



# Environmental Defenders Office

14 February 2020

The Hon Susan Ley MP  
Minister for the Environment  
Parliament House  
CANBERRA ACT 2600



**HUMANE SOCIETY  
INTERNATIONAL**  
AUSTRALIA

**By post and email:** [sussan.ley.mp@aph.gov.au](mailto:sussan.ley.mp@aph.gov.au); [minister.ley@environment.gov.au](mailto:minister.ley@environment.gov.au)

Dear Minister

## **Bushfire Emergency: Options available under the *Environment Protection and Biodiversity Conservation Act 1999* to protect threatened species and communities**

1. The Environmental Defenders Office is a not-for-profit community legal centre specialising in public interest environmental law. Our lawyers work with clients across the country, and as an office, we have been inundated with calls from clients concerned about the impact of the recent Australian bushfires on wildlife.
2. The Humane Society International is a not-for-profit organisation whose objectives include the protection of endangered species and their habitats in Australia.
3. As you are aware, the ongoing Bushfire Emergency across the country has fundamentally changed the landscape that supports Australian wildlife. As your Department has identified, huge swathes of habitat areas for Australian animals, including many threatened species listed under *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**), have been heavily impacted. On Tuesday this week, your Department released a provisional list of 113 animal species requiring urgent management intervention,<sup>1</sup> and on Thursday it released mapping that indicates that bushfires have affected approximately 54 per cent of the Gondwana Rainforests of Australia (NSW, Qld) and 81 per cent of the Greater Blue Mountains Area (NSW).
4. Given the scale of devastation wrought by the Bushfire Emergency, and the community concern about the survival of Australian wildlife and their habitat particularly in areas already earmarked for clearing, we set out below various powers available to you under the EPBC Act to ensure the protection of threatened species and ecological communities that have been affected by the Bushfire Emergency.
5. One important initial step available to you is to temporarily suspend the progress of any current decision-making processes under the EPBC Act in relation to proposed actions

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<sup>1</sup> Wildlife and Threatened Species Bushfire Recovery Expert Panel, "Rapid analysis of impacts of the 2019-20 fires on animal species, and prioritisation of species for management response – preliminary report" (9 February 2020).

that are likely to impact threatened species or ecological communities that have also been heavily affected by the Bushfire Emergency. This temporary suspension would allow time for a full assessment of the impacts of the Bushfire Emergency to be conducted. In turn, this assessment would enable your Department to determine whether the Bushfire Emergency may have resulted in any material change in the impacts of proposed actions on affected threatened species or communities. We note that preliminary assessments are already underway.

6. The catastrophic impacts of the Bushfire Emergency may also have significantly altered the magnitude of the impacts of specific actions for which an approval is already in place under the EPBC Act. For example, for some threatened species and communities that have been most heavily impacted by the Bushfire Emergency, the ongoing impacts of certain approved actions may now be much more significant. Indeed, in some cases, the combination of the impacts of specific actions and the Bushfire Emergency may have created entirely new significant impacts on threatened species and communities that were not present when the actions were originally approved.
7. To ensure the ongoing protection of threatened species and communities from those specific approved actions, you may consider exercising your powers under the EPBC Act to vary or suspend existing approvals to allow for appropriate protection measures to be implemented. In extreme cases, for example where certain actions now pose a risk of extinction, you may even consider revoking existing approvals.
8. There are also possible implications of the Bushfire Emergency on the continued operation of the various Regional Forestry Agreements (**RFA**) in place around the country, and some Wildlife Trade Operations (**WTO**) or Accredited Management Plans (**AMP**) declared in relation to native species, for example the Kangaroo. We set out below steps you may take to ensure that the RFAs, and any applicable WTOs / AMPs, continue to operate in a sustainable manner following the Bushfire Emergency.

### **Impacts of the Bushfire Emergency on threatened species to date**

9. The extent and severity of the Bushfire Emergency throughout NSW, Victoria, the ACT, Queensland, South Australia, Western Australia and Tasmania represents a substantial change in the long-term viability of many populations of threatened species and ecological communities, which is not yet fully understood.
10. The Bushfire Emergency has, according to your Department's preliminary analysis, burned anywhere from 10% to over 80% of the known (or modelled likely) distribution of more than 330 threatened and migratory species listed under the EPBC Act. Your Department estimates that this includes thirty-one critically endangered species, 110 endangered species and 186 species listed as vulnerable.<sup>2</sup>

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<sup>2</sup> Department of Agriculture, Water and the Environment, available at <http://www.environment.gov.au/biodiversity/bushfire-recovery/research-and-resources> (accessed 13 February 2020).

11. More specifically, the fires have destroyed:
  - a. Over 80% of the habitat of the endangered Kangaroo Island Dunnart (*Sminthopsis griseoventer aitkeni*);
  - b. Between 50% and 80% of the habitat of the endangered Long-footed Potoroo (*Potorus longipes*); and
  - c. Up to 30% of the habitat of the:
    - i. Critically endangered Swift Parrot (*Lathamus discolor*);
    - ii. Critically endangered Regent Honeyeater (*Anthochaera phygia*); and
    - iii. Vulnerable Koala (*Phascolarctos cinereus*) populations of Queensland, NSW and the ACT.
12. It is unknown how many, if any, individual animals present in the affected areas may have survived. As such, the true impact that the Bushfire Emergency will have on Australia's threatened species and ecological communities cannot be properly known until the fire-affected areas have been thoroughly surveyed.
13. Having regard to your Department's preliminary analysis of the significant reduction in threatened species habitat caused by the Bushfire Emergency, we are concerned that:
  - a. The impacts that proposed actions will have on remaining threatened species and ecological communities cannot be adequately assessed until the damage to habitat and populations caused by the Bushfire Emergency is known;
  - b. The significance of the impacts of certain approved actions on threatened species and communities may have substantially increased; and
  - c. The Bushfire Emergency has so severely impacted the existing habitat of some threatened species and communities that any further reduction in that habitat caused by certain approved actions may constitute new significant impacts on the threatened species or communities that were not assessed at the time those actions were approved.

## **Options to protect threatened species and ecological communities**

### ***Reassessment of impacts of proposed and approved actions***

14. As an immediate step in responding to the impacts of the ongoing Bushfire Emergency, you may consider commissioning re-assessments of the impacts of proposed and approved actions on threatened species and ecological communities that have been most heavily affected by the Bushfire Emergency. As you are aware, you have express powers under sections 76, 89 and 132 of the EPBC Act to request the proponent of a proposed action to provide further information in relation to the specific impacts of the action - for example, the action's impacts in conjunction with the impacts of the

Bushfire Emergency. In relation to approved actions, such re-assessment could be conducted by independent experts engaged by your Department.

15. As a starting point, we suggest that this re-assessment could focus on, for example, the following actions that have been approved under the EPBC Act on sites that we understand are still intact, and for which threatened species that have been severely affected by the Bushfire Emergency are listed as controlling provisions, due to the actions' impacts on habitat (e.g. through land clearing):
  - a. Wallarah 2 Coal Project (EPBC 2012/6388): The approval of this action lists the endangered Giant Barred Frog (*Mixophyes iteratus*) and the endangered Spot-tailed Quoll (*Dasyurus maculatus maculatus* (SE mainland population)) as controlling provisions. Your Department's preliminary analysis indicates that the Bushfire Emergency has affected up to 50% of the area of known (and modelled likely) distribution of the Giant Barred Frog, and up to 30% of the area of known (and modelled likely) distribution of the Spot-tailed Quoll.
  - b. Mt Gilead Residential Development (EPBC 2015/7599): The approval for this action lists the critically endangered Swift Parrot (*Lathamus discolor*), and the vulnerable Koala (*Phascolarctos cinereus*), Large-eared Pied Bat (*Chalinolobus dwyeri*), and Grey-headed Flying Fox (*Pteropus poliocephalus*), as controlling provisions. Your Department's preliminary analysis indicates that the Bushfire Emergency has affected up to 30% of the area of known (and modelled likely) distribution of those species.
  - c. Shenhua Watermark Coal Project (EPBC 2011/6201): The approval for this action lists the critically endangered Regent Honeyeater (*Anthochaera phrygia*) and Swift Parrot (*Lathamus discolor*), the endangered Spotted-tail Quoll (*Dasyurus maculatus maculatus* (SE mainland population)) and the vulnerable Large-eared Pied Bat (*Chalinolobus dwyeri*), as controlling provisions. Your Department's preliminary analysis indicates that the Bushfire Emergency has affected up to 30% of the area of known (and modelled likely) distribution of those species.
16. We note that most of the threatened species listed above, including the Koala, the Giant Barred Frog, the Spot-tail Quoll, the Spotted-Tail Quoll, the Grey-headed Flying Fox, and the Regent Honeyeater, appear on your Department's provisional list of animals requiring urgent management intervention<sup>3</sup> following the Bushfire Emergency.
17. Across Australia, there are likely to be many examples where the Bushfire Emergency has significantly exacerbated the impacts of proposed or approved actions, or created new significant impacts, in relation to habit loss for threatened species and ecological communities. We are pleased to see that the process of identification of affected species has already begun – it is important to ensure that sites where these species are known to exist are protected while assessments of the impacts of the Bushfire Emergency on biodiversity are being completed.

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<sup>3</sup> Above, fn.1.

### ***Suspension of current decision-making processes***

18. As a further immediate option, and to allow time to complete the re-assessment process referred to above, you may take steps to suspend:
- a. Current assessment and approval processes under the EPBC Act for proposed actions that may impact on threatened species or ecological communities that have been heavily affected by the Bushfire Emergency; and
  - b. Current decision-making process concerning the approval of any management plan (whether an action management plan required under sections 132B and 134(3)(e) of the EPBC Act, or a management plan required under an action approval) relating to threatened species or ecological communities that have been heavily affected by the Bushfire Emergency. As you are aware, you have an express power under section 134(3D) of the EPBC Act to request the holder of an approval to provide specific information relevant to the decision to approve an action management plan – for example, information relating to the impacts of the Bushfire Emergency in conjunction with the specific action.

### ***Reconsideration of “controlled action decisions”***

19. You may also reconsider, on your own initiative (without any request from the proponent), certain “controlled action decisions” under section 75 of the EPBC Act in the wake of the Bushfire Emergency. This would be appropriate in circumstances where the re-assessment referred to above identifies that, as a result of the Bushfire Emergency:
- a. There is substantial new information about the impacts that a proposed action is likely to have on a listed threatened species or ecological community; or
  - b. There has been a substantial change in circumstances that was not foreseen at the time a “controlled action decision” was made that relates to the impacts the action is likely to have on a threatened species or ecological community.
20. As you are aware, in such circumstances, you have express powers under section 78 of the EPBC Act to revoke the relevant “controlled action decision” and substitute it with one that appropriately takes into account the impacts of the action on threatened species and ecological communities in light of the extensive impacts of the Bushfire Emergency.

### ***Consider varying, suspending or revoking existing approvals***

21. In the most serious of cases, where you are satisfied that , as a result of the Bushfire Emergency, a specific action with an existing approval is likely to have a significant impact on a threatened species or community that is a controlling provision for that approval, which:
- a. Was not identified at the time of the action’s approval; or

- b. Is substantially greater than the impact identified at the time of the action's approval,

it would be appropriate for you to exercise your powers under Division 3 of Part 9 of the EPBC Act to vary or add to the conditions of the approval, or suspend the approval, in order to ensure that appropriate measures are implemented to ensure the protection of the threatened species or community. Such powers could be exercised applying a precautionary approach, allowing approved projects to be “paused” while full biodiversity assessments are being completed.

22. In a worst-case scenario where the above criteria are met, the impacts of the Bushfire Emergency on a particular species or community may be so severe that if certain approved actions were now permitted to proceed, the impacts of the actions would be catastrophic. For example, a situation may arise where an existing approval permits the clearing of an area of habitat that, following the Bushfire Emergency, is now the last remaining stand of habitat for a particular species. Therefore, if the action were to proceed as approved the species would become extinct. In such a scenario, it would be clearly appropriate for you to consider exercising your powers under Division 3 of Part 9 of the EPBC Act to revoke the approval for the action.
23. Whilst this is an extreme example, given the extent of the Bushfire Emergency and its impact on such a large number of species, it is within the realms of possibility. As such, identification of approved actions that will further impact on species and communities that have been pushed to the brink of extinction by the Bushfire Emergency, must be a priority, in order that you can consider what action should be taken to ensure the ongoing survival of those species and communities.

### **Options to ensure sustainability of Regional Forestry Agreements**

24. The various RFAs in place across Australia generally permit the harvesting of forest products at no more than “sustainable yields”. Sustainable yields are defined or calculated in accordance with the terms of the relevant RFA.
25. However, there is now an urgent need to review the sustainable yield calculations under each RFA, so that they take into account the extensive forest losses that have resulted, and continue to result, from the Bushfire Emergency. We recommend that you take steps to initiate (including by liaising with the Prime Minister and Minister for Forestry, and relevant State parties to the RFAs) the recalculation of the sustainable yields under the conditions of each RFA or otherwise.
26. In order to ensure that forestry operations under the RFAs are conducted in a sustainable manner following the Bushfire Emergency, we also recommend that you take steps to initiate (including by liaising with the Prime Minister and Minister for Forestry, and relevant State parties to the RFAs) a general review or audit of the operation of the RFAs in light of the Bushfire Emergency (either under the conditions of the relevant RFAs or otherwise).

27. By way of example, and having regard to the NSW RFAs specifically, at a minimum it would be appropriate for this audit or review to address the following criteria:

- a. How the Bushfire Emergency has impacted the CAR Reserve System.
- b. Whether the CAR Reserve System continues to fulfill its purpose as identified in the National Forest Policy Framework and the Nationally Agreed Criteria for the Establishment of a Comprehensive, Adequate and Representative Reserve System for Forests in Australia (the 'JANIS Report').

**Revocation or variation of Wildlife Trade Operations and Accredited Management Plans**

28. There is currently in force a declared WTO and a declared AMP for the export of Kangaroos. Given the potential impacts of the Bushfire Emergency on Kangaroo populations and habitat, we are concerned that the operation of the WTO and AMP is no longer sustainable.

29. As such, we recommend that you exercise your powers to revoke or suspend (by variation of conditions) the WTO and AMP for the export of Kangaroos under section 303FT of the EPBC Act – at least until such time as the impacts of the Bushfire Emergency on the Kangaroo have been properly assessed.

Thank you for considering the options set out above to protect Australian wildlife from further harm, in this interim period while the biodiversity impacts of the Bushfire Emergency are being assessed.

We would be grateful if you could provide a response to this letter as a matter of urgency.

Please contact us on (02) 9262 6989 to discuss this letter.

Yours sincerely

**Environmental Defenders Office**



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