

February 25, 2013

Ms. Krista Adams, Senior Permits & Agreements Specialist
Ministry of Natural Resources-Policy Division
Species at Risk Branch, Permits and Agreements Section
300 Water Street, Floor 2
Peterborough Ontario K9J 8M5

Re: Proposed approaches to the implementation of the Endangered Species Act which could include regulatory amendments to authorize activities to occur subject to conditions set out in regulation consistent with MNR's Modernization of Approvals, EBR Registry Number: 011-7696 (including document with "further details" posted on January 24).

Dear Ms. Adams:

Thank you for the opportunity to provide comments on this posting, offered as part of MNR's transformation plan and specific to the implementation of the Ontario *Endangered Species Act, 2007*. Our comments follow several we have made to MNR postings on the EBR since November 2012 that relate to the Ministry's proposed "transformation" and "modernization of approvals" processes. In each, we have articulated similar major concerns about this ongoing course of action, chief among them that striving for efficiency in the absence of adequate strategy and safeguards will, inevitably, heighten risks to the natural resources MNR is mandated to protect. This posting is no different in this regard, and in fact accentuates our concerns.

We are submitting this letter in our respective capacities as scientists specializing in fish and wildlife ecology, conservation biology, and landscape ecology in Ontario on behalf of WCS Canada¹. We have been involved in both the development and implementation of Ontario's

¹ Wildlife Conservation Society Canada (www.wcscanada.org) was established in May 2004 as a Canadian non-government organization with a mission to conserve wildlife and wildlands by improving our understanding of and seeking solutions to critical problems that threaten key species and large wild ecosystems throughout Canada. We implement and support comprehensive field studies that gather information on wildlife needs and then seek to resolve key conservation problems by working with many actors, including First Nation communities, Government and regulatory agencies, conservation groups, and industry.

Endangered Species Act (ESA) through participation in the Minister's Ontario Endangered Species Act Legislative Review Advisory Panel, the Provincial Caribou Technical Committee (PCTC), and membership on COSSARO. We have also been engaged in the process of species recovery through our research activities in Ontario (including permitting), participating in recovery planning (including roles as reviewers and recovery team members and scientific advisors), as well as recovery and conservation activities associated with a number of fish and wildlife species (including woodland caribou, wolverine, lake sturgeon, lake trout and brook trout). As such, we have experience with various aspects of MNR permitting and authorizations, but particularly those associated with the ESA, the *Public Lands Act*, and the *Fish and Wildlife Conservation Act*.

We are aware that Ontario's Ministry of Natural Resources (MNR) is facing some funding cutbacks and has an increasingly challenging mandate. This seems to be affecting implementation of the ESA, the objectives of which are ambitious but highly important for addressing Canada's obligations under the global *Convention of Biological Diversity* and Ontario's own *Biodiversity Strategy* and associated commitments. It is also evident that the current approvals process associated with permitting activities under the Act is the subject of many complaints by development proponents. We agree that a revised approach is necessary, albeit one with a more strategic focus on how permitting can best support recovery of species at risk than is evident today.

Unfortunately, we have concluded from our analysis -- based on experience with ESA implementation and understanding of the condition of many species at risk in the province -- that the various approaches proposed in this posting will heighten risk to many already-imperiled species in the province and undermine the purposes of the Act. Below, we articulate our chief concerns.

1) The "proposed regulatory approaches" described in the posting are too brief, bereft of examples, and use vague terminology that collectively make it impossible to evaluate the nature of what is being proposed and their implications and associated risks. The posting outlines a framework for proposed approaches to modify the approval system, but the documents that have been provided to the public are characterized by liberal use of broad terminology to describe MNR's intentions that is too open to interpretation. Although additional detail was provided in the document with "further details" posted on January 24, our assessment of the 16 proposed "approaches" described therein reinforce our concerns expressed here. Moreover, the welcoming of "further feedback from affected sectors that fit within this proposal framework but do not have sector-specific details addressed in the details outlined here" suggests strongly that more sector-specific regulations of this nature will be forthcoming. No information is provided in this proposal (or the accompanying detail) on how MNR is assessing risk to threatened and endangered species from this approach or how MNR will determine what activities have "predictable effects" and "require common approaches for minimizing adverse effects and achieving benefits for species."

2) This posting is focused on providing services to clients and certainty to entire development industry sectors, while relegating species at risk to a secondary consideration. Wording throughout the posting makes clear that the proposed regulatory approaches place primary focus on the bureaucratic problem of the escalating volume of permitting requests and preservation of "socio-economic vitality", with protection and recovery of species an ancillary priority. This suggests to us that the MNR has lost sight of the purpose of the permitting and approval process under the ESA, which is to assure that a system is in place to manage the pace, scale, and cumulative effects of activities that adversely impact Ontario's many species at risk.

3) The posting provides no evidence for MNR's assertions that Ontario's species at risk will suffer no adverse impacts as a result of the proposed regulatory approaches. Simply stating that the proposed streamlining process will happen without detriment to the natural resources or sustainability (as occurs throughout the posting, and particularly the Regulatory Impact Statement at the end) is not sufficient to ensure this will happen. In keeping with this point, we remind you of MNR's own Statement of Environmental Values (required by the EBR), which states in part: "From both a sound business and environmental perspective, it is less costly and more effective to anticipate and prevent negative environmental impacts before undertaking new activities than it is to correct environmental problems after the fact."²

Relatively few SARO-listed species have been subjected to proactive strategic recovery planning that is necessary to understand threats and prioritize where recovery actions are needed, including where to focus additional habitat protection measures. Instead, much work implementing the ESA has been devoted to the reactive process of reviewing permit applications of individual activities and industrial development projects. This piecemeal approach governed by lack of strategic oversight has increased, rather than decreased, cumulative habitat threats for many species, particularly in southern Ontario. We disagree, therefore, that MNR is in any position to declare that Ontario's species at risk will suffer no adverse impacts under this proposed system that decreases the prospects for any oversight.

We point to s. 57 of the ESA in particular, which spells out the legal obligation of the Minister to consult with experts and consider alternatives prior to recommending any regulation to Cabinet. MNR provides no evidence in this posting that it has made any scientific assessment of the plausible consequences to the many species at risk in Ontario from these proposed regulations. It would be logical, for example, for the experts on the PCTC to have been consulted by MNR on this very issue prior to the EBR posting; this type of task is explicitly within our mandate³. But we can attest to the fact that while the PCTC received a briefing on these proposed regulations, we have never been asked to conduct an evaluation of risk of these regulations to caribou.

² <http://www.ebr.gov.on.ca/ERS-WEB-External/content/sev.jsp?pageName=sevList&subPageName=10002>

³ Justina Ray is a member of the Provincial Caribou Technical Committee.

4) Most "transition situations" in this document are inappropriate for blanket sector-based streamlined regulatory approaches and will enhance risk to many listed species. The examples of "transition situations" that might merit regulatory amendments for the purposes of "providing certainty" for industrial development amount to a dramatic change for how and where development activities will be authorized. We maintain that the extent of change being proposed is understated in this posting through the use of vague language and terminology.

For example, no definition of what is meant by "approved" or "planned" activities is provided in the posting itself, and the document with "further details" raises additional concerns for us. If a municipality has zoned an area for commercial development, does this mean that all activities that would take place there are already approved or planned? What about a situation where a license for an long operating industrial use such as aggregate operations are never re-issued but rather stay in effect for decades, even when the area of operation expands? Would these operations forever stay outside the purview of being required to meet the core tests of the Act under sections 9 and 10? Would a community-based land use plan under the *Far North Act*, once approved, qualify as a transition situation for the streamlined approvals processes described in the posting?

Similarly, it seems evident that the reference to "new habitat protection" will apply to the 65 "transition species" for which habitat protection measures (habitat regulation or general habitat protection) have been legally delayed since the passage of the Act. Does this mean that general habitat protection that would otherwise come into force on June 30, 2013 constitutes "new" habitat protection? WCS Canada (with Ontario Nature) has analyzed the consequences of continued lack of habitat protection for these transition species, concluding that at least half of them have suffered ongoing declines to their populations or habitats during this delay. We concluded that a continued lack of enhanced habitat protection would be detrimental and negligent, considering MNR's obligations under the ESA.

The reference to "other applicable legislation" in this section of the posting is problematic, as it implies that there is equivalency between the specific species at risk habitat protection measures required by the ESA and legislation designed for the routine licensing of industrial development enabled by other legislation. There is no evidence to support this contention, given that the ESA is only 5 years old and the legislature would have had full knowledge of existing laws when it was developing the ESA . The reason a new Act was designed and passed was because the legislature concluded that a law specific to the needs of species at risk was required⁴.

⁴ See introduction of the 2006 Report of the Endangered Species Act Review Advisory Panel:
http://www.mnr.gov.on.ca/stdprodconsume/groups/lr/@mnr/@species/documents/document/stel02_178841.pdf

There are, however, opportunities to develop approaches within existing legislative frameworks (e.g. the *Crown Forest Sustainability Act*) to use or modify those planning processes to meet the requirements of the ESA. For example, Section 18 of the ESA specifies that other provincial and federal acts can be used as instruments under the ESA (e.g., for habitat protection) as long as they address the prohibitions required by sections 9 and 10. To this end, we agree with the recommendations offered by the Endangered Species Act Panel in their recent report (January 18, 2013) calling for a formal assessment of where existing regulatory frameworks and planning processes currently achieve or conflict with the purposes of the ESA. This is a necessary step for harmonizing approaches to resolve inconsistencies and reduce unnecessary regulatory burden.

5) The proposal to exempt forestry from the ESA protections for five years is highly problematic when one considers that license holders would no longer need to provide an overall benefit to a given species at risk for activities that harm a threatened or endangered species or its habitat. This "rule in regulation" for forest operations would almost certainly increase risk to forest-dwelling caribou in the province, the recovery of which the Ministry has invested much attention and resources. The PCTC is on record for having recently advised Minister Gravelle that the current forest management planning process does not appropriately implement the Caribou Conservation Plan (CCP) because it does not measure or consider the contribution of forest management activities over time to cumulative disturbance within caribou ranges. The requirement stated in this EBR posting that the license holder report on cumulative disturbance as a "condition" under the regulation would be inadequate in this regard, because this action would occur outside the forest management planning process and after the approval of the forest management plan (particularly the long-term management direction). The cornerstone of the CCP is management of cumulative disturbance at the population range scale. If cumulative disturbance levels are found to exceed advisable levels within a given range after approval of the plan, it will be too late and therefore ineffective for caribou recovery.

6) The lack of monitoring implied in the proposed streamlined or permit-by-rule regulatory approaches will enhance risk to listed species. Any exemption or permit-by-rule system that is adopted must be accompanied by monitoring mechanisms that track whether or not species will be negatively affected and enforcement mechanisms for lack of compliance. Instead, the posting makes clear, by repeatedly stating "approaches *may* also include registration with MNR", that MNR is contemplating many situations where proponents will be exempted from any reporting of their activities. Moreover, the document with "further details" makes clear that even in cases where registration is mandatory, the level of information required is far lower than what is currently required through permits (i.e., information about the activities, and anticipated impacts and measures that would be taken to minimize, address and monitor impacts).

This proposed approach would make it impossible for MNR to conduct random audits, enforce compliance, and keep track of when and if adjustments to the regulatory system are needed. The latter would be the case when, for example, a number of individual activities that MNR determines have "insignificant or minimal effects" accumulate over time and space, resulting at

some point in a significant adverse effect (cumulative impacts), hence undermining the Ministry's obligations under the ESA (and the reason behind permitting in the first place).

7) The posting fails to acknowledge the risks associated with permit-by-rule systems. There are a number of plausible scenarios where a "permit-by-rule" system could increase the risk to the natural resources and undermine the safeguard purpose of permitting in the first place. Such scenarios, about which this posting shows no evidence of having considered, could include: 1) multiple similar permits leading to cumulative impacts; 2) circumstances when the rules fail to consider or detect unanticipated impacts due to unforeseen circumstances such as climate change or dynamic ecological systems; and/or 3) particular proponents who have a history of low quality applications, non-compliance or other issues who apply, without adequate oversight.

Understanding the types of activities that result in minimal impact, setting the rules, and creating a system of monitoring and compliance all demand a careful, systematic, and strategic approach from the outset. While this may eventually lead to a quicker and more efficient permitting process than the one that is currently in place, we caution that the necessarily careful approach that would be appropriate at the front-end of this modernization process will require a great deal of strategic forethought and careful monitoring in order to better ensure its success. This could have consequences for what appears to be the chief priority of this exercise--saving time and money (or, achieving efficiencies). In addition, the approaches being proposed depend on compliance, monitoring, and enforcement to provide public confidence and support for Ontario's ministries and policies that natural resources are indeed being properly conserved.

8) Just because a proponent considers its actions to protect and recover species at risk does not mean these are beneficial and should be exempt from ESA authorization without any scrutiny. For example, wetland habitat is often created and managed by changing water levels, and for many wetland species at risk these artificial changes amount to alterations to their habitat that are detrimental to their status. This has been well-documented and must be monitored, particularly given the known decline in the quality and amount of wetland ecosystems in southern Ontario. Some strategic oversight by government at large scales to keep track of these changes, including cumulative effects, and purported beneficial undertakings must be applied. Instead, this proposed regulation will put the entire onus on the proponent to declare its activities beneficial and does not commit the proponent to meaningful reporting and monitoring.

Similarly, it is inappropriate to implement Safe Harbour through exemptions rather than section 16 agreements, which are in the Act for the very purpose of encouraging stewardship activities. Safe Harbour is an important flexibility tool that was explicitly recognized as such in the 2006 report of the Endangered Species Act Review Advisory Panel as a mechanism with demonstrated effectiveness in the U.S. to incentivize landowners to undertake stewardship rather than focus on penalizing them unnecessarily with additional restrictions. It was intended

to be implemented under section 16, allowing MNR to enter into stewardship agreements for the purpose of assisting in the protection or recovery of a species at risk. Because the purpose of Safe Harbour is to authorize activities that harm or have the potential to harm a species at risk or its habitat, oversight by government is necessary. For example, success hinges on allowing a landowner to return a site to its original condition at the outset of the agreement, and nothing less. Key to implementation in this respect would be an initial baseline study, with results clearly detailed in an agreement.

9) The failure to create a clear province-wide incidental trapping policy for species at risk in Ontario has been a key impediment to the monitoring and recovery of species at risk such as wolverine⁵. We are concerned that the proposed amendment signifies intention by MNR to abandon their obligation to manage and monitor what can be a key threat to some species at risk in some areas. We therefore urge MNR to ensure that this proposed amendment follow the priority recovery action proposed in the wolverine draft recovery strategy. A policy must, therefore, incorporate: 1) guidance on best management practices to reduce incidental catch, 2) guidance on the disposition of incidentally-caught animals, 3) a tracking mechanism for incidentally-harvested animals, and 4) an analysis of the opportunity to sell incidentally caught animals under specified conditions, so as to reduce the likelihood of waste and potential non-reporting and legal challenges.

In closing, we have reviewed the multiple documents arising from the "Modernization of Approvals" process since late last year with increasing concern. It is incongruous for the Ministry to be weakening standards and government oversight as they relate to species at risk while publicly declaring its full confidence that impacts to these species will be "neutral." The issuing of tailored regulations for multiple development sectors that exempt each from fundamental aspects of ESA (that itself was designed to be a "best practices law"⁶) is, moreover, fundamentally incompatible with commitments articulated in the recently released *Biodiversity: It's in our Nature*, Ontario's "plan to conserve biodiversity". With respect to this particular posting, we offer the following recommendations:

1) Retract the series of sector-specific "exemptions through regulations" described in this posting, and replace it with a focused effort to improve implementation of the permitting system accomplished from the perspective of achieving the objectives of the Act itself. Our prediction is that such an approach would ultimately lead to the need for fewer individual permits than is the case today, and would allow for a more strategic approach to achieving recovery of species at risk that would be more understandable to proponents and cause fewer frustrating delays. The goal of this endeavor should not be the issuance of permits *per se*, but rather the betterment of conditions for relevant species. This should be accomplished in

⁵ see draft Ontario Wolverine Recovery Strategy
(http://www.mnr.gov.on.ca/stdprodconsume/groups/lr/@mnr/@species/documents/document/stdprod_092924.pdf)

⁶ See introduction of the 2006 Report of the Endangered Species Act Review Advisory Panel

conjunction with prioritization (#3 below) and transparent "balancing" of species and societal needs (#4).

2) With respect to any streamlined permitting approaches that do emerge from Modernization of Approvals exercise, **begin implementation slowly with a few examples to test the approach, measure and monitor the results, and adjust the approach accordingly if necessary in the true sense of adaptive management.** Proceeding with a streamlined approach writ large in the absence of any knowledge of risks to affected species is reckless and ignores the precautionary principle in adaptive management.

3) **With respect to recovery actions, prioritize species that both require and will benefit from the most attention,** based on both the species' needs (e.g., those that are losing ground and require the most intervention), and prospects for success using various available instruments of the Act. Use of tools like section 18 instruments and bundling approaches that can focus protection on Ontario's imperiled ecosystems (e.g., tall-grass prairie, sandbarrens, alvars, etc.) should be strongly considered.

4) For any approach that is taken, **carefully analyze potential risks to species that will be most affected, carefully monitor those that raise the highest concerns from a conservation perspective, and communicate the results and predictions to the public.** In other words, for any of the exemption regulations described in this posting, determine (as per s. 57 of the ESA) which species will be most at risk, and devise a system for tracking their welfare during implementation. Contrary to what is described in this posting, the Ministry should be in a position to both predict potential consequences of any new regulations to affected species and be transparent to the public about such risks. Any "balancing" that is undertaken should proceed in full transparency regarding associated risks to species so that members of the public can be fully knowledgeable about the trade-offs associated with a given approach.

We would be happy to discuss any of the major issues and recommendations in this letter.

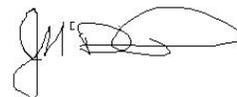
Sincerely yours,



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