

# KELLEHERS AUSTRALIA

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## In-House Memorandum

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### ***Creating a Wetland Habitat***

Each vulnerable and threatened species requires habitat to survive. Where this is not naturally available in a particular location, habitat may be created. Where a water reliant endangered species is involved, such as the Growling Grass Frog<sup>1</sup>, wetland creation may be attempted. Wetland creation is a delicate science, combining engineering, hydrological and planning techniques to ensure suitable placement in order to be effective and sustainable. The ecological value of 'created' wetlands tends to be significantly lower compared to those of 'natural' wetlands<sup>2</sup>.

Although planning and water law are often separated<sup>3</sup>, in an environmental sense they are integrally bound together. This article considers provisions of the Victoria Planning Provisions relevant to wetland creation. The context chosen is the wetland requires for preservation of the Growling Grass Frog within Melbourne's Urban Growth Areas. The Growling Grass Frog's habitat revolves around spatially clustered patterns of wetland occupancy over alternating periods of dry and flood<sup>4</sup>, requiring water bodies located closely proximate so as to give the frog unhindered movement between and within water bodies. Water supply is critical to achieve the appropriate size and availability of wetland habitat at the required hydro-period. The frog is more likely to persist in larger, more permanent wetlands. Water quality is important as the frog is sensitive to some horticultural chemicals, such as fertilizers and pesticides.

Suitable habitat creation parameters are<sup>5</sup>:

- Permanent and semi-permanent wetlands;
- Diverse aquatic vegetation, including higher covers of emergent, submergent and floating vegetation;
- Wetland depth of 1.5m or more across a significant proportion of the wetland;
- Clusters of wetlands within hundreds of metres of one another;
- Wetlands greater than 3,800sqm;
- Still and very slow-flowing water;
- Water salinity not exceeding 10,000 uS/cm;
- Suitable dispersal habitat linking the wetland to other wetlands.

Zones and overlays within the Victoria Planning Provisions specify certain considerations which must be made in order to grant works in the nature of an artificial wetland.

### Zones and Overlays

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<sup>1</sup> DEPI, 'Sub-regional Species Strategy for the Growling Grass Frog' (The State of Victoria, 2013)

<sup>2</sup> Research by Kellehers Australia consultant Dr Rebecca Nelson demonstrates the significant perils of allowing 'natural' habitat destruction through a system of habitat offsets. See, for example, Colleen E. Bronner, et al., *An Assessment of U.S. Stream Compensatory Mitigation Policy: Necessary Changes to Protect Ecosystem Functions and Services*, 49 JAWRA Journal of the American Water Resources Association 451, 453 (2013) and Gardner, R.C. et al., *Compensating for Wetland Losses under the Clean Water Act (Redux): Evaluating the Federal Compensatory Mitigation Regulation*, 38 Stetson Law Review 213-249 (2009).

<sup>3</sup> See, for example, *Yarriambiack Creek Flow Protection Committee Inc v Northern Grampians SC* [2007] VCAT 801 and *Victorian National Parks Association Incorporated v Iluka Resources Ltd* [2004] VCAT 20.

<sup>4</sup> DEPI, 'Sub-regional Species Strategy for the Growling Grass Frog' (The State of Victoria, 2013), p.10.

<sup>5</sup> Biosis Research Pty Ltd, 2012, *Review of habitat corridors for growling Grass Frog Litoria raniformis within Melbourne's urban Growth corridors*. DSE, East Melbourne; Ecology and Heritage Partners, 2011, *Sub-regional Growling Grass Frog Conservation Strategy within the revised urban growth boundary and 28 Precincts. Technical background and guidelines*. Ecology and Heritage Partners, Brunswick; Heard, G; Scroggie, M and Clemen, N, 2010, *Guidelines for managing the endangered Growling Grass Frog in urbanising landscapes*. Arthur Rylah Institute Technical Series No.208, DSE, East Melbourne.

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Under the *Planning and Environment Act 1987* (Vic), “works” are defined as including:

*“...any change to the natural or existing condition or topography of land including the removal, destruction or lopping of trees and the removal of vegetation or topsoil”* (s3, P&E Act)

Construction of a wetland is likely to fall within the definition of “works”, as it requires topographical alteration to create sedimentation basins and inlet and outlet ponds. In addition, an ‘online wetland’<sup>6</sup> is likely to intervene in or interrupt existing drainage arrangements.

Within an **Urban Growth Zone**, a permit is required for any earthworks which change the rate of flow or the discharge point of water across a property boundary and which increase the discharge of saline water<sup>7</sup>. In deciding whether to grant a permit under this zone, regard must be had to:

- The capability of the land to accommodate the proposed use or development, including the disposal of effluent; and
- How the use or development relates to sustainable land management (Cl. 37.07-7).

Within a **Rural Conservation Zone**, a permit is required for earthworks within any area specified by a Schedule to the Zone.

In deciding whether to grant a permit, regard must be had to environmental issues, including:

- Whether the use or development protects and enhances the environmental qualities of the site and its surrounds;
- The retention of vegetation and faunal habitats and the need to revegetate land including riparian buffers along waterways, gullies, ridgelines, property boundaries and saline discharge and recharge areas;
- How the use and development relates to sustainable land management and the need to prepare an integrated land management plan which addresses the protection and enhancement of native vegetation and waterways, stabilisation of soil and pest plant and animal control; and
- The location of on-site effluent disposal areas to minimise the impact of nutrient loads on waterways and native vegetation.

Within an **Urban Floodway Zone** and a **Land Subject to Inundation Overlay**, a permit is required for works on land, including bicycle pathways and trails, a domestic swimming pool or spa and roadworks. Flood mitigation works and the laying of infrastructure where topography is unaltered require no permit. Applications must include a Flood Risk Report outlining:

- Whether the proposed use or development could be located on flood-free land or land with a lesser flood hazard outside this zone;
- The potential flood risk to life, health and safety associated with the development;
- The effect of the development on redirecting or obstructing floodwater, stormwater or drainage water and the effect of the development on reducing flood storage and increasing flood levels and flow velocities; and
- The effects of the development on environmental values such as natural habitat, stream stability, erosion, water quality and sites of scientific significance

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<sup>6</sup> “A wetland located within a waterway or drainage line with base flow and high flows passing through the system”; ‘Constructed Wetlands Guidelines’, (Melbourne Water Corporation, 2010), p.3

<sup>7</sup> Clause 37.07-4, *Urban Growth Zone*, Victoria Planning Provisions

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In deciding whether to grant a permit, regard must be had to the Local Floodplain Development Plan or any Flood Risk Report and any comments from the relevant Floodplain Management Authority.

Within an **Environmental Significance Overlay**, a permit is required to carry out works, construct a fence and remove, destroy or lop any vegetation, including dead vegetation<sup>8</sup>.

In deciding whether to grant a permit, regard must be had to matters specified in a Schedule to the overlay, which in some cases may include:

- The impact of the development on any proposed or existing conservation reserves, streams and waterways, including the potential impacts of nutrients and water run-off, increased weed and pest invasion or recreational impacts;
- The impact on the integrity of the site from the proposed development, disturbance and removal of rock, indiscriminate weed control, habitat fragmentation, isolation, disturbance and destruction of habitat of threatened species; and
- The proposed management practices for the land including the linking and enlarging of areas of significant flora and fauna habitats<sup>9</sup>.

## Link between Planning and Water Law

There is a line of Victoria cases from *Iluka*<sup>10</sup> separating planning from water law. Given the critical role Victorian Planning law in imposing Federal environmental obligations and protection of water dependent listed threatened species, some reconsideration of this approach appears to be urgently required. Provision of environmental water for environmental purposes was considered in *Yarriambiack v Horsham Rural CC*<sup>11</sup>. In that case, although it was a requirement of the SEPP (Waters of Victoria) that agencies provide adequate environmental flows to waterways, wetlands, lakes and estuaries<sup>12</sup>, Member Potts found that the auditing of delivery and benefits of environmental flows ultimately arises from the *Water Act 1989* (Vic) and, therefore, need not be considered in a case concerning permit cancellation or amendment under s82, *Planning and Environment Act 1987* (Vic)<sup>13</sup>. This case relied on *Iluka*<sup>14</sup> in which objector's concerns in regard to environment flows were not considered to be relevant considerations in the exercise of discretion to grant a permit for the development of use of land in question<sup>15</sup>.

Cameron Algie  
10 November 2014

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<sup>8</sup> Exceptions are set out at Clause 42.01-2.

<sup>9</sup> 'Environmental Significance Overlay – Schedule 2', Wyndham Planning Scheme.

<sup>10</sup> *Victorian National Parks Association Incorporated v Iluka Resources Ltd* [2004] VCAT 20.

<sup>11</sup> *Yarriambiack Creek Flow Protection Committee Inc v Northern Grampians SC* [2007] VCAT 801.

<sup>12</sup> Waters of Victoria, State Environment Protection Policy, (Wimmera River section of), 4 June 2003, Clause 41.

<sup>13</sup> *Yarriambiack Creek Flow Protection Committee Inc v Northern Grampians SC* [2007] VCAT 801, per Member Potts at [51].

<sup>14</sup> Fn. 6 supra.

<sup>15</sup> In that case, the development concerned the use of land for a pipeline and pumping station within a Public Conservation and Resource Zone; *Ibid*, at [46].

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