



## Chapter 7

# Getting Approvals Wrong: The MNRF's Risk-Based Approach to Protecting Species at Risk

### Contents

<b>7.0</b>	<b>INTRODUCTION: 237 ONTARIO SPECIES ALREADY AT RISK, AND COUNTING</b>	<b>218</b>
7.0.1	THE <i>ENDANGERED SPECIES ACT</i> IS SUPPOSED TO PROTECT AND RECOVER AT-RISK SPECIES	219
<b>7.1</b>	<b>THE FLEXIBILITY TOOLS UNDER THE <i>ESA</i></b>	<b>220</b>
7.1.1	THE MNRF AUTHORIZES INDIVIDUAL ACTIVITIES THROUGH PERMITS AND AGREEMENTS	220
7.1.2	THE MNRF AUTHORIZES MORE ACTIVITIES THROUGH THE PERMIT-BY-RULE SYSTEM	222
<b>7.2</b>	<b>HOW HAVE THE <i>ESA</i>'S FLEXIBILITY TOOLS BEEN USED?</b>	<b>227</b>
7.2.1	TOTAL <i>ESA</i> AUTHORIZATIONS HAVE DRASTICALLY INCREASED SINCE THE INTRODUCTION OF PERMIT-BY-RULE	227
7.2.2	INFRASTRUCTURE HAS THE LARGEST IMPACT ON SPECIES AT RISK	230
7.2.3	PRESSURE ON SPECIES AT RISK IS HIGHEST IN SOUTHERN ONTARIO	231
7.2.4	SOME SPECIES AT RISK ARE AFFECTED MORE FREQUENTLY	232
<b>7.3</b>	<b>SPECIES ARE GETTING LESS PROTECTION UNDER PERMIT-BY-RULE</b>	<b>234</b>
<b>7.4</b>	<b>BLIND FAITH: THE MNRF DOESN'T CHECK</b>	<b>238</b>
7.4.1	NO ROUTINE COMPLIANCE AUDITING	238
7.4.2	ENFORCEMENT DATA ARE NOT ADEQUATELY TRACKED BY THE MINISTRY	239

The MNRF's risk-based approvals allow harm to endangered and threatened species.

7.4.3	NO LEGAL AUTHORITY TO CONDUCT SITE INSPECTIONS FOR PERMIT-BY-RULE ACTIVITIES	239
7.4.4	THE MNRF IS NOT UNDERTAKING EFFECTIVENESS MONITORING	240
<b>7.5</b>	<b>THE PUBLIC CAN'T ACCESS INFORMATION ABOUT ACTIVITIES THAT AFFECT SPECIES AT RISK</b>	<b>241</b>
7.5.1	THE PUBLIC IS CUT OUT OF <i>ESA</i> DECISION MAKING	241
7.5.2	THE MNRF DOES NOT SHARE INFORMATION ABOUT PERMIT-BY-RULE ACTIVITIES	242
7.5.3	THERE IS NO WAY TO APPEAL <i>ESA</i> PERMIT DECISIONS	244
7.5.4	A BACK-DOOR APPEAL ROUTE FOR RENEWABLE ENERGY PROJECTS	244
<b>7.6</b>	<b>CONCLUSION: BIG CHANGES NEEDED TO PROTECT SPECIES AT RISK</b>	<b>248</b>

## Abstract

The purpose of the *Endangered Species Act* is to protect and recover species at risk. To this end, the Act provides a general prohibition against activities that harm species at risk. But the law also gives the Ministry of Natural Resources and Forestry (the MNRF) flexibility to authorize activities that could harm species at risk, under appropriate conditions. For example, proponents may obtain a permit from the MNRF that allows harmful activity, if the total activity provides an “overall benefit” to the species at risk.

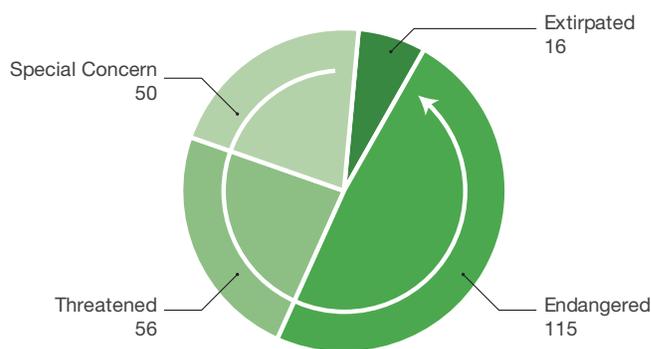
The wellbeing and survival of Ontario's species at risk has been dramatically undermined by the MNRF's “modernization” of its *ESA* approvals. Instead of individualized permits that require an “overall benefit” to species, the MNRF now allows many harmful activities under a permit-by-rule system that requires proponents only to minimize (not eliminate or compensate for) harm. To make matters worse, the MNRF turns a blind eye to whether proponents comply with these weakened rules and to the impact of the new system on species at risk. Meanwhile, the MNRF keeps the public in the dark about what activities it allows to harm species at risk, making it difficult to hold the ministry to account for this critically important program.

## 7.0 Introduction: 237 Ontario Species Already at Risk, and Counting

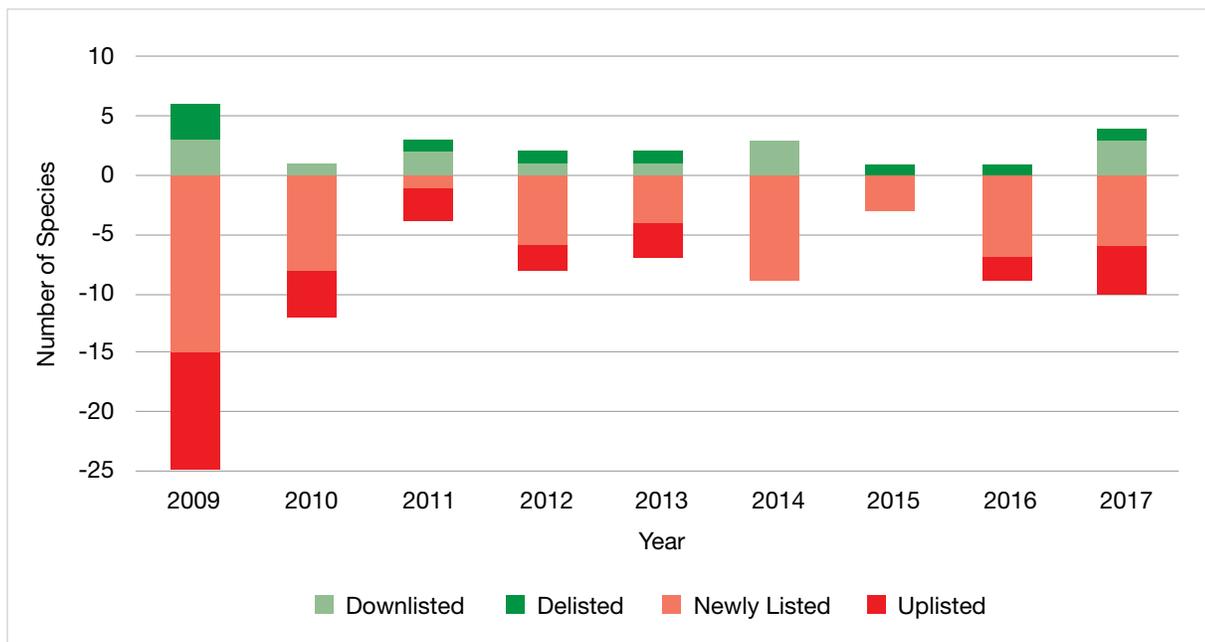
The loss of biodiversity is one of the most urgent problems facing our planet: Earth's species are disappearing at an alarming pace. Scientists estimate that the world is losing species at about 1,000 times the natural rate.<sup>1</sup> Ontario's native species are part of this extinction catastrophe: 237 of Ontario's plants and animals are listed as at-risk under the *Endangered Species Act (ESA)*,<sup>2</sup> and there are many more species whose status has not been assessed yet but may also be at risk (Figure 1). The rapid onset of climate change adds to the stress on many species. Without effective action to protect and recover species at risk, they could disappear altogether from Ontario, representing an incredible loss of our biodiversity.

**THE LOSS OF BIODIVERSITY IS ONE OF THE MOST URGENT PROBLEMS FACING OUR PLANET.**

**Species at risk in Ontario**



**Figure 1.** Species at risk listed under the *ESA* as of June 2, 2017. Arrow reflects level of impairment from low to high.



**Figure 2.** Change over time of species at risk classification under O Reg 230/08 of the *ESA*. Since the law came into force, there has been a total of 247 species (including sub-species and populations) listed as at-risk at some point, while there have been 59 newly listed and 28 uplisted species compared to 14 species downlisted and 9 delisted (i.e., removed from the Species at Risk in Ontario list).

**7.0.1 The *Endangered Species Act* is Supposed to Protect and Recover At-risk Species**

The *Endangered Species Act* is the centrepiece of the Ontario government's efforts to protect and recover species at risk. The law is intended to protect species by making it illegal to kill, harm or harass them, or to damage or destroy their habitat. It aims to recover species through a three-step process: development of a recovery strategy by a person or agency with expertise on the species; a response statement by government that outlines the actions it will take; and finally, on-the-ground conservation action (Figure 3).

**THE *ENDANGERED SPECIES ACT* IS THE CENTREPIECE OF THE ONTARIO GOVERNMENT'S EFFORTS TO PROTECT AND RECOVER SPECIES AT RISK.**

**Framework for protection and recovery under the *Endangered Species Act***

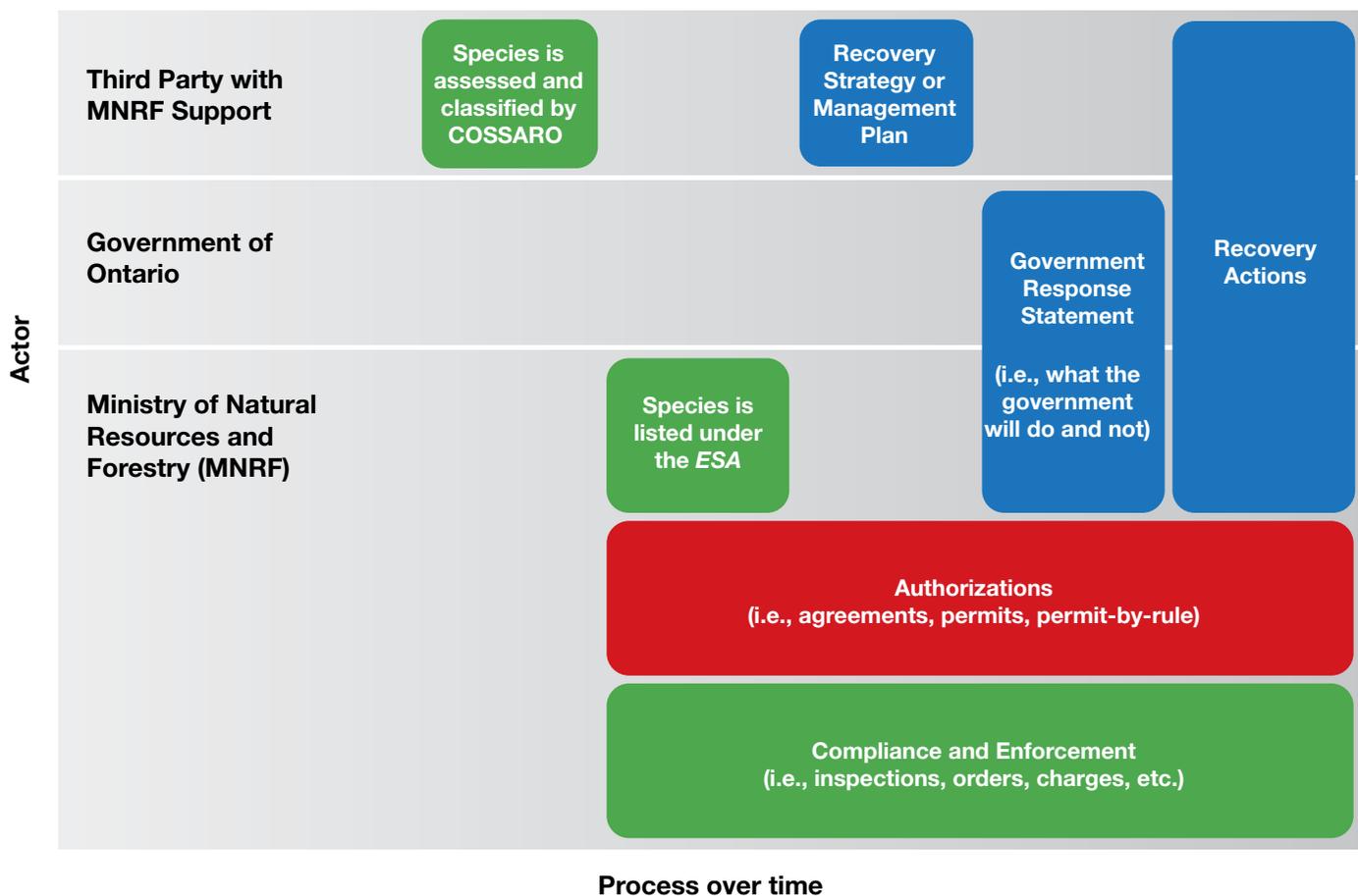


Figure 3. A general overview of the *ESA*'s framework for protecting and recovering species at risk.

## IF BADLY DESIGNED AND/OR BADLY ENFORCED, PERMIT-BY-RULE SYSTEMS CAN EVISCERATE ENVIRONMENTAL PROTECTIONS.

Since its passage in 2007, the ECO has repeatedly concluded that the *Endangered Species Act* provides a solid legal basis for protecting species at risk, but its effectiveness lies entirely with how the Ministry of Natural Resources and Forestry (the MNRF) exercises its powers and responsibilities under the law.

There is some flexibility built into the *Endangered Species Act*, something that was missing in the old law that it replaced a decade ago. People can now carry out activities that could harm species at risk or their habitat if they get authorization from the MNRF. Until 2013, in most cases this meant that proponents of harmful activities had to obtain a specific permit from the MNRF. In 2013, the MNRF cut its workload and delays to proponents by shifting away from authorizing activities through individual permits, and moved to a “permit-by-rule” system. This means that proponents can carry out many harmful activities as long as they follow a series of rules that are set out in a regulation under the *ESA*.

As the Ministry of the Environment and Climate Change has demonstrated, permit-by-rule systems can work well for low-risk, repetitive activities (see Chapter 2 of this report). However, if badly designed and/or badly enforced, permit-by-rule systems can eviscerate environmental protections.

The ECO’s 2013 special report *Laying Siege to the Last Line of Defence: A Review of Ontario’s Weakened Protections for Species at Risk* examined this permit-by-rule approach at its onset and expressed serious concerns about reduced protection for species at risk, a lack of oversight and enforcement, and less

transparency and public consultation. Now that these rules have been in place for four years, the ECO is disappointed to report how many of our initial concerns have proven to be well-founded. The MNRF has implemented the *ESA* framework in a manner that inadequately protects Ontario’s most imperilled species.

### 7.1 The Flexibility Tools Under the *ESA*

The *ESA* protects at-risk species by making it illegal to harm them; more specifically, it is illegal to kill, harm, harass, capture, possess, transport, collect, buy, sell, or take a living member of an endangered, threatened or extirpated species.<sup>3</sup> It is also illegal to damage or destroy the habitat of an endangered or threatened species.<sup>4</sup> But these prohibitions are not absolute – the MNRF can authorize activities that contravene the *ESA*’s prohibitions. The *ESA* provides the MNRF with several mechanisms to authorize a potentially harmful activity: individual permits; agreements between the proponent and ministry; and permit-by-rule (through regulatory exemptions).

#### 7.1.1 The MNRF Authorizes Individual Activities Through Permits and Agreements

The MNRF can issue an individualized permit that authorizes a person to engage in an activity that contravenes the law’s protections. The ministry issues five types of permits covering a range of activities:<sup>5</sup>

**‘A’ permits:** the activity is necessary for the protection of human health or safety, but where the risk is not imminent (e.g., cutting down a tree that is likely to fall on a house, or repairing a bridge);

**‘B’ permits:** the purpose of the activity is to assist in the protection or recovery of a species;

**‘C’ (overall benefit) permits:** the purpose of the activity is not to assist in the protection or recovery

of a species, but, through requirements imposed in the permit, the proponent of the activity will achieve an overall benefit to the species within a reasonable time, and will take reasonable steps to minimize adverse effects on the species;

**'D' permits:** the activity will result in a significant social or economic benefit to Ontario, but will not jeopardize the survival or recovery of the species in Ontario; and

**Aboriginal permits:** may be issued to a band (as defined in the federal *Indian Act*), a tribal council, or an organization that represents a territorially based Aboriginal community.

drainage activities; development and infrastructure projects; and waterpower operations.<sup>7</sup>

For the first five years that the *ESA* was in force, the majority of activities that could harm or harass and endangered or threatened species, or damage or destroy their habitat, were authorized through permits or by entering into an agreement with the MNRF. Most approvals issued during this period (for development or commercial activities) were overall benefit permits.

**THE MNRF HAS NEVER  
DENIED AN *ESA* PERMIT TO  
ANY APPLICANT.**

The MNRF has never denied an *ESA* permit to any applicant. The MNRF staff say the ministry takes an "iterative approach," working with proponents to arrive at an acceptable proposal that it believes will meet the Act's legal tests. According to the ministry, there has been at least one instance of a proponent abandoning its proposal for the time being because of the inability to achieve an overall benefit.

In certain circumstances, the MNRF can also authorize an otherwise prohibited activity by entering into an agreement with a proponent. The Act allows the ministry to enter into agreements for activities aimed at assisting in the protection and recovery of species, and to enter into agreements with Aboriginal persons.<sup>6</sup> When the Act came into force, the ministry also created time-limited, transition exemptions for pre-existing or pre-approved activities in specific sectors to proceed under an agreement, including: aggregate operations,

## More Exemptions on the Horizon: A Permanent Exemption for Commercial Logging?

The *ESA* allows approvals issued under other legislation to act as a substitute for an *ESA* permit, if certain conditions are satisfied.<sup>8</sup> These conditions include demonstrating that each of the legal requirements of the permits will be met. If the approved activity is not specifically aimed at the protection or recovery of a species, an overall benefit to the species must be achieved within a reasonable time. To date, no approvals issued under other legislation have been deemed equivalent to an *ESA* permit.

Commercial forestry on Crown land is carried out in a region covering 438,000 km<sup>2</sup> of the province, known as the Area of the Undertaking. This area is home to at least 54 at-risk species (or species populations) that are listed under the *ESA*. But commercial forest operations in Crown forests have been exempt from the *ESA*'s approval requirements under permit-by-rule since 2013.

One of the reasons for this exemption is that the MNRF already requires forestry operations to minimize risk to species at risk; forestry operations are required to follow area-specific plans that provide detailed direction for addressing potential harm to species and their habitats.

The exemption for forestry is currently set to expire on June 30, 2018. There are several options open to the

MNRF and the forest industry when this occurs: the exemption could be extended; the forest industry could be required to obtain permits; or the ministry could establish a process by which Forest Management Plans under the *Crown Forest Sustainability Act (CFSA)* can have the same effect as an *ESA* permit.

The MNRF has indicated that it is exploring options to “harmonize” the *CFSA* and *ESA*. One aspect of this project is to enable Forest Management Plans issued under the *CFSA* to function as a substitute for an *ESA* permit. However, this harmonization of the *CFSA* and the *ESA* would require that forest management plans meet the overall benefit standard. It is not clear that this will be achievable for all species that are found in the area where commercial forestry takes place.

According to the ministry, of the 54 listed at-risk species found in the Area of the Undertaking:

- 16 species are not on Crown land or are not affected by forest management;
- existing forest management guidance is sufficient to avoid impacts on 10 species; and
- the 28 remaining species will require either new or revised direction to meet *ESA* standards.

### 7.1.2 The MNRF Authorizes More Activities Through the Permit-by-Rule System

In 2013, the MNRF created numerous exemptions to the *ESA*'s permit requirement. The exemptions allow various types of activities to proceed without having to obtain individual government approval. Instead, proponents must follow a series of rules that are set out in a regulation under the law.

#### **Types of Activities Covered by Permit-by-Rule**

The permit-by-rule system covers many of the most common activities that adversely affect species at risk and their habitats, including:

- forestry operations;
- hydro-electric generating stations;
- aggregate pits and quarries;
- ditch and drainage activities;
- early exploration mining; and
- wind facilities.

The permit-by-rule system also includes a broad transition exemption for certain development and infrastructure projects. This exemption delays the protection of most

newly listed species and their habitats from these projects by up to seven years from the date the species are listed.<sup>9</sup>

Permit-by-rule also includes provisions that apply to specific species, including butternut trees, chimney swift, bobolink and eastern meadowlark, barn swallow, and specified aquatic species.

Other activities that qualify for permit-by-rule include: activities geared towards species protection and recovery; ecosystem conservation measures; activities required to avoid or reduce non-imminent threats to human health or safety (e.g., work to prevent environmental contamination, or work to protect against drought, flooding, forest fires, unstable slopes and

**THE PERMIT-BY-RULE SYSTEM  
COVERS MANY OF THE MOST  
COMMON ACTIVITIES THAT  
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AT RISK.**

erosion, etc.); and activities that damage or destroy “safe harbour” habitat (i.e., newly-created habitat for a particular at-risk species).

A summary of the permit-by-rule regulatory exemptions, and the permits they can replace, is provided in Table 1.

**Table 1.** Types of permits under the *ESA* and the corresponding permit-by-rule regulatory exemption(s) under O Reg 242/08.

PERMITS	EQUIVALENT REGULATORY EXEMPTIONS
Human Health and Safety ('A')	Non-Imminent Health and Safety Imminent Health and Safety Protection of Property
Protection or Recovery ('B')	Ecosystem Recovery Possession for Educational Purposes Safe Harbour Habitat Protection or Recovery Actions Zoos Veterinarians Wildlife Custodians
Overall Benefit ('C')	Aquatic Species Barn Swallow Bobolink / Eastern Meadowlark Butternut Chimney Swift Drainage Works Early Exploration Mining Hydro-Electric Generating Stations Pits and Quarries Wind Facilities

## Eastern Hog-nosed Snake



Photo Credit: Jon Fife.

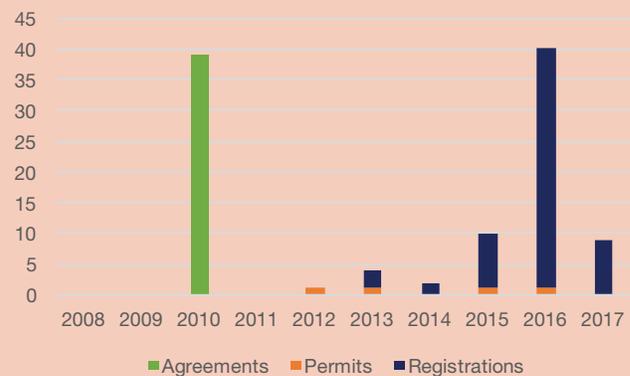
**Status:** Threatened

**Ontario Distribution:** The eastern hog-nosed snake is found in two areas of the province: southwestern Ontario in the Carolinian region and along the Great Lakes-St. Lawrence region.

**Ontario Population and Trend:** There is incomplete information on the population of this species in Ontario, but repeated sampling at known sites shows that the eastern hog-nosed snake is declining. The species is most threatened by habitat loss and fragmentation, road mortality, and persecution by humans.

### Authorizations (excluding protection and recovery activities): 105

- Agreements: 39 (18 for aggregates, 19 for drainage, and 2 for infrastructure)
- Permits: 4 (all 'C' permits)
- Permit-by-rule registrations: 62



**Figure 4.** ESA authorizations for eastern hog-nosed snake (as of March 31, 2017).

**Authorization Trends:** The most frequent authorizations for the eastern hog-nosed snake were registrations made under the non-imminent health and safety regulatory exemption (47%), followed by drainage and aggregate agreements (Figure 4).

### **What's Required by the ESA's Permit-by-Rule System?**

The rules that apply to the *ESA*'s permit-by-rule activities vary, but almost all require a proponent to register with the ministry and to take specific steps to minimize adverse effects on the affected species.

In most cases, proponents must also prepare a mitigation plan that describes the steps taken to minimize adverse effects on the affected species, and to keep the plan updated. Proponents of many of the permit-by-rule activities are required to monitor and/or report on the effects of the activity on the species. Proponents generally do not have to submit their mitigation plans, monitoring records, or reports to the ministry, although they must be provided if the ministry requests them.

Unlike the Ministry of the Environment and Climate Change's permit-by-rule system (the Environmental Activity and Sector Registry, see Chapter 2 of this report), proponents are not required to pay a fee to register an activity to recover costs for running the program.

The ministry has no authority under the *ESA* to require a proponent to seek a permit instead of registering an activity when such a course of action may be warranted (e.g., to address unique local circumstances). It also lacks the authority to say no to activities proceeding under permit-by-rule as long as proponents can meet all of the conditions set out in regulation.

For additional details on exemption conditions refer to Section 4 of the ECO's 2013 Special Report *Laying Siege to the Last Line of Defence: A Review of Ontario's Weakened Protections for Species at Risk* and O Reg 242/08.

**A PERMIT-BY-RULE APPROACH,  
IS ONLY SUITABLE FOR LOWER-  
RISK ACTIVITIES.**

### **What Are the Benefits and Risks of a Permit-by-Rule System?**

A permit-by-rule system, when properly applied, can be an effective tool for regulating activities that can cut costs for both business and government. Indeed, the MNRF's central justification for shifting to a permit-by-rule approach for the *ESA* was the purported high administrative and financial costs of permitting. But, as we noted in our 2013 Special Report, the ministry's high costs for operating its *ESA* program were largely a defect of its own making; by failing to develop clear and consistent policies to guide the permitting process, the MNRF created an inefficient approach to permitting that was unnecessarily lengthy, costly and frustrating for proponents and other stakeholders.

A permit-by-rule system can also eliminate delays and create greater certainty for proponents. But because there is reduced government oversight in a permit-by-rule approach, it is only suitable for lower-risk activities. In the case of activities affecting species at risk, it is most appropriate for activities with predictable effects that can be adequately controlled using proven mitigation measures, where conditions to avoid adverse impacts can easily be standardized and enforced.

## Butternut



Photo Credit: Valerie Zinger.

**Status:** Endangered

**Ontario Distribution:** The butternut tree is found throughout southern Ontario, south of the Canadian Shield.

**Ontario Population and Trend:** The butternut tree has experienced a significant population decline in the past 40 years, primarily due to a fungus called butternut canker. Research indicates that almost 50% of butternut trees in Ontario are in poor condition due to butternut canker.

### Authorizations (excluding protection and recovery activities): 344

- Agreements: 73 (9 for aggregates, 58 for drainage, and 6 for infrastructure).
- Permits: 52 (2 'A' permits, 50 'C' permits).
- Permit-by-rule registrations: 219



**Figure 5.** ESA authorizations for butternut (as of March 31, 2017).

**Authorization Trends:** The MNRF has issued a relatively high number of 'C' permits (overall benefit) for the butternut tree (Figure 5). In general, the overall benefit permits have been issued for housing developments and road construction. The butternut tree has its own species-specific regulatory exemption and so, not surprisingly, the majority of registrations were made under this exemption with 145 registrations (42% of all authorizations for the species). Another 53 registrations (15% of butternut authorizations) were made under the non-imminent health and safety regulatory exemption.

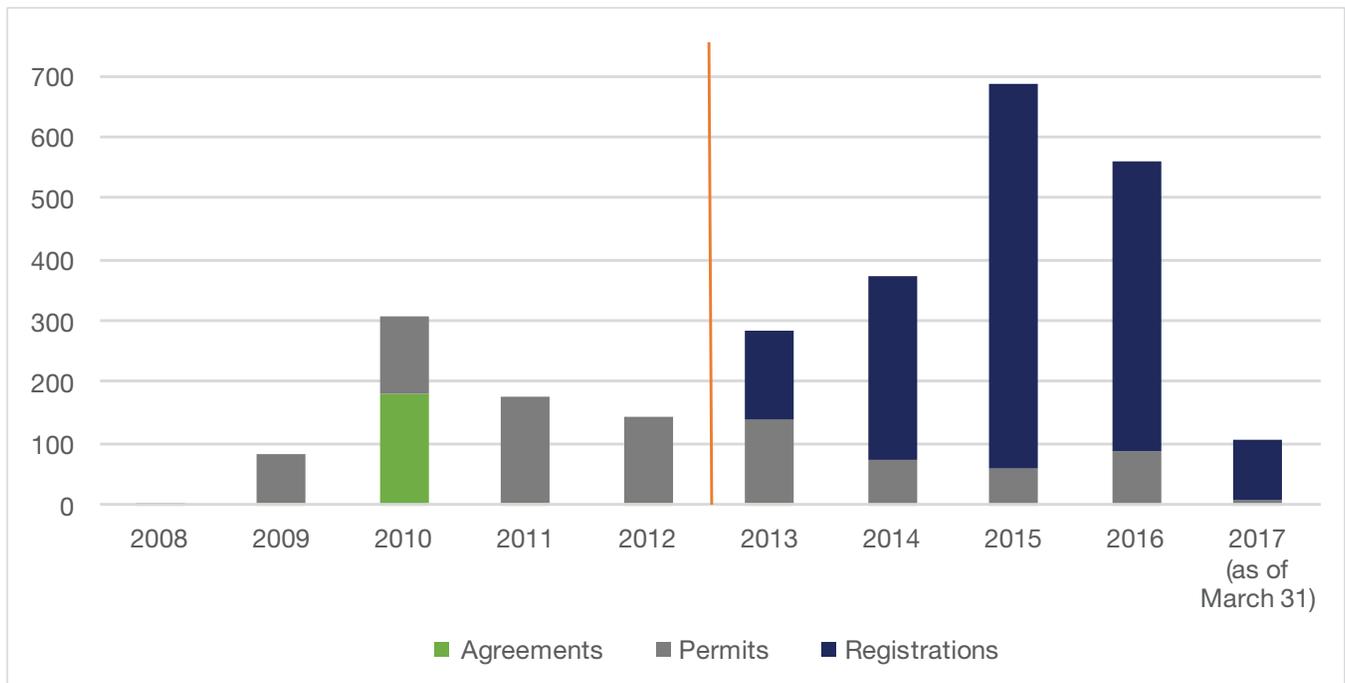
## 7.2 How Have the *ESA*'s Flexibility Tools Been Used?

### 7.2.1 Total *ESA* Authorizations Have Drastically Increased Since the Introduction of Permit-by-Rule

Since the *ESA* came into force in 2008, the MNRF has issued a total of 2,728 authorizations, including 186 agreements, 900 permits and 1,642 registrations (i.e., activities registered under the permit-by-rule system) (as of March 31, 2017). Permits were initially the main form of authorization (except in 2010, when a large batch of agreements were finalized in time to meet the deadline for proceeding under a transition exemption), but the number of permits has declined since the introduction of the permit-by-rule system in 2013; this was partly the intent of the change.

**AUTHORIZATIONS TO HARM SPECIES HAVE INCREASED DRAMATICALLY SINCE THE INTRODUCTION OF PERMIT-BY-RULE.**

Overall, authorizations to harm species have increased dramatically since the introduction of permit-by-rule (Figure 6). This increase is partly because, in 2013, the *ESA*'s habitat protections came into effect for an additional 65 "transition" species, increasing the need for more authorizations for activities.<sup>10</sup> However, large increases in authorizations have also occurred for a number of species that received full protection under the *ESA* prior to 2013.



**Figure 6.** Number of authorizations under the *ESA*.

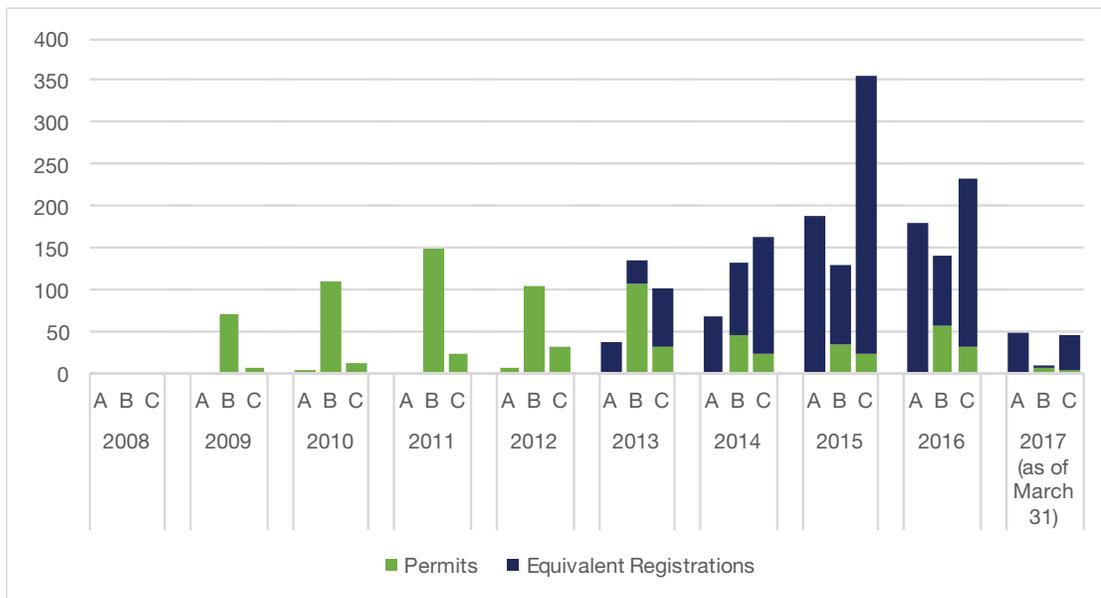
Source: Based on data provided by the MNRF.

### How Registrations Have Impacted Permitting Levels

Shifting to permit-by-rule was meant to decrease the permitting burden on the ministry for some low-impact, high-volume activities with predictable effects. This should allow the MNRF to focus its efforts on activities with a higher potential for negative impacts to species at risk and their habitats.

The clearest case for permit-by-rule lies with 'B' permits, which contribute to the protection or recovery of a species through research, conservation, and habitat rehabilitation. Since the transition to permit-by-rule, the number of 'B' permits issued by the ministry predictably decreased, replaced by a similar number of corresponding registrations (Figure 7).

**THE CLEAREST CASE FOR PERMIT-BY-RULE LIES WITH 'B' PERMITS, WHICH CONTRIBUTE TO THE PROTECTION OR RECOVERY OF A SPECIES THROUGH RESEARCH, CONSERVATION, AND HABITAT REHABILITATION.**



**Figure 7.** The number of 'A', 'B', and 'C' permits issued per year by the MNRF compared to the number of registrations for equivalent regulatory exemptions (note that only one permit was issued in 2008, and 2017 data only represents up to March 31).

Source: Based on data provided by the MNRF.

**IT IS PLAUSIBLE THAT, PRIOR TO 2013, MANY MORE ACTIVITIES HARMFUL TO SPECIES AT RISK TOOK PLACE ILLEGALLY.**

Comparing overall benefit ('C') permits with their equivalent regulatory exemptions provides a different picture. In the period 2009 to 2012, the MNRF issued a total of 77 overall benefit permits. Since 2013, there have been 786 registrations for the equivalent regulatory exemptions, plus a modest increase in overall benefit permits (i.e., 117) (Figure 7). It is plausible that, prior to 2013, many more activities harmful to species

at risk took place illegally, with no authorization under the *ESA*. (A similar phenomenon is documented for the Ministry of the Environment and Climate Change in Chapter 2 of this report). Bringing these illegal activities into the permit-by-rule system could enhance species protection if the newly captured proponents upgrade their activities to comply with the rules, even though the permit-by-rule conditions merely require proponents to minimize adverse effects on the affected species, rather than producing an overall benefit to the species.

A similar trend emerges when comparing 'A' permits (protection of human health and safety) with registrations under the "non-imminent health and safety" exemption (Figure 7) – there has been a marked increase in authorizations for activities related to health and safety since the introduction of permit-by-rule. Unfortunately, as shown below, infrastructure maintenance is one of the most common causes of harm to species at risk. This analysis similarly suggests that, prior to 2013, many activities that required an 'A' permit simply took place illegally.

### Chimney Swift



Photo Credit: Andrew Cannizzaro.

**Status:** Threatened

**Ontario Distribution:** The chimney swift is generally found in southwestern Ontario; however, it has been occasionally observed throughout the province.

**Ontario Population and Trend:** There are approximately 7,500 individuals in Ontario. The Canadian population has been declining at a rate of about 8% per year, representing a total decline of 95% since 1968. The species' decline is thought to be primarily related to a loss of habitat as traditional chimneys become less common in buildings.

#### Authorizations (excluding protection and recovery activities): 125

- Agreements: 1 (for infrastructure)
- Permits: 2 (1 'A' permit, 1 'C' permit)
- Permit-by-rule registrations: 122



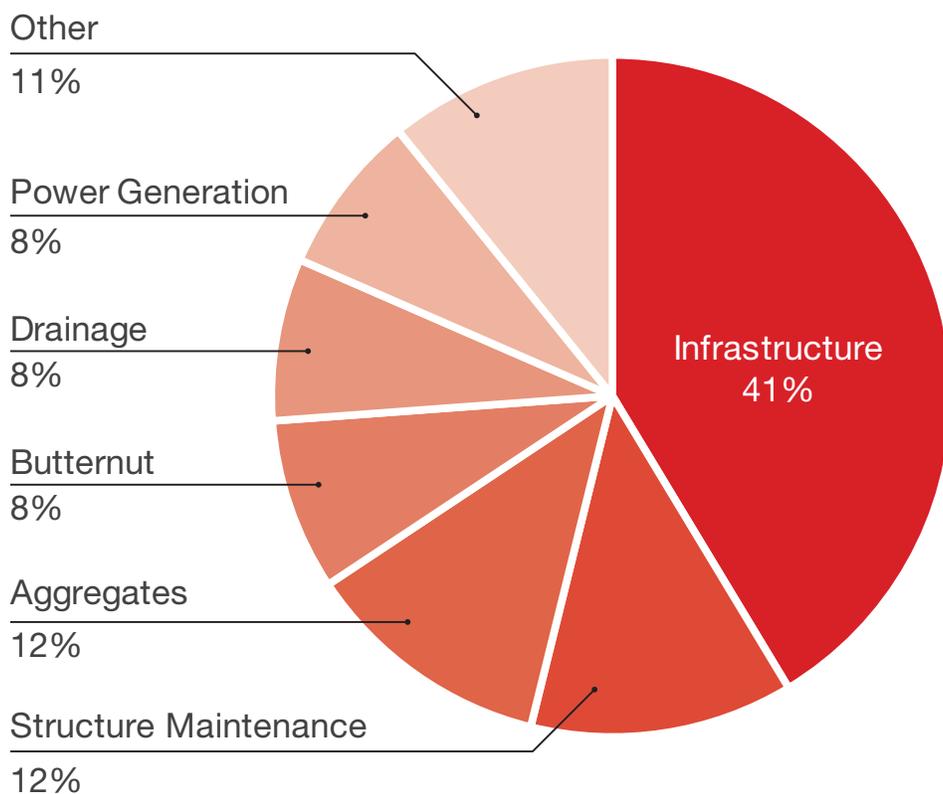
**Figure 8.** *ESA* authorizations for chimney swift (as of March 31, 2017).

**Authorization Trends:** Virtually all of the authorizations (84%) for chimney swift were under the non-imminent health and safety regulatory exemption (Figure 8). Although there is a species-specific exemption for chimney swift, only two registrations have been received by the MNRF under this provision.

## 7.2.2 Infrastructure Has the Largest Impact on Species at Risk

Of all activities that negatively affect species at risk, the most common are activities related to infrastructure and structure maintenance (Figure 9) – for example, work on roads, electric power systems, communications systems, etc. Most of these activities now proceed under the permit-by-rule exemption for “non-imminent threats to human health and safety.” Over 400 activities (about a quarter of all registrations) related to infrastructure

or structure maintenance have proceeded under this exemption since 2013. Although proponents of these activities are supposed to “minimize” adverse effects, in most cases they are not required to go to the effort of preparing a formal mitigation plan, unless they are undertaking a complete infrastructure replacement.<sup>11</sup> This is unlike most other permit-by-rule exemptions. Without such a plan, effective harm mitigation is less likely.



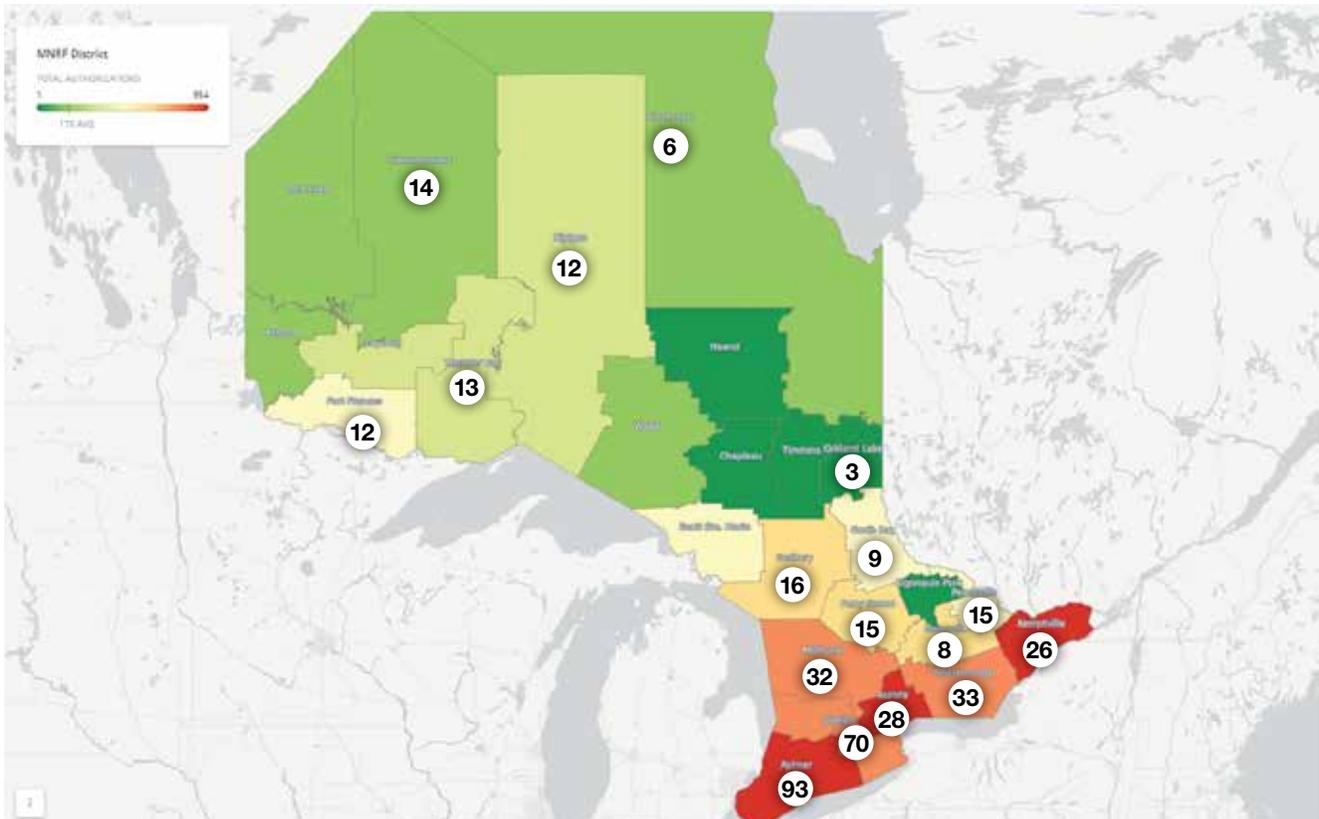
**Figure 9.** Percentage of authorizations by activity. Authorizations for protection or recovery have been omitted in this figure. “Other” category includes agriculture, residential, educational possession, development, mining, and incidental trapping.

Source: Based on data provided by the MNRF.

**OF ALL ACTIVITIES THAT NEGATIVELY AFFECT SPECIES AT RISK, THE MOST COMMON ARE ACTIVITIES RELATED TO INFRASTRUCTURE AND STRUCTURE MAINTENANCE.**

### 7.2.3 Pressure on Species at Risk is Highest in Southern Ontario

The largest numbers of authorizations under the *ESA* are for activities in southern Ontario, particularly in Aylmer, Aurora, and Kemptville districts (Figure 10). This trend is likely a result of the high number of activities (particularly development) conducted in these areas, compounded by the disproportionately high number of species at risk in southern Ontario. On the other hand, the extremely small number of *ESA* approvals in several northern regions raises questions about whether the *ESA* is being appropriately applied in northern Ontario.



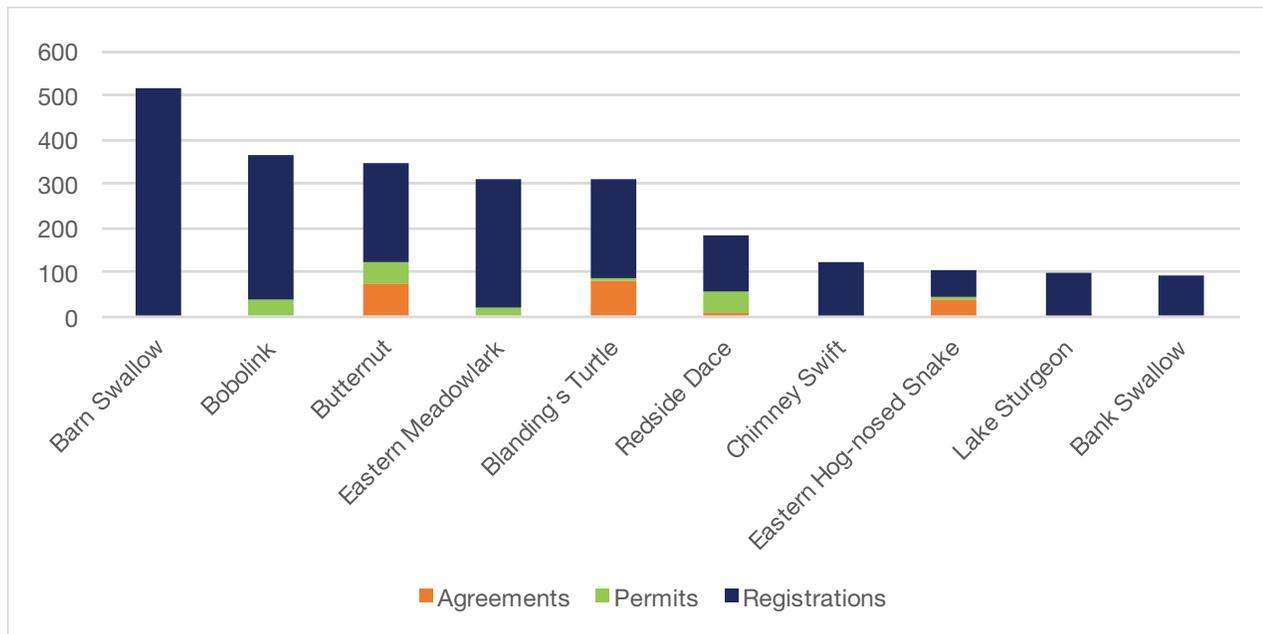
**Figure 10.** Geographic distribution of authorizations under the *ESA* and approximate number of threatened and endangered species present in the area.

Source: Based on data provided by the MNRF.

### 7.2.4 Some Species at Risk Are Affected More Frequently

Of the 171 endangered and threatened species listed under the *ESA*, there are several that are affected particularly frequently by potentially harmful activities. Figure 11 shows the ten species most frequently harmed by activities authorized under the *ESA* (excluding activities undertaken for the purposes of protecting and recovering species).

From a species perspective, large number of authorizations for the barn swallow is particularly troubling. The barn swallow was provided with its own permit-by-rule exemption even though, at the time the system was developed, only two permits had been issued for activities impacting the species. Since the amended regulation came into force in 2013, there have been 520 registrations and five permits issued for the barn swallow, accounting for about 32% of all *ESA* registrations and 19% of all *ESA* authorizations (for additional information on barn swallow, see box below).



**Figure 11.** Top ten species most frequently affected by activities authorized under the *ESA*. Authorizations for activities related to species protection and recovery are excluded.

Source: Based on data provided by the MNRF.

## Barn Swallow



Photo Credit: Charles James Sharp.

**Status:** Threatened

**Ontario Distribution:** Barn swallows are found throughout southern Ontario and have been observed as far north as Hudson Bay.

**Ontario Population and Trend:** The number of barn swallows in Ontario has decreased by 65% between 1966 and 2009. The top threats to barn swallows include habitat loss and degradation, large-scale changes in insect prey, and climate change.

**Authorizations (excluding protection and recovery activities):** 517

- Agreements: 0
- Permits: 4 (1 'A' permit, 3 'C' permits and 0 'D' permits).
- Permit-by-rule registrations: 513



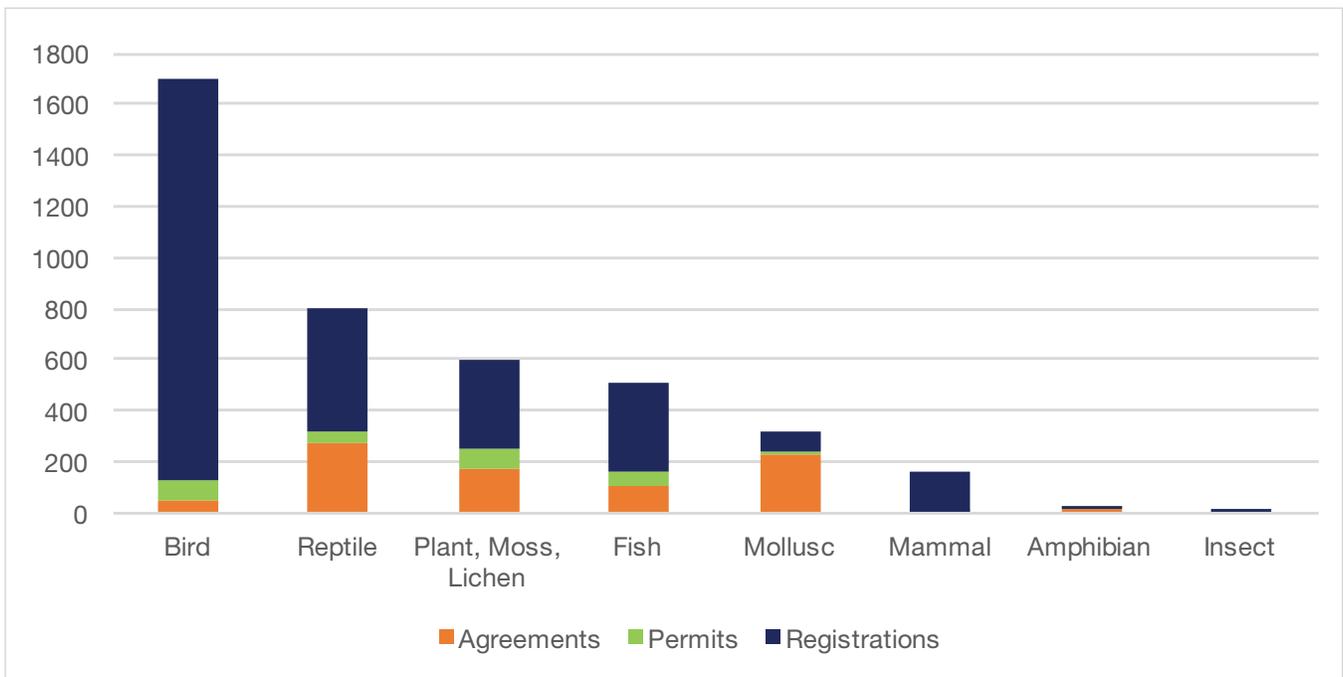
**Figure 12.** ESA authorizations for barn swallow (as of March 31, 2017).

**Authorization Trends:** Although there is a species-specific exemption for barn swallow, most activities affecting the species were registered under the non-imminent health and safety exemption. The non-imminent health and safety exemption accounted for 274 registrations (53%) compared to 200 registrations (39%) for the barn swallow exemption (Figure 12). This is particularly troubling given that the barn swallow exemption includes specific measures to provide a benefit to the species (i.e., creating and maintaining new habitat and monitoring and reporting on habitat), whereas the non-imminent health and safety exemption is generic in nature. It does not include any species-specific mitigation measures, and in most cases does not even require the development of a mitigation plan.

Barn swallow was listed as a threatened species in January 2012. The MNRF issued two permits for the species before permit-by-rule came into effect in 2013. Since that time, there have been 517 registrations under permit-by-rule. The dramatic increase in authorizations brings into question the motivation to establish this species-specific regulatory exemption in the first place. The high number of registrations for the barn swallow may indicate that more activities are coming into compliance given the relative ease of registration versus getting a permit. However, the lack of permits issued to protect the barn swallow prior to the introduction of permit-by-rule in 2013 points to the ineffectiveness of the *ESA* permitting framework.

As a group, birds are highly affected by harmful activities authorized by the MNRF. Although birds constitute just 13% of species listed as endangered or threatened, authorizations for bird species account for 41% of all approvals (Figure 13). Reptiles are also

frequently impacted by activities – they represent just 9% endangered and threatened species listed under the *ESA*, but they are affected by 19% of authorized activities (Figure 13).



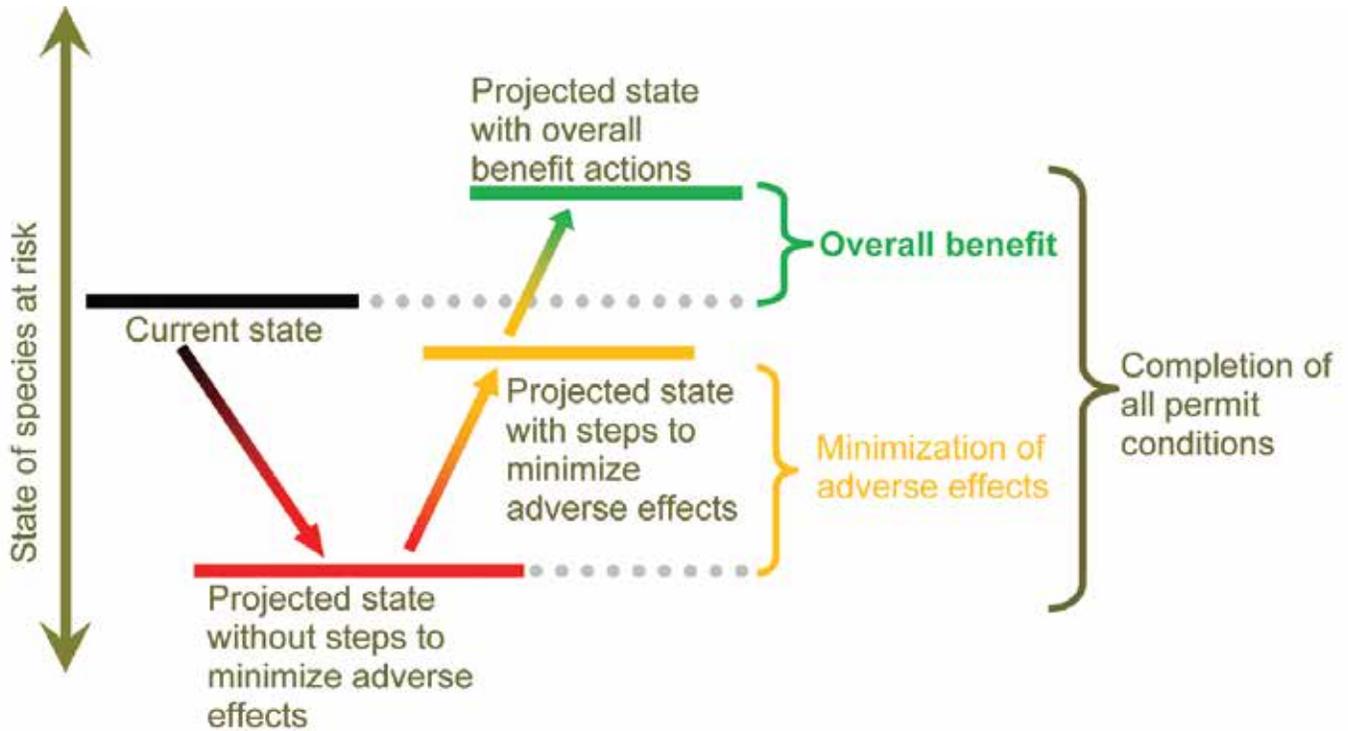
**Figure 13.** Number of *ESA* authorizations by species group. Authorizations for activities related to species protection and recovery are excluded.

Source: Based on data from the MNRF.

### 7.3 Species are Getting Less Protection Under Permit-by-Rule

Although the *ESA* was designed to include flexibility to allow activities that could harm species at risk to proceed with an approval, it was also designed with safeguards. One of the most common types of permits issued for industrial and commercial activities requires that an “overall benefit” to the species be achieved through requirements imposed by conditions of the permit.

Achieving an overall benefit not only requires a proponent to minimize the adverse effects of the activity on the affected species, but also to take steps to actually improve the overall state of the species (see Figure 14). According to the MNRF, “[o]verall benefit is more than no net loss or an exchange of like- for-like ... Overall benefit is grounded in the protection and recovery of the species at risk and must include **more** than steps to minimize adverse effects on the protected species or habitats” (emphasis in original).



**Figure 14.** A simplified representation of overall benefit concept as depicted by the MNRF.

Source: The MNRF, 2012.<sup>13</sup>

In the permit-by-rule system, the MNRF abandoned the essential “overall benefit” safeguard for almost all species at risk and many of the major activities that harm them. While a few of the species-specific exemptions include actions that could potentially benefit the species (e.g., replacing damaged or destroyed habitat with a greater area of suitable new habitat), most exemptions only require the proponent to minimize the predictable adverse effects of their activities – likely leaving the species in a worse state than before. The sweeping scope of the exemptions created by the MNRF in 2013 is also cause for concern.

Only a few of the species-specific rules included in the *ESA*’s permit-by-rule system appear to be appropriate. For example, if an activity will adversely affect a butternut tree, the effects on Ontario’s butternut population can often be counteracted by planting healthy butternut trees elsewhere. The current permit-by-rule exemption requires that proponents that kill or

**THE MNRF IS NOT TRACKING  
THE CUMULATIVE IMPACT OF  
HARMFUL ACTIVITIES ON SPECIES.**

**IN THE PERMIT-BY-RULE SYSTEM, THE MNRF ABANDONED THE ESSENTIAL “OVERALL BENEFIT” SAFEGUARD FOR ALMOST ALL SPECIES AT RISK AND MANY OF THE MAJOR ACTIVITIES THAT HARM THEM.**

take a butternut tree plant between 2 and 20 seedlings to replace it (depending on the size of the tree taken).<sup>14</sup>

The data provided by the ministry indicates that 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.

This is particularly troubling because the MNRF is not tracking the cumulative impact of harmful activities on species. In April 2017, the ECO asked ministry staff whether the MNRF considers cumulative effects in its approvals process or under permit-by-rule, and whether it has conducted a cumulative effects analysis for the *ESA*. The ministry stated that it does not consider cumulative effects and has not undertaken any such analysis. This potentially puts many species in a “death by a thousand cuts” situation that could cause irreparable harm, especially since the MNRF does not deny *ESA* authorizations.

This frequent authorization of harm to species at risk and their habitats – almost across the board – is not counterbalanced by effective recovery planning. Although government response statements are intended to set out a clear plan for recovering species at risk, the ECO has previously reviewed dozens of government response statements and found them to be ineffective (see for example, Part 5.1 of the ECO’s 2014/2015 Annual Report).

## Bobolink



Photo Credit: Andrea Westmoreland.

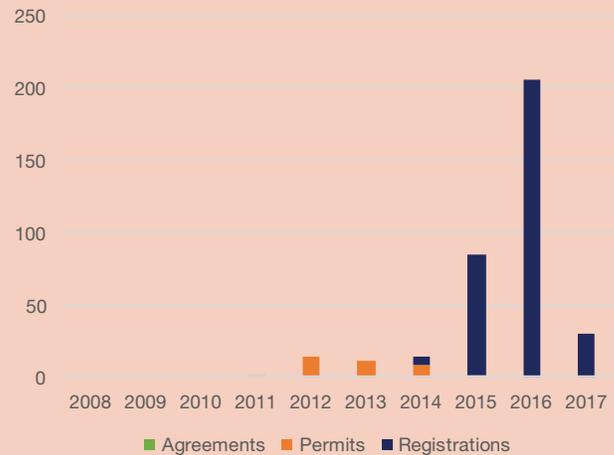
**Status:** Threatened

**Ontario Distribution:** The bobolink is found throughout southern and central Ontario. It depends on grasslands like hayfields and pastures.

**Ontario Population and Trend:** In 2007, the bobolink population was estimated at 400,000 breeding pairs. The bobolink has experienced a loss of 52% of its population since 1998. The bobolink's main habitat is agricultural land leading to problems during harvest, crop conversion and pesticide use.

**Authorizations (excluding protection and recovery activities):** 362

- Agreements: 0
- Permits: 37 (1 'A' permit, 36 'C' permits)
- Permit-by-rule registrations: 325



**Figure 15.** ESA authorizations for bobolink (as of March 31, 2017).

**Authorization Trends:** Although the bobolink has its own species-specific exemption, the majority (60%) of the authorizations for the species were for the non-imminent health and safety regulatory exemption (Figure 15). The bulk of the remaining authorizations were made up of the drainage works and wind operations regulatory exemptions, and 'C' permits (primarily for wind and solar farms).

**PERMIT-BY-RULE IS A  
PROPONENT-DRIVEN APPROACH  
THAT IS LARGELY BASED ON  
SELF-ASSESSMENT.**

## **7.4 Blind Faith: The MNRF Doesn't Check**

Permit-by-rule is a proponent-driven approach that is largely based on self-assessment. This means that there is generally minimal, if any, ministry involvement when a registration occurs. As a result, a robust inspection, compliance and enforcement system is critical to minimize the inherent risk in a permit-by-rule system, by ensuring that proponents are actually following the rules. When the MNRF transitioned to a permit-by-rule system for the *ESA*, the ECO expressed concern that the ministry had done so without developing appropriate compliance and enforcement policies to make sure that people follow the rules.<sup>15</sup> Because of the minimal ministry involvement in permit-by-rule, effectiveness monitoring is essential to ensure that the rules protect species on the ground.

### **7.4.1 No Routine Compliance Auditing**

In January 2017, the ECO asked the MNRF for its enforcement or compliance protocols for its *ESA* program. The ministry eventually provided the ECO with a copy of its *Risk-Based Compliance Handbook for the Endangered Species Act, 2007*, dated May 2017. The handbook essentially informs staff in the ministry's Regional Operations Division that they do not have the authority to engage in any enforcement-related activities. Their compliance-related duties are limited to activities such as education, training and stakeholder outreach; their role is to support, enable and encourage voluntary compliance. Operations staff are informed that they do not have the authority to take

any actions intended to determine whether an activity is compliant with the *ESA* or collect any evidence of non-compliance. Instead, they are directed to refer any instances of suspected non-compliance to the MNRF's Enforcement Branch. The applicability of the handbook is limited to the Regional Operations Division and does not cover any compliance protocols or policies for the Enforcement Branch, although this branch is the lead in determining the ministry's compliance approach.

On its face, this is a reasonable approach given that the law only empowers ministry enforcement officers (i.e., conservation officers and park wardens) to undertake inspections and searches, issue orders, or initiate prosecutions. Although the law does allow the Minister to appoint other persons as enforcement officers for the purposes of the act (for example, it could empower operations staff to act as enforcement officer), the Minister has not exercised this power to date.

The MNRF Enforcement Branch staff stated that the branch does not have any inspection targets or protocols with respect to activities regulated under the *ESA*. Instead, its enforcement actions are largely driven by complaints or tips, or referrals from operations staff who may have grounds to suspect non-compliance. This means that neither the Regional Operations Division nor the Enforcement Branch is conducting routine compliance monitoring of activities regulated under the *ESA*.

**NEITHER THE REGIONAL  
OPERATIONS DIVISION NOR  
THE ENFORCEMENT BRANCH  
IS CONDUCTING ROUTINE  
COMPLIANCE MONITORING.**

The MNRF stated that it conducted a desk-top audit of all the registrations it received in the first year of the permit-by-rule system (July 2013 - June 2014). The ministry's audit found that over 90% of registrants provided the required information in their online submissions and 85% provided mitigation plans or other required records when requested by the MNRF. The ministry did not provide details on its actions to remedy the non-compliance it identified in this audit, but stated that it made "enhancements to the online system and is developing tools and resources to enable registrants to better use the registry system and understand reporting requirements." The MNRF's review of registered activities was limited to a paper audit of the registration system, and did not include any on-the-ground assessment of registered activities. The ministry did not indicate whether it has audited registered activities since its initial examination of the first year of the program.

**NONE OF THE ESSENTIAL COMPLIANCE AND ENFORCEMENT INFORMATION IS TRACKED.**

#### **7.4.2 Enforcement Data Are Not Adequately Tracked by the Ministry**

The ECO requested extensive information on the MNRF's compliance and enforcement activities under the *ESA*, including data summarizing: warnings, charges, orders, inspections and auditing related to authorizations.

According to the ministry, it has issued a total of 58 warnings and laid 132 charges under the *ESA* since 2007. Despite repeated requests from the ECO over

**THE MNRF CLAIMS IT HAS NO LEGAL AUTHORITY TO CONDUCT ROUTINE ON-THE-GROUND COMPLIANCE MONITORING OF REGISTERED ACTIVITIES.**

a period of about six months, the MNRF was not able to provide any additional detail on these instances of non-compliance. The ministry was also unable to provide the ECO with any information regarding orders issued under the *ESA*, statutory inspections (i.e., compliance inspections for permits, agreements and orders), or compliance referrals from the Regional Operations Division. The MNRF staff stated that none of this essential compliance and enforcement information is tracked.

#### **7.4.3 No Legal Authority to Conduct Site Inspections for Permit-by-Rule Activities**

Although the *ESA* grants enforcement officers the authority to conduct site inspections to determine whether a proponent is complying with an agreement, permit or order, this authority does not extend to activities covered by the permit-by-rule system (see endnote for additional detail).<sup>16</sup> As a result, the MNRF claims it has no legal authority to conduct routine on-the-ground compliance monitoring of registered activities. According to the ministry, it considered this limitation while it was developing the permit-by-rule system. In other words, when the MNRF created the permit-by-rule system, which regulates the vast majority of activities affecting at-risk species, it did so with the full awareness that it would not have the jurisdiction to conduct compliance monitoring of those activities.

#### 7.4.4 The MNRF Is Not Undertaking Effectiveness Monitoring

Because there is no on-the-ground auditing of registered activities, the ministry also cannot assess whether the rules themselves are effective for protecting species at risk. In fact, ministry staff stated to the ECO that the MNRF has no plans to evaluate the effectiveness of its permit-by-rule system, which would be necessary to determine whether species are receiving adequate protection under the rules.

Moreover, this also hinders the ministry from re-evaluating the appropriateness of the permit-by-rule system for a particular species or sector.

**THE MNRF HAS NO PLANS TO EVALUATE THE EFFECTIVENESS OF ITS PERMIT-BY-RULE SYSTEM.**

#### Eastern Meadowlark



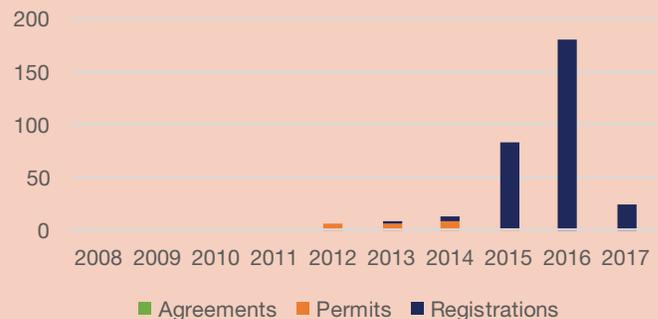
**Status:** Threatened

**Ontario Distribution:** The eastern meadowlark is found south of the Canadian Shield but has been observed as far north as the Lake of the Woods area.

**Ontario Population and Trend:** There are roughly 130,000 adult eastern meadowlarks in Ontario. The species has experienced a 62% population decline in Ontario since 1970. The eastern meadowlark's main threats are habitat loss due to development and agricultural operations.

#### Authorizations (excluding protection and recovery activities): 310

- Agreements: 0
- Permits: 22 (all 'C' permits)
- Permit-by-rule registrations: 288



**Figure 16.** ESA authorizations for eastern meadowlark (as of March 31, 2017).

**Authorization Trends:** Trends in authorizations for eastern meadowlark are virtually identical to the bobolink. The majority of the authorizations (63%) were for the non-imminent health and safety regulatory exemption, with the remaining comprising of the eastern meadowlark, drainage and wind regulatory exemptions, and 'C' permits (primarily for wind and solar farms) (Figure 16).

DESPITE THE STRONG PUBLIC INTEREST IN SPECIES AT RISK, AND THE ENVIRONMENTAL IMPORTANCE OF ESA AUTHORIZATIONS, ONLY A SMALL FRACTION OF ESA AUTHORIZATIONS ARE SUBJECT TO THE EBR'S NOTICE AND CONSULTATION RIGHTS.

## 7.5 The Public Can't Access Information About Activities That Affect Species at Risk

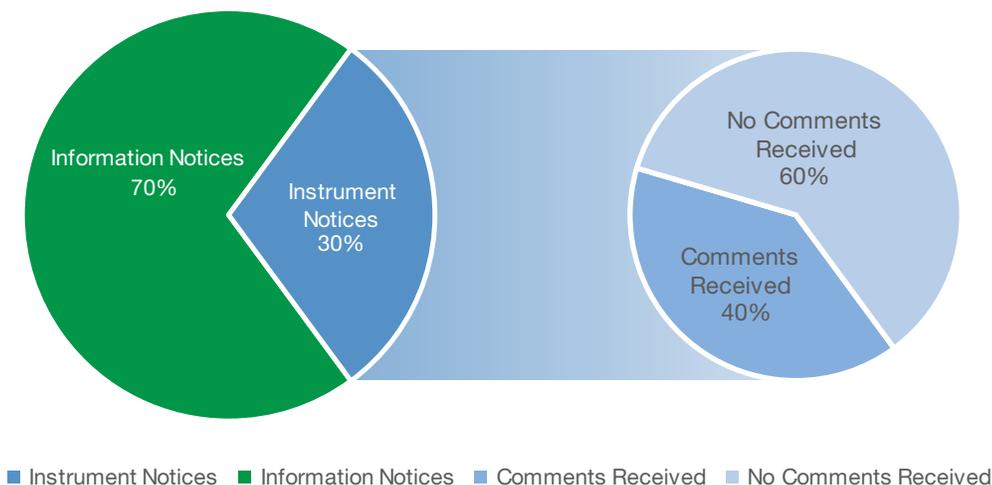
### 7.5.1 The Public Is Cut Out of ESA Decision Making

The *Environmental Bill of Rights, 1993 (EBR)* provides Ontarians with the right to receive notice of, and to comment on, decisions that could have a significant effect on the environment. This right applies to instruments, like permits and other types of approvals, that are “classified” (prescribed) under the *EBR*. For such instruments, ministries must post a notice on the Environmental Registry informing the public about its proposal to issue the instrument and invite the public to submit their comments on the proposal.

Despite the strong public interest in species at risk, and the environmental importance of *ESA* authorizations, only a small fraction of *ESA* authorizations are subject to the *EBR*'s notice and consultation rights. The public doesn't have any right to participate in decisions about species at risk authorizations if: the proposal involves an animal; the proponent is the Crown, a municipality or a public body; and/or the activity takes place on Crown land or in a provincial park.<sup>17</sup>

The ministry's rationale for excluding these permits and agreements is that they are covered by the *Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects*. Ministries do not have to consult the public through the Environmental Registry if an instrument is for a project that is covered (or exempted) by the *Environmental Assessment Act*, including projects that fall under a Class Environmental Assessment (Class EA).<sup>18</sup> This exemption is intended to avoid duplication because, in theory, environmental assessments have public consultation requirements similar to the *EBR* consultation process. However, the public consultation requirements of this Class EA are not equivalent to those of the *EBR*.

Although not required to do so, the MNRF posts information notices on the Environmental Registry to notify the public about *ESA* instruments that are not classified under the *EBR*. However, information notices do not provide the same public rights as proposals for prescribed instruments.<sup>19</sup> Public scrutiny is essential to improve environmental decision making, and is a well used tool when the opportunity is provided, with the public providing input on permits about 40% of the time. However, only 30% of *ESA* overall benefit permits are required to be posted on the Environmental Registry as instrument notices for full public notice and comment (Figure 17).



**Figure 17.** Public consultation on overall benefit permits issued under the *ESA*.

### 7.5.2 The MNRF Does Not Share Information About Permit-by-Rule Activities

Many activities that previously would have required a permit now proceed under permit-by-rule. As a result, these activities no longer show up on the Environmental Registry, and the public loses the *EBR* rights to receive notice and to comment.

In January 2012, the MNRF launched a species at risk “Permit Tracker”— an interactive map that provided information on *ESA* authorizations. At the time the new exemptions came into effect, the MNRF staff indicated to the ECO that eventually all permits, agreements and registrations (i.e., registered activities covered by a permit-by-rule exemption) would be accessible through this tool. However, this never occurred – the MNRF has not updated the authorization tracker since 2013.

The MNRF now has no intention of publicly sharing information on registered activities under the *ESA*. Instead, the MNRF informed the ECO that members of the public can only obtain such information by submitting a freedom of information request under

the *Freedom of Information and Protection of Privacy Act*. In sharp contrast, all registered activities under the Ministry of the Environment and Climate Change’s permit-by-rule program (see Chapter 2 of this report) are fully accessible and searchable online on the ministry’s Access Environment site.

In effect, there is no readily available information on activities that the MNRF allows under permit-by-rule. The public is being kept in the dark on what activities are harming species at risk, and where. Without this information, stakeholders and members of the public cannot provide the MNRF with information about non-compliance, and cannot hold the MNRF accountable for its failures to protect species at risk.

**THE PUBLIC IS BEING KEPT IN THE DARK ON WHAT ACTIVITIES ARE HARMING SPECIES AT RISK, AND WHERE.**

## Redside Dace



**Status:** Endangered

**Ontario Distribution:** The redbase dace is found in southern Ontario, primarily in Lake Ontario tributaries around the Greater Golden Horseshoe and has been observed as far north as western tributaries of Lake Huron.

**Ontario Population and Trend:** There is insufficient data on population numbers in Ontario; however, sampling of historical redbase dace habitat indicate significant reductions in the species' range. The redbase dace's greatest threat is habitat loss and degradation due to urban development and agricultural activities, which can affect water quantity and quality by removing vegetation, changing water flows and temperatures, introducing contaminants, etc.

**Authorizations (excluding protection and recovery activities):** 181

- Agreements: 7 (5 drainage and 2 infrastructure)
- Permits: 48 (2 'A' permits and 46 'C' permits)
- Permit-by-rule registrations: 126



**Figure 18.** ESA authorizations for redbase dace (as of March 31, 2017).

**Authorization Trends:** Registrations under the aquatic works regulatory exemption comprise 52% of the total authorizations for the species, followed by 'C' permits (primarily for bridge and culvert maintenance) and the non-imminent human health and safety regulatory exemption (Figure 18).

### 7.5.3 There Is No Way to Appeal ESA Permit Decisions

The *ESA* does not include any appeal rights for proponents, meaning that anyone seeking an *ESA* permit does not have the ability to challenge a decision by the ministry. This likely has little impact on proponents, since *ESA* permits are never refused. But the *Environmental Bill of Rights, 1993* only creates appeal rights for members of the public when proponents can appeal. As a result, members of the public cannot seek leave (i.e., permission) to appeal the MNRF's decisions to grant an *ESA* permit under the *EBR*.<sup>20</sup> This leaves both instrument holders and concerned members of the public with only one, very expensive and difficult to use option for challenging authorization decisions – applying for a judicial review of the decision.

Challenging decisions through a judicial review is much more difficult than through an appeal under the *EBR*. The process for pursuing an appeal before the Environmental Review Tribunal is simpler, less expensive and faster than going to court. Moreover, courts require judicial review applicants to meet a very high bar to show that a ministry's decision was unreasonable, and the Environmental Review Tribunal has specialized environmental expertise and understanding that the courts lack. No *ESA* approval has been successfully overturned by judicial review. As a result, there is no effective oversight, and no legal remedy for the MNRF's failures to effectively protect species at risk.<sup>21</sup>

**THERE IS NO EFFECTIVE OVERSIGHT, AND NO LEGAL REMEDY FOR THE MNRF'S FAILURES TO EFFECTIVELY PROTECT SPECIES AT RISK.**

### 7.5.4 A Back-door Appeal Route for Renewable Energy Projects

The only exception is the special appeal process for Renewable Energy Approvals (REAs) (e.g., for wind farms) under the *Environmental Protection Act*.<sup>22</sup> Several *ESA* permits have been subject to indirect challenges during wind farm appeals. To date, two appeals of wind energy project approvals have succeeded because of the projects' impacts on threatened and/or endangered species. In both cases the Environmental Review Tribunal found that the MNRF's authorizations (or lack thereof) under the *ESA* were insufficient to prevent serious and irreversible harm to the affected species.

**THE ENVIRONMENTAL REVIEW TRIBUNAL FOUND THAT THE MNRF'S AUTHORIZATIONS (OR LACK THEREOF) UNDER THE *ESA* WERE INSUFFICIENT TO PREVENT SERIOUS AND IRREVERSIBLE HARM TO THE AFFECTED SPECIES.**

In July 2013, the Environmental Review Tribunal granted an appeal of a REA issued to the Ostrander Point Wind Energy Park, a nine turbine wind energy facility in Prince Edward County.<sup>23</sup> The Tribunal found that the roads for the project would cause "serious and irreversible harm" to the Blanding's turtle population at the project site due to mortality. Although the project had obtained an *ESA* permit from the MNRF requiring the proponent to provide an overall benefit to the Blanding's turtle in the province as a whole, the Tribunal found that the conditions were insufficient to protect the

specific population affected by the project, in particular because the project would have been constructed directly in the species' habitat, and because the project was located on publicly accessible Crown land. The appeal ultimately concluded in June 2016, with the Environmental Review Tribunal wholly revoking the REA for the project.<sup>24</sup>

In our 2013 Special Report, we noted that the Tribunal's findings in the Ostrander case created doubt about whether the reduced level of protection afforded to species under the permit-by-rule system would be sufficient to withstand legal scrutiny under similar circumstances. We also noted that the decision underscored the need to account for site-specific factors when determining the adverse effects of projects on species at risk, and that the permit-by-rule system does not do so.

More recently, the Environmental Review Tribunal substantially altered a REA issued for the White Pines Wind Project (also in Prince Edward County), after finding that the project would cause serious and irreversible harm to two species at risk – the little brown bat and Blanding's turtle.<sup>25</sup> The Environmental Review Tribunal ordered amendments to the proponent's mitigation plan to ensure sufficient measures to minimize harm to the little brown bat. It also removed 18 of the 27 project's turbines from the approval to address harm to the Blanding's turtle.

The project was proceeding under both an overall benefit permit (for bobolink, eastern meadowlark and eastern whip-poor-will) and a permit-by-rule *ESA* exemption for wind generation facilities with respect to little brown bat. The proponent did not obtain any *ESA* authorization for Blanding's turtles, on the basis that it would implement measures to avoid harm to this species.

The Tribunal found that the measures included in the proponent's mitigation plan (as required under the wind generation exemption regulation) would be insufficient to prevent harm to the little brown bat. It also noted that the applicable rules in the regulation do not provide any details or minimum standards for operational curtailment (e.g., by specifying turbine speed to minimize risk to bats). The Tribunal found that the Blanding's turtle would suffer serious and irreversible harm as a result of increased collision mortality on upgraded municipal roads.

These cases show why effective oversight of the ministry's *ESA* decisions is essential. They also demonstrate that the MNRF is not using its powers under the *ESA* to effectively prevent harm to species at risk. These cases also illustrate the unusual situation that exists because of the absence of an appeal right for *ESA* approvals – species at risk may be afforded greater protection from the impacts of wind farms and other renewable energy projects than from any other activities in Ontario.

## Blanding's Turtle



Photo Credit: Ontley McNauth.

**Status:** Threatened

**Ontario Distribution:** Blanding's turtle is found in southern and eastern Ontario in approximately four distinct and isolated populations.

**Ontario Population and Trend:** Research indicates that there are approximately 10,000 individuals within Ontario. The top threats include road mortality, habitat loss, and poaching.

**Authorizations (excluding protection and recovery activities):** 308

- Agreements: 80 (35 for aggregates, 43 for drainage, and 2 for infrastructure)
- Permits: 8 (all 'C' permits)
- Permit-by-rule registrations: 220



**Figure 19.** ESA authorizations for Blanding's turtle (as of March 31, 2017).

**Authorization Trends:** Prior to the implementation of the permit-by-rule system, Blanding's turtle was subject to a high number of aggregate and drainage agreements (Figure 19). Since then, the species has been listed on 154 non-imminent health and safety registrations, accounting for 50% of all authorizations for the species.

Blanding's turtle was also included in one species-specific registration for the barn swallow, potentially indicating a misuse of the registration system.

**Bats (Eastern Small-footed Myotis, Little Brown Myotis, Northern Myotis, Tri-colored Bat)**



Little Brown Bat. Photo Credit: USFWS/Ann Froschauer.

**Status:** Endangered (all species)

**Ontario Distribution:** These bats are generally found in southern and central Ontario.

**Ontario Population and Trend:** Cave-dwelling bat populations in Ontario have been decimated by a fungus called white nose syndrome (see Chapter 3.2 of Volume 2 of the ECO's 2015/2016 Environmental Protection Report). It is uncertain whether they will ever recover.

**Authorizations (excluding protection and recovery activities): 127**

- Agreements: 0
- Permits: 3 (all 'C' permits)
- Permit-by-rule registrations: 124



**Figure 20.** ESA authorizations for eastern small-footed myotis, little brown myotis, northern myotis, and tri-colored bat (as of March 31, 2017).

**Authorization Trends:** Authorizations for Ontario's cave-dwelling bats have primarily been issued under the wind facility operation regulatory exemption (65%), followed by the transition regulatory exemption (Figure 20).

## 7.6 Conclusion: Big Changes Needed to Protect Species at Risk

The ECO still stands behind the *ESA* in principle – it is a good law that has the potential to protect and recover species at risk. But as we have now reported on many occasions, the MNRF has utterly failed to implement the law effectively. With each passing year, the extent of this failure becomes more clear – the ministry has reduced what should have been a robust system for protecting species at risk to what is largely a paper exercise. The MNRF is failing to not just protect species at risk as intended under the law, but also to lead effective recovery programs. In the best case, the MNRF has created a system that leaves itself with a minimal role to play; in the worse case, it has a created a system designed to fail.

**THE MNRF HAS UTTERLY FAILED TO IMPLEMENT THE LAW EFFECTIVELY.**

The massive shift from overall benefit to minimizing harm – a much lower standard of protection – now authorizes harm to most species at risk across Ontario. Meanwhile, the MNRF relies on blind faith and on public complaints instead of an effective compliance and enforcement strategy. It makes no attempt to ensure routine compliance, to prevent cumulative impacts, or to monitor the effect of its permit-by-rule system on species at risk.

The MNRF does not have measures in place to monitor or assess if or how the *ESA* regulatory system is working to protect and recover species at risk on the

ground. Because the ministry has not examined the effectiveness of its permit-by-rule conditions, it has no way to evaluate whether changes need to be made to the system. **The ECO recommends that the MNRF determine the effects of its authorizations on species at risk and publicly report on the results.**

Worse, the ministry's compliance monitoring and enforcement actions for activities affecting species at risk are deficient. The MNRF should require the submission of mitigation documentation and monitoring records to help ensure that proponents of registered activities understand and are following the correct rules. The MNRF's Enforcement Branch should also develop an effective enforcement strategy for activities affecting species at risk, including site inspection targets.

On a more fundamental level, it is deeply disturbing that the MNRF designed a permit-by-rule system to regulate activities that could harm the province's most vulnerable species without first ensuring that it had the legal authority to audit the on-the-ground compliance with that system. This astonishing lack of oversight creates serious doubt about the ministry's commitment to actually protecting species at risk, and it should be remedied without delay. **The ECO recommends that the MNRF amend the *Endangered Species Act* to give enforcement officers the power to conduct inspections of registered activities to ensure compliance with permit-by-rule conditions.**

The shift to a less protective regime for species at risk, coupled with insufficient oversight and enforcement by the MNRF is even more problematic given the

increasing lack of transparency and accountability. As time has passed, less and less information is publicly available on activities affecting species at risk. In effect, the system is broken and there is little opportunity for the public to hold the government to account for its failures in protecting species at risk.

The ECO strongly believes that the protection of species at risk in Ontario can be improved by enhancing public participation and transparency. The lack of public notice and comment for *ESA* permits means that the public has no opportunity to know what is happening to species at risk and to hold the MNRF accountable for a critically important program. **The ECO recommends that the MNRF post instrument proposals for all permits on the Environmental Registry for full public notice and comment.**

Further, it is unacceptable that the ministry refuses to make information on activities that are proceeding under the permit-by-rule system publicly available. **The ECO recommends that the MNRF make all species at risk authorizations, including registrations, publicly accessible on Access Environment.**

Lastly, a final challenge is that, even when the public is able to access information on authorizations, it is extremely difficult to challenge those decisions. There needs to be an accessible mechanism to appeal permit decisions when appropriate. **The ECO recommends that the MNRF amend the *Endangered Species Act* to create a right of appeal for permits.**

## Endnotes

1. Stuart L. Pimm et al. "The biodiversity of species and their rates of extinction, distribution and protection" (2014) 344:6187 *Science* 1246752.
2. O Reg 230/08.
3. *Endangered Species Act, 2007*, SO 2007, c 6, s 9 [ESA].
4. *ESA*, *supra* note 3, s 10. Note: it is also illegal to damage or destroy the habitat of extirpated species if prescribed by regulation.
5. *ESA*, *supra* note 3, s 17(2).
6. *ESA*, *supra* note 3, ss 16, 19.
7. O Reg 242/08.
8. *ESA*, *supra* note 3, s 18.
9. O Reg 242/08, s 23.13. However, activities that fall under the aquatic species exemption do not qualify for this exemption.
10. Endangered and threatened species that were listed at the time the *ESA* came into force, but that were not listed under the legislation that preceded the *ESA* did not receive habitat protection for the first five years the law was in force. The *ESA*'s habitat protections came into effect for these species on July 1, 2013.
11. A mitigation plan is only required if work to maintain, repair, remove or replace and existing structure or infrastructure results in the upgrade or removal of a structure or infrastructure, the decommissioning of a mine or the replacement of an entire structure or infrastructure. See O Reg 242/08, s 23.18(5)(1)(ii).
12. Ministry of Natural Resources, *Endangered Species Act Submission Standards for Activity Review and 17(2)(c) Overall Benefit Permits* (Ontario: February 2012).
13. *Ibid.*
14. O Reg 242/08, s 23.7. Note that different ratios apply to butternut trees that are harmed rather than killed/taken. The exemption only applies to a maximum of ten Category 2 trees.
15. Environmental Commissioner of Ontario, *Laying Siege to the Last Line of Defence: A Review of Ontario's Weakened Protections for Species at Risk* (Toronto: ECO, 2013) at 33.
16. Section 23 of the *ESA* establishes the powers of enforcement officers with respect to inspections to determine compliance. Subsection 23(3) sets out the circumstances in which an enforcement officer may conduct an inspection without a warrant – such inspections are limited to determining compliance with a provision of an agreement, permit or order. This power does not extend to activities proceeding under regulatory exemptions.

In addition, subsection 23(1) states that enforcement officers may obtain a warrant to "enter and inspect any land or other place" provided that there are reasonable grounds to believe that an inspection would assist in determining compliance with the *ESA* more broadly. However, warrants must be obtained under the *Provincial Offences Act*. The *Provincial Offences Act* provides the ability to issue a search warrant, but does not contemplate the issuance of a warrant to inspect. The MNRF asserts that it would be unable to obtain a warrant to inspect given that this is not set out in the *Provincial Offences Act*.

The *ESA*'s separate search warrant provisions (as set out in section 25) are only applicable in circumstances where there are reasonable grounds to believe that an actual offence is occurring or has occurred.

17. O Reg 681/94, s 10.5.
18. *Environmental Bill of Rights, 1993*, SO 1993, c 28, s 32.
19. Proposal notices and information notices are different from each other. Ministries are required to invite and consider public comments on proposal notices, and they must also post decision notices explaining the effect of those comments on their final decisions. Information notices do not have to include invitations to the public to provide comments, and ministries are not required to consider public comments or subsequently post decision notices.
20. The *Environmental Bill of Rights, 1993* provides Ontarians with the right to seek leave to appeal decisions of instruments that are classified under the Act, provided that a right of appeal exists under another Act. For example, instrument holders have a right to appeal a decision on whether to issue an approval under the *Environmental Protection Act*, and as a result, a third party may seek leave to appeal an *Environmental Protection Act* instrument.
21. When the *ESA* came into force, the ECO expressed concern over the lack of an appeal mechanism, stating that "giving the public the right to seek leave to appeal ministry decisions to issue permits under the Act easily justifies creating a right of appeal for the potential permit holder. In light of the explicit reference to the precautionary principle in the statute's preamble, the onus lies with MNR to justify why a permit should be granted." See Environmental Commissioner of Ontario, *The Last Line of Defence: A Review of Ontario's New Protections for Species at Risk* (Toronto: ECO, 2009) at 51.
22. The *Environmental Protection Act* allows appeals of REAs on the grounds that engaging in a renewable energy project will cause serious harm to human health or serious and irreversible harm to plant life, animal life or the natural environment.
23. *Alliance to Protect Prince Edward County v Director, Ministry of the Environment* (3 July 2013), 13-002/13-003, online: ON ERT <[www.ert.gov.on.ca](http://www.ert.gov.on.ca)>.
24. *Prince Edward County Field Naturalists v Ontario (Environment and Climate Change)* (6 June 2016), 13-003, online: ON ERT <[www.ert.gov.on.ca](http://www.ert.gov.on.ca)>.
25. *Hirsch v Ontario (Environment and Climate Change)* (26 April, 2016), 15-068/15-069, online: ON ERT <[www.ert.gov.on.ca](http://www.ert.gov.on.ca)>.

