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 **NORTON ROSE FULBRIGHT**

Offshore oil & gas industry face new compliance measures

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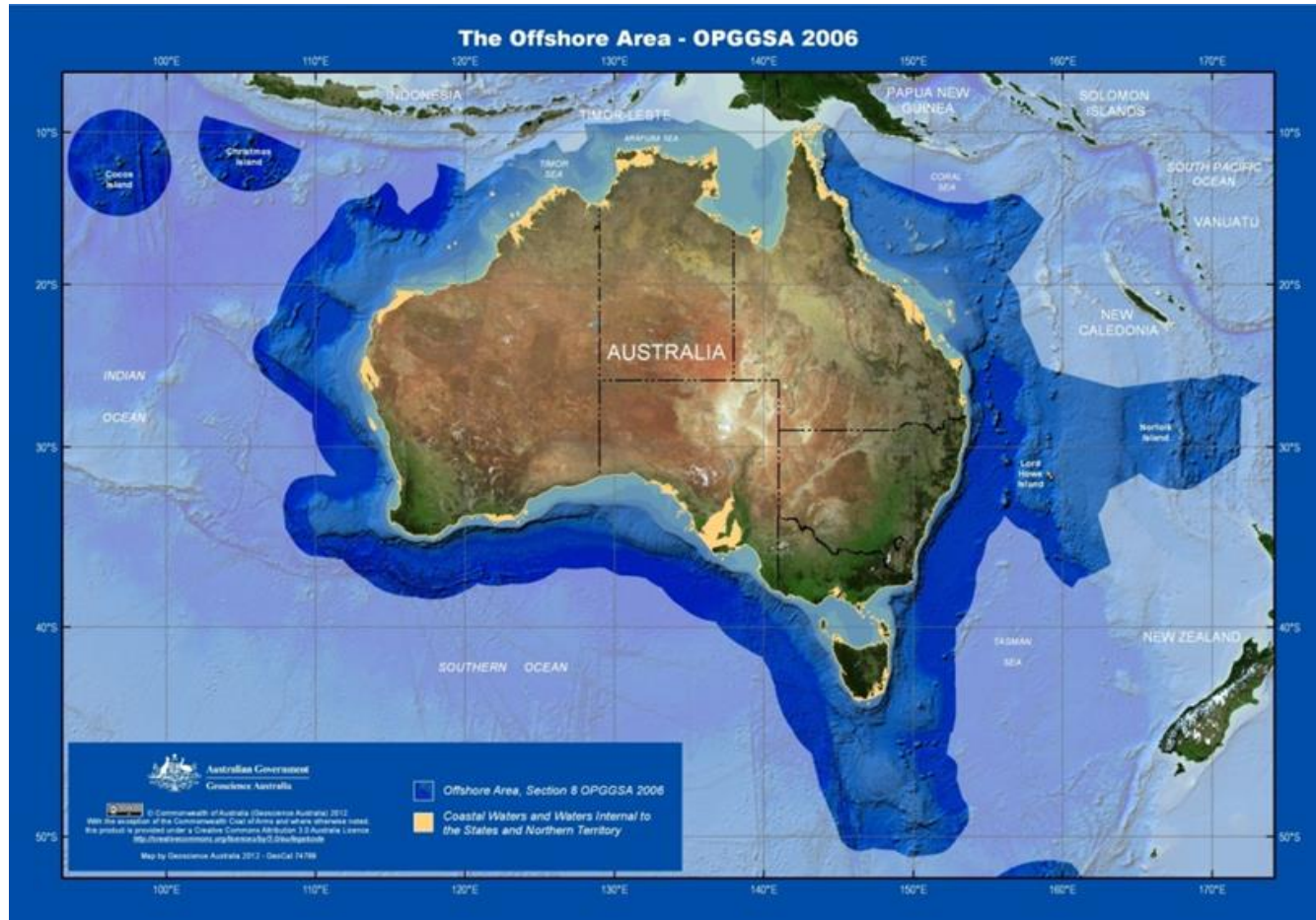
Agenda

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3. NOPSEMA and Ministerial directions
4. Duty to report incidents
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6. Financial assurance requirements
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Applicable environment legislation

- *Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth)* (**OPGGSA**) and its regulations
 - Administered and enforced by National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**)
- *Environmental Protection and Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act**)
 - Administered and enforced by the Commonwealth Department of the Environment (**DoE**)
- *Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cth)*
 - Administered and enforced by the Australian Maritime Safety Authority (**AMSA**)
- *Navigation Act 1912 (Cth)*
 - Administered and enforced by the AMSA

Map showing the Offshore Area covered under the OPGGS Act



‘Polluter pays’ obligation

- Titleholders are under an express ‘polluter pays’ obligation (commenced on 29 May 2013)
- In the case of an escape of petroleum, a titleholder is required to:
 - Stop, control and clean-up the spill
 - Monitor the environmental impact of the escape
 - Remediate the environment
- If a titleholder fails to do any of these things, NOPSEMA, the responsible Commonwealth Minister or an affected State or Territory Government may do them instead

NOPSEMA and Ministerial directions

- General direction
 - applies to a registered titleholder
 - may apply to employees, agents or contractors
 - may extend outside the title area
- Significant offshore petroleum incident direction
 - where the incident has caused or might cause an escape of petroleum
 - may extend outside the title area
- Remedial direction
 - for example, a direction to remediate damage to the seabed
- Commonwealth Minister may take action if there is a breach of a direction
 - costs incurred become a debt due to the Commonwealth

Duty to report incidents

- A titleholder must notify NOPSEMA as soon as reasonably practicable of a 'reportable incident'
- Means an incident that has caused or has the potential to cause moderate to significant environmental damage
- Oral notification followed by a written report
- A titleholder must also notify NOPSEMA of a 'recordable incident' in writing as soon as practicable and not later than 15 days after the end of the calendar month

Approval of a 'petroleum activity'

Background to new project approval process

- Following the Montara Commission of Inquiry in 2011, NOPSEMA was given responsibility for environmental management
- Streamlining of approvals
- Dual approval process removed
- Approval no longer required under *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act)

New process – OPP

- A proponent of an offshore project must submit an Offshore Project Proposal (OPP) to NOPSEMA
- An ‘offshore project’ is a large-scale development project which includes:
 - construction of facilities or pipelines
 - operation of facilities or pipelines
 - recovery of petroleum other than on an appraisal basis
 - injection of greenhouse gas
 - permanent storage of greenhouse gas
- An OPP is mandatory for development projects but may be submitted voluntarily by a proponent for other activities

Streamlining Offshore Petroleum Environmental Approvals

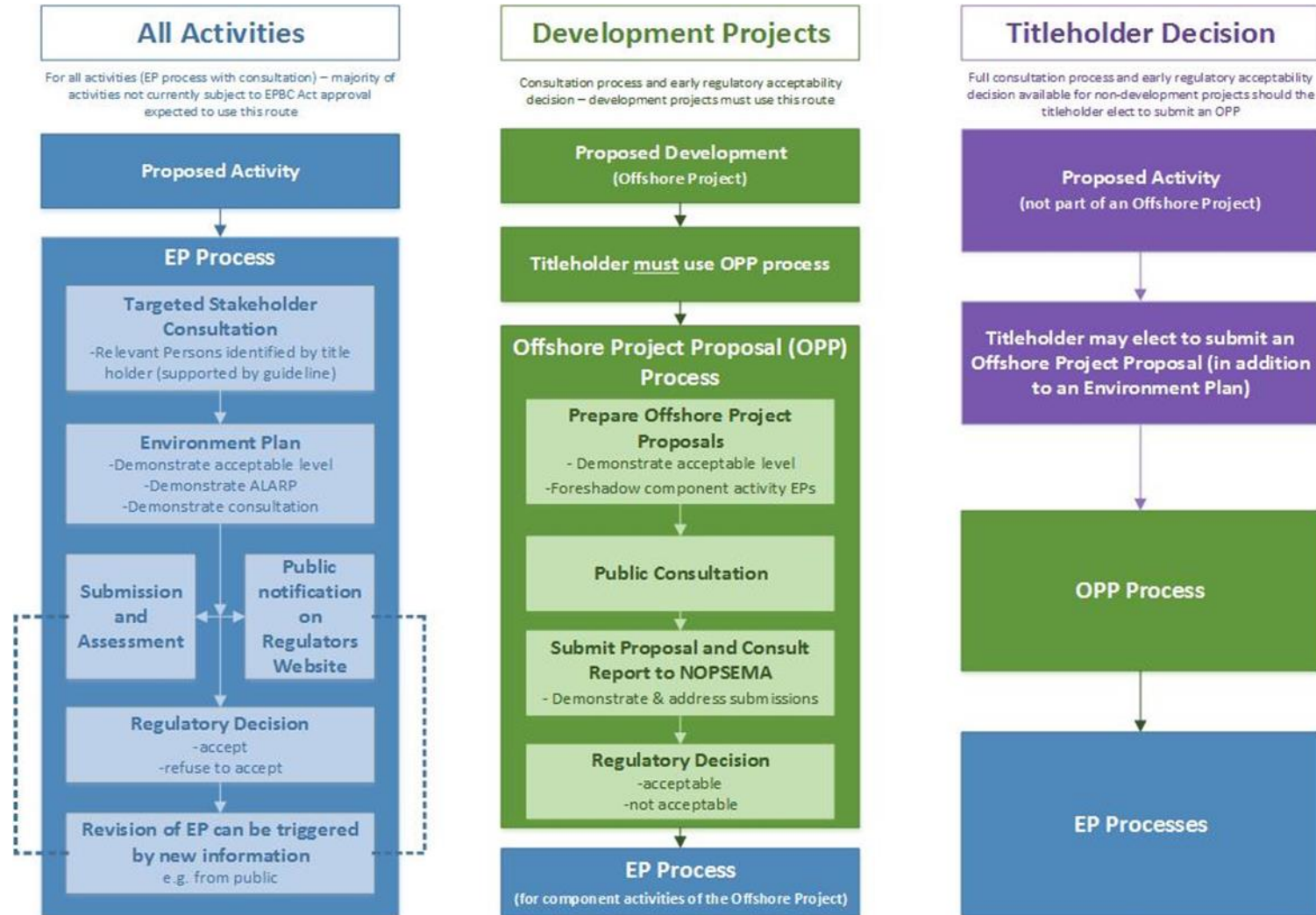
POST-ENDORSEMENT	OPGGS	
SEISMIC	EP	✓
DRILLING (Exploration)	EP	✓
DRILLING (Appraisal)	EP	✓
CONSTRUCTION (inc develop drill)	EP*	✓
PRODUCTION	EP*	✓
DECOMMISSIONING	EP*	✓

} OPP

✓

*OPP life-cycle of project

Offshore Environmental Assessment Process



Requirement for an environment plan

Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009

- A titleholder must submit an environment plan (**EP**) to NOPSEMA before commencing a 'petroleum activity'
- Objective-based regulatory approach. An activity must be carried out:
 - in a manner consistent with the principles of ESD
 - in a manner where the environmental impacts and risks of the activity will be reduced to 'as low as reasonably practicable' (ALARP)
 - in a manner where the impacts and risks will be of an acceptable level
- Acceptance criteria for an environment plan are listed in reg.10A

Content of an EP

- A comprehensive description of the proposed activity
- Description of the existing environment that may be affected
- Details of the environmental impacts and risks
- Environmental performance objectives, environmental performance standards and measurement criteria
- An implementation strategy which:
 - complies with the OPGGSA, the Environment Regulations and any other relevant environment legislation
 - contains an oil pollution emergency plan (formerly an OSCP)
 - provides for appropriate consultation with relevant authorities and other interested persons
 - recording, monitoring and reporting arrangements

EP acceptance process

- Once submitted, NOPSEMA must accept or refuse the EP within 30 days
- NOPSEMA must refuse to accept an EP if it does not meet the acceptance criteria
- It is an offence for a titleholder to:
 - commence an activity without an EP in force for the activity
 - carry out an activity in a way contrary to the EP
 - continue an activity if new or increased environmental risk is identified which is not provided for in the EP
- If a titleholder fails to comply with an accepted EP, NOPSEMA can withdraw its acceptance of the plan

EP acceptance process (cont'd)

- NOPSEMA may request additional information from the proponent
- NOPSEMA must specify which criteria the environment plan does not meet
- Submission of environment plan by titleholder published and outcome of decision published on NOPSEMA website

Financial assurance

- Titleholders are required to maintain financial assurance
- NOPSEMA must not accept an EP unless it is reasonably satisfied that the titleholder can comply with its financial assurance obligations (new regulation 5G)
- The amount of financial assurance will be set by reference to the most potentially ‘costly’ unplanned incident and the worst realistically predictable consequence of that incident
- Financial assurance may take the following forms:
 - Insurance
 - Self-insurance
 - A bond
 - A security deposit
 - An indemnity or other surety
 - A letter of credit
 - A mortgage

Financial assurance (cont'd)

- New Guidelines released by NOPSEMA provide:
 - Assurances must be provided by the titleholder not an affiliate
 - Assurances are to deal with any extraordinary costs, expenses and liabilities that the titleholder might not have the capacity to meet
 - Assurance calculations should focus on calculating the greatest credible costs that may arise from a petroleum incident
 - The titleholder should regularly review the cost calculation method applied
- The Regulations are supported by a costing methodology developed by APPEA

Review of NOPSEMA decisions

- NOPSEMA is required to publish a statement of reasons if it does not accept an environment plan
- No merits appeal is available to the proponent
- Judicial review is available for an error of law. Alternatively, the proponent could prepare a new environment plan for acceptance by NOPSEMA
- Application to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1997* (Cth)
- Person must be 'aggrieved', requiring a third party to establish standing

New enforcement options

New civil penalty regime and daily penalties

- Many civil penalties are significantly higher than previous criminal penalties
- For example, maximum penalty for breach of a significant incident direction is:
 - \$1,912,500 for breach of a civil penalty provision
 - \$85,000 for a strict liability criminal offence
- Daily penalties for each day the offence continues – calculated at a rate of 10% of the maximum penalty
- For example, a continuing breach of a significant incident direction may attract a daily penalty of \$191,200.

New graduated criminal penalties

- Existing strict liability offences have no element of intention, negligence or recklessness
- New 'fault-based' offences have been introduced
- For example, intentionally breaching a NOPSEMA direction attracts a maximum penalty of:
 - \$1.7M for a body corporate
 - \$340,000 for an individual or five years imprisonment or both
- The same strict liability offence attracts a maximum penalty of:
 - \$85,000 for a body corporate
 - \$17,000 for an individual

Alternative enforcement mechanisms

- New enforcement mechanisms include:
 - Infringement notices
 - Injunctions
 - Adverse publicity notices
- The Court has power to make an adverse publicity order at any time within 6 years after the date of the offence or civil penalty
- Company may be required to publicise or notify a specified class of persons
- The order may include publication of the nature of the offence or civil penalty order on the NOPSEMA website, its consequence and the penalty imposed

Prohibition and improvement notices

- Environmental prohibition, improvement and no-not-disturb notices may require petroleum titleholders to:
 - Take or refrain from action where required to remove significant threats to the environment
 - Permit inspection, testing and examination of a facility to occur
- Publication of these notices on the NOPSEMA website is mandatory within 21 days of the issue of the notice unless subject to appeal
- These changes are targeted at publicly listed companies that highly value their business reputation and social licence to operate

NOPSEMA inspection powers

NOPSEMA inspectors – power to enter and search

- Enter and search an offshore petroleum premises
- Inspect, examine, measure or conduct tests concerning the premises
- Take photographs of, make video recordings of, or make sketches of the premises
- Inspect, take extracts from, or make copies of any documents
- Inspect the seabed and subsoil in the vicinity of the premises

NOPSEMA inspectors - compliance powers

- Requirement to provide assistance
- Requirement to answer questions
- Power to require information and produce documents
- Power to take possession of plant or samples
- Privilege against self-incrimination does not apply to the answer given or document produced

Conclusion

- New approval process under the OPGGSA means that offshore petroleum projects no longer require approval under the EPBC Act
- Changes to the OPGGSA have elevated the risk of substantial criminal and civil penalties for titleholders and other participants
- Potential adverse publicity orders and publication of notices on NOPSEMA's website serve as an added deterrent to non-compliance
- Financial assurance requirements create an additional hurdle for titleholders

The logo consists of a stylized, upward-pointing chevron shape in a gold color, positioned above the first letter of the text.

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