

March 31, 2013

To concerned staff of the Ministry of the Environment,

Summary findings from the investigation into the potential for a safe harbour policy under Canada's Species at Risk Act

Under the existing SARA and under existing federal regulations, we have determined that safe harbour agreements are indeed possible, but with several legal and practical caveats. To a limited extent, these can be resolved through regulatory making powers granted to the federal government. However, a safe harbour program under SARA in Canada will be far less effective than what has been possible in the U.S. under the Endangered Species Act.

Overview of research activities:

The Ontario Soil and Crop Improvement Association was tasked with exploring whether safe harbour agreements could be accommodated under the current federal Species at Risk Act. For these purposes, two studies were commissioned: First, an environmental policy professional was employed to produce a report outlining a potential construct for a safe harbour policy. This involved reviewing existing safe harbour policies/programs in other jurisdictions, and studying Canada's Species at Risk Act and other relevant legislation and regulations. Second, a legal review and opinion of the proposed safe harbour construct was conducted - headed by a leading Canadian environmental lawyer.

Issue background: What is safe harbour and why is it used?

Safe harbour agreements (SHAs) are voluntary, time-limited agreements between a landowner and a regulatory body which ensures that if a landowner enhances habitat for a species at risk, s/he will not be subject to additional restrictions under species protection laws, and will be able to exercise the option of returning the land to its prior state (the baseline state) in the future.

Without safe harbour, private landowners may resist pursuing ecologically beneficial activities out of fear they may attract protected wildlife, thereby restricting otherwise permissible activities. SHAs provide *assurances* to allay such fears, thereby contributing to the overarching goal of increasing ecological stewardship on private lands, while creating net conservation benefits for at-risk species. There are two types of SHAs: individual (between the regulator and the landowner) and programmatic. Programmatic SHAs allow an intermediary (such as an NGO) to develop a safe harbour program for a specific area, gain approval from the federal regulator, and then sign-up individual landowners. This is advantageous in that it can ease administrative burden for both government and landowners, and as a result, can greatly increase the scale of SHA deployment.

How can safe harbour agreements be accommodated under SARA?

A fundamental component of a safe harbour agreement is an *assurance* that conditionally shields participating private landowners against normally automatic federal species protection regulations. Thus critical to our work was (1) understanding these regulations, and (2) determining possible mechanisms to grant assurances.

(1) Federal species protection regulations that affect private landowners

Endangered and threatened species are protected by SARA through two prohibitions. SARA's "general prohibitions" protect species and their residences from harm. On private lands, these only apply to aquatic species and migratory birds. SARA's "critical habitat" prohibitions prohibit the destruction of critical habitat, but only come into force after the critical habitat has been designated by the federal government through a recovery strategy or action plan. Critical habitat prohibitions only apply to aquatic species on private lands - they don't apply for any other species on private lands. In addition to SARA's protections, migratory birds listed in the

Migratory Birds Convention Act also receive protection. Under 6(a) of the Migratory Birds Regulations (MBR), it is prohibited to “disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird.”

(2) Mechanisms that can be used to provide safe harbour assurances

Our analysis highlighted two potential mechanisms to provide safe harbour assurances under SARA. The first is a section 73(2) permit or agreement, which can be granted if the SHA “benefits the species or is required to enhance its chance of survival in the wild.” The second is an exemption under 83(4) of SARA, which lifts the general and critical habitat prohibitions for activities permitted under a recovery strategy or action plan. The 73(2) permit is a more likely and expeditious route to safe harbour, as the alternative 83(4) exemption would require there to be an existing recovery strategy or action plan in place.

Legal opinion on the proposed mechanisms and potential for SHAs

- ❖ While it is possible to pursue safe harbour agreements under SARA, it is problematic to do so without issuing at least some new regulations. SHAs are possible under the current SARA for aquatic species. For migratory birds however, the MBR has no mechanism to allow for the types of assurances required for a SHA, thus an amendment to the MBR is necessary.
- ❖ In order for the Minister to approve an SHA under 73(2), there must be defensible scientific evidence that the SHA will be of benefit to each species in the agreement. Unfortunately, there is limited biological evidence that can be used to support SHAs. Under 83(4), it is indeed possible to include an SHA as part of a recovery strategy or action plan, but credible scientific evidence on the benefits is also necessary.

- ❖ Programmatic safe harbour agreements are possible under the existing SARA, but the Minister cannot legally delegate his/her decisions on granting 73(2) permits to the intermediary, and the Minister would still be required to sign off on each individual landowner agreement. If need be, this can be overcome by introducing a new regulation whereby this authority can be delegated.

Conclusion

Since safe harbour agreements are only relevant in cases where there is a regulatory fear, this effectively means that safe harbour agreements under SARA are, at most, only relevant for aquatic species and, to a lesser extent, migratory birds. This suggests that a federal safe harbour program in Canada would be substantially weaker and less encompassing than the U.S. experience. That being said, with a minimum of an amendment to the MBR, a safe harbour regime is possible under Canada's existing Species at Risk Act. It is recommended that, should a safe harbour program be pursued, it be pursued through programmatic delivery of SHAs.

A Safe Harbour Policy for Canada?

Examining the potential for safe harbour agreements within the confines of the federal Species at Risk Act

Produced by Sumeet Tandon for the Ontario Soil and Crop Improvement Association

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Safe harbour agreements have been proposed as a way of promoting good stewardship amongst private landowners by ensuring that if a landowner contributes to habitat for species-at-risk, the landowner will not be subject to additional restrictions under wildlife protection regulations. Safe harbour agreements vary in their form and have historically only been deployed in the U.S. By studying American safe harbour policy as well as Canada's Species At Risk Act, this paper attempts to provide a safe harbour-like construct that could be accommodated under Canada's Species at Risk Act. This paper will also assess the limitations of deploying safe harbour policies under SARA and ways of potentially overcoming these limitations.

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Executive Summary

This report investigates the potential for a safe harbour policy that can be accommodated under Canada's Federal Species at Risk Act (SARA), and outlines a construct by which a safe harbour policy may operate. Safe harbour agreements (SHAs) would allow farm businesses to enhance habitat for species at risk, without facing additional regulations from SARA if such enhancements result in additional species colonizing their property.

To date, the only country that has deployed safe harbour agreements has been the United States, which initiated pilot projects in 1995, before formally issuing a Safe Harbor Policy in 1999. The success of the program has been demonstrated by the program's growth, its landowner enrollment retention, and its ability to change landowner attitudes towards the often feared U.S. Fish and Wildlife Service. However, due to the relative infancy of the program and the lack of biological monitoring, the overall benefit to species recovery has not been determined. Because the U.S. case is the only safe harbour policy in existence, it provides the only available template and experience upon which to study safe harbour, and to determine its potential applicability under SARA.

In determining how safe harbour could be applied under SARA, it was necessary study SARA relative to the U.S. ESA. The U.S. ESA has taken a much stronger regulatory approach to endangered and threatened species protection on private lands, while SARA has taken a more collaborative and voluntary approach. Furthermore, under SARA, the federal cabinet has substantial discretion on where and when to apply species protections, whereas the U.S. ESA is often legally compelled to apply protections- through the courts if necessary. Finally, in Canada, the provinces manage most of the species at risk on non-federal lands, while in the U.S., states

are authorized to manage species at risk only if they meet federal standards. These differences suggest that, under SARA, a safe harbour program will be less encompassing and less effective.

SARA protects endangered and threatened species through two prohibitions. SARA's "general prohibitions" protect species from general harm, and further protect the species' residences from harm. However, on private lands, these only apply to aquatic species and migratory birds. SARA's "critical habitat" prohibitions prohibit the destruction of critical habitat. However, these only come into force after the critical habitat has been designated by the federal government through a recovery strategy or action plan. Even if this is the case, critical habitat prohibitions only apply to aquatic species on private lands - they don't apply for any other species on private lands. Since safe harbour agreements are only relevant in cases where there is a regulatory fear, this effectively means that safe harbour agreements under SARA are only relevant for aquatic species and, to a lesser extent, migratory birds.

There are two legal mechanisms under SARA where a safe harbour agreement may be possible. The first is a section 73(2) permit or agreement that can be granted if the SHA "benefits the species or is required to enhance its chance of survival in the wild." The second is an exemption under 83(4) of SARA, which lifts the general and critical habitat prohibitions for activities permitted under a recovery strategy or action plan. The 73(2) permit is a more likely and expeditious route to safe harbour, as the alternative 83(4) exemption would require there to be an existing recovery strategy or action plan in place. It is recommended that these mechanisms be further investigated. Further investigation should also be conducted to examine the potential conflicts these mechanisms may have with respect to the Migratory Bird Regulations' seemingly absolute prohibitions against incidental take.

Apart from the mechanisms by which SHAs can be applied and the species to which SHAs are relevant, the actual requirements and writing of SHAs under SARA should be very similar to that of the U.S. Therefore U.S. requirements for entering into a SHA, and even their templates for writing a SHA, can be used in the Canadian context under SARA.

The deployment of a safe harbour program in Canada would greatly benefit from the use of programmatic safe harbour agreements, especially during a pilot phase. Programmatic SHAs would reduce the administrative burden for government, simplify and facilitate landowner enrollment on a priority basis, leverage the expertise and resources of conservation groups, and allow conservation priorities to be set and pursued on regional levels. It would also build on established trust between landowners and familiar local conservation groups. Given the benefits of programmatic SHAs, the best route for the federal government to initiate a safe harbour program is through coordination with a conservation group, while equipping that group with the necessary resources.

The mechanism for permitting a programmatic safe harbour agreement under SARA can theoretically mimic the process used under the U.S. ESA. The umbrella organization develops a blanket SHA that details how a net conservation benefit is achieved through the agreement, and how the agreement can provide an overall “enhancement of survival” to the species. Once the permit is approved, the umbrella organization is issued a permit under section 73(2) of SARA and can then sign individual SHAs with private landowners and include them under the umbrella permit.

Safe harbour agreements under SARA are of little value within provinces that have comparable or superior endangered species protections, and this appears to be the case with Ontario. In Ontario, there are only five species that are afforded protection under SARA that are not

protected under Ontario's Endangered Species Act, 2007 (ESA 2007). Despite the lack of relevance, a SARA safe harbour program could still operate in Ontario without conflicting with Ontario's ESA 2007. At present, Ontario is considering amending its Endangered Species Act and may incorporate a policy that allows for safe harbour agreements. The federal government may wish to adopt a wait-and-see approach with respect to Ontario's safe harbour policy. If Ontario's safe harbour policy proves promising, the federal government may even adapt it for use under SARA.

1 Introduction

The objective of this report is to investigate the potential of a safe harbour policy that can be accommodated under Canada's Federal Species at Risk Act (SARA), and outline a construct for such a safe harbour policy. The goal of achieving such a policy would be to protect the interests of farm businesses that create, maintain, or enhance habitat for species at risk, but who do not want to face additional regulations from SARA as a result of such ecologically beneficial activities. Such a policy is beneficial to the public interest if it contributes to the overarching goal of increasing ecological stewardship on private lands and creating net conservation benefits for at-risk species.

For the purpose of outlining a construct for a safe harbour policy, existing safe harbour policies/programs in other jurisdictions are reviewed to examine how they work and any issues they have had to encounter. Canada's Species at Risk Act was also studied to determine its powers and limitations compared with other jurisdictions that have enacted safe harbour programs. A safe harbour construct is then identified under SARA and its limitations detailed,

including how to work around or overcome such limitations. Finally, we examine how such a construct may be applicable in Ontario.

2 What are safe harbour agreements?

In essence, a safe harbour agreement (SHA) is a voluntary, time-limited agreement between a landowner and a regulatory body which ensures that if a landowner creates, improves, or maintains habitat for a species at risk, s/he will not be subject to additional restrictions under species protection laws, and will be able to exercise the option of returning the land to its prior state (the baseline state).

Landowners may be hesitant about pursuing good stewardship initiatives out of fear that they would create habitat that would attract species at risk, and in doing so, subject the landowners to additional restrictions on their activities if such activities could harm the listed species. Such fears can prevent landowners from undertaking habitat improvements on private lands, and could even cause some to practice “defensive management” by pre-emptively destroying habitat to prevent endangered species from later occupying it.¹ Such landowner concerns have been documented both in Ontario, and in the United States. By introducing safe harbour agreements and removing the risk of additional regulation, and allowing landowners the option of returning the land to its agreed upon “baseline” conditions, private landowners may be more likely to pursue good land stewardship and improve habitats, thereby benefitting both the environment and helping to recover listed species. Furthermore, it can alleviate common distrust and fear private landowners may have of the regulators tasked with wildlife protection.

Both this report’s literature review and one conducted by Savanta on behalf of the Ontario Ministry of Natural Resources (OMNR) has sought to determine and describe existing safe

harbour programs in various jurisdictions. They reveal that the only country that has deployed SHAs so far is the United States, enforced under the United States Endangered Species Act (U.S. ESA). Experiences with safe harbour in the U.S. therefore provide useful context to study the design, implementation, success, and hurdles of safe harbour agreements.

3 Description and analysis of the U.S. Safe Harbor Policy

The first and pioneering safe harbour program dates back to 1995 and was developed to protect the red-cockaded woodpecker in the Sandhills of North Carolina. Landowners entered into an agreement with the U.S. Fish and Wildlife Service (USFWS), and pledged to protect habitat for woodpeckers that already existed on their property, and to restore or enhance habitat for use by additional woodpeckers. In return, they received assurances that they would not be subject to any new restrictions if the population of red-cockaded woodpeckers increased on their property. The program gained support, even from private landowners that were previously unreceptive to the idea of cooperation with USFWS.² After the introduction of a small handful of safe harbour pilot programs, the USFWS sought to formalize a policy that could both guide and promote the development and deployment of subsequent SHAs throughout the United States.

On June 12 1997, the USFWS and the National Marine Fisheries Service (termed “Services” and jointly tasked with administering the U.S. Endangered Species Act) released a draft safe harbour policy and proposed regulations to implement the policy. The Services then sought comments on the draft policy, and received comments from entities which included all levels of government agencies, industry, conservation groups, coalitions, and private individuals. The policy was modified to address common concerns and on June 19 1999, the Final Safe Harbor Policy was announced, and would take effect two days later.³

Safe harbour agreements have since become a formalized tool in the USFWS's species conservation toolset. A list of the available conservation tools and a brief description of when they are appropriate is provided in appendix A.

3.1 The purpose of the Policy

The purpose of the U.S. Safe Harbor Policy is to provide an incentive to property owners to restore, enhance, or maintain habitats and/or populations of listed species that result in a net conservation benefit to these species.⁴ Such “net conservation benefits” can result from “reducing fragmentation of habitats, increasing the connectivity of habitats, maintaining or increasing populations, insuring against catastrophic events, and creating areas for testing and implementing new conservation strategies.”⁵ This incentive is an assurance that the property owner can return the enrolled land to a baseline state in the future, as well as allow for “incidental take” of the listed species during ongoing operations as long baseline conditions are maintained.

In the U.S., the fear or regulation (and thus the impedance for performing activities beneficial to listed species) stems from section 9 of the U.S. ESA - the so called “take” prohibitions. “Take” is broadly defined to include killing, harming or harassing.” Harm is further defined to include “significant habitat modification or degradation impairing essential behavioural patterns, including breeding, feeding and sheltering.”⁶ Section 9 prohibitions apply everywhere, including private lands. In an approved Safe Harbour Agreement, the property owner is issued an “enhancement of survival permit”, which is authorized through section 10(a)(1)(A) of the U.S. ESA.⁷ This allows the landowner to “incidentally take” a covered species above the agreed upon baseline conditions of the safe harbour agreement.

The safe harbour policy is in effect, a framework to “ensure consistency in the development of safe harbor agreements” and therefore outlines the rules of safe harbour agreements.⁸ However, an inescapable feature of safe harbour agreements is the inherent flexibility in their design, owing to their voluntary nature, the range of circumstances that might arise, and the vastly varying biological characteristics of the numerous listed species.

3.2 How it works

Safe harbour agreements are open to any non-federal landowner. They are made in coordination with state agencies and any affected tribal governments. There are two types of safe harbour agreements: individual agreements and umbrella (or programmatic) agreements. An individual agreement is between a landowner and the Federal Agency responsible for conserving the particular species involved in the agreement (either the USFWS or the NMFS). In an umbrella agreement, an intermediary (state government agencies, non-profit conservation organizations, etc.) develops a safe harbour program for a specific area.⁹ Once this “umbrella agreement” is approved by USFWS or NMFS, the intermediary is issued an “enhancement of survival permit”, and is then authorized to include individual landowners through a “certificate of inclusion”.¹⁰ The intermediary can work with individual landowners to develop written agreements that are covered by the umbrella agreement. Umbrella agreements are useful in that the intermediary handles much of the paperwork, thereby presenting a much simplified application process to the landowner.¹¹ Umbrella agreements also reduce the administrative burden on the Services, leverage the expertise of state and non-profit agencies, allow conservation priorities to be set and pursued on regional levels, and as a result, can greatly increase the scale of SHA deployment.

There are specific requirements that form a safe harbour agreement. A safe harbour agreement must^{12,13}:

1. Specify the species and/or habitats covered, including habitat conditions, and identify the enrolled property to be covered by the agreement
2. Describe the agreed upon baseline conditions for each of the covered species within the enrolled property
3. Identify management actions that would be undertaken to accomplish the expected net conservation benefits to the species, where and when the benefits would be achieved, and the agreed upon time frames these management actions will remain in effect to achieve the anticipated net conservation benefits
4. Describe the anticipated incidental take associated with the management actions
5. Incorporate a notification requirement (if appropriate), to provide Services or appropriate State agencies with a reasonable opportunity to rescue individuals of a covered species before any authorized incidental taking occurs
6. Describe the activities that would be expected to return the enrolled property to baseline conditions, and the expected incidental take that would likely occur
7. Satisfy other requirements of section 10 of the U.S. ESA
8. Identify the responsible parties that will monitor maintenance of the baseline conditions, implementation of the terms and conditions of the Agreement, and any incidental take that would result from such activities

Applying for a safe harbour agreement involves two applications: (1) the safe harbour agreement itself, (2) and an associated “enhancement of survival permit” application. The completion of these applications is coordinated by all parties (the Services, its delegates, and the property owner) to ensure consistency between them.¹⁴ In order for the agreement to be approved, the

Services or their delegates must make the finding that a “net conservation benefit” will be achieved within the duration of the agreement. To determine this, the FWS analyses the beneficial activities proposed by the landowner, the potential impacts from routine and ongoing activities proposed for incidental take coverage, and the potential impacts from returning the property to baseline conditions at the end of the agreement. Prior to the issuance of the “enhancement of survival” permits (which are part of the safe harbour agreement), the proposed permits are made available for public review and comment.¹⁵ To provide a sense of what is involved in producing a safe harbour agreement, a sample of a programmatic SHA is provided in appendix B.

3.3 Determining the baseline

A SHA must reflect the fact that listed species may already inhabit the property.¹⁶ A SHA does not change a landowner’s responsibilities with regard to pre-existing listed species and their habitats.¹⁷ As stated, baseline means “the population estimates and distribution, and/or habitat characteristics and determined area of the enrolled property that sustain seasonal or permanent use by the covered species at the time the SHA is executed.”¹⁸ Baseline conditions can be expressed in terms of population numbers, but they are most often expressed in amount and quality of the habitat, since the number of individuals could fluctuate over time. If population numbers are used, the known or expected seasonal variations should be described. Baseline conditions are mutually agreed upon and are determined on a case-by-case basis, reflecting the particular characteristics of the species. Sometimes, the baseline can be adjusted if a species disappears for reasons beyond a landowner’s control, such as prolonged drought or major storm event. In such cases, it might be possible to adjust a baseline downward with the authorization of the Services. Determining the baseline requires a survey and access to the landowner’s

property. It must be conducted by a mutually acceptable qualified person, which can include FWS employees, consultants, or the intermediary that holds the umbrella permit.¹⁹ The costs associated with such surveying, and who pays for them, are determined on a case-by-case basis. Usually if an agreement is specifically sought by the Services or an umbrella permit holder (implying a high priority for conservation), such surveying work and its costs can be handled by the Services, umbrella permit holders, or their delegates.

3.4 How is monitoring conducted?

There are two types of monitoring: (1) compliance monitoring to ensure all SHA commitments are being met and (2) biological monitoring to ensure biological goals of SHA are being met and to help determine the effectiveness of the conservation program. Under compliance monitoring, FWS or an intermediary (such as the holder of the umbrella permit) visits the property. The timing, frequency, and advanced notice requirements of such compliance monitoring can be individually negotiated.²⁰ Biological monitoring is not universally conducted or required under SHAs.

3.5 How are neighbouring properties affected?

There has been concern that due to the improvements made through SHA actions on enrolled lands, a neighbouring property might then be colonized by listed species. That neighbouring property owner might then be subject to restrictions on activities that could result in incidental take. There is no firm rule on how this is dealt with, and is addressed on a case-by-case basis. Safe harbour agreements can be written to specify that neighbours not be required to protect the habitat of species that wander onto their property as a result of SHAs on adjacent enrolled lands. Another option is that these neighbouring property owners can sign up for a SHA themselves.²¹

Such an ad-hoc approach may present an issue given that a neighbouring property owner is not necessarily a party to the original agreement, or may have no knowledge of its formulation.

3.6 How long do safe harbour agreements last?

In order to be approved, SHA term lengths must be sufficient to allow the achievement of the net conservation benefit. When specifying the duration of a safe harbour agreement, there are two questions: (1) How long a property owner is obligated to carry out or maintain positive improvements required by the SHA (2) How far into the future the “right to undo” these improvements extends, despite endangered species having colonized the improved areas.²² Due to the flexibility of SHAs, these terms can be negotiated. Although the landowner’s obligations under SHAs are to undertake certain improvements for a certain period of time, the right to undo those improvements, as authorized by the 10(a)(1)(A) permit, extend over a longer period of time.^{23,24} SHAs can also be renewed indefinitely (run with the land).²⁵

3.7 Premature termination of a SHA

In general, the assurances provided to the property owner (through the 10(a)(1)(A) permit) apply only if the owner has complied with all the terms of the agreement. In some circumstances, an agreement may allow a landowner to terminate early and still retain the assurances. Since there is so much flexibility, such considerations should be spelled out in the SHA.

3.8 Transferring an agreement

If a property owner sells or gives away lands enrolled in a SHA, the agreement and associated enhancement of survival permit will be honoured, provided the new owner agrees to become a party to the agreement and permit or would like to enrol in a new mutually agreeable permit.²⁶

The same applies if the landowner dies.²⁷ In doing so, the new property owner would therefore retain the ability to return the enrolled lands to their original baseline conditions.²⁸ If the new property owner does not enter into an agreement, they would be in violation of section 9 prohibitions if they return the property to the baseline.²⁹

3.9 How widespread are SHAs in the United States

The Savanta report documented the scale of the U.S. Safe Harbor Program as of February 2010. At that time, more than 400 landowners were enrolled in SHAs, under 79 different safe harbour agreements. 42 SHAs were individual, while 37 were programmatic. 11 of the programmatic agreements were with non-governmental organizations. In total, all these SHAs covered 75 species across more than 4.3M acres of land. Most of the protected species were birds (23), followed by fish (21), then insects (8), then amphibians/reptiles (7), then mammals (6). There were also (6) species of plants and (4) species of mussels included in SHAs.

3.10 Evaluations of the U.S. Safe Harbor Policy

The growth in number of species, participants, and land covered by SHAs since their inception has demonstrated success in getting traction and in changing landowner attitudes towards the ESA. Furthermore, the retention rate for participants showed that 99% of landowners remained in the program once enrolled. Unfortunately, biological results of SHAs have not been assessed due to the recent implementation of the program, but also due to limited or absent biological monitoring.³⁰

3.11 Precedents or litigation involving U.S. safe harbour agreements

Given the flexibility of SHAs and contentious nature of baseline determination, it would be of interest to determine if there have been any penalties or notable litigious disputes involving safe harbour agreements. However, a brief search of such issues did not yield results. This could be due to the flexible nature of these agreements, the leeway of regulators, and a desire to avoid expensive and contentious and drawn out legal proceedings. However, a more in depth search of such instances might yield insight into how omissions or unclear terms in the U.S. Safe Harbor Policy or its agreements could lead to disputes.

4 Introduction to Canada's Species at Risk Act

The stated purpose of Canada's Species at Risk Act (SARA) is to prevent wildlife species from being extirpated or becoming extinct, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened.³¹ SARA was passed in 2002 and came into full effect in 2004, three decades after the U.S. passed its Endangered Species Act.³² Canadian lawmakers went to great lengths to ensure SARA did not too closely mimic the U.S. ESA, which had a reputation of being "heavy handed" and unfair to private landowners.³³ Kathryn Harrison, a leading expert in comparative U.S./Canada environmental policy, outlines three major differences between the U.S. ESA and SARA: (1) regulatory stringency, (2) the degree of government discretion, and (3) the degree of federal involvement in sub-national government affairs.³⁴

(1) The U.S. ESA is fundamentally a regulatory statute that achieves species protection by regulations, and thus imposes costs on private firms or individuals rather than the state.

SARA however, sought a more cooperative versus adversarial approach. In introducing

SARA, Environment Canada stated that “the best way to protect species habitat is through voluntary protection on private land” through “voluntary preventative measures, rather than having to resort to legal restrictions on land use.”³⁵

(2) Under SARA, there is a much greater degree of discretion awarded to the executive branch of government in determining how much protection to afford to endangered species and where. Both governments have the authority to go through extraordinary lengths to protect any species at risk anywhere in their respective country. However, the U.S. ESA contains non-discretionary language that gives them little choice but to award protection to species, or face lawsuits compelling them to do so. The discretionary language of SARA gives the Canadian cabinet considerable flexibility to determine which actions to take and where.³⁶

(3) In the U.S., the federal government is primarily responsible for species protection, but may authorize states to manage species within their borders, provided that they meet federal standards. Under SARA, it is the opposite - the provinces set the standards for most species protection.¹ Thus the onus placed on the Canadian federal government is to justify its involvement, rather than on provinces to justify their compliance with federal standards. Furthermore, SARA does not specify criteria by which to assess whether a province is adequately protecting listed species, and thus faces challenges in justifiably invoking SARA’s safety net.³⁷

The ways in which SARA’s strength, scope, and application of protections differ to the U.S. ESA is important in understanding potential application and limitations of safe harbour policies

¹ The provinces’ jurisdiction is for all species other than aquatic species and migratory birds

in Canada. The most notable difference is that in Canada, SARA listed species are only protected on federal land, with the exception of aquatic species and migratory birds. All other SARA listed species must rely on provincial regulations for their protection on private lands - regulations which are often weak or absent.³⁸ It is important to note that, in addition to SARA, the Canadian Migratory Birds Convention Act (MBCA) also has regulations that protect migratory birds even though they may not be listed under SARA.

4.1 What activities may be prohibited under SARA?

Unlike the U.S. ESA's Section 9 prohibitions, SARA prohibitions are broken down into different sections (that apply in different circumstances). SARA prohibits the harming of listed species through the application of sections 32 and 33 of SARA, which are collectively known as SARA's "general prohibitions".

32. (1) "No person shall kill, harm, harass, capture or take an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species."

33. "No person shall damage or destroy the residence of one or more individuals of a wildlife species that is listed as an endangered species or a threatened species, or that is listed as an extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada."

SARA also prohibits the destruction of a species' "critical habitat" through section 58, if such critical habitat has been formally identified through a "recovery strategy" or an "action plan". This is known as SARA's "critical habitat prohibitions".

58. (1) “...no person shall destroy any part of the critical habitat of any listed endangered species or of any listed threatened species - or of any listed extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada...”

4.1.1 What is a “residence” and what is “habitat”?

It is reasonable to expect confusion regarding the difference between the term “residence” used in the general prohibitions, and the term “critical habitat” used in the critical habitat prohibitions. The term “residence” is somewhat ambiguous, especially in how it can be distinguished, in practice, from habitat. Under SARA, residence is defined as:

“a dwelling-place, such as a den, nest or other similar area or place, that is occupied or habitually occupied by one or more individuals during all or part of their life cycles, including breeding, rearing, staging, wintering or hibernating.”

Habitat, as defined by SARA is:

- a. “in respect of aquatic species, spawning grounds and nursery, rearing, food supply, migration and any other areas on which aquatic species depend directly or indirectly in order to carry out their life processes, or areas where aquatic species formerly occurred and have the potential to be reintroduced; and”
- b. “in respect of other wildlife species, the area or type of site where an individual or wildlife species naturally occurs or depends on directly or indirectly in order to carry out its life processes or formerly occurred and has the potential to be reintroduced.”

Ecojustice claims that the term “residence” is not a biological or scientific construct, but is used to minimize the automatic consequences of listing a species under SARA by restricting legal protection to a minimal portion of the species’ critical habitat.³⁹

4.2 Where do SARA prohibitions apply?

The major difference between SARA and the U.S. ESA is that the SARA prohibitions (described above) apply differently on federal and non-federal lands, depending on the type of species. In general, the application of the prohibitions is more widespread on federal lands. For the purposes of safe harbour, and due to the complexity of how these prohibitions apply, our analysis will be limited to how these prohibitions apply to provincial lands (and the private lands within them).

On provincial lands (which include private lands), general prohibitions automatically apply to listed aquatic species and listed migratory birds that are also listed under the MBCA. The critical habitat prohibitions only automatically apply for listed aquatic species, and only when critical habitat has been identifiedⁱⁱ - they do not automatically apply for migratory birds or for other species.⁴⁰ It should be noted though, that the “residences” are protected under the general prohibitions, which includes “nests and dens” of migratory birds. For all other listed species, they are afforded no automatic protection on provincial (and thus private) lands.⁴¹ Ecojustice has raised concern regarding the scale of deficiency in geographic coverage of SARA’s protections, noting that “the vast majority of listed species (70 percent) receive no automatic protection at all under SARA on 94 percent of Canada’s land-base.”⁴²

ⁱⁱ Critical habitat is identified through a SARA Recovery Strategy or Action Plan, published some time after a species is listed as endangered or threatened

There are however, two discretionary “safety net” mechanisms by which SARA protections can be afforded to these other listed species on provincial lands - though a cabinet order. This can occur if the Minister is of the opinion that provincial laws do not provide effective protection for these other species.⁴³ This “safety net” can be used to apply the general prohibitions to other listed species on provincial lands. A “safety net” can also be used to apply the critical habitat prohibitions to provincial lands for other listed species as well as listed species that are also listed under the Migratory Birds Convention Act. Before a safety net can be ordered, the government must first be of the opinion that provincial protections are insufficient, and exhaust consultations with the impacted provinces. However, Canadian environmental groups have pointed out that, despite many instances of weak or non-existent provincial species protection measures, no safety net orders have ever been issued in the history of SARA.⁴⁴ The application of SARA’s prohibitions on provincial land is summarized in the table below:

Table 1 - Application of SARA Prohibitions on Provincial Land

	General Prohibitions	Critical Habitat Prohibitions
Aquatic Species	automatic protection	automatic protection
Migratory Birds	automatic protection	by ministerial order
Other Species	by ministerial order	by ministerial order

4.3 By what process are species protected?

Species obtain protection under SARA through a series of steps, beginning with an assessment by an independent body known as the Committee on the Status of Endangered Wildlife in Canada (COSEWIC).

- COSEWIC assesses a species, and recommends that the species be designated as either at risk (which includes being extirpated, endangered, threatened, of special concern), or not at risk.⁴⁵
- If COSEWIC has recommended that a species be listed “at risk” under SARA, Cabinet is legally obliged to list the species under SARA within nine months, or give reasons why it chooses not to.ⁱⁱⁱ Once listed, species receive automatic protections from section 32 and 33 on federal lands. Aquatic and migratory bird species receive automatic section 32 and 33 protections on provincial lands. The federal government can apply section 32 and 33 prohibitions on provincial lands for the other species through the use of a “safety net” provision, if the government finds that provincial laws to protect these species are inadequate. To date, this has never been done.⁴⁶
- SARA obliges the federal government to prepare a “recovery strategy” (within one year of listing for endangered species, and within two years for a threatened species).^{iv} This recovery strategy includes an identification of the species’ critical habitat.⁴⁷

ⁱⁱⁱ However, in practice, such deadlines have not been enforced and the government has created an “extended listing process.”

^{iv} Canadian ENGOs point out that, in practice, the federal government fails to meet these timeline requirements.

- Six months after critical habitat is formally identified, section 58 prohibitions apply for all species on federal lands, but on provincial lands, they only apply for aquatic species. The federal government can apply section 58 prohibitions on provincial lands for migratory birds and other species through the use of a “safety net” provision, if the government finds that provincial laws to protect these species are inadequate. To date, this has never been done.⁴⁸
- Once a recovery strategy is completed, SARA requires the federal government to decide, in consultation with relevant stakeholders, what management actions they will take to carry out the recommendations in the recovery strategy. These management actions are contained in a SARA “action plan”. An action plan can allow consideration of socio-economic factors in determining how to implement recovery actions.⁴⁹

4.4 What about at-risk species that are protected under provincial laws?

If a species is listed as endangered or threatened by provincial laws, the general prohibitions and critical habitat prohibitions of SARA may be extended onto portions of federal lands within that province, but only by discretionary order (SARA section 36 and section 60).

4.5 Implications of the Migratory Birds Regulations (MBR)

Under section 6(a) of the Migratory Birds Regulations (MBR), it is prohibited to “disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird.” This prohibition applies anywhere they are found, including private lands.⁵⁰ This prohibition is not limited to active nests. Private landowners can destroy nests after the nesting season if the species of birds don’t reuse nests from year to year.⁵¹ Despite a species’ listing under the

Migratory Birds Convention Act (MBCA), SARA prohibitions still apply if the migratory bird species is also listed under SARA (thereby protecting the “residences”).⁵²

Environment Canada points out that the nests and eggs of migratory birds can be inadvertently destroyed by routine activities undertaken on land and water. This inadvertent but “incidental take” of migratory birds nests and eggs is in violation of the MBR under 6(a). Currently, regulations do not allow for a permit or exception of incidental take of nests or eggs of migratory birds in the course of industrial or other activities (including agriculture). Violations are prosecutable, regardless of scale of incidental take. Environment Canada is not in a position to explicitly permit or otherwise authorize incidental take of nests and eggs of migratory birds.⁵³

Its advice to private landowners is to “avoid engaging in destructive or disruptive activities during key periods – including the breeding period, which varies by region and by species – in order to reduce the risk of nest destruction or disturbance.”⁵⁴

Although both SARA and MBR prohibit the “harassment” of migratory birds, among other things, the MBR regulations explicitly allow the scaring of birds from landing and nesting so long as firearms or aircraft are not used.^v Under SARA, this could possibly be construed as harassment. Furthermore, under the MBR, the relocation of migratory birds is authorized if it is necessary to avoid injury to agricultural interests.^{vi}

^v See section 24(1) of the MBR

^{vi} See section 26.2 of the MBR

4.6 What permits are available for activities that can harm species at risk?

In the U.S., the existing permitting system was the mechanism by which the safe harbour program was pursued. It is therefore useful to outline what permits or agreements are available under SARA. Under SARA, agreements may be entered into or permits issued to authorize certain activities that would otherwise violate SARA's general and critical habitat prohibitions, provided that certain preconditions are met. Such authorizations are known as "Section 73 Permits."⁵⁵ A competent federal minister may discretionally allow such permits or agreements for any of the following reasons, outlined in 73 (2) of SARA⁵⁶:

- a) The activity is scientific research relating to the conservation of species
- b) The activity benefits the species or is required to enhance its chance of survival in the wild
- c) Affecting the species is incidental to the carrying out of the activity

The preconditions on these permits do not appear to preclude the potential for the use of either (b) or (c) in a safe harbour agreement. In fact, reason (b) seems to be consistent with the "enhancement of survival" rationale used to issue a permit to authorize incidental take in the case of the U.S. Safe Harbor Policy. For the purposes of illustrating just how similar the wording is, Section 10(a)(1)(A) in the U.S. ESA is quoted below:

"The Secretary may permit, under such terms and conditions as he shall prescribe, any act otherwise prohibited by section 9 for scientific purposes or to enhance propagation of survival of the affected species, including but not limited to, acts necessary for the establishment and maintenance of experimental populations..."

Until recently, the terms on SARA agreements were limited to a maximum of five years, and the terms of permits were limited to a maximum of three years. However, SARA has recently been

modified such that these term limits have been removed.⁵⁷ This is of benefit to the potential of SHAs because longer terms offer more certainty of net conservation benefit to species.

Under 83(4) of SARA, exemptions from the general prohibitions or the critical habitat prohibitions are also allowable for a person that engages in activities permitted by a recovery strategy, an action plan, or a management plan if the person is also authorized under an Act of Parliament to engage in that activity. Thus, a “recovery strategy” or “action plan” could also be an appropriate instrument upon which to apply a safe harbour policy.

5 A safe harbour construct for SARA

Generally speaking, the basic components of a safe harbour policy under SARA can be closely modelled after the U.S. Safe Harbor Policy. However, owing to the substantial differences between the strength and jurisdictional application of SARA when compared to the U.S. ESA, the applicability and mechanisms of a safe harbour policy under SARA will be distinct. Because the fundamental design of SARA was to be far less restrictive to private property owners than the much feared U.S. ESA, the impetus and relative effectiveness of a safe harbour program under SARA may be lower. In proposing a safe harbour construct under SARA, four key questions should be answered:

(1) In what circumstances can SHAs be most appropriately applied? This question can be answered in terms of species and species characteristics.

(2) What are the legal mechanisms by which safe harbour agreements can be authorized?

This question can be answered by investigating the permits, agreements, exemptions, or general flexibility of SARA’s prohibitions.

(3) How should SHAs be written? This question can be answered by investigating the requirements of U.S. SHAs and the components of their written agreements.

(4) How can SHAs be most effectively developed and deployed? This question can be answered by investigating the U.S. Safe Harbor Policy and insights from their experiences, while recognizing differences in Canada's enforcement and monitoring capacity, and the more limited encroachment by SARA onto private lands. This discussion will include specifics on how baseline determinations should be made, how incidental take is handled, how agreements are terminated, and the potential for umbrella agreements to be employed.

5.1 Appropriate circumstances for a SHA

5.1.1 Legally applicable species

The purpose of a safe harbour policy is to encourage habitat improvements on private lands by removing the fear of additional regulation.⁵⁸ Thus, in determining how to apply a safe harbour policy under SARA, it is necessary to restate which “fears” (i.e. SARA regulations) apply on private lands.

On private land in Canada, only aquatic species and migratory birds listed under SARA and listed under the Migratory Birds Convention Act are protected by SARA's general prohibitions. A cabinet order can protect other species on private lands, but this has never occurred and seems unlikely to occur. It is much more probable that provincial endangered species laws will be applied to these other species before a safety net order is ever given. Thus we can reasonably conclude that safe harbour agreements under SARA are only appropriate for aquatic species and migratory birds that are listed under either SARA and the MBCA.

Pertaining to SARA’s critical habitat prohibitions, they only apply to aquatic species on private lands, and only after they have been formally identified in a recovery strategy or action plan. The critical habitat of SARA listed migratory birds is not protected. A cabinet order can extend such protections to migratory birds, but this is unlikely to happen.

The absence of automatic critical habitat prohibitions is not a fatal impediment to the effective application of safe harbour for migratory birds. This is because migratory nests, eggs, and residences are protected from incidental take under either SARA’s general prohibitions or MBR Section 6(a). If habitat for these species is occupied presently or habitually, then destroying the habitat would likely cause incidental take. The creation or improvement of such habitat might result in colonization of such species that thus restrict activities if they could cause incidental take. Hence, the impetus for SHA assurances would still be relevant.

SHAs under SARA are most appropriate only for aquatic species and migratory birds listed under SARA or the MBCA.
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5.1.2 Characteristics of ideal candidate species

Species that “can” be protected by SHAs (described above) are not the same as the species that “should” be protected under SHAs. SHAs are most appropriate for species that have particular characteristics that make SHAs easier and more cost effective to administer, eliminate uncertainties regarding baseline determination, allow for reasonable assessment of net conservation benefit, and have habitat that can be reasonably enhanced by farmer/landowner actions. Characteristics of good candidate species for SHAs have been outlined by both Savanta⁵⁹ and Ontario Nature⁶⁰, and are amalgamated below:

- Effects of change are easy to measure and monitor

- Life history and population trends are well understood
- Close proximity to nearby significant population sources
- Narrow habitat requirements
- Heavily dependent on private lands
- Habitat in need of active management
- Landowners are able to manage habitat needs
- Not wide-ranging
- Populations that are zero or close to zero (easy to measure baseline)
- Umbrella species
- Charismatic species with high probability of success

The characteristics of many migratory birds may not be consistent with several of these characteristics. Insight from knowledgeable conservation groups and wildlife experts is recommended to determine the most appropriate species of migratory birds for SHAs.

5.2 What legal mechanisms might allow SHAs to be applied under SARA?

The purpose of a SHA is to provide regulatory relief to landowners who create a net conservation benefit to endangered or threatened species. This regulatory relief is in the form of allowances of incidental take. If a SHA is to operate under SARA, it would mean that enrolled private property owners would be forgiven (or given leeway) for violating SARA general and critical habitat prohibitions. Does SARA allow for such leeway? Though there may be more, two mechanisms have been identified that can hypothetically be used to authorize such “incidental take” under a safe harbour policy.

5.2.1 Authorization under SARA section 73(2)

The first is an agreement or permit under section 73(2). Such a permit or agreement can authorize the violation of general and critical habitat prohibitions if the “activity benefits the species or is required to enhance its chance of survival in the wild”. In its wording, this is similar to the “enhancement of survival” permit used in the U.S. Safe Harbor Policy. Upon brief review of several of these 73(2) permits, they seem to be used as one time authorizations and not for ongoing activities, and it seems like a landowner would have to apply for a permit each time a violation is expected.^{vii} For the purposes of a safe harbour agreement, a long term single permit, granting the “safe harbour assurances”, is the most appropriate. It is inappropriate and inconvenient to require numerous permits for each incidental take request over the course of a safe harbour agreement. Farmers dislike the process of waiting until these permits are approved just so they can continue with their regular activities.⁶¹ While it is unclear whether there is flexibility under 73(2) to issue such long term permits for the purposes of a SHA, is a possibility worth exploring, especially given the discretionary powers available to the Minister under SARA.

5.2.2 Exemption under SARA section 83(4)

The second potential mechanism is an “exemption” under section 83(4) of SARA. This exemption can be granted for a person that engages in activities permitted by a recovery strategy, an action plan, or a management plan if the person is also authorized under an Act of Parliament to engage in that activity.⁶² So if a SHA is included under a recovery strategy or action plan, it

^{vii} Decisions regarding Section 73 permits/agreements are posted online at: http://www.sararegistry.gc.ca/sar/permit/permits_e.cfm

could allow incidental take or return to baseline through this exemption. It's important to note that recovery strategies and action plans are not available for all listed species, thus this mechanism would restrict the deployment of SHAs only to those aquatic or migratory bird species where such recovery strategies or action plans are in place.

One potential problem that may restrict the use of these permits, agreements, or exemptions is the Migratory Birds Regulations, which prevents the inadvertent but “incidental take” of migratory birds nests and eggs under section 6(a). Environmental Canada states that regulations do not allow for a permit or exception of incidental take of nests or eggs of migratory birds in the course of industrial or other activities (including agriculture).⁶³

Incidental take in a SHA can be authorized by section 73(2) of SARA. Incidental take in a SHA may also be allowed through a SARA recovery strategy or action plan. However, pertaining to migratory birds, these authorizations or exemptions may conflict with MBR, so this possibility must be further examined.

5.3 How should SHAs be written

The listed requirements of U.S. SHAs can be considered basic requirements of a SHA, regardless of jurisdiction. A SHA under SARA would need nearly identical requirements. Thus the recommended requirements that should be placed on any SHA under SARA are listed below (adapted from the U.S. Safe Harbor Policy).⁶⁴

1. Specify the species and/or habitats covered, including habitat conditions, and identify the enrolled property to be covered by the agreement
2. Describe the agreed upon baseline conditions for each of the covered species within the enrolled property
3. Identify management actions that would be undertaken to accomplish the expected net conservation benefit to the species, where and when the benefits would be achieved, and

the agreed upon time frames these management actions will remain in effect to achieve the anticipated net conservation benefits

4. Describe the anticipated incidental take associated with the management actions
5. Incorporate a notification requirement (if appropriate), to provide appropriate authorities with a reasonable opportunity to rescue individuals of a covered species before any authorized incidental taking occurs
6. Describe the activities that would be expected to return the enrolled properties to baseline conditions, and the expected incidental take that would likely occur
7. Identify the responsible parties that will monitor maintenance of the baseline conditions, implementation of the terms and conditions of the safe harbour agreement, and any incidental take that would result from such activities

The style and headings of written SHAs can accordingly be modelled on U.S. SHAs. These agreements contain the following sections (adopted from the U.S. SHA guidelines)⁶⁵:

1. Introduction
2. List of Covered Species
3. Background
4. Description of Enrolled Lands
5. Baseline Determination
6. Responsibilities of the Parties
7. Notification Requirements
8. Management Activities for Covered Species
9. Return to Baseline
10. Net Conservation Benefit
11. Changed Circumstances
12. Agreement Duration

13. Take
14. Reporting and Monitoring
15. Funding
16. Modifications
17. Additional Measures
18. References Cited

5.4 Effective development and deployment of SHAs

In the Canadian context, it should be recognized that legally applicable species are far fewer, and administrative and enforcement capacities in Canada are weaker and less established than in the U.S. This implies that a more streamlined, resource efficient, and priority driven safe harbour policy and deployment should be pursued in Canada. This is not so different than the targeted and limited deployment of SHAs in the U.S. prior to the official release of the U.S. Safe Harbor Policy.

5.4.1 The usefulness of an umbrella agreements

The use of umbrella or “programmatic” agreements in the U.S. has demonstrated success in simplifying the process by which private landowners can enroll in SHAs. The benefits will be the same in the Canadian context: reducing the administrative burden for government; simplifying, facilitating, and targeting landowner enrollment; leveraging the expertise and resources of conservation groups (for monitoring and baseline determination); and allowing the conservation priorities to be set and pursued on regional levels. In Canada, umbrella agreements may be more valuable due to the more limited federal species protection resources as compared to the U.S. Landowners may also favour interactions (such as intermediary administration and

monitoring) by locally relevant conservation groups versus that of federal agencies, especially if they are reluctant to allow federal officials access to their private property.

In 2011, a workshop was held by Ontario Nature to examine the potential for SHAs in Ontario. The workshop involved farmers, naturalists, and conservationists. In discussing effective elements to implementation in Ontario, simplicity in the process was seen as very important. Landowner participants also expressed a strong preference for umbrella agreements, and were able to list several organizations that they felt could administer them. These organizations included: The Alternative Land Use Services (ALUS), Ontario Ministry of Natural Resources Stewardship Councils, Ducks Unlimited Canada, and the Ontario Soil and Crop Improvement Association (OSCIA). Landowner participants frequently noted that the OSCIA administered Environmental Farm Plan (EFP) could be used to administer and implement a pilot safe harbour program since it was both well established and had existing buy-in from landowners.⁶⁶

The mechanism for permitting a programmatic safe harbour agreement under SARA can theoretically mimic the process used under the U.S. ESA. The umbrella organization can develop a blanket SHA that details how a net conservation benefit is achieved through the agreement, and how the agreement can provide an overall “enhancement of survival” of the species. Once the permit is approved by either Environment Canada or the Department of Fisheries and Oceans, the umbrella organization can then receive a permit under the authority of SARA section 73(2). The umbrella permit holder can then sign individual SHAs with private landowners and include them under the umbrella permit. In the U.S., this is done through a “certificate of inclusion” and something similar could be done in Canada.

5.4.2 Developing the baseline

A safe harbour agreement must consider that listed species may already inhabit the property, prior to the implementation of the SHA. In order to ensure that net conservation benefit is achieved, and the species' overall survival has been enhanced (as per the terms upon which assurances are authorized), the land enrolled in the SHA cannot be allowed to drop below its baseline conditions. In fact, the SHA specifies the beneficial management activities that are to be conducted to bring the enrolled lands above the baseline conditions. As is the case of the U.S. Safe Harbor Policy, the baseline must be agreed mutually agreed upon by the parties to the SHA.

Determining the baseline conditions is a species specific process and one that necessitates expertise and flexibility. Good candidate species for SHAs are species upon which the baseline is zero, close to zero, or straightforward to determine. Pursuing a SHA for a species that does not have these characteristics could prove slow, complex, and costly in terms of baseline determination.

The U.S. Safe Harbor Policy provides a good description on the ways in which the baseline can be described (discussed in section 3.3 of this report). While the baseline can be described by population numbers, it is most often described by amount and quality of habitat, since the number of individuals can fluctuate over time. If population numbers are used, the seasonal variations of populations should be described. In the case of aquatic species or migratory birds, relying on population numbers might be a poor choice if the population of these species fluctuates significantly from season to season or from year to year.

Under the U.S. Safe Harbor Policy, the case can be made for a post-agreement downward adjustment of the baseline if a species disappears for reasons beyond a landowner's control, such as a natural disaster or drought. This should also be allowed under SARA.

In terms of who calculates the baseline, in the U.S. it is a mutually agreed upon qualified person or the U.S. regulator. In the Canadian context, this should be the same. Who pays is often a question of who wants the SHA more and who it is a priority for. If a landowner wants a SHA that isn't a government priority, the government may be unwilling to allocate any financial or human resources to the determination of the baseline, or to compliance monitoring. In that case, the landowner would pay. It is understandable for the government to pursue a cost-benefit approach to which SHAs are funded.

Ideally, the umbrella permit holder will have the expertise to identify baseline conditions in collaboration with the landowner. Since federal conservation goals are met through the safe harbour program, funding should be established to equip the umbrella permit holder with the financial resources to efficiently undertake not only baseline determinations, but even compliance monitoring. This is especially the case in high priority and regional conservation efforts where landowners are targeted for inclusion in a safe harbour program.

The concept of a voluntary baseline disclosure, through a questionnaire filled out by a landowner, was hypothesized as a simplified way of determining a baseline.⁶⁷ While this would be a useful tool in estimating the baseline, or what species may be present, there is an incentive for the landowner to claim a lower baseline in order to avoid future restrictions. If the risk of this is high, a net conservation benefit can't be guaranteed by this manner of safe harbour agreement deployment.

5.4.3 Handling of Incidental Take

Anticipated incidental take should be described in the agreement for both the ongoing management activities on the enrolled lands, and in the case of returning the land to baseline

conditions. The authorizing of incidental take would be through one of the mechanisms described in section 5.2 of this report. Although incidental take is authorized, there should be notification requirements when activities are expected to cause incidental take to give Environment Canada, or agencies acting on their behalf, the opportunity to mitigate incidental take, or to rescue or relocate individuals of the impacted species.

5.4.4 Transferring, extending, or terminating a SHA

In the U.S. case, a SHA and the associated assurances can be transferred when the land is sold or if the landowner dies. However, to retain the same safe harbour assurances, the new landowner is required to sign as a party to the original agreement, or sign a new mutually agreeable one. If the landowner does not, s/he loses any safe harbour assurances, the permission for incidental take, and the ability to return the land back to the pre-SHA baseline. These same standards should be applied in the SARA context.

The ecological benefits of a SHA increase with time, thus extending the length of an agreement should be seen as positive. At a minimum, the duration should be enough to safely ensure a net conservation benefit, which is to be most appropriately determined by wildlife experts on a case by case basis. SHAs should be allowed to be renewed indefinitely as long as the net conservation benefit is achieved. In the U.S., a SHA (which includes management activities for which a landowner is responsible) is bundled with the “right to undo” assurances. The “right to undo” assurances should last longer than the SHA because there is no benefit if the landowner returns the land to baseline immediately following the agreement for fear of losing the assurances.⁶⁸

With respect to terminating the SHA, it is important that the duration of SHAs be long enough to ensure a “net conservation benefit.” The minimum duration of the SHA is to be spelled out in the agreement itself. The consequences of early termination should also be included in the agreement. In some agreements, early termination would mean that the landowner loses the assurances and is not permitted to return the land to the baseline conditions. In all cases, an exit assessment is necessary to ensure compliance with the terms of the agreement, and in cases of non-compliance, determine whether unauthorized incidental take has occurred.

5.4.5 Monitoring

Compliance monitoring ensures that SHA commitments are being met by the landowner such that the baseline is being improved upon. Monitoring is also necessary if the landowner decides to return the property to the baseline conditions. The qualifications for such activities would be similar to that required to determine initial baseline decisions. As such, the work can be done by the same person/organization. Again, this is an appropriate role for an umbrella permit holder. In high priority conservation areas, government funding should be leveraged.

Although biological monitoring is important to determine effectiveness of a SHA, it has been often neglected in the U.S. experience. In a pilot safe harbour program under SARA, biological monitoring should be conducted based on conservation priorities, in recognition of limited funding.

6 The relevance of SARA safe harbour agreements in Ontario

The effectiveness and relevance of a SARA-based safe harbour program may vary from province to province. SHAs under SARA may be more effective in provinces that offer relatively weak

provincial protections. If a province offered superior protections, then a provincial safe harbour program might be more appropriate.

To determine the relevance of a SARA safe harbour program within the province of Ontario, it is necessary to compare the severity of SARA prohibitions on private lands with that of Ontario's own Endangered Species Act, 2007 (ESA 2007). It is also necessary to determine which SARA species are protected on private land in Ontario and determine whether they are also protected by ESA 2007. A SARA administered SHA would only be pertinent for species where the SARA prohibitions were more stringent than the ESA 2007 prohibitions. Furthermore, it would be useful to determine if and how a SHA under SARA would be accommodated under ESA 2007. Finally, it is worthwhile to entertain the concept of a safe harbour policy administered under an amended Ontario ESA, as is currently being proposed by the Ontario Ministry of Natural Resources (OMNR).

6.1 SARA prohibitions versus ESA 2007 prohibitions

ESA 2007 prohibitions are more stringent than that of SARA in that they apply on private property, and include the prohibition on habitat destruction. Section 9(1) states that it is prohibited to “kill, harm, harass, capture or take a living member of a species that is listed on the Species at Risk in Ontario List as extirpated, endangered or threatened species.” Section 10(1)(a) states that “No person shall damage or destroy the habitat of a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species.”⁶⁹ Habitat is defined to be the “area on which the species depends, directly or indirectly, to carry on its life processes, including life processes such as reproduction, rearing, hibernation, migration or feeding.”⁷⁰ It can also include a specific area defined by a regulation for a particular species, in which case the regulation would prevail over the general definition of habitat.⁷¹

6.2 SARA protected species on private lands

A SHA under SARA is only really relevant if a species is awarded greater protection on private lands under SARA than under ESA 2007^{viii}. To determine the species that would fit this category, SARA's species list was filtered to include all the following characteristics^{ix}:

- Listed under SARA Schedule 1; and
- Taxonomic category of birds, or fish, or molluscs; and
- Classified as endangered, threatened, or extirpated; and
- Has a range that includes "Ontario"

The results for birds were further filtered to only include birds listed under the MBCA.^x Finally, the filtered species list was cross-referenced with the ESA 2007 list to determine the species' ESA 2007 designation. The list of these species, including their ESA 2007 designation, is provided in Appendix C and Appendix D.^{xi}

6.2.1 Migratory bird species

Of 18 migratory bird species present in Ontario and afforded protection^{xii} under SARA, 12 are protected under ESA 2007's relatively stronger prohibitions. Of the remaining six species, five

^{viii} Note: species that fit this category may be poor candidates for SHAs for other reasons (i.e. biological, difficult baseline determinations, etc.)

^{ix} List determined using SARA search filter, available at: http://www.sararegistry.gc.ca/search/default_e.cfm

^x MBCA list available at: <http://www.ec.gc.ca/nature/default.asp?lang=En&n=9AAA86EC-1>

^{xi} The scans of SARA, MBCA, and ESA 2007 species lists were conducted on 22 February 2013 and will not reflect changes to listed species made after this date.

^{xii} Species that are afforded protection are those listed as "threatened" or "endangered"

are listed under ESA 2007 as special concern, and one has recently been delisted.^{xiii} Thus, only five species of birds remain that might be relevant, further contingent on their appropriate biological characteristics. These bird species are:

- Red-headed Woodpecker
- Golden-winged Warbler
- Canada Warbler
- Common nighthawk
- Olive-sided flycatcher

6.2.2 Aquatic species

There are 17 aquatic species present in Ontario and currently protected under SARA. All 17 of these species are also protected under ESA 2007's prohibitions. Thus SHAs under SARA may not be relevant for any aquatic species in Ontario.

6.3 Accommodating SARA SHAs under ESA 2007

On private lands in Ontario, SARA only protects five species that would otherwise receive no formal protection. An additional 29 species are protected by both SARA and ESA 2007. We can hypothesize several scenarios by which SHAs are implemented in Ontario, and then briefly describe any issues with such implementation.

^{xiii} The Hooded Warbler is listed as threatened under SARA, but has been reassessed by COSEWIC to be not at risk. It was recently delisted under ESA 2007.

6.3.1 SARA SHA for species not protected under ESA 2007

The most appropriate scenario for a SARA SHA in Ontario is for the five species mentioned previously. Because these species are not listed under ESA 2007, they do not require exemptions or permits under ESA 2007 and no potential for conflict is expected.

6.3.2 SARA SHA for species also protected under ESA 2007

If for some reason a SHA was deployed under SARA that covered a species also protected by ESA 2007, then there might be some concern over whether exemptions from the ESA 2007 prohibitions would automatically be granted. In such cases, it can be expected that coordination (or at least communication) will invariably occur between the province and the federal government (perhaps through conservation organizations) in drafting the SHA.

ESA 2007 also has a permitting system that would allow exemptions from the prohibitions if “the Minister is of the opinion that the purpose of the activity authorized by the permit is to assist, and that the activity will assist, in the protection or recovery of the species specified in the permit.”^{xiv} Exemptions from prohibited activities are also granted (seemingly automatically) if a permit has been granted under federal laws for activities that will also assist the species.^{72,xv} Thus there doesn't appear to be any potential conflict.

6.4 A safe harbour policy under Ontario's Endangered Species Act

At the time of this report's writing, Ontario is considering amending its ESA to include “Streamlined Approaches for New Activities to Benefit Species” which may incorporate a policy

^{xiv} ESA 2007 17(2)(b)

^{xv} ESA 2007 18(1)(a)

that allows for safe harbour agreements.⁷³ If such a program is established, it would render safe harbour under SARA a moot point in Ontario. One option the federal government has with respect to safe harbour is to adopt a wait-and-see approach with respect to Ontario's safe harbour policy. If Ontario's safe harbour policy proves promising, the federal government may even adapt it for use under SARA.

7 Recommendations

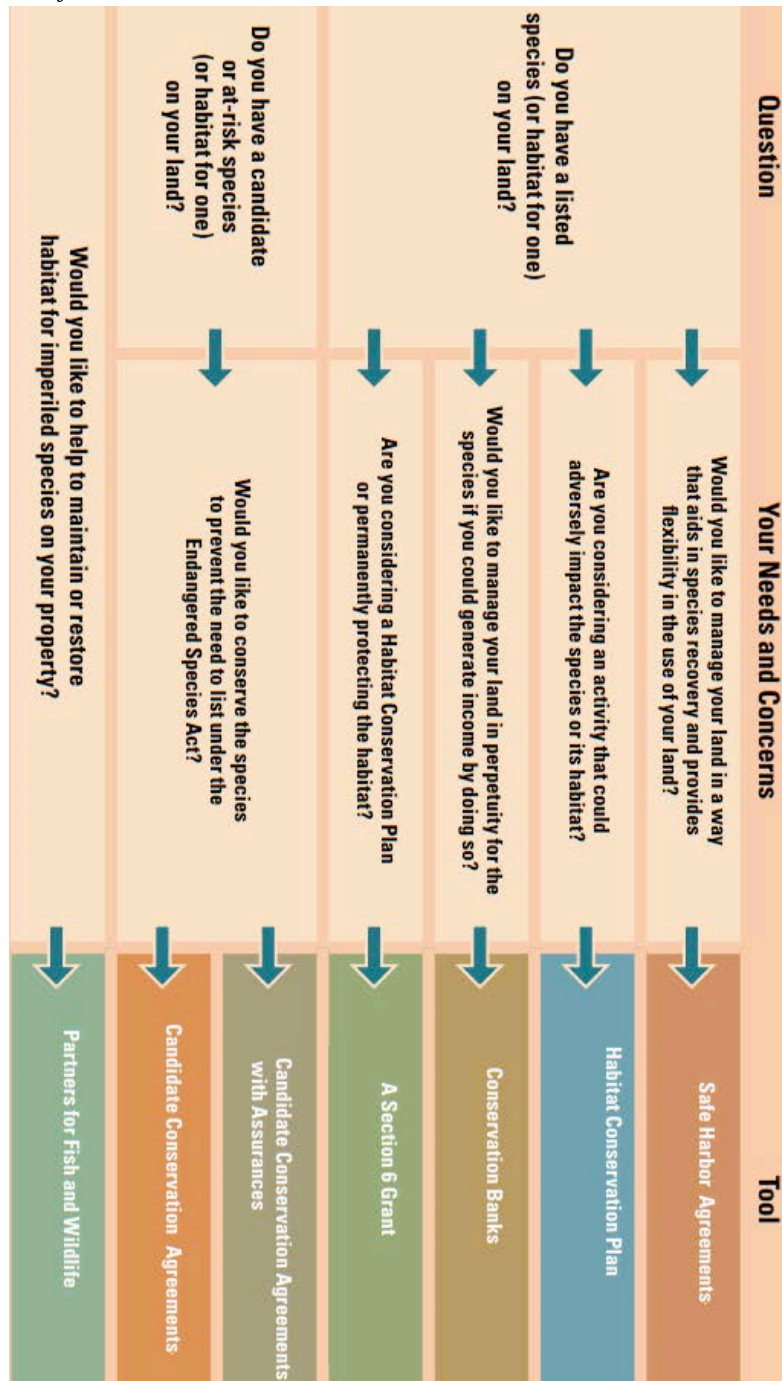
A safe harbour policy under SARA is indeed possible, but it can only apply to aquatic species and listed migratory birds. Therefore any safe harbour policy under SARA can only target these species, and should target the subset which are a priority to protect, and which exhibit biological characteristics that make safe harbour easy to administer.

While this report has identified two potential mechanisms within SARA by which a safe harbour policy is possible, the legal ability to utilize each of these mechanisms should be investigated in greater detail. Furthermore, the potential conflict between the use of either of these mechanisms and the seemingly absolute prohibition on incidental take under the Migratory Birds Regulations should also be investigated.

A SARA safe harbour policy is of little value within provinces that have their own comparable or superior endangered species protections, and this appears to be the case with Ontario. At present, the Government of Ontario is investigating its own safe harbour policy. Should such a program be deployed, it may be possible to adapt Ontario's policy to create a safe harbour policy for aquatic and migratory bird species on private lands under SARA.

Appendix A: U.S. Fish and Wildlife Service's Conservation Tools for Private Lands

Images and information from: *U.S. Fish & Wildlife Service. "Working Together: Tools for Helping Imperiled Wildlife on Private Lands." 2005.*



Safe Harbor Agreements

What are SHAs?

Agreements that provide regulatory assurances for landowners who voluntarily aid in the recovery of species listed under the Endangered Species Act.

What is the landowner's role?

Voluntarily agrees to implement management actions that will contribute to the recovery of a listed species for a specified period of time. Works with the Service to develop a management plan and the agreement.

What are the benefits?

For the landowner: Receives regulatory assurances that he or she can alter or modify property enrolled in the SHA and return it to originally agreed upon "baseline" conditions at the end of the agreement (even if this means incidentally "taking" the covered species).

For the species: Progress towards recovery.

Who can participate?

Any non-Federal property owner. Whole parcels or portions of the owner's property may be enrolled in the SHA.

Property owners also can enroll in an existing programmatic or "umbrella" SHA that is designed for a region or an entire State and is administered by a State or local agency or other entity.

Habitat Conservation Plans

What are HCPs?

Plans that allow for economic development in conjunction with endangered species conservation. If an HCP meets the specified criteria, including minimizing and mitigating the anticipated take of listed species, the Service issues an incidental take permit that allows the landowner to legally take listed species while proceeding with development or other activities.

What is the landowner's role?

The landowner develops an HCP with the Service that includes an assessment of the likely impacts to the species from the proposed project, the steps he or she will take to minimize and mitigate those impacts, and the funding available to implement the steps. The plan also identifies alternative actions to the taking and the reasons why those alternatives are not being used. The landowner then applies for an incidental take permit.

An HCP may exist in your area that you can join. Such plans are known as programmatic HCPs and are often county- or region-wide plans such as the San Diego Multiple-Species Conservation Program. Plans may include plants and nonlisted species as well as listed species.

Conservation Banks

What are conservation banks?

Conservation banks are lands that are permanently protected and managed as mitigation for the loss elsewhere of listed species and their habitats. Conservation banking is a free market enterprise based on supply and demand of mitigation credits. By mitigating multiple development projects at a single site, a conservation bank, all parties involved, including the species benefit from economies of scale.

What is the landowner's role?

Contacts the Service to see whether his or her land is suitable. Appropriate land generally has habitat and is occupied by one or more listed species or is located strategically to contribute to the recovery of such species. If the habitat is suitable, the landowner agrees to preserve and manage this land in perpetuity. He or she is given "mitigation credits" to sell to other landowners who need to mitigate their land development impacts on listed species.

What are the benefits?

For the landowner: Retains title to his or her land while making money selling mitigation credits.

For the species: Provides permanently preserved habitat, generally in larger parcels than would otherwise occur, specifically managed for them.

Cooperative Endangered Species Conservation Fund Grants

What are Cooperative Endangered Species Conservation (Section 6) Grants?

Federal assistance to States and Territories to participate in voluntary conservation projects for candidate and listed species; private landowners are important partners.

Conservation Grants provide funds to States and Territories to implement projects such as species status surveys and to develop management plans for candidate and listed species.

Habitat Conservation Planning Assistance Grants provide funds to States and Territories to develop Habitat Conservation Plans through baseline surveys.

Habitat Conservation Planning Land Acquisition Grants provide funds to States and Territories to acquire land associated with approved HCPs. Grants do not fund the mitigation required of an HCP permittee; instead, they support conservation actions by State or local governments that complement mitigation.

Recovery Land Acquisition Grants provide funds to States and Territories to acquire habitats essential for recovery of threatened and endangered species.

Candidate Conservation Agreements with Assurances

What are CCAs?

Agreements that provide incentives for landowners to implement conservation measures for candidate and at-risk species.

What is the landowner's role?

Voluntarily agrees to implement specific conservation measures for candidate or at-risk species. Works with the Service to develop a management plan and the agreement that lasts for a certain number of years.

What are the benefits?

For the landowner: Regulatory assurances that if the species is later listed, the landowner will not be required to do anything beyond what is specified in the agreement.

For the species: Lessens threats so listing may not be necessary.

Who can participate?

Any non-Federal property owner. Whole parcels or portions of the owner's property may be covered by the CCA.

Property owners can also enroll in an existing programmatic or "umbrella" CCA that is designed for a region or an entire State administered by a State or local agency or other entity.

Candidate Conservation Agreements

What are CCAs?

Agreements between one or more parties that address the conservation needs of candidate or at-risk species. Both

Federal and non-Federal landowners can be CCA partners. CCAs do not provide the landowner with regulatory assurances.

What is the landowner's role?

Voluntarily agrees to implement described actions for a specified period of time to remove or reduce the threats to the species. Works with the Service to design conservation measures.

What are the benefits?

For the landowner: Provides guidance and a formal management plan that identifies specific conservation actions for covered species and habitats.

For the species: Helps to remove threats and improve status so listing may not be necessary.

Who can participate?

Any landowner, Federal or non-Federal.

Partners for Fish and Wildlife Program

What is the Partners for Fish and Wildlife Program?

Through voluntary agreements the Partners program provides expert technical assistance and cost-share incentives directly to private landowners to restore fish and wildlife habitats.

What is the landowner's role?

A phone call or letter initiates the process. The landowner works one-on-one with a local Service biologist to develop a project plan addressing the goals and objectives of the landowner and the Service to benefit fish and wildlife species on his or her land.

To implement a project, a cooperative agreement with a minimum duration of 10 years is signed. The landowner is reimbursed after project completion, based on the cost-sharing formula in the agreement.

What are the benefits?

For the landowner: Fulfilling habitat conservation goals on the land by working one-on-one in partnership with the local Service biologist.

For the species: Restoring important habitats on private lands that may result in the recovery of imperiled species.

Appendix B: Sample U.S. programmatic Safe Harbour Agreement

**SAFE HARBOR AGREEMENT
FOR VOLUNTARY ENHANCEMENT/RESTORATION ACTIVITIES
BENEFITING LAHONTAN CUTTHROAT TROUT
ON PRIVATE LANDS WITHIN THE OREGON PORTION OF THE
NORTHWEST GEOGRAPHIC MANAGEMENT UNIT**

1. INTRODUCTION

This Safe Harbor Agreement (Agreement) is made and entered into on _____, 2011, by the Oregon Department of Fish and Wildlife (the Department or Permittee) and the U.S. Department of the Interior, Fish and Wildlife Service (Service); hereinafter collectively called the “Parties.” This Agreement implements the Service’s Safe Harbor Agreement final policy (64 FR 32717) and final regulations (64 FR 32706) as revised (69 FR 24084), in accordance with the procedural and substantive requirements of section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended.

The Department is the State agency responsible for the restoration and management of fish and wildlife resources in the state of Oregon. The Department has been involved in management, restoration and recovery of Lahontan cutthroat trout, *Oncorhynchus clarki henshawi* (a federally listed threatened species) since the early 1970’s. The Department developed a species management plan for Lahontan cutthroat trout in 1993 (Hanson *et al.* 1993). This plan describes activities and direction to move Lahontan cutthroat trout towards recovery and subsequent de-listing.

This Agreement encourages proactive conservation efforts by private landowners while providing them certainty that future property-use restrictions will not be imposed if those efforts attract Lahontan cutthroat trout to their enrolled property or result in increased numbers or expanded distribution of listed species already present. In return for voluntary conservation commitments, the Agreement will extend assurances to the landowner, which will allow future alteration or modification of the enrolled property to its original baseline conditions. Implementation of this Agreement is an important step towards recovery for Lahontan cutthroat trout.

This Agreement serves as the basis for the Service to issue an enhancement of survival permit (Permit) under Endangered Species Act section 10(a)(1)(A) for the “take” of covered, listed species associated with the potential future return of the enrolled lands to baseline conditions. Under the enhancement of survival permit that accompanies this Agreement, the Department can issue a Certificate of Inclusion (CI) to landowners (Cooperators) who agree to carry out habitat improvement and/or habitat maintenance activities for Lahontan cutthroat trout and abide by the conditions of the Permit. The Parties anticipate that the maximum level of take authorized under this Agreement and Permit will never be realized. Permit issuance will not preclude the need to abide by all other applicable Federal, State, and local laws and regulations that may apply.

This Agreement covers proposed management activities on privately owned land and waters within only the Oregon portion of the Northwest Geographic Management Unit that may affect native or reintroduced populations of Lahontan cutthroat trout. The Northwest Geographic Management Unit is designated in the “Recovery Plan for the Lahontan Cutthroat Trout” as the Quinn River basin in Oregon and Nevada, Black Rock Desert basin in Nevada, and the Coyote Lake basin in Oregon. The Alvord basin in Oregon was not designated as part of the Northwest Geographic Management Unit in the recovery plan, but has been added to the unit for planning purposes, by the Northwest Geographic Management Unit working group. Under this Agreement, the Permittee will enroll willing private landowners in Cooperative Agreements to develop recovery activities and strategies while providing

protections and assurances for incidental takings of Lahontan cutthroat trout on enrolled land.

Landowners enrolled with the Department under the Agreement will receive a Certificate of Inclusion (CI) when they sign a Cooperative Agreement. The Cooperative Agreement will include:

- A map of the property to be enrolled.
- Clear delineation of the portion of the property to be enrolled (if applicable) and associated stream length (kilometers/meters or miles/feet);
- The property's baseline and biological assessment which would include a thorough stream survey (with photos) of the enrolled stream length (kilometers/meters or miles/feet);
- The specific conservation measures to be carried out; and,
- The responsibilities of both the landowner and the Department.
- Grant to the Department and the Service, after reasonable prior notice, and in coordination with the cooperator, permission to enter the cooperator's property to ascertain compliance with the agreement and for monitoring aquatic habitat quality, census populations, remove and relocate species, as well as other necessary measures.

2. PURPOSE AND NEED

The purpose of this Agreement is to enhance the reintroduction and long-term recovery of Lahontan cutthroat trout within the Northwest Geographic Management Unit by encouraging private landowners to voluntarily create, enhance, maintain, or restore Lahontan cutthroat trout habitat.

The primary objective of this Agreement is to encourage voluntary habitat restoration, maintenance, or enhancement activities to benefit Lahontan cutthroat trout by relieving a landowner, who enters into, and implements, the provisions of a Cooperative Agreement with the Department, from any additional section 9 liability under the Endangered Species Act beyond that which exists at the time the Cooperative Agreement is signed (baseline responsibilities). In other words, the objective is to give landowners "safe harbor" from added liability. A Safe Harbor Agreement encourages landowners and assures them that prohibitions against incidental take will not occur if those conservation efforts introduce or attract Lahontan cutthroat trout to the enrolled properties or result in increased numbers or distributions of Lahontan cutthroat trout already present on the enrolled properties. As long as landowners carry out agreed upon conservation measures on their property and maintain their baselines, they may continue or undertake regular ranching activities.

A large percentage of the existing Lahontan cutthroat trout populations and designated recovery streams within the Northwest Geographic Management Unit have private lands somewhere within their perennial reach. Efforts to recover this species without involving and incorporating private lands and landowners may impact our ability to make measurable progress towards Lahontan cutthroat trout recovery. To encourage the cooperation of private landowners, the Department intends to enroll into Cooperative Agreements any private landowners who are willing to allow the introduction or expansion of Lahontan cutthroat trout within their private lands and waters. These Cooperative Agreements will offer protections and assurances to allow for incidental take of Lahontan cutthroat trout by individuals who agree to provide voluntary conservation benefits to the species within their private holdings (See Section 10 in this Agreement for more details). Additionally, the enrollee may cancel this agreement at any time with written notification to the Department and the Service and return to the established baseline conditions, which were present prior to enrollment. The permit will then cease to be in effect.

3. COVERED SPECIES

The Lahontan cutthroat trout (*Oncorhynchus clarki henshawi*), federally listed as threatened under the Endangered Species Act, is considered the “covered species” for purposes of this Agreement. Lahontan cutthroat trout (*Oncorhynchus clarki henshawi*) is the only salmonid native to the Lahontan basin. Lahontan cutthroat trout were once distributed throughout the basin and drainages of ancient Lake Lahontan but currently within the Northwest Geographic Management Unit are limited to small populations in the isolated headwaters of streams in mountain ranges in Nevada and southeast Oregon. Settlement of the Great Basin resulted in the loss of Lahontan cutthroat trout habitat as livestock grazing, urban and mining development, water diversions, hybridization, and competition with non-native trout led to significant declines in the range and numbers of this unique trout species. In response to these declines, Lahontan cutthroat trout was listed as endangered in 1970 (35 FR 13520) and reclassified as threatened in 1975 (40 FR 29863). In December 1993, the Department published a Lahontan Subbasins Fish Management Plan (Hanson *et al.* 1993). In January of 1995, the Service issued the recovery plan for the Lahontan cutthroat trout (USFWS 1995).

In Oregon, Lahontan cutthroat trout were historically common in the Quinn River and Coyote Lake basins. Data collected by the Department and the Nevada Department of Wildlife (NDOW) indicate that Lahontan cutthroat trout are thought to occupy only 15 percent of their historic stream habitat in the Quinn River drainage. The populations have suffered from habitat loss, hybridization with nonnative salmonids and recent extended periods of drought. Recovery actions in the Quinn River drainage are a top priority item in the Service’s 1995 Lahontan Cutthroat Trout Recovery Plan. Currently, Lahontan cutthroat trout occupy approximately 10 streams (57 miles) of habitat in the Coyote Lake basin. This represents most of the available habitat in that basin. In addition to Lahontan cutthroat trout, Alvord cutthroat trout historically occupied Trout Creek and tributaries in the Alvord basin, but those populations are thought to be completely lost to hybridization with rainbow trout.

Lahontan cutthroat trout from the Coyote Lake basin were introduced into nine streams in the Alvord basin in the 1970’s and 1980’s. These include seven streams on the east side of Steens Mountain and two streams on the east side of the Pueblo Mountains.

To facilitate recovery of Lahontan cutthroat trout, the Northwest Geographic Management Unit team was formed in 1999. Members of the team are comprised of personnel from the Service, the Department, NDOW, Bureau of Land Management, U.S. Forest Service, and University of Nevada, Reno. Expanding on the themes identified in the 1995 Recovery Plan, the team has been working to restore habitat and networked populations based upon the results of recent research.

4. RESPONSIBILITIES OF THE PARTIES

Permittee:

Oregon Department of Fish and Wildlife responsibilities include:

- 1) Administer the Permit including enrolling individual landowners via Certificates of Inclusion and Cooperative Agreements. Upon signing of a Cooperative Agreement, the Department will issue a Certificate of Inclusion to a Cooperator authorizing incidental take of Lahontan cutthroat trout on the Cooperator’s lands.
- 2) Provide copies of the draft Cooperative Agreements to the FWS for review and concurrence with the recommended activities/actions, baselines and biological assessments.
- 3) Provide copies of all Certificates of Inclusions and Cooperative Agreements executed during that calendar year to the Service by December 31.

- 4) The Service and the Department may mutually agree to changes to the annual monitoring program (see section 12).
- 5) Provide the Cooperator with advanced notification prior to accessing the Enrolled Property as described in the certificate of inclusion with individual landowners.
- 6) Provide an annual report to the Service (See Section 12.3).
- 7) If warranted, recommend procedures/actions Cooperators may implement to avoid future take based on any take which occurred as described in past annual reports.
- 8) Provide notification of non-compliance to the Cooperator and the Service within 30 days of discovery (See also Section 12.3).

The Service responsibilities include:

- 1) Provide the Department comments within 30 calendar days of receiving a draft Cooperative Agreement. If no comments are received within 30 days, the Department may proceed to finalize the Cooperative Agreement.
- 2) Develop biological assessments and determine baseline conditions with the Department for a minimum of the first five Cooperative Agreements. After this period of calibration between the two Parties finishes, the Department will submit their biological assessment (See Section 12.2) with the Cooperative Agreement for the Service's concurrence unless a unique situation arise which warrants both Parties involvement.
- 3) Upon satisfaction of all other applicable legal requirements, the Service will issue an enhancement of survival permit to the Department in accordance with Endangered Species Act section 10(a)(1)(A), authorizing take of Lahontan cutthroat trout as a result of lawful activities within the enrolled property. The term of the permit will be 30 years.
- 4) Provide a qualified biologist(s) for coordinated implementation of the biological and compliance monitoring as needed on an annual basis.
- 5) Provide the Cooperator with a minimum of 48 hours advanced notification prior to accessing the Enrolled Property, unless the Cooperator agrees to less notification time.
- 6) If warranted, recommend procedures/actions Cooperators may implement to avoid future take based on any take which occurred as described in past annual reports.

The Cooperator's responsibilities include:

1. Comply with their individual Cooperative Agreement and
2. Provide reasonable access to his or her property for the Department and the Service, or their representatives.

In addition to the following stipulations, the Parties will work cooperatively on other issues as necessary to further the purposes of the Agreement. Moreover, nothing in this Agreement shall limit the ability of Federal and State conservation authorities to perform their lawful duties, and conduct investigations as authorized by statute and by court guidance and direction.

5. BASELINE DETERMINATION

The Parties understand that the Permittee may enroll privately owned lands with a wide degree of baseline conditions. It is understood that baseline determinations will be made at a site-specific level and described in individual Cooperative Agreements to capture each unique situation. Baseline may be described as numbers/populations of Lahontan cutthroat trout, habitat conditions or both. Typically baseline determinations will be based on habitat conditions due to the migratory behavior

of the species and the need to reestablish networked populations. Habitat conditions which define baseline will be detailed in each individual Cooperative Agreement based on each particular situation and will be based on a variety of conditions such as stream width, riparian vegetation, substrate, etc. Enrollment of the private landholdings may provide access to many miles of publicly owned stream habitat for Lahontan cutthroat trout restoration and recovery activities that is currently unavailable.

6. DESCRIPTION OF ENROLLED LANDS

This Agreement will cover only the Oregon portion of the Northwest Geographic Management Unit for Lahontan cutthroat trout (Map 1). The Northwest Geographic Management Unit encompasses both the Quinn River and Coyote Lake basins found in southeast Oregon. This agreement will also cover Lahontan cutthroat trout populations in the Alvord basin in Oregon. The Alvord basin was not originally included in the Northwest Geographic Management Unit described in the recovery plan. The Northwest Geographic Management Unit working group includes the Alvord basin for management purposes.

The potential enrollment properties may be any private lands associated with a perennial stream inside the borders of these hydrologic basins. The potential covered lands range in elevation from 4,000 to 9,700 feet and represent many Northern Great Basin vegetative communities as well as irrigated agricultural crops such as meadow hay and alfalfa.

7. LANDOWNER MANAGEMENT ACTIVITIES FOR COVERED SPECIES

Customary management actions considered covered under the Permit for which incidental take may be authorized on the enrolled lands are livestock management, and other agricultural activities. Livestock management includes number and type of livestock, season of livestock use (timing), stocking rates, frequency of grazing, and livestock water supply. Agricultural activities include crop planting and harvest, irrigation (timing, duration, and volume), run-off management, and water sources and diversions. These management actions may result in takings of Lahontan cutthroat trout, but take should be minimized by implementing the conservation measures that will be included in the Cooperative Agreement (Attachment 1). Incidental take covered by the Cooperative Agreements does not include any take that reduces below the established baseline the number of Lahontan cutthroat trout or the amount of occupied habitat or habitat needed for metapopulation connectivity and/or migration Lahontan cutthroat trout expansion into these private lands and associated public lands may allow reconnection of streams previously unused by Lahontan cutthroat trout, achieving the networked populations vital to long-term recovery.

8. CONSERVATION MEASURES

Conservation measures that may be implemented on enrolled properties to contribute to the recovery of Lahontan cutthroat trout will be as varied as the types of lands and landowners. While this section lists many possible conservation measures for each management action, all possible measures cannot be anticipated. Each cooperator will not be expected to implement the full set of measures. The conservation measures to be implemented will be specific to each individual's baseline habitat conditions and management needs.

Conservation measures implemented by the landowner to manage livestock grazing to meet a desired habitat goal may contain the following elements: control of stocking rates (number/density of animals per unit area), manipulation of grazing season, and/or changes in duration, frequency and

livestock types. Other measures may include livestock exclusion fencing, off-site water development, and herding strategies.

Private landowners actively farming to produce an agricultural crop will have the opportunity to implement a multitude of conservation measures to improve habitat conditions for Lahontan cutthroat trout. Agricultural conservation measures could include modifications in crop selection, establishment of riparian buffer zones, fertilizer management, haying of meadows rather than grazing cattle along stream courses, and management of land disturbance (plowing and tilling). Manipulations of irrigation practices including flow diversion timing, duration, and volume may be implemented as well as runoff minimization practices.

Implementation of these grazing and agricultural mitigation measures may be utilized to reduce sediment production, reduce the frequency of algal blooms, reduce water temperature, and improve water quality. These practices could also provide for increases in stream flows and improvements in riparian habitat conditions.

Several additional conservation measures that may be implemented include road or trail management (including improved crossings or fish passage structures), riparian vegetation plantings, rehabilitation projects, and stream habitat improvement projects. Other options may exist that are not readily apparent. The overall goal is to implement conservation measures that are mutually beneficial to the cooperator and the long-term existence of Lahontan cutthroat trout. As conservation measures are formulated, they will be included in that landowner's specific Cooperative Agreement and added to this list of conservation measures for future use.

9. AGREEMENT DURATION

The Service's Safe Harbor Policy states that the length of Agreements must be of sufficient duration to "reasonably allow enough time to achieve the expected 'net conservation benefit' for the listed species." This Agreement becomes effective upon issuance of the section 10(a)(1)(A) Enhancement of Survival Permit and will be in effect for 30 years. The section 10(a)(1)(A) permit authorizing take of the species will also have a term of 30 years from the effective date of the permit. This time frame allows enough time to restore fully functional networked populations within a watershed or basin. Given the probable species response time to the planned conservation measures, the Service and the Department estimate it may take five years of implementing this Agreement to fully reach a net conservation benefit for the species, although some level of benefits will likely occur within a shorter time period.

The 30-year permit term will be advantageous to the Department because of the longer time period available to plan and implement future land-use activities. The permit term will benefit species conservation because impacts associated with take of individuals or habitat above the baseline may not occur in the short term. The Permit and Agreement may be amended to extend the term upon agreement of the Department and the Service.

The Department may enroll Cooperators under Cooperative Agreements from the date this Agreement becomes effective until 10 years prior to its termination. Obligations under Cooperative Agreements will be in effect variable lengths of time depending on the property covered and the agreement of the Cooperator and the Department. However, the minimum duration of obligations will be for 10 years. Upon signing of a Cooperative Agreement, the Department will issue a

Certificate of Inclusion to a Cooperator authorizing incidental take of Lahontan cutthroat trout on the Cooperator's lands.

10. ASSURANCES TO THE COOPERATOR REGARDING TAKE OF COVERED SPECIES

Under this Agreement, the Department is authorized to enroll private landowners via the Cooperative Agreement and Certificate of Inclusion, in efforts to sustain Lahontan cutthroat trout on their property. Cooperators may continue current land use practices or undertake other lawful activities on their property that are covered under the Cooperative Agreement, as long as these activities do not result in take of Lahontan cutthroat trout or habitat to levels below the established baseline. If any Cooperator anticipates an activity that could result in take of Lahontan cutthroat trout, the Department and the Service must be given an opportunity to capture and relocate Lahontan cutthroat trout.

To return the enrolled property to baseline conditions, a Cooperator must demonstrate that baseline conditions were maintained and that activities necessary to achieving a net conservation benefit were carried out for the duration of the Agreement. At the end of the permit term, and before a permit expires, a Cooperator may reduce Lahontan cutthroat trout numbers or habitat to the established baseline to avoid accruing additional take liability under the Endangered Species Act. However, no species or habitat shall be impacted until the Cooperator has given the Department, the Service, or their representatives prior notice of at least 30-days so that individual Lahontan cutthroat trout can be relocated.

11. NET CONSERVATION BENEFIT

Historically, Lahontan cutthroat trout occurred in what were considered networked populations or metapopulations (Ray *et al.* 2000; USFWS 1995), which refers to a collection of discrete local breeding populations. The potential for networked populations to persist despite local catastrophes has long been recognized (Huffaker 1958; Andrewartha and Birch 1954). Networked populations are those where individuals experience different environmental conditions at different locations but are capable of moving between these locations at sufficient rates to modulate population fluctuations that might otherwise lead to local extinction (Ray *et al.* 2000). The presence of several subpopulations increases the probability that at least one will survive through periods of disturbance and consequently protect the genetic variation available for adaptation to change.

One of the recovery actions identified in the 1995 Recovery Plan and the Lahontan Subbasins Fish Management Plan was securing at-risk populations of Lahontan cutthroat trout within the Northwest Geographic Management Unit (Hanson *et al.* 1993). This objective was achieved by reintroducing Lahontan cutthroat trout into several isolated streams within the Northwest Geographic Management Unit, working with the Trout Creek Mountain Working Group to improve habitat in the Quinn (McDermitt) and Coyote Lake basins, as well as introducing Lahontan cutthroat trout to isolated streams in the Alvord basin. These reintroductions and introductions accomplished several important recovery tasks: preserving unique Lahontan cutthroat trout genetic material and decreasing risks to the original Lahontan cutthroat trout populations from severe environmental perturbations (i.e., fire and drought). As Lahontan cutthroat trout recovery continues, these isolated populations have (or may) become extremely important for providing source Lahontan cutthroat trout to repopulate the networked populations.

Research shows Lahontan cutthroat trout population persistence is associated with the ability to

maintain connectivity among populations, i.e., networked populations. A networked system is defined as an interconnected stream and/or stream-lake system in which individuals can migrate from or disperse into areas from which fish have been extirpated (Ray *et al.* 2000). The ability to disperse and repopulate habitats allows populations to persist in environments in which randomly occurring disturbances may impact the Lahontan cutthroat trout habitat (Neville-Arsenault 2003; Rieman and Dunham 2000; Ray *et al.* 2000; Dunham *et al.* 1997). Periodic repopulation by upstream or downstream sources enabled Lahontan cutthroat trout to survive extreme circumstances and provided for genetic exchange (Neville-Arsenault 2003).

The conservation measures associated with this Agreement will contribute, directly and indirectly, to recovery of Lahontan cutthroat trout. Private lands comprise only a small portion of the stream habitats within the recovery stream systems. However, Lahontan cutthroat trout use private land areas to access many miles of publicly owned stream habitats not currently available to them. These private lands encompass streams needed for both isolated and networked populations. Private landowners are often reluctant to participate in activities that will benefit Lahontan cutthroat trout due to fear of regulatory impacts from having species listed as endangered and threatened on their land. Having landowners participate in this Agreement with the regulatory relief it provides will open areas to reintroduction, expansion, and/or preservation of Lahontan cutthroat trout populations needed to protect and recover the species. It will also help to establish populations, provide the opportunity to connect populations, and increase numbers of Lahontan cutthroat trout for use in stocking additional streams. Private lands will also be needed for Lahontan cutthroat trout spawning areas, migration corridors, and healthy population dynamics within the networked areas.

Implementation of this Agreement is expected to result in increased numbers of Lahontan cutthroat trout or amount of habitat in excess of the established baseline for each enrolled property. If all the landowners return their property to baseline conditions after 30 years, Lahontan cutthroat trout populations will still exist within public lands that have become linked due to conservation activities, and within private lands which serve as migration corridors, spawning habitat, and overwintering habitat. Isolated Lahontan cutthroat trout populations that were part of the baseline will have been utilized for repopulating the networked areas, and will still exist. They will no longer need to be tapped for species recovery in other areas, and therefore will be more stable. Landowners participation in this Agreement that results in creation of suitable habitat conditions for Lahontan cutthroat trout and increased population numbers in the Northwest Geographic Management Unit would contribute to the recovery of Lahontan cutthroat trout and promote future delisting of the species.

12. REPORTING AND MONITORING

12.1 Compliance Monitoring. Cooperative Agreements will grant the Department, the Service and/or the Northwest Geographic Management Unit team, after reasonable prior notice to Cooperators, the right to enter enrolled lands to ensure compliance with this Agreement, including any obligations of Cooperators and monitoring of habitat and biological response to activities. Monitoring visits will focus on maintenance of baseline responsibilities and effectiveness of conservation measure(s) implemented. Notification of non-compliance will be submitted to the Service within 30 days of the occurrence or discovery of the occurrence.

12.2 Biological Monitoring. Prior to completing a Cooperative Agreement and Certificate of Inclusion for any enrolled property, the Department, in cooperation with the private landowner and the Service, will complete a detailed biological assessment of that property to determine baseline

conditions. The biological assessment of the given property will determine baseline conditions which will include but is not limited to an evaluation of aquatic habitat quality and suitability, a characterization of species present including non-native species, if any, and a determination of management actions being practiced, and the conservation measures needed. Management practices and conservation measures will be incorporated into the subsequent Cooperative Agreement. Prior to the Department assuming sole responsibility for the biological assessments, the Service will collaborate with the Department for a minimum of the first five Cooperative Agreements. After this collaboration period between the two Parties ends, the Department will submit their biological assessment with the Cooperative Agreement to the Service for Service concurrence unless a situation arises that requires involvement from both Parties.

Following the placement of Lahontan cutthroat trout on enrolled lands or when Lahontan cutthroat trout are otherwise known to be present, the Department, the Service, and/or the Northwest Geographic Management Unit team will monitor Lahontan cutthroat trout by visiting occupied enrolled lands annually to ascertain Lahontan cutthroat trout presence, monitor aquatic habitat quality, and to evaluate the efficacy of current management activities.

12.3 Annual Report. The Department will make available and provide the following information to the Service in an annual report due December 31st of each year:

- a) A narrative describing the number of Cooperators and the amount of habitat potentially maintained, enhanced, or restored as a result of the management actions and/or conservation measures performed under each Cooperative Agreement.
- b) A summary of the location(s) and circumstance(s) where incidental take of Lahontan cutthroat trout was anticipated including the Cooperator, the amount of habitat taken back to baseline, when the take occurred, and whether it was the result of a completed Cooperative Agreement or early termination.
- c) A summary of any interim take of Lahontan cutthroat trout which may have occurred which will include the location of the enrolled property, the name of the Cooperator, the amount of take that occurred, and the management action or conservation measure under which it occurred. (Interim take defined as any Lahontan cutthroat trout or amount of habitat that is taken above baseline.)
- d) A narrative explanation and results of all compliance monitoring activities for each enrolled property.
- e) A narrative explanation and copies of any biological monitoring for each enrolled property within the Northwest Geographic Management Unit.
- f) A summary of actions of any Cooperators who are in non-compliance with the terms and conditions of their Cooperative Agreement or Certificate of Inclusion, and the measures employed to remediate the non-compliance.

12.4 Adaptive Management.

Adaptive management allows for mutually agreed-upon changes to the Agreement's conservation measures in response to changing conditions or new information. If the expected results of the conservation measures appear ineffective, management activities can be changed or alternative activities undertaken to achieve desired results. Decisions related to adaptive management will be based on an evaluation of compliance and biological monitoring results detailed in the annual reports, and of field observations by the Cooperators and Parties. The Northwest Geographic

Management Unit team may also be asked to review reports and field observations and determine whether the management actions and/or conservation measures are adequate.

Adaptive management decisions may be made at any time as deemed necessary by the Parties. However, a major evaluation of this Agreement will be implemented every fifth year to ensure that conservation goals are being achieved. Conservation measures will be evaluated to determine whether they result in increased protection of Lahontan cutthroat trout i.e. reduced incidental take and/or improved conditions for Lahontan cutthroat trout. The evaluation will include an assessment of incidental take on individual enrolled properties to determine if take can be prevented or reduced through modifications to management actions and/or conservation measures on aquatic habitats or adjacent lands.

If management actions or conservation measures need to be altered to improve benefits for the species, this will be done by amending future Cooperative Agreements, not by altering the responsibilities of existing Cooperators. However, if existing Cooperators agree to alter their Cooperative Agreements, modifications of their responsibilities will be addressed on a case-by-case basis. Strategies to reduce incidental take, if necessary, will be reviewed with individual Cooperators and implemented where appropriate on a voluntary basis.

13. MODIFICATIONS

13.1. Modification of the Agreement. Any Party may propose modifications or amendments to this Agreement, as provided in 50 CFR 13.23, by providing written notice to, and obtaining the written concurrence of, the other Party if such modifications do not change the determination that this Agreement will provide a net conservation benefit to Lahontan cutthroat trout. Such notice shall include a statement of the proposed modification, the reason for it, and its expected results. The Parties will use their best efforts to respond to proposed modifications within [15] days of receipt of such notice. Proposed modifications will become effective upon the other Party's written concurrence.

13.1.a. Modification of Cooperative Agreements. A Cooperator may propose modifications or amendments to a Cooperative Agreement by providing written notice to the Department and the Service and obtaining written concurrence. Such notice shall include a statement of the proposed modification, the reason for it, and its expected results. The Parties will respond to proposed modifications within 60 calendar days of receiving the notice. Proposed modifications will become effective upon written concurrence from the Parties.

13.2. Amendment of the Safe Harbor Permit. The Permit may be amended to accommodate changed circumstances in accordance with all applicable legal requirements, including but not limited to the Endangered Species Act, the National Environmental Policy Act, and the Service's permit regulations at 50 CFR 13 and 50 CFR 17. The Party proposing the amendment shall provide a statement describing the proposed amendment, the reasons for it, and an explanation of what, if any, effects the amendment(s) may have on Lahontan cutthroat trout. A *Federal Register* notice with a 30-day comment period will be needed for any proposed amendments to the Permit.

13.3. Permit Relinquishment. If, prior to the expiration of the Permit, the Department ceases to be able to continue to administer this Agreement, and no other entity satisfactory to the Service is willing to assume the Department's responsibilities; the Department will relinquish its Permit to the

Service. The Service shall convert the Certificates of Inclusion that have been issued by the Department to participating landowners into individual enhancement of survival permits that authorize the same actions by the participating landowners that had been authorized by the Certificates of Inclusion, provided the participating landowners agree to continue the management activities and conservation measures established for their property. These actions shall be made per 50 CFR 13.25 for transfer of permits and scope of permit authorization.

13.3.a. Cooperator Agreement Termination. As referenced in 50 CFR 17.3 (revised May 3, 2004: FR 69:24092), Cooperators may terminate their Cooperative Agreement before the expiration date because of circumstances beyond the landowner's control. In such circumstances, the Cooperator may return the enrolled property to established baseline conditions even if the expected net conservation benefit has not been realized, provided that baseline conditions have been maintained and established conservation measures have been implemented. Cooperators may terminate their Cooperative Agreement, due to circumstances beyond their control, 10 calendar days after providing a notice to the Service. Cooperators may also terminate their Cooperative Agreement at any time for reasons other than circumstances beyond their control, but will not have the authority to take Lahontan cutthroat trout. Cooperators must give the Department, the Service, and their representatives the opportunity to relocate Lahontan cutthroat trout within 30 days of providing termination notice. Under any of the termination scenarios, Cooperators must relinquish their Certificates of Inclusion to the Department.

13.3.b. Termination under Other Circumstances. The Department, in coordination with the Service, may terminate a Cooperative Agreement if it is determined that use of the enrolled property is no longer necessary for Lahontan cutthroat trout recovery efforts. Cooperators must then relinquish their Certificates of Inclusion to the Department, and will then be released from any further obligations under the Cooperative Agreement.

13.4. Permit Suspension or Revocation. The Service may suspend or revoke the Permit for cause in accordance with the laws and regulations in force at the time of such suspension or revocation. The Service, as a last resort, may revoke the Permit if continuation of permitted activities would likely result in jeopardy to Lahontan cutthroat trout (50 CFR 13.28(a)). In such circumstances, the Service would exercise all possible measures to avoid revoking the Permit.

13.5. Baseline Adjustment. Unforeseen circumstances could involve habitat impacts resulting from catastrophic (*force majeure*) events such as hurricanes, flash floods, severe drought, lethal forest fires, or insect/disease epidemics. Such events are beyond the reasonable control of the Cooperator, and did not occur through fault or negligence, including but not limited to "acts of God" or sudden actions of the elements such as those described above. Such catastrophes could either locally destroy the species population or render the habitat unsuitable, thereby reducing population numbers or occupied acreage below the original baseline conditions. For such circumstances beyond the control of the Cooperator, the Cooperative Agreement could be terminated, or the Department, the Cooperator, and the Service could agree to revise the baseline conditions to reflect the new circumstances.

13.6. Remedies. Each Party shall have any remedies otherwise available to enforce the terms of this Agreement and the Safe Harbor Permit, except that no Party shall be liable in damages for any

breach of this Agreement, any performance or failure to perform an obligation under this Agreement or any other cause of action arising from this Agreement.

13.7. Dispute Resolution. Both the Department and the Service agree to work together in good faith to resolve any disputes arising under this Agreement and may use dispute resolution procedures agreed upon by all Parties.

14. ADDITIONAL MEASURES

14.1. Succession and Transfer of Cooperative Agreements and Certificates of Inclusion. The rights and obligations under each Cooperative Agreement shall apply to the owner of the enrolled property, and are transferable to subsequent non-Federal property owners pursuant to 50 CFR 13.25. After becoming a party to a Cooperative Agreement and Certificate of Inclusion, the new owner(s) will have the same rights and obligations with respect to the enrolled property as the original owner. The new owner(s) also will have the option of receiving Safe Harbor assurances by signing a new Cooperative Agreement and receiving a new Certificate of Inclusion. Cooperators shall notify the Department of any transfer of enrolled land ownership; the Department will attempt to contact the new owner, explain the baseline responsibilities applicable to the property, and seek to interest the new owner in signing the existing Cooperative Agreement or a new one to benefit Lahontan cutthroat trout on the property. Assignment or transfer of the Cooperative Agreement shall be governed by Service regulations in force at the time.

14.2. Availability of Funds. Implementation of this Agreement is subject to the requirements of the Federal Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any funds from the U.S. Treasury. The Parties acknowledge that the Service will not be required under this Agreement to expend any Federal agency's appropriated funds unless and until an authorized official of that agency affirmatively commits to such expenditure in writing.

14.3. No Third-Party Beneficiaries. This Agreement does not create any right or interest in any member of the public as a third-party beneficiary, nor shall it authorize anyone not a party to this Agreement to maintain any cause of action pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed under existing law.

14.4. Notices and Reports. Any notices and reports, including monitoring and annual reports, required by this Agreement shall be delivered to the persons listed below, as appropriate:

State Supervisor
U.S. Fish and Wildlife Service
Oregon Fish and Wildlife Office
2600 SE 98th Avenue, Suite 100
Portland, Oregon 97266

Field Office Supervisor
U.S. Fish and Wildlife Service
Bend Field Office
20310 Empire Avenue, Suite A-100
Bend, Oregon 97701

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Safe Harbor Agreement to be in effect as of the date that the Service issues the permit.

Permittee
Director, Roy Elicker
Oregon Department of Fish and Wildlife

Date

Approved as to Form by;

State Supervisor
Paul Henson
U.S. Fish and Wildlife Service
Oregon Fish and Wildlife Office

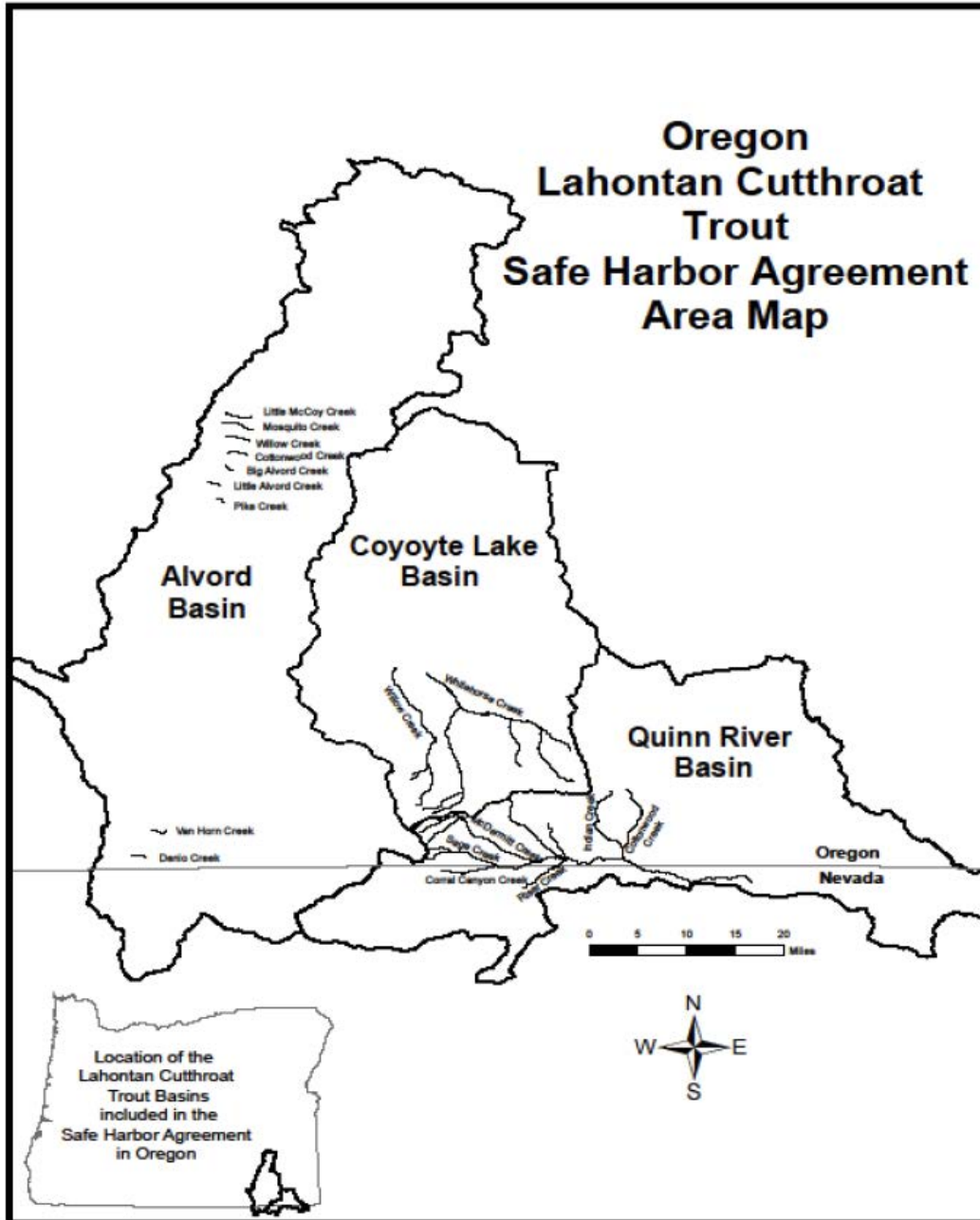
Date

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Appendix A

Lahontan Cutthroat Trout Safe Harbor Agreement Area Map



Appendix B

Cooperative Agreement Template and Certificate of Inclusion

COOPERATIVE AGREEMENT TEMPLATE

1. INTRODUCTION

This Cooperative Agreement (CA), between the Oregon Department of Fish and Wildlife (ODFW) and [REDACTED] (Cooperator), is intended to enhance the reintroduction and long-term recovery of Lahontan cutthroat trout (LCT) (*Oncorhynchus clarki henshawi*) through implementation of management actions and conservation measures within the Northwest Geographic Management Unit (NWGMU) on land owned by the Cooperator. Participation in this CA is a prerequisite for obtaining a Certificate of Inclusion (CI; Attachment A) from ODFW as part of the Safe Harbor Agreement (SHA) between ODFW and the U.S. Fish and Wildlife Service (Service) titled: *Safe Harbor Agreement for Voluntary Enhancement/Restoration Activities Benefiting Lahontan Cutthroat Trout on Private Lands within the Oregon Portion of the Northwest Geographic Management Unit*.

2. ENROLLED PROPERTY

2.1. Background. The Cooperator owns property in [REDACTED] County, Oregon, within the NWGMU containing habitat that may be used by LCT. The property to be enrolled includes [REDACTED] miles of [REDACTED] Creek, located within T [REDACTED] N, R [REDACTED] W, S [REDACTED] in southeast Oregon.

The enrolled property consists of [REDACTED] *[Qualitative description of the property. Include biological & major plant communities or habitat types, locations of water delivery and control systems]*. Photographs of the enrolled property are included in Attachment [REDACTED].

2.2. Current Land Management. Currently, the Cooperator implements the following management actions on the enrolled property: *[livestock management, recreational pursuits, agriculture activities, irrigation, others]*. *Describe in detail: (1) the management actions being undertaken and (2) conservation measures to be implemented to minimize impacts or benefit LCT.*

2.3 Expected Benefits. Implementation of the conservation measures and management actions listed in this CA is expected to result in [REDACTED]. *[generally describe the expected benefits—how the land may change to benefit LCT in response to conservation measures and management actions; also how LCT may now be able to use the habitat, such as for spawning, rearing, or migration]*.

3. BASELINE

3.1. Baseline Conditions. Established baseline conditions are qualitative descriptions with associated photographic documentation of the enrolled property environment prior to implementation of this CA, and are mutually agreed to by the Cooperator, ODFW, and the Service. Baseline conditions shall be based on riparian/stream habitat, fish populations, or both, as well as networked population suitability and recovery needs. Determination of baseline conditions will be accomplished through surveys, photos, and discussions between the landowner, ODFW, and the Service.

Catastrophic natural events such as severe storm events, drought, forest fires, or insect/disease epidemics are beyond the reasonable control of the Cooperator, and could either extirpate LCT from enrolled lands or render LCT habitat on enrolled lands unsuitable for continued occupation. These events may reduce LCT numbers or habitat below established baseline conditions through no fault of, or negligence by, the Cooperator. In such circumstances the Cooperator and ODFW, in coordination with the Service and the NWGMU Team, may agree to revise the baseline conditions in the CA to reflect the new circumstances.

3.2. Existing Condition – Determination of Baseline. A description of existing baseline conditions is critical because the conservation measures agreed upon by the Cooperator not only provide benefits to LCTs but also address potential incidental take ('take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct; 'harm' can include adverse habitat modification.) in the form of [redacted] *[Description of specific threats, e.g., entrainment, habitat, displacement by exotics]* that may occur while engaging in identified management activities, and/or at the end of the CA if there is a return to original baseline conditions. Baseline conditions may be described as numbers/populations of LCT, habitat conditions or both. Generally, at the time of entering into the CA if there are no LCT present, no habitat to support LCT on the enrolled property, and/or no recovery needs identified, then the baseline would be 'zero'. The following baseline conditions are based on surveys conducted on [date]. Survey results indicate that baseline conditions are [redacted] *[habitat conditions and/or LCT populations; discussion of the results of surveys as related to habitat and/or fish populations]*

4. MANAGEMENT ACTIONS AND CONSERVATION MEASURES

4.1. Management Actions. Management actions are activities being conducted by the Cooperator on the enrolled property that have the potential to affect LCT populations or recovery. *[Describe all of the covered activities that will be implemented for this CA within this section]*

4.2. Conservation Measures. Conservation measures are activities agreed to by the Cooperator and ODFW that will benefit LCT on the enrolled property. These measures will be implemented by the Cooperator. *[Discuss in detail in this section. Identify what measures are being implemented, when they will be implemented, what benefits will be gained through implementation of the measures, and what association they have with management actions.]*

5. RESPONSIBILITIES

Responsibilities of ODFW and the Service are listed in the Safe Harbor Agreement signed on [redacted]. The responsibilities of the Cooperator include the following:

- a. Implement conservation measures (*see* 4.2) within the enrolled property to maintain or enhance habitat conditions for LCT.
- b. Provide ODFW, the Service, their representatives (including the NWGMU Team) with reasonable access to enrolled land to manage, monitor, reintroduce, or remove LCT, or to

carry out other management activities, perform biological and compliance monitoring, or salvage or relocate LCT from areas to be impacted by management actions. These entities will contact the Cooperator at least seven days in advance for access to enrolled land.

- c. Inform ODFW within 3 working days of finding any dead or accidentally killed LCT, and allow immediate access to ODFW, the Service, or their representatives (including NWGMU team) to determine the cause of the mortality.
- d. Inform ODFW within five working days of natural or human-caused emergency circumstances, such as storm events or failure of water delivery systems, that could negatively affect occupied aquatic habitats and result in take of LCT; allow immediate access to ODFW, the Service, or their representatives (including the NWGMU Team) for emergency salvage or relocation of affected individuals.
- e. Give ODFW, the Service, or their representatives notice at least a 30 days prior to planned activities that could reasonably be expected to result in the incidental take of LCT on the enrolled property so that Lahontan cutthroat trout may be relocated or removed as necessary.
- f. Notify ODFW 90 calendar days (if possible) prior to transfer of ownership of enrolled land, so that the Department may contact the new owner, explain the baseline responsibilities applicable to the enrolled property, and seek to interest the new owner in signing the existing CA or a new one.

6. MONITORING

To ensure compliance with the SHA and CA, and to document progress in meeting recovery objectives, compliance and biological monitoring must be conducted on all enrolled property. The frequency of surveys shall be agreed on by the Cooperator, ODFW, and the Service, based on the adaptive management component of the SHA. The Cooperator agrees to provide ODFW, the Service, or their representatives with access to the enrolled property for the purpose of conducting these surveys. Results of this monitoring will be a critical component of the annual reports and will be shared with the Cooperator if requested.

6.1. Compliance Monitoring. Compliance monitoring is needed to ensure compliance with the Permit, maintenance of baseline responsibilities, and effectiveness of the conservation measures as outlined in Section 4 of this CA. *[Note that monitoring has been mutually agreed upon by the Cooperator, ODFW, and the USFWS. Specify methods and frequency of monitoring. Specify how and when results will be shared with the Cooperator.]*

6.2. Biological Monitoring. Monitoring of biological or habitat conditions will determine whether conditions on the enrolled property are responding to the conservation measures and management actions being implemented. This response will require comparisons of the established baseline conditions with current habitat or biological conditions as measured through time over the course of implementing the CA. *[Note that monitoring has been mutually agreed upon by the Cooperator, ODFW, and the USFWS. Specify methods and frequency of monitoring. Specify how and when results will be shared with the Cooperator.]*

7. AGREEMENT DURATION

Obligations under this CA will be in effect for a minimum of [redacted] years from the date it is executed. Upon signing the CA and obtaining Service concurrence, ODFW will issue a Certificate of Inclusion to the Cooperator under Permit No: [redacted], authorizing the incidental take of LCT on the enrolled lands. The Certificate of Inclusion will authorize incidental take of LCT from [redacted] [date] to [redacted] [date], but may not exceed [redacted] [the SHA expiration date]. This CA and the Certificate of Inclusion will be filed and administered by ODFW.

8. INCIDENTAL TAKE

Incidental take is discussed in more detail in Section 11 of the SHA. Under the terms of this CA, the Cooperator is authorized to make use of enrolled property in any manner that does not result in reducing the LCT population or its occupied habitat below the established baseline, or affect the beneficial impacts of the conservation measures.

To return the enrolled property to established baseline conditions, a Cooperator must demonstrate that the activities identified in the CA were implemented as necessary to achieve a net conservation benefit for the duration of the CA. The Certificate of Inclusion will authorize incidental take of LCT or associated habitat resulting from lawful activities on the enrolled property, from the time this CA is signed until expiration of the Permit. Lawful covered uses are defined in Section 2.2 of this CA. Before expiration of the CA, a Cooperator may take LCT individuals or habitat back to baseline levels to avoid accruing additional take liability under the ESA. However, the Cooperator shall give the Service notice at least 30 days prior to impacting LCT or habitat so that individuals can be relocated. At that time, the Cooperator will relinquish coverage under the Permit.

9. MODIFICATIONS

9.1. Modification of Cooperative Agreement. The Cooperator or ODFW may propose modifications or amendments to a CA by providing written notice to the Service and obtaining written concurrence by the other parties. Such notice shall include a statement of the proposed modification, the reason for it, and its expected results. The Service will respond to proposed modifications within 60 calendar days of receiving the notice. Proposed modifications will become effective upon written concurrence by the Service and ODFW.

9.2. Termination of the Cooperative Agreement. As referenced in 50 CFR 17.3 (revised May 3, 2004; FR 69:24092), Cooperators may terminate their CA before the expiration date because of unforeseen circumstances. In such circumstances, the Cooperator may return the enrolled property to established baseline conditions even if the expected net conservation benefit has not been realized, provided that baseline conditions have been maintained and established conservation measures have been implemented. Cooperators may terminate their CAs, due to circumstances beyond their control, 10 calendar days after providing notice to the Service. Cooperators may also terminate their CAs at any time for reasons other than uncontrollable circumstances, but will not have the authority to take LCT. Cooperators must give ODFW, the Service, and their representatives the opportunity to

relocate LCT within 30 days of providing the termination notice. Under either termination scenario, Cooperators must relinquish their Certificates of Inclusion to ODFW.

9.2.a. Termination Under Other Circumstances. ODFW, in coordination with the Service, may terminate a CA if it is determined that use of the enrolled property is no longer necessary as a contribution to recovery efforts for LCT. Following that determination and notification to the Cooperator, ODFW, the Service, and their representatives (including the NWGMU Team members) shall remove LCT from the included properties in a manner and to an extent that is consistent with a return to baseline conditions within 60 calendar days at their own expense, and in coordination with the Cooperator, and release the Cooperator from any further obligations under the CA, unless the Cooperator agrees to allow the LCT to otherwise remain. Cooperators must then relinquish their Certificates of Inclusion, and may otherwise return the enrolled property to established baseline conditions.

9.3. Certificate of Inclusion Suspension or Revocation. ODFW may suspend or revoke a Certificate of Inclusion if a Cooperator has breached obligations under this CA, has failed to cure the breach in a timely manner, and the effect of the breach diminishes the likelihood that the CA will achieve stated goals. Termination of a CA, and removal of LCT from the property, at the request of the Cooperator or ODFW for reasons identified in Section 9.2, shall also result in revocation of the Cooperator's Certificate of Inclusion.

9.4. Remedies. ODFW, the Service, and the Cooperator shall have all remedies otherwise available to enforce the terms of the CA and the Certificate of Inclusion, except that none shall be liable in damages for any breach, any performance or failure to perform an obligation, or any other cause of action arising from this CA.

9.5. Emergencies. Emergency situations arising from natural disasters (e.g., fire, excessive rainfall, extreme drought, insect infestations, or epidemic disease) may require the initiation of land management actions that result in take of LCT. The Cooperator will notify ODFW within five working days of natural disasters, and make reasonable accommodations to ODFW, the Service, and their representatives for survey or relocation of LCT prior to initiation of land management actions. Other emergency situations, such as the failure of diversion or pond structures, may occur outside of the control or intention of the Cooperator, and could result in the take of LCT. Under these situations, the Cooperator will notify ODFW within five working days to allow the salvage or relocation of affected LCT individuals, if warranted. ODFW and the Service acknowledge that survey or relocation may be impracticable in certain situations.

10. NOTIFICATION

Communication and correspondence required by this CA should be directed to the addresses below, with a copy sent to the Service. Names and addresses may be changed upon written notice to all parties.



[Name and address of Cooperator]

Director
Oregon Department of Fish and Wildlife
3406 Cherry Avenue NE
Salem, OR 97303

State Supervisor,
U.S. Fish and Wildlife Service
Oregon Fish & Wildlife Office
2600 S.E. 98th Ave, Ste 100
Portland, OR 97266
Tel: 503-231-6179

IN WITNESS WHEREOF, each party hereto has caused this Cooperative Agreement to be executed by an authorized official on the day and year set forth opposite their signature.

COOPERATOR

By: _____

Date: _____

OREGON DEPARTMENT OF FISH AND WILDLIFE

By: _____
Roy Elicker, Director
Oregon Department of Fish and Wildlife

Date: _____

Attachment A. Safe Harbor Agreement Certificate of Inclusion Template

CERTIFICATE OF INCLUSION

This certifies that the property described as follows [Description of portion of property covered by the Safe Harbor Permit] owned by [Cooperator's name], is included within the scope of Permit No. [] issued by the U.S. Fish and Wildlife Service to Oregon Department of Fish and Wildlife on [date] and expiring on [date] under the authority of Section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended 16 U.S.C.1539(a)(1)(A). Such Permit authorizes activities by participating landowners (Cooperators), as part of the Safe Harbor program, to enhance, restore, and recover habitat for the threatened Lahontan cutthroat trout. Pursuant to that Permit and this Certificate, the holder of this Certificate is authorized to engage in lawful activities on the above-described property that may result in the incidental taking of Lahontan cutthroat trout, as appropriate, subject to the terms and conditions of the Permit, the Cooperative Agreement entered into by Oregon Department of Fish and Wildlife and [Cooperator's Name] on [date] and the *Safe Harbor Agreement for Voluntary Enhancement/Restoration Activities Benefiting Lahontan Cutthroat Trout on Private Lands within the Oregon Portion of the Northwest Geographic Management Unit*.

Roy Elicker, Director
Oregon Department of Fish and Wildlife

Date

Appendix C: Migratory Bird Species in Ontario

The list of species presented is of MBCA listed birds that are also listed as either threatened or endangered under SARA's Schedule 1 (meaning SARA prohibitions apply on private lands), and are present in Ontario. The ESA 2007 designation is provided for comparison.

SPECIES NAME	DESIGNATION		
	SARA SCHEDULE 1	ONTARIO ESA	
Acadian Flycatcher	Endangered	Endangered	
Piping Plover	Endangered	Endangered	
Loggerhead Shrike	Endangered	Endangered	
Least Bittern	Threatened	Threatened	
Kirtland's Warbler	Endangered	Endangered	
King Rail	Endangered	Endangered	
Red-headed Woodpecker	Threatened	Special Concern	*
Henslow's Sparrow	Endangered	Endangered	
Golden-winged Warbler	Threatened	Special Concern	*
Canada Warbler	Threatened	Special Concern	*
Red Knot rufa subspecies	Endangered	Endangered	
Eskimo Curlew	Endangered	Endangered	
Chimney Swift	Threatened	Threatened	
Whip-poor-will (eastern)	Threatened	Threatened	
Prothonotary Warbler	Endangered	Endangered	
Common nighthawk	Threatened	Special Concern	*
Olive-sided Flycatcher	Threatened	Special Concern	*
Hooded Warbler	Threatened	Delisted	*

*note there are only 6 species which are protected by SARA prohibitions that are not protected by the Ontario ESA.

Appendix D: Aquatic Species in Ontario

The list of species presented is of aquatic species that are listed as either threatened or endangered under SARA’s Schedule 1 (meaning SARA general and critical habitat prohibitions apply on private lands), and are present in Ontario. The Ontario Endangered Species Act designation is provided for comparison. *note that all SARA protected species are also protected by Ontario ESA’s prohibitions.

SPECIES NAME	DESIGNATION	
	SARA SCHEDULE 1	ONTARIO ESA
Eastern Sand Darter	threatened	Endangered
Gravel Chub	Extirpated	Extirpated
Kidneyshell	Endangered	Endangered
Lake Chubsucker	Endangered	Threatened
Mudpuppy Mussel	Endangered	Endangered
Northern Madtom	Endangered	Endangered
Northern Riffleshell	Endangered	Endangered
Paddlefish	Extirpated	Extirpated
Pugnose Shiner	Endangered	Endangered
Rayed Bean	Endangered	Endangered
Round Hickorynut	Endangered	Endangered
Round Pigtoe	Endangered	Endangered
Salamander Mussel	Endangered	Endangered
Shortnose Cisco	Endangered	Endangered
Snuffbox	Endangered	Endangered
Spotted Gar	Threatened	Threatened
Wavy-rayed Lampmussel	Endangered	Threatened

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Endnotes

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- ¹⁰ (Department of the Interior: Fish and Wildlife Service)
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- ¹⁶ (Environmental Defense)
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- ²¹ (Environmental Defense)
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- ³⁰ (Savanta Inc.)
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- ³² (Ecojustice)
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