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**EBR Registry Number: 011-7696**

Comments from the David Suzuki Foundation re: Proposed approaches to the implementation of the Endangered Species Act which could include regulatory amendments to authorize activities to occur subject to conditions set out in regulation consistent with MNR's Modernization of Approvals.

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Dear Krista Adams:

Please find below comments from the David Suzuki Foundation on the proposed changes to the implementation of Ontario's *Endangered Species Act (ESA)*.

The David Suzuki Foundation (DSF), through a combination of sound science and active public engagement, motivates Canadians to take action on the environmental challenges we collectively face. Since 1990, DSF has worked with communities, government, business and conservation allies to help people find solutions for living within the limits of nature. Consistently named Canada's most trusted environmental organization in polls, DSF communicates with a growing community of over 150,000 individuals focusing on ways we can protect vital marine and terrestrial ecosystems and find climate solutions.

DSF was involved in the development of the ESA and lauded it as a gold standard in species at risk legislation. It is thus with great dismay that we read these proposed changes to its implementation; changes that move the government away from its mandate to steward and protect Ontario's at-risk species towards a system of weak oversight and self-regulation. The EBR posting outlines a future in which increased certainty is provided for industry while the MNR proposes only to 'consider' the protection of species at risk. This would leave the future of imperiled species in Ontario uncertain at best.



The majority of species at risk in Ontario are threatened due to habitat loss and degradation, primarily from the impacts of industrial activity and development. Thus a government cannot guarantee the certainty of business-as-usual industrial activities and at the same oversee the protection of Ontario's vulnerable species.

Under the ESA at present, the permitting system enables industrial activities to continue under that *Act* contingent upon the achievement of an overall benefit for the species (i.e., the species is left better off than before an activity takes place). The proposed changes presented in the EBR posting appear to create a new regime in which the ESA's permitting system is largely replaced by exemptions with terms and conditions. Disturbingly, no mention is made of the need for overall benefit to be achieved as a component of the exemption terms and conditions.

In fact, the EBR posting does not contain any proposed terms and conditions to clarify the potential management regime under the exemptions. Such vagueness and lack of detail significantly undermines our confidence that the proposed changes to the *Act* will uphold its present protection measures.

The exemptions clause in the *Act* was created for truly exceptional situations—not for routine industrial and development activity. The proposal to use exemptions as a rule, rather than an exception, in the *Act*'s implementation, undermines the *Act*'s integrity.

To protect and recover Ontario's species at risk, the MNR must take responsibility for the oversight of habitat protection, including setting thresholds for habitat maintenance and ensuring that, where permits are granted for industry to operate in the habitat that species need to survive and recover, an overall benefit to the species is achieved as per the standard of the *Act*.

Industry, which has profited in many instances from habitat destruction, must also take



responsibility for the impact of its activities by maintaining habitat when necessary for species survival and revising on-the-ground operations when they threaten species viability.

Our specific comments are outline below:

#### Transition for already approved activities: Grandfathering industrial activity

The proposed exemption regulation for grandfathering in projects is far too vague. For example, due to the fact that no timelines are provided, it is unclear whether it would mean that prospectors who have staked the thousands of mining claims scattered throughout northern Ontario would be exempt into perpetuity from complying with the *Act*. If this is the case, these exemptions would grossly undermine efforts to protect at-risk species such as caribou or wolverine that depend upon large, intact habitat tracts in Ontario's north.

The proposed regulatory changes also beg the question: will it become standard practice that development that has been approved at the municipal level is exempted from destroying the habitat upon which species at risk depend? Scenarios like this occur throughout southern Ontario, where many imperiled species such as the Jefferson Salamander rely on tiny pockets of habitat in heavily developed urban areas that face further development pressure. It is unclear if there is any recourse for habitat protection under this proposed new regime, , or if industrial activity or development will always trump conservation when something is regarded as approved, leading, in some instances, to species extirpation.

#### Reliance on other 'applicable' legislation

The posting proposes that activities would be allowed to proceed without additional approvals if they have received approval under other applicable legislation. It is proposed that this would apply to the forestry, renewable energy, development, mineral exploration and aggregate sectors.

Yet surely if the other applicable legislation in Ontario provided sufficient habitat protection



measures for species at risk, we would not need an *Endangered Species Act*. The reality is that Ontario has over 200 species at risk largely because the past and current legislative landscape *do not* provide adequate habitat protection for species.

#### Optional registration

As outlined in the EBR posting, registration for the exemptions outlined in the regulations is optional. It is hard to fathom why the MNR would consider granting exemptions without requiring operators to, at a minimum, register their activities with the MNR so that it can provide oversight.

Registration would at least ensure that operators are literate in the terms and conditions of their exemptions, and enable MNR to tally cumulative impacts of activities as a component of landscape-level planning, as it has previously committed to doing. It would also enable government to test for compliance to ensure that terms and conditions of exemptions are being met.

#### Safe harbour agreements

While we support the opportunity for landowners to enter into safe harbour agreements, we do not support including this tool as an exemption. Strict parameters need to be developed for safe harbour agreements on a case-by-case basis, which are better suited to legally binding agreements. And, as noted above, the fact that a safe harbour exemption *may* include registration provides no assurance that parties would have a full understanding of the baseline condition of the habitat under their purview, or that they accept responsibility for their side of the safe harbour contract.

#### Lack of precautionary approach

The EBR posting cites that the Standardized Condition Approach is applicable for certain types of activities where overall benefit permit conditions have been 'well established'. Yet, at present,



there are very few examples of well-established techniques for securing overall benefits for species at risk.

Although achieving an overall benefit can be relatively straightforward for some species, such as Butternut, methods for the vast majority of species are extremely complex and generally untested. These complexities were highlighted in comments submitted by Ontario Nature and the David Suzuki Foundation regarding proposed permits under the ESA for habitat mitigation for the Butler's garter snake upon the construction of the Windsor-Essex Parkway (December 16<sup>th</sup>, 2009). One of the experts appointed to advise the Minister provided the opinion that:

*Consequently I believe that restoring suitable habitat for Butler's Gartersnake would be a fairly simple process, since the vegetation structure appears to be much more important than the plant species composition.*

In contrast, a second expert raised the following issues: the risk inherent in translocations themselves; the fact that no translocation of Butler's has ever been attempted; the lack of research on Butler's residences; and the known precedent that snakes relocated over shorter distances tend to return to their original location in less than three weeks.

Indeed, both reviewers noted that the complexity of habitat restoration and species relocation is reflected in the fact that only 41 per cent of snake translocations have been successful to date. Further, most habitat restoration, species relocation and species reintroduction programs have also faced unforeseen challenges.

Thus, while we are comfortable with some of the examples utilized in the EBR posting, like the uncapping of a chimney for a chimney swift, we are not comfortable with the fact that no metric for ascertaining a 'well established' net benefit is provided.

### Recommendations



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- **Exemptions must be the exception.** Exemptions should only be used in very limited situations where the level of risk and complexity are low, and where the impacts of the activities are well understood and can be adequately addressed.
- **Improve implementation of the ESA. Don't weaken it.** Don't circumvent the approvals process – improve it. Address legitimate concerns of industry (inconsistency and long delays in permitting process; poor coordination of permits with other required approvals). Regulatory change is not needed to accomplish this.
- **Registration for an exemption cannot be optional.** It is key to management, monitoring and enforcement. In those rare situations where an exemption may be appropriate, to qualify the proponent must be required to register with MNR. They must outline the nature of the activity, the anticipated impact, and the plan to achieve overall benefit for the species and monitor results.

Thank you for the opportunity to comment on the proposed regulatory changes; I look forward to hearing how the concerns of the David Suzuki Foundation are being addressed.

Sincerely,

A handwritten signature in black ink that reads "Rachel Plotkin".

Rachel Plotkin

Ontario Science Projects Manager