Guidelines for Division 5.1 assessments

NSW GOVERNMENT

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Acknowledgement of country

The Department of Planning, Housing and Infrastructure acknowledges the traditional custodians of the land and pays respect to Elders past, present and future.

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Introduction

Not all development in NSW requires development consent.

Certain activities undertaken by councils, government departments and State agencies are “development permitted without consent”. This includes the delivery and maintenance of infrastructure such as health services facilities, schools, roads, railways, emergency services, water supply and electricity.

Division 5.1 was established as a more streamlined and proportionate pathway than development consent, recognising that it generally applies to infrastructure delivered by public authorities.

Before these activities can proceed, public authorities must assess their environmental impacts. This pathway is under Part 5, Division 5.1 of the *Environmental Planning and Assessment Act 1979* (EP&A Act), referred to throughout these Guidelines as Division 5.1.

It enables the cost-effective provision and maintenance of essential infrastructure while ensuring environmental impacts are properly identified and addressed.

These guidelines are designed for proponents and determining authorities undertaking environmental impact assessment for activities under Division 5.1. The guidelines explain what proponents and determining authorities need to do to undertake a Division 5.1 assessment.

Division 5.1 assessment

Review of environmental factors

The types of activities that are 'development permitted without consent' are identified in environmental planning instruments (EPIs).

Under Division 5.1, a determining authority will need to assess the environmental impacts of these types of activities through a **review of environmental factors (REF)**.

The document that records the Division 5.1 assessment is the **REF document**.

The REF document demonstrates that a determining authority has discharged its duty under section 5.5 of the EP&A Act.

Section 5.5 of the EP&A Act:

For the purpose of attaining the objects of this Act relating to the protection and enhancement of the environment, a determining authority in its consideration of an activity shall...examine and take into account matters affecting or likely to affect the environment by reason of that activity.

...The determining authority may take into account the matters affecting or likely to affect the environment by reason of the activity in a manner that is proportionate to the nature and risk of the activity.

When considering the likely impact of an activity on the environment, the determining authority must take into account the factors listed in these guidelines.

Roles under Division 5.1

The two key roles under Division 5.1 are:

- **Determining authority as proponent** – an entity proposing to carry out the activity, which may be a Minister or a public authority (or a private company undertaking the activity on their behalf or private companies in certain limited circumstances), or
- **Determining authority as approver** – the Minister or public authority whose approval is required for the activity to be carried out.

Under Division 5.1, a Minister or public authority may be both a proponent and a determining authority for an activity, whereas other entities (like a private developer) can only be a proponent.

Schedule 1 to the EP&A Regulation prescribes other bodies to be public authorities and, thus, determining authorities.

If a determining authority considers the activity should be referred to the Commonwealth (Cth) Environment Minister to decide if the activity is a controlled action under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), this decision can be included in the REF document.

Undertaking a Division 5.1 assessment

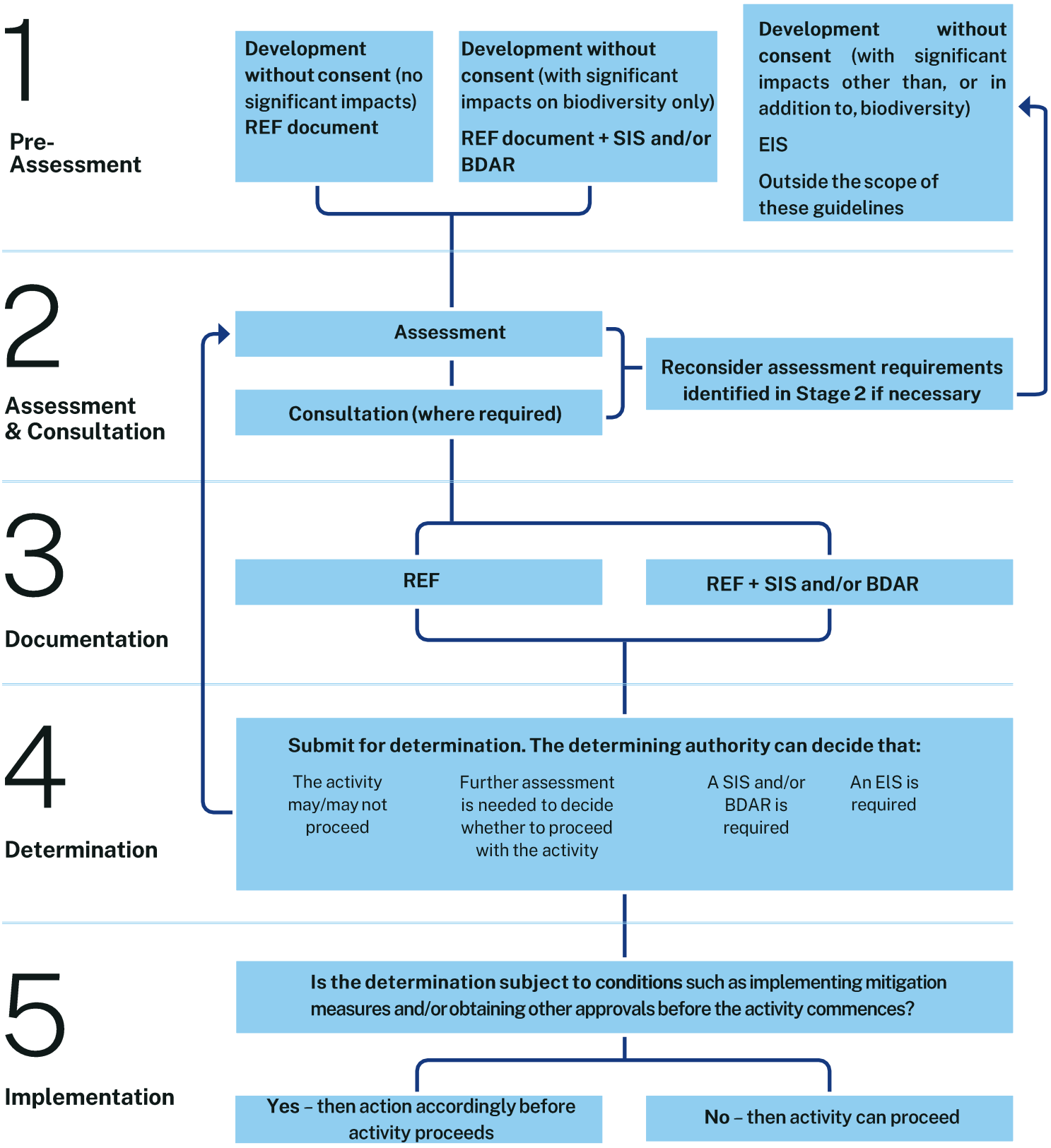


Figure 1 Division 5.1 assessment and determination process

Stage 1: Pre-Assessment

The first step is identifying the applicable assessment requirements that will apply to an activity classed as development permitted without consent. These could be:

- **REF document** – if the activity is unlikely to have significant impacts on the environment
- **REF document and SIS and/or BDAR** – if the activity is likely to have significant impacts on biodiversity only
- **REF and EIS** – if the activity is likely to have significant environmental impacts (other than only impacts on biodiversity).

A proponent may need to revise the assessment requirements at any stage, if warranted.

Activity assessment documentation

The degree of assessment and consultation required should be proportionate to the nature and risk of the activity.

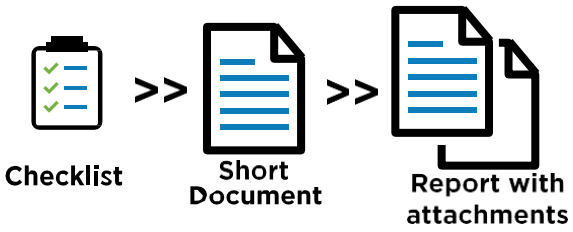


Figure 2: REF documents are scalable

Minor activities

Minor or low impact Division 5.1 activities are small in scale and complexity and may include maintenance works, minor alterations or works that would otherwise be considered as exempt or complying development, apart from minor departures from a relevant code.

They involve low impacts that are typically localised or short term. In this instance, the REF document may take the form of a checklist or summary document.

Project activities

As project activities are larger in scale and complexity, the REF will need to be more detailed and comprehensive to determine the likely potential impacts and mitigation measures. Some technical specialists are likely to be required. While not mandatory, consultation may help to identify community and stakeholder concerns and develop appropriate mitigation measures.

The REF for these types of activities is likely to take the form of a short document or

document with attachments.

Group or multi-site activities

Group or multi-site activities can be assessed collectively. They may include similar types of work across several locations (for example, stop valves on water mains across an interconnected network) or multiple different types of activities in one location over an extended period (for example, management plans for parklands or reserves).

An assessment undertaken for a work program is likely to differ from a single activity assessment as it will need to consider potential impacts that a variety or combination of different activities may have in a variety of different environments.

A group or multi-site REF document should record the contingencies necessary to respond to possible impacts and eventualities, while providing relevant activity and site information so that environmental impacts can be assessed. The level of investigation, assessment and documentation will need to be proportionate to the nature and risk of the activity.

These types of activities are likely to take the form of a covering report with attachments to cover the various activities.

Biodiversity requirements

Biodiversity assessment requirements may apply to an activity under the *Biodiversity Conservation Act 2016* (BC Act) or the *Fisheries Management Act 1994* (Part 7A) (FM Act). These Acts provide for tests for identifying significant impact, in particular: section 221ZV of the FM Act and section 7.2 and 7.3 of the BC Act.

The REF document must record how the test of significance has been applied and the conclusions reached.

Terrestrial

Significance is assessed via the test of significance in section 7.3 of the BC Act, which may then require the preparation of a SIS (or BDAR if the proponent elects to provide a BDAR in place of the SIS).

Division 5 of Part 7 of the BC Act and clause 7.6 of the *Biodiversity Conservation Regulation 2017* set out the required form and content of a SIS and Division 3 of Part 6 and clause 6.8 of the *Biodiversity Conservation Regulation 2017* set out the required form and content of a BDAR.

Aquatic

Section 220ZV of the FM Act sets out the test for determining whether an activity is likely to have a significant effect. In this case, the Division 5.1 assessment requires a SIS.

Division 6 of Part 7A of the FM Act sets out the required form and content for a SIS involving threatened aquatic species, populations or ecological communities.

Concurrence and consultation

If an activity is likely to have a significant effect, the determining authority can make their decision that the activity can proceed only with the concurrence of the Environment Agency Head (unless a BDAR has been obtained) and/or Fisheries Agency Head.

However, concurrence is not required when the determining authority is a Minister (section 7.12 of the BC Act; section 221ZZ of the FM Act). Instead, where a Minister is the determining authority, the Minister must consult with the Minister for the Environment and/or Fisheries Minister (BC Act section 7.11, FM Act, section 221ZY).

If a BDAR is obtained and the determining authority decides to require less credits to be retired than specified in the BDAR, the determining authority has to give reasons for the reduction (BC Act section 7.15 (4)).

Australian Government approvals

If the Division 5.1 assessment finds the activity is likely to have a significant impact on matters of national environmental significance or a significant impact on Commonwealth land under the EPBC Act, the proponent must refer the activity to the Commonwealth Department of Climate Change, Energy, the Environment and Water (Cth DCCEEW).

Projects that fall within the class of actions covered by a strategic assessment approval will not require a biodiversity assessment under Part 5 or an EPBC Act referral, provided they meet the commitments in the relevant conservation plan. For example, Transport for NSW has EPBC Act strategic assessment approval in place for road and traffic management works assessed under Division 5.1. In addition, all actions described in the Cumberland Plain Conservation Plan on land that is biodiversity certified under the NSW framework are approved for the purposes of the EPBC Act.

If the commitments in the "Endorsed Program" cannot be met, the proponent and/or determining authority must undertake a self-assessment to decide whether the Cth DCCEEW needs to determine whether approval is required under the EPBC Act.

If a proponent or determining authority is still unsure following the self-assessment, they should refer the proposed activity to the Commonwealth Department of Climate Change, Energy, the Environment and Water.

Stage 2: Assessment and consultation

During Stage 2, the proponent will **identify, assess** and **evaluate** the **nature, scale** and **extent** of the proposed activity's potential impact on the environment and conduct relevant **consultation**, with all findings recorded in the REF document.

Identifying potential impacts

The proponent gathers and records relevant information on potential environmental impacts, including consideration of:

- **the proposed activity** – particularly those aspects of the activity that may cause environmental change or interact with environmental values
- **the area likely to be impacted** – key characteristics of the receiving environment, existing conditions and trends that form the environmental baseline without the activity, and any sensitive or vulnerable features
- **relevant risk factors** – such as bushfire, flooding, coastal processes or extreme heat events, where these may affect the activity or give rise to additional environmental impacts in combination with the proposal
- **relevant legislative and strategic context** – including applicable national and state legislation, and national, state and local plans or policies that identify environmental value
- **consultation with relevant stakeholders** – including agencies, councils and where appropriate, the public, to assist in identifying material issues.

The determining authority must consider the environmental factors listed a) to r) below:

a) the environmental impact on the community

b) the transformation of the locality

c) the environmental impact on the ecosystems of the locality

d) reduction of the aesthetic, recreational, scientific or other environmental quality or value of the locality

e) the effects on any locality, place or building that has—

   i. aesthetic, anthropological, archaeological, architectural, cultural, historical, scientific or social significance, or

   ii. other special value for present or future generations

f) the impact on the habitat of protected animals, within the meaning of the *Biodiversity Conservation Act 2016*

g) the endangering of a species of animal, plant or other form of life, whether living on land, in water or in the air

h) long-term effects on the environment

i) degradation of the quality of the environment

j) risk to the safety of the environment

k) reduction in the range of beneficial uses of the environment

l) pollution of the environment,

m) environmental problems associated with the disposal of waste

n) increased demands on natural or other resources that are, or are likely to become, in short supply

o) the cumulative environmental effect with other existing or likely future activities

p) the impact on coastal processes and coastal hazards, including those under projected climate change conditions

q) applicable local strategic planning statements, regional strategic plans or district strategic plans made under Division 3.1 of the EP&A Act

r) other relevant environmental factors.

Where an activity is in a regulated catchment, the determining authority must also take into the matters set in section 171A of the EP&A Regulation.

Assessing potential impacts

Impacts should be assessed initially at a high level to determine if they warrant further assessment and consideration. Generally, only impacts on the environment that have a real likelihood of occurring need to be further investigated.]

For each identified potential impact, the proponent assesses its characteristics in a manner proportionate to the nature and risk of the activity.

This involves considering:

- **Type** – the nature of the impact and the pathway by which it may occur.
- **Extent** – the area, environment or population likely to be affected.

- **Magnitude** – the scale or intensity of the impact.
- **Duration** – the timeframe over which the impact would occur and whether it is temporary or permanent, reversible or irreversible.
- **Sensitivity** – the value, vulnerability or resilience of the affected environment, feature or community.
- **Likelihood** – whether there is a real chance or possibility of the impact occurring.
- **Thresholds** – whether the impact would exceed relevant standards, limits or policy criteria.

Section 5.5 allows a proportionate, risk-based approach. The depth of assessment should be commensurate with the potential consequence and likelihood of each impact.

Evaluating potential impacts

The proponent must evaluate whether any impact is likely to significantly affect the environment for the purposes of section 5.7 of the EP&A Act.

If any single impact is likely to significantly affect the environment, a SIS, BDAR or EIS may be required.

Where impacts are not likely to be significant, the REF document should clearly provide the reasoning supporting that conclusion.

Further discussion of whether an impact is "likely to significantly affect the environment" is provided in the box below.

Consultation

EPIs set out obligations to notify and/or consult with stakeholders, including state agencies, councils and the community as part of the Division 5.1 process. These guidelines do not change the consultation requirements within EPIs.

Community consultation and referrals may also be required for certain types of approvals (consents, licences and permits) granted by determining authorities under legislation other than the EP&A Act.

Where required under legislation, proponents and determining authorities must consider any feedback from stakeholders on the proposed activity and/or its environmental impacts.

Stakeholder notification and consultation can be undertaken independently by the proponent or via the NSW Planning Portal.

All notification and consultation requirements must be met before a determination is made on the activity.

"Likely to Significantly Affect the Environment"

Under section 5.7 of the EP&A Act, the determining authority must consider whether an activity is likely to significantly affect the environment. This is an objective legal test capable of judicial review.

The Act does not define "significant". Consistent with judicial interpretation, an impact will be significant where it is important, notable, weighty or more than ordinary, having regard to its context and intensity.

An impact is "likely" where there is a real chance or possibility of it occurring. It does not need to be more probable than not. Remote or speculative impacts are not likely.

In determining whether an impact is likely to be significant, regard should be had to both its consequence and its likelihood, including:

- the scale, duration and intensity of the impact
- the sensitivity, value or vulnerability of the affected environment
- whether the impact would materially alter, degrade or transform the locality
- whether the impact contributes to cumulative environmental stress
- the probability or real chance of the impact occurring

Even relatively small impacts may be significant in sensitive environments. Conversely, large impacts that are highly improbable may not be "likely".

Mitigation measures proposed as part of the activity may be taken into account in evaluating significance. The level of public interest may inform context but does not, of itself, determine significance.

Stage 3: Documentation

The determining authority needs to be satisfied and provide evidence that the assessment has been prepared, or reviewed and certified, by a person suitably qualified in environmental impact assessment as well as evidence that any technical studies have been prepared by suitably qualified technical specialists.

The length of, and level of detail in, the REF document should reflect the nature and complexity of the proposed activity, and the sensitivity of the area affected.

In documenting the Division 5.1 assessment, the REF document should at a minimum:

- demonstrate consideration of the environmental factors listed in these guidelines
- comply with requirements under Part 8, Division 1 of the EP&A Regulation
- comply with these guidelines
- contain no false or misleading information.

Elements of a REF document

Description of the proposed activity

The REF document must describe the proposed activity and its scope, including its nature, purpose and location.

For simple activities, this may be a short title and description on a checklist document. For more complex activities, a more detailed description is useful.

EPI provisions

The REF document must identify the relevant clause/section of the EPI that provides the proposed activity is permitted as development without consent.

Certification

The REF document or decision statement (see Stage 4) must contain a statement signed and dated by a suitably skilled, qualified and experienced professional with responsibility for reviewing and endorsing the REF document (being an employee or agent of the determining authority). This must state:

"I certify that I have reviewed and endorsed the contents of this REF document and, to the best of my knowledge, it is in accordance with the EP&A Act, the EP&A Regulation and the Guidelines issued under section 170 of the EP&A Regulation, and the information it contains is neither false nor misleading".

Proponent, determining authorities and related approvals

The REF document must identify the proponent and all determining authorities and where relevant all related approvals (consents, licences, permits and other authorities) required for the activity. This may be listing names, titles and organisation details on a checklist.

Where other approvals are required the proposed activity may not be able to proceed without first obtaining these approvals.

Description of the environment

The REF must describe the receiving environment likely to be affected by the activity, including:

- key environmental characteristics
- sensitive or vulnerable features
- threatened species, populations or ecological communities (unless biodiversity certified land applies)
- relevant existing conditions and trends.

Assessment of impacts

The assessment of potential impacts of the activity is the most important part of a REF document. This establishes whether any potential impacts are likely to be significant. The REF document should record likely direct, indirect and cumulative environmental impacts for all phases of the activity. It must identify measures to avoid, minimise or manage impacts.

The REF document must include sufficient evidence to demonstrate that each environmental factor has been examined and taken into account in a manner proportionate to the nature and risk of the activity.

Consultation

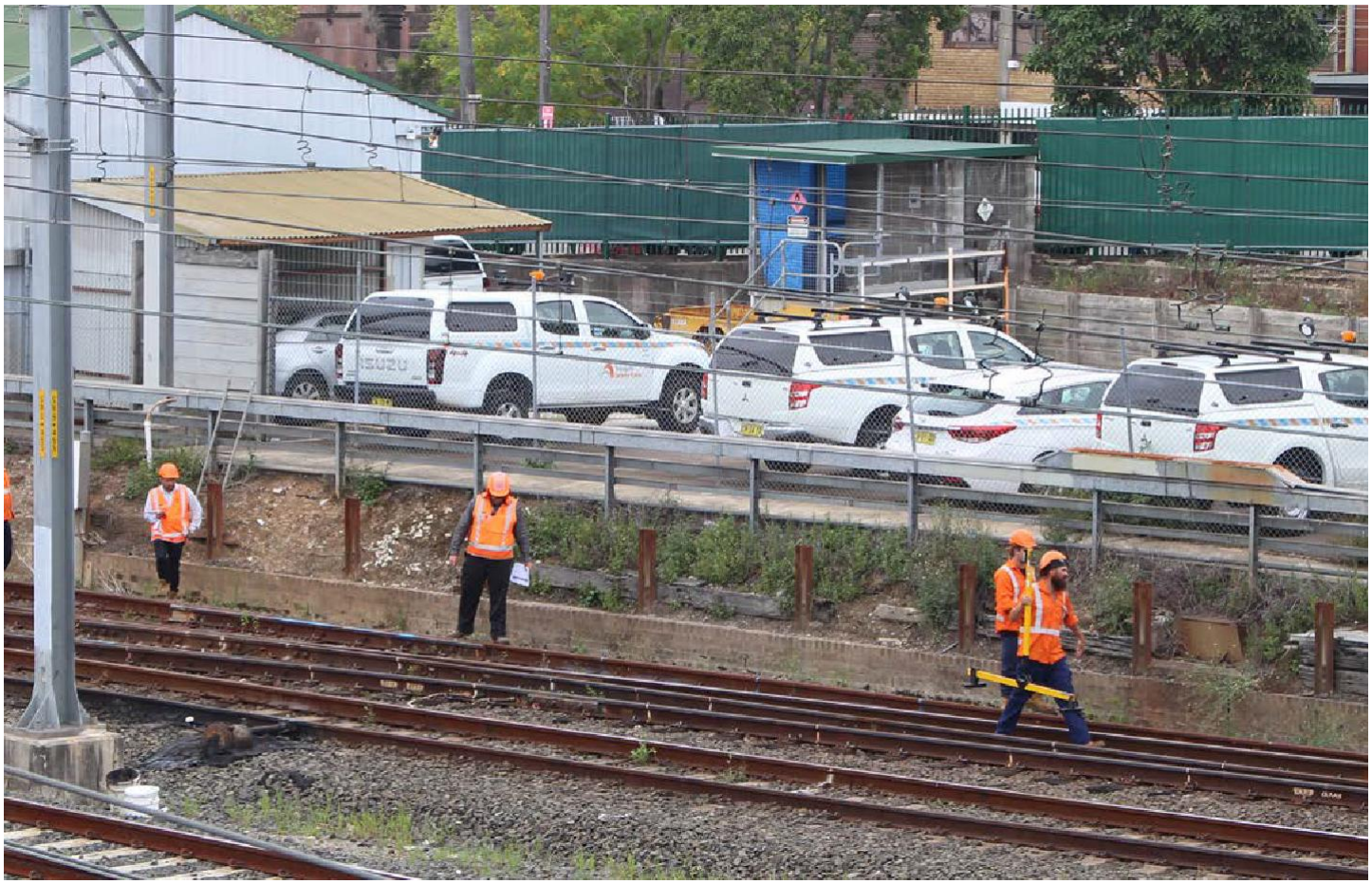
The REF document must record any notifications and/or consultation undertaken.

Conclusions

The REF must state whether:

- the activity is likely to significantly affect the environment (in which case an EIS is required), and/or
- the activity is likely to significantly affect threatened species, populations or ecological communities (in which case a SIS or BDAR may be required).

The REF must provide a clear and reasoned justification for these conclusions.



Stage 4: Determination

Determination occurs after the assessment and documentation stages and after any consultation.

The determination is undertaken by an authorised person - an individual authorised by the determining authority to decide whether the proposal under Division 5.1 of the EP&A Act is to proceed. That authorised person will produce a decision statement.

While this may be the same person who undertook the Division 5.1 assessment, this is not preferable, especially when assessing larger, more complex activities or activities in sensitive locations. Separating these responsibilities provides an opportunity for a review of the assessment.

The REF document is the key evidence for the determination. In considering a REF document, the authorised person decides on behalf of the determining authority:

- that no EIS or SIS and/or BDAR is required, and that the proposed activity may/may not proceed subject to any mitigation measures identified in the REF document and/or the Decision Statement. Such a decision may be conditional or unconditional.
- that an EIS is required
- that a SIS and/or BDAR is or are required.

If the authorised person determines that the proposed activity may not proceed, that determination may be based on the REF document; alternatively, it may be that there is insufficient information in the REF document for the authorised person to discharge their duty.

The determining authority may include a requirement for the activity to be referred to the Commonwealth Environment Minister to determine if the activity is a controlled action under the EPBC Act.

More than one determining authority

If there is more than one determining authority, the Minister may nominate a determining authority via a Ministerial planning order. Where this occurs, the other determining authorities are only exempted from compliance with section 5.7(2) or (3) and section 5.8 of the EP&A Act.

In addition, under section 5.4 of the EP&A Act, sections 5.5 and 5.7 do not apply to an activity or part of an activity that has been approved, or is to be carried out, by another determining authority after environmental assessment in accordance with Division 5.1.

Where multiple determining authorities are involved, those authorities may like to obtain further advice on how best to proceed.

Determination documentation

The determination of the proposed activity will be recorded in the decision statement signed by an authorised person.

This will state that, based on the REF document, other information and any advice from other relevant determining authorities:

- the proposed activity is/is not likely to have a significant impact on the environment and therefore an EIS is / is not required
- the proposed activity will/will not be carried out in a declared area of outstanding biodiversity value and is/is not likely to significantly affect threatened species, populations or ecological communities, or their habitats or impact biodiversity values, meaning a SIS and/or BDAR is/is not required
- the proposed activity may/may not proceed and the reasons for the decision
- mitigation measures are/are not required to eliminate, minimise or manage environmental impacts, indicating where in the REF document the mitigation measures are set out, as well as any additional mitigation measures and/or conditions required and the reasons for these mitigation measures and conditions.

A determining authority may also note whether referral to the Cth DCCEEW has been considered.

If a SIS and/or BDAR is prepared, and the determining authority is a Minister, the decision statement will identify any recommendations from the Environment Agency Head or the Fisheries Agency Head that have not been accepted.

Publication

It is best practice for determining authorities to keep the following REF documentation available for public access once a determination has been made:

- the REF document
- any associated SIS or BDAR.

Section 171(4)-(6) of the EP&A Regulation set out requirements for the publication of a REF document.

A REF document must be published for an activity:

- with an estimated development cost of more than $5 million or,
- if the activity is development carried out under State Environmental Planning Policy (Transport and Infrastructure), sections 2.61A or 3.37A, or
- an approval or permit for activity that requires approval under:
  - FM Act sections 144, 200, 205 or 219, or
  - *Heritage Act 1977* section 57, or
  - *National Parks and Wildlife Act 1974* section 90 or
  - *Protection of the Environment Operations Act 1997* sections 47-49 or 122, or
- if the determining authority considers it to be in the public interest.

Publication of a REF document is not required:

- in circumstances specified by the Planning Secretary, or
- where an approved code under Division 6 of the EP&A Regulation applies.

If the REF is to be published:

- the REF must be published before the activity commences, or as soon as practicable, but no later than one month after the activity commences,
- the determining authority must place all relevant information on the determining authority's website or the NSW Planning Portal prior to the commencement of works.

Stage 5: Implementation

Implementation refers to commencing the activity. It begins after a determination has been made which allows the activity to proceed without further environmental impact assessment at the time of determination.

Any mitigation measures identified in the REF document and/or Decision Statement should be implemented in accordance with the timing identified either in these documents or related documentation such as a construction management plan for that activity.

In addition, other conditions such as any statutory approvals must be obtained at the required time. This may include approvals under legislation such as the *Local Government Act 1993*, the *Heritage Act 1977*, the *Roads Act 1993*, *National Parks and Wildlife Act 1974*, the FM Act or under any Commonwealth legislation.

Nothing in these guidelines allows a proponent to undertake an activity without obtaining all relevant approvals, permits and licences required under any other legislation.

Where there are significant delays to the commencement of an activity approved under a REF, it may be necessary to revisit and update the environmental assessment if the surrounding environment or potentially the activity has changed since the REF document was completed. If this occurs, review and as necessary update the REF document to respond to any new information or new environmental conditions.

Changes to a proposal

The duty in section 5.5 of the EP&A Act is not restricted by any time frame. Failing to reconsider the environmental impact of the activity if that activity changes would amount to a breach of this provision.

If a proposed activity needs to be altered or modified, the REF document will need to be reviewed, and if necessary modified to incorporate the amendment and be reassessed through stages 2 to 4.

If a determination has been made, and a modification (e.g. a change or addition) is proposed, the modification will need to be assessed by either preparing a new REF document, or a REF document addendum. Section 5.4 of the EP&A Act does not require an assessment of a proposed modification in very limited circumstances – being a modification whose environmental impact has already been considered and will reduce its overall environmental impact.

A REF document addendum will describe the proposed modification and assessment and consultation undertaken to assess the environmental impacts of the modified proposal. It may be in the form of the original REF document and include the modification, or be an attachment to the original REF document. In both cases a revised comprehensive list of mitigation measures must be included.
The modified activity is determined as per the determination process described in Stage 4.

Glossary

Table 1 Terms used in these guidelines

Term	Meaning for the purpose of these guidelines
Approved code	A code of practice document approved by the Minister under Part 14, Division 8, 9, or 10 of the EP&A Regulation
Authorised Person	An individual authorised by the determining authority to determine the proposal, including but not limited to authorisation under an instrument of delegation.
Biodiversity development assessment report BDAR	A report required under the BC Act and prepared by a person accredited to apply the biodiversity assessment method
Cumulative impact	Impacts that are a result of incremental, sustained and combined effects of human action and natural variations over time, both positive and negative, or by the compounding effects of a single project or multiple projects in an area, and by the accumulation of effects from past, current and relevant future projects. Refer to definition for 'relevant future projects' to understand scope of projects to be included.
Determining authority	A Minister or public authority and, in relation to any activity, the Minister or public authority by or on whose behalf the activity is or is to be carried out or any Minister or public authority whose approval is required in order to enable the activity to be carried out.
Direct impact	The impacts that usually occur at the same time as the project and in the vicinity of the site.
Environmental impact assessment	An assessment of the environmental, social and/or economic impacts of a project.
Environmental Impact Statement (EIS)	An environmental impact statement prepared by or on behalf of the proponent to accompany a proposed activity under Part 5 when the activity is likely to have a significant effect on the environment
Environmental planning instrument (EPI)	A State environmental planning policy (SEPP) or local environmental plan (LEP) but not including a development control plan (DCP)
Indirect impacts	The impacts that occur as a consequence of the project or the direct impacts of a project. They may be delayed and happen further away from the site.
Mitigation	Actions or measures to avoid, minimise, rectify (by repairing, rehabilitating or restoring) and/or reduce or eliminate over time (by preservation and maintenance) the adverse environmental impacts of a Division 5.1 activity.
Nominated determining authority	In relation to an activity, means the determining authority nominated by the Minister in accordance with section 5.2 in relation to the activity.
Proponent	The person proposing to undertake activity under Division 5.1 (or on whose behalf the activity is to be undertaken)
Prescribed determining authority	A person prescribed as a public authority for the purposes of the definition of public authority in section 1.4 (1) of the EP&A Act so as to allow the person to be a determining authority within the meaning of Division 5.1 of the EP&A Act (see s 5.6 of the EP&A Act)

Public authority	(a) a public or local authority constituted by or under an Act, or (b) a Public Service agency, or (c) a statutory body representing the Crown, or (d) a Public Service senior executive within the meaning of the Government Sector Employment Act 2013, or (e) a statutory State owned corporation (and its subsidiaries) within the meaning of the State Owned Corporations Act 1989, or (f) a chief executive officer of a corporation or subsidiary referred to in paragraph (e), or (g) a person prescribed by the regulations for the purposes of this definition.
Relevant future projects	The following types of development are 'relevant future projects': • State significant development and State significant infrastructure projects • projects classified as designated development and require an EIS • projects that require assessment under Division 5.1 of the EP&A Act that are likely to significantly affect the environment and require an EIS • projects that have been declared to be controlled actions under the EPBC Act • any major greenfield and urban renewal developments that are scheduled for the area (e.g. new areas zoned for urban development). These types of projects are generally large in scale and could potentially contribute to or compound material impacts. They are also generally publicly notified and should therefore be known or reasonably foreseeable.
Review of Environmental Factors (REF)	The Division 5.1 assessment
Species Impact Statement (SIS)	An assessment of the impacts of an activity on threatened species, populations or ecological communities, or their habitats under the BC Act or FM Act.

Department of Planning, Housing and Infrastructure

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