



Environmental Defenders Office

4 November 2020

National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA)
GPO Box 2568
PERTH WA 6001

By email: environment@nopsema.gov.au

Dear NOPSEMA,

Draft Decision Making Guidelines

Thank you for the opportunity to comment on the draft Offshore Project Proposal Decision Making Guideline (**draft OPP Guideline**) and the draft Environment Plan Decision Making Guideline (**draft EP Guideline**). Environmental Defenders Office (**EDO**) has made a number of submissions to NOPSEMA as part of their process of clarifying and operationalising regulatory requirements. Previous EDO submissions relating to NOPSEMA responsibilities are available at: www.edo.org.au/publication/submissions-involving-nopsema/.

Draft OPP Guideline

We note that the purpose of the guideline is to set out the considerations of NOPSEMA in making decisions in accordance with the legislated criteria relevant to OPPs. The Draft OPP Guideline provides that the guideline:

“Communicates the key factors that influence NOPSEMA’s decision making in relation to decision making criteria for:

- o suitability of an OPP for publication (Regulation 5(C)(2)) (‘Stage 1’ of the OPP assessment process); and
- o whether to accept or refuse to accept an OPP (Regulation 5(D)(6)) (‘Stage 2’ of the OPP assessment process)...”

This submission provides feedback on the considerations for a number of the decision-making criteria.

Criterion – 5C(2)(a) Appropriate identification and evaluation of environmental impacts and risks

The draft OPP Guideline states that in considering whether the submitted OPP has undertaken an appropriate identification and evaluation of environmental impacts and risks in relation to the suitability for publication (‘Stage 1’), “NOPSEMA does not specifically consider whether the environmental impacts and risks will be managed to an acceptable level”. While this assessment sits within Stage 2 and the consideration of a proposed EP, EDO submits that at the stage of

T +61 2 9262 6989 **F** +61 2 9264 2414
E info@edo.org.au **W** edo.org.au
Level 5, 263 Clarence St, Sydney NSW 2000
ABN: 72002 880 864

considering whether an OPP will be progressed, NOPSEMA should consider whether the environmental impacts and risks **can** be managed to an acceptable level. If the risks of a project are clearly unacceptable, that decision should be made upfront. We provide further comment in relation to the 'Stage 2' considerations of 'acceptable' impact below.

Criterion – 5C(2)(b) Environmental performance outcomes

This section of the draft OPP Guideline states “When making a decision regarding the relevance of EPOs [Environmental Performance Outcomes] to the identified environmental impacts and risks, the decision maker considers whether... it is evident that EPOs are applicable to the management of the project’s environmental aspects in the context of the proponent’s defined acceptable levels of impact and risk.” It is unclear how NOPSEMA can adequately consider this issue without considering whether the anticipated impacts and risks can be managed to an acceptable level. This emphasises the need to define unacceptable impacts early in the assessment process. This is particularly necessary given the limitations placed on NOPSEMA’s ability to reject EPs at a later date, i.e. that the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 (Regulations) require* a decision maker to ‘accept’ an EP if they are ‘reasonably satisfied’ that the criteria for acceptance have been met. EDO maintains the view that ‘reasonably satisfied’ is too low a bar for such consideration.

Criterion – 5C(2)(c) No project activity undertaken in a World Heritage property

The definition of an activity should clarify that the impacts arising from the activity form part of the activity. That is, an activity that is physically located outside a World Heritage property should not be permitted if that activity will have impacts that occur in a World Heritage property.

Criterion – 5D(6)(c) Appropriate identification and evaluation of environmental impacts and risks

EDO is concerned that the draft OPP Guideline effectively leaves it to proponents to define ‘acceptable’ levels of impact, having reference to “Australian Government policies, relevant documentation on the DAWE website relevant to matters protected under Part 3 of the EPBC Act, relevant guidelines and standards for environmental management and consultation with relevant persons.”

As EDO has submitted previously, ‘acceptable levels’ must be objectively measured and NOPSEMA should outline what environmental impacts will be considered unacceptable (i.e. circumstances in which NOPSEMA could not be reasonably satisfied that the criteria for acceptance of an EP have been met).

EDO further submits that a consideration of whether impacts and risks will be of an acceptable level should include consideration of the environmental management history of the proponent, and whether they have the technical capability to conduct the proposal.

Criterion – 5D(6)(d) Appropriate environmental performance outcomes

The draft OPP Guideline states EPOs must “provide sufficiently strong commitment to implement programs of monitoring and adaptive management that demonstrate the project could be implemented consistent with principles of ESD”. It is unclear what NOPSEMA considers to be a ‘sufficiently strong commitment’. EDO submits that management programs and specified management responses must be mandatory requirements, and that a proponent should not be

given any discretion as to whether to implement such requirements on the basis on whether it decides to honour its 'commitments'.

Criterion – 5D(6)(e) World heritage properties

See our comments in relation to Criterion – 5C(2)(c) No project activity undertaken in a World Heritage property.

Appendix B – Principles of ESD

“Examples of factors that may be contemplated” in consideration of intergenerational equity must expand the timeframe considered from “the duration of the activity”, to the period of time for which the impacts will last. In the case of greenhouse gas emissions (**GHG emissions**) for example, the environmental impact of releasing GHG emissions will extend far beyond the duration of the activity itself and will significantly impact on intergenerational equity.

Draft EP Guideline

We note that the purpose of this guideline is to set out NOPSEMA’s considerations in making decisions in accordance with the legislated criteria relevant to EPs. We provide feedback on a number of issues discussed and on specific considerations for decision-making criteria.

Financial Assurance

The draft EP Guideline states that “if the EP is submitted by an applicant for a title (not yet a titleholder) then the EP can be accepted without providing evidence of compliance with financial assurance, noting that the applicant will have to ensure financial assurance is in place when they become a titleholder.”

We note that this situation arises from the wording of cl.5G(1)(a)(ii) of the Regulations, which states cl.5G only applies if "there is a titleholder in relation to the activity immediately before the Regulator decides whether or not to accept the plan under regulation 10." However, there is no specific point in time after the applicant becomes a titleholder, at which NOPSEMA (as opposed to the applicant) is **required** to satisfy itself that the applicant is compliant with s.571(2) of the Regulations, i.e. that appropriate financial assurance is in place, even though the EP has already been accepted. EDO is of the view that this is a regulatory gap that should be closed. While recognising that NOPSEMA is not currently consulting on potential regulatory change, we provide the following suggested additional clause to cl.5G to address this issue:

- (3) (a) If NOPSEMA decides to accept an environment plan under regulation 10 before there is a titleholder in relation to the activity, as soon as practicable after a petroleum title is granted to a titleholder in relation to the activity, NOPSEMA must consider whether the following criteria are met:
 - (i) the titleholder is compliant with subsection 571(2) of the Act in relation to the petroleum activity; and
 - (ii) the compliance is in a form that is acceptable to NOPSEMA.
- (b) If NOPSEMA is not reasonably satisfied that the criteria in regulation 5G(3)(a) are met, NOPSEMA must withdraw acceptance of the environment plan in accordance with Division 2.5.
- (c) No activities are permitted to be carried out under the environment plan unless NOPSEMA is reasonably satisfied that the criteria in regulation 5G(3)(a) are met.

In absence of such regulatory change, NOPSEMA should specify in the EP Guideline that evidence of compliance with financial assurance must be provided to NOPSEMA prior to the commencement of any activity under the EP.

NOPSEMA Expectations

EDO supports the proposition under section 6 of the draft EP Guideline that “NOPSEMA expects titleholders to continually reassess the impacts and risks of their activity and strive towards continual improvement to ensure these continue to be reduced to ALARP and acceptable levels.” Implementing this need for continual improvement requires NOPSEMA to either specify continual improvement as a mandatory feature of an EP (for example as a means of ensuring an ‘acceptable’ level of impact), or ensuring that EPs are accepted for a duration of time that allows new or revised EPs adopt new, improved technology and management advances in a timely manner.

Criterion 10A(a) – EP is appropriate for the nature and scale of the activity

While the proposed criterion of “Whether the detail and rigour applied to **the impact and risk assessments** are commensurate to the magnitude of impacts and risks arising from the activity” goes some way to addressing the requirement that an EP is appropriate for the nature and scale of the activity, it does create a risk that impacts that are claimed to be low risk by applicants will be subject to low levels of assessment and therefore the true level of risk may not be identified. There is also no indication as to how appropriate “detail and rigour” will be defined by NOPSEMA, making the proposed criterion potentially ambiguous. Instead, EDO submits that thorough preliminary risk assessments are required for all issues to ensure that risks are appropriately categorised and therefore appropriately assessed.

Criterion 10A(b) – EP demonstrates that the environmental impacts and risks of the activity will be reduced to ALARP

NOPSEMA’s approach to ALARP, namely that “It needs to be clear from the information provided in the EP that the costs of implementing any further control measures to reduce risks would be grossly disproportionate to the benefits to the environment that could be gained. Once this point is reached all impacts and risks are considered ALARP”, means that it is vital that environmental costs (and the associated benefits of avoiding those costs) are appropriately considered. This must include the true environmental cost of projects, including the costs of dangerous climate change that new fossil fuel projects will invariably increase (in the absence of carbon offsetting or other abatement), and ensuring intergenerational equity.

Criterion 10A(c) – EP demonstrates that the environmental impacts and risks will be of an acceptable level

Please see our comments in relation to the draft OPP Guideline: Criterion – 5D(6)(c) Appropriate identification and evaluation of environmental impacts and risks. Further, in relation to the draft EP Guideline, ambiguous language such as “not inconsistent with”, “reasonable steps” and “shows regard to” should be changed to require EPs to be “consistent with” those factors listed under section 9.3 of the draft EP Guideline, including recovery plans, threat abatement plans, management plans for Matters of National Environmental Significance, and international obligations.

Criterion 10A(d) – EP provides for appropriate environmental performance outcomes, environmental performance standards and measurement criteria

In addition to the requirements specified in section 10 of the draft EP Guideline, management criteria should include measurable trigger levels that can be used to indicate if performance outcomes or standards are likely to be exceeded. These trigger levels should require EP holders to implement corrective action so that performance outcomes and standards are not exceeded.

Criterion 10A(f) – The EP does not involve the activity or part of the activity being undertaken in any part of a declared World Heritage Property

See our comments in relation to draft OPP Guideline Criterion – 5C(2)(c) No project activity undertaken in a World Heritage property.

Appendix B – Principles of ESD

See our comments in relation to the draft OPP Guideline: Appendix B.

For further information on this submission, please contact Megan Kessler, Director – Science and Expert Advisory on [megan.kessler\[at\]edo.org.au](mailto:megan.kessler@edo.org.au) or ph: 02 9262 6989.

Yours sincerely,

Environmental Defenders Office

A handwritten signature in black ink, appearing to read 'R Walmsley', written in a cursive style.

Rachel Walmsley
Head of Law Reform