

Canada–Ontario Memorandum of Understanding on the Assessment of Effects in Areas of Federal Jurisdiction of the Highway 413 Project

Preamble

WHEREAS Canada and Ontario respect each other’s constitutional responsibilities;

WHEREAS Canada and Ontario are committed to respecting Aboriginal and Treaty rights;

WHEREAS MTO, as a Crown proponent, will undertake consultation with Indigenous communities for the Highway 413 Project in accordance with the honour of the Crown and its guidance set out in its “Consultation with First Nations and Métis Peoples: A Guidance Document for the Ministry of Transportation” October, 2019 (updated in 2021);

WHEREAS Canada and Ontario recognize their shared jurisdiction on matters to do with the environment and are committed to coordinating their respective roles such that both levels of Government work cooperatively;

WHEREAS Canada and Ontario are committed to collaborating on the assessment of effects within areas of federal jurisdiction in relation to the Highway 413 Project;

WHEREAS Canada and Ontario are committed to drawing on the best available expertise, reducing duplication, and increasing efficiency and certainty in administering Ontario’s and Canada’s respective legislative and regulatory requirements;

WHEREAS Canada recognizes that the project is subject to Ontario’s *Environmental Assessment Act* including applicable consultation requirements, and that Ontario may wish to adopt a streamlined provincial environmental assessment process;

WHEREAS MTO recognizes that it will need to meet the requirements of any federal permits or authorizations pursuant to applicable laws, including the *Fisheries Act* and the *Species at Risk Act*;

WHEREAS Canada and Ontario agree to establish a senior-level leadership committee to oversee, discuss and work to resolve issues related to the assessment of effects within areas of federal jurisdiction in relation to the Highway 413 Project;

WHEREAS Canada and Ontario agree to collaborate through early engagement to understand the potential impacts on federal *Species at Risk Act* listed species and species listed under Ontario’s *Endangered Species Act* and identify potential measures to avoid, lessen, or mitigate threats to listed species at risk;

WHEREAS MTO will¹ prepare a mitigation plan, a monitoring program, and an adaptive management plan as needed in relation to the federally listed terrestrial species at risk that are not protected provincially and collaborate with Canada, as appropriate, with respect to federally listed migratory birds and aquatic species at risk;

WHEREAS Canada in considering applications for permit(s) or authorization(s) under the *Fisheries Act* and/or a permit under the *Species at Risk Act* for the Highway 413 Project will undertake consultation with Indigenous communities, as required;

¹ Language in this statement originates from the Dec 22 enclosure provided by MTO

THEREFORE, Canada and Ontario agree to cooperate in the assessment of effects within areas of federal jurisdiction in relation to the Highway 413 Project in accordance with the provisions of this Memorandum of Understanding.

1. Definitions

The following definitions apply for the purposes of this Memorandum of Understanding only and do not alter or affect the interpretation or application of any defined terms in any federal or provincial legislation or regulation, or in any other instrument or agreement.

“Aboriginal and Treaty rights” mean Aboriginal and Treaty rights recognized and affirmed under section 35 of the *Constitution Act, 1982*;

“assessment” means an evaluation and management of adverse impacts in areas of federal jurisdiction;

“CWS” means Canadian Wildlife Service;

“DFO” means the Department of Fisheries and Oceans;

“ECCC” means the Department of Environment and Climate Change;

“Effects in areas of federal jurisdiction” means any adverse effects on federally listed species at risk or their critical habitat as set out in the *Species at Risk Act* as well as adverse effects on habitat or species protected by the *Fisheries Act* and the *Migratory Birds Convention Act* and their regulations;

“IAAC” means the Impact Assessment Agency of Canada;

“MTO” or “Proponent” means the Ontario Ministry of Transportation;

“MECP” means the Ontario Ministry of the Environment, Conservation and Parks;

“Parties” means both Canada and Ontario, including the MTO, MECP, DFO, ECCC, and IAAC;

“Party” means either Canada or Ontario; and,

“Project” means the Highway 413 Project, proposed by MTO.

2. Interpretation

- (1) This Memorandum of Understanding, a public document, creates an administrative framework to facilitate the Parties’ collaboration on the assessment of effects of the Project on areas of federal jurisdiction.
- (2) This Memorandum of Understanding confirms the commitment of the Parties to work together on the assessment of effects in areas of federal jurisdiction, including the management of impacts to federally listed species at risk and their critical habitat. Although the Parties will collaborate together on the assessment and management of federally listed species at risk and their critical habitat, nothing in this Memorandum of Understanding will predetermine the outcome of a review or imply that all effects could effectively be managed.
- (3) Neither Party (Canada nor Ontario) gives up any jurisdiction, right, power, privilege, prerogative or immunity by virtue of this Memorandum of Understanding or any subsidiary agreements resulting therefrom. Nothing in this Memorandum of Understanding will prejudice the implementation of either Party’s jurisdiction or legislative authorities or fetter the discretion of any statutory decision-maker.

3. Bilateral Federal Provincial Working Group

(1) Canada and Ontario agree to establish a Bilateral Federal Provincial Working Group (Working Group), co-chaired by MTO and IAAC. The membership of the Working Group at a minimum will include a delegated senior official at MTO, MECP, DFO, ECCC, and IAAC. The co-chairs may propose additional members from their respective level of government.

(2) The Working Group will meet on a regular basis as set out in a terms of reference with a view to address the matters set out in the **Annex**² so as to oversee, discuss, and work to resolve issues under Canada's responsibility in respect of the Project (e.g., the implementation of guidance and policies, and consideration of applications for permits or other approvals under federal legislation in respect of the Project).

(3) The Working Group will oversee the formation and conduct of technical groups made up of individuals with expertise in areas of federal jurisdiction to support the assessment of effects, identification of mitigation measures and measures to avoid or lessen effects on fish, fish habitat, listed species and their critical habitat, and/or discussions concerning any required authorizations. The technical groups will seek concurrence from the Working Group on a collaborative approach to evaluating and avoiding potential impacts in areas of federal jurisdiction, for example fish and fish habitat, migratory birds, federal species at risk and their critical habitat. Nonetheless, irrespective of the collaborative approach, the federal Ministers will retain the authority as to whether a permit or authorization could be issued.

4. Subject of Collaboration

(1) The Parties will work together to participate in discussion on an evaluation process to identify threats, appropriate measures to avoid, and lessen impacts on federally listed species at risk and their critical habitat in advance of the Detailed Design stage of the Project. MTO will undertake consultation in accordance with the honour of the Crown and its guidance on consultation with Indigenous communities: "Consultation with First Nations and Métis Peoples: A Guidance Document for the Ministry of Transportation" October, 2019 (updated in 2021).

(2) The Project is subject to the requirements of the *Fisheries Act* and *Species at Risk Act*. The MTO and DFO will collaborate on potential measures to avoid, lessen, or mitigate, adverse effects on fish and fish habitat, including aquatic species at risk, and associated Indigenous consultation, if applicable. The Parties will establish specific steps and requirements pursuant to the **Annex** setting out the roles and responsibilities of the Parties.

(3) The Project is subject to the requirements of the *Species at Risk Act* and the *Migratory Birds Convention Act*. MTO and ECCC will respectively collaborate on the assessment of potential impacts on *Species at Risk Act* listed species and their critical habitat, as well as species subject to the *Migratory Birds Convention Act*. The Parties will establish specific steps and requirements pursuant to the **Annex** setting out the roles and responsibilities of the Parties.

5. Coordination during Early Engagement

(1) The Parties agree to early engagement on matters set out in the **Annex** to facilitate coordination between provincial requirements and federal requirements.

² The Annex sets out the specific roles and responsibilities of the Parties.

6. Coordination of Communications

- (1) The Parties (Ontario represented by MTO and Canada represented by IAAC) agree to publicly disclose this Memorandum of Understanding upon signing. The Parties further agree to coordinate the content and timing of public communications in relation to the Memorandum of Understanding upon signing and during its duration. Each Party would designate a communications lead for this purpose.
- (2) The Parties agree to publicly disclose the Terms of Reference for the Working Group once finalized. The Terms of Reference will be finalized and publicly disclosed at the same time as the date of the coming into force of this Memorandum of Understanding.
- (3) The relevant Party (DFO or ECCC) will post on applicable public registries information about any permits and approvals under the *Fisheries Act* and the *Species at Risk Act* in relation to the Project.
- (4) The Parties agree that MTO will make available any studies it solicits or conducts or has conducted to support its application for any federal permits and to inform and facilitate participation in the process by Indigenous communities and the public.

7. General Provisions

- (1) This Memorandum of Understanding comes into force on the date the last Party signs it.
- (2) The Parties will make every reasonable effort to agree on the interpretation and application of this Memorandum of Understanding.
- (3) The Working Group committee will oversee the implementation of this Memorandum of Understanding.
- (4) This Memorandum of Understanding may be revised at any time by mutual consent of the Parties (Ontario represented by MTO and Canada represented by IAAC).
- (5) This Memorandum of Understanding will terminate once ECCC and DFO have made decisions or have reached consensus with MTO within their respective mandates in relation to the Project.
- (6) In the event of a dispute during the implementation of this Memorandum of Understanding, the Working Group will work in good faith with a view to its resolution without compromising subsection 2(3) above.

<Original signed by>

Doug Jones, Deputy Minister,
Ministry of Transportation (Ontario)

Date: April 15, 2024

<Original signed by>

Terence Hubbard, President,
Impact Assessment Agency of Canada (Canada)

Date: April 15, 2024

Annex Setting Out the Roles and Responsibilities of the Parties

This document, an Annex to the “Canada-Ontario Memorandum of Understanding on the Assessment of Effects in Areas of Federal Jurisdiction of the Highway 413 Project,” provides information on the collaboration expected between Fisheries and Oceans Canada (DFO) and the Ontario’s Ministry of Transportation (MTO) in Section (1) and information on the collaboration expected between Environment and Climate Change Canada (ECCC) and MTO in Section (2). The Ontario Ministry of the Environment, Conservation and Parks (MECP) will be included as needed on matters related to sections (1) and (2).

Section (1) On matters under the mandate and responsibility of DFO, MTO and DFO will collaborate to understand *Fisheries Act* and *Species at Risk Act* requirements, and where applicable requirements for Indigenous consultation, including through the following process steps/requirements:

- (i) MTO will submit a “Request for Review” to DFO which outlines the specific impacts of the Project on fish and fish habitat, including any aquatic species at risk and their critical habitat, as early as possible to support timely discussions about avoiding, mitigating, and offsetting impacts on fish and fish habitat.
 - i. MTO will respond to any request for additional information relating to fish and fish habitat to facilitate DFO’s review.
 - ii. DFO will review the Project for effects to aquatic species at risk and their critical habitat, including Redside Dace and Silver Shiner, while concurrently, MTO will engage DFO in early discussion on any protection provisions under Ontario’s *Endangered Species Act* that could help inform the analysis of effects on listed aquatic species at risk and their critical habitat. To the extent possible, MECP will be included in these discussions.
 - iii. MTO and DFO recognize that DFO’s review of an application for DFO’s permit under the *Species at Risk Act*, must consider whether certain statutory pre-conditions are met, including, among other things, that the activity will not jeopardize the survival or recovery of the species.
 - 1. DFO will outline these pre-conditions and provide them to MTO in advance of the “Request for Review”.
 - 2. MTO will demonstrate how, in its view, the pre-conditions will be achieved in the submitted “Request for Review”.
- (ii) MTO will incorporate the results of its collaboration with DFO into publicly available document(s).
 - i. The public facing documentation produced by MTO could support DFO meeting its responsibilities for Crown Consultation in relation to any applicable permit or approval.

Section (2) On matters under the mandate and responsibility of ECCC, MTO and ECCC will engage early and collaborate to assess the potential impacts on migratory birds pursuant to the *Migratory Birds Convention Act* as well as federally listed *Species at Risk Act*, including through the following process steps/requirements:

- (i) MTO and ECCC will establish collaboratively, in writing, the list of federally listed species, not regulated through the provincial *Endangered Species Act*, and their existing identified critical habitat under the *Species at Risk Act*, including Western Chorus Frog - Great Lakes / St. Lawrence - Canadian Shield population, that could be affected by the Project. This list establishment process could be undertaken by a technical group established by the Working Group. For species protected both federally and provincially, MECP and ECCC will work cooperatively to ensure protections and authorizations are in place as appropriate. For species that are not regulated provincially, Ontario will meet *Species at Risk Act* requirements in collaboration with federal officials so as to protect the species and its habitat.
- (ii) ECCC will review project documentation submitted by MTO to provide information to MTO on how to avoid, mitigate and, if possible, offset the negative impacts of the Project on matters within ECCC's mandate.
 - i. MTO will engage ECCC in early discussion on any protection provisions under Ontario's *Endangered Species Act* that could help inform the analysis. MECP will be included in these discussions.
 - ii. MTO will respond to any reasonable request for additional information relating to federally listed species risk and their critical habitat to facilitate ECCC's review.
- (iii) MTO and ECCC will collaborate on the review and assessment of requirements to meet the protections prescribed by the *Migratory Birds Convention Act* and the *Species at Risk Act*.
 - i. MTO and ECCC recognize that ECCC's review of an application for ECCC's permit under the *Species at Risk Act*, must consider whether certain statutory pre-conditions are met, including, among other things, that the activity will not jeopardize the survival or recovery of the species.
 - 1. ECCC will outline these pre-conditions and provide them to MTO in advance of the "Request for Review".
 - 2. MTO will demonstrate to ECCC how the pre-conditions will be achieved in the submitted permit application, if applicable.
- (iv) MTO and ECCC will collaborate and seek to build consensus, in consideration of subsection 2(3) of the Memorandum of Understanding, on federally listed terrestrial species at risk and their critical habitat that:
 - i. all reasonable alternatives to a Project related activity that will reduce the impact on the species have been considered and the best solution has been adopted;
 - ii. all feasible measures will be taken to minimize the impact of the activity on the species or its critical habitat or the residences of its individuals; and,
 - iii. the activity will not jeopardize the survival or recovery of the species.
- (v) MTO will incorporate the results of its collaboration with ECCC into publicly available document(s).
 - i. The public facing documentation produced by MTO could support ECCC meeting its responsibilities for Crown Consultation in relation to any applicable permit or approval.