SUBMISSION REGARDING
LEGISLATIVE AMENDMENTS TO THE *ENDANGERED SPECIES ACT*
BILL 108, SCHEDULE 5

ENVIRONMENTAL REGISTRY NO. 013-5033

May 16, 2019

I. INTRODUCTION

(a) Proposed amendments to the ESA

This is the submission of Ecojustice, the Canadian Environmental Law Association ("CELA") and Lintner Law in relation to the Ministry of the Environment, Conservation and Parks ("MECP") proposed changes to the *Endangered Species Act ("ESA")*.[1]

On May 2, 2019, the Ontario government introduced Bill 108 (the proposed *More Homes, More Choice Act, 2019*) for First Reading.[2] Schedule 5 of Ontario's Bill 108 proposes to amend the *Endangered Species Act, 2007* ("Schedule 5").

In our view, the changes to the *ESA* proposed in Schedule 5 downgrades the core purposes and values of the *ESA*, which was intended to prioritize the protection and recovery of at-risk species. The proposed amendments set out in Schedule 5 will delay the classification of species not currently listed on the Species At Risk in Ontario ("SARO") List (O Reg 230/08) and their automatic protection upon being listed; broaden Ministerial decision-making powers absent a requirement to seek expert advice; and, continue to limit the public accessibility and transparency of agreements made under the *Act*.[3]

Schedule 5 also proposes to establish a new Agency to oversee a Conservation Fund and introduce a new form of agreement, known as a Landscape Agreement, which will allow otherwise prohibited activities to occur within a defined geographic area.

[1] Environmental Registry of Ontario, "10th Year Review of Ontario's Endangered Species Act: Proposed Changes," online: https://ero.ontario.ca/notice/013-5033 **[Notice]**
[2] Bill 108, *An Act to amend various statutes with respect to housing, other development and various other matters*, 1st Sess, 42nd Parl, Ontario, 2019, Schedule 5, online: https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-108 **[Schedule 5]**
[3] *See* Notice, *supra*, note 1

This submission examines the adverse legal consequences of Schedule 5 and its implications for at-risk species in Ontario. We conclude that the changes proposed are inconsistent with the principles of strong species-at-risk legislation.

Accordingly, we make the following recommendations and submit that **Schedule 5 should be immediately abandoned or withdrawn by the Ontario government, in order to safeguard species at risk**:

> **RECOMMENDATION NO. 1:** Maintain the cornerstones of the *ESA*: science-based listings, automatic protections, and mandatory timelines. This aligns with endangered species' protection best practices, which necessitates the identification of species at risk and their habitat, prohibitions on their killing and harming, and investment in their recovery.
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> **RECOMMENDATION NO. 2:** Maintain the strict timelines set out in the *ESA.* Any changes to the *ESA* which lengthen the timeline for species assessment and listing are unwarranted for the express reason that it may cause further declines to their population and threaten their survival or recovery.
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> **RECOMMENDATION NO. 3:** Retain the requirement for the government to consult with an expert prior to entering into agreements with a person or proponent to permit otherwise prohibited activities.
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> **RECOMMENDATION NO. 4:** Apply binding standards and prohibitions against harming or killing at-risk species and their habitat broadly and consistently, instead of on a sector-by-sector or activity basis. Codes of practice, standards and guidelines regarding listed species should not be the primary means of protecting species and their habitat.
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> **RECOMMENDATION NO. 5:** We do not support the Bill's proposal for landscape agreements. If the government chooses to go ahead with landscape agreements, and before any such agreement is approved, we request the government disclose upon what basis it will designate 'benefiting' and 'impacted' species, and develop clear and consistent policies outlining how a decision will be made respecting their jeopardy.
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> **RECOMMENDATION NO. 6:** Ensure that authorizations remain the exception, not the norm. Authorizations which allow persons to engage in otherwise prohibited activities undermines the purposes of the *Act* and are contrary to endangered species protection best practices. Increasing the number of ways in which an authorization can be sought should not be permitted for the express reason that it is contrary to the *Act's* purposes of species recovery and protection.
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> **RECOMMENDATION NO. 7:** Maintain mandatory conditions to be met, such as the 'overall benefit' requirements. 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.

RECOMMENDATION NO. 8: Set out the criteria upon which the Minister will base its decision to designate a species as a 'conversation fund species' and upon what basis their classification as such may change in the *Act*. The *Act* should not rely on non-binding guidelines to set out the activities and species eligible to receive funding.

RECOMMENDATION NO. 9: Keep *ESA*-related notice postings on the *Environmental Bill of Rights* registry. The government should not substitute the requirement that publications be posted on the "environmental registry established under the *Environmental Bill of Rights, 1993,"* with "a website maintained by the Government of Ontario." Ensuring the public's right to know increases the transparency and accountability of decision-makers and, by requiring the disclosure of information, increases its accessibility. The Environmental Registry is an already well-established portal for achieving this purpose.

RECOMMENDATION NO. 10: Require proponents engaging in harmful activities to publicly provide mitigation plans and monitoring reports, to enhance transparency, accountability, and the public's right to know.

(b) Consultation and the Environmental Bill of Rights

Ecojustice, Lintner Law and CELA are also gravely concerned about the government's approach to conducting consultations under the *Environmental Bill of Rights* ("EBR"). Ontario has developed a practice of introducing bills in the assembly prior to completing required *EBR* consultations. We call on Ontario to discontinue this practice and allow time for members of the public to submit comments on a proposed bill before it is tabled.

In this case, Schedule 5 was introduced prior to conclusion of the deadline for posting comments on EBR Notice: 013-5033. This is inconsistent with the spirit and purpose of public consultation under the *EBR* and has rendered the consultation process demonstrably hollow. The Minister has a duty under section 35 of the *EBR* to take every reasonable step to ensure that all comments received in relation to a proposal are considered when decisions about a proposal are made. In our opinion, this burden has not been satisfactorily discharged in this case and any change to the *ESA* should require a comprehensive approach to public comment, rather than a time-limited opportunity to respond within an existing proposal.

II. ABOUT ECOJUSTICE, CELA & LINTNER LAW

Ecojustice is a national charitable environmental law organization[4] with an extensive history of involvement in the protection of Ontario's species at risk under the *ESA*. Ecojustice (then called Sierra Legal Defence Fund) was one of the lead organizations that advocated for the enactment of Ontario's *ESA* in 2007 due to deficiencies in the previous statute. Ecojustice has been actively monitoring the implementation of the Act and commenting on its strengths and weaknesses since it was enacted.

[4] Online: www.ecojustice.ca

CELA is a non-profit, public interest organization established in 1970 for the purpose of using and improving existing laws to protect public health and the environment.[5] For nearly 50 years, CELA has used legal tools, undertaken ground-breaking research and conducted public interest advocacy to increase environmental protection and the safeguarding of communities. CELA works towards protecting human health and the environment by actively engaging in policy planning and seeking justice for those harmed by pollution or poor environmental decision-making.

Lintner Law is a private practice focused on environmental law and policy. Prior to establishing Lintner Law, Anastasia Lintner was a staff lawyer and economist with Ecojustice for more than a decade. Dr. Lintner has been involved in the species at risk file since consultations commenced on A Review of Species at Risk Legislation in 2006.

III. THE HISTORY OF ONTARIO'S *ESA* – PURPOSES AND BEST PRACTICES

In order to understand the nature, scope and significance of the amendments proposed in Schedule 5, it is instructive to first review the historical and legislative context of the *ESA,* and the 'best-in-class' principles which guided its enactment.

The coming into force of Ontario's current *ESA* law represented a significant improvement over the Province's original *Endangered Species Act*, enacted in 1971. The new *ESA* mandated a science-based approach to listing species protected under the law, required timely preparation of recovery strategies, and automatically protected the habitat of endangered and threatened species. It also offered flexibility to landowners and development proponents by allowing them to apply for permits for activities that might harm an at-risk species or its habitat under certain conditions, while raising the standard of protection from simply doing less harm to actually benefiting species.

Recognizing that Ontario's *ESA* and associated programs had not accomplished the goals of recovering extirpated, endangered, threatened and species of special concern, Ontario sought to put in place a new law which was reflective of 'best practices' and enabled on-the-ground-effectiveness. As part of this commitment, Ontario's Minister of Natural Resources established the Endangered Species Act Review Advisory Panel in April 2006.

In 2006, the Advisory Panel released their report, making a number of recommendations aimed at ESA 'best practices' including:[6]

- Ensuring the expert and independent status of Committee on the Status of Species at Risk in Ontario (COSSARO) and its members

- Prohibiting killing, harassing, capturing, taking, possessing, collecting, buying, selling, trading a listed endangered, threatened or extirpated species, or attempts to do so

[5] Online: www.cela.ca
[6] Endangered Species Act Review Advisory Panel, "Report of the Endangered Species Act Review Advisory Panel: Recommendations for Ontario's New Endangered Species Act" (2006) **[Advisory Panel Report]**

- Prohibiting damage, destruction, interference with the habitat of such species, or attempts to do so

- Streamlining provisions for Ministry-issued agreements and instruments for activities whose purpose was to assist species

- Clear constraints on the use of agreements and instruments, such that they could only be used when there was an overall benefit to the species

- Prescribed timelines to ensure the timely preparation and implementation of recovery action plans and their currency

Despite the intent to create a best-in-class *ESA*, since coming into force in 2008, various exemptions through regulation were granted removing numerous species- and sector-specific activities from its scope.[7] This includes:

- Hunting and trapping of the Algonquin wolf

- Hunting of the Northern bobwhite

- Killing or harming the eastern meadowlark or bobolink caused by farming

- Forestry operations on Crown land

- Early exploration mining activities

- Aggregate operations, pits and quarries

- Work undertaken to meet safety standards (i.e. brushing of transmission line corridors)

As reported by the Environment Commission of Ontario in a special report to the Legislative Assembly, the result of exempting major activities known to negatively impact species at risk and their habitat removed the *Act's* "key safeguards" that formed the "backbone of the *ESA*".[8]

IV. COMMENTS ON SCHEDULE 5 AND LEGISLATIVE CHANGES TO THE *ESA*

(a) "Best-in-Class" Species at Risk Protection

In January 2019, the government announced pending reforms to the *ESA* to ensure "best-in-class endangered and threatened species protections."[9] Unfortunately, neither the ERO Notice nor Schedule 5

[7] O Reg 242/08: General under *Endangered Species Act, 2007,* SO 2007 c 6
[8] Environmental Commissioner of Ontario, "Laying Siege to the Last Line of Defence: A Review of Ontario's Weakened Protections for Species at Risk," (2013), online: http://docs.assets.eco.on.ca/reports/special-reports/2013/2013-Laying-Siege-to-ESA.pdf, 6
[9] Notice, *supra*, note 1

provide any well-defined explanation allowing the public to gauge upon what basis the province seeks to measure success for species protection and recovery.

Furthermore, when Bill 108 was first introduced, the Ontario government repeated its desire for a plan that will "reduce red tape."[10] This framing was also evidenced in the language used in the province's 10th Year Review of Ontario's Endangered Species Act: Discussion Paper (herein, "Discussion Paper") and the Environmental Registry Notice (dated April 18, 2019) proposing legislative changes to the *Act*.[11]

Upon reading the text of Schedule 5, it is our belief that the government has not prioritized the *ESA's* purposes of protecting and enabling the recovery of species at risk in Ontario. We reiterate that the cornerstones of the *Act* must be maintained: without science-based listings, automatic protections and mandatory timelines, species at risk will not stand a chance of recovery.[12]

As the government has not undertaken an expert review, like that of the Advisory Panel, nor sought to expand upon its pronouncement of best-in-class protection, we propose the following principles be used as a benchmark, against which MECP's goals and legislative amendments can be measured.[13] In instances where the following principles are not met, we submit the proposed legislative should not be advanced.

1. **Identify species and their habitat**
   Incomplete or out of date data impedes species recovery and the protection of their habitat. Data must be science-based and include Traditional Ecological Knowledge.

2. **Prohibit harm to at-risk species and their habitat**
   Prohibitions on the killing, harming and harassing is a necessary perquisite to species recovery.

3. **Invest in recovery**
   Private landowners, extractive and natural resource industries must be proactively engaged to ensure the effective protection and recovery of species at risk and their habitat. Time-limited actions based on science and inclusive of Traditional Ecological Knowledge must guide at-risk species recovery.

RECOMMENDATION NO. 1: Maintain the cornerstones of the *ESA*: science-based listings, automatic protections, and mandatory timelines. This aligns with endangered species' protection best practices, which necessitates the identification of species at risk and their habitat, prohibitions on their killing and harming, and investment in their recovery.

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[10] *See* https://www.ola.org/en/legislative-business/house-documents/parliament-42/session-1/2019-05-02/hansard#para1032

[11] Notice, *supra*, note 1**;** Ministry of Environment, Conservation and Parks, 10th Year Review of Ontario's Endangered Species Act: Discussion Paper (2019), online: https://prod-environmental-registry.s3.amazonaws.com/2019-01/ESA-10thYrReviewDiscussionPaper.pdf **[Discussion Paper]**

[12] *See* online: https://www.cela.ca/publications/10th-year-review-ontarios-endangered-species-act

[13] *See* for instance, Ecojustice (2012), "Failure to Protect: Grading Canada's Species at Risk Laws" at p 5; A Review of Ontario's Species at Risk Legislation, EBR Registry Number: AB06E6001.

(b) Classification of Species at Risk

The Committee on the Status of Species at Risk in Ontario (COSSARO) oversees the classification of species at risk in Ontario. Currently, the Act requires COSSARO's listing of species be based on the "best available scientific information."[14] However, Schedule 5 broadens the criteria informing the designation of at-risk species, now requiring COSSARO's review to include the species' status across its "biologically relevant geographic range" - which may be within or external to Ontario.[15]

Permitting COSSARO assessments to be based not on the status of a species in Ontario, but instead on its status across its "biologically relevant geographic range"[16] could leave species at risk without protection in Ontario. As many of Ontario's listed species are more stable in the United States, the result of this amendment could trigger their delisting. The species that could be most affected are 'edge of range' species, whose Northern limit is in Canada. These species are critical to conservation efforts, particularly in light of climate change, as they may be better adapted to extreme climates than core populations. They may also have other characteristics that will facilitate adaptation. Excluding them from protection could result in a significant loss of genetic diversity and reduce the ability of species to persist, for example, through geographic range shifts.

Regarding species at risk recovery, the *ESA* currently requires that within 9 months of a recovery strategy being prepared, the Minister must publish a statement of actions it intends to take in response.[17] Schedule 5 introduces an exemption to this requirement. As proposed, Schedule 5's section 12.1 allows the Minister to exceed the 9 months should they state (1) that they need additional time and (2) provide an estimated completion date.[18] In our view, this amendment should not be supported because it creates a loophole to the *Act's* mandatory purpose of advancing species protection and fails to prescribe time limits.

Also, while the *ESA* currently specifies that within 5 years of government's response to a recovery strategy, it must review the progress towards the protection and recovery of the species,[19] Schedule 5 adds a workaround to the 5 year rule, providing an alternative timeframe of a "time specified in the government response statement."[20] As drafted, Schedule 5 does not clearly indicate to what extent this timeframe may exceed the default 5 year review period.

We do not support extending the timeframe for the production of or response to recovery strategies. The five-year reporting on progress is reasonable and ensures transparency and accountability, and provides an impetus for action. If there is no progress to report at the appointed time, then Ontario needs to clearly indicate the state of affairs and why.

In our view, when read together, these amendments will prevent or significantly delay the addition of new species to the SARO List. Because of the numerous ways in which the Minister can pause automatic

[14] *ESA*, s 5(3)
[15] Schedule 5, proposed subsection 5(4) and (5)
[16] *Ibid*
[17] *ESA*, s 11(8), 12(5)
[18] Schedule 5, proposed subsection 12.1(4)
[19] *ESA*, s 11(11)
[20] Schedule 5, proposed subsection 12.2(2)(a)

protections or send back a species' classification to COSSARO for review (without a deadline for its reconsideration), the proposed amendments will effectively bar new species from being added to the SARO List.

Any changes to the *ESA* which lengthen the timeline for species assessment and listing should not be permitted for the express reason that it may cause further declines to their population and threaten their survival or recovery. Furthermore, without set timelines (i.e. within three months or one year), Schedule 5 legalizes delay and allows varying standards to be adopted, on a decision-making basis that is not transparent.

When the *ESA* was passed in 2007, there were 182 species on SARO List - six of which were already extinct.[21] The list has since grown to encompass nearly 250 extirpated, endangered, threatened and special concern species. Therefore, a Bill which introduces provisions which effectively bars new species being added to the SARO List is incongruous with the reality that an increasing number of species face threats to their survival and require the protections provided by the *ESA.*

RECOMMENDATION NO. 2: Maintain the strict timelines set out in the *ESA.* Any changes to the *ESA* which lengthen the timeline for species assessment and listing are unwarranted for the express reason that it may cause further declines to their population and threaten their survival or recovery.

(c) Government Decisions and Expertise

In numerous instances, Schedule 5 increases the potential for Ministerial discretion when classifying species. For instance, formerly the Minister could require the reconsideration of a species listed as at-risk should there be credible scientific evidence that the classification "is not appropriate."[22] Now, the Minister may trigger the reconsideration of a listed species in instances where the classification "may not be appropriate."[23] The Minister is also able to enter into agreements with persons, to allow for otherwise prohibited activities, so long as the survival or recovery of a threatened or endangered species is not jeopardized.[24] In both instances, there is no accompanying requirement that the Minister consult with an expert. For this reason, we oppose the proposed amendments.

Similarly, Schedule 5 proposes to amend the *Act* requiring the Minister to consider whether a proposed regulation is likely to jeopardize the survival of a listed species. Currently, the *ESA* requires the Minister to seek "consultation with a person who is considered by the Minister to be an expert on the possible effects of the proposed regulation."[25] Removing the requirement for the Minister to consult with an expert in the field undermines the credibility and rigour of their decision. Schedule 5's reliance on the standard that an activity 'not jeopardize the survival or recovery of species at risk' is also a lower standard than ensuring the activity has an 'overall benefit' to species at risk.

[21] Advisory Panel Report, *supra* note 6, 1
[22] *ESA*, s 8(2)
[23] Schedule 5, proposed subsection 6(1)
[24] *Ibid*, proposed subsection 16.1(3)(i)
[25] *ESA*, s 57(1)

A new provision in Schedule 5 also allows the Minister to establish codes of practice, standards or guidelines regarding any listed species.[26] Schedule 5 permits the Minister or Cabinet to incorporate by reference any of these documents into regulation.[27] While this would trigger the enforcement mechanisms of the *Act*, whereby "any provision of the regulations" falls within its scope, it is not clear to what extent otherwise unenforceable guidance documents will be incorporated by reference into the *Act*.

In our view, these proposed amendments will increase the discretionary decision-making power of the Minister absent a prerequisite of seeking expert advice. Read together, these provisions increase the ambiguity of the Schedule 5's terms. While Schedule 5 envisions incorporating guidance documents by reference into the regulations, the extent to which this will occur is unknown, thereby limiting their enforceability.

RECOMMENDATION NO. 3: Retain the requirement for the government to consult with an expert prior to entering into agreements with a person or proponent to permit otherwise prohibited activities.

RECOMMENDATION NO. 4: Apply binding standards and prohibitions against harming or killing at-risk species and their habitat broadly and consistently, instead of on a sector-by-sector or activity basis. Codes of practice, standards and guidelines regarding listed species should not be the primary means of protecting species and their habitat.

(d) New to the ESA: Landscape Agreements

As was first posed in the *ESA*'s 10th year review Discussion Paper, the province has sought to advance a landscape approach rather than a species-specific approach to improving outcomes for species at risk. In this regard, Schedule 5 introduces a new form of authorization, termed "landscape agreements", thereby exempting activities which would otherwise be prohibited under the *Act*. We reiterate that we do not support this broad, landscape-level approach which permits harmful activities and fails to consider species-specific and site-specific concerns.

As detailed in the proposed section 16.1 of Schedule 5, a landscape agreement may be entered in to, to permit otherwise prohibited activities within a certain geographic area. The agreement requires that actions be included in its terms which will assist in the protection of 'one or more' listed species within the landscape's defined range.

This new form of exemption to the *Act's* prohibitions also introduces two new definitions, [28] as follows:

> "benefiting species" means species that are listed on the Species at Risk in Ontario List as endangered, threatened or special concern species and that are specified in a landscape agreement as species in respect of which beneficial actions will be executed to assist in their protection or recovery

[26] Schedule 5, proposed section 48.1
[27] *Ibid*, proposed section 58
[28] *Ibid*, proposed subsection 16(10)

> "impacted species" means species that are listed on the Species at Risk in Ontario List as endangered or threatened species and that are specified in a landscape agreement as species in respect of which authorized activities may be carried out despite being otherwise prohibited in respect of the species under section 9 or 10.

Accordingly, the Minister may only enter into a landscape agreement should it be of benefit to one or more impacted species. The test the Minister must meet in deciding whether or not to enter into a landscape agreement is whether the survival or recovery of an impacted species under the agreement is jeopardized. The provision is silent as to whether all impacted species within the geographic scope of the agreement will be considered. Schedule 5 contemplates this will be set out in regulation.[29] Further, not all impacted species will necessarily be the subject of beneficial actions to assist species recovery. According to the proposed subsections 16.1(2) and (3), there is no requirement for the benefiting species under a landscape agreement to be an impacted species as long as there is at least one impacted species that is a benefiting species. The provision is also silent on the basis upon which the Minister will gauge the "jeopardy" of the species.

RECOMMENDATION NO. 5: We do not support the Bill's proposal for landscape agreements. If the government chooses to go ahead with landscape agreements, and before any such agreement is approved, we request the government disclose upon what basis it will designate 'benefiting' and 'impacted' species, and develop clear and consistent policies outlining how a decision will be made respecting their jeopardy.

(e) Authorizations Permitting Prohibited Activities

The authorizations enabled in sections 17 and 18 of the *ESA* which allow the Minister to issue to a permit or instrument to a person, allowing them to engage in otherwise prohibited activities, remains in the text of Schedule 5.

Section 17 of the *ESA* has been amended to include the proviso that a person in receipt of an authorization may be required to pay a conservation change to the Conservation Fund (as discussed in more detail below), as a condition of a permit and in lieu of fulfilling on-the-ground activities to benefit species.[30] Section 17(2)(c) in its current form recognizes that there are circumstances in which a permit may not be issued if an overall benefit to species cannot be achieved. The proposed amendment to section 17(2)(c) effectively increases the number of authorizations that could be issued as proponents who may have not been able to obtain permits under 17(2)(c) can now do so by paying into the Conservation Fund.[31] It has also been amended such that proponents seeking permits under section 17(2)(c) and (d) need only take steps to minimize adverse effects on the affected species in general. Proponents are no longer required to take steps to minimize adverse effects on *individual* members of species.

In our view, these provisions further add to the ways in which the guiding principles and core protections in the *Act* can be undermined. The overall benefit requirement found in section 18 has also been removed in the proposed amendments set out in Schedule 5 in favour of the Conservation Fund.

[29] *Ibid*, proposed subsection 56(1)(c)(iii)
[30] *Ibid*, proposed subsections 17(5)(d.1); 18(2)(d)
[31] *Ibid*, proposed subsection 17(2)(c)(i)

RECOMMENDATION NO. 6: Ensure that authorizations remain the exception, not the norm. Authorizations which allow persons to engage in otherwise prohibited activities undermines the purposes of the *Act* and are contrary to endangered species protection best practices. Increasing the number of ways in which an authorization can be sought should not be permitted for the express reason that it is contrary to the *Act's* purposes of species recovery and protection.

(f) New to the Act: The Conservation Fund

The Notice proposes creating a Crown agency, to be called the Species at Risk Conservation Trust, to provide municipalities and infrastructure developers the option of paying a charge in lieu of meeting species-based conditions of a permit.

Schedule 5 proposes to establish the Species at Risk Conservation Fund (the "Conservation Fund"), with the purpose of providing funding for activities that are reasonably likely to protect or advance species recovery. The Conservation Fund does not apply to all listed species, rather only those the Minister designates by regulation as "conservation fund species."[32] The text is otherwise silent on the criteria the Minister will apply in designating species as conversation fund species and upon what basis their classification as such may change. The Minister may also establish guidelines that set out eligible activities and species to receive funding.[33]

Monies into the fund will primarily arise as a result of:

- Landscape agreements
- Permits authorizing acts otherwise contrary to the prohibitions of the *Act*
- Agreements with Aboriginal persons

The Conservation Fund is to be used to abate or reverse population declines; increase the viability or resilience of a species; increase a species' distribution within their range; or, increase of reproductively-capable individuals.[34] However, as 'conservation fund species' are not yet listed (and instead, to be set out in regulation), it is presently unknown to what extent the Fund will assist in alleviating threats to species and their recovery.

Schedule 5 also seeks to make the Agency overseeing the fund immune from liability noting "no proceeding shall be commenced against the Crown in respect of any act or omission of the Agency."[35]

We strongly oppose the proposal that proponents engaging in activities which harm threatened or endangered species and their habitat should be allowed to simply pay into a conservation fund. This approach reduces accountability and facilitates harm to species at risk and their habitats, with no guarantee that tangible benefits to species at risk will occur. 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

[32] *Ibid,* proposed subsection 20.1(2)
[33] *Ibid,* proposed subsection 20.8(2)
[34] *Ibid,* proposed section 20.7
[35] *Ibid,* proposed subsection 20.18(1)

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.

RECOMMENDATION NO. 7: Maintain mandatory conditions to be met, such as the 'overall benefit' requirements. 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.

RECOMMENDATION NO. 8: Set out the criteria upon which the Minister will base its decision to designate a species as a 'conversation fund species' and upon what basis their classification as such may change in the *Act*. The *Act* should not rely on non-binding guidelines to set out the activities and species eligible to receive funding.

(g) Planning, Reporting and Public Transparency

Schedule 5 introduces new regulation making powers pertaining to the submission of documents from proponents seeking authorizations,[36] landscape agreements[37] and the Conservation Fund.[38] As previously indicated, much of the detail pertaining to these new provisions will be set out in regulation. Therefore, the legal effect of the *Act's* new provisions depends almost entirely on future regulations.

Currently under the *ESA*, proponents are not required to submit their mitigation plans. Schedule 5 amends this process allowing that regulations to be made requiring proponents to submit any documents, data, reports by electronic means to the Minister.[39] However, there is no accompanying provision requiring that these mitigation plans and data be made publicly available.

In our view, proponents should be required to automatically submit mitigation plans so that they are publicly available in order to further the public's right to know and facilitate the public's oversight of proponent activities.

Schedule 5 also proposes new regulation making powers for the "criteria for entering into a landscape agreement," the designation of "conservation fund species," and the manner in which the amount of "species conservation charges" and the timing for such payments will be made.[40] Without seeing the text of the proposed regulations, the sufficiency of this new power within the *Act* for species protection is unknown. Ontario must ensure it seeks to protect and enable the recovery of all species on the SARO List. Any reduction to this list – as contemplated by the selection of 'conservation fund species' - would limit the efficacy of Ontario's *ESA.*

[36] *Ibid,* proposed subsection 55(1)(g)
[37] *Ibid,* proposed subsection 56(1)(c)
[38] *Ibid,* proposed sections 20.1 – 20.18
[39] *Ibid,* proposed subsection 55(1)(g)
[40] *Ibid,* proposed subsection 56(1)

In a number of instances, Schedule 5 substitutes the requirement that publications be posted on the "environmental registry established under the *Environmental Bill of Rights, 1993,"* with "a website maintained by the Government of Ontario".[41]

In our view, this diminishes the public's right to know. Ensuring the public's right to know increases the transparency and accountability of decision-makers and, by requiring the disclosure of information, increases its accessibility. The Environmental Registry is a well-established portal for achieving this purpose. Creating a patchwork of websites where notices and information may be posted in related to at-risk species does not increase their public accessibility. In fact, this contributes little (if any) to the reduction of red-tape or cost-efficiencies.

The principles of natural justice require that every person have adequate notice before a decision is made which may negatively affect them. This requires good faith efforts by the government to make the notice accessible. The *Environmental Bill of Rights, 1993* already provides this framework and absent any rationale as to why it has failed in this regard, substitutes to the Environmental Registry should not be permitted.

RECOMMENDATION NO. 9: Keep *ESA*-related notice postings on the *Environmental Bill of Rights* registry. The government should not substitute the requirement that publications be posted on the "environmental registry established under the *Environmental Bill of Rights, 1993,"* with "a website maintained by the Government of Ontario." Ensuring the public's right to know increases the transparency and accountability of decision-makers and, by requiring the disclosure of information, increases its accessibility. The Environmental Registry is an already well-established portal for achieving this purpose.

RECOMMENDATION NO. 10: Require proponents engaging in harmful activities to publicly provide mitigation plans and monitoring reports, to enhance transparency, accountability, and the public's right to know.

(h) Enforcement Powers

Schedule 5 amends the enforcement officers under the *Act*, removing conservation officers and park wardens and only listing any persons or classes of persons as enforcement officers for the purposes of the *Act*.[42] The Bill expands the scope of enforcement to include "any provision of the regulations" as an offence under the *Act*.[43]

Again, due to the sweeping exemptions permitted by the *Act*, and activities which are yet to seek exemptions through Schedule 5's various authorization processes, enforcement will be of extremely limited value to protecting species at risk and their habitat from harm.

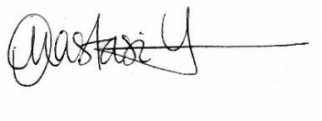
[41] *Ibid*, proposed subsections 12(4), 12.1(2)
[42] *Ibid*, proposed section 21
[43] *Ibid*, proposed subsection 36(1)5

PART V – CONCLUSIONS

Based on our legal analysis, Schedule 5 of Bill 108 represents an unjustified rollback of species protection and recovery actions and should be immediately abandoned or withdrawn by the Ontario government.

In our view, these proposed amendments will result in the status quo of habitat loss and degradation being upheld. Protecting the environment and Ontario's biodiversity requires directing and encouraging economic growth towards less damaging practices. Without timely and meaningful protection and restoration actions through provincial endangered species law, these species will be lost.

Sincerely,



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