

5 AUGUST 2020

OIL & GAS ALERT



IN THIS ISSUE >

PART 7

Draft Upstream Petroleum Resources Development Bill, 2019: The granting, suspension, cancellation and/or lapsing of technical co-operation permits, exploration rights and production rights

In part seven of our series of articles on the draft Upstream Petroleum Resources Development Bill, 2019 (Petroleum Bill), we dissect *inter alia* the granting, suspension, cancellation and/or lapsing of technical co-operation permits, exploration rights and production rights under the Petroleum Bill. Whilst a majority of the proposed provisions relating to the granting, suspension cancellation and/or lapsing of permits and rights under the Petroleum Bill are not dissimilar to the current regulatory regime, there are several newly introduced requirements which we will be unpacking in this article.

FOR MORE INSIGHT INTO OUR
EXPERTISE AND SERVICES

CLICK HERE 



PART 7

Draft Upstream Petroleum Resources Development Bill, 2019: The granting, suspension, cancellation and/or lapsing of technical co-operation permits, exploration rights and production rights

Whilst a majority of the proposed provisions relating to the granting, suspension cancellation and/or lapsing of permits and rights under the Petroleum Bill are not dissimilar to the current regulatory regime, there are several newly introduced requirements which we will be unpacking in this article.

In part seven of our series of articles on the draft Upstream Petroleum Resources Development Bill, 2019 (Petroleum Bill), we dissect *inter alia* the granting, suspension, cancellation and/or lapsing of technical co-operation permits, exploration rights and production rights under the Petroleum Bill. Whilst a majority of the proposed provisions relating to the granting, suspension cancellation and/or lapsing of permits and rights under the Petroleum Bill are not dissimilar to the current regulatory regime, there are several newly introduced requirements which we will be unpacking in this article.

Application and granting of rights and permits

The process of applying for a technical co-operation permit under the Petroleum Bill, as well as the requirements, the granting and duration thereof, are identical to those contained in the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA). However, the process for applying for an exploration and production right has been altered significantly under the Petroleum Bill. A high level overview of these proposed changes are discussed below:

- A new requirement, introduced by section 46(4)(b) of the Petroleum Bill, is that an applicant for an exploration right, in addition to submitting the relevant environmental reports required in terms of Chapter 5 of the National

Environmental Management Act 107 1998 (NEMA), will have to apply for an environmental authorisation within 120 days from the date the acceptance notice is received from the Petroleum Agency. Section 47(1) of the Petroleum Bill, read with section 47(3), then states that the Minister must refuse to grant the exploration right if the Minister has not issued an environmental authorisation to the applicant within 60 days of receipt of the application from the Petroleum Agency. In terms of the MPRDA, there is no requirement to obtain environmental authorisation as part of an application for an exploration right. Instead, the MPRDA stipulates that the holder of an exploration right cannot commence exploration operations until the environmental authorisation has been granted. This proposed requirement may prove impractical, as the process for obtaining environmental authorisation is lengthy, often taking longer than a year to obtain, therefore, to ensure that the application is not refused because the environmental authorisation has not been granted within 60 days of receipt of the application from the Petroleum Agency, the Petroleum Agency may be required to hold on to the exploration or production right application until the environmental impact assessment has been concluded and the Minister has had an opportunity to consider the application for environmental authorisation.

PART 7

Draft Upstream Petroleum Resources Development Bill, 2019: The granting, suspension, cancellation and/or lapsing of technical co-operation permits, exploration rights and production rights ...continued

Once the right is granted, the five year period, as proposed under the Petroleum Bill, would commence.

- A notable addition under the Petroleum Bill is contained in section 46(6). Subsection (a) corresponds with the current provisions of the MPRDA, in that the right granted comes into effect on the "effective date". "Effective date" is not defined, however, in *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* (20069/14) [2015] ZASCA 82 (28 May 2015), it was held that the period for which the right endures is calculated from the date the applicant is informed that the right has been granted, as this is the date upon which the applicant becomes the holder of the right. Therefore, once the right is granted, the five year period, as proposed under the Petroleum Bill, would commence. Subsection (b), however, provides that in the event that an appeal is lodged against the granting of the right or the approval of the environmental authorisation, an exploration or production right may only be notorially executed once such appeal has been finalised. Importantly, it is only the execution of the notarial deed of granting that is suspended until such appeal process is finalised. The Mawetse judgment therefore still stands, in that the applicant becomes the holder of a valid right on the date it is informed that the right has been granted. This position is reinforced by the proposed definition of the word "holder" under the Petroleum Bill, as "in relation to a retention permit, exploration right, production right, reconnaissance permit or technical co-operation permit, means the person to whom such right or permit has been granted or such person's successor in title."
- Furthermore, any person who applies for permission to remove and dispose of petroleum resources in order to conduct tests on it or to identify or analyse it, in terms of section 50 of the Petroleum Bill, must obtain environmental authorisation for the removal and/or disposal of petroleum resources, if these activities were not authorised under the initial environmental authorisation obtained when applying for the exploration right. It remains unclear as to whether the application for permission to remove and dispose of petroleum resources must be accompanied by an environmental authorisation or whether an application for a new or amended environmental authorisation may be applied for once permission to remove and dispose of petroleum resources has been granted. Clarity is necessary from the drafters in this regard.

PART 7

Draft Upstream Petroleum Resources Development Bill, 2019: The granting, suspension, cancellation and/or lapsing of technical co-operation permits, exploration rights and production rights...*continued*

A welcomed addition to the Petroleum Bill, is the extension of the duration of an exploration right to five years, as opposed to the three years provided for in terms of the MPRDA.

- Moreover, the applicant for an exploration and/or a production right, is now obliged, where necessary, to apply for a water use license upon receipt of the acceptance notification from the Petroleum Agency. Water uses which require a water use license are listed in the National Water Act 36 of 1998. The inclusion of the wording "*where necessary*" in provisions relating to the requirements to apply for water use licenses under the Petroleum Bill, appears to provide that a water use license may not be required where, for example, an exploration and/or a production right is sought for offshore operations.

In addition to the proposed changes as explained above, see also [Part 5](#) in our series of articles, which can be accessed here, where we discuss the requirement for State participation and participation by black-owned oil and gas companies during the exploration and production phase.

Duration and renewal of rights and permits

A welcomed addition to the Petroleum Bill, is the extension of the duration of an exploration right to five years, as opposed to the three years provided for in terms of the MPRDA. Provision is also made for the holder of an existing exploration right, granted under the MPRDA, who makes a discovery during the last renewal period.

In these circumstances, the holder will be permitted to apply for an additional two year period to conduct appraisal operations. These additional two years, however, will only be granted if the holder complied with the minimum government work commitment for all previous exploration phases.

A further addition introduced by the Petroleum Bill is the mandatory relinquishment requirement upon the renewal of an exploration right. The holder must, after the initial period of five years, relinquish twenty percent of a block upon the first application for renewal, and at the end of each subsequent renewal period, the holder must relinquish a further fifteen percent of the block. Therefore, the relinquishment requirement for exploration right granted under the Petroleum Bill is mandatory in nature.

Interestingly, the Petroleum Bill now mandates the Minister, when granting an exploration right, to determine the key terms and conditions of the corresponding production right and record such terms in the exploration right. Section 46(2) stipulates that these terms and conditions must be given effect to once an application for a production right is granted. Re-negotiation of these key terms and conditions is provided for, but only upon renewal of the production right. While this provision provides certainty

PART 7

Draft Upstream Petroleum Resources Development Bill, 2019: The granting, suspension, cancellation and/or lapsing of technical co-operation permits, exploration rights and production rights...continued

Unitisation of petroleum operations is still provided for under the Petroleum Bill, however a new concept has been introduced in section 37, relating to the partitioning of a production right.

to investors, it is important that careful consideration be afforded to defining the key terms and conditions of a production right given the long lead time between the grant of the exploration right and the commencement and initial period of production operations.

Unitisation and Partitioning

Unitisation of petroleum operations is still provided for under the Petroleum Bill, however a new concept has been introduced in section 37, relating to the partitioning of a production right. Section 37 provides that the holder of a production right, may, with the necessary consent from the Minister, divide the area over which the production right is held, into more than one area. The current wording of section 37(2) requires that the holder of a production right, who wishes to partition the production right, make an application to vary the production right in terms of section 93 and lodge an application for a "new" production right, simultaneously, in respect of the partitioned area. Whilst this is a welcomed addition to the Petroleum Bill, the current wording only provides for the application of a production right over the partitioned area, and does not provide for circumstances in which the holder/s may want to conduct further exploration activities in the partitioned area.

Suspension or cancellation of a right, permit or permission

The Minister's power to suspend or cancel a permit or right remains unchanged under the Petroleum Bill. The same can be said about the lapsing of a right, permit or permission granted in terms of the Petroleum Bill. However, section 81(d) appears to have introduced a deviation, regarding the lapsing of a right, permit or permission granted or issued in terms of the Petroleum Bill. Section 81(d) provides that:

"81. Any right, permit or permission granted or issued in terms of this Act lapses, whenever—

(d) in the event that the holder is liquidated and finally deregistered or sequestrated, the right, permit, permission, or license must fall within the insolvent estate and if sold, transferred to the purchaser subject to the prior written consent of the Minister in terms of section 36."

The Petroleum Bill states that, where the holder of any right, permit or permission granted or issued in terms of the Petroleum Bill is liquidated and finally deregistered or sequestrated, rather than

PART 7

Draft Upstream Petroleum Resources Development Bill, 2019: The granting, suspension, cancellation and/or lapsing of technical co-operation permits, exploration rights and production rights...*continued*

In our next article in the series, we will be unpacking *inter alia* environmental management and the issuing of closure certificates under the Petroleum Bill.

the right, permit or permission lapsing, as provided for under the provisions of the MPRDA, the Petroleum Bill deviates from this, by providing that it will fall within the insolvent estate and if sold, may be transferred by the liquidators or sequestrator to the purchaser, with the Minister's prior written consent.

Conclusion

As is evident from our discussion above, there are a number of newly introduced requirements relating to the granting, suspension, cancellation and/or lapsing

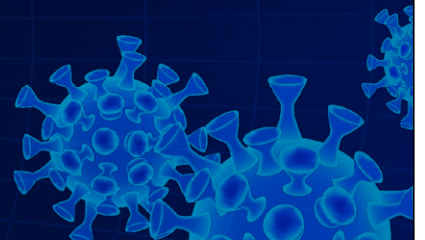
of technical co-operation permits, exploration rights and production rights under the Petroleum Bill, some of which will require clarification in the next iteration of the Petroleum Bill.

In our next article in the series, we will be unpacking *inter alia* environmental management and the issuing of closure certificates under the Petroleum Bill.

Megan Rodgers, Shameegh Allen and Amore Carstens

CDH'S COVID-19 RESOURCE HUB

Click here for more information 



OUR TEAM

For more information about our Oil & Gas sector and services, please contact:



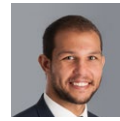
Megan Rodgers

Sector Head
Director
Oil & Gas
T +27 (0)21 481 6429
E megan.rodgers@cdhlegal.com



Gasant Orrie

Cape Managing Partner
Director
Corporate & Commercial
T +27 (0)21 405 6044
E gasant.orrie@cdhlegal.com



Shameegh Allen

Associate
Corporate & Commercial
T +27 (0)21 481 6399
E shameegh.allen@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

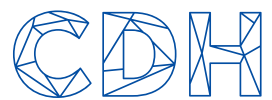
CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

©2020 9219/AUG



CLIFFE DEKKER HOFMEYR