

# DEVELOPERS BEWARE: CHANGES TO O. REG. 242/08 UNDER THE ENDANGERED SPECIES ACT AND WHAT THEY MEAN FOR PROJECTS ALREADY UNDERWAY

Posted on July 5, 2022

**Categories:** [Insights](#), [Publications](#)

Ontario has added fifteen new species to the list of Species at Risk in Ontario (the “**SARO List**”)<sup>[1]</sup> and made corresponding amendments<sup>[2]</sup> to [O. Reg. 242/08](#) (the “**Regulation**”) under the [Endangered Species Act](#) (the “**ESA**”).<sup>[3]</sup> These amendments came into effect on May 31, 2022.<sup>[4]</sup>

The ESA prohibits killing or harming species on the SARO List as well as the destruction of their habitats.<sup>[5]</sup> These amendments deal with whether conditional exemptions from such prohibitions are available for certain commercial, industrial, or development activities.

Companies must therefore consider whether their current or planned activities comply with the new requirements. In some instances, companies may need to submit new or amended notices of activities or develop mitigation plans to qualify for or maintain eligibility for exemptions under the ESA.<sup>[6]</sup> Such exemptions may expire if eligible projects do not proceed within a fixed timeline.<sup>[7]</sup>

This bulletin provides an overview of these amendments and their potential impact on development activities to which the ESA applies.

## **Changes to species eligible for exemptions**

**Exemptions for development activities:** The Regulation makes conditional exemptions available for activities such as constructing drainage works, laying down highways, developments under the [Planning Act](#)<sup>[8]</sup> and [Condominium Act](#),<sup>[9]</sup> transit projects, energy projects, waste management projects, and mining (“**Development Activities**”).<sup>[10]</sup> In other words, for select species on the SARO List,<sup>[11]</sup> prohibitions do not apply if developers satisfy conditions such as submitting notices, preparing mitigation plans, and monitoring their impacts on these designated species.<sup>[12]</sup>

As of May 31, 2022, these conditional exemptions are available for two new types of Development Activities,<sup>[13]</sup> being activities authorized by a municipality’s community planning permit system<sup>[14]</sup> under the [Planning Act](#) and undertakings approved under Part II of the [Environmental Assessment Act](#), including major public or

commercial infrastructure projects that require individual environmental assessments.<sup>[15]</sup> The amendments also extend these conditional exemptions to three new species and remove one species from the list of those eligible for exemption.<sup>[16]</sup>

**Exemptions for pits and quarries:** Conditional exemptions remain available for the operation of pits and quarries. However, note that one new species has been added to the list to which these exemptions will *not* apply.<sup>[17]</sup>

**Exemptions for activities necessary to avoid non-imminent threats to health and safety:** Conditional exemptions also remain available for activities such as preventing pollution, preventing the spread of disease, and repairing infrastructure. Note here too that 11 new species have been added to the list to which these exemptions do *not* apply.<sup>[18]</sup>

### ***Requirements if species are added while development is ongoing***

The amended Regulation includes rules about a Development Activity's eligibility for an exemption when a new species is added to the SARO List *while development is ongoing*. Updates to the Regulation do not substantially change the law but they clarify that Development Activities will be eligible for an exemption if: <sup>[19]</sup>

- the affected species at risk is one to which conditional exemptions apply;<sup>[20]</sup>
- the developer promptly submits notice to the Minister;<sup>[21]</sup>
- a specified project approval milestone<sup>[22]</sup> is reached within two years of a species being added (e.g., adoption of an engineer's report, approval of a draft plan under the *Planning Act*, or approval under the *Ontario Energy Board Act*);<sup>[23]</sup>
- the Development Activity starts within five years of the approval milestone being reached or within two years of the species being added if the approval milestone was reached three years or more before the species was added;<sup>[24]</sup> and,
- the developer satisfies all relevant environmental conditions, such as developing a mitigation plan and monitoring impacts on relevant species.<sup>[25]</sup>

### ***Key Takeaways***

The applicability of prohibitions and conditional exemptions under the ESA varies by activity type, region, species, level of threat to a species<sup>[26]</sup> and the date that a species was added to the SARO List. To ensure compliance and avoid delays and penalties, developers should proactively consider whether the updated SARO List and these amendments cause their activities to be subject to new prohibitions and/or whether they should take action to obtain applicable exemptions.

[1] The SARO List is set out in [O. Reg. 230/08](#); see ERO, "[Amendments to Ontario Regulation 230/08 \(Species at](#)

[Risk in Ontario List](#)) in response to COSSARO's 2019-2020 Annual Report" (January 27, 2022).

[2] [O. Reg. 328/22](#) amends [O. Reg. 242/08](#) effective May 31, 2022.

[3] [Endangered Species Act](#), SO 2007, c 6.

[4] [O. Reg. 328/22](#), [s. 6](#).

[5] [Endangered Species Act](#), SO 2007, c 6, ss. [9\(1\)](#), [10\(1\)](#).

[6] [O. Reg. 242/08](#), ss. [23.3 \(5\)\(3\)](#), [23.13\(7\)\(3\)\(3.1\)](#), [23.13\(11\)](#).

[7] [O. Reg. 242/08](#), [s. 23.13 \(2\)](#).

[8] [Planning Act](#), R.S.O. 1990, c. P.13.

[9] [Condominium Act](#), 1998, S.O. 1998, c. 19.

[10] [O. Reg. 242/01](#), [s. 23.13 Table 1](#).

[11] [O. Reg. 242/08](#), [s. 23.13 Table 2 "Relevant Species"](#).

[12] [O. Reg. 242/08](#), [ss. 23.13 \(5\)\(6\)](#).

[13] [O. Reg. 242/08](#) s. 23.13 at [Table 1 items 7 and 9](#).

[14] A community planning permit is a development permit under the [Planning Act](#), [s. 70.2.1\(2\)\(b\)](#).

[15] The [Environmental Assessment Act](#), R.S.O. 1990, c. E.18 generally applies to major public infrastructure projects and, sometimes, to commercial activities designated in regulations ([s. 3](#)). Activities with predictable environmental effects, such as municipal road projects, are eligible to complete [streamlined environmental assessment](#) applications. Large-scale, complex projects with the potential for significant environmental effects are required to complete [individual environmental assessments](#) under Part II of the Act. Conditional exemptions were already available for some activities that are eligible for streamlined environmental assessments; see [O. Reg. 242/01](#), [s. 23.13 Table 1](#).

[16] [O. Reg. 242/08](#), [s. 23.13 Table 2 "Relevant Species"](#). Added: Black Ash, Hudsonian Godwit, Red-headed Woodpecker. Removed: Goldenseal.

[17] [O. Reg. 242/08](#), [s. 23.14, Table "Species to which subsection 23.14 \(3\) does not apply"](#). False-foxglove Sun Moth is a newly-added species.

[18] [O. Reg. 242/08](#), [s. 23.18, Table "Species to which subsection 23.18 \(3\) does not apply"](#). Newly added species include: Golden-eye Lichen (Great Lakes population); Gillman's Goldenrod; Hairy Valerian; Carolina Mantleslug; Eastern Banded Tigersnail; Shagreen; Toothed Globe; False-foxglove Sun Moth; Transverse Lady Beetle; Lake Whitefish (Opeongo Lake Large-bodied populations); Lake Whitefish (Opeongo Lake Small-bodied populations).

[19] The Regulation was updated to include a [blanket statement](#) about the dates by which regulatory conditions must be satisfied and when activities must commence relative to the date a species was added in order to qualify for exemptions. The previous version of the regulation [listed specific deadlines year-by-year](#). This update does not change the timelines, rather it avoids having to amend the regulation each year species

are added.

[20] O. Reg. 242/08, [s. 23.13 Table 2 “Relevant Species”](#). With the updates, Goldenseal was removed from this list and the following species were added: Black Ash, Hudsonian Godwit, Red-headed Woodpecker.

[21] O. Reg. 242/08, [ss. 23.3 \(5\)\(3\)](#), [23.13\(7\)\(3\)\(3.1\)](#), [23.13\(11\)](#).

[22] For the purposes of this article, “approval milestone” refers to O. Reg. 242/08 [“Regulatory Conditions” in s. 23.13 Table 1 Column 3](#).

[23] O. Reg. 242/08, [s. 23.13\(2\)\(a\)](#).

[24] O. Reg. 242/08 [s. 23.13\(2.2\)](#). Also note that where the activity affects a “transition species”, the activity must have commenced by June 30, 2015. (O. Reg. 242/08 [s. 23.13\(2.2\)\(a\)](#)).

[25] O. Reg. 242/08, [s. 23.13\(5\)-\(15\)](#).

[26] Extinct, extirpated, endangered, threatened, or special concern (*Endangered Species Act*, S.O. 2007, c. 6, [s. 5](#)).

by [Talia Gordner](#), [Ralph Cuervo-Lorens](#), [Andrea Arbuthnot](#) (Summer Law Student) and [Ryan Ejim](#) (Summer Law Student)

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2022