

# **ENGINEERING SERVICES REPORT NO. Eng- 090/10**

## **Ministry of Natural Resources – *Endangered Species Act, 2007* – Regulation 242/08 s. 23 Exemption Agreement for Municipal Drainage May 11, 2010**

Approval Date: May 17, 2010

### **Background:**

The *Endangered Species Act, 2007* came in force as of June 30, 2008. The *Endangered Species Act* (ESA) provides broader protection to species at risk and their habitats, with appropriate regard to social, economic and cultural considerations by:

- Emphasizing the importance of science in making decisions about the protection of species at risk,
- Recognizing the importance of both species protection & habitat protection
- Achieves balance through flexibility tools (agreements, permits & regulations) that create opportunities for species protection, as well as human activity that might otherwise be prohibited
- Recognizes Aboriginal interests & knowledge
- Promotes stewardship activities to help protect & recover species at risk
- Ensures transparency and accountability
- Includes strong enforcement provisions

The ESA prohibits the killing, capture or harassment of species identified as species at risk, and also prohibits damage to the habitat of species that have general habitat protection or regulated habitat. The legislation that prior to any repair or maintenance of existing municipal drains or creation of new ones, a review be undertaken by the Ministry of Natural Resources to ensure proposed works are not negatively impacting endangered species.

### **Analysis:**

The Ministry of Natural Resources has been working with all municipalities that have municipal drains to finalize an agreement under Section 23 of Regulation 242/08.

The purpose of the agreement is to allow for a mechanism to streamline the approval process under the ESA. The Regulation provides a **time limited opportunity (by June 30, 2010)** for Municipalities with municipal drains existing prior to June 30, 2008 to obtain an exemption agreement. Projects covered by the agreements will be exempt from clause 9(1)(a) and subsection 10(1) of the ESA. Intent of the Agreement is for the Municipality to take "**reasonable steps to minimize adverse effects on the species**" while undertaking future Drainage Activities.

If the municipality chooses not to enter into this agreement, any future maintenance or construction on a Municipal Drain, will need to be screened by the Ministry of Natural Resources, to determine if the drainage activities would have an adverse effect on Species at Risk; if the adverse effects can not be avoided, then a permit would be required. Currently, 17 2(c) permits take 7-8 months for approval, and would require the Municipality to achieve "**overall benefit**" for the species **in addition to** taking "**reasonable steps to minimize adverse effects**". These permits will be posted on the Environmental Bill of Rights Registry for comment prior to you receiving a permit to perform your drainage works. The Environmental Registry contains "public notices" about environmental matters being proposed by all government ministries covered by the Environmental Bill of Rights.

The agreement would apply to the specific species that have been identified to be present within the Municipality, and that may be affected by Drainage Activities. A mitigation plan is being developed that will identify to the Municipality "**reasonable steps to minimize adverse effects**" on the species. The scope of mitigation plans would vary according to the nature of the activity and the species involved. Timing windows and modified management practices would be incorporated into the mitigation plans.

The agreements are currently in draft form pending finalization of various schedules. A copy of the draft agreement is attached. At the appropriate time, staff will be reporting back to Council on the specifics as they relate to the municipal drains within the Municipality and will be recommending approval of the agreement.

We have received clarification regarding Article 8 of the agreement which states:

#### “8.1 Audit

Comments have indicated that they are concerned that this article provides the ability to audit all drains in the municipality. This is primarily due to the fact that we have made the decision to include all drains in the municipality in Schedule A to account for situations where species may be encountered unexpectedly. However, this clause only extends to those drains where activities are subject to the terms and conditions of the agreement i.e. the mitigation plan (Schedule C) applies. Only those drains which have been identified as a Sensitive Area/Sensitive Location in the mitigation plan would subject to the audit provision

Secondly, I want to clearly state that MNR understands that the vast majority of municipal drains occur on private land and it is the responsibility of MNR to obtain landowners permission to access these lands for the purpose of an audit. MNR also understands that that there are rights of way associated with the drain to provide access to the municipality for maintenance purposes and that this land is also privately owned.

#### 8.2 Audit by Municipality

Similar to the concerns raised above, your members have indicated that they interpret this clause as requiring them to audit and report on all activities on all drains within the municipality. As above the intent of this clause was to only audit those drains where activities are subject to the terms and conditions of the agreement i.e. the mitigation plan (Schedule C) applies. The inclusion of this clause was to account for the inability of MNR to access lands for the purpose of auditing e.g. private land.

To address the concerns raised by your members, this clause will be **removed** from the Agreement and self auditing will not be required. Instead, MNR will rely on the annual report to provide sufficient information to ensure the terms and conditions of the agreement are being complied with and as a learning mechanism to help improve the mitigation plan and the area of application in the future.

#### Reporting

Your members have forwarded concerns regarding the reporting requirements of the agreement. As with any legal instrument a mechanism must be included to ensure the terms and condition of the instrument are being complied with. Recognizing the unique circumstances of activities conducted under the Drainage Act, MNR is relying on the reporting to provide information on what takes place on the landscape. In addition, recognizing the time pressures your members are under we are working to streamline and simplify this process to the extent practical. For example, the information currently required in the report closely resembles the information provided to OMAFRA as part of the annual drainage grant reporting. The intent is to take advantage of the information already collected to support this process to minimize work on the Drainage Superintendent. Currently, we have been unable to take the full step of harmonizing this reporting as the objectives of OMAFRA and MNR are different. However, we will endeavour to work with the DSAO and OMAFRA to meet everyone’s needs as we proceed with the implementation of the agreements.

In addition specific, components of the reporting tool have been constructed to help your members work through the mitigation plan and track each step of the screening. This section has been included first to provide a record of compliance with the mitigation plan, should the actions of the municipality be questioned by anyone in the future. Second, this will help us determine what steps of the mitigation plan are working and where adjustments are required to better meet everyone’s needs.

MNR appreciates that the reporting requirements appear onerous at this time, as this process represents a new set of requirements for your members. However, the support the DSAO would be appreciated in highlighting the need and benefits of this reporting to your members.”

**Recommendation:**

That Council approves the report submitted and further authorizes the preparation of a by-law to execute the agreement.

Respectfully submitted,

E.R. (Gene) McLaren, C.E.T.  
Director Engineering Services