



Government of **Western Australia**
Department of **Environment Regulation**

Your ref: Pet No 42
Our ref: CEO351/15

Ms Margaret Liveris
Committee Clerk
Environment and Public Affairs Committee
Legislative Council
Parliament House
PERTH WA 6000

Dear Ms Liveris

**STANDING COMMITTEE ON ENVIRONMENT AND PUBLIC AFFAIRS – PETITION NO 42 –
HEARING 11 MARCH 2015 – INDICATIVE TOPICS AND QUESTIONS**

Thank you for your letter dated 19 February 2015 and your subsequent email of 3 March 2015 providing indicative topics of questioning in relation to the Parliamentary Enquiry of the Standing Committee on Environment and Public Affairs into Petition No. 42.

In the interests of assisting the Standing Committee's consideration of environmentally sensitive areas, I attach a submission from the Department of Environment Regulation.

Yours sincerely

~~Jason Banks~~
DIRECTOR GENERAL

6 March 2015

Att

PARLIAMENTARY ENQUIRY - STANDING COMMITTEE ON ENVIRONMENT AND PUBLIC AFFAIRS - PETITION NO 42 - HEARING, 11 MARCH 2015 (ENVIRONMENTAL PROTECTION (ENVIRONMENTALLY SENSITIVE AREAS) NOTICE 2005)

SUBMISSION BY THE DEPARTMENT OF ENVIRONMENT REGULATION

Making of the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*

Section 51C of the *Environmental Protection Act 1986* (EP Act) provides that clearing of native vegetation is an offence unless an exemption applies. Exemptions are contained in Schedule 6 for requirements and powers to clear under legislation. A range of exemptions for routine low impact activities are contained in regulations. These exemptions do not apply in environmentally sensitive areas (ESAs). The flow diagram at Attachment 1 outlines the scheme of the clearing provisions of the EP Act.

Clearing is defined in section 51A of the EP Act as “(a) the killing or destruction of; or (b) the removal of; or (c) the severing or ringbarking of trunks or stems of; or (d) the doing of any other substantial damage to, some or all of the native vegetation in an area, and includes the draining or flooding of land, the burning of vegetation, the grazing of stock, or any other act or activity, that causes - (e) the killing or destruction of; or (f) the severing of trunks or stems of; or (g) any other substantial damage to, some or all of the native vegetation in the area.” Native vegetation includes indigenous aquatic or terrestrial vegetation but excludes vegetation grown in a plantation.

To ensure that the clearing provisions (Part V Division 2) of the EP Act did not come into effect before the exemptions in regulations were in place, the *Environmental Protection Amendment Act 2003* provided that the date for proclamation of these provisions must not precede the tabling of these regulations.

Section 110 of the *Environmental Protection Amendment Act 2003* provided that environmentally sensitive areas could be made as regulations for a period of nine months after the commencement of the clearing provisions. This recognised that it was not possible to declare ESAs under section 51B of the EP Act immediately following the commencement of the clearing provisions, and that not to do so would disadvantage landholders seeking to use exemptions in regulations. At the expiry of the transitional period of nine months, the ESAs in regulation 6 no longer had effect.

Consultation on drafting instructions for regulations and draft regulations, including in the order of 30 workshops and information sessions to a variety of government, industry, agricultural and environmental stakeholders, was conducted between December 2003 and June 2004. In addition, a working group chaired by Hon. Ken Travers MLC of key stakeholders, including the Pastoralists and Graziers Association and the WA Farmers Federation, considered the draft regulations. This included the transitional ESAs in regulation 6.

Following the gazettal of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* on 30 June 2004, the clearing provisions of the EP Act commenced on 8 July 2004. At the time of their introduction, the then Department of Environment which administered the clearing provisions wrote to all agricultural and pastoral landholders in the Department of Agriculture and Food WA's database to advise them of the new legislation and its key features. Radio and television advertising was conducted, and regional roadshows were presented, throughout the State in 2003 and 2004.

Section 51B of the EP Act allows the Minister for Environment to declare by notice either a specified area of the State, or a class of areas of the State, to be an ESA. The notice must be made after consultation with the Environmental Protection Authority (EPA) and such public authorities, persons and groups as the Minister considers to have an interest in its subject matter (section 51B(4)). The notice is subsidiary legislation for the purposes of the *Interpretation Act 1984*.

The *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* was gazetted on 8 April 2005 within nine months of the commencement of the clearing provisions of the EP Act. The draft notice was circulated to stakeholders prior to the making of the notice in 2005 including the Pastoralists and Graziers Association, the WA Farmers Federation and the EPA and 11 submissions were received. The explanatory memorandum to the Joint Standing Committee on Delegated Legislation included details of the consultation process.

The Department of Environment Regulation has guidance on the operation of the exemptions in regulations, including their interaction with ESAs, available on its website. This includes guidelines on exemptions, a fact sheet on ESAs, and a link to the map showing ESAs. Clearing Regulations – Environmentally Sensitive Areas spatial dataset is map based information available via Landgate's Shared Land Information Platform and from the Department of Environment Regulation's website. DER's approach to engagement also includes participation in forums and conferences, field days, and meetings with key stakeholders.

Those intending to clear are encouraged to contact the Department if uncertain about whether or not a clearing permit is required, The Department notes that some stakeholders have indicated that there is a reluctance to do so, through a perceived consequence of self-identification for investigation.

Effect of the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*

The clearing provisions apply to all State lands and waters regardless of tenure, and to all applicants, including the Crown.

ESAs are only relevant in the limited context of exemptions in the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004*. Of the exemptions in regulations, only item 14 of regulation 5 is of significance to the concerns raised by the petition. It provides an exemption for clearing of native vegetation on land that was lawfully cleared within the preceding 20 years where that land has been used as pasture or for cultivation or forestry within those 20 years, and the clearing is only to the extent necessary to enable the land to be used to the maximum extent it was used in those 20 years.

Prior to the introduction of the clearing provisions of the EP Act on 8 July 2004, clearing was regulated under the *Soil and Land Conservation Regulations 1992*. These regulations limited the period for clearing of "regrowth" vegetation without requiring a fresh notification to two years. The current period of 20 years is considerably longer, during which native vegetation may have substantially regrown.

The principal petitioner's submission relating to Petition No. 42 focuses on wetlands that are ESAs. Wetlands are areas that are permanently, seasonally or intermittently waterlogged or inundated with water. The ESA Notice declares defined wetlands to be ESAs, which include wetlands listed under the Ramsar Convention, nationally important wetlands and some (but not all) of the wetlands commonly known as the "geomorphic wetland dataset" which stretches from Cervantes to Walpole. The Department of Parks and Wildlife is the lead agency for most types of wetlands, and is the custodian of geomorphic wetland dataset.

Declared ESAs also include native vegetation under environmental protection policies made under Part III of the EP Act. The wetlands to which the petitioner refers, namely those covered by the Environmental Protection (Swan Coastal Plain Lakes) and the Environmental Protection (South West Agricultural Zone Wetlands) Policy, are restricted to a small area of the south-west, and in the case of the latter do not include the majority of wetlands types. The number of wetlands protected by these policies is a small subset of the high value wetlands of the south-west.

The requirements in clauses 4(5)(a) and 4(5)(b) of the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* apply to all ESAs. However, as previously advised by the Minister for Environment in his letter dated 28 May 2014, all classes of ESAs other than threatened ecological communities and rare flora satisfy the requirements of clause 4(5)(a) as the determination (as defined in clause 4(7)) is publicly available. The Minister's letter provided website references to the determination.

In the case of threatened ecological communities and rare flora, the requirement in clause 4(5)(b) is that "the owner, occupier or person responsible for the care and maintenance of the land has been notified of the area". The reason for this different approach is that no spatial information is publicly available for threatened ecological communities or rare flora in order to protect the location of these highly significant values. The owner, occupier or person responsible for the care and maintenance of the land is notified in writing by a hand delivered letter from the Department of Parks and Wildlife. A record is kept of the notification.

The presence of ESAs does not prevent clearing, but requires that a person intending to clear for purposes prescribed under regulations that would otherwise be exempt, but for the presence of an ESA, must apply for and be granted a clearing permit. This requirement recognises the scope of exemptions, including the period of 20 years during which previously cleared native vegetation can be maintained. Application fees for clearing permits are low (ranging from \$50 to a maximum of \$200).

ESAs are intended to prevent incremental degradation of important environmental assets such as declared rare flora, threatened ecological communities or high value wetlands, and ensure that decisions to approve clearing have had regard to these values.

If the ESA notice were repealed, in order to provide the same level of environmental protection, the scope of clearing under exemptions in regulations would need to be restricted. This would adversely affect the majority of landowners who do not have ESAs on their properties.

Applications to clear within Environmentally Sensitive Areas

Landholders may apply to clear areas which include ESAs, and these are assessed on their merits in accordance with the requirements of the EP Act, including against a set of principles which address biodiversity and wetland values.

Data from 2014 (the most recent complete year of data) indicate that 160 applications to clear native vegetation were received for areas that included ESAs from an overall total of 516 applications. However, of these applications, the majority were for purposes that would not be subject to an exemption regardless of the presence of ESAs, including mineral and petroleum production, installation of gas, water and power infrastructure, and road construction. Only six of these applications were for grazing that **may** be subject to an exemption consistent with item 14 of regulation 5 (further analysis would be required to determine this).

The outcome of the 160 applications within ESAs was that 16 were withdrawn by the applicant; 27 are at various stages of assessment; three did not meet the requirements for a valid application; and the remainder have been granted.

It is important to note that the clearing permit process is intended to ensure that permitted clearing is environmentally acceptable. Where significant environmental impacts would occur as a result of a clearing permit application, wherever possible DER works with applicants to reduce or amend the application, or apply conditions to the permit, to ensure that the impact of the clearing is acceptable.

Enforcement relating to Environmentally Sensitive Areas

Analysis has been undertaken of the number of prosecutions (of both individuals and bodies corporate) for the offence of clearing contrary to section 51C, and separately the offence was for clearing contrary to section 51C(c) since the commencement of the clearing provisions on 8 July 2004 until 4 March 2015. The latter is clearing which would be lawful if the area was not within an ESA. Data are shown in the table below.

Year	Total number of prosecutions (51C)	Fine range	ESA prosecutions (51C(c))	Total fines
2004/05	0	n/a	0	n/a
2005/06	1	\$1,000	0	n/a
2006/07	1	\$2,000	0	n/a
2007/08	4	\$1,000-\$10,000	0	n/a
2008/09	7	\$2,000-\$15,000	0	n/a
2009/10	3	\$12,000-\$40,000	0	n/a
2010/11	3	\$4,000-\$10,000 (one acquittal)	0	n/a
2011/12	7	\$5,000-\$50,000 (two acquittals)	0	n/a
2012/13	4	\$7,500-\$12,000	0	n/a

In the period between 8 July 2004 and 4 March 2015, seven letters of warning were given for clearing that was contrary to section 51C(c) (that is it was within an ESA and was clearing of a prescribed kind).

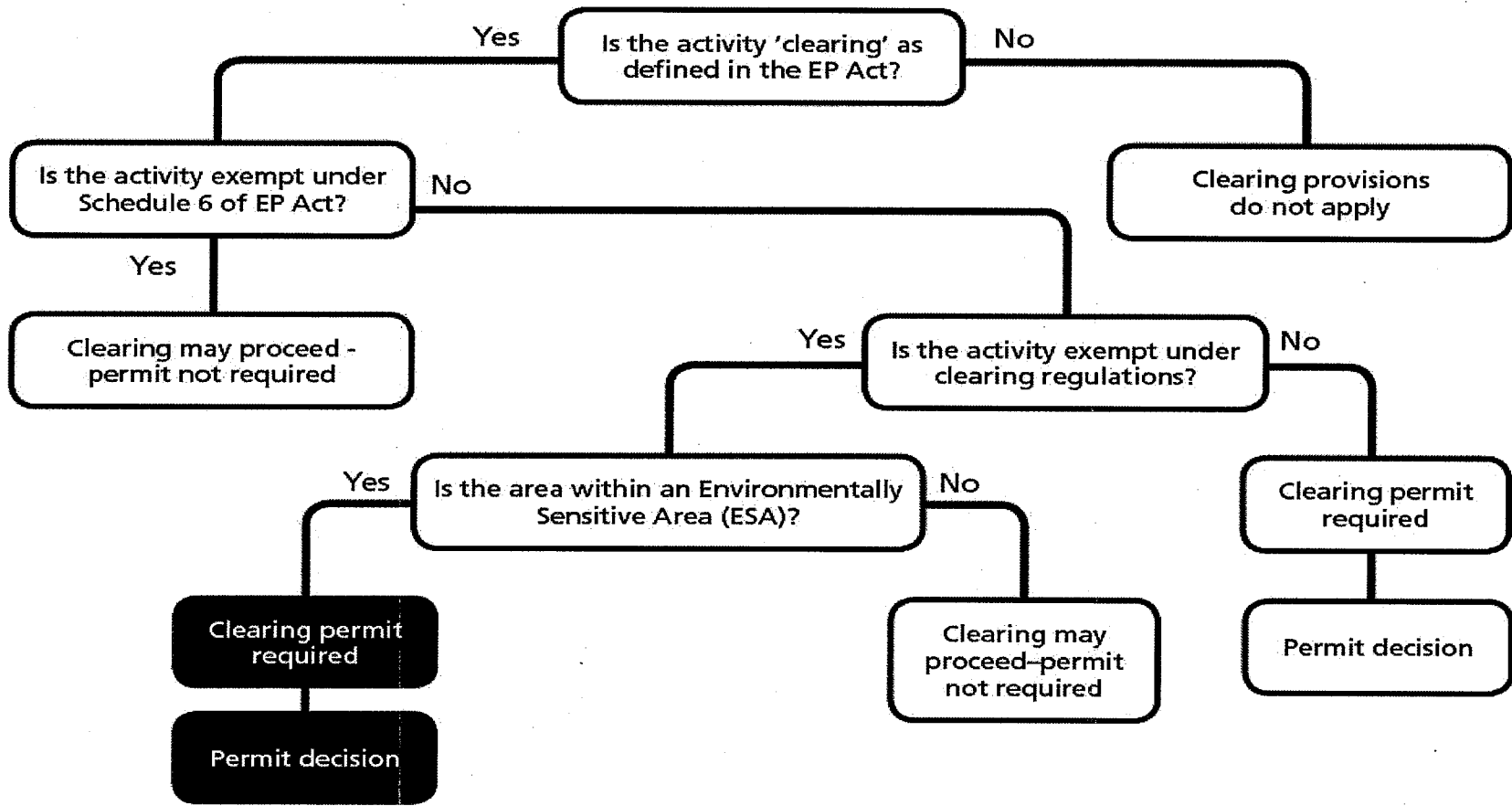
Amendments to the clearing provisions of the Environmental Protection Act

Amendments to the EP Act are proposed to simplify and improve the provisions for clearing of native vegetation by ensuring that assessment is focused on environmental outcomes. The Government intends to introduce these amendments in the 2015 Autumn session of Parliament.

A new referral system will require that any clearing not exempt under the EP Act is to be referred to the CEO for a determination of whether a clearing permit is required, having regard to specified criteria such as the size of the area, known or likely environmental values, scientific knowledge and whether conditions are likely to be required to manage environmental impacts. The adoption of this referral-based system will have the effect of ensuring that resources and assessments focus on clearing that has a significant effect on the environment.

The clearing provisions have strict regulatory requirements, including a set of clearing principles against which clearing must be assessed, even where the impact of the clearing is not significant. The proposed referral system will provide a robust process method to determine whether the clearing should be subject to a permit against the specified criteria, with the decision of the CEO being published.

Framework for regulation of clearing under EP Act 1986



EP Act: *Environmental Protection Act 1986*
 Clearing Regulations: *Environmental Protection (Clearing of Native Vegetation) Regulations 2004*