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Dear Mr. Cornale,

Re: EBR Registry Number 010-3320 New Regulatory Provisions under the endangered Species Act, 2007

Please accept these comments, which we submit on behalf of Save Ontario's Species (SOS), regarding the proposed regulation for exemptions to the Endangered Species Act, 2007 (ESA).

SOS is a partnership of not-for-profit environmental organizations working together to promote the survival and recovery of species at risk in Ontario through the implementation of Ontario's new ESA. The partners include: CPAWS-Wildlands League, the David Suzuki Foundation, Ecojustice, Environmental Defence, ForestEthics and Ontario Nature.

When the new ESA was passed in May 2007, it was widely heralded by our organizations and many others as the strongest piece of legislation protecting species at risk in Canada, and possibly in North America. This assessment was based on the fact that the Act was the first to combine science-based listing of species at risk with mandatory habitat protection and mandatory recovery planning. The Act also offered flexibility mechanisms to encourage stewardship and accommodate certain land uses that did not jeopardize the survival or recovery of species at risk.

Given our high expectations for this new piece of legislation, and the flexibility already afforded through permits and other instruments, we are extremely surprised and disappointed by the proposed exemptions. It was our understanding when the Act was drafted, that exemptions under section 55 would be allowed under extraordinary circumstances only. And now, on the first anniversary of the Act being passed, a suite of 23 exemptions are being put forward, many of which run contrary to the spirit and purpose of the ESA. We are particularly concerned about the exemptions being proposed for industry, and believe that the forestry exemption should be removed entirely and that stricter conditions should be set for the exemptions regarding hydro; pits and quarries; development and infrastructure; and other activities.

In Part 1 below, we highlight our four key concerns and recommendations regarding the industry exemptions, and then in Part 2, we outline remaining concerns and recommendations about other exemptions.

Part 1: Key concerns

1. Forestry Exemption (Section 24 of the proposed regulation)

In our discussions with government no reasonable legal rationale has been provided for this broad exemption for forestry operations. Given the large footprint of forestry (approximately 40 percent of the province is licensed for logging), the broad exemption as proposed contravenes the spirit and intent of the Act. It also undermines the key election promise to “implement our nation-leading Endangered Species Act, beginning with a plan to protect large scale areas for caribou habitat in the Boreal Forest.”

In passing the Act, the government acknowledged that the existing system was failing to adequately protect Ontario’s biodiversity and that greater weight needed to be given to species when making decisions about development. This failing system includes forestry.

The current forest management system is inadequate on its own to protect species.

A clear example of the need for stronger species protection in the managed forest is provided by the threatened woodland caribou, whose population appears to be declining by about 11 percent a year. As logging moves northward in Ontario, woodland caribou are also being driven northward, at a rate of about 34 kilometres per decade. Research has shown that caribou have not returned to areas that have been logged. Under the current forestry system, government-approved forest management plans (FMPs) would allow logging in one million hectares within woodland caribou range.

Peer-reviewed science points to the need for large areas of caribou habitat to remain off-limits to logging and other industrial activities. The current forest management system is failing to provide this and instead allowing logging in some of the last, large intact areas that caribou require. Implementation of the new ESA, in a way that protects caribou habitat, is essential for species recovery.

The forestry exemption has the potential to set a precedent and lead to a rubber stamp of a business as usual approach to logging even when species are under threat. The currently used guide approach to conserving species is an ineffective method of saving the most sensitive and vulnerable species particularly in terms of: its philosophy of adaptive management; its inadequate monitoring programs; its aversion to participating in comprehensive conservation land use planning; and its preoccupation with facilitating logging.

Forest Management Guides—which are intended to preserve biodiversity—instead proceed with overly optimistic assumptions about their effectiveness rather than a precautionary approach. For example, the Ministry of Natural Resources (MNR) assumes that it knows how to successfully mitigate forestry impacts on caribou in spite of the weight of science suggesting otherwise. MNR further assumes that its direction will be carried out properly by industry. Another hole in the safety net is the assumption that if MNR is wrong, the process of adaptive management (“learning by doing”) will solve the problem. However, by pursuing essentially the same strategies across the landscape, there will be no place left to apply the lessons learned. MNR has already been cited by the Environmental Commissioner’s Office (ECO) for having insufficient funds to carry out its stewardship mandate. Without these funds it cannot monitor adequately to learn much in the first place.

In his April 24, 2007 media release titled, *MOE, MNR Starved of Funding for Core Functions*, Environmental Commissioner Gord Miller said:

under successive governments since the early 1990s, the two Ontario ministries that bear the main burdens for environmental protection have suffered a gradual but steady erosion of funding, staffing and expertise. As a result, the ministries of Environment and Natural Resources are faltering in a number of core functions such as inspection, compliance, enforcement and monitoring.

Without adequate monitoring, grand experiments like the caribou mosaic threaten to extirpate caribou quietly. Effective monitoring would provide the empirical evidence to help to raise the alarm to change direction if caribou declines were documented.

Many key concerns are deemed by MNR to be outside the purview of forest management and properly belong under Land Use Planning (LUP). These issues include:

- where and how many roads are built and if they are rehabilitated;
- where forestry occurs;
- where long term deferrals or potential protected areas are established; and
- accounting for the cumulative effects of multiple industries.

However, no one in MNR has taken responsibility for a LUP process. Forest Management Planning (FMP) is widely recognized as the only surrogate for LUP that currently exists. This means species are falling through the LUP cracks in the process.

The determination of how much wood to cut is seen as being more a function of mill demand than it is the carrying capacity of the forest. The Environmental Commissioner's report in 2004 stated:

increased emphasis in the Wood Supply Strategy on using mill demand information to set wood supply objectives and potentially influence available harvest levels in forest management plans raises doubts as to MNR's assurance that wood supply is determined by an assessment of what the forest can sustainably provide.

The Forest Management Branch of MNR is working on a "streamlining" process under the Ministers Council on Forest Industry Competitiveness that seeks to make forest management processes more relevant, efficient, effective and add value. Noble goals, but as the task force members and the steering committee for this process were made up exclusively of industry and MNR personnel, the bottom line was to shave \$1 per cubic metre off the cost of wood to industry, not address other landscape level issues such as caribou protection.

Further, some recommendations considered under the streamlining process would require changes to the Crown Forest Sustainability Act (CFSA), Environmental Assessment Declaration order and Forest Management Planning Manual, the very policies and legislation that the forest industry is claiming now provides adequate protection for species. There are some recommendations that threaten to make the forest management process more obscure and less open to public participation. Diminished public scrutiny means less accountability for the state of biodiversity, including endangered species.

The new Endangered Species Act was intended to be a safety net for species when all other forms of prevention fail. Exempting logging from the Act effectively permits the system of extirpation to proceed without recourse.

We feel that a broad exemption for forestry is unacceptable. If it will be provided, however, the inclusion of a one-year expiration date is preferable to an indefinite exemption.

Recommendation 1: The forestry industry must be required to fully comply with the new ESA. The forestry exemption (section 24) should be withdrawn.

2. Protection Eliminated for the 42 species Covered Under the Old ESA

The proposed exemptions for pits and quarries (section 22); development and infrastructure (section 23); and forestry (section 24) mean that protection has been eliminated for the endangered species formerly covered under Ontario's old ESA. Under the old Act, 42 endangered species and their habitats were fully protected by law. The proposed transition exemptions for pits and quarries, development and infrastructure and forestry will eliminate that protection for the duration of the exemptions.

Recommendation: The proposed transition exemptions (sections 22, 23 and 24) should not apply to the 42 species covered under the old ESA. These 42 species should be explicitly excluded from the exemptions.

3. Exemptions for Industry Result in Insufficient Safeguards

The new ESA provides flexibility mechanisms such as permits and other instruments to accommodate land and resource uses. One of the conditions of issuing permits and other instruments is the requirement to provide an “overall benefit” to affected species. Any activity that potentially harms a species or its habitat must be compensated for (e.g. through restoration efforts), so that the impact on the species is beneficial overall. The proposed exemptions will circumvent this requirement.

Exemptions are needed in situations where it is impossible to provide an “overall benefit” to an affected species. Those who engage in activities that are harmful to an endangered species should be required to demonstrate that they cannot meet the higher standard of a permit (i.e. the overall benefit test) before having that activity exempted. A serious weakness of the proposed exemptions for hydro, pits and quarries (section 22) and development and infrastructure (section 23) is that they do not require industries to explore the feasibility of all available options (permits and other instruments) before their activities are exempted.

Recommendation: The transition exemptions for hydro, pits and quarries, and development and infrastructure (sections 11, 22 and 23) should be revised to ensure that only previously-approved projects that cannot meet the higher standards of permits and other instruments are exempted.

4. Hydro-electric generating stations

The hydro exemption applies to all existing or approved hydro-electric generating stations in Ontario, and to facilities approved in the future with respect to newly listed species. It is a three year exemption, which grants the operators of existing or approved facilities time to enter into an Agreement with the government about minimizing adverse effects on endangered species if they are unable to comply with the Act.

The proposed exemption fails to ensure that the “overall benefit test” (under Section 17 or Section 18 of the Act) is exhausted before moving on to the less stringent standards required in an Agreement. Further, no justification is provided for the lengthy three-year exemption period. Finally, there is no requirement that Agreements reached between industry and government be subject to public scrutiny and comment.

Recommendation: The hydro exemption needs to be improved in a number of areas: 1) The exemption should require that all reasonable steps be taken to minimize harm and reach an “overall benefit” for affected species; 2) it should also require that any Agreements reached be subject to public scrutiny and comment on the Environmental Bill of Rights Registry; 3) the exemption period should be reduced, allowing operators one year, rather than three, to reach an Agreement with the government about mitigating impacts.

Part 2: Remaining Concerns

Section 4 Aurora Trout

The proposed exemption would apply to sport fishing for Aurora trout, as long as the activity is done in accordance with fishing regulations.

Aurora trout is listed as Endangered provincially and nationally. It was originally found in only two lakes in northern Ontario but became extirpated from those lakes in the 1960s. The species has been reintroduced to these two lakes and other lakes as well. One must question why sport fishing would be allowed to continue while the species is still listed as Endangered.

Recommendation: Sport fishing should not be allowed to take precedence over the recovery of an endangered species. The Aurora trout exemption should be withdrawn.

Section 5 Butternut

Butternut in Ontario suffer from a serious fungal disease called Butternut Canker, which can kill a tree within a few years of infection. The disease can spread quickly, and surveys indicate that most butternuts in eastern Ontario are infected. Given how quickly and widely the disease has spread, an exemption to Section 9 is reasonable for Butternut.

The proposed exemption would allow a person to kill a Butternut tree if it is infected by the butternut canker and is not likely to make a significant contribution to the protection or recovery of the species in Ontario. Any Butternut (infected or not) that has been cultivated could be killed at the direction of the owner or occupier of the land on which it is located.

Although it important to provide landowners with the option to remove Butternut, the scope of the proposed exemption is too broad, in light of the following:

- many Butternuts affected by the canker are still relatively healthy and reproducing,
- many of the best trees are found on private land,
- one could argue that no single tree makes a significant contribution to the protection or recovery of the species, so that on a case-by-case basis, all are vulnerable to removal.

Recommendation: The proposed exemption for Butternut should be revised so that it applies only to infected trees that are deemed by experts to have little further chance for survival or recovery.

Section 6 Northern Bobwhite

As a listed endangered species, the Northern Bobwhite must be subject to strict controls and protections and should not be exempted from endangered species legislation. This

exemption could create opportunities for exploitation, facilitate the laundering of wild-caught specimens and erode public support for the conservation of wild populations.

Recommendation: The proposed exemption for Northern Bobwhite should be removed.

Section 8 Protection of health or safety under an Act

The exemption to protect health or safety is not adequately tailored to truly urgent situations. We do not accept, as this exemption implies, that enforcing another law to protect human health or safety should automatically take precedence over enforcing sections 9 or 10 of the ESA. Hypothetically, for example, in order to address a perceived public health threat, there could be a proposal to apply a broad pesticide that might incidentally harm an endangered species. As currently written, the exemption would allow the activity to proceed without proper review of all the potential impacts.

This exemption should be revised to set sufficient parameters around the cases where an exemption would be allowed and to ensure that in such cases all reasonable steps are taken to minimize harm to the species. In keeping with our comments regarding exemptions for industry, above, an exemption should be allowed only if it can be demonstrated that there are no reasonable alternatives to violating the section 9 and 10 prohibitions, and that the ‘overall benefit’ test of permits and other instruments cannot be met.

Recommendation: The exemption regarding the protection of human health and safety should be revised to set clearer conditions that limit exemptions to truly urgent situations.

Section 9 Protection of property

As with the health and safety exemption above, this exemption is not tailored to address truly urgent situations, and is thus open to abuse. We do not accept that in every case reducing property damage should take precedence over the ESA.

This exemption should be revised to set sufficient parameters around the cases where an exemption would be allowed and to ensure that in such cases all reasonable steps are taken to minimize harm to the species. An exemption should be allowed only if it can be demonstrated that there are no reasonable alternatives to violating the section 9 and 10 prohibitions, and that the ‘overall benefit’ test of permits and other instruments cannot be met.

Recommendation: The exemption regarding the protection of property should be revised to set clearer conditions that limit exemptions to truly urgent situations.

Section 11 Hydro-electric generating stations

(Please see comments regarding the hydro exemption in Part 1 above)

Section 14 Trapping – incidental catch

Incidental harvest is the source of tremendous conflict in northwestern Ontario, particularly with regard to wolverine. The wolverine recovery team has been working diligently to address issues, but unfortunately, the proposed exemption fails to draw from any of this work or to support the goals and objectives of wolverine recovery in Ontario.

Recommendation: The trapping exemption should be revised to reflect and support the goals and objectives of wolverine recovery in Ontario.

Section 22 Transition – pits and quarries

(Please see comments regarding the pits and quarries exemption in Part 1 above)

Section 23 Transition – development and infrastructure

(Please see comments regarding the development and infrastructure exemption in Part 1 above)

Summary of Recommendations

1. The forestry industry must be required to fully comply with the new ESA. The forestry exemption (section 24) should be withdrawn.
2. The proposed transition exemptions (sections 22, 23 and 24) should not apply to the 42 species covered under the old ESA. These 42 species should be explicitly excluded from the exemptions.
3. The transition exemptions for hydro, pits and quarries, and development and infrastructure (sections 11, 22 and 23) should be revised to ensure that only previously-approved projects that cannot meet the higher standards of permits and other instruments are exempted.
4. The hydro exemption (section 11) needs to be improved in a number of areas: 1) The exemption should require that all reasonable steps be taken to minimize harm and reach an “overall benefit” for affected species; 2) it should also require that any Agreements reached be subject to public scrutiny and comment on the Environmental Bill of Rights Registry; 3) the exemption period should be reduced, allowing operators one year, rather than three, to reach an Agreement with the government about mitigating impacts.
5. Sport fishing should not be allowed to take precedence over the recovery of an endangered species. The Aurora trout exemption (section 4) should be withdrawn.
6. The proposed exemption for Butternut (section 5) should be revised so that it applies only to infected trees that are deemed by experts to have little further chance for survival or recovery.
7. The proposed exemption for Northern Bobwhite (section 6) should be withdrawn.
8. The exemption regarding the protection of human health and safety (section 8) should be revised to set clearer conditions that limit exemptions to truly urgent situations.
9. The exemption regarding the protection of property (section 9) should be revised to set clearer conditions that limit exemptions to truly urgent situations.

10. The trapping exemption (section 14) should be revised to reflect and support the goals and objectives of wolverine recovery in Ontario.

Concluding Remarks

In conclusion, if the new Endangered Species Act (ESA) is to maintain its integrity as a strong legislative mechanism for the protection and restoration of species at risk in Ontario, all options to void harm or provide overall benefit during industrial, recreational or individual pursuits must be exhausted before activities that might not meet these tests are exempted. Priority must be placed on protection of species at risk over and above all other concerns; otherwise the Act will be weakened and rendered ineffective. As they currently stand, the proposed exemptions do not fully recognize or uphold the central tenets of the Act and may very well serve to hamstring its overall purpose.

Sincerely,



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Gillian McEachern, Senior Campaigner, Boreal and Climate, ForestEthics



Rachel Plotkin, Biodiversity Policy Analyst, David Suzuki Foundation



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