



## **Appeals Convenor**

**Environmental Protection Act 1986**

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### **REPORT TO THE MINISTER FOR ENVIRONMENT**

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**APPEAL IN OBJECTION TO THE AMENDMENT OF  
CLEARING PERMIT CPS 6766/2**

**CLEARING OF UP TO 3.6 HECTARES OF NATIVE VEGETATION ON  
LOT 4205 ON DEPOSITED PLAN 208196, KALLOORUP,  
CITY OF BUSSELTON**

**APPLICANT: V AND S EDWARDS**

Appeal Number 017 of 2018

**August 2019**

## Appeal Summary

This report relates to an appeal lodged in objection to a decision of the Department of Water and Environmental Regulation (DWER) to amend Clearing Permit CPS 6766/1, which authorises Vincent and Sheila Edwards (permit holder) to clear 3.6 hectares of native vegetation on Lot 4205 on Deposited Plan 208196, Kaloorup, in the City of Busselton.

DWER amended Clearing Permit CPS 6766/2 on 30 November 2018, with the following changes since the previous version (Clearing Permit CPS 6766/1):

- extension of the duration of the permit by 12 months to expire on 13 April 2022;
- changes to the condition relating to revegetation and rehabilitation, and extension of timeframe within which at least 180 peppermint trees (*Agonis flexuosa*) are to be established by 12 months to 30 June 2019; and
- addition of a new condition requiring the permit holder to avoid, minimise and reduce the impacts and extent of clearing;
- addition of a new condition requiring the permit holder to keep records on activities under the clearing permit;
- addition of a new condition requiring the permit holder to provide an annual report; and
- consequential re-numbering of conditions and plans, and addition of new definitions.

The appellants submitted that DWER should not have amended Clearing Permit CPS 6766/1 on the basis that the permit holder had not complied with revegetation requirements to establish peppermint trees. The appellants contended that the area proposed to be cleared may provide significant habitat for the critically endangered western ringtail possum (WRP) and are seeking for the Minister to overturn DWER's decision to amend the permit and revoke the amendment to Clearing Permit CPS 6766/1. In the alternative, the appellants contended that an offset or larger amount of revegetation should be required.

In response to the appeal, DWER advised that the requirements for the permit holder to engage a suitably qualified fauna specialist to be onsite at the time of clearing to identify, remove and relocate any WRP occupying the clearing area at the time of clearing and re-establish similar WRP habitat to that found in the clearing area would adequately mitigate potential environmental impacts to WRP.

For the reasons stated in this report, the Appeals Convenor considered that DWER's assessment of the amendment application was reasonable, and was supported by the available evidence, and that DWER was justified in amending the clearing permit subject to the specified conditions to manage and mitigate potential impacts to WRP habitat from the proposed clearing.

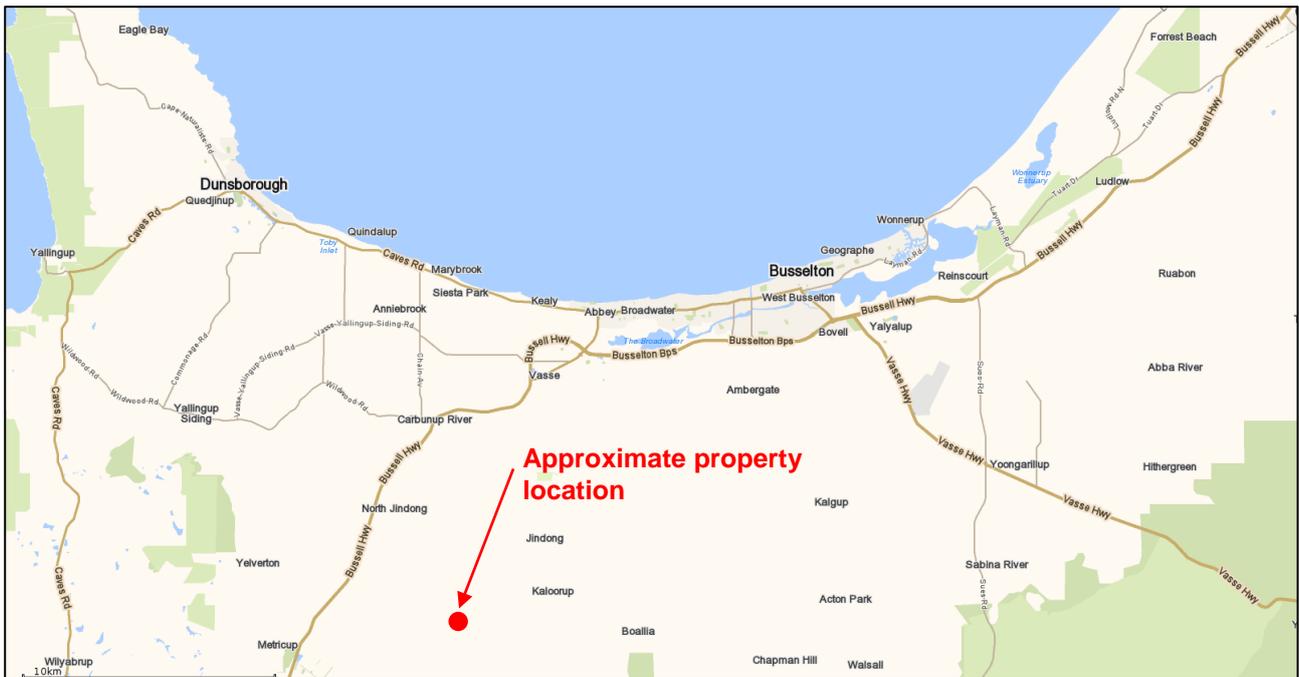
### Recommendation

It is recommended that the appeal be dismissed.

## INTRODUCTION

This report relates to an appeal lodged by M and D Pettersson (appellants), in objection to a decision of the Department of Water and Environmental Regulation (DWER) to amend Clearing Permit CPS 6766/1, which authorises V and S Edwards (permit holder) to clear 3.6 hectares (ha) of native vegetation on Lot 4205 on Deposited Plan 208196, Kaloorup (application area) in the City of Busselton, for the purpose of sand extraction (Clearing Permit CPS 6766/2). The location and extent of the clearing footprint is shown in Figures 1 and 2.

**Figure 1: Location of the property**



(Source: Whereis.com 2019)

## Background

CPS 6766/1 was originally granted on 12 May 2016 by the former Department of Environment Regulation (DER) (now DWER), authorising the permit holder to clear the same area of native vegetation as shown in Figure 2.

On 9 September 2018, the permit holder applied to DWER to amend CPS 6766/1 by extending the timeframe within which at least 180 peppermint trees (*Agonis flexuosa*) are to be established by 12 months to 30 June 2019.

The amendment application was advertised for a 14 day public comment period on 25 September 2018, and DWER advised that no submissions were received.

DWER's decision report for Clearing Permit CPS 6766/2 (CPS 6766/2 Decision Report) states that the assessment against the clearing principles, planning and other matters had not changed. In this regard, the decision report for Clearing Permit CPS 6766/1 (CPS 6766/1 Decision Report) concluded that the proposed clearing may be at variance to clearing principles (b) significant fauna habitat and (e) significant remnant in an extensively cleared area, is not at variance to clearing principle (f) watercourse or wetland, and is not likely to be at variance to the remaining clearing principles.

DWER amended Clearing Permit CPS 6766/2 on 30 November 2018, with the following changes since the previous version (CPS 6766/1):

- extension of the duration of the permit by 12 months to expire on 13 April 2022;

- changes to the condition relating to revegetation and rehabilitation (Condition 2), and extension of the timeframe within which at least 180 peppermint trees are to be established by 12 months to 30 June 2019;
- addition of a new condition requiring the permit holder to avoid, minimise and reduce the impacts and extent of clearing (Condition 1);
- addition of a new condition requiring the permit holder to keep records on activities under the clearing permit (Condition 4);
- addition of a new condition requiring the permit holder to provide annual reports (Condition 5); and
- renumbering of conditions and plans, and the addition of new definitions.

**Figure 2: Permit area (indicated by yellow shading)**



(Source: DWER Clearing Permit CPS 6766/2)

It was against DWER's decision to amend the clearing permit that the appeal was received.

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 permit holder was also given the opportunity to address the matters raised in the appeal. During the appeal investigation the Appeals Convenor met with the appellants to discuss the issues raised in the appeal and visited the permit area with the permit holder.

The environmental appeals process is a merits-based process. For appeals in relation to a DWER decision to amend 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 appellants were of the view that the amendments should not be permitted, and sought for the Minister to revoke the amendment to Clearing Permit CPS 6766/1. In the alternative, the appellants contended that an offset or larger amount of revegetation should be required.

## **GROUND OF APPEAL**

The matters raised by the appellants have been broadly summarised under the following grounds:

- western ringtail possum (WRP) habitat; and
- revegetation requirements.

By section 101A(3) of the EP Act, any person who disagrees with an amendment of a clearing permit may lodge an appeal in writing, setting out the grounds of that appeal. It is under this section that this appeal was lodged. Note that, from the terms of section 101A(3) of the EP Act, an appeal applies only to the specific amendment(s) to a permit. In this instance, the appeal was in relation to the conditions relating to fauna management, and revegetation and rehabilitation.

### **GROUND 1: WRP HABITAT**

The appellants submitted that the application area contains 200 to 250 large peppermint trees, and given this, they were of the view that the area may provide significant habitat for the critically endangered WRP.

In support of their view that the trees should be retained, the appellants contended that the former DER (now DWER) had stated the following in the Decision Report for CPS 6766/1:

- under clearing principle (b) – a site inspection was completed however it was not a targeted WRP survey and the trees under application may be utilised by WRP; and
- under clearing principle (e) – the vegetation under application may provide suitable habitat for WRP and may therefore be a significant remnant of native vegetation within a highly cleared area.

The appellants disputed DWER's conclusion that a lack of native understorey within the application area renders the vegetation under application 'completely degraded' and unlikely to provide significant habitat for WRP.

The appellants also disputed DWER's conclusion that the vegetation under application is unlikely to provide significant habitat for WRP given it is fragmented from other larger remnants of suitable habitat.

The appellants noted that the WRP Recovery Plan (DBCA 2017) identifies the Ludlow/Busselton area as the 'last substantial stronghold' for WRP, and given this, the appellants were of the view that the native vegetation within the application may be significant habitat for WRP. The appellants were also of the view that any habitat where WRP occur naturally should be protected.

### **Consideration**

As noted above, DWER advised that the assessment against the clearing principles, planning and other matters had not changed as a result of the amendment.

WRP is listed as 'critically endangered' under the *Biodiversity Conservation Act 2016* (BC Act) and *Environment Protection Biodiversity Conservation Act 1999* (Commonwealth) (EPBC Act). It is noted

that the conservation status of WRP has changed since the assessment of CPS 6766/1 in 2016, as the species was listed as 'endangered' under the *Wildlife Conservation Act 1950*<sup>1</sup> and 'vulnerable' under the EPBC Act at that time.

It is considered that the assessment against clearing principles (b) and (e) is relevant to this ground of appeal. CPS 6766/1 Decision Report outlines DER's reasons for its conclusion in relation to these clearing principles, as summarised in Table 1 below.

**Table 1: DER (2016) assessment against clearing principles (b) and (e)**

Clearing principle	Assessment findings (summarised) <sup>2</sup>
(b) '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 indigenous to Western Australia'	<p><b>May be at variance:</b></p> <ul style="list-style-type: none"> <li>the application area contains large, mature peppermint trees which are a suitable species for WRP habitat;</li> <li>the application area is mapped as habitat suitability class 'C' in the WRP habitat assessment report<sup>3</sup>;</li> <li>the application area is fragmented from other larger remnants of habitat suitability class 'C' approximately 1.3 km to the west; and</li> <li>no WRP individuals, scats or dreys were observed during a site inspection, however a targeted survey has not been undertaken and the peppermint trees may still be utilised by the species.</li> </ul>
(e) 'Native vegetation should not be cleared if it is significant as a remnant of native vegetation in an area that has been extensively cleared'	<p><b>May be at variance:</b></p> <ul style="list-style-type: none"> <li>the vegetation extents for the bioregion, local government area and mapped vegetation types are above the recommended 30 per cent threshold for biodiversity conservation;</li> <li>the local area (10 kilometre radius) retains approximately 10 per cent native vegetation cover and is considered to be highly cleared; and</li> <li>the vegetation is in 'completely degraded' condition (Keighery 1994) and is not representative of the mapped vegetation types given the land has been grazed, however the overstorey of mature peppermint trees may provide suitable habitat for WRP and may therefore be significant as a remnant.</li> </ul>

The Site Inspection Report<sup>4</sup> states:

The application area is in a completely degraded (Keighery, 1994) condition, comprising an overstorey of Peppermint trees (*Agonis flexuosa*) over exotic grass. There is a genuine lack of native understorey species, indicating that the application area has been previously parkland cleared and consistently grazed.

As shown in Figure 3, DWER mapping identifies the vegetation within the application area as being WRP habitat class C. The expected WRP density within a class C habitat (being the lowest of the habitat categories capable of sustaining viable populations) is 2-5 individuals per hectare<sup>5</sup>; which calculates to a potential density of approximately 7-18 individuals for the application area.

<sup>1</sup> On 1 January 2019, provisions relating to threatened species under the *Biodiversity Conservation Act 2016* came into effect, replacing the previous provisions of the *Wildlife Conservation Act 1950*.

<sup>2</sup> Decision report for Clearing Permit CPS 6766/1, pages 2-3.

<sup>3</sup> Shedley, E. and Williams, K. (2014) *An assessment of habitat for Western Ringtail Possum (Pseudocheirus occidentalis) on the southern Swan Coastal Plain (Binningup to Dunsborough)*. February 2014. Department of Parks and Wildlife, Western Australia.

<sup>4</sup> DWER, *Response to the Appeal*, 13 February 2019, Att. 3.

<sup>5</sup> Shedley, E. and Williams, K. (2014), pages 52-55.

**Figure 3: WRP Habitat Classes within vicinity of Clearing Permit CPS 6766/2**



(Source: Spatial Viewer GIS viewed 13 March 2019)

DWER advised that the application area is located on the outer boundary of the Swan Coastal Plain Management Zone, contained within the *Western Ringtail Possum (Pseudocheirus occidentalis)* Recovery Plan (February 2017), which identifies the area as not containing critical habitat to the survival of the southern Swan Coastal Plain WRP population.

DWER also advised that:

During the assessment of Clearing Permit CPS 6766/1, the former Department of Parks and Wildlife (Parks and Wildlife) provided advice ... regarding impacts to WRPs ... Parks and Wildlife recommended that the Permit Holder be required to undertake a fauna survey to confirm the presence or absence of the WRP. The Department considers that as no evidence of WRPs was observed during the site inspection in 2015, and the Permit Holder is required to undertake a pre-clearance survey to mitigate impacts to WRP individuals, an additional survey prior to the granting of the permit was not required.

In assessing the relative value of the site as habitat for WRP, the Office of the Appeals Convenor sought guidance from a WRP specialist from the Department of Biodiversity, Conservation and Attractions (DBCA). This guidance indicated that:

- the Keighery (1994) Condition Scale, which ranks the composition and structure of vegetation, has little relevance when assessing the quality of WRP habitat. This is because WRP feed and nest in the canopy of suitable trees and have no need to come to ground amongst understorey when conditions are suitable, that is, the condition of understorey is not likely to be of relevance when determining the quality of potential WRP habitat;
- experience has shown that stands of peppermints such as that within the application area, that is, stands of mature peppermints lacking understorey and isolated with no linkage to other bushland can support WRP;
- a targeted WRP survey would be required to determine the presence or absence of WRP to enable an informed decision on the environmental value of the application area as WRP habitat; and
- the home range of any WRP found within the application area is likely to be within a 100 to 150 metre radius and therefore any WRP identified through the fauna management measures specified in Clearing Permit CPS 6766/2, would require capture and translocation to a suitable area approved by DBCA according to its guidelines for translocation.

DWER advised that:

In accordance with the Department's risk-based assessment processes, the risk of unacceptable environmental impacts occurring as a result of the proposed clearing was assessed and determined to be low. The Department therefore considered that sufficient information was available to undertake an assessment of the proposed clearing without the need for a targeted fauna survey.

DWER's published *Clearing Regulation Fact Sheet 16: Risk-based assessment of clearing permit applications*<sup>6</sup> outlines that DWER's risk-based assessment approach for clearing permit applications considers: the size of the area to be cleared; location of the area to be cleared; sensitivity of the environment and the environmental values that occur within or adjacent to the area under application; purpose of clearing and urgency of the application; and public interest in the application.

DWER's published Guide 2, *A guide to the assessment of applications to clear native vegetation*<sup>7</sup> outlines that native vegetation clearing should only be considered after all other reasonable attempts to mitigate adverse impacts have been exhausted, and that potential environmental impacts should be addressed using the impact mitigation sequence.

The impact mitigation sequence (avoid, minimise, rehabilitate, and offset if required) referenced in Guide 2 is reflected in Condition 1, which requires the permit holder to:

- avoid the clearing of native vegetation;
- minimise the amount of vegetation to be cleared; and
- reduce the impact of any clearing on any environmental value.

The amended permit includes (among other things) a Fauna management condition (Condition 3), which requires the permit holder to engage a fauna specialist to inspect the vegetation proposed to be cleared for the presence of WRP during the clearing. If WRP are identified while the clearing is undertaken, the fauna specialist must remove and relocate them.

The permit defines 'fauna specialist' as:

... a person who holds a tertiary qualification specialising in environmental science or equivalent, and has a minimum of 2 years work experience in fauna identification and surveys of fauna native to the region being inspected or surveyed, or who is approved by the CEO as a suitable fauna specialist for the bioregion, and who holds a valid fauna licence issued under the *Wildlife Conservation Act 1950*.

DWER considered that the requirements for the permit holder to engage a suitably qualified fauna specialist to be onsite at the time of clearing to identify, remove and relocate any WRP occupying the clearing area at the time of clearing and re-establish similar WRP habitat to that found in the clearing area would adequately mitigate the environmental impacts to WRP. It is also noted that the amended permit contains requirements to keep records and report on activities carried out under the permit.

In relation to translocation requirements, and specifically the taking or disturbing of threatened species such as WRP, it is noted that DBCA's published *Biodiversity Conservation Regulations 2018 Fact Sheet – Environmental Consultants*<sup>8</sup> states that:

#### **Ministerial Authorisations for Taking Threatened Species**

Flora and fauna licences cannot authorise the taking or disturbing of threatened species. Where a licenced activity is likely to result in the taking or disturbance of a threatened species, a Ministerial authorisation under section 40 of the BC Act is required and should be applied for at

<sup>6</sup> DER, *Risk-based assessment of clearing permit applications*, Fact sheet 16, February 2015.

<sup>7</sup> DER, *A guide to the assessment of applications to clear native vegetation – Under Part V Division 2 of the Environmental Protection Act 1986*, Guide 2, December 2014,

<sup>8</sup> DBCA, *Biodiversity Conservation Regulations 2018 Fact Sheet – Environmental Consultants*, 28 December 2018.

the time of applying for the licence(s), or subsequently if it becomes known that such an authorisation will be required.

Noting the above, the obligations on the permit holder in respect to the taking of specifically protected fauna is provided for under the BC Act.

While no written response to the appeal was provided by the permit holder, during the site visit the permit holder confirmed that clearing will be minimised around the perimeter of the application area to allow for the required set back as specified in the extractive industry licence (EIL), which has been issued by the City of Busselton for sand extraction. It is understood that the EIL requires that the extraction area be set back at least 20 metres from the property boundary. It is also understood that upon completion of sand extraction, the area will be rehabilitated to pasture for grazing livestock.

## **Conclusion**

Taking the above information into account, particularly that DWER has applied conditions to the permit to manage potential impacts to WRP from the clearing of native vegetation within the application area, it is considered that the DWER's assessment of the matters raised under this ground of appeal was appropriate and supported by the available evidence. It is therefore recommended that this ground of appeal be dismissed.

## **GROUND 2: REVEGETATION REQUIREMENTS**

The appellants contended that DWER should not have amended Clearing Permit CPS 6766/1, given that the permit holder had not complied with Condition 3(a) which required that at least 180 peppermint trees be established by 30 June 2018.

The appellants were of the view that the requirement to plant 180 peppermint seedlings would not reduce or mitigate the impact of clearing mature peppermint trees on the environment and WRP habitat. The appellants advised that they had contacted DWER in relation to this condition and were advised that it was a 'mitigation' condition rather than an 'offset' condition. The appellants noted that a DWER fact sheet indicates that an offset should be proportionate to the level of impact and significance of the environmental value being impacted by clearing.

The appellants also noted that the permit holder's application form to amend the permit indicated that the permit holder had not considered alternatives that would avoid or minimise the need for clearing.

## **Consideration**

As noted in Ground 1, DWER applied the impact mitigation sequence through Condition 1 to the clearing permit to minimise the impact of clearing. The impact mitigation sequence also requires that rehabilitation restore the maximum environmental value of the impact that is reasonably practicable, and that any significant residual impacts be offset. In this regard, Condition 2 requires that at least 180 peppermint trees are to be established by 30 June 2019, and that an environmental specialist monitor tree survival and additional planting be undertaken where required to ensure that at least 180 peppermint trees are established and maintained during the term of the permit.

In relation to offsets, DWER advised that it considered that adequate mitigation measures were applied through the conditions, and that in this instance an offset was not required.

It is noted that Condition 2 of the amended permit does not specify the location(s) at which the establishment of at least 180 peppermint trees is to occur. In this regard, CPS 6766/1 Decision Report states that:

The applicant has advised that they propose to return the application area to pasture and grazing. As the clearing is of a temporary nature, revegetation of a similar sized area on the property with vegetation consistent with that under application will be required.

During the site visit the permit holder advised that they intended to establish at least 180 peppermint trees in three separate lots adjacent to a waterway which dissects the property.

During the appeal investigation, additional advice was sought from DWER in relation to the adequacy of revegetation measures applied through the amended permit. In response, DWER advised that:

Condition 2 of Clearing Permit 6766/1 reflects the rehabilitation requirements of the extractive industry licence (EIL) issued for this project by the City of Busselton (DA15/0519). An approved plan attached to this EIL references the creation of three 'revegetation / planting' areas comprising 180 trees and 240 shrubs, ground cover and grass species ... The Permit Holder's proposed revegetation locations ... appear to be consistent with the locations specified in the EIL ...

The clearing area comprises an over storey of Peppermint trees with minimal understorey and the Department of Water and Environmental Regulation (DWER) therefore has not included an understorey requirement in the revegetation conditions applied to the Clearing Permit. DWER has sought to be consistent with the requirements of the EIL by reflecting the requirement to plant 180 Peppermint trees within Lot 4205. As stated in the section 106 report, the Department considers that these revegetation requirements adequately mitigate impacts to Western Ringtail Possums.

In relation to the appellant's submission that the permit holder has not demonstrated a satisfactory commitment to revegetation, DWER advised that:

The Department undertook an investigation into the Permit Holder's non-compliance with Condition 3 of CPS 6766/1 and concluded that, as no clearing had been undertaken, no further action was required ... The Permit Holder submitted an application to amend Condition 3 of Clearing Permit CPS 6766/1 to provide further time for revegetation. The Permit Holder advised that the revegetation required by Condition 3(a) of Clearing Permit CPS 6766/1 was not completed prior to 30 June 2018 as the extractive industry had not commenced. The Permit Holder had not undertaken the clearing at the time of the investigation and no new information has become available to suggest that the Permit Holder has proceeded with the clearing since the investigation was concluded.

The application to amend Clearing Permit CPS 6766/1 did not include any requested changes to the clearing area, nor to revegetation requirements other than extending the date. The Department considers that the circumstances to date do not provide sufficient reason to doubt the Permit Holder's intention to comply with the conditions of amended Clearing Permit CPS 6766/2.

The amended Clearing Permit CPS 6766/2 had additional conditions attached to it, consistent with current permits, requiring the Permit Holder to maintain records of the clearing, revegetation and rehabilitation and fauna management actions and to report these records to the Department's CEO at the nominated time intervals. These conditions tighten the obligations on the Permit Holder.

## Conclusion

Taking the above information into account, particularly DWER's advice in relation to the adequacy of the revegetation requirements applied to the amended permit, it is considered that DWER appropriately considered and addressed the matters raised under this ground of appeal. It is therefore recommended that this ground of appeal be dismissed.

## OTHER MATTERS

The appellants also raised other matters which were not considered to be directly related to the proposal, and are therefore considered to be beyond the scope of appeal. These other matters are outlined below, together with the response from DWER.

The appellants submitted that the permit holder has extractive industry licences for two sites on cleared land within three kilometres of the application area.

In its response to this issue, DWER advised:

Section 51E and 51O of the EP Act set out the considerations the CEO shall have in assessing a clearing application, including taking into consideration planning instruments and matters considered relevant.

It is considered that the availability of additional sand resources for the Permit Holder's commercial benefit is beyond the scope of matters considered relevant matters in determining an application.

Although not a matter raised on appeal, DWER also provided advice in relation to requirements under the Commonwealth EPBC Act:

The Department notes that during the course of the amendment to Clearing Permit CPS 6766/1, the Permit Holder was not notified of their responsibilities to refer the project to the Commonwealth Department of the Environment and Energy under the EPBC Act. Furthermore, any taking or disturbing of threatened fauna requires authorisation from the Minister for Environment under section 40 of the BC Act. The Department will notify the Permit Holder about their responsibilities under the EPBC Act and BC Act.

## **CONCLUSION AND RECOMMENDATION**

For the reasons stated in this report, it is considered that DWER's assessment of the amendment application was reasonable, and was supported by the available evidence, and that DWER was justified in amending the clearing permit subject to the specified conditions to manage and mitigate potential impacts to WRP habitat from the proposed clearing.

Emma Gaunt  
APPEALS CONVENOR

**Investigating Officer:**  
Michael Power, Senior Appeals Officer