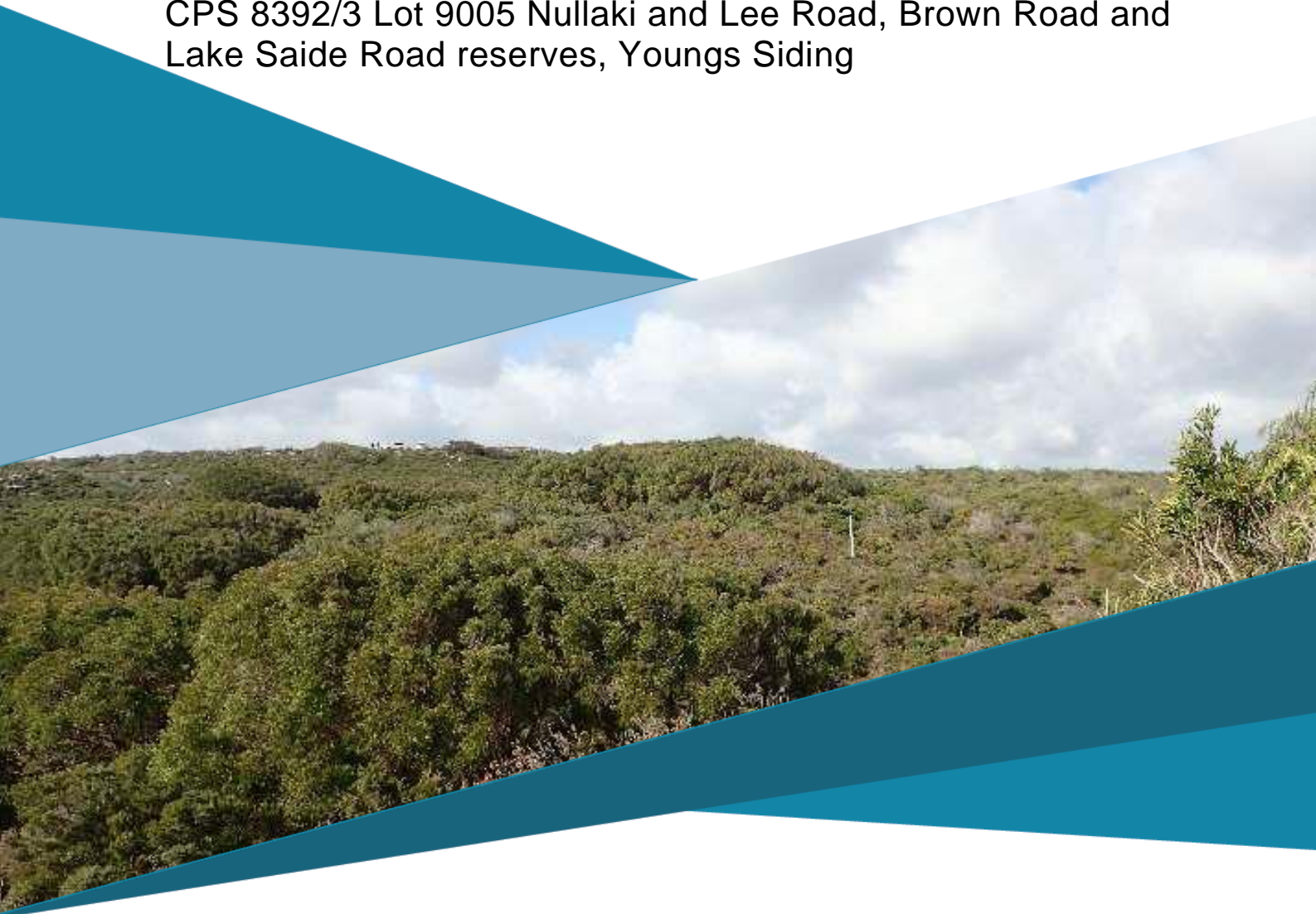




Government of **Western Australia**
Office of the **Appeals Convenor**
Environmental Protection Act 1986

Appeals Convenor's Report to the Minister for Environment

Appeals against amendment of conditions to Clearing Permit
CPS 8392/3 Lot 9005 Nullaki and Lee Road, Brown Road and
Lake Saide Road reserves, Youngs Siding



Permit holder	Mr Graeme Robertson
Appellants	Mr Barry Jackson; and Ms Angela and Mr Andrew Dickinson
Authority	Department of Water and Environmental Regulation (DWER)
Appeal No.	009 of 2021
Date	August 2021

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Cover image: Nullaki lime pit vegetation (DWER Decision Report)

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Acknowledgement of Country

The Office of the Appeals Convenor acknowledges the traditional custodians throughout Western Australia and their continuing connection to the land, waters and community.

We pay our respects to all members of the Aboriginal communities and their cultures, and to Elders both past, present and emerging.

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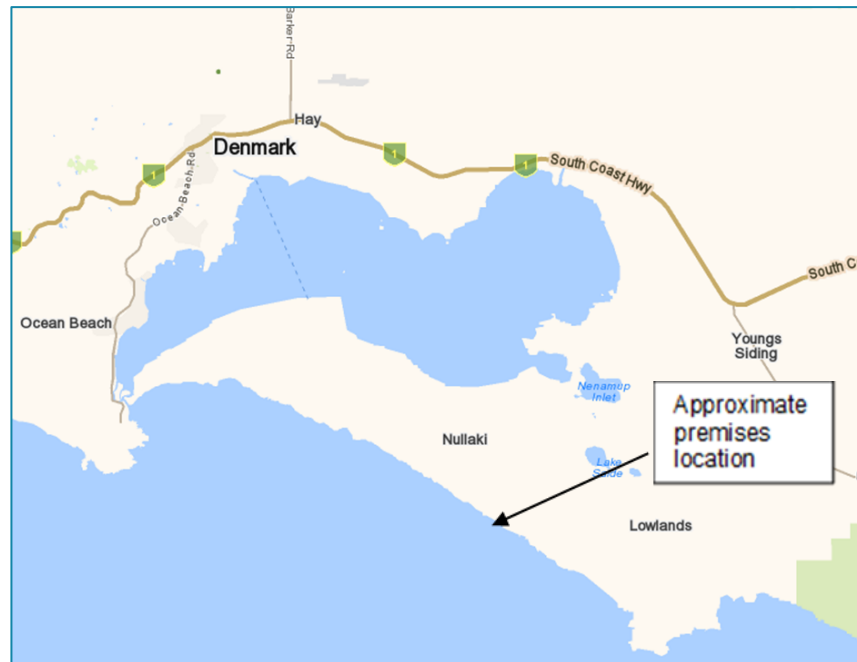
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1 Executive summary

1.1 Decision under appeal

Mr Graeme Robertson holds a clearing permit authorising the clearing of 15.19 hectares (ha) of native vegetation for the purposes of extractive industry (limestone) and road construction and upgrade on the Nullaki Peninsula, approximately 13 kilometres (km) southeast of the town of Denmark (Figure 1).

Figure 1 Approximate location of CPS 8392/3 on the Nullaki Peninsula



CPS 8392/1 was first granted in June 2020. Thirteen appeals were received in objection to the grant of the permit, and the permit was amended by DWER in October 2020 (CPS 8392/2) to give effect to the then Minister’s decision to allow the appeals in part (further background of the history of the permit application and appeals is in Section 3).

On 12 March 2021, DWER amended the clearing permit to vary condition 5(a), with the effect of increasing the extent of clearing within the lime pit on Lot 9005 at any one time, from 2 ha to 3 ha (CPS 8392/3). The total clearing footprint provided for in CPS 8392/3 remained unchanged at no more than 15.19 ha, of which the lime pit is still 8 ha. The amendment allowing 3 ha of clearing at any one time (rather than 2 ha) is consistent with the Development Approval for the site which is discussed at Section 3.2. The purpose of this additional 1 ha is for storage and stockpiling of material, rather than excavation.

It is against this amendment that the 2 appeals were received.

1.2 Grounds of appeal and appellants’ concerns

The appellants are Barry Jackson, and Angela and Andrew Dickinson. They oppose the amendment to allow the additional 1 ha of clearing at any one time within the lime pit and seek for the authorised clearing to be limited to 2 ha at any one time. The appellant’s main concerns have been summarised as 2 main grounds of appeal as provided in Table 1.

Appellants also raised concerns that relate to other approval instruments, compliance, and necessity of the clearing, which are considered to be beyond the scope of appeal.

Table 1 Grounds of appeal

Ground	Main concerns the appellant submitted
Land degradation	There is a significant risk of land degradation from wind erosion, and this risk is increased because of the amendment.
Rehabilitation	Revegetation and rehabilitation will not be achieved due to the environmental characteristics of the site, particularly its susceptibility to wind erosion. The only way to ensure successful rehabilitation is to limit the area cleared at any one time and ensure revegetation occurs prior to additional clearing.

1.3 Key issues and conclusions

This report relates to 2 appeals against DWER's decision to amend the permit which was limited to authorising an additional 1 ha of clearing at any one time, within the limestone pit. The report therefore does not address clearing of the remainder of the permit area including the haul road, nor the limestone extraction, or crushing and screening, which are managed by other statutory processes.

Having regard for the scope of the appeal, the key question for the appeal investigation to determine is, should the amendment have been made? To answer this question, there are 2 issues at the heart of the appeals - the risks of land degradation; and the potential to rehabilitate the site - which are summarised below. Section 2 provides further details about the reasons for our conclusion, including a brief summary of the matters considered to be beyond the scope of the appeal, and supporting information is provided in Section 3.

Did DWER consider if there was an increased risk of land degradation?

We conclude that DWER had adequate regard for the risk of land degradation, and whether the amendment would materially increase this risk.

DWER's initial assessment of the application to clear 2 ha identified that, due to the site characteristics including location, landform, and soil type, the limestone pit area may be prone to land degradation from wind erosion if left bare for a long period of time. However, based on its assessment, DWER concluded that the proposed clearing is unlikely to result in appreciable land degradation from wind erosion, due to the pit being lower than the surrounding landscape, the intact vegetation adjacent providing some protection, and the management and mitigation actions proposed by the permit holder.

On receipt of the application to amend the permit to allow for an additional 1 ha of clearing at any one time (while maintaining the same total authorised clearing footprint of 8 ha in the lime pit), DWER reviewed the risk of land degradation. DWER considered that the risk did not materially change with the amendment because the additional 1 ha will not be left bare but instead be covered with storage material. DWER considered that potential wind erosion in the limestone pit area could continue to be managed through permit conditions.

On review of the appeals, DWER proposed a new amendment to the wording of condition 5(a). We understand that the intent of DWER's recommendation is to ensure that the additional 1 ha stockpile area is only cleared as required for stockpiling and not left as bare, exposed ground. Having regard for the concerns of the appellants, we consider this suggested amendment appropriate to ensure that - while the permit holder can clear an additional 1 ha - there is no increase in exposed soil that may be prone to wind erosion.

Do the conditions provide adequate assurance that the permit area can be rehabilitated?

Based on the evidence available, we consider that the permit generally includes appropriate conditions to manage wind erosion through rehabilitation of cleared areas. While the amendment under appeal does not directly relate to the rehabilitation conditions (condition 12), the appellants' submission that the increased clearing area will make it harder for successful rehabilitation to be achieved is consequential to the amendment and therefore within the scope of the appeal right.

We note that a key mitigating factor in DWER's decision to amend the permit was the permit holder's commitments to undertake progressive and immediate revegetation of cleared areas. Condition 12 requires that once extraction activities are complete, cleared areas within the lime pit are to be revegetated within 12 months.

Noting the appellants' concerns regarding the length of time cleared areas will be left exposed, we recommend that condition 12 be improved to require progressive revegetation and rehabilitation, consistent with the permit holder's commitments. The exact wording is for DWER to determine under section 110 of the *Environmental Protection Act 1986* (EP Act).

Given the outcome of the revegetation will be verified by an environmental specialist and submitted to DWER, and that purpose of the revegetation is to restore the ecological function of the existing vegetation (i.e. stability of the dune), we consider condition 12 is otherwise adequate for the purpose it is intended.

1.4 Recommendation to the Minister

We conclude that the amendment was appropriate, however we recommend the following conditions be further strengthened as follows:

1. the wording of condition 5(a) of the clearing permit be revised to ensure that the stockpile area is only cleared incrementally, as required, and contains stockpiled lime, vegetative material and/or equipment, or is otherwise protected from wind erosion using control mats or geotextiles.
2. the wording of condition 12 of the clearing permit be revised to reflect the intended progressive revegetation and rehabilitation, to reduce the timeframe for which areas of bare ground may be exposed, and with the intent to reduce potential wind erosion and improve the potential for successful rehabilitation.

2 Reasons for recommendation

2.1 Did DWER consider if there was an increased risk of land degradation?

Our conclusion is that DWER adequately assessed the risk of land degradation from wind erosion in the limestone pit, and that the amendment of the permit was appropriate in this regard. In relation to the increased area to be cleared at any one time, DWER concluded that it was unlikely to result in a material increase in the level of risk of land degradation in the limestone pit area. As such, DWER considered that wind erosion could continue to be managed in the limestone pit area through permit conditions. However, having regard for the concerns of the appellants, we support DWER's proposal to strengthen the wording of condition 5(a) to better protect against the risk of wind erosion.

Our reasons for these conclusions are set out below, beginning with a review of DWER's original assessment of the application in relation to land degradation for context.

DWER established the risk of land degradation from clearing 2 ha at any one time in its original decision to grant CPS 8392/1

In its original (June 2020) assessment¹ of the application to clear 15.19 ha against the clearing principles, DWER found the proposed clearing was at variance to clearing principle (f) wetlands; and may be at variance to principles (g) land degradation and (i) water quality.

Regarding (g) land degradation, DWER advised that its assessment was based upon current GIS databases, the Department of Primary Industries and Regional Development's dataset regarding risk potentials for mapped soil subsystems, and a site inspection undertaken by officers of the Department in 2019.

DWER's assessment noted the lime pit was located on an eroded high ridge of interbedded limestone coastal dunes rising between 120m and 160m high. These dunes sit atop an undulating Proterozoic granitic basement. The limestone is a calcarenite, made from beach sand containing shell fragments with some minor and variable quartz.²

DWER's assessment identified that wind erosion within the limestone pit created some risk of land degradation:

The limestone pit area based upon its location, landform and soil type is likely to be prone to wind erosion if left bare for long periods...

The site inspection of the application area noted that the proposed pit area was of a lower point of an otherwise elevated landscape and noted that the proposed pit area was also surrounded by intact vegetation. Noting this, the application is unlikely to result in appreciable land degradation via wind erosion.³

DWER's acknowledgement of the potential risk of land degradation in the limestone pit area is reflected in its proposed conditions on CPS 8392/1, to mitigate this risk:

As a condition of the permit, the applicant will only be allowed to clear two hectares of vegetation within the pit area at any given time. Once the extraction has finished within the two-hectare area, a condition on the permit will require the applicant to

¹ DWER (2020) Decision Report CPS 8392/1

² Ibid, page 13

³ Ibid, page 13

commence revegetation immediately after the extraction has finished and before any further clearing can occur within the pit area.⁴

Overall, DWER concluded that the proposed clearing may impact on the environmental values of the application area, however it determined that the proposed clearing is not likely to lead to an unacceptable risk to the environment, and clearing permit CPS 8392/1 was granted subject to management conditions.

DWER reviewed the risk related to clearing 3 ha at any one time in CPS 8392/3 and the risk remains the same

The appellants contend that the amendment to allow an additional 1 ha of clearing within the lime pit area materially increases the risk of land degradation from wind erosion. An appellant stated:

Wind erosion is a serious risk at such an exposed site as the lime pit. This threat has been recognised by DWER. If large amounts of vegetation are cleared at a given time then this threat increases.⁵

In DWER's view, the amendment to condition 5(a) to allow the clearing of an additional 1 ha stockpile area at any given time is not likely to alter the previous assessment of the application, or significantly increase the risk of appreciable land degradation from wind erosion. An explanation of how DWER reached this conclusion is below.

In November 2020, DWER received the application to amend the permit to allow for 3 ha of clearing at any one time (Figure 2 illustrates the permit holder's proposed additional 1 ha storage area). As noted in Section 3.4, DWER considered this was consistent with the State Administrative Tribunal (SAT) Development Approval which allowed a maximum 3 ha open for extraction and storage at any one time.

DWER assessed the amendment application against the clearing principles, planning instruments and other matters. It advised that it reviewed its previous assessments of CPS 8392/1 and CPS 8392/2, and the conditions imposed on the clearing permit. It also advised that current databases did not reveal any new information that indicated the potential for land degradation impacts to have changed since the assessments undertaken in 2020.⁶

DWER's Decision Report for CPS 8392/3 notes that the location of the clearing, soil types and landforms identified remain unchanged. It confirmed that the amendment related only to an additional 1 ha of clearing at any one time within the existing permit area, and does not alter the 8 ha clearing footprint of the lime pit:

The proposed clearing area remains unchanged from Clearing Permit CPS 8392/1 and Clearing Permit CPS 8392/2...

The Delegated Officer considered that the proposed amendment relates only to amending condition 5(a) of Clearing Permit CPS 8392/2 to increase the area allowed to be cleared at any given time to three hectares, in order to allow for a two-hectare lime extraction pit and a one-hectare stockpile area. The entire clearing footprint sought under CPS 8392/3 is unchanged, and remains no more than 15.19 hectares, of which eight hectares comprises the lime pit, which will be progressively cleared and rehabilitated.⁷

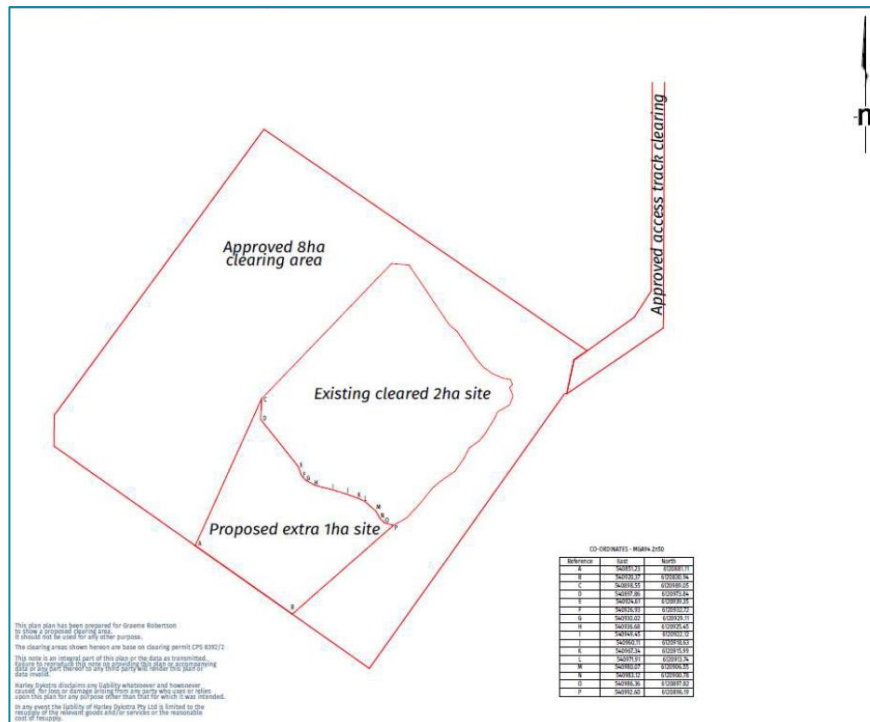
⁴DWER (2020) Decision Report CPS 8392/1, page 13

⁵ Angela and Andrew Dickinson (2021) Appeal related to amendment of CPS 8392/3

⁶ DWER (2021) Appeal Report CPS 8392/3, page 2

⁷ DWER (2021) Decision Report CPS 8392/3, page 6

Figure 2 Proposed additional 1 ha stockpile area (Harley Dykstra 2020) ⁸



DWER’s Decision Report for CPS 8392/3 again considered that the limestone pit area is likely to be prone to wind erosion if left exposed for long periods of time, given its location, landform, and the soil types present. However, regarding the additional 1 ha, DWER’s assessment of the amendment noted that the proposed purpose of the additional 1 ha was for storage, and this was relevant in their consideration of wind erosion:

It is noted that the additional one-hectare area to be cleared at any given time is proposed to be used as a stockpile area adjacent to the lime pit and will not be cleared as part of the extraction pit itself. It is also noted that the stockpile area will be used to store mined lime, vegetative material as required under condition 12 of the Clearing Permit, and machinery and equipment, and therefore, will not be left bare and exposed to weathering for long periods of time.⁹

DWER’s Decision Report therefore concludes:

It is not considered likely that an amendment to condition 5(a) to allow the clearing of an additional one-hectare stockpile area at any given time will alter the previous assessment of the application or significantly increase the risk of appreciable land degradation from wind erosion.

In response to the appeals, DWER summarised its key considerations in forming its view:

- the pit area is at a lower point of an otherwise elevated landscape and is surrounded by intact vegetation
- the permit holder is to adhere to progressive revegetation conditions imposed on the permit (discussed further below)
- the total area to be open for lime extraction at any one time is to remain at 2 ha,

⁸ DWER (2021) Decision Report CPS 8392/3, page 6

⁹ ibid

- the additional 1 ha stockpile area is proposed to be used to store extracted lime, vegetative material and machinery, and therefore, unlikely to be left exposed to weathering for extended periods of time.¹⁰

Given the above, DWER considered that wind erosion could continue to be managed in the limestone pit area through permit conditioning.

However, having regard for the concerns of the appellants regarding the existing risk of wind erosion, DWER proposed amending condition 5(a) to better manage the risk of land degradation, requiring the additional 1 ha to be covered, or otherwise protected from wind erosion using control mats or geotextiles:

Upon further review of the wording of condition 5(a) of the Permit, the Department recognises that the risk of land degradation could be further managed by strengthening the wording of this condition to ensure that the additional one-hectare stockpile area is only cleared as required for stockpiling and is not left as bare, exposed ground. Noting that there will be periods of inactivity at the site, i.e. between April and November as per the Development Approval and Extractive Industry License, the Department considers that any cleared stockpiling areas that will be retained for ongoing operations should not be left exposed to wind erosion during this period.

We agree that the wording of condition 5(a) of CPS 8392/3 should be revised to ensure that the stockpile area is only cleared incrementally, as required, and contains stockpiled lime, vegetative material and/or equipment, or is otherwise protected from wind erosion using control mats or geotextiles.

2.2 Do the conditions provide adequate assurance that the permit area can be revegetated?

An appellant submitted that due to the environmental characteristics of the site, revegetation and rehabilitation will be problematic:

I personally have been involved in revegetation works in conjunction with the City of Albany at similar locations within the adjacent Lowlands reserve. I know that the success of these works has been limited by factors such as wind erosion. This risk needs to be mitigated and the logical and potentially the only way of doing is to limit the area cleared at a given time and to ensure revegetation works are undertaken before additional clearing commences¹¹.

Based on the information available to the investigation we consider that the likelihood of successful rehabilitation is not materially different because of the amendment. However, we do consider that condition 12 should be amended to better reflect the permit holder's intended progressive revegetation. The reasons for this conclusion are discussed in turn below.

The additional 1 ha will be covered by stored material and not left exposed

As discussed in section 2.1, the permit holder intends to use the additional 1 ha stockpile area to store extracted lime, vegetative material and machinery, and therefore, DWER considers it is unlikely to be left exposed to weathering for extended periods of time. DWER has proposed a further amendment to condition 5(a) to ensure this is reflected in the permit conditions, and that if the area is not being used, it is required to be covered with control mats or geotextiles.

¹⁰ DWER (2021) Appeal Report CPS 8392/3, page 3

¹¹ Angela and Andrew Dickinson (2021) Appeal related to amendment of CPS 8392/3

We agree with DWER and recommend the condition 5(a) be amended as discussed at Section 2.1.

The purpose of the revegetation is to mitigate wind erosion

We note that DWER's initial assessment of the application against principle (g) considered that the impact of wind erosion from the proposed clearing could be mitigated through land management techniques and permit conditions, specifically the condition to a) limit the extraction area, and b) require the permit holder to revegetate and rehabilitate any areas no longer required for the purpose of the permit. The requirement to revegetate is addressed in the Decision Report in regard to wind erosion, and therefore we understand that the purpose of condition 12 is to address the risk of wind erosion.

In this regard, DWER's Decision Report for CPS 8392/1 notes the permit holder's commitment to undertake progressive and immediate revegetation of cleared areas; and advised that these would be included as conditions on the permit:

Once the extraction has finished within the two hectare area [now 3 ha], a condition on the permit will require the applicant to commence revegetation immediately after the extraction has finished and before any further clearing can occur within the pit area.¹²

However, we note that condition 12, as per CPS 8392/3, requires only that the permit holder commence revegetation and rehabilitation within 12 months following completion of extraction:

At an *optimal time* within 12 months following completion of material extraction, *revegetate* and *rehabilitate* the areas not required for the purpose of which they were cleared under this permit.¹³

The investigation agrees with the permit holder's commitment to commence revegetation immediately following completion of activities (in this case, either extracting or stockpiling), and before any further clearing occurs. Given that DWER regarded these commitments as a key mitigating factor in its decision to amend the permit (CPS 8392/3), we consider that condition 12 could better reflect this intention. While we note that revegetation should occur at a time to optimise the opportunity for successful revegetation, we also consider that this must be balanced with achieving the intended outcome of mitigating wind erosion by ensuring cleared areas are revegetated as soon as practical.

The permit requires the vegetation to be restored to be similar to pre-clearing vegetation

Condition 12 requires the permit holder to rehabilitate to similar to pre-clearing vegetation types and have it reviewed by an environmental specialist, and verified by DWER:

(c) Within 24 months of laying the vegetative material and topsoil on the cleared area in accordance with condition 12(b) of this Permit:

- (i) engage an *environmental specialist* to determine the species composition, structure and density of the area *revegetated* and *rehabilitated*; and
- (ii) where, in the opinion of an *environmental specialist*, the composition structure and density determined under condition 12(c)(i) of this Permit will not result in a similar species composition, structure and density to that of pre-clearing vegetation types in that area, *revegetate* the area by deliberately *planting* and/or

¹² DWER (2020) Decision Report CPS 8392/1, page 13

¹³ DWER (2021) Clearing Permit CPS 8392/3, condition 12(b), page 3

direct seeding native vegetation that will result in a similar species composition, structure and density of native vegetation to pre-clearing vegetation types in that area and ensuring only *local provenance* seeds and propagating material are used....

e) Where a determination by an *environmental specialist* that the composition, structure and density within areas *revegetated* and *rehabilitated* will result in a similar species composition, structure and density to that of pre-clearing vegetation types in that area, as determined in condition 12(c)(i) and (ii) of this permit, that determination shall be submitted for the *CEO's* consideration. If the *CEO* does not agree with the determination made under condition 12(c)(ii), the *CEO* may require the Permit Holder to undertake additional *planting* and *direct seeding* in accordance with the requirements under condition 12(c)(ii).

Having regard for the purpose of the condition being to address the risk of wind erosion, and that the condition requires verification that the revegetated vegetation is of similar species composition, structure and density to that of pre-clearing vegetation types in that area, we consider that condition 12 is largely adequate to ensure that the outcome is met. However, we consider that the wording regarding the timeframe of revegetation could be improved to better reflect the commitment of the permit holder to progressively rehabilitate cleared areas. The precise wording of condition 12 is for DWER to determine under s110 of the EP Act.

2.3 Other issues

Appellants also raised matters in the appeals that were not directly related to the amendment of the clearing permit. However, for completeness, the appellants' concerns in relation to these matters are noted below, together with DWER's advice.

Compliance

Regarding compliance, appellants submitted that:

- the permit holder has a poor record of compliance, and has been associated with illegal clearing and is not a fit and proper person to hold the permit;
- 2 ha have already been cleared on Lot 9005 and the permit holder has shown disregard for the clearing permit conditions, in particular the principles to avoid, minimise and reduce the impacts of clearing;
- no fauna specialist during clearing has been observed;
- none of the vegetation and topsoil removed from the 2 hectares cleared so far has been stockpiled for revegetation and rehabilitation;
- no dust suppression has been implemented since clearing commenced.

We note that dust is an issue addressed by the works approval issued by DWER authorising crushing and screening at the lime pit. While DWER's assessment of the risk of dust emissions was low, it imposed a condition on the works approval requiring a water cart and sprinkler system on site. The SAT condition also include dust management measures.

Regarding compliance in general, DWER advised:

The Department acknowledges the Appellants' concerns regarding compliance with the Permit conditions. The Department has been monitoring the project and investigating reports of alleged non-compliances with the Permit conditions.

The Department will continue to monitor the project and investigate complaints received. Complaints in relation to compliance with licence and permit conditions

should be lodged directly with the Department's 24 hour Pollution Watch Hotline (1300 784 782) or its online reporting form for investigation.

Enforcement of the conditions of a regulatory instrument is a matter for the Department as the regulator. Where appropriate, the Department will take action in accordance with its *Compliance and Enforcement Policy*.¹⁴

Necessity

One appellant disputed the necessity of the additional 1 ha and raised concerns that the additional 1 ha was unnecessary for storage and would instead be used for extraction.

The appellant submitted that the then Minister for Environment's determination of appeals against the grant of Clearing Permit CPS 8392/1 found that 2 hectares was all that is required for extraction. The appellant is of the view that there is no need to stockpile lime within the pit area as crushing, screening, loading and trucking of lime can be done as an integrated operation.

In response, DWER advised that it acknowledged that the wording of condition 5(a) could be strengthened in this regard:

To ensure mineral extraction could not be extended beyond two hectares and that the additional one hectare of cleared area would only be utilised as required for stockpiling, the Department applied a condition to the Clearing Permit, requiring that the cleared area at any given time is limited to a two hectares lime extraction area and a one hectare stockpile area.¹⁵

¹⁴ DWER (2021) Appeal Report 009/21, page 4

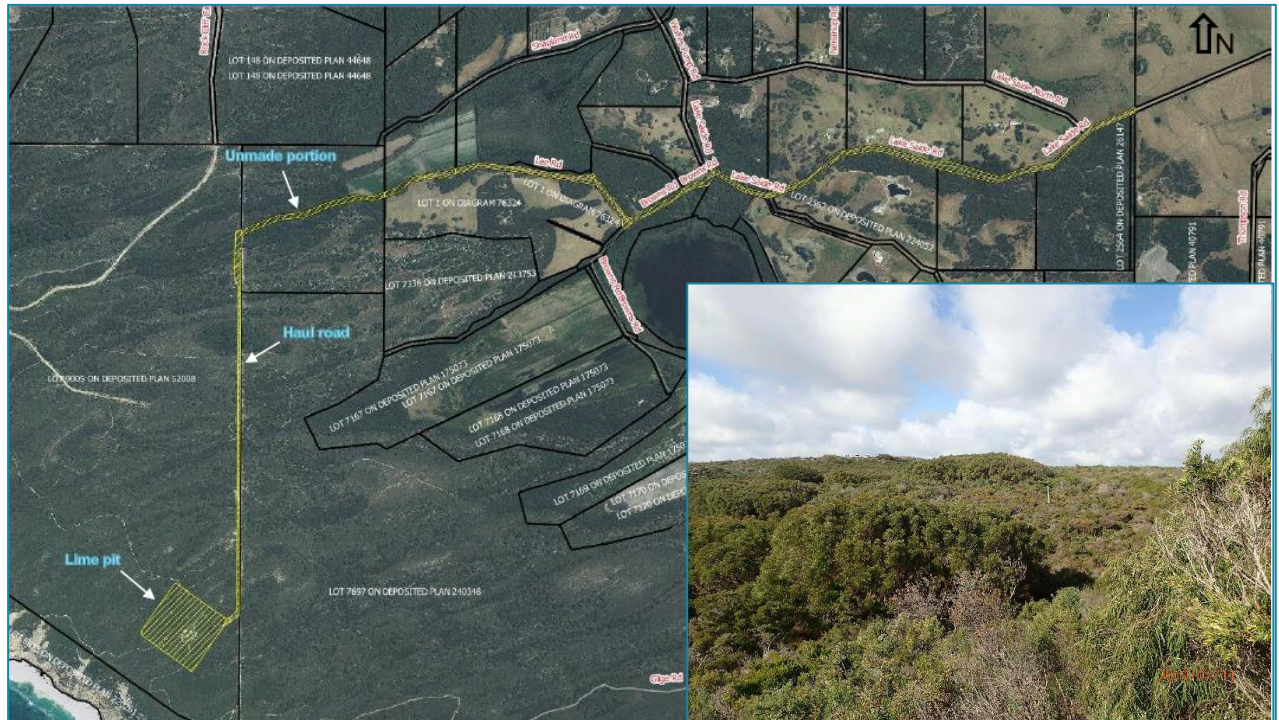
¹⁵ DWER (2021) Appeal Report 009/21, page 3

3 Supporting information

3.1 Site description

Clearing permit CPS 8392/3 is located on the south side of the Nullaki Peninsula, within Lot 9005, Nullaki, Lee Road reserve, Browns Road reserve and Lake Saide Road reserve, Youngs Siding (Figure 3). The Nullaki Peninsula is largely undeveloped, and was previously used for agriculture and zoned Rural, but is now zoned Landscape Protection.

Figure 3 Location of lime pit in the context of CPS 8392/3, and an example of the existing vegetation within the lime pit.



CPS 8392/3 has a total footprint of 15.19 ha, of which the 8 ha is for the extraction of limestone from the 'lime pit'. The remaining 7.19 ha of clearing is associated with the construction of a haulage road, and upgrades of nearby roads, to allow for the transport of extracted materials.

DWER's Decision Report states that the lime pit area consists of open heath in 'pristine' condition¹⁶, however we note that there are some areas of disturbance within the lime pit area. An example of the vegetation present in the lime pit is in Figure 3 above.

The permit area is mapped as the Nullaki Dune System, described as high dunes with coast scrub and peppermint-jarrah-marri woodlands.

DWER advised that flora surveys completed over the limestone pit, haulage road and the proposed new road did not record any priority flora, and the application area is not likely to include or be necessary for the continued existence of threatened flora.

In addition, no significant breeding or foraging habitat for fauna species is likely to occur within the application area. The proposed clearing area was also not determined to comprise of an ecological linkage and will not impact faunal dispersal across the landscape.

¹⁶ DWER (2020) Decision Report CPS 8392/1 page 3

3.2 History of Clearing Permit

Application

In June 2020, a purpose permit was granted to Mr Graeme Robertson (CPS 8392/1) for the clearing of up to 15.19 hectares of native vegetation for the purpose of establishing the Nullaki Lime Pit and constructing/upgrading access roads. The timeline of amendments to the permit is summarised in Table 2.

Table 2 Timeline of permit amendments

Date	Details
26 February 2019	Permit holder submitted application for a purpose permit for 11.8 ha
24 June 2020	CPS 8392/1 is granted by DWER for 15.19 ha (the increase was to allow for additional emergency fire access)
July 2020	13 appeals are lodged in objection to the grant of CPS 8392/1
29 October 2020	DWER amends the permit to give effect to the Minister's determination of the above appeals (CPS 8392/2)
24 November 2020	Permit holder applies to amend CPS 8392/2
12 March 2021	CPS 8392/3 is granted by DWER with an amendment to condition 5
March 2021	2 appeals are lodged in objection to the amendment

Appeals

As noted in Table 2, 13 appeals were received in objection to the grant of clearing permit CPS 8392/1, with grounds related to DWER's assessment of the application and its consideration of the impacts to environmental values, land use impacts, other approvals and necessity of the clearing.

The appeals were partly upheld by the then Minister for Environment in October 2020. The then Minister determined that the permit could be granted but directed that it be subject to additional conditions for mitigating potential impacts to black cockatoos and the western ringtail possum. DWER gave effect to this determination by amending the permit and including further conditions.

3.3 Relevant permit conditions

5. Limitation of clearing within the lime pit

- (a) The Permit Holder must not clear more than three hectares at any given time within the area crossed hatched green on attached Plan 8392/3e for the purpose of extractive industry, comprising:
 - (i) A two-hectare lime extraction area; and
 - (ii) A one-hectare stockpile area.
- (b) The Permit Holder must not clear more than eight hectares total within the area crossed hatched green on attached Plan 8392/3e.

12. Retain vegetative material and topsoil, revegetation and rehabilitation

The Permit Holder shall:

- (a) Retain the vegetative material and topsoil removed by clearing authorised within the area crossed hatched green on attached Plan 8392/3e and stockpile the vegetative material and topsoil in an area that has already been cleared.
- (b) At an *optimal time* within 12 months following completion of material extraction, *revegetate* and *rehabilitate* the areas not required for the purpose of which they were cleared under this permit, by:
 - (i) ripping the ground on the contour to remove soil compaction; and
 - (ii) laying the vegetative material and topsoil retained under condition 12(a) on the cleared area(s).
- (c) Within 24 months of laying the vegetative material and topsoil on the cleared area in accordance with condition 12(b) of this Permit:
 - (i) engage an *environmental specialist* to determine the species composition, structure and density of the area *revegetated* and *rehabilitated*; and
 - (ii) where, in the opinion of an *environmental specialist*, the composition structure and density determined under condition 12(c)(i) of this Permit will not result in a similar species composition, structure and density to that of pre-clearing vegetation types in that area, *revegetate* the area by deliberately *planting* and/or *direct seeding* native vegetation that will result in a similar species composition, structure and density of native vegetation to pre-clearing vegetation types in that area and ensuring only *local provenance* seeds and propagating material are used.
- (d) Where additional *planting* or *direct seeding* of native vegetation is undertaken in accordance with condition 12(c)(ii) of this permit, the Permit Holder shall repeat condition 12(c)(i) and 12(c)(ii) within 24 months of undertaking the additional *planting* or *direct seeding* of native vegetation.
- (e) Where a determination by an *environmental specialist* that the composition, structure and density within areas *revegetated* and *rehabilitated* will result in a similar species composition, structure and density to that of pre-clearing vegetation types in that area, as determined in condition 12(c)(i) and (ii) of this permit, that determination shall be submitted for the *CEO's* consideration. If the *CEO* does not agree with the determination made under condition 12(c)(ii), the *CEO* may require the Permit Holder to undertake additional *planting* and *direct seeding* in accordance with the requirements under condition 12(c)(ii).

13. Records must be kept

...

- (h) in relation to the revegetation and rehabilitation of areas pursuant to condition 12 of this Permit:
 - (i) the size of the area revegetated and rehabilitated;
 - (ii) the date(s) on which the area revegetation and rehabilitation was undertaken;
 - (iii) the revegetation and rehabilitation activities undertaken;
 - (iv) the date(s) where additional planting or direct seeding of native vegetation is undertaken, and
 - (v) the boundaries of the area revegetated and rehabilitated.

3.4 Related approvals

City of Albany Development Approval

In 2017 the City of Albany unanimously refused to grant development approval for a lime pit (extractive industry) under the *Planning and Development Act 2005* on Lot 9005 Rock Cliff Circle, Nullaki Peninsula.

The applicant subsequently sought review of the City's decision by the State Administrative Tribunal (SAT) (see below).

SAT Development Approval

The matter of a development approval for the lime pit was heard by SAT in 2018. In January 2019 SAT overturned the City's decision to refuse the development approval. Approval was granted subject to 45 conditions including requirements for the applicant to undertake a range of road upgrades and a maximum 3 ha being allowed for extraction and storage.

Condition 2 of the development approval determined by SAT states:

Excavation, storage and extraction activities shall be contained within an eight-hectare area in the location depicted in the plan... A maximum of three hectares will be open for extraction and storage of material at any one time.¹⁷

In response to the appeals, DWER advised that it considers the additional 1 ha of clearing at any one time consistent with the development approval condition, and stated:

The Department had regard to Condition 2 of the Development Approval determined by the SAT and Condition 13 of the Extractive Industry Licence granted by the City of Albany which both state that **"a maximum of three hectares will be open for extraction and storage of material at any one time"**. The Department considered that the proposed amendment to the Clearing Permit to allow for a two hectares lime extraction area and a one hectare stockpile area was consistent with the provisions of the Development Approval and Extractive Industry License for the project.¹⁸

City of Albany Extractive Industry Licence

In late 2020, the City of Albany issued an extractive industry licence to Nigel Palmer Earthmoving Pty Ltd, for the extraction of lime for one year, between 1 December and 31 March. The licence limits the area open to extraction and storage to a maximum of 3 ha at any one time.¹⁹

EP Act Part IV

The Nullaki Lime Pit proposal was referred to the Environmental Protection Authority (EPA) by the applicant's consultant in January 2017. The proposal referred is described on the EPA's website as involving:

- the staged development of a 7.5 ha lime pit and 2 ha stockpiling area; and
- the clearing of approximately 1.72 ha for the realignment and extension of Lee Road and a road truck access loop.²⁰

¹⁷ SAT [2019] WASAT 3, condition 2

¹⁸ DWER (2021) Appeal Report 009/21, page 3

¹⁹ City of Albany (2020) Extractive Industry Licence, condition 13

²⁰ EPA (2020) Nullaki Lime Pit <https://www.epa.wa.gov.au/proposals/nullaki-lime-pit>

In August 2017 the EPA decided not to assess the proposal under Part IV of the EP Act and recommended that the proposal be dealt with under Part V Division 2 (Clearing).

EP Act Part V

In November 2020, DWER granted a works approval (W6420/2020/1) to Nigel Palmer Earthmoving Pty Ltd, authorising the crushing and screening of limestone at the same location. The works approval allows for a maximum of 50,000 tonnes of limestone (between 1 December and 31 March) for a time limited operation of 90 days. Four appeals were received in objection to the conditions of the works approval.

Beyond the works approval, the works approval holder will require further approval, in the form of a licence granted under Part V of the EP Act, to authorise emissions associated with the continued operation of crushing and screening equipment.

Appendix 1 Appeal process

The Minister assesses the merits of a decision

Environmental appeals follow a merits-based process. This means the Minister can consider all the relevant facts, law and policy aspects of the decision and decide whether it was correct and preferable.

However, for appeals relating to a clearing permit amendment, the Minister can only consider matters directly linked to the amendment. Appeal rights do not extend to parts of the permit that were not amended.

A merits review cannot overturn the original decision to grant a permit. But if the appeal is upheld, the permit conditions might change, or an amendment might not go ahead.

We report to the Minister, as does the decision-making authority

To decide an appeal's outcome, the Minister for Environment must have a report from both:

- the Appeals Convenor [see section 109(3) of the EP Act], and
- the authority that originally made the decision under appeal [see section 106(1)].

To properly advise the Minister in our report, our investigation included:

- a review of the 2 appeals
- a review of 3 Decision Reports, and the conditions of the 3 issued permits
- a review of the response to the appeals provided by the permit holder
- a review of the section 106 report from DWER
- meetings with the permit holder and one appellant
- email correspondence with one appellant to confirm concerns and grounds of appeal
- reviewing other information, policy and guidance as needed

Table 3 Documents we reviewed in the appeals investigation

Document	Date
SAT Development Approval	January 2019
City of Albany Extractive Industry Licence	June 2020
DWER Decision Report CPS 8392/1	June 2020
Appeals Convenor's Report CPS 8392/1	October 2020
DWER Decision Report CPS 8392/2	October 2020
DWER Decision Report CPS 8392/3	March 2021
Permit Holder's response to appeals	April 2021
DWER Appeal Report 009/21	June 2021