

8 JULY 2020

OIL & GAS ALERT



IN THIS ISSUE >

PART 6

Draft Upstream Petroleum Resources Development Bill, 2019: Retention Permits and Care and Maintenance Permits

In the sixth instalment of our analysis of the draft Upstream Petroleum Resources Development Bill, 2019 (the Petroleum Bill), we unpack the introduction of retention permits and care and maintenance permits under the Petroleum Bill.

FOR MORE INSIGHT INTO OUR
EXPERTISE AND SERVICES

CLICK HERE 



CLIFFE DEKKER HOFMEYR

PART 6

Draft Upstream Petroleum Resources Development Bill, 2019: Retention Permits and Care and Maintenance Permits

Under the Mineral and Petroleum Resources Development Act, 28 of 2002, holders of prospecting rights are afforded the right to apply to the Minister of Mineral Resources and Energy (the Minister) for a retention permit.

In the sixth instalment of our analysis of the draft Upstream Petroleum Resources Development Bill, 2019 (the Petroleum Bill), we unpack the introduction of retention permits and care and maintenance permits under the Petroleum Bill.

Retention permits

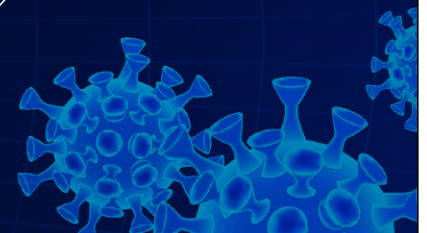
Under the Mineral and Petroleum Resources Development Act, 28 of 2002, holders of prospecting rights are afforded the right to apply to the Minister of Mineral Resources and Energy (the Minister) for a retention permit. The granting of a retention permit suspends the conditions of a prospecting right for a maximum of three years, and may be renewed once, for an additional two years, while retaining the holders exclusive right to apply for a mining right.

Similar to the above, section 55 of the Petroleum Bill introduces an opportunity to apply for a retention permit during the course of oil and gas operations. In terms of section 55, the holder of an exploration right may apply to the Minister for a retention permit. Although, section 56(1) refers to "the holder of the production right" applying for such permit, it is clear from a reading of the section that the drafters envisage that a retention permit will operate in the exploration phase. The section provides that the Minister may issue a retention permit if the holder has –

- (a) explored on the land to which the application relates;
- (b) completed the exploration activities and a feasibility study;
- (c) established the existence of a petroleum reserve which has production potential;

CDH'S COVID-19 RESOURCE HUB

Click here for more information 



PART 6

Draft Upstream Petroleum Resources Development Bill, 2019: Retention Permits and Care and Maintenance Permits...*continued*

If the parameters of section 56 are met, the Minister may issue a retention permit, which will suspend the terms and conditions of the exploration right in relation to the block to which the retention permit relates.

- (d) *studied the market and found that the production of the petroleum in question would be uneconomical due to prevailing market conditions; and*
- (e) *complied with the relevant provisions of this Act, any other relevant law and the terms and conditions stipulated in the exploration right.” (our emphasis)*

If the parameters of section 56 are met, the Minister may issue a retention permit, which will suspend the terms and conditions of the exploration right in relation to the block to which the retention permit relates. This suspension will allow the holder of the retention permit to wait for a shift in adverse market conditions, prior to making an investment decision and prior to committing to production right terms.

Retention permits may not be granted for a period exceeding three years and may be renewed once, for an additional two years. Section 56(2) states that if the exploration period has not expired, the duration of the exploration right runs concurrently with the duration of the retention permit (scenario 1). Notably, this section does not deal with a scenario in which the exploration right expires during the retention permit period (scenario 2). There is no provision for the extension of the duration of the exploration right period,

nor any provision which expressly states that the exploration right shall remain in force, notwithstanding its expiry, until the period of the retention permit has lapsed. It is unclear whether this is an omission by the drafter or whether this was the intended result. Importantly, while the terms and conditions of the exploration right are suspended, the conditions of the environmental authorisation associated with the exploration right are not suspended. Therefore, environmental monitoring obligations will for example continue for the duration of the retention permit. It is improbable that an environmental authorisation would subsist, but the exploration right which underpins such environmental authorisation does not remain in force, during the term of the retention permit. Scenario 2 would therefore benefit from clarification by the drafters.

Notably, the Petroleum Bill is silent on treatment of (i) the potential white period between the lapsing of the exploration period and the granting of a retention permit, and (ii) the potential white period between the lapsing of the three-year initial period of the retention permit and the granting of the two-year renewal period of the retention permit, following the lapsing of the exploration period, and (iii) the potential white period between the lapsing of the retention permit and the granting of a production right, following

PART 6

Draft Upstream Petroleum Resources Development Bill, 2019: Retention Permits and Care and Maintenance Permits...*continued*

Section 77 of the Petroleum Bill introduces the concept of a care and maintenance permits for the first time in the jurisdiction.

the lapsing of the exploration period. A replication of the wording contained in section 46(5) of the Petroleum Bill may assist in providing clarification in how the respective white periods will be treated.

Section 59(3) states that retention permits may not be transferred, ceded, let, sublet, alienated, disposed of, mortgaged or encumbered in any way whatsoever. This provision is problematic for both scenario 1 and scenario 2, in that a transfer of the underlying exploration right could be prohibited if such transfer is sought during the retention permit period, or in the alternative, such transfer may inevitably result in the termination of the permit. If an exploration right is capable of being transferred during the retention permit period, then section 59(3) would clearly prohibit an accompanying transfer of the retention permit. This potentially results in the holders of the exploration right being different to the holders of the retention permit and this could not have been the intention of the drafters. It is therefore likely that the net result would be that a transfer of the underlying exploration right would be prohibited during the retention permit period, or in the alternative, such transfer may inevitably result in the termination of the permit. We anticipate that the drafters may seek to clarify this in the next iteration of the Petroleum Bill.

Care and maintenance permits

Section 77 of the Petroleum Bill introduces the concept of a care and maintenance permits for the first time in the jurisdiction. The holder of a production right may apply for a care and maintenance permit should it wish to scale down production operations or temporarily cease operations.

An application for a care and maintenance permit must contain justifiable reasons which necessitate the need to scale down or temporarily cease production operations, accompanied by documentary evidence justifying the need to scale down or temporarily cease operations. Section 77(2) of the Petroleum Bill sets out the requirements for the grant of a care and maintenance permit. The current drafting of the section 77(2) is sufficiently broad to allow for varying reasons for the grant of a care and maintenance permit, including environmental and economic reasons. The onus rests on the applicant to provide sufficient evidence to justify the issue of the care and maintenance permit.

Care and maintenance permits may not be granted for a period exceeding two years and may not be renewed. These permits are not transferable. Thus, a transfer of the underlying production right could be prohibited if such transfer is sought

PART 6

Draft Upstream Petroleum Resources Development Bill, 2019: Retention Permits and Care and Maintenance Permits...*continued*

It is likely that the net result would be that a transfer of the underlying production right would be prohibited during the care and maintenance permit period, or in the alternative, such transfer may inevitably result in the termination of the permit.

during the care and maintenance permit period, or in the alternative, such transfer may inevitably result in the termination of the permit. If a production right is capable of being transferred during the care and maintenance permit period, then section 77(5)(a) would clearly prohibit an accompanying transfer of the care and maintenance permit. This potentially results in the holders of the production right being different to the holders of the care and maintenance permit and this could not have been the intention of the drafters. It is therefore likely that the net result would be that a transfer of the underlying production right would be prohibited during the care and maintenance permit period, or in the alternative, such transfer may inevitably result in the termination of the permit. Similar to the clarification on retention permits, we anticipate that the drafters may seek to clarify this in the next iteration of the Petroleum Bill.

Conclusion

Although some clarification is required, regarding the practical implementation and consequences of retention permits and care and maintenance permits, the introduction of these permits are welcomed additions. The optionality presented by these permits is indicative of a regulatory regime striving to achieve balance between expedited exploration and production activities, with due regard to the practical realities associated with such activities.

In our next article in this series, we will dissect the granting, suspension, cancellation and/or lapsing of technical co-operation permits, exploration rights and production rights.

Megan Rodgers and Shameegh Allen

OUR TEAM

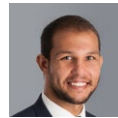
For more information about our Oil & Gas sector and services, please contact:



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 cdhstellenbosch@cdhlegal.com

©2020 9125/JULY

