



**Appeals Convenor**  
**Environmental Protection Act 1986**

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**REPORT TO THE  
MINISTER FOR ENVIRONMENT**

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**APPEAL IN OBJECTION TO THE AMENDMENT OF A CLEARING PERMIT**

**CLEARING PERMIT CPS 1891/3: ROAD RESERVES IN THE  
SHIRE OF BRIDGETOWN–GREENBUSHES**

**PERMIT HOLDER: SHIRE OF BRIDGETOWN–GREENBUSHES**

Appeal Number C011 of 2017

**April 2018**

## Appeal Summary

This report relates to an appeal lodged in objection to the decision of the Department of Water and Environmental Regulation (DWER) to amend Clearing Permit CPS 1891/3 to extend the duration of the permit by five years to 25 October 2027. DWER granted the amended clearing permit on July 2017.

In addition to the date change, the amended permit also removed three roads from the permit (reducing the area of clearing from 20.55 hectares (ha) to 19.9 ha), and included other 'consequential amendments' and a 'modernised' fauna management condition.

The primary issues raised by the appellant were that the duration of the permit should not have been extended as the proposed clearing is at variance with clearing principle (f) (watercourse and wetland) and may be at variance with principle (b) (significant habitat fauna). The appellant submitted that the clearing is excessive and unnecessary, that the conditions are inadequate and that any clearing not completed by the expiry date should be the subject of a new clearing permit application.

In response, DWER advised that as the assessment against the clearing principles, other than clearing principle (a), had not changed, no re-assessment of potential impacts on the clearing principles was considered necessary.

## Recommendation

The Appeals Convenor recommended that the appeal be allowed in part by deleting condition 9 and replacing it with the former condition 10. It is otherwise recommended that the appeal be dismissed.

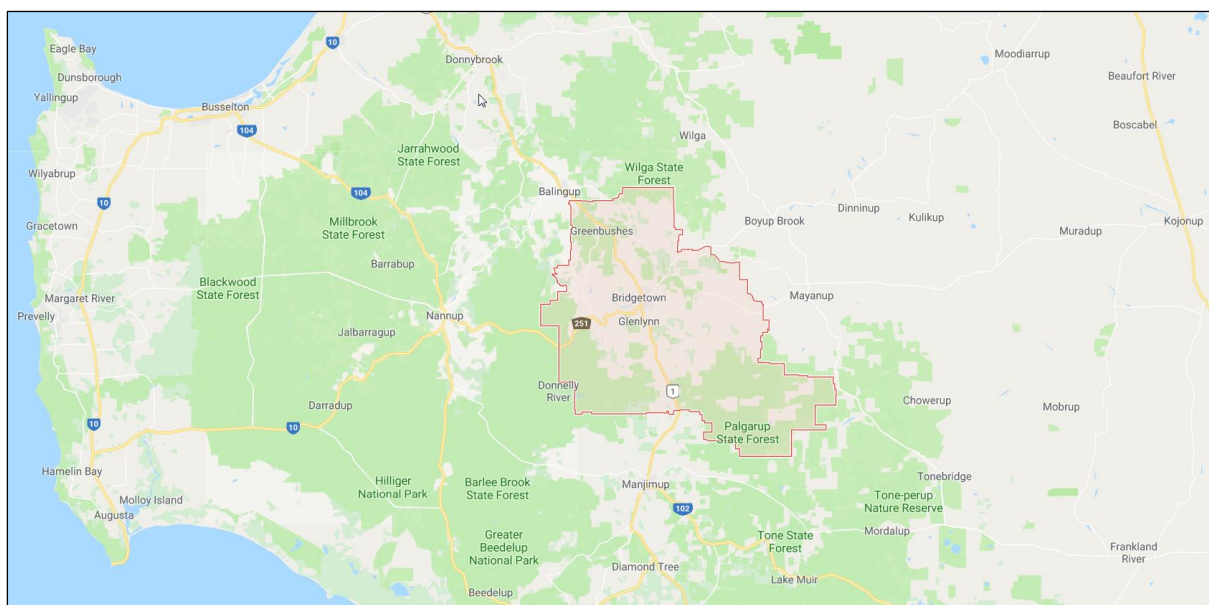
## INTRODUCTION

This report relates to an appeal lodged by the Wildflower Society of Western Australia (Inc) (the appellant) in objection to the decision of the Department of Water and Environmental Regulation (DWER) to amend Clearing Permit CPS 1891/3 issued to the Shire of Bridgetown–Greenbushes (the Shire) to extend the duration of the permit by five years to 25 October 2027.

This document is the Appeals Convenor's formal report to the Minister for Environment under section 109(3) of the *Environmental Protection Act 1986* (EP Act).

## Background

The permit authorises the clearing of up to 19.9 hectares (ha) of native vegetation for the purpose of gravel extraction, road widening and fire hazard zone establishment at various locations within the Shire, the boundaries of which are shown in Figure 1.



**Figure 1 – Shire of Bridgetown-Greenbushes**

(Source: Google Maps, 2018)

The original Clearing Permit CPS 1891/1 was granted on 11 October 2011 and was amended on 14 June 2012. No appeals were received against the original grant or the subsequent amendment.

On 24 March 2017, the former Department of Environment Regulation received an application from the Shire to amend the permit as follows:

- extend the permit duration for an additional five years to October 2027;
- amend condition 4 (period for which clearing is authorised) by increasing the clearing period by five years, to October 2022;
- remove three roads (Peninsula, Tweed and Winnejup Roads) from the permit; and
- amend condition 3 (area of clearing) by reducing the area authorised from 20.55 ha to 19.9 ha.

The amended clearing permit was granted by DWER on 26 July 2017. DWER advised that the amended permit included the requested amendments, additional consequential amendments and 'modernised' conditions.

Consequential amendments included:

- removal of condition 4 (flora management) associated with Tweed Road; and
- removal of condition 14(c) and (d) (flora and fauna reporting conditions).

Conditions modernised included:

- removal of condition 7 (compliance with assessment sequence);
- amend condition 9 (fauna condition);
- amend condition 14 (reporting condition); and
- definitions updated.

## **OVERVIEW OF APPEAL PROCESS**

In accordance with section 106 of the EP Act, a report was obtained from DWER in relation to the issues raised in the appeal. As the permit holder, the Shire was also given the opportunity to address the matters raised in the appeal.

During the appeal investigation, the Appeals Convenor consulted the appellant and the Shire in relation to issues raised in the appeal.

The environmental appeals process is a merits-based process. Appeals in relation to the amendment to a clearing permit relate only to the amendment, and not to elements of the permit that are not amended, or are not directly related to the amendment. The Appeals Convenor normally considers whether the conditions are adequate or appropriate, taking into account an assessment of the proposal against the principles as set out in Schedule 5 of the EP Act, as well as other environmental factors. Questions of additional information not considered by DWER, technical errors, errors in the assessment and attainment of relevant policy objectives are normally central to appeals.

## **OUTCOME SOUGHT BY APPELLANT**

The appellant originally submitted that the clearing permit should not be granted as a whole, however, it later refined its submissions to contend that the expiry date of the permit should not be extended and that any clearing which is not completed by the expiry date should be the subject of a new clearing permit application, which would require a new assessment against the clearing principles.

## **GROUNDINGS OF APPEAL**

The appellant's appeal is summarised as relating to the following matters:

1. fauna habitat;
2. watercourses and wetlands;
3. excessive and unnecessary clearing; and
4. adequacy of the conditions.

### **GROUND 1: FAUNA HABITAT**

By this ground of appeal, the appellant noted that amended condition 9 of the permit (condition 10 of the previous permit) requires an inspection to identify habitat trees suitable for breeding of four species of fauna to be undertaken, and where such trees are identified, an additional requirement for trees to be retained in the event that one or more of the four species of fauna is present at the time of inspection. The appellant expressed concern that the absence of fauna at the time of inspection did not mean that the habitat would not be required in the future, particularly given the cumulative effect of clearing. To this extent, the appellant submitted that the precautionary principle should be applied so that no potential habitat of threatened species is removed.

## Consideration

The Decision Report for the amendment contained the following text relevant to fauna management:

The Delegated Officer determined that the vegetation under application has the potential to provide nesting habitat for Carnaby's cockatoo ..., Baudin's cockatoo ..., forest red-tailed black cockatoo ... and brush-tailed phascogale ... To mitigate the potential impact to these species a condition has been placed on the permit requiring the identification of habitat trees prior to clearing and the avoidance of habitat trees which contain fauna.<sup>1</sup>

In this regard, DWER amended Condition 9 of the permit, replacing the content of the previous permit (formerly condition 10). Condition 9 (the new condition) requires:

### 9. Fauna management

- (a) Prior to undertaking any clearing authorised under this Permit, the area(s) shall be inspected by a *fauna specialist* who shall identify *habitat tree(s)* suitable to be utilised for nesting by Carnaby's cockatoo (*Calyptorhynchus latirostris*), Baudin's cockatoo (*Calyptorhynchus baudinii*), Red-tailed black cockatoo (*Calyptorhynchus banksii naso*) and Brush-tailed Phascogale (*Phascogale tapoatafa*).
- (b) Prior to clearing, any *habitat tree(s)* identified under condition 9(a) shall be inspected by a *fauna specialist* for the presence of fauna listed in condition 9(a).
- (c) Where fauna are identified under condition 9(b) of this Permit, the Permit Holder shall ensure that no clearing of, or within 10 metres of, the identified *habitat tree(s)* occurs, unless approved by the CEO.

The former condition 10 required:

### 10. Fauna management

- (a) Prior to undertaking any clearing authorised under this Permit, the area(s) shall be inspected by a *fauna specialist* who shall:
  - (i) identify *habitat trees* suitable to be utilised by Carnaby's black cockatoo (*Calyptorhynchus latirostris*), Baudin's black cockatoo (*Calyptorhynchus baudinii*) Red-tailed black cockatoo (*Calyptorhynchus banksii naso*) and Brush-tailed Phascogale (*Phascogale tapoatafa*); and
  - (ii) inspect *habitat trees* identified under condition 10(a)(i) for the presence of Carnaby's black cockatoo (*Calyptorhynchus latirostris*), Baudin's black cockatoo (*Calyptorhynchus baudinii*) Red-tailed black cockatoo (*Calyptorhynchus banksii naso*) and Brush-tailed Phascogale (*Phascogale tapoatafa*).
- (b) Where *habitat trees* identified under condition 10(a) contain hollows suitable for use by Carnaby's black cockatoo (*Calyptorhynchus latirostris*), Baudin's black cockatoo (*Calyptorhynchus baudinii*) Red-tailed black cockatoo (*Calyptorhynchus banksii naso*) and Brush-tailed Phascogale (*Phascogale tapoatafa*), the Permit Holder shall retain these *habitat trees* in situ, or if this is not possible the Permit Holder shall:
  - (i) remove and retain intact hollows;
  - (ii) each removed and retained intact hollow shall be attached to a tree located within no more than 10 km from any clearing authorised under this Permit;
  - (iii) each removed and retained intact hollow shall be attached to a tree within one month of removing it; and
- (c) Within one week prior to undertaking any clearing authorised under this Permit, the Permit Holder shall engage a *fauna clearing person* to remove and relocate fauna identified under condition 10(a)(ii).

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<sup>1</sup> DWER, Clearing Permit Decision Report CPS 1891/1, 26 July 2017, page 2.

In response to this ground of appeal, DWER advised:

In considering updating the fauna condition, it was noted that no new impacts to fauna habitat were identified and therefore, the potential impacts to significant habitat for fauna was determined to be unchanged and re-assessment of principle (b) was not required. However ... condition 9 relating to fauna management has been updated to reflect wording of the current contemporary condition.

The two conditions differ in two ways:

- condition 9 protects trees from removal where they contain nesting habitat *and* are found to have one of the four species present at the time of inspection; and
- condition 10 protected trees from removal where they were confirmed as being habitat trees (no requirement for animals to actually be present), but that if retention is not possible, hollows were required to be retained and relocated.

It is considered that by requiring fauna to be present at the time of an inspection in order for nesting trees to be protected, the new condition removes the previous requirement to retain trees (or relocate hollows) irrespective of whether the fauna is present at the time of inspection. While the new condition provides that any nesting trees identified with fauna should not be removed, the permit holder can seek approval from DWER to have the tree(s) removed.

Noting there is a significantly greater likelihood of habitat trees being present without the four species also being present, the former condition is considered to have provided a higher level of environmental protection than the new condition.

Given the Shire did not request the change to this condition, its advice was sought on whether it had any objection to reverting to the wording of the former condition, noting the former condition had been in place for many years. In response, the Shire advised that it had no objection to reverting to the former wording.

## Conclusion

Noting the Shire's advice and DWER's confirmation that the risk assessment in respect to fauna is 'unchanged' (i.e. the risks have not lessened), it is recommended that this ground of appeal be allowed to the extent that condition 9 of the current permit be deleted and replaced with condition 10 of the former permit.

## GROUND 2: WATERCOURSES AND WETLANDS

By this ground of appeal, the appellant submitted that the clearing permit should not be extended as the proposed clearing was at variance with clearing principle (f) (watercourse or wetland). The appellant contended that, in many instances, these areas contain the only or best vegetation along the road in question, and that the proposed clearing at crossings was unacceptable due to the width of the area to be cleared. The appellant submitted that allowing clearing in these areas defeated the purpose of clearing principle (f).

## Consideration

In response to this ground of appeal, DWER advised that the:

... assessment against the ... clearing principles was not changed and reflects the assessments in the Decision Reports for CPS 1891/1 and 1891/2. No re-assessment of potential impacts on clearing principle (f) was considered necessary, noting the requested amendment.

The clearing authorised under the Amended Permit is now reduced in size compared to that approved through versions 1 and 2 of the permit. The environmental impact has been reduced

through the reduction in the clearing area, particularly through avoidance of areas within the Tweed Road reserve which may have contained priority flora.

As no amendments were made to the permit which alter the impacts to watercourses and wetlands, it is considered that this ground of appeal is invalid.

### Consideration

For the above reasons, it is considered that this ground of appeal is invalid and should be dismissed.

### GROUND 3: EXCESSIVE AND UNNECESSARY CLEARING

By this ground of appeal, the appellant submitted that no real reason or justification had been provided for the clearing of 19.9 ha of vegetation. The appellant contended that clearing for 'road widening and fire hazard reduction' did not provide adequate explanation of the benefits for the clearing, which could be assessed against the environmental impacts of the clearing. The appellant further submitted that there was no evidence of any attempt to avoid or minimise the extent/amount of clearing proposed, as is required under the EP Act.

The appellant also questioned the extent to which the proposed road works would improve road safety, including that a number of options were available without requiring the same extent of clearing. The appellant contended that the Shire had not considered these options and that as such, the amendments to the clearing permit should not be granted.

The appellant submitted that the amended clearing permit did not impose adequate conditions or evidence of attempts to avoid, minimise or ameliorate clearing of native vegetation, and recommended that, if the clearing permit is granted, additional conditions should be applied, including in relation to avoidance and minimisation of clearing.

The appellant also submitted that the existing conditions requiring rehabilitation of gravel pits were inadequate.

### Consideration

In response to this ground of appeal, DWER advised that it assesses:

... all applications it receives on a case by case basis. In this instance it is considered that the amendments made to the clearing permit did not result in environmental impacts from clearing that are so significant such as to warrant refusal of the amendment application.

It is also noted that the management of regional road upgrades is the function of local government agencies and that under section 3.18 of *Local Government Act 1995* the local government is to "*satisfy itself that services and facilities that it provides ... are managed efficiently and effectively.*"

The technical engineering standards of roads are not relevant considerations in setting the conditions of a clearing permit. The Department's role is to conduct an assessment of the proposed clearing area, identify the environmental values and potential impacts from clearing, and impose conditions to mitigate and limit these impacts. The Permit Holder is responsible for the specifications of its proposed works.

The Department considers that the appeal grounds largely relate to the previous assessments of clearing permit applications (CPS 1891/1 and CPS1891/2) and not to the amendments made through the granting of the Amended Permit.

The issues raised by this ground of appeal relate to the merits of the purpose and extent of the clearing. Aside from a reduction in clearing from 20.55 ha to 19.9 ha, it is considered that no other amendment made to the permit alters the purpose or extent of the clearing. As a result, it is considered this ground is invalid as it does not relate to an amendment. The

time to object to the extent or purpose of the clearing was at the time of the original approval decision.

### **Conclusion**

For the reasons above, it is recommended this ground of appeal be dismissed.

### **GROUND 4: ADEQUACY OF CONDITIONS**

By this ground of appeal, the appellant submitted that the conditions applied to the permit are inadequate, and should be amended to include requirements for the permit holder to show how it has avoided and minimised the amount of clearing; leave the understorey in place; improve requirements relating to the rehabilitation of gravel pits, and prepare plans with sufficient details, and provide appropriate supervision, to prevent over-clearing of any areas approved to be cleared.

### **Consideration**

With respect to this ground of appeal, including the rehabilitation of gravel pits, it is considered that the issues raised relate to the previous permit. Taking into consideration DWER's advice that the amendments do not result in a change to the impacts of the proposed clearing, it is considered that this ground is beyond the scope of the appeal.

### **Conclusion**

For the reasons stated above, it is recommended that this ground of appeal be dismissed.

### **CONCLUSION AND RECOMMENDATION**

For the reasons outlined in this report, it is recommended that the appeal be allowed in part by deleting condition 9 and replacing it with the former condition 10. It is otherwise recommended that the appeal be dismissed.

If the Minister agrees with this recommendation, DWER will give effect to the decision in accordance with section 110 of the EP Act as soon as practicable.

Emma Gaunt  
APPEALS CONVENOR

### **Investigating Officer:**

Lindsey Pheloung-Beck, Acting Deputy Appeals Convenor  
Jean-Pierre Clement, Deputy Appeals Convenor