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Waterpower industry activities and the *Endangered Species Act*

Ontario's *Endangered Species Act* (ESA) provides a strong legislative framework for the protection and recovery of Ontario's native species at risk and their habitats. The ESA applies to everyone – individuals, businesses, conservation authorities, municipal governments and the provincial government. The waterpower industry is encouraged to learn about their requirements under the ESA when operating waterpower facilities or when planning for new facilities or major upgrades.

Key components of the ESA

Defined under the ESA, a species at risk is any native plant or animal in danger of extinction or of disappearing from Ontario. When there is concern a species may be at risk, it is reviewed by the Committee on the Status of Species at Risk in Ontario. If a species is classified at risk they are added to the Species at Risk in Ontario (SARO) List in one of four categories, extirpated, endangered, threatened, or special concern, depending on the degree of risk. Visit ontario.ca/speciesatrisk for a current list of species at risk in Ontario.

There are two key protection provisions in the ESA:

- Section 9 - describes prohibited activities (e.g. kill, harm, harass, possess, collect, buy and sell) for species listed as extirpated, endangered or threatened on the SARO List.
- Section 10 - prohibits the damage or destruction of the protected habitat of species listed as extirpated, endangered or threatened on the SARO List.

Under the ESA, authorizations may be issued to authorize activities that would otherwise be prohibited. Waterpower activities that will adversely affect protected species or habitat may proceed if authorization under the ESA has been obtained. If the construction or operation of a waterpower facility does not adversely affect protected species or habitat, it does not require a permit or agreement under the ESA. The Ministry of Natural Resources (MNR) can provide advice on the potential adverse effects of waterpower facilities on identified species and all aspects of the ESA.



Photo credit: Kim Groenendyk

Agreements under Ontario Regulation 242/08 for waterpower operations

If it is determined that the waterpower operation is adversely affecting an endangered or threatened species or protected habitat, Section 11 of Ontario Regulation 242/08 provides operators until June 30, 2011 to enter into agreements for species that were listed as of June 30, 2008. For new species added to list after June 30, 2008, or are newly discovered at a facility, facilities must enter into agreements within a three year timeframe. Operators may develop one agreement for all species known to be impacted by a facility, however, if applicable, the timelines established under O. Reg. 242/08 must still be met.

An agreement can be entered into between the operator and the Minister of Natural Resources to allow continued operation, provided the operation does not jeopardize the survival or recovery of the species in Ontario, and the agreement does not conflict with obligations of the Minister to implement recovery actions. Conditions in the agreement, at a minimum, require the operator to minimize adverse impacts on the species and to monitor the effects of the facility's operation on the species.

Agreements may apply to more than one species and are negotiated initially for 30 years, with the possibility of extension. The agreement may include conditions on the operation of the waterpower facility, activities to protect species and/or habitat and mitigation measures to reduce adverse effects. A standard template agreement has been developed by the MNR in collaboration with the Ontario Waterpower Association and is available through the Ontario Waterpower Association's web-site at www.owa.ca.

Permits for new construction

When a new facility or major upgrade is being planned, the operator should obtain the best available information to determine if the construction of the proposed project will harm or harass a protected species or damage or destroy habitat. An initial evaluation is usually undertaken through the Class Environmental Assessment for Waterpower planning process. If adverse effects are identified and cannot be avoided, to ensure compliance with the ESA, the operator is encouraged to apply for and obtain a permit prior to the construction taking place.

In general, should the construction of a new waterpower facility or significant modification of an existing facility adversely affect an endangered or threatened species or protected habitat, this would require an ESA section 17(2)c permit, which requires:

- consideration of reasonable alternatives and justification of the best alternative to be adopted;
- reasonable steps are taken to minimize adverse effects on individual members of the species as conditions of the permit; and
- an overall benefit to the species is achieved within a reasonable period of time.

New facilities may also require authorization to operate over the long-term, if the facility will impact species or their protected habitat. This may result in more than one authorization (e.g. a permit for construction and an agreement for operation). These authorizations need to be considered in a comprehensive manner.

Using best available species at risk information

The Natural Heritage Information Centre (NHIC) (nhic.mnr.gov.on.ca) hosts the province's central online database for species at risk sightings. Proponents and operators should continue to use this resource to research where species at risk have been documented, recognizing that the database does not represent a complete record of all species at risk occurrences in Ontario. The NHIC database is routinely updated when new information becomes available. Fisheries and Oceans Canada also maintains data on fish and freshwater mussels at risk and provides distribution maps through Conservation Ontario at www.conservation-ontario.on.ca/projects/DFO.html.

Since comprehensive mapping of habitat of most endangered and threatened species is not available, MNR encourages proponents and operators to contact their local MNR District Office to determine if additional species or its habitat information is available in the waterpower operation area. A species occurrence is simply a location where an endangered, threatened or special concern species is known to occur. It does not necessarily identify the complete habitat that is used and required by a species.

Existing waterpower facilities operating in the province of Ontario

Do threatened or endangered species occur in the area of the activity?

Self-screening: Review of best available information, including NHIC website, Fisheries and Oceans Canada, local MNR District Offices, existing local knowledge, site assessment, etc. Where the operator deems there is insufficient information, the operator may choose to contact the local MNR District Office.

NO

Self-screening does not indicate presence of a threatened or endangered species. The operator may proceed at their discretion and the MNR may provide a letter confirming this.

YES

Will the activity adversely affect the identified species?

The operator may provide information on location of activity and results of self-screening to MNR district staff. MNR staff will then review this and other additional information, as available, and provide advice on potential impacts to the identified species.

NO

The activity will not adversely affect the identified species. The operator may proceed at their discretion and the MNR may provide a letter confirming this.

YES

Can adverse effects to the identified species be avoided?

The operator and MNR district staff determine if adverse effects can be avoided e.g. timing of the activity, method, etc.

YES

Adverse effects to the identified species can be avoided. The operator may proceed by implementing agreed upon avoidance measures.

NO

Opportunity to enter into an agreement with MNR.



American Eel



Lake Sturgeon

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Frequently asked questions

1. Where can I find more information about Ontario's Endangered Species Act (ESA) and species at risk?

For general information on the Act and species at risk in Ontario, please visit the Ministry of Natural Resources Species at Risk website at ontario.ca/speciesatrisk.

You may also contact your local MNR District Office for advice. For a complete list of ministry offices across Ontario, visit our website at ontario.ca/mnr.

2. How long will it take to obtain an agreement or permit under the ESA?

The timelines associated with obtaining a permit or agreement will vary, depending on the complexity of the request. The majority of permits and agreements are completed within six months, however complex situations may take longer.

3. Are there costs associated with the application process for a permit or agreement under Regulation 242/08 of the ESA?

There is no cost to the applicant for permits and agreements under the ESA. However, there may be costs related to site assessment, inventory, monitoring or assessment work, and for actions that are needed to comply with the permit or agreement. These costs are the responsibility of the applicant.

4. Does the ministry have access to private lands to look for species at risk or their habitat?

In general, ministry staff do not have rights of entry onto private property under the ESA. Exceptions include the authority for enforcement officers to enter for certain enforcement actions and to ensure compliance with an agreement or permit under the ESA.

5. If my existing permit and/or operating plan has terms and conditions relating to the protection of species at risk, do I still need to apply under the ESA for a permit or agreement?

It is recommended that you contact the MNR District Office in your area to determine if current conditions adequately address species at risk.

6. If I discover a species at risk is effected by my operation, do I have a legal obligation to advise the ministry?

The ESA does not obligate the operator to report species at risk. However, advising the ministry and discussing the presence of a species at risk can help ensure that current or future activities of your facility will not result in an adverse effect on the species, which would be an offence under the ESA.

7. Does the ESA apply to waterpower generating facilities located on federal waterways?

The determination of whether the ESA might apply to the operation of a waterpower facility located along a federal waterway depends upon whether the facility is physically located on federal crown land. Such a determination must be made on case by case basis as not every facility situated along a federal waterway is located on land owned by the federal crown.

8. How is protected habitat defined in the ESA?

Under the ESA, 2007, "habitat" means,

- (a) with respect to a species of animal, plant or other organism for which a regulation made under clause 55 (1) (a) is in force, the area prescribed by that regulation as the habitat of the species, or
 - (b) with respect to any other species of animal, plant or other organism, an area on which the species depends, directly or indirectly, to carry on its life processes, including life processes such as reproduction, rearing, hibernation, migration or feeding,
- and includes places in the area described in clause (a) or (b), whichever is applicable, that are used by members of the species as dens, nests, hibernacula or other residences; ("habitat").

For additional information:

Visit the species at risk website at ontario.ca/speciesatrisk

Contact your MNR district office

Contact the Natural Resources Information Centre
1-800-667-1940

TTY 1-866-686-6072

mnr.nric.mnr@ontario.ca

ontario.ca/mnr