

The Honourable Matthew Swinbourne BA LLB MLC
Minister for Environment

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2 March 2026

Nature Conservation Margaret River Region Appeal to the report and recommendations in the WA EPA Report 1802 – Smiths Beach Project Yallingup - Coastal Tourism Village

Preface

Nature Conservation Margaret River Region (Nature Conservation) is the peak non-profit community-based environmental organisation working on the key environmental challenges facing the southwest of Western Australia.

Nature Conservation has more than 3000 local supporters (including members, donors, active volunteers, businesses and project partners/participants). We advocate for best practice environmental land use and management for the natural environment in our region.

We provided a submission on the above Project on 10 February 2025. Our grounds of appeal are largely based on those issues we raised that have not been reasonably and adequately considered by the EPA in Report 1802 (EPA Report).

We submit that the WA EPA (the EPA) cannot reasonably be satisfied on the evidence before it that the impacts of the Smiths Beach Project, Yallingup – Coastal Tourism Village, (the project) even with the recommended conditions, are consistent with the environmental factor objectives it is required to consider and which we consider are not capable of mitigation for those issues we raise as grounds of appeal.

Summary of Appeal outcome sought:

Nature Conservation contends that the Report must be remitted to the EPA under section 101 (1)(d) of the WA Environment Protection Act 1986 for reassessment, with directions from the Minister based on the issues raised in our grounds of appeal.

Grounds of Appeal:

Ground 1: Failure to take into account changes in environmental values since the EPA's strategic assessment approval of 2010 in accordance with the Statement of environmental principles, factors, objectives and aims of the EIA, EPA April 2023 (EPA factors, objectives and aims)

1.1 The changes that have taken place in environmental values over the past 15 years (since the EPA's 2010 strategic assessment) are considerable. Those changes include

climate change present impacts and future projections, biodiversity loss indications and population growth beyond predicted levels, with consequent changes to future expected population growth. These aspects have placed worsening pressures on natural assets in the southwest region and taking proper consideration of such factors, the consideration of this proposal, set in a biodiversity hotspot and surrounded by national park, should have resulted in the application of the most stringent environmental considerations, in particular the precautionary principle (generally) and particularly the use of offsets.

- 1.2 Offsets are discussed in a separate ground below, but we consider that in any event the EPA's report should not have allowed any development less favourable to the environment than in its assessment of 2010. Since this is not the case, there is a clear failure of the EPA to take proper account of relevant environmental changes.

Ground 2: There was no consideration by the EPA of Statement of Planning Policy 6.1 – Leeuwin Naturalist Ridge Policy (SPP 6.1) (WAPC 1998)

- 2.1 This ground of appeal is based on the appropriate and necessary consideration of SPP 6.1 as a state government policy that has application to the proposal and that has not been applied.

- 2.2 References to SPP 6.1 are found in only 3 places in the EPA Report as follows:

- Page 73 under the heading 2.5.4 Consultation where it is stated that public consultation raised concerns about lack of consistency with SPP 6.1
- Page 77 under the heading Planning Scheme and Policy Consideration where it is stated that the EPA notes the information provided in SPP 6.1 (and SPP 2.0) which provide context regarding the visual amenity values specific to the area and guidance for development considerations. The EPA then states that it considers that the WA Planning Commission (WAPPC) will appropriately consider the requirements of its SPPs in assessing the development application under the provisions of the Planning and Development Act (PD Act).
- Page 101 under the heading Subsequent Planning Processes where it is stated that subsequent decision making processes under the PD Act will be able to manage and mitigate impacts of the proposal that the EPA has not considered significant as well as consider broader social and economic matters, where SPP 6.1 is included on the list of things that can be “potentially” regulated by the WAPC. This assessment statement is ambiguous at best and provides no information or evidence as to the application of SPP 6.1. either by the EPA itself or “potentially” the WAPC moving forward.

- 2.3 We therefore submit that given the objectives and policy requirements of SPP 6.1, the EPA should be required to consider those aspects of SPP 6.1 that cannot practically be considered and incorporated into the project once the EPA's recommendations have been accepted by the Minister.

- 2.4 By way of example “having appropriate and efficient infrastructure services that include the site being conducive to the principles of ecologically sustainable

development, (for example, suitable for on-site effluent disposal without off-site effects). This is an example of implementation of land use strategy on page 6 of SPP 6.1 that would need to be taken into account during the EPA's assessment of the proposal for it to be implemented as it would not be possible for the WAPC to consider it after the fact.

2.5 Another example is PS 1.17 of SPP 6.1 which states that development which necessitates servicing and infrastructure requirements may be supported provided that "remnant vegetation and fauna habitats are not threatened". This is not the case with the proposal based on the EPA assessment report as it is clearly stated that the development it will result in significant removal of habitat of endangered species.

2.6.1 There are many other examples in SPP 6.1.

Ground 3: The EPA failed to appropriately report and make recommendations on the social surroundings of the proposal and in particular, the findings of the visual and landscape assessment peer review

3.1 The EPA's reasoning that it had sufficient information regarding the visual and landscape assessment to reach its conclusions on visual amenity impact (Social Surrounding) cannot be supported on the basis of the facts and evidence before the EPA, including the proponent's Visual Landscape Assessment (VLA), the peer review and the proponent's response to the peer review.

3.2 In response to concerns raised in submissions about the inadequacy of the proponent's VLA, the EPA commissioned a peer review, undertaken by GHD (GHD 2025).

3.3.1 The Peer Review concluding that:¹

- (a) the VLA 'assessment currently provides no reliable visual modelling';
- (b) the VLA does not enable 'independent verification of visual impact predictions, which limits confidence in the accuracy of the visual interpretations presented';
- (c) the ERD's outlined mitigation measures intended to manage visual impacts, while being appropriate in principle, 'are not sufficiently defined or tested to ensure protection of visual amenity from key public viewpoints';
- (d) the VLA 'does not demonstrate view-based compliance testing against SPP 6.1 [Leeuwin-Naturaliste Ridge] nor does it establish quantified, enforceable controls for height, bulk, siting, colour, or lighting'; and
- (e) the VLA 'provides only limited detail about the proposed development'.

¹ Peer Review, page 14.

- 3.4 We submit that the findings in the Peer Review could not have led the EPA to reasonably conclude that it had enough information to that impacts could be appropriately managed.
- 3.5 The EPA 's view that the risk of uncertainty in the VLA and the matters raised in the peer review will be considered by the WAPC's assessment of the development application is a view that is inconsistent with the EPA (DWER's) commissioning of the peer review in the first place (ie the EPA's decision that a peer review was required was underpinned by evidence that the VLA was inadequate for the purposes of assessing Social Surroundings); and inconsistent with the EPA's decision to in fact implement a condition as to building heights across designated areas of the development.
- 3.6 The acceptance of the proponent's mitigation measures as to 'tempering' visual impacts is not dealt with in the EPA's conditions (with the exception of building height).
- 3.7 In light of the above points, an adequate VLA should be prepared such that the EPA is appropriately and adequately informed to determine whether development on the ridge is acceptable and, if so, what conditions need to be imposed (for example building height).

Ground 4: The EPA's consideration and treatment of the use of offsets, in particular off-site offsets where there are no current approvals in place for off-site use and no system to support oversight of implementation

- 4.1 We submit that the EPA's Assessment Findings as outlined below are not implementable and therefore not consistent with EPA objectives and should be revisited with a view to ensuring that offset approvals and arrangements are in place before any work is commenced on the proposed development.
- 4.2 We submit that the EPA could not have reasonably come to the conclusion that offsets are appropriate for this development under the Offsets Policy (Government of WA 2011) or the equivalent Commonwealth government policy.
- 4.3 By way of example, the EPA considers that the impact to the western ringtail possum is a significant residual impact. The EPA advises that this significant residual impact should be subject to conditions and require offsets to counterbalance this significant residual impact. The EPA also advises that recommended conditions to set clearing limits on suitable habitat and require canopy connectivity structures to maintain habitat connectivity within the development envelope and to adjoining areas minimises impacts. Subject to the recommended conditions, the environmental outcome is likely to be consistent with the EPA objective for this factor.
- 4.4 In addition, the EPA Report states that clearing of 3 potential nesting trees and up to 5.19 ha of foraging habitat for Baudin's and Carnaby's black cockatoo will occur if the project is implemented. The EPA considers that the impact is not likely to be significant

and therefore we submit that the EPA has misconstrued consideration of its policy requirements and objectives.

- 4.5 On page 8 of the EPA Report it is clearly stated that “Clearing up to 14.68 ha of western ringtail possum habitat and dispersal and displacement of western ringtail possum individuals and fragmentation of the local population” will occur.
- 4.6 The Assessment Finding is that the EPA considers that the impact to the western ringtail possum is a significant residual impact. The EPA advises that this significant residual impact should be subject to conditions and require offsets to counterbalance this significant residual impact. The EPA also advises that recommended conditions to set clearing limits on suitable habitat and require canopy connectivity structures to maintain habitat connectivity within the development envelope and to adjoining areas minimises impacts. Subject to the recommended conditions, the environmental outcome is likely to be inconsistent with the EPA objective for this factor.
- 4.7 The EPA Report goes on to clearly state that “The EPA considers that the impact to the western ringtail possum is a significant residual impact”.
- 4.8 The Assessment Finding is that the EPA advises that this significant residual impact should be subject to conditions and require offsets to counterbalance this significant residual impact. The EPA also advises that recommended conditions to set clearing limits on suitable habitat and require canopy connectivity structures to maintain habitat connectivity within the development envelope and to adjoining areas minimises impacts. Subject to the recommended conditions, the environmental outcome is likely to be inconsistent with the EPA objective for this factor.
- 4.9 On page 26 of the EPA Report under the heading 2.1.4 Consultation it is stated that public consultation raised the issue of certainty in offsets. On page 34 under the heading Consultation it is stated that the suitability of proposed offsets, noting the Mt Duckworth site is degraded and difficult to rehabilitate raised concerns about long4
- 4.10 A detailed description of how the EPA considers that the offsets will be implemented is found on page 41 of the Report and appears to be based on the Proponent’s Offset Strategy and the Offset Environmental Management Plan, with no independent investigation or inquiry by the EPA as to whether any of it is actually implementable.
- 4.11 On page 51 of the Report under the heading B10 Offsets there is a reference to DMA legislation and that “Compliance with the lawful authority is to be obtained under the Biodiversity Conservation Act 2016.
- 4.12 The B10 offsets condition sets out what the proponent must do, but if, say for example, DBCA refuses to provide the appropriate approvals, the proponent will not be able to comply with the conditions and it is likely that habitat destruction on the development site will already be underway – the fact that it is acknowledged in the EPA Report that rehabilitation on offset sites will be delayed because approvals have not been granted is of significant concern. If Conditions B10.6 and B10.7 have to be implemented because the offsite offset conditions have failed, the EPA will not have met it’s policy

objectives and there will have been a complete failure to mitigate, manage (the hierarchy) for the critically endangered and controlled action species (reversion to on-ground management conditions).

- 4.13 For further context for this ground of appeal we note that there is currently underway an audit by the Office of the Auditor General in Western Australia into the use of offsets.

The Auditor General is currently undertaking a performance audit into the management of environmental offsets.

- 4.14 The Office of the Auditor General's website states that offsets have been chosen as an audit topic because Western Australia has globally significant biodiversity and in some areas our natural environment remains untouched by development. The *Environmental Protection Act 1986* was established to protect our environment through environmental protection policies and regulations that control land use and development throughout WA.

- 4.15 It is also stated on the website that protecting the environment also needs to be balanced with economic development. When a proponent is unable to operate without causing environmental damage, government may approve the proposal with one or more environmental offset conditions. This allows the project to go ahead but the **proponent must offset the environmental damage their project causes**.

- 4.16 We submit that given the reliance on offset sites as mitigation measures for destruction of critical habitat and arrangements yet to be agreed and/or approved with the proponent for use of land that they do not own and subject to future agreement with DBCA, there is no certainty that the offsets recommended by the EPA will result in rehabilitation of habitat and numbers of species to compensate for the development. Further, research has demonstrated that in WA only 39% of environmental offsets are successful (May et al. 2017). With such high levels of uncertainty attached to the use of offsets in this case, the EPA has manifestly failed to comply with its own objectives.

Ground 5: The EPA's failure to consider local or regional cumulative impacts to flora and vegetation in accordance with its cumulative impact assessment

- 5.1 On page 30 of its report, the EPA states that "it is not aware of any reasonably foreseeable projects/development involving significant clearing of native vegetation at local or regional scales that would contribute to cumulative loss of the PEC or bring the vegetation complexes within the development envelope below the 30% pre-European extent threshold".
- 5.2 In fact, we are aware of at least 3 other reasonably foreseeable projects/developments in the area that may have a cumulative impact on local and/or regional impact's to flora and vegetation and that should have been considered by the EPA in its cumulative impact assessment. Noting that all of these areas fall under the remit of SPP 6.1, these projects are:

- Gnarabup Tourism Development – Resort and Beach Village (Stage 5 Assessment)
- Moses Rock – Short Stay Accommodation and Reception Centre, Wilyabrup – Part 17 Application for Significant Development (under Assessment)
- Ridglands Precinct - Lots 1045, 660 and 70 Cape Nat Road, zoned Rural Residential (reasonably foreseeable)

Ground 6: The EPA's failure to consider the impact of fire management on Environmental Values in accordance with the Statement of environmental principles, factors, objectives and aims of the EIA, EPA April 2023

6.1 The EPA has not considered fire risk in its Report. The reason provided for this omission is that it involves human safety risks and not environmental values, therefore fire risk is the concern of other authorities and not for the EPA to consider.

6.2 In our view this is a glaring omission based on a clear failure to consider the potential fire impacts on local environmental values, for the following reasons.

First, as a result of increased visitation to the area, the risk of fire ignition is increased (Collins et al., 2015), which could lead to a coastal wildfire. This is clearly a foreseeable risk, and it has occurred in the past on a number of occasions leading to devastating consequences for local flora and fauna. This is a real and significant risk and should be properly addressed by the EPA in its Report.

Second, the proponent's Bushfire Management Plan is likely to involve a number of impacts on environmental values that have simply not been considered. The impacts include:

- clearing and fuel reduction beyond the site boundary (particularly to the South). Relying on adjoining parcels of public land with significant biodiversity values could become part of the final Bushfire Management Plan. The requirements around the extent and nature of clearing for Asset Protection Zones and Fire mitigation have increased significantly over recent years and it is highly likely that this will continue to increase given the significant drying and warming predicted for the Southwest.
- the potential for requiring a second road into the development area may become part of the fire management plan, and any such road is likely to involve considerable clearing of high value native vegetation and the introduction of new roadkill risk to fauna.

The strong likelihood that the Bushfire Management Plan, once finalised, will impact environmental values that are not otherwise considered in the EPA's Report should have been addressed by the EPA, even to simply require further EPA review once the Bushfire Management Plan is approved by other authorities, to ensure any such Plan also complies with environmental objectives. Failure to do so means that a significant potential risk to environmental values associated with the project has not been assessed.

Third, any Bushfire Management Plan that does *not* involve a second road in/out of the development area will increase the risk of catastrophic wildfire due to the likely inaccessibility of the area by the fire department vehicles in the event of a fire.

The EPA's failure to consider and assess these bushfire risks is a complete failure to comply with its own objectives.

6.3 **References**

Collins, Price and Penmn. (2015) Spatial patterns of wildfire ignitions in south-eastern Australia. *International Journal of Wildland Fire*. 24(8). 1098. DOI: 10.1071/WF15054

May, Hobbes and Valentine. (2017). Are offsets effective? An evaluation of recent environmental offsets in Western Australia. *Biological Conservation*. 206. 249-257. DOI: 10.1016/j.biocon.2016.11.038
