

HOW DOES THE *BIODIVERSITY CONSERVATION ACT 2016* INTERSECT WITH THE *ENVIRONMENTAL PROTECTION ACT 1986*?

There are a number of areas of intersection between the *Biodiversity Conservation Act 2016* (BC Act) and the *Environmental Protection Act 1986* (EP Act). This information sheet sets out the main areas of intersection and how these are dealt with, including by administrative arrangements between the Departments of Biodiversity, Conservation and Attractions (DBCA) and Water and Environmental Regulation (DWER).

There are number of new features of the BC Act that are relevant to activities under the EP Act outlined below.

- The BC Act recognises that activities involving the taking of flora or fauna (other than threatened species) and the disturbing of fauna (including threatened species) that are approved under the EP Act do not require further approval under the BC Act, if they are undertaken in accordance with any biodiversity conservation conditions that are applied to an authorisation. These activities include clearing of native vegetation that does not involve the commission of an offence under section 51C of the EP Act, i.e. clearing is either exempt or done under the authority of a clearing permit, or done in accordance with an implementation decision under Part IV of the EP Act.
- Ministerial authorisation is required for the taking of threatened flora, taking or disturbing of threatened fauna and modification of threatened ecological communities. In practice, this authorisation has been delegated to DBCA except for contentious cases, which will be determined by the Minister.
- The BC Act provides the ability to impose conditions on authorisations to take threatened species or modify threatened ecological communities, that mitigate or offset the impact of such actions.
- New requirements for the taking, processing, supplying, dealing, importing and exporting of sandalwood are included in the BC Act.
- A requirement has been introduced for environmental consultants undertaking field work related to the EP Act to provide reports of any threatened species or threatened ecological communities to DBCA.
- DBCA now formally has the ability to notify owners or occupiers of the presence of a threatened species or threatened ecological community on their land and to lodge the notification on the land title. The notification can impose certain obligations on land owners or occupiers, which could include mining and petroleum tenement holders.
- The BC Act provides the ability to list critical habitat for threatened species or threatened ecological communities, including habitat that is outside the area of occupancy of the species or community.

What happens to existing *Wildlife Conservation Act 1950* licences and other previous authorisations?

Implementation of the BC Act has aimed to minimise the impact on existing authorised activities.

Licences issued under the *Wildlife Conservation Act* prior to 1 January 2019 have been transitioned to equivalent licences under the BC Act. This covers most licences issued to persons or companies to undertake activities associated with the EP Act.

Similarly, licences issued for the taking of threatened fauna and permits to take threatened (declared rare) flora have also been transitioned to section 40 authorisations to take threatened species under the BC Act.

While no permission was required under the *Wildlife Conservation Act* to impact a threatened ecological community, approvals granted under the EP Act prior to 1 January 2019 that authorised the disturbance of a TEC have been recognised through an exemption order so that further authorisation is not required.

What additional licences are required for taking flora when implementing projects approved or exempt under the EP Act?

No additional licence under the BC Act to take flora is required where it is clearing that is approved under an EP Act approval, or where the clearing is for an exempt purpose under the EP Act. Where the flora to be taken is threatened flora, an authorisation to take threatened flora will also be required (under section 40 of the BC Act).

How is cultivated flora considered under the BC Act?

The requirement for a licence to take flora does not apply to cultivated flora. The definition of cultivated flora excludes flora that has been sown, planted or propagated as required under a written law. As such, vegetation required to be established, or re-established, under the EP Act is not cultivated flora, and is subject to the licensing provisions of the BC Regulations.

Part 7 of the BC Act provides for the CEO to approve the translocation of flora. BC Regulation 4 provides that such flora is also excluded from the definition of cultivated flora. Threatened flora established through approved translocation proposals are thus not cultivated flora, and remain threatened flora for the purposes of the BC Act. These plants will therefore be defined as threatened flora under the EP Act.

What additional licences are required for taking fauna when implementing projects approved or exempt under the EP Act?

No additional licence to take fauna is required under the BC Regulations where the native vegetation being cleared is either under an EP Act approval, or where the clearing is for an exempt purpose under the EP Act, and the taking of fauna is an unavoidable consequence of the clearing.

However, a licence to take fauna is required where fauna is to be physically captured, such as for their relocation. Where the fauna to be taken is threatened fauna, a section 40 authorisation to take threatened fauna is required under the BC Act.

When is a Ministerial authorisation required to take or disturb a threatened species?

Ministerial authorisation is always required to take a threatened species, irrespective of any approval granted or exemption under the EP Act.

Ministerial authorisation is only required to disturb threatened fauna when the activity has not been authorised under other relevant legislation (i.e. there is not lawful authority for the activity). Lawful authority includes activities that are lawful under the EP Act, including exemptions under that Act. Hence any activity that is lawful under the EP Act does not require a section 40 authorisation to disturb threatened fauna.

What activities could constitute disturbing fauna?

Section 5 of the BC Act provides a definition for 'disturb':

(a) in relation to fauna, includes the following

—
(i) to chase, drive, follow, harass, herd or hunt fauna by any means;

(ii) to apply an identifier to fauna by any means;

(iii) to engage in an activity that has the effect, whether directly or indirectly, of altering the natural behaviour of fauna to its detriment;

(iv) to cause or permit anything referred to in subparagraph (i), (ii) or (iii) to be done

What additional licences are required to disturb fauna when implementing projects approved or exempt under the EP Act?

The BC Act provides for a licence to disturb fauna, but no licence is required where the person has lawful authority. Lawful authority includes an authorisation or exemption under the EP Act, and consequently any activity that is lawful under the EP Act may disturb fauna, including threatened fauna, without the requirement for a BC Act licence.

When is a Ministerial authorisation required to modify a threatened ecological community?

A guidance note has recently been developed that provides advice on what constitutes modification of an ecological community and how land owners or occupiers can assess whether their activities will modify a TEC. It is available from:

pws.dbca.wa.gov.au/images/documents/plants-animals/tecs/TEC_modification_guidance_note.pdf

In summary, an activity that will permanently change the species composition and/or structure of an occurrence of a TEC, or destroy the TEC, is defined as modification of the TEC. Ministerial authorisation under BC Act section 45 is always required to modify a TEC, irrespective of any approval granted or exemption under the EP Act for an activity.

What arrangements are in place for DWER and DBCA to coordinate approval processes for development approvals/clearing proposals?

DWER and DBCA will continue to coordinate assessment processes where a project being assessed under the EP Act (Part IV or Part V) and will involve the taking of a threatened species or modification of an occurrence of a TEC. In accordance with longstanding agency practice, the assessment processes will be undertaken concurrently with advice being provided on the likelihood of an approval/permit being granted under the EP Act or an authorisation being granted under the BC Act.

Proponents/applicants should be encouraged to liaise directly with both agencies when a project is referred or an application for an authorisation is made, to ensure both agencies are aware of the requirement for a dual approval process.

How will environmental offsets be coordinated between DWER and DBCA where a threatened species or threatened ecological community is approved to be taken/modified with a development approval/clearing proposal?

The EP Act, through the state offset policy, has a well-established process for requiring environmental offsets for development proposals that have a significant residual impact on biodiversity values. The BC Act has provisions for applying conditions on authorisations to take threatened species or modification of occurrences of TECs, including for requiring environmental offsets on the net impact to the species or ecological community.

DWER and DBCA will coordinate environmental offsets for proposals that involve the taking of a threatened species or modification of an occurrence of a TEC. This will result in a single agreed offset package being required for a project, with no duplication of offset requirements occurring at the State level.

When does a person need to report the presence of a threatened species or threatened ecological community?

Sections 43 and 49 of the BC Act compel any person carrying out field work for the purposes of an assessment under Part IV of the EP Act, or an application for a clearing permit under Part V Division 2 of the EP Act to report the presence of a threatened species or a TEC to the CEO (of DBCA). Defences apply under sections 43(4) and 49(4) where the person did not know, or could not reasonably have known, that they had found a threatened species or TEC.

Any environmental consultant/researcher undertaking biological surveys or other activities relating to taking or disturbing native flora and fauna will require a licence. It will be a condition of a biological survey licence that the licence holder (i.e. the principal investigator or project leader) provide notification of any threatened species or TECs in the licence return. However, if the provision of such a return will not occur in a reasonable time frame and the works are being undertaken for the purposes described above in relation to the EP Act, a separate report of the occurrence should be made to DBCA's Wildlife Licensing Section via email wildlifelicensing@dbca.wa.gov.au.

The requirement to report occurrences also extends to public officers undertaking assessments relating to EP Act Part IV or Part V approvals as the Act does not restrict this requirement to proponents or agents for proponents.

The mapped boundaries of occurrences of TECs will be incorporated as a geographical information system (GIS) layer into a database maintained by DBCA.

How is data to be held for threatened species and TECs and how can it be accessed?

DBCA will continue to manage threatened species and TEC data in the same way that it currently is. Three separate databases are currently being maintained for threatened flora, threatened fauna and TECs. DBCA is developing a new database that will integrate these three datasets, however, requests for data will still be through the established database managers.

- Threatened flora enquiries should be directed to flora.data@dbca.wa.gov.au
- Threatened fauna enquiries should be directed to fauna.data@dbca.wa.gov.au
- TEC enquiries should be directed to communities.data@dbca.wa.gov.au

What process has been undertaken to notify owners or occupiers that there is a threatened species on their land?

Land owners/occupiers with occurrences of threatened flora (declared rare flora under the Wildlife Conservation Act) have been sent notification letters advising them of their statutory responsibilities under the Act. Similarly, a limited number of owners/occupiers with threatened fauna on their property have been notified of these occurrences. These notifications have been limited to specific circumstances where there are important occurrences of resident threatened fauna that are at risk from land management practices.

These letters will gradually be replaced by new notifications under the BC Act to advise owners/occupiers of their responsibilities under the new Act. New notifications will also be sent out to those owners/occupiers with newly determined occurrences on their land.

What process has been undertaken to notify owners or occupiers that there is a threatened ecological community on their land?

In the past, land owners/occupiers have been notified in writing of the presence of a TEC occurrence on their land. Such notifications only referred to the statutory requirements relating to TECs under the EP Act. New notification letters are being sent to all land owners/occupiers with occurrences of TECs on their land to ensure these and owners/occupiers are aware of the new statutory status of TECs and their responsibilities under the BC Act. The notification letters will include a description of the TEC and a map of the occurrence on their property.

What is critical habitat and what implications does listing it have for the EP Act?

Critical habitat is habitat that is critical to the survival of a listed threatened species or TEC. Such habitat may extend beyond the area of occupancy of a threatened species or TEC if that habitat is critical to its survival, and it is necessary to maintain an area of critical habitat in which the species or community occurs.

Ministerial Guidelines have been developed for the listing of critical habitat and are available on the DBCA website at pws.dbca.wa.gov.au/plants-and-animals/threatened-species-and-communities/118-call-for-public-nominations-for-listing-and-delisting-of-threatened-plants-and-animals.

Although no critical habitat has been listed at this point in time, if it is listed in future, it is likely to be considered to be a very important environmental matter. It should be given a high degree of consideration in an environment impact assessment under the EP Act.

Habitat necessary for the survival or maintenance of threatened species and TECs is currently considered in assessments by the EPA and DWER.

To ensure that habitat damage, or further habitat damage does not occur, critical habitat may have a habitat conservation notice (HCN) placed over it that either requires past impacts to be rectified, current actions to cease, or future actions to be prohibited. If an HCN is in place, any EP Act assessment of an area containing critical habitat should seek an outcome that is consistent with the requirements of the HCN.

What obligation does DWER have to advise DBCA that a clearing or development proposal might include the taking of sandalwood?

DBCA will consult with DWER to ensure that, where a clearing or development proposal includes the taking of sandalwood, appropriate advice will be provided to the proponent about the value of the sandalwood and the options available to them. Because sandalwood is a high value resource, proponents will be strongly encouraged to dispose of the sandalwood into the commercial trade. Licences are required to take, supply (sell), process and deal in sandalwood.

Where the proposal relates to Crown land on which the Forest Products Commission (FPC) has access, the sandalwood may be able to be taken under an FPC contract.

Where the sandalwood occurs on private land, the land owner or occupier should apply for an appropriate licence.



FURTHER INFORMATION

Contact your local office of the Department of Biodiversity, Conservation and Attractions. See the department's website for the latest information www.dbca.wa.gov.au