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1 April 2016

Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

By email: ec.sen@aph.gov.au

Dear Committee,

Oil and Gas Production in the Great Australian Bight

Environmental Defenders Offices of Australia (**EDOA**) welcomes the opportunity to provide input to the Inquiry into Oil or Gas Production in the Great Australian Bight. This submission complements the EDO SA submission.

EDOA consists of eight independently constituted and managed community legal centres located across the States and Territories. Each EDO is dedicated to protecting the environment in the public interest. EDOs:

- provide legal representation and advice,
- take an active role in environmental law reform and policy formulation, and
- offer a significant education program designed to facilitate public participation in environmental decision making.

Given our specific expertise, our comments to this inquiry focus on the regulatory framework that is necessary to ensure potential environmental impacts of oil or gas production are comprehensively assessed and managed. While this submission focuses on the inadequacies of the Commonwealth assessment process for offshore petroleum in general, specific information regarding Bight Petroleum's activities (including a timeline of applications to date) is set out in **Appendix 1**.

This submission addresses:

1. The NOPSEMA assessment and approval process
2. The 'one-stop shop' policy and environmental standards - IFAW proceedings
3. Appendix 1 – Background and timeline of the Bight Petroleum assessment and approval process
4. Appendix 2 – EDOA submission on the NOPSEMA Regulations

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1. NOPSEMA assessment and approval process

EDOA has previously raised concerns about the regulatory framework for assessing offshore oil and gas activities, now undertaken by NOPSEMA. Primarily, we are concerned that the NOPSEMA assessment and approval processes do not equate to the regulatory requirements under the *Environment Protection & Biodiversity Conservation Act 1999* (**EPBC Act**).

Specifically, the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (**Regulations**) do not mirror key components of the EPBC Act, and are therefore unlikely to adequately regulate impacts associated with offshore petroleum activities on matters of national environmental significance (**MNES**) including listed marine species and cetaceans. Specifically, the Environment Regulations do not meet all of the criteria set out in the following Parts of the EPBC Act:

- offence provisions (Part 3);
- assessment provisions (Part 8);
- approval and condition provisions (Part 9);
- precautionary principle provision (Part 16); and
- standing provisions (Part 17).

In other words, the provisions in the Environment Regulation are significantly weaker than those contained in the EPBC Act.

EDOA's detailed analysis of the differences between the EPBC Act and the draft Regulation is contained in our 2013 submission on the proposal for streamlining of approvals for offshore petroleum activities. This submission is reproduced in **Appendix 2**.

We note that the final Regulation included a number of substantive changes. Perhaps the most significant of these is the removal of World Heritage Properties from the Regulation (ie, the Regulation will not apply to offshore petroleum activities that will take place either partly or wholly within a World Heritage Property. These activities will continue to be assessed under the **EPBC Act**, and where relevant, the *Great Barrier Reef Marine Park Authority Act 1975* (Cth)). However, the vast majority of the omissions and deficiencies outlined in our submission regarding the Exposure Draft have not been remedied.

2. 'One-stop shop' policy and environmental standards

EDOA and individual EDO offices have consistently argued that delegating environmental responsibilities to States and other agencies may lower assessment and approval standards, thereby undermining protection of MNES. Our concerns regarding the one-stop shop process are detailed in our audit report *An Assessment of the Adequacy of threatened species and planning laws*,[1] and in submissions made on proposed assessment and approval bilateral agreements in a number of

[1] The Audit report was commissioned by the Places You Love Alliance and is available at: http://www.edonsw.org.au/federal_handover_of_environmental_approval_powers_to_the_states

jurisdictions, and the current Bill designed to facilitate approval bilateral agreements.[2]

The link between the 'one stop shop' reform process and the various applications made by Bight Petroleum is set out in **Appendix 1**.

As feared, the delegation of Commonwealth powers to NOPSEMA provides a clear example of where regulatory outsourcing and 'streamlining' can result in a lowering of environmental and procedural standards.

Recent proceedings undertaken by EDO NSW on behalf of the International Fund for Animal Welfare (**IFAW**) demonstrate that our concerns - particularly in relation to transparency, accountability and rigour - are justified. A summary of these proceedings is outlined in the case study, below.

IFAW v NOPSEMA December 2015

IFAW sought access from NOPSEMA to important documents informing a decision to allow Bight Petroleum to undertake seismic exploration in blue whale feeding grounds near Kangaroo Island, off South Australia.

After NOPSEMA refused to release its assessment documents and the full Environmental Plan for the seismic testing, IFAW, with the help of EDO NSW, took legal action in the Administrative Appeals Tribunal in April 2015

Bight Petroleum objected to the release of the full Environmental Plan on the grounds that the release would adversely affect its business affairs. The Environmental Plan is the regulatory document with which Bight Petroleum must comply; without the full plan there is no way for the public to ensure the company is meeting its obligations under the law.

In addition, NOPSEMA refused to release its own assessments on the basis the documents would reveal its deliberative process. Without NOPSEMA's own assessment of Bight Petroleum's environmental plan, there was no way for the public to verify if NOPSEMA is properly fulfilling its regulatory functions, which includes assessing the impacts from proposed developments on MNES.

This was the first seismic exploration licence that NOPSEMA assessed and approved after Environment Minister Greg Hunt handed over EPBC Act approval powers to the industry regulator in February last year.

In January 2016, NOPSEMA released the documents by consent order of the Administrative Appeals Tribunal.

[2] Our Briefing Note on the
the Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 is available at: https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/2282/attachments/original/1443054743/150924_EPBC_Bilat_Bill_-_briefing_note_FINAL.pdf?1443054743. See also submissions available at: http://www.edonsw.org.au/planning_development_heritage_policy

We note that subsequent to these proceedings, the Department of Industry, Innovation and Science released an issues paper examining the consultation and transparency requirements for offshore petroleum and greenhouse gas activities in place under the *Offshore Petroleum and Greenhouse Gas Storage (Environment Regulations) 2009*. EDOA will be providing input into this review.

EDOA has provided ongoing legal advice to IFAW and the Humane Society International on the regulations and their application to activities in the GAB. We would be happy to discuss the legal issues with the Committee, with the consent of our clients.

For further information, please contact rachel.walmsley@edonsw.org.au or on 02 9262 6989.

Yours sincerely,
Rachel Walmsley

Policy & Law Reform Director
EDO NSW (on behalf of EDOA)

Appendix 1 – Background and timeline of Bight Petroleum assessment and approval process

Background

Bight Petroleum is a wholly-owned Australian subsidiary of Canadian oil and gas exploration company Bight Petroleum Corp. Its primary focus is offshore oil and gas exploration along the coast of South Australia.[3]

Bight Petroleum currently holds two exploration permits, namely EPP41 and EPP42. These were awarded by the National Offshore Petroleum Titles Administrator.

Bight Petroleum Pty Limited has been (and continues to be) a leading proponent of proposed petroleum exploration projects in the Bight Basin. These projects involve significant 3D marine seismic surveys, which propose the use of powerful air gun blasts underwater.

Bight Petroleum's current proposal is for the Lightning 3D Marine Seismic Survey, covering an area of approximately 3000km^2 across their two permit areas. This area is located in the Bight Basin, 68km south of Cape Carnot (Eyre Peninsula) and 104km west of Kangaroo Island (**the Proposal**). The Proposal is for up to 70 days of seismic testing by way of continuous air gun blasts, preceded by 3 days' aerial monitoring for whales.

Seismic testing has been shown to disturb the breeding and feeding patterns of many species of cetaceans. There are many applications for seismic testing in Australian waters already approved, or in the process of approval, by NOPSEMA.

Referral of Proposal under EPBC Act

The proposed action was referred two occasions to the Commonwealth under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) to determine whether it is likely to have a significant impact on matters of national environmental significance (**MNES**).

Bight Petroleum's first referral was for seismic surveys to be carried out in its exploration permit areas from January 2013 to May 2013. The referral concludes that the Proposal is not a controlled action, including because it will not have a significant effect on any Commonwealth-listed threatened or migratory species such as the Blue Whale. However, on 9 January 2013, the Department (as the Minister for Environment's delegate) determined that the Proposal was a controlled action that required assessment under the EPBC Act.

The first referral was withdrawn on 12 February 2013. A second referral was submitted on 4 March 2013. The second referral included updated information and mitigation measures.[4] The second referral also concludes that the Proposal was not

[3] http://www.bightpetroleum.com/14834/faqs.htm
[4] Bight Petroleum, *Public Report - Response to Request for Additional Information EPBC Reference 2013-6770*, Attachment E, p. 1.

a controlled action. However, on 30 May 2013, the Minister for Environment again determined that the Proposal was a controlled action requiring assessment under the EPBC Act. On 14 June 2013, the Department of Environment requested additional information to assist in their assessment of the impacts of the seismic surveys. Bight Petroleum responded to this request on 18 November 2013.[5]

Withdrawal of second referral and creation of NOPSEMA 'one stop shop'

On 28 February 2014, Bight Petroleum withdrew its second referral under the EPBC Act.

The same day, the Commonwealth Government significantly reformed the regulatory regime governing the environmental approval process for offshore petroleum exploration, moving all assessments and approvals out of the Department's portfolio under the EPBC Act, to NOPSEMA, under the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations* 2009 (Cth) (**the Environment Regulations**). The decision to do so formed part of the Commonwealth Government's 'one-stop shop' reforms.

Environment Regulations

The Environment Regulations were endorsed by the Environment Minister pursuant to Part 10 of the EPBC Act, which deals with strategic assessment. Under Part 10, an action or class of action that complies with a 'policy, plan or program' endorsed by the Minister does not require separate approval under the EPBC Act.

The effect of these reforms is that the EPBC Act (and the Department) no longer regulates offshore petroleum and greenhouse gas activities in Commonwealth waters. Rather, NOPSEMA regulates environmental approvals pursuant to the Environment Regulations.

Under this new regime, a proponent of an offshore petroleum or greenhouse gas project must submit both an offshore project proposal and an Environment Plan to NOPSEMA for approval prior to commencing operations.[6]

Approval of Proposal by NOPSEMA

On 9 December 2013, Bight Petroleum applied to NOPSEMA for approval for its Proposal under the new regulatory regime. The application was withdrawn on 21 March 2014.

On 21 March 2014, Bight Petroleum applied for a second time to NOPSEMA for approval for its Proposal.

On 6 June 2014, Bight Petroleum's environmental plan was accepted by NOPSEMA under Regulation 10 of the Environment Regulations. Under this approval, Bight

[5] Ibid.
[6] The Regulations, Reg 9 (see generally Part 2).

Petroleum must comply with the environmental plan it submitted to NOPSEMA detailing the specifics of this project.

At the time of writing, Bight Petroleum had not yet commenced seismic activities in South Australia.

Appendix 2 – EDOA submission on the NOPSEMA Regulations

Australian Network of Environmental Defender's Offices Inc

Submission concerning the Offshore Petroleum and Greenhouse Gas Storage (Environment) Amendment (2014 Measures No.1) Regulation and Draft Strategic Assessment Report

20 December 2013

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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Introduction

ANEDO welcomes the opportunity to comment on the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Amendment (2014 Measures No.1) Regulation 2014* (**Draft Environment Regulation**) and the Draft Strategic Assessment Report for the Streamlining of Offshore Petroleum Environmental Approval (**Report**).

We would like to state at the outset that we are concerned by the brevity and timing of the consultation period for the Environment Regulation. Inviting comment over a two week period immediately prior to Christmas will invariably exclude many members of the community from commenting on the streamlining of approvals for offshore petroleum activities.

As the only public interest environment lawyers in Australia, ANEDO has a particular interest in ensuring that Commonwealth approval processes guarantee a high level of protection for Australia's unique biodiversity.

As such, we oppose the streamlining of approvals under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**). However, if the streamlining of approvals under the Environment Regulation is to go ahead, we submit that a number of amendments would need to be made in order to meet the requirements of the EPBC Act.

In making this statement, we are mindful of Australia's commitment to protect biodiversity under a number of environmental treaties, including the Convention on Biological Diversity (**Biodiversity Convention**), the Convention on Wetlands of International Importance (**Ramsar Convention**), and the Convention on Migratory Species (**Bonn Convention**), amongst others. ANEDO would like to emphasise that the Commonwealth is responsible for ensuring that 'international obligations relating to the environment are met by Australia,'[7] and caution against any regulatory amendment which may compromise compliance with these obligations. This is particularly important as the Minister must not act 'inconsistently with' relevant treaties when deciding whether to endorse the offshore approval process.[8]

Finally, our response to the Environment Regulation and Report forms part of a larger body of work regarding the streamlining of Commonwealth assessment and approval processes. This work reflects broader community concern about the erosion of laws designed to protect World Heritage properties such as the Great Barrier Reef, internationally listed wetlands, migratory species, threatened and endangered species and communities, critical habitat, and the marine environment.

Recommendations

ANEDO does not support the streamlining of environmental approvals by the Commonwealth Government. However, if streamlining is to go ahead, our analysis indicates that a number of amendments to the (Draft) Environment Regulation would be necessary in order to meet the requirements of the EPBC Act, including the requirement for the Minister to 'not act inconsistently' with relevant environmental treaties when deciding whether to endorse the streamlined offshore approval process.

[7] Intergovernmental Agreement on the Environment, cl. 2.2.1 (1).
[8] EPBC Act, Part 10, subdivision C.

The Environment Regulation should be amended to:

1. Include objects which specifically reflect the objects of the EPBC Act in addition to the object to act 'in a manner consistent with the principles of ecologically sustainable development'.

2. To ensure that it includes substantive provisions which operationalise the objects. Recommendations 3 – 20 will assist in this regard.

3. Require the offshore project proposal to identify, where relevant, matters of national environmental significance (**MNES**);

4. Require the environment plan to include information about the proponent's environmental history, including details of any proceedings taken against the proponent;

5. Require the environment plan and a plain-English summary of the same to be exhibited for a minimum of 20 business days;

6. Enable all members of the community to comment on the environment plan and plain-English summary. This should be in addition to targeted consultation with interested and affected parties;

7. Require the environment plan to outline whether any impacts associated with the activity are likely to be unknown, unpredictable or irreversible;

8. Require the environment plan to specify the source, date, reliability and (if relevant) any uncertainties concerning the information contained therein;

9. Require the Regulator to take into account any comments received during the exhibition period when deciding whether to approve or reject the environment plan;

10. To enable the Minister to call in a project and conduct a public inquiry to assess the environmental impacts associated with a particular activity;

11. To require the Regulator, when deciding whether to approve the environment plan, to 'not act inconsistently' with:

    a. Australia's obligations under the World Heritage Convention, the Australian World Heritage management principles, or a plan that has been prepared under s. 316 of the EPBC Act for the management of a declared World Heritage Property (where the activity is likely to impact a World Heritage property);

    b. The National Heritage management principles, an agreement to which the Commonwealth is party under a National Heritage Place, or a plan that has been prepared under s. 324S of the EPBC Act for the management of a National Heritage place (where the activity is likely to impact a National Heritage place);

    c. the Ramsar Convention (where the activity is likely to have an impact on a Ramsar-listed wetland);

    d. Australia's obligations under the Biodiversity Convention, or a recovery plan or threat abatement plan (where the activity is likely to have an impact on threatened species or endangered communities;

e. The Bonn Convention, the China-Australia Migratory Bird Agreement (**CAMBA**), the Japan-Australia Migratory Bird Agreement (**JAMBA**), or the Republic of Korea-Australia Migratory Bird Agreement (**ROKAMBA**) (where the activity is likely to impact certain migratory species).

12. To require the Regulator to be reasonably satisfied that the environment plan is consistent with the principles of ESD;

13. To require the Regulator to take into account the precautionary principle when deciding whether to approve or reject the environment plan;

14. To require the regulator to attach conditions to the environment plan designed to protect MNES;

15. To augment the civil penalty units for undertaking an activity without an environment plan. The civil penalty should reflect those contained in the EPBC Act for Part 3 civil offences;

16. Reinstate a criminal offence provision for undertaking an activity without an environment plan. Penalty units and imprisonment terms should reflect those contained in the EPBC Act for Part 3 criminal offences;

17. To augment the existing criminal offence provisions concerning the environment plan. Penalty units and imprisonment terms should reflect those contained in the EPBC Act for Part 3 criminal offences;

18. To include standing provisions that reflect those contained in the EPBC Act;

19. To require an offshore project proposal to be prepared for exploration activities;

20. To reinstate a quantitative limit on the discharge of produced formation water and the corresponding offence provisions.

Final Terms of Reference

While the Report is not in and of itself legally binding, under the EPBC Act it must reflect the TOR for the strategic assessment of the Current Environment Regulation.[9]

We note in the first instance that the TOR require the Report to consider any changes to the current environmental authorisation process necessary to protect MNES and achieve 'good conservation outcomes.'[10] These changes are to be found in the Draft Environment Regulation.

For ease of reference, this submission will refer hereafter to the **Environment Regulation** unless otherwise necessary to distinguish between the Current and Draft versions.

According to the TOR, the Report must also demonstrate how the Environment Regulation will meet the objects of the EPBC Act and protect the following seven MNES: World Heritage properties; National Heritage places; Ramsar wetlands; Listed threatened species and

[9] EPBC Act, s. 146 (1B).
[10] Report, Attachment A, Final Terms of Reference.

communities; Listed migratory species; Commonwealth marine areas; the environment on Commonwealth land.[11]

This submission will therefore analyse the three core elements of the Environment Regulation with a view to determining whether they meet the requirements of the EPBC Act (as outlined in the TOR). These three elements are: the Regulation's objects; the 'offshore project proposal'; and the 'environment plan'. Reference will be made to the Report where necessary.

Do the objects of the Environment Regulation meet the requirements of the EPBC Act?

Table 4.1 of the Report outlines how the Environment Regulation as a whole addresses the eight objects in the EPBC Act. That is, it does not seek to equate the objects of the Regulation with those of the Act. This may be because the TOR include a requirement to address how the Environment Regulation 'meets the objects of the EPBC Act' as opposed to 'incorporates the objects' of the EPBC Act.

Nevertheless, it is arguable that in order to meet the objects of the EPBC Act, it is necessary to ensure that they are explicitly replicated in the Environment Regulation. This is particularly important as the objects will be used to guide the interpretation of specific sub-regulations within the Regulation. Indeed, the law clearly states that the interpretation of a section or clause that best reflects the objects or purpose of legislation is to be preferred over any other interpretation.[12]

The EPBC Act includes eight objects. Only one of these objects – namely that concerning ESD – is directly addressed in the objects of the Environment Regulation. However we do note that the requirement to 'act consistently with ESD' (as contained in the Regulation) is stronger than the requirement to 'promote ESD' (as contained in the EPBC Act).

While ANEDO supports the construction of ESD contained in the Environment Regulation, it is nevertheless difficult to argue that 'acting consistently with ESD' would guarantee compliance with each of the remaining seven objects in the EPBC Act. This is particularly true as acting consistently with ESD requires the decision maker to balance the six principles outlined above, which is an inherently complex task involving the (often imprecise) weighting of economic, social and environmental factors. As noted by Justice Biscoe, 'as the principles concerning ESD are more subtle and probably still evolving, ESD jurisprudence is likely to take longer to develop.'[13] This notion was reinforced in a leading NSW Court of Appeal case concerning the application of ESD.[14]

Accordingly, it is our view that the objects of the EPBC Act may not be met by the Environment Regulation unless they are explicitly provided for in that Regulation, and supported by adequate substantive provisions which operationalise their intent. Further to this point, we are not convinced that the sub-regulations specified in that Table will indeed meet each of the remaining seven objects of the EPBC Act.

ANEDO will illustrate these conclusions via specific analysis of several objects in the EPBC Act.

[11] Ibid, cl. 3.1.
[12] *Acts Interpretation Act 1901* (Cmth), s. 15AA.
[13] Justice Peter Biscoe, *Ecologically Sustainable Development in NSW*, A paper delivered on 2 June 2007 at the 5th Worldwide Colloquium of the IUCN Academy of Environmental Law, Paraty, Brazil, p. 25.
[14] *Minister for Planning v Walker* [2008] NSWCA 224 at 56.

First object of EPBC Act

The first object of the EPBC Act is to 'provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance.'[15] The Report claims that the Environment Regulation will address this object as it:[16]

> *…ensures protection of the environment as a whole which necessarily includes matters of national environmental significance and the matters protected under Part 3 of the EPBC Act. It requires that all environmental impacts and risks to the environment resulting from petroleum or greenhouse gas storage* ***activities be of an acceptable level****, and* ***reduced to as low as reasonably possible****.* (emphasis added)

The second and third objects of the Environment Regulation are to ensure that the impacts and risks of offshore petroleum activities are of an 'acceptable level', and that they are reduced to 'as low as reasonably practicable'. It possible that these general objects would not in all instances be specifically construed to protect MNES.

It is nevertheless important to read objects in conjunction with substantive provisions which 'operationalise' their intent.[17] However, analysis of the corresponding substantive subregulations in the Environment Regulation does not suggest that they will ensure protection of MNES in at least two ways.

First, the proponent is required to identify 'details of the particular relevant values and sensitivities (if any) of that environment' in the offshore project proposal. The Regulation further states that particular relevant values and sensitivities 'may' include the 'world heritage values of a declared World Heritage property', the 'national heritage values of a National Heritage place', and so on.[18] However, the Regulation does not include a positive obligation to identify MNES where relevant (despite comments to the contrary in the Report).[19]

Second, the Regulation requires the Regulator 'to be reasonably satisfied' that the 'Offshore project proposal' (discussed, below) 'demonstrates that the environmental impacts and risks of the project will be managed to an acceptable level' before accepting the proposal.[20] However, the Regulation does not specify what constitutes 'an acceptable level.' Nor does it specifically link protection of MNES to the notion of an 'acceptable level' of environmental harm.

We do note that the Regulator is also required to be 'reasonably satisfied' that the 'performance outcomes' set for the project are consistent with the principles of ESD before approving the proposal.[21] While we support this particular requirement, it does not alter the fact that the word 'may' does not impose a strict obligation on proponents to identify MNES. If MNES are not identified, it is not possible to develop performance outcomes to protect such matters in accordance with the principles of ESD.

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[15] EPBC Act, s. 3 (a).
[16] Report, Table 4.1, p. 49.
[17] *Minister for Planning v Walker* [2008] NSWCA 224.
[18] Environment Regulation, subregulation 5A (4).
[19] Report, pp. 59-60.
[20] Ibid, subregulation 5D (6) (ii).
[21] Ibid, 5D, (d) (i).

Third object of EPBC Act

It is also our view that the third object of the EPBC Act, namely 'to promote the conservation of biodiversity' is not adequately met under the Environment Regulation. Our view is based on the comments contained in Table 4.1 and analysis of the Regulation itself.

Table 4.1 claims that this object is met in the following fashion:

> *Part 13 of the EPBC Act provides mechanisms, including recovery plans, threat abatement plans, and conservation plans for migratory and marine species to promote the conservation of biodiversity. The Program ensures that petroleum and greenhouse gas storage activities are consistent with these mechanisms. Under the Program, Offshore Petroleum Proposals and Environment Plans for petroleum and greenhouse gas storage activities must consider and be consistent with them.*

However, the Environment Regulation *does not* include any specific requirement for the proponent of such activities to consider and/or act consistently with recovery plans, threat abatement plans or conservation plans. Indeed, no reference to any of these plans or Part 13 of the EPBC Act can be found in the Regulation.

The Report therefore assumes that the Regulation's object 'to act consistently with ESD', coupled with the requirement that the Regulator be 'reasonably satisfied' that environmental impacts and risks are managed 'to an acceptable level' and reduced to 'as low as reasonably possible' somehow translates into a more specific requirement to consider and act consistently with recovery plans, threat abatement plans and conservation plans.

ANEDO submits that omitting any reference to the aforementioned plans does not create the necessary legal obligation to consider and/or act consistently with such plans. By way of corollary, a court would almost certainly rule that there is no legislative requirement to act consistently with any relevant plan.[22]

Fifth object EPBC Act

In the absence of any specific requirement to implement relevant environmental treaties, it is difficult to see how the vague provisions outlined above could ensure that Australia will meet its international legal obligations under these conventions.

This is particularly true given the test for treaty implementation developed by the High Court. Specifically, the statute or instrument purporting to give effect to the treaty or treaties in question must be 'appropriate and adapted' to this task.[23] We are not convinced that the Environment Regulation is 'appropriate and adapted' to giving effect to the many obligations outlined in the Convention on Biological Diversity (**Biodiversity Convention**), the Ramsar Convention, the Bonn Convention, the China-Australia Migratory Bird Agreement (**CAMBA**), the Japan-Australia Migratory Bird Agreement (**JAMBA**), or the Republic of Korea-Australia Migratory Bird Agreement (**ROKAMBA**).

ANEDO's reservation is principally based on the generality of the Regulation and the absence of any reference to these treaties or their obligations.

[22] There is a very slim possibility that the court would have recourse to 'extrinsic material', namely the Report, when interpreting the obligations contained in the Environment Regulation. See *Acts Interpretation Act 1901* (Cmth), s. 15AB.
[23] *State of Victoria v Commonwealth* (1996) 187 CLR 416; 138 ALR 129 at 146.

Recommendations

The Environment Regulation should be amended to:

1. Include objects which specifically reflect the objects of the EPBC Act in addition to the object to act 'in a manner consistent with the principles of ecologically sustainable development'

2. To ensure that it includes substantive provisions which operationalise its objects.

***Do the substantive provisions of* the Environment Regulation concerning offshore project proposals and environment plans meet the requirements of the EPBC Act?**

As previously noted, the TOR require the Report to demonstrate how the Environment Regulation will protect MNES. According to the Report, the current subregulation 11 (draft subregulation 10A) will ensure that MNES are protected. Specifically, it specifies how this subregulation will protect: World Heritage areas, National Heritage places, Ramsar Wetlands, listed threatened species and ecological communities, listed migratory species, Commonwealth marine areas, and Commonwealth land.[24]

Under the EPBC Act, MNES are protected by a number of provisions grouped under different 'parts' of the Act. For our purposes, the most relevant are the: assessment provisions (Part 8); approval and condition provisions (Part 9); offence provisions (Part 3); precautionary principle provision (Part 16); and standing provisions (Part 17). This submission will assess whether the Environment Regulation satisfies each of these parts.

Assessment provisions (Part 8)

ANEDO submits that there are a number of discrepancies between the Environment Regulation and the assessment provisions contained in Part 8 of the EPBC Act. These are summarised below.

Under the EPBC Act, the Minister may choose the method of assessment for the controlled action. The six methods are: an accredited assessment approach; assessment based on information contained in the referral to the Commonwealth; assessment based on preliminary documentation; a public environment report; an environmental impact statement (**EIS**); or a public inquiry.[25]

By way of contrast, assessment under the Environment Regulation is limited to the offshore project proposal and the environment plan. This is not necessarily problematic so long as these processes provide the same level of scrutiny and protection as that offered under Part 8. This issue will be discussed in the following paragraphs.

The referral, preliminary documentation, public environment report and EIS approaches all require the proponent to engage in public consultation. The exhibition periods are as follows:

- draft recommendation report for referred matter – 10 business days;[26]
- preliminary documentation – discretionary;[27]
- draft public environment report – minimum of 20 business days;[28]

[24] Report, pp. 85-124.
[25] EPBC Act, s. 87.
[26] Ibid, s. 93 (3) (b).
[27] Ibid, s. 95 (2) (c).
[28] Ibid, s. 98 (3).

- EIS - minimum of 20 business days.[29]

As the Environment Regulation does not include a minimum public consultation period for the environment plan, it fails to offer the same guaranteed level of engagement as the referral, public environment report or EIS approaches.

Furthermore, while the entire draft recommendation report, public environment report and EIS must be exhibited for public comment,[30] the Environment Regulation only requires that relevant persons be provided with 'sufficient information' (as opposed to the entire environment plan) to allow them to make an assessment of the impacts on their interests, functions and activities.[31] There are advantages and disadvantages to both approaches. Nevertheless, it is arguable that access to the actual documents on which the Regulator will base their final decision is preferable to a summary of those documents.

Consultation under the EPBC Act is not restricted to specific persons or organisations.[32] By way of contrast, the Environment Regulation limits consultation for the environment plan to prescribed agencies and affected persons.[33] While the Regulator must be satisfied that consultation has been undertaken in accordance with the requirements of the Regulation,[34] there are no appeal provisions to assist affected or interested persons who have not been provided with an opportunity to comment.

Schedule 4 of the EPBC Regulation sets out the information that must be contained in a public environment report and EIS.[35] While much of this information must be covered in an offshore project proposal and/or environment plan, Schedule 4 does include some additional requirements. Specifically, the public environment report and EIS must include:

- a statement outlining whether any of the impacts are likely to be unknown, unpredictable or irreversible;
- information concerning the proponent's environmental history (including details of any proceedings taking against the proponent);
- the source, date, reliability and (if relevant) any uncertainties concerning the information in the public environment report or EIS.

The Minister is also empowered to appoint commissioners to conduct a public inquiry and to produce a report if they believe that this is necessary to assess the impacts of a controlled action.[36] The commissioners have numerous powers under the Act, including the power to call witnesses to give evidence at the inquiry, and the power to inspect land, buildings and places.[37]

ANEDO is concerned that the Environment Regulation does not provide for the Minister or Regulator to conduct a public inquiry into the environmental impacts of an offshore petroleum or greenhouse gas activity.

[29] Ibid, s. 103 (3).
[30] Ibid, ss. 93 (3), 98 (1) (c), 103 (1) (c).
[31] Environment Regulation, subregulation 11A (2).
[32] Rather, it is open to the general public.
[33] Environment Regulation, subregulation 11A.
[34] Ibid, subregulations 10 (1) (a), 10A (e).
[35] EPBC Regulation, cl. 5.04.
[36] EPBC Act, s. 107 (1).
[37] Ibid, ss. 111, 114.

Approval and condition provisions (Part 9)

It is arguable that the Environment Regulation fails to fulfil numerous criteria outlined in Part 9 of the EPBC Act, which outlines the Act's approval and conditions process. Specifically, when deciding whether to approve or reject an action under the EPBC Act, and what conditions to attach to the approval, the Minister:

- may take into account the proponent's history in relation to environmental matters and where relevant, the history of a corporation's executive officers in relation to environmental matters;[38]
- must not, (where the action pertains to a World Heritage Property) act inconsistently with Australia's obligations under the World Heritage Convention, the Australian World Heritage management principles, or a plan that has been prepared under s. 316 of the EPBC Act for the management of a declared World Heritage Property;[39]
- must not, (where the action pertains to a National Heritage place), act inconsistently with the National Heritage management principles, an agreement to which the Commonwealth is party under a National Heritage Place, or a plan that has been prepared under s. 324S of the EPBC Act for the management of a National Heritage place;[40]
- must not, (where the action pertains to a Ramsar-listed wetland), act inconsistently with the Ramsar Convention;[41]
- must not, (where the action pertains to threatened species and endangered communities), act inconsistently with Australia's obligations under the Biodiversity Convention, or a recovery plan or threat abatement plan;[42]
- must not, (where the action pertains to migratory species), act inconsistently with the Bonn Convention, CAMBA, JAMBA, or ROKAMBA.[43]

Part 9 of the EPBC Act also creates a framework for the creation of conditions attached to approvals. In short, the Minister is empowered to attach an condition if they are satisfied that the condition is necessary or convenient for protecting a MNES, or repairing or mitigating damage that may or will, or has been, caused by the controlled relevant action to a MNES.[44]

By way of contrast, the Environment Regulation generally empowers the Regulator to attach 'limitations or conditions' to an environment plan.[45] That is, it does not specifically empower or require the Regulator to attach conditions necessary to protect MNES.

We also note that Part 9 generally requires the Minister to 'take into account' the principles of ESD when deciding whether or not to approve a controlled action, and what conditions to attach to an approval.[46]

Under the Environment Regulation, the Regulator must be 'reasonably satisfied' that the environmental performance outcomes for the offshore project proposal are consistent with ESD before approving the project.[47] However, the Environment Regulation does not require the Regulator to be satisfied that any aspect of the environment plan is consistent with ESD.

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[38] Ibid, s. 136 (4).
[39] Ibid, s. 137.
[40] Ibid, s. 137A.
[41] Ibid, s. 138.
[42] Ibid, s. 139.
[43] Ibid, s. 140. See also s. 209 (4) with respect to ROKAMBA.
[44] Ibid, s. 134 (1), (2).
[45] Environment Regulation, subregulation 11 (1) (c).
[46] EPBC Act, s. 136 (2).
[47] Environment Regulation, subregulation 5D (6) (d) (i).

Rather, they may only accept the environment plan if they are 'reasonably satisfied' that the environmental impacts and risks associated with the project will be 'reduced to as low as reasonably practicable.'[48] The Report defines 'as low as reasonably practicable' as:

> *the point where the economic/health and safety costs required to reduce the environmental impacts and risks of the activity any further would be grossly disproportionate to the environmental benefit gained.*[49]

It is arguable that this definition is not necessarily consistent with ESD. Specifically, it does not contain within it any notion of the precautionary principle or intergenerational equity. Rather, it assumes that development must proceed in all instances – but be managed in such a way that balances the economic/health and safety costs of reducing environmental impacts with net environmental benefit.

Offence provisions (Part 3)

The EPBC Act includes offence provisions that are particular to the protection of MNES. Specifically, Part 3 makes it an offence to carry on an activity that is likely to have a significant impact on a MNES in the absence of the necessary approval.

While the Environment Regulation does include offence provisions regarding environment plans (noted above), it does not include any provisions which are specifically designed to protect MNES from significant impacts.

We also note that there is a significant discrepancy between the penalties associated with Part 3 of the EPBC Act and those associated with environment plans. The civil penalty for carrying on an activity that is likely to have a significant impact on a MNES in the absence of the necessary approval is 5,000 penalty units for individuals and 50,000 penalty units for corporations. It is therefore of some concern that the civil penalty for undertaking an activity without an environment plan is only 80 penalty units.[50]

The Environment Regulation does impose 80 criminal penalty units for undertaking an activity in a way that is contrary to the environment plan,[51] or carrying out an activity after a significant new or increased environmental impact or risk arises (which is not provided for in the environment plan).[52] We note that the criminal offence provisions under Part 3 of the EPBC Act are considerably more onerous, namely up to seven years imprisonment, up to 420 penalty units, or both.

As the burden of proof for criminal offences is 'beyond reasonable doubt', it may dissuade the Regulator from enforcing criminal offence provisions. This is particularly problematic as there are no alternative civil offence provisions (for which the burden of proof is 'on the balance of probabilities') for subregulations 7 (1) and 8 (1).

Precautionary principle provision (Part 16)

Under the EPBC Act, the Minister must 'take into account' the precautionary principle when deciding whether to approve an action.[53] The Environment Regulation does not include an equivalent provision.

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[48] Ibid, subregulations 10 (1) (a), 10A (b).
[49] Report, p. 16.
[50] Environment Regulation, subregulation 6 (1).
[51] Ibid, subregulation 7 (1).
[52] Ibid, subregulations 8 (1).
[53] EPBC Act, s. 391.

As previously indicated, the Regulation does require the Minister to be 'reasonably satisfied' that the performance outcomes for the project are consistent with the principles of ESD. It also includes an object pertaining to ESD. However, ESD comprises six principles, of which the precautionary principle is but one. All of these principles must be considered during the decision-making process. In other words (and in the absence of a substantive provision to the contrary), the precautionary principle does not have any special status amongst these six principles.

Standing provisions (Part 17)

The EPBC Act allows an 'aggrieved person' to commence judicial review proceedings for an alleged breach of the Act. An 'aggrieved person' is defined as a person or organisation that has engaged in activities 'for the protection or conservation of, or research into, the environment' for at least two years.[54] By way of contrast, the Environment Regulation *does not* include equivalent standing provisions.

Recommendations

The Environment Regulation should be amended to:

1. Require the offshore project proposal to identify, where relevant, matters of national environmental significance (MNES);

2. Require the environment plan to include information about the proponent's environmental history, including details of any proceedings taken against the proponent;

3. Require the environment plan and a plain-English summary of the same to be exhibited for a minimum of 20 business days;

4. Enable all members of the community to comment on the environment plan and plain-English summary. This should be in addition to targeted consultation with interested and affected parties;

5. Require the environment plan to outline whether any impacts associated with the activity are likely to be unknown, unpredictable or irreversible;

6. Require the environment plan to specify the source, date, reliability and (if relevant) any uncertainties concerning the information contained therein;

7. Require the Regulator to take into account any comments received during the exhibition period when deciding whether to approve or reject the environment plan;

8. To enable the Minister to call in a project and conduct a public inquiry to assess the environmental impacts associated with a particular activity;

9. To require the Regulator, when deciding whether to approve the environment plan, to 'not act inconsistently' with:

    a. Australia's obligations under the World Heritage Convention, the Australian World Heritage management principles, or a plan that has been prepared under s. 316 of the EPBC Act for the management of a declared World Heritage Property (where the activity is likely to impact a World Heritage property);

[54] Ibid, ss. 487, 488.

b. The National Heritage management principles, an agreement to which the Commonwealth is party under a National Heritage Place, or a plan that has been prepared under s. 324S of the EPBC Act for the management of a National Heritage place (where the activity is likely to impact a National Heritage place);

c. the Ramsar Convention (where the activity is likely to have an impact on a Ramsar-listed wetland);

d. Australia's obligations under the Biodiversity Convention, or a recovery plan or threat abatement plan (where the activity is likely to have an impact on threatened species or endangered communities;

e. The Bonn Convention, the China-Australia Migratory Bird Agreement (**CAMBA**), the Japan-Australia Migratory Bird Agreement (**JAMBA**), or the Republic of Korea-Australia Migratory Bird Agreement (**ROKAMBA**) (where the activity is likely to impact certain migratory species).

10. To require the Regulator to be reasonably satisfied that the environment plan is consistent with the principles of ESD;

11. To require the Regulator to take into account the precautionary principle when deciding whether to approve or reject the environment plan;

12. To require the regulator to attach conditions to the environment plan designed to protect MNES;

13. To augment the civil penalty units for undertaking an activity without an environment plan. The civil penalty should reflect those contained in the EPBC Act for Part 3 civil offences;

14. Reinstate a criminal offence provision for undertaking an activity without an environment plan. Penalty units and imprisonment terms should reflect those contained in the EPBC Act for Part 3 criminal offences;

15. To augment the existing criminal offence provisions concerning the environment plan. Penalty units and imprisonment terms should reflect those contained in the EPBC Act for Part 3 criminal offences;

16. To include standing provisions that reflect those contained in the EPBC Act.

Additional concerns

ANEDO notes with some concern that an offshore project proposal does not have to be prepared for offshore exploration activities, which generally involves seismic surveying and drilling. This is particularly problematic as seismic activities can and do impact on cetaceans, which are protected under the EPBC Act.

ANEDO also notes that the Draft Environment Regulation has changed the rules concerning discharges of produced formation water. The Current Environment Regulation includes a quantitative limit on discharge of produced formation water and makes it an offence to exceed this limit.[55] However, the Draft Environment Regulation repeals these provisions, replacing them with a general requirement to 'provide for sufficient monitoring of' 'emissions

[55] Current Environment Regulation, subregulation 29 (1), (2).

and discharges' and to maintain 'a qualitative record' of these emissions and discharges with a view to determining whether 'environmental performance outcomes and standards in the environment plan are being met.'[56]

These amendments, which include the repeal of an offence provision, arguably reduce protection of MNES.

Recommendations

The Environment Regulation should be amended:

1. To require an offshore project proposal to be prepared for exploration activities;

2. To reinstate a quantitative limit on the discharge of produced formation water and the corresponding offence provisions.

[56] Draft Environment Regulation, sub-regulation 14 (7).