

March 17, 2016

To:

The Honorable Glen Murray, Ontario Minister of the Environment and Climate Change

glen.murray@ontario.ca

And

The Honorable Bill Mauro, Ontario Minister of Natural Resources and Forestry

Bill.mauro@ontario.ca

Re: **The Maley Drive Extension and Widening Project in the City of Greater Sudbury and Consideration of the Presence of Species at Risk**

This letter is with regards to the "Maley Drive Extension Class Environmental Assessment" prepared by Marshall Macklin Monaghan for the Region of Sudbury, dated October, 1995, and the "Maley Drive Extension / Lasalle Boulevard Widening Municipal Class EA Addendum" prepared by Earth Tech (Canada) Inc. for the City of Greater Sudbury, dated May 15, 2008, and the City's recent application to the Ministry of Natural Resources and Forestry for Overall Benefit Permits related to species at risk habitat located in or in close proximity to the proposed Maley Drive Extension corridor.

The 1995 Class EA and the 2008 Addendum both assessed the presence of species at risk habitat within areas which might be impacted by the construction and/or presence of the proposed Maley Drive Extension in the City of Greater Sudbury. Both the 1995 EA and the 2008 Addendum did not identify any potential impacts on the habitat of species at risk.

Prior to a recent public input meeting with regards to the proposed Maley Drive Extension, the City of Greater Sudbury revealed that it has been aware of the presence of species at risk habitat either within or in close proximity to the proposed Maley Drive corridor, and specifically in a location several hundred metres to the west of the existing intersection of Maley Drive and Barrydowne Road. To quote from section 10.2 of the city March 1st 2016 Maley Drive Extension and Widening Project Report "Assessments were done in 2013 and 2014 and it was determined that the section of the Maley Drive Extension from 400 metres east of Notre Dame Avenue to Barry Downe Road is habitat for both Whip-poorwills and Blanding's turtles. This area is undisturbed and naturally wooded with areas of wetlands.

The City also indicated in this same document that it is currently working with the Ministry of Natural Resources and Forestry to obtain an Overall Benefit Permit or permits to address the presence of species at risk habitat.

Species At Risk Habitat Impacted by the Maley Drive Extension and Widening Project

The absence of information pertaining to species at risk habitat from both the 1995 Class EA was critical at that time in determining the ultimate, preferred route of what became the Maley Drive Extension. Had the 1995 EA determined the presence of species at risk along the proposed corridor, it may have recommended a different route or transportation alternative to what has now become the Maley Drive Extension. Certainly, all alternatives would have been evaluated with consideration of the presence of species at risk. Unfortunately, due to the findings of the 1995 EA, concerns related to species at risk did not form a part of the then Region of Sudbury's decision to move forward with the preferred route for Maley Drive.

The absence of information pertaining to species at risk in the 2008 Class EA Addendum led to the City of Greater Sudbury not to identify concerns with regards to species at risk habitat in the proposed Maley Drive corridor at that time. Had the 2008 Class EA Addendum identified the presence of species at risk habitat in the corridor, it is conceivable that the Class EA Addendum may have recommended a new municipal class environmental assessment which included an analysis of transportation alternatives and routes.

At this time, impacts on species at risk habitat within or in close proximity to the proposed Maley Drive Extension and Widening project has not been assessed by the City of Greater Sudbury through any environmental assessment process.

Ministry of Environment and Climate Change's "Code of Practice" and Changed Environmental Conditions

The Ministry of Environment and Climate Change's "Code of Practice" for "Preparing, Reviewing and Using Class Environmental Assessments in Ontario" indicates in Section 6.2.10, "Changing a Project After the Planning Process is Complete", in the "Lapse of Time" subsection that,

*"There may be instances where a proponent may not implement a project for some time (for example, **five years**) after the project planning process is complete. The end of the project planning process in this context is defined as either the end of the review period after the Notice of Completion is issued (no Part II Order requests), or the Minister or delegate denies a Part II Order request. The proponent should provide in the class environmental assessment a **procedure** for proponents to follow in these cases. When a lapse of time has occurred (exact time should be defined in the class environmental assessment), the proponent **must** review the project to ensure that no changes are required. Changes could be required to the project because, for example, **the environmental conditions have changed**, and the impact management measures are no longer valued. There could also **be new government policies or standards** or new engineering technologies. The results of the review of the project should be documented."* (pages 84 & 85, "Code of Practice: Class Environmental Assessments")

Neither the 1995 Class EA or the 2008 Addendum set out a time period for lapsing. The 2008 Addendum does, however, refer to a 5 year period for the lapsing of the 1995 Class EA (page 10). Despite the City of Greater Sudbury having acknowledged that the 1995 Class EA had “lapsed” after 5 years, it nevertheless proceeded with a simple addendum to a lapsed document in 2008. By not returning and evaluating the Maley Drive Extension through a new municipal class environmental assessment process, the City continued to rely on the socio-economic assumptions and preferred route option identified in the 1995 Class EA.

The 2008 Addendum does not provide a procedure for proponents to changing a project after the planning process is complete, despite the Code of Practice’s recommendation. It does, however, acknowledge that the 1995 Class EA indicated that, “*The Class EA states that any significant modification to the project or change in the environmental setting for the project, which occurs after the filing of the ESR [Environmental Study Report], shall be reviewed by the proponent and an addendum to the ESR written.*”

With regards to the 2008 EA Addendum, the absence of a defined procedure for changing a project after a planning process is complete creates a significant degree of uncertainty with regards to what might trigger the need to change a class EA, and how those changes should be addressed through the class EA process. However, both the MOECC’s Code of Practice and the 1995 municipal class EA are helpful in this circumstance, as both suggest that when the environmental conditions of a project have changed, the project should be reviewed and documented. Additionally, the MOECC’s Code of Practice indicates that and where new government policy and standards have come into existence, changes should be addressed.

With the identification in 2013 of the presence of species at risk habitat in or within close proximity to the Maley Drive Extension corridor, the City of Greater Sudbury should have undertaken a review of the Maley Drive Extension and Widening project in accordance with the Ministry of Environment and Climate Change’s Code of Practice, and in accordance with the former Region of Sudbury’s 1995 Class EA, despite the lack of guidance to do so provided in the 2008 EA Addendum. This change in environmental conditions from the time of the completion of the 1995 and 2008 class EA documents should have been a trigger for the City to undertake a new municipal class environmental assessment (or at the very least to provide for an additional Addendum – however, a further Addendum to the 1995 Class EA may be problematic for the City further to the reasons that I cite below, related to species at risk, and the requirement for an assessment of alternatives).

Again, at this time, the City of Greater Sudbury has not considered the impacts of the Maley Drive Extension and Widening project on species at risk habitat within or in close proximity to the proposed Maley corridor through any environmental assessment process.

The Endangered Species Act and Overall Benefit Permits

As you know, the Endangered Species Act was enacted by the Province in 2007. This legislation provides for the protection of biological diversity in the Province of Ontario as it applies to threatened and endangered species. It prohibits the harm and harassment of protected species, and the damage or

destruction of their habitat. An overall benefit permit may be required to perform an activity not otherwise allowed under the Endangered Species Act (source: "Species at risk overall benefit permits," the Province of Ontario: <https://www.ontario.ca/page/species-risk-overall-benefit-permits>). One of the activities provided by way of an example on this webpage is "*building a highway through the habitat*" of a species at risk.

One of the requirements for receipt of an overall benefit permit is that, "*reasonable alternatives have been considered, including alternatives that would not adversely affect the species, and the best alternative has been chosen.*" The above-referenced webpage goes on to provide additional information the requirement for alternatives, and indicates:

"Requirement: consider reasonable alternatives

You will need to show the Ministry of Natural Resources **that you have considered reasonable alternatives to your activity.**

Alternative approaches to your activity include:

- ***changing the location of the activity***
- *using alternative methods, equipment or technical designs*
- *changing the timing of the activity to avoid times when the species is there or is most sensitive to disturbance*
- *changing the geographic scale, duration and/or frequency of the potential adverse effects*
- *adding or changing approaches and timing of site restoration or rehabilitation after the activity is done*

When considering reasonable alternatives to your activity, you must:

- ***consider at least one alternative that would completely avoid any adverse effects on species at risk***
- ***identify alternatives that you considered but did not think were reasonable because of biological, technical, social or economic limitations***
- *explain why the approach you have chosen is the best alternative" (source: "Species at risk overall benefit permits," the Province of Ontario: <https://www.ontario.ca/page/species-risk-overall-benefit-permits>)*

With respect to the City of Greater Sudbury's application to the Minister of Natural Resources for an overall benefit permit related to species at risk habitat in or within close proximity to the Maley Drive Extension corridor, there has been no evaluation of alternatives at this time with regards to changing the location of the activity. The last time that the location of the proposed Maley Drive Extension was evaluated with regards to alternatives was through the municipal class environmental assessment

prepared by Marshall Macklin Monaghan in 1995, which the City indicates had lapsed 5 years after its creation. Since then, there has been no evaluation of alternatives to the location of the proposed corridor.

Without a new environmental assessment undertaken now to consider the change in environmental circumstances represented by the presence of species at risk habitat within or in close proximity to the Maley Drive Extension corridor, it is premature to conclude that the City of Greater Sudbury's application for an overall benefit permit is necessary or desirable.

Request to the Minister of Environment to Require of the City of Greater Sudbury an Environmental Assessment for the Maley Drive Extension Project

I respectfully submit to the Minister of Environment and Climate Change that the presence of species at risk habitat within or in close proximity to the Maley Drive Extension corridor should require the City of Greater Sudbury to complete a new municipal class environmental assessment which examines alternative transportation options and, if necessary, alternative routes for the Extension. Such an undertaking should be prepared in accordance with up-to-date class environmental assessment processes and procedures, and be in keeping with the Ministry's Code of Practice.

Further, the assessment should be based on up-to-date socio-economic circumstances, including the use of alternative transportation infrastructure options and traffic demand management to achieve desired transportation results. I urge the Minister to make it known to the City of Greater Sudbury that due to the presence of species at risk habitat within or in close proximity to the proposed Maley Drive Extension corridor, that the City cannot rely on the findings of the 1995 municipal class environmental assessment and the 2008 EA addendum to proceed with the construction of the Maley Drive Extension and Widening project.

Request to the Minister of Natural Resources and Forestry to Defer Making a Decision on the City of Greater Sudbury's Application for an Overall Benefit Permit until the Completion of an Environmental Assessment for the Maley Drive Extension Project

Until such a time that a new class environmental assessment, which examines and assesses alternatives, has been prepared in accordance with MOECC environmental assessment legislation, I submit to the Minister of Natural Resources and Forestry that it will be premature to determine the need for an overall benefit permit, and respectfully urge the Minister to defer the issuance of an overall benefit permit until a new class environmental assessment has been prepared.

Protecting Species at Risk

The protection of the habitat of threatened and endangered species is a shared responsibility between municipal governments and the Province of Ontario. While I understand that processes exist to allow for the destruction or impairment of specific habitat in some circumstances through the issuance of overall benefit permits, the use of these permits should only be considered **as a last resort option after all reasonable alternatives have been considered by a project proponent**. The City of Greater Sudbury

has not considered all reasonable alternatives to the current proposed route of the Maley Drive Extension since 1995. In absence of this consideration, moving forward with the project at this time does not appear to be contemplated by either the Province's environmental assessment legislation or the overall benefit permit process under the Endangered Species Act.

Ministers, please intervene in the City of Greater Sudbury's environmental planning processes as I have submitted above, and require an environmental assessment of the City of Greater Sudbury's proposed Maley Drive Extension and Widening project, specifically but not limited to species at risk as the project would involve destruction of sensitive wetlands in the area and have serious negative implication on the health of junction creek which as the major waterway way through the city, and with considerable citizen involvement within the past several years, has experienced a significant degree of restoration.

I would appreciate a response to this letter after your careful consideration of my requests. Please copy me on any correspondence provided to the City of Greater Sudbury with respect to my requests.

Sincerely,

A handwritten signature in black ink that reads "John R. Lindsay". The signature is written in a cursive style with a long, sweeping underline.

John R. Lindsay
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cc. Caroline Hallsworth, Clerk, the City of Greater Sudbury .. clerks@greatersudbury.ca cler