



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

## Appeals Convenor's Report to the Minister for Environment

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Appeals objecting to the EPA decision not to assess:  
Derby Barge Facility, Shire of Derby-West Kimberley



<b>Appellants</b>	Hon Robin Chapple (then Member for the Mining and Pastoral Region) Environs Kimberley
<b>Proponent</b>	Colonial Marine Consultants Pty Ltd
<b>Authority</b>	Environmental Protection Authority (EPA)
<b>Appeal number</b>	052 of 2020
<b>Report date</b>	May 2021

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**This report**

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Cover image source: Google Earth, aerial image of the Port of Derby from Teal Solutions Environmental Advisory (2020) Port of Derby – Derby Barge Facility Environmental Impact Assessment (June 2020).

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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 and present.

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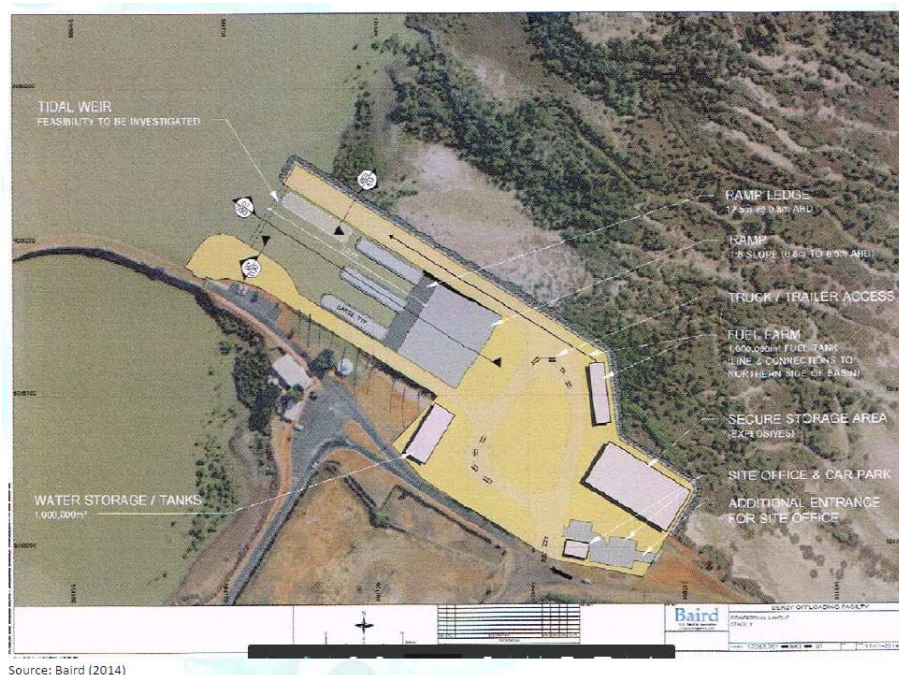
# 1 Executive summary

## 1.1 Decision under appeal

This report addresses appeals lodged in objection to the decision of the Environmental Protection Authority (EPA) not to assess a proposal by Colonial Marine Consultants Pty Ltd (proponent) to develop the Derby Barge Facility at the Port of Derby in the Shire of Derby-West Kimberley.

The EPA considered that the likely environmental effects of the proposal were not so significant as to warrant formal assessment because the small extent and consequence of the predicted impacts as a result of the proposal are predicted to be minimal.

Figure 1 shows the proposal layout and a contextual map is provided in section 3.



**Figure 1** Proposal layout<sup>1</sup>

The proposal is for the development of a barge facility, to relocate the proponent's existing operations at the port, including:<sup>2</sup> Loading/unloading of barges and refuelling, facilities for roll-on/roll-off and lift-on/lift-off loading and unloading, fuel storage and storage and laydown areas.

## 1.2 Grounds of appeal and appellants' concerns

The appellants are the Hon Robin Chapple [retired Member for the Mining and Pastoral Region] and Environs Kimberley. The matters raised in the appeals have been summarised under four main grounds as provided in Table 1. One appellant also raised other issues about marine safety.

<sup>1</sup> Teal Solutions Environmental Advisory (2020) Port of Derby – Derby Barge Facility Environmental Impact Assessment – Supporting Document. Prepared for Colonial Marine Consultants Pty Ltd, June 2020.

<sup>2</sup> Teal Solutions Environmental Advisory (2020) Port of Derby – Derby Barge Facility Environmental Impact Assessment – Supporting Document. Prepared for Colonial Marine Consultants Pty Ltd, June 2020. pp 6-8

**Table 1** Grounds of appeal

Ground	Main concerns the appellant submitted
Mangroves	Mangroves in King Sound are significant and should be protected.
Coastal processes and dredging	The EPA have not considered impacts to coastal processes and more information is required on dredging in order to determine the impacts.
Tidal weir and land access	The EPA have not considered the impacts of the tidal weir and the proponent does not have legal access to the whole proposal area.
Management of environmental impacts and public engagement	The proposal cannot be adequately managed to protect the unique environment and incorporate public engagement, without formal assessment.

The appellants asked for the Minister to remit the proposal to the EPA for formal assessment, with one appellant recommending a level of assessment of Public Environmental Review.

### 1.3 Key issues and conclusions

From the appellants' concerns, we have identified 4 issues at the heart of the appeals. Having regard for the information presented during the appeal investigation, our conclusion is that the EPA was justified in determining that the proposal does not warrant formal assessment under Part IV of the EP Act.

We agree that the potential impacts of the proposal can be adequately managed through implementation of the proposal in accordance with the referral documentation and the proponent's management and mitigation measures, also noting that other statutory processes relevant to this proposal including the native vegetation clearing process and development approval.

We summarise our conclusions to the 4 issues below. Section 2 of this report then details our reasoning and Section 3 provides supporting information. The Hon Robin Chapple's concerns in relation to marine safety are considered to be outside our scope, but are discussed briefly in Section 3.

#### Did the EPA consider the impacts to mangroves?

The EPA considered there was relevant and adequate information to assess the potential environmental impacts from the proposal on benthic communities and habitat including an evaluation of potential impacts to mangroves from the proposal.

The EPA did acknowledge that there was an error in the area of impact to mangroves in its decision. The EPA has since confirmed that the correct calculation of 2.35 ha, would impact 0.8% of the Derby Local Assessment Unit, which is considered to be a small and localised impact and can be considered by the native vegetation clearing process. The EPA's decision not to assess has no presumption regarding the outcome of an application for a clearing permit.

In relation to sedimentation, the EPA advised that the proposal will not significantly affect the sedimentation processes in King Sound, and impacts can be managed by the proponent's mitigation and management measures.

We accept the EPA's advice and recommend that this ground of appeal be dismissed.

#### **Did the EPA consider impacts from dredging and impacts to coastal processes?**

Noting that the impacts of dredging are anticipated to be small, localised, short-term and can be managed through the implementation of the referral documentation, including the proposed mitigation and management measures.

The EPA does not anticipate significant interruption to coastal processes, and we understand that the proponent is required to obtain development approval, which will consider *State Planning Policy 2.6 – State Coastal Planning Policy*.

We accept the EPA's advice and recommend that this ground of appeal be dismissed.

#### **Did the EPA consider the tidal weir and land access rights?**

The EPA did not consider the tidal weir as it was not part of the proposal referred. We understand that the proponent will require a formal lease issued by the Department of Transport and Kimberley Port Authority, ensuring legal access prior to implementation of the proposal.

We accept the EPA's advice and recommend that this ground of appeal be dismissed.

#### **How will environmental impacts be minimised and public engagement undertaken?**

Although the impacts are anticipated to be limited due to the location and nature of the proposal, we understand that the proponent will undertake its operations consistent with its referral documentation, which includes management and mitigation measures. Other statutory approvals are also required which will consider assessment of impacts.

We agree with the EPA that formal assessment is not necessary to allow for public engagement and encourage the proponent to engage with the public on the proposal and management plans going forward.

We accept the EPA's advice and recommend that this ground of appeal be dismissed.

### **1.4 Recommendation to the Minister**

It is recommended that the appeals be dismissed.



## 2 Reasons for recommendation

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### 2.1 Did the EPA consider impacts to mangroves?

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Our conclusion is that the EPA did consider the impacts to mangroves in making its decision, including other statutory processes. We explain our reasoning below.

#### **Avoidance of mangroves**

Appellants noted the beneficial regulatory action of the mangrove biome in terms of salinity, nutrient load, sediment-laying, dispersion of tides and hydrological forces, nursery-ground provision, and long-term carbon storage. On this basis, appellants submitted that the mangroves should be excluded from the proposal footprint and existing contaminated lands in the area should be used instead.

The EPA advised, that while it would have been preferable for the proponent to locate the proposal to avoid impacts on mangroves, it must consider the proposal as referred.

#### **Impacts to mangroves are not accurately defined and considered**

One appellant submitted that the proponent's supporting documentation contained errors regarding proposal footprint and impacts to mangroves.

In response, the proponent advised that the proposal has the potential to impact on 2.35 ha of mangroves, greater than the 1.75 ha referred to in the EPA's decision not to assess. We understand that the new estimate of mangrove loss has arisen from small changes to the width of the basin.

Through further advice, the EPA confirmed that the small changes were already reflected in the spatial data submitted by the proponent, however calculations in the referral supporting document were incorrect.

The EPA advised that the correct calculation of 2.35 ha, would impact 0.8% of the Derby Local Assessment Unit, compared to 1.75 ha and 0.6% of the Derby Local Assessment Unit (in the EPA's decision not to assess).

Based on the corrected calculations, the EPA confirmed that the estimated loss to 2.35 ha of mangrove community:

- is in the same location and subject to the same spatial data as that considered by the EPA
- is a small and localised impact
- is contiguous with existing disturbed areas in the Port of Derby
- represents a small incremental loss of mangrove community within a broader expanse of intact mangrove communities and habitats in King Sound
- will be subject to weed control and management protocols that were set out in the proponent's referral information
- can be managed by the native vegetation clearing permit process.

We note that EPA's decision not to assess has no presumption regarding the outcome of an application for a clearing permit.

## **Adequacy of studies and investigations**

Appellants challenged the relevance of the studies used to determine the impacts of the proposal on mangroves, including mammals, threatened species, reptiles, and avifauna. One appellant submitted that studies were undertaken nine years ago and were not relevant to the impact area.

The EPA advised that the proponent used a range of mangrove surveys completed in the same area of coastline (King Sound), the most recent being in 2017. The EPA considered there was relevant and adequate information to assess the potential environmental impacts from the proposal on benthic communities and habitat including an evaluation of potential impacts to mangroves from the proposal.

Notwithstanding the above, we understand that a native vegetation clearing permit will be required to for any clearing of mangroves. The proponent's referral document states that vegetation survey will be completed consistent with the EPA's technical guidance for the protection of benthic communities and habitats. The proponent advises that the vegetation survey will be used to support an application to the Department of Water and Environmental Regulation for a native vegetation clearing permit and that weed control and management protocols shall be implemented during both construction and operation to prevent the spread of introduced species. We consider that this process will provide the opportunity for any information gaps to be addressed, should they exist.

## **Further studies to determine impacts to sedimentation processes of King Sound**

Appellants noted that King Sound experiences the highest tidal range in Australia and that the tidal range at Derby reaches a maximum of 11.8 m. The appellants considered that removing the mangroves at this location could alter sedimentation in King Sound, adversely affecting the mangrove habitat and passage of vessels. The appellants considered that further studies were required to determine the potential impacts.

Based on the location of the proposal (adjacent to existing marine infrastructure), small loss of mangroves and that construction impacts would be small and localised, the EPA advised that the sedimentation processes in King Sound would not be significantly impacted.

The EPA stated that the surrounding environment of King Sound experiences high ambient turbidity levels as a result of the strong tidal currents and any impacts to marine fauna, marine environmental quality and benthic communities from construction activities are small and localised.

We note that in making its decision not to assess the proposal, the EPA considered the proponent's mitigation and management measures for benthic communities and habitat and marine environmental quality contained in the referral document. These measures include sediment sampling, visual monitoring, construction management measures and standard operating procedures. Section 3.1 provides more details of the specific mitigation and management measures the EPA considered.

## **2.2 Did the EPA consider impacts from dredging and impacts to coastal processes?**

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Our conclusion is that the EPA did consider impacts from dredging activities, where impacts are anticipated to be small and localised. We note that minimal impacts to coastal processes are anticipated and development approval is required which can look at coastal process. We explain our reasoning below.



## Dredging

The appellants considered that it was unclear how much dredging is required in the basin and where this dredge material is proposed to be disposed of, especially if not suitable for fill materials and contaminated with acid sulphate soils or heavy metals.

The proponent's referral document states that in September 2008 the port was classified under the *Contaminated Sites Act 2003* as *possibly contaminated - investigation required*, due to the presence of elevated lead and zinc concentrations associated with export of mineral concentrates. In reviewing the proponent's referral document, we understand that sediments sampled at the site exceeded recommended guidelines for chromium and nickel.

The appellant considered the proposed dredging activities to be unclear. From reviewing the proponent's referral document we understand that dredging activities include:

- dredging the basin to a depth of -1.0 m AHD and a dredging volume of 30,000 m<sup>3</sup>
- land levels to be +6.5 m AHD, requiring approximately 35,000 m<sup>3</sup> of fill, obtained from dredging the basin (assuming material characteristics are suitable) with the remaining clean fill sourced locally
- sediment sampling will be undertaken prior to construction to further assess the risk of generating acid sulfate soils and/or the release of contaminants during the construction works
- acid sulfate soil management plan and/or a site management plan may be prepared to ensure any risks are minimised or mitigated
- all imported fill and rock material shall be sourced from appropriately licenced facilities and be confirmed as suitable
- all waste shall be managed appropriately during construction and all site personnel shall be briefed on waste management procedures
- minimal maintenance dredging is anticipated.

The EPA also advised the following regarding dredging activities:

- no benthic primary producer habitat was identified in the disturbance footprint
- excess dredge material deemed not required or unsuitable for fill would be disposed offsite with the agreement of the Shire
- development approval is required under the *Planning and Development Act 2005*, prior to undertaking any site works.

The EPA was of the view that the potential impacts of dredging are small, localised and short term and can be adequately managed through the implementation of the proposal in accordance with the referral documentation and the proponent's mitigation and management measures.

Based on the information above, we consider that the dredging activities were considered by the EPA, including the management of dredge materials and development approval requirements.

## Coastal processes

An appellant considered that sediment movement along the coast could be impeded by the jetty walls, causing significant environmental impacts. The appellant recommended that a coastal process study be undertaken.

In response, the EPA noted that the proposal is located on historically reclaimed land formed from imported fill material and is located adjacent to existing port infrastructure. On this basis, the EPA did not anticipate significant interruption to coastal processes, with minor sedimentation likely to occur within the harbour requiring occasional maintenance dredging.

Notwithstanding, the EPA advised that the proponent is required to obtain development approval from the Shire of Derby-West Kimberley, and the assessment of this application will consider *State Planning Policy 2.6 – State Coastal Planning Policy*. The EPA advised that the Port of Derby is managed by the Shire of Derby-West Kimberley on behalf of the Department of Transport under a port operation agreement. The proponent advised that it is in discussion with the Shire regarding development approval.

Given the location of the proposal, anticipated small and localised impacts to coastal processes, and requirement for development approval (which can consider coastal processes), we agree with the EPA's position that the potential impacts to coastal processes do not require formal assessment.

## **2.3 Did the EPA consider the tidal weir and land access arrangements?**

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Our conclusion is that the tidal weir was not part of the proposal referred to the EPA and that other regulatory approvals are required to be obtained by the proponent prior to implementing the proposal. We explain our reasoning below.

### **Tidal weir**

An appellant noted that a figure in the proponent's referral document showed a tidal weir with the label 'feasibility to be investigated'. The appellant was concerned that there was no further detail regarding the weir, or the potential environmental impacts. In response the EPA and the proponent advised that the tidal weir was not part of the referral. The EPA understood this to be a potential long-term future option and advised that this would require separate approvals should the proponent wish to proceed with it in the future.

### **Land access**

The appellant noted that proponent has a sublease agreement to access the area of the proposed development. However, based on the information in the referral document, the appellant considered that it was unclear if the proponent has legal access to all of the proposed development area.

In response, the EPA advised that the proponent currently holds a sublease for the proposal area. The EPA noted that Shire of Derby-West Kimberley has advised that the proponent will require a formal lease issued by the Department of Transport and Kimberley Port Authority, ensuring legal access prior to implementation of the proposal. The EPA also noted that the proponent is required to prepare and submit a development application to the Shire of Derby-West Kimberley under the *Planning and Development Act 2005*, prior to implementing the proposal.

Therefore, the decision of the EPA not to assess the proposal, does not remove the requirement for the proponent to obtain other approvals, including a formal lease agreement.

## **2.4 How will environmental impacts be minimised, and public engagement undertaken?**

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Our conclusion is that the EPA has considered the proposal referred where the environmental impacts are not anticipated to be significant, and formal environmental assessment is not necessary for public consultation to occur. We explain our reasoning below.

### **Consideration of alternatives and design optimisation**

The appellants considered that the EPA should formally assess the proposal to allow for consideration of alternative sites and optimisation of the proposal (site design, layout, sequence, technologies, mitigation strategies) in order to minimise environmental impacts.

In relation to the consideration of alternative locations and proposal configurations, we note the EPA's advice that it has considered the proposal referred by the proponent.

One appellant raised concerns that the supporting referral document prepared for Colonial Marine Consultants Pty Ltd, did not feature a signature from an authorised representative of Teal Solutions Pty Ltd. On this basis, the appellant considered that the document is malleable and may not reflect the eventuality of the project.

In response, the EPA advised that the proponent's representative has signed the EPA referral form, and that the content and responses in the referral form refer to the supporting document by Teal Solutions Pty Ltd. The EPA advised that is standard practice. While the design is conceptual, EPA advised that extent of the proposal (intensity, footprint and duration) will remain as presented in the proponent's referral documentation.

Appellants considered that formal environmental assessment would allow environmental impacts to be minimised and managed. In making its decision not to assess the proposal, we note that the EPA considered:

- the location, within an area previously disturbed, adjacent to existing infrastructure
- small scale, extent, severity, and duration of potential impacts (these are discussed in more detail in Sections 2.1 to 2.3).
- widespread distribution of the benthic communities (including mangrove communities)
- resilience of sensitive environmental values in King Sound
- types of feasible mitigation measures proposed by the proponent to manage impacts

Although the impacts are anticipated to be limited, we understand that the proponent will undertake its operations consistent with the referral documentation, and that development approval, a lease agreement and a native vegetation clearing permit will also be required.

### **Public consultation**

The appellants were of the view that a comprehensive environmental assessment would allow for public engagement in the development of environmental management plans.

We understand that prior to undertaking the works a construction environmental management plan (CEMP) will be developed and will include a range of monitoring, management and recording measures, see Section 3.2 for a more comprehensive list.

Following construction, we understand from the proponent's referral document that an operation environmental management plan shall be prepared.

In relation to public input into the proponent's environmental management plans, the EPA advised that consultation on matters such as management plans can occur as part of the proponent's ongoing engagement with the local community, local government and adjacent port operations.

Regarding the consultation undertaken by the proponent, we understand from the referral document that consultation has been conducted with various stakeholders regarding the proposal, including: Department of Transport, Shire of Derby-West Kimberley, Winun Ngari Aboriginal Corporation, Dambimangari Aboriginal Corporation, Mount Gibson Iron, Sheffield Resources and Derby Chamber of Commerce. Regarding public engagement, the EPA advised that the proponent's referral and supporting information was published for a 7-day public comment period consistent with the *Environmental Impact Assessment (Part IV Divisions 1 and 2) Administrative Procedures 2016*. We note that one public comment was received (recommending not to assess).

As previously discussed, the EPA has advised that a native vegetation clearing permit will be required, and we note there is the opportunity for public participation in this process.

Based on the above, we consider that there has been opportunity for public input into the proposal and considered that formal assessment is not necessary to allow for public engagement. We encourage the proponent to engage with the public on the proposal and management plans going forward.

## 3 Supporting information

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### 3.1 Map

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The following map is provided for context of the proposal location within the Port of Derby.



Source: Google Earth

**Figure 2** Aerial image of the Port of Derby<sup>3</sup>

### 3.2 Marine management measures

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As discussed in Section 2.1, the EPA considered the proponent's mitigation and management measures for benthic communities and habitat and marine environmental quality including mangroves contained in its referral document, which included:

- Sediment sampling shall be undertaken prior to construction (in conjunction with a geotechnical survey required to inform the detailed design) to further assess the risk of generating acid sulfate soils and/or the release of contaminants during the construction works. An acid sulfate soil management plan and/or a site management plan may be prepared to ensure any risks are minimised or mitigated.
- Visual monitoring of water quality shall be undertaken during construction.
- Standard operating procedures will apply for all refuelling activities. During construction all marine-based plant shall be refuelled at the existing designated Port of Derby vessel fuelling facility. Where practicable, all land-based construction plant will not be refuelled on or adjacent to waterways.
- Management measures during impact-driving operations will include pre-start survey, safety zones, marine mammal observer and soft start procedures. Marine pest management will be consistent with national guidelines.

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<sup>3</sup> Teal Solutions Environmental Advisory (2020) Port of Derby – Derby Barge Facility Environmental Impact Assessment – Supporting Document. Prepared for Colonial Marine Consultants Pty Ltd, June 2020.

- Refuelling facilities will be installed and operated consistent with the requirements of the Port of Derby and the Department of Transport's Fuel Dispensing to Vessels Guidelines.

### **3.3 Construction environmental management plan**

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As discussed in Section 2.4, prior to undertaking the works it is understood that the proponent will develop a construction environmental management plan (CEMP), which will include:

- acid sulfate soil management (if required)
- contaminated sediment management (if required)
- construction environmental monitoring
- site inductions
- waste management protocols
- refuelling and hydrocarbon spill procedures
- marine mammal management procedure for impact driving works
- introduced marine pest management procedures
- traffic management plan
- dust management
- noise management

### **3.4 Other issues**

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#### **Appellant's remaining concerns are beyond the appeal scope**

One appellant also raised matters in the appeals that were not directly related to the decision of the EPA not to assess the proposal. However, for completeness, the appellant's concerns in relation to these matters are noted below, together with the EPA's advice. However, we have not considered them further because these matters are beyond the scope of appeal.

#### **Marine Safety**

One appellant raised potential safety concerns relating to the proposal and the use of shipping lanes by vessel/boat users. The appellant sought for a fully staffed harbourmaster role to choreograph both public and private vessels.

#### **EPA**

The EPA did not respond to management of public and private vessels. The management of controlled refuelling, spill and waste management procedures and sediment sampling is discussed under Sections 2.1 and 2.2.



## Appendix 1 Appeal process

### The Minister assesses the merits of a decision

The environmental appeals process is a merits-based process. For appeals in relation to an EPA decision not to assess, the Appeals Convenor normally considers questions of environmental significance, relevance of factors, additional information not considered by the EPA, and whether other approvals processes can adequately address the relevant environmental factors without the need for formal assessment by the EPA. The level of public interest may also be relevant.

### 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)].

This document is the Appeals Convenor's report to the Minister. The Appeals Convenor's investigation of the appeals included:

- a review of the appeals, the EPA's decision, and the proponent's referral information
- a review of the responses to the appeals provided by the licence holder
- a review of the section 106 report from the EPA
- additional advice received from the EPA in relation to impacts to mangrove communities
- meeting with the proponent and appellants
- reviewing other information, policy and guidance as needed.

See Table 2 for the documents we considered.

**Table 2** Documents reviewed during the investigation

Document	Date
EPA Public record pursuant to s39(1) of the <i>Environmental Protection Act 1986</i> , Derby Barge Facility, Shire of Derby-West Kimberley Case Number: CMS17850	30 September 2020
Teal Solutions Environmental Advisory (2020) Port of Derby – Derby Barge Facility Environmental Impact Assessment – Supporting Document. Prepared for Colonial Marine Consultants Pty Ltd	June 2020
Colonial Marine Consultants Pty Ltd response to appeals	12 November 2020
EPA Response to Appeal 052/20	17 November 2020
EPA additional advice	7 January 2021