TECHNICAL GUIDELINES ON THE ARCHAEOLOGICAL ASSESSMENT OF FIRST NATIONS UNDERWATER CULTURAL HERITAGE IN COMMONWEALTH WATERS | *CONSULATION*

Australian Energy Producers | 5 December 2024

Australian Energy Producers welcomes the opportunity to provide feedback on the Department of Climate Change, Energy and Water (DCCEEW) draft *Technical Guidelines on the Archaeological Assessment of First Nations Underwater Cultural Heritage in Commonwealth Waters* (draft guidelines).

The Australian oil and gas industry is committed to the protection and preservation of First Nations cultural heritage and meaningful consultation with Traditional Owners and communities. Our industry has been active in offshore operations for 60 years and is a major contributor to Australia's energy and economic security, supporting thousands of jobs and an estimated $17.1 billion in payments to state and federal governments in 2023-24.

The draft guidelines do not provide a clear pathway to strengthen the protection and preservation of First Nations underwater cultural heritage. Instead, they inject uncertainty and ambiguity into the approvals process that that will only enable further legal activism aimed at disrupting and delaying critical energy projects, without regard for the protection of First Nations underwater cultural heritage or the views of Traditional Owners and communities. Legal activism does a serious disservice to First Nations communities and project proponents alike, as seen recently when the Environmental Defenders Office was found to be manipulating First Nations consultation processes to serve their own purposes.

Australian Energy Producers' submission identifies key issues and practical challenges for the industry in complying with the draft guidelines. These issues risk frustrating best efforts to protect and preserve First Nations cultural heritage. In particular, the guidelines:

- **Create overlap with existing frameworks**, without any practical pathway towards coordinating consultation processes across these acts and regulations.
- **Significantly increase the threshold for consultation**, referencing definitions of 'consent' that are not present and/or conflict with existing Australian law. It is recommended such references are removed from the guidelines.
- **Should clearly state they do not apply to intangible cultural heritage** with no physical components; the guidelines should also provide detailed examples of what constitutes tangible First Nations underwater cultural heritage.
- **Provide no clarity on identifying the relevant First Nations groups who can speak for underwater cultural heritage sites** or provide a framework for ensuring 'meaningful and productive' engagement.
- **Represent a significant additional cost and administrative burden for proponents** and risk delaying projects due to limited availability of cultural heritage specialists.

Australian Energy Producers would welcome further engagement with DCCEEW on this important issue.

GPO Box 2201 Canberra ACT 2601
+61 2 6247 0960
contact@energyproducers.au

energyproducers.au

ABN 44 000 292 713

The guidelines create overlap with existing frameworks, without any practical pathway towards coordinating consultation processes.

The draft guidelines create significant overlap with existing frameworks, including under the Offshore Petroleum and Greenhouse Gas Storage Act and the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act). The draft guidelines note "Whilst this document has been designed to guide UCH [underwater cultural heritage] consultants and practitioners on First Nations UCH assessment and management in the context of the application of the UCH Act, it can also serve as a useful reference guide for proponents and practitioners working within other regulatory frameworks where UCH has the potential to be a relevant consideration." In the case of the offshore oil and gas industry, significant compliance processes are already in place regarding consultation requirements with First Nations people, including on cultural heritage issues. These include, but are not limited to:

- The Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023 (Environment Regulations)
- The EPBC Act
- The *Environment Protection (Sea Dumping) Act 1981*.

The draft guidelines do not provide any practical pathway towards coordinating consultation processes across these acts and regulations. For example, the National Offshore Petroleum Safety and Environment Management Authority (NOPSEMA) in its *Consultation in the Course of Preparing an Environment Plan guideline*[1] defines "cultural features". These form part of the definition of 'environment' in regulation 5 of the Environment Regulations and can include both tangible and intangible cultural features. The regulations stipulate that cultural features may include cultural heritage in the form of artefacts or other objects evidencing human occupation and activities over the course of human history.[2] As such, existing consultative processes under the Environment Regulations already require identification and consideration of places and locations for cultural heritage, including UCH.

The draft guidelines do not align with onshore requirements regarding cultural heritage consultation and approvals. They adopt general principles seen in offshore consultation requirements, which are new and problematic, rather than following precedents for native title and heritage knowledge holders. This in-turn risks creating uncertain and ambiguous consultation requirements for project proponents, including around which individuals have the cultural authority to speak on underwater cultural heritage matters.

---

[1] NOPSEMA Guideline available here.
[2] Paragraph 200 – Munkara v Santos NA Barossa Pty Ltd (No 3) [2024] FCA 9

The guidelines increase the threshold for consultation, referencing definitions of 'consent' that are not present and/or conflict with existing Australian law.

The draft guidelines introduce the requirement for community consent as part of a successful archaeological assessment (page viii) that is not required under existing consultation frameworks. The guidelines align with the principles prescribed by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), including with specific reference to:

> *Article 32 (2) – States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*

Australian Energy Producers recommends removing the reference to this Article in the draft guidelines and that provisions in the draft guidelines more closely align with Australian law. Australian Energy Producers would note that 'consent' is not required under existing consultation frameworks with communities and First Nations people. Accordingly, this reference represents a significant change in consultation requirements for oil and gas operations. This will potentially cause confusion and ambiguity for proponents and the community and result in further protracted and expensive litigation as has already been experienced in recent years. The introduction of significant new consultation requirements should not be introduced without appropriate political and community consideration.

The guidelines provide no clarity on identifying the relevant First Nations groups who can speak for underwater cultural heritage sites or provide a framework for ensuring 'meaningful and productive' engagement.

Determining which First Nations groups have legitimate cultural rights, interest, and knowledge in the project area, and can speak for Commonwealth offshore activity areas, can be extremely complex given there is no native title in Commonwealth waters. It is not incumbent upon or appropriate for oil and gas titleholders to make such a determination. As an example, an Australian Energy Producers' member has advised of conflicting and shifting advice from First Nations Groups during consultation on sea country and cultural heritage matters. With no certainty on who speaks for UCH, what values should be considered, and how to handle conflicting advice, compliance with the draft guidelines is extremely difficult. Guidance is required on the process for identification of First Nations people with cultural rights, interests, and knowledge in respective project areas.

The draft guidelines provide that cultural heritage knowledge exists and can only be derived from First Nations people. However, there are instances where such knowledge has not been continuously maintained and therefore does not or may not exist as knowledge in accordance with Aboriginal tradition. This is evident from various publications by coastal Victorian groups that speak to sea country values, referencing the nearshore and specific species, but stop short of speaking to any cultural heritage matters in Commonwealth waters.

The draft guidelines should recognise that this may be the case and the process of assessment for UCH can be a positive step to gain archaeological insights.

The draft guidelines should provide a framework for ensuring 'meaningful and productive' engagement and consider the roles of both parties in achieving this. The draft guidelines mandate consultation with First Nations People before, during and after assessment of UCH. However, there's no consideration of any reasonableness standards or tests, or the requirement for First Nations people to also act in good faith to consult or participate in consultation, noting 'meaningful and productive' engagement can only occur if all parties participate and engage in accordance with the principles set out on pages vii and 26. Further, the principle to 'engage actively and directly' (page 26) does not consider that First Nations people are increasingly represented by legal firms which do not always support (or permit) 'direct' (page 32), nor 'continuous' (page 47) engagement. Genuine engagement and participation by First Nations groups is required for development proponents to meet their obligations under the guidelines. However, to stipulate requirements for proponents, without any certainty in the necessary participation by First Nations groups, presents significant risk for timely approvals and creates potential legal challenges on all front

The guidelines as they are drafted risk injecting uncertainty and ambiguity into the approvals process.

Creating uncertainty and ambiguity in the approvals process will enable further legal activism aimed at disrupting and delaying critical energy projects, without regard for the protection of First Nations underwater cultural heritage or the views of Traditional Owners and communities. Uncertain and ambiguous approval processes risk being taken advantage of by legal activists to serve their own purposes – including stopping the development of natural gas projects that are critical to energy security and emissions reductions in Australia and the region. Elements of the guidelines – in particular, the lack of clarity on what constitutes First Nations UCH, duplication and contractions with other instruments, and uncertainties and ambiguities in processes and definitions – make them vulnerable to exploitation.

Allowing legal activism does a serious disservice to First Nations communities, project proponents, and to Australian taxpayers, as was seen recently when the Environmental Defenders Office (EDO) was found to be distorting and manipulating First Nations consultation processes to serve their purposes.[3] The EDO's attempts to coopt the First Nations consultation process under the OPGGSA ultimately ran counter to the interests of First Nations communities, resulted in significant delays and additional costs for project proponents, and ended up costing tax-payers. This includes both legal cost and via the award of $9 million in costs to Santos from EDO[4] – noting the EDO budget is supported by $2 million in tax-payer funding.

---

[3] Simon Munkara v Santos NA Barossa Pty Ltd (VID 907/2023)

[4] Santos, EDO ordered to pay 100 per cent of Santos' legal costs, 2024

The guidelines should clearly state they do not apply to intangible cultural heritage with no physical components.

Given that intangible cultural heritage with no physical components is not protected under the UCH Act it is important that the draft guidelines explicitly exclude considerations for intangible cultural heritage. It is recommended that this is more clearly stated in section 1.2 of the draft guidelines, rather than relying on drawing a conclusion in relation to the scope of the Act.

Further, to provide a practical framework for strengthening the protection and preservation of First Nations cultural heritage, the guidelines would benefit from detailed examples of what constitutes tangible First Nations underwater cultural heritage.

The guidelines give no consideration to the nature and scale of proposed activities

The draft guidelines do not consider their application to different stages of development, but rather only refer to 'development' in general. Guidance is needed to understand how short-duration, temporary and low impact projects, such as exploration activities, would be considered as they do not represent 'development'. Further, the draft guidelines use the term 'development proponent' throughout the document, with no explanation of what constitutes development.

The guidelines significantly increase the cost of compliance with the Act.

The draft guidelines prescribe several steps that need to be undertaken by a project proponent as part of the First Nations UCH assessment, each of which represents a signification scope of work with significant associated costs. The steps include:

1. Identify areas of First Nations UCH sensitivity.
2. Assess First Nations UCH significance.
3. Evaluate impacts to First Nations UCH
4. Develop impact mitigation & management measures.

These steps comprise significant scopes of work that include detailed underwater investigations, archaeological research, development of predictive models, engagement, and mitigation measures. Further, these activities will not be appropriate in all areas. For example, the geotechnical techniques proposed do not consider seabed hardness around Australia and typical failure of many of these methods to obtain the penetrations stated (Page 39). Further, the techniques presented are expensive and add little value. Rather, the requirements should be non-prescriptive, and outcomes oriented, allowing for other typically used methods like dropped camera or video without a remote operated vehicle (ROV).

By way of example of high costs, advice received from a member organisation actively undertaking offshore activities, indicates that costs of consultancies and additional vessel time on water to conduct surveys and inspections of underwater features are between $500,000 and $1 million depending on the nature and scale of the activity.

The guidelines represent a significant additional administrative burden for proponents and risk delaying development, including due to limited availability of underwater cultural heritage specialists.

As part of all stages of the First Nations UCH archaeological assessment, the draft guidelines require (section 4.3) that a suitably qualified practitioner with demonstrated experience and competence be used. At a minimum this would include:

- archaeologist(s) with tertiary qualifications and demonstrated experience in underwater archaeology.
- archaeologist(s) with tertiary qualifications and demonstrated experience in First Nations archaeology.
- geomorphologist(s) with tertiary qualifications in a relevant scientific discipline and demonstrated experience in marine geomorphology.
- First Nations people with cultural rights, interests, and knowledge in the project area.

Australian Energy Producers members have advised that there are very few qualified UCH specialists available that are capable and willing to undertake work on behalf of the industry. This scarcity will result in escalating associated costs and potential delays to schedules for planned activities and project milestones. The significant workload these guidelines would create for the limited number of qualified professionals could affect proponent ability to deliver projects and will likely create bottle necks in the system. The draft guidelines do not adequately address the need for sufficient resources and funding to support the comprehensive archaeological assessments and engagement processes they recommend.

The draft guidelines should be amended to account for the shortage of suitable qualified UCH specialists, ensuring that the requirements can be practically met by industry.

Additional technical issues that should be addressed

While some technical guidance is of value, there are other areas where further detail and clarification is required, including what constitutes 'sufficient' evidence for or against deeper archaeological assessments. Sections in the draft guidelines related to the technical analysis process, particularly Section 5, are useful. These sections leverage broader project information on geotechnical and seismic data, and the structure of considerations is appreciated. However, there are a number of technical inclusions that are questionable. For example, the use of geophysical means as a way to predict physical sites. Regarding screening, desktop assessment and due diligence, additional criteria on what constitutes 'sufficient' evidence for or against deeper archaeological assessments are needed.

The recommendation to commence archaeological assessments early in the project planning phase could be unrealistic for some offshore oil and gas projects, which may not have the resources or information available at an early stage of a planned activity.

Concerns have been raised by Australian Energy Producers members on the feasibility of sharing all relevant data with First Nations people, particularly in relation to market

sensitive or proprietary information. Additionally, requirements for written notifications (Section 8.3.1) and public disclosures (Section 8.4) of potential discoveries do not account for protection of culturally sensitive information and may expose proponents to legal risk.

Australian Energy Producers would welcome further engagement with DCCEEW on this important issue. Please contact Jason Medd, Director Offshore and Decommissioning via email on jmedd@energyproducers.au.