

Exemptions

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1. Introduction

NOPSEMA may grant certain exemptions from the requirements of the Schedule 3 to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGSA) and some of the regulations.

Generally, NOPSEMA must not grant an exemption unless it is satisfied, on reasonable grounds that it is impracticable for the relevant person to comply with the provision for which the exemption is being sought. NOPSEMA may also grant exemptions to a class of persons in accordance with subsection 46(2) of the *Acts Interpretation Act 1901*.

The power to issue exemptions is necessary because of the varied nature of the facilities to which the Act and the regulations apply. For example, in the case of facilities that are not normally staffed the workplace arrangements in Part 3 of Schedule 3 to the Act may be impracticable. Although aspects of the legislation are performance-based (eg. duty of care), many other aspects are prescriptive and therefore particular circumstances may arise that make an exemption necessary.

One of NOPSEMA's main policy objectives is that the number of exemptions issued by NOPSEMA be kept to a minimum. In addition to this, NOPSEMA aims to contribute to continuous improvement of legislation so that ultimately, there is a reduced need for exemptions to be issued.

The references to legislation made in this Policy refer to the Commonwealth *Offshore Petroleum and Greenhouse Gas Storage Act 2006*. Refer to the relevant State or Northern Territory *Petroleum (Submerged Lands) Act 1982* for equivalent provisions for facilities in designated coastal waters.

2. Scope of this Policy

This policy addresses the areas in which NOPSEMA may grant exemptions. These areas include:

- exemptions from the operation of one or more provisions within Part 2 of the *Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009* (OPGG(S)) [OPGG(S) Reg 2.39].
- exemptions from a range of hazardous substance and noise exposure requirements [OPGG(S) Reg 3.7].
- exemptions from Workplace Arrangements [OPGGSA Schedule 3 Part 3], made by way of a written order. These are legislative instruments and therefore consideration needs to be given to other legislation in drafting these [OPGGSA Schedule 3 Clause 46].

NOPSEMA also may consent to an operator operating in a manner that is different from the safety case in force [OPGG(S) Reg 2.28]. Although the granting of consent is not strictly an exemption, it is addressed within this policy.

NOPSEMA does not have power to grant exemptions from the requirements of Chapter 4 (Diving) of the Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009. The development of this policy satisfies the note to OPGGS(S) Regulation 2.39.

3. Relevant Legislation

Offshore Petroleum and Greenhouse Gas Storage Act 2006 [Schedule 3 Clause 46 & Clause 92]

Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009 [Regulations 2.28, 3.7, 2.39 & 3.31]

4. Legislative limitations

Exemptions can only be granted where there are specific powers within the legislation for NOPSEMA to do so. Applications for exemptions must be made by the relevant person referred to in the legislation and accompanied by sufficient supporting evidence for NOPSEMA to make a decision.

It is the responsibility of the operator or responsible party to make the arguments for the granting of an exemption. It is not the role of NOPSEMA to make the case for the applicant. Exemptions can only be granted by NOPSEMA, not by OHS inspectors.

5. Exemptions

Exemptions may be granted which allow the operator or other responsible parties to be at variance to specific requirements of the legislation, whilst still meeting the overall objectives of the legislation.

Exemptions may only be sought by the person referred to in the exemption provisions of the relevant legislation. An exemption cannot be requested on behalf of another party.

In all cases, a person seeking an exemption must do so before undertaking, or omitting to undertake, an act for which the exemption is sought. That is, an operator or responsible party cannot seek an exemption from doing something they have already done or failed to do. In addition, the exemption must be sought allowing sufficient time for NOPSEMA to assess the application.

5.1. Exemptions from Part 3 of Schedule 3 to the OPGGSA ('Workplace Arrangements')

NOPSEMA may grant written exemptions from any or all of the provisions of Part 3 of Schedule 3 to the OPGGSA [OPGGSA Schedule 3 Clause 46(1)]. Part 3 comprises the Workplace Arrangements. This includes provisions associated with health and safety representatives (HSRs); health and safety committees and emergency procedures.

NOPSEMA must be satisfied on reasonable grounds that it is not practicable for the person to comply with the provision or provisions [OPGGSA Schedule 3 Clause 46(2)]. Therefore the application for exemption must include a demonstration of why it is not practicable to comply with the legislative requirement(s). The obligation is on the responsible party to make this demonstration, not on NOPSEMA.

NOPSEMA has 28 days in which to make a decision on the exemption application [OPGG(S) Reg 3.31(2)]. During this time, NOPSEMA must consult with persons who might be affected by the decision and take into account any submission made by those persons [OPGG(S) Reg 3.31(3)]. In granting an exemption,

NOPSEMA may include conditions on the exemption and may specify a period of time in which the exemption applies [OPGGS(S) Reg 3.31(4)].

An order exempting a specified person from a provision of Part 3 of Schedule 3 to the OPGGSA must be made in writing [OPGGS(S) Schedule 3 Clause 46(1)] and must give reasons for the decision [OPGGS(S) Reg 3.31(5)].

5.2. Exemptions from Part 2 of the OPGGS(S) Regulations ('Safety Cases')

The Regulations provide that NOPSEMA may exempt an operator from one or more of the provisions of Part 2 of the *Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009* [OPGGS(S) Reg 2.39]. Part 2 of the OPGGS(S) Regulations deals with:

- requirements for contents of safety cases;
- submission and acceptance of safety cases;
- revised safety cases; and
- withdrawal of acceptance of a safety case.

However, the only regulations within this Part which place an obligation on the operator for which an exemption may be considered are the requirements to:

- demonstrate to NOPSEMA, to the reasonable satisfaction of NOPSEMA, that:
 - (a) in the development or revision of the safety case for the facility, there has been effective consultation with, and participation of, members of the workforce; and
 - (b) the safety case provides adequately for effective consultation with, and the effective participation of, the members of the workforce, so that they are able to arrive at informed opinions about the risks and hazards to which they may be exposed on the facility [OPGGS(S) Reg 2.11];
- have a scope of validation for the facility agreed between the operator and NOPSEMA prior to submission of a safety case [OPGGS(S) Reg 2.24(4)];
- submit a revised safety case under certain circumstances such as a change in technical knowledge, a proposal to modify or decommission a facility (if not adequately addressed in the safety case in force for the facility), a significant cumulative change in risk of major accident events, a significant change to the safety management system, or a change in the activities conducted at the facility [OPGGS(S) Reg 2.30(1)];
- submit a revised safety case to NOPSEMA as soon as practicable if there has been:
 - (a) a significant increase in the level of risk to the health or safety of persons at or near the facility; or
 - (b) a series of increases in the level of risk to the health or safety of persons at or near the facility that, in total, are significant [OPGGS(S) Reg 2.30(2)];
- have a scope of validation for a proposal to modify or decommission a facility agreed between the operator and NOPSEMA prior to submission of a revised safety case [OPGGS(S) Reg 2.30(3)]; and
- submit a revised safety case five years after the acceptance of a safety case or revised safety case [OPGGS(S) Reg 2.32(1)].

The exemption power in OPGGS(S) Regulation 2.39 does not enable NOPSEMA to grant an exemption from the requirement to have a safety case in force under either Regulation 2.44 or 2.46. The Australian Government Solicitor has advised that in the case of Regulation 2.44, that NOPSEMA cannot exempt a person from the requirement that there be a safety case in force for a facility. The obligation to have a safety case in force is located in Part 6 (headed 'Penalty provisions'), not in Part 3.

It should also be noted that the power to grant an exemption from the contents of a safety case only covers the safety case's provision for effective consultation with, and effective participation of, members of the workforce.

The OPGGS(S) Regulations are silent on the timeframe for assessment of a request for an exemption. The time required to make a decision will depend on the type of the exemption sought and the nature of the issues that must be assessed.

5.3. Exemptions from Hazardous Substances and Noise Requirements of the OPGGS(S) Regulations

NOPSEMA may grant an exemption to a person from requirements relating to a prohibition on the use of certain hazardous substances [OPGGS(S) Reg 3.4(2)], limitations on exposure to certain hazardous substances [OPGGS(S) Reg 3.5(2)] or exposure to noise [OPGGS(S) Reg 3.6(2)]. The authority to grant an exemption from the requirements of these regulations is provided for in Regulation 3.7.

NOPSEMA may choose to grant an exemption if it considers that, in specified circumstances, compliance is not practicable [OPGGS(S) Reg 3.7(3)]. In granting an exemption, NOPSEMA is able to include conditions and limitations on the exemption [OPGGS(S) Reg 3.7(4)]. Exemptions on these grounds must be sought by the operator, employer or person in control of the particular work carried out at the facility [OPGGS(S) Reg 3.7(1)].

5.4. Consent to undertake work outside the requirements of the Safety Case

NOPSEMA may also consent to the operator undertaking work outside the requirements of the safety case in force [OPGGS(S) Reg 2.28]. Whilst this is not strictly identified as an exemption, the intent is that for certain circumstances, the operator would be free from an obligation placed on them by their own safety case. Consent may only be given to an operator of a facility and must be in writing.

To consent to an operator undertaking certain work in a manner that is different from the safety case in force, NOPSEMA must be satisfied that there will not be an occurrence of a significant new risk or significant increase in an existing risk. The operator must provide demonstration to NOPSEMA in writing that there is no significant new risk or significant increase in an existing risk from conducting the activity.

It is anticipated that consent to operate in a manner different from the safety case in force would only be granted for one-off short duration activities, such as unforeseen work that may be required to be conducted as a result of an emergency situation. For planned or longer duration activities the operator should revise their safety case. Such consent will not ordinarily be considered where, in the course of normal activities, situations arise such that safety-critical plant or equipment fails to operate as intended and is out of service for an extended period.

6. Other Considerations

NOPSEMA will endeavour to notify the operator, or party seeking the exemption or consent, within 3 working days as to whether the supporting documentation is complete and the time likely to be required for the assessment.

Provisions are included to address failure to comply with Schedule 3, and subordinate legislation, in an emergency [OPGGSA Schedule 3 Clause 92]. In these instances, the responsible party would be required to prove that it was not practicable to comply with the legislative requirement because of an emergency prevailing at the relevant time.