

NEWSLETTER

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EXAMINING THE MIDSTREAM AND DOWNSTREAM ENVIRONMENTAL REMEDIATION FUND REGULATIONS, 2023

INTRODUCTION

Amongst the more recent set of Regulations issued in the past few weeks by the Nigerian Midstream and Downstream Petroleum Regulatory Authority (“the Authority”), the Midstream and Downstream Environmental Remediation Fund Regulations, 2023 is one such regulation that has caught our fancy. Released in a bid to address the negative environmental impacts resulting from midstream and downstream petroleum operations, the Regulations provide for the establishment of a Fund to manage and rehabilitate environmental damages caused by the midstream and downstream petroleum industry. Essentially, it sets out the general rules for the administration of the Fund.

The Regulations apply specifically to situations where a licensee fails or is unable to undertake the rehabilitation or management of any impact on the environment arising from its operations. Other objectives of the Regulations include the determination of applicable financial contributions based on the size of the relevant petroleum operation and associated environmental risks, as well as the imposition of fines and sanctions for noncompliance. In this newsletter, we shall examine the key aspects of the regulations, while attempting to provide insights into each’s significance and implications.

ESTABLISHMENT AND ADMINISTRATION OF THE ENVIRONMENTAL REMEDIATION FUND

The Regulations establish the Midstream and Downstream Environmental Remediation Fund (“the Fund”), to be managed by the Authority. The Fund is to be set up as an interest-yielding account funded by contributions from licensees engaged in midstream and downstream petroleum operations and accrued interest. Suffice it to say that the goal is to ensure that the Fund remains sustainable and capable of supporting long-term remediation efforts.

Administration of the Fund shall be the mandate of the Authority who shall ensure its exclusive use for rehabilitation and management of negative environmental impacts resulting from midstream and downstream petroleum operations. The Authority is also empowered to set out a procedure and criteria for the administration of the Fund, provided that it shall not be inconsistent with the financial rules as laid down by the Accountant-General of the Federation.

UTILISATION OF THE FUND

As has been pointed out earlier, the Fund is to be used for the rehabilitation and management of environmental impacts caused by midstream and downstream petroleum operations. Operations that are however deemed as forming part of an integrated upstream operation under Section 8(d) of the PIA are not contemplated here.

Generally, a licensee retains responsibility over the negative environmental impacts of its operations. Where a licensee however fails or is unable to rehabilitate or manage said impacts, the Authority

may apply the Fund for such purposes, provided that procurement of goods, works, or services required for the utilisation of the Fund shall be subject to the laws applicable to public procurement in Nigeria.

CONTRIBUTIONS TO THE FUND

Financial contributions to the Fund shall be paid annually by licensees engaged in midstream and downstream petroleum operations. A terminal date of 31st December every year is set as the deadline for payment of relevant contributions. The amount of the contribution is to be determined based on a formula, which includes a fixed contribution, midstream or downstream capital expenditure, among other factors. Payment of contributions is as set out in the schedule to the regulations and varies for both existing and prospective licensees. Financial contributions shall be calculated and paid in United States Dollars, or for locally delivered production, it may be paid in Naira at the Central Bank of Nigeria's investors and exporters (I&E) window exchange rate.

One may argue that by mandating that licensees engaged in midstream and downstream petroleum operations pay an annual financial contribution, the Authority seeks to ensure that all industry stakeholders adopt environmentally sustainable practices and are accountable for the environmental impacts of their activities. Some others may however regard this as no more than overburdening the “already struggling” oil and gas companies within the sub-sectors with more taxes and levies.



REFUND OF FINANCIAL CONTRIBUTIONS

Under the regulations, a financial contribution may be refunded if the licensee surrenders its licence in accordance with the provisions of the PIA, or where the Authority is satisfied that such a licensee has complied with its decommissioning and abandonment obligations as required by the Petroleum Industry Act.

It is important to note that these refund provisions are subject to certain conditions and timelines. Any financial contributions that have been utilised by the Authority for environmental remediation or management or have been allocated to address negative impacts, such as mystery spills, are not eligible for refund. With this provision, the Authority no doubt aims to strike a balance between incentivizing licensees to comply with environmental obligations and ensuring transparency and accountability in the management of the Environmental Remediation Fund.

APPOINTMENT OF INDEPENDENT ASSESSOR

The Authority may appoint an independent assessor to conduct a re-assessment of a licensee's financial contribution where it believes that: the licensee's financial contribution does not reflect the size of its operations and the level of environmental risk; the licensee's allocation to environmental categories under the Regulations was made in error; the licensee's capital expenditures, production or both are underestimated; or, the assessment or financial contribution is unsatisfactory.

It is however mandatory that such an independent assessor must have expertise and experience in environmental matters, natural

resource planning and management, management of petroleum operations, and environmental rehabilitation practices. This mechanism ensures transparency and minimises the potential for undue influence or bias in the determination of financial obligations. By incorporating independent assessments, the Regulations enhance public confidence in the Fund's operations and the regulatory framework as a whole.

INTERVENTION AND INCIDENT QUALIFICATION FOR THE FUND

The Authority may determine negative environmental impacts that qualify for intervention from the Fund based on specific criteria. These criteria include impacts on land, air, water, soil, ecosystems, biodiversity, public infrastructure, public health, and other negative impacts as determined by the Authority.

In response to identified incidents, an ad-hoc Environmental Management and Rehabilitation Committee is formed, responsible for developing a rehabilitation program that may involve remediation, reclamation, or restoration. Upon the Authority's approval, the committee receives funding from the Fund to execute the intervention, funded by contributions from licensees in the affected area. The committee is accountable for the proper use of the funds and submits a detailed report to the Authority upon completion of the rehabilitation efforts, ensuring transparency and effective utilisation of the Fund.

The Fund may also be utilised if a licensee is unable to rehabilitate or manage environmental impacts due to bankruptcy, licence suspension or revocation, or if the Authority is unable to enforce compliance.

AUDITING AND REPORTING REQUIREMENTS UNDER THE FUND

The Authority is obligated to keep proper accounts and records of the Fund, and an annual statement containing details of interventions, contracts issued, contributions, and expenses shall be published on its website. Licensees may conduct audits of the Fund upon request to the Authority.

CONCLUSION

The introduction of these Regulations marks a significant step on the journey toward enhancing compliance, accountability, and environmental stewardship in Nigeria's midstream and downstream petroleum sector. By enforcing penalties and sanctions, the Authority aims to create a safer and more sustainable industry that upholds the highest standards of operation. The provision of a penalty framework that sees the imposition of sanctions gradually advance through 4 different stages of notices further underscores one unequivocal reality – that the

Overall, the regulations demonstrate the government's commitment to responsible environmental stewardship and can serve as a model for other countries seeking to balance economic growth with environmental preservation. As the regulations are implemented, their effectiveness in safeguarding Nigeria's natural resources and public well-being will become evident, solidifying their place as a crucial component of the country's environmental management strategy. However, effective implementation and oversight will ultimately prove essential to ensure the Fund's successful operation and the fulfilment of its environmental objectives.

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