

NORTHWATCH

March 4th, 2019

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

Sent by email ESAREg@ontario.ca

Re. ERO # 013-4143

Re. **Northwatch Comments in Contribution to the 10th Year Review of the Endangered Species Act**

On January 18th, 2019 the Government of Ontario announced that it was undertaking a review of the Endangered Species Act. The stated purpose was “to improve protections for species at risk, consider modern and innovative approaches to achieve positive outcomes for species at risk, as well as to look for ways to streamline approvals and provide clarity to support economic development.”

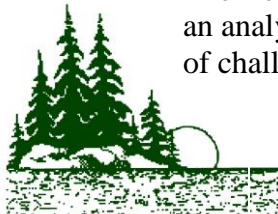
According to the posting on Ontario’s Environmental Registry and the sole other notice Northwatch received, the review was comprised of the posting of an eight page Discussion Paper as a basis for public comment, and a “Skype meeting” delivered twice and described in advance as being for the purpose of providing an overview of the Discussion Paper.

Northwatch is a regional coalition of environmental and social organizations across northeastern Ontario. Founded in 1988, Northwatch has the dual mandate of supporting public participation in environment-related decision-making and consultation processes, and advocating for the wellbeing of human and natural communities in and beyond the region. Northwatch participated in the “Skype meeting” on January 24th and we have reviewed and given careful consideration to the Discussion Paper.

Northwatch offers the following comments in response. They are provided in point-form format to assist the Ministry in their careful dispositioning of our submission.

Overarching and General Comments

- Extremely short timeline for public consultation placed regrettable constraints on ability to engage in detailed review, particularly for municipalities or volunteer organizations (such as those who meeting monthly)
- Endangered Species Act (ESA) is a complex Act and requires both technical/scientific and local understanding of implications and implementation experience
- The Review lacked any evidentiary basis; such a review should have been preceded by an analysis of implementation experience to date at the provincial level, and an analysis of challenges and successes that was supported by actual investigation and analysis



- The primary criteria for the review of the ESA should be “has it been effective in reducing the level of threat to species in Ontario that are endangered, threatened or of special concern?” but there has been no information or analysis made available that allows those engaged in the review to consider the first ten years of the ESA experience in an informed manner
- the discussion paper purports to have upholding the Act’s intent to protect and recover species at risk in Ontario as a primary motivation, but the underlying messages are that finding “efficiencies” may be the greater motivator; the discussion paper lacks clarity on this key point, and that in itself is problematic
- The Act was put in place in 2007 because other policies and legislation were not effectively protecting these species and their habitat (hence the growing list of species on the “list”) and until such time as the level of risk / pressure / threat on those species can be demonstrated to be no longer in force, then the purpose of the Act must be upheld, i.e. levels of protection cannot be reduced
- There is no indication in the discussion paper as to whether the authors / drivers of the discussion paper consider the cause of the identified “challenges” to be in language of the legislation, the policies or regulations, or the implementation; local discussions led to the conclusion that the challenges were in implementation, and in particular in the lack of capacity to properly implement the ESA’s provisions, particularly in a timely manner; as such the focus of this review must return to the challenges in implementation; again, having a sound analysis of experience to date is essential
- The focus of review findings should be on how implementation can be strengthened (and capacity increased)
- The discussion paper seems to suggest that it is a given that an economic development project will be able to actually benefit SAR; this is not supported by any evidence or even anecdotes, and there are more likely to be examples of when an economic development does NOT benefit a species at risk
- The discussion paper ignores several important factors: 1) there was a streamlining of the Act in 2013 that brought about significant changes to the Act’s ability to meet its purpose and 2) the Act is still a “work in progress” in that there are still many listed species for which there is no recovery plan, and even more for which there is no response or regulation
- It is reasonable to have a review of a piece of legislation at the ten year mark, but is problematic when the Act has not yet been fully implemented, and even more so when there is no indication that the review is being based on an examination of implementation experience to date and to what degree implementation to date has been successful in meeting the Act’s purpose, i.e. to protect species at risk

Area of Focus 1 - Landscape approaches

- The absence of any definition of “landscape approach” and any discussion of how this undefined approach would be applied makes it very difficult to comment on this section

- anecdotally, when asked in the January 24th “Skype meeting” the Ministry staff could not reply to a question about the definition of “landscape approach” as used in the discussion paper; this indicates that perhaps even the authors / drivers of the paper are unsure of its meaning or implications
- the section is plagued by unsupported statements which appear to be conclusive but have not been supported by any actual information about how the first ten years of the Act has been evaluated; for example, the statement that a species-specific policy approach “can limit the ability to achieve positive outcomes for species at risk” lacks any evidentiary basis, as does the contention that recovery approaches for individual species “can limit or conflict with one another”; this important review should not be based on hearsay or unsupported assumptions
- the “species specific policy approach” may create management challenges when there are multiple species that require response / protection within a given area, as the discussion paper purports; that is the contemporary reality of species at risk. However, this challenge would be reduced by having a recovery plan and response in place for all listed species – the challenge is made all the greater by having species that are at different points along the path to having regulated protections in place
- species have specific habitat needs, and those habitats must be protected as part of protecting the species; an averaging out of the those habitat needs – which is potentially the notion behind the “landscape approach” - cannot be assumed to meet those needs or expected to assist in the recovery of the species; such a strategy may hasten species along the trajectory from threatened to endangered to extirpated, which is fully in opposition to the purpose of the Endangered Species Act
- the actual state or extent of the recovery of each listed species must be the basis for assessing the effectiveness of recovery actions on a per species basis, and the effectiveness of the Act – and, more importantly, its implementation – overall; this analysis is absent from this review
- there may be potential within a given area, such as a single eco-district, to develop an integrated recovery plan for the various species at risk that have been identified as having a presence in the area; however, such an integrated recovery plan could follow only after the individual recovery plans have been developed on a species-specific basis
- the failure of the system to produce a full suite of recovery strategies / responses / regulations within the first ten years of the ESA is the barrier to being able to potentially move to area-based integrated recovery plans; without more capacity in the responsible agencies, this barrier will most probably remain in place
- the notion of area-based integrated recovery plans must be supported by science, and careful observation and evaluation of progress to date for species at risk or in recovery; while Northwatch is not dismissing the notion out of hand, it cannot be supported without any basis for that support

Area of Focus 2 – Listing Process and Protections for Species at Risk

- the notification process could be improved by improvements to COSSARO’s support, infrastructure and communication systems; for example, the COSSARO web site appears to have not been updated since prior to the Spring 2018 meeting, has no option for being added to an email or notification list (other than the option of emailing the secretariat), and the web site is static and limited; simple improvements like a) keeping the web site current, and b) providing a simple listing or notification system advising when an additional species is coming under the Committee’s consideration and c) increasing transparency around the Committee’s operations would all contribute to significant improvements in the notification process for new species being listed or considered for listing. Again, this appears to be a capacity issue.
- There has already been excessive discretion in the application and extension of exemptions / transition periods; what is required is sufficient capacity and investment to complete the process of those species already listed, and to accommodate any future listings
- Overall, the process regarding assessment and classification can be improved by increasing capacity, investing in the process, applying timelines, and providing greater transparency
- The priority elements of the listing process are a) that the process is science and evidence based and supported by subject experts, and b) that species are afforded protection at the point of being identified as candidates for listing – if the system is slow and cumbersome, it is not the species at risk that that should be sacrificed to failures within the protection system

Area of Focus 3 -- Species Recovery Policies and Habitat regulations

- This section of the discussion paper pays considerable attention to timelines, but there is no analysis of experience to date, including why timelines are not being met, or what changes in the system would be required to improve timelines; this is – again – tightly linked to already identified capacity issues
- Consideration should be given to how greater transparency might improve timelines, particularly in the case of the preparation of Government Response Statements; the lack of appropriate linkages between COSSARO and the bureaucrats charged with preparing Government Response Statements is a factor that should be investigated (for example, there are currently no government employees included in the COSSARO)
- The notion that a habitat regulation might be “not needed” is incompatible with a species having been identified as at risk; without a habitat regulation, the protection of the species and its habitat is subject to interpretation of general habitat guidelines; anecdotally, we have heard from practitioners that such subjective application of general habitat guidelines lacks certainty and predictability (two elements of the regulatory system which industries have consistently identified as being of high priority)

and results in considerable time delays for development projects; we would note that this anecdotal testimony was shared with Northwatch by consultants to the development industry

- There is no evidence-based rationale for changing the current legislated timelines

Area of Focus 4: Authorization Processes

- The section overall conveys an intent to favour economic development over species protection in most or all instances; this is problematic, and inconsistent with the purposes of the Act, the needs of species at risk, and the stated intentions of this review
- There are numerous tools already available that provide alternatives to actually delivering on protection for species at risk as required by the Act (see page 6 of the discussion paper); in the absence of any analysis of the overall effectiveness of the Act or – more specifically in the context of Area of Focus 4 – these already available alternatives, there is no cause to identify additional exemption mechanisms at this point
- Without sufficient capacity, even a changed authorization process can be expected to remain slow, cumbersome, and ineffective
- There is no evidence that a cash-in-lieu system (i.e. “paying into a conservation fund”) will be of any benefit to a species at risk or its recovery, or that it will make the approvals process more effective (or efficient); the subjective nature of this potential tool could result in greater delays and inefficiencies, as well as reducing the protection and/or recovery of species at risk
- The needs of species at risk – and of the development industry – can be more efficiently met by increasing capacity and investing in the system in order to properly support the development of recovery plans and having sufficient staff resources in place in all involved agencies
- Overall, evaluating the effectiveness of the system and its implementation requires ongoing monitoring and evaluation; this should not be a complaint-based approach, but one which is system wide and includes monitoring and evaluation of not only activities undertaken under the auspices of SAR permitting, but of the listed species and their status and (potentially) recovery

Conclusions

Throughout the many discussions about the Endangered Species Act which we engaged in with our counterparts in environmental non-governmental and community organizations, the academic and scientific community, municipalities, developers and members of the public during this review period, three key messages emerged, clearly and consistently. They were:

- The Act is sound, and does not require amendments at this time
- Implementation has been slow and weak and must be improved in order to meet the purposes of the Act and to protect species at risk and their habitat
- The greatest contributor to poor implementation has been a lack of capacity; this has particularly been the case in the Ministry of Natural Resources, and includes insufficient support of the COSSARA; transitioning the Act from the Ministry of Natural Resources and Forests to the Ministry of Environment, Conservation and Parks is going to require a substantial investment if the implementation of the Act is not to be further eroded

In closing, we would recommend that now having had the opportunity to received initial feedback on the Endangered Species Act and its first ten years, the Ministry should now commence a detailed and science-based evaluation of the effectiveness of the ESA over the last ten years, particularly in terms of the protection and recovery of species at risk and their habitat.

As a second phase in this review, the findings of that detailed evaluation should be made public, and consultation undertaken to rank options for strengthening the Act and the protections it provides to species at risk and their habitat. This second phase of consultation should be led by COSSARA, and provided with sufficient resources.

Thank you for your consideration. We look forward to engaging in second-phase discussions of the Endangered Species Act as an extension of this Ten Year Review.

Sincerely,

A handwritten signature in purple ink, appearing to read 'B. Lloyd', is written over a faint circular stamp.

Brennain Lloyd
Northwatch Project Coordinator