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**14 March 2023**

Sue McCarrey  
Chief Executive Officer  
National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA)  
Level 8, 58 Mounts Bay Road  
PERTH WA 6000

On-line submission via NOPSEMA Consultation Hub and via email: [feedback@nopsema.gov.au](mailto:feedback@nopsema.gov.au)

Dear Ms McCarrey

## **CONSULTATION IN THE COURSE OF PREPARING AN ENVIRONMENT PLAN**

Woodside appreciates the opportunity to provide comment as part of the feedback process for the 'Consultation in the course of preparing an environment plan' guideline (the Guideline), published by NOPSEMA on 15 December 2022, following the Full Federal Court's decision in *Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193* (Full Federal Court Decision).

Woodside takes its community and stakeholder consultation obligations seriously. We acknowledge there may be persons who hold rights or interests that may be impacted by our activities, and we seek to understand who those persons are, engage them in an inclusive and respectful manner, and manage our activities in a way that will avoid or minimise risks and impacts to them. In many cases the stakeholder feedback we receive builds upon our established understanding of the areas and communities in which we operate as well as the potential impacts and risks of our activities and supports continuous improvement of our processes and activities.

Woodside acknowledges that the Guideline is aimed at providing clarity and transparency on NOPSEMA's expectations and the way it is seeking to put the legal requirements into practice following the Full Federal Court Decision. We have adopted the consultation methodology in our EP process so that it is consistent with the Full Federal Court Decision and the Guideline, and look forward to continuing to work constructively with NOPSEMA on the content and application of the Guideline.

However, the Full Federal Court decision has created uncertainty for both titleholders and broader stakeholders in relation to the way environment plans (EPs) for offshore projects under the *Offshore Petroleum and Greenhouse Gas Storage (OPGGGS) (Environment) Regulations 2009* (Regulations) are considered and accepted by NOPSEMA. Woodside's view is that legislative reform (as foreshadowed in the Full Federal Court Decision) is ultimately likely to be required to provide sufficient certainty to all parties on the issues highlighted in this submission.

Ahead of any such legislative change, we consider there is an opportunity to improve the content of the Guideline to provide industry and stakeholders with more clarity and certainty regarding regulatory requirements, timing, and process to support submission and timely acceptance of an EP. Our experience to date suggests the Guideline is giving rise to some unintended consequences which include delay in preparing and obtaining acceptance by NOPSEMA of an EP. In some instances, we believe the Guideline may be creating unintended confusion or concern in some communities, as well as placing a significant additional resourcing burden on government, industry, and stakeholders.

These unintended consequences warrant, in our view, some adjustments to the Guideline while it is being finalised. These include:

- The increased consultation burden placed on potential 'relevant persons', who, in many instances may not wish to be consulted and who may also have limited capacity, resources, or interest to respond to requests for timely consultation.
- An expectation by NOPSEMA for titleholders to consult beyond the bounds set out in the Guideline or Full Federal Court Decision. For example, where an assessment has been made that a relevant person's interests may be located within the environment that may be affected (EMBA) but that the relevant person themselves is not located in that area.
- Related to the above points, the level of resourcing required by some Traditional Custodians to consider unplanned or geographically distant activities (for example, an oil spill) is disproportionate to the likelihood and potential impacts of an event occurring that may impact these groups.
- Given the increase in consultation and the substantial additional assessment associated with the consultation requirements, NOPSEMA's capacity to adequately resource and progress assessment of EPs for offshore energy projects.
- The Full Federal Court Decision did not provide practical clarity on key terms contained within Regulation 11A(1)(d). Consequently, the Guideline only provides limited clarity on key terms including, for example: 'Relevant person – definition of function, activities and interests'; 'sufficient time'; 'sufficient information'; and 'statutory timeframes for additional relevant persons to be included in consultation'. The uncertainty in these key terms means it is difficult for titleholders to navigate the consultation requirements with certainty. Given that many of these concepts are explicitly outlined in other regulatory documents, frameworks and instruments it is something that appears able to be addressed and clarified.
- Lack of clarity associated with what is a reasonable timeframe for consultation and what the Full Federal Court called out as being "unacceptable expense and delay".
- The Full Federal Court Decision raised a question around consultation in international waters. Consequently, the Guideline raises the same question but does not provide clarity on this aspect. This is an important question, as there is now doubt as to whether one jurisdiction (Australia) now requires consultation to take place with persons outside of this jurisdiction. This seems to substantially extend the scope of the OPGGS legislation and may be inconsistent with existing international arrangements in areas such as oil spill response.
- The threshold for genuine attempts to consult relevant persons who will not engage voluntarily or who take a view that the consultation requirement gives them a bargaining position. We hold the view that consultation should always be undertaken in a spirit of fairness and with all parties showing good faith.
- Finally, there is an opportunity to capture knowledge, aggregate information and share the information across different EPs, with different titleholders and for different projects. It would be useful if the Guideline confirmed this process as being acceptable.

In addition to these concerns, Woodside has specific comments on a number of references in the Guideline, set out in **Attachment 1**.

Woodside considers it extremely important that NOPSEMA, with the support of the Commonwealth Government, works with titleholders to enable an effective consultation process to support acceptance of EPs associated with project approvals, continuance of operations and to progress decommissioning activities.

Without such certainty there is a risk of significant delay in the development and continuation of offshore energy resources in Australia to meet domestic and international demand. This would in turn impact on energy security and energy transition for Australia and its key regional trading partners.

Woodside once again acknowledges NOPSEMA's efforts and intent in developing the Guideline and its efforts to provide clarity and transparency for industry and stakeholders in the wake of the Full Federal Court Decision. We look forward to NOPSEMA's response to this consultation process and to working constructively with NOPSEMA and the Department of Industry, Science and Resources (DISR) to deliver a clear and effective regulatory framework, for the benefit of industry and stakeholders and in support of the national interest.

Yours sincerely



Tony Cudmore

**Executive Vice President Strategy and Climate**

**Attachment 1: Woodside feedback on the Guideline**

| Section                                                  | Guideline Reference                                                                                                                                                                                                                                                                                                                                                                                                                                               | Woodside Comments                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
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| <p><b>2. Scope</b></p>                                   | <p><i>Titleholder must engage directly 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 including by 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.</i></p> | <p>This appears to be a step-out from the Full Federal Court Decision. The judges arrived at a position by reference to specific elements of the Tipakalippa case, in the specific context of consultation with Traditional Owner groups and by reference to native title analogies. The Guideline expands this concept beyond consultation with Traditional Owner groups to consultation with <i>all</i> relevant persons.</p> <p>This creates an excessive burden on titleholders who, in order to follow the Guideline, would need to adapt each piece of the consultation materials to meet every stakeholder’s specific method (e.g. government departments; fisheries; tourist operators; eNGOs). This is at odds with how standard consultation is generally undertaken: consultation by government on legislative change; consultation by developers on land use etc.</p> <p>There is an added risk of consultation being frustrated where a stakeholder rejects the method of consultation or suggests that a titleholder’s attempts to engage are insufficient. Whilst titleholders will make genuine attempts to seek feedback from relevant persons and discuss how a person or organisation wishes to be engaged, this should not place a requirement on the titleholder to agree a method of consultation or level of information that is unreasonable.</p> |
| <p><b>4. Legislative and regulatory requirements</b></p> | <p><i>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.</i></p>                                                                                                               | <p>This paragraph could be interpreted incorrectly and there is an opportunity to more succinctly express the intent. Woodside understands this paragraph to mean titleholders are required to state in the EP who is classified as a relevant person, rather than to advise the person or organisation at the outset of consultation that they <i>are</i> or <i>are not</i> a relevant person . This should be clarified.</p> <p>The intent of this reference should also be clarified: ‘<i>...advise the relevant person during consultation their obligations for consultation</i>’. Woodside understands this to mean a titleholder’s obligation to include, for example, a record of consultation and provisions for confidentiality to NOPSEMA of feedback.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| <p><b>6. Identifying relevant persons</b></p>            | <p><i>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.</i></p>                                                                                                                                                                                                                                                                                | <p>This point should be strengthened to confirm titleholders can follow the guidance of relevant persons, including representative bodies providing guidance on behalf of their members.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |

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|                                        |                                                                                                                                                                                                                                                                                                                                        | <p>In response to the Guideline, the Western Australian Fishing Industries Council (WAFIC) has developed guidance material advising titleholders not to consult commercial fishery licence holders that WAFIC represents on unplanned activities. NOPSEMA has provided advice that titleholders should clarify the WAFIC guidance and request advice that the feedback or views are those of all the represented members, or that the peak body will take steps to ensure additional feedback from individual members is provided to titleholders.</p> <p>This approach carries the following risks:</p> <ul style="list-style-type: none"> <li>• undermining the guidance provided by the relevant person;</li> <li>• creating an onerous and inappropriate burden on the relevant person to confirm that the feedback provided represents all members (which in some cases could be thousands of members);</li> <li>• potential breaches to an individual's or a group's privacy; and</li> <li>• being inconsistent with the Guideline's note to '<i>engage directly with persons and organisations in designing their consultation processes</i>'.</li> </ul> |
| <b>6. Identifying relevant persons</b> | <i>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.</i>                                                                                                                           | This appears to be a step-out from the Full Federal Court Decision which did not require publication in appropriate media forms or newspapers as a pre-requisite to consultation. This part of the Guideline also indicates that titleholders are required to go beyond the requirements in the Regulations.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| <b>6. Identifying relevant persons</b> | <i>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.</i> | It would be useful to provide guidance as to what "reasonable efforts" involves in this instance and the circumstances in which NOPSEMA will accept "no response" as a close out of consultation.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| <b>6. Identifying relevant persons</b> | <i>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, which will be addressed in more detail below.</i>                                                                                                              | This seems to be at odds with the concepts of the titleholder's 'decisional choice' in the appeal decision. On Woodside's reading of this guidance, NOPSEMA is suggesting that relevant persons have the ability to dictate how consultation is to be carried out.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| <b>6. Identifying relevant persons</b> | <i>Titleholders should also consider how they can create awareness of their activities to encourage potentially relevant persons to make themselves known to the titleholder.</i>                                                                                                                                                      | This suggests that titleholders are required to go beyond the language in the Regulations.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |

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| <p><b>7. General principles for effective consultation</b></p> | <p><i>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.</i></p> | <p>This seems to be at odds with the concepts of the titleholder's 'decisional choice' in the Full Federal Court Decision. On Woodside's reading of this guidance, NOPSEMA is suggesting that relevant persons are entitled to dictate how consultation is to be carried out and the level of information the titleholder is required to provide. For example, this could be interpreted to mean iterative revisions of the environment plan can be required by a relevant person in order to consult. This exceeds the Regulations and is a step out beyond the Full Federal Court Decision.</p>                                   |
| <p><b>7. General principles for effective consultation</b></p> | <p><i>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.</i></p>                                                                                                                   | <p>This reference also seems to be at odds with the concepts of the titleholders 'decisional choice' in the Full Federal Court Decision. From a practical perspective, this also raises concerns that:</p> <ul style="list-style-type: none"> <li>• A titleholder might not have control over the duration and manner of consultation.</li> <li>• A tension or conflict could arise between what a titleholder and a relevant person consider to be a relevant timeframe.</li> </ul>                                                                                                                                                |
| <p><b>7. General principles for effective consultation</b></p> | <p><i>The consultation process should take into account the level of participation in the process required for different relevant persons, 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.</i></p>         | <p>This wording is unclear and suggests that there are differing levels of 'participation' as between different relevant persons.</p> <p>Neither the regulations or the Full Federal Court Decision requires 'participation', and the titleholder has no power to require participation. Consultation is voluntary for relevant persons and although efforts will be made to illicit a response, titleholders cannot 'require' a relevant person to participate. Titleholders also have no power to require a relevant person who is not interested in consulting to state that they do not wish to engage in the consultation.</p> |