379 Ronka Road
Worthington, ON
P0M 3H0
(705) 866-1677

LindaH@OntarioRiversAlliance.ca
OntarioRiversAlliance.ca

25 February 2013

Krista Adams
Senior Permits & Agreements Specialist
Ministry of Natural Resources
Policy Division
Species at Risk Branch
Permits and Agreements Section
300 Water Street, Floor 2
Peterborough, Ontario K9J8M5
Email: esa.permits.agreements@ontario.ca

Dear Ms. Adams:

Re: Proposed Approaches to the Implementation of the Endangered Species Act
EBR-011-7696

Ontario Rivers Alliance (ORA) is a Not-for-Profit grassroots organization with a focus on healthy river ecosystems all across Ontario. ORA members represent numerous organizations such as the French River Delta Association, Council of Canadians, Friends of Temagami, Whitewater Ontario, Vermilion River Stewardship, Mississippi Riverwatchers, along with many other stewardships, associations, and private and First Nations citizens, who have come together to support healthy river ecosystems in Ontario and to ensure that development affecting Ontario rivers is environmentally, ecologically and socially sustainable.

All underlining in the text below is ORA's means of placing emphasis on specific points in our comments.

While there are some good recommendations in these proposed amendments to the Endangered Species Act (ESA), many are worded in language that is far too vague and open-ended, and others are simply unacceptable. ORA is very concerned that this will significantly weaken the hard-fought protection already afforded to our species at risk and their habitats, and is inconsistent with the ESA. Further, many of the proposed approaches appear to be in violation of the EBR in that there is no provision for public and First Nation consultation or transparency.

MNR's Mission and Promise to Ontarions:

MNR's Statement of Environmental Values (SEV) and strategic direction ensure sustainable development, protect and restore biodiversity, and must be the guiding principles in all decisions with regard to streamlining, modernization and economic development. The values set out in

the SEV must be adhered to in the contemplation of any existing or planned activities where endangered species or habitat protection is in question. The SEV clearly states, "*The Ministry's mission is to manage Ontario's natural resources in an ecologically sustainable way to ensure that they are available for the enjoyment and use of future generations. The Ministry is committed to the conservation of biodiversity and the use of natural resources in a sustainable manner."*

Streamlining and modernization of the Ministry of Natural Resources (MNR) is a good idea, but only if environmental, ecological, and species at risk protection is not threatened or diminished. All the streamlining, modernization and framework EBR postings preceding this one promised to uphold environmental and ecological values; however, this posting demonstrates that this promise is not being kept. This proposal clearly reflects a development at all costs approach taken by this administration.

ORA strenuously object to the statement in the Regulatory Impact Statement that casts this proposal as neutral in impact. Instead, this proposal represents an attempt to significantly weaken the Act. If MNR wishes to amend the Act, then they should do so using the appropriate process and show the citizens of Ontario clearly the intended changes in the Act and regulation, rather than unclear and proposed policy changes, with no indication of the actual language that will be contained. There appears to be no process for the public to comment on the language or content in the Rules, nor any indication of how the Rules in Regulation will be developed. This lack of consultation and transparency with the citizens of Ontario is astonishing, and unacceptable.

The Intent and Purpose of the ESA:

The intent of the ESA is to protect and recover species at risk – to do so effectively there is a need to strategically and effectively mitigate past and ongoing activities that jeopardize recovery while recognizing the importance of resource development. ORA agrees that up-front conditions for individuals and businesses should occur when appropriate; however, efficiencies must not result in weakened protection and recovery for Ontario's species at risk. MNR should be strengthening and overseeing the implementation of the ESA rather than sidestepping its strong oversight responsibilities and its mandated responsibility to "***provide leadership and oversight in the management of Ontario's fish and wildlife resources, including species at risk***"[1].

While we agree with partnership approaches, it appears that in many instances the proposed changes will put the fox in charge of the henhouse with little to no oversight by MNR, nor public and First Nation consultation. Based on past experience in Ontario, it is inappropriate to place too much responsibility for the Act and its intent in the hands of developers, especially at this early stage of implementation of the Act.

Environmental legislation, including the ESA, was put in place to bring some balance to resource development that was occurring in the province with little to no recognition of the environmental effects, or attempts to mitigate. The legacy of unbridled resource development associated with loss and serious decline of species and their habitat is not one to be proud of in Ontario - for example pollution, over-fishing and habitat loss in the Great Lakes, the development of the St. Lawrence Seaway and Moses-Saunders dam, blockage of fish migration routes and resulting decimation of many species due to unmitigated hydroelectric development throughout many watersheds, and on and on. By introducing some balance into the equation the ESA provided some hope that this would no longer occur, and that Ontario would benefit by

[1] Statement of Environmental Values, Ministry of Natural Resources

the recovery of other severely depleted, and highly valuable renewable resources (many of these depleted species provided sustenance for early settlers forming a strong component of our natural heritage).

This proposal, if implemented, sets protection and recovery of species at risk back to the stone ages by virtually eliminating government and public/First Nations oversight and transparency on the effects and mitigation plans of major development.

In recognizing the serious threats and losses to biodiversity as a result of unmitigated development, legislation such as the ESA provides a mechanism to restore species that were lost or in serious decline. To effectively achieve this, the province must take action to mitigate past and ongoing effects that seriously jeopardize the survival and recovery of species at risk. Unfortunately the proposed amendments seriously compromise the spirit and intent of the Act, and if implemented, Ontario's ESA will no longer be the outstanding legislation it was proudly rolled out to be. In fact it will become ineffective on many fronts, and will certainly no longer be the gold standard that was so proudly announced.

As can be expected with any new legislation, gaps and uncertainties have become evident with implementation of the ESA, and some clarification and definition seem to be required from both the perspectives of conservation and development. This can be done effectively without these proposed approaches that effectively make sweeping and holistic changes to the legislation and regulations, and that are contrary to the original intent of the Act.

In many cases what has not been said is as important as what has been said. For instance, how, and by who, will the Rules in Regulation be developed, and what will be their content? What if any consultation process will be available for First Nations and the public? What is to become of the requirement for overall benefit and how will it be implemented? How will cumulative effects of new and existing facilities be assessed and incorporated into mitigation plans?

Central to the whole proposal is the idea of Rules in Regulation which we might support in some limited circumstances, but only with a clear understanding and ability to review and comment on the contents of the Rules before they are finalized. ORA is not prepared to endorse the Rules without reviewing them, and we object to the suggestion that we should decide without seeing them. We certainly do not support this approach for activities that would have major, complex, and site specific impacts on species at risk.

Panel Report - An Imbalanced Representation:

MNR states in the beginning of this posting that many sectors, organizations and individuals had challenges in implementing the Endangered Species Act (ESA), and "*brought together a stakeholder working group to identify common issues and potential solutions*" The representation on this working group was heavily weighted in the favour of industry, with apparently only 2 or 3 members representing the environment and 11 representing industry and others. This dramatic imbalance in representation is reflected in this proposal by the significant weakening of the ESA that is proposed. Equally concerning is there will be limited oversight by MNR, and no transparency and consultation with the citizens of Ontario. There are many environmental and conservation organizations that could have been represented on the Panel but were not. Other groups probably would have provided differing perspectives on such major changes to this important piece of legislation. This process was heavily flawed and biased from

its beginning.

In addition, some of the most controversial proposals (e.g. the proposed change from waterpower agreements to Rules in Regulation with no species exclusions and no rationale) in the EBR posting do not even appear in the panel report. And many good recommendations such as the approval continuum were not adopted in the EBR posting. We object strongly to the use of this report as any form of support for the proposed approaches in the posting.

ORA Comments on Specifics:

1. **Helping Existing or Planned Activities Proceed:**

   Ongoing effects of certain activities (e.g. waterpower forestry, etc.) are primary reasons for the listing of many species as "at risk" in Ontario, and continue to harm or kill species at risk, and harmfully alter or prevent the use of important habitat. Significant recovery progress cannot be made without effective mitigation of their effects. Adding new operations without effectively and strategically mitigating the effects of existing facilities and operations will compound effects and seriously jeopardize the survival and recovery of species at risk in Ontario.

   In the case of waterpower, many hydroelectric retrofits now are incorporating cycling or peaking in their operations, which is well documented to have numerous negative impacts on water quality and on fisheries. These changes may have serious implications for certain species, depending on the circumstances. The effects of waterpower are very site specific, complex, and dependent on the species. The Rule in Regulation approach would not be appropriate in these circumstances, but we can see no effective way of treating this other the Permit by Review approach.

   The most recent posting of additional information has made it clear that existing waterpower agreements will be replaced by a nebulous Rules in Regulation process, with no ability to exclude highly vulnerable species (e.g. diadromous fish species, mussels, etc.) from this process. ORA strongly disagree with this proposed change, as these types of projects can and do have devastating, ongoing, long-lasting and highly cumulative impacts that could seriously hamper survival or recovery of species at risk. The waterpower agreement process was flawed already but offered some hope for recovery of vulnerable species if implemented well.

   The "Rules in Regulation" process, which is simply an exemption with conditions, requires no review or approval from MNR, nor permits, and would provide no opportunity for public or First Nation consultation on mitigation plans. This is unacceptable.

   Public and First Nations consultation must be a key component in all development and mitigation proposals before they are finalized.

   The agreement process for existing operations in OReg 242/08 was weak enough, but this proposal sets environmental oversight of major operations with potentially significant individual and cumulative impacts (e.g. waterpower) back 50 years or more. It places far too much trust in proponents having little to no track record of demonstrating, much less recognizing, the need to "effectively mitigate" their effects.

The word “minimize” is far too ill-defined, nebulous and open-ended, especially when left to industry to decide on sufficient mitigation measures themselves, with no government oversight. For example, under the proposed transitioning of waterpower agreements to Rules in Regulation, existing waterpower facilities would be able to decide solely on what steps are required to minimize their effects based on some unknown Rules, with no oversight, no approvals, and no requirement to demonstrate that the continued operation of the facility does not jeopardize recovery and survival. It will be a sad day for species at risk in Ontario if such a proposal is allowed to be implemented, and ORA vigorously objects**.**

ORA expects MNR to carry out its promise to the citizens of Ontario through its SEV and Strategic Directions. Many of the proposals in this posting contradict these directions, and do little to ensure recovery of some species that continue to be jeopardized by the ongoing unmitigated activities of some existing operations or facilities. The current policy and process must be maintained and strengthened, not seriously weakened as many of these recommendations do.

2. Transition for Activities that are Already Approved or Planned:

Recognizing the level of investment for projects that are in advanced stages of approval, MNR is proposing a “time-limited” transition for activities that are approved or planned, but not complete or operating when a species is newly on the SARO List or when new habitat protection comes into effect. This seemed reasonable until we were made aware by MNR staff that it would be time-limited only from the perspective of the stage of approval for the project in question, and that the project would be permanently exempted (not temporarily as implied by the posting) from the protection provisions of the ESA. ORA objects strenuously to this misleading language.

The lack of detail in this section is unacceptable. The proposal states that the transition provisions would be time-limited with conditions, with no details of what the conditions will be. Presumably the conditions would be related to the development of mitigation plans – but there seems to be no transparency, and no opportunity for knowledge or comment on the conditions. This is unacceptable. Time-limited transition conditions must be detailed and specific, with an opportunity for public consultation and comment.

There must be no permanent exemptions for approved or planned activities. While we accept the need to provide transition, we recommend only 2 years transition (and only for certain projects that will have limited effects in the short-term) after which mitigation plans would need to be implemented for the species. Allowing years to develop and implement a mitigation plan for many species at risk is preposterous. During that period of time, an entire colony or population of a newly listed species at risk could be severely depleted or eliminated perhaps before any plan or action to mitigate has even begun, or the species even identified. There needs to be an up-front requirement built into these exemptions to at least thoroughly inventory species before the exemption is issued to avoid creating strong incentive for proponents to not find species at risk.

We do, however, support the proposal to exclude certain highly vulnerable species. But there needs to be a strong, clear process under which this would be decided before we can endorse this approach.

ORA submits that in a risk-based approach, with any type of development where a medium to high risk has been identified, no exemption should be given for a species that is highly vulnerable to the activity, regardless of where the project sits in the approvals process.

The proposed exemptions regarding newly listed species, species found at a site, and newly protected habitat in our opinion represent:

- inconsistency with the direction that species at risk and their habitat are protected under the ESA;
- a weakening of the requirement to provide an overall benefit to threatened and endangered species, replaced with an ill-defined and unacceptable lowering of the standard to minimizing adverse impacts;
- a virtual elimination of government and public oversight;
- undermining the current incentive to be thorough in identification of species at risk as early as possible; and
- an undercutting of the legislated protection for the habitat of 65 threatened and endangered transition species by exempting planned or approved projects when habitat is newly protected.

a. Rules in the Form of Regulation:

When MNR refers to changing regulations it means exempting activities from the ESA permitting requirements which, in keeping with the purpose of the ESA, is required to demonstrate that the activity being permitted achieves an overall benefit to the species impacted. Further, "*rules established in regulation*" (a.k.a. permit-by-rule), means MNR will allow exemptions with conditions, based on unknown rules that may or may not be enforceable with potentially no ability for public or First Nations comment. Indeed it appears that interested Ontario citizens, stakeholders and First Nations will not even have the opportunity to know what is contained in the mitigation plans, let alone have the opportunity to comment. This is not acceptable as MNR is abandoning its responsibility to species at risk. Moreover, failure to make a strong effort to appropriately notify the public of environmentally significant policy is acting counter to the Environmental Bill of Rights (EBR) section 16.

In particular, as noted earlier, the existing agreement process for waterpower facilities includes the need to demonstrate that the continued operation of the facility will not jeopardize the recovery or survival of species at risk. This requirement is not mentioned in these Rules and Regulation with Registration, and ORA strongly objects to this as well as the transitioning of existing agreements (except Saunders) to Rules in Regulation. There is no rationale given for why the Saunders agreement will not be migrated to this process, and the public should understand the rationale for this single exception to enable comprehensive review of the proposal and to understand why the rest of the waterpower agreements/facilities are to migrate to the nebulous Rules in Regulation.

b. Enabling a Streamlined Alternative:

The Rules in Regulation are not provided and we cannot comment nor endorse this until we see them.

c. Registration only is not Adequate:

Registration should only be a first step, and should be mandatory for all projects. However, just letting MNR know an activity is going to take place is not enough to protect species at risk. Mitigation plans will not even be required by MNR for approval. It is unacceptable that MNR will not even see them unless they ask for them and even more problematic that there will be no approval. This is unacceptable and inconsistent with MNR's mandate and direction to ensure development is sustainable. It will certainly be insufficient to protect and ensure species at risk recovery.

In the limited circumstances where an exemption is appropriate, MNR must require companies to not only register their activities, but also to register the anticipated impacts, their plans to minimize the effects, a document demonstrating how their continued operation will not jeopardize the recovery and survival of species at risk, and their plans to address achieving an overall benefit for the species. These plans must be subject to MNR approval and posted on the EBR for public comment.

Government and public oversight would be hampered, and perhaps impossible if mitigation plans are not formally disclosed by the proponent before implementation. Mitigation plans must be filed with MNR to enable monitoring, ensure compliance, and be made available to the public and First Nations for comment.

d. Exemptions with Conditions:

Exemptions should not be the rule, but must remain the exception. The ESA prohibits harm to species at risk & their habitats; therefore, exemptions should only be used in very limited situations where impacts are well understood, risk of significant impacts are low, and impacts/risks can be addressed adequately. Given the complexity and site specificity of impacts by most projects, we argue that exceptions should only be given for projects with extremely well known and consistent impacts and only for selected species, only then can Rules be written and applied with confidence.

For the majority of species at risk, permits are the appropriate tool - not exemptions. Permits can deal with site specific issues – exemptions cannot. Permits ensure that there is an overall benefit to species, and anything less is inconsistent with the ESA – the purpose of which is to protect and recover species at risk and their habitats.

We understand the need to reduce red tape and streamline, but many of the proposed approaches go too far and severely jeopardize survival and recovery of species at risk by placing too much faith in developers, and relying only on enforcement to ensure compliance is achieved. It is doubtful that MNR will have the enforcement capacity, nor the will, to take action against large companies such as waterpower operations (MNR has little or no history of doing so). Moreover, it is doubtful that many of the Rules in Regulation can be written to be clearly enforceable. Also, by the time MNR gets approval to take enforcement action, the damage will already have been done. Repairing the damage could be cost-prohibitive, take many years to accomplish, and perhaps be impossible.

Furthermore, the overall benefit provisions of the act needs to be maintained and strengthened, not eliminated, or substantially reduced as proposed, or recovery will be severely limited. It is unclear how overall benefit will be achieved without permits, and we remain to be convinced that this can be accomplished by the proposed mechanisms. In fact, we wonder if MNR is abandoning the concept of overall benefit altogether through this back door process – it certainly appears that way.

MNR must improve ESA implementation – not weaken the law. MNR can address legitimate concerns of industry regarding inconsistency, delays, and coordination of the approvals process without taking approaches, and regulatory changes, which weaken protection for species at risk. Unfortunately, it appears that many of the proposed approaches significantly weaken the Act and its implementation.

There must be no exemptions for forestry, aggregate, waterpower or infrastructure unless there is an imminent risk to public health and safety without exclusions for vulnerable species.

e. Providing Certainty to Developers:

Providing certainty to developers is important, but would be inappropriate without providing equal certainty to species at risk given the historical unmitigated development that has been allowed to proceed in Ontario. Certainty for developers must not come at the expense of public interests and values, the Act, endangered species, or our environment.

This EBR posting states, "*These proposals would allow existing or planned activities which have received approval under other applicable legislation to proceed subject to conditions in regulations while balancing the protection and recovery of species at risk*." Unfortunately some existing, important, and potentially damaging approaches do not require meaningful public and First Nations consultation prior to being issued. For example, currently a Feed-in-Tariff contract for a renewable energy project is issued without any public consultation. Once this contract is issued the Environmental Assessment process is essentially a pre-approved process, without the possibility of a "no" outcome.

Adding a streamlined regulatory amendment to provide certainty to a range of sectors interested in development has the potential to further degrade a process that is already not working in the best interests of the environment or the public. ORA requests that MNR adhere to the principles of their SEV and ensure certainty to our species at risk, and their environment as well, by limiting the exemptions proposed, including additional species exclusions.

As noted earlier, some lack of clarity and inconsistency can be expected during implementation of new legislation; and the ESA is no exception. There is a lack of clarity and weakness from the conservation and protection side as well as from the development side, but we are aware of no similar process nor panel that has looked at the conservation inconsistencies in the ESA in a similar fashion. Nevertheless, refinements and clarifications can be made without some of the significant changes in the proposed approaches.

In addition, it is probable that most of the concerns by developers are exaggerated, and related more to the unwillingness of some developers to collect and provide the correct information, to mitigate their effects, and to provide transparency to Ontario citizens. Mitigation is often viewed as a cost burden rather than an investment in another renewable resource. This attitude will never be replaced by a strong sense of stewardship unless the incentives are clearly in place. While we understand the developers' need for certainty, it is also needed for conservation measures.

For example, ORA has found that the current proponent led process for waterpower is extremely dysfunctional, and has failed to serve the best interests of the public or the environment. This and other recent MNR policy proposals suggests that MNR is attempting to take this problem to a much lower level in spite of the evidence reflected in recent Environmental Reports for waterpower proposals that demonstrated an extreme lack in detail, science and transparency, and were rejected by MOE. These types of delays are costly and time consuming - not just for the proponent, but also for Agency staff and the public.

Until we see a balanced process which examines the conservation inconsistencies and gaps, as well as the issues raised by developers, we cannot support these proposed approaches.

ORA recommends any new regulations include severe fines and penalties for any compliance infractions that result in serious threats or harm to any species at risk.

f. Enabling Activities Necessary to Human Health or Safety:
Human health and safety must always take precedence over all other considerations. However, clear Rules in Regulation must be established to avoid abuse of this section. These Rules must be posted on the EBR for comment and overseen by government.

3. Streamlined Approaches for New Activities to Benefit Species:

A registration approach should be only a first step. In circumstances where species at risk will be highly vulnerable, permitting and oversight by government and Ontario citizens must remain essential components of ESA implementation to ensure protection and reasonable recovery of species at risk.

a. Protection or Recovery:
An ESA authorization must also be obtained for activities assisting in the protection or recovery of species at risk or for broader conservation initiatives. MNR must not streamline this process or provide an easy and quick way to proceed through the approvals process. It is important for our Crown agency to oversee and ensure proper measures are taken to protect and restore populations of species at risk. These decisions must not be left to private developers whose focus is on getting their projects up and running and on generating profits, not on protecting species at risk or the environment.

b. Standardized Condition Approach:
While standardization may make sense in the circumstances suggested, ORA

insists that all Rules in Regulation are posted on the EBR before they are finalized, as they are environmentally significant policies. Government oversight (not just enforcement) will be important to ensure effective implementation of ESA**.**

An ESA approval and MNR oversight must always accompany any development or work relating to Endangered Species – for all the reasons mentioned above. Registration only is inadequate to ensure sustainability and effective implementation of the ESA. The examples provided in this posting could be considered minor situations with minimal impact; however, this proposed "standardized condition approach" could also be used to make decisions regarding the American Eel, Lake Sturgeon, Blanding Turtle, Whippoorwill, and many other fragile species whose numbers have been reduced by unharnessed, unbalanced and harmful human impacts. Presumably this relates to the Rules in Regulation approach that we have already commented on earlier. As we have stated, Rules in Regulation may be acceptable when the impacts from an activity are well known and the mitigation is straightforward, it will not work when impacts are large and complex and highly cumulative (e.g. waterpower and forestry).

There is no description of how or by whom the Rules or standardized conditions or the related mitigation plans will be written, or if there will be consultation opportunities with Ontario citizens and First Nations. The success of this standardized approach rests on trust, and whether the rules will or can be enforced. Can we trust for-profit developers to act in the best interests of our biodiversity, species at risk, the environment, and public health and safety? We suspect that we cannot in all cases.

With no proactive review in this proposed approach, compliance audits and enforcement must be at the highest standard. We question whether the government has the capacity or will to effectively audit and enforce the Rules and the associated mitigation plans. Past experience and a track record suggests that MNR will not when just one case can tie up an officer for months. Further, our experience with the proponent led process for waterpower for example, suggests that this approach is badly broken, and does not work. We do not support such a sweeping approach across all sectors without any evidence that it can work effectively.

c. Safe Harbour:

While we support the concept of Safe Harbour, we have a major concern if it is implemented by exemption rather than binding stewardship agreements. The exemption route would minimize government oversight and potentially lead to serious harm to the survival and recovery of species at risk.

Further, we are concerned that this could also relate to a corporation wishing to change their operating strategy at a hydroelectric facility from true run-of-river (where species are currently at risk) to a cycling and peaking facility without regard for how species at risk would be impacted. There must not be exemptions in these types of cases where a full environmental assessment clearly is required to assess any additional impacts or harm to species at risk. While we support the concept, ORA objects to exemptions for Safe Harbour as currently worded and

without further clarifications.

d. Human Health or Safety:

Using the example of a hydroelectric facility, or even a bridge, the dewatering of an entire stretch of river for repairs or upgrades must be done only with the supervision of our Crown agencies, and must not be streamlined or given an exemption to carry out the work without specific, clear rules that are not presented here. ORA cannot accept this proposal without seeing and commenting on the rules.

The wording for eligible activities for exemption, to "*maintain, repair or replace/upgrade an existing structure or infrastructure relating to critical services for human health or safety*" could apply to numerous hydroelectric facilities wishing to upgrade to increase power generation capacity, under the guise of a threat to human health and safety. The recent Enerdu GS upgrade on the Mississippi River is the perfect illustration of how upgrades must not be an exception or exemption from permitting. The Environmental Report was extremely lacking in that it did not address any vital aspects of current peaking operations, or the ongoing damage that has been occurring to a large and important Provincially Significant Wetland and ANSI for some time, let alone take into account any additional impact the upgrades would have on endangered species.

Upgrades to existing infrastructure can be just as destructive as new projects, so there should not be any exemption considered for this class of project, unless there is an extreme emergency where dam failure is imminent.

Only in the case of an emergency should any exemptions be made.

4. Administrative Efficiencies:

ORA agrees with the concept of achieving administrative efficiency, but species at risk and their survival, recovery, and habitat protection, must not be diminished or lessened to achieve administrative efficiencies. We are given few details on this section and ORA cannot support them without the opportunity to review the specific plans.

ORA requests much more information be provided. Our position is that registration will not be enough – these activities must have government oversight to avoid abuse. The Rules in Regulation must be posted on the EBR for comment before finalized.

5. Full cost accounting for permits:

There is no need to gut the ESA, as proposed, to make ends meet or to cover costs. While we support strategic streamlining and finding efficiencies, we do not support weakening the ESA in the process. Rather, MNR should introduce a full cost recovery program to charge for permits, applications, oversight, monitoring and approvals. The "Drummond Report" recommends, a "Move towards full cost recovery and user-pay models for environmental programs and services."[2] The government charges those

[2] The Drummond Report, 13-1, p. 337

seeking to use our water for the cost of applying and approving permits to take water, and the same can be done for species at risk permitting and agreements. In ORAs opinion this is only logical and fair given the billions of dollars that developers make from Ontario's natural resources. It is MNRs responsibility to ensure that development does not proceed at the expense of Ontario's other precious resources.

NHIC Data:

We note that in the panel report there was a suggestion that the location of species at risk would be restricted to NHIC data. While this did not appear in the actual posting, we object to the use of this data as the sole source. NHIC data for Ontario Species at Risk is woefully outdated and inadequate for many species, (especially aquatic species), and much of the more current data has not been migrated to NHIC (nor can it be expected to be).

ORA strongly objects to the sole use of the NHIC database to locate species at risk. There are many other sources that should be reviewed, and thorough inventories and data/literature searches must be conducted at the site by the proponent.

Public Consultation:

Public and First Nations consultation was missing as a component in any of these streamlining scenarios. It appears that public and First Nations consultation will be sacrificed in the proposed changes to permitting. For example, transparency and opportunities for meaningful input will be prevented for non-registered, registered and many other instruments under the EBR. Is this the approach now proposed by the government when it comes to transparency? We strongly object as we have little confidence that MNR will ensure appropriate measures to ensure effective mitigation and recovery for species at risk, given their past track record and the current proposed approach.

ORA insists that public and First Nations consultation must not be sacrificed in these proposed changes, and must be a mandatory component of all instruments, rules and other policies that affect endangered species at risk.

MNR and Modernization of Approvals:

The Endangered Species Act is crucial to protecting something near and dear to many of us – protecting and restoring Ontario's biodiversity.

ORA has also commented on EBR posting #011-7540 and #011-6751, and in both instances were supportive of a streamlined approach as long as it did not compromise protection of our environment, natural resources, or our species at risk. The proposed changes in this EBR posting do not represent a responsible approach, but in fact represent a serious weakening and abdication of responsibility for the important values set out in MNR's SEV, and as promised to Ontarians.

ORA understands the need to streamline and eliminate unnecessary red tape; however, this can be done without sacrificing sustainability and recovery of species at risk. We vigorously oppose this proposal because sustainability, protection, recovery and transparency have all

been sacrificed through this back door approach to amend the Act. These drastic changes were unnecessary, and any valid concerns could have been dealt with in a more appropriate manner, considering both species at risk and those that care about their continued survival and recovery. This proposal has been clearly put forward in deference to exaggerated complaints by developers.

ORA is deeply disappointed and concerned with the direction MNR is heading, not just in these proposed approaches and exemptions to the Endangered Species Act, but now for the entire streamlining and modernizing approach. MNR has been vague in the description of this proposal; even the most knowledgeable person will have difficulty understanding the implications of the proposed approaches. ORA questions why MNR keeps heading in this direction. Clearly their mandate for sustainable development and the SEVs have been sacrificed in this proposal, and we are deeply concerned.

Cost savings can be done without sacrificing core values of Ontario citizens and MNRs strategic direction (to ensure development is environmentally sustainable), and does not comprise the intent of the Act. The same can be said for creating an atmosphere conducive to investment. Both can be achieved if the appropriate time, thought and effort are put into this. This proposal appears very rushed, provides little detail and is unacceptable in its current form.

Sustainable development is inconsistent with many of the proposed changes to the ESA. For instance, many proposed approaches ignore the need for existing operations to mitigate their ongoing effects, put the industry in charge of "minimizing effects" (ill-defined) without approval, and without requiring developers to demonstrate how their continued activities will not jeopardize survival and recovery of Ontario's species at risk. How then can we ever hope to achieve effective implementation of the ESA according to its purposes when MNR and government abandon their responsibility in such a fashion, with nebulous and unknown Rules in Regulation, and enforcement for which MNR has questionable capacity and will.

ORA will not support the proposed approaches without reviewing and commenting on all of the Rules in Regulations, the enforcement/compliance resources that will be dedicated, and without assurance that the common conditions, Rules in Regulations, and mitigation plans, will be posted on the EBR for comment.

Regulatory Impact Statement:

ORA strongly disagrees with the assessment statement, "*the anticipated environmental risks and consequences associated with this proposal are likely neutral*". There is no data, study, or rational provided to back up this statement. Based on our foregoing arguments there is no clear justification or rationale for this statement, and it appears to be inaccurate and overstated.

MNR's own policy document, sets it out quite clearly when it states, "*For the purposes of clause 17(2)(c) of the ESA, the concept of providing an overall benefit to a species involves undertaking actions that contribute to improving the circumstances for the species specified in the permit. Overall benefit is more than no net loss or an exchange of like-for-like (Figure 1). Overall benefit is grounded in the protection and recovery of the species at risk and must include more than steps to minimize adverse effects on the protected species or habitats. The outcome of the overall benefit actions is meant to improve the relative standing of a species after taking into account the residual adverse effects to the species or its habitat that are authorized by the permit (i.e., the completion of all permit conditions achieves a net positive*

benefit for the species at risk…)[3] This vital component is totally missing from these proposed changes, and ORA strongly objects.

Government oversight, public transparency and sustainability have been badly sacrificed in this proposal, and the recovery and survival of species at risk will be severely jeopardized if it is approved. ORA is concerned that the real motivation for the weakening of this Act is to "*enhance efficiency, increase the predictability of regulatory requirements and enable cost savings to individuals, businesses and government*", without appropriately considering and incorporating the real purposes of the Act – survival and recovery of species at risk.

To reiterate, we support streamlining to reduce costs, and we support providing certainty to both developers (without sacrificing recovery and survival of species at risk) and to those concerned with conservation and sustainable development. We argue that this proposal has not been adequately thought through, and the approaches are poorly developed and clearly rushed. We suggest that MNR take more time to consult more Ontario citizens, develop draft rules in regulations, consider more species exclusions from the proposed Rules in Regulations, and then redraft the proposed approaches for posting on the EBR for comment. We understand that this means additional work, but this is intensely important work with serious implications if not done well, and in consideration of all sides of the arguments. Certainly, MNR could begin with a much more balanced panel.

Furthermore, we are concerned that this EBR posting will be used as the only consultation process for what amounts to a virtual backdoor amending of the ESA and Regulation, and without details and process necessary for meaningful public participation. MNR is circumventing due process in amending the legislation and regulations by this process, and this will have profound significance on the environment. There must be broad consultation at every step. If this is the only broad consultation opportunity for this proposal on the EBR then we view the whole process to be in violation of the EBR.

MNR has already demonstrated its socio-economic priorities and assessment abilities with their faulty report entitled, "*Economic Impact of Waterpower Projects on Crown Land in Ontario*". This report listed only the positive impacts of waterpower in Ontario, but listed none of the negative well documented and historical impacts associated with these types of projects. This biased report, and the proposed substantial weakening of our endangered species legislation, illustrates a new direction MNR is taking - one that favours development over environmental protection. This new direction is very disturbing to ORA.

Summary:

In summary, ORA recommends (in no particular order):

1. MNR adhere to the principles of their SEV and Strategic Directions, to ensure certainty to species at risk and their habitat.
2. The ESA proposal be completely rewritten to
    a. Conform to the purpose and intent of the ESA, which is to protect and recover species at risk;
    b. Improve and strengthen ESA implementation instead of weakening it; and

[3] Endangered Species Act Submission Standards for Activity Review and 17(2) c, Overall Benefit Permits (February, 2012), P-2

   c. Provide details and wording of all proposed regulations, exemptions, and applications – not just concepts.
3. MNR must require companies to not only register their activities, but also to
   a. Register the anticipated impacts, and their plans to minimize the effects;
   b. Submit a report demonstrating how their continued operation will not jeopardize the recovery and survival of species at risk; and
   c. Submit their plans to address achieving an overall benefit for the species.
4. ESA approval and rigorous MNR oversight must always accompany any development or work that impacts Endangered Species.
5. Mitigation plans must be filed with MNR to enable monitoring, ensure compliance, and be made available to the public and First Nations for comment.
6. Compliance audits and enforcement must be of the highest standard.
7. Public and First Nations consultation must be a key component in all development and mitigation proposals before they are finalized.
8. MNR introduce a full cost recovery program to charge for permits, applications, oversight, monitoring and approvals.
9. New regulations must include severe fines for infractions that threaten or harm species at risk.
10. Human health and safety must always take precedence over all other considerations.
11. Exemptions must not be the rule, but must remain the exception.
12. There must be no permanent exemptions for approved or planned activities.
13. For the majority of species at risk, permits are the appropriate tool - not exemptions.
14. Limit any exemptions to minor, low-risk, and routine developments.
15. No exemption should be given for a species that is highly vulnerable to the activity, regardless of where the project sits in
16. There must be no exemptions in cases where a full environmental assessment clearly is required to assess any additional impacts or harm to endangered species.
17. Any exemptions to the Endangered Species Act should be for site specific exceptions in exceptional circumstances - not entire industries.
18. There must be no exemptions for forestry, aggregate, waterpower or infrastructure unless there is a present and imminent risk to public health and safety.
19. Exceptions should only be given for minor projects with extremely well known and consistent impacts, and only for selected species.
20. Registration should only be a first step, and should be mandatory for all projects.
21. MNR must require companies to not only register their activities, but also to register the anticipated impacts, their plans to minimize the effects, a document demonstrating how their continued operation will not jeopardize the recovery and survival of species at risk, and their plans to address achieving an overall benefit for the species.
22. In any standardized approach, an ESA approval and MNR oversight must always accompany any development or work relating to Endangered Species.
23. Safe Harbour, must not be implemented by exemption, but rather by binding stewardship agreements.
24. All Rules in Regulation must be provided for public and First Nation comment.
25. Overall benefit provisions of the act need to be maintained and strengthened, not eliminated, or substantially reduced as proposed, or recovery will be severely limited.
26. Take the necessary action to mitigate past and ongoing effects that seriously jeopardize the survival and recovery of species at risk.
27. Existing agreements for waterpower facilities must include the requirement to demonstrate that the continued operation of the facility will not jeopardize the recovery or survival of species at risk.
28. Time-limited transition conditions of existing and planned facilities must be detailed and

specific, with an opportunity for public consultation and comment.
29. NHIC database must not be the sole tool to locate species at risk.
30. MNR take more time to consult Ontario citizens, develop draft rules in regulations, consider more species exclusions from the proposed Rules in Regulations, and then redraft the proposed approaches for posting on the EBR for comment.
31. A balanced process which examines the conservation inconsistencies and gaps, as well as the issues raised by developers.
32. Strike an advisory panel that is balanced with an equal number of environmental and industry representatives.

ORA is requesting involvement in any additional consultation and outreach on these proposed approaches to the regulatory amendments, and any other related policy reviews.

Thank you for this opportunity to comment.

Respectfully,

Linda Heron
Chair, Ontario Rivers Alliance

Cc: Honourable Kathleen Wynne, Premier of Ontario - KWynne.mpp.co@liberal.ola.org
Honourable David Orazietti, Minister of Natural Resources - Minister.mnr@ontario.ca
Honourable Bob Chiarelli, Minister of Energy - BChiarelli.mpp@liberal.ola.org
Honourable Jim Bradley, Minister of Environment - Minister.moe@ontario.ca
David O'Toole, Deputy Minister of Natural Resources - David.Otoole@ontario.ca
Gord Miller, ECO - Commissioner@eco.on.ca
Anastasia Lintner, EcoJustice - ALintner@ecojustice.ca
Paul Norris, OWA - PNorris@owa.ca