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Dear [REDACTED]

**RE: PROGRESSING SUCCESSFULLY THROUGH RELEVANT PERSONS CONSULTATION ON OFFSHORE PETROLEUM ENVIRONMENT PLANS**

With the most recent court decision from *Cooper v NOPSEMA* and the many conversations we are having around progressing Environment Plan (EP) approvals I thought it was worth providing some clarification around several issues I am hearing raised by industry, directly with NOPSEMA and more broadly with other government agencies.

*Evidence base for NOPSMEA assessments and decisions on EPs*

The most significant issue is what NOPSEMA can take into account when assessing an EP submission. When undertaking assessments, the delegate making decisions based on whether the written environment plan *itself* demonstrates the criteria are met, including attachments and any sensitive information reports. We continue to encourage conversations between titleholders and NOPSEMA leading up to the submission of an EP, however once submitted the decision maker can only assess written documentation provided through the EP submission. This is common in statutory decision making and necessary to ensure NOPSEMA can maintain an impartial decision-making environment. Therefore, if a titleholder chooses to leave information out of the EP for any reason it potentially exposes a gap, with the decision maker unable to consider critical information.

*Objectives-based outcomes approach to regulation of consultation*

A further concern raised by industry is that what is being required by NOPSEMA is constantly changing. While every project and every EP is different, the regulations in relation to consultation under regulation 11A of the Environment Regulations have not changed. Consultation is required to ensure information from relevant persons is obtained to inform the evaluation and management of environmental impacts and risks, which includes cultural features. For relevant persons to provide information on their functions, activities or interests that may be affected, the regulations clearly stipulate they need to be sufficiently informed so as to make an assessment of the possible consequences of the activity to their functions, activities or interests – that is they have enough information about the activities the titleholder is to undertake, in plain language, so that they can provide input.

The input provided by relevant persons is necessary to inform the content of the EP, including information about the values and sensitivities of the environment, and the evaluation of impacts and risks. In the recent court case, the Court re-affirmed that the consultation must be completed in order for NOPSEMA to properly assess the evaluation and management of environmental impacts and risks.

Consultation required to inform the content of the EP is distinct from the ongoing consultation plan required under regulation 14 which relates to the ongoing operations of the activity.

In discussions with titleholders while EPs are being developed, NOPSEMA will at times provide suggestions on how to address specific issues based on practice we see working well. Our advice may continue to evolve as we see more examples of good practice. This does not reflect a change in requirements, and we make clear our advice is to provide suggestions only, and for the purposes of assisting titleholders to navigate through the objective-based regulatory framework.

*Limits on use of conditions to address outstanding consultation preventing acceptance*

NOPSEMA has always had powers under the Regulations to approve an EP, refuse an EP where we are not reasonably satisfied or accept an EP with conditions or limitations. Based on sound legal advice NOPSEMA made a decision to accept an EP with conditions around the closing out of regulation 11A consultation requirements to assist titleholders with determining when consultation for this purpose is 'complete' and to allow projects to continue moving forward. Following consideration of all the facts, the court did not agree with this approach and clearly articulated that relevant person's consultation required to inform the development of an EP must have concluded prior to the submission of the EP.

*Responsibility to consult rests with the titleholders(s)*

The responsibility for consultation with relevant persons sits with the titleholder, NOPSEMA does not consult with parties in relation to specific projects or activities. We will at times meet with prescribed body corporates, land councils, and other interested organisations such as fishing industry representatives, environmental advocates, and community groups to discuss NOPSEMA's role and the statutory approval process. This is consistent with our legislated role to undertake activities that promote and advise on the regulatory regime. In addition, we do not meet with any organisation representing individuals in relation to titleholders' projects. As stated above, the responsibility for consultation sits with the titleholder.

*Challenges and way forward*

Below is a summary of some common issues observed by NOPSEMA that can assist in more successfully carrying out the consultation required and preparing EPs that provide the robust evidence base to support demonstrating compliance and subsequent acceptance decisions:

- Information in the possession of the titleholder is not shared with relevant persons as part of the consultation process;
- Conversely, titleholders are omitting information or facts from EPs regarding information shared by the titleholder with relevant persons that would be instructive in terms of ensuring the EP demonstrates the consultations required by regulation 11A have been completed.
- Titleholders choosing to leave information out of EPs for a variety of other reasons and therefore preventing it from being taken into account as part of the assessment decision. In some cases, relevant information is not included, which comes to the attention of the decision maker during the assessment process.
- The NOPSEMA procedure on oil pollution risk management guidance (GN1488) being used as a basis to identify persons or organisations as relevant persons under regulation 11A(1)(d). NOPSEMA has not suggested that this procedure be used for this purpose, it is purely for the evaluation of oil pollution

risks and to inform preparedness and response planning for oil spill risk management. It has been a practice of many titleholders to use the environment that may be affected (EMBA) coming from this work as a basis for determining relevant persons. Even though there is nothing preventing a titleholder using this as a methodology to determine relevant persons, this is not a requirement of NOPSEMA.

- Addressing cultural features of the environment and impacts to cultural heritage raised through consultation is an area causing concern for some titleholders, in particular how to document these. This is an area we would encourage you to reach out and discuss if you are having difficulty addressing them in the EP.
- Consent from relevant persons is not required for an activity to proceed. Regulation 11A affords a right to people or organisations to be consulted, have objections or claims considered and where related to environmental management appropriate measures adopted to reduce impacts and risks to acceptable/ALARP. Entering into agreements relating to how First Nations communities are consulted and how cultural heritage will be protected appears to offer a smoother pathway to ensure the duty to consult is discharged and impacts and risks can be demonstrated to be managed to acceptable/ALARP.

#### *NOPSEMA Guidance*

While we are in the process of updating the Consultation in the course of preparing an Environment Plan Guideline, we encourage ongoing conversations between NOPSEMA and titleholders around their specific EPs. We find this approach highly beneficial and one that achieves better outcomes. If you have heard information second hand on what NOPSEMA requires which causes concern, please do not hesitate to call me direct.

I have been, and will continue to be, available to discuss these and any other issues surrounding the EP approval process, as are the NOPSEMA team. We continue to be committed to progressing the approval process.

Yours sincerely

Sue McCarrey

**Chief Executive Officer**

13 October 2013