



17 MAY 2021

ENVIRONMENTAL LAW AND OIL & GAS ALERT

IN THIS ISSUE

Draft Regulations relating to water use licences for onshore unconventional oil and gas exploration and production published for public comment

On 7 May 2021, the Minister of the Department of Human Settlements, Water and Sanitation (DHSWS) published the 'Regulations for the use of water for exploration and production of onshore naturally occurring hydrocarbons that require stimulation, including hydraulic fracturing and underground coal gasification, to extract and any activity incidental thereto that may impact detrimentally on the water resource' (the Draft Regulations), in terms of section 28(1)(g) of the National Water Act 36 of 1998 (NWA), for public comment. In this alert, we unpack the key provisions introduced by the Draft Regulations, which focus exclusively on water use licences (WUL) required for onshore exploration and production operations for unconventional oil or gas development and regulate the exploration for shale gas through the use of hydraulic fracturing.



INCORPORATING
KIETI LAW LLP, KENYA

CLICK HERE 

**FOR MORE INSIGHT
INTO OUR EXPERTISE
AND SERVICES**

Draft Regulations relating to water use licences for onshore unconventional oil and gas exploration and production published for public comment

The Draft Regulations must be read against the background of legal developments that underpin the onshore unconventional oil and gas exploration and production regulatory framework.

On 7 May 2021, the Minister of the Department of Human Settlements, Water and Sanitation (DHSWS) published the 'Regulations for the use of water for exploration and production of onshore naturally occurring hydrocarbons that require stimulation, including hydraulic fracturing and underground coal gasification, to extract and any activity incidental thereto that may impact detrimentally on the water resource' (the Draft Regulations), in terms of section 28(1)(g) of the National Water Act 36 of 1998 (NWA), for public comment. In this alert, we unpack the key provisions introduced by the Draft Regulations, which focus exclusively on water use licences (WUL) required for onshore exploration and production operations for unconventional oil or gas development and regulate the exploration for shale gas through the use of hydraulic fracturing.

The Draft Regulations must be read against the background of certain legal developments that underpin the onshore unconventional oil and gas exploration and production regulatory framework.

Background

In 2015, the Minister of the Department of Water and Sanitation (as the DHSWS was known as at the time) declared the exploration and/or production of onshore naturally occurring hydrocarbons that requires stimulation, including but not limited to hydraulic fracturing and or underground gasification as a controlled activity in terms of section 38(1) of the NWA. Such declaration allows the Minister

to regulate these declared activities that have a detrimental impact on water resources, as is now seen with the Draft Regulations.

Earlier that same year and in respect of hydraulic fracturing specifically, the then Minister of Mineral Resources published the 2015 Regulations for Petroleum Exploration and Production (Petroleum Regulations) on 3 June 2015, which introduced regulations relating to onshore exploration and production operations in respect of shale gas operations involving hydraulic fracturing. However, the Petroleum Regulations were set aside by the Supreme Court of Appeal (SCA) in July 2019, as they were ultra vires the Minister of Mineral Resources' competence, dealing with prescribed standards and practices to ensure safe exploration and production of petroleum, including requirements for environmental impact assessments and management of water, waste, pollution incidents and air quality. The SCA's decision has left a lacuna in our law in respect of the regulation of hydraulic fracturing. As such, the Draft Regulations are welcomed, but is one piece of a much larger legal puzzle.

It is therefore also necessary to mention the interrelatedness of the Draft Regulations within the broader regulation of the environmental impacts of exploration for shale gas by hydraulic fracturing. The NWA is a specific environmental management Act under the National Environmental Management Act 107 of 1998 (NEMA). On 13 November 2020, proposed amendments to the NEMA Environmental

Draft Regulations relating to water use licences for onshore unconventional oil and gas exploration and production published for public comment ...continued

In the event that the applicant for a WUL for production has not complied with the conditions of his or her WUL during exploration, an application for a WUL may be declined for purposes of production, until such time as the non-compliance has been remedied.

Impact Assessment Regulations and Listing Notices were published for public comment, which amendments include hydraulic fracturing as a listed activity requiring environmental authorisation prior to commencement of such activities.

We therefore anticipate that:

- further regulations will be published under NEMA, which deal with the additional aspects of exploration and production operations for unconventional oil or gas development; and
- any potential regulations under NEMA will include those aspects dealt with in the now set aside Petroleum Regulations that are not addressed by the Draft Regulations.

The Draft Regulations also form part of the ongoing transition to the One Environmental System (OES), which is intended to streamline the licensing processes for environmental authorisations and water uses of prospecting, exploration, mining and production operations. The implementation of the OES resulted in the repeal of all environmental aspects from the Mineral and Petroleum Resources Management Act 28 of 2002 (MPRDA) and stripped the Minister of Mineral Resources and Energy of the power to make regulations pertaining to environmental aspects relating to exploration and/or production, although the Minister of Mineral Resources and Energy is the competent authority to grant environmental authorisations for exploration and production activities under NEMA.

The Draft Regulations

The Draft Regulations prescribe that no person may conduct, *inter alia*, hydraulic fracturing onshore without first obtaining a WUL. Whilst the Petroleum Regulations were silent on the duration of a WUL during exploration operations, the Draft Regulations provide that a WUL during exploration may not exceed a period of nine years. On the contrary, exploration operations, under the draft Upstream Petroleum Resources Development Bill, which was published in 2019, may be conducted for up to 11 years. This inconsistency may result in a holder being unable to conduct exploration operations once the water use licence has expired. We do not believe this could have been the intention of the drafters and clarification during the comment period should be sought in relation to the inconsistent prescribed time limitations and whether extension of the WUL is possible.

In the event that the applicant for a WUL for production has not complied with the conditions of his or her WUL during exploration, an application for a WUL may be declined for purposes of production, until such time as the non-compliance has been remedied. In addition to this, Regulation 5(3) of the Draft Regulations grants the responsible authority the power to decline a WUL during production "based on unsatisfactory performance on other licenced areas". It is unclear whether the Draft Regulations refers to the unsatisfactory performance of the specific holder of the WUL during exploration 'on other licenced areas', or whether the

Draft Regulations relating to water use licences for onshore unconventional oil and gas exploration and production published for public comment *...continued*

Regulation 6 relates to the suspension and withdrawal of a WUL issued in terms of the Draft Regulations under certain circumstances, including where the responsible authority has reason to believe that the WUL was obtained through fraud, non-disclosure of material information or misrepresentation of a material fact.

discretion will extend to unsatisfactory performance of other holders in other licenced areas in the Republic of South Africa. The latter scenario would result in an application for a WUL being declined, due to no fault on the part of the applicant. This regulation would therefore benefit from clarification by the drafters.

Furthermore, Regulation 5(4) of the Draft Regulations states that a WUL will lapse, should production not commence within six months after the issuance of the WUL. This deadline is particularly short if one considers the significant preparation required in respect of production operations. It is therefore likely that the WUL will lapse prior to commencement of production, and holders will be obligated to re-apply for such licence.

Regulation 6 (which appears to be aligned with section 54 of the NWA regarding the suspension and withdrawal of entitlements to use water) relates to the suspension and withdrawal of a WUL issued in terms of the Draft Regulations under certain circumstances, including where the responsible authority has reason to believe that the WUL was obtained through fraud, non-disclosure of material information or misrepresentation of a material fact. Suspension can be either proposed or with immediate effect, and in the instance of immediate effect would mean operations would need to cease until the matter around the suspension is resolved. A holder of a WUL will have an opportunity to make representations, following which

the responsible authority can uphold or withdraw the suspension. In respect of the possibility to appeal a decision to suspend or withdraw a WUL, the Draft Regulations are silent. Furthermore, although Regulation 6 does mimic section 54 of the NWA, the NWA prescribes a restricted list in respect of matters that can be taken on appeal to the Water Tribunal, which includes only suspension and withdrawal decisions made under section 54 and at present, not the Draft Regulations.

The Petroleum Regulations contained a list of areas where controlled activities, such as hydraulic fracturing operations, could not take place. The Draft Regulations provides for a similar list under Regulation 7. However, whereas the Petroleum Regulations had different distances ascribed to the specific areas, the Draft Regulations makes provision for one distance, which will apply to all prohibited areas. The Draft Regulations provide that no controlled activity may occur within 5 kilometres of:

- the edge of an existing or proposed municipal wellfield, including its aquifer; water supply borehole and/or groundwater supply infrastructure;
- any town without a wellfield as future water source areas;
- any government waterworks including dams with a safety risk;
- the edge of any identified strategic water source area; and
- the edge of a thermal or cold spring including seismically active springs.

Draft Regulations relating to water use licences for onshore unconventional oil and gas exploration and production published for public comment ...continued

Regulation 9 of the Draft Regulations goes on to prohibit the use of hazardous substances in drilling fluids or as additives to fracturing fluids and introduces approval and disclosure requirements.

Furthermore, the Draft Regulations prohibits several activities, including but not limited to (i) the disposal of drill cuttings containing radioactive substances; (ii) deep well injection of process water for disposal without authorisation; (iii) the storage of process water containing radioactive substances, for reuse or disposal in pits or pollution control dams, (iv) the disposal of sludge at a landfill that is not suitably engineered or authorised to accept such waste and (v) the abandonment of wells without decommissioning, as set out in Regulation 8.

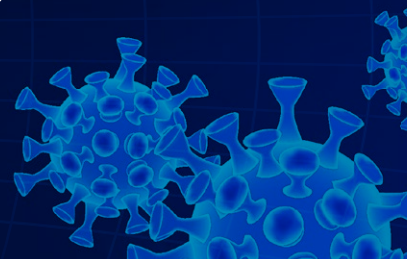
These prohibited activities, however, are focused on those activities involving the use of water, and do not address, *inter alia*, the management of waste during exploration and production

generally, as initially prohibited in the Petroleum Regulations. We therefore anticipate that a further list of prohibited activities will be published under NEMA and potentially the National Environmental Management: Waste Act 59 of 2008 in relation to the management of waste generated by these activities.

Regulation 9 of the Draft Regulations goes on to prohibit the use of hazardous substances in drilling fluids or as additives to fracturing fluids and introduces approval and disclosure requirements. The applicant for a WUL will be required to submit a list of all chemicals planned for use in the fracturing fluids to the DHSWS for approval. The approved list of chemicals will then need to be published on the holder's website.

CDH'S COVID-19 RESOURCE HUB

Click here for more information 



Draft Regulations relating to water use licences for onshore unconventional oil and gas exploration and production published for public comment

...continued

Any person wishing to comment on or make written representations on the Draft Regulations, have until 7 June 2021 to do so.

Additionally, Regulation 10 of the Draft Regulations obliges holders to ensure that the WUL is made available, for access and copying on site, to anyone who requests a copy thereof. The Draft Regulations also broadens the disclosure obligation of the holder and requires holders to publish specific information on its website. The information required to be published includes the relevant hydro census, baseline and monitoring information; the risk analysis information and environmental impact assessment; the hydraulic fracturing programme; the fracturing fluids and its chemical composition; the location of all wells and monitoring boreholes and well integrity information, verified by an independent auditor or specialist and audit reports as specified in the licence.

As is evident from our discussion above and owing to their focus on water use, management and protection, there are many aspects not addressed by the Draft Regulations, which were previously addressed by the Petroleum Regulations, such as environmental impact assessments, well designs and construction, operations and management

of such operations, well suspension and decommissioning. We therefore eagerly await the regulations to be published under NEMA, which are anticipated to address the broader environmental related impacts and aspects not addressed by the Draft Regulations.

Any person wishing to comment on or make written representations on the Draft Regulations, have until 7 June 2021 to do so, using the below details:

By Post to:

The Director-General
Department of Water and Sanitation
Private Bag X313
Pretoria, 0001

By hand to:

The Director-General
Department of Water and Sanitation
Sedibeng Building, 185 Francis Baard Street
Pretoria, 0001

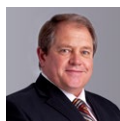
Email:

unconventionalgas@dws.gov.za

*Megan Rodgers, Margo-Ann Werner,
Alecia Pienaar, Shameegh Allen
and Amore Carstens*

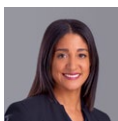
OUR TEAM

For more information about our Environmental Law practice and services in South Africa and Kenya, please contact:



Allan Reid

Mining & Minerals Sector Head
Director
Corporate & Commercial
T +27 (0)11 562 1222
E allan.reid@cdhlegal.com



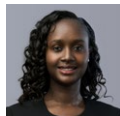
Margo-Ann Werner

Director
T +27 (0)11 562 1560
E margo-ann.werner@cdhlegal.com



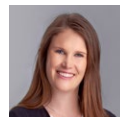
Alecia Pienaar

Senior Associate
T +27 (0)11 562 1017
E alecia.pienaar@cdhlegal.com



Clarice Wambua

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E clarice.wambua@cdhlegal.com



Laura Wilson

Associate
Corporate & Commercial
T +27 (0)11 562 1563
E laura.wilson@cdhlegal.com

OUR TEAM

For more information about our Oil & Gas sector and services in South Africa and Kenya, please contact:



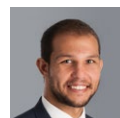
Megan Rodgers

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



Njeri Wagacha

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com



Amore Castens

Associate Designate
Corporate & Commercial
T +27 (0)21 481 6432
E amore.carstens@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

NAIROBI

CVS Plaza, Lenana Road, Nairobi, Kenya. PO Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

STELLENBOSCH

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

©2021 10017/MAY



CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA



MINING & MINERALS | cliffedekkerhofmeyr.com