "jeopardize the survival or recovery of the species in Ontario," as currently required.

We strongly oppose the option of simplifying requirements for exemptions through regulation. As described above, the long list of regulatory exemptions for forestry, hydro, mining, aggregate extraction, infrastructure development, wind facilities and more, approved by Cabinet in 2013, have significantly

undermined not only protections for species at risk and their habitats but also transparency and public accountability. According to the Environmental Commissioner, ESA authorizations have "drastically increased" since the 2013 exemptions were put in place (2017, p. 227). Exemptions have become the primary means for allowing harmful activities to proceed. As of October 11, 2017, there had been 2,065 registrations for exemptions and about 85 percent of these were for activities that violate ESA protections for species at risk and their habitats.[1] These exemptions already allow industry/development proponents to proceed without providing an overall benefit to affected species, without government approval and without public scrutiny. What more do proponents want - carte blanche to proceed without any regard for species at risk? If the MECP truly intends to improve protections for species at risk, it should begin by repealing the 2013 exemptions.

> **Recommendation 10: Repeal the sweeping 2013 regulatory exemptions for harmful industrial/development activities.**

No amendment to the law is needed for the purpose of "meeting Endangered Species Act requirements in other approval processes" (p. 7). Section 18 of the ESA already provides a means to harmonize its requirements with other legislative or regulatory frameworks. The issue is implementation and ensuring that the high standards of the ESA, including the achievement of overall benefit to species affected by harmful activities, are upheld if a section 18 authorization is granted. For instance, discussions about how to harmonize the *Crown Forest Sustainability Act, 1994* with the ESA have been going on for years, but to no avail. The forestry industry has been unwilling to meet the high standards of the ESA, including the requirement to provide an overall benefit where species at risk and their habitats are negatively impacted by forestry activities. Rather than insisting on a solution that upholds the standards of the ESA, the government has so far ceded to industry demands, exempting forestry from ESA requirements essentially since the act came into force in 2008.

> **Recommendation 11: Do not amend the ESA to harmonize its requirements with other legislative or regulatory frameworks. There is no need. Use section 18 authorizations, which exist for this purpose. In so doing, retain the requirement to provide an overall benefit to species negatively affected by authorized activities.**

Summary remarks

When the ESA was taken out of the hands of MNRF and reassigned to MECP, there was cautious optimism that the new ministry in charge would strike a constructive path forward and prioritize the protection and recovery of Ontario's most vulnerable plants and animals through its administration of the Act. MECP's discussion paper suggests, however, that this hope may be ill-founded. Almost all the options put forward for consideration would weaken protections and sacrifice the recovery of species at risk to economic interests. If MECP chooses to compromise the foundations of the ESA – science-based listing, automatic protection of threatened and endangered species and their habitats, and mandatory timelines for planning and reporting – its credibility as the agency responsible for realizing the purpose of the ESA will be shattered.

[1] David Suzuki Foundation, Ontario Nature & Ecojustice. 2017. *Without a Trace: Reflecting on the 10th anniversary of Ontario's Endangered Species Act, 2007*.

The challenges that MECP has identified can and should be addressed through improved implementation of the act, not legislative changes. The ESA already accommodates landscape-level planning (sec. 13 and 14); review of COSSARO decisions based on credible science (sec. 8(2)); flexibility for economic activity (sec. 17 and 18); flexibility to delay or not proceed with a habitat regulation (sec. 56 (1)c); and flexibility to harmonize ESA requirements with other legislative or regulatory frameworks (sec. 18). No changes to the law are needed for these purposes. Other issues presented, such as inadequate notification of species listings and meeting deadlines for planning and reporting, can be resolved through improved planning, implementation and investment in outreach to stakeholders, program development and staffing.

Rather than reducing its administrative role and weakening its effectiveness through exemptions, the ministry should embrace its role as a defender of the broad public interest in conserving biodiversity and securing a healthy environment for all. Investing in and incentivizing stewardship would offer, for example, a much more positive and promising means of protecting species at risk than finding new, streamlined approaches to allow proponents of harmful activities to damage and destroy the critical habitats of Ontario's most vulnerable plants and animals.

Thank you for your attention.

Yours truly,

Anne Bell
Director of Conservation & Education
Ontario Nature

Rachel Plotkin
Ontario Science Campaigns Manager
David Suzuki Foundation

Tim Gray
Executive Director
Environmental Defence

David Miller
Executive Director
Algonquin to Adirondacks Collaborative

Alice Casselman
Founding President
Association for Canadian Educational Resources

Deb Sherk
President
Bert Miller Nature Club of Fort Erie

Norman Wingrove
Acting President
Blue Mountain Watershed Trust

Theresa McClenaghan
Executive Director
Canadian Environmental Law Association

Paul Pratt
President
Essex County Field Naturalists Club

Susan Moore
President
Friends of the Salmon River

Don Scallen
President
Halton/North Peel Naturalists

Bronwen Tregunno
President
Hamilton Naturalists' Club

Sharon Lovett, Karen Yukich & Leslie Gooding
High Park Nature

Sheila Fleming
President
Ingersoll District Nature Club

Arthur Gladstone
President
Kawartha Field Naturalists

Nancy Vidler
Chair
Lambton Shores Phragmites Community Group

Felicia Syer Nicol
President
Lambton Wildlife Incorporated

Marilyn Murray
President
Lennox & Addington Stewardship Council

Brian Bissell
President
Midland-Penetang Field Naturalists

Migs Baker
President
Nature League -Collingwood

Bernie VanDenBelt
President
Nature London

Andrew McCammon
Executive Director
Ontario Headwaters Institute

Linda Heron
Chair
Ontario Rivers Alliance

Patrick Nadeau
Executive Director
Ottawa Riverkeeper

Ted Vale
President
Peterborough Field Naturalists Club

Sandra Dowds
President
Prince Edward County Field Naturalists

George Thomson
President
Quinte Field Naturalists

Angus Inksetter
President
Saugeen Nature

Mark Cranford
President
South Peel Naturalists' Club

Bob Johnstone
President
St. Thomas Field Naturalists' Club

Dave Smith
President
Sydenham Field Naturalists

Linda McCormick
President
The Mississippi Valley Field Naturalists

David Stringer
President
Vankleek Hill and District Nature Society

Josh Shea
President
Waterloo Region Nature

Cassie Barker
Executive Director
Women's Healthy Environments Network

Gloria Marsh
Executive Director
York Region Environmental Alliance

Jeanne Beneteau
President
York-Simcoe Nature Club

Doris Treleaven
President
Protect Our Water and Environmental Resources

Tony Mass
Manager of Strategy
Freshwater Future Canada

Elizabeth Smith
President
The Lower Grand River Land Trust Inc.