

To: Greg Manning (for decision)
Through: S22 Acting Director, PAS

S22 8/5/2020

EPBC 2010/5741 – Request to Revoke Approval – Western Highway Project Section 2

Timing: There is no deadline for this matter. The request was made on 9 January 2019.

Recommendations:

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 145(2) or section 145(2A) of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) are satisfied in relation to this request.

Agree / Not Agreed

3. If you agree with recommendation 2, that you agree that you cannot revoke EPBC approval 2010/5741 – Western Highway Project Section 2 (the **approval**), as requested by Mr Michael Kennedy, on the basis that you have no power under section 145(1)(b) or section 145(2A) of the EPBC Act to do so.

Agreed / Not Agreed

4. If you agree with recommendation 3, that you sign the Statement of Reasons at **Attachment A**.

Signed / Not signed

5. If you agree with recommendation 3, that you sign the letter at **Attachment B** advising Mr Michael Kennedy of your decision.

Signed / Not signed

Signatory: Greg Manning Assistant Secretary
Assessments (WA, SA, NT), Post Approvals
and Policy Branch

Date: 11 May 2020

Comments:



Request for revocation of the approval

- On 9 January 2019, Michael Kennedy (on behalf of affected persons) wrote to James Tregurtha, First Assistant Secretary, Environment Standards Division, in two separate letters, requesting that the Minister exercise the power under section 145 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) to revoke the approval for EPBC 2010/5741: Western Highway Project Section 2 – Beaufort to Ararat, Victoria.

2. The two letters are similar in their request but with some differences in the material presented. One letter (**Attachment C**) includes *Western Highway Duplication Project Expert Witness Statement, May 2018, prepared by Paul Foreman of Blue Devil Consulting* (Foreman Statement) (**Attachment D**). The other letter (**Attachment E**) includes *Western Highway Project Section 2B: Hillside Road, westward to junction with Western Highway (formerly Option 1); Statement of Evidence; 30 November 2018; prepared by Andrew McMahon of Ecology Australia* (McMahon Statement) (**Attachments F**).
3. The basis of the requests for revocation is the assertion that the approved action will have significant impacts, including to two EPBC listed threatened species and an EPBC listed ecological community, that were not properly identified during the assessment of the proposed action. They are *Golden Sun Moth* (GSM) (critically endangered), *Striped legless lizard* (vulnerable) and *Grassy eucalypt woodland of the Victorian volcanic plain* (GEWVVP) (critically endangered).
4. Mr Kennedy has asserted that the information provides sufficient basis for you to revoke the approval under section 145(1) and (2) of the EPBC Act, on the basis that the action will result in a significant impact that was not identified in assessing the action, and that the Minister's delegate would not have granted the approval if this information had been available when the decision to approve the action was made.
5. Mr Kennedy has also asserted that the provisions of section 145(2A) of the EPBC Act also provide sufficient basis for you to revoke the approval on the basis that information provided was inaccurate, due to negligence or a deliberate act or omission by the person proposing to take the action.

Project Approval

6. On 17 April 2014, a delegate of the Minister approved with conditions the Western Highway Project Section 2 – Beaufort to Ararat, Victoria (EPBC 2010-5741), comprising the upgrade of the highway, including duplication of the carriageway (**Attachment G**). On 10 April 2015, the approval was varied to delete conditions 4(b)(iv) and 4(b)(v) in relation to Dwarf Galaxias habitat.
7. The approval contains conditions to protect and offset a number of EPBC listed threatened species and ecological communities. The three of interest in this matter are *Golden Sun Moth* (GSM) (critically endangered), *Striped legless lizard* (vulnerable) and *Grassy eucalypt woodland of the Victorian volcanic plain* (GEWVVP) (critically endangered).

Background to the request

8. Mr Kennedy acts for affected persons including a local landholder, Ms MairiAnne Mackenzie, and has previously sought suspension of the approval. On 16 May 2016, Mr Kennedy requested that the approved action be suspended under Section 144 (1) (b) (2) (a) of the EPBC Act on the basis of there having been insufficient assessment of three matters of national environmental significance (MNES) in the Section 2B/Option 1 alignment, as follows:
 - a) Failure to identify *Striped Legless Lizard* habitat;
 - b) Underestimated GSM habitat and occurrence; and
 - c) Incorrect assessment of *White Box-Yellow Box-Blakely's Red Gum Grassy Woodland and Derived Native Grassland* Ecological Community (Box Gum Woodland) as GEWVVP.
9. A delegate of the Minister decided on 8 December 2016 that she did not believe on reasonable grounds that the conditions specified in section 144(2) of the EPBC Act had been satisfied, and accordingly she refused Mr Kennedy's request to suspend EPBC approval 2010/5741 on the basis that she had no power under Section 144(1)(b) of the EPBC Act to do so. She provided a Statement of Reasons for this decision (**Attachment H**). In summary her reasons were that:

- a) in regard to the Striped Legless Lizard, based on the information available, there was no evidence to suggest that undertaking the approved action would result in a significant impact to the species. Additionally, advice from the Wildlife, Heritage and Marine Division (WHAM) was 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;
 - b) in regard to the GSM, conditions had already been applied for protection of this species, including requirements for offsetting potential significant impacts. WHAM advised that these offsetting requirements were adequate for potential impacts to the species within the Option 1 alignment; and
 - c) in regard to the Box Gum Woodland, advice from WHAM was that the Option 1 alignment was likely to be in a transitional zone between two bioregions where gradation may occur of different types of woodland ecological communities. WHAM considered that the woodland identified by Ms Mackenzie's consultants was likely to have an affinity with the GEWVVP, for which clearing limits and offsetting requirements had already been imposed through the conditions of approval. As, on available information, it was considered unlikely that the Box Gum Woodland is present in the Option 1 alignment, there was no basis by which the Minister could determine that a significant impact may occur.
10. As there was considered to be no evidence that the action would have a significant impact on these matters, the conditions of section 144(2)(a) were not met. Therefore the grounds for suspension of the action under section 144(1)(b) were not met.

Relevant legislation in relation to Mr Kennedy's revocation requests

11. Section 145 of the EPBC Act allows the Minister to revoke an approval in some circumstances if certain criteria are met. The following outlines the relevant legislative provisions in relation to the request from Mr Kennedy.
12. Section 145(1) of the EPBC Act allows you, as the Minister's delegate, to revoke an approval given under Part 9 for the purposes of a specified provision of Part 3 if:
- a) a significant impact on the matter protected by the provision has occurred because of the contravention of a condition attached to the approval; or
 - i. this section is not enlivened as the request does not seek revocation on these grounds;
 - b) the conditions specified at section 145(2) are satisfied.
13. The conditions specified at section 145(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.
14. The power to revoke an approval under section 145(1)(b) is both conditional and discretionary. This means:
- a) if you are not satisfied that the conditions specified in section 145(2) are met, you do not have the power to revoke the approval; and
 - b) if you are satisfied that the conditions specified in section 145(2) are met, you must decide whether to exercise your power to revoke the approval. In making this decision, you must comply with administrative law principles. In addition, in deciding whether or not to revoke the approval, section 145(3) allows you to take the approval-holder's environmental history into account.
15. Section 145(2A) of the EPBC Act allows you, as the Minister's delegate, to revoke an approval given under Part 9 for the purposes of a specified provision of Part 3 if:

- a) the impacts that the action has had, will have or is likely to have were not accurately identified in information available to the Minister when the approval was given; and
- b) the information did not accurately identify those impacts because of negligence or a deliberate act or omission by the person proposing to take the action or the designated proponent of the action.

Departmental analysis of the requests for revocation against Section 145(2)(a)

16. In his two letters requesting revocation, Mr Kennedy has presented specific information supporting his request. In summary they are that:
 - a) The 2012 Environmental Effects Statement (EES) failed to identify the EPBC Act listed critically endangered White Box-Yellow Box-Blakely's Red Gum Grassy Woodland and Derived Grassland Community, and that the initial identification of Grassy Eucalypt Woodland of the Victorian Volcanic Plain and subsequent reviews commissioned by Vic Roads were inaccurate;
 - b) The distribution of the Golden Sun Moth within the road reservation could be significantly underestimated;
 - c) There is evidence that suitable habitat for Striped Legless Lizard is present within and adjoining the road reservation, contrary to the conclusion of Ecology and Heritage Partners in its various reports (**Attachments I and J**).
17. The specific information provided by Mr Kennedy in his requests is contained in two documents: the Foreman Statement (**Attachment D**) and the McMahon Statement (**Attachment F**). Mr Kennedy also refers in his letters to a number of reports prepared either for Vic Roads or for the complainant (Ms Mackenzie).
18. In regard to Mr Kennedy's claim, a review of the Minister's Proposed Decision Brief for the approval decision (**Attachment K**) shows that, at the referral stage, the project was considered to be a controlled action due to the likely impacts on GSM. The brief also noted that there was insufficient information in the referral documentation on impacts on the *Striped legless lizard* and the GEVVVP.
19. Subsequent surveys were conducted and significant impacts identified for the GSM and GEVVVP. General surveys conducted in late 2010 concluded that there was no suitable habitat for *Striped Legless Lizard* in the project area.
20. In regard to the GSM, significant impacts were identified and appropriate conditions to protect GSM habitat and establish offsets, based on the information available at the time, were attached. As part of ongoing management, pre-clearance surveys have been undertaken on several occasions, and the approval holder advised in January 2020 that the surveys have identified a higher level of GSM presence than shown in the original survey reports. This may be due to the prevailing conditions between 2014 and 2019 being more favourable to GSM breeding. The EPBC Act provides for the variation of the conditions of approval if required, to address such new information. The Department expects to brief you in relation to this matter in due course.
21. In regard to the GEVVVP, the Department accepted during the project's assessment that the identified GEVVVP was synonymous with the Department's listing advice for GEVVVP. Accordingly, the approval included provisions for minimising the impact on GEVVVP and for offsetting impacted GEVVVP.
22. In subsequent reviews commissioned by Minter Ellison (acting for VicRoads), Ecology and Heritage Partners Pty Ltd (EHP) specifically examined the area for Box Gum Woodland and determined that the relevant patches of land failed to meet the criteria in relation to this community (**Attachments I and J**). Brett Lane and Associates also reviewed these reports (**Attachment L**) and supported the conclusion that there is no Box Gum Woodland present.
23. Paul Foreman of Blue Devil Consulting, was commissioned by the complainant in 2015 and then in 2018. His Foreman Statement (**Attachment D**) has challenged the EHP and Brett Lane and Associates reports, claiming that they are erroneous in their conclusion

about the presence of Box Gum Woodland. He presents a detailed analysis in support of his view of their errors and his own conclusions. He also suggests that EHP “have tried to mislead” Minter Ellison and others to avoid admitting that their earlier work was inadequate. This issue is addressed later in this brief.

24. The Department’s Ecological Communities Section reviewed the Foreman Statement in June 2018 and generally agreed that Mr Foreman’s survey methods were appropriate and would support the conclusion that the Box Gum Woodland is an accurate classification (**Attachment M**). They also noted that a key issue is the soil type, in that the GEVVVP can only occur on one soil type, Quaternary Basalt, and that its presence would need to be verified to definitely establish its presence.
25. Andrew McMahon of Ecology Australia has also prepared a Western Highway Project Section 2B: Hillside Road, westward to junction with Western Highway (formerly Option 1) Statement of Evidence (**Attachment F**). He states that the EHP findings are incorrect and that Box-Gum Grassy Woodland is present, that suitable habitat for Striped Legless Lizard is present and that suitable habitat for Golden Sun Moth has been underestimated. He bases his opinion regarding the presence of Box-Gum Grassy Woodland, in part, on the understory containing the necessary number (12) of species of forbs.
26. It is clear from the number of reports and reviews that there are widely divergent views established at different times about the three MNES identified by Mr Kennedy. The Department does not therefore believe that it is possible to say with certainty that a significant impact will occur that was not identified during the assessment.
27. Consequently the Department believes that, although there may be some evidence to support a finding that the action may be likely to 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, it is not sufficient to satisfy the Department that such impacts will result as a matter of certainty.

Departmental analysis of the request for revocation against Section 145(2)(b)

28. The Western Highway Section 2 project is part of a broader program of highway upgrades. The Western Highway is the principle interstate road link between Adelaide and Melbourne and a key route for the freight industry and tourism. Significant economic and social benefits were considered to flow from the project by improving transport links and improved road safety.
29. In its initial scoping work, VicRoads identified 10 potential alignment options, with two preferred options (Option 1 and Option 2). In particular, while Option 2 was considered to have a lower impact on farming land and MNES, Option 1 was assessed to pose a lower risk of encountering unstable geological units, would impact less native vegetation in total and would avoid one of the dwellings identified for removal. The State’s assessment report determined that Option 1 was superior in terms of the overall biodiversity outcomes.
30. The proposed EPBC Act decision brief noted that the project’s EES identified a number of significant impacts to MNES from the project. The EPBC Act assessment and subsequent approval include a set of conditions to minimise and mitigate the impacts, and provided for appropriate offsets for unavoidable impacts. The approval conditions provide for revisions of management plans to better protect threatened species and ecological communities.
31. In addition, section 143 of the EPBC Act provides for approval conditions to be varied for a number of reasons, including a determination that a significant impact was either not identified or underestimated. Alternately, the approval holder can seek a variation which the Minister may agree to if any conditions attached to the variation are necessary or convenient to protect the matters protected.
32. While there may be some evidence that the assessment of impacts on MNES may have been incorrect, this does not lead to a conclusion that the Minister would have not approved the project.

33. It is the Department's view that, if the assessment had identified impacts in line with those suggested by Mr Kennedy and the experts whose reports he has provided, the project would still have been approved by the Minister, but subject to conditions which addressed the different identified impacts. The EPBC Act and the approval have safeguards which allow for the conditions to be varied to deal with the inevitable uncertainty associated with assessments and approvals.
34. Therefore, the Department does not believe that the approval would not have been granted if information that the Minister (or delegate) now has about that impact had been available when the decision to approve the action was made.

Departmental analysis of the request for revocation against Section 145(2A)

35. Mr Kennedy's claim that section 145(2A) may apply, appears to be based on the differing opinions about the application of methods and conclusions drawn; that EHP no longer employed the original staff who conducted the survey work; and that the original field notes for those surveys have not been retained and therefore are unavailable for review.
36. As set out above, the Department has no basis on which to determine that EHP provided inaccurate information about the existence of the Box Gum Grassy Woodland at the site.
37. Even if the Department were to accept the view that the Box Gum Grassy Woodland is present at the site, and thus the impacts of the action were not accurately identified, it does not follow that this was because of negligence or a deliberate act or omission by VicRoads as the project proponent of EPBC approval 2010/5741. Furthermore a failure by EHP to retain their field notes for over 6 years is not evidence of negligence or a deliberate act or omission on the part of VicRoads.
38. Following the above conclusions, the Department does not believe that it is possible to form a conclusion that the information did not accurately identify impacts because of negligence or a deliberate act or omission by the person proposing to take the action or the designated proponent of the action (section 145(2A)).

Conclusion

39. Based on this information, the Department considers that:
 - a) there may be a basis for you to form a belief on reasonable grounds that a significant impact that was not identified in assessing the action has occurred, or will occur, though there is no certainty for such an event given the conflicting evidence of the ecological studies;
 - b) there is insufficient basis for you to form a belief on reasonable grounds that the approval would not have been granted if information that the Minister (or delegate) has about that impact had been available when the decision to approve the action was made; and
 - c) there is insufficient basis for you to form a belief on reasonable grounds that the information did not accurately identify such impacts because of negligence or a deliberate act or omission by the person proposing to take the action or the designated proponent of the action.
40. For this reason, the Department considers there is insufficient basis for you to form a belief on reasonable grounds that the conditions specified in sections 145(1), 145(2) or 145(2A) of the EPBC Act are satisfied. Therefore, the Department considers you do not have the power to revoke the approval under sections 145(1)(b) or 145(2A) of the EPBC Act.

Other issues

41. Part of the project area has been subject to legal action under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act). On 6 December 2019, the Federal Court set aside the Minister's July 2019 decision not to make a declaration under section 10 and section 12 of the ATSIHP Act to protect six trees and the surrounding area in Djab Wurrung country, near Buangor, about halfway between

Beaufort and Ararat. The Department is gathering further information to brief the Minister to support her making new decisions under section 10 and section 12 of the ATSIHP Act, taking into account the findings of the Federal Court, and including working with all relevant parties to gather all relevant information to ensure the Minister is able to make fully informed decisions. It is expected that decisions will be made on this matter during the first quarter of 2020.

s47B(a), s47B(b)

Recommendation

43. For the reasons set out in this brief, the Department recommends that you:
- agree that you do not have the power under section 145(1)(b), as shown in paragraph 13.b., to revoke the approval for EPBC 2010/5741, as requested by Mr Kennedy, on the basis that the condition specified in section 145(2)(b), as shown in paragraph 14.b., is not satisfied; and
 - agree that you do not have the power under section 145(2A) to revoke the approval for EPBC 2010/5741, as requested by Mr Kennedy, on the basis that the conditions specified in section 145(2A), as shown in paragraphs 16.a. and 16.b., are not satisfied.
44. If you decide, consistently with the Department's advice, that you have no power to revoke the approval, it is recommended:
- a) that you sign the Statement of Reasons at **Attachment A**; and
 - b) that you sign the letter to Mr Michael Kennedy at **Attachment B**.

Consultation:

45. General Counsel Branch, Heritage Branch

s22
Assistant Director
Post Approvals Section
Ph: (03) 6208 2927

Contact Officer: s22
Project Officer
Post Approval Section
s22

4 May 2020

Attachments

- A. Statement of Reasons (**for signature**)
- B. Response letter (**for signature**)
- C. Letter of 9 January 2019 from Mr Michael Kennedy to James Tregurtha submitting an expert witness statement by Paul Foreman (Blue Devil Consulting) and seeking revocation of EPBC 2010/5741
- D. Western Highway Duplication Project Expert Witness Statement (May 2018) Paul Foreman (Blue Devil Consulting)
- E. Letter of 9 January 2019 from Mr Michael Kennedy to James Tregurtha submitting an expert witness statement by Andrew McMahon (Ecology Australia) and seeking revocation of EPBC 2010/5741

- F. Western Highway Project Section 2B: Hillside Road, westward to junction with Western Highway (formerly Option1) – Statement of Evidence by Andrew McMahon; November 2018
- G. Approval notice and variation for EPBC 2010/5741
- H. Statement of Reasons for 8/12/2016 for M Collins decision that there were no grounds for suspension
- I. Ecological Assessment: Western Highway Project. Section 2B, Victoria – Report by Ecology and Heritage Partners; May 2017
- J. Responses to Key Ecological Issues Raised by MairiAnne Mackenzie: Western Highway Project, Section 2B; Ecology and Heritage Partners; 26 June 2017
- K. Minister's Proposed Decision Brief for the approval decision dated 2/4/2014
- L. Letter from Brett Lane and Associates Pty Ltd to Minter Ellison Lawyers re review of the Ecology and Heritage Partners reports; 3 July 2017
- M. Email from Ecological Communities Section, DEE, providing advice on the Blue Devil Consulting Witness Statement of May 2018

DEPARTMENT OF THE ENVIRONMENT

To: James Tregurtha, Assistant Secretary, South-Eastern Australia Environment Assessments Branch (for decision).

Proposed Approval Decision Brief (Assessment Report) - Western Highway Project, Section 2, Beaufort to Ararat, Victoria (EPBC 2010/5741)

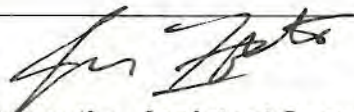
Timing: As soon as possible to provide time to seek comments (final decision due 7 April 2014).

Recommendation/s:

1. Consider the Victorian Government's environmental assessment package, including the State Assessment Report, at Attachment A. **Considered / please discuss**
2. Consider the additional information received in response to the request under section 132 of the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) on 21 June 2013, at Attachment B. **Considered / please discuss**
3. Consider the Recovery Plans, Threat Abatement Plans and Approved Conservation Advice relevant to the proposed action, at Attachment C. **Considered / please discuss**
4. Consider the information in this brief, legal considerations at Attachment D and the Department's offset analysis at Attachment E. **Considered / please discuss**
5. Agree that the recommend proposed assessment decision summarised in the table below, reflects your decision. **Agreed / Not agreed**
6. If you agree to the recommended decision, agree that the proposed conditions of approval as set out in Attachment F (not for signature) reflect your proposed conditions of approval. **Agreed / Not agreed**
7. Sign the letters at Attachment G to VicRoads/person proposing to take the action and relevant Minister on your proposed decision and conditions. **Signed / Not signed**
8. Agree to not publish the proposed decision on the internet for public comment. **Agreed / Not agreed**

Summary of recommendations on each controlling provision:

Controlling Provisions for the action	Recommendation	
	Approve	Refuse to Approve
Listed threatened species and communities (s.18 and 18A)	Approve with conditions	



Date: 2/4/2014

James Tregurtha, Assistant Secretary
South-Eastern Australia Environment Assessments Branch
 Comments:

KEY ISSUES

1. This brief seeks your proposed assessment decision for Roads Corporation's (trading as VicRoads) proposal EPBC 2010/5741 *Western Highway Project Section 2 Beaufort to Ararat, Victoria* (the proposed action). This document summarises the findings of the Victorian Government's environmental assessment and the findings of the Department in relation to all mandatory and relevant considerations, and contains advice recommending you make a proposed approval decision subject to conditions specified at Attachment F.
2. The proposed action constitutes part of a broader program of upgrades along the Western Highway between Ballarat and Stawell. The upgrade is being assisted with \$404 million of funding under the Australian Government's 'Nation Building Program'.
3. On 17 December 2010, the proposed action was accepted separately to other sections of the Western Highway upgrade, as it is geographically distinct, has separate environmental impacts (different bioregions) and is subject to a different funding and construction timelines. Other referrals relating to the broader Western Highway upgrade are:
 - EPBC 2010/5314 (Section 1A – Ballarat to Burrumbeet) – determined NCA on 11 February 2010;
 - EPBC 2010/5705 (Section 1B – Burrumbeet to Beaufort) – determined NCA on 1 December 2010; and
 - EPBC 2010/5744 (Section 3 – Ararat to Stawell) – determined a CA on 20 December 2010 currently under assessment.
4. The Department considers that impacts of the proposed action on listed threatened species and ecological communities under the the EPBC Act will be acceptable, provided the person proposing to take the action secures offsets for Grassy Eucalypt Woodland of the Victorian Volcanic Plain (GEWVVP), Natural Temperate Grassland of the Victorian Volcanic Plain (NTGVVP) and Golden Sun Moth (GSM), and implements onsite management actions for Spiny Rice-flower, Button Wrinklewort and Dwarf Galaxias.
5. On 17 March 2014, the Compliance Section of the Department notified VicRoads they may commence construction of the power poles upgrade along the road alignment as the Compliance Section views that this action does not comprise a physical component of the highway upgrade project: noting ancillary infrastructure has been considered as part of this assessment process.
6. VicRoads has informally notified the Department that refinement of the alignment during construction could realise a reduction in impacts, and is seeking you consider this in your proposed conditions.
7. On 25 February 2014, it came to the Department's attention that potentially part of the Darlington offset site proposed to compensate for impacts to NTGVVP and GSM, is also proposed as an offset site for the Coogee Methanal Plant, Laverton North, Victoria (EPBC 2013/6837), currently under assessment. The Department has considered this in the recommended conditions.
8. The first half of the proposed action is anticipated to take 3 years to construct, with construction scheduled to start once VicRoads has received all necessary approvals. As funding for the second half of the proposed action has not yet been allocated, the proposed action may take up to 15 years to be fully constructed.

9. A summary of your statutory requirements under the EPBC Act are documented at Attachment D for your consideration.

BACKGROUND

Description of proposed action

10. The proposed action is located in western Victoria, approximately 170 kilometres west of Melbourne (Figure 1). The proposed action is to improve the Western Highway to a four-lane dual carriageway between Beaufort and Ararat over a distance of approximately 38 km. The proposed action will involve some sections of duplicating the existing two-lane highway as well as creating some new sections of four-lane dual carriageway to bypass towns and small congregations of houses. The proposed action will also involve one railway crossing, six major watercourse crossings, and ancillary infrastructure.
11. During initial scoping work, VicRoads identified 10 potential alignment options, with two preferred options (Option 1 and Option 2) shortlisted for detailed analysis by VicRoads as part of the Environment Effects Statement (EES). Section 5.4 and 5.5 of the EES provides a detailed description of the methodology and results of this analysis (Figure 2). VicRoads determined both options had comparable environmental impacts and would meet the project objectives. The EES notes that Option 2 has a lower impact on farming land and matters of national environmental significance; however, Option 1 has a lower risk of encountering unstable geological units, will impact less native vegetation in total and will avoid one of the dwellings identified for removal.
12. The State's Assessment Report determined that Option 1 is superior in terms of the overall biodiversity outcomes (even though impacts on matters of national environmental significance would be marginally higher). For the purposes of this assessment, the Department has considered both options, and assessed the project for the highest potential impacts on each matter of national environmental significance (which corresponds with Option 1).

Description of the existing environment

13. The project area is 38 km corridor of approximately 290 ha in size that crosses two bioregions; the Victorian Volcanic Plain and the Central Victorian Uplands bioregions. The project area consists primarily of road reserve (public land) and private land, comprising residential (including rural residential) and agricultural land, used for plantations, grazing and cropping. The project area is characterised by native and exotic grassland vegetation, with scattered areas of remnant indigenous vegetation, ranging from grasslands, woodland or forest in very good condition, to open pasture with very little native vegetation remaining.
14. The existing highway intersects Cemetery Creek, Green Hill Creek, Hopkins River, Billy Billy Creek, Middle Creek, Charleycomb Creek and Fiery Creek, as well as other smaller drainage lines. Between Buangor and Ararat the existing highway is bordered to the north by Langi Ghiran State Park for approximately 5 km.

Referral process

15. The proposed action was referred for consideration under the EPBC Act by VicRoads on 19 November 2010. On 17 December 2010, the Minister's delegate determined the proposed action was a controlled action under the controlling provision listed threatened species and ecological communities (section 18 and 18A of the EPBC Act) due to likely impacts to GSM (*Synemon plana*) (critically endangered).

16. In addition, the Department concluded there was insufficient information contained within the referral documentation to discount impacts on the following species and ecological communities:
- i. Grassy Eucalypt Woodland of the Victorian Volcanic Plain (critically endangered);
 - ii. Natural Temperate Grassland of the Victorian Volcanic Plain (critically endangered);
 - iii. Australian Grayling (*Prototroctes maraena*) (vulnerable);
 - iv. Button Wrinklewort (*Rutidosia leptorrhynchoides*) (endangered);
 - v. Eastern Dwarf Galaxias (*Galaxiella pusilla*) (vulnerable);
 - vi. Growling Grass Frog (*Litoria raniformis*) (vulnerable);
 - vii. Large-fruit Fireweed (*Senecio macrocarpus*) (vulnerable);
 - viii. Southern Brown Bandicoot (*Isoodon obesulus* subsp. *obesulus*) (endangered);
 - ix. Spiny Rice-flower (*Pimelea spinescens* subsp. *spinescens*) (critically endangered);
 - x. Striped Legless Lizard (*Delma impar*) (vulnerable); and
 - xi. Murray Cod (*Maccullochella peelii*) (vulnerable).

State assessment process

17. The proposed action was assessed by the Victorian Department of Planning and Community Development (DPCD), in accordance with clause 14 of the Bilateral Agreement between the Australian Government and the State of Victoria relating to Environmental Impact Assessment, 2009. The assessment process was by an EES under the *Environmental Effects Act 1978 (Victoria)* (EE Act).
18. By letter dated 29 December 2010, the Victorian Government advised that the proposed action would be assessed by Victoria in a manner specified in Schedule 1 (Part B) of the bilateral agreement between the Commonwealth and Victoria relating to environmental impact assessment. A notice to this effect was also published on the Department's website.
19. In September 2011, the Victorian Minister for Planning issued scoping requirements that specified the range of matters to be addressed in the EES. The EES was prepared by VicRoads and then placed on public exhibition, together with draft Planning Scheme Amendments (PSA) for the Ararat and Pyrenees planning schemes under the *Planning and Environment Act 1987 (Victoria)*, from 14 September 2012 to 25 October 2012.
20. Amendment to the Pyrenees and Ararat Planning Scheme allowed for the Public Acquisition Overlays of the land to be compulsorily acquired and exempts VicRoads from requiring planning permits for works and vegetation removal associated with the project, which are covered in the PSA incorporating documents.
21. On 2 November 2012, the Victorian Minister for Planning appointed an Inquiry under the EE Act, to review submissions and inquire into the environmental effects of the proposed action, in accordance with terms of reference issued by the Victorian Minister for Planning.
22. The Inquiry held a directions hearing on 13 November 2012, followed by a public hearing between 4 and 6 December 2012. The Inquiry provided its report to the Victorian Minister for Planning on 11 February 2013, which informed the preparation of the State Assessment Report. The State Assessment Report was provided to the Department on 6 June 2013, after which the statutory 30 day assessment clock commenced.

23. State Assessment Report, Inquiry Report and EES are at Attachment A for your consideration. A discussion of the key points is at Attachment D for your consideration.

EPBC assessment process

24. On 21 June 2013, the assessment decision clock was stopped under section 132 of the EPBC Act, to seek additional information in relation to the proposed offsets.
25. On 13 December 2013, VicRoads provided a copy of the draft 'Weed Management Plan' and 'Native Vegetation Management Plan', required under the State Assessment Report's recommendations to be developed in consultation with the Department.
26. On 3 December 2013, the VicRoads provided an initial offset proposal, however this was withdrawn and submitted with the current proposal due to financial considerations for securing the properties.
27. On 11 March 2014, information sufficient to address the section 132 request for further information was received, and the timeframe for decision commenced, with a final decision due on 7 April 2014. The additional information is at Attachment B for your consideration.

ECONOMIC AND SOCIAL MATTERS

28. Under section 136 (1)(b), in deciding whether or not to approve an action and what conditions to attach to the approval, the Minister must consider economic and social matters, so far as they are not inconsistent with any other requirement of Subdivision B, Division 1 of Part 9 of the EPBC Act.
29. Information on economic and social matters was provided in section 18 and 19 of the EES and section 3.10 (Figure 3) of the State's Assessment Report (Figure 4). A more detailed social assessment and economic assessment was provided in Appendix O and Appendix P of the EES at Attachment A. Key information is summarised in this brief and at Attachment D.
30. The Western Highway is the principle interstate road link between Adelaide and Melbourne and a key route for the freight industry and tourism. It is one of the busiest rural highways in the country and the most significant interstate route not yet duplicated. The implementation of the Western Highway Project Section 2 is anticipated to improve road safety, including a reduction in the crash rate between Beaufort and Ararat from 5.5 to 3.4 per million vehicle kilometres and a substantial reduction in the incidence of casualty crashes, as well as allowing for safe overtaking at all times and eliminating traffic queuing.
31. The upgrade of the Western Highway capacity will make an important contribution to the economic competitiveness of many small and medium businesses due to its role as an interstate freight link between regional and metropolitan centres, including export hubs, and the nexus between agricultural output and manufacturing employment in the region.
32. The proposed action is expected to generate over 2,000 full-time equivalent jobs directly and indirectly involved with construction and flow on effects of over 4,000 full-time equivalent jobs will provide a boost to the regional economy over the three-year construction period.
33. Disruption to local agriculture, current landholders and residents will occur during the construction period and some landholders will be affected by public acquisition of land. The proposal would result in minor amenity impacts in local areas, including noise impacts. The State Assessment Report concluded that although extensive land acquisition is required for the road reservation and the need to relocate some infrastructure assets, the associated

socio-economic impacts are essentially of local significance and are acceptable in the wider context.

SUPPORTING INFORMATION ON LISTED THREATENED SPECIES AND ECOLOGICAL COMMUNITIES

34. This section includes a summary of the matters most likely to be impacted by the proposed action. It includes a summary of the State's findings and the Department's conclusion of the acceptability of impacts on listed threatened species and ecological communities.
35. A number of surveys were undertaken by Ecology and Heritage Partners, on behalf of VicRoads, to support the findings within the EES ([Figure 5](#)). Surveys relevant to this assessment were:
 - General surveys were undertaken on 20-22 October 2010, 26-30 October 2010 and 3-5 November 2010.
 - Targeted flora surveys for SRF, Button Wrinklewort, Large-headed Fireweed, Langi Ghiran Grivillea and Tawny Spider Orchid were undertaken on 14 February 2011, 2 August 2011, 29-31 August 2011 and 8-11 November 2011. These targeted surveys, focused within patches of likely habitat.
 - Targeted GSM surveys were undertaken in suitable conditions on four days in the summer of 2011/2012 (16, 22, 29 December 2011, and 13 January 2012) within all remnant patches of Plains Grassland and suitable patches of Modified Treeless Vegetation.
 - Targeted surveys for Southern Brown Bandicoot were undertaken on 15 February 2010 to 2 March 2010.
 - Targeted Growling Grass Frog surveys were undertaken at the 21 sites with suitable breeding habitat. Each site was surveyed on two occasions under suitable conditions towards the end of the Growling Grass Frog survey season (16-17 February 2011 and 3 March 2011). The *Survey guidelines for Australia's threatened frogs: Guidelines for detecting frogs listed as threatened under the EPBC Act: Guidelines for detecting frogs listed as threatened under the Environment Protection and Biodiversity Conservation Act 1999* (Australian Government, 2010) was considered in assessing the adequacy of these surveys. A copy of this guideline is at [Attachment C](#) for your consideration.
 - Aquatic fauna surveys, water quality and habitat assessments were undertaken on all significant water bodies intersecting the proposed alignments, including nearby farm dams on October 2010, June 2011 and January 2012, specifically:
 - General survey of aquatic habitat undertake on 20-22 October 2010.
 - Macro invertebrate surveys, water quality and riparian vegetation assessments undertaken on 19-20 January 2012.
 - Targeted aquatic fauna surveys, water quality and in stream habitat assessments undertaken on 16-22 June 2011. Bait trapping, fyke netting, electro fishing, dip netting techniques were used to survey fish species, including Dwarf Galaxias.
36. The Department considers that these surveys were undertaken by suitably qualified ecologist, in accordance with the relevant Departmental survey guidelines. The survey results are summarised at section 13 of the EES ([Figure 6](#)) and maps at ([Figure 7](#)).

Grassy Eucalypt Woodland of the Victorian Volcanic Plains (critically endangered)

Description and key information

37. The critically endangered Grassy Eucalypt Woodland of the Victorian Volcanic Plains (GEWVVP) is a open eucalypt woodland with an understorey of a few sparse shrubs over a species-rich ground layer of grasses and herbs. The canopy is typically dominated by Red River Gum (*Eucalyptus camaldulensis*), and an understorey dominated by native grasses such as Kangaroo Grass (*Themeda triandra*), Wallaby Grass (*Austrodanthonia spp.*), Spear Grass (*Austrostipa spp.*), Poa tussock grasses (*Poa spp.*) and/or Weeping Grass (*Microlaena stipoides*).
38. The approved Commonwealth Conservation Advice on Grassy Eucalypt Woodland of the Victorian Volcanic Plain (Threatened Species Scientific Committee, 2008), states that this ecological community has undergone a very severe decline in extent, has a very restricted geographic distribution coupled with demonstrable threat and has undergone a reduction in community integrity that is very severe. Key threats include vegetation clearance, fragmentation of remnants, weed invasion and management regimes (fire, grazing, mowing) that are inappropriate to long-term conservation of biodiversity.
39. The relevant recovery plan; *Nationally Threatened Ecological Communities of the Victorian Volcanic Plain: Natural Temperate Grassland & Grassy Eucalypt Woodland* (Department of Sustainability, Environment, Water, Population and Communities 2011), recommends monitoring of known sites, implementation of appropriate management regimes (including fire and grazing regimes, control of invasive weeds. Of relevance, the plan also recommends working with local councils and State road authorities to ensure road maintenance or improvements do not adversely impact on known remnants.
40. There is no threat abatement plan for this ecological community.
41. Copies of all approved conservation advice, recovery plans and threat abatement plans relevant to the assessment of impacts of the proposed action are at Attachment C for your consideration.

State assessment of impacts

42. VicRoads has taken into consideration impacts to this ecological community, and avoided patches where possible. Table A2.4 of Technical Appendix H of the EES (Figure 8) summarises the extent and quality of vegetation removed by the proposed action. The table indicates that a number of patches, totalling 32.13 ha, of the Victorian ecological community Plains Grassy Woodland (EVC 55-61), will be removed by the proposed action. The Department's listing advice for GEWVVP identifies this ecological community as synonymous with GEWVVP.
43. Further information received by the Department on 11 March 2014 (at Attachment B), clarified that only 11.14 ha proposed to be removed meets condition thresholds for GEWVVP (with an average quality score of 4/10).

44. The State Assessment Report states that the proposed action is likely to have a significant impact on this listed community; however, impacts are likely to be acceptable, provided VicRoads implements DPCD's recommendations. These recommendations seek VicRoads to implement the avoidance and mitigation measures at Section 21.7.6 of the EES ([Figure 9](#)), prepare a native vegetation plan to manage onsite impacts and implement offsets to be determined in consultation with and to the satisfaction of, the Commonwealth, as part of the approval process under the EPBC Act.

Weed Management Plan and Native Vegetation Management Plan.

45. The Department has reviewed the draft Weed Management Plan and Native Vegetation Management Plan received on 13 December 2013, and determined that the Weed Management Plan adequately addresses the requirements for managing onsite weed management to mitigate onsite impacts of nationally protected matters. The plan is at [Attachment B2](#) for your consideration.

Offset proposal

46. The further information received on 11 March 2014, also included an offset proposal and draft offset management plan for this ecological community, involving securing land known as the 'Dunkeld site'. This privately owned grazing property is located within the Victorian Volcanic Plains bioregion and is currently zoned as farming. The offset proposal is to secure 23.5 ha of GEWVVP (with an average quality score of 4.5/10 to 5/10) under a section 173 agreement and actively manage the site in accordance with a management plan for 10 years. For consistency with the proponent's proposal, the Department has used a quality of 4/10 and adjusted the confidence in the quality gain accordingly.
47. The Department has assessed the offset proposal in accordance with EPBC Act Environmental Offsets Policy (October 2012) and Offset Assessment Guide, and determined the current offset proposal does not adequately compensate for this ecological community as it provides only 71.17% of the direct offset requirement and the offset policy requires a minimum 90% direct offset. Further discussion of the Departments' assessment of VicRoad's offset proposal is at [Attachment E](#) for your consideration. The Department has informally notified VicRoads of these findings.
48. VicRoads has informally indicated their preference for direct offsets as a compensatory measure for impacts of the proposed action, and is currently investigation the cost and availability of additional land at the 'Dunkeld' site and an alternative site known as the 'Darlington' site. Based on the likely quality gains at the site, the Department has determined that a direct offset of 33.5 ha GEWVVP (providing 101.45% of the offset requirement), is required at the Dunkeld site.
49. As VicRoads are proposing to secure approximately 35.49 ha of Plains Grassy Woodland (EVC 55-61) (synonymous with GEWVVP) at the Dunkeld site for the purposes of the Victorian Government's Net Gain requirements, the Departments' offset requirements for this ecological community are in line with the Victorian Government's requirements.
50. The report states that the cost of the proposed offset for 23.5 ha GEWVVP is \$1,175,000, based on the market value of \$50,000 per ha. The Department's offset requirement of 33.5 ha GEWVVP is estimated to cost approximately \$1,675,000; however, this will provide for both Victorian and EPBC Act offset requirements for this ecological community.

Conclusion and proposed conditions

51. Given that weed invasion is a key treat for GEWVVP and NTGVVP, the Department recommends attaching a condition to implement the Weed Management Plan, as per Condition 3.
52. Given there are other patches of GEWVVP in close proximity to the proposed action, the Department recommends attaching a condition to limit the impacts to GEWVVP to 11.14 ha, as per Condition 6.
53. Given that impacts of the proposed action on GEWVVP are significant even when avoidance and mitigation measures have been taken into account, the Department recommends attaching a condition of approval to require the long term protection and long term management of at least 33.5ha GEWVVP at the Dunkeld site, as per Condition 7-9.
54. VicRoads has informally requested the Department take into consideration the economic impacts of conditions of approval that impose unnecessary delays to construction. In line with section 136(1)(b) of the EPBC Act, the Department recommends the condition of approval allow removal of GEWVVP, NTGVVP and GSM habitat upon approval, provide the offset site is secured with an approved management plan in place within 12 months of the date of the approval. The Department has taken into consideration a time delay of 12-24 months in assessing the offset requirement.
55. Provided the action is undertaken in accordance with the proposed conditions of approval at Attachment F, the Department considers that the impacts of the proposed action on the critically endangered GEWVVP are acceptable.

Natural Temperate Grassland of the Victorian Volcanic Plain NTGVVP (critically endangered)

Description and key information

56. The critically endangered Natural Temperate Grassland of the Victorian Volcanic Plain (NTGVVP) is an ecological community dominated by a native ground layer of tussock forming perennial grasses, typically kangaroo-grass, wallaby-grass, spear-grasses, interspersed with a variety of wildflowers. Few, if any, shrubs and trees are present. NTGVVP can vary greatly depending on the time of year and the history of the site, such as intensity of grazing and recent fire history. This ecological community is known to support a variety of nationally threatened animals and more than 20 threatened plants, including the SRF, Striped Legless Lizard and GSM.
57. According to the approved Commonwealth Conservation Advice on Natural Temperate Grassland of the Victorian Volcanic Plain (Threatened Species Scientific Committee, 2008), NTGVVP was once wide spread throughout the Victorian Volcanic Plains bioregion, however it is presently very restricted geographically and has suffered a very severe decline in the quality of remaining patches. Key threats are clearing, changes to land management practices of remnants, application of herbicides, addition of fertilisers, weed invasion, poorly managed subdivision and poorly planned land use in peri-urban areas, and lack of knowledge or understanding of native grassland remnants.

58. The relevant recovery plan is *Nationally Threatened Ecological Communities of the Victorian Volcanic Plain: Natural Temperate Grassland & Grassy Eucalypt Woodland* (Department of Sustainability, Environment, Water, Population and Communities, 2011). Priorities identified in the recovery plan are: monitor known sites to identify key threats and effective management actions, undertake survey work to identify additional remnants, minimise adverse impacts at known sites, protect remnants through conservation agreements, covenants and reserves, seed collection, weeding and management plans for key weed species and develop and implement appropriate fire regimes.
59. There is no threat abatement plan for this ecological community.

State assessment of impacts

60. VicRoads has taken into consideration impacts to this ecological community, and avoided patches where possible. Table A2.4 of Technical Appendix H of the EES ([Figure 8](#)) summarises the extent and quality of vegetation removed by the proposed action. The table indicates that a number of patches, totalling 10.86 ha, of the Victorian ecological community Plains Grassland (EVC132), will be removed by the proposed action. The Department's listing advice for NTGVVP identifies this ecological community as synonymous with NTGVVP.
61. Further information received by the Department on 11 March 2014 (at [Attachment B](#)), clarified that only 5.25 ha proposed to be removed meets condition thresholds for NTGVVP (with an average quality score of 6/10).
62. The State Assessment Report states that the proposed action is likely to have a significant impact on this listed community; however, impacts are likely to be acceptable, provided VicRoads implements DPCD's recommendations. These recommendations are the same as for GEVVVP.

Offset proposal

63. The further information received on 11 March 2014, included an offset proposal and draft offset management plan for this ecological community involving securing land known as the 'Darlington' site. This privately owned grazing property is located within the Victorian Volcanic Plains bioregion and is currently zoned as farming. The offset proposal is to secure 20.3 ha NTGVVP (with an average quality score of 5/10) under a section 173 agreement and actively manage the site in accordance with a management plan for 10 years.
64. The Department has assessed the offset proposal in accordance with EPBC Act Environmental Offsets Policy (October 2012) and Offset Assessment Guide, and determined the offset proposal of 20.3 ha for NTGVVP adequately compensates for this ecological community, which provides for 96.19% of direct offsets. The Department also believes this proposal is adequate given the additional offset requirements proposed for GEVVVP and GSM. Further discussion of the Department's assessment of this offset proposal is at [Attachment E](#) for your consideration.
65. VicRoads are proposing to secure approximately 69.43 ha of Plains Grassland (EVC 132) (synonymous with NTGVVP) at the Darlington site for the purposes of the Net Gain requirements, and therefore the Departments' offset requirements for this ecological community are in line with the Victorian government's requirements.

66. The offset requirement of 20.3 ha NTGVVP is estimated to cost approximately \$1,015,000, based on the market value of \$50,000 per ha in total; and this may provide for both state and federal offset requirements for this ecological community.

Conclusion and proposed conditions

67. Given that there are other patches of NTGVVP in close proximity to the proposed action, the Department recommends attaching a condition to limit the impacts to NTGVVP to 5.25 ha, as per Condition 10.
68. Given that impacts of the proposed action on NTGVVP are significant even when avoidance and mitigation measures have been taken into account, the Department recommends attaching a condition of approval for the long-term protection and long-term management of at least 20.3 ha NTGVVP at the Darlington site, as per Condition 11-13. As discussed above, the Department recommends the conditions of approval require the offset site to be secured and management plan approved within 12 months of the date of the approval.
69. Given the landowner for the Darlington site has multiple projects seeking to use the property as an offset site, there is considerable risk that VicRoads may not be able to secure the site for the purposes of this offset, or may only be able to secure a portion of the 20.3 ha required. The Department also acknowledges that VicRoads does not have a Memorandum of Understanding or any other contract with the land owners of either the Darlington or Dunkeld site. Accordingly, the Department recommends a condition of approval for the purposes of contingency offsets for residual offset requirements, as per Condition 18.
70. Provided the action is undertaken in accordance with the proposed conditions of approval at Attachment F, the Department considers that the impacts of the proposed action on the critically endangered NTGVVP are acceptable.

Golden Sun Moth (*Synemon plana*) (critically endangered)

Description and key information

71. The critically endangered Golden Sun Moth (GSM) is a medium sized, day-flying moth that occurs in native grasslands and grassy woodlands containing Kangaroo Grass, Wallaby Grass, Spear Grass and Blue Grass (*Bothriochloa spp.*), but frequently persists in degraded and modified grasslands including Chilean needle grass (*Nassella neesiana*), provided that the soil has not been cultivated. The GSM spends the majority of its lifecycle in a larval stage, living underground and feeding on grass roots. Individuals pupate and emerge to breed for only a few fine and warm days in late spring and early summer, with the complete flying/survey season limited to a few weeks. Males actively fly just above the height of the grasses in search of females, which tend to remain on the ground in inter-tussock spaces a key habitat requirement, using their bright orange underwings to attract the searching males.
72. The *Commonwealth Conservation Advice for Synemon plana (Golden Sun Moth)* (Threatened Species Scientific Committee, 2013) states the key threats for GSM are habitat removal, overgrowth of inter-tussock spaces and soil compaction due to cultivation or construction activities.
73. There is no recovery plan or threat abatement plan for this species.



State assessment of impacts

74. VicRoads has taken into consideration impacts to this listed species, and avoided patches of known habitat where possible.
75. Targeted GSM surveys were undertaken within suitable habitat, in suitable conditions over four days in the summer of 2011/2012 (16, 22, 29 December 2011, and 13 January 2012), in accordance with the Department's guidelines. Surveys identified GSM at several locations along the road alignment, with 40, 17, 86 and 2 male GSM (total of 145) recorded over the survey dates. Of this, a total of 31.56 ha of known GSM (with an average quality score of 4/10 for GSM habitat) is proposed to be removed, primarily within the patches of grassland near creek crossings (Figure 7).
76. Further information received by the Department on 11 March 2014 (at Attachment B), clarified that these surveys were undertaken all remnant patches of Plains Grassland and suitable patches of Modified Treeless Vegetation (i.e. including degraded grassland that may support GSM).
77. The State Assessment Report states that the proposed action is likely to have a significant impact on this threatened species; however, impacts are likely to be acceptable, provided VicRoads implements DPCD's recommendations. These recommendations are outlined in the background above.

Offset proposal

78. The further information received on 11 March 2014, included an offset proposal and draft offset management plan for GSM habitat involving securing land at the 'Darlington' site, which partially overlaps with the NTGVVP offset described above. This privately owned grazing property is located within the Victorian Volcanic Plains bioregion and is currently zoned as farming. The offset proposal is to secure 79.2 ha of known and potential GSM (with an average quality score of 6/10) under a section 173 agreement and actively manage the site in accordance with a management plan for 10 years.
79. The Department has assessed the offset proposal in accordance with EPBC Act Environmental Offsets Policy (October 2012) and Offset Assessment Guide, and determined that the current offset proposal does not adequately compensate for impacts to this threatened species as it provides only 79.39% of the direct offset requirement and the Offset Policy requires a minimum 90% direct offset. Further discussion of the Department's assessment of this offset proposal is at Attachment E for your consideration.
80. VicRoads has informally indicated their preference for direct offsets. Based the likely quality gains at the proposed offset site, the Department has determined that a direct offset of 100 ha of known GSM habitat with a viable population (providing 100.25% of the offset requirement), is required to offset the proposed action's impact at the Darlington site.
81. The report states that the cost of VicRoads proposed offset for 79.39 ha GSM Habitat is \$3,960,000.00, based on the market value of \$50,000 per ha. The Department's recommended offset requirement of 100 ha GSM known habitat is estimated to cost approximately \$5,000,000 in total.

Conclusion and proposed conditions

82. Given that there are other patches of GSM habitat in close proximity to the proposed action, the Department recommends attaching a condition to limit the impacts to GSM to 31.56 ha, as per Condition 14.
83. The State Assessment Report recommends that VicRoads must prepare a Threatened Species Management Plan in consultation with DPCD and the Department, prior to construction in close proximity to Spiny Rice Flower, GSM habitat or Dwarf Galaxias habitat, to ensure the implementation of VicRoad's avoidance and mitigation commitments, as per Condition 4. The Department recommends this include 'no-go' zones for the protection of GSM habitat within or in close proximity to the proposed action, and a detailed plan and schedule for revegetation, rehabilitation and weed removal works for the improvement of GSM habitat impacted by the proposed action.
84. Given that impacts of the proposed action on GSM are significant even when avoidance and mitigation measures have been taken into account, the Department recommends attaching a condition of approval for the long-term protection and long-term management of at least 100 ha known GSM habitat at the Darlington site, as per Condition 15-17. As discussed above, the Department recommends the conditions of approval require the offset site to be secured and a management plan approved within 12 months of the date of the approval.
85. Given that the Darlington site has a mixture of known and potential GSM habitat, the Department recommends attaching a condition of approval requiring additional surveys for GSM at the Darlington site, as per Condition 15(a).
86. As discussed above, given the uncertainties in securing the Dunkeld and Darlington sites, the Department recommends a condition of approval for the purposes of contingency offsets for residual offset requirements, as per Condition 18. The Department also recommends the contingency offset be required in the event that this survey determines the Darlington site does not contain a viable population extending across the 100 ha.
87. Provided the action is undertaken in accordance with the proposed conditions of approval at Attachment F, the Department considers that the impacts of the proposed action on the critically endangered GSM are acceptable.

Eastern Dwarf Galaxias (*Galaxiella pusilla*) (vulnerable)

Description and key information

88. Dwarf Galaxias are small, olive-amber freshwater fish that grow to an average of 30-40 millimetres. Dwarf Galaxias spend their entire life cycle in freshwater, and are typically found in still waters such as swamps, drains, and backwaters of creeks and streams. They often occur in temporary or ephemeral watercourses and can become dormant for several months in the mud under logs and stones or in exiting burrows made by other animals. The Dwarf Galaxias is thought to be an annual species, where adults die after spawning. Therefore it is vital to have successful breeding and recruitment each year, or severe declines in populations will occur, potentially leading to the extinction in certain areas. They are relatively sedentary, and disperse primarily through overland flow of water during



flooding events. The critical period for the breeding/dispersal period is late winter to late spring (from 1 April to 30 November).

89. The *National Recovery Plan for the Dwarf Galaxias (Galaxiella pusilla)* (Saddler, S., J. Jackson, & M. Hammer, 2010) states that while the species is still widely distributed, populations are fragmented and patchy across the landscape. The species has suffered a significant decline in abundance due to habitat changes to shallow freshwater wetlands, especially wetland drainage. According to the recovery plan, key threats to the Dwarf Galaxias include habitat loss and degradation, alteration to flow regime, climate change, illegal collection and introduced aquatic species that outcompete or predate on Dwarf Galaxias. Other key threats include wetland drainage, loss of deep-water refuges, agricultural disturbance, and loss of associated burrowing crayfish species such as yabbies whose abandoned burrows provide important refuge in dry times and as shelter from predation.
90. There is no approved conservation advice or threat abatement plan for this species.

State assessment of impacts

91. Aquatic surveys as outlined in the EES, were undertaken in Billy Billy Creek, Charlie Combe Creek, Hopkins River, and Middle Creek, with 156 Dwarf Galaxias individuals recorded in Billy Billy Creek (Figure 7).
92. The EES and State Assessment Report identify the main risk to this species, under both Option 1 and Option 2, would arise from construction of bridges that span Billy Billy Creek. Bridge construction could result in the removal of habitat and death or injury of individuals of the species.
93. Mitigation measures proposed in the EES to avoid or mitigate impacts on the species include not placing bridge structures/piers within the waterway and construction in and around Billy Billy Creek to occur outside the breeding/dispersal period, which they have identified as May to October. However the Department notes that reports by specialists on Dwarf Galaxias produced for EPBC 2010/5781 and EPBC 2011/5912 state that breeding activity can occur as early as April and as late as November. Waterway crossings with potential habitat are to be designed for unimpeded Dwarf Galaxias dispersal during flood conditions and sedimentation and erosion control measures are to be implemented to protect water quality in the Billy Billy Creek.
94. The State Assessment Report states that the proposed action is likely to have a significant impact on this threatened species; however, impacts are likely to be acceptable, provided VicRoads implements DPCD's recommendations. These recommendations are outlined in the background above.

Conclusion and proposed conditions

95. As per above, the Department recommends attaching a condition requiring a Threatened Species Management Plan be prepared the satisfaction of DPCD and the Department to ensure the implementation of VicRoad's avoidance and mitigation commitments, as per Condition 4. Based on the precedence of EPBC 2010/5781 and EPBC 2011/5912, the Department recommends the condition require the plan be developed by a suitably qualified ecologist and include detailed information on the following:
 - baseline population and habitat condition;
 - establishing no-go zones;

- water quality monitoring;
 - a procedure for isolating waterways and translocating Dwarf Galaxias;
 - commitments to avoiding the breeding season;
 - a plan for revegetation of fringing and in-stream habitat;
 - sediment erosion and pollution controls;
 - an emergency response procedure;
 - monitoring that triggers and contingency action; and
 - reporting on outcomes.
96. Given that the proposed action will involve the construction of bridges and culverts within a number of creek crossings, the Department recommends the Threatened Species Management Plan require a commitment to avoiding construction activities during the critical breeding and dispersal season (from 1 April to 30 November), within the three creeks that provide known Dwarf Galaxias habitat, as per Condition 4(b)(iv).
97. Provided the action is undertaken in accordance with the proposed conditions of approval at Attachment F, the Department considers that the impacts of the proposed action on the vulnerable Dwarf Galaxias are acceptable.

Spiny Rice-flower (*Pimelea spinescens spinescens*) (critically endangered)

Description and key information



98. The critically endangered Spiny Rice Flower (SRF) is a very small, slow growing shrub endemic to south-western and central Victoria. It grows on basalt derived soils in grassland or open scrubland commonly dominated by Kangaroo Grass, Wallaby Grass and Spear Grass. Populations are scattered throughout 184 known sites across central-western Victoria. Most of these sites are considered small (with less than 100 individuals), fragmented and located in close proximity to developed areas where they are vulnerable to weed invasion, human trampling and other indirect impacts. SRF should be surveyed when it is in flower between April and August.
99. The *National Recovery Plan for the Spiny Rice-flower (Pimelea spinescens spinescens)* (Carter, O. & N. Walsh, 2006) states that populations of the species have been substantially fragmented and depleted by land clearance, and this decline is continuing, with almost all populations under threat. Key threats to the SRF include weed invasion, road and rail maintenance, grazing, inappropriate fire regimes and changes to land use.
100. There is no approved conservation advice or threat abatement plan for this species.

State assessment of impacts

101. Targeted flora surveys for listed threatened flora, including SRF were undertaken on 14 February 2011, 2 August 2011, 29-31 August 2011 and 8-11 November 2011. The State Assessment Report states that 575 SRF individual plants were recorded within the existing highway reserve between the Ararat Aerodrome entrance and Wurrayatkin Road (see Figure 7), to the north of the existing highway. The proposed alignment has been chosen to avoid the SRF population, with the exception of a single plant well outside the patch.

102. The State Assessment Report states that the proposed action is likely to have a significant impact on this threatened species; however, impacts are likely to be acceptable, provided VicRoads implements DPCD's recommendations. These recommendations are outlined in the background above.

Conclusion and proposed conditions

103. Given that it may take 15 years for construction activities to occur at the end of the highway where the SRF population is located, the Department considers it likely that the population numbers and distribution may change slightly. Based on precedence where as few as 5 SRF plants is likely to have a significant impact, the Department recommends attaching a condition to limit the impacts of the proposed action to no more than 5 SRF plants, as per Condition 2.
104. Given that the proposed action will be immediately adjacent to a significant population of SRF, critical to the survival of the species, the Department recommends attaching a condition requiring a Threatened Species Management Plan be prepared the satisfaction of the Department to ensure the implementation of VicRoad's avoidance and mitigation commitments relating to SRF, as per Condition 4. Specifically, the Department recommends this condition includes baseline data on the condition and extent of the SRF population, and a procedure for the establishment of no-go zones for the duration that construction is in close proximity to SRF.
105. Provided the action is undertaken in accordance with the proposed conditions of approval at Attachment F, the Department considers that the impacts of the proposed action on the critically endangered Spiny Rice-flower are acceptable.

Button Wrinklewort (*Rutidosia leptorrhynchoides*) (endangered)

Description and key information

106. The Button Wrinklewort is a perennial, multi-stemmed semi-shrub, with upright, linear leaves and leafy ascending flower stems to 35 centimetres tall. Flower heads are bright yellow with curly petals occur in summer. The species occurs in three geographically disjunct areas in south-east Australia: the Southern Tablelands of NSW and ACT, the Gippsland Plains in eastern Victoria and the volcanic plains of western Victoria. There are two chromosomal races of Button Wrinklewort that exist as diploid populations across the entire range.



107. The *National Recovery Plan for Button Wrinklewort (Rutidosia leptorrhynchoides)* NSW Office of Environment and Heritage, 2012 states there are only 11 known populations within Victoria, though some consist of less than 10 plants. Whilst the total population size may appear large, the total area occupied by the species across its entire range (including NSW and ACT) is only 13.4 ha. The identified key threats for Button Wrinklewort are urban development, physical disturbance, climate change, weed invasion by grassy weeds including the Chilean Needle Grass (*Nassella neesiana*), competition, grazing, lack of genetic diversity, genetic incompatibility, inappropriate fire regime, and insufficient formal reservation of population. The identified recovery actions for Button Wrinklewort are; remove threatening weeds, monitor populations, undertake ecological burning as needed, documenting new sites, survey the genetic composition of all populations, genetic enhancement of small populations, formal

reservation or negotiation of management agreements for populations on non-reserve tenure and various site-specific actions.

108. There is no approved conservation advice or threat abatement plan for this species.

State assessment of impacts

109. The State Assessment Report states that a number of significant populations of Button Wrinklewort were recorded during the EES investigations, with a total of 83 individual plants recorded within the road reserve east of Warrayatkin Road and another 5 plants recorded in the Woodnaggerak Reserve (Figure 7).
110. The proposed alignment of the duplicated highway has been refined specifically to avoid these plants. Additional measures have been proposed to ensure that they are not disturbed, including use of appropriate fencing to identify a No-go Zone around the plants.
111. The State Assessment Report states that the proposed action is likely to have a significant impact on this threatened species; however, impacts are likely to be acceptable, provided VicRoads implements DPCD's recommendations. These recommendations are outlined in the background above.

Conclusion and proposed conditions

112. Given that the proposed action will be immediately adjacent to a number of significant populations of Button Wrinklewort, the Department recommends attaching a condition requiring a Threatened Species Management Plan be prepared the satisfaction of the Department to ensure the implementation of VicRoad's avoidance and mitigation commitments relating to Button Wrinklewort, as per Condition 4. Specifically, the Department recommends this condition includes baseline data on the condition and extent of the Button Wrinklewort populations, and a procedure for the establishment of no-go zones for the duration that construction is in close proximity to Button Wrinklewort populations.
113. Provided the action is undertaken in accordance with the proposed conditions of approval at Attachment F, the Department considers that the impacts of the proposed action on the endangered Button Wrinklewort are acceptable.

Other listed species and ecological communities

114. A number of other listed threatened species and ecological communities could not be discounted during the referral stage, due to the presence of suitable habitat and historical records in the region. The details of these surveys are outlined above at paragraph 34.
115. General surveys concluded that the site does not contain suitable habitat for the endangered Buloke Woodlands of the Riverina and Murray-Darling Depression Bioregions ecological community, the vulnerable Striped Legless Lizard (*Delma impar*) or the vulnerable Plains Wanderer (*Pedionomus torquatus*). The EES states that this ecological community and threatened species are unlikely to be present within the proposed alignment options and therefore, it is unlikely that these species would be impacted by the proposed action.
116. The targeted flora surveys for the vulnerable Large-headed Fireweed (*Senecio macrocarpus*), the vulnerable Langi Ghiran Grevillea (*Grevillea montiscole subsp. Brevistyla*) and the endangered Tawny Spider Orchid (*Caladenia fulva*) did not detect any of these flora species. The EES states these threatened flora species are unlikely to be present within the proposed alignment options and therefore, it is unlikely that these species would be impacted by the proposed action.

- 117. Targeted surveys for the endangered Southern Brown Bandicoot (*Isoodon obesulus obesulus*) and vulnerable Growling Grass Frog (*Litoria raniformis*) did not detect these fauna species. The EES states these threatened fauna species are unlikely to be present within the proposed alignment options and therefore, it is unlikely that these species would be impacted by the proposed action.
- 118. Targeted surveys for the vulnerable Australian Grayling (*Prototroctes maraena*), and Murray Cod (*Maccullochella peelii*), did not detect these aquatic fauna species. The EES states these threatened aquatic fauna species are unlikely to be present within the proposed alignment options and therefore, it is unlikely that these species would be impacted by the proposed action.
- 119. The State Assessment Report concludes that the proposed action is unlikely to have a significant impact on these threatened species.

Conclusion and proposed conditions

- 120. Given the lack of recorded presence during targeted surveys for the above species, the Department considers that the proposed action will not result in unacceptable impacts to these listed threatened species and ecological community. However, given the historical records of other threatened species and ecological communities in close proximity to the proposed action, the Department recommends attaching a condition to confine the impacts of the proposed action to within a defined 'project area' (see Condition 1).
- 121. Provided the action is undertaken in accordance with the proposed conditions of approval at Attachment F, the Department considers that the impacts of the proposed action on other listed threatened species or ecological communities are acceptable.

CONSULTATION

- 122. During the EES process, the DPCD invited comments from the public on the proposed action. Twenty three submissions were received, including five (5) from State and local government bodies, and can be summarised as follows:

Number For Against Not specified

- 123. Following completion of the Victorian Government's assessment process, the Department has received ministerial correspondence from one member of the public in opposition to the proposed action. These comments relate to the preferred alignment options and do not relate to the acceptability of impacts to matters of environmental significance.
- 124. The Department's Approvals and Monitoring Section was consulted in preparing the proposed conditions of approval. The Department has considered these comments in preparing this briefing advice. Proposed changes to the administrative conditions displayed as red text.
- 125. Under the EPBC Act, prior to making your final assessment decision, you are required to invite comments on your proposed assessment decision from relevant Commonwealth Ministers (section 131), the person proposing to take the action and the designated VicRoads (section 131AA) for 10 business days.
- 126. As this proposed action is partially funded by the Australian Government's 'National Building Program' the Department recommends you write to the Hon Warren Truss MP, Minister for Infrastructure and Regional Development. VicRoads is both the person proposing to take the action and the designated VicRoads for the proposed action.

127. Under section 131AA of the EPBC Act, you must consult with Roads Corporation (trading as VicRoads) on your proposed decision and any conditions of approval. Draft correspondence is at Attachment G for your signature.

s22

Director
Victoria Section
South-Eastern Australia Environment
Assessments Branch

Ph: 02 s22

27 March 2014

s22

Senior Assessment Officer
Victoria Section
South-Eastern Australia Environment
Assessments Branch

Ph: 02 s22

Figures

1. Map of proposed action within Victoria
2. Section 5.4 and 5.5 of EES Report – Comparison of alignment options
3. Section 18 and 19 of EES Report – Economic and social matters
4. Section 3.10 of State's Assessment Report - Economic and social matters
5. Section 13.3 and Table 13-1 of EES Report– Summary of survey methodology and limitations
6. Section 13.of EES Report - Survey results
7. Maps at Figure 13.2(a) to (i), of EES Report
8. Table A2.4 of Technical Appendix H – Summary table vegetation quality and extent
9. Section 21.7.6 of the EES Report – VicRoads' Environmental Management Commitments

Attachments

A: Victorian Government's environmental assessment package

- I. State Assessment Report
- II. State Inquiry Report
- III. Final EES

B: Additional information

- I. Copy of Department's request for additional information dated 21 June 2013.
- II. Copy of 'Weed Management Plan' and 'Native Vegetation Management Plan' received 13 December 2013.
- III. Information relating to potential offset sites received 7 February 2014.
- IV. Offset management plans provided on 4 March 2014.
- V. Clarification of the size and quality of the impact site and offsets, provided 11 March 2014

C: Recovery plans, threat abatement plans, approved conservation advice and survey guidelines on relevant listed threatened species an ecological communities.

I. Recovery Plans

- o *Nationally Threatened Ecological Communities of the Victorian Volcanic Plain: Natural Temperate Grassland & Grassy Eucalypt Woodland (Department of Sustainability, Environment, Water, Population and Communities, 2011)*
- o *National Recovery Plan for Button Wrinklewort (Rutidosia leptorrhynchoides) (NSW Office of Environment and Heritage, 2012);*
- o *National Recovery Plan for the Dwarf Galaxias (Galaxiella pusilla) (Saddler, S., J. Jackson, & M. Hammer, 2010);*

- o *National Recovery Plan for the Southern Bell Frog (Litoria raniformis) (Clemmann N. & G.R. Gillespie, 2012);*
 - o *National Recovery Plan for the Spiny Rice-flower (Pimelea spinescens spinescens) (Carter, O. & N. Walsh, 2006);*
 - II. Threat abatement plans
 - o *Threat Abatement Plan Infection of Amphibians with Chytrid Fungus resulting in Chytridiomycosis (Commonwealth of Australia, 2006)*
 - III. Approved conservation advice
 - o *Commonwealth Conservation Advice for Synemon plana (Golden Sun Moth) (Threatened Species Scientific Committee, 2013);*
 - o *Commonwealth Conservation Advice on Grassy Eucalypt Woodland of the Victorian Volcanic Plain (Threatened Species Scientific Committee, 2008)*
 - o *Commonwealth Conservation Advice on Natural Temperate Grassland of the Victorian Volcanic Plain (Threatened Species Scientific Committee, 2008)*
 - IV. *Guidelines for detecting frogs listed as threatened under the EPBC Act 1999 (Australian Government, 2010).*
- D: Legal considerations relating to decision making under Part 9
- E: Department's assessment of offsets
- I. Department's assessment of VicRoads offset proposal
 - II. GEWVVP offset proposal
 - III. NTGVVP offset proposal
 - IV. GSM habitat offset proposal
- F: Proposed approval decision – DO NOT SIGN
- G: Letters to VicRoads and Commonwealth Ministers
- I. VicRoads - FOR SIGNATURE
 - II. The Hon Warren Truss MP, Minister for Infrastructure and Regional Development - FOR SIGNATURE

Material used to prepare this briefing package

In addition to the attachments to this brief, the following information is available to inform a decision under the EPBC Act:

- *Environment Protection and Biodiversity Conservation Regulations 2000 (http://www.austlii.edu.au/au/legis/cth/consol_reg/epabcr2000697/);*
- EPBC Act Policy Statement 1.1 Significant Impact Guidelines, Matters of National Environmental Significance (May 2006);
- *EPBC Act Policy Statement 3.11 - Significant Impact Guidelines for the Critically Endangered Spiny Rice-flower (Pimelea spinescens subsp. spinescens) (Department of the Environment, Water, Heritage and the Arts (DEWHA), 2009a);*
- *EPBC Act Policy Statement 3.12 - Significant Impact Guidelines for the Critically Endangered Golden Sun Moth (Synemon plana) (Department of the Environment, Water, Heritage and the Arts (DEWHA), 2009);*
- *Matters of National Environmental Significance Significant Impact Guidelines 1.1 Environment Protection and Biodiversity Conservation Act 1999 (Department of the Environment, 2013);*
- Environment Reporting Tool (ERT);
- Species Profile and Threats Database (SPRAT); and
- Victorian Biodiversity Interactive Map.

From: s22
To:
Subject: FW: Western Highway Duplication: Section 2B: Assessment deficiencies [Reference 2010/5741] [SEC=UNCLASSIFIED]
Date: Thursday, 7 February 2019 4:18:27 PM
Attachments: [image001.png](#)

From: s22
Sent: Friday, 29 June 2018 3:50 PM
To: s22
Cc: s22
Subject: RE: Western Highway Duplication: Section 2B: Assessment deficiencies [Reference 2010/5741] [SEC=UNCLASSIFIED]

Hi s22

Thanks for passing on Paul Foreman's statement. We've read through it and consider he has made a thorough evaluation of the situation on the site. We've limited our response to issues concerning the national ecological communities - Mr Foreman also makes comments about a possible State-listed groundwater-dependent ecosystem and his views regarding the approaches taken in other assessment reports and the general assessment process itself that are not directly relevant to our work and we are unable to comment on.

I note our previous advice and knowledge of the issue, back in July 2016, was focused on the peer review by Ecology Australia (EA) of the several environment reports that were produced for the Western Highway upgrade project up to that time. We agreed that Mr Foreman's assessment should be given due consideration because his methods used on-ground plots to survey the flora with reference to diagnostic and condition criteria cited in EPBC guidance documents (listing advices, recovery plans and info brochures). This approach is most likely to give a definitive result of the floristic values in the surveyed area. We therefore concluded in our initial advice that: "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 reference to potential edge of range occurrence simply acknowledges that the Box Gum Grassy Woodland is more common in the northern and central parts of Vic but its distributional occurrences are less well known south of the dividing range in Victoria. It was not stating that the Box Gum Grassy Woodland cannot be present because the area is in the transitional zone for the ecological community. Mr Foreman has given more detail of his survey methods in the statement that reinforces our former conclusion. Our previous advice also noted the region is close to the boundary of the VVP and Victorian Midlands bioregions and near rain-shadow regions, which raises a possibility some vegetation patches may be considered transitional woodland communities that may have affinity with the drier GEWVVP variant. We noted, however, that the GEWVVP is specifically linked to Quaternary basalt soil. This would need to be verified to definitely establish its presence.

Mr Foreman's statement gives more detail to reliably support his conclusions that Box Gum Grassy Woodland is present rather than Grassy Eucalypt Woodland of the VVP. The key piece of evidence concerns the soil type at the site and confirmation of the bioregion for the patch in question because the diagnostic features of the GEWVVP community include: a distribution limited to the VVP bioregion and occurrences limited to Quaternary basalt soils. We don't believe any such limitations are imposed on the Box Gum Grassy Woodland. Mr Foreman states: "The area in question is located within the Central Victorian Uplands" (p9) and that the physical environment across the area is "a low granite range with moderately sloping metamorphic sandstone" (p10). We agree with Mr Foreman that this rules out the GEWVVP community. An examination of online maps through the Vic NatureKit website shows that the Western Highway in the broad project region between Ararat and Buangor intersects both the VVP and CVU regions. Furthermore, we're aware from other queries from local ecologists that the boundary between the soils of the VVP and adjoining bioregions isn't always 'neat' - small pockets of localised basaltic soils may be scattered within adjoining bioregions such as the Victorian Midlands, but are not a significant feature of those bioregions. The information from Mr Foreman categorically excludes these possibilities: the patch is in the CVU and is not on Quaternary basalt soils. Hence it does not meet these diagnostic features of GEWVVP.

We have a few other clarifications about listed ecological communities made in Mr Foreman's statement.

- In para 77 that he notes that "the 'Refusal to suspend (December 2016)' document states that 'there is no conservation advice or recovery plan for [Box-Gum Grassy Woodland]'. In fact, there is a Conservation Advice at the back of the Listing Advice".
While the listing advice does have a section at the end marked as "Conservation advice" it is not a formally approved Conservation Advice. Conservation Advices prepared before the EPBC amendments in 2007 were simply informal, brief guidance in the listing advice on priority recovery actions, to cover the gap between listing and preparation of a recovery plan. It does not include all the information currently required by the EPBC Act and has not been formally approved by the Minister or their delegate. Hence the SPRAT database notes there is no approved Conservation Advice. However, there is a national recovery plan that has been effective under the EPBC Act since 2013. So the 'Refusal to suspend' document from December 2016 incorrectly stated that there is no recovery plan.
- Mr Foreman generally follows the diagnostic and condition criteria presented as a flowchart in Box Gum guidance

documents. He follows the pathway for small patch sizes (0.1ha to 2ha) with a high diversity of 12 or more non-grassy native understorey species and considers this to be met from his surveys. However, there is an alternative pathway that can apply to patches larger than 2ha, when the understorey diversity may be lower, that should also be considered in such cases. We have previously given the advice below to interpret the Box Gum Grassy Woodland condition:

Guidance on the definition of the EPBC-listed ecological community - White Box-Yellow Box-Blakely's Red Gum Grassy Woodland and Derived Native Grassland - in relation to the understorey condition thresholds criteria.

Firstly, the listing advice provides the key information on the listed ecological community and should be consulted in conjunction with the Policy Statement information booklet and National Recovery Plan for the ecological community. The condition classes in the listing advice state that:

For smaller (at least 0.1 ha) patches:

A patch in which the perennial vegetation of the ground layer is dominated by native species, and which contains at least 12 native, non-grass understorey species (such as forbs, shrubs, ferns and sedges) is considered to have a sufficiently high level of native diversity to be the listed ecological community. At least one of the understorey species should be an important species (e.g. grazing-sensitive, regionally significant or uncommon species; such as Kangaroo Grass or orchids) in order to indicate a reasonable condition.

This requires the 12 species to be present within the patch. The 0.1 ha suggested plot size (in the Policy Statement) for assessing the understorey, is intended to help guide surveys of the patch.

For larger (at least 2 ha) patches:

Areas with both an overstorey and understorey present are also considered of sufficiently good condition to be part of the listed ecological community if the understorey meets any of the conditions above, or if they have a predominantly native understorey, are two hectares or above in size, and have either natural regeneration of the overstorey species or 20 or more mature trees per hectare.

The patch extends to the larger of:

- 1) the area over which the understorey is predominately native, or
- 2) an area that contains five or more trees in which no tree is greater than 75m from another tree (as outlined in the Policy Statement).

An updated version of the flowchart is included as Appendix 2 in the national recovery plan for this ecological community, and is more consistent with the wording and intent of the listing advice (<http://www.environment.gov.au/resource/white-box-yellow-box-blakelys-red-gum-grassy-woodland-and-derived-native-grassland-national>).

It may be prudent to ask Mr Foreman how the site in question fits within this alternative pathway for Box Gum Grassy Woodland, which may allow additional areas of the site to potentially be included if they meet these criteria (for patches >2ha) but didn't meet the minimum twelve non-grass native species understorey diversity.

I hope that helps with your query. Kind regards

s22

Assistant Director
Ecological Communities Section
AG – Dept of the Environment and Energy

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From: s22

Sent: Wednesday, 27 June 2018 11:29 AM

To: s22

Cc: s22

Subject: FW: Western Highway Duplication: Section 2B: Assessment deficiencies [Reference 2010/5741] [SEC=UNCLASSIFIED]

Hi s22

As discussed, please find the information attached alleging the potential misclassification of Box Gum Grassy Woodland as GEWVVP. Very grateful for any advice you may be able to provide on the contents of the document.

Our next step will be to seek clarification from the approval holder, so any indication of the significance/likelihood/accuracy of the information provided would be very greatly appreciated.

I will forward over the advice you previously provided for a bit more context/background.

Kind regards,

s22



s22
A/g Assistant Director
Compliance Monitoring Team
Commonwealth Department of the Environment and Energy

s22
51 Allara St, Canberra 2600
GPO Box 787 Canberra 2601

From: s22
Sent: Friday, 15 June 2018 3:01 PM
To: s22
Cc: s22
Subject: FW: Western Highway Duplication: Section 2B: Assessment deficiencies [Reference 2010/5741] [SEC=UNCLASSIFIED]

Hi s22

Please see below. I spoke to s22 about this, earlier this week. I think s22 was previously the contact for this matter, but understand s22 is out of the office this week.

I haven't responded to this email. s22 thought it would be worth sending on to General Counsel Branch – happy to leave it with you guys to take from here. I will also fwd on a follow up message from Ms McKenzie, which I've received today.

If I receive any further calls / emails, are you able to suggest who is best placed to respond please?

Cheers, s22

From: Michael Kennedy [<mailto:michaelikennedy63@gmail.com>]
Sent: Tuesday, 12 June 2018 6:07 PM
To: s22
Subject: Western Highway Duplication: Section 2B: Assessment deficiencies [Reference 2010/5741]

s22
Director
Victoria and Tasmania Assessments Area
Environmental Standards Division
Department of Environment and Energy
Canberra

Dear s22

I am attaching for your immediate attention an Expert Witness Statement May 2018 (the Statement) written by Paul Foreman, Director of Blue Devil Consulting.

It identifies deficiencies in the 2012 biodiversity impact assessment by a VicRoads' contractor which formed part of the 2012 Environmental Effects Statement prepared for this project, as well as a more recent May 2017 assessment by the same contractor.

The deficiencies included a failure to identify a specific listed endangered MNES community, the White Box-Yellow Box-Blakely's Red Gum Grassy Woodland and Derived Native Grassland community ("the community") as well as the likely presence of a Groundwater Dependant Ecosystem.

The Statement was prepared following a further field visit by Mr. Foreman on 2 March 2018. That field visit was to review his earlier field work in 2015 and to map in a manner consistent with the EPBC Act protocols what was confirmed to be a significant area of the community within the proposed VicRoads' alignment (4.34 ha) and adjoining that alignment (15.14 ha).

The Statement includes a strong technical criticism of the Reasons for a Decision by Monica Collins, Acting Secretary, Compliance and Enforcement Branch of the Department on 8 December 2016 to refuse my request to the Minister in March 2016 to suspend the approval of the controlled action on 17 April 2014 (reference 2010/5741).

While the Statement has been prepared for the purpose of proceedings adjourned in the Supreme Court of Victoria since June 2017, it is forwarded for your urgent attention as VicRoads, through its contractors, has signalled last week its intention to proceed to imminently remove a significant number of Large Old Trees and related vegetation, including the community. That action may commence within this week.

An additional Expert Witness Statement, prepared by Andrew McMahon of Ecology Australia, is close to finalisation. It is based on Ecology Australia's June 2016 peer review report of the EES as updated by a field visit on 2 March 2018. That EWS is focused on deficiencies in the identification of the habitat of two additional

listed endangered fauna MNES, the Golden Sun Moth and the Striped Legless Lizard.

I have instructions to prepare an application to the Minister to revoke the April 2014 approval based on the two Expert Witness Statements. As that application will take a few days to formalise and as time is of the essence in view of the published intentions of VicRoads, I am forwarding this Statement as an interim action to inform you of what are claimed to be assessment deficiencies as a prelude to seeking the intervention of the Minister.

I shall telephone your office tomorrow to ascertain whether you require any further information.

Sincere regards

Michael Kennedy
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