

THE FLARE GAS (PREVENTION OF WASTE AND POLLUTION) REGULATIONS, 2018 – WHAT IS NEW?

The Gas Flaring Problem

According to Maikanti Baru, the Group Managing Director of the Nigerian National Petroleum Corporation, petroleum operators currently flare about 700 million standard cubic feet (“scf”) of gas per day¹, which could generate 5,000 megawatts of electricity daily. At about \$3.81 per 1,000scf of gas and using an exchange rate of N306.35 to \$1.00, Nigeria loses an economic benefit of approximately N817million daily due to gas flaring.

In its unrelenting efforts to achieve the twin objectives of spurring investments in the gas sector and addressing the environmental impact of gas flaring, the Federal Government of Nigeria (the “FGN”) in July 2018 introduced the Flare Gas (Prevention of Waste and Pollution) Regulations, 2018 (the “**Regulations**”). These Regulations are applicable to holders of oil acreages, including marginal fields holders and we consider the salient provisions of the Regulations below.

Purpose of the Regulations

The Regulations provide a legal framework to protect the environment against the effect of gas flaring, prevent the on going waste of gas and create social and economic benefits from Flare Gas (as defined below), by seeking to make effective the right conferred on the FGN under existing laws² to take associated gas free of cost at the flare and without payment of royalties.

The Regulations specifically defines “Flare Gas” as “*any natural gas produced in association with crude oil by a producer and finally diverted toward a flare site by the producer with the intent that the natural gas will be flared, including any such natural gas from a greenfield project*”.

Eligibility and Bidding for Flare Gas Permit

To ensure the commercial utilization of Flare Gas, the Regulations empower the Minister of Petroleum Resources (the “**Minister**”) to grant permits that would exclusively enable a holder of such permit to take Flare Gas, on behalf of the FGN, from one or more specified sites (“**Flare Gas Permit**”).

A Flare Gas Permit is granted to qualified Nigerian-incorporated companies that intend to utilise Flare Gas for their own use or for on-sale to third party off takers. In addition, the Regulations provide that a company that is granted a Flare Gas Permit shall not be a holder of an oil mining

¹ <https://www.businessdayonline.com/wp-content/uploads/2018/03/BusinessDay-07-Mar-2018.pdf> at Page 4.

² Section 9(1) of the Petroleum Act; Paragraph 35(b) (i) of the First Schedule of the Petroleum Act.

lease or a marginal field (i.e. “**Producer**”)³. That said, Producers who wish to commercialise their own Flare Gas must nevertheless also apply to the Minister in this regard⁴; in such instance, applications by Producers must not be made in respect of any Flare Gas volume subject to a bid process (as discussed below) or that has already been assigned to a holder of a Flare Gas Permit. Interested Producers are required to act through a midstream subsidiary - presumably in furtherance of the FGN’s policy to ensure a separation among the activities of upstream, midstream and downstream operators.

In line with the need to ensure transparency in the extractive sector, the Regulations make it mandatory for the grant of a Flare Gas Permit to qualified entities to be made subject to a competitive bid process. A summary of the bid process is as follows:

- i. **Qualification**: To participate in a bid process, a bidder must be deemed qualified following the submission of its response to a request for qualifications in accordance with the tender documentation issued for the relevant bid round; and the bidder must intend to utilize Flare Gas for its own use or for on-sale to third party off takers.
- ii. **Application for Data Access Permit**: Where considered qualified, the bidder is required to apply to the Department of Petroleum Resources (the “**DPR**”) for a Data Access Permit in accordance with the tender documentation. The Data Access Permit is granted on a non-exclusive basis and allows the bidder to access data held at the DPR in respect of specified flare site(s). The Regulations provide for the payment of data prying and data leasing fees to the FGN as may be specified by the DPR.
- iii. **Access to the Data**: Upon issuance of the Data Access Permit, the bidder is granted access to data held at the DPR regarding flare site(s) in respect of which the Data Access Permit was granted.
- iv. **Flare Site Visit**: Prior to submitting a bid for Flare Gas Permit, a bidder may also be authorized by the DPR to enter and assess flare site(s) and related facilities of a Producer, subject to giving a minimum of 7 (seven) days prior notice to the relevant Producer (“**Assessment**”). The Assessment must be conducted in compliance with applicable industry safety standards and regulations.
- v. **Submission of bid for Flare Gas Permit**: Following the completion of the Assessment of the flare site(s) and the related facilities, the bidder may then present its bid in respect of the flare site(s) in accordance with the tender documentation.
- vi. **Grant of Flare Gas Permit**: Upon review of the bid(s) submitted based on the relevant criteria, which we expect will be specified in the tender documentation, the Minister may grant a Flare Gas Permit. A Flare Gas Permit will specify terms and conditions, which the permit holder is required to comply with, such as award fee, terms for the utilization or disposal of the Flare Gas (including in respect of volume), duration *etc.*

³ Regulation 8 (3) of the Flare Gas (Prevention of Waste and Pollution) Regulations, 2018.

⁴ Regulation 3 (2) of the Flare Gas (Prevention of Waste and Pollution) Regulations, 2018.

Contractual and Commercial Framework

The FGN and the Flare Gas Permit holder: Upon the grant of the Flare Gas Permit, the permit holder is required to enter into a gas supply agreement with the FGN. The gas supply agreement will be based substantially on a template to be issued by the DPR and will contain the terms and conditions under which the Flare Gas will be sold by the FGN to the permit holder. It is worth noting that termination of the gas supply agreement is a ground for revocation of the Flare Gas Permit.

The Producer and the Flare Gas Permit holder: The Flare Gas Permit holder is also required to enter into a connection agreement and a deliver or pay agreement with the Producer. The connection agreement relates to the connection of the respective facilities of the Producer and the permit holder to facilitate the offtake of Flare Gas from the flare site; while the deliver or pay agreement is a guarantee given by the Producer to supply to the permit holder an agreed volume of Flare Gas within a specified Flare Gas volume and composition range. Both agreements are required to conform substantially to the templates to be issued by the DPR. The permit holder is required to pay the Producer handling fees under the connection agreement for the operation and maintenance of the interconnection of the assets transferred to the Producer and to guarantee fees under the deliver or pay agreement.

By requiring that agreements under which the commercialisation of Flare Gas will operate (i.e. the gas supply agreement, the connection agreement and the deliver or pay agreement), are to be based on templates to be issued by the DPR, the presumption is that the intention is to ensure the application of standard commercial terms. Still, we expect that transaction parties will be able to introduce appropriate terms in their agreements to address their peculiar commercial arrangements and/or allocation of risks. The Regulations seem to recognise this measure of flexibility by providing that the agreements should be based “*substantially*” on templates to be issued by the DPR⁵.

Prohibition of Gas Flaring

In line with previous legislation on gas flaring⁶, the Regulations prohibit Producers from flaring gas without first obtaining a certificate to do so from the Minister. Producers with a daily production of 10,000 barrels or more of oil are required under the Regulations to make a flare payment of US\$2.00 *per* 1,000scf of gas flared, while Producers with less than 10,000 barrels *per* day are required to pay US\$0.50 *per* 1,000scf of gas flared.

The Regulations also prohibit Flare Gas permit holders from engaging in routine flaring or venting of natural gas from any facility operated by the permit holder.

Reporting Obligations

A key factor to the success of the FGN’s gas flare commercialisation initiative is the availability of accurate data. To ensure this is secured, the Regulations place various reporting obligations on Producers. In this regard, it is worth noting that Producers are mandated to -

⁵ Regulation 24 of the Flare Gas (Prevention of Waste and Pollution) Regulations, 2018.

⁶Section 3(1) of the Associated Gas Re- injection Act Cap A 25 LFN 2004.

- i. maintain a daily log (based on data retrieved from metering equipment and include the date, time, duration, rates, volumes and gas source or type) of the flaring and venting of associated gas and submit the same to the DPR on a monthly basis;
- ii. maintain a daily record of all associated gas produced and submit the record to the DPR on a monthly basis; and
- iii. submit an annual report to the DPR containing all Flare Gas data in respect of each flare site and a list of all available flare sites.

In addition to the above-stated reporting obligations, the DPR may also request a Producer to provide Flare Gas data at any time. Reporting obligations are also imposed on Flare Gas Permit holders (distinct from the Producers), to maintain a daily log of each occurrence of the flaring of Flare Gas and venting of natural gas within its facilities to be submitted to the DPR on a monthly basis and also submit an annual report containing information in respect of the volume of utilised Flare Gas, flared Flare Gas and vented natural gas.

The failure of a Producer or a Flare Gas Permit holder to comply with the imposed reporting obligations and other provisions of the Regulations, attract punitive measures such as fines, custodial sentences, and suspension of operations and/or revocation of the operating licence/permit.

Conclusion

The Regulations have been lauded by industry stakeholders and practitioners as a step in the right direction and are expected to open up the gas sector for new entrants and ultimately address the environmental impact of gas flaring. The statutory entrenchment of competitive bidding should also ensure transparency in the commercialisation process. However, as with all new initiatives of the government, there remains the need for the FGN to ensure the effective implementation and enforcement of the Regulations. While we are hopeful that appropriate steps will be taken in this regard, we can only wait and hope to see the prompt commencement of the first Flare Gas Permit bid round.

Qualifications

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