BIODIVERSITY CONSERVATION ACT 2016

MINISTERIAL GUIDELINE NUMBER 5

CRITERIA AND PROCEDURES FOR LISTING CRITICAL HABITAT

1. LEGISLATIVE BASIS FOR THESE GUIDELINES

Part 4 Division 1 of the Biodiversity Conservation Act 2016 (the Act) pertains to the determination of critical habitat. Section 54 of the Act provides for the Minister to list habitat as critical habitat. Section 55 provides that critical habitat may be listed when habitat is determined to be critical to the survival of a threatened species or a threatened ecological community, or its listing is otherwise in accordance with additional eligibility criteria specified in ministerial guidelines.

Section 260(1) of the Act provides, amongst other matters, for the Minister to issue Guidelines establishing criteria for, and setting out other matters relevant to, the listing of critical habitat under Part 4 Division 1.

Part 4 Division 2 of the Act pertains to habitat conservation notices. Section 59(1) provides for the CEO (of the Department of Biodiversity, Conservation and Attractions) to issue a habitat conservation notice to a person requiring the person to ensure that habitat damage, or further habitat damage, does not occur to the critical habitat, if the CEO reasonably believes that –

(a) habitat damage is likely to occur on the land; or
(b) habitat damage is occurring or has occurred on the land.

Section 59(4) provides that a habitat conservation notice may require any person bound by it to take specified measures, within or for the duration of a specified period, for one or more of the following purposes —

(a) to repair any habitat damage that has occurred;
(b) to re-establish and maintain critical habitat in any area affected by habitat damage to a condition as near as possible to the condition of the critical habitat before the habitat damage occurred;
(c) to prevent the erosion, drift or movement of sand, soil, dust or water;
(d) to ensure that specified land, or a specified watercourse or wetland (as those terms are defined in the Rights in Water and Irrigation Act 1914), where critical habitat is or was located will not be —
   (i) damaged or detrimentally affected; or
   (ii) further damaged or detrimentally affected.

This Ministerial Guideline (Number 5) provides:

1. the eligibility criteria that may be used to determine which areas of habitat are critical to the survival of a threatened species or threatened ecological community; and,

the procedures:

2. to be followed by the Minister in making a decision to list critical habitat;
3. for the CEO to give written notice to the owner or occupier of the land on which the habitat is located; and,
4. for owners and occupiers to make submissions to the Minister in respect of proposed listings, amendments to listings or repeal of listings for critical habitat on their land.
2. **EFFECT OF LISTING CRITICAL HABITAT**

The listing of critical habitat alone does not confer special protection on that habitat as there are no provisions that require special management or impose penalties for detrimentally having an impact on critical habitat solely as a consequence of its listing. The effect of listing critical habitat:

- is to identify those areas of habitat that are critical to the survival of a threatened species or threatened ecological community; and
- for which damage to that habitat has occurred, is occurring, or is likely to occur; and
- where the issuing of a habitat conservation notice serves to prevent habitat damage occurring, or repair any damage that has or does occur.

Section 65 prescribes penalties for contravening a habitat conservation notice relative to the conservation status of the species or ecological community for which the critical habitat was determined.

3. **CRITERIA FOR MAKING A DETERMINATION**

3.1 **Introduction**

For habitat of a threatened species or ecological community to be listed as critical it must meet the criteria established in these guidelines. Although areas of habitat critical to the survival of a species or community will generally be identified in a recovery plan/interim recovery plan for that species or ecological community, or in the nomination to list the species or ecological community as threatened or to change the category of endangerment, ultimately only those areas that are critical to the survival of the threatened species or threatened ecological community and are at high risk from a specific, immediate and manageable threat, will be considered for listing as critical habitat.

When applying these criteria, information on the habitat requirements of the threatened species or ecological community, the prevailing threatening processes and management options will be described.

In most situations, a species or community that requires the listing of critical habitat will have a recovery plan/interim recovery plan prepared for it, and that recovery plan/interim recovery plan will provide the background and defining information for the determination of critical habitat for this purpose. However, critical habitat may also be identified subsequent to the preparation of a recovery plan/interim recovery plan, or in the absence of a recovery plan/interim recovery plan, and may be separately considered for listing. Where a recovery plan/interim recovery plan is in place, the relationship of the new information to that provided in the plan should be described in a subsequent nomination of critical habitat.

Where a recovery plan/interim recovery plan has not been prepared, supporting information of an equivalent level will need to be provided to ensure that the determination of critical habitat has taken into account the requirements and characteristics of the threatened species or community.

Note that under section 89 of the Act the Minister approves full recovery plans. Consequently, critical habitat may be recommended in a full recovery plan that is submitted for the approval of the Minister. Conversely, under section 105 of the Act the CEO makes interim recovery plans. Critical habitat may therefore only be described in an interim recovery plan where the Minister has first approved the listing of the critical habitat.
The following terms are defined in section 5 of the Act:

**Habitat** means the biophysical medium or media –
(a) occupied (continuously, periodically or occasionally) by an organism or group of organisms; or
(b) once occupied (continuously, periodically or occasionally) by an organism, or group of organisms, and into which organisms of that kind have the potential to be reintroduced.

**Organism** means a life form, other than a human being, whether alive or not and includes part of such a life form and the genetic material of such a life form.

### 3.2 Threatened species or threatened ecological community status

Critical habitat may only be listed where the species or ecological community:

- is listed as a threatened species or threatened ecological community (as defined in *Ministerial Guideline Numbers 2 and 4*) and be the subject of an Order made by the Minister and published in the Government Gazette; and
- the species must be extant (i.e. still living) or the ecological community must not be a collapsed ecological community.

### 3.3 Describing the biophysical attributes of the habitat

The description of a species’ or ecological community’s existing habitat and habitat requirements, as may be detailed in a recovery plan/interim recovery plan, may include:

- the geographical, vegetative, topographical, climatological, physical, chemical, or biological attributes or suite of attributes that constitute actual (i.e. occupied) or suitable habitat for the species or community;
- any temporal considerations to the above attributes (e.g. different habitat requirements for a species during different phases of its life cycle or migratory movements or are representative of the historic geographical and ecological distributions of a species or community); and
- any requirements related to distribution and density of separate habitat polygons in a landscape (fragmentation/proximity factors).

It is important to note that habitat is not limited to the geographical area occupied by the species or community at all times, but may include other areas if determined to be essential for the conservation of the species or community. This may include adjacent areas that are essential to the maintenance of the occupied habitat, e.g. maintenance of ecological and biophysical processes. Areas of habitat may also be suitable but unoccupied for a number of reasons including the extirpation of the species or community from this portion of the range. Additional areas of habitat may be unsuitable for the species or community, but may be restored to suitability with proper management, and these should be identified as such.

While not included as occupied habitat, any area or type of habitat that is required to maintain existing known biological or non-biological connections between physically separated polygons of habitat qualify as habitat themselves and should be included in the above habitat description (i.e. connectivity factors).

Where relevant, a description of any area that is either typically required, or required in specific situations to protect the habitat from the influence of typical, expected, non-compatible activities/land uses in the area, and/or biological threats through species interactions should also be included. These areas should be considered part of the habitat itself, and described as such, rather than as a separate concept.

### 3.4 Consideration of habitat
Critical habitat may only include those areas of habitat, as described above, that are essential to a threatened species’ or ecological community’s survival or recovery. Under some circumstances, this may include areas that the species or ecological community is not currently residing in, but is otherwise essential to their survival (e.g. nesting, breeding or feeding grounds for migratory birds).

The recovery plan/interim recovery plan will usually identify whether a species or ecological community has a recovery target (i.e. the number of individuals and/or occurrences) at which the species or community can either maintain its survival (the survival level), or as an interim step, the survival level that might be achievable in the timeframe of the operation of the recovery plan/interim recovery plan. The populations or occurrences most likely to be instrumental in achieving those targets are most likely to be considered for determination as critical habitat.

The ‘Habitat critical to survival, and important populations/occurrences’ identified in the recovery plan/interim recovery plan are also most likely to be instrumental in achieving those survival targets. These are based on the conservation status of the species or ecological community, and the size and condition (sustainability) of the population or occurrence. This section of the recovery plan/interim recovery plan identifies important areas of occupancy of the species or ecological community for management and protection, but is not to be confused with the legislative term ‘critical habitat’. Critical habitat will need to be specifically determined as described below, and would be expected to be a subset of the ‘Habitat critical to survival, and important populations/occurrences’ of the species or ecological community. As stated above, critical habitat may only be recommended in a full recovery plan that is submitted for the approval of the Minister, or identified in an interim recovery plan where the Minister has first approved the listing of the critical habitat.

The determination of an area of critical habitat will be undertaken by evaluating the nominated area of habitat as an important population or occurrence, and the area’s criticality to the survival of the species or community. An assessment of critical habitat should include quantitative information to support how it is critical to the survival of the species or ecological community. Some relevant matters that may be used in making this assessment are included below at section 3.5.

The evaluation may include a review of the conservation status of the species or ecological community against the assessment criteria, to determine if the loss of that population or occurrence would result in a decline in the species’ or ecological community’s conservation status and eligibility for listing at a higher category of endangerment. The evaluation may also consider the relative sustainability of the population or occurrence against other populations or occurrences, to determine the relative importance of the population or occurrence for the long term viability of the species or ecological community.

When several areas of habitat, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat where the intervening areas are necessary for the maintenance of those areas, i.e. acting as a buffer. Evidence of this will need to be provided to justify their inclusion as critical habitat.

The Minister shall designate as critical habitat areas outside the geographical area presently occupied by a species or ecological community only when a designation limited to its present range would be inadequate to ensure the conservation of the species or ecological community.
Areas that cannot be considered to be Critical Habitat

Where possible and applicable, a habitat description may also describe and delineate additional areas that although not currently habitat, could reasonably be expected to become habitat through either ongoing natural processes (i.e. no active management) or through active restoration or enhancement efforts. This is different from unoccupied habitat that is an area that presently contains the attributes of habitat, but the species or community does not occur in that habitat at present. These areas of additional potential habitat may not be determined as critical habitat.

3.5 Relevant matters

The Minister may, in determining habitat to be critical habitat, take into account the following matters:

(a) the extent to which the habitat is critical to the species or ecological community during periods of stress, such as flood, drought or fire;

(b) the extent to which the habitat is used to meet essential life cycle requirements, such as foraging, breeding, nesting, roosting, social behaviour patterns, pollination or seed dispersal processes, that are critical to the survival of a threatened species or species on which an ecological community is dependent;

(c) the extent to which the habitat is used by important populations or supports important occurrences, the loss of which would have a significant impact on the conservation of the species or ecological community;

(d) the extent to which the habitat is necessary to maintain genetic diversity and long-term evolutionary development;

(e) the extent to which the habitat is necessary for use as corridors to allow a threatened species, a key mutualist of a threatened species, or key element of a threatened ecological community, to move freely between sites used to meet essential life cycle requirements;

(f) the extent to which the habitat is necessary to ensure the long-term future of the species or ecological community through reintroduction or re-colonisation;

(g) any other way in which habitat may be critical to the survival of a listed threatened species or a listed threatened ecological community.

3.6 Consideration of threat

In assessing critical habitat, the threats and the level of risk to that area of habitat as a result of those threats, will be identified and taken into consideration.

The effect of listing critical habitat is that under section 59, a habitat conservation notice may be applied to that area of habitat. A habitat conservation notice is served on the owner, occupier or other relevant person of land on which critical habitat occurs to ensure that habitat damage, or further habitat damage, does not occur on the land. The habitat conservation notice specifies the reason for the notice (i.e. what the risk of habitat damage is), and what actions are required to prevent or remediate habitat damage.

To be listed as critical habitat, the threat must therefore be one that can be addressed or managed by use of a habitat conservation notice. The threat must be the result of a specific activity undertaken by people and that when a habitat conservation notice is applied, the threat will be significantly reduced or eliminated and the species or community will be able to persist. For example, a habitat conservation notice can address the threat resulting from clearing of habitat by preventing clearing from occurring, but a notice is unlikely to address broader threats, such as climate change.

Submissions for listing critical habitat thus normally require the identification of the threats and the risk that each of these threats pose to the area of proposed critical habitat, and the management actions that may be undertaken to reduce the threat risk. Listing as critical habitat will be recommended where there
is a very high risk that if the threat is not addressed or managed through human intervention within a nominal time frame, that the species or community will be eligible for listing as an extinct species or collapsed community.

3.7 Mapping areas of critical habitat

Before critical habitat can be listed, it must first be geographically defined and be represented on a map.

The recovery plan/interim recovery plan will describe the extent of occurrence, area of occupancy, and the applicable habitat. Areas that are or may be eligible for listing as critical habitat may be identified at the time of plan preparation or may be the outcome of further investigations. Subsequent determination of critical habitat will be mapped and included on the Register for critical habitat established under section 57 of the Act (see below).

4. THE DECISION-MAKING PROCESS

The Act does not provide for a nomination process for critical habitat. Recommendations of critical habitat for the Minister may be developed through the preparation of a recovery plan (section 82), which includes a consultation process (sections 84-87). Submissions for critical habitat may thus be made through this process.

An interim recovery plan is prepared where there is insufficient scientific information available to allow the preparation of a recovery plan (section 105(b)). Potential critical habitat may be identified during the preparation of an interim recovery plan, however, this may not be possible where the habitat requirements and interactions with threatening processes are not well defined. Consultation on the preparation of an interim recovery plan is more targeted than for a full recovery plan (section 106), but there is some opportunity for submissions for listing critical habitat through this process.

The department or other persons may also make submissions for the determination of critical habitat outside of the formal recovery planning process. A nomination for critical habitat may also be made in association with a nomination to list, or change the listing status, of a threatened species or threatened ecological community. Submissions may be made to the department, or directly to the Minister.

Submissions for listing critical habitat, either through the recovery planning process, associated with a species or ecological communities listing nomination, or as separate submissions, will be required to satisfy the following information requirements:

- identify the area as habitat for a threatened species or ecological community;
- determine the relative importance of an area of habitat to the persistence of the threatened species or ecological community;
- demonstrate a risk factor that threatens the persistence of the species or ecological community at that site; and
- identify the management intervention that may be applied to the area under a habitat conservation notice that will mitigate the risk posed by the identified threat.

While not required under the Act, scientific advice will be provided to the Minister to assist in making the decision to list critical habitat, from the Threatened Species Scientific Committee (TSSC) for species, or the Threatened Ecological Communities Scientific Committee (TECSC) for ecological communities – see Ministerial Guideline 1.

The Minister is not bound by any advice or nomination recommendation, and has the authority to not list an area as critical habitat if the Minister does not consider the nomination meets the criteria for listing, or its listing will not serve any practical effect, including through the operation of a habitat conservation notice.
4.1 Assessing the adequacy of the information available

In determining critical habitat, sufficient information must be presented to demonstrate that the habitat is critical to the survival of a threatened species or threatened ecological community, and can effectively have a habitat conservation notice applied to it that will mitigate the threats to the habitat. The information must demonstrate the impact on the conservation of the species or community should it be lost, by a comparative evaluation of all known populations or occurrences of the species or community.

Critical habitat is not determinable when one or both of the following situations exist:

(i) information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) the biological or non-biological needs of the species or community are not sufficiently well known to permit identification of an area as critical habitat.

If the required information and/or data are not available to make a determination, or if the habitat attributes of the species or community are poorly understood, an accurate determination may not be possible. As a general rule, detailed mapping will only be possible if there is an extremely high confidence level in the accuracy and precision of the mapping as well as temporal permanence of the habitat. However, this does not preclude that a decision not to list critical habitat may be reviewed if adequate data or information become available in the future.

Existing critical habitat may be revised according to procedures in the next section as new data become available to the Minister. This may occur when the recovery plans/interim recovery plans are reviewed, or at any other time.

4.2 Procedure for considering amendments or repeals

When new data or information becomes available relating to the habitat, threats or management of a threatened species or ecological community with listed critical habitat, including during the revision of a recovery plan/interim recovery plan, the Minister may consider amending or repealing the listing of some or all areas of critical habitat for a species or ecological community.

Recommendations to amend or repeal an area of critical habitat will need to demonstrate that the area is either no longer critical to the survival of a threatened species or a threatened ecological community, or no longer satisfies the requirement for a habitat conservation notice, applying the same level of information requirements as applies to the listing of critical habitat. The original listing decision for the area of habitat should be used as a guide to address those matters that were determined to be the cause for the listing of the area as critical habitat.

5. CONSULTATION

Section 56 of the Act requires that:

(1) Before the listing of habitat as critical habitat or the amendment or repeal of such a listing, the CEO must take reasonable steps to give written notice of the proposed listing, amendment or repeal to the owner or occupier of the land on which the habitat is located.

(2) Any notice under subsection (1) must –

(a) contain sufficient information to enable the location and extent of the habitat to be identified; and
(b) in the case of a proposed listing, contain information as to the effect of the listing of habitat as critical habitat under this Act; and

(c) specify a period within which submissions may be made to the Minister in respect of the proposed listing, amendment or repeal.

For the purposes of section 56(2)(b), the written notice will include the management requirements that may be proposed to be included in a habitat conservation notice.

Under section 54(2) of the Act, the Minister must not list habitat as critical habitat or amend or repeal such a listing unless -

(a) the Minister has had regard to any submission made in response to a notice under section 56(1); and

(b) in the case of habitat in Western Australian waters, the listing, amendment or repeal is made with the concurrence of Minister responsible for the administration of the Fish Resources Management Act 1994.

The notification to the owner or occupier of the land on which the critical habitat occurs, as required under section 56 of the Act, will include advice on the means by which the owner or occupier of the land can make a submission regarding the proposed listing, amendment or repeal, including with respect to the information base supporting the proposal, or the potential impact the listing would have on the owner or occupier’s ability to manage their land. The notification will include a reasonable time frame for which the owner or occupier may provide such a submission.

Any submission received by the CEO on a proposed listing, amendment or repeal of a critical habitat listing will be provided to the Minister with the advice of the CEO with respect to the listing, amendment or repeal decision.

5.1 The critical habitat register

Biodiversity Conservation Regulation 11 provides guidance on the form and content of the Critical Habitat Register required under section 57(2) of the Act.

The Critical Habitat Register is maintained by the CEO of the Department of Biodiversity, Conservation and Attractions. The ‘register’ must be a record management system, either in written and/or electronic form and kept at the department’s principal office (Reg 11(1)). The register will take the form of a mapped and georeferenced geographical information system (GIS) data layer and be aligned with the current departmental systems for recording the occurrences of threatened species and communities.

In accordance with Regulation 11(2), the register will include the following information in relation to each critical habitat listed under section 54 of the Act —

(a) the mapped location of the habitat (including the boundaries of the habitat); and

(b) the biodiversity conservation values associated with the habitat.

The register will be made available for public inspection (Reg 11(3)); however, information on the register may be kept confidential to such extent as the CEO considers reasonably necessary in order to protect a critical habitat from habitat damage by members of the public (Reg 11(4)).

Information of a private or personal nature relating to critical habitat may also be kept confidential where necessary to maintain personal privacy, such as the specific location of critical habitat on private property.

To meet the confidentiality requirements, public inspection will be through publishing a summary of the register on the department’s website (Reg 11(5)), which will include as a minimum —
(a) a description of the general location of each critical habitat; and
(b) the biodiversity habitat values associated with each critical habitat.

Details of specific critical habitat sites may be requested from the CEO with information to support the release of any confidential information. Requests may be granted for the release of information where the release of that information will benefit the conservation or management of the area of habitat.

6. AMENDMENT OR REPEAL OF CRITICAL HABITAT LISTING

The Act (section 54(2)) enables amendment or repeal of a listing of habitat as critical habitat (de-listing).

In making a decision to de-list a habitat or a specified area of habitat listed as critical habitat, the Minister may take into account the following matters:

- whether, based on new information, the habitat is no longer determined to be critical for the survival of the relevant threatened species or threatened ecological community;
- whether the habitat has been modified since listing to the extent that it no longer meets those relevant matters identified at section 3.5 of this ministerial guideline; or
- whether a threat to the habitat identified as a justification for listing the habitat as critical habitat is no longer posing a threat at a particular site.

Under section54(2)(a) and section 56(1), where an area of critical habitat is proposed to be de-listed, the owner or occupier of the land on which the habitat is located must be notified in accordance with the procedure identified in steps 1 and 2(a) of section 5 of this ministerial guideline. The critical habitat or area of a critical habitat, once de-listed, will also be removed from the Critical Habitat Register.

The Act also provides for amending a habitat conservation notice (section 61) or cancellation of a habitat conservation notice (section 62), but this will not necessarily affect the continued listing of the corresponding critical habitat, i.e. critical habitat may remain listed after a habitat conservation notice has been amended or cancelled. Equally, an area of critical habitat may be de-listed where a habitat conservation notice has been cancelled if there is no further reason for retaining the relevant area as critical habitat.

Any habitat conservation notice associated with that area of critical habitat that has been de-listed shall be cancelled or amended by the CEO. Where the habitat conservation notice only applied to the area of critical habitat that has been de-listed, the habitat conservation notice will be cancelled. Where the habitat conservation notice applied to a larger area of critical habitat, the habitat conservation notice may be amended to exclude that area of critical habitat that has been de-listed, or considered for cancellation if the habitat conservation notice is no longer relevant or practical to apply to the residual area of critical habitat.

Matters relating to the amendment or cancellation of a habitat conservation notice will be advised to the Minister at the time of making an application to de-list an area of critical habitat.