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**Re: Conservation Ontario Comments on the “Interim Protocol for the Review of Project Proposals that may affect Aquatic Species at Risk in Ontario 2011” (EBR # 011-5661)**

Dear Mr. Downe:

Thank you for the opportunity to provide comments on the proposed “Interim Protocol for the Review of Project Proposals that may affect Aquatic Species at Risk in Ontario 2011”. Conservation Ontario is the umbrella agency for the 36 Conservation Authorities in Ontario.

The following comments are submitted for your consideration based upon a review of the proposed interim protocol by staff from Central Lake Ontario Conservation Authority, Credit Valley Conservation, Grand River Conservation Authority, Lake Simcoe 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 need to conserve and protect aquatic Species at Risk (SAR) is recognized, and overall it is felt that this iteration of the protocol provides improvement over the “Draft Interim Protocol for the Review of Development Proposals that affects Species at Risk in Ontario” reviewed by Conservation Ontario in September, 2009.

#### **General Comments**

Included below are general comments related to the interim protocol. Whenever possible, examples illustrating the general comments are provided in the specific comments section.

#### Role of Conservation Authorities

Given that this protocol outlines specific roles for Conservation Authorities in the review of project proposals involving aquatic SAR, it is unfortunate that Conservation Ontario was not invited to be part of the committee developing this harmonization protocol or at least to be given the opportunity to provide input prior to posting on the Environmental Registry.

The protocol fails to meet one of its stated intentions which included to “Clarify the roles and responsibilities of DFO, MNR and CA staff for the review of project proposals related to aquatic SAR” (p. 3). In review of this protocol there is still confusion amongst CA staff about the role they would play in the review of these projects. While most CAs see benefit in reviewing some projects involving SAR to reduce wait times for their municipal partners and watershed proponents, additional clarity is requested on when a CA could issue a Letter of Advice (LOA) in SAR habitat. Some CAs do not want a role in reviewing projects under SARA other than to screen for presence/absence. The protocol should specify that CA roles with respect to SARA will be confirmed through the individual Fisheries and Oceans Canada (DFO)/CA Partnership Agreements.

At times this protocol contradicts the Partnership Agreements that individual CAs have with DFO. For example, in the Administrative Terms of Reference of the Grand River-DFO Level III Partnership Agreement, it is agreed that Grand River staff will do an initial screening using DFO Aquatic SAR Distribution Maps. If the project falls upon the red highlighted line for Schedule 1 SAR, Grand River staff would then refer the project to DFO for review. In contrast, this Protocol indicates that CAs may make decisions related to whether or not a permit is required under SARA, whether SARA mussels can be moved as a form of mitigation, etc. It is recommended that the entire document, including the appendices, be reviewed to ensure it accurately reflects the current agreements CAs have with DFO. Any proposals for CAs to implement parts of SARA on behalf of DFO should also include careful discussions between both parties about any potential liability that CAs may be taking on as a result of these increased responsibilities. CAs could then make a decision about whether or not they wish to complete these additional tasks on behalf of DFO.

Although this document mentions the requirements for permits under other legislation, given the partnership role that Conservation Authorities have with DFO it is appropriate that specific mention of the *Conservation Authorities Act (CAA)* be made. It is important to note that CAs cannot withhold permissions under the CAA pending outcomes of SAR reviews by MNR and DFO. Therefore it is important for MNR and DFO to communicate any concerns to CAs early in the process. Changes made to project proposals as a result of SAR later in the process may result in the need for the proponent to amend their project design and therefore their permit under the CAA. Coordination between the agencies should minimize inconvenience to the applicant.

Given the uncertainty around the scope of CA involvement in applications involving aquatic SAR, the text should be revised to indicate that CAs “may” undertake the variety of actions described within this interim protocol.

### Mapping

The availability of SAR mapping continues to be a major hurdle to implementing SARA and ESA 2007 in a “coordinated and efficient manner”. This document places importance on proponents performing self-screening of development proposals. It is critical that for species which are protected under both ESA 2007 and Schedule 1 SARA that the mapping of the habitats is the same. Additionally, the fact that there is one set of screening mapping available to proponents and partners, but there is additional mapping held by either MNR or DFO that is not shared, is a cause for concern and may result in officially induced error. Resources should be directed towards the harmonization and long-term maintenance of provincial and federal aquatic SAR information. Many Conservation Authorities also have SAR data which could be used to augment existing data sets. Communication amongst CA, MNR and DFO staff is necessary to determine how this data could be incorporated into existing MNR and DFO data and to clarify the status that any CA data would have in review of project proposals.

Under the current regime of data management, the only way that a proponent could be sure that their project is not impacting SAR habitat is to contact MNR, DFO, and possibly CA staff as a result of their partnership agreements, directly. It is unacceptable that they could get three different answers. This creates uncertainty

for proponents, results in duplication of process and increases workload for all staff involved. These outcomes appear to directly contradict the desired outcomes of the implementation of this protocol.

The proposed interim protocol also tends to lump both Schedule 1 SARA SAR and other SARA SAR where no legal protection to habitat is provided. In the mapping available on the Conservation Ontario website, only “red” areas affect CA reviews under the *Fisheries Act*. The orange and purple segments are only relevant for proponents whose project requires a review under the Canadian *Environmental Assessment Act*. The protocol should be re-structured to clearly identify the different processes for reviews where legally protected species are found and where other SARA SAR are found. If CAs provided notification to DFO for all proposals that may affect SARA SAR (in addition to Schedule 1 species) an overabundance of notifications may be received at DFO offices with little environmental benefit.

Finally, pre-screening and notification to MNR for ESA 2007 SAR, by CAs should be identified as a “courtesy” only within this protocol – no “will” statements should be used. See specific comments, Section 3.2 below for an example.

### Level of Protection Under SARA

Under the *Species at Risk Act* only Schedule 1 Listed SARA species have protection, however, this document endeavours to address all SARA listed species, including Schedule 2 and 3. While DFO and other federal agencies are required to have regard for all SARA listed species under CEAA, the presence of SARA SAR that are not Schedule 1 listed species does not have the same impact through reviews under the *Fisheries Act*. For example, for the matrix on page 20, the SARA classification in the matrix appears to include all Schedules of SARA SAR, while the footnotes identify that only those species “officially listed” have legal protection under SARA. It is recommended that in lieu of using a footnote, the scenarios should provide separate examples of Schedule 1 and other Schedule species.

Additionally, the American Eel example is confusing as this species is not currently “listed” under SARA and therefore has no protection under SARA.

### Communications

The recognition within this document of the need for “clear, open and collaborative communications amongst all involved staff” is applauded. The support for the establishment of local processes such as having regular monthly review meetings is appreciated. Experience has shown that in areas where open dialogue is occurring, reviews are timely and conservation outcomes are often better. Moreover, maintaining communication between all three agencies is integral to having a functional review process.

### **Specific Comments:**

#### 1.2- Key Acronyms and Definitions

- Recommend that if both Schedule 1 SARA SAR and other SARA SAR are to be covered within this document that a clear distinction is provided in this section and throughout the rest of the document.
- For clarity purposes, it may be helpful to include a suffix to differentiate between federal and provincial SAR (i.e. SAR-SARA or SAR-ESA) or use SAR and SARO.

#### 2.1.2-Fish Habitat Referral Process

- In example 3, please reverse the order of the bullet points.
- This table should provide a more explicit link to the Risk Management Framework. The term “acceptable HADD” should be replaced with “low or medium risk”.

### 2.1.3-Species at Risk Review Process

- The reference to DFO having an internal web-based mapping applications tool (*Ontario Aquatic Map Explorer*) which is not shared with CAs is contrary to having a one-window review process.
- Step 2 is very unclear when it comes to CA review of projects:
  - Step 2 should include an option for CA to forward the file to DFO and notify the proponent that review of SARA will be completed by DFO. This is particularly true for those CAs whose Partnership Agreements with DFO do not include SARA.
  - It indicates that mussel relocation could be considered as a possible mitigation measure, but it is unclear whether additional permissions under SARA would be required for mussel relocation.
  - A final bullet point is required which indicates who should be issuing the LOA for the proposal.
- Science Advice: This section should be expanded to include how the final decision is made based on the science advice eventually provided. This section should also provide direction on how DFO habitat staff will proceed while DFO science works on the particular request. There is concern that with no timeline provided for the advice that this process will result in unrealistic delays.

### 2.2.2- Endangered Species Act, 2007 Review Process

- Conservation Authority data should be incorporated into the SARA and ESA 2007 process whenever practical.
- Step 1: Reference to the Information Gathering Form, Avoidance Alternatives Form and C-Permit Application Form should be included. Given that the proponent is expected to pre-screen for SARA species, it is imperative that the MNR ensure that the NHIC data is up to date and/or that SARA distribution maps be provided. Otherwise, the result may be large volumes of screening inquiries or officially induced errors.
- 3a: it is recommended that if MNR has reviewed the project proposal for SAR-ESA implications, and have determined that SAR are not present, that they also identify to the proponent the appropriate fisheries timing window for the area, if the current window that is applied to the area has been established for the protection of a SAR.
- 3b: it may be appropriate for the presence of regulated habitat (e.g. recovery reaches where species is not currently present, but habitat is protected) to be included in this bullet as well.
- It is recommended that in all steps of the review process that the following clause be added: "In cases where screening results and/or any further advice is provided to the proponent by the MNR, it should also be provided in writing to the CA and/or DFO".

### 3.2- Submission of Project Proposal

- Project Proposal Submitted to DFO or CA
  - In some cases CAs do not have an agreement with DFO to administer SARA on their behalf. Therefore, the general reference to CAs undertaking reviews with SARA species in this protocol is incorrect.
  - Based on this paragraph, it is still unclear as to when CAs with agreements to undertake reviews involving SARA species should refer development applications to DFO.
  - Clarification on the last paragraph is also required as it may imply that CAs would advise DFO regarding proposals for any Schedule of SAR. This lack of clarity, coupled with CAs' lack of access to the best available mapping, may result in CAs providing unnecessary notification to DFO. See General Comments- Role of Conservation Authorities for further discussion on this topic.
- The term "screen" should be removed from the footnote below. Notification to MNR regarding ESA 2007-listed species should be identified as a courtesy only within this protocol as CAs do not have a

formal agreement or a complete data set to screen under the ESA 2007. See General Comments-Mapping for further discussion on this topic.

### 3.3- Screening Project Proposals for SAR

- Critical Habitat: It should be clarified that critical habitat only exists for Schedule 1 listed species. Until the mapping is available, it will be difficult for a CA to fully assess whether or not there are questions about the presence of critical habitat.

### 3.4.1- Coordination of Assessments

- The beginning of this section references CA biologists reviewing projects, but then they are no longer mentioned in the following paragraphs. Please revise to section to note that CAs may be reviewing projects per partnership agreements to accommodate the difference amongst CAs.
- The use of American Eel in situation B is contradictory, as it currently does not have any protection under SARA. American Eel would be more appropriately used as an example for situation C.

### Appendix 1

- This flow chart should be given more context as it is excerpted from another document.

### Appendix 2

- The flow chart needs to be revised to be SAR specific. It directs proponents to use Operational Statements without first confirming whether or not the project is in compliance with SARA.

### Appendix 5

- Stage 1 of the process is confusing, as it indicates that if a proponent pre-screens their work, that no SAR approval would be required. At Stage 3, the flow chart directs the agency to screen projects for SAR presence.
- Stage 2 should also include reference to ESA 2007 SAR and that those proposals should go directly to MNR. It is recommended that reference to the proponent providing mitigation for SAR should not be required at this stage, as the agencies confirm SAR presence in Stage 3.
- It is suggested that if DFO has provided the SAR review, then the normal Fish Habitat Referral Process should not be followed. DFO could issue the LOA, to prevent the requirement for re-review from CA staff.
- A reference or explanation for Appendix 5 should be included in the text of the document.
- A note should be added stating that sites where there are no aquatic SAR may also have terrestrial SAR.
- Once amended, this flowchart should be used to replace the flow chart found in Appendix 1.

### Appendix 6

- This appendix requires a thorough review of CA roles and responsibilities, particularly in areas where CAs have been designated as having "lead responsibility".
- It is unclear why a CA would be notifying DFO in writing when provincially protected non-aquatic SAR are present and to our knowledge there is no agreement that CAs would undertake this commitment.
- This information could likely be consolidated into appendix 5.

This document provides direction to staff reviewing project proposals involving aquatic SAR. In the next iteration of the protocol, it may be helpful to also provide a summary for use by proponents.

Thank you once again for the opportunity to provide comments on the "Interim Protocol for the Review of Project Proposals that may affect Aquatic Species at Risk in Ontario 2011". The opportunity to provide comment on future drafts of the protocol will be appreciated. If you have any questions or concerns with these comments, please contact myself at extension 228.

Sincerely,

A handwritten signature in black ink that reads "Leslie Rich". The signature is written in a cursive, flowing style.

Leslie Rich  
Policy and Planning Officer

c.c. DFO