

March 4th, 2019

Public Input Coordinator
Species Conservation Policy Branch
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Canada

RE: OFIA's Submission on the 10th Year Review of the ESA

To Whom it May Concern,

Thank you for the opportunity to comment on Environmental Registry of Ontario number 013-4143. Collectively, the Ontario Forest Industries Association (OFIA) represents 40 forest companies and managers across the province. Our membership directly manages over 20 million hectares of Crown forest and over 50,000 hectares of privately held lands.

OFIA member companies have been involved in discussions surrounding the Endangered Species Act (ESA) since its inception and have been responsible for implementing species at risk policy across Ontario for well over two decades. The enclosed submission represents the collective and professional knowledge of managing this important resource. We encourage you to review the complete submission, however, to enable positive outcomes for species at risk, increase efficiencies, and streamline processes the two most critical items required for the forest sector are:

- 1. Recognition of the Crown Forest Sustainability Act (CFSA) as an equivalent process to the ESA through a permanent section 55 regulation, not harmonization through section 18, is required and well supported by legal precedent.**
- 2. Working under the section 55 regulation, the Ministry of Natural Resources and Forestry (MNRF) must develop workable species at risk policy delivered under the CFSA that contributes to working landscapes and functioning ecosystems while incorporating socio-economic impact analysis, jointly, with practitioners, affected stakeholders, and Indigenous communities.**

The ESA review presents an opportunity to address some other longstanding concerns regarding landscape approaches, the listing process, habitat regulations, and authorizations and we have provided constructive recommendations on all of these focus areas in the enclosed submission. However, if the review does not result in the two items identified above, it will be a failed exercise.

Thank you and we look forward to working collaboratively with your government on this and other important files.



Jamie Lim
President and CEO
Ontario Forest Industries Association

Encl. OFIA's Submission to MECP's 10th Year Review of Ontario's Endangered Species Act

Ministry of the Environment, Conservation and Parks

10th Year Review of Ontario's Endangered Species Act:
Discussion Paper

OFIA's Recommendations:

Area of Focus 1: Landscape Approaches

1. Move forward with a permanent section 55(1)(b) regulatory exemption to the forest sector to continue enabling landscape approaches currently being delivered under the Crown Forest Sustainability Act (CFSA).
2. Working under the section 55 (1)(b) regulation, the Ministry of Natural Resources and Forestry (MNRF) must develop workable species at risk policy delivered under the CFSA that contributes to working landscapes and functioning ecosystems while incorporating socio-economic impact analysis, jointly, with practitioners, affected stakeholders, and Indigenous communities.

Area of Focus 2: Listing Process and Protections for Species at Risk

3. Overhaul the membership of COSSARO to reflect more generalist professionals and Indigenous communities rather than academics with expertise in a very limited field of study. Known experts in a particular species, including local MNRF biologists and local RPFs should be invited to participate in the deliberation of species being evaluated by COSSARO at least 12 months before the committee meets to evaluate the species' status.
4. Develop a clear process for using the "data deficient" category, particularly for species with a wide distribution and lack of data.
5. COSSARO should consider the use of regional sub-populations to account for differences in status across the province, risk to the species and the relative risk of human activities. Populations of species at the normal edge of their ranges in Ontario, outside of their core range, should be evaluated with due consideration of their global population.
6. Add an additional layer of accountability by having the responsible minister weigh scientific evidence provided by COSSARO with the socio-economic impacts before a species is automatically listed and protected.
7. Reassessment of species at risk should be considered when credible evidence has been presented to the responsible ministry beyond what is currently permitted within the ESA.
8. Enable individuals and organizations to report on SAR sightings without the perceived or real fear of being penalized for doing so.

Area of Focus 3: Species Recovery Policies and Habitat Regulations

9. The current 5-year review should go beyond simply listing actions that have taken place. A biological review of the species should be included and feedback into the COSSARO listing process.
10. Habitat renewal should not be viewed as habitat destruction.

Area of Focus 4: Authorization Processes

11. Remove the July 1st, 2020 expiry found in O. Reg. 242/08 (22.1) to forest operations on Crown land giving the sector and government greater certainty.
12. Replace the term "*overall benefit*" within sections 17(2)(c), 18(1)(e)(iii)(A), and 18(2)(f)(iii)(A) with "*positive outcomes*" to species at risk.
13. Equivalency through section 55, not harmonization through section 18 is required for future success and is well supported by legal precedent.

Executive Summary

On January 18th, 2019 the Ministry of the Environment, Conservation and Parks (MECP) posted policy proposal 013-4143, *10th Year Review of Ontario's Endangered Species Act: Discussion Paper*¹. The Ontario government is currently undertaking a review of the Endangered Species Act to improve protections for species at risk, consider modern and innovative approaches to achieve positive outcomes for species at risk, as well as to look for ways to streamline approvals and provide clarity to support economic development.

The desired outcomes of any proposed changes to the Endangered Species Act are to:

- Enable positive outcomes for species at risk
- Ensure species assessments are based on up-to-date science
- Address multiple objectives for ecosystem management through stewardship and protection activities
- Increase efficiencies in service delivery for authorization clients
- Streamline processes and provide clarity for those who need to implement the Act
- Maintain an effective government oversight role

The Endangered Species Act, 2007 came into effect on June 30, 2008. During the past decade of implementing the Endangered Species Act (ESA), the government has heard what works well and what could work better – for species at risk, conservation groups, the public, Indigenous peoples, and economic development. Since coming into effect, the Act has been criticized for being ineffective in its aim to protect and recover species at risk, for being unclear, administratively burdensome, time-consuming and costly for applicants, and for creating barriers to economic development.

OFIA's membership has been involved in discussions surrounding the ESA since its inception and have been responsible for implementing species at risk policy across Ontario for over two decades. Our membership is responsible for the management of over 20 million hectares of managed Crown forests in Ontario and this submission represents the collective and professional knowledge of managing this important and renewable resource.

We welcome this opportunity to participate in MECP's ESA review and look forward to continued progress on this important file.

¹ 10th Year Review of Ontario's Endangered Species Act: Discussion Paper, Environmental Registry of Ontario, <https://ero.ontario.ca/notice/013-4143>

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Background

Approaches to wildlife management have been evolving since the 19th century, from managing strictly for game, to managing for wildlife, a greater focus on science and partnerships, and, most recently, understanding and managing ecosystems². This interaction between ecosystems, wildlife, and socio-economics requires a process for optimizing and balancing these elements of sustainability. From a natural resource management perspective, it is impossible to manage for each value, and each species, individually across a landscape as vast and diverse as Ontario. In recognition of this, MECP has expressed an interest in the discussion paper to explore the development of landscape-level approaches for multi-species recovery while increasing efficiencies in service, streamlining processes, and supporting economic development.

As a result of constitutional powers over its own forestry resources, Ontario has been implementing a successful approach to sustainable forest management and wildlife management under the Crown Forest Sustainability Act (CFSA) for almost 25 years over approximately 45 million hectares of land. The purpose of this section is to provide background information on how legislation impacting forestry and species at risk has evolved over the past 40 years, and how the only path forward for forest operations on Crown land is through a permanent section 55 regulation under the Endangered Species Act (ESA).

Ontario's Environmental Assessment Act (1975)

In 1975 the Ontario Government passed the Environmental Assessment Act (EAA), which requires proponents of any undertaking that might affect the environment, to carry out an environmental assessment of their endeavour.

The purpose of the Act is:

"the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment" (Environmental Assessment Act 1975, Section 2)."

The environment was defined to include air, land, water, plant and animal life, including humans, as well as social, economic and cultural conditions. Ontario's MECP has overall responsibility for the EAA.

The EAA has been used to establish various environmental planning procedures, consultation obligations, and document requirements. Environmental Assessments (EAs) are intended to be proportionate with the environmental significance of the undertaking being proposed. For example, proponents of major or complex undertakings which may pose serious risks to the environment or public health (e.g. large landfills or hazardous waste facilities) are generally required to perform more detailed and rigorous individual studies under the EAA than those required for small-scale, frequently occurring projects with minor and mitigatable impacts (e.g. municipal road widenings or sewer projects).

The Minister, with the approval of the Ontario Cabinet, may issue declaration orders to exempt any proponent, class of proponents, undertaking, or class of undertakings from the requirements of the EAA or regulations. Where an individual EA is required, the proponent cannot proceed with the undertaking unless the EA has been submitted to, and approval to proceed has been granted by, the Minister or, alternatively, the Environmental Review Tribunal (ERT).

² Ministry of Natural Resources and Forestry: Building a Wildlife Management Strategy for Ontario, A Discussion Paper, <https://goo.gl/V8LbMQ>

If a particular project is within a class of undertakings subject to an approved Class EA, then the proponent does not prepare an individual EA. Instead, the proponent follows the planning, documentary and consultation requirements prescribed by the approved Class EA. Class EAs generally include provisions which confer discretion upon the Minister to issue a Part II order (also known as a “bump up”) to require the project to undergo a full individual EA if warranted in the circumstances. Subject to a variety of conditions, forest management on Crown lands in Ontario is operating under a Class EA. A list of currently approved Class EAs is found in Table 1.

Name	Date Approved	Proponent
Environmental Assessment Requirements for Forest Management on Crown Lands in Ontario (MNR-75)	August 25, 2015	Ministry of Natural Resources and Forestry
Class EA for GO Transit	August 8, 2005	GO Transit
Class EA for Activities of the Ministry of Northern Development and Mines under the Mining Act	December 12, 2012	Ministry of Northern Development and Mines
Class EA for Minor Transmission Facilities	November 16, 2016	Hydro One Networks Incorporated
Class EA for Municipal Infrastructure Projects	October 4, 2000	Municipal Engineers Association
Class EA for Provincial Parks and Conservation Reserves	September 23, 2004	Ministry of Natural Resources and Forestry
Class EA for Provincial Transportation Facilities	October 9, 1999	Ministry of Transportation
Class EA for public work	April 28, 2004	Ministry of Infrastructure and Ontario Realty Corporation
Class EA for Remedial Flood and Erosion Control Projects	May 31, 2000	Conservation Ontario
Class EA for Resource Stewardship and Facility Development Projects	September 22, 1999	Ministry of Natural Resources and Forestry
Class EA for Waterpower Projects	October 8, 2008	Ontario Waterpower Association

Table 1. Currently approved Class EAs in Ontario

Ontario's Timber Class EA (1988-1994)

By the late 1980s, the MNRF was evaluating past government forestry programs in Ontario which had worked primarily to ensure the flow of timber to meet the demand for wood and paper products, and instead MNRF began aligning itself with the public's growing concern for environmental health³. As a result, the MNRF stated that its current “forest management policies and programs reflect increased forest renewal, as well as protection of fish and wildlife habitat, protection of social and cultural values, and genetic diversity within the forest”⁴.

The main catalyst in the Ministry's shift towards sustainable forest management was the Class Environmental Assessment for Timber Management Hearings (CEATMH), a series of public meetings held in Ontario from 1988 to 1995. The CEATMH contained many elements, including an updated silvicultural research and development program, the development of a provincial timber policy, and a conservation strategy for old-growth ecosystems⁵. Protection of the forest environment for non-timber values had not previously been an objective of forest management planning. The Timber Class EA process and hearings signified a profound change in the direction of forest policy.

³ Forest History Society of Ontario: From Timber Administration to Steward of the Forest: Forestry and the Evolution of Forest Management, <https://goo.gl/p3DxuM>

⁴ Ministry of Natural Resources: Annual Report (1989-1990): 12.

⁵ Ministry of Natural Resources: Annual Report (1991-1992): 11.

The hearings were opportunity for the public to examine the planning process and the practice of forestry and a significant effort was placed on hearing from people from across Ontario. The hearings took place in 15 different locations, had over 500 presenters, involved dozens of intervenors, and hundreds of support people. This was a long and expensive process; it took six years and cost in excess of \$20 million. Hundreds of witnesses presented thousands of exhibits and the EA hearing record includes 70,000 pages of daily-recorded transcripts.

In its decision the EA Board stated that,

“The hearing record represents the cumulative knowledge, opinions and wisdom of the most expert and authoritative people who have devoted their careers and lives to the task of understanding and managing Ontario’s forests”

The EA Board also said that, *“The environmental assessment process and the hearing gave voice to everyone’s concerns”*. In the Environmental Assessment Board decision summary it stated with a definitive “yes” to the question:

“Can timber management planning for building forest access roads, cutting timber, regenerating the new forest and tending and protecting it in over 385,000 square kilometres of public lands in northern Ontario pass the test of approval under the Environmental Assessment Act?”⁶

EA Board’s 1994 Ruling, and Subsequent Declaration Orders (MNR-71, MNR-74, MNR-75)

On April 5, 1994, the EA Board gave its approval, subject to 115 terms and conditions, for the undertaking to proceed. Term 113 of the Timber Class EA stated that the approval would remain in effect for nine years in order for it to be tested on the ground. The review considered comments made to the Minister of the Environment and the Minister of Natural Resource by the general public, stakeholders, Aboriginal people and the Government Review Team.

During the 2003 review, Ontario’s Minister of the Environment stated:

“Having weighed such injury, damage, or interference with the betterment of people of the whole or any part of Ontario by providing the protection, conservation, and wise management in Ontario of the environment which would result from the failure to extend and amend the Timber Class EA Approval, the undersigned is of the opinion that it is the public interest to make this Declaration Order.”⁷

The current Declaration Order, MNR-75, was granted in 2015 by amending and consolidating Declaration Orders MNR-71 (2003), and MNR-74 (addition of the Whitefeather Forest in 2009). *Crown Forest Sustainability Act (1994)*

The Ontario Government decided to accept the terms and conditions of the Timber Class EA decision and developed the Crown Forest Sustainability Act (CFSA), introduced for first reading in June 1994 and passed third reading in December. This new law bound the Crown and the forest sector to a more rigorous regime under which forest management must be conducted when compared to the *Crown Timber Act*

⁶ Ministry of Natural Resources: A Review by the MNR Regarding the Class Environmental Assessment for Timber Management on Crown Lands in Ontario, <https://goo.gl/L3pPjY>

⁷ Ontario Ministry of the Environment: Declaration Order MNR-71: Class EA for Forest Management on Crown Lands in Ontario, <https://goo.gl/2Z1Kaz>

(1990). For the first time, the CFSA created a direct link between forest management and forest sustainability, closely aligning with the stated purpose of the *Environmental Assessment Act*.

The CFSA fundamentally altered the province's overall forest policy. Using scientific and ecological principles, the CFSA aimed to “*manage Crown forests to meet social, economic, and environmental needs of present and future generations.*”⁸ This required the recognition that forest management strategies should be concerned with more than meeting the need for wood supply, and therefore must consider the impact of harvesting on ecosystems and the environment as a whole. Most importantly, under the CFSA the Ministry officially became a “forest steward” rather than a woodland “manager.”

The principles of the CFSA state that the Forest Management Planning Manual will provide for determinations of the sustainability of Crown forests in a manner consistent with the following principles:

1. *Large, healthy, diverse and productive Crown forests and their associated ecological processes and biological diversity should be conserved.*
2. *The long-term health and vigour of Crown forests should be provided for by using forest practices that, within the limits of silvicultural requirements, emulate natural disturbances and landscape patterns while minimizing adverse effects on plant life, animal life, water, soil, air and social and economic values, including recreational values and heritage values. 1994, c. 25, s. 2 (3).*

The CFSA brought about important change in how Ontario Crown forests are managed. It requires that all forest management activities be conducted in accordance with four regulated manuals, one of which, the Forest Management Planning Manual (FMPM), is the instrument for implementing section 82 of the EA Approval's 115 terms and conditions. In 1995 the EA Board confirmed that the then-draft planning manual had satisfactorily incorporated the planning requirements of its terms and conditions of approval. The other three manuals regulate forest operations and silviculture, forest information and wood measurement. The standards and requirements for forest management are set out directly in the Crown Forest Sustainability Act and these four associated manuals.

Ontario Forest Accord (1999)

The Ontario Forest Accord was developed in conjunction with the Ontario Living Legacy Land Use Strategy. This accord was an agreement among the forest industry, the Partnership for Public Lands and the MNR supporting the expansion of Ontario's parks and protected areas. One of the commitments contained in the accord called for a process to be developed for any permanent increase in future wood supply to be shared between increased wood supply for the forest industry and additional parks and protected areas. The Ontario Forest Accord also recommended improvements to forest management planning, modifications to the Timber Class EA, and support for related science activities.

In July 1999, after the MNR's Lands for Life land use planning exercise and extensive public consultation, Ontario's Living Legacy Land Use Strategy was announced. This was an MNRF initiative to expand Ontario's parks and protected areas to comprise 12% of the Area of the Undertaking. In total, 378 new or expanded parks and protected areas, representing 2.4 million hectares of Crown land, have been added to the protected area system. Forestry, mining and hydroelectric development are not permitted uses within any of these new parks and protected areas.

⁸ Crown Forest Sustainability Act, 1994, Statutes of Ontario 1994, Chapter 25, 767-803.

Endangered Species Act (2007)

When compared to the principles and purpose of the CFSA described in section 1.4, the principles and prohibitions of the *Endangered Species Act* (ESA) (Table 2) result in an obvious conflict (Table 3). The CFSA has served Ontario well in providing landscape-level, bio-diverse habitat for a variety of species, including species at risk. In contrast, serious questions remain regarding the long-term sustainability of the ESA from not only from a socio-economic perspective, but an environmental one as well. The ESA is an Act that protects individual species and individuals of species with de-facto “no-disturbance” restrictions, at times to the detriment of other wildlife species and desired long-term forest composition targets, resulting in unanticipated changes to long-term forest structures. We are concerned that this narrow approach may be short-sighted and contrary to the broader intent of the CFSA around forest-level sustainability.

Prohibitions Under the Provincial ESA
9. (1) No person shall, (a) kill, harm, harass, capture or take a living member of a species that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species;
10. (1) No person shall damage or destroy the habitat of, (a) a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species; or (b) a species that is listed on the Species at Risk in Ontario List as an extirpated species, if the species is prescribed by the regulations for the purpose of this clause. 2007, c. 6, s. 10 (1).

Table 2. Prohibitions under Section 9 and 10 of the *Endangered Species Act*

Outright protection through the prohibition of human intervention or activities, as legislated within the ESA, combined with the suppression of natural disturbances, will be detrimental to the sustainability of our managed Crown forests. To conserve and improve ecosystem health, disturbance must occur by reduced wildfire suppression efforts, prescribed burning, or harvesting. Carefully planned harvesting, in particular, is a disturbance mechanism that allows for an effective critical reset of forest age in order to maintain ecological integrity across the landscape. There are a number of examples of SAR which depend and benefit from disturbance and early successional forest.

Other Canadian jurisdictions, where forest management and SAR policy have also focused on habitat protection and retention, have seen a trend towards over-mature and unhealthy forests with excessive fuel loading. This has contributed to catastrophic natural events such as the insect outbreaks and wildfires we have seen recently in British Columbia.

Crown Forest Sustainability Act (CFSA)	Endangered Species Act (ESA)
<i>Minimize</i> adverse effects on plant life, animal life, water, soil, air and social and economic values, including recreational and heritage values.	To protect species that are at risk and their habitats, and to promote the recovery of species that are at risk.
A long-term, comprehensive Act that focuses on forest sustainability and strikes a balance between the environment, jobs and the economy.	Reactive Act that focuses on individual species. Doesn’t take socio-economic factors into consideration.

Crown Forest Sustainability Act (CFSA)	Endangered Species Act (ESA)
Better suited to climate change mitigation and a well-established dispute resolution process.	Does not consider climate change and does not have a dispute resolution process.
Involves long-term planning horizons in the assessment of objective achievement.	No consideration of the provision of SAR habitat over time.
A focus on healthy populations with well-established mechanisms in place to incorporate new SAR listings.	No process to reconcile overlapping SAR with conflicting habitat needs and continuous cycle of new listings.

Table 3. Comparison of approaches between the Endangered Species Act (2007) and the Crown Forest Sustainability Act (CFSA)

Recognition of the CFSA as an Equivalent Process to the ESA

With the passing of the 2007 Endangered Species Act (ESA), the forest sector was provided with a commitment from the Minister of Natural Resources that the CFSA would be recognized as an equivalent process which plans and provides for species at risk. This would be accomplished through section 55 of the ESA. In a letter dated May 9th, 2007 the Minister of Natural Resources stated,

“If Bill 184 is passed by the legislature, it is our intention to put forward a regulation that will exempt Forest Management Plans (FMPs) from the prohibitions in dealing with species at risk. The regulation will be based on recognition of the efficacy of FMPs in addressing endangered and threatened species.”

The most effective way of achieving equivalency between these two acts was through the passing of a permanent regulation under section 55 of the ESA, as described later in Focus Area 4 – Authorization Processes. This would exempt forest operations on Crown land from the prohibitions of the ESA as long as they continued to follow approved FMPs, which provides for species at risk and other wildlife species as described in more detail below.

The Current Regulation for Forest Operations in Crown Forests Under the ESA

Section 55 of the ESA states:

55. (1) Subject to subsection (2) and section 57, the Lieutenant Governor in Council may make regulations,

(b) prescribing exemptions from subsection 9 (1) or 10 (1), subject to any conditions or restrictions prescribed by the regulations;

Since the introduction of the ESA in 2007, the forest sector has operated under such a regulation. Currently, regulation 242/08 under the Endangered Species Act (ESA) exempts forest operations in Crown forests from the prohibitions of the ESA identified earlier in this document (kill, harm, harass or

destroy habitat)⁹. This regulation is often mischaracterized as a “blanket exemption” giving industry a “carte blanche to degrade and destroy critical habitat¹⁰”.

The conditions of the regulation requires,

1. In cases where the applicable forest management plan includes an operational prescription for an area of concern that specifically applies to the species, the person must conduct the forest operations in accordance with the prescription.
2. In cases where the applicable forest management plan does not include an operational prescription for an area of concern that specifically applies to the species, but does include a condition on regular operations that specifically applies to the species, the person must conduct the forest operations in accordance with the condition.
3. In cases where the applicable forest management plan does not include an operational prescription for an area of concern, nor a condition on regular operations, that specifically applies to the species, and where the person, while conducting forest operations, encounters a nest, hibernaculum, den or other feature of the species' habitat that is established or exists at a specific site within the habitat, the person must do all of the following upon encountering the site-specific feature:
 - i. suspend forest operations in the area of the site-specific feature,
 - ii. ensure that an application is made to the Ministry for an inclusion in the applicable forest management plan of an operational prescription for an area of concern, or for a condition on regular operations, with respect to the site-specific feature, and
 - iii. upon the Ministry amending the applicable forest management plan as appropriate, resume forest operations in accordance with the operational prescription or the condition on regular operations, as the case may be.

More information on what is legally required in a forest management plan is provided below.

Current Forest Management Planning Direction in Ontario

The overall context for forest management in Ontario is the Policy Framework for Sustainable Forests that was approved by Cabinet in 1994. The framework sets broad direction for forest policy and makes forest sustainability the primary objective of forest management. The Timber Class EA Approval and Declaration Order MNR-75 require the provision of four manuals to guide various aspects of forest management in Ontario. These manuals are prepared in accordance with Section 68 of the CFSA and are regulated in accordance with Section 69 (1) 29:

1. The Forest Management Planning Manual (FMPM);
2. The Forest Information Manual (FIM);
3. The Forest Operations and Silviculture Manual (FOSM); and
4. The Scaling Manual (SM).

⁹ O.Reg. 242/08, section 22.1, available here: <https://www.ontario.ca/laws/regulation/080242#BK25>

¹⁰ NRDC, *Ontario: Stop Greenlighting Caribou Habitat Degradation*: <https://on.nrdc.org/2SRbB80>

The FMPM is the pivotal document that provides direction for all aspects of forest management planning for Crown lands in Ontario within the area of the undertaking, as defined in Schedule 1 of MNR's Environmental Assessment Act Requirements for Forest Management on Crown Lands in Ontario, (2015) (Declaration Order MNR-75). This FMPM incorporates conditions 1 to 34 and 39(a) of Declaration Order MNR-75.

Forest Management is conducted in an adaptive management cycle. A forest management plan (FMP) is prepared by a plan author, and approved by the Ontario Government, who is a registered professional forester, who certifies that the FMP provides for the sustainability of the Crown forest. The FMP is implemented as scheduled in the annual work schedule and as reported in the annual report. Following year five, the implementation of the FMP to date is assessed and a determination is made as to whether the implementation of the FMP has provided for the sustainability of the Crown forest and recommendations for future planning are provided. The next FMP is prepared in consideration of recommendations from the year five annual report; changes to the forest condition; updates to science and policy; and specific efforts to confirm, update, or revise management objectives and practices.

Accounting for uncertainty in the management of complex natural systems has been recognized for several decades as a critical component of effective resource planning¹¹. The adaptive management framework, which requires examination of competing hypotheses about resource dynamics and possible effects of management interventions, is widely viewed as the best approach for managing biological systems in the face of uncertainty¹²¹³. Like other natural resources management problems, caribou recovery planning should benefit from a thorough consideration of all sources of uncertainty (e.g. threats, habitat needs, etc.) since this may allow regulatory bodies and participating stakeholders to identify which they feel most confident will generate the best outcomes for recovery.

¹¹Holling CS (1978) Adaptive Environmental Assessment and Management. *Int Ser Appl Syst Anal* 402

¹² Williams BK (2011) Adaptive management of natural resources-framework and issues. *J Environ Manage* 92:1346–1353. doi: 10.1016/j.jenvman.2010.10.041

¹³ Westgate MJ, Likens GE, Lindenmayer DB (2013) Adaptive management of biological systems: A review. *Biol Conserv* 158:128–139. doi: 10.1016/j.biocon.2012.08.016

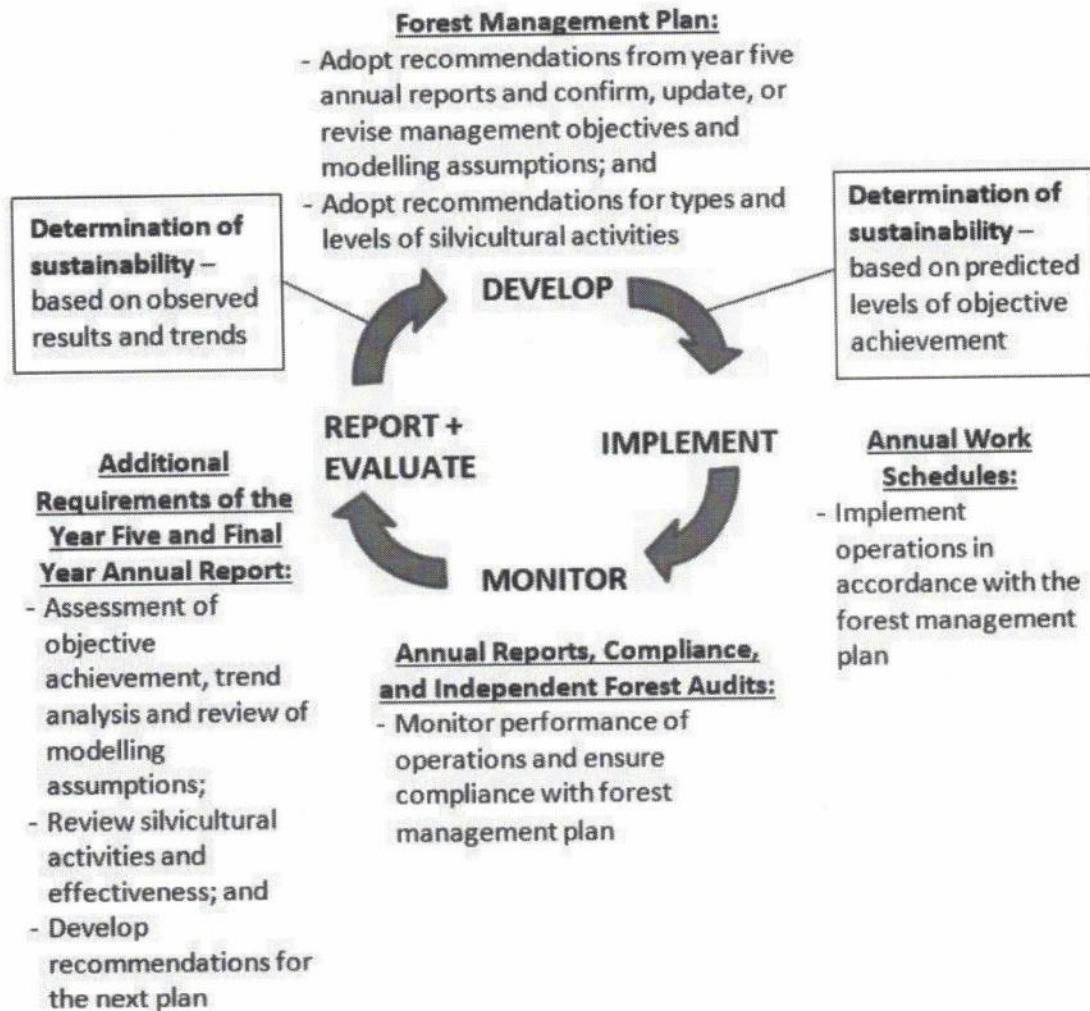


Figure 1. The adaptive management cycle taken from MNR's Forest Management Planning Manual (2017)

The CFSA, through its regulated manuals, requires that forest management guides be used in the preparation of a forest management plan. Using the forest management guides during the planning and implementation of forest management activities is also a legal requirement under MNR's class environmental assessment approval for forest management on Crown lands in Ontario as set out in Declaration Order MNR71.

Current guides include:

1. Forest Management Guide for Boreal Landscapes (Boreal Landscape Guide)
2. Forest Management Guide for Great Lakes-St. Lawrence Landscapes (GLSL Landscape Guide)
3. Forest Management Guide for Conserving Biodiversity at the Stand and Site Scales (Stand and Site Guide)
4. Forest Management Guide to Silviculture in the Great Lakes-St. Lawrence and Boreal Forests of Ontario
5. Silvicultural Guide to Managing Southern Ontario Forests
6. Management Guidelines for Forestry and Resource-Based Tourism (Tourism Guide)

7. Forest Management Guide for Cultural Heritage Values (Cultural Heritage Values Guide)

MECP Area of Focus 1 – Landscape Approaches

The Endangered Species Act sets requirements that must be met for each species that is listed as endangered or threatened. Landscape approaches may provide new tools for managing species at risk within specific geographic areas or ecosystems where the needs of multiple species at risk can be addressed. The case-by-case and species-specific policy approach to implementing the Endangered Species Act can sometimes limit the ability to achieve positive outcomes for species at risk. More broadly, protection and recovery approaches for individual species can limit or conflict with one another. For certain species or habitats, the ability to take a more strategic approach may be preferred.

For species that depend on habitat across wide ranges, a landscape approach that enables planning and authorizing activities at a broad scale may be preferred.

Forest management delivered through the CFSA and over 438,000 square kilometres of land and water is currently the only example Ontario has in providing a landscape approach to all wildlife species, including species at risk. This has been accomplished outside of the ESA and for the last 25 years, demonstrating that “*positive outcomes for species at risk*” do not require the prohibitions of the ESA itself. In fact, the current prohibitions (kill, harm harass, and destroy habitat) and authorizations (providing an overall benefit to the species) under the ESA currently prevents a landscape approach from occurring.

Landscapes are dynamic; through naturally occurring and stochastic events such as wildfire, insect outbreaks, ecological succession, and severe wind events, or, through anthropogenic impacts such as wildfire suppression, forest harvesting, road building and maintenance, recreation, and the impacts of a changing climate.

It is impossible to protect habitat features in perpetuity with without disturbance or habitat renewal. A “*landscape approach*”, therefore, must incorporate a renewal mechanism for species at risk habitat that emulates these natural events. The challenge government will encounter while pursuing a landscape approach is that under the current framework of the ESA there is no differentiation made between habitat “*renewal*” and habitat “*destruction*”.

Permits and instrument authorizations under the ESA authorizes a person to engage in an activity specified in the permit that would otherwise be prohibited by section 9 or 10 of the ESA. The requirements of these authorizations can require that an overall benefit to the species be achieved within a reasonable time through requirements imposed by the conditions of the authorization. This will not be possible to reconcile at a landscape level without some kind of regulation or new authorization. A landscape approach must also incorporate a number of other values (social, cultural, environmental) and wildlife species that are not at risk. This goes beyond the scope and intent of the ESA.

We strongly believe that landscape approaches should be perused by MECP, however, as described in the background section of this document, existing regulated guides and manuals delivered through the CFSA and under authority of the MNRF provide for landscape, stand, and site level direction for species at risk. We therefore recommend that the current regulation be made permanent by removing the July 1, 2020 expiration to forest operations on Crown forests in O. Reg. 242/08.

OFIA Recommendation 1: Move forward with a permanent section 55 (1) (b) regulatory exemption to the forest sector to continue enabling landscape approaches currently being delivered under the Crown Forest Sustainability Act.

If MECP was to pursue a landscape approach through the ESA this would have no impact on exiting species at risk management and forest operations being delivered under the CFSA. Therefore, work will need to be done with the MNRF on addressing the current species-by-species “*area of concern*” (AOC) prescription approach being taken through the forest management planning process and the *Forest Management Guide for Conserving Biodiversity at the Stand and Site Scales* (the Stand and Site Guide).

AOC prescriptions contained within the Stand and Site Guide protect individual species and individuals of species with onerous and often unneeded no-cut restrictions and conditions on road building/use. This is potentially at the expense of healthy populations of SAR, other wildlife species, and desired long-term forest composition targets, resulting in unanticipated changes to long-term forest structures.

We believe that good work was being done under the previous Forest Industry Working Group (FIWG) on developing more workable AOC prescriptions, however, we believe government can achieve positive outcomes for SAR and considerable efficiencies if there is a movement away from the individual species approach currently being pursued in forest management planning.

OFIA Recommendation 2: Working under the section 55 (1)(b) regulation, the Ministry of Natural Resources and Forestry (MNRF) must develop workable species at risk policy delivered under the CFSA that contributes to working landscapes and functioning ecosystems while incorporating socio-economic impact analysis, jointly, with practitioners, affected stakeholders, and Indigenous communities.

MECP Area of Focus 2 – Listing Process and Protections for Species at Risk

The Endangered Species Act provides science-based assessments of native plants or animals by an independent committee of experts called the Committee on the Status of Species at Risk in Ontario (COSSARO). Species that are assessed by COSSARO as being extirpated, endangered, threatened or special concern are then classified as such on the Species at Risk in Ontario List. The Endangered Species Act provides automatic species and habitat protections for species that are listed as endangered or threatened.

- *There is not enough public notice before a new species is automatically listed on the Species at Risk in Ontario List.*
- *In some cases, automatic species and habitat protections can contribute to high uncertainty and costly impacts to businesses and the public.*
- *In some cases, the information around the assessment and classification of a species as threatened or endangered by the independent Committee on the Status of Species at Risk in Ontario is not transparent enough.*

MECP's paper asks discussion questions aimed at what happens after a species is listed through COSSARO. However, we would encourage MECP to pay particular attention on the front-end of the process and how a species is evaluated by COSSARO in the first place.

Rather than having single species-specific experts dominate the membership of COSSARO, more diverse representation to include statisticians, computer modelling experts, registered professional foresters,

Indigenous communities, applied biologists etc, while having the ability to retain recognized experts in specific species from outside of COSSARO, would provide a more defensible assessment of the status of the species.

OFIA Recommendation 3: Overhaul the membership of COSSARO to reflect more generalist professionals and Indigenous communities rather than academics with expertise in a very limited field of study. Known experts in a particular species, including local MNR biologists and local RPFs should be invited to participate in the deliberation of species being evaluated by COSSARO at least 12 months before the committee meets to evaluate the species' status.

OFIA believes there is an overreliance and application of the precautionary principle without adequate spatial distribution data. COSSARO should not default to listing a species "at risk" in these common situations. MECP should establish a higher bar for the listing of species where data is clearly deficient.

There are examples of species that have been listed as "threatened" or "endangered" that should have been classified as "data deficient". More use of and a better definition of what "data deficient" is will prevent inaccurate listings while focusing more research dollars on defensible population studies.

OFIA Recommendation 4: Develop a clear process for using the "data deficient" category, particularly for species with a wide distribution and lack of data.

There needs to be better consideration and recognition for the regional distribution of a species throughout its range and across Ontario. Species that are at risk within urban areas in Southern Ontario can appear to be widespread and abundant in more rural/northern areas.

OFIA Recommendation 5: COSSARO should consider the use of regional sub-populations to account for differences in status across the province, risk to the species and the relative risk of human activities. Populations of species at the normal edge of their ranges in Ontario, outside of their core range, should be evaluated with due consideration of their global population.

If, after addressing the previous three recommendations, COSSARO determines a species to be at risk, the committee can not have ultimate authority of automatically listing and protecting that species; an additional layer of accountability is required. COSSARO must instead make a *recommendation* to the responsible minister on the listing decision who will weigh the scientific evidence provided by COSSARO, along with a socio-economic analysis of the impacts of such a decision. This will better align Ontario with what is happening at a federal level.

COSSARO should not have the authority to automatically list and automatically protect a species. The Minister of Environment, Conservation and Parks should consider the evidence, request reassessment of the listing given adequate scientific rationale and prevent automatic protections given a review of socio-economic impacts.

OFIA Recommendation 6: Add an additional layer of accountability by having the responsible minister weigh scientific evidence provided by COSSARO with the socio-economic impacts before a species is automatically listed and protected.

As discussed further in MECP's focus area 3, a better process of re-evaluating the status of a species is needed. Currently, species at risk are re-evaluated on a 10-year cycle. A process of considering defensible evidence provided by outside parties to COSSARO.

The current system discourages individuals from disclosing sightings of species at risk out of a perceived or real fear of being penalized. This data can help inform population trends and other important information that should be considered during the evaluation of a species but is currently being lost. Government needs to develop a process for this information to be considered in the evaluation of a species while protecting the individual or organization who reports it.

OFIA Recommendation 7: Reassessment of species at risk should be considered when credible evidence has been presented to the responsible ministry beyond what is currently permitted within the ESA.

OFIA Recommendation 8: Enable individuals and organizations to report on SAR sightings without the perceived or real fear of being penalized for doing so.

MECP Area of Focus 3 – Species Recovery Policies and Habitat Regulations

A Government Response Statement outlines the actions the government intends to take or support to help recover each species that is endangered or threatened (i.e. it is a species-specific policy). The Endangered Species Act requires that a Government Response Statement be published within nine months after a recovery strategy is prepared. The response statement is based on advice provided in the recovery strategy, social and economic factors, and input from stakeholders, other jurisdictions, Indigenous peoples and the public.

No later than five years after a Government Response Statement is published, the Act requires a review of progress be conducted towards the protection and recovery of the species. When a species is listed as endangered or threatened, its general habitat is protected. A species' "general habitat" is the habitat the species depends on for its life processes. In addition, the Act requires that a habitat regulation be developed for each species that is endangered or threatened. A habitat regulation provides a description of the habitat that is protected and replaces the general habitat protection.

- In some cases, the time limit of nine months to develop the Government Response Statement for an endangered or threatened species is too short, and there is no option under the Act to extend this timeline when needed.*
- In many cases, conducting a review of progress towards the protection and recovery of a species within five years of the Government Response Statement is too soon.*
- The development of a habitat regulation is not needed for each species that is endangered and threatened since general habitat protection applies and can be clarified through the use of general habitat descriptions.*

Providing government with more flexibility in terms of timelines of Government Response Statements (policy direction), 5-year review, and habitat regulations is something that we support.

Biological reviews of SAR (population dynamics, observations, community information etc.) should feedback into an adaptive management cycle, similar to the CFSA's guides and manuals. For example, if during the 5-year review it is determined that there are substantially more of an individual than initially thought at time of the listing, this information should quickly and easily feedback into a review by COSSARO to determine if a species still qualifies as being "at risk".

OFIA Recommendation 9: The current 5-year review should go beyond simply listing actions that have taken place. A biological review of the species should be included and feedback into the COSSARO listing process.

OFIA Recommendation 10: Habitat renewal should not be viewed as habitat destruction.

MECP Area of Focus 4 – Authorization Processes

The Endangered Species Act includes prohibitions against the harm, harassment or killing of species listed as endangered or threatened and prohibits the damage or destruction of their habitat. Under the Act, the government can issue different types of permits or other authorizations for activities that would otherwise not be allowed.

What new authorization tools could help businesses achieve benefits for species at risk? (e.g., in lieu of activity-based requirements enable paying into a conservation fund dedicated to species at risk conservation or allow conservation banking to enable addressing requirements for species at risk prior to activities.)

What changes to authorization requirements would better enable economic development while providing positive outcomes and protections for species at risk? (e.g., simplify the requirements for a permit under s. 17(2)d, and exemptions set out by regulation.)

How can the needs of species at risk be met in a way that is more efficient for activities subject to other legislative or regulatory frameworks? (e.g., better enable meeting Endangered Species Act requirements in other approval processes.)

Since the ESA was passed in 2007, forestry has operated under the same ESA authorization. Section 55 (1)(b) of the ESA has provided forest operations on Crown land with an exemption to the prohibitions of the ESA as long as a person does so under the authority of a licence granted under the *Crown Forest Sustainability Act, 1994*. As described in the background section of this document, this authorization is the most effective way of achieving equivalency between the CFSA and ESA and has withstood divisional, appeals, and supreme court challenges.

The Ontario government and the forest sector face a large amount of uncertainty during the short regulation periods, with the current one expiring July 1st of next year. If this regulation was to expire, the forest sector would be required to submit a section 17(2)(c) permit for each activity and species at risk. Forest management on Crown land currently covers 438,000 square kilometres of land and water and it was once estimated over 50,000 17(2)(c) permits would be required to be submitted by industry and approved by government. To date, MNRF/MECP has approved just over 200 such permits over the 10 years the ESA has been in place. A huge amount of government resourcing would need to take place if the forest sector was required to go down the permitting route in the absence of a permanent section 55 regulation.

OFIA Recommendation 11: Remove the July 1st, 2020 expiry found in O. Reg. 242/08 (22.1) to forest operations on Crown land giving the sector and government greater certainty.

Authorizations enable activities that would otherwise not be allowed under the prohibitions of the ESA. In the current ESA, many authorizations require achieving an “*overall benefit*” to a species at risk within “*reasonable timelines*”. The core of OFIA’s concerns regarding legal challenges stem from these key terms (e.g. “*overall benefit*”, “*reasonable timelines*”, “*reasonable alternatives*”, etc.) used in the ESA and an absence of satisfactory definition. OFIA has been referred to the Endangered Species Act Submission Standards for Activity Review and 17(2)(c) Overall Benefit Permits document for an explanation, but it raises more questions than it answers.

Figure 2, taken from the submission standards document, illustrates the concepts of “overall benefit” and is typically the same explanation provided by MNR/MECP staff. Defining what the “current state” line looks like for a given species is a difficult task, especially in forestry when planning often looks 100-years plus into the future. The current state of a species is never static, since habitats (forests) are dynamic. As a result, the application of these concepts are more suitably applied on a project-level (bridges, highways, windfarms, etc.) basis where only a short snapshot in time is required.

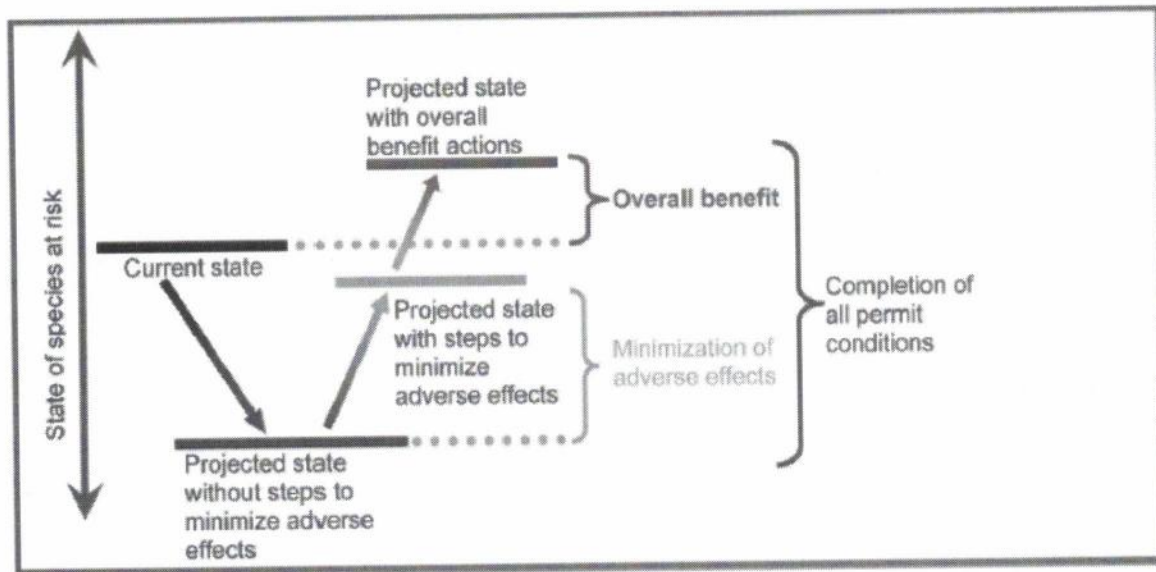


Figure 2. A simplified representation of overall benefit concepts from the Endangered Species Act Submission Standards for Activity Review and 17(2)(c) Overall Benefit Permits.

To better align the ESA with the stated outcomes of the review, we believe the Ontario government should consider changing the language of these key terms. Forestry in Ontario provides an example of providing positive outcomes for species at risk outside the prohibitions of the ESA and this should be reflected in the legislation.

OFIA Recommendation 12: Replace the term “overall benefit” within sections 17 (2) (c), 18 (1) (e) (iii) (A), and 18 (2) (f) (iii) (A) with “positive outcomes” to species at risk.

MRNF and the forest sector have attempted to “harmonize” and “integrate” the ESA/CFSA in the past and we have a number of serious concerns remaining from that process. In 2016, the OFIA’s main opposition with the drafted Forest Management Planning Manual (FMPM) was the inclusion of a section 18 overall benefit instrument. Despite the sector’s well documented concerns, MNR/MECP choose to finalize the FMPM with this authorization under the ESA included in the regulated manual. At the same time, MNR/MECP was working on a new Species at Risk Guide (SAR Guide) which incorporated new SAR prescriptions.

Through this process it became clear that MRNF assigned a higher priority to the ESA when compared to the CFSA. Prescriptions were being developed in isolation within the MNR/MECP to achieve “avoidance”, “minimization of adverse effects” or achieving an “overall benefit” to a species at risk. This resulted in an overly complicated and confusing process of multiple AOC prescriptions for a single species and drove the MNR/MECP further and further away from a “landscape approach”, with no recognition or consideration of socio-economic impacts.

In 2017, Minister Kathryn McGarry of MNRF committed to postponing the SAR guide until the MNRF achieved a better understanding of the impacts of climate change and the cumulative impacts of species at risk on a broad, dynamic landscape, and a much better appreciation of the socio-economics.

With the passing of the current regulation in 2018 by Minister Nathalie Des Rosiers, it was our understanding that there was a change in direction and MNRF was no longer working to harmonize these two acts. During our recent discussions with MECP, it has become clear that this term, along with a new, revised section 18 instrument has resurfaced as a potential outcome of the ESA review for the forest sector. We strongly disagree with this approach.

There is a sense within MECP that a long-term or permanent section 55 regulation to the forest sector will leave the Crown and the sector exposed to legal challenge under section 57 of the ESA that states “*in the case of any proposed regulation under subsection 55, whether the regulation will jeopardize the survival of the species in Ontario.*” A review of previous court decisions find that this concern is unfounded.

In *Wildlands League v. Ontario (Natural Resources and Forestry)*, 2016 decision the Ontario Court of Appeals stated,

“The Divisional Court dismissed the judicial review application. Lederer J., for the court, held that the requirements of s. 57(1) were met. He stated that there was nothing to require the Minister to examine the impact of the proposed regulation on each species to which the regulation would apply, separately or independently, and that it was sufficient if there was a program, approach or other condition that, in the opinion of the Minister, demonstrated there will be no such jeopardy or risk of other significant adverse effects (at para. 35).”

“Section 57 provides for certain conditions precedent before a regulation can be made under s. 55(1)(b). First, s. 57(1) provides that where a regulation is proposed to be made under s. 55(1) that would apply to a listed endangered or threatened species and the Minister is of the opinion that the regulation is likely to: jeopardize the survival of the species in Ontario; have any other significant adverse effect on the species; or result in a significant reduction in the number of members of the species that live in the wild in Ontario, then the Minister shall consult with a person who is considered by the Minister to be an expert on the possible effects of the proposed regulation on the species.”

2016 *Sharpe, LaForme and van Rensburg JJ.A.*, they stated

“I agree with the Divisional Court that the Minister properly considered the effect of the regulation on each affected SAR. The Divisional Court therefore did not err in concluding the Minister complied with the necessary statutory condition precedent to consider the impact of the regulation on each affected SAR in forming his opinion that the regulation was not likely to jeopardize the survival of, or to have any other significant adverse effect on, each species.”

“The appellants say that, under s. 57(1), the Minister must assess whether a proposed regulation will likely jeopardize the survival of, or have another significant adverse effect on, each individual SAR to which it applies. They say that the Divisional Court erred in accepting the Minister's Determination that was based on the effect of the regulation on only “a few” SAR or all SAR collectively.”

“I agree with the respondents that whether the Minister asked and answered the right question – whether he considered the effect of the proposed regulation on each SAR and not just on “some” species or SAR as a group – can be evaluated by looking at the Explanatory Note. The Explanatory Note provides the basis for the opinion “that the effect of the proposed regulation is not likely to jeopardize the survival of

the affected endangered or threatened species in Ontario or to have any other significant adverse effects on these species at risk... each exemption contains conditions that require measures to be taken to minimize the effects on individual affected SAR.”

“In this regard, I note that the regulation operates under a similar approach as the ESA. It imposes limitations and conditions on proponents seeking to rely on exemptions. The limitations and conditions serve to avoid or minimize adverse effects on SAR, and in some cases, provide benefits to SAR.”

Wildlands League and Federation of Ontario Naturalists appealed this decision to the Supreme Court of Canada, however, the application was dismissed with costs. These three court cases give us the best legal precedent we have for maintaining the section 55 regulation to forest operations on Crown lands.

If section 18 of the ESA is amended to remove the requirement of achieving an “*overall benefit*” test, it is not clear to the OFIA how this will be materially different than the current section 55 regulatory exemption to forest operations on Crown lands, other than being untested by the legal system. We believe the MECP is misguided if the use of an authorization “*instrument*” is being pursued rather than “*regulatory exemption*” as a public relations exercise rather than addressing the long-term requirements of the sector.

OFIA Recommendation 13: Equivalency through section 55, not harmonization through section 18 is required for future success and is well supported by legal precedent.

Conclusion and Summary of Recommendations

OFIA thanks the MECP for an opportunity to comment on ERO number 013-4143, *the 10th Year Review of Ontario's Endangered Species Act: Discussion Paper*. By constructively working with government, stakeholders, and Indigenous communities Ontario's forest sector is committed to achieving the desired outcomes of the ESA review. We believe this document and the recommendations provided delivers on MECP's desired outcomes.

Area of Focus 1: Landscape Approaches

1. Move forward with a permanent section 55(1)(b) regulatory exemption to the forest sector to continue enabling landscape approaches currently being delivered under the Crown Forest Sustainability Act (CFSA).
2. Working under the section 55 (1)(b) regulation, the Ministry of Natural Resources and Forestry (MNRF) must develop workable species at risk policy delivered under the CFSA that contributes to working landscapes and functioning ecosystems while incorporating socio-economic impact analysis, jointly, with practitioners, affected stakeholders, and Indigenous communities.

Area of Focus 2: Listing Process and Protections for Species at Risk

3. Overhaul the membership of COSSARO to reflect more generalist professionals and Indigenous communities rather than academics with expertise in a very limited field of study. Known experts in a particular species, including local MNRF biologists and local RPFs should be invited to participate in the deliberation of species being evaluated by COSSARO at least 12 months before the committee meets to evaluate the species' status.
4. Develop a clear process for using the “data deficient” category, particularly for species with a wide distribution and lack of data.

5. COSSARO should consider the use of regional sub-populations to account for differences in status across the province, risk to the species and the relative risk of human activities. Populations of species at the normal edge of their ranges in Ontario, outside of their core range, should be evaluated with due consideration of their global population.
6. Add an additional layer of accountability by having the responsible minister weigh scientific evidence provided by COSSARO with the socio-economic impacts before a species is automatically listed and protected.
7. Reassessment of species at risk should be considered when credible evidence has been presented to the responsible ministry beyond what is currently permitted within the ESA.
8. Enable individuals and organizations to report on SAR sightings without the perceived or real fear of being penalized for doing so.

Area of Focus 3: Species Recovery Policies and Habitat Regulations

9. The current 5-year review should go beyond simply listing actions that have taken place. A biological review of the species should be included and feedback into the COSSARO listing process.
10. Habitat renewal should not be viewed as habitat destruction.

Area of Focus 4: Authorization Processes

11. Remove the July 1st, 2020 expiry found in O. Reg. 242/08 (22.1) to forest operations on Crown land giving the sector and government greater certainty.
12. Replace the term "*overall benefit*" within sections 17(2)(c), 18(1)(e)(iii)(A), and 18(2)(f)(iii)(A) with "*positive outcomes*" to species at risk.
13. Equivalency through section 55, not harmonization through section 18 is required for future success and is well supported by legal precedent.