

ONTARIO PROPERTY AND ENVIRONMENTAL RIGHTS ALLIANCE

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MEMORANDUM

TO: Ontario Municipalities
OPERA Members & Supporters

FROM: R.A. (Bob) Fowler
OPERA Secretary

DATE: July 24, 2009

RE: Overview of Ontario's Endangered Species Legislation

Ontario's Endangered Species Act (ESA 2007) was written by a cartel of professional lobbyists in 2005, unveiled as a Ministry of Natural Resources invention in 2006, filtered through a pre-orchestrated charade called "public discussion" in 2007 and hastily enacted by the provincial legislature in 2008. By such process Queen's Park and its favorite special interest agents transfers economic control of privately owned land to the state by regulation.

Like other equally draconian statutes such as the Greenbelt Act and Source Water Protection Act, ESA 2007 denies three defining principles of democratic governance – the right of appeal, the right of compensation for capital losses arising from government regulation and the right of natural justice. To these basic deficiencies must be added, in the case of endangered species legislation, an obvious Queen's Park intention to not only regulate use of land but also to re-brand vast tracts of it as wildlife habitat rather than private property. For affected municipalities and local taxpayers this subtle exercise in ownership infringement is succinctly evaluated in the following comment from Mr. Bob Woolham, an informed eastern Ontario observer.

"As long as a named species is only of concern to someone else far away, or about an esoteric-sounding bird, plant or animal, we think "why worry, it's not in my backyard".

The thrust of the Act (ESA 2007) is about votes and money. It's about urban employment of qualified professionals and about entertainment, both of which will directly impact those who live, work and/or own a piece of land in rural Ontario. It will have little, if any, adverse voter consequences in urban centers from whence the "real" votes are counted. Its broad based in terms of special interest organizations and groups of biologists whose only source of income comes from government or regulatory requirements for the ecological work to be done. And it gives a host of volunteers a new "mission of consequence".

A "sample" version of species regulation recently introduced covers the habitat of one animal, two birds, two reptiles and four plants located in obscure places. What's really different is not the protection of species but rather extended government control of land and water habitat where named species are said to visit or reside.

Habitat "watchers" are now itching to be called upon to ID one part or another of rural townships as critical habitat of an endangered, threatened or "special concern" species. In all likelihood, what will be legislated next is public access to private land, wetlands, woodlands, etc."

Some of the implications and consequences of habitat regulation under ESA 2007 are documented in the attached commentary by Dr. James White as recently published in the Ontario Farmer magazine. Municipal councilors and citizen-taxpayers across Ontario are urged to read and carefully reflect on that analysis since public knowledge concerning the origins and enforcement of species legislation has never been a priority objective of that statute.

"to protect, and entrench in law, landowner rights and responsibilities"

Landowners Need to Watch for These Species At Risk

If you are an Ontario landowner, the Endangered Species Act 2007, has implications for your future land uses. The Act puts all landowners at risk while claiming to protect about 250 native as well as imported animal and plant species. This legislation is rather unique in that one may be charged under the legal concept of "strict liability" which means one is automatically assumed guilty and must prove their innocence. The only means of doing so is to prove one has practiced "due diligence". Under regular law one is innocent until intent to break a law is proven by the state. The reason for this extreme approach has never been explained but it likely is to copy the federal government acts in the same area.

Proving due diligence is very challenging because it requires one to be aware of the existence of a large number of usually uncommon animals, birds and plants and to have taken measures to avoid harming the plants or animals and their habitat even though they may be living on an adjoining property.

The challenge is made even more onerous since the geographic distribution of very few species has been provided by the Ministry of Natural Resource and even for many of these no indication of what one must or must not do to protect habitat has been provided.

The penalty for harming a species or their habitat is a daily fine of \$250,000 or time in jail. These penalties were established in an effort to "upgrade" the earlier fines from \$50,000 per day and make them equivalent to federal legislation. This alone provides insight into the thinking behind this legislation.

The Ministry of Natural Resources developed habitat regulations for nine priority species and posted the information on the Environmental Registry for comment until June 15, 2009. The species in question are: the American Badger; the Ontario Barn Owl; Jefferson Salamander; Peregrine Falcon; Wood Turtles; the Eastern Prairie Fringed Orchid; Engelmann's Quillwort; Few Flowered Club Rush; and the Western Silver Aster.

To learn where these species exist and their respective habitat regulations, open files at <http://www.on.ec.gc.ca/wildlife/sar/sar-e.html> and <http://www.cws-scf.ec.gc.ca/theme.cfm?lang=e&category=10>. Further links are cited on these web pages. For draft habitat regulations, go to the page which presents the draft regulations that were submitted to the Cabinet by June 30, 2009. The draft regulations are presented in executive summary and full document formats. Unfortunately, only the full documents present the details of where all these species are believed to exist and thus where one should be concerned about the restrictions. Our review indicates locations where restrictions apply to the nine species in question are as follows:

AMERICAN BADGER - The primary locations of sightings of animals from 2000-2008 were along the north shore of Lake Erie in the counties of Norfolk 17, Brant 4, Oxford 3, Middlesex 4, Lambton 2, Waterloo 1, Wentworth 1, Grey 1, Kent 1, and in Northern Ontario Rainy River to Fort Frances 2 and Thunder Bay 1.

The proposed habitat protection provisions for badgers includes protection of dens for three months after their last use for a 5 meter radius and the protection of dens used by a pregnant female badger plus groundhog burrows within 850 meters of the den. The means of habitat protection are not presented but this proposal would create a protection area up to 550 acres or 227 hectares. This undefined "protection" could easily involve parts of up to eight 100 acre parcels of land. There is no indication of how any of these landowners should practice due diligence. This huge "protected" area may put a badger at high risk of immediate termination.

BARN OWLS are reported to live primarily in the counties north of Lake Erie. They nest or roost in trees or barns and other abandoned buildings. Protection is proposed for the area within 25 meters of nesting sites for 12 months after use. The obvious problems are first to determine time of last use and second that most abandoned barns are a liability to the owner who may want or need to replace them. MNR barn owl enthusiasts should consider investigating whether or not these owls will use nest boxes like many blue birds have learned to do.

JEFFERSON SALAMANDERS are found only in Southern Ontario mainly along the Niagara Escarpment. Counties where observed include Dufferin, Peel, York, Halton, Waterloo, Wellington, Brant, Hamilton and Haldimand. Protection of the areas within 300 meters of wetlands, pools and ponds where observed in past 3 years is recommended. They also propose protection of areas suitable for breeding purposes up to 700 meters from presently used breeding grounds. The meaning and the actions needed for protection are not defined making due diligence impossible even if one is aware of the existence of this salamander.

PEREGRINE FALCONS now nest on tall buildings in Southern Ontario cities and on cliffs around Lake Superior. The Ministry proposes to protect areas within 10 meters of building nesting sites and within 1 kilometer of natural cliff faces used for nesting.

WOOD TURTLES are to be protected in the Municipal areas of: Algoma, Sudbury, Nipissing, Parry Sound, Renfrew, Simcoe, Waterloo, Halton and Niagara. In Southern Ontario, the land 400 meters back from streams or water bodies used by the turtles is to be protected. What habitat protection activities are necessary is not explained.

The four endangered species of plants, for which landowners are encouraged to practice due diligence, may create problems because no protective activities are identified. The Eastern Prairie Fringe-Orchid has existed in the municipalities of Chatham-Kent, Essex, Elizabethtown-Kitley, Euthanasia, Goulbourn Kenyon, North Glengarry, Malden Marlborough, North Gwillimbury, Richmond Sandwich, St. Edmunds Vespa Springwater and Montague. The Engelmann's Quillwort is only found around the Gull and Severn Rivers and the Few Flowered Club-Rush at the Royal Botanical Garden in Hamilton and Rouge Park in Pickering. The Western Silver Aster is found at two locations in Northwestern Ontario.

The reader is advised to visit Internet web sites listed above if private landowners are known to reside in the areas identified for these nine species. As to how the Ministry will inform landowners of how to protect the 240 or so remaining endangered species, little is known. This legislation represents a major threat to landowners but is unlikely to be revised unless a major issue is made of the lack of information required to protect ones self. Comments may be directed to local municipal councils, elected MPPs, the Ministry of Natural Resources or appropriate Internet blog sites.

Jim White
June 3, 2009