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*Effectiveness and Modernization of Ontario's Endangered Species Act: Comments from Dillon Consulting Limited*

Dear Public Input Coordinator,

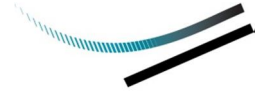
Dillon Consulting Limited (Dillon) welcomes the opportunity to provide comment on the province's *Endangered Species Act (ESA)*; specifically observations that we feel have the potential to assist the Ontario government with improving the effectiveness of the *ESA* and modernizing the program.

Dillon, founded in 1946 in London, Ontario, is a proudly Canadian, employee-owned professional firm with over 800 staff specializing in planning, engineering, environmental science and management, with seven offices in Ontario. As part of our project work, Dillon has advised clients on navigating the *ESA*, including but not limited to, undertaking pre-assessments, site evaluations (e.g. species specific surveys), the submission of Information Gathering Forms (IGF), Avoidance Alternatives Forms (AAF) and C-Permit Application Forms (C-PAF) in support of 17(2)c Overall Benefit Permit (Permit) acquisitions. Dillon is also experienced in the registration of projects in accordance with *Ontario Regulation 242/08*.

The following is our input for consideration organized by the four areas of focus identified as part of the 10 Year Review of the *ESA* Discussion Paper (Discussion Paper).

#### Area of Focus 1 – Landscape Approaches

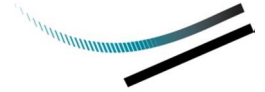
- While we support the idea of a landscape approach to protection and recovery of Species at Risk (SAR), the Discussion Paper provides no detail on how a landscape approach may be implemented.
  - The current approach is individually driven, focused on impacts related to a project development footprint and does not capture the benefits of multiple stakeholders working together to coordinate recovery efforts. It would be beneficial for the landscape approach to coordinate protection and recovery efforts where it matters most.



- Identification of appropriate overall benefit locations through a landscape approach would be beneficial. Concentration of efforts through multiple overall benefit permits in a specific area identified as key for the species recovery and protection can build meaningful change in a way that cannot be done on an individual basis as it is now. For example, if there are known areas where populations of SAR exist but habitat is lacking (or fragmented or of poor quality), providing an "overall benefit" in this area may result in a more substantial benefit to the species or habitat.
- Species that would not necessarily benefit from a landscape level approach would be those that could be registered through the Notice of Activity process (such as Barn Swallow (*Hirundo rustica*), Butternut (*Juglans cinerea*) etc.).
- We caution that the use of a landscape approach to expand the application for assessing possible indirect impacts of a potential development is generically broad and may create additional inefficiencies.

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

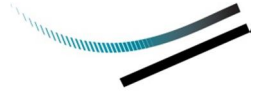
- Consistency between habitat protection being applied as part of the process and the limiting factors identified for the species classification as a SAR requires additional reflection in the permitting process. The habitat protection a species receives when they are newly listed does not always reflect why the species has been listed. For example, several bats are currently listed on the SAR in Ontario (SARO) list. The reason these bats are at risk is due to white nose syndrome which is spread in hibernacula. However, as these bats have general habitat protection, their roosting habitat is also protected. This has resulted in costly studies to determine if bats are feeding and roosting in particular woodlands of interest to assist the Ministry of Natural Resources and Forestry (MNRF) in determining the necessary approach. If it is determined by the MNRF that a permit is required for the removal of roosting habitat, currently, only re-forestation is acceptable to achieve overall benefit. However, roosting habitat is not a limiting factor to the species in the province, and the removal of roosting habitat is not what is causing bats to be considered at risk. Therefore, meaningful protection and recovery of the species is not being accomplished through the current process (i.e. protection and recovery of the non-limiting roost habitat). A similar case could be made for Barn Swallow and Bank Swallow (*Riparia riparia*) nests.
- When species are listed by COSSARO the process must be refined to improve both Ministry and stakeholder preparedness for listing. It is noted that both the province and various industries have been challenged when new species are



- listed for protection without direction being provided as to how to limit/avoid impacts to species and habitat, with the goal of not contravening the ESA, and, when contravening the ESA is unavoidable, how to achieve the authorization/permitting requirements of the Act (i.e. how is the habitat defined, what is required to achieve overall benefit).
- Newly listed SAR in Ontario are required to be incorporated into final approvals of projects that have been often progressing for years. This is a significant risk for companies and can lead to lengthy delays, additional costs, and general uncertainty around securing approvals. It would be useful to have a mechanism for projects to avoid having to consider newly listed species for a specified period of time, where the project has achieved certain approval milestones. Alternatively, it would be useful to have a clear evaluation schedule for certain species being considered by the Committee on the Status of Species at Risk in Ontario (COSSARO) so that possible species that may be of concern as the project progresses through approvals can be pro-actively incorporated, should this be desired. Transition provisions, such as those provided in Ontario Regulation 242/08 in 2013 for species who, after five years of being listed, automatically received general habitat protection after not previously having it, was a useful tool for businesses to allow projects to proceed while still meeting the intent of the *ESA*.

#### Area of Focus 3 – Species Recovery Policies and Habitat Regulations

- Without changes to the existing authorization tools, extending timelines related to completion of a Government Response Statement (GRS) has the potential to directly impact projects. Proponents rely on the clarity provided in a GRS to understand where to focus efforts related to mitigation and compensation/overall benefit. In the absence of a GRS, the amount of consultation required by proponents along with interested stakeholders can be extensive, increasing project costs and schedules. We agree it is important to create meaningful documentation related to SAR in Ontario, but this should not be done at the expense of those looking to invest in Ontario. A suggestion would be for COSSARO to incorporate degree of difficulty related to recovery of a species in setting the timeline for listing of a species and its habitat. Timelines for a GRS could then be set at the time of listing, rather than according to a set timeline as currently outlined in the *ESA*.
- Habitat regulations should distinguish between what is considered habitat versus what part of that habitat is a limiting factor and requires protection and recovery to improve the species potential survival long-term. In many cases, overall habitat requirements for the species, and that which is limiting the species, will be similar if not the same. However for bats, the two are quite different (e.g. hibernacula where white nose syndrome is spread versus roosting

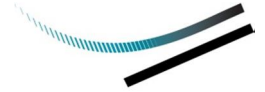


habitat which is common and not a limiting factor). For bats, it would be appropriate to target habitat protection and recovery strategies to areas that are more directly applicable to white-nose syndrome (hibernacula) and not implicate roosting sites where those sites are not of special quality or continue to be assessed as non-limiting in the surrounding landscape.

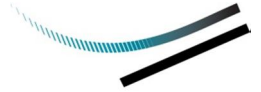
- Payment in lieu, conservation funds, or other similar alternatives are successful tools that are used by other agencies (Conservation Authorities, municipalities, etc.) for offsetting measures where habitat is removed or disturbance to natural heritage features has occurred. A similar approach should be considered for use in certain situations as part of the *ESA*. Two examples for review are the Lake Simcoe Region Conservation Authority's (LSRCA) Ecological Offsetting Plan and Toronto Region Conservation Authority's (TRCA) Compensation Protocol for Loss of Ecosystem Service. The LSRCA and TRCA guidelines are easy to follow and administer, are effective and reduce time and effort to achieve the desired successful outcome.

#### Area of Focus 4 – Authorization Process

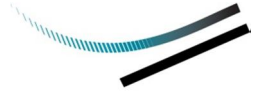
- Processes and decisions must be more consistent, not only Ministry District by Ministry District, but within Ministry Districts. Consistency is required for the following: survey protocols, habitat that is being protected (particularly key for species with general habitat protection), circumstances under which a project can proceed under a Letter of Advice versus a permit and overall benefit required for a species.
- Greater focus and oversight of achieving minimum service benchmarks are required. Review timelines need to be shortened. It would be beneficial if each step requiring Ministry review had a required review timeline associated with it. As a real example, an IGF was submitted in June 2018 for a project that required the removal of a few scattered trees (it was determined in the IGF that the scattered trees provided marginal habitat for SAR bats). Vegetation clearing was anticipated to occur in the winter of 2018/2019. As of February 2019, the IGF has still not been reviewed, and as a result, the tree removal was rescheduled until winter 2019/2020. When asked why this has not been reviewed yet, the Ministry District replied that they are unhappy that Infrastructure Ontario has allowed the project to be built in this spot. Coordination between different groups related to permits, especially between ministries, is important to facilitate project timelines.
- A tool which promotes greater accountability and an opportunity for a formal appeal to occur when there is substantive professional disagreement between a proponent and Ministry staff (e.g. delineation of habitat, need for a permit, requirements to achieve overall benefit, etc.) should be considered.



- Conservation banking is a concept where companies, or a consortium of companies, can proactively implement measures to protect and recover a target SAR in a manner consistent with regulatory requirements and which will be accepted as fulfilment of future permit requirements. This could be particularly useful for land development companies, utilities or other linear infrastructure that have large landholdings who can reasonably predict the possible impact to a particular SAR as part of typical construction and/or operation requirements, and therefore wish to take proactive steps to achieve foreseeable protective and recovery efforts in advance of impacting the species and acquisition of potential permits. Conservation banking/agreements could assist with possibly reducing review timelines and uncertainty with permitting for certain industries. For example, there are developers in the province who own land that cannot be developed due to the presence of natural features. Companies could proactively, using a set of pre-determined measures, implement a variety of positive actions well in advance of known developments that are likely to require a permit or registration. This could reduce much of the individual project negotiation of permit details.
- Prior to December 2018, Ministry Districts could be consulted to obtain relevant, site-specific information regarding SAR occurrence data. In December 2018, the MNRF released the Natural Heritage Information Request Guide and suspended the practice of Ministry District offices from providing site-specific information regarding SAR occurrence data. It is recommended that either the Natural Heritage Information Centre database available online be accurate and up to date with respect to all relevant SAR occurrences in the province up to a specified timeframe (e.g. last 6 months) or Ministry District offices continue to provide site-specific lists of SAR, if requested.
- It is recommended that if SAR by municipality data is intended to be used going forward in lieu of Ministry staff providing site-specific information regarding SAR occurrence data, it be updated to align with current knowledge regarding species distributions and regulated habitat descriptions. For example, the municipalities in the Greater Toronto Area (GTA) all have occurrences for Redside Dace (*Clinostomus elongatus*); however, Redside Dace only occurs in a handful of known watercourses. There are also several municipal lists that include SAR such as Rusty-patched Bumble Bee (*Bombus affinis*). Again, this species is known only to occur in and near Pinery Provincial Park. The SAR by municipality data also contains some very old data (e.g. 50+ years), which is not typically relevant.
- Greater consistency is required across the province with respect to the application of the ESA and its regulations. There is currently too much differentiation between Ministry Districts and Ministry staff for a specific SAR.



- Having worked with the rules in Section 23 of Ontario Regulation 242/08 since they were implemented in 2013, we can state this process has provided some certainty with respect to timelines and requirements; however, improvements are required. Dillon would like to suggest a risk-based approach to defining/categorizing activities and the corresponding requirements, rather than sub-sections in a regulation outlining specific rules in regulation for species or activities. The risk-based approach could follow a similar approach to class environmental assessments where there is a standardized process for classes or groups of activities. This would be beneficial for projects that are routinely carried out and have predictable environmental effects that can be readily managed, such as routine operations and maintenance activities and standard construction practices.
- As outlined in the MNRF Class Environmental Assessment for Resource Stewardship and Facility Development Projects (MNRF 2002), not all projects require the same level of review. To accommodate the diverse range of projects, it has long been recognized by many federal and provincial ministries as necessary to provide several levels of planning and decision making. We suggest that projects/activities can be better categorized to expedite planning and provide increased certainty with respect to requirements and schedule as we continue to invest in building Ontario. Categories can be identified using pre-determined criteria, as currently done for many EAs, including as described in MNRF's Class EA document to determine potential for impact.
- An example from the current regulation is related to the installation of pipelines using trenchless techniques. Operating in the GTA, streams where there are records of Redside Dace within the past 20 years are viewed as habitat, regardless if the species is still currently occupying it. As per Section 23.4 of Ontario Regulation 242/08, the construction, maintenance, repair, modification, expansion, removal or replacement of a pipeline can be registered by providing the Minister a Notice of Activity form. Despite being required to be at least 2 m below the bed of a watercourse and bore pits for directional drilling to be located outside the floodplain, the activity requires the creation of a mitigation plan as well as daily monitoring of the activity site during construction. Annual monitoring of the activity site for a period of five years after construction is also required. Further, benefit to the species must be provided (similar to overall benefit as per Section 17.2.c. of the *ESA*). Trenchless techniques such as directional drilling have long been viewed as a routine construction practice with well-known and documented best practices including mitigation measures. The recognized risk of a frac-out can be appropriately planned for and mitigated, in many cases, without incident. This activity should be viewed as low risk, and in the absence of a frac-out, the activity is of low impact. As such, it should be subject to the same requirements as activities undertaken for non-imminent



threats to health and safety (i.e., Section 23.18 of Ontario Regulation 242/08), which includes the requirement to have an appropriate mitigation plan (i.e., a contingency plan for frac-outs), but does not require long term monitoring or a commitment to provide overall benefit unless a frac-out occurs.

We appreciate the opportunity to provide comment on the provinces *Endangered Species Act* and trust that they will be used to assist with the intended purpose, which is, improve protections for SAR, consider modern and innovative approaches to achieve positive outcomes for SAR, as well as to look for ways to streamline approvals and provide clarity to support economic development.

Yours sincerely,

DILLON CONSULTING LIMITED