

Key contacts



**Yemisi Awonuga**  
Partner and Co-Head,  
Energy and Projects  
yemisi.awonuga@templars-law.com



**Temple Ezebuike**  
Associate  
temple.ezebuike@templars-law.com

# An Overview of The Exposure Draft Midstream and Downstream Environmental Remediation Fund Regulations 2022

## Introduction

The Nigerian Midstream Downstream Petroleum Regulatory Authority (the “**Authority**”) recently released the exposure draft of the Midstream and Downstream Environmental Remediation Fund Regulation 2022<sup>1</sup> (the “**Regulation**”).

In this commentary, we have evaluated the key provisions of the Regulation and the potential impact on midstream and downstream petroleum operations.

### 1. Establishment of the Fund

The Regulation derives its life from section 103(1)<sup>2</sup> of the Petroleum Industry Act 2021 (the “**PIA**”). The Regulation provides for the administration of an Environmental Remediation Fund (the “**Fund**”), established for midstream and downstream petroleum operations carried out under licences, permits and authorizations administered by the Authority. Financial contributions to the Fund shall be made by licensees conducting midstream and downstream petroleum operations. The Authority is mandated to administer and manage the Fund in accordance with the Regulation.<sup>3</sup>

### 2. Utilization of the Fund: Triggers

*Where a licensee fails to rehabilitate*

The Fund shall be utilized solely for the management of environmental impact and the rehabilitation of negative environmental impacts caused by midstream and downstream petroleum operations or activities.

Midstream and downstream petroleum operations are operations that are downstream the measurement points of petroleum mining leases and include<sup>4</sup>:

<sup>1</sup> Pursuant to the Authority’s powers under section 103(1) PIA.

<sup>2</sup> This section empowers the Authority to establish a fund for remediation purposes as a condition for the grant of a licence.

<sup>3</sup> Paragraph 1(3) of the Regulation.

<sup>4</sup> section 318 PIA.

- a. construction and operation of natural gas transport or transmission pipelines, gas processing facilities and central processing facilities, facilities for the storage of natural gas, ethane extraction plants, gas to liquids (GTL) plants, petrochemical and fertiliser plants, liquefied natural gas (LNG) plants, and related LNG terminals;
- b. acquisition, operation or chartering of LNG tankers for marine transportation;
- c. purchase and sale, trading, bartering, aggregating and marketing of natural gas, LNG, methane, ethane, propane, butane, natural gas liquids and liquids from GTL plants;
- d. construction and operation of petroleum liquids<sup>5</sup> transport pipelines (including related pumping stations), refineries, tank farms and other storage facilities, and export terminals for petroleum liquids;
- e. acquisition, operation, leasing of barges, coastal or ocean-going tankers, railcars and trucks for the transport of petroleum liquids; and
- f. purchase and sale, trading, bartering, and marketing of petroleum liquids.

The Regulation provides that the Fund will only be used where a licensee fails or is unable to undertake the rehabilitation or management of any negative environmental impact resulting from its petroleum operations.<sup>6</sup>

The above notwithstanding, the primary duty of rehabilitating the negative impact of petroleum activities on the environment is imposed on the licensee.<sup>7</sup> Whilst the entitlement of the Authority to the Fund upon a licensee's default is well pronounced, the specific meaning of "negative environmental impacts" (which will serve as a qualifying reference for a licensee default) was not provided in the Regulation. The Authority may consider providing a definition, or a guide for determining what constitutes "negative environmental impacts" for regulatory precision.

#### *Procedure for utilizing the Fund*

In the event the Authority determines to utilize the Fund following default by a licensee, the Authority shall provide a written notice of default to the defaulting licensee.<sup>8</sup> It is not clear if the default notice contemplated in the Regulation will include a cure period for the licensee to remedy its default. The determination of the licensee's default therefore seems final without an opportunity to remediate or explain the reason for the default. To avoid such ambiguity, it is expected that the gazetted Regulation will specify a licensee cure period before the Authority deploys the Fund for remediation activities.

## **Environmental Management Plan**

Under the PIA, every licensee is obligated to submit, within one year of the effective date of the PIA or six months after the grant of a licence, its environmental management plan (EMP) to the Authority for approval.

A further sticking point is the question around utilization of the Fund for previous negative environmental impacts resulting from a licensee's operations. The Regulation is silent on the applicability of the Fund to such environmental impacts. However, under the PIA, every licensee is obligated to submit, within one year of the effective date<sup>9</sup> of the PIA or six months after the grant of a licence, its environmental management plan (EMP) to the Authority for approval.<sup>10</sup> It is expected that at the EMP approval stage, considerations about remediation of previous environmental impacts by a licensee or utilization of the Fund for such remediation will be addressed by the Authority. It will also be fitting if this is sculpted in the next iteration of the Regulation for administrative clarity.

#### *What constitutes failure to remediate?*

Although the Regulation is instructive on a licensee's obligation to rehabilitate or manage negative environmental effects resulting from its petroleum operations, it is not clear what constitutes default or failure by a licensee to rehabilitate or manage negative environmental effects resulting from such licensee's petroleum operations. To provide clarity, "failure by a licensee to undertake rehabilitation activities in accordance with its approved EMP" may be considered by the Authority as a definitive trigger of rehabilitation default by a licensee. The Authority may also borrow a leaf from the recently released exposure draft Environmental

<sup>5</sup> Petroleum liquids include crude oil, liquid petroleum products such as liquefied petroleum gas (LPG), condensates, natural gas liquids. Section 318 PIA.

<sup>6</sup> Paragraph 2(1) of the Regulation.

<sup>7</sup> Paragraph 2(2) of the Regulation.

<sup>8</sup> Paragraph 2(3) of the Regulation.

<sup>9</sup> The date the PIA came into force (i.e., 16 August, 2021).

<sup>10</sup> Section 102(1) PIA.

Regulations for Midstream and Downstream Petroleum Operations in Nigeria 2022 (the “**Environmental Regulations**”), which characterises amongst others, the use of unapproved products or technologies for remediation, failure of a licensee to adequately remediate impacted sites or update the Authority on the status of impacted sites, as remediation default.

#### *Penalties for remediation default*

The consequences of a remediation default include fines, the cancellation, suspension or termination of the relevant licence<sup>11</sup>. There is no clarity with respect to the sequence by which the Authority will exercise its discretion to cancel, suspend or terminate a licence following a remediation default. It will be expected that upon a remediation default (particularly where the Authority will apply its discretion of cancellation, suspension or termination) a licensee's licence should first be suspended before cancellation or termination; such that where a licensee eventually carries out the required remediation activity, its licence may be restored. Outright cancellation or termination of a licence following a remediation default may foreclose an easy window of reinstatement of such licence. Therefore, the option of cancellation or termination should be reserved for where a licensee ultimately fails to remediate the impacted environment after a determinable period of suspension.

### 3. Prudence and Accountability

It is noteworthy that in applying the Fund and to avoid misapplication of resources, the procurement of any goods, works or services must be subject to competitive bidding principles under the Public Procurement Act.<sup>12</sup> Hopefully, this would force regulatory discipline and stem imprudence.

### 4. Quantum of the Financial Contribution

#### *31st December*

Monetary contribution to the Fund will be paid on or before 31st December of every calendar year for each licence, permit and authorization including the year such licence, permit and authorization was granted by the Authority.

By the Regulation, monetary contribution to the Fund must be paid on or before 31<sup>st</sup> December of every calendar year for each licence, permit and authorization including the year such licence, permit and authorization was granted by the Authority.<sup>13</sup>

For the purpose of determining the financial contribution, the Regulation provides a specific formula<sup>14</sup>, represented below:

**Financial contribution for a year = Fixed Contribution + (Midstream and Downstream Capital Expenditure x CER<sup>15</sup>) + (CL<sup>16</sup> x CLR<sup>17</sup>) + (CG<sup>18</sup> x CGR<sup>19</sup>)**

For the purpose of determining the yearly *Fixed Contribution* of a licensee, the petroleum operations under each licence will be classified under one of the following categories such

<sup>11</sup> Paragraph 29 of the Environmental Regulations.

<sup>12</sup> Regulation 2(4).

<sup>13</sup> Paragraph 3(1) of the Regulation.

<sup>14</sup> Paragraph 3(4)(a) of the Regulation.

<sup>15</sup> This is the rate applicable to the capital expenditure, as determined in accordance with Table 1 of the Schedule to the Regulation.

<sup>16</sup> This is the average daily capacity of facilities under a licence during a year for which the financial contribution is payable, in barrels per day.

<sup>17</sup> This is the rate in US\$ per bbl/day for average daily capacity for liquid hydrocarbons (CL), as determined in accordance with Table 1 of the Schedule to the Regulation.

<sup>18</sup> This is the average daily capacity of facilities under a licence during a year for which the financial contribution is payable, in thousand cubic feet (Mcf) per day.

<sup>19</sup> This is the rate in US\$ per Mcf/day for average daily capacity for gaseous hydrocarbons (CG), as determined in accordance with Table 1 of the Schedule to the Regulation.

as Onshore High-Risk<sup>20</sup>, Shallow Water High-Risk<sup>21</sup>, Other Onshore Areas<sup>22</sup>, Other Shallow Water Areas<sup>23</sup> and Deep Water Areas<sup>24</sup>. The Regulation further grants the Authority the power to also categorize operations under a petroleum prospecting licence or petroleum mining lease for the purpose of determining their yearly *Fixed Contribution*.<sup>25</sup> However, this power is *ultra vires* as it eats into the regulatory purview of the Upstream Petroleum Regulatory Commission (the "Commission"), which has been exclusively empowered by the PIA<sup>26</sup> to regulate utilization of relevant remediation fund in upstream petroleum operations<sup>27</sup>. Therefore, we recommend that this *ultra vires* provision be expunged in subsequent iteration of the Regulation to avoid a regulatory clash between the Authority and the Commission.

Further, in determining the *Midstream and Downstream Capital Expenditure* component, the Regulation excludes contributions to any decommissioning and abandonment fund.<sup>28</sup>

On the CL and CGR components, the Regulation provides that the average daily capacity of a facility for purposes of determining the CL and CGR inputs is the name plate capacity (which may be adjusted following additional investment by a licensee or an abandonment event). Determining financial contributions using name plate capacities may not be practical, given that licensees may not fully utilize the name plate capacities of their facilities during a relevant year. The Authority may consider benchmarking the CL and CGR capacities against the average daily capacity utilized by a licensee in the relevant year of assessment.

The Regulation also provides that financial contribution must be paid in United States dollar by each licensee. However, for production delivered for local refining, the Regulation allows Naira contributions, converted at the Central Bank of Nigeria applicable exchange rate on the day of payment.<sup>29</sup>

---

<sup>20</sup> Operations in mangrove areas; wetland and swamp areas; a zone of 500 meters along any river and lake; and such other areas as the Authority may determine as high-risk. Regulation 3(2)(a)(i)-(iv). For operations in these areas, the licensee will be required to pay US\$40 per day under the Fixed Contribution component of its yearly financial contribution to the Fund. See Schedule 1 to the Regulation.

<sup>21</sup> Operations in a zone of 10km seawards of a high-water mark; and such other areas as the Authority may determine as high-risk. Regulation 3(2)(b)(i)-(ii). For operations in these areas, the licensee will be required to pay US\$24 per day under the Fixed Contribution component of its yearly financial contribution to the Fund. See Schedule 1 to the Regulation.

<sup>22</sup> Operations in the parts of Nigeria defined as onshore and frontier acreages under the PIA, other than Onshore High-Risk Areas. Regulation 3(2)(c). For operations in these areas, the licensee will be required to pay US\$32 per day under the Fixed Contribution component of its yearly financial contribution to the Fund. See Schedule 1 to the Regulation.

<sup>23</sup> Operations in the parts of Nigeria defined as shallow water under the PIA, other than Shallow High-Risk Areas. Regulation 3(2)(d). For operations in these areas, the licensee will be required to pay US\$16 per day under the Fixed Contribution component of its yearly financial contribution to the Fund. See Schedule 1 to the Regulation.

<sup>24</sup> Operations in the parts of Nigeria defined as deep offshore in the PIA. Regulation 3(2)(e). For operations in these areas, the licensee will be required to pay US\$8 per day under the Fixed Contribution component of its yearly financial contribution to the Fund. See Schedule 1 to the Regulation.

<sup>25</sup> Regulation 3(3)(a).

<sup>26</sup> Section 103(1) PIA.

<sup>27</sup> Upstream petroleum operations include the exploration, development and winning or obtaining of petroleum by or on behalf of a company in Nigeria for commercial purposes, including all activities upstream of the measurement points, related to the winning of petroleum through wells or mining from petroleum reservoirs such as: drilling, fracking, completing, treatment and operation of wells producing petroleum; construction and operation of gathering lines and manifolds for crude oil, natural gas and water; construction and operation of high and low pressure separators; construction and operation of facilities to treat crude oil and natural gas; flaring of natural gas; compression and reinjection of natural gas in reservoirs; construction and operation of facilities for the production of electricity or heat from natural gas or other fuels as energy source for the winning of petroleum; construction and operation of fixed or floating platforms or other vessels required for the winning of petroleum; metering of petroleum at the measurement points prior to transportation; sale and marketing of crude oil, natural gas or condensates or any of them at the measurement points; and such other activities which by regulation are considered upstream petroleum operations, provided however that, where field facilities or fixed or floating platforms or vessels provide for fully integrated upstream and midstream petroleum operations, the Commission may consider the entire operations as upstream petroleum operations. Section 318 PIA.

<sup>28</sup> Regulation 3(4)(a)-(b).

<sup>29</sup> Regulation 3(6).

## 5. Re-assessment of the Quantum of the Financial Contribution

### Refund of Financial Contribution

The financial contribution of a licensee will not be refunded, offset or credited against any liability due from the licensee, except in the event of overpayment.

The Authority is empowered by the Regulation to appoint an independent assessor to conduct an assessment and determine the financial contribution of licensees where, amongst others, the financial contribution does not reflect the size of operations and level of environmental risk; the capital expenditures and/or production are under-estimated; or for any other reasons.<sup>30</sup>

The inclusion of “for any other reasons” (i.e., an omnibus clause) in the assessment metrics allocates wide discretionary powers to the Authority in re-assessing financial contributions made by licensees. To limit discretionary re-assessment, the Authority may consider providing an exhaustive list of circumstances for re-assessment of a licensee’s financial contribution.

## 6. Payment Obligations of Prospective Licensees

The Regulation obligates prospective licensees to pay the initial financial contribution prior to the grant of the licence, which will apply to the first year in which the licence is granted by the Authority.<sup>31</sup>

The Regulation further provides that the financial contribution of a licensee will not be refunded, offset or credited against any liability due from the licensee, except in the event of an overpayment.<sup>32</sup> However, it is not clear whether a prospective licensee will be eligible for a refund in the event that the licence was not granted by the Authority. The Authority may consider clarifying this ambiguity in the next turn of the Regulation. Perhaps, the Authority may consider extending the grounds for a refund to accommodate this.

## 7. Annual Reports and Disclosures

Finally, the Regulation requires the Authority to maintain proper accounts and records relating to the Fund. The Authority is required to publish<sup>33</sup> annually, a statement of the Fund’s account not later than 180 days after the end of the financial year.<sup>34</sup>

From the foregoing, the question of what constitutes “end of a financial year” may arise, given that financial year of each company holding a licence may vary. For precision and regulatory accountability, a definite financial period to benchmark the Authority’s annual disclosures should be provided in the final Regulation that will be issued by the Authority.

## Conclusion

The Authority’s efforts to specifically codify the modalities for utilizing the environmental rehabilitation fund is commendable. If properly implemented, the Regulation will promote a culture of operational prudence, maintenance, rehabilitation and remediation of negative environmental impacts in states where midstream and downstream petroleum operations are undertaken. If the Authority considers the proposed amendments discussed in this commentary in the final iteration of the Regulation, it will enhance the Regulation’s effectiveness and incentivize efficient and ESG-friendly<sup>35</sup> investments in related petroleum operations in Nigeria.

<sup>30</sup> Paragraph 6(1) of the Regulation.

<sup>31</sup> Paragraph 4(1) of the Regulation.

<sup>32</sup> Paragraph 4(4) of the Regulation.

<sup>33</sup> This publication must be in the public domain and on the Authority’s website, accessible to the public.

<sup>34</sup> Paragraphs 7(1)&(2) of the Regulation.

<sup>35</sup> ESG- Environmental Social and Governance.