

July 31, 2009

Hans Loewig – Chief Administrator Officer
City Administrators Office
City of Guelph

Dear Mr. Loewig:

RE: Hanlon Creek Business Park – Construction of Municipal Services - Ministry of Natural Resources (MNR) Comments

The Ministry appreciates the opportunity to review the information that has been submitted in support of the continued development within the Hanlon Creek Business Park (HCBP). Ministry staff have reviewed the City's response to the Ministry's preliminary recommendations dated May 25, 2009, and the attached Salamander Monitoring Status Report (SMSR 2009) developed by the consultant. The Ministry offers the following comments for consideration with respect to Jefferson Salamander (threatened) and the implications of the Endangered Species Act (ESA 2007) on proceeding with the construction of municipal services for Phases 1 and 2 of the HCBP.

The Ministry acknowledges the significant planning history associated with the HCBP development, and the planning approval given by the Ontario Municipal Board (OMB Decision No. 3143) on November 8, 2006. However, the ESA (2007) came into force on June 30, 2008. At that point, Jefferson Salamander individuals received immediate protection under the legislation. To help promote awareness of the ESA (2007), MNR Guelph District sent an invitation to all municipalities within Guelph District's administrative boundary, to attend a full-day information session (January 27, 2009) on the legislation. This session provided detailed information on the Act's prohibitions, and indicated that the ESA (2007) is binding on everyone. More specifically, the onus is on the person that will undertake the activity, including project proponents and contractors hired by proponents to carry out the activity on their behalf, to ensure they will not contravene the ESA (2007).

To inform potentially affected planning agencies of the draft habitat regulations of the species, the Ministry circulated to the City of Guelph (May 22, 2009), advising you of our Ministry's consultation initiatives relative to a proposed habitat description for Jefferson Salamanders. The draft habitat description has been posted on the Environmental Registry (www.ebr.gov.on.ca, # 010-6490) since May 15, 2009.

The proposed description of habitat to be regulated under the ESA (2007) for Jefferson Salamanders, which is anticipated to be finalized in mid-August 2009, states that:

- i. a wetland, pond or vernal or other temporary pool that is being used by a Jefferson Salamander or Jefferson dominated polyploid, or was used by a Jefferson Salamander or Jefferson dominated polyploid at any time during the previous three years;
- ii. an area that is within 300 meters of a wetland, pond or vernal or other temporary pool described in subparagraph 'i' and that provides suitable foraging, dispersal, migration

or hibernation conditions for Jefferson Salamanders or Jefferson dominated polyploids;
and

- iii. an area that provides suitable conditions for Jefferson Salamanders or Jefferson dominated polyploids to disperse from an area described in subparagraph 'i' to a wetland, pond, vernal or other temporary pool that would provide suitable conditions for Jefferson Salamanders or Jefferson dominated polyploids, if the wetland, pond or vernal or other temporary pool is less than 700 meters from the area described in subparagraph 'i'.

In light of the above information, the Ministry is concerned that the continued development of municipal services within the HCBP potentially may lead to a contravention of s.9 (1) and/or s.10 (1) of the Act. This concern originates from the fact that development is proceeding despite the recent discovery of the species on the subject lands, and in the absence of due consideration to the location of the species habitat.

The Ministry has particular concerns with the evidence and conclusions presented in the SMSR (2009) documentation to support the continued development of municipal services, including but not limited to:

- i. The discovery of a dead salamander within the HCBP area on April 20, 2009 suggests that Jefferson Salamander and their associated habitat occurs on or near the subject lands.
- ii. The SMSR (2009) concluding statements assume that habitat for the species is restricted to breeding habitat, when habitat for the species includes many habitat descriptions referenced in subparagraph i and ii of the draft habitat regulations. The presence of dry conditions in the woodlot, located directly north of culvert crossing A, simply indicates that the woodlot does not contain breeding habitat. However, the north woodlot, the wetland complex to the south, and the area between the north woodlot and the wetland may constitute foraging, dispersal, migration or hibernating habitat. Studies have yet to be undertaken to determine where these habitat types may exist on the subject lands.
- iii. The minnow trap surveys were concluded prematurely on April 9th given that the spring movement period, extended at the very least until April 20th. This fact is consistent with the methodology documented in the SMSR (2009) for the Southwest Kitchener site, where the survey was successful in detecting salamanders on and after April 20th.
- iv. The methodology documented in the SMSR (2009) does not indicate the density of minnow traps per wetland feature monitored or make a comparison between other relevant studies. Therefore, it is possible that the density of minnow traps was insufficient given the size of the identified potential breeding ponds to detect the species.
- v. The SMSR (2009) does not cite any literature to support the conclusion that a species is absent from one location when it is detected in another location during the same time period. Published inventory standards consistently assert that it is extremely difficult to

make such a conclusion, due to (i) rare species are by definition difficult to find and (ii) the potential for studies to be designed and/or carried out differently across site locations.

- vi. The SMSR (2009) states that a larval survey was conducted to determine presence/absence of salamanders. The Ministry stated in our letter dated June 29, 2009, sent concurrently with the issuance of permit # 1052211 to the consultant, that larval inventories cannot confirm absence of the species. Consistent with published inventory standards, dip-netting for salamander larvae is a type of study known as *presence/not detected*. The Jefferson Habitat Recovery team does not support this inventory method, due to the high probability of a false negative result.

The Ministry notes that the construction of Culvert A, adjacent to Blocks 3, 5, 6 and 8 of the HCBP engineering design, was initiated on July 6, 2009. In review of the Ministry's preliminary recommendations to the City (May 25, 2009), the Ministry recommended that the development of Culvert A should not proceed until the site was further examined for Jefferson Salamander habitat and the implications of the ESA (2007) had been considered.

The consultant's position that Jefferson Salamander habitat is not in the vicinity of the Road A crossing, and that impacts of the culverts' installation and associated activities (i.e. vehicular and construction equipment access) will not impact habitat for the species, is not supported by the SMSR's (2009) data/conclusions, nor its lack of acknowledgment of the draft habitat regulations. Based on the surveys completed to date, and the questions still left unanswered regarding compliance with the prohibitions of the ESA (2007), the Ministry is not in the position to support this conclusion.

In review of the locations subject to further investigation, identified within Figure 3 of the SMSR (2009), the City has concluded that potential habitat for the species is not sited in the vicinity of the planned municipal servicing areas, "especially Road A and D." The Ministry notes that the orientation of Road A is directly adjacent to habitat survey Site 2, identified on Figure 3, and is therefore well within the 300 meter radius of the potential breeding habitat as defined by subparagraph ii of the draft habitat regulations.

In addition, it is understood that the City is currently in negotiations to acquire Block 15 from Belmont Equities. The Ministry has been requested by the consultant to confirm the potential ESA (2007) implications for Block 15; scheduled to contain stormwater management (SMW) facility #3. Due to the lack of vernal pools, Block 15 does not contain suitable breeding habitat for the Jefferson Salamanders. Notwithstanding, based on the aforementioned habitat regulations, the Ministry is of the opinion that the potential exists for Block 15 (in-part or completely) to be regulated as migratory or dispersal habitat. This opinion is based on: (i) the location of the occurrence mortality directly south of Block 15, (ii) the subject area's centralized orientation between potential breeding habitat (300 meters) identified on figure 4.0 of the SMSR (2009), and (iii) the extent of contiguous natural features on and adjacent to the subject area. However, in the absence of comprehensive habitat information for the species on site, the Ministry notes that it is premature to determine the definitive development or valuation impacts on Block 15 with respect to the ESA (2007).

The Ministry acknowledges the City's commitment to "exercise extraordinary diligence" for identifying the presence of Jefferson Salamander during the construction of municipal services. However, the Ministry suggests that this approach is problematic, because even if the individuals of the species are

not present within the vicinity of the area subject to development, the area may nevertheless be regulated habitat.

The Ministry recommends that the City provide evidence that development of municipal services within the HCBP will either not occur within regulated habitat, or that the activity scheduled to occur on regulated habitat will not damage or destroy said habitat. Based on the current surveys afforded to the site, and the Ministry's documented concerns, additional studies are required to satisfy the questions still left unanswered (i.e. extent and location of habitat). The Ministry recommends that these studies include a more thorough minnow trap inventory in March through April 2010 (exact dates will depend on weather conditions) and a subsequent movement study employing the pitfall trap-drift fence methodology.

In light of the above comments, the Ministry is not in a position to support the continued construction of municipal services for Phases 1 and 2 of the HCBP in the absence of complete information regarding the extent of Jefferson Salamander habitat. In the absence of complete information the precautionary principle should be applied to ensure development does not contravene s.9 1(a) and/or s.10 1(a) of the ESA (2007). Pending the identification of habitat afforded to Jefferson Salamander within the subject lands, the orientation of municipal services cannot be definitively considered as designed to be "compatible with the habitat and wetland features interior to the HCBP", as suggested in the City's June 29, 2009 correspondence.

Please contact the undersigned if further comment or clarification is required.

Sincerely,

Originally Signed By

Ian Hagman
Guelph District Manager
Ministry of Natural Resources
519-826-4931