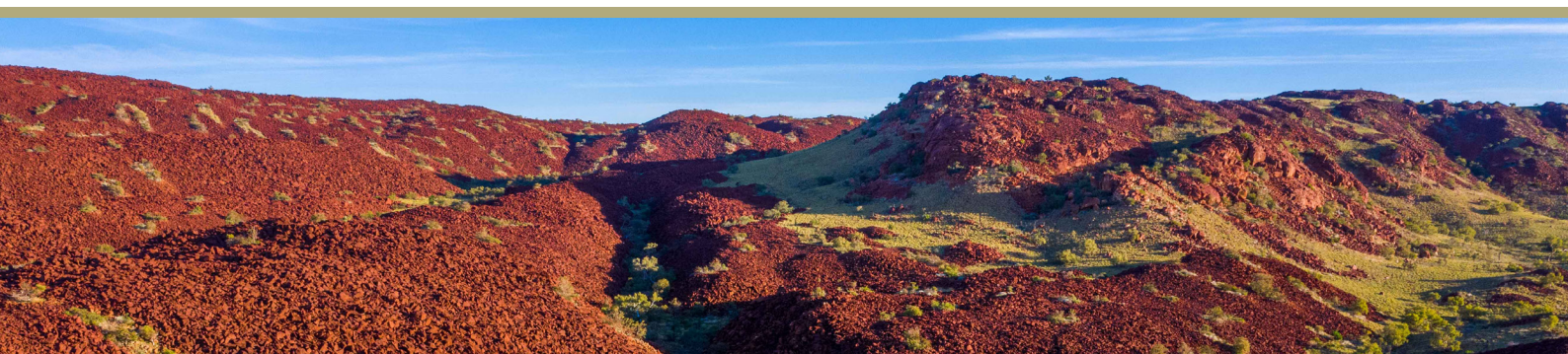


INTERIM Technical Guidance

Environmental impact assessment of Social Surroundings – Aboriginal cultural heritage



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1 Introduction and background

1.1 Purpose

This Technical Guidance has been developed to:

- Outline the Environmental Protection Authority (EPA)'s environmental impact assessment (EIA) process for Social Surroundings – Aboriginal cultural heritage (ACH) under the *Environmental Protection Act 1986* (EP Act).
- Provide the information requirements for the EPA to decide:
 - whether a proposal is likely to have a significant effect on the **social surroundings** environmental factor, as it relates to ACH, and if it should be assessed by the EPA;
 - if ACH is being assessed by the EPA, the information needed for assessment; and
 - if the EPA decides the proposal may be implemented, whether reasonable conditions can be applied to protect ACH from significant harm.
- Outline how the EPA may take into account the statutory decision-making processes outlined in the *Aboriginal Cultural Heritage Act 2021* (ACH Act) (referred to as the ACH Act processes).

The EPA is releasing this as an “interim” Technical Guidance in readiness for the commencement of the ACH Act on 1 July 2023, and will update this document as required.

1.2 Background

Under the EP Act, the EPA is required to consider social surroundings to the extent to which they directly affect or are affected by physical or biological surroundings. This may include impacts to ACH values through physical ground disturbance, changes to culturally significant ground or surface water resources, significant dust emissions received at ACH places, ecological impacts to culturally significant flora and fauna (such as flora or fauna used for bush tucker or teaching), or significant visual impacts to ACH cultural landscapes.

The ACH Act is about valuing and protecting ACH and managing activities that may harm that heritage, recognising the special interest Aboriginal people have in protecting, conserving, preserving and managing ACH¹. The ACH Act provides for **due diligence assessments** to be carried out for a proposed activity within an **activity area** to: assess whether ACH is in the area²; assess whether the ACH is at risk of harm from the activity; identify people who are to be notified or consulted about the activity; and assess the type of ACH Act processes (such as an ACH Permit or ACH Management Plan) which are required for the activity.

The EPA considers the potential harm on ACH within an activity area may be mitigated by the ACH Act processes in most cases. However, this will be determined on a case-by-case basis. EPA assessment may still be required:

- where **ACH Act processes** are not reasonably likely to meet the EPA's objectives for social surroundings; and
- for proposals where there is likely to be a significant impact from physical or biological surroundings which directly affect to ACH values outside an activity area.

¹ Section 4 ACH Act 2021.

² Including whether the area is a “protected area” under section 82 of the ACH Act.

2 Context

2.1 What is Aboriginal cultural heritage?

Aboriginal people have lived on this land for more than 65,000 years and in doing so have developed a living culture that is bound in tradition and manifested through, among other things, familial connections, languages, stories, songs, spiritual beliefs and practices, knowledge, art, sentiment and through the skilled adaptation of resources provided by the land and water.³

For the purpose of this document, **Aboriginal cultural heritage** has the same meaning as defined in the ACH Act and includes Aboriginal places, objects, ancestral remains and cultural landscapes⁴. In summary it means the tangible and intangible⁵ elements that are important to the Aboriginal people of the State, and are recognised through social, spiritual, historical, scientific or aesthetic values, as part of **Aboriginal tradition**.

It is recognised that the ACH has a range of different values for Aboriginal people which may change over time and that Aboriginal tradition includes both living and historical values.⁶

2.2 Environmental considerations

The EPA's objective for the social surroundings environmental factor is, "To protect social surroundings from significant harm".

In order for the EPA to assess whether this objective is likely to be met and whether a proposal is likely to have a significant impact or effect on ACH values, the EPA may have regard to matters for Consideration of Significance, as specified in the EPA's [Statement of environmental principles, factors, objectives and aims of EIA](#).

When considering the likely effects of a proposal on ACH, the EPA will give consideration to the following:

1. The extent to which impacts to ACH values are directly⁷ affected by impacts to physical or biological surroundings.
2. The extent to which the harm to ACH is significant, by taking into account the nature of the ACH, and the extent of impacts to it.
3. The extent to which the ACH Act processes can mitigate impacts to ACH which are significant, and whether the EPA's objective for the social surroundings environmental factor is likely to be met for the proposal. The EPA considers the potential impacts on ACH within an activity area may be mitigated by the ACH Act processes in most cases. However, this will be determined on a case-by-case basis.
4. The places where ACH may be affected by a proposal. These include places where ACH is likely to be significantly impacted through impacts to physical or biological surroundings. These places may be outside an activity area, and for example may include places subject to off-site impacts. (See section 5 of this Guidance for examples of places where ACH which may be affected by proposal impacts to physical or biological surroundings, both within and off site from, an activity area).
5. The extent to which the EPA can recommend reasonable conditions to protect ACH from significant

³ Section 6 of the ACH Act Management Code.

⁴ Section 12 ACH Act 2021. Wherever the term ACH is used in this Interim Guidance it includes any or all of Aboriginal places, objects, ancestral remains or cultural landscapes.

⁵ Intangible ACH has the same meaning as the ACH Act and includes knowledge or oral expression of Aboriginal tradition.

⁶ Section 10 & 11 ACH Act 2021.

⁷ See *Coastal Waters Alliance of WA v EPA* (1996) 90 LGERA 136 for examples of the type of effects to social surroundings which are not direct.

impact, such as conditions which establish avoidance areas, or require the proponent to achieve environmental outcomes which protect significant ACH values. The EPA cannot usually recommend conditions which require proponents to obtain the consent of or reach agreements with, or provide funding or compensation to, any specific third parties, including Aboriginal people.⁸

3 Information requirements

Proponents should refer to the EPA's [EIA Procedures Manual](#) for the information required for proposals at the various stages of assessment. In particular:

- **Referral information:** The EPA usually needs the information outlined in sections 3.1–3.2 of this Guidance to decide whether or not to assess a proposal due to its likely impacts on ACH as part of the social surroundings environmental factor.⁹
- **Assessment information:** If ACH is being assessed the information outlined in sections 3.1–3.2 of this Guidance is needed to assess ACH and consider whether reasonable conditions should be recommended.¹⁰

The EPA usually requires the following information as part of a Social Surroundings – Environmental Impact Assessment Statement for ACH values report.

The information in section 3.1 of this Guidance should be provided for ACH inside the activity area, and the information in section 3.2 of this Guidance should be provided for ACH outside the activity area.

Proponents are encouraged to consider the boundary applied to the activity area in the context of Aboriginal cultural heritage values that are likely to be affected from the activity and physical or biological impacts. Early and broad engagement with Aboriginal people about this:

- provides a more holistic view of impacts to ACH values through the consideration of country;
- is more likely to result in a single, comprehensive, integrated process to consider ACH for the proposal; and
- provides a greater opportunity to protect ACH which may be affected by physical or biological surroundings.

Proponents should refer to the EPA's [Procedures Manual](#), the [Statement of environmental principles, factors, objectives and aims of EIA](#) and the [Environmental Factor Guideline - Social Surroundings](#) for further guidance on usual EIA processes which also apply.

3.1 ACH inside the activity area

Are ACH Act processes for the activity area likely to mitigate the potential impacts to ACH values and meet the EPA's objective for the social surroundings environmental factor in the activity area?

The proponent should provide a summary of the following information for the EPA's consideration:

- a short description of the scope (proposal elements or activities within) and the boundary of the activity area;
- how the ACH Act processes will consider physical and biological impacts to ACH values in the activity area;
- likely outcomes of the ACH Act processes (for example, whether an ACH Permit or ACH Act

⁸ Contractual arrangements with specific third parties, including Aboriginal people, may be proposed by a proponent as part of meeting their obligations for environmental management, monitoring or offsets, but cannot usually be required by Part IV EP Act conditions.

⁹ Section 38G EP Act

Management Plan will be required to authorise harm to ACH); and

- conclusion whether application of the ACH Act processes to the proposal are likely to result in consistency with the EPA's objective to protect social surroundings from significant harm. See [The Interim Guidance – Taking decision-making processes into account in EIA](#) for guidance on information to support a conclusion.

Note: The standard of information should allow the EPA to be reasonably satisfied that the ACH Act processes can mitigate the potential impacts of the proposal on ACH values inside the activity area. If not, the EPA is likely to request the information outlined in 3.2 of the Guidance.

3.2 ACH outside the activity area

- i. *Outside the activity area, are there places where the proposal is likely to have a physical or biological impact which is likely to cause significant harm to ACH values?*

The proponent should provide the following information about these places for the EPA's consideration:

- the physical or biological impacts "off-site" from the activity area;
- the ACH values likely to be significantly harmed by those impacts;
- the extent and duration of the impacts on ACH, taking cumulative effects into account;
- the proposed avoidance and mitigation of impacts to ACH;
- residual impacts to ACH values; and
- the proposed environmental outcomes to protect ACH values which are likely to be significantly harmed by a physical or biological impact from the proposal.

Proponents are encouraged to obtain and provide targeted information to meet the specific requirements of section 3.2 of this Guidance. Rather than providing the EPA with detailed ACH investigations or surveys for all areas which are offsite to the activity area.¹¹

- ii. *Were reasonable steps taken to consult with relevant people about these places outside the activity area?*

The EPA will usually take account of the reasonable steps for consultation outlined in the ACH Act and ACH Act guidelines in considering what are the reasonable steps for its assessment purposes.¹² Proponents are encouraged to refer to the ACH Act and the ACH Act guidelines for guidance on who and how to consult with Aboriginal people.

Proponents should provide information about the following reasonable steps for the EPA's consideration:

- identification of who should be consulted by the proponent;
- provision of sufficient information for informed consultation about the proposal and its physical or biological impacts on ACH values;
- provision of information about proposed avoidance and mitigation;

¹¹ ACH Investigation Guidelines and Survey Report Guidelines have been published by the Department of Planning, Lands and Heritage to specify matters under the ACH Management Code. These Guidelines are relevant for ACH Act purposes, inside the activity area, rather than for EPA information requirements outside the activity area.

¹² Section 101 of the ACH Act states that consultation will depend on the circumstances but should include genuine attempts at contact and reasonable steps to follow up; sufficient information to enable those being consulted to understand the proponent's reasoning and intention; providing an opportunity for people to state and explain their position; and relevant information being disclosed.

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- provision of a reasonable opportunity for people to state and explain their position about ACH values, physical or biological impacts on those values, and proposed avoidance and mitigation;
 - the outcome of the reasonable steps to consult (for example, avoidance areas and environmental outcomes which will protect ACH from significant harm); and
 - a summary of the consultation process and outcome, as it relates to a proposal's physical or biological impacts on ACH values.

4 Scenarios

The following scenarios are provided to assist proponents in preparing the required information for the EPA so it can consider whether the proposal will meet the objective of the social surroundings. Proponents can meet with departmental representatives from the Department of Water and Environmental Regulation to discuss their unique circumstances.

4.1 Social surroundings- ACH assessed by the EPA in all places

If the proponent does not consider that the ACH Act processes can mitigate the potential impacts to ACH to meet the EPA's objective for social surroundings in the activity area, the information in section 3.2 of this Guidance should be provided for all places where ACH values that may be significantly impacted by a proposal.

This may occur for example if the proponent has not identified an ACH activity area at the time of EPA consideration, or because it proposes to review its ACH Act obligations at a later date. Proponents must still separately comply with the requirements of the ACH Act.

4.2 Social surroundings- ACH not assessed by the EPA

If the proponent considers the ACH Act processes can mitigate the potential impacts for all physical and biological impacts to meet the EPA's objective for social surroundings, the EPA encourages proponents to consult with the appropriate Aboriginal people¹³ about the information in section 3.1 of the Guidance. This consultation should occur as early as possible during proposal development.¹⁴ It is recommended that proponents refer to the ACH Act and the **ACH Act guidelines** when engaging in consultation.

If relevant ACH Act processes are likely to include adequate mitigation of physical and biological impacts to ACH values, the EPA may be satisfied its objectives can be met based on the provision of information in section 3.1 of this Guidance.

An example of this is where a proponent will implement an ACH Management Plan which includes avoidance, environmental outcomes, management and monitoring measures for physical and biological impacts to ACH values to ensure they are protected from significant harm.¹⁵

¹³ Refer to section 107 of the ACH Act 2021 for person to be notified or consulted about activities or proposed activities.

¹⁴ This could be done in conjunction with any ACH Act due diligence assessment process (if practicable) to facilitate a consolidated consultation process.

¹⁵ Section 348 of the ACH Act will amend section 41 of the EP Act. This will mean section 41 (decision-makers shall not make any decision which could have the effect of causing or allowing the proposal to be implemented) does not apply to decisions under the ACH Act.

4.3 Social surroundings - ACH impacts outside the activity area – assessed by the EPA

A proponent may identify that ACH Act processes can mitigate the potential impacts to ACH to meet the EPA's objective for social surroundings in the activity area, but that there is likely to be a physical or biological impacts to ACH outside an activity area.

This includes scenarios where an activity area only covers an area proposed for direct disturbance (**proposal footprint**) and doesn't include:

- i. the larger area captured by a **development envelope** to incorporate future flexibility for footprint changes; OR
- ii. an **entire study** area proposed by a proponent for the purposes of EIA processes.

The information in section 3.1 of this Guidance document should be provided for ACH inside the activity area, and the information in section 3.2 of this Guidance should be provided for places outside the activity area.

Proponents must still separately comply with the requirements of the ACH Act.

5 Conceptualising the approach

A visual example of consideration of ACH, where the ACH Act processes inside the activity area may mitigate the potential impacts on ACH and are likely to meet the EPA's objective for the social surroundings environmental factor is included below.

- *Inside the activity area* – ACH Act processes (summary information to be provided in relation to each proposal – see information required in section 3.1 of this Guidance).
- *Outside activity area* – EPA assessment of whether there are places which will have physical and/or biological effects which significantly harm ACH (see information required in section 3.2 of this Guidance).

Note: the proposal is hypothetical and for example purposes only; each proposal will be considered on a case-by-case basis.

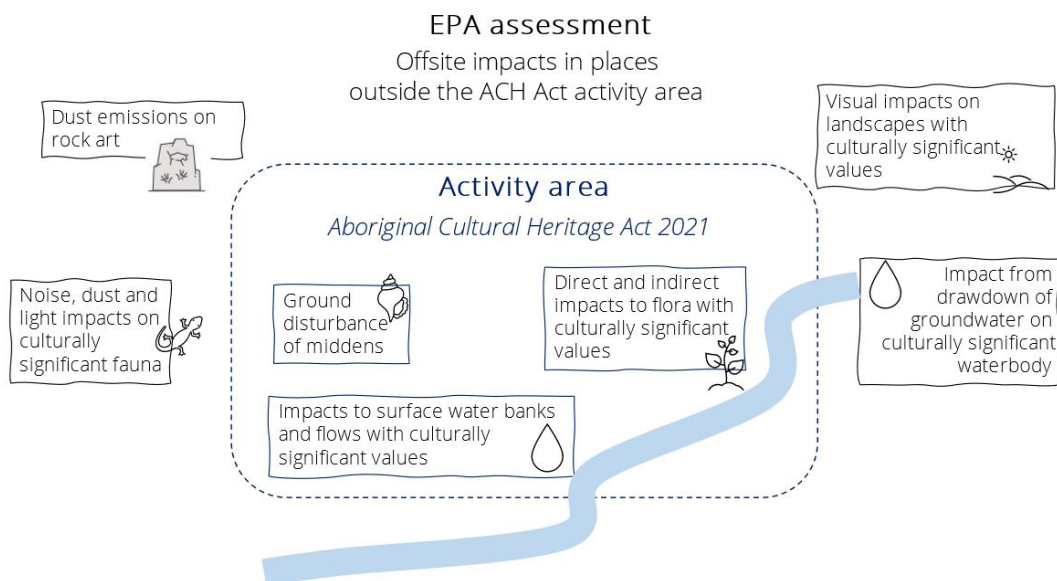


Figure 1: Visual representation of hypothetical environmental impact assessment as it relates to ACH.

6 Conditions

In recommending conditions for a proposal, the EPA is of the view that the potential impacts on ACH values within an activity area could usually be mitigated by the ACH Act processes. However, this will be assessed on a case-by-case basis.

For proposals where there may be a physical or biological impacts to ACH values outside an activity area, conditions may be required. These conditions may also be recommended inside an activity area if ACH Act processes alone may not be likely to meet the EPA's objective for the social surroundings.

The following is provided to outline the type of conditions that may be considered to ensure the EPA's objective for social surroundings can be met.

6.1 Outcome-based conditions

Outcome-based conditions are the preferred condition type recommended by the EPA as they provide clarity of the environmental values to be protected, enhanced, conserved and maintained, see the EPA's [Interim Guidance on Environmental Outcomes and outcomes-based conditions](#).

If the EPA considers the proposal may be implemented, the EPA's preference is to recommend outcome-based conditions outside the activity area to ensure ACH which may be directly affected by proposal impacts to the physical or biological surroundings are protected from significant harm. For example, the EPA may recommend avoidance areas to limit visual impacts on culturally significant landscapes, controls on dust emissions to limit impacts to culturally significant flora, requirements to maintain streamflow of culturally significant water courses, or limits on groundwater drawdown of culturally significant water sources.

The EPA may also recommend conditions which require reporting against achievement of environmental outcomes to Aboriginal people, where appropriate.

6.2 Objective-based conditions

The EPA would not usually recommend objectives-based management plan conditions, unless outcomes-based conditions are not practical. This means an environmental management plan dealing with ACH would not usually be recommended as a condition under Part IV of the EP Act unless outcomes-based conditions are not practical.

The EPA understands there may often be an ACH Management Plan agreed as a result of the ACH Act. The EPA encourages proponents and the relevant Aboriginal peoples to agree to these under the ACH Act to deal with ACH that may be affected by proposal impacts to physical or biological surroundings.

If an environmental management plan dealing with ACH is proposed by a proponent or required by the EPA to ensure the social surroundings environmental factor is met. The EPA's [Instructions on how to prepare Environmental Protection Act 1986 Part IV Environmental Management Plans](#) can be referred to by proponents for further information.

7 Transitional arrangements – from 1 July 2023

What should proponents and Aboriginal people who are part way through an EPA assessment process do?

How and when to satisfy the requirements of the ACH Act is a decision for proponents. Some proponents may also have existing section 18 consents under the *Aboriginal Heritage Act 1972 (WA)*.

The EPA expects that some proponents whose proposals are already being assessed by the EPA may decide to consider their ACH Act requirements after the EPA assessment is complete. Where not already provided, those proponents should provide the information in section 3.2 of this Guidance for places where ACH is likely to be affected by the proposal impacts to physical or biological surroundings.

Proponents who intend to rely on existing section 18 consents under the *Aboriginal Heritage Act 1972 (WA)* should also provide information in section 3.2 of this Guidance for all places where ACH is likely to be affected by proposal impacts to physical or biological surroundings. This is unless they have already or can provide information that demonstrates their section 18 consent process satisfies section 3.1 of this Guidance document.

Proponents who consider their ACH Act processes in an activity area can meet the EPA's objective for social surroundings during an ongoing EPA assessment can choose to provide the information in sections 3.1 of this Guidance during assessment. They should also provide the information in section 3.2 of this Guidance for all places outside the activity area, where ACH is likely to be affected by the proposal impacts to physical or biological surroundings, unless already provided.

8 Definitions

Word, phrase or acronym	Definition for the purpose of this Technical Guidance
Aboriginal cultural heritage	Has the meaning given by section 12 of the ACH Act 2021
Aboriginal tradition	Has the meaning given by section 11 of the ACH Act 2021, in summary means the living, historical and traditional observances, practices, customs, beliefs, values, knowledge and skills of the Aboriginal people.
ACH Act guidelines	Guidelines made under the ACH Act from time to time, in particular the ACH Management Code, the ACH Consultation Guidelines and the ACH Knowledge Holder Guidelines.
ACH Act processes	The processes outlined in the <i>Aboriginal Cultural Heritage Act 2021</i> .
Activity area	The area where it is intended the proposed activity will be carried out as outlined in the <i>Aboriginal Cultural Heritage Act 2021</i> Management Code.
Assessment information	Referral information (s. 38 and where applicable, s. 38A and/or s. 39A(2)(b) and/or additional information (s. 40)) that the EPA uses to assess a proposal (refer to the EPA's Procedures Manual for additional assessment information).
Development envelope	A development envelope is the maximum area within which the proposal footprint will be located and provides a proponent with the flexibility to decide on the final proposal footprint, to allow for changes in proposal design, or avoid or minimise impacts.
Due diligence assessment	Has the meaning given by section 102 of the ACH Act, a person undertakes a due diligence assessment in relation to a proposed activity that is intended to be carried out in an area if the person, in accordance with the ACH Management Code, makes an assessment about matters listed in section 102 of the ACH Act.
Proposal footprint	The location within which the physical Proposal elements will occur.
Referral information	The information provided at referral (s. 38) and, where applicable, from requests for further information (s. 38A) and/or from information derived from the EPA's investigations and inquiries (s. 38G(3)(c)).
Social surroundings	In the case of humans, the reference to social surroundings in the definition of environment (s.3 EP Act) is a reference to aesthetic, cultural, economic and other social surroundings to the extent to which they directly affect or are affected by physical or biological surroundings (refer to s.3(2) of the EP Act).
Study area	An area which includes all potential impacts from a proposal on environmental factors, developed for EIA purposes. It may be different for individual environmental factors.

