Environmental Laws Impacted by the Budget Bill

Canadian Environmental Law Association
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CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

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Canadian Environmental Law Association and Ecojustice Canada have conducted a comprehensive legal analysis of the potential impact of proposed amendments to various environmental statutes contained in Bill 55, the Strong Action for Ontario (Budget Measures) Act, 2012. Key concerns, as well as key opportunities, for meeting Ontario's fiscal and ecological responsibilities are identified. April 2012

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Introduction

Canadian Environmental Law Association and Ecojustice Canada have jointly conducted a legal analysis of the implications of proposed changes to legislation proposed as part of Ontario's Budget 2012. The analysis was conducted by CELA Counsel Rick Lindgren and Ecojustice Staff Lawyers Sean Nixon and Anastasia Lintner.

CELA is a public interest law group founded in 1970 for the purposes of using and improving laws to protect public health and the environment. Funded as a legal aid clinic specializing in environmental law, CELA represents individuals and citizens' groups in the courts and before tribunals on a wide variety of environmental matters. In addition, CELA staff members are involved in various initiatives related to law reform, public education, and community organization.

Ecojustice is Canada's premier non-profit organization providing free legal and scientific services to protect and restore the environment and human health. From offices at four locations in Canada in three provinces, Ecojustice legal counsel work on the leading environmental issues across the country, at every level of court.

Both organizations have a long history of engaging in legislative analysis of environmental statutes, most recently CELA and Ecojustice worked together on substantive written and oral submissions before the Standing Committee on General Government regarding Bill 72, the *Water Opportunities and Water Conservation Act, 2010*. We have prepared this legal analysis in order to enhance the dialogue evolving with respect to Ontario's fiscal and ecological goals, in order to ensure that any amendments to environmental statutes enacted as a budget implementation measure are consistent with both. This legal brief is the result of our initial analysis of Bill 55 as introduced for First Reading. We reserve the right to update our analysis and make detailed recommendations as Bill 55 works its way through the legislative process.

Overall are concerns are twofold:

- OMNIBUS BUDGET BILLS, which contain amendments to several environmental statutes, do not ensure adequate time for the public to participate in government decision making regarding legislative proposals that may be environmentally significant. The exception from the public participation requirements mandated in the *Environmental Bill of Rights, 1993* specifically for amendments to law and policies that give effect to budget implementation presumes that the impact of the proposed amendments will not be environmentally significant.
- INCREASED REGULATORY DISCRETION will mean less transparency, certainty and predictability. This is an inevitable and unacceptable consequence of streamlining public interest legislation.

Bill 55, the proposed Strong Action for Ontario Act (Budget Measures), 2012, will amend numerous statutes, including 11 environmental (or related) laws. Because these amendments form part of a bill that is intended to give effect to the provincial budget, the proposed changes are exempted from the mandatory public participation provisions under the *Environmental Bill of Rights, 1993* (EBR, section 33). The exception from EBR consultations for amendments to law and policies that give effect to budget

implementation presumes that the impact of the proposed amendments will not be environmentally significant. In the case where an omnibus bill is used to amend various pieces of environmental legislation, it is even more important to ensure adequate time for the public to assess and comment on the potential impact of the changes. In his most recent Annual Report, the Environmental Commissioner of Ontario was critical of the government's continued use of omnibus legislation to amend various environmental statutes. Section 8.2.1 "Open for Business, Closed to Public Comment: Omnibus Legislation and the EBR" concludes (ECO, Annual Report 2010/2011, p.137):

> At best, using omnibus legislation to amend environmental laws complicates the EBR process. At worst, it can obstruct the public's right to participate in environmental decision making. Environmentally significant decisions must be made in a transparent and accountable manner. The ECO urges prescribed ministries to ensure that any environmentally significant proposals included in omnibus bills undergo the same degree and quality of notice and consultation on the Environmental Registry that would occur if those proposals were contained in stand-alone bills.

CELA and Ecojustice are deeply concerned that some of the proposed amendments have the potential to cause environmentally significant impacts and are not being given the degree of public participation guaranteed by the EBR. We recommend that the environmental statutes, particularly those related to species protection, sustainable forest operations, protected areas, lakes and rivers protection, and public lands be withdrawn from the Schedules of Bill 55 and that the proposed amendments be reconsidered in light of our comments. Proposed changes can then be reintroduced as stand-alone bills, providing the opportunity for public participation in compliance with Part II of the EBR.

CELA and Ecojustice are also concerned about the numerous provisions which give the Minister and/or the Lieutenant Governor in Council (LGinC) open-ended discretion to exempt any person or body from key requirements under these environmental statutes. The public policy basis for these provisions is not obvious in many cases. We will not be able to fully assess the impact of the actual exemptions until draft regulations are made available for public consultation. We anticipate that any regulations enacted under any new powers established with the passing of Bill 55 will be subject to the usual EBR process. More generally, however, CELA and Ecojustice are concerned about the overall increase in Ministerial or regulatory discretion. More regulatory discretion will mean less transparency, certainty and predictability. This is the inevitable and unacceptable consequence of streamlining public interest legislation. We recommend that the government consider our detailed comments and suggestions below, in order to ensure the amendments in Bill 55 do not have any unintended environmental consequences.

As our detailed legal analysis reveals below, some of the proposals are likely to risk environmental protection. These changes should be given careful consideration. At the same time, there are a number of provisions that may enhance both fiscal and ecological responsibility, such as proposed amendments to the Crown Forest Sustainability Act which will permit the collecting of fees.

Detailed analysis on a schedule-by-schedule basis follows below.

Schedule 15, Crown Forest Sustainability Act, 1994

Summary

In our analysis, the following proposed changes are of greatest concern:

- EXCEPTIONS: there a several amendments that would permit the Minister to develop regulations that provide for exceptions to the requirements of the CFSA. These exceptions are inconsistent with the purpose of the CFSA. Proposed amendments will dispense with:
  - the requirement to prepare an FMP
  - harvesting limits
  - the requirement that forest operations be in accordance with the applicable FMP and an approved Work Schedule
- EXTENSION of "other licences": there is a proposed amendment that would give discretion to change the term and extension of forest resource licences that are intended to be short-term and temporary. Since the CFSA already allows for long-term and renewable licences (sustainable forest resource licences), it is not clear why other licences should be open for longer terms and extensions.

Also, in our analysis, there are two proposed changes, that could lead to a re-allocation of the financial burden associated with forest operations and to more transparency in the delegation of Minister's discretion.

Current CFSA Framework

In order to ensure sustainability of public forests, a Forest Management Plan (FMP) is required for all Crown Forest Management Units (sections 1, 8). An FMP is to be prepared according to the Forest Management Planning Manual, which determines sustainability for public forests (sections 2, 8). There are two types of forest resource licences that can be issued for the harvesting of public forests: a sustainable forest licence (section 26) and an "other licence" (section 27). No harvesting of public forests is permitted unless under a FMP and work schedule (section 42).

Impact of Proposed Changes to CFSA

New Exception to preparing FMP (Section 8)

A new subsection proposed for section 8 would provide the Minister with discretion to establish a regulation that describes circumstances in which an FMP is not required. Currently, there is no discretion to exempt the preparation of an FMP. The only time an FMP is not required, is a situation where there has not been a Forest Management Unit created. The Minister does have discretion to designate only part of a public forest as a Forest Management Unit (CFSA, section 7).

Extension to terms of "other licences" (Section 27)

Proposed amendments to section 27 would allow the extension of the term of a licence (subsection 27(2)) and the extension of a term of a licence (subsection 27(4)) to be altered by regulation. Currently, this type of licence is limited to 5 years and can only be extended for 1 year (if the harvesting or other

conditions cannot be met within the 5-year term). These amendments would allow greater flexibility in issuing these licences; however, as the CFSA is currently written, the intention of these licences is that they are short term and nonrenewable (in contrast to the sustainable forest licences). The impact of permitting terms that are listed in regulations is potentially that the intent of these licences will be changed.

Changes to Exception to Harvesting Limits on Forest Resource Licences (Subsection 29(2))

The harvesting limit for a forest resource licence (sustainable or "other") is limited to the amount available in an FMP (subsection 29(1)). Currently, an exception can be made for a licence that is less than one year if the total area is less than 25 hectares (subsection 29(2)). The proposed amendment will allow another exception to be made in circumstances "prescribed by regulation". This provides a great deal of discretion to dispense with harvesting limits.

Changes to Exception for Forest Operation Requirements of an FMP and Work Schedule (Subsection 47(2))

Currently, forest operations are only permitted in accordance with an FMP, any regulatory requirements, and a work schedule (approved by the Minister). The only exception is for a licence that is less than one year if the total area is less than 25 hectares (subsection 47(2)). The proposed amendment will allow another exception to be made in circumstances "prescribed by regulation". This provides a great deal of discretion to allow forest operations outside the requirements of an FMP/work schedule. Since an FMP is the only mechanism for ensuring forest sustainability, allowing greater ability to exempt operations from this requirement is of deep concern.

New section: 68.1

This proposed section will allow the Minister to establish and collect fees for anything required/permitted by the CFSA. This proposed amendment is consistent with ensuring that the true costs of forest management are borne by the forest operation (rather than the public purse).

New section: 68.2

This proposed section will allow the Minister to delegate responsibilities though regulation. This will be more transparent than current Ministerial delegation.

Schedule 16, Delegated Administrative Authorities Act, 2012

Impact of New DAAA

This new proposed legislation will expand and replace the existing *Safety and Consumer Statutes Administration Act, 1996*. Delegated Administrative Authorities (DAA) that currently exist include: the Ontario Motor Vehicle Industry Council (OMVIC), Real Estate Council of Ontario (RECO), Technical Safety and Standards Authority (TSSA), Electrical Safety Authority (ESA), Vintners Quality Alliance of Ontario (VQA), and the Board of Funeral Services. A concern is that a DAA will consist of a Board that is representative of the industry, permitting more industry self-regulation and less direct government oversight. Currently, the Budget announcement focussed on non-environmental DAAs. However, there

is currently (and will still be) the ability to delegate authority to a DAA under the *Clean Water Act, 2006* and the *Electricity Act, 1998*.

The proposed purpose section 1 states: “The purpose of this Act is to provide for the efficient and effective delivery of delegated government programs and services by independent not-for-profit corporations operating within a strong accountability and governance framework.” This is a clearer purpose section than exists in the current *Safety and Consumer Statutes Administration Act, 1996*, section 1: “The purpose of this Act is to facilitate the administration of designated Acts named in the Schedule by delegating to designated administrative authorities certain powers and duties relating to the administration of those Acts.” Including the goal of “provide for efficient and effective delivery” of programs and that the delegation will be to “not-for-profit corporations operating “within a strong accountability and governance framework” are improvements to the legislative language.

Also, the proposed “Revocation in public interest or for non-compliance” provisions (section 13), have more detail and direction than the existing revocation powers (SCSAA, section 6), as well as providing for “revocation on request” of the administrative authority itself (section 14).

The proposed new law would relieve the Crown of liability for the actions of their delegated authority (section 30): “No action or other proceeding for damages shall be instituted against the Crown for damages that a person suffers as a result of any act or omission taken or made in the administration of this Act or of delegated legislation by a person who is not an employee or agent of the Crown.”

Schedule 19, Endangered Species Act, 2007

Summary

In our analysis, the following proposed changes are of greatest concern:

- DEADLINES: several deadlines in the ESA are extended (some indefinitely). Delay in producing and implementing recovery strategies, and in defining and protecting the habitat species need to survive and recover, will in our view generally harm species at risk in Ontario.
- EXEMPTIONS: several new exemptions have been added in the ESA, and the Budget Bill would generally make it easier to get exemptions from sections of the ESA that protect species and habitat.
    - “Minister’s Instruments” under section 18 have been greatly expanded, making it much easier for the government to grant exemptions to the parts of the ESA that protect species and their habitat. The expanded power for the Minister to grant exemptions under section 18 will in our view likely harm Ontario’s species at risk.
    - A new exemption (section 10.1) has been added applying (amongst other things) to the maintenance, repair and replacement of infrastructure and to non-commercial activities occurring within 50 meters of a person’s primary residence (or within a wider area established by regulation). There is no reason to expect that the replacement or repair of the province’s infrastructure (e.g. bridges, highways) should be exempt from the

requirements of the ESA. The possible expansion of the private land exemption through regulation is also of concern.

Current ESA Framework

Sections 9 and 10 of the ESA set out the central prohibitions that protect listed species and their habitat. Under section 9, no person can kill, harm, harass, capture, take or possess, collect, buy, sell, etc. a member of a listed species. Section 10 protects habitat: no one can damage or destroy the habitat of listed endangered or threatened species.

Habitat is defined in subsection 2(1) of the ESA to mean either: a) an area defined in a regulation made by Cabinet (under clause 55(1)(a)); or, b) the area on which a species depends, directly or indirectly, to carry on its life processes.

The ESA allows several exemptions to the prohibitions in sections 9 and 10, including:

- stewardship agreement (ESA, section 16)
- permit (ESA, section 17)
- instrument (ESA, section 18),
- a specific regulation (ESA, clause 55(1)(b))
    - which can have conditions (directly, per ESA, clause 55(1)(b)) OR
    - can require that the exemption only applies if the conditions of an agreement are complied with (ESA, subsection 55(4))

Impact of Proposed Changes to ESA

New section: 10.1

The Schedule adds a new section 10.1, which would exempt people from the prohibitions in section 9 & 10 if the prohibited act: (i) occurs while carrying out infrastructure maintenance, repair and replacement, (ii) non-commercial activities occurring in close proximity (50 metres) to a person's primary residence or in an area outlined in a regulation, (iii) is an activity for the purposes of protecting human health or safety, or protecting or recovering species at risk.

With respect to infrastructure, the exemption is narrowly scoped to only maintenance, repair and replacement of existing infrastructure. This limited exemption will reduce administrative costs (of applying for a permit, or other authorization, under the ESA in order to conduct this work). However, the ability to provide such an exemption in a regulation already exists under section 55(1)(b). It is not necessary to put this exemption into the ESA.

With respect to non-commercial activities on private property, the drafting suggests that the exemption would apply to areas within 50 metres of a primary residence OR in any area that is outline in a regulation, potentially allowing for sweeping exemptions on private land. Presumably, this exemption is intended to apply if, for example, a species at risk were to find its way into the window well of a person's house. Removing the species to another location would then not be a violation of the ESA. However, the drafting suggests that exemptions of non-commercial activities on private land could be

expanded beyond the "proximity to primary residence" exemption, if listed in a regulation. If the exemption is intended to apply to areas within 50 metres of a primary residence or another specific area in proximity to a primary residence (eg, an exemption to the 50 metre requirement), changes to proposed subsection 10.1(4) will need to be made. And, as noted above, the ability to provide such an exemption in a regulation already exists under section 55(1)(b). It is not necessary to put this exemption into the ESA.

With respect to activities related to protecting/recovering a species at risk, there is already provision for stewardship agreements (section 16) within the ESA. By exempting such activities, the requirement of a stewardship agreement can be avoided (and similarly the requirement that the Minister consider a statement with respect to a recovery strategy. Although this exemption will likely reduce administrative costs, it also prevents the Minister from using the ESA to ensure compliance with specific, written requirements of a stewardship agreement (pursuant to subsection 16(4)). For example, if the activities authorized under a stewardship agreement are not complied with, the authorization is no longer in effect and the individual conducting the activities would be subject to the enforcement provisions of the ESA. Under an exemption, if the activities are not related to protecting/recovering a species at risk, the Ministry would have a much more difficult time proving that the exemption does not apply than would be the case under a written agreement.

All of the exemptions in this new proposed section can currently be achieved through regulation. And, given that there is greater flexibility in enacting regulations, it will also be easier to remove these exemptions, should any prove to increase the threat to species at risk in Ontario.

Extension to deadlines in sections 11, 12, 55

The Schedule also amends the ESA to extend various deadlines, including the deadlines for preparing recovery strategies and publishing government response statements under section 11, the deadline for publishing government response statements to management plans prepared under section 12 and the deadline for giving notice under section 56 of proposals to make habitat regulations under section 55 of the Act.

- the deadline for preparing a recovery strategy for an endangered species is extended from one year after listing to two years after listing (ESA clause 11(4)(a));
- the deadline for preparing a recovery strategy for a threatened species is extended from two years after listing to three years after listing (ESA clause 11(4)(b));
- the deadline for preparing a recovery strategy for endangered or threatened species that were listed as of the time the Ontario ESA came into force is extended indefinitely (from five years after the date section 7 came into force to a time prescribed by regulation) (ESA clause 11(4)(c));
- the deadline for the Minister to prepare a response to a recovery strategy or management plan outlining the actions the government intends to take to recover an at-risk species is extended from 9 months after a strategy or plan is prepared to 18 months (ESA, subsections 11(8) and 12(5));
- the deadline for Cabinet to pass a regulation defining the "habitat" of a listed endangered species under clause 55(1)(a) is extended from two years after the species is listed to two years

after a response statement is published under subsection 11(8) (ESA, clause 56(2)(a)) – this is a significant extension (extension of approx. 3.5 years – two years plus 18 months);

- the deadline for Cabinet to pass a regulation defining the "habitat" of a listed threatened species under clause 55(1)(a) is extended from three years after the species is listed to three years after a response statement is published under subsection 11(8) (ESA, clause 56(2)(b)) – again, this is a significant extension (extension of approx. 4.5 years – three years plus 18 months).

Under subsection 11(5), the Minister already has the power to extend the time limits in subsection 11(4) by posting notice on the Environmental Registry (established under the *Environmental Bill of Rights, 1993*).

Similarly under subsection 12(4), the Minister already has the power to extend the time limit in subsection 12(3) by posting notice on the Environmental Registry (established under the *Environmental Bill of Rights, 1993*).

Discretion has not been granted under the current ESA framework to extend the time limit for the Minister to publish a statement of actions to be taken in response to a recovery strategy (subsection 11(8)) and to publish a statement of actions to be taken in response to a management plan (subsection 12(5)). Given that there was some discretion granted for extending time limits in other situations, presumably it was specifically intended that these time limits should not be extended.

Similarly, discretion has not been granted under the current ESA framework to extend the time limit for enacting habitat regulations for threatened and endangered species.

The overall effect of exercising discretion already permitted under the ESA, is to push out all deadlines. For example, if a new time limit for the development of a recovery strategy for an endangered species is extended by one year (by posting notice on the Environmental Registry), the time for the Minister's response will not start for an additional year. Any legislated delay in developing strategies, plans, and regulations enhances the threat to species at risk.

Amendments to Permitting Section (17)

Given the addition of proposed section 10.1 (outright exemptions for some activities), the permitting section is amended to remove requirements that a permit be obtained in those situations. If section 10.1 is deleted from the Budget Bill, the amendments to section 17 will similarly not be necessary.

Amendments to Instrument Section (18)

Under this section in the current ESA framework, an instrument under another piece of legislation can have the effect of a permit if certain conditions are met. Currently, an exemption under section 18 would only be granted if:

(i) the Minister was of the opinion that the activity authorized by the instrument was necessary for the protection of human health or safety,

(ii) the Minister was of the opinion that the main purpose of the activity authorized by the instrument was to assist, and that the activity would assist, in the protection or recovery of the species specified in the instrument, or

(iii) the Minister was of the opinion that the main purpose of the activity authorized by the instrument was not to assist in the protection or recovery of the species specified in the instrument, but,

a. the Minister was of the opinion that an overall benefit to the species would be achieved within a reasonable time through requirements imposed by the instrument,
b. the Minister was of the opinion that reasonable alternatives had been considered, including alternatives that would not adversely affect the species, and the best alternative was adopted, and
c. the Minister was of the opinion that reasonable steps to minimize adverse effects on individual members of the species were required by the instrument.

The Minister's power to grant exemptions will be much broader and will no longer be subject to preconditions designed to protect species at risk and their habitat – e.g. the changes would remove the requirement that the Minister consider a section 11(8) statement with respect to a recovery strategy prior to granting an exemption; the changes would also eliminate the existing preconditions of overall benefit, alternatives considered, and minimized adverse impact on species (set out in clause 18(1)(e)) of the ESA (eg, preconditions which are the same for permits set out in the section 17 permitting scheme). In essence, the exemption will allow that instruments (such as a Permit to Take Water under the *Ontario Water Resources Act*) to be exempted from prohibitions contained in the ESA. Only noncompliance with the specific instrument or with any "conditions prescribed in the regulations" will bring the instrument holder to account for violations of the ESA.

The proposed amendments no longer make a distinction between "Minister's instruments" and "prescribed instruments". The removal of this distinction does not have implications for species at risk protection and may create less potential administrative oversight.

Schedule 23, Fish and Wildlife Conservation Act, 1997

Summary

In our analysis, the greatest concern regarding these changes is the sheer number of them. The delegation of powers to licence and authorize exemptions is likely to achieve administrative efficiencies; however, without additional information regarding the specific content of the regulations, we cannot assess whether this administrative efficiency will be at the expense of protection for fish and wildlife. We do know that increased regulatory discretion will mean less transparency, certainty and predictability. The overall impact of such changes will potentially risk achieving conservation goals.

Current FWCA Framework

Intent of legislation is not clearly set out (no purpose statement). Section 2 states: "If a provision of this Act and a provision of the *Endangered Species Act, 2007* conflict with respect to an animal, invertebrate

or fish, the provision that gives the animal, invertebrate or fish the most protection prevails." This provides insight; specifically that (as the title of the Act indicates) the intent is the protection of fish and wildlife. The FCWA governs the issuing of licences for a number of activities, such as hunting, trapping, fishing, and holding wildlife in captivity, that are otherwise prohibited.

Impact of Proposed Changes to FWCA

Licences/Authorizations exempted in circumstances prescribed by regulation

Under section 6, a licence is required to hunt or trap. There are existing special provisions for trappers (extending the species for which hunting is permitted within the geographic area covered by the trapping licence and specific season beyond the fur bearing mammals) and farmers (dispensing with requirements of a licence on farmland for family residing on the farm). The proposed amendment will add a new subsection 6(4), which will also allow circumstances in which a licence will not be required to be prescribed in a regulation.

Under section 7, possession/destruction of nests or eggs of a wild bird is prohibited, except for specified birds (American crow, brown-headed cowbird, common grackle, house sparrow, red-winged blackbird or starling, per subsection 7(2)) or if the person has the Minister's authorization. The proposed amendment will replace the current requirement for an authorization, with one that gives discretion to either require a Minister's authorization or prescribe circumstances in which an exemption applies within a regulation.

Section 17 prohibits carrying a loaded firearm on a "conveyance" when travelling to/from or within an area inhabited by wildlife, except in specified circumstances. Conveyance is defined as "a vehicle, boat, or aircraft" (FWCA, subsection 1(1)). Legislated exemptions include: when the boat is not motorized and, specifically for disabled persons, when the Minister gives authorization in situations where mobility of the person is impaired as prescribed in regulations. Related to the latter exemption, the proposed amendment would remove the requirement that this mobility impairment be described in regulation and provides an exemption for disabled persons with either a Minister's authorization or for circumstances prescribed by regulation.

Under section 25, hunting with a dog is prohibited unless authorized by a licence. A proposed amendment will add a requirement that the authorization also be prescribed by regulation. This section would then be similar to existing section 40, where there is a regulation that governs wildlife in captivity, such as zoos. A further proposed amendment would add a new subsection that provides for an exemption to the licencing requirement, in situations prescribed by regulation. In this case, an exemption power is added that didn't exist previously.

Section 40 prohibits the keeping of "live game wildlife or live specially protected wildlife in captivity" without a licence in accordance with regulations. It also prohibits the hunting or trapping of game wildlife for the purposes of keeping it in captivity, without a Minister's authorization. There are existing exceptions for: game amphibians and game reptiles for "personal consumption"; a single game reptile, game amphibian, specially protected mammal, specially protected reptile, specially protected amphibian or specially protected invertebrate for "personal education" purposes (unless the species is

listed under provincial or federal legislation regarding species at risk); game wildlife or specially protected wildlife kept in captivity for educational/scientific/other purposes, if has Minister's authorization; or in situations prescribed by regulation. The proposed amendments would compile existing exceptions into a single subsection 40(2) and limit replace the exception for wildlife kept in captivity for education/scientific/other purposes with a exception for "wildlife custodians" to keep "injured, sick or immature" wildlife for the purposes of rehabilitating them (pursuant to section 44, with amendments as described below). The proposed amendments would also expand the discretion to allow hunting/trapping for the purposes of keeping in captivity to either Ministerial authorizations or situations prescribed in regulations. The latter may be of concern, if broad exceptions are permitted in regulation and Ministerial oversight of fish & wildlife conservation is reduced.

Section 44 currently provides for "wildlife custodians" to be authorized to keep injured, sick or immature wildlife in order to care for and rehabilitate them for release in the wild. Proposed amendments to section 44 will clarify the definition of wildlife custodians and expand the discretion of the Minister to issue authorizations to wildlife custodians or to prescribe conditions in which wildlife custodians are authorized to have wildlife in captivity within a regulation. Similarly proposed amendments would allow wildlife custodians to kill the wildlife in their care under a Minister's authorization or under conditions the Minister has prescribed in regulations.

Section 45 currently provides for propagation of wildlife, with the authorization of the Minister. Proposed amendments would extend the discretion of the Minister to issue an authorization or prescribe conditions within a regulation.

Section 46 prohibits the release of farmed animals, or other wildlife kept in captivity, to be released into the wild, without the Minister's authorization. Proposed amendments would extend the discretion of the Minister to issue an authorization or prescribe conditions within a regulation. And, an incidental proposed amendment will be made to the obligations of the person that permits escape of a farmed animal or other wildlife kept in captivity, that reflect the obligation exists "in circumstances not permitted" under the regulation.

Section 52 prohibits listing game wildlife, specially protected wildlife or fish on a menu, and from charging for serving the same, unless authorized by the Minister or unless caught under a licence or purchased legally. Proposed amendments would clarify the prohibition (subsection 52(1) would simply prohibit listing on a menu or charging for serving game wildlife, specially protected wildlife or fish). The current exceptions would remain. And, proposed exceptions would be permitted in situations either authorized by the Minister or prescribed in regulation (proposed new subsection 52(3)).

Section 54 prohibits releasing imported wildlife or wildlife that was propagated from imported wildlife into the wild, without Ministerial authorization. Proposed amendments would clarify the prohibition (subsection 54(1) would simply prohibit releasing imported wildlife or wildlife that was propagated from imported wildlife). Proposed exceptions would be permitted in situations either authorized by the Minister or prescribed in regulation (proposed new subsection 54(1.1)).

Section 55 prohibits the transport of regulated game wildlife or specially protected wildlife out of Ontario, unless licenced/permitted. Proposed amendment would add new discretion to make exceptions to this prohibiting within a regulation (subsection 55(4)).

Finally, Section 112 is amended to enable the LGinC to make any of the regulations noted above regarding licences and authorizations.

Delegation of Authority (new section 60.1 and amendment to section 61)

A new section on delegation of authority is proposed. Under the Act currently, section 60 enables the Minister to issue licences under this Act and under the Ontario Fisheries Regulation. Also, currently, section 61 enables the Minister to "authorize a person to issue licences on the Minister's behalf". The proposed section 60.1 would allow the Minister delegate the authority to issue licences or delegate any power of the Minister is issue authorizations under the Act (with the exception noted below re. section 61) to a person or a body that is not an employee of the Ministry. A proposed amendment adding subsection 61(2.1) would clarify that the person authorized to issue licences on the Minister's behalf can only do so as provided in guidance documents (eg, the delegated authority is highly limited under this section specifically). All delegations will be made only as prescribed in the regulations (subsection 61.1(2)). The Minister may also delegate the ability to impose conditions (subsection 611.1(3)) and collect fees, which will be required to be held in trust for the Crown (subsections 61.1(4), 61.1(5)). If the Minister delegates his/her authority, the delegate will be read as the Minister in a number of other subsections, including, for example, in current subsection 70(2) where the amendment would mean that a licence will be void if it is altered without the authorization of the delegate (subsection 61.1(7)). Similarly, the delegate would be authorized to refuse to issue or to cancel a licence if it was issued in error. The Minister retains the authority to cancel a licence if he/she is of the opinion that cancellation is reasonably necessary for the conservation of fish or wildlife. The Crown is explicitly made non liable for actions of the delegate (subsection 61.1(8)). Finally, a new paragraph is proposed for section 112, which authorizes the LGinC to make regulations "governing delegations made under section 60.1" (paragraph 42.1).

Schedule 33, Kawartha Highlands Signature Site Park Act, 2003

This legislation established a new protected area that includes both provincial park (public) lands and private lands. The purpose of the legislation is to ensure ecological integrity is the "overriding priority" in management of the park, while maintaining the recreational opportunities and access to private land within the park.

The proposed amendments would remove the management advisory board of the park, on a date to be named in by the Minister (subsection 5(4)). The sections removing the definition of the management advisory board and removing section 5 (describing the function of the advisory board) would not come into force until a date to be proclaimed by the Lieutenant Governor. The removal of the management advisory board, combined with the proposed amendments to the PPCRA (which also applies to this park, with some exceptions), means there may be less Ministerial scrutiny of the management of the park, potentially risking ecological integrity.

Schedule 34, Lakes and Rivers Improvement Act

Summary

In our analysis the greatest concern is the removal of the requirement that a management plan be prepared in accordance with the regulations and Ministerial approved guidelines.

Current LRIA Framework

The Lakes and Rivers Improvement Act was established to provide for the "management, protection, preservation and use of the waters of the lakes and rivers of Ontario and the land under them" (LRIA, clause 2(a)). The LRIA provides for the protection of public rights of way and for the protection of riparian owners' interests. The LGinC is authorized to make regulations regarding, among other things, the use of lakes and rivers. The Minister is authorized to make regulations regarding the design, construction, operation and maintenance of dams. Building a dam is prohibited, without Ministerial authorization. The Minister can delegate the authority to approve the construction, repair and use of dams (LRIA, subsection 15(1)).

Impact of Proposed Changes to LRIA

A proposed amendment would permit the Minister to delegate the authority to make orders in respect of the construction, repair and use of dams, in addition to the approvals authority noted above.

Under section 23.1, the Minister may order the owner of an existing or new dam to prepare or amend a management plan for the operation and maintenance of a dam, in accordance with the regulations and with guidelines approved by the Minister. A proposed amendment to this section would remove the requirement that the management plan be prepared in accordance with regulations and guidelines. This broadens the discretion of the Minister in what is required in a management plan.

Schedule 44, Niagara Escarpment Planning and Development Act

The purpose of the *Niagara Escarpment Planning and Development Act* is "to provide for the maintenance of the Niagara Escarpment and land in its vicinity substantially as a continuous natural environment, and to ensure only such development occurs as is compatible with that natural environment." (NEPDA, section 2) The Niagara Escarpment Plan was developed to provide provincial direction on land uses within the Plan Area, in accordance with legislative objectives. Amendments to the NEP are permitted, with approval of the Niagara Escarpment Commission, so long as such amendments are not explicitly prohibited by the NEPDA.

Under section 17, the NEP is to be reviewed at the same time as the Greenbelt Plan and the procedure for the review is set out. Proposed amendments would direct the Minister to conduct the review through consultation and public participation that is consistent with the requirements of the *Greenbelt Act* regarding the review of the Greenbelt Plan. Any amendments would follow similar procedure for applications for amendments (under NEPDA sections 10, 11), with specified modifications relating to the Minister's discretion to have the Commission hold a hearing and that the Minister sends the recommendations to the LGinC directly (rather than exercising the authority to make a decision under

NEPDA, subsection 10(11)). There is also clarity with respect to the review, in that any amendments proposed must be consistent with the objectives in NEPDA, section 8.

Schedule 47, Ontario Forest Tenure Modernization Act, 2011

The Ontario Forest Tenure Modernization Act, 2011 authorizes the Minister to establish Ontario local forest management corporations, which are Crown agencies. A proposed amendment would change the Minister responsible from the Minister of Northern Development and Mines to the Minister of Natural Resources. Another proposed amendment would permit the Minister to make grants and loans (the latter subject to approval of the Minister of Finance) to an Ontario local forest management corporation. Currently, the Minister is only authorized to make grants.

Schedule 55, Places to Grow Act, 2005

The proposed amendments to *the Places to Grow Act, 2005* are housekeeping in nature: designating the Minister responsible to be changed from the Minister of Public Infrastructure Renewal to the Minister of Infrastructure.

Schedule 58, Provincial Parks and Conservation Reserves Act, 2006

Summary

In our analysis, the following proposed changes are of greatest concern:

- REMOVAL OF TIME LIMITS for duration, examining, and amending the management direction for protected areas. The proposed amendments would remove the requirement that a management direction be created within 5-year (of the PPCRA coming into force or a new protected area being created) and that the management direction plan for a 20-year period. There would also be the removal of the requirement that all management directions over 10-years old be examined for the need to update/amend. This could mean that there will be either no management direction and/or the many management directions that are already (and will eventually become) well over 10-years old will not be revisited and updated with new knowledge. We believe this undermines the purpose of the legislation and should not be pursued, particularly in times of declining resources/capacity of the Ministry of Natural Resources.
- NEW LAND USE PERMITS for private, non-commercial land use may be a future threat to achieving the purpose of the Act and should either be removed or given more legislative guidance.

Current PPCRA Framework

When the PPCRA was enacted in 2006, it brought the protection of provincial parks and conservation reserves (hereinafter referred to as “protected areas”) under a single statute. The overall purpose of the Act is “to permanently protect a system of provincial parks and conservation reserves that includes

ecosystems that are representative of all of Ontario's natural regions, protects provincially significant elements of Ontario's natural and cultural heritage, maintains biodiversity and provides opportunities for compatible, ecologically sustainable recreation." (PPCRA, section 1) Legislative objectives are included for both types of protected areas. The first objective for all protected areas is "To permanently protect representative ecosystems, biodiversity and provincially significant elements of Ontario's natural and cultural heritage and to manage these areas to ensure that ecological integrity is maintained." (PPCRA, subsections 2(1) and 3(1)) The PPCRA obligates that when protected areas are managed, "Maintenance of ecological integrity shall be the first priority and the restoration of ecological integrity shall be considered." (PPCRA, section 3) Ecological integrity is defined as "a condition in which biotic and abiotic components of ecosystems and the composition and abundance of native species and biological communities are characteristic of their natural regions and rates of change and ecosystem processes are unimpeded." (PPCRA, subsection 5(2))

Impact of Proposed Changes to PPCRA

Section 10

A proposed amendment to subsection 10(1) will remove the time limit in which a management direction is completed for a provincial park or conservation reserve. Currently, a management direction is required to be completed within 5 years of either the date on which the PPCRA came into force (for existing parks) or the date of the order that creates the protected area (for any new parks).

Also, a proposed amendment to clause 10(3)(b) will remove the requirement that the management direction cover a 20-year period.

A proposed amendment to subsection 10(6) will add "amending a management plan" to the requirement of only one opportunity for public consultation (at least) and remove it from the current requirement of more than one opportunity for public consultation. This provides discretion to have more than one opportunity for public consultation and is administratively less costly. The preparation of a management plan will still require more than one opportunity for public consultation.

A proposed amendment to subsection 10(7) will give the Ministry complete discretion to determine whether 10-year-old (or older) management directions should be "examined". Currently, the Ministry is mandated to annually examine any management direction that has been in place for 10 years or more and mandated to determine whether there is a need to amend or review.

In a time of decline resources dedicated to the Ministry of Natural Resources, capacity to ensure the regular assessment of the need to examine outdated management directions may be compromised without legislative impetus to do so. Regular review of management directions, to ensure that evolving knowledge regarding ecological integrity is incorporated into protected areas planning is crucially important to meeting the purpose of the Act. As such, the proposed amendments to section 10 should be withdrawn.

Section 11

Under section 11, the Minister is required to report on the state of the protected areas system. A proposed amendment to subsection 11(3) will change the reporting frequency from every 5 years to every 10 years. Effectively, this delays the next report on the state of the system until 2021.

This proposed amendment maintains the legislative requirement for regular reporting and is not likely to put protected areas at risk of compromising ecological integrity.

New subsections: 14(2.1), 14(2.2)

Current provisions in section 14 allow the Minister to lease lands or issue permits for private, non-commercial use only if there is an existing lease/permit. Two new subsections are proposed. Proposed subsection 14(2.1) will give the Minister discretion (in circumstances and for terms that may be prescribed in regulations) to issue new land use permits for private, non-commercial purposes, so long as the permit is consistent with the Act and regulations. Proposed subsection 14(2.2) prevents the Minister from renewing any land use permit issued under subsection 14(2.2). Consequential amendment is proposed to section 54 to give the Minister authority to enact regulations regarding the issuing of new land use permits.

Currently, only existing leases/permits were continued under the PPCRA. No new leases/permits are contemplated. This was considered consistent with the goal of maintaining (and potentially restoring) ecological integrity in protected areas. Permitting new, non-renewable land use permits may risk ecological integrity. If the intent is to allow land use permits within protected areas for incidental use related to an existing private land use immediately adjacent to a protected area, then this should be made explicit within the amendments. However, providing broad discretion to permit new land use permits may lead to future encroachment on the protected area, if applied to new private land use adjacent to a protected area. For example, if a new cottage is built adjacent to a protected area, and land use it permitted in relation to that new cottage within the protected area, there will be on-going threats to ecological integrity. Furthermore, given the overarching goal of protecting and also consideration of restoring ecological integrity, land use within the "greater protected area" (the area surrounding a protected area) should be carefully scrutinized. It is therefore suggested that this amendment either be removed or given more detail to circumscribe the intent.

Section 28

Currently, this section gives the Minister discretion, only with the approval of the LGinC, to enter into agreements with a municipality or, in an unorganized territory, with a road commission to build an access road within a protected area. The two amendments proposed for this section would remove the requirement for LGinC approval to enter such agreements. Consequential amendment is proposed for subsection 24(2) to ensure that the Minister cannot delegate this authority through an agreement with "any person".

Removal of the step of obtaining approval from the LGinC will result in reduced administration cost. The assurance that the Minister will not be able to delegate the authority to approve new access roads must be maintained for this amendment to minimize the risk to the ecological integrity of protected areas.

Schedule 59, Public Lands Act

Summary

In our analysis, the following proposed changes are of greatest concern:

- DISCRETION TO DELEGATE AUTHORITY and thereby REMOVE CROWN LIABILITY. The proposed amendment that would extend discretion to delegate the Minister's authority under the Act is overly broad and should be given some limitations. In addition, the complete removal of Crown liability for all actions of the delegate is of great concern. Additional detail regarding delegation, similar to those proposed in what will be the Delegated Authorities Act (Bill 55, Schedule 16) should be used.
- EXEMPTIONS from the requirement of obtaining a work permit for activities on public lands that may be extended to "a person or a class of person" through regulations.

Current PLA Framework

The *Public Lands Act* gives the Minister of Natural Resources "charge of the management, sale and disposition of the public lands and forests" (PLA, subsection 2(1)). The Minister is authorized to enter into an agreement with "any person" for the purpose of "carrying out his or her duties" under the Act (PLA, subsection 2(2)). There are requirements within the PLA that require the disposition of public land on a water body will ensure frontage is set aside for recreational access purposes and continues to be public land. The PLA authorizes the sale/lease/grant of public lands and/or permitting for specific uses of public lands. Regulations can prescribe circumstances in which sale/lease/use will not be permitted. The PLA also provides authority for the Minister to oversee the construction of roads and dams on public lands. The Minister can ensure compliance and enforcement of unauthorized uses of public lands, through a number of mechanisms including (but not limited to) issuing orders and revoking permits.

Impact of Proposed Changes to PLA

Section 2

A proposed amendment to section 2 will give the Minister additional discretion to delegate any powers under the Act that are prescribed in regulation to persons/bodies listed in the regulation, subject to any limits also prescribed by the regulations (proposed subsection 2(3)). And, an additional new subsection is proposed to ensure the Crown is not liable for the actions of the delegated person/body (subsection 2(4)). A consequential amendment to section 47 to enable the authority to prescribed regulations pursuant to the proposed delegated authority provisions.

If the intention is to allow for delegation to municipalities or conservation authorities, make that explicit, rather than leaving the determination of delegation to regulation, which is much more easily amended than legislation. More importantly, it is of concern that the Minister would be able to delegate authority and thus shed potential liability for that obligation. Under the proposed Delegated Authorities Act (Bill 55, Schedule 16), there is language that might be borrowed in order to ensure adequate oversight and minimize Crown liability for some actions of the delegate.

Subsection 14(1)

Section 14 currently circumscribes regulation making power given to the LGinC to issue work permits on public lands. A proposed amendment to clause 14(1)(a) extends the current discretion to make regulations prohibiting particular land uses unless given a permit to a more general regulation making power that (in addition to regulating the prohibitions) could govern "activities that may be carried out on public lands and on shore lands, including requiring that such activities be carried out in accordance with the regulations". The proposed amendments would also add a new clause 14(1)(e) that would give the LGinC discretion to regulated exemptions from the work permits for "any person or class of person".

Extending an ability to regulate prohibitions to an ability to govern use of public lands more generally may provide for administrative savings, particularly for uses that are frequently the subject of work permit requests. The oversight of this regulation making power resides with the LGinC, rather than a single Minister. It is only the broadening of discretion to regulate exemptions that is of particular concern, though this is tempered by the authority residing in the LGinC.