

Critical Habitat Guidelines for identifying areas that may be eligible for critical habitat determinations

December 2023



We acknowledge and respect Victorian Traditional Owners as the original custodians of Victoria's land and waters, their unique ability to care for Country and deep spiritual connection to it.

We honour Elders past and present whose knowledge and wisdom has ensured the continuation of culture and traditional practices.

DEECA is committed to genuinely partnering with Victorian Traditional Owners and Victoria's Aboriginal community to progress their aspirations.



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Purpose of these guidelines

Habitat plays a critical role in maintaining biodiversity and supporting ecosystems. Its loss and degradation are often threats to the taxa and communities listed on the Threatened List established and maintained in accordance with the *Flora and Fauna Guarantee Act 1988* (the Act). Certain areas of habitat for listed species may be critical for their persistence and recovery, without which their conservation status and risk of extinction may increase.

These guidelines are made by the Secretary under section 20E of the Act. They provide information about areas that may be eligible for critical habitat determinations (CHD) in the context of the statutory provisions described below.

Section 3(1) of the Act includes the following definitions:

- "Critical habitat means an area of Victoria in respect of which a critical habitat determination is made;"
- "Committee to mean the Scientific Advisory Committee established under section 8"
- "Secretary means the body corporate established by Part 2 of the *Conservation, Forests and Lands Act 1987*;"

Section 20(1) of the Act provides that:

"The Secretary may determine any area of Victoria to be critical habitat."

Section 20(2) of the Act provides that:

"A determination under subsection (1) must not be made unless the Secretary considers that –

- (a) the area significantly contributes to the conservation in Victoria of a listed taxon or community of flora or fauna; or
- (b) the area significantly contributes to the conservation in Victoria of a taxon or community of flora or fauna that is not listed, but in respect of which –
 - i. a recommendation has been made by the Committee under section 16D; and
 - ii. the Minister has not made a decision under section 16G or has made a decision under that section to make a recommendation; or
- (c) the area supports ecological processes or ecological integrity that significantly contributes to the conservation of a taxon or community this is listed."

Section 20(3) of the Act provides that:

"Without limiting subsection (2), a determination of a critical habitat may be made if:

- (a) the area is critical to the persistence of a taxon or community of flora or fauna;
- (b) flora or fauna aggregate in the area for reproduction or other important life stages; or
- (c) the area is used by flora or fauna to move between populations, migrate or disperse, or as refugia during environmental stress; or
- (d) the taxon or community of flora or fauna is occasionally present in the area; or
- (e) the taxon or community of flora or fauna is not present in the area but was previously present in the area and there is potential to reintroduce it; or
- (f) the area is likely to be needed by a taxon or community of flora or fauna in the future."

Part 1 of these guidelines outlines the relevant considerations relating to a critical habitat determination (determination). A framework is provided to determine eligibility (what **must** be met for a determination to be made in accordance with these guidelines). Potential considerations for the Secretary on whether a determination **should** be made are also provided. Lastly, there is an outline of the public notice and consultation requirements.

Part 2 explains the practical effects of determinations, including the opportunity provided for the making of Habitat Conservation Orders (HCOs) by the Minister for Environment.

Terminology used in these guidelines

Biodiversity – The Act defines biodiversity as *‘the variability among living organisms from all sources (including terrestrial, marine and other aquatic ecosystems) and includes:*

- (a) diversity within species and between species; and*
- (b) diversity of ecosystems.’*

Protecting Victoria’s Environment - Biodiversity 2037 describes biodiversity as encompassing all components of the living world: ‘the number and variety of plants, animals, and other living things, including fungi and micro-organisms, across our land, rivers, coast, and ocean. It includes the diversity of their genetic information, the habitats, and ecosystems within which they live, and their connections with other life forms and the natural world.’

Community –The Act defines community as *‘a type of assemblage which is or which is wholly or substantially made up of taxa of flora or fauna existing together in the wild.’*

Notable examples of taxa of flora or fauna existing together in the wild are known as communities. Communities can be distinctive natural landscapes or ecosystems. Cool temperate rainforest, limestone grassy woodland, and alpine bog are examples of threatened communities included on the Threatened List.

Conservation Status –A status within the categories that define a taxon’s risk of extinction. The categories established by the International Union for Conservation of Nature (IUCN). Australian jurisdictions have adopted a consistent national approach to assessing conservation status, using the Common Assessment Method (CAM), and including the following conservation status are: ‘extinct,’ ‘extinct in the wild,’ ‘critically endangered,’ ‘endangered,’ ‘vulnerable.’

DEECA – Department of Energy, Environment and Climate Action.

Executive Director – The Executive Director, Biodiversity Division (a division of DEECA).

Listed –The Act defines listed as:

- a) In relation to a taxon of flora or fauna or a community of flora or fauna, that the taxon or community is specified in the Threatened List, and*
- b) In relation to a potentially threatening process, that the process is specified in the Processes List.*

Public authority – The Act defines a public authority as *‘a body established for a public purpose by or under any Act and includes –*

- a) an Administrative Office;*
- b) a Government Department,*
- c) a municipal council,*
- d) a public entity,*
- e) a State-owned enterprise.*

Secretary – The body corporate established by Part 2 of the *Conservation, Forests and Lands Act 1987*.

Taxon/taxa – The Act defines taxon as *‘a taxonomic group of any rank into which organisms are categorised’*

All living things are categorised in a taxonomic system (groups of species form a genus, groups of genera form a family, and so on). A taxon (plural taxa) is any grouping within this system. While a ‘threatened species’ might be familiar concept, the Threatened List can include a threatened subspecies, or a threatened genus, and so on. In conservation science, it is more common to refer to a threatened taxon – referring to a threatened group regardless of that group’s position in the taxonomic hierarchy.

Part 1 – Eligibility of area for Critical Habitat Determination

1.1 Eligibility – environmental matters

There is a three-step process for considering the eligibility of a proposed area to be determined to critical habitat on environmental grounds.

1. Is the area of habitat essential to the taxon or community? For example, the extinction risk would increase or recovery (conservation status improvement) would be impossible without access to the habitat.



2. Are there threats facing the habitat value of the area that cannot be adequately mitigated by the existing arrangements?



3. Would a critical habitat determination materially improve the level of protection for the habitat value of the area against the threats faced?

Key factors to be considered throughout this three-step process to determine eligibility based on environmental grounds are outlined below.

1. Is the area essential to the taxon or community?

Essential could mean that extinction risk will increase, or recovery (improved conservation status) *in-situ* would be impossible, without access to the habitat.

Examples of possible critical habitat for flora could include taxa confined to specific geographic areas due to limits on dispersal and recruitment, or very high-quality patches of flora communities.

Examples of possible critical habitat for fauna could include fauna taxa which are geographically restricted to a specific location, or fauna taxa which are dependent on a specific location for a life-cycle event.

2. Are there threats facing the habitat value of the area cannot be adequately mitigated by existing arrangements?

The second question has two elements:

- identifying the threats faced by the threatened species in the area in question, and
- assessing whether the existing arrangements (e.g., protections and management practices) are adequate in addressing those threats.

Once threats have been identified, the following should be considered:

- the likelihood of harm occurring to the habitat,
- the extent of potential harm to the habitat (that is, the proportion of the habitat facing harm), and
- the severity of potential harm to the habitat (that is, the degree of potential impact of the harm on the habitat) because of those threats.

Consideration of the existing protections and management arrangements could include:

- the statutory protections applicable to the area (such as zoning and overlays made under the *Planning and Environment Act 1987*, conservation covenants under the Trust for Nature program or land management co-operative agreements made under the *Conservation Forests and Lands Act 1987*, the assessment requirements under the *Environmental Effects Act 1978* or Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* which may apply to potential development-related threats in the area – or where the area is on public land, the protections provided by the *National Parks Act 1975* or *Crown Land (Reserves) Act 1978*.

If the existing protections and management arrangements in place are adequate, a determination might not be warranted. Adequate does not necessarily mean completely mitigating the threat(s) but could mean reducing the risk to an acceptable level.

3. Would a critical habitat determination materially improve the level of protection for the habitat value of the area against the threats faced?

If there are threats that are not being adequately addressed by the existing arrangements, the next consideration is whether a critical habitat determination would improve the mitigation of threats at this site.

As section 20F(1) requires the Secretary to take all reasonable steps to enter into an agreement in respect of an area that is subject to a critical habitat determination, the likelihood of the Secretary reaching an agreement should be considered. In this context, agreement means a public authority management agreement or an agreement under section 69 of the *Conservation, Forests and Lands Act 1987*.

Determinations can improve the response to threats by:

- giving greater prominence to the conservation needs of the habitat at the site, and acknowledging that a greater response is warranted;
- causing the creation of critical habitat agreement with the landowner or public land manager, setting out (for example) roles and responsibilities; necessary actions, strategies, and targets; monitoring requirements and accountabilities;
- enabling the Minister to make a Habitat Conservation Order.

Each of the above can mitigate threats in some way. Signalling the importance of an area can influence land managers in their decision making and resource prioritisation; critical habitat agreements can provide concrete parameters around appropriate land management for threatened taxa / communities; and Habitat Conservation Orders are a strong power to prevent incompatible land uses and activities.

1.2 Eligibility – further considerations

If the answers to each of the above questions is “yes”, the Secretary will make further considerations before determining an area to be critical habitat. These further considerations are described below.

Before deciding whether to make a determination, the Secretary may consider:

- What social and financial consequences would follow if a critical habitat determination were made for the area?
- What other tools at your disposal could be used to protect the habitat?

Important: A determination that an area is critical habitat for a taxon or community does not necessarily mean that area is **the only** area eligible for a critical habitat determination in relation to that taxon or community. A critical habitat determination may recognise the value of an area of habitat for more than one threatened taxon. Determinations may be progressively declared for a species. This may be based on scientific discoveries (e.g., new high value habitat areas or types are discovered for a species). A determination may be altered and changed over time, such as where a species progressively recovers. Note that the requirements of sections 20 to 20C (including the requirements to invite and consider public submissions) apply equally to proposals to amend determinations.

1.3 Notices to landowners and public submissions

Before the Secretary can make a critical habitat determination, notice must be given to the owners of the land or the public authority managing the land, and any person whose interests may be adversely affected by the determination.

A public submissions process must also be conducted, with the proposed determination published on the internet and a period for submissions open for at least 30 days.

Members of the public may influence the decision of the Secretary by –

- providing ecological input to:
 - support or challenge the Secretary's view of the importance of the habitat, or the threats faced by the habitat,
 - recommend that the shape and extent of the area subject to the determination be altered,
- recommending an approach to the conservation and management of the habitat,
- raising concerns about any potential consequences of the determination.

In some circumstances, the Secretary may determine that providing notices or publishing the draft determination would be likely to result in damage being done to the habitat in question. For example, publishing the location of a critically endangered orchid species may result in collectors or other persons illegally harvesting the plants. In these circumstances, the Secretary is exempt from the requirement to provide notices or publish the draft determination for public consultation (see section 20B(4)).

Part 2 – What does a critical habitat determination do?

A critical habitat determination –

- identifies critical habitat, and requires all public authorities to give ‘proper consideration’ to the critical habitat determination (see section 4B(2)(c))
- requires¹ the Secretary to take all reasonable steps to enter into:
 - o a land management agreement under section 69 of the *Conservation Forests and Lands Act 1987* with the landowner (in the case of private land)
 - o a public authority management agreement (PAMA) under section 25 of the Act with the public authority land manager (in the case of public land), which provides for the long-term conservation and protection of the critical habitat.
- requires a Minister and a public authority, so far as is consistent with the proper exercise of their functions, must give proper consideration to the critical habitat determination.
- enables the making of a **habitat conservation order** by the Minister, which establishes greater regulatory powers to protect a critical habitat.

2.1 Land management agreements

The table below provides information on the types of agreements that may be entered into under a critical habitat determination.

Type of agreement	Description
Public authority management agreement (PAMA)	Section 25 of the Act sets out the ability for the Secretary to enter into a PAMA with one or more public authorities .
Section 69 agreement	Sets out the power for the Secretary to enter into an agreement with any landowner relating to the management, use, development, preservation, or conservation of land, or to give effect to the objectives or purposes of a relevant law.
Other agreement	This could be any other agreement that is commensurate to the effect and purpose that a PAMA delivers with public authorities, or a section 69 agreement (being an agreement made under section 69 of the <i>Conservation, Forests and Lands Act 1987</i> . The suitability of different agreement types will be made on a case-by-case basis.

Have ‘all reasonable steps’ been taken?

The Act requires the Secretary to commence, negotiate and / or conclude agreements on a **voluntary** basis with the landowner once an area is declared critical habitat, to the extent that ‘all reasonable steps’ have been taken.

In practice, DEECA will endeavour to undertake consultation with the landowner well in advance of any formal public consultation process.

¹ Unless the Secretary considers that an alternative agreement is already in place, which provides for the long-term conservation and protection of the habitat (see section 20F(4)).

Contents of an agreement

Some of the key considerations DEECA will discuss with landowners are noted below. These explore what the agreement making process would entail, what benefits it would bring, or what barriers it might present – which would in turn, lead to consideration of whether a future habitat conservation order is required or not.

- Have the economic and social uses of the land been identified?
 - Are there known financial implications of limiting access to this land?
 - Could protections in the agreement limit development potential near or around the site, helping retain the current sites character?
 - Could protections in the agreement limit public access or other intrusive activity on land that the landowner desires?
- What would the management actions look like?
 - Who will bear the costs of managing the land? Can a private landowner be offered financial incentives for managing this land?
 - Who is responsible for delivering the actions?
 - How are outcomes measured and reported? How are management targets set, and what consequences arise if targets are not met?

If, after taking all reasonable steps, the Secretary is unable to enter into an agreement with a landowner or public authority, a habitat conservation order may be necessary for the conservation and protection of the critical habitat.

2.2 Requirement for public authorities to give ‘proper consideration’

Section 4B of the Act requires public authorities to give ‘proper consideration’ to the objectives and instruments of the Act. Protecting critical habitat is an objective of the Act, and critical habitat determinations are an instrument of the Act.

In practice, this will mean that public authorities will need to ensure they are aware of any critical habitat determinations and their interactions with their functions. In terms of direct interactions, they should follow any agreements that have been made with the landowner from those determinations. Secondly, if there are indirect impacts, determine a course of action based on the biodiversity values, their possible impacts on those values and any countervailing interests or obligations.

The Biodiversity Duty Guidelines for public authorities provide more detail on what public authorities should do to give ‘proper consideration’ to the objectives and instruments of the Act to meet their obligation under section 4B of the Act.

2.3 Habitat Conservation Orders

A habitat conservation order is an optional tool that will only be used where it can be shown that enhanced regulation is necessary to manage risks or impacts.

Within two years of a critical habitat determination being made, the Minister must consider if a habitat conservation order is needed. In making this decision, a habitat conservation order must only be made if the Minister considers that the order is necessary to either:

- halt, prevent or repair damage that has occurred, is occurring, or is likely to occur to the critical habitat or proposed critical habitat, or
- manage the critical habitat or proposed critical habitat to ensure its conservation or protection.

The consequences of the Minister making a Habitat Conservation Order

If a habitat conservation order is made, the Minister may suspend licences and other authorisations or approvals that operate in contravention of the order. A habitat compensation order prevails over any planning scheme provisions applying to the land.

A habitat conservation order can:

- prohibit an activity, land use, or development
- require that a person obtains a permit from the Minister to undertake an activity, land use or development
- empower the Secretary to undertake works to conserve, protect, or manage the critical habitat
- require a person to repair damage that has occurred since the critical habitat determination
- prevail over planning schemes where there is any conflict, and/or
- suspend licences, permits or authorisations.

A habitat conservation order can remain in effect for 10 years and it is an offence under the Act to contravene a habitat conservation order. Contravening a habitat conservation order carries a penalty of up to 240 penalty units or 2 years imprisonment.

Given their significant powers to restrict the use or development of land, the Act has provisions for a right to compensation for losses suffered as a natural, direct, and reasonable consequence of making the habitat conservation order. A person may be entitled to compensation where the habitat conservation order affects an existing use right under the *Planning and Environment Act 1987*, or an authority granted under another Act.

Compensation also covers instances where the Minister has suspended an existing licence, permit or other authority issued under any Act which is in contravention of a habitat conservation order. For example, if a person has a licence to explore minerals issued under the *Mineral Resources (Sustainable Development) Act 1990* in an area that becomes subject to a habitat conservation order, which results in the licence being suspended, they may be entitled to compensation.

In determining the amount of compensation, a person is entitled to receive, the Secretary must ensure that any relevant persons are consulted with (for example, the affected landowner). Also, the Secretary must have regard to the matters set out in section 39(4) of the Act. These include:

- Impact on land value because of the habitat conservation order
- Financial loss that may be incurred because of compliance with the order, and
- Cost of works required to be carried out on the land.

If the Secretary does not make an offer, a person may make a claim for compensation. Section 37 of the *Land Acquisition and Compensation Act 1986* sets out the procedure for making a claim where no offer has been made.

Where to from here?

Critical habitat determinations and habitat conservation orders are just some of the tools DEECA is using to help conserve and recover our threatened species. For more information about some of the other tools and actions that the Victorian Government is undertaking see www.environment.vic.gov.au/conserving-threatened-species

deeca.vic.gov.au