



Environmental Protection Act 1986

Hon Stephen Dawson MLC
Minister for Environment

MINISTER'S APPEAL DETERMINATION

APPEALS AGAINST GRANT AND CONDITIONS OF CLEARING PERMIT CPS 8392/1 – LOT 9005 ON DEPOSITED PLAN 52008, NULLAKI AND LEE ROAD, BROWNS ROAD AND LAKE SAIDE ROAD RESERVES, YOUNGS SIDING

Purpose of this document

This document sets out the Minister's decision on appeals lodged under sections 101A(3)(a) and 101A(4) of the *Environmental Protection Act 1986* in objection to the above clearing permit. This document is produced by the Office of the Appeals Convenor for the Minister but is not the Appeals Convenor's own report, which can be downloaded from the Appeals Convenor's website at www.appealsconvenor.wa.gov.au.

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| Appellants: | Angela and Andrew Dickinson Brad Kneebone and Gillian Williams Geoffrey Evans on behalf of Denmark Environment Centre Inc Barry Jackson Alan and Margaret Francis Bernadette Santo-Spirito Clare Jackson Stephen Grimmer Katy Evans Dr Vicki Stokes on behalf of BirdLife Australia Hon. Diane Evers MLC Nadja Hasenauer John Bailey on behalf of The Beeliar Group |
| Permit holder: | Graeme Robertson |
| Proposal description: | The extraction and transport of lime for agricultural use. |
| Minister's decision: | The Minister allowed the appeals in part |
| Date of decision: | 23 October 2020 |

REASONS FOR MINISTER'S DECISION

Thirteen appeals were received in objection to Clearing Permit CPS 8392/1 granted to Mr Graeme Robertson (the applicant) by the Department of Water and Environmental Regulation (DWER). The permit is for the clearing of up to 15.19 hectares of native vegetation for the extraction and transport of lime in the localities of Nullaki and Youngs Siding.

The appeals sought for either DWER's decision to be overturned or for the conditions of the permit to be amended.

The appeals were submitted on a range of grounds including the adequacy of DWER's assessment of impacts relating to flora, vegetation, biodiversity, fauna, wetlands, acid sulphate soils (ASS), land degradation and conservation areas. Appellants raised a range of other matters relating to land use impacts, other approvals, the necessity of the clearing, referrals and compliance.

Having carefully considered the information provided to him, including the thirteen appeals, the advice of DWER, and the Appeals Convenor's report and recommendation, the Minister considered that DWER's decision to grant the permit was justified. However, the Minister decided to allow the appeals to the extent that the conditions of the permit are amended to require:

- pre-clearing inspections of trees with hollows for use by black cockatoos;
- avoidance of hollows in use by black cockatoos until chicks have fledged;
- replacement of hollows used by black cockatoos with artificial hollows that are installed in an appropriate location nearby and prior to the next breeding season;
- monitoring and maintenance of installed artificial hollows for a period of at least 10 years; and
- extension of the pre-clearing inspection requirements for western ringtail possums (i.e. condition 10) to cover all of the Lee, Browns and Lake Saide Road portions of the application area.

The Minister otherwise decided to dismiss the appeals. The full reasons for the Minister's decision are set out below.

Flora and vegetation

Appellants submitted that targeted threatened and priority flora surveys had not been undertaken for the entire application area, and that such surveys should be required to address the risk of impacts to flora. Appellants submitted that further work is also required to assess potential impacts to threatened and priority ecological communities.

The Minister was advised that targeted threatened and priority flora surveys were completed for portions of the application area, and no such species were recorded. In relation to the portions not targeted, DWER undertook a risk assessment to determine whether species identified in desktop searches had the potential to occur, and if so, whether the proposed clearing could result in significant impacts. This approach was consistent with that recommended to DWER by the Department of Biodiversity, Conservation and Attractions (DBCA).

Having reviewed DWER's assessment and the Appeals Convenor's report, the Minister was satisfied that the available evidence supports DWER's conclusion that the risk of significant impacts to threatened and priority flora is low. Further detailed information regarding the consideration of each species can be found in the Appeals Convenor's report.

In relation to threatened and priority ecological communities, the Minister noted vegetation type mapping was completed for the entire application area and no such communities were identified. DBCA identified a risk that a *Melaleuca densa* vegetation type may not have been accurately described, but the Minister was satisfied that any impacts are unlikely to be significant noting the small size and isolated location of this vegetation within the application area.

It follows that the Minister considered DWER had sufficient information available to undertake an assessment of the potential impacts of the proposed clearing to threatened and priority flora and ecological communities.

Biodiversity

Appellants considered that DWER should have found the proposed clearing at variance to principle (a) given a high level of floral diversity has been recorded in the local area and little evidence observed of historical disturbance.

In response to the appeals, DWER advised that its assessment of principle (a) was consistent with its *A guide to the assessment of applications to clear native vegetation (December 2014)*. DWER outlined that no significant occurrences or habitat for threatened and priority flora and ecological communities were considered likely to be impacted, and that an assessment of biodiversity is more complex than considering species numbers alone.

Noting that the application area includes existing roads and firebreaks, and that extraction activities have occurred historically within portions of the lime pit, the Minister considered that the surrounding remnant vegetation is likely to hold higher biodiversity values.

Fauna

In relation to fauna, the Minister noted concerns were raised in relation to black cockatoos (Carnaby's cockatoo [*Calyptorhynchus latirostris*], Baudin's cockatoo [*Calyptorhynchus baudinii*] and forest red-tailed black cockatoo [*Calyptorhynchus banksii naso*]), western ringtail possums (WRPs) (*Pseudocheirus occidentalis*), Australasian bittern (*Botaurus poiciloptilus*), the south-western snake-necked turtle (*Chelodina colliei*) and amphibians.

Appellants were of the view that the fauna survey commissioned by the applicant was not of sufficient scope and misrepresented the fauna values of the application area.

The fauna survey included targeted assessments for black cockatoos and WRPs, and four WRPs and two dreys were recorded, but no evidence of black cockatoo breeding, roosting or foraging.

The Minister noted appellants provided additional black cockatoo and WRP surveys during the appeal investigation. These showed evidence of black cockatoo foraging and potential breeding activity within the application area, and suggest a greater prevalence and distribution of WRPs.

Considering this information, the Minister agreed with the Appeals Convenor that the proposed clearing may be at variance to clearing principle (b) owing to the risk of mortalities to individual breeding cockatoos and resident WRPs from the clearing operations.

The Minister was satisfied, however, that these impacts can be mitigated through the addition of the aforementioned permit conditions. In relation to the loss of black cockatoo and WRP habitat, the Minister considered DWER's view that this is unlikely to be significant is supported by the available evidence. The Minister agreed that the substantial extent of other similar habitat remaining in the local area is a key consideration in this regard.

In relation to the south-western snake-necked turtle, the Minister understood that a breeding site is likely to be impacted but noted that this species is not currently listed for conservation in WA. Similarly, for amphibians the Minister was advised that no conservation listed species have been recorded within approximately 40 kilometres. Therefore, the Minister agreed with DWER that significant impacts to the south-western snake-necked turtle and amphibians are unlikely to occur.

In relation to the Australasian bittern, the Minister understood this species has recently been observed at Lake Saide and that further work is being undertaken to confirm the current breeding status of the species in the area. The Minister commended the work being undertaken by appellants and affiliates in contributing to the scientific knowledge regarding this species.

With regards to CPS 8392/1, the Minister was advised that minimal suitable habitat for bitterns is likely to be cleared and that this habitat is unlikely to be preferred habitat. Therefore, the Minister considered that the proposed clearing is unlikely to result in significant impacts to the Australasian bittern.

It follows from the above that the Minister supported DWER's view that sufficient information in relation to fauna values was available to inform its assessment.

Wetlands

On the matter of wetlands, appellants submitted that DWER mischaracterised the Lee Rd wetland as a man-made wetland, and that DWER incorrectly suggested a buffer of 140 metres exists between the application area and Lake Saide.

The Minister noted that the Appeals Convenor agreed with appellants that the Lee Rd wetland is a modified natural wetland and that Lake Saide extends to the application area. However, DWER acknowledged in its assessment that the proposed clearing will include 0.064 hectares of the mapped extent (49.21 hectares) of Lake Saide. DWER also noted that no wetland vegetation was recorded within the application area near the Lee Rd wetland.

Noting this and that approximately 45 per cent remnant vegetation remains within the local area, much of which is near the application area and surrounding the wetlands, the Minister agreed with DWER that the impacts to wetlands from the proposed clearing are unlikely to be significant.

Acid sulphate soils

Appellants submitted that the proposed clearing, particularly near the wetlands, has the potential to result in significant ASS impacts. A requirement for a comprehensive ASS assessment was requested.

In response, DWER advised that the likely ASS risk is low, as soil exposure is likely to be shallow, within the root zone of cleared vegetation. The Minister understood appellants disputed this assessment and assert that tree roots extend to substantial depths.

The proposed road works involve the importation of fill to raise the road. The Minister considered that this will assist in mitigating the risk of any root disturbance exposing underlying ASS during the clearing operation. Furthermore, the Minister noted that minimal clearing of wetland vegetation is proposed.

Therefore, based on the available evidence, the Minister agreed with DWER that the risk of significant ASS impacts resulting from the proposed clearing is low.

The Minister noted ASS concerns also exist in relation to construction works at the Browns Rd drain crossing. The regulation of these works is outside the scope of the clearing provisions of the *Environmental Protection Act 1986* (EP Act). However, the Minister understood ASS impacts have been considered in an application made to DWER by the applicant for a bed and banks permit under the *Rights in Water and Irrigation Act 1914*. Further information regarding this aspect can be found in the Appeals Convenor's report.

Land degradation and conservation areas

In relation to land degradation and conservation areas, the Minister understood appellant concerns centred on erosion risks and the potential spread of weeds and dieback.

In granting clearing permit CPS 8392/1, DWER imposed conditions to address these risks including staged clearing and revegetation requirements (conditions 5(a) and 11), and weed and dieback hygiene requirements (condition 9).

It follows that the Minister was satisfied that DWER had considered impacts relating to land degradation and conservation areas, and had imposed conditions commensurate with the level of risk identified.

Land use impacts, other approvals and necessity

Appellants submitted that a range of ongoing operational impacts associated with the lime extraction and haulage activities have not been adequately accounted for. Appellants also submitted that the permit should not have been granted in the absence of other approvals including land access permissions, and that the road upgrades are not required given Eden Rd could be used as an alternative haulage route.

In response to the appeals, DWER advised that many of the operational impacts referred to can be regulated through other processes. The Minister supported DWER's position in this regard noting, for example, that the State Administrative Tribunal (SAT) development approval included conditions relating to hours of operation (condition 4), weeds (condition 8), traffic (conditions 12-26; including operating speeds, avoidance of school bus times), spills (conditions 27-28), noise (conditions 29-31) and fire risk (conditions 35-36).

In relation to other approvals, the Minister noted the applicant has obtained a bed and banks permit and has applied for a works approval for the proposed crushing and screening. An extractive industry licence from the City of Albany is also already in place.

In relation to future approvals, the Minister noted that the application area is confined to the road reserves and Lot 9005 meaning no land access permissions for adjacent reserves are required. Any future works outside the application area are subject to the clearing provisions of the EP Act. It is the applicant's responsibility to ensure any future works comply with the EP Act and DWER will consider the merits of any application if and when received.

With regards to Eden Road, the Minister noted that the SAT approval does not authorise the use of Eden Road as an alternative haulage route.

Therefore, based on the above, the Minister was satisfied that these matters have been appropriately considered by DWER.

Referrals and compliance

The Minister noted appellants have requested the application be referred to the Environmental Protection Authority (EPA) and/or the Commonwealth under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

The Minister was advised that the EPA decided not to assess the Nullaki Lime Pit proposal under Part IV of the EP Act in August 2017 and the EPA's decision is not open to appeal.

The Minister was also advised by DWER that it is the applicant's responsibility to ensure that it complies with the EPBC Act including any referral requirements.

In relation to concerns about compliance, the Minister considered that the monitoring of compliance, and the investigation of reports of alleged unauthorised clearing, are matters for DWER to manage, investigate and respond to as appropriate. If there is evidence of potential unlawful native vegetation clearing, DWER's 24-hour Pollution Watch hotline can be contacted on 1300 784 782.

Conclusion

DWER's assessment of the application found the proposed clearing at variance to clearing principle (f), and may be at variance to principles (g) and (i). As outlined above, the Minister considered the proposed clearing may also be at variance to principle (b).

The Minister noted that the EP Act does not preclude a clearing permit from being granted where the clearing will be at variance to the clearing principles.

In this case, the Minister considered that DWER's decision to grant the permit was justified, however the Minister allowed appeals to the extent that further conditions are applied to the permit in relation to black cockatoos and WRPs as already described. The Minister otherwise decided to dismiss the appeals.

The precise wording of the conditions will be determined by DWER in giving effect to the Minister's decision under section 110 of the *Environmental Protection Act 1986*.

Note: this decision is published pursuant to the terms of section 110 of the *Environmental Protection Act 1986* and regulation 8 of the *Environmental Protection Regulations 1987*.

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