Ministry of the Environment, Conservation and Parks

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10th Year Review of Ontario's Endangered Species Act: Discussion Paper



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FGCA comments March 1, 2019 fgcaontario@gmail.com

**Protecting and Recovering Species at Risk in Ontario**

10th Year Review of Ontario’s Endangered Species Act: Discussion Paper

## PROTECTING AND RECOVERING SPECIES AT RISK IN ONTARIO

Protecting and recovering our province’s species at risk is part of the Ministry of the Environment, Conservation and Parks’ made-in-Ontario environment plan,

“Preserving and Protecting our Environment for Future Generations,” launched in November 2018. The Ontario environment plan will protect our air, land and water, prevent and reduce litter and waste, support Ontarians to continue to do their share to reduce greenhouse gas emissions, and help communities and families prepare for climate change.

Ontarians are fortunate to live in a province that is filled with clean air, land and water, valuable resources, and an incredible diversity of more than 30,000 species of plants, insects, fish and wildlife. These species and their habitats are found in forests, rivers, lakes, wetlands, grasslands, and other important ecosystems that make up Ontario’s rich biodiversity. While many of these species have stable populations, 243 [are listed on the Species at Risk in Ontario List due to threats such as habitat loss,](https://www.ontario.ca/page/species-risk-ontario) pollution, invasive species, climate change

and disease. Species that are at risk include birds, fish, mussels, mammals, amphibians, reptiles, plants and insects, and they occur across Ontario from the southern tip near Point Pelee to the northern edge near Fort Severn. As of January 2019, Ontario has developed and put in place 140 recovery strategies for species at risk in the province.

The [*Endangered Species Act, 2007*](https://www.ontario.ca/laws/statute/07e06)(Endangered Species Act) came into effect on June 30, 2008. Species that are listed as ‘endangered’ or ‘threatened’ are protected from being harmed, harassed or killed, and their habitats are protected from being damaged or destroyed. Avoiding impacts to species at risk and their habitat is an integral part of protection and recovery. Where activities may have impacts that cannot be avoided, an authorization or compliance with a regulatory provision (which in some cases requires registration with the ministry) can allow those activities to occur under certain conditions (e.g. creating and following a mitigation plan).

Both scientific and implementation-focused expertise are essential to informing the protection and recovery of species at risk in Ontario. The Minister of Environment, Conservation and Parks has two committees that provide the Minister and government with this expertise and advice: the [Committee on the Status of Species at Risk in](http://cossaroagency.ca/)  [Ontario (COSSARO)](http://cossaroagency.ca/) and the [Species at Risk](https://www.ontario.ca/laws/statute/07e06#BK55)  [Program Advisory Committee (SARPAC)](https://www.ontario.ca/laws/statute/07e06#BK55).

COSSARO is an independent committee with up to 12 experts that use best available scientific and Traditional Ecological Knowledge to assess native plants or animals that may be at risk, and to provide a classification. SARPAC is an advisory committee with up to 12 representatives from conservation and business groups from

across the province as well as from Indigenous communities. SARPAC provides advice to the Minister on species at risk matters including species at risk policies, best management practices and stewardship and recovery approaches under the Act to promote sustainable social and economic activities that assist in the protection and recovery of species.

The government is committed to ensuring that the Endangered Species Act provides stringent protections for species at risk, continuing to work with stakeholders and Indigenous peoples to improve its effectiveness, and modernizing the program based on best practices in other jurisdictions. During the past decade of implementing the Endangered Species Act, we have heard what works well and what could work better – for species at risk, conservation groups, the public, Indigenous peoples and economic development. It is clear that while the Act has brought many successes, there are also challenges and possible areas for improvement. Since coming into effect, the Act has been criticized for being ineffective in its aim to protect and recover species at risk, for being unclear, administratively burdensome, time consuming and costly for applicants, and for creating barriers to economic development.

In recognition of these challenges, the Ontario government is currently undertaking a review of the Endangered Species Act to improve protections for species at risk, consider modern and innovative approaches to achieve positive outcomes for species at risk, as well as to look for ways to streamline approvals and provide clarity to support economic development.

The desired outcomes of any proposed changes to the Endangered Species Act are to:

* Enable positive outcomes for species at risk
* Ensure species assessments are based on up-to-date science
* Address multiple objectives for ecosystem management through stewardship and protection activities
* Increase efficiencies in service delivery for authorization clients
* Streamline processes and provide clarity for those who need to implement the Act
* Maintain an effective government oversight role

To inform the review of the Endangered Species Act, the government wants to hear your comments and suggestions about how the Act can enable positive outcomes for species at risk, consider modern and innovative approaches to achieve these outcomes as well as consider ways to streamline and provide clarity for those who need to implement the Act. All comments received during the consultation period will be considered in the review of the Act. In the next section, key challenges and discussion questions are outlined under four areas of focus.

## 10TH YEAR REVIEW OF THE ENDANGERED SPECIES ACT

**AREA OF FOCUS 1 – LANDSCAPE APPROACHES**

The Endangered Species Act sets requirements that must be met for each species that is listed as endangered or threatened. Landscape approaches may provide new tools for managing species at risk within specific geographic areas or ecosystems where the needs of multiple species at risk can be addressed.

To learn more: [Species at risk](https://www.ontario.ca/page/species-risk).

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| **CHALLENGES** | **DISCUSSION QUESTIONS** |
| * The case-by-case and species-specific policy approach to implementing the Endangered Species Act can sometimes limit the ability to achieve positive outcomes for species at risk. More broadly, protection and recovery approaches for individual species can limit or conflict with one another. For certain species or habitats, the ability to take a more strategic approach may be preferred. * 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. * SAR policy must be part of a larger OPS natural landscape/biodiversity conservation approach or the SAR list will keep growing, but more importantly the list of extirpated species and communities will grow and the ecological services our economy depends on will decrease. * For any SAR, conservation and or recovery actions are needed, but currently the OPS has to look outside of itself for that action. OPS planning is worthless without delivery of the plan and evaluation of its effects. Look to other biodiversity conservation programs and partners to be efficient In SAR cons/recovery – i.e. reforestation delivery partners that have the local expertise and capacity. * MNRF has increasingly become a closed shop to the public and local partners - it and or MOECP have to open up to stay current and relevant. | * In what circumstances would a more strategic approach support a proposed activity while also ensuring or improving outcomes for species at risk? (e.g., by using a landscape approach instead of a case-by- case approach, which tends to be species and/or site-specific.) * The first challenge is a only a problem because the ESA is not supported by an effective policy for natural landscape conservation and ecological services sustainability. This is the bigger need now, especially in southern Ontario (6E/7E) where losses are significant and increasing. **Overall the problem is lack of recognition of the size of the problem and the allocation of resources/ expertise/leadership to support any approach**. * Otherwise a good recovery strategy addresses the landscape level for habitat and population diversity conservation. Once strategies exist, they can be reviewed to look for strategic approaches that work for more than 1 species. Habitat creation at any scale will not be a success if a specie’s unique reintroduction needs are not addressed. * When the threat is habitat loss/degradation for several species or a particular ecosystem, the answer is action to conserve and restore those remaining areas and /or prevent land uses that harm/degrade the required conditions. It is a laudable and effective solution yet a significant challenge given the private land ownership and municipal planning that affects much of the SAR habitat. Education, communication and incentives will be critical for both the SAR focus and the much needed landscape level conservation approach. * Are there existing tools or processes that support managing for species risk at a landscape scale that could be recognized under the Endangered Species Act? * Many tools exist - from the Ontario Biodiversity Strategy to the PPS to stewardship incentive programs (although the latter have been much constrained over the last 25 years). The problem is that local, short-term economic pressures result in political pressure on the bureaucracy and then unwillingness/ lack of resources to use the tools. The MNRF/MOE constraints over decades have resulted in poor management and protection of all natural resources resulting in more ecosystems and ecological services at risk. As well there is a very significant the loss in staff knowledge, expertise and leadership to effectively and efficiently focus on the increasingly huge challenges. There are many examples of inefficiencies and threats to butternut via ESA misapplication, exacerbated by loss of forester staff, private land forestry assistance and Stewardship programs. |

**AREA OF FOCUS 2 – LISTING PROCESS AND PROTECTIONS FOR SPECIES AT RISK**

The Endangered Species Act provides science-based assessments of native plants or animals by an independent committee of experts called the Committee on the Status of Species at Risk in Ontario (COSSARO). Species that are assessed by COSSARO as being extirpated, endangered, threatened or special concern are then classified as such on the Species at Risk in Ontario List. The Endangered Species Act provides automatic species and habitat protections for species that are listed as endangered or threatened.

To learn more: [How species at risk are listed](https://www.ontario.ca/page/how-species-risk-are-listed) and [How species at risk are protected](https://www.ontario.ca/page/how-species-risk-are-protected)

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| **CHALLENGES** | **DISCUSSION QUESTIONS** |
| * There is not enough public notice before a new species is automatically listed on the Species at Risk in Ontario List. * In some cases, automatic species and habitat protections can contribute to high uncertainty and costly impacts to businesses and the public. * In some cases, the information around the assessment and classification of a species as threatened or endangered by the independent Committee on the Status of Species at Risk in Ontario is not transparent enough. * Local and regional Species experts not just general SAR experts need to be involved to better understand the spp cons/rec needs and in the context of its socio-economic pressures. – is it on crown land or private land; are there huge land use pressures, IAS pressures, etc, etc | * What changes would improve the notification process of a new species being listed on the Species at Risk in Ontario List? (e.g., longer timelines before a species is listed.) * MNRF in increasingly unaware of landowner realities. There needs to be a better understanding of this MNRF inability and unwillingness to communicate with and help landowners and landowner assistance organizations do the right thing for SAR. E.g. MNRF did not communicate butternut exemption regulations to the public for almost 3 years. Many landowners are afraid to communicate with the government for fear of regulations in general. * As such the ESA did not address the need to understand how listing a species can actually exacerbate the threats to a species. As the public/businesses became aware of a new SAR, some people got rid of species fearing regulation would affect their personal situation. Many, many butternuts were lost in this way despite there being a regulation that made the fear largely unnecessary. * Should there be a different approach or alternative to automatic species and habitat protections? (e.g., longer transition periods or ministerial discretion on whether to apply, remove or temporarily delay protections for a threatened or endangered species, or its habitat.) * Analysis of OPS ability to effectively communicate to landowners and then protect a SAR must be done before a species is listed. Otherwise taxes are wasted and species are harmed. * In what circumstances would a different approach to automatic species and habitat protections be appropriate? (e.g., there is significant intersection between a species or its habitat and human activities, complexity in addressing species threats, or where a species’ habitat is not limiting.) * Before listing, identify the conservation and recovery actions needed for a species – do the status report, strategy & action plan first – to determine if a regulatory tool would be helpful. The cost of regulation, which can be large and ineffective, would be better spent on conservation/recovery incentives. E.g. butternut has been a huge regulatory/bureaucratic cost to the taxpayers and yet many, many thousands of healthy butternuts were removed under ESA permits. And the OPS can’t say to date (after 10 years) what the overall effect on the species has been. * How can the process regarding assessment and classification of a species by the Committee on the Status of Species at Risk in Ontario be improved? (e.g., request an additional review and assessment in cases where there is emerging science or conflicting information.) * Identify the best bets for conservation/recovery actions not just protection - from both a biological and socio-economic context. |

**AREA OF FOCUS 3 – SPECIES RECOVERY POLICIES AND HABITAT REGULATIONS**

A Government Response Statement outlines the actions the government intends to take or support to help recover each species that is endangered or threatened (i.e. it is a species-specific policy). The Endangered Species Act requires that a Government Response Statement be published within nine months after a recovery strategy is prepared. The response statement is based on advice provided in the recovery strategy, social and economic factors, and input from stakeholders, other jurisdictions, Indigenous peoples and the public.

No later than five years after a Government Response Statement is published, the Act requires a review of progress be conducted towards the protection and recovery of the species.

When a species is listed as endangered or threatened, its [general habitat is protected](https://www.ontario.ca/page/how-species-risk-are-protected). A species’ “general [habitat” is the habitat the species depends on for its life processes. In addition, the Act requires that a habitat regulation be developed for each species that is endangered or threatened. A habitat regulation provides a](https://www.ontario.ca/page/how-species-risk-are-protected) description of the habitat that is protected and replaces the general habitat protection.

To learn more**:** [How species at risk are protected](https://www.ontario.ca/page/how-species-risk-are-protected)

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| **CHALLENGES** | **DISCUSSION QUESTIONS** |
| * In some cases, the time limit of nine months to develop the Government Response Statement for an endangered or threatened species is too short, and there is no option under the Act to extend this timeline when needed. * In many cases, conducting a review of progress towards the protection and recovery of a species within five years of the Government Response Statement is too soon. * The development of a habitat regulation is not needed for each species that is endangered and threatened since general habitat protection applies and can be clarified through the use of general habitat descriptions. | * In what circumstances would a species and/or Ontarians benefit from additional time for the development of the Government Response Statement? (e.g., enable extending the timeline for the Government Response Statement when needed, such as when recovery approaches for a species are complex or when additional engagement is required with businesses, Indigenous peoples, landowners and conservation groups.) * The ESA is a government promise of SAR protection – and an integrity and communications issue. The public therefore does not correct their own actions or see their own role in SAR conservation and protection. Get rid of the GRS, which is just a subset of the Recovery Strategy and the government is not acting on it anyways, in our experience with butternut. Focus on the recovery strategy and action planning and working with partners to make progress. This would be easier if the strategy and action plan were done ahead of time to better inform everybody of the complexities involved. * In what circumstances would a longer timeline improve the merit and relevance of conducting a review of progress towards protection and recovery? (e.g., for species where additional data is likely to be made available over a longer timeframe, or where stewardship actions are likely to be completed over a longer timeframe.) * Again, remove the bureaucratic GRS step and focus on developing delivery approaches/incentives for the Recovery Strategy and action plan with partners and landowners. Ensure there is timely evaluation of actions taken– for example re butternut, a 5-year review would have shown that early regs were insufficient – e.g. planting is not a good enough OB action, AND the 10 or less tree removal regulation is extirpating the spp in SW Ontario and was based on expediting economic needs not anything to do with the species. * In what circumstances is the development of a habitat regulation warranted, or not warranted? (e.g., to improve certainty for businesses and others about the scope of habitat that is protected. * Lack of information should not be a case for benefiting business over the SAR. OPS must go through the process and to show that a species-specific guideline is not needed. Otherwise it is hiding that OPS does not have the resources to develop species specific habitat guidelines if needed. Communication is an issue – e.g. butternut has had a draft interim habitat regulation for many years – why not confirmed yet? |

**AREA OF FOCUS 4 – AUTHORIZATION PROCESSES**

The Endangered Species Act includes prohibitions against the harm, harassment or killing of species listed as endangered or threatened and prohibits the damage or destruction of their habitat. Under the Act, the government can issue different types of permits or other authorizations for activities that would otherwise not be allowed.

There are a variety of different provisions under the Endangered Species Act that would enable activities otherwise prohibited by the Act. These are:

* + Stewardship agreement, s. 16: An agreement may be entered into under this section for activities to assist in the protection and recovery of species at risk.
  + Health or safety permit, s. 17(2)(a): A health or safety permit may be issued for a situation that involves actions necessary to protect human health or safety.
  + Protection or recovery permit, s. 17(2)(b): A protection or recovery permit may be issued for an activity that is meant to help a species at risk or its habitat, but the activity may involve actions that are otherwise prohibited under the Act (e.g., capturing or possessing the species).
  + Overall benefit permit, s. 17(2)(c): An overall benefit permit may be issued for an activity that would have an adverse effect on species at risk or their habitat, as long as an overall benefit is provided to the species in Ontario through conditions of the permit. Providing an overall benefit to a species means undertaking actions that contribute to improving the circumstances for the species.
  + Significant social or economic benefit permit, s. 17(2)(d): A significant social or economic benefit permit may be issued for an activity that will result in a significant social or economic benefit to Ontario, but the activity would have impacts that are otherwise prohibited under the Act.
  + Instruments under other Acts, s. 18: An instrument issued under other legislation may have the same effect as a permit issued under the Endangered Species Act, if specific conditions are met.
  + Aboriginal persons – permits and agreements, s. 19: Instruments under this section may be issued to (or entered into with) a band (as defined in the federal *Indian Act*), a tribal council, or an organization that represents a territorially-based Aboriginal community.
  + Regulatory exemption, s. 55: An exemption may be made in a regulation that allows activities to impact species at risk without requiring a permit, provided the requirements of the regulation are met.

To learn more: [How to get an Endangered Species Act permit or authorization](https://www.ontario.ca/page/how-get-endangered-species-act-permit-or-authorization) and [Species at](https://www.ontario.ca/page/species-risk-overall-benefit-permits)  [risk overall benefit permits](https://www.ontario.ca/page/species-risk-overall-benefit-permits)

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| **CHALLENGES** | **DISCUSSION QUESTIONS** |
| * Authorization processes can create significant administrative burdens and delays, in particular for applicants filing numerous authorizations or registrations under the rules-in-regulations, for routine activities. * The requirements that applicants must fulfill to obtain an authorization can be extensive, creating barriers to economic development (e.g., in some cases achieving an overall benefit to a species as required under a s. 17(2)(c) permit can be long, onerous, and unpredictable). * The Act adds duplication and delay for activities that are subject to other legislative or regulatory frameworks, like forestry under Ontario’s Crown Forest Sustainability Act. * Enforcement powers are inconsistent across authorizations and regulations, which can limit the ability to inspect and enforce compliance with regulations. | * What new authorization tools could help businesses achieve benefits for species at risk? (e.g., in lieu of activity-based requirements enable paying into a conservation fund dedicated to species at risk conservation, or allow conservation banking to enable addressing requirements for species at risk prior to activities.) * The ESA has been very focused on process and hasn’t to date effectively reported on the effects of those processes on the species. Are SAR better or worse following 10 years of the ESA? * Political pressures resulted in inefficiencies for OPS and businesses and recovery. E.g. the Minister having to sign many, many butternut permits adds no value yet involves significant OPS resources and costly delays for permit proponents. District staff can handle permits more efficiently using their local knowledge and opportunities to audit, if guided by a detailed action plan provided by specialists, the latter also providing oversight for consistency and evaluation of methods. * A conservation bank could be positive/efficient for businesses who don’t have nor want to develop the very specialized SAR expertise needed in the current, proponent driven permit process. * **Real SAR overall benefit requires payments from permit holders to cover specific actions dictated by recovery strategies and detailed action plans.** * Effective administration requires significant communications and networking expertise and respect for SAR complexities and expertise. * Financial management must be efficient and transparent. Long term financial management is essential to provide long term support and protection of all the initiated projects related to permits, as well as monitoring and reporting. * Delivery will be a complex. No one organization currently has the facilities/land to be effective for any one species never mind all species. Many local and regional groups will be involved in delivery. To be more efficient /effective In SAR cons/recovery look to programs/partners that already have expertise and networks that have resulted from decades of government program privatization and cancellation, e.g. SFLs & CFSA, 50 MTP & FO, FGCA and Butternut etc, OFAH and IAS, CAs with local programs and land, etc. Avoid layers of agencies contracting and subcontracting to do the required work which is costly and often ineffective in delivery. * Avoid a Cons Fund ending up as a top-heavy bureaucracy allocating funds to underpaid local/regional/fragmented, short term, unsustained NGO-led activities. The latter is actually what is happening in many cases. * Avoid political **priorities being set that result in the permitted-to-be-harmed species or its habitat not actually receive any resources** * The SAR SF was in essence a conservation fund but it was administration heavy with short term objectives rather than long term strategies for species. It did provide ‘seed’ money that helped FGCA develop our long-term Butternut Recovery Program, but butternut has not been eligible for years and worse MNRF has done no follow up to determine if the initial investments are still bearing fruit for the species and if so how. * Are there other approaches to authorizations that could enable applicants to take a more strategic or collaborative approach to address impacts to species at risk? (e.g., create a new authorization, such as a conservation agreement.) * This is a very vague concept to comment on. If it concerns a particular property being managed in perpetuity for SAR and their habitat, it has to first provide fully the long term persistence of the species, and be protected from damaging land uses and political pressures. * What changes to authorization requirements would better enable economic development while providing positive outcomes and protections for species at risk? ( * Time is money for businesses - get out of Minister’s & Head office, give District staff detailed guidelines, respect NGO species experts, and take a stand where a SAR needs protection. * How can the needs of species at risk be met in a way that is more efficient for activities subject to other legislative or regulatory frameworks? (e.g., better enable meeting Endangered Species Act requirements in other approval processes.) * In what circumstances would enhanced inspection and compliance powers be arranted? (e.g., regulations.) |

This discussion paper has been posted on the Environmental Registry for a 45-day consultation period, closing on March 3, 2019. During the consultation period, comments may be submitted through the [Environmental Registry](https://ero.ontario.ca/) or via email to [ESAReg@Ontario.ca](mailto:ESAReg@ontario.ca).