

Threatened Species Conservation Regulation 2002

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New South Wales

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Threatened Species Conservation Regulation 2002



New South Wales

Part 1 Preliminary

1 Name of Regulation

This Regulation is the *Threatened Species Conservation Regulation 2002*.

2 Commencement

This Regulation commences on 1 January 2003.

3 Definitions

In this Regulation:

authorised officer means:

- (a) an officer or employee of the National Parks and Wildlife Service, or
- (b) a person who is authorised by the Director-General to exercise the powers conferred on an authorised officer by this Regulation, or
- (c) a police officer.

the Act means the *Threatened Species Conservation Act 1995*.

4 Notes

The notes in the text of this Regulation do not form part of this Regulation.

Part 2 Little Penguin critical habitat

5 Definitions

In this Part:

Little Penguin breeding season means the period from 1 July in any year until 28 February in the following year (both dates inclusive).

Little Penguin critical habitat means the area of land declared to be the critical habitat of the endangered population of Little Penguin at North Sydney Harbour, as described in the notification published in the Gazette under section 47 of the Act (as amended from time to time under section 49 of the Act).

Editorial note—

See Gazette No 263 of 20.12.2002, p 10983 for declaration of critical habitat for the Endangered Little Penguin Population at Manly.

Little Penguin critical habitat area A means the area marked A on the Little Penguin critical habitat map.

Little Penguin critical habitat area B means the area marked B on the Little Penguin critical habitat map.

Little Penguin critical habitat map means the map showing the location of the Little Penguin critical habitat, as published in the Gazette under section 53 of the Act.

6 Application of Part

This Part does not have effect until the notification referred to in the definition of **Little Penguin critical habitat**, and the Little Penguin critical habitat map, are published in the Gazette.

7 Companion animals prohibited

(1) A person must not bring a companion animal into the Little Penguin critical habitat.

Maximum penalty: 50 penalty units.

(2) If a companion animal is found in the Little Penguin critical habitat:

(a) the owner of the companion animal, or

(b) if the owner is not present at the time of the offence and another person who is of or above the age of 16 years is in charge of the companion animal at that time, that other person,

is guilty of an offence.

Maximum penalty: 50 penalty units.

(3) In any prosecution for an offence against this clause it is a defence if the defendant establishes that the relevant companion animal is an assistance animal that was being used by a person with a disability (within the meaning of the [Disability Discrimination Act 1992](#) of the Commonwealth).

(4) In any prosecution of the owner of a companion animal for an offence against this clause it is a defence if the defendant establishes that:

- (a) another owner of the animal has been convicted of an offence arising out of the same circumstances, or
- (b) the commission by another owner of the animal of an offence arising out of the same circumstances has been proved but a court has made an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999* in respect of the offence, or
- (c) the offence could not have been avoided by any reasonable efforts on the defendant's part.

(5) In this clause:

assistance animal means an animal referred to in section 9 of the *Disability Discrimination Act 1992* of the Commonwealth.

Note—

That section refers to a guide dog, a dog trained to assist a person in activities where hearing is required and any other animal trained to assist a person to alleviate the effect of a disability.

companion animal and **owner** of a companion animal have the same meaning as in the *Companion Animals Act 1998*.

7A Anchoring, mooring and access by vessels

(1) A person must not:

- (a) anchor or moor a vessel in the Little Penguin critical habitat area A during the Little Penguin breeding season, or
- (b) anchor or moor a vessel outside the Little Penguin critical habitat area A during the Little Penguin breeding season in such a way that the anchored or moored vessel enters the Little Penguin critical habitat area A, or
- (c) cause a vessel (other than a non-motorised tender) to enter or remain in the Little Penguin critical habitat area A between sunset and sunrise during the Little Penguin breeding season.

Maximum penalty: 50 penalty units.

(2) In this clause:

moor a vessel includes attach a vessel to a mooring by any means.

mooring means any post, stake, pile, float, pontoon or any other object (other than the anchor of a vessel) secured by any direct or indirect means to the waters' bed or placed on the waters' bed for the purpose of attaching a vessel to the bed.

tender has the same meaning as it has in the *Boating (Safety Equipment) Regulation—N.S.W.*

vessel includes a water craft of any description used or capable of being used as a means of transportation on water, including:

- (a) any non-displacement craft, and
- (b) a seaplane, but only while it is on water.

8 Fishing

- (1) A person must not take or attempt to take fish from the Little Penguin critical habitat between sunset and sunrise during the Little Penguin breeding season.

Maximum penalty: 50 penalty units.

- (2) In this clause, **take** fish has the same meaning as in section 4 (1) of the *Fisheries Management Act 1994*.

9 Interference with burrows or nests

A person must not interfere with a burrow or nesting box in the Little Penguin critical habitat.

Maximum penalty: 50 penalty units.

Note—

Section 118C of the *National Parks and Wildlife Act 1974* also provides that a person must not, by an act or an omission, do anything that causes damage to any critical habitat. The maximum penalty for a contravention is 2,000 penalty units or imprisonment for 2 years or both.

10 Interference with penguins

- (1) A person must not knowingly be within 5 metres of a Little Penguin while that penguin is on land in the Little Penguin critical habitat.

Maximum penalty: 50 penalty units.

- (2) A person must not knowingly disturb a Little Penguin in the Little Penguin critical habitat if the bird is moulting.

Maximum penalty: 50 penalty units.

- (3) In this clause, **disturb** a Little Penguin includes shining a light on the penguin.

11 Directions given by an authorised officer

- (1) If an authorised officer is of the opinion that a person is contravening this Regulation or disturbing a Little Penguin's breeding or moulting activities, or is likely to do so, the officer may make one or more of the following directions:

- (a) direct the person to cease a particular activity within the Little Penguin critical habitat,

(b) direct the person to leave the Little Penguin critical habitat.

(2) A person must not, without reasonable excuse, fail to comply with a direction given under subclause (1).

Maximum penalty: 50 penalty units.

(3) A person is not guilty of an offence of failing or refusing to comply with a direction given under subclause (1) unless it is established that the authorised officer:

(a) warned the person that a failure or refusal to comply with the direction is an offence, and

(b) identified himself or herself as an authorised officer.

12 Defences

It is a defence to a prosecution for an offence against this Regulation if the defendant proves that the act constituting the offence:

(a) was authorised to be done, and was done in accordance with, a licence granted under the *National Parks and Wildlife Act 1974* or under Part 6 of the *Threatened Species Conservation Act 1995*, or

(b) was the subject of a certificate issued under section 95 (2) of the *Threatened Species Conservation Act 1995*, or

(c) was essential for the carrying out of:

(i) development in accordance with a development consent within the meaning of the *Environmental Planning and Assessment Act 1979*, or

(ii) an activity, whether by a determining authority or pursuant to an approval of a determining authority within the meaning of Part 5 of that Act, if the determining authority has complied with that Part, or

(d) was authorised to be done by or under Part 2 of the *Rural Fires Act 1997*, the *State Emergency and Rescue Management Act 1989* or the *State Emergency Service Act 1989* and was reasonably necessary in order to avoid a threat to life or property, or

(e) was carried out:

(i) by an officer or employee of the National Parks and Wildlife Service in the exercise of his or her functions as such an officer or employee, or

(ii) by an authorised officer in the exercise of his or her functions as such an officer, or

(iii) by an officer or employee of Manly Council, NSW Fisheries, the Waterways Authority or the Environment Protection Authority in the exercise of his or her monitoring or enforcement functions as such an officer or employee, or

- (iv) with the consent of the Director-General given in the form of a licence, permit, approval or other form of written authorisation.

Part 3 Listing criteria

Note—

This Part prescribes the criteria for a determination by the Scientific Committee of the matters required to establish eligibility for listing in accordance with Part 2 of the Act:

- (a) of a species as a critically endangered species, endangered species or vulnerable species (see *Division 1*), or
- (b) of a population as an endangered population (see *Division 2*), or
- (c) of an ecological community as a critically endangered ecological community, endangered ecological community or vulnerable ecological community (see *Division 3*).

Division 4 provides for the interpretation and application of the prescribed criteria.

Division 1 Criteria for listing of species

13 Criteria for listing determinations by Scientific Committee

- (1) **Critically endangered species** For the purposes of section 10 (2) of the Act, a species is facing an extremely high risk of extinction in New South Wales in the immediate future if, in the opinion of the Scientific Committee, it meets the criteria specified for critically endangered species in one or more of the other clauses in this Division.
- (2) **Endangered species** For the purposes of section 10 (3) of the Act, a species is facing a very high risk of extinction in New South Wales in the near future if, in the opinion of the Scientific Committee, it meets the criteria specified for endangered species in one or more of the other clauses in this Division.
- (3) **Vulnerable species** For the purposes of section 10 (4) of the Act, a species is facing a high risk of extinction in New South Wales in the medium-term future if, in the opinion of the Scientific Committee, it meets the criteria specified for vulnerable species in one or more of the other clauses in this Division.

14 Criteria—reduction in population size of species

The species has undergone, is observed, estimated, inferred or reasonably suspected to have undergone or is likely to undergo within a time frame appropriate to the life cycle and habitat characteristics of the taxon:

- (a) for **critically endangered species**—a very large reduction in population size, or
 - (b) for **endangered species**—a large reduction in population size, or
 - (c) for **vulnerable species**—a moderate reduction in population size,
- based on either:

- (d) an index of abundance appropriate to the taxon, or
- (e) geographic distribution, habitat quality or diversity, or genetic diversity.

15 Criteria—restricted geographic distribution of species, and certain other conditions

The geographic distribution of the species is estimated or inferred to be:

- (a) for ***critically endangered species***—very highly restricted, or
- (b) for ***endangered species***—highly restricted, or
- (c) for ***vulnerable species***—moderately restricted,
and either:
 - (d) a projected or continuing decline is observed, estimated or inferred in either:
 - (i) an index of abundance appropriate to the taxon, or
 - (ii) geographic distribution, habitat quality or diversity, or genetic diversity, or
 - (e) at least 2 of the following 3 conditions apply:
 - (i) the population or habitat is observed or inferred to be severely fragmented,
 - (ii) all or nearly all mature individuals are observed or inferred to occur within a small number of populations or locations,
 - (iii) extreme fluctuations are observed or inferred to occur in either:
 - (A) an index of abundance appropriate to the taxon, or
 - (B) geographic distribution, habitat quality or habitat diversity.

16 Criteria—low numbers of mature individuals of species, and certain other conditions

The estimated total number of mature individuals of the species is:

- (a) for ***critically endangered species***—very low, or
- (b) for ***endangered species***—low, or
- (c) for ***vulnerable species***—moderately low (that is, not as low as for paragraph (b)),
and either:
 - (d) a projected or continuing decline is observed, estimated or inferred in either:
 - (i) an index of abundance appropriate to the taxon, or
 - (ii) geographic distribution, habitat quality or diversity, or genetic diversity, or

(e) at least 2 of the following 3 conditions apply:

- (i) the population or habitat is observed or inferred to be severely fragmented,
- (ii) all or nearly all mature individuals are observed or inferred to occur within a small number of populations or locations,
- (iii) extreme fluctuations are observed or inferred to occur in either:
 - (A) an index of abundance appropriate to the taxon, or
 - (B) geographic distribution, habitat quality or habitat diversity.

17 Criteria—low numbers of mature individuals of species

The total number of mature individuals of the species is observed, estimated or inferred to be:

- (a) for ***critically endangered species***—extremely low, or
- (b) for ***endangered species***—very low, or
- (c) for ***vulnerable species***—low.

18 Criteria—very highly restricted geographic distribution of species

For ***vulnerable species***, the geographic distribution of the species is observed, estimated or inferred to be very highly restricted such that it is prone to the effects of human activities or stochastic events within a very short time period.

Division 2 Criteria for listing of endangered populations

19 Criteria for listing determinations by Scientific Committee

For the purposes of section 11 (1) of the Act, a population is facing a very high risk of extinction in New South Wales in the near future if, in the opinion of the Scientific Committee, it satisfies any one or more of the following paragraphs and also meets the criteria specified in one or more of the other clauses in this Division:

- (a) it is disjunct or near the limit of its geographic range,
- (b) it is or is likely to be genetically, morphologically or ecologically distinct,
- (c) it is otherwise of significant conservation value.

20 Criteria—large reduction in population size

The size of the population has undergone, is observed, estimated, inferred or reasonably suspected to have undergone or is likely to undergo within a time frame appropriate to the life cycle and habitat characteristics of the taxon a large reduction based on either:

- (a) an index of abundance appropriate to the taxon, or
- (b) geographic distribution, habitat quality or diversity, or genetic diversity.

21 Criteria—highly restricted geographic distribution of population, and certain other conditions

The geographic distribution of the population is estimated or inferred to be highly restricted and either:

- (a) a projected or continuing decline is observed, estimated or inferred in either:
 - (i) an index of abundance appropriate to the taxon, or
 - (ii) geographic distribution, habitat quality or diversity, or genetic diversity, or
- (b) at least two of the following three conditions apply:
 - (i) the population or habitat is observed or inferred to be severely fragmented,
 - (ii) all or nearly all mature individuals are observed or inferred to occur within a small number of locations,
 - (iii) extreme fluctuations are observed or inferred to occur in either:
 - (A) an index of abundance appropriate to the taxon, or
 - (B) geographic distribution, habitat quality or habitat diversity.

22 Criteria—low numbers of mature individuals in population, and certain other conditions

The estimated total number of mature individuals in the population is low and either:

- (a) a projected or continuing decline is observed, estimated or inferred in either:
 - (i) an index of abundance appropriate to the taxon, or
 - (ii) geographic distribution, habitat quality or diversity, or genetic diversity, or
- (b) at least two of the following three conditions apply:
 - (i) the population or habitat is observed or inferred to be severely fragmented,
 - (ii) all or nearly all mature individuals are observed or inferred to occur within a small number of locations,
 - (iii) extreme fluctuations are observed or inferred to occur in either:
 - (A) an index of abundance appropriate to the taxon, or
 - (B) geographic distribution, habitat quality or habitat diversity.

23 Criteria—very low numbers of mature individuals in population

The estimated total number of mature individuals of the population is observed, estimated or inferred to be very low.

Division 3 Criteria for listing of ecological communities

24 Criteria for listing determinations by Scientific Committee

- (1) **Critically endangered ecological communities** For the purposes of section 12 (1) of the Act, an ecological community is facing an extremely high risk of extinction in New South Wales in the immediate future if, in the opinion of the Scientific Committee, it meets the criteria specified for critically endangered ecological communities in one or more of the other clauses in this Division.
- (2) **Endangered ecological communities** For the purposes of section 12 (2) of the Act, an ecological community is facing a very high risk of extinction in New South Wales in the near future if, in the opinion of the Scientific Committee, it meets the criteria specified for endangered ecological communities in one or more of the other clauses in this Division.
- (3) **Vulnerable ecological communities** For the purposes of section 12 (3) of the Act, an ecological community is facing a high risk of extinction in New South Wales in the medium-term future if, in the opinion of the Scientific Committee, it meets the criteria specified for vulnerable ecological communities in one or more of the other clauses in this Division.

25 Criteria—reduction in geographic distribution of ecological community

The ecological community has undergone, is observed, estimated, inferred or reasonably suspected to have undergone or is likely to undergo within a time span appropriate to the life cycle and habitat characteristics of its component species:

- (a) for ***critically endangered ecological communities***—a very large reduction in geographic distribution, or
- (b) for ***endangered ecological communities***—a large reduction in geographic distribution, or
- (c) for ***vulnerable ecological communities***—a moderate reduction in geographic distribution.

26 Criteria—restricted geographic distribution of ecological community

The ecological community's geographic distribution is estimated or inferred to be:

- (a) for ***critically endangered ecological communities***— very highly restricted, or
- (b) for ***endangered ecological communities***—highly restricted, or

(c) for **vulnerable ecological communities**—moderately restricted,

and the nature of its distribution makes it likely that the action of a threatening process could cause it to decline or degrade in extent or ecological function over a time span appropriate to the life cycle and habitat characteristics of the ecological community's component species.

27 Criteria—reduction in ecological function of ecological community

The ecological community has undergone, is observed, estimated, inferred or reasonably suspected to have undergone or is likely to undergo within a time span appropriate to the life cycle and habitat characteristics of its component species:

(a) for **critically endangered ecological communities**—a very large reduction in ecological function, or

(b) for **endangered ecological communities**—a large reduction in ecological function, or

(c) for **vulnerable ecological communities**—a moderate reduction in ecological function,

as indicated by any of the following:

(d) change in community structure,

(e) change in species composition,

(f) disruption of ecological processes,

(g) invasion and establishment of exotic species,

(h) degradation of habitat,

(i) fragmentation of habitat.

Division 4 Interpretation

28 Application of Division

(1) This Division applies for the purposes of the interpretation and application of the criteria prescribed by this Part (with a note to each provision of this Division specifying which provisions of this Part the provision applies in respect of).

(2) Use in a provision of this Division of the term “population” does not limit the operation of the provision to Division 2 and use of the term “species” does not limit the operation of a provision to Division 1.

29 Ecological function

- (1) Ecological function encompasses the ecological processes and interactions that occur within an ecological community.
- (2) Ecological function includes the following:
 - (a) provision of habitat for native biota,
 - (b) provision of food and other resources for native biota,
 - (c) maintenance of interactions between species (for example, pollination, dispersal, mutualism, competition, predation),
 - (d) cycling, filtering and retention of nutrients,
 - (e) carbon storage or sequestration,
 - (f) maintenance of soil processes,
 - (g) maintenance of catchment scale hydrological and geochemical processes,
 - (h) maintenance of landscape scale ecological processes.
- (3) Some of the processes and interactions within ecological communities may depend upon the presence of non-living components such as leaf litter and fallen or standing dead trees.

Note—

This clause applies in respect of Division 3.

30 Mature individuals

- (1) Mature individuals are individuals in the wild known, estimated or inferred to be capable of producing viable offspring. The total number of mature individuals excludes individuals that are too young (juvenile), too old (senescent), too moribund (for example, diseased) or otherwise unable to produce viable offspring (for example, due to low population density).
- (2) Special cases:
 - (a) In populations with biased sex ratios, it is appropriate to use a lower value for the total number of mature individuals in a way that takes this into account.
 - (b) In populations that fluctuate, the number of mature individuals will refer to a minimum number of individuals that are present most of the time (in a time span appropriate to the life cycle and habitat characteristics of the species), and will thus usually be much less than the mean number present.

- (c) In clonal organisms, reproducing units may be regarded as mature individuals, so long as they survive independently of one another. However, if clonally reproduced individuals are more limited in viability or dispersal ability than sexually reproduced individuals, the total number of mature individuals may be reduced accordingly to take this into account.
- (d) For species in which individuals have synchronous dormant life stages, the number of mature individuals should be assessed during, or projected for, a time when mature individuals are available for breeding.
- (e) Re-introduced individuals must have produced viable offspring (after the individuals were re-introduced) before they are counted as mature individuals.
- (f) Captive, cultivated, or artificially maintained individuals cannot be counted as mature individuals.

Note—

This clause applies in respect of Divisions 1 and 2.

31 Geographic distribution

- (1) Geographic distribution is the area or areas in which a species or ecological community occurs, excluding cases of vagrancy in species.
- (2) This may be assessed by estimating:
 - (a) the extent of occurrence (the area of the total geographic range that includes all extant populations of the species or all extant occurrences of the ecological community), or
 - (b) the area of occupancy (the area within the total range that is currently occupied by the species or ecological community, that is it excludes unsuitable and unoccupied habitat), or
 - (c) the area of suitable habitat (the area within the total range that includes occupied and unoccupied suitable habitat, but excludes unsuitable habitat).
- (3) The scale at which a geographic distribution is assessed should be appropriate to the biology of the species (or component species in ecological communities), the nature of threats and available data.

Note—

This clause applies in respect of Divisions 1, 2 and 3.

32 Severely fragmented

The population or habitat of a species is severely fragmented if individuals of the species are distributed among subpopulations or patches of habitat that are small and isolated

relative to the life cycle and habitat characteristics of the species.

Note—

This clause applies in respect of Divisions 1 and 2.

33 Extreme fluctuations

Extreme fluctuations occur when the population or distribution of a species varies reversibly, widely and frequently, as:

(a) indicated by changes in:

- (i) an index of abundance appropriate to the taxon, or
- (ii) geographic distribution, habitat quality or habitat diversity, or

(b) inferred from the life history or habitat biology of the species.

Note 1—

The cause of fluctuations must be understood or inferred so that they may be distinguished from declines or reductions.

Note 2—

This clause applies in respect of Divisions 1 and 2.