

Halton Area Planning Partnership (HAPP)

10th Year Review of the Endangered Species Act – Proposed Changes Joint Submission

May 10, 2019



Introduction

The Halton Area Planning Partnership (HAPP) is comprised of Halton Region, City of Burlington, Town of Halton Hills, Town of Milton, Town of Oakville, Credit Valley Conservation, Grand River Conservation Authority and Conservation Halton.

This submission represents HAPP's response to the "10th Year Review of Ontario's *Endangered Species Act*: Proposed Changes" proposal (the "Proposal") which was placed on the Environmental Registry of Ontario as a Policy Proposal Notice (ER Number: 013-5033) on April 18, 2019 with a 30-day comment period until May 18, 2019. The Proposal was prepared by the Ontario Ministry of the Environment, Conservation, and Parks (MECP) after consideration of comments on the 10th Year Review of Ontario's *Endangered Species Act*: Discussion Paper (the "Discussion Paper") and contains recommendations for changing various aspects of the *Endangered Species Act*, 2007 (the "Act").

The Halton Area Planning Partnership welcomes this opportunity to have its collective voice heard by responding to the proposed changes to the *Act*. HAPP's response includes:

1. This letter, which contains key comments with respect to the proposed changes; and
2. Appendix 1, which contains table form comments that are more specific to individual recommendations.

Given the 30-day comment period all HAPP member Municipal Councils and Conservation Authority Boards have yet to endorse these comments. Staff will be seeking endorsement as soon as possible.

Background

The *Act* came into effect on June 30, 2008, providing immediate species and habitat protection for the most at risk species listed on the Species at Risk in Ontario (SARO) list. There are currently 243 plant and animal species listed on the Species at Risk in Ontario (SARO) list, which is provided in Ontario Regulation 230/08. Of this list of species, 16 have been identified as "extirpated" from Ontario, 117 are "endangered", 54 are "threatened", and 56 are "special concern". These species are listed due to threats such as habitat loss, pollution, invasive species, climate changes and disease. Species listed as extirpated are those that once, but no longer live in the wild in Ontario. Endangered species still live in the wild in Ontario, but face imminent extinction or extirpation. Threatened species live in the wild in Ontario, but are likely to become endangered if steps are not taken to address factors threatening them. Special concern species live in the wild in Ontario, but may become threatened or endangered due to biological characteristics and identified threats. Based on the current SARO list, species protection currently applies to 187 species listed as endangered, threatened or extirpated; while habitat protection is afforded to the 171 species listed as endangered or threatened.

The proposed changes to the *Act* follow a 10-year review exercise conducted by the Ontario Ministry of the Environment, Conservation and Parks and documented in a Discussion Paper. This paper was released for 45-day public commenting on the Environmental Registry of Ontario as Policy Proposal Notice (ER Number 03-4143) on January 18, 2019. HAPP did not

submit comments on the Discussion Paper; however, some of our partner members did. The provincial government received 14,964 accepted comments.

The seven goals set for the proposed changes to the *Act*, as outlined in the Discussion Paper, are to:

- Enable positive outcomes for species at risk,
- Ensure species assessments are based on up-to-date science,
- Address multiple objectives for ecosystem management through stewardship and protection activities,
- Increase efficiencies in service delivery for authorization clients,
- Streamline processes and provide clarity for those who need to implement the *Act*, and
- Maintain an effective government oversight role.

The Proposal outlines the proposed changes under 5 broad categories, which include:

1. Assessing species at risk and listing them on the SARO list.
2. Defining and implementing species and habitat protections.
3. Developing species at risk recovery policies.
4. Issuing *Endangered Species Act* permits and agreements, and developing regulatory exemptions.
5. Enforcing the *Endangered Species Act*.

In addition, the Proposal describes change to the Environmental Bill of Rights General Regulation (Ontario Regulation 73/94) that may be necessary to exempt Regulations containing Minister's orders to pause protections for listed species from the normal EBR posting and consultation requirements.

Key Points of HAPP's Response

1. Longer Review Time Needed

Please extend the commenting period for this proposal from 30-days to 60-days. Please also provide a 60-day comment period for similar types of Proposals in the future. A 60-day commenting period would ensure staff have the opportunity to complete a more detailed review and consideration of the proposed changes, and report to, or brief Municipal Councils and/or CA Boards prior to the submission deadline.

2. Implementation Improvements

The focus of the proposed changes appears weighted towards minimizing social and economic impacts of the *Act* and associated regulations rather than maintaining existing protections for at risk species and encouraging their recovery. Habitat loss and fragmentation are among the biggest threats to species at risk in Ontario so any proposed changes that could facilitate such activities should be carefully considered. The proposed changes could undermine existing protections for species at risk by modifying mechanisms for automatic protections of listed species and removing or extending requirements for government responses and reporting. The MECP, as the new Ministry responsible for administering the *Act*, should focus more attention on addressing implementation challenges to improve the administration and consistent application of the existing *Act* and

better integrate it with the land use and infrastructure planning processes in Ontario (e.g. Planning Act Applications and environmental assessments), as well as with other legislative and regulatory requirements (e.g. conservation authority approvals).

3. Proposed Changes Vague

The descriptions of proposed changes are vague. It is difficult to understand what the MECP is proposing given vague descriptions which can be widely interpreted. For instance, the description of the proposed new option to pay a charge in lieu of completing certain on-the-ground activities required by the *Act* is vague. It is not clear whether this new option would apply to municipalities and/or other public infrastructure developers only, or whether this option could also be available to private individuals and land developers that also construct infrastructure. HAPP urges the MECP to release a more detailed description of the Proposed Changes for public consultation and extend the consultation period accordingly.

4. MNRF to MECP Transition and Timing of Review

The MECP was not responsible for administering the *Act* over the past 10 years. In October 2018, the provincial government transferred responsibility for the *Act* and species at risk protection and recovery from the Ministry of Natural Resources and Forestry (MNRF) to the MECP. We understand policy, agreements, authorizations, compliance, employees and all other matters under the *Act* only began being transitioned to MECP in April 2019. HAPP recommends postponing the current review exercise until the MECP conducts more complete engagement with stakeholders and can attain implementation focused experience administering the *Act*. As noted in Comment #1 above, MECP should prioritize an investigation of process improvements to increase efficiencies and streamline approvals over legislative changes.

5. Guidelines and other Communication Materials

Should proposed changes be passed, new guidelines and other communication materials would be required for the purpose of communicating the implications of the amended *Act* to applicants at the Pre-consultation stage of *Planning Act* applications and other development and site alteration processes.

6. Longer Review Time Needed

Please consider a 60-day comment period for these types of Proposals in the future so that staff have the opportunity to complete a more detailed review and consideration of the proposed changes, and report to, or brief Municipal Councils and/or CA Boards.

Conclusion

The 10th Year Review of the *Act* must not be rushed. The potential consequences of any inappropriate modifications to this important legislation may be severe and permanent, such as potential extirpation or extinction of some species at risk in Ontario. HAPP recommends that the province reconsider proposed changes to the *Act* in light of our comments.

Thank you for providing the Region, its Local Municipalities, and Conservation Authorities the opportunity to comment on the proposed changes to province's legislation for protecting species at risk in Ontario. We welcome the opportunity to have further discussions with Provincial staff prior to the release of the final proposed amendments to the *Act* and Regulations and the EBR General Regulations.

Respectfully submitted,

Curt Benson, MCIP, RPP
Director of Planning Services &
Chief Planning Official
Halton Region

John Linhardt, MCIP, RPP
Commissioner of Planning & Sustainability
Town of Halton Hills

Mark H. Simeoni, MCIP, RPP
Director of Planning Services
Town of Oakville

Nancy Davy
Director of Resource Management
Grand River Conservation Authority

Heather MacDonald, MCIP, RPP
Director and Chief Planner
Department of City Building
City of Burlington

Barb Koopmans, MCIP, RPP
Commissioner of Planning & Development
Town of Milton

Barb Veale
Director, Planning and Watershed Management
Conservation Halton

Gary Murphy
Director of Planning and Development Services
Credit Valley Conservation

Proposed Changes to the *Endangered Species Act*

APPENDIX 1

Proposed Changes (paraphrased)	HAPP Comments
1. Assessing species at risk and listing them on the Species at Risk in Ontario List	
A.i) Earlier notice of species assessments – Committee on the Status of Species at Risk in Ontario (COSSARO) reports to be made available to public no later than three months after receipt by Minister.	
A.ii) Extend listing time between receipt of COSSARO report by Minister to when listing is to occur from three to twelve months	Due to the proposed decoupling of listing from protection, the proposed extended timeline may be unnecessary, as the Minister would potential have the discretion to suspend species and habitat protection for up to three years, as necessary. Delaying the listing process could result in unintended consequences such as delaying the eligibility for research grants or habitat restoration for some species.
B) The 12-month period between receipt of COSSARO report by Minister to when listing is to occur would apply to all such reports received in 2019.	
C) New COSSARO reporting window – between January 1 and January 31 of each year.	This proposed change may leave no room for emergency listings given that an annual report will be required in January of each year. HAPP recommends that this proposed change to include a provision to allow for emergency listings outside the proposed new COSSARO reporting window.
D) Minister allowed to require COSSARO to reconsider classification of a species and pause requirement to add/upgrade species status for any species subject to re-assessments.	
E) New requirement for COSSARO to consider overall species condition around broader biologically relevant geographic area before classifying a species as threatened or endangered.	Species condition can vary across its natural range and Ontario may be at the edge of some species at risk ranges. That said, the ultimate status of a species in Ontario should be based on species status and population trends from within Ontario, rather than outside Ontario. There is a difference between range edge species (e.g. Barn Owl), and those that may be common

Proposed Changes (paraphrased)	HAPP Comments
	elsewhere but have declined in Ontario (e.g. Bobolink).
F) Broadening COSSARO membership qualifications to include individuals with relevant expertise in ecology, wildlife management, as well as those with community knowledge.	COSSARO's work to classify species status in Ontario should be based on objective assessments using scientific evidence and be undertaken only by those with the actual technical expertise and qualifying credentials. It may be difficult for this Committee to reach consensus with respect to their important work if membership is expanded too broadly to include those outside the scientific community. If member qualifications are to be broadened, a clear statement on what is meant by 'those with community knowledge' is required. A member on COSSARO should not have established ties to any land development proposals, corporations, or any other entities whereby by a clear conflict of interest would present itself. It would be appropriate to broaden membership to include individuals with indigenous knowledge of lands and resources.
2. Defining and implementing species and habitat protections	
A) Discretionary temporary suspension of automatic species and habitat protections for up to three years following listing if certain criteria are met:	Support proposal to de-couple listing and automatic protection of species and habitat, providing the exercise of Ministerial discretion to temporarily suspend the automatic requirement is based on valid scientific reasons and the Minister has consulted with an independent expert to verify these.
A.i) the automatic protections to the species would likely have significant social or economic implications for all or parts of Ontario,	This criterion is vague and introduces subjectivity into considerations for justifying automatic protection pauses. The terms described within this clause should be clearly defined to avoid any misinterpretation and eliminate potential unwarranted consideration of protection pauses.
A.ii) the temporary suspension will not jeopardize survival of the species in Ontario, and	Recommend that the test be stronger than "will not jeopardize survival". The goal should be expanded to achieve an improved state for species at risk.
A.iii) one of the following further criteria:	
1) the species has a broad distribution in the wild in Ontario	
2) habitat availability is not a limiting factor for the species;	

Proposed Changes (paraphrased)	HAPP Comments
<p>3) additional time is needed to address the primary threats to the species, or co-operation with other jurisdictions is necessary to reduce the primary threats to the species,</p>	
<p>4) other criteria that may be specified by regulation</p>	<p>This criterion is unclear. In the absence of a more detailed information, HAPP is unable to review and consider support for this provision.</p>
<p>B) Enable scoping of species protections, where appropriate (i.e. applying them to certain geographies or circumstances), via Minister's regulations.</p>	<p>It is not clear that this change is necessary, and why scoping should be under the purview of the Minister as opposed to the LGIC. It appears that current Regulations may already be scoped to apply protections to certain geographic areas.</p>
<p>C) Remove requirement for provincial government to develop a habitat regulation proposal for each newly-listed threatened or endangered species and retain the option to develop a habitat regulation when needed.</p>	<p>Proposed removal of mandatory legislative requirement and timeline to develop habitat regulations for newly-listed species should be reevaluated. The most suitable time to develop a habitat regulation is in or around the time the listing is made to ensure species protection. Such mandatory requirements hold the government accountable for protection and recovery of newly listed species. The absence of a mandatory timeline could result in newly-listed species at risk not receiving adequate protection putting them further in peril of extinction or extirpation.</p> <p>The Municipal Class Environmental Assessment (MCEA) process includes requirements for identification of species at risk and associated mitigation measures for their protection within the study area. The proposed changes to removing the legislative requirement and timeline to develop habitat regulations for newly-listed species may impact how the mitigation measures are determined during an MCEA study. From a municipal infrastructure planning perspective, not having direction from the Province in a timely manner may prevent municipalities from being able to establish the appropriate mitigation measures during an MCEA study</p>
<p>D) Enable Minister, rather than LGIC, to make species-specific habitat regulations.</p>	<p>It is more appropriate to retain species-specific habitat regulation making authority with the LGIC, rather than the Minister. This ensures more thorough and open discussion and decision making on species-specific habitat</p>

Proposed Changes (paraphrased)	HAPP Comments
	regulation.
3. Developing species at risk recovery policies	
A) Ministerial discretion to extend the nine-month GRS development timeline, for some species.	It is unclear which species this new ministerial discretion to extend the nine-month GRS development timeline would apply to. This should be clarified.
B) Clarification that recovery strategies for species at risk are advice to the government and the GRS is the government's policy direction response	
C) Allow Minister to extend timelines for conducting the review of progress towards protection and recovery based on individual species needs.	The proposed change would allow the Minister of the MECP discretion to extend the 5-year review timeline for certain unspecified species. HAPP consider this 5-year review exercise important for allowing tracking of progress within an appropriately standardized timeframe, hence maintaining government accountability for species at risk protection and recovery actions.
D) Removing requirement to posting under the EBR and instead require certain products under the <i>Act</i> be made available on government website	The EBR posting is a well known, established process which ensures public engagement. The proposal to remove the requirement to post under the EBR and to create a new posting process is unnecessary. It is unclear what this new process will entail or if public consultation requirements will remain.
4. Issuing <i>Endangered Species Act</i> permits and agreements and developing regulatory exemptions	
Creation of Regulatory Charge and Agency	
Cash in Lieu Charge	While this approach is generally supported by HAPP, particularly from a municipal infrastructure planning and construction perspective, there is some concern with the vague details provided in the description of the proposed new cash-in-lieu charge option. It should be clarified that this option would be a last resort option—only available after it has been satisfactorily demonstrated that all other options to avoid, mitigate, fulfill normal on-the-ground requirements are explored. On-the-ground recovery options, particular within the same municipality or watershed in which the species at risk impact occurred, should be prioritized wherever possible. Please also clarify to who this new option could apply. It is not clear if this option is for all, or whether this would only apply to municipalities or other public infrastructure

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	<p>developers.</p> <p>If the provincial government moves forward with the cash-in-lieu charge option, HAPP recommends that the cumulative impacts of this approach be assessed by the Province and that mandatory moratoriums on use of this option as an alternative to normally required conditions be imposed should concerns regarding cumulative impacts be observed.</p> <p>With respect to the funding itself, detailed criteria for the disbursement of funding by the Trust and standards for activities that receive it should be required. For instance, rather than going to activities that are “reasonably likely to support” prescribed species (the language used in the Proposal), the funds collected through the new cash-in-lieu charge option should only be used to support activities that are demonstrated to support protection and recovery and provide an overall benefit to the prescribed species. Those receiving the funds should also be required to monitor and guarantee success of on the ground activities for a reasonable period of time.</p> <p>HAPP note that the Municipal Class Environmental Assessment (MCEA) process includes requirements for identification of species at risk and associated mitigation measures for their protection within the study area. The proposed cash-in-lieu charge option for municipal infrastructure projects may impact how the mitigation measures are determined during an MCEA study and how the overall project costs are estimated. It would be helpful to further understand the MECP’s plans with respect to the cash in lieu charge option (e.g. which species will be eligible, how will the cost be determined, how will the change be incorporated into planning activities, will there be a threshold for when the ‘cash in lieu charge’ applies, what is the timing of commitment to funds during the life of an infrastructure project etc.).</p>
Species at Risk Conservation Trust	Disbursement of cash-in-lieu funds should occur for projects within the same municipality or watershed in which the optional payment originated.

Proposed Changes (paraphrased)	HAPP Comments
	Other potential concerns include the process by which the Board would be selected (and their qualifications), the administrative costs of supporting such an agency, the establishment of suitably detailed guidelines and criteria for disbursement and spending of funds, and the criteria that would be used to determine species eligibility.
Additional changes	
A.i) Remove requirement for Minister to consult with independent expert in 'D' permit process	HAPP does not support this proposed change. By removing the need to consult with independent experts, it removes the scientific, objectivity, thoroughness and transparency of the review process.
A.ii) Replace requirement for LGIC of 'D' permits with Minister Approval	It is more appropriate to retain approval authority for 'D' permits with the LGIC, rather than the Minister. This ensures more thorough and open discussion and decision making on 'D' permits. Only two 'D' permits have been issued under the <i>Act</i> to date; therefore, it is unclear why this change is necessary.
B) Broaden approach to minimizing adverse effects for permits and agreements by shifting the focus from 'individual members' of the species to the 'species' more generally.	This proposed broadened approach should be applied judiciously as it could lead to unintended consequences as the cumulative effect of incremental losses to at risk species and their habitat can easily be overlooked with the proposed shift in focus to the 'species' more generally, particularly where limited data is available.
C) New transition provision for existing permit and agreement holders to continue operating for twelve months following the application of new species or habitat protections while they seek amendments to address newly listed species.	No comment.
D.i) Enable Minister to establish codes of practice, standards and guidelines with respect to species at risk and their habitat, and enable regulations made under the <i>Act</i>	It is unclear by what is meant by this proposed change. More clarification is needed to determine if HAPP can support this provision.
D.ii) Enable regulations made under the <i>Act</i> to incorporate documents to supplement requirements or conditions related to species at risk	It is unclear by what is meant by this proposed change. More clarification is needed to determine if HAPP can support this provision.

Proposed Changes (paraphrased)	HAPP Comments
<p>E) New landscape agreement that takes a strategic, coordinated and consolidated approach to authorizing clients undertaking multiple activities, and which could allow for limited conservation banking to achieve positive outcomes for species, subject to conditions, including:</p>	<p>This proposed change would assist municipalities and other clients undertaking multiple activities to apply a strategic landscape-wide approach that matches ESA requirements with larger, more impactful overall benefit projects. Conservation banking would be helpful in this regard as larger high priority projects could be achieved through this proposed landscape approach. The details of the agreements will be important to ensure that this landscape approach is used appropriately and the conditions identified are supported.</p>
<p>1) the agreement requires reasonable steps to minimize adverse effects of the authorized activities on the impacted species under the agreement</p>	<p>HAPP supports this proposed change.</p>
<p>2) the agreement requires actions to benefit one or more species,</p>	<p>HAPP supports this proposed change.</p>
<p>3) reasonable alternatives have been considered, including those that would not adversely affect the species specified in the agreement, and</p>	<p>HAPP supports this proposed change.</p>
<p>4) the beneficial actions required by the agreement outweigh the adverse effects to the impacted species under the agreement.</p>	<p>HAPP supports this proposed change.</p>
<p>F) Replace s.18 with new provision that would include a more flexible test and would allow the Minister to prescribe activities by regulation, to allow them to be carried out without requiring any additional authorizations under the ESA. An activity could be prescribed for this purpose, where it:</p>	<p>The proposed changes to S. 18 of the <i>Act</i> removes the requirement to demonstrate an overall benefit to the species, substituting instead phrases such as benefiting the species “where appropriate to do so”, and “reasonable steps to minimize adverse affects”. These “best efforts” approaches fall short of the current permitting requirements to provide and overall benefit to the species and may result in unintended consequences for SAR (i.e., extirpation). Harmonization with other instruments is supported, but the overall benefit “test” of the ESA must be applied.</p>
<p>1) is approved or required under another piece of legislation,</p>	

Proposed Changes (paraphrased)	HAPP Comments
2) would not jeopardize the survival of a prescribed species or have any other significant adverse effects,	Recommend that the test be stronger than “will not jeopardize survival”. The goal should be expanded to achieve an improved state for species at risk.
3) would provide a benefit to the prescribed species, where reasonable to do so,	
4) requires reasonable steps to minimize adverse effects on prescribed species, and	
5) involves the consideration of reasonable alternatives, including those that would not adversely affect the prescribed species.	
G) Remove the requirement for the Minister to consult with an expert if the Minister forms the opinion that a proposed regulation is likely to jeopardize the survival of the species in Ontario or to have any other significant adverse effect on the species	Removal of this requirement for the Minister to consult with experts is not supported.
5. Enforcing the <i>Endangered Species Act</i>	
A.i) Applying inspection powers and offence provisions that already exist in the ESA to also include activities conducted under the regulations	HAPP supports this proposed change
A.ii) Extending current protection order powers that can be used with the Minister’s discretion to protect habitat during the intervening period before a species is listed, or where a regulation has been made so that the prohibition is not applicable, to also include the discretion to similarly protect species.	HAPP supports this proposed change
B) Update provisions related to enforcement officers by removing identification of specific	HAPP supports this proposed change

Proposed Changes (paraphrased)	HAPP Comments
classes of persons (e.g. conservation officers) as enforcement officers and retain the Minister's authority to designate officers.	
Proposed Change to EBR General Regulation	
A) If the proposal for the change to allow the Minister to order by regulation a pause of the protections for listed species passes: we are also proposing a change to the EBR General Regulation (<i>O.Reg. 73/94</i>) to exempt the regulations containing Minister's orders made for the purpose of pausing protections from EBR posting and consultation requirements.	This proposed change to EBR General Regulation would reduce transparency and accountability and is not supported.