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An Overview of the  
**Extant Gas Flare Regulations**  
in the Nigerian Petroleum  
Industry

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## INTRODUCTION

The environmental, social, and economic impact of gas flaring in the Nigerian oil and gas sector cannot be overemphasized. Recent statistics from the National Oil Spill Detection and Response Agency (**NOSDRA**) show that gas flaring increased by 10 percent to 138.7 million metric standard cubic feet (scf) for the period of January to June of 2023 from 126.1 million scf in the corresponding period of 2022.<sup>1</sup> Over the years, the Nigerian government has introduced policies and regulations aimed at significantly reducing this practice which has plagued the Nigerian economy for decades. A significant measure was the introduction by the government of the National Gas Policy and the Nigerian Gas Flare Commercialization Programme (the **NGFCP**) aimed at deepening and accelerating the growth of the gas sector, and ultimately attracting investment in the commercialization of flare gas in Nigeria.

Another significant regulatory measure was the issuance of the Flare Gas (Prevention of Waste and Pollution) Regulations, 2018 (the **2018 Flare Gas Regulations**) by the defunct Department of Petroleum Resources in furtherance of the NGFCP. The 2018 Flare Gas Regulations provided for circumstances in which licences would be allowed to flare gas and prescribed penalties for the breach of those penalties.

The passage of the Petroleum Industry Act, 2021 (the **PIA**), also heralded express inclusion of provisions on the regulation of the gas industry which were hitherto not contained in the Petroleum Act 1969. Noteworthy, the PIA confers express powers on the Nigerian Upstream Petroleum Regulatory Commission (the **Commission**) and the Nigerian Midstream and Downstream Petroleum Regulatory Authority (the **Authority**) to issue regulations with respect to gas flaring in the oil and gas sector.

Thus in furtherance of their powers under the PIA, and in recognition of the need to consolidate on the gains of the 2018 Flare Gas Regulations, the Authority earlier this year issued the Midstream Gas Flare Regulations 2023 (the **Midstream Regulations**) for the regulation of gas flaring in the midstream sector of the Nigerian petroleum industry, whilst the Commission recently published the Gas Flaring, Venting, and Methane Emissions (Prevention of Waste and Methane Emissions) Regulations (the **Upstream Regulations**) to regulate gas flaring in the upstream sector of the Nigerian petroleum industry<sup>2</sup>.

The Upstream Regulations and the Midstream Regulations represent the latest in a series of legislative measures which are aimed at reducing and ultimately eliminating gas flaring in the midstream and upstream sectors and promoting responsible gas utilization and environmental sustainability.

This article highlights key provisions of the regulations the rights and statutory obligations of licensees or lease holders, and the penalties for non-compliance with these regulations.

1. Nigeria loses N373bn as gas flaring rises 10 % in H1 '23; <https://www.vanguardngr.com/2023/08/nigeria-loses-n373bn-as-gas-flaring-rises-10-in-h123-2/>

2. The 2018 Flare Gas Regulations have been revoked by the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations 2023 recently issued by the Nigerian Upstream Petroleum Regulatory Commission (NUPRC).

### TITLE TO FLARE GAS

Section 105(2) of the PIA provides that the Commission shall have the right to take free of charge natural gas that is destined for flaring at the flare stack. Pursuant to this, Regulation 3(1) of the Upstream Regulations confers on the Commission, the power to take gas free of charge and without payment of royalty.

With respect to the Authority, Regulation 4(1) of the Midstream Regulations gives the Authority the power to take natural gas at the flare in midstream operations, free of charge and without any payment.

It is instructive to note at this juncture that the aforementioned section 105(2) of the PIA simply makes reference to the Commission's right to take flare gas at the flare stack, and no distinction is made between flaring during upstream, midstream or downstream operations. However, there is no similar provision in the PIA with respect to the Authority other than the power to make regulations generally for gas flaring in the midstream and downstream sectors. It is thus arguable that section 105(2) gives exclusive right and title to capture flare gas to the Commission regardless of whether the flaring occurs in the upstream, midstream or downstream sectors.

Whilst that may be a plausible argument, we are of the view that to adopt such approach may lead to absurdity in the face of the overarching objective of the PIA which clearly creates a bifurcation between the upstream regulator and the midstream and downstream regulator and confers specific regulatory powers relating to gas flaring on both regulators with respect to their respective sectors. Thus, though section 105(2) of the PIA does not specify whether the right of the Commission is limited to gas flared during upstream operations, it can be safely concluded, based on the entire framework of the PIA and the clear language of the Upstream Regulations which limits the regulatory scope of the Commission with respect to gas flaring to upstream petroleum operation<sup>3</sup> that the right granted to the Commission under section 105(2) of the PIA is limited to gas flared within upstream petroleum operations. We however recognize that this right would also extend to gas flared during integrated operations as defined under the PIA pursuant to the regulatory powers granted to the Commission over such integrated operations<sup>4</sup>.

Furthermore, given the clear provisions of the PIA which confer on the Authority, the technical and regulatory oversight over all midstream and downstream operations,<sup>5</sup> as well as the fact that gas flaring also arises from certain midstream operations, we are of the view that the powers of the Authority in this regard as conferred by the Midstream Regulations is in consonance with the spirit and intention of the PIA. This position is further buttressed by a community reading of sections 33(b), (y) and 259(c) of the PIA which shows that the Authority is saddled with the responsibility of issuing regulations for the determination and collection of gas flare penalties arising from midstream operations and its enforcement under the Act.

3. Regulation 2 of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations 2023.

4. See section 8(d) of the PIA which is to the effect that the commercial regulatory functions of the Commission shall extend to integrated operations. It provides that petroleum operations may be considered integrated where there is joint use of utilities used exclusively for upstream and midstream operations.

5. Save for those arising from integrated operations Regulation 2 of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations 2023.

### PERMIT TO ACCESS FLARE GAS

The Upstream Regulations provides that the Commission may issue a permit to access Flare Gas on terms and conditions to be determined by the Commission on an exclusive basis for: (x) one or more flare sites designated in the permit; and (y) the commercialization or utilization of disposed gas.<sup>6</sup> The Upstream Regulations further provides that a foreign company may be granted a permit to access flare gas; however, where such foreign company participates in a bid exercise and is successful for a grant of flare gas permit, such foreign company shall be required to register as a Nigerian company under the Companies and Allied Matters Act 2020<sup>7</sup>, and the duration of the permit will be for the period specified in the permit. It is worth mentioning that the Upstream Regulations provides that a licensee, lessee or producer of gas who fails to grant access to a permit holder to a flare site, or fails to enter into a connection agreement with such permit holder, or submit the required logs and records is liable to a fine of US\$10,000 (Ten Thousand Dollars).<sup>8</sup>

The Midstream Regulations also contain similar provisions and in this regard provides that a license to access flare gas may be granted to: (x) licensees or permit holders; and (y) third parties, subject to terms and conditions to be determined by the Authority. With specific regard to third parties who seek to acquire such permit to access flare gas, the Midstream Regulations provide that the application shall be accompanied by an investment proposal, and such third parties will be required to pay an application fee of NGN100,000 (One Hundred Thousand Naira) to the Authority. The permit granted to access flare gas granted by the Authority is to be valid for a term of one calendar year and renewable for a further term of one year.<sup>9</sup>

Whilst both regulations contemplate a renewal of the permit to access flare gas upon expiration of same, there are no clear parameters or criteria outlined for the renewal process, nor is it specified if the renewal will be automatic where the permit holder or licensee, as the case may be, has adhered to the terms and conditions of the permit. This in our view raises significant concerns from an investment standpoint, particularly in relation to the bankability and long-term viability of gas projects in both the upstream and midstream sector. . In other words, given the capital-intensive nature of gas utilization projects, investors in such projects would seek assurance and predictability regarding the continuity of access to flare gas, especially where it is crucial for their operations, and a clear path to renewal of the access permits is one way of providing the requisite comfort ad assurances. It is hoped that the subsequent guidelines to be issued by the Commission and Authority will address these concerns.

With respect to revocation of the permits, the Upstream Regulations provides that the Commission may revoke the permit to access flare gas where the: (x) permit holder fails to comply with the terms and conditions of the permit; or (y) permit holder intentionally provides inaccurate information or withholds significant information.

6. Regulation 6(1) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations 2023.

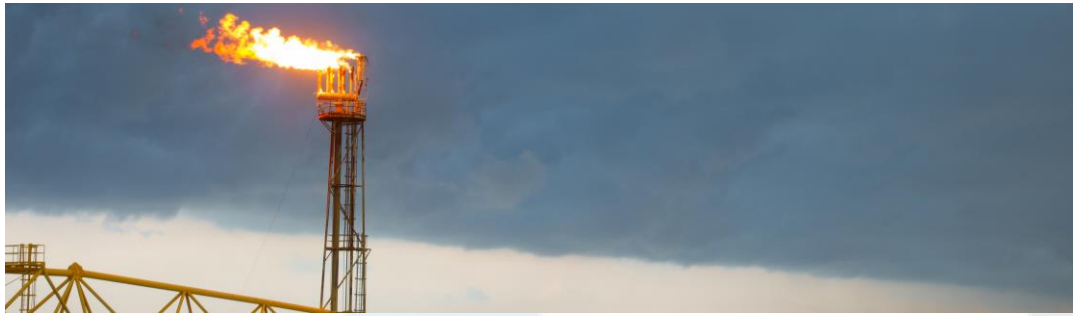
7. Regulation 6(2) and (3) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations 2023.

8. Regulation 21(6) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations 2023.

9. Regulation 4(3) Midstream Gas Flare Regulations 2023.



The Midstream Regulations on the other hand, provides for additional circumstances for revocation in addition to the instances specified for revocation under the Upstream Regulations which are where the: (x) permit holder is dissolved or enters into bankruptcy proceedings; and (y) purpose for which the permit was obtained would negatively impact health, safety, environment or public interest.<sup>10</sup> It should be noted that under both regulations, a revocation of a permit to access flare gas does not release the permit holder from any obligations arising from the Regulations.<sup>11</sup>



#### PERMIT TO FLARE GAS

The Upstream Regulations permits a licensee, lessee or producer of gas to flare gas under the circumstances stipulated by Sections 104 and 17 of the PIA.<sup>12</sup> Except in the case of an emergency, gas flaring may be allowed only where such flaring is within the threshold approved by the Commission and upon payment of the flaring fee.<sup>13</sup> Such flaring fees for permitted flaring are to be set out in a regulation by the Commission<sup>14</sup>.

Similarly, under the Midstream Regulations, the Authority may, upon application by a licensee or permit holder, grant a permit to allow the flaring or venting of natural gas for a specified period, as stipulated in guidelines to be issued by the Authority. The Midstream Regulations further provide that any person engaged in midstream petroleum operations shall not vent or flare gas beyond the limits set by the Authority. Before the issuance of a license to operate, a permit holder is mandated to engage with the Authority to determine the maximum number of major flaring events and quantity of gas flared.<sup>15</sup>

Under the Upstream Regulations, a licensee, lessee or producer of gas that flares, vents or waste gas without the Commission's authorization shall pay a fine of US\$3.5 (Three Dollars Five Cents) per 28.317 scm (1,000 scf) as well as an administrative fine of US\$1,000 (One Thousand Dollars) for the contravention notification to be served by the Commission on erring licensee, lessee or producer of gas and upon such notification, the licensee, lessee or producer of gas will be liable to a fine of US\$1,000 (One Hundred Dollars) for each day that the contravention continues after the notification.

10. Section 107 of the PIA; Regulation 5(1) Midstream Gas Flare Regulations 2023.

11. Regulation 7(2) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations 2023; Regulation 5(2) Midstream Gas Flare Regulations 2023.

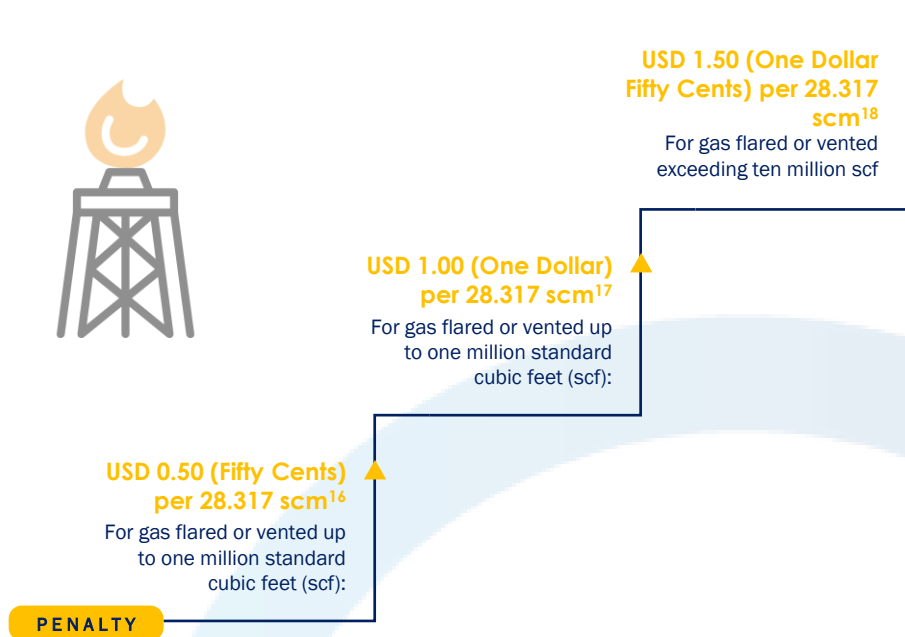
12. Section 104(1) of the Petroleum Industry Act provides a licensee, lessee or marginal field operator may flare or vent natural gas without incurring penalties in the following cases: (x) in the case of emergency; (y) pursuant to an exemption granted by the Commission; and (z) as an acceptable safety practice under established regulations. Section 107 further provides that the Commission or the Authority may grant a permit to a licensee or lessee to allow the flaring or venting of natural gas for a specified period where it is required for facility start-up or for strategic operational reasons, including testing.

13. Regulation 12(2) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations 2023.

14. The Commission is yet to publish a permitted flaring fees regulation.

15. Regulation 8 Midstream Gas Flare Regulations 2023.

The Midstream Regulations contain more elaborate provisions with respect to penalties or fines, as it is graduated based of the volume of the gas flared. Where gas is flared beyond the prescribed limit, the penalties imposed are according to the following scale:



The Midstream Regulations further re-echoes the provision of the PIA that all midstream flare gas penalties collected by the Authority is to be for the account of the Midstream and Downstream Gas Infrastructure Fund<sup>19</sup> and shall be utilized for midstream and downstream gas infrastructure investment within the host community of a designated facility.<sup>20</sup>

#### REPORTING OF GAS FLARE DATA

Under both the Upstream Regulations and the Midstream Regulations, the licensee or permit holder as applicable is mandated to maintain a daily log of each occurrence of flaring and venting of flare gas within its facilities, which is required to be submitted to the Commission and Authority respectively within 21 days following the end of each month.<sup>21</sup> The permit holder is also obligated to install metering equipment in its facilities to provide data for all flare gas logs, and the data shall include the date, time, duration and quantities of the venting or flaring of flare gas within the facilities.<sup>22</sup>

The permit holder is further required to keep copies of flare gas logs in safe custody for not less than 36 months.<sup>23</sup> In respect of annual reporting, the permit holder is required to submit an annual report to the relevant regulator each year by 31st March for the previous year.<sup>24</sup>

16. Regulation 13(1) Midstream Gas Flare Regulations 2023.

17. Regulation 13(2) Midstream Gas Flare Regulations 2023.

18. Regulation 13(3) Midstream Gas Flare Regulations 2023.

19. The Midstream and Downstream Gas Infrastructure Fund is set up by the Section 52 of the PIA 2021 with the purpose of making equity investments of Government owned participating or shareholder interests in infrastructure related to midstream and downstream gas operations aimed at, inter alia, reducing or eliminating gas flare.

20. Section 52(7)(d) of the PIA; Regulation 13(4) of the Regulations.

21. Regulation 15(3) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations 2023;

Regulation 9(1) Midstream Gas Flare Regulations 2023

22. Regulation 23(1) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations 2023; Regulation 9(2) Midstream Gas Flare Regulations 2023.

23. Regulation 15(8) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations 2023; Regulation 9(4) of the Midstream Gas Flare Regulations 2023.

24. Regulation 19(1) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations 2023; Regulation 10(1) of the Midstream Gas Flare Regulations 2023.

A breach of the reporting obligations under the Midstream Regulations makes the permit holder or lessee, as the case may be, liable to a penalty to be issued by the Authority which said penalty will not be more than US\$100,000 (One Hundred Thousand Dollars). Additionally, any permit, licence or authorisation granted to that person may be suspended, cancelled or terminated. Under the Upstream Regulations, the failure of a licensee, lessee or producer of gas to submit gas data, or submit timeously or in the required form makes such a person liable to pay an administrative fine of US\$10,000 (Ten Thousand Dollars).

#### ASSIGNMENT

Under the Upstream Regulations, the holder of a permit to access Flare Gas is prohibited from assigning or transferring its interest or rights under the permit unless the transferee satisfies the minimum technical and financial requirements necessary to become a qualified applicant where such transferee is going to undertake operations pursuant to the permit. Where the prospective transferee is only making financial investments, he is required to satisfy the minimum threshold of financial investment as may be set by the Commission.<sup>25</sup> Furthermore, prior consent of the Commission must be sought and obtained as a condition precedent to a valid transfer or assignment of the permit.<sup>26</sup>

Under the Midstream Regulations, a permit holder with right to access flare gas may assign its interest or rights under the permit where the transferee: (x) satisfies the minimum technical and financial requirements necessary to become a permit holder and assumes all the obligations of the permit holder; and (y) complies with the provisions of the Assignment or Transfer of License and Permit Regulations 2023 and other relevant regulations, guidelines or directives issued by the Authority.<sup>27</sup>

We note that the provisions of both Regulations highlighted above with respect to the ability of a permit holder to assign its rights or interests in the relevant licence, speak to an outright assignment of the permit granted to any such permit holder, and these provisions provides some clarity on the process to be followed in an acquisition scenario. However, both Regulations are silent on the right of permit holders to create security assignment of their interests in the permit in favor of potential lenders. This may be a serious consideration for lenders in potential financings as such lenders will typically seek to have one form of security or the other over such permits. Thus, in structuring the security package for their financings, permit holders would have to provide potential lenders with viable security options that would aid their accessibility to the financing they seek.



25. Regulation 13(2) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations 2023

26. Regulation 13(1) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations 2023

27. Regulation 6 of the Midstream Gas Flare Regulations 2023.

## CONCLUSION

The issuance of these regulations by the Commission and Authority respectively is definitely a step in the right direction, as certainty of the regulatory landscape is necessary for the myriad of opportunities that the Nigerian gas sector presents. By establishing a robust regulatory framework and encouraging repurposing of gas hitherto flared, Nigeria may very well be on its path to attaining net-zero emission by 2060, thereby birthing a more conducive environment for the growth of a greener and more prosperous Nigerian economy. It is expected that both of these regulators will in due course issue subsequent guidelines to provide the required clarity in the gaps identified in the Regulations. Similarly, it is key for relevant stakeholders to embrace the regulations, leverage the opportunities it presents, and contribute to the collective goal of curbing gas flaring and fostering a sustainable energy future for Nigeria. Indeed, with renewed quest to expand investment in the Nigerian market heralded by the new administration of his Excellency, President Bola Ahmed Tinubu, it is expected that investment in Nigeria's gas sector will receive the much-desired boost.

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