



Appeals Convenor
Environmental Protection Act 1986

**REPORT TO THE
MINISTER FOR ENVIRONMENT**

**APPEAL AGAINST DECISION OF THE DEPARTMENT OF WATER AND
ENVIRONMENTAL REGULATION TO GRANT A CLEARING PERMIT**

**CLEARING PERMIT CPS 8502/1: WINDY HARBOUR ROAD
RESERVES (BOORARA BROOK AND NORTHCLIFFE),
SHIRE OF MANJIMUP**

APPLICANT/PERMIT HOLDER: SHIRE OF MANJIMUP

Appeal Number 048 of 2020

December 2020

Appeal Summary

This report relates to an appeal lodged against the decision of the Department of Water and Environmental Regulation (DWER) to grant Clearing Permit CPS 8502/1 to the Shire of Manjimup (applicant).

CPS 8502/1 is for the clearing of up to 3.2604 hectares of native vegetation within Windy Harbour Road Reserves, Boorara Brook and Northcliffe, for the purpose of road widening.

The appellant sought for DWER's decision to be overturned on the grounds that the proposed road works will impinge on the Bibbulmun Track and are near the Northcliffe Workers club and mill workers cottages.

The investigation found that DWER's conclusions on the environmental values of the application area were supported by the available evidence. Additionally, during the appeal investigation the Shire of Manjimup clarified that the Bibbulmun Track will not be impacted and that clearing is likely to be limited to only four (4) trees and vegetation in the road shoulder.

While the proposed clearing was found to be at variance to principle (f), this does not preclude a permit from being granted.

In addition to the above, the Windy Harbour Management Plan¹ exists as a MOU between the Department of Biodiversity, Conservation and Attractions (DBCA) and the Shire of Manjimup. The purpose of the plan is to manage environmentally sensitive areas and threatened flora that exists in the Windy Harbour Road Reserves. Under the plan, prior to any re-alignment works, the Shire is required to contact DBCA for an on-site evaluation prior to any clearing activity.

Recommendation

The Appeals Convenor recommended that the appeal be dismissed.

¹ DBCA 2017 Windy Harbour Management Plan

INTRODUCTION

This report relates to an appeal received in objection to Clearing Permit CPS 8502/1 granted to the Shire of Manjimup (the applicant) by the Department of Water and Environmental Regulation (DWER). The permit is for the clearing of up to 3.2604 hectares of native vegetation within Windy Harbour Road Reserves PIN: 1151015 Boorara Brook and PINs: 11449840; 1190684 Northcliffe for the purpose of road widening (Figure 1).

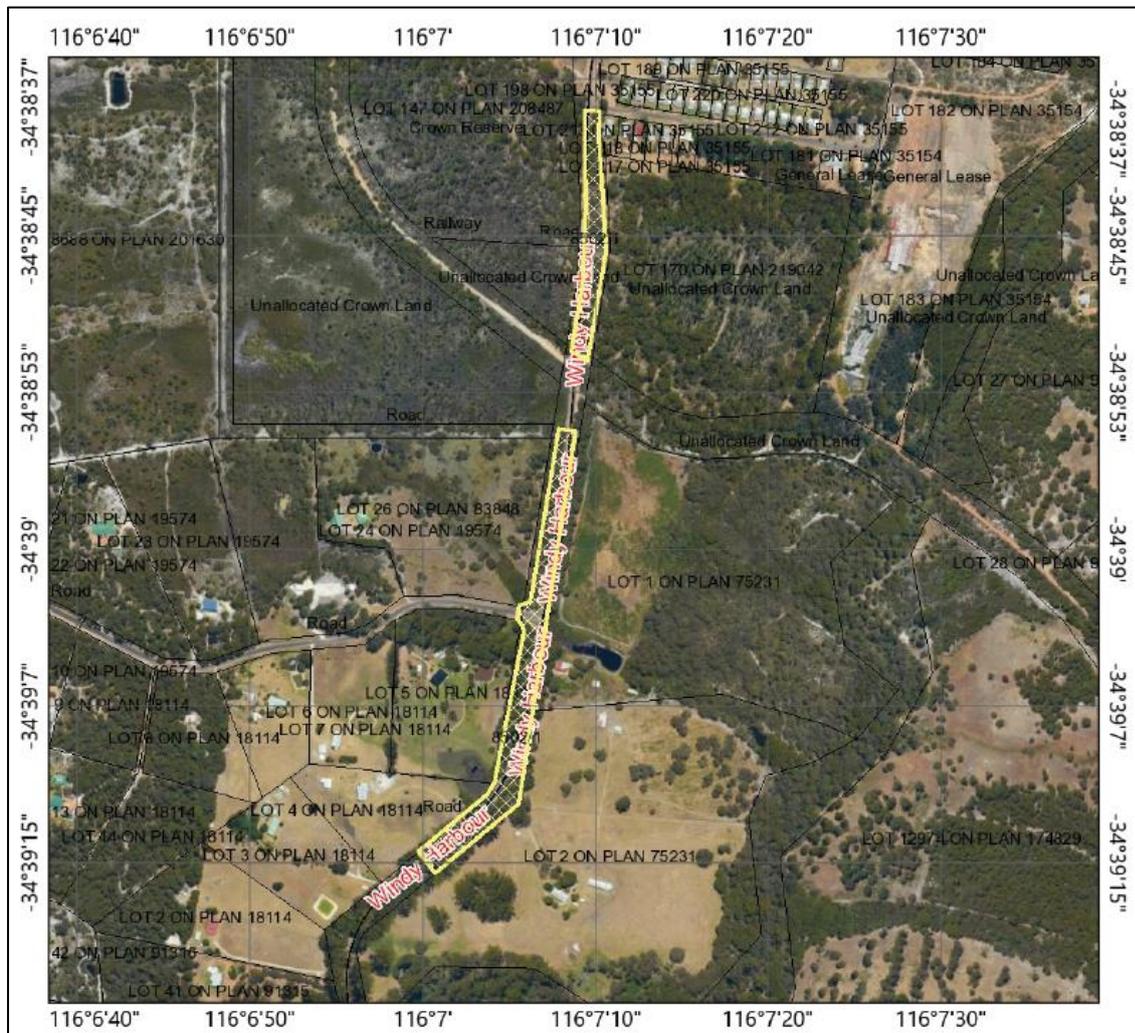


Figure 1: Location of area approved to clear under CPS 8502/1 (yellow hatched).

BACKGROUND

In assessing the application against the ten clearing principles set out in Schedule 5 of the *Environmental Protection Act 1986* (EP Act), DWER found the proposed clearing to be at variance to principle (f), and not likely to be at variance to the remaining principles. This does not preclude a permit from being granted.

In determining to grant the permit, DWER noted the purpose of the clearing permit and the existing Windy Harbour Road Management Plan². DWER imposed a range of conditions on the permit including requirements including:

- Avoiding, minimising and reducing the impacts and extent of clearing (condition 6);

² DBCA 2017 Windy Harbour Management Plan

- The permit holder must implement and adhere to the *Threatened Flora Management Recommendations Shire of Manjimup - Wheatley Coast/Windy Harbour Roads (Windy Harbour Road Management Plan)*³ by the Department of Biodiversity, Conservation and Attractions by (a) not mulching or spraying between priority flora markers; and (b) contacting the Department of Biodiversity, Conservation and Attractions (DBCA) for on-site evaluation at the time of clearing (condition 7); and
- The permit holder shall conduct clearing in a slow progressive manner from one direction to the other (e.g. east to west) to allow fauna to move into adjacent native vegetation ahead of the clearing activity (condition 8).

DWER's assessment considered observations from a site inspection and had regard for the Windy Harbour Road Management Plan, DBCA advice⁴, Western ringtail possum survey and Black cockatoo habitat tree assessment⁵. The application was advertised for a 21-day public comment period and DWER's response to the submission received was documented in its decision report. The submission noted a discrepancy between the application area advertised and the application area as submitted by the Shire of Manjimup. This was confirmed to be 3.2604 hectares and re-advertised for 7 days. No further submissions were received.

OVERVIEW OF APPEAL PROCESS

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

- a report from the Appeals Convenor, as required by section 109(3) of the EP Act; and
- a report from the decision-making authority of the decision under appeal (i.e. from DWER), as required by section 106(1).

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

To properly advise the Minister, the Appeals Convenor conducted an investigation that included:

- review of the matters raised in the appeal submitted by the appellant;
- review of the report from DWER provided under section 106 of the EP Act;
- review of the response to the appeal provided by the applicant;
- phone call with the appellant confirming his grounds of appeal in December 2020; and
- review of other information, policy and guidance as considered necessary.

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

OUTCOME SOUGHT BY APPELLANT

The appellant sought for DWER's decision to be overturned (i.e. that the clearing permit be refused).

³ DBCA 2017 Windy Harbour Management Plan

⁴ DBCA advice to DWER 2017 for CPS 7671/1

⁵ Harewood 2020 Western Ring-tail possum survey and habitat tree assessment for Shire of Manjimup CPS 8502/1

GROUND OF APPEAL

Two grounds of appeal were raised by the appellant, including:

- impacts to the Bibbulmun Track, Northcliffe Workers Club and mill workers cottages were not considered; and
- alternative road safety options were not considered to avoid impacts to the above.

GROUND 1: IMPACTS NOT CONSIDERED

Through this ground of appeal the appellant raised concern that the proposed clearing will impact the Bibbulmun Track, the Northcliffe Workers Club (facility) and several old and established, former or still functioning mill workers cottages in close proximity to the road.

Consideration

Impacts to the Bibbulmun Track, the facility and workers cottages were not explicitly assessed by DWER as the purpose of a clearing permit assessment relates to environmental values. However, given the Bibbulmun Track is renowned as a bushwalking track, its value is closely linked to the environmental values considered during the clearing permit assessment process.

In its assessment, DWER noted that it had regard for the Management Plan for Windy Harbour Road which exists as an MOU between the Shire of Manjimup and DBCA.

In response to the appeal, DWER⁶ noted that:

Under the Management Plan, the Permit Holder is required to avoid conservation significant flora and to contact DBCA for on-site evaluation at the time of road construction activities. As outlined in the Decision Report, the Permit Holder proposes to clear trees which are deemed to represent a safety risk, meaning that not all native vegetation within the Application Area would be cleared. Noting this, and that the proposed clearing will be undertaken in accordance with the Management Plan and in consultation with DBCA, the Department considers that it is unlikely to adversely impact the Bibbulmun Track or amenity values associated with the Bibbulmun track.

The Department also imposed flora, fauna, weed and dieback management conditions to mitigate impacts to the surrounding vegetation. The Department considers that these mitigation measures are adequate to manage environmental impacts from the proposed clearing to the surroundings, including the Bibbulmun Track.

The Department notes that the Facility is located approximately 335 m east of the Application Area. Due to the nature of the proposed works and the distance of the Application Area to the Facility, it is unlikely that the proposed clearing will impact the Facility or other buildings.

As the proposed clearing is limited to trees that pose a safety risk within the area shown in the Plan on the Permit, the proposed clearing is unlikely to have a significant impact on the areas of the Appellant's concern.

In response to the appeal, the Shire of Manjimup⁷ noted that:

...the Shire will only be clearing 4 trees and a small amount of vegetation approx. 3m from the road shoulder. The Bibbulmun track will not be impacted.

The reason the Shire has selected such a large clearing envelope is that at the time the clearing application was submitted, design had not commenced. With the larger clearing envelope, it gives a greater scope to realign the road if necessary. However in this case, realignment was not required, which will result in limited vegetation clearing.

⁶ DWER response to Appeal 048/20, 20 November 2020.

⁷ Shire of Manjimup response to Appeal 048/20, 20 October 2020

Adherence to the Windy Harbour Road Management Plan has been included in condition 7 of the clearing permit.

GROUND 2: ALTERNATIVE ROAD SAFETY OPTIONS - AVOIDANCE

Through this ground of appeal, the appellant questioned the need for road widening and suggested a range of mechanisms to avoid clearing while mitigating road safety concerns. These included extra signage for potentially hazardous intersections, or a series of bends combined with speed limit changes.

Consideration

In response to the appeal, DWER⁸ acknowledged the appellant's suggested road safety mechanisms as an alternative to clearing. However, DWER responded that:

The management of regional road upgrades is the function of local government authorities. The Permit Holder is responsible for the specifications of its proposed works.

The Permit Holder's efforts to avoid and minimise impacts were considered in deciding to grant the Clearing Permit. As outlined in the Decision Report, the Permit Holder has advised that only trees that are deemed a risk to road user safety will be removed, all occurrences of conservation significant flora will be avoided and, where possible, clearing of native vegetation will be avoided.

In determining the Application, the purpose of the clearing is a relevant consideration. The Application states that the purpose of the proposed clearing is "to improve safety". Considering the impacts identified and the purpose of the clearing, the Department remains of the view that that the proposed clearing is not likely to lead to unacceptable risks to the environment and that appropriate conditions have been applied to CPS 8502/1.

CONCLUSION AND RECOMMENDATION

Noting the Shire's advice that clearing is limited to four trees that pose a safety risk and that the clearing will be undertaken in accordance with the Management Plan for Windy Harbour Road in consultation with DBCA, it is considered that DWER's conclusion that the clearing is unlikely to adversely impact the Bibbulmun Track and associated infrastructure was appropriate and its decision to grant the permit was justified.

It is recommended that the appeal be dismissed.

Emma Gaunt
APPEALS CONVENOR

Investigating Officer:
Carly Bishop, Senior Appeals Officer

⁸ DWER response to Appeal 048/20, 20 November 2020.