



Appeals Convenor
Environmental Protection Act 1986

**REPORT TO THE
MINISTER FOR ENVIRONMENT**

**APPEAL IN OBJECTION TO THE CONTENT OF, AND RECOMMENDATIONS IN,
AN ENVIRONMENTAL PROTECTION AUTHORITY REPORT**

EPA REPORT 1688: LAKE WELLS POTASH PROJECT

PROPONENT: AUSTRALIAN POTASH LIMITED

Appeal Number 047 of 2020

January 2021

Appeal Summary

This report relates to an appeal lodged in objection to the report and recommendations of the Environmental Protection Authority (EPA) for the proposed Lake Wells Potash Project (Report 1688), 160 kilometres north-northeast of Laverton in Western Australia by Australian Potash Limited (proponent).

The proposal is to clear and disturb up to 3,220 hectares (ha) within a 13,951 ha development envelope to produce sulphate of potash through the abstraction, evaporation and processing of potassium and sulphate rich brines.

The appellant sought for the Minister to remit the proposal to the EPA and direct the EPA to further assess the proposal on the basis that insufficient consultation had occurred with the appellant and that the proponent's heritage surveys used to assess the proposal were inadequate.

Having considered the information provided during the appeal investigation, it is concluded that the EPA appropriately relied on multiple sources of information to inform its assessment. It is also considered that the EPA's view that consultation was adequate for its assessment is reasonable and supported by the available evidence, and that any residual uncertainty can be managed through the development and implementation of the Cultural Heritage Management Plan (CHMP).

However, for the reasons outlined in the report it is recommended that condition 9 be amended to require the CHMP to be independently reviewed to allow for an independent evaluation of the suitability of pre-clearance survey methodology and the framework for consultation with the appropriate knowledge-holders and stakeholders, including but not limited to the appellant.

Recommendation

It is recommended that the Minister allows the appeal in part to the extent that condition 9 is amended to require:

- the Cultural Heritage Management Plan be reviewed by an independent person determined by the CEO on advice of the appropriate knowledge-holders and the proponent.

The final wording of recommended changes to the conditions should be determined by the Minister in consultation with relevant decision-making authorities under section 45 of the *Environmental Protection Act 1986*.

INTRODUCTION

This report relates to an appeal by Mr Kado Muir (appellant) against the Environmental Protection Authority's (EPA) report and recommendations on the Lake Wells Potash Project (the proposal) located approximately 160 kilometres north-northeast of Laverton. A Native Title claim under the *Native Title Act 1993* was registered in August 2018¹ and has yet to be determined.

Australian Potash Limited proposes to clear and disturb up to 3,220 hectares (ha) within a 13,951 ha development envelope to produce sulphate of potash through the abstraction, evaporation and processing of potassium and sulphate rich brines. The proposal includes development of a brine borefield, solar evaporation ponds, harvest ponds, sulphate of potash processing plant, associated infrastructure, and transport of product by truck to the Port of Geraldton.

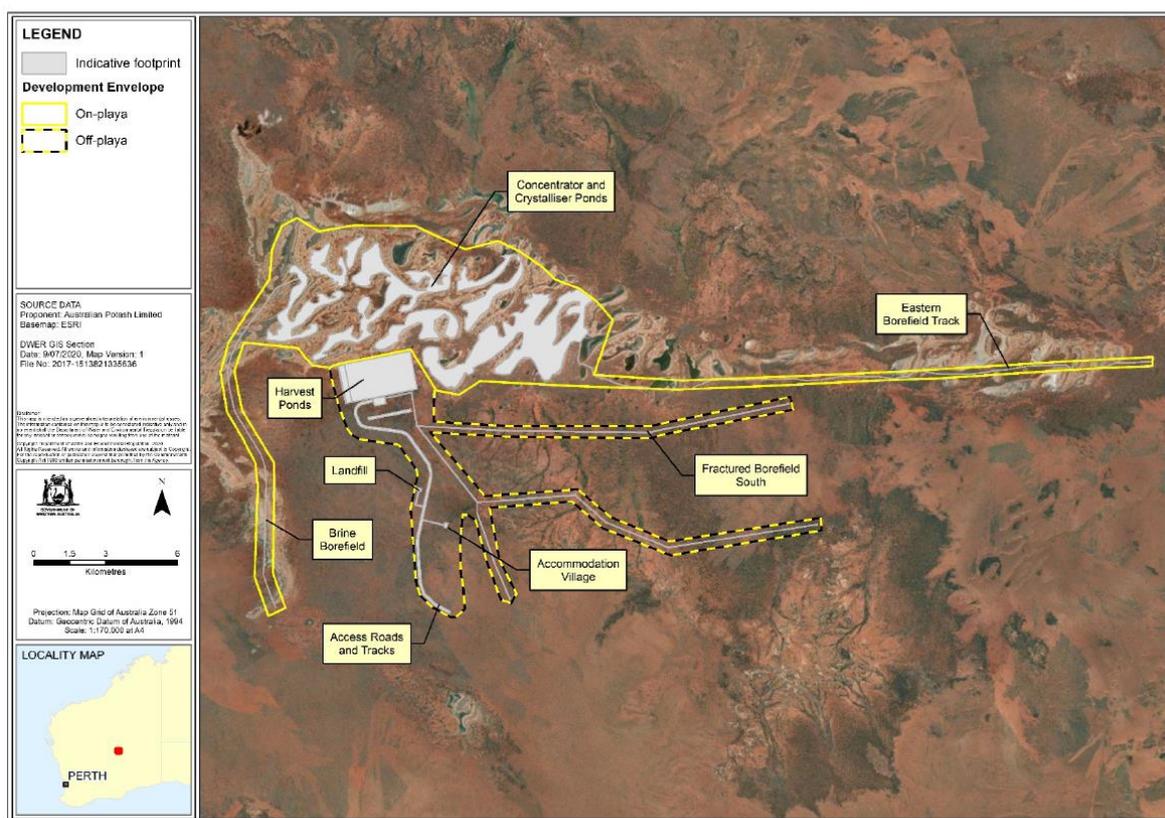


Figure 1: Development envelope and indicative footprint².

Background

The proponent referred the proposal to the EPA on 21 December 2017. The proposal was advertised for a seven-day public comment as part of the referral process and two public comments were received. On 30 January 2018, the EPA decided to assess the proposal and set the level of assessment at Environmental Review – No Public Review.

On 3 May 2018 and 10 July 2020, the proponent made applications to change the proposal during assessment by reducing the overall development envelope from 27,687 to 13 951 ha

¹ Waturta Native Title application details [WC2018/012](#)

² EPA Report and Recommendations (September 2020). Report 1688. Lake Wells Potash Project.

and reducing the maximum abstraction rate from the brine aquifer and from the process/potable bore field. The changes were approved under s. 43A of the *Environmental Protection Act 1986* (EP Act).

The EPA released its report and recommendation that the proposal may be implemented, with conditions relating to the key environmental factors Flora and Vegetation, Terrestrial Fauna, Inland Waters, Subterranean Fauna, Social Surroundings on 7 September 2020. It is against this report that the appeal was received.

The EPA's assessment considered the supporting information provided by the proponent³, matters raised in public submissions, comments received from stakeholders and advice from the Department of Planning, Lands and Heritage (DPLH).⁵

Interaction between Part IV of the EP Act 1986 and s. 18 of the *Aboriginal Heritage Act 1972*

The EPA's statutory objective is to use its best endeavours to protect the environment and to prevent, control and abate pollution and environmental harm.

Section 3(1) of the EP Act defines the term "environment" as:

living things, their physical, biological and social surroundings, and interactions between all of these.

Social surroundings are further defined in section 3(2) of the EP Act:

For the purposes of the definition of "environment" in subsection (1), the social surroundings of man are his aesthetic, cultural, economic and social surroundings to the extent that those surroundings directly affect or are affected by his physical or biological surroundings.

Therefore, the EPA has a statutory obligation to consider Aboriginal (and European) cultural heritage matters as part of its assessment process.

The *Aboriginal Heritage Act 1972* (AH Act) provides for the preservation of Aboriginal heritage sites in Western Australia. The AH Act requires the reporting of Aboriginal sites to the Registrar, and it is an offence to interfere with a registered site unless otherwise authorised under the AH Act. It is also an offence to interfere with any Aboriginal site knowingly or where it would be reasonable to know, regardless of whether it is registered.

When assessing proposals, the EPA considers Aboriginal cultural heritage through the lens of its Social Surroundings factor guidance.⁶ The objective of the Social Surroundings factor is to protect social surroundings from significant harm. Considerations include:

- cases where actual physical protection of the environment is required to protect sites of heritage significance; and
- when matters of Aboriginal cultural associations, including traditional customs, directly linked to the physical or biological aspects of the environment are considered significant. This may include, for example, traditional hunting and gathering activities for native fauna and flora as bush tucker.

If Aboriginal heritage is a relevant environmental factor in the context of a proposal being assessed under the EP Act, the EPA may seek to satisfy itself that the environmental aspects of the issue will be fully addressed through other processes, such as under the AH Act.

³ [Lake Wells Potash Environmental Review documentation June 2020.](#)

⁵ Advice from DPLH to EPA, 17 July 2020.

⁶ EPA Environmental Factor Guideline: Social Surroundings 2016

OVERVIEW OF APPEAL PROCESS

In accordance with the EP Act, for an appeal in respect to an EPA report, two reports relating to the matters raised on appeal are required for the Minister for Environment to determine the outcome of the appeal:

- a report from the EPA on the appeal, as required by section 106(1); and
- a report from the Appeals Convenor, as required by section 109(3).

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

To properly advise the Minister, the Appeals Convenor investigated the matters raised on appeal.

The investigation included review of and regard for the:

- matters raised in the appeal submitted by the appellant;
- response to the appeal provided by the proponent on 9 October 2020;
- report on the appeal from the EPA received on 30 November 2020;
- response to the EPA's report on the appeal provided by the appellant on 8 December 2020;
- response to the EPA's report on the appeal provided by the proponent on 11 December 2020;
- a meeting with the appellant on 27 November 2020;
- meetings with the proponent on 11 November and 3 December 2020;
- advice received from DPLH on 22 December 2020; and
- review of relevant information, policy and guidance as considered necessary.

The environmental appeals process is a merits-based process. For appeals in relation to an EPA report and recommendations, the Appeals Convenor normally considers the environmental merits of the assessment by the EPA, based on objectives as set by the EPA as well as other environmental factors. The appeals process considers environmental significance, relevance of factors, additional information not considered by the EPA, technical errors, and attainment of policy objectives. Where the development has been the subject of previous EPA assessments, those assessments and any subsequent Ministerial appeal decisions also need to be considered.

OUTCOME SOUGHT BY APPELLANT

The appellant requested that the Minister remit the proposal to the EPA and direct the EPA to further assess the proposal pursuant to s.43(1)(b) of the EP Act to ensure the impacts of the proposal on Social Surroundings are fully and adequately assessed.

GROUNDS OF APPEAL

The appellant raised three grounds of appeal:

1. The assessment was conducted without sufficient consultation with the appellant and Waturta Applicant group;
2. Incomplete and inadequate assessment of the impacts of the proposal on Social Surroundings (Aboriginal Heritage); and
3. The EPA did not apply the precautionary principle to Social Surroundings.

GROUND ONE: INADEQUATE CONSULTATION WITH THE APPELLANT

The appellant submitted that there has been insufficient consultation with the appellant for the proponent and the EPA to be able to understand the significance of the social surroundings in relation to Aboriginal cultural associations, including traditional Aboriginal customs. Specifically:

- the proponent did not adequately engage with the Waturta Applicant during the EPA assessment process, despite active efforts by the Waturta Applicant to engage with the proponent;
- the heritage surveys conducted in September 2019 did not include participants on behalf of the Waturta Applicant and the Waturta claimant with the requisite knowledge about Aboriginal heritage, further the results of the survey are unknown and cannot be relied upon in the context of the EPA's assessment; and
- the heritage surveys conducted by the proponent are inadequate and biased.

Consequently, the appellant is of the view that the impacts of the proposal on important sites of cultural significance to the Waturta have not been assessed and the EPA should not have made a recommendation until additional surveys had been undertaken.

The appellant acknowledged that the EPA's recommended environmental conditions requires the proponent to prepare and implement a Cultural Heritage Management Plan (CHMP) (condition 9).⁷ The appellant submitted that the condition should require the proponent to engage with the Waturta Applicant group directly to develop the CHMP rather than the Waturta Applicant group being a 'stakeholder' to be consulted. The appellant also submitted that the surveys should be undertaken by a consultant agreed by the proponent and the Waturta Applicant group.

Consideration

In its assessment of the proposal, the EPA advised that it considered the adequacy of consultation and the heritage surveys. The EPA⁸ noted in its assessment report that the proponent conducted ethnographic heritage surveys within and outside of the development envelopes in accordance with the requirements of the EPA endorsed Environmental Scoping Document. Some of these surveys included participants from the Waturta Applicant group, and other local knowledge-holders. DPLH advised the EPA that the participants in the heritage surveys included known knowledge-holders for the region.

During its assessment, the EPA advised that it invited and received submissions from the Waturta Applicant group. In the assessment report, the EPA notes that:

The claimants have indicated that there is potential for significant sites to occur in the development envelopes that have not been identified in the proponent's ethnographic heritage surveys. The proponent has committed to continuing consultation with relevant stakeholders, including the Waturta claimant, during construction and throughout the life of the proposal.

In response to this ground of appeal, the EPA⁹ advised that the following matters were considered in its assessment:

- The Waturta Applicant's submission provided during the assessment, claiming that the consultation conducted by the proponent was inadequate.
- The proponent's response to the submission, which indicated that two meetings were held between the proponent and the Waturta Applicant, and that more than 130 emails were exchanged between the proponent and the Waturta Applicant's representative, and two

⁷ Appeal submission 21 September 2020, para. 58.

⁸ EPA [Report and Recommendations 1688](#) Lake Wells Potash Project.

⁹ EPA response to appeal, 27 November 2020.

invitations were issued for the members of the applicant group to participate in a September 2019 heritage survey.

- The proponent's heritage surveys and associated reports, which were conducted by an experienced consultant (it is noted that the appellant participated in at least one of the submitted heritage surveys).
- Advice received from DPLH indicating that the participants in the proponent's surveys are considered to be appropriate knowledge-holders for the proposal area.
- Direct consultation by EPA Services with a member of the Waturta Applicant, and the legal representative of the Waturta Applicant, including emails and phone calls.
- The EPA's consultation with the Waturta Applicant, and other local knowledge-holders was detailed in Section 3 of Report 1688. In addition, the proponent's consultation with the Waturta Applicant and other stakeholders were detailed on page 31 of the proponent's Environmental Review Document.

Given the above, the EPA remained of the view that both the EPA and the proponent had adequately demonstrated reasonable efforts had been made to consult with the Waturta Applicant group and other appropriate knowledge-holders.

In this regard, the appellant's response to the EPA's advice is noted:

Australian Potash has asserted that a Waturta claim group member (that is, a person from the broader group on whose behalf the Waturta Applicant has brought the native title claim) participated in a survey commissioned by Australian Potash. However if that is the case, that person did not participate on behalf of, or with the knowledge of, the broader Waturta claim group and/or the Waturta Applicant, the latter being the only persons with any authority to make decisions on behalf of the claim group pursuant to s 62A of the Native Title Act.

The EPA considered that the development of the CHMP, required by recommended condition 9, provides a framework for consultation with relevant stakeholders, including the appellant, ensuring there is opportunity for ongoing consultation during the life of the proposal.

The EPA advised that the CHMP is required to be finalised and approved by the Chief Executive Officer (CEO) of the Department of Water and Environmental Regulation (DWER) prior to implementation of the proposal and while not stated in condition 9 itself, the EPA advised that the Waturta Applicant group would be consulted by DWER as part of the CEO considering the CHMP plan for approval.

Condition 9-1 relevantly provides that the objective of the CHMP is to

- (1) avoid where possible and minimise impacts to heritage sites and cultural values.

Condition 9-2 provides the details of what is to be included in the CHMP to demonstrate how the objective set in condition 9-1 will be met and includes:

- (1) the methodology and scope of pre-clearance surveys to be conducted prior to disturbance in areas identified to be at high risk of including heritage sites or other cultural values;
- (2) management actions to be undertaken where sites or cultural values are identified, to meet the objective of condition 9-1(1);
- (3) a framework for consultation with relevant stakeholders during the life of the proposal, including the timing of consultation relative to the stages of the project, the form of consultation for each stage identified, information to be provided before and during consultation, including spatial data and maps, and actions to be implemented in the event that consultation cannot be conducted due to the inability to schedule consultation events. In the event that all attempts to schedule consultation are unsuccessful, the proponent must continue to implement the plan; and

- (4) contingency actions to be implemented in the event that management actions required by 9-2(2) have not been implemented, including but not limited to consultation with relevant agencies.

Notwithstanding its advice that the Waturta Applicant group would be consulted by DWER as part of its consideration of the CHMP, in response to the appeal, the EPA acknowledged that it does not have access to expert peer review evaluation of Heritage Surveys and advised that there are measures which could be taken to increase the confidence in heritage surveys and the heritage management for the proposal. Specifically, the EPA recommended five amendments to condition 9 as outlined in Table 1¹⁰.

Table 1: EPA proposed amendments to condition 9 (Cultural Heritage Management)

Amendment number	EPA proposed amendment
1	The proponent consults specifically (though not exclusively) with the Waturta Applicant during the construction and operations of the proposal required under condition 9(2)(3)
2	The proponent obtains an independent peer review on the methodology of the existing heritage surveys, with the results of this peer review to inform the methodology of the pre-clearance surveys to be conducted in accordance with condition 9
3	The pre-clearance surveys conducted in accordance with condition 9 include ethnographic as well as archaeological surveys
4	The proponent obtains an independent peer review of all pre-clearance surveys conducted for the proposal, to confirm the adequacy of the surveys and any management actions arising from the surveys, prior to disturbance in the surveyed area
5	The Waturta Applicant be named as a relevant stakeholder in the preparation of, and approval stage, of the CHMP (Cultural Heritage Management Plan)

In response to the EPA's appeal report, while the appellant supported the EPA's suggestion that the proponent specifically engage with the Waturta Applicant, the appellant reiterated that further surveys are required and that surveys should be done by an independent consultant, agreed to by both parties.¹¹

In its response, the proponent was of the view that the amendments were generally unnecessary and in the case of amendments 3 and 4 unjustified.¹²

Noting the competing views about the adequacy of consultation and the adequacy and necessity of the proposed condition amendments, as of part of the appeals investigation, advice was sought from DPLH.¹³ DPLH advised it:

...does not believe that a Cultural Heritage Management Plan (CHMP) is required in this instance as the Proponent has previously modified its proposal to avoid places of importance and significance as identified by key stakeholders and avoid any Aboriginal Sites recognised under the AHA. A CHMP would be recommended if it had been determined that there were Aboriginal sites within the footprint.

¹⁰ EPA response to appeal, 27 November 2020.

¹¹ Appellant response to EPA s106 report, 8 December 2020.

¹² Proponent response to EPA s106 report, 11 December 2020.

¹³ DPLH advice to OAC, 22 December 2020.

Based on the evidence available, however, the proponent has been diligent during the planning of the proposal and impacts have been avoided to the important Aboriginal heritage area, being the creek.

...

Pre-clearance surveys are also unnecessary as multiple heritage surveys have already been conducted over the footprint with key stakeholders, including the appellant, either expressly communicating the absence of Aboriginal sites or failing to provide any information about Aboriginal heritage.

The key stakeholders, being the Waturta Native Title claim group and senior lawmen within the Western Desert Cultural Block, have all participated in multiple surveys over the land, indicating that the footprint of the proposal does not impact on any places of cultural importance or significance.

Conclusion

Having regard to the information provided in response to this ground of appeal, it is considered that the EPA appropriately relied on multiple sources of information to inform its assessment. It is also considered that the EPA's view that consultation was adequate for its assessment is reasonable and was supported by the available evidence.

While DPLH's advice that a CHMP is not required for the proposal is noted, the EPA's advice that the CHMP, amongst other things, provides a framework for ongoing consultation, including with the appellant is also considered reasonable.

Noting the competing views as to the level of detail required in condition 9-2 to ensure that the objective specified by condition 9-1 can be met and the EPA's advice that the condition could be improved and that it does not have access to expert peer review evaluation of heritage surveys, it is considered appropriate for condition 9 to be amended.

Specifically, it is recommended condition 9 be amended to include a requirement for the CHMP to be independently reviewed and that the independent reviewer should be determined by the CEO on advice of the appropriate knowledge-holders and the proponent. Inherent in the review would be an evaluation of the suitability of pre-clearance survey methodology and the framework for consultation with the appropriate knowledge-holders and stakeholders, including but not limited to the appellant.

GROUND TWO: INCOMPLETE AND INADEQUATE ASSESSMENT OF THE IMPACTS ON SOCIAL SURROUNDINGS

The appellant¹⁴ submitted that the EPA placed excessive reliance on the findings of the Aboriginal Cultural Materials Committee (ACMC) pursuant to the AH Act which has resulted in incomplete and inadequate assessment of the environmental factor Social Surroundings. The appellant contended that the environmental impact assessment (EIA) process should consider a broader range of values than areas deemed to meet the criteria of sites under the AH Act.

The appellant submitted that three sites (Marlutja, Witan and Kurumin) are significant cultural heritage sites. The appellant advised that the ACMC had determined that the three sites do not meet the criteria to be a site registered under the AH Act. It is noted the appellant expressed some concerns about the ACMC process and is of the view it should not be relied upon for the purpose of EIA.

¹⁴ Appeal submission 21 September 2020.

As part of the initial appeal submission, the appellant indicated that a consultant had been engaged to conduct a social impact assessment and sought for the Appeals Convenor to delay finalising her report to the Minister until such time as a report had been prepared and submitted. The appellant asserted that the report was being prepared to demonstrate the EPA's report is not an adequate assessment of the proposal and ensure that the impacts of the proposal on social surrounds are fully and adequately assessed.

Consideration

In its assessment of the proposal, the EPA¹⁵ reported that the heritage surveys did not identify any heritage or cultural sites in the development envelopes. Some sites were identified to the north of the development envelopes, including Yilli Yilli creek. The EPA noted the proposal will not directly or indirectly impact these heritage sites or the creek.

The EPA reported that three sites (Marlutja, Witan and Kurumin), which intersect the development envelope, had been submitted for registration, and determined by the ACMC to not meet the criteria to be registered as sites under the AH Act.¹⁶ In its response to the appeal, the EPA advised that these sites were part of its assessment of the proposal and were considered in conjunction with the submission¹⁷ from the Waturta Applicant group.

In its assessment, the EPA¹⁸ considered that:

...assessment under the EP Act may provide additional or different protection to the AH Act, where heritage sites or other cultural values are confirmed to exist, including protection from indirect impacts to the physical environment, and impacts to amenity including access to cultural areas. Where there is uncertainty regarding the nature of sites, the EPA must defer to the requirements of the AH Act, and the determinations of the Aboriginal Cultural Materials Committee.

In response to the appellant's claim that the EPA placed an excessive reliance on the ACMC findings regarding the significance of Marlutja, Witan and Kurumin, the EPA¹⁹ advised that:

...while it considered that the findings of the ACMC were a relevant consideration in its assessment, they were not relied on in a determinative way, but rather were considered in conjunction with other advice and evidence.

In particular, in its response to the appeal, the EPA acknowledged that its statement that it must defer to the AH Act and determinations of the ACMC, could have undermined confidence in its assessment, it stated that it did not actually defer to the ACMC determination, rather it considered the following information in its assessment and recommended condition 9 to address any ongoing uncertainty:²⁰

- the reports provided by the proponent indicating that heritage surveys did not identify the existence of any cultural heritage sites;
- advice from DPLH that the heritage surveys included appropriate knowledge-holders for the area;
- advice received from the Director General of the DPLH which indicated that impacts to Aboriginal heritage can be managed through the AH Act;
- advice received from DPLH that the ACMC had determined that the three sites were not sites to which the AH Act applies; and

¹⁵ EPA [Report and Recommendations 1688](#) Lake Wells Potash Project.

¹⁶ [ACMC meeting 12 May 2020](#).

¹⁷ Waturta claimant submission to EPA, 16 December 2019.

¹⁸ EPA [Report and Recommendations 1688](#) Lake Wells Potash Project.

¹⁹ EPA response to appeal, 27 November 2020.

²⁰ EPA response to appeal, 27 November 2020

- the absence of any other identified sites in the proposal area.

With respect to consideration of broader heritage values, the EPA advised that, consistent with the *EPA Environmental Factor Guideline – Social Surrounds*, the scope of its assessment was broader than s.5 of the AH Act.

The EPA also responded that the EIA process included direct consultation with the Waturta Applicant group to identify any heritage values in the project area and that no potential Aboriginal heritage values beyond the three sites referred to in the appeal were identified during the consultation or at any other stage of the process, except for plant gathering at the site Kurumin.

The EPA advised that the submission on the proposal by the Waturta Applicant group only identified the three sites, Marlutja, Witan, and Kurumin, as having heritage values in the proposal area and did not discuss any other uses or values associated with the area, such as hunting, access, or storylines, that are not associated with specific sites. The EPA noted that Marlutja and Witan were not associated with any cultural values other than their intrinsic values as heritage sites. The gathering of the plant Kurumin is referred to in the submission in association with the site Kurumin. The EPA noted that, this activity was not referred to in relation to the wider project area and was not identified as a specific value for the project area.

During the appeal investigation further advice was sought from DPLH regarding the EPA's consideration of the ACMC findings for Marlutja, Witan and Kurumin. DPLH²¹ advised that:

It is perfectly reasonable and appropriate for the EPA to follow recommendations of the ACMC as this is the statutory body established under section 38 of the *Aboriginal Heritage Act 1972* to form an opinion as to whether there are any Aboriginal sites on the land the subject of a statutory application (section 18) as well as to evaluate the importance and significance of any such site. The ACMC made its decisions based on information provided by senior law holders of the area, Waturta Native Title claimants as well as the appellant himself.

In relation to the report that the appellant advised would be provided during the appeal investigation, a new heritage survey²² was submitted to the Appeals Convenor in December 2020. The 2-day heritage survey undertaken in November 2020 covered a small portion of the proposal's development footprint and proposes to list locations of previously un-documented ethnographic sites, archaeological features and cultural objects.

Consistent with the obligation under s.15 of the AH Act, to report the discovery of heritage places and objects to the Registrar, the Appeals Convenor submitted the heritage survey to the Registrar of Aboriginal Sites for consideration. This is considered the appropriate mechanism to evaluate the importance of the sites. The extent to which it is relevant to the proponent's obligations under the AH Act more broadly, is appropriately a matter for the Registrar and the proponent.

In any event, the EPA's assessment and response to this ground of appeal, acknowledged that there is a potential for additional values to be identified during pre-clearance surveys. The potential for broader values to exist in the project area was considered during the assessment of the proposal, and it was determined that some risk remained that additional values could exist.

Given this, the EPA's recommended condition 9 addresses this risk through specifying that the proponent must avoid, where possible, and minimise impacts to heritage sites and cultural values and requiring the proponent to prepare a CHMP to ensure this objective is met.

²¹ DPLH advice to OAC, 22 December 2020.

²² Heritage Fieldwork Report by SJC Heritage Consultants on behalf of the appellant, 11 December 2020.

Conclusion

Given the above, it is considered the EPA's assessment was consistent with its *Environmental Factor Guideline – Social Surroundings*. Therefore, it is recommended that this ground of appeal be dismissed.

While the appeals process considers environmental significance, relevance of factors, additional information not considered by the EPA and technical errors; it is outside the function of the Appeals Convenor to re-assess the decisions of the ACMC. It is the responsibility of the ACMC, as the statutory body established under the AH Act, to form an opinion as to whether there are any Aboriginal sites on the land the subject of a statutory application, as well as to evaluate the importance and significance of any such site.

GROUND THREE: APPLICATION OF THE PRECAUTIONARY PRINCIPLE TO SOCIAL SURROUNDINGS

The appellant contends that the EPA should have applied the precautionary principle to Social Surroundings, given the alleged uncertainty regarding heritage values of the proposal area.

Specifically, the appellant submitted that:

- the EPA report stated that where there is uncertainty regarding the nature of sites, the EPA defers to the requirements of the AH Act, and the determinations of the ACMC;
- in the presence of uncertainty regarding the nature of the sites, the appellant considers that the EPA should have invoked the precautionary principle; and
- the proposal cannot be assessed without additional survey/assessment of the proposal area, undertaken with the Waturta Applicant group, to extensively map and consider the impact of the project on Waturta heritage.

Consideration

Section 4A of the EP Act describes the 'precautionary principle' as:

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.

As discussed in appeal grounds 1 and 2, in its assessment the EPA considered a range of relevant documentation, and consulted with the Waturta Applicant, other appropriate knowledge-holders, the proponent and DPLH. The EPA concluded that any uncertainty regarding heritage within the proposal area would be managed through the CHMP and pre-clearance surveys and the AH Act.

In response to this ground of appeal and as discussed in ground 1, the EPA²³ advised that it considered the potential for heritage sites and other cultural values to exist in the proposal area during its assessment and determined that no significant values were threatened by the proposal.

Considering the above, the EPA²⁴ concluded that there were no threats of serious or irreversible harm to heritage sites or other cultural values that are evident from the proposal. The EPA confirmed that this conclusion was based on multiple lines of investigation and that it did not therefore consider the precautionary principle applied in this case.

However, the EPA noted that pre-clearance surveys have yet to be undertaken, and that additional Aboriginal heritage may be identified during these surveys. In addition, under

²³ EPA [Report and Recommendations 1688](#) Lake Wells Potash Project.

²⁴ EPA response to appeal, 27 November 2020.

condition 9 the CHMP is required to include management actions to be undertaken where sites or cultural values are identified to meet the objective of 'avoid, where possible, and minimise impacts to heritage sites and cultural values'.

Conclusion

Given the above, the EPA's decision regarding the precautionary principle was justified. Nevertheless, inclusion and amendment of condition 9 provides mitigation against potential impacts to Aboriginal heritage that may be identified during pre-clearance surveys.

Therefore, it is recommended that this ground of appeal be dismissed.

CONCLUSION AND RECOMMENDATIONS

Having considered the information provided during the appeal investigation it is concluded that the EPA appropriately relied on multiple sources of information to inform its assessment. It is also considered that the EPA's view that consultation was adequate for its assessment is reasonable and supported by the available evidence, and that any residual uncertainty can be managed through the development and implementation of the CHMP.

For the reasons in this report, it is recommended that condition 9 be amended to include a requirement for the CHMP to be independently reviewed and that the independent reviewer should be determined by the CEO on advice of the appropriate knowledge-holders and the proponent.

Inherent in the review would be an evaluation of the suitability of pre-clearance survey methodology and the framework for consultation with the appropriate knowledge-holders and stakeholders, including but not limited to the appellant.

Should the Minister agree with this recommendation, consultation as to whether or not the proposal should be implemented is required under s.45 of the EP Act. It is noted that the Minister for Aboriginal Affairs is a relevant decision-maker, and it would be appropriate for the final wording of the condition to be agreed through this process.

It is otherwise recommended that the appeal be dismissed.

Emma Gaunt
APPEALS CONVENOR

Investigating Officer:
Carly Bishop, Senior Appeals Officer