

SAR Policy 4.1

Habitat protection for
endangered, threatened and
extirpated species under the
Endangered Species Act, 2007.

July 22, 2008

Ministry of Natural Resources

Species at Risk Section
Fish and Wildlife Branch
Natural Resources Management Division



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INTRODUCTION

The Endangered Species Act, 2007 (“ESA 2007”) came into effect on June 30, 2008. Ontario now has the most comprehensive species protection legislation in North America.

Three key features define the ESA 2007. First, the Act emphasizes the importance of science in making decisions about the protection of species at risk. Second, the Act includes flexibility tools to create opportunities for both human activity (that would otherwise be prohibited) and species protection. Third, the Act recognizes the importance of both species protection and habitat protection.

Several factors contribute to the loss of species, including habitat loss, invasive species, disease, and climate change. Habitat loss (including loss due to human activities) is a key contributing factor to the decline of many species, making habitat protection essential to the implementation of the ESA 2007. This policy explains how the habitat provisions found in the ESA 2007 will be implemented. It is intended to guide MNR staff with the identification and protection of the habitat of endangered and threatened species under the Act.

This policy also outlines the government’s commitment to transparency and consultation in matters related to habitat protection.

1.0 PURPOSE

The purpose of this policy is to provide direction to the Ministry of Natural Resources (MNR) relating to habitat protection for endangered, threatened and extirpated species under the ESA 2007.

This policy is divided into different sections. Definitions of key terms used in this policy are provided in section 2.0. Additional explanations of key terms are presented in Bulletin 4.2 (*Explanation of key terms relating to habitat identification, description and protection under the Endangered Species Act, 2007*). The background information section of this policy (section 3.0) provides the context of habitat protection under the ESA 2007.

The policy section (4.0) has been organized into five parts: General Policies, Policies Regarding Public Engagement, Policies Regarding Aboriginal Engagement, Policies Regarding the General Definition of Habitat and Policies for Developing Species-specific Habitat Regulations.

Although habitat protection is a central feature of the ESA 2007, the Act includes several other approaches to promote the survival and recovery of threatened, endangered, and extirpated species, such as recovery strategies (section 11),

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the establishment of the Species at Risk in Ontario Stewardship Program (section 47), stewardship agreements (section 16), habitat protection orders (section 28) or through the conditions of a permit issued under section 17. These topics are addressed in separate policies, procedures and programs.

2.0 DEFINITIONS

In this policy,

“general habitat protection” means the legal protection automatically applied to the habitat of a species, through the general definition of habitat in clause 2(1)(b) of the ESA 2007, when it is listed on the Species at Risk in Ontario List as an endangered or threatened species;

“habitat” means,

(a) with respect to a species of animal, plant or organism for which a regulation made under clause 55(1)(a) is in force, the area prescribed by that regulation as the habitat of the species, or

(b) with respect to any species of animal, plant or other organism, an area on which the species depends, directly or indirectly, to carry on its life processes, including life processes such as reproduction, rearing, hibernation, migration or feeding,

and includes places in the area described in clause (a) or (b), whichever is applicable, that are used by members of the species as dens, nests, hibernacula or other residences; [S.2(1)]

For greater certainty, clause (b) does not include an area where the species formerly occurred or has the potential to be reintroduced unless existing members of the species depend on that area to carry on their life processes [S.2(2)].

For the purposes of clause (a), a regulation prescribing the habitat of a species may prescribe areas where the species lives, used to live or is believed of be capable of living [S.55(3)(b)].

“listed species” means any species listed on the Species at Risk in Ontario List in the regulation made under section 7 of the ESA 2007;

“recovery strategy” means a strategy prepared under section 11 of the ESA 2007 for the recovery of a species;

“species-specific habitat regulation” means a regulation made under clause 55(1)(a) of the ESA 2007 that prescribes the habitat of a species listed on the Species at Risk in Ontario List for the purposes of clause 2(1)(a);

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“Species at Risk in Ontario List (“SARO List”)” means the regulation made under section 7 of the ESA 2007 that provides the official status classification of species at risk in Ontario.

3.0 BACKGROUND

Habitat Loss as a Threat to Species at Risk

Throughout the world, species of animals, plants and other organisms are being lost forever at an alarming rate. The loss of these species is most often due to human activities, especially activities that damage or destroy their habitats. One of the primary purposes of the ESA 2007 is to protect species that are at risk and their habitats.

How Habitat is Defined and Protected

Section 10 of the ESA 2007 prohibits the damage or destruction of the habitat of species identified as endangered or threatened on the SARO List, subject to transition provisions for certain species in the first 5 years.

Under the ESA 2007, “habitat” is defined as either an area on which a species depends directly or indirectly to carry on its life processes (based on the general definition in clause 2(1)(b) of the Act) or the area prescribed for the species in a habitat regulation (clause 2(1)(a)). Only one definition will apply to a species at any given time. Therefore the habitat that is protected for any given species will either be the habitat based on the general definition in the Act or the habitat prescribed for that species in regulation. Once a habitat regulation is in place, the habitat for that species is as described in the regulation.

General habitat protection is intended to provide immediate habitat protection to allow for the continued persistence of the species until a more precise evaluation of the habitat needs of the species is completed and habitat is identified in a species-specific habitat regulation. The same prohibition against damage or destruction provided by section 10 of the Act applies to both general habitat and regulated habitat.

The general definition of habitat applies to:

1. Species added to the SARO List after June 30, 2008 as threatened or endangered species. The general definition of habitat will apply until a species-specific habitat regulation is passed.
2. The 42 endangered species that were regulated under the previous Endangered Species Act (listed in schedule 1 of the ESA 2007). These

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species will also receive habitat protection based on the general definition of habitat until a species-specific habitat regulation is passed.

There are special transition provisions for species that were assessed as endangered or threatened before the first reading of the ESA 2007 (species listed in Schedules 3 and 4 of the ESA 2007) but were not regulated under the previous Endangered Species Act. For these species, general habitat protection will not apply for 5 years after the ESA 2007 comes into effect. On June 30, 2013, general habitat protection will apply to these species, unless a habitat regulation for the species is made before then (Appendix 6.1).

Species-specific Habitat Regulations

A habitat regulation prescribes an area as the habitat of the species (by describing boundaries, features of an area, or describing the area in any other manner) [S.55(3)(a)]. The regulated area may be smaller or larger than the area described as general habitat [S.55(3)(c)]. The goal of species-specific habitat regulations is to protect habitat and help ensure the survival and recovery of endangered and threatened species.

In regulating the habitat of a protected species, the Act requires the Minister to consider any recovery strategy that has been prepared for the species and any statement of intended actions that has been published by the government in response to the strategy [S.55(2)].

If the Minister is of the opinion that a habitat regulation is likely to jeopardize the survival of the species in Ontario or to have any other significant adverse effect on the species, or that the regulation is likely to result in a significant reduction in the number of members of the species that live in the wild in Ontario, the ESA 2007 requires the Minister to consult an expert on the species and to undergo additional public consultation as described in section 57 and to consider alternatives [S.57]. The Act requires that the Minister not propose the regulation if he/she is of the opinion that it will result in the loss of the species in the wild in Ontario. The Ministry will ensure that documentation in regard to any such consideration and decision is maintained on file.

Requirements to Propose Habitat Regulations

When new species are added to the SARO List as endangered or threatened after June 30, 2008, the ESA 2007 requires the Minister to develop species-specific habitat regulations. MNR intends to use species-specific habitat regulations to provide, where possible, greater clarity and certainty and therefore better protection of habitat for the survival and recovery of the species. Species-specific habitat regulations may include historically occupied and other recovery habitat.

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The ESA 2007 requires that proposals for species-specific habitat regulations for newly listed species be published within 2 years of listing on the SARO List for endangered species, and within 3 years of listing for threatened species [S.56(2)] (see Appendix 6.2). There are no timelines in the legislation for proposals for species-specific habitat regulations to be made for the 128 species that are listed in Schedule 1, Schedule 3 and Schedule 4 [S.56(3)].

The Minister will post a notice on the Environmental Registry that the preparation of the habitat regulation of a species will be delayed if additional time is needed [S.56(1)(b)] or if a habitat regulation is not required (limited to the circumstances in the Act) [S.56(1)(c)].

Accord for the Protection of Species at Risk in Canada and the Federal Species At Risk Act (SARA)

Ontario is a signatory to the Accord for the Protection of Species at Risk in Canada. This agreement further acknowledges Ontario's commitment to working together with other provinces and the federal government to provide legal protection to endangered and threatened species and their habitats.

The federal government provides legal protection of nationally listed species at risk under the SARA. With the passage of the ESA 2007, Ontario will continue its commitment to working with federal agencies to protect species at risk and the habitat necessary for the survival and recovery of endangered and threatened species.

Binding on the Crown

The prohibition against damaging or destroying habitat is binding on the Crown, except for activities undertaken by the MNR that assist in the protection or recovery of a species on the SARO List.

4.0 POLICY

The policy section has been organized into five parts:

- General Policies (4.1)
- Policies Regarding Public Engagement (4.2)
- Policies Regarding Aboriginal Engagement (4.3)
- Policies Regarding the General Definition of Habitat (4.4)
- Policies for Developing Species-specific Habitat Regulations (4.5)

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4.1 General Policies

Based on Science and Transparency

The identification and description of habitat will be science-based and will follow an accountable and transparent process. Identification and description of habitat will be definable and defensible.

Best Available Scientific Information

To increase certainty about the area protected under the Act, habitats for species will be described by MNR using the best available scientific information. This may include information obtained from community knowledge and Aboriginal traditional knowledge. Habitat descriptions will be amended as new and credible information becomes available.

Using the precautionary principle as noted by the United Nations Convention on Biological Diversity, lack of full scientific certainty should not be used as a reason for postponing decisions to identify and describe habitat when there is a significant threat to the species. In cases where information is lacking, a higher priority will be given to refining habitat descriptions for species most at risk due to habitat loss. Impacts to social and economic activities will also be considered when prioritizing the need to gather better scientific information to refine habitat descriptions.

Sensitive Information

Sensitive information about species that could reasonably be expected to lead to further loss of the species (e.g., harvesting of desirable species) will not be disclosed in habitat descriptions that are made available to the public by MNR.

Harmonizing and Streamlining with Existing Habitat Processes

MNR is committed to harmonizing and streamlining habitat protection under the ESA 2007 with existing municipal, provincial and federal processes that protect habitat provided they are consistent with the intent and direction of the ESA 2007. MNR will work cooperatively with federal agencies to protect habitat that occurs on federal lands.

4.2 Policies Regarding Public Engagement

Stewardship will be recognized, encouraged and supported. MNR will work with affected landowners, land managers and stakeholders to achieve protection of

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habitat while still allowing activities to continue that do not compromise the sustainability or integrity of the habitat on which the species depends.

To the extent possible, MNR will provide greater certainty to affected landowners, land managers and stakeholders by clarifying the areas protected as habitat under the ESA 2007 and the types of activities that may lead to habitat damage or destruction.

There will also be opportunities for broader public engagement in accordance with obligations under the Environmental Bill of Rights.

4.3 Policies Regarding Aboriginal Engagement

MNR is committed to meeting its Constitutional obligations with respect to Aboriginal peoples and will continue to meet and consult with Aboriginal groups and communities regarding the ESA 2007.

MNR is committed to working with and informing Aboriginal peoples in developing and implementing habitat identification, description, and protection of species at risk and accommodating Aboriginal interests when possible while ensuring species recovery and protection.

4.4 Policies Regarding the General Definition of Habitat

Locations at which General Habitat Protection Applies

General habitat protection includes any lands, waters, natural features or human-created features upon which a species depends directly or indirectly to carry out its life processes. General habitat protection does not include an area where the species formerly occurred (historically occupied habitat) or has the potential to be reintroduced (recovery habitat) unless existing members of the species depend on that area to carry on their life processes.

Habitat Descriptions

MNR will develop species-specific habitat descriptions that are consistent with the definition of habitat in the Act to provide technical information on the habitat requirements of a species, as well as guidance on identifying its habitat on the ground. Habitat descriptions will address the length of time that a species will still be considered to occur in an area, despite its real or apparent absence.

Habitat descriptions for endangered and threatened species added to the SARO List after June 30, 2008 will be published on the MNR Species at Risk website as

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soon as possible after a species is added in regulation to the SARO List. Habitat descriptions for the 42 endangered species on Schedule 1 will also be prepared as above by MNR and published on its Species at Risk website as soon as possible.

Boundary Delineation

As required and depending on the risk to the species and relevance to existing human activities, a method for delineating the boundaries of the habitat in a consistent fashion and on a site-specific basis may also be developed and made available by MNR. This method will be based on the best scientific information available. An existing method to delineate habitat boundaries for a species may be adopted if MNR determines that it is consistent with the habitat definition of the Act.

Landowner, Land Manager and Stakeholder Notification

To the extent practical, MNR will endeavour to notify affected landowners, land managers, and planning agencies about general habitat protection to increase certainty about the habitat protected and to encourage and support stewardship activities required for effective habitat protection.

In this context, and to the extent practical,

- Affected landowners and land managers will be notified by MNR that habitat for an endangered or threatened species has been identified on their property.
- Priority will be given to contacting landowners and land managers with known occurrences of the species on their lands. Direct contact (e.g., letters, phone calls, site visits) is preferred, but other methods (e.g., newspaper ads, press releases, presentations to target groups) will be considered when direct contact is not feasible (e.g., many landowners).
- In cases where habitat at a site with known occurrences extends onto adjacent properties, the landowners or land managers of those properties may also be contacted. Decisions to contact these landowners or land managers will be based on considerations such as the level of certainty that habitat for the species occurs on the property, the level of risk to the species, and the potential impact of current land uses. Notification of these landowners or land managers may occur over a longer period after the species has been added to the SARO list.

Concurrently, and to the extent practical, relevant planning agencies (e.g., municipalities, conservation authorities) will also be notified that habitat for an endangered or threatened species occurs within their jurisdiction.

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Consideration will be given to notifying other stakeholders, in addition to landowners, land managers and planning agencies, if they are directly affected by the habitat prohibitions for a newly endangered or threatened species.

4.5 Policies for Developing Species-specific Habitat Regulations

Given the central role of habitat protection in species conservation, Ontario is committed to developing species-specific habitat regulations with the goal of protecting habitat that promotes the survival and recovery of endangered and threatened species.

Method of Describing Habitat in a Regulation

Under the ESA 2007, the habitat of a species may be described in a regulation by,

- Describing specific boundaries for the area (e.g., mapping or referencing jurisdiction boundaries),
- Describing the features of the area (e.g., describing the type of habitat that is being protected), or
- Describing the area in any other manner.

The method used to describe the habitat in a regulation will depend on the species' needs and the type of information available.

Area that may be included in a Habitat Regulation

Because the MNR intends to use species-specific habitat regulations to provide, where possible, greater clarity and certainty and therefore better protection of habitat for the survival and recovery of the species, habitat described in a regulation made by the government would typically include the habitat where the species occurs, and may include areas where the species is believed to be capable of living. An area where the species is believed to be capable of living is potentially suitable recovery habitat intended to contribute to the recovery of the species. It may include historically occupied habitat or areas identified as potential habitat (e.g., through spatial modelling). The suitability of recovery habitat included in a habitat regulation will be verified to ensure there is a good probability that it would contribute to the recovery of the species.

The area prescribed in a regulation as habitat for the species may be larger, smaller or approximately the same as the area protected under the general definition of habitat. During the regulation making process, the government will consider the area protected under the general definition of habitat, the best available scientific information on the species, the recovery strategy, the

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government response statement to the recovery strategy and the social and economic implications of habitat regulation.

In some cases, the best approach to protecting habitat may be to use a multi-species, ecosystem or landscape based approach.

Features that were created by humans may be included in the habitat regulations made under the Act. Decisions on whether to include these features will be based on their importance to the protection and recovery of the species and will consider their original purpose and current use. When the uses of human-created features are compatible with habitat protection (i.e. they do not damage or destroy habitat), then these uses can continue in an area prescribed as habitat. Where MNR considers it appropriate, stewardship agreements will be used as part of an overall approach to protect human-created features of habitat.

Timelines for making Regulations

While there is no legal deadline for proposing species-specific habitat regulations for species listed in Schedules 1, 3 and 4 under the ESA 2007, MNR will make every reasonable effort to propose such regulations for the highest priority species on those schedules by June 30, 2013.

The ESA 2007 identifies timelines within which the Minister must give public notice regarding a proposal to make a species-specific habitat regulation for a species added to the SARO List as endangered or threatened after June 30, 2008 (see Background section). The MNR will make every reasonable effort to meet these legislated timelines.

Habitat regulations will be amended as needed to accommodate newly discovered habitat, habitat protected by a habitat protection order, or other relevant considerations.

Habitat Regulations for Extirpated Species

The government may make a habitat regulation for an extirpated species (clause 55(1)(a)), although it is not required by the ESA 2007. MNR will decide whether to propose such a regulation on a case-by-case basis, considering such factors as the recommendations contained within recovery strategies, the likelihood of a successful species reintroduction and the availability of suitable habitat.

Landowner, Land Manager and Stakeholder Contact

Contact with affected landowners and land managers will build on the relationship established during the period of applying general habitat protection.

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To the extent possible, any known affected landowners or land managers that have been newly identified will also be contacted by MNR.

Landowners and land managers will be encouraged to participate in the development of species-specific habitat regulations through discussions about habitat and the activities that they undertake on their land.

To the extent practical, all known affected landowners and land managers will be given an opportunity to review and provide comment on the proposal regarding habitat to be protected for a given species (or group of species) prior to the proposal being posted on the Environmental Registry for public comment. The same landowners and land managers will be contacted a second time to notify them of the approved habitat regulation.

Other stakeholders in addition to landowners and land managers may be consulted if there is a high interest in the species.

5.0 REFERENCES

5.1 Legal References

- Endangered Species Act, 2007
 - Clause 2(1)(a),(b) – “habitat” definition
 - Section 10 – prohibition on damage to habitat
 - Section 52 – information that could lead to contravention
 - Clause 55(1)(a) – habitat regulations
 - Subsection 55(2) – consideration of recovery strategy
 - Subsection 55(3) – description of habitat
 - Clause 55(3)(c) – may prescribe an area that is smaller or larger
 - Clause 56(1)(b) – additional time is required to prepare proposal
 - Clause 56(1)(c) – Minister is of the opinion that no regulation is required
 - Subsection 56(2) – time period
 - Subsection 56(3) – application under 7(7)(a),(c), or (d)
 - Section 57 – special requirements for certain regulations
- O. Reg. 230/08 – SARO List

5.2 Related references

SAR Bulletin 4.2. Explanation of key terms relating to habitat identification, description and protection under the Endangered Species Act, 2007. Ministry of Natural Resources.

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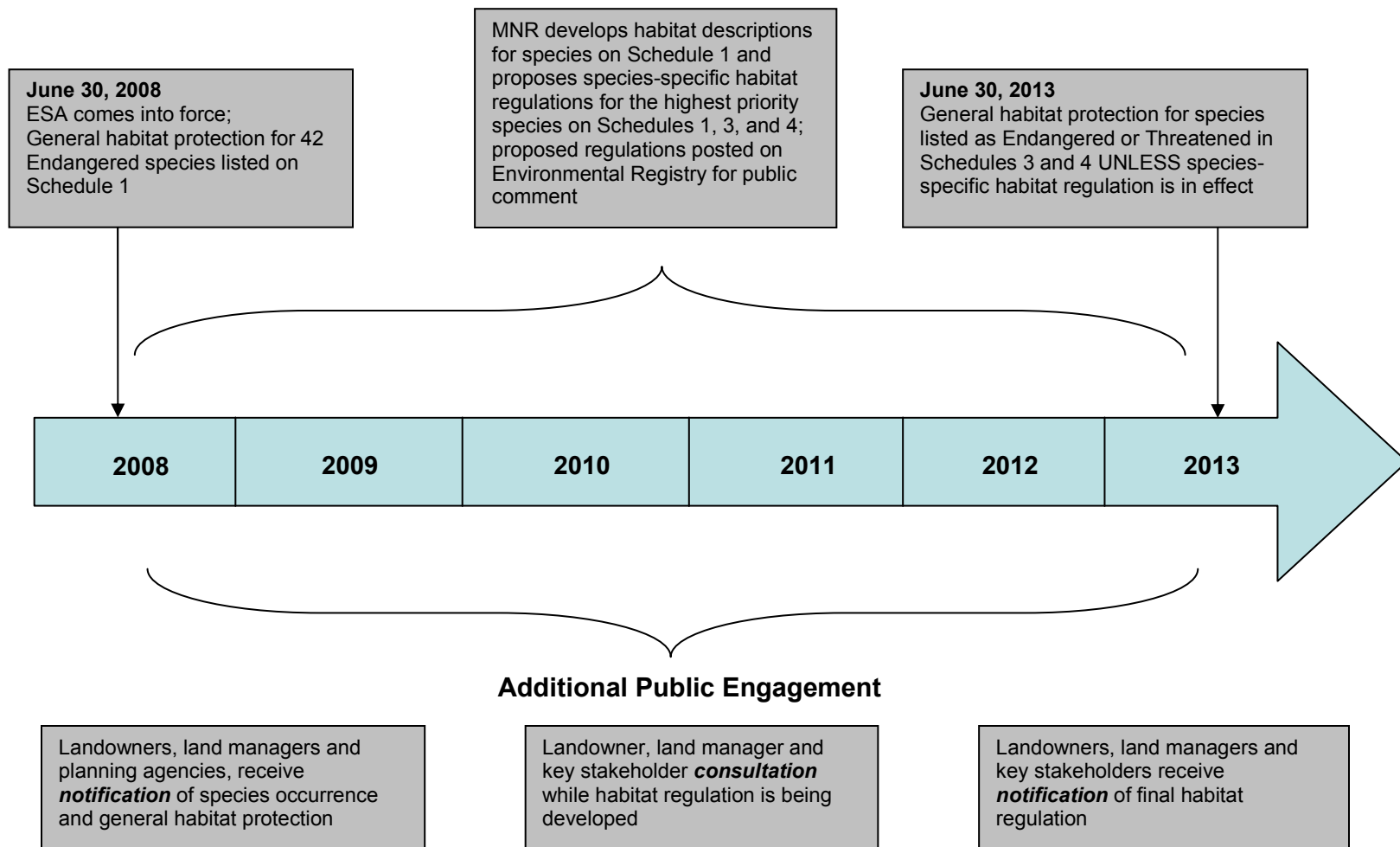
Procedure for developing habitat regulations for the protection of endangered, threatened, and extirpated species under the Endangered Species Act, 2007 (in preparation). Ministry of Natural Resources.

Procedure for the general habitat protection of endangered and threatened species under the Endangered Species Act, 2007 (in preparation). Ministry of Natural Resources.

Procedure for habitat protection orders (in preparation). Ministry of Natural Resources.

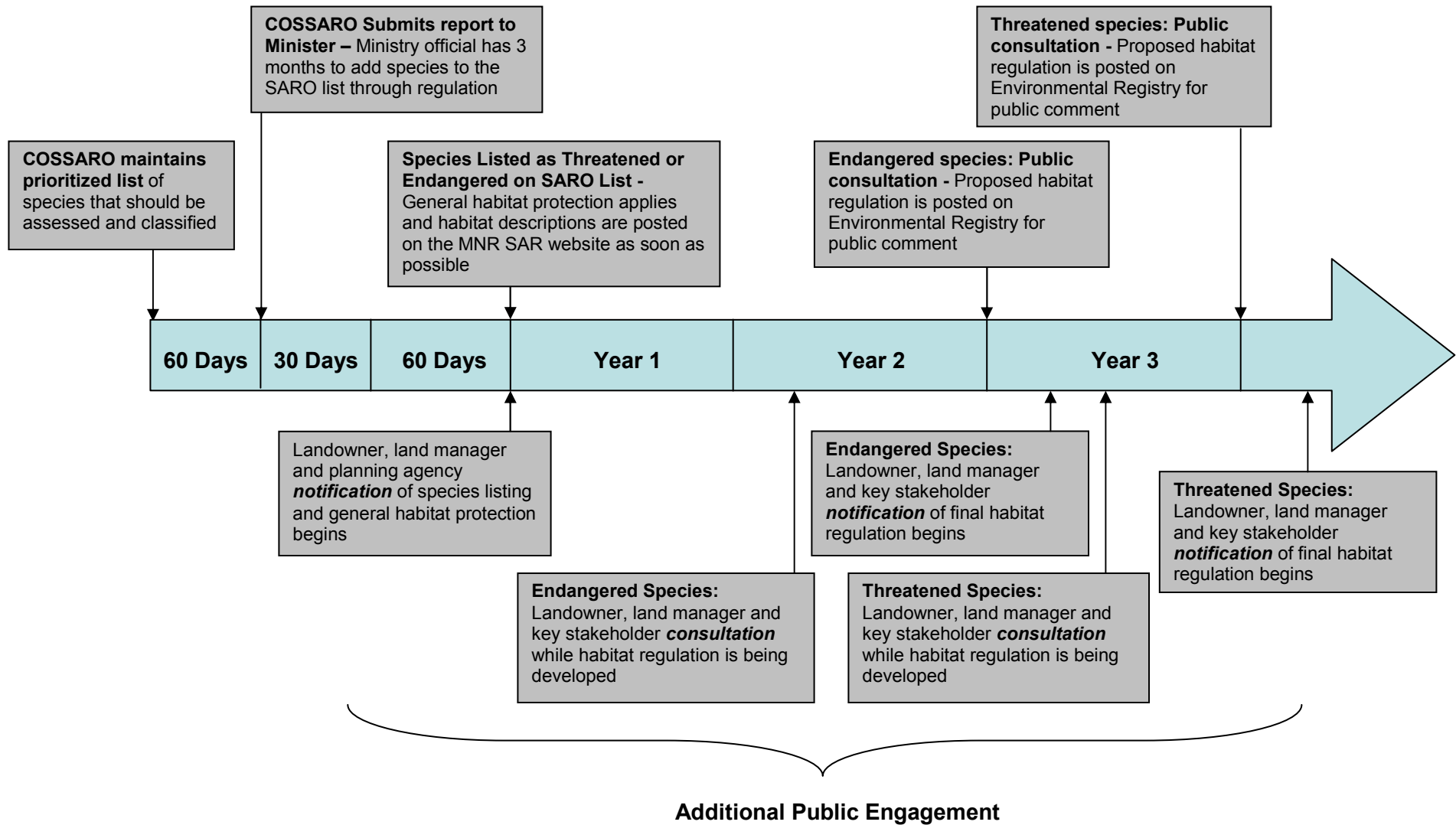
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Appendix 6.1. Habitat protection provisions for species listed under Schedules 1, 3, and 4 in the ESA 2007.



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Appendix 6.2. Habitat protection provisions under the ESA 2007 for species added to the SARO List as endangered or threatened after June 30, 2008.



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