



Appeals Convenor
Environmental Protection Act 1986

**REPORT TO THE
MINISTER FOR ENVIRONMENT**

**APPEAL IN OBJECTION TO THE DECISION OF THE DEPARTMENT OF WATER
AND ENVIRONMENTAL REGULATION TO REFUSE TO GRANT A CLEARING
PERMIT**

**CPS 7550/1: ROE TERRACE AND FREDERICK STREET ROAD
RESERVES, BUSSELTON**

PROPONENT: CITY OF BUSSELTON

Appeal Number 017 of 2019

August 2019

Appeal Summary

This report relates to an appeal lodged by the City of Busselton (appellant; applicant), in objection to a refusal by the Department of Water and Environmental Regulation (DWER) to grant a clearing permit for application CPS 7550/1 to clear 0.497 hectares (ha) of native vegetation within Roe Terrace and Frederick Street Road reserves, Busselton, for the purpose of road construction or upgrades.

Broadly, the appellant submitted that a clearing permit should have been granted as the project is of strategic importance to network upgrades and it believes the area does not contain a threatened ecological community (TEC). The appellant is seeking for the Minister to overturn DWER's decision and grant the clearing permit.

During its assessment DWER obtained advice from Department of Biodiversity, Conservation and Attractions (DBCA) that identified that the vegetation in the application area is potentially representative of a TEC as the area contains samphire vegetation that has the potential to be supported by groundwater tidal influence. DBCA recommended that any clearing in this TEC should not be allowed. In response to the appeal DWER noted that the appellant has provided no further information that would support its claim that the area is not a TEC. Therefore in line with DBCA advice DWER maintained its view that the permit should not be granted.

For the reasons stated in this report, the Appeals Convenor considered that DWER's assessment of the application and conclusions formed in relation to potential environmental impacts of the proposed clearing were supported by the available information. It is also considered that DWER's decision not to grant a clearing permit in this instance was justified.

Recommendation

The Appeals Convenor recommended that the appeal be dismissed.

INTRODUCTION

This report relates to an appeal lodged by the City of Busselton (applicant; appellant) in objection to the Department of Water and Environmental Regulation's (DWER) refusal to grant a clearing permit to clear 0.497 hectares (ha) of native vegetation within Roe Terrace and Frederick Street Road reserves, Busselton, for the purpose of road construction or upgrades. The location of the proposed clearing is indicated in Figure 1 and 2.

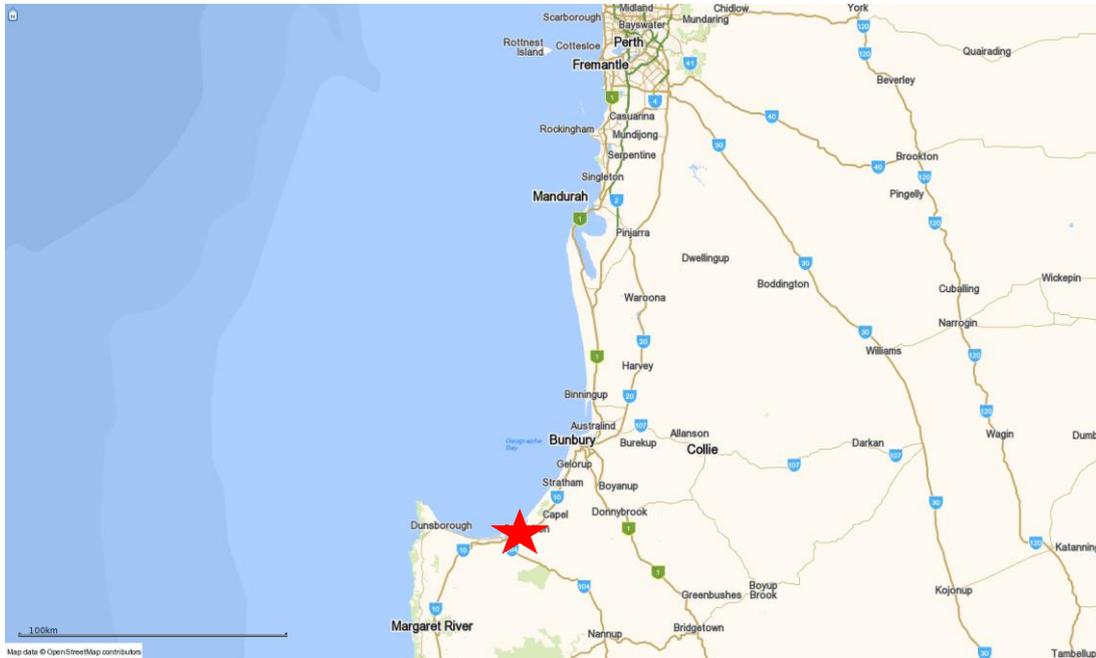


Figure 1 – Location map (indicated by red star)

(Source: Whereis.com, May 2019)

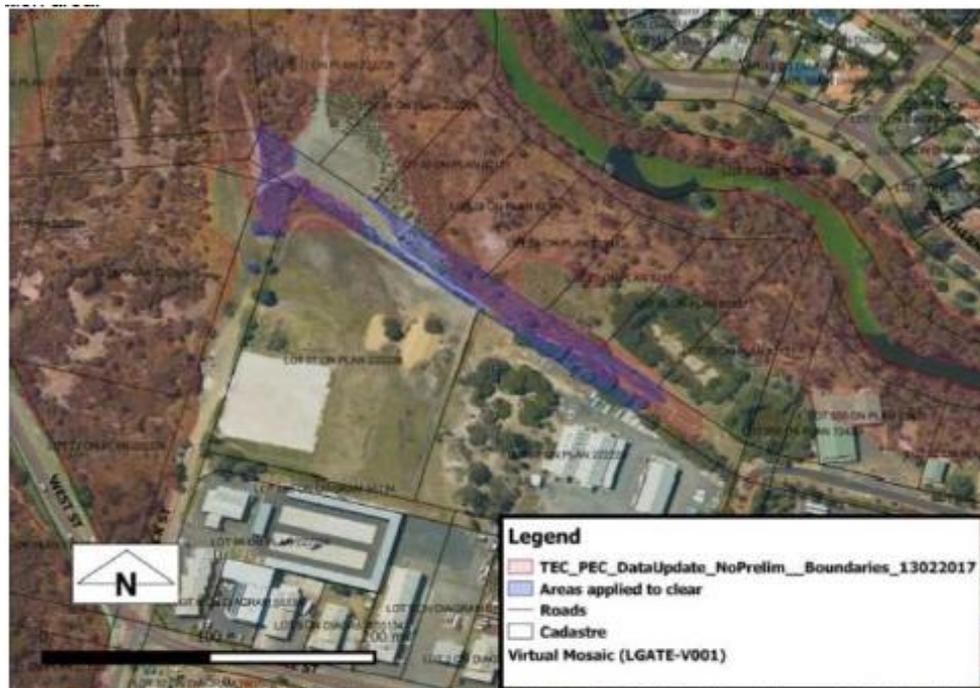


Figure 2 – Location and extent of proposed clearing (in blue)

(Source: DWER CPS 7550/1)

Background

On the 10 April 2017 the appellant applied for a purpose permit to clear up to 0.497 ha of native vegetation within the Roe Terrace and Frederick Street road reserves (application area) for the purpose of road construction or upgrades. This application was publically advertised for 21 days on 1 May 2017 and no public submissions were received.

The then Department of Environmental Regulation (now DWER) undertook a site visit on 9 May 2017. DWER wrote to the applicant on 17 January 2018 requesting further information on the need for the clearing and opportunities to avoid and minimise the extent of clearing and advised that a flora and vegetation survey would be required to determine the presence or absence of conservation significant flora and a threatened ecological community (TEC). The applicant responded to this request on 27 April 2018 with further information on the Busselton Strategic Network Corridors, minimisation and mitigation measures to address land degradation issues and provided additional advice on each clearing principle.

Following receipt of this further information DWER advised the applicant that it remained of the view that the application would impact on a TEC, significant remnant vegetation in an extensively cleared landscape, vegetation associated with a watercourse and vegetation that may contain a high level of biological diversity and significant habitat for threatened flora. On 20 December 2018, DWER advised the applicant that it was intending to refuse to grant a clearing permit for the application.

DWER's decision to refuse to grant a clearing permit was made on the 7 March 2019 for the reasons outlined above. It was against DWER's decision that the appeal was received.

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

OVERVIEW OF APPEAL PROCESS

In accordance with section 106 of the *Environmental Protection Act 1986* (EP Act), a report was obtained from the DWER in relation to the issues raised in the appeal. During the appeal investigation, the Appeals Convenor consulted with DWER in relation to the issues raised in the appeal.

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 is seeking for the Minister to allow the appeal and grant the clearing permit.

GROUNDINGS OF APPEAL

The appellant broadly submitted that this application should be granted given the strategic importance of the project and that it considers that DWER's assessment of the clearing principles is not correct, particularly the assessment of the potential impact to a TEC.

GROUND 1: IMPACT ON THREATENED ECOLOGICAL COMMUNITY

The appellant advised that it does not agree with the outcome of DWER's assessment of the clearing principles. The appellant was of the view that the project area does not contain the Commonwealth-listed Subtropical and Temperate Coastal Saltmarsh TEC (Saltmarsh TEC), submitting that the application area is disconnected from tidal/salt water influence which is a key indicator of this TEC. As a result it considers the proposed clearing is not at variance to principle (d).

Consideration

In its decision report DWER stated that the former Department of Parks and Wildlife (DPaW) conducted a site visit and identified that the application area supports samphire vegetation in good condition and that this represents the Saltmarsh TEC. DPaW advised DWER that this area should not be subject to clearing due to the presence of this TEC, that this area is part of a larger conservation category wetland and that it provides a buffer to adjacent TEC. DPaW identified that the Environmental Protection Authority Guidance Statement No. 33¹ states that wetlands should have a 50 metre buffer, which is not adhered to in this application.

The appellant stated in its appeal that this area is not part of the Saltmarsh TEC as the application area has been disconnected from tidal influence since 1908 and tidal influence is a key diagnostic characteristic as defined in the Approved Conservation Advice for the Coastal Saltmarsh TEC.²

The Approved Conservation Advice for the Saltmarsh TEC provides advice as to different values and functional attributes of an ecological community and their thresholds to be considered representative of this TEC, including the principle features of mainly of salt-tolerant vegetation (halophytes) including grasses, herbs, sedges, rushes and shrubs, generally of less than 0.5 metres in height, along with many non-vascular plants. The Approved Conservation Advice indicates that patches or areas that contain greater than 50 per cent introduced species are excluded from the Saltmarsh TEC. In this case, DWER described the vegetation within the application area as being in 'Good' condition, comprising samphire shrubland growing on clay loam overlaid by sand.

In relation to tidal influence, the Approved Conservation Advice states that the Saltmarsh TEC '*occurs on places with at least some tidal connection, including rarely-inundated supratidal areas, intermittently opened or closed lagoons, and groundwater tidal influences, but not areas receiving only aerosol spray*'.

It is understood that the Department of Biodiversity, Conservation and Attractions (DBCA) advised DWER that while there are weirs and surge barriers in place that disconnect the tidal connection to the application area, this could be altered through barrier management and therefore the disconnection is not permanent.

DBCA also advised that another key diagnostic character of this TEC is groundwater tidal influence and that if there is no groundwater tidal influence and the applied area has been disconnected since 1908 (as per the City of Busselton's advice) then it is highly likely the areas of samphire vegetation within the application area would not have persisted for over 100 years.

¹ Environmental Protection Authority (2008) *Environmental Guidance for Planning and Development Guidance Statement No. 33* Available at http://www.epa.wa.gov.au/sites/default/files/Policies_and_Guidance/GS33-270508.pdf

² Department of Sustainability, Environment, Water, Population and Communities (2013) *Conservation advice for Subtropical and temperate coastal saltmarsh*. Canberra: Department of Sustainability, Environment, Water, Population and Communities. Available at: <http://www.environment.gov.au/cgi-bin/sprat/public/publicshowcommunity.pl?id=118&status=Vulnerable>

DBCA further advised that without investigating the groundwater connectivity, this area cannot be dismissed as the TEC and that the proposed clearing is likely to hydrologically isolate an additional 0.40ha of adjoining TEC.

In response to the appeal DWER stated that:

Based upon DBCA's advice, the Delegated Officer considered that the Application Area does contain vegetation that is representative of a TEC and that the proposed clearing is at variance to principle (d).

The appellant's submission did not provide any further evidence or surveys beyond what was submitted during the application assessment.

In relation to the appellant's submission that the application area is an important part of the Strelly/Barlee/West link which is a component of the Busselton Strategic Network Corridors project, DWER advised that it requested information from the applicant on the strategic importance of the project during its assessment, which was not provided.

DWER noted that upgrades to Roe Terrace or Frederick Street are not specifically mentioned within the description of the Strelly/Barlee/West link project on the appellant's website or on the Busselton Strategic Network Corridors overview map. DWER advised that during a site visit the appellant indicated that it had no current plans to continue Roe Terrace through to West Street and that it was unaware of long-term planning for the road or what the road was intended to service.

CONCLUSION AND RECOMMENDATION

In the absence of any new or additional information about the proposal and its impacts and noting DBCA's advice that the area contains the Saltmarsh TEC, it is considered that DWER's assessment of the application and conclusions formed in relation to potential environmental impacts was supported by the available information.

It is therefore considered that DWER's decision not to grant a clearing permit in this instance was justified and it is recommended that the appeal be dismissed.

Emma Gaunt
APPEALS CONVENOR

Investigating Officer:
Emma Fitzgerald, Appeals Officer