



Ontario
Home Builders'
Association

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February 25, 2013

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Re: Proposed approaches to the implementation of the Endangered Species Act

EBR Registry Number: 011-7696

About the Ontario Home Builders' Association (OHBA)

The Ontario Home Builders' Association is the voice of the residential construction industry in Ontario. OHBA represents over 4,000 member companies, organized through 30 local associations across the province. Our membership includes home builders, commercial and residential land developers, renovators, manufacturers, suppliers, planners, architects, engineers and lawyers.

Introduction:

OHBA is pleased to be given an opportunity to present our comments as part of the input towards the *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.*

The Environmental Registry posting notes that the Ministry of Natural Resources (MNR) has heard from many sectors, organizations and individuals about challenges in implementing the *Endangered Species Act* (ESA) and had brought together a stakeholder working group (OHBA was a member of the working group) to identify common issues and potential solutions. MNR has proposed a number of regulatory changes to provide a balance between the protection and recovery of species at risk while either:

- helping existing or planned activities proceed without additional approvals where new species or habitat protection comes about after their approval;
- enabling a streamlined alternative to authorizing new activities that benefit species;
- enabling activities necessary for human health or safety; and/ or
- achieving administrative efficiencies.

OHBA is supportive of regulatory proposals that streamline permitting and provide certainty for projects having already earned approvals through the planning approvals process. However, OHBA has a number of concerns with the proposed regulatory amendments and further recommendations are provided in greater detail in this submission. Lastly, OHBA appreciates the ongoing dialogue and engagement that MNR staff have had with our members and network of 30 local associations through the difficult, and often lengthy, implementation challenges of administering the ESA.

Transformation MNR – Modernization

MNR is moving forward with a transformation plan to modernize and more sustainably manage Ontario's natural resources. OHBA is supportive of the main components of the transformation plan, including: streamlining approvals processes and operation delivery transformation. OHBA was supportive of *Schedule 19* of the 2012 Provincial Budget and appeared before the Standing Committee on Finance and Economic Affairs supporting the Schedule to move forward with the transformation plan. Unfortunately, this schedule was removed through the budget negotiation process. OHBA supports the provincial objective to transform MNR's operations to make it easier, faster and more efficient for businesses and individuals to access its services. OHBA believes this transformation will provide the Ministry with long-term financial sustainability and support economic growth and job creation, while ensuring that Ontario's natural resources are protected for future generations.

Endangered Species Act – General

OHBA continues to support a balanced approach in implementing the environmental, social and economic goals of the Province, to ensure a high-quality of life and prosperity for Ontario citizens. With respect to the ESA, OHBA believes that habitat regulation should work in conjunction with existing legislation and complement other important provincial goals and objectives. OHBA has strongly advocated for the Province to implement appropriate transition measures for new endangered or threatened species listings that respect existing earned approvals and publically established land designations. OHBA has also advocated for the expeditious review and approval of projects subject to the ESA, particularly given that such projects have already been through an extensive review and approval process in advance of the ESA permit process.

The implementation of the ESA has contributed to significant uncertainty and frustration, with respect to both implementation and transition, for the new housing and development industry. The implementation of the Act, thus far, has been very problematic from OHBA's perspective and has required substantial resource and time investments through an administratively difficult process for both MNR and industry stakeholders as opposed to assisting in species recovery. Through this Modernization MNR initiative, the Provincial Government should undertake an increased focus on implementation improvements such as transitional regulations, streamlining of the permit process and a stronger focus on the conservation of key ecosystems, as opposed to a sole focus on individually listed species.

Proposed Transition Policies - Respecting Existing Approvals

Transitional provisions should be employed to assist with the implementation of the ESA to ensure meaningful protection for species at risk while providing process certainty for agencies involved in the development and construction process (i.e. municipalities, industry, non-profit sector). The land-use approvals process is lengthy and extremely complex involving multiple levels of government and government approval agencies. As with any legislative or regulatory change that seeks to address well entrenched ideals and processes, the key is how we manage transition. Currently, new species listings result

in habitat protection with an end of process permit that ignores all previously obtained environmental, planning and land-use approvals. It is essential that MNR recognize the uncertainty created by establishing a moving target for municipalities and the industry that undermines approvals previously granted under separate provincial legislation.

OHBA is supportive of MNR's acknowledgement that transitional policies are necessary to recognize and respect earned approvals from various different pieces of legislation and government approval agencies. OHBA has been consistent in our recommendation that MNR must implement transition policies that are clear, fair and timely ensuring effective habitat protection that is balanced and provides certainty and respects existing approvals. OHBA is concerned that:

- a) the MNR did not propose a risk based tiered approach to transition based on the level of approvals earned (i.e. Bobolink and Eastern Meadowlark transition provisions were tiered to three different points in the approvals process); and
- b) that the qualifying transition window is proposed for the development of land and associated infrastructure where the land is within a Draft Plan of Subdivision approved under the *Planning Act*. Generally, under the regular land-use planning approvals process, this specific proposed transition point is already many years (and a number of already earned approvals) into a long-term complex approvals process. OHBA believes this is a very "late-in-the-process" transition window that does not recognize other layers of earned approvals.

While OHBA supports the concept of transition, the industry recommends a tiered approach to transition that recognizes that once lands are designated for development within an official plan, that decisions have been made based on extensive technical environmental studies and a robust public consultation process by a democratically elected level of government. OHBA recommends that a tiered transition policy utilizing this 'earlier-in-the-process' approval point correspondingly require a greater degree of mitigation and offset conditions. Tiered transition should tie earned approvals to the level of conditions that should be required of proponents.

OHBA notes that by the time an application receives the proposed single transition point of Draft Plan of Subdivision approval, most natural heritage and environmental issues have already been addressed (i.e. sub-watershed studies, master environmental servicing plans, including: hydrogeology and water balance studies with development limits, environmental 'take-outs' and buffers) and, therefore, additional mitigation opportunities are extremely limited. Alternatively, should the MNR decide not to pursue a tiered approach to transitional regulations, OHBA would strongly recommend that the transition window occur earlier in the *Planning Act* approvals process (i.e. lands designated within an Official Plan or Secondary Plan approval).

OHBA notes that the purpose of the ESA must still be met through any transition regulation and that this should be assessed within a framework that recognizes earned approvals that have been secured under other legislation (i.e. *Planning Act*, *Condominium Act*, *Environmental Assessment Act*), while acknowledging the need to take steps to minimize conflicts with prohibitions in section 9 and 10 of the ESA (no harm/harass species and no damage/destroy habitat). OHBA is generally supportive of time-limited transitional provisions that take effect for projects/activities on the date that a new or threatened species receives habitat projection as well as applying to currently listed species that are found on the site late in the process.

The proposed time-limited transition provisions should provide some measure of flexibility to allow proponents the opportunity to achieve qualifying approvals and an appropriate window of opportunity to commence a project. Given that the current proposed transitional point in the *Planning Act* process is for lands approved within a Draft Plan of Subdivision (i.e. late in the planning process), OHBA recommends that project proponents be allotted a three year window after endangered or threatened species receive habitat protection to obtain Draft Plan of Subdivision approval under the *Planning Act* to qualify for the transition regulation. Furthermore, OHBA recommends a five year window following Draft Plan of Subdivision approval for the activity in qualifying protect that would damage or destroy habitat to commence.

OHBA recognizes that high risk activities or activities that may impact a species near extinction would not qualify for transitional regulations. Furthermore, OHBA recognizes and supports species specific transitional conditions that would prohibit habitat damage or destruction during important life cycle windows. OHBA is supportive of transitional regulatory exemptions that recognize earned approvals provided that appropriate approval process windows to qualify for the transitional exemption apply. Lastly, OHBA strongly recommends that MNR reconsider the Draft Plan of Subdivision approval under the *Planning Act* as the key transition point and either a) implement a tiered approach with the level of mitigation and additional conditions reflecting the level of earned approvals obtained or, b) apply transition earlier in the *Planning Act* approvals process (i.e. lands designated within an Official Plan or Secondary Plan approval).

Streamlined alternative to authorizing new activities that benefit species

Greater efficiency in the ESA approvals process with respect to 'streamlining' would be beneficial to both the MNR and also provide greater clarity and efficiency for proponents. Therefore, the MNR should adopt a risk based standardized approach to approvals based on a prescribed standard set of conditions instead of proceeding through the regular, uncertain and time consuming negotiated approvals process. Projects that suit this approach would generally be those that are common and repeatable where there is confidence in the outcome of mitigation and where there is an acceptable lower-to-medium risk to the species. Furthermore, MNR should implement an automated approvals / self-execution of approval application approach to improve efficiency and effectiveness. OHBA strongly supports the modernization of MNR approvals through streamlining and a rules-in-regulation with registration approach.

OHBA supports the provincial objective for the Ministry of Natural Resources to transform its operations to make it easier, faster and more efficient for businesses, municipalities and individuals to access its services. OHBA believes this transformation will provide the Ministry with long-term financial sustainability and support economic growth and job creation, while ensuring that the Ministry of Natural Resources can continue to meet its mandate with respect to species protection.

Standardized Condition Approaches – Specific Aquatic Species (Rules in Regulation with Registration)

Greater efficiency in the ESA approvals process through streamlining (rules in regulation) would support the Ministry's modernization efforts while providing business certainty and process efficiency for proponents. Improvements are required due to significant delays and uncertainty in receiving permit approvals in a timely and consistent manner. With respect to standardizing specific aquatic species (i.e. Redside Dace) approaches, OHBA suggests that there may also be an opportunity to link new regulatory approaches, to Ontario Regulation 293/11 that was made under the ESA (Redside Dace transitional provisions [sec 23.1 of Ontario Regulation 242/08]).

OHBA notes that the transitional regulation specific to Redside Dace (O. Reg 293/11 made under the ESA amending O.Reg 242/08 – Sec 23.1 of the ESA) will be revoked on December 31, 2014 and at that time all activities eligible for the Mitigation Report approach that would otherwise contravene the ESA in Redside Dace habitat will have to be complete by that date. While many projects that utilized the transitional exemption will be complete by then, a number of projects that have submitted or approved Mitigation Reports may not be complete by December 31, 2014. Furthermore, some of the delays in approving Mitigation Reports and delays in completing works within habitat zones have been complicated by lack of MNR staff resources. OHBA recommends that the Environment Registry 011-7696 regulatory proposal provide a link to the existing O.Reg 293/11, to enable projects that have submitted or approved a Mitigation Report by June 2014, but are not yet completed by December 31, 2014 to remain eligible for the transition exemption regulation provided that the project is complete by December 31, 2016. The OHBA proposed regulatory amendment would not permit any “new” or “additional” projects to qualify for sec 23.1 of the ESA, but would allow projects that have already submitted or approved Mitigation Reports and are already conducting water works in habitat zones to complete the activity provided this is done by Dec 31, 2016.

OHBA is generally supportive of the proposed standardized conditional approaches to specific aquatic species including Redside Dace. OHBA is, however, concerned that the scope of the proposed standardized conditional approaches (rules in regulation with registration) are very narrow and are limited only to riparian zones while excluding all activities that occur ‘in-the-water’. OHBA supports a risk based approach to regulation and recommends that the proposed regulation include ‘in-the-water’ activities that are assessed to be a lower risk to the species with standard mitigation measures that have been demonstrated to be repeatable and effective. Therefore, OHBA is supportive of rules in regulation with registration of standardized conditions approach for activities in the riparian zone and furthermore, OHBA recommends that MNR include a very specific prescribed list of lower-risk activities considering the type of habitat occurring ‘in-the-water’ that would qualify for the proposed rules in regulation with registration approach.

Standardized Condition Approaches – Bobolink & Eastern Meadowlark (Rules in Regulation with Registration)

Similar to the proposed approach to aquatic species, OHBA is generally supportive of the proposed standardized conditional approaches for Bobolink and Eastern Meadowlark. However, OHBA does have a number of specific concerns regarding the narrow scope of the proposed standardized conditional approaches and recommends a number of amendments to the Environmental Registry proposal.

OHBA notes that MNR recognized significant implementation challenges for both the agricultural sector and for the development industry regarding two threatened grassland species (Bobolink and Eastern Meadowlark) and subsequently introduced regulatory amendments in 2012 that provided certainty to landowners respecting existing earned planning approvals which in turn will support investment and job creation. The regulatory amendments ensured the continued support and a direct benefit to grassland species through contributions that will generate new habitat in a fair and equitable manner. The transitional regulatory amendments were clear and fair and introduced a sliding scale of habitat contribution based on the levels of earned planning approvals obtaining under the *Planning Act*.

The proposed standardized conditional approaches to Bobolink and Eastern Meadowlark represent the next step in grassland species at risk regulatory policy once the window of previously approved projects that qualified for the transitional exemption closes. However, it is OHBA’s understanding, that the proposed approach to standardized conditions will only apply to qualified projects that result in temporary habitat

damage or destruction impacts for up to 25 years, with rehabilitation occurring beyond that time-frame. OHBA strongly recommends that *if* the MNR has proposed standardized conditions for a project to qualify for the rules in regulation with registration approach for projects lasting up to 25 years, that this same approach should be applied to longer-term projects with an enhanced benefit to the species as a requirement.

OHBA recommends that the Environmental Registry proposal be amended to allow for all projects under a "to be determined" maximum land area qualify for the standardized approach regardless of the length of time of the habitat impact. New housing and land development projects would result in permanent habitat damage and/or destruction. However, standardized conditions during the activity would have very similar, if not the same outcome regardless of the length of the impact – MNR should therefore simply enhance the overall benefit contribution to reflect the long-term impact on the recovery of species at risk.

OHBA is generally supportive of standardized conditional rules in regulation with registration approach for Bobolink and Redside Dace. OHBA is also supportive of a number of proposed conditions including: creating or enhancing habitat to achieve a benefit to the species (notwithstanding that habitat quality and the long-term management of habitat should be considered by MNR); development of habitat management plans; construction timing windows that do not damage or destroy habitat during important life-cycles of the species at risk as well as long-term monitoring. OHBA does however, strongly recommend that the rules in regulation approach also include longer-term habitat impacts with a corresponding risk based increase to the conditional requirements that reflect the permanent nature of habitat damage or destruction for new housing and land development.

Other Issues

OHBA continues to support a balanced approach in implementing the environmental, social and economic goals of the province to ensure a high quality of life and prosperity for Ontario citizens. However, we would specifically make the following recommendations:

- Habitat regulation should work in conjunction with existing legislation & complement other provincial goals & objectives including social and economic priorities;
- Many stakeholders including OHBA and our individual member companies navigating the requirements of the ESA have expressed frustration with the lack of guidance tools such as brochures, fact sheets or online ministry resources explaining in detail the process, conditions and requirements for obtaining approvals under the ESA. OHBA recommends MNR dedicate resources to the development of robust guidance tools including best management practices and standardized mitigation approaches for proponents (i.e. an MNR Species at Risk Reference Manual). While an initial start-up investment would be required, over the long-term this project would yield efficiencies by saving MNR staff time and resources on individual applications.
- Currently the liability for meeting all the permit requirements under the ESA rests with the proponent (buyer), which is problematic for long-term contracts (as would be the case for permanent habitat destruction). OHBA recommends that MNR should allow for transfer of liability to the seller of the offset through contracts to ensure permit conditions are met over the long-term. Any additional costs or risk taken on through the transfer of liability would be built into negotiated contracts.
- "Safe-Harbour" agreements are potentially an attractive option for many land owners as a means of supporting the recovery of species-at-risk. OHBA does, have a number of concerns that may be

reducing the full potential of “safe-harbour” in Ontario. The industry remains concerned with adjacent property spillover impacts and risk of additional species listings with habitat within safe harbor zone. MNR should address these issues in a strategy to promote the use of “Safe-Harbour” in Ontario.

- OHBA is opposed to the delegation of additional MNR responsibilities to Conservation Authorities. Specifically, OHBA is opposed to delegating ESA permitting to Conservation Authorities as this measure would do nothing to streamline the permitting process and would more likely result in further delays and additional levels of complexity.
- In an effort to streamline processes, municipalities and industry require greater clarity regarding the “definition” of what triggers an ESA permit or application. On many occasions, permits are being filed and processed without the existence of a threatened or endangered species or habitat on a site or time is being spent attempting to have MNR confirm that an observation 3 years ago doesn’t meet the ESA criteria. The nature of many species, especially birds, with their range, sheer numbers and ranges is an ongoing problem that may increase in the future as additional species are listed.
- OHBA recommends MNR apply an “urban lense” to Natural Heritage Systems, Conservation Authority planning and permitting as well as ESA permitting in areas designated for growth in municipal and regional Official Plans as well as the Greater Toronto and Hamilton Area’s long-term urban reserve (commonly referred to as the “whitebelt”). OHBA supports the protection of environmentally sensitive lands and features, however, this must be balanced with an urban lense in terms of resource management that should be applied to the very small portion of Ontario’s land mass where urban growth is planned to accommodate the vast majority of Ontario’s growing population and employment needs for decades to come.

Conclusion

OHBA is generally supportive of the time-limited transition provisions that recognize public earned approvals under other provincial legislation. The industry recommends that MNR reconsider the Draft Plan of Subdivision approval under the *Planning Act* as the only key transition point and either, a) implement a tiered approach with the level of mitigation and additional conditions reflecting the level of earned approvals obtained; or also b) apply transition earlier in the *Planning Act* approvals process (i.e. lands designated within an Official Plan or Secondary Plan approval).

OHBA is generally supportive of the modernization approach to streamlining MNR approvals through standardized conditional approaches (Rules in Regulation with Registration). OHBA has however, outlined concerns that the scope of the proposed regulatory amendments are too narrow in focus and should consider additional low-to-medium risk activities and the type of habitat affected that would result in predictable outcomes for the species at risk. OHBA notes industry concern that MNR has been without the resources to respond to already listed species in a timely fashion, creating significant delays on many projects. The industry is keen to find workable efficient solutions that will protect the species at risk while not unduly constraining the Province’s economic interests.

OHBA appreciates the opportunity to provide comments to the Ministry of Natural Resources and to provide advice on the proposed regulatory improvements. OHBA strongly supports a balanced approach to the environmental, social and economic goals of the province to ensure a prosperous and high quality of life for Ontario citizens.