



Section 11.3 of the *Biodiversity Conservation Act 2016*

Stop Work Order

Forestry Corporation of New South Wales Trading as FORESTRY CORPORATION
ABN 43141857613

PO Box 100
BEECROFT NSW 2119

Attention: [REDACTED], Senior Compliance Manager

Email: compliance@fcnsw.com.au; [REDACTED]

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Date 21 December 2023

NOTIFICATION OF EXTENSION OF THE OPERATION OF A STOP WORK ORDER MADE UNDER SECTION 11.3 OF THE *BIODIVERSITY CONSERVATION ACT 2016 (NSW)* BY FURTHER ORDER

WHY IS THE EPA WRITING TO YOU?

On 14 November 2023 the NSW Environment Protection Authority (**EPA**) made an order under section 11.3 of the *Biodiversity Conservation Act 2016 (BC Act)* that relates to the carrying out of forestry operations in Compartment 34A of the Flat Rock State Forest (**the Original Stop Work Order**). The EPA is writing to you to provide written notification, under sections 11.4(1)(b) and 11.4(2) of the BC Act, that the Original Stop Work Order made on 14 November 2023 has been extended by this further order.

WHAT ARE YOU REQUIRED TO DO?

Read the Further Stop Work Order carefully. Forestry Corporation of NSW (**FCNSW**) is required to cease particular actions set out below and to carry out other actions also set out below.

PURPOSE OF FURTHER STOP WORK ORDER

This Further Stop Work Order has been made for the purposes of the BC Act and Part 5B of the *Forestry Act 2012 (Forestry Act)*.

BACKGROUND

- A. The EPA exercises functions in relation to the regulation and enforcement of forestry operations. This includes exercising functions under the Parts 11-14 of the BC Act and Part 5B of the Forestry Act.
- B. Pursuant to section 11.3 of the BC Act, if the Environment Agency Head is of the opinion that any action is being, or is about to be, carried out (or that any action that should be carried out is not being carried out) in any area of land that is likely to result in a contravention of the BC Act or the native vegetation legislation, the Environment Agency Head may order:
 - a. that the action cease and not be carried out within the period of 40 days (or a lesser specified period) after the order is made, or
 - b. in the case of action that is not being carried out—that the action be carried out within the period specified in the order.
- C. The reference to Environment Agency Head in section 11.3 of the BC Act is taken to include a reference to the EPA, pursuant to section 14.7A of the BC Act.
- D. Section 11.3(2) of the BC Act provides that, for the purpose of section 11.3, an action is likely to result in a contravention of the BC Act or native vegetation legislation if the EPA has reasonable cause to suspect it is likely to do so.
- E. Forestry operations in Flat Rock State Forest are authorised under the Coastal Integrated Forestry Operations Approval (**Coastal IFOA**), granted under Part 5B of the Forestry Act. Part 5B of the Forestry Act is native vegetation legislation for the purposes of sections 11.3 and 14.7A of the BC Act.
- F. The EPA understands that forestry operations, including active harvesting operations, were being carried out in Compartment 34A in Flat Rock State Forest (**the Compartment**) prior to the issue of the Original Stop Work Order.
- G. On 13 November 2023, the EPA received a community notification from members of the public that they had located the den tree of a Southern Greater Glider, observed an adult Masked Owl, heard a juvenile Masked Owl and heard a Yellow-bellied Glider, in the Compartment.
- H. The EPA was advised that the den tree was identified during nocturnal surveys and was located within 50 m of active logging operations.
- I. On 13 November 2023, EPA officers inspected the Compartment in response to the notification received by the EPA. During the inspection:
 - EPA officers identified the location of the den tree of a Southern Greater Glider (*Petauroides Volans*), identified by citizen scientists.
 - EPA officers measured the location of the den tree and determined that it was within 30 metres from harvesting operations in the Compartment.
- J. The EPA understands that Southern Greater Gliders and Yellow-bellied Gliders (*Petaurus australis*) shelter in den trees during the day. A den is defined in Protocol 39 of the Coastal IFOA, specifically in relation to the Southern Greater Glider and Yellow-bellied glider, as including but not limited to:

...a tree-hollow or other hole, crevice or fissure in a tree, which the subject species is seen entering or leaving. The dens may be used by the animal for roosting, sleeping, resting, breeding, raising young and communal congregations sheltering and/or the rearing of young.
- K. The EPA understands that Southern Greater Gliders and Yellow-bellied Gliders use up to 18 den trees within their small home range of up to 3ha in area and feed and move within

the habitat surrounding den trees.

- L. The EPA understands that in around March 2023, FCNSW surveyed the Compartment (**the FCNSW Survey**) and that this survey identified three records of Southern Greater Glider.
- M. The EPA understands that the FCNSW Survey identified and recorded 137 glider sap feed trees in the Compartment for Yellow-bellied Gliders.
- N. The EPA understands from the FCNSW Harvest and Haul Plan 20000372 for the Compartment that FCNSW did not identify any den trees in its broad area habitat searches.
- O. The EPA considers that the presence of Southern Greater Gliders in the Compartment suggests that den trees are likely to exist in the vicinity of the records of that species.
- P. The EPA considers that the presence of 137 glider sap feed trees in the Compartment suggests that a family of Yellow-bellied Gliders are active in the vicinity and would require a number of den trees.
- Q. Under Condition 57.1, a forestry operation (other than road maintenance) must not be conducted in any part of an operational area unless:
 - (a) at least 100 metres in advance of the forestry operation occurring in any part of the operational area, the base net area has been broken up into patches that are no more than 10 hectares in size and mapped in accordance with condition 117 of the approval;
 - (b) a broad area habitat search has been undertaken in accordance with condition 57 of the approval in the patch that contains that part of the operational area; and
 - (c) the broad area habitat survey was completed within a maximum of six months prior to the commencement of the forestry operation in that patch.
- R. Under Condition 57.2 of the Coastal IFOA, each broad area habitat search required under Condition 57.1 must be carried out by a suitably qualified person who is to look for, identify, and record the habitat features listed in Table 2 of Condition 57. Den trees are listed in Table 2 of Condition 57 by reference to those listed in Table 4 of Chapter 4 of the Coastal IFOA. Table 4 of Chapter 4, which is included under Condition 76, lists den trees of the Southern Greater Glider and Yellow-bellied Glider.
- S. Southern Greater Gliders and Yellow-bellied Gliders are 'subject species' for the purposes of 'Evidence of any other subject species', also listed in Table 2 of Condition 57 of the Coastal IFOA, being species listed in Protocol 31 Part 2 of the Coastal IFOA.
- T. Condition 76.1 of the Coastal IFOA requires that a 50m radius exclusion zone be retained around each den specified in Table 4 of that condition, which includes den trees of the Southern Greater Glider and Yellow-bellied Glider.
- U. Under Condition 18.1 of the Coastal IFOA, every forestry operation must be planned, implemented and conducted:
 - (a) in accordance with the conditions of the approval;
 - (b) in a competent manner; and
 - (c) by a suitably qualified person.
- V. It is an offence under section 69SA of the Forestry Act to contravene a requirement imposed by the Coastal IFOA.
- W. Under section 2.4 of the BC Act, a person:
 - (a) who damages any habitat of a threatened species or threatened ecological community, and
 - (b) who knows that it is the habitat of any such species or community,

is guilty of an offence.

X. Under section 1.6 of the BC Act:

- i. a 'threatened species' is defined as a critically endangered species, an endangered species or a vulnerable species listed in Schedule 1 of the BC Act.
- ii. 'habitat' includes:
 - (a) an area periodically or occasionally occupied by a species or ecological community, and
 - (b) the biotic and abiotic components of an area; and
- iii. 'damage' to habitat includes damage caused by:
 - (a) removing or relocating any part of the habitat, and
 - (b) activities that prevent the continued use of the habitat by animals.

Y. Southern Greater Gliders are listed as an endangered species in Schedule 1 Part 2 Division 1 of the BC Act.

Z. Yellow-bellied Gliders are listed as a vulnerable species in Schedule 1 Part 3 Division 1 of the BC Act.

AA. The defence under s 2.8(1) of the BC Act is not available for an offence under Part 2 Division 1 of the BC Act if forestry operations have been carried out contrary to the requirements of the Coastal IFOA.

BB. On 14 November 2023, the EPA issued FCNSW with the Original Stop Work Order.

CC. On 20 November 2023, FCNSW issued the EPA with a letter requesting to vary the SWO.

DD. On 29 November 2023, the EPA issued a Notice of Amendment to the Original Stop Work Order (DOC23/103987-2) to allow some but not all of the actions requested by FCNSW, as detailed in that Order.

EE. On 1 December 2023, FCNSW wrote to the EPA asking for the EPA to rescind the Original Stop Work Order. The 1 December 2023 letter lists the FCNSW response to the Original Stop Work Order including the outcome of a nocturnal unmanned aircraft vehicle (**UAV**) survey conducted on 20 November 2023 in the Compartment (DOC/1017228).

EPA investigations after issuing the Original Stop Work Order

FF. Between 6 and 7 December 2023, the EPA engaged [REDACTED] to undertake drone surveys of the Compartment for the presence of Southern Greater Gliders and den trees. A summary of the preliminary outcomes of this survey, as compared with the FCNSW survey, is set out at **Attachment A** to this Order.

GG. The EPA-contracted survey identified 4 Southern Greater Gliders in the Compartment.

HH. No den trees were located during the survey, which was terminated early because of poor weather.

II. A further survey by the EPA is planned for early January 2024.

JJ. The EPA has reviewed the information provided to it by FCNSW on the outcomes of the FCNSW survey and identified that it did not record any Southern Greater Gliders, nor dens.

KK. The FCNSW survey was undertaken in a similar geographic area to the EPA survey.

LL. The flight pattern of the FCNSW drone was not systematic and not consistent with recommendations for a grid based survey pattern as set out in the Biodiversity Assessment Methodology Survey Guide (DPE 2022).

BASIS FOR EXTENDING STOP WORK ORDER

MM. Under section 11.4(1)(b) and 11.4(2) of the BC Act the EPA may extend the operation of a Stop Work Order by making a further order under Part 11 Division 2.

NN. We have considered the new information in the letter from FCNSW to the EPA on 1 December 2023, in light of the information received from the EPA-contracted survey. The EPA is satisfied the resumption of forestry operations in the Compartment is likely to result in contraventions of section 69SA of the Forestry Act and section 2.4 of the BC Act, should the Original Stop Work Order not be extended.

OO. This is because the information provided to the EPA in the FCNSW survey stated that the FCNSW drone survey did not identify any Southern Greater Gliders, nor den trees whereas the EPA's survey identified 4 Southern Greater Gliders in the Compartment and the EPA considers that measures to search for and identify protected species and their habitat features were not undertaken in a competent manner as the recent FCNSW survey was not systematic or consistent with recommendations for a grid based survey pattern as set out in the Biodiversity Assessment Methodology Survey Guide (DPE 2022).

BASIS FOR ISSUING STOP WORK ORDER

PP. The EPA has reasonable cause to suspect that:

- a. Forestry operations are not being planned, implemented and conducted in accordance with the conditions of the Coastal IFOA, in a competent manner and by a suitably qualified person, in contravention of condition 18.1 of the Coastal IFOA.
- b. FCNSW have not conducted detailed and thorough searches necessary to competently look for, identify and record habitat features for the Southern Greater Glider and Yellow-bellied Glider, in contravention of condition 57.2 of the Coastal IFOA.
- c. Forestry operations have been carried out within the 50m radius exclusion zone of a glider den tree, in contravention of condition 76.1 of the Coastal IFOA.
- d. Forestry operations in the Compartment are likely to result in damage to the habitat of the Southern Greater Glider and the Yellow-bellied Glider, in contravention of section 2.4 of the BC Act.
- e. Following the scheduled expiry of the Original Stop Work Order on 24 December 2023, the resumption of forestry operations in the Compartment is likely to result in contraventions of section 69SA of the Forestry Act and section 2.4 of the BC Act.

FURTHER STOP WORK ORDER

Under section 11.3 of the BC Act and as a delegate acting in a Senior Executive Band 1 role, I, [REDACTED], Acting Director Operations, am of the opinion that following the scheduled expiry of the Original Stop Work Order on Sunday 24 December 2023, the resumption of forestry operations in the Compartment is likely to result in contraventions of section 69SA of the Forestry Act and section 2.4 of the BC Act. I am also of the opinion that actions that should be carried out in the Compartment are not being carried out. I accordingly make this Further Stop Work Order under section 11.3 of the BC Act to extend the Original Stop Work Order as follows:

Required actions

1. For a period of 40 days from 21 December 2023 (being the date this Further Stop Work Order was notified in writing to FCNSW), FCNSW must cease and not carry out the following actions:

- (a) all forestry operations in Flat Rock State Forest in Compartment 34A including all harvesting, haulage operations and roading and track construction, use or maintenance as defined by the IFOA Conditions and Protocols.
2. The requirement to cease and not carry out actions under clause 1. of this Stop Work Order does not apply to the following actions specified in this clause 2:
- (a) Removal of harvested logs
- (i) the removal of harvest logs may continue in the Compartment, where those activities are comprised of the following actions:
- (A.) processing logs into timber products, where those logs are located in log dumps that existed prior to the commencement of this Stop Work Order; and
- (B.) loading and hauling timber products processed in accordance with clause (A.) along existing roads out of the Compartment.
- (b) Drainage work
- (i) Drainage work may continue in the Compartment, where those activities are comprised of the following actions:
- (A.) for the purposes of FCNSW complying with its existing obligations under the Coastal IFOA, using skidders and bulldozers to carry out:
- drainage work on open snig tracks where required; and
 - road maintenance where required.
- (c) Removal of equipment
- (i) the removal of equipment may continue from the Compartment, where those activities are comprised of the following actions:
- (A.) transporting harvesting equipment from the Compartment using heavy vehicles on existing roads.
- (d) Log Haulage associated with unrelated forestry activities
- (i) In situations where fire, flood or another incident impact primary haul roads, haul timber that has been harvested from forestry operations that are not associated with the Compartment along Flat Rock Road.

Application of Further Stop Work Order

3. This Further Stop Work Order applies to FCNSW and all authorised persons including FCNSW's employees, sub-contractors and agents.

When this Further Stop Work Order takes effect

4. This Further Stop Work Order takes effect immediately upon service of this Order.

When this Further Stop Work Order ends

5. This Further Stop Work Order remains in force for 40 days from 21 December 2023.
6. Under section 11.4 of the BC Act, the EPA may extend the operation of this Stop Work Order by making a further order or orders.

Interpretation

7. Words used in this Stop Work Order have the same meaning as in the conditions of the Coastal IFOA, except where contrary intention appears.



A/ Director, Operations

(By delegation)



Date: 21 December 2023

Contact officer: , Director Operations, 

WARNING AND INFORMATION ABOUT THIS ORDER:

- It is an offence under section 11.5 of the BC Act to contravene this Stop Work Order.
- The maximum penalty that a court may impose for this offence is:
 - in the case of corporation – \$1,650,000 and \$165,000 for each day the offence continues;
 - in the case of an individual – \$330,000 and \$33,000 for each day the offence continues.
- A penalty notice may also be issued under section 13.5 of the BC Act. In circumstances where a penalty notice is issued, the potential penalties are:
 - \$16,500 for a corporation; or
 - \$3,300 for an individual.
- Under section 13.11 of the BC Act, your obligation to comply with the requirements of this Stop Work Order continues even if any due dates for compliance have passed.
- EPA may conduct inspections to determine whether this Stop Work Order is being complied with.
- This Stop Work Order is issued under section 11.3 of the BC Act.

APPEAL RIGHTS

- Under section 11.6 of the BC Act, you may appeal to the Land and Environment Court against the making of this Stop Work Order. The lodging of an appeal does not, except to the extent that the Court otherwise directs, operate to stay the Stop Work Order. That is, even if you appeal, you must continue complying with the Stop Work Order, unless the Court directs otherwise.

ATTACHMENT A

Preliminary Comparison for the purposes of the Stop Work Order of Drone Surveys undertaken by [REDACTED] (on behalf of the EPA) and [REDACTED] and [REDACTED] (on behalf of FCNSW)

Comparison Table

Parameters	FCNSW Survey	EPA Survey
Dates	20 and 21 November 2023	6 and 7 December 2023
Flight times	9.00 pm to 12.30 am	9.19 pm to 4.30 am 12-1.00 am (poor weather)
Flight Pattern/Methodology	Methodology not stated.	Grid Pattern, in accordance with Biodiversity Assessment Methodology Survey Guide (DPE 2022)
Operators	[REDACTED] [REDACTED]	[REDACTED]
Drones	DJI Mavic 3T, DJI Matrice 30T	DIJ Matrice 300
Sensors	Visual Light (RGB), thermal sensors	Infrared thermal, colour zoom imagery with spotlight
Total Flight Time in Compartment 34A and nearby areas	4.5 hrs (partial concurrent operation)	7 hours
Area covered in Compartment 34A and nearby areas	50 ha	66.76 ha
Number of Southern Greater Gliders identified in Compartment 34A and nearby areas	0	10 (of which 4 were in unharvested parts of Compartment 34A)
Number of other Gliders identified	Numerous (Numbers not provided)	55
Number of Tree Hollows identified	Not specified	11