

# Consultation in the course of preparing an environment plan

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## 1. Purpose

The purpose of this guideline is to support clarity and transparency on the legal requirements, including recent case law, for consultation by titleholders in the course of preparing their environment plans prior to submission to NOPSEMA. The guideline will also support clarity and transparency around what NOPSEMA will take into consideration when assessing and deciding whether the consultation requirements of the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023 (the Environment Regulations) have been met.

The guideline will focus on the instructive reasons given by the Full Federal Court of Australia, in its appeal decision [Santos NA Barossa Pty Ltd v Tipakalippa \[2022\] FCAFC 193](#) (appeal decision) on 2 December 2022, which from this date, represents the law regarding requirements for consultation in accordance with the Environment Regulations.

This guideline supplements, and should be read in conjunction with, NOPSEMA's Environment Plan Assessment Policy, Environment Plan Decision Making Guidelines and Environment Plan Content Requirements Guidance Note.

## 2. Scope

This guideline should be used by applicants and titleholders to develop processes for implementation of consultation (**consultation processes**) with 'relevant persons' in the course of preparing an environment plan.

The guideline does not dictate exactly what each consultation process should entail, nor how a titleholder should conduct the consultation process as the Environment Regulations place these decisions with the titleholders before submission of an environment plan to NOPSEMA. Rather, the guideline deals with matters that should be considered in designing and implementing consultation processes which are consistent with the requirements of the Environment Regulations. Titleholders should engage with persons and organisations in designing their consultation processes, which will differ in each circumstance, to ensure that they meet the purpose intended in the Environment Regulations. This includes carefully considering what the appropriate consultation processes are for each relevant person and adapting those processes to the nature of the authority, persons and organisations to be consulted.

Demonstrating in an environment plan that ongoing consultation is a part of a titleholder's implementation strategy as required by regulation 22(15), is separate to demonstrating that requirements for relevant persons consultation outlined in this guideline have been met. For guidance on ongoing consultation required by regulation 22(15), see the NOPSEMA N-04750-GN1344 – Environment Plan Content Requirements Guidance Note.

### 3. The purpose of consultation under regulation 25

The purpose of consultation under regulation 25 of the Environment Regulations is to ensure that authorities, persons or organisations which are potentially affected by activities are consulted and their input considered in the development of environment plans. Consultation is designed to ensure that relevant persons are identified and given sufficient information and a reasonable period to allow them to make an informed assessment of the possible consequences the proposed petroleum or greenhouse gas activity may have on them. Regulation 25 is also intended to ensure the titleholder considers and adopts appropriate measures in response to the matters raised by relevant persons. These actions will in turn inform the management of environmental impacts and risks to which the activity and environment plan relate.

Consultation 'in the course' of preparing the environment plan is required so the contents of the environment plan are informed by the information that is provided through that consultation. The requirement to include details of the environmental impacts and risks into an environment plan cannot be met without an understanding of the social, economic and cultural features of the environment. Consultation is intended to ensure that those who may be affected are given a reasonable opportunity to provide details that enable that understanding to be formed<sup>1</sup>. A deficient consultation process results in NOPSEMA being unable to make an assessment as to whether the environment plan meets the other criteria in the Environment Regulations for acceptance<sup>2</sup>. As a result of the consultation process and the inclusion of information gathered through consultation in the environment plan, NOPSEMA will then be properly informed in order to make an assessment as to whether regulation 25 consultations have been undertaken and the measures proposed in their environment plans to address adverse impacts and risks are appropriate.

Consultation processes must be designed in the context of the objects of the Environment Regulations, which are set out in regulation 4, which are to ensure that any offshore petroleum or greenhouse gas activity is carried out in a manner:

- i. consistent with the principles of ecologically sustainable development (**ESD**) set out in section 3A of the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*;
- ii. by which the environmental impacts and risks of the activity will be reduced as low as reasonably practicable (**ALARP**); and
- iii. by which the environmental impacts and risks of the activity will be of an acceptable level.<sup>3</sup>

Consultation is critical to achieve outcomes that are consistent with the principles of ESD, and ensuring environmental impacts and risks of the activity are reduced to ALARP and acceptable levels.

Therefore, the consultation process must assist to ensure that the titleholder has ascertained, understood and addressed all the environmental impacts and risks that might arise from its proposed activity, including information that the titleholder would otherwise not be aware of, except through an appropriate consultation process in order to inform the most effective environmental management of the activities' impacts and risks<sup>4</sup>. The obligation to consult with relevant persons must be discharged prior to submitting an environment plan to NOPSEMA.

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<sup>1</sup> Paragraph 11 - *Cooper v NOPSEMA (No 2)* [2023] FCA 1158

<sup>2</sup> Paragraph 42 - *Cooper v NOPSEMA (No 2)* [2023] FCA 1158

<sup>3</sup> Paragraph 51 - *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193

<sup>4</sup> Paragraph 89 - *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193

The consultation process should also inform the titleholder's understanding of the environment, including (amongst other things) people and communities, the heritage value of places, and their social and cultural features which may be affected by a titleholder's proposed activities<sup>5</sup>.

Consultation gives the titleholder and NOPSEMA an opportunity to receive information that it might not otherwise receive from those affected by the titleholder's proposed activity, and for the titleholder to refine or change the measures it proposes to address impacts and risks by taking into account the information received. This process is intended to improve the titleholder's ability to minimise environmental impacts and risks from the activity.

As a result of the iterative process of preparing an environment plan and during the assessment by NOPSEMA, additional information may be received that may require further consultation processes to be undertaken, including with additional relevant persons.

## 4. Legislative and regulatory requirements

In the course of preparing an environment plan, a titleholder must consult with relevant persons in accordance with division 3, regulation 25, and demonstrate that the measures (if any) that the titleholder has adopted, or proposes to adopt, because of the consultations are appropriate.

### **Division 3 - Consultation in preparing an environment plan**

#### **Regulation 25 - Consultation with relevant authorities, persons and organisations, etc.**

- (1) In the course of preparing an environment plan, or a revision of an environment plan, a titleholder must consult each of the following (a relevant person):
  - (a) each Department or agency of the Commonwealth to which the activities to be carried out under the environment plan, or the revision of the environment plan, may be relevant;
  - (b) each Department or agency of a State or the Northern Territory to which the activities to be carried out under the environment plan, or the revision of the environment plan, may be relevant;
  - (c) the Department of the responsible State Minister, or the responsible Northern Territory Minister;
  - (d) a person or organisation whose functions, interests or activities may be affected by the activities to be carried out under the environment plan, or the revision of the environment plan;
  - (e) any other person or organisation that the titleholder considers relevant.
- (2) For the purpose of the consultation, the titleholder must give each relevant person sufficient information to allow the relevant person to make an informed assessment of the possible consequences of the activity on the functions, interests or activities of the relevant person.
- (3) The titleholder must allow a relevant person a reasonable period for the consultation.
- (4) The titleholder must tell each relevant person the titleholder consults that:
  - (a) the relevant person may request that particular information the relevant person provides in the consultation not be published; and
  - (b) information subject to such a request is not to be published under this Part.

<sup>5</sup> Paragraph 54 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

Regulation 25 establishes a duty on titleholders to carry out consultation in the course of preparing an environment plan. NOPSEMA's role is to assess whether or not the duty has been discharged, read particularly with regulation 34(g).<sup>6</sup>

In order to accept an environment plan under regulation 33, NOPSEMA must be reasonably satisfied<sup>7</sup> (as per regulation 34) that the environment plan demonstrates the duty (to carry out consultation with relevant persons required by regulation 25) has been discharged and that the measures (if any) that the titleholder has adopted, or proposes to adopt, because of the consultations are appropriate<sup>8</sup>.

#### **Regulation 34 - Criteria for acceptance of environment plan**

For regulation 33, the criteria for acceptance of an environment plan are that the plan...

(g) demonstrates that:

- (i) the titleholder has carried out the consultations required by Division 3; and
- (ii) the measures (if any) that the titleholder has adopted, or proposes to adopt, because of the consultations are appropriate.

Regulation 25(1) requires consultation with each authority, person and organisation meeting the definition of a *relevant person*. Notably, a relevant person includes all persons or organisations whose functions, interests or activities may be affected by the activities to be carried out under the environment plan.

In carrying out the duty to consult with relevant persons the titleholder must:

- i. give each relevant person sufficient information to allow the relevant person to make an informed assessment of the possible consequences of the activity on the functions, interests or activities;
- ii. allow a relevant person a reasonable period for the consultation; and
- iii. inform the relevant person that they may request information not be published.

To discharge this obligation, the titleholder must clearly articulate in the environment plan that the consultation with the authority, person or organisation is being undertaken because they have been identified as a relevant person and the titleholder must expressly advise them of titleholder obligations for consultation. To facilitate this communication, titleholders should provide relevant persons with a copy of the NOPSEMA Consultation on offshore environment plans Brochure as part of consultation.

In accordance with regulation 24(b), a report on all consultations between the titleholder and any relevant person for regulation 25, is to be included in the environment plan.

<sup>6</sup> Paragraph 49 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

<sup>7</sup> Paragraphs 31 & 49 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

<sup>8</sup> Paragraph 57 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

### Regulation 24 - Other information in the environment plan

The environment plan must contain the following...

- (b) a report on all consultations under regulation 25 of any relevant person by the titleholder, that contains:
  - (i) a summary of each response made by a relevant person; and
  - (ii) an assessment of the merits of any objection or claim about the adverse impact of each activity to which the environment plan relates; and
  - (iii) a statement of the titleholder's response, or proposed response, if any, to each objection or claim; and
  - (iv) a copy of the full text of any response by a relevant person.

The environment plan must include sufficient information to enable NOPSEMA to form the requisite state of satisfaction on the basis of an evident and intelligible justification<sup>9</sup>.

## 5. General guidance on discharging the obligation of relevant person consultation

Titleholders should consider the following general guidance as it applies to their specific circumstances and activities when preparing an environment plan for submission to NOPSEMA.

## 6. Identifying relevant persons

Titleholders are required to identify and consult with each authority, person or organisation who falls within the categories of relevant persons set out in regulation 25. Titleholders must clearly identify in their environment plan who is a relevant person<sup>10</sup> and the rationale the titleholder has used to determine who they consider falls within that definition.

Environment plans should set out the processes that have been applied to identifying and determining who are relevant persons, as well as the processes undertaken for consultation.

Authorities, persons and organisations are to be identified on a case-by-case basis.

Factors such as the nature of the activity, the environment in which the activity is being undertaken and the possible impacts and risks of the activity should be taken into account when determining whether the activity may be relevant to authorities, or determining who has functions, interests or activities that may be affected.

Regulation 25, like most statutory consultation provisions, imposes an obligation that must be capable of practicable and reasonable discharge by the titleholder<sup>11</sup>. It also involves 'some decisional choice' that the titleholder must make in identifying relevant persons and in how the consultation is undertaken<sup>12</sup>.

<sup>9</sup> Paragraph 31 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

<sup>10</sup> Paragraph 57 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

<sup>11</sup> Paragraph 89 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

<sup>12</sup> Paragraph 47-48 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

Processes for the identification of relevant persons must provide for sufficiently broad capture of ascertainable persons and organisations who *may* have their functions, interests or activities affected or that *may* be affected by the activity.

Publication in appropriate media forms may be a reasonable tool to assist in the identification of relevant persons and inform the delivery of more targeted notices to potentially relevant persons. It is recognised that in any community consultation there will inevitably be persons within a group who could not participate for various reasons, however the absence of their participation would not invalidate the process provided reasonable efforts were made to identify the relevant persons and to consult with them.

The process should include reference to multiple sources of information, such as publicly available materials, review of databases and registers, published guidance, previous history, as well as advice from authorities and other relevant persons.

In some cases, relevant persons have developed guidance detailing their functions, interests or activities and how and when they wish to be consulted on activities. Titleholders should take this guidance into account in developing consultation processes with relevant persons.

Titleholders may also consider how they can create awareness of their activities to encourage potentially relevant persons to make themselves known to the titleholder.

#### **Persons and organisations under regulation 25(1)(d)**

Regulation 25 creates an artificial definition of ‘relevant person’ which is broader than the usual legal meaning given to the term ‘person’<sup>13</sup>. For the purposes of regulation 25(1)(d), while an individual person may be a relevant person, so too may an organisation<sup>14</sup>.

#### **Functions, interests or activities under regulation 25(1)(d)**

The phrase “functions, interests or activities” in regulation 25(1)(d) should be broadly construed as this approach best promotes the objects of the Environment Regulations, including that offshore petroleum and greenhouse gas activities are carried out in a manner consistent with the principles of ESD<sup>15</sup>. The phrase is a composite one, each part of which has work to do in identifying relevant persons<sup>16</sup>.

<b>Functions</b>	Refers to “a power or duty to do something” <sup>17</sup>
<b>Activities</b>	to be read broadly and is broader than the definition of ‘activity’ in regulation 4 of the Environment Regulations and is likely directed to what the relevant person is already doing <sup>18</sup>
<b>Interests</b>	to be construed as conforming with the accepted concept of “interest” in other areas of public administrative law  includes “any interest possessed by an individual whether or not the interest amounts to a legal right or is a proprietary or financial interest or relates to reputation” <sup>19</sup>

<sup>13</sup> Paragraph 46 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

<sup>14</sup> Paragraph 48 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

<sup>15</sup> Paragraph 51 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

<sup>16</sup> Paragraph 45 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

<sup>17</sup> Paragraphs 51& 60 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

<sup>18</sup> Paragraphs 51, 58-59 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193; Paragraph 146 per Lee J

<sup>19</sup> Paragraphs 63 & 65 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

## 7. General principles for effective consultation

Consultation should be a genuine and meaningful two-way dialogue in which relevant persons are given sufficient information and time to allow them to make an informed assessment of the possible consequences of the activity on their functions, interests or activities<sup>20</sup>.

The consultation process used for different activities may vary depending on a range of factors, certain key principles should be evident in the environment plan.

The principles described below are adapted and amended from a report<sup>21</sup> by the former Ministerial Council on Mineral and Petroleum Resources<sup>22</sup> and are reproduced here to provide a 'starting point' on how a consultation process may be undertaken.

<b>Communication</b>	Open and effective engagement should be undertaken during the consultation process to ensure accurate and relevant information is provided and that any feedback provided is received and addressed openly.
<b>Transparency</b>	Wherever possible, the consultation process adopted, the relevant persons consulted, details of the activity and any points of interest or controversy should be made open and transparent. A productive consultation process will establish agreed information and feedback processes.
<b>Collaboration</b>	An effective consultation process will have mutually beneficial outcomes to relevant persons and the titleholder through approaching consultation as a collaborative process.
<b>Inclusiveness</b>	Titleholders should recognise, understand and involve relevant persons early and throughout the life of the activity.
<b>Integrity</b>	The consultation process should foster respect and trust.

The consultation process should be appropriate for the category of relevant person, and the type of function, activities or interest. Where interests are held communally, the method of consultation will need reasonably to reflect the characteristics of the interests affected by the proposed petroleum activity<sup>23</sup>. A titleholder will need to demonstrate to NOPSEMA that what it did constituted consultation appropriate and adapted to the nature of the interests of the relevant persons. The consultation process should take into account the amount of effort required by the titleholder and the relevant person for consultation, and titleholders should be clear about this from the outset. There are various models for engagement which may be applicable such as IAP2's Public Participation Spectrum<sup>24</sup>.

<sup>20</sup> Paragraph 56 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

<sup>21</sup> 'Principles for Engagement with Communities and Stakeholders', Ministerial Council on Mineral and Petroleum Resources, 2005, available online at <<https://www.petroleum.sa.gov.au/regulation2?a=734042>>

<sup>22</sup> The MCMPR was comprised of Commonwealth, state and territory Ministers responsible for resources and mining, as well as respective Ministers from Papua New Guinea and Timor Leste. MCMPR's mission was to 'ensure the safe, responsible, and competitive development of the nation's mineral and energy resources to optimise long-term economic, social and environmental benefits to the community.'

<sup>23</sup> Paragraph 104 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

<sup>24</sup> Quality Assurance Standard in Community and Stakeholder Engagement - [IAP2 Quality Assurance Standard 2015.pdf](#)

Additionally, titleholders should consider various published guidance related to good practice consultation relevant to different sectors and disciplines. Including, for example, Commonwealth Government – Consultations with agencies with responsibilities in the Commonwealth marine area guideline<sup>25</sup>, and the Interim Engaging with First Nations People and Communities on Assessments and Approvals under the *Environment Protection and Biodiversity Conservation Act 1999*<sup>26</sup>.

### **Providing sufficient information under regulation 25(2)**

Information provided must be sufficient to allow an informed assessment of the possible consequences of the activity on the functions, interests or activities of the relevant person. Again, the titleholder has a “decisional choice” to make in how information will be given to allow the “relevant person” to make the assessment contemplated by regulation 25(2)<sup>27</sup>.

Titleholders should consider the functions, interests or activities of relevant persons and the impacts and risks that affect them when determining information requirements.

The environment plan must demonstrate that the duty (to carry out consultation with relevant persons) has been discharged and that the consultation provided sufficient information about the environment and impacts on the environment<sup>28</sup>.

The level of information necessary is likely to vary for different relevant persons and may depend on the degree to which a relevant person is affected. Different consultation processes may be required for relevant persons and organisations depending on information requirements.

What constitutes sufficient information as part of a consultation processes may differ depending on the relevant person(s) and the environment plan should demonstrate that the process was suited to the type of relevant person. Generic, targeted electronic mailouts or links to a webpage may not be sufficient.

Information should be in a form that is readily accessible and appropriate for the relevant person being consulted. Materials provided may include written forms, pictorial or other graphics, verbal briefings or presentations, and the use of other technologies.

Information may well need to be provided in an iterative manner, as finer detail and precision is developed through the consultation process. Titleholders are encouraged to discuss expectations around the type and level of detail of information required with relevant persons early when commencing consultation.

### **Providing a reasonable period under regulation 25(3)**

Titleholders must provide a “reasonable period” for the relevant person to make an informed assessment of the possible consequences of the proposed activity on their functions, interests or activities and so they are able to respond with any concerns<sup>29</sup>.

The nature, scale and complexity of an activity, as well as the extent and severity of potential impacts and risks on a relevant person’s functions, interests or activities may inform what makes a reasonable period for consultation.

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<sup>25</sup> [Consultations with agencies with responsibilities in the Commonwealth marine area guideline | NOPSEMA](#)

<sup>26</sup> [Interim Engaging with First Nations People and Communities on Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999 \(dcceew.gov.au\)](#)

<sup>27</sup> Paragraphs 47-48 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

<sup>28</sup> Paragraph 50 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

<sup>29</sup> Paragraph 56 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193



Relevant persons may have also provided the titleholder with their views of what constitutes reasonable timeframes, their availability and or accessibility issues that should be taken into account.

Therefore, what is a reasonable period for consultation should be considered on a case-by-case basis.

## 8. Consulting where interests are held communally

Where interests are held communally, in accordance with tradition, the method of consultation will need reasonably to reflect the characteristics of the interests affected by the titleholder's proposed activity.

A titleholder will need to demonstrate to NOPSEMA that what it did constituted consultation which is appropriate and adapted to the nature of the interests of the relevant persons. For further guidance particular to First Nations relevant persons, see Section 10 below.

The Full Federal Court has held that there is good reason to adopt pragmatic and practical approaches to consultation conducted in accordance with regulation 25<sup>30</sup>.

Consultation may be through properly notified and conducted meetings, or other engagements that facilitate genuine two-way dialogue between the titleholder and relevant persons<sup>31</sup>. Meetings should be widely advertised to ensure appropriate representation; however, it is recognised that meetings may not be attended by all members of a group<sup>32</sup>.

## 9. Reporting on consultation in the environment plan under regulation 24(b)

The consultation process should be documented within the environment plan through the titleholder report on consultation and the sensitive information report.

Under regulation 24(b) of the Environment Regulations, the environment plan must contain a report on the consultation which provides:

- i. a summary of each response made by a relevant person;
- ii. an assessment of the merits of any objection or claim about adverse impact of each activity to which the environment plan relates;
- iii. a statement of the titleholder's response, or proposed response, if any, to each objection or claim; and
- iv. a copy of the full text of any response by a relevant person.

NOPSEMA expects the environment plan to also provide descriptions of the consultation processes and the rationale used to determine who and how to consult with relevant persons, including the approach to provision of sufficient information and how a reasonable period for the consultation was determined. This will assist to provide a basis for NOPSEMA to form a reasonable satisfaction view that the titleholder has carried out the consultations required by regulation 25.

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<sup>30</sup> Paragraph 104 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

<sup>31</sup> Paragraph 104 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193; see also Paragraph 189 - McGlade v South West Aboriginal Land & Sea Aboriginal Corporation (No 2) [2019] FCACF 238; 374 ALR 329

<sup>32</sup> Paragraph 98 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193; quoting Paragraph 36 - McGlade v South West Aboriginal Land & Sea Aboriginal Corporation (No 2) [2019] FCACF 238; 374 ALR 329; see also Paragraphs 8 & 32 - Dingaal Tribe v State of Queensland [2003] FCA 999

The consultation process should also assist the titleholder to meet its obligation under section 280 or 460 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* which requires that it must carry out the petroleum or greenhouse gas activity respectively in a manner that does not interfere with navigation, fishing, conservation of resources of the sea and seabed, other offshore electricity infrastructure and petroleum activities, and the enjoyment of native title rights and interests (within the meaning of the Native Title Act 1993) to a greater extent than is necessary for the reasonable exercise of the titleholder's rights and obligations.

Titleholders should ensure that a summary containing the main matters raised in each response made by a relevant person is included in the consultation report. The report on consultation should not include the full text or extracts of the full text of any response by a relevant person. Under regulation 26(8), this information must be contained in the sensitive information part of the environment plan and not anywhere else in the plan.

The report on consultation should also include clear and precise identification of claims and objections presented, an assessment of the merit of each objection or claim with sufficient rationale provided to support that assessment, and a demonstration of the suitability of any measures adopted as a result of the consultation.

Full text (source) records must be provided to verify the accuracy of the summary of the consultation. NOPSEMA interprets the term "full text" to mean an unedited version of the correspondence received without redacted or modified text.

Titleholders will need to document in written form all communications undertaken between themselves and relevant persons. This may require documenting the minutes of meetings, undertaking written communications wherever practicable and requesting that responses from relevant persons be provided in writing where practical.

## 10. First Nations people/groups

First Nations groups, such as land councils and prescribed body corporates, may be relevant persons with a function that may be affected by the activities covered by the environment plan. They may also provide advice in relation to who and how other First Nations groups or individuals should be consulted as relevant persons whose interests may be affected by the activities.

The Court has noted that there is no shortage of guidance in decisions on consultation processes under the Native Title Act 1993 (NT Act) which is illustrative of how a seemingly rigid statutory obligation to consult persons holding a communal interest may operate in a workable manner. The NT Act authorities require reasonable notice to group members, but not exhaustive communications with each and every person<sup>33</sup>.

Titleholders must demonstrate to NOPSEMA that a reasonable opportunity to be consulted has been afforded to First Nation groups<sup>34</sup>.

The approach to consultation where interests are held communally requires reasonable notice to be provided to group members, but not necessarily exhaustive communications with each and every person<sup>35</sup>.

<sup>33</sup> Paragraph 96 & 104 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

<sup>34</sup> Paragraph 104 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193; see also Paragraph 189 - McGlade v South West Aboriginal Land & Sea Aboriginal Corporation (No 2) [2019] FCACF 238; 374 ALR 329

<sup>35</sup> Paragraph 104 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

Establishing whether there are communal or collective aspects to “interests” relies on consultation with those relevant persons who hold this knowledge. What is broadly representative of the beliefs of a group must be assessed in the proper cultural context, including by assessing which persons are generally accepted as having authority to speak on the particular topic and excluding those who do not<sup>36</sup>.

Titleholders may need to engage an appropriately qualified expert to assist in this assessment.

Any consultation on a group basis should include reasonable efforts to notify group members of the consultation<sup>37</sup> with clear, simple and directly expressed terms<sup>38</sup>. Superficial or token consultation will not be enough and all group members should be afforded a reasonable opportunity to participate in consultation<sup>39</sup>. A process of public notification and “self-identification” alone is unlikely to be sufficient to demonstrate appropriate representation and reasonable opportunity to participate<sup>40</sup>

The consultation process should produce more detail and precision which may inform titleholders mitigation of the environmental risks and impacts<sup>41</sup>.

#### Definition of ‘cultural features’

The term ‘cultural’ in the phrase “cultural features” which forms part of the definition of environment in regulation 5 of the **Environment Regulations** has a communal or collective aspect such that an individual’s beliefs must be broadly representative of the beliefs of other members of the group to be accepted as cultural<sup>42</sup>. The Court has said the word ‘environment’ in the **Environment Regulations** is defined in very broad terms<sup>43</sup>. It can include both tangible and intangible cultural features.

Cultural features of areas, locations or places may include cultural heritage in the form of artefacts or other objects evidencing human occupation and activities over the course of human history<sup>44</sup> (tangible). It may also include a spiritual connection to an area provided that the connection is by the laws and customs of a people<sup>45</sup> (intangible). For example, a connection of traditional owners with sea country may constitute an interest for the purposes of regulation 25A(1)(d)<sup>46</sup>.

## 11. NOPSEMA assessment of whether the titleholder has met the consultation requirements

Regulation 33(1)(a) requires NOPSEMA to be “reasonably satisfied that the environment plan meets the criteria in regulation 34” in order to accept an environment plan. The word “reasonably” does no more than emphasise that there must be a clear justification for the decision to accept an environment plan, which is to be determined objectively<sup>47</sup>.

<sup>36</sup> Paragraph 923 – *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9

<sup>37</sup> Paragraph 923 – *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9CAFC 193103-104

<sup>38</sup> Paragraph 40 – *Weribone on behalf of the Mandandanji People v State of Queensland* [2013] FCA 255; see also Paragraph 98 – *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 quoting Paragraph 36 – *McGlade v South West Aboriginal Land & Sea Aboriginal Corporation (No 2)* [2019] FCAFC 238; 374 ALR 329

<sup>39</sup> Paragraph 104 – *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193; see also Paragraphs 189 – *McGlade v South West Aboriginal Land & Sea Aboriginal Corporation (No 2)* [2019] FCAFC 238; 374 ALR 329

<sup>40</sup> Paragraph 45 – *Bolton on behalf of the Southern Noongar Families v State of Western Australia* [2004] FCA 760

<sup>41</sup> Paragraphs 79 & 89 – *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193

<sup>42</sup> Paragraph 922 – *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9

<sup>43</sup> Paragraph 192 – *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9

<sup>44</sup> Paragraph 200 – *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9

<sup>45</sup> Paragraph 201 – *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9

<sup>46</sup> Paragraph 62 – *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193

<sup>47</sup> Paragraph 31 – *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193

Critical to a correct understanding of NOPSEMA's task in forming a state of satisfaction, regulation 25(1) imposes a duty *on the titleholder* and it is the performance of the titleholder's duty which must be assessed by NOPSEMA for the purposes of regulation 33(1), read with regulation 34(g)<sup>48</sup>.

In making a decision under regulation 34(g), NOPSEMA considers the content of the environment plan that describes the processes undertaken by the titleholder for consultation required by regulation 25, the titleholder's report on consultation, how information gathered through relevant persons consultation informs and has been incorporated into the environment plan and whether control measures have been adopted in response to consultation.

Through the assessment process, NOPSEMA may make reasonable enquiries to assist it to evaluate the materials presented in the environment plan and forms a view as to whether it is satisfied that the titleholder has discharged its duty to identify and consult with each relevant person.

In addition to the content of the environment plan, the assessment team may consider information from other sources as it deems necessary in accordance with NOPSEMA's Environment Plan Assessment Policy and Decision Making Guidelines.

## 12. Related documents

N-04750-PL1347 – Environment Assessment Policy

N-04750-GL1721 – Environment Plan Decision Making

N-04750-GN1344 – Environment Plan Content Requirements Guidance Note

Brochure - Consultation on offshore environment plans

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<sup>48</sup> Paragraphs 49 & 104 - Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193