



PRESENTATION TO THE PORTFOLIO COMMITTEE

RESPONSES TO WRITTEN INPUTS ON THE DRAFT UPSTREAM PETROLEUM RESOURCES DEVELOPMENT BILL, 2021



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Department:
Mineral Resources and Energy
REPUBLIC OF SOUTH AFRICA



PRESENTATION OUTLINE

1. Progress to date

2. Summary of key concerns and responses

- ✓ Definitions & objects of the Act
- ✓ Ministerial Powers
- ✓ Legal nature of petroleum rights
- ✓ Administration of Acreage
- ✓ Functions of PASA
- ✓ Licensing round and consultation
- ✓ Black persons participation & Reservation of blocks
- ✓ State Participation
- ✓ Petroleum right vs NEMA
- ✓ Notarial execution and third-party access
- ✓ General comments

3. Concluding remarks



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PROGRESS TO DATE

- In November 2019, Cabinet approved the Bill to be published for public comment.
- The Bill was then published for public comment on 24 December 2019.
- The closing period for written submissions ended in February 2020.
- About 60 written submissions were received from interested stakeholders.
- Between April and May 2020, the drafting team conducted virtual consultations on the draft Bill.
- These included the industry, industry representatives, legal fraternity, financial institutions, BEE's, consultants and NGO's.
- All submissions were reviewed and considered where possible.



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PROGRESS TO DATE Cont.

- The Bill went through Cabinet processes and was approved for tabling in Parliament on 1 July 2021.
- On the 24th of June 2022 Parliament published the Bill for the submission of written comments and the closing date was 29 July 2022.



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Summary of key concerns and responses

Definitions

Concern	Treatment/response
<p>“Carrying Holder”:The petroleum rights holders, excluding black persons (the HDSA participants) bear the cost of the carried interest.</p> <p>The current definition specifically excludes HDSA participants (black persons) from bearing the cost of the Carried interest in respect of State Participation</p> <p>“Black Persons”: This section is in contravention in terms of equality and a direct violation of human rights. Any direct racial preference or limitation is a direct contravention of the constitution and a violation of the Universal Declaration of Human Rights</p>	<ul style="list-style-type: none">➤ The objects of the Bill amongst others is to create a conducive environment for black persons participation therefore a definition of carrying holder including black persons goes against the objects of the Act.➤ This is in line with the Constitution to redress past imbalances and further enhanced through government policies and legislations.

Definitions...

Concern	Treatment/response
<p>“Carried interest”:</p> <p>It proposed that the rewording of this definition be “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.</p>	<p>➤ Section 34 provides for state 20% carried interest in petroleum right. However, section 31(1) provides for participation of black persons in a Petroleum right to have a minimum of 10% undivided participation interests.</p>

Objects of The Act

Concern	Treatment/response
<p>Section 2(b):This section is a direct contravention of the Constitution as the state should not have sole right over resources. The limitation that this section will bring will create an environment in which corruption and expropriation of citizens can occur (the state will be able to increase petrol prices and no body will be able to limit the government as the government will limit their transparency).</p>	<p>➤ This is to ensure that the State manages the development of petroleum resources optimally for the benefit of all the people of South Africa.</p>
<p>Section 2(d):Limitation of citizens rights based on race is a direct violation and infringement in terms of equality and human rights)</p>	<p>➤ This is not infringement and violation of human rights. This is to address the imbalances of the past and to ensure that black persons participate meaningfully in the petroleum resource sector.</p>
<p>➤ Section 2(j):This section should be removed as accelerated exploration will cause severe damages to the ecological environment as there is clear evidence that the state has only its personal gain in mind and zero interest in the preservation of the environment.</p>	<p>➤ The Bill seek to ensure a sustainable development of petroleum resources which includes environmental management and socio economic. This is provided for in 2(i).</p>

Objects of The Act

Concern	Treatment/response
Section 2(k): This framework should be made available prior to the commencement of the bill to ensure that the state will not be able to limit transparency and review of the actions of the state and related bodies.	➤ Section 68 of the Bill provides for third party access to upstream petroleum infrastructure, and further to be enhanced in the regulations.

Ministerial Powers

Concern	Treatment/response
Section 3(2)(a): This minister should not have powers stipulated in this section as with reference to the Shell Seismic Survey, the Minister has indicated that the government will ensure that the state gets what the state wants at the full cost of local communities and the environment. There is also no link in terms of accountability for the action of the Minister in this section or the bill.	➤ The processing of applications is done by the Regulator (PASA), who makes recommendation to the Minister for final approval. The Minister does not have the sole discretion.

Legal Nature of Petroleum Rights

Concern	Treatment/response
Section 5 (1), (2) and (3)(a)(b)(c) (d): This section does not provide for information in terms of accountability, the quality of work, the procedures, policies, review of information handed over in terms of the application in relation to the final project .	➤ This section provides for the legal nature of the rights, terms and conditions, Rights and obligations requirements for applications as provided for in the Bill.

Administration of Acreage & Functions of PASA

Concern	Treatment/response
<p>Section 8:The Bill provides further that PASA must, by notice in the Gazette, designate any area block or blocks, including shale gas acreage, over which there is no or limited knowledge of the geology as frontier. This section will perpetuate the 'open season' for petroleum exploration in South Africa.</p>	<p>➤ This is to ensure that there is orderly development of petroleum resources and to ensure that the people of South Africa optimally benefit from the resources.</p>
<p>Section 10(f), 10(g) and 10(m): It must be noted with concern that PASA has traditionally been mandated to perform its primary mandate in accordance with the objectives of promoting the petroleum industry and facilitating its growth. The bill in its current draft seems to prescribe a mandate which PASA is not technically suited or best equipped to perform.</p>	<p>➤ The Ministers of DMRE and DFFE entered into One Environmental Management agreement, whereby DFFE is the policy and legislative developer and the DMRE is the competent authority for implementation. Further to that NEMLA 4 and the MPRDA delegates certain environmental functions to PASA and it is well equipped through its environmental management Department to implement delegated environmental functions.</p>

Licensing rounds & Consultation

Concern	Treatment/response
<p>Section 15 & 37: Both of these sections provides for “licensing rounds” and they do not provide for the current situation as provided for in the MPRDA in terms of which the option of direct submission of applications is provided.</p>	<p>➤ It is the intention of the Bill to move away from first come first serve, and this will only be allowed under exceptional circumstances by Minister’s discretion.</p>
<p>Section 19:The use of the word "may" within the scope of s 19(2) denotes PASA’s discretion to decide when it will conduct public hearings when consulting with interested and affected parties. This discretion is contrary to the principles of openness, transparency, and procedural fairness when decisions are made subject to the discretion not to provide affected persons with a fair opportunity to raise their concerns before making the decisions.</p>	<p>➤ Disagree: Where PASA has concerns with some of the issues in the report, they may consult. However, PASA is obligated to make it known that an application has been accepted and the applicant has an obligation to conduct public consultation.</p>
<p>Section 20: In s 20(1)(a), the requirement to consult must further prescribe the requirement to obtain consent from any landowner, lawful occupier and affected party. Consultation does not equate to acquired.</p>	<p>➤ The process of consultation including consent by land owners will be provided for in the regulations.</p>

Black persons participation /Reservation of blocks

Concern	Treatment/response
<p>Section 31:The two-year extension may not be sufficient as there may be difficulty in securing Black persons who would be able to secure funding for high-risk capital-intensive exploration phase funding.</p> <p>It is therefore submitted that extension period be made flexible in order to take into account the aforementioned circumstances.</p> <p>Section 32:This section assign legal benefits on the basis of race, with persons not being of a certain race not enjoying such benefits.</p>	<ul style="list-style-type: none">➤ An open ended extension goes against the objects of the Bill of ensuring that black persons actively participate in the development of oil and gas.➤ The provision is to promote active participation black persons in the petroleum sector. It is the department's view that the legal basis of this provision is to benefit certain race.

State Participation

Concern	Treatment/response
<p>Section 34: The provisions for a 20% carried interest are relatively vague and unspecific.</p> <p>This section is nothing more than a misnamed tax, entitling the State to a disproportionate 20% of benefits accruing from petroleum resources.</p> <p>Worryingly, in so doing, the State interprets the custodianship principle as akin to nationalisation, in contravention of the original intention behind that principle.</p>	<ul style="list-style-type: none">➤ This is to ensure that the people of South Africa benefit optimally from the exploitation of oil and gas.➤ This is not a tax; the holder is entitled to recover the costs.➤ The intention of the Bill on custodianship does not mean that the State is the owner, custodianship does not bestow ownership, the State will manage the administration.

State Participation/Strategic Stocks

Concern	Treatment/response
<p>Section 34:The provisions for a 20% carried interest are relatively vague and unspecific.</p> <p>This section is nothing more than a misnamed tax, entitling the State to a disproportionate 20% of benefits accruing from petroleum resources.</p> <p>Worryingly, in so doing, the State interprets the custodianship principle as akin to nationalisation, in contravention of the original intention behind that principle.</p> <p>Section 36: The percentage is not stipulated in the Bill. In light of investors we require certainty prior to making investment decisions it is submitted that a maximum percentage be stipulated within the Bill and further that the obligation to sell a percentage should be subject to pre-existing sale agreements to supply petroleum to third parties concluded between the holder and such third parties.</p>	<ul style="list-style-type: none">➤ This is to ensure that the people of South Africa benefit optimally from the exploitation of oil and gas.➤ This is not a tax; the holder is entitled recover the costs.➤ The intention of the Bill on custodianship does not mean that the State is the owner, custodianship does not bestow ownership, the State will manage the administration.➤ The mechanisms on the strategic stock will be an agreement between the holder and the State Owned Entity and the Bill further provides for the arbitration.

Petroleum Right versus NEMA

Concern	Treatment/response
<p>The creation of a new type of right, namely a petroleum right results in misalignment with the EIA Regulations identified activities. The petroleum right is not identified as an activity in terms of section 24(2) of NEMA. This means that no environmental authorisation will be required for a petroleum right, unless amendments are made to the NEMA EIA Regulations that requires environmental authorisation in terms of the EIA Regulations Listing Notices to include the petroleum right as an identified activity requiring environmental authorisation.</p>	<p>➤ The Department has engaged DFFE and agreement was reached to propose a “ General Clause” in the Bill in consultation with the state law adviser, to ensure that any reference to Exploration and Production Rights as contemplated in the NEMA EIA regulations must be construed as reference to “ Petroleum Right”.</p>

Notarial Execution & Third party access

Concern	Treatment/response
<p>Section 42: The notarial process can be delayed due to simple administrative availability of authorized persons within both the holder entities or the regulatory authority and such result in a failure to comply to aforementioned short time (30 days) limit.</p> <p>Section 68: It is submitted that the appropriate mechanism for determining tariffs is governed by the National Energy Regulator of South Africa in accordance with the Gas Act,2001 and the Petroleum Pipelines Act,2003 and not be within the powers provided to the Petroleum Agency and in It is submitted that the appropriate mechanism for determining tariffs is governed by the National Energy Regulator of South Africa in accordance with the Gas Act,2001 and the Petroleum Pipelines Act 2003 and not be within the powers provided to the Petroleum Agency.</p>	<ul style="list-style-type: none">➤ The provision is intended to comply with <i>Mawetse</i> Judgement and furthermore to ensure that there is no hoarding and sterilization of petroleum resources.➤ NERSA's mandate is to regulate the downstream. The tariff that NERSA regulates is for the transmission and distribution of gas not for upstream pipelines.

General Comments

Concern	Treatment/response
The UPRD Bill ignores the climate change crisis and is not aligned with South Africa's Climate Change Bill and international climate change commitments. The Bill should not be promulgated in its current form, but should instead provide an appropriate framework for a just transition away from fossil fuel extraction and use, and towards ecologically sustainable renewable energy.	<ul style="list-style-type: none">➤ The Bill seeks to ensure Petroleum Resources are developed in an ecologically sustainable manner, while seeking to uplift socio economic conditions of South Africa. The Bill further gives effect to section 24 of the Constitution.➤ Environmental issues within this Bill, will be dealt with in conjunction with DFFE through NEMA.
Inclusion of BEE companies in the Industry	<ul style="list-style-type: none">➤ Section 31 provides for a minimum of 10% per cent undivided participating interest of black persons.
Grow local skills and expertise	<ul style="list-style-type: none">➤ The object of the Bill is to promote local employment, skills development, technology transfer and national industry participation through supply of goods and services.

CONCLUDING REMARKS

Passing of the Bill is a critical step for:

- ✓ the development and growth of this sector;
- ✓ Industry's contribution towards energy security; and
- ✓ Ensuring fair share of revenue for the industry and the people of South Africa.



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