



Appeals Convenor

Environmental Protection Act 1986

REPORT TO THE MINISTER FOR ENVIRONMENT

**APPEALS IN OBJECTION TO THE DECISION OF THE DEPARTMENT OF WATER
AND ENVIRONMENTAL REGULATION TO AMEND A CLEARING PERMIT**

**CPS 4924/3: LIMESTONE EXTRACTION ON
LOT 8 ON DIAGRAM 53380, NOWERGUP**

PERMIT HOLDER: OAKFORD LAND COMPANY PTY LTD

Appeal Numbers 041.001–003 of 2019

November 2020

Appeal summary

This report relates to three appeals lodged against the decision of the Department of Water and Environmental Regulation to amend Clearing Permit CPS 4924/3 granted to Oakford Land Company Pty Ltd to clear 15.54 hectares of native vegetation in Nowergup for an extractive industry.

On 18 July 2019, DWER amended the clearing permit to extend the duration and the period in which clearing can take place by seven years, to change the offset requirements including by removing an off-site rehabilitation requirement, reducing the spatial area and increasing the monetary contribution, to change some of the record-keeping requirements, and some consequential and minor amendments to other conditions and definitions.

The appellants submitted that DWER's assessment was inadequate based on new environmental values (e.g. black cockatoo habitat, threatened ecological communities and priority flora) and the intended land use, and that the amended offset is inadequate. Other matters raised included the extension of timeframes in the amended permit, consistency with an objective of State Planning Policy 2.4 *Basic Raw Materials*, the need for an extractive industry licence and the permit holder's alleged non-compliance with a vegetation conservation notice. The appellants sought for the Minister to overturn DWER's decision to amend the clearing permit.

During the appeals process, it was identified that the relationship between the landholder and permit holder was unclear, having implications for future compliance of the permit. Given the permit holder was confirmed to differ from the landowner, a new clearing permit application is required to be submitted to DWER for a contemporary assessment in the appropriate name. During this assessment, the environmental issues as raised on appeal can be considered as part of the DWER clearing permit assessment process.

Recommendation

For the reasons stated in this report, the Appeals Convenor recommended that the appeal be allowed, and the amendment be refused.

INTRODUCTION

This report relates to appeals lodged by Chloe Harris-Brown, Urban Bushland Council WA Inc. and Roslyn Hackshaw (appellants) against the decision of the Department of Water and Environmental Regulation (DWER) to amend Clearing Permit CPS 4924/3 granted to Oakford Land Company Pty Ltd (permit holder).

Background

The clearing permit¹ was granted on 22 November 2012 (CPS 4924/1), authorising the permit holder to clear 15.54 hectares (ha) on Lot 8 on Diagram 53380, Nowergup (the original footprint is shown in Figure 1), subject to conditions including applying a duration within which clearing can take place to 14 December 2017, dieback and weed control, staged clearing to manage wind erosion, revegetation within the clearing footprint following quarry closure, and an offsets package comprising funds for the acquisition of 95 ha of Carnaby's cockatoo (*Calyptorhynchus latirostris*, Endangered) foraging habitat within the Shire of Gingin and the rehabilitation of 8 ha of degraded vegetation.

Figure 1: Location and extent of the clearing footprint (cross-hatched yellow)



(Source: Strategen (2012) Lot 8 Wattle Avenue Rehabilitation Plan)

Section 51K of the EP Act provides for the amendment of a permit for specified reasons, including 'removing or varying any condition to which the clearing permit is subject' and 'extending the duration of the clearing permit'.

On 31 January 2013, the clearing permit was amended (CPS 4924/2), making administrative amendments to clarify the offset requirements.

¹ Clearing permit versions, decision reports and supporting information available at: <ftp://ftp.dwer.wa.gov.au/permit/4924/>

On 10 July 2018, the permit holder applied to amend the clearing permit to extend the timeframe within which clearing can occur and to allow for the option of a monetary contribution offset.

DWER advised that the amendment application was advertised for a 21 day public comment period and one submission was received, which raised concerns regarding impacts on biodiversity, conservation significant species and ecological communities, and nearby conservation areas. DWER advised that these matters were considered in the assessment.

On 18 July 2019, the clearing permit was further amended (CPS 4924/3; amended permit) to:

- extend the overall clearing permit duration from 14 December 2022 to 14 December 2029;
- extend the duration within which clearing can take place from 14 December 2017 to 8 June 2024;
- remove the rehabilitation component of the offsets package;
- change the land acquisition component of the offsets package by:
 - adding Baudin's cockatoo (*Calyptorhynchus baudinii*, endangered) and at least 1.2 ha of the Commonwealth-listed threatened ecological community (TEC) 'Banksia Woodlands of the Swan Coastal Plain' (Banksia Woodlands TEC)
 - reducing the spatial area from 95 ha to 63.97 ha by applying a mitigation credit for the proposed onsite revegetation, and (based on the reduced spatial area) recalculating the monetary contribution as \$241,167 to account for increases in land value
 - providing for acquired land to be directly ceded to the Department of Biodiversity, Conservation and Attractions (DBCA)
 - removing the advice note stating that the offset site is to be located within the Shire of Gingin; and;
- make some consequential changes and minor amendments to other conditions and definitions.

The appellants submit that the amendment to the clearing permit should not have been granted.

Ownership of Lot 8

In January 2018, PMR Quarries Pty Ltd (trading as WA Limestone) became the registered owner of Lot 8. As part of the appeal investigation, WA Limestone provided a copy of a letter from the permit holder to DWER which stated:

This letter confirms that Oakford Land Company Pty Ltd authorises PMR Quarries Pty Ltd (trading as WA Limestone) to act on its behalf for the purpose of amending and implementing Clearing Permit CPS 4924/2, as issued by the Department of Water and Environmental Regulation.

All expenses associated with meeting the conditions outlined on this permit will be the responsibility of PMR Quarries Pty Ltd.²

Section 51N of the EP Act provides for the transfer of an 'area' permit on change of land ownership. However, there is no provision for the transfer of a 'purpose' permit. In this regard it is assumed that a 'purpose' permit, such as the amended permit in this case, cannot be transferred.

Section 51E of the EP Act provides that an application for a purpose permit can only be made 'by the person by or on whose behalf the clearing is to be done'.

Advice was sought from DWER on this issue in August 2020, including whether the landowner can be regarded as acting on behalf of the permit holder in undertaking clearing under the purpose permit.

In reply, DWER advised:

² Oakford Land Company, Letter to DWER, 1 June 2018.

... that it has no evidence indicating that the Permit Holder [i.e. Oakford Land Company] ... has retained any formal involvement or interest in the ongoing mining operation on the property. Section 51E of the *Environmental Protection Act 1986* allows applications for a Purpose Permit to be made by a person who is not the landowner and on whose behalf the clearing will be undertaken. However, on reflection, the Department acknowledges that the landowner in this case [i.e. PMR Quarries] is undertaking the clearing for its own purposes and not on behalf of the Permit Holder. It is reasonable to conclude that the landowner will be in the best position to ensure compliance with the requirements of the clearing permit, including long term revegetation requirements. The Department therefore, accepts that it would be preferable for the clearing permit to have been issued in the name of the landowner, and recommends that the Minister overturns the Department's decision to amend the permit.³

PMR Quarries (as the owner of the land) was given an opportunity to respond to the Department's position. In response, it advised that condition 5 allows the permit holder (being Oakford) to authorise persons to clear native vegetation for the purposes of the permit subject to compliance with the conditions of the permit and approval from the permit holder. As Oakford authorised PMR to clear native vegetation and, PMR would comply with the other conditions, PMR could continue to act on the permit. It further stated:

...[T]his justification for overturning the Department's decision that ... the landowner will be in the best position to ensure compliance with the permit is practically and legally irrelevant as [PMR] is the landowner and by the indemnity given to Oakford is for all intents and purposes bound by the conditions of the permit. The Department has not explained how [PMR] would be further bound as the landowner and permit holder rather than as landowner who indemnifies the permit holder and there is no legal basis that [PMR] cannot use the existing permit.

While the response of PMR is noted, the Department's advice is that there is uncertainty as to the application of the permit to the landowner. On this basis, it is recommended that the appeals be allowed and that the Minister reverses the amendments made to the permit on 18 July 2019. If the Minister agrees to this recommendation, the permit will revert to the form it was before that date, with the result that clearing could not commence after 14 December 2017.

This decision does not preclude PMR from applying for a new permit, and in that regard, DWER indicated that in light of the time elapsed since the appeal was commenced, a decision on any new application would be dealt with expeditiously.

Taking the above into account, it is considered unnecessary to address the substantive issues raised by the appeals regarding the identification of environmental values and the offsets package.

CONCLUSION AND RECOMMENDATION

For the reasons stated above, it is recommended that the appeals are allowed, and the amendment be reversed in full.

Emma Gaunt
APPEALS CONVENOR

Investigating Officers:

Jean-Pierre Clement, Deputy Appeals Convenor (2020)
Carly Bishop, A/Senior Appeals Officer (2020)
Emma Bramwell, Senior Environmental Officer (2019-May 2020)

³ DWER, Letter to Appeals Convenor, 23 September 2020.