



Appeals Convenor
Environmental Protection Act 1986

**REPORT TO THE
MINISTER FOR ENVIRONMENT**

**APPEAL AGAINST DECISION TO GRANT A CLEARING PERMIT
CLEARING PERMIT CPS 8116/1: UPGRADE OF BOYANUP ROAD
WEST, SHIRE OF CAPEL**

APPLICANT/PERMIT HOLDER: SHIRE OF CAPEL

Appeal Number 049 of 2019

April 2020

Appeal Summary

This is a report on an appeal lodged by the Urban Bushland Council WA Inc. against the decision of the Department of Water and Environmental Regulation (DWER) to grant clearing permit CPS 8116/1 to the Shire of Capel. The permit is for the clearing of 2.21 hectares of native vegetation for the upgrade of Boyanup Road West.

DWER's assessment found that the proposed clearing may be at variance to clearing principle (b), and is not likely to be at variance to clearing principle (h).

The appeal sought for DWER's decision to be overturned (i.e. that the clearing permit application be refused). The appellant disagreed with DWER's assessment and submitted that the proposed clearing is seriously at variance to principle (b), and at variance to principle (h). Key concerns raised by the appellant related to impacts to black cockatoo species (*Calyptorhynchus latirostris*, *Calyptorhynchus baudinii* and *Calyptorhynchus banksii naso*), the brush-tailed phascogale (*Phascogale tapoatafa wambenger*), and an ecological linkage between conservation areas. Additional concerns were also submitted relating to climate change.

During the investigation DWER acknowledged that some of the data used in the assessment were erroneous and that the impacts to black cockatoo foraging habitat, significant remnant vegetation in an extensively cleared area, and the ecological linkage were greater than initially determined. DWER remained of the view that the permit should be granted but that an offset should be required to counterbalance the significant residual impacts.

The Appeals Convenor agreed that DWER was justified in granting the clearing permit noting the purpose of the clearing is for a public benefit, being to improve road safety. The Appeals Convenor recommended that an offset condition be applied to the permit requiring the revegetation of at least 3.6 hectares of parkland cleared land on Lot 150 on Deposited Plan 29857, Parkfield. The offset condition should require the preparation, submission, approval and implementation of a revegetation plan to guide the revegetation activities undertaken.

The Appeals Convenor also recommended that a pre-clearing brush-tailed phascogale condition should also be applied to the permit to mitigate the risk of mortality to individuals of the species.

Recommendation

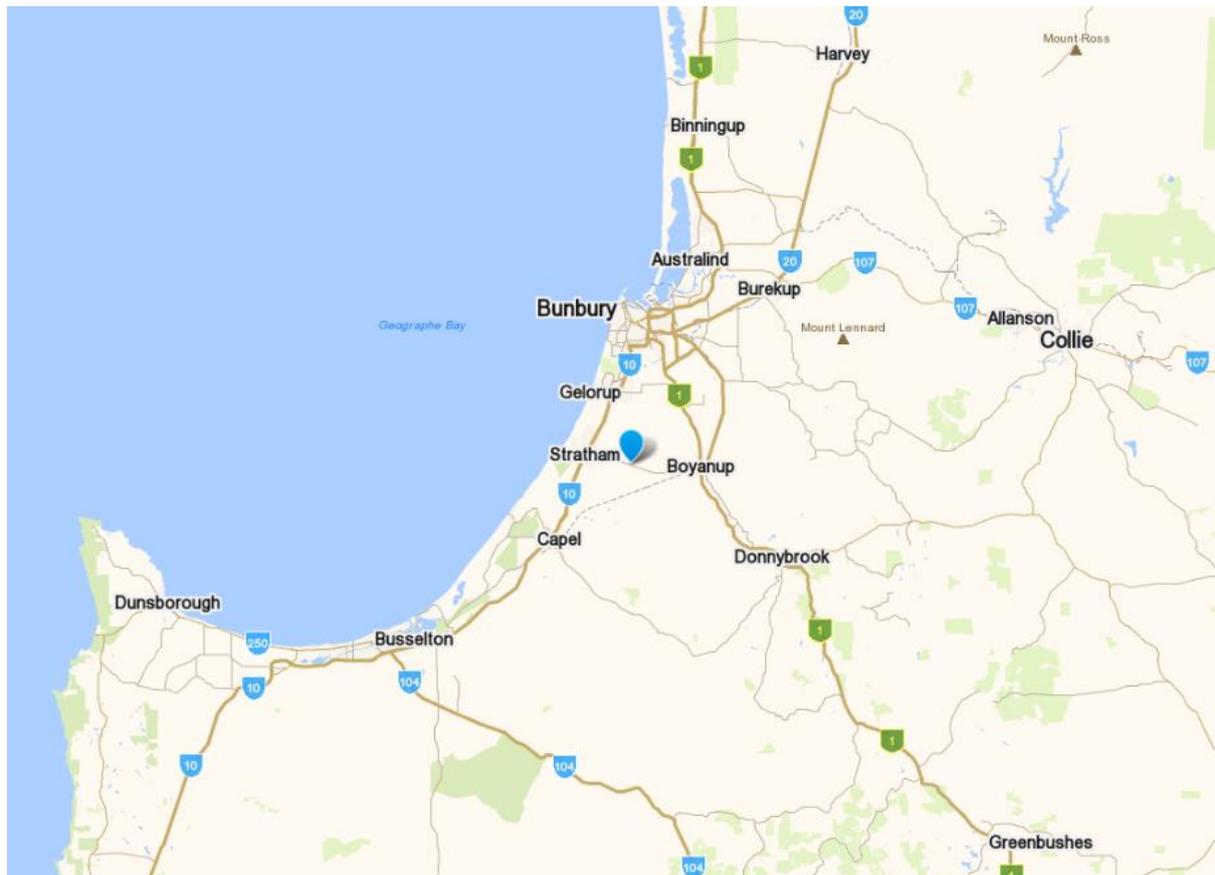
It is recommended that the appeal be upheld to the extent that an offset condition and a pre-clearing brush-tailed phascogale inspection condition be applied to the permit.

INTRODUCTION

On 13 September 2019, the Department of Water and Environmental Regulation (DWER) granted clearing permit CPS 8116/1 to the Shire of Capel. The permit was for the clearing of 2.21 hectares (ha) of native vegetation for the upgrade of Boyanup Road West. DWER's decision to grant the permit was appealed by the Urban Bushland Council WA Inc. (the appellant).

Boyanup Road West is approximately 11 kilometres long and links the towns of Stratham and Boyanup south of Bunbury (Figure 1). The Shire proposes to widen the majority of the road in stages over forthcoming years. Clearing of native vegetation that occurs close to the existing road edge is proposed to facilitate the widening works.

Figure 1 – Approximate location of proposed clearing (indicated by blue pin).



(Source: Whereis.com)

This document is the Appeals Convenor's formal report to the Minister for Environment under section 109(3) of the *Environmental Protection Act 1986* (EP Act).

OVERVIEW OF APPEAL PROCESS

In accordance with section 106 of the EP Act, a report was obtained from DWER in relation to the issues raised in the appeal. The Shire was also given the opportunity to address the matters raised in the appeal and provided a written response.

During the appeal investigation the Appeals Convenor consulted both the appellant and the Shire. This included a site visit with representatives of the Shire. The Appeals Convenor also sought and received further advice from DWER which was considered in the appeal investigation.

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

OUTCOME SOUGHT BY APPELLANT

The appellant requests the Minister overturn DWER's decision to grant the clearing permit.

GROUNDINGS OF APPEAL

The appellant submitted that the proposed clearing will:

- result in unacceptable impacts to fauna;
- diminish an east-west ecological linkage that includes conservation areas; and
- contribute towards climate change.

The appellant's concerns around fauna relate to impacts to black cockatoo species and the brush-tailed phascogale (*Phascogale tapoatafa wambenger*). Black cockatoo species include Carnaby's cockatoo (*Calyptorhynchus latirostris*), Baudin's cockatoo (*Calyptorhynchus baudinii*) and forest red-tailed black cockatoo (*Calyptorhynchus banksii naso*). All three are listed as threatened under the *Biodiversity Conservation Act 2016* (BC Act). The brush-tailed phascogale is listed as a specially protected species (category of species of special conservation interest) under the BC Act.

The appellant submitted that the proposed clearing is seriously at variance to clearing principle (b)¹ and at variance to clearing principle (h)². The appellant is of the view that the above impacts provide sufficient reason to refuse the clearing.

BACKGROUND

The clearing permit application was supported by a flora and vegetation survey commissioned by the Shire and undertaken by Natural Area Consulting Management Services (NACMS) in Spring 2018.³ The survey was targeted at flora, vegetation types and vegetation condition, however, opportunistic observations of conservation significant fauna were recorded.

Observations made by NACMS included a sighting of two forest red-tailed black cockatoo individuals as well as evidence of foraging by the same species within marri (*Corymbia calophylla*) woodland vegetation. It is understood that local residents also informed NACMS staff that a small brush-tailed mammal had been observed crossing Boyanup Road West. NACMS reported that the description provided was consistent with that of brush-tailed phascogale.

In relation to black cockatoos, DWER's decision report outlined:

Whilst the application area provides foraging habitat for black cockatoos, it is considered to be of a low quality based upon the segmented nature of clearing over a distance of 10.3

¹ Principle (b) of Schedule 5 of the EP Act states: Native vegetation should not be cleared if it comprises the whole or a part of, or is necessary for the maintenance of, a significant habitat for fauna.

² Principle (h) of Schedule 5 of the EP Act states: Native vegetation should not be cleared if the clearing is likely to have an impact on the environmental values of any adjacent or nearby conservation area.

³ Natural Area Consulting Management Services (2018). *Shire of Capel Level 2 Flora and Vegetation Survey Boyanup West Road*. Natural Area Holdings Pty Ltd, Whiteman, Western Australia. Version 1, 14 November 2018.

kilometres and that the condition of the vegetation being predominately degraded to completely degraded (Keighery, 1994). Additionally a large amount of similar habitat (approximately 38 hectares) will remain in the road reserve and larger portions of similar or better quality habitat remain in nearby conservation areas.⁴

In relation to brush-tailed phascogale DWER's decision report outlined:

...the brush-tailed phascogale has the potential to occur within the application area, however, given the size of the proposed clearing, the narrow and linear configuration of the clearing and segmented clearing approach over a distance of 10.3 kilometres (of which over 95 per cent of the vegetation will remain in the road reserve), the proposed clearing is not expected to result in significant impacts to brush-tailed phascogale.⁵

In relation to the ecological linkage, DWER's decision report outlined:

According to available datasets, a number of conservation areas have been recorded within the local area, most notably;

- Tuart National Park, located 2.5 kilometres east of the application area;
- Unnamed Nature Reserve, located three kilometres east of the application area;
- Boyanup State Forest, located four kilometres of the application area [sic]; and
- Dardanup Conservation Park, located 8.9 kilometres north east of the application area.

Although there is unlikely to be any direct impacts to the conservation areas listed above from the proposed clearing due to the distances between the application area and conservation areas, the application area is likely to act as an ecological linkage that facilitates the movement of fauna across the landscape, possibly connecting Tuart National Park in the west to the Boyanup State Forest and an unnamed nature reserve in the east. Whilst the proposed clearing will impact on the linkage, it will not sever it noting that the majority of the vegetation will remain within the road reserve.⁶

A map showing the location of the proposed clearing in relation to the conservation areas referenced by DWER is provided at Figure 2.

DWER's assessment concluded that the proposed clearing may be at variance to clearing principle (b) and is not likely to be at variance to clearing principle (h). In deciding to grant the clearing permit, DWER imposed ten conditions on the permit including a fauna management condition (condition 8) which required the Shire to:

- engage a fauna specialist to identify black cockatoo habitat trees within the permit area;
- inspect identified black cockatoo habitat trees for evidence of current or past breeding use by the three black cockatoo species;
- provide the results to the CEO of DWER prior to clearing; and
- ensure that no clearing occurs within 10 metres of identified black cockatoo habitat trees showing evidence of current or past breeding use.

⁴ DWER, Clearing Permit CPS 8116/1 Decision Report, 13 September 2019, page 6.

⁵ DWER, Clearing Permit CPS 8116/1 Decision Report, 13 September 2019, page 6.

⁶ DWER, Clearing Permit CPS 8116/1 Decision Report, 13 September 2019, page 9.

Figure 2 – Location of proposed clearing (yellow) in relation to conservation areas (green)



CONSIDERATION

Black cockatoos

By their appeal, the appellant submitted that all food resources are important for black cockatoos. The appellant submitted that the decline of Carnaby's cockatoo reflects the extent of land clearing. The appellant noted the application area occurs within an extensively cleared area with it intersecting the mapped Heddle vegetation complex 'Guildford'⁷ which retains approximately five per cent of its pre-European extent.⁸

The appellant also noted a confirmed Carnaby's cockatoo breeding site occurs approximately 3.7 kilometres south of the application area. It was submitted that all feeding trees are important within the vicinity of a breeding site and that appropriately sized trees should be left to age and develop hollows for future breeding.

In response to the appeal, DWER advised the following in relation to the confirmed Carnaby's cockatoo breeding site:

The Department's Decision Report makes reference to a confirmed Carnaby's cockatoo breeding site approximately 3.7 km south of the application area. Upon further review, the Department considers that the Decision Report misrepresents the proximity of the application area to the breeding site, with the 3.7 km actually representing the separation distance between the western end of the application area and edge of the breeding site boundary.⁹

A map was provided showing the separation distance and is included as Figure 3. The confirmed breeding site is located within Ludlow State Forest. The site includes a 12 kilometre buffer noting black cockatoos, while breeding, generally forage within a 6-12 kilometre radius of their breeding site.¹⁰

Following the grant of the clearing permit, the habitat tree survey required by condition 8 of the permit was completed by Greg Harewood, the fauna specialist engaged by the Shire. The survey was completed on 12 October 2019 and recorded 297 trees or large shrubs within the permit area. 25 trees were recorded with a diameter at breast height of greater than or equal to 50 centimetres with only one of the trees recorded as containing hollows. The hollows were assessed as being too small for black cockatoo breeding purposes.¹¹

⁷ Heddle, E.M., Lonergan, O.W., and Havel, J.J. (1980). *Vegetation Complexes of the Darling System, Western Australia*. In Department of Conservation and Environment, Atlas of Natural Resources, Darling System, Western Australia.

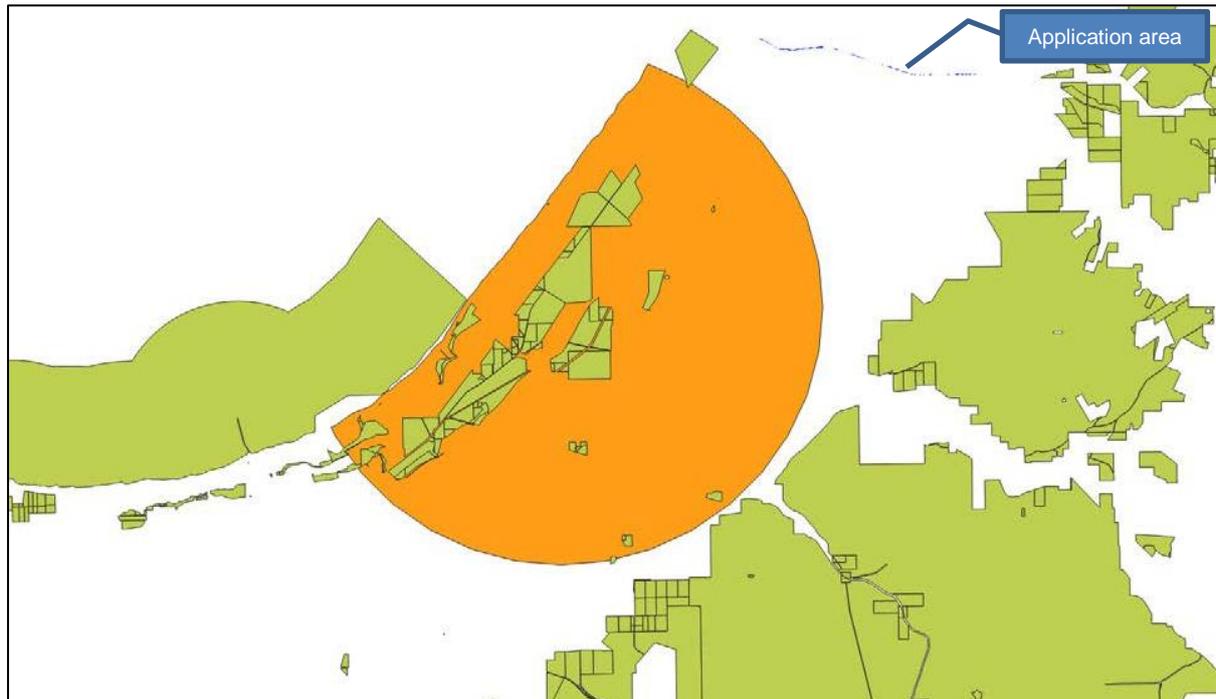
⁸ Government of Western Australia (2019). *2018 South West Vegetation Complex Statistics*. Current as of March 2019. WA Department of Biodiversity, Conservation and Attractions, Perth, <https://catalogue.data.wa.gov.au/dataset/dbca>

⁹ DWER, Response to Appeal 049/19, 11 November 2019, page 3.

¹⁰ Commonwealth of Australia (2012). *EPBC Act referral guidelines for three threatened black cockatoo species*. Australian Government Department of Sustainability, Environment, Water, Population and Communities. Canberra, ACT.

¹¹ Harewood, G. (2019). *Habitat Tree Assessment of Proposed Clearing Areas (CPS 8116/1) – Boyanup Road West (SLK 0.00 to 11.09)*. Unpublished report prepared for the Shire of Capel. Version 1, October 2019.

Figure 3 – Proximity of confirmed Carnaby's cockatoo breeding site (orange) to the application area (blue dotted line) and location of Department of Biodiversity, Conservation and Attractions reserves (green).



In relation to black cockatoo foraging habitat, DWER advised the following in responding to the appeal:

While the Department accepts that the degraded vegetation condition does not exclude it being utilised as a foraging resource, the vegetation within the application area was assessed as being of low quality for foraging purposes.¹²

DWER went on to advise:

While the Department agrees with the appellant's view that the application area provides foraging habitat for black cockatoos, it considers that the foraging habitat is not significant, noting the substantially greater extent of similar or better quality habitat within the vicinity of the known breeding site.¹³

Following receipt of DWER's response to the appeal, additional investigations undertaken by the Office of the Appeals Convenor identified:

- only one substantial Department of Biodiversity, Conservation and Attractions (DBCA) managed conservation area occurs on the Swan Coastal Plain within eight kilometres of the application area (an approximately 270 hectare portion of Tuart Forest National Park);
- the extent of native vegetation that will remain in the road reserve appeared to have been overstated by DWER (i.e. DWER's calculations had appeared to count the area of the road itself as well as other areas devoid of native vegetation in their native vegetation extent total); and
- approximately 50 per cent of the remaining extent of the mapped Guildford vegetation complex occurs in parcel sizes of less than five hectares suggesting the vegetation under application is likely representative of the five per cent of the complex remaining.

¹² DWER, Response to Appeal 049/19, 11 November 2019, page 3.

¹³ DWER, Response to Appeal 049/19, 11 November 2019, page 4.

This information was presented to DWER along with the Appeals Convenor's preliminary view that the clearing was likely to result in significant residual impacts to fauna habitat.

In response, DWER further reviewed its assessment of the application. DWER agreed that the data used in the assessment was erroneous and resulted in an overestimate of the extent of native vegetation that would remain.¹⁴ DWER also agreed that the native vegetation proposed to be cleared is representative of the mapped Guildford vegetation complex.¹⁵ DWER acknowledged that the proposed clearing would result in significant residual impacts including:

- the loss of 1.52 hectares of black cockatoo foraging habitat (i.e. the portion of the application area that comprises marri woodland); and
- the loss of 2.21 hectares of native vegetation significant as a remnant in an area that has been extensively cleared.¹⁶

It is considered that the quantum of significant residual impacts identified by DWER is supported by the available evidence.

Brush-tailed phascogale

The appellant submitted that the brush-tailed phascogale should be considered present within the application area and that mechanical clearing will either kill individuals present immediately or in subsequent days.

In response to the appeal DWER advised:

The Department acknowledges that the proposed clearing may impact on brush-tailed phascogale individuals, however, the assessment determined that any impact to individuals through the clearing would not compromise the conservation status of the brush-tailed phascogale.¹⁷

DWER also advised:

The Department notes that s149 of the *Biodiversity Conservation Act 2016* (BC Act) makes an offence of the taking of fauna unless lawful authority has been provided. It is the Permit Holder's responsibility to comply with the provisions of the BC Act and any other relevant legislation.¹⁸

Brush-tailed phascogale is active between dusk and dawn and typically avoids moving over bare ground, foraging almost exclusively among the tree canopy. The species is known, however, to cross up to 300 metres of open space to nest in isolated paddock trees. Nesting typically occurs in hollows of large trees with one study identifying suitable hollow entrance width as being between 2.4 and 5.5 centimetres.¹⁹

As discussed above, a black cockatoo habitat tree survey commissioned by the Shire recorded one tree with hollows within the permit area. The hollows were described as small, being

¹⁴ DWER advised that it considers the error made is not common practice and that it has reviewed other similar assessments undertaken recently to confirm this. DWER advised, however, that steps have been initiated to ensure quality assurance for data verification and calculations of native vegetation extent in road reserves.

¹⁵ DWER made this conclusion following a review of the published structural formations of the complex.

¹⁶ DWER, Additional advice to the Minister for Environment, 27 February 2020.

¹⁷ DWER, Response to Appeal 049/19, 11 November 2019, page 4.

¹⁸ DWER, Response to Appeal 049/19, 11 November 2019, page 4.

¹⁹ Rhind, S.G. (1996). *Habitat tree requirements and the effects of removal during logging on the marsupial brush-tailed phascogale (Phascogale tapoatafa tapoatafa) in Western Australia*. The Western Australian Naturalist. Volume 21, Number 1, 29 March 1996. School of Biological & Environmental Sciences, Murdoch University, Western Australia.

defined as having apparent hollow entrances of less than 5 centimetres in diameter. The suitability of the hollows for use by brush-tailed phascogale was not assessed.²⁰

Noting there is a tree with potentially suitable hollows within the permit area, it is considered that there is a risk of direct mortality of brush-tailed phascogale individuals if the tree is occupied at the time of clearing. The clearing could also result in indirect mortalities through a reduction in refuge sites if the tree is being used periodically.

Ecological linkages

The appellant submitted that the proposed clearing will diminish an east-west ecological linkage and therefore have an impact on adjacent/nearby conservation areas.

In response to the appeal, DWER advised the following:

While the linkage will be impacted by the proposed clearing, not all vegetation within the road reserve will be cleared, therefore, the viability of the linkage function will be maintained for the dispersal of fauna to nearby conservation areas.²¹

DWER further advised:

The survey recorded 38.2 ha of vegetation within the road reserve, therefore, the proposed clearing would result in the net loss of 5.7 per cent of the vegetation within the road reserve. Given the mitigation measures applied by the Permit Holder, the Department was satisfied that the clearing of 2.21 ha would not diminish the ecological linkage between the application area and nearby conservation areas.²²

As discussed earlier, DWER has since acknowledged that the data used in the assessment was erroneous and resulted in an overestimate of the extent of native vegetation that would remain. Given this, DWER agreed with the Appeals Convenor's preliminary finding that the proposed clearing is likely to result in significant residual impacts to the identified ecological linkage.²³

Climate change

The appellant submitted that all native vegetation should be retained, protected and restored, noting trees absorb carbon dioxide. The appellant submitted that the cumulative effect of clearing is significant in relation to its contribution towards climate change.

In response to this matter DWER advised:

While clearing of native vegetation contributes to climate change, the contribution of 2.21 ha of native vegetation would be minor in this regard. The Department encourages permit holders to seek opportunities to avoid and minimise the impacts of clearing where possible. The State Government is developing a State Climate Policy which will consider the impacts of clearing on climate change and opportunity to sequester carbon.

DWER's position is accepted: the small scale of the proposed clearing is not considered to have any material implications for climate change. It is considered that the implications of future policy developments are a matter for consideration at the time that policy position is settled.

²⁰ Harewood, G. (2019). *Habitat Tree Assessment of Proposed Clearing Areas (CPS 8116/1) – Boyanup Road West (SLK 0.00 to 11.09)*. Unpublished report prepared for the Shire of Capel. Version 1, October 2019.

²¹ DWER, Response to Appeal 049/19, 11 November 2019, page 5.

²² DWER, Response to Appeal 049/19, 11 November 2019, page 5.

²³ DWER, Additional advice to the Minister for Environment, 27 February 2020.

CONCLUSION

It is considered that DWER's initial assessment understated the significance of impacts to black cockatoo foraging habitat, significant remnant vegetation in an extensively cleared area, and ecological linkage values. DWER has acknowledged this but remains of the view that the permit should be granted noting the clearing is for a public benefit being to improve road safety.²⁴

The EP Act does not preclude a clearing permit from being granted where the clearing will be at variance to the clearing principles. For example, section 51O(3) allows the CEO to make a decision that is seriously at variance with the clearing principles if in the CEO's opinion there is good reason for doing so. In this case, noting the purpose of the clearing is for a public benefit being to improve road safety, it is considered that DWER was justified in granting the clearing permit.

Given the identified significant residual impacts to black cockatoo foraging habitat, significant remnant vegetation in an extensively cleared area, and the ecological linkage, DWER is of the view that an environmental offset should be required.²⁵

The applicability, determination and implementation of offsets is the subject of a number of documents, including the *WA Environmental Offsets Policy September 2011* (EOP) and the *WA Environmental Offsets Guidelines August 2014*. In general, an offset is an offsite action or actions that counterbalance the identified significant residual impacts of a development. The EOP seeks to ensure that environmental offsets are applied in specified circumstances in a transparent manner to engender certainty and predictability, while acknowledging that there are some environmental values that are not readily replaceable. The EOP also includes the principle that offsets will only be considered after avoidance and mitigation actions have been pursued.

In responding to the appeal, the Shire outlined that every tree to be potentially removed was marked and plotted to determine the clearing area and to ensure that no inappropriate clearing occurs. The Shire also outlined that a number of areas were excluded from the application to avoid impacts to environmental values including a wetland, priority flora (*Acacia semitrullata*) and an adjacent DBCA conservation area.²⁶ It is noted that DWER also imposed condition 6 on the permit which requires the Shire to have regard to avoiding, minimising and reducing the impacts of the clearing. Noting the Shire's efforts and the requirements of condition 6, it is considered that DWER's position that an offset be applied to the permit is an appropriate finding in this situation. Further details on the nature of the offset to be applied is included in the following section.

In relation to brush-tailed phascogale, it is acknowledged that the species has a lower conservation status than that of the three black cockatoo species. However, the species is listed under the BC Act and it is considered that there is a risk of mortality of individuals from the clearing (through both direct and indirect impacts). To address this risk it is considered appropriate that a pre-clearing brush-tailed phascogale inspection condition be applied to the permit in relation to the tree identified as containing hollows. The condition should require the tree not be cleared until an appropriately qualified and licensed fauna specialist confirms it is not occupied by a brush-tailed phascogale. If evidence of use of the tree is identified by the specialist, the condition should also require installation of a brush-tailed phascogale nest box nearby to ensure the availability of refuge sites does not decrease as a result of the clearing. It is considered that these actions are appropriate to mitigate impacts to the species.

²⁴ DWER, Additional advice to the Minister for Environment, 27 February 2020.

²⁵ DWER, Additional advice to the Minister for Environment, 27 February 2020.

²⁶ Shire of Capel, Response to Appeal 049-19, 4 November 2019.

Offset

Following notification of DWER's revised position that the proposed clearing would result in significant residual impacts, the Shire, in liaison with DBCA, identified a potential offset site. The site is Lot 150 on Deposited Plan 29857, Parkfield and is located approximately 33 kilometres north of the permit area near the suburb of Leschenault (Figure 4).

Lot 150 is freehold land owned by DBCA and surrounded by other similar DBCA owned lands. The property also forms part of a north south ecological linkage mapped by the South West Regional Ecological Linkages project.²⁷ Lot 150 is approximately 100 hectares in size with at least half parkland cleared. The Shire proposes to revegetate a portion of the parkland cleared area utilising species suitable as habitat for black cockatoos.

DWER has agreed that revegetation of the site as proposed by the Shire is a suitable offset.²⁸ DWER undertook a calculation of the size of revegetation required and determined that the revegetation of at least 3.6 hectares would be adequately proportionate to the impacts.²⁹ The calculation was undertaken using the Commonwealth Offsets Assessment Guide. DWER advised that the revegetation would need to be undertaken in accordance with a revegetation plan prepared by the Shire in consultation with DBCA, and approved by DWER.³⁰

It is considered that the implementation of a revegetation offset as outlined above is appropriate for counterbalancing the identified significant residual impacts. It is considered that the requirement for a revegetation plan is sensible in order to guide successful implementation of the works. Noting vegetation establishment may not be able to occur in 2020 due to lead time requirements, it is considered reasonable that preparation and approval of the revegetation plan could occur post-commencement of clearing.

²⁷ Molloy, S., Wood, J., Hall, S., Wallrodt, S. and Whisson, G. (2009). *South West Regional Ecological Linkages Technical Report*, Western Australian Local Government Association and Department of Environment and Conservation, Perth.

²⁸ DWER, Advice to the Shire of Capel, 19 March 2020.

²⁹ DWER, Advice to the Office of the Appeals Convenor, 30 March 2020.

³⁰ DWER, Advice to the Shire of Capel, 18 March 2020.

SUMMARY AND RECOMMENDATIONS

On balance it is considered that DWER was justified in granting the clearing permit noting the purpose of the clearing is for a public benefit being to improve road safety. However, the proposed clearing is considered likely to result in significant residual impacts to black cockatoo foraging habitat, significant remnant vegetation in an extensively cleared area, and ecological linkage values, and this was not reflected in DWER's initial assessment.

It is recommended that the appeal be allowed to the extent that an offset condition be applied to the permit to counterbalance the identified significant residual impacts. It is also recommended that a pre-clearing brush-tailed phascogale condition be applied to the permit to mitigate the risk of mortality to individuals of the species. The final wording of the conditions is a matter for the Department under s110 of the EP Act.

Emma Gaunt
APPEALS CONVENOR

Investigating Officer:
Simon Weighell, A/Senior Appeals Officer