



Date: November 12, 2020

To: Anna Baggio, Conservation Director, Wildlands League

From: Anastasia M Lintner, Principal, Lintner Law

Re: Analysis of proposed amendments to the *Crown Forest Sustainability Act, 1994* Schedule 8, Bill 229, the proposed Protect, Support and Recover from COVID-19 Act (Budget Measures), 2020

Bill 229 was introduced for first reading on November 5, 2020.<sup>1</sup> Because it is a budget measures bill before the Legislative Assembly, the government has taken the position that Bill 229 is exempt from Ontario's *Environmental Bill of Rights, 1993*<sup>2</sup> (EBR). Bill 229 is the most recent, in a disturbing trend, starting with Bill 55, Strong Action for Ontario Act (Budget Measures), 2012<sup>3</sup>, of using omnibus budget measures bills to make substantive changes to environmental laws and thereby sidestepping the public's EBR rights.

Schedule 8 of Bill 229 contains amendments to the *Crown Forest Sustainability Act, 1994* (CFSA), that, if enacted as proposed will (immediately upon Royal Assent):

- Add a definition to the CFSA – ““species at risk” means a species that is listed as extirpated, endangered or threatened on the Species at Risk in Ontario List established under the *Endangered Species Act, 2007*” (amendment to CFSA, s3)

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<sup>1</sup> See <https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-229>.

<sup>2</sup> See <https://www.ontario.ca/laws/statute/93e28>. Section 33 of the EBR states:

33 (1) A minister need not give notice under section 15, 16 or 22 of a proposal that would, if implemented, form part of or give effect to a budget or economic statement presented to the Assembly.

(2) A minister need not give notice under section 15, 16 or 22 of a proposal that would, if implemented, change,

(a) a policy that forms part of a budget or economic statement presented to the Assembly; or

(b) a bill, Act, regulation or instrument that gives effect to a budget or economic statement presented to the Assembly.

<sup>3</sup> See <https://www.ola.org/en/legislative-business/bills/parliament-40/session-1/bill-55>. Bill 55 introduced, among other things, substantive changes to the province's species at risk protections. Although the proposed amendments to Ontario's *Endangered Species Act, 2007* were withdrawn, subsequent regulatory amendments were made to introduce the permit-by-rule regime that is currently in place.

Relatedly, as part of more recent omnibus amendments (as introduced by the Minister of Municipal Affairs and Housing and not part of budget measures), Bill 108, the More Homes, More Choice Act, 2019 (see <https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-108>) further amended Ontario's *Endangered Species Act, 2007* in a manner that is entirely inconsistent with the principles of species at risk legislation.

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- Remove the “deemed inclusion” into forest management plans of agreements or regulations under the *Endangered Species Act, 2007* (ESA) as relates to forest operations (repeal CFSA, s11(3)) and the requirement for public notice about the specifics of such “deemed inclusions” (repeal CFSA, s11(3.1))
- Remove the confirmation that any “deemed inclusion” into forest management plans (as noted in previous bullet) will not be found to “found to fail to provide for the sustainability of a Crown forest as a result of the inclusion of those parts” (repeal CFSA, s11(4))
- Remove the provision that would favour the species at risk protections that were deemed to be included over other parts of forest management plans, in the event a conflict (repeal CFSA, s11(5))
- Add exceptions from prohibitions against killing, harming, harassing, capturing species at risk or damaging or destroying their habitat, while conducting forest operations, so long as those activities are conducted: (i) in a public (aka “Crown”) forest, (ii) in accordance with an approved forest management plan, and (iii) on behalf of the government or under the authority of a forest resource licence (new CFSA provision 47.1(1))
- Add exceptions from prohibitions against transporting or possessing species at risk, if doing so under the forest operations exceptions (as described in the previous bullet) (new CFSA provision 47.1(2))
- Prevent the Minister of the Environment, Conservation and Parks from ever issuing a species protection order or a habitat protection order for any forest operations that are conducted per the forest operation exceptions (new CFSA provision 47.1(3))
- Add discretionary, delegated authority for the Lieutenant Governor in Council to make regulations regarding forest operations, “including requiring persons conducting forest operations to take or refrain from taking specified actions for the purpose of avoiding or minimizing impacts to a species at risk or assisting with the recovery of a species at risk” (new CFSA provision c69(2)(16.2))

Collectively these amendments will end the long-standing commitment to meaningfully reconcile the need to protect and recover species at risk with forest operations in Ontario. Instead, at best, further harms to species at risk and their habitats will be avoided or minimized when timber harvesting is conducted. Bundled with the Ontario government’s commitment to double logging in public forests<sup>4</sup> and the permanent exemption from environmental assessment<sup>5</sup>, this most recent package of amendments will leave just the CFSA regime in place in Ontario’s public forests.

Reliance solely on forest operations conducting under the authority of the CFSA, prior to the enactment of the current ESA in 2007, were not sufficient to curtail the decline of species such as woodland caribou. Reforms to Ontario’s species at risk laws were needed precisely because efforts to avoid and

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<sup>4</sup> See <https://www.ontario.ca/page/sustainable-growth-ontarios-forest-sector-strategy>. It is stated that “Ontario is utilizing only half of the wood that it could sustainably harvest.” Further, Ontario has committed “to unleash the full potential of this important industry” (see <https://www.ontario.ca/page/ontarios-forest-sector-strategy>).

<sup>5</sup> See Environmental Registry of Ontario decision notice “Proposed amendments to General Regulation 334 under the Environmental Assessment Act to remove Regulatory Duplication of Forest Management requirements in Ontario” (June 30, 2020), <https://ero.ontario.ca/notice/019-0961>.

minimize harm were not entirely sufficient. Prior to 2007, species at risk legislation was woefully inadequate because it only prohibited actions that “wilfully” harmed species at risk of extinction.<sup>6</sup> Without prioritizing the protection and recovery of species, by both protecting the species themselves and their habitats, biodiversity decline would continue. Forest operations have not ever been fully subject to these requirements under the current ESA (which came into force in 2008)<sup>7</sup>.

Further, with the amendments that are currently proposed, the situation will be even less protective than prior to 2007 because the Minister of the Environment, Conservation and Parks will have no recourse whatsoever to bring forest operations in line with fulfilling the purpose of the ESA, which is entirely different than that of a resource extraction statute such as the CFSA.

ESA purpose<sup>8</sup>:

The purposes of this Act are:

1. To identify species at risk based on the best available scientific information, including information obtained from community knowledge and aboriginal traditional knowledge.
2. To protect species that are at risk and their habitats, and to promote the recovery of species that are at risk.
3. To promote stewardship activities to assist in the protection and recovery of species that are at risk.

CFSA purpose<sup>9</sup>:

The purposes of this Act are to provide for the sustainability of Crown forests and, in accordance with that objective, to manage Crown forests to meet social, economic and environmental needs of present and future generations.”

These purposes are not the same. We need to both manage forest operations to ensure sustainability AND protect species at risk and their habitats, with an aim to recovery for imperilled species. Rather than rising to this important challenge and seeking to set out a futures-oriented framework for sustainability managing commercial logging, these amendments are anticipated to set the stage for further biodiversity loss and species decline.

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<sup>6</sup> See *Endangered Species Act*, RSO 1990, c E15, <https://www.ontario.ca/laws/statute/90e15>.

<sup>7</sup> In the Environmental Commissioner of Ontario’s 2009 special report titled *The Last Line of Defence: A Review of Ontario’s New Protections for Species at Risk* (<https://www.auditor.on.ca/en/content/reporttopics/envreports/env09/2009-Last-Line-Defence.pdf>), the exemption for commercial forest operations is noted as well as the government’s statement that it is “committed to working with the forestry sector to harmonize its existing processes within the new Act.” (p39) Further, in the Environmental Commissioner of Ontario’s 2013 special report titled *Laying Siege to the Last Line of Defence: A Review of Ontario’s Weakened Protections for Species at Risk* (<https://www.auditor.on.ca/en/content/reporttopics/envreports/env13/2013-Laying-Siege-to-ESA.pdf>), the continued exemption for commercial operations was identified as particularly troubling because the Minister “has no reliable way of knowing whether its regulation of forestry activities is adequately protective of the province’s species at risk.” (p27)

<sup>8</sup> See *Endangered Species Act, 2007*, SO 2007, c6, s1, <https://www.ontario.ca/laws/statute/07e06>.

<sup>9</sup> See *Crown Forest Sustainability Act, 1994*, SO 1994, c25, s1, <https://www.ontario.ca/laws/statute/94c25>.