

Department of Planning and Environment

Guidelines for Division 5.1 assessments

June 2022



Acknowledgement of country

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

We recognise Australian Aboriginal and Torres Strait Islander peoples' unique cultural and spiritual relationships to place and their rich contribution to society.

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Guidelines for Division 5.1 assessments

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Contents

1. Introduction	4
.....	
Processes and activities under Division 5.1	4
Using the guidelines	5
2. Division 5.1 assessment	6
.....	
Review of environmental factors	6
Roles under Division 5.1	6
3. Environmental factors	7
.....	
4. Undertaking a Division 5.1 assessment	9
.....	
Stage 1: Assessment requirements	10
Stage 2: Assessment and consultation	14
Stage 3: Documentation	18
Stage 4: Determination	22
Stage 5: Implementation	24
Changes to a proposal	24
Glossary	25
.....	
Attachment A – Expanded optional guidance	28
.....	

Abbreviations

These guidelines use the following abbreviations

BC Act: Biodiversity Conservation Act 2016

BDAR: Biodiversity development assessment report

EIS: Environmental impact statement

EP&A Act: Environmental Planning and Assessment Act 1979

EP&A Regulation: Environmental Planning and Assessment Regulation 2021

EPBC Act: Environmental Protection and Biodiversity Conservation Act 1999

EPI: Environmental planning instrument

FM Act: Fisheries Management Act 1994

REF: Review of environmental factors

SIS: Species impact statement

1. Introduction

Public authorities are responsible for essential infrastructure like hospitals, schools, roads, railways, emergency services, water supply or electricity. These items contribute to people's quality of life and their construction and operation can also be an economic stimulant with lasting societal benefits.

There are several assessment pathways that these types of development can take in NSW. One of these uses Part 5, Division 5.1 of the *Environmental Planning and Assessment Act (1979)* (EP&A Act), which we refer to as **Division 5.1** throughout these guidelines.

Division 5.1 allows the cost-effective provision or maintenance of essential infrastructure alongside measures to protect the environment, including streamlining environmental assessment of activities that require approval (e.g. a consent, licence or permission) under legislation other than the EP&A Act.

We have designed these guidelines for proponents and determining authorities that undertake environmental impact assessments for activities set out under Division 5.1. The guidelines explain what proponents and determining authorities need to do to undertake a Division 5.1 assessment.

Processes and activities under Division 5.1

Division 5.1 means a determining authority - a Minister or a public authority - can assess the environmental impact of certain activities that they are either carrying out themselves or approving.

These activities are defined as development 'permitted without consent' in an environmental planning instrument (EPI) (for example, in a state environmental planning policy (SEPP) or local environmental plan (LEP)). A Division 5.1 assessment must be undertaken for that activity only where that development is not:

- prohibited under an EPI
- state significant development
- state significant infrastructure
- exempt development
- complying development
- development requiring or that obtained development consent under Part 4 of the EP&A Act
- an activity for which an environmental impact statement (EIS) has been prepared.

Visit <https://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Planning-Approval-Pathways> to find out about other planning approval pathways.

The EP&A Act defines 'activity' as:

- the use of land
- the subdivision of land
- the erection of a building
- the carrying out of a work
- the demolition of a building or work.

If any EPI identifies an activity as 'development permitted without consent', a proponent will not need to obtain a development consent. Instead, they will need to assess the environmental impacts of the activity through a Division 5.1 assessment referred to as a **review of environmental factors** (REF). The document that records the Division 5.1 assessment is the **REF document**.

An REF will vary depending on the scale, complexity and potential impacts of the activity being assessed. For example, the REF may take the form of an environmental checklist for a simple maintenance activity, or it may be a more substantial report that examines multiple factors for an activity with the potential for multiple impacts.

The REF document might list past decisions or approvals that may relate to the activity, any relevant conditions or explain how the proposed activity relates to those past assessments and decisions.

Other requirements may include a **species impact statement** (SIS) or **biodiversity development assessment report** (BDAR), if a proposed activity is defined in the Biodiversity Conservation Act 2016 as “*likely to significantly affect threatened species or ecological communities, or their habitats.*”

If the proposed activity is likely to have a significant impact on the environment more broadly an EIS must be prepared. The EIS process is not covered in these guidelines; however, the guidelines will help a determining authority to understand whether an EIS is required. Proponents can refer to other guidance such as [State Significant Infrastructure Guidelines July 2021](#) for guidance on EIS preparation and processes.

The proposed activity must be considered in full before commencing the REF document, so that all components, including temporary construction requirements, site security requirements and decommissioning requirements (where relevant), are included when describing the activity.

Using the guidelines

These guidelines are made under clause 170 of the *Environmental Planning and Assessment Regulation 2021* (EP&A Regulation), and replace the *Is an EIS required? Best practice guideline for Part 5 of the Environmental Planning and Assessment Act 1979*.

These guidelines outline the form of the REF document, which must demonstrate how environmental factors (outlined in Section 3) are considered when undertaking the Division 5.1 assessment.

These guidelines are designed to help:

- determining authorities seeking to undertake activities under Division 5.1
- proponents seeking an approval (a consent, licence, or permission) under legislation other than the EP&A Act, and where Division 5.1 applies
- determining authorities making determinations or issuing approvals (a consent, licence or permission) under Division 5.1

- community members or interest groups who wish to understand Division 5.1 requirements.

The guidelines apply to all proposed activities that must be evaluated by determining authorities to fulfil their responsibilities under Division 5.1, except for prescribed determining authorities for whom a Code of Practice has been approved by the Minister for Planning (the Minister) under the EP&A Act. Where no such Code of Practice is in place, these guidelines apply.

From time to time, determining authorities publish guidelines related to activities for which they are a determining authority and/or approval authority for the purposes of granting a license, approval or permits under legislation other than the EP&A Act. For example, the NSW Environmental Protection Authority's 2016 *Guide to licensing, Under the Protection of the Environment Operations Act 1997* provides advice on environmental protection licences. These determining authority guidelines are intended to assist proponents in preparing their licence, approval or permit and are not guidelines for the purposes of clause 170 of the EP&A Regulation.

Certain prescribed determining authorities have codes of practice approved under the EP&A Regulation. It is intended that prescribed determining authorities undertaking activities in accordance with an approved code of practice should rely on their approved code and not this guideline. Examples of these Codes of Practice are; *NSW Code of Practice for Part 5 activities for registered non-government schools*, *NSW Code of Practice for Authorised Network Operators*, or *NSW Code of Practice for Environmental Impact Assessment of Development Proposals (Rail Infrastructure Facilities)*.

These guidelines are effective from 1 July 2022 and will remain in force until they are removed from the NSW Planning Portal or varied or revoked in accordance with the EP&A Regulation.

We recommend that proponents and determining authorities monitor their compliance with these guidelines, including annual reviews to confirm compliance and identify opportunities for continued improvement.

2. Division 5.1 assessment

Review of environmental factors

The REF will assist proponents and determining authorities to:

- fulfil duties under section 5.5 of the EP&A Act to consider, *to the fullest extent possible*, all matters affecting or likely to affect the environment, for the purpose of protection and enhancement of the environment
- address the environmental factors set out in these guidelines (see Section 3).

A REF is completed and determined before the proponent undertakes an activity or a determining authority grants approval for an activity to be undertaken. It is recorded in a REF document in accordance with these guidelines. In considering the findings of the Division 5.1 assessment, the determining authority will determine whether:

- an EIS or a SIS and/or BDAR is required
- there is sufficient information to make a decision, or if further information is required
- the proposed activity can proceed subject to any mitigation measures and/or conditions.

If a determining authority believes the activity should be referred to the Commonwealth Environment Minister to determine if the activity is a controlled action under the Commonwealth Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act), this requirement can be included in their determination.

The Australian Government's Matters of National Environmental Significance – [Significant impacts guidelines 1.1 Environment Protection and Biodiversity Conservation Act 1999](#) may help proponents to determine if their activity should be referred.

Section 5.5 of the EP&A Act states:

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, notwithstanding any other provisions of this Act or the provisions of any other Act or of any instrument made under this or any other Act, examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity.

Roles under Division 5.1

The 2 key roles under Division 5.1 are:

- **Proponent**
 - the organisation/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
 - a private company operating under an approved code.
- **Determining authority** – 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 organisations like a private developer or mining company can only be a proponent; they are not authorised to be a determining authority.

The EP&A Regulation can also prescribe other bodies to be a public authority and, thus, a determining authority. This includes registered non-government schools, authorised network operators, the Australian Rail Track Corporation, port operators and universities.

Like public authorities, prescribed determining authorities may be a proponent and a determining authority. This facilitates the provision of essential infrastructure while ensuring environmental impacts are assessed.

3. Environmental factors

When considering the likely impact of an activity on the environment, the proponent and determining authority must take into account the factors set out in Table 1. These are listed in clause 171(2) of the EP&A Regulation.

Table 1 Factors to be considered

Environmental factor	Example
a) Any environmental impact on a community	Social, economic and cultural impacts
b) Any transformation of a locality	Human and non-human environment
c) Any environmental impact on the ecosystems of the locality	Flora, fauna, ecological integrity, biological diversity, connectivity/fragmentation, air, water including hydrology, soil
d) Any reduction of the aesthetic, recreational, scientific or other environmental quality or value of a locality	Visual, recreational, scientific and other
e) Any effect on a locality, place or building having aesthetic, anthropological, archaeological, architectural, cultural, historical, scientific or social significance or other special value for present or future generations	Aboriginal heritage (including intangible cultural significance), architectural heritage, social/community values and identity, scenic values and other
f) Any impact on the habitat of protected animals (<i>within the meaning of the Biodiversity Conservation Act 2016</i>)	Listed species and habitat requirements/critical habitat
g) Any endangering of any species of animal, plant or other form of life, whether living on land, in water or in the air	Listed species, non-listed species and key threatening processes
h) Any long-term effects on the environment	Ecological, social and economic
i) Any degradation of the quality of the environment	Ecological, social and economic
j) Any risk to the safety of the environment	Public health, contamination, bushfire, sea level rise, flood, storm surge, wind speeds, extreme heat, urban heat and climate change adaptation
k) Any reduction in the range of beneficial uses of the environment	Natural resources, community resources and existing uses
l) Any pollution of the environment	Air (including odours and greenhouse gases); water (including runoff patterns, flooding/tidal regimes, water quality health); soil (including contamination, erosion, instability risks); noise and vibration (including consideration of sensitive receptors); or light pollution

Table 1 Factors to be considered

m) Any environmental problems associated with the disposal of waste	Transportation, disposal and contamination
n) Any increased demands on resources (natural or otherwise) that are, or are likely to become, in short supply	Land, soil, water, air, minerals and energy
o) Any cumulative environmental effect with other existing or likely future activities	Existing activities and future activities
p) Any impact on coastal processes and coastal hazards, including those under projected climate change conditions	Coastal processes and hazards (impacts arising from the proposed activity on coastal processes and hazards and impacts on the proposed activity from coastal processes and hazards), climate scenarios
q) Any applicable local strategic planning statement, regional strategic plan or district strategic plan made under Division 3.1 of the Act	Issues, objectives, policies and actions identified in local, district and regional plans
r) Any other relevant environmental factors	Any other factors relevant in assessing impacts on the environment to the fullest extent



4. Undertaking a Division 5.1 assessment

These guidelines set out a 5-stage Division 5.1 assessment process:

1. Assessment requirements
2. Assessment and consultation
3. Documentation
4. Determination
5. Implementation.

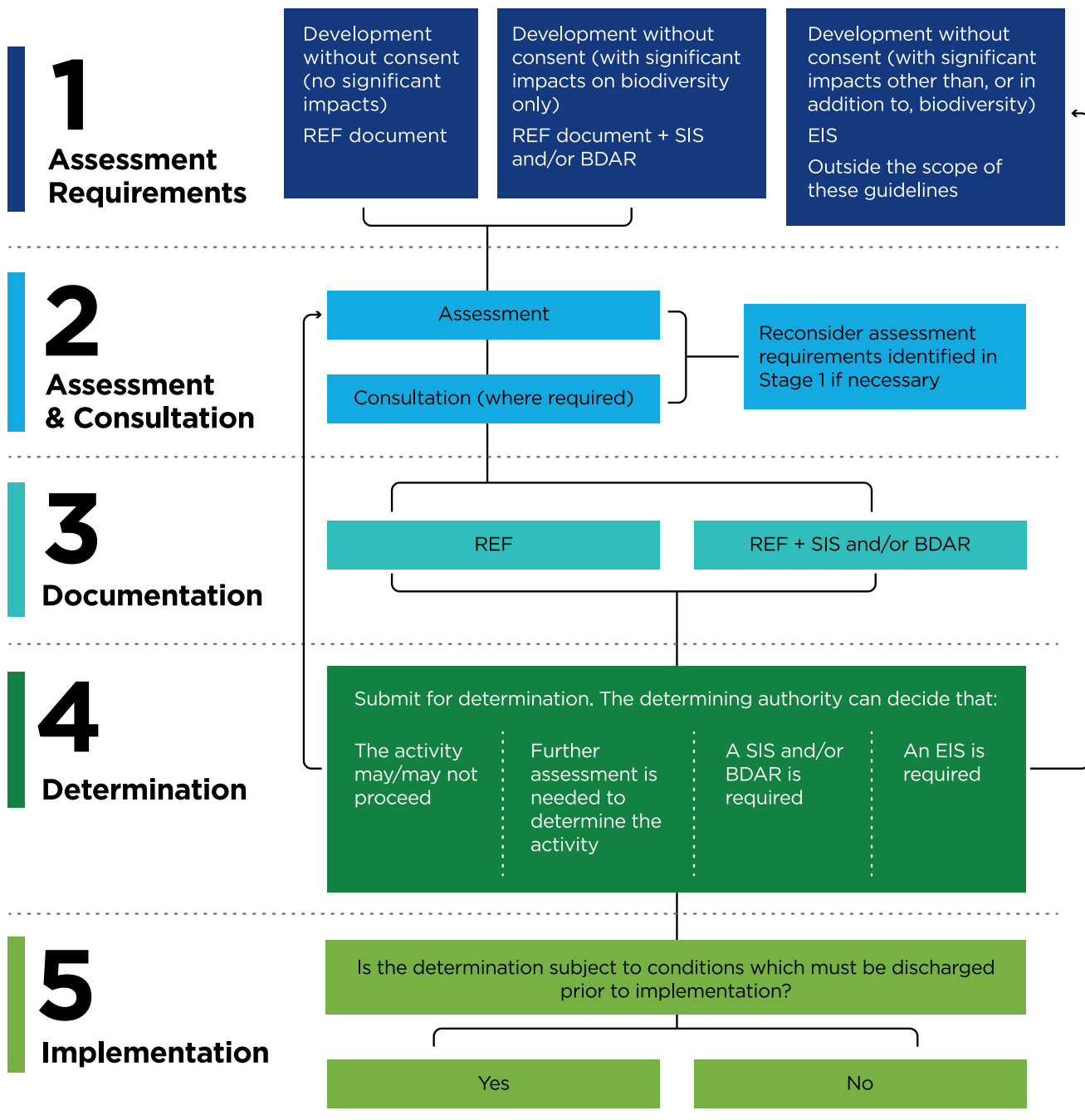


Figure 1 Division 5.1 assessment and determination process

Stage 1: Assessment requirements

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
- **EIS** – if the activity is likely to have significant environmental impacts (other than impacts on biodiversity).

The degree of assessment and consultation required will correspond with the potential level of impact.

A proponent may need to revise the assessment requirements at any stage, if warranted. If it is not obvious which option applies, begin with a REF to identify whether the proposed activity is likely to significantly affect the environment (see Stage 3).

REF document

REFs can be conducted for minor activities, project activities or group or multi-site activities as explained further in this guideline.

The REF is conducted by or on behalf of the proponent, with findings recorded in the REF document. The REF document shows how the proponent has examined and taken into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity and how the environmental factors (Section 3) were addressed.

The level of assessment should reflect the level of likely environmental impact resulting from the proposed activity. For example, minor Division 5.1 activities such as routine maintenance will not need the extent of assessment needed for a more complex Division 5.1 activity, as described in Figure 2.

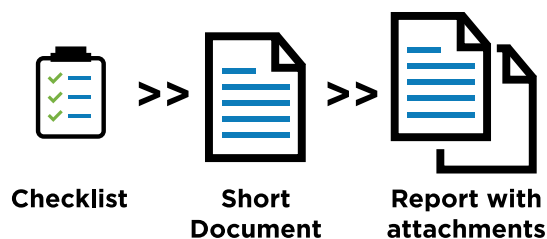


Figure 2 REF documents are scalable

Types of Division 5.1 activities

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 environmental document.

If minor works are proposed in a sensitive location, a more detailed technical appendix may be required as part of the REF document to identify and record potential impacts.

Project activities

As project activities are larger in scale and complexity, the REF will need to be more detailed to determine the likely potential impacts and mitigation measures. Technical specialists are likely to be required and the REF document will be more detailed and comprehensive.

While not required, additional consultation may help to identify community and stakeholder concerns and develop appropriate mitigation measures.

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. Locational constraints and assumptions, and suitable mitigation measures, should be identified.

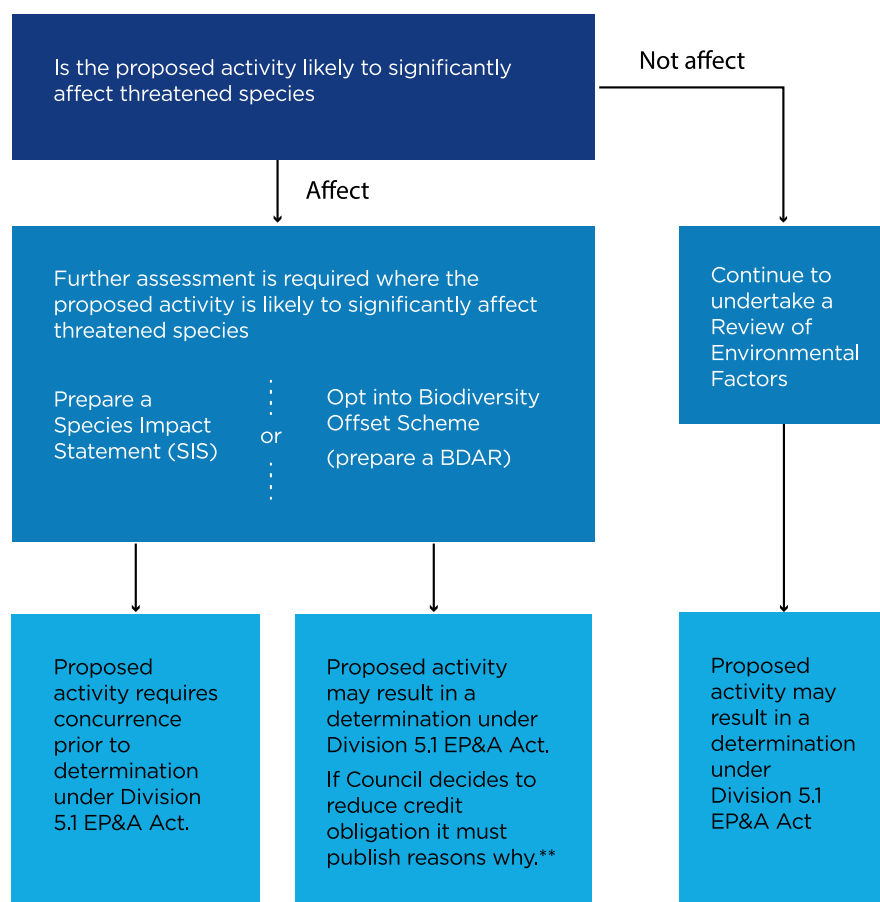
A group or multi-site REF document should record the contingencies necessary to respond to possible impacts and eventualities, while providing relevant activity and site information so that environmental impacts can be assessed. The level of investigation, assessment and documentation will need to be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

SIS and BDAR requirements

If required, a SIS and/or BDAR will focus on impacts on threatened species, populations and ecological communities and their habitats or the impacts on biodiversity values respectively. A REF document that considers and addresses all other environmental impacts will still be required. The flowchart in Figure 3 summarises the biodiversity assessment process.

If the activity is likely to significantly affect threatened species or ecological communities, or their habitats, but no other significant impacts are likely:

- a SIS is required; or
- if the proponent so elects, a BDAR may be prepared in place of the SIS where the activity impacts terrestrial flora or fauna
- if the activity is likely to significantly affect aquatic threatened species, populations or ecological communities, a SIS is required
- if the activity is likely to have significant impacts on both terrestrial and aquatic threatened species, populations or ecological communities, both a BDAR and a SIS may be required.



Note For more information refer to the text box 'More information about biodiversity conservation matters'

Figure 3 Considering biodiversity impacts

Terrestrial species and communities

Section 7.8 of the *Biodiversity Conservation Act 2016* (BC Act) states that a proposed activity that is regarded as an activity that significantly affects threatened species and ecological communities, or their habitats, is taken to also significantly affect the environment.

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

The REF document must record how the test of significance has been applied and the conclusions reached. In instances where there is limited information, apply the precautionary principle.

If a proponent opts into the BDAR process, they may need to consider whether the proposed activity would exceed the biodiversity offset scheme threshold.

Significant impacts on terrestrial biodiversity will be addressed in a SIS or, if the proponent elects, in a BDAR. Division 5 of Part 7 of the BC Act sets out the required form and content of a SIS and Division 3 of Part 6 sets out the required form and content of a BDAR.

Use the terrestrial biodiversity test - [Threatened Species test of significance \(2018\)](#).

Aquatic species and communities

Section 221ZX of the *Fisheries Management Act 1994* (FM Act) states that an activity is likely to significantly affect the environment if threatened species, populations or ecological communities will be affected according to the test in section 220ZZ of the FM Act.

In this case, the Division 5.1 assessment requires a SIS. Division 6 of the FM Act sets out the required form and content for a SIS involving aquatic flora and fauna.

The REF document must record how the tests of significance under the BC Act and FM Act have been applied and the conclusions reached. Use the aquatic biodiversity test of significance available here: [NSW Department of Primary Industries Threatened species assessment guidelines - The assessment of significance \(February 2008\)](#).

More information about biodiversity conservation matters

For Part 5 Division 5.1 activities the BDAR and biodiversity offset scheme are not mandatory.

The biodiversity offset scheme may be an appropriate solution for determining authorities who seek to retire their credit obligations, purchasing offsets and thereby rapidly establishing mitigation, alleviating long-term biodiversity commitments for minor works.

Determining authorities can also use biodiversity certification (Part 8 of the BC Act) to certify precincts and expedite Part 5 assessments. One example of this in practice is the special activation precincts.

Other useful resources:

- [NSW Biodiversity Offset Scheme and Land Management Framework flowcharts](#)
- [When does the Biodiversity Offsets Scheme apply](#)
- [Threatened Species Test of Significance and SIS](#)
- [The role of local government and other decision makers](#)
- [Test of Significance Bulletin](#)

Concurrences and consultation

The determining authority can only make their decision once the concurrence of the Environment Agency Head and/or Primary Industries Head has been received (if required).

If a SIS is required and the Minister is not the determining authority, concurrence of the Environment Agency Head (and/or in connection with aquatic flora and fauna, the Primary Industries Head) is required. This is not required for a BDAR; however, the BDAR and REF document must be submitted to the Department of Planning and Environment 21 days prior to the activity commencing.

If a SIS or BDAR is required, the determining authority must comply with public consultation requirements under the EP&A Act and provide a submissions report. If a condition to retire biodiversity credits has been imposed, the credits must be retired prior to commencement of the activity as required under the BC Act.

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 Agriculture, Water and the Environment.

The Department of Planning and Environment is seeking EPBC Act strategic assessment approval for certain precincts and corridors in key growth areas in NSW via the strategic conservation planning program. Transport for NSW also has EPBC Act strategic assessment approval in place for road infrastructure activities assessed under Division 5.1. Projects that fall within the class of actions covered by a strategic assessment approval will not require an EPBC Act referral provided they meet the commitments in the relevant conservation plan.

If the commitments cannot be met, the proponent

and/or determining authority must undertake a self-assessment to decide whether the Commonwealth Department of Agriculture, Water and the Environment 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 Agriculture, Water and the Environment.

Find out more about the criteria for determining if an activity should be referred to the Australian Government via the [Matters of National Environmental Significance – Significant impacts guidelines 1.1 Environment Protection and Biodiversity Conservation Act 1999](#).

EIS

If the REF finds the activity is likely to significantly affect the environment, other than threatened species or ecological communities, or their habitats, an EIS is required outside of the Division 5.1 pathway. Find out more from <https://www.planning.nsw.gov.au/Policy-and-Legislation/Planning-reforms/Rapid-Assessment-Framework/Improving-assessment-guidance>.



Stage 2: Assessment and consultation

During Stage 2, the proponent will 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.

The scope and detail of the assessment process, and those consulted, will depend on the scale and complexity of the proposal and the sensitivity of the receiving environment.

For example, minor activities with clearly understood impacts on a brownfield site are likely to need a less detailed assessment and consultation than a larger, more complex project on a site known to have features of high value to the community.

Assessment and evaluation

Various tasks will enable the proponent to **identify, analyse** and **evaluate** the activity's likely environmental impacts. Commencing the process of identifying impacts early can save time through the REF documentation process.

For minor activities, a REF checklist may be useful; for larger, more complex projects, a scoping process may be needed to confirm the study area(s) and to identify any technical specialists that may need to contribute. Any initial assessment collated during the scoping process can be shared with relevant public authorities, landowners and/or community members for feedback.

The assessment will identify, analyse and evaluate the direct, indirect and cumulative impacts of the activity to determine whether the activity is likely to have a significant impact on the environment. Each impact should be assessed individually for its level of significance. Mitigation measures may also be identified to eliminate or reduce any negative impacts and enhance positive impacts where possible.

Identifying potential impacts

The proponent will gather and record relevant information on potential environmental impacts including:

- **the proposed activity** - particularly those aspects of the activity likely to impact the environment
- **the area likely to be impacted** - key characteristics and any existing and future trends and issues that make up the environmental baseline without the activity (including sensitive or vulnerable features or features of value to the community, and any potential cumulative impacts of past and relevant future projects)
- **any episodic risks** - such as bushfires, coastal hazards, flooding or extreme heat events that could impact the proposal or result in additional impacts on the environment in combination with the proposal
- relevant national and state legislation and national, state and local strategic plans and policies that identify community priorities that may be impacted
- consultation with relevant stakeholders, including agencies, councils and/or the public.

Analysing potential impacts

The proponent will identify the following attributes for each potential direct, indirect and cumulative impact throughout the project lifecycle (including site preparation, construction, operation and decommissioning, where appropriate):

- **Type of impact** - The characteristics of the impact likely to affect the environment. For instance, likely water pollutants should be noted along with their pathway to the receiving environment (e.g. effluent with a low pH may overflow from holding tanks).
- **Extent** - The area and population expected to be affected.
- **Size** - The estimated area, amount, quantity or volume of impact (e.g., estimated area of vegetation clearing or parts per million of particulate pollution per hour).
- **Duration** - When the impact is expected to occur, for instance, whether only over particular project phases or permanent.
- **Severity** - The likely degree of change (e.g. negligible, minor, moderate, major),

which could depend on how vulnerable or resilient the affected environment, feature or population is to the impact. It may be appropriate to consider how the change compares with relevant standards, codes and/or policies such as noise or air quality standards.

- **Importance** – Any long-held values; whether the environment is rare, unique or readily replaceable; the importance to the community's identity, health and/or welfare; or any listings as being of national, state or local significance.
- **Level of concern/interest** – The concern or interest of the community and whether information is available to enable people to understand the impacts.

Evaluating potential impacts

The potential impact of the proposed activity is evaluated by:

- giving each potential impact a significance rating
- considering the aggregation of all the impacts of the activity
- considering the cumulative impacts of the activity in combination with other activities and projects anticipated in strategic plans, programs and other planned or proposed projects.

The proponent and the determining authority will consider the impacts of the activity on the environment to the fullest extent possible, including direct, indirect and cumulative impacts. Rather than weigh the benefits of the activity against its negative impacts, this process will simply ascertain if any of the negative impacts of the activity may be considered significant or if the proposed activity will attain the objectives to protect and enhance the environment and thus be appropriate to proceed.

As noted, if any single impact of the proposed activity is likely to have a significant effect on the environment, a SIS and/or BDAR or EIS is required. Through this process, the proponent may amend the activity or implement mitigation measures to change the potential impact, and then re-evaluate the proposal. Figure 4 illustrates this process. Proponents should first seek to avoid impacts before minimising and managing

those impacts. Proposed management measures must be justifiable, workable and effective.

If the proposal is changed, the potential environmental impacts of the changed proposal will be assessed and evaluated. A SIS and/or BDAR or EIS may still be required, depending on the impacts.

Using environmental offsets to address residual impacts should not be considered in deciding whether a SIS or EIS is required, unless a proponent has elected to participate in the biodiversity offsets scheme and has prepared a BDAR.

If the assessment identifies the potential environmental impacts of the proposal, or changed proposal, are not likely to be significant, the proponent will proceed with the REF document. The REF document will record the relevant criteria used to evaluate potential impacts and include relevant evidence that is both impartial and based on relevant research.

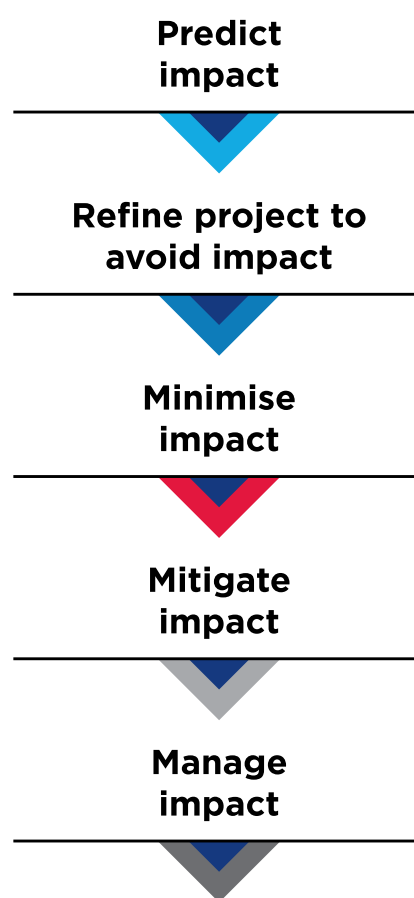


Figure 4 Dealing with impact

Assessing the significance of impacts

Assessing and evaluating each impact provides an understanding of the level of significance of the impacts.

A determining authority needs to be satisfied that the level of significance is understood, and Division 5.1 is the correct approval pathway. This guidance will help determining authorities consider significance and meet responsibilities under Section 5.7 of the EP&A Act.

Impacts can be considered significant where they are important, notable, of consequence or more than ordinary, having regard to their context or intensity. There may be relevant guidelines to assist, such as the Threatened Species Test of Significance Guidelines.

The threshold decision of the determining authority as to when an activity is likely to significantly affect the environment is framed not as a subjective test of the determining authority forming its opinion but as an objective test. The test is a jurisdictional fact capable of review by the courts and the courts have the ability to substitute their own conclusion on the test if they consider that the decision of the determining authority is incorrect. Use the following as a guide: Extensive impacts may be significant in terms of spatial or time dimensions and intensity or severity.

- Impacts that adversely impact sensitive areas, features or communities are likely to be significant. Even relatively small activities in sensitive locations can result in significant or unacceptable impacts. If the environment is already stressed, activities that will further degrade the environment or further impact affected communities may be considered significant. Use a precautionary approach for activities in environmentally sensitive locations and consider alternatives and mitigation strategies. Even activities that are likely to indirectly affect sensitive locations may be at risk of significantly affecting the environment.
- Impacts on a valued feature or place which may be of public interest could be significant. Activities that will unacceptably change or transform a locality or place, at-risk items, buildings or localities included on a national, state or local register are likely to be considered significant. The level of public concern and the degree of controversy must be considered and weighed with other factors in deciding if an EIS is warranted.

A framework for undertaking impact assessment and assessing the level of significance of each impact is included in Figure 5. Optional additional guidance is also considered in Attachment A.

⁵ References will be updated to reflect the final EP&A Regulation 2021 once made.



Figure 5 Analysing and evaluating impacts, and assessing significance

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. 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. These guidelines do not change the consultation requirements within EPIs.

For larger and more complex activities, activities in sensitive locations or activities known to be of concern or interest to the community, a determining authority may request additional community consultation and/or referrals.

Proponents and determining authorities must consider any feedback from stakeholders on the proposed activity and/or its environmental impacts.

EPIs will set out obligations to notify stakeholders. Any notice to stakeholders should describe the scope of works for the proposed activity and invite feedback. There may also be requirements under EPIs to set out further information in a notification to specific stakeholders – for example, a heritage impact assessment for an activity that will impact on local heritage.

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.

Stakeholders may request further information about the proposed activity, such as the existing environmental characteristics or the potential environmental impacts. To streamline the consultation process, a proponent may include this information in their original notice.

If there is a risk that an activity could potentially impact a matter of interest to a state agency,

council or a member of the community (e.g. an affected landowner), notify the agency, council or community member upfront.

The proponent may decide to undertake ongoing consultation following a determination, such as an e-newsletter linking to publicly available document to close the feedback loop.

Stage 3: Documentation

Proponents and determining authorities should engage suitably skilled, qualified and experienced professionals to prepare and/or review and endorse the REF document. Technical specialists engaged to prepare specialist studies as part of the Division 5.1 assessment will also need to possess suitable skills, qualifications and experience to undertake those specialist studies.

The REF document will record the Division 5.1 assessment and any relevant consultation. Depending on the nature and complexity of the proposed activity, and the sensitivity of the area affected, the REF document could be set out in a range of forms, all of which will constitute a REF document as long as they satisfy the requirements in these guidelines as to the form and content of the document. For example, these forms may include a checklist, a simple report, a comprehensive report or digital forms, as required.

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.

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

- comply with requirements under Division 5.1 and Part 8, Division 1 of the EP&A Regulation
- comply with these guidelines
- contain all available information relevant to the assessment of the project and its environmental impacts to the fullest extent possible

- contain no false or misleading information
- contain a consolidated description of the project in a single section
- identify and address relevant statutory requirements, including EPIs or strategies, plans and policies (where relevant to the proposed activity)
- summarise the findings of any consultation and technical assessment of the impacts
- contain a straightforward evaluation of the direct, indirect and cumulative impacts of the project
- identify mitigation measures to eliminate or reduce the detrimental effects of the activity.

The proposed activity may be small scale; in this case, the level of assessment will be less than that required for an activity with more impacts. This will be reflected in the REF document, and some matters may be 'not applicable'.

Elements of a REF document

Proposed activity

The REF document must describe the proposed activity (in full) and its scope, including its nature, purpose and location. Describe all aspects of the proposed activity in sufficient detail to demonstrate the activity's potential for impacts on the environment, including methods of construction, operation and decommissioning (where appropriate) as well as relevant timeframes. For simple activities this may be a short title and description on a checklist document; for more complex activities this may be a few chapters in a report document.

EPI provisions

The REF document must identify the EPI provisions under which Division 5.1 applies to the activity. The REF document will identify the relevant clause of the EPI or legislation that notes the proposed activity 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 approved under clause 170 of the EP&A Regulation, and the information it contains is neither false nor misleading".

Proponent, determining authorities and any required approvals

The REF document must identify the proponent and all determining authorities and where relevant all related approvals (consents, licences and permits) required for the activity. For simple activities this may be listing names, titles and organisation details on a checklist. For more complex activities this may be a discussion in a report outlining other consents or licences that have been obtained and attaching those to the REF document. Where other approvals are required the proposed activity may not be able to proceed without first obtaining these approvals.

Environment of the activity

The REF document must describe the environment of the proposed activity and the surrounding area, and aspects of the environment that are of particularly high value, sensitive to impacts from the proposed activity or of importance to the community.

The REF document must identify and describe any threatened species, populations and ecological communities likely to occur in the area affected by the activity.

The REF document must identify existing issues and future trends, including potential cumulative impacts of relevant future activities (where relevant) that are likely to put stress on the environment, as well as episodic risks such as bushfires, coastal hazards, flooding, extreme heat, extreme storm events or cyber threats that could impact the proposal or result in additional impacts in combination with the proposal. Examples include a flood event impacting soil stockpiles; large unshaded hardstand areas contributing to urban heat impacts; or a cyberattack releasing pollution into a water supply.

Use the impact assessment described in stage 2 to quantify potential cumulative impacts that may be directly or indirectly related to the proposed activity. For minor activities the scope of cumulative impacts may be negligible. The determining authority must be satisfied with the scope of the impacts assessed.

Need for the activity

The REF document must explain the objectives of and need for the proposed activity including its consistency with strategic planning and policies. This will clarify why the proposal should proceed when considering potential environmental impacts.

If the REF document is prepared as part of a broader project, identify and describe associated development applications and approvals and their relationship with the REF document to help justify the need for the proposed activity. For simple activities this may be listing the purpose of the activity e.g. a maintenance requirement for ongoing continued use/working order. For more complex activities such as a redevelopment of a site the need for the activity may be a discussion outlining how the proposal meets strategic planning and policy needs.

Alternatives

The REF document must describe any alternatives considered with sufficient detail to understand the differences between the proposal and the alternatives (including the 'do nothing' alternative). If no alternatives are possible (e.g.

maintenance activity) record this simply in the REF document. The consideration of alternatives could be an item in a checklist REF document.

The REF document must describe how alternatives were assessed to inform selection of the preferred option, including justification for disregarding each alternative (where relevant). Alternatives may be very broad in nature, ranging from alternative construction options, or other solutions such as technology options.

Other relevant projects, programs and plans

The REF document must describe the relationship between the proposal and relevant national and state legislation, and national, state, regional, subregional, district and local plans. The REF document must identify how the proposal contributes or responds to relevant objectives, directions, policies, actions, community priorities and key issues and how these are addressed in the Division 5.1 assessment.

The REF document must also identify other relevant projects, programs and plans that may impact the wider area or contribute cumulative impacts together with the proposed activity, including the types of cumulative impacts that may arise.

If using a checklist or another short REF document it may not be necessary to document how the proposal contributes or responds to relevant national or state policy objectives; instead, list the relevant programs or plans and record compliance against them. At a minimum, the REF document must consider each environmental factor listed in Section 3.

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 and describe their types, extent, size, duration, severity, importance and level of community concern.

At a minimum, the REF document must consider each environmental factor listed in Section 3.

The REF document must take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity. It should also detail the sources and data used to inform the response.

The REF document must describe how potential impacts can be eliminated or reduced through mitigation measures and list these measures against each potential impact. This includes residual impacts and proposed mitigation measures.

The REF document should summarise the impacts of the activity and the proposed mitigation measures. If a checklist or another short REF document is prepared a summary of impacts may not be necessary.

Notification and consultation

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

Conclusions

The REF document must describe:

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

The REF document must justify these conclusions and may reference the more detailed impact assessments.

Irrespective of the conclusion, the determining authority is ultimately responsible for deciding whether a proposed activity is likely to significantly affect the environment. If it is determined that an EIS is required, the proposal is no longer subject to Division 5.1.

If the determining authority forms the opinion that only a SIS (rather than EIS) is required, a SIS must be prepared and publicly exhibited in addition to the REF document. Similarly, a BDAR will be prepared if the proponent elects in relation to impacts that affect terrestrial flora and fauna only.

Remember - if it is unclear whether the proposed activity is likely to significantly affect the environment, the REF can help to determine if an EIS or a SIS and/or BDAR is required. In this sense, the REF can be a precursor to an EIS, or a precursor or attachment to a SIS or BDAR.



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 determine the proposal under Division 5.1 of the EP&A Act and Part 8, Division 1 of the EP&A Regulation. 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 may decide 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 Government 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 has the authority to nominate a determining authority via a ministerial planning order.

If this occurs, only the nominated determining authority is required to carry out the environmental assessment and REF document. This will be provided to and relied on by any other determining authorities.

While this nomination relieves all other determining authorities of undertaking the Division 5.1 assessment, they must still comply with all other relevant provisions of Division 5.1. This means each determining authority will remain responsible for deciding if the granting of their approval for the activity is likely to affect the environment.

Any related submissions received by other determining authorities or other relevant information and decision statements should be forwarded to the nominated determining authority.

If no determining authority is nominated, the determining authorities may agree who will prepare the environmental assessment and the REF document for the benefit of all determining authorities. Alternatively, the Minister could be requested to nominate a determining authority. Regardless, each determining authority will still need to reach their own decision.

A decision statement by each determining authority needs to be published alongside the published REF document.

Determination documentation

The determination of the proposed activity will be recorded in the decision statement signed by the authorised person on behalf of the determining authority.

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 choose to note whether referral to the Commonwealth Department of Agriculture, Water and the Environment 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 Primary Industries Head that have not been accepted.

Notification

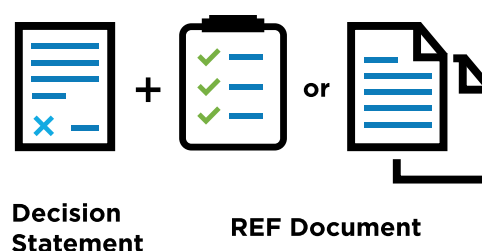


Figure 6 Publication requirements when triggered

Determining authorities will keep the following REF documentation available for public access once a determination has been made:

- the final REF document including appendices
- any associated SIS or BDAR
- the Decision Statement
- any REF document addenda.

The EP&A Regulation (clause 171(4)) requires publication for activity with:

- a capital investment value of more than \$5 million 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.

There are allowances for exceptional circumstances where publication is not required; this is at the Planning Secretary's discretion.

If the REF is to be published, 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.

Certain parts of the REF document may be sensitive, such as sensitive cultural information requested to be redacted by Aboriginal parties or cyber security impacts and mitigation measures. In these instances, the REF document content can be redacted where required.

The REF document (excluding sensitive information) needs to be available online.

Stage 5: Implementation

Implementation begins after:

- a determination has been made which allows the activity to proceed without further environmental impact assessment
- any mitigation measures or conditions are completed or observed, including any approvals that must be obtained under legislation other than the EP&A Act, 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 first 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, update the REF document to respond to any new information or new environmental conditions.

Changes to a proposal

If a proposed activity needs to be altered or modified, the REF document will need to be revised 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, that 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.

In some cases, the addendum may relate to a group or multi-site activity. This may be prepared for a specific site and incorporate a common set of mitigation measures together with site-specific mitigation measures.

The modified activity is determined as per the determination process described in Stage 4.



Glossary

Division 5.1 of the EP&A Act contains terms that may have a different meaning in everyday language. Table 2 clarifies what these terms mean within the context of these guidelines.

Table 2 Terms used in this Guideline	
Term	Meaning for the purpose of Part 5 Guideline
Approved code	A code of practice document approved by the Minister under Part 14, Division 8, 9, or 10 of the EP&A Regulation
Assessing the significance of impacts	Impacts can be considered significant where they are important, notable, of consequence or more than ordinary, having regard to their context or intensity. The optional framework outlined in Figure 5 and Attachment A can assist with assessing the significance of an impact.
Australian Rail and Track Corporation	A non-government agency that is a prescribed determining authority under section 5.6 of the EP&A Act
Authorised Network Operators	A non-government agency that is a prescribed determining authority under section 5.6 of the EP&A Act
Authorised Person	An individual authorised by the determining authority to determine the proposal.
Biodiversity development assessment report BDAR	A report required under the BC Act and prepared by a person accredited to apply the biodiversity assessment method
Community	Anyone affected by or interested in a project under Division 5.1, including individuals, community groups, Aboriginal and Torres Strait Islander communities, culturally and linguistically diverse communities, representative bodies and stakeholder groups.
Cumulative impact	<p>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.</p> <p>Refer to definition for 'relevant future projects' to understand scope of projects to be included.</p>
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.
Engagement	Actions to encourage community participation in Division 5.1 assessment

Table 2 Terms used in this Guideline

Term	Meaning for the purpose of Part 5 Guideline
Environment	All aspects of the surroundings of humans, whether affecting any human as an individual or their social groupings.
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)	The collective name for LEPs, SEPPs, regional environmental plans
Factor	An element of the environment that may be affected by a Division 5.1 activity (for example, ecosystems, air, water, waste or economic or social matters) (see section 3).
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	The determining authority nominated by the Minister when the approval of more than one determining authority is required
Offset	Compensating for the impact of a Division 5.1 activity by replacing or providing substitute resources or environments.
People	Individuals, households, groups, communities, businesses and organisations.
Proponent	Those proposing to undertake activity under Division 5.1.
Prescribed determining authority	An organisation prescribed under section 5.6 of the EP&A Act so as to allow the organisation to be a determining authority
Public authority	Government departments, local councils, statutory bodies and prescribed determining authorities who have been deemed 'public authorities' under Part 5 of the EP&A Act
Registered Non-government Schools	A non-government agency that is a prescribed determining authority under section 5.6 of the EP&A Act

Table 2 Terms used in this Guideline

Term	Meaning for the purpose of Part 5 Guideline
Relevant future projects	<p>The following types of development are ‘relevant future projects’:</p> <ul style="list-style-type: none">• other 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). <p>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.</p>
Review of Environmental Factors (REF)	The Division 5.1 assessment
Review of Environmental Factors (REF) document	The documentation prepared under clause 156(3) of the EP&A Regulations to record the Division 5.1 assessment
Residual impact	Residual impact means the impact remaining after mitigation actions and measures have been applied.
Scoping	A process to identify likely impacts and the level of assessment required to evaluate the significance of impacts on the environment.
Species Impact Statement (SIS)	An assessment of the impacts of an activity on threatened species, populations or ecological communities, or their habitats as established under the BC Act or FM Act.
Stakeholder group	A group or organisation that represents several people with an interest in a Division 5.1 activity.

Attachment A – Expanded optional guidance

This expanded optional guidance will assist in evaluating impacts and their level of significance. Consider the extent of the impacts, rank the potential significance for **each impact** and then rank the impacts for each section (considered as a whole) as high, medium or low.

Evaluation criteria for analysing the extent of impacts:

1. What is the type of impact?
 - The characteristics of impacts that are likely to affect the environment.
2. What is the size of impact?
 - Amount
 - Quantity
 - Volume
 - Mass
 - other
3. What is the scope of the impacts considering the direct or indirect effects?
 - Area
 - Number
 - Range or limits
 - other
4. What is the intensity of the impacts?
 - Power, vigour, force, strength
 - Concentration
 - Rate
 - Ratio, proportion
 - Degree
 - other
5. What is the duration of the impacts considering construction, operations, and any decommissioning elements?
 - Time length
 - Period
 - Interval
 - Term
 - Continuation
 - Other

Evaluation criteria for analysing the nature of impacts (leading to level of significance):

1. What is the level of confidence in predicting impacts?
 - Is there adequate level of understanding of:
 - The environment likely to be affected?
 - The proposed technology or design?
 - The potential interaction?
 - The proposed mitigation and management?
 - The community's concerns and values?
 - Are there established and reliable predictive modelling techniques?
 - Does past experience demonstrate the ability of the environment to cope with similar impacts?
2. How resilient is the environment to cope with impacts?
 - What is the ability of the environment to resist change?
 - What is the ability of the environment to assimilate change without undergoing irreversible changes?
 - Is the environment close to its assimilation capacity for the type of impacts identified?
 - Can other land uses at and around the site be sustained?
 - What is the ability of the environment to return to its original?
3. How reversible are the impacts?
 - Will the site be able to be used beyond the life of the proposed activity for the same or other purposes (e.g. rehabilitation and restored)?
 - Can restoration works be undertaken to assist in reversing impacts?
 - What is the likely recovery rate?
 - To what extent will there be any flow-on impacts from restoration works?

4. How adequately can the impacts be mitigated or managed?
 - How extensive are the risks without proposed mitigation?
 - How effective are the mitigation measures to reduce the risk?
 - Is there adequate precedent that the proposed mitigation measure will be effective?
 - How acceptable are the residual risks?
 - Considering past performance of proponent in will there likely be commitment to the proposed mitigation measure being implemented and maintained
5. Will the activity comply with standards, plans or policies?
 - Is the proposed activity consistent with strategic planning objectives (local, regional, state)?
 - Can the activity meet performance standards?
 - Is the proposed activity consistent with precedents established in the Land and Environment Court?
6. What is the level of public interest in the activity or its impacts?
 - Does the community perceive that the environmental capacity will be exceeded (i.e.. That the environment will not recover/ withstand the impact)?
 - Does the community consider that there is a threat to human health or safety?
 - Does the community perceive that the amenity will be affected?
 - Does the community consider that new inequities will be generated in the community?
 - Does the community object to materials or technologies that are a component of the activity?
 - Is there a high level of uncertainty about the effects of the activity on the community?
7. Are further studies required on impacts or mitigation strategies?



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