

November 2, 2023

The Honourable Andrea Khanjin  
Minister of Environment, Conservation and Parks  
College Park 5th Flr.  
777 Bay St  
Toronto, ON, M7A 2J3

Dear Minister Khanjin,

**Re: ERO 019-7378 – Black Ash regulation**

On behalf of the 42 undersigned organizations, we are writing to express our strong opposition to the proposed conditional exemption for the endangered Black Ash, under Ontario's *Endangered Species Act, 2007* (ESA). The proposal minimizes protection for Black Ash at every turn and reveals a disturbing lack of intent on the part of the Ministry of Environment, Conservation and Parks (MECP) to prioritize the survival and recovery of the species.

More specifically, MECP's approach would exempt about 85 percent of the species' range from legal protection. In the remaining area where ESA provisions would apply, very few Black Ash trees would be considered eligible for protection, and even those that do qualify would receive only minimal habitat protection. We outline these concerns in more detail below.

Overall, the [ERO posting](#) falls woefully short of providing the information needed to solicit meaningful public input. It downplays conservation concerns as well as Ontario's significant conservation responsibility for this species. The International Union for the Conservation of Nature deems Black Ash to be a critically endangered species globally.<sup>1</sup> About 25 percent of its global range occurs in Ontario.<sup>2</sup> It is predicted that Black Ash mortality will exceed 90 percent across much of the area affected by the invasive Emerald Ash Borer (EAB), with lower mortality anticipated in areas with lower winter minimum temperatures.<sup>3</sup> The ERO posting is silent on this basic information.

Although widespread and currently abundant, Black Ash faces a grim future. The primary threat is EAB, which is steadily expanding its range northward, leaving a swath of destruction. Warmer temperatures resulting from climate change will boost the EAB's spread, with up to almost 100 percent of the range of Black Ash in Ontario at risk of

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<sup>1</sup> COSSARO, 2020. *Ontario Species at Risk Evaluation Report for Black Ash*, p. 6.

[http://cossaroagency.ca/wp-content/uploads/2021/04/COSSARO\\_Evaluation\\_blackash\\_FINAL.pdf](http://cossaroagency.ca/wp-content/uploads/2021/04/COSSARO_Evaluation_blackash_FINAL.pdf)

<sup>2</sup> COSSARO, p. 3.

<sup>3</sup> Ministry of Environment, Conservation and Parks, 2022. *Black Ash Recovery Strategy*, p. 8.

<https://www.ontario.ca/page/black-ash-recovery-strategy>

infestation over the next 80 years.<sup>4</sup> As noted in the Recovery Strategy: “Under this scenario, it is estimated that Ontario’s Black Ash population will decline by approximately 82 million mature individuals over the next 80 years” (from a current estimated population of 83 million).<sup>5</sup> Climate change impacts (e.g., drought, heatwaves, late spring frosts, erratic winter weather) and habitat loss pose additional threats to Black Ash, which is found predominantly in wetlands, riparian areas and other seasonally wet areas.<sup>6</sup>

These facts call for urgent action, yet MECP’s response is to deny legal protection for most Black Ash trees and their habitats across their range in the province.

It appears that the conditional exemption has been designed primarily to minimize impacts on development proponents and government, not to protect and recover the species. Certainly, that is the gist of the regulatory impact statement, which makes no mention of environmental or cultural impacts:

**Regulatory impact statement**

This proposal is expected to reduce burden that would otherwise arise if these regulations were not put in place. The proposed regulations are expected to result in cost and time savings for individuals, businesses and government.<sup>7</sup>

The ERO notice also fails to mention the cultural importance of Black Ash to Indigenous Peoples. Yet, as outlined in the Recovery Strategy, Indigenous Peoples have used the wood, bark, roots, young shoots and ashes of this cultural keystone species for thousands of years for many different purposes.<sup>8</sup> It is incumbent upon MECP to consider and explain how the proposed exemption, which severely curtails protections for the species and its habitat, might impact such culturally significant and constitutionally protected uses and practices.

**GEOGRAPHIC LIMITS TO PROTECTION**

MECP is proposing to protect only a small fraction (about 15 percent) of the range of Black Ash in Ontario (see Figure 1 below) – only where it has been most devastated by EAB. Except for the municipalities of Sault Ste. Marie and Thunder Bay, no ESA protections would apply in the northern extent of its range. Thus, Black Ash would be left unprotected in its stronghold where prohibitions on harmful activities would not apply.

There is no scientific rationale for this approach. On the contrary, for this critically endangered species it would make far more sense to ensure that the species and its habitat are secured where it is still doing well. As outlined in the Recovery Strategy, this includes areas predicted to lie beyond potential infestation by EAB:

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<sup>4</sup> COSSARO, p. 3; Recovery Strategy, p. 16.

<sup>5</sup> Recovery Strategy, p. 9.

<sup>6</sup> Recovery Strategy, pp. 17 – 18.

<sup>7</sup> Ministry of Environment, Conservation and Parks, 2023. *Protecting Black Ash and its habitat under the Endangered Species Act, 2007*, ERO 019-7378. <https://ero.ontario.ca/notice/019-7378>

<sup>8</sup> Recovery Strategy, p. 5.

Within the range of Black Ash, in areas beyond the presumed climatic range limit of Emerald Ash Borer the recommended recovery goal is to maintain or increase the current population abundance and distribution of Black Ash and preserve an in-situ (in a natural location) and ex-situ (away from a natural location) gene bank. Due to the uncertainty regarding the success of mitigation measures for Emerald Ash Borer, maintaining or increasing the population abundance and distribution in areas where it is not under threat of Emerald Ash Borer is the surest way to conserve the species in Ontario.<sup>9</sup>

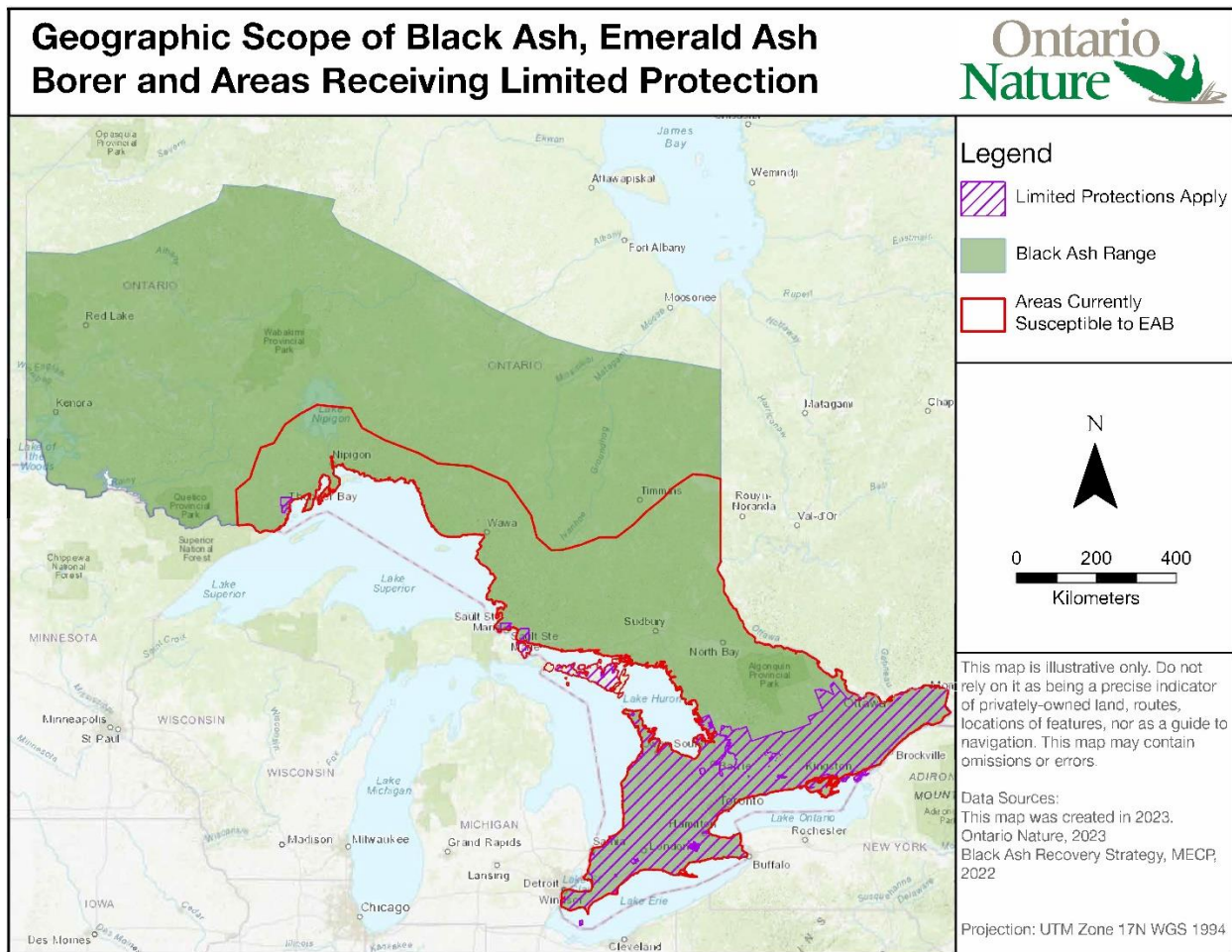


Figure 1. Presumed current climatic range limit of Black Ash and EAB in Ontario (Recovery Strategy, Figure 5) and proposed areas where ESA protections would apply (ERO Posting).

Even if one were to accept MECP’s faulty premise – which we don’t – that ESA protections should apply only where Black Ash is threatened by EAB, the proposed zone is utterly indefensible. First, it ignores known occurrences and current sightings of EAB outside the zone. For example, the Recovery Strategy (Figure 4) shows observations of EAB in Parry Sound, Petawawa, North Bay and Sudbury, all beyond the proposed area where ESA

<sup>9</sup> Recovery Strategy, pp. 35 - 36.

protections would apply. There are several other well-documented observations of EAB on iNaturalist, with photo evidence, also outside the proposed protection zone.

The proposed approach also ignores the fact that the EAB range is expanding rapidly. ESA protections would apply only in about 35 percent of the presumed current climatic range limit of EAB (see area outlined in red above, Figure 1, based on minimum temperatures experienced<sup>10</sup>). In addition, the approach fails to consider climate change modelling referenced in the Recovery Strategy, which suggests that nearly 100 percent of the Ontario range of Black Ash may be susceptible to EAB over the next 80 years.<sup>11</sup>

The geographic limits proposed for implementing ESA protections also undermine the policy set out in the draft Government Response Statement (GRS)<sup>12</sup> which identifies the preservation of Black Ash in EAB susceptible areas as a high-priority action item:

Work collaboratively to develop and implement protocols for identifying Black Ash trees that may have higher EAB resistance as well as those that have cultural value for Indigenous communities and take appropriate action to preserve them.<sup>13</sup>

Further, the GRS ties performance measures to continued population abundance of Black Ash in areas not affected by EAB, indicating the inappropriateness of the proposed approach which eliminates the possibility of applying ESA protections in these areas.<sup>14</sup>

### **ONLY “HEALTHY” TREES TO BE PROTECTED**

In the limited geographic area where ESA protections would apply, MECP is proposing to further restrict protections based on the health and size of individual trees. The proposal is to limit application of the species protection provisions of the ESA (section 9) to trees that appear to have survived exposure to EAB, remain in a healthy condition, and have a trunk diameter at breast height (DBH) of at least 8 centimetres.

In proposing to protect only healthy trees (the definition of which is unclear), MECP is ignoring evidence that infested trees may play an important role in the persistence and recovery of the species. For example, Black Ash can regenerate through suckers or shoots emerging from the roots, trunks and stumps of infested trees, and such regeneration may be more essential than seed dispersal for the persistence of the species in parts of its range.<sup>15</sup>

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<sup>10</sup> See Recovery Strategy, Figure 5, climatic range limit of EAB.

<sup>11</sup> Recovery Strategy, p. iv.

<sup>12</sup> The GRS “sets out the policy with respect to the actions that the Government of Ontario intends to take in response to the recovery strategy.” (*Endangered Species Act, 2007, Sec. 12.1(1)*).

<sup>13</sup> Government of Ontario, 2023. DRAFT Government Response Statement to the Recovery Strategy for the Black Ash in Ontario, lines 318 – 320. [Draft Government Response Statement for Black Ash \(prod-environmental-registry.s3.amazonaws.com\)](https://prod-environmental-registry.s3.amazonaws.com)

<sup>14</sup> GRS, lines 444 – 445 and 448 – 449.

<sup>15</sup> Recovery Strategy, pp. 3 – 4. Note that the Recovery Strategy recommends research to better understand the survival potential of such regenerative growth (p. 50).

Withholding protections from trees smaller than 8 centimetres DBH is also contrary to a precautionary, evidence-based approach. Smaller trees are considered vital to the persistence of Black Ash.<sup>16</sup>

Overall, the proposed approach is inconsistent with high priority action items identified in the GRS which calls for research to better understand a) what makes certain Black Ash trees resilient to EAB – including the possibility that ecological conditions play an important role in EAB resilience; b) the “potential contribution of vegetative sprouts/shoots to species’ recovery;” and c) “genetic variation and adaptive potential within the species’ range.”<sup>17</sup> It simply makes no sense to withhold ESA protections without first understanding such factors or contributions.

### **LIMITED HABITAT PROTECTION**

MECP is proposing to restrict habitat protection to a mere 30 metre radius around a tree that qualifies for protection (i.e., one that satisfies the location, health and size restrictions above). Since few trees may qualify, the result would be very little habitat protection indeed. In sharp contrast, the Recovery Strategy recommends ecosite-level wetland protection where one or more Black Ash trees are present,<sup>18</sup> including young, regenerating trees:

Habitat of Black Ash trees should be protected in order to provide sufficient space and habitat conditions to promote their growth and reproduction (i.e., space should be provided where regenerating young trees can persist). These trees play an important role in securing the future of Black Ash in Ontario because some surviving trees may be a source of Emerald Ash Borer resistant genes. If the remaining trees are not adequately protected, opportunities for recovery of the species will be lost.<sup>19</sup>

The GRS identifies the protection of Black Ash habitat in areas under current or imminent threat of EAB as a high priority action item and calls for a best-management-practices approach:

Work collaboratively to develop or update (as necessary) and implement new and existing best management practices (BMPs) to minimize threats to Black Ash and its habitat and/or support its recovery.<sup>20</sup>

The proposed approach of limiting protections to 30 metres around an extremely limited number of trees cannot possibly be construed as being or as supporting best management

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<sup>16</sup> Gould, J. et al., October 2022. *Mortality of Emerald Ash Borer Larvae in Small Regenerating Ash in New York Forests*, Journal of Economic Entomology, (115: 5).

<https://academic.oup.com/jee/article/115/5/1442/6594672>

<sup>17</sup> GRS, Lines 362 – 373 and 374 – 390.

<sup>18</sup> Recovery Strategy, p. iv.

<sup>19</sup> Recovery Strategy, p.53.

<sup>20</sup> GRS, lines 325 – 339.

practices. In contrast, for example, Nova Scotia recommends protecting suitable areas within 200 metres of Black Ash growing in wetlands, and within 1 kilometre up and downstream of Black Ash in riparian zones, with these areas buffered by 100 metre setbacks.<sup>21</sup>

MECP's proposed approach to protecting habitat fails to account for seed dispersal, seedling establishment or the maintenance of wetland conditions that support viable Black Ash populations. It would invite habitat fragmentation and loss, leaving trees more vulnerable to stressors such as drought and erratic weather. As noted in the Recovery Strategy, "dispersal and movement across communities may be a critical factor in supporting species protection and recovery, particularly in areas where pressures and impacts to wetlands are prominent."<sup>22</sup>

### **BROADER BIODIVERSITY AND CLIMATE BENEFITS UNDERMINED**

The proposed conditional exemption would undermine the broader biodiversity conservation and climate resilience benefits that would arise through fuller protection of Black Ash habitat. The draft Government Response Statement (GRS) notes that:

Although it occurs at low densities across much of its range, Black Ash can be a keystone, foundational species in some wet forested ecosystems and plays an important role in regulating hydrology and maintaining site conditions for associated species.<sup>23</sup>

Black Ash is found primarily in wetlands, which have suffered significant loss historically, especially in southern Ontario. That loss is ongoing, while provincial legal and policy protections for wetlands are being weakened.<sup>24</sup> Wetlands provide habitat for many species, including about 20 percent of Ontario's species at risk, such as Black Ash. The Recovery Strategy mentions several rare or at-risk species associated with Black Ash habitats:

Black Ash directly supports or is associated with several rare species or provincially listed species at risk. Flooded Jellyskin (*Leptogium rivulare*) is a provincially rare lichen which grows on the trunks of Black Ash at several locations (COSEWIC 2015a). Black Ash may be used as nesting sites or food source for birds, although no bird species exclusively use Black Ash for nesting or food. Bird species at risk that nest in forests and swamps include the Canada Warbler (*Cardellina canadensis*, special concern), Cerulean Warbler (*Setophaga cerulea*, threatened), Eastern Wood-

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<sup>21</sup> Nova Scotia Department of Natural Resources and Renewables, 2021. *Addendum to Recovery Plan for the Black ash (Fraxinus nigra) in Nova Scotia – Core Habitat*, Nova Scotia Endangered Species Act Recovery Plan Series. [https://novascotia.ca/natr/wildlife/species-at-risk/docs/Core\\_habitat\\_Addendum\\_Black\\_ash.pdf](https://novascotia.ca/natr/wildlife/species-at-risk/docs/Core_habitat_Addendum_Black_ash.pdf)

<sup>22</sup> Recovery Strategy, p. 24.

<sup>23</sup> GRS, lines 58 – 61.

<sup>24</sup> The overhaul of the Ontario Wetland Evaluation System is of particular concern. See, for example, this [blog](#) and this [joint submission](#). Also of deep concern is the use of [Ministerial Zoning Orders to override policy protections for Provincially Significant Wetlands](#).

pewee (*Contopus virens*, special concern), Louisiana Waterthrush (*Parkesia motacilla*, threatened), Prothonotary Warbler (*Protonotaria citrea*, endangered) and Wood Thrush (*Hylocichla mustelina*, special concern) (COSEWIC 2007; COSEWIC 2010a; COSEWIC 2012a; COSEWIC 2012b; COSEWIC 2015b; COSEWIC 2020).<sup>25</sup>

The Recovery Strategy calls for regulatory standards that can be “reasonably expected to ensure land uses and development affecting Black Ash will not result in net negative outcomes for the species.”<sup>26</sup> Instead, MECP is proposing a hands-off approach through a conditional exemption whereby legal protection for Black Ash from harmful land uses and development through the application of the ESA would be reduced to almost nothing.

In addition, the ministry is also considering a potential extension of the current delay on providing any protection whatsoever for Black Ash under the ESA, which it initiated in 2021. We strongly oppose such an extension. This globally endangered species should benefit from the full protection of the law, without further delay.

With the proposed conditional exemption MECP is throwing precaution and good advice to the wind. The approach defies the spirit and intent of the ESA, including the precautionary principle, cited three times in the legislation:

... where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.<sup>27</sup>

As highlighted at the COP 15 conference in Montreal in December 2022, we are facing unprecedented and accelerating species loss worldwide. Ontario must live up to its responsibility to protect and recover species at risk, including the globally imperiled Black Ash. We urge you not to proceed with the proposed conditional exemption or the extension of the delay in applying ESA protections for Black Ash.

Yours sincerely,

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Ontario Nature



**Deb Sherk**  
Director  
Bert Miller Nature Club



**Liz Benneian**  
Chair  
Biodiversity and Climate  
Action Niagara



<sup>25</sup> Recovery Strategy, p. 4.

<sup>26</sup> Recovery Strategy, p. 43.

<sup>27</sup> *Endangered Species Act, 2007*. See the Preamble and sections 11 and 48.

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