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Environmental Registry of Ontario [ESAREg@ontario.ca](mailto:ESAREg@ontario.ca)

RE: Comments on ERO 019-2636

The Wilderness Committee is a national registered charity that works for people-powered protections for wilderness, wildlife, climate and public resources, with 14,000 supporters in Ontario.

### **1. The Conservation Fund will act as an incentive to destroy habitat**

The easier it is to obtain an authorization for harmful activities, the more likely they are to occur. This was a lesson learned, for example, when the government introduced sweeping regulatory exemptions for proponents of harmful activities back in 2013. According the Environmental Commissioner of Ontario, total ESA authorizations for harmful activities “drastically increased” after the introduction of the 2013 exemptions (ECO 2017 report, p. 227).

A disturbing example concerns one of the Fund species, the barn swallow. Prior to the exemptions, only two permits had ever been granted for activities harming this threatened species. Once exemptions became possible, there were 525 authorizations (520 exemptions, five permits) between 2013 and 2017 (ECO 2017 report, p. 232). There is no doubt that the Fund will make authorizations easier. MECP is explicit about its intent to “shorten timelines, reduce burdens and provide cost certainty” for proponents of harmful activities.

The ministry anticipates that regulatory amendments associated with the Fund will “enable more proponents to register their activities rather than seek permits or agreements from the ministry.” This means that more proponents will be inclined to have their harmful activities exempted from ESA requirements, rather than meet the more stringent requirements of permits or agreements.

### **2. Overall benefit standard abandoned**

The ESA was originally designed to provide some flexibility for harmful activities to occur, based on the premise that the proponent would undertake actions that would more than compensate for the damage done. They were required to provide an “overall benefit” to the species, a standard intended to uphold the purpose of the ESA in protecting and recovering species at risk by achieving a net gain as opposed to merely mitigating damage (making activities less harmful).

The 2013 exemptions were the first disastrous setback to the overall benefit standard. According to the Environmental Commissioner, “few activities now are proceeding under the overall benefit approach – the vast majority of activities are proceeding under exemptions that only ask proponents to minimize harm” (ECO 2017 report, p. 236).

The Fund represents the final, fatal blow to overall benefit because, as set out in the amended ESA (sec. 17(2)(c)(i)), payment into the Fund is an alternative to the provision of overall benefit. There is no link in the amended ESA between the Fund and the provision of overall benefit, and no requirement that the benefit be proportionate to or related to the harmful impact. In this sense, the Fund is a gross abandonment of the overall benefit standard and thus of the goal of recovery itself.

### **3. Funds only loosely tied to species and communities negatively impacted**

MECP is proposing, in the initial stages, to include six species in the Fund scheme: bobolink, eastern meadowlark, barn swallow, butternut, eastern whip-poor-will and Blanding's turtle. With the exception of whip-poor-will, these species are currently those most frequently affected by activities authorized under the ESA (ECO report, p. 232). Of these species, the first four are subject to regulatory exemptions, meaning that proponents do not need a permit or agreement to undertake harmful activities. Instead, they must meet the conditions for an exemption, set out in the regulation. In the case of whip-poor-will and Blanding's turtle, where ESA permits are still required, the Fund offers a quick and easy alternative to providing an overall benefit.

It is important to note that habitat loss and degradation are key factors in the decline of whip-poor-will, bobolink, meadowlark and Blanding's turtle and thought to be a factor in the decline of barn swallow. To the extent that the Fund will facilitate and accelerate habitat loss through exemptions or permits without the provision of overall benefit, it will contribute to the decline of these species.

Add to this the fact that payments to the Fund would be pooled and may be used to benefit any Fund species, not necessarily the one that is impacted. Once the funds are in the pot, there is no direct link between the harm inflicted (the species or the degree and location of the negative impact) and the remedy provided through the Fund. There is also a strong likelihood of significant delays between the harmful activity and any reparative action. Depending on political priorities or on the availability or convenience of compensating activities, there is a distinct possibility that some species or parts of their range will be sacrificed, to the benefit of others.

It is not only species that might lose out, but also communities where harmful activities take place. There is no requirement that Fund monies be used to compensate for negative environmental or social impacts in the watersheds, municipalities or Indigenous traditional territories where the harm occurs. Some communities will see valued natural areas destroyed or degraded, possibly with no local reparation whatsoever for the loss of ecological, cultural, spiritual, recreational, aesthetic or economic values.

Payment into the Fund means that someone, somewhere, at some point will undertake activities to provide some level of benefit to the species for the harm done. Activities supported by the Fund need only be "reasonably likely" to benefit the species harmed. All in all, there's no certainty for the species or communities impacted, but the proponent gains the certainty of being able to walk away scot-free regardless, once they pay into the Fund.

### **4. Fund charges fail to address risk and liability**

MECP has provided formulas to calculate the fee to be charged to proponents of harmful activities. These charges include costs for the compensating activities (including monitoring), land (where applicable), administration (10 percent) and inflation. The amount of the benefit to be generated is to be based on a 1:1.5 ratio, so that, for example, the loss of 1 hectare of habitat requires the provision of 1.5 hectares of new habitat. The quality or functions of the replacement habitat are not considered. The

replacement ratio is roughly based on the costs incurred by proponents to date in meeting the conditions of their ESA permits. Whether these expenses have been sufficient to achieve the required outcomes is unknown, due to a lack of monitoring and testing for efficacy, indicating a weak rationale for the ratio.

While it is good to see monitoring, land values and inflation factored into the charges, these tidy formulas fail to take into account the significant risk associated with offsetting the harm done. According to the International Union for the Conservation of Nature, biodiversity offsets generally have very limited success and net gains have rarely been realized in practice (IUCN, 2014, p. 10). The World Bank Group has flagged offsets involving habitats of “highly threatened ecosystems or species” as particularly high risk (World Bank Group, 2016, p. 14).

The Fund, as discussed above, is likely to encourage much broader use of risky offsets for threatened and endangered species. Risks outlined by the World Bank Group include: impacts that may be hard to measure directly; the failure or only partial success of the offset; potential lower quality or conservation value of the replacement habitat; and temporal lags between the harm done and the full realization of the compensation provided (World Bank Group, p 20). No assessment of or compensation for these risks is factored into the proposed Fund charge formulas.

The formulas also fail to account for liability. Under permits and exemptions, proponents of harmful activities are responsible for ensuring that the compensating activities are implemented. There is value to the proponent of being absolved of liability, and this has not been reflected in the formulas. Once the proponents are out of the picture, who is legally responsible if Fund actions fail to produce the intended result? The answer to this question is disturbingly unclear. But then again, perhaps the Fund itself eliminates the need to even consider liability, given the low bar that has been set: actions funded need only be “reasonably likely” to “support” the protection or recovery of Fund species. Overall, based on the formulas, the fees to be charged to proponents of harmful activities are too low, especially considering that the Fund is expected to pay for itself within a year.

## **5. No long-term government financial support**

The government will initially invest in setting up the Fund, including establishing an agency with a small board and staff for administration. After the first year, MECP anticipates that the agency will be financially independent. In other words, it expects all costs to be covered by the Fund itself. A key concern about this approach, considering the responsibilities of the agency, is that the 10 percent administration fee is unlikely to fully cover costs (e.g., staff salaries, per diems for board members, secretarial support, research, overhead). If 10 percent is not sufficient, will funds be diverted from the compensatory actions to cover these costs? What conservation outcomes will be sacrificed for efficiency? Another concern is whether the Fund will displace current government investments in species at risk protection and recovery, including staffing and other government funds (e.g., the Species at Risk Stewardship Fund). Will the government continue to invest its own money at previous rates, or is it looking at the Fund as a cost-saving measure?

### **Lack of transparency and public accountability**

In administering the Fund, the agency responsible is “to publicly communicate its focus for funding, by submitting to the ministry and publishing a plan for each conservation fund species before any funds are

disbursed for the species.” It will also release annual reports that document “information about funded activities.” There is no requirement or expressed intent, however, to share with the public information about the specific or cumulative impacts of the harmful activities undertaken by proponents (e.g., where the harm occurs, what type of activity or impact, who is responsible, the total area damaged or destroyed). This missing information will make it impossible for the public to assess whether the Fund actions are commensurate with the level of habitat destruction caused by the authorized activities. Similarly, it will make it impossible for the public to track cumulative adverse impacts across the ranges of species at risk.

### **Concluding comments**

For all the reasons outlined above, the Wilderness Committee does not support the government’s plan to proceed with implementing the Fund. It will lead to an increase in habitat loss and degradation, a primary threat to most of the Fund species. Insofar as the Fund circumvents the overall benefit standard, it works against the protection and recovery of at-risk species. It fails to account for adverse environmental, cultural and economic impacts on communities or for significant additional risks to species already threatened with extinction. It also fails to ensure transparency with respect to site-specific and cumulative harm to the habitat of at-risk species.