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**Consultation in the course of preparing an Environment Plan guideline  
National Offshore Petroleum Safety and Environmental Management Authority**

**Stakeholder Feedback  
Conservation Council of WA**

**15 March 2023**

The Conservation Council of WA (CCWA) is the state's foremost non-profit, non-government conservation organisation representing close to 100 environmental organisations across Western Australia, with tens of thousands of engaged individuals state-wide. This broad collective of like-minded groups and individuals creates a vibrant and passionate community, dedicated to the conservation of our unique and diverse state.

CCWA has been a prominent and forthright voice for conservation for more than 50 years working directly with the government, media, industry, community groups, and political parties to promote a more sustainable WA and to protect our natural environment.

## **Background**

Following the Federal Court decision in Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193, NOPSEMA has developed a consultation guideline (**the Guideline**) on how the decision will be applied to the assessment of environment plans.

The purpose of the guideline is to support clarity and transparency on the legal requirements, including recent case law, for consultation by titleholders in the course of preparing their Environment Plans prior to submission to NOPSEMA. The guideline will also support clarity and transparency around what NOPSEMA will take into consideration when assessing and deciding whether the consultation requirements of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (**the Environment Regulations**) have been met.

## **CCWA submission points**

To ensure that the environmental and climate impacts of offshore oil and gas projects are appropriately identified and mitigated, it is important that NOPSEMA consider the interests of relevant persons. Accordingly, CCWA provides the following grounds for its submission, to support the strongest possible consultative mechanisms between titleholders and relevant persons, as defined under the Environment Regulations.

1. Environmental organisations should be included as relevant persons.
2. Contact mechanisms with relevant persons require review.
3. Meaningful consultation needs to be established.
4. An accepted definition of consultation should be applied.

### **1. Environmental organisations should be included as relevant persons.**

Environmental organisations are strongly placed to be able to identify the risks to the environment from offshore oil and gas projects.

The titleholders for all new proposals before NOPSEMA have the obligation to seek out organisations working to protect the environment. This obligation under the Environment Regulations should be made explicit in the Guideline.

As noted in the Guideline (p6) the mechanisms through which titleholders identify and engage with environmental organisations as relevant persons, should be thorough and transparent.

### **2. Contact mechanisms with relevant persons require review.**

*Processes for the identification of relevant persons must provide for sufficiently broad capture of ascertainable persons and organisations who may have their functions, interests or activities affected or that may be affected by the activity.*

*Publication in appropriate media forms may be a reasonable tool to assist in the identification of relevant persons, and inform the delivery of more targeted notices to potentially relevant persons. It is recognised that in any community consultation there will inevitably be persons within a group who could not participate for various reasons, however the absence of their participation would not invalidate the process provided reasonable efforts were made to identify the relevant persons and to consult with them.*

*The process should include reference to multiple sources of information, such as publicly available materials, review of databases and registers, published guidance, previous history, as well as advice from authorities and other relevant persons. (Consultation in the course of preparing an environment plan Guideline P6).*

CCWA considers the current mechanisms for contact with relevant persons inadequate, for the following reasons:

(i) ‘Reasonable efforts’ for contact is not defined.

CCWA’s experience of contact by titleholders has typically been through a general email address, where some notifications have been directed to ‘spam’, and where follow-up emails, after a non-response, have been through the same mechanism, leading to the same shortcomings of process. CCWA has also observed that large organisations and government agencies have similarly been contacted through this process, using generic ‘info’ email addresses. The possibility of key opportunities for consultative processes being overlooked via this mechanism exist.

Proponent bodies should be required to demonstrate that attempts to contact relevant persons is targeted and meaningful. Non-responses from relevant Persons should not be taken to mean a desire not to be involved in consultative process.

(ii) Consultation should not simply be to inform relevant persons.

Consultations that involve simply ‘informing’ relevant persons, while not making concerted attempts to engage with and seek input and comment, require review. On high-risk proposals, CCWA typically seeks to meet with titleholders to discuss any issues or to gain further insights into a proposal and its potential impacts. CCWA’s experience is that, first, opportunities for meaningful consultative engagement with titleholders do not currently exist and, second, the consultative arrangements on offer by titleholders do not easily accommodate the complexities of information sharing, nor the time, effort and commitment that consultative mechanisms entail. Community consultation is not a sequential exercise, but often involves a non-linear pattern of communications, requiring unconventional and flexible processes, as well as expertise in effective participatory practice.

(iii) Titleholder consultation records should be made available to NOPSEMA.

The Tipaklippa judgement and media reports relating to the consultation activities of the titleholder, showed it to have provided misleading statements to Tiwi people.

CCWA believes that titleholders should provide NOPSEMA with comprehensive records relating to consultations with relevant persons, including recordings and transcripts of consultation sessions, meeting notes, and unedited correspondence.

To ensure oversight and privacy, NOPSEMA should hold these consultation records and use them to verify the claims made by titleholders.

### **3. Meaningful consultation needs to be established.**

Regulation 11A of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* specifies that:

*(1) In the course of preparing an environment plan, or a revision of an environment plan, a titleholder must consult each of the following (a relevant person):*

*(2) For the purpose of the consultation, the titleholder must give each relevant person sufficient information to allow the relevant person to make an informed assessment of the possible consequences of the activity on the functions, interests or activities of the relevant person.*

*(3) The titleholder must allow a relevant person a reasonable period for the consultation. (emphasis added)*

Furthermore, the NOPSEMA ‘General Principles for effective consultation’ note that “Consultation should be a genuine and meaningful two-way dialogue in which relevant persons are given sufficient information and time to allow them to make an informed assessment of the possible consequences of the activity on their functions, interests or activities” (Consultation in the course of preparing an environment plan Guideline p7 emphasis added).

CCWA questions whether the intent of meaningful consultation under Reg 11A, or even under explicit direction by NOPSEMA, is being applied in the course of consultations between relevant persons and titleholders.

CCWA asserts that meaningful consultation must include the capacity for relevant persons to have an impact on the final decision, and also to be able to address critical issues of agenda setting, especially those concerning ethics and cultural practice. Importantly, consultation should address matters of a project’s suitability, its socio-economic need, public meaning, and ultimately discussion about a titleholder’s social licence to operate. Consultative process must entail more than a titleholder-led box ticking exercise, and should broaden the concept of ‘risk’ beyond that determined to contain a scientific meaning. Moreover, there should be mechanisms implemented by NOPSEMA to address complaints of titleholders acting in bad faith.

The present provisions of Reg 11A enable titleholders to minimise consultation with relevant persons - engagement can be at a very superficial level and with public comment measured primarily in terms of statutory outcomes, rather than addressing legitimate public objections to the increasing risks to the environment and cultural heritage from offshore petroleum activities.

Additionally, CCWA recognises the resource inequities between titleholders and relevant persons. To ensure that relevant persons are able to meaningfully engage with the complex technical data presented, resources to provide expert support should be provided by NOPSEMA or an independent body.

#### **4. An accepted definition of consultation should be applied.**

While the scope of the guideline is not to “...dictate exactly what each consultation process should entail, nor how a titleholder should conduct the consultation process...”,

the detail of what appropriate consultation processes might look like for each relevant person, is left for the titleholder to decide, rather than being a two-way process. That is, consultative process is being superficially constructed without provision for defining public meaning, or for public objection to different agendas and, therefore, producing a loss of accountability by titleholders to the public and public engagement needs.

Nevertheless, following the Santos NA Barossa Pty Ltd v Tipakalippa [2022] decision, NOPSEMA does recognise the ideal of “genuine and meaningful two-way dialogue” and provides principles outlining a ‘starting point’ on how a consultation process ‘may’ be undertaken (NOPSEMA Consultation in the course of preparing an environment plan Guideline p7).

CCWA proposes that NOPSEMA apply more explicit principles for effective consultation that adopt internationally accepted standards of practice, for example, those promoted by the International Association for Public Participation (IAP2), applying the IAP2 Core Values<sup>1</sup>.

1. *Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.*
2. *Public participation includes the promise that the public’s contribution will influence the decision.*
3. *Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers.*
4. *Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision.*
5. *Public participation seeks input from participants in designing how they participate.*
6. *Public participation provides participants with the information they need to participate in a meaningful way.*
7. *Public participation communicates to participants how their input affected the decision.*

The types of consultation currently on offer under NOPSEMA guidance are very narrowly or inadequately defined, are titleholder-led, and without provision for meaningful engagement with relevant persons. CCWA expects that projects with the potential to impact the environment and/or cultural heritage require a high standard of consultation and should include a collaborative approach, involving partnering “...with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution” (after IAP2 Spectrum of Public Participation).

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<sup>1</sup> [11x17\\_p2\\_pillars\\_brochure\\_20.pdf \(ymaws.com\)](#)

## Recommendations

1. The primary objective for NOPSEMA's guidance document is to establish procedures that avoid superficial or token consultation. These procedures should include mechanisms to provide adequate compliance oversight relating to the consultation activities of titleholders.
2. Relevant persons, particularly First Nations communities and individuals, should dictate how they want to be consulted meaningfully, including the most appropriate methods for being contacted.
3. Titleholders must engage with environmental organisations for all projects under assessment by NOPSEMA. Procedures to make this regulatory requirement explicit are required.
4. An explicit characterisation of 'reasonable efforts' for contact with relevant persons is required to guarantee targeted and meaningful attempts at contact by titleholders.
5. Titleholders should be required to demonstrate how community input is being considered against guidance criteria for 'meaningful' consultation. Consultation must not be a simple one-way information sharing exercise.
6. NOPSEMA has the power to address broader community considerations including those beyond scientific and statutory criteria. These aspects of community consultation must continue to reside with the regulator. Relevant persons must retain the right to meaningfully consult with the decision-maker and not just the titleholder.
7. NOPSEMA should apply a robust and internationally accepted definition of consultation to direct its regulatory role. CCWA points to the IAP2 model as a suitable guide to meaningful and participatory strategies.

CCWA thanks NOPSEMA for the opportunity to provide its feedback on the 'Consultation in the course of preparing an Environment Plan guideline'.

If you have any questions relating to this stakeholder feedback submission, please feel free to contact me.

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Conservation Council WA