



March 4, 2019

Ministry of the Environment, Conservation and Parks
Species Conservation Policy Branch
300 Water Street, Floor 5N
Peterborough, ON
K9J 3C7

(sent via email to ESAREg@ontario.ca)

Re: OSSGA comments on MECP's 10th Year Review of Ontario's ESA

The Ontario Stone, Sand & Gravel Association (OSSGA) appreciates the opportunity to comment on the Ministry of the Environment, Conservation and Park's (MECP) 10th Year Review of Ontario's *Endangered Species Act* (ESA); (ERO 013-4143).

OSSGA is a not-for-profit association representing over 280 sand, gravel and crushed stone producers and suppliers of valuable industry products and services. Collectively, its members supply the substantial majority of the more than 160 million tonnes of aggregate consumed each year in the province to build and maintain Ontario's infrastructure. OSSGA works in partnership with the public and government agencies at all levels to promote a safe and competitive aggregate industry, contributing to the creation of strong communities.

As the model of, and the voice of environmental sustainability and stewardship for the aggregate industry, OSSGA supports the government's commitment to ensuring that the ESA "provides stringent protections for species at risk, while continuing to work with stakeholders to improve the effectiveness of the program." As significant land holders, aggregate producers play a critical role in the protection of species at risk. We believe that the ESA should enable a balanced approach for species at risk and economic development and we therefore offer our comments on the 10th Year Review below.

1) Prohibition on ESA Habitat within Growth Plan Natural Heritage Systems

One of the aggregate industry's biggest concerns is the prohibition of new aggregate applications in endangered and threatened species habitat within the Growth Plan NHS, Greenbelt NHS and Oak Ridges Moraine Conservation Plan Linkage Area. Prohibition within this habitat undermines the ESA and deters investment from the aggregate industry. The result is the sterilization of some of the highest quality and close to market resources in our province. Allowing for the replacement of habitat where the Province is satisfied that the application will result in a net overall benefit to the species while making available significant aggregate resources is a positive outcome for the species and the economy. As the Ministry undertakes this review, it is critical that the Provincial Plans align with the ESA.

As an example, since 2008, applications for new mineral aggregate operations within the Natural Heritage System (NHS) have been permitted within endangered and threatened species habitat subject to overall benefit. In 2017, the Provincial NHS grew significantly and now covers 75% of selected bedrock areas and 50% of sand and gravel areas within the GGH. Due to the number of endangered and threatened species listed in Ontario (117 endangered species, 54 threatened species), the transient nature of these species and their habitat requirements, almost all current aggregate applications contain endangered and threatened species.

OSSGA recently submitted comments to MMAH's Growth Secretariat on proposed changes to the Greater Golden Horseshoe Growth Plan (ERO # 013-4504). Within this submission, we provided recommended changes to 4.2.8.2 which confirms that any extraction within habitat of endangered and threatened species must result in an overall benefit to the species in accordance with provincial and federal requirements.

OSSGA strongly recommends changes to the Growth Plan that would allow aggregate extraction within endangered and threatened species habitat subject to authorization under the ESA.

2) Listing Process and Protections for Species at Risk

Improve Listing Criteria

The fundamental and most critical issue with the ESA is the listing process for determining which species are listed on the Species at Risk in Ontario (SARO) list. The assessment process that leads to the listing of species is not consistent and often based on limited population data. Species should be designated "at risk" based on sound, objective science and data transparency should be provided in reports released on species. The Committee on the Status of Species at Risk in Ontario (COSSARO) tends to rely heavily on the federal COSEWIC status reports or defers to data provided by MNRF which is often outdated or lacking. Under the COSSARO definition for "Data Deficient", it states that "Data Deficient should be used for cases where the status report has fully investigated all best available information, yet that information is insufficient to a) satisfy any criteria or assign any status, or b) resolve the wildlife species' eligibility for assessment."

Rather than applying the Data Deficient designation or designating a species as Special Concern (and using this as impetus to gather additional research and conduct further surveys), a "precautionary principle" is applied by COSSARO, and species are often listed as threatened/endangered based on the (often limited) data that are currently available. For example, the recent designation of the Bank Swallow is based on surveys that largely miss colonies (i.e. designation based primarily on roadside surveys whereas most colonies are located along rivers, lake shores or in pits) and/or on range shifts that may not be related to actual declines. This species may have withdrawn from select areas in Northern Ontario, but this could be entirely independent of population trends in the core of its range in southern Ontario.

Declines should also be removed as criteria unless a population reaches a predetermined population threshold and declines are shown as being caused by habitat issues rather than disease, for example. Some very common species such as Red-winged Blackbird might be shown to be declining at a rate that would trigger listing, yet listing this species would not make sense. Species for which habitat is not limiting (e.g. Barn Swallow, Bank Swallow, Eastern Meadowlark, Butternut and many bats) should be listed as special concern, not endangered or threatened.

In our opinion, the species listing process should not occur without a) an analysis of the economic impact of the designation of protected habitat (as is the case in the U.S.) and b) consideration of the future policy and planning implications once a species is listed.

Additionally, because many common and widespread species are listed to SARO, applicants often experience application delays because of species that either inhabit a site, or are listed to SARO, during the application process. This adds additional costs, delays and uncertainty to the approval process.

OSSGA strongly supports a critical review of the categories and criteria for status assessment used by COSSARO.

Distinguish Between Endangered and Threatened Species

In Ontario, the protection of habitat for endangered or threatened species is the same. In other jurisdictions (the U.S., for example), the species and the habitat of endangered species are protected, whereas when a species is listed as threatened, only the species is protected. At the time of listing, the threat to the species' population should be considered. If the primary threat is not due to habitat loss, the species should not be listed as endangered. Differentiation between endangered and threatened species in the legislation would allow for appropriate focus on species protection. The listing of endangered could be used to put habitat protection into place immediately for those species where habitat is a problem, while listing as threatened could allow for delayed and thoughtful implementation of habitat protection, if necessary, for those species where habitat loss is not the primary threat. For example, Northern Myotis was listed as endangered in 2013 however its main threat is white nose syndrome (a fungus) and not habitat limitations – this species would be more appropriately classified as threatened, under a model where only species and not its habitat are protected. In this example, consideration could still be given for some provisional habitat necessary for important life functions (i.e. over wintering habitat) through the implementation of appropriate habitat regulations following listing. Similarly, Monarch (recently assessed by COSSARO) should not be listed as endangered because its decline is probably not related to habitat change in Ontario.

Down-list Species from SARO when Population Data Reverses

Species that show reversing population trends should be down-listed. If re-analysis of existing breeding bird survey data by the federal government actually reverses trend data that were previously reported for some species or groups of species their status

should be reviewed quickly. There appears to be hesitancy to de-list or down-list species based on new scientific data. For example, the Bald Eagle was not down-listed until long after the data demonstrated successful species recovery.

Delay Habitat Protections Until Habitat Regulations/Descriptions are Developed

OSSGA supports automatic species protection. By distinguishing between endangered and threatened species, this would enable the delaying of habitat protections for those species where habitat is not necessarily the main threat and for those species for which habitat protection is essential for the survival of the species, these species and their habitat should be automatically protected. However, it is essential that habitat regulations be provided at the time of listing. Currently, with the automatic protection of all endangered and threatened species and habitat, combined with the interpretations of 'General Habitat' in the ESA, landowners are left without guidance surrounding habitat protection and little to no transition time to adapt to new listings. In our experience, the District Biologists are also left with incomplete information to properly assess applications for permits for these newly listed species with no habitat regulations.

Automatic Section 9 and Section 10 protections should be decoupled until proper habitat descriptions/regulations are developed or until habitat is determined to be the limiting factor. This would eliminate major discrepancies among Districts with respect to how habitat protections are applied when habitat regulations/descriptions aren't available. For example, District Offices are still inconsistent in their approach to applying the ESA with respect to bats which were listed some time ago.

3) Landscape Approaches

While we recognize that there may be opportunities to take a more strategic approach for species that share habitat with more than one species or species that depend on habitat that spans across wide ranges, we are concerned about the potential for this landscape approach to further sterilize resources. As previously mentioned, the application of a landscape approach with respect to natural heritage systems in Provincial Plan policy areas has resulted in the prohibition of new aggregate activities within ESA habitat.

A landscape approach may work for aquatic habitats, however, there are too many unknowns to necessarily apply a landscape approach for terrestrial (especially highly mobile) species. There may also be value in taking a landscape approach for species for which the removal of small amounts of habitat will not impact the species on a broader level. For example, when Bank Swallows colonize the working face of a pit, this habitat should be viewed in the context of a landscape approach and not overall benefit.

Without a better idea, however, of how a landscape approach would be implemented, at what scale, how that scale may differ among species, or without a guarantee that the current authorization processes under the ESA would apply, we are concerned about this approach.

4) Species Recovery Policies and Habitat Regulations

Flexible Timelines; Focus on Population Recovery

OSSGA supports added flexibility in the timeline requirements for developing Recovery Strategies. Some species would benefit from a longer timeframe (i.e. ten years) to determine whether recovery outcomes are successful, whereas with other species (i.e. species with shorter lifecycles), outcomes may be evident after only two or three years. However, it is essential that fluctuating and current population data be considered when determining recovery success. Ultimately, though, the government needs the resources to effectively meet their own timelines.

The five-year review of progress towards protection and recovery of Ontario's species at risk provides an update of the recent Ministry activities as they relate to the Ontario's species at risk program as well as a detailed progress report of each species. Although a review of the progress of the government's actions is important, often these reviews lack sufficient information on changes to species population and distribution.

Recovery Strategies and Five-Year Reviews should focus more on population ecology and recovery and include appropriate data from suitable surveys.

Habitat Descriptions Versus Habitat Regulations

General habitat descriptions are often too broad, inconsistently applied, and/or not interpreted equally across species groups. OSSGA supports the development of habitat regulations as they provide certainty for both the regulator and the proponent. In our opinion, the MECP should revisit the original intent of the ESA general habitat. The use of general habitat or the general habitat descriptions documents descriptions should only be used to focus habitat protection on important functions, while appropriate habitat regulations are being developed.

5) Authorization Processes

Ensure Efficiencies and Consistency for Section 17 Permits

OSSGA supports the use of the ESA permitting process that allows for overall benefit permits for aggregate extraction within endangered or threatened species habitat. However, the current process for overall benefit permits under section 17 is inefficient and results in significant delays (sometimes over two years) for applications. There should be guaranteed service windows on all permits once the required information has been submitted and automatic review commitments if those service windows are not met. OSSGA recommends a six month turn-around on completed permit applications. Any required field data should also be collected (using appropriate survey efforts and methods) and submitted in a timeframe appropriate to this turnaround. For example, a

Butternut Health Assessment needs to be conducted in the appropriate season, therefore, timing efficiencies should consider how certain species may have specific data gathering timing requirements.

Delays are due to the unpredictability of requirements for an overall benefit permit and correspondence with MNRF staff. There are often inconsistencies in requirements (e.g. what bat habitat surveys are required as part of assessments) among MNRF offices and even among biologists within an MNRF office, resulting in additional uncertainty. Further delays are also caused by the requirement for approval of overall benefit permits at the Regional Office due to disagreement between the Region and District.

We recognize that staff resources are limited; rather than increasing the workload on Ministry staff, we believe that service windows would be met by certifying the ecologists completing the work (perhaps similar to the Registry, Appraisal and Qualification System (RAQS) utilized by the MTO). This could potentially provide Ministry review staff with assured credibility of the work being done, thereby eliminating some of the uncertainty and delays during the approval process. The availability of certified professionals external to the Ministry could also facilitate third-party review, which could also accelerate the review times.

OSSGA strongly supports a guaranteed service window of six months, from the time of the provision of a complete application (including a public review period) on permits issued under the ESA.

Additionally, what qualifies as a significant social or economic benefit to Ontario under Section 17 (2) (d) and the difference between imminent and non-imminent under Section 17(2)(a) should be clarified.

Additional Authorization Tools

OSSGA supports additional authorization tools to help businesses achieve benefits for species at risk; however, we do have some concerns regarding the implementation of new authorization tools under the ESA.

i) Conservation Fund

We are very concerned that the introduction of a conservation fund could lead to compensatory requirements for future ESA authorizations. OSSGA is also concerned about the potential for negative public perception when a conservation fund is used in lieu of activity-based activities.

A conservation fund should be explored as one of several authorization tools, mechanisms and processes available to achieve benefit for species at risk; however, proponents should always be encouraged to choose activity-based species recovery/protection efforts. A compensation fund should never be the only tool in a compensation plan. While it could be utilized for species for which their threat is not loss of habitat (i.e. Butternut or Little Brown Myotis), for species that utilize high-quality

habitat (i.e. Jefferson Salamander) or for species with poor seed germination (i.e. Kentucky Coffee-tree); it should not be used for common species for which there is not a lack of available habitat.

Utilizing a conservation fund must be financially viable, and the fees should be defensible. Additionally, there should be transparency with respect to how fees are determined and used. A lack of transparency and accountability is best exemplified with the extraordinary charges that Conservation Authorities demand for wetland compensation for small isolated low function wetlands pockets that historically were removed without any compensation. Fees that cannot be defended will result in a lack of public trust and perceived misuse of funds. It is crucial that these funds be directly tied to species outcomes and not used to fund indirectly related conservation measures or species surveys, particularly species surveys involving data collection that is not appropriate for the species/habitat issue(s) under consideration (i.e. breeding bird surveys).

It is also important that there are clearly defined roles and responsibilities; there should be a third party (outside of the Ministry) that is responsible for funds administration to ensure no conflict of interest and objectivity.

ii) Habitat Banking

Aggregate producers are uniquely positioned to create habitat banks due to the nature of the aggregate industry, which requires progressive rehabilitation of extracted areas or areas that won't be disturbed for many years. As a result, aggregate producers can create habitat for future projects within these areas. The industry also often works closely with third parties (i.e. Ducks Unlimited) who are well-positioned to develop, manage, or monitor habitat banks.

For example, the aggregate industry is a significant contributor of new wetland habitat and there may be opportunities to create wetlands post-extraction that would also serve as Jefferson Salamander habitat that could be banked for future projects. Through rehabilitation, aggregate producers have also created grassland habitats that host Bobolink and Eastern Meadowlark which could potentially be used for banking. There are some practical challenges with this approach though, predominantly related to overlapping legislation (e.g. Provincial Plan policies) which often restricts the type of rehabilitation (i.e. return to agriculture or forested areas) that producers can conduct.

Although rehabilitation is a legislative requirement, we are concerned that habitat banking may be improperly perceived as "double dipping" even though the proponent-driven creation of SAR habitat would be above and beyond rehabilitation that is in accordance with provincial standards. An additional concern of the industry is that the creation of habitat may constrain business on adjacent properties scheduled for extraction. This is especially concerning for mobile species like Blanding's Turtle or avian species that may inhabit adjacent marginal habitat. Habitat banking agreements must include an agreement to "hold harmless" neighbouring properties from the impacts of creating habitat for species at risk.



Instruments under other Acts – Harmonization with the *Aggregate Resources Act (ARA)*

OSSGA supports potential harmonization of the ESA with the ARA if this would result in reducing study and permitting redundancies. We are concerned, however, that by aligning the ESA with the ARA, changes to ESA authorizations could result in a major site amendment which is currently a lengthy process. We look forward to working with the Ministry to determine potential efficiencies through harmonization.

Conclusion

Thank you again for the consideration of our comments. The aggregate industry is committed to the protection of species at risk and we look forward to continuing to work with the Ontario government on ensuring the ESA achieves a positive outcome for species at risk while not creating barriers for economic development. Should you have any questions or concerns, please do not hesitate to contact Ashlee Zelek, Director of Environment and Education at 647-727-8778 or azelek@ossga.com.

Sincerely,

A handwritten signature in blue ink, appearing to read "Norman Cheesman", is written over a light blue circular stamp.

Norman Cheesman
Ontario Stone, Sand & Gravel Association