



**THE FLARE GAS (PREVENTION OF  
WASTE AND POLLUTION)  
REGULATIONS, 2018:**  
*A NEW DAWN?*

## INTRODUCTION

Following the suspension of the Nigerian Gas Flare Commercialisation Programme (the “**Programme**”) in Q4 of 2017, by the Federal Government of Nigeria due to the lack of sufficient regulations to guide the Programme amongst other reasons, the President of the Federal Republic of Nigeria, who doubles as the Minister of Petroleum Resources recently, on 5 July 2018 made the Flare Gas (Prevention of Waste and Pollution) Regulations, 2018 (the “Regulations”). The Regulations seek the reduction of environmental/social impact caused by the flaring of gas, protection of the environment, prevention of waste of natural resources and creation of social and economic benefits from flare gas capture.

In this briefing note, we have highlighted salient provisions of the Regulations vis-à-vis practical commercial issues with regards to the implementation of the Programme.

### A. *Right of the Federal Government to take all Flare Gas*

The Regulations affirms the right of the Federal Government, pursuant to paragraph 35 of the first schedule to the Petroleum Act, to take natural gas produced with crude oil free of cost at the flare and without payment of royalty.<sup>1</sup> The provision of the Regulations with respect to the rights exercised by the Federal Government are applicable to all petroleum licences, including marginal fields.<sup>2</sup>

The Regulations further state that a Producer of Natural Gas or a flare gas permit holder shall not be liable for the payment of royalties to any person or the Federal Government in respect of flare gas. It is interesting to note while royalties will not be payable on flare gas, some other fees are payable by a permit holder under the Regulations. Such fees include (i) Data prying fees (ii) Data leasing fee and Award fee for grant of Permit to Access Flare Gas, (iii) Handling Fee payable to a Producer (iv) Guarantee Fee to a Producer pursuant to a Deliver or Pay Agreement. Also, it is expected that a permit holder will enter into a Gas Supply Agreement under which the permit holder is expected to buy flare gas taken from the Federal Government. The impact of these fees and costs shall be examined further under the sub-theme regarding associated cost/fees to a permit holder.

<sup>1</sup>Paragraph 2(1) of the Regulations

<sup>2</sup>Paragraph 2(2) of the Regulations

## B. *Access to Flare Gas through competitive bidding*

The Regulations provide that permits for Access to flare gas shall be granted through a competitive bid process conducted by the Federal Government. The Regulations further provides that existing gas Producers can apply to the Minister of Petroleum to utilize flare gas for commercialization subject to the fulfilment of two conditions viz (i) flare gas volume being offered in a bid process or assigned to a permit holder shall be excluded; and (ii) the application for flare gas commercialization shall be made by a Producer on behalf of its midstream subsidiary. The rationale for this is not unconnected with the fact that gas utilization projects are subject to companies' income tax at the rate of 30% therefore, the profits or expenses of gas utilization should be kept separate from crude oil exploration. This position is further confirmed by the provisions of Section 11(2)(c) of the Petroleum Profit Tax Act.

Expectedly, the Regulations make little provisions with regards to the tender process which we expect should be addressed by the Department of Petroleum Resources ("DPR") especially with regards to the step-by-step process. However, the Regulations state that access to flare gas data shall be provided to an applicant in a manner to be prescribed in the tender documentation. Furthermore, data access permit shall be valid (i) during the any period in which a flare site is open for bidding; or (ii) with respect to any flare site for which a permit holder holds a permit until the expiration of a permit to access flare gas. Also, during the bid process, an applicant shall be allowed physical access to the flare site.

## C. *Default Approvals under the Executive Order on the Ease of Doing Business – How Applicable?*

While the Regulations do not provide the timeline in which Permit to Access Flare Gas is to be granted, we reckon that this would most likely be contained in the tender procedure. That said, it would be interesting to see how any proposed timeline would work vis-à-vis the Federal Government of Nigeria's Executive Order on Ease of Doing Business (the "Order") which provides for "default approval". The Order states that where a relevant agency or official fails to communicate approval or rejection of an application within the time stipulated, such application not concluded within the stipulated timeline shall be deemed approved and granted. A useful question under this instance is, '*will default approval apply to applications for a Permit to Access Flare Gas?*'. In our view, the provision of the Executive Order with regards to default approval is not practicable especially for investors who would be comfortable with an 'actual approval' by the regulators.

## D. *Exclusivity and Term of Permit to Access Flare Gas*

Upon grant of a Permit to Access Flare Gas, a permit holder shall have exclusive rights to take flare gas from the relevant flare site(s). It is noteworthy to mention that the Regulations do not state the term of a Permit to Access Flare Gas but states that the permit shall be subject to the terms specified. For the purpose of transparency and certainty, the Regulations ought to have stated clearly the term of a permit in order to guard against potential abuse with respect to discrimination of permit terms.

Please note that a flare gas access permit shall be issued only to a company incorporated in Nigeria.

## E. *Relevant Agreements*

Upon the grant of a permit to access flare gas, it is expected that a permit holder shall enter into the following agreements:

**Gas Supply Agreement:** The regulations envisage that a permit holder shall enter into a Gas Supply Agreement (“GSA”) with the Federal Government through which gas is sold to the permit holder. It is expected that the GSA shall be standardized through templates issued by the DPR.

**Connection Agreement:** This is an agreement to be entered by the permit holder and a Producer in respect of the connection of the respective facilities of the producer and the permit holder.

**Deliver or Pay Agreement:** This agreement becomes relevant in the event a Producer commits or guarantees to supply an agreed volume of flare gas within a specified flare gas volume and composition range to the permit holder.

## F. *Fees*

The following fees are payable by an applicant:

- Data prying;
- Data leasing;
- Award fee for grant of permit to access flare gas;
- Handling fees – payable to a Producer as approved under the Connection Agreement;
- Guarantee fees – payable by the permit holder to the Producer under the Deliver or Pay Agreement;
- Tariffs payable under the GSA;

The Regulations do not clearly distinguish whether the Guarantee Fee under the Deliver or Pay Agreement and the Tariffs under the GSA are payable together. However, our thoughts are that either the Guarantee Fee or Tariffs will be applicable and not both. The rationale for this is that the Tariff under the GSA should apply in the event the flare gas is taken directly from the Federal Government while the Guarantee Fees shall be applicable only in the event where the gas flare is being delivered to a permit holder directly by a Producer. It is necessary that the Ministry of Petroleum and or the DPR provide clarification in this regard.

### *G. Gas Flare Payment*

Where 10,000 barrels or more of oil is produced per day in any Oil Mining Lease area or any Marginal Field, the Producer shall pay to the Federal Government, a flare payment of \$2.00 (two United States Dollars) per 28.317 standard cubic metres (one thousand standard cubic feet) of gas flared within such Oil Mining Lease area or Marginal Field, irrespective of whether the flaring is routine or non-routine flaring.

Where less than 10,000 barrels of oil per day is produced, the applicable flare payment is \$0.50 (fifty United States cents) per 28.317 standard cubic metres (one thousand standard cubic feet) of gas flared.

### *H. Gas Flare Data and Associated Gas Production Log*

The Regulations state that the DPR may request a producer to provide Flare Gas Data and when that request is made, the producer shall provide such Flare Gas Data in the format required within 30 calendar days of the date of the request. Any individual, in any company, that signs a letter conveying the data has a duty to ensure that the data is accurate.

Any person acting on behalf of a producer, who supplies inaccurate or incomplete Flare Gas Data to the DPR or any other duly empowered lawful authority, will be liable to criminal prosecution.

A critical part of meeting Nigeria's flare gas reduction targets will be the monitoring and measurement of natural gas. In connection with this, the Regulations provide that a Producer shall maintain a daily log of the flaring and venting of natural gas produced in association with crude oil and shall submit same to the DPR with 21 days following the end of each month. A Producer shall maintain a daily log of each occurrence of the flaring of flare gas and venting of natural gas within its facilities, which shall also be submitted to the DPR within 21 days following the end of each month.

Also, it is expected that a permit holder and or a Producer are to install metering equipment in their respective facilities. The metering equipment used for measuring the flaring and venting of gas associated with crude oil production and flare gas shall be manufactured, operated, calibrated and inspected in conformity to the Metering and Data Collection Standards issued by the DPR.

## **CONCLUSION**

It is our hope that the Regulations will provide the necessary framework to kick-start the Nigerian Gas Flare Commercialisation Programme and unlock the gas potential of Nigeria. Furthermore, it is expected that the DPR would release the tender process for the competitive bidding process for the implementation of the Programme.

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