

To: Assistant Secretary Monica Collins (for decision)

2010-5741 - COMPLIANCE MONITORING - RESPONSE TO REQUEST TO SUSPEND - BRIEF - FINAL

Timing: ASAP

Recommendation/s:

1. That you consider the contents of this brief, including all attachments.

Considered / ~~Discuss~~

2. That you agree that you do not believe on reasonable grounds that the conditions specified in section 144(2) of the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* are satisfied.

Agree / ~~Not Agree~~

3. If you agree with recommendation 2, above, that you agree to refuse Mr Kennedy's request to suspend the approval EPBC 2010/5741 on the basis that you have no power under section 144(1)(b) of the EPBC Act to do so.

Agree / ~~Not Agree~~

4. If you agree to refuse Mr Kennedy's request to suspend approval EPBC Act Approval 2010/5741 that you sign that Statement of Reasons (**Attachment A**), or provide alternative reasons for your decision.

Signed / ~~Alternative provided / Discuss~~

5. If you agree to refuse Mr Kennedy's request to suspend approval EPBC Act Approval 2010/5741, that you sign the attached letter to Mr Kennedy (**Attachment B**)

Signed / ~~Not signed~~

Assistant Secretary Monica Collins:



Date: 8 Dec 16

Comments:

Clearing/Contact Officer:	section 22 r	section 22 , [redacted] [redacted] nt [redacted] nt	section 22 [redacted]
----------------------------------	--------------	--	-----------------------

Key Points:

1. On 17 April 2014 a delegate of the Minister approved the Western Highway Project Section 2 – Beaufort to Ararat under section 133 of the EPBC Act (EPBC approval 2010/5741); the project was assessed under the Victorian Bilateral. The approval holder is VicRoads (**Attachment C**).
2. The action has commenced. Section 2A (Beaufort to Buangor) of the action has been completed, with preliminary works undertaken in section 2B (Buangor to Ararat).
3. On 15 March 2016, Mr Michael Kennedy (acting on behalf of a landowner affected by the approved action, Ms Mairianne Mackenzie) contacted the Department with concerns relating to perceived insufficient assessment of impacts to Matters of National Environmental Significance (MNES) in the “Option 1” alignment of the approved action; an area comprising approximately 10% of the entire area subject to EPBC 2010/5741 located to the south of the Langi Ghiran reserve.
4. On 16 May 2016, and after numerous discussions with various areas of the Department, Mr Kennedy wrote requesting that the approval be suspended on the claimed basis of insufficient assessment of three MNES in the Option 1 alignment; Striped Legless Lizard, Golden Sun Moth, and Box Gum Grassy Woodland Ecological Community (**Attachment D**).
5. Mr Kennedy has requested that the Minister suspend the approval under section 144(1)(b) of the EPBC Act. Under this section, the Minister can decide to suspend the effect of an approval if the Minister believes on reasonable grounds that the conditions specified in section 144(2) are satisfied. The conditions specified in section 144(2) are:
 - a. *The action has had, or the Minister believes that the action will have, a significant impact that was not identified in assessing the action on a matter protected by a provision of Part 3 for which the approval has effect; and*
 - b. *The approval would not have been granted if information that the Minister has about that impact had been available when the decision to approve the action was made.*
6. The provisions of Part 3 for which the approval has effect are sections 18 and 18A of the EPBC Act (listed threatened species and endangered communities).
7. During the period May – July 2016, Mr Kennedy provided a number of consultancy reports commissioned by Ms Mackenzie, as well as responses to those reports, and other consultancy reports commissioned by the Victorian Government. The consultancy reports commissioned by Ms Mackenzie include a mix of onsite flora and fauna assessments, and peer reviews of other materials.
8. Mr Kennedy has asserted that the reports and other materials provide sufficient basis for the Minister to suspend the action on the basis that a significant impact will occur to the Striped Legless Lizard, Golden Sun Moth, and Box Gum Grassy Woodland Ecological Community and that the Minister would not have granted the approval if information of that impact had been available when the decision to approve the action was made.

9. The Monitoring and Assurance Section (MAS) have consulted on the matter with species and ecological community areas of the Wildlife, Heritage and Marine (WHAM) division and policy and assessment areas of Environment Standards Division (**Attachment E**). A consideration of this consultation is provided below

Striped Legless Lizard

The information provided by Mr Kennedy does not indicate the actual occurrence of Striped Legless Lizard, but an opinion by a consultant ecologist (engaged by Ms Mackenzie) that habitat for the species may occur within the Option 1 alignment.

The species or habitat for the species was identified at the time of the Assessment through the Department's Protected Matters Search Tool (PMST) as likely to occur in the area of the action (the PMST is caveated to be a guide, not an authority in relation to identifying the potential or actual occurrence of a protected matter or its habitat). Under the bilateral assessment process, surveys did not locate the species in the Option 1 alignment.

Information in the Department's Species Profile and Threats Database (SPRAT) indicates the species has a vulnerable EPBC listing status, and although it is cryptic in nature, it has a widespread distribution in SE Australia. There is no Conservation Advice, Listing Advice or Recovery Plan for the species. There is no known important population of the species in the Option 1 alignment area.

Based on the information available, there is no evidence to suggest that undertaking the approved action in Option 1 will result in a significant impact to the species. Additionally, advice from WHAM is that even if the action in the Option 1 alignment had the potential for a significant impact to the species, that impact would be adequately offset through the existing Dunkeld and Darlington offset sites.

As there is no evidence that the action will have a significant impact on this species, the conditions of section 144(2)(a) are not met. Therefore the grounds to suspend the action under section 144(1)(b) are not met.

Golden Sun Moth

The information provided by Mr Kennedy outlines the opinion of a consultant ecologist (engaged by Ms Mackenzie) that Golden Sun Moth habitat is present along the entire Option 1 alignment. During assessment of the referral it was identified that there was habitat for, and actual occurrence of, the species in some parts of the Option 1 alignment; for which offsetting and management requirements were then applied in the conditions of the approval.

The PMST report at the time of the assessment identified that this species, or habitat for this species, was known to occur in the area of the action.

An ecological consultant engaged by the approval holder has suggested that more favourable environmental conditions may have contributed to changes in potential habitat extent. At least 6 years have elapsed since ecological studies were undertaken for the assessment of the project and the work of consultants engaged by

Ms Mackenzie, during which time changes to environmental conditions could feasibly have changed the nature of habitat extent for the species.

Under the EPBC Act, changes in environmental conditions post approval cannot be taken into account.

Conditions have already been applied for protection of this species, including requirements for offsetting potential significant impacts. WHAM has advised that these offsetting requirements are adequate for potential impacts to the species within the Option 1 alignment.

As a significant impact to this species was already identified through the assessment process, and the action was approved, the information provided by Mr Kennedy does not satisfy the conditions of section 144(2). Therefore, the grounds to suspend the action under section 144(1)(b) are not met.

Box Gum Grassy Woodland Ecological Community

The information provided by Mr Kennedy indicates the opinion of an ecological consultant (engaged by Ms Mackenzie) that listed Box Gum Grassy Woodland Ecological Community is present in the Option 1 alignment. The opinion includes a caveat that further survey work would be required to verify the complement of species that comprise the community.

The approval holder's consultant maintains that the community was not identified in mapping undertaken as a part of assessment of the action, and that vegetation types located within the Option 1 alignment are inconsistent with the definition of the community.

Information in SPRAT shows a highly fragmented indicative distribution of box gum woodland ecological community throughout SE Australia. The ecological community is listed as critically endangered. There is no conservation advice or recovery plan for the community. The Department's listing advice suggests that the Option 1 alignment area is in a transitional zone at the edge of the community's indicative range. The listing advice states that in these situations the community may be variable in composition, and accordingly does not fit the definition of the ecological community.

Advice from WHAM is that the Option 1 alignment is likely to be in a transitional zone between two bioregions where gradation may occur of different types of woodland ecological communities. WHAM considers that the woodland identified by Ms Mackenzie's consultants is likely to have an affinity with the Grassy Eucalypt Woodland of the Victorian Volcanic Plain (GEWVP), for which clearing limits and offsetting requirements have already been imposed through the conditions of approval.

As on available information it is unlikely that the Box Gum Grassy Woodland Ecological Community is present in the Option 1 alignment, there is no basis by which the Minister can determine a significant impact may occur. Consequently, the conditions of section 144(2) have not been satisfied. Therefore the grounds to suspend the action under section 144(1)(b) of the Act have not been met.

10. On 11 August 2016, Shane Gaddes, the then Assistant Secretary, Compliance and Enforcement Branch wrote to Mr Kennedy advising him that the Department did not intend to refer to the Minister a recommendation to suspend the approval, on the basis that provisions of the EPBC Act had not been satisfied. (**Attachment F**).

11. On 22 September 2016, Mr Kennedy wrote to the Minister to reiterate his request for the approval to be suspended (**Attachment G**).

s42

s42

14. The Minister has delegated you as decision maker for this matter pursuant to Section 515(1) of the EPBC Act.

15. It is recommended that you refuse Mr Kennedy's request to suspend the effect of EPBC Act approval 2010/5741 on the basis that you do not believe on reasonable grounds that the conditions specified in section 144(2) are satisfied and therefore the grounds to suspend the approval under section 144(1)(b) are not met.

16. In order for you to be able to reach this conclusion you must be satisfied that you do not believe on reasonable grounds that:

- a. the action has had, or will have, a significant impact that was not identified in assessing the action on a matter protected by a provision of Part 3 for which the approval has effect; and
- b. the approval would not have been granted if the information provided by Mr Kennedy had been available when the decision to approve the action was made.

17. If you decide, consistently with this brief, to refuse Mr Kennedy's request to suspend the effect of EPBC Act approval 2010/5741 it is recommended that you sign the Statement of Reasons at **Attachment A** and the letter to Mr Kennedy at **Attachment B**. Alternatively, you may wish to provide a different statement of reasons.

Consultation:

18. Advice from WHAM and ESD Assessments and Policy. General Counsel Branch was consulted in the preparation of this brief.

ATTACHMENTS

- A:** Statement of reasons for decision to refuse an application to suspend EPBC 2010/5741 pursuant to section 144(1)(b) of the EPBC Act
- B:** Letter to Michael Kennedy
- C:** Approval Notice EPBC 2010/5741
- D:** Correspondence from Michael Kennedy 16 May 2016
- E:** Advice from WHAM
- F:** Letter from A/S Gaddes dated 11 August 2016
- G:** Letter from Michael Kennedy 22 September 2016

s42



section 22

From: s47F, s22
Sent: Monday, 4 July 2016 4:08 PM
To: section 22
Cc: s47F, s22
Subject: FW: Western Highway and EPBC Matters [SEC=UNCLASSIFIED]

Hi s22

Thanks for forwarding on the peer review report into EPBC matters in the Western Highway duplication around Hillside Road, between Beaufort and Ararat. Our comments relate to the ecological communities aspects of the report, as s22 has sent his comments on the species separately to you.

The peer review notes a number of environmental consultants have reported on this site. We agree with the review that some weight should be given to the Blue Devil Consultancy (BDC) report because their findings were based on detailed quadrat-based floristic surveys. This is an appropriate method for determining whether listed woodlands and grasslands are present, and the condition of the ground layer. Furthermore, the findings of BDC were confirmed by Ecology Australia at their own on-site visits. The brief description in section 3.1 of the peer review indicated there was a diverse native grass/herb understorey below an open tree layer of *Eucalyptus melioidora* and *Allocasuarina verticillata*. This is consistent with the general description for box-gum grassy woodlands. But we note there were variable estimates for the extent of Box-Gum Woodland present, from 10 to 25 ha.

There are some additional points to be taken into consideration.

- The Western Highway between Ararat and Beaufort goes in and out of two bioregional boundaries. A section from just outside of Ararat to the western intersection with Hillside Rd lies primarily in the Victorian Volcanic Plain bioregion, as does a section of the highway between Buangor and Eurambeen. Most of the remaining central stretch of the highway is in the Central Victorian Uplands subregion of the Victorian Midlands. The latter includes the eastern intersection of the highway with Hillside Rd, close to the patch of woodland in question.
- We note the referral predates the Box-Gum recovery plan which presented updated information about the EC's distribution. The listing advice for Box Gum therefore was a source of information about distribution at the time of referral - it acknowledged the EC to be present in the Victorian Midlands bioregion though only the Goldfields subregion (further north around Bendigo) was explicitly noted.
- The Recovery Plan has since acknowledged that data at the time of listing was limited and recognised the EC occurs in a wider area of the Vic Midlands, i.e. subregions further west such as the Grampians, Dundas Tablelands and Central Victorian Uplands.
- However, neither the listing advice nor Recovery Plan recognise the Box Gum Grassy Woodlands to occur within the VVP bioregion.
- Occurrences of *E. melioidora* in the VVP can be part of the Grassy Eucalypt Woodland of the VVP EC. This is recognised as a drier variant of the EC which mainly occurs in rainshadow areas receiving <600mm rainfall immediately to the west of Melbourne. The GEWVVP EC also is linked to a specific soil type of Quaternary basalt soils common throughout the VVP.
- We note the district south of Ararat also lies in a rainshadow region of <600mm, which may extend to the Hillside road region.
- The woodland in question possibly represents a gradation of the Box-Gum Woodlands of the central Vic slopes into a drier part of the VVP. This implies the patch may be at the edge of the range for the Box-Gum EC.

We also looked at the referral advice for EPBC 2010/5741 and noted there were conditions and offsets applied for the GEW VVP and NTG VVP, that were determined to occur in discrete patches along the length of the roadworks project. The condition requested that no more than 11.14 ha of GEWVVP be removed and an offset of 33.5 ha apply to a property at Dunkeld in regards to the GEW VVP EC. Offsets also were applied in relation to impacts upon NTG VVP.

Based on the information we have at hand, we draw the following conclusions.

The vegetation is consistent with the description for Box-Gum Grassy Woodland EC but it's occurrence appears to be at the edge of the range for this EC in southern Victoria.

The proximity to the VVP boundary and a rainshadow region around Ararat suggest a possible affinity of the vegetation to a drier variant of the GEWVVP EC, for which conditions and offsets have already been determined.

Kind regards s22 s

section 22 :

[Redacted]

[Redacted]

[Redacted] 14 au

From: section 22
Sent: Friday, 1 July 2016 8:54 AM
To: section 22
Cc: section 22
Subject: RE: Western Highway and EPBC Matters [SEC=UNCLASSIFIED]

Hi s22 ,

Probably the most relevant report is the attached – there are several.

I would welcome your view on the information in the report in relation to the EC and two species.

<< File: Ecology Australia WHD Peer Review Final 7 June 2016.pdf >>

Cheers

s22
ion

section 22 x

From: section 22
Sent: Monday, 4 July 2016 10:11 AM
To: section 22
Cc: section 22 n
Subject: Western Highway duplication - Threatened species [SEC=UNCLASSIFIED]

Hi s22:

I have taken a read of the report you provided to section 22 ; which critiques Ecology and Heritage Partners previous work along the route and have also familiarised myself with the existing EPBC approval conditions and scoped out the offset sites by desktop. I would be quite confident that the existing offset requirements for the golden sun moth and EC (Dunkeld and Darlington properties) account nicely for the threatened species impacts and any additional unforeseen impacts to the striped legless lizard or golden sun moth. These two species have numerous records in the vicinity of the offset sites and the sites are suitably sized and covenanted. I don't feel there is a need to do any further surveys or offsets for the two threatened species along the highway route despite the newly identified EC areas and reconsideration of habitat for the striped legless lizard.

I am not speaking for the new areas of the EC though. I understand sect is providing some advice on this.

Kind regards

section 22
[Redacted]
[Redacted]
[Redacted] au

