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PRACTITIONERS GUIDE to the *Species at Risk Act (SARA)* for *Habitat Management Staff*

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Fisheries and Oceans Canada



Canada

The Practitioners Guide to the *Species at Risk Act* (SARA) for Habitat Management Staff is one in a series of Practitioners guides which are intended to provide clear and nationally consistent guidance to Habitat Management practitioners making regulatory decisions related to the habitat protection provisions of the *Fisheries Act*. Together these guides support the objective of providing a predictable and coherent approach to regulatory review of works or undertakings that affect fish and fish habitat across Canada.

The objective of this guide is to provide a Habitat Management perspective on the implementation of the *Species at Risk Act* (SARA). The first four chapters provide a general overview of SARA. The remainder are intended to provide specific guidance to HMP staff on the incorporation of SARA into referral reviews and environmental assessments.

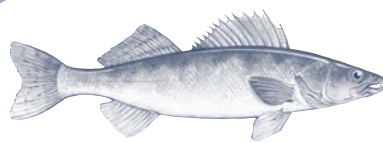
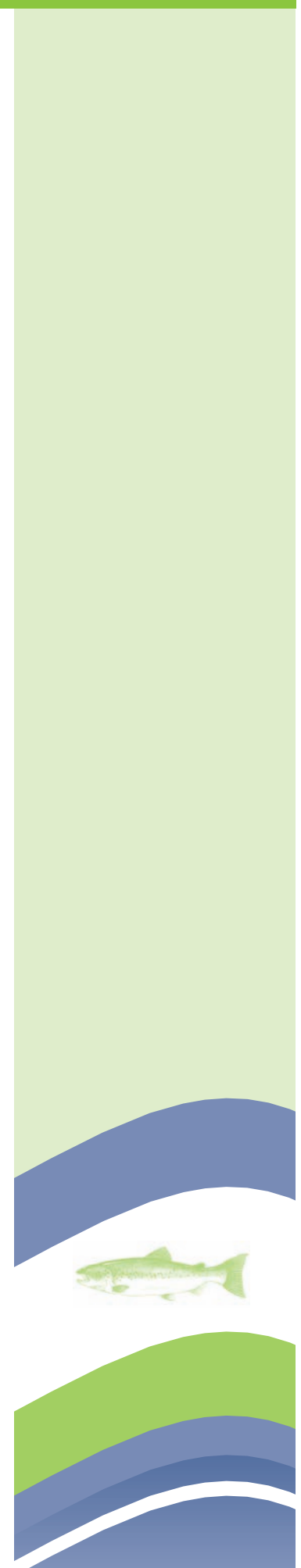


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The objective of this guide is to provide a Habitat Management perspective on the implementation of the *Species at Risk Act* (SARA). The first four chapters provide a general overview of SARA. The remainder are intended to provide specific guidance to HMP staff on the incorporation of SARA into referral reviews and environmental assessments.

1.0. What is SARA?

1.1. A LEGISLATIVE BASIS

At the 1992 Earth Summit in Rio de Janeiro, the international community adopted the Convention on Biological Diversity in an effort to protect global biodiversity and agree on a comprehensive strategy for sustainable development. As a signatory to the Rio Convention on Biodiversity, Canada made a commitment to put in place measures to ensure the protection of species at risk across the country.

In the absence of federal species at risk legislation, the National Accord for the Protection of Species at Risk (Accord) was signed in 1996. The objective of the Accord was to commit federal, provincial and territorial ministers responsible for wildlife to adopt a national approach to the protection of species at risk in order to prevent species from becoming extinct as a consequence of human activity.

By signing the Accord, wildlife ministers agreed to:

- a) participate in the Canadian Endangered Species Conservation Council (CESCC) in order to co-ordinate their activities and resolve issues for the protection of species at risk in Canada;
- b) recognize the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) as a source of independent advice on the national status of species at risk; and,
- c) establish complementary legislation and programs that provide for effective protection of species at risk throughout Canada.

Since the signing of the Accord, federal species at risk legislation has been developed (the *Species at Risk Act*), thereby providing Canada with federal legislation for the protection and recovery of Canadian species at risk.



1.2. SARA LEGISLATION

SARA was introduced into the House of Commons in February 2001 and was passed June 2002. SARA was then passed by the Senate and obtained Royal Assent December 2002.

SARA came into force in two phases. The first phase came into force on June 5, 2003 and included the majority of the SARA provisions with the exception of the prohibitions and the enforcement provisions of the Act. The second phase of SARA, including the prohibitions and the enforcement provisions, came into force on June 1, 2004.

Additional information on SARA and species at risk can be found on several websites including:

- Text of the *Species at Risk Act* (SARA)
http://www.sararegistry.gc.ca/the_act/default_e.cfm
- Fisheries and Ocean's Species at Risk website
http://www.dfo-mpo.gc.ca/species-especes/home_e.asp
- Environment Canada's Species at Risk website
<http://www.speciesatrisk.gc.ca>
- Federal Strategy for the Protection of Species at Risk
http://www.speciesatrisk.gc.ca/strategy/index_e.cfm
- Committee on the Status of Endangered Wildlife in Canada
<http://www.cosewic.gc.ca/index.htm>
- SARA Public Registry
<http://www.sararegistry.gc.ca>
- Habitat Stewardship Program for Species at Risk
<http://www.cws-scf.ec.gc.ca>

1.3. PURPOSE OF SARA

SARA was developed to provide Canada with federal legislation for the protection and recovery of species at risk.

Section 6 of SARA presents the purposes of the Act:

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

Definitions of SARA Terminology

Wildlife Species

Wildlife species means a species, subspecies, variety or geographically or genetically distinct population of animal, plant or other organism, other than a bacterium or virus, which is wild by nature (SARA s.2).



SARA only applies to wildlife species that:

- are native to Canada; or
- have extended their range into Canada without human intervention and have been present in Canada for at least 50 years.

The term 'wildlife species', as it is used in SARA, includes both terrestrial and aquatic species.

Aquatic Species

Aquatic species are wildlife species that are fish (*Fisheries Act* s. 2) or marine plants (*Fisheries Act* s.47).

Note that salamanders, freshwater turtles, frogs and freshwater plants, although largely aquatic, are considered by SARA to be part of the group of terrestrial species falling under the jurisdiction of Environment Canada (EC).

1.4. ADMINISTRATION OF SARA

The responsibilities associated with managing species at risk are shared by a number of federal and provincial bodies. SARA defines the roles of key agencies, including the establishment of working groups to ensure that SARA is implemented in a coordinated manner.

1.4.1. Competent Ministers

There are two competent ministers under SARA:

- Minister of the Environment
- Minister of Fisheries and Oceans.

As Parks Canada Agency (PCA) has a key role in the protection of habitat under SARA, the Minister of Canadian Heritage was originally included as a competent minister but in December 2003, responsibility for PCA was shifted to the Minister of the Environment.

The **Minister of the Environment** is the competent minister responsible for:

- the overall coordination and administration of SARA;
- migratory birds protected by the *Migratory Birds Convention Act, 1994* (MBCA, 1994);
- individual species in or on federal lands administered by PCA;
- all other individual species that do not fall under the responsibility of the Minister of Fisheries and Oceans.

The **Minister of Fisheries and Oceans** is the competent minister for:

- aquatic species other than those that are in or on federal lands administered by PCA.



1.4.2. Committees

The *Species at Risk Act* describes the roles of three key committees: CESSC, COSEWIC and NACOSAR.

Canadian Endangered Species Conservation Council (CESSC) (SARA s. 7)

CESSC is a multi-jurisdictional body comprised of the two competent ministers, and provincial and territorial ministers responsible for the conservation and management of a wildlife species in their province or territory.

CESSC provides general direction on the preparation of recovery strategies and the preparation and implementation of action plans. CESSC also co-ordinates the activities of the various governments represented on CESSC relating to the protection of species at risk.

Committee on the Status of Endangered Wildlife in Canada (COSEWIC) (SARA s. 14-23)

COSEWIC is a scientific body established in 1977 to classify Canada's wildlife species at risk. The functions of COSEWIC include:

- assessing the status of species and identifying threats to their survival;
- classifying species as extinct, extirpated, endangered, threatened or of special concern; alternatively, it could indicate that there was insufficient information to classify a species or that the species was not currently at risk;
- determining when to assess and re-assess particular species, with priority given to those more likely to become extinct.

Members of COSEWIC are appointed by the Minister of the Environment after consultation with the CESSC and other experts. Drawn from academia, government, private and non-governmental sectors, each member of COSEWIC brings specialized knowledge in areas such as conservation biology, population dynamics, taxonomy, systematics, or genetics; or has community knowledge or aboriginal traditional knowledge relevant to the conservation of wildlife species. DFO has one member and one alternate member on COSEWIC.

DFO, as one of the technical experts on marine mammals and turtles, fish, and invertebrates, provides information to the authors of status reports. DFO Science Sector, in collaboration with the operational sectors, consolidates information on species at risk through formal peer review and provides scientific advice to COSEWIC.

National Aboriginal Council on Species at Risk (NACOSAR) (SARA s. 8.1)

The National Aboriginal Council on Species at Risk (NACOSAR) was established under SARA. NACOSAR consists of six representatives of Canada's aboriginal peoples, selected by the Minister of the Environment based on recommendations from aboriginal organizations.

The role of NACOSAR is to:

- advise the Minister on the administration of SARA; and
- provide advice and recommendations to the CESSC.



1.4.3. DFO SARA Governance

The flowchart below summarizes DFO's governance structure for SARA implementation. Note that the dotted lines do not represent direct reporting relationships.

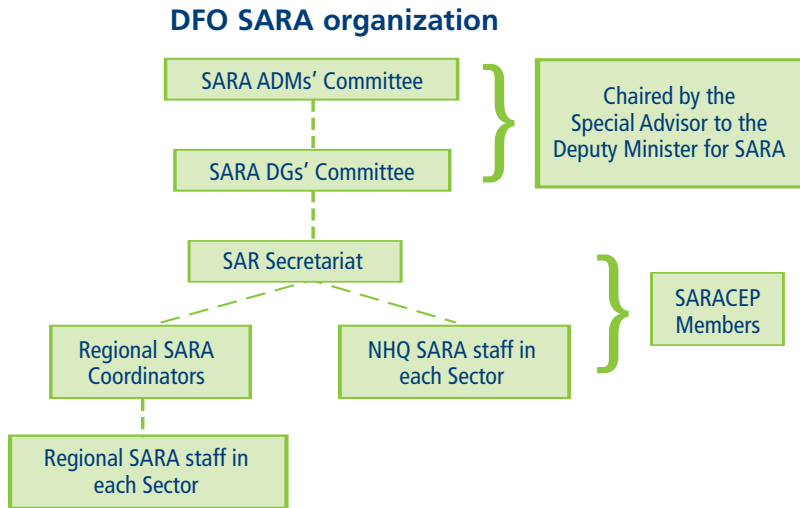


Figure 1. DFO SARA organizational structure

SARA ADMs' Committee

This DFO steering committee is composed of the ADMs of Science, Oceans and Habitat Management, Policy, and Fisheries and Aquaculture Management. The Commissioner of the Coast Guard participates as required. Chaired by the Special Advisor to the Deputy Minister for SARA, the SARA ADMs' Committee operates by consensus and periodically refers policy and other matters to the Departmental Management Committee (DMC). The overall mandate of the SARA ADMs' Committee is to lead the development and implementation of SARA within DFO.

SARA DGs' Committee

The SARA DGs' Committee includes DGs from all DFO sectors as well as all of the RDGs. It is chaired by the Special Advisor to the Deputy Minister for SARA. The mandate of the Committee is to support the SARA ADMs' Committee by developing policy and program proposals for ADMs' Committee's approval. This includes funding proposals and recommendations to add wildlife species to Schedule 1.

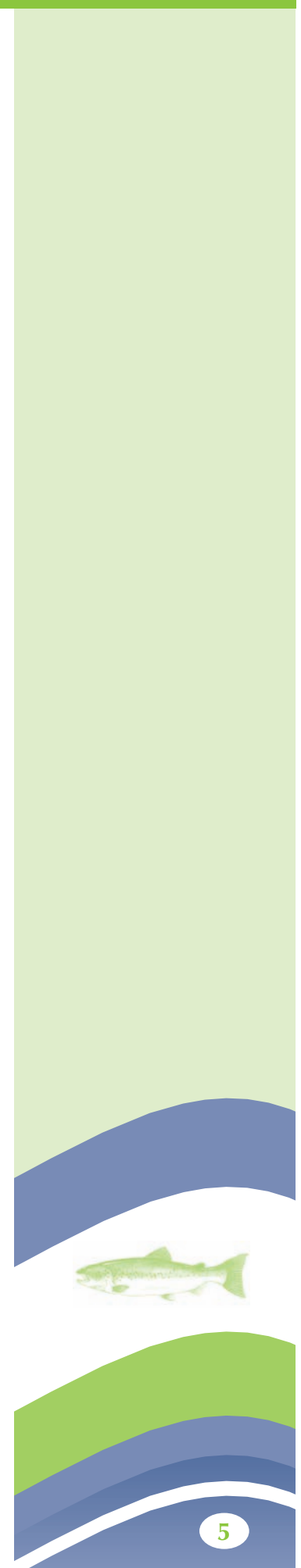
DFO SAR Secretariat & SARCEP

The SAR Secretariat is responsible for the overall coordination and administration of SARA within DFO. The SARA Secretariat chairs the Species at Risk Coordination/ Espèces en Péril (SARCEP) committee.

SARCEP is DFO's coordinating committee that sets SARA policy and recommends resource allocations. SARCEP consists of the SARA Secretariat, Regional SARA Coordinators, and NCR representatives from each sector.

Regional SARA Coordinators

Each DFO region has a Regional SARA Coordinator responsible for administering and coordinating SARA activities, including representing their region at SARCEP. Regional SARA Coordinators work closely with Habitat Management SARA Representatives (see below) to ensure nationally consistent application of SARA within the Habitat Management Program.



Habitat Management SARA Representatives

The regional Habitat Management SARA Representative is generally the first point of contact for Habitat Management practitioners when seeking advice or reporting on SARA issues. The regional SARA Representatives coordinate Habitat Management activities with SARA activities. They also participate in the Habitat Management and Oceans SARA Working Group, which reviews and develops policies for integrating SARA into the work of the Oceans and Habitat Management sectors.

National Habitat Management SARA Representatives provide advice and support to their regional counterparts, contribute to policy development and work to ensure that the SARA activities of Habitat Management staff are conducted in a consistent, coordinated fashion across the country. They also represent the Habitat Management sector on SARCEP.



2.0. Overview of SARA

The structure of SARA is laid out in the Overview of SARA (Table 1) below, with the sections of the Act listed for each major component of SARA of relevance to HMP.

Table 1. Overview of major components of relevance to HMP of the Species at Risk Act (SARA).

Component of SARA	Section of SARA
Definitions	2
Purposes	6
Conservation Agreements	11
Assessment, COSEWIC	14 – 26
Legal Listing, Schedule 1, Emergency listing	27 – 31
Protection, General Prohibitions	32 – 36
Recovery Strategies	37 – 46
Action Plans	47 – 55
Critical Habitat Protection	56 – 63
Compensation	64
Management Plans (species of special concern)	65 – 72
Agreements and Permits	73 – 78
Environmental Assessment	79; 137
Emergency Orders	80 – 82
Enforcement Officers	85
Inspections	86-92
Investigations	93 – 96
Offences, Penalties and Alternative Measures	97 – 119
Public Registry	120 – 124
Schedules 2 and 3	130 - 133
Related Amendments	134 - 141



The simplest way to think of SARA is to group these components into four categories: assessment, listing, recovery planning and protection (Figure 2). Habitat Management Program (HMP) staff may participate in each of these categories as expertise and resources warrant. The following chapter presents an overview of each of these categories and identifies HMP's role within each.

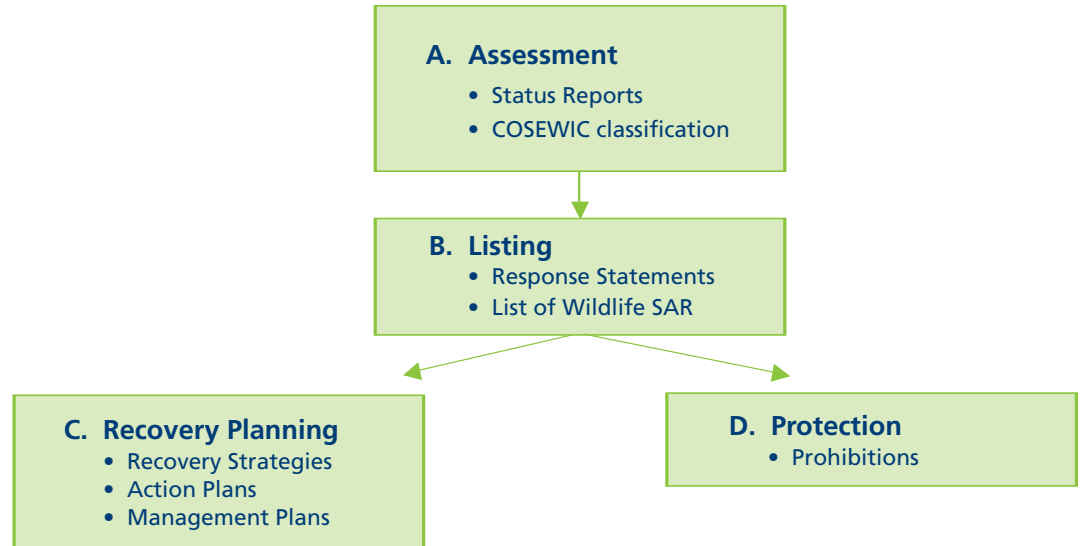


Figure 2. The simplest way to understand SARA is to group the major components into four categories: assessment, listing, recovery planning and protection.

2.1. ASSESSMENT [SECTIONS 14-26]

In order for species to be added, modified or removed (delisted) from Schedule 1, they must first be assessed. Assessment of species at risk is the first stage of the SARA process. Assessment of each species prior to listing on Schedule 1 is the responsibility of the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) (SARA s. 14 & 15).

The first step in the COSEWIC assessment of a wildlife species is the development of a status report that becomes the basis for classifying the species as extinct, extirpated, endangered, threatened, of special concern, data deficient or not at risk. Each report is then evaluated to ensure that relevant research, community and Aboriginal traditional knowledge have been incorporated and that the status report meets the COSEWIC criteria. Status reports are usually commissioned by COSEWIC, however the submission of unsolicited assessment is also possible.

If COSEWIC accepts the status report, the species classification and rationale for that classification, are documented in an assessment summary (species assessment) that COSEWIC provides to the Minister and the Canadian Endangered Species Conservation Council (CESCC). The Minister of the Environment then provides the assessment to Governor in Council (GIC).

As noted in section 1.4.2., Fisheries and Oceans Canada, as one of the technical experts on marine mammals and turtles, fish and invertebrates, supports the work of COSEWIC by providing information to status report authors. Fisheries and Oceans Canada has one member that participates on COSEWIC and one alternate. DFO Science Sector chairs a National Advisory Process (NAP) that consolidates and peer reviews information held by DFO before providing input to COSEWIC. This process has been in place for many years and was unchanged by SARA.

COSEWIC can exercise its own discretion in determining if a species is in need of assessment or re-assessment (section 14 of SARA). COSEWIC species specialist groups (such as the Marine Fishes Subcommittee) can bring species forward for consideration and assessment.

The public can also apply to COSEWIC for an assessment or re-assessment of a species. The application is made in the form of a status report. Within one year of receiving a status report from the public, COSEWIC must assess the status of the species.

The finalized COSEWIC assessments are posted in the SARA Public Registry and provided to the Minister of the Environment. The assessment of species at risk generally takes about two years.

Once COSEWIC has provided a final status report to the Minister of the Environment, the Minister must prepare and post a response statement on the SARA public registry within 90 days of receipt of the assessment. A response statement is a communications document that identifies how the Minister of the Environment intends to respond to the assessment of a wildlife species by COSEWIC. The Minister of Fisheries and Oceans prepares the response statements for aquatic species and provides them to the Minister of the Environment, who is then responsible for posting the response statements on the SARA public registry.

COSEWIC wildlife species status categories are listed below in order of risk:

Extinct - A wildlife species that no longer exists.

Extirpated - A wildlife species no longer existing in the wild in Canada, but occurring elsewhere.

Endangered - A wildlife species facing imminent extirpation or extinction.

Threatened - A wildlife species likely to become endangered if limiting factors are not reversed.

Special Concern - A wildlife species that may become a threatened or an endangered species because of a combination of biological characteristics and identified threats.

Not At Risk - A wildlife species that has been evaluated and found to be not at risk of extinction given the current circumstances

Data Deficient - A wildlife species for which there is inadequate information to make a direct, or indirect, assessment of its risk of extinction.



2.2. LISTING [SECTIONS 27-31]

Within nine months of receiving the COSEWIC assessment, the GIC on the recommendation of the Minister must decide whether or not to add the species to the *List of Wildlife Species at Risk* (List) (Figure 2) or refer the species back to COSEWIC for further information or consideration. Within the nine months, responsible departments must prepare a Regulatory Impact Analysis Statement (RIAS) for each species in question to inform GIC's decision. These statements accompany the proposed regulations outlining the anticipated costs and benefits of adding the species to the List, describing the social and economic impacts of listing and summarizing the consultations that have been carried out to determine the impacts of listing. Note that producing a RIAS is not a unique requirement of SARA. A RIAS must be prepared for any major amendments to federal legislation.

If the GIC has not decided whether to list, not list, or refer the species back to COSEWIC after the nine-month period, the Minister of the Environment must amend the List in accordance with COSEWIC's assessment. The Minister of the Environment must make an order to do this.

The DFO SAR Secretariat and DFO Policy Sector are the leads in the listing process and the preparation of RIAS for aquatic species. Regional and NHQ HMP staff may participate in the listing process for species whose decline is habitat related and where expertise warrants. Their role may include reviewing portions of the RIAS and/or providing a list of stakeholders that should be consulted to determine the impacts of listing. HMP staff may also be expected to play a role in the development of management scenarios for the socio-economic assessment conducted to inform each listing decision.



2.2.1. Schedules of Species [Sections 130-133]

There are three schedules attached to SARA. Schedule 1 is the official *List of Wildlife Species at Risk*. Schedules 2 and 3 are lists of species that have yet to be reassessed by COSEWIC. These schedules are available on the SARA Public Registry¹.

Schedule 1

Schedule 1 is the List of Wildlife Species at Risk (List) that came into force with SARA June 2003. As new species are assessed or reassessed by COSEWIC, they are added to the List through GIC order. The species listed on Schedule 1 as extirpated, endangered or threatened, are the only species that have legal protection under SARA by means of prohibitions.

Schedule 2

This schedule is a list of endangered and threatened species that were previously assessed by COSEWIC but have yet to be reassessed against the new criteria for designating species status established in 1999. SARA sets out timelines for COSEWIC to reassess these species. Once these species have been reassessed against the new criteria, they may be added to the List (Schedule 1) through the Listing process as described above.

Schedule 3

Schedule 3 is a list of species of special concern that have yet to be reassessed against the 1999 COSEWIC criteria. COSEWIC must reassess these species within one year of a request from the competent minister to do so. If and when they are reassessed against the 1999 criteria, they may be added to the List through the Listing process as described above.

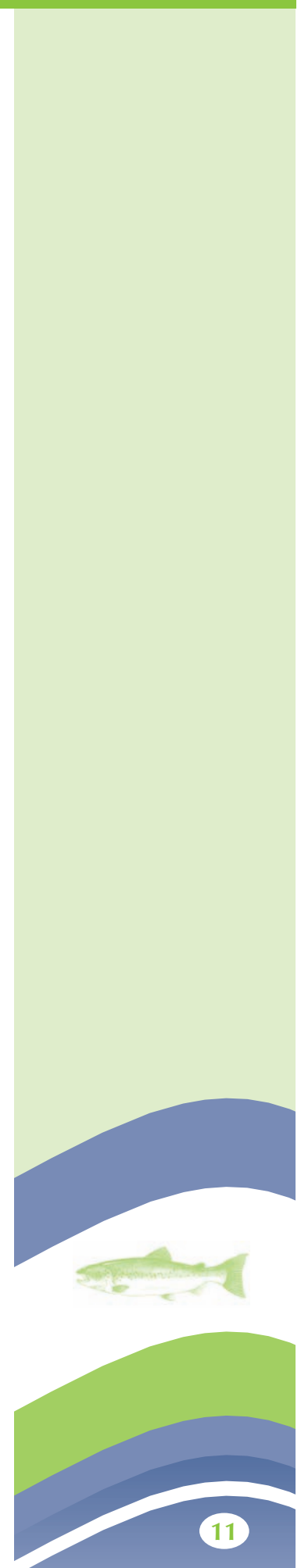
Ultimately, as species are assessed and added to Schedule 1, the three existing schedules of species at risk will be replaced by a single list. The *List of Wildlife Species at Risk* is posted on the SARA Public Registry and updated as the status of species at risk changes.

2.2.2. Emergency Listing [Sections 28-31]

Sections 28-31 of SARA provide for the Emergency Listing of species for which there is an imminent threat to their survival. Any person who believes that there is an imminent threat to the survival of a wildlife species may apply to COSEWIC for an assessment of the threats to that species for the purpose of having the species Listed, on an emergency basis, as endangered. COSEWIC must supply the applicant, the Minister of the Environment and the CESSC with a copy of the assessment and the assessment must be included in the public registry.

If the Minister of the Environment is of the opinion that there is an imminent threat to the survival of a wildlife species, the Minister of the Environment must on an emergency basis, after consulting with the Minister of Fisheries and Oceans, make a recommendation to the GIC that the List be amended to include the species as an endangered species.

¹ SARA Public Registry. www.sararegistry.gc.ca



2.3. RECOVERY PLANNING [SECTIONS 37-55; 65-72]

Under SARA, recovery planning is a two-stage process for extirpated, endangered and threatened species. First, a recovery strategy is developed to identify, inter alia, threats to the survival of the species, to identify the species' critical habitat, to the extent possible, and to set recovery goals and objectives. The recovery strategy is then followed by an action plan that states, inter alia, measures to address the threats to the species and protect the species and their critical habitat.

For species of special concern and their habitat, recovery planning involves the development of a management plan, which should include any conservation measures for the species that the competent minister deems appropriate.

As the competent minister for aquatic species under SARA, the Minister of Fisheries and Oceans is responsible for the development of recovery strategies, action plans and management plans for aquatic species on the List.

A recovery team approach may be used to develop recovery strategies, action plans or management plans where multi-stakeholder teams of species experts, federal, provincial or territorial staff, non-governmental organisations (NGOs), aboriginal groups, land owners and industry groups may work together to develop the strategies and plans. Portions of the strategies and plans may be subject to peer review. More detailed information and guidance is available on the development of recovery strategies, action plans and management plans in the DFO Recovery Planning Guidelines.

Co-operation and consultation are principle components of recovery strategy, action plan and management plan development. SARA requires that they be developed in co-operation with appropriate federal, provincial and territorial ministers, wildlife management boards, aboriginal organizations and any other person or organization the competent minister considers appropriate. If the listed species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of a wildlife species, they must also be prepared, to the extent that they will apply to that area, in accordance with the provisions of the agreement. Landowners and those affected by the strategies and plans must also be consulted. Bilateral discussions between the federal government and provincial/territorial governments may further define a process for the co-operative preparation of recovery strategies and action plans and the identification of critical habitat.



2.3.1. Recovery Roles and Responsibilities

The Minister of the Environment is responsible for the development of recovery strategies, action plans and management plans for non-aquatic species at risk, as well as individuals of aquatic species at risk that are in or on federal lands that are administered by the Parks Canada Agency. In addition, Environment Canada, through the Canadian Wildlife Service Recovery Secretariat, coordinates the publication of all recovery strategies, action plans and management plans as well as maintains and administers the SARA Public Registry.

The Minister of Fisheries and Oceans is responsible for the development of strategies and plans for aquatic species at risk other than individuals mentioned above. The DFO SAR Secretariat in collaboration with the regional SARA coordinators are responsible for coordinating the development of the strategies and plans and soliciting advice from other DFO sectors as expertise warrants.

The DFO SARA Secretariat is also responsible for shepherding these strategies and plans through the DFO approvals process and submitting them to Environment Canada for publication and posting of the SARA Public Registry.

Habitat Management practitioners play a role in recovery strategy, action plan and management plan development, particularly for species whose threats are habitat-related. Habitat Management involvement may include participation on recovery teams, providing advice to recovery teams and reviewing the strategies and plans. There are several areas of strategy and plan development where HMP may contribute as expertise and resources warrant:

- a) Provide information on the species and their habitat use.
- b) Recovery strategies and action plans must identify the threats to the species and habitat as well as strategies to address these threats. Habitat Management practitioners may have expertise on these threats and appropriate mitigation measures to address them.
- c) Habitat Management practitioners may have awareness of ongoing or proposed development activities that may help those charged with the identification of critical habitat select the appropriate areas. Practitioners should undertake a scan of the species' range to determine the types of authorizations that have been issued in the area. It is important that these proponents are informed of their SARA responsibilities and consulted on any implications of the recovery strategies (e.x. critical habitat identification). An approach to dealing with any proponents working under valid *Fisheries Act* authorizations that may contradict the recovery strategy, critical habitat or residence designation should be developed.
- d) Habitat Management practitioners may contribute to discussions of suggested areas for habitat compensation or rehabilitation.
- e) HMP may bring forward *Fisheries Act* authorizations under section 83(4) of SARA. This provision exempts activities that would normally be prohibited under SARA, if they have been authorized under a federal Act of Parliament and permitted by a recovery strategy, action plan or management plan. This provision may provide Habitat Management with the opportunity for existing, ongoing or long-term, multi-year *Fisheries Act* authorizations to be permitted by the recovery strategy or action plan and be exempted from the SARA prohibitions (see section 4.4. for more information on this provision).

If recovery is feasible, recovery strategies must include descriptions or identification of:

- the species and its needs,
- threats to the species and its habitat,
- the strategy to be taken to address threats,
- the species' critical habitat, to the extent possible
- activities that are likely to result in the destruction of critical habitat;
- a schedule of studies to identify critical habitat, where available information is inadequate,
- the population and distribution objectives that will assist in recovery and survival and
- the research and management activities needed to meet those objectives; and,
- a statement about whether additional information is required about the species, a statement of when one or more action plans in relation to the recovery strategy will be completed and,
- any other matters that are prescribed by regulations



Action plans must include descriptions or identification of:

- the species' critical habitat, to the extent possible and consistent with the recovery strategy, and examples of activities that are likely to result in its destruction,
- the measures proposed to protect the species' critical habitat,
- any portion of the species' critical habitat that have not been protected
- measure to be taken to implement the recovery strategy and an indication of when these measures are to take place,
- the methods used to monitor the recovery of the species and its long-term viability,
- the socio-economic costs and benefits of the action plan and
- any other matters that are prescribed by the regulations.

2.3.2. Recovery Strategies [Sections 37-46] and Action Plans [Sections 47-55]

Recovery strategies and action plans are to be developed for extirpated, endangered and threatened species on the List.

Timelines for the preparation of recovery strategies are summarized in Table 2 below. For newly listed endangered species, proposed recovery strategies are to be finalised and posted on the public registry within one year of Listing and within two years for newly listed threatened and extirpated species. The timeline is longer for species already listed on Schedule 1 as of June 1, 2003. For endangered species listed on Schedule 1, proposed recovery strategies are to be finalised and posted on the public registry within three years of June 5, 2003 and within four years for threatened and extirpated species [SARA subsections 42(1 and 2)].

Any person may file written comments within 60 days after the proposed recovery strategy is included in the public registry and the competent minister must finalize the strategy within 30 days after the expiry of the comment period, by including a copy of it in the public registry.

During the initial stages of recovery plan development, the competent minister must determine if the recovery of the listed wildlife species is technically and biologically feasible, based on the best available information including information provided by COSEWIC. The contents of recovery plans differ depending on the feasibility of recovery. If recovery is deemed not to be feasible, the recovery strategy requires 1) a description of the species and its needs, 2) an identification of the species critical habitat to the extent possible and 3) reasons why recovery is not feasible. It is important to note that even if recovery of the listed species is not deemed feasible, critical habitat must be identified to the extent possible for that species. The DFO SAR Secretariat, the regional SARA coordinators and DFO Science are charged with the determination of recovery feasibility. Additional guidance and information on recovery feasibility can be found in the DFO Recovery Planning Guidelines.

If recovery is deemed feasible, section 41 of SARA outlines the items that are required in a recovery strategy (see sidebar).

The identification of critical habitat is an important component of recovery strategies and action plans. Critical habitat is defined in SARA 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 the recovery strategy or in an action plan for the species*". Recovery strategies must include 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.

If critical habitat cannot be identified at the recovery strategy phase because of a lack of best available information about the habitat, the identification of critical habitat can be postponed until the action planning stage. However, a schedule of studies must be set-out in the recovery strategy that outlines the studies necessary to collect the information required to identify critical habitat. DFO Science Sector will develop the schedule of studies with input from HMP, other sectors and the recovery team as necessary.



Recovery strategies must include a timeline for the completion of action plans. If the action plan is not completed in the time set out in the recovery strategy, the competent minister must include a summary of what has been prepared with respect to the action plan in the SARA Public Registry.

The competent minister must report on the implementation of recovery strategies and action plans and on the progress towards meeting their objectives five years after their inclusion in the public registry. Recovery strategies are to be reported on in every subsequent five-year period until their objectives have been achieved or the species recovery is no longer feasible. The reports must be included in the SARA Public Registry.

More detailed information on recovery planning can be found in the DFO Recovery Planning Guidelines.

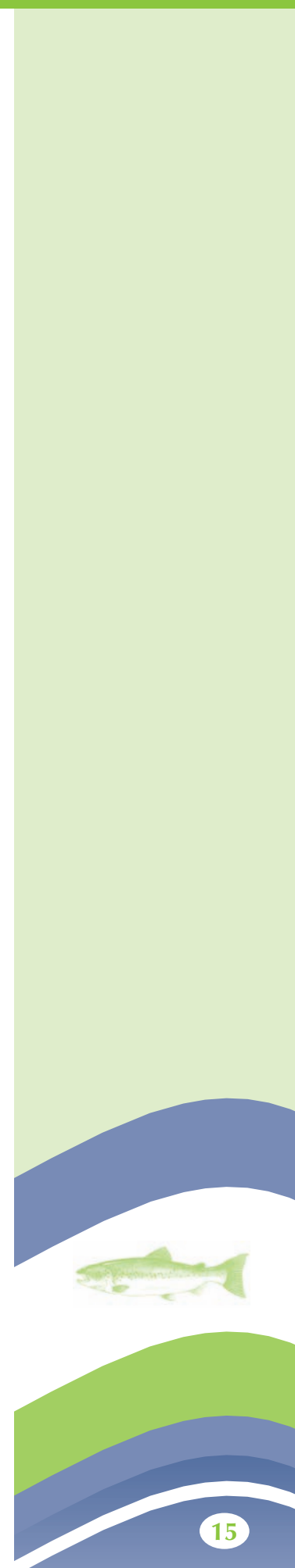
2.3.3. Management Plans [sections 65-72]

Management plans are to be developed for species on the List as special concern. Management plans are to include any measures for the conservation of the species that the competent minister considers appropriate. These are not to be confused with recovery strategies and action plans, which must be prepared for extirpated, endangered and threatened species.

The competent minister must complete and post the proposed management plan on the public registry three years after the species has been listed. For species listed on Schedule 1 upon the coming into force of SARA June 2003, the management plan must be posted on the public registry within five years. Any person may file written comments within 60 days after the proposed management plan is included in the public registry and the competent minister must finalize the plan within 30 days after the expiry of the comment period by including a copy of it in the public registry. The competent minister must monitor the implementation of the management plan and assess its implementation five years after the plan is included in the public registry and every subsequent five-year period until its objectives have been achieved. The assessment report must be included in the SARA Public Registry.

	Requirement	Schedule 1 (as of June 2003)	Newly Listed (as of January 2005)
Extirpated	Recovery strategy	4 years	2 years
Endangered	Recovery strategy	3 years	1 year
Threatened	Recovery strategy	4 years	2 years
Special Concern	Management Plan	5 years	3 years

Table 2. Summary of timelines for the preparation of recovery strategies and management plans.



2.4. PROTECTION [SECTIONS 32-33; AND 58(1)]

There are three main prohibitions in SARA of relevance to aquatic species at risk; these include the general prohibitions in section 32 and 33 of SARA and the critical habitat prohibition in subsection 58(1) of SARA.

2.4.1. General Prohibitions

There are two main general prohibitions in SARA that apply to aquatic species at risk: the prohibition against killing, harming, harassing, capturing or taking species at risk [section 32] and the prohibition against damage or destruction of residence [section 33].

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

(2) No person shall possess, collect, buy, sell or trade an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species, or any part or derivative of such an individual.

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

The general prohibitions came into force on June 1, 2004. These prohibitions apply to listed extirpated, endangered or threatened non-aquatic species on federal lands as well as aquatic species and migratory birds, protected by the *Migratory Birds Convention Act, 1994* (MBCA) wherever they are found. These prohibitions applied to the extirpated, endangered and threatened species on Schedule 1 immediately upon the coming into force of the SARA prohibitions June 1, 2004, and apply to newly listed species as soon as they are added to the List. There is no delay in the application of these prohibitions. The residence prohibition [s.33] constitutes the first action to protect components of a species' habitat under SARA. Additional information on the identification and protection of residence can be found in chapter 3 of this guide.

The general prohibitions do not apply to species other than aquatic species or migratory birds that are protected by the *MBCA, 1994*, that are in lands in a province (other than federal lands), or in a territory (other than lands under the authority of the Minister of the Environment or the Parks Canada Agency) unless an order is made by the GIC to provide that the general prohibitions apply. DFO is **not** required to make such an order because the prohibitions apply to aquatic species wherever they are found.

The Minister of the Environment must recommend that the GIC make such an order if he or she is of the opinion that a species other than an aquatic species or migratory bird is not effectively protected by existing provincial or territorial legislation. This process is termed the **safety net**. This provision does not apply to aquatic species or migratory birds. As such, this approach need not be used to protect aquatic species at risk since, as stated above, the prohibitions apply to listed aquatic species wherever they are found.



HMP biologists must consider species at risk and their residence as part of the referral review process and ensure that *Fisheries Act* authorizations do not contravene the SARA general prohibitions [SARA sections 32 and 33]. As a general practice, DFO HMP will only authorise the harming or killing of species at risk or the damage or destruction of residence under exceptional circumstances and this will be subject to the conditions of SARA section 73 being met.

Under exceptional circumstances, SARA provides a mechanism for the issuance of *Fisheries Act* authorizations that would otherwise contravene the SARA general prohibitions as long as the preconditions in section 73 of SARA can be met. This provision is not intended as a broad permitting mechanism but for use under exceptional circumstances. More information is provided on the integration of SARA into the *Fisheries Act* referral review process and sections 73 and 74 of SARA in chapter 4 of this guide.

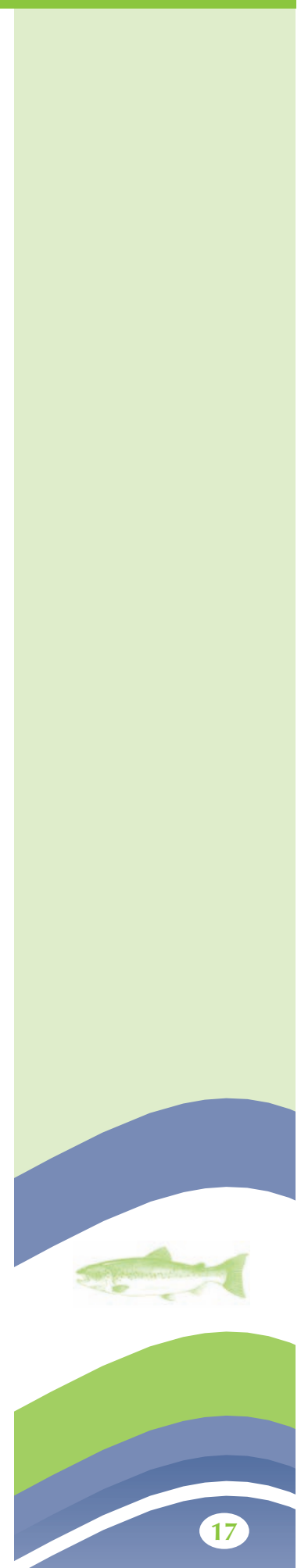
2.4.2. Critical Habitat Prohibition

The critical habitat prohibition in SARA [subsection 58(1)] applies to the critical habitat of listed extirpated, endangered and threatened species. Note that for listed extirpated species, this prohibition only applies to those for which a recovery strategy has recommended the reintroduction of the species into the wild in Canada.

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.*

Except where critical habitat is located within a federal protected area (a national park under 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 prohibition set out in subsection 58(1) only applies in respect of the critical habitat or portion thereof specified in an order made by the competent minister. The competent minister is required to make such an order within 180 days after the recovery strategy or action plan that identified the critical habitat is included in the public registry, if the critical habitat or portions of it are not protected by provisions in or measures under SARA or any other Act or Parliament, including agreements under section 11. Should the competent minister conclude that it is not necessary to make such an order, he or she must include in the public registry a statement setting out how the critical habitat or portions of it, as the case may be, are legally protected. In most situations, the habitat protection provisions of the *Fisheries Act* will adequately protect the critical habitat of listed aquatic species wherever they are found. It is therefore not expected that DFO will often be making orders applying the prohibition set out in section 58(1) to aquatic species.



If the critical habitat or a portion thereof is located within a national park under 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. The prohibition set out in subsection 58(1) applies to the critical habitat or portion thereof described in the *Canada Gazette* 90 days after the description is published.

Thus, the purpose of section 58 will be carried out; ensuring that, within 180 days after the recovery strategy or action plan that identified the critical habitat is included in the public registry, all of the critical habitat is protected by provisions in, or measures under, SARA or any other Act of Parliament or the application of subsection 58(1). [section 57]

To ensure the purpose of section 58 is met, HMP biologists must consider the critical habitat of aquatic species at risk as part of the referral review process and ensure that Fisheries Act authorizations do not authorize HADDs that would destroy any part of the critical habitat of a listed threatened, endangered or extirpated species. As a general policy, DFO HMP will not authorise the destruction of critical habitat except under exceptional circumstances subject to the conditions of SARA section 73 being met.

Under exceptional circumstances, SARA allows for the issuance of permits and agreements for activities, that would result in the destruction of any part of the critical habitat, as long as the preconditions in section 73 of SARA can be met. This provision is not intended as a broad permitting mechanism but for use under exceptional circumstances. More information is provided on the integration of SARA into the *Fisheries Act* referral review process and sections 73 and 74 of SARA in chapter 4.



2.4.3. Critical Habitat on Federal and non-Federal Lands [Section 59-61]

Regulations may be made under section 59 of SARA, on the recommendation of the competent minister and after consultation with the other competent minister, to protect critical habitat on federal lands. The competent minister must make such a recommendation if the recovery strategy or an action plan identifies a portion of the critical habitat as being unprotected and he or she is of the opinion that the portion requires protection. The regulations may include provisions requiring the doing of things that protect critical habitat and provisions prohibiting activities that may adversely affect critical habitat. The competent minister must make the recommendation if the recovery strategy or an action plan identifies a portion of the critical habitat as being unprotected and the competent minister is of the opinion that the portion requires protection.

If critical habitat on non-federal land for non-aquatic species is not effectively protected by federal, provincial or territorial legislation, SARA provides for its protection through a GIC order. If the Minister of the Environment is of the opinion that critical habitat located on non-federal land is not effectively protected, the Minister must recommend to GIC to make an order specifying the portions of the critical habitat to which subsection 61(1) applies, the prohibition on the destruction of critical habitat that is in a province or territory and that is not part of federal lands. This process is termed the *safety net*. However, this provision does **not** apply in respect of aquatic species or the critical habitat of a species of birds that is a migratory bird protected by the *MBCA, 1994* that is the habitat referred to in subsection 58(5.1) [section 61(1.1)].

2.4.4. Provincial and Territorial “Essential Habitat” [Section 60]

SARA prohibits the destruction of habitat that is on federal lands in a province or territory and that has been identified as essential to the survival or recovery of species that are classified as endangered or threatened by a provincial or territorial minister, but not listed under SARA.

In order for the prohibition to apply, a GIC order must be made, on the recommendation of the competent minister, specifying the portions of the habitat to which the prohibition applies.

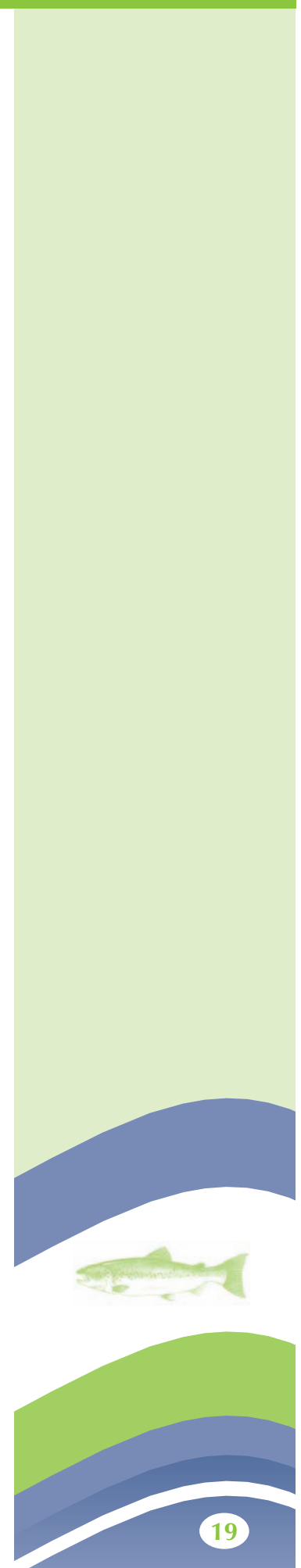
2.4.5. Emergency Orders [Section 80]

The GIC may, on the recommendation of the competent minister, make an emergency order to provide for the protection of a listed wildlife species. The competent minister must make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery.

The emergency order may identify habitat *that is necessary for the survival or recovery* of a listed species. The content of an emergency order differs depending on the species and its location.

For aquatic species, for migratory birds protected by the *MBCA, 1994* on federal land or in the EEZ and for any other species on federal lands, in the EEZ or on the continental shelf of Canada, the emergency order may:

- a) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and
- b) include provisions requiring the doing of things that protect the species and that habitat, and provisions prohibiting activities that may adversely affect the species and that habitat.



For migratory birds protected by the *MBCA, 1994* that are *not* on federal lands or in the EEZ, emergency orders may:

- a) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and
- b) include provisions requiring the doing of things that protect the species and provisions prohibiting activities that may adversely affect the species and that habitat. (As can be seen, the order may not include provisions that require the doing of things that protect habitat.)

For species, other than aquatic species and migratory birds protected by the *MBCA, 1994*, that are not on federal lands, in the EEZ or on the continental shelf of Canada, an emergency order may:

- a) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and
- b) include provisions prohibiting activities that may adversely affect the species and that habitat. (As can be seen, the order may not include provisions that require the doing of things that protect the species and the habitat.)

The competent minister is not required to make a recommendation for an emergency order if he or she is of the opinion that equivalent measures have been taken under another Act of Parliament to protect the wildlife species. If the competent minister is of the opinion that the species to which the order relates no longer faces imminent threats to its survival or recovery even if the order were repealed, they must make a recommendation to the GIC that the emergency order be repealed.

Note that the habitat identified in an emergency order is not termed critical habitat, because it is not identified in a recovery strategy or an action plan.

2.4.6. Financial Compensation [Section 64]

SARA provides, in section 64, that the Minister of the Environment may provide fair and reasonable financial compensation to any person for losses suffered as a result of any extraordinary impact of the application of the critical habitat prohibitions (section 58, 60, or 61) or of an emergency order in respect of habitat identified in it as necessary for the survival or recovery of a wildlife species.

The wording in section 64 of SARA is such that a proponent may be eligible for compensation when section 58, 60 or 61 or an emergency order are applied. Outside of federal protected areas, subsection 58(1) of SARA only applies when an order is made by the competent minister specifying the portion of the critical habitat to which it applies. Compensation may not be provided when critical habitat is protected using any other Act of Parliament or protected using stewardship or conservation agreements under SARA. Therefore, protection of aquatic listed species through the use of the habitat protection provisions of the *Fisheries Act* does not give rise to compensation.

SARA requires the GIC to make regulations that it considers necessary for providing compensation, including regulation prescribing procedures to be followed in claiming compensation, methods to be used in determining eligibility for compensation, and quantifying losses suffered and the amount of compensation in respect of such losses, and any terms and conditions for the provision of compensation.

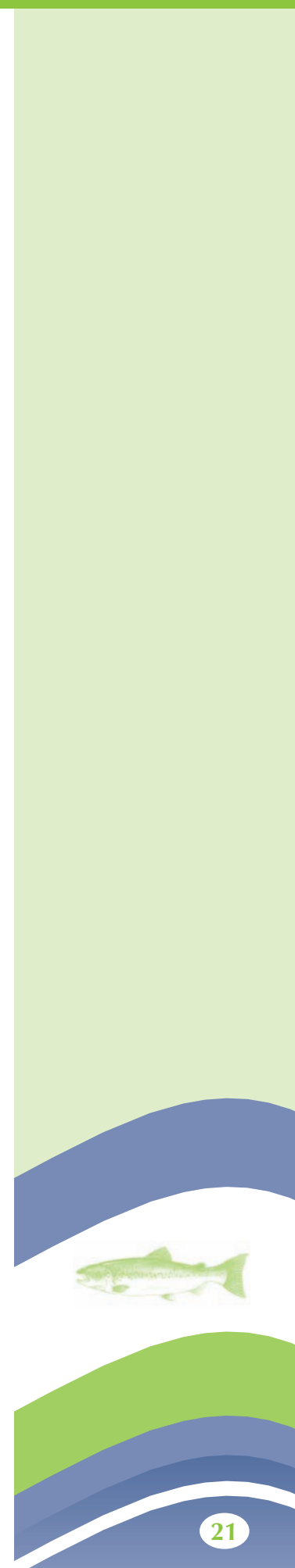


2.4.7. Summary of the SARA prohibitions for aquatic species at risk

Table 3. A summary of the application of the three main SARA prohibitions.

Section	To protect:	Applies when:	Applies where:
32	Individuals listed as extirpated, endangered or threatened	Species on Schedule 1: As of June 1, 2004-07-22 Newly listed species: Immediately upon listing	Aquatic species - Wherever they are found Migratory birds protected by the <i>MBCA, 1994</i> – Wherever they are found All other species on federal lands* in a province or on lands in a territory under the authority of the Minister of the Environment of the Parks Canada Agency.
33	Residence of species listed as endangered or threatened, or of species listed as extirpated if a recovery strategy has recommended the reintroduction of the species into the wild in Canada	Species on Schedule 1: As of June 1, 2004-07-22 Newly listed species: Immediately upon listing	Aquatic species - Wherever they are found. Migratory birds protected by the <i>MBCA, 1994</i> – Wherever they are found All other species on federal lands* in a province or on lands in a territory under the authority of the Minister of the Environment of the Parks Canada Agency.
58(1)	Critical habitat of species listed as endangered or threatened or of species listed as extirpated if a recovery strategy has recommended the reintroduction of the species into the wild in Canada	1. When an order is made by the competent minister specifying the critical habitat or portion of it to which subsection 58(1) applies [subsections 58(4) and (5)] 2. Ninety (90) days after the publication in the Canada Gazette of a description of the critical habitat or portion of it (this description must be published within 90 days after the recovery strategy or action plan that identified the critical habitat is included in the public registry) [subsections 58(2) and (3)] 3. When a GiC order is made specifying the portions of the critical habitat to which subsection 58(1) applies [subsections 58(5.1) and (5.2)] 4. When a GiC order is made specifying the portions of the critical habitat to which subsection 61(1) applies [subsections 61(2) to (5)]	1. Critical habitat (specified in the order) of aquatic species anywhere and all critical habitat (specified in the order) on federal lands, in the exclusive economic zone or on the continental shelf, other than critical habitat described in item 2 below. 2. Critical habitat (described in the Canada Gazette) of any species in a national park, a marine protected area, a migratory bird sanctuary or a national wildlife area. 3. Critical habitat (specified in the order) of migratory birds protected by the <i>MBCA, 1994</i> that is not on federal lands, in the exclusive economic zone, on the continental shelf or in a migratory bird sanctuary, but that is habitat to which the <i>MBCA, 1994</i> applies. 4. Critical habitat (specified in the order) of all species other than aquatic species, that is in a province or a territory and is not - on federal land - critical habitat described in item 3 above.

* Unless the Governor in Council makes an order providing that the prohibition applies in lands in a province (that are not federal lands) and in lands in a territory (that are not under the authority of the Minister of the Environment or of Parks Canada Agency).



3.0. Critical Habitat and Residence Identification

3.1. CRITICAL HABITAT IDENTIFICATION

In the preamble to SARA, it is acknowledged that the habitat of species at risk is key to their conservation. SARA provides for habitat protection through the critical habitat provisions of the Act.

Critical habitat is defined in section 2 of SARA 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 the recovery strategy or in an action plan for the species”*.

Further, section 2 defines habitat in respect of aquatic species as *“spawning grounds and nursery, rearing, food supply, migration and any other areas on which aquatic species depend directly or indirectly in order to carry out their life processes, or areas where aquatic species formerly occurred and have the potential to be reintroduced”*.

SARA requires that recovery strategies or action plans include an identification of a species’ critical habitat to the extent possible, using the best available information, including the information provided by COSEWIC. Once critical habitat has been identified in a recovery strategy or action plan and posted in the SARA Public Registry, there is an obligation on the part of competent ministers to ensure its protection.

Critical habitat identification will vary widely for species representing different taxonomic groups and inhabiting different aquatic ecosystems. A series of guiding principles are under development jointly between DFO and Environment Canada to assist in the identification of critical habitat. These principles are intended for use by federal, provincial or territorial staff and by recovery teams charged with the identification of critical habitat to promote a consistent and scientifically robust approach. More information on these principles can be found in Environment Canada’s Technical Guidelines for the Identification of Critical Habitat located on the SARA Public Registry.

3.1.1. Critical habitat knowledge gaps and uncertainty

There are species for which insufficient knowledge of life history, geographic distribution, or habitat requirements exist to identify critical habitat. When available information is inadequate, SARA requires that a schedule of studies be prepared to identify critical habitat [section 41(1)(c.1)]. The schedule of studies should be included in the recovery strategy and should lay-out the necessary work that is required to identify critical habitat.



3.2. RESIDENCE IDENTIFICATION

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

A species’ residence is a component of a species’ habitat that one or more individuals occupy or habitually occupy during all or part of their lifecycle for a specific function. A residence may be interpreted as a place that an individual returns to on a recurring basis. Generally speaking, the interpretation of the term “residence” should be limited to dwelling places such as nests and dens and similar areas or places. The lifecycle functions that are listed in the definition are functions that may occur in a dwelling place such as a den, nest or other similar area.

The residence concept does not apply to all species. Most aquatic species and many terrestrial species will not likely have a residence. Residences will be defined on a species-by-species basis. Note that the residence prohibition [SARA s. 33] only applies for those species to which the concept of residence applies.

The first step to residence identification and protection will be to determine if the residence concept applies. Ideally, this determination will be made early on, prior to the initial listing consultations for each species. This determination will be coordinated by the SARA Secretariat and involve the Regional SARA Coordinators and the DFO sectors.

There is no legal requirement in SARA to explicitly locate individual residences or publish their whereabouts on the SARA Public Registry or *Canada Gazette*. However, a description of the residence of aquatic species should be communicated to the public and to the federal, provincial and territorial governments. Ideally this information will be presented to the public in the documents made available during the public consultations associated with Listing. After this initial description of residence, residence identification could be further refined, for aquatic species, during the recovery planning process.

A series of criteria are being jointly developed by Environment Canada and DFO to assist in the determination of whether the residence concept applies. In order for the residence concept to apply to the life cycle of the species, there must be a dwelling place:

- such as a den or a nest or other similar area or place; and
- occupied or habitually occupied by one or more individuals during all or part of their life cycle. An individual’s life cycle includes breeding, rearing, staging, wintering, feeding or hibernating.

In addition, a description of residence should consist of:

- a physical site or location including where applicable, a delimited spatial area;
- a temporal period within which the residence is occupied, up to and including permanent occupation; and
- a suite of described biological and physical attributes create the described conditions required to carry out the above-listed crucial functions. These attributes can be pre-existing or the result of intentional modification by the species.



Residence differs from critical habitat in that residence applies to an individual or individuals, whereas critical habitat applies to the listed species as a whole. A residence may occur anywhere within the range of the species' habitat. Critical habitat is limited to those portions of the range that are necessary for the survival or recovery of the species. An area designated as critical habitat may contain several residences or conversely, residences may be located in habitat that has not been designated critical habitat, if for example, they are located in an area beyond the normal range of the species or in atypical habitat. Residence also differs from critical habitat in that there is no requirement under SARA to identify or describe the residence of individuals of a listed wildlife species in a recovery strategy or action plan and there is no requirement to post a description of residence on the SARA public registry.

A comparison of residence and critical habitat is summarized in Table 3. Discussions are underway within DFO and interdepartmentally to clarify the application of the term residence.

Table 4. Comparison of residence and critical habitat.

	Residence	Critical Habitat
Concept applies to:	An individual or individuals	The species as a whole
Relationship:	Residence may be located in critical and non critical habitats.	Critical habitat may contain several residences.
SARA requirements for identification and description:	No legal requirements	Critical habitat must be identified in a recovery strategy or action plan, to the extent possible, and posted on the SARA Public Registry
Find out more:	Residence descriptions should be made available through the SARA Public Registry, but this is not a legal requirement.	Critical habitat identification must be included in a finalized recovery strategy or action plan, to the extent possible.



4.0. Implementing the SARA Prohibitions

4.1 THE SARA PROHIBITIONS AND THE FISHERIES ACT

DFO is legally required to protect listed aquatic species at risk, their residence and their critical habitat as per the SARA prohibitions, which are described in chapter 2 of this guide.

The fish habitat protection provisions of the *Fisheries Act* provide for the legal protection of fish and fish habitat of which aquatic species at risk, their residence and their critical habitat form a part. In order for the habitat protection provisions to adequately protect aquatic extirpated, endangered or threatened species at risk, the SARA prohibitions must be considered and complied with as part of any new referral reviews and environmental assessments.

This includes:

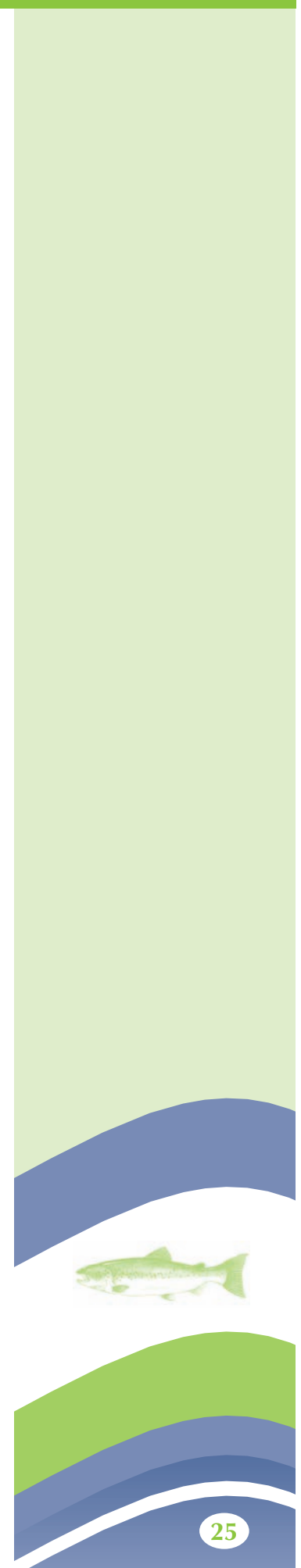
- ensuring that section 32 and subsection 35(2) *Fisheries Act* authorizations do not result in a contravention of the SARA prohibitions for aquatic species at risk.;
- ensuring requirements under other habitat protection provisions of the *Fisheries Act* such as requirements for fish ways, barriers to fish passage, or flow comply with the SARA prohibitions and;
- ensuring mitigation measures, habitat enhancement work and compensation plans are also SARA compliant.

As a general practice, HMP will only authorize the harm or killing of listed aquatic species at risk, the damage or destruction of residence or the destruction of critical habitat under exceptional circumstances and this will be subject to the conditions of SARA section 73 being met.

In most cases, the level of protection provided by the habitat protection provisions of the *Fisheries Act* is consistent with the level of protection that is required by the prohibitions in SARA. For example, when it has been determined that there is no harmful alteration, disruption or destruction of fish habitat (HADD) under section 35 of the *Fisheries Act*, there will not likely be any damage or destruction of residence or destruction of aquatic critical habitat under SARA and it is unlikely that there will be harm or killing of aquatic species at risk.

Note that DFO's *Habitat Conservation and Protection Guidelines* provide a definition of the term "critical habitat". This is not the same as "SARA critical habitat". Critical habitat identified under legislation other than SARA is not afforded any protection under SARA. If critical habitat under SARA has not yet been identified or cannot be identified, HMP staff have discretion to protect habitats considered to be important through the powers of the *Fisheries Act* guided by related policies.

Under exceptional circumstances, SARA allows for activities that result in the killing or harming of species at risk [s. 32], the damage or destruction of residence [s.33] or the destruction of critical habitat [s.s. 58(1)], as long as the preconditions in section 73 of SARA can be met. This provision is not intended as a broad permitting mechanism but for use under exceptional circumstances, only when the preconditions can be met. Specific steps to integrating SARA into operational statements, letters of advice, *Fisheries Act* authorizations and environmental assessments can be found in later chapters.



4.2. PERMITTING ACTIVITIES THAT AFFECT AQUATIC SPECIES AT RISK, RESIDENCE OR CRITICAL HABITAT [SECTIONS 73 & 74]

Section 73 and 74 of SARA provide a mechanism for use under exceptional circumstances, for issuing permits and agreements that may result in effects to species at risk, residence or critical habitat. The SARA prohibitions do not apply to activities authorized under section 73 (by permits or agreements) or 74 (by agreements, permits, licences, orders or similar documents issued by the competent minister under another Act of Parliament, e.g. *Fisheries Act* authorizations) of SARA as long as a series of strict preconditions can be met prior to issuing the authorization.

SARA 73(1) *The competent minister may enter into an agreement with a person, or issue a permit to a person, authorising the person to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals.*

Subsections 73(2) to (6) and 73(9) of SARA set out a series of strict preconditions that must all be met before an agreement may be entered into or a permit issued. These provisions are not intended as a broad permitting mechanism but for use under exceptional circumstances. Refer to chapter 6 for more details.

4.2.1. Terms used in Section 73

“Affect”

The term “affect” within the phrase “affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals” in subsection 73(1) of SARA, should be taken to refer to the effects on species, their residence or their critical habitat that are prohibited by sections 32, 33, 36, 58, 60 and 61 (or by regulations made under section 53, 59 or 71 or by emergency orders made under section 80 if and when such regulations or emergency orders are made prescribing offences.) The competent minister may thus enter into an agreement with a person, or issue a permit to a person, authorizing the person to engage in an activity that would otherwise be prohibited. The term “affect” should **not** be interpreted as referring to broader effects.

“Permit and Agreement”

The terms “permit and agreement” are used in section 73 and 74 of SARA. Section 74 of SARA states that permits, licenses or other similar documents (i.e. *Fisheries Act* authorizations) issued under other Acts of Parliament have the same effect as an agreement or permit under section 73 of SARA, if before they are issued, the competent minister is of the opinion that the requirements of subsections 73(2) to (6) and (9) are met and after they are issued, the requirements of section 73(7) are met. For instance, authorizations issued under section 35 of the *Fisheries Act* that have the same effect as permits and agreements under section 73 will thus exempt their holder from the SARA prohibitions.



“Activity”

The term “activity” is used in SARA section 73 and 74 of SARA. This term is broader than the terms “works and undertakings” as used in section 35 of the *Fisheries Act*. Works or undertakings fall within the meaning of the term “activity” as used in SARA.

4.2.2. SARA permits or *Fisheries Act* authorizations?

Section 73 of SARA provides for the issuance of authorizations that affect listed species at risk, their critical habitat or residences of their individuals; however, this does not mean that this will be a broad permitting mechanism nor does it mean that HMP will be required to issue separate SARA permits.

Section 74 of SARA states that permits, licences or other similar documents (i.e. *Fisheries Act* authorizations) issued under other federal Acts of Parliament have the same effect as an agreement or permit under section 73 of SARA, if before they are issued, the competent minister is of the opinion that the preconditions in section 73(2) to (6) and (9) are met and after they are issued, the requirements of section 73(7) are met.

Section 74 of SARA allows HMP to add the necessary conditions to section 32 and subsection 35(2) *Fisheries Act* authorizations to meet the requirements of section 73. More information on the issuance of *Fisheries Act* authorizations that affect species at risk, their critical habitat and the residences of their individuals can be found in Chapter 6.

4.3. EXCEPTIONS FOR PERMITTED ACTIVITIES [SECTION 83(4)]

Section 83 lists a variety of situations where the SARA prohibitions do not apply. These situations include:

- a) activities related to public safety, health or national security, that are authorized by or under any other Act of Parliament or activities under the *Health of Animals Act* and the *Plant Protection Act* for the health of animals and plants; or
- b) activities authorized under section 73, 74 or 78 by an agreement, permit, licence, order or similar document;
- c) activities undertaken in accordance with conservation measures for wildlife species under a land claims agreement;
- d) activities that are permitted by a recovery strategy, an action plan or a management plan and are authorized under a federal Act of Parliament to engage in that activity; and
- e) possession of a species at risk in the situations outlined in subsection 83(5)

Bullet (d), paraphrased from subsection 83(4), is of particular interest to HMP because it allows activities that would normally be prohibited by the SARA prohibitions to be undertaken if they have been:

- 1) authorized under a federal Act of Parliament **and**
- 2) permitted by a recovery strategy, an action plan or a management plan



This means that if a proponent is working under a valid *Fisheries Act* authorization and the activity is permitted in a recovery strategy, action plan or management plan for the species, the activity may be exempt from certain prohibitions under SARA. This provision may be used to exempt from the SARA prohibitions proponents working under valid *Fisheries Act* authorizations that were issued before the SARA prohibitions came into force, if allowing these activities is consistent with the recovery goals and objectives of the recovery strategies, action plans or management plans for the species and does not jeopardize the survival or recovery of the species. Analyses to support these findings should be documented.



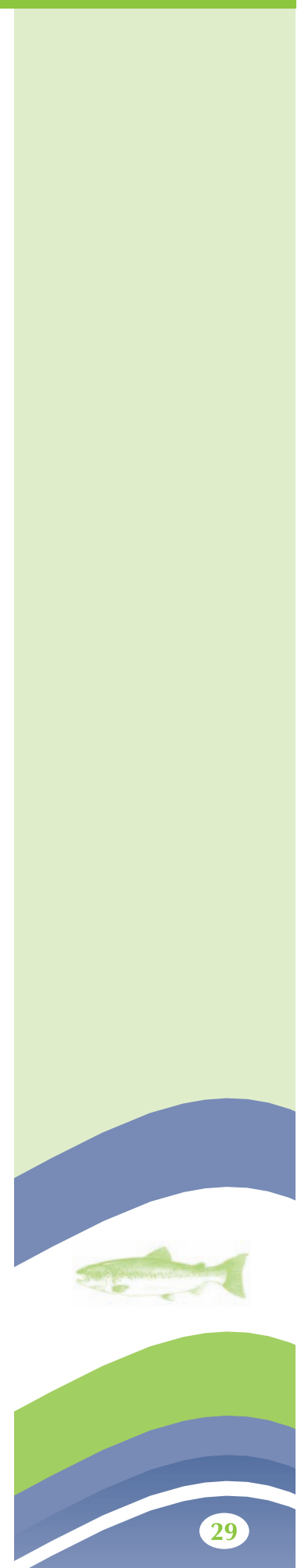
5.0. SARA, Operational Statements and Letters of Advice

HM staff may be required to undertake a series of additional steps when conducting referral reviews to ensure that the SARA prohibitions of most relevance to HMP, on listed aquatic species [sections 32, 36(1)], their residence [section 33] and critical habitat [subsections 58(1), 60(1), 61(1)] are considered. SARA does not replace the HMP's Risk Management Framework. Consideration of the SARA prohibitions becomes an additional consideration within the components of the Framework. The following chapters in this Practitioners Guide review the integration of SARA into the *Fisheries Act* referral review process and the federal environmental assessment process under the *Canadian Environmental Assessment Act* (CEAA).

5.1. SARA AND OPERATIONAL STATEMENTS

HMP has developed a series of national Operational Statements (OS) that describe measures to be incorporated into certain low risk development proposals, in order to avoid the harmful alteration, disruption and destruction (HADD) of fish habitat. Proponents may proceed with their project without review by DFO when they implement all the measures outlined in a given OS and notify DFO of their plans. The OS have been developed for activities that are considered by DFO to be of low risk to fish and fish habitat. Each OS will be reviewed by Habitat Management practitioners to ensure that the activities would also not contravene the SARA prohibitions and are consistent with recovery objectives for the species, its residence or its critical habitat. The approach to integrating SARA into the OS will be for regional or area HM practitioners to review the statements (this may be done in consultation with Science and the SARA representative), to ensure that these conditions are met. Moreover, the OS will be periodically reviewed and updated by regional staff to ensure that they continue to protect fish habitat according to the *Fisheries Act* and SARA. If an OS is found to present any level of risk to aquatic species at risk in a particular region or area, a list of water bodies or areas where the OS does not apply may be listed in the conditions of the OS. It should then be clearly stated in the OS that if the proponent is working in or around a water body listed in the OS, the OS does not apply and the proponent will be required to submit their project for review by DFO HMP.

The OS does not release the proponent from the responsibility of obtaining any other permits or approvals that may be required, including permits under municipal, provincial and federal legislation that apply to the work being carried out in relation to the Operational Statement.



5.2. SARA AND LETTERS OF ADVICE

Habitat Management practitioners routinely review development proposals to ensure compliance with the habitat protection provisions of the Fisheries Act. Referral reviews must now also include consideration of aquatic species at risk, their residence and critical habitat. Specific references to SARA within Letters of Advice is required where aquatic species at risk, their residence or critical habitat, are expected to be present in the area of the proposed development. Note that there is no legal requirement to include a reference to non-aquatic species at risk in letters of advice because their consideration is only required within an environmental assessment.

The addition of SARA wording to letters of advice will not increase the number of letters of advice that are issued. References to SARA will only be added to existing letters, should aquatic species at risk be present in the area of the proposed development. Also, the addition of SARA wording to letters of advice will not hamper streamlining of the Habitat Management Program for activities that are low-to-no risk for fish and fish habitat. Habitat Management's SARA obligations can continue to be met as operational statements replace letters of advice.

Most situations requiring the issuance of a *Species at Risk Act* permit will also require a *Fisheries Act* authorization. Where both legislations apply, the Fisheries Act authorization is to be used as the main regulatory approval mechanism whenever appropriate, within which specific SARA conditions can be included. In the situation where a Species at Risk Act permit is required in the absence of a proponent needing a *Fisheries Act* authorization, additional advice may be sought from the regional SARA representatives.

For more guidance on preparing letters of advice please refer to the *Practitioners Guide for Writing Letters Used in Fisheries Act Reviews* or obtain the most current Letter of Advice templates from Program Activity Tracking for Habitat (PATH) or http://oceans.nrc.dfo-mpo.gc.ca/habitat/hmp/guides/letter-templates_e.asp



5.3. SARA, LETTERS OF ADVICE AND TERRESTRIAL SPECIES AT RISK

The Minister of Fisheries and Oceans is the competent minister for aquatic species at risk as defined as fish and marine plants under the *Fisheries Act*. Practitioners must ensure that referral reviews comply with the SARA prohibitions [such as sections 32, 33 and subsection 58(1)] for aquatic species at risk (these are the prohibitions of currently of most relevance to practitioners, however, there are other prohibitions in SARA and others may be formulated later on in regulations or emergency orders that could impact on the work of practitioners). There is no legal requirement for DFO to consider non-aquatic species at risk within referral reviews. It is the proponent's responsibility to contact Environment Canada should they have concerns about non-aquatic species at risk.

If the referral results in a Letter of Advice, there is no legal requirement for HMP staff to consider non-aquatic species at risk. Letters of Advice should not contain information or mitigation for non-aquatic species at risk, practitioners do not have the expertise or resources to make decisions regarding the effects of a project on non-aquatic species. If HMP staff become aware of non-aquatic species at risk, residence or critical habitat in the area impacted by the project, they should suggest that the proponent consult Environment Canada and direct the proponent to the SARA Public Registry for additional information.

It should be noted that if HMP staff become aware of the presence of non-aquatic species at risk and the issuance of a *Fisheries Act* authorization is considered, as part of the federal environmental assessment process, there are several requirements HMP must fulfill. This includes the requirement to notify Environment Canada in writing under section 79 of SARA (refer to Chapter 7).



6.0. SARA and Fisheries Act Authorizations

6.1. OVERVIEW OF IMPORTANT POINTS

SARA does not replace the existing referral review and environmental assessment processes under the *Fisheries Act* and the *Canadian Environmental Assessment Act*.

The presence of an aquatic species at risk does however, impose additional requirements and conditions that must be met prior to issuing a *Fisheries Act* section 32 or subsection 35(2) Authorization that affects aquatic species at risk, residence or critical habitat.

- DFO is legally required to protect listed aquatic species at risk, their residences and their critical habitat, in accordance with the SARA prohibitions.
- The presence of an aquatic species at risk, residence or critical habitat is usually identified early in the referral review process when determining if fish habitat is present.
- SARA provides a mechanism for issuing SARA permits to allow certain activities to proceed, that would normally be prohibited, as long as the conditions in section 73 of SARA can be met.
- Section 74 of SARA provides a mechanism so that federal permits or Authorizations made by the competent minister under another Act of Parliament have the same effect as SARA permits, thus the proponent does not need to seek two permits from the same department. Where appropriate, a section 32 or subsection 35(2) *Fisheries Act* Authorization could be issued with any conditions governing the activity that the Minister of Fisheries and Oceans considers necessary for protecting the species at risk, minimizing the impact of the authorized activity on the species or providing for its recovery so that it has the same effect as a SARA permit.
- Permits under SARA are only meant to be used under exceptional circumstances. If effects on species at risk can be effectively mitigated, there is no need to issue a SARA permit. The requirements of subsections 73(2) to (6) and (9) of SARA must be met prior to issuing a SARA permit or *Fisheries Act* Authorization that is likely to affect an aquatic species at risk by such ways as
 1. killing, harming or harassing them,
 2. damaging or destroying their residence or
 3. destroying their critical habitat.



6.2. ISSUING AUTHORIZATIONS THAT AFFECT AQUATIC SPECIES AT RISK, RESIDENCE OR CRITICAL HABITAT

In addition to completing the referral review and environmental assessment processes, in order to issue a *Fisheries Act* Authorization that may result in killing, harming or harassing aquatic species at risk, damaging or destroying their residence or destroying their critical habitat, (or violating other SARA prohibitions), a series of conditions must be met under s. 73 of SARA. If the conditions cannot be met, an Authorization cannot be issued.

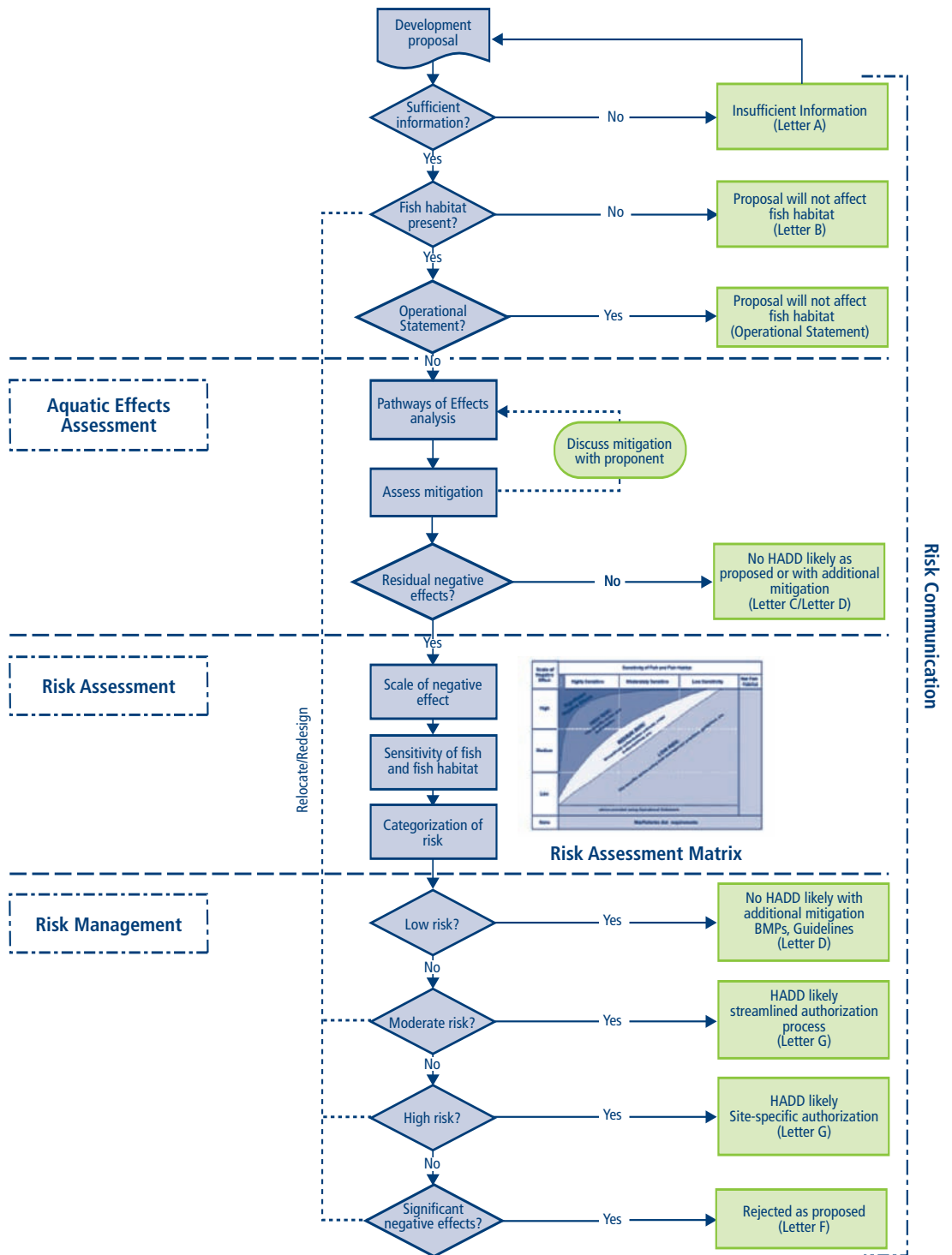
The following sections in this chapter describe the additional conditions and considerations that must be met prior to issuing such a permit or Authorization. The *SARA-Fisheries Act* Authorization Tool provided at the end of this chapter summarizes each of these conditions.

Figure 4 illustrates how the Risk Management Framework fits into the decision-making process. SARA considerations must be undertaken at various stages of this process.

Question 1 of this chapter addresses items you should consider prior to the aquatic effects assessment phase of the decision-making process. Questions 2 – 10 of this chapter address conditions you should consider as part of the aquatic effects assessment, risk assessment and risk management phases.



Figure 3: Applying the Risk Management Framework to Decision-making under the Habitat Protection Provisions of the Fisheries Act.



6.2.1. Determining whether a SARA compliant *Fisheries Act* authorization is required

QUESTION 1. Are listed threatened, endangered or extirpated species at risk present at or near the proposed development site?

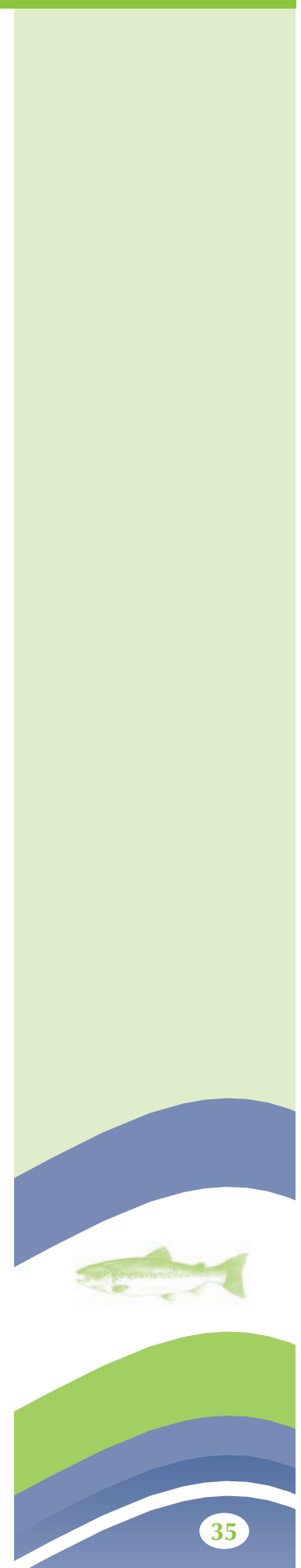
The presence of listed threatened, endangered or extirpated aquatic species at risk, their residence or critical habitat should be determined early on in the decision-making process, prior to the aquatic effects assessment phase. Information about the presence of aquatic species at risk may be provided by the proponent or a third party. You may identify the presence of aquatic species at risk by referring to your region's SARA checklist or map, or EC's web mapping tool at http://www.speciesatrisk.gc.ca/map/default_e.cfm. The status of the species under SARA can be confirmed by referring the SARA public registry (<http://www.sararegistry.gc.ca/>). If you are uncertain about the presence or status of aquatic species at risk, you could also consult with your regional HM SARA representative or regional SARA coordinator. If a species is not listed on SARA Schedule 1, the referral review proceeds as it normally would with no further SARA considerations required because the *Fisheries Act* Authorization does not need to act as a SARA permit.

If the species is listed on Schedule 1 as a species of species concern, the SARA prohibitions do not apply. There is no further requirement to consider a SARA permit nor to have the *Fisheries Act* Authorization act as a SARA permit. However, the *Fisheries Act* authorization must be consistent with measures for the conservation of the species described in the management plan for the species. Moreover, there are additional SARA requirements that must be met as part of the federal environmental assessment (see chapter 7 for more information).

If the proponent has not submitted adequate information on fish or fish habitat (including aquatic species at risk, residence or critical habitat), this requirement should be indicated to the proponent in a letter requesting additional information. Refer to the *Practitioners Guide for Writing Letters Used in Fisheries Act Reviews* for additional guidance.

The proponent is not required to submit information to DFO on non-aquatic species at risk when it is unlikely that a *Fisheries Act* Authorization will be issued. It is the proponent's responsibility to consult with Environment Canada if there is a concern about any species at risk that are non-aquatic, for example, non-fish species or migratory birds. However, if a HADD is likely, the proponent will be required to submit information to DFO on all species at risk as part of the federal environmental assessment (see chapter 7 for more information).

In the absence of any species at risk, the referral review proceeds as it normally would with no further SARA considerations required because the *Fisheries Act* Authorization does not need to act as a SARA permit.



QUESTION 2. Does the proposed activity contravene the SARA prohibitions?

There are three major prohibitions, among others, in SARA that apply to extirpated, endangered or threatened aquatic species at risk listed on Schedule 1:

- S.32 – prohibits the killing, harming or harassing of a threatened, endangered or extirpated species
- S.33 – prohibits the damage or destruction of an individual species' residence...
- S.58 – prohibits the destruction of any part of a species' critical habitat...

If the proposed work or undertaking is likely to contravene one or more of these prohibitions, a *Fisheries Act* Authorization cannot be issued until the conditions in section 73 of SARA are met.

If mitigation can be used to avoid contravention of the three SARA prohibitions, no further SARA considerations are required. The *Fisheries Act* Authorization does not need to act as a SARA permit but there are still additional SARA requirements to be met as part of the federal environmental assessment process (for more information refer to chapter 7).

At this point in the referral review process, if you determine that a *Fisheries Act* Authorization is not required because operational statements or letters of advice will suffice, you should also conclude that there are no effects on fish or fish habitat, including effects on aquatic species at risk, their residences or critical habitat.

Coming to this conclusion means that there should be little to no risk of contravening the SARA prohibitions and that there is no further requirement to consider SARA.

If you still have concerns about aquatic species at risk, you should reconsider your decision to not issue a section 32 or subsection 35(2) *Fisheries Act* Authorization because in most cases, contravening the three SARA prohibitions does constitute a need for a *Fisheries Act* Authorization.

Fish salvage or collection activities that may require a separate SARA permit are exceptions to this decision process and are discussed later in this chapter.

QUESTION 3. Is there a SARA-compliant recovery strategy or action plan for the species?

SARA requires that recovery strategies and action plans be developed for extirpated, endangered and threatened species listed on SARA Schedule 1. These documents summarize the best available information known about the species, identify the species' critical habitat, to the extent possible, and describe the threats to the species and the best ways to address these threats. When recovery strategies and action plans are available, use them to inform the aquatic effects assessment, risk assessment and risk management phases of the referral review process.

You will find finalized recovery strategies and action plans on the SARA public registry at http://www.sararegistry.gc.ca/species/default_e.cfm. If a strategy or plan has not yet been posted on the registry, consult with your regional HM SARA representative or regional SARA coordinator to see if a draft is available.



QUESTION 4. Is the activity permitted in the recovery strategy, action plan or management plan (subsection 83(4) of SARA)?

At times, recovery strategies, action plans and management plan may exempt certain activities that contravene the SARA prohibitions. Under subsection 83(4) of SARA, activities that would otherwise be prohibited are allowed if they are authorized under a federal Act of Parliament and also stated as allowed within a recovery strategy or an action plan or a management plan.

This means that if a proponent is working under a valid *Fisheries Act* Authorization or an Authorization under another Act of Parliament and the activity is stated to be allowed in a recovery strategy or action plan or management plan for the species, the proponent is exempt from the SARA prohibitions. The *Fisheries Act* authorization would still need to contain any conditions imposed on the activity affecting the species that are specified in a recovery strategy, action plan or management plan for the species and the activity should not jeopardize the survival or recovery of the species.

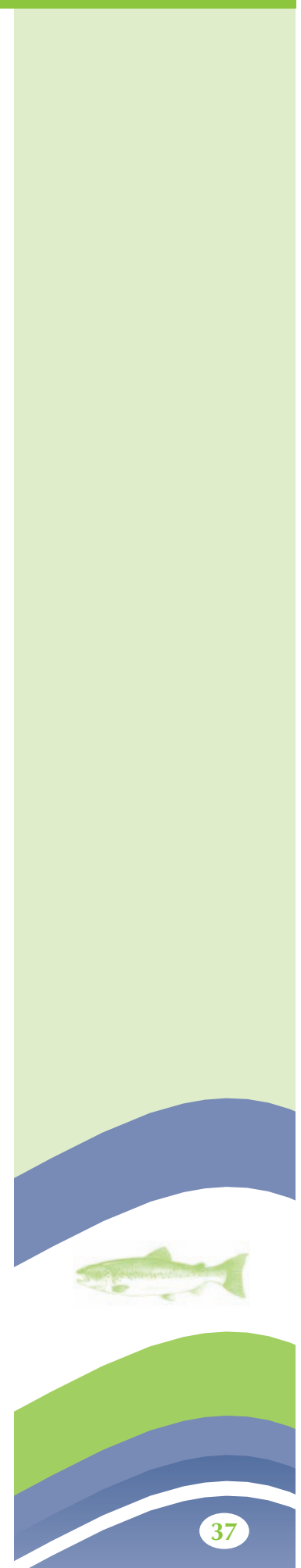
There are two requirements that must be met in order for this exemption to apply.

- 1) The proponent must be authorized under a federal Act of Parliament. This means that the proponent must have a valid section 32 or subsection 35(2) *Fisheries Act* Authorization, or other Authorization under an Act of Parliament; and
- 2) The recovery strategy, action plan or management plan must clearly state that the activity is allowed to occur

If these two requirements are met, the SARA prohibitions do not apply to the proponent engaging in that activity; and the *Fisheries Act* Authorization does not need to act as a SARA permit. However, there are additional SARA requirements that must be met as part of the federal environmental assessment (see chapter 7 for more information).

If the activity does not meet the two requirements in subsection 83(4) of SARA, the activity is not exempt from the SARA prohibitions and all of the conditions in section 73 of SARA must be met prior to issuing the *Fisheries Act* Authorization if the activity is expected to affect threatened or endangered species. Subsection 6.2.2 provides an overview of these conditions.

HM practitioners should note that before recovery strategies and action plans are finalized, they must be reviewed by HM to determine whether there are Authorizations that have been issued to date within the species' range that would be in need of an exemption and should therefore be referenced in the recovery strategy or action plan as activities that are allowed to continue under subsection 83(4) of SARA.



6.2.2. Determining whether a SARA compliant *Fisheries Act* authorization can be issued - the section 73 conditions

Before issuing a *Fisheries Act* Authorization that may affect aquatic species at risk, their residence or critical habitat, Habitat Management practitioners must be sure that all of the conditions set out in subsections 73(2) – (6) and (9) of SARA have been met, as per paragraph 74(a) of SARA.

QUESTION 5. Is the activity one of the activities listed in subsection 73(2) of SARA?

To meet the requirements of subsection 73(2), the activity must fit into one of the following categories:

SARA 73(2)(a) the activity is scientific research relating to the conservation of the species and conducted by qualified persons;

(b) the activity benefits the species or is required to enhance its chance of survival in the wild; or

(c) affecting the species is incidental to the carrying out of the activity

Most *Fisheries Act* Authorizations issued by Habitat Management practitioners are consistent with the condition under paragraph 73(2)(c) of SARA. This is because the purpose of the work or undertaking is not to directly kill or harm species at risk or their habitat, but rather to undertake the work or undertaking. One exception to this case might be habitat enhancement works, which would be covered by the condition under paragraph 73(2)(b) of SARA.

Most referral reviews meet the condition under subsection 73(2) of SARA.

QUESTION 6. Have the pre-conditions in paragraphs 73(3)(a) and (b) of SARA been considered and met?

Paragraph 73(3)(a) of SARA requires that it be demonstrated that all reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted;

Paragraph 73(3)(b) of SARA requires that it be demonstrated that 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.

These requirements are similar to the relocate, redesign, and mitigate options of the referral review process. SARA formalizes this requirement and requires that the alternatives and measures be documented in the SARA public registry, pursuant to subsection 73(3.1) of SARA. More information on the SARA public registry process is provided at the end of this chapter.



QUESTION 7. Has the pre-condition in paragraph 73(3)(c) of SARA been considered and met?

To meet this condition, it must be demonstrated that the proposed development activities will not jeopardize the survival or recovery of the aquatic species at risk.

In order to make this determination, advice may be required from DFO Science Sector in the form of an allowable harm assessment (AHA) or recovery potential assessment (RPA). The AHA or RPA may be stand alone advice or form part of a broader review of species at risk science. The objective of the AHA or RPA is to determine how much harm the species can tolerate and whether the harm resulting from the proposed development falls within these tolerable limits. If the level of residual harm that is predicted to result from the proposed development activity is less than that which is considered to be tolerable under the RPA, taking into account other known activities that may also be affecting the species, then the condition under paragraph 73(3)(c) of SARA can be met and an Authorization may be issued, assuming all of the other conditions are satisfied.

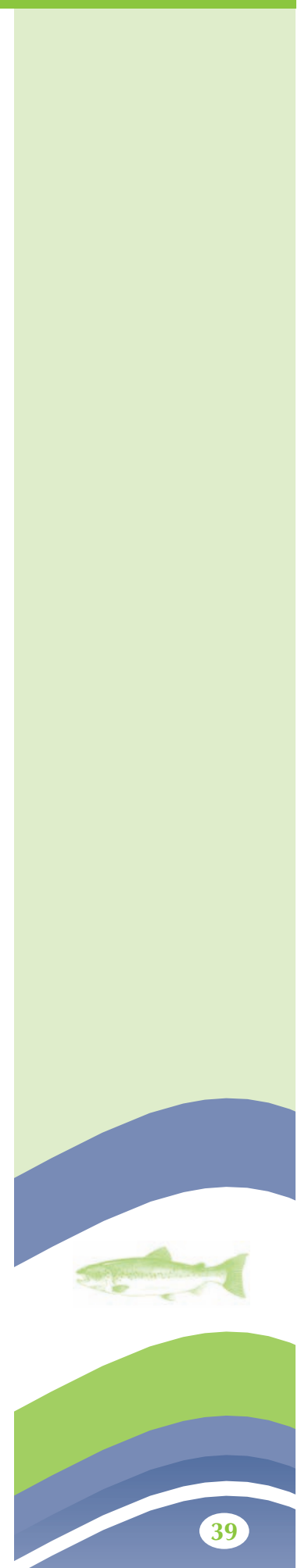
If the RPA indicates that the species cannot tolerate the level of residual harm associated with the activity and mitigation cannot completely eliminate the residual harm, it may be possible to offset negative effects on the species through compensation measures that would enhance the species' chances of survival or recovery. Compensation should only be considered where there are opportunities to provide tangible benefits to the species (e.g., increased productivity or decreased mortality) that would offset the residual incidental harm caused by the work or undertaking sufficiently to ensure that the survival or recovery of the species would not be jeopardized. Compensation measures should be consistent with the RPA and any applicable recovery strategy or action plan. Additional advice from Science may be required. If it is not possible to compensate for residual negative effects that exceed the allowable harm for the species, the Authorization may not be issued because the condition under paragraph 73(3)(c) of SARA cannot be met.

Habitat managers should note that a justification demonstrating that the proposed development will not jeopardize the survival or recovery of the aquatic species at risk must be documented on the SARA public registry. The SARA public registry requirements are addressed in more detail below.

If Science advice is not available regarding allowable harm for the aquatic species at risk in question, consult with your regional HM SARA representative or regional SARA coordinator prior to requesting an AHA.

QUESTION 8. Have the conditions in subsections 73(4) to (6) been considered and met?

Paragraph 74(a) of SARA requires the conditions under subsections 73(4) to (6) of SARA be met, or the *Fisheries Act* Authorization cannot be issued. That is, the Authorization must contain any terms or conditions governing the activity that the competent minister considers necessary for protecting the species, minimizing the impact of the authorized activity on the species or providing for its recovery, under subsection 73(6).



The competent minister must also consult with Wildlife Management Boards if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species and bands under the *Indian Act* if the species is found in a reserve or any other lands that are set apart for the use and benefit of a band under the *Indian Act*, under subsections 73(4) and (5).

If any of these conditions cannot be met, a SARA permit or *Fisheries Act* Authorization that acts as a SARA permit cannot be issued.

After the *Fisheries Act* Authorization has been issued, the competent minister must review the Authorization if an emergency order is made with respect to the species. The competent minister may revoke or amend the Authorization as necessary to ensure the survival or recovery of the species.

QUESTION 9. Will the term of the Authorization be for 3 years or less?

Subsection 73(9) of SARA limits the time span within which *Fisheries Act* Authorizations may act as valid SARA permits to a maximum three years. After three years, an application may need to be made for a new Authorization and a new environmental assessment may need to be undertaken.

In certain cases, it may be possible to exempt the proponent from the three year time limit by exempting the proponent from the SARA prohibitions altogether.

In order for this exemption to be possible, the following two requirements of SARA subsection 83(4) must both be met:

- 1) the recovery strategy or action plan or management plan must clearly state that the activity is allowed to occur and,
- 2) the proponent must be authorized under a federal Act of Parliament. This means that the proponent must be working under a valid section 32 or subsection 35(2) *Fisheries Act* Authorization or an Authorization under another Act of Parliament.

If these two requirements are met, the SARA prohibitions do not apply to the proponent engaging in that activity, there are no further requirements under SARA with respect to aquatic species at risk, and the *Fisheries Act* Authorization does not need to act as a SARA permit. However, the *Fisheries Act* Authorization would need to contain any conditions imposed on the activity affecting the species that would be specified in the recovery strategy, action plan or management plan. There are additional SARA requirements that must be met as part of the federal environmental assessment (see chapter 7 for more information).

If the activity does not meet the two requirements in subsection 83(4), the activity is not exempt from the SARA prohibitions and all of the conditions in section 73 of SARA must be met, including the three year time limit, prior to issuing the *Fisheries Act* Authorization.

Prior to finalizing recovery strategies and action plans, HM practitioners must review any Authorizations that have been issued within the range of the species at risk to determine if any of these Authorizations will continue to be valid for more than three years. If these long-term Authorizations are to be exempt from the three-year limit, they should be referenced in the recovery strategy or action plan as activities that are allowed to continue.



QUESTION 10. Have the SARA public registry requirements been considered and met [subsection 73(3.1)]?

The SARA public registry is the main source of information and documents about SARA including recovery strategies and action plans. It is also a forum for the public to submit comments on proposed SARA policies and listing recommendations. The SARA public registry is completely separate and independent of the CEAA public registry.

Prior to issuing a SARA permit, or a *Fisheries Act* Authorization that will have the same effect as a SARA permit, subsection 73(3.1) of SARA requires that a rationale be posted on the SARA public registry. Habitat Management practitioners are responsible for preparing this rationale for *Fisheries Act* authorizations affecting aquatic species at risk, their residences or critical habitat.

Pursuant to paragraphs 73(3)(a) to (c), the rationale should explain why the Authorization was issued and demonstrate that:

- 1) all reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted;
- 2) 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
- 3) the activity will not jeopardize the survival or recovery of the species.

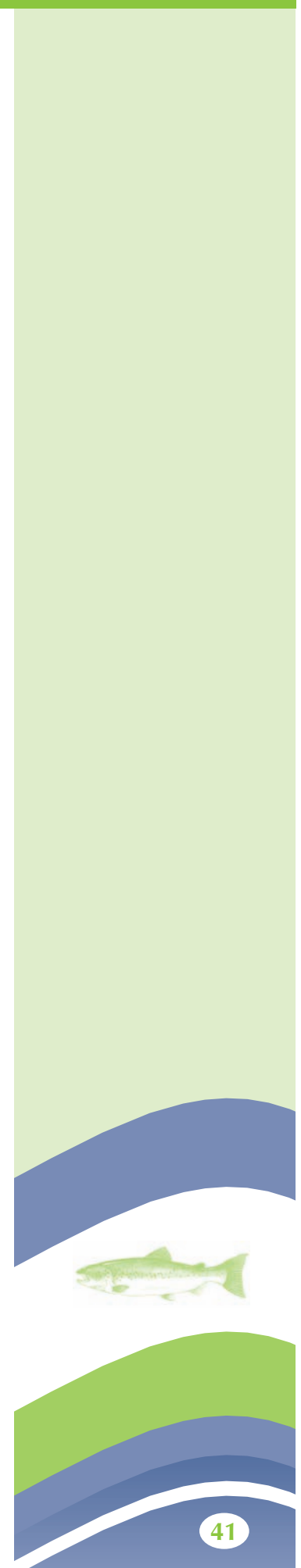
With the assistance of DFO Science, the AHA or a summary of the AHA advice should be incorporated into the rationale to satisfy the third requirement of non-jeopardy. Note that the rationale is required to be signed off at the RDG level before it is posted.

It is important that we track the reasons underlying the decisions to issue Authorizations that affect aquatic species at risk, their residence or critical habitat. The justifications used in determining allowable harm and in issuing the Authorization should be tracked using the PATH system and rolled up by the NHQ PATH Coordinator for submission to the DFO SARA Secretariat.

A field has been made available in the PATH system for cutting and pasting the approved rationale. Once the rationale has been added to PATH, it will be submitted to the SARA Secretariat. A collaborative process between NCR and your region will then be initiated to develop

- a) a public registry-friendly version of the rationale and
- b) depending on the nature of the proposed work or undertaking, develop a briefing note informing the Minister of the specifics of the Authorization and why it is appropriate to issue such an Authorization affecting aquatic species at risk.

DFO's SAR Secretariat will send the finalized justification to Environmental Canada for posting on the SARA public registry. The approvals process may take several weeks and should be initiated as soon as the rationale is available.



6.2.3. Completion of the section 73 conditions

Once all of the conditions in section 73 of SARA have been satisfied, the SARA requirements will have been met and the *Fisheries Act* Authorization can be issued from a SARA perspective.

Habitat Management practitioners should note that an environmental assessment must also be completed and SARA imposes several additional requirements that must be completed as part of the EA. More detail about these requirements will be addressed in chapter 7 where CEAA – SARA requirements are addressed.

Once the environmental assessment is complete and all of the conditions under section 73 of SARA have been met, issue the *Fisheries Act* Authorization using the new SARA template (regulation under development, speak to your HM NHQ SARA rep for more information) that includes SARA wording stating that the *Fisheries Act* Authorization has the same effect as a permit or an agreement under section 73 of SARA.

6.2.4. Other SARA permits issued by DFO, Environment Canada and Parks Canada Agency

6.2.4.1 Other SARA permits issued by DFO

The previous sections have provided an overview of how to issue *Fisheries Act* Authorizations that affect aquatic species at risk, their residence or critical habitat. In some instances, Habitat Management practitioners may be involved in reviewing, providing guidance on or conducting activities that do not require a *Fisheries Act* authorization but that are expected to affect a species at risk and therefore require a SARA permit. Anyone (including proponents, academics, or government employees) undertaking research, beneficial activities, including fish salvage, fish rescues, or other activities in areas where endangered or threatened aquatic species at risk are found may require a SARA permit. Such activities could include mitigation or compensation measures associated with a letter of advice or *Fisheries Act* authorization (e.g., fish salvage activities), or baseline studies associated with an Environmental Assessment.

Under SARA, permits can be issued for scientific research related to the conservation of a species at risk conducted by qualified persons, activities that benefit a species at risk or that are required to enhance its chances of survival in the wild, or activities that affect species at risk incidentally. Unless the activity is to be permitted through a SARA-compliant *Fisheries Act* authorization, the proponent should refer to the DFO SARA permitting website to apply for a separate SARA permit for any such activities expected to affect aquatic species at risk. The website can be found at: http://www.dfo-mpo.gc.ca/species-especes/permits/sarapermits_e.asp. The Regional SARA Coordinators oversee the process for issuing SARA permits.

Before a SARA permit can be issued, the conditions in section 73 of SARA must be met. The onus is on the proponent to do the following:

- Be proactive in their research, or activity design,
- Submit an application for a SARA permit,
- Demonstrate awareness of the provisions of SARA, and;
- Demonstrate that measures are being taken to minimize harm to listed species or its critical habitat or the residence of its individuals and that they have considered all reasonable alternatives to carrying out the activity that would reduce the impact on the species and that the best solution has been adopted.



DFO will then be in a position to review research or activity proposals and determine whether all of the conditions in section 73 have been met and whether a permit may be issued.

Those planning to carry out research or other activities that may impact an aquatic SARA-listed species need to obtain an application for a Section 73 permit from the appropriate Regional SARA Co-ordinator or from the DFO SARA Permit website http://www.dfo-mpo.gc.ca/species-especies/permits/sarapermits_e.asp . The applications should be submitted to the appropriate regional SARA coordinators.

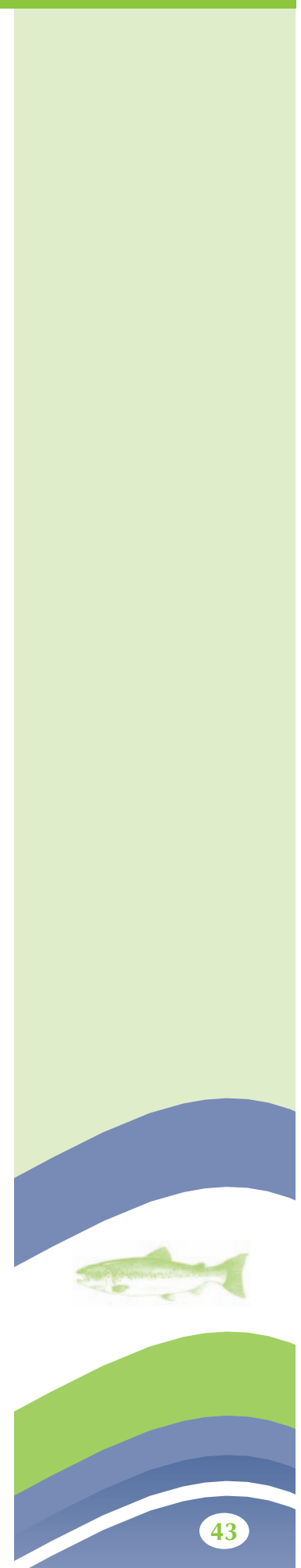
6.2.4.2. Non aquatic listed wildlife species on federal lands or listed wildlife species in national parks or historic sites

If listed migratory birds, other non-aquatic listed wildlife species on federal lands or listed wildlife species in national parks or historic sites are likely to be affected by a proposed development proposal, proponents may be required to seek SARA permits from their regional EC or PCA office under the following circumstances:

- If the wildlife species is listed as an extirpated species, endangered species or threatened species and is a migratory bird protected under the Migratory Birds Convention Act, 1994, the proponent must seek SARA permits from EC.
- If the wildlife species is listed as an extirpated species, endangered species or threatened species and is a non-aquatic species located on federal lands, the proponent must seek SARA permits from EC.
- If the wildlife species is listed as an extirpated species, endangered species or threatened species and is found in or on federal lands administered by the Parks Canada Agency, the proponent must seek SARA permits from PCA.

It is the responsibility of the proponent to determine the need and if necessary apply for SARA permits from Environment Canada and/or Parks Canada. If the issuance of a *Fisheries Act* authorization is not being considered, there is no legal requirement for HMP to consider effects on non-aquatic species. If HMP staff become aware of non-aquatic species at risk, residence or critical habitat in the area impacted by the project, they should suggest that the proponent consult Environment Canada and direct the proponent to the SARA Public Registry for additional information.

It should be noted that if HMP staff become aware of the presence of non-aquatic species at risk and the issuance of a *Fisheries Act* authorization is considered, as part of the federal environmental assessment process, there are several requirements HMP must fulfill. This includes the requirement to notify Environment Canada in writing under section 79 of SARA (refer to Chapter 7).



SARA compliant Fisheries Act authorization decision tool

Part I - Determining whether a SARA-compliant Fisheries Act authorization is needed

Question 1 should be addressed prior to the Aquatic Effects Assessment. The remaining questions in Part I and II should be addressed as part of the aquatic effects assessment, risk assessment and risk management phases of the decision making process.

1. Are listed aquatic endangered, threatened or extirpated species present at or near the proposed development site?

Consult your region's SARA checklist or map, or EC's web mapping tool at http://www.speciesatrisk.gc.ca/map/default_e.cfm, review the status of species on the SARA public registry at http://www.sararegistry.gc.ca/species/default_e.cfm and/or consult with your HM SARA representative or regional SARA coordinator.

Yes

No

No SARA compliant FA authorization is needed

2. Does the proposed activity contravene the main SARA prohibitions?

Is the activity likely to kill, harm or harass a species at risk (s.32), damage or destroy their residence (s.33), or destroy any part of their critical habitat (s.58)?

Yes

No

No SARA compliant FA authorization is needed

3. Is there a SARA-compliant recovery strategy or action plan for the species?

Consult the SARA Public Registry http://www.sararegistry.gc.ca/species/default_e.cfm and/or consult with your HM SARA representative or regional SARA coordinator.

Yes

No

A SARA compliant Authorization may be needed.

4. Is the activity exempt from the SARA prohibitions (pursuant to subsection 83(4))?

Consult the recovery strategy or action plan for the species. For an activity to be exempt from the SARA prohibitions, two requirements must be met:

- 1) The proponent must be authorized under a federal Act of Parliament, (e.g. the proponent must have a valid s.32 or s.s.35(2) Fisheries Act Authorization); and
- 2) The recovery strategy or action plan must clearly state that the activity is allowed to occur.

Yes

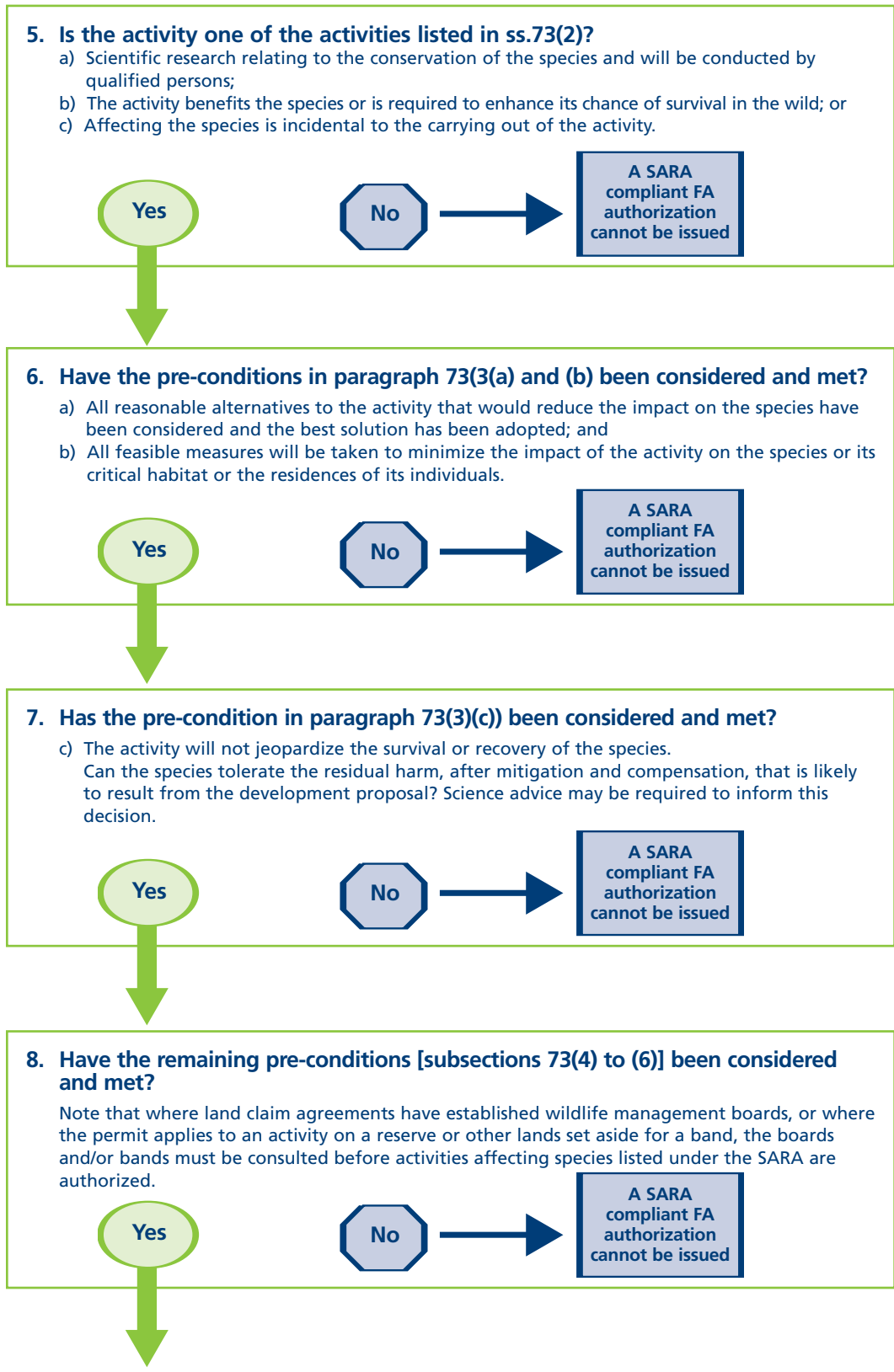
No

Proceed to PART II.



SARA compliant Fisheries Act authorization decision tool

Part II - Determining whether a SARA-compliant authorization can be issued



A SARA compliant authorization is not required.



9. Will the term of the authorization be for 3 years or less [ss.73(9)]?

A SARA compliant Fisheries Act authorization can only be valid for up to 3 years.

Yes

No

A SARA compliant FA authorization cannot be issued. Other options for permitting the activity should be considered.



10. Have the SARA public registry requirements been considered and met [ss.73(3.1)]?

Has the summary of the reasons for issuing the SARA compliant authorization been approved, posted on PATH and sent to EC for posting on the SARA public registry [ss.73(3.1)]?

Yes

No

A SARA compliant FA authorization cannot be issued.



A SARA compliant Authorization **may** be issued. Note that the environmental assessment (EA) must be completed including the additional SARA-CEAA requirements



7.0. SARA and Federal Environmental Assessment

The Species at Risk Act (SARA) contains three provisions that affect the federal environmental assessment (EA) process. They include the:

- Section 137 – amended the definition of "environmental effect" under the *Canadian Environmental Assessment Act* (CEAA);
- Subsection 79(1) – a requirement to notify the competent ministers during an EA if a species at risk is affected by the project under assessment.
- Subsection 79(2) – a requirement to ensure the implementation of mitigation and monitoring of effects on species at risk.

While most EAs for which the Habitat Management Program is responsible are conducted in accordance with the *Canadian Environmental Assessment Act* (CEAA) because of regulatory provisions identified on the *Law List Regulations*, the section 79 provisions of SARA also apply to many federal environmental assessments conducted in Canada under an Act of Parliament. This includes EAs conducted under other federal EA regimes. It should be noted that the remainder of this chapter has been drafted to address the EA process under CEAA because the Habitat Management Program is required to ensure that an EA is conducted under that legislation. This may not be the case for other federal EA regimes and practitioners should be aware of DFO's responsibilities under these other regimes to confirm whether DFO must comply with section 79 of SARA

Note that SARA is not referenced in the *Law List Regulations* under CEAA; therefore, decisions or actions taken under SARA are not, in themselves, CEAA triggers. Note that some actions taken in support of SARA (for example species recovery activities or the issuance of *Fisheries Act* authorizations) could trigger CEAA depending on the role of the federal government as proponent, provider of financial assistance, landowner or regulator.

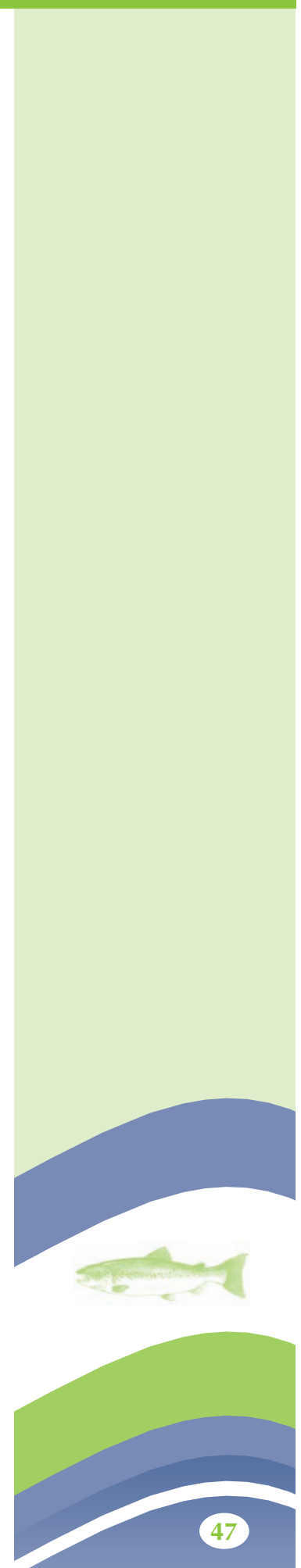
Note that SARA is not referenced in the Law List Regulations under CEAA; therefore, decisions or actions taken under SARA are not, in themselves, CEAA triggers.

The Canadian Environmental Assessment Agency has produced two documents that provide additional guidance on the consideration of SARA within federal environmental assessments. *Addressing Species at Risk Act Considerations under the Canadian Environmental Assessment Act Process*² and the *Environmental Assessment Best Practice Guide for Wildlife at Risk In Canada*³ are both available on the Agency's website⁴.

² *Addressing Species at Risk Act Considerations under the Canadian Environmental Assessment Act Process*

³ *Environmental Assessment Best Practice Guide for Wildlife at Risk In Canada* (February 27, 2004), Canadian Wildlife Service, Environment Canada.

⁴ The Canadian Environmental Assessment Agency www.acee.gc.ca



7.1. DEFINITION OF “ENVIRONMENTAL EFFECT”

When SARA came into effect in June 2003, it contained a provision (Section 137) that amended the definition of environmental effect under CEAA to include effects on a listed wildlife species, its critical habitat or its residences as defined in SARA.

As a result, Habitat Management practitioners must ensure that an EA under CEAA includes consideration of the effects of the project on a listed wildlife species, its critical habitat and the residences of individuals of that species, where the potential exists for any change that the project may cause in the environment. This means that Habitat Management practitioners must ensure the EA report reflects these considerations.

Note that this provision applies to all species listed on Schedule 1, including species of special concern.

7.2. NOTIFICATION OF THE COMPETENT MINISTERS

Subsection 79(1) of SARA states:

“Every person who is required by or under an Act of Parliament to ensure that an assessment of the environmental effects of a project is conducted must, without delay, notify the competent minister or ministers in writing of the project if it is likely to affect a listed wildlife species or its critical habitat.”

This notification requirement applies to all wildlife species listed as extirpated, endangered, threatened, and special concern species in Schedule 1 of SARA, regardless of whether the project is carried out on federal or non-federal lands.

Habitat Management practitioners are required to notify, in writing, Environment Canada (EC) when there is a reasonable expectation that a non-aquatic species at risk will be affected by the project or to notify Parks Canada Agency (PCA) if the project will affect a species that resides in a National Park, Historic Site or other land managed by PCA.

To facilitate this process, these notification letters are to be sent to the same regional contacts at EC or PCA with whom regional Habitat Management practitioners communicate during EAs.

Habitat Management practitioners do not need to notify DFO when aquatic species at risk may be affected by a project. Note that DFO, as the department representing the competent minister for aquatic species at risk (other than those managed by PCA), will receive similar notices from other federal departments when effects to aquatic species at risk (for which the Minister of Fisheries and Oceans is the competent minister) are identified during a federal EA.

7.2.1. Timing of notifications

If DFO, as a responsible authority (RA), determines that a project requiring an EA under CEAA may affect a listed wildlife species or its critical habitat, the SARA notification requirements can be met by sending the SARA subsection 79(1) notification letter, which is available in PATH.

A mechanism in PATH for tracking the issuance and receipt of these letters is under development.



7.3. MITIGATION AND MONITORING REQUIREMENTS

SARA requires that within an EA, if the project is likely to affect a listed wildlife species or its critical habitat, the RA has the obligation to identify the adverse effects of the project on the listed species and its critical habitat and, if the project is carried out, must ensure that measures consistent with any applicable recovery strategy or action plans are taken to avoid or lessen those effects (mitigation measures) and to monitor those effects.

SARA subsections 79(2) and (3) state:

The person must identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, must ensure that measures are taken to avoid or lessen those effects and to monitor them. The measures must be taken in a way that is consistent with any applicable recovery strategy and action plans.

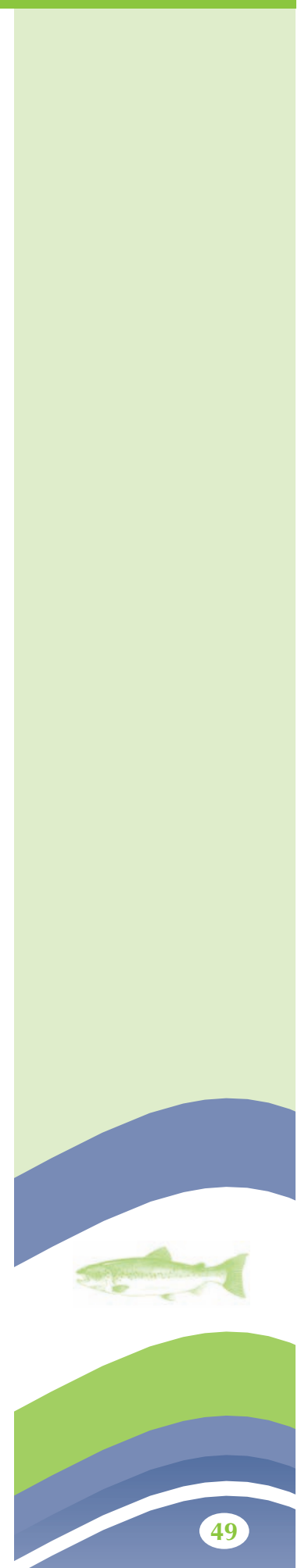
“person” includes an association or organization, and a responsible authority as defined in subsection 2(1) of the Canadian Environmental Assessment Act.

“project” means a project as defined in subsection 2(1) of the Canadian Environmental Assessment Act.

This means that when DFO is an RA, if a project is likely to affect an aquatic or non-aquatic species at risk, DFO is responsible for ensuring that the adverse effects of the project are identified and if the project is carried out, must also ensure that measures (such as mitigation measures) are taken to avoid or lessen those effects and to monitor those effects.

Note that under CEAA, in order for the project to proceed, mitigation measures have to be implemented so that the project is not likely to cause significant adverse environmental effects. However, subsection 79(2) of SARA applies to mitigation measures that must be taken to avoid or lessen all adverse environmental effects, not only the significant ones.

SARA does not specify the content of the monitoring program. It only states that effects on the species at risk must be monitored. The nature of the monitoring, determined under subsection 79(2) of SARA should be compared with the intent of a follow-up program under CEAA to determine if it may be incorporated into the CEAA follow-up program. However, it should not be assumed that the monitoring program under SARA is always a follow-up program under CEAA.



7.3.1. DFO's responsibilities for aquatic species at risk

As an RA, in order for DFO to meet its subsection 79(2) requirements related to aquatic species at risk that are likely to be affected by the project, the following four requirements must be met.

- 1) Effects of project will not jeopardize the survival, recovery of listed extirpated, endangered or threatened species or jeopardize the conservation of species listed as special concern species.**

DFO Science advice may be required to inform this decision. This may take the form of an allowable harm assessment or more informal advice from Science.

- 2) The mitigation and monitoring measures will be undertaken.**

In order for DFO to demonstrate that the mitigation and monitoring measures will be undertaken for the aquatic species at risk, the mitigation and monitoring requirements should be included as conditions of the section 32 or subsection 35(2) *Fisheries Act* authorization (or other authorization/approval).

- 3) The measures are/will be consistent with any applicable recovery strategy or action plan for the listed wildlife species.**

If no recovery strategy and/or action plan has been finalized for a species at risk, then this provision does not apply. However, if a draft strategy or plan is available, it would be prudent to ensure the measures are consistent with the draft, if possible. Note that strategies and plans are available on the SARA Public Registry.

- 4) There is a readiness to apply SARA provisions or other consequences (safety net, emergency orders) in case the mitigation or monitoring is not undertaken.**

DFO should indicate that if the mitigation or monitoring requirements are not undertaken, DFO would be willing to consider invoking the SARA enforcement provisions to promote compliance with the measures.

7.3.2. DFO's responsibilities for non-aquatic species at risk

The above four requirements also apply when DFO is an RA for an EA of a project and the project may affect a species at risk for which the Minister of Fisheries and Oceans is not the competent minister. In order for DFO to minimize its legal risks when applying subsection 79(2) when another species at risk is present and likely to be affected by the project, in all cases, Habitat Management practitioners should secure confirmation in writing from EC, PCA or a provincial or territorial ministry, that the same four requirements will be met. The confirmation of these four requirements should be sought prior to the completion of the EA, i.e., prior to the RA's conclusion on significance of adverse environmental effects.



Note that EC and PCA should be the first point of contact for Habitat Management practitioners when seeking confirmation that these four requirements will be met. EC and PCA should facilitate the process of getting any necessary information or confirmations from the provinces and territories. A more detailed directive for Habitat Management practitioners on how to engage EC and PCA in working with the provinces and territories to meet these requirements is under development.

1) Effects of project will not jeopardize the survival, recovery of listed extirpated, endangered or threatened species or jeopardize the conservation of species listed as special concern species.

Some form of science advice will be required from EC, PCA or the province or territory to determine this for the species at risk.

2) The mitigation and monitoring measures will be undertaken.

In order for DFO to secure confirmation in writing that the mitigation and monitoring measures will be undertaken for the species at risk, the mitigation and monitoring requirements should be included as conditions of a federal, provincial or territorial approval, permit or licence. This means that EC or PCA may include the mitigation for monitoring and mitigation in one of its SARA permits or other licenses. Alternatively, the province or territory may include the mitigation and monitoring measures as conditions as one of its permits or licences.

DFO will not be incorporating mitigation or monitoring measures for non-aquatic species at risk into its *Fisheries Act* authorizations.

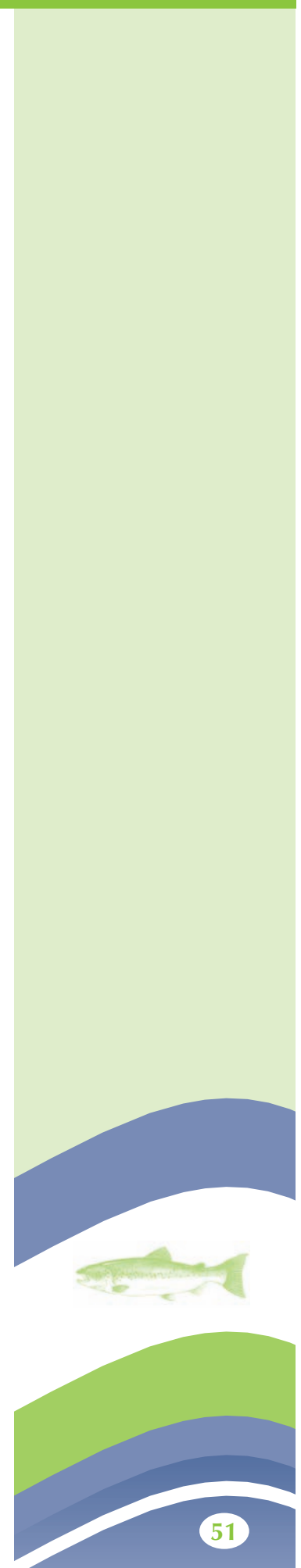
3) The measures are/will be consistent with any applicable recovery strategy or action plan for the species.

If no recovery strategy or action plan has been finalized for a species at risk, then this provision does not apply. However, if a draft strategy or plan is available, it would be prudent to ensure the measures are consistent with the draft, if possible. Note that strategies and plans are available on the SARA Public Registry.

4) There is a readiness to apply SARA provisions or other consequences (safety net, emergency orders) in case the mitigation or monitoring is not undertaken.

EC or PCA should indicate that they would be willing to consider invoking the SARA provisions or other federal provisions to promote compliance with the conditions of their permit or license if the mitigation or monitoring measures are not undertaken.

Likewise, if the mitigation and monitoring requirements are included as conditions of provincial or territorial license or permit, the province or territory may be willing to consider invoking measures to promote compliance as appropriate.



7.4. ADDITIONAL SARA AND EA CONSIDERATIONS

7.4.1. Release of information to the public

Under section 124 of SARA, the Minister of the Environment, on the advice of COSEWIC, may restrict the release of any information required to be included in the SARA public registry if that information relates to the location of a species or its habitat and restricting its release would be in the best interests of the species. Thus, there may be information related to an EA that cannot be placed upon the SARA Public Registry. Confirmation from Environment Canada should be sought with respect to information requiring this protection.

This same protection should be afforded to that information under CEAA for the Canadian Environmental Assessment Registry.

7.4.2. Critical Habitat and EA

Consideration of the effects on the critical habitat of a listed species within an EA can only occur once critical habitat has been identified. Critical habitat identification is required at the stage of the development of the recovery strategy and/or action plan(s) and only "to the extent possible", based upon best available information. It is, therefore, possible that critical habitat of a listed species may not have been identified at the time that an EA is conducted. As such, if there is no critical habitat, there is no ability or requirement to assess the effects on critical habitat in the EA. A specific reference to this fact should be noted in the EA report.

7.4.3. Class Screenings

Under CEAA, a class screening report declared under section 19 may be considered for streamlining DFO's EA responsibilities for projects within the same class of project (i.e. with similar or common characteristics in terms of type, geographical area, proponent, time frames and/or anticipated environmental effects).

Because of the notification requirement in subsection 79(1) and the requirement in subsection 79(2) that mitigation measures and monitoring be taken in a way that is consistent with any applicable recovery strategy and action plans, class screenings may not be an appropriate means to address the environmental effects on species at risk. In most cases, class screening reports specifically indicate this and require that a project-specific EA should be conducted. This will allow for consideration of the SARA requirements related to the species in question.

If a class screening is being used, the requirements of section 79 must still be met.



8.0. Project Activity Tracking for Habitat (PATH) System and SARA

The November, 2006 launch of version 1.6 of the Project Activity Tracking for Habitat (PATH) system included two modifications to incorporate SARA. The emphasis in this version was to include only what is legally required to be tracked and reported on under SARA. The functionality of PATH will be expanded in subsequent versions of PATH.

8.1. SECTION 73 JUSTIFICATIONS

PATH includes a SARA screen used to record justifications for issuing *Fisheries Act* authorizations that may affect species at risk, residence or critical habitat as required under section 73 of SARA. This screen is only available when the user indicates that they may be issuing an authorization. This means that DFO is currently tracking aquatic species at risk issues as they relate to authorizations.

A question box pops up and asks the user if the authorization is likely to affect an aquatic species at risk, residence or critical habitat, and if yes, the SARA screen should be filled in. The screen includes a pick list of aquatic species at risk that are included on the *List of Wildlife Species at Risk* as well as a field for including the RDG-approved rationale for issuing the *Fisheries Act* authorization that affects the aquatic species at risk, residence or critical habitat.

8.2. SECTION 79 EA NOTIFICATION LETTERS

PATH includes a template for the issuance SARA section 79 notification letters within an environmental assessment. Subsection 79(1) of SARA requires every person, association, organization or responsible authority (RA) that is required by federal legislation to ensure that an environmental assessment of a project is conducted, to notify the competent minister (Environment Canada) of the project in writing if it is likely to affect a listed non aquatic species or its critical habitat.

There is a checkbox in the EA screen of PATH that should be checked to indicate that some form of notification was sent to EC regarding the non-aquatic species. In this section, there is also access to the template letter. More specific information on the notification process is included in the SARA and Environmental Assessment chapter of this guide.

8.3. SARA LETTERS OF ADVICE WORDING

The template letters are available in PATH for issuing Letters of Advice that must make reference to aquatic species at risk, their residence or critical habitat.



SARA Section 79. (1)

Every person who is required by or under an Act of Parliament to ensure that an assessment of the environmental effects of a project is conducted must, without delay, notify the competent minister or ministers in writing of the project if it is likely to affect a listed wildlife species or its critical habitat.

(2) The person must identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, must ensure that measures are taken to avoid or lessen those effects and to monitor them. The measures must be taken in a way that is consistent with any applicable recovery strategy and action plans.

9.0. SARA and other federal legislation

9.1. SECTION 79 AND OTHER FEDERAL REGULATORS

Section 79 of SARA imposes two changes on the federal environmental assessment process. This section requires that every person who is required to ensure that an assessment of the environmental effects of a project is conducted must 1) notify the competent minister in writing if a project is likely to affect a listed wildlife species or its critical habitat and 2) identify the adverse effects of the project and ensure that measures are taken to minimise or avoid the effects and monitor them.

Section 79 of SARA applies to every person who is required by or under a federal Act of Parliament to ensure that an assessment of the environmental effects of a project is conducted. These are the responsible authorities (RAs) under the *Canadian Environmental Assessment Act* (CEAA).

Federal regulators (such as the National Energy Board, the offshore petroleum boards, Environment Canada, NRCan, and the Canadian Nuclear Safety Commission) have CEAA triggers for which they are an RA. If a species at risk or critical habitat may be affected by a project, as RAs, the federal regulators must meet the requirements set out in section 79 of SARA.

Activities that require authorization or approval under federal legislation may result in the harmful alteration, disruption, destruction (HADD) of fish habitat. The HADD may require authorization under subsection 35(2) of the *Fisheries Act*. In such cases, DFO is an RA and must fulfil the requirements of section 79 of SARA.

9.2. SECTION 77 AND OTHER FEDERAL REGULATORS

Section 77 of SARA requires that any person or body other than a competent minister, issuing permits or authorizations under a federal Act of Parliament for an activity that may result in the destruction of critical habitat must:

- 1) consult with the competent minister, DFO for aquatic species at risk;
- 2) consider the impacts on the critical habitat;
- 3) consider all reasonable alternatives to the activity and adopt the best solution;
- and
- 4) undertake all feasible measures to minimise the impact on the critical habitat.

Section 77 of SARA applies if permits or authorizations are issued under a federal Act of Parliament for an activity that may result in the destruction of any part of the critical habitat of a listed wildlife species.

Note that section 77 of SARA is not limited to authorizations or approvals that are CEAA triggers, the section applies to any person or body that issues permits authorizations or approvals under federal legislation. It is anticipated that Environment Canada, as administrator of SARA, will assist in co-ordinating the implementation of this provision.

It should be noted that section 58 applies even though a licence, a permit or another authorization has been issued by the federal regulator. This means that if the federal regulator is issuing a permit that may affect species at risk, residence or critical habitat, they may only do so if they have a SARA permit or agreement under section 73 of SARA or *Fisheries Act* authorization as per section 74 of SARA and the preconditions in section 73 have been met.



10.0. SARA and Conservation and Protection

DFO Fisheries Management Conservation & Protection (C&P) officers have been designated as enforcement officers, with the added responsibility of monitoring compliance and enforcing restrictions related to the SARA prohibitions for aquatic species at risk. This may involve monitoring area closures, responding to applications for investigation and ensuring proponents are in compliance. Habitat Management staff support C&P staff as expertise warrants, to gather technical evidence, report on habitat damage and provide “expert witness” testimony.

10.1. ENFORCEMENT OF SARA

SARA enables the Minister of the Environment and the Minister of Fisheries and Oceans to designate officers to enforce it, under subsection 85(1). A competent minister can give a particular person, or person from a group of persons, enforcement powers under SARA. Recognizing that a cooperative approach is essential to achieving the purposes of SARA as they relate to enforcement, future designation of other individuals or groups of individuals will contribute to more efficient use of enforcement resources.

For the purposes of this Act, Section 85(4) gives designated SARA enforcement officers the powers of a peace officer, set out in the Criminal Code. These powers include the power to obtain a search warrant, to seize things that are reasonably believed to be connected to the commission of an offence, to make an arrest and to lay a charge against a person who is alleged to have violated SARA.

Section 97 of SARA lays out the offences and punishments for people that contravene the prohibitions in SARA. The approach in SARA is to use alternative and preventative measures to promote compliance with the law. Encouraging voluntary compliance through public education, consultations and good stewardship is an important step in achieving compliance. When a person violates the Act, penalties of fines and imprisonment may be imposed. All offences under SARA are hybrid offences. Depending on the severity of the alleged offence, the crown can choose to proceed either by summary conviction (regulatory offence) or by indictment for more serious offences. The penalties are as follows:

- for a summary conviction offence
 - corporation: a maximum fine of \$300,000
 - non-profit corporation: a maximum fine of \$50,000
 - any other person: a maximum fine of \$50,000 and a maximum prison term of one year
- for an indictable offence
 - corporation: a maximum fine of \$1,000,000
 - non-profit corporation: a maximum fine of \$250,000
 - any other person: a maximum fine of \$250,000 and a maximum prison term of five years

SARA Section 77. (1)
Despite any other Act of Parliament, any person or body, other than a competent minister, authorized under any Act of Parliament, other than this Act, to issue or approve a licence, a permit or any other authorization that authorizes an activity that may result in the destruction of any part of the critical habitat of a listed wildlife species may enter into, issue, approve or make the authorization only if the person or body has consulted with the competent minister, has considered the impact on the species' critical habitat and is of the opinion that (a) all reasonable alternatives to the activity that would reduce the impact on the species' critical habitat 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' critical habitat.

(2) For greater certainty, section 58 applies even though a licence, a permit or any other authorization has been issued in accordance with subsection (1).



- Based on an Agreement between competent ministers and the Attorney General, alternative measures can be used in lieu of a criminal court trial for infractions under SARA. They can be used when there is evidence of an offence and an information (which describes the offence and the alleged offender) has been laid. Instead of proceeding to court, the person named in the information as having allegedly committed the offence can, in certain situations, negotiate an 'alternative measures' agreement with the Attorney General. Alternative measures can only be used when the person accepts responsibility for the act or omission that is the basis of the offence.

10.2. INVESTIGATIONS

Section 93 of SARA outlines a mechanism for individuals from the public to request an investigation which will assist officers to determine if an alleged violation has occurred. This provision enhances the accountability and transparency of the Act. It recognizes that all Canadians have a role to play in protecting species at risk and facilitates the enforcement of the Act. Section 93 gives individuals (Canadian residents over the age of 18), not corporations, the right to ask for an investigation.

The competent minister (Director of Enforcement for Conservation and Protection) is required to acknowledge receipt of an application for investigation within 20 days. The request will subsequently be reviewed, and a decision made by the competent minister (Director of Enforcement for C&P) whether or not to proceed with an investigation. Should the competent minister decide not to follow-up on the request for an investigation, notice of the decision, with reasons, must be given to the applicant within 60 days after the application is received. Notice need not be given if an investigation in relation to the alleged offence is ongoing, since informing the applicant of an ongoing investigation could potentially compromise the investigation. Once the investigation is concluded, the competent minister must prepare a written report for the applicant, and each person whose conduct was investigated, outlining the information obtained during the investigation, any reason for its conclusion and the action, if any that the competent minister has taken or proposes to take.

The Conservation and Protection (C&P) designated SARA enforcement officer will be the lead in the investigation of alleged offences under SARA. Habitat Management staff may support C&P staff as expertise warrants in fish habitat related investigations through the provision of expertise, gathering technical evidence, reporting on habitat damage and providing "expert witness" testimony in prosecutions.



11.0. The SARA Public Registry

The SARA Public Registry is an electronic (web-based) system set up to increase public understanding of SARA, to facilitate access to documents relating to SARA, to provide current information on the status of SARA activities and to facilitate public participation in the consultation process. Environment Canada is responsible for the administration, development and maintenance of the registry and DFO and Parks Canada Agency are to provide information to support the registry.

Note that the SARA Public Registry is completely independent and separate from the CEAA Public Registry.

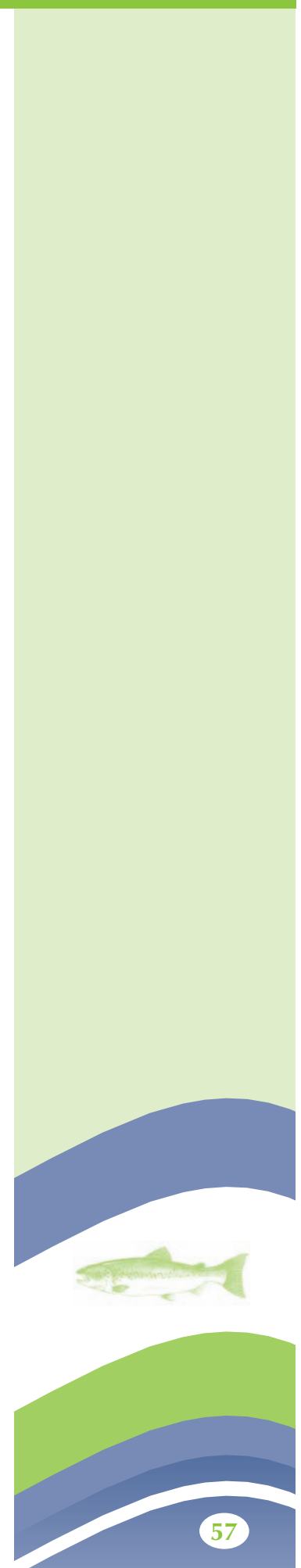
The SARA Public Registry is a web-based information system that will provide:

- A comprehensive on-line source of current public information relating to activities and instruments under SARA (i.e. Regulations, Orders, etc.);
- A user-friendly tool for providing comments to ongoing public consultations.
- An accountability mechanism - fulfilling the legal requirements of reporting, consulting and transparency of the Act
- A tracking tool - tracking development and implementation of SARA instruments an analytical and integrative tool facilitates public consultations and adds value to Canada Gazette, builds on other databases, etc.
- An outreach tool - makes Canadians aware of SARA activities in a comprehensive manner

HMP staff use the SARA Public Registry and direct proponents to the registry to access recovery strategies, actions plans, management plans and COSEWIC status reports. There is only one component of the SARA Public Registry that HMP staff are required to submit. Section 73 of SARA provides for the issuance of authorizations that affect listed wildlife species, or any parts of its critical habitat or the residences of its individuals, as long as a series of strict preconditions can be met. Subsection 73(3.1) requires that explanations and justifications demonstrating that these preconditions have been met be posted on the SARA Public Registry.

Specifically, subsection 73(3.1) requires the posting of an explanation of why an agreement, permit or authorization was issued authorising a person to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals, taking into account the matters referred to in paragraphs 73(3)(a), (b) and (c). This explanation must demonstrate that all reasonable alternatives to the activity that would reduce the impact on the species, have been considered and the best solution has been adopted; all feasible measures will be taken to minimise the impact of the activity on the species or its critical habitat or the residences of its individuals; and that the activity will not jeopardize the survival or recovery of the species.

For HMP, these justifications will be tracked using the SARA screen in PATH and rolled up by the NHQ PATH coordinator for submission to the DFO SARA Secretariat. The DFO SARA Secretariat will then send the justification over the Environmental Canada for posting on the SARA Public Registry.



Appendix 1. Key Definitions

Aquatic species (SARA section 2)

A wildlife species that is a fish, as defined in section 2 of the *Fisheries Act*, or a marine plant, as defined in section 47 of that Act.

Competent minister (SARA section 2)

- (a) the Minister responsible for the Parks Canada Agency with respect to individuals in or on federal lands administered by that Agency;
- (b) the Minister of Fisheries and Oceans with respect to aquatic species, other than individuals mentioned in paragraph (a); and
- (c) the Minister of the Environment with respect to all other individuals.

Critical habitat (SARA section 2)

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 the recovery strategy or in an action plan for the species.

Endangered species (SARA section 2)

A wildlife species that is facing imminent extirpation or extinction.

Extirpated species (SARA section 2)

A wildlife species that no longer exists in the wild in Canada, but exists elsewhere in the wild.

Federal land (SARA section 2)

- (a) land that belongs to Her Majesty in right of Canada, or that Her Majesty in right of Canada has the power to dispose of, and all waters on and airspace above that land;
- (b) the internal waters of Canada and the territorial sea of Canada; and
- (c) reserves 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.

Fish (Fisheries Act section 2)

- (a) parts of fish,
- (b) shellfish, crustaceans, marine animals and any parts of shellfish, crustaceans or marine animals, and
- (c) the eggs, sperm, spawn, larvae, spat and juvenile stages of fish, shellfish, crustaceans and marine animals;

Fish habitat (Fisheries Act section 34(1))

“fish habitat” means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes;



Habitat (SARA section 2)

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

Marine plant (*Fisheries Act* section 47)

Marine plants include all benthic and detached algae, marine flowering plants, brown algae, red algae, green algae and phytoplankton.

Residence (SARA section 2)

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

Species at Risk (SARA section 2)

An extirpated, endangered or threatened species or a species of special concern.

Species of special concern (SARA section 2)

A wildlife species that may become a threatened or an endangered species because of a combination of biological characteristics and identified threats.

Threatened species (SARA section 2)

A wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction.

Wildlife species (SARA section 2)

A species, subspecies, variety or geographically or genetically distinct population of animal, plant or other organism, other than a bacterium or virus, that is wild by nature and

- (a) is native to Canada; or
- (b) has extended its range into Canada without human intervention and has been present in Canada for at least 50 years.

