

**ENVIRONMENT CANADA**  
**SPECIES AT RISK RECOVERY PROGRAM**

**February 2004**

**FEDERAL POLICY DISCUSSION PAPER:**  
**CRITICAL HABITAT**

**NOTE:**

*This document is intended as a discussion paper, in order to give a single source document for review and input from interested parties on a broad sweep of policy issues within the sections of SARA that deal specifically with Critical Habitat. It is not a final or even a draft statement of entrenched policy positions on behalf of the SARA implementing Departments, and should not be construed as such. It is the hope of the SARA implementing Departments that the contents herein will provide focus for detailed discussion with all partners – federal, provincial, non-government, and the public. While considerable effort and analysis has been expended in the preparation of this document, it is a given that the content will continue to evolve as the result of discussion and input of all partners.*

# **POLICY STRUCTURE - TABLE OF CONTENTS**

## **PREAMBLE**

### **1.0 Critical Habitat Identification Policies**

- 0. Intent
- 1. SARA Context
- 2. Accountability Context
- 3. Critical Habitat Identification Policies and Procedures
- 4. Section 60: Habitat of Provincially/Territorially-Listed Species

### **2.0 Critical Habitat Surveying/Mapping Policies**

- 2.1 Intent
- 2.2 SARA Context
- 2.3 Accountability Context
- 2.4 Critical Habitat Surveying
  - 2.4.1 General Approach
  - 2.4.2 Re-Visitation Rate of Critical Habitat Surveys
- 2.5 Critical Habitat Mapping
  - 2.5.1 General
  - 2.5.2 Use of Provincial/Other Mapping Sources
  - 2.5.3 Data Ownership, Distribution, Access, and Charges

### **3.0 Critical Habitat Protection**

- 3.1 Intent
- 3.2 SARA Context
- 3.3 Accountability Context
- 3.4 Determining “Effectively Protected”
  - 3.4.1 Assumptions and Definitions
  - 3.4.2 Scale of Determining “Effectively Protected”
  - 3.4.3 Method for Determining “Effectively Protected”
  - 3.4.4 An “Effectively Unprotected” Finding
- 3.5 Critical Habitat Agreements and Stewardship Policies
- 3.6 Ministerial Orders for Protection on Federal Lands
- 3.7 Critical Habitat Safety Net Policies and Procedures
- 3.8 Critical Habitat and Residence Permitting Policies
- 3.9 Critical Habitat Compliance and Enforcement Policies *(to be completed after main policies are established)*

### **4.0 Critical Habitat Restoration/Creation Policies**

*(to be developed - unassigned at this time - lower priority)*

## **5.0 Compensation Policies**

*To be completed at a later date*

### **Appendices**

(Just a list - Not all completed)

*Priorities for Critical Habitat Surveying and Mapping*

*Technical Guidelines for SAR Critical Habitat Surveys*

*Technical Guidelines for SAR Critical Habitat Mapping (in prep by K. Prior et al)*

*A Decision Framework for Determining Critical Habitat and Residence Protection Status*

*Implementation Guidelines for SARA S. 11 Stewardship Agreements (in prep)*

*The SARA Permits Manual (in prep)*

*Drafting Guidelines for MOUs with Federal Departments/Agencies for Critical Habitat Protection (to be done)*

*Drafting Guidelines for Section 58 Orders (to be done)*

*Drafting Guidelines for Safety Net Recommendations and Orders (to be done)*

and more.....

## **PREAMBLE: “Cooperation and Stewardship First”**

It is important in both the writing and the reading of any policy document to constantly maintain a broader perspective on the given subject. Policy such as this, for Critical Habitat, is after all based upon an Act that is written in the often harsh and cold language of law: prohibitions, orders, restrictions, etc. It is all too easy to get lost in the tone of this language and misplace some of the overarching policy directions upon which the Canadian species at risk recovery effort is based. To that end, recall that the Preamble to the *Species at Risk Act* (SARA) states, *inter alia*, that

*“responsibility for the conservation of wildlife in Canada is shared among the governments in this country and it is important for them to work cooperatively to pursue the establishment of complementary legislation and programs for the protection and recovery of species at risk in Canada”*

*“the conservation efforts of individual Canadians and communities should be encouraged and supported”*

*“stewardship activities contributing to the conservation of wildlife species and their habitat should be supported to prevent species from becoming at risk”*

It follows, therefore, that the overarching policy approach to the Critical Habitat and Residence components of SARA are

“Cooperation and Stewardship First”

Therefore, while It is true that SARA contains strong mechanisms and powers for the federal government to directly and unilaterally regulate the protection of residence and critical habitat in Canada, cooperative, voluntary measures must be viewed as the first option to securing the protection required for these crucial elements to species recovery.

## 1.0 CRITICAL HABITAT IDENTIFICATION POLICIES

### 1.1 The Intent

The following is intended to serve as guidance to the recovery planning and implementation process, most specifically to Recovery Planners and Departmental staff involved in the recovery planning and implementation process. It is specifically intended to illuminate the relative responsibilities/accountabilities of the parties involved in formal Critical Habitat Identification in the Public Registry and to bring a level of national consistency and comparability by defining a general process to be followed.

*NOTE: Throughout this document, the term “recovery planner” is used as a generic reference to those who are undertaking the recovery planning and/or action planning for a particular SAR. Typically, this will be a team or group of individuals; however, this is not mandated in the Act and there may be situations in which recovery planning/action planning is not undertaken through a team or group approach. As such, the generic term is used.*

### 1.2 The SARA Context:

SARA section 2 defines Critical Habitat as

*“...the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species’ critical habitat in a recovery strategy or in an action plan for the species.”*

Sections 41 and 49 (below) of SARA both refer to the need to “identify” Critical Habitat in Recovery Strategies and Action Plans respectively; section 58 speaks to “describing” Critical Habitat in the Canada Gazette, which for policy purposes will be taken as an analogous term to “identify”.

*Section 41. (1) If the competent minister determines that the recovery of the listed wildlife species is feasible, the recovery strategy must address the threats to the survival of the species identified by COSEWIC, including any loss of habitat, and must include.....(c) an identification of the species’ critical habitat, to the extent possible, based on the best available information, including the information provided by COSEWIC, and examples of activities that are likely to result in its destruction;....*

*Section 49. (1) An action plan must include, with respect to the area to which the action plan relates,.....(a) an identification of the species’ critical habitat, to the extent possible, based on the best available information and consistent with the recovery strategy, and examples of activities that are likely to result in its destruction;....*

*Section 58. (1) Subject to this section, 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 -- if*

- (a) the critical habitat is on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada;*
- (b) the listed species is an aquatic species; or*
- (c) the listed species is a species of migratory birds protected by the Migratory Birds Convention Act, 1994.*

*Protected areas*

*(2) If the critical habitat or a portion of the critical habitat is in a national park of Canada named and described in Schedule 1 to the Canada National Parks Act, a marine protected area under the Oceans Act, a migratory bird sanctuary under the Migratory Birds Convention Act, 1994 or a national wildlife area under the Canada Wildlife Act, the competent Minister must, within 90 days after the recovery strategy or action plan that identified the critical habitat is included in the public registry, publish in the Canada Gazette a description of the critical habitat or portion that is in that park, area or sanctuary.*

*Application*

*(3) If subsection (2) applies, subsection (1) applies to the critical habitat or the portion of the critical habitat described in the Canada Gazette under subsection (2) 90 days after the description is published in the Canada Gazette.*

*etc.....*

### 1.3 **The Accountability Context:**

**It is important to note that the ultimate responsibility, accountability, and discretion to identify CH lies with the competent Minister, not the Recovery Planner, as per section 41 of SARA.** In this context, the Recovery Planner can be viewed as a main source of advice to the Minister, among others sources (such as the Department itself, other experts solicited or unsolicited, etc).

The identification of Critical Habitat is a key step in the SARA chain of actions, as, once formally “Identified” in the Public Registry and “described” in the Canada Gazette, the requirements of judging and ensuring Protection take effect, with all of the incumbent issues associated with that area of business. Thus, both the format and the content of the formal identification of Critical Habitat need to be very carefully considered, as they are one of the key, and potentially quite controversial, “issue triggers” in the Recovery process.

It also therefore follows that the process of identification of Critical Habitat should be as transparent as possible, particularly with regard to clearly identified steps distinguishing the “advice” of the Recovery Planner (and others) from the role of the Minister to decide upon the format and content of the formal Critical Habitat

Identification, including the consideration of factors that the Recovery Planner may not have considered, or considered from a different perspective.

#### **1.4 Critical Habitat Identification Policies and Procedures**

##### **The Identification Process**

Identification of Critical Habitat should be considered a process-- series of steps and products that each produce a further refinement of the habitat aspect of the recovery needs of a Species at Risk. The products produced at each step in the process are intended to both inform the next step and the activities of the program; however, only the final steps, the actual legal identification of Critical Habitat in the Public Registry and any subsequent GIC order for protection, will be the basis upon which the legal provisions of the Act are applied.

It is noteworthy that there is no absolute requirement to formally identify Critical Habitat at the stage of a Recover Strategy; the Act recognizes that this may not be possible and specifically allows, in those situations, that a Schedule of Studies be employed aimed at identifying Critical Habitat at the Action Plan stage (at which point it is required). The guidance below, however, is written generically such that it can be applied at either the Recovery Strategy stage or Action Planning stage, or both.

In overview, the process of Critical Habitat Identification, and the responsibility for each step, is:

*(The following presumes that a population recovery target has already been established by the Recovery Planner, including the question of whether the overall target for that species is survival or recovery. It should also be noted that SARA allows for multi-species approaches to recovery, which again would be factored into the general approach below. Guidance on these steps is provided in separate policy documentation related to the Recovery Process)*

Step 1:

Description of the Biophysical Attributes of habitat required by the species at risk  
(Recovery Planner)

Step 2:

Location, to the greatest extent practically possible, of all habitat in the range.  
(Recovery Planner)

Step 3:

Rationalization of this Step 2 habitat area based upon the population target of the species at risk (including the possibility of a need to create/restore habitat) and implementation factors (Recovery Planner and Minister)

Step 4:

Competent Minister Determines Critical Habitat

Step 5:

Formal Identification of Critical Habitat in the Recovery Strategy and the Public Registry and description in the Canada Gazette (Competent Minister)

Each of these steps, and associated policies, are outlined in greater detail below.

It is again noteworthy that section 41(1)(c) of SARA contains the qualifying phrase “to the extent possible” when outlining the requirement of identification of Critical Habitat. The step-wise process outlined below contains numerous decisions, each requiring information or data, to be made by either the Recovery Planner or the Competent Minister. Clearly, if the required information and/or data are not available to make the required determination, or if the habitat attributes of the species are poorly understood, then an accurate determination may not be possible at that time. In these instances, and as the Act itself explicitly prescribes (section 41(1)(c.1)), a Schedule of Studies will be created which outlines the actions to be taken to identify the Critical Habitat of the SAR. Stated in another way, when a determination is made that Critical Habitat identification is “not possible” (as per Section 41 (1) (c)), the determining factors should be confined to scientific or technical impediments to identification.

Furthermore, the following is not presented as a “one time” process; it is well understood that knowledge of CH for specific species will likely grow over time, targets may be amended, and that habitat is by nature dynamic and may change through time. As such, it is anticipated that CH identification will be iterative in many cases; however, each iteration should involve a level of consistency of process, which is outlined below.

**Step 1: Description of the biological, physical and/or Functional Attributes of habitat required by the species at risk.**

- The Recovery Planner is responsible for this product.
- This will consist of a written description of sufficient detail to inform the process of locating the habitat upon the landscape.
- At a minimum, this written description must include:
  - any and all geological, vegetative, topographical, climatological, physical, chemical, or biological attributes or suite of attributes that constitute habitat for the SAR.



- any temporal considerations to the above attributes.
- any requirements related to distribution and density of separate habitat polygons in a landscape (fragmentation/proximity factors).
- Any area or type of habitat that is required to maintain existing known biological connection between physically separated polygons of habitat qualify as habitat themselves and should be included in the above habitat description (connectivity factors).
- Where relevant to the SAR involved, the analysis/thought process of determining SAR habitat should include a description of any area that is either typically required or required in specific situations to protect the habitat from the influence of typical, expected non-compatible activities/land use in the area, and/or biological threats through species interactions. Such areas should be considered part of the habitat itself, and described as such, rather than as some separate concept.

**Step 2: Location, to the greatest practically possible, of all SAR Habitat in the range** (including unoccupied range for extirpated species).

- The Recovery Planner is responsible for this product.
- Based upon the description determined in Step 1, the Recovery Planner will determine the locations, to the greatest certainty feasible, of all areas in the SAR (or population) range that meet the description outlined in Step 1.
- The results of this analysis should be referred to as SAR Habitat in the draft Recovery Strategy.
- Where possible and applicable the Recovery Planner should describe and/or delineate habitat which, while not currently meeting the attributes of SAR Habitat at present, could reasonably be expected to become SAR Habitat through either ongoing natural processes (i.e., no active management) or through active restoration/enhancement efforts. This should be referred to as “*Potential or Restorable SAR Habitat*” in Recovery Plan materials and will serve to inform recovery operations for habitat restoration, enhancement, etc as required. (Note that this is different from the concept of “unoccupied habitat” in SARA, which is an area that does presently contain the attributes of habitat for a SAR, but the SAR does not range into that habitat at present; refer to SARA s. 2, under definition of habitat: “...or formerly occurred and has the potential to be reintroduced”.)
- **It is extremely important to note that this step is intended to be an ecologically-based exercise (including Aboriginal Traditional Knowledge), i.e., not a product rationalized against other factors such as land ownership, stakeholder desires, previewing of implementation issues, etc. Opportunity for inclusion of those factors is provided in the next steps of the Identification process.**
- Also, all of the above points would necessarily involve an appropriate level of peer review.

### **Step 3: Rationalization of this Step 2 habitat area based upon the population target of the species at risk (including the possibility of a need to create/restore habitat) and implementation factors (Recovery Planner and Minister)**

- The goal of this step is to determine what proportion of the SAR Habitat will be formally identified as Critical Habitat in the Public Registry.
- The Recovery Planner will be responsible for the rationalization of the SAR Habitat against the population target for the SAR; the Minister will be responsible for rationalization of the SAR Habitat against program implementation factors, with advice from the Recovery Planner process and other sources as and where deemed appropriate.
- Using a scientifically valid and defensible method, the Recovery Planner will identify the proportion, percentage, or some quantitative/qualitative measure and distribution characteristics of the SAR Habitat that must be protected to ensure the achievement of the recovery target of the SAR. Note that this may be all of the SAR Habitat (i.e., 100%), or some lesser amount, including a zero amount (in the rare case where survival or recovery of a SAR is not limited by habitat issues).
- The Recovery Planner will undertake an analysis of the threats to this habitat and recommend general or specific measures which can be employed to afford protection to that habitat from these anticipated threats.
- The Recovery Planner may undertake additional analysis (and, in specific cases, may be encouraged and equipped to do so) taking into account stakeholder views, considerations of practical implementation, peer review, etc., and include these as advice for the Minister in the next step (below), with a clear understanding that the Minister will determine how and where to incorporate that advice. However, for clarity on the part of the Competent Minister, the Recovery Planner should not integrate these considerations into the biological/ecological considerations and advice to the Competent Minister.

### **Step 4: Competent Minister Determines Critical Habitat**

- The Minister will consider the above advice (from Step 3) and undertake any required additional analysis based upon program implementation factors, socio-economic or other considerations, including stakeholder input, solicited or un-solicited.

### **Step 5: Formal Identification of Critical Habitat in the Recovery Strategy and the Public Registry**

- The Minister is responsible and accountable for the formal Identification of Critical Habitat in the Recovery Strategy and in the Public Registry, and a description in the Canada Gazette.
- While mapping of habitat is ideal and can certainly be employed as the Identification of Critical Habitat (where it is possible to deliver the required

accuracy and precision), the Identification (Public Registry) and description (Canada Gazette) will, at a minimum, consist of a written description of the biophysical and/or functional attributes of the Critical Habitat and a description/coordinates of general locations/ranges upon the landscape within which these types of habitat can reasonably be expected to occur. Note that for the purposes of the Canada Gazette, a legal geographic delimitation is required (i.e., at least three latitude and longitude coordinates) to define the “range” in which the narrative description applies.

- It is also possible, in the Canada Gazette, to simply refer to a map that exists outside of the Gazette – although a cautionary note to this approach is that, if that external map is changed in any way, this by extension legally constitutes a change to the Gazette description, and requires the formal “re-Gazetting” process to be used (consultations, notices, etc).
- Note that the goal is the maintenance of the function of these elements, rather than simply the static maintenance of particular physical attributes of the landscape needed by the individual SARs.
- **Note again that while it is preferable when available and appropriate, detailed mapping (geo-spatially referenced data) is not explicitly required in the formal Identification of Critical Habitat.** This does not mean that detailed maps are not produced in the process of identification of Critical Habitat, described above; rather, that those detailed maps can remain as un-gazetted materials intended for operational program guidance (i.e., where best to direct CH management/protection efforts.) (*see Critical Habitat Mapping section for policies related to habitat mapping*). As general guidance, detailed mapping should only form part of the Public Registry/Canada Gazette materials when there is an extremely high confidence level in the accuracy and precision of the mapping as well as the temporal permanency of the habitat as mapped.

## 1.5 Section 60: Habitat of Provincially/Territorially-Listed Species

Section 60 indicates that the habitat of provincially/territorially-listed species at risk which are not/not yet SARA-listed is protected on federal lands as well, at the discretion on the Governor in Council. This implies an identification of said habitat that is acceptable to the GIC.

The wording of Section 60 parallels that of the definition of Critical Habitat (“...habitat of that species that the provincial or territorial minister has identified as *essential to the survival or recovery* of the species...”). The policy for identification of this habitat under SARA section 60 will therefore be that the identification supplied by the provincial/territorial minister must meet the policy standard established (above) for Critical Habitat of a SARA-listed species.

## 2.0 **Critical Habitat Surveying and Mapping Policies**

### 2.1 **The Intent**

During the course of recovery planning, action planning, and recovery operations, it will commonly be necessary to undertake survey work (using a variety of techniques) to determine the existence of SAR habitat, its spatial extent, and its characteristics. Equally common will be the need to produce mapping products related to the findings of these surveys (whether these maps form part of the formal CH identification or not, as discussed in the previous section).

Although seemingly straightforward in concept, both surveying (especially ground surveys) and the production of map products have been easily among the most controversial aspects of all habitat programming undertaken in Canada over the past four decades. Much of this controversy centres upon issues of landowner rights, surveying techniques and their accuracy, and the accuracy/precision/legal status of maps that result from surveys.

The following is intended to guide the process of Critical Habitat surveying and mapping **if and when it is determined that such surveying and mapping is required for Recovery Planning and/or Recovery Implementation.**

### 2.2 **The SARA Context:**

There is no explicit reference to surveys or “mapping” in the Act. While there will be instances where surveys and maps will ultimately be part of the formal “Identification” of CH in the Recovery Plan, Public Registry, and Gazette, this may not always necessarily be feasible, required, or desirable. In reality, surveys and map products will largely exist strictly as operational program tools, not part of the formal Identification of CH in the Public Registry.

### 2.3 **The Accountability Context:**

As no explicit requirement exists in the Act for Critical Habitat surveying and mapping, no party is legally accountable for their production. Nevertheless, as stated above, surveying and mapping will be a common operational tool in Critical Habitat identification and protection, and as such it is incumbent upon the Minister to provide direction to those involved in Recovery planning and operations on surveying and mapping procedures, to ensure a level of national consistency and comparability for Critical Habitat survey and map products that are used in the Recovery process and/or presented as public information.

### 2.4 **Critical Habitat Surveying**

### 2.4.1 General

Critical Habitat surveying will, in all cases, be carried out using the best available, defensible science, professionally trained individuals, and with respect of landowner rights, requirement of consultation, desire for involvement, and traditional/informal knowledge.

### 2.4.2 Re-visitation Rate

Habitat is, by its very nature, dynamic – in a healthy ecosystem, habitat (especially vegetation-based habitat) will generally slowly evolve naturally over time, and more even more rapidly in situations featuring human land use and/or intentional habitat manipulation. However, due to the legal implications of Critical Habitat designations, it is not possible to designate an area as Critical Habitat that does not presently contain the elements of Critical Habitat simply based upon forward speculation that this habitat will evolve into those characteristics. For all of these reasons, it is necessary to contemplate re-visitation of Critical Habitat periodically.

As a matter of general policy, CH surveys should be reviewed at a maximum of every 5 years; and more frequently if the CH is of a type where it could be reasonably be expected to change naturally over more compressed time frames, or if it is situated in a landscape undergoing major change/disturbance (for example, active forest operations, mineral exploration, urbanization, agriculture, effects of climate change, etc).

For further guidance on Critical Habitat Surveying, see *Technical Guidelines for SAR Critical Habitat and Residence Surveys*, appended to this document.

## 2.5 **Critical Habitat Mapping**

### 2.5.1 General Policies

When carried out, mapping of Critical Habitat (and more general SAR Habitat as well) must conform to the standards laid out in the appended document, *Technical Guidelines for SAR Critical Habitat and Residence Mapping*.

All Critical Habitat mapping must be dated and contain clear disclaimers regarding the intended use of the mapping – for example, as a guide to habitat management activities – and any issues of precision, accuracy, or time sensitivity.

Instances may arise where mapping is posted on the SARA Public Registry solely for the purposes of public/stakeholder information, discussion, etc, and that this mapping may differ from the formal, legal description of Critical Habitat for that species in the Canada Gazette. It should be made clear in these

situations that it is the Canada Gazette material that the prohibitions of SARA are based upon. The materials presented on the SARA Public Registry are not the basis for the prohibitions.

### 2.5.2 Use of Provincial/Other Mapping Sources

The preferred option is to use mapping done to EC CH mapping standards as outlined in *Technical Guidelines for SAR Critical Habitat and Residence Mapping*. However, in the case of provincial sources of mapping which differ from these EC standards, this can be a subject of Bilateral Agreements, whether it be new mapping or potential upgrading of existing mapping.

### 2.5.3 Data Ownership, Distribution, Access, and Charges

General Policies:

- All CH mapping is to be accessible to the public upon request, unless prohibited by agreement with external source data providers, or in cases where the CH is of such a sensitive nature that the general publication of the CH mapping would threaten the CH or the SAR (see SARA S. 124).
- In all cases, the landowner of the properties containing CH (when this is in fact known) must be notified (through all reasonable efforts) of the existence and extent of CH on their lands by registered mail or similar verifiable method to the extent possible, with a full description of their legal obligations and advice on the management of the CH, including opportunities for stewardship where appropriate.
- it is not the responsibility of the federal government to ensure that, in the cases where property ownership changes hands, any subsequent owners of the property are informed of the existence of Critical Habitat; this must naturally be an issue of due diligence on the part of the buyer of the property.

Access and Costs:

- Subject to the above General Policies and where practical, EC will strive to make all mapping available on the Web in a downloadable format for display purposes only (i.e., cannot be amended or manipulated).
- electronic or hard copies of CH mapping data will be available from EC at cost (exception: one set of hard-copy CH mapping will be provided to each affected landowner at no cost).

*(this section needs cross-checking with corporate policy on info distribution)*

### 3.0 CRITICAL HABITAT PROTECTION POLICIES AND PROCEDURES

#### 3.1 The Intent

The following is intended to serve as guidance to Environment Canada staff who must make a recommendation to the Minister on the subject of whether Critical Habitat for a Species at Risk is “effectively protected” and therefore, by extension, whether the Minister should a) recommend to the GIC that the Safety Net order be made; and/or b) make an Order prohibiting CH destruction (depending upon the situation). Specifically, the following is intended to impart a level of consistency and comparability to the process of judging what is “effectively protected” for each situation that will arise.

#### 3.2 The SARA Context:

SARA section 2 defines Critical Habitat as

*“...the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species’ critical habitat in a recovery strategy or in an action plan for the species.”*

Sections 58 and 61 require the Minister to determine whether critical habitat is “legally protected” (S. 58) or “effectively protected “ (S. 61) or not in various situations, and to make a recommendation tot the GIC to apply SARA protective measures if a gap in protection exists.

Of note, section 61(3) contemplates the Minister recommending the application of the SARA protective measures **at the request of** a provincial or territorial Minister. Also along a similar vein, section 60 indicates that the habitat of provincially/territorially-listed species at risk which are not/not yet SARA-listed is protected on federal lands as well, at the discretion on the Governor in Council.

However, the Act does not define key concepts such as what is “protection”, what is “legally protected”, “effectively protected” and what would actually constitute “destruction of any part of” critical habitat.

#### 3.3 The Accountability Context

The competent Minister is ultimately responsible and accountable for ensuring that Critical Habitat (as formally Identified in the Recovery Strategy on the Public Registry – see CH Identification Policy section for guidance) is “legally protected” (on federal lands) or “effectively protected” (on non-federal lands). The Act is not prescriptive in how this is accomplished --the Minister has numerous vehicles and mechanisms available, and the over-arching policy approach for SARA is cooperation and stewardship – but is clear that, on specific timelines, the Minister must judge whether all of the mechanisms being brought to bear on Critical

Habitat constitute, in sum, “legally protected”/ “effectively protected” or not. If not, the Minister is obligated (depending upon the situation *vis-a-vis* federal species, federal lands or otherwise) to either make an order prohibiting destruction and/or invoke the federal Safety Net powers of the Act.

With regard to situations where a provincial or territorial Minister requests that the protective mechanisms of SARA be used (section 61(3)), the Act states that the Minister may make such a recommendation. This implies that the Minister will apply an evaluation as to the validity and need for the use of SARA (as opposed to other existing mechanisms or stewardship approaches). In practice, this evaluation will be the same as for determining “effective protection” under any other circumstance.

The potential for controversy, appeal, and litigation in the exercising of this decision point are self-evident, particularly on lands not owned by federal Departments. As such, it is necessary to approach the analysis of “effective protection” with as high a degree of national consistency and transparency as possible, so that the rationale used in one case in one part of Canada is demonstrably comparable to the rationale used in another case in another part of Canada, i.e. the actual decisions can and will vary with the circumstance, but the logic and the process used to reach that decision are totally consistent.

### 3.4 **Policies for Determining “Effective Protection”**

#### 3.4.1 Assumptions and Definitions

##### Overall Intent

It is the overall policy intent of the SARA implementing Departments that all Critical Habitat is essential to the survival and recovery of a species at risk and that the full spectrum of protection and management measures will be employed to ensure that there is no negative impact upon Critical Habitat.

*NOTE: with regard to the concepts of “legally protected” (section 58, federal lands) and “effectively protected” (section 61, non-federal lands), from a policy perspective it is not desirable to have different standards for federal lands as compared to non-federal lands. As such, as a policy approach, the test of “legally protected” for federal lands will be treated in exactly the same manner as that for “effectively protected” on non-federal lands (below).*

##### “Effectively Protected”

The phrase “*effectively* protected” can be read in different ways. From a policy perspective, “effective protection” should be defined in light of the purposes of the Act as whole:



- i) to prevent wildlife species from being extirpated or becoming extinct,
- ii) to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity; and
- ii) to manage species of special concern to prevent them from becoming endangered or threatened.

In this context, “effective protection” can be defined as:

*“measures and mechanisms that can reasonably be expected to protect critical habitat from alterations that would reasonably be expected to reduce the critical habitat’s capacity to provide for the recovery and survival of a SAR.”*

The above definition emphasizes the concept of reasonableness in determining “effectiveness”; i.e., that the “alterations” being considered are not in the realm of remote possibilities, but rather an activity that can reasonably be expected to occur on that type of site given the prevailing/foreseen conditions/use of that type of site.

#### Definition of “destroy and part of”:

For the purposes of permitting and compliance, it is necessary to gain a consistent understanding of what would constitute the “destroying of any part of “ critical habitat. Similar to above, this concept is contextual within the reason that critical habitat is protected within SARA, i.e., the survival or recovery of the SAR.

“Destroy any part of”:

*Any alteration to the topography, geology, soil conditions, vegetation, chemical composition of air/water, surface or groundwater hydrology, micro-climate, or sound environment of such a magnitude, intensity, or duration which significantly reduces the capacity of the Critical Habitat to contribute to the survival or recovery of the SAR, based upon the biology of that species and as expressed in the approved Recovery Strategy/Action Plan.*

#### Assumption of Compliance

The assumption must be made that all parties will obey the laws of the jurisdiction they are in, the processes established by those laws, and binding agreements they have entered into; and, that the relevant government level (provincial, federal, municipal) will enforce their laws and agreements. In reality, we cannot assume otherwise – or in effect EC is making a blanket statement that Province X or Department Y is intentionally not upholding their own laws, which is not an advisable policy position.

However, within our assessment of “effective” protection it is legitimate to look at the enforcement and compliance regime (i.e., active inspection, complaint

response, voluntary reporting with random audits, etc, etc) that has been formally established by the jurisdiction responsible for the mechanism (be it a law, policy, agreement, or program), and the consequences of violation/failure to perform.

### 3.4.2 Scale of Determining “Effectively Protected”

For critical habitat, the status of “effective protection” will be analyzed and determined at two levels:

- at the level of specific properties (i.e., land ownership level)
- at a polygonal level (where applicable) where a CH polygon involves two or more individual properties. The overall status of “protected” or “unprotected” will be assigned to the polygon based upon the size, distribution, and characteristics of the “unprotected” parcels within the polygon.

However, it is recognized that in many instances the data/level of knowledge will not be detailed enough to facilitate a thorough analysis at the level of specific properties. In those instances, at a minimum, analysis will be performed at the polygon level.

### 3.4.3 Method of Determining “Effective Protection”

In order to ensure consistency and transparency to the process of determining whether Critical Habitat is “effectively protected” or not, Environment Canada will employ a rigorous decision framework consisting of four basic steps:

1. Characterize the Critical Habitat (biophysically, temporally, functionally, chemically, etc);
2. Determine what alterations have the realistic potential to diminish or eliminate the potential of the Critical Habitat (based upon the above-described elements) to recover the SAR;
3. Determine what control mechanisms are in place relative to each of these potential alterations; and
4. Determine if these control mechanisms (including appropriate stewardship agreements), individually or collectively, result in the Critical Habitat being “effectively protected”.

The detailed step-wise process is set out in *A Decision Framework for Determining Critical Habitat and Residence Protection Status*, appended to this document.

It is noteworthy that, although the legal accountability for this action lies with the Competent Minister(s), in reality the process of arriving at a conclusion through the above process will involve considerable input and consultation with provincial/territorial governments, recovery planners, and stakeholders.

Note that there is no policy tool which can or will replace the decision of the biologist and manager in the final recommendation to the Minister of what is “effectively protected” or not. What this Decision Framework seeks to do is provide a consistent thought process to the question of effective protection. Consistency will evolve through experience in applying this process and through training which promotes common interpretations and perspectives on various protection mechanisms.

#### 3.4.4 A “Not Effectively Protected” Finding

If the “gap” is systemic in nature (rather than incidental on a few specific properties), the first option is to engage and work with the province/OGD to put legislation/mechanisms in place, or amend current mechanisms, to close the protection gap (see *Safety Net* and *Section 58 Orders* sections, below).

Failing this, and/or in those situations where the “gap” is not a widely-distributed systemic problem, the preferred approach is to secure a legally-binding agreement with the landowner(s) (see the *Agreements and Stewardship Policies* and *Section 58 Orders* sections of this Guide, below, and associated appendices) that obligates the landowner(s) to, at a minimum, not undertake activities which are likely to lead to the destruction of critical habitat on their property.

### 3.5 Agreements and Stewardship Policies

#### 3.5.1 Introduction

This section contains the implementation steps proposed for the protection of residences/critical habitat on non-federal lands and on *Indian Act Lands* under SARA, in instances where SARA stewardship agreements are used as the legal mechanism for satisfying the SARA requirement for effective protection. This is a draft document and will be amended following clarification on the outstanding policy and legal issues identified in the text.

#### 3.5.2 The SARA Context

##### ***General***

Section 11 agreements may be entered into by a competent Minister (S11(1)) with any government in Canada, organization or person, after consultation with every other competent Minister and with the CESCC or any of its members, as appropriate. SARA S. 11(2) provides that the agreement must provide for conservation measures and may include *inter alia*, protecting the species habitat including its critical habitat (S. 11.2.d), and is consistent with SARA provisions in S 61.4.

### ***Critical Habitat Protection on non-Federal Lands***

SARA S. 61(4) requires the Minister to recommend to the Governor in Council that an order be made to protect critical habitat that a province would not have effectively protected (or that is not protected by other means including S. 11 stewardship agreements (S. 61(4)(a)) or acquisition of the property under SARA S 62). The Minister is required to report regularly on the steps being taken to secure protection of the critical habitat and ultimately on the measures used to protect this critical habitat, but there is no 180 day time limit.

Provincial protection would be negotiated between the provincial and federal government, likely within the framework of the anticipated intergovernmental bilateral agreements. In instances, where the provinces have legislation in place that can protect critical habitat designated as such under SARA or other protection mechanisms in place, the use of SARA S. 11, S.62 or other federal action such as the prohibition order (61(4)) would not be required.

It is anticipated that the responsibility for the majority of critical habitat protection tasks on non-federal lands will rest with the Minister of Environment since the Minister's responsibilities include: migratory birds under MBCA and now SARA; all SAR on lands managed by Environment Canada; and, in instances where the responsible provincial agency has failed to act for the recovery of species, the protection and recovery of species and critical habitat on non-federal lands (except species covered by the *Fisheries Act*).

### ***Critical on Federal Lands (excluding Indian Act Lands)***

It is encouraged (see the section in this guide pertaining to protection of critical habitat on federal lands) that the relevant SARA implementing Department work cooperatively with other federal Departments on the lands of those Departments, through Memoranda of Understanding, Management Plans, etc. SARA s.11 Agreements are not applicable to other federal agencies.

### ***Critical Habitat on Indian Act Lands (Federal lands)***

As covered in previous sections, *Indian Act Lands* are considered federal lands in SARA, and in instances where the identified critical habitat is not effectively protected, SARA S.58.5 requires the Minister to order the prohibition on that particular habitat. Protection of critical habitat on federal lands is required within 180-days.

However, unlike the situation with federal government departments and agencies, it is very clear that First Nations are to be treated as a level of government, and therefore the use of S 11 agreements in their context is entirely appropriate. In fact, in keeping with the overall policy approach to species at risk

recovery under SARA, stewardship-type agreements are the preferred approach for securing “effective protection” on *Indian Act Lands* (federal lands).

### 3.5.3 Section 11 Implementation Policies

The legal and policy context above provides a basis for implementation of the SARA provisions where stewardship agreements are secured for purposes of protecting critical habitat on non-federal lands and on *Indian Act Lands*. Implementation steps are summarized for both below.

#### 3.5.3.1 Section 11 Agreements for Critical Habitat on non-Federal Lands

For critical habitat on non-federal lands, S 61.4 encourages protection action as an alternative to imposing a federal order (safety net) and specifies the use of S 11 agreements as one of the possible protection mechanisms. The determination of whether or not a S. 11 agreement is used by the federal government to protect this habitat is largely dependent on the outcome of intergovernmental negotiations on a case-by-case basis. However, it is important to note that S11 agreements are of strategic benefit to the competent Minister for SAR recovery since these agreements can contain management provisions for site improvement, whereas the 61(4) prohibition order imposes non-use only. In this instance, the absence of ongoing management may ultimately lead to habitat and species decline.

The implementation requirements and recommended contents for S. 11 agreements are outlined in the following steps. Note that this is not intended to imply that all Agreements in place prior to SARA coming into force of law are somehow non-compliant or not eligible for consideration as part of the “effective protection”. On the contrary, it is anticipated that such pre-existing arrangements may form the backbone of effective protection; however, they should be examined in light of the passage of SARA so that they contain the appropriate wording/elements that tie them to “effectiveness” under the Act.

(For more detail, please refer to the annexed document *Implementation Guidelines for SARA S. 11 Stewardship Agreements*.)

1. **Secure Ministerial<sup>1</sup> Direction:** Where critical habitat on non-federal lands has been designated as such by SARA, selection of a preferred protection mechanism will be determined on a case-by-case basis through consultations with provincial and federal agencies. Options could entail *inter alia* provincial action, S. 11(1) agreement, or SARA S.62 – acquisition. Ministerial direction will be required on the preferred protection

---

<sup>1</sup> Note that “Ministerial” direction as used in this section could denote direction from senior management, as delegated authority of the competent Minister, or the competent Minister his/herself.

option. Where S. 11 agreement(s) are recommended, Ministerial direction will also be required on the requirement for and conduct of consultations (S. 11(1) and 11(2)).

2. **Conduct Consultations:** S. 11(1) allows for consultations on stewardship agreements, where competent Minister deems such consultations appropriate. However, as a matter of policy, these consultations should be conducted for all critical habitat on non-federal lands. The consultations should consist of direct discussions with the agency, corporation or individual owners of the land or of the resource development rights to that land and be limited to discussion on S. 11 agreement.
3. **Obtain Ministerial Decision:** Following the conduct of consultations on protection of the critical habitat through SARA S. 11, a Ministerial decision should be obtained to negotiate a S. 11 agreement, where it is likely that an agreement is feasible. The outcome of these consultations and views should be documented and will assist in informing the decision of the Minister.
4. **Negotiate S. 11 Agreement:** Once it is determined by the Minister that a S. 11 agreement is the appropriate protection mechanism for critical habitat on non-federal lands, the development of a S11 agreement is undertaken first by identifying the appropriate government (provincial, or municipal), organization or individual with whom an agreement is required. S. 11 allows for agreements with any other government in Canada, organization or individual. It is recommended that a S. 11 agreement for 61(4) critical habitat protection be negotiated directly between the competent Minister and the owner of the non-federal critical habitat lands (province, corporation or individual), so as to ensure effective protection of the habitat under SARA.

*Note: Use of Section 11 Agreements by Non-Federal Entities*

Alternative arrangements include an administrative arrangement to conclude S. 11-type agreements, for specified critical habitat on non-federal lands, to other governments through SARA S.10. Section 10 allows for agreements between competent Ministers and any other government in Canada, organization or wildlife management board for the administration of any portions of the SARA, following any consultations that may be appropriate.

This option is not recommended in the initial years of SARA implementation, but rather should only be pursued once direct experience has been gained in the use of section 11 agreements and their effectiveness at affording protection to critical habitat.

- 5. Determination of Agreement Purpose and Contents:** SARA specifies only that the S.11 agreements are to benefit species at risk or enhance their survival in the wild, and also, that the agreements must provide for conservation measures consistent with the purposes of the Act (S. 11.2). SARA S.11.2,a,b,c,d and e illustrate these purposes including monitoring, awareness, recovery planning, recovery actions, protection of critical habitat and research. Within the scope of the Act, the content of S. 11 agreements is extremely flexible. However, in applying S. 11 agreements to meet the protection requirements of critical habitat on non-federal lands (S61.4), the S. 11 agreement content will focus on those actions that are deemed sufficient to have “effectively protected” the critical habitat. In this application of S. 11 SARA provisions, the agreement becomes a legally-binding agreement that for purposes of SARA, constrain or prevent the landowner or owner of resource development rights from conducting land/resource uses that threaten the habitat – so as to mitigate threats to the habitat, including outright non-use and to facilitate ongoing site management consistent with recovery action plan requirements for the affected species.

More specifically, the S. 11 agreement will need to contain wording that specifies that the agreement is entered into under SARA S. 11 for purposes of S 61.4 and that it is binding on the owner of the property and should include *inter alia* the following:

- Description of the critical habitat and location
- Protection actions: non-use provisions, habitat management, and altered land uses that ensure “effective protection”, including continuing acceptable uses such as forest cutting or stocking rates,
- Financial information including G&C payments for recovery action and contributions of resources and in-kind on behalf of the owner (see HSP G&C Guide),
- Monitoring of site and measures,
- Access to the property,
- Signage and controlled access,
- Required permits (SARA, MBCA, Fisheries Act etc.)
- Effective date and duration of the agreement,
- Mechanisms for agreement extension and re-negotiation,
- Notice provisions respecting changes in tenure and ownership,
- Non-compliance and penalties including S. 61.4 order,
- Signature of landowner and federal officer, and
- Other

Where funding and federal contributions are involved, the Habitat Stewardship Program G&C agreements can be used as a S. 11 agreement. However, these agreements would need to be modified as noted above with legal advice on wording. Presently, the new terms and conditions for HSP G&C agreements are sufficiently flexible so as to allow

these agreements to be used for this purpose. Where funding is not involved, a separate template is required for S. 11 agreements although in both cases, the identical key subjects (above) will be need to be addressed.

6. **Document Negotiations of the Agreement:** A S. 11 agreement is an alternative to a GIC order under S. 61.4. It will therefore be important to document all aspects of the negotiations leading to the agreement and subsequently monitor and document compliance with the agreement. In cases where negotiations breakdown or the agreement is breached, this documentation will become very important information required to advise the Minister on the imposition of a protection order. Legal advice will be needed on the standard of information and documentation required.
7. **Secure Needed Permits:** Successful implementation of a S. 11 agreement for critical habitat protection will depend, in part, on the concurrent issuance of any SARA permits, or other permits/authorizations under federal jurisdiction, that may be required, particularly if site management is to take place, in support of species recovery. Any permits required should therefore be secured and issued in concert with the signing of the S. 11 agreement and perhaps even deemed a condition of signature.
8. **Signing Authority:** For S. 11 agreements involving HSP funding, the HSP terms and conditions specify that, for Environment Canada, EC regional managers are delegated responsibility for the approval and signing of G&C agreements, once these projects have been approved by the ADM's committee. This model will be adapted for S.11 purposes as well.

### **3.5.3.2 Section 11 Agreements for Critical Habitat on *Indian Act Lands* (Federal Lands)**

*Indian Act Lands* are considered federal lands for purposes of SARA. Identified critical habitat on federal lands must be effectively protected within 180 days, otherwise SARA S.58.5 requires the Minister to order the prohibition on that particular habitat.

Stewardship-type agreements are the preferred approach for achieving “effective protection” of individuals, residences and critical habitat on *Indian Act Lands*. However, given the complex mix of rights and obligations that pertain to First Nations and aboriginals, both in general and in specific cases (such as bands with Treaty rights, actions before the courts, etc) legal and policy advice will be required on the use of SARA Section 11(1) agreements for this purpose on a case by case basis.



## **3.6 Ministerial Orders for Critical Habitat Protection on Federal Lands**

### **3.6.1 The Intent**

SARA contains numerous obligations upon not only the three competent Ministers and their Departments, but also other federal government Departments and federal agencies/entities as well. Among these is the obligation to effectively protect individuals, residences, and critical habitat of SAR found on all federal properties, not just National Park, EC, or DFO-owned lands. In order to achieve this protection, the Act, while always encouraging voluntary action and existing legislation as the priority approach, provides a mechanism for the Minister to make an Order protecting the Critical Habitat.

It is again noteworthy that First Nation Reserve Lands are included under the definition of “federal lands” in SARA.

### **3.6.2 The SARA Context**

Section 58 of SARA speaks to the issue of Critical Habitat protection on federal properties, including First Nation Reserve Lands; specifically, section 58(5) states that the competent Minister must, within 180 days of the identification of Critical Habitat in the Public Registry, either explain how the Critical Habitat on federal lands is protected, or, if it is not protected, make an order to apply the prohibitions of SARA S.58 (1) directly.

Section 59 gives the GIC authority to establish regulations under SARA on any portion of federal government lands (including First Nation Reserve Lands) to protect Critical Habitat if it is deemed to be not effectively protected.

Section 60 establishes protection, through GIC Order, of the habitat of provincially or territorially-listed species (i.e., listed as endangered or threatened under provincial/territorial statute, but not SARA) on federal lands, should this situation arise.

### **3.6.3 The Accountability Context**

The competent Minister holds the key legal accountability for the use (or non-use) of these provisions of SARA. As stated above, section 58(5) is quite explicit in stating that the Minister must make an order of the opinion that Critical Habitat is not legally protected on federal property including First Nation Reserve Land. This implies both analysis and decision on behalf of the Minister regarding the level of protection on individual properties, which (for Critical Habitat) is covered in the previous section “Critical Habitat Protection Policies”.

### **3.6.4 Critical Habitat Protection Policy - Federal Lands and FN Reserve Lands**

An underlying premise in recovery planning is that all individuals, residences, and critical habitat are required for the survival and/or recovery of species (whichever has been chosen as the target). If any part of those items remain effectively unprotected on federal lands including First Nation Reserve Lands, while the ultimate legal responsibility for protection rests with the competent Minister, in the spirit of cooperation the first responsibility is on the appropriate federal governments Department which owns or administers the land to take all reasonable measures to ensure that the habitat is protected.

When either a section 58(5) order is being contemplated, the policy of the federal government will be to implement a governance/consultation framework in an attempt to resolve the issue without the need for such an order.

#### 3.6.4.1 Federal Lands Other Than First Nation Reserve Lands

For federal lands other than First Nation Reserve Lands, the department will inform the appropriate Deputy Minister of the federal Department of all circumstances pertaining to why (and, if applicable, where) the department is of the preliminary opinion that the land-owning Department is not effectively protecting the Critical Habitat. This will serve to formally notify that department or agency/entity that the competent Minister is *considering* the use of a section 58(5) order, and indicate that the competent Minister is willing to work with the land-owning Department/agency/entity to put a **practical plan** in place to effectively protect the Critical Habitat (see MOU, below). Due to the 180 day time limit of the Act itself, a period of no more than 90 days will be allocated to this planning effort.

If the federal land-owning Department/agency/entity does not have protection measures in place but agrees in principle to establishing the necessary measures in an agreed upon reasonable time frame, the competent Minister will defer the use of the section 58(5) order. Although there is no set grace period, the general policy will be that necessary legislation and/or other tools should be in place within 90 days.

If after that consultation/effort the issue is still unresolved, the competent Minister will make a section 58(5) order protecting the Critical Habitat.

It is encouraged that this governance framework be specified in more detail within Memoranda of Understanding between the competent Minister and the federal land-owning Department/agency/entity. For guidance on these agreements, see *Drafting Guidelines for MOUs with Federal Departments/Agencies for Critical Habitat and Residence Protection*, appended to this document.

For guidance on the preparation of a section 58(5) order, see *Drafting Guidelines for Section 58 Orders*, appended to this document.

### Section 60 Orders

A subset of this policy direction on federal lands is the possibility that a province or territory will list a species under their own legislation while it is not listed under SARA; this is the situation contemplated in section 60 of SARA, which states that the “habitat” of that species is protected on federal lands, upon Order by the GIC.

The policy question here is whether the Minister makes a recommendation to the GIC that such an Order be made, and if so, what standards apply (i.e., what becomes protected).

The policy is that the Minister will recommend a GIC order protecting the habitat of provincially/territorially listed species if:

1. The province/territorial Minister requests that this be done;
2. The province/territory has supplied habitat identification consistent with that outlined in this Manual for Critical Habitat; and
3. The Minister is satisfied that all the appropriate consultations have been carried out by the province/territory.

#### **3.6.4.2 First Nation Reserve Lands**

For First Nation Reserve Lands and any other lands that are set apart for the use and benefit of a band under the *Indian Act*, and all waters on and airspace above those reserves and lands, the Grand Chief of the Band and the Minister will inform the Deputy Minister of Indian and Northern Affairs Canada (INAC) of all circumstances pertaining why (and, if applicable, where) the Minister has concluded that SAR Critical Habitat is present on the reserve or land. In addition, this notification will indicate that the competent Minister is willing to work with the Band Council or the Band Council and INAC to put a practical plan in place to effectively protect the critical habitat, with an emphasis on existing mechanisms and stewardship for site protection. This includes use of a formal agreement under section 11 of SARA (see section 4.3 *Agreements and Stewardship Policies*). A period of 180 days will be allocated to this planning effort.

It is encouraged that a governance framework be specified in more detail within Memoranda of Understanding between the competent Minister and Indian and Northern Affairs Canada. For guidance on these agreements, see *Drafting Guidelines for MOUs with Federal Departments/Agencies for Critical Habitat and Residence Protection*, appended to this document.

### **3.7 Safety Net Policies (Individuals, Residence, Critical Habitat)**

### **3.7.1 The Intent**

Through the 1996 Accord for the Protection of Species at Risk, the federal government, the provinces and the territories made a commitment to protect species and habitat within their own jurisdictions. Since the Accord was endorsed, most provinces and territories have introduced, or amended, their legislation to meet commitments in the Accord (note that it is also important that any laws are *implemented effectively* to protect species, critical habitat, or the residences of its individuals). Consequently, the overall approach of SARA is to complement provincial and territorial legislation relating to species at risk with federal legislation and regulation, but only *as and where required*.

Therefore, the intent of the Safety Net is to provide that ultimate federal regulatory protection to SAR (with the exception of Species of Special Concern), their residences (if the SAR is a non-aquatic species or not a migratory bird — otherwise, the protection is automatic through SARA), and their Critical Habitat when, after all other avenues of protection have been explored and exhausted, the individuals or their Critical Habitat remains, in the opinion of the Minister, “not effectively protected” off federal lands.

(for critical habitat on federal lands, see the previous section *Ministerial Orders for Critical Habitat Protection on Federal Lands*)

### **3.7.2 The SARA Context**

With respect to individuals and residences:

Section 34(2) of SARA specifies that The Governor in Council (GIC) may, on the recommendation of the Minister, by order, provide that the general prohibitions (Section 32 and 33) of SARA apply in lands in a province that are not federal lands with respect to individuals of a listed wildlife species that is not an aquatic species or a species of birds that are migratory birds protected by the MBCA. Invoking the order is what is commonly referred to as the “Safety Net”.

Section 34(3) states that the Minister must recommend that the order be made if the Minister is of the opinion that the laws of the province do not effectively protect the species or the residences of its individuals.

With respect to Critical Habitat:

Section 61(4) states that the Minister **must** make a recommendation to the GIC to invoke federal protection if he/she is of the opinion that existing provincial laws or other available measures do not effectively protect Critical Habitat off federal lands.

Section 61(3) contemplates a situation where a provincial or territorial Minister, or the Canadian Endangered Species Conservation Council, requests the Minister to make a recommendation to the GIC to use the SARA safety net powers; however, the section implies discretion (“Minister **may**....”).

Note the above does not apply to aquatic species ( per *Fisheries Act*) or to migratory birds which are covered by the *Migratory Birds Convention Act*, as an assumption has been made in SARA that those two pieces of federal law already afford protection to the residence and habitat of those species groups.

(note that for all of the above, equivalent subsections relate to Territorial situations)

### **3.7.3 The Accountability Context**

The competent Minister/GIC holds the key legal accountability for the use (or non-use) of the Safety Net provisions of SARA. As stated above, section 34(3) is quite explicit in stating that the Minister must recommend a Safety Net order to the GIC if he/she is “of the opinion” that individuals or residences are not effectively protected, and section 61(4) states the same for Critical Habitat off federal lands. The phrase “of the opinion” implies both analysis and decision on behalf of the Minister, which (for Critical Habitat) is covered in the previous section “Critical Habitat Protection Policies”.

### **3.7.4 Safety Net Policies and Process**

The general policy is that all individuals, residences, and critical habitat is required for the survival and recovery of species, and that if any part of those items remain effectively unprotected for non-federal species on non-federal lands, then in the spirit of the SAR Accord the first direct onus is on the appropriate provincial and territorial governments take all reasonable measures to ensure that they are effectively protected.

When either a Section 34(2) or section 61(4) order is being contemplated, the policy of the federal government will be to implement a governance/consultation framework in an attempt to resolve the issue without the need for such an order. To that end, the department will inform the appropriate Wildlife Director in the province or territory of all circumstances pertaining to why (and, if applicable, where) the department is of the preliminary opinion that provincial or territorial legislation is not effectively protecting the species, residences, or Critical Habitat. The department will formally notify the Province or Territory that the federal government is *considering* the use of a Safety Net order, and indicate that the federal government is willing to work with the province/territory to put a **practical plan** in place to effectively protect the Critical Habitat. A period of no more than 90 days will be allocated to this planning effort.

If provinces and territories do not have protection measures in place but agree in principle to establishing the necessary measures in an agreed upon reasonable time frame, the federal government will defer the use of the Safety Net. Although there is no set grace period, the general policy will be that necessary legislation and/or other tools should be in place within one year.

If after that consultation/effort the issue is still unresolved, the Minister of Environment will recommend to the GIC that the safety net be invoked.

It is encouraged that this governance framework be specified in more detail within bilateral agreements between the federal government and each province or territory.

There is no formal appeal mechanism, but a dispute resolution process is encouraged as an element in bilateral agreements with each province or territory.

For those situations where the provincial or territorial Minister has requested that the Minister recommend to the GIC that the safety net aspects of SARA be applied (section 61(3)), the Minister will assess the validity and need for such a recommendation using the same process/rationale as above (i.e., is there really a need for use of the safety net provisions.)

Regarding the Safety Net term, as per SARA, a Safety Net order is for five years, renewable by the GIC. Safety Net orders may be revoked at any time, upon the CH being “effectively protected”.

For guidance on the preparation of a Safety Net recommendation and Order, see *Drafting Guidelines for Safety Net Recommendations and Orders*, appended to this document.

### **3.8 Critical Habitat/Residence Permitting Policies and Procedures**

#### **3.8.1 Intent**

The agreements and permits section (Section 73) of SARA indicates that a *competent minister* may enter into an *agreement* with a person or issue a *permit* to a person authorizing that person to engage in an otherwise prohibited activity affecting a *SARA-listed species*, or its *critical habitat*, or its *residence*.

Subsequent sections of SARA (S's. 74-78) provide further amplification and clarification in this regard. In addition, there are more general *exceptions* to the SARA prohibitions identified in the SARA (S's 83 -84).

The purpose of entering into agreements or issuing permits is to *authorize* (in effect “to make an exception to”) individuals to engage in what otherwise would be unlawful activities under the SARA. If such an agreement was not made or a permit was not issued, and a person was found to have caused harm to a SARA-

listed species/critical habitat, that person would be subject to prosecution under the various prohibition sections of the SARA (assuming the prohibitions are in place in that location, of course).

### 3.8.2 The SARA Context

Section 73 of SARA indicates that a *competent minister* may enter into an *agreement* with a person or issue a *permit* to a person authorizing that person to engage in an otherwise prohibited activity affecting a *SARA-listed extirpated, endangered or threatened species*, or any part of its *critical habitat*, or the *residence* of its individuals.

However, S 73(2) limits this discretion, stating that an agreement may be entered into, or a permit issued, only if the competent minister is of the opinion that the proposed activity has at least one of the following three *purposes*:

- (a) The activity is scientific research relating to the conservation of the species and conducted by qualified persons; or
- (b) The activity benefits the species or is required to enhance its chances of survival in the wild; or
- (c) *affecting* that species is *incidental* to the carrying out of the activity.

For the purposes of this policy, “incidental” shall be taken as meaning that the any potential affects are not intentionally directed at the species, it’s residence, or it’s habitat.

...and, even if an application is in compliance with this above section, S73.(3) establishes further criteria, stating that an agreement may be entered into, or a permit issued, only if the competent minister is of the opinion that the proposed activity adheres to all three of the following *pre-conditions*:

- (a) all reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted, and
- (b) 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
- (c) the activity will not *jeopardize* the survival or recovery of the species.

For the purposes of this policy, “jeopardize” shall be taken as meaning to place into scientific doubt the ability of the species to attain the population recovery target (either survival or recovery) in the timelines projected in the Recovery Strategy/Action Plan for that species.

SARA also includes other permitting requirements or conditions:

- i. pre-permit issuance *consultations* are required with authorized Wildlife Management Boards and relevant bands under the Indian Act (s. 73.(4), (5));
- ii. the permit's duration is a maximum of three years (five years for an agreement) (s. 73.(9));
- iii. other federal legislation can be used for permitting and agreements as long as SARA's requirements are adhered to (s. 74);
- iv. an *explanation* of why any permit or agreement or similar document was issued or made must be included in the Public Registry (s. 73.(3.1)). (It would appear that this applies whether these permits or agreements are issued under SARA (s. 73) or another Act of Parliament (s. 74) because s. 74 requires the competent minister to be satisfied that the requirements of ss. 73 (2) to (6) and (9) are met (including 73(3.1), the public registry requirement provision.)
- v. any government in Canada, *inter alia*, can administer any provision of SARA, for which a competent minister has responsibility for, assuming the competent minister enters into an agreement with that government (s. 78).

### **3.8.3 Agreements / Permits - when to use which?**

An agreement should be used to those situations where critical habitat must be managed (not just protected) over a broad spatial area, over an extended period of time, and involving ongoing consultation between a proponent/entity and the SARA department (i.e., a distinct possibility of the need to adapt methods and approaches over time due to changing circumstances). These are situations where the use of a permit would be cumbersome and inefficient, requiring repeat amendments and extensive transactional costs, and the habitat will actually need to be managed to achieve some portion of the species recovery strategy (which is difficult to achieve with permits).

For more information on the use of Agreements, please refer to the previous section in this Guide on Agreements and Stewardship.

### **3.8.4 Permitting Policies**

#### **3.8.4.1 Use of Existing Federal Permit Regimes**

As noted above, SARA S. 74 allows for the use of existing or other federal permit regimes to be used as “surrogates” of SARA S. 73 permits providing they meet the same standard for protection.

As a general policy, the preferred approach to permitting regarding species at risk is to use existing permit mechanisms under the direct administration of a competent Minister where those permits and processes are deemed at least equivalent to the protection that would otherwise be afforded by using SARA directly.



The implementing Departments of SARA already have such mechanisms in place to permit activities that could affect species at risk, even though those mechanisms may not be specifically focused on listed species: the *Fisheries Act*, the *Migratory Birds Convention Act* (and associated regulations), and the *Canada National Parks Act* are three prominent examples.

It is noteworthy, as has been previously stated in this Guide, that the *Migratory Birds Convention Act* can only enable permitting activities that affect migratory birds and their residence(s), not their habitat and not other biota that the Minister of Environment (Canada) will be responsible for under the SARA. Therefore, if Environment Canada chooses to use the *Migratory Birds Convention Act* and regulations to authorize an activity, it would have to use the SARA permitting systems for the habitat and for other biota.

Other federal government Departments (i.e., other than the three SARA implementing organizations) may have a variety of permitting mechanisms or equivalent in their legislation. However, section 74 explicitly limits the use of federal “surrogates” to those “...issued or made by the competent minister...”; therefore, there is no provision to use federal permit processes not under the direct administration of one of the three competent Ministers as “surrogates” for permitting tied to SARA. However, section 77 adds a nuance to this by explicitly allowing for the existence of permits issued by other federal Ministers in an area of critical habitat, providing that impacts have been minimized **and that Minister has consulted with the relevant competent SARA Minister**. In effect, this amounts to allowing other federal Ministers the freedom to continue to permit activities within their mandates but clearly establishes that those permits cannot destroy any part of critical habitat. They are not, however, “critical habitat permits” as per SARA s 73.

#### **3.8.4.2 Other Governments’ Permitting Mechanisms**

Section 10 of SARA indicates that any government in Canada can administer any provision of SARA, for which a competent minister has responsibility for, assuming the competent minister enters into an agreement with that government. Once that is done, section 78 of SARA indicates that any agreement, permit, license, order or similar document authorized by a province or territory who signed a “section 10 agreement” has the same effect as an agreement or permit established under SARA s. 73(1), assuming the provincial / territorial minister has verified that other relevant subsections of s. 73 are adhered to.

As a general policy, the use of this S 10-S 78 mechanism to facilitate the use of existing provincial or territorial permitting processes is encouraged, providing the pre-requisites are met. This would most naturally be pursued through the broader bilateral agreement process.

### 3.8.4.3 Reviewing and Issuing Section 73 Permits or Their Equivalent

There is a need for a framework / overall rationale / approach within which a definition of a process for issuing authorizations can occur. The following guiding principles constitute that framework.

#### **Overall SARA purpose and commitments**

It is worth noting the overall purpose of the SARA:

*“to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened.” (S6).*

Furthermore, there is specific mention in SARA (**s .38**) of commitments to:

**biodiversity:** *“In preparing a recovery strategy, action plan or management plan, the competent minister must consider the commitment of the Government of Canada to conserving biological diversity” and to*

**a precautionary principle:** *“and to the principle that, if there are threats of serious or irreversible damage to the listed wildlife species, cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty.”*

Staff should particularly take note of this SARA direction regarding the precautionary approach when there is a “lack of full scientific certainty”.

#### **Discretion**

Section 73 enables (not “obligates”) the competent ministers/agencies to authorize persons to perform activities that could / would affect a listed wildlife species. Therefore, it provides the basis for exceptions to the SARA’s prohibitions and also confers a discretionary responsibility on the competent minister for deciding whether to authorize any such exceptions.

The Minister cannot refuse to *consider* a permit request, nor can (s)he, as a matter of policy, refuse to issue permits and state that (s)he is not prepared to allow any activities possibly affecting listed species. The Minister has to consider each permit request that is submitted to him/her, and make a decision on the merits of each case. Of course, the Minister can establish general policies that serve to guide the making of her/his decisions, but those policies must not fetter the exercise of his/her discretion in a particular case.

### ***Adherence to SARA Permitting Purposes and Pre-Conditions***

The issuing authority must ensure that any proposed activities potentially affecting listed species, their residences or their critical habitat(s) have one or more of the *purposes* and adhere to all of the *pre-conditions* stated in SARA (see *The SARA Context*, above).

This also applies to those situations where a permit is requested to undertake an activity in an area which contains individuals or critical habitat of more than one SAR – the conditions must be met for all SARs in that area. In other words, if a permit is requested in reference to species-at-risk “X”, and it meets all of the purposes and pre-conditions of SARA relative to species X, but would have a negative affect on species-at-risk “Y” (inhabiting the same area), then the Permit cannot be issued, as it will have failed to meet the purposes and pre-conditions relative to species “Y”.

In undertaking such reviews, staff of the issuing agency must ensure that process of any such scientific review and/or technical consultation meet the requirements for a *transparent, open, nationally consistent, credible and accountable* process.

For details on the process to be employed in permit review for SARA, please refer to the annexed document, *The SARA Permits Manual* (to be completed).

### ***Consultations/Public Notice on Permits***

Consultation does not require consensus, unanimity or resolution but instead a fair (perceived and actual) process whereby all relevant parties have been accorded sufficient time, resources and information that they can properly present their views on the subject(s) at hand but where another party can actually decide on the matter.

In the context of “Agreements and Permits” in SARA, *consultation* is a legal requirement for the competent ministers with respect to Wildlife Management Boards (s. 73.(4)) and certain “bands” (73.(5)) before entering into an Agreement or issuing a permit.

**Upon reaching a decision to issue a SARA permit the relevant Department will post this decision and the rationale behind it on the SARA Public Registry (as per SARA S 73(3.1)). As a matter of policy, this material will be filed within one month of the decision.**

For details on the process to be employed in permit review for SARA, please refer to the annexed document, *The SARA Permits Manual* (to be completed).

### **3.9 Critical Habitat Compliance and Enforcement Policies**

*(to be completed after main policies are determined)*

**4.0 CRITICAL HABITAT RESTORATION/CREATION POLICIES**  
*(to be completed - not a top priority as this is not prescribed in the Act)*

## **5.0 COMPENSATION POLICIES**

### **5.1 Intent**

The following is intended to guide the response of Departmental staff when dealing with the subject of potential financial compensation for restrictions imposed pursuant to SARA.

### **5.2 The SARA Context**

Section 64 of SARA states:

“The Minister may, in accordance with the regulations, provide fair and reasonable compensation to any person for losses suffered as a result of any extraordinary impact of the application of...”.....the Critical Habitat protection provisions of the Act, sections 58, 60, 61 or emergency order”.

Furthermore, subsection 2 directs the GIC to establish regulations on how the compensation function is to be implemented.

### **5.3 The Accountability Context**

Section 64 refers explicitly to “the Minister”, and SARA defines this as being the Minister of Environment. However, it is noteworthy that section 64 is enabling, not prescriptive: while subsection 2 requires regulations to be made which establishes a process for considering compensation claims, 64(1) is quite clear that the Minister “may” provide compensation, i.e., is not obligated to compensate.

### **5.4 Compensation Policy**

All requests for compensation under SARA are to be referred to the federal cabinet via the Minister’s Office; they will not be processed internally within the implementing Departments, i.e., no recommendation will go forward on individual cases unless specifically requested by the Cabinet or Minister’s Office.

**TECHNICAL GUIDELINES, DRAFTING GUIDELINES, AND DECISION-TOOLS**

*(many to be completed)*

## **Technical Guidelines for Critical Habitat Surveying**

### **Context**

See Section 3 of the *National Policy Guide: Residence and Critical Habitat*

### **General**

Critical Habitat (and residence, in some situations) surveying will, in all cases, be carried out using the best available, defensible science, professionally trained staff, and with respect of landowner rights, requirement of consultation, desire for involvement, and traditional/informal knowledge.

Where possible and practical, the use of repeatable remote-sensing tools should be the first option for CH mapping. Reliance upon ground survey techniques should be minimized wherever possible.

#### **3.5.2 Remote-Sensing Surveys**

- *{need input from the technical working groups here – standards on software, hardware, terminology, data acquisition, etc}*

#### **3.5.3 Ground Surveys**

- access to property only with the written permission of the landowner and notification of the landowner as to survey data, time, etc (no exceptions).\*
- landowner can accompany survey crew if requested.
- “leave it as you found it” rules of property access.
- post-survey notification of the landowner regarding results, as requested.
- all survey crews to have documented experience and expertise in ground feature cartography methods and other specializations as required by the circumstances (botany, geology, etc).
- in the case of landowner refusal for access to property, default to next best alternate data source (historical data, remote sensing data, etc) and notify landowner that this may impart some imprecision in the CH mapping on their property.

\*where the landowner is a First Nation, there are overarching requirements of consultation which need to be followed which may vary by individual situation. Furthermore, access to provincial crown lands may be dealt with comprehensively in Bilateral Agreements and may therefore alleviate the requirement to seek individual permissions to undertake work on Provincial Crown Land.



### Re-visitation Rate of Surveys

Residence: the re-visitation rate is very contextual to the species and what type(s) of residence it has. Therefore, it is not practical to establish a minimum standard for survey re-visitation on residences.

CH surveys should be reviewed at a maximum of every 5 years; and more frequently if the CH is of a type where it could be reasonably be expected to change naturally over more compressed time frames, or if it is situated in a landscape undergoing major change.

## **Technical Guidance for Critical Habitat and Residence Mapping**

### **Context**

See Section 3 of the *National Policy Guide: Residence and Critical Habitat*

*(need to insert work by Critical Habitat Identification Working Group in this document when it becomes available)*

### **General Scale, Format, etc.**

- The mapping scale standard should be 1:5000 or finer, depending upon the circumstances.
- GIS format, polygonal geo-referenced data where possible; overlay on up-to-date aerial photography where possible .
- Feature classification/description should conform to accepted federal (NRCan) vegetation, soil, geology, etc classification standards where possible.
- all maps should contain a disclaimer that the CH mapping is “as of” of a certain date and that CH mapping is an ongoing, iterative process.
- all maps should contain a clear identification as to whether they are a representation of the formal Identification (i.e., gazetted, on Public Registry and in the final Recovery Plan) of CH, or are unofficial mapping intended for program planning and operations only.

### **Potential or Restorable SAR Habitat Mapping**

- the process outlined for the Identification of Critical Habitat contains steps which involve the determination, by the Recovery Planner, of areas which have the potential to become habitat for a SAR, either through natural processes or active management. In some instances, it may be required to map these outputs.
- mapping of such potential or restorable SAR Habitat should be at a minimum of 1:10,000 scale, GIS format and/or overlaid on up-to-date aerial photography. Again, the object is to inform program planning and management operations to the best of our ability, not to regulate.
- if this mapping is carried out through Ground Survey techniques, those (above) policies apply to landowner notification, etc.
- if the mapping is carried out using remote-sensing techniques, landowner notification prior to or after the mapping is not required (this would be done in due course if any restoration/enhancement activities were to be targeted for the area).

### **Man-made Structures/Substrates**

Consistent with the policy approaches to nesting/habitat under such federal legislation as the *Migratory Birds Convention Act* and the *Fisheries Act*, residence and critical habitat of species at risk under SARA should be evaluated at their biological face value, i.e. the origin of the habitat, residence, or supporting structures/substrates, whether natural or man-made, is not at issue in the identification process. Such considerations may or may not be taken in the permitting process, depending upon the circumstances of each case.

## **A Decision Framework for Determining Critical Habitat and Residence Protection Status**

The series of questions below, and the answers to those questions, are not a scoring system or an algebraic formula which will yield a numeric score, above which will be “effectively protected” and below which will be “not effectively-protected”. Rather, the outcome of these collective questions and answers will likely be more qualitative or subjective than that – in effect, the result is an assessment of risk (or, viewed conversely, of confidence) to the Residence or Critical Habitat. What this pathway is intended to deliver is a consistent format for thinking about protection, and thus a means of explaining and defending decisions either on their own or relative to each other. The decision, however, will ultimately lie with the biologist and manager who will make the recommendation (and, if required, defend it) to the Minister on a finding of “effectively protected” vs. “not effectively protected”.

Consistency in this area will also ultimately be strengthened by implementation of national training for recovery practitioners and management staff.

### **Q1: What is the Residence/Critical Habitat of this species characterized by (physically, chemically, temporally)?**

- list any and all
  - geological,
  - vegetative,
  - topographical,
  - climate-related (micro or macro),
  - physical,
  - chemical,
  - biological

attributes or suite of attributes that cause the habitat to be critical habitat for recovery of the SAR.

- list any temporal considerations to the above attributes.
- list any requirements of connectivity, density of polygons in a landscape, etc.

### **Q2: What could affect these Residence/CH elements (described in Q1) to the point of diminished or eliminated capacity to sustain the SAR?**

- List any temporary or permanent alteration to the

- topography,
- geology,
- soil conditions,
- vegetation,
- chemical composition of air/water,
- surface or groundwater hydrology,
- micro-climate,
- sound environment.

which could **reasonably** lead to diminished capacity of the Residence or Critical Habitat described in Q1 to recover the species at risk.

**Q3: What control mechanisms are in place relative to each of these potential alterations?**

**STEP 1: Is there an automatic, non-discretionary prohibition/control legislation against each of these potential alterations?**

(this is an outright prohibition with no mechanism for relief or modification; note that these are extremely rare)

- What is the enforcement/compliance regime used with this law? (i.e., active enforcement by officers/inspectors; complaint-driven enforcement; voluntary compliance, etc)
- What are the consequences of non-compliance? (i.e., fines, sentences, restoration costs, payback of benefits previously received, loss of product/facility certification, loss of access to funding programs, international or government markets, etc)

**STEP 2: Is there legislation enabling a non-automatic and/or discretionary prohibition/control against each of these potential alterations?**

Is this potential prohibition/control enabled by Regulation?

- Does such a Regulation exist, applicable to this residence/CH?
- What are the terms and conditions of the Regulation relative to the potential alterations to the residence/CH?
- What is the enforcement/compliance regime used with this regulation?
- What are the consequences of non-compliance?

Is this potential prohibition/control enabled by a permit, authorization, or equivalent?

- is the permit/authorization mandatory?
- What are the policies for issuing such permits to SAR Residences or in SAR CH?
- What is the enforcement/compliance regime used with this permit/authorization?
- What are the consequences of non-compliance?
- For detailed guidance, see the *Critical Habitat and Residence Permitting* section of this Guide.

Is this potential prohibition/control enabled by establishing a system for land use planning?

- is this residence/CH subject to such a planning control?
- what are the terms, conditions and/or policies of the planning control relative to the potential alterations to the residence/CH?
- What is the enforcement/compliance regime used with this planning control?
- what are the consequences of non-compliance?

Is this potential prohibition/control enabled by establishing a code of practice, operational standard, etc?

- is this residence/CH subject to this code of practice, standard, etc?
- what are the term, conditions and/or policies of this code of practice, standard, etc relative to the potential alterations to the residence/CH?
- What is the enforcement/compliance regime used with this code of practice, standard, etc?
- what are the consequences of non-compliance?

Is this potential prohibition/control enabled by establishing restrictions placed on the title/deed of land (easement, covenant, etc)?

- is this residence/CH subject to such a restriction on title/deed?
- what are the terms and conditions of this restriction on title/deed relative to the potential alterations to the residence/CH?
- what are the consequences of non-compliance with the restriction?

**STEP 3: Is there an agreement and/or contract established for this residence/CH which places a prohibition/control against each of these potential alterations?**

{examples could include: a stewardship agreement; entry of the landowner into a taxation relief program for conservation lands; sale of surface/sub-surface

mineral rights or resource extraction rights; etc. For detailed guidance, see the *Critical Habitat Agreements and Stewardship Policies* section of this Guide }

- what are the terms and conditions of the agreement relative to the potential alterations to the residence/CH?
- What is the duration of the agreement?
- What are the consequences of non-compliance with the agreement?

**Q4: Do these control mechanisms, individually or collectively, result in the residence/Critical Habitat being “effectively protected”?**

**Yes** - residence/CH is “effectively protected”; Minister to report such in Public Registry (for Critical Habitat).

**No** - See Procedures for When Residence/CH is Considered “Unprotected” (individual property or polygon level)