

Hon Albert Jacob MLA
Minister for Environment; Heritage

Our Ref: 50-03722

Hon Simon O'Brien MLC
Chairman
Standing Committee on Environment and Public Affairs
18-32 Parliament Place
WEST PERTH WA 6005

Dear Mr O'Brien

I refer to your letter received on 8 May 2014 regarding the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*.

I understand that the Joint Standing Committee on Delegated Legislation (JSCDL) has raised issues in relation to the public notification of environmentally sensitive areas (ESAs) and queried whether the notification requirements under section 51B(4) were complied with when the notice was made.

I have provided some general background to ESAs below, and also addressed the particular issues of the JSCDL and your Committee separately.

Background

Section 51C of the *Environmental Protection Act 1986* (EP Act) makes it an offence to cause or allow clearing of native vegetation unless the clearing is done under the authority of a permit or in accordance with an exemption.

There are two types of exemptions. Exemptions for clearing that is a requirement of a written law, or authorised under certain statutory processes, are contained in Schedule 6 of the EP Act. There are no restrictions on whether the clearing is within an ESA for these exemptions. Exemptions for low impact management practices are prescribed in the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (Clearing Regulations), but do not apply in ESAs.

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 and such public authorities and persons as the Minister considers have an interest in its subject matter (section 51B(4)).

ESAs were initially included in regulation 6 of the Clearing Regulations for a transitional period of nine months to allow time to develop a notice following the commencement of the clearing provisions on 8 July 2004. The current notice was made at the conclusion of the nine months on 8 April 2005 and is essentially the same list as was included in the Clearing Regulations.

ESAs are in place in the context of the low impact routine activities that are contained in the Clearing Regulations. There is a concentration of ESAs within the intensive area of the south west, and hence their effect is in preventing environmental harm occurring as a result of otherwise small scale low impact clearing activities that would otherwise be permitted by exemption.

ESAs are primarily defined in legislation (for example, areas covered by Environmental Protection Policies made under the EP Act, Ramsar convention wetlands or World Heritage properties listed under the *Environment Protection and Biodiversity Conservation Act 1999*), or based on Government endorsed policies and documents such as Bush Forever.

Public availability of ESAs

The Clearing Regulations – Environmentally Sensitive Areas spatial dataset is available via Landgate's Shared Land Information Platform (www2.landgate.wa.gov.au) and from the Department of Environment Regulation's website.

The statement accompanying the dataset states that "[t]his dataset is provided to assist landowners and managers in determining the location of environmentally sensitive areas under the *Environmental Protection Act 1986*. It is not a substitute for any requirement of the legislation. Those seeking further information should contact the data custodian. Any person who intends to undertake activities that may involve clearing native vegetation is advised to consult the actual legislation and seek advice, including legal advice, where necessary. While the Department has endeavoured to ensure the accuracy of the contents of this web page, it accepts no responsibility for any inaccuracies and persons relying on this information do so at their own risk."

Individual data sets for ESAs are publicly available as follows:

- (a) a declared World Heritage property as defined in section 13 of the *Environment Protection and Biodiversity Conservation Act 1999* - available from Australian Government 'Discover Information Geographically' website, www.environment.gov.au/metadateexplorer/explorer.jsp.

- (b) an area that is included on the Register of the National Estate, because of its natural heritage value under the *Australian Heritage Council Act 2003* - available from Australian Government 'Discover Information Geographically' website, www.environment.gov.au/metadateexplorer/explorer.jsp.
- (c) a defined wetland and the area within 50 metres of the wetland - available from Landgate's Shared Land Information Platform, www2.landgate.wa.gov.au/web/guest/57.
- (d) the area covered by vegetation within 50 metres of rare flora, to the extent to which the vegetation is continuous with the vegetation in which the rare flora is located. Clause 4(5)(b) of the ESA notice applies and the owner, occupier or person responsible for the care and maintenance of the land must have been notified.
- (e) the area covered by a threatened ecological community. Clause 4(5)(b) of the ESA notice applies and the owner, occupier or person responsible for the care and maintenance of the land must have been notified.
- (f) a Bush Forever site listed in "Bush Forever" Volumes 1 and 2 (2000), published by the Western Australia Planning Commission, except to the extent to which the site is approved to be developed by the Western Australia Planning Commission - available from Landgate's Shared Land Information Platform, www2.landgate.wa.gov.au/web/guest/57.
- (g) the areas covered by the following policies —
 - (i) the *Environmental Protection (Gnangara Mound Crown Land) Policy 1992* - available from EPA website www.epa.wa.gov.au/AbouttheEPA/spatial-data/Pages/default.aspx.
 - (ii) the *Environmental Protection (Western Swamp Tortoise) Policy 2002* - available from EPA website, www.epa.wa.gov.au/AbouttheEPA/spatial-data/Pages/default.aspx.
- (h) the areas covered by the lakes to which the *Environmental Protection (Swan Coastal Plain Lakes) Policy 1992* applies - available from EPA website, www.epa.wa.gov.au/AbouttheEPA/spatial-data/Pages/default.aspx.
- (i) protected wetlands as defined in the *Environmental Protection (South West Agricultural Zone Wetlands) Policy 1998*; available from EPA website, www.epa.wa.gov.au/AbouttheEPA/spatial-data/Pages/default.aspx.
- (j) areas of fringing native vegetation in the policy area as defined in the *Environmental Protection (Swan and Canning Rivers) Policy 1998*. This policy has been subsequently repealed.

The reason for the differentiation between clauses 4(5)(a) and 4(5)(b) of the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* 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.

I can advise the Environment and Public Affairs Committee that the Department of Environment Regulation's explanatory material clearly outlines the requirements in relation to ESAs and the low impact exemptions contained in the Clearing Regulations. Those intending to clear are encouraged to contact the department to clarify legal requirements. Some general information about clearing of native vegetation is attached for your information.

It is also important to note that ESAs only apply in the limited context of exemptions in the Clearing Regulations. Extensive clearing either requires a clearing permit or is authorised under a law and listed in Schedule 6 of the EP Act and ESAs are not relevant.

Compliance with notification requirements under section 51B(4)

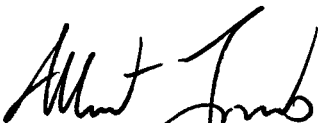
The draft *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* was circulated to stakeholders and the Environmental Protection Authority on 1 April 2005.

Eleven submissions were received from the Chamber of Minerals and Energy; Conservation Council of Western Australia; Department of Conservation and Land Management; Department of Industry and Resources; Department of Planning and Infrastructure; Environmental Protection Authority; Pastoral and Graziers Association; Public Transport Authority; Roadside Conservation Committee; WA Farmers Federation; Water Corporation. The then Environment Minister Hon Judy Edwards MLA considered these submissions before making the notice on 8 April 2005.

The Explanatory Memorandum to the JSCDL dated 8 April 2005 (copy attached) confirms the Environmental Protection Authority as having been notified.

I trust that this information is sufficient for your purposes.

Yours sincerely



Albert Jacob MLA
MINISTER FOR ENVIRONMENT; HERITAGE

Att

28 MAY 2014



Department of
Environment

Your ref:

Our ref:

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Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
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ENVIRONMENTAL PROTECTION (ENVIRONMENTALLY SENSITIVE AREAS) NOTICE 2005

The explanatory memorandum is only an aid to understanding and must not be substituted for the subsidiary legislation or other instrument gazetted, or made available to the public in any way.

Title

Environmental Protection (Environmentally Sensitive Areas) Notice 2005

Statute under which it is made

The *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* is made by the Minister for the Environment under s.51B of the *Environmental Protection Act 1986*. It was gazetted on 8 April 2005.

Purpose

Clearing of native vegetation is regulated under Part V Division 2 of the *Environmental Protection Act 1986*. Under s.51C, clearing requires a permit unless subject to an exemption. There are two kinds of exemptions: those in Schedule 6 of the Act and those in regulations.

The *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* will replace the environmentally sensitive areas defined in Regulation 6 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004*, which are transitional and expire on 8 April 2005.

The Minister under s.51B of the *Environmental Protection Act 1986* declares environmentally sensitive areas. These declared areas are not subject to exemptions from the requirement to hold a clearing permit under regulations, and therefore have greater protection than other lands.

The notice will commence operation on the date of gazettal.

Identification of Controversial Provisions

Given that no additional areas are defined, and that the environmentally sensitive areas have been operating for nine months without significant incident, it is not anticipated that the notice will be contentious or sensitive.

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Consultation

The effect of the Notice is to transfer environmentally sensitive areas defined in Regulation 6 to the 51B notice. Extensive consultation was undertaken on the regulations, including the environmentally sensitive areas, over a period between August 2003 and June 2004.

Stakeholders have been aware of the review of the environmentally sensitive areas, which commenced in August 2004, for some time prior to the letter being circulated.

In addition, the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* was circulated to the following stakeholders by fax on 1 April 2005. A follow up letter was also sent.

- Alinta Gas
- Association of Mineral and Exploration Companies
- Australian Petroleum Production and Exploration Association
- Chamber of Minerals and Energy
- Conservation Council
- Department of Conservation and Land Management
- Department of Industry and Resources
- Department of Planning and Infrastructure
- Environmental Defenders Office
- Environmental Protection Authority
- Main Roads WA
- Pastoralists and Graziers Association
- Public Transport Authority
- Roadside Conservation Committee
- WA Farmers Federation
- WA Local Government Association
- Water Corporation

The covering letter from the A/Director General notes that the Notice includes the same list of environmentally sensitive areas as included in Regulation 6 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004*. The letter also contains a commitment to include a review of environmentally sensitive areas in the comprehensive review of the regulations due to commence in July. Comments were sought from stakeholders by 6 April 2005.

Eleven submissions were received. Submissions were generally supportive or neutral, and no substantive issues were raised. Most of the issues raised were raised during the consultation on the Regulations and some of the submissions have explicitly acknowledged this. These issues were considered during the development of the regulations.

D Carew-Hopkins
A/DIRECTOR GENERAL

Dr Judy Edwards MLA
MINISTER FOR THE ENVIRONMENT; SCIENCE

8 APR 2005