



September 10, 2009

Karen Ralph
Chief Operations
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Burlington, Ontario, L7R 4A6

RE: Interim Protocol for the Review of Development Proposals that affect Aquatic Species at Risk in Ontario 2009

Dear Ms. Ralph,

Thank you for the opportunity to comment on Fisheries and Oceans Canada (DFO) and the Ontario Ministry of Natural Resources' (MNR) draft **Interim Protocol for the Review of Development Proposals that affect Aquatic Species at Risk in Ontario 2009**. Conservation Ontario represents Ontario's 36 Conservation Authorities (CAs).

The following comments are submitted for your consideration based upon a review of the proposed draft by staff from Central Lake Ontario Conservation Authority, Credit Valley Conservation, Kawartha Conservation, Nottawasaga Valley Conservation Authority, St. Clair Region Conservation Authority, Toronto and Region Conservation Authority, Upper Thames River Conservation Authority and Conservation Ontario.

The development of a harmonized approach to the review and approval of proposed development projects under the *Fisheries Act*, *Species at Risk Act* (SARA) and the *Endangered Species Act, 2007* (ESA 2007) is supported. The great need to conserve and protect Species at Risk (SAR) is recognized, as is the importance of developing a standardized protocol to review proposals affecting these species.

Given that this protocol outlines new roles for CAs in their reviews of development proposals related to the ESA 2007, it is unfortunate that Conservation Ontario was not invited to be involved in the development of this protocol. The new roles for CAs related to the ESA 2007 that are described within the protocol, including reviewing separate ESA 2007 SAR distribution maps and notifying MNR in writing if a project is proposed in an area where an ESA-listed species may be present, raise concerns as no formal agreements to carry out these roles have been established between CAs and MNR. If MNR would like to request that CAs take on a formal role related to the ESA 2007, support from Conservation Ontario Council would have to be sought and formal agreements would need to be established. Because no such agreements are in place at this time it is recommended that the references within the protocol that outline roles for CAs under the ESA 2007 be removed.

With regard to reviewing development proposals for aquatic species listed under SARA, it is our

understanding that the protocol intends to simply outline the process already established between CAs and DFO. The comments submitted below regarding CA reviews of species under SARA reflect this understanding. It is suggested that the document, including the appendices, be reviewed to ensure it reflects the current agreements CAs have with DFO. Overall, there is a need for clarity and consistency in the protocol; it is unclear throughout the document whether CAs are only to identify the presence of SAR and pass the project on to DFO, or whether CAs are being given the decision-making ability to assess whether or not there may be detrimental impacts or appropriate mitigation to avoid referral to DFO, or whether they have the ability to co-determine if a SARA permit is required. As no formal changes to the current agreements between CAs and DFO have been made, it is not felt that this document should describe any process other than that which is already in place. It is noted that CAs do not have the same level of expertise that DFO has with regard to SAR and there has been no specific training given to CAs with regard to “acceptable harm” or appropriate mitigation. It is recommended that the protocol clearly describe the SAR referral process CAs are to follow in the course of their fish habitat reviews as per the various levels of agreements established with DFO in the body of the text, rather than only in an appendix (i.e. Appendix 5). It is also recommended that the document be clear that once a CA refers a project with SAR or potential impacts to SAR to DFO it is then the responsibility of DFO to make a decision about the project.

Currently, neither MNR nor DFO receive/review all development project applications which may have an impact on SAR. This is considered a very large gap that is cause for concern relative to the protection of SAR. It is recommended that the protocol address this gap.

There is also a concern that the various permits a project may require could result in “agency induced error”, whereby the conditions imposed on a permit from one agency could be contrary to the permit requirements of another agency. It is recommended that a process be developed that would ensure that relevant agencies are informed when permits are issued and of the conditions on them, and that various agencies are not asking for inconsistent or contradictory elements.

Below, more specific questions, concerns and recommendations regarding the protocol are identified.

General

- As the title of this document only mentions development proposals, it is unclear whether projects relating to restoration or stewardship are to use the same protocol or if there will be another protocol for these projects. It is recommended that the protocol provide clarity on this matter
- It is recommended that the protocol clearly outline to which animal groups it pertains.
- It is understood from MNR that decisions for ESA-listed species are not based on “net effects” post-mitigation, but rather that the Act specifies that a permit would be required for any change in habitat, whether it be positive or negative. Therefore, a Letter of Advice (LOA) could be consistent with SARA but not ESA 2007. It is requested that this matter be clarified within the protocol.
- The current Natural Heritage Information Centre (NHIC) website does not appear capable of supporting the type of SAR screening that this protocol would require. Accessing species-specific distribution maps is time-consuming and cumbersome in species-rich sites. It is recommended that MNR develop screening maps.
- A screening sheet for appropriate habitat for target SAR would be helpful to CAs to identify and protect SAR habitat.
- It is recommended that additional education and training opportunities around aquatic SAR and their habitats be available to agencies (CAs) that issue LOAs on behalf of DFO. Ideally, these training opportunities would be tailored to those SAR found or likely to be found within a particular CA's watershed.
- It is felt that additional information/communication is necessary in order for proponents to start self-

screening for SAR. At a small-scale development level, it may be optimistic to assume that self-screening will occur.

- Because self-screening is promoted within the protocol, it is recommended that SAR information be easily accessible and user-friendly for the public/proponents. It is also recommended that DFO/MNR consider how information could be accessed by those who do not have access to the internet.

Specific Comments

1.1, Objectives of the Interim Protocol:

- It is suggested that another objective be added, to the following effect: **“to provide clarity on roles and responsibilities to DFO and MNR partner agencies”**.
- It is recommended that the objectives include reference to the fact that this protocol is intended to address aquatic SAR, as opposed to all SAR.
- The draft states that *“It is recognized that a harmonized approach between agencies must be guided by clear, open and collaborative communications amongst all involved staff.”* This statement is supported fully.

1.2, Key Definitions:

- It is recommended that the definition of aquatic species be expanded upon and include the definitions referred to in the *Fisheries Act*. It is also recommended that the term “marine animals” (referred to in Section 2 of the *Fisheries Act*) be defined here so proponents are clear as to which animal groups the protocol covers.
- It is suggested that the SARA definitions clearly differentiate between “schedule 1 species” and “listed species” as it relates to Critical Habitat, Recovery Strategies, Action Plans and Management Plans. The terminology used should be consistent.
- As per the comment below under Section 2.1.2, it is suggested that a definition for “Allowable Harm” be included here.

2, Proposal Review Processes in Ontario:

- In this section Parks Canada, the Ministry of Transportation and CAs are only mentioned in the first paragraph. Considering this protocol describes inter-agency harmonization, it is suggested that a brief description of these agencies’ review process(es) be included.

2.1.1, Fish Habitat Referral Process:

- It is recommended that the role of CAs in reviewing potential impacts to fish habitat under Section 35 of the *Fisheries Act* be described here.

2.1.2, Species at Risk Review Process:

- (Page 7, 4th paragraph): This paragraph states that *“Projects that have the potential to contravene SARA must be referred to DFO or a partner agency for review to ensure compliance with SARA”*. It is questioned whether this statement is correct, as Section 3.2 (Submission of Project Proposal) of the protocol states that CAs will be screening applications only, and where SAR are present CAs will direct the project to DFO. Clarity around this issue is requested; it is recommended that *“or a partner agency”* be removed from the above statement.
- Step 1: It is suggested this guidance provide clarification as to whether screening can be done using new data or only screening maps.
- Step 2: It requested that a definition be provided for “Allowable Harm”.

2.2.1, Agency Mandate/Role:

- It is suggested that the role of MNR in project reviews under *the Lakes and Rivers Improvement Act* (LRIA) relative to CA responsibilities under the *Conservation Authorities Act*, as per Ontario Regulation 160/07, be discussed here. This Regulation provides that approvals under the LRIA are not required for specific activities where CAs have regulations under Section 28 of the *Conservation*

Authorities Act in place, except for an approval of a dam as defined under the LRIA, or dam decommissioning works.

- The first two bullets under *Fisheries Act* deal with distribution of Operational Statements and the review of development proposals that can be mitigated (i.e. LOA issued). While DFO has the legislated responsibility for this, it should be acknowledged in the protocol that these items are largely administered by CAs with Level III Agreements.

2.2, Ministry of Natural Resources:

- DFO has partnered with CAs to assist in the review of projects under Section 35 of the *Fisheries Act*. No such agreement exists between MNR and CAs; however, it should be acknowledged in the protocol that many aspects of fisheries management, including fisheries management planning, are often accomplished by CAs under the guidance of MNR (through either a guidance document or charring committees during the development of fisheries management plans). Further, CAs manage development in and around watercourses through the administration of the *Conservation Authorities Act*, and MNR is often only involved under the LRIA when the project involves work around large dams. As such, CAs are often administering MNR timing window guidelines for in-water works.

2.2.2, *Endangered Species Act* Review Process:

- Under the heading “ESA 2007 Screening/Review Process”:
 - The first bullet under ESA 2007 Screening Process lists sources of information. While MNR is technically responsible for fish and fish habitat information management, in the Greater Toronto Area, most of the fisheries monitoring is conducted by Conservation Authorities and housed in corporate databases. This fact is well known by consultants and as such CAs are often the first point of contact for fisheries and fish habitat information. As such, perhaps CAs should be listed as a source of information.
 - It is suggested that reference be made to the timing window mapping that may be available from MNR through CAs, as this is one of the main screening tools that are presently used in some jurisdictions (e.g. Toronto and Region Conservation Authority’s mapping for reddsidedace).
 - Regarding the direction provided under Step 1, This step should note that if an ESA-listed species is identified by a partner agency, then the proponent must proceed to contact an MNR SAR biologist.
- It is recommended that this section reference the Natural Heritage Reference Manual for the information it contains regarding screening for ESA-listed species.
- It is requested that the acronym “BAI” be defined in either the text or elsewhere in a glossary of terms.

3, Harmonized SARA/ESA 2007 Review Processes:

- Regarding Step 1: It is recommended that screening by CAs be identified here.

3.1, Proponent Pre-screening for SAR:

- Page 10: It is recommended that more background information be added to the document to introduce the role of CAs in order to explain why they are involved in the Proponent Pre-screening.
- Page 11, second paragraph: It is suggested that more information be provided regarding what protocol to follow if the presence of SARA SAR is uncertain and potential habitat exists, and that this section state that any sampling or relocating should only be completed if required by MNR or DFO. It is not recommended that the proponent decide if sampling or relocation is required. It is felt that there needs to be a process to ensure sampling protocols are consistent between agencies.
- Page 11, third paragraph: It is suggested that this section be reworded to ensure clarity around the fact that the regular regulatory and review process is to be followed for development applications where SARA SAR are not present.

3.2, Submission of Project Proposal:

- It is recommended that the role of CAs with different level agreements be described in this section.
- Page 12, first paragraph: This paragraph concludes with the statement that if a project requires authorization, the normal referral review protocol applies. This is not true for Level 3 CAs, as they would refer the file to DFO based on the presence of SAR, and DFO would complete the *Fisheries Act* review, including determining appropriate compensation if possible. This is not the standard review protocol.
- Page 12, second paragraph: This paragraph suggests that CAs can choose to review for SAR impacts and issue LOAs or refer projects to DFO. If the project is referred to DFO, the DFO will ensure that they issue LOAs in accordance with the provisions in SARA, the *Fisheries Act* and the *Canadian Environmental Assessment Act* (CEAA). As CAs only look after habitat provisions of the *Fisheries Act* under their agreements with DFO, and are not the responsible agencies for SARA or CEAA, a full review cannot be undertaken by CAs. It is recommended that this section be revisited to ensure this matter is clear within it.
- Page 12, fourth paragraph: This paragraph states that “CA or DFO biologists will offer to forward a copy of the proposal on behalf of the proponent to MNR...”. It is felt that CAs should not be required to notify MNR in writing or to be responsible for the delivery of project proposals on behalf of the proponent. As stated above, this raises concerns that CAs are formally being brought into the ESA review process without any formal agreement with MNR.
- Under the heading “Proposal Submitted to MNR” it should be noted that this should only occur where a CA is not present. If this occurs where a CA is present, MNR will need to notify the CA and direct the proponent appropriately.

3.3.1, DFO – SARA maps:

- Several CAs that provided comments on this draft expressed concerns about the accuracy of the on-line SAR mapping for their jurisdiction. For example, Kawartha Conservation notes that the aquatic SAR (Lake Sturgeon) indicated on the distribution maps provided by DFO are no longer found within the designated areas. The Central Lake Ontario Conservation Authority map shows Lynde and Pringle Creeks as being Redside dace habitat: while Lynde Creek is habitat for Redside dace, there have been no Redside dace caught in Pringle Creek in almost 50 years, as development in this area has degraded habitat conditions to the point that restoration for this sensitive species is unfeasible. This has been identified in the Redside Dace Recovery Strategy. As such, it is recommended that the distribution maps be updated to ensure proper direction/guidance to the proponent(s) for the timely approval of applications prior to finalizing the protocol.

3.3.2, MNR – ESA maps

- This section states that “*It is important to recognize that at the present time proponents and/or agency staff should check both SARA and ESA map sources in order to ensure an appropriate review occurs under both Acts.*” As stated previously, CAs have no formal agreement in place with MNR related to reviews for ESA-listed species; it is therefore recommended that the statement suggesting that CAs are required to check ESA map sources in order to ensure reviews under the ESA 2007 be revised or removed.

3.3.3, Alignment of Data Sources:

- Harmonized mapping and alignment of data between MNR and DFO is strongly recommended, for more efficient project screening for aquatic SAR. Until this alignment is completed, proponents, CA and other agency staff will have the added responsibility of checking SARA and ESA 2007 for designated SAR. As stated above, requesting CAs to review separate ESA maps would require a formal agreement between MNR and CAs to first be established.
- The government is encouraged to provide CAs with SAR data layers and descriptions of how SAR ranges/reaches were determined.
- The most helpful way that SAR information could be displayed is through a GIS layer.

3.4.1, Coordination of Assessments:

- As stated previously, this section outlines new roles for CAs in their reviews, including informing MNR in writing of the project proposal, and being responsible for forwarding a copy of the proposal to MNR on behalf of the proponent. It is noted that the process proposed is not consistent with the Provincial One-Window Approach for review of planning applications that has been established between the Province and municipalities. At SAR training sessions MNR hosted in Spring 2009, CAs and municipalities were advised that the one window planning approach will remain the method of communication between the Province and municipalities regarding SAR. It is felt that there must be consistency in how the Province is to be informed regarding SAR matters; having different protocols will only lead to confusion and delays. Given that MNR will be administering and enforcing ESA 2007, it is recommended that a standard protocol be generated outlining how MNR is to be advised by proponents or other agencies with respect to any and all SAR issues, be it aquatic or terrestrial (plant, bird, amphibian and reptile species).
- Given that it is possible to have proponents contact MNR or DFO directly, even where a CA is present, DFO and MNR are requested to communicate with CAs as appropriate.
- Page 15, paragraph 1, states that “*Projects are reviewed by CA biologists, and where appropriate the DFO designated biologist, under the standard referral protocol described in Section 2.1.2 to assess potential impacts to SAR.*” However, this contradicts the direction given in Section 2.1.2 (pg. 7), which states that “*1. Project referred to DFO by proponent or partner agency – proponent or partner has identified presence of SAR using Aquatic SAR Distribution Maps.*” It is requested that these inconsistencies be addressed.
- Page 17, second bullet: As CAs do not have formal agreements in place with MNR related to SAR at this time, it is recommended that this bullet remove the direction for CAs to notify MNR in writing if a non-aquatic SAR may be impacted. It is also recommended that the bullet be revised to state that if a CA is aware of non-aquatic SAR they will notify DFO, who will ensure that the relevant federal agency is notified as appropriate under CEAA, as CAs are not responsible for CEAA.

3.5.3, Coordination of Permit Issuance:

- It is recommended that this section include reference to CA permit processes and other approvals provided by MNR or DFO. It is felt that all approvals from MNR, DFO and partner agencies should be coordinated as much as possible, as they are all interrelated.

Appendices:

- Not all of the Appendices are referred to in the text of the document (e.g. Appendix 2, Appendix 5) so it is not necessarily clear why they have been included.

Appendix 1:

- It is recommended that the process described in this appendix be clarified, as it seems to suggest that partner agencies are the front-line decision maker. This direction is contradictory to the process described elsewhere in the document which states that if the presence of SARA-listed species is detected the project should be automatically forwarded to DFO for an authorization, LOA, etc.
- Regarding the box at the bottom of the page which states “PROPONENT APPLIES FOR AND RECEIVES SAR PERMIT”. It is recommended that this text be changed to “PROPONENT APPLIES FOR SAR PERMIT”, and the box on the right be changed from “YES” to “RECEIVED/APPROVED” and the box on the left changed from “NO” to “REJECTED/DENIED”.
- According to the flow chart, if it is decided that not all potential impacts to SAR are mitigated, the partner refers the project to DFO habitat management staff, following which it must decide whether a SAR permit is required. It is questioned whether the permit would not automatically be required once it was determined that not all potential impacts could be mitigated.

Appendix 1 and 2:

- It is recommended that appendices 1 and 2 more clearly differentiate between what process is being described with regard to the role of partner agencies/CAs.

Appendix 5:

- The process in this appendix describes CAs as completing reviews for species protection, not just habitat protection. The review by the CA is proposed to be based on their DFO agreement level; the present agreement between CAs and DFO is for the habitat provisions of the *Fisheries Act* only. This is stated in the body of the protocol document. Therefore, it is recommended that the appendix be revised to be in line with the current agreements CAs have with DFO, and that it be ensured that the protocol document provide consistent guidance on this matter throughout.
- In reference to the box regarding "*Federally or provincially protected non-aquatic species*", DFO/MNR are asked to consider whether it is appropriate for non-aquatic species to be addressed so far along the process if agencies are to confirm the presence of SAR at Stage 3.

Appendix 6:

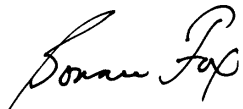
- It is suggested that this section be revisited, particularly step 4, to clarify the process and the role of CAs in the SAR review process.
- DFO/MNR are requested to correct the contradictory information contained in the second bullets under Stages 3 and 4 regarding the role of the CA in notifying MNR and/or "seeking agreement on intended action".

Appendix 7:

- It is recommended that this appendix include the agency office contact list in chart format, and describe by county or municipality who the proponent should contact regarding SAR. It is suggested that information on federal and provincial contacts for non-aquatic SAR also be provided.

Thank you once again for the opportunity to comment on the Interim Protocol for the Review of Development Proposals that affect Aquatic Species at Risk in Ontario 2009. The opportunity to comment on future drafts of the protocol would be appreciated. If you have any questions or concerns with these comments please contact myself at (905) 895-0716 ext. 223, or Natasha Leahy at ext. 228.

Sincerely,



Bonnie Fox
Manager, Policy & Planning

c.c. All Conservation Authorities CAOs/GMs
Jeremy Downe, Ministry of Natural Resources
Debbie Ming, Fisheries and Oceans Canada