

Potential for Safe Harbour Agreements in Ontario

Summary of Spring 2011 Workshops

Prepared by:



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Introduction

This report presents insights and advice from farmers, naturalists and staff from a variety of government and non-government organizations regarding the potential to implement Safe Harbour agreements in Ontario. It summarizes the views expressed by participants in five workshops hosted by Ontario Nature from March to May, 2011 in Kemptville, London, Owen Sound, Guelph and Simcoe.

The objectives of the workshops were:

- 1) to introduce participants to the concept and application of Safe Harbour agreements under Endangered Species Act in U.S.A., and
- 2) to explore potential approaches to implementing Safe Harbour agreements Ontario.

In conducting these workshops and promoting discussion about Safe Harbour, Ontario Nature is seeking a means to support landowner stewardship for species at risk while addressing one of the key concerns raised by landowners regarding Ontario's *Endangered Species Act, 2007* (ESA): the fear of legal repercussions should stewardship initiatives (e.g. habitat restoration, fencing to exclude livestock, species reintroductions, etc.) result in a species at risk moving onto one's property.

The ESA prohibits harming or harassing a species at risk or damaging or destroying its habitat. What happens then when landowners attract a species at risk to their property through good stewardship? Currently, landowners would be breaking the law if they were to violate the ESA prohibitions; activities which harmed a species or damaged its habitat would not be allowed. For farmers and other landowners who make a living off their land, there may be good reason to worry about the potential legal implications of good stewardship.

Safe Harbour agreements offer a way to address this disincentive towards stewardship by allowing landowners to retain control over their land. Safe Harbour agreements are voluntary, time-limited agreements between a landowner and a regulatory body which ensure that if a landowner creates habitat for a species at risk, s/he will not be subject to additional restrictions under the ESA. Under Safe Harbour, harm to a species at risk (so called "incidental take") can be accommodated throughout the duration of the agreement and habitat can be altered at end of the agreement.

Safe Harbour agreements have been used in the U.S.A. since 1995 with apparent success. There has been a steady rise in the number of landowners involved, in the number of species and in the acreage covered. By 2010, 400

landowners had entered into Safe Harbour agreements, covering 75 species and 4.3 million acres of land. The retention rate is high with 99 percent of landowners remaining in the program since it began. One of the greatest benefits has been a positive transformation in landowner perceptions of species at risk.

Safe Harbour in Ontario

Can Safe Harbour agreements work in Ontario? From a legal perspective, they can be accommodated under section 16 of the ESA which allows the Minister of Natural Resources to enter into stewardship agreements for the purpose of assisting in the protection or recovery of a species at risk. Specifically, section 16(3) states that the agreement may authorize a party to the agreement to engage in an activity specified in the agreement that would otherwise be prohibited by section 9 or 10+(i.e., the sections which prohibit harming or harassing the species or damaging or destroying its habitat).

Whether such agreements are desirable and workable in Ontario is another question, and one which we sought to clarify through the five workshops.

The workshops

The five workshops were held in a variety of places where Ontario Nature had ongoing relationships with farmers, naturalists and other conservationists. Overall, the workshops involved representatives from eight agricultural organizations, nine not-for-profit groups and seven government agencies, as well as eight other interested individuals.

Organizational representation at the workshops

Agricultural organizations	Not-for-profit groups	Government agencies
Christian Farmers Federation of Ontario (Grey County)	Saugeen Field Naturalists	Niagara Escarpment Commission
National Farmers Union (Grey County)	Grey Association for Better Planning	Bruce County Planning
Bruce Federation of Agriculture	Blue Mountain Watershed Trust	MNR Stewardship Bruce County
Elgin Federation of Agriculture	Eastern Ontario Model Forest	Kettle Creek Conservation Authority
Ontario Soil and Crop Improvement Association	Thames Talbot Land Trust	Elgin County Planning
Norfolk Alternative Land Use Services (ALUS)	Otter Valley Field Naturalists	Ministry of Agriculture, Food and Rural Affairs
Ontario Cattlemen's Association	Ducks Unlimited Canada	MNR Stewardship Norfolk County

County Agricultural Board of the Norfolk Land Stewardship Council	Norfolk Woodlot Owners Association	
	Owen Sound Field Naturalists	

The workshops began with a presentation based on the American experience. This outlined the concept of Safe Harbour, the types and components of agreements, examples of the stewardship activities covered under Safe Harbour, criteria for selecting candidate species and potential delivery agents. Discussion focused on the following questions.

1. What are your initial thoughts on this concept and its potential to be applied in your area?
2. Do you have concerns or see drawbacks to Safe Harbour agreements? Is there a way for these to be addressed?
3. Do you think Safe Harbour agreements would be effective in your region? If so are there opportunities for an initial pilot project?
4. Who are potential delivery agents for an initial pilot?
5. What species would be good candidates?
6. What role should monitoring play? Who should be doing that work?
7. What are your thoughts on the best structure for Safe Harbour agreements? (Individual and/or umbrella agreements?)

These questions elicited diverse opinions, real-life examples and recommendations about Safe Harbour and its implementation in Ontario. Below the key discussion points are summarized.

The need for Safe Harbour

At all of the workshops some participants spoke about the fear and anxiety among landowners regarding the ESA and its implementation on private land. Many believed that fear of repercussions under the ESA were discouraging or could discourage landowners from engaging in stewardship. In light of this situation, almost all participants agreed that Safe Harbour would be of benefit in addressing this disincentive and in harnessing public goodwill. As one participant at the Kemptville workshop explained, Safe Harbour agreements might help ease the pain of the ESA, particularly if they included clear instructions on how to operate in species at risk habitat. At the London workshop a participant identified landowner education about species at risk as a potential benefit of Safe Harbour agreements.

The need for Safe Harbour agreements was questioned at only one workshop where a participant wondered whether landowners interested in stewardship

would do it regardless of whether a Safe Harbour agreement were in place or not.

Effective implementation of Safe Harbour agreements in Ontario

When discussing effective implementation of Safe Harbour agreements in Ontario, a number of common themes emerged. The need to keep the implementation process simple, for example, was frequently highlighted. As a participant at the Owen Sound workshop explained, %farmers want flexibility, not paper work or administrative headaches.+For this reason, discussions tended to focus on umbrella agreements (between an intermediary organization, such as a conservation or farming organization, and the provincial government, with subsidiary agreements between private land owners and intermediary) rather than on individual agreements (between the individual landowner and the provincial government).

Many participants also felt that coordinating Safe Harbour through existing programs, with which farmers were already familiar, would help to keep things simple. Beginning small, with a pilot to show landowners the benefits of Safe Harbour and give them time to learn about the program, was also recommended at several workshops. Clear guidelines to ensure consistency, clear objectives upon which to base decisions, and %plain language+agreements would be needed for landowner buy-in.

In terms of an intermediary organization for an umbrella agreement, the Alternative Land Use Services (ALUS) program was widely recognized as a good fit, and was mentioned as a strong potential pilot at four of the workshops. Participants in the Norfolk ALUS project were present at both the Guelph and Simcoe meetings and expressed a keen interest in the possibility of piloting an umbrella agreement. One key factor in favour of implementing Safe Harbour through ALUS is that it could then be tied to a financial incentive for the landowner.

Participants mentioned a number of other existing programs that could be tied to the implementation of Safe Harbour, all of which could provide an additional financial incentive. The Environmental Farm Plan (EFP), for example, was mentioned at three workshops. Advantages of implementing Safe Harbour through the EFP were considered to be: 1) it is a well established program, with existing buy-in from farmers and government; 2) it would create an ideal education and outreach medium to a broad audience; and 3) it could be initiated as a pilot with monitoring.

Other existing programs mentioned at one of three workshops were the Conservation Land Tax Incentive Program, the Community Fisheries and Wildlife Improvement Program, and the Managed Forest Tax Incentive Program. Other

potential intermediaries mentioned who could potentially champion Safe Harbour and/or oversee umbrella agreements were the MNR stewardship councils, Ducks Unlimited Canada and the Ontario Soil and Crop Improvement Agency (which oversees the EFP). (Note that these possibilities were not put forward by representatives of these organizations at the meetings, but rather by other participants.) One participant noted that there would be costs associated with developing and administering the agreements, and that there would need to be ways to cover those costs.

Overall, there was a strong preference for umbrella agreements, though one participant mentioned that large landowners might prefer their own individual agreement with the MNR.

What species would be good candidates?

In the United States, a variety of types of plants and animals have been the subject of Safe Harbour agreements, including 23 birds, 21 fish, 8 insects, 7 amphibians and reptiles, 6 mammals, 6 plants and 4 mussels. At the workshops, participants suggested a number of species that could be considered in Ontario, though generally there was uncertainty about which would be good candidates.

To initiate this part of the discussion, Ontario Nature presented the following list of characteristics that could be used to assess the suitability of a candidate species, based on the American experience:

- Easy to monitor and measure effects of change
- Life history and population trends are well understood
- Close proximity to nearby significant population sources
- Narrow habitat requirements
- Habitat in need of active management
- Landowners able to manage for habitat needs
- Not wide-ranging
- Umbrella species
- Charismatic species with high probability of success

Adding to this list, Ontario Nature noted that the species should be listed as either threatened or endangered in order for there to be an incentive, since only the habitat of threatened or endangered species is protected under the ESA.

One participant stated that it would be best to choose a species with a recovery strategy in place. Another suggested that it could be more appealing to farmers to manage for a species that was not directly impacted by their work, such as a turtle in a woodlot. Species that could benefit from something as simple as fencing or the creation of nesting cavities were thought to be a good place to start. Snakes were considered to be promising by one participant, because they

could be easier to monitor and because monitoring programs were already established in some areas.

Species that were suggested included:

Reptiles: eastern ratsnake, Massasauga,

Amphibians: (spotted salamander and chorus frog were both mentioned, but they are not at risk in Ontario)

Birds: bobolink, least bittern, loggerhead shrike, piping plover

Plants: butternut (suggested at three workshops), blunt-lobed woodsia, Hill's thistle, Pitcher's thistle, American chestnut

Lichen: flooded jellyskin

Many participants felt that it would be best to focus on habitats rather than specific species for a Safe Harbour agreement (see Habitat vs. species approach below). One participant suggested that it should begin with the landowner: i.e., determine first who would be a willing participant and then figure out which species would work best.

What role should monitoring play?

Very little monitoring of the impacts of Safe Harbour has been conducted in the United States. As a result, the impacts on the ground are not readily apparent. When asked about the role that monitoring should play in the implementation of Safe Harbour in Ontario workshop participants expressed a variety of opinions.

There were many participants who felt that monitoring would discourage participation in Safe Harbour, because of associated costs and labour, the burden of reporting and the need for expertise. According to one participant we need to have some faith that if the habitat is built, they will come. Many others supported monitoring and considered it to be essential in order to measure success. Acknowledging the very real challenges of costs and labour, they put forward a variety of suggestions that could be explored:

- Piloting projects and species monitoring through the Environmental Farm Plan
- Engaging students for monitoring
- Partnerships with naturalist clubs
- Partnerships with customers (as has been done by some organic farmers)
- Partnerships with boy scouts

Overall, there was general agreement that if monitoring were to occur, it would have to be kept very simple, with a minimum of paperwork and at no cost to the landowner.

Other issues and questions

Summarized below are a number of other issues and questions that arose at the workshops.

1. Habitat vs. species approach

There was considerable agreement across all the workshops that in Ontario we should attempt to base Safe Harbour agreements on the creation of habitat types, such as wetlands or grasslands, rather than on habitats for single species. According to a participant at the Simcoe workshop, this would be a precedent-setting ~~made~~ made in Ontario solution that could be sold to farmers and government.

2. Financial incentives

This issue of financial incentives came up at four workshops where participants discussed ways to enhance potential uptake. One possibility considered was a potential tax incentive, for example through the Conservation Land Tax Incentive Program. Because participants can opt in and out of this program it was considered potentially attractive. The Species at Risk Farm Incentive Program was a possibility mentioned by one participant who noted that, a species at risk doesn't necessarily already have to be on the property for this program. The concept of a conservation tender program was introduced at the Guelph workshop as a way for the government to direct money to high priority projects on a merit-based system. Finally, the ALUS program, which provides financial incentives for stewardship initiatives, was considered to be a good means to match financial incentives with Safe Harbour.

At the Simcoe workshop one participant mentioned that the funding might not be as important in terms of an incentive as the network and access to information and knowledge which would come with a Safe Harbour agreement.

3. Length of agreement

Concern was expressed at several workshops about the length of the Safe Harbour agreement. At the London workshop one participant explained that farmers may not be willing to commit to lengthy terms, and that a 50 year term, for example, had the potential to lower the value of the land. Agreements would need to be flexible enough to allow landowners to opt out of the program at set points.

4. Are the agreements on title?

At four workshops participants inquired whether Safe Harbour agreements would be on title. There was concern about the potential impact on property values.

5. Wide range of landowners

Participants at a couple of the workshops pointed out that a wide variety of landowners could be interested in Safe Harbour, not only farmers. These could

include, for example, retirees, cottagers, or people with conservation easements. Education and outreach would need to be tailored to the specific audience in mind.

6. Land rental

At one workshop, a participant asked what would happen if a farmer rents the land out. It was suggested that stewardship lease agreements could be set up so that the renters would practice with Safe Harbour in mind. However, these restrictions could make the land less attractive to rent and reduce the number of potential renters.

7. Would Safe Harbour stand up in court?

Concern was expressed at one workshop about whether a Safe Harbour agreement would stand up to a challenge in court. There is no precedent for this.

8. Protection of habitat?

Further clarification is needed about what can be covered under a Safe Harbour agreement. Does habitat have to be created and/or actively managed, or can it simply be protected? What about species at risk that have arrived on someone's property because of previous work that they did? Can Safe Harbour apply retroactively?

9. Harmonization with other laws and policies

Concern was expressed at the London workshop about whether a Safe Harbour agreement could be impacted by other laws, such as tree cutting bylaws. For example, if a tree were to be grown under Safe Harbour, would the landowner always retain the right to cut it down, even if this were contrary to a tree cutting bylaw?

10. Incidental take

What happens to a species at risk that has moved onto a property when the landowner opts out of the program? Would it be moved, or simply killed?

11. Neighbours

At two workshops participants asked about potential conflicts if one were to create habitat for a species at risk which then expanded on to a neighbour's property.

12. Conflicting species needs

How does one weigh or balance the conditions needed to benefit a certain species when it conflicts with the needs of another species?

Summary

Generally speaking, workshop participants felt that Safe Harbour agreements in Ontario could benefit both species and landowners if implemented carefully. Advice highlighted the importance of:

- keeping the program simple (e.g., through umbrella agreements)
- tying it to programs that are familiar to landowners
- promoting and delivering it through intermediaries that landowners know and trust
- tying it to incentive programs
- beginning small with a pilot project
- implementing a habitat-based approach.

Participants were interested to learn that Ontario Nature would be compiling the results of the workshops in a report and presenting it to the Ministry of Natural Resources. Many expressed a desire to be engaged in further conversations about Safe Harbour and to be kept informed about potential implementation. An electronic copy of this report will be sent to all participants.

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