



Environmental
Defenders Office

PART OF THE DEFENDING THE UNBURNT SERIES

Environmental assessment and decision- making for development on fire-affected land - Options for re-assessment under the EPBC Act

JUNE 2021

Defending the Unburnt

Environmental assessment and decision-making for development on fire-affected land - Options for re-assessment under the EPBC Act

June 2021

This Fact Sheet outlines a range of mechanisms in the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) that can be used to ensure that environmental assessments and decisions regarding development that impacts on matters of national environmental significance consider the impacts of the 2019-2020 bushfire season.

These mechanisms include:

1. Re-assessment of impacts
2. Reconsideration of “controlled action decisions”
3. Varying, suspending or revoking existing approvals

For general background information on the EPBC Act please refer to EDO’s [EPBC Act Fact Sheet](#).¹

Defending the Unburnt

The bushfire season of 2019-2020 was unprecedented in terms of scale, intensity and duration in Australian bushfire history. Around the country 33 lives were lost,² an estimated 417 people died due to smoke inhalation,³ more than 3,000 homes burnt down,⁴ and property and infrastructure was destroyed including thousands of farms and forest communities.

The bushfires also had a devastating impact on our natural environment. Significant ecosystems and landscapes were decimated, including World Heritage-listed National Parks,⁵ ancient rainforests⁶ and even waterways following post-fire flooding.⁷ An estimated 950 million tonnes of greenhouse gases were emitted.⁸ While it is difficult to estimate the exact number of native animals impacted by the fires, some experts originally predicted it could be as many as 800 million in NSW and one billion nationally,⁹ with more recent analyses suggesting as many as three billion nationally.¹⁰

Protecting intact and unburnt, as well as lightly burnt areas,¹¹ areas of high conservation value is critical, particularly while burnt areas and impacted species recover. These remaining areas are essential for providing habitat and refuge for wildlife; providing future climate change refugia; delivering important ecosystem services, assisting impacted ecosystems and landscapes to recover; building resilience and ensuring our remaining natural areas thrive. The time required for recovery of threatened and sensitive species after average fires ranges from around 10 years up to 120 years for some species.¹²

The 2019-2020 bushfire season changed the Australian landscape and the environmental baseline of our biodiversity conservation and natural resource management frameworks. Widespread damage to ecosystems, landscapes and the significant loss of wildlife caused by the fires means that any assumptions underpinning environmental assessment, decision-making and policies should be re-visited to consider the impacts of the bushfires.

Commonwealth Environment Protection and Biodiversity Conservation Act 1999

The EPBC Act is the key Commonwealth environmental legislation aimed at protecting the environment. It seeks to protect matters of national environmental significance (**MNES**),¹³ including, for example, Federally-listed threatened species and communities, and World Heritage areas.

The Commonwealth Environment Minister has functions and powers relating to the environmental impact assessment and determination of project applications that significantly impact on MNES. The impacts of the 2019-2020 bushfire season on MNES should be considered when carrying out these functions.

Opportunities for considering bushfire impacts in re-assessments and decision-making under the EPBC Act

This fact sheet identifies 3 options:

1. **Re-assessment of impacts**
2. **Reconsideration of “controlled action decisions”**
3. **Varying, suspending or revoking existing approvals**

1. Re-assessment of impacts

Environmental impact assessments that underpin decisions made under the EPBC Act should be accurate and up-to-date. Because the impacts of the 2019-2020 bushfire season were so significant, some environmental assessments may be out-of-date (for example, they were prepared prior to the 2019-2020 bushfire season), rely on outdated information, or inadequately consider the impacts of the 2019-2020 bushfire. In these circumstances, provisions of the EPBC Act could be used to require proponents of development to provide additional information, including re-assessment of impacts that proposals may have on MNES affected by the 2019-2020 bushfires.

Before deciding whether to approve a proposed development the Environment Minister can request further information about the specific impacts of proposed development, prior to determination, as follows.

- **Controlled action decisions:** Under section 76 of the EPBC Act the Minister may request that a proponent provide specified information relating to the decision of whether development is a controlled action¹⁴ under the EPBC Act and what MNES require assessment. The Minister may also request information as to which assessment process will apply to the development.
- **Decisions on assessment approach:** Under section 89 of the EPBC Act, the Minister may request the proponent provide specified information relevant to making the decision on which assessment process will apply to the development. The Minister may make this request even if the Minister has already made a request under the above controlled action decision provisions.
- **Approval decisions:** Under section 132 of the EPBC Act, the Minister may request specified information relevant to making the decision of whether or not to approve the taking of an action. In this instance, the Minister can seek the information from the proponent, or others,

including the appropriate Minister of a State or Territory, or any other person the Minister considers appropriate.

Using these provisions of the EPBC Act, the Minister could request additional information regarding, or re-assessments of, the impacts of proposed actions on MNES, including for example threatened species and ecological communities that have been most heavily affected by the 2019-2020 bushfires.

The Minister can also request specified information when deciding whether or not to approve an **action management plan** that is prepared under conditions of consent of approved development (s134(3D) of the EPBC Act). This would allow the Minister to ensure that action management plans are prepared taking into account relevant bushfire impacts.

2. Reconsideration of “controlled action decisions”

Under section 78 of the EPBC Act, the Environment Minister has the power to revoke a “controlled action decision” and substitute it with a new one in certain circumstances, including if:

- the Minister is satisfied that the revocation and substitution is warranted by the availability of substantial new information about the impacts that the action on a MNES; or
- the Minister is satisfied that the revocation and substitution is warranted by a substantial change in circumstances that was not foreseen at the time of the first decision and relates to the impacts that the action will have on a MNES.

It may be open to the Environment Minister to use this power if, following the 2019-2020 bushfire season, there is substantial new information or substantial change in circumstances relating to impacts that development is likely to have on a MNES, including, for example, threatened species or ecological communities.

Any person can request the Minister reconsider a “controlled action decision”. Section 78A of the EPBC Act and Part 4A of the *Environment Protection and Biodiversity Conservation Regulations 2000* sets out requirements for making a request to the Minister.

The *EPBC Act Policy Statement—Reconsideration: Implementing the requirements of sections 78, 78A, 78B and 78C of the EPBC Act* provides further guidance on the application of these provisions of the EPBC Act.

3) Varying, suspending or revoking existing approvals

Under Part 9 Division 3 of the EPBC Act the Environment Minister has power to vary an approval, including by revoking, varying or adding conditions (section 143), suspend an approval (section 144) or revoke an approval (section 145).

The Environment Minister may consider using these powers where an approved action is, accounting for the impacts of the bushfires, now likely to have a significant impact, which:

- was not identified at the time of the action’s approval; or
- is substantially greater than the impact identified at the time of the action’s approval.

Such powers could be exercised applying a precautionary approach, allowing approved projects to be “paused” while updated environmental assessments are being completed. In a worst-case scenario, for example, the impacts of the bushfires on a particular species or ecological community may have been so severe that if certain approved actions were now permitted to proceed, the impacts of the actions would be catastrophic. In such circumstances consideration could be given to revoking an approval. Whilst this is an extreme example, it is possible that given the extent and severity of the bushfires, impacts of a proposed or approved action may now be greater than originally anticipated.

The EPBC Act also includes specific provisions relating to listing of threatened species and protecting critical habitat. For further information about how these mechanisms could be used to protect the unburnt visit [edo.org.au/unburntsix-mainpage](https://www.edo.org.au/unburntsix-mainpage).

Endnotes

¹ See https://www.edo.org.au/wp-content/uploads/2020/06/EPBC_Act.pdf

² Parliament of Australia, 2020, *2019–20 Australian bushfires—frequently asked questions: a quick guide*, available at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1920/Quick_Guide_s/AustralianBushfires

³ Arriagada, N.B, et al, 2020, *Unprecedented smoke-related health burden associated with the 2019–20 bushfires in eastern Australia*. *Med J Aust* 2020; 213 (6): 282-283. Available at <https://www.mja.com.au/journal/2020/213/6/unprecedented-smoke-related-health-burden-associated-2019-20-bushfires-eastern>

⁴ AFAC (Australasian Fire and Emergency Service Authorities Council) (2020) *Cumulative Seasonal Summary*, AFAC National Resource Sharing Centre, 28 February 2020. Accessed at <https://twitter.com/AFACnews/status/1233262259612213248/photo/1>.

⁵ See, for example, Department of Agriculture, Water and the Environment, 2020. *Greater Blue Mountains Area State of Conservation update - April 2020*, available at <http://www.environment.gov.au/system/files/resources/2073fd28-88e8-42f6-8b2a-20a811f7a279/files/greater-blue-mountains-area-state-conservation-update-april-2020.pdf>

⁶ See, for example, Queensland Government, 2020, *Altered fire regimes pressure on the Gondwana Rainforests*. Available for viewing at <https://www.stateoftheenvironment.des.qld.gov.au/heritage/world/altered-fire-regimes-pressure-on-the-gondwana-rainforests-of-australia>

⁷ NSW Government, 2020. *Bushfire impacts on water quality, February 2020*, available at <https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/water/20p2093-bushfire-impacts-on-water-quality.pdf>

⁸ DISER, 2020, *Estimating greenhouse gas emissions from bushfires in Australia’s temperate forests: focus on 2019-20*, Australian Government, available at <https://www.industry.gov.au/data-and-publications/estimating-greenhouse-gas-emissions-from-bushfires-in-australias-temperate-forests-focus-on-2019-20>

⁹ Professor Chris Dickman, Faculty of Science, University of Sydney. For an explanation of Professor Dickman’s estimates see <https://www.syddney.edu.au/news-opinion/news/2020/01/08/australian-bushfires-more-than-one-billion-animals-impacted.html>

¹⁰ WWF-Australia, *Impacts of the Unprecedented 2019-20 Bushfires On Australian Animals*, November 2020, available at https://www.wwf.org.au/ArticleDocuments/353/WWF_Impacts-of-the-unprecedented-2019-2020-bushfires-on-Australian-animals.pdf.aspx

¹¹ The importance of protecting lightly burnt and some moderately burnt areas from forestry operations post-bushfires was highlighted in the following report: Smith, Dr A. *Review of CFIOA Mitigation Conditions for Timber Harvesting in Burnt Landscapes - A Report to the NSW Environment Protection Authority*, September 2020, available at <https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/forestry/review-of-cfoa-mitigation-conditions-for-timber-harvesting-in-burnt-landscapes.pdf?la=en&hash=6360E080DB80E7BEF935A1A4A6BDDAB46BBFD0A7>

¹² Smith, Dr A. *Review of CFIOA Mitigation Conditions for Timber Harvesting in Burnt Landscapes - A Report to the NSW Environment Protection Authority*, September 2020, available at <https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/forestry/review-of-cfoa-mitigation-conditions-for-timber-harvesting-in-burnt-landscapes.pdf?la=en&hash=6360E080DB80E7BEF935A1A4A6BDDAB46BBFD0A7>

¹³ See <https://www.environment.gov.au/epbc/what-is-protected>

¹⁴ A controlled action is an action which is likely to have a significant impact on a MNES or Commonwealth land. See EDO Fact Sheet – EPBC Act for more information: https://www.edo.org.au/wp-content/uploads/2020/06/EPBC_Act.pdf