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June 20, 2011

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Dear Ms. Nugent and Ms. Marshall,

Introduction:

Ms. Nugent, I have many reactions to and some requests and recommendations related to proposed agreements in two public notices re disposition of American Eel. The notices were provided to me by Andrew Jobes. They identify you as the contact for public comment:

1. Chats Falls Generating Station owned by Ontario Power Generation Inc. on the Ottawa River in Fitzroy Harbour, Ontario and
2. Hydro-electric Generating Stations on the Mississippi River
 - a. Galetta owned by Canadian Hydro Developers Inc.
 - b. Almonte Lower Falls owned by Mississippi River Power Corporation
 - c. Enerdu owned by Enerdu Power Systems Ltd.
 - d. Appleton owned by Canadian Hydro Developers Inc.
 - e. High Falls owned by Ontario Power Generation Inc.

Ms. Marshall, I also have reactions, requests and recommendations about another public notice provided to me by Andrew Jobes, this one for which you are named as the contact:

- Chenaux Generating Station owned by Ontario Power Generation Inc.

An initial problem with the notices is their format. The actual proposals are not presented, only someone's summary of the points included in the proposal. That format risks misunderstandings.

Process for Agreement Development:

I note that there is a complete lack of continuity in the seven proposed agreements and between these proposed agreements and other proposed agreements elsewhere in Ontario. I can only imagine what difficulty individual MNR Districts must be experiencing as they enter negotiations without a specific provincial protocol for the conduct of those negotiations with waterpower industry representatives who see ESA as a bitter pill to swallow and exert pressure and pushback as a broad strategy even though the industry has largely been responsible for the decline of the species. Although it has been three years since O. Reg. 242/08 was enacted, until April 26, 2011 MNR did not post a proposal to the Environmental Registry re its EBR 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*. That document proposes incomplete and ineffective features and was not finalized as policy so negotiations with the waterpower industry were undertaken in the MNR districts without the benefit of a province wide protocol on how to conduct the negotiations. That is wrong so, as a dissatisfied taxpayer, I protest the process used by MNR to generate the proposed agreements even as I sympathize with MNR District offices for having to deal with the confusion by using their own varied personal judgments.

Through my June 15, 2008 public input to MNR re EBR 010-3320 (To establish new regulatory provisions under the Endangered Species Act, 2007 to allow certain activities to continue), I alerted MNR to issues which it could have incorporated into the proposed agreements. For unknown reasons MNR has decided not to follow that advice. I ask that all of my three-year-old public comment to EBR 010-3320 be reviewed and incorporated into any agreement which goes forward. I also ask that my public comments re EBR 011-3334 be reviewed and incorporated into any agreement which goes forward.

In the face of the lack of provincial terms of reference for negotiations between MNR Districts and waterpower facilities owners, MNR has fallen back on an existing policy created in 2002 before ESA 2007 was enacted and before MNR had a commitment to the precautionary principle, a provincial biodiversity strategy or revisions to its Statement of Environmental Values which now embrace cumulative effects since the Ontario government lost its appeal in the LaFarge case in late 2008. As a result the seven proposed agreements are being evaluated in accordance with a Category B project under the Class EA-RSFD (Resource Stewardship and Facility Development)

standards. I vigorously disagree with the MNR decisions to evaluate the projects as Category B projects. Such a low standard of evaluation does not adequately address the scope of issues required at all seven facilities to meet MNR's obligations for resource stewardship at these locations. Consideration under Category B instead of Category D reveals that, in accordance with page 26 of the guide, MNR does not consider the disposition of American Eel to be "complex" (Consideration #1), MNR does not envision "potential for serious negative effects on species at risk" (Consideration #2), MNR does not consider the presence of "effects which require mitigation techniques" (Consideration #3), MNR does not envision "potential to reduce negative effects or increase public understanding by examining other alternatives" (Consideration #4), MNR does not envision "a new or contentious interpretation of management direction or other MNR policy" (Consideration #5), and, especially, MNR does not believe that "a distinct benefit can be derived from the process requirements of Part II of the EA Act including Terms of Reference, formal government review and a decision by the Minister of the Environment (or the Environmental Review Tribunal" (Consideration #6). The shabby result of MNR consideration under Category B is the set of largely token and completely ineffective plans in the various proposed agreements. The MNR Category B decision shows contempt for the precautionary principle which MNR espouses and a willingness to allow the positions of hard-bargaining waterpower facility owners to go forward for public comment. Clearly MNR ignored earlier warnings and did not estimate that "adverse reaction was likely", ignored the likelihood that "a highly polarized and complex situation" might be present and did not understand that a Category B consideration would not "adequately address concerns" (CEA for MNR RSFD Projects, Table 3.2, page 26). Such an MNR decision is unacceptable.

The clauses in the proposed agreements vary significantly from the plans in the draft American Eel Recovery Strategy (MacGregor et al 2010) which was posted on the MNR website in conjunction with November 12, 2010 EBR Posting 011-1606. For instance, safe upstream and downstream fish passage and monitoring standards are not adequately addressed in any of the seven proposed agreements. Construction of fishways is stated specifically in Section 2.2.3 (Fisheries Population and Habitat Management), page 6 of the Class EA-RSFD guide. MNR has not ensured compliance with Section 2.2.3.3 of the EA-RSFD 2002:7 re fishways. If MNR were to accept the wording in the proposed agreements it would undermine the thoughtful work of the American Eel Recovery Strategy team for this species and also undermine the highly positive relationships that the Recovery Team has established with Aboriginal people as part of its

mandate. This undermining is a matter of grave concern which seems to presuppose that MNR has the right to sabotage the work of one of its own writing teams which has operated within its legal mandate and with a record of exemplary consultation over the past 30 months. I make this statement from a background as a writing team member who, in good faith, with trust in stated Ontario Government commitments, and with assiduous attention to detail, has worked within the procedures set by government to ensure recovery of the species.

In addition, the first paragraph of the notices re the seven proposed agreements states that “the disposition is facilitated by an agreement with [Ontario Power Generation Inc./hydro electric generating stations on the Mississippi River] under Section 11 of Ontario Regulation 242/08 under the *Endangered Species Act 2007*.” That is an incomplete, misleading and manipulative statement. What the notice fails to mention is that the agreement process under O. Reg. 242/08 is only one of the mechanisms available to MNR. The notice fails to mention that other MNR EA mechanisms apply to stewardship of American Eel as outlined in Section 2.6 of EA-RSFD 2002:13-14) and that integration of those additional mechanisms is standard procedure under the Class EA process. For instance, Section 32 of the Lakes and Rivers Improvement Act (LRIA) needs to be applied by MNR in each of these seven settings as it was at the Domtar project at Chaudière Falls. Indeed, without the LRIA reference in the notices and without the LRIA integration stated in each agreement the proposed agreements are not consistent with MNR Minister Jeffrey’s reassurance to me that MNR will not avoid its responsibilities under the LRIA for fish passage and ecosystem health and will “ensure that renewable energy projects consider the needs of aquatic ecosystems.” (Jeffrey to Allen, 2011 02 03, copy attached).

Context of Agreement Development

A. Net benefit

There has been much discussion about the concept of “net benefit” to eels as recovery of the species is implemented. If MNR honours its commitment to cumulative effects, as provided in its Statement of Environmental Values (SEVs), net benefit cannot be applied to individual hydro-electric facilities but must be applied to the entire watershed. Net benefit and cumulative effects are intertwined. Net benefit also can be marginal or extensive or anywhere along the continuum between these two extremes. Marginal net benefit will not ensure species recovery.

Consider a hypothetical scenario where the portion of a watershed with eel habitat has 5 existing hydro-electric facilities and an Ontario Government commitment for the addition of two new facilities. After the new dams are built the eels have to migrate past seven dams instead of the current five. If planning for increased safe passage of eels is undertaken at only an individual facility instead of the series of facilities, a marginal increase will satisfy the test of net benefit only at that facility. But, no matter how high a standard for eel passage is built into the design of each new facility in the same watershed, each new facility will produce its own additional risk to safe eel passage. The overall cumulative effect of adding the new facility to the sequence of existing facilities in the watershed may override the individual net benefits at the existing facilities. That means that agreements at existing facilities must take into account the projected added risk to eels in migrating past an increased number of facilities wherever the Ontario government plans to allow additional new hydro generating facilities in the watershed. If the agreements have very long terms, such as 30 years as proposed, the individual agreements must have an extremely high net benefit for eels at each facility in order to ensure watershed net benefit. As each new facility is added to a watershed each of the existing facilities must guarantee a higher net benefit if watershed net benefit is to be achieved.

To understand this concept net benefit has to be quantified. I am one of the authors of a paper about to be published by the American Fisheries Society. (MacGregor et al 2011 in preparation, *The Demise of American Eel in the Upper St. Lawrence River, Lake Ontario, Ottawa River and Associated Watersheds: Implications of Regional Cumulative Effects*). Among the references is my own 2008 *American eel: Driving a Shift in Power*. The Mississippi River, the same river which is the target of one of the MNR notices, is the river featured in MacGregor et al 2011. A mature female American Eel was found in Lake Mississippi by MNR so, using Monte Carlo modeling, we assessed the probability of that eel migrating safely past the six hydro-electric dams on its way to its spawning location, 3 dams of the Mississippi (Appleton, Almonte, Galetta) plus Chats Falls, Chaudière Falls and Carillon on the stem of the Ottawa River). Our statistical analysis revealed a survival rate between 2.8% and 40%. Mortality risk varies somewhat at different facilities and tends to be higher where facilities have smaller turbines but the average mortality is at least 15% per facility.

Since the MacGregor et al 2011 scientific data serve as an example of migrating eel survival rate past a series of hydro-electric dams it is clear that a marginal net benefit at each of six facilities in a migration sequence would not be sufficient to counteract the addition of even one new facility in the same watershed. Watershed net benefit for migrating eels would not be maintained unless individual existing facilities provided an increased net benefit that more than counteracted the negative effects of introducing a new hydro-electric facility to the watershed. Unfortunately, all seven of the proposed agreements fail completely to recognize this reality. Abandoning its commitment to cumulative effects MNR has allowed the proposed study areas affected to be defined in terms encompassing only the areas “immediately upstream and downstream of the hydro-electric generating facility”. Furthermore, under “project description, scale, and duration” the proposed list of reasons for making amendments during the 30 years term do not include watershed net benefit, an omission which almost certainly will lead to further decline of the species. MNR must not let that happen. It has a legal responsibility to ensure watershed net benefit for the eels.

B. Watershed Management:

Watershed net benefit is not the only aspect of watershed management. The American Eel Recovery Plan, which is about to be submitted as advice to government, will advise the need for a strategic watershed approach to eel recovery as a fundamental foundation to government action. The proposed agreements interfere with that strategy and must not be signed. The proposed agreements are at odds with the statement that “proposed agreements, if complied with, will not jeopardize the survival or recovery of the species.” If the proposed agreements are signed by MNR this statement will be false, an issue which will have profound impact on MNR and possibly on the public view of the integrity of the Ontario Government. A false statement, given the limited scope of mitigation plans listed, not only undermines the process for establishing a recovery plan for American Eel but, by precedent, has the effect of sabotaging the recovery plan development process for all species listed under ESA 2007. Statements about compliance with species recovery cannot be made until the government response to the advice in a draft Recovery Strategy has been formally announced as government policy. The development of policy through a back door which does not involve the process endorsed in legislation is unprofessional and subject to a formal public complaint to the Minister. MNR, apparently without the Minister’s knowledge, previously tried to use such an inappropriate and inadvisable process for proposing aspects of policy change via its EBR posting 011-1306 *Technical Guidelines and Requirements*

for Approval under the Lakes and Rivers Improvement Act. That inappropriate process within one component of the posting led directly to my formal complaint to the Minister and her written reassurances to me. MNR obviously has not learned its lesson about this matter. Once again, in the days ahead I will be writing the Minister once I see whether this inappropriate attempt to sabotage an existing government policy process is attempted in these seven proposed waterpower agreements. Waterpower industry and MNR contempt for government processes cannot and will not be tolerated by the public.

C. Ecological Integrity

Ecosystems have integrity when they have their native components intact, including: abiotic components such as water and rocks, biodiversity and ecosystem processes. American Eel is part of a watershed which exhibits ecological integrity. Ecological integrity is not acknowledged in the proposed agreements which, instead, reflect a highly imbalanced notion of water as resource and wrongly support a value that fragmenting the interconnectedness within an ecosystem is appropriate. Such MNR values are highly problematic, are inconsistent with MNR's protection mandate and responsibility, and reveal a lack of respect for *Ginawaydaganuc*, the Aboriginal concept of interconnectedness of all life and our mutual responsibility to care for that life.

D. Victims of Eel Extirpation

In entering negotiations with the waterpower industry the representatives of MNR need to acknowledge the relative past and present negative impacts on different groups affected by extirpation of American Eel in the upper ranges of watersheds. By far the biggest negative impact has been on First Nations and Métis. The commercial fishing industry on Lake Temiskaming no longer has a sustainable eel fishery so it, too, has experienced a negative impact. To date waterpower operations have not been affected significantly even though they are the major contributor to the shrinking range of American Eel over many decades. The industry has not voluntarily applied for permission to kill fish under the federal Fisheries Act and has pressured the Ontario Government not to impose Section 32 fish passage provisions under the Lakes and Rivers Improvement Act. The greatest economic hit has been experienced by Aboriginal people. Commercial fishers also have taken an economic hit. The waterpower industry, on the other hand, has developed a huge infrastructure with high paid staff and executives and has developed the capability to hire legal, public relations and lobby specialists to advance its own interests and to overwhelm the public comment process so that skewed waterpower-friendly public opinion could be interpreted by MNR as representative of public opinion. The process of establishing

agreements with the waterpower industry has the potential to correct some of this huge imbalance. Whenever someone from MNR is asked to consider the economic realities of our time it is paramount to understand and to act on the fact that the economic reality that needs most rectifying is that of Ontario's First Nations within the historic range of American Eel. The waterpower industry can afford to establish fish passage facilities and must be expected to provide such permanent facilities as part of all agreements. Waterpower industry arguments about economic feasibility of ensuring safe fish passage are not credible. The waterpower industry prefers to operate outside the spirit of ESA in the pre-Lafarge era so must be expected by MNR to get up to date. There is no justification for MNR to accept the minimalist terms proposed by the waterpower industry in these seven proposed agreements.

E. Monitoring:

The monitoring and evaluation processes described in the seven proposed agreements fall far short of the minimum scientific standards for effective data collection and must not be allowed to be the basis of future decision making. MNR has a responsibility to reject such a low standard.

Adequacy of Proposed Agreements; Related Requests and Recommendations:

For multiple reasons I am not satisfied with any of the seven agreement proposals. Under the circumstances I request that MNR not enter any of the seven agreements (Allen Recommendation #1). In accordance with Section 5.6 of the Class EA –RSFD process **I ask that MNR voluntarily request the Minister of the Environment to make a Part II order, to have each of the seven projects evaluated under an Individual Environmental Assessment (IEA) (EA-RSFD 2002:39)**. By separate communication to the Minister of the Environment I am making my own request for the elevation to an Individual Environmental Assessment for each of these seven proposed agreements. I ask MNR to recognize that elevation to an IEA is necessary because of the current highly polarized and complex situation. Even as many Aboriginal and non-Aboriginal voices support aggressive recovery strategies for the eels the waterpower industry has projected an opposing view where eels are at near extirpation levels of abundance, citing invalid arguments about economic feasibility where eels currently are vulnerable because of low abundance. MNR has the responsibility to comply with a process in its agreements with the waterpower industry which reflects much more than the lopsided position and token actions of the waterpower industry as evidenced in the current set of proposed agreements. The current process used by MNR has not adequately considered the polarization and complexity of this issue. The result is an unacceptable series of proposed agreements doomed to failure to contribute to recovery of the species.

I also reiterate my recommendation to Andrew Jobes (Allen to Jobes 2011 05 26) 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 (Allen Recommendation #2). That additional time also will allow for completion, without penalty to owners of waterpower facilities, of the requested IEAs for all seven projects.

I also recommend that MNR establish a sequential numbering system for all dams from the furthest downstream and working upstream in succession i.e. Carillon on the Ottawa River is Dam #O1, Dams at Chaudiere Falls are #O2a, O2b, O2c, O2d, Chats Falls is O3, Chenaux is O4 etc. (Allen Recommendation #3). Tributaries would be coded accordingly in sequence. This numbering system would be helpful to everyone in identifying the position of each dam in the overall American Eel migration route, information which will assist discussions about cumulative effects of eels passing the necessary sequence of dams from any given habitat area. I first called for such a numbering system in my November, 2008 presentation to the Latonnell Symposium (Allen 2008 11 20) but have found MNR tardy to help itself with implementing such a system. I believe that, in the interests of clarity, it is time to implement that system.

Applicability to Other Proposed Agreements and Potential Agreements:

The seven proposed agreements span only some of the existing hydro-electric facilities in the Ottawa River Watershed where American Eel have been found recently.

1. Carillon (no known agreement proposed and no rationale provided by MNR for the omission)
2. Chaudière Falls (proposed agreement *Disposition of American Eel (Anguilla rostrata) Hydro-Electric Facilities owned by Domtar Inc. and Energy Ottawa Inc. located at Chaudière Falls on the Ottawa River*. For continuity please review the W. Allen to Sarah Nugent communication of 2011 05 24 re Public Comment to MNR re Notice of proposed agreement at this location.)
3. Rivers such as the South Nation River where some existing flood control dams and/or weirs may be considered as “existing” structures at which hydro-electricity facilities could be added under the label “redevelopment” rather than “new” as was the case with Domtar Inc. at Chaudière Falls. See <http://www.nation.on.ca/en/planning--and--engineering/engineering/water-control-structures/>
4. Facilities such as Renfrew Power’s existing Renfrew 1 and 2 facilities on the Bonnechere River as listed in MNR’s Proposed Hydro-electric Generating Station Agreements under Ontario Regulation 242/08 of the Endangered Species Act. 2007. Available:

http://www.mnr.gov.on.ca/stdprodcontrib/groups/lr/@mnr/@species/documents/document/stdprod_085495.pdf

Because of the uncompleted business by MNR re agreements with such facilities another reason exists to extend the deadline for completion of agreements under S.11 to a date 12 months after the public release of Ontario Government policy outlining the long term recovery strategy for American Eel (Allen Recommendation #2). The additional time not only will allow for completion, without penalty to owners of waterpower facilities, of the requested IEAs for all seven projects in the current set of notices, but will provide time for MNR to prepare agreements with owners of other existing facilities where no agreements to date have been proposed.

Summary:

The seven proposed agreements reveal huge “mission drift” away from the mission and spirit of ESA 2007 and a focus, instead, on minimal action of such a low standard that if these agreements are signed the work of the provincial American Eel Recovery Strategy Team will be severely compromised, the positive relationships between the Ontario Government and Aboriginal people will unravel, and the recovery of American Eel in the Ottawa Watershed will be at substantial risk. In addition, signing the agreements as proposed would place Minister Jeffrey at political risk because the agreements contain clauses that are contrary to her public commitments. The Minister must not be placed in such a position of risk.

The seven proposals as written, if signed, will add one more policy issue to the policy threats already faced by American Eels. It is imperative that MNR not sign them. In my public comment about the proposed agreements I call for the deadline for completion of agreements under S.11 to be extended to a date 12 months after the public release of Ontario Government policy outlining the long term recovery strategy for American Eel. This can be accomplished by the following strategies:

- timely intervention of the Director of the Species at Risk Branch to bring about the necessary regulatory change of deadline
- timely intervention of the Environmental Commissioner as a friend of American Eels
- voluntary request by MNR to the Minister of the Environment to make a Part II order to have each of the seven projects evaluated under an Individual Environmental Assessment

- involvement of the Minister of the Environment to make a Part II order to have each of the seven projects evaluated under an Individual Environmental Assessment as a result of my personal request
- possible other Ontario Government strategy that achieves the goal of extending the deadline well past the public release of Ontario Government policy outlining the long term recovery strategy for American Eel.

It appears that the framers of O. Reg. 242/08 made some false assumptions about the readiness of MNR and the waterpower industry to enter suitable agreements within three years of the passage of the regulation. Possible perspectives of the regulation framers include the following:

1. They did not comprehend the severe implications of a June 30, 2011 deadline in a scenario where the government response to the American Eel Recovery Strategy was not available prior to the beginning of MNR district negotiations with owners of waterpower facilities (In reality the government response will not be available by June 30, 2011.)
2. They assumed that the government response to the American Eel Recovery Strategy would be available by early 2011 in time for negotiations to take place by MNR negotiators. (The government response was not available before Districts embarked on negotiations.)
3. They assumed that soon after June 30, 2008 when O. Reg 242/08 came into effect that MNR would spring into action and provide a negotiating protocol for district negotiators by early 2009. (As of June 20, 2011 MNR Districts do not have a standard protocol for negotiating agreements with the waterpower industry.)
4. They assumed that negotiations would be simplified if, during 2008, 2009 and 2010 MNR would implement fish passage provisions in LRIA. (MNR has only one known LRIA directive in the Ottawa River Watershed as of June 20, 2011 i.e. Chaudière Falls case)

Given these circumstances we can understand why MNR is now hoisted on its own petard. So let's rectify the situation. Solutions cannot be accomplished at the district level by Ms. Nugent and Ms. Marshall. Rather they require the appropriate action of senior officials of the Ontario Government.

Conclusion:

Thank you for the opportunity to comment on this matter. I hope that MNR understands the gravity and long term negative consequences of rigidly continuing along a dangerous path to accept the proposed agreements. We know from fisheries science that juvenile eels come upstream in periodic pulses once every few years. For a species that is so endangered it is imperative that we have appropriate fish passage facilities in place when the strong year class of the next pulse arrives.

Sincerely,

William A. Allen

Copies:

- Marc Rondeau, Director, SARB
- Gord Miller, Environmental Commissioner Ontario
- Honourable John Wilkinson, Minister of the Environment
- Fellow authors of Ontario's American Eel Recovery Strategy (Rob MacGregor, Larry McDermott, John Casselman, Lorne Grieg, Trevor Friessen)
- Anne Bendig, Chair, American Eel Recovery Strategy Team
- Gail Jackson, Senior Permits & Agreements Specialist, SARB
- Andrew Jobes, Permits and Agreements Specialist (acting), MNR Policy Division
- Andy Baxter, Project Manager, MNR
- Kirby Punt, MNR Pembroke
- John Dettmers, Great Lakes Fisheries Commission
- Kevin Reid, Ontario Commercial Fisheries Association
- Linda Heron, Ontario Rivers Alliance

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3. Allen, W. 2008 06 15. Public Comment to MNR re EBR 010-3320 (To establish new regulatory provisions under the Endangered Species Act, 2007 to allow certain activities to continue)
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11. Allen, W. to Andrew Jobes. 2011 05 26. (Public Comment to MNR re 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)
12. MacGregor et al. 2011 (in preparation). *The Demise of American Eel in the Upper St. Lawrence River, Lake Ontario, Ottawa River and Associated Watersheds: Implications of Regional Cumulative Effects*. American Fisheries Society, Maryland.