

ENFORCEMENT

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1. Purpose

The purpose of this policy document is to set out how the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA):

- applies its 'enforcement strategy' to duty holders
- identifies enforcement actions for securing compliance by persons with their occupational health and safety (OHS), environmental and well integrity obligations under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGs Act) and associated regulations
- takes enforcement actions that are outcomes focused, proportionate, responsive, informed, transparent, consistent, targeted and aligned with the principles of procedural fairness.

All enforcement actions undertaken by NOPSEMA will adhere to the framework described in this document.

2. Scope

This policy describes NOPSEMA's approach to making enforcement decisions and the principles that NOPSEMA applies when deciding on a particular course of action.

This document is not a legal document and should not be relied on as such. It is provided to inform stakeholders and staff and does not limit the discretion of NOPSEMA to take any action it sees fit under relevant legislation. It reflects the current policies of NOPSEMA, which may change from time to time, with all changes being notified publicly.

3. Relevant legislation

The following Commonwealth legislation gives direction to NOPSEMA's compliance monitoring enforcement activities:

- *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGs Act)
- *Regulatory Powers (Standard Provisions) Act 2014*
- Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009
- Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009
- Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011

Similar provisions apply in designated coastal waters where the state or the Northern Territory has conferred functions and powers on NOPSEMA under relevant state/Territory legislation. Unless otherwise specified, references to regulatory requirements in the material provided below are in relation to Commonwealth legislation.

4. Background

NOPSEMA's vision is for a protected offshore workforce and enforcement. While duty holders have an obligation to ensure OHS, environmental and well integrity risks are managed to levels that are as low as reasonably practicable, NOPSEMA's functions of compliance monitoring and enforcement provide assurance that duty holders are meeting mandated requirements and complying with relevant legislation.

The OHS, environmental and well integrity responsibilities and powers of NOPSEMA inspectors are set out in the OPGGS Act and associated regulations. NOPSEMA inspectors carry out inspections and investigations to ascertain compliance with legislation, and to provide advice and guidance to duty holders about how to comply with their OHS, environmental and well integrity duties and obligations. Where potential breaches of legislative duties and obligations are detected through inspections or other sources, NOPSEMA may enforce compliance by compelling duty holders to undertake remedial action.

5. Principles of enforcement

NOPSEMA encourages cooperative compliance and promotes continuous improvement in industry performance. Further, NOPSEMA encourages duty holders to effectively engage with the workforce in relation to OHS, environmental management and well integrity matters. Where necessary, NOPSEMA will take enforcement action to ensure duty holders meet legislative requirements. In taking enforcement action, NOPSEMA will be:

- outcomes focused
- proportionate and responsive
- informed
- transparent
- consistent
- targeted
- aligned with the principles of procedural fairness.

5.1. Outcome focused

Enforcement action will primarily target the achievement of clear health, safety, environmental and/or well integrity outcomes. All enforcement actions will have the ultimate intent of driving duty holders to meet the objectives of the relevant legislation.

In response to an incident where a potential non-compliance is identified, NOPSEMA also gives due consideration to broader industry compliance. NOPSEMA's approach to enforcement is based on achieving the best outcome.

5.2. Proportional and responsive

If a potential non-compliance is identified, the decision to act will be timely and executed promptly. NOPSEMA will ensure enforcement action is proportionate to the regulated risk posed by the non-compliance by considering:

- the impacts and risks to health and safety, the environment and/or well integrity inherent in any incident or offence that may have been committed
- the gravity of any incident or offence that may have been committed
- the compliance history of the duty holder

- the potential to influence broader industry compliance.

A proportionate enforcement action deploys appropriate regulatory intervention resources to efficiently and effectively mitigate the risks.

5.3. Informed

NOPSEMA's enforcement action will be informed by various factors including:

- assessment
- planned inspections
- performance reporting
- investigations of accidents and dangerous occurrences
- investigations of complaints
- duty holder compliance history and previous enforcement actions
- industry trends.

5.4. Transparent

Transparency is important in maintaining stakeholder confidence and helping duty holders to understand what is expected of them and what enforcement action may be taken. NOPSEMA will explain to duty holders the basis for any enforcement action taken and options for achieving compliance. The evidence upon which the enforcement action is taken will be shared with the responsible party(s) at an appropriate time.

5.5. Consistent

Consistency in enforcement decision making will be promoted by:

- the use of a standard process for compliance and enforcement action
- the use of an enforcement management tool that facilitates objectivity
- embedding quality assurance practices in the enforcement decision making process such as subjecting the decision to peer review (comparing the decision with similar decisions, and ensuring that established processes have been followed)
- appropriate training of NOPSEMA staff
- oversight of enforcement activity by the NOPSEMA Compliance Committee.

5.6. Targeted

Where non-compliant activity is identified, relevant key duty holders will be considered for enforcement action. Any action subsequently pursued by NOPSEMA will be risk-based and directed in a manner that supports a cost-effective approach to securing compliance.

5.7. Aligned with the principles of procedural fairness

Enforcement action will be carried out within the powers and processes of the applicable legislation, using principles of procedural fairness. This means that enforcement action will:

- be based on proof or evidence
- provide an opportunity for the duty holder to respond to the issue or incident (including appeals where applicable)
- be taken without bias
- be fair

- be subject to appropriate review.

6. Enforcement actions

When NOPSEMA decides to pursue a potential breach, consideration will be given to the range of possible enforcement actions. The form of action(s) pursued will have regard to factors such as the compliance history of the relevant duty holder and potential to influence broader industry compliance.

Having a range of enforcement actions to consider enables the selection of an appropriately proportionate, targeted and effective measure to pursue.

The range of enforcement actions also provides scope for escalation of the initial action with criminal and civil penalties to be pursued if appropriate.

Enforcement actions available to NOPSEMA are:

- power to take possession of plant and samples
- do not disturb notices
- prohibition notices
- improvement notices
- directions
- request to revise a permissioning document, including safety cases, diving safety management systems, well operations management plans and environment plans
- withdrawal of acceptance of a permissioning document
- infringement notices
- injunctions
- civil and criminal prosecutions
- adverse publicity orders.

Further detail regarding these potential enforcement actions is provided below (refer 6.1-6.11).

Item 6.12 below discusses a further potential enforcement tool, a provisional OHS improvement notice which may be issued by a health and safety representative.

6.1. Power to take possession of plant and samples

Clause 75 of Schedule 3 and Clause 9 of Schedules 2A and 2B of the OPGGS Act allows a NOPSEMA inspector to take possession of, or a sample from, plant, a substance or thing at a facility. The inspector may do this if it is reasonably necessary for the purposes of inspecting, examining, taking measurements of, or conducting tests of that thing in connection with the inspection. In this context, plant includes machinery, equipment or tool or any component.

Inspectors will, by written notice, inform the appropriate persons if an item has been taken possession of or sampled and the reasons for it. If an item is taken (rather than sampled), the inspection, examination, measuring or testing, will be conducted as soon as practicable and then the item will be returned to the premises. The results of the testing will also be provided by the inspector as soon as practicable after the testing is complete.

6.2. Do not disturb notices

Clause 76 of Schedule 3 and Clauses 10 and 11 of Schedules 2A and 2B of the OPGGS Act allows a NOPSEMA inspector to issue a written 'do not disturb' notice if the inspector is satisfied on reasonable grounds that it

is necessary to give direction to an operator or titleholder to remove an immediate threat to the health or safety of any person; or to allow the inspection, examination or taking of measurements of, or conducting tests concerning, a facility or any plant, substance or thing at the facility or in relation to offshore petroleum premises.

A period will be stipulated in the notice whereby a particular workplace, plant substance or thing cannot be disturbed, to allow the operator of a facility or the titleholder to remove the immediate threat to safety or to allow for the inspection, examination, measuring or testing for safety, environmental or well integrity purposes to take place.

The direction may be renewed by another direction in the same terms. The necessary notification will be provided to the workplace responsible party in these instances.

6.3. Prohibition notices

Clause 77 of Schedule 3 and Clauses 11A and B of Schedules 2A and 2B of the OPGGS Act allows a NOPSEMA inspector to issue a prohibition notice regarding an activity if the inspector is satisfied on reasonable grounds that it is necessary for the operator of a facility to remove an immediate threat to the health or safety of any person, or if it is necessary for a titleholder to remove an immediate and significant threat to the environment or the integrity of a well. NOPSEMA inspectors may issue prohibition notices to prohibit an activity that is occurring that involves an immediate threat, or on the grounds that an activity may occur, that if it occurred, would involve an immediate threat.

NOPSEMA is required by law to publish prohibition notices on its website as per Clause 80AA(1) of Schedule 3 and clause 12A of Schedules 2A and 2B of the OPGGS Act.

6.4. Improvement notices

Clause 78 of Schedule 3 and Clauses 11C and D of Schedules 2A and 2B of the OPGGS Act allows a NOPSEMA inspector to issue an improvement notice if the inspector is satisfied on reasonable grounds that:

- a duty holder is contravening or has contravened and is likely to contravene again, a provision of a listed OHS law, and that as a result there is, or may be, a risk to the health or safety of any person
- a titleholder is contravening or has contravened and is likely to contravene again, a provision of a petroleum environmental law, and that as a result there is, or may be, a significant threat to the environment.
- a titleholder is contravening or has contravened and is likely to contravene again, a provision of a well integrity law, and that as a result there is, or may be, a significant threat to the integrity of a well.

The content requirements of notices and the duty holder responsibilities after being issued with a notice are clearly stated in the relevant parts of the OPGGS Act. In the case of improvement notices the notice will specify the following:

- the contravention that is occurring or has occurred and is likely to occur again
- the risk to health or safety, or threat to the environment or well integrity as appropriate
- the action that the inspector is satisfied on reasonable grounds is required to be taken by the responsible person to reduce or prevent the OHS risk, or remove the threat to the environment or to the integrity of a well
- a reasonable time period to take corrective action.

It is NOPSEMA policy that the action required by the duty holder should include a caveat that allows the duty holder discretion to achieve the necessary prevention or reduction in OHS risk, or removal of environmental or well integrity threat, by implementing other controls to reduce risk to a level that is as low as reasonably practicable (ALARP).

The period stipulated in the notice to achieve compliance will be sufficient for the improvement to be reasonably achievable by the responsible person. It is the responsibility of the NOPSEMA inspector to decide the period in the notice and it is NOPSEMA policy for inspectors to discuss an improvement notice with the responsible person, including the period of the notice, prior to issue. This policy means the responsible person will generally have input into the agreement of a suitable period to complete the improvement so requests for extension of the stipulated period should be rare.

Notwithstanding the above, if a NOPSEMA inspector believes on reasonable grounds that it is appropriate to do so, the inspector may, in writing and before the end of the period, extend the period specified in the notice.

NOPSEMA will publish improvement notices on its website in accordance with clause 80AA(1) of Schedule 3 and Clause 12A of Schedules 2A and 2B of the OPGGS Act.

6.5. Directions

The OPGGS Act includes provisions that enable NOPSEMA to give directions to require titleholders to do certain things including:

- the general power for NOPSEMA to give a direction to a petroleum titleholder (s.574)
- the power for NOPSEMA to give a significant incident direction to a petroleum titleholder (s.576B)
- the power for NOPSEMA to give remedial directions to current and former holders of petroleum titles (s.586 and s.587).

Under section 574B, directions may extend outside the title area. Therefore, a direction given by NOPSEMA under the general power to give directions in section 574 may require the registered holder of the title in relation to which the direction is given to take an action, or not take an action, anywhere in an offshore area, whether within or outside the titleholder's title area.

6.6. Request to revise a permissioning document

Regulations in support of the OPGGS Act allow NOPSEMA to request an operator of a facility or titleholder for a petroleum activity to revise the permissioning document in force and submit it for re-assessment and acceptance by NOPSEMA. Principal permissioning documents include safety cases, well operations management plans, environment plans and diving safety management systems.

A request by NOPSEMA to revise a permissioning document will be made in writing and include information such as matters to be addressed by the revision, a date by which the revision is required to be submitted and the grounds for the request.

The reasons for requesting the revision (or variation or amendment) will depend on the extent of deviation from the permissioning documents. This may include a duty holders failure to adhere to conditions as set out in the relevant permissioning document or relevant management system and underlying procedures and policies applicable to activities described in the permissioning document.

Other grounds for a request to revise may include the conducting of activities that are not described in the relevant permissioning document in force, or having inadequate controls in place to conduct activities such that the safety, environmental or well integrity impacts and risks from the activity will be ALARP.

6.7. Withdrawal of acceptance of a permissioning document

Regulations in support of the OPGGS Act allow NOPSEMA to withdraw acceptance of certain types of permissioning documents on various grounds through a written notice to the duty holder for a petroleum activity. The regulations specific to each of the different permissioning documents differ in the particular grounds for withdrawal, however in general are:

- failure of the duty holder to comply with their obligations under the OPGGS Act and its supporting regulations
- failure to comply with a notice or directions issued by NOPSEMA or a NOPSEMA inspector under the OPGGS Act
- where NOPSEMA has refused to accept a proposed revision to the permissioning document.

The notice to withdraw acceptance of a permissioning document will contain a statement of the reasons for the decision taken by NOPSEMA. Where the regulations provide for withdrawing a permissioning document, NOPSEMA will provide the operator or titleholder at least 30 days' notice of its intention to withdraw the acceptance prior to withdrawing acceptance. In making a final decision, NOPSEMA will take into consideration any actions taken, or information provided, by the operator or titleholder to remove the grounds for the withdrawal of acceptance or to prevent the recurrence of the grounds for withdrawal.

6.8. Infringement notices

In certain circumstances, a NOPSEMA inspector has the power to issue an infringement notice. These notices will generally only be applied in relation to minor offences with strict liability, such as breaches in relation to administrative reporting and recording provisions. More serious offences will not be suitable for inclusion in an infringement notice scheme.

A person to whom an infringement notice is issued will be entitled to reject the notice and challenge it through prosecution proceedings in court.

6.9. Injunctions

NOPSEMA is able to apply to the court to seek an injunction in relation to contraventions of certain provisions of the OPGGS Act to ensure that persons who are believed to be failing to meet their regulatory obligations can be required by the court to return to a position of compliance.

The provisions that are made enforceable by injunction include the obligation to comply with notices such as do-not-disturb notices, prohibition notices and improvement notices. The notices may be given to persons by a NOPSEMA inspector to require action to remove a threat to health, safety, environment or the integrity of a well. If a person is contravening any of these obligations, that person can be required by the court to cease the contravention.

6.10. Prosecution

NOPSEMA has the capacity to institute criminal and civil prosecutions where non-compliance with relevant legislation is identified.

Prosecutions will be primarily used to deter repetition of breaches of the legislation. Prosecutions will also serve to increase recognition of the potential impacts of non-compliance and assist in generating greater levels of compliant behaviour.

NOPSEMA will consider prosecution action in circumstances where:

- it is warranted by the nature or severity of the incident or breach
- there has been repeated non-compliance with the legislation
- false or misleading information has been supplied wilfully, or with an intent to deceive, in a manner which gives rise to a significant risk
- there has been a failure to comply with an enforcement notice
- NOPSEMA inspectors have been intentionally obstructed in the lawful course of their duties
- a relevant party fails to provide assistance to, hinders or obstructs a NOPSEMA inspector as required under the legislation and despite warnings and reasonable opportunity to do so
- a prosecution would assist overall regulatory efforts to address widespread non-compliance.

Factors that NOPSEMA will take into account in considering whether to initiate a prosecution include:

- the nature and seriousness of the non-compliance
- the compliance history of the responsible parties
- whether the behaviour is systemic or part of a growing industry trend
- the level of co-operation of the responsible parties involved in the non-compliance and any associated mitigating factors
- the strength of the case including what evidence is available or is likely to become available to prove non-compliance
- what impact the remedy will have on the responsible parties and other NOPSEMA stakeholders, including deterrence
- the cost and time to conduct the prosecution.

Where NOPSEMA initiates a criminal prosecution, the matter will be referred to the Commonwealth Director of Public Prosecutions (CDPP) in accordance with its requirements and the Prosecution Policy of the Commonwealth. The CDPP will determine whether the evidence is sufficient to commence criminal proceedings in court. NOPSEMA and the CDPP work collaboratively to ensure that the objectives for both organisations can be met. Arrangements between NOPSEMA and the CDPP recognise that where there is a possibility of criminal prosecution as result of evidence collected by NOPSEMA, there is shared responsibility between the CDPP and NOPSEMA. If criminal proceedings are commenced the case will then be prosecuted by the CDPP.

NOPSEMA may also pursue civil penalties in court for certain breaches of the legislation.

One or more responsible parties (including manufacturers, suppliers and individuals) may be subject to prosecution. Criminal or civil proceedings will be commenced against the most appropriate party(s), being the relevant duty holder(s) responsible for the non-compliance with the legislation.

6.11. Adverse publicity orders

NOPSEMA may apply to the court to make an adverse publicity order following prosecution of a body corporate for an offence where the body corporate is found guilty. In addition to any penalty that may be imposed by the court; an adverse publicity order may require the body to take either or both of the following actions within the period specified in the order:

- to publicise, in the way specified in the order, the offence or civil penalty order, its consequences, the penalty imposed and any other related matter
- to notify a specified person or specified class of persons, in the way specified in the order, of the offence or civil penalty order, its consequences, the penalty imposed and any other related matter.

NOPSEMA will consider applying to the court for an adverse publicity order on a case by case basis in line with the principles described in section 5 of this policy.

6.12. Provisional OHS improvement notice (issued by a health and safety representative)

Under Clause 38 of Schedule 3 of the OPGGS Act, if a health and safety representative for a designated work group believes, on reasonable grounds, that a person is contravening a provision of a listed OHS law; or has contravened a provision of a listed OHS law and is likely to contravene that provision again; and the contravention affects or may affect one or more group members, the representative must consult with the person supervising the relevant activity in an attempt to reach agreement on rectifying the contravention or preventing the likely contravention.

If agreement is not reached within a reasonable time, the health and safety representative may issue a provisional OHS improvement notice to any or all of the persons (including an operator) responsible for the contravention.

In the case of improvement notices the notice will specify the following:

- the contravention that is occurring or is likely to occur, and
- specify a period within which action needs to be taken to prevent further contravention or to prevent the likely contravention.

Within seven days following issuance of a provisional improvement notice, the person issued with the notice may request that an OHS inspection be conducted by NOPSEMA. Upon such a request being made, the operation of the notice is suspended pending the determination of a NOPSEMA inspector.

The NOPSEMA inspector may confirm, vary or cancel the notice. In the event that a NOPSEMA inspector varies or confirms a provisional improvement notice, it is NOPSEMA's policy is to issue an OHS Improvement notice in its place.

7. Publication of prohibition and improvement notices

Clause 80AA(1) of Schedule 3 and Clause 12A of Schedules 2A and 2B of the OPGGS Act requires that NOPSEMA publish on its website prohibition notices and improvement notices within 21 days after the notice is issued. NOPSEMA will publish a notice on its website as soon as practical after the notice has been issued. This does not apply to a provisional improvement notice issued by a health and safety representative.

NOPSEMA will ensure that, as far as is reasonably practicable, personal information (as defined in the Commonwealth *Privacy Act 1988*) will not be published and such information in the notice will be de-identified before being published.

If NOPSEMA is made aware in writing that the decision to issue a notice is the subject of an application for an appeal to the reviewing authority or judicial review by a court, NOPSEMA will not publish the notice.

Where a notice has already been published on the NOPSEMA website and the notice is or subsequently becomes the subject of an appeal to the reviewing authority or review by a court, NOPSEMA will remove the notice from its website as soon as practicable after becoming aware of the application.

The requirement to publish improvement and prohibition notices does not apply to notices issued under the provisions of the Victorian *Offshore Petroleum and Greenhouse Gas Storage Act 2010*.

8. Appeals

Several mechanisms to appeal NOPSEMA notices and decisions exist. Clause 80A and 81 of Schedule 3 of the OPGGS Act covers appeals concerning OHS inspections. Similar appeal provisions do not exist for environmental or well integrity inspections. The right to appeal OHS notices will be detailed on the back of the notices issued by NOPSEMA inspectors. Depending on the circumstances, decisions may be:

- considered by the reviewing authority (Fair Work Commission)
- reviewed (in some cases) under the Commonwealth *Administrative Decisions (Judicial Review) Act 1977*.

Most decisions made by NOPSEMA may also be reviewed by the Federal Court.

9. Working with other agencies

Enforcement actions will be conducted within the context of wider Government policy and other statutory requirements. Legislation provides for using and sharing offshore information and things. For persons with functions under the OPGGS Act, information or things may be shared between persons for the purposes of exercising their regulatory functions and administration of the OPGGS Act.