



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

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**REPORT TO THE  
MINISTER FOR ENVIRONMENT**

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**APPEALS AGAINST DECISION TO GRANT A CLEARING PERMIT  
CLEARING PERMIT CPS 8788/1: OCEAN REEF MARINA EARLY  
WORKS**

**APPLICANT/PERMIT HOLDER: WESTERN AUSTRALIAN LAND AUTHORITY T/A  
DEVELOPMENT WA**

Appeal Numbers 026.001-003 of 2020

**June 2020**

## Appeals Summary

This report relates to three appeals lodged against the decision of the Department of Water and Environmental Regulation (DWER) to grant Clearing Permit CPS 8788/1 to the Western Australia Land Authority trading as Development WA (applicant).

CPS 8788/1 is for the clearing of up to 4.47 hectares of native vegetation within a 5.17 hectare application area for early works associated with the proposed new Ocean Reef Marina.

Appellants sought for DWER's decision to be overturned primarily on the grounds that DWER's assessment did not sufficiently define the environmental risks, and that a prior Bush Forever negotiated planning outcome (NPO) did not adequately offset the environmental impacts.

The investigation found that DWER's conclusions on the environmental values of the application area, as contended by the appeals, were supported by the available evidence.

It was found that DWER's approach to the application of an offset in respect to the proposal was consistent with the WA Environmental Offsets Policy, and with the outcome of the NPO developed through the planning process and subject to the EPA's public advice from 2014.

While the proposed clearing was found to be at variance to a number of the clearing principles, this does not preclude a permit from being granted. Planning context is a relevant consideration and DWER's decision to grant the permit was consistent with the Metropolitan Region Scheme and City of Joondalup local planning strategy.

### Recommendation

The Appeals Convenor recommended that the appeals be dismissed.

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## INTRODUCTION

This report relates to three appeals received in objection to the decision of the Department of Water and Environmental Regulation (DWER) to grant clearing permit CPS 8788/1 to the Western Australian Land Authority trading as Development WA (the applicant). CPS 8788/1 is for the clearing of up to 4.47 hectares of native vegetation within a 5.17 hectare application area (Figure 1) for early works associated with the proposed new Ocean Reef Marina.<sup>1</sup>

The appellants are Urban Bushland Council WA Inc and Joondalup Community Coast Care Forum Inc (joint appeal); Mullaloo Beach Community Group Inc and Mr Bob Mason.

**Figure 1 – Location and extent of application area (cross-hatched yellow)**



(Source: DWER, Clearing Permit CPS 878/1)

<sup>1</sup> Clearing permit, decision report and supporting information available at: <ftp://ftp.dwer.wa.gov.au/permit/878/>

## BACKGROUND

In assessing the application, DWER concluded that the proposed clearing is at variance with clearing principles (a), (b), (e) and (h), and may be at variance to clearing principles (c) and (g). DWER granted the clearing permit subject to conditions, including:

- avoid, minimise and reduce the impacts and extent of clearing
- dieback and weed control
- wind erosion management
- directional clearing
- fencing
- fauna management
- record keeping, and reporting as required.

DWER advised that the clearing permit application was advertised for a 21-day public comment period and five public submissions were received, with an additional submission received after this period. DWER advised that submissions were received from all three appellants. The decision report sets out the manner in which DWER had regard for public submissions in its assessment.<sup>2</sup>

DWER's assessment took into account the supporting information provided by the applicant, and the findings of a site inspection.<sup>3</sup> The supporting information included a report outlining the proposed early works,<sup>4</sup> further information on matters including offsets, conservation-significant flora, management plans and rehabilitation,<sup>5</sup> the report of a 2013 flora and vegetation survey<sup>6</sup>, and a report outlining a Bush Forever negotiated planning outcome (NPO)<sup>7</sup>.

## OVERVIEW OF APPEAL PROCESS

In accordance with the *Environmental Protection Act 1986* (EP Act), two reports relating to the matters raised on appeals are required for the Minister for Environment to determine the outcome of the appeals:

- a report from the Appeals Convenor, as required by section 109(3) of the EP Act
- a report from the decision-making authority of the decision under appeal (i.e. from DWER), as required by section 106(1).

This document is the Appeals Convenor's report to the Minister.

In order to properly advise the Minister, the Appeals Convenor conducted an investigation into the matters raised by the appeals. The investigation included:

- review of and regard for the matters raised in the appeals submitted by the appellants
- review of and regard for the report from DWER provided under section 106 of the EP Act
- review of and regard for the response to the appeals provided by the applicant

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<sup>2</sup> DWER response to Appeals 026/20, 3 June 2020, page 1.

<sup>3</sup> DWER response to Appeals 026/20, 3 June 2020, pages 1-2.

<sup>4</sup> Strategen-JBS&G (2020). *Ocean Reef Marina – Early Works – Native Vegetation Clearing Permit – Purpose Permit – Supporting Documentation*. Unpublished report prepared for Development WA. 58049-126,630 (Rev 0). 10 January 2020.

<sup>5</sup> Strategen-JBS&G (2020). *CPS 8788/1: Response to request for information*. Rev A. Dated 11 March 2020. Unpublished report prepared for DWER.

<sup>6</sup> Mattiske Consulting (2013). *Level 2 Flora and Vegetation Survey of the Proposed Ocean Reef Marina Survey Area*. Unpublished report prepared for Strategen on behalf of the City of Joondalup.

<sup>7</sup> Strategen-JBS&G (2020). *Development WA – Ocean Reef Marina – Bush Forever Negotiated Planning Outcome*. Dated 5 February 2020, 127,360. Unpublished report.

- meetings with appellants in May and June 2020
- a meeting with the applicant in June 2020
- review of other information, policy and guidance as considered necessary.

The environmental appeals process is a merits-based process. For appeals in relation to a DWER decision to grant a clearing permit, the Appeals Convenor normally considers the environmental merits of the assessment by DWER based on the clearing principles as set out in Schedule 5 of the EP Act, as well as planning and other relevant matters. Questions of additional information not considered by DWER, technical errors and attainment of relevant policy objectives are normally central to appeals.

## **OUTCOME SOUGHT BY APPELLANTS**

The appellants seek for DWER's decision to be overturned (i.e. that the clearing permit be refused).

## **GROUNDINGS OF APPEAL**

A range of issues were raised by the appeals and these have been categorised into two primary appeal grounds; environmental risks and adequacy of the offset. Other matters raised by the appeals are discussed under the section 'Other Matters'.

### **GROUND 1: ENVIRONMENTAL RISKS**

The appeals raised a number of issues relating to DWER's assessment of the environmental impacts of the proposed clearing. The key issues raised are considered to relate to:

- flora
- fauna
- clearing within a highly cleared landscape
- impacts to groundwater
- land degradation and impacts to nearby conservation areas.

These issues will be considered in turn.

#### **Flora**

One appellant submitted that because the clearing may be at variance to clearing principle (c), it should be refused based on the precautionary principle.

The appellant stated that over-clearing has meant that many species of flora and vegetation complexes are now locally rare. It stated that quandong has a low genetic diversity therefore clearing could have a significant impact by reducing diversity further.

The appellant submitted that a botanical survey should be conducted to map the extent of *Marianthus paralias* vegetation complex and to develop a plan to protect and restore its extent, and to revegetate suitable adjoining and/or nearby areas. It further submitted that all habitat of priority and rare plants should be avoided and any development and construction plans modified to achieve this outcome.

#### Consideration

Clearing principle (c) provides that native vegetation should not be cleared if it includes, or is necessary for the continued existence of, threatened flora. 'Threatened flora' means a species of flora that is listed by the Minister under section 19(1) of the *Biodiversity Conservation Act 2016*.

*Marianthus paralias* is listed as endangered, and has been recorded in the local area. DWER advised that a total of five flora and vegetation surveys have been undertaken within the application area in the last 20 years; with three undertaken after the listing of *M. paralius* in 2006, and none of these identified the species within the application area.<sup>8</sup> However, DWER noted that:

... the application area is consistent with habitat defined as critical to the survival of the species as it is an "area of similar habitat surrounding and linking populations (these providing potential habitat for population expansion and for pollinators), additional occurrences of similar habitat that may contain undiscovered populations of the species or be suitable for future translocations", and the nearest population is less than 2 kilometres north of the application area (DEC, 2009). Approximately 0.66 ha of the area proposed to be cleared is mapped as coastal heathland.<sup>9</sup>

In response to this ground of appeal, DWER advised:

The impacts to critical habitat for this species is minor and the rehabilitation of degraded areas in adjacent vegetation to be retained includes areas of coastal heathland consistent with critical habitat outlined in the *M. paralias* recovery plan. This critical habitat may be utilised for future translocations or natural recruitment. The Department acknowledges that propagation of some of the species is not presently possible, however, notes that as the areas of rehabilitation were chosen based on vegetation composition consistent with heathland communities, some species are already present, and natural recruitment from adjacent areas of heathland is expected.<sup>10</sup>

Given multiple surveys have not identified *Marianthus paralias* within the application area, and noting DWER's advice that impacts to the critical habitat from the clearing is minor, it is considered that the proposal is not likely at variance to clearing principle (c): that is, the vegetation approved to be cleared is not likely necessary for the continued existence of the species. Despite this, and noting the proposal is found to be at variance to clearing principle (a), the significant residual impacts identified to flora values warrant the application of an offset, the adequacy of which is considered in Ground 2.

## Fauna

By this element of the appeals, appellants raised concerns that DWER failed to adequately consider impacts to fauna.

Specific concerns included that:

- clearing for the Ocean Reef Marina may result in graceful sun-moth (*Synemon gratiosa*) returning to the threatened list
- the application area contains critical habitat for Carnaby's cockatoo (*Calyptorhynchus latirostris*)
- clearing will result in significant death and loss of habitat for many fauna species, especially small species such as reptiles, insects and microfauna and translocation requires investigation

It was submitted that the clearing is seriously at variance to clearing principle (b).

## Consideration

This element of the appeal is considered to raise the following issues:

1. impacts to Carnaby's cockatoo

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<sup>8</sup> DWER, CPS 8788/1 Decision Report, 4 May 2020, page 9.

<sup>9</sup> DWER, CPS 8788/1 Decision Report, 4 May 2020, page 9.

<sup>10</sup> DWER response to Appeals 026/20, 3 June 2020, page 9.



2. impacts to graceful sun moth
3. fauna translocation

### *Impacts to Carnaby's cockatoo*

In response to this element of the appeal, DWER stated:

... that the Application Area contains *Banksia sessilis*, an important foraging species for black cockatoos, and that the proposed clearing will occur within six kilometres (km) of confirmed Carnaby's Black Cockatoo breeding and roosting sites. Based on this information, the Application Area is considered critical habitat for Carnaby's Black Cockatoo, however, the Carnaby's Cockatoo Recovery Plan does note that minimisation and mitigation activities should be employed for activities which cannot be avoided.

...

The determination ... that the proposed clearing was at variance with principle (b) took into account the level of utilisation of the Application Area by conservation significant species. A total of 0.46 ha of vegetation within the Application Area was determined to provide foraging habitat for Carnaby's Black Cockatoo. Given the absence of habitat for breeding or night roosting within the Application Area, the impacts of the proposed clearing were considered unlikely to result in irreversible impact to the conservation status of the Carnaby's Black Cockatoo. The Department therefore does not consider that the proposed clearing is seriously at variance with clearing principle (b).<sup>11</sup>

DWER also noted that the proposal was referred to the Commonwealth, and the clearing was determined not to be a controlled action under the EPBC Act.<sup>12</sup>

The applicant has committed to avoidance and mitigation measures as outlined in section 3 of DWER's decision report and DWER imposed condition 5 on the permit requiring the permit holder have regard for the principles of avoidance, minimisation and reducing the impact of clearing on environmental values.

Based on the habitat values described by DWER, the conclusion that the proposed clearing is at variance to principle (b) is supported. It is noted that any significant residual impacts are counterbalanced via the NPO as discussed under Ground 2.

### *Impacts to graceful sun-moth*

In relation to graceful sun-moth, in responding to the appeals DWER advised:

The Delegated Officer noted that, after extensive survey efforts, the Graceful Sun Moth was delisted to Priority 4 in 2012. The habitat associated with Graceful Sun Moth, *Lomandra maritima* along secondary Quindalup dunes along the coast, is present to the north and south of the Application Area. Based on the minimisation measures proposed, the rehabilitation of *L. maritima* (habitat for this species), and advice received from DBCA ... the Department determined that the proposed clearing will not significantly impact upon the species and that mitigation or offsetting is not required.<sup>13</sup>

In DWER's supplementary response to appeals in relation to CPS 8787/1, DBCA stated that:

The proposed clearing of 8.37 ha / 0.0837 km<sup>2</sup> (3.9 ha for CPS 8787/1 and 4.47 ha for CPS 8788/1) will not result in the graceful sun moth becoming eligibility [sic] for relisting as threatened. The cumulative impact of vegetation and habitat loss contributes to species decline. The sun moth occurs in large areas protected for conservation and it is unlikely that the proposed clearing will alter the species conservation status.

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<sup>11</sup> DWER response to Appeals 026/20, 3 June 2020, page 8.

<sup>12</sup> Ibid.

<sup>13</sup> DWER response to Appeals 026/20, 3 June 2020, page 7.



The graceful sun moth was delisted in 2012 due to the significant increase in distribution, number of known locations (including 20 Crown reserves vested for conservation and managed by DBCA), subpopulations and overall population size, and the discovery of a second host plant species and suitable habitat type.

When the species was listed as threatened, it was only known from remnant vegetation within the Perth metropolitan region, Neerabup south to Mandurah. An area approximately 90 km in length, with extent of occurrence (EOO) approx. 1,500 km<sup>2</sup> (150,000 ha) and area of occupancy (AOO) approx. 140 km<sup>2</sup> (14,000 ha). The species was known from one host plant, *Lomandra maritima*, occurring in coastal open areas of herbland, heathland and shrubland on secondary Quindalup dunes.

Targeted surveys significantly increased the species known range to the north and south of the previously known range. It is now known to occur along the coastal strip from Kalbarri south to Binningup. An area approx. 630 km in length, with EOO approx. 24,500 km<sup>2</sup> (2,450,000 ha) and AOO approx. 400 km<sup>2</sup> (40,000 ha). Surveys also identified a second host plant and habitat type, *Lomandra hermaphrodita* in Banksia woodland. The species range now includes large areas of habitat within conservation reserves. The northern locations are outside of the current area subjected to development pressures. Vegetation clearing and inappropriate management of habitat remain threats to the species.

The known records of the sun moth at Ocean Reef (from 2009-2011) are in the adjoining habitat, outside of the application areas. The flora and vegetation survey mapped some vegetation containing *Lomandra maritima* within the application area. It is possible that the sun moth does occur within the application area. If it does occur, there may be a potential reduction in the local subpopulation size. The potential reduction is unlikely to be significant due to the confirmed presence of the species and available habitat outside of the application area.<sup>14</sup>

Noting DBCA's advice, it is considered that the proposed clearing is not likely to result in significant impacts to the graceful sun-moth.

#### *Fauna translocation*

Appellants submitted that if the clearing is approved, the remaining habitat for fauna will be insufficient to accommodate displaced animals. One appellant submitted that animals and birds need a set amount of particular vegetation to colonise, and forcing more into an area too small for the number of displaced animals risks a significant loss of species. The appellant suggested that translocation be investigated, and that if no suitable habitat is found, then the permit should be refused.

Impacts to fauna were considered by the EPA in 2014, and subject to the development of a suitable NPO, the EPA was of the view that its objective for terrestrial fauna would be met.<sup>15</sup>

In granting the permit, DWER imposed conditions 8 and 10 on the permit requiring directional clearing (to allow fauna to move into adjacent vegetation) and the preparation of a fauna management plan (FMP). The FMP is to set out a plan for minimising the risk of death and injury to native fauna through vehicle strike.

Noting the EPA's overall view of the Ocean Reef Marina project in 2014, and that DWER imposed conditions that seek to minimise impacts to fauna, no additional conditions are considered necessary in respect to this clearing permit.

#### **Clearing within a highly cleared landscape**

One of the appellants submitted that, given the proposed clearing was found to be 'at variance' to clearing principle (e), the clearing ought not to have been approved. The appellant pointed

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<sup>14</sup> DWER supplementary response to Appeals 018/20 (22 May 2020; DBCA advice 11 May 2020), page 8.

<sup>15</sup> EPA, Statement of reasons and public advice, MRS amendment 1270/41, 9 June 2014, pages 2 to 3

to the fact that the land was formerly Bush Forever because it represented particular flora and fauna rich vegetation to achieve a minimum of at least ten percent remaining on the Swan Coastal Plain.

### Consideration

In response to this element of the appeals, DWER stated that the proposed clearing is at variance with principle (e), with the area determined to be a significant remnant of vegetation:

The proposed works will cause the disruption of the north-south linkage function through the widening of one road and the creation of a second. The Department notes that several mitigation measures will be implemented to minimise the disruption to the ecological linkage function as far as practicable, with the proposed revegetation focussing on the areas of remaining vegetation which will improve the ecological linkage to areas of remnant vegetation north and south of the Application Area.

While the Application Area represents a significant remnant of vegetation, the environmental impacts of the clearing have been minimised and mitigated through the NPO and management strategies proposed by the Applicant.<sup>16</sup>

It is considered the Department's conclusion that the proposal is at variance to clearing principle (e) is appropriate. In appeals against CPS 8787/1, it is recommended that that proposal also be found to be at variance to clearing principle (e).

A decision as to whether or not to grant a permit is not confined to conclusions reached in respect to the clearing principles. By section 51O of the EP Act, the CEO is to have regard to a number of matters, including the clearing principles where relevant.

### **Impacts to groundwater**

One appellant submitted that DWER's assessment of clearing principle (f) failed to acknowledge that the vegetation under application is associated with the Gngangara Mound groundwater system. The appellant cited the fact that the application area is mapped as forming part of the Gngangara Mound Ecological Linkages being conceptual linkages of vegetation throughout the Gngangara Mound groundwater system. The appellant submitted that DWER should have found the proposed clearing 'at variance' to clearing principle (f) rather than 'not likely at variance'. The appellant also submitted that a detailed State Government Hydrology Plan should be implemented by Government, regardless of the outcome of the clearing permit, to ensure adequate management of the Gngangara Mound groundwater system.

### Consideration

Clearing principle (f) states native vegetation should not be cleared if it is growing in, or in association with, an environment associated with a watercourse or wetland. The terms watercourse and wetland are defined in Schedule 5 of the EP Act as follows:

**watercourse** has the same meaning as it has in the *Rights in Water and Irrigation Act 1914*;

**wetland** means an area of seasonally, intermittently or permanently waterlogged or inundated land, whether natural or otherwise, and includes a lake, swamp, marsh, spring, dampland, tidal flat or estuary.

Section 3 of the *Rights in Water and Irrigation Act 1914* defines a watercourse as follows:

- (1) In this Act, unless the contrary intention appears —  
watercourse means —

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<sup>16</sup> DWER response to Appeals 026/20, 3 June 2020, page 10.

- (a) any river, creek, stream or brook in which water flows;
  - (b) any collection of water (including a reservoir) into, through or out of which any thing coming within paragraph (a) flows;
  - (c) any place where water flows that is prescribed by local by-laws to be a watercourse, and includes the bed and banks of any thing referred to in paragraph (a), (b) or (c).
- (2) For the purposes of the definition in subsection (1) —
- (a) a flow or collection of water comes within that definition even though it is only intermittent or occasional; and
  - (b) a river, creek, stream or brook includes a conduit that wholly or partially diverts it from its natural course and forms part of the river, creek, stream or brook; and
  - (c) it is immaterial that a river, creek, stream or brook or a natural collection of water may have been artificially improved or altered.

In response to this element of the appeals, DWER advised:

The document which outlines the Gngangara Mound Ecological Linkages (GSS Ecological Linkages) was prepared for the Gngangara Sustainability Strategy. This report uses the Gngangara Sustainability Strategy area, which is based on the Gngangara Mound, as spatial extent for the scope of assessment and the identification of ecological linkages. It is not an indication of the presence of a watercourse or wetland, or an indication of groundwater in the application area.

It is also noted that although the application area forms part of the GSS Ecological Linkage, based on the level of clearing within the application area the impacts to this linkage will be minimal.<sup>17</sup>

It is considered that the Gngangara Mound groundwater system does not fit the definition of a watercourse or wetland and therefore DWER's conclusion that the proposed clearing is not likely at variance to principle (f) is supported.

### **Land degradation and impacts to nearby conservation areas**

By this element of the appeal, one appellant submitted that the proposed clearing will destabilise the coast and invite even greater impacts of land degradation locally and further along the coast – especially for Bush Forever 325 on both sides of the Marina.

The appellant also submitted that the proposal will disrupt fauna and pollination connectivity north south and east west, and will cause a decrease of area to perimeter ratio exacerbating the fringe effect and the degradation of environmental values. While the appellant noted DWER advice that the offset site has a better area to perimeter ratio, it was submitted the real reduction for wildlife will be more than anticipated without documentation of how wildlife will relocate.

### Consideration

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

... Application Area is located more than 80 metres from the coastline, and areas closer to the coast have already been significantly modified by the existing boat harbour, comprising a breakwater, boat pens and carpark. The Department considers that the proposed clearing is unlikely to result in coastal erosion in excess of the impacts associated with existing infrastructure.

The Department also notes that the marine elements of the Ocean Reef Marina project have been assessed by the EPA (as outlined in EPA Report 1629) and approved through Ministerial Statement 1107. One of the environmental factors identified and assessed by the EPA relates

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<sup>17</sup> DWER response to Appeals 026/20, 3 June 2020, page 10.

to coastal processes and a requirement for the proponent to prepare a 'Coastal Processes and Wrack Management Plan' is conditioned through the Ministerial Statement.

The proposed clearing for early works construction is not located adjacent to the coastline or foredune systems, which would have a greater risk of land degradation in association with coastal processes. The Department determined that the land degradation issues associated with CPS 8788/1 could be managed appropriately through the CEMP and Permit conditions.

The Department's assessment noted that the proposed clearing may contribute land degradation impacts, predominantly through wind and water erosion. In addition to the CEMP, management conditions were imposed on the Permit to ensure bare ground is not left undeveloped for more than one month post-clearing. The objective of this condition is to minimise the impacts of wind erosion within and adjacent to the Application Area, thereby ensuring these risks are reduced to an acceptable level.

Although the CEMP has not been submitted to the Department, requirements have been outlined in the NPO, and specifications imposed by the City of Joondalup ... The Department is satisfied that this plan will be developed subject to the appropriate management measures and approved through the relevant authorities prior to the commencement of clearing.

The Department's assessment noted that the proposed clearing would reduce the area to perimeter ratio of the adjacent conservation area, that being Bush Forever Site 325. The sections of the Application Area which run along the boundary of Bush Forever Site 325, are those areas hatched red on Plan 8788/1a [Figure 1]. The management of issues associated with decreasing the area to perimeter ratio will also be addressed through the CEMP, which will include weed and hygiene protocols, as well as management measures for dust suppression and other risks which may impact on adjacent vegetation.<sup>18</sup>

Noting that the permit includes a requirement that the early works must be commenced no more than one month after undertaking clearing, and that this is directed at controlling wind erosion raised by this element of the appeal, it is considered that DWER's assessment of the proposal against principles (g) and (h) was acceptable, and the condition applied justified.

## Conclusion

Taking into account the issues above, it is considered that the surveys undertaken to support the clearing proposed by this permit were sufficient to identify the level of risk posed to the environmental values identified by the appellants.

From this, it is noted that the proposed clearing will result in the loss of native vegetation from a larger remnant that:

- contains a high level of biodiversity being locally significant
- is significant habitat for fauna and includes significant foraging habitat for Carnaby's cockatoo
- is significant in an area that has been extensively cleared and contains significant ecological linkage values.

It follows that DWER was correct to conclude that the proposed clearing is at variance to principles (a), (b), (e) and (h).

In relation to impacts to ground water, the proposed clearing is not likely to be at variance to clearing principle (f).

Having concluded that the proposed clearing will impact on a number of environmental values, the next ground of appeal considers the concerns raised by the appellants that the impact of the clearing will not be counterbalanced by the proposed offset.

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<sup>18</sup> DWER response to Appeals 026/20, 3 June 2020, page 11.

## GROUND 2: ADEQUACY OF THE OFFSET

By this ground of appeal, the appellants submitted that the NPO is not adequate to counterbalance the impacts of the proposed clearing. Appellants sought for the refusal of the permit, unless a like-for-like offset is added to the conservation estate and/or appropriate offsite rehabilitation is undertaken. It was submitted that further surveys would be required to verify the environmental values of the NPO site at Carabooda and regardless it is unlikely to compensate clearing impacts to a coastal landscape.

### Consideration

#### Background

The permit does not include any conditions requiring the applicant to offset or rehabilitate the values of the vegetation approved to be cleared. However, the permit includes the following 'advice note' which provides context to the decision to grant the permit:

This clearing permit area is part of a wider development for the Ocean Reef Marina, a development encompassing 42 hectares (ha) of land. A Metropolitan Region Scheme (MRS) amendment (1270/41) included the excision of 26.26 ha of Bush Forever Site 325 ... As part of the MRS amendment, WAPC required a Negotiated Planning Outcome (NPO) to secure an appropriate conservation outcome for the project ... [which] included the acquisition of an offset site and the rehabilitation of Bush Forever areas adjacent to the application area. The Delegated Officer determined that the measures outlined in the NPO were sufficient to mitigate the impacts of the proposed clearing to biodiversity, fauna habitat, impacts on adjacent conservation areas and impacts on suitable habitat for Threatened species ...<sup>19</sup>

The Decision Report for the permit states:

... that the impacts on environmental values of the proposed clearing of 4.47 ha of native vegetation within a 5.17 ha envelope for early works associated with Ocean Reef Marina development have been suitably minimised and mitigated with the Negotiated Planning Outcome and management strategies proposed by the applicant.<sup>20</sup>

The WA Environmental Offsets Policy defines an offset as 'an offsite action or actions to address significant residual environmental impacts of a development or activity.'<sup>21</sup>

The WA Environmental Offsets Guidelines describe 'significant residual impacts' as including impacts:

... that affect rare and endangered plants and animals (such as declared rare flora and threatened species that are protected by statute), areas within the formal conservation reserve system, important environmental systems and species that are protected under international agreements (such as Ramsar listed wetlands) and areas that are already defined as being critically impacted in a cumulative context. Impacts may also be significant if, for example, they could cause plants or animals to become rare or endangered, or they affect vegetation which provides important ecological functions.<sup>22</sup>

DWER has published a procedure on offsets for clearing permits, which relevantly states:

Offsets are required when clearing is at variance with one or more of the biodiversity related clearing principles (principles a – f, h) and a significant residual impact remains.<sup>23</sup>

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<sup>19</sup> DWER, CPS 8788/1 Decision Report, 4 May 2020, page 1.

<sup>20</sup> DWER, CPS 8788/1 Decision Report, 4 May 2020, page 2.

<sup>21</sup> Western Australian Government, WA Environmental Offsets Policy, September 2011, page 2.

<sup>22</sup> Western Australian Government, WA Environmental Offsets Guidelines, August 2014, page 8.

<sup>23</sup> DER, Clearing native vegetation offsets procedure, August 2014, page 2.

As noted in Ground 1 of this report, DWER was considered to be justified in finding that the proposed clearing is at variance to principles (a), (b), (e) and (h). Consistent with the above procedure, and DWER's reference to the residual impacts requiring offsetting it is taken that DWER considered an offset is required for the clearing authorised under this permit. In that regard, DWER is of the view that the NPO provides a suitable offset, and determined that no additional offset requirement is necessary in respect to this permit.

The question therefore raised by this ground of appeal is whether the NPO is an adequate offset for the significant residual impacts identified for the proposed clearing.

Unfortunately, DWER did not set out in its decision report or elsewhere what it regarded as the significant residual impacts posed by the proposed clearing. However, in the context of the Offsets Procedure, and noting the content of the decision report and the conclusions from Ground 1, these are considered to be:

- clearing principle (a) – high biodiversity vegetation
- clearing principle (b) – loss of habitat for fauna including habitat for Carnaby's cockatoo
- clearing principle (e) – significant remnant vegetation including ecological linkage values.

These impacts and the value of the NPO will be considered in turn.

#### Clearing principles (a) and (e)

The Carabooda site was identified through the NPO process established as part of the Bush Forever planning regime. In its consideration of the MRS amendment in 2014, the EPA identified that development contemplated by that amendment would see about 19.5 ha of native vegetation cleared, and that this would impact on *Conostylis bracteata*, priority ecological communities and ecological linkage values. The minimum selection criteria for the land acquisition portion of the offset included that it 'contain conservation significant species and communities of similar value and priority for protection [and] vegetation communities as similar as practicable to the impacted site.'<sup>24</sup>

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

... the NPO site contains ecological communities of very high conservation value, namely *Aquatic Root Mat Communities in Caves on the Swan Coastal Plain* (Critically Endangered), *Tuart Woodlands of the Swan Coastal Plain* (Critically Endangered) and *Banksia Woodlands of the Swan Coastal Plain* (Endangered) ... It was determined that the land acquisition site has a very high significance based on its environmental values ...<sup>25</sup>

DWER acknowledged appellant concerns that the land acquisition portion of the NPO does not include 'like for like' flora, fauna or vegetation, but noted that State Planning Policy 2.8 provides that vegetation with high conservation value may be offset with an area of 'the same vegetation/habitat type OR a Very High significance vegetation/habitat in the same Bioregion.'<sup>26</sup>

In response to submissions on the clearing permit, the Decision Report includes similar advice:

Offset approved by the EPA, DPLH and DBCA; it was determined to be as like as practicable and have a higher environmental value compared to the application area.<sup>27</sup>

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<sup>24</sup> DWER, CPS 8787/1 Decision Report, 2 April 2020, page 6.

<sup>25</sup> DWER response to Appeals 026/20, 3 June 2020, page 4.

<sup>26</sup> Ibid.

<sup>27</sup> DWER, CPS 8788/1 Decision Report, 4 May 2020, page 14.

The WA Environmental Offsets Guidelines state that while an offset should be 'like for like':

... in some cases strict like-for-like may not be possible. In these cases the Minister may accept an alternative offset, however, it should still be related to the significant residual impacts of the project.<sup>28</sup>

From this, it is considered open to a decision maker to apply an offset that is not like for like. In this case, DWER formed the view that the significant residual impacts under clearing principles (a) and (e) would be adequately offset by the NPO developed through the planning process, and consistent with the EPA's earlier public advice. This view is considered to be justified in the context of the WA Environmental Offsets Guidelines and the planning decision.

#### Clearing principle (b)

As noted in Ground 1, the proposal the subject of this appeal will result in the clearing of up to 4.47 ha of native vegetation, which includes significant habitat for fauna including foraging habitat for Carnaby's cockatoo. DWER found the clearing the subject of this permit to be at variance to clearing principle (b), and that the residual impact of this clearing is significant.

The NPO site at Carabooda was inspected by DWER staff to assess its value as habitat for Carnaby's cockatoo. That site assessment identified the presence of high quality black cockatoo foraging and breeding habitat, and while this was not quantified,<sup>29</sup> DWER stated that 'black cockatoo habitat was the main fauna consideration in the selection of this site.'<sup>30</sup>

One appellant submitted that the NPO does not compensate for the loss of black cockatoo habitat as the Carabooda site already exists and the clearing therefore represents a net loss of significant habitat that will impact on the recovery plan for the species. In relation to the rehabilitation component it was submitted that rehabilitation will take many years to provide foraging habitat.

Offsets can include land acquisition, with the value of the acquisition site being assessed against a range of factors, including the quality of the values at that site. In that regard, DWER advised:

Although land acquisition as an offset does not result in any additional habitat for mobile conservation significant fauna species, such as black cockatoos, securing existing high quality remnant vegetation into the conservation estate is an important and valid approach to counterbalance the impacts of clearing. In conjunction with the rehabilitation plans outlined, the NPO was considered appropriate to counterbalance impacts to black cockatoos.<sup>31</sup>

In this case, the Carabooda site was identified through the NPO process established as part of the Bush Forever planning regime. In its consideration of the MRS amendment in 2014, the EPA identified that development contemplated by that amendment would see about 19.5 ha of native vegetation cleared, and that (among other things) this would likely impact foraging habitat for Carnaby's cockatoo. The EPA concluded, however, that the development of an NPO would ensure that its objective for terrestrial fauna would be met.<sup>32</sup>

In response to this element of the appeal, DWER advised:

The significance of the Application Area for habitat for fauna was considered, and it was determined that the offset site and proposed rehabilitation were suitable in mitigating and counterbalancing the impacts to the 4.47 ha of vegetation proposed to be cleared.<sup>33</sup>

<sup>28</sup> Western Australian Government, WA Environmental Offsets Guidelines, August 2014, page 13.

<sup>29</sup> DWER, CPS 8788/1 Decision Report, 4 May 2020, page 16.

<sup>30</sup> DWER response to Appeals 026/20, 3 June 2020, page 4.

<sup>31</sup> DWER response to Appeals 026/20, 3 June 2020, page 8.

<sup>32</sup> EPA, Statement of reasons and public advice, MRS amendment 1270/41, 9 June 2014, pages 2 to 3.

<sup>33</sup> DWER response to Appeals 026/20, 3 June 2020, page 8.



In relation to concerns raised by an appellant that the rehabilitation element of the NPO will take some years to return the foraging values lost from the clearing, DWER advised:

The focus on rehabilitation of foraging species was included to mitigate the impacts of foraging capacity for the local area. The Appellants' comments regarding the timeframe for effective rehabilitation are noted. The Department understands that, as a disturbance specialist and a reseeded, *Banksia sessilis* has a relatively short timeframe to establish, with time to first flowering at approximately 48 months. Carnaby's cockatoos feed on both the nectar and seeds of the species and rehabilitation incorporating this species may provide suitable foraging habitat within two years.<sup>34</sup>

Noting that the content of the NPO was the subject of the EPA's decision on the MRS amendment in 2014, and that the area approved to be cleared by DWER in respect to this permit is largely within the area of the MRS amendment, the adequacy of the NPO as an offset for the whole site has been considered and approved through planning processes. Furthermore, on the advice of DWER, habitat values to black cockatoos were the primary consideration for fauna values. Coastal values were also considered with criteria set that any land acquisition should occur within 10 km of the coast.<sup>35</sup> The site at Carabooda occurs 5 km from the coast. The required rehabilitation also occurs at the Ocean Reef Marina site.

On the basis of the information provided by DWER, it is considered that the significant residual impacts it identified in respect to fauna are adequately offset through the NPO agreed through the MRS amendment. This includes a rehabilitation element which, on DWER's advice, will likely provide new foraging habitat four years after establishment.

#### Other impacts raised in appeals

Appellants raised a number of other concerns about the appropriateness of the NPO as an offset, including that:

- rehabilitation of an equivalent amount of surrounding bushland is inadequate for the recovery of *Marianthus paralius* (Threatened)
- the loss of graceful sun-moth habitat is justified by the NPO, which identified *L. maritima* habitat but no records of the species at Carabooda; the inclusion of *L. maritima* habitat in rehabilitation will take years to provide habitat similar to habitat lost.

The WA Environmental Offsets Policy states that while 'environment offsets may be appropriate for significant residual environmental impacts, they will not be applied to minor environmental impacts.'<sup>36</sup> On the basis of DWER's findings that the only significant residual impacts identified for this proposal were those discussed above, it is considered that contemplation of whether the above impacts identified in the appeals were addressed through the NPO is not required.

Nonetheless, it is noted that the NPO was developed to address the key environmental factors identified by the EPA in 2014 in respect to the possible clearing of up to 19.5 ha of vegetation as part of the MRS amendment. As the clearing the subject of this permit is a subset of the area considered by the EPA, the broader values raised by the appellants were amenable to the development of the NPO as a part of that earlier process.

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<sup>34</sup> DWER response to Appeals 026/20, 3 June 2020, page 8.

<sup>35</sup> Strategen-JBS&G (2020). *Development WA – Ocean Reef Marina – Bush Forever Negotiated Planning Outcome*. Dated 5 February 2020, 127,360. Unpublished report. Page 162.

<sup>36</sup> Western Australian Government, WA Environmental Offsets Policy, September 2011, page 3.

## Conclusion

For the reasons stated above, it is considered that DWER's approach to the application of an offset in respect to this proposal was consistent with the WA Environmental Offsets Policy, and with the outcome of the NPO developed through the planning process and subject to EPA's public advice from 2014.

It is recommended therefore that this ground of appeal is dismissed.

## PLANNING CONTEXT

By section 51O(4) of the EP Act, in considering whether or not to grant a clearing permit, 'the CEO shall have regard to any planning instrument, or other matter, that the CEO considers relevant.' A 'planning instrument' is defined to include 'a scheme or a strategy, policy or plan made or adopted under a scheme.' This requirement is considered applicable to the Minister's role in determining appeals in respect to the grant of a clearing permit.

As has been noted in discussion on the appeal grounds above, the clearing proposed in this case is to undertake geotechnical investigations associated with the future development of the site as part of the proposed Ocean Reef Marina.

The marine elements of that proposal were the subject of an environmental impact assessment, which the EPA reported on in February 2019. The Minister for Environment subsequently partly allowed appeals against that report in July 2019, and the proposal received final environmental approval in August 2019.

The terrestrial elements of the proposal were not assessed as part of the above process, as they were considered by the EPA in 2014 as part of MRS amendment 1270/41. In November 2019, the MRS amendment took effect, and that amendment contemplates the development of a large portion of the area for urban uses, including residential development. By section 38(2) of the EP Act, only the proponent of a proposal under an assessed scheme may refer that proposal to the EPA.

Similarly, clause 9 of Schedule 6 of the EP Act provides that clearing undertaken 'in accordance with a subdivision approval given by the responsible authority under the *Planning and Development Act 2005*' is exempt from the requirement to obtain a clearing permit.

As a result of the MRS amendment the subject of the EPA's public advice in 2014, the majority of the land the subject of the application area for this permit has been excluded from Bush Forever, and has been included as urban zoned land (see Figure 2).

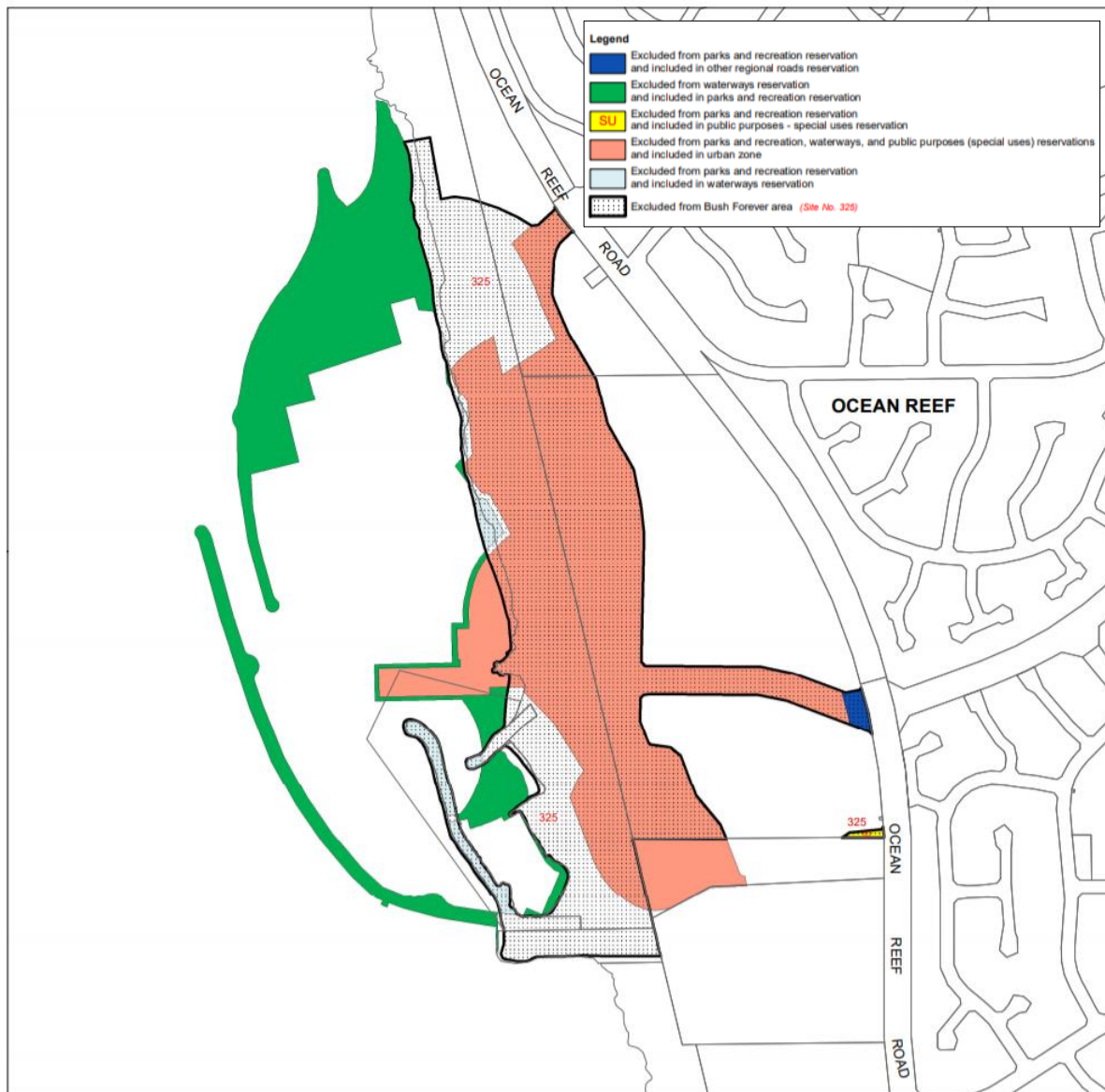
In short, the changes effect through the MRS process have excluded portion of Bush Forever site 325 from Bush Forever status, and has rezoned the majority of this area from parks and recreation, waterways, and public purposes (special uses) to urban zone.

The MRS process is also consistent with the City of Joondalup's local planning strategy, which relevantly commits the City to 'continue to progress the Ocean Reef Marina redevelopment as a development site to accommodate future residential land uses such as short-term accommodation and freehold residential lots.'<sup>37</sup>

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<sup>37</sup> City of Joondalup, Local Planning Strategy, 10 November 2017, Section 4.2.2.

Figure 2 – MRS amendment 1270/41



It is thus within the contemplation of the MRS and the local planning strategy for the area the subject of MRS amendment 1270/41 to be redeveloped for urban uses, which will entail the clearing of approximately 19.5 ha of native vegetation.

In this context, it is considered that the majority of the clearing proposed by the permit is within the area contemplated for future clearing under relevant planning instruments.

## OTHER MATTERS

### Reliance on the CEMP and RP

The NPO makes reference to the preparation of two plans: a construction environmental management plan (CEMP) and a rehabilitation plan (RP). The CEMP is to be prepared to support subdivision and is to include vegetation clearing protocols to ensure no indirect impacts to adjacent vegetation. The RP is to be prepared to guide the rehabilitation component of the offset. Both plans are to be submitted with the subdivision application.

One of the appellants submitted that DWER's assessment relies on the implementation of both documents and therefore the permit should not have been granted until they have been prepared. For example, in relation to clearing principle (h), the appellant refers to DWER's conclusion that the CEMP will mitigate indirect impacts to Bush Forever Site 325. In relation to clearing principle (c), the appellant refers to DWER's conclusion that the RP will mitigate impacts to habitat for *Marianthus paralius*.

In response to this matter, DWER advised:

The preparation of the Construction Environmental Management Plan (CEMP) and Rehabilitation Plan, although not finalised, have requirements outlined in the NPO, and specifications imposed by the City of Joondalup. The Department is satisfied that these plans will be developed and submitted through subsequent planning processes.<sup>38</sup>

It is considered that DWER's expectation that preparation and implementation of the CEMP and RP through the planning process is reasonable noting that they are documented requirements of the NPO for achieving subdivision.

It is acknowledged that the CEMP will not be in place when the clearing under CPS 8788/1 is scheduled to occur. However, it is noted that condition 6 of the permit requires the implementation of dieback and weed control measures which are the key potential indirect impacts to adjacent vegetation associated with the clearing. The rehabilitation is not required to occur at the time of clearing and therefore the timing of preparation of the RP is not considered critical. It is understood that the applicant has been collecting seed for use in rehabilitation in advance of the proposed clearing.

DWER's reference to the requirements of the CEMP and RP in its assessment is supported.

### **Clearing within a conservation area**

One of the appellants referred to previous accidental clearing in a conservation area by the DPLH for a fire break, raising concern that authorities failed to stop degradation of coastal bushland, including from previous development. The appellant submitted that the clearing permit should not be issued until there are adequate plans to address issues associated with fire access.

In response to this matter, DWER advised:

The clearing undertaken by DPLH is not relevant to the assessment of the clearing permit application as it was undertaken by a party unrelated to the Permit Holder. The Department understands that measures to prevent accidental clearing outside of authorised areas will be addressed in the CEMP. Any clearing outside of the areas authorised under Clearing Permit CPS 8788/1 may be unlawful and, where determine to be so, be subject to appropriate enforcement action under the provisions of the EP Act.<sup>39</sup>

DWER's position is supported.

### **Purpose of clearing**

Appellants submitted that DWER should have considered the impacts of the larger Ocean Reef Marina development in assessing the application.

As outlined in earlier sections, the impacts of the proposed clearing for the larger development, as they relate to the clearing applied for, have been considered including how they were addressed through the MRS amendment.

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<sup>38</sup> DWER response to Appeals 026/20, 3 June 2020, page 12.

<sup>39</sup> DWER response to Appeals 026/20, 3 June 2020, page 13.

## Residential component not part of original proposal

One appellant requested a review of the original project environmental approval as it has substantially changed from maritime facilities in the marina waters area to a redevelopment with residential priorities and significant impacts on the environment. The appellant raised concern that the boating and community sectors were disregarded in the planning, design and consultation processes, including the following concerns:

- marina entrance design is unsafe, inadequate for boat launching and includes unusable boat penning facilities
- 30 per cent of the shoreline, which supports a world-renowned abalone fishing event in an environmentally sustainable harvest, will be lost due to the development
- residential component will be among Australia's highest density housing developments.

The appellant put forward an alternative concept plan aimed at protecting and enhancing the environment to improve environmental and public access outcomes.

In response to this issue, DWER advised that its assessment:

... took into account the impacts of the proposed clearing ... with consideration also given to planning instruments and other matters relevant to the proposed clearing. The original purpose of the land purchase by the City and the design of the marina, including density of housing and marine safety, were not considered relevant planning or other matters for the purposes of the assessment.

...

On 7 August 2019, Ministerial Statement No. 1107 was published providing approval for the implementation of the project. Measures to manage the impacts to the marine component of the development have been specified in the Ministerial Statement, including a Marina Construction Monitoring and Management Plan, Marina Operations Management Plan, Coastal Processes and Wrack Management Plan, Abalone Habitat and Biomass Monitoring Plan, as well as an Offsets Strategy to mitigate the impacts to benthic communities.<sup>40</sup>

DWER's advice on this matter is considered to be appropriate. Through the appeal investigation, the Office of the Appeals Convenor arranged for the appellant to meet separately with the applicant to discuss his concept plan for the site, noting these are outside the scope of the appeal in respect to permit CPS 8788/1.

## Consideration of public submissions

One of the appellants submitted that their public submission had been ignored by DWER with no evidence of any proper review and due consideration.

In response to this matter, DWER advised:

...that the Application was advertised for public comment on the Department's website on 1 February 2020, in accordance with section 51E(4) of the EP Act. This advertisement included the provision of the flora and vegetation survey undertaken in 2013 and a supporting report prepared by the Applicant, which summarised the environmental values of the Application Area. Six public submissions (Attachment 10) and comments from DPLH and the City of Joondalup were received during the 21-day submission period.

On 4 April 2020, the Clearing Permit, Plans and Decision Report were made publicly available on the Department's website, and notifications were sent to stakeholders and to individuals and organisations that made submissions following the advertising of the Application.

The letter referenced by the Appellant includes notification of the grant of CPS 8788/1, with an electronic link to the Decision Report. The Decision Report is publicly available, and outlines

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<sup>40</sup> DWER response to Appeals 026/20, 3 June 2020, page 14.

the assessment of the Application, consideration of the clearing principles, and planning instruments and other relevant matters.<sup>41</sup>

As indicated by DWER, pages 11 to 13 of the decision report provide responses to the public submissions received.

### **Authority of the delegated officer**

One of the appellants submitted that the DWER officer who granted the clearing permit was not authorised to do so noting the officer had determined the clearing to be at variance to the clearing principles. In response to this matter, DWER advised that:

... the CEO may, under section 20 of the EP Act, by notice in the *Government Gazette*, with approval of the Minister, delegate their powers or duties. The Western Australian *Government Gazette* No.48 (31 March 2020) includes Delegation No. 152 with CEO delegation of powers and duties under the EP Act for clearing permits to a number of holders of offices, including 'Manager, Native Vegetation Regulation'.

The Department confirms that the Delegated Officer that signed the permit holds the office of 'Manager, Native Vegetation Regulation' and is an officer appropriately delegated under section 20 of the EP Act.<sup>42</sup>

Section 51O(2) of the EP Act outlines that in considering a clearing matter, the CEO shall have regard to the clearing principles so far as they are relevant to the matter under consideration. In accordance with section 51O(4) the CEO is to have regard to any planning instrument, or other matter, that the CEO considers relevant. The consideration of the clearing principles and planning and other matters has been discussed earlier in this report.

### **CONCLUSION AND RECOMMENDATIONS**

The appeals investigation found that DWER's conclusions on the environmental values of the application area, as contended by the appeals, were supported by the available evidence.

It was found that DWER's approach to the application of an offset in respect to this proposal was consistent with the WA Environmental Offsets Policy, and with the outcome of the NPO developed through the planning process and subject to the EPA's public advice from 2014.

While the proposed clearing was found to be at variance to a number of the clearing principles, this does not preclude a permit from being granted. Planning context is a relevant consideration under Part V Division 2 of the EP Act and therefore DWER's decision to grant the permit is supported.

Emma Gaunt  
APPEALS CONVENOR

#### **Investigating Officers:**

Simon Weighell, A/Senior Appeals Officer  
Jean-Pierre Clement, Deputy Appeals Convenor

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<sup>41</sup> DWER response to Appeals 026/20, 3 June 2020, page 12.

<sup>42</sup> DWER response to Appeals 026/20, 3 June 2020, pages 5 to 6.