CLARIFYING CONSULTATION REQUIREMENTS FOR OFFSHORE PETROLEUM & GREENHOUSE GAS STORAGE REGULATORY APPROVALS | CONSULTATION PAPER

Australian Energy Producers |8 March 2024

Australian Energy Producers welcomes the opportunity to provide feedback on the Department of Industry, Science and Resources (DISR) Clarifying Consultation Requirements for Offshore Petroleum & Greenhouse Gas Storage Regulatory Approvals Consultation Paper (the Consultation Paper).

DISR's consultation paper[1] acknowledges that recent court decisions have introduced uncertainty on how titleholders should consult with relevant persons. It says: "The government believes there may be benefit in further clarifying the consultation requirements outlined in Australia's current Offshore Environment Regulations."

Australian Energy Producers welcomes the Government's recognition that the regulations need to be clarified to provide certainty for titleholders.

The Australian oil and gas industry is committed to comprehensive and meaningful consultation with Traditional Owners and communities that may be impacted by our operations. However, as DISR's discussion paper notes, recent court decisions – in particular the Federal Court ruling in *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] almost 15 months ago – have highlighted ambiguities in the regulations that have led to a significant increase in the consultation required by the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) for Environmental Plans (EPs).

In addition to creating "consultation fatigue" for titleholders and Traditional Owners, the uncertainty has also significantly increased the workload of NOPSEMA, resulting in a significant backlog of EPs awaiting acceptance and unprecedented delays in project approvals. This has delayed potential gas supply to contracted customers in Australia and Asia, and impacted decommissioning and carbon capture and storage projects.[2]

This submission identifies a number of cross-industry issues identified with the current regulations within the scope of this consultation and proposes amendments to the regulations and other avenues through which the Government can provide more clarity on their application.

Full and proper consideration of potential solutions to the current regulatory ambiguity is needed to ensure that any changes do not lead to unintended consequences, increase the legal risk of judicial review or results in an onerous and complex compliance regime. Additionally, clarity is needed to ensure that NOPSEMA has clear authority to enforce compliance with the OPGGSA or regulations, that third parties do not have standing to ask a court to do this.

To minimise the impact of excessive consultation requirements on industry and stakeholders, whilst maintaining adequate and reasonable opportunity for relevant affected persons to be consulted, the Australian Government should consider amendments to the OPGGS environment regulations and the

[1] https://consult.industry.gov.au/offshore-petroleum-consultation-requirements
[2] Economics Legislation Committee, NOPSEMA, Senate Estimates 26 October 2023

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creation of guidelines that are up to date to assist and instruct industry and relevant affected persons. In summary Australian Energy Producers recommend:

- The creation and implementation of a clear statement of purpose and objectives of consultation under the regulations.
- Clarification on the adequacy of effort to contact relevant affected persons and when consultation activities are considered complete, including the establishment of time-based limits.
- Clarification on how information provided and shared by relevant affected persons is stored, shared and reported to the offshore regulator.
- Clear guidance on identifying a relevant persons who may be affected by the activity and who is within a defined geographic area for the activity.
- Cultural features are clearly defined in the regulations, not ascribed to an individual and requiring evidence of a belief held by a group.
- Clarification on what activities and risks constitute effects and impacts to relevant persons.

Australian Energy Producers looks forward to working with Government to progress these necessary reforms.

Yours sincerely

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Theme 1: Ensuring targeted and effective consultation

The current regulations lack a clear statement of the purpose or objective of consultation where the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations[3] (the Regulations) 25(1), lead to potential misinterpretation and in some cases misuse of the Regulations to delay activities. To improve targeted and effective consultation Australian Energy Producers recommends that the government explicitly state the purpose and objectives of consultation, as articulated in the Full Court's decision in Tipakalippa[4]. This would provide clarity to titleholders, relevant persons and regulatory authorities regarding the purpose and objectives of consultation. Recent case law has identified the purpose of consultation under Division 3 is to:

- inform the titleholder and NOPSEMA about the environment that may be affected and the possible environmental impacts and risks of the proposed activity in this area through planned and unplanned events;
- inform the titleholder about appropriate measures that may be adopted to mitigate the environmental impacts and risks associated with the proposed activity; and

[3] Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations: Federal Register of Legislation (link)
[4] Federal Court of Australia: Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193 (fedcourt.gov.au), paragraphs 50 & 56.

- provide NOPSEMA with the requisite information to determine whether the measures adopted, or proposed to be adopted, by the titleholder in the environment plan are appropriate in relation to the environmental impacts and risks of the activity.

How much information is enough?

Australian Energy Producers notes that the current regulations lack clarity regarding the standard for consultation efforts, particularly in regard to 'sufficient information' and the need to distinguish when consultation for the purpose of preparing an environment plan is considered complete. We note that differences in views between titleholders and relevant persons on what constitutes sufficient information, frequently result in extending consultation timeframes.

To provide clarity we recommend that Regulation 25(2) is amended to explicitly require titleholders to make reasonable efforts in consultation during the preparation of an EP. We suggest that reasonable efforts and a clearly defined process is provided in guidance materials to support this implementation. Additionally, introduce new subsections to specify when consultation is considered complete and to confirm that Regulation 30 does not affect ongoing consultation obligations. Changes to the Regulations should also consider the following items:

- Historical engagement and engagement within a broader approvals framework can be recognised as part of ongoing engagement, which contributes to meeting requirements of Section 25 of the Regulations;
- Acknowledging that resolution of issues with consultation participants is not a requirement for meeting regulatory consultation requirements, recognising that there may be unresolved views;
- Confirm that participation in consultation processes is not compulsory;
- Failure of a relevant person to consult will not delay or result in the consultation process being incomplete. A defined timeframe from the commencement of engagement should be implemented so that if titleholders have sought engagement with a relevant person but have not been able to receive feedback following multiple attempts to contact them through more than one line of communication (if available) then this is considered sufficient for the requirement of consultation; and
- Acknowledgement that those being consulted may choose to withhold information, or to not engage in consultation, if information is withheld or not communicated to a titleholder, then the titleholder is not required to consult further with that person in this respect.

Australian Energy Producers further recommends that regulations are included to inform factors on reasonable efforts and have regard for nature, duration, and scale of an offshore activity. In addition, consultation requirements relating to revisions and 5-yearly reviews of current EPs including operations related EPs to only require consultation in relation to updated information and planned impacts.

How are different types of consultation recorded?

Australian Energy Producers' members have identified a number of issues with the recording and reporting of consultation related activities in the preparation of their environment plans. Firstly, companies advise that during the consultation process, instances have arisen where information shared or requested can be sensitive to certain genders or cultural backgrounds, potentially leading to discomfort or lack of engagement among participants. To address this we recommend that guidance is provided to titleholders on how sensitive information is collected, reported and shared. This may include:

- Notifying participants upfront how sensitive information will be managed; and
- how sensitive information is provided to NOPSEMA.

In the consultation process, there have been instances where relevant persons may prefer or be only willing to provide information orally or on their country, making it challenging to document their evidence or information in a consultation process that primarily relies on written submissions and formal meetings. We recommend clarification on how sensitive information is shared, including oral information.

There is currently no mandate for NOPSEMA to see a summary of information provided to a relevant person in the report on consultation in Regulation 24(b) which leads to a lack of context for assessors and relevant persons when the EP is published. We recommend that Regulation 24(b) is amended to include a requirement for the titleholder to provide a summary of the information provided to relevant persons. Alternately, this requirement could be provided in related guidance. Where the guidance for requisite information to be provided, including guidance on how technical information used for consultation can be appropriately simplified. Minimum information requirements for consultation should be prescribed where such requirements should be proportionate to the nature, scale and risks of the activity.

When is a consultation process considered 'complete'?

Uncertainty on the completeness of consultation is a key issue largely unaddressed in the current Regulations, specifically the absence of any definitions or time-based limits to complete consultation. Titleholders/companies have identified several issues which should be clarified as part of the regulatory reform process. We note that the current regulations create tension between the requirement to "complete" consultation before submission of an environment plan and the need for ongoing consultation after acceptance. This tension is further exacerbated by uncertainty about whether consultation during the assessment period may inadvertently undermine the claim that consultation was "complete" at submission. We recommend that Government either:

- Clarify the stages of consultation over time such as prior to first submission, and then create obligations for consultation during the NOPSEMA assessment process.

and/or

- Clarify that 'in preparation of the EP' means when the titleholder has the EP for modification and that when the EP is under assessment the titleholder need not consult so as to protect the integrity of the assessment.

and

- That regulation acknowledges that resolution of issues with consultation participants is not a requirement for meeting regulatory consultation requirements, recognising that there may be unresolved views.

An associated issue arises when certain EPs, are required to undergo a public comment period before their first submission as described in Regulation 30. This requirement necessitates that consultation with relevant persons must be deemed "complete" prior to public comment process. This public comment process provides further opportunity for relevant persons to identify themselves (i.e. meaning consultation cannot have been completed) directly to NOPSEMA, rather than through a titleholders consultation process. We recommend that Government reviews the interaction of consultation requirements for an EP with the objective of streamlining/ minimising duplication.

We note that the 'reasonable period' for consultation is currently applied in two separate ways; the first being related to the reasonable opportunity that someone has between the time they become aware of the activity's possible consequences on their functions, interests, and activities and first submission, and the second being a reasonable time someone has with sufficient information.

The Government should amend Regulation 25(1) to more clearly define these two requirements and potentially link the new 'reasonable opportunity' to the awareness raising activities. Alternatively, Government could consider amending regulation 25(3) where further detail and process is provided on time and effort on behalf of the applicant.

With regard to timeliness, we would recommend 'reasonable period' and reasonable opportunity are defined in the regulations and include a prescribed time period for application, for example 30 calendar days. If this is not sufficient time, any other time period agreed between the titleholder and the relevant person demonstrating a clear reason on the basis of reasonable needs.

Providing a reasonable time for consultation

Australian Energy Producers acknowledges that titleholders are responsible for conducting an effective consultation process that meets the requirements of the regulations and the reasonable needs of the relevant affected persons. Similarly, we recommend that consultation should be conducted early with the timing and frequency guided by the scale and nature of the underlying activity, environment that may be affected, and input from relevant persons/entities and include 30 calendar days for consultation or otherwise agreed between the titleholder and relevant person.

We also recommend clarification that participation in consultation processes are not compulsory, where titleholders are not required to follow up on non-responses, unavailability or requests for extended consultation periods which are made outside of the publicised consultation timeframe, as described above, failure of relevant persons to consult will not delay or result in the consultation process being incomplete.

Coordination

Australian Energy Producers encourages collaboration amongst titleholders for consultation where the opportunity presents itself and that collaboration with industry and community representative bodies and organisations could help to reduce “consultation fatigue”.

The Regulations should allow flexibility for titleholders to satisfy the consultation requirements through collaboration with other titleholders and interest holders. This may occur by consulting about classes of activities on a regional (not activity-specific) basis. This should not be a requirement but there should be flexibility to allow for collaborative and other approaches to be developed to support the purpose of the consultation. For example, the preparation and distribution of educational material which is relevant to certain types activities irrespective of titleholder, these include:

- Educational explanations of activities (drilling, seismic, construction activities, operational facilities, decommissioning); and
- Communication activities to build awareness of consultation and enable self-identification for the purpose of consultation.

Consultation fatigue could be mitigated through the following contributing to meeting the requirements of Section 25 of Regulations:

- Coordinated consultation among titleholders; and
- Consulting on multiple activities (ie title holders “bundling” activities” when they consult with representative bodies.

Theme 2: Identifying relevant persons to consult under the Offshore Environment Regulations

Australian Energy Producers notes that under the current regulations, specifically Regulation 25(1), terms including “functions”, “interests” and “activities”, are not defined, leading to ambiguity in their interpretation and application for the purposes of identifying relevant persons to which to consult.

The Government should define the terms “functions”, “interests” and “activities” in the Regulations for the purposes of removing ambiguity and doubt to industry and stakeholders.

Identifying relevant persons

Currently, the Regulations do not provide clear criteria for determining who qualifies as a “relevant person” under Regulation 25(1), leading to uncertainty in the consultation process.

Australian Energy Producers recommend that Government establish specific criteria for determining 'relevant persons,' including considerations related to the nature and degree of impacts and risks on

functions, interests, or activities, as discussed by the Full Court in Tipakalippa[5]. Consideration of the following could be included in regulations and or guidance:

- A person or organisation will only be taken to be a relevant person for the purposes of Regulation 25(1)(d) where:
    - the impacts and risks of the planned activity to the environment in the area of that person's functions, interests or activities are of a nature and degree that is capable of having an effect on those functions, interests or activities; and
    - the functions, interests or activities of the person will be affected by the proposed activity in more than an immaterial or negligible way.
- Inclusion of detail on the factors that inform what "immaterial" and "negligible" having regard to the nature, duration and scale of an activity.

For further clarity, a 'relevant persons' definition could include:

- Persons with a relevant interest or activity that may be materially affected by and proximal to planned activities;
- A general interest in the environment is not relevant for the purposes of consultation in the preparation of an EP. There is provision in the regulations for comments of a general nature to be provided (an example being the public comment phase for an offshore project proposal);
- For first nations groups, this will be guided by the principles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[6]; and
- Groups of individual interest holders may be represented through an industry body (e.g. for fisheries).
- Exclusion of persons and groups in international jurisdictions outside of Australia.

Australian Energy Producers notes that the Regulations do not address the determination of 'relevant persons' in the context of communal interests, leaving potential ambiguity in the consultation process. We recommend that a new subsection is inserted under Regulation 25 to provide clarity on determining 'relevant persons' in cases involving communally held functions, interests, or activities, for example of First Nations people, based on recognised representative bodies as suggested by the Full Court in Tipakalippa[7]. In line with Articles 19 and 32 of the UNDRIP, consultation should occur through the First Nations group's chosen representative entities or bodies, unless a representative body specifies an individual or individuals who are required to be consulted.

The current process followed by titleholders to identify relevant persons may not always result in the identification of each and every relevant person. Challenges such as workability, changing interests,

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[5] Federal Court of Australia: Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193 (fedcourt.gov.au)
[6] United Nations Declaration on the Rights of Indigenous Peoples (link)
[7] Federal Court of Australia: Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193 (fedcourt.gov.au)

ascertain ability, and individuals deliberately avoiding the process can lead to incomplete identification. It is recommended that Government considers ways in which identifying relevant persons can be simplified and possibly incorporate advice for individuals from representative communal and industry bodies.

Australian Energy Producers recommends the Regulations be amended to incorporate the findings and observations of the Federal Court judgment in Munkara v Santos[8] (Munkara Decision), in particular the consideration and capture of cultural features of an area to which Aboriginal people have a spiritual connection. As Justice Charlesworth noted in her Judgment:

> *In my view, to the extent that the applicants rely upon beliefs and values relating to or attributable to an area or place, the correct question is whether those beliefs and values are properly to be characterised as cultural features of the place. More specifically, it is necessary to ask whether the beliefs and values are held by the relevant people as a people. There is considerable dispute as to who are the relevant people for the purposes of that enquiry. But the enquiry cannot be avoided by a construction of the Regulations that ignores the communal or collective aspect of the word "cultural" in its ordinary meaning*.

Clarification of 'may be affected'

There are a number of ways offshore activities can affect the surrounding marine environment and communities which are not limited to the offshore petroleum industry. Typically, these impacts can be visual (vessels, facilities) noise related or areas of oil spill risk. NOPSEMA currently provides guidance on oil spill modelling that requires proponents to develop "environment that may be affected" (EMBA) model[9]. Australian Energy Producers recommends that an EMBA should not be prescribed as a mechanism for determining the extent of an area that may be affected for the purposes of defining the geographical extent of an area that may be affected. An EMBA is an unmitigated, probabilistic model used to determine the theoretical extent of oil spills in all conditions to very low concentrations that in many circumstances would be difficult to ascertain and observe directly.

Other Issues

Ongoing consultation

The requirement for ongoing consultation after the acceptance of an EP is not clearly linked to the environmental management system (EMS) and the continued management of environmental impacts and risks to As Low As Reasonably Practicable (ALARP). This lack of clarity can lead to disjointed efforts and a disconnect between consultation and effective environmental management. It is noted that there is some inconsistency between Regulation 22(9) and 25(1) which will need to be resolved. Industry would advise that any solution that prescribed ongoing consultation with everyone on an ongoing basis would likely be

[8] Munkara v Santos NA Barossa Pty Ltd (No 3) [2024] FCA 9 (link)
[9] NOPSEMA Environment Bulletin - Oil Spill Modelling April 2019 (link)

overly burdensome and could contribute to consultation fatigue. Further definition in the regulations is needed to define and differentiate 'ongoing consultation' and 'ongoing engagement'.

Obligation to disclose information

Australian Energy Producers recommends that a requirement be placed on relevant persons to disclose information to a title holder during the consultation process. This requirement would go some way to prevent "new" risks being introduced by relevant persons at the conclusion of consultation. As Justice Charlesworth noted in her Judgment[10]:

> *The applicants' construction of the word "new" would include a risk first brought to the titleholder's attention by a relevant person, being a risk that was known by the relevant person to exist at the time of the reg 11A consultative process, and peculiarly within the relevant person's knowledge, and yet not previously disclosed at the time of those processes by that person when afforded the opportunity. It is difficult to envisage why Parliament would intend such a late disclosure to be regarded as "new". Such a narrow construction of the word "new" would defeat the objective of establishing an effective regulatory framework. It would denude the consultative processes mandated by reg 11A of their purpose. It would result in the resources of NOPSEMA being diverted again to consider what the statutory process would have captured, were it not for the relevant person's withholding of information. It would place the titleholder in the invidious position of having large scale activities immediately halted upon the belated disclosure, lest it be subject to criminal sanction. Regulation 17(6) should not be construed in a way that automatically permits of any such scenario.*

Resubmission of Environment Plans

Regulation 39 addresses a number of circumstances in which an obligation to submit a revised environment plan may arise, including that there is a new activity (Regulation 39(1), (2), (3), (4)), a significant modification or new stage in an activity (Regulation 39(5)), a new or increased environmental impact or risk (Regulation 39(6)), or a change in titleholder (Regulation 39(7)). Regulation 40 enables NOPSEMA to provide these requests. Australian Energy Producers recommend the Regulations be amended to clarify when a new or revised EP needs to be submitted under Regulation 39(6) – specifically clarity on a "new" and "increased risks to the environment". Further we would suggest that capacity is provided for either new or increased risk to be addressed by the titleholder by updating the EP in accordance with the approved EP's management of change process.

[10] Munkara v Santos NA Barossa Pty Ltd (No 3) [2024] FCA 9, paragraphs 228 & 229 (link)