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To: The Hon. Josh Frydenberg MP, Federal Minister for Environment and Energy

From Ms Kate Kelly Convenor Save Beeliar Wetlands,

Dear Minister,

Background

As you are aware, Main Roads Western Australia has proposed to construct and operate a dual carriageway road from the current terminus of Roe Highway at Kwinana Freeway in Jandakot to Stock Road in Coolbellup.¹

The construction work has significant adverse environmental impacts, and is the subject of an approval, dated 21 October 2015, granted to Main Roads Western Australia, by Bruce Edwards, Assistant Secretary, Assessments (WA, SA, NT) and Air Branch, within your Department. Mr Edwards, in granting the Approval, acted with authority delegated from you. The approval was granted pursuant to sections 130(1) and 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act). Appropriately, as a part of that approval, you have required compliance with sixteen conditions².

Impact to Threatened Species

The Carnaby's Black Cockatoo (*Calyptorhynchus latirostris*) and the Forest Red-tailed Black Cockatoo (*Calyptorhynchus banksii naso*) are each threatened species and communities under the EPBC Act. The former is listed as endangered and the latter as vulnerable.

Conditions 7 to 9 within EPBC 2009/5031 are concerned with offsetting the impact of the proposed construction to black cockatoo habitat:

Offsetting of residual impacts

7. To offset the loss of **black cockatoo habitat**, prior to **commencement**, the **approval holder** must provide the **Department** with written evidence that funds have been provided to the **DPAW** for the acquisition of an environmental **offset property**. The written evidence must include a description and map clearly defining the location and boundaries of the **offset property** and be accompanied with the **offset attributes** and a **shapefile**.
8. Within 12 months of the **commencement** of the **action**, the **approval holder** must provide the **Department** with written evidence, including certificates of title, that the **offset property** has been transferred to the State of Western Australia for the purpose of addition to the conservation estate.
9. Within 5 years of the **commencement** of the **action**, the **approval holder** must provide funds to **DPAW** to assist in the management of the offset property following the transfer of the land as described in condition 8. The funding must be adequate for **DPAW** to maintain the quality of black cockatoo habitat within the **offset property** for at least 20 years. The **approval holder** must consult with **DPAW**, in determining the amount of necessary funding to achieve the aims of this condition. Once the funding has been provided to **DPAW**, the **approval holder** must provide written evidence of this to the **Department**.

On **30 November 2016**, the Commissioner, in purported compliance with condition 7 forwarded materials to your Department. Those materials identified as the nominated offset property, the

¹ Hon Albert Jacob MLA, Minister for Environment; Heritage, Ministerial Statement No. 1008

² **Roe Highway Extension, Kwinana Freeway to Stock Road, WA (EPBC 2009/5031)**

areas of land referred to as the Lake Clifton offset site and the Nirimba offset site. The materials also included botanist opinion relating to the characteristics of the habitat of those proposed offset sites. One business day later, construction work on the Roe Highway extension commenced and continued until a temporary cessation on **21 December 2016**.

Work is to re-commence tomorrow Wednesday 11 January 2017.

Federal Court Proceedings

On 30 December 2016, Save Beeliar Wetlands Inc. commenced Federal Court Proceeding WAD 601/2016³ seeking declarations as to the proper construction of condition 7, and, further, seeking a final injunction precluding the Commissioner of Main Roads in WA from carrying out or continuing to carry out the construction works on the Roe Highway extension site until there had been compliance with that condition.

The Applicant in those proceedings contended that, on its proper construction, condition 7 requires that, as a condition precedent to the commencement of the construction works, the Commissioner produce to your Department evidence, which establishes, on an objective basis, that the proposed offset properties contain at least 523 ha of black cockatoo habitat with similar or better quality than the black cockatoo habitat being impacted by the construction works.

Alternatively, the applicant contended that, on its proper construction, condition 7 requires that, prior to the commencement of the construction works, the Minister or the Minister's delegate be satisfied on the basis of the evidence presented by the Commissioner, that the offset property or properties were of the specified black cockatoo habitat standard.

Evidence was put into Court and relied upon by the Applicant from experts which was to the effect that materials produced by the Commissioner to you in Main Roads Western Australia's Land Acquisition and Management Plan (November 2016), did not demonstrate that, as a matter of objective fact, the offset properties nominated by the Commissioner, met the specified black cockatoo habitat standard.

For reasons published by His Honour Justice Siopis of the Federal Court of Australia the Applicant's submissions were not accepted.⁴ His Honour, in contrast, found that the conditions contemplated that there would be a staged process over a period of five years for the acquisition and establishment of an offset property or properties which meet the specified black cockatoo habitat standard.

Potential Unintended Outcome

It is absolutely crucial that you and your Department now pay urgent attention to all aspects of His Honour's findings and reasoning and consider the extent to which your conditions as drafted or His Honour's construction of them may operate to undermine the objectives of the EPBC Act.

Justice Siopis accepted that the wording of the conditions means that there is no compulsory process whereby the Commissioner of Main Roads has, by a certain date, to provide you or your nominated delegate with written evidence proving that the property nominated as offset property meets the standard you have specified for black cockatoo habitat. This is a striking omission, in our opinion, for the Commonwealth legislative regime aimed at threatened species and habitat protection. See specifically The Honourable Justice Siopis' comments at [42]:

³ *Save Beeliar Wetlands Inc v Commissioner of Main Roads & Ors* [2017] FCA 4 delivered 9 January 2017

⁴ See [2017] FCA 4 at [34]-[42]

“However, it is apparent that the conditions do not prescribe a compulsory regime whereby the Commissioner has, by a certain date, to provide the Minister with written evidence proving that the property nominated in the condition 7 map, (or indeed any other property) meets the specified black cockatoo habitat standard”

Threatened Ecological Community

The absence of any compulsory process whereby the Commissioner of Main Roads has, by a certain date, to provide you or your nominated delegate with written evidence proving that the property nominated as offset property meets the standard you have specified for black cockatoo habitat poses, in our opinion, a significant risk to threatened species and communities.

This risk is brought into even sharper focus given you have, from September 2016, accepted the advice of the Threatened Species Scientific Committee established under the EPBC Act and amended the list of threatened ecological communities under section 184 of the EPBC Act to include the **Banksia Woodlands of the Swan Coastal Plain** ecological community in the endangered category.

Objects of the EPBC Act

With the utmost respect we repeat the objects of the EPBC Act below (with our emphasis):

- (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and
- (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and
- (c) to promote the conservation of biodiversity; and
- (ca) to provide for the protection and conservation of heritage; and
- (d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and
- (e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and
- (f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and
- (g) to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.

Urgent Remedy Required

The absence of a compulsory process whereby the Commissioner of Main Roads must satisfy you or your nominated delegate with evidence proving that their nominated offset property

meets the standard you have specified for black cockatoo habitat needs to be immediately remedied.

To minimise risk of irreparable harm posed by construction works within a threatened ecological community we urgently call upon you to exercise your power to suspend your approval (EPBC 2009/5031) under section 144(2)(a) of the EPBC Act. Once suspended, approval conditions can be varied to better ensure protection of threatened species and ecological communities on the Swan Coastal Plain

Regards,

Kate Kelly
Convenor Save Beeliar Wetlands