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28 September 2021

Department of Forestry, Fisheries and the Environment
The Director-General
Attention: Ms Dee Fischer
Private Bag X447
PRETORIA
0001

By email: dfischer@environment.gov.za

Copy to: **Petroleum Agency of South Africa**
By email: NgesiP@petroleumagencysa.com

Dear Ms Fischer,

REPRESENTATIONS OF THE OFFSHORE PETROLEUM ASSOCIATION OF SOUTH AFRICA IN RESPECT OF THE PROPOSED REGULATIONS PERTAINING TO FINANCIAL PROVISIONING FOR THE MITIGATION AND REHABILITATION OF ENVIRONMENTAL DAMAGE CAUSED BY RECONNAISSANCE, PROSPECTING, EXPLORATION, MINING OR PRODUCTION OPERATIONS, PUBLISHED ON 27 AUGUST 2021

1 Background

1.1 This submission is made on behalf of the Offshore Petroleum Association of South Africa (**OPASA**) in response to the invitation published in the Government Gazette No. 45058 on 27 August 2021 for submission of written comments on the Proposed Regulations Pertaining to Financial Provisioning for the Mitigation and Rehabilitation of Environmental Damage Caused by Reconnaissance, Prospecting, Exploration, Mining or Production Operations (**Proposed Regulations**) published in terms of the National Environmental Management Act, 1998 (**NEMA**).

1.2 OPASA is a member-funded representative body for the offshore upstream petroleum industry in South Africa, and OPASA members include majority Historically Disadvantaged South African owned local companies as well as international oil and gas majors and super-majors. Every OPASA member is the holder of an exploration right and/or a production right in South Africa, granted in terms of sections 80 or 84 of the Mineral and Petroleum Resources Development Act, 2002 (**MPRDA**) respectively. The list of OPASA members is annexed to this letter as **Annexure A**.

1.3 OPASA has been heavily involved in the public participation process surrounding the development of the Proposed Regulations, and has always engaged with the Department of Forestry, Fisheries and the Environment (the **Department**) in a co-operative, transparent and collaborative manner. It is noted that OPASA has previously provided comments in respect of:

(1) the Regulations Pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations, published in the Government Gazette No. 39425 on 20 November 2015 under government notice no. 1147 (**2015 Regulations**);

(2) the proposed revisions to the 2015 Regulations, published in the Government Gazette No. 40371 on 26 October 2016 under government notice no. 1314 (**2016 Draft Amendments**);

(3) on the proposed regulations pertaining to the financial provision for prospecting, exploration, mining or production operations published in the Government Gazette No. 41236 on 10 November 2017 under Government Notice no.1228 (**2017 Draft Amendments**); and

(4) the Proposed Regulations Pertaining to Financial Provisioning for the Rehabilitation and Remediation of Environmental Damage Caused by Reconnaissance, Prospecting, Exploration, Mining or Production Operations published in the Government Gazette No. 42464 on 17 May 2019 (**2019 Draft Amendments**).

1.4 OPASA understands that many of the issues which are raised in this submission impact organs of state other than the Department (in particular, the Department of Minerals and Energy and the National Treasury).

1.5 Accordingly, OPASA wishes to make the submissions set out herein, and urges the Department to duly consider the comments made in the finalisation of the Proposed Regulations.

2 Key issues for the offshore petroleum industry

2.1 In addition to our full submission, which is set out in the table annexed to this submission letter as **Annexure B**, we would like to emphasize the following key issues for consideration:

(1) General suitability of the Proposed Financial Regulations to the offshore oil and gas industry.

(2) Parent or Affiliate Company investment grading

(3) Impact of upfront financial provision for final rehabilitation

(4) Categorisation of Incidents

3 General suitability of the Proposed Financial Regulations to the offshore oil and gas industry

3.1 OPASA would like to submit that many of the issues identified in the submission below arise as a result of the unique nature of the offshore oil and gas exploration and development industry.

3.2 It is and will continue to be extremely difficult to structure a regulatory regime which is effective and applicable to both oil and gas explorers and producers and participants in other extractive industries. This has been widely recognised as a key contributing factor to the separation of oil and gas legislation from the MPRDA and drafting of the Upstream Petroleum Resources Development Bill (which process is ongoing).

3.3 It is therefore submitted that the Department seriously consider the separation of the offshore oil and gas industry from the Proposed Regulations as a long-term measure to ensure that effective regulations can be developed to ensure environmental protection within the challenging and unique context of the offshore oil and gas industry.

4 Parent or Affiliate Company credit rating

4.1 The costs associated with rehabilitation, decommissioning, closing and abandonment of oil and gas operations are enormous and prohibitive. Such costs (to reiterate, a single oil and gas operation may require billions of rand to fully rehabilitate, decommission and achieve closing):

(1) severely limit the ability of smaller financial service providers to provide financial guarantees or insurance products; and

(2) significantly increase the costs of obtaining such a guarantee or insurance product from an institution large enough to provide such funds.

4.2 The use of parent or affiliate company guarantees is a key method by which the oil and gas companies active in the offshore petroleum industry are able to guarantee the environmental obligations of the relevant operating companies around the world.

4.3 Given the importance of such guarantees, OPASA strongly welcomes the Proposed Regulations' introduction of Parent or Affiliate Company Guarantee as a means by which an applicant and holder may make financial provision (regulation 8(1)(d)).

4.4 However, as set out in the definition for "Parent or Affiliate Company Guarantee", the Proposed Regulations require that the relevant parent or affiliate hold "at least an investment grade credit rating from an international rating agency".

4.5 As South Africa's credit rating is below investment grade, a South African parent affiliate company is therefore excluded from providing such a guarantee. Furthermore, because the definition is premised on international ratings, it may also effectively exclude private companies.

4.6 In order to allow for the full and effective participation in the petroleum industry by South African stakeholders and private companies, it is proposed that the credit rating requirement be amended to provide for a South African sovereign credit rating.

5 **Impact of upfront financial provision for final rehabilitation**

5.1 Under the Proposed Regulations, Holders and Applicants (as defined in the Proposed Regulations) will be required to set aside funds necessary to fully rehabilitate any environmental harm resulting from the current disturbed area, any works planned in the next 12 month period (including decommissioning, sealing, plugging and abandonment costs) and the premature closure costs calculated for the management and rehabilitation of latent impacts that may be associated with the operation, regardless of when such decommissioning activities are to take place.

5.2 Whilst this may be appropriate in other extractive industries, such a regime is hugely problematic for oil and gas operations due to the following key factors:

(1) First, the nature of offshore oil and gas exploration and production operations are such that it is largely not necessary to conduct any material rehabilitation, remediation or decommissioning activity during the life of an exploration or production operation, and in particular once a production platform or other installation is in place. The bulk of such activities (upwards of 80% of decommissioning costs associated with such operation) will only be conducted at the end of the life of the operation.

(2) Second, offshore oil and gas operations have project life spans which may be significantly longer than operations in other extractive industries. It is not uncommon for production operations to last in excess of 60 years.

(3) Third, the costs of rehabilitation and decommissioning activities associated with production operations are may be much greater than in other cases (easily billions of rand in each case).

5.3 The result of these key differences between the offshore oil and gas industry and other extractive industries is that oil and gas right Holders will be required to set aside (and sterilize) enormous sums of money (in some cases) up to 60 years in advance of such funds being required, and to set aside such funds before any revenue can be generated from the production of oil or gas.

5.4 It is for this reason that in other oil and gas producing jurisdictions around the world, oil and gas producers are not required to provide funds for final rehabilitation, decommissioning and abandonment prior to production. The international standard in place around the world is instead for oil and gas producers to provide a parent company guarantee initially, and to contribute to a fund over time, typically beginning to pay into the fund once a fixed percentage (often 50%) of the fields recoverable reserves having been depleted, with the result that by the time rehabilitation funds are required, they are fully available (having been saved out of revenue generated).

5.5 As currently drafted, there is a real eventuality that the Proposed Regulations will particularly disadvantage small companies, private companies, South African and BEE Companies and render many oil or gas production projects in South Africa both non-viable economically and to Joint Ventures. As an industry, we have fundamental concerns that the Proposed Regulations, being designed for hard-rock mining, are not well suited to the very different circumstances that exist for oil and gas. Ideally, tailored regulations would be generated for the industry.

5.6 OPASA submits that the most appropriate solution to this issue is to require participants in the offshore oil and gas industry to set aside funds as financial provision for environmental rehabilitation and remediation on a unit-of-production basis, whereby each Holder or Applicant is required to set aside

funds from the point at which the operations of the Holder or Applicant reach a determined threshold of total anticipated production (we suggest 50 to 70% of depletion of recoverable reserves).

5.7 Under such proposed regime, funds would be deposited it in an escrow account held by an recognised financial institution thereby ensuring that funds for decommissioning and rehabilitation are provided by all participants for well in advance of their requirement in satisfaction of the Government's objective to ensure and secure rehabilitation funds for extractive projects.

6 Categorisation of Incidents

6.1 The Proposed Regulations define an "Incident" to mean "an unanticipated and unusual **natural** event which causes, has caused or may cause environmental damage". This definition is relevant to the application of Regulation 3(3)(c), which states that the Proposed Regulations do not apply in case of an incident. Therefore, holders and applicants are not required to make financial provision for incidents under the Proposed Regulations.

6.2 The word "natural" is a new determinative factor introduced in the definition of incident in comparison with the 2019 Draft Amendments. The term "incident" was defined in the 2019 Draft Amendments to mean "an unplanned and unusual event **which could include** an act of God that may cause environmental damage".

6.3 In contrast to the above, section 30 of NEMA defines "incident" to mean "an unexpected, sudden and uncontrolled release of a hazardous substance, including from a major emission, fire or explosion, that causes, has caused or may cause significant harm to the environment, human life or property".

6.4 The effect of the new definition of incident under the Proposed Regulations is that only natural events (which are also unanticipated and unusual) can constitute incidents. This definition of "incident" is therefore extremely narrow in its application by comparison to the previous draft definitions and what is provided for under NEMA.

6.5 This would have the effect of excluding scenarios particular to the offshore industry which were previously covered under the 2019 Draft Amendments, such as blow-outs.

6.6 It is therefore recommended that the definition of "incident" be aligned with the language used in section 30 of NEMA, in that incident should include any event which is "unexpected, sudden and uncontrolled", irrespective of whether such event is "natural" in essence.

Yours faithfully

Adewale Fayemi
OPASA CHAIRMAN
chairman@opasa.co.za

Annexure A

OPASA Members

1. CNR International (South Africa) Limited
2. Impact Oil and Gas Limited
3. New African Global Energy SA Proprietary Limited
4. Sasol SA Proprietary Limited
5. Sungu Sungu Petroleum Proprietary Limited
6. Sunbird Energy Holding Limited
7. The Petroleum, Oil and Gas Corporation of South Africa (SOC) Limited
8. Thombo Petroleum Limited
9. TotalEnergies EP South Africa B.V.