



Appeals Convenor
Environmental Protection Act 1986

**REPORT TO THE
MINISTER FOR ENVIRONMENT**

**APPEAL IN OBJECTION TO THE REFUSAL TO GRANT A CLEARING PERMIT
CPS 8059/1: PROPOSED CLEARING OF 9.5 HECTARES OF NATIVE
VEGETATION WITHIN LOT 1 ON DIAGRAM 73539, ROY ROAD,
METRICUP, CITY OF BUSSELTON**

APPLICANT: MR SIMON ENSOR

Appeal Number 004 of 2019

May 2019

Appeal Summary

This is a report on an appeal against a decision of the Department of Water and Environmental Regulation (DWER) to refuse a permit to clear approximately 9.5 hectares (ha) of native vegetation at a property at Metricup, approximately 25 kilometres south-west of Busselton, for the purpose of sand extraction.

In refusing the permit, DWER identified that the vegetation proposed to be cleared is known to support populations of conservation-significant fauna and a threatened ecological community and may support a number of threatened and priority flora; is significant as a remnant in an extensively cleared area; and that the clearing may cause appreciable land degradation (wind erosion).

The appellant was of the view that DWER was not justified in refusing to grant a clearing permit and challenged DWER's assessment of the clearing application, contending that the findings were speculative and not based on facts. The appellant submitted that the populations of conservation significant fauna which occupy the application area are the result of the appellant's efforts and expense in establishing a predator-free enclosure at the property. The appellant also submitted that DWER had not properly considered rehabilitation of the application area following the proposed clearing and sand extraction.

In response to the appeal, DWER advised that its assessment of the clearing application had regard to the clearing principles which consider environmental impacts on biodiversity values, water quality and land degradation, and to planning instruments and other matters considered relevant in accordance with section 51O of the *Environmental Protection Act 1986*.

Having regard to the information presented in relation to the appeal, particularly guidance from DBCA as to the potential risks to conservation significant flora, fauna and ecological communities posed by the intended clearing, it is considered that DWER's assessment of the clearing application was appropriate, and that the conclusions reached were justified by the available evidence. It is concluded that DWER was justified in its decision to refuse to grant a clearing permit.

Recommendation

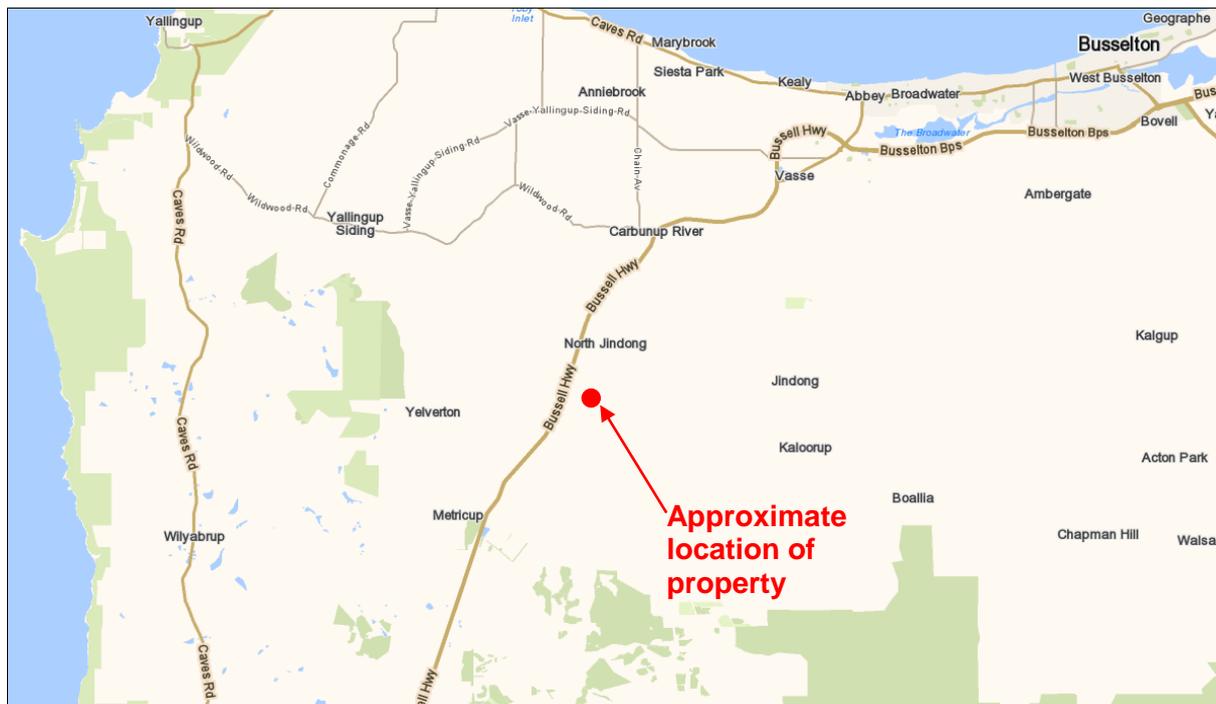
It is recommended that the appeal be dismissed.

INTRODUCTION

This is a report on an appeal lodged by Mr Simon Ensor (the applicant; appellant) in objection to the refusal by the Department of Water and Environmental Regulation (DWER) to grant a clearing permit for the purpose of sand extraction.

The land the subject of this appeal is located at Lot 1 on Diagram 73539, Roy Road, Metricup, in the City of Busselton, approximately 25 kilometres south-west of Busselton (see Figure 1).

Figure 1 – Location of property



(Source: *Whereis.com* 2019)

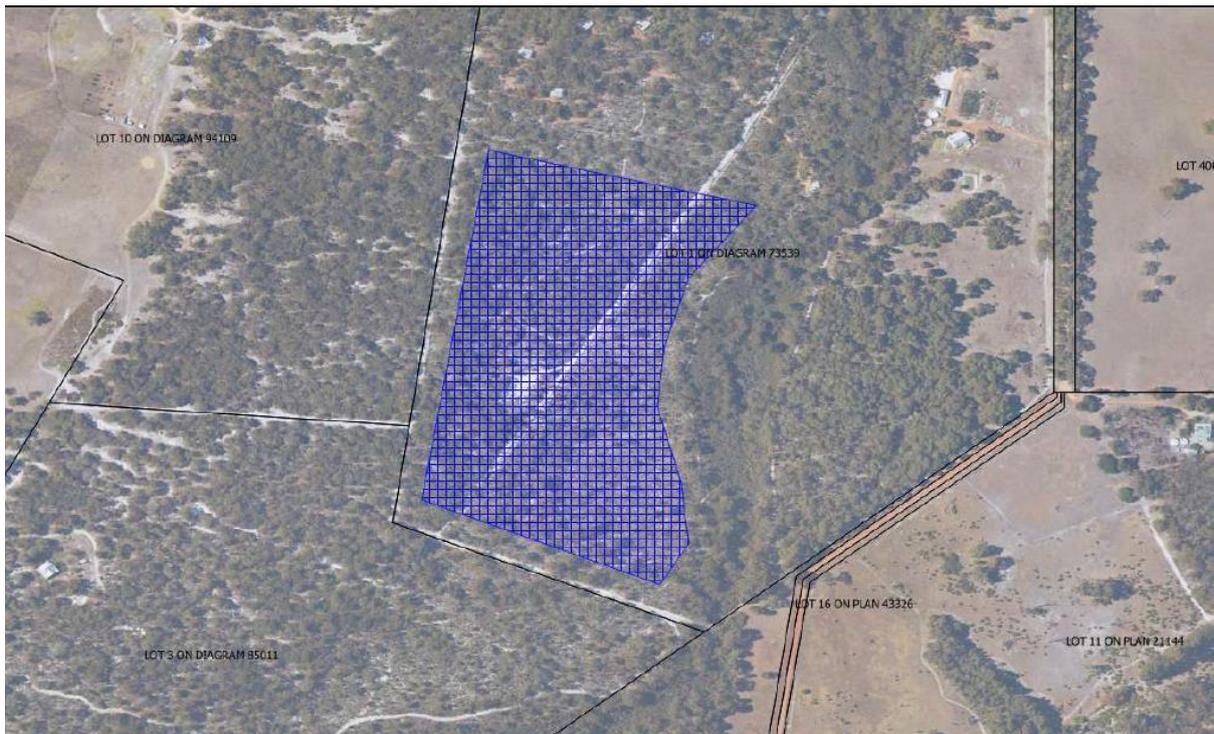
In April 2018, the applicant lodged a clearing permit application (CPS 8059/1) to clear approximately 9.5 hectares (ha) of native vegetation (the application area), within Lot 1, as shown in Figure 2.

On 23 May 2018, DWER advertised the application for a 21-day public submission period and one submission was received. The submission objected to the proposed clearing and contended that the property, which is bounded by a predator exclusion fence, has been operating as an eco-retreat and wildlife sanctuary for a number of years and contains a population of relocated woylie and is likely to contain many other conservation significant flora and fauna species.

DWER published its decision to refuse to grant a clearing permit and the Decision Report¹ on 7 January 2019. It is against this decision that the appeal was lodged.

¹ DWER, *Decision Report CPS 8059/1*, January 2019.

Figure 2 – Area proposed to be cleared (hatched in blue)



(Source: DWER CPS 8059/1)

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).

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. During the appeal investigation the Appeals Convenor met with the appellant and his wife at the property to discuss the issues raised in the appeal and visited the site of the proposed clearing.

The environmental appeals process is a merits-based process. For appeals in relation to a DWER decision to refuse to grant a clearing permit, the Appeals Convenor normally considers the environmental merits of the assessment by DWER based on 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 and attainment of relevant policy objectives are normally central to appeals.

OUTCOME SOUGHT BY APPELLANT

The appellant was of the view that DWER was not justified in refusing to grant a clearing permit and that the Minister on appeal should grant the permit.

GROUND OFS OF APPEAL

The appellant's grounds of appeal are summarised as follows:

- Assessment of the environmental values of the application area; and
- Planning and other matters.

GROUND 1 - ASSESSMENT OF THE ENVIRONMENTAL VALUES OF THE APPLICATION AREA

The appellant challenged DWER's assessment of the clearing application outlined in its Decision Report and was of the view that the findings were speculative and not based on facts. The appellant was particularly concerned about DWER's use of the terms 'may be', 'could be', 'possibly', 'likely', 'may occur' and 'may support' throughout the Decision Report.

The appellant submitted that the populations of woylie and western ringtail possum (WRP), which occupy the application area are the result of the appellant's efforts and expense in establishing a predator-free enclosure at the property. The appellant was also concerned that DWER had incorrectly stated that the woylie population was established from three individuals released by the Department of Biodiversity, Conservation and Attractions (DBCA), when in fact woylies had been relocated from Perth Zoo and Dryandra and through a wildlife carer.

Consideration

In response to the appeal, DWER advised that in determining to refuse the clearing application, it took into account a range of information, including the findings of a site visit conducted by DWER officers, specialist flora and fauna advice from DBCA and information from flora and fauna databases.

DWER determined that the proposed clearing is at variance to clearing principles (a) biodiversity, (b) significant habitat for fauna, (d) threatened ecological community (TEC) and (e) significant remnant in an extensively cleared area and may be at variance to (c) threatened flora and (g) land degradation, and is not likely to be at variance to the remaining principles.

The Decision Document indicates that DBCA's guidance as to the potential risks to conservation significant flora and fauna was an important consideration in DWER's assessment of the application, particularly in respect to clearing principles (a), (b), (c) and (d).

In this regard, DBCA advised that:

- in 2008, Land for Wildlife recorded a number of threatened and priority fauna species on the property, including woylie, western ringtail possum, brush-tailed phascogale and quenda;
- the proposed clearing is likely to have a significant impact on the resident population of critically endangered woylie;
- the predator-free enclosure is highly likely to have benefited resident WRP and bandicoot populations and as such their numbers both within the applied area and the surrounding vegetation are likely to be high and the proposed clearing would result in significant displacement issues;
- the application area contains significant foraging habitat for threatened black cockatoo species, and while not recorded in the site inspection report it is possible that breeding hollows may be present;
- the threatened and priority flora taxa which may occur within the application area are: *Drakaea micrantha* (threatened) and *Caladenia excelsa* (threatened), *Andersonia* sp. Echidna (A.R. Annels ARA 5500) (Priority 2), *Boronia capitata* ssp. *gracilis* (Priority 3), *Acacia semitrullata* (Priority 4), *Johnsonia inconspicua* (Priority 3), *Laxmannia jamesii* (Priority 4);
- the vegetation within the application area is representative of the Banksia Woodlands of the Swan Coastal Plain TEC, which is listed as endangered under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act); and

- the creekline adjacent to the application area is representative of the Shrublands of near permanent wetlands in creeklines Priority 1 listed ecological community (PEC).

In relation to woylie, DBCA stated that:

The proposed clearing of 10 ha of vegetation on the property is likely to have a significant impact on the woylie population present. Clearing of the application area would result in a significant reduction in habitat available to the species and it is unknown if the remaining habitat area would be sufficient to sustain the population. The proposed sand extraction activities are also a threat to the fauna; from potential vehicle strike and entrapment in the excavations, and disturbance from dust, noise and vibrations.

In relation to the appellant's submission that woylies and western ringtail possums are present because of the appellant's conservation efforts, DWER advised:

The Department understands that the Appellant has made efforts to enhance the environmental value of the Application Area and notes that the Appellant considers that this has not been adequately addressed in the Decision Report, particularly in relation to a population of woylies. The Department has based its assessment on the environmental values known or considered likely to exist within the Application Area and considers that the proposed clearing has the potential to significantly impact upon the woylie population.

In the Department's view, the origin of this population does not diminish its environmental value or the potential for clearing to impact upon it. The Department's consideration of this matter was also informed by advice from the DBCA.

In its assessment against clearing principle (a), the Department gave consideration to a number of different aspects of biodiversity ... The presence of woylies and ringtail possums were only one aspect considered in the assessment against this clearing principle.

In relation to clearing principle (e), the Decision Report states that the application area is located within an extensively cleared area with approximately 21 per cent of native vegetation remaining in the local area (10 kilometre radius). The *National Objectives and Targets for Biodiversity Conservation 2001-2005*² include a target to have clearing controls in place that prevent clearance of ecological communities with an extent below 30 per cent of that present pre-1750. DWER considered the application area to be significant as a remnant as it contains a high level of biodiversity, significant fauna habitat and a TEC. Given this, DWER determined that the proposed clearing is at variance to clearing principle (e).

In relation to clearing principle (g), the Decision Report states that the proposed clearing may lead to appreciable land degradation in the form of wind erosion, given the sandy nature of the soils and the mapped land degradation risk of the area. Given this, DWER determined that the proposed clearing may be at variance to clearing principle (g).

Noting the appellant's concern that the findings of DWER's assessment were speculative and not based on facts, DWER acknowledged that the appellant offered to undertake flora and fauna surveys to confirm or deny the presence of threatened and priority flora, conservation significant fauna and TECs. DWER advised that it had recommended against commissioning further surveys on the basis of the known environmental values of the area, including the presence of a woylie population and known occurrences for other conservation significant fauna. DWER advised that it was unlikely that further information would have altered its assessment that clearing would have a significant environmental impact and noted that commissioning further surveys would have incurred a substantial cost for the appellant.

Further, DWER advised:

² Commonwealth of Australia, *National Objectives and Targets for Biodiversity Conservation 2001-2005*, Canberra, 2001.

The assessment conducted by the Department considers the likely impacts of an application for a permit in accordance with the requirements of the EP Act. Assessment is a judgment in accordance with the requirements of the EP Act on whether or not a clearing permit application is likely to have a significant effect on the environment and assessing officers use a range of tools and information sources to gather information required for objective assessment under each clearing principle.

The assessment of the application was undertaken using an established approach consistent with the Department's *A guide to the assessment of applications to clear native vegetation* (Guide to Assessments). The use of text such as *may be*, *could be*, *may occur* does not indicate that the assessment is lacking an evidence-based approach.

The Department considers that the decision to refuse the Clearing Permit has been justified by evaluation against each clearing principle and the information used to support this decision has been substantiated including biological database records, expert advice from DBCA and the findings of a site visit. The Department's reasoning and use of information is outlined and referenced in the Decision Report ... and therefore the Department does not agree that there is a lack of certainty which compromised the decision to refuse to grant a clearing permit.

Based on the foregoing, particularly guidance from DBCA as to the potential risks to conservation significant flora, fauna and ecological communities posed by the intended clearing, it is considered that DWER's assessment of the clearing application was appropriate, and that the conclusions reached were justified by the available evidence.

GROUND 2 - PLANNING AND OTHER MATTERS

The appellant was concerned that DWER had not properly considered rehabilitation of the application area following the proposed clearing and sand extraction.

The appellant also submitted that the application area is within land that is held as freehold title, which he and his wife have owned for some 30 years. The appellant advised that they had planned to fund their retirement through revenue from sand extraction. The appellant contended that the refusal of the application is an improper interference in property rights of the application area.

The appellant also advised that correspondence from DWER had mentioned that DBCA had expressed interest in purchasing a portion of the property for inclusion in the conservation estate. The appellant welcomed the idea and asked for the contact details of the relevant DBCA representative to progress the matter.

Consideration

By section 51O of the EP Act, in considering an application for a clearing permit, the CEO of DWER (and by extension, the Minister on appeal) is required to have regard to:

- the clearing principles so far as they are relevant to the matter under consideration; and
- any planning instrument, or other matter, that are considered relevant.

DWER's published Guide 2, *A guide to the assessment of applications to clear native vegetation*³ outlines the planning and other matters that might be relevant when making a decision on a clearing permit. With regard to planning matters, Guide 2 states that DWER will have regard for planning instruments, relevant local and regional level planning strategies, by-laws and polices.

³ Department of Environment Regulation, *A guide to the assessment of applications to clear native vegetation – Under Part V Division 2 of the Environmental Protection Act 1986*, Guide 2, December 2014, page 39.

With regard to other matters, Guide 2 states that other matters are generally environmental issues not directly within the scope of clearing principles, but within the object and principles of the EP Act and include consideration of land use impacts (such as environmental, social and economic impacts arising from the land use), previous decisions related to the area, other legislative requirements (such as an extractive industries licence) and the necessity of the clearing.

In this case, the following is noted:

- the City of Busselton's *Local Environmental Planning Strategy*⁴ has planning objectives for basic raw material (BRM) extractive industries which include:

7.3 Objectives

The planning framework of the Shire shall:

1. Recognise the importance of the environmentally sustainable exploitation of BRM.
 2. Protect higher value conservation areas as priority over BRM (e.g. ESAs, DRF, TEC's, habitat for threatened fauna etc) ... ;
- no extractive industry licence for the proposed sand extraction had been obtained from the City of Busselton;
 - DWER considered the application before it, including any proposals for rehabilitation that may have been put forward as part of the application, and concluded that the proposed clearing would significantly impact on the identified environmental values and was not environmentally acceptable; and
 - Guide 2 states that in determining the necessity of the clearing, higher priority will be given to clearing for public use than private benefit or commercial gain.

In relation to appellant's contention that the decision to refuse a clearing permit impinges on property rights, this is a legal question and not one which forms part of the Minister's appeal jurisdiction. Nonetheless, in investigating this appeal, the Office of the Appeals Convenor has considered the object of the EP Act, the guiding principles, and the requirements of section 51O in the context of the issues raised in the appeal.

DWER provided the following response to the appellant's query regarding the potential purchase of land by DBCA:

The Appellant refers to previous correspondence with the Department in relation to the opportunity to sell a portion of the property for inclusion into a conservation estate managed by DBCA and requests that contact details to commence this process are provided by the Department. The Department wishes to add that the letters referred to by the Appellant (dated 20 September 2018 ... and 7 January 2019 ... outline that the sale of the property to DBCA was not a consideration in the Department's assessment or a factor in the Department's decision to refuse the Application. The Department has, however, provided the Appellant with a contact at DBCA to explore this opportunity.

In this regard, at a meeting held on site with the appellant and representatives of the Office of the Appeals Convenor, the appellant confirmed that he had been in contact with a representative of DBCA.

⁴ City of Busselton, *Local Environmental Planning Strategy*, October 2011.

CONCLUSION AND RECOMMENDATION

After considering the information provided in the appeal, relevant guidelines and the advice of DBCA provided to DWER as part of the assessment, it is considered that DWER's assessment of the application had appropriate regard to the environmental values of the area proposed to be cleared, and in particular impacts to the critically endangered woylie and western ringtail possum and habitat for threatened black cockatoos, impacts to the Banksia Woodlands of the Swan Coastal Plain TEC, and the significance of the application area as a remnant.

It follows that it is considered that DWER's assessment of the clearing application was appropriate and that its conclusions that the proposed clearing is not environmentally acceptable was justified by the available evidence.

Noting that the purpose of the intended clearing is for sand extraction and that no extractive industry licence has been obtained from the City of Busselton, as well as the guidance from DBCA as to the potential risks to conservation significant fauna and flora posed by the intended clearing, it is considered that, on balance, the decision to refuse the permit was also justified.

It is therefore recommended that the appeal be dismissed.

Emma Gaunt
APPEALS CONVENOR

Investigating Officer:
Michael Power, Senior Appeals Officer