



Environmental Protection Authority

Guidance for the Assessment of Environmental Factors

(in accordance with the
Environmental Protection
Act 1986)

Assessment of Aboriginal Heritage

No. 41

Final

April 2004

Western Australia

FOREWORD

The Environmental Protection Authority (EPA) is an independent statutory authority and is the key provider of independent environmental advice to Government.

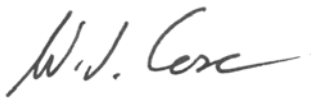
The EPA's objectives are to protect the environment and to prevent, control and abate pollution and environmental harm. The EPA aims to achieve some of this through the development of Guidance Statements to assist the environmental impact assessment (EIA) of proposals.

This document is one in a series being issued by the EPA to assist proponents, consultants and the public generally to gain additional information about the EPA's thinking in relation to aspects of the EIA process. The series provides the basis for the EPA's evaluation of, and advice on, development proposals subject to EIA. The Guidance Statements are intended to assist proponents to achieve an environmentally acceptable proposal. Consistent with the notion of continuous environmental improvement and adaptive environmental management, the EPA expects proponents to take all reasonable and practicable measures to protect the environment and to view the requirements of this guidance as representing the minimum standards necessary to achieve an appropriate level of environmental protection.

This guidance considers 'Aboriginal heritage' as a *relevant environmental factor* in circumstances where the heritage values are linked directly to the physical and biological attributes of the environment, and when the protection and management of those attributes are threatened as a result of a proposed development.

The Guidance Statement has the status of '**Final**' which means it has been reviewed by stakeholders and the public. The EPA has signed off the Guidance Statement as an expression of its current thinking on Aboriginal heritage as a *relevant environmental factor*.

I am pleased to release this document which now supersedes the draft version.



Dr Walter Cox
CHAIRMAN
ENVIRONMENTAL PROTECTION AUTHORITY

April 2004

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Appendix 1 – Guidance Statement process flow chart

Guidance Statement No. 41

Guidance Statement for the Assessment of Aboriginal Heritage

Key Words: Aboriginal heritage, environment, social surroundings

1 INTRODUCTION

1.1 Purpose

Guidance Statements are developed by the EPA to provide advice to proponents and the public about the minimum requirements for environmental management which the EPA would expect to be met when the Authority considers a proposal during the EIA process. The generic process for developing Guidance Statements is set out in Appendix 1.

This Guidance Statement specifically addresses the EPA's position on the assessment of Aboriginal heritage. It provides information which the EPA will consider when assessing proposals where Aboriginal heritage is a *relevant environmental factor*.

This Guidance Statement has been prepared in consultation with staff of the Department of Indigenous Affairs (DIA) with a view to developing a common approach for the benefit of proponents where Aboriginal heritage issues are important.

This Guidance Statement is termed 'Final', and the EPA expects that proponents will give full attention to the information provided when preparing proposal documents for review and assessment.

1.2 Limitations

This Guidance Statement has been prepared by the EPA to assist proponents and the public. While it represents the contemporary view of the EPA, each proposal which comes before the EPA for EIA will be judged on its merits. Proponents wishing to deviate from the guidance provided in this document would be expected to prepare a well-researched, clear and robust justification for the proposed deviation.

2 THE ISSUE

2.1 General

The EPA is required to report under section 44 (1) of the *Environmental Protection Act 1986* (EP Act) on the environmental factors relevant to a proposal, i.e. the *relevant environmental factors*. In recent years the EPA has had cause to reconsider its position within the scope of the EP Act in relation to Aboriginal heritage matters. The broad definition of environment in the EP Act clearly encompasses the physical environment including heritage matters (see definition in Section 6 of this document). Given the overlap with the *Aboriginal Heritage Act 1972* (AH Act), the EPA has developed this guidance to reduce duplication of requirements for information and to make them as complementary as possible.

Section 3 of the EP Act defines the term “environment” as follows:

“environment”, subject to subsection (2), means living things, their physical, biological and social surroundings, and interactions between all of these.”

Subsection 3(2) of the EP Act provides:

For the purposes of the definition of “environment” in subsection (1), the social surroundings of man are his aesthetic, cultural, economic and social surroundings to the extent that those surroundings directly affect or are affected by his physical or biological surroundings.

The term “environment” in relation to social surroundings has to relate to a specific place which has a physical entity and relates to a person who may be affected by the proponent’s activity (Supreme Court, 26 March 1996).

2.2 Aboriginal heritage

Both the EP Act and the AH Act have the legal capacity to consider aspects of Aboriginal heritage. The EPA recognises the specialist expertise of DIA in Aboriginal matters and that DIA has primary responsibility for considering those matters.

The focus of the AH Act is the protection of sites with social and heritage significance. A primary focus of the EP Act is to consider proposals which have the potential to have a significant effect on the environment. The EP Act allows for the consideration of actual physical impacts as well as social impacts. The EP Act can, in some instances, complement the AH Act, for example, in cases where actual physical protection of the environment is required to protect sites of heritage significance. The EP Act can also give

attention to matters of a social nature, such as traditional hunting activities, by providing for the retention of habitat for native fauna to enable those activities to continue.

Previously, the EPA has considered that, in relation to Aboriginal heritage issues, the AH Act has legislative processes which have to be met and that compliance with that Act would be the appropriate way to ensure that those issues were addressed. However, given the definitions in the EP Act and the EPA's obligations when assessing a proposal, the EPA has revised its approach to addressing Aboriginal heritage.

If Aboriginal heritage is a *relevant environmental factor* in the context of a proposal being assessed under the EP Act, the EPA must consider the issue and must satisfy itself that it can, and will, be addressed, consistent with the scope and requirements of the EP Act. One way to assist the EPA to be satisfied is for the EPA to be provided with confirmation that environmental aspects of the issue will be fully addressed through other processes, such as under the AH Act.

The EPA will give consideration to Aboriginal heritage matters to the extent that they may be affected by the impacts of the proposal on the physical or biological surroundings. When considering Aboriginal heritage matters as part of the assessment of a proposal, the EPA will consult with the DIA. Proponents are encouraged to visit the DIA website, www.dia.wa.gov.au/Heritage.

3 GUIDANCE

3.1 Guidance on the EIA process

The EPA has to consider whether and how it will assess proposals referred under Part IV of the EP Act. At the time of making those decisions, the EPA considers what are the likely environmental factors and make a judgement about the significance of any potential environmental impact. It therefore requires, at the time of referral, sufficient information about the proposal and its likely impact on Aboriginal heritage sites to form a view on the proposal.

In those instances where the EPA determines that a proposal should be subject to formal assessment, the guidelines for that assessment will identify specific issues that will need to be further addressed in proponent documentation and by the EPA.

When formally assessing proposals with the potential to affect Aboriginal heritage matters, the EPA must have sufficient information available to it to undertake two basic tasks:

- determine whether or not an issue is a *relevant environmental factor*; and
- if it is determined to be a *relevant environmental factor*, consider and report to the Minister for the Environment on that factor.

In doing so, the EPA wants to ensure that the EIA process achieves a number of goals:

- to ensure that the proponent adequately considers and addresses environmental issues during project design, construction and operation;
- to ensure that the public has access to relevant information to enable a constructive public consultation process; and
- to provide a basis for sound environmental advice to decision-makers.

The EIA process undertaken by the EPA is a very open and transparent process. Where a formal assessment is undertaken, an essential element of the process is the preparation of an environmental review document for public release. That document describes the magnitude of the impacts of the proposal on the environment (physical, biological and social surroundings) and how these impacts will be managed in an environmentally acceptable manner, including management in accord with relevant legislation. The EPA is required to report to the Minister for the Environment on the environmental factors relevant to the proposal.

3.2 Guidance on Aboriginal heritage as a relevant environmental factor in the EIA process

In providing guidance, this statement seeks to ensure that a proposal gives attention to the AH Act and the EP Act, and that the changes to the biological and physical environment resulting from the proposed development do not adversely affect matters of heritage significance to Aboriginal people.

As part of the formal EIA process (i.e. where it has been determined that a proposal will be subject to formal assessment), proponents and the community could expect that the EPA will:

- where Aboriginal heritage is likely to be important, identify it as an issue to be addressed by the proponent (this is a reminder to the proponent to provide information so that the EPA can consider whether or not Aboriginal heritage is a *relevant environmental factor*);
- on the basis of information provided to it in the environmental review document and submissions, consider whether Aboriginal heritage is a *relevant environmental factor*; and
- where Aboriginal heritage is a *relevant environmental factor*, report on the implementation of the proposal in relation to resulting changes to physical and biological attributes of the environment which may impact on the heritage significance of those attributes to Aboriginal people.

The EPA will expect the proponent to undertake a competent analysis of and report on the likelihood of the presence of matters of heritage significance to Aboriginal people. Proponents should test their proposal against the proposition that changes to the physical

or biological environment, consequent upon the proposal being implemented, may result in there being an impact on matters of heritage significance to Aboriginal people. Where it is likely that Aboriginal heritage is a *relevant environmental factor*, the proponent should demonstrate that the relevant Aboriginal heritage issues have or will be identified (to the satisfaction of the DIA) and that the proponent has properly considered how to minimise any adverse impact by the proposal on heritage values.

The enquiries and consultations required will vary depending on the circumstances. The list of actions set out below provides guidance on the range of activities which may assist the proponent to satisfy the EPA. It may be appropriate for some of the relevant work to be completed before the EIA document is submitted, with further work to be completed as part of any relevant environmental management plan, before, during or after construction.

Actions which may be pertinent to the factor of Aboriginal heritage

- Consult with staff of the DIA and review any site records (desk-top review) in accordance with the AH Act.
- Undertake an Aboriginal heritage survey (if it is noted from a desk-top review that an adequate survey has not been undertaken for an area to be developed) which should include both consultation with appropriate Aboriginal people, which may include an anthropological survey, and, if necessary, an archaeological survey.
- Inform the relevant Aboriginal people about details of the proposed development, including potential environmental impacts.
- Consult with relevant Aboriginal people to enable them to make known to the proponent their concerns in regard to environmental impacts as they affect heritage matters.
- Demonstrate that any concerns raised by Aboriginal people have been adequately considered by the proponent in its management of environmental impacts, and any changes as a result of this process are made known to the relevant Aboriginal people.

The EPA expects that any relevant reports prepared in the course of the above actions will be made available to the EPA and the DIA, subject to any relevant confidentiality requirements. The key findings of any such surveys and consultations should be referred to in the environmental review document.

In the event that the EPA does give advice in relation to Aboriginal heritage, it is likely to be in the form of specific management requirements to protect those attributes of the physical and biological environment which are considered to be of Aboriginal heritage significance.

Specific information about how to approach and address Aboriginal heritage issues, including requirements under the AH Act, can be found on the DIA's web site (www.dia.wa.gov.au/Heritage).

4 APPLICATION

4.1 Area

This Guidance Statement applies to proposals throughout the State of Western Australia considered under Part IV of the EP Act.

4.2 Duration and review

The duration of this Guidance Statement is for five years unless it is revised earlier.

5 RESPONSIBILITIES

5.1 Environmental Protection Authority responsibilities

The EPA will apply this Guidance Statement during the assessment of proposals under Part IV of the EP Act if, as a result of the proposal being implemented, there is likely to be an impact on matters of heritage significance to Aboriginal people

5.2 Department of Indigenous Affairs responsibilities

EPA identification of Aboriginal heritage as a *relevant environmental factor* in the assessment of a specific project does not impinge upon the responsibilities of the DIA under the provisions of the AH Act. However, this Guidance Statement has been prepared in consultation with staff of the DIA with a view to developing a common approach for the benefit of proponents where Aboriginal heritage issues are important.

5.3 Proponent responsibilities

Where proponents demonstrate to the EPA that the requirements of this Guidance Statement are incorporated into proposals, the assessment of such proposals is likely to be assisted.

6 DEFINITIONS AND ABBREVIATIONS

6.1 Definitions

The following technical terms and abbreviations are used in this document:

Aboriginal heritage	Aboriginal heritage includes both physical and cultural aspects and relates to the significance of places and objects to Aboriginal people in terms of traditions, observations, customs and beliefs.
Consultation	Consultation involves discussions and participation by the relevant parties, rather than simply giving information.
Environment	Environment means living things, their physical, biological and social surroundings, and interactions between all of these (EP Act).
Social surroundings	Social surroundings of man are his aesthetic, cultural, economic and social surroundings to the extent that those surroundings directly affect or are affected by his physical or biological surroundings (EP Act).

6.2 Abbreviations

AH Act	<i>Aboriginal Heritage Act 1972</i>
DIA	Department of Indigenous Affairs
EPA	Environmental Protection Authority
EP Act	<i>Environmental Protection Act 1986</i>

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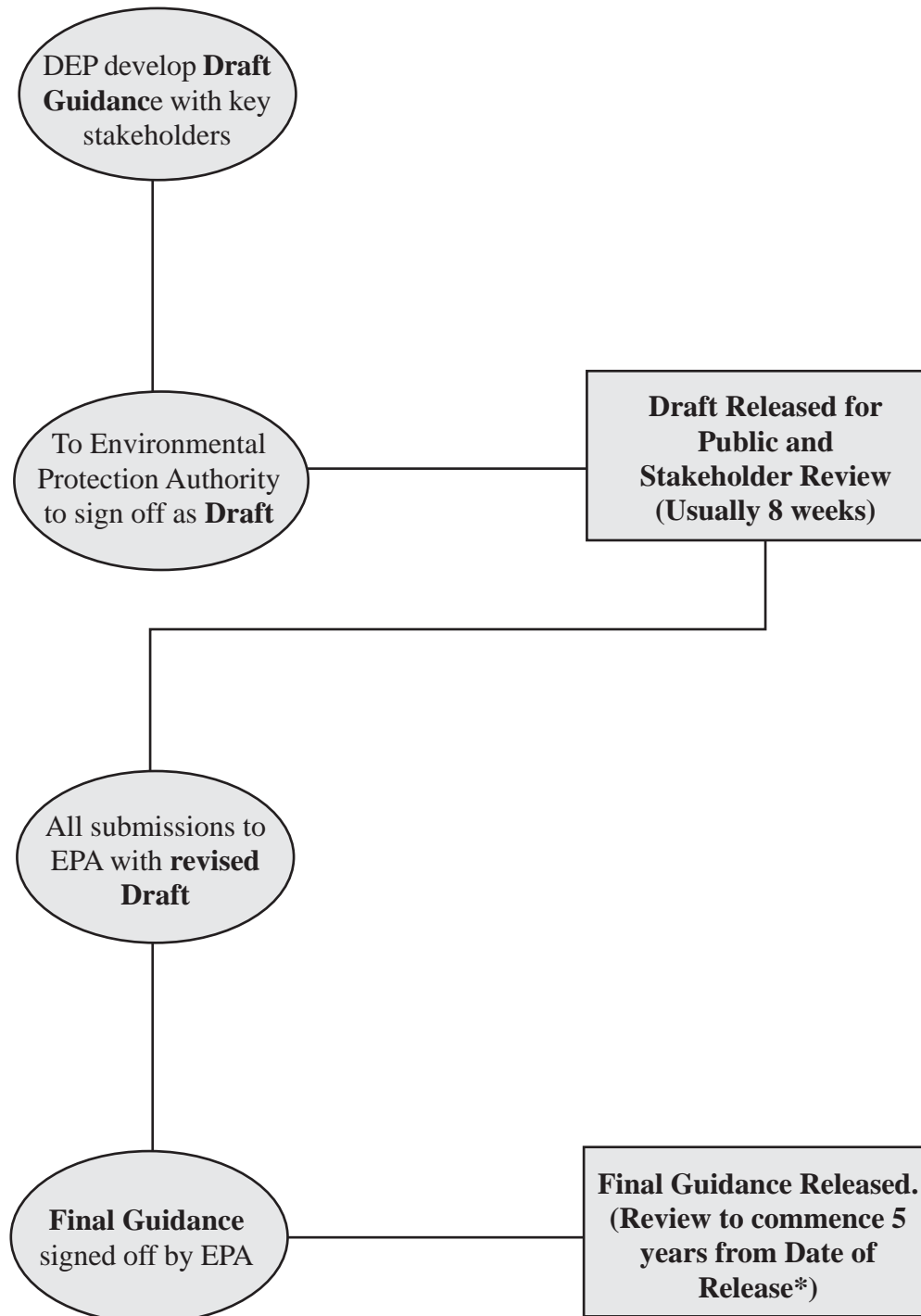
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Appendix 1

Generic Flow Diagram for the Guidance Statement Process



*Guidance may be reviewed earlier if circumstances require it.