

To:	Warden Hicks and Members of Grey County Council
Committee Date:	May 9, 2019
Subject / Report No:	Review of Proposed Endangered Species Act Changes / Addendum to PDR-CW-14-19
Title:	Grey County Comments on Endangered Species Act
Prepared by:	Grey County Staff
Reviewed by:	Randy Scherzer
Lower Tier(s) Affected:	All Municipalities within Grey County
Status:	Recommendation adopted by the Committee of the Whole as presented as per Resolution <i>CW107-19</i> ; Endorsed by County Council as per Resolution <i>CC41-19</i> .

Recommendation

1. That Addendum to Report PDR-CW-14-19 regarding an overview of the ‘*10th Year Review of Ontario’s Endangered Species Act: Proposed Changes*’ be received, and
2. That Addendum to Report PDR-CW-14-19 be forwarded onto the Province of Ontario as the County of Grey’s comments on the proposed legislation review posted on the Environmental Registry through posting # 013-5033, and
3. That the Report be shared with member municipalities and conservation authorities having jurisdiction within Grey County; and
4. That staff be authorized to proceed prior to County Council approval as per Section 25.6 (b) of Procedural By-law 5003-18.

Executive Summary

The Province recently released their ‘*10th Year Review of Ontario’s Endangered Species Act: Proposed Changes*’ and they are seeking comments by May 18, 2019. The proposed changes are in response to the Province’s discussion paper from earlier this year on updates to the *Endangered Species Act*. County comments were submitted on the original discussion paper, and further comments on the changes are proposed through this report. Grey County has an interest in this review as it impacts first and foremost the protection of the County’s natural environment, but also impacts future development approvals within the County, and the County’s ability to build and maintain public infrastructure and facilities. County staff are

supportive of some of the proposed amendments but have some concerns with other planned changes.

Background and Discussion

On February 28th, 2019 the County Committee of the Whole supported staff report PDR-CW-14-19, with respect to the Province's '10th Year Review of Ontario's Endangered Species Act: Discussion Paper' (hereafter referred to as the discussion paper). This staff report was later forwarded onto the Province as the County's comments on the discussion paper. A copy of the County staff report can be found in the attachments section of this report. A copy of this discussion paper can be found at [this link](#), and the proposed Environmental Registry posting, with a concise summary of the proposal can be found [here](#).

Following up on this discussion paper, and the feedback received, the Province has now released their '10th Year Review of Ontario's Endangered Species Act: Proposed Changes'. A copy of the propose changes can be found at [this link](#). The Province released these proposed changes on April 18th and is seeking comments by May 18th, 2019. Based on the short timeframe for submitting comments, and the deadline for having this report completed, staff have not been able to consult member municipal staff, or conservation authority staff within Grey County. Staff are recommending that this report be shared with municipalities and conservation authorities for their review.

The proposed changes fall within the following five categories:

1. *"Assessing species at risk and listing them on the Species at Risk in Ontario List,*
2. *Defining and implementing species and habitat protections,*
3. *Developing species at risk recovery policies,*
4. *Issuing Endangered Species Act permits and agreements, and developing regulatory exemptions, and*
5. *Enforcing the Endangered Species Act"*

What follows are some thoughts on the Ministry of the Environment, Conservation and Parks' (MECP) five proposed changes.

Assessing Species at Risk and Listing them on the Species at Risk in Ontario List

Currently species are classified by the Committee on the Status of Species at Risk in Ontario (COSSARO) as threatened, endangered, special concern, extinct, or extirpated. Once classified, such species are required to be added to the Species at Risk in Ontario (SARO) List, which is done by regulation. Currently, when COSSARO submits a species report to the Minister, the species must be added to the SARO List three months from the time a report is submitted. Once a species is added to the SARO list, the *Endangered Species Act* (ESA) immediately protects the species and its habitat. If passed, the ESA proposed changes would implement the following:

- A. *"Provide the public earlier notice of COSSARO's species' assessment and classification results by making its report available to the public no later than three months after it is received by the Minister. Also, extend the time from when a COSSARO report is*

received by the Minister to when listing is to occur from three to twelve months (i.e. when a species must be added to the SARO List).

- B. Provide that the twelve-month period for amending the SARO List will apply to any COSSARO report received in 2019, to address the possibility of such a report being received before the changes, if passed, come into effect.*
- C. Improve certainty of the timing of species list changes by requiring COSSARO to submit an annual report to the Minister between January 1 and January 31 of each year.*
- D. Allow the Minister to require COSSARO to reconsider the classification of a species where the Minister forms the opinion based on scientific information that the classification may no longer be appropriate. For species that are not yet on the list or are listed as special concern, the proposed changes provide that the species would not be added to the SARO List or listed to a more endangered status during COSSARO's re-assessment.*
- E. Require COSSARO to consider a species' condition around its broader biologically relevant geographic area, inside and outside Ontario, before classifying a species as endangered or threatened. If the overall condition of risk to the species in the broader biologically relevant geographic area is lower, COSSARO would be required to adjust the species' classification to reflect its overall condition.*
- F. Broaden COSSARO member qualifications to include members who have relevant expertise in ecology, wildlife management, as well as those with community knowledge.”*

Staff Response

County staff see some merit in giving additional notice of when a species is added to the SARO list. The addition of a species to the SARO list, or the reclassification of a species can have impacts on development or infrastructure projects across the County. In some cases, it may be appropriate that this delay could have the effect of allowing projects already underway to proceed, without needing costly delays to reconsider or study a newly added or upgraded species. This additional notice period may also allow time for further consultation with municipalities, conservation authorities, and other stakeholders to determine the status of these species in local jurisdictions, which could be beneficial.

That said, the delay in adding a species could also have an unintended consequence of giving people notice that a species is to become listed, and therefore people may choose to remove the species from their properties. For example, if a landowner had been given a 'heads up' that Butternut trees were becoming endangered within the next 9 – 12 months, they may choose to 'preemptively' cut down the Butternuts on their property to avoid future restrictions.

With respect to item (c), staff have no concern in principle, but wonder if an exemption clause could be added to be used for more immediate circumstances. This exemption may also need to apply to the timeframes in item (a), where an emergency situation could be demonstrated.

Staff have concerns with the proposed changes under items (d) and (e). Currently COSSARO functions as an independent committee who make decisions based on science. If the Minister can 'veto' these science-based decisions, the SARO list could become more politically motivated and not necessarily based on the best science. There is also a concern that a species can be referred back to COSSARO only to reduce its protections, not to increase its protections. Furthermore, if a species is 'left off the list' based on its condition outside of Ontario, the Province could be viewed as relying on others to protect species that Ontario is not otherwise

willing to protect. Ontario would be doing so at its peril, as there is no guarantee that such species are being protected elsewhere. Climate change also needs to be considered here, noting that species habitat locations are changing to correspond with changing trends in weather and climate (i.e. some species ranges are shifting in response to climate change). These comments are caveated with the fact that protection of a species in Ontario should generally be restricted to species that are native to Ontario.

On item (f), staff see some merit in broadening the COSSARO qualifications to include local or indigenous expertise, provided the Committee is still firmly weighted in science, and does not simply become politically motivated.

Defining and Implementing Species and Habitat Protections

As noted above, under the current process, once a species is added to the SARO list the protections apply immediately to the species and its habitat. This habitat is first protected in a general sense, before a more specific regulation can be developed and approved by the Lieutenant Governor in Council (LGIC) to replace the general protection. If passed, the ESA proposed changes would implement the following:

- A. *“De-couple the listing process from automatic protections and provide greater Minister’s discretion on protections, while keeping the assessment as a science-based process at arm’s length. While the role of classifying species would remain with COSSARO and listing of classified species would continue to be required, the proposed changes would provide the Minister with authority to temporarily suspend species and habitat protections for up to three years for some newly-listed species when the following specified criteria are met:*
 - i. *applying the prohibitions to the species would likely have significant social or economic implications for all or parts of Ontario so additional time is required to determine the best approach to protect the species and its habitat;*
 - ii. *the temporary suspension will not jeopardize the survival of the species in Ontario; and*
 - iii. *one of the following further criteria is met:*
 1. *the species has a broad distribution in the wild in Ontario;*
 2. *habitat availability is not a limiting factor for the species;*
 3. *additional time is needed to address the primary threats to the species, or co-operation with other jurisdictions is necessary to reduce the primary threats to the species,*
 4. *other criteria that may be specified by regulation.*
- B. *Enable scoping of species protections, where appropriate, via new Minister’s regulations. This proposed new authority would enable species protections to apply to specific geographies or in specific circumstances (e.g., to species that are not affected by disease).*
- C. *Remove the mandatory legislative requirement and timeline to develop a habitat regulation proposal for each newly-listed threatened or endangered species and retain the option to develop a habitat regulation when needed.*
- D. *Enable the Minister, rather than LGIC, to make species-specific habitat regulations.”*

Staff Response

In principle staff are not against the idea of de-coupling the listing from the automatic protection.

However, staff believe that this de-coupling time-period (i.e. the time after a species has been listed and before it has been protected) could be used to develop specific habitat regulations. Staff would question whether 3 years is too long to 'suspend protections', and whether a shorter timeframe could be utilized here. Under the current process, there are times when a species gets added, and therefore the species and general habitat are protected. However, without having much information on the species or their specific habitat it can be difficult to know exactly what to protect, versus what may not have an impact. In this regard staff would prefer to see habitat regulations developed early on, versus being delayed indefinitely as could be the case in item (c).

This de-coupling time-period could also be used to develop public education, and/or consult with specific sectors that may impact the species or be impacted by the species being listed. For example, if a new grassland bird were to be added which could impact pasture or alfalfa lands, then direct consultation with farmers and farm organizations would be beneficial.

With respect to item (b) above, staff see some merit in this approach, provided it is used cautiously, and does not result in healthy species being removed, which are otherwise still endangered.

As per above in section 1, staff believe that the intent of using the best science available should be retained to the extent feasible, rather than granting too much exemptive powers to the Minister.

Developing Species at Risk Recovery Policies

Currently, once a species is listed as either endangered or threatened, the government is responsible for developing a recovery strategy for that species. Within 9 months of the recovery strategy being published, the government also needs to prepare a response statement. Following the completion of that response statement, the government then needs to publish a progress report within 5 years. If passed, the ESA proposed changes would implement the following:

- A. *"Give the Minister discretion to extend the nine-month Government Response Statement development timeline, for some species.*
- B. *Clarify that recovery strategies are advice to government, and that Government Response Statements are the government's policy direction for species at risk.*
- C. *Allow the Minister to extend timelines for conducting the review of progress towards protection and recovery based on individual species' needs.*
- D. *Remove duplicative requirements by removing specific reference to posting under the Environmental Bill of Rights, 1993 and instead requiring that certain products under the Act be made available publicly on a government website."*

Staff Response

Staff generally have no issue with the above changes provided there are some mandatory maximum timeframes (i.e. such statements or progress reports need to be completed by 'x' date), and that the public distribution of information under item (d) is clear, easily accessible, and still available for public comment.

Issuing ESA Permits and Agreement and Developing Regulatory Exemptions

The ESA currently contains some exemptions or permits that can be issued provided certain criteria can be met. For example, a Butternut tree cannot be removed, unless it is assessed by a Butternut health assessor, and they determine that the tree is severely impacted by the Butternut canker, to the point where it cannot be saved. In some instances, there can also be permits granted to remove a healthy Butternut, where certain criteria can be met, in exchange for planting new Butternut trees elsewhere.

If passed, these ESA proposed changes would; ‘create a new independent Crown agency, known as the Species at Risk Conservation Trust (SARCT). This agency would allow municipalities and other infrastructure developers the option to pay a fee, in lieu of completing some activities required by the ESA. The option to ‘pay-in-lieu’ would only be available on certain species, as prescribed by regulation. The funds collected by SARCT would then be used to assist in the recovery and protection of species at risk.’ SARCT would;

“receive the funds and ensure informed, unbiased and expert decisions are made to disburse the funds to third parties that will undertake the activities in accordance with the purposes proposed to be set out in the statute. The proposed amendment would restrict the funds to fund only those activities that are reasonably likely to support the protection and recovery of prescribed species. The Minister would have the ability to establish guidelines (e.g. objectives and priorities) for funding and set standards for activities that receive funding.”

Other changes proposed through this section provide more flexibility in the permitting process, remove the requirement for the Minister to consult with experts in some scenarios, and provide for transition provisions for existing ESA permit holders following a new species listing or habitat regulation.

Staff Response

Staff have several concerns with the changes being proposed through this section of the ESA review. First, elements of the proposed ‘pay-in-lieu’ system, and the establishment of the SARCT are currently unclear. The current proposed wording speaks to allowing “municipalities or other infrastructure developers” the ability to pay-in-lieu, where a species has been prescribed by regulation. While the term ‘municipalities’ is clear, the term ‘other infrastructure developers’ is not. Presumably this might be extended to include private utility companies such as gas, electricity, or telecommunications companies. However, could the term also be extended to include private developments such as subdivisions, where new roads are being built? Later in the posting it also notes;

“This new approach will give greater certainty to business and better enable positive outcomes for species at risk compared to the current piece-meal industry-led approach.”

The above sentence suggests that the pay-in-lieu system would extend to beyond just municipalities and could include private business.

While, there could certainly be some direct benefit to municipalities, which may result in timelier infrastructure improvements, it is not yet known what the costs will be, or what species will be prescribed. Furthermore, the proposed changes only exempt some requirements, while others may still be required, as per below:

“The charge would be paid in lieu of fulfilling certain potential conditions that could otherwise have been imposed under the permit, agreement, or regulation.... Clients would still need to fulfill some on-the-ground requirements, including considering reasonable alternatives for their activity and taking steps to minimize the adverse effects of the activity on the species at risk.”

Based on the unknown costs, and requirements it is difficult to speculate what the actual benefit to municipalities would be.

Staff also have concerns that the pay-in-lieu and SARCT system could result in unfair application of the ESA exemptions. If municipalities and larger developers are able to ‘buy their way out of’ meeting requirements, it could penalize smaller developers who may not have that same ability, either legally or financially.

From a ‘fairness’ perspective, it would be unfair to hold the private sector to a higher standard than the public sector (i.e. if the public sector gets to pay-in-lieu, but the private sector does not). The public sector should be leading by example in this regard, if we then expect the private sector to show due environmental stewardship.

The source of funding to establish and run the SARCT has not yet been outlined by the Province. If monies paid in lieu will be used to establish and run this trust, then it could mean less funds going back into the actual species protection.

Staff are also unclear how the SARCT would distribute these funds, and whether actual improvements are made locally to species recovery. For example, if the County were to pay money to ‘by-pass’ certain environmental requirements for a fish species, when undertaking a bridge replacement, would that recovery money then get spent locally on that species? Would there also be performance measures tied to the allocation of these funds?

It also not clearly defined what ‘third party’ groups would be getting these funds. Would such groups include conservation authorities, field naturalists, or hunting and fishing groups? In many cases there would be benefits to having such ‘on-the-ground’ local organizations have additional funding for such projects, provided they could be coordinated appropriately.

If not done properly the new system could have the impact of paying to remove species or habitat, with no actual improvement to the species recovery.

Staff would note that the pay-in-lieu and the SARCT is a form of ecological offsetting, which staff have been investigating for potential use within the County. Based on recent case studies presented by a neighbouring conservation authority, staff see some merit in ecological offsetting approaches. In some cases, it may be an excellent method by which to ensure that the conservation outcomes result in no net loss of a feature and preferably a net gain of biodiversity. For example, in instances where someone is proposing to remove a recently planted pine plantation, it may be easy to replicate that feature on another site by replanting said pine trees. However, in cases where the removal of endangered species or their habitat is ‘at stake’, then removing that species or replicating their habitat on another site may not be so easy. From

staff's limited research to date, ecological offsetting may be an appropriate tool to use in some instances but will not work as a 'one-size-fits-all' approach. If the Province is considering this approach, both the science and the species/habitat specific circumstances will need to be considered.

Beyond the pay-in-lieu and the SARCT, staff are also concerned with some of the changes to the permitting / agreements process, and the extended powers of the Minister to avoid expert consultation. Staff would once again reiterate the need for science to be 'front and centre' in this process, and not be bypassed by the government of the day. While some flexibility is appreciated in the permitting process, it has to be measured against the impact it may cause to species or habitat.

Staff are generally supportive of the transition provisions proposed for existing permit and agreement holders. However, there may be species-specific circumstances where based on the advice of COSSARO, an automatic 12-month transition permit may not be feasible, while also ensuring the long-term protection of the species. This new transition provision may want to consider some 'exceptions' to the transition, where more immediate action needs to be taken.

Regardless of the degree of flexibility proposed, staff support a permitting process which is supported by knowledgeable Ministry staff who can offer support to applicants, who may be considering applying for a permit or agreement. Having staff guidance at the front-end of this process is crucial to help people understand where a permit may or may not be appropriate. Staff would encourage the Province to consider ensuring that these new permitting procedures can be supported by adequate staff resources.

Enforcing the ESA

This section would allow for modern enforcement, as well as reflect the transition of this portfolio from the Ministry of Natural Resources and Forestry (MNRF) to the Ministry of the Environment Conservation and Parks. If passed, the ESA proposed changes would implement the following:

A. *“Enhance and streamline enforcement powers by:*

- *Applying inspection powers and offence provisions that already exist in the ESA to also include activities conducted under the regulations.*
- *Extending current protection order powers that can be used with the Minister's discretion to protect habitat during the intervening period before a species is listed, or where a regulation has been made so that the prohibition is not applicable, to also include the discretion to similarly protect species.*

B. *Update provisions related to enforcement officers by removing identification of specific classes of persons (e.g. conservation officers) as enforcement officers and retain the Minister's authority to designate officers.*

If the proposal for the change to allow the Minister to order by regulation a pause of the protections for listed species passes: we are also proposing a change to the EBR General Regulation (Ontario Regulation 73/94) to exempt the regulations containing Minister's orders made for the purpose of pausing protections from EBR posting and consultation requirements. This is being proposed in to preserve the ability of the Minister to act swiftly and minimize associated social or economic impacts.”

Staff Response

Staff generally have no issue with points (A) and (B) above. However, staff are unaware of the impact of removing identification of specific classes of persons (such as conservation officers) and would seek to chat with ministry or conservation authority staff to better understand these provisions.

However, the last paragraph quoted above means that if a regulation is passed to allow for the Minister to pause protections on a listed species, the government will also pass a change to the EBR general regulation that provides for by-passing a public commenting period. Once again, staff would recommend that these 'by-pass' provisions be used only very sparingly.

General Comments

Based on the nature of the changes being proposed, and the potential for both positive and negative impacts, the Province should consider a more robust consultation on these proposed changes. The current Environmental Registry posting was posted on April 18th and comments are due by May 18th. This short timeframe does not give municipalities and other stakeholders much time to (a) respond, (b) ask questions, or (c) consult. Staff would recommend that the consultation period be extended to at least 90 days, to allow for a more robust consultation on this topic.

Legal and Legislated Requirements

The effect of new legislative changes can sometimes be tough to predict at this early stage, as some of the future changes will be implemented through Regulation. Some of the changes are welcomed by the County, provided the legislated changes still provide an appropriate level of protection to species and habitats. However, there are changes that cause concern, and could impact species health.

Financial and Resource Implications

At this stage there are no immediate financial or resource implications to this discussion paper, as the full details of its implementation are not known.

Staff will continue to monitor the review of the *Endangered Species Act* and keep County Council aware of any major changes, or regulatory changes.

Relevant Consultation

- Internal: Planning and Transportation Services.
- External: Member Municipalities and Conservation Authorities within Grey (to be circulated following Committee of the Whole)

Appendices and Attachments

[Staff Report PDR-CW-14-18](#)