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28 March 2023

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Consultation in the course of preparing an Environment Plan guideline & Environment Plan decision making guideline

Thank you for the opportunity to provide feedback on NOPSEMA's:

- *Consultation in the course of preparing an Environment Plan guideline (Consultation Guideline)*,¹ published by NOPSEMA on 15 December 2022; and
- amended *Environment Plan decision making guideline (EP Guideline)*², published by NOPSEMA on 16 December 2022,

each published following the Full Court of the Federal Court's decision in *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 (**Appeal Decision**).

Before commenting on the Consultation Guideline itself, Santos wishes to raise a broader policy issue relating to consultation and approvals uncertainty. Proponents of offshore petroleum projects make final investment decisions based on acceptance by NOPSEMA of Offshore Project Proposals (OPPs) and the grant by NOPTA of production licences, which have historically provided sufficient approvals certainty to underpin what are often multi-billion dollar investment decisions. A full public consultation process is undertaken prior to acceptance of OPPs and Santos contends this should be able to be relied upon for all the activities that are covered by subsequent Environment Plans (EPs).

Santos contends that the consultation process currently required for EPs should be elevated to the OPP stage, even if this requires further consultation for the OPP and a commitment to continue to keep relevant persons (who were identified during the OPP stage) informed about each specific activity and the EP for that activity. This would mean the necessary consultation for all proposed activities would occur at the OPP stage to ensure the regulator has confidence in a proponent's OPP. Once the OPP is accepted by NOPSEMA, a project proponent should have the certainty to execute long-term gas contracts with customers, make other contractual and financial commitments and ultimately sanction the project. The regulator would then assess EPs that are required for the specific activities without having to consider activity-specific consultation. This is effectively the process that successfully operates under the EPBC Act for onshore petroleum projects already and Santos contends this process could therefore operate for offshore petroleum projects as well.

¹ https://consultation.nipsema.gov.au/environment-division/consultation-guideline/supporting_documents/Consultation%20in%20the%20course%20of%20preparing%20an%20Environment%20Plan%20guideline.pdf

² <https://www.nipsema.gov.au/sites/default/files/documents/Environment%20plan%20decision%20making%20guideline.pdf>

Feedback on Guidelines

Santos recognises the importance of robust and meaningful consultation and is committed to continuous improvement in our consultation processes with our broad range of stakeholders.

Santos understands and appreciates that NOPSEMA is working within the bounds of regulation 11A of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) and the Appeal Decision to provide clarity on titleholders' consultation obligations. However, the Guidelines as drafted, and particularly the Consultation Guideline, will introduce additional complexity and burden beyond the Federal Court's interpretation in several respects. Santos holds serious concerns that the Guidelines could be used to frustrate and delay project approvals by groups who oppose projects rather than have a genuine interest in consultation to help proponents reduce impacts to as low as reasonably practical and acceptable. Santos notes that there is no linkage between the Consultation Guideline and the object of the *Offshore Petroleum and Greenhouse Gas Storage Act* (Cth), which by extension is also the underlying object of the associated Environment Regulations.

Santos' key issues are:

1. Requiring mandatory co-design of the consultation process creates an unnecessary burden on both titleholders and relevant persons. The *opportunity* to co-design the process should be offered to relevant persons, but it should not be an obligation imposed on titleholders.
2. The Consultation Guideline should provide boundaries on the consultation process to avoid lengthy delays and frustration of the process by third parties (for example, reasonable timeframes).
3. References to different 'categories' of relevant persons should be removed as it creates confusion, is discriminatory and suggests that some relevant persons have 'veto' powers.

This submission also highlights topics that have not been addressed or considered in the Consultation Guideline (section 2), and provides drafting suggestions to resolve inaccuracies or ambiguities (section 3). Santos' submission concerning the EP Guideline is set out at section 4.

Santos also supports the industry submission made by APPEA.

1 Key issues on Consultation Guideline

1.1 Consultation on consultation

Section 2 of the Consultation Guideline states that 'titleholders must engage directly with persons and organisations in designing their consultation'. This gives the impression that:

- before a titleholder can consult on an environment plan (i.e., as a separate and discrete phase of regulation 11A consultation), it effectively has a positive obligation to consult on the process of consultation;
- this requirement applies to all relevant persons; and
- this requirement may apply to consultation with relevant persons each time regulation 11A consultation is conducted for an EP.

Requiring consultation to be co-designed is an undesirable extension of the Appeal Decision, which will create an unnecessary burden on both titleholders and relevant persons. The Appeal Decision requires that a titleholder demonstrate to NOPSEMA that 'what it did constituted consultation appropriate and adapted to the nature of the interests of the relevant persons' [104]. This statement was made in the context of the court adopting a 'pragmatic and practical approach' to regulation 11A. It is not pragmatic or practical for NOPSEMA, in order to be satisfied that consultation was appropriate and adapted to the interests of each relevant person, to require a titleholder to co-design the consultation process in this manner. In addition, Santos is concerned that this requirement will considerably extend the timeframes required for titleholders to complete, and for NOPSEMA to assess, regulation 11A consultation.

Santos suggests that the Consultation Guideline should be amended or clarified, such as to require that titleholders afford relevant persons an *opportunity* to co-design the consultation process, such as by advising relevant persons that they may provide feedback on the consultation process and that the titleholder will have regard to such feedback. Santos notes further that the requirement that titleholders 'must engage directly' in designing consultation appears inconsistent with the suggestion at sections 6 and 7 that titleholders may engage with relevant persons by having regard to those persons' pre-existing guidance on consultation (as to which, see section 1.2 below).

As to the third point above, it is unclear whether the bespoke approach to consultation is limited to consultation as between different relevant persons, or could also be interpreted to apply to consultation with the same relevant person in respect of different environment plans. If the former, Santos submits that the Consultation Guideline should be amended to clarify this. If the latter, Santos submits that this approach is not practical and is likely to lead to consultation fatigue.

1.2 Relevant person's guidance on consultation

Section 6 provides that:

In some cases, relevant persons have developed guidance detailing their functions, interests or activities and how and when they wish to be consulted on activities, which will be addressed in more detail below.

Section 7 provides that:

Relevant persons may have also provided the titleholder with their views of what constitutes reasonable timeframes, their availability and or accessibility issues that should be taken into account.

Consistent with the comments above, Santos agrees that titleholders should have regard to feedback from relevant persons in designing consultation for the purposes of regulation 11A. However, in Santos' opinion, NOPSEMA should ensure that its guidance does not effectively allow titleholders to be held hostage by such requirements from those seeking to prevent or delay consultation because they are simply seeking to stop the project rather than to engage in consultation for the proper purpose, which is to help project proponents reduce impacts to as low as reasonably practical and acceptable. This could be clarified by including reference to the Appeal Decision's statement at [48] that the titleholder has some 'decisional choice' about how the requisite consultation is undertaken. As it stands, it is unclear whether the ultimate yardstick for consultation is a matter for the titleholder, or for the person being consulted.

1.3 Level of participation required for different relevant persons

Section 7 of the Consultation Guideline states that:

The consultation process should take into account the level of participation in the process required for different relevant persons, and titleholders should be clear about this from the outset. There are various models for engagement which may be applicable such as IAP2's Public Participation Spectrum.

Firstly, this wording is unclear and suggests that there are differing levels of 'participation' as between different relevant persons. It is unclear whether this is meant to distinguish between the level of participation as between members of a group, or that, depending on the nature of the relevant person, the level of their engagement will be higher / lower. In any event, neither the Regulations nor the Appeal Decision *require* participation, and the titleholder has no power to require participation.

Secondly, the IAP2's public participation spectrum contains the following categories of participation, each increasing in 'impact on the decision':

1. Inform
2. Consult
3. Involve
4. Collaborate
5. Empower

It is unclear whether the Consultation Guideline is suggesting that titleholders should have regard to the 'Consult' category, or whether the Consultation Guideline is suggesting that Regulation 11A consultation might range from 'Inform' to 'Empower' based on who the relevant person is. If the latter is intended, this far exceeds the obligations of Regulation 11A and the Appeal Decision – for example, clearly Regulation

11A is not intended to 'Empower' relevant persons by 'placing the final decision making in the hands of the public'.

2 Requests for further guidance and consideration in Consultation Guideline

2.1 Consultation with foreign persons

At NOPSEMA's briefing session on 15 December 2022, a query was raised as to whether regulation 11A requires consultation with potential relevant persons who might be located internationally. NOPSEMA advised that this query would be addressed in a further 'Q&A document' to be released by NOPSEMA. To Santos' knowledge, this query has not been addressed. Given the considerable uncertainty in this area, Santos suggests that NOPSEMA should set out its expectations as to regulation 11A consultation with persons who are located internationally, but may have a 'function, interest or activity' that may be affected by activities under an environment plan, such as because the international person carries out activities in offshore areas within the 'environment that may be affected' by activities under the environment plan.

2.2 eNGOs

The Consultation Guideline does not address the status of eNGOs or other public interest groups as relevant persons. Titleholders would benefit from clear guidance from NOPSEMA as to the circumstances in which eNGOs are or are not relevant persons. For example, an eNGO which opposes a project on whatever grounds may have no genuine interest in consultation for its proper purpose (to help the proponent reduce impacts to as low as reasonably practical and acceptable) and is highly likely to seek to use the consultation process as a means to frustrate the project from progressing or ever being developed.

3 Drafting suggestions: Consultation Guideline

Ref.	Suggested amendment	Explanation
Section 2	Consultation gives both the titleholder and NOPSEMA an opportunity to receive information that it might not otherwise receive from those affected by the titleholder's proposed activity, and <u>enables</u> the titleholder to refine or change the measures it proposes to address impacts and risks by taking into account the information received.	Suggest amending consistent with [89] of the Appeal Decision to clarify that information obtained will not always lead to a change in measures to address impacts or risks – this is a matter for the titleholder to ascertain.
Section 3	<u>Subject to the below.</u> t he obligation to consult must <u>generally</u> be discharged prior to submitting an Environment Plan <u>or revision to an Environment Plan</u> to NOPSEMA.	As NOPSEMA is aware, consultation often continues after an EP is submitted to NOPSEMA, including as a result of RFFWIs from NOPSEMA. This is reflected later in section 3, where the Guideline states: As a result of the iterative process of preparing an Environment Plan and during the assessment by NOPSEMA, additional information may be received that may require further consultation processes to be undertaken, including with additional relevant persons. Santos suggests that the first statement above be amended or qualified to prevent confusion.
Section 4	To discharge [the obligations of Regulation 11A], the titleholder must clearly articulate in the Environment Plan that the consultation with the authority, person or organisation is being undertaken because they have been identified as a relevant person and the titleholder must expressly advise them of titleholder obligations <u>under Regulation 11A(4).</u> for consultation.	It is unclear what particular obligations the Guideline requires relevant persons to be advised of. If this requirement is limited to informing relevant persons of the requirements of Regulation 11A(4) – i.e., that the relevant person may request that particular information not be published, and that information subject to such a request will not be published - this should be stated. If this requirement is intended to suggest that relevant persons must be

		informed that the titleholder considers them to be relevant, Santos suggests that this is not required by the Regulations and is inappropriate in circumstances where ascertaining who is a 'relevant person' is an iterative process which will be informed by the information obtained through regulation 11A consultation. In particular, a titleholder may be unable to definitively ascertain whether a person is a relevant person until after the titleholder has conducted regulation 11A consultation with that person.
Section 7	The Environment Plan must demonstrate that the duty (to carry out consultation with relevant persons) has been discharged and that the consultation provided sufficient information about the environment and impacts on the environment <u>the titleholder has adopted, or proposes to adopt, measures (if any) – relating to the environmental impacts and risks of the activity – that are appropriate because of the consultations.</u>	Amended consistent with the footnote reference to [50] of the Appeal Decision.
Section 7	Additionally, titleholders should consider various published guidance related to good practice consultation relevant to different sectors and disciplines. Including, for example, Commonwealth Government – Consultations with agencies with responsibilities in the Commonwealth marine area guideline, and Engage Early guidance for proponents on best practice Indigenous engagement for environmental assessments under the EPBC Act <u>the Interim Engaging with First Nations People and Communities on Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999.</u>	The Engage Early guideline has been updated.
Section 10	Superficial or token consultation will not be enough and all group members should be afforded a reasonable opportunity to participate in decision-making <u>the consultation process.</u>	The reference to participation in 'decision-making' has been drawn from a native title context (as is clear from the paragraph of the Appeal Decision referenced), and is inappropriate in this different regulatory context.
Section 10	The consultation process should produce more detail and precision <u>as to the functions, interests or activities of relevant persons</u> , which will <u>may</u> inform titleholders' mitigation of the environmental risks and impacts.	Amended to clarify consistent with the footnote reference to [79] and [89] of the Appeal Decision.
Section 11	Through the assessment process, NOPSEMA may make reasonable enquiries to assist it to evaluate the materials presented in the Environment Plan and forms a view as to whether it is satisfied that	Santos encourages NOPSEMA to consider the potential procedural fairness implications of NOPSEMA conducting its own enquiries and considering information from other sources. Having regard to the standard of reasonable

	<p>the titleholder has discharged its duty to identify and consult with each relevant person.</p> <p>In addition to the content of the Environment Plan, the assessment team may consider information from other sources as it deems necessary in accordance with NOPSEMA's Environment Plan Assessment Policy (at [insert cross reference]) and Decision Making Guidelines (at [insert cross reference]).</p> <p>[Insert brief summary of how information will be recorded and dealt with, or cross-reference to NOPSEMA's policy in this regard]</p>	<p>satisfaction set out in the Appeal Decision, it is important that any information NOPSEMA relies on to reach a state of reasonable satisfaction is clearly documented and transparent to the titleholder. It may be appropriate to document NOPSEMA's process in this regard in the EP Guideline, or include a cross-reference to where this is set out elsewhere.</p>
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4 Drafting suggestions: EP Guideline

The below comments relate to the amendments to the EP Guideline, not to the EP Guideline as a whole. To the extent that Santos' comments on the Consultation Guideline above are relevant to the EP Guideline, they are incorporated in this section.

Ref.	Suggested amendment	Explanation
Section 4	<p>To accept an environment plan under r 10, NOPSEMA must be reasonably satisfied that the environment plan demonstrates that the acceptance criteria including any duty imposed on the titleholder under r 10A have been met. The word "reasonably" emphasises that there must be a clear justification for the decision, which is to be determined objectively, based on the facts and evidence.</p>	<p>The reference to 'facts and evidence' is not supported by the Appeal Decision. Further, it is contrary to the regulatory requirement that NOPSEMA's standard of satisfaction is as to what is 'demonstrated' by the environment plan, and suggests the standard of reasonable satisfaction can be supported or undermined by facts and evidence outside of an environment plan. This was the subject of the applicant's unsuccessful ground 2 in <i>Tipakalippa v NOPSEMA (No 2)</i> [2022] FCA 1121 (see at [246]-[275]). Santos notes that its proposed amendment is consistent with the equivalent wording in the Consultation Guideline.</p>
Section 12.3	<p>Effective consultation has taken place with relevant persons demonstrating a reasonable opportunity has been provided to relevant persons to provide input, and engagements have facilitated a genuine two-way dialogue has occurred to further understand the environment in which the activity will take place and that the measures adopted (if any) because of the consultation are appropriate.</p>	<p>Amended on the basis that the titleholder has no ability to require relevant persons to engage in a two-way dialogue. Santos notes that section 8 of the Guideline suggests engagements should 'facilitate genuine two-way dialogue'. For completeness, Santos notes that the language of 'two-way dialogue' does not appear in the Appeal Decision.</p>
Section 12.3	<p>relevant persons have been provided a reasonable period to consider information and make an informed response make an informed assessment of the possible consequences of an activity on their functions, interests or activities.</p>	<p>Amended consistent with the Regulations. There is no regulatory requirement for a relevant person to provide a response, and again, a titleholder has no ability to compel one.</p>