NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 27/09/2022 12:20:19 PM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged**:**	Notice of Appeal (Fee for Leave Not Already Paid) - Form 122 - Rule 36.01(1)(b)(c)
File Number:	VID555/2022
File Title:	SANTOS NA BAROSSA PTY LTD ACN 109 974 932 v DENNIS MURPHY TIPAKALIPPA & ANOR
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised

Dated**:** 27/09/2022 4:41:23 PM AEST Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

Form 122
Rules 36.01(1)(b); 36.01(1)(c)

Notice of appeal

No. of 20

Federal Court of Australia

District Registry: Victoria

Division: General

On appeal from the Federal Court

Santos NA Barossa Pty Ltd (ACN 109 974 932)

Appellant

Dennis Murphy Tipakalippa and another named in the schedule

Respondents

To the Respondents

The Appellant appeals from the judgment and final orders as set out in this notice of appeal.

1. The papers in the appeal will be settled and prepared in accordance with the Federal Court Rules Division 36.5.

2. The Court will make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence. You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place: Owen Dixon Commonwealth Law Courts Building, Level 7, 305 William Street, Melbourne

Date:

Signed by an officer acting with the authority of the District Registrar

Filed on behalf of Santos NA Barossa Pty Ltd (Appellant)
Prepared by Charles Philip Blaxill
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Perth WA 6000

The Appellant appeals from the whole of the judgment and all of the orders of the Federal Court given on 21 September 2022 at Melbourne.

Grounds of appeal

1. The learned primary judge erred in concluding that the delegate of the second respondent (**NOPSEMA**) could not have been "reasonably satisfied" under reg 10(1)(a) of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) (**Environment Regulations**) that the Barossa Development Drilling and Completions Environment Plan (**Drilling EP**) demonstrated that the appellant (**Santos**) had carried out the consultations required by Division 2.2A (being the criterion in reg 10A(g)(i)) because the Drilling EP did not demonstrate "that the methodological exercise of identifying each and every relevant person conducted by Santos had been correctly undertaken in accordance with the requirements of the consultation criteria under the Regulations" (Reasons at [127]) in that:

    a. on a proper construction of the Environment Regulations, it is not necessary for a Drilling EP to include such a methodological statement in order for the Second Respondent to be so "reasonably satisfied";

    b. the Drilling EP identifies the persons consulted by Santos during the course of preparing the Drilling EP and the method used by Santos for identifying those persons as "relevant persons" within the meaning of reg 11A(1); and

    c. the primary judge ought to have concluded that it was open to NOPSEMA to achieve the requisite state of reasonable satisfaction on the basis of an exercise of judgment upon a holistic assessment of the Drilling EP, informed by those matters set out in the Drilling EP, including the relevant persons identified by Santos and the method used by Santos for identifying relevant persons, and its own knowledge and experience as the regulator administering the Environment Regulations.

2. The primary judge erred in concluding that NOPSEMA could not have been "reasonably satisfied" under reg 10(1)(a) of the Environment Regulations that the Drilling EP demonstrated that Santos had carried out the consultations required by Division 2.2A (being the criterion in reg 10A(g)(i)) because it had failed "to consider material in the Drilling EP dealing with sea country and the interests and activities of traditional owners" (Reasons at [126]), later defined as "**sea country material**" (Reasons at [190]) in that:

    a. on a proper construction of the Environment Regulations, no consideration of the sea country material was mandated;

b. further and alternatively to ground 2(a), it was open to infer, and the primary judge ought to have inferred, that NOPSEMA did consider the sea country material in its assessment of the EP; and

c. the appellant repeats ground 1(c) above.

3. Further and alternatively to grounds 1 and 2, the primary judge erred in failing to consider and determine the proper construction of reg 11A(1)(d) of the Environment Regulations (Reasons at [289]) because, on a proper construction of that regulation, it was not open to draw either of the inferences of legal error drawn by the primary judge in that:

a. on a proper construction of reg 11A(1)(d), the connection of individuals who are part of a traditional land owning group with 'sea country' is not a "function, interest or activity" for the purposes of reg 11A(1)(d); and

b. as to the first inference drawn by the primary judge:

i. the methodological approach propounded by the primary judge required the identification of relevant persons to be by reference to "every value and sensitivity" (Reasons at [150]) in the environment that may be affected by the activities;

ii. the identification of values and sensitivities of the existing environment that may be affected by the activities are matters relevant to the environmental assessment process under reg 13 but are not, on a proper construction of the Environment Regulations, required to be "evaluated to discover their possible intersection with the functions, interests and activities of particular people or organisations" (Reasons at [139]) in order to identify persons or organisations whose functions, interests or activities may be affected within the meaning of reg 11A(1)(d); and

iii. the methodological exercise identified by the primary judge was therefore inconsistent with the Environment Regulations and so any failure to perform that exercise could not be a proper basis for inferring that an error had been made by NOPSEMA in forming its state of reasonable satisfaction;

c. as to the second inference drawn by the primary judge:

i. the primary judge found the sea country material was "sufficiently probative" because it "sufficiently suggests the existence of values or sensitivities which may be 'functions, interests or activities' of traditional owners that may be affected by the Activity" (Reasons at [216])";

ii. that finding was erroneous because, on a proper construction of reg 11A(1)(d),"values or sensitivities" cannot be equated with "functions, interests or activities"; and

iii. therefore, on a proper construction reg 11A(1)(d), the primary ought not to have concluded that a failure to consider the sea country material provided a proper basis for inferring that an error had been made by NOPSEMA in forming its state of reasonable satisfaction;

d. further and alternative to ground (c), the drawing of the second inference was erroneous because, on a proper construction of reg 11A(1)(d), it was reasonably open to NOPSEMA to be satisfied that individual traditional owners (including the Applicant, members of the Munupi clan and the traditional owners of the Tiwi Islands generally) were not relevant persons, such that the sea country material was not probative of whether relevant persons who fall within the description in reg 11A(1)(d) had been consulted and so no adverse inference could be drawn from the failure to include traditional owners as relevant persons;

e. further and alternative to grounds (c) and (d), any failure by NOPSEMA to consider the sea country material was not material to the decision to accept the Drilling EP because, on a proper construction of reg 11A(1)(d), it was reasonably open to NOPSEMA to be satisfied that individual traditional owners (including the Applicant, members of the Munupi clan and the traditional owners of the Tiwi Islands generally) were not relevant persons, such that consideration of the sea country material could not give rise to a realistic possibility of a different decision; and

f. therefore, on a proper construction of "functions, interests or activities" within the meaning of reg 11A(1)(d), the primary judge ought to have concluded that it was open to NOPSEMA lawfully to form the requisite state of reasonable satisfaction.

4. Further and alternatively to grounds 1, 2 and 3, the judge erred in the identification of the statutory standard set by the phrase "reasonably satisfied" in reg 10(1)(a) of the Environment Regulations (Reasons at [74]).

Orders sought

1. Appeal allowed.

2. The orders made on 21 September 2022 be set aside and in lieu thereof, order that:

    a. the applicant's amended originating application dated 28 July 2022 be dismissed; and

    b. there be no order as to costs as between the applicant and second respondent.

3. There be no order as to the costs of the appeal as between the appellant and the first respondent.

Appellant's address

The Appellant's address for service is:

Place: Allens, Level 11, Mia Yellagonga Tower 2, 5 Spring Street, Perth WA 6000

Email: Philip.Blaxill@allens.com.au

The Appellant's address is Santos NA Barossa Pty Ltd of 60 Flinders Street, Adelaide SA 5000.

Service on the Respondents

It is intended to serve this application on the Respondents.

Date: 27 September 2022

Signed by Charles Philip Blaxill
Lawyer for the Appellant

Schedule

No. of 20

Federal Court of Australia
District Registry: Victoria
Division: General

Respondents

Second Respondent:	National Offshore Petroleum Safety and Environmental Management Authority

Date: 27 September 2022