**COMMENTS AND PROPOSED AMENDMENTS TO THE 2021 UPSTREAM PETROLEUM RESOURCES DEVELOPMENT**

**BILL – for HDSA CARRIED PARTICIPATION**

13 July 2022

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| **Section** | **Provision** |  | **Comment** | Proposed wording |
| 1 | **Definitions** | 1. Only the State benefits from State Participation. 2. The carrying holder bears the cost of State Participation. |  | ***Carried interest*** means up to 15 per cent State participation and up to 5 per cent to black persons through an interest in a petroleum right as contemplated in section 34 and section 31 respectively. The carried interest vests exclusively for the benefit of these carried participants and the costs of which are borne by the carrying holder of a petroleum right. |
| ***Carried interest*** means State participation through an interest in a petroleum right as contemplated in section 34, which interest vests exclusively for the benefit of the State and the costs of which are borne by the carrying holder of a petroleum right. | The current definition does not make provision for a carried interest allocated to black persons. It is proposed that furthermore that allocation is for a minimum state participation in the legislation that can be revised by way of the regulation. |
| 1 | **Definitions** | The petroleum rights holders, excluding black persons (the HDSA participants) bear the cost of the carried interest. |  | No change required |
| **‘carrying holder’** means any other holder of an undivided participation |  |
| interest in a petroleum right, except black persons as defined in this Act; | The current definition specifically excludes HDSA participants (black persons) from bearing the cost of the Carried interest in respect of State Participation |

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| **Section** | **Provision** |  |  |  |
| 31 | **Participation of black persons in petroleum rights**   1. Every petroleum right must have a minimum of 10 per cent undivided participating interest by black persons. 2. The black persons’ undivided participation interest in a petroleum right contemplated in subsection (1) may be diluted to no less than five per cent to any funder or company, regardless of the ownership structure of such a funder or company, for purposes of raising capital subject to section 29. 3. The dilution of black persons’ participation contemplated in subsection (2) will not trigger a requirement for the holder of the petroleum right to augment black persons’ participation interest to 10 per cent. 4. The holder or an applicant for a petroleum right who is not able to comply with the required black persons’ participation interest requirement contemplated in subsection (1) must lodge a request for extension to comply within a period to be determined by the Petroleum Agency. | 1. Black persons have a minimum 10% participation in a petroleum right. 2. Black persons can dilute their participation by 49%. 3. There is no obligation upon the other petroleum rights holders to restore the participation by black persons back to 10%. 4. An extension up to 4 years can be granted by PASA for applications in respect of petroleum rights where the petroleum rights holders are unable to meet the requirement for participation by black persons.   . | The current section 31 does not make provision for carried participation in terms of Black persons. It is onerous for black persons to fund their participation in the exploration and development of a petroleum right. Particularly as such activities are costly and carry significant risk. Commercial borrowing is not available to Black persons in the absence of assurance of a cashflow from production or mechanism for repayment. Funding of the participation by black persons is likely to take the form of equity in the ownership of the HDSA participant. It is proposed that section 31 is amended to allow for up to 5% of the 10% participation by black persons to be allocated as a carried interest.  It is furthermore proposed that Black persons cannot farmout the carried interest with the up to 49% diluted their participation.  . | Participation of black persons in petroleum rights   1. Every petroleum right must have a minimum of 10 per cent undivided participating interest by black persons of which up to 5 per cent is a right to carried interest. 2. The carrying holder or holders are entitled to recover 100 percent of the black person’s proportionate share of exploration and production costs, together with imbedded interest on the outstanding balance at SOFR per annum 3. The black persons’ undivided participation interest in a petroleum right contemplated in subsection (1) may be diluted to no less than 5 per cent to any funder or company, regardless of the ownership structure of such a funder or company, for purposes of raising capital subject to section 29. Provided that such dilution is not in respect of the 5 per cent carried interest. |
| 31 | 1. An application for extension contemplated in subsection (4) must be accompanied by: 2. detailed information and proof of inability to secure the required percentage of black participation in the petroleum right; 3. full details of potential black persons that were engaged; and 4. any other information as may be determined by the Petroleum Agency for purposes of assessing the application. 5. The Petroleum Agency may grant extension contemplated in subsection (4) for a period not exceeding two years, subject to terms and conditions that must be recorded in the petroleum right. 6. An application for a petroleum right may be granted subject to the provisions of subsection (3), (4) and (5). |  |  |  |

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| **Section** | **Provision** | **Interpretation** | **Comment** | **Proposed wording** |
| 34 | **State participation in petroleum rights** | 1. The State is allocated a 20% carried participation in petroleum rights. 2. The State is carried interest in respect of the exploration phase and development of the field in terms of the production phase. 3. The State carried interest, is an interest free loan by the carrying holder(s) of which 50% of the exploration costs are paid back out of the State’s share of production and 100% of the development costs will be paid out of the State’s share of production. 4. The provision is mute as to whether the carried interest in respect of capital expenditure only or extends to all expenditure in the exploration and development of a field under a petroleum right. | Internationally State participation is on a carried basis in terms of capital expenditure on exploration and development of the field, with repayment out of the State’s share of production.  In the circumstance black persons are allocated up to 5% carried interest, it is proposed that this allocation is from the 20% carried interest designated for the State. As such 15% of the 20% State Participation will be on a carried basis. The dilution of the State Carried interest to 15%, effectively results in the State required to contribute toward 25% of this participation in a Petroleum Right. These can be significant amounts creating a drain on the fiscus accordingly the State may limit its participation to the 15% carried interest.  The designation of black persons that will qualify for the carried interest may be implemented way of regulation to benefit emerging BEE & BBBEE participants vs established BEE participants. | **State participation in petroleum rights** |
| 1. The State Petroleum Company is designated as a state-owned entity   responsible for managing State participation in exploration and  production activities through a carried interest in petroleum rights as contemplated in subsections (2) and (3).   1. The State has a right to a 20 per cent carried interest in petroleum rights, including in both the exploration and production phase. 2. The carrying holder or holders are entitled to recover 50 and 100 percent of the State’s proportionate share of exploration and production costs, respectively. 3. The State’s proportionate share of exploration and production costs must, subject to subsection (3), be recoverable from its proportionate share of production or revenue. | (1) The State Petroleum Company is designated as a state-owned entity responsible for managing State participation in exploration and  production activities ~~through a carried interest~~ in petroleum rights as contemplated in subsections (2) and (3).  (2) Every petroleum right must have up to 20 per cent undivided participating interest by the State of which the State has a right to a 15 per cent carried interest in petroleum rights, including in both the exploration and production phase. |

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| |  |  |  |  | | --- | --- | --- | --- | | **Section** | **Provision** | **Interpretation** | **Comment** | | |  |  |  |  | | --- | --- | --- | --- | |  | **Provision** | **Interpretation** | **Comment** | | |  |  |  |  | | --- | --- | --- | --- | |  |  | **Interpretation** | **Comment** | | |  |  |  |  | | --- | --- | --- | --- | |  | **Provision** | **Comment** | **Comment** | |
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|  | 1. The State may elect to take its proportionate share of petroleum |  |  |
|  | production in kind or in cash. |  |  |
|  | 1. A percentage of the State’s annual share of production or revenue, |  |  |
|  | as the case may be, for repayment of its proportionate share of |  |  |
|  | exploration and production development and production costs is as |  |  |
|  | prescribed. |  |  |
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|  | (7) Cost recovery rules that govern the recovery of exploration and |  |  |
|  | production costs as contemplated in subsection (3) are as prescribed, |  |  |
|  | and to the extent necessary, further amplified in the terms and |  |  |
|  | conditions of the petroleum right. |  |  |
|  | (8) The State Petroleum Company must enter into a joint operating |  |  |
|  | agreement with the holder or become a party to an existing joint |  |  |
|  | operating agreement and appoint a minimum of two or more |  |  |
|  | representatives to the joint operating committee of the exploration or |  |  |
|  | production operation to represent the State. |  |  |
|  | (9) The State Petroleum Company is entitled to full participation, |  |  |
|  | including corresponding percentage of voting rights as determined in the |  |  |
|  | joint operating agreement. |  |  |
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