



Ontario
Home Builders'
Association

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Bree Walpole
Ministry of Natural Resources and Forestry
Species Conservation Policy Branch
300 Water Street
Peterborough ON K9J 8M5

Re: Development of the Safe Harbour Policy under the Endangered Species Act (#012-8234)

About the Ontario Home Builders' Association (OHBA)

The Ontario Home Builders' Association (OHBA) is the voice of the land development, new housing and professional renovation industries in Ontario. OHBA represents over 4,000 member companies, organized through a network of 29 local associations across the province. Our membership is made up of all disciplines involved in land development and residential construction, including: builders, developers, professional renovators, trade contractors, manufacturers, consultants and suppliers. The residential construction industry employed over 330,000 people and contributed over \$51 billion to the province's economy in 2015. OHBA has been engaged with the Ministry of Natural Resources and Forestry (MNR) since the initial consultations on the *Endangered Species Act, 2007* and was a member of the Endangered Species Act Stakeholder Group and a member of the Bobolink / EML Roundtable.

Purpose of Proposed Government Response Statement and Regulation:

In July 2013, Ontario Regulation 242/08 was amended to enable the development of Safe Harbour Instruments under Section 23.16 – "Safe Harbour Habitat". Safe Harbour Instruments are tools available to proponents and others to create, or in limited circumstances enhance, species at risk habitat, for a set period of time, while retaining the assurances that they may modify the habitat at a later date. It is intended to encourage landowners to establish species at risk habitat on their property, while providing certainty that increasing the presence of species at risk populations or creating habitat on their land would not result in future additional land use restrictions. Under this provision certain types of authorizations can be considered Safe Harbour Instruments, if they meet the requirements set out in the regulation. This includes 17(2)(b) (protection or recovery) permits, 17(2)(c) (overall benefit) permits and stewardship agreements.

To support the implementation of Section 23.16, the MNRF has developed a draft policy that will provide additional direction regarding the considerations and requirements necessary for the development, assessment and implementation of Safe Harbour Instruments as outlined in the regulation. The primary goals of the Safe Harbour Policy are to support stewardship-driven and/or beneficial activities focused on the protection, recovery and overall benefit of species at risk in Ontario. The purpose of the Safe Harbour Policy is:

- To provide direction regarding the considerations and requirements necessary for the development, assessment and implementation of safe harbour instruments as outlined in s. 23.16 (safe harbour habitat) of Ontario Regulation 242/08.
- To provide guidance on establishing conditions within one of three ESA authorizations (a section 16 stewardship agreement, a clause 17(2)(b) (protection or recovery) permit or a 17(2)(c) (overall benefit) permit) in order to enable the recognition of these authorizations as safe harbour instruments within the meaning of Ontario Regulation 242/08.

OHBA Continued Support for ESA Stakeholder Panel Recommendations

The *Endangered Species Act, 2007* (ESA) came into effect on June 30, 2008 along with two regulations that support the implementation of the act: O. Reg. 242/08 – General Regulation, and O. Reg. 230/08 – the SARO List. O. Reg. 242/08 allows certain activities to precede that would affect threatened, endangered or extirpated species and that would otherwise not be allowed, provided specific conditions are followed to protect species and their habitat. OHBA was a member of the Endangered Species Act Stakeholder Panel, which provided recommendations in February 2013 proposing a number of new approaches to the implementation of the *Endangered Species Act* including the establishment of transition provisions and streamlining of permitting. The ESA Stakeholder Panel specifically recommended to the Minister in 2013 (Recommendation 3.7-2) “It is recommended that pilot scale application of Safe Harbour Agreements be pursued for immediate implementation where appropriate.

On July 1, 2013, amendments to this regulation which OHBA supported (EBR #011-7696) came into force that allow certain activities to proceed by registering with MNRF, subject to protective conditions. OHBA continues to support these regulatory amendments to streamline and provide more certainty in the regulatory process.

OHBA Support for Bobolink / Eastern Meadowlark Round Table Safe Harbour Recommendations

OHBA has been engaged with the MNRF through the Bobolink / Eastern Meadowlark Round Table. OHBA supported the transition policy (EBR 011-5372) passed in May 2012 that exempted qualified projects from an Overall Benefit Permit by providing support for the species through contributions to support habitat creation. OHBA continues to support the Bobolink / Eastern Meadowlark Roundtable and the important role it serves in providing the government advice to support the recovery of these two species in Ontario. OHBA supports the Bobolink Round Table proposed government led actions in the development of a GRS on the Bobolink and Eastern Meadowlark

OHBA supports the Round Table recommendation on the concept of Safe Harbour as an important incentive mechanism and a key component of a successful benefits exchange program. Safe Harbour could alleviate the concerns of development proponents who are worried about

maintaining properties in grassland prior to development. Safe Harbour could also help reduce the conversion of grassland habitats to cash crops and would also generally create opportunities for grassland habitat creation projects and enhancement through legal assurances that increased species at risk populations or habitat on their land would not result in future land use restrictions for the private landowner.

OHBA specifically supports the following Bobolink / Eastern Meadowlark Round Table recommendations regarding Safe Harbour:

- [Rec 51.] Clearly define and articulate in plain language what the Safe Harbour exemption means with respect to Bobolink and Meadowlark, and work with stakeholders, consultants, and MNRF and OMAF staff to raise awareness about this regulatory change;
- [Rec 5.2] In addition to individual Safe Harbour agreements, the government should develop and implement umbrella Safe Harbour agreements. For stewardship organizations, umbrella agreements are a critical delivery mechanism for Safe Harbour, which will help simplify arrangements with farmers and landowners and increase participation in the benefits exchange;
- [Rec 5.3] As it is being implemented, Safe Harbour needs to be included within the monitoring and assessment regime.

OHBA Comments and Recommendations re: #012-8234

1.0 Introduction

- OHBA is generally supportive of the language in the introduction and concurs with the observation that “a certain level of concern and uncertainty exists among private landowners around what can be done on their property in the presence of species at risk and their habitats.” OHBA is generally supportive of the descriptions of Safe Harbour as a policy and American jurisdictional examples of moving towards a voluntary, incentive-based policy structure.

2.0 Purpose

- OHBA is generally supportive of the goals and purpose statements in this section.

3.0 Definitions

- OHBA is generally supportive of the definitions in this section.

4.0 Safe Harbour

- OHBA is generally supportive of Potential Conservation Outcomes (Sec 4.1) and the encouragement to continue the ongoing management of the habitat area after the conservation period has ended.
- OHBA recognizes that (Sec 4.2 Stewardship Agreement, Protection/Recovery Permit or Overall Benefit Permit) Safe Harbour conditions will only be considered within overall benefit permits

where the initial impact to the listed species habitat is temporary in nature and thus will be restored upon completion of the activity as part of the permit conditions. This will limit opportunities within the land development sector given that “safe harbour habitat conditions should not be considered in overall benefit permits in situations where there are permanent losses to a listed species habitat.”

- 4.3 OHBA notes that Safe Harbour agreements can and should be flexible enough to cover more than one species.
 - ESA instruments (i.e. permits) often cover more than one species. Under Section 16, a Stewardship Agreement can benefit more than one species, and doesn't have to result in benefits for all species at risk present on the property. OHBA is supportive of allowing Safe Harbour Agreements to cover more than one species by identifying the target species for the habitat that is intended and for potential secondary species at risk that has the potential to inhabit the area.
 - OHBA is however concerned that only “endangered” and/or “threatened” species can be listed at secondary species. OHBA recommends allowing “special consideration” species to also be listed to protect the property owner in the event that a “special consideration” species is up-listed.
 - OHBA is further concerned that as new species are added by COSSARO to Ontario's list of SARO that new endangered or threatened species could be listed that are present in a Safe Harbour property that were not listed by the property owner as a secondary species. Such a risk to property owners may discourage participation in Safe Harbour agreements, therefore OHBA recommends that MNRF develop a transition policy to protect property owners that have entered into Safe Harbour agreements from being exposed to the risk of new SARO listings impacting existing Safe Harbour agreements.
- 4.4.1 OHBA has a number of concerns with a “Zero Baseline Condition”
 - OHBA notes that it may be difficult to prove with absolute certainty a “Zero Baseline Condition” exists and recommends MNRF consider language that allows for some limited low-risk flexibility.
 - The Draft Safe Harbour Policy states that “For a species other than Bobolink or Eastern Meadowlark, the area being established as habitat for a species listed as endangered or threatened is not currently the habitat of a species listed as endangered or threatened”. This language precludes the opportunity to *enhance* existing habitat to benefit a SARO (other than Bobolink and Eastern Meadowlark) as part of a Safe Harbour Agreement. OHBA notes that other jurisdictions allow ‘habitat enhancement’ as an option for Safe Harbour. OHBA strongly recommends that MNRF amend the draft Safe Harbour policy to allow for enhanced habitat as a component of Safe Harbour.
- 4.4.3 OHBA is generally supportive of establishing a minimum conservation time period for Safe Harbour Habitat. OHBA continues to support the minimum conservation period for enhancing existing Bobolink or Eastern Meadowlark habitat of five years, which is consistent with the requirements established under subsection 23.6 of O.Reg 242/08.

- 4.4.4 OHBA has consistently supported a risk-based approach to the *Endangered Species Act* and regulations under the Act. OHBA therefore is generally supportive on the “Scalable Complexities” policies where as potential uncertainties and risk increase, so should information requirements needed to set up the instrument, including additional habitat development conditions.

5.0 Review and Assessment Considerations for Safe Harbour Instruments

- OHBA is generally supportive of policies that would discourage the establishment of Safe Harbour habitat that risk becoming habitat ‘sinks’. OHBA is generally supportive of a broad policy objective for MNRF to only enter into Safe Harbour instruments based on what is suitable for the species, however OHBA is apprehensive about the MNRF potentially being overly risk-adverse in the application of such policies.
- 5.1 Species Suitability
 - OHBA is generally supportive of a risk-based approach where priorities is given to selecting species whose needs are well understood which will provide for a greater amount of ease in locating, managing and reporting on the species on the property.
 - OHBA is generally supportive of an approach that recognizes the type and duration of anticipated future land uses in the area.
 - OHBA is generally supportive of policies that recognize the ability of the target species to function as an umbrella species, however OHBA notes that property owners should be aware of potential secondary species that should be listed in the agreement and OHBA has expressed concern under Section 4.3 that “special consideration” species pose a risk for property owners if they are up-listed as “threatened” or “endangered” as do other species that may at some point in the future be added to the SARO list. Safe Harbour instruments should provide protections to property owners entering into Safe Harbour agreements through a transition policy for future SARO listings.
- 5.2 Habitat Suitability
 - OHBA is concerned about policies for minimum habitat area requirements. This would preclude property owners from entering into Safe Harbour agreements where smaller habitat areas that would benefit SARO could be created. OHBA encourages MNRF to not be overly risk adverse when considering minimum thresholds
- 5.3 OHBA is generally supportive of the Conservation Period Suitability policies
- 5.4 OHBA is generally supportive of the Safe Harbour Instrument Decision policies. OHBA recognizes that there are no formal mechanisms in the ESA to appeal a decision and is therefore supportive of language in the draft Safe Harbour policy that proponents should continue to work with MNRF to revise proposed activities and instrument application details with the goal of satisfying the legislated requirements.

6.0 Safe Harbour Effectiveness Monitoring

- 6.1 OHBA is generally supportive of the draft effectiveness monitoring conditions, however OHBA continues to have general concerns regarding limited MNRF resources and if the Ministry will be effectively able to monitor conditions.
- 6.2 OHBA is generally supportive of the draft timing requirements for Safe Harbour effectiveness to be conducted at least once a year through the duration of the instrument. However OHBA again raises a general concern regarding limited MNRF resources and if the Ministry will be able to monitor conditions reports submitted by proponents as frequently as the draft Safe Harbour policies suggest. OHBA recommends a risk-based approach where lower-risk Safe Harbour instruments could have a two year requirement.

7.0 Damaging and Destroying Habitat

- OHBA is generally supportive of the activity reporting requirements in Sec 7.1 and the minimizing potential adverse effects in Sec 7.2.

8.0 Additional Considerations

- OHBA is supportive of Implementing a Safe Harbour Instrument (Sec 8.1).
- 8.2 OHBA has a number of concerns regarding Neighbouring Landowners/Managers:
 - OHBA's concerns were also shared by the members of the Endangered Species Act Panel. The Panel's Report and Recommendations to the Minister noted: "Safe Harbour Agreements may negatively affect adjacent landowners and non-participating landowners. Innovations sometimes have the potential to have unintended consequences, requiring thoughtful consideration."
 - OHBA is concerned the Draft Safe Harbour Policy does not go far enough to adequately provide legal protection for neighbouring landowners/managers. The draft policy states (lines 750-753): "In the event that the creation or enhancement of a safe harbour habitat is likely to result in species at risk occupying adjacent lands not covered by the instrument, implications to the neighboring landowner, not party to the instrument, will be assessed on a case-by-case basis." This draft policy to assess on a case-by-case basis presents a significant risk and OHBA strongly recommends the policy be strengthened to provide greater protection against spillover impacts. The MNRF must recognize that spillover impacts will occur in many cases, and there are many neighbouring landowners/managers across Ontario who may be adverse into entering into Safe Harbour Agreements with the government and/or may not have the type of relationship with their neighbours in which they would be willing partners to enter into legal agreements.
- 8.3 OHBA has a number of concerns regarding other SARO listed species:

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- Broadly speaking, Safe Harbour can have positive benefits for biodiversity and may provide benefits to other listed species at the same time.
- OHBA is supportive of the language in 8.3: “In the event that other SARO-listed species also inhabit the property as a result of the newly created safe harbour habitat, proponents are exempt when damaging or destroying the created/enhanced safe harbour habitat once the terms of the instrument have been fulfilled if they follow the conditions outlined in the regulation.”
- OHBA notes that the draft Safe Harbour Policy in 8.3 states: “Further, the SARO list may be updated from time to time and it is the responsibility of the proponent to ensure the most current list is used to identify species in the safe harbour habitat area.” While OHBA notes that it is positive that the Draft Policy acknowledges that the SARO list is updated from time-to-time, the Draft Policy has not proposed any policies as to what a property owner or proponent must do to protect their Safe Harbour Agreement in the event of a new SARO being listed that is present on the property and benefiting from the Safe Harbour Agreement that may have been put in place years prior to that species being newly listed as a SARO.
- OHBA strongly recommends that Safe Harbour instruments should provide protections to property owners entering into Safe Harbour agreements through a transition policy for future SARO listings.
- OHBA is generally supportive of the policies under section 8.4 that allow for and establish provisions and policies for the revocation and termination of a Safe Harbour Instrument.
- OHBA is supportive of the policies in section 8.5 that allow a Safe Harbour instrument to be transferred to a new landowner where land has been sold or succeeded.

Conclusion

OHBA has consistently supported the Government developing a safe harbour policy framework and is generally supportive of the draft Safe Harbour Policy. OHBA's primary concerns are appropriately staffing MNRF to negotiate on a case-by-case basis and that spillover impacts on neighbouring properties have not been adequately addressed in the draft Safe Harbour policy. OHBA notes that Safe Harbour only applies to endangered and threatened species and is concerned regarding uncertainties with respect to creating or enhancing habitat that attracts unlisted species that become listed as SARO in the future. Lastly, OHBA is concerned that Safe Harbour Agreements require Ministerial approval and recommends MNRF allow delegated authority.

OHBA appreciates the opportunity to provide comments and advice to MNRF. 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.

Sincerely



Michael Collins-Williams, RPP, MCIP
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Ontario Home Builders' Association