



15 February 2023

National Offshore Petroleum Safety and Environmental Management Authority
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RE: Consultation in the Course of Preparing an Environment Plan Guideline

Thank you for the opportunity to provide feedback on the National Offshore Petroleum Safety and Environmental Management Authority's (NOPSEMA) Guideline on Consultation in the course of preparing an environment plan (Consultation Guideline).

Whilst the Australian Conservation Alliance (ACA) is of the position that NOPSEMA should be limiting the number of titles it awards for offshore oil and gas and focusing on establishing the offshore renewables industry given the urgency of the energy transition, the ACA recognises that natural gas will likely be a necessary transition fuel and that for existing offshore oil and gas projects, meaningful stakeholder consultation is an essential prerequisite. Additionally, the ACA recognises the importance of natural gas within the Australian export economy, and the domestic energy mix. In this regard, the ACA supports the publication of the Consultation Guideline and welcomes the clarity it provides. The Consultation Guideline provides a blueprint for emerging best practice in stakeholder consultation for large scale energy projects in the Commonwealth Offshore Area. Nonetheless, the ACA makes the following submissions.

First Nations Consultation

The ACA welcomes the Consultation Guideline's discrete focus on appropriate consultation with First Nations communities. The clarified consultation requirements bring the expectations on offshore petroleum proponents in line with the requirements being imposed on onshore energy proponents under other regulatory regimes. The Consultation Guideline embraces the major takeaway from the Juukan Gorge Parliamentary Inquiry that First Nations peoples and groups must be genuinely and meaningfully consulted.[1] It is also broadly consistent with the guidelines and practice notes released by the NSW Government as part of its Electricity Infrastructure Roadmap.[2]

Following Court Guidance

The ACA is supportive of the fact that the Consultation Guideline reflects and extensively references the state of Commonwealth law following the majority judgement in Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193 (Santos decision).[3]

[1] A Way Forward – Parliament of Australia (aph.gov.au)

[2] First Nations Guidelines | NSW Climate and Energy Action

[3] Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193 (fedcourt.gov.au)

This decision is indicative of the expected standard of consultation for major energy projects, particularly those that have an impact on the cultural heritage of First Nations communities. Nonetheless, NOPSEMA may consider providing further guidance on the appropriate consultation processes when consulting persons who hold a communal interest.

On pages 10-11 the Consultation Guideline ostensibly repeats the content of majority judgement in the Santos decision:

The Federal Court has noted that there is no shortage of guidance in decisions on consultation processes under the Native Title Act 1993 (NT Act) which is illustrative of how a seemingly rigid statutory obligation to consult persons holding a communal interest may operate in a workable manner.

However, NOPSEMA may consider specifically directing titleholders to the relevant authorities and listing some of the processes which were considered appropriate in the relevant circumstances. The ACA believes that if NOPSEMA were to specify the relevant authorities and accepted processes there is a reduced likelihood that deficient consultation processes will be implemented in the future.

Update on Environmental Law Reforms

The ACA understands that a new National Environmental Standard for First Nations Engagement and Participation in Decision-Making will be developed as a priority to enable First Nations views and knowledge to be considered in all project approvals and planning decisions under national environmental law.[4] NOPSEMA should ensure the Consultation Guidance is updated upon the release of these proposed reforms to the Environment Protection and Biodiversity Conservation Act 1999 (Cth).

Consultation Requirements for Offshore Renewable Projects

The ACA requests that a similar guideline be released for offshore renewables projects as soon as possible. As mentioned above, the Consultation Guideline provides an emerging best practice model for stakeholder consultation which should be applied to all types of energy projects. However, early articulation of this standard within the context of the offshore renewables regulatory framework is vital.

Whilst the offshore petroleum regulatory framework and the offshore renewables regulatory framework have undoubted similarities, they are by no means the same and the Consultation Guideline cannot be applied to the offshore renewables industry without amendment. Therefore, to allow offshore renewable proponents to begin to prepare to meet their consultation requirements, NOPSEMA should work with the relevant Commonwealth authorities to prepare a similar but regulatory-appropriate guideline to be released in conjunction with the relevant offshore electricity infrastructure regulations on environmental management. Concurrent release of these materials will ensure offshore renewables proponents are well equipped to meet their consultation requirements and the reduce the likelihood of consultation-related approval delays which could slow Australia's transition to a low-carbon economy.

[4] Nature Positive Plan: better for the environment, better for business (dceew.gov.au)

Role of Marine Spatial Planning

The ACA supports the implementation of a marine spatial planning (MSP) regime for the Commonwealth Offshore Area. Whilst the Consultation Guideline is relatively narrow in its scope, we believe that the implementation of an MSP regime would ensure best practice consultation with key stakeholders going forward.

Literature from the European jurisdictions hail MSP as a legal framework capable of enshrining stakeholder consultation as an effective practice.^[5] This consultation is done in a public and transparent manner to ensure any potentially impacted parties are given ample opportunity to submit their concerns with potential projects. Such a process could be shaped depending on the particular circumstances of the case, such as where First Nations communities seek to have certain cultural practices kept confidential.

The ACA again thanks NOPSEMA for the opportunity to make this submission.

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[5] Robert Pomeroy and Fanny Douvere, 'The Engagement of Stakeholders in the Marine Spatial Planning Process' (2008) 32 *Marine Policy* 816, 816-7; Sue Kidd, 'Rising to the Integration Ambitions of Marine Spatial Planning: Reflections from the Irish Sea' (2013) 39 *Marine Policy* 273.