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Policy on Critical Habitat Protection on Non-federal Lands



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1.0 Preface

The purposes of the *Species at Risk Act* ('SARA', the Act) include 1) to prevent wildlife species from extirpation or extinction, and 2) to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity. The fact that habitat loss or impairment is the primary threat for most species at risk is reflected in SARA's preamble. SARA defines critical habitat as "the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified in a recovery document for the species".

Subsection 61(1) of SARA provides that no person shall destroy any part of the critical habitat of a listed endangered or threatened terrestrial species at risk that is on non-federal lands. Subsection 61(2) states that this prohibition applies only to the portions of the critical habitat that the Governor in Council, on the recommendation of the Minister of the Environment (the Minister), specifies by Order.

Subsection 61(4) requires that, if the Minister forms the opinion that any portion of critical habitat is not effectively protected by the laws of the province or territory, and there are no measures in or provisions under SARA (such as a section 11 conservation agreement) or any other Act of Parliament that protect the particular portion of the critical habitat, the Minister must recommend that the Governor in Council make an order that extends the prohibition against the destruction of critical habitat to that portion.

Subsection 61(4) also states that before forming the opinion, the Minister is required to consult with the appropriate provincial or territorial minister(s). In all cases, the Governor in Council makes the final decision whether to make the order to protect the parts and/or portions of critical habitat which are unprotected on non-federal lands.

If in the opinion of the Minister any portion of a species' critical habitat on non-federal land remains unprotected 180 days after it was first identified in a final recovery strategy or action plan posted on the Species at Risk Public Registry, the Minister must, in accordance with section 63 of SARA, include in that Registry a report on the steps taken to protect the critical habitat. Section 63 requires that the Minister continue to report with respect to every subsequent 180 day period until the portion is protected or is no longer identified as critical habitat.

Section 11 of SARA authorizes a competent minister to enter into a conservation agreement to benefit a species at risk or enhance its survival in the wild. The agreement must provide for the taking of conservation measures consistent with the purposes of the Act, and may include measures with respect to protecting the species' habitat, including its critical habitat.

Text bolded in this document is defined in section 7.0 Definitions and Examples.

2.0 Purpose

The purpose of this policy is to set out the factors guiding the assessment of whether existing laws and measures protect critical habitat that has been identified on non-federal lands, and the actions to be taken following the completion of that assessment. Environment and Climate Change Canada will assess the protection of critical habitat on non-federal lands for terrestrial species at risk, for which the Minister of the Environment is the competent Minister under SARA, using this policy.

3.0 Overarching Policy Statements

3.1 Protection and Effective Protection

3.1.1 Critical habitat will be considered to be protected or effectively protected for the purposes of subsection 61(4), where provisions in, or measures under SARA or other Acts of Parliament (as per paragraph 61(4)(a)), or the laws of the province or territory (as per paragraph 61(4)(b)), are, based on the available evidence, having the same protection outcome as would be the case if SARA subsection 61(1) prohibitions were in place. The **protection outcome** is that critical habitat is not being and will not be destroyed, except in ways that SARA's discretionary measures would allow.

3.2 Risk-Based Approach to Protection and Effective Protection

3.2.1 Where there are no provisions in, or measures under SARA or other Acts of Parliament, or the laws of the province or territory that provide for protection, critical habitat will also be considered to be protected or effectively protected for the purposes of subsection 61(4) if there is a low level of risk that the critical habitat will be destroyed.

3.3 Destruction of Critical Habitat

3.3.1 Critical habitat will be considered destroyed if part of the critical habitat is degraded, either permanently or temporarily, such that it would not serve its function when needed by the species. Destruction may result from a single or multiple activities at one point in time or from the cumulative effects of one or more activities over time.

3.4 Cooperation with Responsible Parties

3.4.1 When assessing the protection of critical habitat that is not on federal lands, Environment and Climate Change Canada will consult and, to the extent possible, cooperate with provincial, territorial, Indigenous, and local governments, federal government departments, and others with responsibility for managing non-federal land on which critical habitat has been identified.

3.4.2 The purpose of this consultation and cooperation will be to accurately understand the laws, provisions, and measures that are in place, or are planned to be put in place, to protect portions of the critical habitat.

3.5 First Opportunity to the Province or Territory Responsible for Managing Non-Federal Land

3.5.1 Environment and Climate Change Canada will first look to the laws of the province or territory to assess whether they provide effective protection against the destruction of the critical habitat on non-federal land prior to considering provisions in or measures under SARA or other Acts of Parliament.

4.0 Critical Habitat Protection Assessment on Non-Federal Lands

4.1 General Process and Scope

4.1.1 When assessing the protection of critical habitat, Environment and Climate Change Canada will use a four-step process called Critical Habitat Protection Assessment on Non-Federal Lands (hereafter referred to as CHPA).

4.1.2 SARA subsection 61(1) states, ‘No person shall destroy any part of critical habitat’, and subsection 61(2) and section 63 refer to ‘portions’ of critical habitat. The CHPA will consider all **parts** and **portions** of critical habitat for a given species, or multiple species as appropriate.

- The parts of critical habitat are the components or constituent elements of the habitat that make it necessary for the survival and recovery of the species. These are often referred to as biophysical attributes within recovery documents (e.g. attributes specific to nesting, foraging, plantgrowing conditions).
- A portion of critical habitat is the geographic area within which a common set of land ownership, land tenure or management type, and protection mechanisms apply.

4.1.3 Recovery Strategies and Action Plans include a section entitled “*Activities likely to result in the destruction of critical habitat*” which describes examples of the types of activities and how these could result in destruction of critical habitat. The CHPA will review each of these activities for each portion of critical habitat.

- The best available information will be used for the assessment. If new information about additional activities becomes available after the Recovery Strategy or Action Plan is posted on the Species at Risk Public Registry, the CHPA will also take that information into account.

4.1.4 Steps 1 through 3 of the CHPA provide an assessment of the strength of provincial and territorial laws, federal provisions and measures in providing protection and, if those are not sufficiently strong, an assessment of the risk that critical habitat

destruction will occur.

4.1.5 The results of Steps 1-3 provide an initial assessment of whether the critical habitat is effectively protected/protected.

4.1.6 If effective protection / protection is in place, Step 4 monitors and verifies the efficacy of protection over time.

4.2 CHPA Step 1

4.2.1 SARA paragraph 61(4)(b) refers explicitly to ‘the *laws* of the province or territory’. In recognition that the federal government will first look to the laws of the province or territory for effective protection on non-federal lands, the first step of the CHPA is to review the laws of the province or territory to determine if there are any ‘gaps’ in protection from those laws. For the purposes of the assessment, laws include statutes, associated regulations, and contracts entered under law, collectively referred to as legal instruments.

4.2.2 Step 1 evaluates the strength of provincial or territorial laws for each portion and activity. The strength assessment is based on a review of specific criteria to provide an initial determination on the extent to which the laws provide the same protection outcome as would be the case if SARA subsection 61(1) prohibitions were in place, and that the laws are actually providing protection, based on the history of how the laws have been applied to date. A particular consideration when assessing whether the protection outcome has been achieved is the purpose of any authorization to engage in an activity that may affect critical habitat, and whether it is subject to the pre-conditions set out in section 73 of SARA or similar conditions.

- The criteria considered with respect to whether the law is mandatory in its application are: limitations, exemptions, discretion, and permitting authorities.
- The criteria considered with respect to whether the law is enforceable are: prohibitions and offences, enforcement regime, and penalties or consequences.
- The strength assessment considers both the literal interpretation and the history of the application of the law in relation to the criteria noted above, thus assessing whether the law is both capable of and actually preventing destruction of critical habitat.
- The assessment will not evaluate whether provincial or territorial laws are equivalent to the content and structure of SARA with respect to the above criteria; rather, that the protection outcome of preventing destruction of critical habitat is being achieved, including an evaluation of whether any authorized destruction of critical habitat is subject to similar conditions as provided in SARA.

4.2.3 Provincial or territorial laws with “moderate” and “strong” overall strength will be considered as providing effective protection for that portion of critical habitat, with respect to the specific activity likely to destroy it. “Strong” laws are equivalent to protection outcomes if SARA prohibitions/permitting were in place; “moderate” strength laws may be structured differently than SARA prohibitions, but are still likely to result in the equivalent outcome of protection.

4.2.4 Provincial or territorial laws with “weak” overall strength will be considered a ‘gap’ in protection for that portion of critical habitat, as will the absence of any applicable law. In this situation, Step 2 will be completed.

4.3 CHPA Step 2

4.3.1 SARA paragraph 61(4)(a) refers to ‘provisions in, or measures under, Acts of Parliament’, including SARA, and specifically refers to agreements under section 11. The second step of the CHPA is identical to the first step, except that the assessment is directed at provisions and measures under federal laws, if any are in place. Step 2 is only completed if there are gaps in protection from provincial or territorial laws.

4.3.2 Provisions in or measures under SARA or other Acts of Parliament, including section 11 conservation agreements, codes of practice, or regulations will be assessed under Step 2 to provide an initial determination of the extent to which they are mandatory and enforceable.

4.3.3 As in 4.2.2, the strength assessment is based on a review of specific criteria to provide an initial determination on the extent to which the laws are both mandatory and enforceable such that the same protection outcomes are achieved as would be the case if SARA subsection 61(1) prohibitions were in place; in other words, critical habitat will not be destroyed and any discretion to permit any destruction of critical habitat is no greater than that which would exist under SARA.

- The criteria considered with respect to whether the law is mandatory in its application are: limitations, exemptions, discretion, and permitting authorities.
- The criteria considered with respect to whether the law is enforceable are: prohibitions and offences, enforcement regime, and penalties or consequences.
- The strength assessment considers both the literal interpretation and the history of the application of the law in relation to the criteria noted above.
- The assessment will not evaluate whether other Acts of Parliament are equivalent to the content and structure of SARA with respect to the above criteria; rather, that the protection outcome of preventing destruction of critical habitat will be achieved, including an evaluation of whether any authorized destruction of critical habitat is subject to similar conditions as provided in SARA.

4.3.4 Provisions in or measures under Acts of Parliament with “moderate” and “strong” overall strength will be considered as providing **protection** for that portion of critical habitat, with respect to the specific activity likely to destroy it.

4.3.5 Provisions in or measures under Acts of Parliament with “weak” overall strength will be considered a ‘gap’ in protection for that portion of critical habitat, as will the absence of any applicable provision in or measure under Acts of Parliament. In this situation, Step 3 will be completed.

4.4 CHPA Step 3

4.4.1 Overarching policy statement 3.2 indicates that a risk-based approach will be applied to the assessment of critical habitat protection. This step also provides information to inform the determination of protection under subsection 61(4). SARA’s preamble recognizes the need to encourage and support stewardship activities and the conservation efforts of all Canadians. In recognition of this, and the role that conservation measures can play in achieving protection, if the assessment indicates that a ‘gap’ in protection remains after Steps 1 and 2, the third step of the CHPA will consider the **overall risk** that critical habitat destruction will occur. This includes an evaluation of the **anticipated risk** associated with an activity that is likely to destroy critical habitat within that portion, and the **residual risk** of destruction after consideration of **conservation measures** that prevent, lessen or mitigate that activity, if any are in place. Conservation measures may include, for example, non-regulatory agreements (including conservation agreements under SARA section 11, if the specific agreement is not mandatory and enforceable in its application), beneficial management practices and certification schemes.

4.4.2 If the overall risk that critical habitat destruction will occur is “moderate” or higher, that portion of critical habitat will be considered to be unprotected for the purposes of the initial CHPA, and the information will be provided to the Minister.

4.5 CHPA Step 4

4.5.1 Step 4 is only completed if previous steps indicate that instruments or measures are in place and functioning to prevent destruction of critical habitat. Continued verification that protection is in place and actually providing protection will be ongoing. The fourth step of the CHPA will include monitoring of the critical habitat over time to verify that destruction of critical habitat has not occurred, except as would have been authorized under SARA if the subsection 61(1) prohibitions were in effect. If there is evidence that critical habitat destruction has occurred, or is at moderate to high risk of occurring, then it will be considered that protection is not in place, and the information will be provided to the Minister.

5.0 Using the results of a Critical Habitat Protection Assessment

5.1.1 The Minister's opinion will be based on all information that the Minister considers relevant.

5.1.2 For the purposes of the initial CHPA, protection will be assessed as in place if:

- there are no gaps in protection for one or more portions of critical habitat (i.e. instrument(s) strength is strong or moderate in Steps 1 and 2), OR
- there are gaps in protection as identified in Steps 1 and 2, but Step 3 indicates a very low or low risk of critical habitat destruction.

5.1.3 If the initial CHPA indicates the results outlined in 5.1.2, information will be provided to the Minister to enable consideration of whether or not the portion(s) of critical habitat are protected.

5.1.4 If ongoing monitoring from Step 4 of the CHPA indicates that protection is no longer in place, consultation will be conducted as in 5.1.5.

5.1.5 If the initial CHPA indicates that critical habitat is not protected, consultation will proceed as quickly as possible with provincial, territorial, Indigenous, and local governments, federal government departments, and others with responsibility for managing the non-federal land on which critical habitat has been identified. The purpose of working with partners during this consultation process will be to finalize the assessment and put protection in place that meets the requirements of SARA in a timely way.

5.1.6 Any new information provided in the responses to consultations will be assessed using the CHPA. Following these consultations, information will be provided to the Minister to enable consideration of whether or not the portion(s) of critical habitat are unprotected.

6.0 Minister's Opinion, and Reporting on Critical Habitat Protection on Non-Federal Lands

6.1 Minister Forms the Opinion that Critical Habitat is Protected

6.1.1 If the Minister has formed the opinion that critical habitat is protected, a summary of the final results of the CHPA Steps 1-3 will be put on the Species at Risk Public Registry. A report on steps to protect critical habitat (SARA section 63) is not necessary, given that the critical habitat is already protected.

6.1.2 If ongoing monitoring from the CHPA Step 4 verifies that critical habitat continues to be protected, this will be indicated through reports on the implementation of recovery strategies and action plans (SARA sections 46 and 55).

6.2 Minister Forms the Opinion that Critical Habitat is Unprotected

6.2.1 If the Minister has formed the opinion that critical habitat is *unprotected*, and reasonable steps are actively underway to put protection in place, a report will be put on the Species at Risk Public Registry on the steps being taken to protect the critical habitat. The report will be updated with respect to every 180 day period until the portion(s) of critical habitat are protected.

- Reasonable steps are considered to be actions underway to put protection in place in a timely manner, consistent with the criteria in the CHPA.

6.2.2 If the Minister has formed the opinion that critical habitat is *unprotected*, the Act requires that the Minister recommend to the Governor in Council that a protection order be made to bring SARA's subsection 61(1) prohibition against the destruction of critical habitat into force for the unprotected portions. As long as reasonable steps to put protection in place are actively underway, the Minister will defer making a recommendation for an order to Governor in Council.

7.0 Definitions and Examples

The terms defined below are used throughout this document and should be understood in that context.

- **Activities likely to result in the destruction of critical habitat (ALTD):** Examples of activities that are likely to occur, and that require management (e.g. prevention, reduction) to prevent destruction of critical habitat. ALTD are described in the recovery strategy or action plan, and are reviewed for each portion of critical habitat in the CHPA. This concept is particularly relevant for provinces and territories that do not have laws which prohibit "destruction of critical habitat".
- **Anticipated Risk:** Within an area for which there is a gap in protection from the laws of the province / territory, the risk of critical habitat being destroyed by the impact of a given activity, prior to consideration of conservation measures. This is assessed during the CHPA Step 3.
- **Conservation measures:** Actions, agreements, or other measures that have been shown to prevent, lessen, or mitigate the activity likely to result in the destruction of critical habitat. These are not always legally-binding, however they are carefully evaluated in Step 3 of the CHPA, and are in keeping with the recognition in SARA's preamble that responsibility for the conservation of wildlife is shared, that the role of

aboriginal peoples is essential, and that stewardship activities and the conservation efforts of individual Canadians and communities have an important role to play.

- **Destruction of Critical Habitat:** Understanding what constitutes destruction of critical habitat is necessary for the protection and management of critical habitat. Destruction is determined on a case by case basis. Critical habitat will be considered destroyed if part of the critical habitat were degraded, either permanently or temporarily, such that it would not serve its function when needed by the species. Destruction may result from a single or multiple activities at one point in time or from the cumulative effects of one or more activities over time.
- **Effective Protection:** Critical habitat is effectively protected under paragraph 61(4)(b) where laws of the province or territory are, based on the available evidence, having the same protection outcome as would be the case if SARA subsection 61(1) prohibitions were in place; or, if legal instruments are not likely to result in the same protection outcome, there is a low level of risk that the critical habitat will be destroyed.
- **Legal instrument:** An instrument with a basis in public law (e.g. statutes and their enabling provisions) or in private (civil) law (e.g. contracts). The strength of these instruments is assessed in CHPA Steps 1 and 2.
- **Non-federal Lands:** Lands that do not meet the SARA subsection 2(1) definition of federal lands.
- **Overall Risk:** The final result of CHPA Step 3, where the Residual Risk results for multiple activities are aggregated for a given portion.
- **Parts:** The parts of critical habitat are the components or constituent elements that make the habitat necessary for the survival and recovery of the species. These are often referred to as biophysical attributes within recovery documents (e.g. attributes specific to nesting, foraging, specific plant growing conditions).
- **Portions:** A portion of critical habitat is the geographic area within which a common set of land ownership, land tenure or management type, and protection mechanisms apply.
- **Protection:** Critical habitat is protected under paragraph 61(4)(a) where provisions in, or measures under SARA or other Acts of Parliament are having the same protection outcome as would be the case if SARA subsection 61(1) prohibitions were in place; or, if legal instruments are not likely to result in the same protection outcome, there is a low level of risk that the critical habitat will be destroyed..
- **Protection Outcome:** When considering whether critical habitat is protected or effectively protected by the laws of the province or territory, or by provisions in, or measures under SARA or other Acts of Parliament, the protection outcome is that

critical habitat will not be destroyed, and any discretion to allow, by permit or otherwise, any destruction of critical habitat is no greater than that which would exist under SARA.

- **Residual Risk:** The result of considering the strength of conservation measures along with the anticipated risk that the impact of an activity will result in destruction of critical habitat for a given portion. This is assessed during CHPA Step 3.
- **Unprotected critical habitat:** In the opinion of the Minister of the Environment, on non-federal lands the critical habitat is not effectively protected by the laws of the province or territory, there are no measures in or provisions under SARA (such as a section 11 conservation agreement) or any other Act of Parliament that protect the critical habitat, and there is a moderate to high level of risk that the critical habitat will be destroyed.

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