

15 March 2023

Environment, Renewables & Decommissioning
National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA)
Submitted online

RE: COMMENT ON NOPSEMA DRAFT GUIDELINE – CONSULTATION IN THE COURSE OF PREPARING AN ENVIRONMENT PLAN

The Australian Petroleum Production and Exploration Association (APPEA) welcomes the opportunity to provide feedback on the NOPSEMA draft guideline on “Consultation in the course of preparing an Environment Plan”¹ (the Draft Guideline).

APPEA welcomes developments in ensuring adequate and meaningful consultation with relevant persons, in particular in light of the upcoming referendum on The Voice. The Full Court's recent decision in *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193² (the Court Decision) has provided clarity on the requirements of relevant persons consultation to be undertaken by the Australian upstream oil and gas sector. The implications of the decision are that the sector must undertake consultation in relation to a wider area, with more types of relevant persons, and undertake more intensive consultation in terms of time and information provision.

As a result, the broader and more intensive consideration of consultation undertaken in accordance with regulation 11A of the Offshore Petroleum and Greenhouse Gas Storage Environment Regulations (Environment Regulations) continue to delay 34 environment plan (EP) applications that were underway at the time of the Court Decision but not accepted prior to the Court Decision. These EPs are now ‘stranded’.

APPEA notes that there is already a significant backlog of offshore EPs for decommissioning, operations and project approvals that are significantly behind schedule or on critical path and require urgent attention by NOPSEMA. A temporary solution is required to unlock and de-risk the ‘stranded’ EPs. Some of these EPs are required for investment decisions already made on the basis of approvals already given by NOPSEMA (but now set aside by the Federal Court) and to meet contractual obligations already entered into in the reasonable expectation that EPs would be approved within average historical timeframes. In both circumstances, titleholders are bearing costs, sometimes of millions of dollars per week, to pay for equipment on standby or other contractual penalties.

¹ Draft Guide available online here: [Guideline - Consultation in the course of preparing an Environment Plan \(nopsema.gov.au\)](https://www.nopsema.gov.au/Guideline-Consultation-in-the-course-of-preparing-an-Environment-Plan)

² Federal Court of Australia decision available online here: [Santos v Tipakalippa: Online File \(fedcourt.gov.au\)](https://www.fedcourt.gov.au/Santos-v-Tipakalippa-Online-File)

Whilst the introduction by NOPSEMA of the Draft Guideline and subsequent meetings and workshops with industry are a welcome first step, APPEA considers the Draft Guideline, as currently provided, does not provide industry or stakeholders with sufficient certainty regarding regulatory requirements (including assessment criteria), timing, or process to support submission and acceptance of an EP. Further, the Draft Guideline introduces concepts that go beyond the Federal Court decision, including a decision-making role for relevant persons which was not contemplated in the Federal Court decision and was never contemplated in the Environment Regulations when they were developed.

Importantly, the Draft Guideline has no obvious linkage with the object of the OPPGGS Act which, by extension, also applies to the Environment Regulations and which is 'to provide an effective regulatory framework for petroleum exploration and recovery' (emphasis added).

APPEA members continue to experience difficulties associated with meeting the expanded consultation requirements. This is demonstrated by the significant activity and effort that is currently being undertaken by industry to address these requirements. APPEA members note for example, that difficulty contacting some relevant persons and consultation fatigue are providing significant barriers in meeting the expanded consultation requirements. Compounding these issues is the "surge" in consultation efforts by companies that have stretched the resources and availability of relevant persons, where consultation can often overlap between companies.

The ongoing delays in EP approvals have had significant and operational impacts to title holders which has included:

- EP approvals consultation that has increased from 250 to 750+ stakeholders;
- Stacking of mobile offshore drilling units with standby rates of US\$750,000 per day;
- Missed seismic acquisition activity windows that will incur at least a 6 month delay to completion;
- Missed exploration windows that will delay drilling for various periods or changes to timing of drilling programs;
- Impact to titleholders incurring fees associated with service contractors being delayed; and
- Loss to the Australian region of mobile offshore drilling units with uncertainty to the availability of replacement units in the short to medium term. This loss could flow on to the industry's ability to carry out the extensive decommissioning work and carbon sequestration that is also planned over the next few years.

NOPSEMA's capacity to adequately resource and progress assessment of EPs for offshore projects is of concern, noting added regulatory burden and competing demand for specialist expertise. This concern arises from the additional demands imposed by the Guideline on NOPSEMA to assess the methodology and application of an expanded scope of consultation, including into specialist areas such as cultural heritage. This has also increased pressure on industry to have to re-evaluate the timeframes it will take (with some uncertainty) and requesting extension to EP submission dates to allow in house development of stakeholder engagement methodology and formulation of detailed stakeholder consultation plans.

Ultimately, as signalled in the Court Decision, APPEA considers that legislative reform is required in order to provide sufficient clarity and certainty as to the application of the



consultation requirement, definition of a relevant person and to ensure that the consultation process is practically workable and consistent with the objectives of the Act and Regulations.

Without certainty being restored in a timely manner, the risk of significant delay in the development of Australian offshore oil and gas resources to meet domestic and international demand increases. This will in turn have negative impacts on energy security and energy transition for Australia and our key regional trading partners as well as for future government revenue, export income, regional jobs and business opportunities.

Attachment 1 provides for detailed feedback and input to the Draft Guideline. To the extent that APPEA's comments are relevant to the amended 'Environment Plan decision making guideline', also open for feedback, this submission applies equally to that guideline. Please feel free to contact [REDACTED] at [REDACTED] for any follow up questions or points for clarification

Yours sincerely

[REDACTED]

[REDACTED]
[REDACTED]
APPEA

Attachment 1.

General Comments and Observations

There are minimal ethnographic studies/surveys that have been completed and that are available to titleholders that set out cultural and spiritual knowledge of the environment and sea country to inform consultation and provide input for Environment Plans. APPEA is advised that members are seeing requests from traditional owners to fund these types of studies and there may be a role for industry/APPEA alongside the Traditional Owners to take a more collaborative approach to gathering and sharing this information (or agreed aspects of the information) more widely and therefore forming the 'body of knowledge' whereby a realistic impact assessment can be conducted in the EP with appropriate control measures.

It would be useful for NOPSEMA to take a role in educating Prescribed Body Corporates (PBCs) on the environment plan acceptance process and the expectations of consulting with relevant persons. In some instances, members have had some PBCs requesting EPs to review, when the requirement is to consult *in the course of preparing* the EP and in circumstances where there is not yet an EP available to review. It would be useful for NOPSEMA to confirm there is no requirement for relevant persons to review the EP and no corresponding obligation for a titleholder to provide a draft EP to a relevant person for review, prior to the EP being accepted and published on NOPSEMA's website.

The requirements for relevant persons/stakeholder consultation for Offshore Project Proposals (OPPs), aside from the prescribed public comment period (4 weeks as per Reg 5C(3) of the Regulations), remains unclear and remains a key risk to approvals. It is understood that NOPSEMA expects relevant person consultation to have been initiated and substantially progressed before an OPP can be submitted. This exceeds the regulatory requirements for an OPP, which only require a 4-week public comment period, and is not clarified within the Draft Guideline.

APPEA notes feedback from the Western Australian Fishing Industry Council (WAFIC) is that they want to consult on the Operational Area, but they do not want to consult on the EMBA unless there is an incident³. It is not clear how WAFIC's request can be met, given the requirement following the Court Decision is to consult on the EMBA. It would be helpful if NOPSEMA could confirm if WAFIC's nominated approach is acceptable. Further, it would be helpful to have guidance, more generally, on whether titleholders are able to defer to relevant persons' preferences in conducting reg 11A consultation, or whether the regulatory obligations are such that titleholders must effectively ignore relevant persons' requests in order to meet its regulatory requirements. WAFIC's request is a clear example that this is already occurring.

³ [Consultation Approach for Unplanned Events - WAFIC](#)

Identifying Relevant Persons

A better-defined process for identifying relevant persons or organisations is needed. “Functions”, “interests”, and “activities” is defined in the Court Decision, and what the process is for consultation based on the relevant person type.

The increased consultation burden placed on potential ‘relevant persons’, who often have limited capacity or interest to meet industry requests for timely consultation, is emerging as a significant issue. For example, where there are no apparent potential ‘relevant persons’, there is an emerging expectation from NOPSEMA that titleholders engage with the closest geographically located persons whether or not there is relevant interest.

The key point is consistent assessment of the methodology. For example, once the methodology is endorsed for one EP, it does not need to be entirely re-visited and re-assessed (and amended) in another EP. NOPSEMA could accept the methodology of identification of relevant persons as proposed by the titleholder where it is robust and in line with the intent of the legislative definition.

While the Draft Guideline requires titleholders to explain the rationale for their identification of relevant persons, NOPSEMA’s application of the Draft Guideline to date appears to indicate that it has a preconceived view of who is a relevant person.

In practice, NOPSEMA appears to insist on the identification of relevant persons – specifically Traditional Owners – whether or not “interests” exist.

It would be helpful if the Draft Guideline could provide greater clarity on what is a “reasonable effort” to undertake consultation, or provide clarity that it is acceptable for a relevant person to “opt out” and for a titleholder to rely on that decision by the relevant person (in particular, where there are multiple EPs affecting the same relevant person i.e. if they opt out for one on the basis that they don’t want to be consulted, can that be the position for all EPs).

Co-design of consultation should not be prescribed for all relevant persons, it is reasonable for an opportunity for co-design to be applied relevant to the nature and scale of the effect on the functions, interests and activities of the person, the type of relevant person they are, contact information that is available to the titleholder, and what existing processes are in place. It should be recognised that co-design may be as simple as a relevant person notifying their preferred method of communication (e.g. an email attaching information sheet is acceptable/preferred by the relevant person).

The Draft Guideline also lacks clarity on international consultation requirements to meet NOPSEMA’s assessment criteria for identifying and consulting relevant persons. To date, NOPSEMA advice suggests that that applicants obtain their own legal advice in this regard. This approach could likely lead to differing advice being provided to titleholders and differing consultation methodologies undertaken. . Practically, when this occurs, NOPSEMA will need to form a view on this in its assessment of the relevant EP, which will then become public and may result in titleholders who have taken a different approach needing to re-consult. In the meantime, it would be helpful for NOPSEMA to make any current views

known to the industry. Leadership by government is needed to “set the boundary” for consultation with international stakeholders to ensure a common consistent approach.

Finally, we have concerns relating to the threshold for genuine attempts to consult relevant persons who will only engage if they are paid a fee for service, which may raise issues for Titleholder anti-bribery and corruption policies and applicable laws, as well as the clear potential reputational concerns around titleholders paying relevant persons to consult ⁴

General Principles for Effective Consultation

The general principles provided by NOPSEMA are only useful if the regulator confirms that using the model and meeting those expectations would lead to an accepted EP (which is not the case as it just refers to the principles being a starting point). APPEA notes that many of our members have always followed these principles as a matter of course.

Information Provision and Reporting

More clarity is needed as commentary in the Draft Guideline is subjective and unclear as to how it will be assessed for acceptance. However, the Court Decision provides helpful guidance on what information would be “sufficient” as a minimum for a relevant person. The Draft Guideline could be improved to incorporate this guidance. Any such consultation materials could include:

- A map of the EMBA;
- Information on what the activity involves;
- Information on the environmental risks and impact of the activity; and
- Information on the safeguards (control measures) that have been adopted.

Reasonable Consultation Period

The timeframes for assessment of an EP for acceptance have increased significantly, driven primarily by the expanded scope for consultation (including the apparent requirement for consultation to be co-designed) and lack of clarity regarding NOPSEMA’s expectations for sufficient time and sufficient information for consultation with relevant persons.

NOPSEMA’s expectation is that ‘consultation’ must have concluded before the EP is submitted to NOPSEMA for assessment - despite there being no determined appropriate time, scope or scale for consultation - creates a fundamental challenge for titleholders. Of particular concern, this uncertainty enables self-identified ‘relevant persons’ to continue to self-identify (often strategically to delay projects) well after the initial EP consultation period concludes. No guidance on this issue is included in the Draft Guidance. APPEA has been advised by members who have encountered this in relation to EP applications currently before NOPSEMA, with additional consultation periods triggered by self-identified ‘relevant

⁴ Such laws could include *Foreign Corrupt Practices Act of 1977* (FCPA) (15 U.S.C. § 78dd-1, et seq.) further information available online here: [Foreign Corrupt Practices Act \(justice.gov\)](https://www.justice.gov/oc/foreign-corrupt-practices-act)

persons' corresponding directly with NOPSEMA about matters already substantially covered in the EP.

Members who followed a clear process in identifying 'relevant persons' who may be impacted by activities, note that there is no clear delineation as to when 'sufficient time' and 'sufficient information' has been provided to these stakeholders in order for NOPSEMA to assess and accept EPs.

Clarity over the concept of 'statutory timeframes for additional relevant persons to be included in consultation', can drive improvement of NOPSEMA's performance regarding timeframes for review and acceptance – it would be helpful if NOPSEMA could confirm which statutory processes and timeframes (e.g. Native Title Act 1993) and guidelines (e.g. draft consultation Guidelines under the Aboriginal Cultural Heritage Act) would be acceptable for the different types/categories of relevant persons.

Consulting with Communal Groups Including First Nations

The level of resourcing required by some Traditional Owners and First Nations groups to consider unplanned and / or geographically distant activities is disproportionate to the risk, likelihood and potential impacts of an event occurring. Consulting on the risk also has the potential to create confusion and unnecessary concern. In particular, where a titleholder is required to submit multiple EPs relating to linked but separate activities, the resourcing obligation from the titleholder to potentially multiple Traditional Owner groups risks becoming prohibitively high and drawing resourcing away from community priorities. The converse is also relevant where Traditional Owner groups have multiple approaches for consultation where there are multiple EPs for linked but separate activities.

Feedback provided to titleholders from some of these Traditional Owner groups has indicated that the Traditional Owner groups neither have the time, capacity and in some instances any interest in participating in an extensive and detailed consultation process, especially when discussing remote risks of unplanned events. APPEA considers that this outcome is creating an outcome that the Regulations and Draft Guideline are not aiming to achieve.

Consultation fatigue is real. One APPEA member reported that only one Traditional Owner corporation that is being consulted has established a subcommittee to deal with titleholders separate to the board. While PBCs have confirmed it is extremely important for them to be involved in the EP consultation process, they also have many other significant burdens on their time. The potential for fatigue only increases when consultation must be conducted not only at the representative body level, but with individual persons or clans. To this point, during hearings into native title compensation payable to the Yindjibarndi people, the Federal Court has heard emotional evidence from Yindjibarndi elders on the spiritual and cultural impacts of resources development on country.

APPEA members advise that PBCs in particular have noted that they are feeling enormous pressure to process all of this new information, on top of existing titleholder information that they already receive from the mining industry.

The intangibles associated with the PBCs and knowledge holders' responsibility to make decisions on behalf of their people are difficult to quantify in the context of the EP. As a broad example, the most senior Elder is responsible and accountable for any harm to country – sea and land.

Generally, cultural knowledge is not divulged to people who have no prior existing relationships with the knowledge holders. If it is shared at all, it is piece meal, over time as the relationship with the organisation becomes more trusted. In this context, it would be useful to clarify what “reasonable efforts” to engage Traditional Owners are.

NOPSEMA Assessment

The timeframes for assessment of an EP for acceptance have increased significantly, driven primarily by the expanded scope for consultation and lack of clarity regarding NOPSEMA's expectations on sufficient time and sufficient information for consultation with relevant persons.

A consultation checklist would be helpful, for example similar to the Director of National Parks Consultation Guide Provided at **Attachment 2**. It would also be helpful to have greater clarity on NOPSEMA's internal assessment criteria.

Attachment 2.

What you need to know

Why do we have Australian Marine Parks?

Australia's natural, cultural and heritage values are unique and an essential part of our national identity. Australian Marine Parks (AMPs) are one of the largest and most sophisticated networks of marine parks in the world. Our AMPs are critical to halting the decline and supporting the recovery of numerous threatened species. We do this by protecting important habitats that support a healthy and productive marine environment.

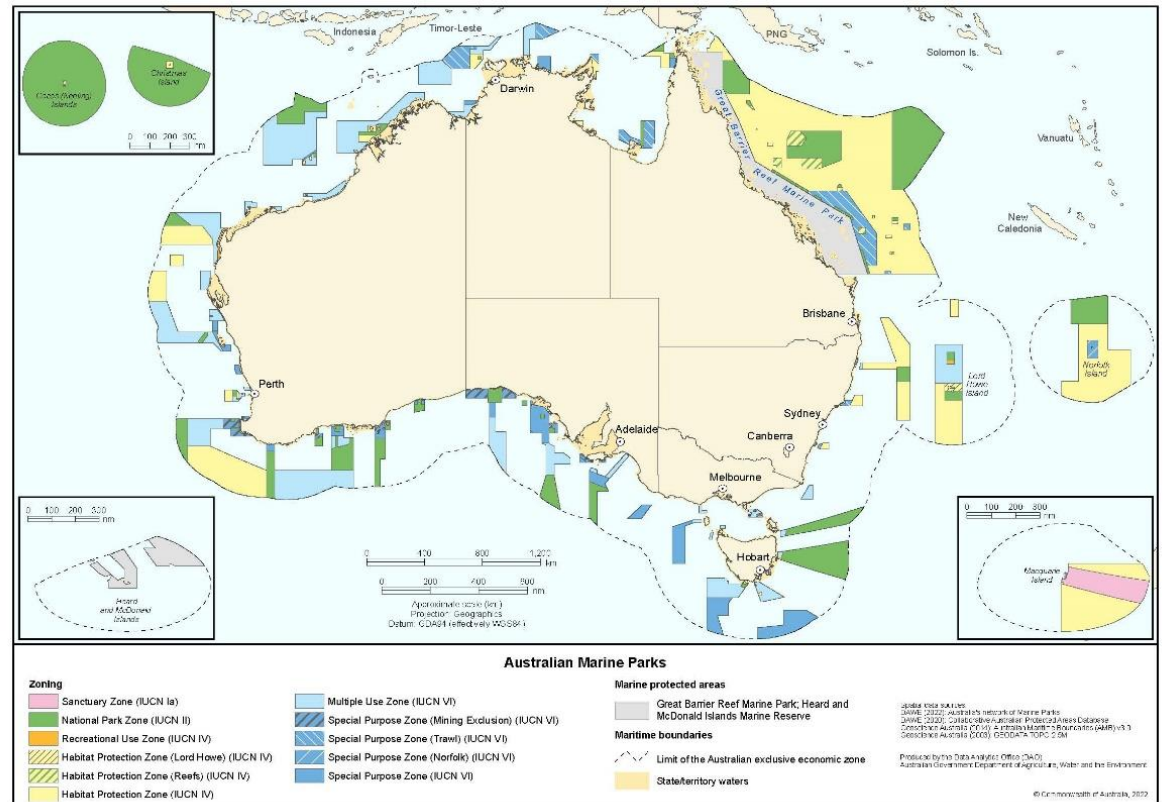
AMPs provide for sustainable and diverse socio-economic activities that support our nation and the communities that rely upon these environments.

What are Australian Marine Parks?

To protect Australia's natural, cultural, heritage and socio-economic values, the Australian Government manages 62 AMPs within Commonwealth waters (over 5.5 kilometres from the coast).

Zones set out what you can do in marine parks. There are four main types of zones:

- **Sanctuary Zone** (IUCN Ia) managed primarily for scientific research and monitoring
- **National Park Zone** (IUCN II) managed to preserve its natural condition
- **Habitat Protection Zone** (IUCN IV) managed to maintain habitats or meet requirements of species, including via active intervention
- **Special Purpose / Multiple Use Zone** (IUCN VI) managed to ensure long-term protection of biological diversity while allowing a wider range of activities, including petroleum activities



Managing petroleum activities in Australian Marine Parks

The Director of National Parks (DNP) regulates activities in AMPs in accordance with the EPBC Act, EPBC Regulations and marine park management plans. Management plans specify what activities are allowed, allowable subject to authorisation and not allowed for specific marine park zones in each network.

Offshore petroleum activities fall within the definition of 'mining operations' in the EPBC Act and management plans. Under a class approval, NOPSEMA can assess and authorise petroleum activities on behalf of DNP in Special Purpose / Multiple Use zones (IUCN VI) through an accepted Environment Plan (EP) under the OPGGS Act.

Petroleum activities in National Park and Habitat Protection zones (IUCN II and IV) are limited to the construction and maintenance of pipelines and require separate DNP authorisation and a NOPSEMA accepted EP. Proponents and titleholders should endeavour to avoid the installation of pipelines in these zones and expect significant scrutiny of any activity proposed in these zones.

What you need to do

When to consult with the DNP

DNP is a relevant person for the purposes of consultation under the OPGGS (Environment) Regulations. Any objections or claims raised by DNP need to be considered and addressed in the EP. The following criteria are a trigger for consultation with DNP on EPs:

- Any proposed activity to occur **within** an AMP
- Any proposed activity to occur **adjacent** to an AMP
- Any proposed activity **that could affect** an AMP's established values, even if the activity is completely outside the park, such as impeding the migration of cetaceans to and from AMP's.

Consultation is also recommended for offshore project proposals.

How to consult with DNP

Using the following checklist will support effective consultation with DNP.

All consultation, notifications and correspondence to DNP in relation to consultation about EPs and offshore project proposals should be sent to:

marineparksauthorisations@dcceew.gov.au

NEED TO CONSULT WITH US ON AN ENVIRONMENT PLAN? DO THE FOLLOWING (more information is always welcomed)

In the email, include the following:

- In the subject line state that you are **consulting us** on an Offshore Project Proposal or Environment Plan and the project or activity it relates to
- In the email body be clear:
 - Why you're consulting DNP (OPGGS Regulations and EPBC Act require it)
 - When you would like DNP to respond by (allow a minimum of eight weeks)
 - Attach information sheet(s) and shapefiles identifying the boundaries of the activity in any of the following formats: zipped shape file, csv, KML, geo JSON, WMS and WFS. Relevant shapefiles for mapping AMPs are available on [Parks Australia's website](#)
- Send your email to marineparksauthorisations@dcceew.gov.au

The consultation information should contain the follow as a minimum:

- Name of company or titleholder
- Why you're consulting us and who else you are consulting that may relate to the marine park(s)
- Who we can contact if with any questions, comments or claims and objections
- What** you are doing and how are you doing it:
 - Type of activity (i.e. geophysical survey, drilling and completions, decommissioning)
 - Specific activities and locations of the activity (i.e. drilling and completions with locations identified on the map and shapefile)
 - Equipment and vessels (specific or expected)
 - Activity timing and scheduled start and completion dates of key activities
- Where** the activity is planned to occur including:
 - Petroleum title number/s
 - Map(s) that include the activity's operational area, activity / acquisition area, EMBA (if known) **with** marine park(s) and zone(s) identified
 - Distances from the activity to the marine park boundaries **and** zones
- What **marine park values may be present** or could be affected by the activity. Identify which natural, historic, cultural and socio-economic values may be present, such as:
 - Biologically Important Areas and Key Ecological Features
 - Species and key behaviours
 - Relevant recovery and threat abatement plans for species or ecological communities ([SPRAT EPBC Recovery Plans \(environment.gov.au\)](#))
 - Native Title, Sea Country and cultural heritage
 - Other marine park users, including other planned or existing offshore petroleum activities
 - Where the values are not known or partly known at the time of this consultation, outline how the EP will identify relevant values
- Methods for **determining impacts to AMPs** and managing these to acceptable levels including:
 - Existing or planned research to establish a baseline of the environment, including the presence or absence of values and current environmental condition; and, to enable monitoring of change across time should the activity occur
 - Identifying impact pathways for values, how these will be mitigated, and that any residual impacts are consistent with the marine park management plan, EPBC Act and OPGGS Act and Regulations
 - Methodology to measure mitigation effectiveness and residual impacts against a documented environmental performance targets
 - Where the impacts are not known or partly known at the time of this consultation, outline how the EP will identify and manage impact pathways and ensure the activity is consistent with the management plan(s).