



Appeals Convenor

Environmental Protection Act 1986

REPORT TO THE MINISTER FOR ENVIRONMENT

**APPEAL IN OBJECTION TO THE DECISION OF THE ENVIRONMENTAL PROTECTION
AUTHORITY NOT TO ASSESS A PROPOSAL**

**DEMOLITION AND RECONSTRUCTION OF THE ESPERANCE TANKER
JETTY, SHIRE OF ESPERANCE**

PROPONENT: SHIRE OF ESPERANCE

Appeal Number 036 of 2019

September 2019

Appeal Summary

This is a report against two appeals received against the decision of the Environmental Protection Authority (EPA) not to assess a proposal by the Shire of Esperance (proponent) to demolish and reconstruct the Esperance Tanker Jetty (proposal) under Part IV of the *Environmental Protection Act 1986* (EP Act).

The underlying basis for the appeals appears to be a concern that the existing jetty is proposed to be replaced using steel and concrete instead of timber and that as a result the heritage values will be lost.

The appellants acknowledged that the existing jetty structure is beyond repair, however submitted that its replacement using timber has been considered by three marine engineers and found to be feasible. The appellants submitted that the proponent and the EPA should have considered this alternative (to steel and concrete) to retain the heritage values.

The appellants also submitted that the proposal will have significant environmental impacts and questioned the adequacy of the information considered by the EPA given that no baseline surveys of the marine environment have been undertaken. Noting the amount of public interest in the proposal, the appellants contended that a formal assessment by the EPA at the level of public environmental review is required.

The EPA considered the likely impacts of the proposal referred to it, being (in part) the replacement of the existing jetty using steel and concrete. The EPA concluded that the proposal is unlikely to have a significant effect on the environment and does not warrant formal assessment. The EPA gave public advice¹ containing recommendations on environmental matters, including impacts on benthic communities and habitats, marine fauna, marine environmental quality, and social surroundings.

Having regard for the information presented during the appeals investigation, the Appeals Convenor considered that the EPA's conclusion that the environmental impacts of the proposal are not so significant as to warrant formal assessment and can be managed to meet its objectives for the identified environmental factors, was reasonable and supported by the available information.

Recommendation

The Appeals Convenor recommended that the appeals be dismissed.

¹ Environmental Protection Authority (2019) *Environmental Protection Act 1986 – Section 39A(7) – Public advice*. Public advice for the proposal 'Demolition and reconstruction of the Esperance Tanker Jetty'. Available from: <http://www.epa.wa.gov.au/proposals/demolition-and-reconstruction-esperance-tanker-jetty>

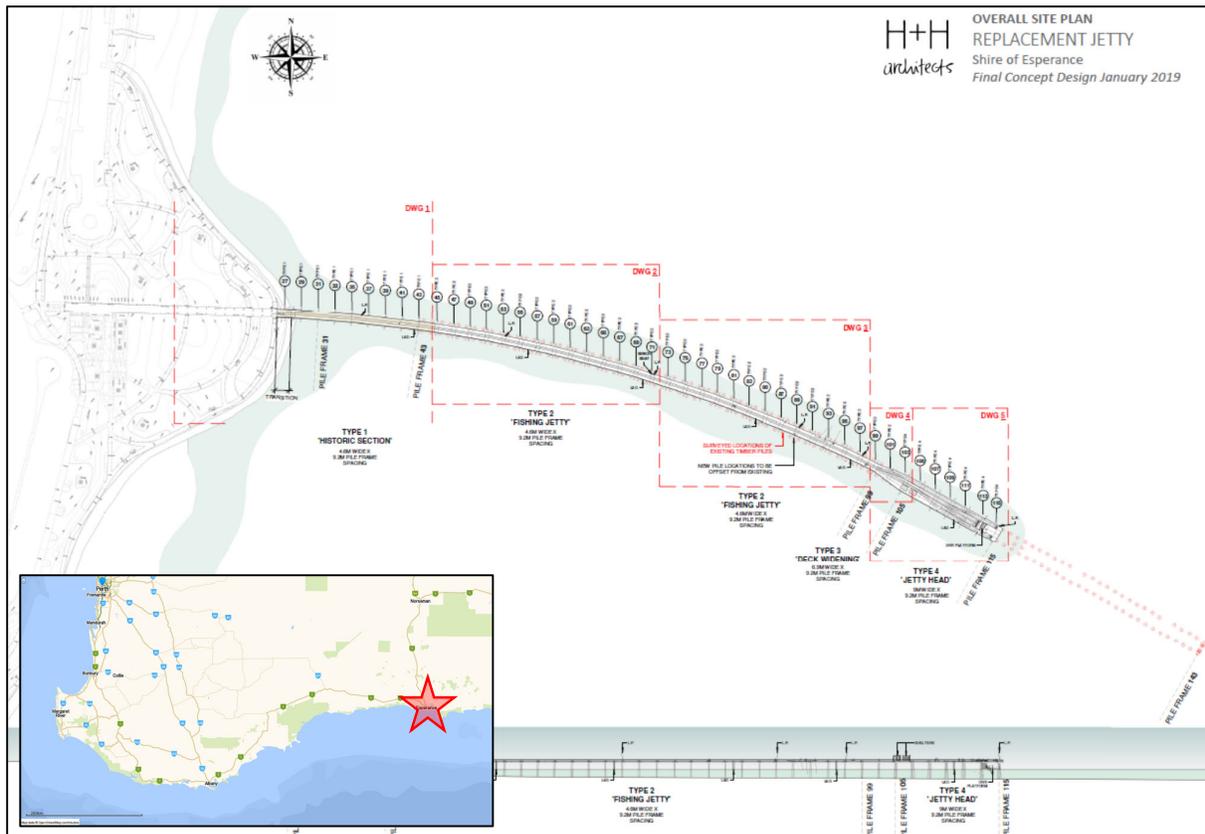
INTRODUCTION

David Eltringham (appellant 1) and Friends of the Esperance Tanker Jetty Inc. (appellant 2) appealed against the decision of the Environmental Protection Authority (EPA) not to assess a proposal by the Shire of Esperance (proponent) to demolish and reconstruct the Esperance Tanker Jetty (proposal) under Part IV of the *Environmental Protection Act 1986* (EP Act).

The proposal comprises of two stages (refer Figure 1):

- deconstruction of the existing jetty: piles are to be retained in-situ at mean sea level for 400 metres (m), and at three m below lowest astronomical tide for the 112 m beyond this
- construction of the replacement jetty: proposed to be constructed in close alignment with the existing jetty structure, extending 400 m of the 512 m length of the existing jetty.

Figure 1: Location (red star) and extent of proposal



(Source: *Whereis.com*, August 2019; EPA referral documentation²)

The existing jetty is currently owned by the Department of Transport (Southern Ports Authority), and has been managed by the proponent since 1990 under a licence agreement. Structural integrity surveys conducted during 2000-10 reported noticeable degradation of the existing jetty, leading to its closure to the public in 2015.

² Available from: <http://www.epa.wa.gov.au/proposals/demolition-and-reconstruction-esperance-tanker-jetty>

The existing jetty was originally constructed in 1935.³ The Statement of Significance for listing on the WA Register of Heritage Places (Place No. 831)⁴ lists the following cultural heritage values of the existing jetty:

- a rare and good example of a substantially intact timber jetty in WA, and one of four remaining
- aesthetic significance due to size, scale and construction, and contribution to sense of place
- valued by the community, site of commercial, social and recreational pursuits since construction, association with period of economic growth (1930s) and development of local industries
- brought employment to workers during period of economic depression (1930s), and associated with Government efforts to employ destitute men in a variety of jobs at that time.

In December 2016 the then Minister for Heritage issued a 'stop work' Conservation Order under section 59 of the *Heritage of Western Australia Act 1990*,⁵ prohibiting demolition (but not routine maintenance or other approved works) of the existing jetty. While recognising that 'restoration or reconstruction of the jetty to its original form and scale is unlikely', the Minister advised that the Conservation Order would remain in place until the proponent developed a fully funded and detailed design that is supported by the Heritage Council of Western Australia (Heritage Council) and meets the needs of the community.⁶

The proponent engaged a heritage architect to design a replacement jetty in association with the Heritage Council and community and in June 2019 approval was given from the Minister for Heritage under section 64 of the *Heritage of Western Australia Act 1990* to implement the proposal.⁷

The proposal was referred to the EPA by a third party in December 2018. On 24 June 2019, the EPA published its decision not to assess the proposal on the basis that it considers the likely environmental effects of the proposal are not so significant as to warrant formal assessment, and gave public advice⁸ containing recommendations regarding environmental matters. In making this decision, the EPA noted that noise impacts can be managed and mitigated.

OVERVIEW OF APPEAL PROCESS

In accordance with section 106 of the EP Act, a report was obtained from the EPA in relation to the appeals. The proponent was also given the opportunity to address the matters raised in the appeals. During the appeals investigation, the Office of the Appeals Convenor consulted with the appellants and the proponent. The appellants' response to the EPA's report was also considered.

The environmental appeals process is a merits-based process. For appeals in relation to an EPA decision not to assess, the Appeals Convenor normally considers environmental significance, relevance of factors, and additional information not considered by the EPA, and if other approvals processes can adequately address the relevant factors without the need for formal assessment by the EPA. The level of public interest may also be relevant.

³ Heritage Council of Western Australia (2008a) *Register of Heritage Places – Assessment Documentation – Tanker Jetty, Esperance*. 26 August 2008. Available from: <http://inherit.stateheritage.wa.gov.au/Public/Inventory/Details/7a37f921-f6f5-4dc9-90ba-27145b04883c>

⁴ Heritage Council of Western Australia (2008b) *Register of Heritage Places – Permanent Entry – Tanker Jetty, Esperance*. 26 August 2008.

⁵ Repealed by the *Heritage Act 2018* s.166 as at 1 July 2019

⁶ Ministerial media statement (2016) *Minister extends conservation order for jetty*, 20 December 2016. Available from: <https://www.mediastatements.wa.gov.au/Pages/Barnett/2016/12/Minister-extends-conservation-order-for-jetty.aspx>

⁷ Proponent's information about the proposal available from: <https://www.esperance.wa.gov.au/esperance-tanker-jetty> and <https://www.esperance.wa.gov.au/new-esperance-jetty>

⁸ Environmental Protection Authority (2019) *Environmental Protection Act 1986 – Section 39A(7) – Public advice*. Public advice for the proposal 'Demolition and reconstruction of the Esperance Tanker Jetty'. Available from: <http://www.epa.wa.gov.au/proposals/demolition-and-reconstruction-esperance-tanker-jetty>

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

OUTCOMES SOUGHT BY APPELLANTS

The appellants submitted that the proposal should be remitted to the EPA for formal assessment of the environmental impacts (including of the alternative of reconstruction using timber to retain the heritage values) at the level of Public Environmental Review.

GROUNDINGS OF APPEAL

The underlying basis for the appeals appears to be a concern that the existing jetty is proposed to be replaced using steel and concrete instead of timber. The appellants submitted that its replacement using timber has been considered by three marine engineers and found to be feasible, and that the EPA should have considered this alternative (to steel and concrete) to retain the heritage values.

The appellants also submitted that the proposal will have significant environmental impacts and questioned the adequacy of the information considered by the EPA given that no baseline surveys of the marine environment have been undertaken. The appellants also noted the considerable amount of public interest in the proposal.

The appellants' concerns are considered under the following appeal grounds:

- Ground 1: Insufficient information on which to base conclusion
- Ground 2: Impacts to social surroundings and heritage should be assessed
- Ground 3: Impacts to benthic communities and habitats should be assessed
- Ground 4: Impacts to marine fauna should be assessed
- Ground 5: Impacts to coastal processes should be assessed.

GROUND 1: INSUFFICIENT INFORMATION ON WHICH TO BASE CONCLUSION

The appellants submitted that the information considered by the EPA to inform its decision not to assess the proposal was inadequate, and that the EPA did not have proper regard for public interest:

- the EPA's decision was based on information provided by the proponent, and not independently verified
- the proponent's referral and additional information was insufficient to allow the EPA to form a view about the impacts of the proposal
- the proponent has not provided detailed design for community review nor met the conditions imposed by the Minister for Heritage
- the EPA's decision was not in accordance with Section 5 of its *Statement of Environmental Principles, Factors and Objectives*
- the EPA did not take into account that two-thirds of the 156 submissions received during the public comment period favoured an environmental review of the proposal
- the EPA should have considered a 2016 petition of 8,000 signatures in favour of retaining the existing jetty
- the EPA should have had regard for proposed amendments to the *Heritage Act 2018* to include provisions to protect and preserve the existing jetty as a place of cultural heritage significance.

One appellant also questioned aspects of the deconstruction methodology in relation to the experience of the contractor and the suitability and safety of the equipment proposed to be used.

Consideration

EPA's process for referred proposals

The EPA's *Environmental Impact Assessment (Part IV Divisions 1 and 2) Administrative Procedures 2016*⁹ (Administrative Procedures) sets out that:

The EPA's decision is based on the following information—

- information submitted in or with the referral (s.39A(2)(a) [of the EP Act])
- information provided in response to any requests by the EPA for further information under s.38A (s.39A(2)(a))
- information derived from the EPA's own investigations and inquiries (s.39A(2)(b)), including but not limited to, relevant public comment on the referral (see Section 2.2.1)
- the EPA's consideration of the significance of the proposal.¹⁰

The EPA's *Environmental Impact Assessment (Part IV Divisions 1 and 2) Procedures Manual*¹¹ (Procedures Manual) states:

When considering significance of the potential impacts, the EPA may have regard to various matters, including the following:

- Values, sensitivity and quality of the environment which is likely to be impacted
- Extent (intensity, duration, magnitude and geographic footprint) of the likely impacts
- Consequence of the likely impacts (or change)
- Resilience of the environment to cope with the impacts or change
- Cumulative impacts with other existing or foreseeable activities, developments and land uses
- Connections and interactions between parts of the environment to inform a holistic view of impacts to the whole environment
- Level of confidence in the prediction of impacts and the success of proposed mitigation.¹²

In addition to the above, section 5 of the EPA's *Statement of Environmental Principles, Factors and Objectives*¹³ states that the EPA may also have regard to 'public interest about the likely effect of the proposal, if implemented, on the environment'.

The EPA advised that it is obligated to make its decision about the referred proposal.

Adequacy of the information

The EPA advised that in determining not to assess the proposal it:

- considered the referral documentation, information gathered from its own investigations, inquiries with other government agencies, internal expertise and public comments
- had regard to the significance of the impacts to make a judgement that the proposal was not so significant as to warrant formal assessment.

⁹ Environmental Protection Authority (2016) *Environmental Impact Assessment (Part IV Divisions 1 and 2) Administrative Procedures 2016*. Published in the *Government Gazette* No. 223, December 2016. Government of Western Australia. Available from: <http://www.epa.wa.gov.au/administrative-procedures>

¹⁰ EPA Administrative Procedures, section 2.2.

¹¹ Environmental Protection Authority (2018) *Environmental Impact Assessment (Part IV Divisions 1 and 2) Procedures Manual*. April 2018. Government of Western Australia. Available from: <http://www.epa.wa.gov.au/procedures-manual>

¹² EPA Procedures Manual, page 11.

¹³ Environmental Protection Authority (2018) *Statement of Environmental Principles, Factors and Objectives*. June 2018. Government of Western Australia. Available from: <http://www.epa.wa.gov.au/statement-environmental-principles-factors-and-objectives>

The referral documentation¹⁴ considered by the EPA includes the following:

- referral form and cover letter submitted by the third-party referrer
- the Heritage Council's Report and Register of Heritage Place¹⁵
- the proponent's response to the EPA's request for further information
- the proponent's replacement jetty *Final Concept Design Report*, which describes a 400 m replacement jetty incorporating heritage components, interpretation nodes and improved public facilities, based on retention of the existing piles and piling between or alongside these¹⁶
- the Department of Planning, Lands and Heritage's (DPLH) letter to the proponent outlining the necessary steps for progressing the proposal, including obtaining approval under section 64 of the *Heritage of Western Australia Act 1990*¹⁷ and lifting of the Conservation Order
- the Heritage Council's letters to the proponent supporting the deconstruction methodology subject to amendments, and the detailed design drawings and interpretation elements of the replacement jetty.¹⁸

The EPA's public record¹⁹ identifies that the proposal may cause noise and vibrations, underwater noise, reduced water quality, and may have potential impacts on the health of benthic communities and habitat, marine fauna, and on cultural heritage, aesthetic and social values.

The EPA's public advice documents the EPA's recommendations regarding environmental issues, including that the proponent 'engage technical expertise to ensure that its proposed Environmental Management Plans are implemented and compliant with industry standards' and incorporate:

- management of piling impacts to marine fauna, including sea lions, dolphins and whales
- standard operating procedures for piling to have regard for seasonal use of area by marine fauna, soft start procedures, the need for observers and shut-down procedures in the event marine mammals come within shut-down zones
- specific advice from the Department of Biodiversity, Conservation and Attractions (DBCA) on the management measures to apply to this proposal
- advice from DBCA on the black-faced cormorant (*Phalacrocorax fuscescens*; listed marine species under the *Environment Protection Biodiversity Conservation Act 1999* (EPBC Act)), particularly measures to prevent the species breeding on the structures during deconstruction
- management, disposal and storage of hazardous materials to Australian Standards and consistent with material safety data sheets
- spill kits on all piling vessels and staff trained in their use
- storage and recycling/disposal of solid waste via a licensed contractor
- inspection of all non-local vessels associated with piling for introduced marine pests, and cleaning (if necessary) prior to being mobilised to Esperance.

The public advice also outlines the proponent's mitigation commitments during deconstruction and construction. These are discussed under each of the Grounds below where relevant.

¹⁴ Available from: <http://www.epa.wa.gov.au/proposals/demolition-and-reconstruction-esperance-tanker-jetty>

¹⁵ Heritage Council of Western Australia, 2008a and 2008b

¹⁶ H+H Architects (2019a) *Replacement Jetty – Shire of Esperance – Final Concept Design Report*. Report prepared for the Shire of Esperance, dated January 2019. Available from: <http://www.epa.wa.gov.au/proposals/demolition-and-reconstruction-esperance-tanker-jetty> and <https://www.esperance.wa.gov.au/new-esperance-jetty>

¹⁷ The *Heritage of Western Australia Act 1990* was repealed by the *Heritage Act 2018* (section 166) as at 1 July 2019

¹⁸ The detailed design and interpretation drawings considered by the Heritage Council are published on the proponent's website: <https://www.esperance.wa.gov.au/new-esperance-jetty>

¹⁹ Environmental Protection Authority (2019) *Public record pursuant to s39(l) of the Environmental Protection Act 1986*. Determination for the proposal 'Demolition and reconstruction of the Esperance Tanker Jetty', dated 19 June 2019. Available from: <http://www.epa.wa.gov.au/proposals/demolition-and-reconstruction-esperance-tanker-jetty>

For its part, the proponent advised that a section 64 permit was issued by the Minister for Heritage in June 2019. The conditions in the section 64 permit require the proponent to:

- deconstruct the existing jetty in a manner that reduces the risk of unnecessary movement and damage to adjoining elements, and in accordance with the advice of the Heritage Council
- salvage and retain the maximum amount of original materials for the purpose of specified interpretation works
- construct a replacement jetty that is at least 400 m in length, is built in the original alignment of the existing jetty, has piles installed on the incline (raked) that avoid the location of the original piles along the whole length of the jetty, and be completed in line with the detailed design drawings supported by the Heritage Council
- implement all interpretation elements of the replacement jetty in line with the drawings supported by the Heritage Council
- maintain public liability insurance for the deconstruction and construction activities
- complete construction of the replacement jetty and interpretation works within 24 months
- award the tender for the construction of the replacement jetty prior to the commencement of deconstruction of the existing jetty.

Level of public interest

In its public advice the EPA acknowledged the social importance of the existing jetty as expressed in the many public comments it received on the proposal, including in relation to heritage values, the structure and the historical record, amenity values and cultural associations such as recreational and commercial activities. The EPA also noted the proponent's community consultation and establishment of community representation (through the Jetty Replacement Working Group) into the development of the concept plan, and the community's input in the design of the replacement jetty.

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

- it notes the appellant's reference to the 2016 petition, and that there is still considerable public interest in the proposal
- of 156 public comments received on the proposal, 102 were in favour of a formal assessment and 54 were not
- in making a decision on whether to assess a referred proposal, its consideration is not limited to the number of public comments received but has regard for other information when determining the significance of the impacts
- it is aware that community members closely link their local identity and sense of place to the existing jetty and that the proposed demolition has been a cause of upset and community division over many years, and a formal assessment is unlikely to address these divided views
- when the level of public interest is considered in the context of the proponent's proposed efforts to mitigate the impacts to cultural heritage and improve social, amenity, recreational and commercial values, the proposal is not so significant as to warrant formal assessment.

For its part, the proponent advised that it has undertaken significant public consultation since 2011 and made information available on its website. The proponent submitted that its 2018 community survey of the replacement jetty concept design indicated approximately 80 per cent support.

The appellants' reference to proposed amendments to the *Heritage Act 2018* relates to a Parliamentary debate in 2018 in relation to whether the *Heritage Act 2018* should include specific protection for three jetties (including the Esperance Tanker Jetty). The appellants noted that while this motion was not passed, it reflected significant public concern.

Contractor qualification and experience

As outlined above, the Heritage Council supports the proponent's deconstruction methodology and the proponent has obtained a section 64 permit which includes specific requirements relating to deconstruction activities. In addition, one of the proponent's mitigation commitments (as outlined in the public advice) is a tender requirement for the contractor to implement an Environmental Management Plan to avoid and minimise the proposal's impacts.

For its part, the proponent advised that the deconstruction methodology was developed by the contractor and supported by Shire engineers and the Heritage Council, and has been planned to minimise potential impacts on the marine environment.

Conclusion

From the above, the following key points are noted:

- the EPA considered the proposal in line with the process set out in the EP Act, Administrative Procedures and Procedures Manual
- the EPA considered the referral documentation, information gathered from its own investigations, inquiries with other government agencies, internal expertise and public comments, to inform its view on the significance of the impacts.

The appellants' view that the EPA should have considered the alternative of reconstruction using timber to properly retain the heritage values of the existing jetty is noted, however noting the information before the EPA, including the proponent's advice that the Heritage Council supports the deconstruction methodology and that the proponent has obtained a section 64 permit which includes specific requirements relating to deconstruction activities, it is considered that the EPA had sufficient information before it to inform its decision as to whether to assess the proposal.

GROUND 2: IMPACTS TO SOCIAL SURROUNDINGS AND HERITAGE SHOULD BE ASSESSED

The appellants submitted that the EPA did not have adequate regard to the impacts of the proposal on social surroundings and cultural heritage:

- the description of the proposal implies that the existing jetty will be 'demolished' and 'reconstructed', and does not reflect the intention to construct a separate 'replacement' jetty
- the EPA did not have sufficient regard to the loss of cultural heritage or the duration of the impacts of the proposal through the permanent replacement of the historical jetty with a new construction
- the EPA's finding that the design for the replacement jetty is 'sensitive to the potential loss of cultural heritage' misrepresents the situation, as the proposal will result in permanent and irreversible loss of cultural heritage
- in concluding that the proposal will not have a significant impact on social surroundings, the EPA (and the Heritage Council in giving support) did not have sufficient regard for, and was inconsistent with the findings in, the Heritage Council Report and Register of Heritage Place
- the EPA's decision did not have sufficient regard for the precautionary principle²⁰ and the principle of intergenerational equity.²¹

²⁰ Section 4A of the EP Act: 'Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, decisions should be guided by (a) careful evaluation to avoid, where practicable, serious or irreversible damage to the environment; and (b) an assessment of the risk-weighted consequences of various options'.

²¹ Section 4A of the EP Act: 'The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations'.

Consideration

The objective for the EPA's environmental factor Social Surroundings is 'to protect social surroundings from significant harm'. The EPA's *Environmental Factor Guideline – Social Surroundings*²² states 'for the EPA to consider social surroundings as a factor in EIA, a proposal's ... effect on social surroundings, via its effect on the physical or biological environment, must be significant'. On the basis of the available information, the EPA concluded that the impacts of the proposal in respect to this factor are not so significant as to warrant formal assessment.

The EPA's public advice identifies that the proposal has the potential to result in impacts to social and heritage values during deconstruction and construction, and sets out the EPA's key considerations in forming its view that these impacts can be managed to meet its objective. These are summarised in Table 1.

Table 1: EPA's consideration of impacts to social and heritage values

| Potential impacts | Key considerations |
|---|--|
| <ul style="list-style-type: none"> Loss of cultural heritage associated with the original timber structure Impacts to the social values including public amenity and, recreational and commercial activities Noise to the local community Impacts to heritage values with the introduction of replacement jetty | <ul style="list-style-type: none"> The cultural heritage, amenity and social values associated with the existing jetty are highly valued by the local community of Esperance (refer to public advice for detailed list) The community's input in the design of the replacement jetty Retention of cultural heritage through construction of the heritage section and interpretation nodes paying homage to the jetty's original timber structure and cultural significance The proponent's commitment to mitigation strategies, management actions and procedural controls to avoid and minimise impacts during deconstruction and construction activities |

The proponent's mitigation commitments relevant to impacts to social surroundings and cultural heritage during deconstruction and construction, as outlined in the public advice, include:

- deconstruction and construction activities are subject to the *Environmental Protection (Noise) Regulations 1997*, which specifies works to be carried out in accordance with control of environmental noise practices set out in section 4 of AS 2436-2010 *Guide to noise and vibration control on construction, maintenance and demolition sites*, and may require the proponent to prepare a Noise Management Plan
- a tender requirement for the contractor to implement an Environmental Management Plan to avoid and minimise impacts to social surroundings.

As discussed above, the EPA considered the Heritage Council's Report and Register of Heritage Place, as well as the Heritage Council's letters to the proponent endorsing the proposed deconstruction methodology and detail design drawings for the replacement jetty. In its letters the Heritage Council advised that:

As Tanker Jetty, Esperance [is] in the State Register of Heritage Places, the proposed development has been considered in the context of its identified cultural significance and the Heritage Council resolved to advise the Shire of Esperance that the proposed detailed design and the interpretation elements are supported.²³

²² Environmental Protection Authority (2016) *Environmental Factor Guideline – Social Surroundings*. December 2016. Government of Western Australia.

²³ Heritage Council letter to proponent, dated 23 May 2019.

In response to this ground of appeal, the EPA recognised that the design of the replacement jetty has the significant challenge of preserving and communicating the heritage values of the existing jetty, and that the proposal will result in the loss of cultural heritage.

The EPA noted that the Heritage Council, as the administrator of the Register of Heritage Places, has provided support and endorsement of the proposal and has obligations under the *Heritage of Act 2018* and the Conservation Order to assess the proponent's strategies to mitigate the loss of cultural heritage. The EPA advised that it understands that the proponent has met the requirements of the heritage legislation through consultation with the Heritage Council, appointment of a heritage architect, and extensive consultation with the community and Jetty Replacement Working Group to inform the design of the replacement jetty.

The EPA advised that in its consideration of the significance of the impacts on cultural heritage, the precautionary principle and the principle of intergenerational equity, impacts can be lessened by the design aims and strategies outlined in the proponent's replacement jetty *Final Concept Design Report* (as per the referral information). The EPA also considered the design aims and strategies are satisfactory to support its decision not to formally assess the proposal on the basis of social surroundings and loss of cultural heritage. These include:

- the proponent's commitment to the Heritage Council's requirement for an interpretation strategy that is clearly integrated within the concept design and ensures the Burra Charter principles are addressed
- the interpretation of the key heritage themes within the fabric of the replacement jetty and its setting through signage, information devices, sculptural elements and creative installations
- the maintenance of the existing jetty's alignment in the design of the replacement jetty
- the inclusion of a heritage section extending a 50-75 m from the jetty head which structurally references the original timber structure of the existing jetty
- salvaging a significant proportion of the existing jetty fabric for re-use in non-structural applications of the replacement jetty
- jetty furniture and elements inspired by original elements
- inlay of original railway alignment to the full length of the replacement jetty to interpret original commercial shipping functions
- significant improvements to fishing, diving and other recreational facilities.

The EPA also noted that the community has influenced the design to incorporate contemporary elements to support future uses of the jetty for amenity, recreation and commercial uses.

For its part, the proponent advised that the approved design takes into account the cultural, historical and heritage significance through the overall design elements that have been incorporated and through the inclusion of multiple interpretation nodes along the replacement jetty.

The proponent also advised that the Heritage Impact Statements for deconstruction of the existing jetty²⁴ and construction of the replacement jetty²⁵ detail how the proposal will impact the Statement of Significance, and outline measures to minimise detrimental impacts on the heritage significance.

²⁴ H+H Architects (2019c) *Heritage Impact Statement – Tanker Jetty, Esperance*. Draft unpublished report prepared for the Shire of Esperance detailing deconstruction methodology for the existing jetty, and provided to Heritage Council for review, dated March 2019.

²⁵ H+H Architects 2019b

Conclusion

From the above, the following key points are noted:

- the EPA identified that the proposal will impact on social surroundings (including cultural and heritage values), and that these were considered in consultation with the community
- the EPA considered that these impacts can be managed to meet its environmental objective through implementation of the detailed design (as supported by the Heritage Council) and the proponent's management commitments
- the Heritage Council has given support of the deconstruction methodology (subject to amendments) and the detailed design drawings and interpretation elements of the replacement jetty, and has obligations under the heritage legislation and Conservation Order to assess the proponent's strategies to mitigate the loss of cultural heritage from the proposal
- impacts to heritage values are subject to other legislative processes, including approval from the Minister for Heritage under section 64 of the *Heritage of Western Australia Act 1990* to implement the proposal.

Based on the above, and specifically noting that the demolition and reconstruction of a new structure has been approved under the heritage legislation, it is considered that the EPA's decision not to assess the proposal in respect to these values was justified. Furthermore, noting that the Minister for Heritage recognised that the existing jetty was beyond repair, and that it is currently closed to public use, construction of a replacement structure will provide the reinstatement of a number of social values that are currently unavailable.

It follows that the EPA's conclusion that the impacts to social surroundings are not so significant as to warrant formal assessment was reasonable, and was supported by the available information. It is therefore recommended that this ground of appeal be dismissed.

GROUND 3: IMPACTS TO BENTHIC COMMUNITIES AND HABITATS SHOULD BE ASSESSED

The appellants submitted that the EPA did not adequately consider the significance of the impacts of the proposal on benthic communities and habitats, and did not have sufficient information to conclude that the following impacts do not warrant formal assessment:

- the removal of the existing jetty's decking will expose a unique and presently-shaded marine environment and associated species to ultra violet light for up to two years for the jetty portion up to 400 m from shore, and permanently for those portions of the existing jetty that are beyond 400 m or else are not within the alignment of a narrower replacement jetty
- the cutting of the existing piles to three m below lowest astronomical tide at 400 m from shore would leave stubs of about 600 millimetres (mm) that would not sustain benthic habitat growth
- the EPA's views that impacts are temporary and localised, and that benthic community habitats have the ability to recover, are incorrect on the basis that the jetty environment is unique and colonisation of marine growth on steel piles is likely to require seeding over the long-term
- the EPA did not consider the pharmacological values of marine species below the existing jetty
- baseline surveys and predictive modelling are needed to determine impacts.

Consideration

The objective for the EPA's environmental factor Benthic Communities and Habitats is 'to protect benthic communities and habitats so that biological diversity and ecological integrity are maintained'. On the basis of the available information, the EPA concluded that the impacts of the proposal in respect to this factor are not so significant as to warrant formal assessment.

The EPA's public advice identifies that the proposal has the potential to result in impacts to benthic communities and habitats during deconstruction and construction activities, and sets out the EPA's key considerations in forming its view that these impacts can be managed to meet its objective and are not so significant as to warrant formal assessment. These are summarised in Table 2.

Table 2: EPA's consideration of impacts to benthic communities and habitats

| Potential impacts | Key considerations |
|---|--|
| <ul style="list-style-type: none"> • Direct but highly localised impacts to marine flora and fauna due to degradation of benthic communities due to changes in the sheltered environmental conditions beyond 400 m up to the 512 m following deconstruction • Changes to marine environmental quality or benthic communities and habitat • Direct and indirect impacts to benthic communities and habitats from piling and construction activities and changes in marine environmental quality • Impacts to marine environmental quality from minor and temporary increased turbidity or sedimentation caused by pile driving and construction activities • Impacts to the marine environment from introduced marine pests | <ul style="list-style-type: none"> • The relatively small geographic footprint of direct impacts to benthic communities • The ability of affected benthic communities to recover within a reasonable timeframe and their likelihood to recolonise the replacement jetty • The predicted increase in sedimentation and turbidity in the vicinity of the piling activities is expected to be minor, sporadic in nature, highly localised and dissipate quickly • The potential for introduced marine pests can be mitigated through procedural controls, primarily inspection and cleaning of marine based piling equipment before it is deployed • The proponent's commitment to mitigation strategies, management actions and procedural controls to avoid and minimise impacts during deconstruction and construction activities |

The proponent's mitigation commitments relevant to impacts to benthic communities and habitat during deconstruction and construction, as outlined in the public advice, include:

- retention of the existing piles so that disturbance to the seabed and the marine biota colonised on the old jetty piles will be minimised
- the expected short duration of deconstruction (four to six months) and construction (six months), to be completed within two years (as required under the section 64 permit)
- construction methodology allows for the retention of old timber jetty piles in-situ to reduce disturbance to the seabed and marine flora and fauna
- a tender requirement for the contractor to implement an Environmental Management Plan to avoid and minimise impacts to the marine environment.

In response to this ground of appeal, the EPA considered the potential impacts of the proposal are localised and small in scale, and are unlikely to affect the ecological integrity of the local or regional marine environment. The EPA advised that:

- it recognises that the existing jetty and its surrounding environment have developed over time to support a locally diverse assemblage of marine flora and fauna species that are easily accessed by the community, and therefore have high amenity value to the local community
- the coral and fish species under the existing jetty are found both locally and regionally in the marine environment and are not threatened, and many temperate corals are likely to be sparse in the wider natural environment due to competition for limited available habitat
- publicly available information indicates that the waters of Esperance Bay are clear, relatively shallow (compared to deeper offshore waters where similar benthic communities are found) and promote good light penetration and underwater visibility

- light attenuation associated with shading from the existing jetty could be regarded as minor compared to the range of prevailing light conditions found in the adjacent natural environment, and that it is more likely that the structure, rather than the reduced light conditions, is the more defining factor in creating an environmental niche for these benthic communities to occur
- it accepts the proposed cut-off depth of existing piles past 400 m to be the most practicable solution to maximise avoidance of impacts to benthic communities whilst ensuring maritime safety given the replacement jetty will be about 112 m shorter in length than the existing jetty
- publicly available information demonstrates that artificial reefs can be constructed from a range of inert and uncontaminated materials including steel, concrete, aluminium and timber, and noted that the HMAS Swan, a steel hulled naval vessel that was intentionally sunk off Busselton in 1997, now represents an artificial reef supporting marine flora and fauna
- the timeframe for colonisation of replacement jetty piles to occur is unknown, however the replacement jetty would provide favourable conditions for colonisation from species resident on the existing jetty piles or the surrounding area
- as the species under the existing jetty are locally and regionally represented, the potential pharmacological values are not lost and remain available for future research and development.

The EPA also advised that the focus for mitigation strategies should be on retaining the timber piles as far as practicable, and recommended that the proponent should be asked to confirm that materials used for the replacement jetty are uncontaminated and that no antifouling protective coatings are applied that may prevent colonisation of the benthic communities

For its part, the proponent disagreed that the marine environment would be exposed for up to two years. The proponent advised that the proposal methodology allows for deconstruction and construction to be undertaken concurrently, which would reduce the exposure time.

The width of the replacement jetty is discussed in the proponent's Heritage Impact Statement for construction of the replacement jetty:²⁶

The width of the jetty was originally determined on the basis of the functional requirements for clearances either side of the "G" class locomotive ... The width of the jetty was variable, being 15' wide (4600mm approx.) for the main length, and splaying to 46' (14000mm approx.) at Pier 155 where the Jetty Head was located. The deck was also widened between Piers 136 & 143 to accommodate sheds (1962) giving this area a total width of 29' (8840mm approx.) It is proposed to re-create the original 15' (4600mm) width of the jetty for the full length of the Jetty ...and this allows retention of the original scale of the jetty platform, which is reconstructed at its full width. It is also proposed to introduce a widened deck at the Jetty Head ... in reference to this original design feature, albeit not the full 46' width. ...²⁷

Conclusion

From the above, the following key points are noted:

- the EPA identified that that the proposal will impact on benthic communities and habitats (including from disturbance and the removal of shading), and that these impacts will be localised and for a limited duration and will not affect threatened species
- the EPA considered that the impacts can be managed to meet its environmental objective through implementation of the proponent's deconstruction and construction methodology (as supported by the Heritage Council) and management commitments
- the EPA considered that benthic species will remain on the existing piles following deconstruction of the existing jetty, and colonise the steel piles of the replacement jetty.

²⁶ H+H Architects (2019b) *Heritage Impact Statement – Tanker Jetty, Esperance*. Draft unpublished report prepared for the Shire of Esperance detailing construction methodology for the replacement jetty, and provided to Heritage Council for review, dated April 2019.

²⁷ H+H Architects 2019b, page 7.

It is considered that the EPA's conclusion that the impacts on benthic communities and habitats can be managed and are not so significant as to warrant formal assessment was reasonable, and was supported by the available information. It is therefore recommended that this ground of appeal be dismissed.

GROUND 4: IMPACTS TO MARINE FAUNA SHOULD BE ASSESSED

The appellants submitted that the EPA did not adequately consider the significance of the impacts of the proposal on marine fauna:

- the replacement jetty constructed from steel and concrete will not provide suitable nesting habitat for the black-faced cormorant, which currently nests in the timber structures of the existing jetty and may permanently vacate the Esperance area in the absence of suitable nesting habitat
- the leafy sea-dragon (*Phycodurus eques*) and black-faced cormorant are listed species under the EPBC Act, and the EPA should have gathered further information from relevant agencies before making its decision not to assess the proposal.

Consideration

The EPA's objective for Marine Fauna is 'to protect marine fauna so that biological diversity and ecological integrity are maintained'. On the basis of the available information, the EPA concluded that the impacts of the proposal in respect to this factor are not so significant as to warrant formal assessment.

The EPA's public advice identifies that the proposal has the potential to result in impacts to marine fauna during deconstruction and construction activities, and sets out the EPA's key considerations in forming its view that these impacts can be managed to meet its objective and are not so significant as to warrant formal assessment. These are summarised in Table 3.

Table 3: EPA's consideration of impacts to marine fauna

| Potential impacts | Key considerations |
|--|--|
| <ul style="list-style-type: none"> • Direct, but highly localised impacts to marine flora and fauna due to disturbance from deconstruction activities • Impacts to marine fauna including Australian Sea Lions, dolphins and whales from underwater noise and vibration from installation of jetty piles | <ul style="list-style-type: none"> • Leafy sea-dragons have been observed in close vicinity to the jetty and artificial reef located beyond and outside the jetty canopy • While seagrass beneath the existing jetty may provide habitat for leafy sea-dragons, the existing piles covered in soft corals are not likely to represent its preferred habitat • The risk of impacts to seagrass from piling for the replacement jetty is expected to be small and highly localised, and seagrass has the capacity to recover within a reasonable timeframe • The proponent's commitment to mitigation strategies, management actions and procedural controls to avoid and minimise impacts during deconstruction and construction activities |

The proponent's mitigation commitments relevant to impacts to marine fauna during deconstruction and construction, as outlined in the public advice, include:

- seeking advice from DBCA on the black-faced cormorant, particularly on measures to prevent the species breeding on the structures during deconstruction.

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

- neither the leafy sea-dragon or black-faced cormorant are listed as a priority or threatened species in WA, however are both listed by the IUCN Red List of Threatened Species as 'least concern', and that the proposal will not result in a change to this status for these species
- the proponent may have obligations under the EPBC Act as the leafy sea-dragon and black-faced cormorant are listed under the Declaration under section 248 of the EPBC Act List of Marine Species, and the proponent should consult with the Commonwealth accordingly
- the proponent will require a permit under the *Biodiversity Conservation Act 2016* if disturbance to black-faced cormorant individuals and/or nests is proposed, and the proponent should consult with DBCA to ensure any potential impacts are appropriately managed
- the proponent has committed to specific mitigation strategies, management actions and procedural controls in an Environmental Management Plan to avoid and minimise impacts to marine fauna.

For its part, the proponent advised that retention of the existing piles will retain habitat for the leafy sea dragon, and that deconstruction will be completed during September to March outside the breeding season of black-faced cormorants and after chicks have fledged. The proponent also submitted that black-faced cormorants did not use the existing jetty as a nesting site prior to its closure to the public and the demolition of the jetty island by the Southern Ports Authority in 2015.

Conclusion

From the above, the following key points are noted:

- the EPA identified that the proposal will impact on marine fauna (including from underwater noise), and that these impacts will be localised and for a limited duration
- the EPA considered that these impacts can be managed through implementation of the proponent's management commitments
- impacts to the leafy sea-dragon or black-faced cormorant are subject to other legislative processes, including under the Commonwealth EPBC Act.

It is considered that the EPA's conclusion that the impacts on marine fauna can be managed to meet its environmental objective and are not so significant as to warrant formal assessment was reasonable, and was supported by the available information. It is therefore recommended that this ground of appeal be dismissed.

GROUND 5: IMPACTS TO COASTAL PROCESSES SHOULD BE ASSESSED

The appellants submitted that:

- deconstruction of the existing jetty would result in a substantial loss of the original profile, which could (in the long term, as the existing piles deteriorate) impact on coastal processes leading to tidal surges, erosion and beach instability
- baseline and predictive studies are needed to test water flow dynamics as a result of the proposal.

Consideration

The environmental objective for the EPA's environmental factor Coastal Processes is 'to maintain the geophysical processes that shape coastal morphology so that the environmental values of the coast are protected'. The EPA did not identify this factor to be relevant for the proposal.

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

- it previously assessed coastal processes in Esperance Bay in its assessment of the Esperance Port upgrade proposal, the subject of EPA Report 989,²⁸ which encompassed the foreshore located between Dempster Head and Bandy Creek Harbour
- based on the findings of the previous assessment, the removal of the existing jetty and construction of the replacement jetty would not impact the sediment transport dynamics that exist in Esperance Bay
- the existing jetty is located in a large body of water and is designed to provide minimal impediment to the existing hydrodynamics in order to withstand natural forces
- there would be a minimal shadow effect at and adjacent to the jetty structures but otherwise the hydrodynamics of Esperance Bay would remain the same, and there is unlikely to be any significant change in beach erosion as a result of the implementation of the proposal.

The Esperance Port upgrade proposal assessed by the EPA in 2000 involved relocation and widening of the breakwater, dredging of the harbour basin and berths and disposal of the dredge spoil behind the breakwater, and an extension to the breakwater groyne. The EPA identified Coastal Processes and Littoral Drift to be a relevant factor for that proposal, and identified that:

- beach erosion at Esperance has been an ongoing problem since at least 1914 when the first recorded beach protection works consisting of a timber revetment was installed
- the construction of the existing breakwater and dredged channel in 1962-63, together with the breakwater extension in 1973-75, have further interrupted the natural north eastward longshore movement of sand
- monitoring surveys have indicated that the Esperance Harbour breakwater intercepts approximately 25,000-28,000 m³ per annum, that the Esperance town beaches are experiencing similar rates of erosion, and that approximately 20,000-30,000 m³ of sediment is trapped per annum in the vicinity of Bandy Creek
- the configuration of the Port Authority breakwater, finger groyne and dredged channel have effectively interrupted the longshore sediment transport from west of Dempster Head into Esperance Bay.

The EPA concluded that the impacts of the Esperance Port upgrade proposal were capable of being managed to meet its environmental objective for coastal processes and littoral drift.

Conclusion

From the above, the following key points are noted:

- the EPA has previously assessed coastal processes in Esperance Bay
- the EPA considered that the proposal will have a minimal shadow effect in relation to hydrodynamics, however is unlikely to notably contribute to beach erosion and would not impact on sediment transport dynamics.

It is considered that the EPA's consideration of its previous assessment of coastal processes, and its conclusion that the proposal is unlikely to have a notable impact on hydrodynamics, beach erosion and sediment transport dynamics, was reasonable, and was supported by the available information. It is therefore recommended that this ground of appeal be dismissed.

²⁸ Environmental Protection Authority (2000) *Esperance Port upgrade of marine facilities, incorporating a change to existing environmental conditions and technical advice in support of Environmental Protection Noise Regulation 17 Approval Notice*. Bulletin 989, August 2000. Available from: <http://www.epa.wa.gov.au/proposals/iron-ore-export-through-port-esperance-s46-1327>

CONCLUSION AND RECOMMENDATION

For the reasons stated in this report, I consider that the EPA's conclusion that the environmental impacts of the proposal are not so significant as to warrant formal assessment, and can be managed to meet its objectives for the identified environmental factors, was reasonable and was supported by the available information. On this basis I consider that the EPA's decision not to assess the proposal was justified.

I recommend that the appeal be dismissed.

Emma Gaunt
APPEALS CONVENOR

Investigating Officer:
Emma Bramwell, Senior Environmental Officer