



March 23, 2009

Marc Rondeau,  
Director for Species at Risk  
Ministry of Natural Resources  
[marc.rondeau@ontario.ca](mailto:marc.rondeau@ontario.ca)

Jason Travers  
Species at Risk Coordinator  
Ministry of Natural Resources  
[jason.travers@ontario.ca](mailto:jason.travers@ontario.ca)

Dear Marc and Jason,

**Re. Habitat regulations for wood turtle, peregrine falcon and Jefferson salamander**

Thank you for inviting us to the stakeholder session on March 12 regarding the draft habitat regulations for wood turtle, peregrine falcon and Jefferson salamander. We have taken the time since then to reflect on the information and options discussed at the meeting as well as the recently released recovery strategies, and would like to offer the following comments regarding these three regulations specifically and our hopes and expectations for habitat regulations generally.

We begin with the general comments, as these provide a frame for the species-specific comments that follow.

**Expectations for habitat regulations**

**1. Habitat regulations must serve the purpose of protecting and recovering endangered and threatened species.** This is clearly the intent of the legislation and of the habitat policy, as stated for example, in the policy document:

“The goal of species-specific habitat regulations is to protect habitat and help ensure the survival and recovery of endangered and threatened species.” (p. 5)

“Given the central role of habitat protection in species conservation, Ontario is committed to developing species-specific habitat regulations with the goal of protecting habitat that promotes the survival and recovery of endangered and

threatened species.” (p. 10)

We would like to express our concern, that at the March 12 stakeholder session, this policy goal was not clearly presented, resulting in confusion about the purpose of the exercise and about what the habitat regulations need to accomplish.

We recognize of course that socioeconomic implications are also to be considered, along with a number of other factors such as the area protected under the general definition of habitat, the best available scientific information on the species, the recovery strategy, and the government response statement to the recovery strategy (SAR Policy, 4.1, pp. 10 – 11). In the end, however, consideration of all of these factors must serve the ultimate goal of protecting and recovering the species.

**2. Regulating habitat must be based on a precautionary approach.** The need for a precautionary approach to protecting species at risk was written into both the Preamble of the *Endangered Species Act, 2007* (ESA)<sup>1</sup> and into the provisions on recovery strategies. It was thus intended to guide both the implementation of the Act by the government and the interpretation of the Act in the courts.

With regard to our discussions on March 12, a precautionary approach would mean ensuring, among other things, that all of the habitat upon which a species depends to carry out its life processes, whether natural or human-made, is regulated as habitat under the Act. For wide-ranging species such as woodland caribou, it should include the entire current range. As contemplated in both the ESA and the habitat policy, it should also include, where feasible, historically occupied habitat or areas identified as potential habitat.

**3. The habitat regulations must be based on the recommendations of the recovery teams and the best available scientific information.** Both the ESA (section 11.(2)) and the habitat policy make the link between the recovery strategies and the development of the habitat regulations. The ESA requires recovery teams to make recommendations regarding the area to be considered in the development of a habitat regulation for the species. SOS was very concerned when the recovery strategy for woodland caribou did not include these recommendations. However, we are happy to see that the recovery strategies for the other nine fast tracked species do include these recommendations, and trust that that will be the case from now on.

Having read through the nine recovery strategies posted this week on the Environmental Registry, we note that there is a certain inconsistency in terms of the recommendations being put forward by the recovery teams. For example, the recommendations for the three species we discussed on March 12, the peregrine falcon, the wood turtle and the Jefferson salamander look quite strong and scientifically defensible. In contrast, the recommendations for Engelmann’s Quillwort look very weak. The authors of this recovery strategy admit that their recommendations are based on “partial identification” of federal critical habitat, and that knowledge gaps prevent further recommendations from being made at this time. Having looked into the habitat needs for this species, we believe that the critical habitat identified, which stops at the high water mark, will facilitate further development along the Severn and Gull rivers and will not suffice to protect and recover the species.

---

<sup>1</sup> “The United Nations Convention on Biological Diversity takes note of the precautionary principle, which, as described in the Convention, states that, where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.” (ESA, Preamble)

In general, we can expect that recommendations for habitat regulations coming from recovery teams will be scientifically sound advice. Given the inconsistency noted above, and as an extra precaution, however, it is important that even these recommendations be subject to government and public scrutiny to ensure that they reflect the best available science. As the Environmental Commissioner emphasizes in his recent report on the ESA, MNR must ensure that habitats are prescribed on an ecological basis, rather than being driven by economic or social constraints (p. 30).

**4. The habitat regulations should be written so as to automatically include the habitat of any new or unknown occurrences of Threatened or Endangered species.** In other words, there should be no delay between the discovery of habitat and its inclusion as regulated habitat under the Act. This approach is recommended, for example, in the recovery strategy for eastern prairie fringed-orchid:

“It is recommended that the habitat regulation also be written such that it is flexible enough to immediately protect newly discovered occurrences ...” (p. 19)

A similar recommendation is included in the recovery strategy for peregrine falcon:

“the habitat regulation should be written such that it is flexible enough to immediately protect newly discovered Peregrine Falcon nest sites in the same way as currently used sites.” (p. 24)

This approach should be incorporated into all habitat regulations to better protect Threatened and Endangered species.

**5. The habitat regulations should not prescribe an area that is smaller than that which would be protected under the general definition of habitat.** Even though the ESA and the habitat policy allow for habitat regulations to prescribe less than the area protected under the general definition of habitat, such an approach is clearly inappropriate for the vast majority of species at risk in Ontario, most of which are threatened by habitat loss and degradation. The Environmental Commissioner’s report provides sound advice on this issue:

“In the few cases in which habitat loss is not a primary threat to a species at risk, regulating a smaller portion of its habitat may be acceptable. However, the flexibility of this aspect of the law is unnecessary due to all the later exceptions and exemptions that can be granted to address socio-economic concerns by allowing the destruction of habitat once it is regulated (see Sections 7 and 8 of this Special Report). The ECO strongly believes that the Act’s habitat regulation-making powers should typically be applied to reaffirm and delineate the same area that is protected under the general definition, as well as any possible areas that a given species at risk could likely use for the purposes of recovery.” (p.31)

**6. The habitat regulations should prescribe, where feasible, habitat where the species historically occurred and where it is believed to be capable of living.** Both the ESA and the habitat policy allow for habitat regulations to prescribe more than the currently occupied habitat. This option should be pursued wherever possible to help ensure the recovery of the species. The importance of protecting historic habitat is underlined, for example, in the peregrine falcon recovery strategy:

“...to meet the recovery goal, it is necessary to protect historic habitat through a habitat regulation.” (p. 24)

## **Species-specific comments on habitat regulations for wood turtle, peregrine falcon and Jefferson salamander**

Before commenting on each of the habitat regulations, we would like to point out that it would have been very informative to have had the recommendations from the recovery teams in front of us for the stakeholder consultation on March 12. It is hard to understand why you did not present this information to us as a basis for the discussion. Clearly, this is the advice of the leading experts in the field, and should absolutely be the starting point for a discussion designed to consider what should be included in a habitat regulation. We hope that in the future, such critical information will be presented at any stakeholder consultations.

### **Wood turtle**

Overall, we agree with the recommendations put forward by the recovery team, e.g. the range map, the mapping methodology and the numbers used to describe the area that should be prescribed as habitat in the habitat regulation.

For known populations of wood turtle, the mapping methodology put forward by the recovery team should be outlined in the regulation as a basis for determining regulated habitat. However, it is unrealistic to expect that, for all populations, it will be possible to gather the necessary information on spatial occurrence prior to the June 30, 2009 deadline for the habitat regulation. Therefore it is important that the habitat regulation be written so as to automatically include the habitat of any new or unknown populations.

At the March 12 stakeholder consultation, concern was expressed about revealing the known locations of wood turtle populations in the habitat regulation, because of the poaching issue. To address this problem, we would suggest that information on the known location of wood turtle populations be housed at MNR district offices, and that this information be used to provide advice and grant permits for proposed developments. We agree that it should not be widely available to the public.

At the March 12 meeting, the issue of excluding human-created sand piles from the habitat regulation was raised. SOS does not support excluding any nesting habitat, whether human-made or not, from the habitat regulation. This issue should be dealt with through permit requirements that would specify timing when disturbance of the habitat would not be detrimental to the species.

### **Peregrine falcon**

We agree with the recommendations of the recovery team that the regulated habitat should include: historical nest sites used prior to the population collapse in 1963; unoccupied nest sites used since 1986, current nest sites used within the last 10 years, and newly discovered nest sites. We also agree that for cliff nesting birds, the nesting territory (defendable territory) should be included in the regulation, and therefore agree with the recovery team that habitat within 3 km of current or newly discovered nests should be regulated, and that habitat within 1 km of unoccupied or historical nests should be regulated.

We agree with the recommendations regarding regulated habitat for urban birds.

We also agree that the habitat regulation should be written to be flexible enough to immediately protect newly discovered nest sites in the same way as currently used sites.

At the March 12 meeting, there was discussion about whether all nesting sites, including those on human-created habitats, should be included in the regulation. SOS strongly believes that all nesting sites for peregrine falcon should be included in the habitat regulation whether located in natural or human-created habitats. We understand that COSSARO re-examined the status of the

peregrine falcon in the fall of 2008 and decided to retain its status as Threatened, indicating that in Ontario, this species still requires the full protections offered through the ESA.

At the March 12 meeting, the issue of excluding human-created habitats, such as mine sites and quarries, from the habitat regulation was also raised. SOS does not support excluding any nesting territory, whether human-made or not, from the habitat regulation. This issue should be dealt with through permit requirements that would specify the circumstances under which disturbance of the habitat would not be detrimental to the species.

### **Jefferson Salamander**

The habitat regulation for Jefferson salamander must capture all habitat upon which the species depends directly or indirectly to carry out its life processes, including breeding habitat, core habitat, buffers and corridors. We agree with the recovery team that all wetlands or wetland features that provide suitable breeding conditions for the species should be included within the habitat regulation. In addition, we would suggest that both a range map and a map of documented locations of the species be included in the habitat regulation to provide clarity about where the regulation would apply.

We agree with the recovery team that terrestrial habitat, described as suggested by the recovery team, should also be included in the regulation. The recovery team recommends that the regulated habitat include described areas and features extending radially 300 metres from the edge of breeding ponds. We agree that this should be the general approach where the actual habitat of specific populations is not known.

It is our understanding, however, that the actual habitat upon which the species depends varies from one population to another, and that in one instance, the known habitat extended up to one kilometre from the breeding pond. Therefore, where information exists to demonstrate that the habitat of a particular population is bigger or smaller than the area within one km of the breeding pond, the regulation should allow the regulated habitat to be adjusted accordingly.

At the March 12 meeting, the issue of exclusions from the habitat regulation was raised. SOS agrees with the recommendations of the recovery team on this issue, that buildings, structures, and roads should be excluded from the regulation. We also agree that agricultural fields which do not serve as corridors between habitat and breeding areas should also be excluded. However, we would suggest that quarries and other pre-existing industrial land uses not be excluded outright, but that they be treated in the same manner as agricultural fields – i.e., that they be excluded only if they do not serve as a corridor between habitat and breeding areas.

In closing, we would like to thank you once again for meeting with us to discuss the development of these habitat regulations. We look forward to working with the MNR to ensure that the habitat regulations being developed for the ten fast-tracked species provide the best possible protection and the best chances for recovery.

Yours truly,



Anne Bell, Senior Director of Conservation and Education, Ontario Nature



Justin Duncan, Coordinating Lawyer, Ecojustice



Catharine Grant, Boreal Campaigner, ForestEthics



Rachel Plotkin, Biodiversity Policy Analyst, David Suzuki Foundation