

NOPSEMA Inspector OHS Enforcement Decision Appeals

Document No: N-05000-GL0069 A15720

Date: 13/05/2020

1. Purpose

The purpose of this document is to provide guidance to the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) and the offshore petroleum industry on the appeal processes for NOPSEMA inspector OHS enforcement decisions.

2. Scope of this Guideline

The scope of this guideline includes the appeal processes for any OHS enforcement action taken by a NOPSEMA inspector in administering the offshore occupational health and safety legislation [OPGGSA Schedule 3 Clause 80A and 81].

Decisions subject to appeal include decisions by NOPSEMA inspectors to issue:

- OHS improvement notices [OPGGSA Schedule 3 clause 78];
- OHS prohibition notices [OPGGSA Schedule 3 clause 77];
- OHS do not disturb notices [OPGGSA Schedule 3 clause 76]; and
- Notices to take possession [OPGGSA Schedule 3 Clause 75].

The appeals relate to decisions taken in conducting an OHS inspection, or in relation to the issue of corresponding notices under section 602E (after entering premises under Part 3 of the Regulatory Powers Act as applied under Division 1 of Part 6.5 of the OPGGSA)

Appeals can also be made when a NOPSEMA inspector makes a decision to confirm or vary a disputed Provisional Improvement Notice issued by a Health and Safety Representative [OPGGSA Schedule 3 clause 39].

This guideline relates to both Commonwealth waters and to Victorian state waters where powers have been conferred under the Victorian *Offshore Petroleum and Greenhouse Gas Storage Act 2010*.

Specific references in this Guideline are to the Commonwealth *Offshore Petroleum and Greenhouse Gas Storage Act 2006* [OPGGSA].

3. Enforcement Action

NOPSEMA inspectors are empowered to issue notices and directions to responsible parties to ensure compliance with a duty specified in the OPGGSA or a requirement of the associated Regulations. For example, a NOPSEMA inspector may issue an OHS improvement notice when he or she has formed an opinion, on reasonable grounds, that the responsible party:

- is contravening a duty or a requirement of OPGGSA Schedule 3 or the regulations; or

- has contravened a duty or requirement of OPGGSA Schedule 3 or the regulations in circumstances that make it likely that the contravention will continue or be repeated; and
- as a result there is, or may be, a risk to the health or safety of any person.

4. The Reviewing Authority

The reviewing authority for appeal of notices and directions in Commonwealth waters is the Fair Work Commission [OPGGSA Schedule 3 Clause 3]. On an appeal, the Fair Work Commission may:

- affirm or revoke the decision appealed against; and
- if it revokes the decision – substitute any other decision of the kind appealed against that it thinks appropriate.

If the decision is:

- varied; or
- revoked; or
- revoked with the substitution of another decision,

the decision is taken to have effect, and always to have had effect, accordingly.

5. Who can apply?

Appeals can be lodged by a range of persons, depending on the OHS enforcement or other action taken [OPGGSA Schedule 3 Clause 80A].

Appeals against a NOPSEMA inspector's decision can be made to the Fair Work Commission by:

- the operator of the facility or any employer who is affected by the decision;
- a titleholder, if the notice relates to the title holder's well-related obligation;
- a person to whom a notice has been given;
- a relevant health and safety representative (HSR);
- a relevant workforce representative, if requested by a member of the workforce affected by the decision; or
- where relevant, a person who owns a workplace, plant, substance or thing to which the decision relates.

6. Appealing a Decision

A person eligible to lodge an appeal against enforcement or other action with the Fair Work Commission must make the appeal in accordance the Fair Work Commission rules and instructions. Further information and relevant forms are available on the Fair Work Commission website (www.fwc.gov.au).

The Fair Work Commission has the power to make rules with respect to the practice and procedure to be followed; or the conduct of business; and, in particular:

- the manner in which, and the time within which, applications, submissions and objections may be made to reviewing authority; and
- the manner in which applications, submissions and objections may be dealt with by reviewing authority.

After lodging the notice of appeal with the Fair Work Commission, you must, as soon as practicable, serve a copy of the notice of appeal to the NOPSEMA Inspector and to NOPSEMA. Documents must also be provided to other parties as outlined by the reviewing authority.

7. After an application is lodged

Lodging an appeal against a decision of a NOPSEMA inspector to issue an OHS enforcement notice, other than an OHS improvement notice or provisional OHS improvement notice, does not affect the decision or prevent the taking of action to implement the decision except to the extent that the reviewing authority makes an order to the contrary [OPGGSA Schedule 3 Clause 81(3)].

Therefore, the responsible party to whom the notice was served must continue to work towards complying with the notice. The responsible party can request that the appeal does affect the operation of the decision or prevent the taking of action to implement the decision. However, to do this they must include an application to that effect with their application to the reviewing authority.

If the appeal is against an OHS improvement notice, the notice is suspended pending determination of the appeal unless the reviewing authority makes an order to the contrary [OPGGSA Schedule 3 Clause 81(4)].

Likewise, if the appeal is against a decision to confirm or vary a Provisional OHS Improvement Notice issued by an HSR, the operation of the notice is further stayed pending determination of the appeal, except to the extent that the reviewing authority makes an order to the contrary [OPGGSA Schedule 3 Clause 81(5)].

The reviewing authority will fix a time and place for the hearing or the appeal. The reviewing authority will give notice to the NOPSEMA inspector and NOPSEMA CEO of this information. The reviewing authority is required to give at least 10 days' notice of the time and place for the hearing of a matter. However, consideration of the urgency or importance of the matter may warrant an earlier hearing.

8. Attending the appeal proceedings

The NOPSEMA inspector who issued the notice and their Team Manager or General Manager will attend the proceedings.