

May 17, 2019

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SUBMITTED ONLINE through the Environmental Registry

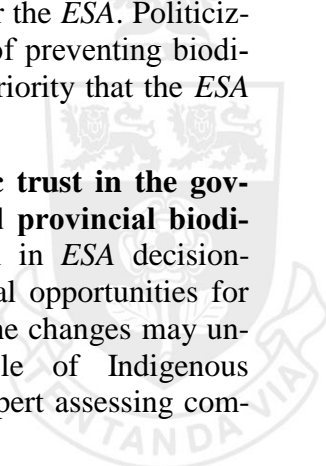
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**Re: ERO #013-5033 10th Year Review of Ontario's Endangered Species Act**

Dear Minister of the Environment, Conservation and Parks,

On behalf of the Osgoode Hall Law School's Environmental Justice and Sustainability Clinic, we are writing to provide comments on the changes proposed in the 10<sup>th</sup> year review of the Endangered Species Act ("*ESA*"), posted to the Environmental Registry on April 18, 2019 ("the Proposal").<sup>1</sup>

In our view, the proposed amendments to the Endangered Species Act in Bill 108 should be rejected for three reasons.<sup>2</sup>

1. **The amendments fundamentally undermine the purposes of the Act and the unique role the *ESA* is intended to play in Ontario's suite of natural resource and environmental laws.** The purpose of the *ESA* is to protect Ontario's biodiversity by identifying and prioritizing the protection of species at risk and their habitat when they are in danger of being lost. The introduction of significant ministerial discretion into the *ESA* process will weaken the respected independent, science-driven assessment and listing process under the *ESA*. Politicizing species protection reduces Ontario's chances of preventing biodiversity loss by removing the necessary statutory priority that the *ESA* puts in place.
  2. **The changes to the *ESA* will undermine public trust in the government's ability to protect species at risk and provincial biodiversity.** Limiting public notice and participation in *ESA* decision-making weakens transparency and removes critical opportunities for public input to enhance these decisions. Further, the changes may undermine Indigenous participation and the role of Indigenous knowledge by changing the membership of the expert assessing committee and independent listing process.
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3. **The proposed introduction of charges in lieu of protection activities and the expansion of regulatory exemptions will result in unacceptable, irreversible loss of species at risk and their habitat in the province.** In the context of a global crisis in biodiversity loss, the “overall benefit” and “net gain” standards enshrined in the *ESA* when it was enacted should be upheld in all *ESA* processes. Any permit-by-rule exemptions should attract significant Ministry oversight and monitoring, and increased resources for enforcement rather than the current proponent-driven model. Further, such changes fail to recognize the role of Indigenous jurisdiction in species at risk decision making, which could lead to conflict and delay.

As detailed below, we recommend many of the proposed amendments in Bill 108, such as the new sections 8.1, 16.1, 18, 20.1 to 20.18, be rejected. We further recommend that any amendments to the *ESA* should be made in accordance with both the Act’s purposes and the constitutionally protected rights of Indigenous peoples with respect to species and habitat protection. Finally, we note at the outset that many proposed changes will not be detailed until proposed regulations are released. Therefore, at this stage it is impossible to understand the full effect of the proposed amendments.

## ANALYSIS

### *The ESA’s Purpose*

The purpose of the *ESA* is threefold: to identify species at risk, to protect species and their habitats and promote their recovery; and to promote stewardship activities.<sup>3</sup> While Ontario has a number of statutes in which environmental protections are balanced with other social and economic values, such as land use planning and natural resource laws, the *ESA* is intended to prioritize species protection. This prioritization is necessary because the Act is focused on those species who are in danger of being lost forever, fundamentally undermining the biodiversity of the province and the planet. Our main consideration in reviewing the proposed changes is whether they enhance the ability of the *ESA* to achieve these purposes and maintain its unique role.

The *ESA*’s purposes reflect the globally recognized need to preserve biodiversity, specifically, species diversity. The recent Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services global assessment report concludes the Earth is currently in a biodiversity crisis, with one million species of plants and animals facing extinction globally.<sup>4</sup> Ontario is no exception.<sup>5</sup> Indeed we have particular obligations to protect biodiversity as the home to some of the world’s most extensive intact ecosystems.<sup>6</sup> This biodiversity is essential to maintaining ecosystem services such as food, medicine, and clean air and water.<sup>7</sup>

The 2011 provincial Biodiversity Strategy outlined six main threats to Ontario's biodiversity: habitat loss, invasive alien species, population growth, pollution, unsustainable use, and increasingly climate change.<sup>8</sup> The 2019 UN biodiversity report found the five main factors of change in nature to be changes in land and sea use, direct exploitation, climate change, pollution, and invasive alien species, while the World Wildlife Fund found that "the main drivers of the decline in biodiversity are the overexploitation of species, agriculture and land conversion".<sup>9</sup> Indeed, the UN report specifically identified land use change as the single most important driver of biodiversity loss.<sup>10</sup> The purposes of the *ESA* recognize its protective function as a central part of Ontario's regulatory framework governing land use and development. In order to deal with imminent threats and to effectively protect biodiversity, the Act's unique role should be strengthened rather than watered down into a balancing exercise. Research demonstrates that environmental protection often loses in such balancing exercises, particularly where jobs and economic growth are pitted against species and habitat protection.<sup>11</sup> We strongly recommend that the new section 8.1 that allows the Minister to suspend species protection for up to three years, the new section 16.1 authorizing landscape agreements, the new section 18 that authorizes regulated activity that would be prohibited, and the new sub-sections 20.1-20.18 that create the pay-in-lieu program, be rejected to ensure species and habitat protection remain the priority for all *ESA* decisions.<sup>12</sup>

### ***Undermining the Purpose of the Act through Ministerial Discretion***

#### **Assessing and Listing Species at Risk**

The proposal makes several significant changes to the listing process for species at risk in Ontario. The amendments would remove automatic protection for species once classified as at risk by the assessing committee, Committee on the Status of Species at Risk in Ontario ("COSSARO") and grant the Minister greater discretion in the listing process. This includes allowing the Minister to temporarily suspend protections for up to three years when certain criteria are met. The automatic listing process based on the independent expert advice of COSSARO is one of the strengths of the current Act. The introduction of significant ministerial discretion into the protection of endangered species will result in politicization of the listing process and undermine the effectiveness of the Act. Significant listing delays are likely to result in irreparable harm and perhaps even the avoidable loss of some species. They may also attract federal intervention under the emergency powers in the *Species at Risk Act*.<sup>13</sup>

Finally, while not set out in Bill 108, the 10<sup>th</sup> year review posting proposes to broaden membership of COSSARO to include "those with community knowledge." Currently members must have relevant scientific expertise or expertise in "aboriginal traditional knowledge."<sup>14</sup> Any expansion of COSSARO qualifications must be interpreted to maintain the independence and expertise of COSSARO in accordance with the recommendations of the 2006 Endangered Species Act Review Advisory Panel. We are concerned that

this ill-defined category of “community knowledge” may be used to diminish and dilute the role of both scientific expertise and Indigenous knowledge in *ESA* decision making.

### Changes to Timelines

The proposed amendments also include changes to the reporting process. First, the time from when a report from COSSARO is received by the Minister to when it is made public, would be extended from three to twelve months. The extended time period will apply to any report received in 2019. Reports to the Minister will be now annual, between January 1 and January 31 instead of whenever the need arises. Further, the Proposal suggests that the Minister be authorized to require the COSSARO to reconsider the classification of a species. During the reconsideration period, the species would not be added to the list.<sup>15</sup>

Prior to designation the Proposal would also require COSSARO to consider the populations of a species both inside and outside of Ontario before classification and adopt the lowest indicated classification in this broader range.<sup>16</sup> This shift from “best available scientific information” means Ontario species may not be protected even if they are facing significant threats in the province. This proposed amendment must be rejected. Local species populations are not socially or ecologically interchangeable with populations elsewhere and should be classified in accordance with the risks they face.

The amendments would also allow the Minister to indefinitely extend timelines for the Government Response Statement (“Statement”) and progress report, and would treat the Statement and strategy as “policy direction” and “advice” respectively, suggesting that they are not binding.<sup>17</sup> The section 56 mandatory legislative requirement and timeline for a habitat regulation proposal for species listed as ‘endangered’ or ‘threatened’ would be removed, instead making it discretionary for the Minister to make such regulations.<sup>18</sup> Given that habitat loss is a key driver of biodiversity loss, it is critical that habitat protection be mandatory for listed species.

We strongly recommend removing the proposed changes in sections 8.1, 16.1, 18, and 20.1 to 20.18. Research has demonstrated how ministerial discretion in the federal *SARA* process has undermined the listing process, particularly the prioritization of species protection over other values and interests.<sup>19</sup> The protection of biodiversity in the face of a global crisis requires a regulatory regime based on the stability and independence of assessment and automatic protection.

### ***Undermining Public Trust***

#### Notice and Participation

The Proposal also suggests removing posting requirements in a number of circumstances, for example, where the Minister decides to pause protection.

As well, the amendments specify that certain decisions will be posted on a government website rather than on the Environmental Registry.<sup>20</sup> In our view, this diminishes transparency and accountability in *ESA* decision-making. All notices and information should continue to be posted to the well-established Environmental Registry in accordance with the *Environmental Bill of Rights*.<sup>21</sup> As the Environmental Commissioner of Ontario has noted, “[p]ublic scrutiny is a key driver for improving environmental decision making” and failing to disclose decisions would be inconsistent with the goals of the Environmental Bill of Rights.<sup>22</sup>

### Indigenous Communities

This Proposal is likely to have particularly significant impacts on the constitutionally protected treaty and Aboriginal rights of Indigenous communities in Ontario with respect to existing species populations within their traditional and treaty territories. An example of this is the Boreal forest, part of which is in Ontario and is habitat for caribou. Caribou are very important to a number of Indigenous groups and have been listed by both SARA and the *ESA* as a threatened species.<sup>23</sup> As the boreal caribou range across Canada, they need intact forest ecosystems that span over long distances.<sup>24</sup> In British Columbia, the Doig River First Nation is reliant on caribou for physical sustenance as well as cultural knowledge, however the community notes that the population is no longer stable enough to sustain a hunt.<sup>25</sup> The loss of the caribou hunt is felt in terms of community subsistence in winter and spring, but is also a loss of knowledge, and cultural practice. Caribou have been very important to the First Nations’ diet because they were a predictable and reliable presence.<sup>26</sup> Ontario’s Woodland Caribou Conservation Plan recognizes this as it seeks to incorporate Aboriginal Traditional Knowledge into caribou recovery, and consult with Indigenous groups, to meet constitutional obligations that exist in terms of Aboriginal and treaty rights.<sup>27</sup> In weakening the regulatory protection for endangered and threatened species in Ontario, this Proposal is likely to have significant adverse effects on Indigenous peoples and their constitutionally protected rights.

### ***Charge in Lieu and Regulatory Exemptions***

#### Implementing species and habitat protections

The amendments would make significant changes to the implementation of species and habitat protections under the *ESA*. Section 9 of the Act which prohibits killing, harm, harassment, capture or taking of a listed species could be “scoped” by regulation to apply only to “specific species in specific circumstances”, “geographic areas”, or “a specified stage in the development of the species.”<sup>28</sup> In our view, this scoping of protection could result in important habitats and species being excluded from protection.

## New Regulatory Charge and Agency

The amendments include the creation of a new regulatory charge and agency. Instead of requiring infrastructure developers to do on-the-ground work to protect species, under certain conditions they would be able to pay a charge in lieu. According to the Proposal, a board-governed provincial agency would be created to administer the funds and disburse the money to third parties that would undertake protection activities in order to achieve the purposes stated in the Act. We are particularly concerned about this incorporation of the notion of ‘conservation banking’.<sup>29</sup> This proposed charge is a type of “biodiversity offset”, a way of achieving “measurable conservation outcomes resulting from actions designed to compensate for significant residual adverse biodiversity impacts arising from project development after appropriate prevention and mitigation measures have been taken”.<sup>30</sup> Biodiversity experts say they should only be used as a “last resort”.<sup>31</sup>

Property developers prefer this tool as it means that their habitat protection obligations can be dealt with quickly and easily through a single payment, however this puts the onus on the third party agency in this case to actually offset the loss of habitat in an effective manner.<sup>32</sup> Given the ministerial discretion in establishing guidelines for funding and regulation-making authority in the composition of the board, for example, it is unclear where this money will go, and whether it will be put to effective use in preserving biodiversity in Ontario.

This system has been tried in the United States with regards to wetlands in 1995, where a developer could pay in-lieu fees to an “in-lieu fee sponsor”.<sup>33</sup> However, in 2001, a study released by the National Research Council (NRC) at the request of the Environmental Protection Agency found that the system was not taking into account several of the complex functions carried out by wetlands. The NRC also found that some of the most basic functions of the scheme were not being carried out by the administrators, there was very little enforcement, and the study could not conclude that the goal of “no net loss” was being achieved.<sup>34</sup>

A large body of international research has also concluded that this kind of “biodiversity trading has not produced its promised biodiversity outcomes.”<sup>35</sup> Indeed, one study concluded such schemes allowed for development to proceed as usual “while offsets fall short of goals or are never implemented.”<sup>36</sup> Simply put, individual members of species, local populations, and specific local interactions between ecological entities are not interchangeable.<sup>37</sup> The ecological complexity of specific species interactions in a particular place can neither be recreated nor replaced elsewhere, nor do we have an adequate understanding to measure and predict impacts and harms.<sup>38</sup> Research has also shown that such schemes require a high level of oversight and enforcement, which rarely accompanies the reforms.<sup>39</sup> There is nothing in Bill 108 which indicates such oversight will be provided nor that more resources will be devoted to enforcement. In the current political context, this is unlikely to be the case.

We are also concerned at the lack of public consultation in the operation of the fund and agency. Such schemes already largely fail to account for a wide range of non-economic values and ecosystem functions.<sup>40</sup> Without public input, this knowledge gap will be exacerbated. Further, landowners are discouraged from participating in conservation efforts directly.<sup>41</sup>

Finally, we are concerned that this proposal has serious implications for constitutionally protected Indigenous rights. Indigenous communities with rights and responsibilities in relation to particular wildlife or plant/medicine species must be consulted on decisions impacting their Aboriginal and treaty rights, including decisions taken about species at risk and habitat. The charge and agency funding process do not appear to include Indigenous consultation, which may lead to conflict and litigation, and therefore uncertainty and delay.

#### Issuing permits and agreements

The Proposal would also make it easier for developers to get permits and agreements. The requirement for the Minister to consult with an independent expert and get approval from the Lieutenant Governor in Council in the ‘D’ permit process has been removed. Rather, a permit is given if there is ministerial approval, if the Minister believes that the main purpose of the proposed activity is not to protect or recover a species but will result in a significant social or economic benefit to Ontario, if the project will not jeopardize the survival or recovery of the species in Ontario, if reasonable alternatives have been considered, and if the permit requires reasonable steps to minimize adverse effects of individual members of the species.<sup>42</sup>

The proposed changes also provide for a transition provision for permit holders when new protections are added, allowing them to operate for twelve months while they make changes. Habitat destruction during this period may accelerate to avoid compliance once the protections come into force.

#### Developing regulatory exemptions

The Proposal would also extend the problematic permit-by-rule system brought in by the previous government. In 2017, the Environmental Commissioner of Ontario (“ECO”) wrote a report that was highly critical of this system, which requires proponents to register with the ministry and take steps to minimize adverse effects for the vulnerable species rather than requiring impacts to be minimized, and an overall benefit to the species.<sup>43</sup> This was a significant and highly criticized change from the original *ESA*. In our view the permit-by-rule system should be repealed or narrowed rather than expanded.

Bill 108 also proposes replacing section 18 of the Act, which allows instruments under other Acts to be used as permits when certain conditions are meant. This essentially allows activities under other regulations to proceed without being approved under the *ESA*. The requirements for this are

incredibly broad, stating that it has to be approved or required under another piece of legislation, does not jeopardize the survival of a species or have other significant adverse effects, would benefit the species when reasonable, require reasonable steps to minimize adverse effects, and involve consideration of reasonable alternatives. The repeated use of the word “reasonable”, as well as “significant” and “adverse” introduces a high level of discretion into the process. The effect is to create a loophole for industries to avoid strict obligations under the Act by shifting assessment out of the protective *ESA* regime to regulatory regimes that facilitate development and do not prioritize biodiversity protection.

For example, forestry operations under the *Crown Forest Sustainability Act, 1994*<sup>44</sup> are exempt, allowing operators to kill, harm, harass, or take species that are classified as ‘endangered’ or ‘threatened’. The forestry exemption was intended to be a temporary way to get around the *ESA* protection requirements and was intended set to expire in 2020. However, the proposed changes would provide for ongoing avoidance of the *ESA* for forestry operations, only protecting biodiversity when it is easy to do so.<sup>45</sup>

### **Conclusion**

In conclusion, the Proposal does not set out changes that would truly make the *ESA* more effective. Rather, it undermines the purposes of the Act through increased ministerial discretion, more lax posting requirements, in-lieu offsetting payments, and expanded regulatory exemptions. Making these amendments would speed biodiversity loss and erode relations with Indigenous communities, while streamlining the development process for developers. We urge the government to reconsider.

Sincerely,



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<sup>1</sup> As co-directors of the clinic, we bring a wealth of expertise in environmental law and governance, natural resources law, and planning law to this submission. Dr. Dayna Nadine Scott holds a York Research Chair and is Associate Professor at Osgoode Hall Law and the Faculty of Environmental Studies at York University, academic co-director of the Environmental Justice and Sustainability Clinic, and co-coordinator of the MES/JD program. Dr. Estair Van Wagner, is an Assistant Professor at Osgoode Hall Law School and academic codirector of the Environmental Justice and Sustainability Clinic. She researches and teaches on natural resource law and Indigenous environmental jurisdiction in both Canada and New Zealand. Osgoode Hall Law School JD student Madhavi Gupta provided research support to this submission.

<sup>2</sup> 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/parliament42/session-1/bill-108>>. [Schedule 5]

<sup>3</sup> *Endangered Species Act, 2007*, SO 2007, c 6 s 1 (1-3) [ESA]

<sup>4</sup> *Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*, 6 May 2019 at 3, online: *Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* <[https://www.ipbes.net/sites/default/files/downloads/spm\\_unedited\\_advance\\_for\\_posting\\_htn.pdf](https://www.ipbes.net/sites/default/files/downloads/spm_unedited_advance_for_posting_htn.pdf)>.

<sup>5</sup> *Biodiversity: A Nation's Commitment, An Obligation for Ontario* (Toronto: Environmental Commissioner of Ontario, 2012), online <<http://docs.assets.eco.on.ca/reports/special-reports/2012/2012%20Biodiversity%20Special%20Report.pdf>>.

<sup>6</sup> *Serving the Public: Annual Report 2012/2013* (Toronto: Environmental Commissioner Ontario, 2013) at 64, online <<http://docs.assets.eco.on.ca/reports/environmental-protection/2012-2013/2012-13-AR.pdf>>. [Serving]

<sup>7</sup> Ontario Biodiversity Council, *Ontario's Biodiversity Strategy, 2011: Protecting What Sustains Us* (Peterborough, 2011) at 1-3, online (pdf): <<http://ontariobiodiversitycouncil.ca/wp-content/uploads/Ontarios-Biodiversity-Strategy-2011-accessible.pdf>>. [OBC]; "Biodiversity", (3 December 2012), online: World Health Organization <<https://www.who.int/globalchange/ecosystems/biodiversity/en/>>.

<sup>8</sup> OBC *supra* note 7 at 15-18.

<sup>9</sup> *UN Report: Nature's Dangerous Decline 'Unprecedented'; Species Extinction Rates 'Accelerating'* (Paris: United Nations, 2019), online <<https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/>>. [UN Report]; *WWF Living Planet Report 2018* (Gland: Switzerland: World Wildlife Fund, 2018) at 4, online <[http://assets.wwf.ca/downloads/lpr2018\\_full\\_report\\_spreads.pdf?\\_ga=2.231101407.1358647544.1558028531-1310448032.1558028531](http://assets.wwf.ca/downloads/lpr2018_full_report_spreads.pdf?_ga=2.231101407.1358647544.1558028531-1310448032.1558028531)>.

<sup>10</sup> *UN Report supra* note 9.

<sup>11</sup> Jeffery A Hutchings & Marco Festa-Bianchet, "Canadian Species at Risk (2006-2008), with Particular Emphasis on Fishes" (2009) 17 *Environ Rev* 53 at 63.; Arne O. Mooers et al., "Science, Policy, and Species at Risk in Canada" (2010) 60:10 *BioScience* 843 at 846.

<sup>12</sup> *Schedule 5 supra* note 2, proposed ss 8.1, 16.1, 18, 20.1-20.18.

<sup>13</sup> *Species at Risk Act*, SC 2002, c 29 s 80. [SARA]

<sup>14</sup> *ESA, supra* note 3 at s 3(4).

<sup>15</sup> *Schedule 5 supra* note 2, proposed s 6, 8.1.

<sup>16</sup> *Ibid*, proposed ss 7(4), (5).

<sup>17</sup> Environmental Registry of Ontario, "10th Year Review of Ontario's Endangered Species Act: Proposed Changes," online: <https://ero.ontario.ca/notice/013-5033> [Notice]

<sup>18</sup> *Schedule 5 supra* note 2, proposed s 56.

<sup>19</sup> *SARA supra* note 13 at s 77 (1), 78, 80.

<sup>20</sup> *ESA supra* note 3 at s 56.

<sup>21</sup> *Environmental Bill of Rights, 1993*, SO 1993, c 28, s 8(2).

<sup>22</sup> *Serving the Public: Annual Report 2012/2013* (Toronto: Environmental Commissioner Ontario, 2013) at 22. [Serving].

<sup>23</sup> *ESA supra* note 3 at schedule 4.; *SARA supra* note 13 at schedule 1.

<sup>24</sup> Rachel Plotkin, "Tribal Parks and Indigenous Protected and Conserved Areas: Lessons from B.C." (2018) at 38, online (pdf): David Suzuki Foundation <<https://david Suzuki.org/wp-content/uploads/2018/08/tribal-parks-indigenous-protected-conserved-areas-lessons-b-c-examples.pdf>>.

<sup>25</sup> Susan Leech and Carolyn Whittaker, "Madziih (caribou) Tsáá? ché ne dane Traditional Knowledge and Restoration Study" (2016) at 3, online (pdf): David Suzuki Foundation <<https://david Suzuki.org/wp-content/uploads/2016/12/caribou-traditional-knowledge-restoration-study.pdf>>. [Madziih]

<sup>26</sup> *Madziih supra* note 25 at 23-24.

<sup>27</sup> *Ontario's Woodland Caribou Conservation Plan* (Ontario: Ministry of Natural Resources, 2009) at 3, 17, online <<https://files.ontario.ca/environment-and-energy/species-at-risk/277783.pdf>>.

<sup>28</sup> *Schedule 5 supra* note 2, proposed s 8(1.3).

<sup>29</sup> Deborah L. Mead, "History and Theory: The Origin and Evolution of Conservation Banking" in Ricardo Bayon, Nathaniel Carroll & Jessica Fox, *Conservation and Biodiversity Banking: a guide to setting up and running biodiversity credit trading systems*, (London: Earthscan, 2009).

<sup>30</sup> David W Poulton, "Biodiversity Offsets: A Primer for Canada" (2014) at 4, online (pdf): uOttawa <<https://institute.smartprosperity.ca/sites/default/files/publications/files/Biodiversity%20Offsets%20in%20Canada.pdf>>. [Offsets]

<sup>31</sup> *Ibid* at 12.; Kerry ten Kate & Michael Crowe, "Biodiversity Offsets: Policy Options for Governments" (2014) at 17, online (pdf): IUCN <<https://portals.iucn.org/library/sites/library/files/documents/2014-028.pdf>>. [IUCN]

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<sup>32</sup> *IUCN supra* note 31 at 43.

<sup>33</sup> *Offsets supra* note 30 at 56.

<sup>34</sup> *Ibid* at 29.

<sup>35</sup> Susan Walker et al., “Why Bartering Biodiversity Fails” (2009) 2:4 Conservation Letters 149 at 149, online <  
<https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1755-263X.2009.00061.x>>. [*Bartering Biodiversity*]

<sup>36</sup> *Bartering Biodiversity supra* note 35 at 149.

<sup>37</sup> David Moren-Mateos et al. “The True Loss Caused by Biodiversity Offsets” (2015) Biological Conservation 1 at 2, online <  
<http://arnaudbechet.ouvaton.org/publications/Moreno-Mateos2015BC.pdf>>. [*True Loss*]

<sup>38</sup> *True Loss supra* note 37 at 3.

<sup>39</sup> *Bartering Biodiversity supra* note 35 at 150.

<sup>40</sup> *True Loss supra* note 37 at 3.

<sup>41</sup> *Ibid* at 3.

<sup>42</sup> *Schedule 5 supra* note 2, proposed s 17(2)(d).

<sup>43</sup> *Good Choices, Bad Choices: Environmental Rights and Environmental Protection in Ontario* (Toronto: Environmental Commissioner Ontario, 2017) at 222. [*Choices*]

<sup>44</sup> O Reg 242/08, s 22.1. [*OReg*]

<sup>45</sup> *Serving supra* note 22 at 47.; *Choices supra* note 22 at 222.; *OReg supra* note 44 at s 22.1.