



# Environmental Defenders Office



25 February 2020

The Hon. Gladys Berejiklian MP  
Premier of NSW  
GPO Box 5341  
SYDNEY NSW 2001

## By post

## Copy to:

The Hon. John Barilaro MP  
Deputy Premier  
Minister for Regional New South Wales, Industry and Trade

The Hon. Robert Stokes MP  
Minister for Planning and Public Spaces

The Hon. Matthew Kean  
Minister for Energy and Environment

Dear Premier

## NSW Bushfire Emergency: Options 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 NSW Bushfire Emergency has fundamentally changed the landscape that supports the State's native wildlife. As identified by the Department of Planning, Industry and Environment (**DPIE**)<sup>1</sup>, huge swathes of habitat areas for native animals, including many threatened species listed under the *Biodiversity Conservation Act 2016* (**BC Act**), have been heavily impacted. DPIE reports that the bushfires have

---

<sup>1</sup> DPIE, "Wildlife and Conservation Bushfire Recovery: Immediate Response", January 2020.

affected approximately 54 per cent of the Gondwana Rainforests World Heritage Area and more than 80 per cent of the Greater Blue Mountains World Heritage Area. In addition, the Federal Department of Environment and Energy (**DoEE**) has released a provisional list of 113 native animal species requiring urgent management intervention following the Bushfire Emergency.<sup>2</sup>

4. Given the scale of devastation wrought by the Bushfire Emergency and community concern about the ongoing survival of NSW wildlife and its habitat, particularly in areas already earmarked for land-clearing and logging, we set out below some recommendations to supplement the NSW Government's response to the Bushfire Emergency. These recommendations involve the exercise of existing powers under NSW laws in the planning, environment and forestry contexts, to ensure the protection of threatened species and ecological communities that have been affected by the Bushfire Emergency.
5. One important step immediately available to the Planning Minister is to temporarily suspend the progress of any current decision-making processes under the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) in relation to proposed State Significant Development and State Significant Infrastructure that is likely to impact threatened species or ecological communities that have also been heavily affected by the Bushfire Emergency. The Planning Minister could also take steps to initiate a process by which decision-making for other proposed development with similar impacts could be suspended. 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 relevant consent authorities to determine whether the Bushfire Emergency may have resulted in any material change in the impacts of proposed development 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 developments for which development consent is already in place under the EP&A Act. For example, for some threatened species and communities that have been most heavily impacted by the Bushfire Emergency, the ongoing impacts of certain developments on their remaining habitat may now be much more significant.
7. To ensure the ongoing protection of threatened species and communities from those specific developments, it is open to the Planning Minister to take action under the EP&A Act to facilitate a process by which existing development consents could be modified to allow for appropriate protection measures to be implemented. In extreme cases, for example where certain developments now pose a risk of extinction, this process could also allow for existing consents to be revoked.

---

<sup>2</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).

8. There are also possible implications of the Bushfire Emergency for the continued operation of the Regional Forestry Agreements (**RFA**) and Integrated Forestry operations Approvals (**IFOA**) in place in NSW. We set out below steps that the NSW Government may take to in relation to the RFAs and IFOAs to avoid further harm following the Bushfire Emergency.
9. The Bushfire Emergency is also likely to have affected the sustainable operation of licences to take wildlife granted under the *Biodiversity Conservation Act 2012* (**BC Act**). It is open to the Environment Minister to take steps to suspend those licences until the impacts of the Bushfire Emergency on relevant wildlife has been fully assessed.

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

10. The extent and severity of the Bushfire Emergency throughout NSW represents a substantial change in the long-term viability of many populations of threatened species and ecological communities, which is not yet fully understood.
11. The Bushfire Emergency has, according to DPIE's preliminary analysis<sup>3</sup>, impacted:
  - a. 30% of bushland where 32 threatened animal species have previously been sighted; and
  - b. 5% of bushland where 114 threatened animal species have previously been sighted.
12. More specifically, the fires have affected:
  - a. 97.1% of bushland where the critically endangered Long-footed Potoroo (*Potorous longipes*) has previously been sighted;
  - b. 81.7% of bushland where the endangered Brush-tailed Rock-wallaby (*Petrogale penicillata*) has previously been sighted;
  - c. 89.3% of bushland where the endangered frog *Philoria pughii* has previously been sighted;
  - d. 81.9% of bushland where the endangered Hastings River mouse *Pseudomys oralis* has previously been sighted; and
  - e. 24% of all modelled habitat for the vulnerable Koala (*Phascolarctos cinereus*) in eastern NSW.
13. 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 NSW's threatened species and ecological communities cannot be properly known until the fire-affected areas have been thoroughly surveyed.

---

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

14. Having regard to DPIE'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 developments 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 developments with existing consents 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 developments may constitute new impacts on the threatened species or communities that were not assessed at the time consent was granted for those developments.

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

#### ***Reassessment of impacts of proposed SSD and SSI***

15. As an immediate step in responding to the impacts of the ongoing Bushfire Emergency, the Planning Minister may commission re-assessments of the impacts of proposed SSD and SSI on threatened species and ecological communities that have been most heavily affected by the Bushfire Emergency. As you are aware, the Planning Minister has express powers under clause 54 of the *Environmental Planning and Assessment Regulation 2000* to request an applicant for a proposed development to provide further information in relation to the specific impacts of the development - for example, the development's impacts in conjunction with the impacts of the Bushfire Emergency.

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

16. As a further immediate option, and to allow time to complete the re-assessment process referred to above, the Planning Minister may take steps to suspend:
- a. Current assessment and approval processes under the EP&A Act for proposed SSD and SSI that may impact on threatened species or ecological communities that have been heavily affected by the Bushfire Emergency; and
  - b. Current decision-making processes concerning the approval of any management plan or other approvals or certifications required under the conditions of consent for any SSD or SSI relating to threatened species or ecological communities that have been heavily affected by the Bushfire Emergency.

#### ***Preparation of draft SEPP and LEPs concerning the Bushfire Emergency***

17. In order to properly address the impacts of proposed or existing development on threatened species and communities affected by the Bushfire Emergency we recommend that the Planning Minister exercise his powers under the EP&A Act to make

a draft State Environmental Planning Policy (**SEPP**) and draft Local Environmental Plans (**LEP**) for bushfire affected areas.

18. The draft SEPP and LEPs should be directed at addressing the impacts of the Bushfire Emergency in conjunction with the impacts of proposed and approved development. We recommend that, at the least, the draft SEPP and LEPs serve the following two functions:
  - a. To impose a requirement that consent authorities must consider, before granting consent, updated environmental assessments for all proposed development that is likely to impact on threatened species and communities that have been heavily impacted by the Bushfire Emergency; and
  - b. To provide the Planning Secretary and Local Councils with the power to modify or revoke existing consents for development that is likely to impact on threatened species and communities that have been heavily impacted by the Bushfire Emergency.
19. In regard to paragraph [18.b] above, we note that section 4.57 of the EP&A Act provides the Planning Secretary and Local Councils with the express power to modify or revoke development consent having regard to the provisions of a draft SEPP or LEP.
20. The draft SEPP and LEPs would operate in the most serious of cases where, as a result of the Bushfire Emergency, a specific development with an existing consent is likely to have an impact on a threatened species or community that was not identified at the time of consent, or is substantially greater than the impact identified at the time of consent.
21. In these circumstances, it would be appropriate for the Planning Secretary or a Local Council to exercise the power under section 4.57 of the EP&A Act to modify the consent 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 development to be suspended while updated biodiversity assessments are being completed.
22. As an example, the draft SEPP or LEP may apply to the Mt Gilead Residential Development (Campbelltown LPP 3868/2017/DA-CW), which will impact on the vulnerable Koala (*Phascolarctos cinereus*) and Large-eared Pied Bat (*Chalinolobus dwyeri*) through land-clearing. As DPIE's preliminary analysis indicates that the Bushfire Emergency has affected over 24% of Koala habitat in Eastern NSW, and 21.5% of the areas where the Large-eared Pied Bat has been sighted, it may be appropriate for the consent to be modified to prevent further impacts on those species at the site while the impacts of the Bushfire Emergency on these species are being assessed.
23. Across NSW, there are likely to be many examples where the Bushfire Emergency has significantly exacerbated the impacts of approved developments in relation to habitat loss for threatened species and ecological communities. In a worst-case scenario, the

impacts of the Bushfire Emergency on a particular species or community may be so severe that if certain approved developments were now permitted to proceed, the impacts would be catastrophic. For example, a situation may arise where an existing consent 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 development were to proceed as approved the species would become extinct. In such a scenario, it would clearly be appropriate for the Planning Secretary or a Local Council to consider exercising the power under section 4.57 of the EP&A Act to revoke consent for the development.

24. 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 development 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 so that the NSW Government can consider what action should be taken to ensure the ongoing survival of those species and communities.
25. 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 from proposed and approved development while assessments of the impacts of the Bushfire Emergency on biodiversity are being completed.

### **Forestry operations in NSW**

26. The RFAs in place in NSW 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.
27. 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. It is open to the NSW Government to take appropriate measures in this regard under the conditions of the RFAs, or otherwise (including by liaising with the Commonwealth Government), to re-calculate the sustainable yields under each RFA.
28. In order to ensure that forestry operations under the RFAs are conducted in a sustainable manner following the Bushfire Emergency, we recommend that the NSW Government initiates 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).
29. By way of example, 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 fulfills 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').

30. There are also powers available to the Deputy Premier and Environment Minister with respect to the sustainable conduct of forestry operations under the *Forestry Act 2012*. For example, the Deputy Premier and Environment Minister are jointly empowered to revoke, suspend, or amend an Integrated Forestry Operations Approval (**IFOA**) at any time in order to address the impacts of the Bushfire Emergency.<sup>4</sup>
31. Further, the Deputy Premier, as the Portfolio Minister of the NSW Forestry Corporation, has the power, with the approval of the Treasurer, to issue a direction to the board of the Forestry Corporation, if the Deputy Premier is satisfied that, because of exceptional circumstances, the direction is in the public interest.<sup>5</sup>
32. The present Bushfire Emergency clearly constitutes exceptional circumstances. The scale of the fires was unprecedented, as were the conditions leading up to them. It is in the public interest for forestry operations to be suspended while the damage is assessed, and a plan put in place to mitigate that damage as best as possible. It may be in the public interest for certain forestry operations to be permanently suspended, in circumstances where, for example, their continuation would affect remaining stands of habitat for threatened species.
33. At a minimum all logging should be excluded from known and likely habitat of those animals and plants identified by the Commonwealth and/or NSW Governments as most significantly affected by the 2019-20 fires until the required surveys fully assess impacts and recovery needs.

### **Selective logging in State Forests**

34. In relation to forest management, we are deeply concerned at the NSW Government announcement to permit selective logging in areas affected by the Bushfire Emergency, known as "post-fire logging." This decision has been made in the face of substantial evidence warning against this. Detailed studies by the Australian National University, including following Victoria's devastating Black Saturday fires, showed that post-fire logging did widespread damage to forest recovery. The research showed that post-fire logging hampers species recovery - destroying important areas for refuge, and had negative effects on water, increasing sedimentation and catalysing erosion. The research also showed that post-fire logging increases future fire risk.
35. The justification for this decision is stated as being to "help to maintain local jobs and meet critical timber supply" and the legal mechanism used to do this is to make additional site-specific conditions under the Coastal Integrated Forestry Operations Approval. We are particularly concerned about the apparent circumvention of biodiversity protections and public consultation requirements and the validity of site-specific conditions purporting to do this. This decision should be revoked as the

---

<sup>4</sup> *Forestry Act 2012*, s 69R.

<sup>5</sup> *State Owned Corporations Act 1989*, s 20P

approach is scientifically flawed, and raises questions about the proper use of site-specific conditions.

### **Suspension or revocation of licence to injure or take wildlife**

36. DPIE has also acknowledged that the Bushfire Emergency is likely to have had a negative impact on Kangaroo populations.<sup>6</sup> As the impact of the Bushfire Emergency on Kangaroos and on other iconic wildlife including Wombats has not been fully assessed, and until necessary mitigation and recovery measures have been put in place, we recommend that no licences under section 2.11 of the BC Act to injure or take wildlife (for commercial purposes or otherwise) be granted. We also recommend that the Environment Minister take steps to ensure that, where necessary, any existing licence relating to species that have been heavily impacted by the Bushfire Emergency is suspended or revoked pursuant to section 2.15 of the BC Act.

Thank you for considering the above options for the NSW Government to protect the State's 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.

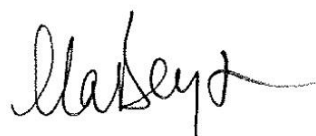
Yours sincerely

**Environmental Defenders Office**



Elaine Johnson  
**Principal Lawyer, EDO**

**Humane Society International**



Nicola Beynon  
**Head of Campaigns, HSI**

---

<sup>6</sup> See "Bushfire impacts" at <https://www.environment.nsw.gov.au/licences-and-permits/wildlife-licences/licences-to-control-or-harm/licences-to-harm-kangaroos>