

*"ANALYZING AN ANALYSIS"*

# Peel/Halton Landowners Association

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Monday, January 22, 2007

Ms. Debbie Ramsay, Manager  
Species at Risk Legislative Review  
Ministry of Natural Resources  
6<sup>th</sup> Floor, Room 6630, Whitney Block  
99 Wellesley Street, West  
Toronto, Ontario, M7A 1W3

Dear Ms. Ramsay:

Re: EBR Registry Number AB06E6001  
Report of the Endangered Species Act Review Advisory Panel: Submitted to the Hon.  
David Ramsay, Minister of Natural Resources August 11, 2006  
Peel-Halton Landowners Association 2<sup>nd</sup> Response

by FAX to 705-755-1788

The following comments are in addition to the PHLA response of Tuesday, July 4, 2006 to the Endangered Species Act Review; EBR Registry Number: AB06E6001. There is no indication that any of the PHLA concerns raised in our first response were read and considered. As a consequence this second set of comments must be read along with the first and considered as whole.

## Offences & their Defence:

Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed acts which, in the case of Species at Risk, are proposed to be both broad and diffuse: killing, harming, harassing, capturing, taking, possessing, collecting, buying, selling, or trading of a listed endangered, threatened or extirpated species or attempting to do such.

The Panel advocates a due diligence defence be used in the enforcement of the SAR legislation along with the removal of the requirement to prove wilful intent. Applied to endangered species or species at risk [SAR], due diligence means that landowners and their agents shall take all reasonable precautions, under the particular circumstances, to prevent disturbance or harm to listed taxa

on their lands. Presumably to exercise due diligence, a land owner or their agent [tenant, contractor or consultant] must investigate all possible listed taxa which may exist or even potentially exist on their lands and implement a plan to identify possible land management hazards to the listed taxa and carry out the appropriate corrective action to prevent disturbance or injuries arising from these hazards. Under the proposed legislation all landowners are to accomplish this work without any compensation. On the contrary, they shall be under considerable threat of prosecution and heavy fines to deliver ecological goods and services for the general public good of all Ontarians.

"Due diligence" is important as a legal defence for a person charged under regulatory legislation whose purpose is to enforce the performance of various duties, thereby safeguarding the general welfare of society. If charged, a defendant may be found not guilty if they can prove that due diligence was exercised. In other words, the defendant must be able to prove that all precautions, reasonable under the circumstances, were taken to protect the health and safety of SAR.

The complexity of the biology of SAR and their habitats and the proposed broad and diffuse proscribed acts makes the governance assumption that a responsible citizen will have a comprehensive knowledge of the proposed law unreasonable. The frustration of this important governance assumption is further compounded by the secrecy of the known locations of all SAR, secrecy of the "decision support systems" or protocols for listing SAR and their habitats, and lack of notice to affected or potentially affected land owners. How will land owners and their agents have an opportunity to be responsible citizens under this proposed legislative system which relies on heavy penalties against offenders on the one hand and no notification and secrecy on the other? There is a fundamental lack of fairness proposed.

The Panel suggestion that the proceeds of prosecution under the Endangered Species Act be directed to a special purpose fund set up to finance activities under the legislation could well lead to a distortion of enforcement activities. The tying of funding to the enforcement of SAR may also create an increased incentive for the production of "scientific" work that is distorted by self-interest where more SAR listings, leads to more enforcement, leading to more funding.

#### Protection of Species & Habitat:

The Panel proposes to reverse the traditional conservation approach of enhancing and restoring habitat and working directly with SAR and instead focus on restricting and prohibiting human activity anywhere in the Province which may kill, harass or harm a SAR. Any current land management activity and any proposed development must under the Panel's proposed SAR centred approach

“demonstrate an overall benefit to the species in question.” The entire landscape of Ontario and all human communities and their economies are to be “permitted” to carry out their activities on a case by case basis to the benefit of SAR. The Panel assumes that perfect knowledge of a SAR biology and habitat may be produced and implemented through the listing process and recovery strategies and associated management plans, produced under surprisingly tight time frames, to the extent that landowners and their agents may conduct their own management and development activities in responsible ways under the legislation. The PHLA expresses astonishment at this Panel assumption and we do not think this recommendation is practicable.

The Panel recommends that the definition “habitat” be expanded to include “areas that an individual or species depends upon to carry out its life processes and where it has the potential to be reintroduced.” The use of such a broad and speculative definition would be in conflict with established rules of administrative justice and fairness when offences are to be based upon the “killing, harming, harassing” of SAR accidentally or deliberately where the SAR may not normally be known to habit an area or when there is just the potential or speculative possibility for a SAR to habit an area. The PHLA also has similar concerns with the Panel’s proposed listing of “species of special concern”.

### A Special SAR Agency?

“The Panel strongly supports Legislative Proposal 1. The Panel agrees that the Committee on the Status of Species at Risk in Ontario (COSSARO) should be identified as the species assessment body, and that COSSARO should be comprised of members with relevant scientific expertise and community or Aboriginal traditional knowledge.”

“The Panel strongly believes that decoupling listing from a rigid protection process will help minimize political influence on the science-based process of listing. Thus, the Panel recommends that upon listing of species, the Act trigger a protection and exceptions system (see Sections 5 and 6), as well as the stewardship programs and recovery process described in Sections 2 and 7. “

The Panel proposes a special purpose agency be created, not to interpret site specific SAR implementation details but to make law completely independent of the legislature and solely in terms of known biological science, eliminating all consideration of socio-economic considerations. The PHLA considers this recommendation contrary to our democratic principles of government. It is beyond belief that a group of wildlife biologists and botanists would be given independent law making authority over the entire landscape of Ontario and all human communities and their economies to the sole benefit of rare and extirpated species. The Panel is clearly self-serving and lacking in a balanced perspective on the wellbeing of Ontario’s people and natural environment. The case has not been clearly made by the Province why the legislation proposed safeguards the general welfare of society. Without this important rationale the Panel has gone off and recommended extreme and unfair measures.

Conclusion:

In our first response the PHLA attempted to articulate a perspective to foster the cooperation of rural landowners which is important to avoid creating a 'sea' of social hostility towards SAR in Ontario. This cooperative and fairness approach continues to be our objective.

This PHLA response has been prepared by Ian G. Sinclair, M.A.E.S., O.A.L.A., Director of PHLA and approved by the Board of PHLA: Lieven Gaevart, Stuart Reddington, Jim Moore, Lynn Moore, Rick Stull, Susan McLure, Robert McLure, Gord McLure, Jim Wallace, Edward Ford-King. The Board appreciates this second opportunity for comment on this far reaching legislative initiative.

Sincerely,

Ian G. Sinclair, on behalf of the Peel-Halton Landowners Association