

August 23, 2016

Honourable Kathryn McGarry
Minister of Natural Resources and Forestry
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Sent via regular mail

Dear Minister McGarry,

Re: EBR# 012-7742 and 012-7568 – Delay postings under the Ontario *Endangered Species Act*

We represent Ontario Nature and the David Suzuki Foundation with respect to Ontario's delayed recovery strategies under the *Endangered Species Act, 2007* (ESA). On behalf of these organizations, we bring to your attention a serious and chronic problem in the implementation of this law: delays in preparing recovery strategies for species at risk, in contravention of legal requirements.

Ontario Nature is a charitable conservation organization that protects wild species and wild spaces through conservation, education and public engagement. Established in 1931, Ontario Nature represents over 30,000 members and supporters and more than 150 member groups across the province.

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

We track trends in the preparation of recovery strategies and habitat regulations for listed species in Ontario and other jurisdictions on behalf of our clients. There are two broad categories of species in Ontario that have suffered from persistent delays in the preparation of recovery strategies under the ESA. The first category is "non-priority" species. These species have been subjected to delay notices that state simply that the reason for the delay is that priority is being given to the preparation of recovery strategies for other species ("non-priority species"). The second category are species that have a delay notice posted providing as a reason that the Ontario

government is awaiting the preparation of a recovery strategy for the species under the federal *Species at Risk Act* (“SARA-delayed species”).

The Ontario government recently posted updated delay notices for 33 SARA-delayed species and 15 non-priority species (EBR# 012-7742 and 012-7568)

A majority of these delays are for recovery strategies that are approximately three years overdue. The ESA requires that a valid delay notice must be posted to the Environmental Bill of Rights Registry prior to the date when the recovery strategy is due pursuant to subsection 11(5) of the ESA. If no valid delay notice occurs before that date, then the recovery strategy is legally overdue pursuant to subsection 11(4). For a delay notice to be valid, subsection 11(5)(c) requires that the delay notice include: “an estimate of when the preparation of the strategy will be completed.”

We have identified 44 species for which no valid delay notice exists. The recently updated delay notices for 48 species continue to exclude the required time estimate for completion of a recovery strategy. These notices fail to meet the timing requirements of subsection 11(5) of the ESA. Accordingly, the recovery strategies for these species are legally overdue.

There are a handful of particularly egregious cases where the original reason provided for the delay was that the Minister was awaiting the preparation of a SARA recovery strategy.¹ In these cases, the SARA recovery strategy has now been prepared in either draft or final form. Several of these species have been included in the update and downgraded to “non-priority” species instead of meeting the previous commitment to adopt the federal strategy in a timely manner once it was available.

All 28 of the updated delay postings for SARA-delayed species make no commitment to adopt the federal recovery strategies for these species, instead stating only that: “Once federally-led strategies are finalized, they will be *available for adoption* under the ESA.” This statement is non-compliant with subsection 11(5)(c) of SARA as the posting fails to provide any estimate of when the recovery strategy for Ontario species will be completed. It is also unreasonable in that it fails to make any commitment for Ontario to adopt the federal strategy once it is complete.

Of the delayed species identified above:

- 19 have recovery strategies that are anticipated to be completed federally under SARA within the next year;
- 9 have draft recovery strategies under SARA that have not been adopted by Ontario;
- 15 already have finalized recovery strategies under SARA that have not been adopted by Ontario, sometimes after several years;

¹ Channel Darter, Colicroot, False Hop Sedge, Kentucky Coffee Tree, Least Bittern, Loggerhead Shrike, Scarlett Ammannia, Toothcup.

- 10 are not actually listed federally as endangered or threatened, and thus no federal recovery strategy is required.² Despite this, 8 of the delay postings for these species provide waiting for a SARA recovery strategy as the reason for delay.

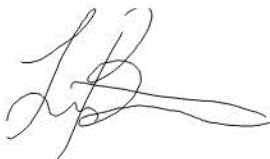
While we appreciate that subsection 11(5)(a)(ii) of the ESA permits the Minister to issue an otherwise legally valid delay posting due to “the desire to prepare the strategy in co-operation with one or more other jurisdictions” for this to be a *bona fide* reason for the delay, there must be a reasonable expectation that the federal government will be working on the preparation of recovery strategies in coordination with Ontario.

In our opinion, the species that now have completed SARA recovery strategies that have just been downgraded to “non-priority” species demonstrate a lack of any such true coordination between Ontario and the federal government in the preparation of recovery strategies. In any event for the delay postings to be legally valid, they must be posted before the recovery strategy is due and Ontario must estimate when the recovery strategy will be completed.

We attach a chart of the species for which there is a legally delayed Ontario ESA recovery strategy, including noting if they are SARA-listed species or not. We note that as there is no legally valid delay notice for these species and as a result the Ontario government is in contravention of the legal requirements of the ESA. If there is evidence of cooperation between the federal government in the preparation of the recovery strategies for these species, or a timeline for the completion of the recovery strategy by Ontario, we ask that you provide this information to us.

We would be pleased to speak with you about this at any time.

Yours truly,



Laura Bowman
Barrister & Solicitor
Ecojustice

Cc. Dianne Saxe, Environmental Commissioner of Ontario
Vivian Brownell – Senior Species at Risk Biologist, Ministry of Natural Resources and Forestry
Charles Hatt, Ecojustice
Anne Bell, Ontario Nature
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Encl. – Chart of legally delayed species.

² Pugnose Minnow, Silver Chub, Lilliput, Threehorn Wartyback, Gypsy Cucko Bumble Bee, Silver Shiner, Yellow-Breasted Chat, Cerulean Warbler, Hickorynut, Mountain Lion

