EDOs of Australia

Submission responding to the Issues Paper on Consultation and Transparency Requirements for Offshore Petroleum Activities in Commonwealth Waters

29 April 2016

EDOs of Australia (formerly ANEDO, the Australian Network of Environmental Defender's Offices) 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.

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Introduction

EDOs of Australia (**EDOA**) welcomes the opportunity to comment on the Issues Paper: Consultation and Transparency Requirements for Offshore Petroleum Activities in Commonwealth Waters (**Issues Paper**).

EDOA has engaged in various policy and legislative processes concerning the accreditation of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (**Environment Regulation**) under Part 10 of the Environment Protection and Biodiversity Conservation Act 1999 (**EPBC Act**).[1]

Our NSW office also brought proceedings in the Administrative Appeals Tribunal (**AAT**) on behalf of the International Fund for Animal Welfare (**IFAW**) seeking access from NOPSEMA to Bight Petroleum's complete Environment Plan for seismic testing near Kangaroo Island,[2] as well as the regulator's assessment documents for the project.[3] Most recently, EDOA contributed to the Senate Inquiry into Oil and Gas Production in the Great Australian Bight.[4]

We are therefore well placed to respond to the Issues Paper and to make recommendations to improve consultation processes and overall transparency under the Environment Regulations.

By way of background, the Environment Regulation was accredited pursuant to Part 10 of the EPBC Act, thereby making NOPSEMA responsible for both the assessment and approval of offshore petroleum activities likely to have a significant impact on matters of national environmental significance (**MNES**). EDOA has argued that the Environment Regulation does not meet the requirements of the EPBC Act in a number of significant ways.[5] Relevantly, this includes concerns regarding exhibition, consultation and overall transparency. Accordingly, this submission will reiterate these concerns, comment on the 'options for improving consultation and transparency' outlined in the Issues Paper, and make final recommendations designed to facilitate access to information under the Regulation.

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[1] EDOA submission on the draft Terms of Reference for a strategic assessment of the environmental management authorisation process for petroleum activities administered by NOPSEMA under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006,* September 2013; EDOA submission on the Offshore Petroleum and Greenhouse Gas Storage (Environment) Amendment (2014 Measures No.1) Regulation and Draft Strategic Assessment Report, December 2013. These two submissions are available online at: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/358/attachments/original/1380680250/130913Strategic_assessment_NOPSEMAprocess.pdf?1380680250 http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1232/attachments/original/1387517295/FINAL_ANEDO_submission_on_NOPSEMA_strategic_assessment_PDF.pdf?1387517295

[2] Located in the Great Australian Bight.

[3] A case study of these proceedings is included in Part 3 of this submission.

[4] Submission on Oil and Gas Production in the Great Australian Bite, April 2016. This submission is available online at: https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/2725/attachments/original/1461029765/Inquiry_into_offshore_oil_and_Gas_Production_SA_EDOA_submission_Apr2016.pdf?1461029765

[5] See our submission on the Offshore Petroleum and Greenhouse Gas Storage (Environment) Amendment (2014 Measures No.1) Regulation and Draft Strategic Assessment Report, December 2013.

Specifically, this submission will address the following matters:

1. The contents of offshore project proposals
2. The contents of Environment Plans
3. Exhibition and consultation requirements for Environment Plans
4. Definition of 'relevant persons'
5. Definition of 'sufficient information'
6. Access to assessment information
7. Standing under the Environment Regulation

1. The contents of offshore project proposals

EDOA is concerned that the Environment Regulation does not include a mandatory requirement to include information about likely impacts on MNES in offshore project proposals. Environment Regulation, clause 5A (6) provides that the titleholder 'may' include details of 'relevant values and sensitivities' including MNES. That is, this requirement is not mandatory. Furthermore, clause 5A (8) generally states that the titleholder must include details of environmental impacts and risks, but does not specifically require impacts on MNES to be outlined. This is concerning insofar as the Environment Regulation has been accredited under Part 10 of the EPBC Act.

Recommendation 1: The Environment Regulation should be amended to explicitly require the offshore project proposal to identify, where relevant, MNES.

2. The contents of Environment Plans

EDOA is similarly concerned about the contents of Environment Plans, in particular:

- the absence of a mandatory requirement to include information about likely impacts on MNES; and
- the absence of a mandatory requirement to include information about the titleholder's environmental history, including details of any proceedings taken against the titleholder.

Recommendation 2*:* The Environment Regulation should be amended to require Environment Plans to identify MNES that may be affected by the project proposal, and outline any likely impacts on these MNES.

Recommendation 3: The Environment Regulation should be amended to require that Environment Plans must include information about the titleholder's environmental history, including details of any proceedings taken against the titleholder.

3. Exhibition and consultation requirements for Environment Plans

EDOA is particularly concerned that the Environment Regulation does not require full draft Environment Plans to be placed on public exhibition. We note that while the Issues Paper identifies this omission, it goes on to outline a series of justifications for this practice. In summary, these are:[6]

1. Environment Plans are 'large and complex documents developed to inform regulatory decision making and to serve as an operational document for the titleholder.' They contain 'significantly more information than that which is ordinarily made available to facilitate public comment in other environmental decision making processes…'

2. The 'additional information' contained in Environment Plans 'is not relevant to informing affected parties of the potential impacts of an activity on them.' Rather, they are 'prepared specifically to allow the independent, expert regulator to make a decision against the requirements of the legislation as opposed to being intended as a basis for public consultation or comment.'

3. Releasing full draft Environment Plans for consultation will means that the timeframes for these processes will be 'extensive due to the level and complexity of information released.'

4. Environment Plans contain information that is commercial-in-confidence or otherwise proprietary in nature (such a scientific studies). If titleholders are required to release full draft Environment Plans, they may be less inclined to apply the same level of rigour in their development, or include the same level of detail in the Plans themselves.

5. The titleholder would be required to develop an Environment Plan 'to the point that it is ready for submission such that it can be published' rather than 'focussing exclusively on those elements of the Environment Plan that inform external parties of the potential impacts and risks of a proposed activity to their functions, interests and activities.' This would in turn 'extend lead times for titleholders in preparation of Environment Plans.'

EDOA vigorously rejects the aforementioned justifications for non-disclosure of full draft Environment Plans. Our reasons our outlined below.

In the first instance, it is unlikely that Environment Plans contain significantly more detail than environmental impact statements (**EIS**), which must be exhibited to the general public for a minimum of 20 business days under the EPBC Act.[7] While we believe that this exhibition period is insufficient given the length and complexity of EIS documents, we support the underlying principle of full disclosure.

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[6] Issues Paper, pp. 17-18.

[7] EPBC Act, s. 104. Though we note that only an 'aggrieved person' may seek judicial review of a decision made under the EPBC Act: ss. 487, 488.

Second and based on our experience, conservation and community groups (in particular groups with a particular interest in the impacts associated with offshore petroleum activities) have a very clear interest in accessing and evaluating Environment Plans.

Third, while EIS and Environment Plans are inherently complex documents, it cannot be assumed that conservation or community groups are incapable of properly interpreting the material contained therein, or obtaining advice from appropriately qualified experts. However, and as suggested in the Issues Paper, non-experts would certainly benefit from a summary of the Environment Plan being placed on public exhibition prior to a determination being made by NOPSEMA.

Fourth, while the consultation period would need to be commensurate with the Plan's complexity, this is unlikely to prejudice the titleholder to any significant degree. Relevantly, titleholders already benefit from a streamlined assessment and approval process under the (accredited) Environment Regulation. Furthermore, any inconvenience that may be borne by the titleholder is arguably outweighed by the public's interest in transparent decision-making processes and environmental protection.

Fifth, genuinely commercial-in-confidence material can be redacted before full draft Environment Plans are exhibited. On the other hand, scientific studies informing the titleholder's management processes should be made available to the public so that interested parties can evaluate the findings contained therein.

Sixth, it is of great concern that the Australian Government believes that transparent assessment and decision-making processes may deter titleholders from preparing sufficiently detailed Environment Plans. We note that NOPSEMA is empowered under the Environment Regulation to reject any Environment Plan that fails to meet the requirements of that Regulation,[8] and should do so if any Plan lacks the appropriate level of detail. Furthermore, assuming the Government's concerns are well-founded, NOPSEMA should be charged with educating titleholders about the importance of drafting rigorous, evidence-based Environment Plans – regardless of the audience.

Seventh, the titleholder is required to prepare a full draft Environment Plan for NOPSEMA. To that extent, it is unclear why placing a full draft on exhibition would significantly increase 'lead times' for the titleholder. This is particularly true as NOPSEMA is entitled to begin its assessment of the Plan once it is placed on exhibition.

Finally, failure to place the full Draft Environment Plan on exhibition (and to make the final Environment Plan available to the public) may result in the public commencing proceedings in the Administrative Appeals Tribunal in order to obtain access to the Plan and related documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**). The time and resources expended in such

[8] Environment Regulation, cll. 10 (4) (b) (ii), 5 (a).

proceedings could be avoided entirely by making these documents available in the first instance, as demonstrated in the case study, below.

Case Study

***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.

Recommendation 4: The Environment Regulation should be amended so that full draft Environment Plans are required to be placed on public exhibition on NOPSEMA's website for a minimum of 30 working days.[9]

Recommendation 5: The Environment regulation should be amended so that a summary of the Environment Plan[10] is required to be placed on public exhibition on NOPSEMA's website for a minimum of 30 working days.

Recommendation 6: The Environment Regulation should be amended so that NOPSEMA is required to consider any comments made during the exhibition period when determining the Environment Plan.

[9] We note that under the EPBC Act, there are precedents for public exhibition periods of longer than 20 business days. For example: Carmichael Coal Mine Project EIS– 15 Dec 2012 to 11 February 2013 (39 business days), and Badgery's Creek Airport EIS – 19 October to 18 December 2015 (45 business days). Source: http://www.environment.gov.au/protection/assessments/key-assessments

[10] As defined in Environment Regulation, cl. 11 (4).

Recommendation 7: The Environment Regulation should be amended so that the final Environment Plan is published on NOPSEMA's website.

4. Definition of 'relevant persons' for targeted consultation

As noted in Part 3 of this submission, EDOA recommends that the full Draft Environment Plan be placed on public exhibition.

In addition, we support the current targeted consultation process with 'relevant persons' during the development phase of the Environmental Plan (i.e, prior to the full public exhibition of the plan).

We note that a 'relevant person' is defined in the Environment Regulation to include 'a person or organisation whose functions, interests or activities may be affected by the activities to be carried out under the environment plan.'[11]

EDOA does not support decreasing the scope of this definition, however believes that the targeted consultation process should be advertised on NOPSEMA's website so that any relevant persons who are not contacted are afforded the opportunity to participate in this process.

This would also result in the public-at-large being informed about the proposed activity, which is arguably the first step in transparent decision-making processes under the Environment Regulation. By way of comparison, we note that the Department of Environment maintains a public notification site, in particular in relation to actions referred to it under the EPBC Act.[12]

Recommendation 8: The Environment Regulation should be amended to require the targeted consultation process to be advertised on NOPSEMA's website.

5. Definition of 'sufficient information' and time period for targeted consultation

The Environment Regulation requires the titleholder to provide each 'relevant person' with 'sufficient information' to make an 'informed assessment of the possible consequences of the activity on the functions, interests or activities of the relevant person.'[13] We further note that the Regulation does not stipulate a minimum consultation period; rather, it simply states that the titleholder must provide a 'reasonable period for the consultation.'[14]

Recommendation 9: The Environment Regulation should be amended so that 'relevant persons' are provided with 'sufficient information' to make an 'informed assessment of the possible consequences of the activity on the functions,

[11] Environment Regulation, cl. 11A (1) (d).
[12] http://www.environment.gov.au/epbc/public-notices
[13] Environment Regulation, cl. 11A (2).
[14] Environment Regulation, cl. 11A (3).

interests or activities of the relevant person, as well as the environment (including any relevant MNES).'

Recommendation 10: The Environment Regulation should be amended so that the targeted consultation period is no less than 30 business days.

6. Access to assessment information

There is a strong public interest argument to be made in favour of disclosing information clarifying NOPSEMA's assessment process for any Environment Plan. Again, this would likely save time insofar as interested parties would not have to rely on either the FOI Act or in the case of non-disclosure, legal proceedings, to obtain these documents. We note that in NSW some departmental 'assessment reports' for major developments must be made publically available.[15] Similarly, it is standard practice in NSW for local councils to publish assessment reports for development applications before councillors make a determination.

Recommendation 11: The Environment Regulation should be amended to require NOPSEMA to publish its assessment report for an Environment Plan on its website.

7. Standing

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.[16] By way of contrast, the Environment Regulation – and the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* that the regulation is made under - *do not* include equivalent standing provisions. This means that conservation groups would have to rely on common law standing, which is assessed on a case-by-case basis. Again, this is arguably indicative of the Regulation's failure to meet the requirements of the EPBC Act.

EDOA has consistently argued that there is a strong public policy rationale for retaining broad standing provisions that allow conservation groups and individual 'third parties' to seek judicial review. Relevantly:

- There is a general public interest in ensuring that decision-makers lawfully comply with legislative procedures – this is the role of judicial review.

- The potential for additional scrutiny promotes better decision-making, accountability and public confidence that the law will be upheld. It is also

[15] *Environmental Planning and Assessment Regulation 2000* (NSW), cl. 85B (d).
[16] EPBC Act, ss. 487, 488.

instructive to note that where third party rights do exist, they are very rarely exercised.

Recommendation 12: The *Offshore Petroleum and Greenhouse Gas Storage Act 2006* should be amended to include standing provisions that reflect those contained in ss. 487 and 488 of the EPBC Act.