

William A. Allen  
9 First Ave., Box 85,  
Burk's Falls, Ontario  
P0A 1C0  
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Andrew Jobes  
Permits and Agreements Specialist (acting)  
Ministry of Natural Resources  
Policy Division  
Species at Risk Branch  
300 Water Street  
Floor 2  
Robinson Place South Tower  
Peterborough Ontario  
K9J 8M5

Subject: EBR Registry Number: 011-3334: Agreements for existing hydro-electric generating stations, under Section 11 of Ontario Regulation 242/08 under the Endangered Species Act, 2007, in Ontario, and related attachments.

Dear Mr. Jobes:

I commend MNR for efforts to establish a framework to be used as the basis for development of agreements under O. Reg. 242/08, Section 11 (hereafter referred to as S.11) which sets out the requirements for such agreements. I recognize the awkwardness experienced by MNR and the persons operating hydro-electric generating stations in coming to agreements prior to the government response to the Recovery Strategy for American Eel, a response which the Minister has not been able to make because of the timelines for the development of the strategy. Under S.11 (3iii) the Minister must be of the opinion that the agreement does not conflict with the obligation of the Minister to ensure the implementation of any action under subsection 11 (9) of the Act. That, in turn, includes the Minister's obligation under subsection 11(8) of the Act, to ensure that the agreement does not conflict with the Minister's published statement that summarizes the actions that the Government of Ontario intends to take in response to the recovery strategy and the Government's priorities with respect to taking those actions (2007, c. 6, s. 11 (8)). As a member of the American Eel Recovery Strategy Team and one of the six co-authors of the American Eel Recovery Strategy, I can assure you that my co-authors and I have

paid assiduous attention to establishing a recovery strategy for American Eel which has feasible mitigation strategies that are within the responsibilities of the Minister and treat the required adaptive management process with respect. Under the circumstances I recommend that the deadline for completion of agreements under S.11 be extended to a date 12 months after the public release of Ontario Government policy outlining the long term recovery strategy for American Eel. It is that government response to the advice provided by the American Eel Recovery Strategy Team which has a basis in law and should set the standards for S.11 agreements, not the questionable process and details outlined in 011-3334.

As the contents of EBR Posting 011-3334 stand, some but not all of the criteria of S.11 are fulfilled. Since S.11 requires all of the criteria to be fulfilled, MNR should not enter any further S.11 agreements with any persons operating hydro-electric facilities.

I further commend MNR for its plan voluntarily to post all proposed agreements on the Environmental Registry as announced in your May 20, 2011 communication to me and copied to Gord Miller, Rob MacGregor, Ken Durst, Rick Watchorn and Chloe Stewart (Jobes to Allen. 2011 05 20, 4:33 PM.). Those future EBR postings will help to clarify:

1. Confusion over the process used by MNR in its recent series of public notices about specific S.11 agreements.
2. Confusion that exists since prior to the 011-3334 deadline no known public notices for proposed agreements have been published for some Hydro-electric Generating Stations, listed in the sixth 011-3334 link as "Proposed Hydro-electric Generating Station Agreements under Ontario Regulation 242/08 of the Endangered Species Act" eg. Renfrew 1 & 2, St. Catharines Hydro Inc. etc. This problem is exacerbated by the fact that some areas of Ontario such as the Trent Watershed are assumed by the authors of 011-3334 to have no eels and have come to that conclusion without scientific study that warrants exclusion of the hydro-electric facilities from "Proposed Hydro-electric Generating Station Agreements under Ontario Regulation 242/08 of the Endangered Species Act"
3. Confusion over lack of consistency by MNR in its decisions to post voluntarily. For instance, Renfrew Power Generation Inc. is a party under Section 9(1) a of the ESA for more than one endangered species. EBR Posting 011-0316 addresses Butternut trees (*Juglans cinerea*) but the public has seen no notice, let alone an Environmental Registry posting, for American Eel for the same Renfrew Power Generation Inc.

4. Confusion about the significance and use of “Proposed Mitigations for Waterpower Agreements (PMWA)”, a document created by unidentified individuals using an unidentified process but provided as part of the EBR 011-3334 posting to the public as a link to enhance public consultation. I am deeply concerned that PMWA interferes with the mitigation strategies recommended by the provincial American Eel Recovery Team which, in good faith, has followed its legal mandate, standard Ontario Government procedures and exemplary consultations over the last 30 months and was never told that its work would be usurped by an alternate hidden MNR process for developing proposed mitigation strategies for American Eel. This fact alone puts the Minister in a highly untenable position as she needs to express opinions about the reasonableness of mitigation strategies under S.11 Subsection 3i, 3ii and 3iii and needs to endorse the monitoring standards in various S.11 agreements as set out in S.11 Subsection 4. All proposed S.11 agreements available to the public to date show absolute scorn for proper scientific approaches to monitoring and, through their juvenile and ill-conceived wording, fall far short of MNR’s own commitments through its Statement of Environmental Values (SEV). By posting O11-3334 in its current form MNR had created a monster that will not easily be rectified except by starting over.
5. Confusion over the lack of terms of reference for length of term of each agreement and for the required incorporation and deadlines re new mitigation strategies required as a result of a credible and scientifically valid monitoring process.
6. Confusion evident in the high variability in proposed agreements available to the public to date.
7. Confusion over the absence in proposed agreements of measurable targets for reduction of eel mortality.
8. Confusion over the lack of planning about the integration of permits under the “Lakes and Rivers Improvement Act” at the same facilities as those in the agreement.

I recommend that all S.11 agreements contain a statement documenting the dates of posting of the proposed agreement on the Environmental Registry and stating that the public input has been considered by MNR in the wording of the final agreement.

I further recommend that each agreement include a statement about the cumulative effects of a series of hydro-electric facilities within a watershed and identify the number of dams in the sequence of dams between the facility in the agreement and sea level.

I recommend that if “Proposed Hydro-electric Generating Station Agreements under Ontario Regulation 242/08 of the Endangered Species Act” is to survive as a guide that it be updated based on scientific studies.

With one possible exception at Chaudière Falls, proposed S.11 agreements shared with the public to date reveal only token mitigation strategies, strategies which fall well short of the widely distributed recommendations of the provincial Recovery Strategy Team for American Eel. The Minister has the authority under O. Reg. 242/08 to express the opinion that agreements with such token mitigation strategies are reasonable. If so, the Minister will demonstrate that the work of the provincial American Eel Recovery Strategy is of questionable value and needs to be superseded by the alternate hidden MNR strategy for developing mitigation strategies. I believe that expression of such a Ministerial opinion would be viewed, perhaps widely viewed, as cognitive dissonance and government duplicity, a flash point issue for any government. If the Ontario government supports agreements which appear contemptuous of the spirit of its own Endangered Species Act 2007, EBR Posting 011-3334 will take on historic significance for years to come. MNR is playing with fire.

I am a citizen who is concerned about Ontario’s endangered species and fish habitat and about Ontario’s responsibilities in its various legislative and policy commitments re safe fish passage and ecosystem health. I also am concerned about appropriateness of the methods used by the Ontario Government in making decisions, including regulations, policies and agreements, which flow from the legislation. For this reason I was concerned when I read within EBR 011-1306, “Technical Guidelines and Requirements for Approval under the Lakes and Rivers Improvement Act”, that MNR was attempting to change some policy through a non-standard back door process about which the Minister appeared to have no knowledge. As a result I not only made input to the Registry, I wrote the Minister alerting her. Her response of Feb. 3, 2011 assured me that in no way was MNR attempting to avoid its responsibilities under LRIA for fish passage and ecosystem health and that MNR will continue to apply existing legislative and policy tools, including those within the LRIA, to ensure that renewable energy projects consider the needs of aquatic ecosystems (Jeffrey to Allen, MNR4046MC-2010-2680). From my perspective the Minister’s reassurances to me are not reflected in the way MNR is dealing with S.11 agreements, nor in the hugely diluted mitigation and monitoring plans in both the “Proposed Mitigations for Waterpower Agreements”, and in the proposed individual agreements currently available to the public. Those

problems need to be fixed. By copying of this communication I am alerting the Minister about the repetition of a flawed and inappropriate MNR process under 011-3334.

Conclusion:

It is promising for the recovery of American Eel for MNR to establish a framework to be used as the basis for development of agreements under O. Reg. 242/08, Section 11. The details within EBR 011-3334 and the process by which MNR has arrived at those details indicate a standard too low and ineffective for MNR to enter the proposed agreements. The work of the American Eel Recovery Strategy Team and the formal government response to the advice of the team has not been honoured in the 011-3334 proposal. Indeed, 011-3334 threatens to replace the recovery strategy with an indefensible end run. That problem must be corrected and the Minister must not be placed in a position of risk, as she will be if the low standard of mitigation and monitoring presently outlined in 011-334 and the proposed agreements that it has spawned, are allowed to stand. Under the circumstances I recommend that MNR enter no additional S.11 agreements and that the deadline for completion of agreements under S.11 be extended to a date 12 months after the public release of the Minister's published statement that summarizes the actions that the Government of Ontario intends to take in response to the American Eel Recovery Strategy and the Government's priorities with respect to taking those actions.

Thank you for the opportunity to comment on EBR Posting 011-3334.

Sincerely,

William A. Allen

Copies:

Honourable Linda Jeffrey, Minister, MNR

Gord Miller, Environmental Commissioner Ontario

Fellow authors of Ontario's American Eel Recovery Strategy (Rob MacGregor, Larry McDermott, John Casselman, Lorne Grieg, Trevor Friessen)